About This Publication:

Compiled between September 2016 & June 2017, this Publication is designed to help people interpret U.S. Indian Policy in its current & historic interpretations, as used in United States Courts.

Historically, the first step in the advancement of rights & policy have begun by studying the science of jurisprudence through its current interpretation.

In today's world, especially as a young indigenous person, it is supposed that there is a deep confusion & resentment that could be involved, to make sense of a world wherein only generations ago, your people are renown for having been wild & free amongst immaculate ecosystems, yet looking around one's immediate surroundings, one feels confined & limited, unable to access what once was, reduced to living on a foreign peoples' terms, *however* —

It should be found as encouraging, that, vast acreages of wildlands still remain, & conservation efforts over the years have increased dramatically, & that conservation *can* move to a platform of "ecological restoration", provided an enticing educational campaign for public & tribal benefit.

Population Analysis:

- there are over 3.5 million miles of rivers & streams in the U.S., covering an enormous & diverse landscape.[1]
- 3.5 million miles converts to 2,240,000,000 acres alongside each river bank.[2]
- Due to the fact that there are *two* river banks, "there are over 4,480,000,000 acres of land, in total, along America's riversides".
- 4,480,000,000 (acres) minus 81,000,000 (families currently living in the United States)[3] = 399,000,000 acres would remain, as wilderness, *if* we were to (hypothetically) "give one acre of land, along a waterway, to every family in the U.S.".

4,480,000,000 divided by 81,000,000 = 55.3.

Therefore:

There would be approximately 54.3 acres of wilderness left in between each family's homestead among such scenario- & that's just along the major waterways! *Everything else would be open space!*

It is <u>*not*</u> being suggested to allot an acre to each family along America's waterways: rather, what is being suggested is that "the myth of overpopulation" is moreso a *myth*, than the *reality* that, if we manage resources wisely, we can shift society to manage ecosystems in a way which provides the needs of humanity <u>*and*</u> which nurtures the spirit of good will indigenous people & non-native residents who are seeking to find their place within the *solution*, so that we might all *find our way*. This Publication has been compiled so we may *wrap their heads around the legal structure* & "grab it by the reins to move it forward".

1 **EPA website, "Rivers & Streams":** https://archive.epa.gov/water/archive/web/html/index-17.html
2 **Google Convert, "Miles to Acres":** www.google.com/#q=miles+to+acres
3 **"The Statistics Portal":** www.statista.com/statistics/183659/number-of-families-in-the-us/

Why Black's Law Dictionary?

Black grew up in New York State's Hudson Valley region, & developed an interest in the law at a young age. In fact, he was something of a prodigy: he published the first edition of Black's Law Dictionary before his 31st birthday[4] in 1891, & the second edition then in 1910.[5]

Ironically, he wasn't a particularly noteworthy lawyer. Although he received formal legal training & began to practice law after graduating from a now-defunct law school in Pennsylvania, he grew frustrated with the demands of the profession & left his post after just five years. He then holed himself up in his parents' house & began compiling a comprehensive list of legal terms. Although it's unclear whether he intended this compilation to become an iconic tome, the scope of his ambition was clear from the start. He published over 1,000 scholarly articles that touched upon arcane legal matters as well as timely political issues. In recognition of his achievements, he received an honorary law degree from his undergraduate *alma mater (the school, college, or university that one once attended)* in 1917. Black *kept returning* to the legal dictionary that he had created. During his lifetime, he issued several revised editions of the tome. With each successive publication, he personally oversaw the addition of thousands of new definitions & concepts. By the time he passed on in 1927, he had earned recognition as one of the most powerful legal thinkers of his generation.[6]

Today Black's Law Dictionary is the most widely used law dictionary in the United States; used for terms in *legal briefs* and *court opinions*. Unless otherwise indicated, legal terms are defined throughout this book using definitions from Black's Law Dictionary, *Deluxe Tenth Edition,* by Henry Campbell Black & Editor In Chief Bryan A. Gardner.[7]

"Liberty, whether natural, civil, or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law."

- Henry Campbell Black, *Handbook of American Constitutional Law*, 1895

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4 **Black's Law Dictionary, *"Who Is Henry Campbell Black?"*:** http://thelawdictionary.org/article/who-was-henry-campbell-black/

5 **Online Computer Library Center, *33831602*:** www.worldcat.org/title/law-dictionary-containing-definitions-of-the-terms-and-phrases-of-american-and-english-jurisprudence-ancient-and-modern-and-including-the-principal-terms-of-international-constitutional-ecclesiastical-and-commercial-law-and-medical-jurisprudence-with-a-collection-of-legal-maxims-numerous-select-titles-from-the-roman-modern-civil-scotch-french-spanish-and-mexican-law-and-other-foreign-systems-and-a-table-of-abbreviations/oclc/33831602

6 **Black's Law Dictionary, *"Who Is Henry Campbell Black?"*:** http://thelawdictionary.org/article/who-was-henry-campbell-black/

7 **ISBN: 978-0-314-62130-6**

Related Legal Definitions, as Currently Federally Defined:

Treaty: An agreement formally signed, ratified, or adhered to between two countries or sovereigns; an international agreement concluded between two or more states in written form & governed by international law.[8]

Reservation: The establishment of a limiting condition or qualification; especially, a country's formal declaration, upon signing or ratifying a treaty, that its willingness to become a party to the treaty is conditioned on the modification or amendment of one more more provisions of the treaty as applied in its relations with the other parties to the treaty.[9]

Indian Country: 1. The land within the borders of all Indian reservations, together with the land occupied by an Indian community *(whether or not located within a recognized reservation)* & any land held in trust by the United States but beneficially owned by an Indian or tribe.

Indian Land: Land owned by the United States but held in trust for & used by the American Indians.

Indian Law: 1. The body of law dealing with American Indian tribes & their relationships to federal & state governments, private citizens, & each other. **2.** The laws of India.

Indian Reservation: An area that the federal government has designated for use by an American Indian tribe, where the tribe generally settles & establishes a tribal government.[10]

The Role of The Government:

- To protect the country against invasion.
- To manage the Tribes' estates via honoring its Fiduciary Duty.
- To safeguard & uphold rights including civil rights, water rights, rights to soil, & other rights.

Note: An *Artificial Person (i.e "Corporation")* is <u>not</u> a Citizen for purposes of the Privileges & Immunities Clauses in Article IV § 2 of The Constitution <u>or</u> according to the Fourteen Amendment.[11]

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8 **Black's Law Dictionary *Deluxe Tenth Edition* by Henry Campbell Black, Editor in Chief *Bryan A. Garner*. ISBN: 978-0-314-61300-4, *page 1732***

9 **" ", *page 1500***

10 **" ", *page 819***

11 **" ", *page 1325* under "Artificial Person"**

Sentiments by George Washington regarding the *Good Faith* Invested in Treaties:

In a message to the Senate, on September 17th, 1789, he stated:

> **"It doubtless is important that all treaties & compacts formed by the United States with other nations, whether civilized or not, should be made with caution & executed with fidelity."**[12]

Fidelity: "Faithfulness to a person, cause, or belief, demonstrated by continuing loyalty & support."[13]

On December 17th, 1789, in a letter, he wrote:

> **"To the Chiefs of the Choctaw Nation:**
>
> **Brothers,**
>
> **I have sent Major Doughty one of our Warriors, in order to convince you that the United States will remember the treaty they made with your Nation four years ago at Hopewell on the Keowee— guard & protect him & show him the places at which trading posts shall be established in order to furnish you with goods; & when the said posts shall be established, support them to the utmost of your power.**
>
> **Be attentive to what he shall say in the name of the United States for he will speak only truth.**
>
> **Regard the United States as your firm & best support— Keep bright the chain of friendship between the Chickasaws & your nation—reject the advice of bad men who may attempt to poison your minds with suspicions against the United States. Given under my hand & Seal, at the City of New York this seventeenth day of December One thousand, seven hundred & Eighty nine.**
>
> **Go: Washington**
> **By Command of the President of the United States.**
>
> **H. Knox**
> **Secretary for the department of War"**[14]

Excerpt from Washington's speech to Congress in 1794:

> **"... my policy, in our foreign transactions, has been, to cultivate peace with all the world ; to observe treaties with pure & absolute faith; to check every deviation from the line of impartiality; to explain what may have been misapprehended, & correct what may have been injurious to any nation."**[15]

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12 **Preserved by Google Book Search, first Published by American Stationers' Company (John B. Russell),** ***"The Writings of George Washington; Being His Correspondence, Addresses, Messages, & Other Papers, Official & Private, Selected & Published from the Original Manuscripts, with a Life of the Author, Notes, & Illustrations"*** **by Jared Sparks. Volume XII. (1837),** ***speech from "Message to Senate 81"*****:** http://www.archive.org/stream/writingsgeorgew17washgoog/writingsgeorgew17washgoog_djvu.txt

13 **Google** ***Definitions. Standard search.***

14 **Founders Online,** ***"From George Washington to the Chiefs of the Choctaw Nation, December 17th, 1789, to the Chiefs of the Choctaw Nation"*****:** https://founders.archives.gov/documents/Washington/05-04-02-0293

15 ***"The Writings of George Washington... "Part v. SPEECHES TO CONGRESS. 63"***

The *George Washington* Wampum Belt:

President George Washington had this belt made to ratify the 1794 Canandaigua Treaty with the Haudenosaunee, that together the nations shall live in peace & friendship forever. The 13 figures represent the 13 States of the newly formed United States of America. The two figures & the house symbolize the Haudenosaunee. The two figures next to the longhouse are the Mohawk (Keepers of the Eastern Door) & the Seneca (Keepers of the Western Door).[16]

September 17th, 1789, during Farewell Address of 1796, he stated:

"Observe good faith & justice toward all nations. Cultivate peace & harmony with all."[17]

On December 5th, 1793, Washington spoke to both Houses of Congress:

"I have respected & pursued the stipulations of our treaties, according to what I judged their true sense; & have withheld no act of friendship, which their affairs have called for from us, & which justice to others left us free to perform. I have gone further; rather than employ force for the restitution of certain vessels, which I deemed the United States bound to restore, I thought it more advisable to satisfy the parties.. that, if restitution were not made, it would be incumbent on the United States to make compensation."[18]

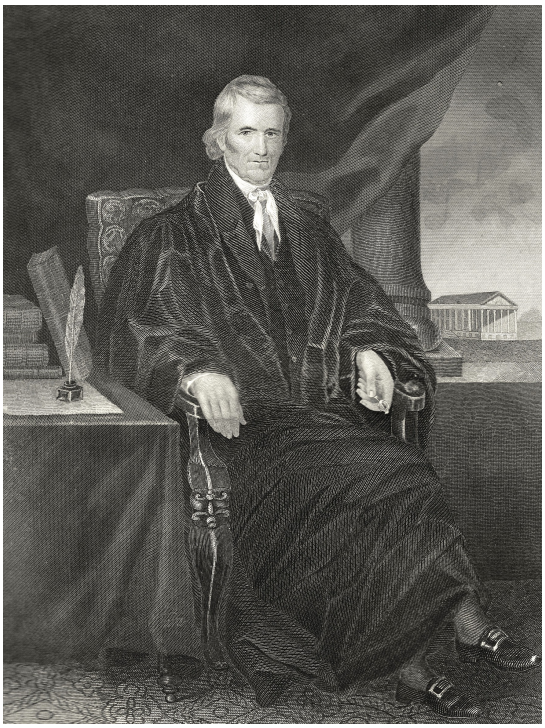
"The Signing of the Treaty of Greene Ville, 1795", by Howard Chandler Christy (1945): *http://touringohio.com/history/greeneville-treaty.html*

16 **Onandaga Nation website, "George Washington Belt":** www.onondaganation.org/culture/wampum/george-washington-belt/

17 **Yale Law School, *Lillian Goldman Law Library*, § 30:** *http://avalon.law.yale.edu/18th_century/washing.asp*

18 ***"The Writings of George Washington..." speech on "Respecting the French Minister Genet, & the Relations with France":*** www.archive.org/stream/writingsgeorgew17washgoog/writingsgeorgew17washgoog_djvu.txt

1801-1835: John Marshall Serves as Chief Justice of the U.S. Supreme Court:



Steel engraving with signature. "National Portrait Gallery of Eminent Americans from original full length portraits by Alonzo Chappel" Vol I, New York: Johnson, Fry & Co. 1862 "The Cooper Collections"

John Marshall (Sept. 24th, 1755 – July 6, 1835) was the fourth Chief Justice of the Supreme Court, the longest-serving Chief Justice & the fourth longest-serving justice in U.S. Supreme Court history. His court opinions helped lay the basis for U.S. constitutional law, & established the Supreme Court as the final authority on the meaning of the Constitution in cases & controversies that must be decided by the federal courts.[19] He reinforced the principle that federal courts are obligated to exercise judicial review, by disregarding purported laws if they violate the constitution. *Marbury v. Madison 5 U.S. 137 (1803).* Thus, Marshall cemented the position of the American judiciary as an independent & influential branch of government. He repeatedly confirmed the supremacy of federal law over state law, & supported an expansive reading of the enumerated powers. Some of his decisions were unpopular. Nevertheless, he built up the third branch of the federal government, & augmented federal power in the name of the Constitution & rule of law.[20]

In 1788 Marshall was selected as a delegate to the Virginia convention**,** responsible for ratifying or rejecting the U.S. Constitution, which had been proposed by the Philadelphia Convention a year earlier. Together with James Madison & Edmund Randolph, Marshall led the fight for ratification, & was especially active in defense of Article III *(page 3)*, which provides for the Federal judiciary. His most prominent opponent at the ratification convention was Anti-Federalist Patrick Henry. Ultimately, the convention approved the Constitution by a vote of 89–79.[21]

In 1795, Marshall declined Washington's offer of Attorney General of the U.S., & in 1796 he declined to serve as minister to France. In 1797, however, he accepted when President John Adams appointed him to a three-member commission to represent the U.S. in France alongside Charles Cotesworth Pinckney & Elbridge Gerry. However, when the envoys arrived, the French refused to conduct diplomatic negotiations unless the U.S. paid enormous bribes. This diplomatic scandal became known as the XYZ Affair, inflaming anti-French opinion in the United States. Hostility increased even further when the French Foreign Minister Talleyrand refused to negotiate with Marshall & Pinckney, prompting their departure from France in April 1798. Marshall's handling of the affair made him popular with the American public when he returned to the U.S. In 1798, he declined a Supreme Court appointment, recommending Bushrod Washington, who later became one of his staunchest allies in Court.[22]

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19 **John Marshall at Supreme Court Historical Society**
20 **Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (2000) p. 121**
21 **Smith, *John Marshall* (1998) pp. 118–20**
22 **"Ariens, Michael. "John Marshall."**

Marshall was a known leader of the Federalist Party in Virginia prior to serving as Chief Justice. Alongside fellow Federalist Party member Daniel Webster (who argued some of the cases), Marshall sought to build a stronger federal government,[23] to support a strong national government & commercial interests, over the opposition of the Jeffersonian Republicans, who advocated states' rights & idealized the yeoman farmer & the French Revolution.[24]

In 1799 he reluctantly ran for a seat in the U.S. House of Representatives. Although his congressional district favored the Democratic-Republican Party, Marshall won the race, in part due to his conduct during the XYZ Affair & in part due to the support of Patrick Henry. His most notable speech was related to the case of Thomas "Jonathan Robbins" Nash, whom the government had extradited to Great Britain on charges of murder. Marshall defended the government's actions, arguing that nothing in the Constitution prevents the U.S. from extraditing one of its citizens. Marshall served for one year, & on May 7, 1799, President Adams nominated Congressman Marshall as Secretary of War. However, on May 12, Adams withdrew the nomination, instead naming him Secretary of State as a replacement for Timothy Pickering. Confirmed by the Senate on May 13th, Marshall took office on June 6th, 1800. As Secretary of State, Marshall directed the negotiation of the Convention of 1800, which ended the Quasi-War with France & brought peace to the new nation.[25]

Marshall was thrust into the office of Chief Justice in the wake of the presidential election of 1800. With the Federalists soundly defeated & about to lose both the executive & legislative branches to Jefferson & the Democratic-Republicans, (2nd) President Adams & the lame duck Congress *(in politics, a "lame duck" is an elected official whose successor has already been elected)* passed what came to be known as the Midnight Judges Act, which made sweeping changes to the federal judiciary, including a reduction in the number of Justices from six to five *(upon the next vacancy in the court)* so as to deny Jefferson an appointment until two vacancies occurred.[26] As the incumbent Chief Justice Oliver Ellsworth was in poor health, Adams first offered the seat to ex-Chief Justice John Jay, who declined on the grounds that the Court lacked "energy, weight, & dignity".[27] Jay's letter arrived on January 20, 1801, & as there was precious little time left, Adams surprised Marshall, who was with him at the time and able to accept the nomination immediately.[28]

Marshall served during the administrations of six Presidents: John Adams, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams, & Andrew Jackson. He remained a stalwart advocate of Federalism & a nemesis of the Jeffersonian school of government throughout its heyday. He participated in over 1000 decisions, writing 519 of the opinions himself.[29]

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23 **Jean Edward Smith, *John Marshall: Definer of a Nation* (1998) p. 8**
24 **Smith, *John Marshall* (1998) pp. 118–20**
25 **Smith, *John Marshall: Definer of a Nation* (1998) pp. 258–59, 268–86**
26 **Stites (1981), pp. 77–80**
27 **"John Jay to President John Adams, Jan. 2, 1801, in 4 *The Correspondence and Public Papers of John Jay*, (Henry P. Johnson ed., 1893)".**
28 **Robarge, David (2000). *A chief justice's progress: John Marshall from Revolutionary Virginia to the Supreme Court*. Greenwood Publishing. p. xvi.**
29 **John Edward Oster, *The political and economic doctrines of John Marshall* (2006) p. 348**

Marbury v. Madison, 5 U.S. 137 (1803):

This landmark U.S. Supreme Court case formed the basis for the exercise of judicial review under Article III of the Constitution, & helped define the boundary between the constitutionally separate executive & judicial branches of the American form of government.

Article III:

"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 Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

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.

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.

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.

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.

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."

The case resulted from a petition to the Supreme Court by William Marbury, who had been appointed Justice of the Peace in the District of Columbia by President John Adams but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force the new Secretary of State, James Madison, to deliver the documents.

The Court, with John Marshall as Chief Justice, found firstly that Madison's refusal to deliver the commission was both illegal *and* correctible. In deciding whether Marbury had a remedy, Marshall stated: **"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."** One of the key legal principles on which *Marbury* relies is the notion that for every violation of a vested legal right, there must be a legal remedy. Marshall next described two distinct types of Executive actions:

1. **"Political Actions":** Where the official can exercise discretion.
2. **"Purely Ministerial Functions"**: Where the official is legally required to do something.

Marshall found that delivering the appointment to Marbury was a purely ministerial function required by law, & therefore the law provided him a **remedy**:[30]

Remedy: "The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief. — Also termed *civil remedy.*"[31]

Marshall concluded that a **writ of mandamus**, by definition, was the correct judicial means to order an official of the United States (in this case, the Secretary of State) to do something required of him (in this case, deliver a commission), **however the Court stopped short of ordering Madison to hand over Marbury's commission, instead holding that Section 13 of the Judiciary Act of 1789 which enabled Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III of the Constitution establishes**. The petition was therefore denied.

Original Jurisdiction: "A court's power to hear & decide a matter before any court can review the matter."[32]

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30 ***Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)**

31 **Black's Law Dictionary *Deluxe Tenth Edition.* Compiled by *Henry Campbell Black*. Editor in Chief *Bryan A. Garner*. Page 1485. ISBN: 978-0-314-61300-4**

32 **" " page 982**

Marshall Determined The Court Can Strike Down Unconstitutional Acts of Congress and that the Supreme Court has *Appellate Jurisdiction, Not* Original Jurisdiction:

Marshall first examined the Judiciary Act of 1789 & determined that Section 13 purported to give the Supreme Court original jurisdiction over writs of mandamus. Marshall then looked to Article III of the Constitution, which defines the Supreme Court's original *and* appellate jurisdictions. Marbury had argued that the Constitution was only intended to set a floor for original jurisdiction that Congress could add to. Marshall disagreed & held that Congress does not have the power to modify the Supreme Court's original jurisdiction. Consequently, Marshall found that the Article III of the Constitution & *section 13 of the Judiciary Act of 1789* *conflicted.*, & therefore Section 13 was *unconstitutional*:

> **"SEC . 13. *And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state & its citizens; & except also between a state & citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; & original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts & courts of the several states, in the cases herein after specially provided for; & shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty & maritime jurisdiction, & writs of mandamus, in cases warranted by the principles & usages of law, to any courts appointed, or persons holding office, under the authority of the United States."**

Marshall wrote: "To enable this court then to issue a mandamus, it must be shown to be an exercise of **appellate jurisdiction** *(on appeal, not original action)*... It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, & that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, *not* original.

