

“IT DOESN’T SEEM VERY FAIR, BECAUSE WE WERE HERE FIRST”:¹ RESOLVING THE SIOUX NATION BLACK HILLS LAND DISPUTE AND THE POTENTIAL FOR RESTORATIVE JUSTICE TO FACILITATE GOVERNMENT-TO-GOVERNMENT NEGOTIATIONS

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“As we work together to forge a brighter future for all Americans, we cannot ignore a history of mistreatment and destructive policies that have hurt tribal communities. The United States seeks to continue restoring and healing relations with Native Americans and . . . [w]e further recognize that restoring tribal lands through appropriate means helps foster tribal self-determination.”

— President Barack Obama²

“The courthouse doors have been slammed in our face. Congress and the president are the only viable branches of government that can really resolve these issues.”

— Mario González, Lakota tribal attorney³

I. INTRODUCTION

The return of sacred and traditional lands, as well as the right to religious, economic, and personal use of these lands, has been a central concern of Native American⁴ people for hundreds of years.

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¹ Marisa Snider, a seventeen-year-old Oglala Sioux from the Pine Ridge Reservation in South Dakota, used these words to describe her feelings on the Black Hills that are sacred to her and her people. Eric Becker, *Honor the Treaties*, YOUTUBE (2012), <http://www.youtube.com/watch?v=k4cBOF9DE10#t=703>.

² President Barack Obama, Executive Order 13647 Establishing the White House Council on Native American Affairs, 78 Fed. Reg. 39539 (June 26, 2013).

³ Maria Streshinsky, *Saying No to \$1 Billion*, THE ATLANTIC (Feb. 9, 2011), available at <http://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380/>.

⁴ This Note will use the terms “Native American,” “American Indian,” and “Indian” interchangeably.

Examples of this concern are numerous, including the experience of the Indian Court of Claims, which handled 546 cases in 32 years, the vast majority of which centered on land disputes,⁵ and national Native American political group policy initiatives such as the trust land mission of the National Congress of American Indians⁶ or the Native American Rights Fund's mission statement, which identifies "secure and permanent land bases, and the rights of self-determination" as crucial in strengthening tribal communities.⁷ There is an entire chapter of the United States Code dedicated to Indian land settlements,⁸ and numerous instances of pending litigation for the return of lands, recognition of Indian title,⁹ or regarding acquisition or management of Indian trust lands.¹⁰

Litigation, however, has limited utility for Native Americans who wish to regain use of their traditional lands or who dispute the ability of monetary payment to properly compensate them for the loss of their land. The troubled history of the Lakota Sioux¹¹ and

⁵ U.S. INDIAN CLAIMS COMM'N, AUG. 13, 1946-SEPT. 30, 1978: FINAL REPORT (1979), 125, 127.

⁶ *Trust Land*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/land-natural-resources/trust-land>.

⁷ *About Us*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/about/mission.html>; see also 1-15 FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15-01.

⁸ See generally 25 U.S.C. Ch. 19 (listing 14 Indian Land Claims Settlement Acts).

⁹ Indian title is defined as the "right of occupancy that the federal government grants to an American Indian tribe based on the tribe's immemorial possession of the area." BLACK'S LAW DICTIONARY (9th ed. 2009); see, e.g., *US Supreme Court rejects Onondaga's NY land claim*, THE ASSOCIATED PRESS (Oct. 17 2013), available at <http://www.nativetimes.com/index.php/news/tribal/9172-us-supreme-court-rejects-onondaga-s-ny-land-claim> (describing the Court's denying certiorari to an upstate New York tribe seeking a declaratory judgment that they retained title to a large swath of New York State while denying that they sought payment for it).

¹⁰ Indian trust land, to be discussed in further detail below, is defined as "land owned by the United States but held in trust for and used by American Indians." BLACK'S LAW DICTIONARY (9th ed. 2009); see *Akiachak Native Community v. Salazar*, 935 F.Supp.2d 195 (2013) for a fascinating decision exemplifying of the complexity of federal Indian law, in which land taken into trust is differentiated from land "claims"; see also *Current Cases & Projects*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/cases/index.html> (indexing a variety of current cases involving, *inter alia*, Indian land, tribal sovereignty, tribal administration/regulation, water rights, artifact repatriation, as well as a Tribal Supreme Court Project that monitors pending federal litigation on Indian Law and assists tribes and tribal attorneys in petitioning for certiorari, preparing briefs, coordinating and in some cases preparing Briefs of Amicus, and various other assistance with regard to pending cases).

¹¹ The nomenclature of the Sioux is difficult. The federal government refers to them as the Sioux Nation or Sioux, but that group is comprised of three main tribes including the Lakota, Nakota, and Dakota. These three groups are then divided into seven sub-groups, each of which contains various smaller tribes. See Danielle Her Many Horses, *Oglala Lakota Nation Profile*, 2 TRIBAL L.J. 3, 3 n.1; see also Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U.L. REV. 317 (1998), 317 n.1. References to

their struggle to receive what they believe to be legitimate redress of the loss of the Black Hills in South Dakota is a compelling example of the failure of litigation, highlighting the need for an alternative dispute resolution process that both addresses past injustices and fosters cooperation and open communication for future negotiations. The Sioux have already litigated their claim in the Supreme Court,¹² and despite being awarded a substantial amount of money as compensation for the illegal taking of the Black Hills, they have refused to accept the money, arguing that the land was not for sale.¹³ This Note proposes that the Obama administration's indication of renewed commitment to negotiating with the Lakota to end the Black Hills controversy, as well as the Lakota's insistence that a resolution must include at least partial restoration of their right to the land, calls for a negotiation process inhered with the principles of restorative justice. This approach should begin with a genuine attempt to create a truth-seeking forum in which the Sioux can explain to the government, and the country as a whole, the significance of the loss of the Black Hills. Only after this has been done can comprehensive negotiations begin.

Part II of this Note outlines the historical background of the Black Hills land claim. Part III describes the legal avenues taken by the Sioux in the past and those currently open to them, examining the different ways that Native Americans can pursue land claims and the potential each branch of government has to resolve the conflict. Part IV discusses President Barack Obama's unique relationship to the Indian community, and explores the ideals and goals of restorative justice, proposing that these ideas can usefully be incorporated into a comprehensive negotiation between the federal government and the Sioux, comparing the positive model of South Africa's Truth and Reconciliation Commission to its less successful Canadian counterpart. Finally, Part V includes observations on the possible outcomes and the need to move quickly on these issues.

"Sioux Nation" or "Sioux" in this Note are to signatories of the Fort Laramie treaty, including sub-groups of the Lakota and Nakota, unless otherwise noted.

¹² *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

¹³ Francine Uenuma & Mike Fritz, *Why the Sioux are Refusing \$1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011), available at http://www.pbs.org/newshour/updates/north_america/july-dec11/blackhills_08-23.html.

II. HISTORICAL AND LEGAL BACKGROUND

A. *Historical Origins of the Claim to the Black Hills*

The history of the Sioux Nation's legal claim to the Black Hills dates to the signing in 1868 of the Fort Laramie treaty and the United States government's violation of that treaty six years later. Congressional legislation in 1877 abrogated the Fort Laramie treaty and took possession over much of the designated Sioux land, including the Black Hills. Over a hundred years later, the Supreme Court wrote that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . . ."¹⁴

The importance of the land to the Sioux Nation goes beyond dedication to the place they had lived in for generations. The Lakota creation story itself incorporates the Black Hills in particular as central to their identity as a people. The Black Hills are not only regarded as the birthplace of Sioux culture in religious songs and legends, but as the first place created on Earth—literally the heart of the Earth, which is seen as Mother.¹⁵ Sioux spiritual lore utilizes metaphor both to explain and to embody the thing signified—the Black Hills *are* the heart of the Earth, and that concept is made real for those who believe it through physical interaction with it.¹⁶ Put another way, the Hills themselves are the earthly embodiment of the legends—"heaven on Earth" is one way a person versed in the Abrahamic tradition might understand it. Physical separation from the Black Hills affects the ability of the Sioux to access the power that they are believed to contain. Abrahamic theology, on the other hand—particularly Christianity—believes that access to the core of their religious beliefs can be achieved anywhere, and some Christians interpret the Bible to say that it ought to be done in private.¹⁷ Though the differences between these religious and cultural philosophies are difficult to articulate, or even

¹⁴ *Sioux Nation*, 448 U.S. at 388 (citation omitted).

¹⁵ See, e.g., Huston Smith, *Homelands of Religion: The Clash of Worldviews over Prayer, Peace, and Ceremony, A Conversation with Charlotte Black Elk*, in *A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM* 58, 62–65 (Phil Cousineau ed., 2006).

¹⁶ Alexandra Witkin-New Holy, *Black Elk and the Spiritual Significance of Paha Sapa (the Black Hills)*, in *THE BLACK ELK READER* 188, 191–93 (Clyde Holler ed., 2000).

¹⁷ Compare 1 Timothy 2:8 ("I will therefore that men pray every where . . .") with Matthew 6:6 ("But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret . . .").

grasp, it is important to make an attempt to understand the significance of the Black Hills, though a full discussion of Sioux spirituality is outside the scope of this Note.¹⁸

The Fort Laramie Treaty, signed as a result of Sioux military victories in the Powder River War,¹⁹ created, on behalf of the Lakota signatories to the treaty, what became known as the Great Sioux Reservation.²⁰ This great tract of land included roughly the entire western half of present-day South Dakota, including the Black Hills. The treaty further stipulated that the signatories had hunting rights to another tract of “unceded” land that stretched north from the North Platte River and east to the Bighorn Mountains (much of what is now eastern Wyoming and northeastern Nebraska).²¹ The distinction between the two is that reservation land was intended for agricultural use, while the “unceded” territory would permit those who wished to continue hunting buffalo to do so, as long as they lived on the reservation lands during the winter.

