

WITNESS LIST

December 1, 2025

In the Matter of:

Clean Nuclear Energy Corp. Uranium Exploration Permit Application – EXNI 453

Elizabeth Lone Eagle submits the following list of witnesses:

Witnesses

	Name	Address
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2.	Alex White Plume	PO Box 95 Manderson, SD 57756 Oglala Sioux Tribe
3.	Violet Catches	% Pierre Indian Learning Center 3001 E. Sully Ave. Pierre, SD 57501 Cheyenne River Sioux Tribe
4.	Seth Eagle Bear, Jr.	PO Box 44 Wounded Knee, SD 57794

5.	Helen Red Feather	PO Box 173 Wounded Knee, SD 57794
6.	Beverly Larson	PO Box 82 Wounded Knee, SD 57794
7.	Ruddell Bear Shirt	PO Box 88 Wounded Knee, SD 57794
8.	Bruce Ellison	PO Box 2508 Rapid City, SD 57709
9.	Emmanuel Iron Hawk	PO Box 556 Dupree, SD 57623
10.	Philimon Two Eagle	PO Box 1157 Rosebud, SD 57570 Rosebud Sioux Tribe
11.	Reno L. Red Cloud	PO Box 4052 Pine Ridge, SD 57770
12.	MerleJohn Lone Eagle	% Lakota Prairie Ranch PO Box 656 Kyle, SD 57752

Subpoena and Attendance Notes

Several of the witnesses listed above may require **subpoenas** to ensure their appearance due to travel constraints, work-release requirements, or employment policies.

I reserve the right to request subpoenas from the Hearing Officer for any witness for whom compulsory attendance becomes necessary.

Reservation of Rights

I, **Elizabeth Lone Eagle**, reserve the right to call as a witness each and every person identified on the witness list of every other party and intervenor in this case.

I, **Elizabeth Lone Eagle**, further reserve the right to supplement this witness list with additional witnesses as necessary, including those needed for rebuttal testimony.

Electronic Signature

/s/ Elizabeth Lone Eagle

Elizabeth Lone Eagle

% Lakota Prairie Ranch

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EXHIBIT LIST

In the Matter of:

Clean Nuclear Energy Corp. Uranium Exploration Permit Application – EXNI 453

Elizabeth Lone Eagle hereby submits the following:

Exhibits

Exhibit No.	Title / Description	Source / URL (if applicable)	Notes
1.	United States Constitution	https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf	
2.	Fort Laramie Treaty of 1851	https://commons.und.edu/cgi/viewcontent.cgi?article=1154&context=indigenous-gov-docs	
3.	Fort Laramie Treaty of 1868	https://www.archives.gov/milestone-documents/fort-laramie-treaty	
4.	United States v. Sioux Nation of Indians	https://tile.loc.gov/storage-services/service/ll/usrep/usrep448/usrep448371/usrep448371.pdf	
5.	Winters v. United States	https://tile.loc.gov/storage-services/service/ll/usrep/usrep207/usrep207564/usrep207564.pdf	
6.	Agua Caliente Band Of Cahuilla Indians v. Coachella Valley Water Dist. et. al.	https://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/07/15-55896.pdf	

7.	Supreme Court Declines to Review Ninth Circuit Decision Applying Federal Reserved Water Rights Doctrine to Groundwater	https://cawaterlibrary.net/document/supreme-court-declines-to-review-ninth-circuit-decision-applying-federal-reserved-water-rights-doctrine-to-groundwater/
8.	Washington State Dept. of Licensing v. Cougar Den, Inc.	https://www.supremecourt.gov/opinions/18pdf/16-1498_q811.pdf
9.	Exhibit: Washington State Department of Licensing v.Cougar Den, Inc. Case Citation	N/A
10.	Lac Du Flambeau Indians v. Stop Treaty Abuse-Wis., Inc.	https://law.justia.com/cases/federal/district-courts/FSupp/781/1385/1411703/
11.	Clayvin Herrera v. State Of Wyoming	https://www.supremecourt.gov/DocketPDF/17/17-532/71707/20181113153510005_Respondent%20Herrera%2017-532.pdf
12.	USDA — <i>Annual Report on Tribal Co-Stewardship</i>	https://www.usda.gov/sites/default/files/documents/co-stewardship-authorities-november-508.pdf

13.	Bureau of Indian Affairs / White House Tribal Nations Summit Progress Report	https://www.bia.gov/sites/default/files/media_document/125.24_tns_progress_report.508.pdf
14.	Transcript for Tribal Treaty Rights MOU Consultation - 9/19/22	https://www.bia.gov/sites/default/files/dup/tctranscript/transcript_ttr-mou-consultation_9-19-22_508_0.pdf
15.	Exhibit: State vs. Federal Land Permitting & Staging – EXNI 453 / Chord Project	N/A
-

Reservation of Rights

I, **Elizabeth Lone Eagle**, reserve the right to introduce as an exhibit **each and every exhibit identified on the exhibit list of every other party and intervenor in this case.**

I, **Elizabeth Lone Eagle**, further reserve the right to supplement this exhibit list with additional exhibits as necessary.

Electronic Signature

/s/ Elizabeth Lone Eagle
Elizabeth Lone Eagle
Intervenor, EXNI 453

CERTIFICATE OF SERVICE

Intervenor, **Elizabeth Lone Eagle** hereby certifies that copies of the above-listed exhibits were shared via electronic means with the following parties in the above captioned matter:

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Dated this 3rd day of December, 2025

Signature: /s/Elizabeth Lone Eagle

The Constitution of the United States of America

We the People

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States; and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 3. The Senate shall be composed of two Senators from each State, chosen by the Legislature thereof, for a Term of six Years; and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 4. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 5. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 6. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 7. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 8. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 9. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 10. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

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Section 12. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 13. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 14. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 15. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 16. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 17. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 18. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 19. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 20. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 21. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 22. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 23. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 24. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 25. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 26. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 27. The Senate shall elect their President and other Officers; and shall have the sole Power to try all Impeachments.

Section 28. The House of Representatives shall elect their Speaker and other Officers; and shall have the sole Power of Impeachment.

The Constitution of the United States of America

Dear Senate Visitor:

This edition of the U. S. Constitution is intended to serve as a keepsake of your visit to the United States Senate. As the world's longest-surviving written charter of government, the Constitution can be read with profit by all who care about this nation's system of representative democracy. Brief explanations of each of the Constitution's sections were prepared by the Office of the Secretary of the Senate with the assistance of Johnny H. Killian of the Library of Congress.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Written in 1787, ratified in 1788, and in operation since 1789, the United States Constitution is the world's longest surviving written charter of government. Its first three words—"We The People"—affirm that the government of the United States exists to serve its citizens. The supremacy of the people through their elected representatives is recognized in Article I, which creates a Congress consisting of a Senate and a House of Representatives. The positioning of Congress at the beginning of the Constitution reaffirms its status as the "First Branch" of the federal government.

The Constitution assigned to Congress responsibility for organizing the executive and judicial branches, raising revenue, declaring war, and making all laws necessary for executing these powers. The president is permitted to veto specific legislative acts, but Congress has the authority to override presidential vetoes by two-thirds majorities of both houses. The Constitution also provides that the Senate advise and consent on key executive and judicial appointments and on the ratification of treaties.

For over two centuries the Constitution has remained in force because its framers successfully separated and balanced governmental powers to safeguard the interests of majority rule and minority rights, of liberty and equality, and of the central and state governments. More a concise statement of national principles than a detailed plan of governmental operation, the Constitution has evolved to meet the changing needs of a modern society profoundly different from the eighteenth-century world in which its creators lived.

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CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Preamble explains the purposes of the Constitution, and defines the powers of the new government as originating from the people of the United States.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The Constitution divides the federal government into three branches, giving legislative powers to a bicameral (two chamber) Congress.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The House of Representatives was intended to be "the people's house." Its members were elected directly by the voters in the states, and the entire House would have to stand for election every two years.

ARTICLE I

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Representatives need to be 25 years old (compared to 30 for senators), and 7 years a citizen (compared to 9 years for senators). They must be residents within their states at the time of their election, but do not necessarily have to live within their districts.

Membership in the House is apportioned according to the population of the states. Every state must have at least one House seat. Larger states will have many more representatives. Every ten years, after the census has been taken, House districts are reapportioned to reflect their changing population. For many years the House increased its size as the nation's population grew, but in 1911 the number of representatives was fixed at 435 (together with non-voting delegates representing several territories and the District of Columbia). *Words in italics indicate provisions that were later dropped from the Constitution.* The 13th amendment abolished slavery, and the 14th amendment provided that representation would be determined according to the whole number of persons in each state, not by the "three-fifths" of the slaves. Since American Indians are now taxed, they are counted for purposes of apportionment.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one Vote.

Vacant House seats must be filled by election. For the Senate, state governors may fill vacancies.

Representatives choose their presiding officer, the Speaker, from among the membership of the majority party. Other elected officers, such as the chaplain, clerk of the House, sergeant at arms, and doorkeeper, are not members of the House. Impeachment is the power to remove federal officers. The House initiates the process by voting to impeach, which then refers the matter to the Senate for a trial.

Each state has two senators, regardless of the size of its population. Originally, senators were chosen by state legislatures. In 1913 the 17th amendment provided that senators would be directly elected by the people.

ARTICLE I

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

From the beginning, senators were divided into three groups for staggered elections, so that one-third of the seats are filled every two years. The italicized parts, regarding the filling of vacancies, were altered by the 17th amendment.

As with representatives, the Constitution fixes the qualifications a person must meet to be eligible to be a senator.

As the presiding officer of the Senate, the vice president may vote only to break a tie.

Except for the Vice President, the Senate elects its own officers. The President pro tempore is usually the longest-serving member of the majority party. Other elected officers include a chaplain, secretary of the Senate, and sergeant at arms, who are not senators.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Once the House votes to impeach, the Senate conducts a trial to determine whether to convict or acquit. A two-thirds vote is necessary to remove the individual from office. The chief justice of the Supreme Court presides over the impeachment trial of a president.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Convicted persons can be barred from holding future office, and may be subject to criminal trial in the courts.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Federal elections are conducted by the individual states, although Congress has gradually enacted laws that regulate those elections. The 17th amendment made the treatment of the election of senators and representatives the same.

The Congress shall assemble at least once in every Year, and such Meeting shall *be on the first Monday in December*, unless they shall by Law appoint a different Day.

The 20th amendment changed this provision for the convening of Congress from the first Monday in December to the 3rd of January.

ARTICLE I

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The House and Senate decide whether their members are qualified to serve and have been properly elected, and determine any disputed elections. One-half plus one of each house is necessary to make a quorum to conduct business.

The Senate and House each sets its own rules, disciplines its own members, and by a two-thirds vote can expel a member. Censure and lesser punishments require only a majority vote.

The Senate and House each publish journals listing bills passed, amendments offered, motions made, and votes taken. In addition to these journals, Congress publishes an essentially verbatim account of its debates, called the *Congressional Record*. Videotapes of floor proceedings are deposited at the National Archives.

This section was included to prevent either chamber from blocking legislation through its refusal to meet. Each chamber takes very seriously its independence of the other body. To avoid having to ask the other chamber for permission to adjourn, the Senate and House simply conduct *pro forma* (as a matter of form) sessions to meet the three-day constitutional requirement. No business is conducted at these sessions, which generally last for less than one minute.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

The "speech or debate" clause is a basic protection of members of Congress in a government of separated powers. Inherited from the British parliament, the right prevents executive oppression of the legislature, and here protects members from criminal or civil liability in the performance of their legislative responsibilities.

To preserve the separation of powers, no member may be appointed to an executive or judicial office that was created or accept a salary that was increased during the term to which that senator or representative was elected, nor may anyone serving in Congress simultaneously hold office in any other branch of government.

The House, directly elected by the people, received authority to originate all tax bills. The Senate, however, can amend a tax bill, and the support of both houses is necessary for the bill to become law.

ARTICLE I

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The "presentment clause" describes the *only* way that a bill can become law: it must be passed in identical form by both Houses and it must be signed by the president or passed by a two-thirds vote of Congress over the president's veto. If, while Congress is in session, the president does not sign a bill, it automatically becomes law. If Congress has adjourned or is in recess, the president can "pocket veto" the bill—in a sense, simply putting it in his pocket, unsigned. Congress cannot override bills that have been pocket vetoed.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

This clause prevents Congress from circumventing the previous clause by calling a bill something else. All it means is that any "order, resolution, or vote" that has the force of law must be passed in the manner of a bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Section 8 begins the enumerated powers of the federal government delegated to Congress. The first is the power to tax and to spend the money raised by taxes, to provide for the nation's defense and general welfare. This section was supplemented by the 16th amendment, which permitted Congress to levy an income tax.

To borrow Money on the credit of the United States;

Congress can borrow money through the issuance of bonds and other means. When it borrows money, the United States creates a binding obligation to repay the debt and cannot repudiate it.

ARTICLE I

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The "commerce clause" is one of the most far-reaching grants of power to Congress. Interstate commerce covers all movement of people and things across state lines, and every form of communication and transportation. The commerce clause has permitted a wide variety of federal laws, from the regulation of business to outlawing of racial segregation. The "Indian commerce clause" has become the main source of power for congressional legislation dealing with Native Americans.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Acts of Congress define the requirements by which immigrants can become citizens. Only the federal government, not the states, can determine who becomes a citizen. Bankruptcy laws make provisions for individuals or corporations that fail to pay their debts.

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

These clauses permit Congress to coin money and to issue paper currency. By extension, under its ability to enact laws "necessary and proper" to carry out these powers (as stated at the end of Article I, Section 8), Congress created the Federal Reserve System to regulate the nation's monetary supply.

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

The postal powers embrace all measures necessary to establish the system and to insure the safe and speedy transit and prompt delivery of the mails. Congress may also punish those who use the mails for unlawful purposes.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

Copyright and patent protection of authors and inventors are authorized by this clause, although it uses neither word.

The Constitution provides only for a Supreme Court, and left it to Congress to create lower ("inferior") courts, and to set their jurisdictions and duties.

Every sovereign nation possesses these powers, and Congress has acted under this authority from the beginning.

The "war powers" are defined here and in Article II, Section 2. Congress declares war, while the president wages war. However, presidents have committed U.S. forces leading to conflict without a congressional declaration of war in Korea, Vietnam, and other places, provoking national argument over the meaning of these powers. Congress' control of funding the military provides another check on the executive branch.

ARTICLE I

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Under these provisions, the right of the states to maintain a militia, including what is now the National Guard, is always subordinate to the power of Congress. In 1795 Congress first gave the president authority to call out the militia to suppress insurrections. Presidents employed this power to enforce federal law during desegregation disputes during the 1950s, and later during civil disturbances in various cities during the 1960s.

This clause enables Congress to govern the District of Columbia. Congress has now delegated that power to a locally elected government, subject to federal oversight. Congress also governs forts, arsenals, and other places obtained from the states for the federal government's purposes.

The "elastic clause" enlarges legislative power by enabling Congress to use any means it thinks reasonable to put these powers into action. This clause also authorizes Congress to enact legislation necessary to carry out the powers of the other branches, for example to organize and reorganize the executive branch.

Section 9. *The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.*

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

This obsolete provision was designed to protect the slave trade from congressional restriction for a period of time.

Habeas corpus is a judicial device by which jailed people may require their jailer to justify their imprisonment to a court. It is a fundamental safeguard of individual liberty, and the Supreme Court has interpreted it to give federal courts review over state court convictions and to enforce federal constitutional guarantees. It is generally accepted that only Congress has the power to suspend *habeas corpus*. President Abraham Lincoln's suspension of the right during the Civil War met with strong opposition.

A bill of attainder is a legislative act declaring the guilt of an individual or a group of persons and punishing them. Only the courts may determine whether one has violated a criminal statute. An *ex post facto* law declares an act illegal after it has been committed, or increases the punishment for an offense already committed.

ARTICLE I

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

Direct taxes are poll or "head" taxes and taxes on land. The Supreme Court once held that income taxes were unconstitutional direct taxes, a result overturned by the 16th amendment.

No Tax or Duty shall be laid on Articles exported from any State.

To prohibit discrimination against any states or regions, Congress cannot tax goods exported from a state to foreign countries or those that move between states.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

Congress cannot favor one state against another while regulating trade.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

The departments and agencies of the executive branch may not spend any money that Congress has not appropriated, or use federal money for any purpose that Congress has not specified.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

This clause was designed to end the aristocratic tendencies that the American Revolution had been fought against. Federal officials must turn over to the government all but minimal gifts from foreign nations.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

These provisions protect national powers from state incursions.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

States may not interfere with the international trade of the United States.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

States cannot levy tonnage duties, which are taxes charged for the privilege of entering, trading in, or remaining in a port. States may come together to work on common problems, such as pollution of a river passing through several states, but the agreements or compacts they reach are subject to congressional consent.

ARTICLE II

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of

This clause provided the title of the chief executive and defined the term of office. It says nothing about reelection. George Washington established a two-term tradition, which was not broken until Franklin D. Roosevelt won a third and fourth term. The 22nd amendment now limits presidents to two terms.

The Constitution established an electoral college as a compromise between direct popular election of the president and election by Congress. The method of selecting electors was left to the states. Electors are now chosen by popular vote.

This clause was superseded by the 12th amendment, after the election of 1800 in which Thomas Jefferson and his running mate, Aaron Burr, received identical votes and both claimed the office. After many votes, the House of Representatives chose Jefferson, and soon thereafter the amendment was speedily approved.

Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Congress has enacted legislation requiring that presidential elections (the selection of electors) occur on the Tuesday following the first Monday in November every four years. Electors gather to vote on the Monday after the second Wednesday in December. The two houses of Congress convene to count the electoral ballots on the following January 6.

ARTICLE II

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

This clause requires that in order to take the oath of office a president must be 35, a resident within the United States for 14 years, and a natural-born citizen. This last requirement raises the question of whether someone born to American parents outside of the United States would be eligible to hold the office.

The 25th amendment superseded this clause regarding presidential disability, vacancy of the office, and methods of succession.

To preserve the president's independence, Congress can neither raise nor lower the president's salary during his term. Nor can a president accept any other pay.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The Constitution prescribes the oath that presidents must take. By contrast, Congress by statute created the oath taken by other federal officials, including the vice president.

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

As Commander in Chief, the president controls the military forces. Presidents have also cited this power as extending to their control of national and foreign policy in war and peacetime. Congress may not restrain the president's power to pardon, except in impeachment cases.

ARTICLE II

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The Constitution gives the Senate a share in foreign policy by requiring Senate consent, by a two-thirds vote, to any treaty before it may go into effect. The president may enter into "executive agreements" with other nations without the Senate's consent, but if these involve more than minor matters they may prove controversial.

The president must also submit judicial and major executive branch nominations to the Senate for its advice and consent. The Constitution makes no provision for the removal of executive officers, which has remained largely at the discretion of the president.

When the Senate is not in session, and therefore unable to receive nominations, the president may make recess appointments. The Senate will then consider the nomination when it returns to session.

Section 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The duty to deliver to Congress an annual address, known as the State of the Union message, is the basis of the president's legislative leadership. Presidents have frequently summoned Congress into "extra" or "special" sessions, but they have never exercised the power to adjourn Congress. The law enforcement function has been a source of the president's control over the executive branch, however the laws that the president is to execute are the laws that Congress passes, and those laws constrain as well as empower the chief executive.

Impeachment is the ultimate power of Congress to deter and to punish abuse of power by officers of the executive and judicial branches. Federal judges constitute the greater number of impeached and convicted officers. President Andrew Johnson won acquittal by a single vote, and President Richard Nixon resigned before he could be impeached.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This clause identifies the third branch of our separated government, empowering the courts to decide cases and limiting them to the exercise of a certain kind of authority. The Constitution makes no mention of judicial review, the right of the Supreme Court to declare federal and state laws unconstitutional. The Court asserted this right in the case of *Marbury v. Madison* in 1803 and on more than 120 occasions since then. For the sake of independence, justices and judges are given life tenures, subject only to removal by impeachment, and a guarantee that their salaries cannot be reduced.

The use of “cases” and “controversies” emphasizes the nature of the judicial power. These words encompass the concepts of adversity between parties, and require that litigants must have suffered injury sufficient to invoke the power of a federal court.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Certain cases may be brought directly to the Supreme Court without having been heard by another court. Under statute, the Supreme Court also exercises appellate review, that is the right to review the decisions of a lower federal or state court.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Anyone accused of a crime has a right to a trial by jury, except in the case of impeachments. This right was further defined and strengthened by the 6th, 7th, 8th, and 9th amendments.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

This clause limits Congress' ability to define treason or to set its punishment, as a means of preventing political "offenders" from being charged as traitors. At least two witnesses must testify in court that the defendant committed a treasonable act.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Each state is required to recognize the laws and records (such as licenses) of other states and to enforce rights in its own courts that would be enforced in other state courts.

States must treat the citizens of other states equally, without discrimination.

The governor of a state in which a fugitive is found must return the fugitive to the state demanding custody.

This clause, applicable to fleeing slaves, is now obsolete.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

By acts of Congress, newly settled or newly acquired areas will be admitted as states on an equal status with those states already in the Union.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Congress has charge of the public lands within the states, which in the West constitutes an enormous amount of land. Congress also governs acquired territories, which today include Puerto Rico, the Virgin Islands, Guam, and American Samoa.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Under this provision, Congress has authorized presidents to send federal troops into a state to guarantee law and order.

ARTICLE V

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; *Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*

The Constitution may be amended in two ways. The standard device, used for all amendments so far, is for both houses of Congress to pass by two-thirds vote a proposal, which they send to the states for ratification, either by state legislatures or by conventions within the states. An amendment is ratified when three-fourths of the states approve. The Constitution also authorizes a national convention, when two-thirds of the states petition Congress for such a convention, to propose amendments, which would also have to be ratified by three-quarters of the states.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

The new federal government assumed the financial obligations of the old government under the Articles of Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The "supremacy clause" is the most important guarantor of national union. It assures that the Constitution and federal laws and treaties take precedence over state law and binds all judges to adhere to that principle in their courts.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

State and federal officials, whether legislative, executive, or judicial, must take an oath to uphold and defend the Constitution. No religious test, either an avowal or a repudiation of any religious belief, shall ever be required of any public officeholder in the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Constitutional Convention met under the Government of the Articles of Confederation, which required unanimous assent of all 13 states to change any provisions of the Articles. Nevertheless, the Constitution mandated that the new government would go into effect when nine of the 13 states acted affirmatively.

DONE in Convention by the
Unanimous Consent of the States
present the Seventeenth Day of
September in the Year of our
Lord one thousand seven
hundred and Eighty seven and of
the Independence of the United
States of America the Twelfth. In
WITNESS whereof We have
hereunto subscribed our Names,

G^o. WASHINGTON—
Presi^{dt}. and deputy from Virginia.

<i>New Hampshire</i>	JOHN LANGDON, NICHOLAS GILMAN.
<i>Massachusetts</i>	NATHANIEL GORHAM, RUFUS KING.
<i>Connecticut</i>	WM. SAML. JOHNSON, ROGER SHERMAN.
<i>New York</i>	ALEXANDER HAMILTON.
<i>New Jersey</i>	WIL: LIVINGSTON, DAVID BREARLEY, WM. PATERSON, JONA. DAYTON.
<i>Pennsylvania</i>	B. FRANKLIN, ROBT. MORRIS, THO: FITZSIMONS, JAMES WILSON, THOMAS MIFFLIN, GEO. CLYMER, JARED INGERSOLL, GOUV: MORRIS.
<i>Delaware</i>	GEO: READ, JOHN DICKINSON, JACO: BROOM, GUNNING BEDFORD, JUN'R, RICHARD BASSETT.
<i>Maryland</i>	JAMES M'HENRY, DANL CARROLL, DAN: OF ST. THOS. JENIFER.
<i>Virginia</i>	JOHN BLAIR, JAMES MADISON, JR.
<i>North Carolina</i>	WM. BLOUNT, HU. WILLIAMSON, RICH'D DOBBS SPAIGHT.
<i>South Carolina</i>	J. RUTLEDGE, CHARLES PINCKNEY, CHARLES COTESWORTH PINCKNEY, PIERCE BUTLER.
<i>Georgia</i>	WILLIAM FEW, ABR. BALDWIN.
Attest:	WILLIAM JACKSON, <i>Secretary.</i>

AMENDMENTS TO THE CONSTITUTION

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first ten amendments comprise the Bill of Rights. The first amendment protects religious freedom by prohibiting the establishment of an official or exclusive church or sect. Free speech and free press are protected, although they can be limited for reasons of defamation, obscenity, and certain forms of state censorship, especially during wartime. The freedom of assembly and petition also covers marching, picketing and pamphleteering.

Amendment II (1791)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Whether this provision protects the individual's right to own firearms or whether it deals only with the collective right of the people to arm and maintain a militia is strongly debated.

Amendment III (1791)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

This virtually obsolete provision was in response to anger over the British military practice of quartering soldiers in colonists' homes.

AMENDMENT IV

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Applying to arrests and to searches of persons, homes, and other private places, this amendment requires a warrant, thereby placing a neutral magistrate between the police and the citizen.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Indictment by a grand jury requires the decision of ordinary citizens to place one in danger of conviction. Double jeopardy means that when one has been convicted or acquitted, the government cannot place that person on trial again. The self-incrimination clause means that the prosecution must establish guilt by independent evidence and not by extorting a confession from the suspect, although voluntary confessions are not precluded. Due process of the law requires the government to observe proper and traditional methods in depriving one of an important right. Finally, when the government seizes property to use in the public interest, it must pay the owner fair value.

Amendment VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Defendants in criminal cases are entitled to public trials that follow relatively soon after initiation of the charges. Witnesses must be brought to the trial to testify before the defendant, judge, and jury. Defendants are also entitled to compel witnesses on their behalf to appear and testify.

Amendment VII (1791)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Mistrustful of judges, the people insisted on the right to jury trial in civil cases. The minimum level, \$20, is so low today that it would burden the federal judiciary, so various devices have been developed to permit alternative resolution of disputes.

Amendment VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Neither bail nor punishment for a crime are to be unreasonably severe. The "cruel and unusual punishments" clause has been the basis for challenges to the death penalty.

AMENDMENT IX

Amendment IX (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Failure of the Constitution to mention a specific right does not mean that the government can abridge that right, but its protection has to be found elsewhere.

Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The federal government is the recipient of constitutionally delegated powers. What is not delegated remains in the states or in the people.

Amendment XI (1798)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

When the Supreme Court held in the 1793 case *Chisholm v. Georgia* that a state could be sued in federal court under Article III of the Constitution, this amendment was rapidly adopted. It provided that states could only be sued in state courts.

Amendment XII (1804)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President,

and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. *And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President*—The

AMENDMENT XIII

person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

After the disputed election of 1800, this amendment required separate designation of presidential and vice presidential candidates, each of whom must meet the same qualifications for eligibility as the president.

Amendment XIII (1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

President Lincoln's Emancipation Proclamation did not apply to slavery in the states that had not seceded. To abolish slavery entirely, Congress proposed this amendment, which also gave Congress specific authority to enforce the amendment by legislation. Under these provisions, Congress has legislated against slavery-like conditions, such as peonage.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

In the *Dred Scott* decision of 1857, the Supreme Court had said that African-Americans were not citizens. This amendment declared that every person born or naturalized in the U.S. was a citizen. The amendment's "due process" clause has had enormous

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being *twenty-one* years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens *twenty-one* years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any

constitutional importance, since the Supreme Court has used it to apply most of the Bill of Rights to the states. The amendment also establishes that all citizens are entitled to "equal protection of the laws," the provision which the Supreme Court cited in *Brown v. Board of Education* in 1954, ruling school segregation unconstitutional.

AMENDMENT XIV

office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV (1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

This amendment was designed to protect the right of African-Americans to vote and has served as the foundation for such legislation as the Voting Rights Act of 1965.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

In 1895 the Supreme Court had declared a federal income tax law unconstitutional. This amendment reversed that decision and authorized a tax on income.

Amendment XVII (1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

The original system of having state legislatures elect U.S. senators began to break down with the growth of political parties in the mid-19th century. Disagreements between and within parties produced deadlocks that delayed state legislative business and left states without their full Senate representation, often for lengthy periods. This amendment provides for senators to be elected the way members of the House are—by direct election of the people.

When vacancies happen in the representation of any State in the Senate, the executive authority of

such State shall issue writs of election to fill such vacancies:

AMENDMENT XVIII

Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII (1919)

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The "noble experiment" of Prohibition was instituted by this amendment, only to be repealed 16 years later by the 21st amendment.

Amendment XIX (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

The Constitution has never prohibited women from voting and for many years before the adoption of this amendment women did vote in several states. The 19th amendment established a uniform rule for all states to follow in guaranteeing women this right.

Amendment XX (1933)

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

This so-called "Lame-Duck" amendment reduced the previous four-month period between the November elections and the March 4 starting date of congressional and presidential terms. This ended the custom, when both terms expired on the same day, that required outgoing presidents to sit outside the Senate chamber waiting to sign last-minute legislation. Also, under this amendment, if a presidential election were thrown into the House of Representatives following a deadlock in the January 6 counting of electoral ballots, that decision would be made by a newly elected House rather than one set to go out of existence on March 4.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI (1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

In repealing Prohibition, this was the only amendment that the states ratified by conventions rather than by legislatures.

Amendment XXII (1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

George Washington established the custom of presidents serving no longer than two terms. Following Franklin D. Roosevelt's election to third and fourth terms, this amendment set a future limit at two terms.

Amendment XXIII (1961)

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

In authorizing the creation of a federal district as seat of government, the Framers made no provision for the suffrage rights of persons who resided there. This amendment for the first time, effective with the 1964 election, gave District of Columbia residents the opportunity to vote for three presidential electors.

Amendment XXIV (1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The poll tax was the last surviving instance of a property qualification for the suffrage, and it was in effect, at the time of the adoption of this amendment, in only five States. The amendment was offered as a removal of another obstacle to the right to vote.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV (1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

This amendment clarifies the Constitution's previously ambiguous language about presidential succession, explicitly confirming the long-standing custom that when a president dies in office the vice president *becomes* president, rather than *acts as* president.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

If the vice presidency becomes vacant, the president may nominate a new vice president, subject to the confirmation of both the House and Senate. The amendment also provides procedures for replacing a president who becomes incapacitated.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers

and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that

AMENDMENT XXVI

purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI (1971)

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

During the Vietnam War, this amendment lowered the voting age in federal and state elections to 18, the same age at which young men could be drafted for military service.

Amendment XXVII (1992)

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

More than two-hundred years after it was proposed as part of the original Bill of Rights, this amendment prohibited members of Congress from receiving an increase in salary until after the next election had been held.



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1904

Treaty of Fort Laramie with Sioux, Etc., 1851 (Kappler)

Charles J. Kappler
Senate Committee on Indian Affairs

David D. Mitchell
Indian Affairs

Thomas Fitzpatrick
Indian Affairs

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58TH CONGRESS, }
2d Session. }

SENATE.

DOCUMENT
No. 319.

INDIAN AFFAIRS.

LAWS AND TREATIES.

Vol. II.
(TREATIES.)

COMPILED AND EDITED
BY
CHARLES J. KAPPLER, LL. M.,
CLERK TO THE SENATE COMMITTEE
ON INDIAN AFFAIRS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1904.

108.D.30

TREATY OF FORT LARAMIE WITH SIOUX, ETC., 1851.

Sept. 17, 1851.
11 Stats., p. 749.

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.^a

Peace to be observed.

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

Roads may be established.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

Indians to be protected.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

Depredations on whites to be satisfied.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

Boundaries of lands.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

Sioux.

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

Grosventre, etc.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

Assiniboin.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of

^a This treaty as signed was ratified by the Senate with an amendment changing the annuity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

Blackfoot.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

Crow.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Butte, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fé road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

Cheyenne and Arrapaho.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations 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.

Rights in other lands.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

Head chiefs of said tribes.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

Annuities.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.

Annuities suspended by violation of treaty.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D. D. Mitchell
Thomas Fitzpatrick
Commissioners.

Sioux:
 Mah-toe-wha-you-whey, his x mark.
 Mah-kah-toe-zah-zah, his x mark.
 Bel-o-ton-kah-tan-ga, his x mark.
 Nah-ka-pah-gi-gi, his x mark.
 Mak-toe-sah-bi-chis, his x mark.
 Meh-wha-tah-ni-hans-kah, his x mark.
 Cheyennes:
 Wah-ha-nis-satta, his x mark.
 Voist-ti-toe-vetz, his x mark.
 Nahk-ko-me-ien, his x mark.
 Koh-kah-y-wh-cum-est, his x mark.
 Arrapahoes:
 Bè-ah-té-a-qui-sah, his x mark.
 Neb-ni-bah-seh-it, his x mark.
 Beh-kah-jay-beth-sah-es, his x mark.

In the presence of—

A. B. Chambers, secretary.
 S. Cooper, colonel, U. S. Army.
 R. H. Chilton, captain, First Drags.
 Thomas Duncan, captain, Mounted Rifle-
 men.
 Thos. G. Rhett, brevet captain R. M. R.
 W. L. Elliott, first lieutenant R. M. R.
 C. Campbell, interpreter for Sioux.
 John S. Smith, interpreter for Chey-
 ennes.
 Robert Meldrum, interpreter for the
 Crows.

Crows:
 Arra-tu-ri-sash, his x mark.
 Doh-chepit-seh-chi-es, his x mark.
 Assinaboines:
 Mah-toe-wit-ko, his x mark.
 Toe-tah-ki-eh-nan, his x mark.
 Mandans and Gros Ventres:
 Nochk-pit-shi-toe-pish, his x mark.
 She-oh-mant-ho, his x mark.
 Arickarees:
 Koun-hei-ti-shan, his x mark.
 Bi-atch-tah-wetch, his x mark.

H. Culbertson, interpreter for Assini-
 boines and Gros Ventres.
 Francois L'Etalie, interpreter for Arick-
 arees.
 John Pizelle, interpreter for the Arrapa-
 hoes.
 B. Gratz Brown.
 Robert Campbell.
 Edmond F. Chouteau.

TREATY WITH THE CHICKASAW, 1852.

June 22, 1852.

10 Stat., 974.
 Ratified Aug. 13,
 1852.
 Proclaimed, Feb. 24,
 1853.

Articles of a treaty concluded at Washington, on the 22nd day of June, 1852, between Kenton Harper, commissioner on the part of the United States, and Colonel Edmund Pickens, Benjamin S. Love, and Sampson Folsom, commissioners duly appointed for that purpose, by the Chickasaw tribe of Indians.

Agent to reside
 among the Chicka-
 saws.

ARTICLE 1. The Chickasaw tribe of Indians acknowledge themselves to be under the guardianship of the United States, and as a means of securing the protection guaranteed to them by former treaties, it is agreed that an Agent of the United States shall continue to reside among them.

Sale of Chickasaw
 lands.

ARTICLE 2. That the expenses attending the sale of the land ceded by the Chickasaws to the United States, under the treaty of 1832, having, for some time past, exceeded the receipts, it is agreed that the remnant of the lands so ceded and yet unsold, shall be disposed of as soon as practicable, under the direction of the President of the United States in such manner and in such quantities, as, in his judgment, shall be least expensive to the Chickasaws, and most conducive to their benefit: Provided, That a tract of land, including the grave-yard near the town of Pontotoc, where many of the Chickasaws and their white friends are buried, and not exceeding four acres in quantity, shall be, and is hereby set apart and conveyed to the said town of Pontotoc to be held sacred for the purposes of a public burial-ground forever.

Burial ground in
 Pontotoc.

Settlement of title
 of Chickasaws to a
 tract in Tennessee.

ARTICLE 3. It is hereby agreed that the question of the right of the Chickasaws, so long contended for by them, to a reservation of four miles square on the River Sandy, in the State of Tennessee, and particularly described in the 4th article of the treaty concluded at Oldtown, on the 19th day of October, 1818, shall be submitted to the Secretary of the Interior who shall decide, what amount, if any thing, shall be paid to the Chickasaws for said reservation: Provided, however, That the amount so to be paid shall not exceed one dollar and twenty-five cents per acre.

Proviso.



Treaty of Fort Laramie (1868)

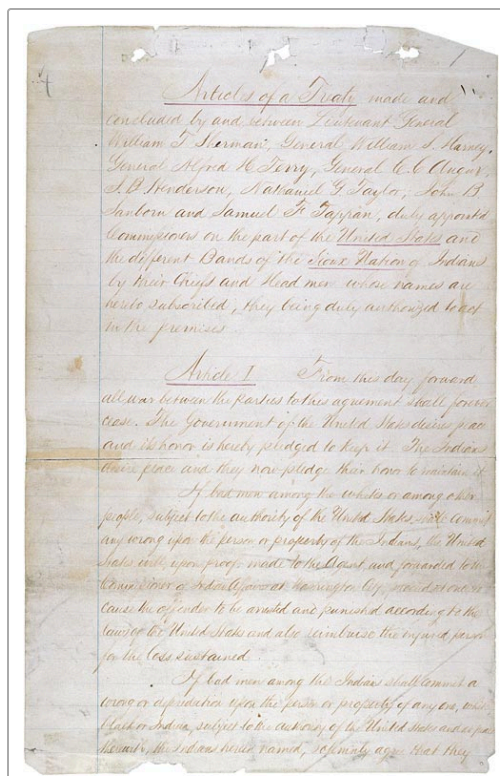
In this treaty, signed on April 29, 1868, between the U.S. Government and the Sioux Nation, the United States recognized the Black Hills as part of the Great Sioux Reservation, set aside for exclusive use by the Sioux people.

In the 19th century, the U.S. Government's drive for expansion clashed violently with Native Americans' resolve to preserve their lands, sovereignty, and ways of life. This struggle over land has defined the relationship between the U.S. Government and Native tribes.

From the 1860s through the 1870s, warfare and skirmishes broke out frequently on the American frontier. In 1865, a congressional committee studied the uprisings and wars in the American West. They produced a "Report on the Condition of the Indian Tribes" in 1867. This led to an act to establish an Indian Peace Commission to end the wars and prevent future conflicts.

The U.S. Government set out to establish a series of treaties with Native tribes that would force American Indians to give up their lands and move further west onto reservations. In the spring of 1868, a conference was held at Fort Laramie, in present-day Wyoming, which resulted in a treaty with the Sioux (Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee) and the Arapaho.

The goal of the treaty was to bring peace between White settlers and the tribes, who agreed to relocate to the Black Hills in the Dakota Territory. All the tribes involved gave up many thousands of acres of land that had been promised in earlier treaties, but retained hunting and fishing rights in their older territory. They also agreed not to attack railroads or settlers.



Citation: Treaty with the Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, San Arcs, and Santee and Arapaho, 4/29/1868; General Records of the United States Government; Record Group 11; National Archives.

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In exchange, the U.S. Government established the Great Sioux Reservation, consisting of a large portion of the western half of what is now the state of South Dakota, including the Black Hills, which are sacred to the Sioux people.

Though the reservation land was set aside for exclusive use by the Sioux people, in 1874 Gen. George A. Custer led an expedition into the Black Hills, accompanied by miners who were seeking gold. Once gold was found in the Black Hills, miners were soon moving onto the Sioux hunting grounds and demanding protection from the U.S. Army. Soon, the Army was ordered to move against wandering bands of Sioux hunting on the range in accordance with their treaty rights.

In 1876, Custer, leading an Army detachment, encountered an encampment of Sioux and Cheyenne at the Little Bighorn River. Custer's detachment was annihilated, but the United States would continue its battle against the Sioux Tribe in the Black Hills until the government confiscated the land in 1877. To this day, ownership of the Black Hills remains the subject of a legal dispute between the U.S. Government and the Sioux Nation.

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Transcript

ARTICLES OF A TREATY MADE AND CONCLUDED BY AND BETWEEN

Lieutenant General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C. C. Augur, J. B. Henderson, Nathaniel G. Taylor, John G. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different

bands of the Sioux Nation of Indians, by their Chiefs and Head men, whose names are hereto subscribed, they being duly authorized to act in the premises.

ARTICLE I.

From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites, or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof, made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named, solemnly agree that they will upon proof made to their Agent, and notice by him, deliver up the wrong doer to the United States, to be tried and punished according to its laws, and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this Article as in his judgment may be proper, but no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country to wit: viz, commencing on the east bank of the Missouri river where the forty sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto all existing reservations of the East back of said river; shall be and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians, as from time to time they may be willing, with the consent of the United States, to admit amongst them, and 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 to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon or reside in the territory described in this article, 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.

ARTICLE III.

If it should appear from actual survey or other satisfactory examination of said tract of land, that it contains less than one hundred and sixty acres of tillable land, for each person, who at the time may be authorized to reside on it under the provisions of this Treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil, as farmers, the United States agrees to set apart for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

ARTICLE IV.

The United States agrees at its own proper expense to construct, at some place on the Missouri river, near the centre of said reservation where timber and water may be convenient, the following buildings, to wit: a warehouse, a store room for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician to cost not more than three thousand dollars, and five other buildings for a Carpenter, Farmer, Blacksmith, Miller, and Engineer, each to cost not exceeding two thousand dollars; also, a school house or Mission building so soon as a sufficient number of children can be induced by the Agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular Saw-Mill, with a Grist-Mill and Shingle Machine attached to the same to cost not exceeding eight thousand dollars.

ARTICLE V.

The United States agrees that the Agent for said Indians, shall, in the future make his home at the Agency building; that he shall reside among them and keep an office open at all times, for the purpose of prompt and diligent enquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their Treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken

in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE VI.

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the Agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified and recorded in the "Land Book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon, be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected, a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the Agent, after the same shall have been recorded by him, in a book to be kept in his office subject to inspection, which said book shall be known as the "Sioux Land Book."

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or territory, not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands; upon application in writing sustained by the proof of two disinterested witnesses made to the Register of the local land office, when the land sought to be entered

is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the Commissioner of the General Land Office. And the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall at the same time retain all his rights to benefits accruing to Indians under this treaty.

ARTICLE VII.

In order to insure the civilization of the Indians entering into this Treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they, therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school, and it is hereby made the duty of the Agent for said Indians, to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages, who can be induced or compelled to attend school, a house shall be provided; and a teacher competent to teach the elementary branches of an English education, shall be furnished who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

ARTICLE VIII.

When the head of a family or lodge shall have selected lands and received his certificate as above directed and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value, twenty-five dollars. And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for and whenever more than one hundred persons shall enter upon the cultivation of the soil a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

ARTICLE IX.

At any time after ten years from the making of this Treaty the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer and miller herein provided for, but in case of such withdrawal, an additional sum thereafter, of ten thousand dollars per annum shall be devoted to the education of said Indians, and the

Commissioner of Indian Affairs, shall, upon careful enquiry into their condition, make such rules and regulations for the expenditure of said sums as will best promote the education and moral improvement of said tribes.

ARTICLE X.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the Agency House on the reservation herein named, on or before the first day of August of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat and a pair of home made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the Agent each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years while such persons roam and hunt and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper: And, if within the thirty years, at any time, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the Indians named herein, Congress, may, by law, change the appropriation to other purposes, but in no event, shall the amount of the appropriation be withdrawn or discontinued for the period named. And the President shall, annually, detail an officer of the Army to be present and attest the delivery of all the goods, herein named, to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery: And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States for the period of four years after he shall have settled upon said reservation one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall

remove to the reservation herein described and commence farming, one good American cow, and one good well broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE XI.

In consideration of the advantages and benefits conferred by this Treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation, as herein defined, but yet reserve the right to hunt on any lands, north of North Platte and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase, and they, the said Indians, further expressly, agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the Plains.

2d. That they will permit the peaceful construction of any railroad, not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river, and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested Commissioners to be appointed by the President for that purpose, one of the said commissioners to be a Chief or Head man of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads, now established, south of the North Platte river, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE XII.

No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying or

interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article VI of this treaty.

ARTICLE XIII.

The United States hereby agrees to furnish annually, to the Indians, the Physician, Teachers, Carpenter, Miller, Engineer, Farmer, and Blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the Estimate of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XIV.

It is agreed that the sum of five hundred dollars annually for three years, from date, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the Agent, may grow the most valuable crops for the respective year.

ARTICLE XV.

The Indians herein named, agree that when the Agency House and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this Treaty, to hunt as stipulated in Article XI hereof.

ARTICLE XVI.

The United States hereby agrees and stipulates that the country, north of the North Platte river and east of the summits of the Big Horn Mountains, shall be held and considered to be unceded Indian Territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained to pass through the same: And it is further agreed by the United States that within ninety days after the conclusion of peace with all the Bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned and that the road leading to them and by them to the settlements in the territory of Montana shall be closed.

ARTICLE XVII.

It is hereby expressly understood and agreed by and between the respective parties to this Treaty, that the Execution of this Treaty and its ratification by the United States Senate shall have the effect and shall be construed as abrogating and annulling all treaties and agreements heretofore Entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and Bands of Indians as become parties to this Treaty, but no further.

In testimony of all which we the said Commissioners and we the Chiefs and Head men of the Brule Band of the Sioux Nation have hereunto set our hands and seals at Fort Laramie, Dakota Territory, this twenty ninth day of April in the year one thousand eight hundred and sixty eight.

N. G. TAYLOR,
W. T. SHERMAN,
Lieutenant General
WM. S. HARNEY,
Brevet Major General U.S.A.
JOHN B. SANBORN,
S. F. TAPPAN,
C. C. AUGUR,
Brevet Major General
ALFRED H. TERRY,
Brevet Major General U.S.A.
Attest:
A. S. H. WHITE, Secretary.

Executed on the part of the Brule Band of Sioux, by the Chiefs and Head man whose names are hereto annexed, they being thereunto duly authorized, at Fort Laramie, D. T., the twenty ninth day of April in the year A. D. 1868.

MA-ZA-PON-KASKA, his X mark, Iron Shell.
WAH-PAT-SHAH, his X mark, Red Leaf.
HAH-SAH-PAH, his X mark, Black Horn.
ZIN-TAH-GAH-LAT-WAH, his X mark, Spotted Tail.
ZIN-TAH-GKAH, his X mark, White Tail.
ME-WAH-TAH-NE-HO-SKAH, his X mark, Tall Man.
SHE-CHA-CHAT-KAH, his X mark, Bad Left Hand.
NO-MAH-NO-PAH, his X mark, Two and Two.
TAH-TONKA-SKAH, his X mark, White Bull.
CON-RA-WASHTA, his X mark, Pretty Coon.
HA-CAH-CAH-SHE-CHAH, his X mark, Bad Elk.
WA-HA-KA-ZAH-ISH-TAH, his X mark, Eye Lance.
MA-TO-HA-KE-TAH, his X mark, Bear that looks behind.
BELLA-TONKA-TONKA, his X mark, Big Partisan.
MAH-TO-HO-HONKA, his X mark, Swift Bear.
TO-WIS-NE, his X mark, Cold Place.

ISH-TAH-SKAH, his X mark, White Eye.
MA-TA-LOO-ZAH, his X mark, Fast Bear.
AS-HAH-HAH-NAH-SHE, his X mark, Standing Elk.
CAN-TE-TE-KI-YA, his X mark, The Brave Heart.
SHUNKA-SHATON, his X mark, Day Hawk.
TATANKA-WAKON, his X mark, Sacred Bull.
MAPIA SHATON, his X mark, Hawk Cloud.
MA-SHA-A-OW, his X mark, Stands and Comes.
SHON-KA-TON-KA, his X mark, Big Dog.

Attest:

ASHTON S. H. WHITE, Secretary of Commission.
GEORGE B. WITHS, Phonographer to Commission.
GEO. H. HOLTZMAN.
JOHN D. HOWLAND.
JAMES C. O'CONNOR.
CHAR. E. GUERN, Interpreter.
LEON T. PALLARDY, Interpreter.
NICHOLAS JANIS, Interpreter.

Executed on the part of the Ogallalla band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized, at Fort Laramie, the 25th day of May, in the year A. D. 1868.

TAH-SHUN-KA-CO-QUI-PAH, his mark, Man-afraid-of-his-horses.
SHA-TON-SKAH, his X mark, White Hawk.
SHA-TON-SAPAH, his X mark, Black Hawk.
EGA-MON-TON-KA-SAPAH, his X mark, Black Tiger
OH-WAH-SHE-CHA, his X mark, Bad Wound.
PAH-GEE, his X mark, Grass.
WAH-NON SAH-CHE-GEH, his X mark, Ghost Heart.
COMECH, his X mark, Crow.
OH-HE-TE-KAH, his X mark, The Brave.
TAH-TON-KAH-HE-YO-TA-KAH, his X mark, Sitting Bull.
SHON-KA-OH-WAH-MEN-YE, his X mark, Whirlwind Dog.
HA-KAH-KAH-TAH-MIECH, his X mark, Poor Elk.
WAM-BU-LEE-WAH-KON, his X mark, Medicine Eagle.
CHON-GAH-MA-HE-TO-HANS-KA, his X mark, High Wolf.
WAH-SECHUN-TA-SHUN-KAH, his X mark, American Horse.
MAH-KAH-MAH-HA-MAK-NEAR, his X mark, Man that walks under the ground.
MAH-TO-TOW-PAH, his X mark, Four Bears.

MA-TO-WEE-SHA-KTA, his X mark, One that kills the bear.
OH-TAH-KEE-TOKA-WEE-CHAKTA, his X mark, One that kills in a hard place.
TAH-TON-KAH-TA-MIECH, his X mark, The Poor Bull.
OH-HUNS-EE-GA-NON-SKEN, his X mark, Mad Shade.
SHAH-TON-OH-NAH-OM-MINNE-NE-OH-MINNE, his X mark, Whirling hawk.
MAH-TO-CHUN-KA-OH, his X mark, Bear's Back.
CHE-TON-WEE-KOH, his X mark, Fool Hawk.
WAH-HOH-KE-ZA-AH-HAH, his X mark,
EH-TON-KAH, his X mark, Big Mouth.
MA-PAH-CHE-TAH, his X mark, Bad Hand.
WAH-KE-YUN-SHAH, his X mark, Red Thunder.
WAK-SAH, his X mark, One that Cuts Off.
CHAH-NOM-QUI-YAH, his X mark, One that Presents the Pipe.
WAH-KE-KE-YAN-PUH-TAH, his X mark, Fire Thunder.
MAH-TO-NONK-PAH-ZE, his X mark, Bear with Yellow Ears.
CON-REE-TEH-KA, his X mark, The Little Crow.
HE-HUP-PAH-TOH, his X mark, The Blue War Club.
SHON-KEE-TOH, his X mark, The Blue Horse.
WAM-BALLA-OH-CONQUO, his X mark, Quick Eagle.
TA-TONKA-SUPPA, his X mark, Black Bull.
MOH-TOH-HA-SHE-NA, his X mark, The Bear Hide.

Attest:

S. E. WARD.

JAS. C. O'CONNOR.

J. M. SHERWOOD.

W. C. SLICER.

SAM DEON.

H. M. MATHEWS.

JOSEPH BISS

NICHOLAS JANIS, Interpreter.

LEFROY JOTT, Interpreter.

ANTOINE JANIS, Interpreter.

Executed on the part of the Minneconjou band of Sioux by the chiefs and headmen whose names are hereunto subscribed, they being thereunto duly authorized.

HEH-WON-GE-CHAT, his X mark, One Horn.
OH-PON-AH-TAH-E-MANNE, his X mark, The Elk that Bellows Walking.
HEH-HO-LAH-ZEH-CHA-SKAH, his X mark, Young White Bull.
WAH-CHAH-CHUM-KAH-COH-KEEPAH, his X mark, One that is Afraid of Shield.

HE-HON-NE-SHAKTA, his X mark, The Old Owl.
MOC-PE-A-TOH, his X mark, Blue Cloud.
OH-PONG-GE-LE-SKAH, his X mark, Spotted Elk.
TAH-TONK-KA-HON-KE-SCHUE, his X mark, Slow bull.
SHONK-A-NEE-SHAH-SHAH-ATAH-PE, his X mark, The Dog Chief.
MA-TO-TAH-TA-TONK-KA, his X mark, Bull Bear.
WOM-BEH-LE-TON-KAH, his X mark, The Big Eagle.
MATOH, EH-SCHNE-LAH, his X mark, The Lone Bear.
MA-TOH-OH-HE-TO-KEH, his X mark, The Brave Bear.
EH-CHE-MA-KEH, his X mark, The Runner.
TI-KI-YA, his X mark, The Hard.
HE-MA-ZA, his X mark, Iron Horn.

Attest:

JAS. C O'CONNOR,
WM. D. BROWN,
NICHOLAS JANIS,
ANTOINE JANIS,
Interpreters.

Executed on the part of the Yancetonais band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized:

MAH-TO-NON-PAH, his X mark, Two Bears.
MA-TO-HNA-SKIN-YA, his X mark, Mad Bear.
HE-O-PU-ZA, his X mark, Louzy.
AH-KE-CHE-TAH-CHE-KA-DAN, his X mark, Little Soldier.
MAH-TO-E-TAN-CHAN, his X mark, Chief Bear.
CU-WI-TO-WIA, his X mark, Rotten Stomach.
SKUN-KA-WE-TKO, his X mark, Fool Dog.
ISH-TA-SAP-PAH, his X mark, Black Eye.
IH-TAN-CHAN, his X mark, The Chief.
I-A-WI-CA-KA, his X mark, The One who Tells the Truth.
AH-KE-CHE-TAH, his X mark, The Soldier.
TA-SHI-NA-GI, his X mark, Yellow Robe.
NAH-PE-TON-KA, his X mark, Big Hand.
CHAN-TEE-WE-KTO, his X mark, Fool Heart.
HOH-GAN-SAH-PA, his X mark, Black Catfish.
MAH-TO-WAH-KAN, his X mark, Medicine Bear.
SHUN-KA-KAN-SHA, his X mark, Red Horse.
WAN-RODE, his X mark, The Eagle.

CAN-HPI-SA-PA, his X mark, Black Tomahawk.
WAR-HE-LE-RE, his X mark, Yellow Eagle.
CHA-TON-CHE-CA, his X mark, Small Hawk, or Long Fare.
SHU-GER-MON-E-TOO-HA-SKA, his X mark, Fall Wolf.
MA-TO-U-TAH-KAH, his X mark, Sitting Bear.
HI-HA-CAH-GE-NA-SKENE, his X mark, Mad Elk.
Arapahoes.

LITTLE CHIEF, his X mark.
TALL BEAR, his X mark.
TOP MAN, his X mark.
NEVA, his X mark.
THE WOUNDED BEAR, his X mark.
WHIRLWIND, his X mark.
THE FOX, his X mark.
THE DOG BIG MOUTH, his X mark.
SPOTTED WOLF, his X mark.
SORREL HORSE, his X mark.
BLACK COAL, his X mark.
BIG WOLF, his X mark.
KNOCK-KNEE, his X mark.
BLACK CROW, his X mark.
THE LONE OLD MAN, his X mark.
PAUL, his X mark.
BLACK BULL, his X mark.
BIG TRACK, his X mark.
THE FOOT, his X mark.
BLACK WHITE, his X mark.
YELLOW HAIR, his X mark.
LITTLE SHIELD, his X mark.
BLACK BEAR, his X mark.
WOLF MOCASSIN, his X mark.
BIG ROBE, his X mark.
WOLF CHIEF, his X mark.

Witnesses:

ROBERT P. MCKIBBIN,
Captain 4th Infantry, and Bvt. Lieut. Col. U. S. A.,
Commanding Fort Laramie.
WM. H. POWELL,
Brevet Major, Captain 4th Infantry.

HENRY W. PATTERSON,

Captain 4th Infantry.

THEO E. TRUE,

Second Lieutenant 4th Infantry.

W. G. BULLOCK.

FORT LARAMIE, WYOMING TERRITORY

November 6, 1868.

MAH-PI-AH-LU-TAH, his X mark, Red Cloud.

WA-KI-AH-WE-CHA-SHAH, his X mark, Thunder Man.

MA-ZAH-ZAH-GEH, his X mark, Iron Cane.

WA-UMBLE-WHY-WA-KA-TUYAH, his X mark, High Eagle.

KO-KE-PAH, his X mark, Man Afraid.

WA-KI-AH-WA-KOU-AH, his X mark, Thunder Flying Running.

Witnessess:

W. MCE. DYE,

Brevet Colonel U. S. Army,

Commanding.

A. B. CAIN,

Captain 4th Infantry, Brevet Major U. S. Army.

ROBT. P. MCKIBBIN,

Captain 4th Infantry, Bvt. Lieut. Col. U. S. Army.

JNO. MILLER,

Captain 4th Infantry.

G. L. LUHN,

First Lieutenant 4th Infantry, Bvt. Capt. U. S. Army.

H. C. SLOAN,

Second Lieutenant 4th Infantry.

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Syllabus

UNITED STATES v. SIOUX NATION OF INDIANS
ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 79-639. Argued March 24, 1980—Decided June 30, 1980

Under the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation (Sioux), and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths of the adult male Sioux population. The treaty also reserved the Sioux' right to hunt in certain unceded territories. Subsequently, in 1876, an "agreement" presented to the Sioux by a special Commission but signed by only 10% of the adult male Sioux population, provided that the Sioux would relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations for as long as they would be needed. In 1877, Congress passed an Act (1877 Act) implementing this "agreement" and thus, in effect, abrogated the Fort Laramie Treaty. Throughout the ensuing years, the Sioux regarded the 1877 Act as a breach of that treaty, but Congress did not enact any mechanism by which they could litigate their claims against the United States until 1920, when a special jurisdictional Act was passed. Pursuant to this Act, the Sioux brought suit in the Court of Claims, alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. In 1942, this claim was dismissed by the Court of Claims, which held that it was not authorized by the 1920 Act to question whether the compensation afforded the Sioux in the 1877 Act was an adequate price for the Black Hills and that the Sioux' claim was a moral one not protected by the Just Compensation Clause. Thereafter, upon enactment of the Indian Claims Commission Act in 1946, the Sioux resubmitted their claim to the Indian Claims Commission, which held that the 1877 Act effected a taking for which the Sioux were entitled to just compensation and that the 1942 Court of Claims decision did not bar the taking claim under *res judicata*. On appeal, the Court of Claims, affirming the Commission's holding that a want of fair and honorable dealings on the Government's part was evidenced, ultimately held that the Sioux were entitled to an award of at least \$17.5 million, without interest, as damages under the Indian Claims Commission Act,

for the lands surrendered and for gold taken by trespassing prospectors prior to passage of the 1877 Act. But the court further held that the merits of the Sioux' taking claim had been reached in its 1942 decision and that therefore such claim was barred by *res judicata*. The court noted that only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. Thereafter, in 1978, Congress passed an Act (1978 Act) providing for *de novo* review by the Court of Claims of the merits of the Indian Claims Commission's holding that the 1877 Act effected a taking of the Black Hills, without regard to *res judicata*, and authorizing the Court of Claims to take new evidence in the case. Pursuant to this Act, the Court of Claims affirmed the Commission's holding. In so affirming, the court, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property, applied the test of whether Congress had made a good-faith effort to give the Sioux the full value of their land. Under this test, the court characterized the 1877 Act as a taking in exercise of Congress' power of eminent domain over Indian property. Accordingly, the court held that the Sioux were entitled to an award of interest on the principal sum of \$17.1 million (the fair market value of the Black Hills as of 1877), dating from 1877.

Held.

1. Congress' enactment of the 1978 Act, as constituting a mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States, did not violate the doctrine of the separation of powers either on the ground that Congress impermissibly disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in the case mere advisory opinions, or on the ground that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left that court no adjudicatory function to perform. *Cherokee Nation v. United States*, 270 U.S. 476. Congress, under its broad constitutional power to define and "to pay the Debts of the United States," may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States. When the Sioux returned to the Court of Claims following passage of the 1978 Act, they were in pursuit of judicial enforcement of a new legal right. Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. *United States v. Klen*, 13 Wall. 128, distinguished. Pp. 390-407.

2. The Court of Claims' legal analysis and factual findings fully support its conclusion that the 1877 Act did not effect a "mere change in the form of investment of Indian tribal property," but, rather, effected a taking of tribal property which had been set aside by the Fort Laramie Treaty for the Sioux' exclusive occupation, which taking implied an obligation on the Government's part to make just compensation to the Sioux. That obligation, including an award of interest, must now be paid. The principles that it "must [be] presume[d] that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that [it] exercised its best judgment in the premises," *Lone Wolf v. Hitchcock*, 187 U. S. 553, 568, are inapplicable in this case. The question whether a particular congressional measure was appropriate for protecting and advancing a tribe's interests, and therefore not subject to the Just Compensation Clause, is factual in nature, and the answer must be based on a consideration of all the evidence presented. While a reviewing court is not to second-guess a legislative judgment that a particular measure would serve the tribe's best interests, the court is required, in considering whether the measure was taken in pursuance of Congress' power to manage and control tribal lands for the Indians' welfare, to engage in a thorough and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry Pp. 407-423.

220 Ct. Cl. 442, 601 F. 2d 1157, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Parts III and V of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 424. REHNQUIST, J., filed a dissenting opinion, *post*, p. 424.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *William Alsop*, *Dirk D Snel*, and *Martin W Matzen*.

Arthur Lazarus, Jr., argued the cause for respondents. With him on the brief were *Marvin J Sonosky*, *Reid P Chambers*, *Harry R. Sachse*, and *William Howard Payne*.*

*Steven M. Tullberg and Robert T Coulter filed a brief for the Indian Law Resource Center as *amicus curiae*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over \$17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866-1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.¹

The Fort Laramie Treaty included several agreements central to the issues presented in this case. First, it established the Great Sioux Reservation, a tract of land bounded on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one

¹ The Sioux territory recognized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana. The Powder River War is described in some detail in D. Robinson, *A History of the Dakota or Sioux Indians* 356-381 (1904), reprinted in 2 *South Dakota Historical Collections* (1904). Red Cloud's career as a warrior and statesman of the Sioux is recounted in 2 G. Hebard & E. Brinnstool, *The Bozeman Trail* 175-204 (1922).

hundred and fourth meridian of west longitude,² in addition to certain reservations already existing east of the Missouri. The United States "solemnly agree[d]" that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [this] territory" *Ibid.*

Second, the United States permitted members of the Sioux tribes to select lands within the reservation for cultivation. *Id.*, at 637 In order to assist the Sioux in becoming civilized farmers, the Government promised to provide them with the necessary services and materials, and with subsistence rations for four years. *Id.*, at 639.³

Third, in exchange for the benefits conferred by the treaty, the Sioux agreed to relinquish their rights under the Treaty of September 17, 1851, to occupy territories outside the reservation, while reserving their "right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase." *Ibid.* The Indians also expressly agreed to withdraw all opposition to the build-

²The boundaries of the reservation included approximately half the area of what is now the State of South Dakota, including all of that State west of the Missouri River save for a narrow strip in the far western portion. The reservation also included a narrow strip of land west of the Missouri and north of the border between North and South Dakota.

³The treaty called for the construction of schools and the provision of teachers for the education of Indian children, the provision of seeds and agricultural instruments to be used in the first four years of planting, and the provision of blacksmiths, carpenters, millers, and engineers to perform work on the reservation. See 15 Stat. 637-638, 640. In addition, the United States agreed to deliver certain articles of clothing to each Indian residing on the reservation, "on or before the first day of August of each year, for thirty years." *Id.*, at 638. An annual stipend of \$10 per person was to be appropriated for all those members of the Sioux Nation who continued to engage in hunting; those who settled on the reservation to engage in farming would receive \$20. *Ibid.* Subsistence rations of meat and flour (one pound of each per day) were to be provided for a period of four years to those Indians upon the reservation who could not provide for their own needs. *Id.*, at 639.

ing of railroads that did not pass over their reservation lands, not to engage in attacks on settlers, and to withdraw their opposition to the military posts and roads that had been established south of the North Platte River. *Ibid.*

Fourth, Art. XII of the treaty provided.

"No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same." *Ibid.*⁴

The years following the treaty brought relative peace to the Dakotas, an era of tranquility that was disturbed, however, by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver.⁵ In 1874 the Army planned and undertook an exploratory expedition into the Hills, both for the purpose of establishing a military outpost from which to control those Sioux who had not accepted the terms of the Fort Laramie Treaty, and for the purpose of investigating "the country about which dreamy stories have been told." D. Jackson, *Custer's Gold* 14 (1966) (quoting the 1874 annual report of Lieutenant General Philip H. Sheridan, as Commander of the Military Division of the Missouri, to the Secretary of War). Lieutenant Colonel George Armstrong Custer led the expedition of close to 1,000 soldiers and teamsters, and a substantial number of military and civilian aides.

⁴ The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return." Robinson, *supra* n. 1, at 387.

⁵ The history of speculation concerning the presence of gold in the Black Hills, which dated from early explorations by prospectors in the 1830's, is capsulized in D. Jackson, *Custer's Gold* 3-7 (1966).

Custer's journey began at Fort Abraham Lincoln on the Missouri River on July 2, 1874. By the end of that month they had reached the Black Hills, and by mid-August had confirmed the presence of gold fields in that region. The discovery of gold was widely reported in newspapers across the country.⁶ Custer's florid descriptions of the mineral and timber resources of the Black Hills, and the land's suitability for grazing and cultivation, also received wide circulation, and had the effect of creating an intense popular demand for the "opening" of the Hills for settlement.⁷ The only obstacle to "progress" was the Fort Laramie Treaty that reserved occupancy of the Hills to the Sioux.

Having promised the Sioux that the Black Hills were reserved to them, the United States Army was placed in the position of having to threaten military force, and occasionally to use it, to prevent prospectors and settlers from trespassing on lands reserved to the Indians. For example, in September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry, Commander of the Department of Dakota, at Saint Paul, directing him to use force to prevent companies of prospectors from trespassing on the Sioux Reservation. At the same time, Sheridan let it be known that

⁶ In 1974, the Center for Western Studies completed a project compiling contemporary newspaper accounts of Custer's expedition. See H. Krause & G. Olson, *Prelude to Glory* (1974). Several correspondents traveled with Custer on the expedition and their dispatches were published by newspapers both in the Midwest and the East. *Id.*, at 6.

⁷ See Robinson, *supra* n. 1, at 408-410; A. Tallent, *The Black Hills* 130 (1975 reprint of 1899 ed.), J. Vaughn, *The Reynolds Campaign on Powder River* 3-4 (1961).

The Sioux regarded Custer's expedition in itself to be a violation of the Fort Laramie Treaty. In later negotiations for cession of the Black Hills, Custer's trail through the Hills was referred to by a chief known as Fast Bear as "that thieves' road." Jackson, *supra* n. 5, at 24. Chroniclers of the expedition, at least to an extent, have agreed. See *id.*, at 120; G. Manypenny, *Our Indian Wards* xxx, 296-297 (1972 reprint of 1880 ed.).

he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians." App. 62-63. Sheridan's instructions were published in local newspapers. See *id.*, at 63.⁸

Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory. In a letter dated November 9, 1875, to Terry, Sheridan reported that he had met with President Grant, the Secretary of the Interior, and the Secretary of War, and that the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners, "it being his belief that such resistance only increased their desire and complicated the troubles." *Id.*, at 59. These orders were to be enforced "quietly," *ibid.*, and the President's decision was to remain "confidential." *Id.*, at 59-60 (letter from Sheridan to Sherman).

With the Army's withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of settlers into the Black Hills increased. The Government concluded that the only practical course was to secure to the citizens of the United States the right to mine the Black Hills for gold. Toward

⁸ General William Tecumseh Sherman, Commanding General of the Army, as quoted in the *Saint Louis Globe* in 1875, described the military's task in keeping prospectors out of the Black Hills as "the same old story, the story of Adam and Eve and the forbidden fruit." Jackson, *supra* n. 5, at 112. In an interview with a correspondent from the *Bismarck Tribune*, published September 2, 1874, Custer recognized the military's obligation to keep all trespassers off the reservation lands, but stated that he would recommend to Congress "the extinguishment of the Indian title at the earliest moment practicable for military reasons." Krause & Olson, *supra* n. 6, at 233. Given the ambivalence of feeling among the commanding officers of the Army about the practicality and desirability of its treaty obligations, it is perhaps not surprising that one chronicler of Sioux history would describe the Government's efforts to dislodge invading settlers from the Black Hills as "feeble." F. Hans, *The Great Sioux Nation* 522 (1964 reprint).

that end, the Secretary of the Interior, in the spring of 1875, appointed a commission to negotiate with the Sioux. The commission was headed by William B. Allison. The tribal leaders of the Sioux were aware of the mineral value of the Black Hills and refused to sell the land for a price less than \$70 million. The commission offered the Indians an annual rental of \$400,000, or payment of \$6 million for absolute relinquishment of the Black Hills. The negotiations broke down.⁹

In the winter of 1875–1876, many of the Sioux were hunting in the unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty. On December 6, 1875, for reasons that are not entirely clear, the Commissioner of Indian Affairs sent instructions to the Indian agents on the reservation to notify those hunters that if they did not return to the reservation agencies by January 31, 1876, they would be treated as “hostiles.” Given the severity of the winter, compliance with these instructions was impossible. On February 1, the Secretary of the Interior nonetheless relinquished jurisdiction over all hostile Sioux, including those Indians exercising their treaty-protected hunting rights, to the War Department. The Army’s campaign against the “hostiles” led to Sitting Bull’s notable victory over Custer’s forces at the battle of the Little Big Horn on June 25. That victory, of course, was short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the Government.¹⁰

⁹ The Report of the Allison Commission to the Secretary of the Interior is contained in the Annual Report of the Commissioner of Indian Affairs (1875), App. 146, 158–195. The unsuccessful negotiations are described in some detail in Jackson, *supra* n. 5, at 116–118, and in Robinson, *supra* n. 1, at 416–421.

¹⁰ These events are described by Manypenny, *supra* n. 7, at 294–321, and Robinson, *supra* n. 1, at 422–438.

In the meantime, Congress was becoming increasingly dissatisfied with the failure of the Sioux living on the reservation to become self-sufficient.¹¹ The Sioux' entitlement to subsistence rations under the terms of the Fort Laramie Treaty

¹¹ In *Dakota Twilight* (1976), a history of the Standing Rock Sioux, Edward A. Milligan states:

"Nearly seven years had elapsed since the signing of the Fort Laramie Treaty and still the Sioux were no closer to a condition of self-support than when the treaty was signed. In the meantime the government had expended nearly thirteen million dollars for their support. The future treatment of the Sioux became a matter of serious moment, even if viewed from no higher standard than that of economics." *Id.*, at 52.

One historian has described the ration provisions of the Fort Laramie Treaty as part of a broader reservation system designed by Congress to convert nomadic tribesmen into farmers. Hagan, *The Reservation Policy: Too Little and Too Late*, in *Indian-White Relations: A Persistent Paradox* 157-169 (J. Smith & R. Kvasnicka, eds., 1976). In words applicable to conditions on the Sioux Reservation during the years in question, Professor Hagan stated:

"The idea had been to supplement the food the Indians obtained by hunting until they could subsist completely by farming. Clauses in the treaties permitted hunting outside the strict boundaries of the reservations, but the inevitable clashes between off-reservation hunting parties and whites led this privilege to be first restricted and then eliminated. The Indians became dependent upon government rations more quickly than had been anticipated, while their conversion to agriculture lagged behind schedule.

"The quantity of food supplied by the government was never sufficient for a full ration, and the quality was frequently poor. But in view of the fact that most treaties carried no provision for rations at all, and for others they were limited to four years, the members of Congress tended to look upon rations as a gratuity that should be terminated as quickly as possible. The Indian Service and military personnel generally agreed that it was better to feed than to fight, but to the typical late nineteenth-century member of Congress, not yet exposed to doctrines of social welfare, there was something obscene about grown men and women drawing free rations. Appropriations for subsistence consequently fell below the levels requested by the secretary of the interior.

"That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest." *Id.*, at 161 (footnotes omitted).

had expired in 1872. Nonetheless, in each of the two following years, over \$1 million was appropriated for feeding the Sioux. In August 1876, Congress enacted an appropriations bill providing that "hereafter there shall be no appropriation made for the subsistence" of the Sioux, unless they first relinquished their rights to the hunting grounds outside the reservation, ceded the Black Hills to the United States, and reached some accommodation with the Government that would be calculated to enable them to become self-supporting. Act of Aug. 15, 1876, 19 Stat. 176, 192.¹² Toward this end, Congress requested the President to appoint another commission to negotiate with the Sioux for the cession of the Black Hills.

This commission, headed by George Manypenny, arrived in the Sioux country in early September and commenced meetings with the head men of the various tribes. The members of the commission impressed upon the Indians that the United States no longer had any obligation to provide them with subsistence rations. The commissioners brought with them the text of a treaty that had been prepared in advance. The principal provisions of this treaty were that the Sioux would relinquish their rights to the Black Hills and other lands west of the one hundred and third meridian, and their rights to hunt in the unceded territories to the north, in exchange for subsistence rations for as long as they would be needed to ensure the Sioux' survival. In setting out to obtain the tribes' agreement to this treaty, the commission ignored the stipulation of the Fort Laramie Treaty that any cession of the lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males. Instead, the treaty was presented just to Sioux

¹² The chronology of the enactment of this bill does not necessarily support the view that it was passed in reaction to Custer's defeat at the Battle of the Little Big Horn on June 25, 1876, although some historians have taken a contrary view. See Jackson, *supra* n. 5, at 119.

chiefs and their leading men. It was signed by only 10% of the adult male Sioux population.¹³

Congress resolved the impasse by enacting the 1876 "agreement" into law as the Act of Feb. 28, 1877 (1877 Act) 19 Stat. 254. The Act had the effect of abrogating the earlier Fort Laramie Treaty, and of implementing the terms

¹³ The commission's negotiations with the chiefs and head men is described by Robinson, *supra* n. 1, at 439-442. He states:

"As will be readily understood, the making of a treaty was a forced put, so far as the Indians were concerned. Defeated, disarmed, dismounted, they were at the mercy of a superior power and there was no alternative but to accept the conditions imposed upon them. Thus they did with as good grace as possible under all of the conditions existing." *Id.*, at 442.

Another early chronicler of the Black Hills region wrote of the treaty's provisions in the following chauvinistic terms:

"It will be seen by studying the provisions of this treaty, that by its terms the Indians from a material standpoint lost much, and gained but little. By the first article they lose all rights to the unceded Indian territory in Wyoming from which white settlers had then before been altogether excluded, by the second they relinquish all right to the Black Hills, and the fertile valley of the Belle Fourche in Dakota, without additional material compensation, by the third conceding the right of way over the unceded portions of their reservation, by the fourth they receive such supplies only, as were provided by the treaty of 1868, restricted as to the points for receiving them. The only real gain to the Indians seems to be embodied in the fifth article of the treaty [Government's obligation to provide subsistence rations]. The Indians, doubtless, realized that the Black Hills was destined soon to slip out of their grasp, regardless of their claims, and therefore thought it best to yield to the inevitable, and accept whatever was offered them.

"They were assured of a continuance of their regular daily rations, and certain annuities in clothing each year, guaranteed by the treaty of 1868, and what more could they ask or desire, than that a living be provided for themselves, their wives, their children, and all their relations, including squaw men, indirectly, thus leaving them free to live their wild, careless, unrestrained life, exempt from all the burdens and responsibilities of civilized existence? In view of the fact that there are thousands who are obliged to earn their bread and butter by the sweat of their brows, and that have hard work to keep the wolf from the door, they should be satisfied." Tallent, *supra* n. 7, at 133-134.

of the Manypenny Commission's "agreement" with the Sioux leaders.¹⁴

The passage of the 1877 Act legitimized the settlers' invasion of the Black Hills, but throughout the years it has been regarded by the Sioux as a breach of this Nation's solemn obligation to reserve the Hills in perpetuity for occupation by the Indians. One historian of the Sioux Nation commented on Indian reaction to the Act in the following words:

"The Sioux thus affected have not gotten over talking about that treaty yet, and during the last few years they have maintained an organization called the Black Hills Treaty Association, which holds meetings each year at the various agencies for the purpose of studying the

¹⁴ The 1877 Act "ratified and confirmed" the agreement reached by the Manypenny Commission with the Sioux tribes. 19 Stat. 254. It altered the boundaries of the Great Sioux Reservation by adding some 900,000 acres of land to the north, while carving out virtually all that portion of the reservation between the one hundred and third and one hundred and fourth meridians, including the Black Hills, an area of well over 7 million acres. The Indians also relinquished their rights to hunt in the unceded lands recognized by the Fort Laramie Treaty, and agreed that three wagon roads could be cut through their reservation. *Id.*, at 255.

In exchange, the Government reaffirmed its obligation to provide all annuities called for by the Fort Laramie Treaty, and "to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." *Id.*, at 256. In addition, every individual was to receive fixed quantities of beef or bacon and flour, and other foodstuffs, in the discretion of the Commissioner of Indian Affairs, which "shall be continued until the Indians are able to support themselves." *Ibid.* The provision of rations was to be conditioned, however, on the attendance at school by Indian children, and on the labor of those who resided on lands suitable for farming. The Government also promised to assist the Sioux in finding markets for their crops and in obtaining employment in the performance of Government work on the reservation. *Ibid.*

Later congressional actions having the effect of further reducing the domain of the Great Sioux Reservation are described in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 589 (1977)

treaty with the intention of presenting a claim against the government for additional reimbursements for the territory ceded under it. Some think that Uncle Sam owes them about \$9,000,000 on the deal, but it will probably be a hard matter to prove it." F Fiske, *The Taming of the Sioux* 132 (1917)

Fiske's words were to prove prophetic.

II

Prior to 1946, Congress had not enacted any mechanism of general applicability by which Indian tribes could litigate treaty claims against the United States.¹⁵ The Sioux, however, after years of lobbying, succeeded in obtaining from Congress the passage of a special jurisdictional Act which provided them a forum for adjudication of all claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof." Act of June 3, 1920, ch. 222, 41 Stat. 738. Pursuant to this statute, the Sioux, in 1923, filed a petition with the Court of Claims alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. This claim was dismissed by that court in 1942. In a lengthy and unanimous opinion, the court concluded that it was not authorized by the Act of June 3, 1920, to question whether the compensation afforded the Sioux by Congress in 1877 was an adequate price for the Black Hills, and that the Sioux' claim in this regard was a moral claim not protected by the Just Compensation Clause. *Sioux Tribe v United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943).

In 1946, Congress passed the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.*, creating a new forum to hear and determine all tribal grievances that had

¹⁵ See § 9 of the Act of Mar. 3, 1863, 12 Stat. 767, § 1 of the Tucker Act of Mar. 3, 1887, 24 Stat. 505.

arisen previously. In 1950, counsel for the Sioux resubmitted the Black Hills claim to the Indian Claims Commission. The Commission initially ruled that the Sioux had failed to prove their case. *Sioux Tribe v United States*, 2 Ind. Cl. Comm'n 646 (1954), aff'd, 146 F Supp. 229 (Ct. Cl. 1956). The Sioux filed a motion with the Court of Claims to vacate its judgment of affirmance, alleging that the Commission's decision had been based on a record that was inadequate, due to the failings of the Sioux' former counsel. This motion was granted and the Court of Claims directed the Commission to consider whether the case should be reopened for the presentation of additional evidence. On November 19, 1958, the Commission entered an order reopening the case and announcing that it would reconsider its prior judgment on the merits of the Sioux claim. App. 265-266, see *Sioux Tribe v United States*, 182 Ct. Cl. 912 (1968) (summary of proceedings).

Following the Sioux' filing of an amended petition, claiming again that the 1877 Act constituted a taking of the Black Hills for which just compensation had not been paid, there ensued a lengthy period of procedural sparring between the Indians and the Government. Finally, in October 1968, the Commission set down three questions for briefing and determination. (1) What land and rights did the United States acquire from the Sioux by the 1877 Act? (2) What, if any, consideration was given for that land and those rights? And (3) if there was no consideration for the Government's acquisition of the land and rights under the 1877 Act, was there any payment for such acquisition? App. 266.

Six years later, by a 4-to-1 vote, the Commission reached a preliminary decision on these questions. *Sioux Nation v United States*, 33 Ind. Cl. Comm'n 151 (1974). The Commission first held that the 1942 Court of Claims decision did not bar the Sioux' Fifth Amendment taking claim through application of the doctrine of res judicata. The Commission concluded that the Court of Claims had dismissed the earlier

suit for lack of jurisdiction, and that it had not determined the merits of the Black Hills claim. The Commission then went on to find that Congress, in 1877, had made no effort to give the Sioux full value for the ceded reservation lands. The only new obligation assumed by the Government in exchange for the Black Hills was its promise to provide the Sioux with subsistence rations, an obligation that was subject to several limiting conditions. See n. 14, *supra*. Under these circumstances, the Commission concluded that the consideration given the Indians in the 1877 Act had no relationship to the value of the property acquired. Moreover, there was no indication in the record that Congress ever attempted to relate the value of the rations to the value of the Black Hills. Applying the principles announced by the Court of Claims in *Three Tribes of Fort Berthold Reservation v United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), the Commission concluded that Congress had acted pursuant to its power of eminent domain when it passed the 1877 Act, rather than as a trustee for the Sioux, and that the Government must pay the Indians just compensation for the taking of the Black Hills.¹⁶

The Government filed an appeal with the Court of Claims

¹⁶ The Commission determined that the fair market value of the Black Hills as of February 28, 1877, was \$17.1 million. In addition, the United States was held liable for gold removed by trespassing prospectors prior to that date, with a fair market value in the ground of \$450,000. The Commission determined that the Government should receive a credit for all amounts it had paid to the Indians over the years in compliance with its obligations under the 1877 Act. These amounts were to be credited against the fair market value of the lands and gold taken, and interest as it accrued. The Commission decided that further proceedings would be necessary to compute the amounts to be credited and the value of the rights-of-way across the reservation that the Government also had acquired through the 1877 Act.

Chairman Kuykendall dissented in part from the Commission's judgment, arguing that the Sioux' taking claim was barred by the res judicata effect of the 1942 Court of Claims decision.

from the Commission's interlocutory order, arguing alternatively that the Sioux' Fifth Amendment claim should have been barred by principles of res judicata and collateral estoppel, or that the 1877 Act did not effect a taking of the Black Hills for which just compensation was due. Without reaching the merits, the Court of Claims held that the Black Hills claim was barred by the res judicata effect of its 1942 decision. *United States v. Sioux Nation*, 207 Ct. Cl. 234, 518 F 2d 1298 (1975). The court's majority recognized that the practical impact of the question presented was limited to a determination of whether or not an award of interest would be available to the Indians. This followed from the Government's failure to appeal the Commission's holding that it had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages, without interest, under § 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U. S. C. § 70a (5). Only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. 207 Ct. Cl., at 237, 518 F 2d, at 1299.¹⁷

¹⁷ See *United States v. Tillamooks*, 341 U. S. 48, 49 (1951) (recognizing that the "traditional rule" is that interest is not to be awarded on claims against the United States absent an express statutory provision to the contrary and that the "only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment"). In *United States v. Klamath Indians*, 304 U. S. 119, 123 (1938), the Court stated: "The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

The Court of Claims also noted that subsequent to the Indian Claims Commission's judgment, Congress had enacted an amendment to 25 U. S. C. § 70a, providing generally that expenditures made by the Government "for food, rations, or provisions shall not be deemed payments on the claim." Act of Oct. 27, 1974, § 2, 88 Stat. 1499. Thus, the Government would no longer be entitled to an offset from any judgment eventually awarded the Sioux based on its appropriations for subsistence rations

The court affirmed the Commission's holding that a want of fair and honorable dealings in this case was evidenced, and held that the Sioux thus would be entitled to an award of at least \$17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to passage of the 1877 Act. See n. 16, *supra*. The court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills. The court concluded. "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe." 207 Ct. Cl., at 241, 518 F. 2d, at 1302.

Nonetheless, the court held that the merits of the Sioux' taking claim had been reached in 1942, and whether resolved "rightly or wrongly," *id.*, at 249, 518 F. 2d, at 1306, the claim was now barred by *res judicata*. The court observed that interest could not be awarded the Sioux on judgments obtained pursuant to the Indian Claims Commission Act, and that while Congress could correct this situation, the court could not. *Ibid.*¹⁸ The Sioux petitioned this Court for a writ of certiorari, but that petition was denied. 423 U.S. 1016 (1975)

The case returned to the Indian Claims Commission, where the value of the rights-of-way obtained by the Government through the 1877 Act was determined to be \$3,484, and where it was decided that the Government had made no payments to the Sioux that could be considered as offsets. App. 316.

in the years following the passage of the 1877 Act. 207 Ct. Cl., at 240, 518 F. 2d, at 1301. See n. 16, *supra*.

¹⁸ Judge Davis dissented with respect to the court's holding on *res judicata*, arguing that the Sioux had not had the opportunity to present their claim fully in 1942. 207 Ct. Cl., at 249, 518 F. 2d, at 1306.

The Government then moved the Commission to enter a final award in favor of the Sioux in the amount of \$17.5 million, see n. 16, *supra*, but the Commission deferred entry of final judgment in view of legislation then pending in Congress that dealt with the case.

On March 13, 1978, Congress passed a statute providing for Court of Claims review of the merits of the Indian Claims Commission's judgment that the 1877 Act effected a taking of the Black Hills, without regard to the defenses of res judicata and collateral estoppel. The statute authorized the Court of Claims to take new evidence in the case, and to conduct its review of the merits *de novo*. Pub. L. 95-243, 92 Stat. 153, amending § 20 (b) of the Indian Claims Commission Act. See 25 U. S. C. § 70s (b) (1976 ed., Supp. II).

Acting pursuant to that statute, a majority of the Court of Claims, sitting en banc, in an opinion by Chief Judge Friedman, affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills and of rights-of-way across the reservation. 220 Ct. Cl. 442, 601 F. 2d 1157 (1979).¹⁹ In doing so, the court applied the test it had earlier articulated in *Fort Berthold*, 182 Ct. Cl., at 553, 390 F. 2d, at 691, asking whether Congress had made "a good faith effort to give the Indians the full value of the land," 220 Ct. Cl., at 452, 601 F. 2d, at 1162, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property. The court characterized the Act as a taking, an exercise of Congress' power of eminent domain over Indian property. It distinguished broad statements seemingly leading to a contrary

¹⁹ While affirming the Indian Claims Commission's determination that the acquisition of the Black Hills and the rights-of-way across the reservation constituted takings, the court reversed the Commission's determination that the mining of gold from the Black Hills by prospectors prior to 1877 also constituted a taking. The value of the gold, therefore, could not be considered as part of the principal on which interest would be paid to the Sioux. 220 Ct. Cl., at 466-467, 601 F. 2d, at 1171-1172.

result in *Lone Wolf v Hitchcock*, 187 U. S. 553 (1903), as inapplicable to a case involving a claim for just compensation. 220 Ct. Cl., at 465, 601 F. 2d, at 1170.²⁰

The court thus held that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of \$17.1 million, dating from 1877.²¹

We granted the Government's petition for a writ of certiorari, 444 U. S. 989 (1979), in order to review the important constitutional questions presented by this case, questions not only of longstanding concern to the Sioux, but also of significant economic import to the Government.

III

Having twice denied petitions for certiorari in this litigation, see 318 U. S. 789 (1943), 423 U. S. 1016 (1975), we are confronted with it for a third time as a result of the amendment, above noted, to the Indian Claims Commission Act of 1946, 25 U. S. C. § 70s (b) (1976 ed., Supp. II), which

²⁰ The *Lone Wolf* decision itself involved an action by tribal leaders to enjoin the enforcement of a statute that had the effect of abrogating the provisions of an earlier-enacted treaty with an Indian tribe. See Part IV-B, *infra*.

²¹ Judge Nichols concurred in the result, and all of the court's opinion except that portion distinguishing *Lone Wolf*. He would have held *Lone Wolf*'s principles inapplicable to this case because Congress had not created a record showing that it had considered the compensation afforded the Sioux under the 1877 Act to be adequate consideration for the Black Hills. He did not believe that *Lone Wolf* could be distinguished on the ground that it involved an action for injunctive relief rather than a claim for just compensation. 220 Ct. Cl., at 474-475, 601 F. 2d, at 1175-1176.

Judge Bennett, joined by Judge Kunzig, dissented. The dissenters would have read *Lone Wolf* broadly to hold that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation given. "The law we should apply is that once Congress has, through negotiation or statute, recognized the Indian tribes' rights in the property, has disposed of it, and has given value to the Indians for it, that is the end of the matter." 220 Ct. Cl., at 486, 601 F. 2d, at 1182.

directed the Court of Claims to review the merits of the Black Hills takings claim without regard to the defense of res judicata. The amendment, approved March 13, 1978, provides:

“Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.” 92 Stat. 153.

Before turning to the merits of the Court of Claims' conclusion that the 1877 Act effected a taking of the Black Hills, we must consider the question whether Congress, in enacting this 1978 amendment, “has inadvertently passed the limit which separates the legislative from the judicial power.” *United States v. Klem*, 13 Wall. 128, 147 (1872)

A

There are two objections that might be raised to the constitutionality of this amendment, each framed in terms of the doctrine of separation of powers. The first would be that Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions. See *Hayburn's Case*, 2 Dall. 409, 410-414 (1792) (setting forth the views of three Circuit Courts, including among their complements Mr. Chief

Justice Jay, and Justices Cushing, Wilson, Blair, and Iredell, that the Act of Mar. 23, 1792, 1 Stat. 243, was unconstitutional because it subjected the decisions of the Circuit Courts concerning eligibility for pension benefits to review by the Secretary of War and the Congress) The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, effectively reviewed and reversed that court's 1975 judgment that the claim was barred by *res judicata*, or its 1942 judgment that the claim was not cognizable under the Fifth Amendment. Such legislative review of a judicial decision would interfere with the independent functions of the Judiciary

The second objection would be that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left the court no adjudicatory function to perform. See *United States v Klein*, 13 Wall., at 146, *Yakus v United States*, 321 U.S. 414, 467-468 (1944) (Rutledge, J., dissenting) Of course, in the context of this amendment, that objection would have to be framed in terms of Congress' removal of a single issue from the Court of Claims' purview, the question whether *res judicata* or collateral estoppel barred the Sioux' claim. For in passing the amendment, Congress left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law See n. 23, *infra*.

These objections to the constitutionality of the amendment were not raised by the Government before the Court of Claims. At oral argument in this Court, counsel for the United States, upon explicit questioning, advanced the position that the amendment was not beyond the limits of legislative power.²² The question whether the amendment

²² In response to a question from the bench, Government counsel stated: "I think Congress is entitled to say, 'You may have another opportunity to litigate your lawsuit.'" Tr. of Oral Arg. 20.

impermissibly interfered with judicial power was debated, however, in the House of Representatives, and that body concluded that the Government's waiver of a "technical legal defense" in order to permit the Court of Claims to reconsider the merits of the Black Hills claim was within Congress' power to enact.²³

²³ Representative Gudger of North Carolina persistently argued the view that the amendment unconstitutionally interfered with the powers of the Judiciary. He dissented from the Committee Report in support of the amendment's enactment, stating:

"I do not feel that when the Federal Judiciary has adjudicated a matter through appellate review and no error has been found by the Supreme Court of the United States in the application by the lower court (in this instance the Court of Claims) of the doctrine of *res judicata* or collateral estoppel that the Congress of the United States should enact legislation which has the effect of reversing the decision of the Judiciary." H. R. Rep. No. 95-529, p. 17 (1977).

Representative Gudger stated that he could support a bill to grant a special appropriation to the Sioux Nation, acknowledging that it was for the purpose of extinguishing Congress' moral obligation arising from the Black Hills claim, "but I cannot justify in my own mind this exercise of congressional review of a judicial decision which I consider contravenes our exclusively legislative responsibility under the separation of powers doctrine." *Id.*, at 18.

The Congressman, in the House debates, elaborated upon his views on the constitutionality of the amendment. He stated that the amendment would create "a real and serious departure from the separation-of-powers doctrine, which I think should continue to govern us and has governed us in the past." 124 Cong. Rec. 2953 (1978). He continued:

"I submit that this bill has the precise and exact effect of reversing a decision of the Court of Claims which has heretofore been sustained by the Supreme Court of the United States. Thus, it places the Congress of the United States in the position of reviewing and reversing a judicial decision in direct violation of the separation-of-powers doctrine so basic to our tripartite form of government.

"I call to your attention that, in this instance, we are not asked to change the law, applicable uniformly to all cases of like nature throughout the land, but that this bill proposes to change the application of the law with respect to one case only. In doing this, we are not legislating, we are adjudicating. Moreover, we are performing the adjudicatory func-

The question debated on the floor of the House is one the answer to which is not immediately apparent. It requires us to examine the proper role of Congress and the courts in

tion with respect to a case on which the Supreme Court of the United States has acted. Thus, in this instance, we propose to reverse the decision of the Supreme Court of our land." *Ibid.*

Representative Gudger's views on the effect of the amendment vis-a-vis the independent powers of the Judiciary were not shared by his colleagues. Representative Roncalio stated.

"I want to emphasize that the bill does not make a congressional determination of whether or not the United States violated the fifth amendment. It does not say that the Sioux are entitled to the interest on the \$17,500,000 award. It says that the court will review the facts and law in the case and determine that question." *Id.*, at 2954.

Representative Roncalio also informed the House that Congress in the past had enacted legislation waiving the defense of res judicata in private claims cases, and had done so twice with respect to Indian claims. *Ibid.* He mentioned the Act of Mar. 3, 1881, 21 Stat. 504 (which actually waived the effect of a prior award made to the Choctaw Nation by the Senate), and the Act of Feb. 7, 1925, 43 Stat. 812 (authorizing the Court of Claims and the Supreme Court to consider claims of the Delaware Tribe "de novo, upon a legal and equitable basis, and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"). Both those enactments were also brought to the attention of a Senate Subcommittee in hearings on this amendment conducted during the previous legislative session. See Hearing on S. 2780 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., 16-17 (1976) (letter from Morris Thompson, Commissioner of Indian Affairs). The enactments referred to by Representative Roncalio were construed, respectively, in *Choctaw Nation v United States*, 119 U. S. 1, 29-32 (1886), and *Delaware Tribe v United States*, 74 Ct. Cl. 368 (1932).

Representative Pressler also responded to Representative Gudger's interpretation of the proposed amendment, arguing that "[w]e are, indeed, here asking for a review and providing the groundwork for a review. I do not believe that we would be reviewing a decision, indeed, the same decision might be reached." 124 Cong. Rec. 2955 (1978). Earlier, Representative Meeds clearly had articulated the prevailing congressional view on the effect of the proposed amendment. After summarizing the history of the Black Hills litigation, he stated.

"I go through that rather complicated history for the purpose of point-

recognizing and determining claims against the United States, in light of more general principles concerning the legislative and judicial roles in our tripartite system of government. Our examination of the amendment's effect, and of this Court's precedents, leads us to conclude that neither of the two separation-of-powers objections described above is presented by this legislation.

B

Our starting point is *Cherokee Nation v United States*, 270 U. S. 476 (1926). That decision concerned the Special Act of Congress, dated March 3, 1919, 40 Stat. 1316, conferring jurisdiction upon the Court of Claims "to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five." In the judgment referred to by the Act, the Court of Claims had allowed 5% simple interest on four Cherokee claims, to accrue from the date of liability. *Cherokee Nation v United States*, 40 Ct. Cl. 252 (1905). This Court had affirmed that judgment, including the interest award. *United States v Cherokee Nation*, 202 U. S. 101,

ing out to the Members that the purpose of this legislation is not to decide the matter on the merits. That is still for the court to do. The purpose of this legislation is only to waive the defense of res judicata and to waive this technical defense, as we have done in a number of other instances in this body, so this most important claim can get before the courts again and can be decided without a technical defense and on the merits." *Id.*, at 2388.

See also S. Rep. No. 95-112, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain legal prohibitions so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum"), H. R. Rep. No. 95-529, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain technical legal defenses so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum").

123-126 (1906) Thereafter, and following payment of the judgment, the Cherokee presented to Congress a new claim that they were entitled to compound interest on the lump sum of principal and interest that had accrued up to 1895. It was this claim that prompted Congress, in 1919, to reconfer jurisdiction on the Court of Claims to consider the Cherokee's entitlement to that additional interest.

Ultimately, this Court held that the Cherokee were not entitled to the payment of compound interest on the original judgment awarded by the Court of Claims. 270 U.S., at 487-496. Before turning to the merits of the interest claim, however, the Court considered "the effect of the Act of 1919 in referring the issue in this case to the Court of Claims." *Id.*, at 485-486. The Court's conclusion concerning that question bears close examination.

"The judgment of this Court in the suit by the Cherokee Nation against the United States, in April, 1906 (202 U.S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata*. In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata*, and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General, representing the Government, properly concedes this to be the correct view. *The power of Congress to waive such an adjudication of course is clear*" *Id.*, at 486 (last emphasis supplied).

The holding in *Cherokee Nation* that Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States is dispositive of the question considered here. Moreover, that holding is consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and "to pay the Debts of the United States." U S. Const., Art. I, § 8, cl. 1. That precedent speaks directly to the separation-of-powers objections discussed above.

The scope of Congress' power to pay the Nation's debts seems first to have been construed by this Court in *United States v Realty Co.*, 163 U S. 427 (1896). There, the Court stated.

"The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice, when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded." *Id.*, at 440.

Other decisions clearly establish that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States, as Congress did in this case and in *Cherokee Nation*. Although the Court in *Cherokee Nation* did not expressly tie its conclusion that Congress had the power to waive the res judicata effect of a judgment in favor of the United States to Congress' consti-

tutional power to pay the Nation's debts, the *Cherokee Nation* opinion did rely on the decision in *Nock v United States*, 2 Ct. Cl. 451 (1867). See 270 U. S., at 486.

In *Nock*, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damages claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the effect of setting aside the court's prior judgment. Rather, the court concluded.

"It is unquestionable that the Constitution has invested Congress with no judicial powers, it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially*, neither have they *reversed* a decree of this court, nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct. Cl., at 457-458 (emphases in original)

The *Nock* court thus expressly rejected the applicability of separation-of-powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.²⁴

²⁴ The joint resolution at issue in *Nock* also limited the amount of the judgment that the Court of Claims could award Nock to a sum that had

The principles set forth in *Cherokee Nation* and *Nock* were substantially reaffirmed by this Court in *Pope v. United States*, 323 U. S. 1 (1944). There Congress had enacted special legislation conferring jurisdiction upon the Court of

been established in a report of the Solicitor of the Treasury to the Senate. See 14 Stat. 608. The court rejected the Government's argument that the Constitution had not vested in Congress "such discretion to fetter or circumscribe the course of justice." See 2 Ct. Cl., at 455. The court reasoned that this limitation on the amount of the claimant's recovery was a valid exercise of Congress' power to condition waivers of the sovereign immunity of the United States. "[I]t would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first." *Id.*, at 458.

Just because we have addressed our attention to the ancient Court of Claims' decision in *Nock*, it should not be inferred that legislative action of the type at issue here is a remnant of the far-distant past. Special jurisdictional Acts waiving affirmative defenses of the United States to legal claims, and directing the Court of Claims to resolve the merits of those claims, are legion. See *Mizokami v. United States*, 188 Ct. Cl. 736, 740-741, and nn. 1 and 2, 414 F. 2d 1375, 1377, and nn. 1 and 2 (1969) (collecting cases). A list of cases, in addition to those discussed in the text, that have recognized or acted upon Congress' power to waive the defense of *res judicata* to claims against the United States follows (the list is not intended to be exhaustive) *United States v. Grant*, 110 U. S. 225 (1884), *Lamborn & Co. v. United States*, 106 Ct. Cl. 703, 724-728, 65 F. Supp. 569, 576-578 (1946), *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19 (1944), *Richardson v. United States*, 81 Ct. Cl. 948, 956-957 (1935), *Delaware Tribe v. United States*, 74 Ct. Cl. 368 (1932), *Garrett v. United States*, 70 Ct. Cl. 304, 310-312 (1930).

In *Richardson*, the Court of Claims observed:

"The power of Congress by special act to waive any defense, either legal or equitable, which the Government may have to a suit in this court, as it did in the *Nock* and *Cherokee Nation* cases, has never been questioned. The reports of the court are replete with cases where Congress, impressed with the equitable justice of claims which have been rejected by the court on legal grounds, has, by special act, waived defenses of the Government which prevented recovery and conferred jurisdiction on the court to again adjudicate the case. In such instances the court proceeded in conformity with the provisions of the act of reference and in cases, too numerous for

Claims, "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon" certain claims against the United States arising out of a construction contract. Special Act of Feb. 27, 1942, § 1, 56 Stat. 1122. The court was also directed to determine Pope's claims and render judgment upon them according to a particular formula for measuring the value of the work that he had performed. The Court of Claims construed the Special Act as deciding the questions of law presented by the case, and leaving it the role merely of computing the amount of the judgment for the claimant according to a mathematical formula. *Pope v United States*, 100 Ct. Cl. 375, 379-380, 53 F Supp 570, 571-572 (1944). Based upon that reading of the Act, and this Court's decision in *United States v Klein*, 13 Wall. 128 (1872) (see discussion *infra*, at 402-405), the Court of Claims held that the Act unconstitutionally interfered with judicial independence. 100 Ct. Cl., at 380-382, 53 F Supp., at 572-573. It distinguished *Cherokee Nation* as a case in which Congress granted a claimant a new trial, without directing the courts how to decide the case. 100 Ct. Cl., at 387, and n. 5, 53 F Supp., at 575, and n. 5.

This Court reversed the Court of Claims' judgment. In

citation here, awarded judgments to claimants whose claims had previously been rejected." 81 Ct. Cl., at 957

Two similar decisions by the United States Court of Appeals for the Eighth Circuit are of interest. Both involved the constitutionality of a joint resolution that set aside dismissals of actions brought under the World War Veterans' Act, 1924, 38 U. S. C. § 445 (1952 ed.), and authorized the reinstatement of those war-risk insurance disability claims. The Court of Appeals found no constitutional prohibition against a congressional waiver of an adjudication in the Government's favor, or against conferring upon claimants against the United States the right to have their cases heard again on the merits. See *James v United States*, 87 F 2d 897, 898 (1937), *United States v. Hossmann*, 84 F 2d 808, 810 (1936). The court relied, in part, on the holding in *Cherokee Nation*, and the sovereign immunity rationale applied in *Nock*.

doing so, the Court differed with the Court of Claims' interpretation of the effect of the Special Act. First, the Court held that the Act did not disturb the earlier judgment denying Pope's claim for damages. "While martastically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before." 323 U. S., at 9. Second, the Court held that Congress' recognition of Pope's claim was within its power to pay the Nation's debts, and that its use of the Court of Claims as an instrument for exercising that power did not impermissibly invade the judicial function.

"We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary *United States v Realty Co.*, 163 U. S. 427 Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. [Footnote citing *Nock* and other cases omitted.] Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly See *Cherokee Nation v United States*, 270 U. S. 476, 486." *Id.*, at 9-10.

In explaining its holding that the Special Act did not invade the judicial province of the Court of Claims by directing it to reach its judgment with reference to a specified formula, the Court stressed that Pope was required to pursue his claim in the usual manner, that the earlier factual findings made by the Court of Claims were not necessarily rendered conclusive by the Act, and that, even if Congress had stipulated to the facts, it was still a judicial function for the Court of Claims to render judgment on consent. *Id.*, at 10-12.

To be sure, the Court in *Pope* specifically declined to consider "just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside the judgment of the Court of Claims in favor of the Government and to require relitigation of the suit." *Id.*, at 8-9. The case before us might be viewed as presenting that question. We conclude, however, that the separation-of-powers question presented in this case has already been answered in *Cherokee Nation*, and that that answer is completely consistent with the principles articulated in *Klein*.

