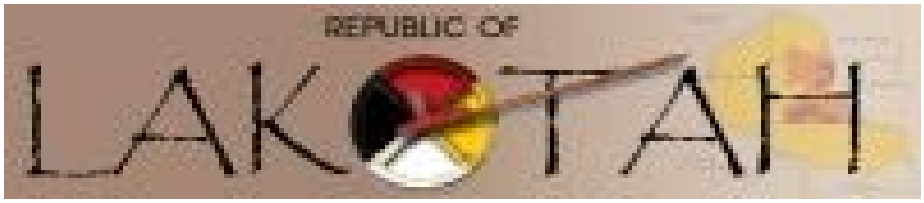

Barack H. Obama
President of the United States of America
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Hillary D. Clinton
Secretary of State of the United States of America
2201 C Street, NW
Washington, DC 20520

Dear President Obama and Secretary Clinton,

Pursuant to the principles of Article 65 (1) and (2) and Article 67(1) and (2) of the *Vienna Convention on the Law of Treaties*, (1986)[i](signed by the United States on 26 June 1987), the Republic of Lakotah again gives notice to the United States of America that the Lakotah Nation is terminating and withdrawing from the 1851 and 1868 treaties between the United States of America and the Sioux Nation of Indians. The two treaties were signed respectively on 17 September 1851, 11 Stats., 749, and 29 April 1868, 15 Stats. 635, Ratified by the United States Senate on 16 February 1869, and Proclaimed by the President of the United States on 24 February 1869. The first notification by the Republic of Lakotah of termination and withdrawal from these treaties was 17 December 2007, in Washington, D.C.

Under the established international legal principle of ***inadimplanti non est adimplendum*** ("one has no need to respect his obligation if the counter-party has not respected his own"), as well as under Article 60[ii] of the Vienna Convention, the Lakota assert, and will substantiate below, that the United States of America has been, and continues to be, in material breach of the provisions of the treaties between itself and the Lakotah. As a consequence of these overt, numerous and continuous breaches of the treaties by the United States of America, the Lakotah are freely entitled to withdraw from, and to terminate, the treaties, and to insist that the parties return to their positions held prior to the signing of the instruments.

§ 1. The Historical Position of the United States of America Regarding the Status of Treaties Between Itself and Indigenous Nations, Including the Lakotah

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial….The very term "nation" so generally applied to them [Cherokees], means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land has adopted and sanctioned the previous treaties with the Indian nation, and consequently admits their rank among those powers who are capable of making treaties. The word

> "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each definite and well-understood meaning. ***We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense***. (emphasis added)
>
> ***Worcester v. Georgia*** , 31 U.S. 515, --, (1832)

The history of international treaty-making between indigenous nations and European states (Netherlands, Sweden, England, France) in what is now North America predated the emergence of the United States by nearly 150 years.[iii] France, Spain and Britain continued the pattern of securing political, commercial, territorial and military alliances with indigenous nations through the 18th century.

As late at 1938, the United States Department of State admitted that "during the years when the rivalries of England France and Spain on the continent gave the various Indian tribes positions of strategic power, negotiations with those tribes were carried on by the Colonies and later by the United States **on the basis of international treaties. These treaties acknowledge the sovereignty of Indian tribes**…."[iv]

That treaties between the U.S. and indigenous nations were international instruments was articulated early in the history of the United States by the U.S. Attorney General, the top law enforcement officer for the U.S., and legal advisor to the President. William Wirt wrote in 1828:

> If it be meant to say that, although capable of treating, [indigenous nations'] treaties are not to be construed like the treaties of nations absolutely independent, no reason is discerned for this distinction in the circumstance that their independence is of a limited character. If they are independent to the purpose of treating, they have all the independence that is necessary to that argument.
>
> *** Nor can it be conceded that their independence as a nation is a limited independence. Like all other independent nations, they are governed solely by their own laws. Like all other independent nations, they have the absolute power of war and peace. Like all other independent nations, their territory is inviolable by any other sovereignty. *** As a nation they are still free and independent. They are self-governed – self-directed. They treat or refuse to treat, at their pleasure; and there is no human power which can rightfully control them in the exercise of their discretion in this respect. In their treaties, in all their contracts with regard to their property, they are as free, sovereign and independent as any other nation. And being bond, on their own part to the full extent of their contracts, **they are surely entitled to hold those with whom they thus treat and contract equally bound to them**.[v]

