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NOTE

UNENFORCED PROMISES: TREATY RIGHTS AS A MECHANISM TO ADDRESS THE IMPACT OF ENERGY PROJECTS NEAR TRIBAL LANDS

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Treaties between the United States and Native nations are binding until abrogated by the clear and plain intent of Congress. Many treaties signed in the 18th and 19th centuries remain unabrogated, but are also unenforced by the courts of the United States. The Dewey Burdock Project is a proposed uranium mining operation which would sit adjacent to the Pine Ridge Indian Reservation, where many members of the Oglala Sioux reside. The 1851 and 1868 Fort Laramie Treaties impliedly grant the Sioux access to safe drinking water and explicitly reserve for them off-reservation buffalo hunting rights.

This Note posits that unenforced but unabrogated treaty rights may serve as a mechanism for the Oglala Sioux to assert a greater role in decision-making regarding the Dewey Burdock Project. This Note also discusses the failure of the Nuclear Regulatory Commission to consider the project's effect on protected treaty rights, which may be a basis for injunctive relief. It lastly conceptualizes the project's interference with treaty rights as a property loss deserving of monetary compensation, both in the context of a government taking by the agency and as private interference by the mining company.

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I. INTRODUCTION

We are very connected to the sacred water . . . . It's up to us to defend that water. When you make your decision, feel that heartbeat. Help us. Help us to survive.

—Dennis Yellow Thunder[1]

The Dewey Burdock Project (DBP) is a proposed mining operation under the authority of the Nuclear Regulatory Commission (NRC)[2] which seeks to excavate uranium through groundwater pumps in South Dakota.[3] The proposed project area spans 10,000 acres and is located on land historically promised to the Great Sioux Nation through the 1851 and 1868 Fort Laramie Treaties with the United States federal government.[4] The DBP is both adjacent to the Pine Ridge Indian Reservation and upstream of the Cheyenne River tributaries that run through it.[5] The Oglala Sioux, a band of the Sioux Nation who live on the Pine Ridge Indian Reservation, heavily oppose the project.[6] This Note applies the canons of Indian treaty interpretation to the 1851 and 1868 Fort Laramie Treaties to assess the legal rights of the Sioux and the DBP's potential impact on those rights.

This Note uses the term "Indian" to describe the indigenous peoples from the area which now makes up the United States. This choice was made in consideration of the term

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[1] Dennis Yellow Thunder, a member of the Oglala Sioux, spoke to the Atomic Safety and Licensing Board in August 2014 about the DBP. Talli Nauman, *Native Sun News: Release of Secret Uranium Mining Data Ordered*, INDIANZ (Sept. 1, 2014), https://www.indianz.com/News/2014/014928.asp [https://perma.cc/E5X2-WDSA]. When delivering his speech, he asked them to "place their hands on their hearts to feel them beating" like the "the water coursing under the earth." *Id.*

[2] *See Application Documents for Dewey-Burdock*, U.S. NUCLEAR REGULATORY COMM'N, https://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/dewey-burdock/dewey-burdock-app-docs.html [https://perma.cc/3NT4-HGM9] (Apr. 1, 2016).

[3] *Public Comments Regarding the EPA Region 8 Proposed Dewey-Burdock In-Situ Uranium Recovery Project Permitting Actions*, ENV'T PROT. AGENCY (2017), https://www.epa.gov/sites/production/files/2017-09/documents/epadewey-burdockcommentsreceivedfromnamedentities.pdf [https://perma.cc/9J8Q-RRGJ] [hereinafter *EPA Public Comments*]

[4] Talli Nauman, *Oglala Sioux Tribe Keeps Up Fight Against Uranium Mine*, NATIVE SUN NEWS TODAY (Feb. 8, 2019), https://www.indianz.com/News/2019/02/08/native-sun-news-today-oglala-sioux-tribe-22.asp [https://perma.cc/7BNB-8WKA].

[5] *Id.*

[6] *Id.*

as the technical legal descriptor[7] for the peoples being discussed, as well as in light of critiques of the phrase "Native American." Critics of the phrase have viewed the shift as an attempt by the United States to distance itself from the promises it has made to and the marginalization it has maintained of the Indians.[8] Where possible, tribes are discussed by name instead of by any single overarching term.

Part II of this Note describes the canons of treaty interpretation and details the leading caselaw governing judicial interpretation of off-reservation treaty rights. The canons of treaty interpretation require ambiguities in treaty language to be interpreted to the benefit of the signatory Indians.[9] They also call for defining treaty terms as they would have been understood by tribes at the time of signing.[10] Finally, these canons hold that acts by the United States that do not demonstrate "clear and plain"[11] intent of Congress to abrogate treaties cannot be held to have done so. The United States government has previously violated federal treaty obligations. This leaves the current state of Indian rights and interests unclear, as treaties may be unabrogated, but also unenforced. Modern resource development has led to the increase of energy infrastructure and natural resource mining projects in the western United States near

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[7] *See American Indian Law*, Legal Info. Inst., https://www.law.cornell.edu/wex/american_indian_law [https://perma.cc/FMB6-H46B](describing the legal definition of the term "Indian").

[8] For an extended critique of the term "Native American" as a manner by which to refer to Native peoples, see Michael Yellow Bird, *What We Want to Be Called*, 23 Am. Indian Q. 3 n.2 (1999); *see also* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 335–356 (2nd ed. 2006) ("In conversation, every [N]ative person I have ever met (I think without exception) has used 'Indian' rather than 'Native American' . . . [w]e were enslaved as American Indians, we were colonized as American Indians and we will gain our freedom as American Indians and then we will call ourselves any damn thing we choose.") (quoting Russell Means).

[9] *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973) ("[C]ircumstances such as these which have led this Court in interpreting Indian treaties to adopt the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930))); Winters v. United States, 207 U.S. 564, 576–77 (1908) (describing and applying this canon).

[10] *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them."); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (describing treaty terms with Indian tribes to be construed "in the sense in which naturally the Indians would understand them").

[11] United States v. Dion, 476 U.S. 734, 739–40 (1986).

current and former reservation lands.[12] A clear definition of unabrogated treaty rights is now crucial to assessing Indians' legal ability to protect their interests from projects affecting their lands. These determinations are especially important in the Dakotas, where the United States government has a particularly complex relationship with outstanding treaty obligations and where some of the most controversial Indian rights cases in recent history are currently unfolding.[13]

Part III of this Note describes relevant provisions of the 1851 and 1868 Fort Laramie Treaties which still bind the United States and the Sioux. It also discusses the effect of a prominent Supreme Court case on these treaties. At the end of the 19th century, the United States government violated the 1851 and 1868 Fort Laramie Treaties between the United States and the Great Sioux Nation. [14] Among other territories described in the documents, which span the modern-day Dakotas, the Fort Laramie Treaties protected the Black Hills—a site known to be of sacred religious importance to the Sioux.[15] The United States government withheld food rations from the Sioux until they eventually yielded and surrendered the Black Hills to the United States.[16] These measures have been remembered as especially heinous. As Justice Blackmun recounted in *United States v. Sioux Nation of Indians*, "[a] more ripe and rank case of dishonest dealings may never be found in our history."[17] Despite the severity of these actions, the United States' unilateral taking of the Black Hills did not fully abrogate the Fort Laramie Treaties,

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[12] Clayton Thomas-Muller, *Energy Exploitation on Sacred Native Lands*, RACE, POVERTY & ENV'T (2005), https://reimaginerpe.org/node/307 [https://perma.cc/6289-YEZ8].

[13] Julie Carrie Wong & Sam Levin, *Standing Rock Protesters Hold Out Against Extraordinary Police Violence*, GUARDIAN (Nov. 29, 2016, 3:26 PM), https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation [https://perma.cc/U9G4-6HY8] (describing use of excessive police force on pipeline protestors); Talli Nauman, *Clash Mounts over Proposed Black Hills Uranium Mining*, NATIVE SUN NEWS (Feb. 19, 2013), https://www.indianz.com/News/2013/008582.asp [https://perma.cc/4DSK-P43R].

[14] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 403 (7th ed. 2017) (describing the United States government's interference with the Sioux's treaty-protected rights in the late 1800s).

[15] Timothy Williams, *Sioux Racing to Find Millions to Buy Sacred Land in Black Hills*, N.Y. TIMES (Oct. 3, 2012), https://www.nytimes.com/2012/10/04/us/sioux-race-to-find-millions-to-buy-sacred-land-in-black-hills.html [https://perma.cc/6NP6-4LME].

[16] United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). See *infra* Part III.B for a longer discussion of *Sioux Nation*.

[17] *Sioux Nation*, 448 U.S. at 388 (quoting United States v. Sioux Nation of Indians, 518 F.2d 1298 (Ct. Cl. 1975)).

and the DBP may impact the rights that still exist within these treaties.

Finally, Part IV of this Note discusses the legal obligations owed to the Oglala Sioux in the context of the DBP, as well as the potential remedies available to the tribe should the project proceed. The Oglala Sioux—through the Fort Laramie Treaties, which bind the United States and the entire Great Sioux Nation—have express and implied rights to water, hunting, and land ownership both on- and off-reservation. Therefore, the NRC must give full consideration to the tribe's material interests as environmentally destructive projects like the DBP affect their reservation lands. The *Winters* doctrine guarantees viable water sources to the Oglala Sioux on the Pine Ridge Indian Reservation, and the tribe contends that the DBP jeopardizes that right.[18] Additionally, the National Environmental Policy Act (NEPA)[19] obligates the NRC to fully consider the Sioux's off-reservation hunting rights, which were not mentioned in the DBP permit analysis.[20] For these reasons, the project should not be permitted to proceed in its current form. Should the DBP continue, either the federal government or Azarga Uranium, the full owner of the DBP and its potential uranium harvest,[21] must award monetary compensation to affected Oglala Sioux for the value of their treaty rights—either by conceptualizing their lost land and interests as a taking or as damages caused by the construction and administration of the DBP.

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[18] *EPA Public Comments*, *supra* note 3.

[19] *See National Environmental Policy Act at the NRC*, U.S. NUCLEAR REGULATORY COMM'N, https://www.nrc.gov/about-nrc/regulatory/licensing/nepa.html [https://perma.cc/FMQ8-4LJN] (Dec. 15, 2020) ("The NRC must assess the effects of any proposed action ('undertaking') on historic properties under Section 106 of the National Historic Preservation Act of 1966, as amended. . . . The NRC conducts the Section 106 process as part of its NEPA review.").

[20] *See* U.S. NUCLEAR REGULATORY COMM'N, NUREG-1910, SUPP. 4. VOL. 1, ENVIRONMENTAL IMPACT STATEMENT FOR THE DEWEY-BURDOCK PROJECT IN CUSTER AND FALL RIVER COUNTIES, SOUTH DAKOTA (2014) [hereinafter DEWEY-BURDOCK EIS] (describing the project as not intruding on Sioux hunting but with little mention specifically of treaty-protected hunting rights).

[21] Azarga Uranium, formerly Powertech Uranium Corp., owns 100% of DBP uranium and is the licensee for all DBP permits issued by the NRC. *Dewey Burdock Uranium Project*, AZARGA URANIUM, http://azargauranium.com/projects/usa/dewey-burdock/ [https://perma.cc/C3SY-BGVM] (last visited Feb. 11, 2021).

II. BACKGROUND

A. History of Treaty Interpretation

Longstanding power imbalances between Indian nations and the United States federal government, along with prominent, inadequately-managed language barriers, characterized Indian treaty negotiations and bargaining. These inequities led to present-day doctrine regarding the interpretation of language in treaties between the United States government and Indian tribes. Currently, the Supreme Court employs three main canons of treaty interpretation when determining the rights and privileges that the documents in question vest and confer to tribal signatories. First, all treaties must be understood in light of how the Indians who signed them would have understood their terms.[22] Next, ambiguities in the treaties' terms must be resolved in favor of Indians.[23] Finally, Congress will not be seen as abrogating treaties and the rights therein where such abrogation is ambiguous, and abrogation will not be read into general statutes.[24]

As far back as 1832,[25] the Supreme Court has actively recognized (at least in part) the bargaining imbalances that existed between the federal government and tribal negotiators during treatymaking. Justice Gray discussed this inequity and how the interpretation of Indian treaties must be framed when writing for the court in *Jones v. Meehan*:

> [it must] be borne in mined [*sic*] that the negotiations for the treaty are conducted, on the part of the United States, . . . by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language.[26]

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[22] Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

[23] McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973).

[24] U.S. v. Dion, 476 U.S. 734, 739–40 (1986).