The decision in *United States v Klein*, 13 Wall. 128 (1872), arose from the following facts: Klein was the administrator of the estate of V F Wilson, the deceased owner of property that had been sold by agents of the Government during the War Between the States. Klein sued the United States in the Court of Claims for the proceeds of that sale. His lawsuit was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820, which afforded such a cause of action to noncombatant property owners upon proof that they had "never given any aid or comfort to the present rebellion." Following the enactment of this legislation, President Lincoln had issued a proclamation granting "a full pardon" to certain persons engaged "in the existing rebellion" who desired to resume their allegiance to the Government, upon the condition that they take and maintain a prescribed

oath. This pardon was to have the effect of restoring those persons' property rights. See 13 Stat. 737. The Court of Claims held that Wilson's taking of the amnesty oath had cured his participation in "the rebellion," and that his administrator, Klein, was thus entitled to the proceeds of the sale. *Wilson v United States*, 4 Ct. Cl. 559 (1869).

The Court of Claims' decision in Klein's case was consistent with this Court's later decision in a similar case, *United States v Padelford*, 9 Wall. 531 (1870), holding that the Presidential pardon purged a participant "of whatever offence against the laws of the United States he had committed and relieved [him] from any penalty which he might have incurred." *Id.*, at 543. Following the Court's announcement of the judgment in *Padelford*, however, Congress enacted a proviso to the appropriations bill for the Court of Claims. The proviso had three effects: First, no Presidential pardon or amnesty was to be admissible in evidence on behalf of a claimant in the Court of Claims as the proof of loyalty required by the Abandoned and Captured Property Act. Second, the Supreme Court was to dismiss, for want of jurisdiction, any appeal from a judgment of the Court of Claims in favor of a claimant who had established his loyalty through a pardon. Third, the Court of Claims henceforth was to treat a claimant's receipt of a Presidential pardon, without protest, as conclusive evidence that he had given aid and comfort to the rebellion, and to dismiss any lawsuit on his behalf for want of jurisdiction. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

The Government's appeal from the judgment in Klein's case was decided by this Court following the enactment of the appropriations proviso. This Court held the proviso unconstitutional notwithstanding Congress' recognized power "to make 'such exceptions from the appellate jurisdiction' [of the Supreme Court] as should seem to it expedient." 13 Wall., at 145. See U. S. Const., Art. III, § 2, cl. 2. This

holding followed from the Court's interpretation of the proviso's effect:

"[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 13 Wall., at 145.

Thus construed, the proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor.

"The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

"Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.*, at 146-147

Second, the rule prescribed by the proviso "is also liable to just exception as impairing the effect of a pardon, and thus

infringing the constitutional power of the Executive." *Id.*, at 147. The Court held that it would not serve as an instrument toward the legislative end of changing the effect of a Presidential pardon. *Id.*, at 148.

It was, of course, the former constitutional objection held applicable to the legislative proviso in *Klein* that the Court was concerned about in *Pope*. But that objection is not applicable to the case before us for two reasons. First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action could not be grounded upon its broad power to recognize and pay the Nation's debts. Second, and even more important, the proviso at issue in *Klein* had attempted "to prescribe a rule for the decision of a cause in a particular way" 13 Wall., at 146. The amendment at issue in the present case, however, like the Special Act at issue in *Cherokee Nation*, waived the defense of res judicata so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims' ultimate decision of that claim. See n. 23, *supra*.²⁵

²⁵ Before completing our analysis of this Court's precedents in this area, we turn to the question whether the holdings in *Cherokee Nation*, *Nock*, and *Pope*, might have been based on views, once held by this Court, that the Court of Claims was not, in all respects, an Art. III court, and that claims against the United States were not "within Art. III's extension of "judicial Power" "to Controversies to which the United States shall be a Party" U. S. Const., Art. III, § 2, cl. 1. See *Williams v. United States*, 289 U. S. 553 (1933).

Pope itself would seem to dispel any such conclusion. See 323 U. S., at 12-14. Moreover, Mr. Justice Harlan's plurality opinion announcing the judgment of the Court in *Glidden Co. v. Zdanok*, 370 U. S. 530 (1962), lays that question to rest. In *Glidden*, the plurality observed that "it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court." *Id.*, at 566. But they concluded that that circumstance did not render the decisions of

C

When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the

the Court of Claims legislative in character, nor, impliedly, did those instances of "lively attention" constitute impermissible interferences with the Court of Claims' judicial functions.

"Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. Congress has waived the benefit of *res judicata*, *Cherokee Nation v. United States*, 270 U. S. 476, 486, and of defenses based on the passage of time.

"In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here.

Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States v. Realty Co.*, 163 U. S. 427

"The issue was settled beyond peradventure in *Pope v. United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function." *Id.*, at 566-567

The Court in *Glidden* held that, at least since 1953, the Court of Claims has been an Art. III court. See *id.*, at 585-589 (opinion concurring in result). In his opinion concurring in the result, Mr. Justice Clark did not take issue with the plurality's view that suits against the United States are "Controversies to which the United States shall be a Party," within the meaning of Art. III. Compare 370 U. S., at 562-565 (plurality opinion), with *id.*, at 586-587 (opinion concurring in result).

amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by *res judicata*, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.

Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. That court was left completely free to reaffirm its 1942 judgment that the Black Hills claim was not cognizable under the Fifth Amendment, if upon its review of the facts and law, such a decision was warranted. In this respect, the amendment before us is a far cry from the legislatively enacted "consent judgment" called into question in *Pope*, yet found constitutional as a valid exercise of Congress' broad power to pay the Nation's debts. And, for the same reasons, this amendment clearly is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*.

In sum, as this Court implicitly held in *Cherokee Nation*, Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

IV

A

In reaching its conclusion that the 1877 Act effected a taking of the Black Hills for which just compensation was due the Sioux under the Fifth Amendment, the Court of Claims

relied upon the "good faith effort" test developed in its earlier decision in *Three Tribes of Fort Berthold Reservation v United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968). The *Fort Berthold* test had been designed to reconcile two lines of cases decided by this Court that seemingly were in conflict. The first line, exemplified by *Lone Wolf v Hitchcock*, 187 U. S. 553 (1903), recognizes "that Congress possesses a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians." *Id.*, at 565. The second line, exemplified by the more recent decision in *Shoshone Tribe v United States*, 299 U. S. 476 (1937), concedes Congress' paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government '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.'" *Id.*, at 497 (quoting *United States v Creek Nation*, 295 U. S. 103, 110 (1935)). In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristically pithy phrase. "Spoliation is not management." 299 U. S., at 498.

The *Fort Berthold* test distinguishes between cases in which one or the other principle is applicable:

"It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

"Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action. Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 182 Ct. Cl., at 553, 390 F. 2d, at 691.

Applying the *Fort Berthold* test to the facts of this case, the Court of Claims concluded that, in passing the 1877 Act, Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills. The principal issue presented by this case is whether the legal standard applied by the Court of Claims was erroneous.²⁶

B

The Government contends that the Court of Claims erred insofar as its holding that the 1877 Act effected a taking of the Black Hills was based on Congress' failure to indicate affirmatively that the consideration given the Sioux was of

²⁶ It should be recognized at the outset that the inquiry presented by this case is different from that confronted in the more typical of our recent "taking" decisions. *E. g.*, *Kaiser Aetna v. United States*, 444 U. S. 164 (1979), *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978). In those cases the Court has sought to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U. S., at 124. Here, there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply.

equivalent value to the property rights ceded to the Government. It argues that "the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. The Government derives support for this rule principally from this Court's decision in *Lone Wolf v Hitchcock*.

In *Lone Wolf*, representatives of the Kiowa, Comanche, and Apache Tribes brought an equitable action against the Secretary of the Interior and other governmental officials to enjoin them from enforcing the terms of an Act of Congress that called for the sale of lands held by the Indians pursuant to the Medicine Lodge Treaty of 1867, 15 Stat. 581. That treaty, like the Fort Laramie Treaty of 1868, included a provision that any future cession of reservation lands would be without validity or force "unless executed and signed by at least three fourths of all the adult male Indians occupying the same." *Id.*, at 585. The legislation at issue, Act of June 6, 1900, 31 Stat. 672, was based on an agreement with the Indians that had not been signed by the requisite number of adult males residing on the reservation.

This Court's principal holding in *Lone Wolf* was that "the legislative power might pass laws in conflict with treaties made with the Indians." 187 U. S., at 566. The Court stated.

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Con-

gress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." *Ibid.* (Emphasis in original.)²⁷

The Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts." *Id.*, at 568.

In the penultimate paragraph of the opinion, however, the Court in *Lone Wolf* went on to make some observations seemingly directed to the question whether the Act at issue might constitute a taking of Indian property without just compensation. The Court there stated.

"The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian

²⁷ This aspect of the *Lone Wolf* holding, often reaffirmed, see, e. g., *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 594 (1977), is not at issue in this case. The Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868. They claim only that Congress could not do so inconsistently with the command of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

tribal property In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. *We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.* In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional.” *Ibid.* (Emphasis supplied.)

The Government relies on the italicized sentence in the quotation above to support its view “that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe.” Brief for United States 52. Several adjoining passages in the paragraph, however, lead us to doubt whether the *Lone Wolf* Court meant to state a general rule applicable to cases such as the one before us.

First, *Lone Wolf* presented a situation in which Congress “purported to give an adequate consideration” for the treaty lands taken from the Indians. In fact, the Act at issue set aside for the Indians a sum certain of \$2 million for surplus reservation lands surrendered to the United States. 31 Stat. 678, see 187 U. S., at 555. In contrast, the background of the 1877 Act “reveals a situation where Congress did not ‘purport’ to provide ‘adequate consideration,’ nor was there

any meaningful negotiation or arm's-length bargaining, nor did Congress consider it was paying a fair price." 220 Ct. Cl., at 475, 601 F. 2d, at 1176 (concurring opinion).

Second, given the provisions of the Act at issue in *Lone Wolf*, the Court reasonably was able to conclude that "the action of Congress now complained of was but a mere change in the form of investment of Indian tribal property." Under the Act of June 6, 1900, each head of a family was to be allotted a tract of land within the reservation of not less than 320 acres, an additional 480,000 acres of grazing land were set aside for the use of the tribes in common, and \$2 million was paid to the Indians for the remaining surplus. 31 Stat. 677-678. In contrast, the historical background to the opening of the Black Hills for settlement, and the terms of the 1877 Act itself, see Part I, *supra*, would not lead one to conclude that the Act effected "a mere change in the form of investment of Indian tribal property."

Third, it seems significant that the views of the Court in *Lone Wolf* were based, in part, on a holding that "Congress possessed full power in the matter." Earlier in the opinion the Court stated. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." 187 U. S., at 565. Thus, it seems that the Court's conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v Weeks*, 430 U. S. 73, 84 (1977).²⁸

²⁸ For this reason, the Government does not here press *Lone Wolf* to its logical limits, arguing instead that its "strict rule" that the management and disposal of tribal lands is a political question, "has been relaxed

Fourth, and following up on the political question holding, the *Lone Wolf* opinion suggests that where the exercise of congressional power results in injury to Indian rights, "relief must be sought by an appeal to that body for redress and not to the courts." Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution. See Parts II and III, *supra*. Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply *Lone Wolf's* principles of deference. See *United States v Tillamooks*, 329 U. S. 40, 46 (1946) (plurality opinion)

The foregoing considerations support our conclusion that the passage from *Lone Wolf* here relied upon by the Government has limited relevance to this case. More significantly, *Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle for deciding questions

in recent years to allow review under the Fifth Amendment rational-basis test." Brief for United States 55, n. 46. The Government relies on *Delaware Tribal Business Comm. v. Weeks*, 430 U. S., at 84-85, and *Morton v. Mancari*, 417 U. S. 535, 555 (1974), as establishing a rational-basis test for determining whether Congress, in a given instance, confiscated Indian property or engaged merely in its power to manage and dispose of tribal lands in the Indians' best interests. But those cases, which establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment, do not provide an apt analogy for resolution of the issue presented here—whether Congress' disposition of tribal property was an exercise of its power of eminent domain or its power of guardianship. As noted earlier, n. 27, *supra*, the Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie Treaty. They seek only a holding that the Black Hills "were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe." *United States v. Creek Nation*, 295 U. S. 103, 111 (1935). The rational-basis test proffered by the Government would be ill-suited for use in determining whether such circumstances were presented by the events culminating in the passage of the 1877 Act.

of the kind presented here. In every case where a taking of treaty-protected property is alleged,²⁹ a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in a guardianship and to pertinent constitutional restrictions." *United States v Creek Nation*, 295 U. S., at 109-110. Accord. *Menominee Tribe v United States*, 391 U. S. 404, 413 (1968), *FPC v Tuscarora Indian Nation*, 362 U. S. 99, 122 (1960), *United States v Klamath Indians*, 304 U. S. 119, 123 (1938), *United States v Shoshone Tribe*, 304 U. S. 111, 115-116 (1938), *Shoshone Tribe v United States*, 299 U. S. 476, 497-498 (1937).

As the Court of Claims recognized in its decision below, the question whether a particular measure was appropriate for protecting and advancing the tribe's interests, and therefore not subject to the constitutional command of the Just Compensation Clause, is factual in nature. The answer must be based on a consideration of all the evidence presented. We do not mean to imply that a reviewing court is to second-guess, from the perspective of hindsight, a legislative judgment that a particular measure would serve the best interests of the tribe. We do mean to require courts, in considering whether a particular congressional action was taken in pursuance of Congress' power to manage and control tribal lands

²⁹ Of course, it has long been held that the taking by the United States of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U. S. 272, 285 (1955). The principles we set forth today are applicable only to instances in which "Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently" *Id.*, at 277. In such instances, "compensation must be paid for subsequent taking." *Id.*, at 277-278.

for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry

C

We turn to the question whether the Court of Claims' inquiry in this case was guided by an appropriate legal standard. We conclude that it was. In fact, we approve that court's formulation of the inquiry as setting a standard that ought to be emulated by courts faced with resolving future cases presenting the question at issue here.

"In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired [them], we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition.

"The 'good faith effort' and 'transmutation of property' concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That in-

quiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." 220 Ct. Cl., at 451, 601 F 2d, at 1162.³⁰

D

We next examine the factual findings made by the Court of Claims, which led it to the conclusion that the 1877 Act effected a taking. First, the Court found that "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient." 220 Ct. Cl., at 458, 601 F 2d, at 1166. This finding is fully supported by the record, and the Government does not seriously contend otherwise.³¹

³⁰ An examination of this standard reveals that, contrary to the Government's assertion, the Court of Claims in this case did not base its finding of a taking solely on Congress' failure in 1877 to state affirmatively that the "assets" given the Sioux in exchange for the Black Hills were equivalent in value to the land surrendered. Rather, the court left open the possibility that, in an appropriate case, a mere assertion of congressional good faith in setting the terms of a forced surrender of treaty-protected lands could be overcome by objective indicia to the contrary. And, in like fashion, there may be instances in which the consideration provided the Indians for surrendered treaty lands was so patently adequate and fair that Congress' failure to state the obvious would not result in the finding of a compensable taking.

To the extent that the Court of Claims' standard, in this respect, departed from the original formulation of the *Fort Berthold* test, see 220 Ct. Cl., at 486-487, 601 F 2d, at 1182-1183 (dissenting opinion), such a departure was warranted. The Court of Claims' present formulation of the test, which takes into account the adequacy of the consideration given, does little more than reaffirm the ancient principle that the determination of the measure of just compensation for a taking of private property "is a judicial and not a legislative question." *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327 (1893).

³¹ The 1877 Act, see *supra*, at 382-383, and n. 14, purported to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization," and "to furnish to them schools and instruction in mechan-

Second, the court found, after engaging in an exhaustive review of the historical record, that neither the Manypenny Commission, nor the congressional Committees that approved the 1877 Act, nor the individual legislators who spoke on its behalf on the floor of Congress, ever indicated a belief that the Government's obligation to provide the Sioux with rations constituted a fair equivalent for the value of the Black Hills and the additional property rights the Indians were forced to

cal and agricultural arts, as provided for by the treaty of 1868." 19 Stat. 256. The Court of Claims correctly concluded that the first item "was so vague that it cannot be considered as constituting a meaningful or significant element of payment by the United States." 220 Ct. Cl., at 458, 601 F.2d, at 1166. As for the second, it "gave the Sioux nothing to which they were not already entitled [under the 1868 treaty]." *Ibid.*

The Government has placed some reliance in this Court on the fact that the 1877 Act extended the northern boundaries of the reservation by adding some 900,000 acres of grazing lands. See n. 14, *supra*. In the Court of Claims, however, the Government did "not contend that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." 220 Ct. Cl., at 453, n. 3, 601 F.2d, at 1163, n. 3. And Congress obviously did not intend the extension of the reservation's northern border to constitute consideration for the property rights surrendered by the Sioux. The extension was effected in that article of the Act redefining the reservation's borders; it was not mentioned in the article which stated the consideration given for the Sioux' "cession of territory and rights." See 19 Stat. 255-256. Moreover, our characterizing the 900,000 acres as assets given the Sioux in consideration for the property rights they ceded would not lead us to conclude that the terms of the exchange were "so patently adequate and fair" that a compensable taking should not have been found. See n. 30, *supra*.

Finally, we note that the Government does not claim that the Indian Claims Commission and the Court of Claims incorrectly valued the property rights taken by the 1877 Act by failing to consider the extension of the northern border. Rather, the Government argues only that the 900,000 acres should be considered, along with the obligation to provide rations, in determining whether the Act, viewed in its entirety, constituted a good-faith effort on the part of Congress to promote the Sioux' welfare. See Brief for United States 73, and n. 58.

surrender. See *id.*, at 458–462, 601 F. 2d, at 1166–1168. This finding is unchallenged by the Government.

A third finding lending some weight to the Court's legal conclusion was that the conditions placed by the Government on the Sioux' entitlement to rations, see n. 14, *supra*, "further show that the government's undertaking to furnish rations to the Indians until they could support themselves did not reflect a congressional decision that the value of the rations was the equivalent of the land the Indians were giving up, but instead was an attempt to coerce the Sioux into capitulating to congressional demands." 220 Ct. Cl., at 461, 601 F. 2d, at 1168. We might add only that this finding is fully consistent with similar observations made by this Court nearly a century ago in an analogous case.

In *Choctaw Nation v. United States*, 119 U. S. 1, 35 (1886), the Court held, over objections by the Government, that an earlier award made by the Senate on an Indian tribe's treaty claim "was fair, just, and equitable." The treaty at issue had called for the removal of the Choctaw Nation from treaty-protected lands in exchange for payments for the tribe's subsistence for one year, payments for cattle and improvements on the new reservation, an annuity of \$20,000 for 20 years commencing upon removal, and the provision of educational and agricultural services. *Id.*, at 38. Some years thereafter the Senate had awarded the Indians a substantial recovery based on the latter treaty's failure to compensate the Choctaw for the lands they had ceded. Congress later enacted a jurisdictional statute which permitted the United States to contest the fairness of the Senate's award as a settlement of the Indian's treaty claim. In rejecting the Government's arguments, and accepting the Senate's award as "furnish[ing] the nearest approximation to the justice and right of the case," *id.*, at 35, this Court observed.

"It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure

had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres." *Id.*, at 37-38.

As for the payments that had been made to the Indians in order to induce them to remove themselves from their treaty lands, the Court, in words we find applicable to the 1877 Act, concluded.

"It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded, and they are all only such expenditures as the government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. *As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.*" *Id.*, at 38 (emphasis supplied)

These conclusions, in light of the historical background to the opening of the Black Hills for settlement, see Part I, *supra*, seem fully applicable to Congress' decision to remove the Sioux from that valuable tract of land, and to extinguish their off-reservation hunting rights.

Finally, the Court of Claims rejected the Government's contention that the fact that it subsequently had spent at least \$43 million on rations for the Sioux (over the course of three-quarters of a century) established that the 1877 Act was an act of guardianship taken in the Sioux' best interest. The court concluded. "The critical inquiry is what Congress

did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation.” 220 Ct. Cl., at 462, 601 F. 2d, at 1168. It found no basis for believing that Congress, in 1877, anticipated that it would take the Sioux such a lengthy period of time to become self-sufficient, or that the fulfillment of the Government’s obligation to feed the Sioux would entail the large expenditures ultimately made on their behalf. *Ibid.* We find no basis on which to question the legal standard applied by the Court of Claims, or the findings it reached, concerning Congress’ decision to provide the Sioux with rations.

E

The aforementioned findings fully support the Court of Claims’ conclusion that the 1877 Act appropriated the Black Hills “in circumstances which involved an implied undertaking by [the United States] to make just compensation to the tribe.”³² *United States v. Creek Nation*, 295 U. S., at 111.

³² The dissenting opinion suggests, *post*, at 434–437, that the factual findings of the Indian Claims Commission, the Court of Claims, and now this Court, are based upon a “revisionist” view of history. The dissent fails to identify which materials quoted herein or relied upon by the Commission and the Court of Claims fit that description. The dissent’s allusion to historians “writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees,” *post*, at 435, is also puzzling because, with respect to this case, we are unaware that any such historian exists.

The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record. No one, including the Government, has ever suggested that the factual findings of the Indian Claims Commission and the Court of Claims fail to meet that standard of review.

A further word seems to be in order. The dissenting opinion does not identify a single author, nonrevisionist, neorevisionist, or otherwise, who

We make only two additional observations about this case. First, dating at least from the decision in *Cherokee Nation v Southern Kansas R. Co.*, 135 U. S. 641, 657 (1890), this Court has recognized that Indian lands, to which a tribe holds recognized title, "are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided only, that they are not taken without just compensation being made to the owner." In the same decision the Court emphasized that the owner of such lands "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.*, at 659. The Court of Claims gave effect to this principle when it held that the Government's uncertain and indefinite obligation to provide the Sioux with rations until they became self-sufficient did not constitute adequate consideration for the Black Hills.

Second, it seems readily apparent to us that the obligation to provide rations to the Sioux was undertaken in order to ensure them a means of surviving their transition from the nomadic life of the hunt to the agrarian lifestyle Congress had chosen for them. Those who have studied the Government's reservation policy during this period of our Nation's history agree. See n. 11, *supra*. It is important to recognize

takes the view of the history of the cession of the Black Hills that the dissent prefers to adopt, largely, one assumes, as an article of faith. Rather, the dissent relies on the historical findings contained in the decision rendered by the Court of Claims in 1942. That decision, and those findings, are not before this Court today. Moreover, the holding of the Court of Claims in 1942, to the extent the decision can be read as reaching the merits of the Sioux' taking claim, was based largely on the conclusive presumption of good faith toward the Indians which that court afforded to Congress' actions of 1877. See 97 Ct. Cl., at 669-673, 685. The divergence of results between that decision and the judgment of the Court of Claims affirmed today, which the dissent would attribute to historical revisionism, see *post*, at 434-435, is more logically explained by the fact that the former decision was based on an erroneous *legal* interpretation of this Court's opinion in *Lone Wolf*. See Part IV-B, *supra*.

that the 1877 Act, in addition to removing the Black Hills from the Great Sioux Reservation, also ceded the Sioux' hunting rights in a vast tract of land extending beyond the boundaries of that reservation. See n. 14, *supra*. Under such circumstances, it is reasonable to conclude that Congress' undertaking of an obligation to provide rations for the Sioux was a *quid pro quo* for depriving them of their chosen way of life, and was not intended to compensate them for the taking of the Black Hills.³³

V

In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property" *Lone*

³³ We find further support for this conclusion in Congress' 1974 amendment to § 2 of the Indian Claims Commission Act, 25 U. S. C. § 70a. See n. 17, *supra*. That amendment provided that in determining offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." The Report of the Senate Committee on Interior and Insular Affairs, which accompanied this amendment, made two points that are pertinent here. First, it noted that "[a]lthough couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case." S. Rep. No. 93-863, p. 2 (1974) (incorporating memorandum prepared by the Sioux Tribes). Second, the Committee observed:

"The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood, secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs." *Id.*, at 4-5.

See also R. Billington, Introduction, in National Park Service, *Soldier and Brave* xiv (1963) ("The Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded").

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Wolf v Hitchcock, 187 U. S., at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

The judgment of the Court of Claims is affirmed.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I agree that there is no constitutional infirmity in the direction by Congress that the Court of Claims consider this case without regard to the defense of *res judicata*. I also agree that the Court of Claims correctly decided this case. Accordingly, I concur in Parts III and V of the Court's opinion and in the judgment.

MR. JUSTICE REHNQUIST, dissenting.

In 1942, the Sioux Tribe filed a petition for certiorari requesting this Court to review the Court of Claims' ruling that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands—an exchange Congress believed to be in the best interests of the Sioux and the Nation. This Court declined to review that judgment. *Sioux Tribe v United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943). Yet today the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943, and proceeds to reject the 1942 Court of Claims' factual interpretation of the events in 1877. I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding, that there is no judicial principle justifying the decision to afford the respondents an additional

opportunity to litigate the same claim, and that the Court of Claims' first interpretation of the events in 1877 was by all accounts the more realistic one. I therefore dissent.

I

In 1920, Congress enacted a special jurisdictional Act, ch. 222, 41 Stat. 738, authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims. The Sioux filed suit claiming that the 1877 Act removing the Black Hills from the Sioux territory was an unconstitutional taking. In *Sioux Tribe v United States*, *supra*, the Court of Claims considered the question fully and found that the United States had not taken the Black Hills from the Sioux within the meaning of the Fifth Amendment. It is important to highlight what that court found. It did not decide, as the Court today suggests, that it merely lacked jurisdiction over the claim presented by the Sioux. See *ante*, at 384. It found that under the circumstances presented in 1877, Congress attempted to improve the situation of the Sioux and the Nation by exchanging the Black Hills for 900,000 acres of grazing lands and rations for as long as they should be needed. The court found that although the Government attempted to keep white settlers and gold prospectors out of the Black Hills territory, these efforts were unsuccessful. The court concluded that this situation was such that the Government "believed serious conflicts would develop between the settlers and the Government, and between the settlers and the Indians." 97 Ct. Cl., at 659. It was also apparent to Congress that the Indians were still "incapable of supporting themselves." *Ibid*.

The court found that the Government therefore embarked upon a course designed to obtain the Indians' agreement to sell the Black Hills and "endeavored in every way possible during 1875 and 1876 to arrive at a mutual agreement with the Indians for the sale. " *Id.*, at 681. Negotiation having failed, Congress then turned to design terms for the ac-

quisition of the Black Hills which it found to be in the best interest of both the United States and the Sioux. The court found that pursuant to the 1877 agreement, Congress provided the Indians with more than \$43 million in rations as well as providing them with 900,000 acres of needed grazing lands. Thus the court concluded that "the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties." *Id.*, at 668. The court emphasized.

"[T]he Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay" *Id.*, at 667

This Court denied certiorari. 318 U. S. 789 (1943)

During the course of further litigation commencing in 1950, the Sioux again resubmitted their claim that the Black Hills were taken unconstitutionally. The Government pleaded *res judicata* as a defense. The Court of Claims held that *res judicata* barred relitigation of the question since the original Court of Claims decision had clearly held that the appropriation of the Black Hills was not a taking because Congress in "exercising its plenary power over Indian tribes, took their land without their consent and substituted for it something conceived by Congress to be an equivalent." *United States v. Sioux Nation*, 207 Ct. Cl. 234, 243, 518 F. 2d 1298, 1303 (1975). The court found no basis for relieving the Sioux from the bar of *res judicata* finding that the disability "is not lifted if a later court disagrees with a prior one." *Id.*, at 244,

518 F 2d, at 1303. The court thus considered the equities entailed by the application of *res judicata* in this case and held that relitigation was unwarranted. Again, this Court denied certiorari. 423 U S. 1016 (1975).

Congress then passed another statute authorizing the Sioux to relitigate their taking claim in the Court of Claims. 92 Stat. 153. The statute provided that the Court of Claims "*shall review on the merits*" the Sioux claim that there was a taking and that the Court "*shall determine that issue de novo.*" (Emphasis added.) Neither party submitted additional evidence and the Court of Claims decided the case on the basis of the record generated in the 1942 case and before the Commission. On the basis of that same record, the Court of Claims has now determined that the facts establish that Congress did not act in the best interest of the Sioux, as the 1942 court found, but arbitrarily appropriated the Black Hills without affording just compensation. This Court now embraces this second, latter-day interpretation of the facts in 1877

II

Although the Court refrains from so boldly characterizing its action, it is obvious from these facts that Congress has reviewed the decisions of the Court of Claims, set aside the judgment that no taking of the Black Hills occurred, set aside the judgment that there is no cognizable reason for relitigating this claim, and ordered a new trial. I am convinced that this is nothing other than an exercise of judicial power reserved to Art. III courts that may not be performed by the Legislative Branch under its Art. I authority

Article III vests "the judicial Power of the United States" in federal courts. Congress is vested by Art. I with *legislative* powers, and may not itself exercise an appellate-type review of judicial judgments in order to alter their terms, or to order new trials of cases already decided. The judges in *Hayburn's Case*, 2 Dall. 409, 413, n. 4 (1792), stated

that "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested." We have interpreted the decision in *United States v. Klein*, 13 Wall. 128 (1872), as having "rested upon the ground that Congress was without constitutional authority to control the exercise of judicial power by requiring this Court to set aside the judgment of the Court of Claims" and as holding that Congress may not "require a new trial of the issues which the Court had resolved against [a party]" *Pope v. United States*, 323 U. S. 1, 8, 9 (1944).

This principle was again applied in *United States v. O'Grady*, 22 Wall. 641, 647 (1875), where the Court refused to legitimize a congressional attempt to revise a final judgment rendered by the Court of Claims finding that such judgments "are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, *absolutely conclusive of the rights of the parties, unless a new trial is granted by that court.*" (Emphasis added.) The Court further found that there is only one Supreme Court and "[i]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *Id.*, at 648. See also *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103 (1948). Congress has exceeded the legislative boundaries drawn by these cases and the Constitution and exercised judicial power in a case already decided by effectively ordering a new trial.

The determination of whether this action is an exercise of legislative or judicial power is of course one of characterization. The fact that the judicial process is affected by an Act of Con-

gress is not dispositive since many actions which this Court has clearly held to be legitimate exercises of legislative authority do have an effect on the judiciary and its processes. Congress may legitimately exercise legislative powers in the regulation of judicial jurisdiction, and it may, like other litigants, change the import of a final judgment by establishing new legal rights after the date of judgment, and have an effect on the grounds available for a court's decision by waiving available defenses. But as the Court apparently concedes, Congress may not, in the name of those legitimate actions, review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case.

The Court relies heavily on the fact that Congress was acting pursuant to its power to pay the Nation's debts. No doubt, Congress has broad power to do just that, but it may do so only through the exercise of legislative, not judicial powers. Thus the question must be, not whether Congress was attempting to pay its debts through this Act, but whether it attempted to do so by means of judicial power. The Court suggests that the congressional action in issue is justified as either a permissible regulation of jurisdiction, the creation of a new obligation, or the mere warver of a litigant's right. These alternative nonjudicial characterizations of the congressional action, however, are simply unpersuasive.

A

The Court first attempts to categorize this action as a permissible regulation of jurisdiction stating that all Congress has done is to "provid[e] a forum so that a new judicial review of the Black Hills claim could take place." But that is the essence of an appellate or trial court decision ordering a new trial. While Congress may *regulate* judicial functions it may not itself *exercise* them. Admittedly, it is not always readily apparent whether a particular action constitutes the assignment or the exercise of a judicial function since

the assignment of some functions is inherently judicial—such as assigning the trial court the task of rehearing a case because of error. The guidelines identified in our opinions, however, indicate that while Congress enjoys broad authority to regulate judicial proceedings in the context of a *class* of cases, *Johannessen v United States*, 225 U.S. 227 (1912), when Congress regulates functions of the judiciary in a *pending* case it walks the line between judicial and legislative authority, and exceeds that line if it sets aside a judgment or orders retrial of a previously adjudicated issue. *United States v Klein*, *supra*, at 145, *Pope v United States*, *supra*.

By ordering a rehearing in a pending case, Congress does not merely assign a judicial function, it necessarily reviews and sets aside an otherwise final adjudication, actions which this Court concedes Congress cannot permissibly take under the decisions of this Court. *Ante*, at 391–392. The Court concludes that no “review” of the Court of Claims decisions (and our denials of certiorari) has occurred, and that the finality of the judgments has not been disturbed, principally because Congress has not dictated a rule of decision that must govern the ultimate outcome of the adjudication. The fact that Congress did not dictate to the Court of Claims that a particular result be reached does not in any way negate the fact it has sought to exercise judicial power. This Court and other appellate courts often reverse a trial court for error without indicating what the result should be when the claim is heard again.

It is also apparent that Congress must have “reviewed” the merits of the litigation and concluded that for some reason, the Sioux should have a second opportunity to air their claims. The order of a new trial inevitably reflects some measure of dissatisfaction with at least the manner in which the original claim was heard. It certainly seems doubtful that Congress would grant a litigant a new trial if convinced that the litigant had been fairly heard in the first instance. Unless Congress is assuming that there were deficiencies in the prior judicial

proceeding, why would it see fit to appropriate public money to have the claim heard once again? It would seem that Congress did not find the opinions of the Court of Claims fully persuasive. But it is not the province of Congress to judge the persuasiveness of the opinions of federal courts—that is the judiciary's province alone. It is equally apparent that Congress has set aside the judgments of the Court of Claims. Previously those judgments were dispositive of the issues litigated in them, Congress now says that they are not. The action of Congress cannot be justified as the regulation of the jurisdiction of the federal courts because it seeks to provide a forum for the purposes of reviewing a previously final judgment in a pending case.

B

The action also cannot be characterized and upheld as merely an exercise of a litigant's power to change the effect of a judgment by agreeing to obligations beyond those required by a particular judgment. This Court has clearly never found that the judicial power is encroached upon because Congress seeks to change the law after a question has been adjudicated. See, e. g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How 421 (1856), *Hodges v. Snyder*, 261 U. S. 600 (1923). This is a recognition of the right of every litigant to pay his adversary more than the court says is required if he so chooses. Congress, acting under its spending powers, is, like an individual, entitled to enlarge its obligations after the court has adjudicated a question. The decision in *Pope v. United States*, 323 U. S. 1 (1944), clearly rests upon this distinction.

But here Congress has made no change in the applicable law. It has not provided, as our opinions make clear it could have, that the Sioux should recover for all interest on the value of the Black Hills. Counsel for respondents in fact stated at oral argument that he could not persuade Congress "to go that far." Congress has not changed the rule of law, it simply directed the judiciary to try again. Congress may not attempt

to shift its legislative responsibilities and satisfy its constituents by discarding final judgments and ordering new trials.

C

The Court also suggests that the congressional action is but a "mere waiver" of a defense within a litigant's prerogative. *Ante*, at 407 Congress certainly is no different from other litigants in this regard, and if the congressional action in this case could convincingly be construed as having an effect no greater than an ordinary litigant's waiver, I certainly would not object that Congress was exercising judicial power. But it is apparent that the congressional action in issue accomplished far more than a litigant's waiver. Congress clearly required the Court of Claims to hear the case in full, and only if a waiver of *res judicata* by a litigant would always impose an obligation on a federal court to rehear such a claim, could it be said that Congress has exercised the power of a litigant rather than the power of a legislature.

While *res judicata* is a defense which can be waived, see Fed. Rule Civ. Proc. 8 (c), if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. See *Hedger Transportation Corp. v. Ira S. Bushey & Sons*, 186 F. 2d 236 (CA2 1951), *Evarts v. Western Metal Finishing Co.*, 253 F. 2d 637, 639, n. 1 (CA9), cert. denied, 358 U.S. 815 (1958), *Scholla v. Scholla*, 92 U.S. App. D.C. 9, 201 F. 2d 211 (1953), *Hicks v. Holland*, 235 F. 2d 183 (CA6), cert. denied, 352 U.S. 855 (1956). This result is fully consistent with the policies underlying *res judicata*. It is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948), *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328 (1971), *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The Court of Claims itself has indicated that it would not engage

in reconsideration of an issue previously decided by the Court of Claims without substantial justification.

"It is well to remember that *res judicata* and its offspring, collateral estoppel, are not statutory defenses, they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen v United States*, 157 Ct. Cl. 798, 800 (1962).

It matters not that the defendant has consented to the relitigation of the claim since the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding. Since the Court of Claims found in this case that there was no adequate reason for denying *res judicata* effect after the issue was raised and the respondents were given an opportunity to demonstrate why *res judicata* should not apply, it is clear that the issue has been heard again only because Congress used its legislative authority to mandate a rehearing. The Court of Claims apparently acknowledged that this in fact was the effect of the legislation, for it did not state that readjudication was the product of a waiver, but rather that through its decision the court "carried out the *obligation imposed upon us* in the 1978 jurisdictional statute." (Emphasis added.)

Nor do I find this Court's decision in *Cherokee Nation v United States*, 270 U. S. 476 (1926), dispositive. Again, in *Cherokee Nation*, the Court was asked to consider and decide a question not previously adjudicated by the Court of Claims. The Court stated that the theory of interest presented in the second adjudication was not "presented either to the Court

of Claims or to this Court. It is a new argument not before considered." *Id.*, at 486. Thus even *Cherokee Nation* did not involve congressionally mandated judicial re-examination of a question previously decided by an Art. III court.

Here, in contrast, the issue decided is identical to that decided in 1942. It is quite clear from a comparison of the 1942 decision of the Court of Claims and the opinion of the Court today that the only thing that has changed is an interpretation of the events which occurred in 1877. The Court today concludes that the facts in this case "would not lead one to conclude that the Act effected 'a mere change in the form of investment of Indian tribal property'" *Ante*, at 413. But that is precisely what the Court of Claims found in 1942. See *supra*, at 425-426. There has not even been a change in the law, for the Court today relies on decisions rendered long before the Court of Claims decision in 1942. It is the view of history, and not the law, which has evolved. See *infra*, at 434-437. The decision is thus clearly nothing more than a second interpretation of the precise factual question decided in 1942. As the dissenting judges in the Court of Claims aptly stated. "The facts have not changed. We have been offered no new evidence." 220 Ct. Cl. 442, 489, 601 F.2d 1157, 1184.

It is therefore apparent that Congress has accomplished more than a private litigant's attempted waiver, more than legislative control over the general jurisdiction of the federal courts, and more than the establishment of a new rule of law for a previously decided case. What Congress has done is uniquely judicial. It has reviewed a prior decision of an Art. III court, eviscerated the finality of that judgment, and ordered a new trial in a pending case.

III

Even if I could countenance the Court's decision to reach the merits of this case, I also think it has erred in rejecting the 1942 court's interpretation of the facts. That court

rendered a very persuasive account of the congressional enactment. See *supra*, at 425–426. As the dissenting judges in the Court of Claims opinion under review pointedly stated. “The majority’s view that the rations were not consideration for the Black Hills is untenable. What else was the money for?” 220 Ct. Cl., at 487, 601 F. 2d, at 1183.

I think the Court today rejects that conclusion largely on the basis of a view of the settlement of the American West which is not universally shared. There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of “revisionist” historians or the mores of another era actions that were taken under pressure of time more than a century ago.

Different historians, not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court’s opinion. This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science.

But the inferences which the Court itself draws from the letter from General Sheridan to General Sherman reporting on a meeting between the former with President Grant, the Secretary of the Interior, and the Secretary of War, as well as other passages in the Court’s opinion, leave a stereotyped and one-sided impression both of the settlement regarding the Black Hills portion of the Great Sioux Reservation and of the gradual expansion of the National Government from the Proclamation Line of King George III in 1763 to the Pacific Ocean.

Ray Billington, a senior research associate at the Huntington Library in San Marino, Cal., since 1963, and a respected student of the settlement of the American West, em-

phasized in his introduction to the book *Soldier and Brave* (National Park Service, U. S. Dept. of the Interior, 1963) that the confrontations in the West were the product of a long history, not a conniving Presidential administration.

"Three centuries of bitter Indian warfare reached a tragic climax on the plains and mountains of America's Far West. Since the early seventeenth century, when Chief Opechancanough rallied his Powhatan tribesmen against the Virginia intruders on their lands, each advance of the frontier had been met with stubborn resistance. At times this conflict flamed into open warfare. In King Phillips' rebellion against the Massachusetts Puritans, during the French and Indian Wars of the eighteenth century, in Chief Pontiac's assault on his new British overlords in 1763, in Chief Tecumseh's vain efforts to hold back the advancing pioneers of 1812, and in the Black Hawk War.

"In three tragic decades, between 1860 and 1890, the Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded.

"This epic struggle left its landmarks behind, as monuments to the brave men, Indian and white, who fought and died that their manner of living might endure." *Id.*, at xiii-xiv

Another history highlights the cultural differences which made conflict and brutal warfare inevitable:

"The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens, and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe, and a highly developed sign language

was the only means of intertribal communication. The effective unit was the band or village of a few hundred souls, which might be seen in the course of its wanderings encamped by a watercourse with tipis erected, or pouring over the plain, women and children leading dogs and packhorses with their trailing travois, while gaily dressed braves loped ahead on horseback. They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching." S. Morison, *The Oxford History of the American People* 539-540 (1965).

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

phases of it—are ably dealt with in the opinion of the Court of Claims, and it would be unnecessary repetition to go over the argument or to review the cases.

Judgment affirmed.

WINTERS *v.* THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 158. Argued October 24, 1907.—Decided January 6, 1908.

The rule that all the parties must join in an appeal or writ of error unless properly detached from the right so to do applies only to joint judgments and decrees. This court has jurisdiction of an appeal taken or writ of error sued out by one of several defendants if his interest is separate from that of the other defendants.

In a suit against several defendants as trespassers in which some of them defaulted and others answered, *held*, that each defendant was a separate trespasser and that while those who defaulted were precluded from questioning the correctness of the decree entered against them, the answering defendants had nothing in common with the others and could maintain an appeal without them.

In a conflict of implications, the instruments must be construed according to the implication having the greater force; and, in the interpretation of agreements and treaties with Indians, ambiguities should be resolved from the standpoint of the Indians.

In view of all the circumstances of the transaction this court holds that there was an implied reservation in the agreement of May 1, 1888, 25 Stat. 124, with the Gros Ventre and other Indians establishing the Fort Belknap Reservation, of a sufficient amount of water from the Milk River for irrigation purposes, which was not affected by the subsequent act of February 22, 1889, 25 Stat. 676, admitting Montana to the Union, and that the water of that river cannot be diverted, so as to prejudice this right of the Indians, by settlers on the public lands or those claiming riparian rights on that river.

The Government of the United States has the power to reserve waters of a river flowing through a Territory and exempt them from appropriation under the laws of the State which that Territory afterwards becomes.

148 Fed. Rep. 684. affirmed.

EXHIBIT

Lone Eagle 5

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Statement of the Case.

THIS suit was brought by the United States to restrain appellants and others from constructing or maintaining dams or reservoirs on the Milk River in the State of Montana, or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation.

An interlocutory order was granted, enjoining the defendants in the suit from interfering in any manner with the use by the reservation of 5,000 inches of the water of the river. The order was affirmed by the Circuit Court of Appeals. 143 Fed. Rep. 740. Upon the return of the case to the Circuit Court, an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer, upon which and the bill a decree was entered making the preliminary injunction permanent. The decree was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 684.

The allegations of the bill, so far as necessary to state them, are as follows: On the first day of May, 1888, a tract of land, the property of the United States, was reserved and set apart "as an Indian reservation as and for a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation." The tract has ever since been used as an Indian reservation and as the home and abiding place of the Indians. Its boundaries were fixed and defined as follows (25 Stat. 124):

"Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of People's Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning."

Milk River, designated as the northern boundary of the

reservation, is a non-navigable stream. Large portions of the lands embraced within the reservation are well fitted and adapted for pasturage and the feeding and grazing of stock, and since the establishment of the reservation the United States and the Indians have had and have large herds of cattle and large numbers of horses grazing upon the land within the reservation, "being and situate along and bordering upon said Milk River." Other portions of the reservation are "adapted for and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of grass, grain and vegetables," but such portions are of dry and arid character, and in order to make them productive require large quantities of water for the purpose of irrigating them. In 1889 the United States constructed houses and buildings upon the reservation for the occupancy and residence of the officers in charge of it, and such officers depend entirely for their domestic, culinary and irrigation purposes upon the water of the river. In the year 1889, and long prior to the acts of the defendants complained of, the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miners' inches, and conducted it to the buildings and premises, used the same for domestic purposes and also for the irrigation of land adjacent to the buildings and premises, and by the use thereof raised crops of grain, grass and vegetables. Afterwards, but long prior to the acts of the defendants complained of, to wit, on the fifth of July, 1898, the Indians residing on the reservation diverted from the river for the purpose of irrigation a flow of 10,000 miners' inches of water to and upon divers and extensive tracts of land, aggregating in amount about 30,000 acres, and raised upon said lands crops of grain, grass and vegetables. And ever since 1889 and July, 1898, the United States and the Indians have diverted and used the waters of the river in the manner and for the purposes mentioned, and the United States "has been enabled by means thereof to train, encourage and accustom large numbers of Indians residing upon the said reserva-

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tion to habits of industry and to promote their civilization and improvement." It is alleged with detail that all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created, and that in furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them, it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

It is alleged that "notwithstanding the riparian and other rights" of the United States and the Indians to the uninterrupted flow of the waters of the river the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and by means of canals and ditches and waterways have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof. And this diversion of the water, it is alleged, has continued until the present time, to the irreparable injury of the United States, for which there is no adequate remedy at law.

The allegations of the answer, so far as material to the present controversy, are as follows: That the lands of the Fort Belknap Reservation were a part of a much larger area in the State of Montana, which by an act of Congress, approved April 15, 1874, c. 96, 18 Stat. 28, was set apart and reserved for the occupation of the Gros Ventre, Piegan, Blood, Blackfoot and River Crow Indians, but that the right of the Indians therein "was the bare right of the use and occupation thereof at the will and sufferance of the Government of the United States." That the United States, for the purpose of opening for settlement a large portion of such area, entered into an agreement with the Indians composing said tribes, by which the Indians "ceded, sold, transferred and conveyed" to the United States all of the lands embraced in said area, except Fort Belknap Indian Reservation,

described in the bill. This agreement was ratified by an act of Congress of May 1, 1888, c. 213, 25 Stat. 113, and thereby the lands to which the Indians' title was thus extinguished became a part of the public domain of the United States and subject to disposal under the various land laws, "and it was the purpose and intention of the Government that the said land should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed and cultivated and communities of civilized persons be established thereon."

That the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company were qualified to become settlers upon the public land and to acquire title thereto under the homestead and desert land laws of the United States. And that said corporations were organized and exist under the laws of Montana for the purpose of supplying to their said stockholders the water of Milk River and its tributaries, to be used by them in the irrigation of their lands.

That the defendant, the Empire Cattle Company, is a corporation under the laws of Montana, was legally entitled to purchase, and did purchase, from those who were qualified to acquire them under the desert and homestead land laws of the United States, lands on the Milk River and its tributaries, and is now the owner and holder thereof.

That the defendants, prior to the fifth day of July, 1898, and before any appropriation, diversion or use of the waters of the river or its tributaries was made by the United States or the Indians on the Fort Belknap Reservation, except a pumping plant of the capacity of about 250 miners' inches, without having notice of any claim made by the United States or the Indians that there was any reservation made of the waters of the river or its tributaries for use on said reservation, and believing that all the waters on the lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rulings and customs

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of the State of Montana, in like manner as water on other portions of the public domain, entered upon the public lands in the vicinity of the river, made entry thereof at the United States land office, and thereafter settled upon, improved, reclaimed and cultivated the same and performed all things required to acquire a title under the homestead and desert land laws, made due proof thereof, and received patents conveying to them, respectively, the lands in fee simple.

That all of said lands are situated within the watershed of the river, are riparian upon the river and its tributaries, but are arid and must be irrigated by artificial means to make them inhabitable and capable of growing crops.

That for the purpose of reclaiming the lands, and acting under the laws of the United States and the laws of Montana, the defendants, respectively, posted upon the river and its tributaries, at the points of intended diversion, notices of appropriation, stating the means of diversion and place of use, and thereafter filed in the office of the clerk and recorder of the county wherein the lands were situated a copy of the notices, duly verified, and within forty days thereafter commenced the construction of ditches and other instrumentalities, and completed them with diligence and diverted, appropriated and applied to a beneficial use more than 5,000 miners' inches of the waters of the river and its tributaries, or 120 cubic feet per second, irrigating their lands and producing hay, grain and other crops thereon. The defendants and the stockholders of the defendant corporations have expended many thousands of dollars in constructing dams, ditches and reservoirs, and in improving said lands, building fences, and other structures, establishing schools and constructing highways and other improvements, usually had and enjoyed in a civilized community, and that the only supply of water to irrigate the lands is from Milk River. If defendants are deprived of the waters their lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained thereon.

That there are other lands within the watershed of the

Milk River and its tributaries and dependent upon its waters for irrigation upon which large numbers of persons have settled under the land laws of the United States and are irrigating and cultivating the same by means of said waters, and have assisted the defendants "in establishing a civilized community in said country and in building and maintaining churches, schools, villages and other elements and accompaniments of civilization; that said communities consist of thousands of people, and if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up and the purpose and object of the Government in opening said lands for settlement will be wholly defeated."

It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained for stock and irrigation purposes, and particularly these: People's Creek, flowing about 1,000 inches of water; Big Horn Creek, flowing about 1,000 inches; Lodge Pole Creek, flowing about 600 inches of water; Clear Creek, flowing about 300 inches. That all of the waters of these streams can be made available for use upon the reservation, and that it was not the intention of the Government to reserve any of the waters of Milk River or its tributaries. That the respective claims of the defendants to the waters of the river and its tributaries are prior and paramount to the claims of the United States and the Indians, except as to 250 inches used in and around the agency buildings, and at all times there has been sufficient water flowing down the river to more than supply these 250 inches.

And it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than \$100,000 to them, and that if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but will greatly exceed \$100,000," and that they will

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Argument for Appellants.

be wholly without remedy if the claim of the United States and the Indians be sustained.

Mr. Edward C. Day and *Mr. James A. Walsh* for appellants:
The decree is, in fact, separate and severable.

It is not charged that the defendants acted jointly. Neither one is responsible for the acts of the other. In so far as the record shows, the defaulting defendants are not the owners of any lands and are not interested in this suit. *Hancock v. Patrick*, 119 U. S. 156; *Forgay v. Conrad*, 6 How. 201; *Gillfillan v. McKee*, 159 U. S. 303; *City Bank v. Hunter*, 129 U. S. 578; *Milner v. Meek*, 95 U. S. 252; *Todd v. Daniel*, 16 Pet. 521; *Railroad Co. v. Johnson*, 15 Wall. 8; *Germain v. Mason*, 12 Wall. 261. See also *Hill v. Chicago and Evanston Ry. Co.*, 140 U. S. 52; *Basket v. Haskell*, 107 U. S. 602; *Louisville & N. A. C. v. Pope*, 74 Fed. Rep. 5; *Farmers' Loan & Trust Co. v. McClure*, 49 U. S. App. 146; *Mercantile Trust Co. v. Adams Express Co.*, 16 U. S. App. 37.

In the agreement with the Indians and the act of Congress, ratifying that agreement, there was no reservation of the waters of Milk River or its tributaries for use on the Fort Belknap Indian Reservation. Nor can it be held that the Indians understood that there was any reservation of the waters of Milk River for use upon the Belknap Reservation, or that they ceded and relinquished to the Government anything less than the absolute title to the lands and all waters thereon to that portion of the former reservation to which they relinquished their claims.

The rule that the treaty must be construed most favorably to the Indians does not apply to this case. Here the controversy is between the United States, as guardian of the Indians, and the appellants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case, the appellants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their

entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams upon or adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensation.

There is nothing before the court for construction or interpretation, but the plain, unambiguous language of the agreement, and that is so clear that it does not require any construction or interpretation.

The appellants made valid appropriations of the waters of Milk River and its tributaries under the laws, customs and decisions of Montana, and the laws of Congress, and their rights as grantees of the Government are superior to any rights which the Indians may have by reason of the agreement entered into between them and the Government.

The doctrine of riparian rights is not recognized, does not prevail and never was in force in Montana, and the rights of the parties to the use of the waters of Milk River and its tributaries must be construed according to the laws of this State.

Even if the doctrine of riparian rights did prevail, the appellants would be entitled to a reasonable use of the water for the purpose of irrigating their lands, having in view the equitable rights of others.

The right to appropriate water is recognized by the laws of the United States, the laws and decisions of the courts and the customs prevailing in Montana, which are now and were in force in Montana at the time the agreement was made with the Indians, and these appellants have shown that they acquired title to their lands under the grant from the Government and made valid and prior appropriations of the waters to reclaim such lands.

Mr. Assistant Attorney General Sanford and Mr. Assistant Attorney General Van Orsdel, with whom The Solicitor General

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Argument for Appellee.

and *Mr. A. C. Campbell*, Special Attorney, were on the brief, for appellee:

The decree below adjudging the complainants' right to the flow of the waters of Milk River as against all of the defendants before the court, is a joint decree within the meaning of the rule that all parties against whom a joint judgment or decree is rendered must join in prosecuting a writ of error or appeal, and that if prosecuted by less than the whole number of such parties, without a summons and severance or other equivalent proceeding, the appellate court acquires no jurisdiction of the case and the writ of error or appeal will be dismissed. *Owings v. Kincannon*, 7 Pet. 399; *Masterson v. Herndon*, 10 Wall. 416; *Hampton v. Rouse*, 13 Wall. 187; *Wilson's Heirs v. Insurance Co.*, 12 Pet. 140.

The defect of lack of jurisdiction for want of necessary parties to the appeal was not waived by the final decree entered by the Circuit Court of Appeals upon the merits without objection on that ground. *Union & Planters Bank v. Memphis*, 189 U. S. 71, 73.

Under the just and reasonable construction of this agreement with the Indians, considered in the light of all the circumstances and of its express purpose, the Indians did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk River necessary to their use for agricultural and other purposes upon the reservation, but retained this right, as an appurtenance to the land which they retained, to the full extent in which it had been vested in them under former treaties, and the right thus retained and vested in them under the agreement of 1888, at a time when Montana was still a Territory of the United States, could not be divested under any subsequent legislation either of the Territory or of the State.

While the United States may itself abrogate rights granted to the Indians under a treaty with them, it alone has this power, and unless such rights are abrogated by the United States itself by subsequent legislation it is well settled that all

rights acquired by the Indians under the treaty are to be fully protected against invasion by other parties. *The Cherokee Nation v. Georgia*, 5 Pet. 1; *United States v. Cook*, 19 Wall. 591.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

A question of jurisdiction is presented by the United States. Five of the defendants named in the bill failed to answer and a decree *pro confesso* was taken against them. The other defendants, appellants here, after the affirmance by the Circuit Court of Appeals of the interlocutory injunction, filed a joint and several answer. On this answer and the bill the case was heard and a decree entered against all of the defendants. From that decree the appellants here appealed to the Circuit Court of Appeals without joining therein the other five defendants. The contention is that the Circuit Court of Appeals had no jurisdiction and that this court has none, because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal, or proceedings should have been taken against them in the nature of summons and severance or its equivalent.

The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established.¹ But the rule only applies to joint judgments or decrees.² In other words, when the interest of a de-

¹ *Williams v. Bank of United States*, 11 Wheat. 414; *Owings v. Kincannon*, 7 Pet. 399; *Heirs of Wilson v. Insurance Company*, 12 Pet. 140; *Mussina v. Cavoza*, 6 Wall. 355; *Masterson v. Herndon*, 10 Wall. 416; *Hampton v. Rouse*, 13 Wall. 187; *Simpson v. Greeley*, 20 Wall. 152; *Feibelman v. Packard*, 108 U. S. 14; *Estis v. Trabue*, 128 U. S. 225, 230; *Mason v. United States*, 136 U. S. 581; *Dolan v. Jennings*, 139 U. S. 385; *Hardee v. Wilson*, 146 U. S. 179; *Inglehart v. Stansbury*, 151 U. S. 68; *Davis v. Mercantile Trust Company*, 152 U. S. 590; *Beardsley v. Railway*, 158 U. S. 123, 127; *Wilson v. Kiesel*, 164 U. S. 248.

² *Todd v. Daniel*, 16 Pet. 521, 523; *Germain v. Mason*, 12 Wall. 259; *Forgay v. Conrad*, 6 How. 201; *Brewster v. Wakefield*, 22 How. 118, 129; *Milner v. Meek*, 95 U. S. 252; *Basket v. Hassell*, 107 U. S. 602, 608; *Hanrick*

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Opinion of the Court.

fendant is separate from that of other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was between them, in the diversion of the waters of Milk River, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests and action on the part of the defendants. In other words, whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all, they were separate trespassers. Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree *pro confesso* was entered against them, and thereafter, according to Equity Rule 19, the cause was required to proceed *ex parte* and the matter of the bill decreed by the court. *Thomson v. Wooster*, 114 U. S. 104. The decree was in due course made absolute, and granting that it might have been appealed from by the defaulting defendants, they would have been, as said in *Thomson v. Wooster*, absolutely barred and precluded from questioning its correctness, unless on the face of the bill it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied and we proceed to the merits.

The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to

v. Patrick, 119 U. S. 156; *City Bank v. Hunter*, 129 U. S. 557; *Gilfillan v. McKee*, 159 U. S. 303.

be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule

should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject of appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States v. Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union and the power over the waters of Milk River which the State thereby acquired

to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the Government.

Decree affirmed.

MR. JUSTICE BREWER dissents.

FOR PUBLICATION**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AGUA CALIENTE BAND OF CAHUILLA
INDIANS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee,

v.

COACHELLA VALLEY WATER
DISTRICT; ED PACK, in Official
Capacity as Member of the Board of
Directors of the Coachella Valley
Water District; JOHN POWELL, JR., in
Official Capacity as Member of the
Board of Directors of the Coachella
Valley Water District; PETER
NELSON, in Official Capacity as
Member of the Board of Directors of
the Coachella Valley Water District;
G. PATRICK O'DOWD, in Official
Capacity as a Member of the Board
of Directors of the Coachella Valley
Water District; CASTULO R.
ESTRADA, in Official Capacity as a
Member of the Board of Directors of
the Coachella Valley Water District;
DESERT WATER AGENCY; PATRICIA
G. OYGAR, in Official Capacity as
Member of the Board of Directors of

No. 15-55896

D.C. No.
5:13-cv-00883-
JGB-SP

OPINION

the Desert Water Agency; THOMAS KIELEY, III, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; JAMES CIOFFI, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; CRAIG A. EWING, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; JOSEPH K. STUART, in Official Capacity as Member of the Board of Directors of the Desert Water Agency,
Defendants-Appellants.

Appeal from the United States District Court
For the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted October 18, 2016
Pasadena, California

Filed March 7, 2017

Before: Richard C. Tallman and Morgan B. Christen,
Circuit Judges, and Matthew F. Kennelly,* District Judge.

Opinion by Judge Tallman

*The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

SUMMARY**

Water Rights / Tribal Rights

The panel affirmed the district court's partial summary judgment in favor of the Agua Caliente Band of Cahuilla Indians and the United States, which declared that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley.

The Tribe filed this action for declaratory and injunctive relief against water agencies, and the parties stipulated to divide the litigation into three phases. Phase I, at issue in this interlocutory appeal, addressed whether the Tribe has a reserved right to groundwater.

Under the doctrine in *Winters v. United States*, 207 U.S. 564 (1908), federal reserved water rights are directly applicable to Indian reservations.

The panel held that the *Winters* doctrine does not distinguish between surface water and groundwater. The panel held that the United States, in establishing the Agua Caliente reservation, impliedly reserved water. The panel further held that because the United States intended to reserve water when it established a home for the Agua Caliente Band of Cahuilla Indians, the district court did not err in determining that the government reserved appurtenant water sources – including groundwater – when it created the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Tribe's reservation in the Coachella Valley. The panel also held that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.

The panel rejected the water agencies' arguments concerning the contours of the Tribe's reserved water rights. The panel held that state water rights are preempted by federal reserved rights. The panel also held that the fact that the Tribe did not historically access groundwater did not destroy its right to groundwater now. Finally, the panel held that the Tribe's entitlement to state water did not affect the analysis with respect to the creation of the Tribe's federally reserved water right.

COUNSEL

Steven Bane Abbott (argued), Gerald D. Shoaf, and Julianna K. Tillquist, Redwine and Sherrill, Riverside, California, for Defendants-Appellants Coachella Valley Water District, G. Patrick O'Dowd, Ed Pack, John Powell Jr., Peter Nelson, and Castulo R. Estrada.

Roderick E. Walston (argued), Arthur L. Littleworth, Michael T. Riddell, and Steven G. Martin, Best Best & Krieger LLP, Walnut Creek, California, for Defendants-Appellants Desert Water Agency, Patricia G. Oygar, Thomas Kieley III, James Cioffi, Craig A. Ewing, and Joseph K. Stuart.

Catherine F. Munson (argued), Kilpatrick Townsend & Stockton LLP, Washington, D.C.; Steven C. Moore and Heather Whiteman Runs Him, Native American Rights

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OPINION

TALLMAN, Circuit Judge:

“When the well’s dry, we know the worth of water.” Benjamin Franklin (1706–1790), Poor Richard’s Almanac.

The Coachella Valley Water District (“CVWD”) and the Desert Water Agency (“DWA”) (collectively, the “water agencies”) bring an interlocutory appeal of the district court’s grant of partial summary judgment in favor of the Agua Caliente Band of Cahuilla Indians (the “Tribe”) and the United States. The judgment declares that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe’s reservation in California’s arid Coachella Valley. We agree. In affirming, we recognize that there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater. However, because we

conclude that it does, we hold that the Tribe has a reserved right to groundwater underlying its reservation as a result of the purpose for which the reservation was established.

I

A

The Agua Caliente Band of Cahuilla Indians has lived in the Coachella Valley since before California entered statehood in 1850. The bulk of the Agua Caliente Reservation was formally established by two Presidential Executive Orders issued in 1876 and 1877, and the United States, pursuant to statute, now holds the remaining lands of the reservation in trust for the Tribe. The reservation consists of approximately 31,396 acres interspersed in a checkerboard pattern amidst several cities within Riverside County, including Palm Springs, Cathedral City, and Rancho Mirage. *See Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971).

The Executive Orders establishing the reservation are short in length, but broad in purpose. In 1876, President Ulysses S. Grant ordered certain lands “withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California.” Exec. Order of May 15, 1876. Similarly, President Rutherford B. Hayes’s 1877 Order set aside additional lands for “Indian purposes.” Exec. Order of Sept. 29, 1877. These orders followed on the heels of detailed government reports from Indian agents, which identified the urgent need to reserve land for Indian use in an attempt to encourage tribal members to “build comfortable houses, improve their acres, and surround themselves with home comforts.” Comm’r of Indian Aff., Ann. Rep. 224 (1875). In short, the United

States sought to protect the Tribe and “secure the Mission Indians permanent homes, with land and water enough.” Comm’r of Indian Aff., Ann. Rep. 37 (1877).

Establishing a sustainable home in the Coachella Valley is no easy feat, however, as water in this arid southwestern desert is scarce. Rainfall totals average three to six inches per year, and the Whitewater River System—the valley’s only real source of surface water—produces an average annual supply of water that fluctuates between 4,000 and 9,000 acre-feet, most of which occurs in the winter months.¹ See CVWD, Engineer’s Report on Water Supply and Replenishment Assessment at III-12 (2016–2017); CVWD, Urban Water Management Plan at 3-2, 3-20 (2005). In other words, surface water is virtually nonexistent in the valley for the majority of the year. Therefore, almost all of the water

¹ An acre-foot is the volume of water sufficient to cover one acre in area at a depth of one foot. CVWD, 2010–2011 Annual Review at 2. It is equivalent to 325,851 gallons. *Id.* It takes about four acre-feet of water to irrigate one acre of land for a year in the Coachella Valley. See U.S. Dep’t of Agric., A Review of Agricultural Water Use in the Coachella Valley at 6 (2006). Therefore, at 9,000 acre-feet per year, the river system provides enough water to irrigate around 2,250 acres. At 4,000 acre-feet per year, the system can only irrigate about 1,000 acres. Considering that the Tribe is not the only user of the Whitewater River System, and that its reservation alone accounts for 31,396 acres, even in a peak year the river system provides very little water for irrigation or for human consumption.

consumed in the region comes from the aquifer underlying the valley—the Coachella Valley Groundwater Basin.²

The Coachella Valley Groundwater Basin supports 9 cities, 400,000 people, and 66,000 acres of farmland. *See* CVWD-DWA, *The State of the Coachella Valley Aquifer* at 2. Given the demands on the basin's supply, it is not surprising that water levels in the aquifer have been declining at a steady rate. Since the 1980s, the aquifer has been in a state of overdraft,³ which exists despite major efforts to recharge the basin with water delivered from the California Water Project and the Colorado River. In total, groundwater pumping has resulted in an average annual recharge deficit of 239,000 acre-feet, with cumulative overdraft estimated at 5.5 million acre-feet as of 2010.

The Tribe does not currently pump groundwater on its reservation. Rather, it purchases groundwater from Appellant water agencies. The Tribe also receives surface water from the Whitewater River System, particularly the Andreas and Tahquitz Creeks that sometimes flow nearby. The surface water received from this system is consistent with a 1938 California Superior Court adjudication—the Whitewater River Decree—which attempted to address state-law water rights for users of the river system. Because the United States held the lands in trust, it participated in the

² The CVWD estimates that surface water accounts for less than five percent of its water supply each year. *See* CVWD, *Urban Water Management Plan* at 3-20 (2005).

³ Overdraft occurs when the amount of water extracted from the underground basin exceeds its recharge rate. CVWD, 2010–2011 *Annual Review* at 2.

adjudication via a “Suggestion” on behalf of the Tribe and the resulting state court order included a water allotment for the Tribe’s benefit.⁴ The amount of water reserved for the Tribe from this adjudication, however, is minimal, providing enough water to irrigate approximately 360 acres. Further, most of this allotment is filled outside of the growing season because the river system’s flow peaks between December and March. Thus, groundwater supplied by the water agencies remains the main source of water for all types of consumption on the reservation throughout the year.

B

Given an ever-growing concern over diminishing groundwater resources, the Agua Caliente Tribe filed this action for declaratory and injunctive relief against the water agencies in May 2013. The Tribe’s complaint requested a declaration that it has a federally reserved right and an aboriginal right to the groundwater underlying the reservation. In June 2014, the district court granted the United States’ motion to intervene as a plaintiff. The United States also alleges that the Tribe has a reserved right to groundwater.

The parties stipulated to divide the litigation into three phases. Phase I, at issue here, seeks to address whether the Tribe has a reserved right and an aboriginal right to groundwater. According to the parties’ stipulation, Phase II

⁴ In providing this “Suggestion,” the government maintained that it was not “submitting the rights of the United States . . . to the jurisdiction of the Department of Public Works of the State of California” and that the court lacked “jurisdiction [to adjudicate] the water rights of the United States.” The federal government continues to maintain this position before us.

will address whether the Tribe beneficially owns the “pore space” of the groundwater basin underlying the Agua Caliente Reservation and whether a tribal right to groundwater includes the right to receive water of a certain quality. Finally, Phase III will attempt to quantify any identified groundwater rights.

In March 2015, the district court granted in part and denied in part Plaintiffs’ and Defendants’ cross motions for partial summary judgment with respect to Phase I of the litigation. In its order, the district court held that the reserved rights doctrine applies to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe’s reservation.⁵ The district court then certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted the water agencies’ petition for permission to prosecute this appeal.

II

The district court’s grant of summary judgment is reviewed de novo. *Tohono O’odham Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48

⁵ The district court also held that the Tribe does not have an aboriginal right to the groundwater. An aboriginal right is a type of property right that derives from territorial occupancy of land. See *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641–42 (9th Cir. 1986). However, the Tribe did not appeal this issue, and we do not review it here.

(1986). A court shall grant summary judgment when, “under the governing law, there can be but one reasonable conclusion as to the verdict.” *Anderson*, 477 U.S. at 250.

III

Due to the unusual trifurcation of this litigation, we are concerned on appeal only with Phase I—whether the Tribe has a federal reserved right to the groundwater underlying its reservation. This question, however, is best analyzed in three steps: whether the United States intended to reserve water when it created the Tribe’s reservation; whether the reserved rights doctrine encompasses groundwater; and, finally, whether the Tribe’s correlative rights under state law or the historic lack of drilling for groundwater on the reservation, or the water the Tribe receives pursuant to the Whitewater River Decree, impacts our answers to these questions. We address each in turn.

A

For over one hundred years, the Supreme Court has made clear that when the United States “withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing U.S. Const. art. I, § 8; U.S. Const. art. IV, § 3); *see also Winters v. United States*, 207 U.S. 564, 575–78 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981).

In what has become known as the *Winters* doctrine, federal reserved water rights are directly applicable “to Indian reservations and other federal enclaves,

encompassing water rights in navigable and nonnavigable streams.” See *Cappaert*, 426 U.S. at 138. The creation of these rights stems from the belief that the United States, when establishing reservations, “intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.” *Arizona v. California*, 373 U.S. 546, 600 (1963); see also *id.* at 598–99 (“It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”).

Despite the longstanding recognition that Indian reservations, as well as other reserved lands, require access to water, the *Winters* doctrine only applies in certain situations: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land. *Winters*, 207 U.S. at 575–78; *Cappaert*, 426 U.S. at 138. Once established, however, *Winters* rights “vest[] on the date of the reservation and [are] superior to the rights of future appropriators.” *Cappaert*, 426 U.S. at 138.

B

1

Given the limitations in the *Winters* doctrine, we must first decide whether the United States, in establishing the Agua Caliente Reservation, impliedly reserved water. See *United States v. New Mexico*, 438 U.S. 696, 701 (1978). We conclude that it did. And although the parties and the district

court focused on the application of the *Winters* doctrine to groundwater specifically, their argument over the creation of a federal reserved right—and, in particular, the relevance of *New Mexico* to that question—depends on whether the Agua Caliente Reservation carried with it a reserved right to water generally. Whether the Tribe’s reserved right extends to the groundwater underlying its reservation is a separate question from whether the establishment of the reservation contained an implicit right to use water.

In *New Mexico*, the Supreme Court emphasized that, under the reserved rights doctrine, the government reserves only “that amount of water necessary to fulfill the purpose of the reservation, no more.” *Id.* (quoting *Cappaert*, 426 U.S. at 141). “Where water is only valuable for a secondary use of the reservation, . . . the United States [must] acquire water in the same manner as any other public or private appropriator.” *Id.* at 702. In other words, *New Mexico* established a “primary-secondary use” distinction. Water is impliedly reserved for primary purposes. It is not, however, reserved for secondary purposes.⁶

The water agencies argue that *New Mexico* requires us—when deciding if a reserved right exists at all—to determine whether water is necessary to fulfill the primary purpose of the Agua Caliente Reservation. If it is not, they argue, then we are to conclude that Congress did not intend any water to be impliedly reserved under a federal water right. Put

⁶ We have previously noted that *New Mexico* is “not directly applicable to *Winters* doctrine rights on Indian reservations.” *United States v. Adair*, 723 F.3d 1394, 1408 (9th Cir. 1983). However, it clearly “establish[es] several useful guidelines.” *Id.* Thus, we consider its application here.

differently, the water agencies argue that *New Mexico* stands for the proposition that water is impliedly reserved only if other sources of water then available cannot meet the reservation's water demands. According to the water agencies, if other sources of water exist—and the lack of a federal right would not entirely defeat the purpose of the reservation—then Congress intended to defer to state water law and require the United States to obtain water rights like any other private user.

New Mexico, however, is not so narrow. Congress does not defer to state water law with respect to reserved rights. *Id.* at 702, 715. Instead, Congress retains “its authority to reserve unappropriated water . . . for use on appurtenant lands withdrawn from the public domain for specific federal purposes.” *Id.* at 698.

The federal purpose for which land was reserved is the driving force behind the reserved rights doctrine. “Each time [the] Court has applied the ‘implied-reservation-of-water-doctrine,’ it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.” *Id.* at 700. But the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the reservation envisions water use.

Winters itself established that the purpose of the reservation is controlling. In *Winters*, the Supreme Court addressed whether the federal government reserved water for tribal usage at the Fort Belknap Indian Reservation, which had been reserved by the United States “as and for a permanent home” for several tribes. 207 U.S. at 565. The

Winters Court observed that the arid tribal reservation would be “practically valueless,” and that a civilized community “could not be established thereon,” without irrigation. *Id.* at 576. Thus, the Court held that, in creating the reservation, the United States simultaneously reserved water “for a use which would be necessarily continued through years.” *Id.* at 577. The reserved right turned on the purpose underlying the formation of the Fort Belknap Reservation.

Though it was decided seventy years after *Winters*, *New Mexico* remains faithful to this construction. In analyzing the reserved rights doctrine, the Court first sought to determine Congress’ intent in creating the Gila National Forest. *New Mexico*, 438 U.S. at 698. After reviewing the congressional act that established the forest, the Court determined that Congress intended only two purposes—“to conserve the water flows, and to furnish a continuous supply of timber for the people.” *Id.* at 707 (citation omitted). It did not, however, reserve the forest lands for aesthetic, environmental, recreational, or wildlife-preservation purposes. *Id.* at 708. Thus, the Court deemed the latter uses “secondary,” for which the reserved right did not attach, and held that only “to fulfill the very purposes for which a federal reservation was created . . . [did] the United States intend[] to reserve the necessary water.” *Id.* at 702.

As such, *New Mexico*’s primary-secondary use distinction did not alter the test envisioned by *Winters*. Rather, it added an important inquiry related to the question of *how much* water is reserved. It also answered that question by holding that water is reserved only for primary purposes, those directly associated with the reservation of land. It did not, however, eliminate the threshold issue—that

a reserved right exists if the purposes underlying a reservation envision access to water.

2

Because *New Mexico* holds that water is reserved if the primary purpose of the reservation envisions water use, we now determine the primary purpose of the Tribe's reservation and whether that purpose contemplates water use. To do so, we consider "the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created." *Walton*, 647 F.2d at 47.

The Executive Orders establishing the Tribe's reservation declared that the land was to be set aside for "the permanent use and occupancy of the Mission Indians" or, more generally, for "Indian purposes."⁷ See *supra* Part I. While imprecise, such a purpose is not indecipherable. Our precedent recognizes that "[t]he specific purposes of an Indian reservation . . . [are] often unarticulated. The general purpose, *to provide a home for the Indians*, is a broad one and must be liberally construed." *Walton*, 647 F.2d at 47 (emphasis added). Moreover, "[m]ost of the land in these reservations is and always has been arid," and it is impossible to believe that the United States was unaware "that water . . . would be essential to the life of the Indian people." *Arizona*, 373 U.S. at 598–99.

⁷ Additionally, government reports preceding the Executive Orders recognized the need to secure the Tribe "permanent homes, with land and water enough." See Comm'r of Indian Aff., Ann. Rep. 37 (1877).

The situation facing the Agua Caliente Tribe is no different. Water is inherently tied to the Tribe's ability to live permanently on the reservation. Without water, the underlying purpose—to establish a home and support an agrarian society—would be entirely defeated. Put differently, the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose. Thus, we hold that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation.

C

While we conclude that the federal government envisioned water use when it established the Tribe's reservation, that does not end our inquiry. We must now determine whether the *Winters* doctrine, and the Tribe's reserved water right, extends to the groundwater underlying the reservation. And while we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater,⁸ we now expressly hold that it does.

Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the

⁸ We previously held that the *Winters* doctrine applies “not only [to] surface water, but also to underground water.” *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974), *aff'd on other grounds*, *Cappaert*, 426 U.S. at 142. But on appeal, the Supreme Court did not reach this question. *See Cappaert*, 426 U.S. at 142. In that case, the peculiarities of the hydrological forms led the Court to conclude as a question of fact that the reserved water in a cavern pool was surface water, not groundwater. *Id.*

unappropriated water must be “appurtenant” to the reservation. *See Cappaert*, 426 U.S. at 138. Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only. *Cappaert* itself hinted that impliedly reserved waters may include appurtenant groundwater when it held that “the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” *Id.* at 143. If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.⁹

Further, many locations throughout the western United States rely on groundwater as their only viable water source. *See, e.g., In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 746 (Ariz. 1999) (en banc) (“The reservations considered in [*Winters* and *Arizona*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that

⁹ Although the district court found that the groundwater contained in the Coachella Valley aquifer “does not ‘add to, contribute to or support’ any surface stream from which the Tribe diverts water,” that does not mean that the hydrological cycle in the Coachella Valley has been severed. *See* U.S. Geological Surv., Ground Water and Surface Water: A Single Resource, U.S.G.S. Circular 1139 at 9–10 (1998) (recognizing a connection between surface and groundwater even where the water table falls below the stream bed). Further, we note that surface water is used here to replenish groundwater sources. As such, the district court may wish to hear expert opinion on the interconnectedness of the waters in the valley in the later phases of this litigation. Proper factual findings on this issue will allow the district court to fashion appropriate relief during the quantification phase.

the United States reserved land for habitation without reserving the water necessary to sustain life.”). More importantly, such reliance exists here, as surface water in the Coachella Valley is minimal or entirely lacking for most of the year. Thus, survival is conditioned on access to water—and a reservation without an adequate source of surface water must be able to access groundwater.

The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities, we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land.¹⁰ The creation of the Agua Caliente Reservation therefore carried with it an implied right to use water from the Coachella Valley aquifer.

D

The final issue we must address is the contours of the Tribe’s reserved right, including its relation to state water law and the Tribe’s existing water rights.

A “reserved right in unappropriated water . . . vests on the date of the reservation and is superior to the rights of future appropriators.” *Cappaert*, 426 U.S. at 138. Further, reserved rights are not analyzed “in terms of a balancing

¹⁰ The parties do not dispute appurtenance, nor could they. The Coachella Valley Groundwater Basin clearly underlies the Tribe’s reservation. See generally CVWD, Engineer’s Report on Water Supply and Replenishment Assessment (2016–2017).

test.” *Id.* Rather, they are federal water rights that preempt conflicting state law. *See Walton*, 647 F.2d at 51–53; *see also New Mexico*, 438 U.S. at 715 (“[T]he ‘reserved rights doctrine’ . . . is an exception to Congress’ explicit deference to state water law in other areas.”). Finally, the rights are not lost through non-use. *See Walton*, 647 F.2d at 51. Instead, they are flexible and can change over time. *See id.* at 47–48; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956).

Despite the federal primacy of reserved water rights, the water agencies argue that because (1) the Tribe has a correlative right to groundwater under California law and (2) the Tribe has not drilled for groundwater on its reservation, and (3) because the Tribe is entitled to surface water from the Whitewater River Decree, the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being entirely defeated. Put differently, the water agencies argue that, because the Tribe is already receiving water pursuant to California’s correlative rights doctrine and the Whitewater River Decree, a federal reserved right is unnecessary.

However, the water agencies’ arguments fail for three reasons. First, state water rights are preempted by federal reserved rights. *See Walton*, 647 F.2d at 51; *see also Ahtanum Irrigation Dist.*, 236 F.2d at 329 (“Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them.”). Second, the fact that the Tribe did not historically access groundwater does not destroy its right to groundwater now. *See Walton*, 647 F.2d at 51. And third, the *New Mexico* inquiry does not ask if water is currently needed to sustain the reservation; it asks whether water was envisioned as

necessary for the reservation's purpose at the time the reservation was created. *See supra* Part III.B. Thus, state water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right.

IV

In sum, the *Winters* doctrine does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created. As such, because the United States intended to reserve water when it established a home for the Agua Caliente Band of Cahuilla Indians, we hold that the district court did not err in determining that the government reserved appurtenant water sources—including groundwater—when it created the Tribe's reservation in the Coachella Valley.

Finally, we recognize that the district court's failure to conduct a thorough *New Mexico* analysis with respect to whether the Tribe needs access to groundwater was largely a function of the parties' decision to trifurcate this case. We also understand that a full analysis specifying the scope of the water reserved under *New Mexico* will be considered in the subsequent phases of this litigation.

Presumably, however, the water agencies will continue to argue in these later phases that the *Winters* doctrine is dependent upon the Tribe's demonstrated need—that is, need above and beyond what the Tribe is already receiving under state-law entitlements or could receive through a paramount surface water right. And while we express no opinion on how much water falls within the scope of the Tribe's federal groundwater right, there can be no question

that water in some amount was necessarily reserved to support the reservation created. Thus, to guide the district court in its later analysis, we hold that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.

Each party shall bear its own costs.

AFFIRMED.

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Supreme Court Declines to Review Ninth Circuit Decision Applying Federal Reserved Water Rights Doctrine to Groundwater

Alexandra M. Wyatt | December 21st, 2017

The 2012-2016 drought in California and parts of other western states may have ended, but availability of water will continue to present issues for Congress to consider. While state, rather than federal, law typically governs allocations of water resources within a state, there are exceptions where federal law does affect water allocation. The federal reserved water rights doctrine, for example, holds that when the federal government reserves federal lands for a particular purpose (such as for a tribal reservation or national monument), it impliedly reserves a right to water necessary to accomplish the purposes for which the reservation was created. Since 1908, when the Supreme Court established the doctrine in *Winters v. United States*, courts have applied it to surface waters; a March 2017 decision of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held, apparently for the first time, that the doctrine can encompass groundwater as well. On November 27, 2017, the Supreme Court declined to review this decision, which thus, for now, sets a potentially important precedent within the Ninth Circuit for other groundwater resource issues and disputes.

The case *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* originated when a tribe sued local water agencies in 2013 in federal district court in California, alleging that the water agencies were adversely affecting the quantity and quality of water available to them by over-drafting an aquifer. Among other claims, the tribe sought a declaration that it had a federally reserved right to the groundwater underlying the reservation, which was established in the 1870s. The United States intervened to defend its ownership, tribal trust, and sovereign interests in the water rights and the tribe's reservation. In 2015, the district court ruled in favor of the tribe and the United States on the threshold claim that the government impliedly reserved appurtenant water sources — including underlying groundwater — when it created the tribe's reservation. (Subsequent phases of the *Agua Caliente Band* case are still being litigated. They involve whether the tribe owns the "pore space" or "storage space" of the groundwater basin. [Get Document Email](#)



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Supreme Court Declines to Review Ninth Circuit Decision Applying Federal Reserved Water Rights Doctrine to Groundwater

Alexandra M. Wyatt
Legislative Attorney

December 21, 2017

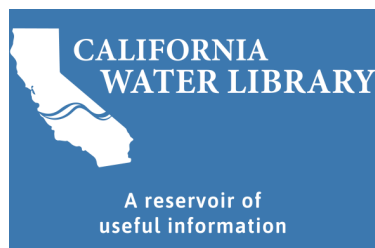
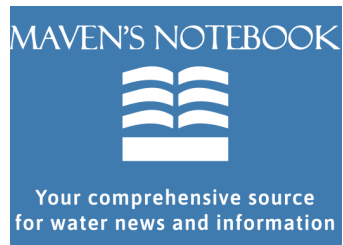
The 2012-2016 [drought](#) in California and parts of other western states may have [ended](#), but a water will continue to present [issues for Congress to consider](#). While state, rather than federal typically governs allocations of water resources within a state. there are exceptions where fed

Keywords

Groundwater Exchange, tribal water issues, water rights

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CONTACT



(Slip Opinion)

OCTOBER TERM, 2018

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WASHINGTON STATE DEPARTMENT OF LICENSING
v. COUGAR DEN, INC.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 16–1498. Argued October 30, 2018—Decided March 19, 2019

The State of Washington taxes “motor vehicle fuel importer[s]” who bring large quantities of fuel into the State by “ground transportation.” Wash. Rev. Code §§82.36.010(4), (12), (16). Respondent Cougar Den, Inc., a wholesale fuel importer owned by a member of the Yakama Nation, imports fuel from Oregon over Washington’s public highways to the Yakama Reservation to sell to Yakama-owned retail gas stations located within the reservation. In 2013, the Washington State Department of Licensing assessed Cougar Den \$3.6 million in taxes, penalties, and licensing fees for importing motor vehicle fuel into the State. Cougar Den appealed, arguing that the Washington tax, as applied to its activities, is pre-empted by an 1855 treaty between the United States and the Yakama Nation that, among other things, reserves the Yakamas’ “right, in common with citizens of the United States, to travel upon all public highways,” 12 Stat. 953. A Washington Superior Court held that the tax was pre-empted, and the Washington Supreme Court affirmed.

Held: The judgment is affirmed.

188 Wash. 2d 55, 392 P. 3d 1014, affirmed.

JUSTICE BREYER, joined by JUSTICE SOTOMAYOR and JUSTICE KAGAN, concluded that the 1855 treaty between the United States and the Yakama Nation pre-empts the State of Washington’s fuel tax as applied to Cougar Den’s importation of fuel by public highway. Pp. 4–18.

(a) The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute “taxes the importation of fuel, which is the transportation of

WASHINGTON STATE DEPT. OF LICENSING *v.*
COUGAR DEN, INC.

Syllabus

fuel.” 188 Wash. 2d 55, 69, 392 P. 3d 1014, 1020. It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” *Id.*, at 67, 392 P. 3d, at 1019. The incidence of a tax is a question of state law, *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U. S. 450, 461, and this Court is bound by the Washington Supreme Court’s interpretation of Washington law, *Johnson v. United States*, 559 U. S. 133, 138. Nor is there any reason to doubt that the Washington Supreme Court meant what it said when it interpreted the statute. In the statute’s own words, Washington “impose[s] upon motor vehicle fuel licensees,” including “licensed importer[s],” a tax for “each gallon of motor vehicle fuel” that “enters into this state,” but only “if . . . entry is” by means of “a railcar, trailer, truck, or other equipment suitable for ground transportation.” Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). Thus, Cougar Den owed the tax because Cougar Den traveled with fuel by public highway. See App. 10a–26a; App. to Pet. for Cert. 55a. Pp. 4–10.

(b) The State of Washington’s application of the tax to Cougar Den’s importation of fuel is pre-empted by the Yakama Nation’s reservation of “the right, in common with citizens of the United States, to travel upon all public highways.” This conclusion rests upon three considerations taken together. First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language now before the Court; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *United States v. Winans*, 198 U. S. 371, 380–381; *Seufert Brothers Co. v. United States*, 249 U. S. 194, 196–198; *Tulee v. Washington*, 315 U. S. 681, 683–685; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678. Thus, although the words “in common with” on their face could be read to permit application to the Yakamas of general legislation (like the legislation at issue here) that applies to all citizens, this Court has refused to read “in common with” in this way because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685. Second, the historical record adopted by the agency and the courts below indicates that the treaty negotiations and the United States’ representatives’ statements to the Yakamas would have led the Yakamas to understand that the treaty’s protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is just what the treaty protects. Therefore,

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precedent tells the Court that the tax must be pre-empted. In *Tulee*, for example, the fishing right reserved by the Yakamas in the treaty was held to pre-empt the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. The Court concluded that “such exaction of fees as a prerequisite to the enjoyment of” a right reserved in the treaty “cannot be reconciled with a fair construction of the treaty.” *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel. Pp. 10–18.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG, concluded that the 1855 treaty guarantees tribal members the right to move their goods, including fuel, to and from market freely. When dealing with a tribal treaty, a court must “give effect to the terms as the Indians themselves would have understood them.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196. The Yakamas’ understanding of the terms of the 1855 treaty can be found in a set of unchallenged factual findings in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, which are binding here and sufficient to resolve this case. They provide “no evidence [suggesting] that the term ‘in common with’ placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads.” *Id.*, at 1247. Instead, they suggest that the Yakamas understood the treaty’s right-to-travel provision to provide them “with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.” *Id.*, at 1262. A wealth of historical evidence confirms this understanding. “Far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture,” and travel for purposes of trade was so important to their “way of life that they could not have performed and functioned as a distinct culture” without it. *Id.*, at 1238. Everyone then understood that the treaty would protect the Yakamas’ preexisting right to take goods to and from market freely throughout its traditional trading area. The State reads the treaty only as a promise to tribal members of the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington Territory—was worth far more than an abject promise they would not be made prisoners on their reservation. This Court’s cases interpreting the treaty’s neighboring and parallel right-to-fish provision further confirm this understanding. See, e.g., *United States v. Winans*, 198 U. S. 371. Pp. 1–11.

BREYER, J., announced the judgment of the Court and delivered an

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opinion, in which SOTOMAYOR and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS, ALITO, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS, J., joined.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WASHINGTON

[March 19, 2019]

JUSTICE BREYER announced the judgment of the Court, and delivered an opinion, in which JUSTICE SOTOMAYOR and JUSTICE KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court’s similar decision.

I
A

A Washington statute applies to “motor vehicle fuel importer[s]” who bring large quantities of fuel into the State by “ground transportation” such as a “railcar, trailer, [or] truck.” Wash. Rev. Code §§82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license, and it says that a fuel tax will be “levied and imposed upon motor vehicle fuel licensees” for “each gallon of motor vehicle fuel” that the licensee brings into the State. §§82.36.020(1), (2)(c). Licensed fuel importers who

import fuel by ground transportation become liable to pay the tax as of the time the “fuel enters into this [S]tate.” §§82.36.020(2)(c); see also §§82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But *only* those licensed fuel importers who import fuel *by ground transportation* are liable to pay the tax. §§82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay *this* tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, *i.e.*, about one-fourth of the land that makes up the State today. Art. I, *id.*, at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas \$200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas’ reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include “the right, in common with citizens of the United States, to travel upon all public

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highways,” “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory,” and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, *id.*, at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington’s fuel import tax, as applied to Cougar Den’s activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas’ reserved “right, in common with citizens of the United States, to travel upon all public highways.” Art. III, 12 Stat. 953.

In December 2013, the Washington State Department of Licensing (Department), believing that the state tax was not pre-empted by the treaty, assessed Cougar Den \$3.6 million in taxes, penalties, and licensing fees. App. to Pet. for Cert. 65a; App. 10a. Cougar Den appealed the assessment to higher authorities within the state agency. App. 15a. An Administrative Law Judge agreed with Cougar Den that the tax was pre-empted. App. to Brief in Opposition 14a. The Department’s Director, however, disagreed and overturned the ALJ’s order. App. to Pet. for Cert. 59a. A Washington Superior Court in turn disagreed with the director and held that the tax was pre-empted. *Id.*, at 34a. The director appealed to the Washington Supreme Court.

188 Wash. 2d 55, 58, 392 P. 3d 1014, 1015 (2017). And that court, agreeing with Cougar Den, upheld the Superior Court’s determination of pre-emption. *Id.*, at 69, 392 P. 3d, at 1020.

The Department filed a petition for certiorari asking us to review the State Supreme Court’s determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute “taxes the importation of fuel, which is the transportation of fuel.” *Ibid.* It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” *Id.*, at 67, 392 P. 3d, at 1019.

Nor is there any reason to doubt that the Washington Supreme Court means what it said when it interpreted the Washington statute. We read the statute the same way. In the statute’s own words, Washington “impose[s] upon motor vehicle fuel licensees,” including “licensed importer[s],” a tax for “each gallon of motor vehicle fuel” that “enters into this state,” but *only* “if . . . entry is” by means of “a railcar, trailer, truck, or other equipment suitable for ground transportation.” Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). As is true of most tax laws, the statute is long and complex, and it is easy to stumble over this technical language. But if you are able to walk slowly through its provisions, the statute is easily followed. We need take only five steps.

We start our journey at the beginning of the statute which first declares that “[t]here is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate . . . pro-

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vided in [the statute] on each gallon of motor vehicle fuel.” §82.36.020(1). That is simple enough. Washington imposes a tax on a group of persons called “motor vehicle fuel licensees” for “each gallon of motor vehicle fuel.”

Who are the “motor vehicle fuel licensees” that Washington taxes? We take a second step to find out. As the definitions section of the statute explains, the “motor vehicle fuel licensees” upon whom the tax is imposed are “person[s] holding a . . . motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license.” §82.36.010(12). This, too, is easy to grasp. Not everyone who possesses motor vehicle fuel owes the tax. Instead, only motor vehicle fuel importers (and other similar movers and shakers within the motor vehicle fuel industry) who are licensed by the State to deal in fuel, must pay the tax.

But must each of these motor vehicle fuel licensees pay the tax, so that the fuel is taxed as it passes from blender, to importer, to exporter, and so on? We take a third step, and learn that the answer is “no.” As the statute explains, “the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state.” §82.36.022. Reading that, we understand that only the first licensee who can be taxed, will be taxed.

So, we ask, who is the first taxable licensee? Who must actually pay this tax? We take a fourth step to find out. Logic tells us that the first licensee who can be taxed will likely be the licensee who brings fuel into the State. But, the statute tells us that a “licensed importer” is “liable for and [must] pay tax to the department” when “[m]otor vehicle fuel enters into this state *if . . . [t]he entry is not by bulk transfer.*” §§82.36.020(2)(c), 82.36.026(3) (emphasis added). That is, a licensed importer can only be the first taxable licensee (and therefore the licensee that must pay the tax) if the importer brings fuel into the State by a

method other than “bulk transfer.”

But what is “bulk transfer”? What does it mean to say that licensed fuel importers need only pay the tax if they do not bring in fuel by “bulk transfer”? We take a fifth, and final, step to find out. “[B]ulk transfer,” the definitions section explains, “means a transfer of motor vehicle fuel by pipeline or vessel,” as opposed to “railcar, trailer, truck, or other equipment suitable for ground transportation.” §§82.36.010(3), (4). So, we learn that if the licensed fuel importer brings fuel into the State by ground transportation, then the fuel importer owes the tax. But if the licensed fuel importer brings fuel into the State by pipeline or vessel, then the importer will not be the first taxable person to possess the fuel, and he will not owe the tax.

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State’s real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington’s statute is different because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by high-

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way. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter “into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge” by means of a “tank truck” destined for “the Yakama Reservation.” *Ibid.* The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must prove that Cougar Den *traveled by highway* in order to apply its tax.

B

We are not convinced by the arguments raised to the contrary. The Department claims, and THE CHIEF JUSTICE agrees, that the state tax has little or nothing to do with the treaty because it is not a tax on *travel with fuel* but rather a tax on the *possession of fuel*. See Brief for Petitioner 26–28; *post*, at 5 (dissenting opinion).

We cannot accept that characterization of the tax, however, for the Washington Supreme Court has authoritatively held that the statute is a tax on travel. The Washington Supreme Court held that the Washington law at issue here “taxes the importation of fuel, which is the transportation of fuel.” 188 Wash. 2d, at 69, 392 P. 3d, at 1020. It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” *Id.*, at 67, 392 P. 3d, at 1019. In so doing, the State Supreme Court heard, considered, and rejected the construction of the fuel tax that the Department advances here. See *ibid.*, 392 P. 3d, at 1019 (“The Department argues, and the director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. . . . The Department’s argument is unpersuasive. . . . Here, travel

on public highways is directly at issue because the tax was an importation tax”). The incidence of a tax is a question of state law, *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U. S. 450, 461 (1995), and this Court is bound by the Washington Supreme Court’s interpretation of Washington law, *Johnson v. United States*, 559 U. S. 133, 138 (2010). We decline the Department’s invitation to overstep the bounds of our authority and construe the tax to mean what the Washington Supreme Court has said it does not.

Nor would it make sense to construe the tax’s incidence differently. The Washington Supreme Court’s conclusion follows directly from its (and our) interpretation of how the tax operates. See *supra*, at 4–7. To be sure, it is generally true that fuel imported into the State by trucks driving the public highways *can also* be described as fuel that is *possessed for the first time* in the State. But to call the Washington statute a tax on “first possession” would give the law an over-inclusive label. As explained at length above, there are several ways in which a company could be a “first possessor” of fuel without incurring the tax. See *ibid.* For example, Cougar Den would not owe the tax had Cougar Den “first possessed” fuel by piping fuel from out of State into a Washington refinery. First possession is not taxed if the fuel is brought into the State by pipeline and bound for a refinery. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, Cougar Den would not owe the tax had Cougar Den “first possessed” fuel by bringing fuel into Washington through its waterways rather than its highways. First possession is not taxed if the fuel is brought into the State by vessel. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Thus, it seems rather clear that the tax cannot accurately be described as a tax on the *first possession of fuel*.

But even if the contrary were true, the tax would still have the practical effect of burdening the Yakamas’ travel.

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Here, the Yakamas’ lone off-reservation act within the State is traveling along a public highway with fuel. The tax thus operates on the Yakamas exactly like a tax on transportation would: It falls upon them only because they happened to transport goods on a highway while en route to their reservation. And it is the practical effect of the state law that we have said makes the difference. We held, for instance, that the fishing rights reserved in the treaty pre-empted the State’s enforcement of a trespass law against Yakama fishermen crossing private land to access the river. See, *e.g.*, *United States v. Winans*, 198 U. S. 371, 381 (1905). That was so even though the trespass law was not limited to those who trespass in order to fish but applied more broadly to any trespasser. Put another way, it mattered not that the tax was “on” trespassing rather than fishing because the tax operated upon the Yakamas when they were exercising their treaty-protected right. *Ibid.*; see also *Tulee v. Washington*, 315 U. S. 681, 685 (1942) (holding that the fishing rights reserved in the treaty pre-empted the State’s application of a fishing licensing fee to a Yakama fisherman, even though the fee also applied to types of fishing not practiced by the Yakamas). And this approach makes sense. When the Yakamas bargained in the treaty to protect their right to travel, they could only have cared about preventing the State from burdening their exercise of that right. To the Yakamas, it is thus irrelevant whether the State’s tax might apply to other activities beyond transportation. The only relevant question is whether the tax “act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve.” *Tulee*, 315 U. S., at 685. And the State’s tax here acted upon Cougar Den in exactly that way.

For the same reason, we are unpersuaded by the Department’s insistence that it adopted this tax after a District Court, applying this Court’s decision in *Chickasaw*

Nation, barred the State from taxing the sale of fuel products on tribal land. See Brief for Petitioner 6–7; *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1262 (WD Wash. 2005). Although a State “generally is free to amend its law to shift the tax’s legal incidence,” *Chickasaw Nation*, 515 U. S., at 460, it may not burden a treaty-protected right in the process, as the State has done here.

Thus, we must turn to the question whether this fuel tax, falling as it does upon members of the Tribe who travel on the public highways, violates the treaty.

III

A

In our view, the State of Washington’s application of the fuel tax to Cougar Den’s importation of fuel is pre-empted by the treaty’s reservation to the Yakama Nation of “the right, in common with citizens of the United States, to travel upon all public highways.” We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *Winans*, 198 U. S., at 380–381; *Seufert Brothers Co. v. United States*, 249 U. S. 194, 196–198 (1919); *Tulee*, 315 U. S., at 683–685; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678 (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.” Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas “the right, in common with citizens of

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the United States, to travel upon all public highways.” Art. III, para. 1, *ibid.* The words “in common with” on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685.

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. See, e.g., *Winans*, 198 U. S., at 380; *Seufert Brothers*, 249 U. S., at 198; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. App. 65a; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas’ own language. App. 68a–69a.

Thus, in the year 1905, in *Winans*, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U. S., at 381; see also *Tulee*, 315 U. S., at 684 (“It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council”); cf. *Water Splash, Inc. v. Menon*, 581 U. S. ___, ___ (2017) (slip op., at 8) (noting that, to ascertain the meaning of a treaty, courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties”)

(internal quotation marks omitted).

The Court added, in light of the Yakamas' understanding in respect to the reservation of fishing rights, the treaty words "in common with" do not limit the reservation's scope to a right against discrimination. *Winans*, 198 U. S., at 380–381. Instead, as we explained in *Tulee*, *Winans* held that "Article III [of the treaty] conferred upon the Yakimas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S. 371; emphasis added). Also compare, e.g., *Fishing Vessel*, 443 U. S., at 677, n. 22 ("Whatever opportunities the treaties assure Indians with respect to fish are admittedly *not 'equal' to, but are to some extent greater than*, those afforded other citizens" (emphasis added)), with *post*, at 4 (KAVANAUGH, J., dissenting) (citing this same footnote in *Fishing Vessel* as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U. S., at 380.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. *Id.*, at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. *Id.*, at 61a.

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They traveled to the mountains to gather berries and roots. *Ibid.* The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. *Id.*, at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. *Ibid.*

The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. *Id.*, at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. *Id.*, at 66a–67a; see also, *e.g.*, *id.*, at 66a (“[W]e give you the privilege of traveling over roads”). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. *Id.*, at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, “You will be allowed to go on the roads, to take your things to market, your horses and cattle.” App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 68a (record of the treaty proceedings). He added that the Yakamas “will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.” *Ibid.* Governor Stevens further urged the Yakamas to accept the United States' proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close proximity to public highways that would facilitate trade. He said, “You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.” App. 66a. In a word, the treaty negotiations and the United States'

representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In *Tulee*, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. We concluded that "such exaction of fees as a prerequisite to the enjoyment of" a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.

We consequently conclude that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Ibid.* Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians. Cf. *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148–149 (1973).

B

Again, we are not convinced by the arguments raised to the contrary. THE CHIEF JUSTICE concedes that "the right to travel with goods is just an application of the Yakamas' right to travel." *Post*, at 2 (dissenting opinion); see also *ibid.* ("It ensures that the Yakamas enjoy the same privi-

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leges when they travel with goods as when they travel without them.”). But he nevertheless insists that, because of the way in which the Washington statute taxes fuel, the statute does not interfere with the right to travel reserved by the Yakamas in the treaty. *Post*, at 3.

First, THE CHIEF JUSTICE finds it significant that “[t]he tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled.” *Ibid.*, see also *ibid.* (“The tax before us does not resemble a blockade or a toll”). But that argument fails on its own terms. A toll on highway travel is no less a toll when the toll varies based on the number of axels on a vehicle traveling the highway, or on the number of people traveling in the vehicle. We cannot, therefore, see why the number of gallons of fuel that the vehicle carries should make all the difference. Put another way, the fact that a tax on travel varies based on the features of that travel does not mean that the tax is not a tax on travel.

Second, THE CHIEF JUSTICE argues that it “makes no sense,” for example, to hold that “a tax on certain luxury goods” that is assessed the first time the goods are possessed in Washington cannot apply to a Yakama member “who buys” a mink coat “over the state line in Portland and then drives back to the reservation,” but the tax can apply to a Yakama member who “buys a mink coat at an off-reservation store in Washington.” *Post*, at 4. The short, conclusive answer to this argument is that there is a treaty that forbids taxing Yakama travel on highways with goods (*e.g.*, fuel, or even furs) for market; and there is no treaty that forbids taxing Yakama off-reservation purchases of goods. Indeed, if our precedents supported THE CHIEF JUSTICE’s rule, then our fishing rights cases would have turned on whether Washington also taxed fish purchased in the grocery store. Compare, *e.g.*, *Tulee*, 315 U. S., at 682, n. 1 (holding that the fishing right reserved by the Yakamas in the treaty pre-empted the application

to the Yakamas of a state law which prohibited “catch[ing] . . . fish for food” without having purchased a license). But in those cases, we did not look to whether fish were taxed elsewhere in Washington. That is because the treaty does not protect the Yakamas from state sales taxes imposed on the off-reservation sale of goods. Instead, the treaty protects the Yakamas’ right to travel the public highways without paying state taxes on that activity, much like the treaty protects the Yakamas’ right to fish without paying state taxes on that activity.