Of particular pertinence to the cases of unilateral breach of treaties, and of our particular proof of U.S. breach of the 1851 and 1868 Ft. Laramie treaties in this case, the Attorney General acknowledged the point that the United States does not possess the legal right unilaterally to abrogate treaty provisions under its domestic law. He also admitted that the remedies for breach rest with either aggrieved party to the treaty, and not exclusively with the United States:

> The point, then once conceded, that the Indians are as independent to the purpose of treating, their independence to that purpose is as absolute as that of any other nation. Being competent to bind themselves by treaty, **they are equally competent to bind the party who treats with them. Such party cannot take the benefit of the treaty with the Indians, and then deny them the reciprocal benefits of the treaty** on the grounds that they are not independent nations to all intents and purposes.[vi]

John Marshall, Chief Justice of the U.S. Supreme Court, in the seminal case Worcester v. Georgia, confirmed Wirt's advisory opinion four years later.[vii] Until the late nineteenth century, the language of international diplomacy was often used by the United States in its treaty negotiations with indigenous nations. As the renowned Indian law scholar, and former Solicitor of the Department of Interior, Felix Cohen noted, "Many provisions [of treaties between the U.S. and indigenous nations] show the international status of the Indian tribes" in clauses related to war and peace, territorial boundaries, passports[viii], extradition and foreign relations.[ix]

§ 2. **Principles Guiding the Negotiation and Execution of Treaties Between the United States of America and the Lakotah**.

Long prior to the existence of the United States of America, two legal, philosophical and spiritual principles were in place, in European and Lakota societies respectively, that later laid the foundation for treaties between the Lakota and the United States. The first of these was the European principle of ***pacta sunt servanda.***[x] Rooted in the ancient spiritual traditions of China, India, Egypt, Islam and early Christianity, ***pacta sunt servanda*** evolved into a basic tenet of the European law of nations. This international legal brocard, or basic fundamental principle, meant that signatories must honor the essential terms of treaties. ***Pacta sunt servanda*** is "undoubtedly a positive norm of general international law,"[xi] as it was at the time of the signing of the treaties between the Lakotah and the United State of America, discussed here.

The second tenet that formed the basis for agreement between the Lakotah and the United States of America, was the Lakotah understanding of ***wowauonihan***, or respect and honor. [xii]Through the appreciation of ***wowauonihan*** in Lakota philosophy and practice, one is able to understand that the United States of America was not the only party to these treaties that had developed sophisticated understandings of the duties of honor, respect and reciprocal legal obligation under the treaties. Unfortunately, as history and the state practice of the United States would reveal, only one of the parties to these treaties, the Lakotah, would adhere to both the legal obligations contained in ***pacta sunt servanda*** and ***wowauonihan***.

For indigenous peoples, treaties with the United States were not exclusively European-American imposed agreements, in which indigenous peoples were helpless victims in an unequal process.[xiii] By the 19th century, Euro-American states had well-developed treaty law and diplomatic protocols, and so, too, did indigenous nations. Treaties were viewed by indigenous nations as sacred texts that served as connections between interconnected relatives, allowing both parties to imagine a world of human respect and solidarity.[xiv] Additionally, indigenous peoples saw treaties as "divinely mandated covenants of law and peace between peoples. A treaty required treaty partners to acknowledge their shared

humanity and to act upon a set of constitutional values reflecting the unity of interests generated by their agreement."[xv] The Lakotah view of treaty obligations was entirely consistent with the *jus cogens* nature of *pacta sunt servanda* in 1851 and 1868[xvi]

The principles of both Euro-American and indigenous treaty law – mutual respect, equality of nations, free consent, good faith and honoring the terms of the agreement - by whatever name, were so profoundly rooted in global notions of justice, integrity and fair play, that they became embodied as core norms in international treaty law in the 18th and 19th centuries, and were later ensconced in the Covenant of the League of Nations (1919), The *United Nations Charter* (1945) and the *Vienna Convention on the Law of Treaties* (1969, 1986)[xvii] Article 26 of the Vienna Convention is unambiguous that "every treaty in force is binding upon the parties to it, and must be performed by them in good faith."

