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The Black Hills Case: On the Cusp of History

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ON THE CUSP OF HISTORY

By Frank Pommersheim

Indian Law provokes the deepest and most enduring questions about the nature of law in our society. The entire field rests, sometimes precariously, on the viability and vitality of the historical promises contained in treaties. The future course of Indian law is inseparable from the fate of these sovereign covenants. Time has wrought its changes, but the basic challenge to fashion a just and pluralistic society remains: It is the cornerstone responsibility of the law to be an intellectual and moral lodestar in this effort.

I. Background and Significance: The Fort Laramie Treaty of 1868 and the Taking of the Black Hills

The starting point in tracing the legal and cultural history of the Black Hills controversy is the Fort Laramie Treaty of 1868. Despite the existence of seven prior treaties with various Sioux tribes, the Fort Laramie Treaty of 1868 is the centerpiece. It served to end the military deadlock between the Lakota and the United States government in the Dakota Territory and established two overarching objectives: (1) to guarantee peace between the Sioux and the United States, and (2) establish the boundaries of the Great Sioux Nation Reservation free from white intrusion.

Article I of the Treaty ended hostilities and established peace while Article II set out the boundaries of the Great Sioux Reservation which consisted of all of western South Dakota including parts of present day Wyoming, Montana, North Dakota, and Nebraska. This land was "set apart for the absolute and undisturbed use and occupation of the Indians herein named." The other key provision of the Treaty is Art. XII which provides that "no treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same." These provisions coupled with the Supremacy Clause of the United States Constitution recognizing treaties as the supreme law of the land would seem to have established an unassailable and legally binding agreement between two sovereign entities. Yet history (and the law) has taken a much different course.

Two points of reference that established rich benchmarks from which much of subsequent tribal history is measured need to be emphasized. First, at the time of the Treaty of 1868, the Lakota were truly sovereign. As Vine Deloria, Jr, the leading Sioux intellectual, has written: "On the whole the Sioux, even when you consider the broad spectrum of opinion that was represented by tribal leaders, were telling the United States, 'If you don't get out, we are going to push you out.' The Sioux people not only considered themselves a nation but they were prepared, some were even eager, to fight to the death against the United States. They definitely considered themselves a distinct and separate sovereignty which had to receive the respect of other nations, particularly the United States. They had a military fighting force that, while small, was still the most potent single force the United States would meet on the field of battle until they encountered Geronimo's band of Apaches nearly twenty years later." The reach of the federal government, particularly the tenacities of its legal and political structure, had not penetrated Lakota society. The United States government and the Lakota saw each other vividly—proud, separate, apart.

The second point concerns the nature of the treaty itself. The Lakota did not see the treaty as mere expediency and the power politics of the day, subject to future accommodation to other emerging national interests. Every treaty was settled with the
smoking of the pipe. As insightfully noted by Father Peter John Powell, the well known historian and anthropologist, "[w]hites rarely, if ever, have understood the sacredness of the context in which treaties were concluded by the Lakota people... the pipe never fails." My people, the Cheyennes, say, for the pipe is the great sacramental, the great sacred means that provides unity between the Creator and the people. Any agreement that was signed was a sacred agreement because it was sealed by the smoking of the pipe. It was not signed by the chiefs and headmen before the pipe had been passed. Then the smoking of the pipe sealed the treaty, making the agreement holy and binding. Thus, for the Lakota, the obligations sealed with the smoking of the pipe were sacred obligations."

These feelings have not abated over time. The words of Mr. Louis Bad Wound of the Pine Ridge Reservation iterate the ongoing commitment. "The Lakota have never violated the Treaty. Our forefathers have entered into that agreement with the United States Government on the sacredness of the Pipe and we are bound to honor that Treaty. No matter how much cruelty and poverty we must suffer to honor that treaty, we will honor it."

