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A HISTORY OF INDIAN HUNTING AND FISHING RIGHTS AS THEY PERTAIN TO THE CONFEDERATED SALISH AND KOOTENAI TRIBES AND THE HELLGATE TREATY OF 1855

By

Michael J. Wheeler

B.A., University of Montana, 2002

Presented in partial fulfillment of the requirements

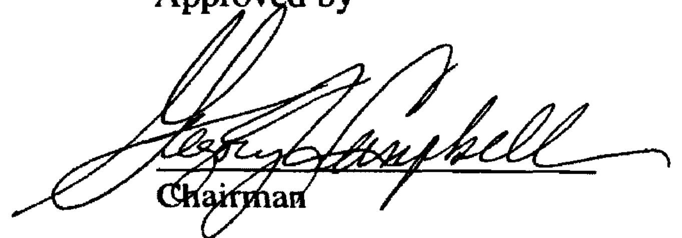
for the degree of

Master of Arts

The University of Montana

May 2006

Approved by



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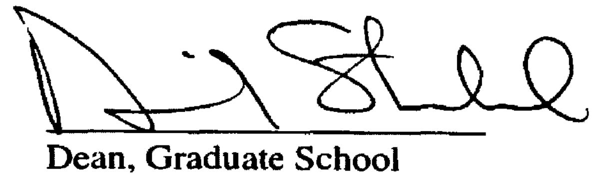

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A history of Indian hunting and fishing rights as they pertain to the Confederated Salish and Kootenai Tribes and the Hellgate Treaty of 1855.

Chairman: Gregory R. Campbell

As the United States developed into a nation, there were constant conflicts between Indians and non-Indians over various resources. Indian people first negotiated with non-Indian colonists using treaties to memorialize their agreements. Over time, treaties gave way to codified laws. However, it was during the colonization of America that Indians and non-Indians endured numerous clashes over culture, politics, economics and religion. The result of these confrontations can be seen in the various tribal, federal, and state institutions that we have today. Another result has been disputes over hunting and fishing, mainly between tribes and states. Fish and game have historically been essential to the overall existence of Indian people. States also have an interest, mainly economic, in the fish and game within state boundaries. Indian tribes who agreed to treaties with the U.S. Government often retained rights to fish and game on and off of their land base. This has been particularly troublesome to states, because they contend that they have the sovereign right to manage the resource within state boundaries. Indian treaty tribes also have the sovereign right to govern and manage the resources within, and sometimes outside of, their land base. Obviously, this has led to conflicts and political squabbling between tribes and states.

Out of these conflicts emerged court cases and Congressional legislation that have had varied effects on treaty rights of Indians, and the rights of states to enact game laws as well. For the Confederated Salish and Kootenai Tribes of the Flathead Reservation and the State of Montana, there has been a highly contentious fight over who ultimately has jurisdiction over fish and game in the state and on, or near, the reservation for over a century. The final result has been a joint tribal/state compact, but this agreement was reached only after decades of sometimes violent confrontations between both parties. This study traces the history of governmental authority for tribes, states, and the federal government. In addition, this study generally and specifically traces the evolution of game laws and tribal rights, with a focus on the tribes of the Confederated Salish and Kootenai Nation.

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-United States v. Washington, 384 F.Supp. 312 (W.D.Wash.1974), affirmed 520 F.2d 676 (9th Cir.1975), cert. denied Washington v. United States, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).
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-Ward v. Racehorse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).
-Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).

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United States Indian Policies

-The Indian Removal Act of 1830 provided for an exchange of lands with any of the Indians residing in any of the states and territories, and for their removal west of the Mississippi River. It was used to set into motion the mass forced relocations of the Creek, Cherokee, Choctaw, Chickasaw, Seminole and many other Indian Nations located East of the Mississippi during the 1830's. The intent of the act was to clear away all Indian tribes and people Westward beyond the Mississippi, thus opening up their lands for non-Indian settlement. Most of the removed tribes were relocated into Indian Territory in Oklahoma, an area belonging to other Tribal Nations.

-The General Allotment Act of 1887, also known as the Dawes Act, enabled the U.S. Government to intervene unilaterally into the affairs of Indian Nations to break up their traditional systems of collective land use. In order to retain any land at all, Indian people were compelled to accept individually deeded land parcels. Once each Indian had received his allotment of land, the remainder of reservation land was opened up to non-Indian settlement.

-The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, was imposed by the U.S. Government to supplant traditional forms of tribal government with IRA approved models structured after Western examples. Indian IRA governments required the approval of the Commissioner of Indian Affairs to be ratified.

-The Termination Act of 1953, also know as House Concurrent Resolution 108, was a federal policy designed to unilaterally dissolve specific Indian Nations. In total, 109 Indian Nations were terminated by congressional action during the late 1950's. A few nations were restored to federal recognition during the 1970's.

-Public Law 280, enacted in 1954, reduced the number of unterminated tribes in California, Minnesota, Nebraska, Oregon, Washington, and Alaska by placing them under varying degrees of state civil and criminal jurisdiction without the affected tribes consent.

-The Indian Civil Rights Act of 1968, while negating many of the most damaging aspects of termination, made native governments a functional part of the federal governmental system. The act was interpreted to provide relief in federal court against tribal government actions only in matters pertaining to habeas corpus. The act was amended in 1986 to allow tribal courts greater powers of penalization, up to one year imprisonment and $5,000 in fines, on certain types of criminal offenses.

-The Indian Self Determination and Educational Assistance Act of 1975 does nothing to afford Indians the right to determine for themselves their social, political, and economic

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relations with the U.S. and other foreign nations. Rather, it requires that they be included more in staffing the various programs affecting them. However, the act makes clear that the federal government still holds preeminent authority over Indian affairs.

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CHAPTER I

THE HISTORY OF FEDERAL, STATE, & TRIBAL INTERACTIONS

The Confederated Salish and Kootenai Tribes of the Flathead Reservation have been in many on and off reservation hunting and fishing rights conflicts with state and federal governments since 1855. Aside from the legal controversies, these matters have been emotional because the stakes are high for tribal members and non-Indians alike. Two of the most compelling reasons tribal members and reservation governments defend these rights include the protection of property rights and tribal sovereignty.

To understand Indian hunting and fishing rights, it is essential to first gain a perspective on how the relationships between Indian tribes, the federal government, and state governments were formed. In addition, it is important to recognize and understand precedent setting court cases, particularly those that are still cited today. Furthermore, historical trends in Indian policy provide insight into the ever-changing field of Indian law. The interactions between federally recognized tribes and the United States Governments are numerous, varied, and complex due to the unique status of Indian tribes, and the many overlapping claims of authority between the three parties. To understand the tribes' right to hunt and fish both on and off a reservation it is imperative to grasp the multitude of interests, policies, and regulations involved.

The following chapter will address Indian rights derived from treaties, executive orders, statutes, agreements, and established aboriginal rights. This chapter also will examine the history of federal Indian policy, particularly its origins and development over time, and how this policy relates to tribal hunting and fishing. Specifically, this

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study will closely examine the scope and source of these powers for the three parties involved in this relationship: the federal government, state governments, and Indian tribes.

Indian Treaties

A beginning point to study tribal, state, and federal relations is treaties. It is important to understand the nature of treaties as they apply to Indian nations. A treaty is a contract between two sovereign nations. A sovereign nation is basically a nation that has the right to self-government. The origin of U.S. treaty authority is the United States Constitution, which authorizes the President to negotiate treaties on behalf of the United States, with the consent of two-thirds of the U.S. Senate.[1] The Constitution declares treaties as "the supreme law of the land", meaning they are superior to state laws and constitutions and are equal to laws passed by Congress.[2] Under the supremacy clause of the United States Constitution, treaties override any conflicting state constitutional provisions or laws.[3]

As a result, a treaty with an Indian Nation is not to be taken lightly by state or federal governments. For example, the U.S. Supreme Court has expressly held that an Indian treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those rights not granted."[4] Indian treaties do not give rights to Indians,

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[1] Stephen L. Pevar, *The Rights of Indians and Tribes* (Southern Illinois University Press Carbondale and Edwardsville, 1992, Second Ed.) p. 37.
[2] Ibid., p. 37.
[3] Felix Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1982 ed.) p. 62.
[4] Vine Deloria Jr. & Clifford M. Lytle, *American Indians, American Justice*, (1983, University of Texas Press), p. 49.

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treaties take rights away or reaffirm rights. This means that Indians have a great many rights in addition to those inherent rights of a sovereign. Any right not explicitly taken from Indians by treaty or executive order is reserved to the tribe, which maintains their ability to govern themselves. This is known as the "reserved rights" doctrine.[5]

The real value of treaties to Indian tribes has not really been realized until after the late 18th century. Certainly the earliest treaties conferred some benefit to treaty tribes, however, most if not all of the treaties entered into by Indian Nations have been broken by the United State Government. These original treaties, although rarely honored by the United States, do at least give us some insight into U.S. policy and, to a lesser extent, the objectives of the Indian tribes who were party to the agreements. So, it could be argued that the value of these early treaties is largely in a historical context, and not so much for any functional use by a tribe seeking to assert specific rights today.

Early treaties were constructed "voluntarily" between the parties on the premise of relative equality between Indian Nations and the federal government, however this changed after the War of 1812. Indians were no longer needed as allies against the British, and Indian land was coveted by non-Indians. Treaties between the two parties then became one-sided affairs, almost always to the detriment of Indians who no longer had equal standing in the dealings, but still retained sovereignty. Generally these treaties contained three common provisions. First, the Indians gave up large tracts of land to the United States. Second, the Indians were guaranteed a federally protected reservation by the United States. Finally, a trust relationship between the treaty tribe and the United States was established.[6] While Indians were always held to their part of the bargain by

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[5] Pevar, *The Rights of Indians and Tribes*, p. 37.
[6] Ibid., pp. 37-38.

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giving up millions of acres of land, the United States government rarely protected reservations, and in most cases decreased the size of the holdings over time or looked the other way as non-Indian settlers illegally stole reservation land for their own use.[7]

Congress ended treaty making in 1871, but it in no way impaired the obligations of earlier treaties.[8] After passing the 1871 statute that ended treaty making, the federal statutes that compose the body of federal Indian law expanded due to broad, sweeping congressional legislation intended to affect many tribes with a single document. Previous treaties had predominantly dealt with Indian nations on a tribe-by-tribe basis, which ensured that the rights of individual tribes would not decrease as they did under collective legislative actions. Collective legislative actions are acts of Congress designed to provide blanket coverage of the affairs of many tribes using only one piece of legislation, as opposed to dealing with each tribe individually. After 1871, Congress enacted legislation that replaced treaties and required passage by the U.S. House of Representatives and the U.S. Senate, but did not require Indian consent.[9]

Regardless of the 1871 statue ending treaty making, the federal government still had treaty obligations to fulfill. In an effort to protect the rights of tribes over disputes caused by the terms or provisions of a treaty, the United States Supreme Court has developed a set of rules that govern the interpretation of treaties involving Indians. These rules are known as the canons of treaty construction. "There are three basic canons. First, ambiguities in treaties must be resolved in favor of the Indians. Second, Indian

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[7] Peter Nabokov, *Native American Testimony* (Penguin Books New York, New York 1999 edition) p. 271.
[8] Cohen, *Handbook of Federal Indian Law*, pp. 106-107.
[9] Ibid., p. 107.

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treaties must be interpreted as the Indians would have understood them. Finally, Indian treaties must be construed liberally in favor of the Indian."[10]

Due to the canons of treaty construction, Indian treaties and treaties made with foreign nations have their differences. However, treaties with Indian tribes and foreign nations are similar except in two important instances. Unlike treaties with foreign nations, Indian treaties are constructed in favor of Indians. Meaning, any questions that arise from interpreting the treaty are to be resolved in the tribe's favor. Also, courts will not allow a treaty to be abrogated by later treaties or legislation unless it is expressly indicated by the new treaty that abrogation was intended. Treaties with Indian tribes are accorded this special treatment due to the trust relationship between tribes and the federal government, which does not extend to foreign nations.[11] As with foreign nations, Indian tribes who naively enter into fraudulent treaties or are not represented properly during the ratification of negotiated treaties are <u>not</u> protected by an investigation into the matter by the courts. Furthermore, Indian treaties and foreign treaties alike can be abrogated at any time by Congress, provided established protocol is followed.[12] To this day, Indian treaties remain an important source of federal Indian law.

When the era of treaty making between the federal government and Indian nations ended, treaties, as well as statutes, revealed a trend toward greater federal control over Indian interactions with non-Indians. This trend diminished tribal autonomy as the federal government imposed its' will in matters that involved non-Indians in Indian-territory. However, several important principles were established that laid the foundation for how tribes interact with state and federal governments. These principles include:

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[10] Pevar, *The Rights of Indians and Tribes*, p. 40.
[11] Cohen, *Handbook of Federal Indian Law*, pp. 63-65.
[12] Ibid., pp. 62-70.

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> Most notable are the general tenets that Indian tribes are governments, that the United States has broad power over Indian affairs, that matters affecting tribal self-government are normally reserved to the tribes, that states have very limited jurisdiction in Indian country, that the United States has a special trust obligation to Indians, and that treaties and statutes affecting Indians are construed according to rules of construction that favor Indians. These doctrines, established early in our jurisprudence during the treaty era, continue to dominate modern federal Indian law.[13]

Indians and the Colonial Government

The history of Federal Indian policy in American can be traced to colonial times. Felix Cohen wrote, "The Indian policy of the United States developed from legal precedent established by the European colonists in their relations with American Indians. Most basic principles of federal Indian law today are traceable to those early sources".[14] In fact, pre-constitutional dealings with Indian tribes in North America were patterned after an example set in 1532 by Franciscus de Victoria, a Spanish intellectual and academic. Victoria recognized, and later advised the Emperor of Spain, that the natives were the true owners of the land in the Americas. He also realized that "discovery", divine right, and conquest were not legally sufficient to transfer title to Spain so long as the Indians respected the natural rights of Spain.[15] The legal alternative was to obtain title by free and voluntary choice, which essentially means by treaties. Victoria's theories seem to have been adopted by most European nations and became the foundation of international law. From his writing emerged:

> The idea that land should be acquired from Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) that the Indian tribe has a transferable title, of some sort, to the land in question;

[13] Cohen, *Handbook of Federal Indian Law*, p. 70.
[14] Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942).
[15] Deloria & Lytle, *American Indians, American Justice*, pp. 2-3.

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and (3) that the acquisition of Indian land could not safely be left to individual colonists but must be controlled as a governmental monopoly. These three principles are embodied in the "New Project of Freedoms and Exemption," drafted about 1630 for the guidance of officials of the Dutch West India Co.[16]

In many cases Europeans got around these principles by waging a "just" war, and tribes were often punished as a result. However, these three requirements were later adhered to by the U.S. Government. The colonists followed the international laws established by writers in the sixteenth, seventeenth, and eighteenth centuries, who were heavily influenced by Franciscus de Victoria's theories. The realities of colonial life also dictated the use of treaties, as opposed to simply taking the land, for acquiring Indian property. Indians heavily outnumbered colonists at this time, which is why it was beneficial for European settlers to negotiate, rather than risk extermination at the hands of powerful Indian nations. Each colony employed unique methods in dealing with tribes, but the overriding concern for each was survival, acquiring lands, and establishing trade relations with Indians.[17]

The colonies negotiated for coveted Indian land according to their own policies. At times they had to deal with interference, in the form of royal claims to land title, by the British Crown. The British dealt with the Indian tribes formally as foreign sovereign nations. Colonies often employed local authorities to negotiate with Indians on behalf of the community. When the French and Indian War erupted in 1754, the British attempted to usurp power over Indian dealings from the colonists.[18] They did this in order to negotiate treaties, keep peace with Indians, and to keep the Crown informed about

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[16] David H. Getches, Daniel M. Rosenfelt, Charles F. Wilkinson, *Federal Indian Law Cases and Materials*, (St. Paul, Minnesota, West Publishing Co. 1979) p. 32.
[17] Deloria & Lytle, *American Indians, American Justice*, pp. 2-4.
[18] Cohen, *Handbook of Federal Indian Law*, pp. 55-58.

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colonial events. As the colonies grew in both numbers and power it became clear to the British that the colonists were abusing their relationship with Indians. In an effort to avoid expensive Indian wars and to enforce justice, the Crown took on the role as protector of the tribes as well. This is undoubtedly why, when the colonist revolted, many of the tribes sided with the British. Later, the colonies assumed control from the British over Indian affairs.[19]

It was during the American Revolutionary War that the new nation signed a treaty of alliance with the Delaware Indians September 17, 1778. This was the first treaty between the United States and an Indian tribe in American history and its main purpose was to guarantee Indian support during the war between the colonies and the British.[20] This early document established the protocol that the U.S. Government would later follow in it's dealings with Indian Nations, and it was the first official validation that Indian tribes were in fact sovereign nations.

Throughout the early years of the revolution, Indian affairs were a central concern of the Continental Congress. In an effort to centralize control over Indians in the national government, Congress declared its jurisdiction over Indian tribes by creating the Northern, Southern, and Middle Departments of Indian affairs in 1775. The departments were employed to maintain peace during the revolution and to negotiate treaties with Indian tribes. This illustrates the Continental Congress' commitment to securing and maintaining somewhat good relations with Indians, even though it was for the benefit of the nation and not the Indians.[21]

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[19] Cohen, *Handbook of Federal Indian Law*, pp. 55-58.
[20] Ibid., pp. 58-59.
[21] Ibid.

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The Far Reach of the U.S. Supreme Court

As the colonies achieved independence and became the United States of America, friction over land between Indians and non-Indians, caused by a burgeoning East Coast population of non-Indians eager to attain "free" land, increased despite the Trade and Intercourse Acts passed by Congress between 1790 and 1834. These acts were far-reaching and complex, however, they essentially separated Indians from non-Indians and made all their interactions subject to federal control, especially land dealings. More importantly, the Trade and Intercourse Acts controlled the actions of non-Indians that sought to engage in various dealings with individual Indians and tribes.[22] The ultimate solution to the many problems between Indians and non-Indians became Indian removal to land beyond the Mississippi, which was supported by many influential politicians, including President Jackson. Yet, at the same time the United States Supreme Court, led by Chief Justice John Marshall, was constructing legal doctrines that would influence Indian law to the present.

In the case Johnson v. McIntosh[23] in 1823, the Supreme Court recognized "a legal right of Indians in their lands, good against all third parties but existing at the mere sufferance of the federal government."[24] This right of occupancy is often referred to as aboriginal title or Indian title. Later, in two of the most influential cases in the history of Federal Indian Law, Justice Marshall made rulings that both limited and supported the sovereignty of Indian Nations.

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[22] William C. Canby, Jr., *American Indian Law in a Nut Shell* (West Group St. Paul, Minnesota, third edition, pub. 1998), p. 12.
[23] 21 U.S. 543, 5 L.Ed. 681 (1823).
[24] Johnson v. McIntosh, 21 U.S. 543, 5 L.Ed. 681 (1823).

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The Cherokee cases arose due to the state of Georgia's attempts to extinguish Indian title to land within the state. The facts were that "between 1828 and 1830, Georgia enacted a series of laws that divided up the Cherokee territory among several Georgia counties, extended state law to the divided territory, invalidated all Cherokee laws, and made criminal any attempts of the Cherokee to act as a government."[25] In response, the Cherokees brought a case to the United States Supreme Court in Cherokee Nation v. Georgia[26] of 1831. To bring this action to court the Cherokees had to have standing as a "foreign nation" as defined in Article III of the Constitution.[27] Chief Justice John Marshall determined that the Cherokee had demonstrated it was "a distinct political society separated from others, capable of managing its own affairs and governing itself," and negotiated treaties between the tribes and the United States validated this claim.[28] However, Marshall concluded that tribes could not be considered "foreign" states in the strict sense of the words. The tribes, according to Marshall, were instead "domestic dependent nations."[29] As William Canby points out, "It's emphasis on nationhood laid the groundwork for future protection of tribal sovereignty by Marshall and his immediate successors, but the characterization also created an opportunity for much later courts to discover limits to tribal sovereignty inherent in domestic dependent status. Marshall's reference to tribes as "wards" was to have an equally mixed history; it provided a doctrinal basis for protection of the tribes by the federal government, but it also furnished

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[25] Canby, *American Indian Law in a Nutshell*, p. 14.
[26] 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831).
[27] Deloria & Lytle, *American Indians, American Justice*, p. 29.
[28] Prucha, *Documents of U.S. Indian Policy*, p. 58.
[29] Joseph P. Mazurek, Julie Wrend, Clay Smith, *American Indian Law Deskbook: Conference of Western Attorneys General* (University Press of Colorado Niwot, Colorado, Second Edition, pub. 1998), p. 2.

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support for those who disagreed with Marshall's view that the tribes were states capable of self-government."[30]

In the Supreme Court case Worcester v. Georgia[31] in 1832, Marshall ruled that the laws of Georgia have no force over the Cherokee nation, who represented "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[32] Although the Cherokees made a commendable fight and Chief Justice Marshall's last decision upheld limited tribal sovereignty, Indian removal beyond the Mississippi was eventually realized due to the value and location of Cherokee lands.

Indian Removal & The Reservation System

After the American Civil War it became apparent that Indian removal to the West would no longer satisfy the non-Indian appetite for land. Lands West of the Mississippi became the target for non-Indians as the nation looked to expand by taking control of Indian Territory. In order to achieve this goal, the federal government concocted the policy of creating Indian reservations. The reservation system was designed to restrict Indian tribes to permanent tracts of land, thus opening up "unsettled" lands to non-Indians, as well as keeping Indians and non-Indians separated. Also, reservations were supposed to eventually "civilize" Indians by forcing them to abandon their nomadic

[30] Canby, *American Indian Law in a Nut Shell*, p. 16.
[31] 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).
[32] Mazurek, Wrend, Smith, *American Indian Law Desk book: Conference of Western Attorneys General*, p. 4.

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lifestyles in favor of western practices, such as farming and ranching.[33] Restricting tribes to reservations was typically accomplished through treaties, which were often of a coercive or dishonest nature.[34] In these treaties the tribes ceded much of the land they occupied to the United States, while retaining a small portion for themselves. In some instances, the tribes were moved hundreds of miles from their homeland to distant, unknown reservations.

As noted previously, in 1871 Congress passed a statute declaring that no tribe thereafter was to be recognized as an independent nation capable of making treaties with the United States. However, existing treaties were not affected. It is questionable that Congress could legally limit the constitutional treaty making power of the President, yet the statue did effectively end the Indian treaty making practice by making it clear that no new treaties would be ratified after the statutes inception. Reservations established after 1871 were created by statute or executive order, until Congress ended the Presidents ability to make reservations in 1919.[35]

The Policy of Allotment

In 1887, the General Allotment Act, also known as the Dawes Act, emerged as a solution to the problems that plagued Indians.[36] The reservation policy was viewed by most as a failure. Indians did not become sedentary farmers by being moved to the reservations. Instead, as a result of being confined to the reservation, they faced famine

[33] Duane Champangne, *Native America: Portrait of the Peoples* (Visible Ink Press, 1994), p. 286.
[34] Ibid., p. 284.
[35] Getches, Rosenfelt, Wilkinson, *Federal Indian Law Cases and Materials*, pp. 67-68.
[36] Champagne, *Native America: Portrait of the Peoples*, p. 284.

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and starvation as the governments' promise of rations that came with the treaties often went ignored. Also, non-Indian settlers wanted access to the lands on the reservation that were "unoccupied" by Indians. The Allotment Act of 1887 was a policy that many non-Indians believe was truly meant to benefit Indian people by assimilating them into Western culture and society.[37] This was to be achieved by designating to individual members of the tribe a section of land on the reservation for them to farm or ranch, with citizenship being the desired end result. Policy makers believed that ownership of land or property would encourage individuals to move away from a tribal lifestyle and become mainstream American workers.[38] However, this failed to materialize for a variety of reasons including cultural differences and poor implementation of policy objectives by government agents.