It is the essential criterion of appellate jurisdiction, that it revises & corrects the proceedings in a cause already instituted, & does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, & therefore seems not to belong to appellate, but to original jurisdiction... The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; & it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised."[33]

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33 **Jim Riley, *Regis University, Denver, Colorado*:**
http://academic.regis.edu/jriley/400section_13_of_1789_judiciary_act.htm

Writ: "(bef. 12c.) A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act."[34]

> **"Writs have a long history. We can trace their formal origin to the Anglo-Saxon formulae by which the king used to communicate his pleasure to persons & courts. The Anglo-Norman (Norman = "Norse", *Norwegian*) writs, which we meet with after the Conquest, are substantially the Anglo-Saxon writs turned into Latin. But what is new is the much greater use made of them, owing to the increase of royal power which came with the Conquest."**[35]

Writ of Mandamus: "*n.* [Latin "we command"] A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act. Also termed *mandamus*. **mandamuses***, pl.* – **mandamus**, *vb*."[36]

> **"The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. in the specific relief which it affords, a mandamus... is resorted to for the redress of purely private wrongs, or the enforcement of contract rights... The object of a mandamus is to prevent disorder from a failure of justice & a defect of police, & it should be granted in all cases where the law has established no specific remedy & where in justice there should be one. And the value of the matter in issue, or the degree of its importance to the public, should not be too scrupulously weighed... The writ of mandamus is of very ancient origin, so ancient indeed that its early history is involved in obscurity, & has been the cause of much curious research & of many conflicting opinions. It seems, originally, to have been one of that large class of writs or mandates, by which the sovereign of England directed the performance of any desired act by his subjects, the word 'mandamus' in such writs or letters missive having doubtless given rise to the present name of the writ. These letters missive or mandates, to which the generic name mandamus was applied, were in no sense judicial writs, being merely commands issuing directly from the sovereign to the subject, without the intervention of the courts... The term mandamus, derived from these letters missive, seems gradually to have been confined in its application to the judicial writ issued by the kings bench, which has by a steady growth developed into the present writ of mandamus."**[37]

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34 **Black's Law Dictionary *Deluxe Tenth Edition. p*age 1845**

35 **W.S. Holdsworth, *Sources and Literature of English Law* 20 (1925).**

36 **Black's Law Dictionary *Deluxe Tenth Edition* under "mandamus", *page 1105***

37 **James L. High, *A Treatise on Extraordinary Legal Remedies* § 2, at 5-6 (1884).**

Marshall Ruled that "Laws *(etc.)* *That Conflict with The Constitution* Are *Not* Laws":

This conflict raised the important question of what happens when an Act of Congress conflicts with the Constitution. Marshall answered that Acts of Congress that conflict with the Constitution are not law, & the Courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position Marshall looked to the nature of the written Constitution— there would be no point of having a written Constitution if the courts could just ignore it. Marshall argued that the very nature of the judicial function requires courts to make this determination. If two laws conflict with each other, a court must decide which law applies.[38]

Finally, Marshall pointed to the judge's *oath* requiring them to uphold the Constitution, & to *the Supremacy Clause* of the Constitution:

Article VI, Clause 2

"The Supremacy Clause":

"This Constitution, & *the laws of the United States* which shall be made in pursuance thereof; & all treaties made, *or which shall be made*, under the authority of the United States, shall be *the supreme law of the land*; & the judges in *every state* shall be bound thereby, *anything in the Constitution or laws of any State to the contrary notwithstanding*."

Article VI, Clause 3

"The Oaths Clause":

"The Senators & Representatives before mentioned, & *the members of the several state legislatures*, & *all* executive & judicial officers, *both of the United States &* of the several states, shall be bound by oath or affirmation, *to support this Constitution*."[39]

38 **5 U.S. (1 Cranch) 176-177**

39 **Transcript of The Constitution of The United States, National Archives website::** https://www.ourdocuments.gov/doc.php?flash=true&doc=9&page=transcript

Statements by Marshall in Regards to the decision:

"It is emphatically the province & duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound & interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law [e.g., a statute or treaty] be in opposition to the Constitution, if both the law & the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty...

… Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, & see only the law [e.g., the statute or treaty].

This doctrine would subvert the very foundation of all written constitutions."

– **Chief Justice John Marshall, *Marbury v. Madison***

Plague engraved into the wall of the U.S. Supreme Court Building:

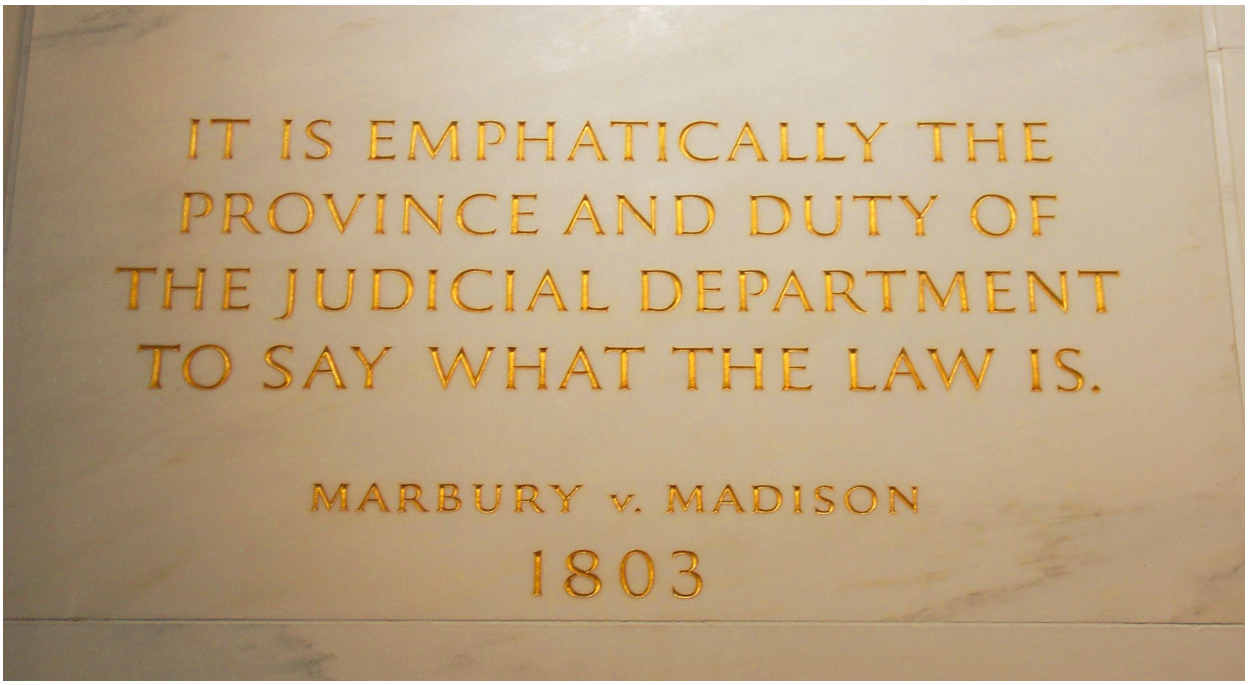

Photo Source: https://upload.wikimedia.org/wikipedia/commons/f/f7/Plaque_of_Marbury_v._Madison_at_SCOTUS_Building.JPG

Fletcher v. *Peck*, 6 Cranch 87 (1810):

In the 1780's & 1790's, after the Revolutionary War, Georgia claimed its territory extended from the Atlantic Ocean to as far west as the Mississippi River. In the late 1780's, the state legislature began exploring the option of selling some of its western lands to raise money & promote settling in the area. After several failed attempts by land companies to make a successful purchase of the western territories, in 1794 & 1795, serious contenders came forward: four separate land companies joined forces to present a $500,000 offer on approximately 35,000,000 acres of land which comprises most of modern day Mississippi & Alabama. Their offer of *2 cents per acre* was extremely low, even by the standards of the day, but the land companies had U.S. senators, congressmen, & other influential partners interested in securing the deal.

Rumors of corruption & bribery in "the Yazoo sale" *(named after the Yazoo River)* began to come forward, followed by public outcry against the state selling the land to these companies. Another interested company came forward, bidding $800,000 for the property, while depositing $40,000 as earnest money. This new bidder, the Georgia Union Company, even offered to allow the state to have control of 6 to 8 million acres of the land for public use, but their offer was never given real consideration, & against the will of Georgia voters, state legislators voted to sell the western territory to the four land companies.

Almost immediately efforts began to repeal & reverse the sale of the western territory, but the four land companies wasted no time in selling parcels to land speculators & investors, who in turn sold to others at a significant profit.[40] Learning of the circumstances, Georgia's leading Jeffersonian Republican, U.S. senator James Jackson, resigned his seat & returned home, determined to overturn the sale. Making skillful use of county grand juries & newspapers, Jackson & his allies gained control of the legislature.[41]

James Jackson destroying land records (evidence w/ names) in the fire, Georgia Historical Society.

After holding hearings which substantiated the corruption charges, Jackson dictated the terms of the 1796 Rescinding Act, signed by Governor Jared Irwin, which included:

- nullification of the Yazoo sale
- destruction of records connected with the sale,[42] thereby taking away ownership of the land from prior buyers, including supposedly innocent third-party purchasers who had bought parcels of the tract from the original grantees[43]
- state officials involved in the Yazoo land fraud were denied reelection, & would be replaced by anti-Yazoo, pro-Jefferson supporters

40 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

41 **Hargrett *Rare Book & Manuscript Library,* University of Georgia Libraries, "James Wilson Yazoo Land Cocument", Retreived on 1-28-2009 from New Georgia Encyclopedia:** http://hmfa.libs.uga.edu/hmfa/view?docId=ead/ms1042-ead.xml

42 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

43 **Coenen, Dan T. "*Fletcher v. Peck* (1810)." New Georgia Encyclopedia. 06 June 2017. Web. 14 June 2017:** www.georgiaencyclopedia.org/articles/government-politics/fletcher-v-peck-1810

Immediately lawsuits sprang up from the purchasers & others involved with the Yazoo Sale[44], with many challenging the constitutionality of the Rescinding act.[45]

In 1798 Jackson orchestrated a revision of the state constitution that included key elements with regard to the Rescinding Act. To prevent those claiming lands under the Yazoo purchase from receiving a sympathetic hearing in a Congress dominated by Federalists, Jackson & his lieutenants blocked any cession of the western territory until Republicans were in control.

Then in 1802, commissioners from Georgia, including Jackson, transferred the land & the Yazoo claims to the federal government, who agreed to pay Georgia $1,250,000[46] & to extinguish as quickly as possible the remaining claims of Native Americans to areas within the state so that legitimate claims could be established in the area Georgia politicians then used the "Yazoo" label to bludgeon opponents for almost twenty years following the settlement.

However, as cotton plantations & culture spread across Georgia, the national government proved unable to extinguish quickly enough for land-hungry Georgians demanding Creek & Cherokee lands within the state, anger over this matter fueled the development of the "states' rights" philosophy, for which Georgia's leaders became notorious in the 1820s & 1830s for promoting as they prodded the U.S. to complete the process of Indian removal.[47]

And finally, in 1810, one of the Yazoo cases had finally made its way to the Supreme Court[48]: Robert Fletcher, a resident of New Hampshire, had bought his Yazoo tract from John Peck, a resident of Massachusetts, who traced his title back to the state of Georgia through allegedly innocent purchasers. In connection with the land transfer, Peck promised Fletcher that the title had not been constitutionally impaired by the 1796 rescinding legislation. Fletcher discovered the sale of the land *had* been voided by state law, so he brought suit against Peck for damages, claiming Peck had lied to him in promising he had good title to the land. The case thus entailed Peck's arguing to the U.S. Supreme Court that the 1796 act was unconstitutional, so that no breach of his promise to Fletcher had occurred.[49]

A federal circuit court ruled for Peck, & Fletcher appealed to the U.S. Supreme Court. The question before the Court was whether the Rescinding Act of 1796 (which had repealed the act of 1795) had violated "the Contract Clause" of Article I § 10 of the Constitution:

"No State shall... pass any... Law impairing the Obligation of Contracts."

In other words, once the state of Georgia had finalized the original sale of the land, could the federal government constitutionally repeal that sale, or did the Constitution prohibit it from doing so?

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44 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

45 **Coenen, Dan T. "*Fletcher v. Peck* (1810)." New Georgia Encyclopedia. 06 June 2017. Web. 14 June 2017:** www.georgiaencyclopedia.org/articles/government-politics/fletcher-v-peck-1810

46 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

47 **Hargrett *Rare Book & Manuscript Library,* University of Georgia Libraries, "James Wilson Yazoo Land Cocument", Retreived on 1-28-2009 from New Georgia Encyclopedia:** http://hmfa.libs.uga.edu/hmfa/view?docId=ead/ms1042-ead.xml

48 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

49 **Coenen, Dan T. "*Fletcher v. Peck* (1810)." New Georgia Encyclopedia. 06 June 2017. Web. 14 June 2017:** www.georgiaencyclopedia.org/articles/government-politics/fletcher-v-peck-1810

The Supreme Court, in a 4-1 decision written by Chief Justice John Marshall, ruled that Georgia had violated the Contract Clause of the Constitution when it repealed the grants, & that *the Rescinding Act* unconstitutionally had violated the *right to contract.*[50]. The Court sustained the constitutional challenge to Georgia's rescinding act, thus establishing an important precedent: that the Supreme Court has the power to declare state laws unconstitutional. *(The Court's earlier, more famous decision in Marbury v. Madison recognized the Court's ability to strike down Acts of Congress, but had not specidifed the Court's power to invalidate laws enacted by states)*[51]

The Court conceded that the fraud underlying the grants was "deplorable", but it rejected Fletcher's argument that Georgia had the "sovereign power", as the agent of the people, to repeal this act of public corruption. The Court reasoned that Peck was an innocent third party who had entered into two valid contracts: first when he paid for the land from the original grantee, & second when he sold the land to Fletcher. Peck thus fell outside the original fraud the Georgia legislature sought to undo in its repeal. As Marshall put it, **"When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."**[52]

The case laid the basis for the principle that the limitations imposed by the **"impairment of contract"** clause extend to governmental, as well as private, contractual obligations. The Court's opinion also hinted at the notion that Americans may possess judicially enforceable rights rooted not so much in the specific language of the U.S. Constitution as in **"general principles, which are common to our free institutions."**[53]

In 1814, the state agreed to pay damaged claimants $5,000,000 from the subsequent sale of the Yazoo lands. This sale was such an egregious display by the Georgia legislature that a new method to dispose of state-owned lands was devised. Six subsequent land sales were done by a lottery based on a point system to prospective buyers, & many of the parcels were sold at 4 cents per acre.

The right to rescind contracts, & the federal government's right to invalidate a state law, & other land-related issues were established within this case.[54]

The Court's strict interpretation of the Contract Clause was modified 17 years later by the Taney Court in *Charles River Bridge v. Warren Bridge (1837)*, but for nearly a century the decision served as a major barrier to state economic regulation of business corporations. In *Home Building & Loan Association v. Blaisdell (1934)*, as a response to the massive economic dislocation of the Great Depression, the Court ruled that the state could constitutionally alter the terms of any contract so long as the alteration is rationally related to protecting the public's welfare.[55]

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50 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

51 **Coenen, Dan T. "*Fletcher v. Peck* (1810)." New Georgia Encyclopedia. 06 June 2017. Web. 14 June 2017:** www.georgiaencyclopedia.org/articles/government-politics/fletcher-v-peck-1810

52 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

53 **Coenen, Dan T. "*Fletcher v. Peck* (1810)." New Georgia Encyclopedia. 06 June 2017. Web. 14 June 2017:** www.georgiaencyclopedia.org/articles/government-politics/fletcher-v-peck-1810

54 **LandThink, "The Yazoo Land Fraud", 10-27-2015:** www.landthink.com/the-yazoo-land-fraud/

55 **PBS, Supreme Court History, *"Capitalism & Conflict, Landmark Cases"Fletcher v. Peck (1810)" by* Alex McBride, third year law student at Tulane Law School in New Orleans:** www.pbs.org/wnet/supremecourt/capitalism/landmark_fletcher.html

Johnson v. M'Intosh, 21 U.S. 543 (1823):

At the root of most land titles in America, outside the original thirteen colonies, is a federal "land patent". The validity of government title, in turn, rests on *Johnson v. M'Intosh*, which held that **"a discovering sovereign has the exclusive right to extinguish Indians' interests in their lands, either by *purchase* or *just war*"**. Interestingly, Justice Marshall also acknowledges that Indians own the rights to the soil *(pages 26 & 27)*.

Sovereign: "A person, body, or state vestee with independent & supreme authority."[56]

M'Intosh involved conflicting claims to large tracts of land in southern Illinois & Indiana. The plaintiffs made their claim under deeds obtained directly from the Indians by predecessors organized as the *United Illinois and Wabash Land Companies*.

The defendant countered with conflicting claims under a U.S. Patent. In ruling for the defendant, Chief Justice Marshall established that **"the federal government would not recognize private purchases of Indian lands"**.[57]

The foundational legal principle laid out in Johnson is **"that discovery gave title to the government... against all other European governments."**[58]

Many associate this ruling with having incorporated the Doctrine of Discovery into U.S. law, however the Roman Catholic Doctrine was not directly mentioned in the ruling; its principles can be found throughout the Court's ruling however *(pages 24-25)*. Chief Justice Marshall stated:

> **"The plaintiffs in this cause claim the land in their declaration mentioned under two grants purporting to be made, the first in 1773 & the last in 1775, by the chiefs of certain Indian tribes constituting the Illinois & the Piankeshaw nations, & the question is whether this title can be recognized in the courts of the United States.**
>
> **The facts... show the authority of the chiefs who executed this conveyance so far as it could be given by their own people, & likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is in a great measure confined to the power of Indians to give, & of private individuals to receive, a title which can be sustained in the courts of this country.**
>
> **As the right of society to prescribe those rules by which property may be acquired & preserved is not & cannot be drawn into question, as the title to lands especially is & must be admitted to depend entirely on the law of the nation in which they lie...**

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56 **Black's Law Dictionary *Deluxe Tenth Edition* by Henry Campbell Black, Editor in Chief *Bryan A. Garner*. ISBN: 978-0-314-61300-4, *page 1611***

57 **Johnson v. M'/ntosh, 585, 595-96. Marshall distinguished the plaintiffs' primary supporting case, Campbell v. Hall, I Cowp. Rep. 204 (1774), as involving royal imposition of a tax. Parliament, not the Crown, had the exclusive power to tax.**

58 **Judicial Toolkit on Indian Law, Key Federal Cases. Prepared by Judge Joseph J. Wiseman, "Foundational Cases: The Marshall Trilogy":** www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition & enterprise of all, & the character & religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization & Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements & consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives & establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, & to the assertion of which by others all assented.

Those relations which were to exist between the discoverer & the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, & to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, & their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, & claimed & exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America from its discovery to the present day proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, & with the United States all show that she placed in on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France also founded her title to the vast territories she claimed in America on discovery... Her monarch claimed all Canada & Acadie as colonies of France at a time when the French population was very inconsiderable & the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi & the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts in 1603, constitute him Lieutenant General, & the representative of the King in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude, with authority to extend the power of the French over that country & its inhabitants, to give laws to the people, to treat with the natives & enforce the observance of treaties, & to parcel out & give title to lands according to his own judgment.

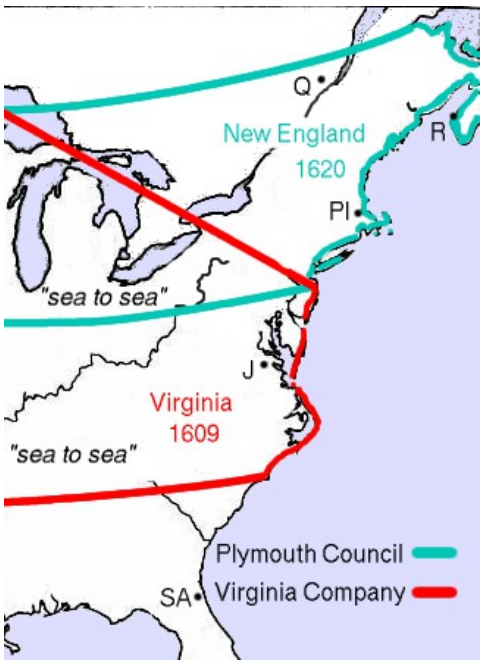
The states of Holland also made acquisitions in America & sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude, & this country they claimed under the title acquired by this voyage...

