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INDIAN TRIBAL RIGHTS AND THE NATIONAL FORESTS: THE CASE OF THE ABORIGINAL LANDS OF THE NEZ PERCE TRIBE

CHARLES F. WILKINSON*

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For more than a century, American Indian tribes conducted most of their administrative business with the United States through the Bureau of Indian Affairs. Then, beginning in the 1960s, as the modern Indian sovereignty movement was born, the expanded exercise of tribal powers led to relationships with a broad array of federal agencies. By the late 1980s, this included the oldest federal land management agency, the United States Forest Service.

This article addresses the relationship between the Nez Perce Tribe of Idaho and the Forest Service. In aboriginal times, the Nez Perce lived on a large expanse of land in the interior Columbia River Basin. The Tribe signed successive treaties in which it ceded much of its land to the United States. The Nez Perce Tribe, however, never surrendered its sovereignty or its trust relationship with the United States. Nor did the Tribe relinquish its fishing, hunting, and gathering rights in the ceded lands, including millions of acres within five national forests. These rights, and the ways in which the Nez Perce

* Distinguished Professor and Moses Lasky Professor of Law, University of Colorado. I am indebted to Andy Huff, my research assistant, for his fine work on this article. I also thank Kevin Geiger, Scott Miller, and Cynthia Carter and numerous people, too many to name, on the staffs of the Nez Perce Tribe and the Forest Service. Professor Dennis Colson, who has done extensive research on the Nez Perce Tribe, made several valuable suggestions on the manuscript.

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Tribe and the Forest Service have interacted with respect to them, are at once inlaid in Central and Northern Idaho and also matters of considerable interest in the many areas across the country where special tribal rights apply to the management of the national forests.

I. THE 1855 TREATY

By the early 1850s, the Nez Perce still lived in their vast aboriginal domain. It encompassed most of Central Idaho — nearly to the headwaters of the Salmon River in the south, to the Palouse River in the north, to the Continental Divide in the east, and to the modern state line in the west — as well as parts of southeast Washington and northeast Oregon, including the Wallowa Valley. The area amounted to some 13 million acres, about one-fourth the size of the State of Idaho.¹

When the runs came, the Nez Perce lived off of the salmon, travelling to traditional fishing spots as far west as the fabulous grounds at Celilo Falls on the Columbia. The Nez Perce people made good use of the huckleberries, kouse, wild carrots, and the mild, onion-like root of the lily camas.² They also took deer, elk, and, in the broad valleys on the far side of Lolo Pass, buffalo. In the 1700s the Tribe obtained the horse, which reduced its travelling time and increased its military power.³

The white people — first Lewis and Clark, then the fur traders, the farmers, and especially the missionaries — made their mark on the Nez Perce way. Some people were lost to combat, many more to disease. But the big Palouse, Clearwater, and Salmon River country, especially the forest land rising up toward the eastern sky, gave the Nez Perce a sturdy measure of insulation.⁴ Even today this region, along with the canyon country of the southwest, makes up one of the most remote blocs of backcountry in the lower 48 states.

In 1853, President Franklin Pierce appointed Isaac Stevens as Governor, and Superintendent of Indian Affairs as well, of the new and sprawling Washington Territory, which took in northern Idaho

1. On Nez Perce tribal history, see generally ALVIN M. JOSEPHY, JR., *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* (Abridged ed., 1971); ENVIRONMENTAL RESTORATION & WASTE MANAGEMENT DEPARTMENT, *NEZ PERCE TRIBE, A NEZ PERCE NATURE GUIDE: I AM OF THIS LAND, WETES PE ME WES 18-21* (Dan Landeen & Jeremy Crow, eds. 1997) [hereinafter *NATURE GUIDE*]. See also MERRILL D. BEAL, *I WILL FIGHT NO MORE FOREVER: CHIEF JOSEPH AND THE NEZ PERCE WAR* (1963).