[25] *See* Worcester v. Georgia, 31 U.S. 515 (1832) (implementing the canons of treaty interpretation for the first time).

[26] Jones v. Meehan, 175 U.S. 1, 11 (1899). *Meehan* refers to the United States as "enlightened" and also to the Indians as a "weak and dependent" people. This was common in Supreme Court decisions of the era, and the racism entrenched in these opinions taints all of modern federal Indian law. *Id.*

Justice Gray accurately described the unfairness of the bargaining situation at the time, which was exacerbated by the rampant racial and cultural biases of courts. Tribes were expected to conform to a new set of unfamiliar laws that used unshared Western concepts of property ownership. Tribes were also expected to understand technical legal jargon that United States government officials drafted in order to advance the interests of the new nation at the Indians' expense. Further, government-funded interpreters' translations of these treaties were often inaccurate, skewing negotiated terms in favor of the United States.

Examples of treaty negotiations without proper translation, and therefore without meaningful consent of Indian tribes, abound. For example, in *United States v. State of Washington*,[27] Judge Boldt was tasked with interpreting the various treaties (the Stevens Treaties) that Isaac Stevens, governor of the state in the mid-1850s, had negotiated in the Washington territory. Boldt was tasked with defining the extent of existing off-reservation fishing rights held by several Western Washington tribes.[28] In discussing one of the tribes in question, Judge Boldt began the analysis by recalling that "[t]he Makah could neither read, write nor speak English."[29] In Judge Boldt's retelling, Governor Stevens attempted to combat these linguistic barriers by using interpreters from entirely different tribes. Specifically, Stevens hired a member of one of the Clallam tribes who was said to partially speak the Makah language, despite the stark differences between the two tribes' languages and cultures.[30] In another documented instance, Stevens negotiated with the Makah by speaking in English and having treaty terms translated into the entirely distinct language of Chinook.[31] Chinook Jargon is a trade language borne out of the combination of several Indian languages, English, and French.[32] Not only was Chinook Jargon not universally known among the negotiating parties, the language also consists of fewer than 500 words in total, with vocabulary tailored to the purposes of trade and

[27] United States. v. State of Wash., 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

[28] *Id.*

[29] *Id.* at 364.

[30] *Id.*

[31] *Id.* at 330.

[32] GEORGE GIBBS, DICTIONARY OF THE CHINOOK JARGON, OR, TRADE LANGUAGE OF OREGON [ABRIDGED] (1863), https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Treaties%20&%20Reservations/Documents/Chinook_Dictionary_Abridged.pdf [https://perma.cc/SVN9-76F9].

conveying practical and concrete concepts.[33] Boldt's opinion underscored the fact that the United States did not take care to ensure that treaty negotiations were fair, or even comprehensible, to the tribes involved. Modern doctrine works to at least partially mitigate the impact of these linguistic and cultural barriers.[34]

The final canon of interpretation protects the strength and longevity of binding treaties by requiring that Congress's intent to abrogate treaty documents be "clear and plain" in order for the Court to find abrogation.[35] The seminal case illustrating this canon is *United States v. Dion*, a 1986 Supreme Court decision that explored how the Endangered Species Act (ESA) interacts with existing treaty hunting rights. Dwight Dion, a member of the Yankton Sioux, was prosecuted under the ESA for shooting four bald eagles.[36] In his defense, he pointed to the hunting rights preserved in the Yankton Sioux's 1858 treaty with the United States.[37] When the Yankton Sioux ceded all but 400,000 acres of tribal land to the United States, that remaining land became an official reservation on which the Yankton Sioux were entitled to "quiet and undisturbed possession of their reserved land."[38] The fact that the Indians were to have exclusive

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[33] *Id.*

[34] United States v. Dion, 476 U.S. 734, 739–40 (1986).

[35] Thomas-Muller, *supra* note 12. The use of inference based on legislative history in *Dion* as a means to satisfy the "clear and plain" intent requirement is a departure from, and loosening of, the demonstration of Congressional intent to abrogate described in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). There, the Court heavily preferences explicit statutory language regarding abrogation. *Id.* at 690 ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."). The *Dion* Court denied that its actions constituted a departure, stating that the court has not strictly "interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.'" *Dion*, 476 U.S. at 739 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 223 (1982)).

[36] *Dion*, 476 U.S. at 734.

[37] *Id.*

[38] *Id.* at 737. The Supreme Court held in *United States v. Winans* that state licenses preferencing non-Indian fishing techniques could not be used as a vehicle to exclude Yakima fishermen from fishing in off-reservation waters on which the Yakima retained treaty fishing rights. 198 U.S. 371 (1905). In 1942, the Court further clarified the interaction between off-reservation fishing rights and license restrictions, stating that the states have the power to regulate fishing generally but do not have authority to impose license fees on tribal fisherman exercising reserved treaty rights. Tulee v. Washington, 315 U.S. 681 (1942). More modern analysis has held that this general right of states to

hunting and fishing rights on that reserved land was not disputed in *Dion*; instead, the parties disagreed as to whether those rights superseded the species-specific hunting restrictions in the ESA.[39]

In considering whether the Yankton Sioux's right to hunt bald eagles remained intact for purposes of ESA analysis, the Court first examined the intersection between the tribe's hunting rights and the Bald Eagle Protection Act (BEPA).[40] Although the original BEPA made no reference to Indian hunting, a 1962 amendment, which added protection for a new species of eagle, carved out an explicit exception for certain Indian religious ceremonies.[41] The Court took this as an implication that silent provisions of the BEPA did not afford the same exception; the Court also gave great weight to House reports that cited "demand for eagle feathers for Indian religious ceremonies" as one of the threats that motivated BEPA's passage.[42] Though not explicit in the language of BEPA, the Court held that the weight of the evidence justified an inference that the statute was intended to abrogate the Yankton Sioux's treaty hunting rights as applied to golden and bald eagles.[43] To satisfy the "clear and plain"[44] intent requirement, the Court only required "clear evidence that Congress *actually considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[45] The Court then found Dion liable under the ESA because, although the ESA did not have legislative history supporting an intention to abrogate the Yankton Sioux's treaty, Dion could not be protected by rights which the BEPA had already nullified.[46]

Even with the *Dion* Court's liberal interpretation of the BEPA to locate congressional intent to abrogate, the presumption still stands in favor of upholding existing treaties. As Justice

regulate off-reservation fishing can, in some cases, regulate the manner in which fish are caught so long as fishing generally is permitted to continue. Puyallup Tribe v. Wash. Dep't of Game, 391 U.S. 392 (1968). *See infra* Part III for a deeper analysis of off-reservation fishing and hunting rights.

[39] *Dion*, 476 U.S. at 734.

[40] *Id.* at 736.

[41] *Id.*; 16 U.S.C. §§ 668–668d.

[42] *Dion*, 476 U.S. at 743.

[43] *Id.* at 745.

[44] *Id.* at 738.

[45] *Id.* at 740 (emphasis added).

[46] *Id.* at 740, 745.

Marshall put it in *Dion*, "Indian treaty rights are too fundamental to be easily cast aside."[47]

In addition to the three main canons of interpretation, courts also view treaties in light of Chief Justice Marshall's majority opinion in *Worcester v. Georgia*. In *Worcester*, Marshall describes tribal sovereignty and tribal rights as predating the United States and the former colonies, and therefore, as retaining all rights and privileges not directly forfeited by treaty provisions.[48] To Chief Justice Marshall, treaties represent a series of negotiations which sought to exchange existing Indian rights with the United States for certain provisions or to avoid violence.[49] At their core, such treaties are "not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."[50] Treaties should thus be construed broadly in favor of the Indians that signed them, both through the canons of interpretation and also when viewed as limited agreements representing a narrow forfeiture of existing Indian rights.

B. Historical Implicit and Express Off-Reservation Indian Rights

Among the clearest examples of Indian retention of rights in treaty negotiation are the reserved tribal rights that persist on former Native lands now ceded to the United States government. In addition to fishing and hunting rights, often explicitly enumerated in these reserved off-reservation rights, some treaty language has also been interpreted to impose obligations, owed to Indians, onto the non-Indians occupying that land.

1. Fishing Servitudes

As fishing was a crucial source of food for many tribes, especially those in the modern Pacific Northwest, many treaties explicitly protected the fishing rights of tribes, even in lands that were vested to the United States. The Court has held that these provisions confer upon Indians a right to fish outside of the waters within their territory, even where state law contradicts

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[47] *Id.* at 739.

[48] *See* Worcester v. Georgia, 31 U.S. 515, 542–45 (1832) ("It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.").

[49] *Id.* at 551.

[50] United States v. Winans, 198 U.S. 371, 381 (1905).

these terms.[51] Some treaty provisions even impliedly grant upstream protection of fish to ensure eventual entrance into tribal waters.[52] Off-reservation fishing rights are among the most heavily-litigated treaty benefits tribes maintain on ceded lands and are important in defining the potential scope of off-reservation rights more generally.

In 1905, the Supreme Court decided *United States. v. Winans*, a seminal case on the breadth of off-reservation fishing rights. The case interpreted provisions of one of the Stevens Treaties, the 1859 treaty between the Yakima and the United States that promised the Yakima people the "exclusive right of taking fish" on their reservation as well as a right to fish "at all usual and accustomed places, in common with citizens of the Territory"[53] on lands ceded to the United States.[54] The Yakima contended that the state of Washington inhibited their ability to exercise their fishing rights and the United States brought suit against the state on the Yakima's behalf.[55] In the years leading up to this litigation, the state of Washington issued fishing licenses to non-Indian fishers outside of the Yakima reservation, allowing the use of fishing wheels[56] that caught the vast majority of harvestable fish and deprived the Yakima of meaningful fishing access to those bodies of water.[57] Interpreting the 1859 treaty as the Yakima would have understood it, the Court reasoned that the Yakima would never have agreed to cede lands to the United States if that would have resulted in a loss of fishing ability.[58] The Court emphatically underscored that the "right to resort to the fishing places in controversy was a part of

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[51] *Id.*

[52] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[53] Treaty with the Yakima art. 3, Mar. 8, 1859, 12 Stat. 951.

[54] *Winans*, 198 U.S. at 380.

[55] *Id.* at 379. The United States sued on behalf of the Yakima in its role as trustee for the tribe. The federal government maintains a trust relationship over all federally recognized tribes, and under certain circumstances has a duty to act in the tribe's benefit. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). As such, the United States had an obligation to initiate this suit against the State of Washington to protect the Yakima's protected treaty rights to fish in the specified locations.

[56] A fishing wheel, also known as a salmon wheel, is "a trap for catching salmon, consisting of a revolving wheel with attached nets set in a river so that it is turned by the current to capture the passing fish." *Fishing Wheel*, DICTIONARY.COM, https://www.dictionary.com/browse/salmon-wheel [https://perma.cc/32WX-3Z8G] (last visited Oct. 29, 2020).

[57] *Winans*, 198 U.S. at 380.

[58] *Id.* at 381.

larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[59] The Court found that the state of Washington's authority to issue or revoke fishing licenses as the governing authority in the location where those waters ran was limited by the Yakima's treaty fishing rights.[60]

Further, the Court noted that since the Yakima were owners of the historical right to fish, the treaty represented a limited grant of fishing rights from the Yakima to the United States for new settlers to share.[61] The Yakima had always maintained the right to fish on the rivers in question, and this right persisted despite the tribe ceding physical possession of the land and notwithstanding its grant of shared access to the fish to the general population.[62]

Many treaty rights endure in this same way across the United States, preserving tribal access to fishing and hunting despite the United States' physical ownership of formerly Indian lands. *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (the Boldt Decision) was a consolidated opinion interpreting the Stevens Treaties between the United States and Indian nations. The United States brought the suit on behalf[63] of seven tribes located in the Northwest, asking the Court to clarify how to interpret the rights preserved in a series of treaties using common phrases.[64] The Boldt Decision interpreted language almost identical to the language discussed above in *Winans*, granting the United States certain ceded lands but retaining Indians' right to fish in rivers that the tribes had historically used.[65] The Court held that the retained fishing rights not only permitted Indian fishing on off-reservation lands, but also that treaty-bound Indians were "entitled to a 45% to 50% share of the harvestable fish passing through their recognized tribal fishing grounds in the case area, to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments."[66] This decision bound both the state of

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[59] *Id.*

[60] *Id.* at 381–84.

[61] *Id.* at 381.

[62] *Id.*

[63] *See* Newton *supra*, note 55 (explaining general federal trust obligations).

[64] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 658, 665–67 (1979).

[65] *Id.* at 674.

[66] *Id.* at 658.