The claim of the Dutch was always contested by the English – not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample & complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to Christian people & to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage & discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title... The right of discovery given by this commission is confined to countries 'then unknown to all Christian people', & of these countries Cabot was empowered to take possession in the name of the King of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathens, & at the same time admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert in 1578 authorizes him to discover & take possession of such remote, heathen, & barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I granted to Sir Thomas Gates & others those territories in America lying on the seacoast between the 34th and 45th degrees of north latitude & which either belonged to that monarch or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first or southern colony was directed to settle between the 34th and 41st degrees of north latitude, & the second or northern colony between the 38th and 45th degrees. *Shown at right.*



The extension of the rights granted to the Virginia Company by the Plymouth Council "from sea to sea."

In 1609, after some expensive & not very successful attempts at settlement had been made, a new & more enlarged charter was given by the Crown to the first colony, in which the King granted to the "Treasurer and Company of Adventurers of the City of London for the first colony in Virginia", in absolute property, the lands extending along the seacoast four hundred miles, & into the land throughout from sea to sea...

This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a *writ of quo warranto*, but the whole effect allowed to this judgment was to revest in the Crown the powers of government & the title to the lands within its limits..."

Marshall goes on to describe several other titles which historically have been granted throughout various places throughout the Americas, under the same unnamed established principle or method of granting described above, before continuing:

"Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the Crown or was vested in the colonial government, the King claimed & exercised the right of granting lands & of dismembering the government at his will.... In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants...

These various patents cannot be considered as nullities, nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only would never contain words expressly granting the land, the soil, & the waters. Some of them purport to convey the soil alone, & in those cases in which the powers of government as well as the soil are conveyed to individuals, the Crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted & exercised, the power to

dismember proprietary governments was not claimed, & in some instances, even after the powers of government were revested in the Crown, the title of the proprietors to the soil was respected.

Charles II was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, & he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors & declared their dependence immediately on the Crown. The King, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war...

… discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed (in war), it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted & neither had then extinguished.

These conflicting claims produced a long & bloody war which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded & guaranteed to Great Britain all Nova Scotia, or Acadie, & Canada, with their dependencies, & it was agreed that the boundaries between the territories of the two nations in America should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river & the lakes Maurepas & Ponchartrain, to the sea. This treaty expressly cedes, & has always been understood to cede, the whole country on the English side of the dividing line between the two nations, although a great & valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquired the country, & any after attempt to purchase it from the Indians would have been considered & treated as an invasion of the territories of France...”

Marshall goes on to describe several similar occurrences regarding the circumstances of title transfer, wherein the title transfers in the same manner, then continues:

“By the treaty which concluded the war of our revolution, Great Britain relinquished all claim not only to the government, but to the 'propriety & territorial rights of the United States' whose boundaries were fixed in the second article. By this treaty the powers of government & the right to soil which had previously been in Great Britain passed definitively to these states. We had before taken possession of them by declaring independence, but neither the declaration of independence nor the treaty confirming it could give us more than that which we before possessed or to which Great Britain was before entitled. It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian

right of occupancy, & that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

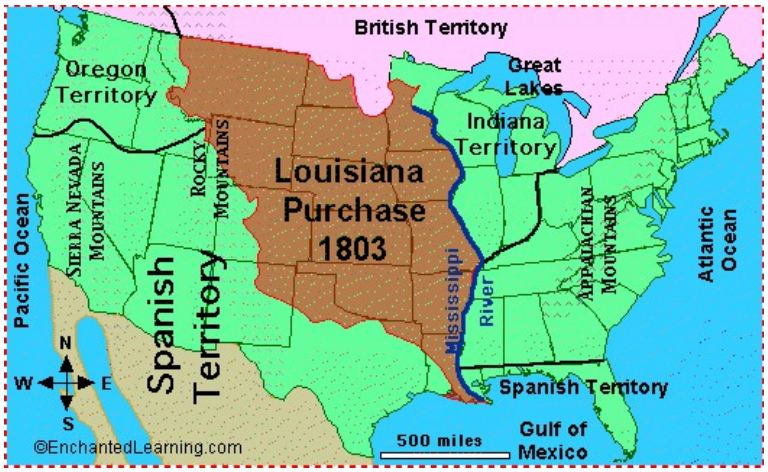
Virginia, particularly, within whose chartered limits... passed an act in the year 1779 declaring her 'exclusive right of preemption from the Indians of all the lands within the limits of her own chartered territory, & that no person or persons whatsoever have or ever had a right to purchase any lands within the same from any Indian nation except only persons duly authorized to make such purchase, formerly for the use & benefit of the colony and lately for the Commonwealth'... The act then proceeds to annul all deeds made by Indians to individuals for the private use of the purchasers... it may safely be considered as an unequivocal affirmance on the part of Virginia of the broad principle which had always been maintained that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded at the same session to open her land office for the sale of that country which now constitutes Kentucky, a country every acre of which was then claimed & possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The ceded territory was occupied by numerous & warlike tribes of Indians, but the exclusive right of the United States to extinguish their title & to grant the soil has never, we believe, been doubted.

After these states became independent, a controversy subsisted between them & Spain respecting boundary. By the treaty of 1795, this controversy was adjusted & Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war...



*www.**enchantedlearning.com**/history/us/1800/louisianapurchase/*

The United States, then, has unequivocally acceded to that great & broad rule by which its civilized inhabitants now hold this country. They hold & assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest...

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the Crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with & control it. An absolute title to lands cannot exist at the same time in different persons or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, & recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute & complete title in the Indians.

We will not enter into the controversy whether agriculturists, merchants, & manufacturers have a right on abstract principles to expel hunters from the territory they possess or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private & speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government & whose rights have passed to the United States, asserted title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them & the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained & established as far west as the River Mississippi by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it....

The title by conquest is acquired & maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, & that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, & become subjects or citizens of the government with which they are connected. The new & old members of the society mingle with each other; the distinction between them is gradually lost, & they make one people. Where this incorporation is practicable, humanity demands & a wise policy requires that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, & that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, & united by force to strangers.

When the conquest is complete & the conquered inhabitants can be blended with the conquerors or safely governed as a distinct people, public opinion, which

not even the conqueror can disregard, imposes these restraints upon him, & he cannot neglect them without injury to his fame & hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages whose occupation was war & whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible because they were as brave & as high spirited as they were fierce, & were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country & relinquishing their pompous claims to it or of enforcing those claims by the sword, & by the adoption of principles adapted to the condition of a people with whom it was impossible to mix & who could not be governed as a distinct society, or of remaining in their neighborhood, & exposing themselves & their families to the perpetual hazard of being massacred.

Frequent & bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, & skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker & more unbroken forests, & the Indians followed. The soil to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power & taken possession of by persons who claimed immediately from the Crown or mediately through its grantees or deputies...

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, & afterwards sustained; if a country has been acquired & held under it; if the property of the great mass of the community originates in it, it becomes the law of the land & cannot be questioned. So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, & to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, & be adapted to the actual condition of the two people, it may perhaps be supported by reason, & certainly cannot be rejected by courts of justice.

This question is not entirely new in this Court. **The case of *Fletcher v. Peck* grew out of a sale made by the State of Georgia of a large tract of country within the limits of that state, the grant of which was afterwards resumed. The action was brought by a subpurchaser on the contract of sale, & one of the covenants in the deed was that the State of Georgia was, at the time of sale, seized in fee of the premises."**

Related Definitions:

Fee: "A heritable *(capable of being inherited*[59]*)* interest in land, especially a fee simple absolute."[60]

Fee Simple Absolute: "An estate of indefinite or potentially indefinite duration. Ofent shortened to fee simple or fee"[61]

Seizin: "**1.** Completion of the ceremony of feudal investiture, by which the tenant was admitted into freehold. **2.** Possession of a freehold estate in land; ownership."[62]

Marshall continues:

> **"The real question presented by the issue was whether the seizin in fee was in the State of Georgia or in the United States... [T]he court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seizin in fee on the part of the state.**
>
> **This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring...**
>
> **Another view has been taken of this question which deserves to be considered. The title of the Crown, whatever it might be, could be acquired only by a conveyance from the Crown. If an individual might extinguish the Indian title for his own benefit, or in other words might purchase it... to allow an individual to separate a portion of their lands from the common stock & hold it in severalty, still it is a part of [the Crown's] territory & is held under them by a title dependent on their laws... the courts of the United States cannot interpose for the protection of [a non-issued] title. The person who purchases lands from the Indians within their territory incorporates himself with them... holds their title under their protection & subject to their laws. If they annul the grant, we know of no tribunal *(court)* which can revise & set aside the proceeding...**
>
> **By the treaties concluded between the United States & the Indian nations whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States without any reservation of their title. These nations had been at war with the United States, & had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country without a reservation of this land affords a fair presumption that they considered it as of no validity. They ceded to the United**

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59 **Black's Law Dictionary *Deluxe Tenth Edition* by Henry Campbell Black, Editor in Chief *Bryan A. Garner*. ISBN: 978-0-314-61300-4, *page 844* under "heritable"**

60 **" ", *page 732***

61 **" ", *page 734***

62 **" ", *page 1564***

States this very property, after having used it in common with other lands as their own, from the date of their deeds to the time of cession, & the attempt now made, is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain in 1763 [wherein] the Crown reserved under its own dominion & protection, for the use of the Indians, 'all the land & territories lying to the westward of the sources of the rivers which fall into the sea from the west & northwest', & strictly forbade all British subjects from making any purchases or settlements whatever or taking possession of the reserved lands... is supposed to be a principle of universal law that if an uninhabited country be discovered by a number of individuals who acknowledge no connection with & owe no allegiance to any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided & parceled out according to the will of the society, expressed by the whole body or by that organ which is authorized by the whole to express it...

A title might be obtained either by making an entry with the surveyor of a county in pursuance of law or by an order of the governor in council, who was the deputy of the King, or by an immediate grant from the Crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the Crown to vacant lands was acknowledged...

The peculiar situation of the Indians, necessarily considered in some respects as a dependent & in some respects as a distinct people occupying a country claimed by Great Britain, & yet too powerful & brave not to be dreaded as formidable enemies, required that means should be adopted for the preservation of peace, & that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites, & the power to do this was never, we believe, denied by the colonies to the Crown...

It has been stated that in the memorial transmitted from the Cabinet of London to that of Versailles, during the controversy between the two nations respecting boundary which took place in 1755, the Indian right to the soil is recognized...

[T]his recognition was made with reference to their character as Indians & for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of His Britannic Majesty to dominion over them.

The opinion of the Attorney & Solicitor General, Pratt & Yorke, have been adduced to prove that in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the Crown. The opinion of those persons would certainly be of great authority on such a question, & we were not a little surprised when it was read, at the

doctrine it seemed to advance. An opinion so contrary to the whole practice of the Crown & to the uniform opinions given on all other occasions by its great law officers ought to be very explicit & accompanied by the circumstances under which it was given, & to which it was applied before we can be assured that it is properly understood. In a pamphlet written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, & is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies, but there is reason to believe that the author of Plain Facts is, in this respect, correct. The opinion commences thus: 'In respect to such places as have been or shall be acquired by treaty or grant from any of the Indian princes or governments, your Majesty's letters patent are not necessary.'

The words 'princes or governments' are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their 'princes or governments'...

Much reliance is also placed on the fact, that many tracts are now held in the United States under the Indian title, the validity of which is not questioned...

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned...

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, & the able & elaborate arguments of the bar... the court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States, & that there is no error in the judgment which was rendered against them in the District Court of Illinois."[63]

The opinion incorporates aspects often associated with the Doctrine of Discovery, into U.S. law, though the doctrine itself is never mentioned throughout the case. The case established:

- the exclusive right of the discovering European nation to acquire the soil from the Indians
- the diminished sovereignty of tribes resulting as a consequence of discovery
- the Indian right of occupancy, which exists, is not a fee simple, & can only be conveyed to the discovering sovereign; but unless "recognized" by treaty, statute, or executive order."[64]

63 **Justia, US Supreme Court, Johnson v. M'Intosh 21 U.S. 543 (1823), (full text), pages 571-605:** https://supreme.justia.com/cases/federal/us/21/543/case.html

64 **Judicial Toolkit on Indian Law, Key Federal Cases. Prepared by Judge Joseph J. Wiseman, "Foundational Cases: The Marshall Trilogy":** www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf

For the sake of comparison to the court's opinion in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), we've included an overview & excerpts from The Doctrine of Discovery:

Rodrigo Borgia (Pope Alexander VI) ***& The Doctrine of Discovery*:**

From Saint Tarcissus Parish

Following the death of Pope Innocent VIII on July 25th, 1492 A.D., a meeting wherein Cardinal Rodrigo Borgia threatened to unleash *an embarrassing speech* regarding "certain indiscretions" about *an opposing prelate* who sought to ascend to the Papacy. *was held.* Borgia did so because he sought to secure votes for *himself* to become Pope, of which *he did* on August 11th, thus changing his name to Alexander VI.

He described *lawlessness* at the time as being an epidemic which needed to be addressed immediately, thus ordering investigations to be made against anyone suspected of inciting mayhem and/or destruction, decreeing that if these troublemakers were found guilty, they were to be hung on the spot, & their homes razed to the ground. Furthermore, he divided the city into four districts, assigning magistrates (lower court judges who handle lesser offenses) with *absolute* powers to enforce & maintain civil order. It soon became apparent as to his nefarious nature.

"**You must know that for those destined to dominate others, the ordinary rules of life are turned upside down & duty acquires an entirely new meaning.**"

~Rodrigo Borgia, acting as Pope Alexander VI[65]

On May 4, 1493, he issued a Papal Bull called "Inter Caetera", better known as The Doctrine of Discovery, which played *a central role* in the Spanish conquest of the Americas. The doctrine supported Spain's strategy to secure exclusive rights to the lands discovered by Columbus the previous year, effectively giving Spain a monopoly on the lands in the "New World".

The Bull stated that any land not inhabited by Christians was available to be **"discovered"**, & that **"the Catholic faith & the Christian religion be exalted & be everywhere increased & spread, that the health of souls be cared for & that barbarous nations be overthrown & brought to the faith itself."**

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65 **Saint Tarcissus Parish, "ALEXANDER VI: PORTRAIT OF PAPAL INFAMY" by MICHAEL WOJCIECHOWSKI of "The Faithful Wellspring:** http://sttars.org/blog/alexander-vi-portrait-of-papal-infamy/

Excerpts from "The Doctrine of Discovery":

Plaque outside the Archbishop's Palace, Valencia.

..."Catholic kings & princes, after earnest consideration of all matters, especially of the rise & spread of the Catholic faith, as was the fashion of your ancestors, kings of renowned memory, you have purposed with the favor of divine clemency to bring u nder your sway the said mainlands & islands with their residents & inhabitants... to bring them to the Catholic faith. This your holy & praiseworthy purpose... that the name of our Savior be carried into those regions... by your reception of holy baptism... you are bound to our apostolic commands... your duty, to lead the peoples dwelling in those islands & countries to embrace the Christian religion; nor at any time let dangers or hardships deter you therefrom... together with all their dominions, cities, camps, places, & villages, & all rights, jurisdictions, & appurtenances, all islands & mainlands found & to be found, discovered... be in the actual possession of any Christian king or prince... we make, appoint, & depute you ("deputize") & your said heirs & successors *lords of them* with full & free power, authority, & jurisdiction of every kind... we command you... you should appoint... worthy, God-fearing, learned, skilled, & experienced men, in order to instruct the... inhabitants & residents in the Catholic faith & train them in good morals. Furthermore, under penalty of excommunication... should anyone thus contravene, we strictly forbid all persons of whatsoever rank, even imperial & royal, or of whatsoever estate, degree, order, or condition, to dare without your special permit or that of your... heirs & successors, to go for the purpose of trade or any other reason... apostolic constitutions & ordinances & other decrees whatsoever to the contrary notwithstanding. We trust in Him from whom empires & governments & all good things proceed, that... you, with the Lord's guidance, pursue this holy & praiseworthy undertaking... while your hardships & endeavors will attain the most felicitious result, to the happiness & glory of all Christendom."[66]

66 **The Gilder-Lehrman Institute of American History, "The Doctrine of Discovery, 1493":** www.gilderlehrman.org/history-by-era/imperial-rivalries/resources/doctrine-discovery-1493

Cherokee Nation v. *Georgia,* 5 Pet. 1 (1831):

In June 1830 a delegation of Cherokee led by Chief John Ross & William Wirt, Attorney General in the Monroe & Adams administrations, to defend Cherokee rights before the U.S. Supreme Court. The Cherokee Nation requested an injunction, claiming that Georgia's state legislation had created laws that **"go directly to annihilate the Cherokees as a political society."**

Georgia pushed hard to bring evidence that the Cherokee Nation couldn't sue as a "foreign" nation due to the fact that they did not have a real constitution or a strong central government. Wirt argued that **"the Cherokee Nation [was] a foreign nation in the sense of our constitution & law"**, *not subject* to Georgia's jurisdiction. Wirt asked the Supreme Court to *void* all Georgia laws extended over Cherokee lands on the grounds that they violated the U.S. Constitution, U.S.-Cherokee treaties, & U.S. Intercourse (commerce) laws.

The Court did hear the case but declined to rule on the merits; Chief Justice Marshall referenced Article III § 2 of The Constitution in describing the court's **original jurisdiction** *(see page 5 for definition)* over "controversies" arising between a state *(here, the state of Georgia)* & "foreign states", holding that tribes are not foreign "states".

Excerpt from Article III § 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 Controversies between... a State... and foreign States..."

Marshall determined that the framers of the Constitution did not really consider the Indian Tribes as **"foreign nations"**, but rather as **"domestic dependent nation[s]"** with a relationship to the U.S. like that of a **"ward to its guardian"**:

> **"… Indians are acknowledged to have an unquestionable... right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes... can, with strict accuracy, be denominated foreign nations. They may, more correctly... be denominated 'domestic dependent nations'. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. ... they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.**
>
> **They look to our government for protection; rely upon its kindness & its power; appeal to it for relief to their wants... They & their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty & dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, & an act of hostility."**[67]

The Court held open the possibility that it yet might rule in favor of the Cherokee **"in a proper case with proper parties"**.[68]

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67 **Digital History, *"Resistance in the Court", Digital History ID 682,* 5 Peters 15-20 (1831):** www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=682

68 **Wilkinson, C. (1988). *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, Yale University Press. Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831).**

Marshall's language represents the genesis of the trust doctrine in federal Indian law, which holds that the U.S. has a trust responsibility to act on behalf of Indian Tribes.[69]

Related Definitions, from Merriam-Webster Dictionary's Online Dictionary[70]:

Pupilage: "the state or period of being a pupil."

Pupil: "**1.** a (student) in school or in the charge of a tutor or instructor. **2.** one who has been taught or influenced by a famous or distinguished person."

***Related Definitions,* from Black's Law Dictionary Deluxe Tenth Edition[71]:**

Guardian: "Someone who has the legal authority & duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability."

Ward: "A person, *usually a minor*, who is under a guardian's charge or protection."

Trust: "An equitable or beneficial right or title to land or other property, held for the beneficiary *(tribes, in this case)* by another person *(guardian)*, in whom resides the legal title or ownership."

Fiduciary Relationship: "A relationship wherein one person is under a duty to act for the benefit of another on matters within the scope of the relationship, which requires an unusually high degree of care."

Fiduciary Duty: "A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary *(such as an agent or a trustee)* to the beneficiary *(such as the agent's principal or the beneficiaries of the trust)*; a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary *(such as a lawyer or corporate officer)* to the beneficiary *(such as a lawyer's client or a shareholder)*; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person *(such as the duty that one partner owes to another)*. For example, directors have a duty not to engage in self-dealing to further their own personal interests rather than the interests of the corporation. – Also termed *duty of loyalty*; *duty of fidelity*; *duty of faithful service*, *duty to avoid conflicts of interest*."[72]

Fiduciary: "1. Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, & disclosure **2.** Someone who must exercise a high standard of care in managing another's money or property."