Indians who accepted allotments became United States citizens and were subject to state laws until 1906. However, the most damaging aspect of the allotment act was that the Secretary of the Interior was authorized by the act to "negotiate with the tribes for disposition of all excess lands remaining after allotments, for the purpose of non-Indian settlement."[39] The General Allotment Act of 1887 was the first policy to affect many tribes in the nation with a single piece of legislation. This meant that the individual needs of a tribe were not addressed, but instead a generic policy model was forced on several tribes at once. It should be noted that Indian treaties almost always had an allotment provision, whether the affected tribe realized it or not, and the 1887 act simply provided the mechanism to carry out the practice of allotting Indian lands. The results of the act were devastating to tribes in several ways. As Felix Cohen noted "Indian land holdings

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[37] Champagne, *Native America: Portrait of the Peoples*, p. 284.
[38] Ibid.
[39] Canby, *American Indian Law in a Nut Shell*, p. 21.

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were reduced from 138 million acres in 1887 to 48 million in 1934, a loss of 90 million acres."[40] Most of the land remaining for Indian use was of low quality and not fit for farming. In addition, the tribes were usually required to abandon their traditional cultures and religions because non-Indian administrators felt it would help them assimilate into non-Indian society easier.

Although allotment was mainly used to divest tribes of land, it also provided the U.S. government with justification to use plenary power to abrogate treaty provisions that stood in the way of allotment policies. Although the abrogation of Indian treaties was rare, the federal government has found cause to do so on occasion. The case Lone Wolf v. Hitchcock[41] of 1903 is one of the most infamous court decisions dealing with Indian rights in United States history and it lends insight into how Congress can abrogate Indian treaties. This Supreme Court decision clearly established federal government control over Indians and it also defined the status of Indians as dependent upon the U.S. government. In addition, Lone Wolf became the embodiment of federal paternalism over Indians. The overriding issues that made Lone Wolf such an important case are: reservation allotments and the sale of surplus lands in violation of treaty stipulations and the plenary power of the United States Congress to increase legislative and judicial control over Indians and their property.[42]

Adding controversy to the Lone Wolf case was Article 12 of the 1867 Treaty of Medicine Lodge which stipulated that no part of the Kiowa-Comanche Reservation could be ceded in the future without the approval of three-fourths of the adult males of the

[40] Cohen, *Handbook of Federal Indian Law*, p. 138.
[41] 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).
[42] Blue Clark, *Lone Wolf v Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* (University of Nebraska Press Lincoln and London, 1994) pp. 1-6.

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tribes.[43] After allotment of the Kiowa-Comanche Reservation was realized, Congress authorized the sale of excess lands on the reservation without three-fourths approval, which led to the tribe's attempts to block the act. However, the U.S. Supreme Court declared that Congress had plenary power over Indian relations and it had power to pass laws abrogating treaty stipulations. Also, amidst the legal arguments involved in Lone Wolf, the U.S. Supreme Court determined that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests. In addition, plenary authority of Congress over Indians was said to have always been present in the federal tribal relationship and it was a political power not subject to control by the judicial branch of the United States Government. This power exists to abrogate the provisions of an Indian treaty, though such power is presumed to only be exercised when certain circumstances arise which justify governmental disregard for the provisions, or if the interests of the nation and the Indians themselves demand such action.[44] This means that regardless of the language contained in a treaty, if Congress feels it would be in the best interests of the nation or the Indians, Congress has the ability to ignore treaty stipulations and can act in a manner they see fit to resolve the issue at hand. Obviously, this is an un-welcomed prospect to the tribes who face abrogation. Abrogation confers no benefit to treaty tribes, and is regarded by many as little more than a tool used by the government to justify voiding treaty provisions when it suits the needs of non-Indians, mostly in an economic context.

[43] Clark, *Lone Wolf v Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*, p.115.
[44] Francis Paul Prucha, *Documents of United States Indian Policy* (University of Nebraska Press Lincoln and London, third edition, pub. 2000) pp. 201-202.

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Indian Reorganization Act

The next major event in the field of Federal Indian Law was the 1934 Indian Reorganization Act. The Reorganization Act ended the further allotment of Indian lands.[45] It also authorized the Secretary of the Interior to return "surplus" lands not sold during allotment back to tribal ownership, providing no third party had legal claim to the land.[46] This gave tribes a chance to recover some of their reservation land base. In addition, the act encouraged tribal economic development, cultural plurality, the revitalization of tribalism, and self-determination. The most important aspect of the Indian Reorganization Act was that it allowed and aided tribes in creating a new system of self-government. The tribes were able to draft and ratify constitutions and employ their own counsel, but these acts required authorization from the Secretary of the Interior. This process of authorization often led to non-traditional forms of tribal government that, by design, resembled the United States system. However, many modern tribal governments have strong legislative and judicial branches of government with a weak executive function, which differs from the U.S. example. The IRA form of government was not suited to the traditional needs of most Indian people, so it should be no surprise that the ultimate successes of these governments have been varied.[47]

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[45] M. Annette Jaimes, *The State of Native America: Genocide, Colonization, and Resistance* (South End Press Boston, Massachusetts, pub. 1992), p. 15.
[46] Champagne, *Native America: Portrait of the Peoples*, p. 287.
[47] Wendell H. Oswalt, Sharlotte Neely, *This Land was Theirs: A Study of North American Indians* (Mayfield Publishing Company Mountain View, California, Fifth Edition, pub. 1996), pp. 49-50.

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Termination

In 1953, the winds of Indian policy had drastically shifted with the adoption of the termination policy. The goals of the policy were "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to end their status as wards of the United States."[48] Termination, which is also known as House Concurrent Resolution No. 108, declared that federal benefits and services to Indian tribes should be ended at the earliest time possible.[49] Over one hundred tribes endured Congressional termination of their federal assistance. Each of these tribes was ordered to distribute its lands and property to its members and to permanently cease all tribal governmental operations. As a result of termination the tribal relationship with the federal government ended, Indians were subject to state laws, and all Indian lands were converted to private ownership or sold.[50] Once again, many non-Indians felt that this policy was truly meant to help the Indian people it affected. The outcome, however, was tragic as the tribes that faced termination plunged into deeper economic and social despair. However, due to the paternalistic nature of U.S. Federal Government relations with Indians, some tribes actually favored termination as an acceptable alternative to constant government interference and oversight.

[48] Canby, *American Indian Law in a Nut Shell*, p. 25.
[49] Deloria & Lytle, *American Indians, American Justice*, pp. 17-18.
[50] Pevar, *The Rights of Indians and Tribes*, p. 7.

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Jurisdiction & Public Law 280

Also in 1953, Congress enacted Public Law 280 extending state civil and criminal jurisdiction over Indian Country and reducing the number of unterminated indigenous nations in California, Minnesota, Nebraska, Oregon, Washington, and Alaska.[51] Any other state could later apply this jurisdiction by statute or state constitutional amendment, and tribal consent was not required. Public Law 280 dramatically disrupted the former reservation jurisdictional boundaries that had been previously established between the federal government, states, and tribes. These three competing claims of authority have consistently led to conflict throughout the history of the nations existence. Assumption of jurisdiction by states left the tribes with less control over their own lands, and also allowed states to assume some jurisdiction over Indians residing on reservations. Public Law 280 was in direct contrast to Chief Justice John Marshall's ruling in Worcester v. Georgia,[52] that state laws have no force in Indian- territory, yet it was enacted and enforced. States were given jurisdiction in Indian-territory and over individual Indians as well. It should be noted that Public Law 280 did not end the federal governments trust responsibility to Indians. The act specifically notes that states may not tax Indian properties held in federal trust or interfere with treaty hunting and fishing rights, which are property rights as well.[53] Some tribes viewed Public Law 280 with distain because it eroded their rights by letting the states extend jurisdiction into Indian lands without their consent. The cost to the states, by assuming jurisdiction over Indian-territory, was an added burden that could not be made up by taxing Indian properties. This fact led many

[51] Jaimes, *The State of Native America: Genocide, Colonization, and Resistance*, pp. 15-16.
[52] 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).
[53] Getches, Rosenfelt, Wilkinson, *Federal Indian Law Cases and Materials*, pp. 466-477.

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states to either neglect law enforcement in Indian-territory or to not assume jurisdiction in the first place.

Indian Civil Rights

Congress passed the Indian Civil Rights Act in 1968, and it marked a shift in policy away from the goal of assimilation, reflecting the failures of termination, but still maintained federal authority over Indians and Indian policy. Furthermore, it allowed tribes greater powers to penalize certain types of criminal offenses up to one year imprisonment and $5,000 in fines.[54] The main effect of the act was to place Indians under the protection of the United States Bill of Rights. This subjected tribal governmental actions to U.S. Constitutional restraints that they had previously avoided. These restraints mainly dealt with due process rights of criminal, leaving tribes to continue to be free from other Constitutional provisions. Some people believe that the independence of tribes was negatively affected by this act, and they oppose it on those grounds. Yet, others see the act as placing congressional procedures on tribal governments, which would suggest their future existence and not demise. One aspect of the Civil Rights Act that almost everyone accepted was the provision that amended Public Law 280. The amendment mandated that states no longer had civil and criminal jurisdiction over Indian Country unless a tribe consented to it.[55]

[54] Jaimes, *The State of Native America: Genocide, Colonization, and Resistance*, p. 16.
[55] Canby, *American Indian Law in a Nut Shell*, pp. 29-30.

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Nixon's Contribution

Current Indian policy of self-determination gained its direction from the Nixon administration. President Nixon declared termination a failure and ordered Congress to eliminate it as a policy. Nixon also reinforced the trust relationship between the federal government and the tribes. More importantly, the President recommended legislation that would encourage tribal autonomy. In the years following, Congress passed acts that reflected the goals of President Nixon. The Indian Financing Act of 1974 provided revolving loans to assist in the development of tribal resources. The Indian Self-Determination and Education Assistance Act of 1975 allowed tribes to enter into contracts that would allow them to be responsible for administering federal Indian programs. However, the Self-Determination Act does nothing to afford Indians the internationally recognized right to determine for themselves their social, political, and economic relationship with the U.S. or other foreign governments. Rather, the act requires that Indians be more fully included in the staffing of the various programs intended for their benefit, but it remains clear that federal policymakers still maintain preeminent authority over Indian affairs.[56] In the years following, policies toward Indians have continued to favor tribal autonomy over assimilation. The goal now seems to be recognizing and building the strength of tribal governments, while at the same time eliminating tribal dependence on the federal government.[57]

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[56] Jaimes, *The State of Native America: Genocide, Colonization, and Resistance*, pp. 16-17.
[57] Canby, *American Indian Law in a Nut Shell*, pp. 30-32.

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The Tribe, The State, & The Feds

At this juncture it is important to understand the historic relationship between tribes, states, and the federal government. The central aspect of this relationship was the source and scope of power shared by the three entities. Because of overriding federal authority, it is important to address sources of power over Indians and their affairs. The key is that "The federal-tribal relationship is premised upon broad but not unlimited federal constitutional power over Indian affairs, often described as plenary".[58] Furthermore, "the relationship is also distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. The inherent tension between broad federal authority and special federal trust obligations has produced a unique body of law."[59]

The federal government's source of power in this relationship is its constitution and military strength. The U.S. Constitution contributes the legal justification for use of that power in a number of clauses. The commerce clause states "Congress shall have the power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[60] Also the treaty clause is what gave the President and Senate the power to make all treaties. The Supreme Court has held that these two constitutional provisions provide Congress with "all that is required" for complete control over Indian affairs.[61] It should be noted that when treaty making with Indians ended in 1871 the commerce clause became the focal constitutional provision in Supreme Court decisions

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[58] Cohen, *Handbook of Federal Indian Law*, p. 207.
[59] Ibid.
[60] Pevar, *The Rights of Indians and Tribes*, p. 48.
[61] Worcester v. Georgia, 31 U.S. at 559 (1832).

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supporting exercises of federal power over Indians. Although there has been no discussion of the property clause in relation to the two previous clauses, it is another source of federal authority over Indians.

In addition, the Supreme Court has provided two other justifications for federal control over Indians. First, the court applied the rule of international law. The court noted, "discovery and conquest gave the conquerors sovereignty over the ownership of the lands thus obtained."[62] Simply put, this rule allowed the United States Federal Government to enforce its laws over all persons and property that were "conquered" when Europeans "discovered" North America and subdued its inhabitants. Also, the doctrine of trust responsibility was a source of federal power over Indians. This arose due to the fact that most Indian treaties contained a guarantee that the federal government would protect the tribe that entered into the treaty. The Supreme Court has held that this promise not only gave the federal government the right to regulate Indians for their own protection, but it was also their duty.[63]

The scope of federal power over Indians appears to be nearly limitless. As mentioned formerly, the U.S. Congress has plenary power over all Indian people, tribes, governments, and property. Although this power is full and complete, it is not unlimited. The Supreme Court has stated that the "power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[64] The fifth amendment of the U.S. Constitution places two limitations on the plenary power of Congress. They are the due process clause and the just compensation clause. The due process clause prohibits Congress from

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[62] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (University of Texas Press, 1997). p. 177.
[63] Deloria & Lytle, *American Indians, American Justice*, pp. 30, 33.
[64] Delaware Tribal Business Community v. Weeks, 430 U.S. 73, 84 (1977), citing U.S. v. Tillamooks, 329 U.S. 40, 54 (1946).

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enforcing laws that are unreasonable, arbitrary, or invidiously discriminatory by nature. The just compensation clause prohibits the federal government from taking private property without fair compensation for the property taken.[65]

The doctrine of trust responsibility is a quasi-check on the power of Congress in regards to Indian matters. This doctrine is intended to make the federal government loyal to Indians and tribes, to follow through with promises made to Indians in treaties, and to act in the Indians best interest. However, until recent times courts have viewed Congress's trust responsibility as an unenforceable moral obligation at best.[66] It is important to note that only Congress has plenary power over Indians, not federal agencies. Federal agencies can only act with powers that Congress has granted them. For agencies to act beyond their granted powers is illegal. Congress obviously does not have the ability to administer policies on a day-to-day basis, which is why these tasks have been delegated to various federal agencies. Of course this means that these agencies actually have a greater impact on Indians than Congress since they work daily on issues concerning Indians. This has led to an implementation of Indian policy that rarely resembles the intent of Congress, and in some cases, severe mismanagement on behalf of the tribes by federal employees.[67]

The next area to know is the source and scope of tribal power in relation to states and the federal government. Indian tribes have been self-governing throughout history, and in fact have the inherent right to govern themselves regardless of foreign intervention. This right of self-government by Indians was limited, but not abolished, by

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[65] United States Constitution, Fifth Amendment "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
[66] Pevar, *The Rights of Indians and Tribes*, pp. 26-27, 33.
[67] Ibid., pp. 52-53.

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being included within the boundaries of the United States. Tribal self-government is validated by the constitution, legislation, treaties, judicial-decisions, administrative practices, and is protected by the federal government to insure continued Indian self-government for eligible tribes. As Felix Cohen stated, "the recognition of tribal self-government embodied in legislation and treaties establishing reservations serves to preempt competing assertions of state authority."[68]

The exercise of tribal governing power may itself preempt state law in areas where, absent tribal legislation, state law might otherwise apply. Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once considered a political body by the United States, a tribe retains its sovereignty until "Congress acts to divest that sovereignty."[69] A basic principle of Indian law that is supported by a number of court decisions is that powers exercised by a tribe are not delegated powers given to them by Congress, but are instead "inherent powers of a limited sovereignty which has never been extinguished."[70]

The Supreme Court has stated, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[71] Tribes originally entered into dealings with the United States Government as independent nations with sovereign powers intact. After coming under the authority of the U.S. government, limitations were placed on the tribes' ability to govern themselves, however, a very small number of tribes may have actually benefited

[68] Cohen, *Handbook of Federal Indian Law*, pp. 230-231.
[69] Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976).
[70] U. S. v. Wheeler, 435 U.S. 313, 322-23 (1978).
[71] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

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from this federal "permission" because it ensured the continued functioning of their tribal governments. This continued assertion of tribal independence within the territorial boundaries of the U.S. has endured many changes over the course of time.[72]

Although Congress creates the policies that affect Indian tribes, the U.S. Supreme Court has played a huge role in determining, in their view, exactly how Congressional policies were meant to be carried out. The Supreme Court has also played a large part in determining exactly how to interpret treaty language that comes before the court. In an early example, the United States Supreme Court recognized tribal sovereignty as an inherent right in Worcester v. Georgia[73]. In this 1832 case, Chief Justice John Marshall looked to an earlier case from 1831, Cherokee Nation v. Georgia[74], in which he established that tribes were "domestic dependent nations" whose "relation to the United States resembled that of a ward to a guardian."[75] In the Worcester case, Marshall established that the Indians "ward" status did not make tribes dependent on federal law for their powers of government.[76] Upon studying the history of tribal and federal relations and applying the concepts found in international laws, Marshall recognized that tribes were originally dealt with as sovereigns by European Nations. Tribes later entered into treaties with these nations as equals. The United States followed this pattern as it emerged as a nation and entered into treaties with Indian tribes. This act by itself suggests that the United States has always recognized tribal assertions of sovereignty, thus validating them. Marshall ruled that the United States had become the "protector" of Indian tribes, offering security to Indian communities in exchange for peaceful relations

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[72] F. Cohen, *Handbook of Federal Indian Law*, p. 232.
[73] 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).
[74] 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831).
[75] Deloria & Lytle, *American Indians, American Justice*, p. 30.
[76] Ibid., pp. 32-33.

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between the two. This relationship did not damage tribal sovereignty, according to the Supreme Court: "The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state."[77]

This ruling, with its emphasis on protection of tribal sovereignty, both preserved tribal government and also shielded it from state intrusion. Felix Cohen notes, "In summary, Worcester held that the political existence of the tribe continued after their relations with both the states and the federal government. As a consequence of the tribes' relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities."[78] The doctrine of inherent tribal sovereignty as found in Worcester v. Georgia[79] has faced some changes over time, yet its basic premise has endured. It is still well established that Indian tribes are distinct political communities, tribes are limited sovereigns because Congress has the power to abolish or limit tribal powers, states have a limited ability to impose their laws on reservations, and tribes retain their inherent rights to self-government unless Congressional policy says otherwise.[80]

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[77] Worcester v. Georgia, 31 U.S. 515 6 Pet. at 560, 561, 515, 8 L.Ed. 483 (1832).
[78] Cohen, *Handbook of Federal Indian Law*, p. 235.
[79] 31 U.S. 515, 6 Pet. 515 8 L.Ed. 483 (1832).
[80] Cohen, *Handbook of Federal Indian Law*, pp. 234-235.

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The source of the United States Federal Government's power over Indian tribes is the U.S. Constitution and federal military force. But what is the source of an Indian tribe's power? The people are the source of a tribe's power. As mentioned previously, Congress did not give tribes their power of self-government, but they can limit it. The Supreme Court has stated, "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power."[81] The limits on tribal power appear to be mainly from Congress. Tribes have inherent powers, but Congress may abolish these powers. The federal government has the ability to limit the activities of tribes and dismantle their governments, which is a political reality that tribes have always faced. Tribes have two types of limits on their power, explicit and implicit. Congress has explicitly prohibited tribes from certain activities, such as selling land without permission from the Department of the Interior. Tribes have also implicitly lost power, mainly due to their dependent status. For example, tribes lost the power to enter into treaties with other foreign nations due to their domestic dependent status as "conquered" nations. Tribal governments enjoy a unique status in our nation. Indian tribes are not completely sovereign, yet they practice sovereignty over both their people and their lands. In addition, tribal powers are not limited by the U.S. Constitution. The intent of the constitution was to place limits on the power of state and federal governments, not on tribal governments. Due to this fact, tribal governments can enact laws that would violate the U.S. Constitution if enacted by state or federal governments, but not violate the Indian Civil Rights Act of 1968.[82]

[81] U. S. v. Wheeler, 435 U.S. 313, 323 (1978).
[82] Pevar, *The Rights of Indians and Tribes*, pp. 80-81.

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Tribal governments have the same power as state and federal governments to manage their own affairs, with few exceptions. The scope of tribal authority includes nine essential areas: 1) forming a government; 2) determining tribal membership; 3) regulating tribal property; 4) regulating individual property; 5) the right to tax; 6) the right to maintain law and order; 7) the right to exclude nonmembers from tribal property; 8) the right to regulate domestic relations; 9) and the right to regulate commerce and trade.[83] It must be noted that these are only a few of the more important rights that Indian tribes have at their disposal. However, it is clear that Indian tribes have a broad scope of powers over their own people, property, and domestic operations that are sometimes subject to federal oversight, but rarely state intervention.

Having addressed the source and scope of the federal government's power and the source and scope of tribal government power, it is now time to examine the source and scope of state powers over Indian tribes and individual Indians. The fact that Indian reservations are located within state boundaries has been a constant source of conflict since territories became states. Historically states have had jurisdiction over all people and activities within their boarders, with the exception of reservation Indians. Congress has exclusive authority over Indian affairs, thus preempting state jurisdiction. Hence, a state could not extend it's jurisdiction to Indian reservations within it's boarders without the express consent of Congress, which has given states very little authority over reservations. Federal treaties and statutes have never needed a states approval to become the "supreme law of the land."[84] In fact, any rights extended to Indians by Congress

[83] Pevar, *The Rights of Indians and Tribes*, pp. 81-82.
[84] United States Constitution, article VI, sec. 2, provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under theAuthority of the United States, shall be the Supreme Law of the Land; and the Judges in every State

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before a territory became a state still had to be honored when statehood was achieved. The Supreme Court in Worcester v. Georgia[85] ruled that state laws have no force within an Indian reservation unless authorized by Congress.[86] This absolute stance has been scaled back by the court in recent years, and in fact, determining the amount of jurisdiction a state has over Indian reservations in modern times has been a complex issue with few easy answers.

The "special" status of tribes within state boarders has consistently angered state officials. States resent the fact that they cannot tax or regulate reservation Indians or property on a reservation within the state. On the other hand, Indians are upset over repeated attempts by the states to extend state jurisdiction over reservation Indians. It should be noted that Indians living or traveling off the reservation are generally subject to the same state laws as non-Indians, with a few exceptions. For example, an Indian who commits a crime, such as theft, off the reservation is subject to state laws and prosecution. However, this is not the case if a federal law or treaty grants immunity. For instance, an Indian can hunt off the reservation and not be subject to state game laws if a treaty or federal law extends this right to that particular Indians' tribe. Many tribes and states have recently attempted to mend their difference and work together for the benefit of each party. Tribes and states may disagree over matters of regulation, but they are beginning to recognize the need for cooperation in order for each to function efficiently, especially since neither side is going to voluntarily cede jurisdiction to the other.

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shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[85] 31 U.S. 515, 6 Pet. 515 8 L.Ed. 483 (1832).

[86] Canby, *American Indian Law in a Nut Shell*, p. 129.

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Because certain state laws generally had little force over Indian reservations, states had to aggressively lobby Congress to permit them to regulate reservation activities. Congress appeased the states in three important instances and granted them power to regulate activities on Indian reservations. The General Allotment Act of 1887, Public Law 280, and termination laws each gave states legitimate jurisdiction over reservation activities.[87] The General Allotment Act gave federal officials the power to divide reservation lands into individual plots for Indians to permanently settle on. In addition, the act allowed federal officials to sell any "surplus" reservation land to non-Indians. Due to the act allowing non-Indians to own reservation lands, some states were able to assume jurisdiction over predominantly non-Indian land holdings within the reservation. Also, allotting land to Indians in trust status that ended after twenty-five years allowed the state to tax these reservation allotments once a deed was obtained.[88]

As mentioned, Public Law 280 mandated five states to extend criminal and limited civil jurisdiction onto Indian reservations without the consent of the tribes within the states involved. All other states were given the option to extend this jurisdiction if they wished to, even if they had a disclaimer clause in their constitutions that prevented state jurisdiction in Indian country. Public Law 280 allowed these states to remove the disclaimer clause from their constitutions. Only a few of the option states extended jurisdiction over Indian-territory due to the cost and extra responsibility involved, especially since states could not tax reservation Indians to make up for the extra cost involved in assuming jurisdiction on reservations. Also, option states could assume

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[87] Pevar, *The Rights of Indians and Tribes*, pp. 112-113.
[88] Ibid.. pp. 111-118.