Washington and its non-Indian citizens to limit their fish harvest off-reservation in order to afford an equitable percentage of catch to tribal fishers.[67]

Decades later, the state of Washington attempted to circumvent the Boldt Decision in *United States v. Washington*, better known as "the Culverts Case."[68] On appeal, the state sought to escape an injunction imposed by the lower courts, which found that the state violated protected treaty rights by building and sustaining culverts.[69] These culverts prevented salmon from travelling for food and to spawn, reducing the salmon population entering Indian reservations.[70] According to the state, though the tribes were entitled to 50% of the actual catch, the treaties did not guarantee a minimum harvestable fish population.[71]

The Ninth Circuit flatly rejected the state's reading of the Stevens Treaties, concluding that "in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties."[72] Although the treaties outright promised[73] a quantity of fish to the tribes, the court reiterated that such a promise would have been inferred regardless, as treaties afford an implied promise to the number of fish "sufficient to provide a 'moderate living'[74] to the Tribes."[75] The Boldt Decision and the Culverts Case demonstrate the scope of the judiciary's existing

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[67] *Id.*

[68] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court* Washington v. United States, 138 S.Ct. 1832 (2018) (mem.).

[69] A culvert is a "a drain or channel crossing under a road," which in this case posed a physical barrier for underground water channels to regenerate nearby streams. *Culvert*, DICTIONARY.COM, https://www.dictionary.com/browse/culvert [https://perma.cc/KD2N-KWCV] (last visited Jan. 7, 2021).

[70] *United States v. Washington*, 853 F.3d at 954.

[71] The State of Washington asserted at oral arguments that the Stevens treaties would not prohibit the state from blocking every single salmon from entering tribal waters. *Id.* at 962.

[72] *Id.* at 966.

[73] Governor Stevens said, "'I want that you shall not have simply food and drink now but that you may have them forever.' During negotiations for the Point-No-Point Treaty, Stevens said, 'This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?'" United States v. Washington, 853 F.3d at 964 (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (ellipsis in original)).

[74] *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 686.

[75] *United States v. Washington*, 853 F.3d at 965.

treatment of off-reservation rights and the far-reaching breadth of legal protection potentially available to tribes with unextinguished treaty rights.

2. Implied Water Rights

In addition to granting Indians broad latitude in asserting that fishing rights and a quantity of fish are reserved, courts have interpreted treaties to confer the much more intangible right to water to Indians. This right has been read into treaties in a variety of contexts, including for the continuation of fishing and hunting rights on reservations[76] and for the sustenance of life on the reservation in general.[77]

The reserved and implied water rights doctrine originates in the 1908 Supreme Court case *Winters v. United States*. In *Winters*, the Court adjudicated a dispute between residents of the Fort Belknap Indian Reservation[78] and Winters, a non-Indian defendant who settled near the reservation.[79] Non-Indian use of the river outside of the reservation—through dams, reservoirs, and canals—had re-routed the water in a manner that precluded any meaningful Indian use of water on the reservation.[80] No specific treaty language guaranteed the Indians continued flow of the rivers and streams that had always run through the territory in question. Nevertheless, the Court still found this to be an implicit and inseverable part of the 1888 treaty establishing the Fort Belknap Reservation.[81] The Court reasoned that the Indians—whose dry and arid reservation would have made agriculture impossible without the ability to divert water from the river in question—would not have agreed to a treaty that would render its purpose of increasing agricultural capacity for the Indians impossible to achieve.[82] In resolving the ambiguities of the treaty in favor of the Indians, the Court held that a right to water must be implied where the right is necessary

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[76] *See* United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (recognizing a "continued water right to support [the Tribe's] hunting and fishing lifestyle").

[77] *See* Winters v. United States, 207 U.S. 564, 576 (1908) (recognizing the Tribe's right to irrigated water since the lands "without irrigation, were practically valueless").

[78] The United States acting in its tribal trust obligation represented the residents of the Fort Belknap Indian Reservation in the dispute. *See* United States v. Winans, 198 U.S. 371, 380 (1905) (explaining "trust relationship").

[79] Winters v. United States, 207 U.S. 564 (1908).

[80] *Id.* at 567.

[81] *Id.* at 577.

[82] *Id.* at 576.

to afford the full use of reservation lands.[83] The Court did not find it material that Winters and other landowners would have frustrated purpose and meaningless property without the same rights to divert the river.[84]

The implied right to water also applies in the context of protecting reserved fishing and hunting rights. In *United States v. Adair*, the United States brought suit asking the Oregon courts to clarify the extent of existing water rights between the Klamath and Oregonian private landowners.[85] Though the Klamath had "hunted, fished, and foraged in the area . . . for over a thousand years,"[86] they ceded much of their land to the United States in 1864, reserving for themselves the land that eventually became the Klamath Reservation. They retained the exclusive right to hunt and fish on the reservation under the treaty.[87] At issue in the case was whether deprivation of water to the reservation through consumptive, non-Indian upstream use violated the Klamath's treaty right to hunt and fish on reservation marshlands, which could not sustain meaningful fish and game populations without adequate water flow.[88] The right to water itself was not explicit in the treaty; however, the Ninth Circuit held that the tribe was entitled to the amount of water necessary to maintain fish and wildlife populations and the continuation of Indian hunting and fishing.[89] The consumptive, non-Indian water use that was depriving the marshland of necessary moisture had to be enjoined to a level that allowed the Indians to continue to use their land in the manner they negotiated in their treaty with the United States.[90] The court held that the Indians were entitled to sufficient water so as not to frustrate the original purpose of the reservation lands.[91] As the right to hunt and fish was one of the primary purposes for establishing the Klamath Reservation, the water needed to exercise those rights was also guaranteed under the treaty.[92] In describing the right of the Klamath to indirectly impose restrictions on the water use of government and individual non-Indians off-reservation, the court defined the Indian entitlement as "the right to prevent other

[83] *Id.*
[84] *Id.* at 574.
[85] United States v. Adair, 723 F.2d 1394, 1397 (9th Cir. 1983).
[86] *Id.*
[87] *Id.* at 1398–99.
[88] *Id.* at 1399–1400.
[89] *Id.* at 1410.
[90] *Id.* at 1411.
[91] *Id.* at 1410.
[92] *Id.*

appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies."[93] The Klamath's treaty with the United States afforded them the distinct off-reservation privilege to enjoin certain non-Indian activities.

The *Winters* doctrine of reserved water rights affords the Indians vital protections of a resource necessary for all facets of everyday life. As demonstrated by the *Adair* case, courts are willing to enforce this right, even at the expense of non-Indian water appropriators.

3. Off-Reservation Hunting Rights

Many treaties between the United States government and Indian tribes also included provisions which guaranteed Indians the right to hunt outside of the borders of their reservations. As with fishing servitudes, these provisions are often read broadly in favor of continuing tribal use. Treaty provisions to hunt outside of reservation lands have been interpreted to withstand political reorganization, such as the incorporation of statehood,[94] and to apply in National Forests.[95] The treaty right to hunt outside of reservation lands has even been applied to Indian tribes who were not signatories to any treaty document.[96]

As recently as 2019, the Supreme Court reaffirmed that off-reservation hunting rights survive the United States government's structural reorganization of tribal lands and interests, including after the establishment of statehood, absent a clear congressional intent to abrogate those interests. In *Herrera v. Wyoming*,[97] the Court interpreted treaty language stating that the Crow Indians would "have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts."[98] At issue in the case was Clayvin Herrera's elk hunt, which took place within Bighorn National Forest. Herrera did not have a state hunting license at the time; however, he was a member of the Crow tribe and argued that the Crow's off-reservation right to hunt afforded him the ability to

[93] *Id.* at 1411.

[94] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999).

[95] Herrera v. Wyoming, 139 S.Ct. 1686, 1691 (2019).

[96] State v. Coffee, 556 P.2d 1185, 1193 (Idaho 1976).

[97] *Herrera*, 139 S.Ct. at 1691.

[98] *Id.* at 1691 (citations omitted) (quotations omitted).

hunt irrespective of state licenses and prescribed hunting seasons.[99] The state court had prevented him from asserting a treaty defense, holding that Wyoming's 1890 entrance into the union abrogated the Crow's treaty.[100] In *Herrera*, the Court reaffirmed its precedent in *Minnesota v. Mille Lacs Band of Chippewa Indians* that the establishment of statehood alone does not abrogate Indian treaty rights to hunt and fish, and held that Herrera should have been permitted to put forth his treaty-based defense.[101]

The Court went even further to protect off-reservation hunting rights by establishing a broad interpretation of the Crow treaty's use of the phrase "unoccupied lands of the United States."[102] Although Bighorn National Forest is a federally protected forest subject to United States Forest Service management, government maintenance of the forest does not meet the definition of occupation as the signatory Crow would have understood it. Applying a canon of interpretation to read treaty terms as the Indians would have understood them, the Court determined that the Crow would have conflated the ideas of occupation and settlement, and would have seen Bighorn National Forest as "unoccupied."[103]

Protected treaty rights to hunt outside of reservation boundaries have even been applied to Indians who do not have treaties with the United States. In *State v. Coffee*,[104] the Supreme Court of Idaho considered Dianne Coffee's criminal convictions for hunting deer off-season and using certain technologies prohibited by state statute.[105] Coffee's defense was her membership in the Idaho Kootenai Indian Tribe—one of the five tribes that makes up the greater Kootenai Tribe, and one that is federally recognized, but also has neither a treaty with the United States nor an established reservation.[106] The Court held that because the 1855 Hellgate Treaty ceded Kootenai land to the United States, along with other Indian lands negotiated by other

[99] *Id.* at 1693.

[100] *Id.*

[101] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999); *Herrera*, 139 S.Ct. at 1694.

[102] *Herrera*, 139 S.Ct. at 1691.

[103] *Id.* at 1702.

[104] State v. Coffee, 556 P.2d 1185, 1185 (Idaho 1976).

[105] *Id.* at 1186.

[106] *Id.*

tribes, the treaty applied to the Kootenai.[107] After this treaty, the United States subsequently treated those lands as ceded to American control and monetarily compensated the Idaho Kootenai accordingly; therefore, the rights exchanged ought to be applied to the Idaho Kootenai.[108] Since the Hellgate Treaty did not surrender hunting rights on the ceded lands, neither had the Kootenai.[109] The cession of hunting rights would not be implied either: "where established by historical use, aboriginal title includes the right to hunt and fish and where those rights have not been passed to the United States, by treaty or otherwise, the rights continue to adhere to the current members of the tribe which held them aboriginally."[110]

III. TREATIES AT ISSUE: FORT LARAMIE

The Dewey Burdock Project seeks to mine uranium from aquifers in South Dakota on lands that the Sioux retained as part of the 1851 and 1868 Fort Laramie Treaties. As these treaties were originally negotiated between the United States and the Great Sioux Nation, the word "Sioux" in this context also applies to each of the seven bands of the Great Sioux Nation that the original treaty binds, including the Oglala Sioux.[111]

A. The 1851 and 1868 Fort Laramie Treaties

The 1851 Fort Laramie Treaty defined the geographic boundaries of the Great Sioux Nation to allow for non-Indian settlement of areas not under Sioux control. However, the treaty did not establish an official reservation for the Sioux. Article V of the treaty clarifies that the Sioux—by recognizing the existing boundaries outlined in the 1851 document—"do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."[112] However, the United States soon violated the terms of the 1851 treaty. Post-Civil War settlement of white people within Great Sioux Nation's defined territory, as

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[107] *Id.* at 1187. The Court also discussed the "Kootenay" signatories to the Hellgate Treaty as a potential transcription error and as further evidence that the Kootenai were contemplated at signing. *Id.*

[108] *Id.* at 1188.

[109] *Id.* at 1193.

[110] *Id.* at 1189.

[111] D.L. Birchfield, *Sioux*, COUNTRIES & THEIR CULTURES, https://www.everyculture.com/multi/Pa-Sp/Sioux.html [https://perma.cc/M8QJ-MML6] (last visited Jan. 7, 2021).