> **"The term 'fiduciary' is so vague that plaintiffs have been able to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* but simply had withheld property form the plaintiff in an unconscionable manner."**[73]

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69 **Judicial Toolkit on Indian Law, Key Federal Cases. Prepared by Judge Joseph J. Wiseman, "Foundational Cases: The Marshall Trilogy":** www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf

70 **Merrian-Webster's Online Dictionary, *"Pupilage":*** www.merriam-webster.com/dictionary/pupilage

71 **Black's Law Dictionary *Deluxe Tenth Edition* by Henry Campbell Black, Editor in Chief *Bryan A. Garner*. ISBN: 978-0-314-61300-4**

72 **Black's Law Dictionary *Deluxe Tenth Edition, page 617* under "duty"**

73 **D.W.M. Waters, *The Constructive Trust; The Case for a New Approach in English Law* ISBN: 9780485134087**

Worcester v. Georgia, 31 U.S. 515 (1832):

The Court held that the **"laws of Georgia could have no force"** in Cherokee territory. Here, Marshall defines Indian nations as **"distinct political communities"** having **"territorial boundaries within which their authority (that) is exclusive."** This seems to suggest that discovery, & the colonial charter grants under the discovery doctrine *(page 13)*, did not extinguish the inherent sovereignty of the Indians, & that the Cherokee's acts of entering into treaties & associating with a stronger nation for its protection likewise do not strip itself of the right to self-govern. Marshall states that tribes retain **"their original natural rights as the undisputed possessors of the soil from time immemorial."** Marshall also finds that the U.S. Constitution grants Congress the exclusive authority to regulate Indian affairs.

United States v. Kagama, 118 U.S. 375 (1886):

Under Chief Justice Morrison Waite, appointed by Ulysses S. Grant in 1874, the Court affirmed Congress' power to enact the Major Crimes' Act.[74] While the U.S. Government has recognized Indian tribes to have a state of semi-independence & pupilage, it has the right & authority, instead of controlling them by treaties, to govern them by acts of Congress, they being within the geographical limit of the U.S. & being necessarily subject to the laws which Congress may enact for their protection & for the protection of the people with whom they come in contact.

> **§ 9. "That immediately upon & after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, & larceny, within any territory of the United States, & either within or without the Indian reservation, shall be subject therefor to the laws of said territory relating to said crimes, & shall be tried therefor in the same courts, & in the same manner, & shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; & said courts are hereby given jurisdiction in all such cases; & all such Indians committing any of the above-described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, & within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, & in the same manner, & subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."**

The States have no such power over them in the case of internal disputes.

74 **Judicial Toolkit on Indian Law, Key Federal Cases. Prepared by Judge Joseph J. Wiseman, "Foundational Cases: The Marshall Trilogy":** www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf

The Indians owe no allegiance to a State within which their reservation, that may be established, & the State gives them no protection.[75]

This is a seminal *(influential)* case wherein the Court appears to deny the existence of a tribe's absolute sovereignty, & affirms Congress' power to regulate tribes, not through the Commerce Clause, but because **"the Indians are within the geographical limits of the United States."** This case appears to create the congressional plenary power doctrine, wherein Congress' authority over Indian tribes flows from the guardian/ward relationship & exists because such a relationship has **"never existed anywhere else."**

Seminole Nation v. United States, 316 U.S. 286 (1942):

Under Chief Justice Harlan F. Stone, appointed by Franklin Delano Roosevelt in 1941, The Court found that the U.S. government breached its fiduciary duty to the Seminoles when it continued to pay money to the tribal counsel even after the government discovered that the money has been misappropriated. The Court held that it has **"recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people,"** & then defined the scope of the government's obligations within equitable trust principles. To continue to pay the tribe's money when the government knew it was being fraudulently misspent was a violation of the government's duty to the tribe.

Lyng v. Northwest Indian Cemetery Protective Association, 471 U.S. 759 (1985):

Under Chief Justice Warren E. Burger, appointed by Richard Nixon in 1969, the Court ruled, while admitting that a road & logging project by the U.S. Forest Service would **"have devastating effects on traditional Indian religious practices"**, **the Court permitted the U.S. Forest Service to proceed with the project**.

The Court found that the project did not violate the Indians' free exercise of religion under the First Amendment as no religious practices were prohibited, noting that the Government was prepared to accommodate the religious practices to some extent, but that the Government could not to be entirely divested **"of its right to use what is, after all, its land."** *(emphasis in original)*. The Court also found no protection for the tribe under the American Indian Religious Freedom Act (AIRFA), holding that the congressional intent behind AIRFA was to insure the **"basic right of the Indian people to exercise their traditional religious practices"**, but *not* to **"confer special religious rights on Indians."** In response to this case, tribal religious advocates went to Congress & were able to get favorable amendments to several federal public land use planning statutes, the most important being the National Historic Preservation Act.[76]

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75 **Justia, United States v. Kagama 118 U.S. 375 (1886) – *full* text:** https://supreme.justia.com/cases/federal/us/118/375/case.html

76 **Judicial Toolkit on Indian Law, Key Federal Cases. Prepared by Judge Joseph J. Wiseman, "Foundational Cases: The Marshall Trilogy":** www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf

Purpose (Charter) of the National Historic Preservation Act (NHPA) of 1966:

(b) The Congress finds and declares that —

(1) the spirit & direction of the Nation are founded upon & reflected in its historic heritage;

(2) the historical & cultural foundations of the Nation should be preserved as a living part of our community life & development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, & energy benefits will be maintained & enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, & residential, commercial, & industrial developments, the present governmental & nongovernmental historic preservation programs & activities & inadequate to insure future generations a genuine opportunity to appreciate & enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying & administering them, & the encouragement of their preservation will improve the planning & execution of Federal & federally assisted projects & will assist economic growth & development

(7) ... it is... necessary & appropriate for the Federal Government to accelerate its historic preservation programs & activities, to give maximum encouragement to agencies & individuals undertaking preservation by private means, & to assist State & local governments & the National Trust for Historic Preservation in the United States to expand & accelerate their historic preservation programs & activities.[77]

77 **National Historic Preservation Act of 1966, as amended through 1992, Public Law 102-575,** ***(16 U.S.C. 470):*** www.nps.gov/history/local-law/nhpa1966.htm

1966 National Environmental Policy Act (NEPA): About NEPA & Section 106 Consultation:

The environmental review process initiated with the passage of the 1966 National Historic Preservation Act (NHPA) (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) by Congress ushered in a new approach to Federal project planning. The passage of the National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321) in December 1969 & its subsequent signing into law on January 1, 1970, expanded environmental reviews & formally established environmental protection as a Federal policy. NEPA & NHPA require Federal officials to "stop, look, and listen" before making decisions that impact historic properties & the human environment.

The regulations that implement Section 106, Protection of Historic Properties (36 C.F.R. Part 800), encourage agencies to plan "Section 106 consultations" coordinated with other requirements of other statutes, as applicable, such as NEPA.

Consultation means the process of seeking, discussing, & considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.

What is an Adverse Effect in Section 106?

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the property's integrity. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative. [36 C.F.R. § 800.5(a)(1)]

NEPA and CEQ's regulations require the preparation of an Environmental Impact Statement ("EIS") when a proposed Federal action may significantly affect the human environment. When an EIS is prepared, the NEPA review process is concluded when a record of decision (ROD) is issued. Historic properties, as a subset of cultural resources, are one aspect of the "human environment" defined by the NEPA regulations. Consequently, impacts on historic properties & cultural resources must be considered in determining whether to prepare an EIS.

Under NEPA, Federal agencies are encouraged to consult with Indian tribes early in the planning process, & to invite Indian tribes to be cooperating agencies in preparation of an EIS, when potential effects are on a reservation or affect tribal interests. Tribal consultation under NEPA can include effects to treaty, trust, & other natural resource issues, as well as to cultural resources in general, whether or not they meet the specific definition of historic property under the NHPA. The NEPA review may also include the government's responsibilities under Executive Order (EO) 12898.[78]

78 **Council on Environmental Quality, Executive Office of The P Resident and Advisory Council on Historic Preservation, "NEPA and NHPA; A Handbook for Integrating NEPA and Section 106, March 2013:** www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf

Executive Order (EO) 12898:

6-606: *Native American Programs.* Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.[79]

Additional Information Regarding NEPA & Section 106 Consultation:

While many SHPOs, THPOS, Indian tribes, & NHOs may find early involvement in the NEPA process challenging, it is important that agencies engage these Section 106 consulting parties early in project planning. Their involvement in the development of alternatives & consideration of historic preservation issues will benefit both the NEPA & the Section 106 processes.

Under the NHPA, consultation with Indian tribes & Native Hawaiian organizations is mandatory. It focuses on identifying & evaluating historic properties, assessing effects, and, where appropriate, resolving adverse effects to those properties. Consultation is required with any Indian tribe or Native Hawaiian organization that may attach religious & cultural significance to historic properties that may be affected by a proposed undertaking, regardless of whether the property is located on or off tribal lands.[80]

Los Angeles Times, "Clashes, arrests and fears — North Dakota pipeline protest at a boiling point", 10-24-2016:
www.latimes.com/nation/la-na-pipeline-protest-20161024-snap-story.html

Shown at Left: Water Protectors protesting against the destruction of their ancestral burial sites after the Section 106 Consultation Process was subverted & denied to the tribe, thereby causing their burial sites to be desecrated by construction workers. "Consultation & Consent" are *vital* aspects of maintaining healthy & resepectful relations with tribes.

www.standingrockclassaction.org/?page_id=146

79 **Federal Register Presidential Documents Vol. 59, No. 32 Wednesday, February 16, 1994 Title 3— The President Executive Order 12898 of February 11, 1994 Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations:** www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf

80 **Council on Environmental Quality, Executive Office of The P Resident and Advisory Council on Historic Preservation, "NEPA and NHPA; A Handbook for Integrating NEPA and Section 106, March 2013:** www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf

Key Sections from C.F.R. § 800.2 Participants in the Section 106 process:

(C.F.R. = "Code of Federal Regulations")

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 & to ensure that an agency official with jurisdiction over an undertaking takes legal & financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking & can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law *(includes Fiduciary Duty– see page 31)*.

(1) *Professional standards*. Section 112(a)(1)(A) of the NHPA *(see page 34)* requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

Note: *"Did the Secretary's professional standards & regulations take into consideration the Fiduciary Duty? Find out!*

(2) *Lead Federal agency*. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors*. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses & recommendations under this part. The agency official remains legally responsible for all required findings & determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards & guidelines.

(4) *Consultation*. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings & determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking & the scope of Federal involvement & coordinated with other requirements of other statutes... such as the National Environmental Policy Act, the Native American Graves Protection & Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act & agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures & mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance & advice on the application of the procedures in this part, & generally oversees the operation of the section 106 process. The Council also consults with & comments to agency officials on individual undertakings & programs that affect historic properties.

(1) ***Council entry into the section 106 process.*** When the Council determines that its involvement is necessary to ensure that the purposes of section 106 & the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met & notify the parties to the section 106 process as required by this part.

(2) ***Council assistance*****.** Participants in the section 106 process may seek advice, guidance & assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) ***State historic preservation officer.***

(i) The State historic preservation officer (SHPO) reflects the interests of the State & its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises & assists Federal agencies in carrying out their section 106 responsibilities & cooperates with such agencies, local governments & organizations & individuals to ensure that historic properties are taking into consideration at all levels of planning & development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes & Native Hawaiian organizations.

(i) ***Consultation on tribal lands*****.**

(A) ***Tribal historic preservation officer*****.** For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) ***Tribes that have not assumed SHPO functions*****.** When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the

SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation & concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to & on the same basis as consultation with the SHPO.

(ii) ***Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*** Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious & cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation... provides... a reasonable opportunity to identify (tribe's) concerns about historic properties, advise on the identification & evaluation of historic properties, including those of traditional religious & cultural importance, articulate its views on the undertaking's effects on such properties, & participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable & good faith effort to identify Indian tribes & Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify & discuss relevant preservation issues & resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, & court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government & Indian tribes... Consultation... should be conducted in a manner sensitive to the concerns & needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes & Native Hawaiian organizations attach religious & cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult... Federal agencies should be aware that frequently historic properties of religious & cultural significance are located on ancestral, aboriginal, or ceded lands... & should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of

tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council & the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) ***Representatives of local governments*****.** A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.... the local government may be authorized to act as the agency official for purposes of section 106.

(4) ***Applicants for Federal assistance, permits, licenses & other approvals*****.** An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO & others, but remains legally responsible for all findings & determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government to government relationships with Indian tribes.

(5) ***Additional consulting parties*****.** Certain individuals & organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) ***Nature of involvement.*** The views of the public are essential to informed Federal decision making in the section 106 process. The agency official shall seek & consider the views of the public in a manner that reflects the nature & complexity of the undertaking & its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals & businesses, & the relationship of the Federal involvement to the undertaking.

(2) ***Providing notice and information*****.** The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking & its effects on historic properties & seek public comment & input. Members of the public may also provide views on their own initiative for the agency official to consider in decision making.

(3) ***Use of agency procedures*****.** The agency official may use the agency's procedures for public involvement under NEPA or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart. Subpart B- The section 106 Process § 800.3 Initiation of the section 106 process.

(a) ***Establish undertaking*****.** The agency official shall determine whether the proposed Federal action... is a type of activity that has the potential to cause effects on historic properties.

(1) ***No potential to cause effects*****.** ***If the*** **undertaking is a type of** ***activity*** **that** ***does not have the potential to cause effects on historic properties, assuming such historic properties were present***, the agency official has no further obligations under section 106 or this part.

(2) ***Program alternatives*****.** If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) ***Coordinate with other reviews*****.** The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking & with any reviews required under other authorities such as the **National Environmental Policy Act**, the **Native American Graves Protection and Repatriation Act**, the **American Indian Religious Freedom Act**, the **Archeological Resources Protection Act** & **agency-specific legislation**, such as section 4(f) of the Department of Transportation Act...

(c) ***Identify the appropriate SHPO and/or THPO*****.** … The agency official shall... determine whether the undertaking may occur on or affect historic properties on any tribal lands...

(3) ***Conducting consultation*****.** The agency official should consult with the State Historic Preservation Officer *or* Tribal Historic Preservation Officer *("SHPO" or "THPO", sometimes the Tribal Officer has become the State Officer)* in a manner appropriate to the agency planning process... & to the nature of the undertaking & its effects on historic properties.

(4) ***Failure of the SHPO/THPO to respond*****.** If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) ***Consultation on tribal lands*****.** Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to & on the same basis... with... the Council...

(e) ***Plan to involve the public.*** In consultation... the agency official shall plan for involving the public ... The agency official shall identify the appropriate points for seeking public input & for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation... the agency official shall identify any other parties entitled to be consulting parties & invite them to participate... The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) ***Involving local governments and applicants.*** The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) ***Involving Indian tribes and Native Hawaiian organizations.*** The agency official shall make a reasonable & good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious & cultural significance to historic properties in the area of potential effects & invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) ***Requests to be consulting parties.*** The agency official shall consider all written requests of individuals & organizations to participate as consulting parties and, in consultation with the SHPO/THPO & any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(f) ***Identify other consulting parties.*** In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties & invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the... process moves forward.

(1) ***Involving local governments and applicants*****.** The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) ***Involving Indian tribes and Native Hawaiian organizations.*** The agency official shall make a reasonable & good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious & cultural significance to historic properties in the area of potential effects & invite them to be consulting parties. Such (tribe) that requests in writing to be a consulting party shall be one.

(3) ***Requests to be consulting parties*****.** The agency official shall consider all written requests of individuals & organizations to participate as consulting parties and, in consultation with the SHPO/THPO & any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties...[81]

81 **36 CFR PART 800 -- PROTECTION OF HISTORIC PROPERTIES (incorporating amendments effective August 5, 2004), § 800.2 Participants in the Section 106 process:** ww.achp.gov/regs-rev04.pdf

The *Prior Appropriations Doctrine*, & *Winters v. United States*, 207 U. S. 564 (1908), confirmed Tribes' "Reserved Senior Water Rights":

- The Supreme Court has found that treaties are superior to State laws, including State constitutions, & are accorded *equal status* with Federal statutes; *Article II, Section 2, Clause 2* of The U.S. Constitution provides treaties are *equal to Federal laws* & are *binding on states* as *the supreme law of the land*.
- The *prior appropriations doctrine (pages 40-44)* is used to allocate water based on the notion of "first in time, first in right" a water user obtains a right *senior & superior to all later users* if he or she appropriates the water by (1) diverting water *out* of a watercourse, & (2) *putting it to beneficial use* for such purposes as irrigation, mining, industrial, municipal, or domestic use. Once these conditions are met, the water user has established an appropriation date.
- Although Indian reserved water rights are not (always) expressed in treaties, they are *inherent* or *implied* rights. The *reserved water right as applied to Indians* is derived from *Winters v. U.S.,* 1908. This landmark Supreme Court case held that *"sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established"*. This *Doctrine of Federal Reserved Rights* established a vested right (a right so completely settled that it is not subject to be defeated or canceled) whether or not the resource is actually put to use, & enables the tribe to expand its water use over time in response to changing reservation needs. The Winters Doctrine provides that tribes have senior water rights, & *all later users* have junior rights."[82]
- The Standing Rock Sioux Tribe stands by its right to self-government as a sovereign nation, which includes taking a government-to-government stance with the states & federal governments. The tribe maintains jurisdiction on all reservation lands, including rights-of-way, waterways, & streams running through the reservation.[83]
- Within Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), Congress found that **"The continuation of the opportunity for subsistence uses by Alaska Natives on the public lands is *essential* to physical, economic, traditional, & cultural existence of a people."**[84]

Note: The above Title necessarily provides to non-Alaska Natives **"equal protection of the laws"**, in accordance with *The 14th Amendment*.

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82 **United States Department of Agriculture, U.S. Forest service *official website*, "Forest Service National Resource Guide to American Indian and Alaska Native Relations", *State and Private Forestry FS-600, April 1997, (previous editions obsolete)*: "Section 2: Treaty Rights and Forest Service Responsibilities", *pages 44 & 47*:** www.fs.fed.us/people/tribal/trib-2.pdf

83 **Standing Rock Sioux Tribe's *official website*, "History":** http://standingrock.org/history/

84 **Alaska National Interest Lands Conservation Act (ANILCA), *Title VIII* transcript:** www.web-ak.com/anilca/title08.html

1834: Fort William (Laramie) is Founded:

In 1834 Robert Campbell & William Sublette established the first "Fort Laramie" here. Officially named Fort William after pioneer, frontiersman, trapper, fur trader, explorer, & mountain man William Sublette, *an agent of the Rocky Mountain Fur Company*[85], the post was rectangular, & small, measuring only 100 by 80 feet. Hewn cottonwood logs 15 feet high formed the fort's palisade.

With the beaver trade already in decline, Campbell & Sublette recognized that the future of the fur trade lay in trading with the Native population for buffalo robes. Fort William enjoyed a near monopoly on the buffalo trade in this region until a competing trading post, *Fort Platte,* was built a mile away in 1841. This rivalry spurred Fort William's owners to replace their own aging fort with a larger, adobe walled structure named Fort John.

Here, for 56 years successive waves of trappers, traders, Native Americans, missionaries, emigrants, soldiers, miners, ranchers & homesteaders came to trade & interacted.

Tribes, especially the Lakota (Sioux), traded tanned buffalo robes here for a variety of manufactured goods. Each spring caravans arrived with trade goods at the fort. In the fall, tons of buffalo hides & other furs were shipped east. Throughout the 1840's, however, the take of buffalo robes continually declined & Fort John's role changed. In 1841, the first of many westward-bound emigrants arrived at Fort John. Tens of thousands of emigrants bound for Oregon, California, & the Salt Lake Valley would stop at the fort. The traders at Fort John did a brisk seasonal business catering to the needs of emigrants.

Fort William in 1840, by Alfred Jacob Miller:

Wyoming State Historic Preservation Office, "Fort Laramie":
www.wyohistory.org/encyclopedia/fort-laramie

85 **Sabin, Edwin Legrand; Howard Simon; Marc Simmons (1995).** ***Kit Carson Days, 1809-1868*****. University of Nebraska Press. p. 922. ISBN 978-0-8032-9238-3.**

In 1849, the U.S. Army offered to purchase Fort John as part of a plan to establish a military presence along the emigrant trails. The owners of the Fort agreed to the sale, & on June 26, the post was officially renamed Fort Laramie, & it began its tenure as a military post. The Army quickly constructed new buildings for stables, officers' & soldiers' quarters, a bakery, guardhouse, & a powder magazine to house & support the fort garrison.