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partial jurisdiction and could pick which reservations to extend jurisdiction over.[89] For example, the state of Montana, which has seven Indian reservations within its boarders, only extended jurisdiction over the Flathead Indian Reservation through a compact made with the tribe. Most tribes opposed Public Law 280 due to the possibility that states might attempt to increase their jurisdiction over tribal activities. In response, Congress amended Public Law 280 to require a tribes consent to be placed under state jurisdiction. Also, Congress authorized the United States to accept a return of any jurisdiction previously acquired by the state under Public Law 280.

Termination laws were the most damaging method that allowed state jurisdiction to extend to Indian reservations. These laws required affected tribes to dismantle their governments and distribute all tribal property to individual members. This marked the end of that particular tribes' existence, and fully subjected it former members to state laws. Termination laws cost affected tribes millions of acres of land and subjected thousands of Indians to complete state jurisdiction. Thankfully, the termination period was soon recognized as a huge failure, and a few tribes who survived being federally terminated were able to regain federal recognition of their sovereign status as tribal governments. However, many tribes that faced termination saw their land-base and sovereign governments destroyed and had little left to assist them when the federal government offered re-recognition of the tribe.

It is very apparent that treaties are important documents that helped establish the field of Federal Indian Law. Treaties, as well as statutes, executive orders and aboriginal rights have played a central role in tracing and establishing the rules and regulations that are seen today in Indian law. Also, the content of these documents have helped define

[89] Pevar, *The Rights of Indians and Tribes*, pp. 113-118.

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the roles of tribes, states, and the federal government within their unique relationship. Although the history of Federal Indian policy is complex and subject to varied interpretations, it gives guidance as scholars attempt to understand how this field of law developed. This understanding comes to light through examining the source and scope of the jurisdictional power that tribes, states, and the federal government share today. These treaties and laws that generally affect tribal communities are the same treaties and laws that are the source of authority for tribal hunting and fishing rights.

In the following chapter, this study will provide a general explanation of Indian hunting and fishing rights both on and off of reservations. Furthermore, it will examine the competing interests of the federal, state, and tribal governments and their claims of jurisdiction over fish and game resources, as well as important court cases and decisions that helped define on and off reservation tribal hunting and fishing laws and regulations.

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CHAPTER II

A GENERAL EXAMINATION OF INDIAN HUNTING & FISHING

The history of federal Indian law provides the backdrop for understanding the relationship between the federal, state, and tribal governments. One difficult issue to determine in this relationship is the establishment of jurisdiction over Indian hunting and fishing rights. Examining treaties, statutes, and executive orders, as well as pivotal court cases, provides an understanding of the evolution of Indian hunting and fishing rights as they are today. In addition to focusing on Indian hunting and fishing rights on reservations, chapter two also examines Indian hunting and fishing rights off of reservations. The following chapter will broadly address hunting and fishing conflicts between Indians and non-Indians, in addition to important court cases affecting Indian hunting and fishing rights. Chapter two will also discuss the general development of Indian hunting and fishing rights, including a brief overview of where these rights originated. The competing interests of the federal, state, and tribal governments will also be addressed, as will the extent of each government to either regulate or eliminate tribal hunting and fishing activities. Finally, this study will examine the affect of non-Indian hunting and fishing activities on tribal reservations in regard to tribal sovereignty.

The Legal History of Indian Hunting & Fishing Rights

Hunting and fishing, as well as trapping and gathering, have always been central aspects of Indian economies and cultures. Historically, Indians relied on wild plant and

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animal resources, as well as small-scale domestic horticulture, for their livelihood. When non-Indians arrived in North America, the native economic systems, which were based on a reciprocal relationship with nature, were disrupted and altered by the foreigners and their market system. Despite this change, Indians continued to rely on natural resources for food, shelter, religious and ceremonial pieces, clothing, sport, capital, and other functional items even to this day. Throughout the centuries, resources like fish and game have been absolute necessities for Indian economies, which helps explain the importance of hunting and fishing to Indian people today. Also, the fact that Indian hunting and fishing still remains a property right further adds to its importance to Indian tribes and people, especially since these rights have been contested throughout American history. Protecting these rights is akin to protecting tribal sovereignty.

The legal rights of Indians to hunt and fish come from five main sources. These sources are; aboriginal rights, treaty rights, agreements, statutes or executive orders. Aboriginal rights come from historical custom and practices of native people that were recognized by European courts. To determine the existence and scope of these rights, courts required that tribes show an exclusive history of use and occupancy over an extended length of time. If this occupancy was in common with several tribes, the courts would not allow a particular tribe to take sole possession of the right of aboriginal or original title. Also, aboriginal rights remained with Indians unless they were abandoned, removed by statute, or granted to the United States by treaty. In the event of a treaty containing overlapping aboriginal rights, the original title was still important to determine the extent of the rights reserved under the treaty.[90]

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[90] Cohen, *Handbook of Federal Indian Law*, pp. 441-443.

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Treaties, as mentioned in chapter one, are an important source of Indian rights to hunt and fish. In the U.S. Supreme Court case United States v. Winans[91] of 1905, the court recognized that treaties are not a grant of rights to Indians, but a grant of rights from Indians to the United States. This means that any right not expressly taken away from the tribe by Congress is reserved to said tribe. Indians have many rights in addition to those explicitly spelled out in treaties. Felix Cohen wrote, "In Winans the Court held that the Indians had an easement to go across and use privately owned land in the exercise of their treaty fishing rights; the Court explicitly rejected the argument that the treaty gave the Indians no rights but those that any inhabitant of the territory or state would have."[92] In addition, because of the various military and legal disadvantages experienced by Indians when they negotiated treaties with the United States, the courts have mandated that all treaty language must be interpreted in favor of the Indians.[93]

Statutes, agreements, and executive orders replaced treaties as the method of negotiating with tribes after 1871, when Congress ended treaty making with Indian Nations. Since then, courts have recognized that Indian hunting and fishing rights still exist by applying the same liberal rules of construction to statutes, agreements and executive orders that are afforded to treaties. To emphasize this point, the U.S. Supreme Court stated, "Once ratified by Act of Congress, the provisions of the agreements become

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[91] 198U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).
[92] Cohen, *Handbook of Federal Indian Law*, p. 444.
[93] E.g., Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). Also, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), the court noted that

> [s]ince... the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted ... to the Indians in the Chinook jargon and then translated into native languages by Indian Interpreters. Chinook jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained.

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law, and like treaties, the supreme law of the land."[94] The right of Indians to hunt and fish is a sovereign property right, and although many years and various political climates have followed, Indians have retained this right in its' basic form to this day.

The Washington Case

The case United States v. Washington[95] in 1974 provides an example of the federal court's role in mediating disputes between Indians and non-Indians. Before European contact, the Pacific Northwest was inhabited by many small bands of coastal and inland plateau Indian Nations including the Nez Perce, Cayuse, Salish, Makah, Yakima, and Colville, among many others.[96] The coastal and inland tribes in the area relied heavily on fish, especially salmon and steelhead trout, and to a lesser degree hunting and gathering for the bulk of their economic and subsistence activities. Both salmon and steelhead are anadromous species of fish, which means they hatch in rivers, then journey out to sea only to return to their rivers of birth to spawn. These fish represented the central commodity for both food and trade to the Pacific area tribes. Also, salmon and steelhead had other uses that included using the skin as containers, producing oil from the eggs, and manufacturing glue from other parts. Salmon and steelhead were held in high esteem for spiritual, ceremonial, and cultural purposes for

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[94] Antoine v. Washington, 420 U.S. 194 (1975).
[95] 384 F.Supp. 312 (W.D. Wash. 1974).
[96] Champagne, *Native America: Portrait of the Peoples*, p. 274.

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many of the Pacific Northwest tribes. The Nisquallies, for example, identified three constellations of stars that were all fishing symbols to them.[97]

The activity surrounding the first catch of each major salmon run was an example of the ceremonial significance of the salmon to the Northwest Indians. The Puyallup and Nisqually believed that the first fish caught should always be cut lengthwise, never crosswise, so as not to insult the salmon and cause it to not come back for the people's benefit. Every part of the ceremonial salmon had to be consumed except for the bones, which were placed back in the water with the head pointing upstream as a symbolic gesture to ensure renewal of salmon and abundant runs in the future.[98]

The Indians who frequented these abundant runs of fish relied heavily on them, yet this system was drastically altered when non-Indians began to inhabit the Northwest. Captain George Vancouver entered the Puget Sound in 1792, and the Lewis and Clark expedition trekked from the inland westward reaching the tidewaters of the Columbia River in 1805. About two decades after Lewis and Clark explored the area, Canadian employees of the Hudson's Bay Company established a trading post. These remained the only non-Indians in the area, but they appear to have maintained peaceful relations with the neighboring tribes, and even took Indian women as wives. Later, in 1836 the Dr. Marcus Whitman party established a mission east of the Cascade Mountains.[99] The Whitman party, sent by the American Board of Foreign Missions, attempted to bring Western spirituality and economic practices to the Cayuse Indians. However, in 1847 following a very large influx of non-Indian settlers to the Pacific Northwest, which

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[97] Jana Roderick, "*Indian-White Relations in the Washington Territory: The Question of Treaties and Indian Fishing Rights*," Journal of the West, vol. XVI, no. 3 (July 1977), pp. 23-34.
[98] Marian Smith, *The Puyallup-Nisqually*, (New York: Columbia University Press, pub. 1940), p. 101.
[99] Champagne, *Native America: Portrait of the Peoples*, pp. 278-279.

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created tensions between Indians and non-Indians over land and resources, the Whitman group were massacred by the Cayuse.[100] This incident was a prelude to future relations between the areas tribes and the American settlers who sought land and also disrupted the traditional hunting and fishing practices of the Indians.

Over the span of the next two or three years, more non-Indian Americans settled the region and often times engaged in dishonest business and land deals with the local Indians, which caused a general mistrust to develop. However, the American government continued to encourage non-Indian settlement in the area. In 1850 the Oregon Donation Land Act, designed to separate Indians from their land, was signed into law by President Millard Fillmore. The Oregon act opened up Oregon Territory and encouraged rapid American settlement of the territory, which was also claimed by the British. The problem with this act was that the U.S. Government was giving away land that it did not have legal title to, and this was happening without the affected tribes being consulted for their consent. Nor did the U.S. Government follow the established practice of purchasing the land from the Indians to remove them, thus extinguishing their claim to the land. The provisions of the Oregon Donation Land Law were also extended to Washington Territory when it was separated from Oregon Territory in 1853, again without Indian consent.[101]

The first American governor of Washington Territory was Isaac Ingalls Stevens. He was responsible for creating treaties with all of the territories treaty tribes from 1854-1855. Under the authority of the Indian Treaty Act of 1850, Stevens negotiated treaties

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[100] Roderick, "*Indian-White Relations in the Washington Territory: The Question of Treaties and Indian Fishing Rights*," pp. 23-34.
[101] Daniel L. Boxberger, *To fish in Common: The Ethnohistory of Lummi Indian Salmon Fishing*, (University of Washington Press, Seattle and London, pub. 2000), pp. 24-26.

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with the Indians in hopes of extinguishing Indian title to land and moving the Indians onto reservations, thus opening up the territory to non-Indian settlement and a railroad.[102] Stevens followed sample treaties that had been used to negotiate with other tribes as a model for his own dealings. The Stevens treaties contained the language that provided the affected tribes the right to retain fishing at "usual and accustomed places" and of hunting, gathering roots and berries on "unoccupied lands." This was very important language that was eventually used by the Supreme Court in 1974, reinstating past Indian fishing rights in United States v. Washington.[103] The treaty language illustrated that Governor Stevens and the tribes alike both understood that moving the Indians to reservations was for residence purposes, and they would retain the right to hunt and fish off the reservation at traditional places in common with the white settlers, maintaining access to fish and game.[104]

Stevens never could have anticipated the controversy that would result from the language used in his treaties, and although the tribes who signed treaties drafted by Stevens lost millions of acres of land, their ancestors were able to use the treaty language to turn the tables and reap benefits in modern times. Judge George Boldt, of U.S. District Court for Washington, ruled on the case United States v. Washington,[105] which was one of the most pivotal and emotional cases in American history. The court recognized that fishing remained an essential aspect of local tribal economies and lifestyles well into modern times.[106] Also, because the treaty language was not specific about particular

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[102] Champagne, *Native America: Portrait of the Peoples*, p. 279.
[103] 384 F.Supp. 312 (W.D. Wash. 1974).
[104] Roderick, "*Indian-White Relations in the Washington Territory: The Question of Treaties and Indian Fishing Rights*," pp. 23-34.
[105] 384 F.Supp. 312 (W.D. Wash. 1974).
[106] Getches, Rosenfelt, Wilkinson, *Federal Indian Law Cases and Materials*, p. 640.

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areas that were off-limits to Indians, and since the coastal area treaties were negotiated in the limited trade language called Chinook jargon, the court was required to construe the treaty language as Indians would have understood it, settle the ambiguities in the Indians favor, and construe the treaties liberally in the Indians favor when ruling on the case, which basically meant they were to follow the canons of treaty construction.[107]

The important aspects that emerged from Judge Boldt's ruling in the case upheld the Indians right to fish as guaranteed in the treaty language. Judge Boldt held that the Indian tribes were sovereign at the time of treaty negotiations, which further solidified their property rights to the fish both on and off reservation.[108] However, in the ruling Boldt created circumstances that angered both Indian and non-Indian fishermen. The district court's ruling, which was disputed by the state, interpreted the treaty language of fishing "in common with" other citizens at traditional grounds as justifying an equal apportionment of the total fish harvest between treaty Indians and non-treaty fishermen.[109] This means that each group could harvest up to fifty percent of the fish allowed, with perpetuation of the species in mind, which reflects the courts opinion on the sovereign status of Indians in the treaty negotiations and what the tribes would have expected as a condition to signing the treaty and accepting its provisions.

The court also held that the state of Washington and its agencies could regulate off reservation fishing at the Indians usual and accustomed grounds, but only if it satisfied the courts requirements of a show of reasonable and necessary conservation that was non-discriminatory and expressly for the perpetuation of the species. In addition, the treaty tribes who qualified could regulate fishing by their own members free from state

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[107] Deloria & Lytle, *American Indians, American Justice*, pp. 47-48.
[108] U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).
[109] Boxberger, *To fish in Common: The Ethnohistory of Lummi Indian Salmon Fishing*, p. 155.

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regulation, on as well as off the reservation, provided they kept the state informed on their regulations and activities. The Washington case was extremely important in regard to protecting and reasserting the rights of Indians to hunt and fish off-reservation in their traditional grounds free from unjust or excessive state interference and harassment.[110] However, both Indians and non-Indians were not satisfied with the decision. Non-Indians resented sharing what they contended was theirs. Indians, on the other hand, felt non-Indians were apportioned too much of the fish harvest. In the end the decision was an unpopular compromise that upset both parties. Additionally, some non-Indians were so upset that they actually threatened to kill Judge Boldt.

The Washington case is also important for providing a general explanation of Indian rights to hunt and fish on and off reservation. Basic hunting and fishing rights for Indians stem from their status as sovereign nations. Treaties and other documents simply support their status as nations. Due to their sovereign rights, tribes must be allowed to hunt and fish outside of state or federal interference, unless Congress expressly limits or abolishes that right. Throughout the history of the U.S., states have disputed this right, causing various courts to respond with precedent setting rulings. For example, it was established by Menominee Tribe of Indians v. United States[111] in 1968 that an Indian reservation created by treaty, statue, or agreement includes the implied right of Indian hunting and fishing on that reservation free from state interference.[112]

Court cases have been essential in determining who has the ultimate authority when disputes between Indians and states arise. In light of the decision in the U.S.

[110] U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).
[111] 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).
[112] Menominee Tribe of Indians v. U.S., 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

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Supreme Court case McClanahan v. Arizona State Tax Commission[113] in 1973, which at the time left the states virtually powerless to regulate Indians in Indian country, states have rarely contested the rights of Indians to hunt and fish on reservations. Also, Public Law 280 and the dated Assimilative Crime Acts of 1825, which extended state jurisdiction onto Indian reservations, did not affect the hunting and fishing property rights of Indians either on or off the reservations. Furthermore, states were also preempted from prohibiting the sale or possession of fish or game off of reservations by an Indian who had harvested them on the reservation.[114]

In the cases Kimball v. Callahan,[115] decided in 1974, and State v. Tinno,[116] decided in 1972, the courts stated that when a treaty granted either hunting or fishing rights, it also included the right of the related activity not named, be it fishing, hunting, or trapping, unless specifically excluded by a treaty. This treaty interpretation also included the right to harvest fish regardless of their species or origin, as stated in the 1974 case United States v. Washington.[117] Treaties with Northwest tribes like the Salish and Kootenai of Western Montana also reserved for the Indians the right of "gathering roots and berries" on open and unclaimed land.[118]

In the case Menominee Tribe v. United States,[119] the court established that the right of a tribe to hunt and fish free from state law survives even a congressional termination of the trust relationship between the federal government and the tribe. In

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[113] 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).
[114] Canby, *American Indian Law in a Nut Shell*, pp. 420-421.
[115] 493 F.2d 564, (9th Cir.), cert. denied, 419 U.S. 1019 (1974).
[116] 94 Idaho 759, P.2d 1386 (1972)
[117] 384 F. Supp. 312 (W.D. Wash. 1974).
[118] Documents of the 1855 "Treaty with the Flathead," in *Indian Affairs Laws and Treaties, vol. II*, pp. 722-723.
[119] 391 U.S. 404 (1968).

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addition, Congress must show a clear intent to extinguish these rights, meaning rights could not be taken away without Congress expressly stating that intention.[120]

If the federal government does not recognize a group of Indians as a tribe, it does not affect their treaty rights if they can show a clear descent from a treaty signatory and have maintained a tribal structure to the present. A tribal group that does not maintain a relationship with a treaty tribe does not retain any treaty rights.[121]

Temporary Rights of Indians

Indian hunting and fishing rights, both on and off reservation, that are temporarily reserved by treaty or are guaranteed "during the pleasure of the President of the United States" are a complex source of rights. Temporary rights guaranteed by treaty were protected to a greater extent than any aboriginal rights, and could not be dissolved by implication. However, in the case Crow Tribe of Indians v. Repsis[122] of 1995, the court ruled that the right of Indians to hunt on unoccupied lands of the United States was understood to be temporary and was abrogated by admission of Wyoming into the Union "on an equal footing with the original States." The equal footing doctrine mandated that the federal government "cannot reserve any greater federal constitutional power over new states than over the original states."[123] In Pollard v. Hagan,[124] the Court held that the Constitution mandates constitutional equality of new states with the original thirteen states. A similar "equal footing" was applied to identical treaty language in a prior case

[120] Menominee Tribe of Indians v. U.S., 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).
[121] Canby, *American Indian Law in a Nutshell*, pp. 421-422.
[122] 73 F.3d 982 (10th Cir. 1995).
[123] Cohen, *Handbook of Federal Indian Law*, p. 268.
[124] 44 U.S. 3 (How.) 212 (1845).

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called Ward v. Racehorse[125] in 1896. Many of those who observe federal Indian law thought that the rationale in Racehorse had been undermined by the later ruling in United States v. Winans[126] of 1905. The presiding Supreme Court in Winans, in construing a 1859 treaty regarding the Yakima Indians' right to fish off the reservation at their "usual and accustomed places, in common with citizens of the Territory," stated, "Only a limitation of [those aboriginal rights], however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[127] However, the court in Crow Tribe emphasized the temporary nature of treaty rights, and stated "Racehorse is alive and well" in regards to such rights.[128]

The Ward v. Racehorse[129] case is worth a further examination due to the impact it had on both the Bannock Tribe and the field of federal Indian law. Chief Racehorse of the Bannock Indians killed seven elk, the principle game resource of the tribe, in western Wyoming in July of 1895 and was later arrested by Uinta County Sheriff John Ward for violating his federal treaty rights by hunting on occupied lands. Racehorse was very aware of his hunting rights, as he was present when his tribe entered into a treaty with the U.S. Government on July 3, 1868 that established the Fort Hall Indian Reservation in southeastern Idaho and guaranteed his right to hunt on unoccupied lands of the United States.[130]

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[125] 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).
[126] 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).
[127] U.S. v. Winans, 198 U.S. 371, 381 (1905).
[128] Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) cert. denied, 517 U.S. 121 (1996).
[129] 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).
[130] Brian Czech, "Ward vs Racehorse—Supreme Court as Obviator?" Journal of the West, vol. XXXV, no.3 (July 1996), pp. 61-69.

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At the time Racehorse killed the elk, well off his reservation, the political climate of the region and within the federal government was anti-tribal. Locally, ranchers and game conservationists protested Indian hunting that was occurring on the Bannock's traditional lands, much of which had recently become cattle ranges and the newly created Yellowstone National Park.[131] Congress had eliminated treaty making in 1871, and passed the Major Crimes Act in 1885 giving the federal government limited jurisdiction on Indian reservations over specific crimes, and the U.S. Supreme Court was dominated by assimilation minded justices. However, Racehorse was well within his treaty rights when he made the fateful kill, later determined in court to be on unoccupied lands. Racehorse's assertion of his treaty rights eventually led to a case in Wyoming District Court. Article IV in the 1868 treaty states: "...[the Bannocks] will have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[132] At the time of the incident, Racehorse met all the requirements of the treaty to conduct a lawful hunt. Yet after Judge John Riner of the U.S. Circuit Court for the District of Wyoming ruled in Racehorses favor, the case was appealed by Sheriff Ward to the Supreme Court.[133]

When Ward v. Racehorse[134] reached the United States Supreme Court an obvious transformation unfolded as the case no longer focused on treaty rights and adherence to treaty stipulations in the decision making process of Justice Edward White. Instead Justice White chose to question "whether the treaty made by the United States with the

[131] Champagne, *Native America: Portrait of the Peoples*, p. 283.
[132] Czech, "Ward vs Racehorse—Supreme Court as Obviator?," p. 64.
[133] Ibid., pp. 61-69.
[134] 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).

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Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws."[135] White went on to claim, "although the lands were not...near settlements, the right conferred on the Indians by the treaty would be of no avail to justify a violation of the state law."[136] Justice White later decided what the treaty-makers had really intended when he declared the treaty "provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts."[137]

White's ruling seems to have been prompted by the 1890 act that had established Wyoming's statehood. Section 1 of the act states, "...the state of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects..."[138]
The original thirteen states had managed to obtain jurisdiction over wildlife within their boundaries not by legislation, but gradually through the courts during a period of federal nonchalance regarding states' ownership of wildlife. The Migratory Bird Act of 1918 reversed this trend as the federal government recognized that individual states could not properly manage migratory wildlife. Yet, the damage had already been done. Wyoming, like the original states, would be granted jurisdiction over the wildlife within it's boundaries and Justice White would base his ruling in Racehorse upon this fact, thus delivering a devastating blow to Bannock treaty rights and traditional culture.[139]

The fact that Wyoming was created on an "equal footing" with the original states does not automatically mean that the state should have been given jurisdiction over

[135] Ward v. Racehorse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).
[136] Ibid.
[137] Ibid.
[138] Czech, "Ward vs Racehorse—Supreme Court as Obviator?," p. 66.
[139] Ibid., pp. 61-69.