2. See DEWARD E. WALKER, JR., *INDIANS OF IDAHO* 71 (1978); see also JOSEPHY, *supra* note 1, at 17.

3. See WALKER, *supra* note 2, at 71-72; BEAL, *supra* note 1, at 9-11.

4. See generally JOSEPHY, *supra* note 1, chs. 1-5.

and part of western Montana.⁵ By 1854, Stevens, energetic and ambitious, had decided to take on the task of negotiating treaties with the tribes of the Territory to make way for the westward expansion. His bullying tactics caused him difficulties from the start. The December 1854 treaty with a group of southern Puget Sound tribes⁶ — Stevens designated both the tribes that would be grouped together and the “chiefs” who would represent them — went bad immediately. He forced such a small reservation on the Nisqually that Chief Leschi and his followers would have none of it, leading to a bloody war of outrage.⁷

Stevens worked his way south and then east, calling a treaty council for May 1855 on Mill Creek in the Walla Walla Valley. He sent word to the Nez Perce and other tribes of the area.⁸

The treaty council was fascinating in many respects. There was a grandeur about it, with an estimated 5,000 Indian people in attendance.⁹ The Nez Perce rode in, “a thousand warriors mounted on fine horses and riding at a gallop, two abreast, naked to the breech-clout, their faces covered with white, red, and yellow paint in fanciful designs, and decked with plumes and feathers and trinkets fluttering in the sunshine.”¹⁰ The personalities and relationships were complex. Isaac Stevens used strong-arm tactics but his fellow negotiator, Joel Palmer, who far better understood the Indians’ reactions and point of view, repeatedly had to step in, back up, and move down a better track.¹¹ For the Indians’ part, there were divisions among the tribes, leading finally to the creation of three reservations, one for the Nez Perce, one for the Umatilla, Cayuse, and Wallawalla, and one for the Yakama and several smaller Columbia River tribes and bands.¹²

But when you read the minutes of Indian treaty negotiations, certainly including these minutes, you find something else, something

5. On Isaac Stevens, see generally KEN D. RICHARDS, *ISAAC I. STEVENS: YOUNG MAN IN A HURRY* (1979).

6. Treaty with the Nisqually and other Tribes, Dec. 26, 1854, 10 Stat. 1132 (1855).

7. See generally CECILIA SVINTH CARPENTER, *FORT NISQUALLY: A DOCUMENTED HISTORY OF INDIAN AND BRITISH INTERACTION* (1986); CECILIA SVINTH CARPENTER, *LESCHI: LAST CHIEF OF THE NISQUALLIES* (1986).

8. JOSEPHY, *supra* note 1, at 307.

9. *Id.* at 309.

10. *Id.* at 308.

11. See A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Gov. & Supt. W.T. and Joel Palmer Supt. Indian Affairs O.T. on the Part of the United States with the Tribes of Indians named in the Treaties made at that Council, May 28 – June 11, 1855 [hereinafter *Official Proceedings*].

12. See *id.*; see also Treaty between the United States of America and the Nez Perce Indians, June 11, 1855, 12 Stat. 957 (1863) [hereinafter 1855 Treaty].

more profound. It is a point laid out in detail by Alvin Josephy in his great book, *The Nez Perce Indians and the Opening of the Northwest*,¹³ which is, in essence, that the stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong.¹⁴

The negotiators for the Nez Perce, and for the other tribes as well, had a complete understanding of the situation.¹⁵ The white people wanted their land, and had the population and technology to take it. The tribes, on the other hand, had considerable leverage: in time they would lose a military campaign, but they could exact great costs in terms of human life and monetary expenditures to fight a war on the fragile, far edge of American territory.

The calculus was about power, and the tribes could make the calculations as well as the white people. The tribal negotiators were sophisticated and they used every technique and device available to them. They strung the proceedings out (the talks began on May 28th and went until June 11th), giving them time to caucus, think, and make what changes they could.¹⁶ They made their arguments precisely and ably.¹⁷ As anthropologist Herbert Spinden accurately put it, Nez Perce oratory was "effected only by calm reasoning where facts were to be considered, and by impassioned appeal when the decision depended on sentiment. There was considerable use of gesticulation and a great display of dignity. Statements were concise and concrete."¹⁸

Both sides were clear that the land at issue was the Indians' land. To be sure, traditionally Indian people did not think in terms of land ownership. As Owhi, a Yakama said, the Creator "made our bodies from the earth. . . . What shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute?"¹⁹ The prevailing view among the tribal leaders, however, seemed to be an amalgam of tradition and the practical fact that the tribes were going to have to relinquish some land and, by the white man's rules, would be entitled to be paid for it. Young Chief said:

I wonder if this ground has anything to say: I wonder if the ground is listening to what is said. . . . I hear what this earth says, the earth says, God has placed me here. . . . God on

13. JOSEPHY, *supra* note 1.

14. *See, e.g.*, Official Proceedings, *supra* note 11, at 52-63.