As the years went by, the post continued to grow in size & importance. Fort Laramie soon became the principal military outpost on the Northern Plains. Fort Laramie also became the primary hub for transportation & communication through the central Rocky Mountain region as emigrant trails, stage lines, the Pony Express, & the transcontinental telegraph all passed through the post.

Fort Laramie played an important role hosting several treaty negotiations with the Northern Plains Indian Nations, the most famous of which were the Horse Creek Treaty of 1851 and the still controversial and contested Treaty of 1868.

Sadly, relations that began amicably between Native Americans & the Army began to change as the number of emigrants using the overland trails swelled. As conflicts grew, major military campaigns were launched from the fort against the Northern Plains tribes, who fiercely defended their homeland against further encroachment by a nation moving west.

As the Indian Wars came to a close Fort Laramie's importance diminished. The post was abandoned & sold at public auction in 1890. Over the next 48 years, it nearly succumbed to the ravages of time. Preservation of the site was secured, however, in 1938 when Fort Laramie became part of the National Park System.[86]

www.wyohistory.org/encyclopedia/fort-laramie

Right: Alfred Jacob Miller's pictures of Fort Laramie are the only ones that survive showing the fort's first configuration as a wooden stockade. Walters Art Museum.[87]

86 **National Park Service, *History & Culture*, "Fort Laramie: Crossroads of a Nation Moving West ":** www.nps.gov/fola/learn/historyculture/index.htm

87 **Wyoming State Historic Preservation Office, "Fort Laramie:** www.wyohistory.org/encyclopedia/fort-laramie

In 1849, The Discovery of Gold in The West led to the development of U.S. Water Policy, *"The Prior Appropriations Doctrine"*:

The American colonies were originally founded by the royal families of Europe, & were subject to *English* laws at the time. English water law was relatively simple & undeveloped, having unfolded in a land where water was abundant & conflicts over its use were correspondingly rare. The navigable waters of England belonged to the Crown & were available to the public for the purposes of navigation & fishing. The Crown's ownership prevented these what were considered *economic activities* from being monopolized by individuals, thereby reducing the potential for conflict. Rights to the use of waters *not* used for navigation were held by those who owned the banks of the streams, & were therefore known as *riparian rights*.[88]

Water use conflicts were so rare in England & in the original American states that a body of *water law* was not well developed in the first decades of this country's history.

The heart of the original riparian doctrine as developed in Europe as the idea that rivers were considered the most valuable places to establish buildings, *etc.*. Rivers enhanced the value of surrounding land, as each landowner along a river was entitled to receive the benefit of free-flowing water. This came to be known as the "natural flow" interpretation of the riparian doctrine. It held that landowners were allowed to remove water from streams *only* for basic domestic purposes such as drinking, bathing, cooking, & the watering of limited numbers of livestock. Landowners were otherwise required to leave rivers in an undiminished & unpolluted condition.[89]

The "*Reasonable Use* Riparian Doctrine":

The riparian doctrine was modified during the Industrial Revolution to allow riparian landowners to make reasonable use of the waters flowing over their lands. This "reasonable use" interpretation gave each landowner the right to the use of water flowing over the land without diminution or obstruction.[90]

The features of the reasonable use riparian doctrine:

1. Only riparian landowners could have rights to the use of water.
2. Owners of non-riparian lands & any others wishing to preserve free-flowing waters could not have *any* legal rights to the water.

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88 **Wilkinson, C. F. 1992. Crossing the Next Meridian: Land, Water, and the Future of the West. Island Press, Washington, D.C.**

89 **MacDonald, J. B. 1990. Riparian Doctrine. Pages 19-22 in Wright KR, ed. Water Rights of the Fifty States and Territories. American Water Works Association, Denver, CO.**

90 **Gould, G. A. 1990. Water Rights Systems. Pages 6-18 in Water Rights of the Fifty States and Territories. K. R. Wright, ed. American Water Works Association, Denver, CO.**

How the California Gold Rush Changed Historic Water Use Patterns:

Miners provided the primary impetus for changing the rules under the Spanish system allocating water in the American West, especially after gold was discovered in 1848.

The first gold deposits were found primarily along streams, and early miners usually established claims along the stream banks, where they could pan for gold directly.[91]

When the miners & other migrants moved to California, no government awaited them. The Gold Rush occurred near the end of the U.S.-Mexican War, after the Mexican government had been expelled, but before the region had been officially transferred to the United States.[92]

The miners adopted the "first come, first served" principle already in wide use on the public domain, where rights were based on occupation rather than ownership.[93]

The miners applied the same rules they used to govern access to mining claims. When applied to water, these rules became known as *the prior appropriation doctrine*.

The miners staked a claim to water by physically taking, or "appropriating" *what they needed*. Construction of the diversion necessary to take the water served as notice to other miners that the water was being appropriated. The first miners to appropriate water had the best right to continue using it. Subsequent appropriators were required to make do with what was left, if anything.

The "sluices" of the Gold Rush were usually long wood boxes with "riffles" in them to catch the gold:

"Ohio Repository, The (Canton, Ohio) May 8, 1845":
https://yesteryearsnews.wordpress.com/category/blue-collar/page/3/

91 **Gillilan, D. M. and T. C. Brown. 1997. *"Instream Flow Protection: Seeking a Balance in Western Water Use"*, Island Press, Washington, D.C.**

92 **Fischer, W.R. and W. H. Fischer. 1990. Appropriation Doctrine. Pages 23-30 in Wright KR, ed. Water Rights of the Fifty States and Territories. American Water Works Association. Denver, CO.**

93 **Gillilan & Brown, *"Instream Flow Protection: Seeking a Balance in Western Water Use"***

"Junior" vs. "Senior" Water Rights:

Even if located upstream from a prior user's diversion works, a subsequent "junior" water user was required to allow enough water to pass to meet the need of the downstream "senior" appropriator.

The "use it or lose it" principle was also incorporated within the prior appropriation system, so that miners not making beneficial use of their water were forced to surrender it to those who would.[94]

In the absence of definitive guidance from federal or state legislatures, the task of defining uniform principles fell to the California state courts.

In 1850, California's first legislature had adopted the common practice (or common law) as the state's legal foundation, & this meant that the allocation of water would be governed by riparian principles. But just one year later, the legislature adopted a statute that sanctioned the use of prior appropriation.

The uncertainty of their jurisdiction & the conflicting guidance given by the state legislature made it difficult for the early courts to define a uniform set of water allocation principles. Occasionally the courts developed hybrid doctrines that merged aspects of both the competing doctrines. Over time, their rulings increasingly reflected the precepts of the prior appropriation doctrine that prevailed in the mining camps. In 1855, the California Supreme Court clearly set forth its justification for adopting priority principles to resolve water disputes on the public domain. The court reasoned that the federal government had implicitly validated the new legal system by failing to object to it. *Irwin v. Phillips* (1855) is often cited as marking the birth of the prior appropriation doctrine.[95]

Left: "Man leans over a wooden sluice in California between 1890 and 1915. Rocks line the outside of the wood boards that create the sluice". Call number P-1252, ***Western History Department*** **of the Denver Public Library:** http://digital.denverlibrary.org/

Image location: Wooden_gold_sluice_in_California_between_1890_and_1915..jpg

94 **Anderson, T. L. and P. Snyder. 1997. Water Markets: Priming the Invisible Pump. Cato Institute, Washington, D.C.**

95 **Gillilan, D. M. and T. C. Brown. 1997. Instream Flow Protection: Seeking a Balance in Western Water Use. Island Press, Washington, D.C.**

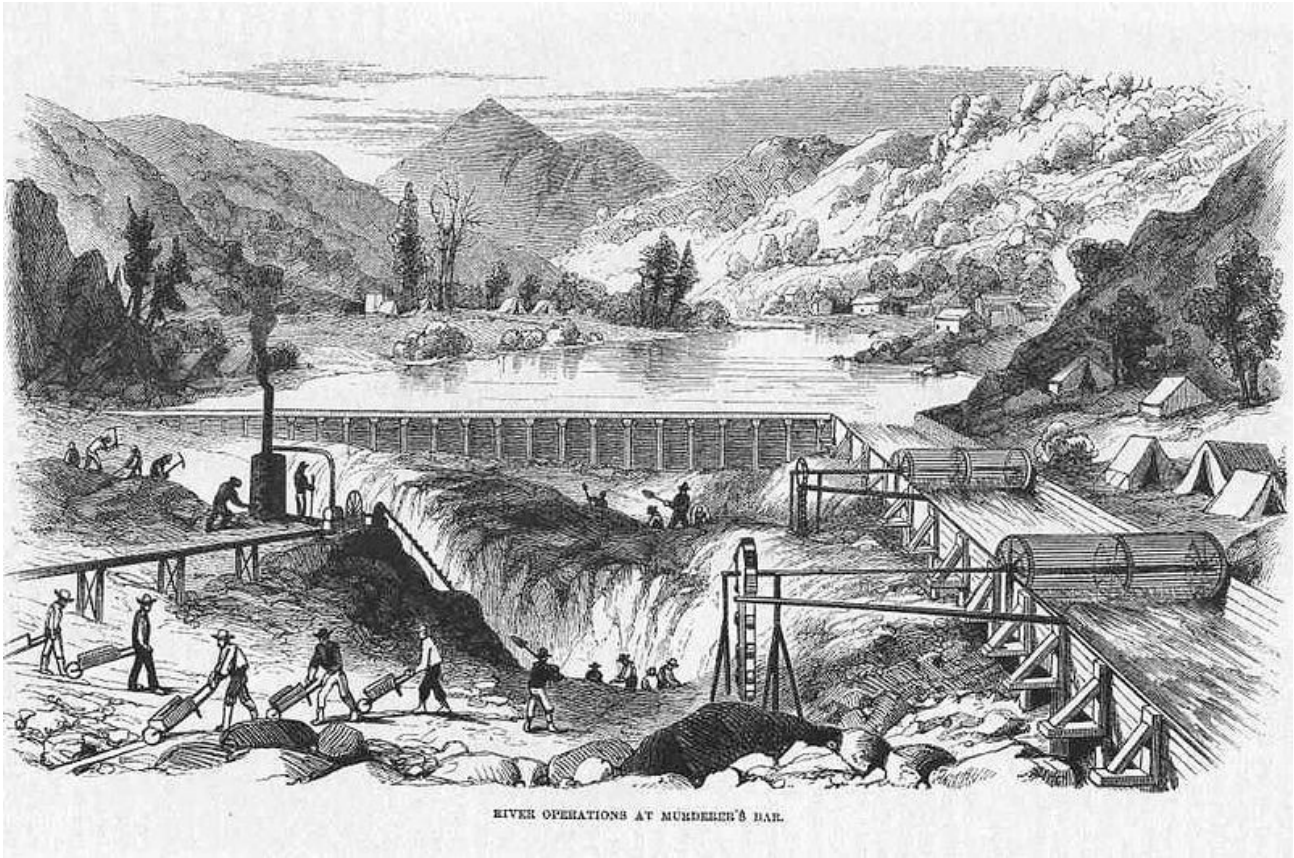
"Diverting Water" to Claim "Senior Rights" got *out of hand*:

By the 1860s, the use of the prior appropriation doctrine was firmly established as the mechanism by which the California courts would resolve water conflicts occurring on the public domain.

The basic features of the prior appropriation doctrine:

1. The right to use water could be obtained by taking the water & putting it to beneficial use.
2. The right was limited to the amount of water that was beneficially used.
3. First in time was first in right.
4. The water must be used or the right was lost.[96]

It soon became apparent that there were a number of problems with the operation of this system. One of the greatest problems was the prevalence of claims for excessive amounts of water. These problems eventually led people to call for adoption of new administrative systems to control the allocation & distribution of water.



"Seeking gold in California river bottom", mid 1850s, Harper's Weekly Magazine, no Artist cited: *https://commons.wikimedia.org/wiki/File:Gold_seeking_river_operations_California.jpg*

96 **Wilkinson, C. F. 1992. Crossing the Next Meridian: Land, Water, and the Future of the West. Island Press, Washington, D.C.**

How The Prior Appropriations Doctrine Developed into Legal System:

In the prior appropriation system, to ensure that water was distributed in accordance with the priorities of the rights, any water user not receiving their legal share of a river's flow could place a "call" on the river. In response to the call, agents of the state required any water users with rights junior to those of the calling water user to curtail their diversions until the senior right was satisfied.

The states of *North* & *South* Dakota, Nebraska, Kansas, Oklahoma, & Texas all tried to take advantage of the developmental benefits of the new prior appropriation doctrine without upsetting the expectations of citizens who based their water claims on the common law riparian doctrine.[97]

Constitutions or statutes of many western states emphasize the fact that appropriations will no longer be valid just because they benefit someone; rights will be granted only if proposed water uses are also consistent with the public interest.

Water for domestic & for municipal needs receives *the highest priority* in all of the states that have established preferences, the use of water for agriculture is favored over all *but domestic uses*.[98]

Notice:

All aforementioned historical documentation re: "The Prior Appropriations Doctrine" was compiled by **Women in Natural Resources, Vol. 24 No. 3, 2003-04, "Evolution of U.S. Water Policy: Emphasis on the West" By Daina Dravnieks Apple**, *natural resource economist with the U.S. Forest Service, Staff Assistant to the Deputy Chief for Programs, Legislation, & Communication in Washington D.C. She served as Administrator, Workplace Relations in the Pacific Southwest Region in California; in the Washington Office she served as an economist on the Policy Analysis Staff, as a strategic planner for the National Forest System, & as an Assistant Regulatory Officer. She also was the Regional Land Use Appeals Coordinator, & was on the Engineering Staff in Region 5, San Francisco. She began her Forest Service career as an economist at the Pacific Southwest Research Station, Berkeley. Apple was elected Fellow of the Society of American Foresters, & is Past Chair of the National Capital SAF. She is a member of Sigma Xi Scientific Research Society; was elected Fellow of Phi Beta Kappa, & served as President of Phi Beta Kappa Northern California Association, & served as National Secretary. She is a graduate of the University of California at Berkeley, where she earned a B.Sc. in the Political Economy of Natural Resources and an M.A. in Geography.*[99]

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97 **Fischer, W.R. and W. H. Fischer. 1990. Appropriation Doctrine. Pages 23-30 in Wright KR, ed. Water Rights of the Fifty States and Territories. American Water Works Association. Denver, CO.**

98 **Wilkinson, C. F. 1992. Crossing the Next Meridian: Land, Water, and the Future of the West. Island Press, Washington, D.C.**

99 **Full Article, "Evolution of U.S. Water Policy: Emphasis on the West":** www.webpages.uidaho.edu/winr/applewater.htm

1853: The Use of *Water Cannons* used around Nevada County, California in order to Blast Gold out of Mountainsides*:*

Prior to implementation of environmental regulations, Edward Matteson discovered easier access to gold by using jets of highly pressurized water to erode hillsides while diverting the sediment runoff through sluice boxes or to holding ponds. Matteson honed his technique in 1853 at locations in & around Nevada City, California, & the hillsides throughout western Nevada County were soon exposed to large scale industrial-sized monitors capable which *pulverized* hillsides.

Hydraulic Mining, French Corral, ca1866:

Photo from ***Library of Congress, as recorded by the "Mining History Association", Nevada City, California:*** *www.mininghistoryassociation.org/NevadaCity.htm*

1860s: North Bloomfield Mining & Gravel Company Dominates Industry:

During the 1860s, when hydraulic mining was at its apex in the Sierra Nevada foothills, entire hillsides were decimated & washed through gigantic sluices.

The North Bloomfield Mining & Gravel Company[100], established in 1866, is the embodiment of the hydraulic mining era, as no other operation matched its scale, expense or productivity.

The company was owned by 30 different venture capitalists from San Francisco, led by a consortium of railroad barons.[101]

Hydraulic mining used high pressure hoses to funnel water through the nozzle of a monitor to wash rocks & gold-bearing gravel away:

The Union, "Hydraulic mining leads to historic environmental decision" by Mathew Renda:
www.theunion.com/news/local-news/hydraulic-mining-leads-to-historic-environmental-decision/

100**Malakoff Diggins State Historic Park, about the "North Bloomfield Gravel Mining Company":** malakoffdigginsstatepark.org/history/north-bloomfield-gravel-mining-company/

101**The Union, "Hydraulic mining leads to historic environmental decision" by Mathew Renda:** www.theunion.com/news/local-news/hydraulic-mining-leads-to-historic-environmental-decision/

~1880: Downstream Citizens in Marysville
Organize Grassroots Lawsuit & Campaign to *Save the Water*:

The operation consisted of a nearly 8,000-foot-long drainage tunnel at the current site of the Malakoff Diggins State Historic Park & seven large monitors capable of dislodging 50,000 tons of gravel daily during the peak of operation.

After the gravel was sifted for gold, much of the leftover sediment was dispensed down the Yuba River where it accumulated rapidly downstream.

"Photographic Print of Gold Mining in Nevada County, California, 1888", posted by Yoel Rider: *https://guide.alibaba.com/shop/photographic-print-of-gold-mining-in-nevada-county-california-1888_52941691.html*

All that debris had to go somewhere & almost immediately, with the invention of hydraulic mining, came the effects of the removal of many layers of ancient gravel beds laid down millions of years ago. People down below the diggins, in the valleys & all the way to San Francisco Bay, felt the impact of the mountain's destruction.

As hydraulic mining continued to add enormous sediment loads to downstream locations throughout the Sacramento Valley, habitations along the river began to experience increasingly devastating flooding problems, & navigation of rivers became increasingly treacherous for steamboats & other watercraft. Farmers also began experiencing the detrimental effects from the large-scale sediment deposits traveling downstream.[102]

Eventually, outraged citizens of Marysville met & formed the *Anti-Debris Association* & gathered information to be used in lawsuits against hydraulic mining companies. The legislature debated the mining debris question & finally passed legislation authorizing the creation of a *State Engineering Office* with authority to examine the water problem, particularly as it related to matters of irrigation & debris. They attributed ***negligence*** on the part of the hydraulic miners. The group presented factual evidence to support its claims, & the miners threatened to boycott valley businesses.

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102 **The Union, "Hydraulic mining leads to historic environmental decision" by Mathew Renda:** www.theunion.com/news/local-news/hydraulic-mining-leads-to-historic-environmental-decision/

1884: Citizens file 20,000 Pages of Testimony,
Leading to First Environmental Law in the U.S. "The Sawyer Decision":

Cite: Woodruff vs. North Bloomfield Gravel Mining Company & Others v.18, no.14-48[103]

In the fall of 1882, Edward Woodruff of Marysville filed suit in the United States Ninth Circuit Court in San Francisco seeking a perpetual injunction against the North Bloomfield and other mines on the Yuba River, & on the morning of June 18, 1883, at 5:00 a.m. disaster struck when the English Dam gave way. This was a wood & stone structure built in 1859 on the Middle Yuba River, & was more than 130' high. Capacity was 650,000,000 cubic feet, & it was *full* at the time the dam broke. Water poured down the channel of the Middle Yuba River & swept away everything in its path. It took an hour & a half for the dam to drain dry. By 3:00 p.m. levees broke near Marysville, causing a flood that deposited *thousand of tons of sediment into the Feather River*. The dam was inspected just days before & no problems were detected. It has been theorized that *sabotage* was the cause of the break.

On January 7, 1884, after two years of litigation in the case of Woodruff vs. North Bloomfield Gravel Mining Company & over 2,000 witnesses with 20,000 pages of written testimony taken during the trial, Judge Lorenzo Sawyer's decision ("The Sawyer Decision") was handed down. The decision prohibited the discharge of debris in the Sierra Nevada regions. It imposed strict laws regarding any debris sent downstream & it did close *all loop-holes*. In essence, the ruling stated that "all tailings must stop".[104]

Sawyer, who was a federal judge (appointed by President Ulysses S. Grant) at the time, is roundly credited for handing down the first environmental decision from a judge in the history of the United States of America. The decision abruptly brought the hydraulic mining era to a close.