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wildlife in the state at the expense of the Bannock's treaty rights. The original thirteen states were not created with wildlife jurisdiction, they simply started off with the jurisdiction because they began as colonies and had been passing their own game laws over non-Indians since the 1600's. The federal government did not become seriously involved in wildlife management until the late 1800's. Many of the states created prior to Wyoming had to fight in the courts to gain their jurisdiction over wildlife. Entering into the Union on true "equal footing" for Wyoming would have entailed obtaining jurisdiction on a case-by-case basis, just as the previous states before it had done.[140]

Regardless of this equal protection controversy, the Supreme Court ruling in Racehorse was questionable at best. In light of explicit treaty language giving the Bannocks the right to hunt off their reservation and Chief Justice John Marshall's ruling in Worcester v. Georgia[141] of 1832, which required that treaties be construed as Indian would have understood them, the court in Racehorse clearly departed from precedent and established trends in the law. The resulting decision forever altered the Bannock way of life and continued federal paternalism over Indian tribes, which was contrary to the assimilation policies of the time.[142]

In the matter of rights guaranteed "during the pleasure of the President of the United States" the courts took a different approach. The case Mille Lacs Band of Chippewa Indians v. Minnesota[143] of 1997, in which several Chippewa bands claimed to have the right to hunt, fish, and gather on ceded lands under an 1837 treaty guaranteeing those rights "during the pleasure of the President of the United States" serves as an

[140] Czech, "Ward vs Racehorse—Supreme Court as Obviator?," pp. 61-69.
[141] 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).
[142] Czech, "Ward vs Racehorse—Supreme Court as Obviator?," pp. 61-69.
[143] 124 F.3d 904 (8th Cir. 1997), pet. For cert. Filed, 66 U.S.L.W. 3607 (1998).

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example. The courts held that the rights were not understood to be temporary by the Indians. This ruling included all land, not just unoccupied land of the United States, which is necessarily temporary.[144]

This court ruling did not uphold the language of Crow Tribe or Racehorse because of its emphasis on classification of land use that included all ceded land, and not just unoccupied ceded land. Treaty rights of this nature have often been exercised in accord with a state's sovereign rights. Therefore, when Minnesota was admitted into the union on an "equal footing" with the original states, the Chippewas' right was not abrogated. The hunting and fishing right was also not abrogated by an1850 executive order of President Taylor that revoked the "temporary" rights granted to the Chippewa in 1837, and required their removal to a reservation. The court held that the executive order was "unauthorized because the President had no statutory power unilaterally to order removal and the removal provision was not severable from the extinguishments provision."[145]

In light of the previous cases it should be noted that treaty rights were also held to be viable on all public and private land, generally open to hunting, in ceded territory. This is known as an easement. An easement allows treaty Indians the right to hunt and fish at "usual and accustomed places" even if they have to cross private property to exercise this right. This is important because it reinforces the property rights of Indians to hunt and fish off-reservation free from state regulations. However, private land open only with consent of the owner was not addressed in the Minnesota case.[146]

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[144] Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997), pet. For cert. Filed, 66 U.S.L.W. 3607 (1998).
[145] Ibid.
[146] Canby, *American Indian Law in a Nutshell*, p. 425.

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Fishing Conflicts on the Great Lakes

The controversy surrounding Racehorse foreshadowed future conflict over fish and game. In modern times the growing popularity of hunting and fishing combined with the scarcity of fish and game resources has forced Indians to compete directly with non-Indians over allocation of these valued commodities. Non-Indian attitudes about "unregulated" Indian harvest of fish and game have led to frustration and anger in light of both false information and misunderstanding in regards to treaty interpretations and perceived "special treatment" of Indians by the federal government. Non-Indian fish and game enthusiasts from all walks of life have organized and pressured their state governments to fight the federal and tribal governments for control of resources, especially resources located off-reservation. The two central arguments for more control put forth by states and commercial interests are that Indian hunting and fishing interferes with the sovereign functions of the state, and disrupts the conservation goals of the state, which in turn affects sportsmen and commercial fishermen.[147]

The events and circumstances surrounding the U.S. District Court Case United States v. the State of Michigan[148] in 1979 provide a prime example of the conflict created by off-reservation Indian fishing rights being practiced among non-Indian communities in modern times. The Michigan case was rendered five years after the landmark decision handed down in the 1974 United State v. Washington[149] case, which reinforced the treaty rights of several Pacific Northwest tribes to fish off-reservation at traditional grounds. The Michigan case was very similar to the Washington case on several fronts. Each case

[147] Getches, Rosenfelt, Wilkinson, *Federal Indian Law Cases and Materials*, pp. 617-618.
[148] 471 F Supp. 192 (W.D. Mich. 1979).
[149] 384 F.Supp. 312 (W.D. Wash. 1974).

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involved communities of both Indians and non-Indians who relied heavily on fishing for economic reasons, subsistence, or both. Each community was mired in hostility and violence, usually directed towards Indians pushing for their treaty rights in areas populated and controlled by non-Indians. Also, each court decision disrupted the balance of power in the affected community, and focused on Indian treaties as their guiding force in court proceedings.

Although there are similarities between Washington and Michigan, the Michigan case merits a further analysis. The pre-reservation Chippewa and Ottawa Indians inhabited the Great Lakes region, particularly the territory that would later become the state of Michigan. They relied heavily on fishing the lakes and surrounding rivers for several varieties of trout, sturgeon, whitefish, and herring, among other species. These Indians fished to supply food for their families and for trading with the American Fur Company. In the late 18th and early 19th centuries non-Indian settlers began to populate the region, mainly because of the fur trade and land opportunities. Later, after the fur trade died down, industrious settlers recognized the potential for commercial fishing in the lakes. The settlers soon encroached on tribal fishing grounds and competed for land and resources with the native populations. Due to United States Government policy and Indian efforts to retain their traditional fishing grounds in the face of increasing settlement, the Chippewa and Ottawa of the Great Lakes region entered into treaties with the United States Government in 1820, 1836, and 1855.[150]

As inhabitants of the region before the arrival of non-Indians, the Chippewa and Ottawa had aboriginal property rights to hunt and fish in their homelands because they

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[150] Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington; The University Press of Kentucky, 1990), pp. 7-22, 87.

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had traditionally relied on these activities for food. The treaties that the Chippewa and Ottawa signed with the United States, although confining these tribes to reservations, further secured their property rights to hunt and fish on-reservation and in their traditional lands off-reservation. Article 13 of the 1836 Treaty of Washington stated "the Indians stipulate[d] for the right of hunting on the lands [they had sold]...with the other usual privileges of occupancy."[151]

During the mid 19th and 20th centuries, from about 1850 to 1950, the Great Lakes were supporting a growing commercial fishing empire. Non-Indians established an out of state market and provided the transport, wholesale, and large scale fishing operations in the lakes. They controlled most of the market in the Great Lakes and employed both Indians and non-Indians to fish for them. These large-scale fishing operations prospered, while the small time fishermen that sold to them barely made a profit. By as early as 1871, the Great Lakes were already showing signs of over-fishing. During the same time frame, the region's other natural resources were being depleted as well. Intensive big game and bird hunting, combined with excessive logging that destroyed forests and animal habitats, severely altered the landscape and drastically limited the resources that the Chippewa and Ottawa relied upon for food and income. At various critical junctures in time, the state of Michigan stepped forward with conservation efforts aimed at halting the damage caused by over-harvest, and protecting the resources for future generations.[152]

In the 1960s the state of Michigan wanted to bolster its fledgling tourist economy by attracting more vacationers, especially sport fishermen, to its northern lakes and forests. The state established a fishery program that restocked Lake Michigan, which lay

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[151] 1836 Treaty of Washington, Article 13. from Doherty, *Disputed Waters.*
[152] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 24-50.

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largely in ruins during the 1950's, with several varieties of sport fish. The fishery program and the tourist industry proved to be huge economic successes for the state of Michigan and its northern residents who lived near the lakes. The tourists, namely sport fishermen, spent millions of dollars in the lake region annually. This sport industry was argued to be more profitable to the state than commercial fishing. The controversy that later developed was based on Chippewa and Ottawa efforts to fish commercially using gill nets in a region that non-Indians dominated and were determined to protect.[153]

Bolstered by the civil rights movements beginning in the 1950's and the fish-ins orchestrated by Pacific Northwest Indians in the 1960's, the Michigan Chippewa and Ottawa began to push for their own treaty fishing rights in 1965. The Chippewa and Ottawa experienced varied successes in Michigan courts until the ruling by the Michigan Supreme Court in People v. LeBlanc[154] was handed down in 1976. The ruling provided:

> That the present-day descendents of historical Chippewa and Ottawa bands still had fishing rights stemming from the Treaty of Washington that their ancestors had signed in 1836. The state could limit these rights only after proving that Indian fishing endangered the resource. The court held that the state's gill-net ban could only be extended to the Chippewas and Ottawas after the state had shown that: (1) Use of gill nets threatened the fish generally; (2) Indian use of gill nets threatened the fish; (3) Banning Indian gillnetting was not discriminatory. The Supreme Court remanded the case to the District Court for a hearing on these issues.[155]

Though LeBlanc lost his case in state district court, he was aware of the influence the public held over locally elected district judges and he pursued the case in federal court as well. With the support of the Sault Tribe of Chippewa Indians, the Bay Mills Indian Community, the Upper Peninsula Legal Services, and the Native American Rights Fund

[153] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 51-66.
[154] 399 Mich. 31, 248 N.W.2d 199 (Mich. 1976).
[155] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 68-69.

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who provided the gifted attorney Bruce Greene, LeBlanc pursued his treaty rights in the federal court. Also, as part of their trust responsibilities towards recognized groups of Indians, the United States Departments of Justice and the Interior entered into the suit on behalf of LeBlanc.[156] The ensuing case, which began in 1973 and was not settled until 1985, became known as United States v. the State of Michigan.[157]

Between 1973 and 1985, the time period it took to settle the Michigan case, nobody really knew the legal status of the fisheries. In 1978, after several years of preparation, the case went to trial and was heard by the United States District Court. The essential task before the court was to answer two questions; Did modern day descendents of 19th century treaty signatories still have fishing rights, and if fishing rights still did exist, to how many and what kinds of fish were the Indians entitled? Part one of this question involved Indian property rights, which had well defined legal concepts for a guide, and was therefore removed from the states concern for conservation or environmental protection. Part two was more difficult to determine, as few precedents existed to guide the court.[158]

Attorney Bruce Greene argued a well prepared case that was based on treaty rights, aboriginal rights, historical land use by the Chippewa and Ottawa, as well as legal precedent that had established the trends in federal Indian law, which were clearly supportive of his case. Defense attorneys Gregory Taylor and Peter Steketee, although competent lawyers, based their argument upon conservation of the fish and an article in the 1836 treaty that provided for Indian removal from their lands, which would have extinguished fishing rights had removal actually taken place.

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[156] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, p. 69.
[157] 471 F Supp. 192 (W.D. Mich. 1979).
[158] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, p. 86.

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It appears that Taylor and Steketee's defense arguments were purposely hindered so the state would lose the case. This was accepted so long as they argued the case in a manner that appeased constituents of those who held political power in Michigan governmental circles. Taylor and Steketee were under funded, they lacked credible witnesses, and they apparently ignored obvious opportunities to counter many of Greene's most influential arguments. The state seemed content to putting up a front that would lead the casual observer to believe they were fighting for the non-Indian interests in the state, and those of sports fishermen as a whole. However, this was mostly done for individual political gain to the detriment of the court case.[159]

In May 1979, the United States District Court ruled in United States v. Michigan.[160] It was a huge victory for the Indians. The decision affirmed the Michigan Chippewa and Ottawa's rights to fish in the Great Lakes free from Michigan state law. The court went on to state:

> The Indians have a right to fish today wherever fish are to be found within the area of cession...The right is not a static right today any more than it was during treaty times. The right is not limited as to the species of fish, origin, the purpose of use or the time or manner of taking. It may be exercised utilizing improvements in fishing techniques, methods and gear. Because the right of...the tribes to fish...is protected by treaties..., that right is preserved and protected under the supreme law of the land,...is distinct from the rights and privileges held by non-Indians and may not be qualified by any action of the state...except as authorized by Congress.[161]

The state appealed the decision, but the United States Supreme Court did not review the district court's ruling. That refusal followed accepted precedent and reflected the work of a well-trained jurist. However, the court's decision had failed to solve the

[159] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 87-104.
[160] 471 F Supp. 192 (W.D. Mich. 1979).
[161] United States v. the State of Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).

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problem of allocation of the resource, which had been turned over to Indian control without mention of non-Indian rights to the resource.[162]

In the time it took to address the allocation problem, the emotions and controversies surrounding Indian fishing, especially gill net fishing, intensified to violent levels. Indians had taken their newly reinforced fishing rights to more intensive levels of harvesting. The state complained that the Indians were "greedy" and would ruin the fishery, for sport fishermen in particular. The state even claimed that Indians were harvesting fish beyond the limits that the populations could sustain. Based on a conservation argument, not allocation, the state appealed to federal agencies for a consensus management plan, which would take fish management exclusivity out of Indian hands. In the 1980's, with the support of the state rights minded Reagan administration, the state of Michigan entered into negotiations to gain some control over the fishery in Lake Michigan. In 1981, the Reagan administration instructed Deputy Undersecretary of the Interior William P. Horn to settle this problem before it reached the courts.[163]

Undersecretary Horn drafted a settlement plan in 1982 called the Ann Arbor Agreement. The agreement focused on conservation and restoring lake trout to the sustainable levels in the fishery. Horn's plan divided the Great Lakes treaty waters into four types of zones: "sport fishing, Indian commercial fishing, a large lake trout refuge along the Manitou-Beaver Island chain, and a few small areas where Indians could fish with trap nets. Indians would be allowed to gillnet only in tribal zones, primarily located in the north... reserving southern waters, including most of the "gold coast" area between

[162] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 87-104.
[163] Ibid., pp. 105-123.

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Empire and Cross Village, for sport fishing..."[164] However, due to conflicts, posturing, and failed negotiations, Horn's Ann Arbor agreement died in principle in January of 1983.[165]

In the fall of 1984, Judge Richard Enslen seized control of the case, which had become mired in a paper war between opposing lawyers. Enslen, recognizing the complexity of the case, opted to settle the matter using alternative dispute resolution. He employed the services of special master in complex litigation Francis E. McGovern, who negotiated a settlement within six months of being appointed. On March 28, 1985, one month before the Michigan case was set to go to trial on the allocation phase, Indians and non-Indians agreed to allocate the fishery without going to court.

McGovern retooled Undersecretary Horn's Ann Arbor Agreement to create allocation zones, which were very similar to those in the original agreement, and used his coercive power as special master to settle the matter. Also, McGovern offered $6.2 million dollars for signing, with the stipulation of no money for refusing, to the Chippewa and Ottawa tribes. Although the final settlement created some questions involving treaty rights not being upheld and who's interests experienced the greatest benefit, it did resolve the major conflicts of allocation, conservation, and questions revolving around who really had the right to manage the fishery. The Michigan case, as well as the previously mentioned Washington case, provide modern examples of the emotions and conflicts involved when Indians pursue their rights to harvest fish and game off-reservation, especially in and around non-Indian communities.[166]

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[164] Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery*, pp. 118-119.
[165] Ibid., pp. 118-122.
[166] Ibid., pp. 122-139.

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Competing Jurisdictions

Another issue that caused a lot of controversy between Indians and non-Indians was determining who ultimately had jurisdiction over fish and game. There are basically three competing interests when it comes to jurisdiction over fish and game in the United States. Federal, state, and tribal governments all play a role in this relationship, which revolves around coveted natural resources that do not recognize man made boundaries or regulations. The fact that wildlife migrates and moves freely from place to place, including across state and reservation boundaries, makes this situation even more confounding. Because wildlife usually travel or migrate unimpeded, it would make sense for all these governments to manage resources cooperatively. However, the logistics of such a cooperative effort sometimes causes more problems than it solves. It should be noted that the majority of the conflicts over fish and game are exclusively between tribes and states. This is because Indian Nations are located within state boundaries and each government feels they have the sovereign right to manage the fish and game within their territories. The federal government usually does not get involved in disputes between tribes and states unless the problem is brought to a federal court or if Congress finds cause to intervene.

The issue of jurisdiction often boils down to control and money. Both tribes and states want to control their lands and resources, which creates a competition for jurisdiction over fish and game. To make matters even more confusing is the history of Federal Indian Law that is sometimes contradictory or incomprehensible to the layman. States and tribes do not want to surrender any of their sovereignty to other governments,

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including the federal government. The loss of sovereignty translates to a lesser ability to self govern, which is a loss of power, and that is something that states and Indian tribes alike want to avoid. Most states and tribes contend that they should have the absolute right to manage all activities within their borders. If the sovereignty of either entity was diminished, it might mean that they would lose the right to manage what goes on within their borders, and that is not a welcome prospect to either government. Also, there are economic benefits that come into play by having jurisdiction over fish and game. The ability to generate income from licenses, fines, and from money brought into the community by non-resident sportsmen have been valuable sources of revenue for the government that holds jurisdiction over the natural resources. This revenue funds fish and game conservation efforts, hires fish and game wardens to enforce regulations, and funds programs like fish studies that ensure healthy game populations for sportsmen. There is a lot at stake for both the states and the tribes, creating emotions that run high in these types of disputes.

At the root of these disputes is confusion over jurisdiction. The first question to ask is to what extent is the federal government involved in theses jurisdictional conflicts? The federal government's role in this relationship is limited. Federal official have no authority over reservation activities of any sort unless congress has expressly taken it from tribes and then assumes the responsibility or has given it to states.[167] In the absence of such consent, federal officials cannot take actions that violate treaty rights or disrupt Indian hunting and fishing.[168] However, if Congress wanted, it could extinguish hunting and fishing rights at any time, provided they pay just compensation to the tribe as

[167] Pevar, *The Rights of Indians and Tribes*, p. 196.
[168] Ibid.

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required by the Fifth Amendment of the U.S. Constitution, which prohibits taking of private property without fair and just compensation to the owner.[169] However, Congress has left the right of managing fish and game primarily in the hands of tribes and states, and in fact, federal official are given very little authority over these groups.

It should be noted that Congress has given federal officials three important enforcement functions. First, federal officials are required to assist tribes in enforcing tribal laws. Congress has made hunting and fishing on a reservation in non-compliance with tribal laws a federal offense. This has given tribes even more legitimate power to enforce their laws. Second, Congress has authorized federal officials to file suit on behalf of Indian tribes to protect their treaty rights to hunt and fish. Third, Congress has authorized federal officials to enact conservation measures, reaching both on and off the reservation when a tribe's own measures have failed to adequately preserve a treaty resource. On the other hand, statues like the Bald Eagle Protection Act of 1940 apply to Indians and non-Indians alike, and federal officials have enforcement powers to protect the eagles.[170] With respect to Indian hunting and fishing, federal officials are largely uninvolved, especially on-reservations.

The next question to ask is what role do states play in these jurisdictional disputes? States contend they have the inherent right to manage the fish and game within their boundaries. This point of view was recognized by the Supreme Court decision Geer v. Connecticut[171] in 1896, but the supremacy clause of the U.S. Constitution rendered this

[169] The Fifth Amendment provides: "No person shall be...deprived of life, liberty, or property, without due process of the law; nor shall private property be taken for public use, without just compensation."
[170] Pevar, *The Rights of Indians and Tribes*, pp. 196-197.
[171] 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896).

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decision moot.[172] Because Indian reservations were created by treaty or statute, they are not subject to, and have supremacy over state laws and restrictions, unless Congress expressly provides that states can extend jurisdiction onto the reservation. This Means, Indian treaties and federal statues override state law and establish the right of Indians to take fish and game free from state interference. This sentiment is expressed in the following "a state cannot enforce its laws on an Indian reservation if that enforcement is preempted by federal law or would interfere with the ability of the tribe to govern itself, unless Congress has given its consent."[173] Congress has not given its consent to allow states to manage fish and game on Indian reservations. In fact, when Congress passed Public Law 280 in 1953, which gave some states jurisdiction over reservations crimes, the law expressly prohibited state jurisdiction over Indian hunting and fishing on reservations. State interference with Indian hunting and fishing, if in violation of established rights, interferes with tribal self-government.[174]

Indian Hunting On & Off the Reservation

Moving on from the federal, state, and tribal relationship, the distinction between Indian hunting and fishing disputes on and off of reservations must be addressed. Each state has the right to regulate fish and game within its boundaries, meaning Indians who hunt off the reservation must comply with state laws, unless they have been expressly reserved the right to hunt and fish by treaty or statute that overrides state laws. Yet, even in this case the states do retain some limited control. For example, states are allowed to

[172] Getches, Rosenfelt, Wilkinson, *Federal Indian Law Cases and Materials*, p. 617.
[173] Pevar, *The Rights of Indians and Tribes*, p. 195.
[174] Cohen, *Handbook of Federal Indian Law*, p. 449.

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regulate Indian hunting and fishing, particularly off-reservation, if conservation is a legitimate issue.

Tribal sovereignty is limited when states attempt to regulate Indian hunting and fishing. Furthermore, state regulation often times violates Indian treaties and that has led courts to conclude that Indian hunting and fishing on the reservation cannot be regulated by the state. Conservation efforts by states creates an exception to this rule that was created in the case Puyallup Tribe, Inc. v. Department of Game of the State of Washington[175] in 1968. The Puyallup I case led to a United States Supreme Court ruling that, in effect, allowed the state to regulate Indian fishing on reservations to ensure conservation of the species being harvested. Later court decisions have made it clear that states have very limited jurisdiction over Indian hunting and fishing on the reservation, even when non-Indians are involved. States cannot implement conservation on there own initiative even if a species is in danger of becoming extinct. They can act only if the tribe had failed to respond with its' own plan for conservation and only if the federal government has not preempted the state's jurisdiction by enacting a conservation plan of its own. Stephan Pevar points out, "In short, the state's authority with respect to on-reservation hunting and fishing is limited to the circumstances addressed in Montana v. United States[176] and Puyallup. First, the state can regulate non-Indians who are hunting and fishing on patent (fee) land. Second, the state can regulate Indians when this is essential for conservation purposes."[177] In the case New Mexico v. Mescalero Apache Tribe[178] of 1983, the United States Supreme Court ruled that states cannot exercise even

[175] 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968).
[176] 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).
[177] Pevar, *The Rights of Indians and Tribes*, p. 196.
[178] 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

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concurrent jurisdiction over non-Indian hunting and fishing on Indian lands. This means that non-Indians who wish to hunt or fish on tribal lands must comply with the tribe's game laws, not the state's laws.[179]

Of course, there are tribes who share fish and game jurisdiction with states under voluntary agreements between both parties. These cooperative agreements allow states, with tribal consent, to share fish and game jurisdiction on reservation lands for reasons including, but not limited to, state conservation efforts and enforcement of tribal fish and game laws. The Confederated Salish and Kootenai of Montana have had several agreements with the state of Montana. By the mid 1930's the Confederated Salish and Kootenai Tribes required non-Indian sportsmen to purchase a tribal license to hunt or fish on the reservation. The problem, in the eyes of many non-Indian sportsmen on the Flathead Reservation, was that the state of Montana required non-Indians to purchase a state license to hunt and fish on the Flathead reservation as well. Although a compact was eventually made between the tribe and the state to address the issue of dual permits, there has been constant friction between Indians and non-Indians over the permit systems.

The fees from these licenses help each government to fund state fish and game conservation and protection programs. As mentioned previously many non-Indian sportsmen believe that they should only have to purchase one license in order to hunt or fish on the reservation, be it state or tribal, especially since tribal members only purchase a tribal license in most cases. Non-Indian sportsmen contend that they have contributed their fair share to conservation by purchasing one license. To be required to buy two licenses to hunt or fish, while Indians purchase one or no license at all, raises complaints

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179 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

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about special treatment of Indians by the federal government and double taxation. Both sides involved have passionate arguments to support their position on the matter, which has led to a lot of hard feelings and contempt between sportsmen and both state and tribal governments.