There is little question that, at the time of the signing of both the 1851 and 1868 treaties, the United States knew the stance of the indigenous nations regarding the protection of their territories[xviii], and, in turn, the U.S. conveyed its position that the Lakotah were viewed as an independent nation.[xix]

The United States of America cannot reap the benefit of the bargain from treaties between itself and the Lakotah, and subsequently claim variously that: **A.** the treaties were not "genuine" treaties, in the international legal sense;[xx] neither can the United States of America **B.** claim that it did not consider the Lakota to be competent to enter into the treaty, nor that the Lakota did not constitute a *bona fide* state for purposes of treating,[xxi] simply because it had invaded and illegally occupied the territory of the Lakota. The United States of America is also estopped **C**. from utilizing its domestic (municipal) law to breach the treaties, or to abrogate the treaties unilaterally.[xxii]

§ 3. Evidence of Intent to Breach, and of Actual Material Breach, of the Treaties Between the Lakota and the United States of America.

The U.S. violations of the treaties have been so blatant and egregious that the United States of America's own federal courts, including the Supreme Court, acknowledged that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history…."[xxiii] The Court also acknowledged U.S. "President [Ulysses S.] Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills."[xxiv] When the highest court of one of the parties to a treaty concedes a material breach of the treaty through fraud and deceit by the president of the signatory nation, that is *per se* a violation of the fundamental international legal principle of ***pacta sunt servanda***.

Regarding the 1868 Ft. Laramie Treaty, certain provisions were negotiated and agreed to by the parties at the Ft. Laramie Treaty Commission. Subsequently, Commander of the U.S. Army, William Tecumseh Sherman, made changes when the treaty was transported through Chicago, on its way to Washington, D.C. for ratification. Known as the "Chicago Re-write," these provisions unilaterally and materially altered the treaty, without the knowledge, or the consent, of the Lakotah people. [xxv]

There are several instances in which Congress altered the provisions of treaties that were negotiated with indigenous nations, and the indigenous parties to the treaty rejected those altered provisions. Subsequently, "the treaty (or statute) was regarded as null and void."[xxvi] In the case of the "Chicago Rewrite," the alteration, and the failure of the U.S.

to secure the informed consent of the Lakotah for the alterations, certainly renders the treaty voidable.

The historical record regarding the intention, and the actual practice in law and policy, of the United States to breach the 1868 Ft. Laramie Treaty with the Lakotah is extensive, and every detail need not be repeated here.[xxvii] What should be noted are the repeated attempts by the United States to violate Article 12 and 16 of the treaty[xxviii] and to coerce Lakota acceptance of changes to the treaty, including a "sell or starve" policy in 1876, and in the late 1880's.[xxix]

In 1871, The United States Congress unilaterally attempted to alter both the character of the parties to treaties between the U.S. and indigenous nations, and the obligations of the U.S. to abide by those treaties. In 25 U.S.C §71, the U.S. Congress asserted that:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

§4. Remedies for Material Breach of the 1868 Treaty by the United States of America

The historical record is replete with examples of duplicity, fraud, coercion, and material breach by the United States concerning its obligations under the 1868 Ft. Laramie Treaty. Numerous admissions by U.S. officials in the executive, legislative and judicial branches that the United States either never intended to keep the treaty, or had blatantly violated material provisions of the treaty, also establish persistent breaches.

Apparently, from the perspective of the United States, the courts and legislature of one of the parties to the treaty should exclusively determine the remedy for these continuous material breaches – namely itself.[xxx] It must be obvious that justice, fairness and international law demand remedies other than those that the United States has unilaterally considered to be adequate.

The position of the Republic of Lakotah in this matter is clear: The United States has materially breached the 1851 and 1868 Fort Laramie Treaties, and it has violated its legal obligations under those instruments. The United States of America has no intention of ever meeting its comprehensive legal obligations under the treaty. Therefore, the treaty is void, and the parties must return to their original positions prior to the signing of the treaty. We will now outline the legal and equitable arguments that support our position.