[112] CHARLES J. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 1066 (1927).

well as establishment of United States military posts on Sioux land, caused conflict between the United States and the Sioux.[113] Largely in order to avoid violence, and without a real choice in the matter, the Sioux agreed to renegotiate their treaty to form the Fort Laramie Treaty of 1868.[114]

In the 1868 treaty, the Sioux ceded large swaths of land in return for the Great Sioux Reservation, which contained the Black Hills, a site extremely sacred to the Sioux, as well as the promise of food and clothing provisions.[115] The Great Sioux Reservation encompassed the lands now subject to discussions of development of the DBP. In addition to delineating the new boundaries of the Sioux territory, the treaty promised the Indians the right to exclude most unwanted visitors and settlers from their land:

> The United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized[,] . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.[116]

The treaty also preserved the Sioux's right to hunt on both reservation and certain described off-reservation lands "so long as the buffalo may range thereon in such numbers as to justify the chase."[117]

Other aspects of the 1868 Fort Laramie Treaty were specifically focused on the tensions that arose between the settlers and the Sioux after the signing of the 1851 treaty. For

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[113] *The Treaties of Fort Laramie, 1851 & 1868*, N.D. STUD., https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868 [https://perma.cc/FLR7-SLWR] (last visited Jan. 7, 2021).

[114] *Id.*

[115] *Id.*

[116] Treaty of Fort Laramie art. II, Apr. 29–Nov. 6, 1868, 15 Stat. 635.

[117] The reserved hunting right applied to lands "north of North Platte[] and on the Republican Fork of the Smoky Hill river." *Id.* art. XI.

example, the second provision of Article XI of the 1868 treaty describes a promise by the Indians that "they will permit the peaceful construction of any railroad not passing over their reservation as herein defined."[118]

Finally, the treaty described the conditions under which the terms of the document could be renegotiated or altered, stating in plain language that no further land cession "shall be of any validity or force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same."[119]

B. Effect of *Sioux Nation* and Subsequent Land Confiscation on Fort Laramie Treaty Rights

Although the DBP is technically on lands protected by the 1868 treaty, determining ownership of the area is not so simple. Almost immediately after the United States signed the treaty, white settlers found gold in the Black Hills and began to force the Sioux out of their sacred site.[120] In June of 1876, tensions eventually erupted into the now-infamous battle of Little Bighorn, where the Sioux defeated the American forces led by General Custer.[121] Although the Sioux won the battle, the United States won the war. The Americans took all of the Sioux's weapons and horses, leaving them unable to hunt and entirely dependent on rations of food and clothing that the United States government provided.[122] In August of 1876, Congress enacted an appropriations bill that halted the annual provision of annuities to the Sioux unless they ceded the Black Hills and gave up their right to hunt on the unceded territory north of the reservation.[123] The United States then sent a presidentially-appointed commission to negotiate the annexation of the Black Hills.[124]

Out of food and out of options, a few Sioux leaders eventually conceded to the terms: the Sioux would allow the United States to take legal and physical control of the sacred Black Hills in exchange for subsistence rations.[125] Although Article XII of the 1868 Fort Laramie Treaty requires at least three-fourths of adult Sioux males to assent to treaty

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[118] *Id.*

[119] *Id.* art. XII.

[120] *Id.*

[121] GETCHES ET AL., *supra* note 14, at 403.

[122] *Id.*

[123] *Id.* at 404. These lands north of the Great Sioux Reservation do not intersect with the project area of the DBP.

[124] *Id.*

[125] *Id.*

negotiations, less than ten percent of adult male Sioux agreed to the terms.[126] The United States government ignored this crucial provision of the 1868 Fort Laramie Treaty and codified the forced agreement into a formal document in 1877 (the 1877 Act).

The Sioux attempted to regain their sacred site through the courts, a journey which began as a claim for land title in claims court in 1923 and eventually rose to the Supreme Court, under the theory that the Sioux were owed just compensation in response to the government's unlawful Fifth Amendment taking of the Black Hills.[127] In 1980, Justice Blackmun acknowledged the unjust and illegal taking of the Black Hills in his strongly-worded opinion in *United States. v. Sioux Nation of Indians*,[128] reiterating that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."[129] Writing for the majority, Justice Blackmun determined that the government's unilateral annexation of the Black Hills clearly violated the 1868 treaty and was a taking within the definition of the Fifth Amendment, and affirmed the lower court's grant of a substantial financial award to the Sioux.[130]

Although valid critiques of the *Sioux Nation* decision persist, including by the Sioux,[131] applying the case as written

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[126] *Id.* at 403.

[127] United States v. Sioux Nation of Indians, 448 U.S. 371, 384 (1980).

[128] *Id.*

[129] *Id.* at 371.

[130] *Id.* at 424.

[131] Although *Sioux Nation* was formally decided in 1980, many tribal members and advocates consider the issue to be ongoing. At the time the Sioux Nation's claims were in their final stages, "attorney contracts with tribes representing a majority of the Sioux had expired and the attorneys and the court were aware that many Sioux opposed the settlement." GETCHES ET AL., *supra* note 14, at 311. Despite this, the settlement was signed on behalf of all of the tribes, and the Court of Claims submitted judgement. *Id.* Some bands of the Sioux, including the Oglala Sioux, refused to re-sign attorney contracts because the lawyers were only advocating for monetary compensation, not for restitution of the Black Hills land title. Linda Greenhouse, *Sioux Lose Fight for Land in Dakota*, N.Y. TIMES (Jan. 19, 1982), https://www.nytimes.com/1982/01/19/us/sioux-lose-fight-for-land-in-dakota.html [https://perma.cc/JY7A-HH9K]. Overall, the Great Sioux Nation has been vocal in demanding the return of the physical land title to the Black Hills; the seven bands of the tribe refused the settlement money awarded in *Sioux Nation*, which sits in a federal bank account accumulating interest and is now valued at $1.3 billion. *Why the Sioux Are Refusing $1.3 Billion*, PBS NEWS HOUR (Aug. 24, 2011, 3:57 PM), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23#:~:text=The%20refusal%20of%20the%20money,region%20of%20western%20South%20Dakota [https://perma.cc/27YK-Q5C7].

does not inhibit the Oglala Sioux's ability to pursue judicial recognition of their treaty rights. Based on *Sioux Nation*, title to the lands outside the Pine Ridge Indian Reservation and below the DBP remain under the legal ownership of the United States government, private individuals, and corporations who have purchased them. However, the forced exchange of Sioux lands through the Fifth Amendment Takings Clause does not abrogate the entire 1868 Fort Laramie Treaty—specifically, those provisions that do not depend on physical ownership of the land.

Nor would the land confiscation which took place after the 1877 Act serve to abrogate the Fort Laramie Treaties. Although the United States continued to take land from the Great Sioux Nation without adhering to the 1868 Fort Laramie Treaty's Article XII ratification procedures, the federal government never explicitly adopted an intention to abrogate the treaty's usufructuary rights.

In 1889, the United States vastly reduced the total size of the Great Sioux Reservation and divided it into six smaller reservations, including the modern-day Pine Ridge Indian Reservation.[132] The so-called negotiations behind the 1889 Act took place during a time of armed conflict between the Sioux and the white settlers. The events of 1889 are described similarly to the loss of the Black Hills in 1877: "[g]iven this situation, tribal representatives acceded to demands for land cession under some duress if not a threat of attack during intermittent war."[133] Sioux displeasure about the 1889 Act is not just implied by the historical context of the dealings. A delegation of Sioux leaders travelled to Washington, D.C. the year before the 1889 document took effect to discuss their desire to keep the Great Sioux Reservation intact. Leader John Grass, a member of the Blackfoot Sioux, protested so publicly that his complaints were documented in the October 11, 1888 edition of the *New York Times*.[134]

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[132] HERBERT T. HOOVER, S.D. STATE HIST. SOC'Y, THE SIOUX AGREEMENT OF 1889 AND ITS AFTERMATH (1989), https://www.sdhspress.com/journal/south-dakota-history-19-1/the-sioux-agreement-of-1889-and-its-aftermath/vol-19-no-1-the-sioux-agreement-of-1889-and-its-aftermath.pdf [https://perma.cc/7PS2-S4PH] at 68.

[133] *Id.* at 59.

[134] *Indian Chief John Grass; The Sioux Treaty from His Standpoint. Sixty-Four Chiefs on Their Way to Visit the Great Father—Sitting Bull Among Them*, N.Y. TIMES, Oct. 1, 1888, at 3, https://www.nytimes.com/1888/10/11/archives/indian-chief-john-grass-the-sioux-treaty-from-his-standpoint.html [https://perma.cc/92M4-2CX2].

Despite the federal government's clear disregard for the preferences of the Great Sioux Nation, none of these acts articulated clear and plain congressional intent to abrogate the outstanding rights promised to the Great Sioux Nation in the Fort Laramie Treaties.

The canons of treaty interpretation hold that a statute or act cannot abrogate a treaty without clear and plain congressional intent.[135] The rights and privileges of the Indians cannot be abolished by implication, especially with regards to uses such as hunting, fishing, and other activities "established by historical use."[136] Therefore, the 1868 Fort Laramie Treaty between the United States and the Sioux remains intact, absent the provisions the 1877 and 1889 Acts specifically abrogated. Neither the plain language of the acts nor the legislative history surrounding the documents support a reading that abolishes the totality of the 1868 treaty.

The terms of the 1877 Act are precise. The act identifies the exact swath of land the Sioux agreed to cede to the United States and outlines the geographic area where the Sioux were to forfeit their hunting rights.[137] These lands and interests relate to the annexation of the Black Hills and other lands adjacent to the Great Sioux Reservation, and do not intersect with the rights and interests the Oglala Sioux may have in relation to the DBP.[138] Importantly, despite the attention to detail in the 1877 Act, the document made no mention of the potential abrogation of any other rights and privileges not expressly stated.[139] Courts have historically declined to find abrogation of treaty rights by implication, even with regards to treaties whose language more heavily implies the forfeiture of privileges and interests than does the 1877 Act. For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[140] the Supreme Court interpreted treaty language outlining broad renunciation of rights as insufficient to abrogate Chippewa usufructuary rights guaranteed in earlier negotiations. Although the terms of the treaty explicitly stated that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest,

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[135] United States v. Dion, 476 U.S. 734 (1986).

[136] State v. Coffee, 556 P.2d 1185, 1189 (Idaho 1976).

[137] Act of 1877, Ch. 69, 72, 44th Cong. (1877), https://www.loc.gov/law/help/statutes-at-large/44th-congress/session-2/c44s2ch72.pdf [https://perma.cc/NP3R-B67A].

[138] *Id.*

[139] *Id.*

[140] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

of whatsoever nature . . . to any other lands,"[141] the Court found that the Chippewa's rights to hunt, fish, and gather remained intact. The treaty language, although broad enough to cover such usufructuary rights, "does not mention hunting, fishing, and gathering rights."[142] And in fact, the treaty as a whole "is devoid of any language expressly mentioning—much less abrogating—usufructuary rights . . . [or] providing money for the abrogation of previously held rights."[143] The 1877 Act is similarly devoid of express mention of the lands and interests relevant to the modern Oglala Sioux's objection to the DBP, nor does it contain broad provisions relinquishing unspecified rights.[144] Instead, the 1877 Act is a detailed document that leaves out the majority of usufructuary rights promised to the Great Sioux Nation in 1851 and 1868.[145]

Absent clear language in the statute or act directing abolishment of treaty provisions, courts can still find that Congress abrogated a treaty document if it is clear that the legislators contemplated such abrogation and decided to draft accordingly.[146] However, the legislative history surrounding the 1877 Act provides no rationale for abrogation of the 1868 Fort Laramie Treaty. The explicit purpose of the 1877 Act was to "secure to the citizens of the United States the right to mine the Black Hills for gold."[147] This purpose was underscored by the previous settlement patterns of miners who flooded the area despite the 1868 treaty protections, and the United States military shared this goal.[148] In a letter dated November 9, 1875, General Sheridan describes meeting with President Grant and other cabinet personnel and deciding to officially withdraw military forces and allow miners to flood the Black Hills.[149] The President then authorized a commission to draft the 1877 Act with specific instructions to annex the Black Hills.[150] Nowhere in the history of the 1877 Act is there explicit legislative intent to fully abrogate the 1868 Fort Laramie Treaty nor the treaty rights to hunt outside of the Black Hills.

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[141] *Id.* at 195.
[142] *Id.*
[143] *Id.*
[144] Act of 1877, *supra* note 137.
[145] *Id.*
[146] United States v. Dion, 476 U.S. 734 (1986).
[147] United States v. Sioux Nation of Indians, 448 U.S. 371, 378 (1980).
[148] *Id.*
[149] *Id.*
[150] GETCHES ET AL., *supra* note , at 404.

The terms of the 1889 Act are even more narrow. The document only addresses the restructuring of the Great Sioux Reservation and is entitled "[a]n act to divide a portion of the reservation of the Sioux Nation of Indians . . . ."[151] There is sparse legislative history surrounding the document, but from its plain text it is clear that, as was true for the 1877 Act, there was not clear and plain congressional intent to abrogate any Fort Laramie treaty provisions other than those directly relating to the formation of the Great Sioux Reservation. Therefore, despite the historical and practical significance of the 1877 and 1889 documents, they do not affect the off-reservation hunting rights of the Oglala Sioux in the context of the DBP.