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. Almost immediately after the signing of the Treaty, the adverse portions of the chronicle began. General George Custer led an expedition of scientists into the area known as the Black Hills. The Black Hills are located in the western part of South Dakota and are clearly located within the Great Sioux Reservation boundaries as set out in the Treaty of 1868. During this expedition, gold was discovered in the area. The report of the Custer expedition stirred substantial excitement in the white community and in its wake brought a large number of miners and other frontierspeople into the Black Hills area.

The Federal Government quickly sent the Allison Commission to the Dakota territory to negotiate a cession of the Black Hills area in accordance with the terms of the Fort Laramie Treaty of 1868. The negotiations were without success. The Commission failed in its mission but that did not deter the efforts of the Federal Government. The Federal Government did not receive this information gracefully; instead it went to the pressure points. In 1876, President Grant simply pulled the army out of the Black Hills and allowed miners to flood the area and file claims. The United States absolved itself of its treaty commitment that "the United States now solemnly agrees that no persons except those herein designated and authorized to do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this Article." The Federal Government went further. It declared all Sioux that were away from the home agencies (usually for subsistence hunting) as 'hostile' subject to military engagement by the United States Army. Congress also passed a statute denying the Sioux appropriations and annuities under past treaties until they ceded the Black Hills. Another Commission was sent west to get the signatures. Despite the enforced suffering and travail, the Commission failed in its attempt to get the necessary approval of three-fourths of the adult males as required by the Fort Laramie Treaty of 1868.

Not to be denied and regardless of the treaty commitment, Congress simply took the proposed Agreement with its pittance of signatures and enacted it into law. The result was the 'confiscation' of 7.7 million acres of the Black Hills by the Federal Government. The federal statute which effectively annexed the Black Hills paid no recompense to the Lakota, but simply agreed to pay subsistence rations. The implication and importance of the Black Hills, then and now, are explored further in the following sections of this Article. The Black Hills Act represents the first loss of land within Great Sioux Nation Reservation area recognized and established in the Fort Laramie Treaty of 1868.

Two elements of this situation conspire to provide a rare historical chance to right a wrong and to provide our nation with an opportunity to act with honor and principle. These elements are that most of the Black Hills are still held by the Federal Government (rather than the state or private land owners) and that the Black Hills have deep spiritual and cultural significance for Lakota people. 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. Indeed, for many Lakota, this is the final convergence of many forces. Charlotte Black Elk, descendent of the great Ogala religious figure of the same name, believes she was raised for this moment in history. "The elders said to us, 'we lost one generation to the civilizers and Christians. We lost another generation to traumatic change and alcohol.' They said our generation would be the last — if we did not fight the battle — because the other would go the way of drugs or choose not to be Lakota. This was the obligation on the grandchildren."

II. The Legal History

These high stakes have their roots in a long and complicated legal history. In the aftermath of the Black Hills Act of 1877, there was no immediate avenue for legal redress. The Federal Government could not be sued by an Indian tribe without first providing its consent. Even though the United States Court of Claims was established in 1855 to permit the bringing of many claims against the United States, Indian treaty claims were barred by an 1863 statute.

The first opportunity for legal redress occurred when Congress passed a special jurisdiction statute in 1920 permitting the Sioux to sue "under any treaties, agreements, or laws of Congress, on the misappropriation of any of the funds or lands of said tribe or band or bands thereof." Suit was filed in 1923 in the Court of Claims alleging that the Government had taken the Black Hills improperly and in violation of the Fifth Amendment to the United States Constitution. This claim was ultimately dismissed in 1942 as a moral claim not protected by the Fifth Amendment.

In 1946, Congress passed the Indian Claims Commission Act which created a new forum to hear all tribal grievances that had arisen previously. In 1950, the Sioux Nation resubmitted its original claim. Four years later, the Indian Claims Commission decided that the Sioux Nation had not proved their claim and this decision was affirmed by the Court of Claims in 1956. The Sioux Nation then filed a motion with the Court of Claims to vacate its judgment affirming the decision of the Indian Claims Commission because the record before the Commission was inadequate due to ineffective legal representation. Surprisingly, this motion was granted and in 1958 the Indian Claims Commission was ordered to reconsider its 1954 decision denying the Sioux claim.