Though this was a reduction in territory from an earlier 1851 treaty,²² the terms of the Fort Laramie treaty represented an opportunity to resolve the ongoing military conflict in a way that satisfied both parties. While the Sioux relinquished any claim to land not designated theirs by the treaty and agreed to abandon their resistance to railroads being built on or near their territory, they gained a promise from the United States that no one would be allowed to enter treaty territory without permission from the Sioux, as well as promises of various supplies and rations. The United States, on the other hand, was able to insert numerous provisions encouraging a transition from the Sioux hunting-based society to an agricultural one. An article of the treaty that would become notorious only a few years later states that no cessation of any land designated under the treaty would be deemed valid unless approved by three fourths of the males living on the reservation.²³

¹⁸ See New Holy, *supra* note 11, for an in-depth, accessible discussion of the spiritual significance of the Black Hills and the impact of religious considerations on the way the Sioux approach their claim. Smith, *supra* note 15, is another enlightening resource.

¹⁹ See generally Tom Rea, *Peace, War, Land and a Funeral: The Fort Laramie Treaty of 1868*, WYOHISTORY.ORG, <http://www.wyohistory.org/essays/peace-war-land-and-funeral-fort-laramie-treaty-1868>; see also David L. Hieb, *Fort Laramie*, NATIONAL PARK SERVICES HISTORICAL HANDBOOK SERIES NO. 20 (1961), http://www.cr.nps.gov/history/online_books/hh/20/index.htm.

²⁰ Fort Laramie Treaty, Apr. 29, 1868, 15 Stat. 635, art. II.

²¹ Hieb, *supra* note 19; see also *The History and Culture of The Standing Rock Oyate*, Maps, ND.GOV, <http://www.ndstudies.org/resources/IndianStudies/standingrock/maps.html> (index of several helpful maps including 1868 lands, 1877 lands, and a map of the Sioux land claims).

²² Rea, *supra* note 19.

²³ *Id.* at art. XII.

Overall, though imbued with language indicating the government's strong preference for assimilation over sovereignty, the Fort Laramie Treaty represents a typical negotiation—albeit conducted in wartime—in that both parties were required to partially accede to the demands of the other. Unfortunately, however, the treaty's potential to have facilitated the coexistence of a healthy Sioux Nation with American economic and territorial expansion was rendered moot by the official discovery of gold in the Black Hills in 1874.²⁴ General George Custer led the first expedition into the Black Hills, and confirmation of gold and other resources sent a flood of settlers into the area. President Ulysses S. Grant was unwilling to use force to remove non-Indians from Sioux territory, and was further enticed by the promise of immense mineral wealth in Sioux territory. President Grant therefore agreed to a decision by military leaders to force the Sioux who were hunting the “unceded” territory onto the Great Sioux Reservation in central South Dakota. By prematurely separating the Sioux from the bison they depended on to survive the winter—as well as confiscating their firearms and horses—the government functionally rendered the tribes unable to feed themselves.²⁵ The campaign to push the Sioux out of the Black Hills was bloody—it was here that Custer had his last stand at the Battle of Little Bighorn—but the outcome was all but inevitable.²⁶ The Congressional appropriations bill for Indian Services in 1876 conditioned any rationing to the Sioux on the end of hostilities and relinquishment of the Black Hills, appropriating funds for President Ulysses S. Grant to accomplish the land cession.²⁷ The resultant treaty, signed by only 10% of the adult male Sioux in flagrant violation of the Fort Laramie Treaty, ceded the Black Hills as well as the hunting rights to land outside the smaller reservation created by this new agreement, and was ratified by Congress in 1877.²⁸ The Sioux's struggle to regain the Black Hills had begun.

²⁴ Hieb, *supra* note 19.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Act of Aug. 15, 1876, ch. 289, 19 Stat. 176, 192.

²⁸ Act of Feb. 28, 1877, ch. 72, 19 Stat. 254.

III. AVENUES FOR RESTORATION OF THE BLACK HILLS: SUCCESSSES, FAILURES, AND POTENTIAL

A. *The Limitations of Litigation*

The Sioux have maintained ever since that the treaty ratified by the 1877 Act was invalid for several reasons, including the insufficient number of signatures, the coercive nature of the negotiations, and, crucially, because the Black Hills were never for sale. As discussed above, the Black Hills—The Heart of Everything That Is—are profoundly sacred to the Sioux, central to both their creation story and their identity as a people.²⁹ Despite this being the case, however, the Sioux did not have the any legal avenue to contest the taking of the Black Hills, and it took fifty years for Congress to pass a statute allowing Indians to sue the government over the loss of tribal land.³⁰ Despite creating a Court of Claims to allow non-Indians to sue the federal government, claims by Indians were expressly barred³¹ until 1920.³² The Lakota's claim for monetary compensation, filed in 1923 and alleging that the seizure of the Black Hills constituted an illegal taking under the Fifth Amendment, represented the only legal means for any redress for the loss of their land, and for decades the Sioux pursued the claim despite the inadequacy of a monetary award to address the real harm—the loss of their sacred land.³³ The claim was cyclically rejected by the courts and revived by Congress due to pressure from the Sioux Nation until the claim finally reached the Supreme Court of the United States in 1979, over fifty years after the first filing of the claim.³⁴

By this time, however, the advent of a national Indian political movement, influenced by the larger Civil Rights Movement and

²⁹ See, e.g., New Holy, *supra* note 11; see also, e.g., *Sioux Nation Black Hills Act: Hearing on S. 1453 Before the Select Comm. on Indian Affairs*, 99th Cong. 65–66, app. 185–204 (1986) (testimony and prepared statement of Charlotte Black Elk, secretary of the Black Hills Steering Committee) (describing the religious mythology of the Black Hills).

³⁰ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 384 (1980) (noting that prior to the creation of the Indian Claims Commission in 1946, Native Americans had no forum in which to bring claims against the government).

³¹ Act of Mar. 3, 1863, ch. 92, 12 Stat. 765, 767.

³² Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 764 (1992) (citing Act of June 3, 1920, ch. 222, 41 Stat. 738).

³³ See New Holy, *supra* note 11, at 331–40 (detailing the origins of the claim and arguing that pursuit of the claim was initially seen as a matter of survival).

³⁴ See 448 U.S. at 384–390 (discussing in detail the procedural history of the claim before the Court); see also Newton, *supra* note 32.

the violent, sensational standoff at Wounded Knee in 1973, signaled that the political attitude within the Sioux Nation had shifted.³⁵ The idea of a “transactional” payment for the sacred Black Hills became *unacceptable* where it was once merely undesirable; despite the Supreme Court’s finding that the seizure was an illegal taking and ordering an award of over \$100 million, the Sioux Nation—some of the poorest people in the Western Hemisphere³⁶—refused the money. Speaking to the Senate in 1986, a representative from the Cheyenne River Sioux explained the cultural and religious imperative of pursuing the restoration of the Black Hills:

When we started our efforts [to regain the Black Hills] we were told by our elders and spiritual leaders that this work was necessary, because the Black Hills is the core of our existence. They said, “even if there is only one just man in the entire world and you must walk the entire earth to find that one man—then that is what you must do, for generations yet unborn depend upon you to defend the Heart of Everything That Is.”³⁷

The award remains in trust with the federal government, accruing interest, and totals somewhere between \$800 million and \$1.3 billion today.³⁸

For the Sioux to obtain any redress of the loss of the Black Hills beyond monetary compensation, they must seek it outside the courts, for there is no further opportunity to litigate the issue. Indeed, weeks after the Supreme Court’s decision in *United States v. Sioux Nation of Indians*, the Oglala Sioux Tribe (one of the subgroups within the Lakota, both famous and infamous for their pug-

³⁵ New Holy, *supra* note 11, at 334–40 (describing the change in Native American, and especially Lakota Sioux, political consciousness that occurred in the 1960s and 70s and its effect on the Black Hills land claim).

³⁶ Extreme poverty is a terrible problem among Native Americans generally, and particularly among the Lakota in South Dakota. See, e.g. Alexandra Fuller, *In the Shadow of Wounded Knee*, NATIONAL GEOGRAPHIC (Aug. 2012), available at <http://ngm.nationalgeographic.com/2012/08/pine-ridge/fuller-text> (providing a look at how the Oglala Sioux live on the Pine Ridge Reservation, including a stunning photo study by Aaron Huey); see also Annie Lowry, *Pain on the Reservation*, N.Y. TIMES (July 12, 2013), available at http://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html?_r=0 (detailing the impact of sequestration cuts on the Lakota and other Native Americans).

³⁷ *Hearing on S. 1453*, *supra* note 29, at app. 111 (prepared statement by Keith Jewett, tribal representative for the Cheyenne River Sioux).

³⁸ Uenuma & Fritz, *supra* note 13 (stating in 2011 that the fund now contains \$1.3 billion); Timothy Williams, *Sioux Race to Find Millions to Buy Sacred Land in the Black Hills*, N.Y. TIMES, Oct. 3, 2012, available at http://www.nytimes.com/2012/10/04/us/sioux-race-to-find-millions-to-buy-sacred-land-in-black-hills.html?_r=0 (stating the fund contains \$800 million). There does not appear to be a current figure available.

nacity and radicalism) initiated a lawsuit for restoration of the treaty lands and a monetary award of \$11 billion, and the Supreme Court declined grant certiorari.³⁹ Jurisprudential principles such as *res judicata* mean that the courts have virtually no ability to change the scope of the award or alter the Supreme Court's finding of a taking in *Sioux Nation*.

Even if this were not so, Supreme Court precedent⁴⁰ interpreting the Indian Commerce Clause of the Constitution⁴¹ as giving Congress plenary power over Indian land makes any lawsuit that attempts to invalidate Congressional legislation a difficult endeavor. Though in *Sioux Nation* itself the Court asserted the its own power to ensure that Congress acts in good faith in its capacity as a fiduciary trustee⁴² of Indian land,⁴³ the court's jurisdiction over Congressional action in this area remains limited.

Furthermore, the federal judiciary has rarely been inclined to intervene on behalf of Indian sovereignty, especially with relation to land claims. In fact, Justice Blackmun's decision in *Sioux Nation* was perhaps the high point in the history of Supreme Court receptiveness to Indian plaintiffs, and that era ended soon after, arguably with William Rehnquist's elevation to Chief Justice.⁴⁴ Recently, it has been noted that the Supreme Court has in fact hindered some Congressional attempts to provide Native Americans with substantive and procedural rights.⁴⁵ Indeed, at a recent con-

³⁹ *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S.*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *see also* Linda Greenhouse, *Sioux Lose Fight for Land in South Dakota*, N.Y. TIMES, Jan. 19, 1982, available at <http://www.nytimes.com/1982/01/19/us/sioux-lose-fight-for-land-in-dakota.html>.

