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## Priceless Property

Kirsten Matoy Carlson

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## PRICELESS PROPERTY

**Kirsten Matoy Carlson\***

### ABSTRACT

In 2011, the poorest American Indians in the United States refused to accept over one billion dollars from the United States government. They reiterated their long-held belief that money—even \$1.3 billion—could not compensate them for the taking of their beloved Black Hills. A closer look at the formation of the Sioux claim to the Black Hills helps us to understand why the Sioux Nation has repeatedly rejected compensation for land taken by the United States over 100 years ago. This article seeks to understand why the Sioux view the Black Hills as priceless property by studying the formation of the Black Hills claim. It constructs a new, richer approach to understanding dispute formation by combining narrative analysis with the sociolegal framework for explaining dispute formation. The article argues that narratives enrich the naming, claiming, and blaming stages of dispute creation. It illustrates the usefulness of this new approach through a case study of the Black Hills claim. It uses the autobiographical work of an ordinary Sioux woman to provide a narrative lens to the creation of the Sioux claim to the Black Hills. *American Indian Stories* by Zitkala-Sa presents a narrative of Sioux life around the time of the claim's emergence. By contextualizing and humanizing the claim, my analysis provides insights into why the Sioux claim to the Black Hills emerged into a legal dispute and helps

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\* Assistant Professor, Wayne State University Law School. B.A., The Johns Hopkins University, 1997; M.A., Victoria University of Wellington (New Zealand), 1999; J.D., The University of Michigan Law School, 2003; Ph.D. (political science), The University of Michigan, 2007. I gratefully acknowledge James Boyd White, Richard Abel, Angela Riley, Kristen Carpenter, Matthew Fletcher, Bethany Berger, Sarah Abramowitz, Christopher Lund, and participants at the Association for the Study of Law, Culture and the Humanities Annual Conference and the Michigan State University Fourth Annual Indigenous Law Conference for reading and commenting on earlier versions of this piece.

to explain why the Black Hills remain priceless property to the Sioux Nation today. The article concludes with a suggestion for successful resolution of the Black Hills claim based on acceptance of the Black Hills as priceless property to the Sioux Nation.

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## INTRODUCTION

The people of the Sioux Nation<sup>1</sup> rank among the most economically impoverished in the United States. As Diane Sawyer revealed in a recent episode of *20/20*,<sup>2</sup> the reality for Oglala Sioux living on their traditional lands is especially devastating: eighty percent unemployment, over sixty-one percent of children living below the poverty line, an infant mortality rate five times higher than the national average, and a teen suicide rate of over fifteen percent.<sup>3</sup> Their living conditions are marginal at best; thirteen percent of the residents of the Pine Ridge Reservation lack complete plumbing facilities.<sup>4</sup>

Despite this unbelievable poverty, the Sioux Nation has refused to accept 1.3 billion dollars from the United States government.<sup>5</sup> While 1.3 billion dollars would bring incredible monetary riches to the Nation and its people, the Sioux insist that they cannot accept the money in return for the taking of their beloved Black Hills.<sup>6</sup> To them, the Black Hills are priceless property. They cannot be replaced. The Sioux cannot accept money for land that was never for sale.<sup>7</sup>

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1. The Sioux Nation comprises Nakota, Dakota, and Lakota peoples. I use the term Sioux to describe generally the descendants of the bands that were signatories to the Fort Laramie Treaty of 1868: the Cheyenne River, Crow Creek, Lower Brule, Rosebud, Standing Rock, Santee, and Fort Peck Tribes. See Treaty with the Sioux Indians, Agreement for Peace, Apr. 29, 1868, 15 Stat. 635, 640–47 [hereinafter Fort Laramie Treaty].

2. *20/20: A Hidden America: Children of the Plains* (ABC television broadcast Oct. 14, 2011), available at <http://www.hulu.com/watch/289337/abc-2020-fri-oct-14-2011>.

3. *The Reservation*, RED CLOUD INDIAN SCH., <http://www.redcloudschool.org/page.aspx?pid=432> (last visited Aug. 9, 2012).

4. *Id.*

5. Maria Streshinsky, *Saying No to \$1 Billion*, ATLANTIC (Feb. 9, 2011), <http://www.theatlantic.com/magazine/print/2011/03/saying-no-to-1-billion/8380/>.

6. *Id.*; John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 63 (2001).

7. Streshinsky, *supra* note 5.

Accordingly, for the past thirty years, this money has sat—untouched—in the United States Treasury.<sup>8</sup>

To understand why the poorest Indian nations in the United States absolutely refuse to accept over \$1 billion requires a closer look at their claim to the Black Hills and how it formed into the largest, still unresolved land claim in United States history.<sup>9</sup>

For over a century, the Lakota, Dakota, and Nakota peoples, collectively known as the Sioux Nation, have contended that the United States government breached the Fort Laramie Treaty of 1868 by illegally expropriating the Black Hills in 1877.<sup>10</sup> They have continuously pursued their legal claim before the Court of Claims, the Indian Claims Commission, and Congress.<sup>11</sup> In 1980, the Supreme Court decided to review the Court of Claims' 1979 decision,<sup>12</sup> finding that the United States government had taken the Black Hills without just compensation, in violation of the Fifth Amendment.<sup>13</sup> The Supreme Court affirmed the Court of Claims' findings and award of \$17.5 million plus five percent interest to the Sioux Nation for a total of \$122.5 million.<sup>14</sup> The Sioux had finally won. Or had they?

The Sioux did not think so. Even before the courts found for them and awarded them compensation, hints existed that the Sioux did not want money; they wanted the return of their sacred Paha Sapa—the Black Hills.<sup>15</sup> Shortly after the Supreme Court handed down its opinion finding for the Sioux people and compensating them for the illegal taking of the Black Hills, the Sioux refused to accept the compensatory award.<sup>16</sup> Subsequently, Sioux have occupied portions

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8. *Id.*

9. *Id.*

10. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

11. *Id.* at 384–85.

12. *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl.), *cert. granted*, 444 U.S. 989 (1979), *aff'd*, 448 U.S. 371 (1980).

13. *Sioux Nation*, 448 U.S. at 389.

14. *Id.* at 423–24.

15. Frank Pommersheim, *Making All the Difference: Native American Testimony and the Black Hills*, 69 N.D. L. REV. 337, 347 (1993).

16. Marc Goldstein, *Sioux Agonize over Taking Money or Regaining Black Hills*, N.Y. TIMES, July

of the Black Hills,<sup>17</sup> filed suit in federal courts against the United States government asking for the return of the Black Hills,<sup>18</sup> and worked ardently with Congressmen to secure passage of legislation returning land in the Black Hills to them.<sup>19</sup> None of these endeavors have been successful.<sup>20</sup> Over thirty years after their “victory” in the Supreme Court, the Sioux continue to claim that money is not just compensation; they seek the return of the sacred Black Hills.<sup>21</sup>

The Sioux claim to the Black Hills remains one of the largest unresolved claims against the United States government.<sup>22</sup> The size of the claim—recent estimates of the award plus interest suggest it is now \$1.3 billion<sup>23</sup>—and its longevity are astounding. These facts are made even more amazing by the marginalized living conditions faced by the Sioux people.<sup>24</sup> The persistence of this claim suggests a need for a deeper understanding of what it is about, how it arose, and why the Sioux, despite abject poverty, refuse to accept money in lieu of the Black Hills.

This Article provides a more complete understanding of the Black Hills claim, including its genesis and persistence, by combining

16, 1984, at A17.

17. See, e.g., David F. Salisbury, *Small Sioux Band Still ‘Occupying’ Black Hills Area*, CHRISTIAN SCI. MONITOR, Mar. 2, 1982, at 9; David F. Salisbury, *Sioux Tribe Wants to Stay in Black Hills; US Says No*, CHRISTIAN SCI. MONITOR, Sept. 11, 1981, at 12 [hereinafter Salisbury, *Sioux Tribe Wants to Stay in Black Hills*]; *Sioux Protesters Leave One Site in Black Hills*, N.Y. TIMES, Sept. 9, 1981, at A22.

18. See, e.g., *Around the Nation; Appeals Court Rejects Suit by Indians over Black Hills*, N.Y. TIMES, June 3, 1981, at A18; Ed Bruske, *Black Hills Suit—A Will of Its Own*, WASH. POST, Aug. 19, 1980, at A9; *Tribe Files Suit for \$11 Billion over Black Hills*, N.Y. TIMES, July 19, 1980, § 1, at 5; Goldstein, *supra* note 16; Linda Greenhouse, *Sioux Lose Fight for Land in Dakota*, N.Y. TIMES, Jan. 19, 1982, at A14.

19. See, e.g., *Indian Land Claims; Gold in the Hills*, ECONOMIST, July 23, 1994, at 28–29; Goldstein, *supra* note 16; Jim Schachter, *Sioux Get Boost in Fight over Territory*, GUARDIAN (London), Dec. 29, 1987.

20. Bruske, *supra* note 18; Greenhouse, *supra* note 18. Most recently, the Sioux Nation has sought to purchase portions of the Black Hills. In November 2012, the Sioux Nation successfully purchased the sacred site Pe’ Sla at an auction for nine million dollars. *Pe’ Sla Returns to Oceti Sakowin*, INDIAN LAND TENURE FOUND. (Nov. 30, 2012), <https://www.iltf.org/news/announcements/pe-sla-returns-oceti-sakowin>.

21. LaVelle, *supra* note 6, at 42; Streshinsky, *supra* note 5.

22. Streshinsky, *supra* note 5.

23. *Id.*

24. *The Reservation*, *supra* note 3.

narrative analysis<sup>25</sup> with the sociolegal framework<sup>26</sup> for understanding the emergence of legal disputes. In Part I, I construct a new approach to understanding dispute formation that combines the sociolegal framework for the creation of legal disputes (dispute formation framework) with narrative analysis.<sup>27</sup> I argue that combining the dispute formation framework with narrative analysis greatly enhances our understanding of the dispute formation process.<sup>28</sup>

In Part II, I demonstrate how useful narrative analysis is to the claims formation process by taking a closer look at the formation of the Black Hills claim at the beginning of the twentieth century.<sup>29</sup> First, I set the stage for the Sioux claim by discussing Sioux beliefs that the Black Hills are priceless property.<sup>30</sup> By priceless property, I refer to how Sioux beliefs about the Black Hills describe them as so central to Sioux cultural and spiritual identity that they cannot be replaced and are of a value beyond all price.<sup>31</sup> Then, I use the stories of Zitkala-Sa, a Dakota writer, as a narrative for understanding how the shared dispossession of these sacred lands affected the everyday

25. Narratives contextualize claims and highlight the role that cultural differences and understandings of a grievance play in dispute formation. In this way, narratives provide insights into how historical claims emerge and why some persist.

26. Law and society scholars have long sought to understand the genesis of legal claims. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631, 633 (1980–1981); see also KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 26–27 (1988); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 18–19 (1998). Not all human experiences that could develop into legal claims do in fact become lawsuits. BUMILLER, *supra* at 26–27; EWICK & SILBEY, *supra* at 19 (“It turns out that although almost any social interaction could, in theory, become a matter of contest and dispute, few do.”); Felstiner et al., *supra* at 633. As explained in Part II, many law and society scholars suggest that disputes emerge through a series of events, which transform human experiences into legal claims.