Third, THE CHIEF JUSTICE argues that only a law that “punished or charged the Yakamas” for an “integral feature” of a treaty right could be pre-empted by the treaty. *Post*, at 6. But that is true of the Washington statute at issue here. The treaty protects the right to travel with goods, see *supra*, at 10–14, and the Washington statute taxes travel with goods, see *supra*, at 4–7. Therefore, the statute charges the Yakamas for an “integral feature” of a treaty right. But even if the statute indirectly burdened a treaty right, under our precedents, the statute would still be pre-empted. One of the Washington statutes at issue in *Winans* was not a fishing regulation, but instead a trespassing statute. That trespassing statute indirectly burdened the right to fish by preventing the Yakamas from crossing privately owned land so that the Yakamas could reach their traditional fishing places and camp on that private property during the fishing season. See 198 U. S., at 380–381. It cannot be true that a law prohibiting trespassing imposed a burden on the right to fish that is “integral” enough to be pre-empted by the treaty, while a law taxing goods carried to the reservation on the public highway imposes a burden on the right to travel that is too attenuated to be pre-empted by the treaty.

C

Although we hold that the treaty protects the right to

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travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty “forecloses the [S]tate from charging the Indians a fee of the kind in question here,” the State retained the “power to impose on Indians, equally with others, such restrictions of a purely regulatory nature . . . as are necessary for the conservation of fish.” 315 U. S., at 684. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were “regulatory as well as revenue producing,” “their regulatory purpose could be accomplished otherwise,” and “the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program.” *Id.*, at 685. See also *Puyallup Tribe v. Department of Game of Wash.*, 391 U. S. 392, 402, n. 14 (1968) (“As to a ‘regulation’ concerning the time and manner of fishing outside the reservation (as opposed to a ‘tax’), we said that the power of the State was to be measured by whether it was ‘necessary for the conservation of fish’” (quoting *Tulee*, 315 U. S., at 684)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member’s exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States’ awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States’ intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See *id.*, at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by “railcar, trailer, truck, or other equipment suitable for ground transportation,” see *supra*, at 6, a sales or use tax normally applies irrespective of transport or its means. Here, however, we deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See *supra*, at 14–18. Second, the treaty protects the Yakamas’ right to travel on the public highway with goods for sale. See *supra*, at 10–14. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See *supra*, at 4–10. For these three reasons, Washington’s fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

GORSUCH, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WASHINGTON

[March 19, 2019]

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins,
concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy “the right, in common with citizens of the United States, to travel upon all public highways.” Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty’s original meaning. *Eastern Airlines, Inc. v. Floyd*, 499 U. S. 530, 534–535 (1991). When we’re dealing with a

tribal treaty, too, we must “give effect to the terms as the Indians themselves would have understood them.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations “English words were translated into Chinook jargon . . . although that was not the primary language” of the Tribe. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U. S. negotiators wrote the treaty in English—a language that the Yakamas couldn’t read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas’ understanding of the treaty’s terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas’ challenge to certain restrictions on their logging operations. *Id.*, at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court’s estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. *Post*, at 1–2 (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty’s terms. To the Yakamas, the phrase “‘in common with’ . . . implie[d] that the Indian and non-Indian use [would] be joint but [did]

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not imply that the Indian use [would] be in any way restricted.” *Yakama Indian Nation*, 955 F. Supp., at 1265. In fact, “[i]n the Yakama language, the term ‘in common with’ . . . suggest[ed] public use or general use without restriction.” *Ibid.* So “[t]he most the Indians would have understood . . . of the term[s] ‘in common with’ and ‘public’ was that they would share the use of the road with whites.” *Ibid.* Significantly, there is “no evidence [to] sugges[t] that the term ‘in common with’ placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads.” *Id.*, at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them “with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.” *Id.*, at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty’s terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone’s admission, the state tax at issue here isn’t about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The *Yakama Indian Nation* decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. “Prior to and at the time the treaty was negotiated,” the Yakamas “engaged in a system of trade and exchange with other plateau tribes” and tribes “of the Northwest coast and

plains of Montana and Wyoming.” *Ibid.* This system came with no restrictions; the Yakamas enjoyed “free and open access to trade networks in order to maintain their system of trade and exchange.” *Id.*, at 1263. They traveled to Oregon and maybe even to California to trade “fir trees, lava rocks, horses, and various species of salmon.” *Id.*, at 1262–1263. This extensive travel “was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes.” *Id.*, at 1262. Indeed, “far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture.” *Id.*, at 1238. Travel for purposes of trade was so important to the “Yakamas’ way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel.” *Ibid.* (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas’ preexisting right to take goods to and from market freely throughout their traditional trading area. “At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to . . . trade.” *Id.*, at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would “be allowed to go on the roads to take [their] things to market.” *Id.*, at 1244 (emphasis deleted). Governor Stevens called this the “‘same libert[y]” to travel with goods free of restriction “‘outside the reservation” that the Tribe would enjoy within the new reservation’s boundaries. *Ibid.* Indeed, the U. S. representatives’ “statements regarding the Yakama’s use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors.” *Id.*, at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yaka-

GORSUCH, J., concurring in judgment

mas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U. S. treaty negotiators were “under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory.” *Id.*, at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed “to obtain title to Indian lands” to place these settlements on a more lawful footing. *Ibid.* The government itself also wanted to build “wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades.” *Ibid.* So “obtaining Indian lands east of the Cascades became a central objective” for the government’s own needs. *Id.*, at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty’s neighboring and parallel right-to-fish provision further confirm this understanding. The treaty “secure[s] . . . the right of taking fish at all usual and accustomed places, *in common with* citizens of the Territory.” Treaty Between the United States

and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an “impotent” construction on the treaty. *United States v. Winans*, 198 U. S. 371, 380 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws “may be both convenient and, in [their] general impact, fair,” this Court observed, they act “upon the Indians as a charge for exercising the very right their ancestors intended to reserve.” *Tulee v. Washington*, 315 U. S. 681, 685 (1942). Interpreting the same treaty right in *Winans*, we held that, despite arguments otherwise, “the phrase ‘*in common with* citizens of the Territory’” confers “upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their ‘usual and accustomed places.’” *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S., at 371; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe “free access” from local roads to the public highways, but indicates that tribal members are to use those highways “in common with” non-Indians. On the State’s account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas’ goods once they arrive there. See also *post*, at 3 (KAVANAUGH, J., dissenting).

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The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas’ understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won’t work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also *post*, at 3 (ROBERTS, C. J., dissenting) (acknowledging that the treaty prohibits the State from “charg[ing] . . . a toll” on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn’t offend that right. It doesn’t, we are told, because the “object” of the State’s tax isn’t *travel* but the *possession* of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a “mink coat” in a Washington store would have to pay the State’s sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See *post*, at 2–7.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to

give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to *travel* on the highways free of most restrictions on their movement; it also guarantees tribal members the right to *move goods* freely to and from market using those highways. And it's impossible to *transport* goods without *possessing* them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to *possess* the fish they catch—just like their right to *move* goods on the highways embraces the right to *possess* them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. *Post*, at 6, n. 2 (ROBERTS, C. J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty *also* guarantees a right to move (and so possess) goods freely as they travel to and from market. *Ibid.*

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is

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entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—*that* is the treaty right the Yakamas reserved. And it’s easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas’ transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas’ conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington’s highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also *post*, at 7–10 (ROBERTS, C. J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas *themselves* enjoy a right to travel free of at least some nondiscriminatory state regulations, this “problem” inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See *post*, at 3 (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State’s parade of horrors isn’t really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its “in common

with” language *also* indicates that tribal members knew they would have to “share the use of the road with whites” and accept regulations designed to allow the two groups’ safe coexistence. *Yakama Indian Nation*, 955 F. Supp., at 1265. Indeed, the Yakamas *expected* laws designed to “protec[t]” their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State’s hypothetical parade of horrors has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn’t so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington’s ability to regulate the transportation of diseased apples from Oregon. See also *post*, at 10 (ROBERTS, C. J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is

GORSUCH, J., concurring in judgment

reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of “tribal members across the country.” See *post*, at 10 (ROBERTS, C. J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

ROBERTS, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WASHINGTON

[March 19, 2019]

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE KAVANAUGH join, dissenting.

In the 1855 treaty in which the Yakamas surrendered most of their lands to the United States, the Tribe sought to protect its way of life by reserving, among other rights, “the right, in common with citizens of the United States, to travel upon all public highways.” Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. Cougar Den, a Yakama corporation that uses public highways to truck gas into Washington, contends that the treaty exempts it from Washington’s fuel tax, which the State assesses upon the importation of fuel into the State. The plurality agrees, concluding that Washington cannot impose the tax on Cougar Den because doing so would “have the practical effect of burdening” Cougar Den’s exercise of its right to travel on the highways. *Ante*, at 9. The concurrence reaches the same result, reasoning that, because the Yakamas’ right to travel includes the right to travel with goods, the State cannot tax or regulate the Yakamas’ goods on the highways. *Ante*, at 7–8 (GORSUCH, J., concurring in judgment).

But the mere fact that a state law has an effect on the Yakamas *while* they are exercising a treaty right does not establish that the law impermissibly burdens the right

itself. And the right to travel with goods is just an application of the Yakamas' right to travel. It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation. Under our precedents, a state law violates a treaty right only if the law imposes liability upon the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee v. Washington*, 315 U. S. 681, 685 (1942). Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty. I respectfully dissent from the contrary conclusion of the plurality and concurrence.¹

We have held on three prior occasions that a non-discriminatory state law violated a right the Yakamas reserved in the 1855 treaty. All three cases involved the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, 12 Stat. 953. In *United States v. Winans*, 198 U. S. 371 (1905), and later again in *Seufert Brothers Co. v. United States*, 249 U. S. 194 (1919), we held that state trespass law could not be used to prevent tribe members from reaching a historic fishing site. And in *Tulee v. Washington*, we held that Washington could not punish a Yakama member for fishing without a license. We concluded that the license law was preempted because the required fee "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve"—the right to fish. 315

¹There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.

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U. S., at 685.

These three cases found a violation of the treaty when the challenged action—application of trespass law and enforcement of a license requirement—actually blocked the Yakamas from fishing at traditional locations. Applying the reasoning of those decisions to the Yakamas’ right to travel, it follows that a State could not bar Yakama members from traveling on a public highway, or charge them a toll to do so.

Nothing of the sort is at issue here. The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: “There is hereby levied and imposed . . . a tax . . . *on each gallon of motor vehicle fuel.*” Wash. Rev. Code §82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road, rail, barge, or pipeline. §§82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den’s travel on the highway; it is not charging the Yakamas “for exercising the very right their ancestors intended to reserve.” *Tulee*, 315 U. S., at 685.

It makes no difference that Washington happens to impose that charge when Cougar Den’s drivers cross into Washington on a public highway. The time and place of the imposition of the tax does not change what is taxed,

and thus what activity—possession of goods or travel—is burdened. Say Washington imposes a tax on certain luxury goods, assessed upon first possession of the goods by a retail customer. A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. Yet, as the plurality acknowledges, under its view a tribal member who buys the same coat right over the state line in Portland and then drives back to the reservation will owe no tax—all because of a reserved right to travel on the public highways. *Ante*, at 15. That makes no sense. The tax charges individuals for possessing expensive furs. It in no way burdens highway travel.

The plurality devotes five pages to planting trees in hopes of obscuring the forest: to delving into irrelevancies about how the tax is assessed or collected, instead of the substance of what is taxed. However assessed or collected, the tax on 10,000 gallons of fuel is the same whether the tanker carrying it travels three miles in Washington or three hundred. The tax varies only with the amount of fuel. Why? Because the tax is on fuel, not travel. If two tankers travel 200 miles together from the same starting point to the same destination—one empty, one full of fuel—the full tanker will pay the fuel tax, the empty tanker will pay nothing. Their travel has been identical, but only the full one pays tax. Why? Because the tax is on fuel, not travel. The tax is on the owner of the fuel, not the owner of the vehicle. Why? You get the point.

The plurality responds that, even though the tax is calculated per gallon of fuel, it remains a tax on travel because it taxes a “feature” of travel. *Ante*, at 15. It is of course true that tanker trucks can be seen from time to time on the highways, but that hardly makes them a regular “feature” of travel, like the plurality’s examples of axels or passengers. And we know that Washington is not taxing the gas insofar as it is a feature of Cougar Den’s travel, because Washington imposes the exact same tax on

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gas that is not in transit on the highways.

Rather than grappling with the substance of the tax, the plurality fixates on variations in the time and place of its assessment. The plurality thinks it significant that Washington does not impose the tax at the moment of entry on fuel that enters the State by pipeline or by a barge bound for a refinery, but instead when a tanker truck withdraws the fuel from the refinery or pipeline terminal. This may demonstrate that the tax is not on *first* possession of fuel in the State, as the plurality stresses, but it hardly demonstrates that the tax is not on possession of fuel *at all*. Regardless of how fuel enters the State, someone will eventually pay a per-gallon charge for possessing it. Washington simply assesses the fuel tax in each case upon the wholesaler. See 188 Wash. 2d 55, 60, 392 P. 3d 1014, 1016 (2017). This variation does not indicate, as the plurality suggests, that the fuel tax is somehow *targeted* at highway travel.

The plurality also says that it is bound by the Washington Supreme Court’s references to the tax as an “importation tax” and tax on “the importation of fuel,” *ante*, at 7 (quoting 188 Wash. 2d, at 67, 69, 392 P. 3d, at 1019, 1020), but these two references to the point at which the tax is *assessed* are not authoritative constructions of the *object* of the tax. The state court did not reject Washington’s argument that this is a tax on fuel; instead, like the plurality today, it ignored that argument and concluded that the tax was invalid simply because Washington imposed it while Cougar Den was traveling on the highway. In any event, the state court more often referred to the tax as a “tax on fuels” or “fuel tax[.]” *Id.*, at 58–61, 392 P. 3d, at 1015–1016.

After the five pages arguing that a tax expressly labeled as on “motor vehicle fuel” is actually a tax on something else, the plurality concludes . . . it doesn’t matter. As the plurality puts it at page nine of its opinion, “even if” the

tax is on fuel and not travel, it is preempted because it has “the practical effect of burdening” the Yakamas’ right to travel on the highways. The plurality’s rule—that States may not enforce general legislation that has an effect on the Yakamas while they are traveling—has no basis in our precedents, which invalidated laws that punished or charged the Yakamas simply for exercising their reserved rights. The plurality is, of course, correct that the trespass law in *Winans* did not target fishing, but it effectively made illegal the very act of fishing at a traditional location. Here, it is the possession of commercial quantities of fuel that exposes the Yakamas to liability, not travel itself or any integral feature of travel.

The concurrence reaches the same result as the plurality, but on different grounds. Rather than holding that the treaty preempts any law that burdens the Yakamas while traveling on the highways, the concurrence reasons that the fuel tax is preempted because it regulates the possession of goods, and the Yakamas’ right to travel includes the right to travel with goods. *Ante*, at 7–8. But the right to travel with goods is just an application of the right to travel. It means the Yakamas enjoy the same privileges whether they travel with goods or without. It does not provide the Yakamas with an additional right to carry any and all goods on the highways, tax free, in any manner they wish.² The concurrence purports to find this additional right in the record of the treaty negotiations, but

²The plurality simply assumes that the right to travel with goods is an additional, substantive right when it reasons that the fuel tax is preempted because it taxes an “integral feature” of travel with goods. *Ante*, at 16. The concurrence makes the same assumption when it compares the fuel tax to a tax on “‘possession’ of fish” *Ante*, at 8. That tax would be preempted because “taking possession of fish” is just another way of describing the act of fishing. But possession of a tanker full of fuel is not an integral feature of travel, which is the relevant activity protected by the treaty.

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the record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.

Nothing in the text of the treaty, the historical record, or our precedents supports the conclusion that the right “to travel upon all public highways” transforms the Yakamas’ vehicles into mobile reservations, immunizing their contents from any state interference. Before it reaches the reservation, the fuel in Cougar Den’s tanker trucks is always susceptible to state regulation—it does not pass in and out of state authority with every exit off or entry onto the road.

Recognizing the potentially broad sweep of its new rule, the plurality cautions that it does not intend to deprive the State of the power to regulate when necessary “to prevent danger to health or safety occasioned by a tribe member’s exercise of treaty rights.” *Ante*, at 17. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. *Ante*, at 9–10. I am not so confident.

First, by its own terms, the plurality’s health and safety exception is limited to laws that regulate dangers “occasioned by” a Yakama’s travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk “occasioned by” highway driving. I do not see how, under the plurality’s rule or the concurrence’s, a Washington police officer could burden a Yakama’s travel by pulling him over on suspicion of carrying such contraband on the highway.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. Importantly, our prece-

dents—all of which concern hunting and fishing rights—acknowledge the authority of the States to regulate Indians’ exercise of their reserved rights only in the interest of *conservation*. See *Tulee*, 315 U. S., at 684 (“[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions . . . as are necessary for the conservation of fish”); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 205 (1999) (“We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.”); *Confederated Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1197 (ED Wash. 2011) (“Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of ‘in common’ usufructuary rights is any reference to a state’s exercise of its public-safety police power.”). Indeed, this Court had previously assured the Yakamas that “treaty fishermen are *immune from all regulation save that required for conservation*.” *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 682 (1979) (emphasis added). Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas’ right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality’s hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today’s decision digs such a deep hole that the future promises a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a

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broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or *amicus* has addressed the question.

The plurality’s response to this important issue is the following, portentous sentence: “The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety.” *Ante*, at 17. A lot of weight on two words, “may not.” The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent “bad white men” from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. *Ante*, at 18. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today’s decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular “usual and accustomed places.” I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas’ right to travel may undermine rights that the Yakamas and other tribes really did reserve.

The concurrence does not mention the plurality’s possible health and safety exception, but observes that the Yakamas expected to follow laws that “facilitate the safe use of the roads by Indians and non-Indians alike.” *Ante*, at 11. The State is therefore wrong, the concurrence says, to contend that a decision exempting Cougar Den’s fuel from taxation would call into question speed limits and reckless driving laws. But that is not the State’s principal argument. The State acknowledges that laws facilitating safe travel on the highways would fall within the long-recognized conservation exception. See Tr. of Oral Arg.

12–13. The problem is that today’s ruling for Cougar Den preempts the enforcement of any regulation of *goods* on the highway that does not concern *travel* safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington). See *id.*, at 13; Brief for Petitioner 44.

The concurrence says not to worry, the apples could be regulated and inspected where they are grown, or when they arrive at a market. Or, if the Yakamas are taking the apples back to the reservation, perhaps the Federal Government or the Tribe itself could address the problem there. *Ante*, at 10. What the concurrence does not say is that the State could regulate the contraband apples on the highway. And there is no reason offered why other contraband should be treated any differently.

Surely the concurrence does not mean to suggest that the parties to the 1855 treaty intended to confer on the Tribe the right to travel with illegal goods, free of any regulation. But if that is not the logical consequence of the decision today, the plurality and the concurrence should explain why. It is the least they should do.

I respectfully dissent.

KAVANAUGH, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WASHINGTON

[March 19, 2019]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS joins, dissenting.

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a “right, in common with citizens of the United States, to travel upon all public highways.” Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. The treaty’s “in common with” language means what it says. The treaty recognizes tribal members’ right to travel on off-reservation public highways on equal terms with other U. S. citizens. Under the text of the treaty, the tribal members, like other U. S. citizens, therefore still remain subject to *nondiscriminatory* state highway regulations—that is, to regulations that apply equally to tribal members and other U. S. citizens. See *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. THE CHIEF JUSTICE concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe’s treaty right to travel on the public highways. I agree with THE CHIEF JUSTICE and join his dissent.

Even if the fuel tax is a highway regulation, it is a *non-*

discriminatory highway regulation. For that reason as well, the fuel tax does not infringe the Tribe's treaty right to travel on the public highways on equal terms with other U. S. citizens.

The plurality, as well as the concurrence in the judgment, suggests that the treaty, if construed that way, would not have been important to the Yakamas. For that reason, the plurality and the concurrence would not adhere to that textual meaning and would interpret "in common with" other U. S. citizens to mean, in essence, "exempt from regulations that apply to" other U. S. citizens.

I respectfully disagree with that analysis. The treaty right to travel on the public highways "in common with"—that is, on equal terms with—other U. S. citizens was important to the Yakama tribal members at the time the treaty was signed. That is because, as of 1855, States and the Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether. See, *e.g.*, Treaty Between the United States of America and the Utah Indians, Art. VII, Dec. 30, 1849, 9 Stat 985; Mo. Rev. Stat., ch. 80, §10 (1845). The Yakamas needed to travel to sell their goods and trade for other goods. As a result, those kinds of laws would have devastated the Yakamas' way of life. Importantly, the terms of the 1855 treaty made crystal clear that those kinds of travel restrictions could not be imposed on the Yakamas.

In particular, the treaty afforded Yakama tribal members two relevant rights. First was "free access" on roads from the reservation to "the nearest public highway." Art. III, 12 Stat. 953. Second was a right to travel "in common with" other U. S. citizens on "all public highways." *Ibid.* The right to free access from the reservation to public highways, combined with the right to travel off

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reservation on public highways, facilitated the Yakama tribal members' extensive trading network.

In determining the meaning of the “in common with” language, we must recognize that the treaty used different language in defining (1) the right to “free access,” which applies only on roads connecting the reservation to the off-reservation public highways, and (2) the right to travel “in common with” other U. S. citizens, which applies on those off-reservation public highways. The approach of the plurality and the concurrence would collapse that distinction between the “free access” and “in common with” language and thereby depart from the text of the treaty. I would stick with the text. The treaty’s “in common with” language—both at the time the treaty was signed and now—means what it says: the right for Yakama tribal members to travel on public highways on equal terms with other U. S. citizens.

To be sure, the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas. As a matter of separation of powers, however, courts are bound by the text of the treaty. See *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U. S. 753, 774 (1985). It is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law. And since 1855, and especially since 1968, Congress has in fact taken many steps to assist tribes through a variety of significant legislative measures. In short, lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.

What about precedent? It is true that some of our older precedents interpreted similar “in common with” treaty language regarding fishing rights to grant tribal members an exemption from certain fishing regulations, even when

the fishing regulations were nondiscriminatory. But as we explained in the most recent of those fishing cases, those nondiscriminatory fishing regulations had the effect of preventing the Tribes from catching a fair share of the fish in the relevant area. In other words, the fishing regulations at issue were discriminatory in effect even though nondiscriminatory on their face. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, n. 22 (1979).

That rationale for departing from the treaty text in the narrow context of the fishing cases does not apply in the highway context. Facially nondiscriminatory highway regulations—such as speed limits, truck restrictions, and reckless driving laws—are also nondiscriminatory in effect, as relevant here. They do not deprive tribal members of use of the public highways or deprive tribal members of a fair share of the public highways.

Washington’s facially nondiscriminatory fuel tax is likewise nondiscriminatory in effect. The Washington fuel tax therefore does not violate the key principle articulated in the fishing cases. I would adhere to the text of the treaty and hold that the tribal members, like other citizens of the State of Washington, are subject to the nondiscriminatory fuel tax.

The Court (via the plurality opinion and the concurrence) disagrees. The Court relies on the fishing cases and fashions a new right for Yakama tribal members to disregard even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington’s similarly structured cigarette tax. The Court’s newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the State of Washington. As a result, the State of Washington (along with other States) stands to lose millions of dollars annually in tax revenue, which

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will necessarily mean fewer services or increased taxes for other citizens and tribes in the State.

In addition, the Court’s newly created right—if applied across the board—would seem to afford Yakama tribal members an exemption from all manner of highway regulations, ranging from speed limits to truck restrictions to reckless driving laws. No doubt because of those negative real-world consequences, the Court simultaneously fashions a new health and safety exception.* But neither the right nor the exception comes from the text of the treaty. As THE CHIEF JUSTICE explains, the Court’s “need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence.” *Ante*, at 8.

I share THE CHIEF JUSTICE’s concern that the Court’s new right for tribal members to disregard even nondiscriminatory highway regulations and the Court’s new exception to that right for health and safety regulations could generate significant uncertainty and unnecessary litigation for States and tribes. THE CHIEF JUSTICE says it well: The Court “digs such a deep hole that the future promises a lot of backing and filling.” *Ibid*.

Instead of judicially creating a new atextual right for tribal members to disregard nondiscriminatory highway regulations and then backfilling by judicially creating a new atextual exception to that right for health and safety regulations, I would adhere to the text of the treaty and leave it to Congress, if it chooses, to provide additional benefits for the Yakamas. In my respectful view, even when we interpret any ambiguities in the treaty in favor of the Tribe, the treaty phrase “in common with” cannot properly be read to exempt tribal members from nondiscriminatory highway regulations.

*I understand both the plurality opinion and the concurrence to approve of a health and safety exception.

In sum, under the treaty, Washington's nondiscriminatory fuel tax may be imposed on Yakama tribal members just as it may be imposed on other citizens and tribes in the State of Washington. I respectfully dissent.

Exhibit: Washington State Department of Licensing v. Cougar Den, Inc., 586 U.S. ____ (2019) – EXNI 453 / Chord Project

Date: 11/23/2025

Prepared by: Elizabeth Lone Eagle

Case Citation:

Washington State Department of Licensing v. Cougar Den, Inc., 586 U.S. ____ (2019) (No. 16-1498), decided March 19, 2019. Majority opinion by Breyer, concurring opinion by Gorsuch (joined by Ginsburg). (supreme.justia.com)

Majority Opinion (Breyer, J.)

“The treaty granted the Yakama Nation ‘the right, in common with citizens of the United States, to travel upon all public highways.’ Although ‘in common with’ might on its face allow state regulation equally, that is not what the Yakamas understood the words to mean in 1855.”

Source: Supreme Court PDF, pp. 4–5.

Concurring Opinion (Gorsuch, J., joined by Ginsburg, J.)

“When we’re dealing with a tribal treaty, ... we must ‘give effect to the terms as the Indians themselves would have understood them.’”

“During the negotiations, English words were translated into Chinook jargon ... although that was not the primary language of the Tribe. After the parties reached agreement, the U.S. negotiators wrote the treaty in English — a language that the Yakamas couldn’t read or write.”

“There is no evidence [suggesting] that the term ‘in common with’ placed Indians in the same category as non-Indians with respect to any tax or fee ... Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them ‘with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.’”

Source: Supreme Court PDF, pp. 2–6.

Relevance

These passages demonstrate:

- Favoring the original landowners / tribal parties in interpreting treaty rights.
- Recognition of translation / language discrepancies at the time of treaty negotiation, supporting a tribal-perspective interpretation.
- Direct Gorsuch language citing the principle that ambiguities or translations are resolved in favor of the tribe's understanding.



LAC DU FLAMBEAU INDIANS v. Stop Treaty Abuse-Wis., Inc., 781 F. Supp. 1385 (W.D. Wis. 1992)

US District Court for the Western District of Wisconsin - 781 F. Supp. 1385 (W.D. Wis. 1992)
January 6, 1992

781 F. Supp. 1385 (1992)

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, Michael Allen, Wa-Swa-Gon Treaty Association, Thomas Maulson, Robert Martin, Nick Hockings, Gilbert Chapman, Plaintiffs,

v.

STOP TREATY ABUSE-WISCONSIN, INC., Dean Crist, Tommy Handrick, Unknown John Does and Jane Roes, Defendants.

No. 91-C-117-C.

United States District Court, W.D. Wisconsin.

January 6, 1992.

***1386 *1387** Brian L. Pierson, Charne, Clancy, Krueger & Pollack, Milwaukee, Wis., for plaintiffs.

Richard E. Sommer, Sommer, Olk & Schroder, Rhinelander, Wis., for Stop Treaty Abuse-Wisconsin, Inc., and Dean Crist.

Tommy Handrick, pro se.

OPINION AND ORDER

CRABB, Chief Judge.

This is a civil case for injunctive relief in which plaintiffs seek a permanent injunction preventing the named defendants from interfering intentionally with the exercise of treaty-recognized hunting, fishing and gathering rights by any member of the plaintiff band. A preliminary injunction to this effect has been in place since March 15, 1991. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty-Abuse, Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D.Wis.1991).

The case is before the court at this time on plaintiffs' motion for summary judgment; on plaintiffs' motion to strike the supplementary brief and affidavit in opposition to the motion for summary judgment filed by defendants Stop Treaty Abuse-Wisconsin, Inc. and Dean Crist; on the motion of defendants Stop Treaty Abuse and Dean Crist for leave to file a second amended answer to assert two additional affirmative defenses; and on plaintiffs' motion to strike the untimely motion for summary judgment filed by the same defendants. I turn first to the motion for leave to file a second amended answer.

At a hearing held on October 31, 1991, I denied a motion by these same defendants to file a first amended answer to add as an affirmative defense the claim that the individual plaintiffs lacked standing to pursue this suit because they are not full-blooded Chippewa. The motion was untimely, and in my view so lacking in merit as to make amendment futile. *See Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) ("court may deny leave to amend where the proposed amendment fails to allege facts which support a valid theory of liability ... or where the party moving to amend has not shown that the proposed amendment has substantial merit")

In their new motion to amend, defendants Stop Treaty Abuse and Crist (hereafter, defendants) seek to assert the same claim in their proposed amended answer, as well as the claim that the plaintiffs are barred by the doctrine of res judicata from asserting retained rights to hunt, fish and gather in the ceded territories because the Indian Claims Commission ruled definitively on those rights in 1973, 1977 and 1978.

Defendants have shown no reason to reverse the earlier holding that there is no merit to their claim that the individual plaintiffs lack standing to pursue this action because they may lack proof that they are full-blooded Chippewa. The Lac du Flambeau band has treaty-protected usufructuary rights to hunt, fish and gather in the ceded territory. Those rights may be exercised by its members. Who those members are is to be determined by the band under the well-settled law that Indian tribes have the power to regulate their internal and

social relations with respect to membership, inheritance and domestic relations, subject to the plenary authority of Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56, 98 S. Ct. 1670, 1675-76, 56 L. Ed. 2d 106 (1978). Defendants have no standing to challenge the criteria by which the band determines its membership, and they are not contending that the Lac du Flambeau band does not consider the individual plaintiffs to be members of the band. Therefore, there is nothing to the affirmative defense defendants are seeking to assert.^[1]

***1388** In their proposed amendment defendants contend that the Indian Claims Commission rulings bar the tribes from asserting their usufructuary rights. That claim is out of place in this law suit. The plaintiff tribe's right to hunt, fish and gather in the ceded territory of Wisconsin has been determined in other litigation to which all of the citizens of the State of Wisconsin were party, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Final Judgment)*, 775 F. Supp. 321 (W.D.Wis.1991). That holding may not be reexamined in this suit. The res judicata effect of the Indian Claims Commission proceedings could have been raised in that suit (and was raised, in connection with the timber subphase of the case, see *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Timber)*, 758 F. Supp. 1262 (W.D.Wis.1991)). Therefore, the ordinary principles of res judicata preclude defendants from litigating in this suit the effect on the earlier suit of the Indian Claims Commission proceedings. See generally 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure*, §§ 4401-4478 (1981).

Because there is no merit to either of defendants' proposed affirmative defenses, it would be futile to grant them leave to serve and file their untimely proposed second amended answer. Their motion for such leave will be denied.

I turn next to plaintiffs' motion to strike defendants' supplemental brief and affidavit in opposition to plaintiffs' motion for summary judgment. Plaintiffs' opposition to this brief derives from the same basis as their opposition to defendants' motion to file and serve a second amended answer. In the supplemental brief, defendants argue that the Indian Claims Commission proceedings preclude the plaintiffs from asserting any usufructuary rights in the ceded territory. Because defendants have been denied leave to amend their answer to raise this claim, and because the issue cannot be litigated in this case, defendants' argument has no relevance to any issue in the case and need not be considered. Plaintiffs' motion to strike the supplemental brief and affidavit will be granted.

For the same reasons, plaintiffs' motion to strike the defendants' motion for summary judgment will be granted. The motion is based on the same meritless claims defendants

seek to add to their answer.

I turn finally to plaintiffs' motion for summary judgment. For the purpose only of deciding this motion, I find that there is no genuine issue with respect to any of the following material facts.

UNDISPUTED FACTS

The Lake Superior Chippewa are a tribe recognized by the United States. The Chippewa entered into treaties with the United States by which they ceded territory to the federal government, but reserved the right to hunt, fish and gather food.

Plaintiff Michael Allen is president of the Lac du Flambeau band of Lake Superior Chippewa Indians and is its highest elected official. Wa-Swa-Gon Treaty Association is an unincorporated association of members of the Lac du Flambeau band and others. It supports the tribe's exercise of off-reservation treaty-recognized fishing rights. Plaintiffs Tom Maulson, Nick Hockings, Robert Martin and Gilbert Chapman are members of the Lac du Flambeau band who reside on the Lac du Flambeau reservation. As members of the band, they have the right to engage in off-reservation treaty-protected fishing in the ceded territory.

***1389** Defendant Stop Treaty Abuse-Wisconsin, Inc. is a for-profit corporation organized under the laws of the State of Wisconsin, with its principal place of business at AV 2075 Witches Lake Road, Woodruff, Wisconsin. Defendant Dean Crist is a member and co-founder of Stop Treaty Abuse-Wisconsin, Inc. and a spokesman for it. He resides in Minocqua, Wisconsin. Defendant Tommy Handrick is a resident of Minocqua and has been a member of Stop Treaty Abuse-Wisconsin, Inc. at all relevant times.

The significance of fishing for the Chippewa is religious and cultural as well as economic. Traditional religious rituals and festivals are an important part of Chippewa fishing activities.^[2]

In order to spear walleye, Chippewa spearers wear helmets similar to a miner's, with a lantern attachment, and they carry a ten foot spear. Typically, the spearer will stand in the front of a boat, concentrating all of his attention on the water, which is lighted by his helmet lamp. High wakes interfere with a spearer's ability to spear, and create the danger of his falling into the near-freezing water.^[3]

Stop Treaty Abuse-Wisconsin, Inc. was formed between the 1988 and 1989 walleye spearing seasons. After it became active, protests against Chippewa spearing escalated, crowds increased at the boat landings where spearing was taking place and the practice of creating wakes to interfere with spearing became widespread. Stop Treaty Abuse-Wisconsin encouraged as many people as possible to gather at boat landings and on lakes. The group supported the assembling of boats around launching areas while plaintiffs were trying to launch their boats. At Catfish Lake in 1989, Stop Treaty Abuse members and others encircled the launch area with 35 to 40 protest boats to make it more difficult for Lac du Flambeau to launch their boats.^[4]

It was one of Stop Treaty Abuse's objectives to get as many boaters as possible driving back and forth on the lakes in an effort to disturb Lac du Flambeau spearers attempting to exercise their fishing rights. At protests organized by Stop Treaty Abuse-Wisconsin, members and others intentionally created high wakes to interfere with spearers who were attempting to exercise their off-reservation spearing rights.^[5]

***1390** On at least three occasions in 1989, Stop Treaty Abuse announced it would pay fines for all persons who crossed police lines at launching areas. At Rainbow Flowage in 1989, Stop Treaty Abuse members crossed police lines to occupy the area where the plaintiffs were launching their boats. In May 1989, Stop Treaty Abuse members and others crossed police lines at Trout Lake to the area in which the plaintiffs were launching their boats. Later, Stop Treaty Abuse paid the court costs of all the persons arrested. In 1990, Stop Treaty Abuse encouraged members and others to cross police lines at Big St. Germain Lake.

Also in 1989, Stop Treaty Abuse discussed with its members and others the spraying of rocks with insect repellant and the use of blunted hooks as drifting anchors to interfere with plaintiffs' treaty-protected right to use gill nets. The group put together and distributed protest kits that included steel whistles for use by protesters at boat landings in 1991.

The purpose of the on-water protests and the protests at the boat landings was to stop the plaintiffs' exercise of their right to engage in off-reservation spearing of walleye and muskellunge.^[6] The goal of Stop Treaty Abuse-Wisconsin has been to stop the plaintiffs from exercising their treaty recognized right to spear fish, by doing everything in its power to stop plaintiffs' spearing.

At Stop Treaty Abuse's major rally in 1991 at Minocqua, leaders encouraged participants to protest that night (April 20) at Sand and Dam Lakes. That night at the Sand and Dam Lake

boat landings, a mob of protesters surrounded a small group of Indians, shouted threats and racial slurs at them, pushed in on them and blew whistles in their ears.

Stop Treaty Abuse had an information network for gathering information about spearing activities and for disseminating such information.

Defendant Crist decided where Stop Treaty Abuse would protest. It was his stated policy to crowd the boat landings with people and vehicles to make it more difficult for spearers to launch boats, to use artificial decoys to interfere with spearing, to get as many boaters as possible driving back and forth on the lakes making waves to make it difficult for spearers to stand in their boats and to see the fish. At a Stop Treaty Abuse meeting in April 1989, he advised members on techniques for interfering with Chippewa spearing. He has stated, "our efforts to hinder the tribal spearing and netting harvest won't be stopped...." "Every fish saved from the spearers will mean an extra fish for the sport anglers ... that is why disturbing spearers will be effective...." Deposition of Dean Crist, Feb. 26, 1991, at 110-112.

Defendant Crist made wakes on lakes where Lac du Flambeau members were spearing on almost every evening that there was spearing in 1989 and 1990. He did so intentionally, in an effort to impede spearing. In 1989, at Minocqua Lake, Trout Lake and Big Arbor Vitae Lake, ***1391** defendant Crist participated in on-water protests against Chippewa gill netting. At Big Arbor Vitae Lake in 1989, Stop Treaty Abuse members, including defendant Crist and others, formed a flotilla of boats around the launching area while spearers tried to launch their boats. At Plum Lake in 1990, defendant Crist and other Stop Treaty Abuse members, including board member David Worthen, made high wakes while plaintiff Nick Hockings was trying to spear. Defendant Crist was in a large assemblage of boats clustered around the boat landing at Catfish Lake in 1990, as Lac du Flambeau spearers attempted to launch their boats.

Stop Treaty Abuse paid defendant Crist's fines and legal fees in connection with his arrests at Rainbow Flowage and Trout Lake in 1989 and paid his legal fees in connection with his arrests at Plum Lake in 1989 and 1990, at Big St. Germain Lake in 1990, and at Catfish Lake in 1990.

In January 1991, defendant Crist drove his truck onto a frozen lake to observe a Chippewa spearer and to circle the spearer in his truck.

Defendant Crist believes that Stop Treaty Abuse has been effective in minimizing plaintiffs' fish harvest.

In 1989 or 1990, defendant Handrick was in a pontoon boat at Minocqua Lake with Al Soik, Elaine Soik, Lois Pavlovich, Charles Ahlborn, Jack Lanta and Rose Lanta protesting Chippewa gill netting. The pontoon boat approached close enough to Lac du Flambeau gill netters to make physical contact. In 1989, at Big Arbor Vitae Lake, defendant Handrick participated in an on-water protest against Chippewa gill netting. Defendants Handrick and Crist were part of an assemblage of boats that encircled the landing at Catfish lake as Lac du Flambeau spearers tried to launch their boats. Defendant Handrick crossed police lines at Trout Lake in 1989 together with other Stop Treaty Abuse protesters. Stop Treaty Abuse paid his legal fees. Defendants Crist and Handrick have operated boats or been passengers in boats that made wakes within 500 feet of boats in which Lac du Flambeau members were trying to spear. In 1990, defendant Handrick was in a boat with defendant Crist on Big Arbor Vitae Lake protesting Lac du Flambeau gill netting.

On occasions during 1989 and 1990, protesters pelted spearers, their family members and friends with stones. On many occasions during the 1989 and 1990 spearing seasons, protesters crowded groups of Indians, subjecting them to unwanted physical contact while blowing whistles, shouting threats, racial slurs and insults.

At Star Lake in 1990, protesters blew whistles in the ears of Anita Thoms Koser, blocked her way to prevent her from reaching the lake where she intended to perform a religious ritual, surrounded her and tried to force her to buy a Stop Treaty Abuse button. In 1991, at Lake Nakomis, protesters assaulted her again by blowing whistles at her at close range.

Protesters at landings in 1989 and 1990 threatened spearers and their families with violence. At protests organized by Stop Treaty Abuse, members and others have interfered with plaintiffs' right to practice their religion and have prevented them from sharing fishing activities with their children and other members of their band.

At the Stop Treaty Abuse rally in Torpy Park in Minocqua in 1990, the speaker's podium featured a caricature of an Indian.

Stop Treaty Abuse literature prepared by defendant Crist, Charles Ahlborn and Al Soik for distribution to members and the public is filled with inflammatory statements about the plaintiffs, such as

- a. Chippewa spearers use spears "mass produced in China and Korea," and outboard motors "manufactured in Japan";

b. Many speared fish are sold;

c. "Thousands of fish spoil because of warm weather and the lack of ambition to clean them. Each year thousands of spoiled game fish are dumped in dumps and along road sides because tribal member [sic] didn't want to clean them";

d. Tribal members receive "huge amounts of free government surplus food including cheese, butter, milk and other vast amounts of `commodity' foods. ***1392** Along with these free foods they receive free food stamps and a cost of living allowance of over \$20,000/household/year. They are also eligible for free government housing, subsidized heat and light, a whole list of government entitlements and subsidies, and a host of other government benefits. Tribal members receive 100% free medical and dental care, free pharmaceutical coverage, free day care and free and complete educational subsidies.

Al Soik is a former chairman and current vice-chairman of Stop Treaty Abuse. He often led protesters in chants using a bullhorn. He did so

as a satirical means of pointing out the anachronistic and inappropriate nature of allowing a practice established in an era of birchbark canoes, flaming torches, and hardened wood spears to be conducted with the aid of pickup trucks, aluminum and fiberglass boats powered by outboard motors, high-powered headlamps, and steel-tined spears....

Affidavit of Al Soik of October 30, 1991 at 2-3. Soik has chanted, "Tom, Tom, the white man's son," as a means of drawing attention

to what he believes is the hypocritical and contrived nature of the invocation of Indian heritage and tradition by Maulson and other members of a tiny band of spiteful and irresponsible individuals to justify the rape and destruction of a

resource and that the chant was not intended to be demeaning of Indians in general.

Id. at 3.

Elaine Soik is a member of Stop Treaty Abuse's board of directors. Charles Ahlborn is a former chairman of Stop Treaty Abuse. David Worthen is a member of Stop Treaty Abuse's board of directors. Al Soik, Elaine Soik, Charles Ahlborn and defendants Handrick and Crist have "chanted Tom, Tom, the white man's son" and "Hi-How-are-ya" to the mock beat of a tomtom at the boat landings with other protesters. David Worthen has a notice in his pub in the form of a help wanted ad that reads, "Small Indians wanted for mudflaps. Must be willing to travel." Defendant Crist is aware of the notice.

In 1990, at Big St. Germain Lake, defendant Handrick said, "Here comes another fucking Indian on relief," as Donald Smith arrived.

OPINION

In the order entered herein on March 15, 1991, I found that plaintiffs had demonstrated a likelihood of success on their claims that defendants had violated plaintiffs' rights under 42 U.S.C. §§ 1982, 1985(3) and 1986. *Lac du Flambeau Band*, 759 F. Supp. 1339. Based on the facts that I have found to be undisputed, I hold now that plaintiffs have established the violations of their rights under 42 U.S.C. § 1982, and are entitled to the entry of a permanent injunction. (This resolution makes it unnecessary to reach the issue of plaintiffs' rights under § 1985(3) and 1986 or state law.) Defendants have failed to show the existence of a genuine dispute about any of the facts material to a decision on plaintiffs' § 1982 claim. There is no need for a trial; plaintiffs are entitled to injunctive relief as a matter of law.

[Fed.R.Civ.P.] 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986).

A. Section 1982

42 U.S.C. § 1982 guarantees all citizens of the United States the same rights enjoyed by white citizens to "inherit, purchase, lease, sell, hold and convey real and personal property," and forbids both official and private interference with such rights. I have previously held in this case that the Lac du Flambeau band's right to exercise its usufructuary rights in the ceded territory is a property right. *Lac du Flambeau Band*, 759 F. Supp. at 1350. Defendants argue, however, that treaty rights cannot be subject to the protection of § 1982 because "[protection of an exclusive right to engage in hunting and fishing activity claimed by a political entity has no bearing on 'equality between persons of different races.' It does not contribute to 'eliminating all discrimination and the effect thereof on the ownership of property.'"

Defendants base their argument on a case holding that preferential treatment for tribal members is not racially discriminatory since it is rooted in a political relationship. *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) (establishment of preference for hiring Indians in the Bureau of Indian Affairs not unconstitutional or violation of the Equal Employment Opportunities Act of 1972). However, cases addressing the constitutionality of special hiring preferences for Indians are irrelevant. That the federal government may establish special preferences *in favor of* Indians without running afoul of the requirements of the Constitution or of federal anti-discrimination statutes because of its political relationship with Indians does not mean that private persons are free to discriminate *against* Indians for the same reason.

The issue in this case is the right to hold (and enjoy) one's own property and the question is whether defendants have violated that right of plaintiffs, which is the same right enjoyed by white citizens. Defendants' argument comes down to an assertion that plaintiffs are not entitled to the benefit of § 1982, because their usufructuary right to fish, hunt and gather is an unusually valuable right and one not available to non-members of the tribe. There is no merit to this assertion. Neither the relative values of property nor the particular nature of the property are relevant to the lawful owner's right to use and enjoy the property without illegally discriminatory interference. Just because a Van Gogh painting might be worth \$10 million does not mean that its owner is not entitled to the protections of § 1982, that is, to be free of discriminatory interference with his right to hold and enjoy his painting.

A prerequisite to recovery under § 1982 is a showing that the plaintiffs have been subjected intentionally to discrimination because of their ancestry or their ethnic characteristics. *See*

Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987). Defendants contend that no such showing can be made here because the undisputed facts do not demonstrate that a racial animus has been the motivating factor in the defendants' efforts to prevent plaintiffs from exercising their treaty-protected usufructuary rights.

The initial question is whether race must be *the* motivating factor or merely a motivating factor. Defendants say race must be the sole motivation and cite *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988). However, *Stevens* makes no reference to the question and provides no guidance. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 97 S. Ct. 555, 563-64, 50 L. Ed. 2d 450 (1977) held that at least where official action is involved, a plaintiff suing under § 1982 need prove only that "a discriminatory purpose has been a motivating factor in the decision." *See also Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970): "race is an impermissible factor in an apartment rental decision" by private landlord that "cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination." (Emphasis in original). Defendants do not cite any case overruling *Arlington Heights* or *Smith*, and I can find nothing that suggests that § 1982's requirements have been changed to make it necessary to show that discrimination was *the* sole motivating factor for a defendant's interference with a plaintiff's property rights.

Plaintiffs have adduced compelling evidence of defendants' racially-motivated animus. Defendants mounted a caricature ***1394** of an Indian on the lectern at their largest rally. One member of Stop Treaty Abuse displayed a "Help Wanted" poster in his bar, seeking "Small Indians for use as mudflaps." Stop Treaty Abuse disseminated a brochure replete with stereotypical images of Indians as lazy, wasteful and receiving munificent welfare benefits. The brochure perpetuated the baseless rumor that Indian households receive \$20,000 a year as a cost of living allowance.^[7] It also gave currency to the unproved assertion that the Chippewa do not need the fish they spear for sustenance, but throw them away to rot after catching them. Stop Treaty Abuse members, including defendants Crist and Handrick, mocked Indian chants. By his own admission, Stop Treaty Abuse member Al Soik disparaged and held up for public ridicule the plaintiffs' spearing practices and characterized plaintiffs' assertions of the religious and cultural aspects of spearing as hypocritical.

Despite their assertions to the contrary, Stop Treaty Abuse and its members exhibit racist motives and actions in their opposition to Indian spearing. Perpetuating and encouraging

stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group. *See generally*, Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv.L.Rev. 1331 (1988), and sources cited therein.

As I noted in the March 1991 order, it is disingenuous for defendants to argue that they are trying to prevent the Lac du Flambeau from spearing or gill netting only because they oppose those activities and not because they are biased against Indians in general. Defendants have not pointed to any other instance in which they have acted against a threatened harm to the fishing environment. It is impossible to escape the conclusion that it is the coalescence of a perceived harm *and* the minority source of that harm that produced the defendants' reaction. This is not unusual. Instances of racial discrimination rarely occur until and unless a minority group acts to exercise its rights. *See New York State NOW v. Terry*, 886 F.2d 1339, 1359 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S. Ct. 2206, 109 L. Ed. 2d 532 (1990):

In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable. ... It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights but not against class members whose actions do not offend them [citation omitted; emphasis in original].

B. Sections 1985(3) and 1986

Section 1985(3) reaches conspiracies formed for the purpose of depriving any person or class of persons of a constitutionally protected right. It provides no substantive right itself, but merely provides a remedy for the violation of rights. *Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981). The rights must be federally protected ones to which the plaintiff is entitled ***1395** to protection against anyone; not mere prohibitions against impairment by the state *Cohen v. Ill. Institute of Technology*, 524 F.2d 818, 828 (7th Cir.1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976). For example, a private conspiracy to

discriminate irrationally between similarly situated persons is not actionable. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). See also *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983).

The federally protected right that plaintiffs claim to have been deprived of is their right to enjoy their property rights, a right guaranteed them under § 1982. Since I have already found that defendants violated plaintiffs' rights under that statute, there is no need to consider whether defendants might have conspired to do so. The act of conspiracy creates no additional liability in and of itself; it merely serves as a means of assessing liability against persons who may not have acted independently to violate plaintiffs' rights. Proving the existence of a conspiracy is unnecessary in this case, in which there is clear evidence of each defendant's liability for violation of § 1982.

The same analysis applies to plaintiffs' claim under § 1986, which covers persons who fail to prevent or aid in the prevention of the commission of wrongs conspired to be done, although they have power to do so.

C. State Law Claims

It is unnecessary to consider whether plaintiffs have established defendants' violation of Wis.Stat. §§ 844.01(3) (interference with real property), 29.223 (interference with lawful fishing) and 813.125 (harassment), because I have found that they are entitled to an order granting them permanently the injunctive relief they were granted preliminarily in March 1991.

D. Nature of Injunction

As I stated in the March 1991 order granting plaintiffs' motion for a preliminary injunction, the injunctive relief they seek is not intended to reach the defendants' verbal expression of their views. It is intended only to enjoin defendants from physical interference with plaintiffs' exercise of their treaty-protected fishing rights.

ORDER

IT IS ORDERED that plaintiffs' motions to strike the supplementary brief and affidavit filed by defendants Stop Treaty-Abuse Wisconsin, Inc. and Dean Crist in opposition to plaintiffs' motion for summary judgment and to strike defendants' untimely motion for summary judgment are GRANTED; the motion of defendants Stop Treaty Abuse-Wisconsin, Inc. and Dean Crist for leave to file a second amended answer is DENIED; and plaintiffs' motion for summary judgment is GRANTED as to all of the named defendants.

The Clerk of Court is directed to enter judgment in favor of plaintiffs against defendants Stop Treaty Abuse-Wisconsin, Inc., Dean Crist and Tommy Handrick as follows:

Defendants Stop Treaty Abuse-Wisconsin, Inc., Dean Crist and Tommy Handrick and all those acting in concert with or at the direction of these defendants are enjoined permanently from

- a) Assaulting or battering any member of the Lac du Flambeau band or any member of the family of a Lac du Flambeau band member at any landing or on any lake within the ceded territory;
- b) Intentionally creating wakes on any waterway to interfere with any spearer;
- c) Planting decoys in any waterway;
- d) Intentionally blocking spearing boats from moving from the boat landings out to the spawning beds;
- e) Shining lights into the eyes of any spearer or spearing boat operator while on the water;
- f) Playing "leapfrog" with any spearing boat, or otherwise impeding the progress of any spearing boat; and

g) Taking any other action that is intended to or may reasonably be expected to interfere with plaintiffs' exercise of their spearing rights, including blowing whistles *1396 at spearers or any members of their families.

FURTHER, IT IS ORDERED that this action is dismissed with respect to "unknown John Does and Jane Roes" for plaintiffs' failure to identify and serve these defendants.

NOTES

[1] In their brief in opposition to plaintiffs' motion for summary judgment, defendants raise what appears to be a variation of the theme that plaintiffs have no standing to bring this suit. Defendants argue that plaintiffs cannot assert any treaty rights because the Lac du Flambeau band has not maintained an organized tribal structure, that is, the band cannot show that some defining characteristic of the original tribe persists in an evolving tribal community, *Native Village of Venetie I.R.A. Council v. Alaska*, 918 F.2d 797 (9th Cir.1990), *amended, op. withdrawn, superseding op.*, 944 F.2d 548 (9th Cir. 1991), and therefore, it is not entitled to claim the benefits of the treaties between the federal government and the tribe from which the Lac du Flambeau claims descent. This issue cannot be raised in this action. The Lac du Flambeau band's entitlement to the benefits of the treaties has been resolved definitively in litigation between it and the State of Wisconsin. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Final Judgment)*, 775 F. Supp. 321 (W.D.Wis.1991). The principles of res judicata bar relitigation of the issue.

[2] Defendants try to put this fact into dispute with the affidavits of persons present on the boat landings who say that they observed few instances of religious ceremonies occurring on the landings in connection with spearing. Whether these persons observed ceremonies in a particular place at a particular time does not rebut plaintiffs' proposed finding that spearing has religious and cultural significance to the Chippewa.

[3] Defendants have submitted affidavits of experienced fishers who claim that it is not necessary, or even wise, to stand in a boat to spear, or to wear a helmet with a lamp, or to use a spear as long as ten feet. This does not put into dispute plaintiffs' proposed finding that standing in a boat with a ten foot spear and wearing a miner's helmet is the way that the Chippewa do spear, and that high wakes interfere with this practice.

[4] Defendants try to put this fact into dispute by asserting that plaintiffs were never actually prevented from launching their boats, but were only blocked temporarily. Defendants' effort fails.

[5] Defendants attempt to create a genuine issue about this fact by asserting that it is disputed whether the wakes made by Stop Treaty Abuse members were any higher than the normal wave level that may be encountered on any given lake and whether any wakes so created were hazardous in nature and intended to interfere with spearers. They support their assertions with affidavits, including one of defendant Crist, in which Crist avers that

he has operated a boat on numerous lakes on occasions when Indian spear fishing was occurring and that in the course of such operation, his boat has inevitably created a wake as it moved through the water and that the size of such wakes was not necessarily larger than the size of waves created on the surface of the lakes by a brisk wind.

Affidavit of Dean Crist, Nov. 11, 1991, at 5. By itself, this affidavit does not put into dispute the proposed finding that defendants created high wakes intentionally to interfere with spearers efforts to exercise their treaty rights. A wake "the size of waves created ... by a brisk wind" will interfere with a spearer trying to fish on an otherwise calm lake while standing in a boat. As Crist admitted in his deposition, spearers need calm water if they are going to spear from a boat. Deposition, Feb. 26, 1991, at 130, 132.

To the extent that Crist attempts to contradict his earlier, explicit deposition testimony concerning his efforts to create rough water conditions by filling "the back live wells and driving [his boat] half throttle [which creates greater displacement of water]" deposition, Feb. 26, 1991 at 131, and that driving in such a water is an effective way in which to minimize the spearing of fish, *id.*, his affidavit must be ignored. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 861 (7th Cir.1985) (district court has duty to ignore sham issues in determining appropriateness of summary judgment; parties are not allowed to create credibility issues by contradicting their own prior testimony). *See also Lovejoy Electronics, Inc. v. O'Berto*, 873 F.2d 1001, 1005 (7th Cir.1989) (same).

[6] Defendants try to put this fact into dispute by arguing that their primary effort was to save walleyes. However, defendant Crist's deposition testimony is unequivocal: the way to stop the walleye catch was by preventing plaintiffs from fishing. *See* deposition, Feb. 26, 1991, at 36 (Stop Treaty Abuse planned to "do our level best to minimize the unfair exploitation of Wisconsin resources by the Chippewa ... if possible we would like to stop the harvest"); at 39 (Stop Treaty Abuse planned "to crowd boat landings with people and vehicles to make it more difficult for spearers to launch boats"); at 39-40 (Stop Treaty

Abuse "encouraged the use of artificial decoys to interfere with spearing in 1989"); at 70-72 ("we are going to take one county, one weekend, and do our damndest to stop it").

Defendant Crist's conclusory statements to the contrary in his Nov. 11, 1991 affidavit do not create a genuine issue of fact.

[7] The statements in the brochure are the rural version of the "urban legends" that Jan Harold Brunvand writes about in "The Vanishing Hitchhiker," and "Curses! Broiled Again!" (1989). According to Brunvand, a distinguishing feature of an urban legend is that no one is ever able to produce an eyewitness to the actual event only a "friend of a friend." Another is that the stories crop up over and over again, in many different settings. The same is true about the oft-repeated legend that the Chippewa receive allowances from the government of over \$20,000 a year. As plaintiffs point out, defendants are unable to cite any provision in the law for such allowances.

Although defendant Crist was questioned at length about the sources of the statements in the brochure, he was uncertain about many of them and unable to identify any statement for which he had first-hand knowledge or as to which he had made any effort to confirm its accuracy, with the one exception that he claimed to have seen Japanese-manufactured outboard motors on some spearers' boats and "Made in Japan" or "Made in Korea" stamped on some spears.

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No. 17-532

**In The
Supreme Court of the United States**

—◆—
CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

—◆—
**On Writ Of Certiorari To The District
Court Of Wyoming, Sheridan County**

—◆—
BRIEF FOR RESPONDENT
—◆—

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INTRODUCTION

Twenty-five years ago, the Crow Tribe sued Wyoming officials to prohibit enforcement of Wyoming hunting and fishing laws against tribal members. The Tribe lost. The Tenth Circuit Court of Appeals interpreted the 1868 Treaty with the Crows and ruled that “the Tribe and its members are subject to the game laws of Wyoming.” *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 994 (10th Cir. 1995).

When Wyoming prosecuted Herrera for killing a trophy bull elk without a license, however, Herrera argued that, despite *Repsis*, he was immune from prosecution as a member of the Crow Tribe. This Court should not reward Herrera’s collateral attack by reinterpreting the Crow Treaty.

“One of the law’s very objects is the finality of its judgments.” *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). After the appeals are over, the losing party must accept the court’s answer. To protect against parties who refuse to respect final judgments, this Court imposes *res judicata*—either claim preclusion or issue preclusion—as a matter of federal common law. Litigants cannot return to court again and again seeking a different outcome.

Herrera presents several arguments as to why this Court should ignore the *Repsis* final judgment and reinterpret the Crow Treaty, but his claimed exceptions to finality are far broader than anything this Court has adopted. Moreover, because the preclusive effect of federal judgments—like the

decision in *Repsis*—is federal common law, a decision to reach the merits in this case will hearten losing parties across all areas of substantive law. This Court should decline to resolve the question presented entirely and affirm the Wyoming courts.

If this Court recognizes an exception to preclusion and decides the merits, it should affirm Herrera’s conviction. Of the hundreds of Indian treaties negotiated by the United States, only two have the identical language presented here.¹ For both treaties, the courts have held that the off-reservation hunting right has expired.

The first decision was by this Court. In *Ward v. Race Horse*, this Court held that Congress intended the off-reservation hunting right in the Shoshone-Bannock Treaty to expire when Wyoming became a state. 163 U.S. 504 (1896). In 1999, this Court affirmed that holding. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

The second case was the Tenth Circuit’s decision in *Repsis*, which held that the Crow Tribe’s off-reservation hunting right has expired. Wyoming and its citizens have relied upon these interpretations, and the decisions are correct as a matter of law. Herrera’s

¹ Two months after signing the Treaty with the Crows, the United States, the Eastern Band of Shoshone, and the Bannock Tribe of Indians agreed to the Shoshone-Bannock Treaty. Except for reservation descriptions and payments, articles 1-12 of the two treaties are identical. *Compare* Treaty with the Eastern Band of Shoshonees and Bannacks, 15 Stat. 673 (1869), *with* Treaty with the Crows, 15 Stat. 649 (1868).

new interpretation disregards the text, the historical context, and the implementation of the Crow Treaty. The off-reservation hunting right has expired, and this Court should affirm his conviction.

◆

STATEMENT OF THE CASE

In January 2014, Herrera and three companions climbed over a fence into Wyoming and killed four bull elk. When caught months later, Herrera asserted a tribal right to hunt in Wyoming, but the Wyoming courts rejected his claimed immunity because of more than 100 years of history and case law.

To interpret tribal treaty rights, this Court looks to “the larger context that frames the Treaty.” *Mille Lacs*, 526 U.S. at 196. Wyoming offered this information to the trial court. (JA235). Herrera said an evidentiary hearing was unnecessary, (R.905), and the trial court dismissed the scheduled hearing when it ruled Herrera’s treaty defense was unavailable. (Pet.App.43). The record before the Court therefore lacks required evidence about “the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Mille Lacs*, 526 U.S. at 196. Wyoming has attempted to use public documents, to the extent feasible, to provide this information.

A. The Fort Laramie Treaty of 1851

In 1851, the United States sought to protect settlers traveling the Oregon Trail. At the time, all of northern Wyoming was Indian Territory under the control of the War Department and subject to the restrictions of the Indian Intercourse Act of 1834. Regulation of Trade and Intercourse with the Indian Tribes, ch. 161, 4 Stat. 729 (1834); Bruce Blevins, *Mapping Wyoming* 9 (2007).

“[G]old had recently been discovered in California. Increasing numbers of people journeying westward were crossing the lands of the Indians. Buffalo and other game fell prey to the travelers’ need for food (and sometimes their need for sport).” *Crow Tribe of Indians v. United States*, 284 F.2d 361, 364 (Ct. Cl. 1960). “The Indians resented these inroads, and their resistance often made the westward journey a perilous one.” *Id.*

The Fort Laramie Treaty sought “to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians.” *Montana v. United States*, 450 U.S. 544, 557-58 (1981) (*Montana II*). The 1851 Treaty did not “create a reservation” for any of the signatory tribes under the laws of the United States. *Id.* Rather, the Treaty subdivided Indian Territory (part of which would become Wyoming) into hunting districts “to establish, as between the

United States and the various signatory tribes, the boundaries of the lands of the tribes.” *Crow Tribe*, 284 F.2d at 367.

B. The 1868 Treaty with the Crows

Right of safe passage to the Pacific was sufficient only if settlers traveled onward. Within a year after the discovery of gold in Montana, the Bozeman Trail brought so many outsiders that the agent for the Crow Tribe reported non-Indians “are now overrunning their whole country.” Frederick Hoxie, *Parading through history: The making of the Crow nation in America, 1805–1935* 88 (1995).

At the same time, Indian policy in the United States evolved toward reservations in order to “restrict the limits of all the Indian tribes upon our frontiers, and cause them to be settled in fixed and permanent localities, thereafter not to be disturbed.” *Cohen’s Handbook of Federal Indian Law* § 1.03[6][a], Lexis (database updated July 2017) (quoting Commissioner of Indian Affairs George Manypenny).

In November 1867, with the Sioux Indians attacking settlers along the Bozeman Trail, representatives of the Crow Tribe met members of the Great Peace Commission. At the meeting, United States officials acknowledged the Tribe’s “buffalo and game [were] driven off and [the Tribe’s] grass and timber consumed by the opening of roads and the passing of emigrants through [Indian] countries.” *Montana II*, 450 U.S. at 571 n.5. The United States offered the

Tribe “homes and cattle, to enable [them] to begin to raise a supply of stock with which to support [their] families when the game was disappeared” in return for permanent settlement on a reservation. Indian Peace Commission, *Proceedings of the Great Peace Commission of 1867 and 1868* 87 (1975).²

Like other nomadic Plains tribes, the Crow Indians relied primarily on buffalo for their sustenance. With the looming extermination of this food source, United States officials saw reservation life as the alternative to starvation. “Buffalo are the Indian’s bread, but they are going away, and soon will be all gone, and the friends of the Indians want them, by that time, to have something else.” *Annual Report of the Commission of Indian Affairs for 1873* at 500 (1873 statement by Felix Brunot to Crow Chief Blackfoot).

Off-reservation hunting rights were temporary measures to gain time. “When the buffalo is gone the Indians will cease to hunt. A few years of peace and the game will have disappeared.” *Report of the Indian Peace Commissioners*, H.R. Exec. Doc. 97 at 18 (1868). “In the meantime by the plan suggested we will have formed a

² Herrera quotes from this 1867 meeting to interpret the parties’ later agreement. (Pet.Br.6-7). The Crow refused to sign a treaty at the end of the 1867 meeting, however, and Chief Blackfoot specifically rejected the reservation concept. “You speak of putting us on a reservation and teaching us to farm,” but “[w]e were not brought up to do that and are not able to do that.” *Peace Commission Proceedings* 88. “That talk does not please us.” *Id.* Chief Blackfoot’s speech at the treaty signing in 1868, acknowledging that the game would soon disappear, marked a change in his opinion and is more relevant to treaty interpretation.

nucleus of civilization among the young that will restrain the old and furnish them a home and subsistence when the game is gone.” *Id.* See also Statement of General Hancock, *Peace Commission Proceedings* 14 (“There will soon be no necessity for the Indians to leave their reservations in search of subsistence, for the game will be gone.”).

On May 7, 1868, the Crow Tribe and the United States agreed to the Treaty with the Crows. 15 Stat. 649 (1868). At the treaty signing, Chief Blackfoot acknowledged: “We were all raised on wild meat—buffalo, elk, mountain sheep, black-tailed & white-tailed deer. All that is getting scarcer every year. I know it [is] all going to be gone soon.” Speech of Chief Blackfoot, Chief of the Crow Indian Tribe, May 6, 1868, in *Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69* (Ratified Treaty 370, Documents Relating to the Negotiation of the Treaty of May 7, 1868, with the Crow Indians (available HeinOnline American Indian Law Collection)).

In Article 4 of the Treaty, the Crow agreed to “make said reservation their permanent home,” accepting what this Court described in *Race Horse* as a “temporary and precarious” right to hunt off-reservation:

The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the

right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

15 Stat. at 650; 163 U.S. at 510.

The Crow Treaty encouraged raising crops and livestock on the reservation, not a continuing nomadic life. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (Shoshone-Bannock Treaty, with identical language, evinces “purpose on the part of the United States to help to create an independent permanent farming community upon the reservation”).

After 1868, the Tribe understood off-reservation hunting was temporary because the United States expressly said so. In 1873, when Felix Brunot and Chief Blackfoot discussed the Treaty, Brunot said tribal members could travel “across the river, where you go to hunt buffalo . . . while the buffalo are there; but when the game is gone away from there that is all to be white man’s land.” *Annual Report of the Commissioner of Indian Affairs for 1873* at 494. The off-reservation hunting right meant that “as long as there is peace between the Crows and the whites they may hunt buffalo where there are any and where there are not too many whites.” *Id.* at 503.

In the period from 1870-75, “almost six million buffalo were slaughtered, and the species—except for a negligible number of animals which escaped and fled

to the north of the range, some of which crossed the Canadian border—was extinguished.” Hans Huth, *Nature and the American: Three Centuries of Changing Attitudes* 163 (2d ed. 1990).

Even on the Crow reservation, game became scarce: “There is no game left upon their reservation at all worth speaking of and we shall have to have a much larger quantity of supplies than have been allowed us for the present fiscal year or the Crows will start to go over the [reservation] line.” Hoxie, *Parading* 18 (Letter from Agent Henry Armstrong to Commissioner of Indian Affairs, Sept. 15, 1883). “To Armstrong, either outcome would have been disastrous, for the Montana Territory’s burgeoning population resented the tribe’s vast reserve of land and would have seized on any off-reservation hunting expeditions as evidence of the Indians’ hostile intent.” *Id.*

In 1883, the United States Army forced Crow Chief Crazy Head to return to the reservation while on an off-reservation hunt, and the Tribe stopped off-reservation hunting altogether. *See* Hoxie, *Parading* 113-15. Crow lands now “marked the limits of Crow mobility.” *Id.* at 115.

While Herrera claims the Crow hunted off-reservation from 1868 through 1989, evidence before the Tenth Circuit in *Repsis* included deposition testimony from Crow officials that the Tribe stopped all off-reservation hunting by 1886. *Repsis* App., Vol. II at 376, 485, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (No. 94-8097). Crow Indians were

prosecuted for poaching in the Bighorn Mountains as early as 1887. Calvin King, *History of Wildlife in the Big Horn Basin of Wyoming* 22 (1992). Indeed, Crows could be jailed for leaving the reservation without the permission of their agent from the 1880s until World War I. Hoxie, *Parading* 183.

“Because the buffalo were now nearly extinct and their Sioux and Piegan enemies were rapidly being replaced by American farmers and ranchers, [the Crow] knew crossing the Yellowstone or traveling south into Wyoming or east to the Powder River country would bring them into a hostile and barren land.” Hoxie, *Parading* 122. Elk disappeared from the eastern slope of the Bighorn Mountains by the mid-1880s, and “game in the Big Horn Basin was practically extinct in 1900[.]” King, *History of Wildlife* 17, 19.

In 1884, the United States relocated the Crow Tribe to flatland alongside the Little Bighorn River, marking the Tribe’s “confinement within the permanent boundaries of a modern reservation. Before 1884, the tribe could imagine that their life as a hunting people persisted; the founding of Crow Agency marked the beginning of the days after the buffalo had gone away and when other game could not sustain them.” Hoxie, *Parading* 15. The Crow “shifted from a migratory hunting subsistence to a pattern of permanent residence in an agricultural community.” *Id.* at 184.

C. *Ward v. Race Horse*

The Shoshone-Bannock Treaty of 1869 was signed two months after the Crow Treaty, and it is the only treaty with language identical to Article 4. 15 Stat. 673 (1869). The Eastern Shoshone and Bannock also understood this off-reservation hunting right was temporary. At a meeting with the Tribes, General Auger acknowledged that “[t]here are a great many white men in your country now, and as soon as the railroad is complete there will be many more.” *Peace Commission Proceedings* 151. The United States would set aside land, and “[u]pon this reservation he wishes you to go with all your people as soon as possible, and to make it your permanent home.” *Id.* at 152. The Tribes had “permission to hunt wherever you can find game,” but “[i]n a few years the game will become scarce and you will not find sufficient to feed your people.” *Id.* “You will then have to live in some other way than by hunting and fishing.” *Id.* The tribes understood this truth. “I am willing to go upon a reservation, but I want the privilege of hunting the buffalo for a few years. When they are all gone far away we hunt no more; perhaps one year, perhaps two or three years; then we stay on the reservation all the time.” *Annual Report of the Commissioner of Indian Affairs for 1868* at 658 (Remarks of Tygee, head chief of the Bannock).

In 1895, non-Indians killed three Bannock Indians and arrested others while the Indians were hunting in Jackson Hole, Wyoming. The State argued that the Indians had violated Wyoming game laws and were

killing animals indiscriminately, not for sustenance, but to sell their hides in trade. *See* 28 Cong. Rec. 6230-39 (1895-96) (statement of Del. Mondell). Both the United States and Wyoming agreed the dispute should be settled in court. *Annual Report of the Commissioner of Indian Affairs for 1896* at 58.

Wyoming charged two Bannock Indians with poaching, and the United States Attorney sought a writ of habeas corpus. *Id.* at 59. The lower court ruled Wyoming game laws were pre-empted by the Article 4 hunting right. *In re Race Horse*, 70 F. 598, 613 (Cir. Ct. D. Wyo. 1895).

On appeal, this Court reversed. *Ward v. Race Horse*, 163 U.S. 504 (1896). It held that the term “unoccupied lands of the United States” did not include “all such lands of the United States wherever situated, but only lands of that character embraced within what the treaty denominates as hunting districts.” *Id.* at 508. “Hunting districts” were not simply “places where game was to be found,” but were territory “beyond the borders of the white settlements.” *Id.* at 508. “[T]he march of advancing civilization foreshadowed the fact that the wilderness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled[.]” *Id.* at 508-09.

The Treaty did not allow a tribal member to “seek out every portion of unoccupied government land and there exercise the right of hunting” because the “very object” of the Treaty was “[c]onfining him to the reservation” so his “tribal relations might be enjoyed

under the shelter of the United States” and away from “the new settlements as they advanced.” *Id.* at 509. The right to hunt diminished “naturally . . . from the advance of the white settlements in the hunting districts to which the treaty referred” and when the land around the reservation “ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State,” the hunting right disappeared altogether. *Id.* at 510. Although Congress had the power to create treaty rights “which are of such a nature as to imply their perpetuity,” the Shoshone-Bannock Treaty created only a “temporary and precarious” right, “essentially perishable, and intended to be of a limited duration” that expired upon Wyoming statehood. *Id.* at 515.

The *Race Horse* Court also held that the hunting right was incompatible with the Act admitting Wyoming into the Union under the equal footing doctrine. *Id.* at 514.

D. *Crow Tribe v. Repsis*

Citing a treaty right to hunt on the “unoccupied lands of the United States,” the Crow Tribe sued Wyoming in federal court in 1992, seeking to prohibit Wyoming officials from enforcing state game laws against its tribal members. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). The Tribe sued on its behalf and on “behalf of its members, namely members of the Crow Tribe.” Amended Complaint, ¶ 2 (JA258).

The district court granted summary judgment to Wyoming. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994). On appeal before the Tenth Circuit, the Crow Tribe distinguished *Race Horse* in the same way Herrera does now. The Tribe argued this Court had overruled, repudiated, and disclaimed every legal doctrine underlying *Race Horse*, especially the equal footing doctrine. *Repsis*, 73 F.3d at 988. *See also* Brief of Appellant at 16-21, *Repsis*, 73 F.3d 982 (No. 94-8097) (arguing that this Court: (1) “has expressly overruled the fiction of state ‘ownership’ of wild game[;]” (2) “rejected use of the Equal Footing Doctrine in the field of state regulation and jurisdiction over Indian treaty rights[;]” (3) declared “there is no irreconcilable conflict between the state power to regulate and the exercise of federal authority as mistakenly supposed in *Race Horse*[;]” and (4) “reversed” “the rules of treaty construction employed in *Race Horse*[;]” so therefore “there is nothing left of either the reasoning or the holding in *Race Horse*”). The Tribe asserted the equal footing doctrine was a “major premise” of the *Race Horse* decision despite this Court’s repudiation of that doctrine as a limit on Indian treaty rights less than ten years later. *Repsis*, 73 F.3d at 990; *see also United States v. Winans*, 198 U.S. 371, 384 (1905).

The Tenth Circuit agreed that the equal footing doctrine “does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union.” *Repsis*, 73 F.3d at 991. But it held the 1868 Treaty did not convey such a right: “the privilege given was temporary and

precarious.” *Id.* at 992. The Tenth Circuit held that because the Crow Treaty is identical to the Shoshone-Bannock Treaty construed in *Race Horse*, and because *Race Horse* held the hunting right expired when the hunting districts disappeared at Wyoming statehood, the Crow Tribe’s off-reservation hunting right also had expired. *Id.* at 988-89 (citing *Race Horse*, 163 U.S. at 510).

The Tenth Circuit did not hold that the off-reservation hunting right was abrogated, as Herrera argues. (Pet.Br.19-32). Rather, the Court held the Treaty itself “does not give [the Tribe] the right to exercise this privilege within the limits of [Wyoming] in violation of its laws.” *Repsis*, 73 F.3d at 989.

The Tenth Circuit adopted two additional rationales for applying Wyoming game laws to tribal members. The court held the creation of the Bighorn National Forest meant the land was no longer “unoccupied” within the meaning of the 1868 Treaty. *Id.* at 993. Wyoming made this argument in its brief to the District Court and on appeal. Brief of Appellee at 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097); Brief of Defendants, *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1995) (No. 92-CV-1002) found in *Repsis* App., Vol. II at 381-82. Reviewing the record below, the Tenth Circuit also held that “ample evidence” supported a ruling that Wyoming’s restrictions on elk hunting were reasonable and necessary for conservation. *Id.* at 992-93.

E. *Minnesota v. Mille Lacs Band of Indians*

Four years after *Repsis*, in 1999, this Court ruled that Minnesota statehood did not abrogate, by implication, the Mille Lacs Band of Chippewa Indians' 1837 treaty right to hunt, fish, and gather wild rice. *Mille Lacs*, 526 U.S. at 208. *Mille Lacs* confirmed what *Repsis* had anticipated: the equal footing doctrine has not been a basis for terminating Indian treaty rights since 1905. *Compare id.* at 205 n.7 (citing *Winans*, 198 U.S. at 382-84), *with Repsis*, 73 F.3d at 991 (also citing *Winans*). The *Mille Lacs* Court held the relevant inquiry is whether Congress intended Indian treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event. *Id.* at 206-07. "The Court did not, however, overrule the outcome in *Race Horse*, but rather preserved the ruling that the specific rights reserved in the Shoshone-Bannock treaty were intended to terminate upon statehood." *Cohen's Handbook*, § 18.04[2][e] n.60.

The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The Treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian Tribes through a treaty, and that "it would be also within the power of Congress to continue them in the State, on its admission into the Union." *Race Horse*, 163 U.S. at 515. We also acknowledged that if Congress intended the

rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the treaty at issue there—“the right to hunt on the unoccupied lands of the United States”—were not intended to survive statehood. 163 U.S. at 514; *see* 163 U.S. at 514-15.

Mille Lacs, 526 U.S. at 206.

F. Herrera’s conviction

In January 2014, Herrera traveled to the Montana-Wyoming border, crossed the fence built by the federal lessee who grazes cattle in the national forest there, and hiked three-quarters of a mile into Wyoming. (JA54,68-70,74-75). After spotting several bull elk, Herrera and his companions killed four. (JA54-55,185-86). In the Bighorn Mountains, the last day to hunt trophy bull elk was November 5, 2013, two months earlier. (R.581-90). Wyoming bans all elk hunting in the Bighorn Mountains from January until September so animals can survive the winter and raise young. (R.835-42).

A few days after killing the elk, Herrera emailed the Wyoming Game and Fish Department, stating he was a tribal game warden and offering to “help in any way we can to catch violators near our mutual borders.” (JA241). Wyoming Game Warden Dustin Shorma met Herrera, and Herrera asked about Wyoming’s forensic investigation capabilities. (JA30-34). Shorma later found a recent photograph on the

internet of Herrera displaying a bull elk, captioned “Good Year on the Crow Reservation.” (JA34,38,242). Looking at the landscape, Shorma believed the photograph was taken in Wyoming. (JA43).³

After the snow melted in summer 2014, Shorma found four elk carcasses—three headless—just south of the Crow Reservation. (JA54-55). The location matched Herrera’s photograph exactly. (JA52-62). Working with the Crow Tribe, Shorma cited Herrera, who handed over a mounted elk head that matched the DNA of one of the carcasses. (JA117,120-21,125-26,237).

Wyoming charged Herrera with (1) killing an antlered big game animal without a license or during a closed season and (2) helping others do the same. (Pet.App.5). Herrera moved to dismiss the charges, arguing his tribal membership allowed him to hunt the “unoccupied lands of the United States” regardless of Wyoming law. (R.368). The trial court denied his motion. (Pet.App.36-43). A jury convicted Herrera, and the judge sentenced him to probation and a fine. (R.1468-69). Herrera appealed to the Wyoming district court, which affirmed his conviction and sentence.

³ Before this Court, Herrera suggests he killed the elk for food to survive the winter, but Herrera did not raise a necessity defense below. (Pet.Br.13-14). If he had, Herrera would have had to explain why he left an entire elk to rot in the field, left meat on the other three elk, and hiked out with three elk heads as trophies, including the one in the photograph Herrera posted on monstermuleys.com (a website where hunters compare the size of their trophy kills). (JA34,38,52-53,55-57,231,240).

(Pet.App.3-35). The Wyoming Supreme Court denied certiorari. (Pet.App.1-2).

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SUMMARY OF ARGUMENT

The Crow Tribe and Wyoming have already litigated the exact issue presented here. The Tenth Circuit ruled the Tribe and its members must obey Wyoming law. Herrera argues that final judgment does not prevent him from arguing the Tenth Circuit was wrong, but this Court should enforce the preclusive effect of *Repsis* and affirm Herrera's conviction.

As an initial matter, *Repsis* precludes Herrera from relitigating the Crow Treaty because all of the elements of issue preclusion are met. The question presented here is identical to the question resolved by the Tenth Circuit. The Crow Tribe litigated whether Article 4 of the Crow Treaty prevented Wyoming from prosecuting tribal members for hunting in the Bighorn National Forest. The Tenth Circuit interpreted Article 4 as a necessary part of its final determination. Because Herrera is in privity with his Tribe, he is bound by the result even though he was not personally named. The Crow Tribe had a full and fair opportunity to litigate its treaty rights and, as the plaintiff, had every incentive to forcefully press its arguments in the lawsuit it brought against Wyoming officials in federal court.

Herrera cannot avoid preclusion by arguing that the law has changed. *Mille Lacs* did not overrule *Race Horse*; it affirmed that “the right to hunt on the unoccupied lands of the United States” was not intended to survive Wyoming’s statehood. 526 U.S. at 206. Moreover, this Court has never adopted the suggestion in the Restatement (Second) of Judgments that a change in law, by itself, should relax preclusion, and this is not the case for the Court to do so. Finally, because Herrera’s treaty defense was an affirmative defense rather than an element of a charged crime, there is no fundamental unfairness or constitutional due process implication in applying the *Repsis* judgment to bar Herrera from relitigating the Treaty’s meaning.

If this Court allows Herrera to relitigate his tribal treaty defense, it should still affirm Herrera’s conviction. *Race Horse* was correct: Article 4 was a temporary right not intended to survive Wyoming’s statehood. As the history and conduct of the parties establishes, Article 4 allowed the Crow Tribe—a tribe of Plains Indians who survived by hunting buffalo—to hunt on public domain lands to provide for its members. The parties intended, however, that this right continue only until tribal members could learn to cultivate the soil and provide for themselves within the confines of the reservation. Once the advance of civilization reached Crow reservation boundaries, the wilderness that had once surrounded the reservation disappeared and the land became occupied. Wyoming statehood was not just a legal event, it was a

recognition the once wild frontier was no more. And the Crow Tribe understood that its hunting right had ended. The Tribe stopped hunting off-reservation in 1886, as the history and the record in *Repsis* show.

If this Court concludes that Herrera retains the right to hunt off-reservation in the “unoccupied lands of the United States,” his conviction should still be affirmed. Creation of the Bighorn National Forest was an act of occupation, placing that land outside of the ambit of the Crow Treaty right. Moreover, the federal government’s control over the forest has a second effect. Federal regulations require Herrera to comply with Wyoming law before hunting in the national forest. He did not do so.

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ARGUMENT

I. The Tenth Circuit’s ruling in *Repsis* binds Herrera, and he cannot use this case to collaterally attack that final judgment.

The Crow Tribe and Wyoming have litigated the exact question presented here to final judgment, and the Tenth Circuit ruled that “the Tribe and its members are subject to the game laws of Wyoming.” *Repsis*, 73 F.3d at 994; Amended Complaint (JA257-67).

Herrera cannot distance himself from the *Repsis* final judgment.⁴ Under the general rules of issue preclusion, the analysis is not difficult. The only significant question is whether Herrera himself is bound by his Tribe's prior loss, and the Court's case law on the nature of tribal sovereignty says that he is.

Moreover, Herrera cannot avoid preclusion by arguing that the underlying law has changed. The *Mille Lacs* Court expressly preserved the "alternative holding" of *Race Horse* upon which the Tenth Circuit relied in *Repsis*. In addition, this Court has never adopted the Second Restatement of Judgments' broad exception for a "change in the applicable law" as Herrera proposes. It should not do so here. Finally, Herrera claims that because he is a criminal defendant, preclusion should not apply to him. But Herrera's claim of a tribal right was an affirmative defense, not an element of the crime, so the state court properly applied *Repsis* to bar his argument.

A. The *Repsis* decision binds Herrera and precludes him from asserting an off-reservation hunting right against Wyoming.

The preclusive effect of *Repsis* is a matter of federal common law. *Semtek Int'l Inc. v. Lockheed*

⁴ Although Herrera did not raise preclusion in his question presented, this threshold question dictates affirmance of his conviction, and Wyoming preserved the issue in its Brief in Opposition to a Writ of Certiorari. Sup.Ct.R.15.2.

Martin Corp., 531 U.S. 497, 507-08 (2001). This Court has held that “once an issue is [1] actually and necessarily determined [2] by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving [3] a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979) (*Montana I*).

Each element of issue preclusion is met here. First, the matter was actually and necessarily determined. In *Repsis*, the Tenth Circuit ruled that tribal members must comply with Wyoming’s game laws. The court did so after the Tribe sought a declaration that tribal members “retain their treaty-reserved, off-reservation hunting and fishing rights on ceded, unoccupied, and public lands, and that such rights preclude state regulation.” Complaint at Prayer for Relief (b) (JA265). The *Repsis* judgment not only actually resolved whether the members of the Crow Tribe are subject to Wyoming law, but the Tribe’s Complaint that initiated the case demonstrates that the court necessarily did so.

Second, no party contests that the federal courts are courts of competent jurisdiction to interpret Indian treaties. *United States v. Thomas*, 151 U.S. 577, 585-86 (1894).

Finally, while Herrera was not a “party” in *Repsis*, his membership in the Crow Tribe binds him to the *Repsis* interpretation of the Tribe’s off-reservation hunting right. Herrera argues that he cannot be bound because he was “all of ten years old” when *Repsis*

was decided. (Pet.Br.55). While non-parties are not generally bound by litigation, this Court recognizes “an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.” *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (citation omitted). As one exception, preclusion can arise from a “pre-existing ‘substantive legal relationship.’” *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

The relationship of the Crow Tribe to Herrera is such a relationship. In *Repsis*, the Tribe sued “in its own behalf and in behalf of its members” as the “successor in interest to the Crow Tribe who was a party to the Fort Laramie Treaties of 1851 and 1868.” Complaint ¶ 2 (JA258).

The Crow Tribe is “a distinct political society, separated from others, capable of managing its own affairs and governing itself.” *United States v. Lara*, 541 U.S. 193, 205 (2004) (citation omitted). The fact of the Crow Treaty itself is recognition of the Tribe’s authority to reach “an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 60 (1831). If the Court denies the Tribe’s ability to bind its members, this Court diminishes an “attribute[] of sovereignty,” making the Tribe more like a “private, voluntary organization[].” *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

Having brought a dispute to the courts, the Crow Tribe and its members must respect the final judgment. Like other litigants, when a sovereign submits a dispute to the federal courts for resolution, the result binds the sovereign. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984). And when a sovereign is bound by a judgment, the judgment also binds its citizens. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938); *Moses v. Dep't of Corr.*, 736 N.W.2d 269, 283 (Mich. Ct. App. 2007) (“Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, [the court] find[s] that the requisite privity exists to apply the doctrine of collateral estoppel in this case.”).

When this Court denied the Tribe’s petition for a writ of certiorari in *Repsis* in 1996, the appeals were over. The judgment in *Repsis* became final. Herrera cannot both claim a tribal treaty right and simultaneously evade the final judgment that interprets that same right when that final judgment binds his tribe.

B. Herrera cannot evade issue preclusion by pointing to a change in law.

Herrera argues that this Court can ignore *Repsis* because the Tenth Circuit relied, in part, upon *Race Horse*, and *Mille Lacs* “thoroughly repudiated” *Race Horse*, and therefore “plainly changed the legal context” underlying *Repsis*. (Pet.Br.28&20).

Herrera is incorrect for two reasons. First, Herrera’s interpretation of *Mille Lacs* is flatly inconsistent with that opinion. Second, the exception he identifies—comment c to § 28 of the Restatement (Second) of Judgments, which says that a change in law eliminates issue preclusion—is far broader than any exception adopted by this Court. Indeed, Herrera’s formulation is broader even than the Restatement comment. This Court should not adopt this exception here.

1. *Mille Lacs* intentionally preserved the interpretation of the specific treaty language in *Race Horse*, so Herrera cannot argue that *Mille Lacs* undermined earlier decisions that relied upon that holding.

Wyoming does not dispute that this Court has rejected the doctrine of “equal footing” mentioned in *Race Horse* as resting “on a false premise” that Indian hunting rights are irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 204. Herrera argues that this case is about the “equal footing” doctrine, but Wyoming never relied upon this doctrine in the state courts below, and the Tenth Circuit did not rely on this doctrine in 1995 when it held that the Crow Tribe is subject to Wyoming game laws. Herrera’s arguments about the equal footing doctrine and treaty “abrogation” are red herrings. He seeks to reverse his conviction based on reasons the state courts never adopted.

The equal footing doctrine “was only part of the holding” in *Race Horse*. *Mille Lacs*, 526 U.S. at 206. *Mille Lacs* re-affirmed what it said was *Race Horse*’s “alternative holding.” *Id.* The *Race Horse* hunting rights—which are identical to the Crow Tribe’s rights—had a “fixed termination point,” and Congress “clearly contemplated” when it ratified the Treaty that “the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States.” *Id.* at 207. “[T]he particular rights in the treaty at issue there—the right to hunt on the unoccupied lands of the United States’—were not intended to survive statehood.” *Id.*

Both *Repsis* courts had identified and followed this alternative holding before *Mille Lacs* expressly approved of it. The *Repsis* district court held that “the underlying fact pattern, including the treaty language at issue” in the Crow Treaty “precisely matches” the treaty in *Race Horse*, and lower courts “must follow the controlling decision.” *Repsis*, 866 F. Supp. at 524. Similarly, the Tenth Circuit relied upon *Race Horse*’s determination that “it was the intent of Congress to repeal the right to hunt upon Wyoming’s admission to the Union.” *Repsis*, 73 F.3d at 991.

Only the *Mille Lacs* dissent argued that *Mille Lacs* “overruled” *Race Horse*. 524 U.S. at 220 (Rehnquist, C.J., dissenting). The Court majority, which of course was the master of its own holding, responded by explaining that not all “temporary and precarious” hunting rights expired upon statehood; however, some did, specifically the right in Article 4 of the

Shoshone-Bannock Treaty. Therefore, the Court stated, the dissent's contention in *Mille Lacs* that it had reversed *Race Horse sub silentio*—with the effect of resurrecting the Shoshone-Bannock (and Crow) Article 4 off-reservation hunting right—was incorrect.

The *Mille Lacs* Court merely held that statehood did not *automatically* extinguish tribal hunting rights which, like the Mille Lacs right, could be terminated through other means. The Court reasoned that a categorical rule based solely on whether the rights could expire in the future for any reason was “too broad to be useful as a guide to whether treaty rights were intended to survive statehood.” 526 U.S. at 207. This holding did not prevent the *Mille Lacs* majority from explaining that in the particular case of the Shoshone-Bannock Treaty, statehood had indeed marked the expiration of the off-reservation hunting right. Thus, the *Race Horse* decision survived *Mille Lacs*, contrary to Herrera's reliance on the dissent's characterization.

Moreover, this Court should note the irony of Herrera's embrace of the *Mille Lacs* dissent. The dissent believed the Tribe's off-reservation hunting right had expired upon Minnesota statehood, differences between that 1837 treaty and the Shoshone-Bannock Treaty of 1869 notwithstanding. Properly understood, the views in *Mille Lacs* were: a five justice majority endorsing *Race Horse* on a narrow alternative holding, and a four justice dissent endorsing *Race Horse* on the broader basis that statehood necessarily extinguished the treaty right. *Race Horse*, at least as applied to the specific language

of Article 4 of the Shoshone-Bannock and Crow Treaties, emerged from *Mille Lacs* with the approval of a unanimous Court.

As one further irony, in its brief to this Court in *Mille Lacs*, the United States assured this Court that it could uphold the Mille Lacs Tribe's hunting right without overruling *Race Horse*'s contrary interpretation of a similar, but not identical, provision in the Shoshone-Bannock Treaty. The Mille Lacs majority expressly obliged. Now, the United States asserts that *Mille Lacs* constitutes a sufficiently tectonic shift in the legal landscape to overcome the preclusive effect of *Race Horse* and *Repsis*. This is just the sort of unfair incrementalism that this Court would invite if it endorses Herrera's fuzzy exception to finality.

This Court's decision in *Mille Lacs* to preserve *Race Horse*'s "alternative holding" provides clear direction. This Court does not permit "other courts [to] conclude [that] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Race Horse* therefore has direct application for the Shoshone-Bannock Treaty and the one other Treaty negotiated at the same time with identical language: the Treaty with the Crows.⁵

⁵ It is unsurprising that the courts have not applied *Race Horse* since *Mille Lacs*. (United States Br. at 20-21). Article 4 has been interpreted with a final judgment for the only two treaties in which it appears.

Herrera’s argument, then, cannot plausibly be that *Mille Lacs* changed the applicable legal context. His actual argument is that this Court should *change the law* to excuse issue preclusion. This cannot happen. “A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out.” *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (Gorsuch, J.) (*Ute* VI).

2. This Court allows a “change in the applicable legal context” to defeat issue preclusion only in limited circumstances, and Herrera’s interpretation of this exception would be a dramatic expansion.

Herrera argues that a “change in the applicable legal context” defeats issue preclusion. (Pet.Br.46-48) (citing *Bobby v. Bies*, 556 U.S. 825, 834 (2009)). The Court’s opinion in *Bies* cites to a comment from the Second Restatement of Judgments that “an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties.” Restatement (Second) of Judgments § 28 cmt. c (Am. Law Inst. 1982). This Court’s brief reference in *Bies* to the Restatement should not be understood to rewrite the federal common law of issue preclusion, and the Court should not enshrine the Restatement’s approach here.

This Court's longstanding case law on issue preclusion is considerably more protective of finality than the Restatement. Under this Court's opinions, litigants can escape issue preclusion only "for 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana I*, 440 U.S. at 162. "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Id.* (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)) (emphasis by the Court). "But *a fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Id.* (emphasis by the Court).⁶

Herrera's case does not fit this exception. As the Wyoming district court noted below, "the determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication" in *Repsis*. (Pet.App.25). The Crow Tribe's off-reservation hunting right was a "right distinctly adjudged" in *Repsis*, and "that right cannot be disputed

⁶ *Montana I* does suggest preclusion might be relaxed for "parties with an ongoing interest in constitutional issues" when preclusion would "freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana I*, 440 U.S. at 162-63. This is not a constitutional case.

in the present action, even if the determination was reached through an erroneous application of the law.” (Pet.App.26) (following *Moser*, 266 U.S. at 242).

Moreover, nothing in *Bobby v. Bies* indicates that this Court’s citation of the Restatement represented its adoption of the Restatement’s broad exemption as a matter of federal common law. *Bies* did not cite *Montana I* or other case law. *Bies* dealt with issue preclusion as embodied in the Double Jeopardy Clause, not the concept of issue preclusion that applies to all federal decisions as a matter of federal common law. *But see Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion) (distinguishing Double Jeopardy Clause from modern civil preclusion principles).⁷

This exception from preclusion is narrow for good reason. The Restatement’s broad exception encourages unhappy litigants to move into a state court and try again.

Litigants are bound by lower federal court decisions, but state courts are not bound by the lower

⁷ In *Bies*, Ohio had conceded in an earlier proceeding that the jury could consider Bies’s mental impairment as a mitigating factor against capital punishment; the concession did not preclude Ohio from arguing Bies could still be executed after this Court held that the Eighth Amendment bars execution of mentally impaired offenders. 556 U.S. at 827-28. *Bies* held the elements of issue preclusion were not met, but even if they were, preclusion was inappropriate because an Eighth Amendment challenge presents a discrete issue, and “the change in law substantially altered” the State’s incentive to contest mental impairment in the earlier proceeding. *Id.* at 836-37.

federal courts' interpretations of law. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). Only preclusion protects against a second try in state court. Under Herrera's approach, litigants can "disregard the binding effect" of the first loss and "attempt to relitigate . . . in a friendlier forum" whenever they can argue that something—a precedent or a principle—has somehow been undermined by this Court. *Ute VI*, 790 F.3d at 1003. If the stubborn litigant wins on the second try, then he creates a split in authority for this Court to address. If the second court catches on and imposes preclusion, that is of no moment. Review by this Court, for Herrera, not only evaluates whether there has been a "change in the applicable legal context" but also allows a potential victory on the merits even though the first judgment was final long ago.

This cannot be the law. Protective of its own authority, this Court demands that even when its precedents have "wobbly, moth-eaten foundations," lower courts must faithfully apply them to decide newly-filed cases with *different parties*, for whom relief is only possible through a grant of certiorari. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The Restatement's approach is the opposite, encouraging the *same parties* to argue ceaselessly about the evolution of this Court's case law and leaving the question of whether to follow this Court's precedents to lower courts.

Herrera's approach is especially destructive of finality when the dispute involves sovereigns without natural lives, who can wait much longer for a shift in

this Court’s jurisprudence. *Repsis* “was resolved nearly twenty years ago, the Supreme Court declined to disturb its judgment, and the time has long since come for the parties to accept it.” *Ute VI*, 790 F.3d at 1012. This Court should not relax its longstanding rules on issue preclusion for Herrera.

C. No other exception permits Herrera to escape issue preclusion in this case.

1. Issue preclusion still applies to Herrera even though he is a criminal defendant.

Herrera argues issue preclusion is constitutionally dubious in the criminal context. (Pet.Br.56-57). He cites no rule directly on point, and the cases he identifies are irrelevant.

Herrera’s cases about preclusion in the criminal context all involve using the doctrine to establish or refute elements of the charged crimes. (Pet.Br.56-57). Wyoming did not convict Herrera after an earlier jury had decided “an issue of ultimate fact” and acquitted him. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *United States v. Harnage*, 976 F.2d 633, 634 (11th Cir. 1992) (precluding relitigation of “evidentiary facts”). A prior guilty plea did not preclude Herrera “from relitigating an issue in a subsequent criminal proceeding.” *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1243 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889

(3d Cir. 1994) (rejecting issue preclusion for an element of the crime).

To convict Herrera, Wyoming had to prove the elements of the charged crimes beyond a reasonable doubt. Wyoming proved that (1) “on or about the 18th of January, 2014;” (2) “in Sheridan County, Wyoming;” (3) “the defendant, Clayvin Herrera;” (4) “did knowingly take;” (5) “an antlered elk;” (6) “during a closed season.” (R.1412); Wyo. Stat. Ann. § 23-3-102(d). For the second charge, the State proved that (1) “on or about the 18th day of January, 2014;” (2) “in Sheridan County, Wyoming;” (3) “the defendant, Clayvin Herrera;” (4) “aided the knowing taking;” (5) “of an antlered elk;” (6) “during a closed season.” (R.1413); Wyo. Stat. Ann. § 23-6-205(a).

In Wyoming, defendants have the burden of production to present a *prima facie* case for an affirmative defense. *Duckett v. State*, 966 P.2d 941, 948 (Wyo. 1998). Like other “circumstances of justification, excuse, or alleviation,” a tribal hunting right is an affirmative defense. *Patterson v. New York*, 432 U.S. 197, 202 (1977). “Proof [beyond a reasonable doubt] of the non-existence” of an affirmative defense by the government “has never been constitutionally required.” *Id.* at 210. When Herrera asserted a tribal hunting right, he stepped into the shoes of the Crow Tribe, the sovereign who negotiated the treaty with the United States. *Antoine v. Washington*, 420 U.S. 194, 205 (1975); *United States v. Dion*, 476 U.S. 734, 738 n.4 (1986). At its heart, Herrera’s claim of a treaty right is a claim of federal pre-emption that has no relationship to the

crime charged or the State's burden of proof. There is nothing constitutionally dubious about the conclusion that, if the Crow Tribe cannot assert a treaty hunting right against Wyoming because of preclusion, then its members cannot either.

2. The Crow Tribe is precluded from challenging the Tenth Circuit's decision that the Bighorn National Forest is occupied.

Herrera argues the Tenth Circuit's holding that Bighorn National Forest is occupied for purposes of the Crow Treaty does not bind either the Tribe or himself. He argues the court denied the Crow Tribe a "full and fair opportunity" to litigate the issue and that an "alternative holding" has no preclusive effect. (Pet.Br.50-53). Herrera has not accurately recounted the *Repsis* litigation, and he cannot avoid preclusion by attacking the Tenth Circuit.

The Crow Tribe had ample opportunity in *Repsis* to dispute whether the Bighorn National Forest was occupied. Before the district court, Wyoming argued the Bighorn National Forest was occupied because, in part, "Congress passed numerous acts establishing and regulating federal lands including the Big Horn National Forest." Response Brief of Defendants at 7-8, *Repsis* App., Vol. II at 381-82. Wyoming renewed this argument on appeal from summary judgment, making it far from a "bolt from the blue." Compare Brief of Appellee 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097) with

(Pet.Br.53-54). And, as Herrera concedes, the Tribe addressed the issue in its reply. (Pet.Br.53-54). Moreover, “[t]he values of preclusion would be destroyed if proof of the quality of the decision were required of the party asserting preclusion or permitted to the party opposing it.” 18 Charles Wright et al., *Federal Practice & Procedure* § 4423 (3d ed. 2016).

Herrera’s final argument against preclusion is that *Repsis*’s ruling that the Bighorn National Forest was “occupied” is an alternative holding. He cites another comment from the Restatement (Second) of Judgments that, if a “judgment by a court of first instance” relies on “determinations of two issues” that independently support the result, then the judgment is not preclusive on either issue. (Pet.Br.50 (citing Restatement (Second) of Judgments § 27 cmt. i)).

This Court has never adopted the position urged by the Restatement; its longstanding rule has been the opposite. “[W]here there are two grounds . . . each is the judgment of the court and of equal validity with the other.” *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924). More fundamentally, Herrera’s argument conflates the *Repsis* judgment—the basis for issue preclusion—with the *Repsis* reasoning. “With issue preclusion, it is the prior judgment that matters, not the court’s opinion explaining the judgment.” 18 *Moore’s Federal Practice (Civil)* § 132.03, Lexis (database updated September 2018). *Repsis* held that tribal members must follow Wyoming law in the Bighorn National Forest because it is not “unoccupied

land[] of the United States” under the Crow Treaty. *Repsis* provided two explanations for this judgment: (1) land belonging to the United States ceased to be “unoccupied” when Wyoming became a state; and (2) “the creation of the Big Horn National Forest resulted in the ‘occupation’ of the land.” *Repsis*, 73 F.3d at 993. These were two explanations for the same ruling, not different judgments.

The courts have interpreted the Crow Treaty already, and the judgment is final. This Court’s inquiry should stop here, and it should affirm the respect for finality demonstrated by the Wyoming courts.

II. The Treaty with the Crows does not grant tribal members the right to hunt in the Bighorn National Forest in Wyoming.

Herrera’s claimed treaty hunting right should be resolved as the Wyoming courts did: through issue preclusion. If this Court reaches the merits of the question presented, it should affirm the decision it reached 122 years ago in *Race Horse* when examining identical treaty language—the off-reservation treaty right was “not intended to survive Wyoming’s statehood.” *Mille Lacs*, 526 U.S. at 206. This conclusion is not only entitled to respect as *stare decisis*, it is entitled to respect because it is correct.

Herrera argues the Crow Tribe thought that land could only be occupied by the “actual, physical presence of non-Indian settlers.” (Pet.Br.34-35). This interpretation is contrary to the treaty’s text, ignores

its historical context, and is inconsistent with the behavior of the Tribe and the United States.

A. Article 4 provided authority for the Crow Tribe to seek game outside the reservation boundaries only until non-Indians began to occupy the wilderness surrounding the reservation.

Indian treaties are “construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Treaty language matters, however, and a court cannot disregard “the obvious, palpable meaning of the words of an Indian treaty” because “in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians.” *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). Courts must follow treaty language “that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe’s claims.” *Or. Dep’t of Fish and Wildlife v. Klamath Indians Tribe*, 473 U.S. 753, 774 (1993).

Interpretation requires the Court to examine the text, the treaty’s historical context, and the understanding of the parties as reflected in the treaty’s implementation. Each of these inquiries demonstrates that the Crow Tribe’s off-reservation hunting right has expired. The text of Article 4, when read as a whole, provides only for a limited right. When reading the

treaty in its historical context—a time when the United States sought to sequester tribes from incoming settlements and allow a transition to agriculture—the temporary nature of the hunting right becomes evident. Finally, post-ratification implementation of the Crow Treaty indicates that both parties believed the off-reservation hunting right ended around the time of Wyoming statehood. Statehood was not, as Herrera suggests, a legal event that abrogated the off-reservation hunting right. Wyoming statehood represented a moment when all concerned could agree that the off-reservation hunting right had expired as envisioned by the 1868 Treaty.