⁴⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress has plenary power over Indian land, including the power to abrogate treaties); *U.S. v. Kagama*, 18 U.S. 375 (1886) (holding that tribal sovereignty is subordinate to the laws of the United States).

⁴¹ U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power . . . To regulate Commerce . . . the Indian tribes).

⁴² *See FAQ: Are American Indians and Alaska Natives wards of the Federal Government?*, U.S. DEPT. OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (explaining that the ward-guardian language used in early Supreme Court decisions has been replaced with a description of a fiduciary trust relationship).

⁴³ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (holding that Congressional actions regarding Native people can present justiciable questions).

⁴⁴ *See* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 34–38 (2000); *see also* David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001). Justice Rehnquist, incidentally, was the lone dissenter in *Sioux Nation*. *See supra* note 12.

⁴⁵ Getches, *supra* note 44; *see also* NATIVE AMERICAN RIGHTS FUND, TRIBAL SUPREME COURT PROJECT TEN-YEAR REPORT (Dec. 2011), available at <http://sct.narf.org/index.html> (detailing the success rate for Indian claims in the Supreme Court from 2000–2010, and noting that

vention held by the National Congress of American Indians, a prominent tribal lawyer echoed this sentiment and warned Native people that the federal courts are as unresponsive now as they have ever been to lawsuits regarding Indian sovereignty, and that therefore tribes should be wary before bringing a claim to court.⁴⁶ Though there are currently many cases pending in federal court on a wide array of issues,⁴⁷ it is clear that due to judicial deference to the Indian plenary power doctrine, and perhaps a hostility to the notion of sovereignty itself,⁴⁸ Native American people who desire the return of ancestral lands would in general be best served by turning to the legislative or executive branches of government. For the Sioux Nation in particular, there appears to be no other choice.

the Roberts Court has decided against Indian plaintiffs without exception. For a slightly more optimistic view on the Supreme Court's potential ability to strengthen Native sovereignty, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993)).

⁴⁶ Gale Courey Tounsing, *Indian Law Attorneys' Advice to Tribes: 'Stay Out of the Courts!'*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 28, 2013) available at <http://indiancountrytodaymedianetwork.com/2013/10/28/indian-law-attorneys-advice-tribes-stay-out-courts-151957> (discussing three recent Supreme Court cases seen by the Native American Rights Fund as threatening Indian sovereignty); see also Susan Shannon, *NARF And NCAI Advise Tribes To Stay Away From Supreme Court*, KGOU.COM (Sept. 27, 2013) <http://kgou.org/post/narf-and-ncai-advise-tribes-stay-away-supreme-court>.

⁴⁷ See, e.g., *Current Cases & Projects*, *supra* note 10 (indexing cases currently being litigated by the Native American Rights Fund).

⁴⁸ *Carcieri v. Salazar*, 55 U.S. 379 (2009), is one example of a recent case that has been greeted with dismay by many in the Native American legal community as well as by the Obama Administration. There, the Supreme Court interpreted a crucial statute, the Indian Reorganization Act of 1934, narrowly so as to restrict the Bureau of Indian Affairs' ability to take land into trust, throwing the status of many existing land agreements into question. See, e.g., *Obama administration reaffirms opposition to Supreme Court tribal land ruling*, THE ASSOCIATED PRESS (Nov. 1, 2011), available at <http://www.standupca.org/news/2011/carcieri-obama-administration-reaffirms-opposition-to-supreme-court-tribal-land-ruling/>; see also Debra Cassens Weiss, *Supreme Court Indian Trust Ruling Is Victory for States Seeking to Limit Casinos*, ABA JOURNAL (Feb. 24 2009), http://www.abajournal.com/news/article/supreme_court_indian_trust_ruling_is_victory_for_states_seeking_to_limit_ca/. Another example is the Baby Veronica saga that ended with the Supreme Court's ruling in *Adoptive Couple v. Baby Girl*, 570 U.S. ____ (2013), in which the Court narrowed the interpretation of the Indian Child Welfare Act of 1978 and denied custody of his child to a member of the Cherokee Nation. See Andrew Young, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, THE ATLANTIC (April 12, 2013), available at <http://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/> (discussing the case in the week before it was decided, and noting the Obama administration's support of the biological father).

B. *Pitfalls of the Legislative Option*

Soon after the Court's decision in *Sioux Nation*, the Sioux began lobbying Congress to pass a bill that would partially restore the Black Hills to them. In 1987, New Jersey Senator William Bradley introduced The Sioux Nation Black Hills Act after several years of negotiations and meetings with various tribal leaders. The bill would have returned 1.3 million acres of land lost under the Act of 1877, under certain conditions—no state or private property would be affected, some national parks would be co-managed, and, unsurprisingly, Mount Rushmore would not be conveyed.⁴⁹ The bill further provided for the right of first refusal in the case of sale of private property within the boundaries of the re-established Great Sioux Reservation, ordered the Secretary of the Interior to obtain lands held by South Dakota at Bear Butte (another sacred Lakota site), and provide monetary compensation for the loss of the use of the land from 1877 to the present.⁵⁰ In a notable substantive shift, that money was specifically described as essentially “back rent” and *not* an extinguishment of title to the land. In short, the bill would have been an enormous step forward for Sioux relations with the federal government.⁵¹

Unfortunately, the political changes that empowered the Sioux to aggressively seek alternatives to a monetary award in exchange for the Black Hills were not without costs. Internal dissension within the several tribes and outside influence from distant tribal members resulted in vicious factionalization among the Sioux, with one camp supporting the Bradley Bill and another opposing it, promoting instead a competing bill that would have drastically increased the monetary compensation for mineral wealth extracted from the Black Hills since 1877.⁵² As the tribe argued amongst itself and Congressional leaders began to balk, Senator Bradley decided not to reintroduce the bill, and critical momentum, as well as years of negotiations, were lost.⁵³ Over the next several years, other tribal members tried to restart the legislative

⁴⁹ Sioux Nation Black Hills Act, S. 1453, 99th Cong. § 4, 4(a), 8(a), 11 (1986).

⁵⁰ *Id.* at § 8(b), 9(b), 10(a).

⁵¹ See generally *Hearing on S. 1453, supra* note 29, at app. 87–275 (prepared statements and resolutions detailing the comprehensiveness of the negotiations leading up to the drafting of the bill, and attesting that the bill's passage would essentially end the conflict over the Black Hills).

⁵² See New Holy, *supra* note 11, at 342–45; see also MARIO GONZALEZ & ELIZABETH COOK-LYNN, *THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY* 34–37 (1999).

⁵³ New Holy, *supra* note 11, at 345.

effort but in many ways the damage of the leadership battle had already been done, and there has been minimal legislative action on the Black Hills in over ten years.⁵⁴

The frustrations encountered by the Sioux Nation as they attempted to push legislation through Congress twenty years ago highlight the inherent difficulty of writing comprehensive, and often polemical, legislation that is able to pass both Houses. Congress members from South Dakota may have the most at stake in a vote to approve a bill like the Sioux Nation Black Hills Act, but a majority of states contain Indian reservations, and thus other members outside the South Dakota delegation may be unwilling to set a precedent they see as dangerous or disruptive to their own states. For the Sioux now to attempt to negotiate a bill for the return of the Black Hills directly with Congress, they would not only have to present a united front themselves, but grapple with the disparate interests represented in Congress, as well.

C. *The Uncertain Promises of Executive Branch Action*

As discussed above, Congress abrogated the Fort Laramie treaty in 1877 to the extent that it contained claims to the Black Hills,⁵⁵ and had by that time already eliminated the federal government's ability to make any new treaties with Native American tribes.⁵⁶ Furthermore, the courts have consistently sanctioned Congress' power to unilaterally abrogate Indian treaties,⁵⁷ and there is no reason to believe that this conservative judicial philosophy regarding Indian sovereignty in general will change in the near future, if ever. The significant assertion of power over tribal relations by Congress does not, however, eliminate the executive's

⁵⁴ *Id.* at 345–47.

⁵⁵ Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, art. I (outlining the new territorial boundaries of the Sioux reservation and explicitly abrogating Article XVI of the 1868 Fort Laramie treaty).

⁵⁶ Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71). The Act kept all treaties ratified before 1871 intact. Congress took similar action in 1919 when it prohibited the Executive from creating Executive Order reservations, as had been done extensively in the past, 1–15 FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 15.04(4) (citing Act of June 30, 1919, §§ 27, 41 Stat. 3).

⁵⁷ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress[.]"); see also *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 98 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).

ability to negotiate with tribes.⁵⁸ Instead, in many situations, agreements between the Executive Branch and Native tribes must go through the additional step of ratification and enactment by Congress.⁵⁹

The Executive Branch has, to varying degrees over the subsequent 150 years, taken seriously its obligation to deal fairly with Indian tribes. In 1968, a special address to Congress by President Lyndon Johnson marked the turning point from the *Lone Wolf*-era attitude that Native Americans were passive recipients of government resources to a more progressive model of promoting tribal sovereignty through dialogue.⁶⁰ President Richard Nixon echoed these sentiments in his own special address to Congress in 1970, again appealing to Congress to end many of its paternalistic policies dealing with Native Americans and devise a program meant to strengthen tribal self-determination.⁶¹ Several landmark pieces of legislation were passed in response to President Nixon's address, meant to help the tribes become more involved in the crucial decision-making that Congressional leaders and Washington agency executives made about the everyday lives of Native Americans.⁶²

Though a full discussion of the century-long maturation of federal Indian policy is outside the scope of this Note, it is important to recognize that there has been a concerted movement by both the Executive Branch and Congress to pass legislation and implement policies that support and facilitate tribal sovereignty since President Johnson's first efforts to do so.⁶³ As will be explored more fully in Part III, the Sioux Nation has no realistic way to achieve their goals without the full participation of the Executive Branch.

⁵⁸ *Antoine v. Washington*, 420 U.S. 194, 203 (1975) ("The [Act of March 3, 1871] in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties.").