15. *Id.*

16. *See id.*

17. *See, e.g., id.* at 64-65.

18. Herbert Joseph Spinden, *The Nez Perce Indians*, 2 MEMOIRS OF THE AMERICAN ANTHROPOLOGICAL ASSOCIATION 165, 243 (1907-1915).

19. Official Proceedings, *supra* note 11, at 58; *see also* JOSEPHY, *supra* note 1, at 317.

placing them on the earth . . . [said] take good care of the earth and do each other no harm. God said. You Indians who take care of a certain portion of the country should not trade it off unless you get a fair price.²⁰

Isaac Stevens knew, as a matter of American real property law, that the Nez Perce and the other tribes had an ownership interest in their land. When the United States resolved title to the Pacific Northwest in the 1846 treaty with Great Britain, the United States gained clear title to the region as against all foreign nations.²¹ But the United States still had a shared title with the tribes who, under Chief Justice John Marshall's 1823 decision in *Johnson v. M'Intosh*,²² were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion."²³

This Indian right of occupancy meant that tribes had a legal right to live on their aboriginal land, to hunt and fish on it, and to use the minerals, trees, and other vegetation.²⁴ The right of occupancy, while it did not require compensation if taken by the federal government, also included a legal right of possession as against the states and settlers, who would be trespassers as against the tribal title.²⁵ Under federal law, the United States could obtain title in one of two ways, by conquest — that is, war — or by purchase, the treaty-making process that federal policy preferred and that Stevens was engaged in.²⁶

The ground rules in the Walla Walla Valley in 1855, then, were well drawn. The United States had more power but the tribes had some power. The United States was there to obtain Indian land, not to give land to the tribes. The tribes already had their land, by possession and by law. They came to the negotiations as land owners and sovereigns. Given the military superiority of the United States, it was not a negotiation among equals — few negotiations are — but it was most definitely a negotiation.

20. Official Proceedings, *supra* note 11, at 55; see also JOSEPHY, *supra* note 1, at 316-17. The minutes used the term God but the speaker probably used the Yakama term for Creator.

21. Oregon Treaty, June 15, 1846, U.S.-U.K., 9 Stat. 869, T.I.A.S. 12:95 (entered into force July 17, 1846).

22. 21 U.S. (8 Wheat.) 543 (1823).

23. *Id.* at 574.

24. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 117-18 (1938). See also FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 442-43, 532-33 (1982 ed.).

25. See, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-74 (1974). The ability of the United States (but not states, or settlers) to extinguish the tribal right to occupancy was announced by the Court much later. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

26. See COHEN, *supra* note 24, at 491-93.

The Nez Perce Treaty of 1855 remains controversial within the Tribe to this day. Lawyer, a tribal chief, acted as the principal negotiator for the Nez Perce and charges persist that he was too anxious to please, that he was manipulated by Stevens. Late in the negotiations, Looking Glass, the Nez Perce war chief, arrived amidst great commotion. He had been hunting buffalo, and doing battle with the Blackfeet, across the Continental Divide. Looking Glass had raced back upon hearing of the council. "My people, what have you done? While I was gone, you have sold my country."²⁷ He proceeded to designate the reservation he thought was right. Looking Glass went to Stevens' map and with his finger drew a line precisely around the whole Nez Perce traditional territory.²⁸ But the die had been cast and it was too late in the council proceedings. The Nez Perce chiefs, including Looking Glass, signed the treaty that Lawyer had agreed to with Stevens.²⁹