1. The text of Article 4 of the Crow Treaty demonstrates that the Tribe's hunting right is limited to areas of wilderness before the arrival of non-Indians.

The text of Article 4 demonstrates that the Tribe's off-reservation hunting right is limited to the territorial wilderness. While the treaty phrase “unoccupied lands of the United States” could be read more broadly, those words “cannot be considered alone, but must be construed with reference to the context in which they are found.” *Race Horse*, 163 U.S. at 508.

In the 19th century, unoccupied lands were not simply vacant lands; they were lands that could become occupied. *See, e.g., Hutton v. Frisbie*, 37 Cal. 475, 486 (Cal. 1869) (Acts to pre-empt title derived

from Mexican government “were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the *unoccupied lands* which they have had the courage and hardihood to settle . . .”) (emphasis added).

The “unoccupied lands of the United States” have a more common description: lands in “the public domain.” “The public domain was the land owned by the Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws.” *Hagen v. Utah*, 510 U.S. 399, 412 (1994). Public domain land could be settled by private parties, but “[f]rom an early period in the history of the government it was the practice of the President to order, from time to time, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.” *Id.* (internal punctuation omitted). Reservations from the public domain served various purposes, including “Indian settlement, bird preservation, and military installations.” *Id.*

The justices on the *Race Horse* Court understood this meaning. The Court interpreted the phrase to mean “lands owned by the United States, and the title to or occupancy of which had not been disposed of.” 163 U.S. at 508. *See also id.* at 509-10 (Court refers to “unoccupied public land of the United States”).

In order for the other words in Article 4 to have meaning, however, they must be read to limit the off-reservation hunting right. The right to hunt on

unoccupied lands exists only “so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” 16 Stat. 50.⁸

Hunting districts in the Treaty were not simply “places where game was to be found” or else the Treaty would not refer to “peace on the borders” of the districts. 163 U.S. at 508. Peace “among whites and Indians” on the “borders” of the hunting districts was similarly irrelevant if homesteaders had already arrived within the territory and were “no longer beyond the borders of the white settlements.” *Id.* The best reading of Article 4 as a whole, then, is that the “unoccupied lands of the United States” are “lands of that character embraced within what the treaty denominates as hunting districts.” *Id.*⁹

⁸ In *Repsis*, Wyoming argued that even if the hunting right continued after statehood, the game was gone, and the treaty does not permit tribal members to hunt a new resource that exists only through State investment. *Repsis* App., Vol. I at 265, 271-72 (demonstrating no viable population of elk existed in the Bighorn Mountains by 1909 and recovery came through Wyoming’s actions). Wyoming also asserted that laches prevents the Tribe from reviving a hunting right it abandoned 100 years ago. *Id.* at 176. Because Wyoming prevailed on other grounds below, these arguments are not before this Court. Wyoming will raise these objections on remand, if needed.

⁹ Interestingly, the Treaty does not limit Crow hunters to “unoccupied lands” within a specific hunting district identified for the Crow Tribe in the 1851 Treaty. Article 4 refers to “borders of the hunting districts” in the plural. This is unsurprising, given that the tribes that signed the 1851 Treaty did not cede territory to create the hunting districts, either to the United States or to one another. Treaty of Fort Laramie, Art. 5 (1851) (found in 2

The term “hunting districts” describes lands as they were at the time the Treaty was negotiated. “When in 1868 the treaty was framed, the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation.” 163 U.S. at 508. The hunting districts were “wilderness” that had not yet seen the “march of advancing civilization.” *Id.*

Unlike “unoccupied lands,” the term “hunting districts” was not in common use; it appears only in the 1851 Treaty of Fort Laramie. In that document, hunting districts are the labels for areas within Indian Territory, described so travelers on the Oregon Trail could know which tribal land they crossed and the Army could hold specific tribes accountable for predation. *Montana II*, 450 U.S. at 557-58. The reference to hunting districts in the 1851 Treaty was not a grant of authority or title to the signatory tribes; “the 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories.” *Id.* at 553. *See also United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 349 (1940) (noting the Court has repeatedly held 1851 lands “were Indian country, subject only to the Indians’ right of occupancy”).

Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-95 (1904) (Tribes “do not hereby abandon or prejudice any rights of 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”).

“Hunting districts” were not simply “places where game was to be found,” but reflected territory “beyond the borders of the white settlements.” *Race Horse*, 163 U.S. at 508. Therefore, when Article 4 provided that tribal members could hunt on unoccupied lands so long as peace prevailed on the borders of the hunting districts, the question of whether such lands remained unoccupied depended on whether the lands were beyond the borders of white settlements, not on whether, as Herrera argues, such lands lacked physical improvements.

2. Wyoming statehood did not abrogate the Tribe’s hunting right; it reflected congressional recognition that the land identified in 1851 as “hunting districts” had permanently transformed.

The interaction of the phrase “hunting districts” and the “unoccupied lands of the United States” must also be understood in the historical context of reservation policy in the 1860s.

The “very object” of the Crow Treaty was to confine tribal members to a reservation separate from “the new settlements as they advanced.” *Race Horse*, 163 U.S. at 509. Reservations were intended to “keep distance and peace between Indians and non-Indians.” William C. Canby, Jr., *American Indian Law in a Nutshell* 21 (6th ed. 2015). When the Great Peace Commission convened in the late 1860s, the “principal cause of complaint” of the Indian tribes was “the fact

that the whites are invading their territory, cutting roads wherever they please, running railroads without stint, and building forts and filling them with soldiers, thereby driving all game from the country and depriving the Indians of the means of living.” *Indian Peace Commission*, N.Y. Times, Sept. 29, 1867, at 4.

The transition to reservation life was particularly important for Plains Indians, who would perish after the buffalo disappeared if they did not adopt an agricultural lifestyle. Reservation policy did not envision that a tribal member could continue to “seek out every portion of unoccupied government land and there exercise the right of hunting” even if that parcel of land was in “already established States.” *Race Horse*, 163 U.S. at 509. Such travel delayed the development of an agrarian lifestyle and magnified the potential for conflict, even on land that was still in the public domain. This is because, throughout western expansion, non-Indians raised livestock not just on their homesteads but on all nearby unoccupied land. *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (recognizing “an implied license, growing out of the custom of nearly a hundred years” to graze lands in the public domain “especially those in which the native grasses are adapted to the growth and fattening of domestic animals”).¹⁰

¹⁰ The *Race Horse* litigants presented this concern to the Court, noting Race Horse hunted on land that was “used by the settlers as a range for cattle, and was within election and school districts of the State of Wyoming.” 163 U.S. at 507. The Court

If the phrase “unoccupied lands of the United States” encompassed all land in the public domain anywhere, then the Treaty did not create the separation needed “to protect [tribal] rights and to preserve for [each Indian] a home where his tribal relations might be enjoyed under the shelter of the authority of the United States.” *Race Horse*, 163 U.S. at 509. Travel off-reservation created danger, as incoming settlers seized “on any off-reservation hunting expeditions as evidence of the Indians’ hostile intent.” Hoxie, *Parading* 18.

The *Race Horse* Court understood reservation policy, in the 19th century, was a policy of separation. The Court also understood that the words of Article 4 created only a temporary right to hunt off-reservation which would terminate with the settlement of the West.

B. The historical implementation of the Crow Treaty indicates that the off-reservation right to hunt ended at the time of Wyoming statehood.

Shortly after signing the 1868 Treaty, the United States explained that the Crow Tribe’s off-reservation right was not available “where there are too many whites.” *Annual Report of the Commissioner of Indian Affairs for 1873* at 503. “[T]he march of advancing civilization foreshadowed the fact that the wilderness,

concluded that the actual use of the land was not relevant to the interpretation of the treaty right it adopted.

which lay on all sides of the point selected for the reservation,” would soon be “occupied and settled.” *Race Horse*, 163 U.S. at 508-09.

This march of civilization ended at statehood. By the mid-1870s, the buffalo were gone. In 1880, Indian Department regulations instructed Indian agents to inform tribal members that “they must confine their movements wholly within the limits of their respective reservations, that under no pretext must they leave the same without a special permit.” Section 235 *Ins.* 1880 (as published in *Regulations of the Indian Department* § 492 (1884)).¹¹ The United States Army forced Crow Chief Crazy Head to return to the reservation when he sought to hunt elsewhere in 1883. The United States relocated the Crow Tribe to agricultural flatland in 1884. In 1886, the Crow ceased off-reservation hunting. By the time Congress granted statehood to Wyoming (1890) and Montana (1889) and Idaho (1890), all parties understood that the time for hunting had passed.

The *Race Horse* Court’s conclusion that the hunting right had expired reflects the 19th century understanding of not just the *law* of statehood but what statehood represented. “[C]entral to the original conception of the territorial system” was the idea that

¹¹ The 1904 Regulations of the Indian Office are even more clear about the places Indians may not travel: tribal members “will not be allowed to roam away from their reservations without any specific object in view, nor will they be allowed to *trespass upon the public domain*.” *Regulations of the Indian Office* § 585 (1904) (emphasis added).

early settlers would, through territorial government “achieve self-government in a developing political community that eventually would be welcomed into the Union.” Peter S. Onuf, “Territories and Statehood” (*Encyclopedia of American Political History* 1283, 1284 (1984)). Political leaders saw early settlers as “uninformed, and perhaps licentious people” whose “routine defiance of state and federal land laws” was but one disagreeable aspect of the character needed to settle the rough frontier. *Id.* at 1283. Statehood, in contrast, was not just a legal act; it was congressional recognition that these individuals no longer held sway.

This was the moment when civilization arrived. It is also, then, the logical time when hunting districts ceased and territory came “within the authority and jurisdiction of a State.” *Race Horse*, 163 U.S. at 509; see also *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927 (8th Cir. 1997), *aff’d*, 526 U.S. 172 (1999) (“The standard of when ‘unoccupied’ lands become ‘occupied’ is certainly vague, and could logically include the grant of sovereignty to a newly formed state.”).¹²

¹² The statutes providing for land sales by the Crow Tribe in 1891 and 1904 do not affect the analysis. While each statute contains a savings clause that these later acts do not alter the tribe’s treaty rights, no party argues that the land sales statutes affected the hunting right as a legal matter. Herrera’s argument “rests on the assumption that there was a perpetual right conveyed by the treaty,” and this Court rejected that conclusion. *Race Horse*, 163 U.S. at 515.

**C. The Tribe understood land could be
“occupied” without physical presence.**

Herrera offers an interpretation of “unoccupied lands of the United States” that no member of the *Race Horse* Court, no court ever, has adopted. Herrera agrees that the tribal right to hunt does not exist on land where “the whites” have “settled.” (Pet.Br.34). He appears to concede that no right to hunt exists on private land at all, even if the owners are absent at a specific moment. (*Id.*) (noting the “tracts of land” where “the whites” eventually settled “would become occupied”).¹³ But Herrera argues the Crow Tribe would not have understood land was occupied without “actual, physical presence of non-Indian settlers.” (Pet.Br.34-35).

Herrera’s interpretation is incorrect. The Treaty with the Crows demonstrates that the Tribe understood “occupation” without physical presence. Article 2 reserved land for “the absolute and undisturbed use and occupation of the Indians herein named.” 15 Stat. at 650. This phrase means “for all practical purposes, the tribe owned the land” and “no beneficial interest” other than “naked fee” was held by the United States. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). This phrase grants the Crow Tribe “the implicit power to exclude others from the

¹³ The *Race Horse* Court described the treaty hunting right as “temporary and precarious” not simply because it could expire; the right was temporary and precarious because its application in any particular location “was to cease whenever the United States parted merely with the title to any of its lands.” 163 U.S. at 515.

reservation.” *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993).

Both the Crow and the United States understood the importance of the power to exclude. The 1868 Treaty reserved eight million acres, or 12,500 square miles, for the exclusive use and occupation of approximately 2,000 people. Joe Medicine Crow, *From the Heart of Crow Country* 12, 14 (1992) (noting smallpox had lowered Crow population from 8,000 in the 1830s to 2,000 by 1870). For perspective, the State of Maryland contains about six million acres.

“Under the treaty a relatively few Indians were to ‘occupy’ millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians’ understanding would not necessarily require actual physical presence or use to change land from an ‘unoccupied’ to an occupied status.” *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985) (construing identical language in the Shoshone-Bannock Treaty). Tribal members knew that this grant of “exclusive use and occupation” meant that “no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should ‘ever be permitted to pass over, settle upon, or reside’ in the territory so reserved” without the Tribe’s permission. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 486 (1937).

If the sheer size of the Crow Reservation does not demonstrate that “physical presence” was not required for occupation, the Tribe had experience with the

behavior of the United States. Four years after the 1868 Treaty, the United States created Yellowstone National Park, preventing its settlement and “proceeding immediately to forbid hunting in a large portion of the Territory” of the hunting district without establishing an actual physical presence throughout that place. *Race Horse*, 163 U.S. at 510.¹⁴

Herrera’s argument about physical presence also misunderstands the nature of settlement in the Rocky Mountain West. The area lacks abundant moisture and fertile soil. “[P]ublic lands in the West” were, as President Roosevelt concluded, “suitable chiefly or only for grazing.” Message of Theodore Roosevelt to the Senate and House of Representatives (December 2, 1902) (15 *A Compilation of the Messages and Papers of the Presidents* 6725 (1909)). “[I]n the grazing region the man who corresponds to the homesteader may be unable to settle permanently if only allowed to use the

¹⁴ The legislative history cited by the United States is inconclusive. (Br. of United States at 25-26). Senator Harlan noted the treaty was “expected to induce the Indians to settle down and engage in pastoral and agricultural pursuits.” Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Nevertheless, he explained, “There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements.” *Id.* Yellowstone was not settled, but its creation reflected an immediate congressional decision that not all lands needed “settlements” to lie beyond the off-reservation right. Moreover, when Senator Harlan qualified his understanding with “I think,” he not only indicated to his colleagues that he was uncertain about the Treaty’s meaning, but he also showed why “[s]ubsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier Congress.’” *Jones v. United States*, 526 U.S. 227, 238 (1999).

same amount of pasture land that his brother, the homesteader, is allowed to use of arable land. One hundred and sixty acres of fairly rich and well-watered soil, or a much smaller amount of irrigated land, may keep a family in plenty, whereas no one could get a living from one hundred and sixty acres of dry pasture land capable of supporting at the outside only one head of cattle to every ten acres.” *Id.*

Wyoming’s heavy reliance on cattle and sheep ranching further demonstrates why Herrera’s focus on “actual, physical presence” is incorrect: tribal leaders understood that land with cattle was occupied, but land with cattle was often in the public domain.

In 1870, the Wyoming Territory had 8,143 cattle. T.A. Larson, *History of Wyoming* 165 (1965). Fifteen years later, Wyoming’s Territorial Governor reported that ranching was ninety-percent of the state’s economy, and its 894,788 cattle “roam in every valley and drink from every stream in the territory.” *Id.* at 167. The Crow long understood that cattle would appear when the bison disappeared and that cattle meant the settlers had arrived. *Cutler*, 708 P.2d at 859 (cattle are an “indicium of occupancy”). See Frank Linderman, *Plenty-Coups, Chief of the Crows* 40-41 (2d ed. 2002) (Crow Chief Yellow-Bear told Chief Plenty-Coups that in Plenty-Coups’ lifetime, “the buffalo will go away forever” “and that in their place on the plains will come the bulls and cows and calves of the white men.”).

Herrera's theory that tribal members could hunt anywhere they could not discern actual, physical presence—unless, of course, the land was private property—would have created conflict. Private property with an absent owner could be off-limits, and land with cattle in the public domain could appear occupied. Herrera's theory would have required tribal members to understand survey lines and land patents in order to discern the true status of land they hunted, and this cannot be the intended meaning of either the United States or the Crow Tribe.

D. This Court should honor *stare decisis* by maintaining its current interpretation of the phrase “unoccupied lands of the United States.”

Under the doctrine of *stare decisis*, once this Court has fully considered and decided an issue, it is not reexamined again and again. Wyoming and its citizens have relied on the interpretation from *Race Horse* for 122 years, and *stare decisis* “has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision[.]” *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991).¹⁵

¹⁵ Herrera and the United States are somewhat vague as to whether private land is outside of his tribal hunting right. This means that a ruling in Herrera's favor will also dramatically disrupt the settled expectations of private property owners who for more than 100 years have believed they have the right to exclude others from hunting or crossing their property. Such a

In 1896, this Court held that the right to hunt on “unoccupied lands of the United States” in Wyoming was “not intended to survive statehood.” *Mille Lacs*, 526 U.S. at 206. “This Court does not overturn its precedents lightly.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). “Considerations of *stare decisis* have special force in the area of statutory interpretation” because Congress can override the Court’s decisions with contrary legislation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

In 1900, there were no elk on the eastern slope of the Bighorn Mountains. Calvin King, *Reestablishing the Elk in the Bighorn Mountains* 1 (1963). (R.519). In 1909, Wyoming began a four-decade conservation effort to reintroduce elk in the Bighorn Mountains, moving captured elk by sleigh over Teton Pass from Jackson Hole, Wyoming, into Idaho, by wagon to a nearby railroad station, and then by railroad car to the Bighorn Mountains. *Id.* at 8-18 (R.523-28). With this re-introduction, with the re-introduction of Bighorn Sheep, and with other efforts at species preservation, Wyoming has developed and implemented a complex scheme of wildlife management and conservation in the Bighorn Mountains, and it has earned public support (and investment) with the understanding that Wyoming’s authority is unquestioned. Moreover, Wyoming’s management not only protects elk, but it

holding also arguably conflicts with *Montana II*, which concluded that the Crow Tribe had no demonstrated interest in regulating hunting and fishing on privately owned land *within* the reservation. 450 U.S. at 565-67.

uses this species to provide funding to conserve hundreds of other animals, from the grizzly bear to the sage grouse to the black-footed ferret. *See 2017 State Wildlife Action Plan* (<https://bit.ly/2pRaS6Z>).

The members of the *Race Horse* Court, having lived through the three decades of western expansion after the Civil War, were well-positioned to interpret the language of Article 4. They had watched the buffalo disappear from the Great Plains, leaving nomadic tribes like the Crow Indians to adapt or vanish. The Court understood how the phrases “unoccupied lands of the United States” and “hunting districts” interacted with the United States’ Reservation Policy because these were the current events of daily life. This Court should adopt their conclusion that Article 4’s “temporary and precarious” off-reservation hunting right has expired, because their analysis was informed by more legal and historical context than the parties here could ever present. And it is correct.

III. By withdrawing the Bighorn National Forest from the public domain, the United States occupied that land within the meaning of the Crow Treaty.

Wyoming does not argue that President Cleveland “abrogat[ed] Indian treaty rights when creating” the national forest. (Pet.Br.39). When he declared a national forest reserve in the Bighorn Mountains, President Cleveland removed these lands from the

public domain. When lands are no longer in the public domain, the Treaty itself says they are no longer within the ambit of the off-reservation hunting right.

A. President Cleveland’s proclamation changed the character of the Bighorn National Forest lands.

In the 19th century and now, the federal government can occupy land through its exercise of dominion and control, and creation of the national forest was exercise of the United States’ “power of reservation” to remove land from settlement because “the public interest would be served by withdrawing or reserving parts of the public domain.” *Hagen*, 510 U.S. at 412.¹⁶

The Forest Reserve Act provided authority to “set apart and reserve” in “any State or Territory having public land bearing forest” the land “wholly or in part covered with timber” as a “public reservation.” Timber Culture Repeal (Forest Reserve Act), ch. 561, § 24, 26 Stat. 1095 (1891). President Cleveland proclaimed the Bighorn National Forest was “reserved from entry or settlement and set apart as a Public Reservation.” Proclamation No. 30, Grover Cleveland (Feb. 22, 1897), 29 Stat. 909.

¹⁶ If this Court concludes the Bighorn National Forest is unoccupied as a matter of law, the United States agrees Wyoming is entitled to a remand to offer factual evidence of occupation. (Br. of United States at 29).

The declaration of a national forest is no different than creation of a military reservation or an Indian reservation. The United States orders that land in the public domain “be reserved from sale and set apart for public uses.” *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868). Tribal leaders had visited military outposts in 1867, so they “undoubtedly understood that a governmental unit could ‘occupy’ lands within the meaning of the treaty.” *Cutler*, 708 P.2d at 857. The Crow Tribe’s occupation of its reservation was similar; the Tribe did not live everywhere on the land but it had the right to prevent entry and settlement by others.

As *Race Horse* noted, the creation of Yellowstone “forbid hunting in a large portion of the Territory” of a hunting district. 163 U.S. at 510. That statute used words similar to those in President Cleveland’s proclamation: the land was “reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States and set apart as a public park or pleasuring-ground.” ch. 24, § 1, 17 Stat. 32 (1872).

At the time, President Cleveland’s declaration of numerous national forests was controversial. In response, Congress enacted the Organic Act of 1897, and this statute also reflects the understanding that the forest had been reserved and the sovereign would henceforth manage the forest as its own private property. ch. 2, 30 Stat. 11 (1897). The Organic Act suspended President Cleveland’s designations and the “lands embraced therein” were “restored to the public domain.” 30 Stat. at 34. If the forest was not “otherwise disposed of” within a year after enactment of the

Organic Act, and the Bighorn National Forest was not, then the President's designation became effective again. *Id.* The act also authorized "such rules and regulations" as "will ensure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction." 30 Stat. at 35.

B. The United States' proprietary regulation of the Bighorn National Forest demonstrates its occupation of the land.

Wyoming does not dispute that the United States, in its proprietary capacity, has "plenary power" to decide who hunts on its land. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). It has done so here, and Herrera's actions violated the restrictions on hunting imposed by the United States as landowner. The United States itself regulates hunting in the national forests, and Herrera's actions violated these commands.

Since 1941, the United States has banned hunting in a national forest without a permit from the Forest Supervisor. 36 C.F.R. § 241.3(b). The same rule directs the Forest Service to enter into cooperative agreements with states for wildlife management (*i.e.*, hunting). 36 C.F.R. § 241.2; Master Memorandum of Agreement between the Forest Service and Wyoming Game and Fish Commission, *Repsis App.*, Vol. I at 248-60. (cooperative agreement for Wyoming to manage

wildlife in the national forests and containing no reference whatsoever to tribal hunting rights).

Other federal restrictions on hunting in the national forests date back even earlier. In the first appropriation to implement the Organic Act, Congress ordered that federal employees “shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game[.]” Appropriations Act of 1899, ch. 424, 30 Stat. 1074, 1095 (1899); *see United States v. New Mexico*, 438 U.S. 696, 722 (1978) (discussing history); 16 U.S.C. § 553.

In its brief, the United States identifies another regulation that limits tribal hunting: the prohibition against discharging firearms near a residence. The United States does not, however, explain why that regulation applies to Herrera, while the prohibition against hunting without a permit does not. (Br. of United States at 28 (citing 36 C.F.R. § 261.10(d)(1))). The explanation cannot be that the regulations have different underlying authority, as both rely on proprietary authority under the Organic Act. Regulations for the Administration and Enforcement of Laws Relating to Wildlife, 6 Fed. Reg. 1987 (Apr. 17, 1941); National Forest System Prohibitions, 42 Fed. Reg. 2956, 2957 (Jan. 14, 1977).

Moreover, neither restriction explicitly references an Indian treaty right, so the different application cannot derive from an unspecified “clear statement”

requirement. The United States' suggestion that one restriction is within its power necessarily implies that the other restriction, which reinforces the illegality of Herrera's conduct, also applies here.

The United States does not need to alter the federal common law of issue preclusion, overcome *stare decisis*, and revive a defunct treaty right to accomplish the result it seeks here. This is federal property, and the United States decides who may enter and what they may do.

C. The Crow Tribe understood the Bighorn National Forest was occupied.

When President Cleveland acted, the Bighorn National Forest looked nothing like the "aboriginal hunting grounds" Herrera invokes. (Pet.Br.10). By the 1890s, the Homestead Act's vision of small farms had given way to the most exploitive, scarring extraction of natural resources the Bighorn Mountains had ever seen. "[G]ame in the Big Horn Basin was practically extinct in 1900[.]" King, *History of Wildlife* at 19. The animals had been killed for food by men living in logging camps and mining camps. By 1899, in the Bighorn National Forest, "[n]early all has been burned, much of it recently, and a large part has been subjected to repeated fires." *Annual Report of the United States Geological Survey for 1898*, Part 5a: Forest Reserves at 168 (1899). "A considerable proportion of its area consists of open parks from which the timber has evidently been completely driven out." *Id.*; see also *id.*

at 186 (“Less than 10 per cent of the area of the reserve bears timber large enough for present use[.]”); *id.* at 179-81 (noting multiple logging mills); *id.* at 181-83 (noting mining claims for gold and copper, and stating, “In these localities and many others every acre for miles around has been staked off in claims.”); *id.* at 183-85 (400,000-450,000 head of sheep grazed there).

The Crow Tribe would have understood the Big-horn Mountains were occupied even before President Cleveland’s declaration, which removed any doubt.

D. The Forest Reserve Act “savings clause” cited by Herrera is irrelevant.

Herrera notes that the Forest Reserve Act states that Indian treaty rights are not changed, repealed, or modified as a result of the Act. (Pet.Br.39 (“But Congress also made crystal clear that ‘nothing in this act shall change, repeal, or modify any . . . treaties made with Indian tribes.’”)). The full provision has a different meaning: “nothing in this act shall change, repeal, or modify any agreements or treaties with Indian tribes *for disposal of their lands* . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements[.]” See ch. 561, § 10, 26 Stat. at 1099 (1891) (emphasis added). The provision says nothing about treaty hunting rights; it exists because immediately before the savings clause in section 10, the Forest Reserve Act stated “no public lands of the United States, except abandoned military reservations . . . shall be sold at

public sale.” ch. 561 § 9, 26 Stat. at 1099. Without the savings clause, the United States could not fulfill existing agreements to sell tribal land, because it still had the legal title.



CONCLUSION

Since *Race Horse*, Wyoming has relied upon this Court’s holding; it is Wyoming’s responsibility to manage wildlife in trust for all. Wyoming has reintroduced wildlife where there was none, including within the Bighorn National Forest.

The United States suggests the parties return to the lower courts to litigate whether conservation necessity justifies Wyoming’s regulation. Wyoming is confident of its wildlife management, but additional costly litigation is not necessary. This Court should preclude Herrera from relitigating the exact treaty provision that his sovereign—the Crow Tribe—litigated and lost. Collateral attacks undermine the expectations of litigants and, more generally, faith in the judicial system.

If this Court nonetheless considers Herrera’s new interpretation of Article 4 of the Crow Treaty, it should conclude that the text, the historic context of the treaty, and the post-ratification conduct of the parties all indicate that Article 4 was a temporary measure. Article 4 expired when Wyoming gained statehood and the hunting districts vanished. If this Court concludes that the right persists, then it should hold that

creation of the Bighorn National Forest occupied that land as a matter of law. Herrera's conviction should be affirmed.

Respectfully submitted,

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ANNUAL REPORT ON TRIBAL CO-STEWARDSHIP

**Implementation of Joint Secretarial Order 3403:
Fulfilling the Trust Responsibility to Indian Tribes in
the Stewardship of Federal Lands and Waters**

Background

At the Tribal Nations Summit in November 2021, President Biden unveiled the “Tribal Homelands Initiative,” a joint effort between the U.S. Departments of Agriculture (USDA) and the Interior (DOI) focused on improving Federal stewardship of public lands, waters, and wildlife through bolstering the role of Tribal communities in Federal land management. Following the creation of the initiative, Secretaries Tom Vilsack and Deb Haaland signed Joint Secretarial Order 3403 (Order) “Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.” This Order establishes that both the USDA and the DOI will manage Federal lands and waters in a way that protects the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes and is consistent with the nation-to-nation relationship between the United States Government and federally recognized Tribes and the U.S. Government’s trust obligations. It also describes how the Departments will carry out their obligations. The Order directs each Department to pursue agreements with Tribes to collaborate in the co-stewardship of Federal lands and waters under each Departments’ purview and, where consistent with applicable law, support opportunities to consolidate Tribal homelands and Tribal stewardship of those resources. In November 2022, Joint Secretarial Order 3403 was amended to include the U.S. Department of Commerce (DOC), providing increased opportunity for co-stewardship of Federal waters.

To ensure the USDA monitored and fulfilled its obligations under the Order, the Department established the inaugural Joint Secretarial Order (JSO) implementation team in late 2021. Representing senior leaders from across the Department (Office of the Secretary, Office of the Under Secretary for Natural Resources and Environment, Office of Tribal Relations, and the Office of the General Counsel) and key offices within USDA Forest Service (Office of the Chief; State, Private, and Tribal Forestry; National Forest System; and Office of Tribal Relations), in partnership with field leaders (regional foresters and forest supervisors), the team has worked over the past 2 years to increase meaningful and durable opportunities for co-stewardship.

Year Two Accomplishments and Progress

In 2022, USDA made important progress in implementing JSO 3403. Building on this foundation in 2023, USDA continued to make significant advancements in providing opportunity for co-stewardship of the Nation's forests and grasslands. For example, the USDA Forest Service and Tribes executed more than 120 co-stewardship agreements, representing a total investment of approximately \$68 million, more than triple the \$19.8 million invested in fiscal year 2022. These agreements include approximately \$37 million in 12 self-determination agreements, up from approximately \$4.3 million in fiscal year 2022. In addition to significantly increasing the number of co-stewardship agreements, the Forest Service also made notable policy adjustments recognizing the importance of Indigenous Knowledge and providing Tribes with improved access to USDA programs. This report highlights some of USDA’s 2023 accomplishments.

Embedding Tribal Co-Stewardship in the USDA Forest Service

This year USDA continued its efforts to improve relationships with Tribes and affirm its commitment to expanding the respectful application of Indigenous Knowledge into Federal land decisions by making several key organizational and policy changes. This section highlights some of the steps taken to meet our duty to uphold our general federal trust and treaty responsibilities to Tribal Nations and enhance Tribal engagement.

Renaming USDA Forest Service State, Private, and Tribal Forestry

The USDA Forest Service has begun to implement a new way of working to build trust and create innovative opportunities with Tribal Nations, beginning with renaming the State and Private Forestry Deputy Area. By changing the name to State, Private, and Tribal Forestry, the USDA Forest Service is publicly and intentionally emphasizing its commitment to working with Tribal Nations. This includes a focus on co-stewardship of the Nation's forests and grasslands, respectful application of Indigenous Knowledge, and protection of sacred sites.

USDA Forest Service Releases Action Plan on Strengthening Tribal Consultation and Nation-to-Nation Relationships

Acknowledging that the millions of acres managed by the USDA Forest Service are the ancestral homelands of American Indian and Alaska Native Tribal Nations, and the tragic history involving the forced displacement of Indigenous people, the USDA Forest Service continued its commitment to general federal trust and treaty responsibilities this year with the release of [“Strengthening Tribal Consultations and Nation-to-Nation Relationships: A USDA Forest Service Action Plan”](#) in February 2023. This plan represents an organizational shift in USDA Forest Service culture, beginning with reflection on agency policies, programs, and practices and the real-life implications they have on Indigenous peoples. It includes clear goals and expected outcomes to hold the agency accountable for the implementation of the action plan. Divided into four focus areas, the plan directly addresses barriers identified by Tribes through consultation. Focus areas incorporated into the report include (1) strengthening relationships between Tribes and the USDA Forest Service, (2) fulfilling general trust and treaty obligations, (3) advancing Tribal relations within the Forest Service, and (4) enhancing co-stewardship of the Nation's forests and grasslands. Regarding the latter, the Forest Service established and staffed a new subdirectorate within the agency's Office of Tribal Relations in the State, Private, and Tribal Forestry Deputy Area. This action underpins and reinforces progress made through implementation of JSO 3403. This subdirectorate was established for the express purpose of providing expertise, training, and support in executing agency business with Tribes and focuses on the entire suite of allowable USDA Forest Service authorities across all agency program areas.

Improving Access to USDA Programs

In April 2022, USDA released a new Equity Action Plan in support of Executive Order 13985, “Advancing Racial Equity and Support to Underserved Communities.” The plan outlines actions USDA will take to advance programmatic equity to improve access to programs and services for

underserved stakeholders and communities. The Equity Action Plan includes a commitment to removing the unique barriers for Indigenous and Tribal access to USDA programs and services, promoting Tribal self-determination principles, and incorporating Tribal values and Indigenous perspectives into Federal policies.

USDA Forest Service Issues Match Waiver Policy

In 2023, collaboration between the Office of the Under Secretary for Natural Resources and Environment (Dr. Homer Wilkes) and the Office of the Chief of the USDA Forest Service (Randy Moore) led to a policy change that recognizes the importance of partnerships in accomplishing mission-critical work. To better enable work with partners, the Forest Service reviewed its grants and agreements process and found that policy requirements for cash matching or substantial cash contributions were an impediment to expanding work with partners at the appropriate scale. In some cases, existing policies created insurmountable barriers for partners, including Tribes, to contribute their expertise and capacity in enhancing the health and resilience of America's forests and grasslands.

After a review of existing policies, the USDA Forest Service took several actions to make partnering easier, as well as more accessible and equitable. Agency policy now makes clear that a partner with an established formal agreement may satisfy match requirements by providing cash, real or personal property, services and in-kind contributions, or a combination thereof. The value of "services and in-kind contributions" that partners bring includes but is not limited to (1) access to networks and communities that are underrepresented or underserved, (2) access to Indigenous Knowledge, (3) networks and relationships that increase social license for wildfire risk reduction and treatments, (4) creativity and innovation that can support effective public outreach and education and facilitate safe and inclusive recreation experiences, (5) experience managing work projects to improve forest health and climate resilience, (6) capabilities to support project design and management and provide subject matter expertise that complements the skills of agency employees or fills a gap in agency capacity, and more.

Policy match requirements (meaning any match requirements not required by statute) are waived for all agreements with Tribes, as encouraged in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Agreements with Tribes help the agency meet its general trust responsibilities and deliver on priorities, including equity and co-stewardship, by providing benefits without the need for any additional cash matching.

USDA Engages Youth Through Indian Service Youth Corp

In partnership with the USDA Forest Service's Office of Tribal Relations and reforestation team, USDA established the USDA Forest Service Indian Service Youth Corp (ISYC). The ISYC provides paid experience with conservation work on both public and Indian lands for individuals ages 16–30 (up to age 35 for veterans). Since February 2023 the agency has allocated \$5 million and six multi-year agreements under the program with two agreements in direct partnership with Tribes. These investments have helped over 200 Indigenous students gain necessary skills that may provide an advantage when applying for Federal conservation jobs.

USDA Forest Service Plans Release of Inventory for Land Conveyance Authorities

Recognizing that the USDA Forest Service manages forests and grasslands that are the ancestral homelands of American Indian and Alaska Native Tribes, USDA is compiling a list of statutory authorities available to entities and Tribes interested in land exchanges, purchases, and, in limited circumstances, transfers. The intent of this inventory is to provide Forest Service line officers and Tribes with an increased understanding of policy tools that can be used when working with Tribes on exchanges, purchases, or land transfers.

USDA Forest Service Clarifies “Base Property” Eligibility Criteria

The USDA Forest Service reviewed rangeland management program policies and identified a need to clarify base property requirements. Specifically, Tribal trust land can be used for satisfying the base property requirement for obtaining livestock grazing permits on national forests and national grasslands. This change in policy increases opportunities for Tribal members to apply for grazing permits on Federal land and is directly responsive to a barrier identified by Tribes through consultation.

USDA Forest Service Develops Tribal Keystone Agreements

To enhance partner involvement in tackling the wildfire and climate crises, in 2023 the USDA Forest Service initiated development of several keystone agreements that allow the agency to execute high-priority projects quickly and efficiently. During 2023, several new significant keystone agreements were put into place. The Forest Service has committed \$100 million to the development of keystone agreements with Tribes or Tribal organizations. In the coming months, the Forest Service will execute one or more Tribal keystone agreement(s) for technical assistance, active engagement, and outreach in the delivery of agency programs and services. The agency has been working with numerous Tribal organizations and through national consultation to expand agreements designed to increase Tribal workforce capacity and engagement in co-stewardship.

USDA Forest Service Creates Community Navigator Program

In fiscal year 2023, the USDA Forest Service launched its first ever community navigator program aimed at improving access to funding opportunities and technical assistance for underserved communities, including Tribes and Indigenous communities. Serving as a national resource, community navigators support Forest Service programs receiving funding from the Inflation Reduction Act (IRA) and Bipartisan Infrastructure Law (BIL). Navigators are initially focused on helping Tribes and underserved communities apply for community wildfire defense grants and IRA-related urban and community forestry awards and forest landowner support provisions. In March 2023, the USDA Forest Service announced it was accepting applications for the second round of funding under the Community Wildfire Defense Grant Program. To increase Tribal participation, a separate notice of funding opportunity was issued specifically for Tribes. The USDA Forest Service plans to increase the number of

community navigators in early 2024 into specific regions, including Puerto Rico, Alaska, New Mexico, the South, and Northeast.

USDA Forest Service Releases Financial Resources Guide

In preparation for the 2023 White House Tribal Nations Summit, the USDA Forest Service has created a financial resources guide that includes information on available Bipartisan Infrastructure Law and the Inflation Reduction Act resources that can be used in support of co-stewardship. With the addition of this guide and community navigators, the Forest Service is providing additional easy-to-access information to Tribes on the range of grants and funds that are available.

USDA Forest Service Co-Stewardship Agreements with Tribes

In 2022 the USDA Forest Service was honored to announce nearly 60 new co-stewardship agreements. The agency doubled that number in 2023, with more than 120 new agreements that tripled the fiscal year 2022 investment (\$19.8 million) with approximately \$68 million in Tribal agreements.

Multiple existing authorities enable the Forest Service to enter into co-stewardship agreements with Tribes. One key co-stewardship authority is the Tribal Forest Protection Act of 2004 (TFPA), which includes special consideration for cultural, traditional, and historical affiliation of Tribes with the land and their Indigenous Knowledge and skills. In the 2018 Farm Bill, the USDA Forest Service was granted a demonstration authority to enter into self-determination agreements “to perform administrative, management, and other functions of programs of the TFPA of 2004” under the Indian Self-Determination and Education Assistance Act (TFPA 638). In 2023, the USDA Forest Service invested \$36.7 million in 12 new TFPA self-determination agreements, up from approximately \$4.3 million in 4 agreements in fiscal year 2022.

This year, co-stewardship agreements between Tribes and the USDA Forest Service span the full range of Tribal priorities and USDA Forest Service mission critical work, with the most common being for watershed and habitat improvements, restoration, invasives management, and fuels reduction. Fire-centric investments include development of fire crews and wildfire defense planning. Incorporation of Indigenous Knowledge runs throughout—in traditional plant management and ethnobotany, cultural interpretation, and traditional methodologies and techniques—as does workforce and youth capacity building. Other agreements invest in infrastructure, including equipment purchases to support Tribal wood enterprise and biomass heating systems as well as Tribal nurseries.

Table 1. USDA Forest Service regional co-stewardship investments in fiscal year 2023

Region ¹	Investment	Region	Investment
Northern (Region 1)	\$1,316,673	Pacific Northwest (Region 6)	\$9,313,587
Rocky Mountain (Region 2)	\$273,904	Southern (Region 8)	\$6,313,452
Southwest (Region 3)	\$27,943,516	Eastern (Region 9)	\$4,327,917
Intermountain (Region 4)	\$1,639,571	Alaska (Region 10)	\$7,113,595
Pacific Southwest (Region 5)	\$11,192,707	Agencywide Total:	\$69,434,922

¹ The USDA Forest Service is organized into nine jurisdictional regions. Region 1 covers the States of Montana and North Dakota, the Idaho Panhandle, and a part of South Dakota. Region 2 includes Nebraska, Kansas, Colorado, and the majority of South Dakota and Wyoming. Region 3 is comprised of Arizona and New Mexico, while Region 4 includes Nevada, Utah, and portions of Idaho and Wyoming. Region 5 is California and Hawaii. Region 6 covers the States of Oregon and Washington. Region 8 spans across 13 Southern States from Texas to Virginia and down to Florida, including Puerto Rico. Region 9 includes the Northeast and Midwest from Minnesota, Iowa, and Missouri up to Maine. Region 10 is Alaska.

Forest Service Regional Co-Stewardship Agreement Highlights

Northern (Region 1)

Montana—Confederated Salish & Kootenai Tribes. Three new agreements with the Confederated Salish and Kootenai Tribes in fiscal year 2023 strengthened the long-standing and collaborative relationship with the Northern Region: a new Good Neighbor agreement that provides a framework for current and future restoration and two challenge cost-share agreements. The Good Neighbor agreement adds a full-time liaison to facilitate communication and recommendations between the Tribes (resource departments, culture committees, and Tribal Council), and four national forests (Bitterroot, Flathead, Kootenai, and Lolo). The challenge cost-share agreements meet the interests of the Forest Service and the Tribes to develop data about natural and cultural resources on the Tribes' ancestral homelands, which will fill an information need and center these resources and treaty rights in planning, priority setting, and land management decisions.

North Dakota—Turtle Mountain Band of Chippewa Indians. The Forest Service made the first award in the region to the Turtle Mountain Band of Chippewa Indians in the form of a community wildfire defense grant (with match waived). This grant will fund a 2-year, Tribe-led project to develop a community wildfire protection plan in one of the most underserved communities in the nation (79.7 percent Native American, with 26.9 percent of those living on or near the reservation at or below poverty level).

Rocky Mountain (Region 2)

Colorado/New Mexico—Southern Ute Tribe. In fiscal year 2023 a TFPA 638 agreement was executed with the Southern Ute Tribe. This agreement supports Tribal ethnobotany and Indigenous Knowledge studies for incorporation into vegetation management, fuels reduction, and forest restoration activities under the Rocky Mountain Restoration Initiative. All 24 Tribes and Pueblos that are culturally affiliated with the San Juan National Forest will be invited to participate in this work to advance Tribal consultation, collaboration, and shared stewardship goals.

South Dakota—Rosebud Sioux Tribe/Sicangu Lakota, Oglala Lakota Nation, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, and other Tribes. Despite significant, historic challenges in Tribal relationships, and complex issues and interests on the Black Hills National Forest, major milestones were achieved, beginning with co-stewardship of the Pactola/He Sapa Visitor Center. A co-stewardship agreement for jointly developing a natural and cultural interpretation program of the Pactola Visitor Center on the Black Hills National Forest is nearing completion with the Rosebud Sioux Tribe/Sicangu Lakota, Oglala Lakota Nation, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, and other Tribes. This cooperation will maximize opportunities for the participating nations to have a voice in telling their story while developing the next generation of Lakota and Dakota knowledge bearers; provide appropriate representation of Indigenous natural resource values, history, and culture to Black Hills National Forest visitors; support perpetuation and revitalization of cultural literacy and Lakota and Dakota language; and educate agency staff,

members of the local communities, and the visiting public about the living legacy of the participating nations. A memorandum of understanding was negotiated, and interested Tribes are in the process of submitting it to their Tribal Councils for approval.

Southwest (Region 3)

Arizona—San Carlos Apache Tribe. In fiscal year 2022, the San Carlos Apache Tribe received approval of a TFPA proposal with the Apache-Sitgreaves, Coronado, and Tonto National Forests—lands within the boundaries of the National Forest System that are considered ancestral to the San Carlos Apache Tribe and associated with reserved treaty rights and/or that have importance to the Tribe. In fiscal year 2023 a self-determination agreement was executed to restore and improve forest health, wildlife habitat, and watershed conditions. The agreement will create a capable workforce through leadership and forest, fire, and cultural ecology training, which emphasizes the importance of traditional ecological knowledge in decision making.

Arizona—White Mountain Apache Tribe. The White Mountain Apache Tribe has entered a TFPA self-determination agreement for restoration, watershed protection, and forest health improvement. This work will restore and improve forest health on a cultural landscape with Tribal significance. Through consultation, Tribal elders will have an opportunity to provide input on cultural and heritage issues related to forest health and treatment. The Tribe also received a grant from the Wood Products Infrastructure Assistance program to transition away from mature product markets toward a more profitable and sustainable organization focused on other wood products and innovation. Finally, the Tribe received a Cooperative Forestry Assistance grant to manage the Tribe's forest resources with due consideration of social and cultural values in the Mt. Baldy area. This area is important to the White Mountain Apache Tribe due to its cultural significance, water resources, threatened and endangered species, and economic and recreation values.

New Mexico—Santa Clara Pueblo. The Santa Clara Pueblo and Santa Fe National National Forest entered into an agreement that supports the Rio Chama Collaborative Forest Landscape Restoration Program (CFLRP). Through the agreement, the Tribe and USDA Forest Service will increase Tribal workforce capacity and supply vegetation materials needed to increase the pace and scale of watershed and forest restoration through support of the Tribal nursery. This agreement further supports Tribal self-determination and input in CFLRP decision-making processes, incorporates Indigenous Knowledge into forest and watershed restoration practices, and facilitates intergenerational connections within and between the Tribal communities by engaging the next generation of natural and cultural resource management and leaders and workforce.

Intermountain (Region 4)

Idaho—Shoshone-Bannock and Shoshone-Paiute Tribes. The Shoshone-Bannock Tribes and the Shoshone-Paiute Tribes have each entered into agreements with the Boise National Forest in the Southwest Idaho Wildfire Crisis Strategy Landscape. These agreements include fuels reduction projects and job training that will help protect communities and important cultural

resources by using Tribal resources to reduce wildfire risk on the National Forest System. These projects will also remove biomass and wood and repurpose it for firewood. On-the-job training is being provided to members and staff of both Tribes, and cooperative planning and implementation will help ensure that Indigenous Knowledge is incorporated into projects. Additionally, the Boise National Forest manages recreation sites that are culturally significant to the Shoshone-Bannock Tribes. To simultaneously manage for recreation and protect these sites, the Shoshone-Bannock Tribes and Boise National Forest have also entered an agreement to jointly develop cultural site interpretive displays and outfitter resource information that will educate visitors and enhance their experience.

Nevada/California—Washoe Tribe. The Intermountain Region awarded a \$1 million grant to the Washoe Tribe through the Wood Products Infrastructure Assistance program. These funds will support the Washoe Tribe Elder Share Wood program. The Washoe Tribe calls their firewood bank “Share Wood” and supplies elders and others in need with up to four cords of free firewood per year. The Tribe is combining this grant with funds received from the Alliance for Green Heat to purchase a firewood processor, supplies, and storage sheds. In addition to serving their own people, the Washoe Tribe plans to distribute hundreds of cords of firewood to neighboring Tribes.

Pacific Southwest (Region 5)

California—Klamath River Basin Tribes. USDA has committed to invest \$25 million in the Klamath River Basin. This area is critically significant for water, fish habitat, and the vitality of the culture and well-being of Tribes in the Klamath River Basin. This investment will be used to address multiple Tribal priorities, including reduced wildfire exposure and risk, improved watershed condition and fish habitat, and opportunities for capacity building. As work progresses the agreement will be expanded to additional Tribes and national forests in the area, and a future investment in a Tribe-led, long-term restoration plan.

Pacific Northwest (Region 6)

Oregon—The Cow Creek Umpqua Band of the Umpqua Tribe of Indians. The Cow Creek Umpqua Band of the Umpqua Tribe of Indians received a grant from the USDA Forest Service Wood Products Infrastructure Assistance program for a Forest Health Resilience Enhancement Project. The Tribe is seeking to optimize the use of forest residuals generated as a byproduct of forest restoration and fuel treatment projects. These funds will help to create a profitable enterprise with a sustainable return on investment that ultimately includes the sawmill, chipper, and potentially a fuel pellet production facility (an option in the second phase of this project), as well as long-term employment opportunities for residents and Tribal members.

Southern (Region 8)

North Carolina—Eastern Band of Cherokee Indians. Led by the Eastern Band of Cherokee Indians, the USDA Forest Service is participating in a coalition of Tribal, Federal, State, and nonprofit and public partners working toward restoration of the Oconaluftee River. The Oconaluftee River flows through Eastern Band of Cherokee lands, and reconnecting the river is a step toward restoring this once vital and thriving fishery. This work will reconnect 549 miles

of river and streams and expand habitat for the sicklefin redhorse a threatened species in North Carolina and a species of cultural significance for the Cherokee people. This work and the Forest Service's financial contribution support the TFPA and Good Neighbor agreements executed by the Tribe and National Forests in North Carolina in fiscal year 2022. This Tribal/Forest Service partnership focuses on shared priorities of ecological and cultural importance on the Eastern Band of Cherokee's ancestral landscape, including enhancing climate resiliency and improving watershed condition, function, aquatic organism passages, and water quality.

Texas—Comanche Nation. The National Forests and Grasslands in Texas entered a Supplemental Good Neighbor Agreement with the Comanche Nation for archeological assessments and surveys. Certified heritage resource technician paraprofessionals in the Comanche Tribal Historic Preservation Office will work with the USDA Forest Service in areas that are culturally sensitive to Native American Tribes on the Caddo-Lyndon B. Johnson National Grasslands.

Texas—Jena Band of Choctaw. The National Forests and Grasslands in Texas and Jena Band of Choctaw recognize the need to improve habitat for the endangered red-cockaded woodpecker, reduce hazardous fuels, control southern pine beetle risk, and restore longleaf and shortleaf pine. This collaboration with the Jena Band of Choctaw will consist of marking and timber cruising and heritage surveys but may progress to other sale preparation activities with additional training.

Eastern (Region 9)

Minnesota—Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa. On May 2, 2023, the Bois Forte Band of Chippewa, the Fond du Lac Band of Lake Superior Chippewa, and the Grand Portage Band of Lake Superior Chippewa (the Bands) and the Superior National Forest entered a memorandum of understanding (MOU) to provide for co-stewardship and protection of the Bands' treaty-reserved rights under the Treaty of 1854. This agreement—the first of its kind between the Band and the Forest Service—recognizes the Bands as original stewards of lands now encompassing the Superior National Forest and outlines procedures to ensure that Tribal input is incorporated into USDA Forest Service decision making. This includes robust processes for meaningful and early Tribal consultation on USDA Forest Service decisions that may impact the Bands' treaty-reserved rights. It also includes provisions for designation and protection of culturally sensitive areas within the national forest, coordination on forest management objectives, and Tribal-Forest Service training. The Bands and the Forest Service also commit to jointly pursuing funding opportunities to support co-stewardship within the Superior National Forest. Through this agreement, the Bands will assist the Forest Service using deep, place-based Tribal traditional ecological knowledge to support shared goals of protecting and enhancing the land and water for future generations.

Alaska (Region 10)

Alaska—Central Council of Tlingit and Haida Indian Tribes. The Forest Service recognizes the importance of the Mendenhall Glacier Recreation Area within the Tongass National Forest to Tlingit and Haida people and acknowledges the value of Tlingit and Haida Indigenous Knowledge in the administration of the recreation area. To that end, the Alaska Region and Central Council of Tlingit and Haida Indian Tribes entered a historic memorandum of understanding (MOU) for co-stewardship of the Federal lands of the Mendenhall Glacier Recreation Area. This MOU will ensure that management decisions affecting those lands and waters consider the expertise and traditional, cultural, and historical knowledge of the Tribes wherever possible.

Conclusion

The U.S. Department of Agriculture has made tremendous strides to engage Native American Tribes at the highest levels to promote co-stewardship. These actions confirm a deep-seeded commitment to upholding our nation-to-nation and general trust responsibilities. This year the Department celebrates a threefold increase in co-stewardship investments with Tribes and the clearing of specific programmatic barriers hindering access to certain USDA programs and financial resources. The implementation of the community navigators program, new educational information and additional resources, and large keystone investments in Indian Country all lay the groundwork for even more opportunities for collaboration and growth next year. While the Department is proud of the work completed through Joint Secretarial Order 3403, there is still more to be done. Efforts are ongoing to pinpoint and remove unique barriers faced by Indian Tribes and Indigenous communities in accessing USDA programs—looking toward the future, ensuring all employees understand that the Government’s treaty responsibilities remain a priority. The Department looks forward to 2024 and working alongside Tribal leaders and partners in the stewarding of our Nation’s lands and waters.

EXHIBIT

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THE WHITE HOUSE TRIBAL NATIONS SUMMIT PROGRESS REPORT

DECEMBER 9, 2024

PREPARED BY THE DOMESTIC POLICY COUNCIL



THE WHITE HOUSE
WASHINGTON

December 9, 2024

I send my warmest greetings to all the Tribal leaders gathered for the 2024 Tribal Nations Summit in Washington, D.C.

When I became President, I promised that my Administration would prioritize respect for Tribal sovereignty and self-determination. To make this new era of self-determination a reality, we committed to honoring the solemn promises the United States made to fulfill our trust and treaty obligations to Tribal Nations and work together to rebuild Tribal economies and institutions. At the core of my Administration's relationship with Tribes is the principle of respect—respect for Tribal governments as the best arbiter of their people's needs. We've made progress, but we know Indigenous communities still live in the shadows of the failed policies of the past.

I have always believed that we must know the good, the bad, and the truth of our past so that we can begin to remember and heal. That is why I became the first President to issue a formal apology for the Federal Indian Boarding School era, one of our Nation's most horrific periods. My Administration remains committed to working with you to write a new and better chapter in American history for Tribal Nations and Native communities.

At the same time, we have made record investments in Tribal Nations. We secured the first-ever advanced funding for Indian Health Services. Through the Inflation Reduction Act, Tribal communities are helping lead the transition to clean energy and ease the impact of climate change. Thanks to the Bipartisan Infrastructure Law, we have made the single biggest investment in Tribal roads, bridges, water, high-speed internet, electricity, and irrigation. And we were proud to restore protections for Tribal lands and waters. All of this was made possible in part because of the partnership and tireless efforts of Tribal leaders across America.

As you gather for the Tribal Nations Summit, may you take pride in how far we have come in establishing a new era of Tribal sovereignty and Indigenous self-determination—one grounded in dignity, respect, and friendship.

We owe all of you here and across Indian Country.

The truth must be told.

**And the truth must be heard –
all across America.**

**But this official apology –
is only one step forward –
from the shadows of failed policies
of the past.**

That's why –

**I've been committed
to working with –**

**Indigenous communities across the country –
to write a new and better chapter in our history.**

**To honor the solemn promises
the United States made to Tribal Nations –
and to fulfill our federal trust and treaty obligations.**

It's long overdue.

- President Biden
Presidential Apology for the Federal Indian Boarding School Era

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EXECUTIVE SUMMARY

Over the last four years, the Biden-Harris Administration has demonstrated its unwavering commitment to Indian Country, cementing its legacy as one of the most supportive Administrations in modern history for Tribal Nations and Native communities. This legacy is reflected in the actions of President Biden and Vice President Harris, as well as in the leadership of historic Native appointees across the government. Together, they have delivered unprecedented investments, championed Tribal sovereignty, honored the federal trust responsibility, and strengthened the Federal-Tribal nation-to-nation relationship.

The Biden-Harris Administration has invested more than \$45 billion in Indian Country, transforming infrastructure, expanding healthcare, advancing education, and addressing systemic injustices. Landmark policies and federal action, such as elevating Tribal consultation and implementing government-wide training on Tribal treaty rights and the trust responsibility, have centered Native voices in federal decision-making.

Respect for Tribal Nations has been the core of the Biden-Harris Administration's relationship with Tribes. From the protection of sacred lands through National Monument designations and the conservation of over 45 million acres of lands and waters to the historic Presidential apology for federal Indian boarding schools, the Administration has affirmed its deep dedication to Native communities. These legacy-defining actions include:

Executive Orders:

- Reforming federal funding to uphold Tribal self-determination.
- Improving public safety and criminal justice, addressing missing and murdered Indigenous people.
- Enhancing educational outcomes for Native students by tackling systemic barriers.

Presidential Memoranda on Tribal Consultation:

- 2021 Memorandum: Strengthening Nation-to-Nation Relationships.
- 2022 Memorandum: Establishing Uniform Tribal Consultation Standards.

Historic Investments in Indian Country:

- \$32 billion (American Rescue Plan): Largest federal investment in Tribes and Native communities ever.
- \$13 billion (Bipartisan Infrastructure Law): Supporting infrastructure in Tribal communities.
- \$700 million (Inflation Reduction Act): Climate resilience, clean energy, and drought mitigation for Tribes and Native communities.

Buy Indian Act:

- Billions in contracts to Native-owned businesses.

Conservation Leadership:

- Restored sacred lands, designated new national monuments, and signed over 200 co-stewardship agreements.

Representation and Commitment:

- Over 80 Native appointees, including historic positions like Secretary of the Interior Deb Haaland.
- Reinstated the White House Tribal Nations Summit and the White House Council on Native American Affairs.

Historic Apology for Federal Indian Boarding Schools:

- For the first time ever, acknowledged the systemic abuses and deaths of Native children in federally-run boarding schools.
- Affirmed the need to remember painful history to prevent its repetition.

2024 ANNOUNCEMENTS

This 2024 Progress Report showcases new announcements and highlights key accomplishments from the past year, and the Biden-Harris Administration takes immense pride in these achievements, such as the 10-Year Plan on Native Language Revitalization and the release of government-wide trainings on Tribal Consultation and Tribal Treaty Rights. For President Biden and Vice President Harris, it has been the honor of a lifetime to build lasting partnerships with Tribal Nations and to usher in a new era of respect and progress for Indian Country.

STRENGTHENING THE NATION-TO-NATION RELATIONSHIP

EXECUTIVE ORDER 14112

President Biden signed Executive Order 14112 at the 2023 White House Tribal Nations to usher in the next era of Tribal self-determination, ensuring that Tribal Nations have greater autonomy over how they invest federal funding. Since the President signed the Executive Order, federal Departments and Agencies have moved forward in reforming federal funding programs, making the programs more accessible and flexible and in line with Tribal self-determination. The Executive Order 14112 [addendum](#) outlines hundreds of reforms that Departments have taken. In addition, the Office of Management and Budget (OMB) has released its guidance to Federal agencies on how to assess unmet federal obligations to support Tribal Nations, which Federal agencies are to respond to in the spring of 2025.

TRIBAL CONSULTATION

Trainings on Tribal Consultation. In accordance with the 2022 Presidential Memorandum on Uniform Standards for Tribal Consultation, the White House Council on Native American Affairs (WHCNA), the Department of the Interior, and the Office of Personnel Management developed a Tribal Consultations training course. The Memorandum emphasizes the significance of Tribal consultations and establishes uniform standards to reinforce the U.S. government's treaty and trust responsibilities to Tribes. This course will help agencies fulfill the annual training requirements outlined in Section 8 of the Memorandum for all federal employees who work with Tribal Nations or on policies with Tribal implications.

Presidential Memorandum on Uniform Standards for Tribal Consultation U.S. Army Corps of Engineers (USACE). The U.S. Army Corps of Engineers (USACE) worked to comply with the Presidential Memorandum on Uniform Standards for Tribal Consultation, including implementing annual training to comply with Section 8(a) of the Memorandum and to further employees' understanding of the federal trust responsibility and treaty rights.

Implementation of the Tribal General Welfare Exclusion Act (TGWEA). The Tribal General Welfare Exclusion Act was passed in 2014 and addresses the tax status of Tribal payments to Tribal members. Tribes have sought guidance for ten years and during this Administration Treasury has focused on being responsive to Tribal requests to conduct Tribal consultation and issue guidance. On September 2024, Treasury announced publication of draft guidance on the Tribal General Welfare Exclusion and has conducted Tribal consultations on the draft guidance.

VA Tribal Consultation Policy Revision. The Department of Veterans Affairs (VA) is implementing uniform standards on how VA's Tribal consultations are conducted, to include an update on the new required annual training. On January 23, 2024, VA published a revised Tribal Consultation Policy based on consultation and input with Tribal leaders. The VA Tribal

Consultation Policy was addressed in a Federal Register Notice on March 22, 2024, and received Tribal Leader input. The policy is in the process of being updated.

U.S. Department of Homeland Security (DHS) Tribal Affairs developed and provided quarterly training to all DHS components and offices on the policy and instruction regarding consultation. This achievement complies with Section 8(a) of the “Presidential Memorandum on Uniform Standards for Tribal Consultation.” This training will continue to be offered on a quarterly basis until the Secretary of the Interior and the Director of the Office of Personnel Management (OPM), in consultation with Tribal Nations, establish training modules. The Department of Homeland Security (DHS) Tribal Affairs is actively seeking opportunities to incorporate lessons learned from other contributing agencies to remove barriers to supporting Tribal Nations.

AmeriCorps Native Nations Convening. AmeriCorps hosted our second annual three-day convening and training for Tribal Nations, Indigenous grantees, and partners in Las Vegas, Nevada which included remarks and a listening session with AmeriCorps CEO Michael Smith. The convening featured resources, trainings, collaboration, and networking activities, with meaningful conversations amongst Tribal partners leading programs in areas such as natural resources; developing pathways to college and the workforce for Tribal youth; and fighting the devastating consequences of the COVID-19 crisis and opioid epidemics. The convening focused on building stronger partnerships, addressing barriers, and Indigenizing service.

DOE Order & Policy 144.1. The Department of Energy (DOE) updated its internal directives on Tribal consultation and engagement DOE Policy 144.1: *U.S. Department of Energy Policy on Consultation and Engagement with Federally Recognized Indian Tribes and Alaska Native Claims Settlement Act Corporations* (Policy) and DOE Order 144.1: *Department of Energy (DOE) Requirements for Consultation and Engagement with Federally Recognized Indian Tribes and Alaska Native Claims Settlement Act Corporations Pursuant to DOE Policy 144.1* (Order). The Policy establishes federal Indian policy direction in the conduct of the Department’s mission. The Order establishes management objectives, requirements, and assignment of responsibilities consistent with applicable requirements and policies. The Order also contains a contractor requirements document (CRD). These revisions clarify DOE roles, responsibilities, and requirements, and strengthens DOE’s capacity to better meet the agency’s Tribal trust responsibilities through enhanced Tribal consultation and engagement practices.

New requirements for Tribal Letters of Support and Tribal awareness on the Department of Energy (DOE) funded projects. In April 2024, the Department of Energy (DOE) finalized new guidance for when DOE funded projects potentially impact Indian Tribes. Under this guidance, referred to as [FAL 2024-03](#), applicants are required to make Tribes aware of projects that potentially impact them and required to obtain Tribal letters of support, at the time of application, when projects are proposed on Tribal land. This policy complements DOE’s updated Order & Policy ensures that applicants for DOE funding are assisting DOE in Tribal consultation, if needed.

Social Security Administration Tribal Action Plan Reaffirmed its Commitment to Consultation. In January 2024, Social Security Administration (SSA) released its FY 2024 Tribal Consultation and Call to Action plan, providing six objectives the Agency will take to facilitate robust engagement regarding policies with Tribal implications. For accountability for the promises made in the prior year, the Agency published the FY23 Tribal Program Report and released a January 2024 Dear Tribal Leader Letter to share both resources.

Deepening Employee Knowledge of Tribal Affairs. In 2024, the Department of Agriculture (USDA) updated its Departmental regulation on Tribal consultation and signed a contract with a Tribal corporation to enhance its cross-agency training modules. The training will create foundational curriculum for topics critical to USDA programs, such as Indian land tenure, Tribal corporation structures, and Alaska Native Corporations. USDA expects to deploy the curriculum on a rolling basis to all employees in 2025 and 2026. The new training will build on agency-specific efforts, such as USDA's Rural Development's two-day annual *Working in Harmony with Tribes and Tribal Communities* and the USDA Natural Resources Conservation Service's four-day annual *Working Effectively with American Indians*.

Department of Justice Policies and Programs. DOJ components held formal consultations with Tribes throughout the year. Issues and topics included the following:

- DOJ held consultations in June and July 2024 on a proposed policy relating to the Department's Tribal environmental justice work. More information may be found at <https://www.justice.gov/otj/media/1352401/dl?inline>.
- DOJ's Drug Enforcement Administration held consultations in June 2024 to discuss regulations impacting the provision of telehealth services to persons in opioid addiction recovery.
- DOJ held consultations in October and November 2024 on legislative proposals to improve the Department's funding mechanisms and better meet the public safety and criminal justice needs of Tribes. Additional information about this consultation may be found here: <https://www.justice.gov/tribal/tribal-consultations-advisory-groups>.
- The Office for Victims of Crime (OVC) hosted a virtual Tribal Consultation on the Tribal Set-Aside from the Crime Victims Fund for FY 2025 in October 2024. An informational [Framing Paper](#) on the FY 2025 Tribal Set-Aside and [FY 2024 Tribal Set-Aside annual report](#) provided relevant background and questions for participants at the consultation to consider.
- DOJ held the Annual Tribal Consultation on Violence Against American Indian and Alaska Native Women required by the Violence Against Women Act, as amended, at the Pueblo of Pojoaque in New Mexico on November 19-21, 2024. Every year, Tribal leaders travel from all over the United States to provide recommendations to DOJ, DOI, and HHS on the statutorily mandated topics of administering Tribal funds and programs, enhancing the safety of Indian women, strengthening the federal response to domestic violence, dating violence, sexual assault, homicide, and stalking in Tribal communities,

and improving access to crime information databases and systems. Over 450 Tribal and federal representatives attended the three-day event, at which senior officials from all three federal agencies heard testimony from nearly 50 Tribal leaders and designees describing how the federal government can support them in preventing and responding to gender-based violence in their communities. **On November 18, 2024, the Bureau of Justice Assistance held a consultation about improving Bureau of Justice Assistance grant processes.**

SELF-DETERMINATION

Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019 (PROGRESS Act). In July 2024, the Department of the Interior's (DOI) Office of the Assistant Secretary for Indian Affairs published in the Federal Register a proposed rule implementing DOI's Tribal Self-Governance program, in response to amendments to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5301 § et seq. contained in the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes Act, known as the PROGRESS Act. DOI convened four consultation sessions in mid-July and accepted comment until mid-August. DOI is issuing a final rule by December 2024, as required by the authorization of the PROGRESS Act.

PRESIDENTIAL PROCLAMATIONS

Missing or Murdered Indigenous Persons Awareness Day Proclamation 2024. President Biden signed a proclamation commemorating Missing or Murdered Indigenous Persons Awareness Day on May 3, 2024, to honor the individuals missing and lives lost. By signing this proclamation, President Biden recommits to working with Tribal Nations to end the violence and inequities that drive this crisis.

Indigenous People's Day Proclamation 2024. President Biden signed a proclamation commemorating Indigenous People's Day on October 11, 2024, to honor and celebrate the vast contribution of indigenous communities. By signing this proclamation, President Biden recommits to respecting and honoring Tribal sovereignty and self-determination.

National Native American Heritage Month Proclamation 2024. President Biden signed a proclamation establishing the month of November as Native American Heritage Month as a way to honor and respect Native contributions to our Nation but also to accept and apologize for the Nation's failed and harmful policies subjected to generations of Native peoples. From protecting and conserving more than 45 million acres of lands and water including the Chumash Heritage National Marine Sanctuary to becoming the first and only President to visit Indian Country in 10 years and formally apologize for the unspeakable harms cause to Native peoples at Federal Indian Boarding Schools, President Biden has remained committed to working in Nation-to-Nation partnership with Tribal Nations.

AGENCY GUIDANCE ON WORKING WITH TRIBAL NATIONS

New ICWA Interagency Webinar Series Hosted by DOJ’s National Advocacy Center. In July 2024, DOJ, DOI, and HHS collaboratively launched a new ICWA webinar series, in direct response to feedback received during Tribal consultation on the need for additional training on the application of ICWA in state child-custody proceedings. The six-part webinar series took place between July and December 2024 and covered the following topics: ICWA and its historical context, applicable federal regulations and guidance, and federal funding opportunities and other programs available at DOI, HHS, and DOJ; the roles of Tribal and State social workers, attorneys, and judges in ICWA proceedings; and the roles of attorneys representing parents and children.

Community Services Block Grant (CSBG). The Administration for Children and Families Office of Community Services (ACF) completed the approval process through OMB for the Community Services Block Grant (CSBG) Program, CSBG Tribal Annual Reports and Tribal Model Plan. The Tribal Annual Report and Tribal Annual Report (Short Form) are due each year on March 31 by CSBG direct-funded Tribes and Tribal organizations as required performance reporting in the CSBG Act. The CSBG Tribal Model Plan is due each year on September 1 as required in the CSBG Act.

Collaborated with contractor Tribal Tech, LLC to deliver the cultural humility training. AmeriCorps conducted a cultural humility training for staff and grantees called the *Fundamentals for Working with Indigenous Peoples*. AmeriCorps was able to deliver the training to 453 participants.

Examining Flexibilities Under Executive Order (EO) 14112 to Meet Tribal Needs. On December 6, 2023, President Biden signed the EO 14112, Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination, which ushered in the next era of Tribal Self-Determination. The Social Security Administration’s Office of Native American Programs (ONAP) works with internal stakeholders to examine our policies and approaches and identify flexibilities to better support and partner with Tribal communities. By streamlining SSA’s internal business processes based on a critical review of agency policies and funding opportunities, we identified potential changes in policy which require legislative or regulatory change to reduce barriers. There is additional work to accomplish under EO 14112 for SSA to improve service delivery and equitable access to our programs. Our work in FY 2024 included engagements with Tribal Organizations, Tribal Leaders and with peers in Federal Agencies to learn of their expectations and plans to meet these expectations. In addition, we invited experts in Indian Country to speak directly with SSA’s national Tribal Self-Determination workgroup. The workgroup consists of legal, policy, and budget experts, among others, tasked with implementing EO 14112. With the consolidated feedback, we are learning best practices and policies which can be modified to eliminate barriers.

NEW TRIBAL LEADER AND NATIVE ADVISORY COMMITTEES

In February 2024, USDA held the inaugural meeting of its Tribal Advisory Committee (TAC), along with its first in-person meeting in May 2024. The USDA TAC will meet quarterly before presenting its annual report to Congress and the Secretary of Agriculture, carrying out its statutory authority to provide advice and guidance to the Secretary on matters relating to Tribal and Indian affairs.

DOJ Office on Violence Against Women (OVW) Tribal Leaders Council. In response to recommendations from Tribal leaders, OVW established the Violence Against American Indian and Alaska Native Women Tribal Leaders Council (OVW TLC) to facilitate the exchange of views, information, and advice concerning the management or implementation of federal programs established pursuant to statute. The OVW TLC will provide a forum for discussion between OVW and federally-recognized Tribal Government leaders, acting in their official capacities, further upholding Tribal sovereignty and the government-to-government relationship between the United States and Tribal Nations. In fall 2024, OVW sought nominations for the Council and selected Tribal leaders representing each of the 12 BIA regions. The OVW TLC will focus on the implementation of federal programs designed to enhance the safety of American Indian and Alaska Native survivors of domestic violence, dating violence, sexual assault, stalking, and sex trafficking.

Sacred Site Laliik at Hanford Site to Have Intertribal Commission's Guidance. An intertribal commission was formed to help guide stewardship of a sacred site known as Rattlesnake Mountain, or "Laliik" to Tribal people, which is within federal lands managed by DOE in Washington State. The Patanaknuwit Commission (meaning "to care for together") is made up of leaders from the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe and Wanapum Band of Priest Rapids. These Tribes have spiritual interconnectedness to Laliik and the cultural and natural resources there that have existed since time immemorial. Through these discussions, Tribes are experiencing more access, with controls in place, including a ceremonial elk hunt by the Yakama Nation last year. The DOE and DOI have been meeting with the Tribes since 2022 to discuss the potential for co-stewardship, and Secretaries Granholm and Haaland signed a Memorandum of Understanding in 2023 for the two agencies to work collaboratively with the Tribes to improve management of Laliik as sacred.

ADMINISTRATION VISITS TO INDIAN COUNTRY

President Biden visited Indian Country as the first President to do so in 10 years. At the Gila River Indian Community, President Biden formally apologized for the federal government's involvement and policies in federal Native American boarding schools causing generational trauma and family separations.

Secretary Haaland makes Tribal visits a cornerstone of her efforts. In 2024 alone, Secretary Haaland traveled to or held meetings with 140 Tribal communities to highlight the Biden-Harris administration's efforts to invest in Indian Country. Visits included every corner of the United States

Department of Labor (DOL) Acting Secretary Julie Su visited Navajo Nation on August 7. Acting Secretary Su met with President Nygren and other Navajo leadership. On August 8, Acting Secretary Su delivered remarks at the Council for Tribal Employment Rights (CTER) National Conference at the Gila River Resorts & Casino in Chandler, AZ.

World Water Week IHS Field Visits. As of summer 2024, over 800 Bipartisan Infrastructure Law (BIL)-funded Sanitation Facilities Construction (SFC) projects were implemented, ranging from procurement and construction to final report. These projects, funded with over \$1.8 billion from the BIL, have made a major dent in the legacy list of Sanitation Deficiency System projects. Due to the historic nature of the BIL, the Indian Health Service (IHS) has undergone internal process improvements in the SFC program. The agency also is continuing to work closely with HHS partners. The IHS also strengthened current and established new partnerships across the federal government outside of HHS.

USDA Agricultural Trade Attaché Mexico Visit. On July 11, 2024, the Intertribal Agriculture Council hosted an agricultural tour of Arizona to New Mexico. The tour welcomed USDA Locally Employed (LE) Staff to develop a better understanding of U.S. agriculture. The agricultural tour benefitted the Native producers by educating LE staff from around the world enhanced on promoting Native grown products.

DOJ Principal Travel to Indian Country. Since the 2023 Tribal Nations Summit, Attorney General Merrick B. Garland has conducted several visits to Tribes across the country to address public safety and justice concerns, including support for Tribal law enforcement, combating drug trafficking, addressing the crisis of missing or murdered Indigenous people, public safety funding, and services for victims of crime. In March 2024, the Attorney General visited the Crow Nation in Montana. In August 2024, he, along with Interior Secretary Haaland, met with Tribal leaders from the eight Northern Pueblos at Tesuque Pueblo in New Mexico. And in August 2024, the Attorney General met with Tribal leaders from all nine Tribal Nations in South Dakota on the Yankton Sioux Tribe's Reservation, where he was joined by Senator Rounds. In May 2024, the Acting Associate Attorney General visited the Navajo Nation and the Pueblo of Acoma, and met with the All-Pueblo Council of Governors to discuss a range of public safety, environmental, and resource issues.

On March 28, 2024, DOI and the Department of Labor (DOL) hosted a Tribal offshore wind roundtable in Eureka, CA. The roundtable was with California Tribal leaders to discuss the importance and benefits of advancing offshore wind while maintaining Federal trust and treaty responsibilities, conducting meaningful consultations and engagements, and avoiding and minimizing potential impacts to Tribal interests.

Secretary Cardona visited Oneida Elementary School during the 2024 Back to School Bus Tour. Secretary of Education Miguel Cardona visited Oneida Elementary School on Oneida Nation to promote multilingualism programs that preserve Native American languages and promote tribal culture. The Secretary was welcomed by the students singing traditional songs and he learned Oneida from students in early learning programs.

RESTORING AND PROTECTING TRIBAL HOMELANDS

TRIBAL CO-STEWARDSHIP AND PARTNERSHIPS

Increasing Tribal Co-Stewardship of Lands and Waters. The Department of the Interior (DOI) will release its third annual report on Tribal co-stewardship, which outlines implementation of Joint Secretary's Order 3403 and highlights agreements entered into in the past year. During the last year of the Biden-Harris Administration, DOI has entered into 69 stewardship agreements with Indian Tribes, bringing the total agreements to nearly 150 since the Secretary's order was signed. Throughout 2024, DOI hosted seven co-stewardship and Indian Law trainings across the country for Senior Executive Service and land managers. Nearly 400 leadership and staff participated in the workshops, which included presentations by Tribal leaders and nationally recognized experts in the fields of Indian law and natural resources management.

USDA has invested about \$47 million through 40 agreements to date in FY 2024 through Tribal co-stewardship agreements and land management/forestry grants to Tribes. USDA expects to award another \$23 million in 35 additional agreements within the next several months. These investments include \$18 million in Tribal Forest Protection Act work supported by the Bipartisan Infrastructure Law. Projects support hazardous fuels risk reduction, including prescribed use of fire, to help make reservations and communities safer and watershed restoration to provide clean drinking water. All projects will incorporate Indigenous knowledge to support long-term sustainable land use.

Tribal Co-Stewardship and Other Tribal Investments. In FY 2024, the USDA Forest Service invested approximately \$113 million in 121 agreements with Tribes and Alaska Native Corporations, with more than half of these focused on co-stewardship of the National Forest System. This work spans a range of Tribal and Forest Service priorities, honors treaty rights, and protects and maintains resources important to Tribes and cultural lifeways. Co-stewardship investments include 14 Tribal Forest Protection Act 638 demonstration project agreements in the amount of \$15 million, 21 Good Neighbor agreements that have invested more than \$28 million in restoration, and \$18 million in other instruments such as Participating, Stewardship, and Challenge Cost Share agreements. Co-stewardship includes integration of Indigenous Knowledge in land management decisions, reducing wildfire and other risks to Tribal lands and communities through reduction of hazardous fuels, invasive species management, and other

actions, support of traditional food systems through habitat improvements for fish and wildlife, and capacity building through youth and other workforce development.

Standing Rock Sioux Tribe USDA Forest Service Dakota Prairie National Grassland Co-Stewardship Agreement (Northern Region). In August 2024, the Standing Rock Sioux Tribe and USDA Forest Service signed a co-stewardship agreement for the Dakota Prairie Grasslands focused on bison restoration that includes transitioning a grazing allotment from cattle to a bison operation, reconstructing or new construction of critical allotment infrastructure, restoring previously cultivated lands within the allotment to native grasslands species, planting native woody species, and integrating a youth engagement component to this work.

Great Sioux Nation Tribes and USDA Forest Service Memorandum of Understanding to Co-Steward the Black Hills National Forest (Rocky Mountain Region/R2). In August 2024, the Rocky Mountain Region and eight Tribes from the Great Sioux Nation — Cheyenne River, Crow Creek, Flandreau Santee, Lower Brule, Oglala Lakota, Rosebud, Sisseton-Wahpeton, Spirit Lake, and Standing Rock — signed a historic MOU to outline the co-stewardship of portions of the Black Hills National Forest. The MOU establishes an ambitious framework for consultation, land and water conservation, sustainable forest stewardship, landscape scale restoration, cultural resource and sacred site protection, fuel reduction, wildfire management, youth programs, workforce development and enhanced visitor relations. This is one of the first MOUs with the Tribes and the Forest over the Black Hills where the Tribes hold ancestral and cultural ties to the land.

Pueblo of Tesuque, USDA Forest Service, and DOI Bureau of Land Management Memorandum of Understanding to Co-Steward the Caja del Rio Plateau (Southwest Region/R3). Through a Memorandum of Understanding signed on November 1, 2024, the Pueblo of Tesuque, Forest Service, and Bureau of Land Management seek to: develop a collaborative program to address illegal dumping, looting, and desecration of sacred places within the Caja del Rio Plateau; conduct a landscape-wide ethnographic study; secure access to and the protection of places of cultural importance; and include Traditional Ecological Knowledge in Federal land management decisions. Through this framework, the Pueblo and its Federal partners will collaborate in natural resource management that maintains Pueblo cultural lifeways and works to ensure protection, preservation, and access to culturally significant Pueblo sites within the boundaries of land managed by the Forest Service and Bureau of Land Management.

The Shoshone Paiute Tribes Firewood Banks (Intermountain Region/R4). The Shoshone Paiute Tribes received funding under the Infrastructure and Investments and Jobs Act Firewood Banks program. This direct Tribal investment contributes to a broader Wood for Life/Wood Project team which has grown in the past three years to become an integral service to the community of the Duck Valley Indian Reservation, focusing on Tribal elders, single parent homes, and needy families. Burning firewood on the reservation is a way of life that has been

going on for generations. Most homes on the reservation have a wood stove and families burn wood to stay warm during the winter. Burning firewood also helps to offset the cost of their electric bills in colder months. This work will process and deliver an estimated 1000 cords of firewood to families and members of the community this year and next.

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and Wallowa-Whitman National Forest (Pacific Northwest Region/R6). This agreement initiates Phase 2 of work to improve critical habitat for threatened Steelhead and Bull Trout in the Granite Creek ‘Priority Watershed’ and in support of the Mid-Columbia Steelhead Recovery Plan. This mine reclamation and habitat restoration contributes to CTUIR’s commitment to “to protect, restore, and enhance the First Foods – water, salmon, deer, cous, and huckleberry – for the perpetual cultural, economic, and sovereign benefit of the CTUIR.” Long-standing restoration efforts to benefit Tribal reserved rights to fish, hunt and gather foods and medicines enables CTUIR to be a strong partner of the Forest Service to restore the health of these unique special habitats and ecosystem functions

Leasing of Osage Reservation Lands for Oil and Gas Mining Regulations. Since 2012, DOI has worked with the Osage Nation and Osage Minerals Council to revise the regulations in 25 C.F.R. Part 226 that govern the administration of the Osage Mineral Estate. The current regulations are outdated, do not account for technological advancements, do not reflect modern operations within the Osage Mineral Estate, and are inconsistent with both industry standards and the Department’s regulations governing oil and gas development throughout the rest of Indian country. The final rule plans to address these deficiencies, strengthen Interior Department management of the Osage Mineral Estate, and improve production accountability to work towards ensuring the Osage Nation receives the full value of its oil and gas resources while promoting safe and environmentally sound development. The royalty rate (floor) of no less than 16 2/3 percent for oil and gas is not planned to change in the final rule and hopes to ensure the Osage Nation and Headright holders benefit from their resources.

Co-Land Management and Co-Stewardship Opportunities with Tribal Nations. USACE developed uniform approach for co-land management and co-stewardship opportunities between USACE and Tribal partners.

Mashpee Wampanoag Tribe Capacity Building and Collaboration Agreement. In April 2023, BOEM signed a Cooperative Agreement with the Mashpee Wampanoag Tribe to help the Tribe manage and analyze environmental information provided by offshore wind developers, develop best practices for management of data and information concerning cultural and archaeological places important to the Tribe, and facilitate the nomination of Nantucket Sound as a National Historic Landmark.

FY

TRIBAL LANDS PROTECTION AND EXPANSION

Alaska Native Claims Settlement Act Section 17(d)(1) Withdrawals. The Department of the Interior finalized the decision to retain protections for 28 million acres of public lands across

Alaska, which many Alaska Native Tribes, Native Corporations and Tribal entities have noted are vital to protecting important natural, cultural and subsistence resources. The action came in response to the previous Administration's unlawful decision in its final days to end longstanding protections (known as withdrawals) without sufficient analysis of the potential impacts of such a decision on subsistence and other important resources, appropriate Tribal consultation, and without compliance with other legal requirements. This sweeping action would have opened millions of acres of public lands to extractive development activities, such as mining and oil and gas drilling, and removed the federal subsistence priority from millions of acres.

GSA Federal Excess Real Property Transfer to Tribes. GSA is responsible for promoting effective use of federal real property assets, as well as the disposal of real property that is no longer mission-critical to federal agencies. GSA, while working together with partner federal agencies, state and local governments, non-profit organizations, business groups, and citizens, leaves a lasting positive impact on communities by making valuable government real estate available for numerous public purposes. In FY24, GSA supported the transfer of excess property to Tribes: 5 properties in Oklahoma, 2 properties in Alaska, 1 in South Dakota, and 1 in Utah.

Stockmore Ranger Station to the Ute Indian Tribe of the Uintah and Ouray Reservation. A National Forest Administrative Site for the Ashley National Forest in Utah that is within the Ute Indian Tribe of the Uintah and Ouray Reservation's historic exterior boundaries was determined to be excess to the agency's needs by USDA and the General Services Administration. The Bureau of Indian Affairs and Ute Tribe are taking final steps needed to accept the transfer of 31.4 acres to be taken into trust for the Ute Indian Tribe.

Leech Lake Band of Ojibwe. In June 2024, the USDA transferred administrative jurisdiction to 11,778 acres of land (Federal land), located on the Chippewa National Forest in Cass County, Minnesota, to the Secretary of the Interior to be held in trust by the United States for the benefit of the Leech Lake Band of the Minnesota Chippewa Tribe and to be considered part of the Leech Lake Reservation. This transfer implemented Public Law 116-255, the Leech Lake Band of Ojibwe Reservation Restoration Act. The restored lands will enable the Leech Lake Band of Ojibwe to invest in future generations with economic and residential development. Lands subject to transfer hold historical and cultural significance to the Band.

Yavapai-Apache Nation Land Exchange. In November 2024, the Yavapai-Apache Nation and the U.S. Forest Service finalized a land exchange allowing the Nation to reclaim a portion of its ancestral homelands. These restored lands will open the door to new economic development opportunities for the Nation as well as provide much-needed space for new housing for its people. The exchange includes 11 parcels of National Forest System land totaling approximately 3,207 acres within the Prescott and Coconino National Forests for 6 parcels of non-Federal land totaling approximately 4,782 acres, within the Prescott, Coconino, Apache-Sitgreaves, and Kaibab National Forests. Nearly all of the 3,207 acres the Nation will acquire are contiguous to the Nation's existing Reservation lands near Camp Verde, Arizona.

Interagency Working Group on Tribal Agricultural Lands. USDA and DOI are working together to build a permanent Interagency Working Group on Tribal Agricultural Lands to ensure we successfully change the way both agencies support agriculture throughout Indian Country. USDA participated in a Bureau of Indian Affairs training in June 2024 to deepen understanding of Tribal land tenure, and USDA will coordinate DOI-BIA in-person and online joint trainings in 2025. The Working Group expects to have a joint agreement in 2024 addressing the coordination of cultural resource protection under NHPA Section 106 to streamline project implementation actions that use federal dollars.

New Tribal Partnerships for Climate-Smart Commodities. USDA’s Farm Service Agency awarded funding to projects that will deliver important climate-smart impacts for farmers, ranchers, foresters, and communities nationwide, including to over 20 Tribal Nation, Tribal group-led, and Tribal partner projects. For example, USDA funded the “Recognizing the Role of Buffalo Production as a Climate-Smart Commodity” project, in which the Intertribal Buffalo Council and other partners plan to work with 76 Tribes to incentivize their use of climate-smart practices related to buffalo herds. The project’s Tribal Buffalo Market Initiative plans will assist Tribes in marketing their buffalo as a climate-smart commodity, develop sustainable programs for historically underserved Tribal buffalo producers, and create a Tribally led national strategy for education and outreach of buffalo as a climate-smart agricultural product.

SACRED SITES

Sacred Sites Best Practices Training. Under the coordination of the White House Council on Native American Affairs, federal agencies that signed the 2021 Sacred Sites Memorandum of Understanding developed a Best Practices Guide (BPG) for the management and protection of sacred sites on federal lands and waters, informed by consultations with Tribal and Native Hawaiian leaders. In line with their commitment from the 2023 Tribal Nations Summit, WHCNA and the signatory agencies initiated a training program for leadership and key staff to effectively implement the BPG. Since July 2024, this training has been actively deployed across agencies, garnering positive feedback from participants and enhancing the safeguarding of sacred sites.

Hanford National Monument Sacred Sites Memorandum of Understanding. The DOI and DOE entered into a Memorandum of Understanding (MOU) to establish a collaborative framework to improve protection of/access to Rattlesnake Mountain, or “Laliik” located within the Hanford nuclear site in Benton County, Washington. This effort will increase access to conduct traditional harvesting and enable cultural and ceremonial activities for the Confederated Tribes of the Umatilla Indian Reservation, Nez Perce Tribe, Yakama Tribes, and the Wanapum Band. Since the announcement of the MOU at the Tribal Nations Summit in 2023, the Tribes have entered into an intergovernmental agreement to create an intertribal commission to work with the DOI and DOE.

Protecting Molok Luyuk. In May 2024, President Biden used his authority under the Antiquities Act to expand the Berryessa Snow Mountain National Monument in northern California. The addition of nearly 14,000 acres to the national monument, which is jointly

managed by the Bureau of Land Management and the U.S Forest Service, honors the requests of Tribal Nations to more fully protect an area sacred to the Patwin people. The President also renamed the ridgeline at the heart of the expansion, previously known as “Walker Ridge,” to Molok Loyuk, which means Condor Ridge in the language of the Patwin people.

GRAZING AND LAND USE

HEARTH Act Ordinance Approvals. Under the Helping Expedite and Advance Responsible Tribal Home Ownership Act, or HEARTH Act, Tribes with Secretary of the Interior-approved Tribal leasing regulations are authorized to negotiate and enter into leases without further approvals by the Federal Government. To date, 112 Tribal leasing regulations have been approved by the Secretary of the Interior.

Federal Subsistence Board Rule. A final rule was published in February 2024 to add three Alaska Native seats to the Federal Subsistence Board. This proposed rule would revise the regulations concerning the composition of the Federal Subsistence Board (Board) by adding three public members nominated or recommended by federally recognized Tribal governments, requiring that those nominees have personal knowledge of and direct experience with subsistence uses in rural Alaska including Alaska Native subsistence uses, defining requirements used for the selection of the Board Chair, affirming the Secretaries' authority to replace members from the Board, and affirming the Secretaries' responsibility and oversight regarding Board decisions while incorporating a ratification requirement.

Moving the Office of Subsistence Management. In July of 2024, the Department of the Interior completed the transfer of the Office of Subsistence Management to the Office of the Secretary. This move is one of many that the Department is making to strengthen federal subsistence policies and structure and ensure that federally qualified subsistence users and Alaska Native peoples have an opportunity for meaningful engagement in its implementation.

National Petroleum Reserve. Following engagement with the public, Alaska Native Tribes, and Alaska Native Corporations, DOI's BLM finalized the Management and Protection of the National Protection Reserve in Alaska (NPR-A) rule that will ensure maximum protection for significant resource values on the more than 13 million acres of Special Areas in the western Arctic, while supporting subsistence uses and needs for Alaska Native communities.

TREATY RIGHTS

Trainings on Tribal Treaty Rights. As part of the WHCNA's Tribal Treaty Rights MOU, the Council's multi-agency membership has developed the Tribal Treaty Rights Training course for federal employees working with Tribal Nations or policies that impact them. This training, designed with input from Tribal leadership, provides a foundational understanding of treaty-protected rights, reserved rights, and the trust relationship with federally recognized Tribes. It is based on WHCNA's Tribal Treaty Rights Best Practices Guide, ensuring that federal employees are well-equipped to engage respectfully and effectively with Tribal Nations.

Procedures for Federal Acknowledgment of Indian Tribes (25 CFR Part 83). On July 12, 2024, DOI Assistant Secretary for Indian Affairs announced a Notice of Proposed Rulemaking on 25 CFR Part 83, Procedure for Federal Acknowledgement of Indian Tribes. The scope of the rulemaking is limited to whether DOI should move forward with a limited re-petitioning option to allow previously unsuccessful petitioners to petition DOI for federal acknowledgement once again. Previously unsuccessful petitioners would be required to make a threshold showing that either (1) new evidence; or (2) a change in the regulations (from a previous version of Part 83 to the current version) justifies reconsideration of their petition. § 83.48(a). The comment period for the NPRM closed on September 13, 2024, and DOI is now reviewing comments in preparation for a Final Rule.

REGIONAL STRATEGIES AND SUPPORT

Countering Weapons of Mass Destruction (CWMD). The Department of Homeland Security (DHS) operated aerosol bio-detection equipment in partnership with state and local entities across the nation. CWMD's BioWatch program has strengthened preparedness of Tribal Nations by establishing a relationship with Bureau of Indian Affairs Office of Emergency Management (BIA OEM). This relationship ensures any bio incident detected by the BioWatch program will include necessary notification and response support to any affected Tribal Nations via the BIA OEM Tribal Assistance Coordination Group (TAC-G). DHS also provided radiological and nuclear threat detection equipment and technical support to the Lumbee Tribe of North Carolina in cooperation with the North Carolina State Highway Patrol (NCSHP) and FBI Weapons of Mass Destruction coordinator during their homecoming celebration events held in Lumberton, North Carolina.

Thriving Communities Technical Assistance Centers. Established in 2023 and continuing into 2024 the EPA created a national network of technical assistance providers to help gain access to federal funds for grassroots Tribal members, Tribal organizations, and Tribal governments. The Thriving Communities Technical Assistance Centers (TCTAC's) are working with other federal agencies within the Thriving Communities Network that include the Grantmaker program that allows 11 organizations across the country to provide easy-to-access sub awards to all Tribes and their communities as well. The Environmental Protection Agency's (EPA) Office of Environmental Justice and External Civil Rights partnered with EPA's Office of Air and Radiation (OAR) to host several roadshows in venues with Tribal connections in year one and the lead national TCTAC for Tribes, the National Indian Health Board, is working in partnership with regional TCTAC's and EPA staff to provide national outreach to grassroots Tribal communities in year two of the five-year TCTAC program.

CONTAMINATION CLEANUP

Solid Waste Training for Tribal Employees. Beginning the end of August 2024, Tribal solid waste staff will be able to take pre-recorded online courses such as Collection & Transfer, Landfill Operations, and Safety Training, with live training opportunities potentially available in the

future. The courses include individual classes as well as certifications (e.g., Manager of Landfill Operations). This opportunity stems through an Interagency Agreement that EPA's American Indian Environmental Office (AIEO) has with the Indian Health Service (IHS) to provide solid waste training to Tribes. AIEO provides funding to cover half of the costs of the cooperative work done under two contracts that IHS has with the Institute of Tribal Environmental Professionals (ITEP) and the Solid Waste Association of North America (SWANA). This opportunity leverages EPA's Indian Environmental General Assistance Program (GAP) funding and IHS solid waste funding.

Alaska Native Claims Settlement Act Contaminated Lands Initiative. EPA launched the Contaminated Alaska Native Claims Settlement Act (ANCSA) Lands Grant Program in 2023, which provides funding for assessment and remediation of legacy contaminated sites on conveyed Alaska Native Claims Settlement Act (ANCSA) lands. The program has received a total of \$40 million in appropriations over the last two FYs. In September 2023, EPA awarded three Alaska Native Corporations to receive over \$2.5 million in an initial round of funding. Ukpeaġvik Iñupiat Corporation received funding to assess lands impacted by a fuel spill and conduct lead and asbestos testing and abatement at the former Naval Arctic Research Laboratory (NARL) in Utqiagvik, AK. Tyonek Native Corporation conducted their initial field efforts in the summer of 2024 with the funding they received for the characterization and removal of abandoned drums and soil contamination on the Iniskin Peninsula. Ounalashka Corporation began field work, under their cooperative agreement in May 2024, and removed over 500 tons of polychlorinated biphenyls PCB contaminated soil adjacent to a WWII-era Navy mess-hall in Unalaska, AK. Two additional projects were funded in October 2024 by the EPA for a total of \$3.7 million. The Yukon River Inter-Tribal Watershed Council received funding to address legacy contamination from railroad fueling operations near the Tanana Community Hall in Tanana, AK, and the Aleut Corporation received funding to address asbestos contamination from a former U.S. Navy warehouse in Adak, AK.

EPA launches Tribal Waste Management Operations and Maintenance Quantification Initiative. EPA is working to address the lack of solid waste services for Tribal communities. Lack of service often leads to open dumping, which is harmful to the environment and subsistence lifeways. Key to developing a sustainable waste program is to understand the costs of operation and maintenance services and to develop a proactive funding strategy. With this goal in mind, EPA initiated a Solid Waste Operating and Maintenance Cost-Of-Service Quantification Study and completed six Tribal site visits at locations with diversity in terms of population, geography, and economic conditions. For each site, EPA developed a report that includes the baseline funding level needed to provide waste services. Each report also includes demographic information, infrastructure, and waste market challenges. All six reports will be used in the next phase of the initiative which will involve cost-modeling applicable to all federally recognized Tribes. Tribal consultation for the final report is anticipated to occur in March 2025.

IHS Sanitation Facilities Program. In 2024, the IHS Division of Sanitation Facilities (SFC) continued to maximize opportunities created by the Bipartisan Infrastructure Bill (BIL), which provides \$3.5 billion over five years to the IHS to develop critical infrastructure, including a safe supply of drinking water, reliable sewage systems, and solid waste disposal facilities. Currently, over 800 BIL-funded SFC projects are in some state of implementation, ranging from procurement to construction to final report.

ENVIRONMENTAL JUSTICE AND CLIMATE RESILIENCE

Supporting Tribes and Other Communities Considering Voluntary Relocation. The Community-Driven Relocation Subcommittee of the National Climate Task Force released *The Opportunities for Federal Support of Community-Driven Relocation* report, which provides background on voluntary community-driven relocation to avoid climate and pollution-related hazards, an overview of the current Federal legal and programmatic landscape, and next steps that Federal agencies can take to support Tribes and other communities contemplating relocation.

Tribal Climate Resilience. The Department of the Interior announced \$120 million in 2024, supported by President Biden’s Investing in America agenda, to fund climate resilience projects for 102 Tribes and nine Tribal organizations. The program is part of a nearly \$560 million investment for Tribal climate resilience programs through the Department’s Bureau of Indian Affairs (BIA), funded through the Bipartisan Infrastructure Law, Inflation Reduction Act, and annual appropriations. In addition to Tribal Climate Resilience, the Biden-Harris administration has also launched a Voluntary Community-Driven Relocation Program with \$115 million of funds plus \$17 million from FEMA and \$2 million from the Denali Commission. This funding is part of more than a collective \$50 billion invested by the President’s Investing in America agenda to advance climate adaptation and resilience across the nation, including in communities that are most vulnerable to climate impacts.

Environmental Mitigation under the Department of Defense (DoD) Native American Lands Environmental Mitigation Program. DoD administered the Native American Lands Environmental Mitigation Program at \$16.5M in FY 2024 to address environmental effects of past DoD actions on Indian lands and on other locations where DoD, an Indian tribe, and the landowner agree that such mitigation is appropriate. Clean-up projects enable Tribes to resume traditional and cultural subsistence activities and remediate threats to human health and the environment.

Tribal Provisions of the Bipartisan Permitting Reform Implementation (BPRI) Rule. As part of the Biden-Harris Administration’s all-of-government effort to improve the efficiency and effectiveness of federal permitting processes, the White House Council of Environmental Quality (CEQ) finalized the Bipartisan Permitting Reform Implementation (BPRI) rule, codified at 40 C.F.R. Parts 1500-1508. The BPRI rule improves federal agencies’ engagement with Tribal Nations in the environmental review process under the National Environmental Policy Act (NEPA) and encourages agencies to incorporate Indigenous Knowledge into environmental

reviews. It also directs agencies to consider under NEPA any effects of their actions on the reserved rights of Tribal Nations. In response to concerns from Tribes that project schedules could be too short to allow Nation-to-Nation consultation to occur, the final rule added time needed for Tribal consultation as a factor that agencies may consider in setting project schedules.

Carbon Sequestration and Soil Health. In 2024, the Departments of the Treasury, Agriculture and Energy, alongside the White House, published a Joint Statement on Voluntary Carbon Markets. Voluntary Carbon Markets available to Indian Country continue to build equity within large landscapes, that include usual and accustomed Tribal territories. Soil carbon sequestration represents a growing opportunity in these markets, and DOI's Office of Assistant Secretary for Indian Affairs continues to uplift soil health through policy integration and enactment through co-stewardship within the Office of Strategic Partnership. These efforts include Departmental, non-Government organizations, Bureau and Tribal inclusion for ecosystem restoration. The promotion of soil health coincides with the large landscape actions and implementation of BIL projects in 2025.

New Tribal Partnerships for Climate-Smart Commodities. USDA's Farm Service Agency awarded funding to projects that will deliver important climate-smart impacts for farmers, ranchers, foresters, and communities nationwide, including to over 20 Tribal Nation, Tribal group-led, and Tribal partner projects. For example, USDA funded the "Recognizing the Role of Buffalo Production as a Climate-Smart Commodity" project, in which the Intertribal Buffalo Council and other partners plan to work with 76 Tribes to incentivize their use of climate-smart practices related to buffalo herds. The project's Tribal Buffalo Market Initiative plans will assist Tribes in marketing their buffalo as a climate-smart commodity, develop sustainable programs for historically underserved Tribal buffalo producers, and create a Tribally-led national strategy for education and outreach of buffalo as a climate-smart agricultural product.

DOJ Environmental Justice. Following last year's Tribal Nations Summit, the DOJ has held four regional summits to help further identify, refine, and develop ways for the federal government and Tribal governments to obtain litigation outcomes that will better address localized environmental challenges. The Summits deliver on the promise in the DOJ's Comprehensive Environmental Justice Enforcement Strategy to work with Tribal governments and other federal agencies to "address and incorporate Tribal concerns into the Department's enforcement work." Between July 2023 and July 2024, a total of four regional summits were conducted in the following locations across the United States: Spokane, Washington; Minneapolis, Minnesota; Albuquerque, New Mexico; and San Bernardino, California.

Between May and August 2024, the Department's Offices of Tribal Justice (OTJ) and Environmental Justice (OEJ) hosted Tribal consultation on environmental justice efforts under consideration that have Tribal implications. The focus of the consultation was the Department's environmental justice work in Tribal communities broadly, to seek feedback and input on a draft Tribal Environmental Justice Policy, and in furtherance of the Department's efforts to develop an

Environmental Justice Strategic Plan, as required by Executive Order 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All (2023).

EPA’s Climate Pollution Reduction Grant (CPRG) Program. EPA’s \$5 billion Climate Pollution Reduction Grant (CPRG) program supports states, local governments, Tribes, and territories to establish and implement climate action plans to reduce greenhouse gas emissions and other harmful air pollution and to assist with the transition to a clean energy economy. In fall 2023, under phase 1 of the program, EPA awarded \$25 million to fund 90 planning grants serving over 200 Tribes and Tribal consortia. In spring 2024, Tribal planning grant recipients submitted their first deliverables due under the planning grants: Priority Climate Action Plans. Additionally, in spring 2024, under phase 2 of the CPRG program, EPA closed two grant competitions for implementation grants with funding totaling approximately \$4.6 billion, including a \$300 million competition for Tribal and territorial applicants only. EPA anticipates announcing selected applicants under both competitions this summer, with funding expected to be awarded by the end of 2024.

Justice40 Initiative. For the first time in our nation’s history, the Federal Government has made it a goal that 40% of the overall benefits of certain federal investments flow to disadvantaged communities marginalized by underinvestment and overburdened by pollution, including federally-recognized Tribes. President Biden made this historic commitment, launching the Justice40 Initiative, when he signed Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, within days of taking office. Through the President’s Investing in America agenda, federal agencies are making historic levels of investment to advance the Justice40 goal, including in Indian Country.

AFFIRMATIVE LITIGATION AND PROMOTING JUSTICE FOR TRIBES AND NATIVE COMMUNITIES

DOJ Affirmative Trespass Cases. DOJ filed a series of complaints in 2023 and 2024 to address trespass on the Colorado River Indian Tribes Reservation. DOJ has now filed 20 complaints in this Administration, and plans to file more in the coming months. Of the cases filed, DOJ obtained default judgment against one trespasser, secured favorable rulings in several cases, and has reached tentative settlements in multiple cases.

United States v. Town of Lac du Flambeau, (W.D. Wis.). The United States filed this affirmative litigation against the Town of Lac du Flambeau for trespass and ejectment on lands of the Lac du Flambeau Band of Lake Superior Chippewa Indians and individual Indian landowners. DOJ continued to litigate this case in 2024.

United States v. Leroy & Katherine Howell (D. Idaho). The United States filed suit against the defendants for trespass, ejectment, nuisance, and conversion in connection with their illegal use and occupation of land and resources owned by the United States in trust for the Nez Perce Tribe and a group of Indian allottees. As part of a 2020 settlement, the defendants agreed to clean up and remediate, under the supervision of the United States, the damage their activities had caused

to trust lands, allotted land, and their own property, which they would sell to the Tribe. In 2024, DOJ/Environment and Natural Resources Division (ENRD) and the Tribe are jointly seeking to compel defendants to comply with the settlement agreement.