As mentioned in §§ 1 and 2, *supra*, at a minimum, two ancient legal principles, that are antecedent to the U.S. legal system, should bind the United States: *pacta sunt servanda* "agreements must be kept." and *Inadimplanti non est adimplendum* "one has no need to respect his obligation if the counter-party has not respected his own." These legal principles were in place at the time of the signing of the 1851 and 1868 Fort Laramie treaties, and should bind the United States.

The two legal principles above also provided essential foundation for subsequent developments in international law regarding the signing and enforcement of treaties. Two

pertinent documents in this field are: *The Vienna Convention on the Law of Treaties* (1969 and 1986)[xxxi] and the *United Nations International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.*[xxxii] Also instructive in this area are standards that have been articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*, and in the *United Nations Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*.

All of these instruments were developed with an intent of promoting the peaceful and just settlement of disputes, respect for the self-determination of all peoples, and the promotion of friendly relations between nations. The Republic of Lakotah is dedicated and committed to these goals, and believes that the guidelines that are articulated in the instruments mentioned immediately above can give guidance in providing remedies for the breaches of the 1851 and 1868 treaties by the United States.

Article 60 of the Vienna Convention, defining the conditions for material breach of a treaty was mentioned above (footnote 2, *supra*.) We also note here Articles 37 and 40 of the Declaration on the Rights of Indigenous Peoples, respecting treaty rights:

> Article 36 (1) - Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive agreements, concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive agreements.
>
> Article 40 – Indigenous peoples have the right to access to an prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, ***as well as to effective remedies for all infringements of their individual and collective rights***. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. (emphasis added)

The U.N. Special Rapporteur on Treaties clarified the point in article 36(1) above when he concluded:

> 270. This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in the light of international law.
>
> 271. The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.
>
> 272. The legal reasoning supporting the above conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void. This is a notion that has been deeply ingrained in the conceptual

development, positive normativity and consistent jurisprudence of both municipal and international law since Roman Law was at its zenith more than five centuries ago, when modern European colonization began.

Taking all of the above into consideration, the Republic of Lakotah reiterates that:

1. the 1851 and 1868 Fort Laramie Treaties were, at the time of their signing, binding international legal instruments between the United States and the various indigenous nation signatories;

2. principles of international law with regard to compliance with the terms of the treaty apply;

3. the United States did not, and does not, possess the right unilaterally to alter or to breach material provisions of the treaties without the prior, free and fully informed consent of all indigenous parties to the treaties;

4. the United States cannot use its domestic law or policy unilaterally to interpret, apply or abrogate any material provision of the treaties, or the entire treaties;

5. the United States has, and continues to, materially breach the essential provisions of the 1851 and 1868 Fort Laramie treaties, and the United States gives no indication that it intends to abide by the essential territorial and jurisdictional provisions of the treaties in the future;

6. The breach and violation of the 1851 and 1868 treaties by the United States constitutes an internationally wrongful act; the Republic of Lakotah declares that the intentional, continuous and material breach, by the United States of America, of the 1851 and 1868 treaties between the Lakota Nation and the United States of America has rendered the treaties void.

§ 5. Restitution Due to the Lakotah for the Internationally Wrongful Acts of the United States

The International Law Commission (ILC), is the primary United Nations entity "encouraging the progressive development of international law and its codification." In other words, this is a body of international legal experts who discuss and advance the evolution of international legal standards and application of those standards.

The Commission has developed an instrument entitled *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* that outlines what constitutes wrongful international acts by states, and what remedies should be administered in instances of breaches of international law.

The Republic of Lakotah (ROL) endorses these guidelines, and believes that the application of these Articles in the case of the breach of the 1851 and 1868 Fort Laramie treaties might provide some level of just remedy for the international wrongful acts of the United States of America.

Articles 1, 2, and 3 of the ILC's instrument outline the definitions for what constitutes an internationally wrongful act.[xxxiii] The Republic of Lakotah asserts that each of these articles is satisfied regarding the application of the Articles to the acts of the United States with regarding to the deliberate and ongoing breach of its treaty

obligations. The ROL acknowledges the provisions of Article 3, which makes clear that a State cannot shield itself from the application of these principles through the assertion of its domestic law, as the United States has repeatedly done.