The Indian Claims Commission rendered a favorable decision sixteen years later in 1974. The decision held that the Federal Government had taken the land in violation of the Fifth Amendment because it had not paid just compensation and the fair market value of the land taken and the gold extracted at the time of the taking in 1877 was 17.5 million dollars. Since this taking violated the Fifth Amendment, the tribes were also entitled to five percent interest which was normally not permitted in Indian Claims Commission proceedings based on wrongdoing or treaty violations not implicating the Fifth Amendment. This decision was appealed by the United States Government and one year later the Court of Claims reversed the decision of the Indian Claims Commission based on the doctrine of res judicata, that the issue before Indian Claims Commission had already been litigated and decided by the Court of Claims back in 1942. This meant that there was not improper taking under the Fifth Amendment and therefore the $17.5 million award plus interest was lost.

It was not, however, completely lost. The Indian Claims Commission had also found the United States Government had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages without interest under 1/2 of the Indian Claims Commission Act. Interest is awarded only when there is unconstitutional taking under the Fifth Amendment. This finding against the United States Government had not been appealed and therefore was unaffected by the appeal to the Court of Claims. The matter of interest, however, was paramount. For example, five percent interest on $17.5 million from 1877 (the date of the taking) to say 1980 would be approximately an additional 485 million, five times the amount of the award itself. The Court of Claims concluded its opinion with the ob-
ervation that "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe."15

On remand to the Indian Claims Commission, the Commission with minor adjustments, made a finding for a final award of $17.5 million. The Commission, however, deferred the entry of final judgment in view of legislation then pending before Congress. On March 15, 1978, Congress enacted legislation enabling the Court of Claims to rehear the Sioux Nation claim without regard to the potential bar of the res judicata doctrine. In 1979, the Court of Claims, unshackled from the restraints of res judicata, found that the United States Government had unconstitutionally taken the Black Hills in violation of the Fifth Amendment and it reinstated the $17.5 million award plus interest.

The United States Government appealed this decision to the United States Supreme Court. In 1980, fifty-seven years after the litigation began, the Supreme Court affirmed the rulings in the courts below that the Federal Government had taken the Black Hills unconstitutionally in violation of the Fifth Amendment.16 It is instructive to review the Court's reasoning as well as examining the practical import of its decision. In reaching the decision it did, the Court had to reconcile two competing legal rationales that are available when a 'taking' of Indian property is involved.

The first rationale is typified by the Lone Wolf v. Hitchcock17 line of cases which recognizes a plenary power in Indian affairs to exist in the United States Congress. This plenary power permits Congress, as the trustee over Indian lands, to dispose of that property, including the transfer of the entire title, to the United States Government. Notwithstanding treaty provisions to the contrary, Congress may effect this transfer as long as it 'makes a good faith effort to give the Indians full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.'18

The second legal rationale is the exercise of the Federal Government's power of eminent domain under the Fifth Amendment to take private property for a public purpose as long as just compensation is paid. The 'good faith' test requires no payment of interest while Fifth Amendment takings do. In regard to Indian land, according to the Supreme Court, Congress may act in either capacity but it cannot act in both at the same time. In the context of the Black Hills, the Court ruled that the Federal Government had clearly not acted in its 'plenary authority' capacity because there was not good faith attempt to pay full value for the land, but only the obligation to provide subsistence rations. Therefore the Government must have acted under its eminent domain power and it must pay just compensation plus interest.

The question before the Supreme Court was never whether the Federal Government could take the land in question but rather under what legal theory it acted and what financial consequences, if any, flowed from its activities. As a necessary corollary, the issues before the Court never involved the question of returning the land. The return of Indian land (improperly) taken by the Federal Government is not within the province of the Courts but only within the authority of the Congress itself. For many Lakota, this limitation, which was often not fully disclosed to the Sioux Nation tribes by their lawyers, festers like an open wound; a constraint inconsistent with any notion of true justice.