The Nez Perce retained a reservation of 8 million acres, but ceded away about 5.5 million acres.³⁰ The size of this cession has caused resentment among the Nez Perce then and today. Yet, from one perspective, Lawyer and the other representatives had done well. Typically, tribes ceded away roughly eighty or ninety percent of their aboriginal land at treaty time. The Nez Perce retained sixty percent of their land. It was an impressive and, however value might be defined, a valuable tract. The 1855 Nez Perce reservation, along with the Ute Tribe's 16-million acre reservation created in western Colorado by that tribe's 1868 treaty principally negotiated by Chief Ouray, ranks among the finest tracts of land ever reserved by any Indian tribe.³¹

Further — and this would become critical in the twentieth century — the tribal negotiators were unwilling to relinquish all of their rights in the ceded area. If a tribe does not explicitly preserve rights in a ceded area, the tribe normally loses all rights in that land. So the

27. JOSEPHY, *supra* note 1, at 319.

28. See *id.* at 321. There is a question as to whether the Record of the Official Proceedings supports Josephy's version of this event. A later exchange during the negotiations between Stevens, Looking Glass, and Palmer seems to support Josephy's version:

Gov. Stevens: Looking Glass is satisfied with the Nez Perce line

Looking Glass: I said yes to the line I marked myself, not to your line.

Gov. Stevens: I will say to the Looking Glass, we cannot agree.

Gen. Palmer: I would say to the Looking Glass, what use is it to purchase his country and give it all back again.

Official Proceedings, *supra* note 11, at 77.

29. *Id.* at 79.

30. See *Nez Perce Tribe v. United States*, 18 Indian Cl. Comm'n 119, 131 (1967).

31. 1868 Treaty with the Ute Indians, Mar. 2, 1868, 15 Stat. 619 (1869). See generally ROBERT EMMITT, *THE LAST WAR TRAIL: THE UTES AND THE SETTLEMENT OF COLORADO* (1954); see also WILSON ROCKWELL, *THE UTES: A FORGOTTEN PEOPLE* (1956). See also *White River Ute Commission Investigation, before the House of Representatives*, 46th Cong., 2d Sess., H.R. EXEC. DOC. NO. 83 (1880).

Nez Perce, like other tribes who had treated with Stevens, insisted upon keeping specified off-reservation rights. Stevens and Palmer assured them several times during the proceedings that those rights would be protected.³² The 1855 treaty guaranteed to the Nez Perce Tribe, in addition to exclusive rights to take fish on the reservation, specific off-reservation rights:

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.³³

It is important to mark down the enduring role of the 1855 treaty. Although its promises of a permanent 8 million acre homeland soon were shattered, the other central structural provisions that came out of the treaty — the federal-tribal trust relationship, the recognition of Nez Perce sovereignty, and the guarantee of expansive off-reservation hunting, fishing, and gathering rights — all remain fully in place today.³⁴ And so, as one of the thousands of ironies that lace the federal-tribal relationship, a certain kind of legal stability — of which our legal system can be quite proud — protected some tribal rights while, concurrently, the Nez Perce people experienced almost incomprehensible agony and loss as momentous events continued to sweep across Nez Perce country.

II. THE 1863 TREATY

The 1855 treaty came under fire immediately. Traces of gold were found on the South Fork of the Clearwater within a year after the treaty.³⁵ Then, in 1860, refugees from the rich but increasingly crowded California fields made major finds in the Clearwater watershed.³⁶ As a Governor of Idaho later put it, the Nez Perce "reservation was overrun by the enterprising miners; treaty stipulations were disregarded and trampled under foot; towns were established thereon, and all means that cupidity could invent or disloyalty achieve were resorted to to shake their confidence in the Government."³⁷ This reservation was no longer the more limited right of occupancy held before the treaty; this was now treaty land, the Tribe's in fee simple ab-

32. See Official Proceedings, *supra* note 11, at 25, 46-50, 67, 76.

33. 1855 Treaty, *supra* note 12, at Art. III.