IV. APPLICATIONS OF TREATY RIGHTS PRINCIPLES TO THE DEWEY BURDOCK PROJECT

The Dewey Burdock Project is a proposed mining operation that would use in-situ leach mining[152] for uranium removal.[153] The DBP site will cover 10,000 acres and is located on "1868 Fort Laramie Treaty land in Custer and Fall River counties adjacent to the Pine Ridge Indian Reservation and upstream on Cheyenne River tributaries."[154] The Oglala Sioux—the band of the Sioux that lives on the Pine Ridge Indian Reservation—oppose the project.[155] The Environmental Protection Agency (EPA), at the time of this writing, is considering renewal of DBP mining licenses.[156] The Oglala Sioux

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[151] Act of 1889, Ch. 405, 406, 50th Cong. (1889), https://www.loc.gov/law/help/statutes-at-large/50th-congress/session-2/c50s2ch405.pdf [https://perma.cc/FZV9-UE72].

[152] In-situ leach mining is a method of uranium extraction wherein a chemical solution is pumped into the uranium ore, and the metal is extracted through the groundwater to avoid surface-level land disturbance. *In Situ Leach Mining of Uranium*, WORLD NUCLEAR ASS'N, https://www.world-nuclear.org/information-library/nuclear-fuel-cycle/mining-of-uranium/in-situ-leach-mining-of-uranium.aspx [https://perma.cc/9CFB-KNEK] (Sept. 2020).

[153] *EPA Public Comments*, *supra* note 3.

[154] Nauman, *supra* note 4. *See infra* Figure 1 (providing a visual representation of the DBP project area).

[155] *Id.*

[156] The public comment period on EPA renewal of two permits associated with the DBP closed on December 11, 2019. The EPA is now considering those comments, as well as others from 2017, to make a decision about the project's status. *Public Notice: EPA Dewey-Burdock Class III and Class V Injection Well Draft Area Permits, 2019*, ENV'T PROT. AGENCY (Aug 26, 2019), https://www.epa.gov/uic/epa-dewey-burdock-class-iii-and-class-v-injection-well-draft-area-permits-2019 [https://perma.cc/UV3C-RXF4].

have an opportunity to contest the DBP as a violation of their protected treaty rights under the 1868 Fort Laramie Treaty because it potentially defies the implied reservation of water rights, found in *Winters*, by jeopardizing the water supply of the reservation. It may also disrupt treaty protected Oglala Sioux hunting rights not considered in the NRC's permit analysis.

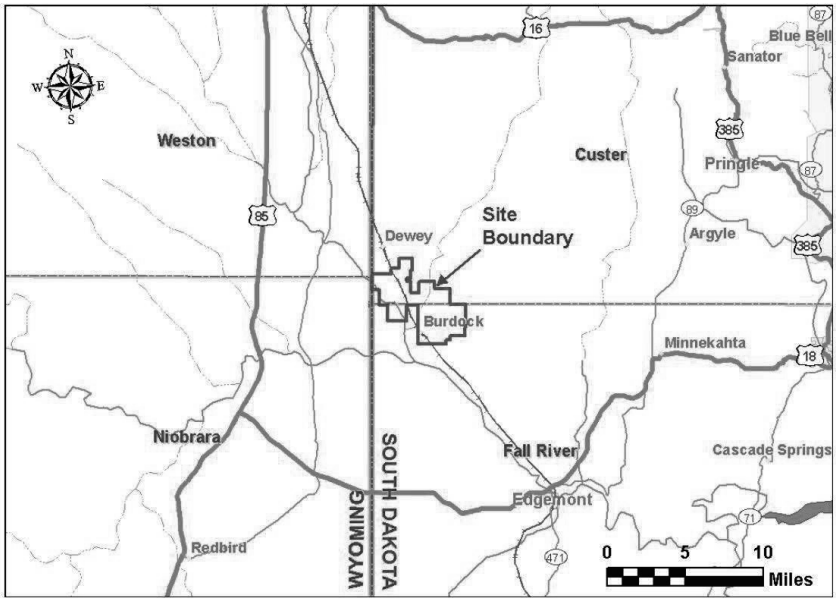

Figure 1: Map of the Dewey Burdock Project and Surrounding Area[157]

A. Judicial Review and Procedural Posture of the DBP

The NRC's mission is to "license[] and regulate[] the Nation's civilian use of radioactive materials to provide reasonable assurance of adequate protection of public health and safety, and to promote the common defense and security, and to protect the environment."[158] Certain privately-owned and operated projects that relate to nuclear materials, such as the

[157] Map of the Dewey Burdock Project Area (illustration), *in* Seth Tupper, *Oglala Sioux Tribe Appeal Seeks Survey of Uranium Mine Site*, S.D. PUB. BROADCASTING RADIO (Jan. 23, 2020), https://listen.sdpb.org/post/oglala-sioux-tribe-appeal-seeks-survey-uranium-mine-site [https://perma.cc/7R8N-F45W] (crediting the Nuclear Regulatory Commission for the map).

[158] U.S. NUCLEAR REGULATORY COMM'N, 2018–2019 INFORMATION DIGEST, NRC AT A GLANCE, https://www.nrc.gov/docs/ML1822/ML18226A117.pdf [https://perma.cc/NK25-GS36] (last visited Jan. 7, 2021).

DBP, are approved and overseen by the NRC.[159] Like other agencies which oversee public and private developments, the NRC is bound to consider certain federal statutes when reviewing project proposals, such as NEPA and the National Historic Preservation Act (NHPA).[160]

In accordance with the Administrative Procedure Act (APA), federal agencies must open certain decisions, such as the approval of certain licenses or the promulgation of rules, for public comment.[161] The Oglala Sioux were among the many parties that submitted comments during the public comment period of the DBP's license approval process.[162] The tribe eventually challenged the license in court, contending that the NRC had not adequately addressed the DBP's impact on the 1868 Fort Laramie treaty protections.[163] In their public comment, the Oglala Sioux challenged the scientific analysis of the NRC regarding the DBP and raised concerns about the cumulative effects of uranium from the DBP in the watershed encompassing the reservation.[164] However, federal courts only have jurisdiction to review final agency actions.[165] Therefore, the ongoing issue of the potential water quality impacts of the DBP was not ripe for review when the Oglala Sioux brought suit in D.C. Circuit Court in 2018. Instead, the tribe challenged whether the NRC's decision to keep the project license for the DBP active while the NRC investigated water quality, and other potential project impacts on tribal welfare, violated NEPA's requirement that agencies take a "hard look"[166] at the environmental and cultural impacts

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[159] *Id.*

[160] Section 102 of the National Environmental Policy Act directs federal agencies to prepare detailed statement on environmental impacts of projects, including the consideration of alternatives to project construction. 42 U.S.C. § 4332(2)(C). Similarly, Section 106 of the National Historic Preservation Act mandates that federal agencies to "take into account" the effects of projects on historic, including Native, property prior to expending federal funds or issuing license approvals. 54 U.S.C. § 306108.

[161] 5 U.S.C. §§ 551–559 (2011).

[162] *EPA Public Comments*, *supra* note 3.

[163] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520 (D.C. Cir. 2018).

[164] *EPA Public Comments*, *supra* note 3, at 164.

[165] *See* 28 U.S.C. § 2342(4) ("[A]ll final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.").

[166] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." (internal citations omitted)).

of agency actions.[167] In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*,[168] Judge Garland found that these actions violated NEPA and remanded the decision to keep the license active back to the NRC.[169] Judge Garland noted that the court did "not have jurisdiction over the bulk of the rulings challenged by the Oglala Sioux Tribe" due to the lack of finality in the NRC's 2016 determinations on the DBP.[170] The Oglala Sioux petition challenging both the accuracy and the depth[171] of the NRC's review of groundwater impacts was still in internal NRC review and thus was procedurally barred from consideration by the D.C. Court of Appeals. Only the NRC and the Atomic Safety and Licensing Board have deemed the agency's groundwater impacts analysis of the DBP sufficient. No federal court has reviewed this decision.[172] Now that the NRC's rulings on the DBP are final, the Oglala Sioux are procedurally situated to challenge the NRC's decision based on the *Winters* implied water protections.

B. Implied Water Rights

The *Winters* doctrine of reserved water rights holds that tribes are entitled to sufficient water to support the original purpose for creating their federal reservations.[173] Under the 1868 Treaty of Fort Laramie, the Oglala Sioux have a right to sufficient water to support the Great Sioux Reservation, and thus, to support the present-day Pine Ridge Indian Reservation. The Oglala Sioux claim that the DBP will directly affect the Cheyenne River—which is interconnected with the Madison and Minnelusa aquifers—the groundwater, and Cheyenne headwaters.[174] The Oglala Sioux contend that these bodies of water have the potential to impact baseline tribal water

[167] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520, 530–31 (D.C. Cir. 2018).

[168] *Id.*

[169] *Id.* at 539.

[170] *Id.* at 538.

[171] Public comments on the proposed project focused not only on the perceived strength of the groundwater analysis, but also on the NRC's failure to consider the existing threats to the Cheyenne River when predicting the effects of DBP. The Oglala Sioux assert a risk of cumulative impacts to the Cheyenne watershed, both upstream of and adjacent to the Pine Ridge Indian Reservation, due to a history of agricultural pollution and existing upstream uranium mining waste. *EPA Public Comments*, *supra* note 3.

[172] Powertech (USA), Inc.; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 13141 (Mar. 18, 2010) (notice).

[173] Winters v. United States, 207 U.S. 564 (1908).

[174] *EPA Public Comments*, *supra* note 3, at 283.

quality.[175] As explained above, *Winters* prohibits deprivation of water on tribal land if doing so is contrary to the purpose of the treaty which established the reservation in question.[176] Now that the Oglala Sioux are procedurally situated to bring a case about the DBP and other uranium mining projects' potential impacts on their reservation waters, they are entitled to relief, so long as their experts can prove this harm.

Polluting the ground and surface water that residents of the Pine Ridge Indian Reservation use for drinking, agriculture, and bathing contravenes the purpose of the reservation, which was created with the intent to provide a home for members of the Great Sioux Nation. Article XV of the 1868 Fort Laramie Treaty acknowledges the intended longevity of that goal, saying that the Sioux "will regard said reservation their permanent home."[177] The purpose of providing a permanent residence for the Oglala Sioux is fundamentally at odds with the virtual elimination of clean and safe water sources on the reservation. The *Winters* right to water, as later courts have held, includes the right to water free from contamination or degradation, not just the right to have water itself flow through the land.[178] The DBP cannot be permitted to infringe upon these *Winters* rights by polluting reservation waters with uranium.

Although the court in *Oglala Sioux* did not yet have the jurisdiction to review the Oglala Sioux's claims regarding the NRC's inadequate consideration of baseline water quality impacts, the tribe put forth the testimony of hydrologist Dr. Robert E. Moran[179] in their briefing. Dr. Moran had over forty years of professional experience related to water quality, hydrogeology, and geochemical work at the time of filing.[180] He earned his Ph.D. from the University of Texas at Austin in Geological Sciences, and his thesis work explored trace contamination of metals in Colorado streams.[181] In his capacity

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[175] *Id.*

[176] *Winters*, 207 U.S. at 577.

[177] Treaty of Fort Laramie, *supra* note 116, art. XV.

[178] United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1454–55 (D. Ariz. 1996) (issuing an injunction to prevent upstream activities which harm water quality in an effort to "restore to the Apache Tribe water of sufficient quality to sustain commercial production" of crops).

[179] Final Opening Brief of Petitioner Oglala Sioux Tribe at 31, Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520 (D.C. Cir. July 20, 2018) (No. 17-1059).

[180] *Dr. Robert Moran*, MICHAEL-MORAN ASSOCS., LLC, https://remwater.org/#experience [https://perma.cc/JZ24-ZABS] (last visited Jan. 7, 2021).

[181] *Id.*

as a consultant, he has worked with public and private organizations, citizens, tribes, and government agencies.[182] In his original report to the NRC, Dr. Moran asserted that the DBP's Environmental Impact Statement (EIS)[183] did not sufficiently consider the effects of past mining operations and other contamination to the watershed; therefore, it could not have accurately analyzed the baseline groundwater quality of the aquifers which the DBP could affect.[184] The *Winters* doctrine compels the enjoining of the project if such impacts are proven, even if they do not rise to the level of danger which might implicate other common law rights.