On the other hand, on-reservation hunting and fishing by Indians rarely creates conflict for non-Indian sportsmen and state governments, unless there is a conservation issue. Still, fish and game disputes have surfaced when Indians hunt on-reservation, even if this right to hunt is protected by sovereign rights, treaties, or other agreements. These controversies usually arise when Indians hunt or fish on reservation land that has been allocated by the Federal government for federal projects like reservoirs.

Likewise, non-Indian sportsmen have run into problems while hunting on-reservations. This is usually the result of an individuals' failure, either intended or not, to buy hunting licenses from the appropriate agency, or agencies in the case of some reservations that require both a state and tribal license to harvest game within the reservation.

Over the years, the general result has been a combative attitude between two groups of competing interests. On one side there are non-Indians and the states that have a common goal of gaining jurisdiction over game from the tribes in their regions. On the other side there are the Indian tribes and the federal government who, although do not represent a united front, work to uphold the sanctity of law as expressed in treaties and the language of Federal Indian Law, which in turn generally protects tribal sovereign rights. This conflict is ongoing in many states to this day, especially in the Western states

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and the Great Lakes region where fish and game are integral parts of the local economies and cultures for many people.

Regardless of the seemingly endless conflicts, tribes have the right to regulate member and non-member hunting and fishing on-reservations, with a few exceptions as mentioned in Montana v. United States.[180] This right is taken very seriously as hunting and fishing have always been central aspects of Indian cultures and economies and because these activities involve property rights. Most tribes strictly regulate their game resources in an effort to perpetuate their traditional hunting and fishing practices indefinitely. Tribal courts, with Congressional backing, are used to enforce tribal game regulations. This gives Indians real power to manage the fish and game resources on their reservations because activities that threaten tribal resources, both on and off the reservation, can be halted by Indian tribes.[181]

Off-reservation hunting and fishing rights have been constantly contested due to ill defined Indian rights in treaty language and jurisdictional confusion. The treaties negotiated in Washington Territory between 1854 and 1855 by Issac Stevens have been the most controversial and litigated. This is because the treaties contained language that stated Indians reserved for themselves property access off-reservation to "usual and accustomed" places, which were clearly defined in the beginning, but have become less defined as time has passed. When a treaty reserves the right of a tribe to hunt or fish off-reservation at "usual and accustomed" places, the state may not require fees or restrict access. In the 1977 case State v. Stasso,[182] the court ruled that a tribal member exercising the right to hunt on "open and unclaimed lands" within his tribe's aboriginal territory, but

[180] 450 U.S. 544 , 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).
[181] Cohen, *Handbook of Federal Indian Law*, pp. 465-466.
[182] 172 Mont. 242, 563 P.2d 562 (Mont. 1977).

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outside of its reservation, cannot be subject to state seasonal limits. Public lands outside the original territory of a tribe are included in the unrestricted right to hunt on "open and unclaimed lands."[183]

In Antoine v. Washington,[184] decided in 1975, Congress ratified an agreement that allowed Indians immunity while hunting on ceded lands "in common with all other persons." However, the state may impose limits upon this right for reasons of conservation. In addition, a treaty reserving the right to hunt or fish on ceded lands also reserves the right to fish commercially on adjacent water without a state license. States have the right to regulate Indians when a tribe cedes lands without expressly retaining hunting and fishing rights, because the tribe has ceded their property rights unless expressly retained in the agreement. Without treaty rights, an Indian and his property rights outside of the reservation are subject to the same state laws as non-Indians and their property.[185]

Indians who fish off of reservations are granted easement across private property for the purpose of harvesting fish in accustomed places. This means that Indian fishermen can travel across private property to exercise their treaty "right of taking fish at all usual and accustomed places, in common with citizens of the Territory".[186] In the 1905 case United States v. Winans,[187] the Supreme Court held, "the contingency of the future ownership of the lands...was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned....And the right was intended to be

[183] State v. Stasso, 172 Mont. 242, 563 P.2d 562 (Mont. 1977).
[184] 420 U.S. 194, 95 S.Ct. 944, 43, L.Ed.2d 129 (1975).
[185] Canby, *American Indian Law in a Nutshell*, pp. 423, 425-426.
[186] Cohen, *Handbook of Federal Indian Law*, p. 452.
[187] 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

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continuing against the United States and its grantees as well as against the State and its grantees...[The treaty] fixes in the land such easements as enables the right to be exercised."[188] Cases that have followed Winans consistently provide Indians an easement to fish their accustomed fishing territory.

Tribal law usually does not apply outside of reservation boundaries. This is most often the domain of the state. However, if a tribe has the right to partake in off-reservation activities, the tribe can regulate its' members participation. Tribes can limit off-reservation hunting and fishing by its' members and can prosecute them in tribal court for violating established restrictions. Tribes have the authority to regulate all of their off-reservation rights. In 1974's Settler v. Lameer,[189] the court noted that it would be unreasonable to conclude that Indians, in reserving their fishing rights, would decline to retain all control over the exercise of their rights. This means that in addition to reserving the property right to hunt and fish off-reservation in treaty language, Indians also reserved the right to regulate tribal hunting and fishing at "all usual and accustomed places."[190]

Non-Indian hunting and fishing on the reservation is an important source of income from tribes like the Salish and Kootenai and the Mescalero Apache. Due to rights of self-government, tribes can allow non-members to hunt and fish on-reservation for a fee. Also, tribes are free to impose restrictions, limits, and prohibitions upon these non-member sportsmen provided they are not subject to tribal criminal jurisdiction. State fish and game laws are applicable to non-Indian sportsmen who hunt or fish on-reservation unless they are preempted by tribal or federal laws, or the application of such laws disrupt

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[188] U.S. v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).
[189] 507 F.2d. 231 (9th Cir. 1974).
[190] Settler v. Lameer, 507 F.2d. 231 (9th Cir. 1974).

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tribal sovereignty. However, in the case of migratory birds that inhabit territory on and off the reservation, the states and the federal government may take an interest in regulating nonmember tribal hunting that is as restrictive, or even more so, than the tribes measures.[191]

Non-resident reservation hunters who are also non-members usually have no problem with abiding by the regulations and fees imposed by tribes and states because this opportunity to hunt on-reservation is a privilege more than a right. Most problems arise from non-member reservation residents who own fee land within reservation boundaries. The allotment acts caused these problems because they opened Indian reservation lands to settlers. These non-Indian landowners believe that the tribes should have no right to regulate the fish and game on their fee property.[192]

In addition, many non-member reservation landowners claim that they should follow state laws and regulations only, and not the tribal measures at all. Non-Indians often argue that they should not have to follow the laws of tribal governments. This is basically a taxation without representation argument that has been put forth by non-Indians who oppose tribes regulating their on reservation activities. Since non-members cannot hold a tribal office, they believe that it is a violation of their constitutional rights to be required to follow tribal laws without having any representation in tribal government. This is an argument that has some merit on the surface, however, Indian tribes are afforded the right to manage the property within their reservations because of their sovereign status, which super-cedes state regulations. Also, because tribes have a special relationship with the federal government that allows them to practice sovereignty

[191] Pevar, *The Rights of Indians and Tribes*, pp. 194-197.
[192] *Missoula Independent*, October 18-25, 2001, p. 10.

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within their reserved lands, and control the fish and game upon said lands, these non-member arguments are basically ignored. However, United States Supreme Court decisions like Montana v. United States,[193] decided in 1981, have offered non-members who own fee property on reservations a further argument against tribes. The court in Montana conceded that tribes could regulate or prohibit non-member hunting and fishing on tribal land or on land held in trust by the United States, however, tribes had no regulatory power over non-members on fee land owned by non-members within the reservation. This matter is far from being settled as many state and property rights groups have organized to fight the ability of tribes to manage fish and game on non-Indian fee lands within reservation boundaries.[194]

Chapter two was intended to provide a general history of Indian hunting and fishing rights on and off reservations as guaranteed by treaties, statues, and sovereign property rights. In addition, it was meant to provide an overview of the tribal, state, and federal relationship as it applies to hunting and fishing both on and off the reservation. It is clear that hunting and fishing rights of Indian have long been a source of conflict that has been fueled by emotional arguments from all parties involved.

A source of particularly emotional conflict is the right of some tribes to hunt and fish off-reservation. This is because off-reservation hunting and fishing by Indians upsets local residents and state leaders, who claim they should have jurisdiction over game off-reservation. They also resent the status and property rights of Indians to engage in activities that they themselves have absolutely no right to.

[193] 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).
[194] *Missoula Independent*, October 18-25, 2001, p. 10.

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The unique status of some tribes that gives Indians the right to practice hunting and fishing on-reservations and in aboriginal territory, free from limits imposed on non-Indians, have been fought both in the courts and in the fields for over a century. These rights have, at various times, been weakened by court decisions that were often inconsistent with established trends in Indian law. Although these rights seems to have been both solidified and attacked in modern times, nobody knows for sure what the future holds. In fact, today's political climate coupled with a conservative, state rights minded Supreme Court, has recently presented itself as a threat to all aspects of Indian sovereignty and rights. Many tribes have recognized the need to take preemptive legal and administrative measures to avoid having their rights challenged in the courts. They have achieved this by staying clear of controversial activities and litigation. For instance, a lot of tribes today realize it is not a particularly good time to assert any disputed treaty rights in order to force the courts to uphold those rights.

The Confederated Salish and Kootenai Tribes are particularly keen to the political climate of the courts. Tribal officials have recently discussed the possibility of ending the practice of requiring both a state and tribal license to hunt and fish on the reservation in order to avoid any legal challenges on the matter. Although a tribe in this modern age could actually gain rights, in addition to those they already have, in light of a favorable court ruling, the reality is that anything could happen in court. The safest course of action, especially with the conservative nature of the United States Supreme Court in mind, is to avoid conflicts with states and non-Indians and stay out of the courts. Another course of action is to negotiate with states, thereby giving a little, but saving a lot. By

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staying below the radar, tribes stand a better chance of maintaining the rights they do have for at least the immediate future.

Chapter two has provided a general look at Indian hunting and fishing, examined the competing interests of the three governments involved, and revealed some of the important cases and trends in Federal Indian Law. Chapter three will focus on hunting and fishing rights of the Confederated Salish and Kootenai tribes as guaranteed in the 1855 Treaty of Hellgate. Chapter three will also address hunting and fishing conflicts both on and off the Flathead Reservation while looking at particular instances where Indians and state officials have clashed, sometimes with deadly consequences.

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CHAPTER III

INDIANS, TREATIES, AND GAME

Chapters one and two have provided a general explanation of the history of Indian treaties, inter-governmental relations in the United States, Indian hunting and fishing rights, precedent setting court cases, and trends in federal Indian law. Chapter three will specifically address the Indians of the Confederated Salish and Kootenai Nation, the Flathead (Salish), Kootenai, and Pend d'Oreille. Included will be the confederated Indians pre-treaty histories, and their rights to hunt and fish on and off the Flathead Reservation as guaranteed in Article III of the 1855 Treaty of Hellgate. Also, this study will examine hunting and fishing conflicts on the Flathead reservation, and in the traditional grounds of the confederated Indians off their reservation.

The Pre-Treaty Flathead, Pend d'Oreille, and Kootenai

In order to provide the essential information needed to understand contemporary Indian issues, this chapter will explain the traditional land base, customs, and economy of the Flathead, Kootenai, and Pend d'Oreille prior to the 1855 Treaty of Hellgate. The Flathead Indians are linguistically related to Salish speaking people who continue to inhabit the Pacific Coast and Columbia Plateau area. This language family includes the Flathead, the Pend d'Oreille, Kalispell, Coeur d'Alene, Spokane and others. These tribes occupied what we now know as the plateau area of Washington, Oregon, Idaho, Western Montana and North to the Fraser River in Canada. Most Salish-speaking people stayed near the Pacific Coast, but the Flathead and Pend d'Oreille tribes gradually moved

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eastward into Idaho, and later Montana. They may have begun to filter into Western Montana as long ago as 5,000 B.C., which would make them the first present day Montana tribes to arrive here.[195] Flathead tribal history tells of a disagreement, which resulted in the Flatheads relocating from the Pacific Coast to Western Montana. A fight amongst the Salish resulted in friends killing one another. The fight was caused by two leaders who argued whether flying ducks quack with their wings or their bills. A truce was called, but one of the leaders set out with his followers to find a new homeland. The departing group arrived in the Bitterroot Valley in Western Montana, which was later considered to be the traditional homeland of the Flathead-Salish.[196]

Upon the arrival of the Flathead to the Bitterroot Valley they encountered another Salish speaking group. The Pend d'Oreilles Indians had been using the Bitterroot as a seasonal campsite, but agreed to welcome the Flatheads to settle, while they moved North beyond St. Ignatius to another favored campsite.[197] The Pend d'Oreille were a larger tribe than the Flathead and controlled most of the valleys of Western Montana. The Pend d'Oreille lived from Paradise, Montana to as far as Butte, Montana. However, most lived in the Bitterroot, Missoula, and Flathead Valleys.[198] So, prior to the Hellgate Treaty of 1855 the Flathead-Salish and the Pend d'Oreille were able to share land and coexist most likely because of their shared linguistic heritage, which served as a unifying force between the two tribes.

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[195] William L. Bryan, Jr., *Montana's Indians; Yesterday and Today* (Montana Magazine, Inc., vol. 11) p. 118.
[196] Adolf and Beverly Hungry Wolf, *Indian Tribes of the Northern Rockies* (Good Medicine Books, 1989 ed.) p. 87.
[197] Ibid., pg. 87.
[198] Bryan, *Montana's Indians; Yesterday and Today*, pp. 118-119.

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The third tribe that makes up The Confederated Salish and Kootenai Tribes is the Kootenai, also spelled Kootenay or Kutenai. The Kootenai have a unique history that is still somewhat clouded in mystery. For instance the Kootenai speak a dialect that is related to no other language in the world. Their dialect is what is know as a language isolate. Elder Kootenai have said their ancestors came from an underground hole on the East side of the Rocky Mountains, which might help explain why ethnographers have had trouble determining the origins of the tribe.[199] The Kootenai call themselves Ksunka, meaning "People of the Standing Arrow."[200] To them the standing arrow symbolized strength, unity, and dexterity. However, when the French first encountered the Ksunka, they called them Kootenai, meaning "water people," because they were so adept at canoeing the Columbia River.[201] Around the year 1500, the Kootenai are presumed to have been located in Southeastern British Columbia, Northwestern Montana, and Southwestern Alberta. Scholars believe that they were divided into at least three major bands. These bands were located near Lake Windemere, British Columbia, near McLeod, Alberta, and along the Kootenai River. It is believed that the three bands were actually two distinct groups of Kootenai, with those living in Alberta having a lifestyle and culture representative of plains bison hunters. They were called the Plains Kootenai. The other bands were called the Plateau Kootenai. They lived in the mountains of the Columbia Plateau and their lifestyle focused on lake and river resource exploitation. Eventually the Plains Kootenai were forced off the plains and over the mountains where they joined with the Plateau Kootenai.[202] Later, as the Pend d'Oreille moved south from

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[199] Hungry Wolf, *Indian Tribes of the Northern Rockies*, p. 60.
[200] Bryan, *Montana's Indians; Yesterday and Today*, p. 119.
[201] Ibid.
[202] Ibid.

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the Flathead Lake towards St. Ignatius, the Kootenai began to inhabit the Northern end of the lake. By the 1850's the Flathead, Pend d'Oreille, and Kootenai were living as allies in Western Montana, while still making regular trips east of the Continental Divide to hunt buffalo. As can be expected, all three tribes united against the Blackfeet, who harassed and killed bison hunters in their territory on the Montana Plains.[203]

The customs and economic activities of the Flathead, Pend d'Oreille, and Kootenai are certainly much different in historic times than they were prior to European contact. Migrations of entire tribes, the introduction of guns and horses, and European diseases have altered the cultures and economies of all North American Indian tribes. The three confederated tribes dabbled in bison hunting at one time or another, but they were not year round bison hunters for various reasons. Population pressure, competition, and location seem to have been key factors in why these tribes may have decided to focus most of their efforts on resources other than bison. Also, the Flathead Confederacy tribes occupied a homeland the necessitated that they engage in economic activities that heavily relied on fish, small game, and plant resources, leaving bison hunting for times when a large party of able men could be organized to protect themselves against their enemies on the buffalo plains. However, the Flathead and their allies did manage to make about two yearly buffalo hunts.[204]

Despite their distance from plains bison herds, the prehistoric Flathead, Pend d'Oreille, and Kootenai engaged in summer hunting trips on the prairies east of the Rocky Mountains of Montana, camping and procuring bison meat and hides. The vast herds of plains bison were undoubtedly enticing for these nomadic hunters and gatherers.

[203] Bryan, *Montana's Indians: Yesterday and Today*, p. 119.
[204] [204] Peter Ronan, *Historical Sketch of the Flathead Indian Nation* (Ross and Haines, Inc., copyright 1890) p. 30.

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However, at around 1800 the powerful and aggressive Blackfeet nation assumed control over the plains region in Montana and Canada. Being heavily outnumbered, the tribes of the Flathead Confederacy probably moved to their semi-permanent settlements in the mountain valleys of Western Montana as a response to their enemies' arrival.[205] The Blackfeet viewed bison hunting parties of Flathead Indians as trespassers, even though the Flathead had been hunting bison on the plains for many generations. Competition between the Blackfeet and the tribes of the Flathead over the right to hunt bison on the plains evolved into a fierce and deadly blood feud, with each side eager to dispatch the other. An example of the extreme hatred shared between the two tribes can be seen in this quote regarding the treatment of a Blackfeet captive of the Flathead:

> I allude to the unfortunate Blackfeet who had been captured by the Flathead. Having been informed that they were about putting one of their prisoners to death, I went to their camp to witness the spectacle. The man was tied to a tree, after which they heated an old barrel of a gun until it became red hot, with which the burned him on the legs, thighs, neck, cheek, and stomach. They then commenced cutting the flesh from about the nails, which they pulled out, and next separated the fingers from the hand joint by joint. During the performance of these cruelties, the wretched captive never winced, and instead of suing for mercy he added fresh stimulants to their barbarous ingenuity by the most irritating reproaches, part of which our interpreter translated as follows: "My heart is strong; you do not hurt me; you can't hurt me; you are fools; you do not know how to torture; try it again; I don't feel any pain yet. We tortured your relations a great deal better, because we make them cry out loud, like little children. You are not brave- you have small hearts, and you are always afraid to fight." Then addressing one in particular he said: "It was by my arrow you lost your eye;" upon which the Flathead darted at him and with a knife in a moment scooped out one of his eyes, at the same time cutting the bridge of his nose almost in two. This did not stop him; with the remaining eye he looked sternly at another and said, "I killed your brother, and I scalped your old fool of a father." The warrior to whom this was addressed instantly sprung at him and separated the scalp from his head. He was then about plunging a knife in his heart, until he was told by the chief to desist. The raw skull, bloody socket and mutilated nose now presented a horrible appearance, but by no means changed his tone of defiance.[206]

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[205] Hungry Wolf, *Indian Tribes of the Northern Rockies*, p. 89.
[206] Ronan, *Historical Sketch of the Flathead Indian Nation*, pp. 3-4.

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Although bison hunting was alluring to the tribes of the Flathead Nation, it was much safer for them to exploit the resources found in their mountain valley homelands. As was mentioned previously, the Plains Kootenai were bison hunters until they were forced off the plains and into the lands of the Plateau Kootenai, who exploited fish, various game, and wild plants. The Flathead, Pend d'Oreille, and Plateau Kootenai shared a similar subsistence pattern, probably due to reliance on mountain valley resources. They hunted large game like deer, elk, mountain sheep, and on occasion bison. In addition, they fished, trapped small game, harvested wild plants, and used various types of fowl for food.[207]

Due to this unique situation, where the Flathead Confederacy Tribes lived in mountain valleys but remained in contact with plains bison and tribes, the cultures of these people do not fit classic categories. They can be more accurately described as having a blend of plains and plateau characteristics.[208] For example, the Indians of the Flathead Confederacy lived in teepees, were nomadic, and sought vision quests. All of which are traits common to plains Indians. However, they also relied on fish, traveled via waterways, and did not engage in the sun dance. Traits which would likely be attributed to plateau cultures. It is important to note that the Kootenai did in fact practice the sun dance until 1947, but this strengthens the point that these tribes share mixed and varied cultures.[209]

[207] Champagne, *Native America: Portrait of the Peoples*, pp. 273-274.
[208] James L. Lopach, Margery Hunter Brown, Richmond L. Clow, *Tribal Governments Today* (University Press of Colorado Niwot, Colorado, 1998 Revised Edition) pp. 1-2.
[209] Hungry Wolf, *Indian Tribes of the Northern Rockies*, pp. 83-84.

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The Hellgate Treaty of 1855

Prior to 1855 the Flathead, Pend d'Oreille, and Kootenai were separate bands of people who shared a common region and became allies due to practical circumstance. They occupied vast sections of Western Montana, Southern Canada, and the Idaho panhandle. In spite of their interactions with one another they retained their unique identities and cultures well after European contact. However, these centuries old traditions were about to be assaulted like never before seen in the northwest.

The assault began when Congress formed the Territory of Washington in March of 1853. The Territory was comprised of land north of the Columbia River to the Canadian Boundary, and from the Pacific Ocean to what is now the northern strip of Idaho, south to the Snake River, and the western portion of Montana to the summit of the Rockies. Isaac Stevens was appointed Superintendent of Indian Affairs and Governor of the territory.[210] Two years later on July 9, 1855, a few miles west of Missoula, Montana at a site called Council Groove, Governor Isaac Stevens held a meeting with the representatives of the Flathead, Pend d'Oreille, and Kootenai Indians.[211]

It was here that Stevens intended to persuade Indian tribes to restrict themselves to reservations, thus opening up huge tracts of land for non-Indian settlement and commerce. Representing the Flathead was Chief Victor, for the Pend d'Oreille was Chief Alexander, and representing the Kootenai was Chief Michelle.[212] Governor Stevens, in

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[210] Helen Addison Howard, "Isaac Ingalls Stevens: First Governor of Washington Territory," Journal of the West, vol. II, no. 3 (July 1963), p. 338

[211] Bryan, *Montana's Indians: Yesterday and Today*, p. 119.

[212] Robert Bigart and Clarence Woodcock, *In the Name of the Salish & Kootenai Nation: The 1855 Hell Gate Treaty and the Origin of the Flathead Indian Reservation* (Salish & Kootenai College Press, 1996), p. 16.

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an effort to take as much land out of Indian occupation as possible, submitted that the three tribes present at Council Groove move onto a single confederated reservation.[213] Stevens made this recommendation despite the fact that the Flathead, Pend d'Oreille, and Kootenai were three separate tribes that should have been negotiated with individually, which shows us just how valuable the land in the vicinity was to Stevens, and his lack of respect for tribal governance.

Alexander, who was the leader of approximately 1,000 Pend d'Oreille, and Michelle, who was the leader of approximately 800 Kootenai, agreed to a confederated reservation.[214] It has been said the both Alexander and Michelle misunderstood the intentions of Governor Stevens when they signed. The two Chiefs believed that the treaty would protect them from their enemies, the Blackfeet, but they were unaware that in return they were to permanently cede most of their land base in western Montana.[215] Victor dissented and maintained that his approximately 450 Flatheads should be allowed to remain in their homeland, the Bitterroot Valley. Stevens reluctantly agreed and Victors' people were allowed to live in the Bitterroot until 1872, when problems with non-Indian settlers prompted the government to renegotiate with the Flathead for their holdings in the Bitterroot Valley. Victor's son, Charlo, was the leader of the Flathead in 1872. He too refused to sign an agreement of removal with the U.S. Government. However, lower Chiefs Arlee and Adolf did sign and Charlo's signature was forged, thus permanently confining the Flathead to the Jocko Reservation, now known as the Flathead Reservation.[216]

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[213] Champagne, *Native America: Portrait of the Peoples*, p. 279.
[214] Bryan, *Montana's Indians: Yesterday and Today*, p. 119.
[215] Bigart & Woodcock, *In the Name of the Salish & Kootenai Nation*, p. 1.
[216] Bryan, *Montana's Indians: Yesterday and Today*, p. 119.