34. See discussion *infra* Parts IV, V.

35. See JOSEPHY, *supra* note 1, at 382-89.

36. See *id.*

37. HELEN JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES DEALINGS WITH SOME OF THE INDIAN TRIBES 118 (1885).

solute, held in a sacred trust by the United States. Nevertheless, whether it was the Cherokee in the 1820s, the California Indians in the '40s and '50s, the Sioux in the '70s, or any number of other tribes, gold had always obliterated Indian land holdings, and the Nez Perce were no exception.³⁸

The inevitable treaty came in 1863 at Lapwai.³⁹ Lawyer again took the lead in representing the Tribe. His role here, as eight years before, is clouded in controversy. He may well have been doing the best he could in the face of what amounted to a full-scale invasion by American private citizens. But we do know that the leaders of several Nez Perce bands either refused to show up or walked away from the treaty negotiations, and never had the slightest intention of seeing their valleys transferred away by surrogate signatories.⁴⁰ The minutes of the 1863 negotiations give no indication that Lawyer purported to speak for the other bands when he signed the treaty. Yet the federal commissioners pretended that all the bands had consented: as Alvin Josephy's careful research showed, "[I]n the end, a bold lie was broadcast in the assertion that the entire tribe had agreed to the treaty. That statement was conveyed to Washington without qualification."⁴¹

In all, the 1863 treaty ceded away more than ninety percent of the magnificent 8-million-acre Nez Perce reservation created in 1855, leaving some 750,000 acres east of Lewiston.⁴² The treaty expressly left in place the other provisions of the 1855 treaty, including the off-reservation fishing, hunting, and gathering rights.⁴³ Nonetheless, the document had blown apart the Nez Perce land base even though many of its chiefs had never consented. Josephy and leading historian Angie Debo both use the same word for it — "fraudulent"⁴⁴ — but fraud seldom slowed the march of expansion. Under *Lone Wolf v. Hitchcock*,⁴⁵ a treaty negotiated by the Executive and confirmed by the Senate is the Supreme law of the Land, fraud or no.

One of the chiefs who refused to attend the negotiations was Joseph the senior, leader of the band that lived across the Snake River

38. See *id.*; see also ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 158-60 (1970).

39. Treaty between the United States of America and the Nez Perce Tribe, June 9, 1863, 14 Stat. 647 [hereinafter 1863 Treaty].

40. See, e.g., Documents Relating to the Negotiations of Ratified and Unratified Treaties with Various Tribes of Indians 1801-1869, Record Group 75, Records of the Bureau of Indian Affairs, Roll 6, Ratified Treaties 1856-1863, National Archives, National Archives Records Service, General Services Administration, Washington, D.C. 30, 38, 40, 50, 60, (1960).

41. See JOSEPHY, *supra* note 1, at 421.

42. See NATURE GUIDE, *supra* note 1, at 21.

43. See 1863 Treaty, *supra* note 39, at Art. III.

44. See JOSEPHY, *supra* note 1, at 420; DEBO, *supra* note 38, at 261.

45. 187 U.S. 553 (1903).

in the high, sublime Wallowa Valley.⁴⁶ His son, also named Joseph (his Nez Perce name, Hin-mah-too-yah-lat-kekht, meant, so appropriately, Thunder Travelling to Loftier Heights) studiously followed the events. The younger Joseph lost his father in 1871: "I buried him in that beautiful valley of the winding rivers. I love that land more than all the rest of the world."⁴⁷

By then, because of the words agreed to by others in 1863, it was the land not of the Nez Perce but of the farmers, ranchers, and miners of the United States. Joseph—eloquent, sensible, and smart—tried to reason with the federal authorities, but they were insistent on enforcing the 1863 treaty. Finally, confronting the inevitability of military might, Joseph relented. He would remove to the Lapwai Reservation. Joseph and his people left the Wallowa Valley and, as the sad procession neared the reservation, combat with local settlers broke out. Young Nez Perce warriors in Joseph's party were exacting revenge for past killings and violence.⁴⁸

Thus began Joseph's epic 1300-mile march, assisted by Looking Glass the younger and other able lieutenants, studded with bravery and military genius, across the Divide, down to newly-proclaimed Yellowstone National Park, and up through central Montana nearly to the Canadian line.⁴⁹ There, in the Bear Paw Mountains, the depleted band of 418 Nez Perce, three quarters of them women and children, surrendered after a final battle that took the lives of Looking Glass and twenty-four others.⁵⁰ After eight years of imprisonment at Fort Leavenworth and in the Indian Country of Oklahoma, Joseph and the remaining survivors were returned to the Northwest. Some went to Lapwai, but Joseph and 150 others were sent to the Colville Reservation in Washington, not to Nez Perce, and certainly not to the Wallowa Valley.⁵¹

III. ALLOTMENT

Just two years after part of the Wallowa group returned to Idaho, Congress passed the General Allotment Act.⁵² The idea was to make Indians into farmers by providing every tribal member with a plot of land, usually 160 acres, carved out of the tribal reservation.