Right: Malakoff Diggins & several other sites easily spotted throughout western Nevada County, remain as a testament to the environmental devastation the form of mining wrought as early settlers sought their riches.[105]

Malakov Diggins State Park photo gallery:
www.parks.ca.gov/ImageGallery/?page_id=494

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103 **v.18, no.14-48, WOODRUFF V. NORTH BLOOMFIELD GRAVEL MINING CO. AND OTHERS. Circuit Court, D. California. January 7, 1884, 1. PUBLIC AND PRIVATE NUISANCE FROM MINING DEBRIS:** https://law.resource.org/pub/us/case/reporter/F/0018/0018.f.0753.pdf

104 **Malakoff Diggins State Historic Park, "The Sawyer Decision:** Legal Action Taken To Stop Hydraulic Mining!" malakoffdigginsstatepark.org/history/north-bloomfield-gravel-mining-company/sawyer-decision/

105 **The Union, "Hydraulic mining leads to historic environmental decision" by Mathew Renda:** www.theunion.com/news/local-news/hydraulic-mining-leads-to-historic-environmental-decision/

In Addition to Sparking U.S. Water Policy, The Gold Rush *also* led U.S. Officials to Negotiate *Safe Passage* Through The Black Hills:

The U.S. government considered the west a "permanent Indian frontier"— an inhospitable land inhabited by "Indians" who were known for *raiding* trespassing settlers. The discovery of gold in California in 1849 at Sutter's Mill, *however*, created a high demand for settlers to travel west.

Posted to "The Way West" by Jean: *www.pinterest.com/OlympedeGouges/the-way-west/*
Map by NYSTROM Maps & Globes: *www.nystromeducation.com/c/nys-mapsandglobes.web?s@oH_pHyffGMnqg*

In the early 1850s, overland travelers *en route* to gold fields via the Platte River Road set off a series of confrontations between gold & *land* seeking European setters, & native tribes *concerned* about the masses encroaching on their already *pushed-back* homelands.[106] Travelers, frightened by tribal raids, demanded government protection.

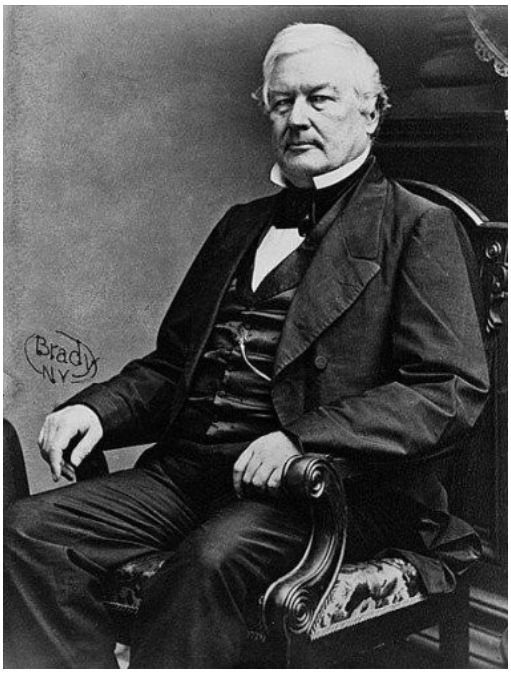
"Simply Marvelous Horse World- The Wonderful World of Horses, article: "Right Out Of History: Wagon Trains Celebrate Minnesota 150th Anniversary": *https://simplymarvelous.wordpress.com/2008/05/07/right-out-of-history-wagon-trains-celebrate-minnesota-150th-anniversary/*

Frederic Remington's painting called "The Emigrants", painted 1903.

Preserved on "Museum of Fine Arts", 1000 museums webpage: *www.1000museums.com/art_works/frederic-remington-the-emigrants*

106 **Official Portal for North Dakota State Government,** ***The History & Culture of The Standing Rock Oyate:*** www.ndstudies.org/resources/IndianStudies/standingrock/migration.html

A Treaty to Be Negotiated:



Miller Center, University of Virginia:
http://millercenter.org/president/fillmore

As a result, *in 1851, under 13th U.S. President & last President of the Whig Party, Millard Fillmore,* the federal government brought many of the Plains tribes together at Fort Laramie, *including Lakota & Dakota bands*, to establish *not only* peace between interwarring tribes, but *also* between the tribes & settlers.

Whig Party:

In 1834 political opponents of President Andrew Jackson had organized a new party to contest pro-slavery Jacksonian Democrats. Guided by their most prominent leader, Henry Clay, they called themselves Whigs—the name of an earlier English anti-monarchist, anti-Catholic party— the better to stigmatize the seventh president as 'King Andrew". They were immediately derided by the Jacksonian Democrats as a party devoted to the interests of wealth & aristocracy, a charge they were never able to completely shake. Whigs were seen as champions of banks, business, corporations, economic growth, the positive liberal state, humanitarian reform, & morality in politics, & also as *opponents* of expansionism, executive tyranny, "states' rights", labor, & voting rights.

The party was founded by individuals united in their antagonism to Jackson's war on the Second Bank of the United States & his high-handed measures in waging that war, & his ignoring of Supreme Court decisions, the Constitution, & Indian rights embodied in treaties.

In Congress, Whigs supported the Second Bank of the United States, a high tariff, distribution of land revenues to the states, relief legislation to mitigate the effects of the great depression that followed the financial panics of 1837 & 1839, & federal reapportionment of House seats (a 'reform' likely to enlarge Whig representation in Congress). Studies of voting patterns in the states reveal Whig support of banks, limited liability for corporations, prison reform, educational reform, abolition of capital punishment, & temperance (abstaining from alcohol). They were considered a moralist, *anti-war party*, who attracted persons unhappy with brutal treatment of blacks & Native Americans. In 1852, as slavery's expansion became the great issue of American politics, Whigs suffered a drastic decline in popularity, & by 1854 they were no longer able to hold the support of 'Cotton Whigs'. who found a more congenial political home in the Democratic party, or of 'conscience Whigs' who broke away to form a less moderate, & new, *Republican party.*[107]

"May God save the country, for it is evident *the people* will not."

– Millard Fillmore

107 **History.com, "Whig Party":** www.history.com/topics/whig-party

1851: "*The Treaty of Fort Laramie* with Sioux, etc." aka "The Horse Creek Treaty", A Public Ceremony Arranged:

In the autumn of 1850, St. Louis newspapers announced a conference to negotiate rights of passage through American Indian lands for westward-bound emigrants. Fur traders, Indian agents, mountain men, missionaries & former U.S. Superintendent of Indian Affairs Thomas Harvey had been pushing this idea since 1846, when the swelling number of emigrants led to increasing complaints from the tribes. Harvey lobbied for a **"general council"**, arguing that **"a trifling compensation for this right of way"** would **"secure [the Indians'] friendship."**

That year, Congress had authorized a conference for all the prairie tribes west & south of the Missouri River, & north of Texas. Its stated purpose was to benefit the tribes, promising them ample compensation for depredations against them & also an annuity—**"an annual present, in goods, from their Great Father."**

The government encouraged the tribes to attend with all their women & children, explaining that a large force of soldiers would be on hand to ensure their safety. The government would **"divide & subdivide the country"**; this would be **"for the permanent good of the Indians"**; to **"extinguish. . .the bloody wars which have raged from time immemorial."** The conference was set to begin Sept. 1st, 1851 at Fort Laramie.

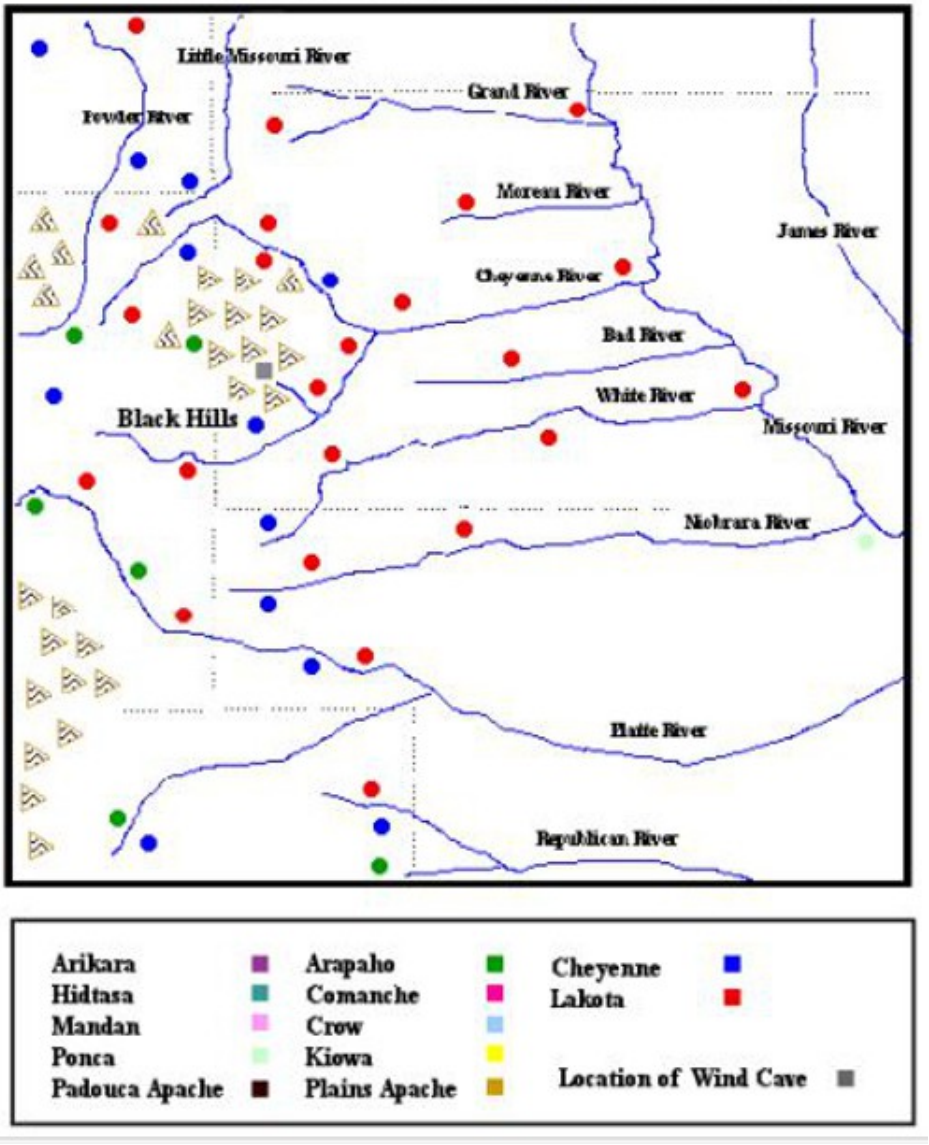
Conference co-commissioner David Mitchell left St. Louis July 24, & on August 30 he reached Fort Laramie, where thousands of Sioux, Arapaho & Cheyenne people waited. The Comanche, Kiowa, & Apache—tribes of the southern plains—had refused to come. The Shoshone, however, had come in force from their homelands in the northern Great Basin & along the Continental Divide. They, however, had not been invited.

After consulting with the assembled tribes, the commissioners decided to move the conference about 30 miles east, to the mouth of Horse Creek on the North Platte River, just east of the present Wyoming-Nebraska border. Arriving there on September 5, Mitchell assigned the Platte's north bank to tribal encampments and Horse Creek's west side to the traders and interpreters. The east side of Horse Creek would be the meeting grounds. The council would open on Monday, September 8.

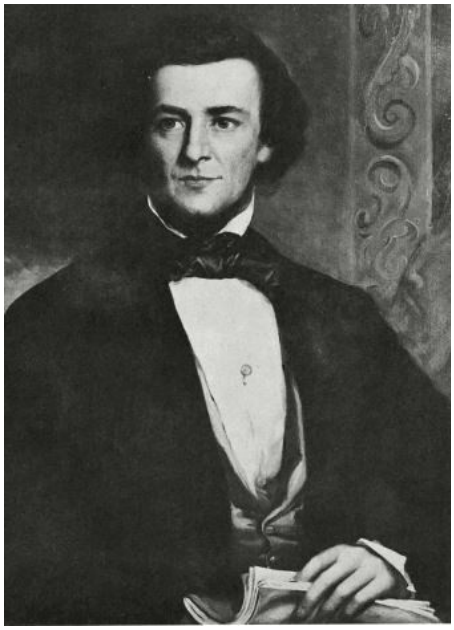
After smoking the peace pipe, Mitchell opened the council. **"We do not come to you as traders,"** he said. **"We do not want your land, horses, robes, nor anything you have; but we come to advise with you, & to make a treaty with you for your own good."** He then promised the tribes compensation for 50 years, in part for allowing **"the right of free passage for [the Great Father's] White Children"** over the increasingly popular emigrant trails.

The government wanted to establish tribal territories so that the tribes' Great Father could **"punish the guilty & reward the good"** for any future depredations. These divisions, Mitchell assured the tribes, were **"not intended to take any of your lands away…or to destroy your rights to hunt, or fish, or pass over the country, as heretofore."** Instead, he explained that the boundaries would bring peace, & he emphasized again that the tribes would be well compensated.

In the 1850s, there were many reports specifically identifying the whereabouts and numbers of Lakotas, Cheyennes, and Arapahos. The principal sources of information for this era include the Annual Reports of the Commissioner of Indian Affairs and Henry Schoolcraft‟s Historical and Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States (1851-57:3:629-631). There are also Lt. G. K. Warren‟s 1855 map (in McDermott 1952:14-15) and reports from the Harney Expeditions (Warren 1875). Finally, Ferdinand Hayden‟s work On the Ethnography and Philology of the Indian Tribes of the Missouri Valley (1862), was based on material he collected on his many different visits to the region.[108]



108 **Paragraph & map was compiled by the National Park Service, “Wind River Cave, History & Culture: Chapter Five TREATIES AND BROKEN PROMISES: 1851 to 1877 “, page 90-91:** www.nps.gov/wica/learn/historyculture/upload/-7e-5-Chapter-Five-Treaties-and-Broken-Promises-Pp-84-132.pdf



Colonel David D. Mitchell, participant in the Fort Laramie Treaty Conference of 1851. (Courtesy of the Missouri Historical Society)

Opening Ceremony— Commissioner Mitchell said he was present on important business, & wanted everything done in good faith, then proclaimed they would smoke the pipe of peace, allowing only those whose hearts were free from deceit to touch the pipe. A large red pipestone calumet (ceremonial pipe) with a three foot stem ornamented with bright colored beads & hair was produced. The proper mixture of tobacco and kinnikinnick, which was the inner bark of red willow, was made up & put in the bowl. The interpreter of the Sioux then lit the pipe & handed it to Colonel Mitchell, who took a few puffs & passed it to Major Fitzpatrick. In turn he passed it on to the Sioux chiefs, & by them to the chiefs next in the circle. The natives smoked with great ceremony. The most common form was to point the pipe to the four corners of the compass, then up to the Great Spirit and down to the bad. To show the utmost degree of sincerity & truthfulness most of the smokers added an additional gesture for the particular occasion. This was done by drawing the right hand slowly along the stem from the bowl to the throat, which was symbolic of supreme good faith & the assurance of deep solemnity & reassurance.[109]

"Too Many Indians, *Not Enough Chiefs*"— Mitchell then asked each tribe to designate a single chief, along with one or two tribal members to be fêted (decorated) in Washington, D.C. — a longstanding government practice with tribal representatives. He encouraged the tribes to take the next two days to **"think, talk, & smoke over"** the proposals.

Peace Between Long-Warring Tribes, & The U.S Government— That afternoon, the Cheyenne offered reparations for the dead Shoshone by **"cover[ing] the bodies"**—a ceremony of apology. After offering a feast & gifts to their former enemies the Shoshone, the Cheyenne returned the scalps of the fallen & swore they had not danced a scalp dance to celebrate the taking of the Shoshone scalps. The brothers of the Shoshone victims accepted the scalps, embraced the Cheyenne & distributed the Cheyenne gifts among the Shoshones. After more speeches from both sides, the Cheyenne & Shoshone joined together in song and dance.

That night, the Mandan, Hidatsa, Arikara & Assiniboine tribes arrived from the upper Missouri River. The arrival on September 10 of a contingent of the Crow tribe from what's now Montana swelled the number of natives gathered to an estimated 10,000.

Terra Blue, a Brulé Sioux, explained that, despite the tribe's good intentions, the Sioux, the largest of the Plains tribes, could not appoint a single chief. That was simply not the way their politics worked.

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109 **Nebraska State Historical Society, article *"The Great Indian Treaty Council of 1851"* by Burton S. Hill, *page 98*:** www.nebraskahistory.org/publish/publicat/history/full-text/NH1966Indian_Treaty_1851.pdf

Separate Lands for Separate Tribes— The hard work of defining tribal territories began on Friday, September 12, despite the fact that questions of compensation & tribal chiefs & representatives remained unsettled. Since no one knew the region *or the tribes* better than the renown beloved Jesuit Priest Pierre-Jean De Smet, & also mountain man James Bridger: Mitchell instructed them, *with the assistance of the traders*, to create a map that respected traditional homelands.

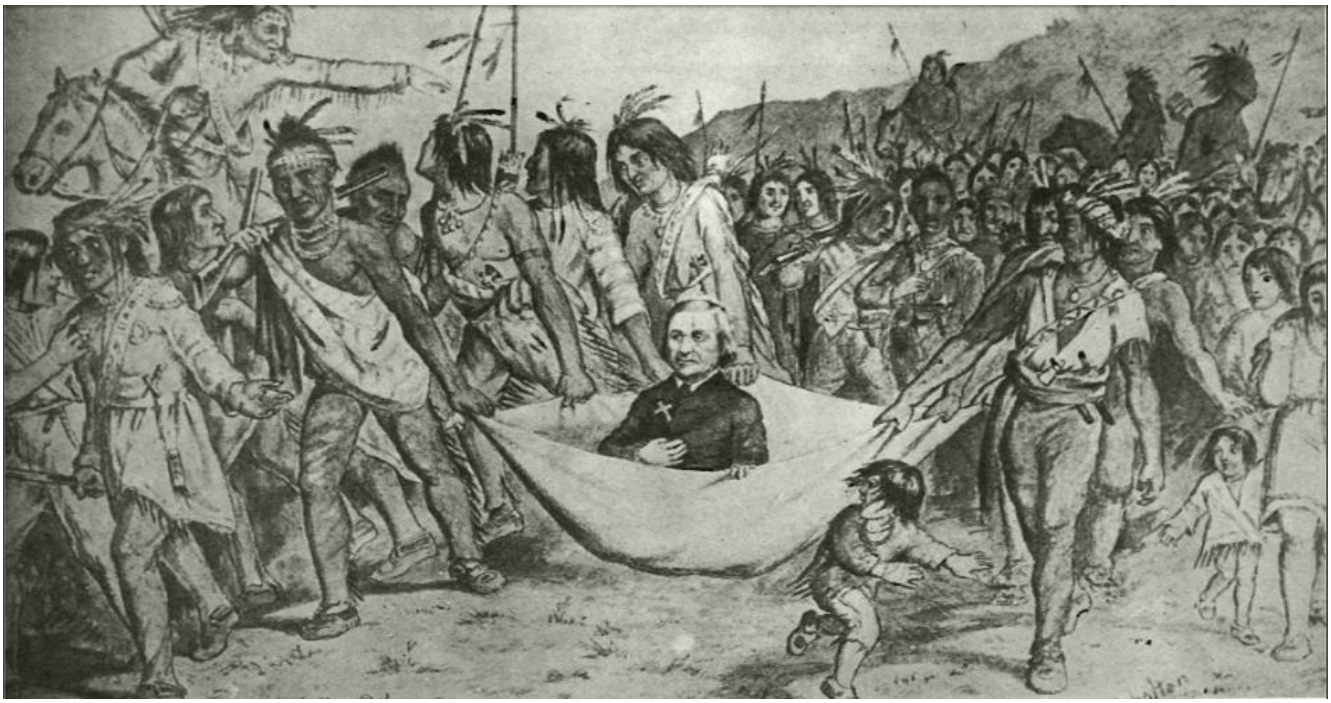
On Saturday, the commissioners presented their map to the tribes. The Oglala Sioux complained that their hunting grounds should extend south of the Platte, which the map designated as Cheyenne & Arapaho territory. Mitchell explained again that any tribe could venture into any region, as long as their intentions were peaceful. Although the Sioux remained skeptical, the tribes finally agreed to the newly defined territories.

Missouri River trader Alexander Culbertson made sure that lands north & west of the Crow territory tribe was designated for the Blackfeet, even though the Blackfeet were not present.

Baptisms— On Sunday, De Smet celebrated the Feast of the Exaltation of the Cross in front of a great crowd of Indians, mixed-bloods & whites. Afterwards, he baptized the willing. Ultimately, De Smet recorded baptisms of 239 Oglala; 305 Arapaho; 253 Cheyenne; 280 Brulé and Osage Sioux; 56 "in the camp of Painted Bear."

Nearly all were children. He also baptized 61 mixed-bloods. In return, the Sioux named him Watankanga Waokia, "The Man Who Shows His Love for the Great Spirit."