III. Beyond the Supreme Court: Themes and Reactions to the Sioux Nation Black Hills Act

The 1980 judgment of the Supreme Court for $17.5 million plus interest remains undistributed, gathering dust (plus continuing interest) in the United States Treasury. The rules for the distribution of claims awards are found in the Distribution of Judgment Funds Act of 1973.19 These rules require the Secretary of Interior to prepare a distribution plan with tribal input within one year of the entry of judgment and the plans require a floor award of twenty percent for tribal needs with up to eighty percent for per capita distribution. Despite the passage of seven years, no distribution plan has been prepared by Congress. All eight participating tribes (the Rosebud, Oglala, Cheyenne River, Standing Rock, Lower Brule and Crow Creek Sioux of South Dakota and the Santee Tribe of Nebraska and Fort Peck Sioux of Montana — the original signatories of the Fort Laramie Treaty of 1868) have passed tribal resolu-
tions in opposition to any distribution of the money judgment. In fact, the tribes have obtained a federal court injunction prohibiting the Secretary of Interior from submitting any plan to Congress.

The tribes want, as they always have, the land returned. And with that continuing emphasis and commitment, the focus has shifted away from the courts to the United States Congress which does have the authority to restore Indian title to lands that were improperly divested from tribal ownership. Finally in 1985, for the first time, a bill entitled the Sioux Nation Black Hills Act was submitted to Congress. The bill found no sponsors within the South Dakota Congressional delegation and its lone sponsor in the Senate was Senator Bill Bradley of New Jersey.

Senator Bradley, the former New York Knicks basketball star, had developed friendships with a number of Indian people in South Dakota, particularly at Pine Ridge where he had put on several basketball clinics. These friendships plus his own evaluation of this situation led him to sponsor and support the bill. Senator Bradley was the commencement speaker at the thirteenth annual Ogala Lakota College commencement exercises on the Pine Ridge Reservation in June 1986. In his commencement address, he emphasized that the significance of the Black Hills to Lakota people is more than geography; it runs deeper as the wellspring and guardian of a rich history and spiritual heritage.

These sentiments are not widely shared by the non-Indian community in South Dakota. To some, Senator Bradley is no more than an officious intermeddler. For example, the then Attorney General of South Dakota, Mark Meierhenry, admonished the Senator to tend to his wares in New Jersey where most of the state, he said, is owned by the Mafia.

The Black Hills also have substantial significance for the non-Indian community in the state. The Hills, which are located in the western part of the state, are wild, impressive and beautiful. The Black Hills and environs are also the focal point for the state's second largest industry — tourism. The centerpiece of this attraction is the Mount Rushmore monument with those imposing granite visages of Washington, Jefferson, Lincoln and Teddy Roosevelt. There is also excellent camping and hunting and fishing along with substantial agriculture and mining interests. The Black Hills embody a closely held bundle of economic, recreational, and personal attachments for many non-Indians that evince a strong intransigence and antipathy to any legislative redress. In South Dakota, the Black Hills are not peripheral or without substance to any segment of the population and therefore feelings often run high — and uninformed.

Perfunctory Congressional hearings were held on the Sioux Nation Black Hills Act in the summer of 1986. The Act picked up approximately a dozen additional sponsors in 1987 including Senator Daniel Inouye of Hawaii, Chairman of the Senate Select Committee on Indian Affairs, and Rep. Morris Udall of Arizona as well as the beginnings of favorable national exposure. However, uniform opposition by the South Dakota congressional delegation and the governor and state officials remains the norm and have effectively prevented any additional Congressional hearings from being held. Nevertheless, the proposed Act, or at least the idea of the necessity of some legislative adjustment appears to be moving glacially forward. The heart of this controversial legislation centers on two provisions. One would be the reconveyance of all the federally held land — approximately 1.3 million acres — from the federal government to the Sioux Nation (that is the original signatories of the Fort Laramie Treaty of 1868) and the other is the establishment and recognition of an entity known as the Sioux National Council to govern the 'reestablished area' as it is defined in the legislation. The Sioux National Council would govern in accordance with a Constitution adopted within three years after the passage of the legislation. The legislation does not contemplate this restoration as a static monument to commemorate some long ago historical iniquity, but rather to establish a dynamic, organic entity fusing Lakota people with their past and reestablishing the sacred hoop of unity and wholeness.