Most importantly, the ILC discusses the remedies for State breaches of international obligations. Articles 31 through 36[xxxiv], provide remedial standards, which the ROL supports. Of particular interest and application in this case is the conclusion that reparations must be made by a State for its internationally wrongful acts. Article 35 of the standards repeat that a state is under an obligation to make restitution and "that is to re-establish the situation which existed before the wrongful act was committed."

The commentary to these Articles elaborates on their meaning and application:

> The concept of restitution is not uniformly defined. According to one definition, restitution consists in re- establishing the status quo ante, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. (emphasis added)[xxxv]

The above discussion supports the position of the Republic of Lakotah which is that the United States of America has breached its international obligations under the provisions of the 1851 and 1868 treaties, that such a breach constitutes a series of wrongful acts under international law, and that the remedy for such wrongful acts is the restitution of the status quo ante in this case, and that the parties return to their respective positions prior to the signing of the 1851 and 1868 treaties.

To this end, President Obama and Secretary Clinton, we put you on notice, and we demand that the United States, and all of its subordinate sovereignties – including state and municipal governments -- immediately cease attempts to assert civil or criminal jurisdiction, zoning or other regulatory laws in the territories of the Lakotah, as acknowledged in the 1851 and 1868 treaties. We insist that the U.S. immediately begin the process of physically abandoning the territory of the Lakotah, and we consider any land, mineral or water concessions that the United States has made, from 1868 to the present, to any entity, individual or corporate, to be void. We demand and insist that the United States, and the states of South Dakota, North Dakota, Nebraska, Wyoming and Montana, immediately relinquish and abandon any

presence at the sacred sites of the Lakotah. These sites include, but are not limited to: Mato Tipila (Devil's Tower), Wind Cave National Park, Mount Rushmore National Park, Bear Butte, and Harney Peak.

Proceedings for restitution, and/or for financial compensation for damages for U.S. wrongful acts will take place in due course, and will be taken to impartial international bodies for resolution. Liquidated damages for trespass and for conversion of Lakotah property, through your failure to abandon and relinquish Lakotah territories after 180 days from this date, will be calculated at a rate of no less than $5 million per day.

On behalf of the Republic of Lakotah,

Russell Means
22 June 2010
Porcupine, Republic of Lakotah

[i] Article 65(1) states: "A party which…invokes…a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other party of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore." 65(2) states: "If after expiry of a period which except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed." Article 67 (1) states: "The notification provided for under Article 65, paragraph 1, must be made in writing." 67(2) states: "Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of Article 65 shall be carried out through an instrument communicated to the other parties." *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, Mar. 21,1986, U.N. GAOR, U.N. Doc. A/CONF.129/15, *reprinted in* 25 ILM 543 (1986). *See also*, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679.

[ii] Article 60 (1) states: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." 60(3) states: "A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

[iii] The Dutch West India Company signed a treaty with the Lenape Nation as early as 1629, and Sweden followed suit in 1654. Alden T. Vaughn, *Early American Documents: Treaties and Laws, 1607-1789*, 2-3, 25-27. cited in Seigfreid Weissner, "American Indian Treaties and Modern International Law, "7 *St. Thomas L. Rev*. 567, n.12. (1995). In 1630, the Dutch were the first to articulate three foundational assumptions about treaties with indigenous peoples that were carried forward through the 19th century: 1. that both parties to the treaty are sovereign powers; 2. that indigenous peoples had transferrable title; and 3. that the acquisition of indigenous territories must be controlled by government monopoly, and not by individual Europeans. See *Felix Cohen's Handbook of Federal Indian Law* (1942, ed.) 47.

[iv] "A Brief Statement on the Background of Present-day Indian Policy," Statement by the U.S. Department of State delegation at the *Eighth International Conference of American States* at Lima Peru, 9 December 1938. cited in *Felix Cohen's Handbook of Federal Indian Law*, p. 28. (emphasis added)

[v] 2 Op. Atty Gen. [William Wirt] 110 (1828),132-35. (emphasis added)

[vi] Id. (emphasis added). This opinion concerned a specific case involving the Cherokee Nation. The State of Georgia requested U.S. Attorney General Wirt to consider that the U.S. treaty with the Cherokee Nation was not international in character. Wirt refused, citing the eminent international legal scholar Emmerich de Vattel, "And that civilization which should claim an exemption from the full obligation of a treaty, or seek to narrow it by construction, on the ground that the other party to the treaty was uncivilized, would be as little entitled to our respect as the religion which should claim the same consequence on the ground that the other treating party was a heathen. Id., 135-36(1828)

[vii] Id.