Tribally Renown *Father Pierre De Smet* being carried in for the Opening Ceremony:



From Nebraska State Historical Society, article "The Great Indian Treaty Council of 1851" by Burton S. Hill: *www.nebraskahistory.org/publish/publicat/history/full-text/NH1966Indian_Treaty_1851.pdf*

A New Chief for the Sioux:

By Monday, the Oglala, Brulé, Miniconjou & other bands of Sioux still had not named a single leader for the entire tribe. Frustrated, Mitchell announced he would choose for them. He selected the Brulé warrior Conquering Bear, described in the *Missouri Republican* as **"connected with a large and powerful family, running into several of the bands, & although no chief … a brave of the highest reputation."**

With trepidation, because the idea of a single leader was so contrary to tribal tradition, & because he himself was not yet considered a leader even among the Brulés, Conquering Bear accepted. **"I will try to do right to the whites, & hope they will do so to my people,"** he said, according to the newspaper.

The Treaty Signed:

Finally, on September 17, twenty-one chiefs representing the Sioux, Cheyenne, Arapaho, Crow, Mandan, Hidatsa, Arikara & Assiniboine signed the Horse Creek Treaty. They agreed to the government's right to **"form roads & establish military posts"** in Indian territory; terms for maintaining peace & for assigning reparations for losses on either side; indemnity for any prior destruction caused by the emigrants; $50,000 to each tribe for those damages; & $50,000 in annual payments per tribe for 50 years.

Mixed Bloods & Gifts:

The traders, most of whom had married Indian women, sought a mixed-blood allotment. De Smet called this **"the sole means of preserving union among all those wandering & scattered families, which become every year more & more numerous."**

Editor Chambers noted: **"The white man who has taken a squaw for a wife, however honestly & virtuously they may have lived, is, with his wife, for ever debarred admission into society. He has shut himself out, & must reap the consequences which his own course has entailed upon him."**

The proponents suggested lands for the mixed-bloods near present-day Denver, but this was Cheyenne & Arapaho territory & they objected. **Never legally recognized, many mixed-bloods did become dispossessed.**

Gifts Presented:

Mitchell presented *each* chief with a military uniform & gilt sword before distributing the rest of the trinkets. Each band, **"glad or satisfied, but always quiet"**, accepted their gifts & dispersed. The remarkable 1851 Horse Creek Treaty Council was over.[110]

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110 **Wyoming State Historical Society, *"Separate lands for separate tribes: The Horse Creek Treaty of 1851"* by Lesley Wischmann:** www.wyohistory.org/essays/horse-creek-treaty

Transcript of The 1851 "Horse Creek Treaty":

Articles of the treaty made & concluded at Fort Laramie, *on tribal grounds*, between D. D. Mitchell, *superintendent of Indian affairs*, & Thomas Fitzpatrick, *Indian agent*, commissioners specially appointed & authorized by the 13th President of the United States, *Millard Fillmore*, & the chiefs, headmen, & braves of the following Indian nations, residing *south of the Missouri River, east of the Rocky Mountains, & north of the lines of Texas & New Mexico:* the Sioux or *Dahcotahs*, Cheyennes, Arrapahoes, Crows. Assinaboines, Gros-Ventre Mandans, & Arrickaras, on September 17th, 1851.

ARTICLE 1.

The aforesaid nations, *parties to this treaty*. having assembled for the purpose of establishing & confirming peaceful relations amongst themselves, do hereby covenant & agree to abstain in future from all hostilities whatever against each other, to maintain good faith & friendship in all their mutual intercourse *(international or interstate trade aka "commerce")***, & to make an effective & lasting peace.**

ARTICLE 2.

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

ARTICLE 3.

In consideration of the rights & 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.

ARTICLE 4.

The aforesaid Indian nations do hereby agree & 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.

ARTICLE 5. *(description of agreed boundaries)*

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

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 Bute, 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; & thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, *Mandans, & 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.

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 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.

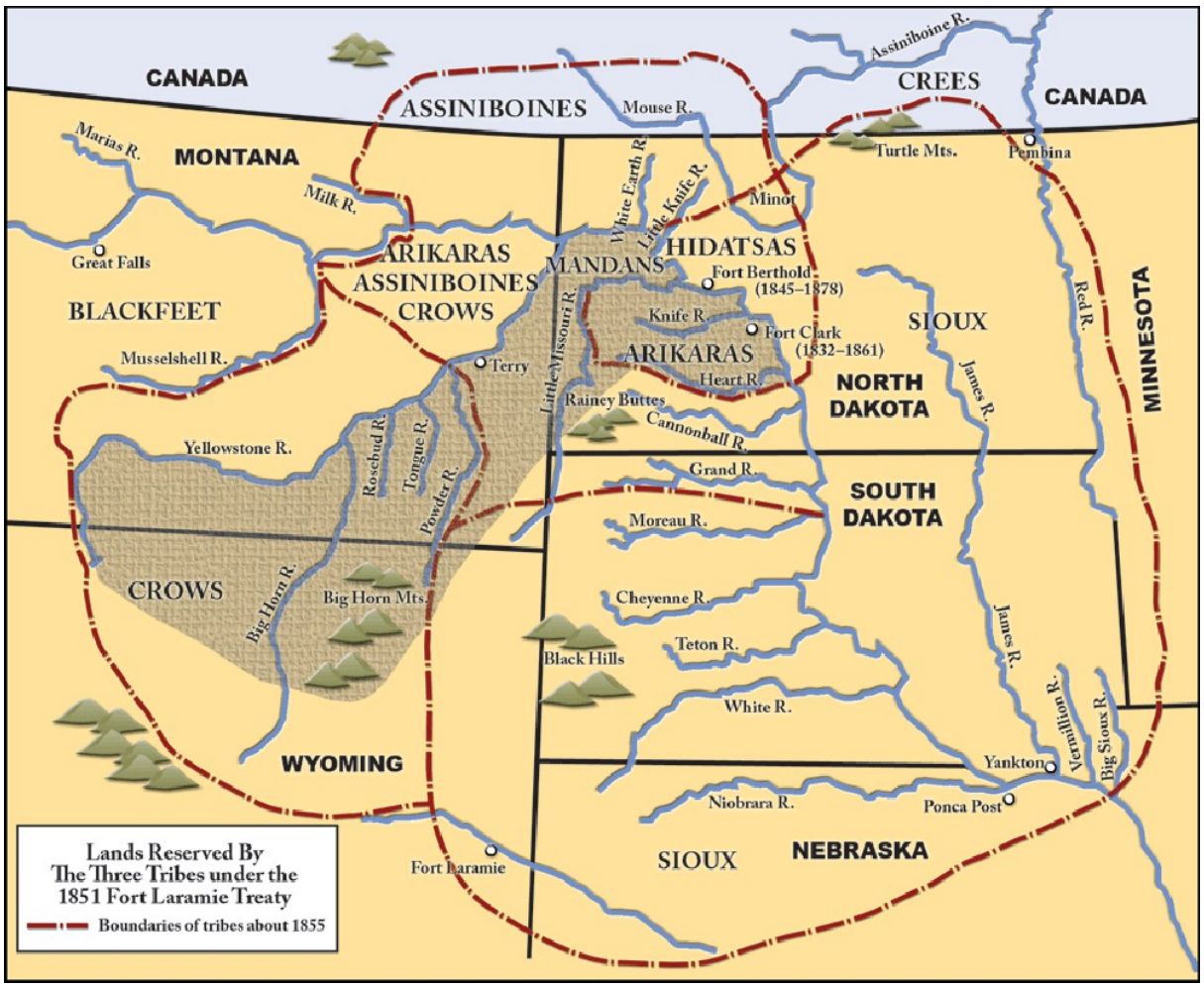
The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone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

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.

The territory of the Cheyennes & Arrapahoes, commencing at the Red Bute, 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.

It is, however, understood that, in making this recognition & acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; & further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

Map of 1851 Agreed Treaty Boundaries



Source: ***"History & Culture of the Mandan, Hidatsa, & Sahnish", Official Portal of The North Dakota State Government website****:*
www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical_laws.html

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 & their successors during good behavior.

ARTICLE 7.

In consideration of the treaty stipulations, & for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, & for their maintenance & the improvement of their moral & 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, & 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.

ARTICLE 8.

It is understood & 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 aportion 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.

****

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.

Commissioners.

D. D. Mitchell

Thomas Fitzpatrick

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.

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.

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.

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.

Arickarees:

Koun-hei-ti-shan, his x mark.

Bi-atch-tah-wetch, his x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.

She-oh-mant-ho, 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 Riflemen.***

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 Cheyennes.***

Robert Meldrum, ***interpreter for the Crows.***

H. Culbertson, ***interpreter for Assiniboines and Gros Ventres.***

Francois L'Etalie, ***interpreter for Arick arees.***

John Pizelle, ***interpreter for the Arrapahoes.***

B. Gratz Brown.

Robert Campbell.

Edmond F. Chouteau.

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)* & in subsequent agreements this treaty has been recognized as in force.[111]

111 **Oklahoma State University, Electronic Publishing Center, *"Indian Affairs: Laws & Treaties Vol. II, Treaties.* Compiled and edited by Charles J. Kappler. Washington : Government Printing Office, 1904:** http://digital.library.okstate.edu/kappler/vol2/treaties/sio0594.htm

Thomas Fitzpatrick:

An immigrant from Ireland, he became known as "Broken Hand," or "White Hair," to the native people of the Rocky Mountains: the first from an exploding rifle having badly damaged his left hand; the second from his hair having turned suddenly white during ten days of a harrowing escape from a band of Indians.

In 1846, because of his knowledge of the area, & the respect & high regard in which this *long-time* renown fur trader was held, Colonel Thomas Fitzpatrick was appointed *Indian Agent* of all the tribes on the headwaters of the Arkansas, Platte, and Kansas Rivers. As agent, he treated the native people under his jurisdiction with a fairness, impartiality & degree of integrity that set him permanently apart in the minds & memories of the indigenous inhabitants. Decades after his death in 1854, he was remembered with respect by the people of the high plains. His call to council had a potent effect on tribal leaders in 1851.[112] He died in 1854, & is buried in the Congressional Cemetery in Washington, DC.[113]

Friday Fitzpatrick, *his adopted Arapaho son:*

His Arapaho name was “Man Who Sits Thinking” (aka “Black Spot”, “White Crow”, “Thunder”, & “Sits Brooding”), but he became known as Friday. In 1831, he was found wandering the prairies by Fitzpatrick on a Friday, hence his name. The mountain man took the boy back to St. Louis with him & sent him to school for two years, where he stayed an additional five years before returning to his people & the Arapaho way of life.

As a result of his education, Friday was the main interpreter for councils & meetings between English-speakers & the tribes from 1850 until his death. He brought back useful knowledge to the Arapaho elders, & proved that you can go to school but not lose the Arapaho way.[114]

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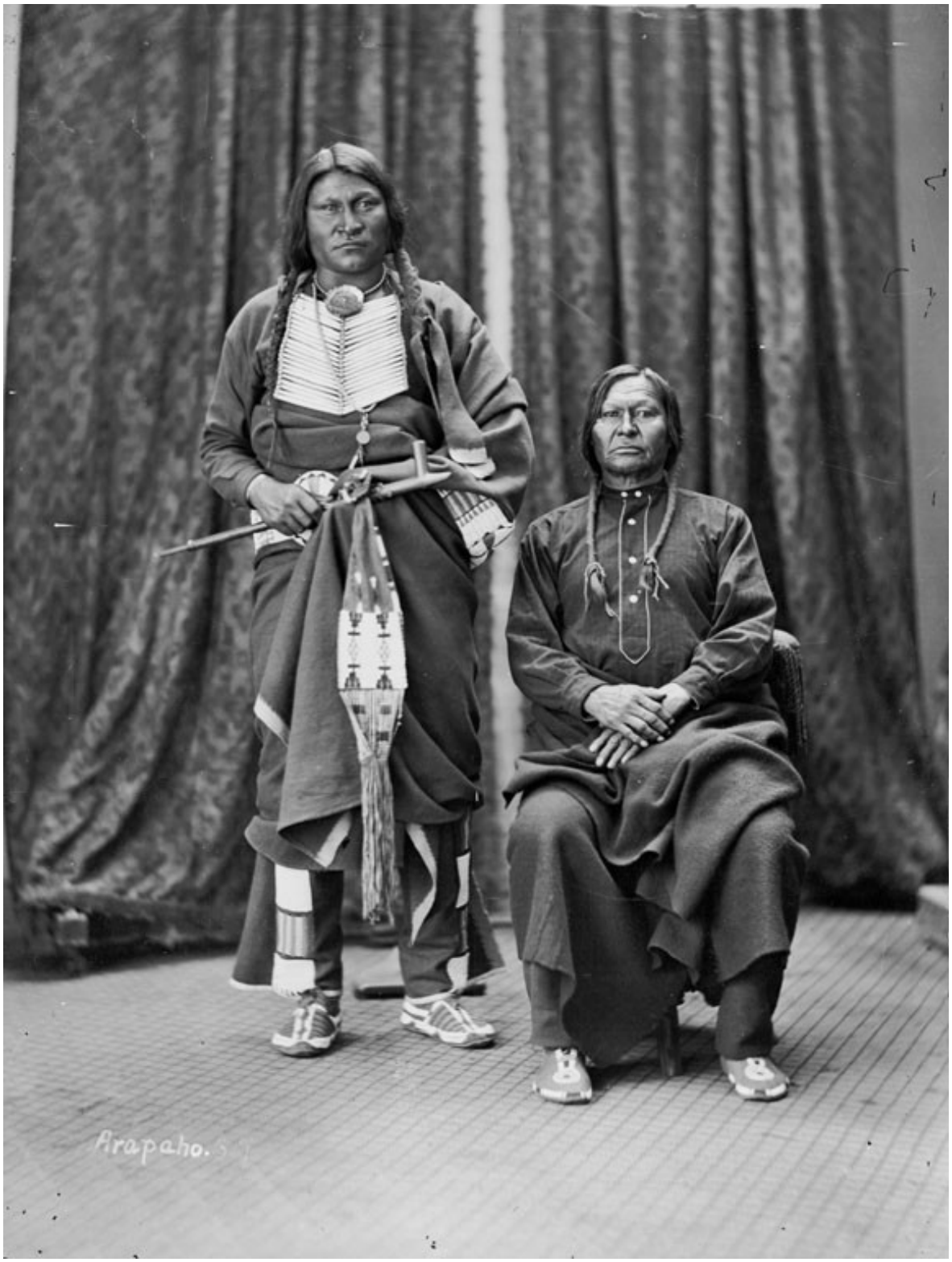
112 ***“TALES OF OLD FORT LARAMIE”* by Robert L. Munkres, The National Tombstone Epitaph, November, 1981:** www.muskingum.edu/~rmunkres/military/Laramie/Tales.html“

113 **Test & drawing: Hafen, *“Broken Hand - The Life Story of Thomas Fitzpatrick, Chief of the Mountain Men”*, The Old West Publishing Co, Denver, Colorado, 1931:** http://triggernometry.us/viewtopic.php?t=1379

114 **Information *and* photograph of Friday in 1869 from Arapaho Legends, *“Friday, the Arapaho Interpreter”* by Jackie Dorothy of the Northern Arapaho Long Legs tribe:** www.arapaholegends.com/friday-the-arapaho-interpreter/

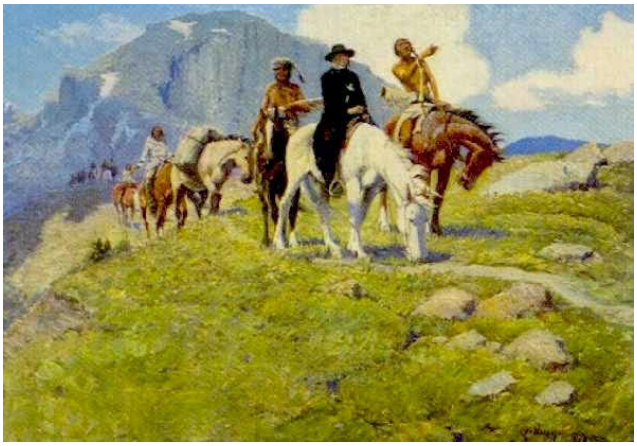
Friday eventually moved back with his tribe, & later became a band chief. He remained on friendly terms with the whites, & visited Washington several times.



Crazy Bull & Friday in 1873, photo from Little Bighorn History Alliance:
http://lbha.proboards.com/thread/2792/delegation-1851-52

About Friar Pierre De Smet:

Montana, "Art in the House Lobby": oil on canvas, "After the Whiteman's Book Edgar S. Paxson, 1912: *https://mhs.mt.gov/education/Capitol/Art/House-Lobby*



Fr. De Smet, S.J. Apostle of the Rocky Mountains. Friday 18th September, 2015 Ember Day. St. Joseph Cupertino,C: *http://catholic2007.blogspot.com/2015/09/fr-de-smet-sj-apostle-of-rocky.html*

Fr. Pierre De Smet was a Jesuit priest from Belgium— one of the best known missionaries in the world, who traveled more than 260,000 miles in his missionary journeys.

He emigrated to the United States in 1821 through a desire for missionary labors, & entered the Jesuit novitiate at Whitemarsh, Maryland. In 1823, however, at the suggestion of the United States Government a new Jesuit establishment was determined on & located at Florissant near St. Louis, Missouri, for "work among the Indians". De Smet was among the pioneers & thus became one of the founders of the Missouri Province of the Society of Jesus.[115]

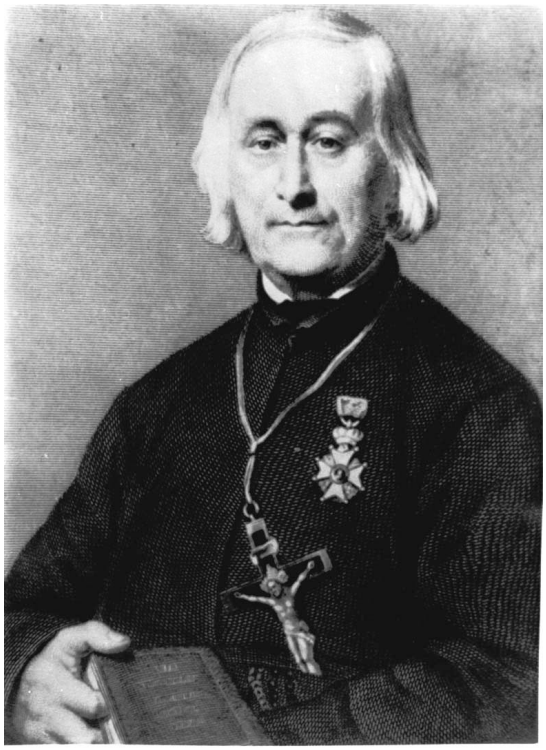
His first missionary tour among Native Americans was in 1838 when he founded St. Joseph's Mission at Council Bluffs, Iowa for the Pottawatomies, who had been forcibly removed from their homeland in Indiana in 1838 as part of the "Trail of Death". At this time also he visited various Sioux tribes to arrange peace between them & the Pottawatomies, the first of his peace missions. What may be called his life work did not begin, however, until 1840 when he set out for the Flathead country in the Far North-west. As early as 1831, some Rocky Mountain Indians, influenced by Iroquois descendants of converts of one hundred & fifty years before, had made a trip to St. Louis, seeking "Black Robe" (Jesuit Priests).

115 **"Fr. Pierre-Jean De Smet" by WILLIAM H.W. FANNING (cfr. Catholic Encyclopedia):** https://solutioproblematisomnes.wordpress.com/2015/05/

He was considered the *one person* American Indians truly trusted. They called him **"the white man whose tongues does not lie"**, although he was most commonly & endearingly known as "Black Robe". It was the friendships he developed while traversing the country which helped to bring together all the different tribes who took part in signing the 1851 treaty in order to try to secure lasting peace. He was known for actively speaking out against the violence & abuses against Native American people.