Indians, like most other classes of plaintiffs, can pursue legal relief for groundwater contamination without pre-existing treaty rights. For example, plaintiffs can bring tort claims such as negligence and nuisance[185] against parties responsible for groundwater contamination.[186] However, these common law claims must meet sometimes stringent standards of harm for injured parties to find relief. In South Dakota, an injured party bringing a nuisance claim must show that the defendant's alleged groundwater pollution is pervasive enough to *substantially and unreasonably* interfere with the use of their land.[187] Further, the Supreme Court of South Dakota has been clear that the defendant's pollution discharge must be both intentional and unreasonable, or they must be both unintentional and negligent in order to be held liable.[188] In South Dakota, to bring a claim for nuisance based on an unintentional action, or to bring a standalone claim for negligence, a plaintiff must prove not only

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[182] *Id.*

[183] An Environmental Impact Statement is a document prepared as part of an application for an NRC license, detailing all expected impacts of the project on the "human environment." *National Environmental Policy Act at the NRC*, *supra* note 19. It is required by NEPA for any "major federal action," including in this case a uranium mining project. *Id.*

[184] Opening Written Testimony of Dr. Robert E. Moran, In the Matter of Powertech (USA), Inc. (June, 20, 2014) (No. 40-975-MLA, ASLBP No. 10-898-02-MLA-BD01), https://www.nrc.gov/docs/ML1417/ML14171A785.pdf [https://perma.cc/UUH9-3RN6].

[185] Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 107 (1972) ("[F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.").

[186] *See* Allan Kanner et al., *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155 (2003) (discussing Indian tort claims in the context of environmental degradation).

[187] Greer v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961).

[188] Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748, 761 (S.D. 1996) (quoting RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979)).

the injury suffered, but also that such an injury was a foreseeable result of the original action.[189]

These common law claims require a higher standard for assigning liability than the guaranteed right to water protected in *Winters*. Under *Winters*, courts need not determine whether an action is unreasonable, nor whether the harm at issue was foreseeable by the actors being accused. Instead, courts look at whether the deprivation[190] or contamination[191] of water frustrates the original purpose of the Indian reservation. Therefore, the implied treaty protection to water under *Winters* entitles the Oglala Sioux to a more favorable, consequence-based standard than does tort law. It is not uncommon for tribal rights and interests to be treated differently than those of the average American citizen under the law. For example, although project applicants seeking approval under NEPA can meet federal standards through mitigation—or by generating environmental benefits outside of a project area to offset harms—impacts to tribal fishing rights cannot be mitigated, and instead must be avoided.[192] Here, if the DBP impacts nearby water quality, courts need not determine whether the project actions were reasonable, nor whether the harms were foreseeable. If the Oglala Sioux were to raise their claim about the potential adverse impacts of the DBP on water quality, the D.C. Circuit must only decide whether those impacts frustrate the original purpose of the Pine Ridge Indian Reservation.

C. Off-Reservation Hunting Rights

The Oglala Sioux may also have a simpler remedy to address the DBP by focusing on off-reservation hunting rights rather than water rights. The Oglala Sioux have argued that the NRC did not adequately consider their implied water rights, but a court determining whether that is true would have to rely on scientific and expert analysis on the DBP's water quality impacts. In contrast, the Oglala Sioux can simply point out that the hunting rights preserved in the 1868 Fort Laramie treaty have been outright ignored. The Oglala Sioux's treaty-protected

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[189] Rikansrud v. City of Canton, 116 N.W.2d 234, 239 (S.D. 1962).

[190] *Winters*, 207 U.S. at 577.

[191] United States v. Gila Valley Irrigation Dist., 920 F.Supp. 1444, 1454-55 (D. Ariz. 1996).

[192] Bart J. Freedman & Benjamin A. Mayer, *Considering the Difference: Treaty Rights and NEPA Review*, LAW360 (Aug. 29, 2016), https://www.law360.com/articles/833840/considering-the-difference-treaty-rights-and-nepa-review [https://perma.cc/7PXD-54MQ].

hunting rights are not mentioned a single time in the 614-page EIS discussing the human and ecological impacts of the DBP.[193]

In addition to the DBP's obligation to consider the Oglala Sioux's hunting rights, the DBP is required to consider all project impacts relating to Indian treaty rights, culture, and religion. NEPA calls for assessment of risks to interests which are "aesthetic, historic, cultural, economic, [or] social . . . whether direct, indirect, or cumulative,"[194] including historic treaty rights.[195] Further, the NRC's own provisions require "an analysis of significant problems and objections raised by . . . any affected Indian Tribes."[196] Although the court in *Oglala Sioux* did not reach the issue of hunting rights because it was absent from both the EIS and the complaint, it did consider the DBP's obligation to assess the religious and historic value of the Black Hills under this provision of NEPA.[197] The court found that both NEPA and the NHPA obliged the NRC to withhold project approval since the DBP had not completed cultural and religious interest surveys about the sacred site.[198] Further, the court held that the NRC acted in a manner that was "arbitrary and capricious" when it permitted the DBP license to remain active despite failing to meet NEPA standards. As a result, it remanded the DBP's license to the NRC for reconsideration of the status of the license while the DBP worked to cure the NEPA deficiency.[199]

The arbitrary and capricious standard is the bar at which an agency action can be overturned by the courts; when an action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[200] courts have the authority to set aside or outlaw the agency decision. An agency acts in an arbitrary and capricious manner when it inadequately considers federal requirements, as the NRC did with the NEPA requirements to assess the religious and cultural impacts of the DBP. However, an agency action can also be considered arbitrary and capricious where it "entirely failed to consider an important aspect of the

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[193] DEWEY-BURDOCK EIS, *supra* note 20.

[194] 40 C.F.R. § 1508.8 (2019).

[195] *Tribal Treaty Rights in the Section 106 Process*, ADVISORY COUNCIL ON HISTORIC PRES. (Feb. 2020), https://www.achp.gov/native-american/information-papers/tribal-treaty-rights [https://perma.cc/BGS4-ZREF].

[196] 10 C.F.R. § 51.71(b) (2020).

[197] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520, 530–31 (D.C. Cir. 2018).

[198] *Id.*

[199] *Id.*

[200] 5 U.S.C. § 706(2)(A).

problem."[201] Here, the NRC has entirely failed to consider the hunting rights of the Oglala Sioux, which may be cause for a reconsideration of the DBP license.

1. "In Such Numbers as to Justify the Chase"

Article XI of the 1868 Fort Laramie Treaty lays out for the Sioux terms which "reserve the right to hunt . . . so long as the buffalo may range thereon in such numbers as to justify the chase."[202] In applying the canons of treaty interpretation, these terms must be read in the manner that the Sioux signing the treaty would have understood them,[203] and ambiguities in the treaty language must be understood broadly and favorably to the Sioux.[204]

Interpreting these treaty terms in the manner in which the Sioux would have understood them, the treaty allows buffalo hunting on the specified off-reservation lands, so long as the Sioux can justify the effort to chase the herd. Courts have consistently interpreted off-reservation hunting and fishing servitudes to guarantee Indian use of resources, despite local government[205] and settler[206] inconvenience. For example, the Court in *United States v. Winans* interpreted treaty language protecting Yakima fishing rights as impliedly prohibiting the state of Washington from regulating fisheries in a way that impinged upon Indian use.[207] The Court, using the canons of interpretations, found that the tribe never would have agreed to a document that gave the United States control over the Indians' main food source.[208] A similar logic applies to the Oglala Sioux because the 1868 Treaty of Fort Laramie discussed retained

[201] Motor Vehicle Mfrs. Ass'n U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[202] Treaty of Fort Laramie, *supra* note 116, art. XI.

[203] *See*, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622–23 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (cases applying this canon of interpretation to find that terms should be read as the Indians would have understood them).

[204] *See*, *e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576–77 (1908) (cases applying this canon and reading ambiguities generally in favor of the Sioux).

[205] *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905).

[206] *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[207] *Winans*, 198 U.S. at 381–82.

[208] *Id.*

hunting rights to buffalo, which was the main source of Sioux food at the time of signing.[209]

Even if the hunting rights provision of the 1868 Fort Laramie treaty is seen as ambiguous, that ambiguity must be resolved in favor of the Sioux signatories.[210] If the plain language of a treaty document allows two potential inferences about treaty language—one "which would support the purpose of the agreement and the other impair or defeat it"[211]—courts must favor the first interpretation.[212] One potential ambiguity may exist in interpreting which party, the Indians or the United States, is empowered to decide the size of a buffalo herd which can "justify"[213] chase. One of the purposes of the 1868 Fort Laramie Treaty was to bring peace between the Indians and the white settlers who were encroaching on Sioux land and inhibiting their traditional way of life.[214] Treaty language granting the United States the authority to terminate hunting rights crucial to the cultural heritage and subsistence[215] of the Sioux people likely would not promote peace. Further, resolving this ambiguity in the 1868 treaty in favor of the Indians supports a reading that grants autonomy to the Sioux to decide whether a buffalo hunt is worthwhile.

A Seventh Circuit case applies similar logic. At issue in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* was the meaning of an ambiguous phrase.[216] A treaty between the Chippewa and the United States provided that the treaty would remain in effect "during the pleasure of the President of the United States."[217] One way to construe this language is to allow the treaty to be terminated at the will of the

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[209] *See generally* Richard B. Williams, *History of the Relationship of the Buffalo and the Indian*, TANKA, http://www.tankabar.com/cgi-bin/nanf/public/viewStory.cvw?sessionid=<<sessionid>>&sectionname=Buffalo Nation&storyid=61954&commentbox= [https://perma.cc/7SZJ-JDU7] (arguing that the survival of tribal societies is dependent on buffalo).

[210] *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576–77 (1908).

[211] *Winters*, 207 U.S. at 577.

[212] *Id.*

[213] Treaty of Fort Laramie, *supra* note 116, art. XI.

[214] Linda Darus Clark, *Sioux Treaty of 1868*, NAT'L ARCHIVES (Sept. 23, 2016), https://www.archives.gov/education/lessons/sioux-treaty [https://perma.cc/4QQX-Q4R6].

[215] *See generally* Williams, *supra* note 209 (discussing the relationship between the Sioux and wild buffalo).

[216] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983).

[217] *Id.* at 356.

president. The other interpretation is that the treaty remains active so long as the tribes do not disobey a treaty provision, which would cause the president displeasure. The court took the latter interpretation to resolve this ambiguity in favor of the Chippewa and to apply the treaty terms as the Indians would have understood them.[218]

The potential ambiguity in the 1868 Fort Laramie Treaty—in the phrase "reserve the right to hunt . . . so long as the buffalo may range thereon in such numbers as to justify the chase"[219]—can more easily be resolved than the "pleasure of the President."[220] It is plausible both that a nation would enter into a treaty defined in length by the whims of its leader, and also that it would expire upon the disobedience of one of the signatories. It is less plausible that the federal government would make rights contingent on their ability to judge which hunts are justified without experience in nomadic buffalo hunting. It is even less plausible that, taking the terms of the treaty as the Indians would have understood them, the Sioux would have signed a treaty which makes the right to hunt their primary food source contingent on the caprices of an American definition of what would "justify the hunt."[221] Moreover, the other canon, which resolves ambiguities broadly in favor of tribal signatories, supports a definition of "justify"[222] that gives the Oglala Sioux the authority to determine what number of buffalo justifies their own hunt.

Only once has a court suggested that an executive of the United States federal government had the authority to define for the Oglala Sioux what "justifies"[223] a hunt. A 1942 Court of Claims case, *Sioux Tribe of Indians v. U.S.*, incidentally addressed the issue in response to a claim by several bands of the Sioux against the United States for compensation for wrongfully seized territory.[224] The court quoted the then-Secretary of the Interior, who had convinced representatives of the Sioux to sign away the tribe's off-reservation hunting rights in Nebraska by stating that by the time of their conversation in 1875, "buffalo [wa]s not found on the Smoky Hill Fork of the Republican, so as

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[218] *Id.*

[219] Treaty of Fort Laramie, *supra* note 116, art. XI.

[220] *Lac Courte Oreilles Band*, 700 F.2d at 356.

[221] Treaty of Fort Laramie, *supra* note 116, art. XI.

[222] *Id.*

[223] *Id.*

[224] Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 629–30 (1942).

to make it worth while [sic] to hunt them."[225] More importantly, the Secretary of the Interior admitted that with regards to these Nebraska lands, the federal government "cannot stop the white people from going out there" and seizing the land from the Indians.[226] Without an agreement binding the Sioux to cede their hunting rights in Nebraska, the court would not have been able to accept the Secretary of the Interior's opinion without violating the canons of treaty interpretation. No other court has attempted to do so, nor has any case spoken directly to the off-reservation hunting rights that the Sioux maintain in South Dakota.