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The document signed at Council Groove by Victor, Alexander, and Michelle was known as the Hellgate Treaty of 1855. Created out of confusion and disagreement, the Hellgate Treaty became one of the most important legal documents in the history of Western Montana. It provided the legal documentation for the relationship between the federal government and the Salish and Kootenai tribes and created the land base that became the Flathead Reservation when the treaty was ratified in 1859.[217]

The articles of the Hellgate Treaty were similar to the other Indian treaties created by Governor Stevens in the northwest. However, the Hellgate Treaty had specific impacts on the people of the Confederated Salish and Kootenai. For instance, the treaty caused over forty years of confusion over the Flathead claim to the Bitterroot Valley. It allowed the tribe to fend off efforts by government agents to restrict Indian travel off the reservation in the late nineteenth century. It was the basis for the tribes' objection to the opening of the reservation without tribal consent in 1910. Article VI of the treaty included a reference to an article from a treaty with the Omaha Indians that was used to imply that the Salish and Kootenai had given their consent to accept individual allotments and the sale of so-called surplus lands to non-Indians. It established the federal government's obligation to supply certain assistance to the tribe, it guaranteed the right of the Salish and Kootenai people to continue to hunt and fish in their accustomed territory, and finally, it has served as the legal basis for the sovereignty of the Salish and Kootenai tribes.[218] Of course Indian treaties are much more complex and detailed, but these are the common elements found within many treaty articles, including the Hellgate Treaty of 1855.

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[217] Bigart & Woodcock, *In the Name of the Salish & Kootenai Nation.* p. 1.
[218] Ibid., pp. 1-2.

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The article of the Hellgate Treaty of 1855 that is most relevant to this study is Article III. Article III of the Hellgate Treaty addresses the Confederated Salish and Kootenai Tribes hunting and fishing rights. Article III reads as follows: "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."[219]

Article III of the Hellgate Treaty reserves the right of Confederated Salish and Kootenai Indians to hunt, fish, and gather wild plants on the reservation free from state regulations, but subject to federal oversight if applicable. Article III also reserves the right of the Confederated Salish and Kootenai Indians to hunt, fish, and gather on open and unclaimed lands within the tribes' "usual and accustomed" territory. Meaning any land not claimed publicly or privately in the pre-reservation homeland of said Indians is open for hunting, fishing, and gathering, although some conservation related regulations may apply. Article III of the Hellgate Treaty provides the documentation that ensures the right of the Flathead, Pend d'Oreille, and Kootenai to have jurisdiction over the game on their reservation, and it allows these same Indians the right to hunt, fish, or gather off the reservation in certain ill-defined areas.[220] Additionally, it is clear that Article III does not mandate any limits on what time of year the Salish-Kootenai can hunt or how often they can hunt. Article III is cited when Confederated Salish and Kootenai Indians have a conflict with non-Indians over hunting, fishing, and gathering either on or off the

[219] Documents of the 1855 "Treaty with the Flatheads," in *Indian Affairs Laws and Treaties*, vol. II, p. 723.
[220] Ibid., Article III, pg. 723.

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reservation. However, it is court precedent that ultimately decides who is right and who is wrong when there is a dispute that goes to litigation. And as will be revealed, conflicts over hunting and fishing rights in Montana can lead to disputes that turn deadly.

In addition to Article III, the fact that the tribes signed a treaty created the assumption that the tribal people would remain an independent nation, with the power to govern itself within the boundaries of the reservation. The treaty stated that the Salish-Kootenai had exclusive rights to fish and game. Not only did it state that tribes retained the right to use those resources, but that they also had the power to exclude others from using those resources. The treaty was consistently used by the Salish-Kootenai to defend their right hunt and fish after the reservation was opened to non-Indian settlement.

A History of the Flathead Reservation

The boundaries of the Flathead reservation were established by the Hellgate Treaty of 1855. The reservation is in a beautiful setting nestled between the Cabinet Mountains on the west and the Mission Mountains on the east. Flathead Lake borders the northern end of the reservation, with the Rattlesnake Wilderness on the southern flank.[221] The Flathead River flows through the reservations interior on its way to the Clark Fork of the Columbia River. There are 1,242,969 acres within the reservation, of which 404,047 acres was eventually lost due to allotment of the Flathead Reservation.[222] The reservation is overlapped by four county governments; Lake, Flathead, Sanders, and Missoula counties.

221 Bryan, *Montana's Indians; Yesterday and Today*, p. 121.
222 Champagne, *Native America: Portrait of the Peoples*, p. 285.

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As might be imagined, the area that comprised the Flathead reservation in the 1800's was rich with game, timber, and fresh water, which was seen as sufficient to support three separate tribes by the government brokers of the Hellgate treaty. This was hardly the case. Reservation Indians would have trouble sustaining themselves on such a small parcel of land, especially with three tribes congregated in an area substantially smaller than their original homelands. These concerns were noted by several Chiefs who spoke with Governor Stevens during the treaty negotiations at Council Groove.[223] However, it was later understood by the Indians that they would not be confined to the reservation, and they would be able to continue their hunting trips outside of reservation boundaries. This understanding of freedom of movement was further supported by Article three of the Hellgate Treaty, which spoke of Indian rights to hunt, fish, and gather at "usual and accustomed" places.[224] To the Indians of the Flathead Confederacy, the reservation was merely a home from which they could continue their traditional ways.[225]

Another problem for Flathead reservation Indians was that non-Indian settlers were allowed by Indian agents to illegally settle on and around the reservation, making competition for resources even more intense. Although the Indians protested by stealing horses or destroying structures of illegal settlers, Indian agents became more concerned with reprimanding Indians, as opposed to protecting tribal land and resources from encroachment.[226] Also, due to the realities and restrictions of reservation life, the Salish, Pend d'Oreille, and Kootenai were unable to consistently organize bison hunts like in the past. And if they could organize hunts, Indian agents often withheld ammunition or

[223] Bigart & Woodcock, *In the Name of the Salish & Kootenai Nation*. pp. 21-65.
[224] Documents of the 1855 "Treaty with the Flatheads," in *Indian Affairs Laws and Treaties*, vol. II, p. 723.
[225] John Fahey, *The Flathead Indians* (University of Oklahoma Press, Norman, 1974), p. 95.
[226] R.D. Seifried, *Early Administration of the Flathead Indian Reservation, 1855-1893* (Thesis, University of Montana, 1969), pp. 18-19.

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restricted where the Indians could hunt.[227] These factors, combined with misunderstanding and greed, set the stage for conflict between whites and Indians on and around the reservation for decades to come.

Many of the conflicts were caused by Indians hunting and fishing off of the Flathead Reservation. Hunting, fishing, and gathering were important to the Confederated Tribes of the Flathead throughout the their pre-reservation histories. These activities had historically been, and continue to be central to the culture and lifestyles of the Flathead, Pend d'Oreille, and Kootenai. Any disruption of this pattern had the potential to be devastating to the people. The following quote helps to demonstrate this point, "For Flathead men of the past, the most important activity in a typical day was hunting. During Summer and Fall, when the people often camped out on the plains, men went out hunting nearly every day."[228]

After the Hell Gate Treaty was ratified in 1859, and later when Charlo led the last of the Flathead out of the Bitterroot onto the Jocko (Flathead) Reservation in 1891, the confederated tribes were officially reservation Indians.[229] The federal government assumed that once Indian people were confined to reservations they would immediately see the faults in their nomadic ways and soon settle into being sedentary farmers and ranchers. This rarely happened due to many reasons. For instance, most Indian people did not like farming because it required them to abandon traditional activities and ceremonies. One could not go on extended hunting trips with crops to manage. Also, most crops need to be harvested in the summer, which is the time that tribes gather to socialize and hold celebrations in preparation for the coming winter. Farming and

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[227] Seifried, *Early Administration of the Flathead Indian Reservation, 1855-1893*, p. 139.
[228] Hungry Wolf, *Indian Tribes of the Northern Rockies*, p. 109.
[229] Bryan, Montana's Indians; Yesterday and Today, pp. 119-120.

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ranching just did not fit into the cultural cycles of Indian people on the Flathead reservation, or for most Indian people as a whole.[230]

What did result from reservation conditions was often starvation due to unproductive farming attempts, governmental failure to deliver on promises of food rations, and intense competition for game and plant resources in the reserve area. Leading up to the reservation period, it was rare for the Salish-Kootenai to face long periods of starvation. Yet, after being confined to the Flathead reservation they encountered need and starvation regularly. Indian wars and Indian agents had caused restricted travel, bison were increasingly scarce, and farming had failed to provide for the people. In 1871, the Pend d'Oreilles had their crops wiped out by crickets, and in that same year the Salish lost many men to a well-armed party of Sioux warriors while on a hunting trip.[231] A few years later, the tribes faced an extremely cold winter that killed many of their cattle, followed by a hot and dry summer that killed scores of crops.[232] The Salish-Kootenai were finding out that life on the reservation was much harder than they ever could have imagined.

Allotment and the Problems of Competing Jurisdictions

Confining Indians to the reservation and opening up the remaining lands to non-Indian settlement was the basic goal of Governor Stevens when he created the Hell Gate

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230 Champagne, *Native America: Portrait of the Peoples*, pp. 278-287.
231 H.R. Clum, *Annul Reports of the Commissioner of Indian Affairs. Congressional Series Set., Flathead Agency Reports* (House Executive Document no. 1, 42nd Cong., 2d sess., serial 1505), p. 426.
232 1881 Letter From Agent Peter Ronan to Commissioner of Indian Affairs, August 1, document # F-2 (Montana Indian Reservations Historical Jurisdiction Study, Volume III, Archival Documents of the Blackfeet, Northern Cheyenne, Fort Belnap, Flathead. University of Montana Microfiche. Montana: Historical Research Associates, Alan S. Newell Director).

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Treaty of 1855. After the treaties ratification, and Charlos' removal from the Bitterroot Valley, the Salish-Kootenai prepared to settle in for the realities of reservation life. However, Indian agents and the federal government had their own ideas about what was best for reservation Indians. Soon the reservation was in jeopardy of being divided up and sold because of the Dawes Act of 1887, also known as the General Allotment Act.

The Allotment Act did not, in fact, open the reservation to allotment. Article VI of the Hell Gate Treaty actually opened the Flathead Reservation to allotment in principle. Article VI states: "The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."[233] The General Allotment Act of 1887 simply provided the legal mechanism by which allotment could be realized. Despite the passage of the Allotment Act, the Salish-Kootenai were able to fight off allotment on the Flathead Reservation until 1904, when Flathead Allotment Act was enacted by Congress.[234] As one might expect, the inclusion of the Omaha Treaty clause into Article VI of the Hell Gate treaty had profound effects on the land base of the Salish-Kootenai. Also, there are many who question whether the treaty tribes involved had any idea about the Omaha treaty, or how it would impact them by being referenced in Article VI of the Hell Gate Treaty. The Omaha clause has been further questioned by those who believe it contradicts Article II of the

[233] Documents of the 1855 "Treaty with the Flatheads," in *Indian Affairs Laws and Treaties*, vol. II, p. 723.
[234] Burton M. Smith, *The Politics of Allotment* (Pacific Northwest Quarterly, 70(3).), p.132.

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Hell Gate Treaty, which states: "All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and superintendent and agent."[235]

Clearly article II supports the idea that the Salish-Kootenai would have the "exclusive use and benefit" of their reservation lands, free from the encroachment of non-Indians. The intent of Article VI of the Hell Gate Treaty contradicts the intent of Article II, which is why Governor Stevens included Article VI as a sleeper clause that would pass unnoticed by those it was meant to effect. It appears that Article VI of the Hell Gate Treaty was designed to deceive the Salish-Kootenai into later being subject to an unwanted policy of allotment, and Governor Stevens was aware and party to that deceit.

In spite of any alleged deceit, or claims of misunderstanding, the Flathead Reservation was made open to allotment in 1904. In 1908 the Flathead Reservation was surveyed and allotted, with each tribal member set to receive 80 acres farming land or 160 acres grazing land. The remaining, unclaimed lands were then made available for homesteading. However, through various efforts, including sending delegates to Washington D.C., the Salish-Kootenai were able to ward off the influx of settlers until the spring of 1910. On April 1, 1910 the government announced that approximately one million acres of Flathead Reservation lands would be opened for non-Indian settlement.[236]

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[235] Documents of the 1855 "Treaty with the Flatheads," in *Indian Affairs Laws and Treaties*, vol. II, p. 723.
[236] Bryan, *Montana's Indians: Yesterday and Today*, pp.119-120.

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For the purposes of this study the importance of the Allotment Act is not in its' policies, but rather, in the consequences it has had on the Salish-Kootenai. Therefore, allotment will not be explained in much detail. However, this study will explain what the policy of allotment did to affect the Salish-Kootenai in terms of jurisdiction, and property rights.

The most visible and well-known legacy of the allotment policy was the systematic loss of reservation lands that Indians faced due to the act. As mentioned previously, prior to the Allotment Act, tribes were dealt with on a tribe-by-tribe basis, ensuring that a tribes individual needs would be addressed. But, with far reaching legislation like the Allotment Act, the federal government could enact sweeping change upon many tribes with only one piece of legislation.[237] This tactic employed by the federal government was very detrimental to individual tribes, who were forced to contend with legislation that often did not suit their needs.

In addition to the generic nature of its legislation, allotment on the Flathead Reservation was extremely devastating to the tribes' land base. The loss of thousands of acres of communally used tribal land destroyed the traditional economy of the Salish-Kootenai. Their economy, which was based on consumption of natural resources over a large area, could not withstand the kind of wholesale land loss that the Salish-Kootenai experienced after 1910. Open, unmolested land was needed for wildlife and wild plants to accumulate to levels that could sustain three separate tribes on a relatively small parcel of land, as was the case with the Salish-Kootenai. The prospect of having enough land to support their nomadic, hunting and gathering ways on a reservation was slight to begin with, but coupled with land loss caused by allotment, the situation proved impossible.

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[237] Cohen, *Handbook of Federal Indian Law*, p. 129-132.

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Another of the problems the Salish-Kootenai faced as a result of allotment came in the form of jurisdictional confusion. The issue of jurisdiction proved to be long lasting and very emotional because of what was potentially at stake. The state of Montana, the Salish-Kootenai tribes, as well as various Indian and non-Indian civilians all faced the prospect of losing their rights.

The root of this problem developed as a result of illegal non-Indian settlement on the reservation prior to allotment that intensified soon after 1910 with the opening of the Flathead Reservation to homesteading. Competition for resources, combined with an ineffective Flathead Indian Agent put the Salish-Kootenai Indians at a political disadvantage. The Salish-Kootenai had no recourse when non-Indians illegally settled, grazed cattle, or harvested game within the reservation boundaries. In fact, their complaints of illegal activities on the reservation to the Indian Agent fell on deaf ears. As a result, the Indian agent often facilitated the harvest of reservation resources by non-Indians. With no government officials to back them, the Salish-Kootenai realistically had no political recourse to address the problems, or the force to bring the illegal activities to a halt.[238]

Also contributing to the jurisdictional problems were the misunderstandings between Indians and whites regarding law enforcement on the reservation. Salish-Kootenai people felt that non-Indians had failed to understand the tribal-federal relationship, which made reservation law much more complicated than it should have been. The failure of non-Indians to understand the tribal-federal relationship also carried over to tribal-state relations. This failure by non-Indians to understand the interactions

[238] John Q. Smith, *1876 Flathead Agency Report* (Congressional Serial Set, House Executive Document no. 1, 44th Cong., 2d sess., serial 1749, pp. 379-685), p.493.

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between three separate governments often caused non-Indians to be unaware when the state had overstepped its limited authority on the reservation. To understand how jurisdiction over fish and game was established on the Flathead Reservation, it is necessary to first understand Indian and state conflicts over laws.

The jurisdictional conflict grew as the Confederated Salish-Kootenai Tribes and the state of Montana, both sovereign governments, were compelled to negotiate with one another's political leaders. As each government attempted to regulate the citizens of the other, legal disputes arose. For instance, conflict was created if the tribes attempted to regulate non-Indians on the reservation, and vice versa, conflict grew when the state attempted to regulate Indians on the reservation. Neither government was really sure how much jurisdiction they held over the other in certain matters like hunting and fishing. In the book *American Indians, American Justice,* Vine Deloria and Clifford Lytle attempt to clear up who has jurisdiction by setting forth some of the criteria:

> A court's authority to hear and determine a case is usually predicated upon its jurisdiction over (a) the subject matter of the dispute or (b) the parties involved in the dispute (personal jurisdiction). If, for instance, an accident occurs within a state, the state court may assume jurisdiction since the subject matter of the dispute (the accident) occurred within the confines of the state's borders. Personal jurisdiction is invoked when the parties, as opposed to the subject matter, fall under the authority of the court. If two opposing litigants are domiciled within the state, that is, personally and geographically living within its borders, then the state court may assume jurisdiction over their persons so as to entertain jurisdiction.[239]

Obviously, the subject of jurisdiction was not easy to decipher. Historically, determining whether or not jurisdiction on the reservation was in favor of the state or the tribe depended on the status of one's residence, or whether the violation occurred on state, federal, or tribal owned property. This process of distinction brought up the

[239] Deloria, & Lytle, *American Indians, American Justice*, p. 209.

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question of whether the violation occurred on land held in trust for Indians by the federal government, trust patented land, or on fee patented land, which fell under state taxation and control? Also, the ethnicity of the individual involved in the violation determined whether the case would be heard in tribal or state court. The rules given above by Deloria and Lytle were the guidelines used to determine early game laws, but they proved to be inadequate, and fish and game conflicts were much too difficult to resolve with such a model.[240]

The tribal and state conflict over jurisdiction on the reservation has produced many problems, and also many questions. The two questions that seem to be the most central to the conflict are, how much authority should the state of Montana have over the Salish-Kootenai people, and how much jurisdiction should the tribes have over non-Indians living on the reservation? The Salish-Kootenai, using previously held Supreme Court and lower court decisions, would generally argue in disputes over jurisdiction on the reservation that they had been continually recognized as a sovereign nation, giving them the right to govern much of what goes on within the reservation boundaries. In regards to hunting and fishing, this means the tribe would determine when and where people could hunt or fish, and whether or not a permit system would be implemented. In addition, the tribe would be in a position to arrest and prosecute any violators of fish and game regulations. Furthermore, since Indians who left the reservation fell under state jurisdiction for any violations, it would be logical to conclude that non-Indians who violated game laws on the reservation would fall under the jurisdiction of the tribe.[241]

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[240] Dagny Kristine Krigbaum, *The impact of allotment on comtemporary hunting conflicts: The Confederated Salish & Kootenai as example*, (1997, Thesis, University of Montana), pp. 89-90.
[241] Ibid., pp. 89-90.

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Those non-Indians living on the reservation, along with the state, would generally counter the tribe's argument by stating that they were not fairly represented in issues that directly affected them because they were not allowed to run for tribal offices. This means that their constitutional rights as Americans were violated by being forced to fall under any tribal jurisdiction. They argued that Indians should have no authority over decisions affecting non-Indians who lived on the reservation in the form of a taxation without representation style argument, which ironically was employed against the British crown to gain independence early in our nations history. When the state wanted to extend its jurisdiction over Indians, it argued that Indian people had the same rights as non-Indians, in that they could vote and run for political office. Also, because Indians and non-Indians alike receive state services, the state argued that in particular instances Indians must follow state laws. An additional argument from non-Indians living on the reservation was that because Indians do no pay property taxes, the burden of economic contribution to the state fell to non-Indians on the reservation. In terms of hunting and fishing, non-Indians argued that they pay fees to the state, in the form of permits and licenses, which re-stock state fish and wildlife and provide funding for their management, and they would not pay again by purchasing a tribal permit to hunt or fish on the reservation.[242]

As a result of this ill-defined jurisdiction, the fish and game laws on the Flathead Reservation have grown out of confusion and contention. Sometimes litigation was necessary to sort through the competing claims to jurisdiction, and other times authority was exerted over individuals, often illegally, to solve various problems. Because jurisdiction on the reservation has always been contested, fish and game laws have evolved according to emotional pleas and the changing times and needs of the people.

[242] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, 1997, p. 90.

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Also, jurisdictional issues on reservations have been adjudicated and committed to law based on prior outcomes of litigation. In the absence of precedent setting court cases, jurisdiction may have been exerted based on someone's perceived needs at the time, often without any real legal justification. The history of conflict over fish and game provided the tools to understand how decisions were made regarding hunting and fishing on the Flathead Reservation.

In the case of the Salish-Kootenai, disputes have been at the forefront of the implementation of laws regarding fish and game. Conflicts between Indians and non-Indians on and around the Flathead Reservation show up in the historical record in the early 1900's. With allotment opening up the reservation to non-Indian settlement, problems between residents inevitably followed. Cultural differences, combined with a changing landscape meant that the Flathead Reservation would see its share of disputes, especially fish and game conflicts. Non-Indian reservation residents believed heavily in the concept of private ownership. The private ownership of land was particularly important based on historical factors that gave landowners more of the "American Dream" than their landless counterparts. In contrast, the Salish-Kootenai went about their daily lives in the same communal fashion as they had for hundreds of years. The idea that the Indians would suddenly become ranchers or farmers after allotment had proved as ill conceived as the policy of allotment itself. The Salish-Kootenai paid little attention to boundaries or land ownership as they continued to harvest the resources in the same places that had sustained their families for generations. This was where the conflict probably began. Salish-Kootenai hunters continued hunting, fishing, and gathering throughout the reservation and on traditional sites off the reservation. Non-

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Indians, with their concept of ownership firmly intact, viewed Indian hunters on their lands as trespassers. Settlers did not want Indians on their property. Furthermore, conservation of fish and game was becoming a growing issue in Montana. State game wardens argued that regulation of Indian hunting and fishing would be essential for ensuring abundant game populations. Also, underlying the conservation argument was simple greed and racism, along with the belief that Indians would eventually have to assimilate into the dominant Western cultural norms found in America. It seems that non-Indians feared the prospect of uncontrolled Indians hunting off the reservation, while in turn Indians continued with their regular lives regardless of state regulations.

In response to the mobile culture of the Salish-Kootenai people, rules and regulations were enacted in an effort to confine them to the reservation. However, these regulations enforced upon the Salish-Kootenai were often little more than interpretations and opinions of officials who sought to dictate the actions of tribal people. Actual fish and game laws that were specific in content were virtually non-existent. State and county officials asserted that they could make laws pertaining to all reservation residents, however, laws dealing with Indian people were almost exclusively made by Congress.[243] In reality, states had very little power over Indian people on the reservation, as Felix Cohen noted: "When federal constitutional power over Indian affairs is validly exercised it is the "Supreme Law of the Land" and supersedes conflicting state laws or state constitutional provisions pursuant to the Supremacy Clause."[244]

Furthermore, state laws had no validity with Indian people because of legislation enacted under the Indian Commerce Clause, which Chief Justice Marshall summarized in

[243] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, p. 93.
[244] Cohen, *Handbook of Federal Indian Law*, p. 211.

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1832: "From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, with which their authority is ex-clusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[245]

Contrary to the intentions of legislation found in the Indian Commerce Clause, Congress often failed to protect Indian nations, instead simply allowing the Indians and states to settle their disputes. The federal government's failure to act on behalf of Indians came in part from the fact that most laws affecting Indians were poorly constructed, leaving out specifics on how to apply the law. Because of this poor construction of specific aspects of federal law concerning Indians, states could take advantage of vaguely worded laws and exploit them, usually at a huge disadvantage to Indian people. Also, there was the problem of Congress and the federal government contending they were too far removed from the Indian-state conflict to effectively pass or enforce laws protecting Indian nations. The failures of Congress and the federal government to protect Indian nations and their people often led to state and county jurisdictions being applied to Indian people, property, and resources, even on reservation lands. With the Salish and Kootenai asserting their sovereign rights, and the State of Montana abusing poorly drafted laws, it was just a matter of time before a confrontation occurred.