United States v. Union Pacific Railroad (D. Idaho). DOJ filed this affirmative litigation against the Union Pacific Railroad to quiet title to certain lands within the City of Pocatello for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. Our complaint explains that the Tribes agreed in 1881 to cede a portion of their reservation to the United States to allow the federal government to transfer the land to Union Pacific’s predecessor for railroad-related uses and that, as early as 1936, the railroad began leasing a portion of the land in Pocatello, Idaho, for non-railroad uses (and that such non-railroad uses continue today).

Tribal Trespass Toolkit, Resources for U.S. Attorneys’ Offices. DOJ/ENRD, working with experienced practitioners, assembled legal resources on how to address trespass on Tribal lands, which have been publicized and posted on training sites for U.S. Attorneys’ Offices. DOJ/ENRD, working with the National Advocacy Center, the Department of the Interior’s Solicitor’s Office and the U.S. Attorney’s Office for the District of New Mexico, also held a virtual webinar in October, “Protecting Tribal Lands from Trespass: Furthering Environmental Justice and Supporting Tribal Self-Determination,” attended by approximately 170 federal participants.

DOJ Civil Enforcement of Federal Environmental Laws. *United States v. Holly Energy Partners-Operating, L.P. (W.D. Okla.).* In March 2024, the district court entered a consent decree resolving the United States’ claims against Holly Energy Partners-Operating, L.P. (HEP), and Osage Pipe Line Company, LLC under the Clean Water Act for discharges of 7,110 barrels of crude oil from the Osage pipeline on allotted Tribal land owned by members of the Sac and Fox Nation. Under the settlement, the defendants will pay \$7.4 million in civil penalties. The settlement also requires the companies to complete the cleanup and remediation of the impacted area, improve their pipeline integrity program, provide additional training, and expand their spill notification efforts for Tribal governments. The United States closely engaged with Sac and Fox Nation’s environmental, cultural resources, and realty offices, as well as impacted Tribal members, throughout the case.

Early Settlements Concerning Lower Duwamish River. DOJ continued its work in securing a series of early settlements with polluting parties to address natural resource damages in the Lower Duwamish River. The Elliott Bay Trustee Council, which includes the National Oceanic and Atmospheric Administration, the U.S. Department of the Interior, the State of Washington, the Muckleshoot Indian Tribe, and the Suquamish Indian Tribe of the Port Madison Reservation (collectively, “Trustees”), has been working closely together since 1990 on damage assessment and restoration in the Lower Duwamish River. This year, two settlements have been reached with Defendants Crowley Marine Services, Inc., 8th Avenue Terminals, Inc., the Washington State Department of Transportation, and General Recycling of Washington (these have been lodged in the United States District Court for the Western District of Washington). The settlements require the creation of channel habitat and funding of restoration credits, as well as payments to the Trustees for additional restoration and to provide compensation for past and

future natural resource damage assessment costs. In recent years, DOJ also reached settlements with the Boeing Company (2010); the City of Seattle (2021); Vigor Industrial and Exxon Mobil Corp. (2021); and Lynden parties (2023).

United States v. PotlatchDeltic Land & Lumber, LLC (D. Idaho). In May 2024, the United States District Court for the District of Idaho entered a consent decree that DOJ negotiated with PotlatchDeltic Land & Lumber, LLC, to resolve alleged Clean Water Act violations related to stormwater discharges from the company's sawmill and lumberyard facility in St. Maries, Idaho. The settlement requires the defendant to pay a \$225,000 civil penalty. The settlement also requires the defendant to implement injunctive relief designed to ensure it will meet the compliance schedule in its current Clean Water Act permit. The settlement requires the company to implement mitigation actions to offset the environmental harms of its discharges, including replacing four culverts on its property to provide fish passage and improve fish habitat. The company also will record a conservation easement that prohibits timber harvesting along several streams on its properties for 100 years to provide stream buffers and protect habitat. The mitigation actions were developed in coordination with the Coeur d'Alene Tribe, and the Tribe will be the holder of the conservation easement.

United States v. Pope Resources (W.D. Wash). In June 2024, DOJ lodged a proposed consent decree with the United States District Court for the Western District of Washington to resolve the United States' claims (asserted on behalf of various trustees for natural resource damages) against Pope Resources, OPG Properties LLC, and OPG Port Gamble LLC. The trustees are the Department of the Interior, the State of Washington (through the Washington Department of Ecology), the Jamestown S'Klallam Tribe, the Lower Elwha Klallam Tribe, the Port Gamble S'Klallam Tribe, the Skokomish Indian Tribe, and the Suquamish Indian Tribe of the Port Madison Reservation. The settlement will require the defendants to perform two habitat restoration projects (worth nearly \$10 million) developed by the trustees. These projects will restore 15 acres of critical habitat and protect about 10 more acres within Port Gamble Bay on the Kitsap Peninsula, restoring shoreline processes and enhancing habitat for benthic invertebrates, forage fish, shellfish, and juvenile salmonids in the Bay. The settlement also requires the defendants to fund future long-term maintenance, monitoring, and stewardship of the project, and pay the trustees' past and estimated future costs for natural resource damages assessment and restoration implementation and oversight.

- *United States v. Marathon Oil (D.N.D.).* In September 2024, the court entered a settlement reached by the Department of Justice and Environmental Protection Agency with Marathon Oil Company to resolve Clean Air Act violations at the company's oil and gas production operations on the Fort Berthold Indian Reservation in North Dakota. The settlement requires that Marathon pay a civil penalty of \$64.5 million, the largest ever for violations of the Clean Air Act at stationary sources, invest in extensive compliance measures estimated to cost \$177 million, and obtain permits with innovative facility-wide volatile organic compound (VOC) emission limits at production facilities. These actions will eliminate nearly 110,000 tons of VOC emissions over five years. The same measures will also reduce the equivalent of over

2.25 million tons of carbon-dioxide emissions over the next five years, or approximately the reductions achieved by taking 487,000 cars off the road for one year.

DOJ Litigation Arising in Alaska. *United States v. Alaska (D. Alaska & 9th Cir.)*. DOJ filed this civil action to challenge the State of Alaska's orders that interfere with federal management of subsistence salmon fishing on the 180-mile segment of the Kuskokwim River within the Yukon Delta National Wildlife Refuge. The State orders purport to open the river for subsistence gillnet fishing by all Alaskans during periods of time when the Federal Subsistence (FSB) determined that fishing should be limited to qualified federal subsistence users. In March 2024, the district court granted summary judgment in the United States' favor. Alaska appealed, and DOJ is now defending the FSB's decision in the Ninth Circuit.

State of Alaska v. Newland (D. Alaska). The United States defended a November 2022 DOI decision to acquire for non-gaming purposes a parcel of land in downtown Juneau for the benefit of the Central Council of Tlingit and Haida Indian Tribes of Alaska. The State of Alaska challenged Interior's decision, alleging that the decision violates the Alaska Native Claims Settlement Act. DOJ achieved a partial victory in the case in 2024, successfully arguing that the Secretary of the Interior does have the authority to take land into trust and that authority was not altered by the Alaska Native Claims Settlement Act.

Other DOJ Affirmative Litigation. As a general matter, DOJ brings affirmative litigation to protect the almost 60 million acres of lands held in trust by the United States for Indian Tribes and their members as well as the rights and resources associated with those lands. These cases are central to preserving sustainable Tribal homelands, assuring cultural and economic hunting, fishing, and gathering, and defending Tribal sovereignty as manifested through governance over resource management and land use. This litigation includes important categories of cases that are not described above. For example, DOJ is protecting hunting and fishing rights in *United States v. Michigan (W.D. Mich.)*. DOJ filed this action on behalf of the United States to assert the off-reservation treaty fishing and hunting rights of the Tribal successors to the signatories of the 1836 Treaty of Washington. Through consent decrees entered in 1985 and 2000, the litigation secured the rights of these five Tribes (the Sault Ste. Marie Tribe of Chippewa Indians, the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, and the Little Traverse Bay Bands of Odawa Indians) to fish certain waters of the Great Lakes, to regulate Tribal fishing, and to allocate the resource between the Tribes and the State of Michigan. The parties, with the exception of the Sault Tribe, filed a proposed decree with the court on December 11, 2022. In 2022, the Division worked with the Tribes and the State of Michigan to negotiate a new consent decree concerning the Great Lakes fisheries. On August 24, 2023, the district court overruled all objections to the Proposed Decree and approved the Decree in favor of the United States and the other stipulating parties. DOJ is defending the district court's decision in the Sixth Circuit.

DOJ Defensive Litigation. DOJ handles a large docket of defensive cases of interest to Tribes, including cases in which DOJ defends DOI decisions that benefit Tribes. New cases in the past year include the following:

Historic Agreement Addressing Long-Running Litigation Concerning Operation of Dams in the Columbia River Basin. Following over two and half years of mediation, the United States, environmental organizations, the States of Washington and Oregon, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe reached a landmark agreement to address long-running litigation related to the operation of 14 dams in the Pacific Northwest. In the underlying litigation, *National Wildlife Federation v. National Marine Fisheries Service* (D. Or.), DOJ/ENRD is defending challenges to the compliance of five federal agencies (the U.S. Army Corps of Engineers, Bureau of Reclamation, Bonneville Power Administration, National Marine Fisheries Service, and U.S. Fish and Wildlife Service) with the Endangered Species Act, the National Environmental Policy Act, and/or the Northwest Power Act. In February 2024, in light of the agreement, the court granted a stay of the litigation through December 13, 2028, so that the federal government can undertake commitments to restore the Columbia River Basin’s fish and wildlife resources. This agreement follows an historic settlement announced in September 2023 addressing the Columbia River Treaty Tribes’ fishing rights in the Upper Columbia River Basin. That prior agreement secured hundreds of millions of dollars to fund Tribally led pilot projects and ultimately reintroduce salmon in blocked habitats in the Upper Basin of the Columbia River.

Legend Lake Property Owners Ass’n v. U.S. Dep’t of Interior (E.D. Wisc.). DOJ successfully defended final Interior decisions to acquire certain property in trust for the Menominee Indian Tribe of Wisconsin pursuant to the Menominee Restoration Act. In February 2024, the district court adopted the United States’ arguments that Plaintiff’s restrictive covenants—purporting to block DOI’s acquisition of the land into trust—were preempted by federal law.

West Flagler, LLC v. Haaland (D.C. Cir.). On June 30, 2023, the D.C. Circuit reversed the district court’s decision that the Secretary of the Interior violated the Indian Gaming Regulatory Act (IGRA) by taking no action (and thus allowing to go into effect by operation of statute) a gaming compact between the Seminole Tribe of Florida and the State of Florida. The compact contemplates that the Tribe may accept wagers placed by users outside Indian lands through its online sportsbook. On the central question of whether the Seminole-Florida compact violates IGRA, the court adopted the United States’ argument that while IGRA only *authorizes* gaming on Indian land, it permits discussion of gaming outside Indian land, and the compact therefore appropriately authorizes the Tribe’s actions on Indian land, while leaving for state law to decide whether the placement of bets from outside Indian land is legal. On June 17, 2024, the Supreme Court denied West Flagler’s petition for a writ of certiorari in this matter, bringing the litigation to a close.

Littlefield et al. v. U.S. Dep’t of Interior (1st Cir.). The case concerned a challenge to DOI’s decision to acquire certain lands in trust for the Mashpee Wampanoag Tribe in Massachusetts. The trust lands established the initial reservation for the Tribe and provide a homeland upon which they can govern and engage in economic development. DOI first approved the acquisition in 2015, which plaintiffs successfully challenged in 2016 on the grounds that the Secretary of Interior misinterpreted a portion of the Indian Reorganization Act. On remand, DOI reevaluated

its authority to acquire the land in trust under the statute and concluded in 2018 that it did not have authority. The Tribe successfully challenged that determination, resulting in another remand to the agency. In 2021, following further review, Interior issued a new decision concluding it did have the requisite authority under the Indian Reorganization Act to acquire the land in trust. Plaintiffs challenged the decision, and DOJ/ENRD successfully defended the decision in both the district and appellate courts. On April 1, 2024, the Supreme Court denied David Littlefield et al.'s petition for writ of certiorari in the matter, bringing this long-running litigation to a close.

Village of Hobart v. U.S. Dep't of Interior (E.D. Wisc.). DOJ/ENRD is defending Interior's decision to acquire certain lands in trust for the Oneida Nation in Wisconsin. Among other things, the suit seeks declaratory relief that the Indian Reorganization Act, enacted ninety years ago this year, is unconstitutional on various grounds, and seeks to invalidate the agency decision on that basis. DOJ continues to litigate this case in 2024.

Morrison County v. U.S. Dep't of Interior (D. Minn.). DOJ/ENRD is defending Interior's decision to acquire certain lands in trust for the Mille Lacs Band of Chippewa Indians in Minnesota. Similar to the *Village of Hobart* case, the suit also seeks a ruling that the Indian Reorganization Act is unconstitutional, and that the agency decision should be invalidated on that basis. DOJ continues to litigate this case in 2024.

Arizona State Legislature v. Biden & Heaton v. Biden (D. Ariz.). DOJ/ENRD is defending lawsuits filed by several plaintiffs to challenge President Biden's Proclamation 10,606 establishing the Baaj Nwaayjo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument. The plaintiffs claim that President Biden lacked statutory authority under the Antiquities Act to create the Monument, that his exercise of authority to establish the Monument violated other federal laws, and that the Antiquities Act is unconstitutional. The Havasupai Tribe, Hopi Tribe, and the Navajo Nation have moved to intervene as defendants, citing (among other things) the importance of the lands within the Monument, which are "sacred components" of the Tribes' origin and history.

DOJ Amicus Participation. *Metlakatla Indian Community v. Dunleavy (D. Alaska)*. On June 10, 2024, the Court granted summary judgment in favor of the Metlakatla Indian Community, upholding its reserved fishing right, and rejecting all of the arguments by the State seeking to defeat that right on remand. The parties had filed cross motions for summary judgment on whether the Metlakatla Indian Community holds reserved fishing rights. DOJ/ENRD filed an amicus brief in support of the Community and, at the Community's request, participated in an oral argument in February 2024. The DOJ amicus brief put forth new arguments based on the rule of mandate and law of the case. The court recited this law favorably and rejected State arguments as inconsistent with the Ninth Circuit's mandate. It also adopted the United States' distinction between reserved rights and aboriginal rights, holding that the Community need not prove the legal elements of an aboriginal right to establish its reserved fishing rights claim. The case will now proceed to trial on the narrow issue properly before the court on remand (whether the Community's traditional off-reservation fishing grounds include the waters within Alaska Districts 1 and 2).

SUSTAINABLE ENERGY

WHCNAA Offshore Wind Resource Page. The White House Council on Native American Affairs (WHCNAA) Offshore Wind Working Group and Offshore Wind Resource Page aims to improve coordination and communication across the government to support Tribal governments' participation in the planning and permitting of offshore wind projects. Our goal is to centralize information and resources related to offshore wind to enhance efficient and transparent communication.

Tribal Electrification Program. Through a \$150 million investment from the Inflation Reduction Act, the Department of the Interior launched a first-of-its-kind Tribal Electrification Program, which was launched with a \$150 million investment from the Inflation Reduction Act, the largest ever investment in climate. In only its second year, the program is providing financial and technical assistance to 23 Tribes to connect homes in Tribal communities to transmission and distribution that is powered by clean energy; provide electricity to unelectrified homes through zero-emissions energy systems; transition electrified homes to zero-emissions energy systems; and support associated home repairs and retrofitting necessary to install these systems. In addition, the program supports clean energy workforce development opportunities in Indian Country and is a critical step toward the goal of electrifying all homes in the United States with clean energy sources.

Historic funding to Tribal communities to date, and more to come. Over the last four years, DOE committed more than half a billion dollars in Tribal energy investments for clean energy generation and deployment, electrification and grid resilience, and more. These investments, largely from the BIL and Individual Retirement Arrangement (IRA), will bring equity to those communities, energy sovereignty, and strengthen the national energy security of the United States.

Implementation of the Indian Energy Purchase Preference at Federal Facilities. In August 2024, the Biden-Harris Administration announced the government's first-ever purchase of carbon pollution-free electricity from a Tribal majority-owned business under the Indian Energy Purchase Preference provisions of the Energy Policy Act of 2005. The General Services Administration (GSA) purchased unbundled Energy Attribute Certificates (EACs). As a result, the net annual usage for 185 buildings in 12 states has been matched with 100% carbon pollution-free electricity. Collectively, the total electricity load for these federal buildings is 349,108 megawatt-hours, which is equivalent to the power that 32,780 typical homes consume in a year. The purchase also represents a savings of nearly \$800,000 compared to the average price that GSA paid for unbundled Carbon Pollution-Free (CFE) EACs last year. The procurement was supported through interagency collaboration with the DOE.

Support for Tribes on Offshore Wind. The White House Council on Native American Affairs established a new interagency working group focused on offshore wind issues, to facilitate an

all-of-government approach to support transparency in the offshore wind planning and development and to enhance coordination between agencies and Tribal Nations.

Loan Programs Office (LPO) administers first Tribal energy loan guarantee. On Sept 13, 2024 the Department of Energy's Loan Program Office (LPO) closed on a partial guarantee of a \$100 million loan to finance the development of a solar-plus-long-duration-energy-storage microgrid. The microgrid will be located on the Tribal lands of the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation near Alpine, California.

Supporting Tribal Capacity with Clean Energy Innovator Fellows. When Tribal Nations are in the lead, energy projects are more likely to respect sacred sites and the environment while the benefits are more likely to reach Native communities. To support Tribal capacity, and sovereignty, on energy development, the DOE piloted a Tribal cohort of Clean Energy Innovator Fellows. Fourteen Clean Energy Innovator Fellows were placed in Tribes and Intertribal Organizations in 2023 and 2024. These Fellows are recent graduates and energy professionals who support critical Tribal energy organizations in advancing clean energy solutions that will help decarbonize the power system, electrify transportation and industry, and make community power system more resilient, equitable and inclusive. The program is strengthening the next generation of Tribal energy professionals in Indian Country. The Fellows are supported through the DOE Office of Energy Efficiency and Renewable Energy, the DOE Grid Deployment Office, and the DOE Office of Indian Energy.

WATER AND INFRASTRUCTURE

Clean Drinking Water for Tribal Nations. In April 2024, the Department of the Interior's Bureau of Reclamation and Indian Health Service (IHS) announced a new MOU to further develop safe drinking water and community sanitation infrastructure projects across Indian Country. The Administration has targeted to ensure water infrastructure improvements across Indian Country, investments that are crucial to ensuring the health, safety, and economic prosperity of Indigenous communities.

IHS and BOR Infrastructure projects. On July 24, 2024, representatives from the IHS and the Bureau of Reclamation (BOR) met with Yakama Nation leadership to announce the very first pilot project under the historic MOU between the two agencies aimed at leveraging expertise and resources to speed completion of infrastructure projects. Combined, the IHS and BOR will invest \$1 billion in such projects this year. In April, the IHS participated in the White House Water Summit, announcing the partnership with BOR and the latest round of BIL funding.

Indian Water Rights Settlements. The Department of the Interior allocated the entire \$2.5 billion in funding appropriated in the Bipartisan Infrastructure Law for Indian Water Rights Settlements. The settlements that have received funding include: Ak-Chin Indian Community Water Settlement, Colorado Ute Indian Water Rights Settlement (specifically the Animas La-Plata Project) (Ute Mountain Ute and Southern Ute Indian Tribes), Snake River Water Rights

Act (Nez Perce Tribe), Navajo-Utah Water Rights Settlement, Northwestern New Mexico Rural Water Projects (Navajo-Gallup Water Supply Project), Montana Water Rights Protection Act (Confederated Salish and Kootenai Tribes), Blackfeet Water Rights Settlement, Crow Tribe Water Rights Settlement, White Mountain Apache Water Rights Quantification Act, San Carlos Apache Tribe Water Rights Settlement, and the Arizona Water Rights Settlement Act, which includes Gila River Indian Community Water Rights Settlement and Southern Arizona Water Rights Settlement (Tohono O'odham Nation).

DOJ Water Rights Adjudications. DOJ attorneys are involved in water rights adjudications throughout the arid West, asserting federal reserved water rights held by the United States for the benefit of Tribes to ensure that Tribal reservations provide viable permanent homelands. DOJ has dozens of these cases (in Oregon, New Mexico, Arizona, Nevada, Utah, Idaho, Montana, and California) and more coming in the near future. A few notable examples of DOJ work during this Administration are provided below, including one example of DOJ's work in assisting the Department of the Interior in connection with the negotiation of comprehensive water rights settlements and securing necessary congressional ratification.

Little Colorado River Water Rights Adjudication (Super. Ct., Apache County, Ariz.). This adjudication involves water rights claims in the Little Colorado River Basin, including claims asserted by the United States as trustee for the Navajo Nation and the Hopi Tribe. In 2024, the Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe, and local parties finalized a water rights settlement agreement. Tribal councils for all three Tribes, the State of Arizona, and other local parties have approved the agreement. Federal legislation to ratify the agreement was introduced into Congress by Senator Kelly from Arizona.

New Mexico ex rel. State Engineer v. Kerr-McGee Corporation (D.C. Cibola County, N.M.). This is a waters rights adjudication for the Rio San José River system. In 2022, the non-federal parties reached a settlement addressing the rights of the Acoma and Laguna Pueblos. In 2024, the non-federal parties then reached a settlement addressing the rights of the Navajo Nation. Bills that would provide congressional approval of both settlements are pending in Congress.

Water Rights of the Confederated Salish and Kootenai Tribes. In September 2021, Secretary of the Interior Deb Haaland signed a compact that confirmed the reserved water rights of the Confederated Salish and Kootenai Tribes in northwestern Montana. The historic settlement followed decades of litigation and resolved a century-long series of intractable disputes, including over ownership of water rights and jurisdiction over water use on the Flathead Reservation. The settlement also authorized funding of more than \$1.9 billion for infrastructure and to modernize one of the largest Indian irrigation projects in the nation, while also providing for significant increases in stream flows and the reestablishment of fish habitat. After the parties moved the adjudication court for entry of a decree reflecting the congressional ratified settlement, the court set a briefing schedule for roughly 700 objections. In 2024, DOJ/ENRD successfully moved to dismiss some of these objections, and in July, filed a merits brief defending the settlement and asking the Court to deny the remaining objections. Briefing on these dispositive issues continued for several months, before argument was held in September.

In Re: The General Adjudication of All Rights of Water Use in the Coeur d'Alene-Spokane River Basin (District Ct., Idaho). DOJ/ENRD has filed water rights claims for the Coeur d'Alene Tribe in the adjudication. Discovery is ongoing, and a trial on the claims is scheduled for 2026.

DOJ Affirmative Water Rights Cases. In addition to water rights adjudications, DOJ files affirmative lawsuits to assert water rights. Examples in the past year include *United States v. Gila Valley Irrigation District (D. Ariz.)*. This litigation seeks to enjoin unauthorized diversions from the Gila River. This case is part of an ongoing effort by the United States and the San Carlos Apache Tribe to enforce a consent decree, the Gila Decree, Globe Equity No. 59.

Final EPA Regulation to Protect Tribal Reserved Rights. In May 2024, EPA issued a final rule that revises the water quality standards regulation at 40 CFR part 131 to explicitly address how EPA and states must consider Tribal reserved rights – defined in this rule as rights to Clean Water Act-protected aquatic and/or aquatic-dependent resources reserved to Tribes through treaties, statutes, or executive orders – in establishing water quality standards, where Tribes assert these rights for consideration. This rule creates a regulatory framework that will be applied consistently while accounting for local conditions and factors to inform the development of water quality standards to protect applicable Tribal reserved rights.

Final PFAS National Primary Drinking Water Regulation. In April 2024, EPA finalized the first-ever national drinking water standard to protect communities from Per- and Polyfluoroalkyl Substances (PFAS) exposure. The final rule will reduce PFAS exposure for approximately 100 million people, prevent thousands of deaths, and reduce tens of thousands of serious illnesses. The new limits in this rule are achievable using a range of available technologies and approaches and EPA will be working closely to support states, Tribes, water systems, and local officials to implement the final rule. At the same time, EPA continues to support Tribal drinking water systems with funding to address PFAS and other emerging contaminants, including funding allocations announced in May 2024 for an additional \$35 million in FY 2024 to address these contaminants in Tribal drinking water.

ACF funding for Rural Community Development. Through the Administration for Children and Families, the United South and Eastern Tribes, Inc. and the Inter-Tribal Council of Arizona each received \$1.38 million in Rural Community Development (RCD) program Non-Competing Continuation (NCC) funding to implement the fifth year of their program. The RCD Program works with regional and tribal organizations to manage safe water systems in rural communities. The NCC period will begin October 1, 2024 and extend through September 30, 2025.

IHS and U.S. Public Health Service seven-year plan. In May 2024, the IHS and the U.S. Public Health Service Commissioned Corps Headquarters launched a seven-year strategic plan to improve safe drinking water access and sanitation in American Indian and Alaska Native communities. In August as part of World Water Week, the IHS hosted much-publicized events in five IHS areas highlighting successful projects funded by the BIL and recognizing the importance of improving water and sanitation infrastructure. These events also celebrated the 65th anniversary of the IHS SFC Program and its unique and successful history.

America the Beautiful Freshwater Challenge. In April 2024, the Biden-Harris Administration announced a new national goal and partnership to conserve and restore freshwater resources. The America the Beautiful Freshwater Challenge: A Partnership to Conserve and Restore America's Rivers, Lakes, Streams, and Wetlands sets a bold, new national goals to protect, restore, and reconnect 8 million acres of wetlands and 100,000 miles of our nation's rivers and streams by 2030. To achieve these goals, the Freshwater Challenge calls on all other governments and entities, including Tribal Nations, to advance their own policies and strategies for conserving and restoring America's freshwater systems. Working together to advance these shared freshwater goals, the 33 Tribes of the Affiliated Tribes of Northwest Indians and the National Congress of American Indians passed resolutions in support of the Freshwater Challenge and joined in partnership with the Administration.

FISH RESTORATION AND SUBSISTENCE MANAGEMENT

Columbia River Basin Salmon Restoration. The Biden-Harris Administration reached a historic agreement to work in partnership with Pacific Northwest Tribes and States to restore wild salmon populations, expand Tribally sponsored clean energy production, and provide stability for communities that depend on the Columbia River System. Building on President Biden's direction to Federal agencies, the agreement, when combined with other funding that the Administration is anticipated to deliver to the region, will bring more than \$1 billion in new Federal investments to wild fish restoration over the next decade and enable an unprecedented 10-year break from decades-long litigation against the Federal government's operation of its dams in the Pacific Northwest.

Reintroduction of Salmon in the Upper Columbia. The Biden-Harris administration reached a historic agreement to support Tribally led efforts to restore healthy and abundant salmon populations in the Upper Columbia River Basin. The agreement between the United States, the Confederated Tribes of the Colville Reservation, the Coeur d'Alene Tribe, and the Spokane Tribe of Indians will fund efforts to test the feasibility of, and ultimately to reintroduce salmon in blocked habitats in the Upper Basin. The agreement includes \$200 million over 20 years from the Bonneville Power Administration, a federal power marketing administration under the Department of Energy, to advance the Tribally led implementation plan. The Department of the Interior also announced it is providing \$8 million over two years through the Bureau of Reclamation to support these efforts.

Fish Passage and Reintroduction with the Yakama Nation. The Biden-Harris Administration's Investing in America agenda includes over \$3 billion for aquatic ecosystem restoration. The DOI's Bureau of Reclamation partnered with the Yakama Nation, Washington State, local farmers, and conservationists to provide fish passage and reopen 30 miles of the Cle Elum River to rebuild the historic sockeye salmon population that once graced these waters – once the largest population of sockeye salmon in the Columbia River Basin. For generations, Tribal communities in the Basin have gone without these sacred fish. When the project is completed in 2027 and the river is reopened, it will provide spawning access to Cle Elum Lake for several fish species in the Basin and is expected to benefit sockeye, coho, and spring Chinook

salmon, and Pacific lamprey. This project is the largest reintroduction of sockeye salmon in the continental United States to date.

Restoring Salmon and Steelhead and Supporting Tribal Cultures in the Klamath River Basin. As part of the Biden-Harris Administration’s commitment to honor the United States’ obligation to Tribal Nations, restore culturally important fish and wildlife, and protect and restore our nation’s rivers, the Administration has been a strong partner in restoring the Klamath River to a free-flowing state, allowing salmon and steelhead to make their long journey from the sea to the inland rivers and streams in the Basin. As part of the Administration’s whole-of-government approach to restoring this Basin and honoring our commitments to Tribal Nations in the region, in February 2024, the DOI announced a landmark agreement between the Klamath Tribes, Yurok Tribe, Karuk Tribe, and Klamath Water Users Association to advance collaborative efforts to restore the Klamath Basin ecosystem and improve water supply reliability for Klamath Project agriculture. Administration funding will support 24 restoration projects developed by signers of this agreement, as well as other Tribes and other conservation partners. Through the Bipartisan Infrastructure Law, the Administration is investing over \$200 million over five years to restore the Klamath region’s ecosystem and repair local economies. These investments will secure reliable water for the national wildlife refuges, advance the restoration of salmon post dam removal, address water quality and conveyance issues, and support co-developed restoration projects with Tribes, farmers and ranchers, and conservation partners. The fourth and last large dam on the Klamath river was removed in August 2024. Just weeks later, on October 16, 2024, the Tribe witnessed the first returning salmon to their homelands in over 100 years.

The Federal Bering Sea Task Force and Tribal Advisory Committee. The Federal Bering Sea Task Force and Tribal Advisory Council established by EO 13754 has committed to establishing an interagency salmon rehabilitation plan to address the dire salmon crisis facing communities of the Yukon, Kuskokwim and Norton Sound regions of Alaska. This plan will be co-developed between federal partners and Tribal leaders.

NOAA to BIA Interagency Agreement (IAA). In 2024, the Department of Commerce, National Atmospheric and Oceanic Administration finalized an historic Inter Agency Agreement (IAA) with the Bureau of Indian Affairs (BIA) for \$240 million to support Tribal Fish Hatcheries in the Northwest (Alaska, Washington, Oregon, California, and Idaho). BIA will manage these Inflation Reduction Act funds to support Pacific Salmon restoration efforts.

Subsistence Management Board Curriculum. USDA partnered with an Alaskan non-profit organization to develop curriculum for engaging in Federal Subsistence Management Board, focusing on rural citizens and Alaskan youth. The curriculum teaches the history of federal subsistence policy and increases the ability of Alaskans to engage in the process by introducing the components of federal subsistence management and the agencies and stakeholders involved in it. In 2024, this program brought students to the Federal Subsistence Board meeting in April and supported the delivery of workshops in two Southeast Alaskan communities and at three statewide gatherings.

Native Fish Initiative Partnership. The USDA has received Tribal comments regarding the agency's fish procurement policies and practices, as well as requests for support from communities that have historically and currently depend on healthy fish populations for cultural, nutritional, ecological, and economic health. In 2024, USDA entered into a cooperative agreement with an Alaskan non-profit organization to analyze barriers and identify opportunities to increase food sovereignty and economic opportunities for Tribal nations and Alaska Natives who depend on Indigenous fish and seafood. The agreement will examine opportunities for USDA food procurement, incorporation of new fish and seafood species into nutrition programs and elevating wild food harvesting benefits from forest lands.

- Infrastructure and Investment in Jobs Act (BIL) funds supported the USDA Forest Service's Collaborative Aquatic Landscape Restoration Program and enabled the award of \$28 million in support of 11 watershed restoration projects. Nine of these projects (~90% of funding) will provide benefits to Tribal fisheries and water quality.
- Continuing a long-standing partnership with the Native American Fish & Wildlife Society (NAFWS), the USDA Forest Service invested \$45,000 in program funding in FY 2024 to support technical training, youth professional development, Indigenous and Traditional Ecological Knowledge transfer, and annual conferences. Forest Service investment in this partnership has continued to grow over the past 10 years and demonstrates the Agency's commitment to implementing the Forest Service Tribal Action Plan.
- For the past 3-years, the Forest Service has supported the Rocky Mountain Region Indigenous Internship program, which annually hires 2 indigenous interns to support a variety of fisheries, wildlife, watershed positions on National Forests and Grasslands in the Rocky Mountain Region (R2). In FY 2024, the Forest Service fisheries program provided \$102,000 to support the Rocky Mountain Region Indigenous Internship program.

CONSERVATION

National Monument Creation, Expansion, and Restoration. As part of the Biden-Harris Administration's unprecedented commitment to protect America's natural wonders for future generations, honor areas of cultural significance to Tribal Nations and Indigenous peoples, and expand access to nature, President Biden has designed and restored several national monuments. These include expanding the Berryessa Snow Mountain National Monument in California, designating Avi Kwa Ame National Monument in Nevada, designating the Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument in Arizona, and restoring protections for the Bears Ears National Monument and the Grand Staircase-Escalante National Monument in Utah.

Chumash Heritage National Marine Sanctuary. Following nearly a decade of work by Tribes, Indigenous Peoples, community leaders, organizations, businesses, state and local officials, and members of Congress, the National Oceanic and Atmospheric Administration designated the

Chumash Heritage National Marine Sanctuary. Off the coast of California, this is the third largest sanctuary in the National Marine Sanctuary System.

Appendix C Rulemaking Effort. In February 2024, USACE published a proposed rule to rescind Appendix C. USACE would instead rely on ACHP's regulations and joint USACE/ACHP guidance for implementation of Section 106. The Army intends to coordinate closely with Tribal Nations and ACHP throughout this rulemaking effort.

DHS Office of Health Security (OHS). OHS worked in partnership with the Mille Lacs Band of Ojibwe to develop and pilot a catastrophic reference scenario tabletop investigating questions surrounding degradation of Tribal lands and Native foods.

Regional Conservation Partnership Program announcements. The Natural Resources Conservation Service (NRCS) created a Tribal set-aside in its Regional Conservation Partnership Program (RCPP) funding to support conservation and climate-smart agriculture, awarding nearly \$111 million to 8 Tribal-led Regional Conservation Partnership Program projects – above the \$110 million originally set aside for Tribes. As part of USDA's bison efforts, RCPP provided \$63.75 million to the InterTribal Buffalo Council to restore cultural and spiritual practices, sequester carbon and reduce greenhouse emissions in Southwest, Northeast and Northern Great Plains Regions.

Keystone Initiatives (KI). In 2024, several U.S. Fish and Wildlife Service Keystone Initiatives promoted ecosystem restoration across America. Tribal projects were included in the nine (9) Initiatives (Salt Marsh, Appalachia, Grasslands, Sage, Klamath, Gravel to Gravel, Hawaiian Forest Birds, Seeds Initiative, and Early Detection Rapid Response). Approximately \$70 million (30% of currently allocated funds for Keystone Initiatives) was invested throughout Indian Country, representing keystone species such as salmon and bison, with the inclusion of Indigenous Knowledge in native seed preservation. Pollinator promotion, soil rehabilitation, research support and cultural preservation by investing in native youth, were a few of the important parts of this initiative.

Memo on Conserving and Restoring Terrestrial Wildlife Habitat Connectivity and Corridors in the United States. In October 2024, USDA released a memo directing coordination and action within the Department to improve terrestrial wildlife habitat connectivity and corridors. With respect to Tribes, this memo calls for, among other things, the improvement of inter-jurisdictional coordination, including identifying priorities for wildlife habitat connectivity and corridors; focusing resources to help achieve goals consistent with identified priorities; engaging in Tribal co-stewardship of wildlife and wildlife habitat; incorporating Indigenous Knowledge regarding wildlife connectivity and related stewardship needs whenever possible; providing technical and other assistance to Tribes as available; and collaborating directly with Tribes to build on and identify opportunities to conserve wildlife habitat connectivity and corridors.

America the Beautiful Challenge Grants. The Biden-Harris administration launched a \$1 billion America the Beautiful Challenge to leverage federal conservation and restoration investments with private and philanthropic contributions to accelerate land, water, and wildlife conservation efforts across the country. To date more than \$232 million in grants have been awarded leveraging more than \$62 million in matching contributions for a total conservation impact of \$294 million. In 2024, approximately 50% of allocated funds were dedicated to Tribal projects. Overall, from 2022 through 2024, approximately \$120 million will directly support Tribal projects with an additional \$21 million that will indirectly support Tribes or Tribal projects.

ECONOMIC DEVELOPMENT

TRIBAL AND NATIVE OWNED BUSINESS SUPPORT

Implementation of the American Rescue Plan Act [Access to Capital Initiative]. Treasury leads economic recovery for Tribes through the administration of \$30 billion in direct set-asides. Treasury continues to approve Tribal applications for our last fund which is the largest Tribal small business set-aside through the State Small Business Credit Initiative (\$500 million Tribal set aside). In October 2024, Dept. of Treasury announced \$520 million in SSBCI Tribal capital & Technical Assistance allocation awards.

IMPROVING FEDERAL FUNDING ACCESSIBILITY

Implementation of P.L. 117-169, aka the Inflation Reduction Act (IRA). Treasury administers the bulk of available IRA funds through tax credits. For the first time in history, Tribes can access a series of IRA clean energy tax credits using the new elective pay credit monetization. To increase Tribal access Treasury has focused on consultations, customization of guidance and opening of filing for 2023 tax year allocations. In October 2024 Tribal Nations Summit, Treasury announced a proposed rule opening up direct pay to Tribal entities. In November 2024, Treasury announced a Final Rule that enables Tribes to access direct pay through joint arrangements with non-Tribal entities,

Increased Tribal Access and Financial Investments from USDA. In addition to Forest Service/Tribal co-stewardship of the National Forest System, USDA increased investments to Tribes in FY 24 through competitive grants with a focus on removing barriers to access and increasing capacity and funding opportunities directly to Tribes. This included structuring competitive grant opportunities to support Tribal access (e.g., funding set aside for Tribes, extended application windows, and dedicated support capacity) and leveraging non-competitive funds to build Tribal capacity. This work directly meets the intent of Executive Order 14112, *Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination*.

- **Wood Innovation Grants:** The Wood Innovations Program which administers three separate grant opportunities—Wood Innovations Grants, Community Wood Grants, and Wood Products Infrastructure Assistance, allocated \$6.4 million dollars to 9 Tribes in FY 2024. USDA Forest Service staff conducted focus outreach to Tribes and Tribal partners to increase awareness for funding opportunities. Through partnership with the Alliance for Green Heat, Wood for Life, and Firewood Banks, another \$688,000 was awarded to Tribes to support firewood programs.
- **Urban and Community Forestry Grants:** Inflation Reduction Act funding for urban and community forestry work was awarded directly to 4 Tribes, totaling \$4 million dollars. In addition, the Arbor Day Foundation awarded \$8 million in grants to support community forestry on Tribal lands. This funding went to 16 sub awardees that were selected out of more than 50 applicants, and the selected projects will benefit a total of 26 individual Tribes. The grants awarded will be used to plant trees and grow green spaces on or near Indigenous lands and projects range in focus from food sovereignty to workforce development. Two additional national pass-through organizations will be announcing direct awards to Tribes shortly.
- **Climate Smart Forestry:** In 2024, the Forest Service announced an award of \$13 million to the Denali Commission to help Tribes and Alaska Native Corporations access emerging climate markets and implement climate informed forest management practices that will improve forest health and resilience. The agency also partnered with National Indian Carbon Coalition providing \$2 million dollars for technical assistance to Tribes interested in exploring voluntary carbon market opportunities. A Tribal-specific Notice of Funding Opportunity of \$20 million for market access was announced in 2024. All this funding will go directly to Federally recognized Tribes, and final awards are expected soon.
- **Tribal Nurseries:** Through the Bipartisan Infrastructure Law, the Forest Service is working closely with Tribes to provide technical assistance and award financial assistance to Tribal nurseries to improve operations. In FY 2024, the Forest Service hired a full time Tribal Nursery Specialist to support and provide technical assistance to Tribal nurseries. In FY 2024, \$1 million dollars directly supported 4 Tribal nurseries.
- **Landscape Scale Restoration:** The Landscape Scale Restoration Program provides direct grants to Tribes to perform work on Tribal lands. In FY 2024, \$1.5 million dollars directly supported 5 Tribal projects.
- **Community Wildfire Defense Grants:** In FY 2024, the Forest Service awarded \$19.2 million to a total of 11 Tribes under the Community Wildfire Defense Program (CWDG). These grants assist at-risk local Tribal communities in planning for and reducing wildfire risk, including development and revision of Community Wildfire Protection Plans and implementing the goals of the National Cohesive Wildland Fire Management Strategy.
- **Community Navigators to Improve Financial Access.** In 2024, the Forest Service signed agreements with the American Indian Alaska Native Tourism Association and the First Nations Development Institute to improve Tribal and Indigenous communities' access to funding opportunities from the Inflation Reduction Act and the Bipartisan Infrastructure Law. These partner organizations are in the process of building their

community navigator capacity to assist Tribes through webinars, trainings, and conference presentations. Both organizations are outreaching and preparing to assist Tribes with the upcoming Community Wildfire Defense Grant funding opportunity.

Clarification of Tax Status of Tribally Chartered Corporations [Access to Capital Initiative] For 30 years, Tribes have requested that the Department of the Treasury issue guidance addressing the tax status of Tribally chartered corporations. In response to these requests and to increase access to IRA tax credits, Treasury conducted two Tribal consultations and issued proposed guidance confirming that wholly owned Tribal corporations are tax exempt. In October 2024, Treasury announced publication of a draft guidance on the tax status of Tribally chartered corporations and has Tribal consultations scheduled on the draft guidance.

COMMUNITY ECONOMIC DEVELOPMENT

Public/Private Partnerships. Earlier this year, DOI Secretary Haaland convened a historic roundtable through the DOI's Office of Strategic Partnerships in collaboration with the Departments of Commerce, Treasury, and Agriculture; the Small Business Administration; and the Office of the Comptroller of the Currency to support public-private leveraging of available funding and increase access to capital in Indian Country. The agencies continue to work together to strengthen partnerships that support access to capital, including the Tribal Community Vision Partnership - a national, multi-sector initiative dedicated to advancing Tribal self-determination and fostering sustainable economic development. Led by Native Americans in Philanthropy, the Vision Partnership is looking to generate \$1.2 billion in impact for Indian Country over the next seven years to spearhead projects that will spur community development, clean energy, and Native small businesses - and provide replicable models for future projects. The Vision Partnership will consolidate private and philanthropic investments - in the form of grants, equity, and debt capital -to leverage unprecedented levels of federal funding and increase the flow of capital into Tribal communities.

Clarified Eligibility in Keystone USDA Market Development Program. USDA Rural Development responded to years of Tribal leader feedback by clarifying that Tribal corporations and other arms and instrumentalities are eligible under the Rural Business Development Grant (RBDG). This intermediary program provides competitive grant funds for market feasibility studies, job training, business incubation, and other related activities, which are often cornerstones to Tribal economic priorities. Recently, the Rural Business-Cooperative Service (RBCS) codified changes to policy through the rewriting of RBDG regulation providing Tribes and Tribal corporations with greater flexibility to support the economic well-being of their nations. The new regulatory changes provide flexibility in the structure of applicants, allowing better use of regular RBDG funding and set asides.

Access to Capital Clearinghouse WHCNA. The White House Council on Native American Affairs (WHCNA) is enhancing the Access to Capital (AtC) Clearinghouse by incorporating data automation and AI. These improvements will increase the number of opportunities available and make them easier to search. With input from Tribal Leaders, the WHCNA has upgraded

the Clearinghouse's search and filter functions, helping Tribal communities access pertinent federal resources more effectively. The AtC Clearinghouse serves as a centralized resource, assisting Tribal nations in finding essential financial resources such as grants, loans, and technical support to promote economic development and community prosperity.

USDA Invests in Tribal Infrastructure. USDA Rural Development's Rural Utilities Service invested over \$141 million in Tribal Broadband, Energy, and Water projects. Here are a few recent examples:

- **Standing Rock Telecommunications Inc. - ReConnect Broadband Program - \$22.2 million.** This Rural Development grant will be used to deploy a fiber-to-the premises network to provide high-speed internet. This network will benefit 426 people, 16 businesses, 104 farms and three educational facilities across the Standing Rock Reservation.
- **Navajo Tribal Utility Authority - Electric Infrastructure Loan and Loan Guarantee Program - \$76.5 million** Navajo Tribal Utility Authority (NTUA) will use this \$76.5 million loan to finance the construction of a 93.7 MWdc/72MWac ground-mounted, single-axis tracking solar photovoltaic farm. NTUA is a wholly owned enterprise of the Navajo Nation headquartered in Fort Defiance, Arizona, that provides electricity, natural gas, water, sewer, and broadband services to the residents of the Navajo Nation. This project will be constructed within the Red Mesa Chapter of the Navajo Nation, located in San Juan County, Utah. This project is expected to create 220 local construction jobs, power approximately 36,000 rural households, and provide permanent employment for 2 to 3 people.
- **The Yomba Shoshone Tribe – Water and Environmental Program - \$772,000-** The Yomba Shoshone Tribe in Nevada, a participant of USDA's Rural Partners Network (RPN), will use a \$772,000 grant to make water infrastructure improvements. The funding will be used to replace a water tank, install water lines and fire hydrants, and make other improvements to increase efficiency and resiliency of the Tribe's water system. These improvements will enable homes and buildings throughout the Tribe's community to have access to safer water. The project is an example of how the RPN alliance of Federal partners is helping communities access government resources to build critical infrastructure and support long-term economic growth where it's needed most.

GOVERNMENT SUPPORT AND ENTITLEMENT POLICIES

Social Security Expanded Remote Service Near Tribal Communities. Based on feedback and discussions during Tribal listening sessions, advocate sessions, and Tribal consultations with Tribal leaders, the Tribal Consultation Official directed improvements necessary to expand service in critical remote areas of the country where customers cannot access Social Security Administration (SSA) services without enduring extensive and costly travel to an SSA field office. In FY 2023, SSA flew staff to Tribal health centers in remote locations of Alaska to

provide direct service in-person and to increase awareness for eligibility for Supplemental Security Income (SSI) benefits. In addition, we conducted testing to gather necessary information to build a fully remote service design that met data driven workload goals and cost estimates for a sustainable service model. In FY 2024, SSA expanded this effort to provide continued outreach to underserved zip codes, provide improved service delivery, and sought to improve Tribal relationships; SSA coordinated with local partners in another three key areas to establish one day, in-person service where we do not have field offices.

SSA outreach to unincorporated areas. In FY 2024 SSA expanded this effort to provide continued outreach to underserved zip codes, provide improved service delivery, and to improve upon Tribal relationships; SSA coordinated with local partners in another three key areas to establish one day, in-person service in August 2024. The selected locations identified in Alaska for FY 2024 were Dillingham, Nome, and Sitka. While at these locations, SSA partnered with local Tribal and village health providers, provided SSA services to include benefit eligibility, established appointments, claims, enumeration actions, and addressed other SSA related topics. Additionally, SSA conducted recruitment for SSA jobs and lay the groundwork for future remote collaborations with Tribal communities and health centers. By identifying local community partners and government agencies with available space and willingness and capacity to host SSA personnel, we will be able to build a network of future locations to provide similar in-person services. In order to measure success and improve upon our process that meets Tribal needs, SSA will continue to engage in follow-up Tribal Listening Sessions. During the Listening Sessions, we will gather feedback, concerns, and successes in addition to recommended future locations for service for FY 2025.

FOOD AND AGRICULTURE

USDA Increasing Land, Market and Capital Access Program. This \$300 million program helps underserved producers by increasing land, capital, and market access through cooperative agreements or grants for projects, including projects on tribal lands. Nearly \$17 million was awarded to Chippewa Cree Tribe of the Rocky Boy's Reservation, Menominee Indian Tribe of Wisconsin, and Lower Brule Sioux Tribe to purchase approximately 2,500 acres of grazing land, 160 acres of grazing land for the fall season, and 320 acres of dryland crop. The Tribal organizations also will be providing micro-grants for Tribal producers to purchase land, equipment, and operational needs. The tribal organizations also plan to provide training to professional support staff and direct assistance to Tribal producers in developing comprehensive farm and food business plans, including conservation plans to support expanded production and access to the full suite of USDA and other support resources. The ILA program awarded funding to eight organizations that will partner with Tribal organizations and Indigenous-led organizations. These organizations plan to provide outreach and technical assistance, purchase land, provide micro-grants, and provide low interest loans to Tribal farmers and producers: Piikani Lodge Health Institute, NDN Collective, Inc., Intertribal Agriculture Council Inc., Indian Land Tenure Foundation, Southwest Indian Agricultural Association, Inc., Four Bands Community Fund Inc., American Indian Mothers, Inc., and Trust for Public Land. [JH1]

USDA Enhanced Program Access and Delivery for Farm Loans. Effective September 2024, USDA's updated regulations for Enhancing Program Access and Delivery for Farm Loans revised the definition of "Family farm" in 7 CFR 761.2(b) to include commercial foraging operations as an eligible family farm for the purposes of operating loans where commodities such as wild rice are commercially foraged on Indian land. Commercially foraged means the harvesting of naturally occurring plants, or plantlike material, including fungi, that develop with limited management of the resource. The rule also addressed key barriers to program access related to applicant farm experience and loan collateral requirements. Additionally, this rule provides for the development of farm operating plans and repayment terms that emphasize the accumulation of working capital reserves and savings necessary to ensure farm resiliency and promote operational growth. As a result, more Tribal lands and operations will be eligible for Farm Service Agency loans.

Increasing Alternative Funding Arrangements (AFAs) to empower Tribes and better fund Tribal conservation. Since USDA Natural Resources Conservation Service's 2022 publication of an Alternative Funding Arrangements (AFA) policy to allow for greater Tribal self-governance, multiple Tribal nations have entered into AFAs for participation in the Environmental Quality Incentives Program (EQIP) and Conservation Stewardship Program (CSP). In 2024, the Southern Ute Indian Tribe of Colorado, agreed to enroll all 125,000 rangeland acres managed by its Department of Natural Resources into the Conservation Stewardship Program through an AFA. Conservation practices implemented will help improve and favor deep rooted, native perennial plants that can help sequester more carbon and build soil health. Also in 2024, USDA entered into an Alternative Funding Arrangement with the Mashantucket Pequot Tribal Nation in Connecticut to address resource concerns associated with agricultural production while assisting the Mashantucket Pequot Tribal Nation in working toward their goal of food sovereignty on Meechooôk Farm, which the Tribe established in 2016 to provide a variety of farm-to-table produce for Tribal Members. Five other states are currently in negotiations with Tribes for Alternative Funding Arrangements in coming years.

Tribal Ambassadors: Educating Farmers and Ranchers on Federal Crop Insurance. In 2024, USDA funded a cooperative agreement to strengthen Risk Management Agency's (RMA) outreach, engagement, and impact within Indian country. A Tribal Ambassador was selected from the Pueblo of Acoma Tribe, bringing their lived experience to USDA's risk management work. The Tribal Ambassador entered a one-year RMA-funded partnership to meet with farmers and ranchers in the western United States to help them build agricultural risk management work. The Tribal Ambassador entered a one-year RMA-funded partnership to meet with farmers and ranchers in the western United States to help them build agricultural risk management strategies. In this role, they engage with Tribal producers at major national and regional events, providing valuable presentations and one-on-one consultations.

Hemp Tribal Engagements. On February 16, 2024, the Hemp Plan for the Crow Creek Sioux Tribe was approved, granting the Tribe jurisdiction over hemp production within its territory. The adoption of this plan marks the 54th Tribal Hemp Plan to be approved by USDA's Domestic Hemp Production Program (DHPP).

BISON RESTORATION INITIATIVE

Partnership with InterTribal Buffalo Council. As part of the DOI's effort to restore healthy and wild bison and grasslands initiative, Interior partnered with the InterTribal Buffalo Council (ITBC) to restore bison herds, and USDA entered into a formal MOU with ITBC to support Tribal bison conservation. In the Fall of 2024, the Bison Management Apprenticeship Program was launched with ITBC hiring a program coordinator and by December 2024, the Program selected ten to twelve apprentices as the inaugural cohort. The coursework and practicums will include working with federal, Tribal, and NGO bison herds to offer a wide variety of hands-on experience in herd management. Students will graduate from the program and receive a Department of Labor bison herd management certificate. The certificate for bison herd management will enable preferential hiring for federal positions and tuition credits for the university/college of their choice.

Tribal-Led Bison Restoration. The DOI and USDA worked with Native Americans in Philanthropy, World Wildlife Fund, The Nature Conservancy, and InterTribal Buffalo Council to develop a public-private partnership to increase and leverage funding for Tribal-led bison restoration called the Tribal Buffalo Lifeways Collaboration. In July 2024, the philanthropic and non-profit partners officially signed a charter and launched the bison fund to support Tribal-led bison restoration. This new, historic alliance was created to stabilize, establish, and expand Tribal-led buffalo (bison) restoration, and foster cultural, spiritual, ecological, and economic revitalization within Native communities. Together, the partners have committed to build on the momentum created by Indigenous leaders to bring lasting structural change and return buffalo to Tribal lands at an unprecedented scale. In November 2024, the Interior Department's BIA announced the availability of \$5 million from the Inflation Reduction Act for Habitat Restoration, to support the restoration of bison populations and grassland ecosystems in Tribal communities. The funding will support Tribally led initiatives to strengthen bison conservation and expansion, improved management of existing herds, and ecosystem restoration efforts for bison habitats.

FOOD SOVEREIGNTY

Indigenous Meat Processing Grants Awarded. In FY 2024, USDA awarded \$42.5 million in additional grants to eight Tribal Nations through Indigenous Animals Harvesting and Meat Processing Grants, to build on the first four that were announced at the 2023 Tribal Nations Summit. The funding will help expand processing opportunities using modern and traditional harvesting methods for animals that are native to North America like bison, reindeer, and salmon, and benefit Tribes in Alaska, Maine, Montana, Nebraska, North Carolina, Oregon, and Washington. USDA designed the program to support priorities voiced by Tribal Nations over two years of consultations. This program marks the first joint collaboration supporting Tribal

economic and food sovereignty interests through three USDA agencies: the Rural Business Cooperative Service, the Agricultural Marketing Service, and the Office of Tribal Relations.

Meat and Poultry Processing Technical Assistance Program (MPPTA). Through the MPPTA, USDA invested nearly \$25 million to establish cooperative agreements with seven organizations to provide technical assistance on the development and expansion of independent meat and poultry processors at no cost to the beneficiary. Both the lead partner, the Flower Hill Institute, and the Intertribal Agriculture Council collaborate with USDA on these efforts and represent significant knowledge of coordinating across Indian Country. Technical assistance will continue to be available until December 2026.

Bison Fee Reimbursement Program: In 2024, USDA is partnering with the Flower Hill Institute to stand up a \$700,000 program reimbursing federally inspected meat processing establishments for voluntary bison inspection fees incurred by Native American owned meat processing facilities or facilities operating on Tribal lands.

Expanding Traditional Indigenous Foods in School Meals. On June 5, 2024, USDA awarded \$2.3 million in grants to five organizations to support Child Nutrition Programs serving more traditional Indigenous foods to Tribal and Native Hawaiian communities. As part of USDA's commitment to expanding the use of traditional Indigenous foods in school meals and other child nutrition programs, these grants were awarded across the country to maximize the number of Tribal communities being served.

Final Rules for Traditional Indigenous Foods in School Meals. In April 2024, USDA published final regulations to allow schools serving primarily American Indian or Alaska Native children to offer vegetables, including traditional starchy vegetables such as tumpula (also known as or prairie turnip), in place of grains in reimbursable school meals. The final regulations also encourage schools to offer traditional Indigenous foods in school meals. These changes will support serving traditional Indigenous foods in school meals, supporting Indigenous food systems and local economies.

BIE and Native American Agriculture Fund Partnership. In June 2024, the Interior Department's Bureau of Indian Education and the Native American Agriculture Fund (NAAF) announced a new partnership through which NAAF will invest \$50,000 to develop high school agricultural lessons. The partnership launched in Fort Wingate, New Mexico and has expanded to include a pilot program at Chemawa Indian School in Salem, Oregon, where supplemental education materials will enhance existing curricula with hands-on learning experiences. The Pilot Program aims to provide traditional Indigenous foods and adopt Indigenous-based land and agricultural management practices for BIE-operated schools and BIA-operated detention centers.

FDPIR Enhancements Implemented. In October 2024, USDA published final regulations to make access and parity improvements within several food distribution programs, including the Food Distribution Program on Indian Reservations (FDPIR). FDPIR Tribal leaders have often expressed concern in Nation-to-Nation consultations about the lack of parity between FDPIR and the Supplemental Nutrition Assistance Program (SNAP) with respect to the Food and Nutrition

Services' (FNS) ability to waive or modify specific regulatory requirements in certain situations. Previously, USDA could only waive FDPIR administrative requirements during Presidentially declared disasters or emergencies, where SNAP waiver authorities are much broader. The final regulations are expected to create more equitable flexibilities for FDPIR in parity with SNAP.

FDPIR Self-Determination Demonstration Project. In June 2024, USDA participated in a Nation-to-Nation consultation on FDPIR self-determination, which was authorized and funded by the 2018 Farm Bill. During the consultation, Tribal leaders expressed their approval of the project, and their desire for its expansion and permanency. A total of sixteen Tribes received nearly \$9 million in funding from the USDA Food and Nutrition Service to participate in the self-determination demonstration project. Foods offered include fresh produce, meats, fish, wild rice, and beans mainly sourced from Tribal vendors.

Encouraging Expansion of The Emergency Food Assistance Program (TEFAP) in Tribal Lands. The USDA Food and Nutrition Service finalized regulations to encourage more emergency food assistance (food banks) to be provided to Tribal areas in October 2024. The Food Distribution Programs: Increasing Access and Parity rule encouraged TEFAP State agencies and eligible recipient agencies to implement or expand TEFAP distributions in rural, remote, and Tribal areas. Previously, State agencies and ERAs were only encouraged to implement or expand the program within rural areas.

Child Nutrition Pilot Project. In June 2024, USDA's Food and Nutrition Service (FNS) engaged in Nation-to-Nation consultation with Tribal leaders on how USDA can best deliver the pilot project authorized by Sec. 758(a) of Division B of the Consolidated Appropriations Act 2024 (P.L. 118-42), which appropriated \$2 million for pilot projects to Tribal organizations to operate Child Nutrition Programs as a State agency. Tribal leaders and child nutrition program operators provided thoughtful input to FNS on project options, potential resource needs, and related matters that will help FNS and the USDA pilot project workgroup deliver the pilot project in partnership with Tribal Nations.

Summer EBT Partnerships with Tribal Nations: In May 2024, the USDA Food and Nutrition Service launched SUN Bucks, or the Summer Electronic Benefits Transfer for Children Program (Summer EBT), and two Tribal Nations participated in the first year: the Cherokee Nation and the Chickasaw Nation. This program extended critical summer food access for children eligible for free or reduced-price school meals, providing them with up to \$120 per child for the summer months. Starting in May 2024, both Tribal Nations increased food and nutrition security for thousands of children. Cherokee Nation and Chickasaw Nation estimated serving over 148,000 and 110,000 eligible children in summer 2024, respectively. This partnership is a powerful recognition of Tribal sovereignty and Tribes' ability to increase food and nutrition security for children in Tribal communities. FNS also provided technical assistance to several other Tribal Nations that are interested in implementing the Program in a future year.

Security Backup Seed Protections: The USDA Agricultural Research Service (ARS) is increasing Tribal partnerships and data sovereignty in its "Seed Bank" at its National Laboratory

by Genetic Resources Preservation in Fort Collins, Colorado, where security backup seed collections are maintained by the National Plant Germplasm System as well as other eligible entities. New language has been added to provide clarification on seed storage agreements that allow Tribal seed bank deposits to remain private, allowing them to be stored safely with them to be stored safely without entering the public domain. USDA is developing templates and outreach strategies to extend these agreements to more Tribes for seed storage and food security.

Food Purchases from Tribal Nations – Local Food Purchase Assistance Program (LFPA).

Continuing in 2024, USDA provided nearly \$112 million through the Local Food Purchase Assistance Plus program for Tribal Nations to purchase minimally processed food from underserved and tribal producers and distribute that food through their communities. LFPA provided noncompetitive cooperative agreements with tribal governments to procure and distribute local and regional foods that are unique to their geographic area. The indigenous foods meet the needs of the population, and serve feeding programs, including food banks, schools and organizations that reach underserved communities. Nearly 100 Tribal nations submitted partnership proposals under this program.

USDA Launches National InterTribal Food Business Center to Support Resilient Tribal Food Systems.

The National Intertribal Food Business Center will open its first funding opportunity by the end of 2024 for Business Builder awards. These awards of up to \$100,000 will be offered to small and medium-sized food producers and businesses over the next 4 years, for a total of more than \$20 million. The Center has engaged partners to develop collaborative strategies for identifying and meeting needs of Tribal food producers and businesses, as well as identify national and regional needs and opportunities.

Agricultural Leasing Regulations. Agriculture continues to play an important role in Tribal cultures and economic systems. Following consultation and public listening sessions with Indian Tribes, farmers, ranchers, and intertribal organizations, the Interior Department revised the Indian Agricultural Leasing regulations with a proposed rule that it is seeking to publish before year-end 2024. Modernizing the regulations will better enable Tribes and producers to manage their lands, implement sustainable and regenerative agricultural practices, and continue Tribal traditions of self-sufficiency.

HEALTHCARE

MENTAL HEALTH/ BEHAVIORAL HEALTH

Tribal Behavioral Health Agenda: SAMHSA created a website to increase accessibility and awareness of the National Tribal Behavioral Health Agenda (TBHA). The website includes relevant and updated links to a variety of resources and trainings that are aligned with Tribally developed foundational elements, priorities, and strategies. The website also allows for improved navigation of the Cultural Wisdom Declaration, a repository of agency strategies and Tribal data information, as well as a training that has been developed to educate on the contents and how to navigate the TBHA. SAMHSA is working to continually maintain and update the website, which

will help support a collaborative focus on aligning Federal and Tribal priorities around behavioral health.

Suicide Prevention: On April 23, 2024, the Biden Harris Administration, through HHS, released the final 2024 National Strategy for Suicide Prevention (National Strategy) and accompanying Federal Action Plan. SAMHSA and Centers for Disease Control and Prevention (CDC), in partnership with the National Action Alliance for Suicide Prevention (Action Alliance), led the development of these critical deliverables which support the Biden-Harris Administration's priorities to address the overdose and mental health crises, key pillars of the Biden-Harris Unity Agenda. An Interagency Work Group (IWG) comprised of over 20 agencies in 10 federal departments across the government contributed to the development of the National Strategy.

SAMHSA Tribal Prevention Summit: The SAMHSA Tribal Prevention Summit, held on August 6-7 in St. Louis, Missouri, provided an opportunity to gather innovative, holistic, and urgently needed prevention programming across AI/AN communities. Summit participants discussed best practices and shared practical knowledge and experiences related to expanding AI/AN prevention programs and opportunities in Suicide Prevention, Substance Use Disorder Prevention, Overdose Prevention, Alcohol Use Disorder Prevention, and Behavioral Health Support. Tribes and Tribal organizations convened to provide evidence of successful service to AI/AN communities, identification of emerging and innovative areas that require focus to guide prevention work and increase shared knowledge about effective prevention in AI/AN communities nationwide. SAMHSA supports prevention work as an inclusive continuum of care, from harm reduction to recovery support, across the lifespan. The summit is a continuation of SAMHSA's ongoing Tribal summit series.

The National Center for Domestic Violence, Trauma and Mental Health (NCDVTMH): The Office of Family Violence Prevention and Services (OFVPS) at the Administration for Children and Families (ACF) under the Department of Health and Human Services (DHHS) provides funding under the Family Violence Prevention and Services Act (FVPSA) to a Special Issue Resource Center, called the (NCDVTMH). The NCDVTMH provides an array of training and technical assistance support to the domestic violence (DV) field and out to FVPSA's recipients nationally offering specific expertise on trauma, substance use and mental/behavioral health (MH/BH). The NCDVTMH has traveled to several tribes and sovereign nations to provide activities related to addressing mental and behavioral health that include: Accessible, Culturally Responsive, and Trauma-Informed (ACRTI) Café (an opportunity for colleagues in the domestic violence and sexual violence fields to discuss strategies to integrate ACRTI values into work and organizational culture); creating a Mind-Body-Spirit Toolkit to support holistic approaches to healing and wellness; developing an array of resources supporting collaboration between the DV and mental health fields as part of the [Survivor Health Consortium](#), focused on increasing safe access for survivors across DV, MH, and BH services.

Demonstration Grants to Strengthen the Response to Victims of Human Trafficking in Native Communities: The Administration for Children and Families, Office on Trafficking in Persons: In 2024, OTIP continued funding direct services, assistance, and referrals, including

healthcare and behavioral health services, to Native American (i.e., American Indians, Alaska Natives, Native Hawaiians, and/or Pacific Islanders) victims of human trafficking through the Demonstration Grants to Strengthen the Response to Victims of Human Trafficking in Native Communities Program.

Bureau of Indian Education Behavioral Health and Wellness Program. Over the past year, the Bureau of Indian Education (BIE) has successfully grown its Behavioral Health and Wellness Program (BHWP). The BHWP provides students and staff at all Bureau-funded schools and programs with Indigenous focused, evidence-based and trauma-informed behavioral health and wellness supports. Services are tailored to meet the unique and diverse mental, cultural, spiritual, emotional, and social needs of Indigenous communities served by BIE. Services include tele-behavioral health counseling focused on providing short-term, solution-focused, and culturally sensitive virtual counseling, a BIE-specific 24/7 call line, and crisis support. BHWP’s clinical team is primarily staffed with Indigenous clinicians, who have direct experience serving Native communities.

PUBLIC HEALTH

American Indian and Alaska Native Workshops on Syphilis. HHS is leading a workshop series to gather community input on how best to improve syphilis and congenital syphilis outcomes, including how to better support community efforts to improve health equity and support related syndemic, sexual, and reproductive health services. In January 2024, the series began with two workshops - one with American Indian and Alaska Native tribes on January 23 and the other with providers who represent people disproportionately affected by syphilis and congenital syphilis on January 30. In February, additional workshops were held on syphilis prevention, treatment, and other related issues.

INDIAN HEALTH SERVICE IMPROVEMENTS

Centers for Medicare and Medicaid Services (CMS) Calendar Year (CY) 2-25 Outpatient Prospective Payment System (OPPS) final rule, CMS-1809-F was issued on November 1, 2024. The CY 2025 OPPS final rule contains three tribal provisions. CMS amended the Medicaid clinic services regulation to authorize Medicaid coverage for clinic services furnished by IHS and Tribal clinics outside the “four walls” of their facilities. In addition, states implementing the Medicaid clinic services benefit can opt to cover clinic services furnished outside the “four walls” of behavioral health clinics or clinics located in rural areas. To improve Medicare payments to IHS and tribal hospitals, and better account for the costs of high-cost drugs furnished to people with Medicare seeking care at these facilities, the rule also finalized a proposal to pay an add on payment for high-cost drugs and biologics that significantly exceed the IHS Medicare Outpatient All Inclusive Rate (AIR). Finally, CMS discussed comments received in response to a Request for Information—Paying all IHS and Tribally Operated Clinics the IHS Medicare Outpatient AIR.

Traditional Health Care Practices 1115 Demonstration Proposals. On October 16, 2024, the U.S. Department of Health and Human Services (HHS), through the Centers for Medicare & Medicaid Services (CMS), approved section 1115 demonstration amendments that allow, for the first time ever, Medicaid and Children’s Health Insurance Program (CHIP) coverage of traditional health care practices provided by Indian Health Service (IHS) facilities, Tribal facilities, and urban Indian organizations (UIO). Approval of the demonstrations are expected to improve access to culturally appropriate health care and improve the quality of care and health outcomes for tribal communities in Arizona, California, New Mexico, and Oregon, and will support IHS, Tribal, and UIO facilities in serving their patients

HHS announced publication of brand new Tribal and Tribal Epidemiology Center Data Access Policies. The HHS-wide policies included guidance on data available to Tribes and Tribal Epidemiology Centers and establishes protocols for responding to Tribal epidemiology data requests. By improving and clarifying how the Department will provide data to Tribes and Tribal Epidemiology Centers, HHS seeks to advance health equity for AI/ANs and eliminate data disparities facing Tribes. These policies will help ensure that HHS is sharing data with Tribes to the maximum extent permissible under federal laws, regulations, and existing agreements, and enhance the social, physical, spiritual, economic, and health status of AI/ANs.

SUBSTANCE USE

Tribal Opioid Response Grants. In September 2024, HHS, through the Substance Abuse and Mental Health Services Administration (SAMHSA), awarded \$63 million in funding for its Tribal Opioid Response (TOR) grant program, an increase in \$8 million from FY 2022. Based on feedback received at Tribal Consultation, the TOR program has been extended from a 2-year program to a 5-year program. For FY 2024, TOR funding includes supplemental funding for Tribes with the highest OUD-related mortality rates. This program reflects HHS’s commitment to addressing opioid use disorder in and outside of Tribal communities—one of the four Unity Agenda priorities of the Biden-Harris Administration.

Substance Use harm mitigation. The IHS National Supply Service Center also now stocks fentanyl test strips to support sites’ efforts to create access to drug checking equipment used to mitigate harm and save lives.

INDIGENOUS CITIZENS WITH DISABILITIES

Disabilities within Indian Country. The Administration for Community Living (ACL) collaborated with ACL Administration of Disabilities (AoD) with their work on the Native American Action Plan which will serve American Indian/Alaska Native, Native Hawaiian, and Pacific Islander Indigenous populations and communities. ACL also assisted with providing culturally appropriate support toward their efforts for indigenous citizens with disabilities and their communities.

PUBLIC HEALTH FUNDING

Quality Improvement Award Funding. In June 2024, the Health Resources and Services Administration (HRSA) awarded \$55 million in one-time FY 2024 funding to all health center grantees. This funding is supporting HRSA-funded health centers to prepare for and implement programs and technologies to modernize the Uniform Data System for submitting health center data. A total of \$1,161,508 was awarded to the 35 tribal and Urban Indian health centers. Funding was allocated on a formula including a base amount and a per patient amount based on 2023 patient data.

Behavioral Health Service Expansion to Health Centers. On September 19, 2024, HRSA announced \$240 million in awards to launch and expand mental health and substance use disorder services in more than 400 community health centers across the country that care for more than 10 million people. These grants will help expand access to needed care to help tackle the nation's mental health and opioid crises – two pillars of the Biden-Harris Administration's Unity Agenda for the nation. Four Tribal facilities from Arizona, Utah, and Arizona were awarded over \$2.2 million to support their health services.

Elder Justice. Through the Administration for Community Living, the Tribal Elder Justice Innovation Grant (TEJIG) in collaboration with Administration for Community Living (ACL) Office of Elder Justice awarded six new cooperative agreement to the Confederated Tribes of the Grand Ronde Community of Oregon, the Swinomish Indian Tribal Community, Oneida Nation, the Kiowa Tribe of Oklahoma, the St. Regis Mohawk Tribe, and the Nisqually Indian Tribe. The six awardees will focus on identifying the needs of their communities related to elder abuse, neglect, and exploitation, facilitating multidisciplinary elder justice activities, and to prevent/respond to, or address abuse, neglect, and exploitation.

Caregivers and Grandparents Raising Grandchildren. The Native American Caregiver Support Program will initiate strategies with the National Strategy to Support Family Caregivers.

Behavioral Health Grant Awards. In FY 2024, SAMHSA released 19 Notice of Funding Opportunities (NOFOs) available to Tribes and Tribal organizations. These NOFOs provide grants to Tribal communities aimed at improving behavioral health by preventing and reducing suicidal behavior and substance use/misuse, reducing the impact of trauma, and promoting health among Native youth. SAMHSA anticipates funding over 150 grants to Tribes and/or Tribal organizations in FY 2024.

NATIVE CHILDREN AND FAMILIES

REPRODUCTIVE HEALTHCARE

Tribal Personal Responsibility Education Program. The Family Youth Service Bureau's Adolescent Pregnancy Prevention Program through the ACF continues to fund seven Tribal PREP grantees that target services to Alaskan Native/American Indian (AI) youth most at risk for teen pregnancy and contracting sexually transmitted infections. Tribal PREP efforts are dedicated to developing, delivering, and evaluating culturally appropriate interventions and services that rely on the best available research to inform and guide practice.

CHILD CARE/ FAMILY WELFARE

Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule. On December 5, 2024, ACYF published a final rule that amends the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations to require state title IV-E agencies to collect and report additional data related to the procedural requirements related to the Indian Child Welfare Act of 1978 (ICWA). ACYF heard from Tribes directly and agrees that gathering more ICWA-related data will help ACF, researchers, and other policymakers better understand the status and experiences of American Indian/Alaskan Native (AI/AN) children and families interacting with the state child welfare systems and better address the continuing overrepresentation in foster care and other outcomes that Native children experience. While the information that is currently required to be reported in AFCARS is helpful, it does not provide sufficient information about the unique factors particular to Native children to meaningfully inform policymaking. More complete data collection will provide a foundation for improved policy development, targeted technical assistance, and focused resources. Collecting more data elements related to ICWA's procedural requirements would enable HHS, other Federal agencies, and the states to target policy development, training, and technical assistance to specific areas of need. This could assist in efforts to mitigate disproportionality for children and families, support pathways to timely permanency for these children, and help maintain the integrity of tribal communities, and may provide insight into potential areas for technical assistance and supports to help improve child welfare outcomes.

National Tribal Child Welfare Center for Innovation and Advancement. On September 30, 2024, the Children's Bureau (CB) in ACF awarded the following grants to strengthen Tribal child welfare programs, Tribal courts, and State-Tribal partnerships to improve outcomes for Tribal children and families. CB awarded a 5-year cooperative agreement for the National Tribal Child Welfare Center for Innovation and Advancement. The first-year award will total approximately \$4,370,000. The Center will serve as CB's primary vehicle for delivering effective, high-quality technical assistance (TA) to American Indian and Alaska Native Nations (AI/AN) participating in the Title IV-B and Title IV-E programs. TA provided will enhance organizational and system performance, and improve outcomes for Tribal children, youth, and families by honoring Indigenous Ways of Knowing and working collaboratively to ensure the preservation of Tribal cultures.

Tribal Court Improvement Program grants. CB will award up to four (4) new Tribal Court Improvement Program grants. Each grant recipient will receive an award of up to \$150,000 per year for four years. Projects will help Tribal courts assess and improve how they handle American Indian and Alaska Native child welfare cases.

State-Tribal Partnerships to Implement Best Practices in Indian Child Welfare. CB will award up to six (6) new grants for State-Tribal Partnerships to Implement Best Practices in Indian Child Welfare. Each grant recipient will receive an award of up to \$500,000 per year for four years. The grants will help create and implement intergovernmental partnership models to improve existing and develop new best practices in family preservation and reunification efforts for Indian children. Recipients will serve as demonstration sites to design and implement projects to effectively develop and implement child welfare best practices to prevent the placement of Indian children outside their Tribal communities and improve equity in cases involving Indian families.

Improved Process for Tribal Early Childhood Facilities Construction and Major Renovation Projects. At the 2024 Tribal Nations Summit, the Administration for Children and Families (ACF), Office of Child Care (OCC), Office of Head Start (OHS), and Office of Early Childhood Development (ECD) announced the release of a combined application and streamlined process for Tribes to use Head Start and Tribal Child Care and Development Fund (CCDF) resources for early childhood facilities construction and major renovation projects. This will significantly reduce burden for jointly funded projects.

Tribal Maternal, Infant, and Early Childhood Home Visiting (MIECHV) Program. In an effort to support Native families and children, the ACF Office of Early Childhood Development continues to implement a significant expansion of the Tribal MIECHV program. In late 2022, President Biden signed legislation doubling the MIECHV Tribal set-aside from 3 to 6 percent, and the total amount of funds made available for the Tribal MIECHV grants increased from \$12 million in FY 2022 to \$33 million in FY 2024. This expansion in grant funding for Tribes, Tribal organizations, and Urban Indian Organizations (UIOs) led to awarding 47 grants in FY 2024 (including 6 new grants to communities without existing Tribal MIECHV programs), compared to 23 grants in FY 2022. Grant recipients will serve 68 Tribal Nations and 17 urban Indian communities. At the 2024 Tribal Nations Summit, HHS will announce its plan to issue an additional Notice of Funding Opportunity (NOFO) in FY 2024 for the Tribal MIECHV Program.

Elimination of the Tribal Non-Federal Share Requirement in the Child Support Program. The Administration for Children and Families (ACF) published the final rule on February 12, 2024, which eliminates the requirement for Tribal child support program expenditures. This rule will be in effect for FY 2025 funding and beyond. By eliminating the non-federal share, we aim to promote equity and honor Tribal sovereignty, recognizing the trust relationship between the federal government and Tribal Nations. Under the new rule, the federal government will fully fund both new and existing Tribal child support programs. This change is designed to enhance efficiency, alleviate financial burdens, and ensure equitable access to essential services for Tribal families and children. Removing the non-federal share requirement will have significant implications for Tribal child support programs, including:

- **Enhanced Services:** With full federal funding, Tribal programs can expand their services, including paternity establishment, child support enforcement, and family-centered support.
- **Equitable Access:** Removing financial burdens ensures that Tribal families have equal access to essential services.
- **Cultural Alignment:** By aligning with Tribal values and cultures, programs can better serve their communities, respecting traditions, and local context.

New Eligibility Provisions for American Indian and Alaska Native (AIAN) Head Start Programs. On March 23, 2024, President Biden signed into law the Further Consolidated Appropriations Act, 2024 (Public Law 118-47), which provides FY (FY) 2024 appropriations for several federal departments and agencies. Section 238 of Division D of the Further Consolidated Appropriations Act, 2024 included a new provision that gives Tribes increased flexibility in determining which children are eligible for Tribal Head Start programs. This provision clarifies that Tribes have the discretion, using their selection criteria, to enroll any child in their service area who would benefit from Head Start programs regardless of income, including children in families for which a child, a family member, or a member of the same household, is a member of an Indian tribe. The purpose of this provision is to provide Tribes with the autonomy to determine which children to prioritize for the Head Start program. This policy could increase the number of children in Tribal communities who have an opportunity to participate in Head Start, including learning their Native language and experiencing their culture while enrolled in Head Start programs.

Increased Flexibility for Tribes in Child Care and Development Fund (CCDF) Eligibility. In November, 2024, this final rule allowed all Tribes and Tribal Organizations operating CCDF programs, at their discretion, to establish and use eligibility criteria regardless of family income. This final rule facilitates better alignment between Tribal CCDF and Tribal Head Start so that Tribes can look more holistically at their early childhood funds to best serve the families in their communities and honors Tribal sovereignty by creating flexibility so that Tribes can determine which children to serve in their communities.

ACCESS TO AFFORDABLE HEALTHCARE

PRC Expansion. The Purchased/Referred Care (PRC) Program purchases services from private health care providers for eligible American Indian and Alaska Natives when (1) no IHS or Tribal direct care facility exists, (2) a facility cannot provide required emergency and/or specialty care, (3) a facility's capacity is exceeded, and (4) supplementing alternate resources is necessary for comprehensive care. In June 2023, IHS updated the PRC Program's medical priorities to integrate all aspects of the care continuum, in a balanced way that is evidence-based, outcome-oriented, and consistent.

IHS Indian Health Care Improvement Act. The IHS has prioritized taking every measure to lessen burdens to patients caused by delays in the claims process and to clarify patient financial liability. As a result, pended claims have been reduced by 44%, with the goal of being current by

December 2024. The agency has also added clarity to No Patient Liability Language from Section 222 of the Indian Health Care Improvement Act, clarifying patients are not financially liable for services. Finally, the Catastrophic Health Emergency Fund reimbursement threshold has been lowered from \$25,000 to \$19,000.

Expansion of PRC delivery areas. In 2024, expansion of five PRC delivery areas (PRCDAs) covered Tribal nations such as the Chickahominy Indian Tribe, Chickahominy Indian Tribe-Eastern Division, Monacan Indian Nation, Nansemond Indian Tribe, Pamunkey Indian Tribe, Rappahannock Tribe, and Upper Mattaponi Tribe, and the Spokane Tribe. These redesignations make more people eligible for the PRC Program. PRCDAs expansion is expected to increase even further by December 2024.

New Facilities Construction. IHS is responsible for providing comprehensive primary health care and disease prevention services to approximately 2.8 million American Indians and Alaska Natives in 574 federally recognized Tribes, through a network of over 605 hospitals, clinics, and health stations on or near Indian reservations. Many service recipients reside in reservations or rural communities and lack reliable means of transportation, making access to facilities that offer affordable health care a significant barrier to some. To increase access to affordable health care, IHS has supported the planning and construction of new facilities across Indian Country.

MATERNAL HEALTH

Secretary’s Advisory Committee on Infant and Maternal Mortality

(ACIMM). Administered by the Maternal and Child Health Bureau (MCHB), the ACIMM advises the Secretary of Health and Human Services on department activities, partnerships, policies, and programs directed at reducing infant mortality, maternal mortality, and severe maternal morbidity, and improving the health status of infants and women before, during, and after pregnancy. The ACIMM continues to regularly discuss during meetings efforts to disseminate and promote the “Making Amends: Recommended Strategies and Actions to Improve the Health and Safety of American Indian and Alaska Native Mothers and Infants” report with recommendations to improve birth outcomes of American Indian/Alaska Native (AI/AN) mothers and infants.

HRSA’s National Maternal Mental Health Hotline (NMMHH). (1-833-TLC-MAMA) is a 24/7, 365 day, free, and confidential service that provides direct connections to qualified and professional counselors who are licensed and certified in supporting pregnant and postpartum individuals facing mental health challenges. These services of emotional support, resources, and referrals are provided in English, Spanish, and 60-on-demand languages including Hopi, Choctaw, Yupik, and Navajo via voice and text. HRSA partnered with IHS to help promote the National Maternal Mental Health Hotline.

Increasing Indigenous Foods in the Women, Infants, and Children (WIC) Food Package. In 2024, the USDA Food and Nutrition Service published updates to revise the WIC food packages with the intent of providing a wider variety of foods that align with the latest nutritional science, allowing WIC state agencies greater flexibility to prescribe and tailor food packages that

accommodate participants' personal and cultural food preferences, and supporting equitable access to supplemental foods. The enhancements in the final rule include expanding whole grain options to include foods like quinoa, blue cornmeal, and teff to reflect dietary guidance and accommodate individual or cultural preferences; providing more convenience and options within the dairy category, including flexibility on package sizes and non-dairy substitution options such as plant-based yogurts and cheeses and requiring lactose-free milk to be available; and including canned fish in more food packages, creating more equitable access to this under-consumed food.

VETERANS

VETERANS HEALTH AND CULTURAL COMPETENCY

VA Indian Health Service/Tribal Health Programs/Urban Indian Organization (I/T/U) Reimbursement Agreements Program. The VA Indian Health Service/Tribal Health Programs/Urban Indian Organization (I/T/U) Reimbursement Agreements Program (RAP) provides VA reimbursement to IHS, Tribal Health Program (THP) and Urban Indian Organization (UIO) health facilities for services provided to eligible Native Veterans. The RAP works directly with I/T/U facilities and is seamless to the Veterans accessing their Native health care.

No preauthorization for health care. Under RAP, eligible Native Veterans do not need VA preauthorization to receive health care services at participating I/T/U RAP health facilities.

VA and IHS signed new reimbursement agreement. In 2023/2024 VA expanded the scope of reimbursements to also include Purchased/Referred Care and contracted travel, in addition to direct care provided by I/T/U-operated facilities. On December 6, 2023, VA and IHS signed a new reimbursement agreement; thereafter, VA finalized the THP and UIO templates in June and July 2024, respectively.

VETERANS BENEFITS

Social Security Expanded Outreach Efforts for Veterans. Social Security sought nationwide opportunities to clarify, for military service members, who can receive expedited processing of claims through our Veterans Wounded Warriors Program. To support this effort: On November 15th, SSA partnered with the Veterans Benefits Administration - Outreach, Transition and Economic Development Team at the Native American Heritage Month Symposium to share SSA's goals for FY 2024 to support AIAN populations. On April 19th, SSA presented information on the expedited application process to over 500 veterans and their spouses at the Native American Training Institute Veterans Symposium at the Isleta Tribal event center.

SSA additionally provided FY 2024 goals to enhance third-party video service connections between tribal locations and SSA field offices in an effort to reduce geographic barriers. This video service promotes accessibility for local service in Indian Health Service locations near veterans living in Tribal communities. As a result, SSA enhanced video connections across all sites by 91.4% and specifically with American Indian Alaska Native sites by 53.1%.

CANCER CARE

VA's NOP education campaign. VA's National Oncology Program (NOP) and Office of Tribal Health collaborated to launch an education campaign to develop cancer care and screening education resources to inform the outreach more effectively into the Tribal Veteran communities. This education campaign is ongoing and is initially focused on the top cancers affecting Veterans, and on the cancers where screening has the greatest impact on outcomes like prostate, colorectal, breast, and lung. To reach across the VA enterprise, NOP distributed these cancer screening education materials to VA Medical Centers (VAMCs) with a high population of Native Veterans, the Office of Health Equity, the Office of Rural Health, and the Center for Minority Veterans. Through the Office of Tribal Health, cancer screening education materials have been distributed by National Outreach Managers and VISN Tribal Health Coordinators.

REVISED VA HEALTHCARE ENROLLMENT FORM

VHA Data Collection. The VHA Office of Tribal Health (OTH) identified the need to improve the collection of American Indian/Alaska Native Veteran data. OTH and the VHA Health Eligibility Center partnered to revise the 10-10EZ form to reflect "American Indian/Alaska Native" and allow for the selection of two or more races. These changes further improve VA's data by reflecting a more accurate number of Native Veterans enrolled in VA health care.

PREVENTING SUICIDE AMONG SERVICE MEMBERS, VETERANS, AND THEIR FAMILIES

Expanding the "Governor's Challenge to Prevent Suicide Among Service Members, Veterans, and their Families". VA is working collaboratively with the Substance Abuse Mental Health Services Administration (SAMHSA), and have expanded the *Governor's Challenge to Prevent Suicide Among Service Members, Veterans, and their Families* (SMVF), which is now active in all 50 states and five territories. While the Governor's Challenge has been pivotal in supporting state SMVF suicide prevention work, a new model is being developed in partnership with Tribal Sovereign Nations. VA and SAMHSA are working to ensure that their collaborative efforts to support Native Veterans and their families, both elevate and celebrate the knowledge, service, and contributions of our Native communities.

AMERICAN INDIAN/ALASKA NATIVE VETERAN COPAYMENT EXEMPTION

Copay Exemption for eligible Native Veterans. To honor Native Veterans and treaties with sovereign nations, eligible Native Veterans no longer have a copayment for certain care received from VA. VA will also reimburse eligible Native Veterans for certain copayments for VA health care services provided on or after January 5, 2022. The copayment exemption aims to address health care access and health care disparities experienced by Native Veterans by eliminating certain copayment requirements so that Veterans are more likely to utilize the benefits they have earned. Since implementation and as of June 8, 2024, 5,409 Native Veterans have been approved for the copayment exemption, and more than 200,000 copayments have been exempted and/or reimbursed totaling more than \$4 million.

TRADITIONAL HEALING SUMMIT

HHS hosted 2024 Traditional Healing Summit. The Department of Health and Human Services (HHS) hosted the 2024 Traditional Healing Summit. The Centers for Medicare & Medicaid Services (CMS), IHS, OTH, and other partners served on the interagency planning committee. The primary goal of the Summit is to partner with Traditional Healers and agency leaders. to continue to offer and expand Traditional Healing Services in Federal Agencies.

TRIBAL CLAIMS CLINICS / PACT ACT EVENTS IN INDIAN COUNTRY

PACT Act events. The VA Office of Tribal Government Relations has coordinated over 30 Claims Clinics/PACT Act events in FY24 in Indian Country. Tribal Native Women Who Served in the Military: Addressing Post-Military Needs/Issues/Concerns.

Tribal Women Veterans Summit. On October 21, 2024, VA and the Muscogee Nation hosted their fifth annual Tribal Women Veterans Summit in Tulsa, Oklahoma during which VA Deputy Secretary Tanya Bradsher addressed Tribal women Veterans in a roundtable discussion. VA, hosted by Tribal Nations, held four Tribal Women Veterans Summits, addressing their needs, concerns, and issues related to topics, from women's health care, mental health, PTSD, TBI, suicide prevention, IPV/Domestic Violence, addressing and/or marrying military, to traditional culture-addressing those traditional barriers, and moral injury. Currently, many programs and services exist, culturally, for Native male Veterans, but not for Native female Veterans. These summits provide the opportunity to provide Native women Veterans a voice, and provides those who serve them an understanding of how to better serve this unique population.

VA CLINIC ON THE CHEROKEE NATION IN VINITA, OKLAHOMA

Historical agreement between Cherokee Nation and Eastern Oklahoma VA Health. The Cherokee Nation and the Eastern Oklahoma VA Health Care System signed a historic agreement to provide a VA clinic inside the Tribe's Vinita Health Center for area Veterans. The Tribe provides approximately 1,300 square feet of leased space for the VA Clinic. The VA clinic serves Native Veterans and non-Native Veterans in the region.

VA-IHS OPEN CLINIC-IN-A-CLINIC

VA and IHS grand opening of Clinics. VA and IHS celebrated the grand opening of VA Clinics within IHS Facilities at both Chinle and Kayenta, AZ in the Spring of 2024. IHS is allowing VA Providers to see patients in the IHS clinic space at both of these remote locations.

VHA-IHS REIMBURSEMENT AGREEMENT

IHS reimbursement signed. Through listening to Tribal Leaders, VA and IHS were proud to announce that in December 2023, the revised VHA-IHS Reimbursement Agreement was signed. Under this agreement, VA reimburses IHS for direct care provided to Native Veterans, and it now includes VA reimbursement for purchased and referred care (PRC) and contract travel.

IHS-VA Claims Processing Guide. To accompany the revised reimbursement agreement, the IHS and VA drafted, negotiated, and reached agreement on an *IHS-VA Claims Processing Guide* that outlines the process for claims to be submitted by the IHS and adjudicated by VA. Also, Tribal nations may enter into their own reimbursement agreements with VA if they so choose. Since the inception of this collaboration, our joined health care programs have mobilized over \$186 million from VA, extending comprehensive care to more than 15,000 veterans across 74 IHS sites and 116 Tribal health program sites.

LOWER 48 REIMBURSEMENT AGREEMENT FOR TRIBAL HEALTH PROGRAMS AND URBAN INDIAN ORGANIZATIONS

Tribal Health Program. VA implemented a revised VA-Tribal Health Program (THP) and Urban Indian Organization (UIO) Reimbursement Agreement template for the Lower 48 states. This agreement template replaces and expands upon the prior direct care agreements between VA and THPs/UIOs, originally executed beginning in 2012. This significant update underscores VA's commitment to strengthening the partnership between VA and THPs/UIOs to share resources and enhance access to health care services for Native Veterans. The revised agreement

template includes several key improvements designed to expand the scope of reimbursements and honor the unique capabilities and traditions of THPs/UIOs.

NATIVE VETERAN HOMELESSNESS

Stand Downs HUD-VASH. VA will support Stand Downs in urban areas with the highest-documented populations of Native Veterans, collect and utilize Native Veteran data, identify best practices, and conduct post Stand Down outreach. Stand Downs are one-to-three-day events during which VA staff and volunteers provide food, clothing, and health screenings and referrals to homeless and at-risk Veterans. Tribal HUD-VASH will continue to provide supportive housing to Native Veterans who are experiencing or at risk of homelessness.

NATIVE VETERAN NATIONAL SUICIDE PREVENTATION AND INTERVENTION STRATEGY

VHA Office of Tribal Health strategy. The VHA Office of Tribal Health is in the initial stages of developing a Native Veteran National Suicide Prevention and Intervention Strategy. The strategy will align to the VHA-IHS MOU and leverage the expertise and resources of VHA and IHS to support Native Veterans and communities.

HOUSING

Supporting Tribal Communities Through Service Memorandum of Understanding. The U.S. Department of Housing and Urban Development's Office of Native American Programs and AmeriCorps proudly announce the signing of a new Memorandum of Understanding (MOU) to support Tribal communities through national service. This MOU creates a collaborative framework to place AmeriCorps National Civilian Community Corps (NCCC) members at Tribal sites funded under Housing and Urban Development programs, supporting affordable housing and community development initiatives. This partnership benefits Indian tribes, Tribally Designated Housing Entities, and the Department of Hawaiian Home Lands, fostering mutual collaboration on programs, projects, training, and fieldwork. This agreement underscores the federal government's commitment to honoring the Trust responsibility while empowering Tribal self-determination. We look forward to the positive impact this partnership will have on Tribal communities and their housing and development needs.

Rural Community Development Program. HHS's ACF Office of Community Service (OCS) is currently in preproduction on several videos that highlight OCS-funded work including Community Services Block Grant (CSBG), Rural Community Development Program (RCD), and the Affordable Housing and Supportive Services Demonstration Program among tribes, specifically in Oklahoma and Alaska. OCS has produced seven videos that highlight OCS' Community Services Block Grant (CSBG), the Low-Income Home Energy Assistance Program (LIHEAP), and the Rural Community Development program (RCD) funded services in tribal communities in Alaska, Arizona, Colorado, and New York. Videos remain available.

Reinforcing Water and Sanitation Infrastructure for Tribal Housing. HUD and IHS are partnering to co-host a Tribal consultation to understand the existing barriers for Tribes to access water and sanitation infrastructure funding and how IHS and HUD can work together to better serve Tribes and honor Tribal self-determination.

Building Equity for Tribes in HUD's Programs. In alignment with Executive Order 14112 and supported by HUD's TIAC, HUD has worked across the Department to commit new set-aside funding for Tribes. These new dedicated resources will expand Tribes' ability to serve their communities and better address local housing needs.

USDA Establishes New MOU on Tribal Guaranteed Housing Loans. This year, USDA Rural Development's Rural Housing Service entered into the first Memorandum of Understanding with a nationwide lending partner with considerable experience in lending on Tribal trust lands, 1st Tribal Lending. Through these efforts Tribal citizens will have increased access to homeownership financing and Native Community Development Financial Institutions can collaborate with 1st Tribal Lending to originate and sell their loans to a secondary market investor. Through this approach, USDA anticipates increasing lender interest in utilizing this program to provide additional housing loans on Tribal trust land.

Convene a National Tribal Home Ownership and Asset Building Summit. On November 20-21, 2024, HUD hosted a national Native Homeownership & Asset Building Summit. The event will include speakers from a wide array of Federal agencies, financial institutions, and non-profit organizations. The breakout sessions and plenary speakers will highlight Federal and non-Federal resources that support homeownership and asset building for Tribal community members.

Increasing Native Homeownership through the Section 184 Program. On March 20, 2024, HUD published a final rule titled "Strengthening the Section 184 Indian Housing Loan Guarantee Program." This marks the culmination of many years of cumulative work between HUD, lenders, and Tribes.

Tribal/Interagency Streamlining Toolkit (TIES). HUD leads the Tribal Housing and Related Infrastructure Interagency Task Force and is excited to share the Tribal/Interagency Environmental Streamlining Toolkit (TIES).

Tribal Safe Housing Center: The Office of Family Violence Prevention and Services (OFVPS) at the Administration for Children and Families (ACF) provides funding under the Family Violence Prevention and Services Act (FVPSA) to the National Indigenous Women's Resource Center (NIWRC)'s Safety, Training, Technical Assistance and Resources Support (STTARS) Project as the national capacity building center for safe and supportive housing for domestic violence survivors in tribal communities. STTARS focus on developing and delivering comprehensive TTA in a culturally appropriate, relevant and sensitive manner on meeting the housing needs of Indigenous including Alaska Native and Native Hawaiian survivors living in tribal communities.

Demonstration Grants to Strengthen the Response to Victims of Human Trafficking in Native Communities: The Administration for Children and Families: In 2024, OTIP continued funding direct services, assistance, and referrals, including housing, to Native American (i.e., American Indians, Alaska Natives, Native Hawaiians, and/or Pacific Islanders) victims of human trafficking through the Demonstration Grants to Strengthen the Response to Victims of Human Trafficking in Native Communities Program.

USDA Provides Additional Homeownership Opportunities through the Native Community Development Financial Institutions (CDFIs) Relending Demonstration Program. This year USDA Rural Development's Rural Housing Service announced \$5.5 million in low interest loans to Native CDFIs that will be relent to expand homeownership opportunities for American Indians, Alaska Natives, and Native Hawaiians living on Tribal lands and Native Hawaiian Homelands. The loans were made to six certified Native CDFIs: Ha Yaakawu (AK), Nixwyaawii Community Financial Services (OR), Hawaii Community Lending (HI), Lake Superior CDC (MI), Cherokee Nation CNDTA Inc. (OK), and Wisconsin Native Loan Fund (WI). The Native CDFIs will use the loans to finance approximately 38 homes.

PUBLIC SAFETY AND JUSTICE

MISSING OR MURDERED INDIGENOUS PEOPLE & VIOLENCE AGAINST NATIVE WOMEN

FCC Adopts New Alert Code to Help Law Enforcement Agencies in the Recovery of Missing and Endangered Persons. In August 2024, the Federal Communications Commission's five commissioners voted unanimously to change its rules and adopt a new event code for the Emergency Alert System (EAS) to enable the delivery of emergency alerts about missing and endangered persons (MEP). The EAS protocol uses fixed alert codes to identify the various elements of an emergency alert so that each alert can deliver accurate, secure, and geographically targeted alerts to the public. Alert originators, such as state, tribal, territorial, and local public safety officials, select from a group of event codes based on the nature of the emergency (for example, "CAE" signifies a Child Abduction Emergency, otherwise known as an AMBER Alert). The new event code for missing and endangered persons, "MEP," was adopted to better and more widely disseminate information regarding missing and endangered persons across multiple jurisdictions, to notify the public so they can help with searches. The MEP code is expected to help support the issuance of EAS alerts for those missing and endangered persons who do not meet the criteria for an AMBER Alert, and is intended to fill a critical gap to assist in the recovery of missing persons. The FCC expects that the MEP event code will assist law enforcement efforts to find missing and endangered persons, including Indigenous persons who are disproportionately at risk of being missing and endangered.

FBI Validation of violent death certificates as part of the Centers of Disease Control (CDC) National Violent Death Reporting System (NVDRS). The FBI has been working with the

CDC related to sharing information to validate death certificates associated to violent deaths of American Indian/Alaska Native (AI/AN) persons within Indian Country. When a death occurs the death certificate and appropriate health information provided by the medical examiner/coroner is shared with the state Health and Human Service (HHS) department which in turn shares the death related information to CDC systems. For violent deaths that system is NVDRS and an extra layer of validating information is requested by the state HHS to the law enforcement agency who investigated the violent death. Currently, the NVDRS is missing law enforcement validating data associated to violent deaths on many reservations across the United States. In order to assist in the validation process, the FBI and CDC have been working together over the year to determine the ability to share and develop a process for the FBI to share information within legal parameters.

DOJ's Indian Country Basic Course at the National Advocacy Center (NAC). This year the FBI partnered with DOJ's National Advocacy Center to develop and provide a two-week Indian Country Violent Crime Basics training program, in Columbia, SC. The first iteration was presented in January 2024. Topics covered included Sexual Violence Investigations, Evaluating Strangulation and Gunshot Wounds, Trauma-Informed Victim Interviews and Minimal Facts and Forensic interviews involving Children and Adolescents, Crime Scene Management, Indian Country Criminal Jurisdiction, among others. 91 people participated in the program, including 41 FBI participants, Tribal law enforcement, Tribal prosecutors, BIA and other DOJ personnel. The FBI continues to work with the NAC and plans to offer this training annually.

Agency Response to Not Invisible Act Commission Recommendations. The Not Invisible Act Commission was created by P.L. 116-166, the Not Invisible Act of 2019, the enactment of which was led by Secretary Haaland during her time in Congress. The Commission included law enforcement, Tribal leaders, federal partners, service providers, family members of missing or murdered individuals, and survivors. As mandated by the Act, the Commission developed recommendations for federal government actions to take on six focused topics to combat violent crime against Indigenous people and within Indian lands, and to address the epidemic of missing people, and the murder or trafficking of American Indian and Alaska Native peoples, as specified under the law. DOJ and DOI released a joint response on March 5, 2024, addressing the 186 recommendations directed at DOJ or DOI. In the joint response, DOJ makes a variety of commitments that implicate a broad span of DOJ's work in support of Native communities. Subsequently, HHS released a Supplemental Response on November 15, 2024, the department details how it will improve services to human trafficking survivors, support improving data collection on MMIP and human trafficking, as well as uplift resources available to Tribes and organizations for violence prevention and healing.

DOJ's MMIP Regional Outreach Program. After DOJ's establishment of the MMIP Regional Outreach Program in June 2023, the program has worked in 2024 to coordinate with Tribal, federal, state, and local governmental and non-governmental agencies in three core areas: cases, outreach, and training. Currently, eight of ten MMIP Regional Assistant United States Attorneys and MMIP Regional Coordinators serve the five designated regions throughout Indian country. Highlights for the program in 2024 include enhanced coordination with BIA's Missing and Murdered Unit, prosecutions and case coordination in MMIP-related cases, and multiple

outreach and training events throughout the five program regions. The program continues to coordinate and collaborate with local United States Attorney's Offices, the National Native American Outreach Services Liaison, and the National Indian Country Training Initiative Training Coordinator.

Second Annual Human Trafficking Summit. The Justice Department's Human Trafficking Prosecution Unit (HTPU) continues to coordinate with DOI's Missing and Murdered Unit (MMU) in the Bureau of Indian Affairs to enhance the MMU's capacity to conduct victim-centered, trauma-informed, culturally sensitive investigations into human trafficking and related crimes impacting Indigenous persons and communities. In August 2024, HTPU, in collaboration with DOJ's Child Exploitation and Obscenity Section and National Indian Country Training Initiative, will held its second annual human trafficking summit with the MMU, building on the initial human trafficking training summit convened in 2023.

Continuing in DOJ's efforts to prioritize the resolution of missing or unidentified Native persons. The National Missing and Unidentified Persons System (NamUs) program accomplished the following Tribal related activities between December 1, 2023, and June 30, 2024:

- Initiated efforts that supported the addition of 186 missing Native persons cases to the NamUs database, bringing the total number of active Tribally affiliated missing persons cases housed in the database to 875. Of those cases reported during that timeframe, 84 cases involved missing Native persons that were Tribally enrolled or affiliated, 55 cases involved a Native person that went missing from Tribal land, and 44 cases involved missing Native persons whose primary residence were on Tribal lands. Within that same timeframe, the NamUs program was directly involved in resolving 131 missing Native persons cases, 118 of whom were found alive.
- Added 32 unidentified suspected Native persons cases to NamUs, bringing the total number of active Tribally affiliated unidentified persons cases housed in the database to 223. Of those cases reported during that timeframe, 11 cases involved unidentified suspected Native persons that were found on Tribal land. Within that same timeframe, the NamUs program was directly involved in resolving 18 unidentified Native persons cases.
- Added 6 unclaimed Native persons cases to the NamUs database, bringing the total number of active Tribally affiliated unclaimed persons cases housed in the database to 35. The NamUs program was directly involved in resolving four of these cases.
- Since December, the program's prioritization of Tribal forensic service requests has cleared any backlog for forensic testing services for Native persons cases. NamUs facilitated over 100 forensic service requests for Native missing and unidentified persons cases which included DNA testing, forensic genetic genealogy, fingerprint analysis, odontology, and advanced image searching.
- The NamUs Tribal Liaison facilitated 15 trainings for Tribal law enforcement and community members, including support for dedicated missing persons day events, engaging with approximately 650 vested parties. An Associate Tribal Liaison

completed the updating of active Native persons cases in the database and continues to identify cases associated with Tribal agency investigations.