27. See *infra* Part I.

28. See *infra* Part I.

29. See *infra* Part II. Rather than focus on the narratives presented by lawyers or courts, I focus on a narrative written by a Dakota woman. I argue that the narrative of a common person, rather than those of major players, such as lawyers or tribal leaders, provides insights into the actual experiences of ordinary Sioux people. For a discussion of the importance of the stories of ordinary people to legality and legal consciousness, see generally EWICK & SILBEY, *supra* note 26; ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993); PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* (2002).

30. See *infra* Part II.

31. See *infra* Part II.

lives of the Sioux people.<sup>32</sup> This analysis contextualizes the claim<sup>33</sup> and provides a fuller understanding of why the Sioux perceive the Black Hills to be priceless property.<sup>34</sup> The Article concludes with a suggestion for successful resolution of the Black Hills claim based on acceptance of the Black Hills as priceless property and informed by emerging international law.

### I. A NEW APPROACH: NARRATIVES IN DISPUTE FORMATION

In this Part, I argue that combining narrative analysis with the sociolegal dispute formation framework provides valuable insights into how parties understand disputes. I maintain that narratives may increase our understanding of dispute formation by suggesting why legal claims emerge out of specific sets of events.

The idea of narratives about the law, or legal narratives, is not new.<sup>35</sup> Laws develop within cultures, and the creation of legal meaning “takes place . . . through an essentially cultural medium.”<sup>36</sup> In giving law meaning, the culture—and often the various communities within it—develops a narrative surrounding the law and its political and social significance.<sup>37</sup> These narratives provide the community (and other communities) with a way to understand the meaning of law and its social and political context.<sup>38</sup> They “do not

32. *See infra* Part II.

33. Legal scholars have noted the importance of contextualization in American Indian law. Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605 (2006); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 761 (1992) (“These stories illustrate better than any dry legal exegesis that Indian tribes’ grievances against the Government, whether based on ancient happenings or present-day affairs, are very real.”).

34. Zitkala-Sa’s autobiographical stories also give voice to ordinary Sioux people and reflect the shared experiences and values underlying their claims to the Black Hills. For a discussion of the community-building functions of stories, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1988).

35. As Robert Cover pointed out over twenty years ago, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.” Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); *see also* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997).

36. Cover, *supra* note 35, at 11.

37. *See generally id.*

38. *Id.* at 4–5.

simply recount happenings; they give them shape, give them a point, argue their import, [and] proclaim their results.”<sup>39</sup> Narratives help us to understand this system of meaning by providing a way of ordering discourse.<sup>40</sup>

Narratives may be useful not only in understanding the law and the legal system in general but also in understanding disputes. By dispute, I mean “an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other.”<sup>41</sup> As conflicts or controversies, disputes fuel the legal system, which is designed to process and resolve them.<sup>42</sup> Disputes, like laws, “are social constructs.”<sup>43</sup> Disputes develop over time, and depend upon the meanings given to them by those involved in them. As law and society scholars point out, “a significant portion of any dispute exists only in the minds of the disputants.”<sup>44</sup>

While disputes emerge out of human experiences, not all encounters that could materialize into disputes do in fact become disputes.<sup>45</sup> Rather, disputes depend upon human identification of the event as a dispute.<sup>46</sup> This process of human identification leads to dispute formation or emergence.<sup>47</sup> Narratives about personal and collective experiences reflect how individuals and communities perceive what happens to them.<sup>48</sup> They provide clues as to the meanings assigned to events and the context in which people respond to their experiences.<sup>49</sup> As informative of human experience, narratives may help us to understand how potential disputes emerge into actual disputes. To uncover the role narratives play in dispute

39. Peter Brooks, *Narrativity of the Law*, 14 *LAW & LITERATURE* 1, 4 (2002).

40. Peter Brooks, *The Rhetoric of Constitutional Narratives: A Response to Elaine Scarry*, 2 *YALE J.L. & HUMAN.* 129, 129 (1990).

41. *BLACK’S LAW DICTIONARY* 424 (5th ed. 1979).

42. Felstiner et al., *supra* note 26, at 631.

43. *Id.*

44. *Id.* at 632.

45. *Id.* at 633; BUMILLER, *supra* note 26, at 26–27; EWICK & SILBEY, *supra* note 26, at 19.

46. Felstiner et al., *supra* note 26, at 633.

47. BUMILLER, *supra* note 26, at 26.

48. Felstiner et al., *supra* note 26, at 633.

49. *Id.*

formation, it is useful to look more closely at the process of dispute emergence and transformation.

Felstiner et al. provide a three-step framework for describing and understanding the emergence and transformation of disputes.<sup>50</sup> The first step, or transformation, they call “naming.”<sup>51</sup> Naming occurs when an individual or group of individuals realizes that “a particular experience has been injurious.”<sup>52</sup> A dispute will not arise unless one party identifies the encounter as injuring him or her.<sup>53</sup> Consider a simple example: When leaving the crowded Walmart parking lot on a Saturday afternoon, another car bumps the rear fender of my brand new, just-bought-off-the-lot, burnt orange BMW convertible. If the bump does not scratch or dent my convertible, I may not perceive the accident as injurious and no dispute will develop. Conversely, if the car smashes my left tail light, I will feel injured by the damage to my newly minted convertible and name the encounter as such.

Once a party has named the injury, the second step, blaming, may take place.<sup>54</sup> Blaming “is the transformation of a perceived injurious experience into a grievance.”<sup>55</sup> This transformation has three aspects.<sup>56</sup> First, blaming only occurs “when a person attributes an injury to the fault of another individual or social entity.”<sup>57</sup> Second, blaming requires that the injured person have a complaint against someone in particular.<sup>58</sup> Finally, for blaming to occur, “the injured person must feel wronged and believe that something might be done in response to the injury, however politically or sociologically improbable such a response might be.”<sup>59</sup> To illustrate the blaming

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50. *Id.* at 632.

51. *Id.* at 635.

52. *Id.*

53. *Id.*

54. Felstiner et al., *supra* note 26, at 635.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (“A grievance must be distinguished from a complaint against no one in particular (about the weather, or perhaps inflation) and from a mere wish unaccompanied by a sense of injury for which another is held responsible (I might like to be more attractive).”).

59. *Id.*

process using the hypothetical car accident described above, I would attribute the damage to my tail light to the other driver and thus have a specific complaint against a particular individual. Further, I would expect the other driver to fix the damage to my convertible, most likely by replacing the tail light. The dispute, however, still would not have fully developed. For a dispute to develop, a third transformation has to happen.

The third and final transformation, claiming, “occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy.”<sup>60</sup> Claiming would happen when I stopped my convertible, exited, and confronted the other driver with the damage by asking him or her to replace the tail light. My claim to a new tail light would be transformed into a dispute when the other driver rejected the claim in whole or in part.<sup>61</sup> In my hypothetical car accident, the driver could simply refuse to take responsibility or argue that the accident was my fault. Either way, a dispute would emerge between the two of us over the accident, who was at fault, and who was responsible for the damage. Unless we could come to an agreement as to who was at fault, which is unlikely at this point, the dispute would enter into some kind of dispute processing, such as the United States legal system.<sup>62</sup> I would probably file a complaint, alleging that the other party hit my convertible and caused damage to my tail light. In turn, the other party would respond with an answer or a counterclaim, and the process of formal, legal adjudication would begin.

Grievances, however, normally only enter into processing if the parties conceive of the experience as a dispute.<sup>63</sup> If I never felt injured, attributed my injury to the actions of the other party, expected him or her to remedy the problem, and had my claim

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60. Felstiner et al., *supra* note 26, at 635.

61. *Id.* at 636 (“A claim is transformed into a dispute when it is rejected in whole or in part.”).

62. Most likely, if both parties had automobile insurance, their insurers would investigate the accident and try to settle the dispute informally. In the event that settlement could not be reached, the insurer would probably file the lawsuit. But for the sake of my hypothetical, let’s assume that for some reason one of the parties files the lawsuit.

63. Felstiner et al., *supra* note 26, at 636.

rejected by him or her, then no dispute would exist. There would be no reason to seek dispute processing.

Narratives enable us to understand disputes more completely as socially constructed by the participants involved.<sup>64</sup> By narrative, I mean the “broader enterprise that encompasses the recounting (production) and receiving (reception) of stories.”<sup>65</sup> Narratives are created through a process of storytelling.<sup>66</sup> Narrative creation is an interactive process that involves the storyteller asserting a story—creating the glue to combine the incidents, events, and texts together in a meaningful way—and the responses and reactions of the listener as she receives the story.<sup>67</sup> To continue with the example above, I am recounting a story and creating a narrative about my experience in the Walmart parking lot each time I retell the story of the car accident. I reassert my claim against the other driver as part of the story because I perceive the experience as a dispute. My story reflects how I see my experience and translate it to others. My perceptions and beliefs inform how I tell my story, and the narrative I present provides context to my claim against the other driver. My story, however, is only one narrative about the dispute. The other driver, who counters that I caused the accident, has his own narrative.

Narratives describe the experiences of the people involved in the dispute and may suggest why their experiences contributed to the emergence of a legal claim.<sup>68</sup> They provide insights into how the claimants see the claim and why it emerged from an experience to a dispute.<sup>69</sup> These insights may help to explain why certain kinds of experiences produce legal disputes and why some legal disputes persist over time. Certain kinds of narratives may be more likely to

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64. Baron & Epstein, *supra* note 35, at 148.

65. *Id.* at 147.

66. Brooks, *supra* note 39, at 2 (“[N]arrative can be thought not only as a set of contents but also as a form and a procedure.”).

67. *Id.* at 3.

68. *See id.* (describing how “the way incidents and events are made to combine in a meaningful story, one that can be called ‘consensual sex’ on the one hand or ‘rape’ on the other”).

69. *See id.*

lead to disputes.<sup>70</sup> Others may inhibit dispute emergence or transformation or push these processes in one direction or another.<sup>71</sup> In this way, narratives may play an influential role in dispute development.

My approach differs from other narrative analyses of the law and legal processing in two main ways. First, my focus in this Article is on the time immediately before the dispute enters a dispute processing system. I emphasize the importance of what happens before a complaint is filed rather than the narratives produced by dispute processing or trials. Second, my interest is in the narratives of ordinary people and how they shape the dispute and the initial decision to make the claim rather than those created by legal professionals. Even though all the participants in dispute processing—claimants, defendants, judges, and lawyers—may produce their own narratives about the dispute, the experiences of the parties to the dispute are particularly important to understanding the process of dispute formation.<sup>72</sup> As the source of the dispute, parties, especially claimants, play a special role in dispute processing. Without them, there would be no dispute, and had they reacted differently to their experiences, a dispute may never have emerged. Further, successful resolution of the dispute depends on the willingness of the parties to accept the outcome.

Despite their centrality to the existence of the dispute, and its later dispute processing, legal scholars have often overlooked the perspectives of the ordinary people involved in disputes in their legal analysis.<sup>73</sup> Many studies that do consider these perspectives only do so as they relate to the professional actors, such as lawyers and judges, involved in the dispute processing.<sup>74</sup> They tend to overemphasize the role of these professional actors and

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70. *Id.* at 3–4.