2. The Term "Buffalo"

Although the NRC acknowledged the presence of big game hunting of elk and deer on DBP lands in the project's EIS,[227] this acknowledgement is unlikely to implicate the Oglala Sioux's treaty rights to off-reservation hunting. Though ambiguities are resolved in favor of the Indians, this canon does not permit "reliance on ambiguities that do not exist."[228] The treaty specifies that the Sioux who signed it are permitted to hunt "buffalo" on the original boundaries of their land as defined in 1868. As described above,[229] the Sioux retained off-reservation hunting rights, despite ceding physical occupation of the land. Taking terms as the Sioux would have understood them, it is unlikely that "the buffalo" would have stood as a placeholder for all wild game because the animal holds a distinct importance in Sioux culture.[230]

Full understanding of historical context of treaty terms may at times require exploration of the "cultural context"[231] of the signatory Indians. The Lakota are one of three subgroups of regionally and linguistically distinct tribal communities which make up the seven bands of the Great Sioux Nation.[232] The Oglala Sioux are one of the bands of the Sioux within the Lakota

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[225] *Id.* at 629.

[226] *Id.* at 630.

[227] DEWEY-BURDOCK EIS, *supra* note 20.

[228] South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986).

[229] *See supra* Part II.B (explaining that the rights and privileges of Indians will respect to hunting are not abolished by implication and that the 1868 Fort Laramie treaty between the United States and the Sioux remains intact, absent the provisions the 1877 Act specifically abrogated).

[230] Williams, *supra* note 209.

[231] Menominee Indian Tribe of Wis. v. Thompson, 922 F.Supp. 184, 199 (W.D. Wis. 1996).

[232] Birchfield, *supra* note 111.

subgroup.[233] Buffalo have always occupied a special place in Lakota culture: buffalo heads feature prominently in many religious Lakota ceremonies, including the Sun Dance, and buffalo symbolism is consistent across Lakota culture.[234] Buffalo meat has historically been the predominant food source of the Lakota, and the relationship between the two populations is beyond the Western conceptualization of predator and prey.[235] Oglala writer Richard Williams wrote of this connection: "[t]he adage 'You are what you eat' was never more applicable than in the symbiotic relationship between the buffalo and the Plains Indian. The Plains Indian culture was intrinsic with the buffalo culture. The two cultures could not be separated without mutual devastation."[236] Moreover, the Lakota word for buffalo, tȟatȟáŋka (or its English transliteration tatanka), is distinct from the Lakota words for other game such as elk (heȟáka or hexaka) and deer (tȟáȟča or tahca).[237] The deep cultural ties and linguistic distinctions between the Lakota Sioux and the buffalo make it unlikely that the Sioux signing the 1868 Fort Laramie Treaty would have understood buffalo to be synonymous with any other presence of wild game.

However, even if other game is not protected by treaty terms preserving the Oglala Sioux's buffalo hunting rights, the NRC's failure to consider this treaty right in the context of the DBP remains unjustified. Although many refer to wild buffalo as part of the distant history of the plains, there are still herds of buffalo in and around the Pine Ridge Indian Reservation.[238] These herds graze on the Pine Ridge Indian Reservation as well as in Badlands National Park,[239] and the approval process for the

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[233] *Oglala Sioux Tribe*, TRAVEL S.D., https://www.travelsouthdakota.com/trip-ideas/article/oglala-sioux-tribe [https://perma.cc/76J2-S5FP] (last visited Jan. 7, 2021).

[234] Oglala Sioux Tribe, *Oglala Sioux Tribe*, https://www.lakotamall.com/importance-of-buffalo [https://perma.cc/4BEA-9A9Z] (last visited Nov. 22, 2020).

[235] Williams, *supra* note 209.

[236] *Id.*

[237] Sunshine Carlow & Nacole Walker, *Intensive L/Dakota for Beginners*, STANDING ROCK SIOUX TRIBAL DEP'T EDUC., http://wotakuye.weebly.com/uploads/2/3/7/4/23749479/ldl121_packet.pdf [https://perma.cc/2RA6-CDKL] (last visited Nov. 22, 2020).

[238] Sharon Pieczenik, *Bison Hunting on the Pine Ridge Indian Reservation*, NAT'L GEOGRAPHIC (Aug. 11, 2016), https://blog.nationalgeographic.org/2016/08/11/bison-hunting-on-the-pine-ridge-indian-reservation/ [https://perma.cc/6ED6-YJND].

[239] Katherine Rivard, *Conservation of the Badlands Bison*, NAT'L PARK FOUND. BLOG, https://www.nationalparks.org/connect/blog/conservation-badlands-bison [https://perma.cc/MZU4-TMAG] (last visited Nov. 22, 2020).

DBP did not address the potential impact of the project on these animals.

Though bison numbers have dwindled, tribal and environmental support of remaining herds has been consistent, and buffalo hunting by the Oglala Sioux still continues.[240] At one point in 2013, the buffalo population on the Pine Ridge Indian Reservation was estimated to be as low as 900.[241] Even at 2013 levels, the Oglala Sioux deemed this number satisfactory to justify a hunt.[242] Since 2013, conservation efforts by tribal and environmental organizations have focused on increasing herd size and expanding herd range,[243] which would also increase the potential for buffalo hunting. The Oglala Sioux have continuously exercised their treaty right to hunt buffalo on and off of the Pine Ridge Indian Reservation. In recent years, public interest in the Oglala Sioux's buffalo hunt has permeated mainstream American media.[244] With that trend has come substantial documentation of the Oglala Sioux exercising their treaty right to hunt buffalo.[245] In 2016, a *National Geographic* employee documented his experience hunting buffalo with the Oglala Sioux,[246] and a separate video documentary detailing a hunt with members of the tribe was released on Amazon Video in June 2019.[247] Moreover, buffalo are still part of the economic livelihood of some Oglala Sioux. Tanka is a food company run by "Oglala Lakotas on the Pine Ridge Reservation, SD, with a deep commitment to helping the People, the Buffalo and Mother Earth."[248] The site features nutritional bars based on traditional recipes and made from "high-protein, prairie-fed buffalo and tart-sweet cranberries."[249] These bars, which exploded into success in 2018, were featured in grocery stores like Whole Foods

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[240] Russell Contreras, *'The Buffalo Hunt' Seeks to Show Tribe in a New Light*, ASSOC. PRESS (June 7, 2019), https://apnews.com/24e9dea429774b75bd1804b89ee2ad25 [https://perma.cc/Z67R-HZLH].

[241] Katie Gustafson, *Bringing the Bison Home*, WORLD WILDLIFE FUND (June 13, 2013), https://www.worldwildlife.org/stories/bringing-the-bison-home [https://perma.cc/GP6F-CYKR].

[242] *Id.*

[243] *Id.*

[244] *See, e.g.*, Pieczenik, *supra* note 238; Contreras, *supra* note 240 (focusing on, and romanticizing, the Oglala Sioux's buffalo hunting technique).

[245] Pieczenik, *supra* note 238.

[246] *Id.*

[247] Contreras, *supra* note 240.

[248] *Ancient Nutrition for Today's Healthy Lifestyle*, TANKA, http://www.tankabar.com/cgi-bin/nanf/public/main.cvw [https://perma.cc/LQP4-FZMY] (last visited Nov. 22, 2020).

[249] *Id.*

for a brief period, and are now predominantly available online.[250] Although the brand has scaled back, it represents a well-known business that generates revenue for members of the Oglala Sioux tribe based around buffalo products.[251]

The full range of the buffalo herd or herds on and near the Pine Ridge Indian Reservation is unclear, as is whether the lands beneath the DBP overlap with their grazing areas. It is also unknown whether, or to what extent, changes in water composition and construction noise associated with the project might impact the well-being of the animals or the Oglala Sioux buffalo hunt. This information is unknown because the NRC did not conduct any studies nor issue any analyses on the impact of the project on the Oglala Sioux's treaty right to hunt buffalo on the land covered in the 1868 Fort Laramie Treaty.

To produce a comprehensive EIS, as NEPA requires, an analysis of the project's impact on treaty-protected hunting rights was necessary because the DBP will be built on land over which the Oglala Sioux have retained hunting rights and as well as on land adjacent to the Pine Ridge Indian Reservation. The failure of the NRC's permitting analysis regarding DBP to address the Sioux's hunting rights is arbitrary and capricious within the meaning of the APA, and the project should not proceed without this crucial evaluation.

D. DBP as a Property Loss Deserving of Monetary Compensation

Although ensuring continued fulfillment of Oglala Sioux treaty rights by analyzing and limiting the impacts of the DBP is most appropriate here, at minimum, the Oglala Sioux are entitled to monetary compensation for the value of their lost treaty rights, should the project continue. This is because the DBP, if constructed, would constitute a loss of Oglala Sioux treaty interests conceivable as either a Fifth Amendment taking by the United States, or as property damage resulting from the actions of Agarza Uranium.

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[250] Marilyn Noble, *One Year After Native-Owned Tanka Bar Had Lost Nearly Everything, the Buffalo Are on Their Way Back*, COUNTER (Jan. 24, 2020), https://thecounter.org/tanka-bar-niman-ranch-bison-grassfed/ [https://perma.cc/EGS4-YAKX].

[251] *Id.*

1. DBP as a Fifth Amendment Taking

As the Supreme Court found in *Sioux Nation*,[252] it is possible to acknowledge and resolve a breach of treaty terms by awarding the harmed tribe financial compensation for their lost resources or land. There is no dispute that the United States government has the ability to breach or abrogate treaty terms to which it once agreed.[253] However, it is also well-established that the government has a duty to act within the bounds of its trustee obligation in caring for the needs of the tribes.[254] There is an inherent conflict of interest when the United States acts both as trustee of Indian assets and as a governing body exercising its eminent domain power in acquiring land. This conflict is discussed in *Shoshone Tribe v. United States*[255] and relied upon in the *Sioux Nation* decision. When the United States government acquires land from a tribe, the exchange is a taking unless Congress makes a "good faith effort to give the Indians the full value of the land."[256] The United States is not permitted "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . for that would not be an exercise of guardianship, but an act of confiscation."[257]

The Court, in *Sioux Nation*, found that the 1877 Act did not represent a good-faith effort to negotiate a fair deal, and thus annexing the Black Hills constituted a taking.[258] The further reduction of these lands in 1889 would likely fare no better under an analysis of fair dealings. *Sioux Nation* was based upon the United States' failure to adequately financially compensate the Sioux for their land, and also on the United States' outright disregard for the 1868 Fort Laramie Treaty's tribal voting procedures for treaty ratification—both characteristics of American dealings were also true of the federal government's actions in 1889.[259]

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[252] United States v. Sioux Nation of Indians, 448 U.S. 371, 373 (1980).

[253] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

[254] *See supra* text accompanying note 55 (explaining the trust relationship).

[255] Shoshone Tribe v. United States, 299 U.S. 476 (1937).

[256] Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968).

[257] United States v. Creek Nation, 295 U.S. 103, 110 (1935) (internal citations omitted).

[258] United States v. Sioux Nation of Indians, 448 U.S. 371, 409 (1980).

[259] HOOVER, *supra* note 132; *see also* the discussion of the 1889 Act in Part III.B.

The United States continued to redefine Sioux lands after the 1877 Act, but it never adhered to the 1868 Fort Laramie Treaty requirements that three-fourths of the adult male Sioux must assent to changes.[260] The continued, unilateral, and, often, forced land exchanges between the United States and the seven bands of the Sioux have not escaped domestic and international attention. Although *Sioux Nation* aimed to settle the issue of the federal taking of the Black Hills, subsequent lawsuits,[261] congressional bills,[262] presidential policy stances,[263] and United Nations investigations[264] have all attempted to address the

[260] Treaty of Fort Laramie, *supra* note 116, art. XII.

[261] *See* Greenhouse, *supra* note 131 (The Oglala Sioux independently sued after *Sioux Nation*, seeking "the [Black Hills] land plus $10 billion in compensation for the removal of nonrenewable resources and $1 billion additional in damages for 'hunger, malnutrition, disease and death.'" The Supreme Court denied certiorari.). In 2011, the District of South Dakota, Southern Division, dismissed another claim for physical control of the Black Hills. Different Horse v. Salazar, 2011 WL 3422842 (D.S.D. Aug. 4, 2011).