⁵⁹ *Id.* at 204.

⁶⁰ President Lyndon B. Johnson, *Special Message to the Congress on the Problems of the American Indian: "The Forgotten American."* (Mar. 6, 1968), available at <http://www.presidency.ucsb.edu/ws/?pid=28709>.

⁶¹ President Richard Nixon, *Special Message to the Congress on Indian Affairs* (July 8, 1970), available at <http://www.presidency.ucsb.edu/ws/?pid=2573>; see also Colette Routel & Jeffery Hoff, *Toward Genuine Tribal Consultation in the 21 Century*, 46 U. MICH. J. L. REFORM 417, 430 (2013).

⁶² See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450n, Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1923.

⁶³ See 1–1 FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02–1.07 for a rich and thorough explanation of Indian law from contact to the present; see also Routel & Hoff, *supra* note 61, at 431–33.

Tribal consultation, one result of this new perspective on Indian sovereignty, essentially involves a dialogue between agencies, such as the Department of the Interior, Energy, or Education, and the tribal governments that would be affected by actions taken by the agency. Following Johnson and Nixon's lead, President Ronald Reagan's Indian policy promoted the idea of "government-to-government negotiation,"⁶⁴ a turn of phrase utilized to this day that gives weight to the meaningfulness of the dialogue. Each subsequent president has emphasized federal government agencies' responsibility to work with Indian tribes to minimize conflict and promote cooperation between the two entities.⁶⁵ President Obama's 2009 Executive Order to agency heads reiterated the federal government's commitment to consultation, and though there are numerous criticisms of the process from all sides,⁶⁶ consultation provides one procedural resource through which tribes can make their needs and priorities heard.

There is also flexibility within various federal agencies to negotiate agreements with individual tribes relating to water use or national park management, for instance. National Park Services announced in 2012 that a final deal was in place between the agency and the Oglala Sioux tribe to fully transfer park management responsibility of the South Unit of Badlands National Park to the tribe.⁶⁷ Though the management change would not alter ownership of the park, it represents some recognition of the tribe's right to the land in a very basic sense. By deferring to their judgment on how best to maintain the land they've occupied for generations, the transfer implicitly acknowledges the Oglala's connection to that land. The Plan itself includes several pages detailing the history of the Sioux Nation, including a blunt acknowledgement of the destructive relationship between the federal

⁶⁴ Haskew, *supra* note 44 at 33.

⁶⁵ *Id.*; see also Routel & Hoff, *supra* note 61 at 437–47.

⁶⁶ See generally, Haskew, *supra* note 44, Routel & Hoff, *supra* note 61; see also Walter E. Stern, *Cultural Resources Management—Tribal Rights, Roles, Consultation and Other Interests (A Developer's Perspective)*, No. 2 RMMLF-INST Paper No. 3 (2012).

⁶⁷ Press Release, U.S. Dep't of the Interior, Salazar, Jarvis Announce Proposal to Establish Nation's First Tribal National Park in Badlands, (Apr. 26 2012) available at <http://www.doi.gov/news/pressreleases/Salazar-Jarvis-Announce-Proposal-to-Establish-Nations-First-Tribal-National-Park-in-Badlands.cfm>; Juliet Elperin, *In the Badlands, a tribe helps buffalo make a comeback*, THE WASHINGTON POST (June 23 2013), available at http://www.washingtonpost.com/national/health-science/in-the-badlands-a-tribe-helps-buffalo-make-a-comeback/2013/06/23/563234ea-d90e-11e2-a016-92547bf094cc_story.html.

government and the Sioux, and a map that compares the 1868 treaty lands with current reservation boundaries.⁶⁸

In one sense, agreements like this one, as well as tribal consultation, highlight the executive branch's ability to mediate between Native American tribal leadership and Congress. The South Unit Plan is not a bill crafted by special interests—it is a comprehensive agreement negotiated over six years, one made between the parties closest to and most knowledgeable about the issue.⁶⁹ Many of the difficulties that would face a bill like the Sioux Nation Black Hills Act are eliminated through this approach, as the Plan is backed by Executive and agency leaders, and has already undergone an extensive process that included public meetings, public draft reviews, and notice-and-comment procedures.⁷⁰ Nevertheless, Congress could kill, stall, or gut the legislation that National Park Services and tribal leaders eventually draft, and thereby maintain the federal status quo.⁷¹ In other words, without Congressional approval and action—often extremely hard to come by—the plan will go nowhere.

The Executive's ability to use the power delegated by Congress via the Indian Reorganization Act of 1934⁷² is a key mechanism through which tribes can increase their land base. Pursuant to an act of Congress authorizing acquisition of trust land, tribal governments can petition the Department of the Interior to take the land into trust on behalf of the tribe, who then follows a proce-

⁶⁸ National Park Services, *South Unit Badlands National Park Final General Management Plan & Environmental Impact Statement* 35–36 (April 2012) [hereinafter *Final General Management Plan*], available at <http://www.parkplanning.nps.gov/document.cfm?parkID=117&projectID=17543&documentID=47117>.

⁶⁹ Press Release, U.S. Dep't of the Interior, *supra* note 67.

⁷⁰ News Release, National Park Services, *South Unit General Management Plan, Record of Decision Signed*, (June 7, 2012), available at <http://home.nps.gov/badl/parknews/south-unit-general-management-plan-record-of-decision-signed.htm>.

⁷¹ *Final General Management Plan*, *supra* note 68, at 37–38. As of May 2014, the plan, including its definition of “tribal national park” has been forwarded to federal officials in Washington, D.C., but has yet to reach Congress, illustrating the amount of time necessary to accomplish even such a circumscribed goal as this. See Jim Kent, *Managing Bison in the Badlands South Unit*, SOUTH DAKOTA PUBLIC BROADCASTING (May 16, 2014, 10:31am), available at <http://listen.sdpb.org/post/managing-bison-badlands-south-unit>.

⁷² Act of June 18, 1934, 48 Stat. 984, codified at 25 U.S.C. § 461 et seq. Among its several lofty goals, the Act was intended to repudiate earlier efforts to break up tribal land bases and instead facilitate tribes' ability to stabilize their communities and become government entities with which the federal government could interact on more equal footing, FELIX S. COHEN, 1–1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05.

dures set out in the regulations to decide whether or not to do so.⁷³ The regulations specify several circumstances under which this can happen,⁷⁴ such as after a purchase of land in fee simple by the tribe, or through a determination by the Secretary of the Interior that taking the land into trust would promote “tribal self-determination, economic development, or Indian housing.”⁷⁵ In all cases, the tribe must take the first step of petitioning the Department of Interior.⁷⁶

In a situation such as this one, in which the Sioux Nation desires the acquisition of land that is neither within the existing boundaries of the tribe’s reservation nor adjacent to it, the Secretary of the Interior is required to make a more exacting examination of the impact that taking the land into trust status would entail, but in any case the tribe seeking trust status must submit a detailed explanation of the benefits it would bring, along with any foreseeable conflicts that could arise with relevant parties, such as state and local governments or private individuals.⁷⁷ Again, any action on this front would require the participation and approval of Congress, but Congress appears willing to allow the Secretary of the Interior some leeway in negotiating trust agreements with Indian tribes.⁷⁸

1. Unique Opportunity During the Obama Administration

President Barack Obama has demonstrated significant interest in addressing issues facing Native Americans, including the centrality of land to tribal sovereignty. Several tribal leaders have reported that in a 2008 campaign meeting, then-Senator Obama indicated openness to negotiation and dialogue on the Black Hills,⁷⁹ and the President continues to reach out to tribal leader-

⁷³ Dep’t of Interior Land Acquisition Policy, 25 C.F.R. § 151.3 (2014); FELIX S. COHEN, 1–15 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.03, 15.07.

⁷⁴ 25 C.F.R. § 151.3(a), 151.10–11.

⁷⁵ 25 C.F.R. § 151.3(a)

⁷⁶ 25 C.F.R. § 151.9.

⁷⁷ 25 C.F.R. § 151.9–15. The farther the distance between the off-reservation land is from the tribe’s reservation, the more exacting the scrutiny must become, 25 C.F.R. 151.11.

⁷⁸ See, e.g., Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064 (2010) (dealing with the Cobell Settlement, discussed below).

⁷⁹ Matthew L.M. Fletcher, *Could President Obama Solve the Black Hills Question?*, TURTLE TALK BLOG (Aug. 30, 2009), <http://turtletalk.wordpress.com/2009/08/30/could-president-obama-settle-the-black-hills-question/> (reporting that tribal leaders have asserted that during a 2008 meeting in Iowa, President Obama’s campaign “gave [the leaders] a proposal that read in part: ‘Barack Obama is a strong believer in tribal sovereignty. He does not believe courts or the federal government should force Sioux tribes to take settlement money for the Black Hills . . .

ship on a variety of issues.⁸⁰ There have also been several class-action settlements between the Obama Administration (operating through the Departments of Justice and Interior) and Native American plaintiffs, including the historic Cobell Settlement,⁸¹ with President Obama expressing strong approval and support of these actions as strengthening tribal sovereignty as well as government-to-government negotiations.⁸² Significantly, various tribal elders, government officials, and representatives have publicly commented on their approval of the Administration's relationship with Indian Country and their desire to work with the federal government on resolving the Black Hills land dispute.⁸³

Obama would not be opposed to bringing together all the different parties through government-to-government negotiations to explore innovative solutions to this long-standing issue.'"). There does not appear to be an official record of such a statement.

⁸⁰ President Barack Obama, *Remarks at the Opening of the White House Tribal Nations Conference and a Discussion With Tribal Leaders* (November 5, 2009) [hereinafter *Remarks 2009*], available at <http://www.presidency.ucsb.edu/ws/?pid=86854>; President Barack Obama, *Remarks at the White House Tribal Nations Conference* (December 5, 2012) [hereinafter *Remarks 2012*], available at <http://www.presidency.ucsb.edu/ws/?pid=102735>; President Barack Obama, Executive Order 13647, *supra* note 2.