AATTAP Program. DOJ's AMBER Alert in Indian Country (AATTAP) Program will equip Tribes across the US with the tools needed to search for a missing child in Indian Country. Currently, DOJ is providing Tribe's toolkits containing resources needed when responding to the urgent call of a missing child. In the coming year, Tribes will be able to request additional resources, including, but not limited to airboats, technology, etc. for the purpose of a search of a missing child/investigation. The AMBER Alert in Indian Country (AATTAP) Program will also work with Tribal agencies across the US to develop and deliver Child Abduction Response Team (CART) Training and certification. Currently, there are no CART Teams in Indian Country. This individualized, culturally specific training will help Tribal communities prepare and train to respond in the case of a missing child. CART Teams require bringing all resources in a community together to plan for these events. CART Training Teams and evaluators with Indian Country subject matter expertise and training specific to each sovereign nation will work with Tribal communities to develop Tribal CART teams across the US and work to partner with Missing and Murdered Indigenous Persons (MMIP) and Tribal Community Response Plan (TCRP) initiatives. Expected date of completion is December 2024.

VAWA 2022 Alaska Pilot Program Implementation. The Violence Against Women Act (VAWA) Reauthorization Act of 2022 required that the Attorney General establish a process to facilitate Alaska Tribes' participation in a Pilot Program for implementing special Tribal criminal jurisdiction (STCJ). In response, DOJ implemented a three track processes that reflects feedback received during consultations and discussions with Alaska Tribal leaders and advocates. DOJ has worked closely with the Alaska Native Justice Center (ANJC), along with five Alaska-based partners, to establish and support an Alaska-specific Inter-Tribal Technical Assistance Working Group (Alaska ITWG) on STCJ and provide technical assistance for Alaska Tribes seeking to enhance their criminal justice systems. The Alaska ITWG met for the first time on May 9-10, 2024, in Fairbanks, Alaska, and included over 100 participants. The second meeting of the Alaska ITWG was held on October 21-22, 2024, in Anchorage, Alaska. Representatives from more than 35 Alaska Tribes participated in each Alaska ITWG meeting. Currently, there are 17 Alaska Native Tribes formally participating in the Alaska ITWG, which will convene again in April 2025. DOJ continues to provide support to participating Tribes and welcomes requests to participate from both individual Alaska Native Tribes and consortiums that are interested in exploring any of the three tracks.

DOJ FY 2024 Tribal Grants. Office of Justice Programs (OJP), Office on Violence Against Women (OVW), and Community Oriented Policing Services Office (COPS)—announced FY 2024 awards in support of a broad range of public safety and capacity building goals. DOJ announced more than \$84 million through the Coordinated Tribal Assistance Solicitation, DOJ's Office on Violence Against Women (OVW) awarded more than \$86 million, and DOJ's Office for Victims of Crime (OVC) awarded over \$67 million to support Tribal communities in meeting the needs of crime victims under the Tribal Victim Services Set-Aside program (TVSSA) from the Crime Victims Fund, of which \$54 million supported formula funding for

Tribal victim services programs. TVSSA funds are administered via an administrative formula and are used by Tribal communities to serve victims of arson, assault, burglary, child abuse, dating violence, domestic violence, elder abuse, fraud, identity theft, kidnapping, labor trafficking, rape/sexual assault, robbery, sex trafficking, and stalking. In consultation with Tribal Leaders in 2019 (and every year since), OVC determined that the TVSSA funds would be administered annually via a noncompetitive formula to interested federally recognized Indian Tribes. The formula-based funding was instituted in 2020. OVC consults annually on the administration of the Set-Aside and the population-based formula used to distribute TVSSA funds.

FY 2025 Funding Requested for OVW's Tribal Programs. The President's FY 2025 Budget for OVW totals \$800 million, which is \$87.0 million more than the FY 2024 Enacted Budget. Included in this amount is \$108.8 million in funding that supports programs and initiatives in Indian country and Alaska Native Villages. That is a \$27.8 million increase from the FY 2023 Enacted Budget. OVW's Tribal-specific funding programs focus on preventing and addressing domestic violence, sexual assault, dating violence, stalking, and sex trafficking and include the following programs: the Grants to Indian Tribal Governments Program; the Tribal Sexual Assault Services Program (TSASP); the Special Tribal Criminal Jurisdiction Grant Program, including a Targeted Support for Alaska Native Tribes Special Initiative; the Tribal Domestic Violence and Sexual Assault Coalitions Grant Program; the Tribal Special Assistant U.S. Attorney (TSAUSA) Program; and funding for the National Tribal Clearinghouse on Sexual Assault (NTCSA).

DOJ Healing and Response Team Initiative. In response to the Not Invisible Act Commission (NIAC) findings and recommendations, DOJ's Office on Violence Against Women (OVW) launched a new initiative to support the creation, training, and sustainability of Healing and Response Teams (HRT). This HRT initiative will assist Indian Tribes, Tribal community-based organizations, and urban Indian organizations, as described in the NIAC recommendations. HRTs are designed to provide victim-centered support, advocacy, resource liaisons, healing pathways, and systems navigation assistance using a Tribal-based model of care in responding to missing or murdered Indigenous people cases that involve domestic violence, dating violence, sexual assault, stalking, and sex trafficking crimes. In FY 2024 OVW made a two-year award in the amount of \$2,000,000 to the Minnesota Indian Women's Sexual Assault Coalition (MIWSAC) for the Healing and Response Teams Special Initiative. MIWSAC's key partners in this work are the Alaska Native Women's Resource Center and the National Indigenous Women's Resource Center.

Special Tribal Criminal Jurisdiction Reimbursement Program. In May 2024, OVW issued the first awards made through the Special Tribal Criminal Jurisdiction Reimbursement Program (Tribal Reimbursement Program) for Tribes who are exercising Special Tribal Criminal Jurisdiction (STCJ) under the Violence Against Women Act Reauthorization Act of 2022. The Tribal Jurisdiction Program reimburses Tribes for expenses incurred in exercising STCJ over non-Native individuals who commit certain covered crimes on Tribal lands.

Innovative Use of Microgrants for Victim Assistance in Alaska Communities. DOJ/OVC invested \$4.3M to provide victim assistance funds and technical assistance to tribal communities in Alaska through microgrants in FY 2023. Throughout 2024, microgrants are being used to address unmet needs in tribal victim assistance programs and/or to develop or expand the ability of tribal victim assistance programs to provide services, including shelter for crime victims. Construction will be supported under this program including the renovation, repair, or improvements of existing structures and the construction of new structures to be used for victim services programs. In addition, funds may support Tribes with needs assessments, strategic plans, and program implementation to respond to extractive industries' impacts on violence and victimization. The funds will be administered through the Denali Commission.

DOJ's Annual Tribal Governments Program Implementation Workshops. Through these specialized workshops, the Office on Violence Against Women builds the capacity of Tribal governments, Tribal justice system professionals, and Tribal victim services organizations to respond effectively to domestic violence, dating violence, sexual assault, stalking, and sex trafficking. These workshops have significantly increased successful applications from Tribes and have greatly improved grant financial and program management by grantees. In FY 2024, DOJ/OVW expanded and replicated this model for Tribes in the California and Midwest regions. In FY 2025, expansion will continue to include Tribes in the Southwest and the Great Plains regions.

23rd Meeting of DOJ's National Inter-Tribal Technical Assistance Working Group (National ITWG) on Special Tribal Criminal Jurisdiction (STCJ). DOJ hosted its 23rd Meeting of the National Inter-Tribal Technical Assistance Working Group (National ITWG) on Special Tribal Criminal Jurisdiction (STCJ) on December 3-4, 2024, at DOJ's National Advocacy Center in Columbia, SC. The ITWG is a collaborative, working group of Tribal representatives who exchange views, information, and advice about how Tribes may best exercise STCJ over non-Indians and address responses to the covered crimes as set forth in the Violence Against Women Act Reauthorization Act of 2022. Over 50 Tribes regularly participate in this group.

Convening and Expansion of the Task Force on Research on Violence Against American Indian and Alaska Native Women. The federal advisory committee, managed by DOJ/OVW and the National Institute of Justice (NIJ), provided advice and recommendations on the Department's NIJ Program of Research on Violence against American Indian and Alaska Native Women at a June 17, 2024, virtual convening. The 904 Task Force was rechartered in 2024, and OVW and NIJ recently announced seven new members to join the current members, bringing the Task Force up to its full complement of 14 members.

Effective Multi-Jurisdictional Collaboration in Missing or Murdered Indigenous Persons (MMIP) Cases, an eLearning course. Released in January 2024 this COPS-supported eLearning course explores how partnerships between Tribal law enforcement and local, state, federal, and private sector agencies can strengthen the prevention and response to MMIP cases using a fair, victim-centered and trauma-informed approach. By employing MOUs/MOAs and utilizing other shared resources that enhance relationships, effective communication and

collaboration are strengthened for the prevention and response to MMIP cases. Through a case study exercise, learners will acquire insights into how MOUs/MOAs can serve as a framework for law enforcement agencies aiming to improve their MMIP efforts through the formalization of cooperative arrangements. As of early July 2024, nearly 300 participants have completed the course. The course is available in the COPS Training Portal [here](#).

Volunteer Engagement for American Indian and Alaska Native Missing Person Cases.

Released at the end of 2023 this training program offered through the DOJ/COPS Office's Collaborative Reform Initiative – Technical Assistance Center (CRI-TAC) prepares and introduces the basic elements and practices for creating a volunteer engagement program to support law enforcement and communities in responding to emergent missing person cases. Every agency, Tribe, and missing person situation will have different needs and challenges. This training will provide Tribal stakeholders with options and considerations while building a volunteer engagement program to meet their unique needs.

Research and Analysis. During the past calendar year, DOJ/BJS, the statistical arm of the Department, in consultation with Tribes, developed and implemented the Tribal Justice Statistics Program, including initiating the development of a 10-year strategic plan, enhancing and improving the Survey of Jails in Indian Country (SJIC), and consulting with Tribal nations and federal partners on the implementation of the 2024 Census of Tribal Law Enforcement Agencies (CTLEA) and 2024 Census of Tribal Courts Systems (CTCS). The 2023 SJIC featured new items on crimes against vulnerable persons (i.e., human trafficking, kidnapping, and elder abuse) and a broader range of offense categories. The 2024 CTLEA will collect data from Tribally operated law enforcement agencies in the lower 48 states, BIA police agencies, and the Alaska State Police, which operates the Village Public Safety Officer (VPSO) program in Alaska Native villages. The 2024 CTCS will collect data from Tribal court systems in the lower 48 states, judicial forums in Alaska Native villages, and Code of Federal Regulations Courts operated by the BIA. DOJ/BJS implemented a process to ensure a Tribal-centered statistical approach, high response rates and program growth over the long-term:

- In October 2023, DOJ/BJS sent a letter to the 574 federally recognized Tribes announcing the new CTLEA and CTCS projects; and inviting Tribal participation in the development process of the CTLEA & CTCS.
- From February 2024 through April 2024, DOJ/BJS held four listening sessions specifically for Tribal leaders, Tribal law enforcement, Tribal courts and federal agencies and the Alaska State Police's VPSO program.
- In April 2024, BJS hosted an in-person Tribal justice data expert panel meeting in Albuquerque, NM, to provide recommendations for improvements to the CTLEA & CTCS questionnaires based on input from the webinar listening sessions.

A total of 258 unique entities participated in the four Tribal crime and justice data listening sessions and one in-person expert panel meeting. Participants represented 120 different Tribal nations or Alaskan villages, 27 Tribal law enforcement agencies, 46 Tribal courts, and 10 federal agencies across 33 states and the District of Columbia. Data collection for the 2024 CTLEA & 2024 CTCS will commence in the Spring of 2025. In the Fall of 2024, DOJ/BJS will be

conducting cognitive testing of the new web-based questionnaires on a sample of Tribal justice agencies to ensure the reliability and validity of responses and assess the respondent burden and quality of available data. Results from the 2023 SJIC are pending release this summer. Data collection for the 2024 SJIC commenced in July 2024.

DOJ/National Institute of Justice (NIJ) participated in The National Academies of Sciences, Engineering, and Medicine (NASEM) seminar on Advancing the Federal Research Agenda on Tribal Crime, Justice, and Safety with Feedback from the Field on May 23, 2024. This public seminar, led by NASEM, was held to obtain input on advancing the federal research agenda on Tribal crime, justice, and safety. Funding robust empirical studies remains challenging despite efforts across several bureaus and program offices throughout the Department of Justice to support Tribal research and evaluation over the last two decades. This seminar gathered feedback from interested groups, including members of Tribal communities, and contributed to a conversation about possibilities for supporting criminal justice-focused research and programming moving forward. The feedback and recommendations garnered from this meeting will help OJP better improve Tribal data collection efforts and research as it relates to missing or murdered AI/AN persons.

Human Trafficking Webinar. On February 7, 2024, DOJ's Human Trafficking Prosecution Unit (HTPU) served on a panel with Judge Pope, a Trial Judge for the Potawatomi Tribal Court, in a program convened by the Civil Rights and Social Justice Section of the American Bar Association for over 300 participants from a broad cross section of the legal sector to raise awareness of human trafficking issues affecting Tribal communities.

Family Violence Prevention and Services Act Grants: The Family Violence Prevention and Services Act (FVPSA) through the Department of Health and Human Services' Administration for Children and Families' Office of Family Violence Prevention and Services (OFVPS) administers the mandatory formula FVPSA grants to tribes and tribal organizations to assist tribes with the increasing public awareness about primary and secondary prevention of family violence, domestic violence and dating violence; to provide immediate shelter and supportive services for victims of family violence, domestic violence and or dating violence and their dependents. The standing notice of funding opportunity (NOFO) can be found at: [FVPSA Standing Notice of Funding Opportunity for Tribes and Tribal Organizations | The Administration for Children and Families](#) and applications are due January 31, 2025.

First-Ever DOJ Event on Legal Assistance for Native Communities and Impact on Public Safety and Justice. In 2025, DOJ's Office for Access to Justice (ATJ) will hold a virtual event highlighting legal assistance needs of individual Tribal members and resources currently available in Native communities. This event is designed to improve agency awareness of the need for legal assistance, including civil legal assistance, for Tribal members, as well as to highlight distinct approaches to representation in Indian Country, such as the use of lay advocates and non-attorney justice workers.

New DOJ Tribal Defense Resource Update. DOJ/ATJ is launching an update to its existing PD Hub that will compile specific resources for public defense services in Tribal courts. This update

builds on work that the ATJ Initiative did in 2013, when it issued a guide on grants, training, technical assistance, and other resources provided by the federal government that may be of particular interest to Tribal criminal defense and delinquency representation providers. This project will highlight grant opportunities from the Coordinated Tribal Assistance Solicitation (CTAS), OJP's Tribal Civil and Criminal Legal Assistance program (TCCLA), OVW's Tribal Jurisdiction and Tribal Reimbursement Programs (TJP & TRP), and OJP's Byrne Justice Assistance Grants (Byrne JAG), among others. This resource will also be useful to supplement the support DOJ is providing to Tribes seeking to join the Alaska Pilot Program. DOJ/ATJ will also work toward developing a training on Tribal public defense resources to accompany the resource.

DOJ Criminal Investigation and Enforcement in Indian Country. DOJ continues to undertake investigations, lead and participate in law enforcement operations, prosecute cases, and enter into litigation to support the enforcement of criminal laws in Indian Country. Examples of this year's accomplishments include:

- **FBI's Joint Operation Not Forgotten (June-September 2024).** To address the crisis of violence in Tribal communities, FBI launched Operation Not Forgotten (ONF) to focus resources on seeking justice for women and children who have been victims of crime and who have not yet seen their cases resolved. ONF surges resources to Tribal areas with the mission of examining cases that have gone unresolved. The goal is to move those cases closer to resolution, provide services for victims, and to bring offenders to justice, who have so far escaped it.
- In FY23, FBI surged 31 Special Agents and 7 Intelligence personnel to ten field offices with substantial Indian Country responsibilities. Through these resources, agents were able to conduct investigative activities connected to more than 200 pending investigations related to violence against Indigenous women and children.
- In FY24, FBI partnered with BIA-MMU to make ONF a joint operation between the FBI and BIA. BIA-MMU provided significant intelligence and investigative support for the duration of the operation. For the FY24 operation, 51 personnel deployed in support of ONF. Those personnel included 47 Special Agents and 4 Intelligence personnel. During ONF FY24, over 300 cases received investigative assistance, 44 offenders were arrested, and 9 child victims were located and recovered.

LAW ENFORCEMENT

DHS Federal Law Enforcement Training Centers (FLETC). DHS supported Tribal law enforcement communities by providing low-cost and no-cost training opportunities conducted on its campuses as well as Tribal host locations across the United States. In August 2024, FLETC provided human trafficking and leadership training to Tribal law enforcement at the 2nd Annual U.S. Indian Police Academy Instructor and Training Certification Forum and the 31st Annual National Native American Law Enforcement Association Conference.

Law Enforcement Hiring, Ensuring Tribal communities are safe remains a core responsibility of the United States. BIA provides funding and direct services to Tribes for law enforcement, Tribal courts, and detention services. Recruiting and retaining law enforcement personnel is a historical challenge, but one the Department remains committed to solving. To that end, the BIA has taken steps to better recruit and retain law enforcement by increasing law enforcement pay so that it is on par with the rest of the Department, utilizing incentives such as recruitment bonuses, and shortening the time to hire so that job applicants receive timely job notifications, and expanding recruitment efforts. During the Biden-Harris Administration, BIA increased hiring by more than 5 percent improving critical public safety services to Indian Country.

Bureau of Indian Affairs Law Enforcement Pay Parity. BIA is focused on improving the recruitment and retention of BIA law enforcement. BIA's foremost strategy on staffing is a pay parity initiative to bring BIA law enforcement pay levels in line with other federal law enforcement, resulting in up to an additional \$30,000 annually for BIA law enforcement officers

FBI's Expanded Safe Trails Task Force (STTF) Program in FY24. In FY24, the FBI and DOJ created two additional Safe Trails Task Forces to address the increasing violent crime threat in Indian Country. These two STTFs were in the Boston Field Office and the Las Vegas Field Office. The Las Vegas Field Office seized the opportunity to strengthen relationships with Tribal partners in the Reno Resident Agency area of responsibility. The Nevada STTF is currently comprised of the FBI and 5 state and Tribal partner agencies. There are currently 26 STTFs.

FBI Associate Deputy Director's American Indian/Alaska Native (AI/AN) Community Roundtable. In July 2024, the FBI held an AI/AN Community Partner Roundtable with FBI's Associate Deputy Director. The Roundtable was focused on Public Safety Issues affecting AI/AN communities (urban and on Tribal lands), developing trusted partnerships, as well as recruitment and retention of AI/AN people into the FBI.

Analysts Fully Embedded into FBI and BIA-MMU Partnership. In FY24, an analyst from the Department of the Interior's Missing and Murdered Unit has been fully embedded as a Task Force Member into the FBI's Indian Country and International Violent Crime Unit through the Safe Trails Task Force (STTF) Program. As a Task Force Member, BIA-MMU is now receiving notification of all new Indian Country investigations as soon as the case is opened. The MMU analyst has access to all FBI Indian Country cases. There are plans for an FBI Intelligence analyst to have similar access to BIA-OJS systems.

Alaska-specific Training and Technical Assistance. The DOJ/COPS Office is supporting Alaska-specific training and technical assistance needs through a FY23 award to the Association of Village Council Presidents to update and deliver basic and advanced Village Police Officer/Tribal Police Officer training courses delivered by Yuut Elitnaurviat (YE) in Bethel, Alaska. The DOJ/COPS Office also made an award announcement in FY24 to provide funding to the Rural Alaska Community Action Program, Inc. (RurAL CAP) to deliver a project that will meet the emergent capacity building and training & technical assistance needs of Alaska's Tribes in establishing and expanding Tribal policing efforts through an assessment of Tribal law

enforcement needs, development of a technical assistance strategy, and deliveries of technical assistance.

Training and Technical Assistance Pilot Program for Alaska Tribes. In 2023, DOJ piloted a new approach to alleviate the struggle some remotely-located Tribes’ experience with the human and technological resources required to submit grant applications through government systems. This pilot was implemented in direct response to requests from Alaska Native villages for in-person support with grant applications. Grant managers from DOJ/OVC’s Tribal Division deployed to Alaska to meet with Alaska Village grant applicants to assist with such tasks as creating program designs and project budgeting. In 2024, 6 DOJ/OVC Tribal Division staff met with 30 grantees in 3 cities to provide hands-on technical assistance. In addition, staff from 4 DOJ/OVC Training and Technical Assistance providers also traveled to the 3 cities in Alaska to help ensure applicants had specific programmatic, financial, and construction-related assistance for both current and projected victim service projects.

CRIMINAL JURISDICTION

U.S. Intervention in Support of Tribe’s Challenge to On-Reservation Criminal Jurisdiction. In *Muscogee (Creek) Nation v. City of Tulsa (N.D. Okla.)*, the Muscogee (Creek) Nation filed a complaint against the City of Tulsa, along with the City’s mayor, chief of police, and city attorney (together, the “City”), alleging that the City continues to prosecute Indian defendants within the Creek Reservation despite the holdings of *McGirt* and other federal case law saying that states and their political subsidiaries do not have criminal jurisdiction over Indian defendants in Indian country. In May 2024, DOJ/ENRD intervened as a plaintiff on behalf of the United States (acting on its own behalf and as trustee for the Tribe) to support the Tribe’s claims that the city lacks criminal jurisdiction over Indians for conduct occurring within the Reservation and that the City’s continued assertion of that jurisdiction violates federal law.

DOJ Response to the Supreme Court Decision in *Oklahoma v. Castro-Huerta*. The Departments of Justice and the Interior (DOJ and DOI) held joint listening sessions on September 26-27, 2022, to discuss with Tribal leaders the implications of the Supreme Court’s decision in *Castro-Huerta* and its impact on Tribal communities. Based on Tribal feedback, DOJ is issuing an invitation to Tribes to consult formally on a possible legislative proposal in response to the *Oklahoma v. Castro-Huerta* decision.

Supporting Oklahoma Tribes in Response to *Castro-Huerta*. In March 2024, DOJ filed an amicus brief in *Stitt v. City of Tulsa (Oklahoma Court of Criminal Appeals)*, an appeal of a conviction by a member of the Cherokee Nation for aggravated speeding within the boundaries of the City of Tulsa and the Muscogee (Creek) Nation. Specifically, DOJ argued that the United States and Tribes, not states, possess authority over Indians in Indian country and that *Castro-Huerta* did not overrule or alter principles of federal law under which states lack criminal jurisdiction over Indians in Indian country absent congressional authorization.

Tribal Access Program Expansion. On June 24, 2024, DOJ opened the application period for Tribes to participate in the Tribal Access Program (TAP) for National Crime Information. TAP

improves public safety by providing federally recognized Tribes the ability to access and exchange data with national crime information databases for authorized criminal justice and non-criminal justice purposes. In FY 2024, seventeen additional Tribes were selected for participation in the TAP program. There are currently 149 federally recognized Tribes and more than 460 Tribal government agencies participating in TAP. Using TAP, Tribes have shared information about missing persons; entered domestic violence orders of protection for nationwide enforcement; registered convicted sex offenders; run criminal histories; located fugitives; entered bookings and convictions; and completed fingerprint-based record checks for non-criminal justice purposes such as screening employees or volunteers who work with children.

DOJ/Bureau of Justice Assistance (BJA) worked with the National Judicial College and other partners to sponsor the American Indian Justice Conference in Albuquerque, NM on July 30-31, 2024. This two-day event brought together 200-300 individuals from Tribes across the nation with an opportunity to learn strategies to enhance Tribal justice systems while providing essential information on courts and traditional justice; alcohol and substance misuse; probation; reentry; policing; violent crime prevention; multidisciplinary collaboration; and other relevant topics.

DOJ/BJA will sponsor Tribal Law Enforcement Quarterly Virtual Calls to introduce BJA staff and resources to Tribal Chiefs of Police and law enforcement. The first call was held on August 7, 2024. Throughout this initiative, DOJ/BJA will collect information from Tribal law enforcement to inform the agenda for future quarterly calls, respond to training and technical assistance requests, and share information on current open solicitations that Tribes may apply and compete for resources, and learn about Tribal law enforcement success, challenges, issues, and needs.

HOLISTIC PUBLIC SAFETY WORK

New FBI Indigenous Language Analyst. In FY24, the FBI hired its first-ever first Indigenous Language Analyst (Dinélanguage) as a 2-year pilot program. In prior years the translation work was being done as a collateral duty and not as a full-time linguist position.

FBI's Indian Country Wellness and Resiliency Program (April- September 2024). FBI Indian Country Agents investigate some of the most violent crimes, including homicide, aggravated assault, sexual assault, and the physical and sexual abuse of children. Repeated exposure to these types of investigations can have physical, emotional and psychological impacts on the people working them. Taking those impacts into consideration, the FBI developed the Indian Country Wellness and Resiliency Program (ICWaR). The first iteration of the program launched in FY22. Since then, the program has focused on providing participants with the knowledge and tools to identify and mitigate common stressors associated with Indian Country assignments. In FY24, ICWaR accommodated more than 250 Indian Country agents, TFOs and spouses/significant others. Based on feedback from participants, ICWaR has contributed to increased morale among the FBI's Indian Country investigators.

DOJ/BJA, in partnership with the Tribal Law and Policy Institute (TLPI), hosted the 2024 Tribal Healing to Wellness Court Implementation and Enhancement Training in September 2024 in Phoenix, Arizona. Tribal Healing to Wellness Court practitioners received training in the following areas: Tribal issues, jurisdictional and legal issues unique to Indian country, the incorporation of custom and tradition into the phases, case management, treatment curriculums, tangential services, and the peer-to-peer sharing of successful Healing to Wellness Courts models in operation. Training topics covered adult criminal, juvenile justice, family dependency, DWI/DUI, and veteran's models.

DOJ/Office of Juvenile Justice and Delinquency Prevention (OJJDP) hosted a National Conference on November 19-21, 2024, to bring together youth and families, grantees, leading researchers, practitioners, and other stakeholders from across the U.S. who are working to transform juvenile justice. During this conference, DOJ/OJJDP hosted a Tribal Track with session topics such as: "Elders and Youth: Partnering for Success", "We Are Living Arts: Create. Heal. Inspire. Native Youth Program," and "Modeling a Combined Tribal Juvenile & Family Healing to Wellness Court, Possibilities & Challenges". As a part of this conference, DOJ/OJJDP held a Tribal Pre-Conference for DOJ/OJJDP grantees on November 18th that included a Listening Session focused on the unmet needs of Tribal communities. DOJ/OJJDP also hosted a session entitled, "Building an Indigenous Response to Systems," focusing on utilizing cultural practices as a protective factor to empower Indigenous youth in the child welfare system. This session was delivered from the perspective of our Supporting Vulnerable and At-Risk Youth Transitioning Out of Foster Care and Tribal Children's Advocacy Center Training and Technical Assistance programs (Tribal CAC TTA) and featured a panel discussion with individuals from Youth Collaboratory and Native Child Advocacy Resource Center/National Native Children's Trauma Center.

DOJ/OJJDP, in partnership with DOJ's National Indian Country Training Initiative, is hosting a quarterly series of webinars centered on "Culture as Prevention." The series has presented four sessions to thousands of registered participants thus far on topics relevant to juvenile justice and child welfare, including Tribal notification when Tribal youth are in state juvenile justice systems, the use of Indigenous Knowledge in juvenile justice systems, the Alaska EXCEL program (a vocational training program for school districts in rural Alaska), and the use of Elders in youth programming.

Protecting Heritage and Culture through Peacekeeping In-Person Training Course. This one and a half day in-person training course, supported by the DOJ/COPS Office, was piloted this fall 2024. The course seeks to strengthen the relationships between local law enforcement and the Tribal jurisdictions they protect. Through discussion, lecture, and group activities law enforcement will explore Tribal history and recognize the unique culture of specific Tribes in their area. With an emphasis on tolerance and anti-biased policing practices, participants will explore interactions between Tribal members and law enforcement and discuss strategies for improved relations. Participants will identify community partners and opportunities for collaborative engagement between law enforcement and Tribal communities. Case studies and scenarios will be reviewed to identify successful strategies to help eliminate bias and intolerance.

DOJ/OVC First Ever Alaska Regional Gathering. In February 2024, 50 grantees, representing 26 Alaska Native communities, participated in hands on, skill building training at the Dena'ina Civic and Convention Center in Anchorage. The event provided individualized, in-person assistance to Tribal Victim Service Set-Aside (TVSSA) grantees; strengthened relationships with OVC grant managers and training and technical assistance providers; and offered opportunities for regional networking and peer support. The Tribal Victim Services Training and Technical Assistance (T-VSTTA) team, Tribal Financial Management Center (TFMC), Performance Management team, and OVC grant managers attended the gathering to share tools and resources for TVSSA project planning, budgets, progress reports, and financial reports.

DOJ/DOI Tribal Justice, Safety, and Wellness Summit. In July 2024, the Departments of Justice and the Interior jointly hosted an on-line Tribal Justice, Safety, and Wellness Summit. The summit was held virtually over three consecutive afternoons. This is the second time that the Summit was held. The first Summit was held in June 2022 and 737 persons attended; the year's summit included 948 attendees. The audience was comprised of federal, state and Tribal prosecutors, law enforcement officers, advocates, elected leaders, academics, medical professionals, and community stakeholders. There were four separate training tracks: resources; MMIP; criminal justice law enforcement and prosecution; and technology.

DRUG TRAFFICKING

DEA Supervisory Special Agents to Serve Indian Country. DEA has designated 25 Supervisory Special Agents (SSAs) to serve as counterparts for Tribal matters in their districts. The list was created to mirror the FBI Safe Trails Task Forces (STTFs) that exist around the country. All 25 SSAs are in locations that correspond to FBI STTF locations. The SSAs on the list and their management have all been informed of their duties and responsibilities and have an open line of communication with HQ.

DEA's Operation Overdrive on the Blackfeet Reservation. In June 2024, DEA selected the Blackfeet Reservation in Montana as a DEA Operation Overdrive location. Operation Overdrive uses a data-driven, intelligence-led approach to identify and dismantle criminal drug networks operating in areas with the highest rates of violence and overdoses. To further mitigate the public health and safety impact on the communities, DEA incorporates prevention and outreach through close coordination with local stakeholders.

YOUTH AND JUVENILE JUSTICE

DOJ/OJP's Office of Juvenile Justice and Delinquency Prevention (OJJDP). Tribal Youth Program training and technical assistance provider created and released two national grantee portals, one for Juvenile Healing to Wellness Courts and one for Tribal Youth Program grantees. These portals include important resources such as a grantee directory, strategic planning

resources, templates, training opportunities, as well as a forum that supports grantees' ability to connect with one another around specific topics.

This year DOJ/OJJDP will establish and administer a Tribal Youth Fellowship Program for two Tribal Youth Justice Fellows with lived experience in Tribal youth justice systems to ensure Tribal training and technical assistance efforts are grounded and centered on young people's lived experience within Tribal juvenile justice systems. In addition, OJJDP will fund a Tribal Youth Leadership & Partnerships Initiative and a State, Local, & Tribal Partnerships to Support Justice Involved Youth Program as part of the training and technical assistance. Grant awards were made October 2024.

DOJ/OJP's Office of Juvenile Justice and Delinquency Prevention (OJJDP) is fulfilling its commitment made in the NIAC Response to convene a listening session to discuss children and youth who voluntarily go missing or are trafficked. This listening session will be held during the OVC's Indian Nations Conference at Agua Caliente on December 9, 2024.

DOJ/OJJDP's Tribal Children Advocacy Center (CAC) training and technical assistance provider will release a practice brief in the Fall of 2024 on "How to Develop a Tribal Multidisciplinary Team." A webinar will accompany this brief.

DOJ/OJJDP's Tribal CAC training and technical assistance provider presented two sessions at the National Children's Alliance Leadership conference in June, 2024. The sessions included "Engaging with Native Nations Around Multidisciplinary Teams and CACs" and "Reaching Native Kids: American Indian and Alaska Native Grantees Panel."

DOJ/OJJDP's Tribal CAC training and technical assistance provider developed five briefs housed on the National Native Child Advocacy Resource Center's website on various topics related to supporting child advocacy services for American Indian and Alaska Native communities. Briefs include Collaborating with the FBI to Serve Tribal Children and Families; Words of Wisdom from Tribal CAC Directors; Mental Health Services for Caregivers; Working with the Western Regional CAC; and Evidence-Supported, Culturally Responsive Mental Health Care for Native Children and Families in the CAC Setting.

DISASTER PREPAREDNESS

FEMA Designates 158 Tribal Nations' lands as Community Disaster Resilience Zones. In 2022 President Biden signed the Community Disaster Resilience Zones (CDRZ) Act into law, which directed FEMA to identify census tracts most at risk for effects of natural hazards and climate change. The goal of CDRZ is building resilience by driving federal, public, and private resources to underserved communities that have high natural hazard risk. Throughout 2023 and 2024 FEMA worked collaboratively with Tribal Nations to identify 20% of the census tracts that overlap with their Tribal lands to be designated as a CDRZ. All 574 Tribal Nation are eligible for their own CDRZ designations and should contact their [FEMA Regional Tribal Liaison or FEMA Tribal Integration Team](#) to learn more about CDRZ and the designation process.

FEMA’s Building Resilient Infrastructure and Communities Grant Program. In FY 2023, FEMA prioritized 40% of funding of its Building Resilient Infrastructure and Communities Program for disadvantaged communities, which included \$77 million in awards to Tribal Nations—a significant increase over prior funding levels. FEMA is approving the Tribal applicants for FY 2023 funding, supported by the Bipartisan Infrastructure Law (BIL), and will release the NOFO for FY 2024 soon. Under the program, FEMA is also providing technical assistance to 51 Tribal Nations that includes support for climate risk assessments, community engagement, partnership building, hazard mitigation, and climate adaptation planning.

Center for Domestic Preparedness 10th Annual Tribal Nations Training Week. In 2024 FEMA hosted over 320 Tribal students from 108 Tribal Nations during the 9th Annual Tribal Nations Training Week, at the FEMA Center for Domestic Preparedness. FEMA will host the 10th Annual Tribal Nations Training Week during April 26-May 3, 2025. The training provides Tribal attendees with necessary emergency certifications, offers training from Tribal instructors, and helps build emergency management relationships across Indian Country and beyond. This training is fully funded up front for Tribal leaders, Tribal emergency responders, and any designated Tribal staff and includes roundtrip airfare, meals, and lodging. FEMA will additionally host a virtual Tribal Nations Training Week during May 5-9, 2025. If you would like to learn more about either week or register, please email FEMA-tribalnationscdp@fema.dhs.gov.

FEMA Improves Individual Assistance for Tribal Community Members Impacted by Disasters. In 2024, FEMA published an interim final rule improving its regulations governing its Individual Assistance (IA) program to help disaster survivors by establishing new benefits, cutting red tape and expand eligibility, and simplifying the application process for certain types of assistance. These improvements were influenced by government-to-government consultations with Tribal Nations. The improvements to the IA program were some of the biggest that FEMA has proposed in 20 years. FEMA Tribal Affairs has published [a tribal one-pager](#) to highlight these improvements for Tribal Nations and the positive impacts they will have on disaster survivors across Indian Country.

Improving the FEMA Public Assistance Program and Policy Guide (PAPPG) for Indian Country. FEMA is working to update and improve its (2020) Public Assistance Program and Policy Guide (PAPPG). The Guide provides a pathway for a Tribal Nation to request Public Assistance (PA) after a Presidential disaster is declared so that it can quickly respond to and recover from major disasters or emergencies. In 2024, FEMA hosted a series of consultations, listening sessions, and webinars with Tribal Nations to gather input on revisions and updates to the PAPPG, specifically how to simplify the PA program, streamline ways for customers to meet requirements, and increase accessibility. The revised Guide will be released with [key improvements for Tribal Nations](#).

Enhancing Long Term Disaster Recovery by through FEMA’s National Disaster Recovery Framework. FEMA’s National Disaster Recovery Framework (NDRF) explains how the federal government supports disaster impacted Tribal Nations as they recover and provides a framework to support Tribal Nations planning for and leading their own recovery operations. In 2024,

FEMA began its work to improve the following five NDRF issue areas that partners have identified as important areas for updating: recovery scope, roles and responsibilities, capacity and resources, planning, and data metrics. To better incorporate Tribal Nations within the NDRF, FEMA then hosted three Tribal Working Group sessions with Tribal emergency managers and Tribal leaders and hosted tribal consultations to gather feedback and input to improve disaster recovery in Indian Country. These consultations led to a NDRF that better incorporated Tribal Nations needs for recovery after a disaster strikes.

FEMA Proposal for Tribal Homeland Security Grant Program Reform. After Tribal consultation, FEMA proposed changes to Congress that would improve the Tribal Homeland Security Grant Program, which supports Tribal Nations and Tribal first responders in reducing risks from manmade and natural disasters. The proposed changes better meet the needs of Tribal Nations and acknowledge Tribal sovereignty.

- Through ACE and HHS, the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation have a Diaper Distribution Pilot grant awarded in 2023. In the Summer of 2024, the Tribe received supplemental funds of nearly \$540,000 along with a 12-month extension. The supplement combined with the extended program period will increase the tribe's capacity to provide diapers, diaper supplies, and wrap around support services to families in need.

FEMA Launches the 2024 Tribal Declarations Interim Guidance. Building upon the Federal Emergency Management Agency's (FEMA) extensive government-to-government consultations and work with Tribal Nations in 2023, FEMA launched the Tribal Declarations Interim Guidance. The Guidance will help Tribal Nations better navigate pathways to receive Presidential disaster declarations and obtain assistance for Tribal community members when they need it most. Key improvements include decreasing the Public Assistance minimum damage amount from \$250,000 to \$100,000, launching two new pathways for Tribal Nations to receive a 98% cost share adjustment for disaster declarations, streamlining access to Individual Assistance for Tribal community members, increasing timelines to meet Tribal Nation needs, and more.

Animal and Plant Emergency Response and Preparedness Trainings. In 2024, USDA hosted eight regional trainings on or near Tribal-managed lands to increase awareness about animal and plant health emergencies and response capabilities. The trainings introduced Tribal personnel to their USDA counterparts, assisted Tribal Nations in developing plant and animal health emergency response plans, and outlined how Tribal and Federal responders can work together during an initial plant or animal health emergency.

EDUCATION AND WORKFORCE DEVELOPMENT

EPA enters Memorandum of Understanding with the American Indian Higher Education Consortium (AIHEC) and Northwest Indian College (NWIC). In 2024, EPA entered into Memorandum of Understandings (MOUs) with several academic institutions and a national higher education organization, including the American Indian Higher Education Consortium

(AIHEC) and the Northwest Indian College (NWIC). These MOUs are intended to increase cooperation and promote collaboration through bidirectional and shared learning between communities, establish opportunities for activities based on shared goals, and provide for EPA leaders to meet directly with administrators, students, and other Tribal education professionals. With these MOUs, EPA is committed to technical partnerships, training students, and promoting environmental science and federal careers with the goal of connecting students with Tribal Environmental Programs and EPA Programs.

EPA Region 7 Liaison Program with Haskell Indian Nations University. Since October 2022, when EPA Region 7 and Haskell Indian Nations University renewed their memorandum of understanding (MOU) to pilot a new on-campus outreach program, the program has grown from mentoring 15 students in the 2022-2023 school year to 30 students in the 2023-2024 school year. Since the start of the pilot, 11 Haskell students have interned or are interning with EPA at Region 7 or Headquarters, and two were hired permanently at EPA. In addition, EPA staff have assisted Haskell students in applying for and receiving internships and permanent placements with other federal agencies through the pilot program.

USDA Funded NDSU Creation of a Food Sovereignty and Public Health Student Summer Program. USDA received \$1 million to develop a Tribal Public Health Resource Center at a land-grant university with existing Indigenous public health expertise to expand current partnerships and collaborative efforts with Indigenous groups, including Tribal colleges to improve the delivery of culturally appropriate public health services and functions in American Indian communities focusing on Indigenous food sovereignty. The Office of Tribal Relations (OTR) worked with North Dakota State University (NDSU) to develop a center focused on the intersection of Tribal food sovereignty and public health. In June 2024, 19 Native students spent three weeks in-person to complete both classroom and experiential learning, witnessing buffalo harvests and visiting food distribution programs, to engage with leaders and experts in the food sovereignty field to provide them with the tools to improve public health in their communities.

New Tribal College Liaisons. USDA created a new team of Tribal College and University (TCU) liaisons to serve Indian Country with regional staff nationwide. TCUs are engines of economic development and arms of Tribal governments, and these new staff will provide dedicated outreach and technical assistance to the TCUs and the Tribes they serve.

White House Initiative for Advancing Education Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities co-hosted an Education Summit with the California Indian Nations College. The Education Summit included conversations with state and tribal educators along with the California State Superintendent of Education, Tony Thurmond and California Assembly member James C. Ramos.

Federal Working Group to Enhance Engagement with Tribal Nations and Native Communities. In 2022, the U.S. Department of Labor's Office of Disability Employment Policy, in collaboration with the White House Initiative on Advancing Educational Equity for Native Americans and the U.S. Department of Education, established a federal working group to enhance engagement with Tribal Nations and Native communities. This initiative seeks to

uphold tribal sovereignty while improving education, workforce development, and economic opportunities for youth and adults, with an emphasis on including those with disabilities. Key activities completed include the Advancing Federal Interagency Problem Solving and Capacity-Building in Native Communities Summary Report (August 2024) and a convening on the same topic (October 2023). Additionally, a virtual dialogue series was conducted addressing mental health, community engagement, financial mobility, and healthcare career pathways from 2022 to 2023.

INTERNSHIP, APPRENTICESHIP, AND SERVICE PROGRAMS

Indian Youth Service Corps. In FY 2024, the Department of the Interior provided nearly \$7 million in new funding to support the Indian Youth Service Corps Program. The programs and projects included support for food sovereignty through the reestablishment of indigenous farming methods and the development of traditional seed libraries to support the production of fresh foods and vegetables, cultural resource conservation, support for wildfire resilience, historic preservation of ancient ruins, environmental justice, language restoration, ecological restoration, and water conservation. Additionally, in FY 2024, the Department of the Interior's Bureau of Land Management established the BLM's Indian Youth Service Corps (IYSC), and implemented ten Tribal youth cooperative agreements engaging 43 youth on both public and Tribal lands. Finally, the USDA Forest Service Workforce Development Partnerships Hub collaborated with the Reforestation and Fire & Aviation Management Programs to improve reforestation and hazardous fuels management activities, awarding more than \$9 million to eighteen new Indian Youth Service Corps reforestation and hazardous fuels management projects were funded in fiscal years 2023 and 2024.

NextGen Agriculture. The USDA National Institute of Food and Agriculture invested \$25.8 in the next generation of future leaders at Tribal Colleges and Universities through the NextGen program, including support for scholarships and paid internships to encourage young people to grow their careers in food, agriculture, natural resources, and human sciences. Projects are led by the College of Menominee Nation, Fond du Lac Tribal and Community College, Northwest Indian College, and Nueta Hidatsa Sahnish College. In 2024, the projects awarded 26 scholarships and funded more than 20 internships. Additional activities conducted include youth programs exposing young people and their families to careers in food, agriculture, natural resources, and human sciences; support for student research and professional development (including research opportunities for high school students); the development of module-based internship programs to allow more flexibility for students as they meet learning outcomes.

New FBI Outreach, Information Sharing, and Recruitment Efforts with AI/AN Serving Colleges/Universities & Tribal Colleges. In FY24, the FBI launched a new outreach program to Tribally-owned colleges and AI/AN serving colleges and universities. This program will provide these education facilities and students with information about the FBI, including work the agency does and the variety of careers available. This initiative will encourage AI/AN students to see themselves as part of the FBI mission and provide additional options for their futures. This will also help fulfill issues regarding recruiting, hiring, and retention of Native employees brought up in the Not Invisible Act Commission report.

U.S. Department of State – Indigenous Youth Leadership Coalition (IYLC). The Indigenous Youth Leadership Coalition (IYLC) was established by the State Department’s Special Representative for Racial Equity and Justice (SRREJ), in collaboration with the White House and Department of the Interior, as a new network to elevate the voices of Indigenous youth in conversations about global civic and political participation. From November 6-9, 2023, the SRREJ team organized and hosted the first annual IYLC cohort, bringing six Indigenous youth leaders from the Western Hemisphere to Washington, D.C. to participate for the first time in the White House Tribal Youth Forum Alongside Native American youth leaders. The Tribal Youth Forum offered the opportunity for the cohort to share effective practices with Native youth leaders and enabled them to share their perspectives on critical issues such as preserving Indigenous knowledge and languages, furthering climate resilience, and addressing health inequities.

State Department Office of Special Representative for Racial Equity and Justice (SRREJ) collaborating with representatives from the United Indian Tribal Youth. In 2024, to further expand the success and sustainability of the initial program, SRREJ is collaborating with representatives from the United Indian Tribal Youth organization (UNITY), which has identified four Native American youth leaders to participate virtually in IYLC quarterly meetings, workshops, and knowledge exchange programs. The State Department and UNITY will also work to develop an in-person offsite retreat in the United States during the fall/winter of 2024 in close collaboration with a Native American Tribe that will allow the cohort to cultivate lasting relationships between future leaders and develop solution-driven knowledge exchanges between international Indigenous youth and Native American youth on issues that directly affect their communities. This inspirational in-person program has the potential to serve as an incubator for new perspectives to empower youth and encourage future collaboration beyond borders on issues impacting Indigenous communities.

Meat Processing Workforce Development. USDA funded Blackfeet Community College, Bay Mills Community College and Dine College to bolster workforce development in the meat and poultry sciences to encourage food security and food sovereignty. These Tribal colleges will partner with USDA and the Flower Hill Institute to provide assistance in the processing of meat and poultry from start to finish. The outcome will be training Tribal college students how to process meat and poultry in a safe environment.

Meat Inspector Boot Camp. Tribal nations across the country are standing up new meat processing facilities to service their and surrounding communities. The requirements to serve as a USDA meat and food inspector broadly include a four-year degree in a relevant field or a high school diploma with one-year of relevant experience. USDA is partnering with the American Meat Science Association and Tribal Agriculture Fellowship to develop and host at least two bootcamps in targeted locations in Indian Country that will provide aspiring Tribal food inspectors with the tools to competitively apply for federal food inspection positions.

Tribal Food and Agriculture Internship Program. USDA and the Partnership for Public Service onboarded 13 interns through the Future Leaders in Public Service Internship Program to work for the US Department of Agriculture both in Washington, DC and remotely within Indian Country on agriculture and food portfolios.

WORKFORCE DEVELOPMENT

Social Security Provided Free Virtual National Training sessions. Due to significant turnover through the Pandemic due to COVID, it was imperative for Social Security Administration to offer *SSA 101 Basic Benefits Training* for employees of Indian Health Service, Tribal Government Offices and Urban Indian Organizations and for any other roles who provide social worker support for Tribal members applying for SSA programs and services. To support this effort, we developed a national training strategy help the workforce in these critical support roles better understand SSA benefits and services. We specifically took the following actions:

- In November 2023 and March 2024, SSA provided training on the Assistance Based on Need (ABON) program and the Native American Precedent Repository and Resource Center for employees of Tribal Government Offices and Urban Indian Organizations who provide social work support roles for Tribal members applying for SSA programs and services. The training focused on exceptions to the SSI income and resource limits; COVID-related disaster relief payments; the Indian Gaming Regulatory Act; and the requirements necessary to classify Tribal benefit programs as ABON, which does not count towards SSI income limitations.
- In November 2023 and March 2024, SSA provided a *SSA 101 Basic Benefits Training* for employees of Tribal Government Offices and Urban Indian Organizations who provide social worker support roles for Tribal members applying for SSA programs and services.
- In December, SSA published a detailed **Tribal Benefits Coordinator Guide** and created other educational resources for Tribal Benefit Coordinators on Social Security programs and services.
- In December, SSA released a Dear Tribal Leader Letter to notify and market SSAs Tribal affairs website (www.ssa.gov/people/aian) to Tribal Government Offices and Urban Indian Organizations. The website provides information on services relevant to Tribal communities.
- In April, SSA provided a *Supplemental Security Income – Program Tools and Tips training* for employees of Tribal Government Offices and Urban Indian Organizations. The training detailed the initial disability and appeals filing process.
- In May, SSA provided an *Appointed Representative versus Power of Attorney training* for employees of Tribal Government Offices and Urban Indian Organizations. The training focused on the Appointed Representative role and how it could support disability claims and appeal filing.

- In June, SSA provided an *Understanding Benefits for Survivors training* for employees of Tribal Government Offices and Urban Indian Organizations. The training focused on benefits available, eligibility, and how to apply.
- In July, SSA provided an *Understanding Overpayments training* for employees of Tribal Government Offices and Urban Indian Organizations. The training focused on an overpayment overview, policy changes, repayment options, and appeal rights.
- In August, SSA provided a *Program Overview of Social Security Disability and Supplemental Security Income training* for employees of Tribal Government Offices and 8 Urban Indian Organizations. The training focused on the differences in the two programs, factors of eligibility and entitlement, and the application process.

HEALING FROM DESTRUCTIVE PAST POLICIES

INDIAN BOARDING SCHOOLS

Federal Indian Boarding School Initiative. Following the historic Presidential apology for the Federal Indian Boarding School era, DOI will announce new agreements with the U.S. Library of Congress and the Smithsonian Institution’s National Museum of American History as part of the Department’s Federal Indian Boarding School Initiative. The new agreements will house and protect the information uncovered as part of the initiative’s oral history project, preserve survivor experiences, and inform the public on histories relating to the federal Indian boarding school system and its impacts on Indigenous children and their communities.

DEPARTMENT OF DEFENSE APOLOGY

The Navy Flag Officer apology to clan leaders and community of Angoon and Kake, Alaska. In the 1800s, the U.S. Navy bombarded the Tlingit villages and Clans of Angoon and Kake (Alaska) causing significant and disproportionate loss of life and culture. The affected clans express continued effects and intergenerational trauma caused by these actions and are seeking an apology from uniformed military officers. A Navy flag officer delivered an apology to clan leaders and the community of Kake (September 21) and Angoon (October 26).

VOTING AND CIVIL RIGHTS

Designation of Voter Registration Sites through State Collaboration. As part of President Biden’s Executive Order 14019, “Promoting Access to Voting” aimed to reduce past injustices of discriminatory voting policies in the United States. In 2022, New Mexico and Kansas became the first-ever states to designate the Department of the Interior’s two post-secondary schools as voter registration agencies: Southwestern Indian Polytechnic Institute (SIPI) and Haskell Indian Nations University (HINU), respectively. The state-led voter agency designations ensures that Haskell and SIPI students and community members have access to voting information and opportunities to register to vote. In September 2023, SIPI went further to announce the

establishment of its first-ever on-campus Voter Registration Office to start the 2023 school year and ensure its community members have full access to voter information.

Justice Department ADA findings. On June 18, 2024, the Justice Department issued findings that Alaska violated Title II of the Americans with Disabilities Act (ADA), discriminating against voters with disabilities by failing to provide an accessible ballot for in-person voting, selecting inaccessible polling places for federal, state, and local elections, and maintaining an inaccessible elections website.

On January 17, 2024, in *Winnebago Tribe of Nebraska v. Thurston County* (D. Neb.), the Department filed a statement of interest regarding Section 2 of the Voting Rights Act. In that case, the Winnebago and Omaha Tribes of Nebraska, and several Tribal members, sued Thurston County alleging that the County's at-large method of electing its county supervisors diluted the voting strength of Native American voters in the County, in violation of Section 2. On January 26, 2024, the court entered a consent decree requiring the County to adopt a method of election compliant with Section 2 of the Voting Rights Act.

The Department has continued to hold meetings with state and local election officials and minority community members in various jurisdictions to discuss the minority language requirements of Section 203 of the Voting Rights Act, and to answer questions regarding implementation of effective language assistance programs. Under the determinations made by the Director of the Census, published in the December 8, 2021 Federal Register, jurisdictions covered under Section 203 for American Indian and Alaska Native languages include jurisdictions within Alaska (Yup'ik, Aleut, Inupiat), Arizona (Navajo, Pueblo, Hopi, Paiute, Apache), Colorado (Ute), Florida (Seminole), Idaho (Nez Perce), Mississippi (Choctaw), Nevada (Shoshone), New Mexico (Navajo, Pueblo, Ute), Texas (Kickapoo, Alabama-Coushatta), and Minnesota and Wisconsin (Ho-Chunk).

On May 20, 2022, in *Turtle Mountain Band of Chippewa Indians v. Howe* (formerly *Jaeger*) (D.N.D.), the Department filed a statement of interest regarding Section 2 of the Voting Rights Act. The plaintiffs, including the Spirit Lake Tribe and individual Tribal members, alleged that North Dakota's legislative redistricting plan violated Section 2 of the Voting Rights Act because it dilutes the voting power of Native American voters. Secretary of State Jaeger filed a motion to dismiss, arguing, among other things, that the Voting Rights Act does not contain a private right of action for a violation of Section 2. The Department's statement articulated that private plaintiff do have a cause of action under Section 2. The district court denied Secretary Jaeger's motion to dismiss finding as the plaintiffs had standing to bring suit under Section 1983. After trial, the district court found that the State's plan violates Section 2. The case is now on appeal in the Eighth Circuit on the question of whether Section 2 is privately enforceable under Section 1983. The Department filed an amicus brief in the Eighth Circuit explaining that it is.

Civil Rights Enforcement Actions in South Dakota. On October 19, 2022, the Division filed *United States v. Retsel Corporation*, a lawsuit against the owners of a hotel and bar for making public comments that Native Americans were not allowed on the property and turning away Native Americans who tried to book hotel rooms. On November 29, 2023, the federal

district court for the District of South Dakota entered the consent order requiring the owners to adopt a non-discrimination policy, barred one of the owners from leading the company or managing the hotel for four years, and required the owners to issue a public apology to Tribal organizations in South Dakota and the Great Plains region. Throughout 2024, the Division has been working to ensure implementation of the terms of the consent order.

Civil Rights Investigation of Phoenix, AZ Law Enforcement Department. On June 13, 2024, the DOJ issued a findings report concerning its investigation of the Phoenix, Arizona Police Department. In operative part, the report stated: Phoenix Police Department “discriminates against Black, Hispanic, and Native American people when enforcing the law.”

Financial Assistance to Farmers, Ranchers, and Forest Landowners through the Discrimination Financial Assistance Program. Authorized and funded by the Inflation Reduction Act, the DFAP program issued payments to 43,000 individuals across all 50 states, ranging from \$10,000 to \$500,000. The program provided financial assistance to farmers, ranchers and forest landowners, including Tribal citizens, who experienced discrimination in USDA farm lending programs prior to January 2021. USDA is actively working to build a department that ensures no customers are ignored or left behind, as outlined in its 2024 Equity Action Plan.

INDIGENOUS LANGUAGES, KNOWLEDGE, AND CULTURE

INDIGENOUS KNOWLEDGE AND HISTORIC PRESERVATION

ACHP Policy Statement on Indigenous Knowledge and Historic Preservation. In March 2024, the Advisory Council on Historic Preservation unanimously approved a Policy Statement on Indigenous Knowledge and Historic Preservation. The policy statement tailors government-wide Guidance for Federal Departments and Agencies on Indigenous Knowledge to the needs of the historic preservation community. The policy communicates 12 baseline principles that federal agencies, state and local governments, and non-governmental institutions should implement as a part of their stewardship, Section 106 participation and compliance, sacred sites management, and other historic-preservation actions, consistent with their unique missions and authorities. Overall, the policy statement reinforces that Indigenous Knowledge should be recognized as an independent, valid, and self-supporting line of evidence meant to support program, policy, and procedural decisions related to historic preservation and recognizes designated representatives of Indian Tribes and Native Hawaiian organizations as the appropriate subject matter experts capable of informing decision making related to such knowledge. The policy also calls on the historic preservation community to ensure the appropriate amount of time and resources are dedicated to the identification, documentation, utilization, management, and safeguarding of Indigenous Knowledge, along with developing guidance to inform these

activities. An overarching goal of the policy is to ensure the Indigenous Knowledge of Indian Tribes, Native Hawaiians, and other Indigenous Peoples has an equitable and ongoing role in the decision-making process, recognizing the history of federal-Tribal/Native Hawaiian relations has not consistently or effectively accounted for this information.

Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian

Organizations. The ACHP has finalized an Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian Organizations. This exemption constitutes a Section 106 program alternative that exempts from Section 106 review certain federally funded, licensed, or managed restoration, rehabilitation, preservation, and reconstruction activities proposed, directed, authorized, or supported by Native Hawaiian Organizations. It applies to all undertakings as defined in the National Historic Preservation Act, including landscaping practices, agricultural activities, restoration of water features, restoration of historic pathways, restoration of sacred and traditional sites, installation of interpretive signs, return or incorporation of Indigenous names, and the reconstruction or restoration of traditional Native Hawaiian buildings and structures.

National Park Service Tribal Historic Preservation. Since 2021, the National Park Service has signed 27 new agreements with Tribal Historic Preservation Offices, supporting Indian Tribes in strengthening their historic preservation programs managed on Tribal lands. NPS has distributed \$77 million to Tribes to support historic and cultural preservation work, including apportionments to Tribal Historic Preservation Offices and through annual Tribal Heritage Grants, in addition to distributing another \$10.4 million in grants to museums, Indian Tribes, and NHOs to assist in consultation, documentation, and repatriation under NAGPRA. In 2022, the NPS also hired a full-time investigator to enhance oversight and museum compliance with NAGPRA for the first time in the Act's 31-year history.

Historic New Treaty on Genetic Resources and Traditional Knowledge of Indigenous

Peoples. In May 2024, World Intellectual Property Organization (WIPO) Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge through its member states successfully approved a groundbreaking Treaty making history as the first WIPO Treaty to include Indigenous Peoples. Successful negotiations were led by the United States Government including the Departments of Commerce, Interior, and State, and consulted with U.S. Tribal governments and organizations consistent with protections of genetic resources and traditional knowledge held by Indigenous Peoples.

EPA's Indigenous Knowledge (IK) Training for Employees. In December 2022, with the release of the "Guidance for Federal Departments and Agencies on Indigenous Knowledge," EPA responded by creating and deploying an EPA-wide IK Training to educate staff regarding what Indigenous knowledge (IK) is, and how it can be recognized, considered, and applied in federal research, policy, and decision-making at EPA. "Live" trainings occurred throughout the 2024 calendar year. A recorded version of the training is accessible internally to EPA employees on EPA's IK intranet site, which also features additional IK-related resources, including a recorded discussion between then EPA Deputy Administrator Janet McCabe and Dr. Robin Wall

Kimmerer, author of *Braiding Sweetgrass*. As of June 2024, four of five planned IK trainings are complete, with almost 1800 employees attending.

Promoting the use of Indigenous Knowledge in Federal Decision Making at DOI. The Department of the Interior has taken steps to incorporate Indigenous Knowledge into its work, including through the publication of departmental guidance on the inclusion and protection of Indigenous Knowledge in decision making and scientific research. Under Secretary Haaland’s leadership, a new chapter in the agency’s Departmental Manual formalized Indigenous Knowledge as a foundational piece of the Department’s mission and formally recognized Indigenous Knowledge as one of the many important knowledge systems that contribute to the well-being of the United States and to the collective understanding of the natural world. As part of the implementation of the Department Manual chapter, the Department is conducting Tribal consultation on a draft handbook that has been developed to provide guidance, practical tips, and promising practices for engaging with Tribal Nations and Indigenous communities on the inclusion and application of Indigenous Knowledge.

Promoting the use of Indigenous Knowledge in Federal Decision Making at USA. In June 2024, USAID launched our new policy on Knowledge Management and Organizational Learning. The policy specifically identified Indigenous knowledge as a critical asset that USAID must consider in program design and implementation in order to increase equitable partnerships and improve program effectiveness and results. To support the implementation of the policy, USAID is exploring development of a framework and web-based tool to increase access to information and resources associated with understanding and engaging local and Indigenous knowledge in development and strengthening local learning systems.

GRAVES PROTECTION AND REPATRIATION

Final Native American Graves Protection and Repatriation Act (NAGPRA) Rule. The Department of the Interior published final revisions to its NAGPRA regulations on December 13, 2023, that provide a systematic process for returning human remains, funerary objects, sacred objects, or objects of cultural patrimony to Tribal Nations and Native Hawaiian Organizations. The regulatory changes close loopholes and streamline the requirements for museums and federal agencies to inventory and identify human remains and cultural items in their collections with appropriate deference to Indigenous knowledge.

NATIVE LANGUAGES

Native Language Plan. The Administration is releasing its 10-year National Plan on Native Language Revitalization (Plan). The Plan calls for historic action to address the United States government’s role in the loss of Native languages across the lower 48 states, Alaska, and

Hawai‘i. The Plan lays out a long-term, all-of-government strategy that works with Tribal Nations, the Native Hawaiian Community, Urban Native communities, Native language experts, schools, community organizations, and the philanthropic sector for the revitalization, protection, preservation, and reclamation of Native languages. The plan’s proposals would: 1) expand access to immersion language environments, 2) support community-led revitalization efforts, and 3) develop, grow and sustain Native language support networks. The Plan proposes ways to address a chronic under-investment in Native language revitalization to date. Implementation of this plan would require an investment of \$16.75 billion between 2025 and 2035 – \$1.5 billion per year. This is proportionate to the need *and* the historical harm that was caused during the boarding school and assimilation eras.

National Fund for Excellence in American Indian Education. The Interior Department’s Bureau of Indian Education will announce \$7.5 cooperative agreement with the National Fund for Excellence in American Indian Education (National Fund) to support Native Language revitalization. Through this innovative partnership, DOI and the National Fund will work together to administer the BIE Language Grant Program (LGP), and support Native language revitalization systems. A core goal of the partnership is reimagining BIE schools as leaders in providing world class learning opportunities for students. To successfully support BIE students in learning their language and culture, the National Fund will provide grants to BIE schools to start or expand access to high-quality language and culture immersion programs. The partnership will foster a network of BIE schools undertaking this work and will help to create more efficiency and learning opportunities for the educators and school leaders engaged in the effort.

SSA Native Languages Accessibility Improvements. SSA is enhancing interpreter services and seeking opportunities to translate relevant SSA publications into Native Languages. In 2023, SSA developed strategies to translate targeted publications and market interpreter services in Tribal communities, implemented new Tribal outreach to Urban Indian Centers in Limited English Proficient communities, and worked on hiring bilingual employees. In 2024, SSA produced publications in Native Languages that included a poster for display in Field Offices titled “Share Your Race and Ethnicity & Help Us Improve Service and Access” in Yup’ik and Diné native languages. In April 2024, we posted the blog Social Security Publishes Native Language Action Plan to Improve Access to Our Programs and Services sharing our accomplishment in SSA’s first ever Native Language Action Plan to do our part in supporting Native language revitalization. By the end of the FY 2024, the Office of Native American Partnership bridged efforts with another federal agency to utilize a Native Language Center to translate a limited number of publications into 5 Native languages for publications. Those publications will be released in FY 2025.

TECHNOLOGY, BROADBAND, SPECTRUM, AND CYBERSECURITY

INTERNET AND BROADBAND

BIA Indigenous Communications & Technology (ICT) Division. In 2024, the Department of the Interior opened the new Bureau of Indian Affairs Indigenous Communications & Technology (ICT) Division to modernize access to wireless services and technical assistance to assist Tribal Nations in technological self-governance and economic development initiatives in managing, creating, and maintaining broadband infrastructure; review of new electromagnetic spectrum leasing mechanisms; providing technical assistance for needed interagency coordination and overlooked tribally-led wireless development on Tribal lands; and facilitation of new economic development opportunities between Tribes, tech industry, and the federal government, including electric vehicle deployment, that has been chronically absent on Tribal lands. The Department also announced the opening and new BIA ICT Division Director and Attorney-Advisor to further carry out the goals of the 2022 Tribal Spectrum MOU between the DOI-FCC-NTIA, and coordination of the National Spectrum Implementation Plan that required the President's inclusion of Tribal Nations for the first time in history.

CYBERSECURITY

DHS Cybersecurity and Infrastructure Security Agency (CISA). Completed several Security at First Entry (SAFE) assessments, an Infrastructure Survey Tool (IST) project for the Squaxin Island Tribal community, which is one of the federally recognized tribes. Participated on a Tribal symposium discussion panel for the Washington state tribal community.

Tribal Cybersecurity Grant Program (TCGP). Part of the \$1B Infrastructure Investment and Jobs Act (IIJA) Cybersecurity Grant appropriation, with 3% of the \$1B being set aside for grants to be made directly to Federally Recognized Tribes. Approximately \$18.2M was available for this round of funding.

DHS Immigration and Customs Enforcement/Homeland Security Investigations (ICE/HSI). Collaborated with the DHS Know2Protect campaign and the Center for Combating Human Trafficking to bring education and awareness to Oklahoma Tribal communities concerning topics including cyber security, cyberbullying, social media, child exploitation, and human trafficking in the Tornado Alley Child Exploitation and Trafficking Task Force (TACETT).

INTERNATIONAL AND BORDER ISSUES

BORDER ISSUES

Supporting global progress on the development of Indigenous Peoples. In 2024, USAID invested approximately \$79 million to support the development efforts of global

Indigenous Peoples and other racial and ethnic communities in line with USAID's Policy on Promoting the Rights of Indigenous Peoples. Interventions include:

- In Colombia, the Indigenous Peoples and Afro-Colombian Empowerment Activity (IPACE) is partnering with nine umbrella Indigenous Peoples and Afro-Colombian organizations to contribute to the self-determined development of ethnic communities and to co-create and implement peacebuilding and sustainable development initiatives. In FY (FY) 2023, IPACE promoted the respect and effective enjoyment of collective rights of the Nasa, Inga, Kankuamo, Curripaco, Cubeo, Tikuna, Eperara Siapidara, Awa, Wiwa, Arhuaco, Kamentsa, Kogui, and Wayuu peoples. The partnership implemented actions for peacebuilding, preservation of cultural heritage, strengthening of their organizational capacities, food sovereignty, income generation and inclusive business development, prevention and response to natural and health emergencies, climate change adaptation, and youth and gender equality strengthening involving 5,439 individuals.
- In India, the Producer-Owned Women Enterprises (POWER) activity, implemented by the Industree Foundation, established three women-owned production units in FY 2023, benefitting 823 underprivileged women, particularly women from India's tribal communities. Two of these enterprises are based on sustainably-sourced tree leaves for leaf plate making and the third is based on sustainably-grown bamboo. Through this activity, USAID also mobilized approximately 440 farmers to establish bamboo plantations on their underutilized land, increasing economic productivity and access to resources. Though men own the land in a majority of cases, the activity worked with communities in promoting women's leadership and decision making in farming.
- In India, the Scaling up Early Reading Intervention (SERI) activity is working towards inclusion of Indigenous Peoples to ensure they are socially and linguistically integrated in the mainstream schooling system. Under SERI, multilingual education workbooks for grades 1 and 2 were developed in the State of Rajasthan to promote mother tongue-based instruction, including for tribal and Indigenous populations. In addition, an online course on multilingual education called "Multilingual Self Learning Package" was launched in the State for primary teachers. The objective of the course is to orient teachers on the significance and pedagogic approach to ensure linguistic inclusion in classrooms.
- USAID/India has several health programs supporting the Government of India to strengthen their ability to provide critical health screening, prevention, and treatment services to tribal populations across the country leveraging health-care solutions based on locally-identified needs. Under the Tribal tuberculosis (TB) program, USAID has supported tribal communities with TB screening, education, and treatment services. Under the ACCELERATE project, USAID has provided adolescents of different tribal communities in the Northeast with HIV services, education referrals, social protection linkages, and nutrition and life skills education.

- The USAID Regional Mission for Southern Africa implemented the Advancing Rights in Southern Africa (ARISA) program which advocated for the legal recognition and rights of Indigenous Peoples in the region. In its fifth and final year, ARISA advanced the rights of Indigenous Peoples through research, litigation, and capacity building and financial support for Indigenous Peoples organizations. ARISA trained 557 Indigenous leaders and activists on media, advocacy, and paralegal skills, far exceeding its annual target of 50. Groups that ARISA trained and supported were increasingly trusted and seen as credible by their communities and by the regional and international communities. For example, ARISA partners were invited to participate in a virtual workshop on the status of African Indigenous Peoples organized by the African Commission on Human and Peoples' Rights, enabling them to engage on policy issues at the continental level while networking with colleagues from other regions.

INTERNATIONAL INDIGENOUS RIGHTS AND PARTNERSHIPS

Grant Award to Support the UN's Voluntary Fund for Indigenous Peoples. USAID participated in the United Nations Assembly on the Expert Mechanism for the Rights of Indigenous Peoples (EMRIP) held in Geneva, Switzerland from July 8-12, 2024. The USG delegation announced USAID's support to enhance participation of Indigenous Peoples at the UN; and an award of a \$1,750,000, 5-year partnership with the UN Voluntary Fund for Indigenous Peoples to advance their rights in the UN Fora.

FAS Market Development Program Funding. Since 1998, the Intertribal Agriculture Council has utilized Market Access Program (MAP) funds. In fiscal year 2024, IAC received \$716,181 in MAP funds, a threefold increase since 2019. The American Indian Foods program has established a presence in the global supply chain that supports producers entering various markets where they receive fair prices and increased market access for their foods and products.

Communities Forest Tenure Pledge, Forest Tenure Funders Group (FTFG)

At COP26 in Glasgow in 2021, the U.S. Government and 21 funders, including governments and private philanthropic organizations, announced a \$1.7 billion ~~pledge~~ in support of advancing Indigenous Peoples and local communities' forest tenure rights. As stated in the Pledge statement, donor contributions are for: a) Funding that channels increased and direct support to Indigenous Peoples and local communities, including for capacity building, development of collective governance structures, and sustainable livelihoods; and b) Activities that strengthen and protect Indigenous Peoples and local communities' land and resource rights, including support for forest tenure reforms and implementation. USAID has led the participation of the USG in the FTFG pledge and

reporting. This year, the "Third Annual Progress Report" will provide an update on donor spending during January to December 2023. It aggregates donor spending data and provides details on how funds were spent. The report also captures key challenges for achieving pledge ambitions and identifies areas for greater collaboration between donors, Indigenous Peoples' and local communities' organizations, and wider stakeholders.

Tribal Products in Agricultural Trade Missions and Shows. In 2024, USDA Foreign Agricultural Service hosted an Agribusiness Trade Mission to Canada focusing on expanding opportunities for food and agriculture businesses representing Tribes, Tribal members, and the Native Hawaiian Community. The first of its kind, this trade mission specifically highlighted products made and produced by Native agribusinesses, focusing on the reinvigoration of historic Native Nations agricultural trade networks across the United States and Canada. Tribal producers participated in the mission and highlighted the Made/Produced by American Indians official trademark, privately certified by the Intertribal Agriculture Council. Producers from the Native Hawaiian Community operating on Hawaiian Home Lands also participated and showcased their products. Collectively, these 14 Native agrifood businesses participated in 130 business-to-business meetings resulting in over \$1.15 million in projected 12-month sales.

APPENDIX A. - LIST OF ACRONYMS

Acronym	Term
ACF.....	Administration for Children and Families (part of HHS)
ACHP.....	Advisory Council on Historic Preservation
AI/AN.....	American Indian / Alaska Native
BIA.....	Bureau of Indian Affairs (part of DOI)
BIE.....	Bureau of Indian Education (part of DOI)
BIL.....	Bipartisan Infrastructure Law
BJA.....	Bureau of Justice Assistance (part of DOJ)
BJS.	Bureau of Justice Statistics (part of DOJ)
BTFA.....	Bureau of Trust Funds Administration (part of DOI)
CEQ.....	White House Council on Environmental Quality (part of EOP)
COPS.....	Community Oriented Policing Services (part of DOJ)
DHS.....	Department of Homeland Security
DOC.....	Department of Commerce
DOE.....	Department of Energy
DOI.....	Department of the Interior
DOJ.....	Department of Justice
DOL.....	Department of Labor
DOT.....	Department of Transportation
DPC.....	White House Domestic Policy Council (part of EOP)
EOP.....	Executive Office of the President of the United States
ED.....	Department of Education
EPA.....	Environmental Protection Agency
FBI.....	Federal Bureau of Investigation (part of DOJ)
FCC.....	Federal Communications Commission
FEMA.....	Federal Emergency Management Agency (part of DHS)
GSA.....	General Services Administration
HHS.....	Department of Health and Human Services
HRSA.....	Health Resources and Services Administration (part of HHS)
HUD.....	Department of Housing and Urban Development
ICE.....	Immigration and Customs Enforcement (part of DHS)
IHS.....	Indian Health Service (part of HHS)
IRA.....	Inflation Reduction Act
IRS.....	Internal Revenue Service (part of Treasury)
ITBC.....	Intertribal Buffalo Council (non-governmental)
MMU.....	Missing and Murdered Unit (part of BIA/DOI)
NOAA.....	National Oceanic and Atmospheric Association (part of DOC)
NTIA.....	National Telecommunications and Information Administration (part of DOC)
OJJDP.....	Office of Juvenile Justice and Delinquency Prevention (part of DOJ)

Acronym	Term
OMB.....	Office of Management and Budget (part of EOP)
OTR.....	Office of Tribal Relations (part of USDA)
SAMHSA.....	Substance Abuse and Mental Health Services Administration (part of HHS)
SBA.....	Small Business Administration
SSA.....	Social Security Administration
State/DOS.....	Department of State
TCU.....	Tribal Colleges and Universities
Treasury.....	Department of the Treasury
UIO.....	Urban Indian Organization (non-governmental)
USACE.....	United States Army Corps of Engineers (part of DOD)
USAID.....	United States Agency for International Development
USDA.....	United States Department of Agriculture
USFS.....	United States Forest Service (part of USDA)
VA.....	Department of Veterans Affairs
WHCNA.....	White House Council on Native American Affairs

1 U.S. DEPARTMENT OF THE INTERIOR

2 BUREAU OF INDIAN AFFAIRS

3 **EXHIBIT**

4 Lone Eagle 14

exhibiticker.com

5 Tribal Treaty Rights Memorandum of Understanding

6 Consultation on Implementation

7 Monday, September 19th, 2022

8 2:02 P.M. to 3:37 P.M. (EST)

9 Attended via Zoom Webinar

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1 C O N S U L T A T I O N A T T E N D E E S

2

3 Bryan Newland

4 Assistant Secretary of Indian Affairs

5 Heather Dawn Thompson

6 USDA Director

7 Office of Tribal Relations

8 Jane Nashida

9 EPA Assistant Administrator

10 Office of International and Tribal Affairs

11 Jarred Michael Erickson

12 Chairman, Colville Confederated Tribes

13 Ron Allen

14 Chairman, Jamestown S'Klallam Tribe

15 Harold Frazier

16 Cheyenne River Sioux Tribe

17 Alicia Mousseau

18 Vice-President Oglala Sioux Tribe

19 Justin Parker

20 Clyde Estes

21 Arlando Teller

22 Department of Transportation

1 P R O C E E D I N G S

2

3 **OLIVER WHALEY:** Today we welcome your
4 comments. If you would like to make a verbal
5 comment, please raise your virtual hand. To do
6 this, go to reactions and select raise hand and
7 the Assistant Secretary will call on individuals
8 to speak.

9 If you are unable to raise your virtual
10 hand, please type your name in the comment chat
11 box. When you are called upon to provide a verbal
12 comment, please provide your name, title, and
13 tribe.

14 For those of you joining us by a
15 toll-free number, please hit star nine to raise
16 your virtual hand and star six to mute and unmute
17 yourself. For closed captioning services I will
18 be putting a link in the chat box so you can
19 follow that link if you need those services.

20 I will also put a link in the chat box
21 to the Dear Tribal Leader Letter just for
22 reference, as well as the draft tribal

1 consultation policy and procedures.

2 To provide comments, please submit those
3 to consultation@bia.gov, written comments by
4 October 10th, 2022. Please include tribal treaty
5 rights MOU in the subject line.

6 Thank you, again, for being here today
7 and I will now turn the floor over to the
8 Assistant Secretary for Indian Affairs, Bryan
9 Newland.

10 **BRYAN NEWLAND:** Meegwetch. Thank you so
11 much, Oliver, and --

12 (WHEREUPON A NATIVE LANGUAGE WAS
13 SPOKEN.)

14 **BRYAN NEWLAND:** Good afternoon. Good
15 morning, everybody.

16 Thanks for joining us today. My name is
17 Bryan Newland. I have the privilege of serving as
18 Assistant Secretary for Indian Affairs here at the
19 Department of the Interior and I also want to
20 extend my gratitude to all of you for taking time
21 today to join us for this consultation and the
22 implementation of the MOU on interagency

1 collaboration on the protection of tribal treaty
2 and reserved rights.

3 Before we begin the consultation, I want
4 to invite Chairman Wooten here from the Samish
5 Tribe. I believe Chairman Wooten may be joining
6 us by phone today.

7 Okay, if not, what I will do instead is
8 ask everybody to take a moment of silence to pray
9 or reflect in your own way for all of us to have a
10 good, positive conversation today in a good
11 spirit.

12 Thank you very much. I also want to
13 take a moment to offer our support and our prayers
14 for everybody in the villages in Western Alaska
15 who are dealing with the aftermath of the storm
16 over the weekend. I know that it was intense, and
17 folks were still taking stock of the aftermath,
18 but I want to make sure that those of you who are
19 joining us from that region know that our team is
20 committed to supporting you and that we are, of
21 course, offering our prayers and support for your
22 wellbeing in addition to that.

1 So, with that I want to turn it over to
2 my colleague and my friend, Daron Carreiro from
3 the Domestic Policy Council.

4 **DARON CARREIRO:** Great, thank you,
5 Assistant Secretary Newland. I know your
6 attention turned to Alaska yesterday and you spent
7 a lot of your Sunday talking to folks there, so
8 thank you for that.

9 Thank you to the tribal leaders for
10 joining us today.

11 My name is Daron Carreiro. I'm the
12 Senior Policy Advisor for Native Affairs at the
13 White House Domestic Policy Council. Protecting
14 tribal treaty rights and reserve rights to land,
15 water and historic practices like hunting, fishing
16 and gathering, protecting these rights are among
17 the most important things the Federal Government
18 is responsible for. It's one of our most solemn
19 obligations.

20 This is a priority for the Biden Harris
21 Administration and it's one of the cornerstones of
22 the President's relationship with tribal nations.

1 Treaty obligations are not limited to a particular
2 department or agency. They are duties owed on
3 behalf of the entire Federal Government, which is
4 why we try to accomplish this work through an all
5 of Government approach, through the White House
6 Council on Native American Affairs and at today's
7 case, the tribal treaty rights MOU.

8 We had seventeen agencies commit to
9 setting best practices for identifying and
10 protecting tribal treaty rights and reserve rights
11 in Federal agency decision making.

12 Getting seventeen agencies to commit to
13 something of this magnitude was a major
14 achievement and we were thrilled to announce the
15 MOU at last year's Tribal Nation Summit. As
16 successful as we were in getting that commitment
17 from agencies, it's just as important, if not more
18 so, that we do a good job implementing it and
19 achieving success through implementation.

20 What these seventeen agencies have been
21 working on this year and the work we hope to
22 accomplish with tribal leaders through

1 consultation today, picking up on our conversation
2 from last week, this type of implementation takes
3 time and hard work, but if we can do it right, it
4 can be extremely meaningful to our engagement with
5 tribal nations and in upholding the Federal
6 Government's protection of tribal treaty rights.

7 One of the keys in this case, again, is
8 implementing this guidance in a uniform manner
9 across all departments and agencies with staff
10 throughout the entire country. That is why an all
11 of Government approach is critical here, and it's
12 why the White House Council on Native American
13 Affairs has driven this work and coordinated this
14 consultation through its committee on climate
15 change, tribal homelands, and treaties.

16 Thank you so much to the committee
17 co-chairs at EPA, Interior and USDA and all the
18 other agencies who I know have been working hard
19 on this. We were in the waiting room just prior
20 to this call and there was something like thirty
21 Federal officials from across the entire Federal
22 Government, and I know many were logged on today,

1 just demonstrating the Administration's commitment
2 to these issues and to this guidance.

3 We are really looking forward to the
4 consultation today and moving this guidance
5 forward.

6 With that, Bryan, I'll turn it back over
7 to you.

8 **BRYAN NEWLAND:** Meegwetch. Daron, thank
9 you so much. It's always great to have you here
10 from the White House, the DPC, especially, you
11 know, considering how busy you are working across
12 the administration to make sure all the chess
13 pieces are moving down the board, so I appreciate
14 you taking the time to join us today.

15 This is the second in the series of
16 consultations, but this is as a whole the first
17 interagency consultation facilitated by the White
18 House Council on Native American Affairs. And
19 this administration under President Biden has been
20 full of firsts for Indian Country.

21 It's the first administration to have a
22 Native Cabinet Secretary with DOI, Secretary

1 Haaland, my boss, and who also co-chairs the
2 council on Native American affairs.

3 It's also the first administration to
4 have a Native American Treasurer of the United
5 States with Chief Malerba being sworn in to her
6 new role just last week.

7 And it's the first administration to
8 have a senior level appointee for Tribal Affairs
9 at the Office of Management and Budget with Liz
10 Carr's recent appointment.

11 And President Biden's Administration has
12 never before seen milestones in terms of the scope
13 and the depth of Federal resources committed to
14 Indian Country through the American Rescue Plan,
15 the Bipartisan Infrastructure Law, the Inflation
16 Reduction Act as well as the annual budget. This
17 is billions and billions of dollars in Federal
18 funding for tribes and tribal communities.

19 And now today, we're asking for your
20 feedback and perspective on another set of firsts
21 under this administration with the work completed
22 under the 2021 Tribal Treaty Rights MOU announced

1 at last year's Tribal Nation Summit.

2 The MOU builds on the treaty rights MOU
3 signed in the Obama Administration in the fall of
4 2016, and the purpose of today's consultation is
5 to honor the Nation-to-Nation relationship and to
6 elicit the expertise of tribal leaders so that the
7 draft best practices guides in the flow charts are
8 stronger and implementation aligns with tribal
9 priorities.

10 The goal of these consultations is to
11 have policy documents that reflect the priorities
12 of tribes, the Administration's commitment to
13 those priorities and for the documents that have
14 practical and positive effect for Federal staff.

15 For today's consultation I'll ask my
16 fellow co-chairs of the White House Council on
17 Climate Change, Tribal Homelands and Treaties to
18 help lead this discussion. This committee was
19 instrumental in getting the MOU drafted and signed
20 by seventeen Federal departments and agencies.

21 The committee co-chairs are the EPA
22 Assistant Administrator for the Office of

1 International and Tribal Affairs, Jane Nashida,
2 and USDA's director of the Office of Tribal
3 Relations, Heather Dawn Thompson.

4 Today's consultation is closed to the
5 press, so if you are a member of the press and you
6 have questions you can disconnect and contact us
7 at interior_press@ios.doi.gov.

8 This is a Government-to-Government
9 consultation and tribal leader's comments are
10 going to be prioritized and we'll seek them out
11 first. We have a number of Federal leaders here
12 from the various signatory agencies and we'll
13 introduce them shortly.

14 As a reminder, written comments can be
15 submitted to us by midnight on Monday, October
16 10th, and you can send those to
17 consultation@bia.gov.

18 At this time, I want to turn it over to
19 my friend and co-chair from USDA, Heather Dawn
20 Thompson.

21 **HEATHER DAWN THOMPSON:** Thank you so
22 much, Assistant Secretary Newland. It's a

1 pleasure to be with everybody today. Heather Dawn
2 Thompson, --

3 (WHEREUPON A NATIVE LANGUAGE WAS
4 SPOKEN.)

5 **HEATHER DAWN THOMPSON:** I'm a citizen of
6 the Shine River Sioux Tribe and I'm honored to
7 serve in this administration directly with
8 Secretary Vilsack and his office as the Director
9 of his Office of Tribal Relations.

10 Serving on this committee on climate,
11 homelands and treaty rights has been a significant
12 commitment by Secretary Vilsack and by his entire
13 team, and as you can see by the treaty MOU as well
14 as many of the other work products that have come
15 out of this committee, we've been very busy.

16 I just wanted to briefly mention one of
17 our other work products, which is the Joint
18 Secretarial Order, which is between Secretary
19 Vilsack and Secretary Haaland at the Department of
20 Interior to really encourage and additional tribal
21 participation in all Federal Land Management
22 decision making.

1 So, we appreciate the many different
2 tribal leaders that have been having conversations
3 with us about co-stewardship within that context
4 as well.

5 We had a very robust conversation with
6 tribal leaders about treaty rights in this draft
7 on Friday and we look forward to continuing that
8 conversation today.

9 I want to introduce our other co-chair,
10 EPA Assistant Administrator Jane Nashida, who has
11 been really instrumental to the tribal treaty
12 rights MOU.

13 Jane?

14 **JANE NASHIDA:** Thank you, Director
15 Thompson.

16 As mentioned, good afternoon and good
17 morning. My name is Jane Nashida. I am the
18 assistant administrator for EPA's office for
19 international and tribal affairs, and it is a
20 pleasure to be with you today.

21 As indicated, EPA serves as one of the
22 co-leads, along with Department of Interior and

1 Agriculture for the White House Council for Native
2 American Affairs, Climate Change, Tribal Homelands
3 and Treaties Committee. We are also honored to be
4 a co-chair for the White House Council's
5 International Indigenous Issues Committee as well.

6 As mentioned, last November at the White
7 House Tribal Nation Summit, Administrator Regan
8 had the honor of announcing the renewal of the
9 2016 Tribal Treaty Rights Memorandum of
10 Understanding as a key deliverable which we are
11 going to discuss today in terms of its
12 implementation.

13 EPA has worked closely with the sixteen
14 other Federal Agencies who signed on to the
15 renewal of the MOU, and EPA continues to be
16 committed to the strong implementation of the
17 tribal treaty rights MOU and is actively engaged
18 on the White House Council of Native American
19 Affairs Implementation Workgroup.

20 I want to take this moment now to
21 acknowledge my colleagues across the Federal
22 family who have joined today's consultation. From

1 the Advisory Council on Historic Preservation,
2 Reno Franklin, who is a member for the Advisory
3 Council for Historic Preservation.

4 In addition, Jordan Tannenbaum, the
5 Chief Development Officer for the United States
6 Holocaust Museum and the Acting Chair for the
7 Advisory Council on Historic Preservation; from
8 the Department of Defense, Richard Kidd, the
9 Deputy Assistant Secretary for the Department of
10 Defense for Environment and Energy Resilience;
11 from the Department of Education, Hollie Mackey,
12 the Executive Director for the White House
13 Initiative on Advancing Educational Equity,
14 Excellence and Economic Opportunity for Native
15 Americans and strengthening tribal colleges and
16 university; from the Department of Housing and
17 Urban Development, Iris Friday, the Native
18 American Program Specialist in the Office of
19 Native American Programs; From the Department of
20 Justice, Assistant Attorney General Todd Kim from
21 the Environment and Natural Resources Division,
22 and Deputy Assistant Attorney General Gina Allery;

1 from the Department of Transportation, Arlando
2 Teller, who is the Deputy Assistant Secretary for
3 Tribal Affairs.

4 I also want to acknowledge that other
5 senior level advisors and appointees are also
6 joining us and attending and representing their
7 signatory agencies.

8 Thank you, again, for being with us
9 today and we look forward for our discussion, and
10 I will turn it now back to Director Thompson.

11 **HEATHER DAWN THOMPSON:** Thank you so
12 much, Assistant Administrator Nashida.

13 Just a couple things that we wanted to
14 go over with you about some of the other projects
15 that the treaty rights MOU team has been working
16 on to frame out today's conversation.

17 First, the senior appointees that you're
18 meeting now and that are on the call today, we
19 want to let you know and assure you we've been
20 meeting on a monthly basis, which is a very
21 aggressive cadence for Federal employees to really
22 work through, Assistant Secretary Newland says

1 it's one thing to sign it, but it's a whole other
2 thing to implement this level of commitment to
3 tribal treaty rights.

4 And so, in addition to the policy teams
5 that have been meeting, because obviously so much
6 of this is very legal in nature, we have an entire
7 legal working group, the solicitors and the
8 attorneys from each of our federal agencies that
9 have been meeting as well.

10 And perhaps not surprising, one of the
11 first recommendations that the legal working group
12 made to us is that we need to educate ourselves
13 outside of this working group. We really need to
14 make sure that all Federal employees understand
15 this trust and treaty responsibility, and their
16 obligations.

17 And so, two very interesting and helpful
18 things that have come from that conversation is
19 one, we started a speaker series in which
20 professional attorneys in this space, in Indian
21 Country, have come and really done extensive,
22 detailed educating of Federal employees.

1 Our next speaker is Dean Elizabeth
2 Crump, which many of you know. So, this is the
3 third in this series and we're hoping to make this
4 a really regular occurrence so that folks have
5 exposure to that opportunity and that education.

6 And then second, some of you have seen
7 we have created a BETA database of treaties. We
8 started with a certain set of treaties, and we got
9 them scanned in. And you can find them on
10 Oklahoma's State's website. I think Jared is
11 going to put it in the chat there for you. There
12 you go. So, that's the BETA version. We
13 appreciate that this is still in development and
14 there are things that we need feedback on, so we
15 strongly encourage you to go to your own treaties,
16 click around, make sure that you feel comfortable
17 with what we have in there right now.

18 What we're doing at the moment is phase
19 two after we have digitized these treaties from
20 Kappler's. We are now focusing on phase two,
21 which has two components to it. One is that we're
22 trying to index different subject matters.

1 So, for example, if you are interested
2 in rights of way, where might you go in the
3 various treaties to find out about rights of way,
4 or energy or education. So that indexing is in
5 process right now.

6 Second and more complicated is that
7 we're trying to put in the database successor and
8 interest tribe. Obviously, many of our tribes
9 have changed their name through the Federal
10 Recognition Process, through history, and
11 sometimes it's not always clear who the original
12 signatories were on that treaty.

13 And so, you might actually be receiving
14 a call, or your in-house counsel might be
15 receiving a call from one of our research teams to
16 ask for your opinion. We want to make sure that
17 we are hearing directly from you as tribal
18 nations, that your concept of what is the right
19 treaties for your nation is what we're putting in
20 that database as well.

21 So, there's just a couple examples of
22 the things that we've been working on as part of

1 the tribal treaty MOU. We're also thinking about
2 other stuff. We haven't got there yet, they're
3 just conceptional but we're talking about dispute
4 resolution. We're talking about office of treaty
5 rights. We're having conversations. We wanted to
6 let you know we're trying to be very thoughtful
7 and reflective about our treaty obligations and
8 how best to implement this MOU.

9 So, let me turn it back to my teammate,
10 Assistant Secretary Bryan Newland, and we really
11 look forward to hearing from you today at today's
12 tribal consultation.

13 **BRYAN NEWLAND:** Thank you, Heather Dawn,
14 I appreciate that, and Assistant Administrator
15 Nashida, thank you for your time, and all of our
16 friends and colleagues across the Federal
17 Government, thank you as well for your time.

18 Again, you know, the combined presence
19 of so many high-ranking officials from across the
20 Federal Government here today shows, I hope, our
21 commitment to these issues. We know that treaties
22 are the supreme law of the land and that we have

1 an obligation as Federal officials and as Federal
2 agencies to fulfil the commitments that the United
3 States made in those treaties.

4 The 2016 version of the tribal treaty
5 rights MOU created a foothold so that we could
6 have this conversation today, with the ambition
7 and work stemming from the 2021 MOU reach a new
8 level. And it's an effort that's never before
9 been undertaken on this scale, again, with
10 seventeen signatory agencies.

11 This consultation seeks your feedback on
12 how to best implement this MOU, and part of this
13 discussion is how the Federal Government can move
14 toward a consensus-based mode of tribal
15 consultation regarding treaty and reserved rights.

16 The draft products under the MOU were
17 developed with input from each of the seventeen
18 signatory agencies. The MOU workgroup and legal
19 workgroup reviewed existing Federal agency
20 consultation policies and developments at the
21 international level to create this best practices
22 report, which Federal agencies can use to help

1 guide and inform their approaches to consultation,
2 policy development and Federal decision making.

3 This effort is also in line with the
4 January 26, 2021, executive memorandum from
5 President Biden on strengthening our
6 Nation-to-Nation relationships.

7 The MOU workgroup also developed a field
8 guide for agency staff that provides key
9 principles and instructions, and an accompanying
10 flow chart for Federal field staff to follow when
11 engaging tribes on treaty and reserved rights
12 issues.

13 The field guide and flow chart are
14 intended to help Federal staff identify treaty and
15 reserved rights that may be impacted by Federal
16 decision making and encourage early consultation
17 and coordination with tribal governments through a
18 step-by-step process. The MOU leadership wants to
19 ensure that these documents are meaningful and
20 informed by your perspectives.

21 We're open to any other suggestions that
22 tribal leaders may have to ensure that the Federal

1 Government lives up to the commitments that we've
2 made through this MOU.

3 To start the tribal leader dialogue
4 portion, I'll ask, again, USDA's director of the
5 Office of Tribal Relations, Heather Dawn Thompson,
6 to help me moderate, and we're going to try to
7 prioritize comments from elected tribal leaders
8 and it will be helpful for us if you could signify
9 whether you're an elected tribal official or not.

10 When you do raise your hand to ask a
11 question, you can use the raise my hand feature at
12 the bottom of your screen. And if you're joining
13 us by phone, please hit star nine to raise your
14 hand and then star six to unmute yourself once
15 you're called upon.

16 So, with that, I'm going to open this up
17 today with Ms. Wilson from the Lummi Nation.

18 **LISA WILSON:** Good morning and thank you
19 for reaching out to the tribes.

20 You know, we, in the northwest, have
21 been on the forefront working with you regarding
22 treaty rights at risk, and last year right around

1 this time, we did write a letter, kind of along
2 the same lines of, you know, an executive order.
3 And in this, we came up with, you know, how our
4 federal trustees would go and create a plan of how
5 they would protect our treaty rights. You know,
6 along the lines of, you know, for years it seems
7 like they've been concentrating on our hatcheries
8 and our harvest instead of protecting, you know,
9 our treaty rights.

10 And so, that's something that I just
11 want to make sure, you know, because I want to
12 make sure that this MOU, it's voluntary, but you
13 know, how can we get it to have some teeth in
14 this, you know, as you know that we've been
15 working on executive orders 3206, and you know, we
16 still are -- it's a work in progress and we're
17 looking to see how that could create teeth to
18 that.

19 So, I just want to make sure that this
20 is, you know, meaningful and that it's going to
21 have, you know, some teeth in it that, you know,
22 that they -- that our Federal trustees are going

1 to look at the best interest of our people,
2 because, you know, we're getting down to zero on
3 our harvest and you know, we're getting regulated
4 so much on our hatcheries that, you know, we're
5 basically trying to fight with both hands tied
6 behind our back.

7 Another thing that we're facing is that
8 we're in state processes that are clearly not
9 working for our tribe. So, we need directed
10 funding to tribes because you know, for the Lummi
11 Nation, you know, we're creating -- we're
12 producing our own salmon and we're trying to fix
13 the habitat. You know, we brought eight salmon
14 back up to almost three thousand and twenty-five
15 hundred died on our grounds before they could
16 reach the spawning grounds.

17 So, our habitat is shot, but we're
18 having to compete for those funds, you know, so
19 here we are producing our own fish, trying to fix
20 the habitat and competing for those funds against
21 stakeholders in the state process.

22 So -- and so, you know, we need some

1 help because we're -- it's all on the backs of us
2 and yet, you know, the harvest is divided fifty
3 percent when it comes to fisheries management.

4 So, those are some of the things that I
5 would really like to see taken into consideration,
6 and out of respect for everybody's time, I just
7 want to thank you all for being here.

8 **HEATHER DAWN THOMPSON:** We just wanted
9 to comment, Councilwoman that we really appreciate
10 your comment about the harvest and the fish. I
11 know that USDA has not been as active in this
12 space in the past, but both Department of Interior
13 and USDA included this in our joint secretarial
14 order, water management, natural resources
15 management, and we are trying to make sure that we
16 incorporate that into our treaty of conversations
17 as well. So, we appreciate you raising that
18 specifically with us. It's very helpful.

19 I see lots of good hands being raised,
20 thank you guys so much. I think we have
21 Councilman Jarred Michael Erickson and the
22 Chairman Ron Allen, and then Chairman Harold

1 Frazier in the cue in that order.

2 Councilman?

3 **JARRED MICHAEL ERICKSON:** Can you guys
4 hear me okay?

5 **HEATHER DAWN THOMPSON:** We can.

6 **JARRED MICHAEL ERICKSON:** All right,
7 thank you.

8 Jared Michael Erickson. I'm the
9 Chairman for the Colville Confederated Tribes. I
10 appreciate what Lisa had to say before me.

11 One thing I want to bring to attention
12 is, you know, we always talk about travel treaty
13 rights, and I brought this up for our local state
14 and DNR, but it's tribal trust rights, right? You
15 know, our reservation is established by executive
16 order. We didn't give up any rights. We never
17 had them spelled out because you know, like I
18 said, we never gave any up.

19 So, I want to make sure when we're
20 looking at this MOU that we're thinking about
21 that, it's not just tribal treaty rights, because
22 that always seems to be at the forefront of

1 everything and I appreciate every tribe's treaty,
2 you know, and I respect them. At the same time,
3 that doesn't mean we're second class, you know,
4 Indians when it comes to that.

5 So, I want to make sure that it's maybe
6 worded differently, stated differently, and that
7 there is not any differentiating between the two.
8 So, that's my main comment I want to get across,
9 and so hopefully, we can incorporate that and I'm
10 sorry if I haven't been in this process through
11 the whole thing, but I'm here today, so thank you
12 guys.

13 **BRYAN NEWLAND:** Thank you, Chairman, and
14 I will -- first I appreciate you taking time to
15 join us today and share your views. I know how
16 busy you are running your tribal government where
17 you're at.

18 I want to make sure that I emphasize
19 that the MOU is on the implementation of treaty
20 and reserved rights for many of the reasons that
21 you just laid out, and that's something that we're
22 doing our best to be mindful of.

1 **JARRED MICHAEL ERICKSON:** Yeah, and
2 again, I'm just trying to get that point across,
3 you know, because it's always treaty first, right,
4 and then it's reserved. You know what I mean, I'm
5 just so -- and then sometimes they don't even
6 mention it, you know, when we start talking, they
7 aren't seeing treaty rights, and so I appreciate
8 that, Bryan.

9 Actually, I think I'm maybe going to
10 meet with you at the end of the month. This will
11 come out in Meet Gun, and I have some meetings out
12 there at the end of September, so maybe we'll get
13 to meet here shortly, so, thank you.

14 **BRYAN NEWLAND:** Chairman Allen.

15 **RON ALLEN:** Thanks, Bryan.

16 And I apologize, I jumped on a little
17 bit late, so I might have missed a lot of the
18 intro on the purpose of this summit. I do want to
19 start by saying I agree with Heather and I'm --
20 excuse me, Lisa, and Jarred's comment about that
21 it is a trust obligation is true throughout Indian
22 Country, and so, I think that there are always

1 environmental in habitat protection issues,
2 natural resource matters are critically important
3 to us.

4 So, I think you guys get it. So, I just
5 -- I think the thing I'm interested in -- well,
6 first let me say I deeply appreciate that the
7 white house advisory council has established their
8 subcommittee to more narrowly zeroing in on
9 natural resource and climate change issues.

10 They easily -- well, they obviously
11 overlap, and we totally agree with that, and we
12 think that you guys know that when you talk about
13 one, you can't not talk about the other one in
14 terms of its impact to the natural resources that
15 we also depend. So, we in the northwest, without
16 a doubt, fisheries and forestry is a big deal, but
17 I'm sure Harold will raise issues in the Great
18 Plains and things that are critically important to
19 them as well as all of our sister tribes to the
20 south and to the east.

21 But the question I -- or the challenge
22 that I have for you as we move this agenda

1 forward, it's always good to get a high level,
2 senior level commitment, recognition of the
3 Federal obligation and the importance of the
4 coordination with all the Federal agencies to
5 protect this resource.

6 That was in detail, how does that
7 happen? What happens at the national level with
8 all these respected agencies? What happens at the
9 regional level, and how do we -- how do we make a
10 reasonable ask of the Federal Government to give
11 us a report on the progress and/or the challenges
12 if we're not accomplishing what we want to
13 accomplish.

14 We, in the northwest, you know, have
15 high concerns over riparian zones along all of our
16 tributaries and river systems, et cetera. The
17 importance of respect between the ag industry and
18 the timber industry with regard to our fishery and
19 salmon resource industry, and they have to coexist
20 respectfully and responsibly.

21 So, we're not trying to browbeat any
22 other industry, but we find ourselves, like Lisa

1 was saying, at the forefront of protecting a
2 resource that is precious to our culture and to
3 our community much less the non-Indian community
4 who also have a high value for a resource as well.

5 So, my ask is that we ask of you how we
6 can document -- what are we doing together? How
7 is Ag and Interior, Commerce, Army Corp, et
8 cetera, Department of Transportation, how are they
9 collaborating with regard to the protection of
10 these resources and how can we -- can we ask for
11 an annual report? So, we're going to be upcoming,
12 we got an annual -- a White House meeting. We're
13 looking forward to it. We suspect this topic will
14 be on the menu, if you will, but you know, one
15 year from now, what -- are we moving the needle
16 with regard to protection of these resources.

17 So, that's my question and my challenge,
18 quite frankly, because we don't want to just walk
19 away with this verbal and written commitment.
20 We've gotten them before, and some would say and
21 treaties or other kinds of documents, we got them
22 there, too. It doesn't say the natural resources.

1 It doesn't protect the salmon because of what you
2 all -- according to Lisa's comment or it may
3 not -- we feel like we're losing ground. You
4 know, every cycle of the salmon, but we seem to be
5 going backwards here, not forward, even though we
6 have success.

7 So, the resources you guys make for
8 climate change, thank you. That helps. Get the
9 money out to us and on that point, the second ask
10 I would have is, work with these agencies,
11 particularly Commerce. You got to get this money
12 straight to us. We don't need to go through the
13 State, you know, we're a government too, and I
14 think this president and your bosses all agree
15 that we have a respectful relationship. So, those
16 resources that are made available, get them
17 directly to the tribe.

18 You know, maybe we're going to argue
19 over fair sharing. At the end of the day, just
20 figure out what the share is as best you can and
21 get the money to the tribes for these programs and
22 these activities. So -- and so that they're

1 directed to us.

2 And I would make a case that using your
3 638 and self-governance legal vehicles is the
4 vehicle to get it done. Interagency transfers.
5 So, that's what I ask.

6 (Audio glitch) -- fresh in all of our
7 minds. So, thank you, again.

8 **BRYAN NEWLAND:** Thank you, Chairman. I
9 just -- I feel the same way about a lot of these
10 issues that -- the way that you just expressed,
11 and I just want to make sure on the implementation
12 of the execution of this MOU that I'm pointing
13 out, the stuff we're consulting on today are the
14 step down documents, step down policies, if you
15 will, on how we go from treaties, which are the
16 supreme law of the land to the agency or the
17 Administration's commitment to make sure that we
18 are giving life to those obligations and not just
19 speaking words about them.