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[245] Cohen, *Handbook of Federal Indian Law*, p. 211.

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The Inception of Fish and Game Laws on the Flathead Reservation

In October of 1908, all of the conflicts over Indian hunting and fishing came to a boiling point as a group of Flathead Indians invoked their treaty right to hunt at usual and accustomed places off the Flathead Reservation. The resulting encounter between the Indians and state game wardens made national news, as shown by this quote from the *Kansas City Journal* dated October 19, 1908:

> Missoula, Mont. Oct 19--A telephone message from Ovando, Powell county, says that Deputy Warden C.B. Peyton and four Flathead Indians are dead as a result of a pitched battle between Deputy Peyton, his assistant, Herman Rudolph and a band of Flathead Indians near Holland's Prairie on Swan River yesterday afternoon.
>
> Peyton and Rudolph were attempting to arrest the Indians for hunting without a license and killing deer in excess of the law. Peyton went to the camp of the Indians and told them that they must accompany him to Missoula. Without a word of warning they fired on the deputy with rifles. Their fire was returned by Peyton and Rudolph. Yellowhead was one of the Indians killed. The others are unknown. The squaws escaped.[246]

In a letter addressed to the Secretary of the Interior, from acting commissioner R.G. Valentine, Valentine addressed the hunting conflict above and concluded that the incident was the result of Indians hunting illegally off the Flathead Reservation. However, when the article was written, nobody knew for sure whether the incident had happened on or off the reservation.[247] Nonetheless, each party in the dispute maintained a position that supported their agenda. The real issue was determining if the killing of the game warden had occurred on state or reservation land. Once this fact was known, officials could determine if the Indians would be tried in state or federal court. If the

[246] 1908 letter from R.G. Valentine to Secretary of the Interior, *Archival Documents of the Flathead* on microfilm.
[247] Ibid.

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incident occurred on reservation land, the defendants would be tried in federal court, and if the killing took place on state land, the trial would proceed in state court. Regardless of which court would try the Indians, the simple fact remained that Article III of the Hell Gate Treaty should have prevented the entire incident. The Indians involved did not need a permit to hunt, and they were not subject to state bag limits, so Deputy Peyton never should have attempted an arrest. Had Peyton been aware of the treaty rights of the Indians, he would have realized that he had no jurisdiction in the matter, and consequently, that he had no way of making a legal arrest on the hunters.

Despite the seemingly obvious error made by Deputy Peyton that caused the dispute, R.G. Valentine informed the Secretary of the Interior in his letter that if the Indians were found to have been on state land, then they would have no treaty rights as a result of the ruling handed down in Racehorse.[248] The bottom line in Racehorse was that the Supreme Court, in a decision that went contrary to established precedent, ruled that Indians could not hunt within the boundaries of the state in violation of state laws. Obviously, this ruling contradicted Article III in the Hell Gate Treaty, which was supposed to be the supreme law of the land. Despite the seemingly illogical ruling in the Racehorse case, the decision set legal precedent in the field of Indian law. This was particularly upsetting since the U.S. Supreme Court was not supposed to set policy in their decisions, and in this instance it seems that was exactly what the court had done. Had Congress intended for Article III of the Treaty of Hellgate to have no force in terms of Indian hunting rights off the reservation, they would have made it clear through legislation. However, the Supreme Court was allowed to step in and do Congress's job,

[248] 1908 letter from R.G. Valentine to Secretary of the Interior, *Archival Documents of the Flathead* on microfilm.

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which should have never been allowed to stand. Furthermore, the state officials and the Supreme Court should have recognized that the Treaty of Hellgate, particularly Article III, superseded any state game laws since it originated from a treaty, and treaties were the supreme law of the land, overriding any contradictory state laws unless Congress determined otherwise. And it is known that Congress did not make a determination on the matter, instead allowing the Supreme Court to overstep their bounds and made a determination themselves.

Getting back to Valentine, he would later come to the conclusion that the Indians involved had been hunting off the reservation in violation of state game laws.[249] Surprisingly, despite the Hell Gate Treaty, outside the reservation came to include any land within the reservation boundaries that had been relinquished to the state by the federal government.[250] This decision to designate land relinquished to the state as off the reservation had the potential to be devastating to the tribe. According to the logic of some non-Indians, the reservation boundaries existed only in theory because the land had become a checkerboard of tribal, state, federally owned property. This opinion had the potential to be used as a mechanism to abolish the reservation, since it was no longer all-Indian in ownership. This meant that the Salish-Kootenai would have to know the status of every single acre of land on the reservation in order to avoid conflict, which would be nothing less than impossible. It was clear that the evolution of game laws was taking place on the Flathead Reservation, and conflicts over game were fueling the change.

Another incident that proved pivotal in the emergence of game laws occurred on the Flathead Reservation in 1915. Antoine Larose was an Indian and resident of the

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[249] 1908 letter from R.G. Valentine to Secretary of the Interior, *Archival Documents of the Flathead* on Microfilm.
[250] Ibid.

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Flathead Reservation. More importantly, Larose was a ward of the federal government as a result of his private property being held in trust by the federal government. This fact meant that Larose fell under tribal, and ultimately, federal jurisdiction. The case against Larose began when he was cited for fishing on the reservation with a type of spear called a gaff hook. Larose was charged by the state game warden for violating two state fish and game laws. The laws the Larose allegedly broke were, fishing with a spear, and fishing without a license on a reservoir that was part of the Flathead irrigation project. Larose was arrested and tried in Missoula county, where he was found guilty and fined $25.00 or 10 days in jail. Soon after his conviction, Larose spoke with Fred Morgan, the superintendent of the Flathead Reservation. In turn, Morgan wrote to the Commissioner of Indian Affairs and requested that he back Larose in the matter for several reasons. Morgan reasoned that since Larose was a ward of the federal government, he should therefore fall under federal jurisdiction. Consequently, if Larose fell under federal jurisdiction, he should not have been cited by a state official. Furthermore, Larose was fishing on a reservoir within the boundaries of the reservation on a body of water operated by the U.S. Reclamation Service, which fell under federal, not state, jurisdiction. Falling under federal jurisdiction, and being a ward of the federal government, excluded Larose from having to buy a state permit to fish on his own reservation. Also, by falling under federal jurisdiction, Salish-Kootenai members had "exclusive" rights to the fish in all the bodies of water on the reservation. Morgan had enough foresight to realize that if the federal government did not back Larose, the state would eventually assert total jurisdiction on the reservation altogether. It seems that the state recognized this

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possibility as well, which caused them to be more involved than ever in tribal hunting and fishing.[251]

Although Larose had been fishing with two Indian companions, the state chose to pursue a case against Larose only. Perhaps the state did not want to engage in three similar cases, or maybe Larose was singled out for protesting the citation based on his treaty rights.[252] Whatever the case, by challenging Larose's treaty rights, the state would directly challenge all treaty rights of the Salish-Kootenai. Flathead Agent Morgan's initiative to contact the U.S. Attorney proved to be pivotal in this case. The U.S. Attorney advised Morgan that Larose was indeed within his rights to fish the reservoir without a permit, and that Larose should appeal the district court decision to the state supreme court in order to get another opinion. The U.S. Attorney also agreed to defend Larose at trial.[253]

Ultimately the case made it to the federal courts, where Judge George M. Bourquin ruled that the game laws of the state of Montana had no force or effect on Indian reservations. Larose had won the case, however, the ruling was not exactly clear on its face. The case had determined that any future tribal members would not have to deal with state game authorities, but only as long as the federal government was holding title to the land that was being hunted or fished. However, the federal government had commonly relinquished land on the Flathead reservation for railroad, or state use. These relinquishments would prove to be problematic for Indians attempting to hunt of fish on a fragmented reservation. In contrast, the lands opened to settlers were not relinquished, as they were opened under the provisions of the homestead, mineral, and town-site laws of

[251] 1915 letter from F.C. Morgan to CIA, June 16, *Archival Documents of the Flathead* on microfilm.
[252] Ibid.
[253] Ibid.

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the United States. Other plots of land reserved for wildlife refuges, reservoirs, or power sites were not relinquished either. Rather, they were reserved for the federal government, with Indians maintaining title to the land.[254]

Another effect of Judge Bourquin's decision was that it angered state officials and game wardens who seemed unwilling to allow Indian hunting anywhere off the reservation. State game warden J.L. DeHart wrote several letters to federal officials stating his intention to enforce state game laws anywhere off the reservation, because he felt Article III of the Hell Gate Treaty no longer had any legitimacy. In addition, DeHart asked the Commissioner of Indian Affairs to grant the state jurisdiction over Indian fish and game matters on the reservation.[255] It seems clear that DeHart's pleas for federal assistance to help the state control Indian hunting and fishing were a response to pressure from non-Indian settlers. In fact, settlers in the Bitterroot Valley had threatened to attack the Salish-Kootenai if state officials could not stop them from hunting in the valley. The response of non-Indians to the presence of Indian hunters does not appear to be the result of conservation, but rather, the result of fear. Non-Indian settlers appear to have been weary of large numbers of Indians hunting in land that they saw as theirs.

The fear that non-Indians felt regarding Indians hunting in the Bitterroot Valley eventually led to another dispute. In 1915, settlers on Fish Creek complained that tribal member Judge Parce frequented the valley for fall hunts, bringing many horses, men, women, children, and dogs along with him. Other than the fact that Parce killed many

[254] Documents of the 1904 to allot and survey the land within the Flathead Reservation, in *Indian Affairs Laws and Treaties*, vol. III, p.79.
[255] 1916 letter from Montana State Fish and Game Warden to CIA, May 11, *Archival Documents of the Flathead* on microfilm.

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deer for his winter supply, people on Fish Creek had no other specific complaints about his activities. But they did request he and his party be removed.[256]

For his part, Judge Parce admitted to hunting on Fish Creek, however, he maintained that three years prior he had been run out of the area by non-Indian settlers at gun point. Agent Morgan stated in a letter to the commissioner that Parce had come to his office every year asking for documentation acknowledging his right to hunt at Fish Creek, so he could show it to the settlers. Judge Parce was aware that if he couldn't prove his right to hunt, there might me another incident like the one in 1908 that left four Salish-Kootenai and one game warden dead. Morgan not only provided the letter to Parce, but he also employed the habit of advising Salish-Kootenai Indians on state game laws, so as to avoid potential conflicts. Morgan offered his advise even though the Salish-Kootenai did not fall under state game laws while hunting off the reservation. However, Morgan felt it necessary for Indian people to avoid violating state game laws in order to prevent conflict between Indians and whites.[257]

Conflicts aside, non-Indians began to search for alternate means to solve the jurisdiction problems plaguing the Indian hunting situation, and their solution was creative. Conservation became the rallying cry for state officials and non-Indian settlers alike. Finally they had found an issue that appealed to almost all non-Indians. It was believed by state officials that conservation could be used to force Indians to comply with state laws, because both state and reservation game would have to be under the jurisdiction of the state to insure proper management. Following the logic of protection and preservation of game, the state was free to assert their jurisdiction over Indian people

[256] 1916 letter from Montana State Fish and Game Warden to CIA, May 8, *Archival Documents of the Flathead* on microfilm.
[257] 1916 letter from F.C. Morgan to CIA, August 8, *Archival Documents of the Flathead* on microfilm.

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who hunted and fished anywhere in the state.[258] Contrary to the idea that Indian people needed to be forced to conserve game was the fact that the Salish-Kootenai had traditionally used resources with the idea of future use for all generations. Salish-Kootenai conservation, and for that matter hunting methods, were obviously different from the examples set forth by non-Indians. However, their differences in no way compromised the Salish-Kootenai traditions of respect and proper etiquette in regard to taking game. Maintaining a good relationship based on traditional hunting techniques and respect for the animal killed ensured future success in hunting for all Salish-Kootenai.[259]

Moving away from the conservation issue, in 1926 a hunting conflict involving an Indian who was hunting "illegally" on reservation land forced the Salish-Kootenai to redress the issue of tribal hunters who had received fee patents for their land, which had formerly been held in trust by the federal government. Tribal member Philip Moss was charged by a state game warden for killing an Elk on land within reservation boundaries. The reason Moss was cited is because he had recently been issued a patent in fee on his allotted land, prompting the state to assume he was no longer a ward of the federal government, thus placing him under state jurisdiction due to the fact he had paid taxes on his land. The state arrested Moss for killing the elk during Montana's closed hunting season. Moss countered that he had shot the animal on tribal lands, and had butchered the elk on allotted land of a friend held in trust, thus placing him under either tribal or federal jurisdiction. The state refused to back down, and maintained that Moss was under state jurisdiction based on the fact that he owned fee patented land. Moss was tried in a

[258] 1916 letter from Montana State Fish and Game Warden to CIA, May 8, *Archival Documents of the Flathead on Microfilm.*
[259] Hungry Wolf, *Indian Tribes of the Northern Rockies*, pp. 109-112.

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local justice court, and was convicted. The importance of the Moss case was that it explored the issue between private property and tribal membership. The states argument was that once an Indian owned land he was equal to every other American citizen. Meaning that any tribal rights he possessed would be lost. Moss contented that his tribal rights were not connected to his personal land status. Phillip Moss tried for months to get an appeal to his case, which he finally received in district court. Moss lost his case again, and received his choice between an elevated fine or more jail time than was sentenced in justice court. The courts justification for Moss's conviction was based on a previous verdict found in the Montana Supreme Court case known as State v. Big Sheep.[260] The Big Sheep case, which refers to the Crow tribe of Montana, ruled that when an Indian received a fee patent to his allotment, he no longer retained his rights as a tribal member of a federally recognized tribe. Receiving a fee patent, according to the courts, was akin to denouncing one's tribal membership and accepting all of the responsibilities of being a citizen of the state. After the district court's decision, Moss attempted to appeal his case again, however, Judge Bourquin denied the appeal and placed Moss back in the custody of the sheriff.[261]

The short term legacy of Phillip Moss and his fight for justice was that his failed attempt to push for his treaty rights backfired. Although Moss was trying to protect and expand Indian rights, he actually set precedent that would limit the rights of all Indian hunters for the immediate future. The trial of Phillip Moss was one of the first major

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[260] 75 Mont. 219, 243 P. 1067, Mont., Jan. 26, 1926.
[261] 1930 letter from Burton K. Wheeler to CIA, *Archival Documents of the Flathead* on microfilm.

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cases in which the courts ruled that Indians did not have "special rights", even within the boundaries of their home reservations.[262]

Despite the fact that the court ruled against Phillip Moss, the federal government still maintained that tribal members retained their treaty rights even after falling into fee patent status. In a letter to Senator Burton K. Wheeler from Assistant Commissioner J. Henry Scattergood, Scattergood stated:

> With all due regard to what was said by the court in the Big Sheep case, supra, we are of the opinion that such right still rests with the member of an Indian tribe to whom a patent in fee simple has been issued. In other words, the mere issuance of a patent in fee to an individual member of an Indian tribe, covering the lands allotted in severalty to him does not, of itself, operate to deprive such Indian any other tribal or property right. Obviously, such an Indian is still entitled to participate in further disbursements of tribal funds, per capita payments etc., and undoubtedly has a like right also to enjoy hunting and fishing privileges on lands belonging to the tribe of which he is still a member.[263]

Although the federal government supported the Salish and Kootenai in affirming their rights to hunt and fish, the reality was that the officials for the State of Montana constantly harassed and arrested tribal members for a variety of questionable violations of state game laws. Throughout the 1920's, and into the 1930's, Indians and non-Indians remained confused as to who ultimately had jurisdiction over fish and game on the reservation. State game wardens began patrolling Indian property for game violations. Non-Indian settlers even openly protested state officials patrolling their private property on the reservation. And Indian people hunted cautiously to avoid being arrested and

[262] 1930 letter from Burton K. Wheeler to CIA, *Archival Documents of the Flathead* on microfilm.
[263] Ibid.

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fined by state officials. All the while, the federal government maintained its distance and let the tribe and the state hammer out their differences.[264]

However, in a move that was surprising, given their previous efforts to not get involved, the federal bureaus created some general regulations for both Indians and non-Indians to follow. The state of Montana was quick to consistently act upon these regulations, while the tribe had little say in important game matters that affected them. Important tribal matters concerning fish and game were left to state and federal officials to discuss, leaving the tribe to accept the outcome. The regulations that the federal government laid down read as follows:

> <u>For Indians;</u>
>
> 1. State game laws do not apply to Indians while hunting on their own land held in trust, or on unallotted tribal lands within the reservation. Federal officials such as reservation agents and superintendents do not have the jurisdiction to regulate hunting on the reservation unless occurs on property that is fee patented, thus falling under state jurisdiction. Indians should, however, be advised of state statutes that are designed to protect fish and game. This is advisable to Indians in that it would protect their best interests in fish and game conservation.
>
> 2. When Indians do hunt off of the reservation, or on fee patented lands in or outside of reservation boundaries, they are subject to state laws and to the state courts for any violation of those laws. Hunting rights in the Treaty were to be interpreted to mean that Indians could hunt outside of the reserve in common with the citizens of the state. They were not, however, allowed special rights like excessive bag limits, hunting outside of state game seasons, etc.
>
> <u>For Non-Indians;</u>
>
> 1. Non-Indians have no rights to fish, hunt or trap anywhere within the reservation without the permission of the superintendent. The superintendent may grant a permit depending on the circumstances. The permission is granted at the discretion of the superintendent, and a fee will be charged for a reservation permit. Those allowed any special privileges must comply with any special rules

[264] 1927 Letter from CIA to Montana State Game Warden, *Archival Documents of the Flathead on Microfilm.*

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and regulations on the reservation, and they must comply with all state laws pertaining to fishing and hunting as well. Possession of a state permit to fish, hunt or trap does not confer the right to do so on the Reservation.

2. All non-Indian persons on reservations including business owners, traders, and employees are expected to comply with all state laws as well as the rules and regulations of the reservation. State laws do apply on the reservations, and state courts do have jurisdiction as to any action by whites if it does not involve an Indian, Indian property, or the operations of the federal government.[265]

The regulations above seemingly had the ability to solve some of the problems concerning game jurisdiction on and around the Flathead Reservation. However, because these regulations were so vaguely worded, they left enormous gaps in jurisdiction on and off the reservation. Indian people were still concerned with being arrested by state game wardens for hunting on the reservation. The fragmentation of the reservation land base confused officials regarding whose property was under state or federal jurisdiction. And there was the question of who should ultimately be in control of game on the reservation, the state or the tribe? These questions were not answered by the implementation of the federal regulations mentioned above. In fact, these questions became more urgent as the regulations implemented by the federal governments failed to solve the jurisdictional problems on the Flathead Reservation.[266] Furthermore, the regulations seem to have appeased state interests at the detriment of the Salish and Kootenai. These regulations were clearly inconsistent with the tribe's actual treaty rights. To begin with, Indians should not have been subject to state law while hunting off the reservation in "usual and accustomed places," or on fee patent lands they owned or had permission to be on. In addition, the tribal leadership, not the superintendent, should have been the authority allowing or forbidding non-Indian hunting on the Flathead Reservation. Finally, while

[265] 1932 Commissioner of Indian Affairs Memorandum, *Archival Documents of the Flathead* on microfilm.
[266] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, pp. 112-113.

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hunting on the reservation, non-Indians should have been subject to tribal customs and laws due to the tribe's sovereign status. Nonetheless, this was just the beginning of the legal wrangling over codified laws and regulations between the Salish and Kootenai and the State of Montana.

By the 1930's the tribe was focusing on the issue of ownership. Ownership of water on the reservation, ownership of fish in those waters, and the ownership of game became the key issues surrounding the tribe. Also, in 1934 the Indian Reorganization Act (IRA), or Wheeler-Howard Act, was unveiled by the federal government. The IRA was implemented to transfer certain decision-making responsibilities from the federal government to individual tribes. Also, the IRA allowed Indian nations the right to assume control over their own well being by gaining control over programs previously under federal government management. Most importantly, however, was the IRA goal of creating Indian self-government by assisting in the creation and implementation of tribal constitutions free from the crippling effects of federal paternalism.[267]

By 1935 the Salish-Kootenai had accepted and adopted a federally recognized tribal council under the legislation of the IRA. This gave the tribe the ability to finally participate in the decision-making process concerning tribal matters, which had previously been left in the hands of state and federal officials. However, the IRA essentially mandated that the Salish and Kootenai enact a form of government that closely adhered to Western norms. The result was a system that very often failed the tribe culturally, legally, and economically. In many instances tribal values and modes of justice were not facilitated by IRA models of government. The ultimate success of IRA modeled tribal governments is debatable. Nonetheless, under the legislation found in the

[267] Jaimes, *The State of Native America*, p. 15.

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IRA the Salish and Kootenai were finally able to create a tribal council with the power to assert authority over Indians and non-Indians who engaged in actions harmful to the tribal resource base. The Act allowed the tribe to protect and preserve tribal property, which included land and natural resources. By having jurisdiction over fish and game matters on the reservation, the tribe also had indirect control over certain actions of non-Indians. To regulate the actions of non-Indians, the Salish and Kootenai began to require non-Indians to purchase a permit to hunt and fish on the reservation. These tribal permits were issued independently of the state of Montana, and the Fish and Game Commission. In addition to allowing the creation of federally recognized tribal governments, the IRA also led Attorney General W. Bonner to conclude that:

> All Indian lands, whether allotted or unallotted, held separately or jointly and all land held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government; all game fish, wild birds, game or fur-bearing animals, including beaver, killed, caught or captured thereon are Indian property; said beaver are not protected by the laws of Montana; The Indian under tribal ordinances may kill or capture said beaver on the lands aforesaid; the Indian's possession would be legal and the State of Montana has no claim or ownership therein, nor has the State jurisdiction over the same; beaver caught, killed or captured on any of the lands aforesaid is not considered as beaver coming from without the state but considered to be within the geographical limits of Montana.[268]

The relevant point made by the Attorney General was that he felt the fish and game were constructively owned by the tribe, and were held in trust by the federal government for the tribe. The letter from Bonner also stated his belief that the tribe could require non-Indians to purchase a tribal game permit when hunting or fishing on the reservation since the tribe had authority to protect their lands and resources. In addition, Bonner did not seem to believe that the migratory nature of game animals had any affect on the

[268] 1942 letter from John W. Bonner, Attorney General to J.S. McFarland, Warden, *National Archives, Pacific N.W. Region.*

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tribes' jurisdiction over the animals, even if the game were to migrate onto fee land owned by non-Indians. With General Attorney Bonner's opinions in mind, the potential for tribal control over reservation resources began to expand, and in response, non-Indians increasingly felt resentment and resisted further expansion of tribal jurisdiction and power.

When the Salish-Kootenai actually began to patrol the reservation for game violations, they encountered opposition from non-Indians who were confused by the permit system, and by who had the ultimate authority over non-Indians who violated tribal game laws. Non-Indians especially resented being under the jurisdiction of the tribe, whom they felt had an unfair relationship with the federal government that gave them extra rights that non-Indian citizens did not enjoy. This resentment led to non-Indians ignoring tribal game laws and resisting any tribal authority or jurisdiction. In addition, non-Indians were upset about being required to buy both state and tribal permits to hunt on the reservation. Many non-Indians hunters reasoned that they should be under the jurisdiction of one government's game laws, be it state or tribal, but not both governments. Regardless, by 1935 the Salish-Kootenai could legally patrol their lands for game law violators, but they had little money set aside to do so. This led many to believe that trial authority had no real teeth, since they could not enforce their own laws on their own reservation. In fact, it was widely known that hunting and trespassing on Indian land never led to any serious consequences against the guilty party.[269]

Although the Salish-Kootenai initiated their permit system in order to raise revenue for the protection of reservation resources, namely fish and game, non-Indians

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[269] 1936 letter from L.W. Shotwell, to Editor, Flathead Currier, *Archival Documents of the Flathead* on microfilm, p. 2.