⁸¹ See Justin Guilder, *Focus On: Cobell v. Salazar*, 57 APR FED. L. 31 (2010) for a brief explanation and appraisal of the Cobell Settlement, in which plaintiffs alleged mismanagement of Indian trust land in a 1996 class action suit. After over a decade of litigation, the case was settled for \$3.4 billion. Part of the award will be used to consolidate Indian land interests that were splintered through individual allotment of tribal land, as well as to buy back land from non-Indian owners permitted to buy Indian land beginning in 1887 with the passage of the disastrous Dawes Act, a bill expressly intended to destroy the tribe as a collective unit and force rapid assimilation by Native Americans. For information on the current administration of the settlement fund, see <http://www.indiantrust.com/index>, the official government website.

⁸² See, e.g., President Barack Obama, *Statement on the United States District Court Approval of the Settlement in the Keepseagle Class-Action Lawsuit on Discrimination by the Department of Agriculture* (April 28, 2011), available at <http://www.presidency.ucsb.edu/ws/?pid=90316> (emphasizing that settlement of the lawsuit "strengthen[s] our nation-to-nation relationship with Indian Country"); Patrick Reis, *Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES, Dec. 8, 2009, available at <http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-1-92369.html>; Mary C. Curtis, *Obama Hails Passage of Settlement for Native Americans, Black Farmers*, POLITICS DAILY.COM (Nov. 30, 2010), <http://www.politicsdaily.com/2010/11/30/obama-hails-passage-of-settlement-for-native-americans-black-fa/> (commenting on President Obama's remarks after signing the Claims Resolution Act of 2010 that includes appropriations for the Cobell Settlement).

⁸³ See, e.g., *Obama promises Native Americans place on agenda*, USA TODAY, Nov. 5, 2009, available at http://usatoday30.usatoday.com/news/washington/2009-11-05-obama-indians_N.htm ("It's truly a beginning," said Theresa Two Bulls, president of the Oglala Sioux Tribe in South Dakota. "I feel in my heart, there's going to be many more meetings [of tribal leadership with the Obama Administration] like this."); see also Gale Courey Toensing, *Jefferson Keel Talks About Time at NCAI and Getting Back to Who He Is*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 18, 2013), <http://indiancountrytodaymedianetwork.com/2013/10/18/jefferson-keel-talks-about-time-ncai-and-getting-back-who-he-151791> (interviewing the outgoing president of the National Congress of American Indians, who calls President Obama a "good friend to Indian

Part of President Obama's appeal, however, is his recognition of not only the anger with the federal government within Native American communities, but the legacy of broken promises and token gestures of good faith that so often has defined federal Indian law.⁸⁴ In particular, the vocal and influential Oglala Sioux tribe express hostility to, and deep cultural alienation from, the federal government.⁸⁵ Russell Means, a tremendously polarizing Oglala activist and politician, described a meeting with federal officials after the seventy-one day standoff at Wounded Knee in this way:

Hundreds of Oglala people came on May 17 to Grandpa Fools Crow's place in Kyle . . . to meet the promised White House delegation and to discuss our treaty. Those emissaries from Washington, however, had no official standing and no authority to offer anything. After hours of evasions, the white men left, promising to come back in two weeks with answers. The Oglala people returned on May 31, the day the white delegates had said they would come back, but nobody from Washington D.C., showed up. Instead, [White House counsel] Leonard Garment . . . sent an insulting note. It said, in part, "The days of treaty making with the American Indians ended in 1871; . . . only Congress can rescind *or* change in any way statutes enacted since 1871."⁸⁶

country"); Rob Hotakainen, *Obama woos tribes, says he'll visit Indian Country in 2014*, McCLATCHY WASHINGTON BUREAU (Nov. 13, 2013), available at <http://www.mcclatchydc.com/2013/11/13/208486/obama-woos-tribes-says-hell-visit.html#storylink=cpy>.

⁸⁴ President Obama's statements on Native issues are replete with such references. See, e.g., Obama, *Remarks 2009* and *Remarks 2012*, *supra* note 80. Multiple agency heads at the most recent White House Tribal Conference reiterated the sentiment. See Hotakainen, *supra* note 83 ("I know from growing up in this country that the federal government does not have a proud legacy with tribes, and justice can't be reversed overnight," [Interior Secretary Sally] Jewell said. . . . Eric Shinseki, [former] secretary of the Department of Veterans Affairs, acknowledged that some [Native American] veterans lack trust in the government. . . . [President Obama] said he wanted to build a stronger relationship between tribes and the federal government, "based on trust and respect.").

⁸⁵ The Oglala historically resisted contact with federal authorities and were among the tribes who refused to move voluntarily to the Great Sioux Reservation in the aftermath of the 1868 Fort Laramie treaty. Their Pine Ridge Reservation is home to the site of the Wounded Knee Massacre in 1890 as well as the 1973 Wounded Knee Standoff, which itself was inspired chiefly by young Oglala radicals. See New Holy, *supra* note 11, for a history of the Black Hills land claim that discusses the militancy that defines the Oglala's role in the dispute. See also ROY ROSENZWEIG & DAVID THELEN, *THE PRESENCE OF THE PAST: POPULAR USES OF HISTORY IN AMERICAN LIFE* 162–75 (1998) for a chapter on the Oglala Sioux's unique relationship to American history, obtained through interviews with 200 residents of Pine Ridge. See also Hotakainen, *supra* note 83, in which current Oglala President Bryan Brewer gives the only negative quote regarding President Obama.

⁸⁶ New Holy, *supra* note 11 at 338 (alterations in original) (quoting RUSSELL MEANS & MARVIN J. WOLF, *WHERE WHITE MEN FEAR TO TREAD* 293 (1995). Means, an architect of the 1973

An attempt to negotiate a complex settlement of the magnitude required to resolve the Black Hills dispute must make the history of the conflict, and the suspicion and anger that accompanies it, a central concern to be dealt with in no uncertain terms.

IV. PROPOSAL: RESTORATIVE JUSTICE AND THE BLACK HILLS LAND CLAIM IN 2013

Exploration of the legal avenues open to the Sioux Nation strongly suggests that pursuing negotiation within the Executive Branch is the most efficient and logical means of achieving the tribe's ultimate goals. In light of the historical, legal, and political complexities that surround the Black Hills, however, a specially-tailored negotiation forum is necessary if there is any hope of resolving the land claim. Even in negotiation over a proposal as relatively technical and un-emotional as national park management, any discussion of the Lakota's right to land must be attuned to their feeling that their rights have been abrogated and that their losses—in wealth, independence, and health—must be recognized, if not compensated.⁸⁷ For these reasons, the principles of restorative justice appear uniquely appropriate for a forum that would address the Black Hills.

Restorative justice is defined by the Centre for Justice and Reconciliation as “a theory of justice that emphasizes repairing the harm caused by criminal behavior. It is best accomplished when the parties themselves meet cooperatively to decide how to do this. This can lead to transformation of people, relationships and communities.”⁸⁸ Howard Zehr and Ali Gohar define restorative justice

Wounded Knee Standoff who passed away in 2012, began toward the end of his life to create The Republic of Lakotah, and traveled to Washington, D.C. in 2007 to officially “secede” from the United States, *About Us*, REPUBLIC OF LAKOTA, available at <http://www.republicoflakotah.com/about-us/>. The project appears to have been almost universally rejected by both tribal leaders and government officials, Gale Courey Toersing, *Withdrawal from US treaties enjoys little support from tribal leaders*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 4, 2008), available at <http://indiancountrytodaymedianetwork.com/2008/01/04/withdrawal-us-treaties-enjoys-little-support-tribal-leaders-79806>, and though Means' project was based in Porcupine, SD on the Pine Ridge Reservation, there is no mention of it on the tribal government's website, <http://www.oglalalakotanation.org>. The Republic's website today is dedicated almost entirely to memorializing Means, and it is unclear whether the endeavor will be abandoned entirely due to his passing.

⁸⁷ See *Final General Management Plan*, *supra* note 68, and accompanying text.

⁸⁸ CENTRE FOR JUSTICE AND RECONCILIATION, RESTORATIVE JUSTICE BRIEFING PAPER 1 (Nov. 2008), available at <http://www.restorativejustice.org/sitemap>.

as “a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.”⁸⁹ As indicated in these explanations, it is a concept usually applied in the criminal context, and it functions as an alternative to, or variation on, adversarial justice and traditional methods of punishment. The goal of restorative justice is to transform traditional punishment into a mechanism that not only prevents future wrongdoing but also ameliorates the actual damage done by the crime. This approach to criminal justice differs in its scope and its goals from the traditional system in that

[f]irst, it views criminal acts more comprehensively—rather than defining crime as simply lawbreaking, it recognizes that offenders harm victims, communities and even themselves. Second, it involves more parties in responding to crime—rather than giving key roles only to government and the offender, it includes victims and communities as well. Finally, it measures success differently—rather than measuring how much punishment is inflicted, it measures how much harm is repaired or prevented.⁹⁰

There are several methods by which practitioners use restorative justice, including victim-offender mediation, conferencing, and sentencing or peacemaking circles. Each are variations on the general theme that full participation by those affected by crimes will result in the most positive outcomes, both long and short term.⁹¹

Many of the concepts involved in restorative justice stem from interpretations of traditional indigenous forms of conflict resolution. The Navajo Nation, which pioneered formal peacemaking techniques within its own communities, has been particularly influential in the field, especially within the United States.⁹² Indigenous communities around the world have instituted community restorative justice programs and in many cases, the federal criminal justice systems in their respective countries have incorporated these practices into contexts such as non-violent crimes, domestic abuse, ju-

⁸⁹ HOWARD ZEHR & ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 40, available at www.unicef.org/tdad/littlebookrjpkaf.pdf.

⁹⁰ *Id.*

⁹¹ *Id.* at 1–2.