71. *Id.*

72. See IRONS, *supra* note 29, at xii, 3.

73. See EWICK & SILBEY, *supra* note 26, at 19–20, 34–35.

74. See *id.* at 19; IRONS, *supra* note 29, at x (recounting the narratives of actual plaintiffs in civil rights cases).

underemphasize how the claimants themselves shape the dispute.<sup>75</sup> When studies consider the claimants, often they focus exclusively on the few individuals bringing the claim rather than the wider community affected by the lawsuit.<sup>76</sup> Few studies have closely analyzed the role that the wider community plays in dispute formation and persistence.<sup>77</sup>

The key role that parties play in the formation and processing of disputes suggests the importance of their views and experiences to our understanding of legal claims. To understand the genesis of the dispute, we need to know where the claimants are coming from, what they have experienced, and how their experiences have influenced and continue to inform the dispute from their vantage point. In collective claims, like the Black Hills claim, which stemmed from a communal experience and affected an entire community, it is especially important to look beyond the named claimants to the wider community to understand the dispute's formation fully.<sup>78</sup> This can only be discerned by taking a closer look at the narratives told by the community involved in particular disputes. Combining their stories with the dispute formation framework enriches our understanding of how communities of claimants experience events and construct grievances and lawsuits out of them.

## II. THE EMERGENCE OF THE SIOUX CLAIM TO THE BLACK HILLS

In this Part, I demonstrate the usefulness of combining narrative analysis with the dispute formation framework through a case study of the Black Hills claim. I explore the emergence of the Sioux claim

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75. *See, e.g.*, EWICK & SILBEY, *supra* note 26, at 19–20.

76. *See, e.g., id.* at 20.

77. *See, e.g., id.* The few studies that do consider the influence of the wider community often explore how the community encourages people not to litigate against their neighbors. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 1–104 (1991) (exploring how the Shasta County community persuaded cattle ranchers not to pursue legal claims against their neighbors).

78. *See generally* EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES: 1775 TO THE PRESENT* (1991).

to the Black Hills, using the stories of Zitkala-Sa<sup>79</sup> as a narrative lens.<sup>80</sup> Zitkala-Sa's stories present a narrative about Sioux life around the time of the emergence of the Black Hills claim in the late nineteenth and early twentieth centuries.<sup>81</sup> Her narrative helps us to understand how the Black Hills claim developed out of the beliefs and experiences of the Sioux people. I attempt to reverse the normal pattern of using the law as the starting point and then tracing its trajectory into society. Instead, I focus on the beliefs and experiences of the Sioux people in an effort to understand the communal context underlying their collective claims to the Black Hills and how that context eventually led them into the United States legal system.

First, I provide a brief history of the Black Hills claim and explore Sioux beliefs about the Black Hills, which form the basis of the claim and are central to Zitkala-Sa's stories and description of the world.<sup>82</sup> Second, I use the stories of Zitkala-Sa to illustrate how the beliefs and the experiences of the Sioux people in the late nineteenth and early twentieth centuries informed the emergence of the largest land claim ever filed against the United States government.<sup>83</sup> Finally, I draw some preliminary conclusions about how narratives may foster a deeper understanding of claims formation.<sup>84</sup>

#### *A. Priceless Property: The Sioux And The Black Hills*

In its simplest terms, the Black Hills claim is about seven million acres of land.<sup>85</sup> These seven million acres, however, compose no ordinary lands; to the Sioux people, they are priceless.<sup>86</sup> From a

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79. Zitkala-Sa is also known by the name, Gertrude Simmons Bonnin. She is referenced as such in BLACK HILLS/WHITE JUSTICE. See LAZARUS, *supra* note 78.

80. See generally LAZARUS, *supra* note 78.

81. *Id.* at 119 ("No one knows precisely when the Sioux began agitating about the loss of the Black Hills.").

82. See *infra* Part II.A.

83. See *infra* Part II.B.

84. See *infra* CONCLUSION.

85. Fred Barbash, *58 Years Later, Sioux Legal Claim Still in Court*, WASH. POST, Apr. 28, 1980, at A2.

86. See *id.*

historical economic standpoint, the Black Hills also represent some of the most valuable land in the United States.<sup>87</sup> The Home Stake gold mine, situated within their boundaries, yielded more than \$1 billion to its non-Indian owners during its lengthy existence.<sup>88</sup> Long before fortune seekers discovered gold in the Black Hills, they belonged to the Sioux peoples.<sup>89</sup>

The United States recognized Sioux possession of the Black Hills.<sup>90</sup> They formed part of the Great Sioux Reservation, which was “set apart for the absolute and undisturbed use and occupation of the Indians” under the Fort Laramie Treaty of 1868.<sup>91</sup> Less than a decade after signing the Fort Laramie Treaty in 1868, prospectors found gold in the Black Hills, and Congress unilaterally ceded the Black Hills to the United States government in 1877.<sup>92</sup>

Since 1877, the Sioux have asserted that the United States stole the Black Hills from them.<sup>93</sup> By the 1880s, they started organizing around this assertion.<sup>94</sup> Throughout the 1890s and 1900s, Sioux elders and leaders continued to meet to discuss the loss of the Black Hills.<sup>95</sup> By 1903, some Sioux leaders were claiming that the United States government had violated the Fort Laramie Treaty of 1868 by taking the Black Hills.<sup>96</sup> They wanted to pursue their claim legally by appealing to a foreign legal system for justice.<sup>97</sup>

But the United States courts were closed to the Sioux who could not sue the United States government until Congress passed legislation allowing them to do so.<sup>98</sup> The Sioux could not even hire an attorney to advise them on the claim because they needed the

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87. *See id.*

88. *Id.*

89. *Id.*

90. Fort Laramie Treaty, *supra* note 1.

91. *Id.*; *see also* \$105 Million Award to Sioux Is Upheld, N.Y. TIMES, July 1, 1980, at A1.

92. United States v. Sioux Nation of Indians, 448 U.S. 371, 382 (1980).

93. *Id.* at 383.

94. LAZARUS, *supra* note 78, at 119.

95. *Id.* at 119–20.

96. *Id.* at 122.

97. *Id.*

98. *Id.* at 124.

approval of the Bureau of Indian Affairs.<sup>99</sup> Unrepresented, the Sioux lobbied Congress for almost twenty years for legislation granting the courts special jurisdiction to hear their claim to the Black Hills.<sup>100</sup>

For almost 150 years, Sioux have been continuously pursuing their claim to the Black Hills legally and politically.<sup>101</sup> The long duration of the claim and the persistence of the Sioux in pursuing it suggest that this is no ordinary grievance. Sioux beliefs and stories about the Black Hills are central to understanding their claim to the Black Hills. These beliefs frame the events that led to the Sioux's long pursuit to have their land returned to them and provide insights into how and why their legal claim to the Black Hills developed. Sioux views on the Black Hills can be identified in statements made by them about the Black Hills and the Black Hills claim.<sup>102</sup> I rely on public statements made by Sioux about the claim and their relationship with the Black Hills and scholarly works on the Black Hills claim to identify Sioux beliefs about the Black Hills.

Over time, the Sioux have told many stories about the Black Hills.<sup>103</sup> They tell stories about how Sioux peoples were created in the Black Hills, how the Black Hills are sacred to their way of life, and how the United States government and white settlers illegally alienated their land.<sup>104</sup> These stories suggest that the Sioux perceive the Black Hills to be priceless or irreplaceable.<sup>105</sup> The priceless nature of the Black Hills underlies the Sioux Nation's ongoing claim to them.<sup>106</sup>

The stories that the Sioux tell about the Black Hills reveal several aspects of the relationship between the Sioux people and the Black

99. *Id.* The Bureau of Indian Affairs refused to consider hiring an attorney for the Sioux until Congress passed a special jurisdictional act authorizing the bringing of the claim. *Id.*

100. LAZARUS, *supra* note 78, at 128–38. Congress finally passed legislation in 1920. *Id.* at 138.

101. For a chronology of the claim's history, see MARIO GONZALEZ & ELIZABETH COOK-LYNN, *THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY* app. H (1999).

102. *Id.* at 77.

103. *Indian Land Claims; Gold in the Hills*, *supra* note 19, at 28.

104. *Id.*; see also GONZALEZ & COOK-LYNN, *supra* note 101, at 77.

105. *Indian Land Claims; Gold in the Hills*, *supra* note 19, at 28.

106. *Id.*

Hills that make these lands priceless to them. These core beliefs fueled the deep sense of loss that Sioux felt at the alienation of the Black Hills in 1877 and the legal claims that developed out of this grievance.<sup>107</sup> To better understand the claim, it is essential to take a closer look at these beliefs.

First, and most importantly, the Black Hills are priceless because they are sacred to the Sioux people.<sup>108</sup> The Black Hills are the center of the Sioux universe.<sup>109</sup> They sustain the Sioux people culturally, spiritually, and physically.<sup>110</sup> When asked to sell the Black Hills to the United States government in 1875, Red Cloud described them as “the head chief of the land,”<sup>111</sup> Sitting Bull promised to kill any man who would sell them, and several chiefs referred to them as the head and the heart of the Sioux people.<sup>112</sup> More recently, Professor New Holy has explained the sacred nature of the Black Hills:

Lakota oral history teaches that the Ikce Wicasa (Lakota) are the descendants of the Pte Oyate (Buffalo People) who emerged on to the surface of the earth from Wind Cave in the Black Hills. Since that time, the Lakota have lived in and around the Hills, depending on buffalo, deer, and sheep. Before their confinement on reservations, Lakota freely entered Paha Sapa for physical, social, and spiritual reasons.<sup>113</sup>

New Holy suggests that the Black Hills are central to ongoing Sioux spirituality.<sup>114</sup> She mentions one of the oldest Sioux stories about the Black Hills, namely their location as the place of origin of the Sioux

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107. Linda Kanamine, *Money Vs. Promised Land: Sioux Tribes Spurn Cash for Sacred Black Hills*, USA TODAY, Nov. 30, 1992, at 7A.

108. *Indian Land Claims; Gold in the Hills*, *supra* note 19, at 28.

109. LAZARUS, *supra* note 78, at 7.

110. *Id.* at 82 (quoting Red Cloud on Sioux dependency on the Black Hills).

111. *Id.*

112. *Id.* at 137.

113. Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 322 (1998).

114. *Id.* at 322 n.22.

peoples.<sup>115</sup> The centrality of the Black Hills to Sioux creation shows how important they are to the Sioux peoples, their spirituality, and way of life.<sup>116</sup> The sacred status of the Black Hills, evident in these stories, suggests that their religious and cultural importance to the Sioux transcends any economic value that could be assigned to them; in essence, these lands are priceless and cannot be sold.<sup>117</sup>

Second, as Professor New Holy explains, this spiritual importance is not only historical.<sup>118</sup> It is continuous.<sup>119</sup> The Sioux continue their relationship with the sacred Black Hills,<sup>120</sup> and today, the Black Hills constitute a central aspect of their cultural identity.<sup>121</sup> As Professor John LaVelle reiterated:

The Black Hills land is of primary importance because of its sacredness, its nexus to the cultural well being of Lakota people, and its role as a mediator in their relationship with all other living things . . . .

Land is inherent to Lakota people. It is their cultural centerpiece—the fulcrum of material and spiritual well being. Without it, there is neither balance nor center. The Black Hills are a central part of this “sacred text” and constitute its prophetic core[.]<sup>122</sup>

LaVelle, like New Holy, suggests that the sacred nature of the Black Hills is central to Sioux beliefs about the Black Hills.<sup>123</sup> The

115. *Id.* at 318.

116. Lakota beliefs about their creation in the Black Hills are widely known and have been reported in the media. *See, e.g., Indian Land Claims; Gold in the Hills, supra* note 19, at 28; Kanamine, *supra* note 107.