De Smet with "converts", from The Life of Father De Smet, Father E. Laveille, S.J.:
www.cfnews.org/page88/files/7f4c125e374ad95e8c6acd5c3defa054-358.html

He traveled eight times back to Europe to raise funds & beg supplies for the "Indians" as they were still called at the time, & endured incredible hardships in summer & winter, on foot or whatever transport was available, while going without food or water for several days.[116]



"Father DeSmet. SHSND B0610", from State Historical Society of North Dakota:
www.history.nd.gov/nhdinnd/turningpoints/FatherDeSmet.html

For decades he worked & lived among various tribes, establishing missions, battling "liquor traffic", & helping to secure peace treaties between rivaling tribes. He wrote in his personal journal, which later was compiled into the four-volume collection called **"Life, Letters, and Travels of Father Pierre-Jean De Smet."**[117]

It is recorded that De Smet asked the Flathead Chief *Big Face,* **"Have you no sins to repent of since your last baptism?"**

"Sins?" Big Face replied, astounded. **"How could I commit sins when it is my duty to teach others to live well?"**

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116 **Holy Roman Catholic Church Vs Vatican Council II, *"Fr. De Smet, S.J. the Founding of the St. Mary's Mission and some amazing miraculous accounts"*, posted Friday, September 18th, 2015, excerpted from *"The Life of Father De Smet, S.J. Apostle of the Rocky Mountains 1801-1873"*:**
https://catholic2007.blogspot.com/2015/09/fr-de-smet-sj-apostle-of-rocky.html

117 **Article, *"Native History: Father De Smet Talks Peace With Sitting Bull"* by Alysa Landry- 6/19/14":**
http://indiancountrytodaymedianetwork.com/2014/06/19/native-history-father-de-smet-talks-peace-sitting-bull-155353

Father De Smet Shares Disdain Toward Protestants,
A Sentiment Often Felt by Protestants Against Catholics at the Time:

There is little need to mention the historic disdain between Catholics & Protestants had for each other during this time— ever since Martin Luther tacked the "95 Theses" onto the Roman Catholic church door in Wittenberg, Germany on Oct. 31st, 1517[118], which publicly contested several of the church's practices as malarkey. Within many of De Smet's writings, much the same is observed. **"Time passes; already the sectaries of various shades** (various sects of Christianity) **are preparing to penetrate more deeply into the desert, & will wrest from those degraded & unhappy tribes their last hope– that of knowing & practicing the sole & true faith."**

In a short time native people became involved in the same sectarian controversy that had deluged all Europe in blood. The priests told the tribes that if they followed the teachings of the Protestants they would go to hell, & the Protestants extended the same cheering information in regard to Catholicism. [119]

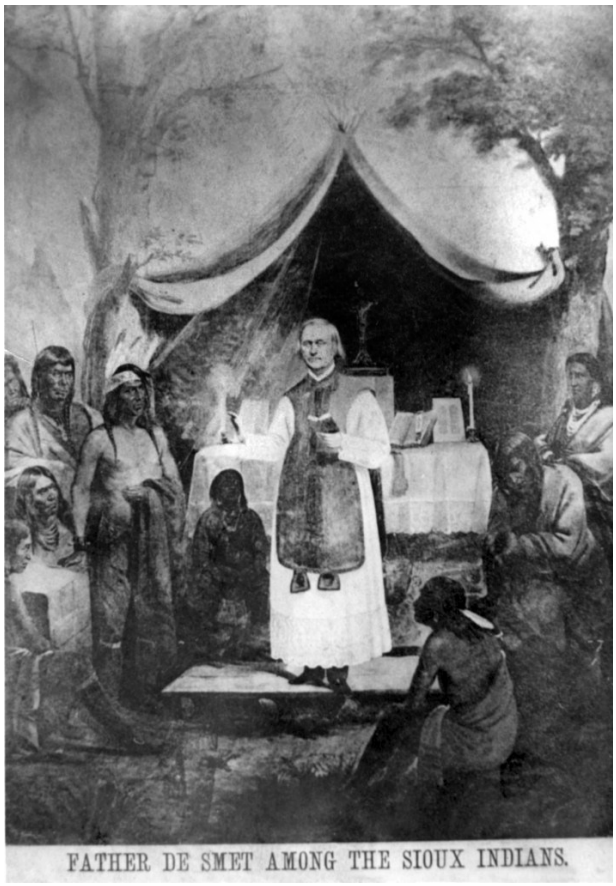
Father De Smet depicted here with Flathead tribe in Montana, author unknown:
http://indiancountrytodaymedianetwork.com/2014/06/19/native-history-father-de-smet-talks-peace-sitting-bull-155353

118 **The 95 Theses *transcript*:** www.luther.de/en/95thesen.html
119 **"Murder of the Missionaries":** www.accessgenealogy.com/native/murder-missionaries.htm

Free of the prejudices many of the white Anglo-Saxon Protestant Americans harbored towards Indians, De Smet was seen as a fair broker. In the vein of "what might have been," Esolen poignantly observes: **"Had America followed his lead, great good would have come of it and many evils—war, the theft of Indian lands, perfidy, mutual hatred, and the moral collapse that awaits a defeated people under patronage—might never have been."**[120]

Friar Pierre De Smet was born Jan. 30th, 1801 at Termonde (Dendermonde), Belgium, & died at St. Louis, Missouri on May 23rd, 1873.

Below: Salish family seated in front of their tepee– part of a "Jesuit reduction,", a system created by the Jesuit Order during the 17th & 18th centuries in South America to Christianize, tax, institute into labor, & *offer provisions for* indigenous people more efficiently via having them move their lodges to the immediate vicinity of the mission chapel. St. Mary's chapel at *Bitterroot, Wyoming, founded by De Smet,* in background.



Leopold & Analogous Traditional Elites, "May 23 – Chevalier of the Order of Leopold": *www.nobility.org/2013/05/23/de-smet/*

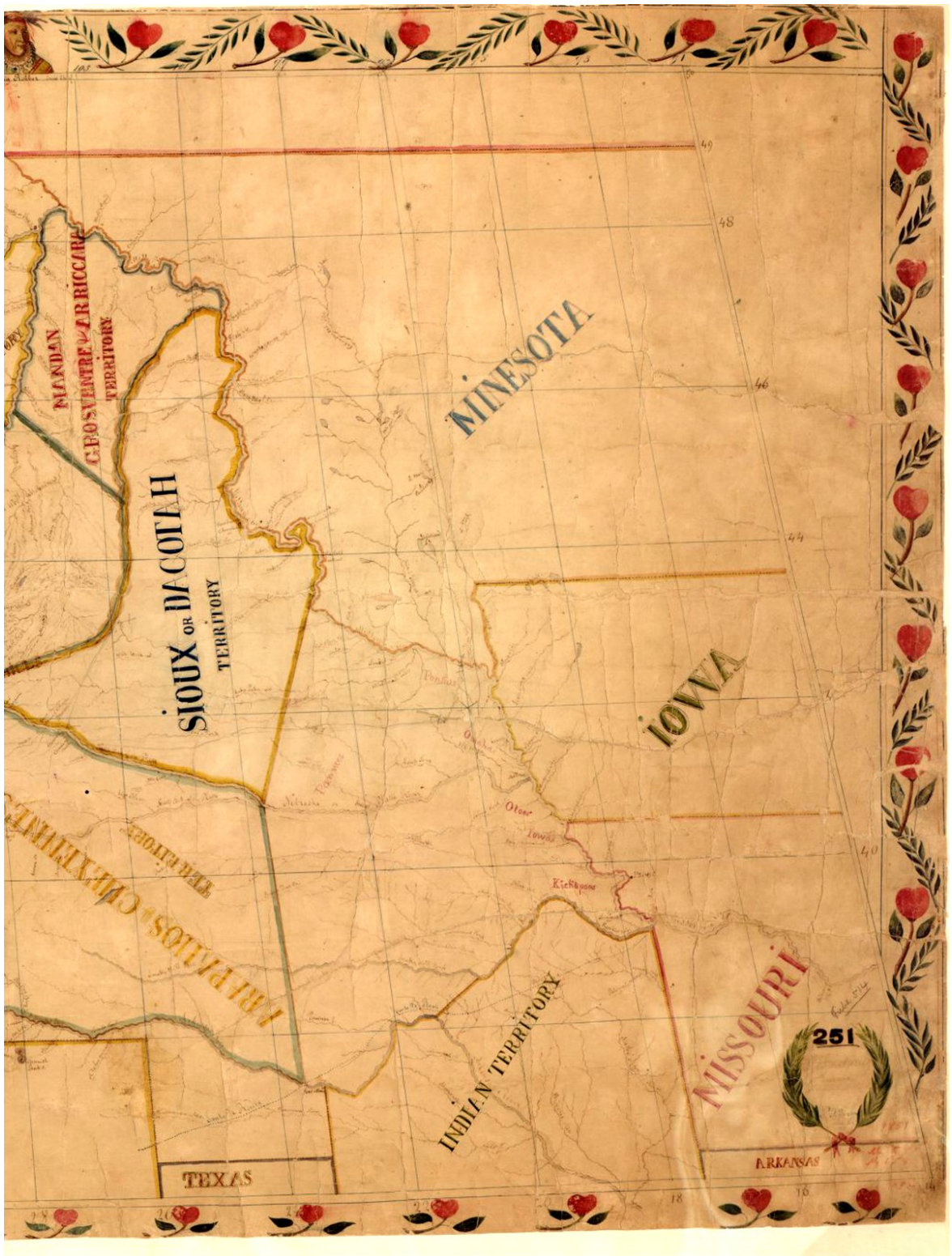
From St. Mary's Rediviva: *www.lewis-clark.org/article/3151*

120 **"St. Louis Expels De Smet from Campus" by JOHN M. GRONDELSKI, June 1, 2015:** www.crisismagazine.com/2015/st-louis-expels-de-smet

Father Pierre De Smet drew this map in 1851,

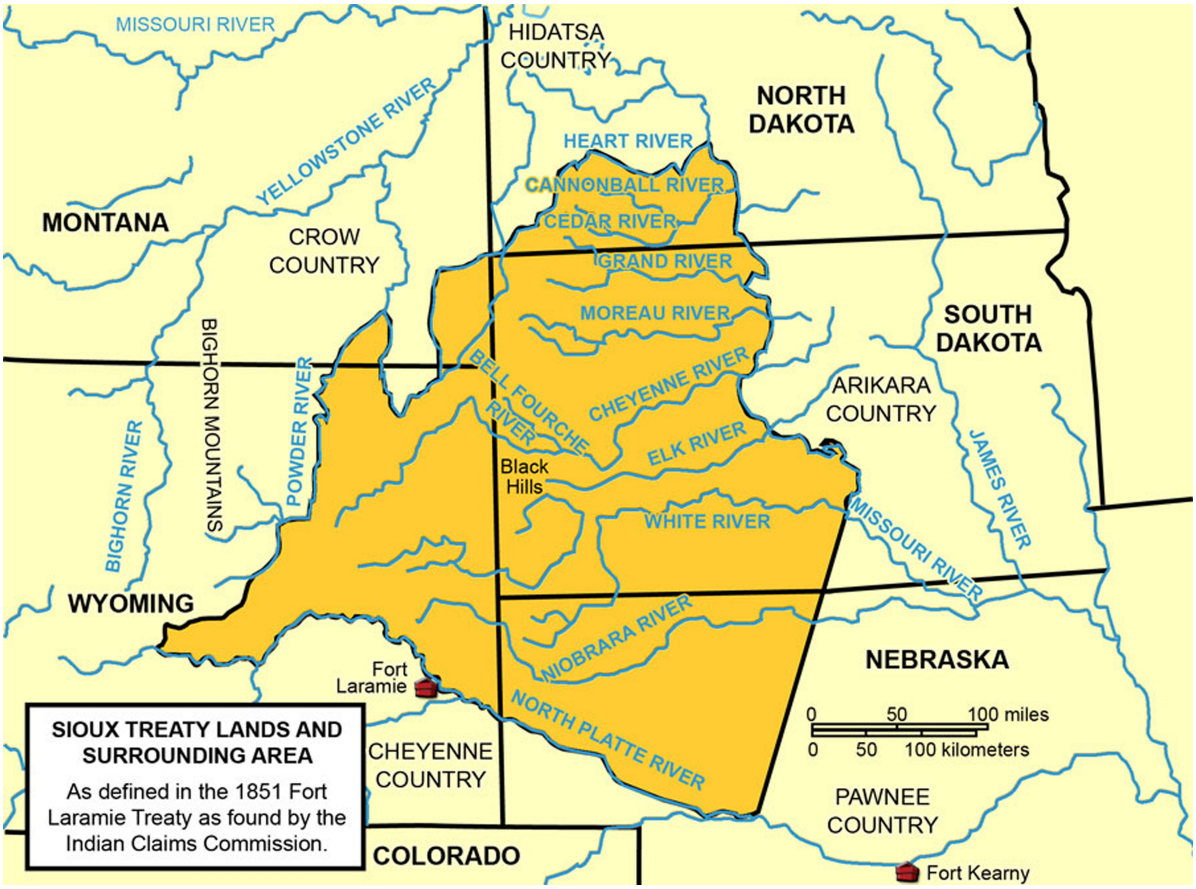
Retrieved from the Library of Congress on May 15, 2017, De Smet, Pierre-Jean. "82 x 131 cm map of the upper Great Plains and Rocky Mountains region": *www.loc.gov/item/2005630226/*

which became the blueprint for the Treaty:



Map of Designated "Sioux & Dakota Nation" Territory, *Treaty of 1851*:

This treaty was the first effort to define the territory of the Great Sioux Nation of Lakota, Dakota, & Nakota. The treaty council was attended by thousands of Sioux men & their families as well as soldiers & officers of the U.S. Army, representatives of the United States government, & interpreters. The Treaty of 1851 did not establish a reservation, but began the process of defining territory in which the Sioux could live & hunt. The treaty was supposed to reduce warfare among the Indian tribes of the northern Great Plains.[121]



Much of this territory was shared with Cheyennes *and* Arapahos who became falsely & exclusively identified with territories between the North Fork of the Platte River in eastern Wyoming & the Arkansas River in Colorado[122]. Even though both these populations still lived in & used the Black Hills *(the Cheyennes much more so than the Arapahos)* this was not taken into consideration when treaty negotiators carved out areas of tribal habitation according to European derived notions of exclusive occupancy. This area thus became *exclusively* assigned to the Lakota.

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121 **North Dakota State government (including map), Lesson 4: Alliances And Conflicts, Topic 2: Sitting Bull's People, SECTION 3: THE TREATIES OF FORT LARAMIE, 1851 & 1868:** http://ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868

122 **Shakespeare 1971:72; Weist 1977:47; Price, C. 1996: 1-36**

Traditional Lifeways Interrupted:

Judging by some of the speeches of tribal leaders contained in the Fort Laramie Treaty Journal, including one given by Black Hawk[123], the Lakota were fully aware that they shared much of their territory with the Cheyennes & Arapahos because they had taken & defended it together as allied parties. In fact, it was common practice for tribal nations who fought together to share use rights to the territories they jointly acquired & defended. Imposing territorial boundaries by tribal identification was not the way in which local populations distributed themselves across geographic space[124]. At this point in history, the territorial boundaries drawn on the 1851 treaty map were largely meaningless as local tribes continued to move across the landscape in complex ways that encouraged the sharing of jointly held territories.[125]

As Raymond DeMallie (2001a:795) points out, **"The treaty set in motion the process of limiting tribal lands." Given what we now know of tribal movement in & occupation of areas west of the Missouri River & north of Arkansas, the tribal territories established by the Fort Laramie Treaty are grievously inconsistent with the historic record. This is true not only from the perspective of tribal oral traditions but also in relationship to the observations & writings of European Americans who traveled this region before 1851."**[126]

The year 1851 marked a major turning point for the Lakota *and* their Cheyenne & Arapaho allies. It was the end of a time when tribal population growth soared, when their territorial holdings multiplied, & when their economic opportunities were plentiful[127]. It was the dawn of a new era, when these & other tribes began to feel even greater pressure from the scores of emigrants entering their lands.[128] The arrival of miners & settlers brought epidemic disease, which had especially devastating impacts on the bands whose territories bordered the overland trails[129]. Major food source of local tribes, the bison, declined, & the U.S. government began to play a role in provisioning tribes with food rations[130]. The very fabric of tribal livelihoods was being eroded by the loss of their food base, freedom of movement, & the lands that defined & sustained their way of life.[131]

As for the treaty, many did not know the it even existed: intertribal raiding *and* raiding of caravans continued. The U.S. regarded raids as a breach of treaty, even though the government was unable compel its own countrymen to respect the boundaries either. Travelers continuously passed through defined native territories, & their numbers would soon *drastically increase*.[132]

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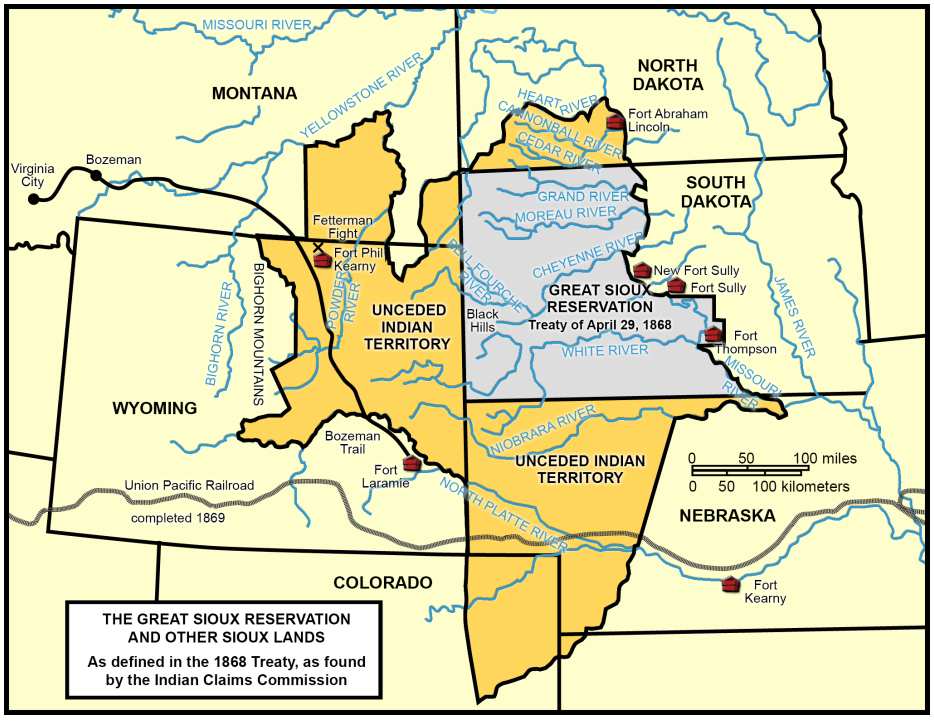
123 **Horr 1974:55-56**
124 **Lazarus 1991:16- 19; Albers 1993:112-122**
125 **Albers and Kay 1987:80- 82**
126 **National Park Service, "Chapter Five TREATIES AND BROKEN PROMISES: 1851 to 1877 ", page 90:** www.nps.gov/wica/learn/historyculture/upload/-7e-5-Chapter-Five-Treaties-and-Broken-Promises-Pp-84-132.pdf
127 **Bray 1994**
128 **Price, C. 1996:27-28; Isenberg 2000:111-113**
129 **Hyde 1937:63, 67; Denig in Ewers 1961:19- 22; Bettelyoun and Waggoner 1988:44-48**
130 **Swagerty 1988:76, 83; Pickering 1994:62; Price, C. 1996: 28- 30**
131 **National Park Service, "Chapter Five TREATIES AND BROKEN PROMISES: 1851 to 1877 " page 86:** www.nps.gov/wica/learn/historyculture/upload/-7e-5-Chapter-Five-Treaties-and-Broken-Promises-Pp-84-132.pdf
132 **The History & Culture of the Standing Rock Oyate, "The 1851 Fort Laramie Treaty":** www.ndstudies.org/resources/IndianStudies/standingrock/1851treaty.html

Article V, "Treaty of Fort Laramie With Sioux, Etc., *1851*" establishes that The Missouri River *is* "The Territory of The Sioux & Dakota Nations":

Article V of "The 1851 Treaty of Fort Laramie" aka "The Horse Creek Treaty". establishes rights to The Missouri River on behalf of "Sioux & Dakotah Nations":

> **"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 Bute, 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; & thence down the Missouri River to the place of beginning.**
>
> **It is, *however*, understood that, in making this recognition & acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; & further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."**[133]

Map of Established Ancestral Territory, 1851 *and* 1868 Treaties, *compared*:



Source: State of North Dakota official website.[134]

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133 **INDIAN AFFAIRS: LAWS AND TREATIES, Vol. II, Treaties, "TREATY OF FORT LARAMIE WITH SIOUX, ETC., 1851" Sept. 17, 1851. | 11 Stats., p. 749:** http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0594.htm

134 **"Lesson 4: Alliances And Conflicts, Topic 2: Sitting Bull's People, SECTION 3: THE TREATIES OF FORT LARAMIE, 1851 & 1868":** http://ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868