20 And as you know from dealing with the
21 Federal agencies that don't have to deal with five
22 hundred and seventy-six tribes on a regular basis

1 or on a daily basis, a lot of these concepts are
2 new to them. And there's not a whole lot of easy
3 understanding like you might see at BIA or at IHS
4 or even at USDA.

5 So, what we're trying to do with these
6 documents is to get the basics in the hands of
7 Federal officials across the Government, across
8 these agencies, including the Department of
9 Commerce so that the folks you deal with on the
10 ground from those agencies have a diagram, you
11 know, a how-to sheet on, how do we do early
12 engagement? What's a treaty? What is our
13 obligation here when it comes to treaties? We
14 know that they're the supreme law of the land and
15 what does that mean? Making sure that our
16 colleagues across the Federal Government
17 understand that treaties are sources of law
18 themselves, that you don't need a separate
19 regulation or statute to act under.

20 And when it comes to a report, that's
21 something that, you know, we've got here. Now a
22 comment from you in this consultation, that's

1 something we can discuss when we're back as to how
2 to show progress or lack of progress on some of
3 this work.

4 **RON ALLEN:** So, if I might -- thanks,
5 Bryan, I couldn't agree more.

6 And I just want to encourage you and
7 Heather and the rest of the Federal
8 representatives, we in the northwest, we organize
9 our issues on this subject matter through our Fish
10 Commissions. They're our experts, quite frankly,
11 along with our tribal staff. And so, I wanted --
12 I see Justin's hand is up after Harold, that we
13 need them in the mix of the problem solving and
14 the solutions that are going to respectfully come
15 up with.

16 So, I appreciate always being included.
17 Thank you.

18 **BRYAN NEWLAND:** And last point -- thank
19 you, Chairman -- under this MOU we do have a
20 requirement for an annual report to the executive
21 director for the White House Council on our
22 implementation. So, Heather Dawn?

1 **HEATHER DAWN THOMPSON:** Chairman Frazier
2 is up next and if there are any other tribal
3 leaders that would like to be in the cue, please
4 raise your hand to be put in the cue. Chairman
5 Frazier.

6 **HAROLD FRAZIER:** Hello, can you hear me?

7 **HEATHER DAWN THOMPSON:** Yes, sir.

8 **HAROLD FRAZIER:** I'd like to begin by
9 saying that I find it quite amazing that after
10 over a hundred and fifty years the Sioux Nation
11 finally has an opportunity to discuss the
12 treaties.

13 Many times, you know, they're ignored.
14 So, I want to thank President Biden for reaching
15 out for this.

16 You know, one of the things, if the
17 Federal Government is truly going to honor our
18 treaties, they need to leave. Leave our land, you
19 know, because then our treaty, the 1868 Fort
20 Laramie Treaty says that in order for anybody to
21 travel through or reside on our treaty land they
22 must get consent of the Indians. And I don't

1 remember our people letting people live here in
2 South Dakota, North Dakota, Nebraska, Wyoming, et
3 cetera, Montana.

4 And one of the biggest things that we
5 have that people try to do with us is the BIA,
6 Bureau of Indian Affairs. I believe that's what
7 was set up to do that. But right now, the Bureau
8 of Indian Affairs is saying they don't have a
9 trust responsibility in a lot of areas which are
10 defined in our treaty.

11 I remember in early 2000 Chairman Wyatt
12 Jaju (ph.) and President John Still (ph.) told us,
13 be careful, they're trying to define trust, in
14 which they did, the BIA. So, I'm going to be
15 going to a meeting in our area on this on Thursday
16 and the only thing we're going to be talking about
17 is issues dealing with land.

18 So, where do we go for education? Where
19 do we go for healthcare? And where do we go for
20 roads, things like that.

21 And the other thing, in our treaty,
22 Article V, it gives us our line authority. You

1 know, there's to be an agent her eon our
2 reservation, and if we can't resolve it, it goes
3 to the Commissioner of Indian Affairs in D.C. And
4 one of the things I learned the other day is just
5 totally unreal with law enforcement. We have a
6 lot of gun violence, homicides on the Great Sioux
7 Nation, and we had a meeting out in Rapid City and
8 our -- I don't know what he's called, District I
9 Commander was there, and I asked him, I said who
10 and where is your boss? He said in Oklahoma.

11 I said, where is his boss? Albuquerque.
12 Where is his boss? Phoenix. Where is his boss?
13 D.C. So, that is totally in violation of our
14 treaty, by putting these authorities in the area
15 that is not defined in our treaty.

16 And if we are -- you know, I was
17 fortunate the other day to talk briefly with the
18 President and one of the things he said to me was,
19 you are a Nation. So, if that's the case, where
20 is the State Department?

21 And you know, if we want to honor our
22 treaties and things like that, you know, we need

1 to be treated as a Nation. You know that 1871
2 Appropriation Act which said the Government will
3 no longer recognize us as a nation, that's your
4 law. We are still here. And under our laws, we
5 are a sovereign nation.

6 You know, another thing that, you know
7 we talk about treaty rights, and you know, and one
8 of the things I see is one of the biggest
9 diminishments of our treaty rights and our
10 sovereignty is Congress passing laws forcing us to
11 come into agreements with the States.

12 We need to deal Nation-to-Nation and
13 truly mean it. If we don't, then why are we
14 having this call? So that's one of my main, you
15 know, points is that we need to be -- instead of
16 talking about it, let's start walking it, because
17 right now all I hear from all the leaders in
18 Congress is, you know, is we'll honor treaty
19 rights. Well, let's go.

20 And I'm glad EPA is on here because one
21 of the things that's big for the Sioux tribes is
22 these oil pipelines. And again, to remind you

1 guys, in order to travel through or reside must
2 get consent of the Indian.

3 So, why is DAPL still operating?
4 They're operating without an easement to cross the
5 Missouri River, but yet they're still operating.
6 So again, I'm going to say, if we're going to
7 honor treaties, then let's truly honor them and
8 let's just quit talking about them.

9 But more importantly, everybody needs to
10 leave our lands until you get consent. Because
11 we're still living up to our plans, and that was
12 peace. The 1868 Fort Laramie Treaty was a peace
13 treaty, and they left. They burned their forts
14 and they left.

15 So, in exchange for peace, the United
16 States pledged these certain things, so I would
17 like to get a meeting with the President
18 Nation-to-Nation.

19 That's all I got to say, thank you.

20 **HEATHER DAWN THOMPSON:** Thank you. Mr.
21 Chairman. We always appreciate the leadership
22 that you take on these treaty conversations. A

1 couple thoughts and then I'll turn it over to
2 Bryan.

3 One, you should have received a
4 consultation invitation for October 7th, and we'll
5 be sending you a meeting request with tribal
6 council for October 6th as a follow up to your
7 meeting with the Department of USDA about a month
8 or so ago. The Chief of the Forest Service, which
9 obviously plays a huge role in the Black Hills and
10 your treaty rights has agreed to come out for your
11 invitation. So, we're really looking forward to
12 seeing you with the Chief of the Forest Service to
13 talk about your treaty rights that first week in
14 October.

15 And I appreciate you brought up the
16 State issue. I think Chairman Allen and
17 Councilwoman Lisa also brought it up, and it's one
18 that we struggle with, too, I think probably more
19 so at USDA than some of the other agencies because
20 so many of our economic development programs
21 Congress has designed to go through the states,
22 including some of our food nutrition programs,

1 which is incredibly frustrating for all tribes,
2 and particularly from a treaty rights perspective.

3 So, I wanted to acknowledge that we're
4 aware of that problem and at least at USDA we're
5 starting to think through what statutory changes
6 that we could make to make sure that tribes have
7 access to those programs directly in accordance
8 with our trust and treaty responsibility. So, I
9 appreciate you bringing up that subject. Bryan?

10 **HAROLD FRAZIER:** One more just to add, I
11 thank you for that, but one of the things that
12 nobody wants to talk about is that word, consent.
13 I mean, read our treaty.

14 **HEATHER DAWN THOMPSON:** Uh-huh.

15 **HAROLD FRAZIER:** (Unintelligible) --
16 consent. Instead, a consultation. You know,
17 we've been consulted to death, and nothing has
18 changed. So again, I think the discussion needs
19 to be around the word, consent, and
20 Nation-to-Nation, you know, instead of telling us,
21 again, telling the little Indian, here's what you
22 do, you know, here's what's going to happen. I

1 mean, when are we going to ever talk about our
2 agenda, you know, and I'm saying this from -- you
3 can change, I don't care if they're Democrat,
4 Republicans, they're still the same, still the
5 same.

6 So, I just hope someday maybe that word,
7 consent, will be really discussed and utilized,
8 let's consult with them Indians. That Black Hills
9 belongs to us. The Federal Government's Court
10 said that. But yet, no, we're going to go
11 consult, consult.

12 Oh, let's see what Norm's (ph.) going to
13 say, you know, them days need to be over.

14 Thank you, that's all -- I will be
15 quiet.

16 **BRYAN NEWLAND:** Thank you, Chairman.
17 Next, I'm going to move to Vice-President
18 Mousseau.

19 Mousseau, sorry.

20 **ALICIA MOUSSEAU:** Mousseau.

21 **BRYAN NEWLAND:** Thank you.

22 And then we'll go to Justin Parker after

1 you.

2 **ALICIA MOUSSEAU:** Thank you, Assistant
3 Secretary Newland. And I thank Chairman Frazier
4 for his comments.

5 You know, we're both treaty signing
6 tribes and nations and we work together very
7 regularly, because the things that happen at the
8 Federal and State level, you know, we have to work
9 on the daily level for our people on the ground,
10 and that requires a lot of collaboration,
11 especially because we don't ever get the accurate
12 funding or accurate communication between the
13 Bureau and other entities. So, we work together a
14 lot.

15 So, I want to thank Chairman Frazier for
16 his leadership and his mentorship. And one thing
17 that is really coming up quickly, and that is
18 about treaties is the Bickwell (ph.) case, so the
19 Brackteen Hawland (ph.) case, which I've been
20 trying to sound alarms on. I mean, that is why,
21 you know, we are political entities. We're
22 nations and that case coming to the Supreme Court

1 could, you know, have huge ripple effects, but
2 most importantly, our children can be taken away
3 again, and there's been many eras in the United
4 States Government where our children have been
5 taken away. This is writing on the wall.

6 So, we've been sounding alarm here and
7 we have a state emergency here on the Pine Ridge
8 Reservation, the Oglala Sioux Tribe has issued
9 that. We have a task force that has been working,
10 you know, to get things in place, because as we've
11 seen with the Supreme Court, there have been some
12 major changes to people's daily lives and
13 decisions, and this can have huge implications and
14 impacts on Indian Country. We don't want our
15 children to be taken away anymore. We've seen
16 what that has done to our community and that's
17 unacceptable and we won't stand for it.

18 So, we are trying to plan and prepare
19 locally to figure out if the worst-case scenario
20 happens and ICWA is, you know, overruled and we
21 don't have that anymore to protect our children
22 and families, so my question to the Federal folks,

1 if we are, you know, political entities per our
2 treaties, what is our plan politically, because
3 there needs to be plans politically as well. You
4 know, we signed on to all the Amicus briefs and
5 done all those things, and this also shows the
6 huge impacts of the treaties not being upheld
7 throughout the years. You know, we don't have
8 accurate funding, enough funding for all of our
9 programs, and so it's kind of been setting us up
10 for failure.

11 But like I said, we work tribally, tribe
12 to tribe to work together to problem solve and to
13 come up with resources and figure it out, and you
14 know, we're trying to talk about treaties here,
15 but they haven't been upheld, and so, we are here,
16 you know, working from the bottom to try to plan
17 and prepare for the worst-case scenario, which is
18 another era of removing our children.

19 So, my question to the Federal folks is,
20 what are your guy's plans? I know we have all
21 these legal pieces in place, but is there any
22 funding things in place to support tribes on the

1 ground with our families, with our children to
2 protect them since the treaties haven't been
3 upheld for so long? Thank you.

4 **BRYAN NEWLAND:** Thank you,
5 Vice-President. I appreciate your forceful
6 advocacy on behalf of Indian children and ICWA.

7 I will say that first and foremost, the
8 plan is to defend ICWA and win the case, and I
9 know that our attorneys here at the Department of
10 the Interior are working with many tribes and
11 attorneys through the Amicus process, and of
12 course, through the Solicitor General in the
13 Department of Justice. That's where the focus in
14 on that case and this Administration has been
15 mounting a full defense in support of ICWA because
16 we all understand what's at stake and, you know,
17 our teams are also working to make sure that we're
18 ready -- you know, ready to act when the Court
19 issues its decision, however it turns out on that
20 front.

21 But here at the Department of the
22 Interior, we're also continuing our work on the

1 Secretary's Boarding School Initiative to lay out
2 the history of this and also to explain why it's
3 relevant to modern times with the boarding school
4 era and taking kids from their families and their
5 communities and how much money was spent in that
6 effort to prevent us from passing our languages
7 on, our cultural practices, and we view that as
8 all related.

9 So, these are some of the things that
10 are in action right now and I appreciate you
11 raising that.

12 With that we'll go to Justin Parker.

13 **JUSTIN PARKER:** Thank you, Assistant
14 Secretary Newland. So, I appreciate your time
15 today. I know this can be overwhelming with all
16 the consultations, but I'd have to admit this is a
17 much better space here than where we were in the
18 previous administration where there was very
19 little consultation or very little that was done
20 based on our consultations.

21 So, I do appreciate all that you're --
22 everybody that's involved with all these

1 consultation sessions. I know it takes a lot of
2 time to put these on and the get tribal leaders
3 engaged and glad we have a little bit of a turnout
4 today.

5 But with that said, and we've said this
6 time and time again, you know, we've got some
7 great people that have come to this administration
8 and the agencies in the White House, executive
9 branch, et cetera, so we got some good champions
10 from Indian Country that are in places, but now
11 we're starting to see them roll out, you know, we
12 saw Libby leave and then now we got Daron -- but
13 you know, nothing against Daron but that takes
14 time to educate them on everybody -- every time
15 there's a turnover, we have the constant education
16 that we talk about, Bryan, and how you're, you
17 know, having to use a lot of time on educating
18 people.

19 So, one of the things that we're -- as
20 Ron mentioned, too, it's kind of a little bit of a
21 follow up to what Chairman Allen had mentioned,
22 some of that follow up and that's going to be good

1 to have that report coming out of the treaty
2 rights at risk -- excuse me, treaty rights memo,
3 tribal treaty rights MOU, I mean. And so having
4 that as a follow up to do a report, I think, on
5 the annual basis is going to be great.

6 But somehow, we need to turn the dial a
7 little bit to where -- and I've heard Heather used
8 this and others have used this on the Federal
9 side, is that we're engaged where we're having
10 conversations, but really at the end of the day
11 our asks have been pretty consistent, pretty
12 specific, and you know, we have done it, you know,
13 a dozen times in a dozen different ways of how we
14 articulate that, but at the end of the day a lot
15 of the issues are still the same as they were when
16 we rolled our treaty rights at risk out in July of
17 2011. And at some point, we really need to move
18 the chain. We need to, you know, hopefully it's
19 football season so I'll just use the keeper of the
20 football analogy so if we can get it across the
21 goal line.

22 And so, we want to make some

1 advancements here. You know, the previous
2 administration, they rolled back about a hundred
3 and twenty-five environmental regulations, I mean,
4 I believe about eighty plus were rolled back,
5 another forty plus were under review. And so,
6 we're having to, you know, get back to that point
7 instead of this starting point, if you will,
8 including like our Washington State Water
9 Standards, which protects the most vulnerable,
10 because, you know, which is our tribal
11 communities, and you know, of course we're the
12 ones that rely on the seafood and it's based on,
13 you know, how much toxin can go in the water, et
14 cetera.

15 And so, I'm meeting with the colonial,
16 Colonial Bullock from the Corp of Engineers for
17 lunch today. Him and his team here at AP&I, and
18 so we want to continue to keep this conversation
19 going, but we're also going to need the D.C. folks
20 to really weigh in because there's certain things,
21 as you can imagine, in Colonial Bullock's world,
22 you know, and that's a little bit different than

1 most of us have to deal with but you got that
2 military style.

3 So, they have to -- they have to follow
4 the chain of command to the tee, and so we need --
5 this is where we need Assistant -- Deputy
6 Assistant Secretary Pinkham and Assistant
7 Secretary Connor over in the Corp and the civil
8 works, you know, to help support Colonial Bullock
9 in the region. And so, we need those people. We
10 need Jane Nashida and others, Michael Regan and
11 the support -- Administrator Sixkiller out here in
12 Region 10.

13 And one of the, I guess, final pieces
14 that I would come back to that, you know, we need
15 to reciprocate this somehow so it's not this
16 constantly tribes constantly pushing the envelope.
17 You know, we really need the political appointees
18 to help with some of that and not lose sight of
19 what we're trying to accomplish.

20 I think Chairman Frazier said, you know,
21 it's really -- tribes got to be pushing this
22 agenda, and to have some of the issues addressed

1 that we laid out in front of you all, we need to
2 start making some headway on it.

3 So, I appreciate your time, and again, I
4 thank you for making this happen and for really --
5 Bryan, you know, just that educational piece, I
6 mean, that is so critical in Interior. So, even
7 though you may not have some of the regulation
8 components, but that educational piece that you're
9 meeting with other agencies, I can't say enough
10 about that. So, I do appreciate all that you're
11 doing. So, thank you.

12 **BRYAN NEWLAND:** Thank you, Justin. You
13 know, I just want to lay out a couple of things,
14 too, that we, the Administration, are working on
15 when it comes to actually moving the needle on a
16 lot of the things that you've raised, Chairman
17 Allen raised earlier, Councilwoman Wilson.

18 One is the ecosystem restoration funding
19 that was included in the infrastructure law as
20 well as the Inflation Reduction Act, combined with
21 the increases that you're seeing in those funds
22 through the budget increase. And then when we

1 compared that with the co-stewardship work that
2 we're doing where tribes are co-managing, you
3 know, these water sheds and landscapes with
4 agencies here at the Department of the Interior
5 and at USDA, that that can make a difference.

6 We're also -- folks may have heard at
7 the recent self-governance conference; we're also
8 undertaking a review of how to grow the use of
9 self-governance compacting here at the Department
10 of the Interior beyond the Bureau of Indian
11 Affairs for a lot of these ecosystem and habitat
12 protection programs that we do at the Department.

13 You know, these are things, when paired
14 with the work that we're doing under this MOU, you
15 know, we're really hopeful are really putting
16 tribes in the driver's seat of moving the needle
17 and just providing the support from the Federal
18 Government, because as Secretary Haaland likes to
19 say, you know, when tribes are out there managing
20 the landscapes and managing this work, you know,
21 we see healing, we see things that could come back
22 into balance.

1 So, you know, these are concrete
2 examples of the things this Administration is
3 doing to help move the needle.

4 **HEATHER DAWN THOMPSON:** And just to
5 build on that for you, Justin, and you've brought
6 it up, and so have some of the other speakers.
7 You know, the education component of folks in the
8 Federal Government, I'm a new Fed, I've been in
9 this job a year-and-a-half, so I'm usually on the
10 other side of this conversation and often
11 frustrated with the lack of education as well.

12 And one thing I really wanted to flag
13 for us as we have this conversation is, of course,
14 election matters, right, and who's in the
15 administration matters, but every Federal agency
16 has a legal department. They have office of
17 general counsel or office of solicitors, and most
18 of our Indian law attorneys that want to work for
19 the Federal Government go to the Department of the
20 Interior, which is amazing, right, and they have a
21 huge, very deep bench.

22 But then we have almost none in the

1 other Federal agencies. So, when you have
2 Department of Commerce, or USDA really thinking
3 about treaty rights, our general counsel right now
4 is an appointee and she's an Indian law expert.
5 And we have a lot of folks that do as a secondary
6 component of their job, but we don't have a single
7 person who's a career staff in our legal office
8 whose only job is Indian law and treaty law.

9 So, we're hiring that now. So, I'm
10 going to put it on the chat like a little plug
11 here, get people to apply, but this is across the
12 board, right, for all Federal agencies. We really
13 need to encourage our young, Native Indian law
14 attorneys to apply for these Federal agencies that
15 are not the Department of Interior. No offense,
16 Department of Interior, but our treaty rights
17 apply to all Federal agencies equally, right,
18 Justin, as you're pointing out. NOAA, USDA, all
19 sorts of water and fish components.

20 And we've got to make sure that we have
21 people that know our treaties and that we trust to
22 interpret Indian law in every single Federal

1 agency legal department. Not just the policy
2 department because in the end, even the best
3 policy appointees still have to go to their
4 general counsel's office to get sign off, right?

5 And so, that's one thing I just really
6 encourage us as a team to think about, is to
7 really be aggressive about getting young Indian
8 lawyers and Indian law experts into all Federal
9 agencies to help enforce and protect treaty
10 rights.

11 **JUSTIN PARKER:** Good points, both of
12 you, Bryan and Heather, so I appreciate it. And
13 knowing that we finally got an OMB tribal person,
14 you know, that's something we've been pushing on
15 for a decade, so that's good to see that success.
16 And we talked about politics. So how about Mary
17 Peltola up in Alaska, how awesome is that?

18 So, you know, we're getting some good
19 people lined up. And then, I would say, too, if
20 there's anything that we can help do, please reach
21 out, because like Ron said, utilize our inner
22 tribal organizations, so if there's anything that

1 we can do to help clarify, to help push the dial
2 or need to be looking at things a little bit
3 differently from a strategic standpoint, or our
4 political standpoint, please let us know. So,
5 thank you.

6 **BRYAN NEWLAND:** Thank you, Justin.
7 Chairman Erickson, before I turn back to you, I
8 just want to make sure we get a chance to hear
9 from anyone else who hasn't yet had an opportunity
10 to speak, you can use the raise my hand feature,
11 it's under the reactions button at the bottom of
12 your screen or those of you who are dialing in can
13 press star nine.

14 We're scheduled to go until 4:00 p.m.
15 eastern day, which is fifty-two minutes from now,
16 so we have time.

17 With that we'll go back to Chairman
18 Erickson.

19 **JARRED MICHAEL ERICKSON:** All right.
20 So, I kind of want to make a comment. I know
21 we're all, I wouldn't say getting on our soapbox
22 about stuff, but I want to make sure that we're

1 commenting on the actual consultation process,
2 right, that's what we're trying to comment on and
3 making sure we're okay with, I guess, what's
4 spelled out in that.

5 We're looking at -- you know, it talks
6 about timelines and scheduling and if I know one
7 thing about the Federal Government is it's hard to
8 get a meeting and it's hard to keep to those
9 meetings unless something's at stake. Through the
10 FMCS process recently, the only reason that moved
11 as quickly as it did is because there was a stay
12 and they're trying to get the extension to that.
13 And it's kind of almost humorous how you can get
14 meetings every week with Federal entities but when
15 you're trying to get one for tribe to tribe it
16 takes months, right, and then it -- nothing ever
17 moves quickly.

18 So, I don't know what the -- it doesn't
19 have a timeline on the schedule on there of how
20 early they have to let us know about consultation,
21 when that will happen and then sticking to those
22 meetings. That was one of the biggest things I

1 saw on there that I have always struggled with the
2 Feds.

3 Personally, at the tribe, we've been
4 talking about having our own consultation process
5 approved through counsel, and we sent that out to
6 every entity. This one kind of spells out an
7 overall consultation process and what that looks
8 like through each entity, I guess. So, I don't
9 know how the Feds will take that. Obviously, if
10 you have five hundred plus from each federally
11 recognized tribe, that's a hard thing to sort
12 through and what each individual tribes is, but we
13 are a sovereign nation, so we are looking at that.
14 We haven't passed that yet, we are talking about
15 that, having that at our next meetings, a better
16 discussion on.

17 Even the state, right, we have all the
18 state agencies that have a different consultation
19 process, so the Feds have each state entity that
20 it's not really uniform. So, I appreciate trying
21 to get a uniform consultation process but we are a
22 sovereign nation so I think that's something you

1 should take into account, each tribe has their own
2 consultation process, they want to -- I mean, it's
3 similar to yours but different as well.

4 So, scheduling is a big thing. I want
5 to make sure we schedule things accordingly and
6 timely and not -- because we get busy, too, and so
7 --

8 **BRYAN NEWLAND:** Thank you. I have an
9 appreciation and understanding for how busy things
10 can be at the tribal office and with tribal
11 counsel and we're trying to make sure that we're
12 respectful of that as well and appreciate that
13 you've taken time -- all of you have taken time
14 from your busy jobs to join us today.

15 There are no speakers in the cue with
16 their hand raised. I just want to take an
17 opportunity to remind everybody that you can
18 submit written comments in response to this
19 consultation to consultation@bai.gov all the way
20 up until midnight on October the 10th.

21 So, we are scheduled to go until 4:00
22 p.m. Eastern, which is a little more than

1 forty-five minutes from now. Also, we do have a
2 lot of other representatives from other Federal
3 agencies on the line. I want to make sure that
4 those of you who are joining from other agencies,
5 if you have any responses to any of the tribal
6 leader comments, please feel free to chime in and
7 offer those as well.

8 So, I'm not going to ask everybody to
9 sit here and just stare at my face for the next
10 forty-five minutes, we can certainly give your
11 time back if you wish. I see Chairman Allen has
12 his hand back up.

13 **RON ALLEN:** Yeah, just real quickly I
14 threw in the chat, Bryan, the question -- we know
15 there's a White House meeting coming up in
16 November. We know the date hasn't been set yet
17 based on the President's schedule and the rest of
18 the cabinet schedules. But I'm assuming -- I'm
19 just asking out loud, will there be a breakout on
20 natural resource issues for us to extend these
21 kind of conversations?

22 **BRYAN NEWLAND:** Thanks Chairman. I

1 don't want to steal the thunder from the team over
2 at the White House, and Daron and folks who are
3 organizing on behalf of the President, so we'll
4 have to stay tuned on that.

5 **RON ALLEN:** Well, if you could, what
6 would you say?

7 **BRYAN NEWLAND:** You know, before we --
8 Chairman, before we come to these events -- before
9 we come to these events, you know, they put a
10 shock collar on Heather Dawn and myself to --

11 **RON ALLEN:** Okay, fair enough, fair
12 enough. We'll wait and see. We're looking
13 forward to it. The hands are up because we know
14 that this president is continuing the commitment
15 that President Obama and slash Biden had for eight
16 years, so thank you for renewing that commitment
17 to the tribes.

18 **BRYAN NEWLAND:** Thank you.

19 **HEATHER DAWN THOMPSON:** We're excited
20 for it, too, Chairman.

21 Bryan, we have a question. I'm going
22 through the comments and see if we had any

1 questions in the comments chat section, and
2 Charles from Mille Lacs asked a question about the
3 database about the treaty database, and he says
4 since there are minor differences between treaty
5 languages in the statutes at large and Kappler's,
6 which version of the treaty languages ultimately
7 will be referenced. It's a great question. We've
8 had a lot of different questions about other
9 things in addition to Kappler's, you know,
10 executive orders and treaties that aren't in
11 Kappler's, and different versions, and no decision
12 has been made yet.

13 We started with Kappler's because it had
14 broad appeal and was broadly accessible to folks,
15 and it was easier for us to digitize. But we are
16 fully aware that that is not the end all, be all,
17 nor is it everything that would be needed to
18 interpret a treaty. Just so you know the audience
19 and the goal of the treaty database is your
20 average Federal worker who doesn't have Indian law
21 expertise.

22 We don't anticipate that this database

1 will provide all of the answers. What we hope it
2 does is ask the question, so that when you do have
3 these consultations, when you do have these
4 meetings in the field, you know, Sarah in Oklahoma
5 can say oh, I'm meeting with Osage and can go to
6 the website, look up Oklahoma, look up Osage and
7 at least see, you know, which treaties generally
8 are referenced by Osage so that she can have a
9 good, solid conversation. But knowing that any
10 real in-depth analysis will take a lot more,
11 including going to the general counsel's office,
12 getting the tribes own interpretation.

13 So, it's not intended to be and end all,
14 be all, but a starting point so that at least what
15 you won't hear anymore, hopefully, from a federal
16 employee is I don't even know where to find those
17 treaties. I don't even know where to start. So,
18 this is intended as a place to start.

19 So, thank you for that question.

20 Alicia Mousseau. Vice President
21 Mousseau asked, how can the various treaty
22 counsels get involved in this consultation as

1 well?

2 As far as this treaty consultation
3 versus -- and then the Black Hills, I'll tell you
4 how we're handling it for the Black Hills
5 consultation, Vice-President Mousseau. We have
6 the official Government-to-Government with the IRA
7 Government's consultation on Friday afternoon.
8 That's October 7th.

9 And then the next morning we're having a
10 separate meeting with treaty counsel so that they
11 have an opportunity to participate as well,
12 knowing that it doesn't exactly fit into the IRA
13 Government-to-Government structure.

14 Regarding treaty counsel in these
15 conversations, I don't think we've discussed it as
16 a team yet, but what we might be able to do is
17 have a general listening session in which the
18 treaty counsels could more robustly participate in
19 those conversations. So, that's a good flag for
20 us to think about, Vice-President, I appreciate
21 that.

22 **BRYAN NEWLAND:** Dawn, before we go back

1 to Chairman Erickson, Daron Carreiro from Domestic
2 Policy Council wanted to respond to Chairman
3 Allen's question.

4 **DARON CARREIRO:** Hey, thanks, Bryan.

5 I may have missed a moment on it. I
6 know Chairman Allen, we've been talking and trying
7 to pin down that date, so the date we are still
8 working on, but in terms of the subject matter as
9 we mentioned, treaty rights, lands, natural
10 resources, these are a top priority for the
11 administration. It's -- I would count on further
12 discussion of these issues at the Tribal Nation
13 Summit and would welcome the engagement at that
14 time for sure.

15 It was good to see you on here and the
16 other tribal leaders as well.

17 **BRYAN NEWLAND:** Chairman Erickson.

18 **JARRED MICHAEL ERICKSON:** Yeah, sorry
19 for raising my hand again and asking so many
20 questions. So, on the decision makers, you know
21 it talks about having decision makers, quote,
22 unquote at the table and these consultations.

1 What I've noticed is not a lot of follow
2 up, or as the actual decision makers that can
3 actually make a decision on the topic usually
4 there. I mean, I've definitely dealt with some
5 more than others, DOR, I guess BPA might be a
6 little separate, but it always ends up being --
7 you have these others who can't answer the
8 questions you need answered in those consultations
9 or who can make a decision. Some of that isn't
10 decision making during the consultation, but you
11 know what I'm getting at, if you don't have the
12 high enough level people in some of these meetings
13 to actually get anywhere with them, so then the
14 bucks pass and there's not much follow up with
15 that, or it just takes a lengthy, lengthy process.
16 It shouldn't have been dragged out as long as it
17 was, so just something to think about, having high
18 enough level people there in the meetings when you
19 need them.

20 **HEATHER DAWN THOMPSON:** In addition to
21 this treaty MOU, we actually have a White House
22 counsel that's working on tribal consultation

1 policy for exactly a lot of the reasons that
2 you're talking about. Yes, we have the executive
3 order on tribal consultation and yes, different
4 agencies have their own implementation rules in
5 place, but clearly there are best practices, as
6 you just pointed out, timeliness and getting back
7 with folks as far as making sure the right
8 decision makers are there, although I can attest
9 that almost nobody can make a decision there,
10 right, because as Bryan said, everybody has a
11 shock collar on and they got to go back and get
12 ten other people to agree to the decision.

13 But that's a really fair point, among
14 many others, making sure that there's enough
15 notice, making sure that we get back to you about
16 how the decision's been handled.

17 So, all of those things, we really did
18 hear you when we had the consultation on
19 consultations, and we are trying to implement that
20 by creating standard policies across the Federal
21 Government, so you don't have so much
22 inconsistency.

1 **JARRED MICHAEL ERICKSON:** Yeah, and I
2 appreciate that. And I understand that, I just
3 making the point again because it seems like
4 that's always the case riding, so, appreciate that
5 comment, Bryan and Heather, so thank you.

6 **HEATHER DAWN THOMPSON:** Thank you,
7 Chairman.

8 **BRYAN NEWLAND:** Assistant Administrator.

9 **JANE NASHIDA:** Thank you.

10 I also wanted to echo what my colleagues
11 have mentioned with regard to the consultation
12 policy. Like USDA, EPA is also reviewing based on
13 the consultations that we had on our consultation
14 policy, and many of the issues that have been
15 raised in the past hour, the need to raise the
16 decision maker in our consultations, the need to
17 consider consensus, the need for earlier
18 consultation, these are all things that we have
19 heard from our consultation with regards to EPA's
20 policy, and we are reviewing and hopefully
21 revising to better reflect the tribal concerns.
22 Thank you.

1 **BRYAN NEWLAND:** Thank you, Assistant
2 Administrator, and that's a great point. There
3 are a number of agencies that are working
4 alongside EPA to develop that consensus-based
5 approach to consultation, and I just wanted to
6 highlight your words there and thank you, again,
7 for your time. And also, for co-chairing the
8 subcommittee.

9 We have a hand raised from Clyde Estes.

10 **CLYDE ESTES:** Can you hear me? Hey,
11 good afternoon. Hey, you know, I was thinking of
12 a couple of things. First of all, thank you for
13 giving me the time to address you all. Thinking
14 back about Chairman Frazier said and Vice
15 Chairwoman Mousseau, made some really, really
16 great points.

17 You know, Chairman Frazier brought up
18 the point of, you know, it feels like we have
19 these consultations and stuff but sometimes to us
20 as leaders, I guess, it feels -- and please don't
21 take this in any way disrespect, but it feels like
22 a lot of lip service sometimes, because when we

1 talk about treaties and rights and reserve rights
2 and all that, for us it always goes back to why do
3 we have to keep asking over and over the same
4 things?

5 Vice-President Mousseau made a great
6 point. We're constantly asking for a fair
7 funding, equal amount of funding for our programs
8 that are severely underfunded. Let alone here in
9 our tribe, our biggest problem is just getting the
10 funding. It's sad. It's really, really sad and
11 it really points a black eye at BIA.

12 But it goes back to treaty and trust
13 responsibilities. You know, I'm really hoping
14 that this day and age and with all these
15 consultations we're having, and meetings and new
16 appointees, I'm like, somebody hit the nail on the
17 head earlier also about consistency. When you
18 have a constant turnover of staff and losing
19 people and you have to reeducate them all the time
20 about, you know, what is a PL638 or what is RA
21 tribe or, you know, it's like you have to start
22 that wheel all over again. And for tribes that

1 felt like they were advancing, they maybe have
2 taken one or two steps back.

3 And in this day and age, this time, this
4 world we're living in, it's no tribe can afford to
5 move back or take a step back. I mean,
6 everything's constantly changing.

7 And when we talk about reserve rights
8 and treaty rights for tribes, there seems to be so
9 many rules and policies and procedures put in
10 place just for tribes to get what is rightfully
11 theirs. I think that is one of the biggest
12 hinderances I've seen in my short years, that all
13 the reporting you have to do for our funding and
14 all of this and that, and you know it just I mean,
15 I understand some of it but it comes back to the
16 point of if we -- all these people, this is my
17 point from the government side, if we owe these
18 people, which would be the tribes, these things
19 under the treaties, why are we making it so hard
20 for them? Why are we making it so difficult for
21 them to get what is rightfully theirs?

22 Also, another thing I would like to see

1 provided to all the tribes, especially the tribes
2 that have a stake in the Black Hills, the amount
3 of gold, and minerals and silver and everything
4 taken from those Black Hills that belonged to the
5 people -- I shouldn't say belonged because it
6 still does belong to.

7 And accurate count of what was taken
8 from the treaty tribes who have rightful rights to
9 the Black Hills, I think that would be a great
10 thing for somebody to bring along to the October
11 7th meeting, whether it be the U.S. Forest Service
12 or USDA or some, because you know, there has to be
13 a number there. And the tribes, I think, and I
14 feel have a right to be consulted about what was
15 taken from there even though we never gave anybody
16 any blessing or okay or permission to take
17 anything from there.

18 And I think about -- it's really hard
19 when I think about this, when you talk about
20 treaty rights and reserve rights because it just
21 feels like the tribe's rights have been stomped
22 all over for many, many years, and I give you

1 credit, Mr. Newland, and Mrs. Thompson, and
2 Secretary Haaland, I don't know how many years
3 it's going to take to get this ship going in the
4 right direction, but I appreciate the start of
5 this, and -- but like I said, back to Chairman
6 Frazier's and Vice-President Mousseau's
7 statements, those things are really at the top of
8 the list for tribes, especially here in the Great
9 Plains.

10 I mean, it just -- we can't keep
11 continuing down this way. And we're thankful for
12 our predecessors that started this fight for us
13 and now it's up to this next generation to keep
14 carrying on the good job.

15 And I really wanted to be an open,
16 working person, to get along and work -- not for
17 just better for us tribes but for all of mankind,
18 so the next generation doesn't have to go through
19 this. And for us as tribal leaders, that's what
20 it's all about. It's trying to make sure that
21 we're doing the best we can and setting it out for
22 the next seven generations to come.

1 I really hope you take into account the
2 statements I made, and especially if our -- if
3 we're to be honored and honor our rights and our
4 reserved rights through treaties, then we
5 shouldn't have to be fighting as hard as we do for
6 what is rightfully ours, which is by the funding
7 we need in today's day and age, especially to
8 account for inflation. Also, for the growth of
9 our enrollment to fully fund our 638, another
10 thing. And I'm really hoping that something good
11 comes from all of this, and I wish you all good
12 health and happiness. Peace. Thank you.

13 **HEATHER DAWN THOMPSON:** Thank you so
14 much for your words, Chairman. As a Shine River
15 Sioux tribal citizen, I share your frustrations.
16 I do hope you will be able to attend the
17 consultation on the seventh.

18 The challenge, I think, that we find as
19 tribal citizens and dealing with the Federal
20 Government is despite our position and despite
21 treaty counsel's position, the Federal
22 Government's position, of course, is that the 1980

1 decision is set, so that's a hard place to start
2 the conversation from.

3 But that's where we're hoping to talk
4 about, you know, with this limitation in mind, how
5 can we increase tribal decision making and
6 participation in sacred lands --

7 (WHEREUPON A NATIVE LANGUAGE WAS
8 SPOKEN.)

9 -- and develop that relationship.

10 And so, I'm kind of letting the cat out
11 of the bag because you're not supposed to know
12 until the consultation, but for the first time
13 ever, which is mind boggling, the Black Hills has
14 hired a tribal liaison, a full-time tribal
15 liaison, and they've never had it this whole time,
16 which is challenging.

17 But it is reassuring that they're taking
18 the relationship and their treaty responsibilities
19 more seriously. So, we are hoping to have a good
20 conversation with you guys on the seventh, and
21 then there will be a couple more things on the
22 eighth, including with treaty counsel.

1 I don't know that we have an accounting
2 of the gold taken from the Black Hills from the
3 Federal Government perspective. I have seen
4 private estimates before. So, I will bring that
5 back, but I just want to be transparent that I'm
6 not sure that that's something that I can deliver
7 for you, Chairman, but I acknowledge the question
8 and I'll see if I can dig around and see what's
9 out there.

10 So, thank you and the other Great Plains
11 tribal chairpeople for your thoughtful comments,
12 in particularly on the Black Hills, and we look
13 forward to continuing that conversation.

14 Our colleague, Arlanda Teller, who is at
15 the Department of Transportation, our partner
16 there, would like to comment on some of the tribal
17 leader comments you've heard today. So, we really
18 appreciate you joining us on behalf of Secretary
19 Buttigieg from the Department of Transportation.
20 Arlando?

21 **ARLANDO TELLER:**

22 (WHEREUPON A NATIVE LANGUAGE WAS

1 SPOKEN.)

2 **ARLANDO TELLER:** -- thank you, Heather,
3 and also Bryan.

4 It's good to see and hear and be pointed
5 on the conversations at hand. Here at USDOT we
6 are certainly working as hard as we can with the
7 Administration's support and promotion and
8 advancement of transportation into Indian Country.

9 And we here are also working to ensure
10 that we not only honor this conversation today,
11 but also conversations when it comes to updating
12 our tribal consultation plan and policy at USDOT.
13 And this policy and this plan, it actually is the
14 first time in nineteen years that we are going to
15 be tackling, and we will be tackling this update.

16 In fact, we are in the process of
17 addressing this and formulating the final draft
18 working closely with all of the modes within the
19 umbrella of USDOT. So, with that same breath as
20 my colleague, Ms. Nashida, I think you can hear
21 closely and fervently that we are doing all that
22 we can to ensure that the policies that ensure our

1 discussions, particularly in transportation, is
2 there.

3 And I am really proud to be a part of
4 this conversation, a part of this effort. So, any
5 questions, I will put my information in the chat,
6 and I thank you all. Thank you.

7 **HEATHER DAWN THOMPSON:** Thank you so
8 much, Arlando, from the Department of
9 Transportation.

10 And Chairman Frazier from the Shine
11 River Sioux tribe has his hand back up. Chairman?

12 **HAROLD FRAZIER:** Thank you.

13 I guess just listening to you talk about
14 consulting on the seventh, and I've written a
15 letter to the President, and I was asking to, on
16 the Jenny Gulch Mining that everything needs to be
17 stopped, withdrawn and get consent of all the
18 Sioux Nation.

19 The other thing is I know I wanted to
20 talk about was co-managing and taking over the
21 Black Hills. It has nothing to do with
22 consultation. So, it should be a negotiation

1 meeting, because we go in the -- and that's what I
2 mean, you know. When are the tribes -- when are
3 we going to address the tribe's agenda? Why are
4 we always listening to the Government and
5 consultation, that's gone. That's gone because
6 that don't get a tribe anywhere. We have never
7 succeeded in anything in consulting.

8 And I know that to consult is to inform
9 and they move on. So, I don't think that --
10 again, we're going to honor our treaty. Leave
11 then. In other words, they're just words, no
12 action. And the action of that is tribes need to
13 get -- have to have consent, give consent before
14 anything happens.

15 You know, they want us to -- the Federal
16 Government just wants us to be like a Kalijah,
17 wooden Indian, just sitting there, pictures,
18 that's it. And them days need to be over; you
19 know. So again, if you're going to honor
20 treaties, honor them. If there's no intention to
21 honor the treaties, let us know or let me know and
22 I'll quit wasting my time.

1 But again, where is the State
2 Department? And somebody asked a question, if
3 we're going to go by the treaties or the statute,
4 we have to go by the treaty. So, everything prior
5 1871, that's what we need to discuss.

6 So, I don't know, you know, exactly the
7 direction, but we're going to continue down this
8 path, this path that has gotten us nowhere. I
9 always remember one of our councilmen said every
10 time the Government comes, they bring nothing but
11 bad, nothing good comes from it.

12 So, I don't agree with, again,
13 consultation. So, if that's a consultation
14 meeting, I'll just -- I'll just not be there and
15 I'll meet with the White House, because I did meet
16 with the White House, and I told them what we
17 wanted. We want to take over the Black Hills
18 because that's ours.

19 So, if that's not going to happen, then
20 you -- Shine River, I, as the chairman out of our
21 nation will not be there because I don't want to
22 be consulted. Thank you.

1 **HEATHER DAWN THOMPSON:** Thank you, Mr.
2 Chairman. I appreciate your thoughts and your
3 frustrations. I think this will actually be a
4 very productive trip and I hope you'll join. This
5 was at your invitation, and as Chairwoman Alcare's
6 (ph.) so the Chief is coming out in response to
7 your last meeting.

8 You will have an invitation sent to you,
9 as I said, for a private conversation on Thursday
10 as the Chief is driving through Shine River on the
11 way to the Black Hills. The consultation on
12 Friday, one of the topics is how do we structure
13 your ongoing relationship with the Black Hills so
14 that it is more productive? The South Dakota
15 chairpersons will also receive an invitation to a
16 private lunch with the Chief on Saturday -- you
17 should be getting that tomorrow morning -- to talk
18 about co-management options, including the
19 potential taking over of the visitor's center to
20 tell the Black Hills story from the tribe's
21 perspective, which has never been done before, as
22 a starting point.

1 And we very much welcome a more in-depth
2 conversation during our trip about potential
3 co-management or co-stewardship opportunity. As
4 Bryan and I pointed out, we do have the joint
5 secretarial order directing us to have those
6 conversations, and we are coming out in direct
7 response to your letter and your invitation to
8 have those discussions.

9 So, we look forward to more in depth and
10 fruitful discussions in person when we arrive.
11 Assistant Secretary Newland?

12 **BRYAN NEWLAND:** Thank you, Heather Dawn.
13 Thank you, Chairman.

14 At this time, we've got about twenty
15 minutes left in the consultation. I don't see any
16 hands raised in the cue. I'm happy to hear from
17 additional speakers. In the meantime, we welcome
18 your written submission to consultation@bia.gov
19 all the way until midnight on October the 10th.

20 So, since we haven't had additional new
21 speakers in a while, I will do a last call for
22 speakers. Of course, if we get a flurry of folks

1 who want to come in at the last minute, we'll stay
2 until the scheduled hour. If not, we can break
3 early.

4 Going once, going twice. Okay. On
5 behalf us here at the Department of the Interior
6 and our subcommittee, I want to thank all of you
7 who have taken time to join us today for this
8 conversation. It's been helpful for me in
9 ordering the work that we do here at the
10 Department of the Interior, and also the work --
11 or the perspective we bring to our subcommittee
12 under the White House Council on Native American
13 Affairs.

14 I know it's been mentioned both here and
15 several other places that people get consultation
16 fatigue. I understand that very well. I do also
17 hope, though, that the fact that you give myself
18 and other heads of agencies from across the
19 Federal Government in these consultations. That's
20 a sign of respect and also our commitment to
21 getting things done. And I hope that we have
22 shown over the last eighteen plus months that

1 we're able to engage with you on a regular basis,
2 fold in what we hear from you at sessions like
3 this into our work and our policies, and then that
4 it leads to some concrete actions.

5 I know it's sometimes painstakingly
6 slow, but you know, we've been working to make
7 sure that you get decision makers and folks who
8 work at senior levels of agencies in these
9 consultations across the board to help do that,
10 and that's what we're aiming to do with the treaty
11 rights MOU.

12 So, I want to throw it over to Heather
13 Dawn and Assistant Administrator Nashida for
14 closing thoughts and then we'll wrap it up.

15 **HEATHER DAWN THOMPSON:** Thank you so
16 much, Bryan and Jane, who have just been excellent
17 teammates throughout this whole process.

18 You know, as indigenous people working
19 for the Federal Government, we appreciate the
20 frustration that you feel. We feel it as well.
21 But we hope that by seeing this level of
22 commitment, as Bryan said, with these

1 consultations to make sure that we're hearing your
2 input as we start to make these decisions to
3 actually try and hold the Federal Government more
4 accountable for implementing the treaties that we
5 hear you, and it will help adjust the decision
6 making as we go forward.

7 So, thank you very much for your
8 valuable time today. Jane?

9 **JANE NASHIDA:** Sorry, I'm still having
10 challenges in terms of the mute button.

11 But I just wanted to echo what my
12 colleagues have said, and that we understand your
13 frustrations, and I know that for many of the
14 tribal leaders and speakers today, you have dealt
15 with EPA, and we have had these conversations in
16 the past. But I can say that you have the strong
17 commitment of the Biden Administration to make a
18 difference in terms of actions and we hope that we
19 can demonstrate that as we move forward.

20 So again, thank you.

21 **BRYAN NEWLAND:** Great. Thank you
22 everybody. That will conclude our consultation

1 today.

2 I appreciate you all taking time to join
3 us and look forward to seeing you and hearing from
4 you on the road or here in D.C. and all points in
5 between. Take care.

6 **HEATHER DAWN THOMPSON:** Have a blessed
7 day, everybody --

8 (WHEREUPON A NATIVE LANGUAGE WAS
9 SPOKEN.)

10 (WHEREUPON THE MEETING WAS
11 CONCLUDED AT 3:37 P.M.)

12

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1 **CERTIFICATE OF COURT REPORTER**

2

3 I, JULIANNE FLUTIE, do hereby certify

4 that the foregoing proceeding was attended by me

5 and thereafter transcribed from my digital audio

6 recording and aided by the provided additional

7 recordings and materials to me which has been

8 transcribed by me or under my direction.

9

10 I further certify that I am not related

11 to any of the parties in this matter and that this

12 transcript is a true and accurate record of said

13 audio recording to the best of my ability.

14 Further, I certify that the above information has

15 been transcribed by me with a pledge of confidence

16 that the content and information contained herein

17 will not be discussed nor released.

18

19

20 _____

21 JULIANNE FLUTIE

Exhibit: State vs. Federal Land Permitting & Staging – EXNI 453 / Chord Project

Date: 11/23/2025

Prepared by: Elizabeth Lone Eagle

I. Introduction / Statement of Purpose

- Summary of this part of the project: state + federal lands adjacency, potential use of state land as staging for federal exploration on Craven Canyon (“Jinx Project” on federal land), cultural / water / environmental sensitivity.
- Legal / factual focus: state permit under SDCL 45-6D, tribal/cultural/water/environmental concerns in this specific location, potential staging/back-door use of state land for federal drilling.

II. Relevant Statutory & Regulatory Framework (State)

- SDCL 45-6D (grounds for denial) and ARSD 74:11:08 (state obligations for exploration permits — bonding, reclamation, environmental/cultural considerations, protections for water, archaeology, wildlife, etc.).
- Links:
 - State Uranium Exploration / Permit info —
https://danr.sd.gov/Environment/MineralsMining/Exploration/Uraniumexploration.aspx?utm_source=chatgpt.com
 - Permit forms & documents —
https://danr.sd.gov/Environment/MineralsMining/Exploration/UraniumExplorationForms.aspx?utm_source=chatgpt.com

III. Description of Project – Focused on Staging / Adjacency

- Official “Notice of Filing” for state permit shows project area: portions of Section 36, T7S-R2E, Fall River County.
- Exploration plan: up to 50 holes, max 700 ft depth, 50 drill platforms (60 ft × 60 ft).

- State permit is exploration-only; federal permit (the “October Jinx Project” / “Jinx” on USFS land) covers adjacent federal land — potential staging implications.
- Link: Notice of Filing PDF —
https://danr.sd.gov/Environment/MineralsMining/Exploration/docs/CleanNuclearNOF.pdf?utm_source=chatgpt.com

IV. Overlap / Adjacency Evidence

- Craven Canyon: rock art, pictographs/petroglyphs, archaeological/cultural significance.
- Federal land component of project overlaps / abuts state parcel; company may stage on state land for the federal “October Jinx Project.”
- Supporting documentation:
 - BHCWA Chord Project info —
https://bhcwateralliance.org/chord-project/?utm_source=chatgpt.com [Black Hills Clean Water Alliance](#)
 - BHCWA mining claims map —
https://bhcwateralliance.org/reports-expert-testimony/mining-claims-map/?utm_source=chatgpt.com [Black Hills Clean Water Alliance+1](#)
 - Federal permitting update (Jinx area) —
<https://nexusuranium.com/nexus-uranium-provides-u-s-permitting-update-chord-project-south-dakota/>

V. State Process Limitations (Relevant to this Section Only)

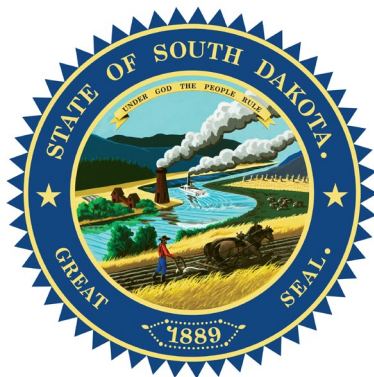
- Confidentiality of drill-hole maps and archaeological reports limits review.
- Exploration permitting under SDCL/ARSD does not require assessment of cultural, traditional-use, or subsistence resources.
- Plugging standards cover test holes only, not protection of plants, wildlife, or sacred sites.

- Links:
 - New EXNIS / confidential materials —
https://danr.sd.gov/Environment/MineralsMining/Exploration/NewEXNIS.aspx?utm_source=chatgpt.com
 - SDCL / ARSD citations —
https://danr.sd.gov/Environment/MineralsMining/Exploration/Uraniumexploration.aspx?utm_source=chatgpt.com

VI. Key Links / References (Part-Specific)

1. Notice of Filing PDF —
https://danr.sd.gov/Environment/MineralsMining/Exploration/docs/CleanNuclearNOF.pdf?utm_source=chatgpt.com
2. State Uranium Exploration info —
https://danr.sd.gov/Environment/MineralsMining/Exploration/Uraniumexploration.aspx?utm_source=chatgpt.com
3. BHCWA Chord Project / claims map —
https://bhcleanwateralliance.org/reports-expert-testimony/mining-claims-map/?utm_source=chatgpt.com
4. Media / aquifer & Craven Canyon coverage —
https://www.sdpb.org/environment/2024-08-23/company-wants-to-explore-for-uranium-on-school-public-lands-in-southern-black-hills?utm_source=chatgpt.com
5. Federal permitting update describing the “October Jinx” (federal) portion —
<https://nexusuranium.com/nexus-uranium-provides-u-s-permitting-update-chord-project-south-dakota/>
6. BHCWA overview of uranium mining threats in Black Hills (context) —
<https://bhcleanwateralliance.org/uranium-mining-info/> [Black Hills Clean Water Alliance+1](#)

South Dakota Constitution



EXHIBIT

Lone Eagle 16

exhibitsticker.com

Monae L. Johnson

**Monae L. Johnson
Secretary of State**

January 2023

Foreword

I am pleased to be able to present this copy of the State Constitution to the people of South Dakota. Since becoming the 40th state to enter statehood, South Dakota has risen to be one the freest and most vibrant in the union.

Within these pages of our State Constitution is the foundation of South Dakota's unique heritage and understanding of life as experienced on the prairie, in the rugged west and in city life. Our laws continue to reflect the diversity of culture and people who live here and have made South Dakota their home.

Since the Constitution was created in 1889, South Dakotans have carved their impression in our state with adventurous spirits, rugged individualism, and the chance to improve upon an already blessed region.

South Dakota has been fortunate to have an educated and engaged citizenry who have worked to actively ensure our laws will protect your rights and freedoms as citizens of South Dakota.

A handwritten signature in black ink, reading "Monae L. Johnson". The signature is written in a cursive, flowing style.

Secretary of State

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South Dakota Constitution

Preamble

We, the people of South Dakota,

grateful to Almighty God for our civil and religious liberties, in order to form a more perfect and independent government, establish justice, insure tranquility, provide for the common defense, promote the general welfare and preserve to ourselves and to our posterity the blessings of liberty, do ordain and establish this Constitution for the state of South Dakota.

Article I

Name and Boundary

§1. Name of state.

The name of the state shall be South Dakota.

§2. Boundaries of state.

The boundaries of the state of South Dakota shall be as follows: Beginning at the point of intersection of the western boundary line of the state of Minnesota, with the northern boundary line of the state of Iowa and running thence northerly along the western boundary line of the state of Minnesota, to its intersection with the seventh standard parallel; thence west on the line of the seventh standard parallel produced due west to its intersection with the twenty-seventh meridian of longitude west from Washington; thence south on the twenty-seventh meridian of longitude west from Washington to its intersection with the northern boundary line of the state of Nebraska; thence easterly along the northern boundary line of the state of Nebraska to its intersection with the western boundary line of the state of Iowa; thence northerly along the western boundary line of the state of Iowa to its intersection with the northern boundary line of the state of Iowa; thence east along the northern boundary line of the state of Iowa to the place of beginning.

Article II

Division of the Powers of Government

The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.

Article III

Legislative Department

§1. Legislative power -- Initiative and referendum.

The legislative power of the state shall be vested in a Legislature which shall consist of a senate and House of Representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state, and also the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. Not more than five per cent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the Legislature or any member thereof of the right to propose any measure. The veto power of the Executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be: "Be it enacted by the people of South Dakota." The Legislature shall make suitable provisions for carrying into effect the provisions of this section.

§2. Number of legislators -- Regular sessions.

After the Legislature elected for the years 1937 and 1938 the number of members of the House of Representatives shall not be less than fifty nor more than seventy-five and the number of members of the senate shall not be less than twenty-five nor more than thirty-five.

The sessions of the Legislature shall be biennial except as otherwise provided in this Constitution.

§3. Qualifications for legislative office -- Officers ineligible.

No person is eligible for the office of senator who is not a qualified elector in the district from which such person is chosen, a citizen of the United States, and who has not attained the age of twenty-one years, and who has not been a resident of the state for two years next preceding election.

No person is eligible for the office of representative who is not a qualified elector in the district from which such person is chosen, and a citizen of the United States, and who has not been a resident of the state for two years next preceding election, and who has not attained the age of twenty-one years.

No judge or clerk of any court, secretary of state, attorney general, state's attorney, recorder, sheriff or collector of public moneys, member of either house of Congress, or person holding any lucrative office under the United States, or this state, or any foreign government, shall be a member of the Legislature:

provided, that appointments in the militia, the offices of notary public and justice of the peace shall not be considered lucrative; nor shall any person holding any office of honor or profit under any foreign government or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of three hundred dollars, hold any office in either branch of the Legislature or become a member thereof.

§4. Disqualification for conviction of crime -- Defaults on public money.

No person who has been, or hereafter shall be, convicted of bribery, perjury, or other infamous crime, nor any person who has been, or may be collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the Legislature or to any office in either branch thereof.

§5. Legislative reapportionment.

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

§6. Legislative terms of office -- Compensation -- Regular sessions.

The terms of office of the members of the Legislature shall be two years; they shall receive for their services the salary fixed by law under the provisions of § 2 of article XXI of this Constitution, and five cents for every mile of necessary travel in going to and returning from the place of meeting of the Legislature on the most usual route.

No person may serve more than four consecutive terms or a total of eight consecutive years in the senate and more than four consecutive terms or a total of eight consecutive years in the House of Representatives. However, this restriction does not apply to partial terms to which a legislator may be appointed.

A regular session of the Legislature shall be held each year and shall not exceed forty legislative days; excluding Sundays, holidays and legislative recess, except in cases of impeachment, and members of the Legislature shall receive no other pay or perquisites except salary and mileage.

§7. Convening of annual sessions.

The Legislature shall meet at the seat of government on the second Tuesday of January at 12 o'clock p.m. and at no other time except as provided by this Constitution.

§8. Oath required of legislators and officers -- Forfeiture of office for false swearing.

Members of the Legislature and officers thereof, before they enter upon their official duties, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the state of South Dakota, and will faithfully discharge the duties of (senator, representative or officer) according to the best of my abilities, and that I have not knowingly or intentionally paid or contributed anything, or made any promise in the nature of a bribe, to directly or indirectly influence any vote at the election at which I was chosen to fill said office, and have not accepted, nor will I accept or receive directly or indirectly, any money, pass, or any other valuable thing, from any corporation, company or person, for any vote or influence I may give or withhold on any bill or resolution, or appropriation, or for any other official act.

This oath shall be administered by a judge of the Supreme or circuit Court, or the presiding officer of either house, in the hall of the house to which the member or officer is elected, and the secretary of state shall record and file the oath subscribed by each member and officer.

Any member or officer of the Legislature who shall refuse to take the oath herein prescribed shall forfeit his office.

Any member or officer of the Legislature who shall be convicted of having sworn falsely to, or violated his said oath, shall forfeit his office and be disqualified thereafter from holding the office of senator or member of the house of representatives or any office within the gift of the Legislature.

§9. Each house as judge of qualifications -- Quorum -- Rules of proceedings -- Officers and employees.

Each house shall be the judge of the election returns and qualifications of its own members.

A majority of the members of each house shall constitute a quorum, but a smaller number may adjourn from day-to-day, and may compel the attendance of absent members in such a manner and under such penalty as each house may provide.

Each house shall determine the rules of its proceedings, shall choose its own officers and employees and fix the pay thereof, except as otherwise provided in this Constitution.

§10. Filling legislative vacancies.

The Governor shall make appointments to fill such vacancies as may occur in either house of the Legislature.

§11. Legislators' privilege from arrest -- Freedom of debate.

Senators and representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same; and for words used in any speech or debate in either house; they shall not be questioned in any other place.

§12. Legislators ineligible for other office -- Contracts with state or county.

No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected, nor shall any member receive any civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which he shall have been elected, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

§13. Legislative journals -- Recording of yeas and nays.

Each house shall keep a journal of its proceedings and publish the same from time to time, except such parts as require secrecy, and the yeas and nays of members on any question shall be taken at the desire of one-sixth of those present and entered upon the journal.

§14. Elections viva voce.

In all elections to be made by the Legislature the members thereof shall vote viva voce and their votes shall be entered in the journal.

§15. Open legislative session's -- Exception.

The sessions of each house and of the committee of the whole shall be open, unless when the business is such as ought to be kept secret.

§16. Adjournment of legislative houses.

Neither house shall without the consent of the other adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§17. Reading of bills.

Every bill shall be read twice, by number and title once when introduced, and once upon final passage, but one reading at length may be demanded at any time before final passage.

§18. Enacting clause -- Assent by majority -- Recording of votes.

The enacting clause of a law shall be: "Be it enacted by the Legislature of the State of South Dakota" and no law shall be passed unless by assent of a majority of all the members elected to each house of the Legislature. And the question upon the final passage shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal.

§19. Signing of bills and resolutions.

The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the Legislature, after their titles have been publicly read immediately before signing, and the fact of signing shall be entered upon the journal.

§20. Origin of bills -- Amendment in other house.

Any bill may originate in either house of the Legislature, and a bill passed by one house may be amended in the other.

§21. One subject expressed in title.

No law shall embrace more than one subject, which shall be expressed in its title.

§22. Effective date of acts -- Emergency clause.

No act shall take effect until ninety days after the adjournment of the session at which it passed, unless in case of emergency, (to be expressed in the preamble or body of the act) the Legislature shall by a vote of two-thirds of all the members elected of each house, otherwise direct.

§23. Private and special laws prohibited.

The Legislature is prohibited from enacting any private or special laws in the following cases:

1. Granting divorces.
2. Changing the names of persons or places, or constituting one person the heir at law of another.
3. Locating or changing county seats.
4. Regulating county and township affairs.
5. Incorporating cities, towns and villages or changing or amending the charter of any town, city or village, or laying out, opening, vacating or altering town plats, streets, wards, alleys and public ground.
6. Providing for sale or mortgage of real estate belonging to minors or others under disability.
7. Authorizing persons to keep ferries across streams wholly within the state.
8. Remitting fines, penalties or forfeitures.
9. Granting to an individual, association or corporation any special or exclusive privilege, immunity or franchise whatever.
10. Providing for the management of common schools.

11. Creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers are elected or appointed.

But the Legislature may repeal any existing special law relating to the foregoing subdivisions.

In all other cases where a general law can be applicable no special law shall be enacted.

§24. Release of debt to state or municipality.

The Legislature shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this state or to any municipal corporation therein.

§25. Games of chance prohibited -- Exceptions.

The Legislature may not authorize any game of chance, lottery, or gift enterprise, under any pretense, or for any purpose whatever provided, however, it shall be lawful for the Legislature to authorize by law, bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, volunteer fire departments, or such other public spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious, or other public spirited uses. However, it shall be lawful for the Legislature to authorize by law a state lottery or video games of chance, or both, which are regulated by the State of South Dakota, either separately by the state or jointly with one or more states, and which are owned and operated by the State of South Dakota, either separately by the state or jointly with one or more states or persons, provided any such video games of chance may not directly dispense coins or tokens. However, the Legislature may not expand the statutory authority existing as of June 1, 1994, regarding any private ownership of state lottery games or video games of chance, or both. The Legislature shall establish the portion of proceeds due the state from such lottery or video games of chance, or both, and the purposes for which those proceeds are to be used. [SDCL 42-7A](#), and its amendments, regulations, and related laws, and all acts and contracts relying for authority upon such laws and regulations, beginning July 1, 1987, to the effective date of this amendment, are ratified and approved. Further, it shall be lawful for the Legislature to authorize by law, roulette, keno, craps, wagering on sporting events, limited card games and slot machines within the city limits of Deadwood. The entire net Municipal proceeds of such roulette, keno, craps, wagering on sporting events, card games, and slot machines shall be devoted to the Historic Restoration and Preservation of Deadwood.

§26. Municipal powers denied to private organizations.

The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever.

§27. Suits against the state.

The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.

§28. Bribery and corrupt solicitation of officers -- Compelling testimony -- Immunity from prosecution.

Any person who shall give, demand, offer, directly or indirectly, any money, testimonial, privilege or personal advantage, thing of value to any executive or judicial officer or member of the Legislature, to influence him in the performance of any of his official or public duties, shall be guilty of bribery and shall be punished in such manner as shall be provided by law.

The offense of corrupt solicitation of members of the Legislature, or of public officers of the state, or any municipal division thereof, and any effort towards solicitation of said members of the Legislature, or officers to influence their official actions shall be defined by law, and shall be punishable by fine and imprisonment.

Any person may be compelled to testify in investigation or judicial proceedings against any person charged with having committed any offense of bribery or corrupt solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, but said testimony shall not afterwards be used against him in any judicial proceeding except for bribery in giving such testimony, and any person convicted of either of the offenses aforesaid shall be disqualified from holding any office or position or office of trust or profit in this state.

§29. Legislative powers in emergency from enemy attack.

Notwithstanding any general or special provisions of the Constitution, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, the Legislature shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred the Legislature shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the Legislature so to do would be impracticable or would admit of undue delay.

§30. Power of committee of Legislature to suspend administrative rules and regulations.

The Legislature may by law empower a committee comprised of members of both houses of the Legislature, acting during recesses or between sessions, to suspend rules and regulations promulgated by any administrative department or agency from going into effect until July 1 after the Legislature reconvenes.

§31. Convening of special sessions upon petition.

In addition to the provisions of Article IV, Section 3, the Legislature shall be convened in special session by the presiding officers of both houses upon the written petition of two-thirds of the members of each house. The petition shall state the purposes of the session, and only business encompassed by those purposes may be transacted.

§32. Term limitations for United States Congressmen.

Commencing with the 1992 election, no person may be elected to more than two consecutive terms in the United States senate or more than six consecutive terms in the United States House of Representatives.

Article IV

Executive Department

§1. Executive power.

The executive power of the state is vested in the Governor.

§2. Qualification, election and term.

The Governor and lieutenant governor must be citizens of the United States, have attained the age of twenty-one years, and be residents of the State of South Dakota for two years preceding their election. They shall be jointly elected for a term of four years at a general election held in a nonpresidential election year. The candidates having the highest number of votes cast jointly for them shall be elected. Commencing with the 1974 general election, no person shall be elected to more than two consecutive terms as Governor or as lieutenant governor. The election procedure shall be as prescribed by law.

§3. Powers and duties of the Governor.

The Governor shall be responsible for the faithful execution of the law. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its civil divisions. This authority shall not authorize any action or proceedings against the Legislature.

He shall be commander-in-chief of the armed forces of the state, except when they shall be called into the service of the United States, and may call them out to execute the laws, to preserve order, to suppress insurrection or to repel invasion.

The Governor shall commission all officers of the state. He may at any time require information, in writing or otherwise, from the officers of any administrative department, office or agency upon any subject relating to the respective offices.

The Governor shall at the beginning of each session, and may at other times, give the Legislature information concerning the affairs of the state and recommend the measures he considers necessary.

The Governor may convene the Legislature or either house thereof alone in special session by a proclamation stating the purposes of the session, and only business encompassed by such purposes shall be transacted.

Whenever a vacancy occurs in any office and no provision is made by the Constitution or laws for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment.

The Governor may, except as to convictions on impeachment, grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

§4. Veto power.

Whenever the Legislature is in session, any bill presented to the Governor for signature shall become law when the Governor signs the bill or fails to veto the bill within five days, not including Saturdays, Sundays, or holidays, of presentation. A vetoed bill shall be returned by the Governor to the Legislature together with the Governor's objections within five days, not including Saturdays, Sundays, or holidays, of presentation if the Legislature is in session or upon the reconvening of the Legislature from a recess. Any vetoed bill shall be reconsidered by the Legislature and, if two-thirds of all members of each house shall pass the bill, it shall become law.

Whenever a bill has been presented to the Governor and the Legislature has adjourned sine die or recessed for more than five days within five days from presentation, the bill shall become law when the Governor signs the bill or fails to veto it within fifteen days after such adjournment or start of the recess.

The Governor may strike any items of any bill passed by the Legislature making appropriations. The procedure for reconsidering items struck by the Governor shall be the same as is prescribed for the passage of bills over the executive veto. All items not struck shall become law as provided herein.

Bills with errors in style or form may be returned to the Legislature by the Governor with specific recommendations for change. Bills returned shall be treated in the same manner as vetoed bills except that specific recommendations for change as to style or form may be approved by a majority vote of all the members of each house. If the Governor certifies that the bill conforms to the Governor's specific recommendations, the bill shall become law. If the Governor fails to certify the bill, it shall be returned to the Legislature as a vetoed bill.

§5. Powers and duties of lieutenant governor.

The lieutenant governor shall be president of the senate but shall have no vote unless the senators are equally divided. The lieutenant governor shall perform the duties and exercise the powers that may be delegated to him by the Governor.

§6. Succession of executive power.

When the office of Governor shall become vacant through death, resignation, failure to qualify, conviction after impeachment or permanent disability of the Governor, the lieutenant governor shall succeed to the office and powers of the Governor. When the Governor is unable to serve by reason of continuous absence from the state, or other temporary disability, the executive power shall devolve upon the lieutenant governor for the residue of the term or until the disability is removed.

Whenever there is a permanent vacancy in the office of the lieutenant governor, the Governor shall nominate a lieutenant governor who shall take office upon confirmation by a majority vote of all the members of each house of the Legislature.

Whenever there is a concurrent vacancy in the office of Governor and lieutenant governor, the order of succession for the office of Governor shall be as provided by law.

The Supreme Court shall have original and exclusive jurisdiction to determine when a continuous absence from the state or disability has occurred in the office of the Governor or a permanent vacancy exists in the office of lieutenant governor.

§7. Other executive officers -- Powers, duties, and term limitations.

There shall be chosen by the qualified electors of the state at the general election of the Governor and every four years thereafter the following constitutional officers: attorney general, secretary of state, auditor, treasurer, and commissioner of school and public lands, who shall severally hold their offices for a term of four years. Commencing with the 1992 general election, no person may be elected to more than two consecutive terms as attorney general, secretary of state, auditor, treasurer, or commissioner of school and public lands.

§8. Reorganization.

All executive and administrative offices, boards, agencies, commissions and instrumentalities of the state government and their respective functions, powers and duties, except for the office of Governor, lieutenant governor, attorney general, secretary of state, auditor, treasurer, and commissioner of school and public lands, shall be allocated by law among and within not more than twenty-five principal departments, organized as far as practicable according to major purposes, by no later than July 1, 1974. Subsequently, all new powers or functions shall be assigned to administrative offices, agencies and instrumentalities in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department.

Except as to elected constitutional officers, the Governor may make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the Legislature within five legislative days after it convenes, and shall become effective, and shall have the force of law, within ninety days after submission, unless disapproved by a resolution concurred in by a majority of all the members of either house.

§9. Appointment and removal power.

Each principal department shall be under the supervision of the Governor and, unless otherwise provided in this Constitution or by law, shall be headed by a single executive. Such single executive, unless provided otherwise by the Constitution, shall be nominated and, by and with the advice and consent of the

senate, appointed by the Governor and shall hold office for a term to expire at the end of the term for which the Governor was elected, unless sooner removed by the Governor.

Except as otherwise provided in this Constitution, whenever a board, commission or other body shall head a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the Governor. The term of office and removal of such members shall be as prescribed by law.

The Governor shall have power to nominate and make interim appointments requiring senate confirmation during recess of the Legislature except that such nominations and interim appointments shall extend only to the end of the Governor's term or until acted upon by the Legislature.

§§10 to 13. Superseded.

Article V

Judicial Department

§1. Judicial powers.

The judicial power of the state is vested in a unified judicial system consisting of a Supreme Court, circuit courts of general jurisdiction and courts of limited original jurisdiction as established by the Legislature.

§2. Supreme Court.

The Supreme Court is the highest court of the state. It consists of a chief justice and four associate justices. Upon request by the Supreme Court the Legislature may increase the number of justices to seven. All justices shall be selected from compact districts established by the Legislature, and each district shall have one justice.

§3. Circuit courts.

The circuit courts consist of such number of circuits and judges as the Supreme Court determines by rule.

§4. Courts of limited jurisdiction.

Courts of limited jurisdiction consist of all courts created by the Legislature having limited original jurisdiction.

§5. Jurisdiction of courts.

The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court. The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.

The circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law.

Imposition or execution of a sentence may be suspended by the court empowered to impose the sentence unless otherwise provided by law.

§6. Qualifications of judicial personnel.

Justices of the Supreme Court, judges of the circuit courts and persons presiding over courts of limited jurisdiction must be citizens of the United States, residents of the state of South Dakota and voting residents within the district, circuit or jurisdiction from which they are elected or appointed. No Supreme Court justice shall be deemed to have lost his voting residence in a district by reason of his removal to the seat of government in the discharge of

his official duties. Justices of the Supreme Court and judges of circuit courts must be licensed to practice law in the state of South Dakota.

§7. Judicial selection.

Circuit court judges shall be elected in a nonpolitical election by the electorate of the circuit each represents for an eight-year term.

A vacancy, as defined by law, in the office of a Supreme Court justice or circuit court judge, shall be filled by appointment of the Governor from one of two or more persons nominated by the judicial qualifications commission. The appointment to fill a vacancy of a circuit court judge shall be for the balance of the unexpired term; and the appointment to fill a vacancy of a Supreme Court justice shall be subject to approval or rejection as hereinafter set forth.

Retention of each Supreme Court justice shall, in the manner provided by law, be subject to approval or rejection on a nonpolitical ballot at the first general election following the expiration of three years from the date of his appointment. Thereafter, each Supreme Court justice shall be subject to approval or rejection in like manner every eighth year. All incumbent Supreme Court justices at the time of the effective date of this amendment shall be subject to a retention election in the general election in the year in which their respective existing terms expire.

§8. Selection of the Chief Justice.

The chief justice shall be selected from among the justices of the Supreme Court for a term and in a manner to be provided by law. The chief justice may resign his office without resigning from the Supreme Court.

§9. Qualifications commission.

The Legislature shall provide by law for the establishment of a judicial qualifications commission which have such powers as the Legislature may provide, including the power to investigate complaints against any justice or judge and to conduct confidential hearings concerning the removal or involuntary retirement of a justice or judge. The Supreme Court shall prescribe by rule the means to implement and enforce the powers of the commission. On recommendation of the judicial qualifications commission the Supreme Court, after hearing, may censure, remove or retire a justice or judge for action which constitutes willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, disability that seriously interferes with the performance of the duties or conduct prejudicial to the administration of justice which brings a judicial office into disrepute. No justice or judge shall sit in judgment in any hearing involving his own removal or retirement.

§10. Restrictions.

During his term of office no Supreme Court justice or circuit court judge shall engage in the practice of law. Any Supreme Court justice or circuit court judge who becomes a candidate for an elective non-judicial office shall there by forfeit his judicial office.

§11. Administration.

The chief justice is the administrative head of the unified judicial system. The chief justice shall submit an annual consolidated budget for the entire unified judicial system, and the total cost of the system shall be paid by the state. The Legislature may provide by law for the reimbursement to the state of appropriate portions of such cost by governmental subdivisions. The Supreme Court shall appoint such court personnel as it deems necessary to serve at its pleasure.

The chief justice shall appoint a presiding circuit judge for each judicial circuit to serve at the pleasure of the chief justice. Each presiding circuit judge shall have such administrative power as the Supreme Court designates by rule and may, unless it be otherwise provided by law, appoint judicial personnel to courts of limited jurisdiction to serve at his pleasure. Each presiding circuit judge shall appoint clerks and other court personnel for the counties in his circuit who shall serve at his pleasure at a compensation fixed by law. Duties of clerks shall be defined by Supreme Court rule.

The chief justice shall have power to assign any circuit judge to sit on another circuit court, or on the Supreme Court in case of a vacancy or in place of a justice who is disqualified or unable to act. The chief justice may authorize a justice to sit as a judge in any circuit court.

The chief justice may authorize retired justices and judges to perform any judicial duties to the extent provided by law and as directed by the Supreme Court.

§12. Rule-making power.

The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar. These rules may be changed by the Legislature.

§13. Transition.

The Legislature by law and the Supreme Court by rule shall provide for the orderly transition of the judicial system in conformity with this article.

§§14 to 39. Superseded.

Article VI

Bill of Rights

§1. Inherent rights.

All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§2. Due process -- Right to work.

No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization.

§3. Freedom of religion -- Support of religion prohibited.

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.

No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

§4. Right of petition and peaceable assembly.

The right of petition, and of the people peaceably to assemble to consult for the common good and make known their opinions, shall never be abridged.

§5. Freedom of speech -- Truth as defense -- Jury trial.

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right. In all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. The jury shall have the right to determine the fact and the law under the direction of the court.

§6. Jury trial -- Reduced jury -- Three-fourths vote.

The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy, but the Legislature may provide for a jury of less than twelve in any court not a court of record and for the decision of civil cases by three-fourths of the jury in any court.

§7. Rights of accused.

In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

§8. Right to bail -- Habeas corpus.

All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great. The privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.

§9. Self-incrimination -- Double jeopardy.

No person shall be compelled in any criminal case to give evidence against oneself or be twice put in jeopardy for the same offense.

§10. Indictment or information -- Modification or abolishment of grand jury.

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

§11. Search and seizure.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.

§12. Ex post facto laws -- Impairment of contract obligations -- Privilege or immunity.

No ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise or immunity, shall be passed.

§13. Private property not taken without just compensation -- Benefit to owner -- Fee in highways.

Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

§14. Resident aliens' property rights.

No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property.

§15. Imprisonment for debt.

No person shall be imprisoned for debt arising out of or founded upon a contract.

§16. Military subordinate to civil power -- Quartering of soldiers.

The military shall be in strict subordination to the civil power. No soldier in time of peace shall be quartered in any house without consent of the owner, nor in time of war except in the manner prescribed by law.

§17. Taxation without consent -- Uniformity.

No tax or duty shall be imposed without the consent of the people or their representatives in the Legislature, and all taxation shall be equal and uniform.

§18. Equal privileges or immunities.

No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

§19. Free and equal elections -- Right of suffrage -- Soldier voting.

Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers in time of war may vote at their post of duty in or out of the state, under regulations to be prescribed by the Legislature.

§20. Courts open -- Remedy for injury.

All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.

§21. Suspension of laws prohibited.

No power of suspending laws shall be exercised, unless by the Legislature or its authority.

§22. Attainder by Legislature prohibited.

No person shall be attainted of treason or felony by the Legislature.

§23. Excessive bail or fines -- Cruel punishments.

Excessive bail shall not be required, excessive fines imposed, nor cruel punishments inflicted.

§24. Right to bear arms.

The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

§25. Treason.

Treason against the state shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or confession in open court.

§26. Power inherent in people -- Alteration in form of government -- Inseparable part of Union.

All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper. And the state of South Dakota is an inseparable part of the American Union and the Constitution of the United States is the supreme law of the land.

§27. Maintenance of free government -- Fundamental principles.

The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue and by frequent recurrence to fundamental principles.

§ 28. Right to vote by secret ballot.

The rights of individuals to vote by secret ballot are fundamental. If any state or federal law requires or permits an election for public office, for any initiative or referendum, or for any designation or authorization of employee representation, the right of any individual to vote by secret ballot shall be guaranteed.

§29 Rights of crime victim. A victim shall have the following rights:

1. The right to due process and to be treated with fairness and respect for the victim's dignity;
2. The right to be free from intimidation, harassment and abuse;
3. The right to be reasonably protected from the accused and any person acting on behalf of the accused;
4. The right to have the safety and welfare of the victim and the victim's family considered when setting bail or making release decisions;
5. The right, upon request, to prevent the disclosure to the public, or the defendant or anyone acting on behalf of the defendant in the criminal case, of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records. This does not limit law enforcement from sharing information with the public for the purposes of enlisting the public's help in solving a crime;
6. The right, upon request, to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;

7. The right, upon request, to reasonable, accurate and timely notice of, and to be present at, all proceedings involving the criminal or delinquent conduct, including release, plea, sentencing, adjudication and disposition, and any proceeding during which a right of the victim is implicated;

8. The right, upon request, to be promptly notified of any release or escape of the accused;

9. The right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated;

10. The right, upon request, to confer with the attorney for the government;

11. The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any pre-sentence or disposition sentence investigation report or plan of disposition, and to have any such information considered in any sentencing or disposition recommendations;

12. The right, upon request, to receive a copy of any pre-sentence report or plan of disposition, and any other report or record relevant to the exercise of a victim's right, except for those portions made confidential by law;

13. The right, upon request, to the prompt return of the victim's property when no longer needed as evidence in the case;

14. The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal conduct and as provided by law for all losses suffered as a result of delinquent conduct;

15. The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related post-judgment proceedings;

16. The right, upon request, to be informed of the conviction, adjudication, sentence, disposition, place and time of incarceration, detention or other disposition of the offender, any scheduled release date of the offender, and the release of or the escape by the offender from custody;

17. The right, upon request, to be informed in a timely manner of all post-judgment processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. Any parole authority shall extend the right to be heard to any person harmed by the offender;

18. The right, upon request, to be informed in a timely manner of clemency and expungement procedures, to provide information to the Governor, the court, any clemency board and other authority in these procedures, and to have that information considered before a clemency or expungement decision is made, and to be notified of such decision in advance of any release of the offender; and

19. The right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card.

The victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government, upon request of the victim, may assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right and ensuring that victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants and children accused of delinquency. The reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record.

The granting of these rights to any victim shall ensure the victim has a meaningful role throughout the criminal and juvenile justice systems and may not be construed to deny or disparage other rights possessed by victims. The Legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to further define, implement, preserve, and protect the rights guaranteed to victims by this section.

As used in this section, the term, victim, means a person against whom a crime or delinquent act is committed. In the case of a victim who is killed or incapacitated as a result of the crime or delinquent act, or who is a minor, the term also includes any spouse, parent, child, sibling, or as designated by the court, grandparent, grandchild, or guardian. The term does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

Nothing in this section or any law enacted under this section creates a cause of action for damages against the state or any political subdivision of the state, or any officer, employee, or agent of the state or of any political subdivision of the state.

Article VII

Elections and Right of Suffrage

§1. Right to vote.

Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

§2. Voter qualification.

Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for mental incompetence or the conviction of a felony. The Legislature may by law establish reasonable requirements to insure the integrity of the vote.

Each elector who qualified to vote within a precinct shall be entitled to vote in that precinct until he establishes another voting residence. An elector shall never lose his residency for voting solely by reason of his absence from the state.

§3. Elections.

The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces.

§§4 to 10. Superseded.

Article VIII

Education and School Lands

§1. Uniform system of free public schools.

The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.

§2. Perpetual trust fund for maintenance of public schools -- Principal inviolate.

All proceeds of the sale of public lands that have heretofore been or may hereafter be given by the United States for the use of public schools in the state; all such per centum as may be granted by the United States on the sales of public lands; the proceeds of all property that shall fall to the state by escheat; the proceeds of all gifts or donations to the state for public schools or not otherwise appropriated by the terms of the gift; and all property otherwise acquired for public schools, shall be and remain a perpetual fund for the maintenance of public schools in the state. It shall be deemed a trust fund held by the state. The principal shall never be diverted by legislative enactment for any other purpose, and may be increased; but, if any loss occurs through any unconstitutional act, the state shall make the loss good through a special appropriation.

§3. Fund income apportioned among schools -- Apportionment of fines.

The interest and income of this fund together with all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the public schools of the state, and shall be for this purpose apportioned among and between all the several public school corporations of the state in proportion to the number of children in each, of school age, as may be fixed by law; and no part of the fund, either principal or interest, shall ever be diverted, by legislative enactment, even temporarily, from this purpose or used for any other purpose whatever than the maintenance of public schools for the equal benefit of all the people of the state. However, before the interest and income is apportioned to the public schools, the principal shall be increased each year by an amount equal to the rate of inflation from the interest and income earned from this fund. The principal may be prudently invested as provided by law.

The proceeds of all fines collected from violations of state laws shall be paid to the county treasurer of the county in which the fine was imposed, and distributed by the county treasurer among and between all of the several public schools incorporated in such county in proportion to the number of children in each, of school age, as may be fixed by law.

§4. Sale of school lands -- Appraisal.

After one year from the assembling of the first Legislature, the lands granted to the state by the United States for the use of public schools may be sold upon the following conditions and no other: not more than one-third of all such lands shall be sold within the first five years, and no more than two-thirds within the first fifteen years after the title thereto is vested in the state, and the Legislature shall, subject to the provisions of this article, provide for the sale of the same.

The commissioner of school and public lands, the state auditor and the county superintendent of schools of the counties severally, shall constitute boards of appraisal and shall appraise all school lands within the several counties which they may from time to time select and designate for sale, at their actual value under the terms of sale.

They shall take care to first select and designate for sale the most valuable lands; and they shall ascertain all such lands as may be of special and peculiar value, other than agricultural, and cause the proper subdivision of the same in order that the largest price may be obtained therefor.

§5. Terms of sale of school lands.

No land shall be sold for less than the appraised value, and in no case for less than ten dollars per acre. The purchaser shall pay at least one-tenth of the purchase price in cash. The Legislature shall provide by general law for payment of the balance which shall be made in partial payments and must be fully paid up within thirty years. Interest shall be established by the Legislature. All lands may be sold for cash, provided further, that the purchaser or purchasers shall have the right or option of paying the balance in whole or in part on any interest paying date, under such rules as the Legislature may provide. No land shall be sold until appraised and advertised and offered for sale at public auction. No land can be sold except at public sale.

Such lands as shall not have been specially subdivided shall be offered in tracts of not more than eighty acres and these subdivided into the smallest division of the lands designated for sale and not sold within two years after their appraisal shall be reappraised by the board of appraisers as hereinafter provided before they are sold.

§6. Conduct of sales of school lands -- Conveyance of right or title.

All sales shall be conducted through the office of the commissioner of school and public lands as may be prescribed by law, and returns of all appraisals and sales shall be made to said office. No sale shall operate to convey any right or title to any lands for sixty days after the date thereof, nor until the same shall have received the approval of the Governor in such form as may be provided by law. No grant or patent for any such lands shall issue until final payment be made.

§7. Perpetual trust fund from proceeds of grants and gifts.

All lands, money, or other property donated, granted, or received from the United States or any other source for a university, agricultural college, normal schools , or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased, but shall never be diverted by legislative enactment for any other purpose, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses that may occur through any unconstitutional act or where required under the Enabling Act.

§8. Appraisal and sale of donated lands -- Separate accounts.

All lands mentioned in the preceding section shall be appraised and sold in the same manner and by the same officers and boards under the same limitations, and subject to all the conditions as to price, sale and approval, provided above for the appraisal and sale of lands for the benefit of public schools, but a distinct and separate account shall be kept by the proper officers of each of such funds.

§9. Lease of school lands.

The lands mentioned in this article shall be leased for pasturage, meadow, farming, the growing of crops of grain and general agricultural purposes, and at public auction after notice as hereinbefore provided in case of sale and shall be offered in tracts not greater than one section. All rents shall be payable annually in advance, and no term of lease shall exceed five years, nor shall any lease be valid until it receives the approval of the Governor.

Provided, that any lessee of school and public lands shall, at the expiration of a five-year lease, be entitled, at his option, to a new lease for the land included in his original lease, for a period of time not exceeding five years, without public advertising, at the current rental prevailing in the county in which such land is situated, at the time of the issuance of the new lease. The commissioner of school and public lands shall notify by registered mail each lessee or assignee on or before the first day of November first preceding the expiration of his lease that such lease will expire.

Such option shall be exercised by the lessee by notifying the commissioner of school and public lands by registered mail, on or before the first day of December first preceding the expiration of his lease describing the lands for which he desires a new lease, in the same manner as the same is described in his original lease.

The Legislature may provide by appropriate legislation for the payment of local property taxes by the lessees of school and public lands.

§10. Trespassers' claims to public lands not recognized -- Improvements not compensated.

No claim to any public lands by any trespasser thereon by reason of occupancy, cultivation or improvement thereof, shall ever be recognized; nor shall compensation ever be made on account of any improvements made by such trespasser.

§11. Investment of permanent educational funds.

Except as otherwise required by the Enabling Act, the moneys of the permanent school and other educational and charitable funds shall be invested by the state investment council in stocks, bonds, mutual funds, and other financial instruments as provided by law.

§12. Disapproval by Governor of sale, lease or investment.

The Governor may disapprove any sale, lease or investment other than such as are in trusted to the counties.

§13. Audit of losses to permanent educational funds -- Permanent debt -- Interest.

The permanent school or other educational and charitable_funds of this state shall be audited by the proper authorities of the state. If any loss occurs through any unconstitutional act, the state shall make the loss good through a special appropriation. The amount of indebtedness so created shall not be counted as a part of the indebtedness mentioned in article XIII, § 2.

§14. Protection and defense of school lands.

The Legislature shall provide by law for the protection of the school lands from trespass or unlawful appropriation, and for their defense against all unauthorized claims or efforts to divert them from the school fund.

§15. Taxation to support school system -- Classification of property.

The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state. The Legislature is empowered to classify properties within school districts into separate classes for purposes of school taxation. Taxes shall be uniform on all property in the same class.

§16. Public support of sectarian instruction prohibited.

No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

§17. Interest in sale of school equipment prohibited.

No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, under such penalties as shall be provided by law.

§18. Apportionment of mineral leasing moneys -- Amounts covered into permanent funds.

Notwithstanding the provisions of §§ 2, 3 and 7 of article VIII of this Constitution, moneys received from the leasing of all common school, indemnity, and endowment lands for oil and gas and other mineral leasing of said lands shall be apportioned among the public schools and the various state institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted in trust to the state by the Enabling Act approved February 22, 1889, as amended, and allocations authorized pursuant to the provisions of § 17 of such Enabling Act; and further that not less than fifty percent of each such amount so allocated shall be covered into the permanent fund of the public schools and each of such institutions.

§19. Mineral rights reserved to state -- Leases permitted.

All gas, coal, oil and mineral rights, and any other rights, as specified by law, to or in public lands, are reserved for the state. Leases may be executed by the state for the exploration, extraction and sale of such materials in the manner and with such conditions as are provided by law.

§20. Loan of nonsectarian textbooks to all school children.

Notwithstanding the provisions of section 3, Article VI and section 16, Article VIII, the Legislature may authorize the loaning of nonsectarian textbooks to all children of school age.

Article IX

Local Government

§1. Organization of local government.

The Legislature shall have plenary powers to organize and classify units of local government, except that any proposed change in county boundaries shall be submitted to the voters of each affected county at an election and be approved by a majority of those voting thereon in each county. No township heretofore organized may be abolished unless the question is submitted to the voters of the township and approved by a majority of those voting thereon in each township.

§2. Home rule.

Any county or city or combinations thereof may provide for the adoption or amendment of a charter. Such charter shall be adopted or amended if approved at an election by a majority of the votes cast thereon. Not less than ten percent of those voting in the last preceding gubernatorial election in the affected jurisdiction may by petition initiate the question of whether to adopt or amend a charter.

A chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state. The charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that the administrative proceedings be subject to judicial review. Powers and functions of home rule units shall be construed liberally.

§3. Intergovernmental cooperation.

Every local government may exercise, perform or transfer any of its powers or functions, including financing the same, jointly or in cooperation with any other governmental entities, either within or without the state, except as the Legislature shall provide otherwise by law.

§4. Local initiatives to provide for cooperation and organization of local government units.

On or after January 1, 2001, the voters of any unit of local government shall have the right to initiate proposals for cooperation within or between local governmental units, either within or without the state, except as the Legislature shall provide otherwise by law. Such proposals may include combining, eliminating, and joint financing of offices, functions, and governmental units. Such proposals shall be adopted if approved at an election by a majority of the votes cast thereon in each affected unit. A number not less than fifteen percent of those voting in the last preceding gubernatorial election in each affected jurisdiction may by petition initiate the question of whether to adopt the proposal at the next general election.

§§5 to 7. Superseded.

Article X

Municipal Corporations

[Repealed by SL 1972, ch 3, approved Nov. 7, 1972.]

Article XI

Revenue and Finance

§1. Annual Tax.

The Legislature shall provide for an annual tax, sufficient to defray the estimated ordinary expenses of the state for each year, not to exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes.

And whenever it shall appear that such ordinary expenses shall exceed the income of the state for such year, the Legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year. And for the purpose of paying the public debt, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and the principal of such debt within ten years from the final passage of the law creating the debt; provided, that the annual tax for the payment of the interest and principal of the public debt shall not exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state, as ascertained by the last assessment made for the state and county purposes.

Provided, that for the purpose of establishing, installing, maintaining and operating a hard fiber twine and cordage plant at the state penitentiary at Sioux Falls, South Dakota, the Legislature shall provide for a tax for the year 1907 of not to exceed one and one-half mills on each dollar of the assessed valuation of all taxable property in the state, as ascertained by the last assessment made for state and county purposes.

§2. Classification of property for taxation -- Income.

To the end that the burden of taxation may be equitable upon all property, and in order that no property which is made subject to taxation shall escape, the Legislature is empowered to divide all property including moneys and credits as well as physical property into classes and to determine what class or classes of property shall be subject to taxation and what property, if any, shall not be subject to taxation. Taxes shall be uniform on all property of the same class, and shall be levied and collected for public purposes only. Taxes may be imposed upon any and all property including privileges, franchises and licenses to do

business in the state. Gross earnings and net incomes may be considered in taxing any and all property, and the valuation of property for taxation purposes shall never exceed the actual value thereof. The Legislature is empowered to impose taxes upon incomes and occupations, and taxes upon incomes may be graduated and progressive and reasonable exemptions may be provided.

§3. Corporate tax power of state not suspended.

The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party.

§4. Banks and bankers taxed.

The Legislature shall provide for taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects or dues of every description, of all banks and of all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals.

§5. Public property exempt from taxation -- Exceptions.

The property of the United States and of the state, county and municipal corporations, both real and personal, shall be exempt from taxation, provided, however, that all state owned lands acquired under the provisions of the rural credit act may be taxed by the local taxing districts for county, township and school purposes, and all state owned lands, known as public shooting areas, acquired under the provisions of § 25.0106 SDC 1939 and acts amendatory thereto, may be taxed by the local taxing districts for county, township and school purposes in such manner as the Legislature may provide.

§6. Property exempt from taxation -- Personal property.

The Legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, property acquired and used exclusively for public highway purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation.

§7. Other exemption laws void.

All laws exempting property from taxation other than that enumerated in §§ 5 and 6 of this article, shall be void.

§8. Object of tax to be stated -- Use of vehicle and fuel taxes.

No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied, and the proceeds from the imposition of any license, registration fee, or other charge with respect to the operation of any motor vehicle upon any public highways in this state and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel except costs of administration and except the tax

imposed upon gasoline or other liquid motor fuel not used to propel a motor vehicle over or upon public highways of this state shall be used exclusively for the maintenance, construction and supervision of highways and bridges of this state.

§9. Taxes paid into treasury -- Appropriations required for expenditure.

All taxes levied and collected for state purposes shall be paid into the state treasury. No indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer except in pursuance of an appropriation for the specific purpose first made. The Legislature shall provide by suitable enactment for carrying this section into effect.

§10. Special assessments for local improvements -- Taxes for municipal purposes.

The Legislature may vest the corporate authority of cities, towns and villages, with power to make local improvements by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

§11. Unauthorized use of public money as felony.

The making of profit, directly or indirectly, out of state, county, city, town or school district money, or using the same for any purpose not authorized by law, shall be deemed a felony and shall be punished as provided by law.

§12. Annual statement of receipts and expenditures.

An accurate statement of the receipts and expenditures of the public moneys shall be published annually, in such manner as the Legislature may provide.

§13. Vote required to increase tax rates or valuations.

The rate of taxation imposed by the state of South Dakota on personal or corporate income or on sales or services, or the allowable levies or the percentage basis for determining valuation as fixed by law for purposes of taxation on real or personal property, shall not be increased unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.

§14. Vote required to impose or increase taxes.

The rate of taxation imposed by the State of South Dakota in regard to any tax may not be increased and no new tax may be imposed by the State of South Dakota unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.

§15. Inheritance tax prohibited.

No tax may be levied on any inheritance, and the Legislature may not enact any law imposing such a tax. The effective date of this section is July 1, 2001.

Article XII

Public Accounts and Expenditures

§1. Appropriation and warrant required for payment from treasury.

No money shall be paid out of the treasury except upon appropriation by law and on warrant drawn by the proper officer.

§2. Contents of general appropriation bill -- Separate appropriation bills.

The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.

§3. Extra compensation prohibited -- Unauthorized contracts -- Change in compensation of officers -- Appropriations for defense of state.

The Legislature shall never grant any extra compensation to any public officer, employee, agent or contractor after the services shall have been rendered or the contract entered into, nor authorize the payment of any claims or part thereof created against the state, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void; nor shall the compensation of any public officer be increased or diminished during his term of office: provided, however, that the Legislature may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion.

§4. Annual statement required.

An itemized statement of all receipts and expenditures of the public moneys shall be published annually in such manner as the Legislature shall provide, and such statement shall be submitted to the Legislature at the beginning of each regular session by the Governor with his message.

§5. Health care trust fund established - Investment - Appropriations.

There is hereby created in the state treasury a trust fund named the health care trust fund. The state treasurer shall deposit into the health care trust fund any funds on deposit in the intergovernmental transfer fund as of July 1, 2001, and thereafter any funds appropriated to the health care trust fund as provided by law. The South Dakota Investment Council or its successor shall invest the health care trust fund in stocks, bonds, mutual funds, and other financial instruments as provided by law. Beginning in fiscal year 2003, and each year thereafter, the state treasurer shall make a distribution from the health care trust fund into the state general fund to be appropriated by law for health care related programs. The calculation of the distribution shall be defined by law and may

promote growth of the fund and a steadily growing distribution amount. The health care trust fund may not be diverted for other purposes nor may the principal be invaded unless appropriated by a three-fourths vote of all the members-elect of each house of the Legislature.

§6. Education enhancement trust fund established - Investment - Appropriations.

There is hereby created in the state treasury a trust fund named the education enhancement trust fund. The state treasurer shall deposit into the education enhancement trust fund any funds received as of July 1, 2001, and funds received thereafter by the state pursuant to the Master Settlement Agreement entered into on November 23, 1998, by the State of South Dakota and major United States tobacco product manufacturers or the net proceeds of any sale or securitization of rights to receive payments pursuant to the Master Settlement Agreement, any funds in the youth-at-risk trust fund as of July 1, 2001, and thereafter any funds appropriated to the education enhancement trust fund as provided by law. The South Dakota Investment Council or its successor shall invest the education enhancement trust fund in stocks, bonds, mutual funds, and other financial instruments as provided by law. Beginning in fiscal year 2003, and each year thereafter, the state treasurer shall make a distribution from the education enhancement trust fund into the state general fund to be appropriated by law for education enhancement programs. The calculation of the distribution shall be defined by law and may promote growth of the fund and a steadily growing distribution amount. The education enhancement trust fund may not be diverted for other purposes nor may the principal be invaded unless appropriated by a three-fourths vote of all the members-elect of each house of the Legislature.

§ 7. Balanced budget.

The Governor shall propose a budget in which expenditures or appropriations may not exceed anticipated revenue and existing funds available for expenditure or appropriation. Appropriations by the Legislature may not exceed anticipated revenue and existing funds available for expenditure or appropriation. Nothing in this section is intended to limit, restrict, expand, modify, or otherwise affect any other provision of this Constitution, including Article XIII.

Article XIII

Public Indebtedness

§1. State enterprises -- Legislative vote required -- Defense of state -- Rural credits -- Maximum indebtedness.

For the purpose of developing the resources and improving the economic facilities of South Dakota, the state may engage in works of internal improvement, may own and conduct proper business enterprises, may loan or give its credit to, or in aid of, any association, or corporation, organized for such purposes. But any such association or corporation shall be subject to regulation and control by the state as may be provided by law. No money of the state shall be appropriated, or indebtedness incurred for any of the purposes of this section, except by the vote of two-thirds of the members of each branch of the Legislature. The state may also assume or pay any debt or liability incurred in time of war for the defense of the state. The state may establish and maintain a system of rural credits and thereby loan and extend credit to the people of the state upon real estate security in such manner and upon such terms and conditions as may be prescribed by general law. The limit of indebtedness contained in § 2 of this article shall not apply to the provisions of this section, but the indebtedness of the state for the purposes contained in this section shall never exceed one-half of one percent of the assessed valuation of the property of the state, provided however, that nothing contained in this section shall affect the refinancing or refunding of the present outstanding indebtedness of this state.

§2. Maximum state debt -- Irrepealable tax to repay.

For the purpose of defraying extraordinary expenses and making public improvements, or to meet casual deficits or failure in revenue, the state may contract debts never to exceed with previous debts in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state or the United States in war and provision shall be made by law for the payment of the interest annually, and the principal when due, by tax levied for the purpose or from other sources of revenue; which law providing for the payment of such interest and principal by such tax or otherwise shall be irrepealable until such debt is paid: provided, however, the state of South Dakota shall have the power to refund the territorial debt assumed by the state of South Dakota, by bonds of the state of South Dakota.

§3. State debt as in addition to territorial debt.

That the indebtedness of the state of South Dakota limited by § 2 of this article shall be in addition to the debt of the territory of Dakota assumed by and agreed to be paid by South Dakota.

§4. Debt limitations for municipalities and political subdivisions.

The debt of any county, city, town or civil township shall never exceed five per centum upon the assessed valuation of the taxable property therein, for the year preceding that in which said indebtedness is incurred. The debt of any school district shall never exceed ten per centum upon the assessed valuation of the taxable property therein, for the year preceding that in which said indebtedness is incurred. In estimating the amount of the indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of the Constitution shall be included.

Provided, that any county, municipal corporation, civil township, district, or other subdivision may incur an additional indebtedness, not exceeding ten per centum upon the assessed valuation of the taxable property therein, for the year preceding that in which said indebtedness is incurred, for the purpose of providing water and sewerage, for irrigation, domestic uses, sewerage and other purposes; and

Provided, further, that in a city where the population is eight thousand or more, such city may incur an indebtedness not exceeding eight per centum upon the assessed valuation of the taxable property therein for the year next preceding that in which said indebtedness is incurred for the purpose of constructing street railways, electric lights or other lighting plants.

Provided, further, that no county, municipal corporation, civil township, district or subdivision shall be included within such district or subdivision without a majority vote in favor thereof of the electors of the county, municipal corporation, civil township, district or other subdivision, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof by a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same.

§5. Irrepealable tax to repay debt of municipality or political subdivision.

Any city, county, town, school district or any other subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrepealable until such debt be paid.

§6. Adjustment of debts and liabilities of territory of Dakota.

In order that payment of the debts and liabilities contracted or incurred by and in behalf of the territory of Dakota may be justly and equitably provided for and made, and in pursuance of the requirements of an act of Congress approved February 22, 1889, entitled "An act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form Constitutions and state governments and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states" the states of North Dakota and South

Dakota, by proceedings of a joint commission, duly appointed under said act, the sessions whereof were held at Bismarck in said state of North Dakota, from July 16, 1889, to July 31, 1889, inclusive, have agreed to the following adjustment of the amounts of the debts and liabilities of the territory of Dakota which shall be assumed and paid by each of the states of North Dakota and South Dakota, respectively, to wit:

1. This agreement shall take effect and be in force from and after the admission into the union, as one of the United States of America, of either the state of North Dakota or the state of South Dakota.