117. The Sioux strongly opposed sale of the Black Hills when the United States government sought to purchase them in 1875. LAZARUS, *supra* note 78, at 80–83.

118. New Holy, *supra* note 113, at 317.

119. *Id.* at 317–18.

120. *See, e.g.,* Kanamine, *supra* note 107 (“Children and adults often visit the scenic mountains for recreation and religious ceremonies.”).

121. LaVelle, *supra* note 6, at 67 (“For the Lakota, Dakota, and Nakota people, Paha Sapa is ‘constitutive of cultural identity. . . .’”).

122. *Id.* at 66 (alteration in original) (quoting Pommersheim, *supra* note 15, at 352).

123. *Id.*

sacredness of the Black Hills to the Sioux is widely documented,<sup>124</sup> and repeatedly asserted by Sioux leaders.<sup>125</sup>

The Sioux were not only created in the Black Hills; the Black Hills continue to sustain them physically, spiritually and culturally.<sup>126</sup> The Sioux have and continue to use the Black Hills for religious and physical sustenance.<sup>127</sup> The Sioux pass down more than just stories about the Black Hills. They share their sense of the sacredness of the Paha Sapa, the place of their creation, renewal and sustenance.<sup>128</sup> This ongoing relationship between the Sioux and the Black Hills is central to their belief that the Black Hills are priceless.

The ongoing relationship that the Sioux have with their sacred Black Hills informs not only their perception of the Black Hills as priceless, but also how they experienced the alienation of their land at the end of the nineteenth century.<sup>129</sup> The Sioux resisted the intrusion of white settlers and their technology into their lands.<sup>130</sup> In the 1860s, they opposed the development of a road through their best hunting grounds in the Powder River Country.<sup>131</sup> After a series of armed engagements, the United States and the Sioux re-entered into treaty

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124. See, e.g., Salisbury, *Sioux Tribe Wants to Stay in Black Hills*, *supra* note 17 at 12 (“Few argue with the Sioux contention that during the centuries they lived in the area, the Black Hills were considered a holy place. Ranging widely throughout the Great Plains during the winter, the tribes would return to Paha Sapa each spring to spend the summer in the cool hills and to conduct a number of religious ceremonies.”); see also Alix Sharkey, *A Five-Star Hotel and Casino. Well Thanks, Kevin*, INDEP. (London), May 20, 1995, at 31 (“Standing at the centre of a six-state area once known to white settlers as ‘Indian country,’ the Black Hills, or Paha Sapa, are sacred to the Sioux. These were their burial grounds and holy lands, where they came on ‘vision quests,’ and held their annual Sundance rituals.”).

125. Several Lakota leaders have publicly mentioned the sacred nature of the Black Hills. For instance, in 1980, “Russell Means of the American Indian Movement called the land ‘our graveyard, our church, the center of our universe and the birthplace of our people.’” *\$105 Million Award to Sioux Is Upheld*, *supra* note 91, at B9.

126. See generally LaVelle, *supra* note 6.

127. See, e.g., Kanamine, *supra* note 107 (“‘We claim all the Hills; they are our church,’ says Sam Loudhawk, an Oglala Sioux who is chairman of a multi-nation lands committee. ‘They are our origins and some of our burial grounds.’”).

128. See generally LaVelle, *supra* note 6.

129. *Id.* at 65–66.

130. LAZARUS, *supra* note 78, at 14–44.

131. *Id.* at 35–36.

negotiations.<sup>132</sup> These negotiations resulted in the Fort Laramie Treaty of 1868, which:

[E]stablished peace between the Sioux bands and the United States (art. 1); established a 26-million-acre reservation (the Great Sioux Reservation) for the “absolute and undisturbed use and occupation” of the Sioux bands (art. 2); provided that no future cession of the reservation would be valid without the signatures of three-fourths of the adult male population of the Sioux bands (art. 12); provided that the Sioux bands would have hunting rights over their remaining 1851 treaty lands and expanded hunting rights westward to the summits of the Bighorn Mountains and southward to the Republican River so long as the Buffalo ranged in such numbers as to justify a chase (art. 11); provided that when agency buildings were constructed by the United States, they would regard the permanent reservation as their permanent home (art. 15); and provide that all remaining 1851 treaty lands would remain “unceded Indian territory” (art. 16).<sup>133</sup>

The Treaty, however, did not end white encroachments onto Sioux lands.<sup>134</sup> In 1874, Lieutenant Colonel George Armstrong Custer led a military expedition into the Black Hills.<sup>135</sup> He sent back reports of gold in the Black Hills, and speculators and fortune seekers flocked to the Hills en masse.<sup>136</sup> Hostilities soon broke out as Sioux tried to defend their lands from encroachment.<sup>137</sup> The United States government refused to protect Sioux lands or prevent further incursions.<sup>138</sup> In 1875, the United States asked the Sioux to sell the

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132. *Id.* at 37–45. The Sioux had concluded treaties with the United States before 1868. *Id.* at 45.

133. GONZALEZ & COOK-LYNN, *supra* note 101, at app. H; *see also* Fort Laramie Treaty, *supra* note 1.

134. LAZARUS, *supra* note 78, at 76–77.

135. *Id.* at 77.

136. *Id.* at 76–77.

137. *Id.* at 76–79.

138. *Id.* at 79.

Black Hills for \$6 million.<sup>139</sup> The Sioux vehemently refused to sell.<sup>140</sup> Feeling that the white occupation of the Black Hills could not be stopped,<sup>141</sup> Congress passed legislation exerting ownership over the Black Hills in 1877.<sup>142</sup> Ever since, Sioux have condemned this act as the theft of their lands and felt a deep sense of cultural, spiritual, and economic loss due to the alienation of land so sacred to them that they were unwilling to sell it.<sup>143</sup>

Due to the ongoing, sacred relationship that the Sioux have with the Black Hills, the loss of these lands devastated them. Many of the public and autobiographical statements made by Sioux and newspaper reports on the Sioux's loss of their land highlight how the alienation of these lands affected them spiritually, culturally, and economically.<sup>144</sup> One newspaper emphasized the spiritual degradation they experienced and reported:

The loss of the Black Hills was the worst part. The Sioux call them “wamaka ognaka onakizin,” “the sanctuary of everything that is.” They believe that the first Sioux was put on earth there. Asking a Sioux to give up the Black Hills, one wrote, is like asking a Christian to reject Christ as the Son of God.<sup>145</sup>

This statement illustrates how Sioux beliefs about the Black Hills, their sacred view of the land and their ongoing relationship with it, contributed to how they reacted to the 1877 Act confiscating their lands.<sup>146</sup> These beliefs made these lands priceless to the Sioux. They

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139. *Id.* at 82.

140. LAZARUS, *supra* note 78, at 80–83.

141. *Id.* at 83.

142. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 383 (1980) (“The passage of the 1877 Act legitimized the settlers’ invasion of the Black Hills, but throughout the years it has been regarded by the Sioux as a breach of this Nation’s solemn obligation to reserve the Hills in perpetuity for occupation by the Indians.”).

143. *Id.* at 385.

144. For a fuller description of how the loss of the Black Hills affected the Sioux economically and culturally, see LAZARUS, *supra* note 78, at 94.

145. *Indian Land Claims; Gold in the Hills*, *supra* note 19, at 28.

146. *Id.*

informed Sioux understandings of their experiences, fueled the grievance they felt at the loss of the lands,<sup>147</sup> and motivated the Sioux to meet regularly in the 1890s to lament the loss of the Black Hills.<sup>148</sup>

The deep sense of loss that the Sioux felt as a result of their dispossession frames their later actions to reclaim the Black Hills.<sup>149</sup> Not all grievances, however, turn into legal disputes, and the identification of Sioux beliefs about the Black Hills does not provide any insights into how the alienation of the Black Hills turned into a land claim against the United States. To understand how Sioux beliefs collectively may have contributed to the transformation of their grievance into a legal claim against the United States requires a closer look at the experiences of every day Sioux from the late 1870s to around the time of the original filing of the Black Hills claim in the Court of Claims in 1923.

### *B. From Grievance To Lawsuit: The Communal Narrative Fueling The Black Hills Claim*

In this section, I illustrate how combining narrative analysis with the sociolegal framework for dispute formation enriches our understanding of the Black Hills claim. I use *American Indian Stories*, an autobiographical work based on a young woman growing up on the Yankton Sioux Reservation in the decades immediately following the 1877 Act, to provide insights into how Sioux beliefs

147. This sense of loss continues as Lakota feel slighted when they must pay user fees to go on their lands and deal with tourists in their sacred sites. Goldstein, *supra* note 16.

Most important, the Indians view this land as sacred. Their ancestors once ranged across the northern Plains, praying, fasting and seeking visions in the Black Hills. Now the Sioux say they must pay user fees and endure tourists in their holy places.

“It’s like someone taking a church or synagogue and giving it to some private people,” said Mr. Gonzalez, the tribal lawyer. “It would be outrageous to Jews or Christians, but for Indians it’s O.K.”

The Indians say they must save the Black Hills from “rape” by developers who would reduce its pine forests and granite bluffs to strip mines, gravel pits and nuclear waste dumps.

*Id.*

148. LAZARUS, *supra* note 78, at 119.

149. See generally *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl.), cert. granted, 444 U.S. 989 (1979), *aff’d*, 448 U.S. 371 (1980).

about the Black Hills as priceless property along with their experience of dispossession inform the formation of the Black Hills claim.<sup>150</sup> I argue that *American Indian Stories* illustrates how Sioux beliefs about the Black Hills informed the naming, blaming, and claiming process that transformed Sioux grievances about the loss of their land into the largest land claim ever filed against the United States government. Sioux engaged in the process of naming, blaming, and claiming that underlies dispute formation as they sought to deal with the loss of their land and eventually formulated a legally viable claim for its return. While ordinary Sioux may not have always been conscious of their role in this process, Zitkala-Sa's stories document their participation by recounting how they collectively experienced and reacted to dispossession.<sup>151</sup>

Sioux beliefs about the Black Hills emerge in the autobiographical stories of Zitkala-Sa. Zitkala-Sa's *American Indian Stories* highlights the importance of land in everyday Sioux life and culture.<sup>152</sup> It shows how these communal beliefs, weaved together with the experiences of the Sioux from 1877 to 1903, affected them and prompted their leaders to seek legal redress for the alienation of their land.<sup>153</sup>

*American Indian Stories* presents a narrative for understanding how Sioux beliefs about the Black Hills combined with the negative economic, social, cultural, and spiritual consequences of their dispossession.<sup>154</sup> When this narrative is transposed against the dispute formation framework, it provides a more complete understanding of how dispossession and its aftermath influenced the emergence of the Black Hills claim.

Gertrude Bonnin, or Zitkala-Sa, experienced the dispossession of the Sioux first hand.<sup>155</sup> She was born on the Yankton Sioux Reservation in 1876, one year before the United States abrogated the

150. See discussion *infra* Part II.B.

151. See generally ZITKALA-SA, *AMERICAN INDIAN STORIES* (1921).

152. *Id.*

153. I focus on the time period from 1877 to 1903 because by 1903 Sioux leaders were making treaty based claims against the United States. LAZARUS, *supra* note 78, at 121.