[viii] Treaties requiring passports of non-indigenous people entering into the territories of indigenous nations included the *Treaty with the Creek Nation*, 7 Stat. 35, 37, Art. 7, (1790); and the *Treaty with the Cherokee Nation*, 7 Stat 39, Art. 9 (1791)

[ix] *Felix Cohen's Handbook of Federal Indian Law* (1942, ed.), 40.

[x] Literally, "agreements must be kept." The principle is embodied in Article 26 of the *Vienna Convention* (1986), *supra*, note 1, which states: "*Pacta Sunt Servanda* - Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[xi] Josef L. Kunz, The Meaning and the Range of the Norm *Pacta Sunt Servanda*, 39 American Society of International Law. 180-197 (1945).

[xii] "In Indian diplomatic traditions, treaties were not merely temporal agreements. They were sacred collective obligations, to be broken only under peril of divine displeasure.***It was in the New World among Indians that the sense of sacredness remained strong, informing diplomacy, vivifying it, furnishing the standards of right and wrong, endowing activities with cosmic significance. Dorothy V. Jones, "British Colonial Indian Treaties," 4 *Handbook of North American Indians* 187 (Wilcomb Washburn ed., 1988). See, also, Birgil Kills Straight and Steven Newcomb. Toward and Oglala Lakota Constitution – Statement of Principles. June, 2004. Indigenous Law Institute. http://ili.nativeweb.org/constitution.html.

[xiii] There is no question that some treaties between the United Sates and some indigenous nations were coerced and involuntary, and, in fact some of the documents subsequent to the 1868 Treaty with the Lakotah were coerced, but both the 1851 and the 1868 treaties were negotiated, from the Lakotah perspective, utilizing well-established principles of diplomacy and law by the Lakotah.

[xiv] Robert A. Williams, Jr, *Linking Arms Together: Amreican Indian Visions of Law and Peace, 1600-1800*. (1997). 98.
[xv] Id., 99.
[xvi] See article 53 of the Vienna Convention on definition of peremptory norm (jus cogens)
[xvii] *Vienna Convention*, *supra*, note 1. Preambulatory paragraph 3 of the Convention states "that the principles of free consent, and of good faith and the *pacta sunt servanda* rule are universally recognized." Article
[xviii] In 1853, Indian Commissioner George Manypenny wrote: "With few exceptions, the Indians were opposed to selling any part of their lands, as announced in their replies to the speeches of the commissioner." *Report of the Commissioner of Indian Affairs*, 1853, p.250.
[xix] Heading for the 1851 Ft. Laramie Treaty: *Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following **Indian nations**, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arapahos, Crows, Assinaboines, Gros-Ventre Mandans, and Arikaras, parties of the second part.*…11 Stats. 749, 17 September 1851 (emphasis added)*;* Heading of the 1868 Ft. Laramie Treaty: *Articles of a treaty made and concluded by and between Lieutentant-General William T. Sherman, General Alred H. Terry, General C.C. Augur, J.B. Henderson, Nathanial G. Taylor, John B. Sanborn and Samuel F. Tappan, duly appointed commissioners for the United States, and the different bands of the **Sioux Nation** of Indians by their chiefs and head-men, whose names are hereto subscribed, they being duly authorized to act in the premises*; 29 April 1968, 15 Stats 635 (emphasis added). Twenty years after Manypenny's comments, and five years after the signing of the 1868 Ft. Laramie Treaty, the opinion of Indian Commissioner Edward P. Smith, the highest ranking U.S. official dealing directly with U.S.–Indigenous affairs, regarding the status of treaties was clear: "We have in theory **over sixty five independent nations** within our borders, **with whom we have entered into treaties as sovereign peoples**."
Report of the Commissioner of Indian Affairs, 1873, p. 3. (emphasis added)
[xx] See, fn 5, *supra*; and Section II *infra*.
[xxi] *Id*. *Worcester v. Georgia*, 31 U.S. 515 (1832).
[xxii] *Vienna Convention* (1987), supra, note 1. Article 17(1) states: "A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty."
[xxiii] 207 Ct. Cl., at 241, 518 F.2d, at 1302. Cited by the U.S. Supreme Court in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 388.