[262] Senator Bill Bradley from New Jersey proposed in 1985 "A bill to reaffirm the boundaries of the Great Sioux Reservation to convey federally held lands in the Black Hills to the Sioux Nation." Sioux Nation Black Hills Act, S. 1453, 99th Cong. (1985). Bradley sent the bill to committee, where it died, after spending time on the Pine Ridge Indian Reservation. Wayne King, *Bradley Offers Bill to Return Land to Sioux*, N.Y. TIMES (Mar. 11, 1987), https://www.nytimes.com/1987/03/11/us/bradley-offers-bill-to-return-land-to-sioux.html [https://perma.cc/F7RV-4FH7].

[263] During his presidential campaign, the Lakota County Times published a statement by Barack Obama in support of the Lakota's quest for Black Hills land restoration, and for tribal sovereignty generally. Loretta Afraid of Bear-Cook, *Pine Ridge Indian Reservation Community & District Hearings to Appoint Representatives of the Oglala Sioux Tribe to Meet with President Barack Obama on Black Hill's Land Claim Issues and Re-Affirm that the Black Hills are Not for Sale, Following an Historic Gathering of Oglala Lakota Nation*, LAKOTA TIMES (Sept. 1, 2009), https://www.lakotatimes.com/articles/monday-august-24th-2009-for-immediate-press-release/ [https://perma.cc/NSZ8-CJZ8]. Oglala Sioux Tribal President John Yellowbird Steele wrote a public letter to Obama in response to the press release, stating that the "Oglala Sioux Tribe feels that there are innovative solutions that can fulfill our sacred obligation to protect our aboriginal homelands . . . and still enter into a mutually agreeable accord with the Federal government to resolve all the issues involved in the Black Hills Land Claim." Brandon Ecoffey, *Lakota Country Times: Oglala Sioux Tribe Eyes Land Claim Talks*, INDIANZ (July 11 2016), https://www.indianz.com/News/2016/07/11/lakota-country-times-oglala-sioux-tribe-2.asp [https://perma.cc/7EYS-V5Z8].

[264] In 2012 James Anaya, a United Nations Special Rapporteur on the Rights of Indigenous People, took a 12-day tour of the United States to speak with tribal leaders across the nation. At the end of it, he publicly endorsed land restoration of the Black Hills. *UN Official Calls for US Return of Native Land*, BBC NEWS (May 5, 2012), https://www.bbc.com/news/world-us-canada-17966113 [https://perma.cc/7VG3-EB3X]. These findings were officially published in a U.N. General Assembly Report. *See* James Amaya (Special Rapporteur on the

inadequacy of financial compensation for the loss of the Black Hills, and have endeavored to at least partially restore Sioux land ownership of the area.

As the United States, through unfair dealings, did take the Sioux land in the Black Hills that now sits underneath the DBP construction site, this too could be conceptualized as a Fifth Amendment taking deserving of compensation. Such a finding would entitle the Oglala Sioux to further financial award than was granted in *Sioux Nation*. It may also entitle the tribe to seek restoration of the former Sioux lands underneath the project site by allowing federal courts to reconsider the taking of the Black Hills. Such a court would be able to take into account the persistent, ongoing[265] efforts of the Oglala Sioux post-*Sioux Nation* to seek restoration of title.

2. Private Financial Liability

Another remedy available to the Oglala Sioux would be to seek private damages directly against Agarza Uranium.

Though written in the context of a government taking, the Supreme Court has implied that tribes may be due financial reimbursement for the loss of their off-reservation fishing and hunting rights. In *Menominee Tribe of Indians v. United States*[266]—while deciding that the Termination Act was not meant to fully abrogate usufructuary rights in the treaties it discussed—the Court stated: "[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation."[267] This indicates a potential willingness by the courts to conceptualize usufructuary rights as interests due monetary compensation, which could translate to private financial liability in the context of damages.

Here, the Oglala Sioux could levy a common law damages claim for the monetary value of the cultural and nutritional benefits of buffalo hunting lost due to DBP impacts. A quantification of these off-reservation rights would not be entirely novel. The Boldt Decision marks an example of an explicit determination of the amount of fish owed to the tribes of the Pacific Northwest by their treaty rights to fish in

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Rights of Indigenous Peoples), *Rep. on the Situation of Indigenous Peoples in the U.S.*, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012).

[265] *See supra* text accompanying note 131 (summarizing the Oglala Sioux's efforts to restore tribal land title to the Black Hills).

[266] Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

[267] *Id.* at 413.

off-reservation rivers.[268] In that case, the tribes were owed between forty-five and fifty percent of all harvestable fish passing through the runs where they had fishing interests.[269] The Boldt Decision demonstrates that a numeric value of an off-reservation right can be determined and utilized to calculate money damages for lost catch. Courts regularly valuate abstract concepts, such as potential lost wages of injured workers, in order to adjudicate common law damages claims associated with negligence. In those instances, the monetary reward is estimated as "'the difference . . . between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm.'"[270] Using this formula, federal courts could assess the value of the damage to the Oglala Sioux's buffalo hunting from the construction and operation of the DBP.

Nez Perce Tribe v. Idaho Power Co.[271] details a similar claim for compensation by the Nez Perce Indians. The tribe sought financial reimbursement for the reduction of fish in the Snake River, an off-reservation site where they retained a treaty fishing right.[272] Three dams constructed and operated by Idaho Power Company significantly reduced the fish catch in the Snake River.[273] Although the court declined to find any federal cause of action that would allow collection of monetary damages from Idaho Power for this harm,[274] the details of the *Nez Perce* case are distinct from the Oglala Sioux's potential claim.

The Federal Power Act (FPA) coordinates the development of the United States' hydroelectric projects, and it empowers the Federal Energy Regulatory Commission to oversee the licensing and operation of federal dams.[275] The FPA also governs the Nez Perce Indians' claim for monetary compensation relating to the Snake River dam projects.[276] The court in *Nez Perce* failed to see a state action at common law which would not be preempted by the FPA's general damages provisions, which did not provide for compensation for lost usufructuary rights.[277]

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[268] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[269] *Id.* at 343.

[270] Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 132 (1997) (quoting RESTATEMENT (SECOND) OF TORTS § 924 (AM. L. INST. 1979)).

[271] Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994).

[272] *Id.* at 794.

[273] *Id.*

[274] *Id.* at 812.

[275] *Id.*

[276] *Id.*

[277] *Id.*

The court further declined to read the tribe's novel cause of action into FPA section 803(c), which details the liability of potential licensees for damages that their projects cause.[278] In determining whether a litigant has a private right of action under a federal statute, the Supreme Court has held that the "ultimate issue is whether Congress intended to create a private cause of action."[279] Applying that standard, the Idaho court determined that it was inconsistent with the legislative history of the FPA to find a common law cause of action to recover damages for impacts to treaty fishing rights.[280]

The NRC operates under an entirely different liability scheme, largely due to the high-risk nature of nuclear projects.[281] Section 170 of the Atomic Energy Act of 1954 provides that the NRC must require certain licensees to obtain liability insurance "to cover public liability claims."[282] The statute defines public liability as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation)," not including claims related to workers' compensation or war.[283] The NRC language regarding project liability is broader than that of the FPA, but this language has not yet been interpreted to allow damages claims relating to Indian usufructuary rights.

Finally, the *Nez Perce* court declined to create a cause of action under federal common law, although the court acknowledged that it could have done so.[284] In making this decision, the *Nez Perce* court stressed that the right to have an

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[278] 16 U.S.C. § 803(c).

[279] Karahalios v. Nat'l Fed'n Fed. Emps., Local 1263, 489 U.S. 527, 532 (1989) (quoting California v. Sierra Club, 451 U.S. 287, 293 (1981)).

[280] *Nez Perce Tribe*, 847 F.Supp. at 812. As courts have a long history of denying private rights of action to recover damages under NEPA, it is unlikely that the Oglala Sioux would fare any better than the Nez Perce in trying to recover under the statutory and regulatory scheme which governs energy development. *See* Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, REGUL. TRANSPARENCY PROJECT (Oct. 16, 2018), https://regproject.org/paper/national-environmental-policy-act/ [https://perma.cc/3DD3-JN3X].

[281] U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-654, NUCLEAR REGULATION: NRC'S LIABILITY INSURANCE REQUIREMENTS FOR NUCLEAR POWER PLANTS OWNED BY LIMITED LIABILITY CORPORATIONS (May 2004).

[282] 42 U.S.C. § 2210.

[283] 10 C.F.R. § 140.92, App. B.

[284] *Nez Perce Tribe*, 847 F.Supp. at 811.

opportunity to catch fish was not equivalent to a vested property interest in a catch of fish; therefore, there was no claim to lost property which they could compensate.[285] However, the *Nez Perce* court fails to acknowledge that the Boldt Decision—written fifteen years before the District of Idaho heard the Nez Perce Indians' claim—provides support for the exact opposite conclusion.[286] As discussed in Part I, treaty fishing rights cannot be circumvented or nullified by otherwise legal actions of non-Indians.[287] Further, the Boldt Decision explicitly held that treaty fishing rights afford Indians more than the opportunity to fish, and conferred several tribes of the Pacific Northwest a specific entitlement of forty-five to fifty percent of all fish passing through the rivers on which the Indians have fishing servitudes.[288] Although the *Nez Perce* court would not have been legally bound by the Boldt Decision, it may have been persuaded by the case. The Boldt Decision remains a highly influential and well-cited decision, and the Ninth Circuit has been home to several decades-long cases about interpreting treaty language preserving usufructuary rights.[289]

There are also normative rationales for granting damages to tribes whose treaty rights have been trampled by private projects. Courts might provide a mechanism for Indians to demand corporate prioritization of tribal consultation by recognizing federal common law damages claims against private parties that violate treaty interests. If tribes are able to recover the monetary value of their lost treaty rights as a result of environmentally damaging energy infrastructure projects, the corporations behind them would be forced to take that financial burden into consideration when assessing a project's economic viability. Corporations may find extended conversation with tribes about existing treaty interests to be less costly than legal fees and property damage payouts. Federal statutes currently require corporations to engage in some consultation with tribes,[290] but this system does not mandate a sufficient level of discussion, and is inadequate to address the current onslaught of planned infrastructure projects on and near tribal lands. In the context of the DBP, treaty protections may offer the Oglala Sioux a mechanism by which they can influence Agarza and the federal

[285] *Id.*

[286] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[287] *See generally* United States v. Winans, 198 U.S. 371 (1905).

[288] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[289] *See, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975).

[290] *See* discussion in Part IV A and C of the NEPA and NHPA obligations corporations applying for federal agency permits must comport with.

agencies involved in project approval to more meaningfully consult with tribal needs and interests.

The current system incentivizes utility companies to carry out bare minimum impact analysis and tribal consultation before developing large swaths of land that may directly impact federally protected Indian rights and interests. Broadening our understanding of common law damages to hold companies financially accountable for the economic value of the tribal interests these developments destroy would encourage robust analysis of tribal interests before construction to avoid future financial liability. This new system is also a practical one; it would ensure that Indians have an opportunity to seek proper compensation for diminished or extinguished treaty rights.

The Oglala Sioux have a treaty-protected right to hunt buffalo in perpetuity, so long as sufficient numbers of the herd exist. Therefore, if the DBP is proven to impact the health or size of surrounding herds, or should the construction or operation of the uranium mining impact Indians' ability to hunt these animals, the Oglala Sioux should at minimum be permitted to seek federal compensation at common law.

V. CONCLUSION

The 1851 and 1868 Fort Laramie Treaties guarantee the Oglala Sioux access to clean water on the Pine Ridge Indian Reservation and to off-reservation buffalo hunting. The *Winters* doctrine of reserved water rights mandates that the quantity and quality of Indian water sources be maintained, and the DBP cannot threaten to degrade these tribal waterways. Reevaluation of the DBP's safety with regards to groundwater quality is ripe for judicial review, should the Oglala Sioux wish to pursue a claim in federal court. Additionally, the Oglala Sioux have a protected right to hunt buffalo on lands in and around the DBP site. This right was ignored by the DBP's EIS, and the NRC has an obligation to consider the Oglala Sioux's hunting rights before issuing further permission to develop the DBP. The Oglala Sioux have legal rights created to maintain their quality of life on the Pine Ridge Indian Reservation, and federal agencies such as the NRC should not approve projects which disregard the treaties of the United States, to which we are *all* still bound. Should the project proceed despite these objections, and if the water quality of the Pine Ridge Indian Reservation declines, or if hunting by the Oglala Sioux is impacted, the tribe is due monetary compensation either as a taking of their land and interests, or as private damages for the value of their losses.