154. See generally ZITKALA-SA, *supra* note 151.

155. See generally *id.*

Fort Laramie Treaty and expropriated the Black Hills.<sup>156</sup> As a child, she experienced the aftermath of this dispossession, and her stories reflect this.<sup>157</sup> She spent the first eight years of her life living in a tipi on the Missouri River and learning the traditions of her people.<sup>158</sup> During this time, she may have heard her elders talk about the loss of the Black Hills.<sup>159</sup> Like many Sioux children, Zitkala-Sa left the reservation to attend a boarding school where Indian children were forced to abandon their native languages and cultures and expected to assimilate.<sup>160</sup> She experienced the pain of learning a new language and culture.<sup>161</sup> She felt the alienation of returning home to the reservation three years later.<sup>162</sup> In 1895, she pursued further education at Earlham College where she distinguished herself as an orator, poet, and violinist.<sup>163</sup> She graduated and taught at the Carlisle Indian School for a few years before returning to Sioux country and marrying Raymond Bonnin, another Sioux, in 1902.<sup>164</sup>

The Bonnins spent their lives together advocating for Indian peoples.<sup>165</sup> They lived on Indian reservations and in Washington, D.C.<sup>166</sup> In the 1920s and 1930s, Zitkala-Sa worked for various pan-Indian organizations, including the Society of the American Indian and the National Council of American Indians.<sup>167</sup> She advocated for Indian citizenship, Indian employment in the Bureau of Indian

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156. Dexter Fisher, *Zitkala-Sa: The Evolution of a Writer*, 5 AM. INDIAN Q. 229, 231 (1979); see also LAZARUS, *supra* note 78, at 93.

157. See generally Fisher, *supra* note 156.

158. *Id.* at 231.

159. *Id.*

160. *Id.* at 230. For more information on the experiences of students at Indian boarding schools, see AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES (Margaret L. Archuleta, Brenda J. Child & K. Tsianina Lomawaima eds., 2000); LAZARUS, *supra* note 78, at 101–02 (explaining the boarding school policy and Sioux reaction to it).

161. Fisher, *supra* note 156, at 232.

162. *Id.*

163. *Id.*

164. *Id.* at 230, 234.

165. *Id.* at 235–36.

166. *Id.* at 235.

167. Fisher, *supra* note 156, at 235.

Affairs, equitable settlement of tribal land claims, and legal reforms relating to Indians.<sup>168</sup>

Zitkala-Sa wrote her autobiographical *American Indian Stories* at the beginning of the twentieth century before she launched her work in Indian reform.<sup>169</sup> From 1900 to 1902, she published the individual stories in the collection in *Atlantic Monthly*, *Harper's Magazine*, and *Everybody's Magazine*.<sup>170</sup> The stories were first published as a collection in 1921.<sup>171</sup>

Zitkala-Sa's writing and initial publication of the stories in *American Indian Stories* coincided with the commencement of collective Sioux strategies for claiming the Black Hills legally and politically.<sup>172</sup> Her stories were first published around the same time that Sioux leaders started voicing their grievance over the Black Hills as a legal claim in 1903.<sup>173</sup> From 1903 to 1920, Sioux lobbied Congress for an act waiving the United States government's sovereign immunity and permitting a lawsuit based on the unilateral usurpation of the Black Hills.<sup>174</sup> Zitkala-Sa participated in this lobbying effort as a member of the Society of American Indians, which made congressional passage of a jurisdictional act to hear Indian grievances one of its highest priorities.<sup>175</sup> In 1920, after decades of lobbying efforts, the Sioux finally succeeded in convincing Congress to pass a special jurisdictional act allowing them to file suit against the United States government for claims "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof."<sup>176</sup> The Sioux then hired counsel, and by 1923, their

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168. *Id.*

169. *Id.* at 233–34

170. *Id.*

171. *Id.* at 235.

172. See LAZARUS, *supra* note 78, at 122–38.

173. *Id.* at 129.

174. *Id.* at 122–38; see also GONZALEZ & COOK-LYNN, *supra* note 101, at app. H.

175. LAZARUS, *supra* note 78, at 131; Fisher, *supra* note 156, at 235.

176. Act of June 3, 1920, ch. 222, 41 Stat. 738.

new lawyer, Ralph Case, had filed the Sioux's treaty claims in the United States Court of Claims.<sup>177</sup>

While she played a role in the hiring of the attorneys to represent the claim in 1920,<sup>178</sup> Zitkala-Sa was not a traditional Sioux leader or a major instigator of the Black Hills claim.<sup>179</sup> She was born to a common Sioux family, and her experiences were similar to other Sioux at the time, especially those that left the reservation as children to attend boarding school.<sup>180</sup> As one of the first American Indian women to write without the assistance of an editor,<sup>181</sup> she presents a view distinct from those of the predominantly male leadership pursuing the claim. Her focus is not on the claim, but on the experiences of ordinary Sioux struggling to survive after dispossession and dealing with the encroachment of white settlers into their territory.<sup>182</sup> Her stories reflect her perspectives on her life as a Sioux woman living in a transitional period in Sioux life. Dexter Fisher describes them as emblematic “of the experience of many Indians living in transition between two worlds—the remembered past and the alien present, tradition and change.”<sup>183</sup>

Zitkala-Sa does not directly discuss the Black Hills claim in *American Indian Stories*. Rather, her work depicts the experiences of common Sioux following the events—the 1877 Act and ensuing dispossession—that precipitated the grievance and its transformation into a legal claim. It represents a narrative of Sioux life prior to the inception of the grievance as a legal claim, and provides insights into the early stages of the creation of the claim as it was experienced by ordinary Sioux people. Her stories refer to Sioux beliefs about the Black Hills and their experiences after the alienation of their sacred

177. GONZALEZ & COOK-LYNN, *supra* note 101, at app. H.

178. LAZARUS, *supra* note 78, at 139. Zitkala-Sa lobbied Sioux leaders to hire Charles Evans Hughes to represent them. *Id.* at 139–40.

179. *See generally* ZITKALA-SA, *supra* note 151.

180. Dexter Fisher, *Foreword* to Zitkala-Sa, *American Indian Stories*, in *MASTERPIECES OF AMERICAN INDIAN LITERATURE* 193, 195–97 (Willis G. Regier ed., 2005).

181. *Id.* at 195.

182. *See generally* ZITKALA-SA, *supra* note 151.

183. Fisher, *supra* note 180, at 196.

lands in 1877. Many recount individual factual situations remarkably similar to what happened collectively to the Sioux as they lost their land and struggled to regain it.

Although not overtly political in nature, *American Indian Stories* reflects Zitkala-Sa's "controlled rage over the mistreatment of Indians and [her] desire to convince America of the Indian's humanity."<sup>184</sup> She writes about how she treasured her early childhood on the Northern plains and describes the impact of the injustice done to her people.<sup>185</sup> For her, "[w]riting became a means not only to perpetuate tradition in the face of cultural disintegration but also a chance for Native Americans to tell their side of the story to a wider audience."<sup>186</sup> *American Indian Stories* provides us with a perspective lost in the court filings and opinions. It gives us insight into the voices, experiences, and beliefs of the ordinary Sioux and why they supported their leaders as they struggled to file the Black Hills claim.

*American Indian Stories* presents a narrative about how ordinary Sioux peoples collectively experienced the loss of the Black Hills. Her stories document the sacred, ongoing relationship that Sioux have with the land, the raw feelings of dispossession and despair they felt shortly after the United States took the land in 1877, and the challenges the Sioux faced in their quest for justice.<sup>187</sup> The reader sees how Sioux peoples view the Black Hills as priceless property and have been shaken to their core by the loss of their land and watches as they transform from their traditional, land-based lifestyle to one more dependent upon the federal government.<sup>188</sup>

A close reading of Zitkala-Sa's stories suggests how ordinary Sioux may have experienced the naming, blaming, and claiming process underlying the development of the legal claim.<sup>189</sup> Recall that disputes emerge through a three-step process.<sup>190</sup> In the first step,

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184. Fisher, *supra* note 156, at 232.

185. See generally ZITKALA-SA, *supra* note 151.

186. Fisher, *supra* note 180, at 195.

187. See generally *id.*

188. See *id.* at 9, 40, 95.

189. Felstiner et al., *supra* note 26, at 631.

190. *Id.*

naming an individual or community identifies a particular experience as injuring them.<sup>191</sup>

In *American Indian Stories*, Zitkala-Sa shows how the Sioux identified dispossession as injuring them by recounting the bitterness and loss the Sioux felt about the expropriation of their land.<sup>192</sup> In the very first story that Zitkala-Sa tells about a girl getting water from the river with her mother,<sup>193</sup> she indicates the sense of loss that the Sioux felt due to the alienation of their land.<sup>194</sup> The daughter in the story recounts the deep sadness of her mother, which she knows comes from dispossession.<sup>195</sup> The mother's sadness reflects the sense of loss and injury ordinary Sioux felt as the result of their dispossession.<sup>196</sup>

At the end of the story, Zitkala-Sa poignantly indicates the injury to the Sioux.<sup>197</sup> The mother points to the hill upon which her other daughter is buried and explains to her young daughter: "There is what the paleface has done! Since then your father too has been buried in a hill nearer the rising sun. We were once very happy. But the paleface has stolen our lands and driven us hither. Having defrauded us of our land, the paleface forced us away."<sup>198</sup> The characters in her stories feel injured by the loss of their land, which is accompanied by loss of livelihood and culture.<sup>199</sup> They perceive the root of their injury as the loss of their land<sup>200</sup> and are bitter about and hurt by the loss.<sup>201</sup> These strong feelings of anger, bereavement, and

191. *Id.* at 635.

192. *See* ZITKALA-SA, *supra* note 151, at 10.

193. *Id.* at 7–11.

194. *Id.* at 9 ("If the paleface does not take away from us the river we drink.").

195. *Id.* at 7 ("Often she was sad and silent, at which times her full arched lips were compressed into hard and bitter lines, and shadows fell under her black eyes.").

196. *See id.*

197. *Id.* at 10–11.

198. ZITKALA-SA, *supra* note 151, at 9–11, 44–45.

199. *See id.* at 10–11 (discussing the loss of livelihood, relatives, and culture through education and impoverishment due to loss of land); *id.* at 44–55 (discussing the loss of culture through education); *id.* at 165–66 (discussing the impoverishment through loss of land).

200. *See id.* at 10.

201. *See id.* at 9–11.

injury stem in part from their beliefs about the sacredness of the land and their spiritual connection to it.<sup>202</sup>

Zitkala-Sa more implicitly illustrates the loss to the Sioux and their transition from a life on the land to dependency on the government through the progression of her stories. Her first stories speak of her almost idyllic life as a Sioux child roaming free on the Northern plains, learning beadwork from her mother, and listening to the stories of the elders.<sup>203</sup> She describes the storytelling:

As each in turn began to tell a legend, I pillowed my head in my mother's lap; and lying flat upon my back, I watched the stars as they peeped down upon me, one by one. The increasing interest of the tale aroused me, and I sat up eagerly listening to every word. The old women made funny remarks, and laughed so heartily that I could not help joining them.<sup>204</sup>

Throughout the book, however, life on the reservation changes. By the end of the book, the Sioux people have lost the ability to live on their land and are growing more dependent on the federal government.<sup>205</sup> She registers this gradual transition and the loss that accompanies it, noting small changes from traditional life to the ways of the white man throughout the book. For example, by the time the

202. *See id.* at 10.