46. See JOSEPHY, *supra* note 1, at 421.

47. See DEBO, *supra* note 38, at 261.

48. See BEAL, *supra* note 1, at 45-51.

49. See generally BEAL, *supra* note 1.

50. See *id.* at 233, 258.

51. See JOSEPHY, *supra* note 1, at 624.

52. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 (1983)).

Not so incidentally, on many reservations much of the land not allotted would be declared "surplus" and opened for settlement by non-Indians.⁵³ Allotment remade Indian Country. When the Act was passed in 1887, Indian land holdings nationally totaled 140 million acres, about eight percent of all land in the Lower 48 states. By 1934, when the allotment policy was mostly abandoned, tribal land holdings had plummeted to 50 million acres, a loss of 90 million acres, an area the size of Idaho and Washington combined.⁵⁴

In 1893, the Nez Perce Tribe was forced to sign an allotment agreement — I say "forced" because, even given the inequality at treaty time, these proceedings were not the negotiations that the treaties were.⁵⁵ Federal Indian negotiators pressured Nez Perce leaders to sign. Congress enacted the document into law. Much of the reservation, euphemistically called "surplus," was taken up by non-Indian farmers.⁵⁶

Many of the allotments to tribal members, originally held in trust, passed out of Indian ownership through tax defaults (the land had been non-taxable while in trust) or sales, a good number of which were fraudulent.⁵⁷ One Nez Perce woman recalled, "I don't know what happened, but about 1920 they just shoved us away from the agency. We didn't have anything to say about it. They just gave us fee patents. We didn't have any choice. About all of us lost the land because of taxes."⁵⁸

Of those able to hold on to their allotments, few cared to forsake their traditional fishing and hunting life for farming. In 1898, the BIA agent at Nez Perce reported that only ten percent of the land was being cultivated and that white people did most of the farming.⁵⁹ Even in the face of those numbers, the agent — like so many others relentlessly optimistic in the belief that Indians could and should be turned into farmers — advanced his view that allotment was a good thing for

53. See generally VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 8-12 (1983). See also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 20 (1995); FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

54. See POMMERSHEIM, *supra* note 53, at 20.

55. See generally ALLEN P. SLICKPOO, SR., *NOON NE-ME-POO (WE, THE NEZ PERCES): CULTURE AND HISTORY OF THE NEZ PERCES* (1973). See also DEWARD E. WALKER, JR., *CONFLICT & SCHISM IN NEZ PERCE ACCULTURATION: A STUDY OF RELIGION AND POLITICS* (1968).

56. See SLICKPOO, *supra* note 55, at 220; see also BRUCE HAMPTON, *CHILDREN OF GRACE: THE NEZ PERCE WAR OF 1877* 331, 372, n.49 (1994).

57. See SLICKPOO, *supra* note 55.

58. See SLICKPOO, *supra* note 55, at 221; see also WALKER, *supra* note 55, at 78.

59. See D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 133 (1973).

the Nez Perce: "It gives the Indians a chance to be a man among men."⁶⁰

But not much of a chance. Allotment ravaged the Nez Perce reservation. Of the 750,000 acres that existed in tribal ownership in 1893, today the fragmented reservation consists of 49,252 acres held as individual trust allotments and 36,409 acres owned by the Tribe.⁶¹ The rest — 664,000 acres, or eighty-eight percent of all land within the 1863 reservation's boundaries — has been transferred to non-Indians.⁶² The Tribe had lost more than ninety-nine percent of the land that it owned when it entered the negotiations with Isaac Stevens.