⁹² See, e.g., Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (April 27, 2007), http://www.iirp.edu/article_detail.php?article_id=NDA1 (discussing restorative justice with The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation Supreme Court and James Zion, adjunct professor at Northern Arizona University, family court commissioner, and former solicitor to the courts of the Navajo nation).

venile justice, and within the prison system.⁹³ Traditional aboriginal principles—often inextricably linked to religion—such as the emphasis on family and community support, the healing value of reintegration and rehabilitation, and a belief in the community’s responsibility to actively engage in a process of ameliorating the consequences of crime, are echoed in core restorative justice doctrine.⁹⁴

The Sioux Nation has a traditional system of order, at once religious, legal, and familial, that draws on principles that can be seen in restorative justice programs. Envisioning society as a “sacred hoop” that connects each member of the family and by extension, the community, each individual is charged with the responsibility to care for society at large.⁹⁵ Leadership, diplomacy, and consensus-building remain pillars of Lakota society.⁹⁶ Among the Oglala of Pine Ridge, one response to the devastating effects of cultural disaffection, violence, and gang activity⁹⁷ on the reservation has been the initiation of sentencing circles. This iteration of

⁹³ See e.g., Fred W.M. McElrea, *Twenty Years of Restorative Justice in New Zealand*, TIK-KUN, (Jan. 10, 2012) (“[Restorative justice] supports indigenous ways of dealing with conflict and builds on the strengths of indigenous Maori people. . . . Maori and Pacific Island communities in New Zealand had argued for a model that empowered families and communities, and they were both influential in the shaping of the 1989 [juvenile restorative justice] legislation.”); Margaret Shaw & Frederick Jané, *Restorative Justice And Policing in Canada: Bringing the Community into Focus*, ROYAL CANADIAN MOUNTED POLICE, available at <http://publications.gc.ca/collections/Collection/JS62-117-2003E.pdf> (“Sentencing circles have emerged as one of the main responses to the need for localized, community-responsive justice for Aboriginal peoples. They are seen as utilizing the traditional philosophy and principles found in Aboriginal communities which emphasiz[e] peacemaking, mediation and consensus-building, as well as respect for alternative views and equality of voices.”); MARIAN LIEBMANN, *RESTORATIVE JUSTICE: HOW IT WORKS* 277 (2007) (“Building on indigenous practices, Columbia, Ecuador, Bolivia, Peru and Guatemala have introduced legislation for penal conciliation.”).

⁹⁴ See John Braithwaite, Dorothy J. Killam Memorial Lecture: Restorative Justice and A Better Future (Oct. 17, 1996), available at http://www.iirp.edu/article_detail.php?article_id=NDk4; see also Mirsky, *supra* note 92 at 2 (discussing the link between Navajo religious practices and peacemaking processes).

⁹⁵ Karen Kimbro Chase, *Oglala Sioux Tribal Profile*, 12 TRIBAL L.J. 1, 5–7 (2011).

⁹⁶ *Id.* at 7–8. Chase notes, however, that the rest of the traditional mechanisms of governance were replaced by a system that mirrors the American Constitutional framework, but the Tribal Council has been plagued by dissention, corruption, and coups since its establishment in 1935. *Id.* at 10–11.

⁹⁷ See, e.g., Erik Eckholm, *Gang Violence Grows on a Reservation*, N.Y. TIMES, Dec. 13, 2009, available at http://www.nytimes.com/2009/12/14/us/14gangs.html?_r=1. See also U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF INDIAN SERVICES, 2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 8 (2005) for statistics on Pine Ridge, including an unemployment rate of 89% and that 34% of the working population living below poverty guidelines. Unfortunately, these numbers are not outside the norm for many of the Lakota Sioux tribes.

restorative justice consists of discussions between various interested community members, including the victim and the offender, as well as relatives, police, or other community members with a stake in resolving the conflict.⁹⁸

The Oglala are also in the process of building a new tribal justice center through a \$40 million grant from the Bureau of Indian Affairs.⁹⁹ The center, which is not yet completed, will contain courtrooms, judicial chambers, and a short-term detention facility, as well as a central garden and specialized courtroom for sentencing and talking circles.¹⁰⁰ The courtroom will be “[d]ifferent from more traditional courtrooms where the judge sits on a raised bench, [because] this courtroom has a flat floor and all participants sit around a circle. It is a dialogue that allows participants to participate equally in the process as part of a discussion that will hopefully lead to restoration.”¹⁰¹ The integration of a traditional Lakota philosophy and Western-based justice system, explicitly intended to address the consequences of cultural displacement, poverty, and violence, can be seen as a response to the need for flexible and innovative solutions to the problems that face Native Americans today.

For an agreement to be reached on an issue as historically fraught and legally dense as the Sioux Nation’s claim to the Black Hills, it seems a necessary first step to utilize the mechanisms found in restorative justice proceedings in order to build trust and respect between the parties. Though it may appear an ungainly or even superfluous addition to an already arduous process, ultimately the benefits of establishing mutual understanding will speed the negotiations, rather than slow them. Two examples of restorative justice forums—the Truth and Reconciliation Commission in South Africa, and its Canadian counterpart that deals specifically with residential schools—are opposite ends of the spectrum that

⁹⁸ Joshua Wachtel, *Oglala Sioux tribe in SD trying sentencing circles*, RESTORATIVE WORKS LEARNING NETWORK (May 22, 2012), <http://restorativeworks.net/2012/05/ogla-la-sioux-tribe-in-sd-trying-sentencing-circles/>.

⁹⁹ *New Pine Ridge Justice Center to Meet Unique Needs of Tribal Legal System*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 5, 2011), <http://indiancountrytodaymedianetwork.com/2011/07/05/new-pine-ridge-justice-center-meet-unique-needs-tribal-legal-system-41401>.

¹⁰⁰ *Id.*; see also Chris Peterson, *Pine Ride Justice Center: Full Cooperation*, MILENDER WHITE CONSTRUCTION CO. (April 1, 2013), http://www.milenderwhite.com/files/images/pages/20130509_PineRidge.pdf.

¹⁰¹ Lisa Kopochinski, *Tribal Justice Center First of Its Kind*, CORRECTIONAL NEWS (Sept. 7, 2011), <http://www.correctionalnews.com/articles/2011/09/7/first-its-kind> (quoting John Cain, principal of Venture Architects).

may illustrate how such a process could be used between the Sioux Nation and the federal government in the United States.

A. *Reconciliation as the Starting Point for Negotiations:
The South African Model*

The Truth and Reconciliation Commission, established in South African after the end of apartheid in 1995,¹⁰² is perhaps the most celebrated—and extensive—example of restorative justice used to mitigate the effects of historical violence and oppression. The intricacy of that set-up is neither needed in this particular case¹⁰³ nor is it a foreseeable response by the federal government, but despite its inevitable imperfections, the Commission represents one way to deal with deep cultural trauma. A key goal of the Commission was to encourage stories to be told about the individual experience under apartheid, and the ability for perpetrators to receive amnesty through confession and apology.¹⁰⁴ The act of hearing the stories be told has been described as causing “cognitive dissonance” between what supporters of one side or another believed about the purity of their cause and the truth in the accounts of survivors.¹⁰⁵ This process allowed for recognition of the damage done by racist, dogmatic institutions to all sectors of society, thereby helping to promote reconciliation.

For this process to work in the case of the Sioux Nation, it is imperative that the forum be public, honest, and legitimate, which is to say it must be held in the public eye (not merely for the ears of Senators or witnesses to the proceedings), uncircumscribed in its content to a large degree, and yet contained within, and sanctioned by, the government. Although the American public is aware of the continuing strife between Indian tribes and all levels of the govern-

¹⁰² See generally S. AFR. DEP'T OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, TRUTH AND RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/> (last visited Feb. 8, 2014).

¹⁰³ But see William Bradford, “With a Very Great Blame on Our Hearts”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003), for an influential and forceful discussion of the issue as applied to the entirety of the Native American experience since European contact.

¹⁰⁴ SA TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT, Vol. 1, 103–35 (Oct. 1998) (S. Afr.) [hereinafter TRC]. The Commission’s final report is seven volumes long, but the Summary and Guide to Contents provides some guidance on where to look for discussions and findings about particular areas of the Commission’s work. TRC FINAL REPORT, <http://www.justice.gov.za/trc/report/execsum.htm>.

¹⁰⁵ James L. Gibson, *The Contributions of Truth to Reconciliation*, 50 J. CONFLICT RESOL. 3, 414–15 (2006).

ment,¹⁰⁶ their comprehension of the legacy of Native American history is an important component of resolving the conflict, if for no other reason than because elected government officials are responsive to the opinions of their constituencies. Although many similar stories will be told, the difference between a deliberately public airing of grievances and, for instance, a hearing by the Senate Committee on Indian Affairs or a book written by a Native American lawyer,¹⁰⁷ is that the general American public will naturally become a participant in the reconciliation process. The creation of an inclusive dialogue between those directly and indirectly affected by the Sioux's negotiation with the government would not only aid in achieving justice for the Sioux, but also facilitate a more complete reckoning with the many inequities that have resulted from America's treatment of Native people throughout history.¹⁰⁸

The testimony in such a forum should be uncircumscribed in the sense that those who decide to participate must feel free to speak of whatever it is they feel is important, and not merely about their ancestors' involvement in the Great Sioux War of 1876, for example. Instead, any way that an Oglala or Rosebud individual wishes to describe his or her experiences and relationship to the Black Hills should be welcomed. Crucially, participation must not be limited to tribal officials or "spokespersons" but include as

¹⁰⁶ A good example of the American public's confrontation with Native American politics is the recent and ongoing controversy over the National Football League's Washington Redskins. See Michael Martinez, *NFL official: 'Redskins' not a slur*, ESPN.COM (June 1, 2011), http://espn.go.com/nfl/story/_id/11007769/nfl-official-says-washington-redskins-name-not-slur (reporting on recent responses to calls for the name to be changed, with some NFL officials calling the name offensive and in need of a change while others defend it, after 50 Senators sent a letter demanding the name be changed to the Commissioner of the League). Polling evidence suggests that support for the name and mascot, although still overwhelming, has fallen since the discussion began receiving national attention. Compare Will Wrigley, *Majority Of Washingtonians Support Redskins' Name, Washington Post Poll Finds*, THE HUFFINGTON POST (June 25, 2013, 10:31pm), http://www.huffingtonpost.com/2013/06/25/majority-support-redskins-name_n_3496552.html (citing a poll finding that support for the name, while still strong, was lower than a national poll conducted in May 2013, with 61% of D.C. residents supporting it versus 80% nationally) with Erik Brady, *Poll: 71% don't think Redskins should change name*, USA TODAY (Jan. 2, 2014, 9pm), <http://www.usatoday.com/story/sports/nfl/redskins/2014/01/02/team-name-controversy-public-policy-polling/4297665/> (discussing on a Public Policy Polling national survey conducted in late 2013 that reported 71% approval of the name, 18% disapproval, and 11% unsure).