203. ZITKALA-SA, *supra* note 151, at 7–24.

204. *Id.* at 15. She recounts several other moments as well. For instance, she describes her mother doing beadwork:

Untying the long tasseled strings that bound a small brown buckskin bag, my mother spread upon a mat beside her bunches of colored beads, just as an artist arranges the paints upon his palette. On a lapboard she smoothed out a double sheet of soft white buckskin; and drawing from a beaded case that hung on the left of her wide belt a long, narrow blade, she trimmed the buckskin into shape. Often she worked upon small moccasins for her small daughter. Then I became intensely interested in her designing. With a proud, beaming face, I watched her work. In imagination, I saw myself walking in a new pair of snugly fitting moccasins.

*Id.* at 18–19.

205. *See id.* at 161 (describing poverty and starvation on the reservation); *id.* at 164 (noting application of white man's law); *id.* at 170 (stating that times have changed and describing dependency of old Indian woman); *id.* at 172 (noting autocratic power of the United States government over Indians).

little girl in the first story goes off to boarding school, her mother has moved into town and is trying to adjust to living in a white man's house.<sup>206</sup>

Central to the loss of the Sioux traditional lifestyle is a claim—this loss is the result of their dispossession. This claim is a recurring theme in *American Indian Stories*. The work suggests that from very early on, ordinary Sioux, much like their leaders and elders, were naming the wrong against them—the stealing of their land—and felt severely injured by it.<sup>207</sup>

Zitkala-Sa's *American Indian Stories* also suggests the role that Sioux beliefs and experiences may have played in the second stage of claim formation, blaming. Blaming occurs as a perceived injurious experience is transformed into a grievance with the expectation that something can be done to remedy the injury.<sup>208</sup> Repeatedly, Zitkala-Sa identifies the parties responsible for the injuries experienced by the Sioux through the alienation of their land.<sup>209</sup> The responsible party is often described generically as the “palefaces,”<sup>210</sup> who are depicted as heartless and deceitful.<sup>211</sup>

In the first story, the mother clearly blames the white man for the injuries done to her family.<sup>212</sup> The story, like some of the others, suggests a growing skepticism of white people among the Sioux and a genuine resentment of whites for the taking of Sioux land.<sup>213</sup> As the

206. *Id.* at 40 (“First it was a change from the buffalo skin to the white man’s canvas that covered our wigwam. Now she had given up her wigwam of slender poles, to live, a foreigner, in a home of clumsy logs.”). She also notes the transitions that she noticed when she returned from boarding school. *Id.* at 72 (“They were no more young braves in blankets and eagle plumes, nor Indian maids with prettily painted cheeks. They had gone three years to school in the East, and had become civilized. The young men wore the white man’s coat and trousers, with bright neckties. The girls wore tight muslin dresses, with ribbons at neck and waist. At these gatherings they talked English.”).

207. Lazarus documents that Sioux leaders and elders complained about the taking of the Black Hills from the very beginning. LAZARUS, *supra* note 78, at 119–20 (noting that the first organized protest was in 1887 and that most of the old chiefs retained memories of theft and deception).

208. Felstiner et al., *supra* note 26, at 635.

209. See ZITKALA-SA, *supra* note 151, at 44 (“The palefaces, who owe us a large debt for stolen lands . . .”).

210. See *id.* at 9.

211. *Id.* at 11, 41, 93, 95–96.

212. *Id.* at 9.

213. *Id.* at 7–11.

mother and daughter get water, the daughter dreams of the day when she will get water for her mother and her mother will not have to do it.<sup>214</sup> She suggests this to her mother, who responds harshly.<sup>215</sup> Zitkala-Sa describes the mother's reaction:

With a strange tremor in her voice which I could not understand, she answered, "If the paleface does not take away from us the river we drink."

"Mother, who is this bad paleface?" I asked.

"My little daughter, he is a sham,—a sickly sham! The bronzed Dakota is the only real man."

I looked up into my mother's face while she spoke; and seeing her bite her lips, I knew she was unhappy.<sup>216</sup>

The mother's comments about the river and the "palefaces" suggest that the "palefaces" have taken something valuable that the Sioux did not intend to give them.<sup>217</sup> Her sadness stems from this loss, and she expresses a distrust of the palefaces, who she fears will take more from her people.<sup>218</sup> The story describes how the loss of land affected the Sioux emotionally as they attempted to adjust to the ways of the white man and blamed the white man for that loss.<sup>219</sup>

Some of the stories, however, indicate that the white man's government is to blame for the problems faced by the dispossessed Sioux.<sup>220</sup> These stories imply an expectation that the government could remedy the situation by highlighting the failure of the government to do anything to assist the Sioux. Many suggest that

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214. *Id.* at 9.

215. ZITKALA-SA, *supra* note 151, at 9.

216. *Id.*

217. *See id.*

218. *See id.* at 9–10.

219. *Id.* at 9 ("Stamping my foot on the earth, I cried aloud, 'I hate the paleface that makes my mother cry!'").

220. The two stories that most clearly identify the government as responsible for the alienation of Lakota land are "An Indian Teacher Among Indians" and "The Widespread Enigma of Blue-Star Woman." ZITKALA-SA, *supra* note 151, at 81–99, 159–82.

justice cannot be obtained from the government in Washington.<sup>221</sup> In the story entitled “A Trip Westward,” the mother blames the “Great Father” in Washington for their dispossession and poverty.<sup>222</sup> The mother explains to her daughter, who has just returned from the East, how her brother lost his job:

Well, my daughter, this village has been these many winters a refuge for white robbers. The Indian cannot complain to the Great Father in Washington without suffering outrage for it here. Dawée tried to secure justice for our tribe in a small matter, and today you see the folly of it.<sup>223</sup>

Here, the mother identifies the government as part of the problem and to blame for the problems experienced by her family.<sup>224</sup> She expresses her expectation that the United States government will act to end white incursions onto Sioux lands and implies that it should and could do something to right wrongs against the Sioux, but it will not.

Zitkala-Sa’s characters identify the United States government more explicitly as the party to blame for the dispossession of Sioux lands in the very last story in the book.<sup>225</sup> In this allotment-era story,<sup>226</sup> the government contributes to the continued alienation of

221. *See id.* at 91.

222. *Id.* at 90–91 (“Dawée! Oh, has he not told you that the Great Father at Washington sent a white son to take your brother’s pen from him? Since then Dawée has not been able to make use of the education the Eastern school has given him.” (internal quotation marks omitted)).

223. *Id.* at 91.

224. Similar complaints about white incursions onto Sioux lands are made throughout *American Indian Stories*. *See id.* at 93, (discussing the “shrinking limits of the village”); *id.* at 94 (identifying the fires of white intruders on Sioux lands); *id.* at 96 (mentioning stories of the encroaching frontier settlers on the reservation).

225. *Id.* at 181–82.

226. Allotment was a government policy formulated in the 1880s to civilize and assimilate Indian individuals into American culture and society by encouraging them to take up farming. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton et al. eds., 2005 ed.) (1941). The policy divided communal tribal lands into parcels and distributed these parcels to individual Indians. *Id.* Surplus lands were then sold to white homesteaders. *Id.* For a more thorough discussion of the impact of the allotment policy, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

tribal land through shady dealings.<sup>227</sup> An elderly chief tries to prevent the loss of land by writing a letter to a benefactor in the East.<sup>228</sup> Through his granddaughter, he writes:

We were not asked to give land, but our land is taken from us to give to another Indian. This is not right. Lots of little children of my tribe have no land. Why this strange woman get our land which belongs to our children? Go to Washington and ask if our treaties tell him to give our property away without asking us. Tell him I thought we made good treaties on paper, but now our children cry for food. We are too poor. We cannot give even to our own little children. Washington is very rich. Washington now owns our country. If he wants to help this poor Indian woman, Blue-Star, let him give her some of his land and his money.<sup>229</sup>

The chief suggests that the government, in his words, “Washington,” is responsible for the loss of tribal land.<sup>230</sup> He calls on an American woman to make his case and invokes the government’s treaty obligations to the Sioux in his petition to her.<sup>231</sup> His statements imply that he knows that the government is not respecting tribal treaty rights, that it ultimately is to blame for the tribe’s condition, and that it has the power to remedy the situation.<sup>232</sup>

In addition to suggesting how ordinary Sioux may have come to blame the United States government for the losses they experienced after dispossession, the narrative presented by Zitkala-Sa in these two stories mirrors the collective experiences of the Sioux bands from 1877 to 1903 and indicates that the United States government was to

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227. ZITKALA-SA, *supra* note 151, at 159–82.

228. *Id.*

229. *Id.* at 172–73.

230. *Id.*

231. *Id.* at 173.

232. *Id.* at 172–73. He also makes the same claim that the Sioux Nation will eventually make against the United States government, namely that the United States ignored tribal treaty rights by passing the 1877 Act ceding the Black Hills. *Id.* at 172.

blame for their dispossession, poverty, and loss of culture. The first story about the woman's son and how Sioux cannot trust the government to provide them with justice reflects collective Sioux experiences with the Fort Laramie Treaty.<sup>233</sup> Sioux chiefs entered into the Fort Laramie Treaty with the United States in 1868 to secure ownership over their lands and prevent further encroachment by whites.<sup>234</sup> Yet, white prospectors invaded their lands shortly thereafter.<sup>235</sup> Instead of protecting their lands, the government soon condoned the actions of the settlers<sup>236</sup> and provided the ultimate sanction for their incursions onto Sioux lands by taking these lands through the 1877 Act.<sup>237</sup> In Zitkala-Sa's story, as in real life, the government denied justice to Sioux peoples, and the Sioux identified the government as the party to blame for their injuries.<sup>238</sup>

The second story about the shady land dealings also parallels how the United States government treated Sioux and their lands after 1877 and blames the government for this treatment.<sup>239</sup> Much as the United States government confirmed the confiscation of Sioux land by encroaching settlers through the 1877 Act, in this story, the government facilitates the loss of their land by sanctioning shady land dealings during the allotment of communal Sioux lands into individual parcels and the selling of surplus lands in the 1890s.<sup>240</sup> While Zitkala-Sa relays these stories on an individual level rather than a collective one, the similarities between her stories and the collective experiences of Sioux suggest that her narrative may allude to more than the problems faced by and experiences of individual Sioux. The old chief in her story makes almost the same claim, namely that the United States government ignored tribal treaty rights,

233. *Id.* at 85–92.

234. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

235. *Id.* at 377 (describing nationwide circulation of reports of Custer's discovery of gold in the Black Hills in July 1874).

236. *Id.* at 378 (“[T]he Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory.”).

237. *Id.* at 382–83.

238. *Id.* at 383–84.

239. ZITKALA-SA, *supra* note 151, at 159–82.

240. *Id.*

that the Sioux Nation later made in *United States v. Sioux Nation*.<sup>241</sup> Her stories identify an expectation that the wrongs against the Sioux could be remedied and indicate that they felt that the United States government could not be trusted and was to blame for the alienation of Sioux land.

Perhaps the clearest statement that Zitkala-Sa makes on who is to blame for Sioux dispossession is in her essay, “America’s Indian Problem,” which follows the stories in *American Indian Stories*.<sup>242</sup> In her essay, Zitkala-Sa alleges that the government has mismanaged Indian lands and treated Indian people unequally.<sup>243</sup> She states, “[t]he many treaties made in good faith with the Indian by our government we would like to see equitably settled.”<sup>244</sup> Her statements, both in the essay and the stories, identify a particular party—the United States government—as responsible for the injury to the Sioux. They illustrate how the Sioux may have come to blame the government rather than white people in general for the loss of their land. Further, they suggest an expectation that the government could remedy the land alienation problem but that it would not.