[xxiv] Id.

[xxv] "According to David Miller, a former history professor at Black Hills State University, the treaty was taken to Chicago from Fort Laramie for Gen. Phil Sheridan, commander of Military Division of the Missouri, to review. □□ Concerned it would limit military operations -- and convinced a showdown was inevitable -- Sheridan had an addition made. Called "the Chicago rewrite," the new language stipulated that the Sioux would not oppose the "construction of railroads, wagon trains, mail stations or other works of utility or necessity which may be ordered or permitted by the laws of the U.S. Miller wrote there is no evidence that the bands of Indians who signed onto the treaty ever knew that language was added. But years later, the Army argued that the "works of necessity" clause justified Lt. Col. George Custer's expedition into the Black Hills in 1874 looking for sites for a military post, Miller says." Steve Young. "A broken treaty haunts the Black Hills." *Sioux Falls Argus Leader*. June 27, 2001, http://www.bluecloud.org/bighorn-4.html.

[xxvi] Vine Deloria, Jr and Raymond J. DeMallie. *Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979*. Norman: U. of Oklahoma Press, 1999. 1018.

[xxvii] Jeffrey Ostler. *The Lakotas and the Black Hills: The Struggle for Sacred Ground.* NY: Viking, 2010. Heather Cox Richardson. *Wounded Knee: Party Politics and the Road to an American Massacre*. NY: Basic Books, 2010. Stan Hoig. *White Man's Paper Trail: Grand Councils and Treaty-Making on the Central Plains*. Boulder: U. of Colorado Press, 2006. Jeffery Ostler. *The Plains Sioux and U.S Colonialism from Lewis and Clark to Wounded Knee*. NY: Cambridge U. Press, 2004. Edward Valandra. *Not Without Our Consent: Lakota Resistance to Termination, 1950-59*. Chicago: U. of Illinois Press, 2006. Mario Gonzales and Elizabeth Cook-Lynn. *The Politics of Hallowed Ground: Wounded Knee and the Struggle for Indian Sovereignty*. Chicago: U. of Illinois Press, 1999. John William Sayer. *Ghost Dancing the Law: The Wounded Knee Trials*. Cambridge: Harvard U. Press, 1997. David Wilkins. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice.* Austin: U. of Texas Press, 1997. Ward Churchill. *Since Predator Came: Notes From the Struggle for American Indian Liberation*. Littleton, CO: Aigis Publications, 1997,133-141. Edward Lazarus. *Black Hills, White Justice: The Sioux Nation Versus the United States – 1775 to the Present*. NY: Harper-Collins, 1991. Roxanne Dunbar-Ortiz, ed. *The Great Sioux Nation: Sitting in Judgment on America*. San Francisco: Moon Books, 1977. Robert Burnette and John Koster. *The Road to Wounded Knee*. NY: Bantam Books, 1974.

[xxviii] Article 12 states: No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

Article 16 states: The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and

by them to the settlements in the Territory of Montana shall be closed.

[xxix] "In August [1876], Congress attached a punitive rider to the Indian Appropriations Act, cutting off food and rations to the agency Sioux until they agreed to cede the Black Hills, to give up their other rights outside the permanent reservation, and to grant rights of way through the remainder of their land.***The commission would deliver the nation's ultimatum, which in its simplest terms, gave the Sioux the choice to die in battle, to die from starvation, or to surrender everything they held of value." Lazarus, *Black Hills, White Justice*. n. 27, supra, 90. In retaliation against Lakota opposition to the Crook Commission's attempts to take more Sioux territory, in 1889, " the Indian Office informed the Pine Ridge and Rosebud Sioux of a 20 to 25 percent reduction in their beef ration for the coming year.***...the United States had not only launched a sustained assault on religious and cultural traditions, it had now taken almost half of the Sioux' remaining land as well....a drought settled on the Plains. The winter of 1889-1890 was especially hard. There was not enough to eat, and diseases like influenza and whooping cough claimed many lives. Ostler (2004), n. 27 supra, 237-239.

[xxx] For an extensive discussion of the legal and political machinations by the United States in this area, see, Lazarus, *Black Hills, White Justice*, n.27, supra.