¹⁰⁷ Or a Note written by a non-Indian law student, for that matter.

¹⁰⁸ Again, the Redskins Controversy is an example of a national discussion that would benefit from a holistic evaluation of the historical weight of a word that the Oxford English Dictionary decorously describes as "not the preferred term," OXFORD ENGLISH DICTIONARY (2d ed. 2009), and that Merriam-Webster's warns new English speakers "is very offensive and should be avoided," MERRIAM-WEBSTER'S LEARNER'S DICTIONARY (2014), available at <http://www.learnersdictionary.com/definition/redskin>.

many members of the various tribes as possible. The point of this process is not to hold a hearing in the legal sense (though something of that nature could come later, and findings, were there to be any, from this portion of the proceedings could very well be used during negotiations), but to establish a basic level of mutual understanding. Surveying the history of this conflict strongly suggests that without a feeling by the Sioux that the government understands the true gravity of their complaint, reaching a lasting agreement will be impossible.

Finally, it is equally important that this process take place under the aegis of the federal government. The Wounded Knee Standoff in 1973 is a good example of a way in which the Sioux Nation brought national attention to their anger and disillusionment with the status quo, and yet failed to achieve any meaningful change for themselves. This is not to say that the conflict “flew under the radar”—on the day the standoff ended, the scene was described as “a strange carnival . . . [with] [h]undreds of newsmen speaking dozens of languages, swarm[ing] over the reservation’s headquarters.”¹⁰⁹ Marlon Brando famously refused to accept an Oscar for his role in *The Godfather* in March 1973 (six weeks before the standoff ended), instead sending Sacheen Littlefeather, an Apache Indian, in his place to highlight the negative portrayal of Native Americans in media, including the depiction of the Sioux at Wounded Knee.¹¹⁰ Yet despite the sensational media coverage, Wounded Knee was arguably a step backward for the Sioux in the sense that the prolonged extralegal standoff hardened a large portion of the country against their cause, and exacerbated fissures that already existed within their communities.¹¹¹

Whether or not national opinion about the crisis was a fair evaluation of the Sioux, or whether the media misrepresented the grievance presented, is not the point. Wounded Knee is relevant here to illustrate that attention to the existence of an injustice is not always sufficient to shift the tenor of the national conversation. Instead, the government must recognize in a concrete way the le-

¹⁰⁹ Andrew H. Malcolm, *Occupation of Wounded Knee Is Ended*, N.Y. TIMES, May 8, 1973, available at <http://www.nytimes.com/learning/general/onthisday/big/0508.html#article>.

¹¹⁰ Associated Press, *Indian Terms Words Her Own, Not Brando’s*, N.Y. TIMES, April 1, 1973, available at <http://select.nytimes.com/gst/abstract.html?res=F10A1EFC3F5C147A93C3A9178FD85F478785F9>; Oscars, *Marlon Brando’s Oscar Win for “The Godfather”*, YOUTUBE (Oct. 2, 2008), <http://youtu.be/2QUacU0I4yU>.

¹¹¹ The competing point, of course, is that Wounded Knee symbolized a refusal to remain passive in the face of what the Sioux perceive as government oppression, and therefore strengthened the community in other, non-legalistic ways.

gitimacy of the aggrieved parties, both in the eyes of the parties themselves and in the eyes of the general public. The act itself of creating public forum wherein the Sioux can explain their positions, their history, and their desires for the future, *even without* a pledge by the government to negotiate, explicitly indicates that the issues raised there are worth the time and effort it take to hear them. That alone is something that many people, including government officials, have not yet been convinced is true, and a public acknowledgment of the validity of the Sioux's cause would do much to aid the ability of both sides to negotiate with one another.

A reconciliation forum like the one envisioned here would naturally be very different from the one established in Cape Town. In South Africa the actual perpetrators and victims were alive, present, and giving testimony, with the future of the country at stake. There was almost unanimous international condemnation of apartheid by that time, and support for the creation of the Commission was widespread. Here, all those who witnessed and participated in the taking of the Black Hills are long dead, and there is no collective feeling that America cannot survive without righting that injustice. The reconciliation process for the Sioux would likely last months, not years, and as imagined here is only the beginning of a longer, more intimate legal negotiation about a way forward, whereas in South Africa the reconciliation itself was largely the point.¹¹² Though the South African Commission had at least one overwhelmingly practical concern—that the country not collapse into civil war—the forum here would be on a much smaller scale, with the ultimate goal of deciding how best to ameliorate the Sioux's loss of the Black Hills, whether it be through taking land into trust, establishing a park management plan to allow religious ceremonies to be performed in the Black Hills, or any other method upon which the parties can agree.

The Truth and Reconciliation Commission was the largest undertaking of its kind at the time of its establishment¹¹³, with three separate committees, over 300 staff members and an annual budget of \$18 million USD.¹¹⁴ Over the course of seven years, the Commission took testimony from 21,000 people with over 2000 individuals making their statements publicly.¹¹⁵ It also had judiciary

¹¹² See TRC, *supra* note 104, at 55–58.

¹¹³ TRC, *supra* note 104, at 55.

¹¹⁴ U.S. INST. FOR PEACE, TRUTH COMMISSION: SOUTH AFRICA, <http://www.usip.org/publications/truth-commission-south-africa>.

¹¹⁵ *Id.*

authority to subpoena witnesses, conduct searches and seizures, arbitrate amnesty claims, and make recommendations for prosecution.¹¹⁶ This structure is not necessary for negotiations over the Black Hills to go forward, and in fact, giving the forum judicial powers might easily reduce participation in it, due to the Sioux's general mistrust of the courts at this point in time. A more useful approach would be to create a supervisory body to oversee the proceedings and summarize results and findings for use in the negotiations that would ideally follow. This group could be composed of members chosen by the Sioux and others chosen by the government, or perhaps international arbitrators with experience in reconciliation and restorative justice, particularly in the aboriginal context. Although whether the individuals had backgrounds in the law, American and/or Native American history, or specialized knowledge and experience with the Black Hills and Sioux Nation might be seen as logical or even essential attributes of supervisory members, an understanding and enthusiasm for the goals of the project would certainly be a necessary qualification. One might think this is an unnecessarily obvious statement, but the experience of Canada's Indian Residential Schools Truth and Reconciliation Commission, currently in its fifth year, indicates otherwise.

B. *The Negative Model of Canada's Indian Residential Schools Truth and Reconciliation Commission*

Canada's history with its Native¹¹⁷ population bears many unfortunate similarities with America, including broken or dishonest treaties, and a political attitude that was unsympathetic at best and cruel at worst.¹¹⁸ One of the most egregious aspects of that history is the residential school system, a period that lasted from the late eighteenth century until the late twentieth, in which aboriginal children were taken to mandatory boarding schools in an effort to forcibly assimilate the Native population. Not only were the children prohibited from speaking or writing their own languages, but they

¹¹⁶ TRC, *supra* note 104, at 54.

¹¹⁷ Aboriginal Canadians refer to themselves generally as First Nations, Métis (mixed French and aboriginal heritage), or Inuit (aboriginal people of the northernmost Arctic region), with "Native" and "aboriginal" being other common descriptors.

¹¹⁸ See generally Peter Scott Vicaire, *Two Roads Diverged in a Wood: Comparative Analysis of Indigenous Rights in a North American Constitutional Context*, 50 NO. 3 JUDGES' J. 18 (2011) (comparing the American and Canadian historical and legal experience with their respective native populations).

received abysmal medical care, inadequate food, and suffered a range of physical, emotional, and sexual abuse.¹¹⁹ The legacy of residential schools has been terrible, as the children who were raised there often became alcoholics, drug addicts, or abusers themselves, and many committed suicide.¹²⁰

In 2006, the Indian Residential Schools Claims Settlement was reached, providing, among other things, for the establishment of a Truth and Reconciliation Commission with a five-year mandate.¹²¹ That mandate included preparing a comprehensive historical record and public database about the residential schools, as well as establishing a research center and hosting memorial events around the country.¹²² The federal government was obligated by the terms of the legal settlement to fully fund the Commission, as well as provide documents from its archives to help create the historical record as required by the agreement.¹²³

The Commission has struggled since it began the project in June 2008. In October 2008, the head commissioner resigned after previously warning that the Commission was “paralyzed,” citing disagreement with the Commission’s two other members over the Commission’s goals, and criticizing them for refusing to accept his authority.¹²⁴ The remaining members resigned in January 2009 amid mounting concerns that the Commission had lost credibility and needed to start afresh.¹²⁵

¹¹⁹ See TRUTH AND RECONCILIATION COMMISSION OF CANADA, *THEY CAME FOR THE CHILDREN: CANADA, ABORIGINAL PEOPLES, AND RESIDENTIAL SCHOOLS* (2012), available at <http://www.trc.ca/websites/trcinstitution/index.php?p=9>; see also JULIAN WALKER, LEGAL AND LEGISLATIVE AFFAIRS DIVISION, PARLIAMENT OF CANADA, *THE INDIAN RESIDENTIAL SCHOOLS TRUTH AND RECONCILIATION COMMISSION* 4–11 (Feb. 11, 2009), available at <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0848-e.htm#B-Mandate>. The United States also used residential schools, including among the Sioux people. For several first-hand accounts, see *We Shall Remain: Wounded Knee* (American Experience and National Association of Public Television, 2009), in which Native Americans who participated in the 1973 Standoff recount their experiences in residential schools.

¹²⁰ *THEY CAME FOR THE CHILDREN*, *supra* note 119, at 79–80.

¹²¹ ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, FACT SHEET – INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT, <https://www.aadnc-aandc.gc.ca/eng/1332949137290/1332949312397>.

¹²² *Id.*

¹²³ WALKER, *supra* note 119, at 12.