I have often tried to imagine what it must have been like on the reservations in, say, the 1920s, when it was commonplace for people to make statements like the Nez Perce woman I quoted earlier, who said, "I don't know what happened, but about 1920 they just shoved us away from the agency. . . . They gave us the fee patents. We didn't have any choice."⁶³

A fee patent. No, that is an abstraction. Land. No, something more even than that. Something so sacred that the Nez Perce have regularly reacted in the fashion of Smoholla, whose Dreamer faith moved many Sahaptin-speaking people around the time that Joseph and his followers were being forced on their long trail east.⁶⁴ Smoholla began, "You ask me to plough the ground! Shall I take a knife and tear my mother's bosom? Then when I die, she will not take me to her bosom to rest."⁶⁵

A fee patent. Land. A mother's bosom. Something that can be lost by something called a notice that comes in the mail, written in a foreign language, about something new, called taxes.

I've tried to imagine the despair, the utter hopelessness, confusion, and helplessness, that grew ever deeper and reached to every corner of every reservation during the 1930s and the 1940s and 1950s, when official federal policy had quite a distinctive ring to it: termina-

60. See *id.*

61. See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 830, 902 n.139 (1996).

62. See SLICKPOO, *supra* note 55 at 221-25; see also DAVID LAVENDER, LET ME BE FREE: THE NEZ PERCE TRAGEDY 344 (1992).

63. See WALKER, *supra* note 55, at 78.

64. See JOSEPHY, *supra* note 1, at 424-26.

65. *Id.* at 426.

tion.⁶⁶ I've known many Indian people who lived through those times, and I've talked to them at length, but I know that words cannot explain the depths of it.

Yet, over the course of just two generations, American Indians have managed to push ahead, not by erasing all the grief that comes to a land-based people whose land has been mostly taken, but by achieving steady, clear progress that, in its totality and under the circumstances, is as unimaginable as was the despair that preceded it. The Nez Perce Tribe is surely one place where you can see the progress at work.

IV. THE MODERN ERA

In the late 1960s, the Nez Perce tribal government had just a handful of employees.⁶⁷ The Bureau of Indian Affairs still was the real government. But changes were in the wind. The War on Poverty, through the Office of Economic Opportunity and other agencies, was beginning to bring some resources to the Tribe. Nationally, Indian Country was beginning to buzz with the possibilities of breathing life into tribal sovereignty, the trust relationship, and resource rights.⁶⁸

Three decades later, the revolution in Indian Country is well in evidence at Nez Perce, where the Tribe, rather than the BIA, is most definitely the sovereign. The modern Nez Perce government includes, among other things, a large and growing health-care program, a substantial Headstart project, a tribal court, an on-reservation attorney's office, two new gaming operations, a loan program for tribal members, a tribal housing project, and many other social programs.⁶⁹ Significant problem areas remain — among them, low income, high unemployment, and health problems, including alcoholism — but by any standard, the Nez Perce have made a dramatic resurgence by reversing a seemingly hopeless situation and restoring a considerable part of the Tribe's dignity and independence.⁷⁰ At Nez Perce, and among tribes nationally, there is no better place to see the progress as well as the dedication and hard work that made it possible, than in the area of natural resources.

66. See, e.g., DELORIA, *supra* note 53, at 15; Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977).

67. Telephone Interview with Del White, Nez Perce Tribal Executive Committee member and longtime Nez Perce Tribe employee (Apr. 27, 1998) (The tribal government has grown from "a mom and pop store to a supermarket" since the 1970's.).

68. See, e.g., DELORIA, *supra* note 53, at 103.

69. See generally NEZ PERCE TRIBE, REPORT TO THE NEZ PERCE TRIBAL GENERAL COUNCIL, May 2-3, 1997 [hereinafter NEZ PERCE REPORT].

70. See *id.*

In the mid-1960s in the Pacific Northwest, the first priority for the tribes was salmon. The states, showing contempt for the treaties, had been cracking down on Indian fishermen, calling them poachers and renegades. The runs had plummeted and the cry went out — never mind the dams — that the fault lay with overfishing by the tribes. Indian fishermen refused to abandon the grounds their ancestors had fished for thousands of years, suffering arrests and confiscation of their gear.⁷¹