In the modern world of complexity, particularly as it relates to the intricate web of non-Indian (and state) personal, economic, legal, and social interests, this is a very complicated task. Mutual goodwill is necessary, but not a sufficient condition to achieve the desired breakthrough. The legal and public policy questions relative to matters of jurisdiction, water rights, hunting and fishing, mineral leases, grazing permits, and
nother leases are not inconsequential and without merit. The proposed legislation addresses all these issues, though perhaps not in a completely satisfactory manner to all interested parties. There is however more than sufficient room for negotiation and the likely accommodation of various interests. The problem, of course, is that most people, both Indian and non-Indian—but particularly non-Indians—have not read the bill. Reactions are visceral, untrammeled by any understanding of what is actually being proposed. This is not an environment conducive to informed decision making.

Two other factors are particularly pertinent. The proposed legislation explicitly states that privately held lands within the reestablished area shall not be disturbed. This is often a prominent fear in much of the non-Indian community and, not unexpectedly, it often prevents a more engaged and rational dialogue. The proposed legislation is also not, as some might characterize it, without guiding precedent or historical viability. There have been, for example, far more widespread and complex land claims settlement enactments pertaining to Alaska Natives and the Penobscot and Passamaquoddy tribes in the state of Maine.

The current impasse on this issue within the State of South Dakota needs to be unlocked in order that informed and responsible debate might gain the ascendency. The issue turns, ultimately, on the willingness of a people to confront the past, perceive an historical injustice, and have the courage and integrity to set it right. As suggested by Gerald Cliftord, a member of the Oglala Sioux Tribe and Chairman of the Black Hills Steering Committee, the Sioux Nation Black Hills Act was conceived, prepared, and is animated by a spirit of reconciliation to heal the breach between Indians and non-Indians in South Dakota. This is not a burden but an opportunity, for history seldom grants second chances. The Black Hills, which are held closely by so many, need to be unburdened from the culpidity of the past in order to suffice the future with equanimity and balance.

### Footnotes

15 Stat. 635. (1868).


The word Lakota is the traditional linguistic reference used by the people to describe themselves in their own language. The term Dakota is also often applied in an all-inclusive term. The word Sioux is a French corruption of a Chippewa word which means snake. It is said it was used by the Chippewa in a derogatory fashion to describe their traditional enemy, the Lakota. Lakota, then, is often a preferred term although popular and legal usage has made the word Sioux a much more conventional and better known term. The terms are used interchangeably throughout the article.


22 Id. at p. 105 quoting Father Peter John Powell.

23 Id. at p. 184 quoting Lewis Bad Wool.


41 Stat. 758 (1920).

60 Stat. 1049, 23 U.S.C. §70 et seq. (1985) Substantive grants of relief applicable only to groups and not to individual Indians, are set forth in Sec. 2 of the Act.

The Commission shall hear and determine: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revoked on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact or are grounded cognizable by a court of equity; (4) claims arising from the taking by legal or equitable title of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Under both the Fifth Amendment and the Indian Claims Commission rules, fair market value is determined at the time of the taking or at the time of litigation. Fifth Amendment takings require the payment of interest from the date of the taking. Indian Claims Commission awards to not provide for the payment of interest.

207 Ct. Cl. at 241, 518 F.2d at 1302 (1975).


187 U.S. 553 (1903).

182 Ct. Cl. at 553, 390 F.2d at 691 (1968).


Guy, "The History of the Reconciliation process," The entire bill is 28 pages in length.

For example, the sections on jurisdiction (Sec. 21) and the adoption of a constitution (Sec. 13) are very vague and poorly drafted.

For example, no law students (until it became an assignment) had read it prior to putting on a workshop in the spring of 1987 for Senator Tom Daschle and Rep. Tim Johnson's South Dakota staffs none of them had read it. Very few colleagues in the South Dakota Bar Association have read it.


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