[xxxi] The question of the application, prospectively or retroactively, of the Vienna Convention to treaties between indigenous peoples and states was addressed by the Special Rapporteur's conclusions in the UN Treaty Study: "[Paragraph]267. The State parties to those compacts - which have benefited the most from gaining jurisdiction over former indigenous lands - argue that those attributes were indeed relinquished, on the basis of provisions of their domestic legislation and decisions of their domestic courts, as well as on the realities of today's world, and of the historical developments leading to the present situation. However, the principle that no one can go against his own acts goes back to ancient Rome and was valid as a general principle of law at the time of the dispossession.

[Paragraph] 268. In this connection, the Special Rapporteur is very aware of the non-retroactivity of the 1969 Vienna Convention on the Law of Treaties, (58) which entered into force in 1980. A considerable number of States with indigenous peoples living within their current borders are parties to it. Nonetheless, he has also borne in mind that the text adopted in Vienna has to do not only with the development of new rules and concepts in international law, but also with the codification of those which had survived the test of time and were, in 1969, already part and parcel of international law, either as customary law or as positive law as embodied in a number of already-existing bilateral and/or multilateral international instruments.

[Paragraph] 269. He believes that the content of article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...") was already a rule of international law at the time when the process leading to the disenfranchisement and dispossession of indigenous peoples' sovereign attributes was under way, despite treaties to the contrary concluded with them in their capacity as recognized subjects of international law.

The Special Rapporteur then proceeded explicitly to mention the violations of the 1868

Ft. Laramie treaty, and the application of the principle of *pacta sunt servanda* to this case:

[Paragraph] 276. Probably the most blatant case in point is the United States federal Government's taking of the Black Hills (in the present-day state of South Dakota) from the Sioux Nation during the final quarter of the nineteenth century. The lands which included the Black Hills had been reserved for the indigenous nation under provisions of the 1868 Fort Laramie Treaty. It is worth noting that in the course of the litigation prompted by this action, the Indian Claims Commission declared that "A more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history", and that both the Court of Claims, in 1979, and the Supreme Court of that country decided that the United States Government had unconstitutionally taken the Black Hills in violation of the United States Constitution. However, United States legislation empowers Congress, as the trustee over Indian lands, to dispose of the said property including its transfer to the United States Government. Since the return of lands improperly taken by the federal Government is not within the province of the courts but falls only within the authority of the Congress, the Supreme Court limited itself to establishing a $17.5 million award (plus interest) for the Sioux. The indigenous party, interested not in money but in the recovery of lands possessing a very special spiritual value for the Sioux, has refused to accept the monies, which remain undistributed in the United States Treasury, according to the information available to the Special Rapporteur.

277. It is well known that fulfillment, in good faith, of legal obligations that are not in contradiction with the Charter of the United Nations (Art. 2.2) is considered one of the tenets of present-day positive international law and one of the most important principles ruling international relations, being, as it is, a peremptory norm of general international law (*jus cogens*). Of course, article 26 of the Vienna Convention on the Law of Treaties has enshrined the principle of *pacta sunt servanda* as the cornerstone of the law of treaties, and mention has already been made above of the importance of article 27 of that Convention.

[xxxii] *The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.* Cambridge: Cambridge U. Press, 2002. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[xxxiii] Ibid. *Article 1. Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law.

Such characterization is not affected by the characterization of the same act as lawful by internal law.

[xxxiv] Ibid. *Article 31. Reparation*

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed….

*Article 36. Compensation*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is

[xxxv] Ibid.

Signature Page (copy) -

Tipila (Devil's Tower), Wind Cave National Park, Mount Rushmore National Park, Bear Butte, and Harney Peak.

Proceedings for restitution, and/or for financial compensation for damages for U.S. wrongful acts will take place in due course, and will be taken to impartial international bodies for resolution. Liquidated damages for trespass and for conversion of Lakotah property, through your failure to abandon and relinquish Lakotah territories after 180 days from this date, will be calculated at a rate of no less than $5 million per day.

On behalf of the Republic Of Lakotah,

Russell Means

Convenor

Glenn T. Morris

Attorney General

22 June 2010

Porcupine, Republic of Lakotah