*American Indian Stories* also sheds light on how ordinary Sioux may have experienced the third stage of dispute formation, claiming. Claiming occurs when the party with the grievance voices it to the person believed to be responsible, asks for some remedy, and is denied.<sup>245</sup> In the final story, Zitkala-Sa illustrates the several difficulties that arose when Indians tried to make land claims, including issues over who should be on and deserving of tribal land,<sup>246</sup> the role of clever white lawyers in the claims process,<sup>247</sup> and

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241. *Id.* at 172. In *Sioux Nation*, the Nation claimed that the United States violated the signature clause of the Fort Laramie Treaty of 1868 because it did not obtain the signatures of three-fourths of all adult male Sioux before alienating the Black Hills in the 1877 Act. *Sioux Nation*, 448 U.S. at 374–84 (describing the history and substance of the Sioux claim to the Black Hills).

242. ZITKALA-SA, *supra* note 151, at 185–88.

243. *Id.* at 190–92.

244. *Id.* at 187.

245. Felstiner et al., *supra* note 26, at 635.

246. ZITKALA-SA, *supra* note 151, at 160–61.

247. *Id.* at 169.

the dispossession of more land as a result of engaging in the process.<sup>248</sup>

Zitkala-Sa describes two claims in her final story.<sup>249</sup> First, Blue-Star Woman, an impoverished Indian of uncertain heritage, appeals to the United States government, claiming a share in tribal land as her entitlement as an Indian.<sup>250</sup> Then, an elderly chief of the tribe challenges Blue-Star's claim and asks the government to prevent further alienation of tribal lands.<sup>251</sup> He alleges that Blue-Star Woman's claim is illegitimate and that the government is violating its treaty obligations by allocating tribal lands.<sup>252</sup>

The elements of claiming identified by the dispute formation framework emerge in both stories. Both Blue-Star Woman and the elderly chief state a claim and ask for a remedy.<sup>253</sup> The direction of their claims to the United States government shows that they have identified the United States government as the responsible party.<sup>254</sup> Finally, both claims are at least partially denied by the government.<sup>255</sup> At first, the government denies Blue-Star's claim.<sup>256</sup> She only succeeds in making her claim after two Indians working for unscrupulous white lawyers help her.<sup>257</sup> Further, the success of her claim is questionable. Once she receives the land, she has to cede half of it to them as payment.<sup>258</sup> She reluctantly agrees to this arrangement, thinking "A little something to eat is better than nothing!"<sup>259</sup> The government rejects the chief's claim, and he is

248. *Id.* at 181–82.

249. *Id.* at 159–82.

250. *Id.* at 159–61.

251. *Id.* at 171–73.

252. ZITKALA-SA, *supra* note 151, at 172–73.

253. *Id.* at 170–73.

254. *See id.*

255. *Id.* at 160–61, 182.

256. *See id.* at 160–61 (implying her inability to prove her heritage prevented fulfillment of her claim).

257. *Id.* at 168–70 ("A self-condemning sense of guilt [sic] disturbed her. In her dire need she had become involved with tricksters. Her nephews laughingly told her, 'We use crooks, and crooks use us in the skirmish over Indian lands.'").

258. ZITKALA-SA, *supra* note 151, at 168–69.

259. *Id.* at 169.

imprisoned for writing his petition.<sup>260</sup> Later, he is only released after his son makes a deal with the same corrupt Indians that helped Blue-Star Woman.<sup>261</sup>

These narratives hint that the government is more interested in obtaining land fraudulently than in assisting Indians in protecting their land.<sup>262</sup> Both Blue-Star Woman and the elderly chief lose half their lands.<sup>263</sup> This suggests that the government denies all wrongdoing towards the Sioux and does not see land alienation as a problem.<sup>264</sup> Even in the rare circumstances that a valid claim could be made, the government denies it.<sup>265</sup>

Zitkala-Sa's description of the troubles faced by individual Sioux in making claims reflects what happened and was happening collectively to the Sioux at the time.<sup>266</sup> In 1868, they had sought to secure their land from alienation through the Fort Laramie Treaty.<sup>267</sup> Their efforts failed when the United States government violated the treaty by unilaterally passing the 1877 Act.<sup>268</sup> The government appeared more interested in acquiring additional land for white settlement than protecting sacred Sioux lands.<sup>269</sup> Further, the United States political system continually foiled Sioux efforts to remedy this injustice.<sup>270</sup> At the time that Zitkala-Sa wrote *American Indian Stories*, Sioux had been collectively grieving and protesting the alienation of the Black Hills for close to twenty-five years.<sup>271</sup> Their

260. *Id.* at 177–78.

261. *Id.* at 181–82.

262. *See id.* at 171–75.

263. *Id.* at 169, 181 (“I pledged to pay them half of your land if they got you out of jail.”).

264. *See ZITKALA-SA, supra* note 151, at 169, 181.

265. *See id.*

266. *See id.* at 159–82.

267. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

268. *Id.* at 380–83 (describing Sioux efforts to resist selling the Black Hills to the Mannypenny Commission and Congress’s resolution of the impasse by passing the 1877 Act).

269. *See id.* at 383–84 (explaining the breach of the treaty “legitimized the settlers’ invasion” of Sioux land).

270. *Id.* at 414.

271. Historians recorded their response to the Act:

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

early political efforts failed.<sup>272</sup> By the time *American Indian Stories* was published in 1902, Sioux leaders were beginning to see the Black Hills theft in legal terms,<sup>273</sup> but they could not seek redress in United States courts without specific congressional authorization.<sup>274</sup> For the next twenty years, Sioux leaders actively pursued a jurisdictional act from Congress that would allow them to make a treaty-based claim for their beloved and priceless Black Hills.<sup>275</sup> In the early decades of the twentieth century, even getting the Black Hills claim into court must have seemed elusive as it took almost two decades for the Sioux to persuade Congress to pass a statute waiving sovereign immunity and permitting the claim.<sup>276</sup> At the same time, the Sioux continued to pursue their claim and conform their actions to the dispute formation framework.

*American Indian Stories* presents a narrative of how the dispossession of Sioux land in 1877 may have influenced the development of the largest land claim ever adjudicated against the United States. The book illustrates how Sioux beliefs that the Black Hills are priceless and how the Sioux experiences with dispossession informed the creation of the Black Hills claim. The Sioux's sacred ongoing relationship with their land, particularly the Black Hills, sheds lights on how they dealt with the experience of dispossession. The stories vividly describe how ordinary Sioux deeply felt the injury of dispossession, suffering economically, culturally, and spiritually as their land was alienated. This sense of loss helped the Sioux to identify their injury and name it as the dispossession of their land.

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studying the treaty with the intention of presenting a claim against the government for additional reimbursements for the territory ceded under it. Some think that Uncle Sam owes them about \$9,000,000 on the deal, but it will probably be a hard matter to prove it. *Id.* at 383–84 (quoting FRANK FISKE, *THE TAMING OF THE SIOUX* 132 (1917)); LAZARUS, *supra* note 78, at 119–20.

272. LAZARUS, *supra* note 78, at 119 (“The Sioux must have held nearly a hundred meetings during the 1890s to discuss their old grievances, especially the theft of the Hills. No one paid them much attention.”).

273. *Id.* at 122.

274. *Id.* at 122–23, 128, 137–38.

275. *Id.* at 124–38.

276. *Id.* at 137–38.

The acuteness of this injury spurred their growing skepticism of white people and genuine resentment towards whites and the United States government for stealing their land. The Sioux blamed whites for their injury and over time, determined that the government in particular was to blame because it failed to live up to its promises. When Sioux made claims against the government, these claims were denied or ignored as if no wrong had occurred. Zitkala-Sa's stories illuminate the process of naming, blaming, and claiming that the Sioux experienced as they identified the injury caused by the United States and fought to transform it into a legal claim cognizable in a United States court. Further, her narrative contextualizes and personalizes the Sioux claim to the Black Hills by describing how dispossession affected ordinary Sioux in the late nineteenth and early twentieth centuries. *American Indian Stories* hints at the link between the how and why behind the emergence of the Black Hills claim. When juxtaposed against the dispute formation framework, we can glean from *American Indian Stories* how the experiences and beliefs of the Sioux may have transformed from the grievances of individual people into a collective legal claim. The process of naming, blaming, and claiming illustrates how the Sioux grievances about the loss of their land informed their legal claims against the United States. If the Sioux had not felt injured and could not attribute that injury to the government, the Black Hills claim would not have developed. The ability of the Sioux to feel the injury and identify the responsible party was related to their beliefs about and relationship to the Black Hills. The sacred nature of the land heightened the sense of loss or injury felt by the Sioux.

*American Indian Stories* also provides insights into why the dispossession of the Sioux emerged into a legal claim. Sioux beliefs about the priceless nature of the land informed how they experienced their dispossession. These beliefs fueled the Sioux sense of economic, social, spiritual, and cultural injury and their desire to do something about it.

*American Indian Stories* illustrates how the narratives of common people broaden our understandings of their disputes. The book

suggests that culture and beliefs matter in how individuals perceive their experiences and may influence whether claims emerge out of specific sets of events. Further, the book indicates that the injury's centrality to the people involved may affect when, how, and why claims emerge and persist.

#### CONCLUSION

Applying narrative analysis to the dispute formation framework augments understandings of how human experiences transform into legal disputes. The narrative lens provides useful insights into how disputes emerge by highlighting how parties' subjective beliefs and understandings of their experiences inform the dispute formation process. Because not all human experiences develop into legal disputes, the parties' understandings of their experiences may help to explain why some incidents develop into and persist as legal claims.

In the case of the Black Hills claim, the narratives in Zitkala-Sa's *American Indian Stories* suggest how Sioux beliefs about the Black Hills combined with their late nineteenth century experiences encouraged the formation of their legal claims against the United States government. The Black Hills claim emerged as a legal dispute largely because the Sioux believe the Black Hills to be sacred, priceless property and feel a deep sense of cultural, spiritual, and economic loss over these lands' dispossession. As *American Indian Stories* shows, even ordinary Sioux perceived the loss of their land as an acute injury that needed to be rectified by the United States government, which was primarily responsible for their land's alienation. This understanding of the Sioux dispossession became the basis of the Black Hills claim.

The refusal of the Sioux Nation to accept \$1.3 billion from the United States as compensation for the Black Hills indicates that this history of dispossession remains relevant today.<sup>277</sup> The Sioux people

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277. LaVelle, *supra* note 6, at 63.

continue to believe that the Black Hills are priceless property.<sup>278</sup> If the Black Hills truly are priceless property, how can the seemingly intractable dispute over them be resolved, especially in a legal system that prefers compensation to specific performance in land claims?<sup>279</sup>

First, the legal system has to accept that the Black Hills are priceless property to the Sioux people.<sup>280</sup> As the narrative in Zitkala-Sa's *American Indian Stories* suggests, the Sioux's lived experience plays a large role in the Black Hills claim's existence. This history of the Sioux dispossession persists in their lived experience because their economic marginalization relates to their land loss and their traditional subsistence lifestyle. A one-time infusion of money, such as the acceptance of the Black Hills award, most likely will not significantly change this. Nor would accepting the money resolve the acute feelings of grievance felt by the Sioux; they would remain dispossessed of their sacred lands.<sup>281</sup> To be made whole requires more than compensation for the Sioux Nation.