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continued to protest the tribe's authority and competence in the matter. The tribal permit was seen by non-Indians as redundant when compared with the state permit, and tribal authority was rarely respected, for obvious reasons. In light of these problems, non-Indians residents of the reservation began to devise ways to avoid any jurisdiction at all. These schemes proved problematic to the tribes, as well as the state, because illegal hunting and fishing was happening and nobody could stop it.[270]

The permit system of the Salish-Kootenai was important because it allowed the tribes to fund fish and game programs ranging from fisheries to game law enforcement. However, the permit system was also important because it was the first time in the tribe's history that it had been able to escape the paternalism of the federal government. The money from permits and from court fines was the first money that was not confiscated and held in trust for the tribe by the Secretary of the Interior.[271] So, the symbolic nature of the revenue probably held as much weight with the tribe as did the functional use of those revenues. Which was why it was somewhat surprising that within the same year that they had implemented a tribal permit to fish and hunt, the tribe was forced to stop issuing permits until they could solve the confusion over authority and find the means to enforce fish and game laws more effectively. The period between tribal permit systems was brief, but it immediately allowed non-Indians to once again take advantage of Indian resources at no cost. Soon after the tribal permits were discontinued, many of the heated issues surrounding the tribal management of fish and game died off as well.[272]

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[270] 1936 letter from L.W. Shotwell, to Editor, Flathead Currier, *Archival Documents of the Flathead* on microfilm, p. 2.
[271] 1939 letter from Montana State Deputy Game Warden to L.W. Shotwell, *Archival Document of the Flathead on microfilm.*
[272] 1940 letter from Superintendent of State Fisheries, to L.W. Shotwell, *Archival Document of the Flathead on microfilm.*

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By the early 1940's the tribe was once again looking to implement a permit system to protect the natural resources on the reservation. Also during this time the State Fish and Game Commission was continually denied any direct authority over game violations that occurred on the reservation by Indians. However, there were cases where state game wardens would overstep their authority and arrest reservation Indians for game violations. Such was the case with the arrest of Sahkale Finley, an Indian detained in the fall of 1941 for killing a deer out of season. Finley had killed the deer on the reservation, but then carried it off the reservation where he was caught during closed hunting season in Montana. The Flathead Superintendent immediately contacted the state, and Finley was freed due to the understanding that the state had no authority over his particular hunt.[273]

In 1942 the Montana Fish and Game Commission sent a letter to the Department of the Interior that stated what jurisdiction they did not have over wildlife on Montana reservations. This was important because it helped to clear up the inconsistencies over game jurisdiction on Montana Indian reservations, and it defined the limitations of the Fish and Game Commission. The limitations noted by the Fish and Game Commission were handed down by the Attorney General as a guideline for dealing with reservation hunting and fishing. The guidelines included issues like the fact that state game laws on Indian reservations could not be enforced upon Indians. Also, they agreed that the state had no right to arrest Indians or non-Indians in violation of game laws on the reservation. In addition, Indians would be allowed to carry their kill outside of reservation boundaries, and travel to necessary destinations with their kill. Finally, the Attorney General

[273] 1941 letter from L.W. Shotwell, to Mark H.Derr, Attorney, Polson, MT., *Archival Documents of the Flathead* on microfilm.

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declined to allow the state to hire Indians on a reservation to arrest other Indians for state game law violations.[274] The Assistant Attorney General, William Zimmerman, agreed with the Attorney General's assessment of the law, with one exception. Zimmerman concluded that if the state were not allowed to assume jurisdiction over non-Indians on the reservation, it would promote the transgression of jurisdiction and laws. It seems that Zimmerman was more concerned with not creating a reservation safe haven for non-Indians, than he was with the protection of non-Indians under state jurisdiction.[275]

1942 proved to be a pivotal year for the Salish-Kootenai in terms of fish and game jurisdiction. For years the tribe had been asserting their power to govern themselves, and had used the power of tribal law to convince other government agencies to work with them to solve common issues. Also, these governments were beginning to agree on some general rules for solving jurisdictional disputes. In the 1940's the tribe, the state, and the federal government all agreed that fish and game conservation was an issue that they should address together. This came on the heels of the tribe's decision to stop issuing fish and game permits, which cost them revenue, and opened up many of their fish and game responsibilities to state control. The decision to stop issuing permits compromised the tribe's sole jurisdiction over fish and game matters on the reservation, which was not their intention. 1942 was finally the year that the Salish-Kootenai and the state of Montana decided to create a joint resolution to solve the jurisdiction issues over fish and game on the Flathead Reservation.[276] This decision to compromise was probably

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[274] 1942 letter from Montana State Fish and Game Warden to Secretary of the Interior, *Archival Documents of the Flathead* on microfilm.
[275] 1942 letter from the CIA to the Montana Fish and Game Commission, *Archival Documents of the Flathead* on microfilm.
[276] 1942 letter from John W. Bonner, Attorney General to J.S. McFarland, Warden, *National Archives, Pacific N.W. Region*, p. 13.

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prompted by the history of conflict and hard feelings created by the confusion over fish and game laws on the reservation. Looking back, it appears that this would have been a good compromise for both parties involved. The state would finally have some legitimate jurisdiction on the reservation, and the tribe could revoke any personal concessions they had made if they deemed it necessary. Perhaps the tribe felt that if they gave a little to the state, they would save much more for themselves.

The proposed agreement between the Salish-Kootenai and the state is summed up as follows:

1. The two organizations will appoint someone to act as both State Game Warden, and Indian Deputy Game Warden on the reservation. The person will be appointed by the tribe, and approved by the State Fish and Game Commission.

2. Those appointed to the game warden position will be paid equally by both the Flathead Indian Agency, and the State Fish and Game Commission.

3. The appointed Fish and Game Warden will carry out the provisions of the fish and game regulations within the boundaries of the reservation, and also act as a manager of Fish and Game affairs of the tribe.

4. All non-members of the tribe are required to have a State Fish and Game License when fishing on the Flathead Reservation.

5. In reciprocation for the re-stocking of fish in the Flathead Lake and distribution of game birds on the reservation, non-members of the tribe will be allowed to fish and hunt on the reservation without paying for a permit from the tribe.

6. No seining will be permitted by Indians or non-Indians except for the purpose of supplying State Fish Hatcheries with sockeye salmon.

7. The opening and closing of streams and lakes, and the setting of seasons for hunting upland birds and migratory waterfowl for non-members of the tribe will be determined mutually by the Tribal Council and the State Fish and Game Commission.

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8. The Superintendent of the reservation will be authorized to tag beaver pelts caught by Indians of the tribe. The tags are furnished by the State Fish and Game Commission free of charge. In addition, a record of all beaver skins tagged will be furnished to the State Fish and Game Department.

9. The Tribal Council and the State Commission agree that big game hunting is closed within the original confines of the Flathead reservation.

10. It is understood that the Salish-Kootenai are not relinquishing any treaty rights or any of their rights contained in the 1934 Indian Reorganization Act.[277]

Although this agreement seemed to be quite advantageous to the state and non-Indian community as a whole, it went nowhere due to the remaining disagreement over the tribal council's authority concerning game issues. Throughout the next several decades, the tribe worked with federal and state officials to solve the jurisdictional problems on the Flathead Reservation. The one problem that continually surfaced during these interactions was how the tribe could enforce laws on non-members living on the reservation. Enforcing laws on tribal members was very simple. Tribal members who broke game laws were tried in tribal court, and faced the loss of hunting privileges on the reservation. Non-Indians who violated game laws on the reservation were turned over to state authorities and tried in state courts. This made it difficult for the Salish-Kootenai to actually arrest non-Indian violators, because they had little respect for, or fear of, tribal authority.[278]

The absence of respect for tribal authority and institutions was wide spread among non-Indians who sought to harvest tribal resources illegally. This lack of respect grew

[277] 1942 letter from John W. Bonner, Attorney General to J.S. McFarland, Warden, *National Archives, Pacific N.W. Region*, p. 13.
[278] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, pp. 128-129.

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from the tribe's inability to establish accepted jurisdiction on the reservation, and their perceived lack of legitimate power to uphold and enforce the laws on their reservation. However, this all changed in 1947 when a legislative act authorized the tribe and the state to draft agreements over fish and game management. Under the agreement, the state Department of Fish Wildlife and Parks was allowed to issue joint licenses for fishing and bird hunting on the reservation, with the revenue going to the Salish-Kootenai.[279] The Salish-Kootenai benefited by avoiding continuous conflict, and by finally defining the exact authority the tribe maintained as a result of the agreement. While non-Indians benefited by being allowed to hunt and fish in places they had no legal right to hunt and fish in the first place. Sadly, non-Indians viewed their privilege of hunting on the reservation in terms of falling under corrupt governmental jurisdiction, as they were subject to the "injustices" of tribal law and courts if they violated the game laws.

Following the joint agreement between the Salish-Kootenai and the state of Montana, the tribe went about the business of protecting natural resources on the Flathead Reservation. By the 1970's, however, controversy over ownership of game became a major issue on the reservation. In 1978 two major events took place that forced the tribe to shift from focusing their authority over people involved in game violations, to determining who had authority over fish and game itself. First, the state claimed that because they managed fish and game in most areas of Montana, they should have control over all wildlife in Montana. The state believed that since the Flathead Reservation was within the boundaries of Montana that it should be under the authority of the state. While the tribe maintained that wildlife on the reservation was owned by the tribe, and should be managed by the tribe. The problem for both governments was that wildlife regularly

[279] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, p. 174.

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migrates, and are not aware of political boundaries that help to determine things like jurisdiction.[280]

The second event occurred in December of 1978 when the state of Montana and the Salish-Kootenai became involved in a conflict involving the killing of a bighorn sheep by an Indian hunter. The state was in the process of buying an island from private ownership when a bighorn sheep left the island and crossed a frozen lake, where it was killed by an Indian hunter. In addition to buying the island, the state Fish and Game Department had been restocking and relocating fish and game on the reservation. Because of this, the state reasoned that they had jurisdiction to prosecute the hunter for killing a bighorn sheep illegally. The state felt that they owned the game on the reservation, especially game found on state or fee status property. During the initial arrest of the tribal hunter, the state illegally confiscated the sheep carcass, leaving the tribe unable to prosecute the violator due to lack of evidence. The tribes found themselves in a disagreement with the State Fish and Game Department regarding jurisdiction over game on the reservation. The tribe maintained that it was their responsibility to prosecute all hunting violations that involved tribal members, and that they owned the wildlife within the confines of the reservation. The conflict grew and increasingly focused on the ownership of big game in Montana. The tribe took a hard line and fought to retrieve the sheep carcass from the state. When the state failed to comply, the tribe threatened other action. In turn, the state maintained a position of authority over the bighorn, and threatened to pursue the right to extend their jurisdiction over all big game on the reservation. In the end, the tribe and the state agreed to compromise, largely because the tribe could not afford any loss of jurisdiction because of

[280] Krigbaum, *The impact of allotment on contemporary hunting conflicts*, pp. 150-151.

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this crisis. As a result of the compromise, the state kept their authority over game on the reservation, while the tribe avoided potentially costly litigation. The tribe was prepared to negotiate at a loss in order to avoid the prospect of an emotionally charged court battle over reservation jurisdiction. By compromising with the state, the tribe lost a small battle, but they maintained their authority over big game, which was a trade-off that may have saved the tribe from losing a lot in court. As for the state, the negotiation appeased their wishes, and may have caused them to back away from their threats to assume control over all the big game on the reservation.[281]

In 1979, the commissioner of the Montana Fish and Game Department, Al Bishop, sued the tribes over hunting rights off the reservation. Bishop reasoned that Indian hunting off the reservation was taking away from the game available to non-Indian hunters. In addition to being accused of over-harvesting the state's wildlife, the Salish-Kooteani were also labeled "anti-conservationists." Commissioner Bishop was even quoted as saying, "They'll kill anything," when referring to the Salish-Kootenai.[282] This quote shows that in addition to dealing with political issues, the Salish-Kooteani also had to deal with negative stereotypes and outright racism when asserting their jurisdiction and treaty rights to hunt and fish.

By 1987, the Salish-Kootenai developed plans to work out a new agreement with the state over game management. Tribal Hunting and Fishing Ordinance 44-D allowed the tribes to assert their jurisdiction over game throughout the entire reservation. Despite non-Indian protest, Ordinance 44-D was approved by the Secretary of the Interior. In addition to negotiating Ordinance 44-D, the tribe and the state negotiated an agreement

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[281] *Missoulian*, January 24, 1979, p.29.
[282] *Missoulian*, November 2, 1979, p. 15.

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concerning the tribe's jurisdiction over wildlife. Throughout 1987, the tribe pushed to gain control over most reservation wildlife issues. They intended to contract many of the wildlife functions of the Flathead Agency to the federal government.[283] The tribe also made agreements between the counties within the reservation boundaries. Some of these counties even agreed to acknowledge that land-use planning authority belonged to the tribe.[284]

This agreement between the tribe and the state was made to, once again, ease jurisdictional disputes. The agreement called for a joint license for non-tribal residents of the reservation, joint management, and cross deputization of wardens. The joint license was specifically implemented to quiet the complaints of non-Indians who resented having to buy two licenses. Furthermore, the brokers of the agreement envisioned that non-Indians who committed game violations on the reservation would be tried in tribal court, and if violations occurred on state land, the alleged violator would be tried in state court. The agreement would also create a local fish and game board comprised of Indian and non-Indian residents. Although the Salish-Kootenai signed this pact in 1988, the final signing by the state was delayed as Governor Ted Schwinden yielded his position to newly elected Stan Stephens.[285]

Governor Stephens and his administration did not agree with the proposal formerly negotiated by the Salish-Kootenai and the Schwinden administration. The Stephens administration opposed non-Indians ever being tried in Indian courts for game violations. The opposition set forth by Governor Stephens forced the tribe and the state to renegotiate the final agreement over fish and game jurisdiction on the reservation. The

[283] *Char Koosta News*, September 8, 1987, p.1.
[284] *Missoulian*, April 15, 1987, p. 9.
[285] *Missoulian*, July 16, 1989, p. B-1.

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state soon drafted a new proposal, but the tribe refused to sign it because they felt they would be giving up too much to the state. For their part, the Stephens administration felt that tribal game wardens were not adequately trained unless they had graduated from the Montana Law Enforcement Academy.[286] In this case, Governor Stephens decided to discount the cultural norms of the Salish-Kootenai by suggesting their system of law enforcement was not suitable to state standards. Additionally, Stephens' actions showed considerable disrespect for tribal sovereignty.

As a response to the ongoing, and unresolved, debate between the Salish-Kootenai and the Stephens administration, the tribe began to withdraw from an agreement made in 1963 to implement Public Law 280 on the reservation and share jurisdiction between the state and the tribe, in the hopes of sharing responsibilities with the federal government instead. The bill to withdraw from the tribal-state compact was called House Bill 797. Although this bill mainly dealt with misdemeanor crimes and not necessarily game laws, the outcome added to the evolution of tribal jurisdiction. House Bill 797 was intended by the Salish-Kootenai to withdraw from shared jurisdiction so the tribe could finally hold their own court, conduct their own policing, and set their own penalties for crimes committed.[287] Opposition came because of the tribe's desire to have total jurisdiction over all reservation misdemeanor crimes. Non-Indian reservation residents were afraid that in the future this jurisdiction would lead to total tribal authority over non-Indian violations, including game matters.[288]

Due to the state's opposition to complete tribal jurisdiction, House Bill 797 died until it was resurrected at a later date as Senate Bill 368. Bill 368 allowed the tribe only a

[286] *Missoulian*, December 8, 1989, p. A-1.
[287] *Missoulian*, February 20, 1993, p. B-1.
[288] *Missoulian*, March 14, 1993, p. B-2.

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partial withdrawal from their previous compact with the state. However, the passage of Senate Bill 368 gave the tribe partial legal jurisdiction on the Flathead Reservation. The bill allowed the tribe to assume jurisdiction in all misdemeanor crimes involving tribal members, and in felonies and civil cases after consultation with the state.[289] The tribe and the state began dividing up their duties, eventually creating a cross-deputization proposal that reservation law enforcement agencies could sign onto.[290] By all accounts, the pact had worked well for the tribe, the state, and the communities affected by the agreement. Senate Bill 368 was intended to transfer authority over tribal members from state to tribal control, but it also reinforced tribal jurisdiction over non-Indians in some cases. Although the tribe was not allowed to try non-Indians in tribal court, they could investigate crimes and cite non-Indians under tribal jurisdiction if an arrest needed to be made.[291]

By 1990, the tribe and the state were looking to enter into another cooperative game management agreement. The result was the State-Tribal Cooperative Agreement Act of 1990, which was to be renewed every four years. The agreement provided for the Salish-Kootenai to regulate hunting and fishing activities by both tribal members and non-members within the boundaries of the Flathead Reservation.[292] However, with this new agreement came the same old controversies concerning non-Indians who owned land on the reservation being under tribal jurisdiction, and sportsmen being forced to buy a tribal permit in addition to a state permit to hunt on the reservation.

[289] *Missoulian*, February, 20, 1993, p. B-1.
[290] *Missoulian*, April, 26, 1996, p. B-5.
[291] Ibid.
[292] *Missoula Independent*, October 18-25, 2001, p. 10.

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One non-Indian reservation resident who has been particularly vocal in his opposition to the agreement is Del Palmer. In protest of the agreement, and in an effort to exert his perceived property and constitutional rights, Del Palmer has staged annual illegal hunts on his privately owned fee patented land, located within reservation boundaries, since 1991. Palmer has the opinion that he should be able to hunt on his property without buying a tribal permit. However, Palmer has no grievance against buying a state permit. The annual protests usually involve Mr. Palmer killing a game bird without a tribal permit. Del alerts authorities before his protest in the hopes that he will be cited so he could take his case to court and argue against the tribes' right to require the purchase of joint fish and game permits. Del believes that since his is fee-patented land, it is no longer part of the reservation, and therefore should not fall under any tribal authority. So far, Palmer's attempts to plead his case before the courts have been meet with acquittals, dropped charges, no shows by game wardens, and dismissal of charges.[293] Tribal game wardens seem to have decided to ignore Palmer's attempts to force litigation, probably in an effort to stay out of the courts.

Despite the non-response by game officials, Palmer maintained that the agreement between the tribe and state contradicted established U.S. Supreme Court precedent. In the 1981 case Montana v. United States[294] the court stated, "Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or held by the United States in trust for the Tribe, it has no power to regulate non-Indians fishing and hunting on reservation land owned in fee by non-members of the tribe."[295]

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[293] *Missoulian*, November 24, 1996, p. B-5.
[294] 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2nd 493 (1981).
[295] Montana v. U.S., 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2nd 493 (1981).

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This ruling involved the Crow Reservation in Montana, but Palmer believed the decision made the 1990 agreement between the Salish-Kootenai and the state of Montana invalid.

Upon examining Del Palmer's argument, it is clear that he is attempting to revive many of the same issues brought against the tribe that non-Indians had been arguing since the early 1900's. One of the disputes is the question of who has jurisdiction over non-Indians when they are on their private property? According to Palmer, Indians have little to no jurisdiction over non-Indians or their non-fee reservation property. Another source of conflict and dispute is who has jurisdiction over game? The tribe believes that game on the reservation, regardless of land status, belongs to the tribe. While the state maintains that since the reservation is within state boundaries, the game ultimately belongs to the state.

The tribe has used several convincing arguments to establish ownership of game on the reservation. Citing Article III of the Hell Gate Treaty of 1855, the tribe maintains that they have exclusive rights to fish and game on their reservations as well as in all "usual and accustomed places," meaning that the treaty supported tribal authority over game by giving them the power to exclude others from harvesting the resources. Furthermore, the tribe has invested in the wildlife on the reservation in the form of re-stocking, monitoring, and patrolling for violators of the law. The Tribal Constitution, as well as the federal government, also acknowledge that the game on the reservation do in fact belong to the Salish-Kootenai. In 1943, the assistant to the Commissioner of Indian Affairs wrote to the Tribal Council stating that all fish and game were the property of the

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tribe. By adopting the Tribal Constitution, the council has vested power to regulate fish and game activity.[296]

Del Palmer and those opposing tribal authority have argued that because their fees and taxes have benefited the entire state's fish and game program, that they should have control over the game on the reservation as well. By paying fees and taxes, the Del Palmers of the world feel that they have helped to re-stock, monitor, and conserve all the game in the state. Because they have paid the state to maintain game, and game programs, they contend that they should not have to pay the tribe for the same services.

Del Palmer's attack against tribal control over his property is really a misconception on his part. The Salish-Kootenai do not seek to control the fee patented property of non-members on the reservation. However, the tribe does seek to control tribal resources on the reservation. Fish and game are seen by the Salish-Kootenai as a tribal resource, which require management by the tribe regardless of one's land status within reservation boundaries. Whether or not Palmer has realized that the tribe wants no authority over his land or private property is not important. It is clear that Palmer's issues are with tribal sovereignty and the Salish and Kooteni's right to self-government. However, the tribe's position of asserting authority over reservation resources really makes the issue of tribal authority over non-tribal property moot. The tribe does not consider non-tribal property within the context of their authority, however, Del Palmer appears to have problems with any tribal assertion of authority.

It is very probable that Del Palmer is aware that many of his arguments are flawed, but it is almost certain that Palmer knows anything can happen if he can get his way, and ends up fighting for his perceived rights in the courts. Palmer's repeated

[296] 1943 letter from Walter V. Woehlke, to Eli Gigras, *National Archives, Pacific N.W. Region.*

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violations of game laws on the reservation do have the potential of being a threat to tribal authority. Palmer is probably aware that if he can get his case heard by a sympathetic court, he will stand chance of having the case decided on an emotional, rather than strictly legal basis. It certainly would not be the first time in the history of federal Indian law that a judge went against established precedent and ruled against Indian rights.

While this ongoing drama has played on without any meaningful results, Del Palmer has presented documents to the Mountain States Legal Foundation, which is a conservative think tank that advocates personal property rights and wise use of public lands. It is also noted for opposing Native American religious activity at Devil's Tower, a well-known and ancient Indian religious site in Wyoming.[297] The story of Del Palmer, and his fight to usurp tribal authority, has not led to any victories or losses for either side. The tribe has basically ignored Palmer and went about their business as usual. As for Del Palmer, I have heard from a reservation resident who follows the dispute that Del finally gave up the fight. Mr. Palmer reportedly sold his property on the reservation and no longer seeks a personal conflict with the tribe over hunting violations. This is strictly word of mouth, but I have not noticed any recent attempts by Palmer to resurrect his fight against the tribal-state agreement in the local papers or rumor mill.

Conclusion

This study is meant to provide insight into the development of tribal, federal, and state relationships and how they affect Indian treaty rights. Included is a history of tribal interactions with the United States government, with an emphasis on the importance of

[297] *Missoula Independent*, October 18-25, 2001, p. 10.

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Indian treaties. It reveals how the federal government is able to exercise control over Indian nations, and also what gives them the legal justification to break or renegotiate the many treaties they have signed with Indian tribes over the course of United States history. In addition, this study examines the dynamics of the various relations between tribes, states, and the federal government, in the context of hunting and fishing. The intention was to address the treaty rights of tribes to hunt and fish on and off of their reservations, particularly focusing on the Confederated Salish and Kootenai Tribes and the Hellgate Treaty of 1855. This study unveils many key pieces of legislation, court cases, and conflicts that helped to define the field of federal Indian law, particularly game laws. Also, it specifically addresses the hunting and fishing conflicts between the Salish and Kootenai and the State of Montana throughout the last century, while providing some historical facts regarding tribal history. The result is a chronology of governmental interactions, precedent setting court cases, and the role the Salish-Kootenai have played in the evolution of game laws in the state of Montana, and throughout the nation as well. This study is an informative and historically accurate look into the world of tribal government and politics. It unveils some the issues that affect sovereign tribal nations as they function under the supervision of another sovereign nation, the United States. The final purpose of this study is to provide others with the tools to understand and appreciate the history and evolution of Indian interactions with state and federal governments.

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