2. The words "state of North Dakota" wherever used in this agreement, shall be taken to mean the territory of North Dakota, in case the state of South Dakota shall be admitted into the union prior to the admission into the union of the state of North Dakota; and the words "state of South Dakota," wherever used in this agreement, shall be taken to mean the territory of South Dakota in case the state of North Dakota shall be admitted into the union prior to the admission into the union of the state of South Dakota.

3. The said state of North Dakota shall assume and pay all bonds issued by the territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of North Dakota, and shall pay all warrants issued under and by virtue of that certain act of the legislative assembly of the territory of Dakota, approved March 3, 1889, entitled an act to provide for the refunding of outstanding warrants drawn on the capitol building fund.

4. The said state of South Dakota shall assume and pay all bonds issued by the territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of South Dakota.

5. That is to say: The state of North Dakota shall assume and pay the following bonds and indebtedness, to wit: Bonds issued on account of the hospital for insane at Jamestown, North Dakota, the face aggregate of which is two hundred and sixty-six thousand dollars; also, bonds issued on account of the North Dakota University at Grand Forks, North Dakota, the face aggregate of which is ninety-six thousand seven hundred dollars; also, bonds issued on account of the penitentiary at Bismarck, North Dakota, the face aggregate of which is ninety-three thousand six hundred dollars; also, refunding capitol building warrants dated April 1, 1889, eighty-three thousand five hundred and seven dollars and forty-six cents.

And the state of South Dakota shall assume and pay the following bonds and indebtedness, to wit: Bonds issued on account of the hospital for the insane at Yankton, South Dakota, the face aggregate of which is two hundred and ten thousand dollars; also, bonds issued on account of the school for deaf mutes, at Sioux Falls, South Dakota, the face aggregate of which is fifty-one thousand dollars; also, bonds issued on account of the university at Vermillion, South Dakota, the face aggregate of which is seventy-five thousand dollars; also,

bonds issued on account of the penitentiary at Sioux Falls, South Dakota, the face aggregate of which is ninety-four thousand three hundred dollars; also, bonds issued on account of agricultural college at Brookings, South Dakota, the face aggregate of which is ninety-seven thousand five hundred dollars; also, bonds issued on account of the normal school at Madison, South Dakota, the face aggregate of which is forty-nine thousand four hundred dollars; also, bonds issued on account of school of mines at Rapid City, South Dakota, the face aggregate of which is thirty-three thousand dollars; also, bonds issued on account of the reform school at Plankinton, South Dakota, the face aggregate of which is thirty thousand dollars; also, bonds issued on account of the normal school at Spearfish, South Dakota, the face aggregate of which is twenty-five thousand dollars; also, bonds issued on account of the soldiers' home at Hot Springs, South Dakota, the face aggregate of which is forty-five thousand dollars.

6. The states of North Dakota and South Dakota shall pay one-half each of all liabilities now existing or hereafter and prior to the taking effect of this agreement incurred, except those heretofore and hereafter incurred on account of public institutions, grounds or buildings, except as otherwise herein specifically provided.

7. The state of South Dakota shall pay to the state of North Dakota forty-six thousand five hundred dollars on account of the excess of territorial appropriations for the permanent improvement of territorial institutions which under this agreement will go to South Dakota, and in full of the undivided one-half interest of North Dakota in the territorial library and in full settlement of unbalanced accounts, and of all claims against the territory, of whatever nature, legal or equitable, arising out of the alleged erroneous or unlawful taxation of the Northern Pacific Railroad lands, and the payment of said amount shall discharge and exempt the state of South Dakota from all liability for or on account of the several matters hereinbefore referred to; nor shall either state be called upon to pay or answer to any portion of liability hereafter arising or accruing on account of transactions heretofore had, which liability would be a liability of the territory of Dakota had such territory remained in existence, and which liability shall grow out of matters connected with any public institution, grounds or buildings of the territory situated or located within the boundaries of the other state.

8. A final adjustment of accounts shall be made upon the following basis: North Dakota shall be charged with all sums paid on account of the public institutions, grounds or buildings located within its boundaries on account of the current appropriations since March 8, 1889; and South Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within its boundaries on the same account and during the same time. Each state shall be charged with one-half of all other expenses of the territorial government during the same time. All moneys paid into the treasury during the period from March 8, 1889, to the time of taking effect of this agreement by any county,

municipality or person within the limits of the proposed state of North Dakota shall be credited to the state of North Dakota; and all sums paid into said treasury within the same time by any county, municipality or person within the limits of the proposed state of South Dakota shall be credited to the state of South Dakota; except that any and all taxes on gross earnings paid into said treasury by railroad corporations since the eighth day of March 1889, based upon earnings of years prior to 1888, under and by virtue of the act of the legislative assembly of the territory of Dakota, approved March 7, 1889, and entitled "An act providing for the levy and collection of taxes upon property of railroad companies in this territory," being chapter 107 of the Session Laws of 1889 (that is, the part of such sum going to the territory) shall be equally divided between the states of North Dakota and South Dakota; and all taxes heretofore or hereafter paid into said treasury under and by virtue of the act last mentioned, based on the gross earnings of the year 1888, shall be distributed as already provided by law, except that so much thereof as goes to the territorial treasury shall be divided as follows: North Dakota shall have so (much) thereof as shall be or has been paid by railroads within the limits of the proposed state of North Dakota and South Dakota so much thereof as shall be or has been paid by railroads within the limits of the proposed state of South Dakota. Each state shall be credited also with all balances of appropriations made by the seventeenth legislative assembly of the territory of Dakota for the account of public institutions, grounds or buildings situated within its limits, remaining unexpended on March 8, 1889. If there be any indebtedness except the indebtedness represented by the bonds and refunding warrants hereinbefore mentioned, each state shall at the time of such final adjustment of accounts, assume its share of said indebtedness as determined by the amount paid on account of the public institutions, grounds or buildings of such state in excess of the receipts from counties, municipalities, railroad corporations or persons within the limits of said state as provided in this article; and if there should be a surplus at the time of such final adjustment, each state shall be entitled to the amounts received from counties, municipalities, railroad corporations or persons within its limits over and above the amount charged to it.

§7. Obligation of state to pay proportion of territorial debt.

And the state of South Dakota hereby obligates itself to pay such part of the debts and liabilities of the territory of Dakota as is declared by the foregoing agreement to be its proportion thereof, the same as if such proportion had been originally created by said state of South Dakota as its own debt or liability.

§8. Refunding bond issue authorized for territorial debt payment.

The territorial treasurer is hereby authorized and empowered to issue refunding bonds to the amount of one hundred seven thousand five hundred dollars, bearing interest not to exceed the rate of four percent per annum, for the purpose of refunding the following described indebtedness of the territory of Dakota, to wit:

Seventy-seven thousand five hundred dollars, five percent bonds, dated May 1, 1883, issued for the construction of the west wing of the insane hospital at Yankton and thirty thousand dollars, six percent bonds dated May 1, 1883, issued for permanent improvements [of the] Dakota penitentiary, at Sioux Falls, such refunding bonds, if issued, to run for not more than twenty years, and shall be executed by the Governor and treasurer of the territory, and shall be attested by the secretary under the great seal of the territory.

In case such bonds are issued by the territorial treasurer as hereinbefore set forth, before the first day of October, 1889, then upon the admission of South Dakota as a state it shall assume and pay said bonds in lieu of the aforesaid territorial indebtedness.

§9. Road construction and coal supply by state.

The construction and maintenance of good roads and the supplying of coal to the people of the state from the lands belonging to the state are works of necessity and importance in which the state may engage but no expenditure of money for the same shall be made except by the vote of a two-thirds majority of the Legislature.

§10. State cement enterprises.

The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracks, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elect of each branch of the Legislature.

§11. State pledge to fund cement enterprises.

The state may pledge such cement plants and all of the accessories thereto, and may pledge the credit of the state, to provide funds for the purposes enumerated in §10 of this article, any provision in this Constitution to the contrary notwithstanding.

§12. State electric power enterprises.

The manufacture, distribution and sale of electric current for heating, lighting and power purposes are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation all lands, easements, rights of way, tracks, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material incident or necessary to the acquisition, ownership, control, development and operation of the water powers of this state, and to carry this provision into effect: provided, however, that no expenditure of money for the purposes enumerated in this

section shall be made except by a vote of two-thirds of the members elect of each branch of the Legislature.

§13. State pledge to fund electric power enterprises.

The state may pledge such plants and all of the accessories thereto, and may pledge the credit of the state, to provide funds for the purposes enumerated in § 12 of this article, any provision in this Constitution to the contrary notwithstanding.

§14. State coal mining enterprises.

The mining, distribution and sale of coal are hereby declared to be works of public necessity and importance in which the state may engage, and the Legislature may enact suitable laws to carry this provision into effect and to empower the state to acquire, by purchase or appropriation, all lands, structures, easements, tracks, rights of way, equipment, cars, motive power, and all other facilities, implements, instrumentalities, and materials necessary or incidental to the acquisition, mining, manufacturing and distribution of coal for fuel purposes: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made except upon a vote of two-thirds of the members elect of each branch of the Legislature.

§15. State pledge to fund coal enterprises.

The state may pledge such plants and all of the accessories thereto, as well as the credit of this state, to provide funds for the purposes enumerated in § 14 of this article, any provision in this Constitution to the contrary notwithstanding.

§16. Works of internal improvement -- State indebtedness.

The state may engage in works of internal improvement, any provision in this Constitution, or limitation in § 2 of this article, to the contrary notwithstanding. The indebtedness of the state for the purposes contained in this section shall never exceed one-half of one percent of the assessed valuation of all property in this state and no such indebtedness shall be incurred nor money expended, except upon a two-thirds vote of the members elect in each branch of the Legislature.

§17. Home loans by state -- Debt limitation inapplicable.

The state may establish and maintain a system of credits for assisting in the building of homes by the people of the state, and therefor may loan money and extend credit to the people of the state upon real estate security in such manner and upon such terms and conditions as may be prescribed by general law. The limitations and provisions regarding the incurring of indebtedness elsewhere found in the Constitution shall not apply to this section, but the Legislature shall, at the time of incurring any indebtedness hereunder, provide for discharging same.

§18. Compensation of military and war relief personnel -- Maximum indebtedness.

The Legislature shall be authorized to provide by law for compensating honorably discharged soldiers, sailors, marines, and others, who have served with the armed forces of the United States, or who have engaged in war relief work in the World's War, or other wars of the United States, including former American citizens, who served in allied armies against the central powers in the World's War and who have been honorably discharged and repatriated; such compensation not to exceed the sum of fifteen dollars per month for the period of such service. For this purpose the Legislature may use the credit of the state, and any indebtedness created for this purpose shall not be a part of the indebtedness authorized or limited by other provisions of the Constitution; provided, that the amount of all indebtedness created by the state for the purposes specified in this section shall not exceed six million dollars.

§19. Bonus paid to veterans and deceased veterans' dependents.

1. The Legislature shall be authorized to provide by law for compensating and paying a bonus in money to veterans and to dependents of deceased veterans, who were legal residents of the state of South Dakota for a period of not less than six months immediately preceding entry into the armed forces of the United States and who have served for ninety or more days in the armed forces of the United States between the period beginning December 7, 1941 and ending September 2, 1945 and who are still in the armed forces or were discharged therefrom under conditions other than dishonorable. Such bonus to be paid in cash, at the rate of fifty cents per day for each day of service in the armed forces within continental United States and at the rate of seventy-five cents per day for each day of service in the armed forces outside of continental United States, provided that any such person who served wholly within continental United States shall be entitled to receive not to exceed a bonus or total sum of five hundred dollars, and any such person who has served wholly outside of continental United States, or partly within and partly without, shall be entitled to receive not to exceed a bonus payment in the total sum of six hundred fifty dollars; such bonus to be paid on or before the thirty-first day of December 1950. For this purpose the Legislature may use credit of the state and any indebtedness created for this purpose shall not be a part of the indebtedness authorized or limited by other provisions of the Constitution; provided that the amount of indebtedness created by the state for the purpose specified in this section shall not exceed thirty million dollars. If upon computation the amount of thirty million dollars shall be inadequate to make the specified payments as stated in this section, the Legislature shall have the power to apportion the amount.

2. The term "armed forces" shall mean and include the following: United States army, army of the United States, United States navy, United States naval reserves, United States marine corps, United States marine corps reserve, United States coast guard, United States coast guard reserve which shall be construed to include the United States guard temporary reserve, women's army corps, United States navy women's reserve, United States marine corps women's reserve, United States coast guard women's reserve, army nurse corps and navy nurse corps.

§20. Trust fund created from proceeds of state cement enterprise – Investment.

The net proceeds derived from the sale of state cement enterprises shall be deposited by the South Dakota Cement Commission in a trust fund hereby created to benefit the citizens of South Dakota. The South Dakota Investment Council or its successor shall invest the trust fund in stocks, bonds, mutual funds, and other financial instruments as provided by law.

§21. Transfers from trust fund to general fund in support of education.

The Legislature shall transfer from the trust fund to the state general fund four percent of the lesser of the average market value of the trust fund determined by adding the market value of the trust fund at the end of the sixteen most recent calendar quarters as of December thirty-first of that year and dividing that sum by sixteen, or the market value of the trust fund at the end of that calendar year for the support of education in South Dakota. The transfer shall be made prior to June thirtieth of the subsequent calendar year.

Article XIV

State Institutions

§1. Charitable and penal institutions.

The charitable and penal institutions of the state of South Dakota shall consist of a penitentiary, a hospital for the mentally ill, a school for the developmentally disabled, and a reform school for juveniles.

§2. Government of charitable and penal institutions.

The state institutions provided for in the preceding section shall be governed under such rules and restrictions as the Legislature shall provide.

§3. Governance of state educational institutions.

The state university, the agriculture college, the school of mines and technology, the normal schools, a school for the deaf, a school for the blind, and all other educational institutions that may be sustained either wholly or in part by the state and that offer academic or professional degrees of associate of arts, associate of sciences, baccalaureate or greater, shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide. The Legislature may increase the number of members to nine. Postsecondary technical education institutes that offer career and technical associate of applied science degrees and certificates or their successor equivalents and that are funded wholly or in part by the state shall be separately governed as determined by the Legislature.

§4. [Repealed.]

§5. Mining and metallurgy to be taught.

The Legislature shall provide that the science of mining and metallurgy be taught in at least one institution of learning under the patronage of the state.

Article XV

Militia

§1. Composition of militia.

The militia of the state of South Dakota shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such persons as now are, or hereafter may be, exempted by the laws of the United States or of this state.

§2. Legislative provisions for militia.

The Legislature shall provide by law for the enrollment, uniforming, equipment and discipline of the militia and the establishment of volunteer and such other organizations or both, as may be deemed necessary for the protection of the state, the preservation of order and the efficiency and good of the service.

§3. Conformity to federal regulations.

The Legislature in providing for the organization of the militia shall conform, as nearly as practicable, to the regulations for the government of the armies of the United States.

§4. Commissions of officers of militia.

All militia officers shall be commissioned by the Governor, and may hold their commissions for such period of time as the Legislature may provide, subject to removal by the Governor for cause, to be first ascertained by a court-martial pursuant to law.

§5. Militia privileged from arrest.

The militia shall in cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at muster and elections and in going to and returning from the same.

§6. Safekeeping of military records and relics.

All military records, banners and relics of the state, except when in lawful use, shall be preserved in the office of _the adjutant general as an enduring memorial of the patriotism and valor of South Dakota; and it shall be the duty of the Legislature to provide by law for the safekeeping of the same.

§7. Conscientious objectors.

No person having conscientious scruples against bearing arms shall be compelled to do military duty in time of peace.

Article XVI

Impeachment and Removal from Office

§1. Power of impeachment in house -- Majority required.

The house of representatives shall have the sole power of impeachment.

The concurrence of a majority of all members elected shall be necessary to an impeachment.

§2. Trial of impeachments -- Presiding officer.

All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the members elected. When the Governor or lieutenant governor is on trial the presiding judge of the Supreme Court shall preside.

§3. Officers subject to impeachment -- Grounds -- Removal from office -- Criminal prosecution.

The Governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under the state. The person accused whether convicted or acquitted shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

§4. Removals of officers not subject to impeachment.

All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance or crime or misdemeanor in office, or for drunkenness or gross incompetency, in such manner as may be provided by law.

§5. Suspension of duties between impeachment and acquittal.

No officer shall exercise the duties of his office after he shall have been impeached and before his acquittal.

§6. Lieutenant governor not to try Governor.

On trial of an impeachment against the Governor the lieutenant governor shall not act as a member of the court.

§7. Service of copy of impeachment before trial required.

No person shall be tried on impeachment before he shall have been served with a copy thereof at least twenty days previous to the day set for trial.

§8. Impeachment twice for same offense prohibited.

No person shall be liable to impeachment twice for the same offense.

Article XVII

Corporations

§1. Special corporation laws prohibited -- State- controlled corporations excepted.

No corporation shall be created or have its charter extended, changed or amended by special laws, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state; but the Legislature shall provide, by general laws, for the organization of all corporations hereafter to be created.

§2. Invalidation of charters without bona fide organization and business.

All existing charters, or grants of special or exclusive privileges under which a bona fide organization shall not have taken place and business been commenced in good faith at the time this Constitution takes effect, shall thereafter have no validity.

§3. Laws for benefit of corporation as conditioned on compliance with Constitutional provision.

The Legislature shall not remit the forfeiture of the charter of any corporation now existing nor alter or amend the same nor pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution.

§4. Corporations subject to eminent domain -- Police power.

The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.

§5. Casting of votes for directors or managers.

In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer.

§6. Place of business and authorized agent required of foreign corporation.

No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served.

§7. Business to be expressed in charter -- Real estate restricted.

No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business.

§8. Stocks and bonds -- Indebtedness increase.

No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law.

§9. Legislature's power to alter, revise, or annul corporate charters -- Creation, renewal, or extension.

The Legislature shall have the power to alter, revise or annul any charter of any corporation now existing and revocable at the taking effect of this Constitution, or any that may be created, whenever in their opinion it may be injurious to the citizens of this state, in such a manner, however, that no injustice shall be done to the incorporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.

§10. Local consent required for grant of street railroad right.

No law shall be passed by the Legislature granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.

§11. Construction and maintenance of telegraph lines -- Controlling interest in competing company prohibited.

Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this state and to connect the same with other lines; and the Legislature shall by general law of uniform operation provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire by purchase or otherwise, any other competing line of telegraph.

§12. Railroad corporations.

Every railroad corporation organized or doing business in this state under the laws or authority thereof shall have and maintain a public office or place in this state for the transaction of its business, where transfers of its stock shall be made, and in which shall be kept for public inspection books in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amount owned by them respectively; the amount of

stock paid in, and by whom; the transfers of said stock; the amount of its assets and liabilities; and the names and place of residence of its officers. The directors of every railroad corporation shall annually make a report, under oath, to the auditor of public accounts or some officer or officers to be designated by law, of all their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law, and the Legislature shall pass laws enforcing by suitable penalties the provisions of this section.

§13. Movable property of railroad corporation considered personality -- Execution and sale.

The rolling stock, and all other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the Legislature shall pass no laws exempting such property from execution and sale.

§14. Consolidation of railroad lines -- Forfeiture of charter for evasion of provisions.

No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice given out, at least sixty days to all stockholders, in such manner as may be provided by law. Any attempt to evade the provisions of this section, by any railroad corporation, by lease or otherwise, shall work a forfeiture of its charter.

§15. Railways and rail companies declared public highways and common carriers -- Regulation of rates.

Railways heretofore constructed or that may hereafter be constructed, in this state are hereby declared public highways, and all railroad and transportation companies are declared to be common carriers and subject to legislative control; and the Legislature shall have power to enact laws regulating and controlling the rates of charges for the transportation of passengers and freight as such common carriers from one point to another in this state.

§16. Right to construct and operate railroad -- Passengers, tonnage and cars.

Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination.

§17. Rate discrimination prevention.

The Legislature shall pass laws to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises.

§18. Compensation for private property taken for public use -- Assessment of damages.

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

§19. "Corporations" defined.

The term "corporations," as used in this article, shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships.

§20. Monopolies and trusts prohibited-- Combinations in restraint of trade -- Legislative powers.

Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any co-partnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor.

The Legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises.

§21. Corporate or syndicate farming prohibited -- Definitions -- Restrictions.

No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The

term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate does not include general partnerships, except general partnerships in which nonfamily farm syndicates or nonfamily farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

§ 22. Restrictions -- Application.

The restrictions in § 21 of this Article do not apply to:

(1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate;

(2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

(3) Nonprofit corporations organized under state non-profit corporation law;

(4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased on a contract signed as of the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to

be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential non-farming purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation, but pending the development of the agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non-syndicate or non-corporate farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a non-syndicate or non-corporate farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of sections 21 to 24, inclusive, of this Article;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

§ 23. Loss of qualification -- Requalification or dissolution.

If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to

one another within the fourth degree of kinship or their spouses, and their land holdings are not increased, to either requalify as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

§ 24. Annual report -- Violations -- Action and enforcement.

Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of sections 21 to 24, inclusive, of this Article to the Secretary of State on an annual basis, under rules promulgated by the Secretary pursuant to state law. The Secretary of State shall monitor such reports and notify the Attorney General of any possible violations, and any resident of the state may also notify the Attorney General of any possible violations. If a corporation or syndicate violates any provision of sections 21 to 24, inclusive, of this Article, the Attorney General shall commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land or livestock held in violation of sections 21 to 24, inclusive, of this Article. The court shall order any land held in violation of sections 21 to 24 of this Article to be divested within two years and any livestock to be divested within six months. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the state. If the Attorney General fails to bring an action in circuit court to enforce sections 21 to 24, inclusive, of this Article, any resident of the state has standing in circuit court to sue for enforcement.

Article XVIII

Banking and Currency

§1. General banking law -- Provisions required.

If a general banking law shall be enacted it shall provide for the registry and countersigning by an officer of this state of all bills or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in the approved securities of the state or of the United States, to be rated at ten per centum below their par value, and in case of their depreciation the deficiency shall be made good by depositing additional securities.

§2. Bank to cease operations within twenty years of organization -- Reorganization.

Every bank, banking company or corporation shall be required to cease all banking operations within twenty years from the time of its organization, and promptly thereafter close its business, but shall have corporate capacity to sue or be sued until its business is fully closed, but the Legislature may provide by general law for the reorganization of such banks.

§3. Liability of banking corporation shareholders and stockholders -- Exemption under federal law.

The shareholders or stockholders of any banking corporation shall be held individually responsible and liable for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders. Provided that if the shareholders and stockholders of any national banking corporation shall be exempt from liability by federal law then and in that event the liability upon shareholders and stockholders of state banking corporations herein imposed shall not be operative in the event that such state banking corporation has membership in the federal deposit insurance corporation.

Article XIX

Congressional and Legislative Apportionment

§1. Congressional representatives elected at large.

Until otherwise provided by law, the members of the house of representatives of the United States, apportioned to this state, shall be elected by the state at large.

§2. Senatorial and representative districts -- Apportionment.

Until otherwise provided by law, the senatorial and representative districts shall be formed, and the senators and representatives shall be apportioned as follows:

DISTRICTS

[Omitted -- See Chapter 2-2 for current provisions.]

Article XX

Seat of Government

§1. Temporary seat of government -- Vote.

The question of the location of the temporary seat of government shall be submitted to a vote of the electors of the proposed state of South Dakota in same manner and at the same election at which this Constitution shall be submitted, and the place receiving the highest number of votes shall be the temporary seat of government until a permanent seat of government shall be established as hereinafter provided.

§2. Permanent seat of government -- Vote.

The Legislature at its first session after the admission of this state, shall provide for the submission of the question of a place for a permanent seat of government to the qualified voters of the state at the next general election thereafter, and that place which receives a majority of all the votes cast upon that question shall be the permanent seat of government.

§3. Election between two places with highest votes if majority vote not received.

Should no place voted for at said election have a majority of all votes cast upon this question, the Governor shall issue his proclamation for an election to be held in the same manner at the next general election to choose between the two places having received the highest number of votes cast at the first election on this question. This election shall be conducted in the same manner as the first election for the permanent seat of government, and the place receiving the majority of all votes cast upon this question shall be the permanent seat of government.

Article XXI

Miscellaneous

§1. Seal and coat of arms.

The design of the great seal of South Dakota shall be as follows: A circle within which shall appear in the left foreground a smelting furnace and other features of mining work. In the left background a range of hills. In the right foreground a farmer at his plow. In the right background a herd of cattle and a field of corn. Between the two parts thus described shall appear a river bearing a steamboat. Properly divided between the upper and lower edges of the circle shall appear the legend, "Under God the People Rule" which shall be the motto of the state of South Dakota. Exterior to this circle and within a circumscribed circle shall appear, in the upper part, the words, "State of South Dakota," in the lower part the words, "Great Seal," and the date in Arabic numerals of the year in which the state shall be admitted to the union.

§2. Salary of constitutional officers.

The Legislature by two-thirds vote of each branch thereof at any regular session may fix the salary of any or all constitutional officers including members of the Legislature. In fixing any such salary the Legislature shall determine the effective date thereof and may in its discretion decrease or increase the salary of any officer during his term.

§3. Oath of office.

Every person elected or appointed to any office in this state, except such inferior offices as may be by law exempted, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States and of this state, and faithfully to discharge the duties of his office.

§4. Exemptions.

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws.

§5. Rights of married women.

The real and personal property of any woman in this state, acquired before marriage, and all property to which she may after marriage become in any manner rightfully entitled, shall be her separate property, and shall not be liable for the debts of her husband.

§6. Drainage of agricultural lands.

The drainage of agricultural lands is hereby declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization

of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

§7. Irrigation of agricultural lands.

The irrigation of agricultural lands is hereby declared to be a public purpose and the Legislature may provide for the organization of irrigation districts for the irrigation of land, and may vest the corporate authorities thereof and the corporate authorities of counties, townships and municipalities with the power to construct, operate and maintain irrigation dams, reservoirs, canals, flumes, ditches and laterals, and to keep in repair all irrigation dams, reservoirs, canals, flumes, ditches and laterals heretofore constructed, under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

§8. Hail insurance.

The providing of insurance against loss or damage to crops by hail is hereby declared to be a public purpose, and the Legislature is authorized and empowered to levy an assessment upon agricultural land for such purpose, with such exemptions as may be provided by law. The state may be divided into hail insurance districts and the assessment per acre in the different districts shall be as the Legislature may determine, but such assessment shall be uniform upon all land of the same district that is similarly situated. The assessment hereby authorized may be levied by the Legislature direct, or by the corporate authorities of the districts herein provided for, or by such other agency as may be authorized by general law.

§9. Marriage.

Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.

Article XXII

Compact with the United States

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

Article XXIII

Amendments and Revisions of the Constitution

§1. Amendments.

Amendments to this Constitution may be proposed by initiative or by a majority vote of all members of each house of the Legislature. An amendment proposed by initiative shall require a petition signed by qualified voters equal in number to at least ten percent of the total votes cast for Governor in the last gubernatorial election. The petition containing the text of the proposed amendment and the names and addresses of its sponsors shall be filed at least one year before the next general election at which the proposed amendment is submitted to the voters. A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment.

§2. Revision.

A convention to revise this Constitution may be called by a three-fourths vote of all the members of each house. The calling of a constitutional convention may be initiated and submitted to the voters in the same manner as an amendment. If a majority of the voters voting thereon approve the calling of a convention, the Legislature shall provide for the holding thereof. Members of a convention shall be elected on a nonpolitical ballot in the same districts and in the same number as the House of Representatives. Proposed amendments or revisions approved by a majority of all the members of the convention shall be submitted to the electorate at a special election in a manner to be determined by the convention.

§3. Ratification.

Any constitutional amendment or revision must be submitted to the voters and shall become a part of the Constitution only when approved by a majority of the votes cast thereon. The Legislature may provide for the withdrawal by its sponsors of an initiated amendment at any time prior to its submission to the voters.

Article XXIV
Prohibition (Repealed)

Article XXV
Minority Representation (Rejected)

Article XXVI

Schedule and Ordinance

§1. Continuation of prior writs, actions, claims, and bodies corporate -- Validation of previously issued process.

That no inconvenience may arise from the change of the territorial government to the permanent state government, it is hereby declared that all writs, actions, prosecutions, claims and rights of individuals, and all bodies corporate, shall continue as if no change had taken place in this government; and all process which may be before the organization of the judicial department, under this Constitution, issued under the authority of the territory of Dakota, within the boundary of this state, shall be as valid as if issued in the name of the state of South Dakota.

§2. Fines, forfeitures and escheats of territory to accrue to state.

That all fines, penalties, forfeitures and escheats accruing to the territory of Dakota, within the boundary of the state of South Dakota, shall accrue to the use of said state.

§3. Recognizances, bonds, obligations and undertakings -- Criminal prosecutions and penal actions.

That all recognizances, bonds, obligations or other undertakings, heretofore taken, or which may be taken before the organization of the judicial department under this Constitution, shall remain valid, and shall pass over to, and may be prosecuted in the name of the state of South Dakota; and all bonds, obligations or undertakings, executed to this territory, within the boundaries of the state of South Dakota, or to any officer in his official capacity, shall pass over to the proper state authority, and to their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly.

All criminal prosecutions and penal actions, which have arisen, or which may arise before the organization of the judicial department under this Constitution, and which shall then be pending, may be prosecuted to judgment and executed in the name of the state.

§4. Civil and military officers.

All officers, civil and military, now holding their offices and appointments in this territory under the authority of the United States, or under the authority of the territory of Dakota, shall continue to hold and exercise their respective offices and appointments until superseded under this Constitution: provided, that the provisions of the above sections shall be subject to the provisions of the act of Congress providing for the admission of the state of South Dakota, approved by the president of the United States on February 22, 1889.

§5. Election of Constitution and state officers -- Ballots.

This Constitution shall be submitted for adoption or rejection to a vote of the electors qualified by the laws of this territory to vote at all elections, at the election to be held on Tuesday, October 1, 1889.

At the said election the ballots shall be in the following form:

For the Constitution: Yes. No.

For prohibition: Yes. No.

For minority representation: Yes. No.

As a heading to each of said ballots shall be printed on each ballot the following instructions to voters:

All persons desiring to vote for the Constitution, or for any of the articles submitted to a separate vote, must erase the word "No."

All persons who desire to vote against the Constitution, or against any article submitted separately, must erase the word "Yes."

Any person may have printed or written on his ballot only the words "for the Constitution," or "against the Constitution," and such ballot shall be counted for or against the Constitution accordingly. The same provision shall apply to articles submitted separately.

In addition to the foregoing election for the Constitution and for the articles submitted by this convention for a separate vote thereon, an election shall be held at the same time and places, by the said qualified electors, for the following state officers, to be voted for on the same ballot as above provided for votes on the Constitution and separate articles, to wit:

A Governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, superintendent of public instruction, commissioner of school and public lands, judges of the Supreme, circuit and county Courts, representatives in Congress, state senators, and representatives in the Legislature.

All the elections above provided for shall be held in the same manner and form as provided for the election for the adoption or rejection of the Constitution. And the names of all the officers above specified to be voted for at such election shall be written or printed upon the same ballots as the vote for or against the Constitution.

The judges of election in counting the ballots voted at such election shall count all the affirmative ballots upon the Constitution as votes for the Constitution; and they shall count all the negative ballots voted at said election upon the Constitution as votes against the Constitution; and ballots voted at said election upon which neither of said words "yes" or "no" following the words "for the Constitution" are erased, shall not be counted upon such proposition. And they shall count all affirmative ballots so voted upon the article on prohibition separately submitted, as votes for such article, and they shall count all negative ballots so voted upon such article as votes against such article; and ballots upon which neither the words "yes" or "no" following the words "for prohibition" are erased, shall not be counted upon such proposition; and they

shall count all the affirmative ballots so voted upon the article on minority representation, separately submitted, as votes for such article. And they shall count all negative ballots so voted upon such article as votes against such article; and ballots upon which neither of said words "yes" or "no" following the words "for minority representation" are erased, shall not be counted upon such proposition.

If it shall appear in accordance with the returns hereinafter provided for, that a majority of the votes polled at such election, for and against the Constitution, are for the Constitution, then this Constitution shall be the Constitution of the state of South Dakota. If it shall appear, according to the returns hereinafter provided for, that a majority of all votes cast at said election for and against "prohibition" are for prohibition then said article XIV shall be and form a part of this Constitution, and be in full force and effect as such from date of said election, but if a majority of said votes shall appear, according to said returns to be against prohibition, then article XXIV shall be null and void and shall not be a part of this Constitution. And if it appear, according to the returns hereinafter provided for, that a majority of all votes cast at said election for and against "minority representation" are for minority representation, then article XXV shall be and form a part of said Constitution, and be in full force and effect as such from the date of said election; but if a majority of said votes shall appear, according to said returns, to be against minority representation, then said article XXV shall be null and void and shall not be a part of this Constitution.

At such election the person voted for, for any one of the offices to be filled at such election, who shall receive the highest number of votes cast at said election, shall be declared elected to said office.

§6. Election for temporary seat of government.

At the same time and places of election there shall be held by said qualified electors an election for the place of the temporary seat of government.

On each ballot, and on the same ballot on which are the matters voted for or against, as hereinbefore provided, shall be written or printed the words "for temporary seat of government," (Here insert the name of the city, town or place, to be voted for.)

And upon the canvass and return of the vote, made as hereinafter provided for, the name of the city, town or place which shall have received the largest number of votes for said temporary seat of government, shall be declared by the Governor, chief justice and secretary of the territory of Dakota, or by any two of them, at the same time that they shall canvass the vote for or against the Constitution, together with the whole number of votes cast for each city, town or place, and the officers above named, shall immediately after the result of said election shall have been ascertained, issue a proclamation directing the Legislature elected at said election to assemble at said city, town or place so selected, on the day fixed by this schedule and ordinance.

§7. Conduct of election.

The election provided for herein shall be under the provisions of the Constitution herewith submitted, and shall be conducted in all respects as elections are conducted under the general laws of the territory of Dakota, except as herein provided. No mere technicalities or informalities in the manner or form of election, or neglect of any officer to perform his duty with regard thereto, shall be deemed to vitiate or avoid the same, it being the true intent and object of this ordinance to ascertain and give effect to the true will of the people of the state of South Dakota, as expressed by their votes at the polls.

§8. Election returns.

Immediately after the election herein provided for, the judges of election at each voting place shall make a true and complete count of all the votes duly cast at such election, and shall certify and return the result of the same, with the names of all the candidates and the number of votes cast for each candidate, and the number of votes cast for and against the Constitution, and the number of votes cast for and against prohibition, and the number of votes cast for and against minority representation, and the number of votes cast for each city, town or place for the "temporary seat of government," to the county clerk, or auditor of the respective counties, together with one of the poll lists and election books used in said election.

§9. Canvass of vote -- Filing with county clerks or auditors.

Within five days after said election the several boards of county canvassers provided by law for the canvassing of the results of the election, shall make and certify to the secretary of the territory of Dakota the true and correct return of the total number of votes cast for the Constitution, and against the Constitution, of the number of votes cast for and against "prohibition," and the number of votes cast for and against "minority representation," and the number of votes cast for each city, town or place as the "temporary seat of government," and of the number of votes cast for each person voted for at such election, except county officers and members of the Legislature, and shall transmit the same to the secretary of the territory of Dakota, by mail, and shall file with the county clerk or auditor of each of said counties a duplicate and certified copy of said return.

Said board of county canvassers shall issue certificates of election to the persons who shall have received the highest number of votes cast for the respective offices of judge of the county court, and representatives in the Legislature, and for state senator or senators.

§10. Certification of senator or representative from multi-county district.

When two or more counties are connected in one senatorial or representative district, it shall be the duty of the clerks and auditors of the respective counties to attend at the office of the county clerk of the senior county in the date of organization within twenty days after the date of election, and they

shall compare the votes given in the several counties comprising such senatorial and representative district and such clerks or auditors shall immediately make out a certificate of election to the person having the highest number of votes in such district for state senator or representative or both; which certificate shall be delivered to the person entitled thereto on his application to the clerk of the senior county of such district.

§11. Delivery of returns to proper state officer -- Certification to president -- Proclamation of election result -- Lists of elected officers -- Certificates of election.

The secretary of the territory shall receive all returns of election transmitted to him as above provided, and shall preserve the same, and after they have been canvassed as hereinafter provided, and after the admission of the state of South Dakota into the union, he shall deliver said returns to the proper state officer of said state of South Dakota.

Within fifteen days after said election the secretary of the territory, with the Governor and chief justice thereof, or any two of them, shall canvass such returns and certify the same to the president of the United States, as provided in the Enabling Act.

They shall also ascertain the total number of votes cast at such election for the Constitution and against the Constitution; the total number of votes cast for and against prohibition; and the total number of votes cast for and against minority representation; and the total number of votes cast for each city, town or place as the "temporary seat of government"; and the total number of votes cast for each person voted for, for any office at said election, excepting county judges and members of the Legislature, and shall declare the result of said election in conformity with such vote, and the Governor of the territory shall thereupon issue a proclamation at once thereof.

They shall also make and transmit to the state Legislature, immediately upon its organization, a list of all the state and judicial officers who shall thus be ascertained to be duly elected.

The various county and district canvassing boards shall make and transmit to the secretary of the territory the names of all persons declared by them to be elected members of the senate and house of representatives of the state of South Dakota; he shall make separate lists of the senators and representatives so elected, which list shall constitute the rolls under which the senate and house of representatives shall be organized.

The Governor of the territory shall make and issue certificates of election to the persons who are shown by the canvass to have received the highest number of votes for Governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, superintendent of public instruction, commissioner of school and public lands and judges of the Supreme and circuit Courts. Such certificates to be attested by the secretary of the territory.

§12. Apportionment of state Legislature -- Number of senators and representatives initially elected.

The apportionment made in this Constitution shall govern the elections above provided for members of the state Legislature, until otherwise provided by law.

At the first election held under this ordinance for senators and representatives of the Legislature, there shall be elected forty-five senators and one hundred and twenty-four representatives in the state Legislature respectively.

§13. First assembly of Legislature -- Oaths of office.

The Legislature elected under the provisions of this ordinance and Constitution shall assemble at the temporary seat of government on the third Tuesday in October, in the year A. D. 1889, at 12 o'clock noon, and on the first day of their assemblage the Governor and other state officers shall take the oath of office in the presence of the Legislature. The oath of office shall be administered to the members of the Legislature and to the state officers by the chief justice of the territory, or by any other officer duly authorized by the laws of the territory of Dakota to administer oaths.

§14. Election of two United States senators -- Two representatives.

Immediately after the organization of the Legislature and taking the oath of office by the state officers, the Legislature shall then and there proceed to the election of two senators of the United States for the state of South Dakota, in the mode and manner provided by the laws of Congress for the election of United States senators. And the Governor and the secretary of the state of South Dakota shall certify the election of the said senators and two representatives in Congress, in the manner required by law.

§15. Adjournment after election of senators -- Next meeting.

Immediately after the election of the United States senators as above provided for, said Legislature shall adjourn to meet at the temporary seat of government on the first Tuesday after the first Monday of January, 1890, at 12 o'clock m.; provided, however, that if the state of South Dakota has not been admitted by proclamation or otherwise at said date, then said Legislature shall convene within ten days after the date of the admission of the state into the union.

§16. Legislature and officers to exercise necessary and authorized powers only pending admission of state into union.

Nothing in this Constitution or schedule contained shall be construed to authorize the Legislature to exercise any powers except such as are necessary to its first organization, and to elect United States senators, and to adjourn as above provided. Nor to authorize any officer of the executive, administrative or judiciary departments to exercise any duties of his office until the state of South Dakota shall have been regularly admitted into the union, accepting such as may be authorized by the Congress of the United States.

§17. Validity of ordinances and schedule.

The ordinances and schedule enacted by this convention shall be held to be valid for all the purposes thereof.

§18. Freedom of religion -- Public lands -- Indian lands -- Uniformity of taxation -- Territorial debt -- Public schools -- Federal reservations -- Irrevocability.

That we, the people of the state of South Dakota, do ordain:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state, shall never be taxed at a higher rate than the lands belonging to residents of this state. That no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands _as have been, or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, all such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

Fifth. That jurisdiction is ceded to the United States over the military reservations of Fort Meade, Fort Randall and Fort Sully, heretofore declared by the president of the United States: provided legal process, civil and criminal, of this state shall extend over such reservations, in all cases of which exclusive jurisdiction is not vested in the United States, or of crimes not committed within the limits of such reservations.

These ordinances shall be irrevocable without the consent of the United States, and also the people of the said state of South Dakota, expressed by their legislative assembly.

§19. Tenure of elected officers.

The tenure of all officers, whose election is provided for in this schedule, on the first day of October, A. D. 1889, shall be as follows:

The Governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, superintendent of public instruction, commissioner of school and public lands, judges of county courts, shall hold their respective offices until the first Tuesday, after the first Monday, in January, A. D. 1891, at twelve o'clock m., and until their successors are elected and qualified.

The judges of the Supreme Court and circuit courts shall hold their offices until the first Tuesday, after the first Monday, in January, A. D. 1894, at twelve o'clock m., and until their successors are elected and qualified; subject to the provisions of § 26 of article V of the Constitution.

The terms of office of the members of the Legislature, elected at the first election held under the provisions of this Constitution, shall expire on the first Tuesday, after the first Monday, in January, 1891.

§20. Time of general election.

That the first general election under the provisions of this Constitution shall be held on the first Tuesday after the first Monday in November, 1890, and every two years thereafter.

§21. Form of ballot.

The following form of ballot is adopted:

Constitutional Ticket
INSTRUCTIONS TO VOTERS

All persons desiring to vote for the Constitution, or for any of the articles submitted to a separate vote, may erase the word "No."

All persons who desire to vote against the Constitution, or any articles separately submitted may erase the word "Yes."

For the Constitution: Yes. No.

For Prohibition: Yes. No.

For Minority Representation: Yes. No.

For ____ as the temporary seat of government.

For Governor.

For Lieutenant Governor.

For Secretary of State.

For Auditor.

For Treasurer.

For Attorney General.

For Superintendent of Public Instruction.

For Commissioner of School and Public Lands.

For Judges of the Supreme Court.

First District _____

Second District _____

Third District _____

For Judge of the Circuit Court ____ Circuit.

For Representatives in Congress.

For State Senator.

For Representative in the Legislature.

For County Judge.

§22. Enrollment of Constitution -- Delivery to secretary of state -- Inclusion in state laws -- Copy to president of United States.

This Constitution shall be enrolled and after adoption and signing by the convention shall be delivered to Hon. A. J. Edgerton, the president of the constitutional convention, for safekeeping, and by him to be delivered to the secretary of state as soon as he assumes the duties of his office, and printed copies thereof shall be prefixed to the books containing the laws of the state and all future editions thereof.

The president of this convention shall also supervise the making of the copy that must be sent to the president of the United States; said copy is to be certified by the president and chief clerk of this convention.

§23. Agreement by joint commission concerning territorial records, books, and archives.

The agreement made by the joint commission of the constitutional conventions of North and South Dakota concerning the records, books, and archives of the territory of Dakota is hereby ratified and confirmed, which agreement is in the words following: That is to say:

The following books, records and archives of the territory of Dakota shall be the property of North Dakota, to wit:

All records, books and archives in the offices of the Governor and secretary of the territory (except records of articles of incorporation of domestic corporations, returns of election of delegates to the constitutional convention of 1889, for South Dakota, returns of elections held under the so-called local option law in counties within the limits of South Dakota, bonds of notaries public appointed for counties within the limits of South Dakota, papers relating to the organization of counties situate within the limits of South Dakota, all of which records and archives are a part of the records and archives of said secretary's office; excepting also census returns from counties situate within the limits of South Dakota and papers relating to requisitions issued upon the application of officers of counties situate within the limits of South Dakota, all which are part of the records and archives of said Governor's office.)

And the following records, books and archives shall also be the property of the state of North Dakota, to wit:

Vouchers in the office or in the custody of the auditor of this territory relating to expenditures on account of public institutions, grounds or buildings situate within the limits of North Dakota; one warrant register in the office of the treasurer of this territory, being a record of warrants issued under and by virtue of chapter twenty-four of the laws enacted by the eighteenth legislative assembly of Dakota territory; all letters, receipts and vouchers in the same office now filed by counties and pertaining to counties within the limits of North Dakota; paid and canceled coupons in the same office representing interest on bonds which said state of North Dakota is to assume and pay; reports of gross earnings of the year 1888 in the same office, made by corporations operating

lines of railroad situated wholly or mainly within the limits of North Dakota; records and papers of the office of the public examiner of the second district of the territory; records and papers of the office of the second district board of agriculture; records and papers in the office of the board of pharmacy of the district of North Dakota.

All records, books and archives of the territory of Dakota which it is not herein agreed shall be the property of North Dakota, shall be the property of South Dakota.

The following books shall be copied and the copies shall be the property of North Dakota, and the cost of such copies shall be borne equally by the said states of North Dakota and South Dakota. That is to say:

Appropriation ledger for the years ending November, 1889 and 1890 -- one volume.

The current warrant auditor's register -- one volume.

Insurance record for 1889 -- one volume.

Treasurer's cash book "D."

Assessment ledger "B."

Dakota territory bond register -- one volume.

Treasurer's current ledger -- one volume.

The originals of the foregoing volumes which are to be copied, shall at any time after such copying shall have been completed, be delivered on demand to the proper authorities of the state of South Dakota.

All other records, books and archives which it is hereby agreed shall be the property of South Dakota shall remain at the capital of North Dakota until demanded by the Legislature of the state of South Dakota, and until the state of North Dakota shall have had a reasonable time after such demand is made to provide copies or abstracts or such portions thereof as the said state of North Dakota may desire to have copies or abstracts of.

The state of South Dakota may also provide copies or abstracts of such records, books and archives which is agreed shall be the property of North Dakota as said state of South Dakota shall desire to have copies or abstracts of.

The expense of all copies or abstracts of records, books and archives which it is herein agreed may be made, shall be borne equally by said two states.

Article XXVII
State Control of Manufacture
And Sale of Liquor (Repealed)

Article XXVIII
County Investment of
Permanent School and Investment Funds

§1. School and governmental bonds -- Farm loans.

The several counties of the state shall invest the moneys of the permanent school and endowment funds in bonds of school corporations, state, county and municipal bonds or in first mortgages upon good improved farm lands within their limits respectively, under such regulations as the Legislature may provide, but no farm loan shall exceed one thousand dollars to any one person, firm or corporation.

Article XXIX
State Elevators, Warehouses,
Flouring Mills and Packing Houses

§1. Provision for elevators and warehouses -- Marketing of agricultural products -- Flouring mills and packing houses.

The Legislature may provide by law and appropriate money for the purchase or construction and operation of elevators and warehouses, within or without the state, for the marketing of agricultural products; and provided, further, that the Legislature may provide by law and appropriate money to buy or construct and operate flouring mills and packing houses within the state, if, in the future, and in the judgment of the Legislature, the public necessities may so require.

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CALIFORNIA COASTAL COMMISSION ET AL. *v.*
GRANITE ROCK CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 85-1200. Argued December 2, 1986—Decided March 24, 1987

The Mining Act of 1872 authorizes a private citizen to enter federal lands to explore for mineral deposits, to perfect a mining claim, and to secure a patent to the land by complying with the requirements of the Act and regulations promulgated thereunder. Appellee Granite Rock Co. holds unpatented mining claims on federally owned lands in a national forest located in California. In accordance with federal regulations, Granite Rock obtained approval from the Forest Service in 1981 of its 5-year plan for mining limestone on the lands, and began to mine shortly thereafter. In 1983, the California Coastal Commission (Commission), acting pursuant to the California Coastal Act (CCA), instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter. Under the CCA, the Commission is the State's coastal zone management program for purposes of the federal Coastal Zone Management Act of 1972 (CZMA), which provides for financial assistance to States for the development of coastal zone management programs and which defines a State's coastal zone so as to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." Granite Rock filed suit in Federal District Court for declaratory and injunctive relief on the ground that the Commission's permit requirement was pre-empted by Forest Service Regulations, by the Mining Act of 1872, and by the CZMA. The court denied Granite Rock's motion for summary judgment and dismissed the action. The Court of Appeals reversed, holding that the Commission's permit requirement, which enforced state environmental standards, was pre-empted by the Mining Act of 1872 and Forest Service regulations.

Held:

1. The case is not moot even though Granite Rock's 5-year plan of operations expired during the course of the litigation. Because the Commission asserts that Granite Rock needed a Commission permit for work undertaken after the date of the Commission's letter, the Commission may require reclamation efforts to prevent river pollution resulting from the mining that has already occurred. Granite Rock disputes the Commission's authority to require such reclamation. Also, it is likely that

Granite Rock will submit new plans of operation in the future, and dispute would continue as to enforcement of the conditions of a Commission permit. This Court does not have appellate jurisdiction under 28 U. S. C. § 1254(2) because the Court of Appeals invalidated only the Commission's exercise of authority under the CCA, not any portion of the state statute itself as is required under § 1254(2). However, treating the jurisdictional statement as a petition for certiorari, the petition is granted. Pp. 577-579.

2. Neither Forest Service regulations, nor federal land use statutes, nor the CZMA pre-empts the Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest. Pp. 579-594.

(a) The Property Clause of the Constitution—which gives Congress plenary power to legislate the use of federal lands—does not itself automatically conflict with all state regulation of federal lands. The question in this case is governed by the usual pre-emption analysis whereby state law is pre-empted if Congress has evidenced an intent to occupy entirely a given field or, where Congress has not entirely displaced state regulation, if state law actually conflicts with federal law. Pp. 579-581.

(b) The Forest Service regulations, governing the use of unpatented mining claims on federal forest lands authorized by the Mining Act of 1872 (which expressed no legislative intent on the then rarely contemplated subject of environmental regulation), do not justify a facial challenge to all conditions that might be imposed by the Commission's permit requirement. It is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity. The Forest Service regulations here not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operation will comply with state environmental protection laws. Pp. 581-584.

(c) There is no merit to the contention that federal land management statutes—the Federal Land Policy and Management Act and the National Forest Management Act—demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Commission permit requirement is therefore pre-empted as an impermissible state land use regulation. Even if it is assumed (without deciding the issue) that the combination of those federal Acts pre-empts the extension of state land use plans to unpatented mining claims in national forest lands, the Commission asserts that it will use permit conditions to impose environmental regulation, not land use planning. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities, and thus it is anomalous to maintain that Congress intended any state environmental regulation

of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning. In the present posture of this litigation, the Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement. Pp. 584-589.

(d) The CZMA, by excluding federal lands from its definition of the coastal zone, does not demonstrate a congressional intent to pre-empt any possible Commission permit requirement as applied to the mining of Granite Rock's unpatented claim. The CZMA's language and legislative history expressly disclaim an intent to automatically pre-empt all state regulation of activities on federal lands. Congress' statements indicate that it intended the CZMA *not* to be an independent cause of pre-emption except in cases of actual conflict between state and federal law. Pp. 589-593.

768 F. 2d 1077, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, and in Parts I and II of which POWELL and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 594. SCALIA, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 607.

Linus Masouredis, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Joseph Barbieri*, Deputy Attorney General.

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Harold M. Brown*, Attorney General of Alaska, *Jim Smith*, Attorney General of Florida, *Robert K. Corbin*, Attorney General of Arizona, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *James*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether Forest Service regulations, federal land use statutes and regulations, or the Coastal Zone Management Act of 1972 (CZMA), 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), pre-empt the California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest.

I

Granite Rock Company is a privately owned firm that mines chemical and pharmaceutical grade white limestone. Under the Mining Act of 1872, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.*, a private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," 30 U. S. C. § 26, although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by com-

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Briefs of *amici curiae* urging affirmance were filed for the Alaska Miners Association et al. by *Ronald A. Zumbrun* and *Robin L. Rivett*; and for the American Mining Congress by *Mary Jane C. Due*.

plying with the requirements of the Mining Act and regulations promulgated thereunder, see 43 CFR §3861.1 *et seq.* (1986), and, upon issuance of the patent, legal title to the land passes to the patent holder. Granite Rock holds unpatented mining claims on federally owned lands on and around Mount Pico Blanco in the Big Sur region of Los Padres National Forest.

From 1959 to 1980, Granite Rock removed small samples of limestone from this area for mineral analysis. In 1980, in accordance with federal regulations, see 36 CFR §228.1 *et seq.* (1986), Granite Rock submitted to the Forest Service a 5-year plan of operations for the removal of substantial amounts of limestone. The plan discussed the location and appearance of the mining operation, including the size and shape of excavations, the location of all access roads, and the storage of any overburden. App. 27–34. The Forest Service prepared an Environmental Assessment of the plan. *Id.*, at 38–53. The Assessment recommended modifications of the plan, and the responsible Forest Service Acting District Ranger approved the plan with the recommended modifications in 1981. *Id.*, at 54. Shortly after Forest Service approval of the modified plan of operations, Granite Rock began to mine.

Under the California Coastal Act (CCA), Cal. Pub. Res. Code Ann. §30000 *et seq.* (West 1986), any person undertaking any development, including mining, in the State's coastal zone must secure a permit from the California Coastal Commission. §§30106, 30600. According to the CCA, the Coastal Commission exercises the State's police power and constitutes the State's coastal zone management program for purposes of the federal CZMA, described *infra*, at 589–590. In 1983 the Coastal Commission instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter.¹

¹ The Coastal Commission also instructed Granite Rock to submit a certification of consistency pursuant to the consistency review process of the CZMA, 16 U. S. C. §1456(c)(3)(A), described *infra*, at 590–591. The

Granite Rock immediately filed an action in the United States District Court for the Northern District of California seeking to enjoin officials of the Coastal Commission from compelling Granite Rock to comply with the Coastal Commission permit requirement and for declaratory relief under 28 U. S. C. § 2201 (1982 ed., Supp. III). Granite Rock alleged that the Coastal Commission permit requirement was pre-empted by Forest Service regulations, by the Mining Act of 1872, and by the CZMA. Both sides agreed that there were no material facts in dispute. The District Court denied Granite Rock's motion for summary judgment and dismissed the action. 590 F. Supp. 1361 (1984). The Court of Appeals for the Ninth Circuit reversed. 768 F. 2d 1077 (1985). The Court of Appeals held that the Coastal Commission permit requirement was pre-empted by the Mining Act of 1872 and Forest Service regulations. The Court of Appeals acknowledged that the statute and regulations do not "go so far as to occupy the field of establishing environmental standards," specifically noting that Forest Service regulations "recognize that a state may enact environmental regulations in addition to those established by federal agencies," and that the Forest Service "will apply [the state standards] in exercising its permit authority." 768 F. 2d, at 1083. However, the Court of Appeals held that "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is pre-empted." *Ibid.*

The Coastal Commission appealed to this Court under 28 U. S. C. § 1254(2). We postponed consideration of the question of jurisdiction to the hearing of the case on the merits, 475 U. S. 1094 (1986).

II

First we address two jurisdictional issues. In the course of this litigation, Granite Rock's 5-year plan of operations

Commission subsequently admitted that it had waived its right to review the 1981-1986 plan of operation under the CZMA consistency provision by failing to raise its right to review in a timely manner. App. 17.

expired. The controversy between Granite Rock and the Coastal Commission remains a live one, however, for two reasons. First, the Coastal Commission's 1983 letter instructed Granite Rock that a Coastal Commission permit was required for work undertaken after the date of the letter. App. 22–24. Granite Rock admitted that it has done work after that date. *Id.*, at 83. Because the Coastal Commission asserts that Granite Rock needed a Coastal Commission permit for the work undertaken after the date of the Commission's letter, the Commission may require "reclamation for the mining that [has] occurred, measures to prevent pollution into the Little Sur River." Tr. of Oral Arg. 8. Granite Rock disputes the Coastal Commission's authority to require reclamation efforts. Second, Granite Rock stated in answer to interrogatories that its "investments and activities regarding its valid and unpatented mining claims require continuing operation beyond the present Plan of Operations," and that it intended to conduct mining operations on the claim at issue "as long as [Granite Rock] can mine an economically viable and valuable mining deposit under applicable federal laws." App. 83–84. Therefore it is likely that Granite Rock will submit new plans of operations in the future. Even if future participation by California in the CZMA consistency review process, see *infra*, at 590–591, or requirements placed on Granite Rock by the Forest Service called for compliance with the conditions of the Coastal Commission's permit, dispute would continue over whether the Coastal Commission itself, rather than the Federal Government, could *enforce* the conditions placed on the permit. This controversy is one capable of repetition yet evading review. See *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U. S. 282, 285, n. 3 (1986); *Dunn v. Blumstein*, 405 U. S. 330, 333, n. 2 (1972). Accordingly, this case is not moot.

The second jurisdictional issue we must consider is whether this case is properly within our authority, under 28 U. S. C. § 1254(2), to review the decision of a federal court

of appeals by appeal if a state statute is "held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States" Statutes authorizing appeals are to be strictly construed. *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 247 (1984); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 43 (1983). As noted in *Silkwood*, *supra*, at 247, "we have consistently distinguished between those cases in which a state statute is expressly struck down" as repugnant to the Constitution, treaties, or laws of the United States, and those cases in which "an exercise of authority under state law is invalidated without reference to the state statute." This latter group of cases do not fall within this Court's appellate jurisdiction.

In the present case, the Court of Appeals held that the particular exercise of the Coastal Commission permit requirement over Granite Rock's operation in a national forest was pre-empted by federal law. The Court of Appeals did not invalidate any portion of the CCA. In fact, it did not discuss whether the CCA itself actually authorized the imposition of a permit requirement over Granite Rock. See Cal. Pub. Res. Code Ann. § 30008 (West 1986) (limiting jurisdiction over federal lands to that which is "consistent with applicable federal . . . laws"). Accordingly this case is one in which "an exercise of authority under state law is invalidated without reference to the state statute," *Silkwood*, *supra*, at 247, and not within our § 1254(2) appellate jurisdiction. We therefore treat the jurisdictional statement as a petition for certiorari, 28 U. S. C. § 2103, and having done so, grant the petition and reverse the judgment of the Court of Appeals.

III

Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations. Indeed, the record does not disclose what conditions the

Coastal Commission will place on the issuance of a permit. Rather, Granite Rock argues, as it must given the posture of the case, that there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law—that any state permit requirement is *per se* pre-empted. The only issue in this case is this purely facial challenge to the Coastal Commission permit requirement.

The Property Clause provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U. S. Const., Art. IV, § 3, cl. 2. This Court has “repeatedly observed” that “[t]he power over the public land thus entrusted to Congress is without limitations.” *Kleppe v. New Mexico*, 426 U. S. 529, 539 (1976), quoting *United States v. San Francisco*, 310 U. S. 16, 29 (1940). Granite Rock suggests that the Property Clause not only invests unlimited power in Congress over the use of federally owned lands, but also exempts federal lands from state regulation whether or not those regulations conflict with federal law. In *Kleppe*, 426 U. S., at 543, we considered “totally unfounded” the assertion that the Secretary of the Interior had even proposed such an interpretation of the Property Clause. We made clear that “the State is free to enforce its criminal and civil laws” on federal land so long as those laws do not conflict with federal law. *Ibid.* The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, as we explained in *Kleppe*:

“Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under

the Supremacy Clause." *Ibid.* (citations omitted) (emphasis supplied).

We agree with Granite Rock that the Property Clause gives Congress plenary power to legislate the use of the federal land on which Granite Rock holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would pre-empt any requirement that Granite Rock obtain a California Coastal Commission permit. To answer this question we follow the pre-emption analysis by which the Court has been guided on numerous occasions:

"[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190,] 203-204 [(1983)]; *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)." *Silkwood v. Kerr-McGee Corp.*, *supra*, at 248.

A

Granite Rock and the United States as *amicus* have made basically three arguments in support of a finding that any possible state permit requirement would be pre-empted. First, Granite Rock alleges that the Federal Government's environmental regulation of unpatented mining claims in na-

tional forests demonstrates an intent to pre-empt any state regulation. Second, Granite Rock and the United States assert that indications that state land use planning over unpatented mining claims in national forests is pre-empted should lead to the conclusion that the Coastal Commission permit requirement is pre-empted. Finally, Granite Rock and the United States assert that the CZMA, by excluding federal lands from its definition of the coastal zone, declared a legislative intent that federal lands be excluded from all state coastal zone regulation. We conclude that these federal statutes and regulations do not, either independently or in combination, justify a facial challenge to the Coastal Commission permit requirement.

Granite Rock concedes that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation. Brief for Appellee 31-32. In 1955, however, Congress passed the Multiple Use Mining Act, 69 Stat. 367, 30 U. S. C. § 601 *et seq.*, which provided that the Federal Government would retain and manage the surface resources of subsequently located unpatented mining claims. 30 U. S. C. § 612(b). Congress has delegated to the Secretary of Agriculture the authority to make "rules and regulations" to "regulate [the] occupancy and use" of national forests. 16 U. S. C. § 551. Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that "use of the surface of National Forest System lands" by those such as Granite Rock, who have unpatented mining claims authorized by the Mining Act of 1872, "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 CFR §§ 228.1, 228.3(d) (1986). It was pursuant to these regulations that the Forest Service approved the Plan of Operations submitted by Granite Rock. If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by any state environmental regulation,

one would expect to find the expression of this intent in these Forest Service regulations. As we explained in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 718 (1985), it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity:

“[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.”

Upon examination, however, the Forest Service regulations that Granite Rock alleges pre-empt any state permit requirement not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws. The regulations explicitly require all operators within the national forests to comply with state air quality standards, 36 CFR § 228.8(a) (1986), state water quality standards, § 228.8(b), and state standards for the disposal and treatment of solid wastes, § 228.8(c). The regulations also provide that, pending final approval of the plan of operations, the Forest Service officer with authority to approve plans of operation “will approve such operations as may be necessary for timely compliance with the requirements of Federal and *State laws . . .*” § 228.5(b) (emphasis added). Finally, the final subsection of § 228.8, “[r]equirements for environmental protection,” provides:

“(h) Certification or other approval issued by *State agencies* or other Federal agencies of compliance with laws and regulations relating to mining operations will

be accepted as compliance with similar or parallel requirements of these regulations.” (Emphasis supplied.)

It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all state regulation of unpatented mining claims in national forests. Neither Granite Rock nor the United States contends that these Forest Service regulations are inconsistent with their authorizing statutes.

Given these Forest Service regulations, it is unsurprising that the Forest Service team that prepared the Environmental Assessment of Granite Rock’s plan of operation, as well as the Forest Service officer that approved the plan of operation, expected compliance with state as well as federal law. The Los Padres National Forest Environmental Assessment of the Granite Rock plan stated that “Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission.” App. 46. The Decision Notice and Finding of No Significant Impact issued by the Acting District Ranger accepted Granite Rock’s plan of operation with modifications, stating:

“The claimant, in exercising his rights granted by the Mining Law of 1872, shall comply with the regulations of the Departments of Agriculture and Interior. The claimant is further responsible for obtaining any necessary permits required by State and/or county laws, regulations and/or ordinance.” *Id.*, at 54.

B

The second argument proposed by Granite Rock is that federal land management statutes demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Coastal Commission permit requirement is therefore pre-empted as an impermissible state land use regulation.

In 1976 two pieces of legislation were passed that called for the development of federal land use management plans affecting unpatented mining claims in national forests. Under the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III), the Department of the Interior's Bureau of Land Management is responsible for managing the mineral resources on federal forest lands; under the National Forest Management Act (NFMA), 90 Stat. 2949, 16 U. S. C. §§ 1600-1614 (1982 ed. and Supp. III), the Forest Service under the Secretary of Agriculture is responsible for the management of the surface impacts of mining on federal forest lands. Granite Rock, as well as the Solicitor General, point to aspects of these statutes indicating a legislative intent to limit States to an advisory role in federal land management decisions. For example, the NFMA directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies," 16 U. S. C. § 1604(a). The FLPMA directs that land use plans developed by the Secretary of the Interior "shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law," and calls for the Secretary, "to the extent he finds practical," to keep apprised of state land use plans, and to "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans." 43 U. S. C. § 1712(c)(9).

For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands. The Coastal Commission² asserts that it will use permit con-

² Although the California Coastal Act requires local governments to adopt Local Coastal Programs, which include a land use plan and zoning

ditions to impose environmental regulation. See Cal. Pub. Res. Code Ann. § 30233 (West 1986) (quality of coastal waters); § 30253(2) (erosion); § 30253(3) (air pollution); § 30240(b) (impact on environmentally sensitive habitat areas).

While the CCA gives land use as well as environmental regulatory authority to the Coastal Commission, the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit. The CCA declares that the Coastal Commission will “provide maximum state involvement in federal activities allowable under federal law or regulations” Cal. Pub. Res. Code Ann. § 30004 (West 1986). Since the state statute does not detail exactly what state standards will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission to limit the regulations it will impose in those circumstances. In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F. 2d, at 1080 (“The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether . . .*”) (emphasis supplied); 590 F. Supp., at 1373 (“The [Coastal Commission] seeks not to prohibit or ‘veto,’ but to regulate [Granite Rock’s] mining activity in accordance with the detailed requirements of the CCA. . . . There is no reason to find that the [Coastal Commission] will apply the CCA’s regulations so as to deprive [Granite Rock] of its rights under the Mining Act”); Defendants’ Memorandum of Points

ordinance, see Cal. Pub. Res. Code Ann. §§ 30500, 30512, 30513 (West 1986), no Local Coastal Program permit requirement is involved in this case. The permit at issue in this litigation is issued by the Coastal Commission directly. §§ 30600(a), (c); Tr. of Oral Arg. 52 (“We’re dealing with the second type of permitting, which is by the Coastal Commission itself, not a local government. . . . [T]he Coastal Commission issues permits based upon compliance with the environmental criteria in the Coastal Act itself”).

and Authorities in Opposition to Plaintiff's Motion for Summary Judgment in No. C-83-5137 (ND Cal.), pp. 41-42. ("Despite Granite Rock's characterization of Coastal Act regulation as a 'veto' or ban of mining, Granite Rock has not applied for any coastal permit, and the State . . . has not indicated that it would in fact ban such activity. . . . [T]he question presented is merely whether the state can *regulate* uses rather than *prohibit* them. Put another way, the state is not seeking to *determine* basic uses of federal land: rather it is seeking to *regulate* a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion").

The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. As noted above, 43 U. S. C. § 1712(c)(9) requires that the Secretary of the Interior's land use plans be consistent with state plans only "to the extent he finds practical." The immediately preceding subsection, however, requires that the Secretary's land use plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." § 1712(c)(8). Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies. The stated purpose of part 228, subpart A of the Forest Service regulations, 36 CFR § 228.1

(1986), is to “set forth rules and procedures” through which mining on unpatented claims in national forests “shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources.” The next sentence of the subsection, however, declares that “[i]t is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.” Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation. Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning. Congress’ treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.

Granite Rock suggests that the Coastal Commission’s true purpose in enforcing a permit requirement is to prohibit Granite Rock’s mining entirely. By choosing to seek injunctive and declaratory relief against the permit requirement before discovering what conditions the Coastal Commission would have placed on the permit, Granite Rock has lost the possibility of making this argument in this litigation. Granite Rock’s case must stand or fall on the question whether *any possible* set of conditions attached to the Coastal Commission’s permit requirement would be pre-empted. As noted in the previous section, the Forest Service regulations do not indicate a federal intent to pre-empt all state environmental regulation of unpatented mining claims in national forests. Whether or not state land use planning over unpatented mining claims in national forests is pre-empted, the Coastal Com-

mission insists that its permit requirement is an exercise of environmental regulation rather than land use planning. In the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement. This analysis is not altered by the fact that the Coastal Commission chooses to impose its environmental regulation by means of a permit requirement. If the Federal Government occupied the field of environmental regulation of unpatented mining claims in national forests—concededly not the case—then state environmental regulation of Granite Rock's mining activity would be pre-empted, whether or not the regulation was implemented through a permit requirement. Conversely, if reasonable state environmental regulation is not pre-empted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed. The permit requirement itself is not talismanic.

C

Granite Rock's final argument involves the CZMA, 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), through which financial assistance is provided to States for the development of coastal zone management programs. Section 304(a) of the CZMA, 16 U. S. C. § 1453(1), defines the coastal zone of a State, and specifically excludes from the coastal zone "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." The Department of Commerce, which administers the CZMA, has interpreted § 1453(1) to exclude all federally owned land from the CZMA definition of a State's coastal zone. 15 CFR § 923.33(a) (1986).

Granite Rock argues that the exclusion of "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or

agents" excludes all federally owned land from the CZMA definition of a State's coastal zone, and demonstrates a congressional intent to pre-empt any possible Coastal Commission permit requirement as applied to the mining of Granite Rock's unpatented claim in the national forest land.

According to Granite Rock, because Granite Rock mines land owned by the Federal Government, the Coastal Commission's regulation of Granite Rock's mining operation must be limited to participation in a consistency review process detailed in the CZMA. Under the CZMA, once a state coastal zone management program has been approved by the Secretary of Commerce for federal administrative grants, "any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application . . . a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the [state] program." 16 U. S. C. § 1456(c)(3)(A). At the same time, the applicant must provide the State a copy of the certification. The State, after public notice and appropriate hearings, is to notify the federal agency concerned that the State concurs or objects to the certification. If the State fails to notify the federal agency within six months of receiving notification, it is presumed that the State concurs. If the State neither concurs nor is presumed to concur, the federal agency must reject the application, unless the Secretary of Commerce finds that the application is consistent with the objectives of the CZMA or is "otherwise necessary in the interest of national security." *Ibid.*

In order for an activity to be subject to CZMA consistency review, the activity must be on a list that the State provides federal agencies, which describes the type of federal permit and license applications the State wishes to review. 15 CFR § 930.53 (1986). If the activity is unlisted, the State must within 30 days of receiving notice of the federal permit appli-

cation inform the federal agency and federal permit applicant that the proposed activity requires CZMA consistency review. § 930.54. If the State does not provide timely notification, it waives the right to review the unlisted activity. In the present case, it appears that Granite Rock's proposed mining operations were not listed pursuant to § 930.53, and that the Coastal Commission did not timely notify the Forest Service or Granite Rock that Granite Rock's plan of operations required consistency review. App. 17. Therefore, the Coastal Commission waived its right to consistency review of the 1981-1986 plan of operations.

Absent any other expression of congressional intent regarding the pre-emptive effect of the CZMA, we would be required to decide, first, whether unpatented mining claims in national forests were meant to be excluded from the § 1453(1) definition of a State's coastal zone, and, second, whether this exclusion from the coastal zone definition was intended to pre-empt state regulations that were not pre-empted by any other federal statutes or regulations. Congress has provided several clear statements of its intent regarding the pre-emptive effect of the CZMA; those statements, which indicate that Congress clearly intended the CZMA *not* to be an independent cause of pre-emption except in cases of actual conflict, end our inquiry.

Title 16 U. S. C. § 1456(e)(1) provides:

"Nothing in this chapter shall be construed —

"(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects. . . ."

The Senate Report describes the above section as “a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by the Act,” or “to change interstate agreements.” S. Rep. No. 92-753, p. 20 (1972). The Conference Report stated, “[t]he Conferees also adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields, including submerged lands.” H. R. Conf. Rep. No. 92-1544, p. 14 (1972). While the land at issue here does not appear to fall under the categories listed in 16 U. S. C. § 1456(e)(1), the section and its legislative history demonstrate Congress’ refusal to use the CZMA to alter the balance between state and federal jurisdiction.

The clearest statement of congressional intent as to the pre-emptive effect of the CZMA appears in the “Purpose” section of the Senate Report, quoted in full:

“[The CZMA] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. The bill authorizes Federal grants-in-aid to coastal states to develop coastal zone management programs. Additionally, it authorizes grants to help coastal states implement these management programs once approved, and States would be aided in the acquisition and operation of estuarine sanctuaries. Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. *There is no attempt to diminish state authority through federal preemption.* The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.” S. Rep. No. 92-753, *supra*, at 1 (emphasis supplied).

Because Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA, we conclude that even if all federal lands are excluded from the CZMA definition of "coastal zone," the CZMA does not automatically pre-empt all state regulation of activities on federal lands.

IV

Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow. Granite Rock argued that any state permit requirement, whatever its conditions, was *per se* pre-empted by federal law. To defeat Granite Rock's facial challenge, the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law. The Coastal Commission alleges that it will use its permit requirement to impose reasonable environmental regulation. Rather than evidencing an intent to pre-empt such state regulation, the Forest Service regulations appear to assume compliance with state laws. Federal land use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning. Finally, the language and legislative history of the CZMA expressly disclaim an intent to pre-empt state regulation.

Following an examination of the "almost impenetrable maze of arguably relevant legislation," *post*, at 606, JUSTICE POWELL concludes that "[i]n view of the Property Clause . . . , as well as common sense, federal authority must control" *Ibid*. As noted above, the Property Clause gives Congress plenary power over the federal land at issue; however, even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress "evidences an intent to occupy a given field," *Silkwood v. Kerr-McGee Corp.*, 464 U. S., at 248. The suggestion that traditional pre-emption analysis is inapt in this context can be

justified, if at all, only by the assertion that the state regulation in this case would be "duplicative." The description of the regulation as duplicative, of course, is based on JUSTICE POWELL's conclusions that land use regulation and environmental regulation are indistinguishable, *post*, at 600-601, and that any state permit requirement, by virtue of being a permit requirement rather than some other form of regulation, would duplicate federal permit requirements, *post*, at 604-605. Because we disagree with these assertions, see *supra*, at 587-588, 589, we apply the traditional pre-emption analysis which requires an actual conflict between state and federal law, or a congressional expression of intent to pre-empt, before we will conclude that state regulation is pre-empted.

Contrary to the assertion of JUSTICE POWELL that the Court today gives States power to impose regulations that "conflict with the views of the Forest Service," *post*, at 606, we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Because I agree that this case is properly before us, I join Parts I and II of the Court's opinion. In Part III, the Court considers the Forest Service's approval of Granite Rock's plan to operate its mine in a national forest. Because I cannot agree with the Court's conclusion that Congress intended to allow California to require a state permit, I dissent from Part III.

I

A

To understand Part III of the Court's opinion, one must have some knowledge of two groups of statutes and regulations. The first group of provisions regulates mining. As the Court explains, the basic source of federal mining law is the Mining Act of 1872, ch. 152, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.* In general, that law opens the public lands to exploration. If one discovers valuable mineral deposits, the statute grants him the right to extract and sell the minerals without paying a royalty to the United States, as well as the right—subject to certain statutory requirements—to obtain fee title to the land. See Mining Act § 1, 30 U. S. C. § 22; *United States v. Locke*, 471 U. S. 84, 86 (1985). As the demand for minerals has increased during the past century, Congress has emphasized that an “economically sound and stable domestic mining . . . industr[y]” is important to the economy, and to our Nation's security. See Mining and Minerals Policy Act of 1970, § 2, 30 U. S. C. § 21a.¹

B

The second area of federal law important to this case concerns the management of federal lands. In response to the increasing commercial importance of federal lands, as well as the awareness of the environmental values of these lands,

¹ See also National Materials and Minerals Policy, Research and Development Act of 1980, § 2(a)(1), 30 U. S. C. § 1601(a)(1) (congressional finding that the availability of minerals “is essential for national security, economic well-being, and industrial production”); § 2(a)(3), 30 U. S. C. § 1601(a)(3) (congressional finding that the extraction of minerals is “closely linked with national concerns for energy and the environment”); § 3, 30 U. S. C. § 1602 (“[I]t is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs”).

Congress passed the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III). That statute promotes the effective development of federal lands in two ways pertinent to this case. First, it directs the Secretary of the Interior to inventory the resources located on federal lands and to develop comprehensive plans for future development. §§ 1701(a)(2), 1711, 1712. Second, it ensures that the States' interests in these resources will not be ignored:

“[T]he Secretary shall . . . coordinate [his plans] with the land use planning and management programs of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary . . . shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.” § 1712(c)(9).

Significantly, the FLPMA only requires the Secretary to listen to the States, not obey them. As the Conference Report explained: “[T]he ultimate decision as to determining the extent of feasible consistency between [the Secretary’s] plans and [state or local] plans rests with the Secretary of the Interior.” H. R. Conf. Rep. No. 94-1724, p. 58 (1976).

The surface management provisions of the FLPMA do not apply to national forest lands. 43 CFR § 3809.0-5(c) (1986). Congress first provided for management of these lands in the Organic Administration Act of 1897. The current version of that statute delegates to the Secretary of Agriculture the authority to “regulate [the] occupancy and use” of national forests. 16 U. S. C. § 551. The Forest Service, as the Secretary’s delegate, has promulgated regulations to control the “use” of national forests. 36 CFR § 228.1 *et seq.* (1986). Persons wishing to mine in the national forests submit plans of operation detailing their anticipated activities. If the For-

est Service determines that the plans comply with the regulations, it approves them and authorizes the mining operation. The Court, by focusing on the Forest Service's concern for preservation of the national forests, characterizes these regulations as "environmental" regulations, in its view something entirely different from "land use" regulations. *Ante*, at 587-589.

In fact, the regulation of land use is more complicated than the Court suggests. First, as is true with respect to the Secretary of the Interior, the Secretary of Agriculture has been directed to develop comprehensive plans for the use of resources located in national forests. See Forest and Rangeland Renewable Resources Planning Act of 1974 (Forest Planning Act) §3(a), as amended, 16 U. S. C. §1601. The Forest Planning Act initially did not require the Forest Service to consider the views of state regulators. But when Congress passed the FLPMA in 1976, it also passed the National Forest Management Act (NFMA), that amended the Forest Planning Act. Of special importance, §6(a) of the NFMA requires the Secretary of Agriculture to coordinate his land management plans "with the land and resource management planning processes of State and local governments." 16 U. S. C. §1604(a). Section 14 specifically requires the Secretary of Agriculture to give state governments "adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." §1612(a). Thus, it is clear that the Secretary of Agriculture has the final authority to determine the best use for federal lands, and that he must consider the views of state regulators before making a decision. There is no suggestion in the statute or the legislative history that state regulators should have the final authority in determining how particular federal lands should be used.

The Forest Service also has a role in implementing the Nation's mineral development policy. The Court shrugs off the

importance of this obligation, noting that “the responsibility for managing [mineral] resources is in the Secretary of the Interior.” *Ante*, at 588 (quoting 36 CFR §228.1 (1986)). This statement erroneously equates mineral resources management with land use management. Title 43 of the Code of Federal Regulations details the activities of the Bureau of Land Management (BLM) in this context. Generally, BLM manages the process by which rights to minerals are obtained from the United States and protected against others, the payment of royalties to the Federal Government, and the conservation of the minerals themselves. In some cases—like those of oil, gas, and coal—BLM supervises leasing of the right to extract the materials. But this case involves “hard-rock” minerals governed by the Mining Act of 1872. With respect to those minerals, BLM’s actions are limited to determining whether the land is subject to location under the mining laws; whether a mining claim is properly located and recorded; whether assessment work is properly performed; and whether the requirements for patenting a claim have been complied with. See 43 CFR pts. 3800–3870 (1986). None of these determinations is a “land use” determination in the sense of balancing mineral development against environmental hazard to surface resources. The Forest Service makes these determinations through its review of a mining plan of operation.

The Organic Administration Act of 1897 makes clear that the Forest Service must act consistently with the federal policy of promoting mineral development. Section 1 of that Act precludes the Secretary of Agriculture from taking any action that would “prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof.” 16 U. S. C. §478.² Forest Service ma-

² More recently, congressional solicitude for development of federal mineral resources led Congress to order the President to “coordinate the responsible departments and agencies to, among other measures . . . en-

terials confirm its duty to balance "[t]he demand for mineral development . . . against the demand for renewable resources and the land management agency's responsibility to reasonably protect the environment." United States Dept. of Agriculture, Forest Service Minerals Program Handbook preface (1983). See also Forest Service Manual §2802 (Dec. 1986) (stating that the Forest Service's policy is to "ensure that exploration, development, and production of mineral and energy resources are conducted in an environmentally sound manner and that these activities are integrated with planning and management of other national forest resources"); 30 U. S. C. §1602. In sum, although the Secretary of the Interior has a substantial responsibility for managing mineral resources, Congress has entrusted the task of balancing mineral development and environmental protection in the national forests to the Department of Agriculture, and its delegate the Forest Service.

II

The Court's analysis of this case focuses on selected provisions of the federal statutes and regulations, to the exclusion of other relevant provisions and the larger regulatory context. First, it examines the Forest Service regulations themselves, apart from the statutes that authorize them. Because these regulations explicitly require the federal permits to comply with specified state environmental standards, the Court assumes that Congress intended to allow state enforcement of any and all state environmental standards. Careful comparison of the regulations with the authorizing statutes casts serious doubt on this conclusion. The regulations specifically require compliance with only three types of state regulation: air quality, see 36 CFR §228.8(a) (1986); water quality, see §228.8(b); and solid waste disposal, see §228.8(c). But the Court fails to mention that the types of

courage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs." 30 U. S. C. §1602(7).

state regulation preserved by § 228.8 already are preserved by specific nonpre-emption clauses in other federal statutes. See 42 U. S. C. § 7418(a) (Clean Air Act requires federal agencies to comply with analogous state regulations); 33 U. S. C. § 1323(a) (similar provision of the Clean Water Act); 42 U. S. C. § 6961 (similar provision of the Solid Waste Disposal Act). The Forest Service's specific preservation of certain types of state regulation—already preserved by federal law—hardly suggests an implicit intent to allow the States to apply other types of regulation to activities on federal lands. Indeed the maxim *expressio unius est exclusio alterius* suggests the contrary.³

The second part of the Court's analysis considers both the NFMA and the FLPMA. The Court assumes, *ante*, at 585, that these statutes "pre-emp[t] the extension of state land use plans onto unpatented mining claims in national forest lands." But the Court nevertheless holds that the Coastal Commission can require Granite Rock to secure a state permit before conducting mining operations in a national forest. This conclusion rests on a distinction between "land use plan-

³The Court rests this part of its pre-emption analysis on *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707 (1985). In that case, the Court stated: "[W]e will pause before saying that the mere volume and complexity of [an agency's] regulations indicate that the agency did in fact intend to pre-empt." *Id.*, at 718. *Hillsborough*, however, is quite different from this case. First, the state regulations were designed to ensure the health of plasma donors, an aim entirely separate from the aim of the federal regulations, to ensure the purity of the donated plasma. In this case, by contrast, federal authorities already have considered the environmental effects of Granite Rock's mine. The California Coastal Commission seeks only to reconsider the decision of the federal authorities. In any event, the argument for pre-emption in this case does not rest on the Forest Service regulations alone, but also on the comprehensive regulatory system enacted by Congress. The Court cannot make *Hillsborough* controlling simply by considering the regulations separately from their statutory source. As I explain, *infra*, at 604–606, the complex of applicable statutes and regulations, considered as a whole, pre-empts the Coastal Commission's permit requirement.

ning” and “environmental regulation.” In the Court’s view, the NFMA and the FLPMA indicate a congressional intent to pre-empt state land use regulations, but not state environmental regulations. I find this analysis unsupportable, either as an interpretation of the governing statutes or as a matter of logic.

The basis for the alleged distinction is that Congress has understood land use planning and environmental regulation to be distinct activities. The only statute cited for this proposition is § 202(c)(8) of the FLPMA, 43 U. S. C. § 1712(c)(8), that requires the Secretary of the Interior’s land use plans to “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans.” But this statute provides little support for the majority’s analysis. A section mandating consideration of environmental standards in the formulation of land use plans does not demonstrate a general separation between “land use planning” and “environmental regulation.” Rather, § 202(c)(8) recognizes that the Secretary’s land use planning will affect the environment, and thus directs the Secretary to comply with certain pollution standards.

Nor does this section support the Court’s ultimate conclusion, that Congress intended the Secretary’s plans to comply with all state environmental regulations. As I have explained *supra*, at 599–600, other federal statutes require compliance with the listed standards.⁴ Also, because the

⁴The Forest Service regulations discussed above mention a slightly different set of environmental standards than does the FLPMA. Both provisions specifically preserve air and water standards. The Forest Service regulations also mention solid waste disposal standards; the Land Management Act also mentions noise control standards. Cf. 42 U. S. C. § 4901(a)(3) (Noise Control Act provision stating that the “primary responsibility for control of noise rests with State and local governments”). The slight difference between the two lists of pollution standards, however, is insignificant. The feature that *all* the listed standards have in common is

FLPMA requires compliance only with “applicable” standards, it is difficult to treat this one section as an independent and controlling command that the Secretary comply with all state environmental standards. Rather, viewing the complex of statutes and regulations as a whole, it is reasonable to view § 202(c)(8) simply as a recognition that the Secretary’s plans must comply with standards made applicable to federal activities by other federal laws.

The only other authority cited by the Court for the distinction between environmental regulation and land use planning is a Forest Service regulation stating that the Forest Service’s rules do not “provide for the management of mineral resources,” 36 CFR § 228.1 (1986). From this, the Court concludes that the Forest Service enforces environmental regulation but does not engage in land use planning. This conclusion misunderstands the division of authority between the BLM and the Forest Service. As explained *supra*, at 597–598, the BLM’s management of minerals does not entail management of surface resources or the evaluation of surface impacts. Indeed, the Court acknowledges that the Forest Service is “responsible for the management of the surface impacts of mining on federal forest lands.” *Ante*, at 585. The Forest Planning Act and the NFMA direct the Secretary of Agriculture and the Forest Service to develop comprehensive plans for the use of forest resources. Similarly, the Organic Administration Act commands the Secretary of Agriculture to promulgate regulations governing the “occupancy and use” of national forests, 16 U. S. C. § 551. These regulations are integral to the Forest Service’s management of national forests. To view them as limited to environmental concerns ignores both the Forest Service’s broader responsibility to manage the use of forest resources and the federal policy of making mineral resources accessible to

that other federal statutes specifically preserve a place for state regulation. See *supra*, at 599–600.

development.⁵ The Coastal Commission has no interest in the matters within the jurisdiction of the BLM; the regulations that it seeks to impose concern matters wholly within the control of the Forest Service. Thus, this regulation does not support the Court's distinction between environmental regulation and land use planning.

The most troubling feature of the Court's analysis is that it is divorced from the realities of its holding. The Court cautions that its decision allows only "reasonable" environmental regulation and that it does not give the Coastal Commission a veto over Granite Rock's mining activities. But if the Coastal Commission can require Granite Rock to secure a permit before allowing mining operations to proceed, it necessarily can forbid Granite Rock from conducting these operations. It may be that reasonable environmental regulations would not force Granite Rock to close its mine. This misses the point. The troubling fact is that the Court has given a state authority—here the Coastal Commission—the power to prohibit Granite Rock from exercising the rights granted by

⁵ The lack of statutory support for the Court's distinction is not surprising, because—with all respect—it seems to me that the distinction is one without a rational difference. As the Court puts it: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Ante*, at 587. This explanation separates one of the reasons for Forest Service decisions from the decisions themselves. In considering a proposed use of a parcel of land in the national forest, the Forest Service regulations consider the damage the use will cause to the environment as well as the federal interest in making resources on public lands accessible to development. The Forest Service may decide that the proposed use is appropriate, that it is inappropriate, or that it would be appropriate only if further steps are taken to protect the environment. The Court divides this decision into two distinct types of regulation and holds that Congress intended to pre-empt duplicative state regulation of one part but not the other. Common sense suggests that it would be best for one expert federal agency, the Forest Service, to consider all these factors and decide what use best furthers the relevant federal policies.

its Forest Service permit. This abdication of federal control over the use of federal land is unprecedented.⁶

III

Apart from my disagreement with the Court's characterization of the governing statutes, its pre-emption analysis accords little or no weight to both the location of the mine in a national forest, and the comprehensive nature of the federal statutes that authorized Granite Rock's federal permit.

One important factor in pre-emption analysis is the relative weight of the state and federal interests in regulating a particular matter. Cf. *Hines v. Davidowitz*, 312 U. S. 52, 66-69 (1941). The Court recognizes that the mine in this case is located in a national forest, but curiously attaches no significance to that fact. The Property Clause specifically grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, § 3, cl. 2. See *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404 (1917). This provision may not of its own force pre-empt the authority of a State to regulate activities on federal land, but it clearly empowers Congress to limit the extent to which a State may regulate in this area. In light of this clear constitutional allocation of power, the location of the mine in a national forest should make us less reluctant to find pre-emption than we are in other contexts.

The state regulation in this case is particularly intrusive because it takes the form of a separate, and duplicative, permit system. As the Court has recognized, state permit requirements are especially likely to intrude on parallel federal authority, because they effectively give the State the power to veto the federal project. See *International Paper Co. v.*

⁶I express no view as to the Court's conclusion that the Coastal Zone Management Act of 1972 (CZMA), 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), does not pre-empt the state regulation in this case. See *ante*, at 589-593.

Ouellette, 479 U. S. 481, 495 (1987); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U. S. 152, 164 (1946). Although the intrusive effect of duplicative state permit systems may not lead to a finding of pre-emption in all cases, it certainly is relevant to a careful pre-emption analysis.

The dangers of duplicative permit requirements are evident in this case. The federal permit system reflects a careful balance between two important federal interests: the interest in developing mineral resources on federal land, and the interest in protecting our national forests from environmental harm. The Forest Service's issuance of a permit to Granite Rock reflects its conclusion that environmental concerns associated with Granite Rock's mine do not justify restricting mineral development on this portion of a federal forest. Allowing the Coastal Commission to strike a different balance necessarily conflicts with the federal system.

Furthermore, as discussed *supra*, at 595-597, Congress already has provided that affected States must be afforded an opportunity to communicate their concerns to the federal regulators charged with deciding how federal lands should be used.⁷ Because Congress has ensured that any federal de-

⁷The discussion in Part I deals primarily with the FLPMA and the NFMA. In this case, the Coastal Commission actually had yet another statutory basis for influencing the federal decisionmaking process. Because Granite Rock's mine is near the California Coast, the Coastal Commission has a right to consistency review under the CZMA. Thus, if the Coastal Commission had voiced its concerns, the Secretary could not have approved this permit unless he determined, after a hearing, that "the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." 16 U. S. C. § 1456(c)(3)(A). Although the Coastal Commission had notice of Granite Rock's application to the Forest Service, it did not object to Granite Rock's activities until two years after the application was approved and Granite Rock began mining pursuant to the federal permit. Because the Coastal Commission failed to make a timely complaint to the Forest Service, it forfeited its right to consistency review under the CZMA.

By noting the provision for consistency review, I do not imply that the CZMA itself pre-empts the Coastal Commission's permit requirement. See

cision will reflect the environmental concerns of affected States, a duplicative system of permits would serve no purpose. Indeed, the potential for conflict between state and federal decisions has obvious disadvantages.

IV

In summary, it is fair to say that, commencing in 1872, Congress has created an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departments of the Executive. There is little cause for wonder that the language of these statutes and regulations has generated considerable confusion. There is an evident need for Congress to enact a single, comprehensive statute for the regulation of federal lands.

Having said this, it is at least clear that duplicative federal and state permit requirements create an intolerable conflict in decisionmaking.⁸ In view of the Property Clause of the Constitution, as well as common sense, federal authority must control with respect to land "belonging to the United States." Yet, the Court's opinion today approves a system of twofold authority with respect to environmental matters. The result of this holding is that state regulators, whose views on environmental and mineral policy may conflict with the views of the Forest Service, have the power, with respect to federal lands, to forbid activity expressly authorized by the Forest Service. I dissent.

n. 6, *supra*. I believe, however, that the provision for consistency review, considered with the other specific provisions for state participation in the federal regulatory process, indicates that Congress did not believe the States could have imposed separate permit requirements, even before passage of the CZMA.

⁸The Court concludes that Granite Rock has failed to demonstrate a conflict because it rejects my conclusion that land use regulation and environmental regulation are indistinguishable and because it sees no harm in allowing state permit requirements to supersede the decisions of federal officials. *Ante*, at 593-594.

JUSTICE SCALIA, with whom JUSTICE WHITE joins, dissenting.

I agree with the Court that this case is live because of continuing dispute over California's ability to assert a reclamation claim, *ante*, at 578.¹ In my view, however, the merits of this case must be decided on simpler and narrower grounds than those addressed by the Court's opinion. It seems to me ultimately irrelevant whether state environmental regulation has been pre-empted with respect to federal lands, since the exercise of state power at issue here is not environmental regulation but land use control. The Court errs in entertaining the Coastal Commission's contention that "its permit requirement is an exercise of environmental regulation," *ante*, at 589; and mischaracterizes the issue when it describes it to be whether "any state permit requirement, whatever its conditions, [is] *per se* pre-empted by federal law," *ante*, at 593. We need not speculate as to what the nature of this permit requirement was. We are not dealing with permits in the abstract, but with a specific permit, purporting to require application of particular criteria, mandated by a numbered section of a known California law. That law is plainly a land use statute, and the permit that statute requires Granite Rock to obtain is a land use control device. Its character

¹ I would not rely upon the alternative ground that the dispute between these parties is "capable of repetition yet evading review." *Ante*, at 578. Assuming that Granite Rock submits a new 5-year plan to the Forest Service and that California again seeks to require it to comply with the coastal permitting requirements, I see no reason why that action would evade our review. See *Weinstein v. Bradford*, 423 U. S. 147, 149 (1975). Moreover, for a dispute to be "capable of repetition," there must be a "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Ibid.* The Court may be correct that it is *possible* that California will seek to enforce its permit requirement directly again, *ante*, at 578; but since California may well be able to accomplish what it wants through the Coastal Zone Management Act's consistency review procedures, 16 U. S. C. § 1456(c)(3)(A), I do not think it likely that it will do so.

as such is not altered by the fact that the State may now be agreeable to issuing it so long as environmental concerns are satisfied. Since, as the Court's opinion quite correctly assumes, *ante*, at 585, state exercise of land use authority over federal lands is pre-empted by federal law, California's permit requirement must be invalid.

The permit at issue here is a "coastal development permit," required by the California Coastal Act, Cal. Pub. Res. Code Ann. §30000 *et seq.* (West 1986). It is provided for by §30600 of Chapter 7 of that Act (entitled "Development Controls"), which states that a person wishing to undertake any "development" in the coastal zone—a term defined to include construction, mining, and "change in the density or intensity of use of land," §30106—must obtain a coastal development permit from a local government or the California Coastal Commission. The permit is to be granted if the proposed development is in conformity with a state-approved local coastal program or, where no such program yet exists, if the proposed development "is in conformity with the provisions of Chapter 3 . . . and . . . will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3." §30604. The "local coastal programs" to which these provisions refer consist of two parts: (1) a land use plan, and (2) zoning ordinances, zoning maps, and other implementing actions. §§30511(b), 30512, 30513. Chapter 3 of the Act, with which these local coastal programs must comply, consists largely of land use prescriptions—for example, that developments providing public recreational opportunities shall be preferred, §30213; that oceanfront land suitable for recreational use shall be protected for recreational use and development, §30221; that commercial recreational facilities shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry, §30222; that oceanfront land suitable for coastal-dependent aquaculture shall be protected for that use,

§ 30222.5; that facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded, § 30234; that the maximum amount of prime agricultural land shall be maintained in agricultural production, § 30241; that all other lands suitable for agricultural use shall not be converted to nonagricultural use except in specified circumstances, § 30242; that conversions of coastal commercial timberlands in units of commercial size to other uses shall be limited to providing for necessary timber processing and related facilities, § 30243; that the location and amount of new development should maintain and enhance public access to the coast, § 30252; that coastal-dependent developments shall have priority over other developments on or near the shoreline, § 30255; and that coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites, § 30260.²

²The State Coastal Commission is responsible for issuing coastal development permits until the Commission has certified a local land use plan, Cal. Pub. Res. Code Ann. § 30600.5(b) (West 1986), at which time the responsibility devolves upon the local government, *ibid.* Regardless of which governmental entity has the authority to issue the permit, the requirements for its issuance are those set forth in Chapter 3 of the California Coastal Act discussed *supra*. These apply directly if a local coastal program has not been certified, § 30604(a), or by enforcement of the requirements of the local coastal program, § 30604(b), whose land use plan must conform with that Chapter in order to be certified, §§ 30512(c), 30512.1(c), 30512.2. Because local coastal programs consist of such classic land use regulation tools as a land use plan, zoning maps, zoning ordinances, and other implementing devices, §§ 30511(b), 30512, permits issued upon a showing of consistency with a local coastal program may be even more obviously land use control devices than permits issued upon a showing of consistency with the provisions of Chapter 3. But under the plain terms of the statute, the latter no less than the former are permits for land use. To establish the contrary proposition, which is essential to its holding, the majority relies upon nothing more substantial than the statement of counsel for the Commission, in oral argument before us, that "[T]he Coastal Commission issues permits based upon compliance with the environmental criteria in the Coastal Act itself." Tr. of Oral Arg. 52, quoted *ante*, at 586, n. 2. Read literally (*i. e.*, without inferring the adverb

It could hardly be clearer that the California Coastal Act is land use regulation. To compound the certainty, California has designated its Coastal Act as the State's coastal management program for purposes of the Coastal Zone Management Act (CZMA), 16 U. S. C. § 1451 *et seq.* Cal. Pub. Res. Code Ann. § 30008 (West 1986). The requirements for such a program include "[a] definition of what shall constitute permissible land uses and water uses within the coastal zone," 16 U. S. C. § 1454(b)(2), and "[a]n identification of the means by which the state proposes to exert control over [those] land uses and water uses." § 1454(b)(4).

The § 30600 permit requirement, of course, is one of those means of control—and whenever a permit application is evaluated pursuant to the statutory standards, land (or water) use management is afoot. Even if, as the State has argued before us and as the Court has been willing to postulate, California intended to employ the land use permit in this case only as a device for exacting environmental assurances, the power to demand *that permit* nevertheless hinges upon the State's power to do what the statutory permitting requirements authorize: to control land use. The legal status of the matter is that Granite Rock, having received land use approval from the Federal Government, has been requested to obtain land use approval from the State of California. If state land use regulation is in fact pre-empted in this location, there is no justification for requiring Granite Rock to go through the motions of complying with that *ultra vires* request on the chance that permission will be granted with no more than environmental limitations. It is inconceivable

"exclusively"), the statement is true (the Act does contain some environmental criteria) but unhelpful to the majority's case. If, however, counsel meant to imply that the Commission's permits could not be conditioned upon compliance with the land use criteria, the statement would not only contradict the plain language of the Act, but would also be inconsistent with the litigating position taken by the Commission in the previous stages of this lawsuit, see *infra*, at 611–612.

that, if a labor union federally certified as an authorized bargaining agent sought injunctive or declaratory relief against a requirement that it submit to state certification for the same purpose, we would say that “[b]y choosing to seek . . . relief against the . . . requirement before discovering what conditions the [State] would have placed on the [certification], [the union] has lost the possibility” of prevailing. *Ante*, at 588. I see no basis for making the equivalent statement here. In the one case as in the other, the demand for state approval is in and of itself invalid. As the Ninth Circuit said in a similar case that we summarily affirmed:

“The issue is whether [the State] has the power of ultimate control over the Government’s lessee, and this issue persists whether or not a use permit would eventually be granted.” *Ventura County v. Gulf Oil Corp.*, 601 F. 2d 1080, 1085 (1979), summarily aff’d, 445 U. S. 947 (1980).

Even on the assumption, therefore, that California was only using its land use permit requirement as a means of enforcing its environmental laws, Granite Rock was within its rights to ignore that requirement—*unless* California has land use authority over the federal lands in question.

In fact, however, this case is even more straightforward than that, for there is no reason to believe that California was seeking anything less than what the Coastal Act requires: land use regulation. The Commission’s letter to Granite Rock demanding a permit application read as follows:

“Because of the significant control and authority enjoyed by Granite Rock Company over the land subject to its mining claims at Pico Blanco and the concomitant [*sic*] significant diminution of federal discretionary control, this land cannot be included among the federal lands excluded from the coastal zone by the CZMA. . . . Consequently, because the land is located seaward of the coastal zone boundary established by the state legisla-

ture effective January 1, 1977, it is subject to the permit requirements of the California Coastal Act.

“This letter will serve to notify Granite Rock of its obligation to apply to the Coastal Commission for a coastal development permit for any development, as defined in Section 30106 of the Coastal Act, at the site undertaken after the date of this letter.” App. 22.

This letter contains no hint that only environmental constraints are at issue, as opposed to compliance with all of the requirements of the State’s coastal management program. Even in the litigation stage—both in the District Court and in the Court of Appeals—the argument that California was (or might be) seeking to enforce only environmental controls was merely an alternative position. The Commission’s more sweeping contention was that the land in question is not excluded from the CZMA, and that the CZMA permits designated state coastal management programs to override the Mining Act. See App. to Juris. Statement A-4, A-12, A-24. That argument has not been pressed here, having been rejected by both lower courts. 768 F. 2d 1077, 1080-1081 (CA9 1985); 590 F. Supp. 1361, 1370-1371 (ND Cal. 1984). It is perfectly clear, however, that the assertion that the State is only enforcing its environmental laws is purely a litigating position—and a late-asserted one at that.

On any analysis, therefore, the validity of California’s demand for permit application, and the lawfulness of Granite Rock’s refusal, depend entirely upon whether California has authority to regulate land use at Pico Blanco. The Court is willing to assume that California lacks such authority on account of the National Forest Management Act of 1976 (NFMA), 16 U. S. C. § 1600 *et seq.* (1982 ed. and Supp. III), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III). *Ante*, at 585. I believe that assumption is correct. Those statutes, as well as the CZMA, require federal officials to coordinate and consult with the States regarding use of fed-

eral lands in order to assure consistency with state land use plans to the maximum extent compatible with federal law and objectives. 16 U. S. C. §§ 1456(c)(3)(A), 1604(a); 43 U. S. C. § 1712(c). Those requirements would be superfluous, and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands. The Court is quite correct that the CZMA did not purport to change the status quo with regard to state authority over the use of federal lands. *Ante*, at 589–593. But as the CZMA's federal lands exclusion, 16 U. S. C. § 1453(1), and consistency review provisions, 16 U. S. C. § 1456(c)(3)(A), clearly demonstrate, that status quo was assumed to be exclusive federal regulation.

Finally, any lingering doubt that exercise of Coastal Act authority over federal lands is an exercise of land use authority pre-empted by federal laws is removed by the fact that that is not only the view of the federal agencies in charge of administering those laws, see Brief for United States as *Amicus Curiae*, but also was the original view of California, which until 1978 excluded from the Coastal Act, in language exactly mirroring that of the federal lands exclusion from the CZMA, 16 U. S. C. § 1453(1), "lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents." 1976 Cal. Stats., ch. 1331, § 1, as amended by 1978 Cal. Stats., ch. 1075, § 2, codified at Cal. Pub. Res. Code Ann. § 30008 (West 1986).

Any competent lawyer, faced with a demand from the California Coastal Commission that Granite Rock obtain a § 30600 coastal development permit for its Pico Blanco operations, would have responded precisely as Granite Rock's lawyers essentially did: Our use of federal land has been approved by the Federal Government, thank you, and does not require the approval of the State. We should not allow California to claim, in the teeth of the plain language of its legislation, and in violation of the assurance it gave to the Federal Gov-

ernment by designating its Coastal Act as a coastal management program under the CZMA, that it would use the permitting requirement to achieve, not land use management, but only environmental controls. We should particularly not give ear to that claim since it was not the representation made to Granite Rock when application for the permit was demanded. If environmental control is, as California now assures us, its limited objective in this case, then it must simply achieve that objective by means other than a land use control scheme. If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because of the Federal Government's voluntary accommodation of state environmental concerns—an accommodation that could not occur here only because California neglected to participate in the proceedings. *Ante*, at 576–577, n. 1, 591.

I would affirm the court below on the ground that the California Coastal Act permit requirement constitutes a regulation of the use of federal land and is therefore pre-empted by federal law.