Once the United States government realizes that compensation will never satisfactorily resolve the Sioux Nation's claim to the Black Hills, various remedial approaches can be considered.<sup>282</sup> The Sioux

278. *Id.* at 63–69.

279. WILLIAM M. TABB & ELAINE W. SHOBEN, REMEDIES IN A NUTSHELL 15–16 (2005) (indicating a preference for damages remedies unless they are shown to be inadequate); RUSSELL L. WEAVER, ELAINE W. SHOBEN & MICHAEL B. KELLY, PRINCIPLES OF REMEDIES LAW 13 (2d ed. 2011); *see also* Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. 1 ¶ 112 (2002) (merits decision of Dec. 27, 2002) (noting that the Indian Claims Commission interpreted the Indian Claims Commission Act to limit “relief that could be ordered by the ICC to that which was compensable in money and did not include recovery of land where that would be plausible”); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 142 (2d ed. 2004) (“Within the Western liberal frame adopted into the political and juridical culture of the United States, indigenous peoples’ lands have been treated as fungible with cash.”); Imre Sutton, *Incident or Event? Land Restoration in the Claims Process*, in IRREDEEMABLE AMERICA 211, 212 (Imre Sutton ed., 1985) (“One must note the irony in the fact that the same government that has awarded millions in judgment funds to almost all western tribes has rejected, except in a few instances, opportunities to restore a modicum of land to improve tribal economies.”).

280. LaVelle, *supra* note 6, at 70 (noting the inability of the United States government and state of South Dakota to understand the importance of restoration of the Black Hills to the Sioux).

281. *Id.* at 65–66 (stating that the Sioux realize “that if they ever accept money damages in exchange for their claim to these sacred lands, they will forfeit their cultural identity as Lakota people” (quoting Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1645 (2000))).

282. A full discussion of the various remedial approaches to the Black Hills claims, including whether

Nation has long proposed a return of a portion of the Black Hills as the preferred remedy to their dispossession.<sup>283</sup> Since the 1980s, the restoration of some of the Black Hills to the Sioux Nation has been discussed as a possible remedy.<sup>284</sup> Senators have even proposed legislation that would authorize a land return.<sup>285</sup>

A land transfer, returning a portion of the Black Hills to the Sioux Nation, is possible because the federal government owns significant portions of the Black Hills.<sup>286</sup> For this reason, issues of private or state land ownership would not complicate restoration of part of the Black Hills to the Sioux Nation. Congress could simply pass legislation transferring public domain land in western South Dakota to the Sioux Nation. Congress has transferred public lands to Indian nations before, so this solution is not new or unique.<sup>287</sup> For example, in 1975, the federal government transferred 185,000 acres of National Park Service lands within the Grand Canyon National Park to the Havasupai Tribe.<sup>288</sup>

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the Sioux Nation would have been entitled to restitution rather than damages under the common law of restitution in the United States, is beyond the scope of this article. It is worth noting that the Indian Claims Commission Act would only grant compensatory damages as a remedy for Indian land claims. Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, in RETHINKING INDIAN LAW 102, 106 (NAT'L LAWYERS GUILD COMM. ON NATIVE AM. STRUGGLES ed., 1982); INDIAN LAW RES. CTR., NATIVE LAND LAW PROJECT: DRAFT GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES 106–13 (2010); Sutton, *supra* note 279, at 213.

283. LaVelle, *supra* note 6, at 42 (“For well over a century, these tribes have fought long and hard—on the battlefield, in the courts, and in the halls of Congress—for a return of *Paha Sapa*, the sacred Black Hills, to the ownership and control of the Great Sioux Nation.”).

284. For a discussion of some of the proposals to return portions of the Black Hills to the Sioux Nation, see Sutton, *supra* note 279, at 224.

285. See Goldstein, *supra* note 16, at A17; *Indian Land Claims: Gold in the Hills*, *supra* note 19, at 28; Schachter, *supra* note 19.

286. LaVelle, *supra* note 6, at 41. For example, the Black Hills National Forest covers an area 125 miles long and 65 miles wide. *About the Black Hills National Forest*, USDA FOREST SERV., <http://www.fs.usda.gov/main/blackhills/about-forest> (last visited Aug. 9, 2012). The Mount Rushmore National Memorial includes another 1,278 acres in the Black Hills. *Mount Rushmore: Park Statistics*, NAT'L PARK SERV., <http://www.nps.gov/moru/parkmgmt/statistics.htm> (last updated Feb. 7, 2013).

287. Sutton, *supra* note 279, at 214–29 (reviewing select land restorations and proposed land restorations).

288. 16 U.S.C. § 228i (2006); see also ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS 182 (1998) (recounting the story of the Havasupai land transfer).

A land return is not only possible but also the preferred legal remedy under emerging international law.<sup>289</sup> Treaty-based organizations have recently interpreted international law as recognizing the uniqueness of indigenous property rights.<sup>290</sup> For example, the Inter-American Court on Human Rights has described the unique relationship between indigenous peoples and their territories as “not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>291</sup> Because of the spiritually based relationship between indigenous peoples and their ancestral territories, a growing segment of the international legal community increasingly views restitution or land restoration as an appropriate remedy when—as in the case of the Sioux Nation’s claim to the Black Hills—the ancestral territories of indigenous peoples have been expropriated without their consent.<sup>292</sup>

A transfer of a portion of the Black Hills to the Sioux Nation would comply with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), endorsed by the Obama Administration in 2010.<sup>293</sup> Article 28 of the UN Declaration favors land returns over compensation payments for indigenous lands confiscated, occupied, or taken without the free, prior, and informed

289. International law affirms property as both an individual and a collective human right. *See, e.g., ANAYA, supra* note 279 (explaining that the Universal Declaration of Human Rights, American Convention on Human Rights, American Declaration on the Rights and Duties of Man, and the European Convention on Human Rights all recognize property as a human right and prescribe arbitrary deprivations of property rights). For a similar argument about how international law can provide a legal theory for re-establishing tribal lands, see Angelique A. EagleWoman, *Re-establishing the Sisseton-Wahpeton Oyate’s Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 AM. INDIAN L. REV. 239 (2004–2005).

290. *See, e.g., INTER-AM. COMM’N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 20 (2009) (“The unique relationship between indigenous and tribal peoples and their territories has been broadly recognized in international human rights law.”).

291. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).*

292. *See, e.g., Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 146, ¶ 131 (Mar. 29, 2006).*

293. Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES, Dec. 17, 2010, at A1.

consent of the traditional indigenous owners.<sup>294</sup> While “[t]he Declaration is a non-binding instrument, meaning that [states] are not, strictly speaking, legally bound” to implement its provisions, it is an official statement by most member states of the United Nations of the rights of indigenous peoples under international law.<sup>295</sup> Many of the Declaration’s articles on the property rights of indigenous peoples simply reinforce rights recognized and protected in other international human rights documents.<sup>296</sup> For example, ILO Convention No. 169 recognizes the traditional property rights of indigenous peoples<sup>297</sup> and proscribes the relocation of indigenous peoples from these lands except in exceptional circumstances.<sup>298</sup> Significantly, the ILO Convention also supports the Declaration’s preferred remedy for indigenous land loss—restitution—and a restoration of the Black Hills to the Sioux Nation.<sup>299</sup> Article 16(3) of

294. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sept. 7, 2007). The text of Article 28 reads:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

*Id.*; see also Mattias Åhrén, *The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 200, 211 (Claire Charters & Rodolfo Stavenhagen eds., 2009); Luis Enrique Chavez, *The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra*, at 96, 104 (noting that “first and foremost . . . the right is one to restitution” because restitution is “the main form of redress”).

295. Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 546 (2009).

296. See G.A. Res. 61/295, *supra* note 294.

297. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organisation, June 7, 1989, No. 169, art. 14(1) [hereinafter ILO Convention No. 169] (“The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised [sic].”).

298. *Id.* at art. 16.

299. ANAYA, *supra* note 279, at 144 (“In light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous

the ILO provides that if traditional lands cannot be returned, indigenous peoples should be “provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them.”<sup>300</sup>

The preference for the restitution of indigenous peoples’ ancestral lands in the Declaration also reflects interpretations of indigenous property rights by treaty based human rights bodies.<sup>301</sup> The Inter-American Human Rights System, composed of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights, has developed a robust jurisprudence on the land rights of indigenous peoples under international human rights law.<sup>302</sup> Central to this jurisprudence is the recognition of restitution as the preferred remedy for ancestral land loss.<sup>303</sup> The Inter-American Human Rights System “has highlighted the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories, and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain

peoples the option of regaining lands and access to natural resources.”); see also Lee Sweptson, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 696–710 (1990).

300. ILO Convention No. 169, *supra* note 297, at art. 16(4).

301. See, e.g., *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149* (Aug. 31, 2001) (requiring Nicaragua to respect indigenous land rights and demarcate indigenous territories); *Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02* (2002) (merits decision of Dec. 27, 2002) (finding that the United States had violated the property rights of the Western Shoshone by attempting to extinguish those rights through gradual encroachment notwithstanding the fact that the Western Shoshone continue to occupy their traditional lands); *Comm. for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure Decision 1, 68th Sess., Feb. 20–Mar. 10, 2006, CERD/C/USA/DEC/1* (Apr. 11, 2006) (finding that United States’ continued efforts to privatize Western Shoshone lands and allow for destructive activities on them, such as nuclear testing, violated the Western Shoshone’s right to equal treatment under the law).

302. INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 290, at 34.

303. The Inter-American Commission on Human Rights outlined “Reparations for Violations of the Right to Territorial Property”:

[F]or claims or requests for the recovery of ancestral territories, and in general in all cases that involve the loss of possession of ancestral territory, the preferred form of reparation is restitution of the claimed territory—in particular because this is the measure of reparation that comes the closest to *restitutio in integrum*.

*Id.* at 135.

community integrity.”<sup>304</sup> Similarly, in its General Recommendations on Indigenous Peoples, the Committee on the Elimination of Racial Discrimination also indicated a preference for land restoration rather than compensation when it called on state parties to the International Convention on the Elimination of All Forms of Racial Discrimination to take steps to return lands and resources taken from indigenous peoples without their consent.<sup>305</sup> Restoration of a portion of the Black Hills to the Sioux Nation would provide an effective remedy for their alienation and comply with emerging international law, which views restitution of indigenous traditional lands as a preferred legal remedy.<sup>306</sup>

In his opinion finding that the United States government had illegally confiscated the Black Hills from the Sioux Nation, Justice Blackmun repeated the lower court’s description of the case, stating, “A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history.”<sup>307</sup> It is well past time to close the door on this dishonorable chapter in the relationship between the Sioux Nation and the United States. The people of the Sioux Nation and the United States cannot resolve successfully the Black Hills claim until the United States recognizes the Black Hills for what they are to the Sioux Nation—priceless property. And as Sioux chiefs told the United States treaty commission over one hundred years ago, money cannot compensate for priceless property.

304. *Id.* at 53. For a full description of the Inter-American Human Rights System’s jurisprudence on the right to restitution of ancestral territory, see *id.* at 52–60.

305. Comm. for the Elimination of Racial Discrimination, *supra* note 301.

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

Office of the High Comm’r for Human Rights, Gen. Recommendation No. 23: Indigenous Peoples, 51st Sess., Aug. 18, 1997.

306. For a fuller discussion of the right to an effective remedy under international law, see INDIAN LAW RES. CTR., *supra* note 282, at ch. XI.

307. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980).