¹²⁴ *Chairman quits troubled residential-school commission*, CBC NEWS (Oct. 20, 2008, 11:30pm), <http://www.cbc.ca/news/canada/chairman-quits-troubled-residential-school-commission-1.704043>.

¹²⁵ *Remaining 2 members resign from residential schools commission*, CBC NEWS (Jan. 30, 2009, 8:02pm), <http://www.cbc.ca/news/canada/remaining-2-members-resign-from-residential-schools-commission-1.781852>.

Though new commissioners were appointed promptly and the Commission restarted its work, the Ontario Supreme Court was forced in January 2013 to compel the government to turn over millions of documents from Library and Archives Canada, with the government arguing that it was obligated only to allow access to the documents, but not affirmatively provide them to the Commission.¹²⁶ Months later, allegations that the federal government was deliberately stalling the release of documents resurfaced.¹²⁷ Political opponents of Prime Minister Stephen Harper's Conservative Party suggested that the lack of cooperation from the government would lead to a second lawsuit for a failure to comply with the settlement agreement, and began pushing for the Commission's mandate to be extended.¹²⁸ The government agreed, and in November 2013 the Commission and the government filed a joint petition that the mandate be extended.¹²⁹ The Supreme Court of British Columbia granted a yearlong extension almost immediately.¹³⁰

Accusations that the government will not fully cooperate continued to circulate, however. The \$14 million CAD contract to a private firm to sift through the archival documents before they could be sent to the Commission was not awarded for another year,¹³¹ and the Commission received the files, still unsorted and many not digitized, for the first time in April 2014.¹³² This only confirmed the new Commissioner's fears that the government would wait until the Commission's mandate was ending before "dumping" the documents.¹³³ Earlier in the year, an internal

¹²⁶ *Ottawa ordered to provide all residential schools documents*, CBC NEWS (Jan. 30, 2013), available at <http://www.cbc.ca/news/politics/ottawa-ordered-to-provide-all-residential-schools-documents-1.1345892>.

¹²⁷ Laura Stone, *Extend mandate of aboriginal Truth and Reconciliation Commission: opposition*, GLOBAL NEWS (May 2, 2013), <http://globalnews.ca/news/531112/extend-mandate-of-aboriginal-truth-and-reconciliation-commission-opposition/>.

¹²⁸ *Id.*

¹²⁹ ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, STATEMENT BY THE HONOURABLE BERNARD VALCOURT ON THE MANDATE OF THE TRUTH AND RECONCILIATION COMMISSION (Nov. 14, 2013), available at <http://www.aadnc-aandc.gc.ca/eng/1384445439915/1384445654380>.

¹³⁰ *Id.*

¹³¹ *Ottawa ordered to provide all residential schools documents*, CBC NEWS (Jan. 30, 2013), available at <http://www.cbc.ca/news/politics/ottawa-ordered-to-provide-all-residential-schools-documents-1.1345892>.

¹³² Steve Rennie, *Indian residential schools inquiry about to get reams of documents*, THE CANADIAN PRESS (Apr. 22, 2014), available at <http://globalnews.ca/news/1283817/indian-residential-schools-inquiry-about-to-get-reams-of-documents>.

¹³³ *Id.*

memo from 2012 was leaked, proving that the Harper Government was warned by a private consulting firm that failure to turn over the files could result in the Supreme Court of British Columbia removing the government as administrator of the Commission and stepping in to oversee the process itself.¹³⁴ Speculation about the reason for the government's sluggishness include bureaucratic inefficiency, concern from the Treasury about the cost of the project, lack of political will due to the potentially damaging information that could become public if government officials are found to have been complicit in the residential school system in ways that not yet been disclosed, or that the Harper government is simply continuing the historical practice of deliberately covering up details concerning the schools.¹³⁵

This example illustrates several of the difficulties that can accompany an attempt at reconciliation through restorative justice. First, and most obvious, is that a project such as a Truth and Reconciliation Commission will ideally be the brainchild of both parties, with each side invested in truly resolving the conflict. The fundamental problem facing Canada's Commission is that the perception that the government is stonewalling threatens to undermine the entire process. With each survivor of the residential school system that passes away before being able to give testimony (one of the Commission's biggest concerns), anger at government inaction from survivors and their supporters will grow. Although a major element of the Commission's purpose is to promote dialogue and a national reckoning with the depth of the cultural trauma associated with the residential schools that will continue to affect Canada for years, this goal is being undermined by the government's perceived hostility to the cause.¹³⁶ At the very least, Harper's government has failed to convincingly respond to these criticisms, even if it is honestly and in good faith trying to comply with the terms of

¹³⁴ Mark Kennedy, *Harper Government Was Warned of 'Risks' of Not Finding Residential School Files*, CANADA.COM (Feb. 7, 2014), available at http://www.bishop-accountability.org/news2014/01_02/2014_02_07_Kennedy_HarperGovernment.htm.

¹³⁵ *Id.*; Tim Alamenciak, *Ottawa pushes for St. Anne's documents to stay secret*, THE TORONTO STAR, Jan. 20, 2014, available at http://www.thestar.com/news/gta/2014/01/20/ottawa_pushes_for_st_annes_documents_to_stay_secret.html (reporting that the government has moved to seal documents that were presented in a hearing before the Commission, concerning a notoriously brutal residential school, from being made public).

¹³⁶ See Angela Sterritt, *Residential school survivors face 'adversarial' government*, CBC NEWS (Feb. 6, 2014, 2:53pm), available at <http://www.cbc.ca/news/canada/north/residential-school-survivors-face-adversarial-government-1.2523520> (detailing complaints from several lawyers for those trying to access settlement money through an adjudicatory body set up according to the settlement, that the government's attitude has become hostile and capricious over the past year).

the settlement. Quite possibly this is the result of the Commission being formed not as the result of the two parties—residential school survivors and the federal government—coming together with the goal of honestly resolving the conflict, but as a result of the government’s hand being forced due to the class-action suit. As the Commission’s mandate comes to a close, the perception that the government is merely trying to get through the Commission’s term as cheaply and cleanly as possible makes the Commission’s already complicated task all the more difficult.

These controversies do great damage to the legitimacy of the Commission. As discussed above, it is crucial that a Truth and Reconciliation Commission be seen as a *national* undertaking, not a concession to a special interest group. The government must be seen as a willing participant, because otherwise the difficult truths of historical injustices can be too easily ignored as invalid, “whining” or political opportunism. An opinion piece in the conservative Canadian newspaper *The National Post* entitled, “Could it be that residential schools weren’t so bad?” that includes excerpts from letters the newspaper received in response to recent Commission findings, exemplifies the divide between the way survivors of the schools view their history and legacy, and the way in which non-aboriginal Canadians feel they are being taken advantage of and “guilt-tripped” by ungrateful Natives and their unscrupulous lawyers.¹³⁷ Mitigating the prevalence of, and helping to eventually eliminate, this “us-against-them” racial dynamic is the central motivation behind a Truth and Reconciliation Commission such as this one. The government’s inability, or unwillingness, to fully comply with the terms it agreed to under the settlement allows the general Canadian public to avoid an honest confrontation with the legacy of racism in their country, by casting a shadow of illegitimacy over the entire process.

The Sioux Nation and the federal government would be well advised to heed the Canadian example and work closely to establish a forum in which a national conversation can take place and to which both sides are equally committed. Without the government’s full and sincere participation, the risk that the forum pro-

¹³⁷ See Paul Russell, *Could it be that residential schools weren’t so bad?*, *THE NATIONAL POST* (Jan. 11, 2014), available at <http://fullcomment.nationalpost.com/2014/01/11/paul-russell-could-it-be-that-residential-schools-werent-so-bad/> (“‘[This story] heavily spins out a ‘physical and sexual abuse’ [narrative] as if 150,000 Indian and Inuit children had gained nothing good from taxpayer-provided white education. At least some of them learned English and French to, fluently, play the system and bite the hand that had fed them.’”).

duces more division, anger, and resentment than before becomes a real possibility. Especially in the case envisioned here, where a “mini-Truth and Reconciliation Commission” is only a foundation upon which further negotiations can be built, it is imperative that the forum be seen as legitimate and honest.

V. THE CASE FOR EXPEDIENCY

As President Barack Obama’s final term passes its halfway mark, the path forward for the Sioux Nation becomes more uncertain. Though President Obama has been hailed as a historically sympathetic leader by Native American tribal leadership and his legacy of appointing many more individuals of Indian descent to posts within the Bureau of Indian Affairs and Department of Interior than previous Presidents may survive the end of his tenure, there is no telling how receptive future presidents—Republican or Democrat—will be to the concerns of Native Americans. With that in mind, the Sioux Nation must develop a plan to present to the White House as soon as possible. To do that, the internal divisions that have so often plagued the Sioux’s efforts to recover the Black Hills must be overcome, with the focus being on finding a realistic and innovative method of resolving the conflict. Presenting the White House with a blueprint for a forum in which grievances can be aired and addressed could signal the beginning of a process to truly recompense the Sioux in some way for the taking of the Black Hills over 100 years ago, and the farther along that process is, the harder it will be for subsequent administrations to back away from promises made by President Obama’s administration. Future administrations would hopefully have learned from the unfortunate lesson of Canada’s Truth and Reconciliation Commission—that shirking responsibilities that were willingly acceded to can yield unexpected, and extremely damaging, results—but once President Obama leaves office, even the tentative optimism his administration has fostered within the Sioux Nation would be gone. Tribal leadership will have to forge a collaborative relationship with an entirely new set of actors, and quite possibly the new administration would have a completely different attitude toward addressing the needs of Indian communities.

There is a great deal of promise in a forum imbued with the principles of restorative justice with the goal of repairing the legacy of the government’s bad faith dealing with the Sioux Nation. Such

a forum presents the opportunity for the Sioux to be heard on a national stage, and their grievances legitimized outside the adversarial legal system that is trusted neither by the Sioux (who, like other Indian communities, view it as hostile to their needs) nor by the American public (who often see litigation as *too* receptive to combative special interests). In dealing directly with an issue so fraught with racial, cultural, and religious significance—one that, for better or worse, has captured the imagination of the country for over a century—both the Sioux people and the nation as a whole will make great progress toward repairing the damage done by federal Indian policy, having taken the first step towards moving forward together.