The Nez Perce and the other Columbia River tribes moved for court enforcement of their treaty rights. In 1968, a Yakama fisherman named David Sohappay filed suit against the Oregon state fish commissioner to establish the Tribe's off-reservation rights.⁷² Shortly thereafter, the federal government, which supported the tribes and the treaties as trustee, filed *United States v. Oregon* to enforce the treaties.⁷³ The tribes were now ready to shed the passivity that had characterized Indian Country ever since allotment. The Nez Perce joined with the other three tribes, the Yakama of Washington and the Warm Springs and Umatilla of Oregon, that fished at off-reservation sites on the Columbia River from Bonneville Dam up to the mouth of the Umatilla River. The four tribes intervened in *United States v. Oregon*, which was then consolidated with *Sohappay v. Smith*.⁷⁴

The tribes won a key victory in 1969 in *Sohappay v. Smith*, where Judge Belloni held that the off-reservation fishing rights, as guaranteed in the tribes' 1855 Stevens treaties, remained valid.⁷⁵ Further, the tribes had an allocation right to a "fair share" of the runs.⁷⁶ Then, in litigation involving the western Washington tribes, United States District Judge George Boldt quantified the "fair share" formulation: In 1974 Judge Boldt held that the tribes were entitled to the opportunity to take fifty percent of the runs at their off-reservation sites.⁷⁷ In 1975, the Ninth Circuit Court of Appeals affirmed Judge Boldt's ruling.⁷⁸

71. See AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS (1970).

72. *Sohappay v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

73. See FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 78 (1986) [hereinafter TREATIES ON TRIAL].

74. See *id.*

75. 302 F. Supp. at 911.

76. *Id.*

77. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

78. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

The Columbia River tribes reached a comprehensive settlement on the Columbia in 1977.⁷⁹ Issues involving seasons, harvest of specific runs, and escapement were all addressed. In 1979, in appeals involving tribes in western Washington, the United States Supreme Court definitively ruled on the off-reservation rights in the Stevens treaties.⁸⁰ The Court approved Judge Boldt's ruling in all major respects, declaring the treaties valid and that the tribes possessed a treaty right to harvest fifty percent of the runs.⁸¹

The Nez Perce and other tribes moved into a new phase. Now, although many legal skirmishes remained, the tribes would place heavy emphasis on resource management, both of inriver matters involving the dams and of habitat protection throughout the Columbia River Basin. In 1977, the tribes took an innovative and historic step by pooling their resources to create the Columbia River Inter-Tribal Fish Commission.⁸² CRITFC, with a strong staff of biologists and other scientists, quickly gained respect for its data on the salmon runs. Today, it has a budget of \$7 million and sixty full-time employees in Portland, as well as twenty enforcement officers. CRITFC is an integral part, as co-managers along with state and federal agencies, in the complex effort to protect the salmon in a river system that once seemed to have no bounds to the electricity it could produce.⁸³

It is not commonly realized the extent to which tribes have committed themselves to scientific resource management. In Washington, the sister consortium to CRITFC is the Northwest Indian Fisheries Commission, formed by twenty tribes.⁸⁴ Among many other programs, the NWIFC has a state-of-the-art laboratory specializing in fish genetics and fish health. All the Washington tribes also have developed their own on-reservation fisheries capabilities. In total, considering both NWIFC and individual tribes, Washington tribes employ approximately 200 biologists.⁸⁵ Extraordinarily, especially considering

79. A Plan for Managing Fisheries on Stocks Originating from the Columbia Rivers and its Tributaries Above Bonneville Dam (1977) (entered into pursuant to *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969)).

80. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

81. See *id.*; see also *TREATIES ON TRIAL*, *supra* note 73, at 83.

82. See Columbia River Inter-Tribal Fish Commission (CRITFC), *Wy-Kan-Ush-Mi-Wa-Kish-Wit: Spirit of the Salmon*, July 1996, at 2-10 [hereinafter *Spirit of the Salmon*].

83. Telephone Interview with Tom Backman, Fish Biologist with CRITFC (Sept. 26, 1997). See also CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN* 213 (1992).

84. See, e.g., NORTHWEST INDIAN FISHERIES COMMISSION FY 1996 OVERVIEW (NWIFC, Olympia, WA); see also NORTHWEST INDIAN FISHERIES COMMISSION NEWS, Vol. XVII, No. 1 (NWIFC, Olympia, WA), Winter, 1997.

85. Telephone Interview with Fran Wilshusen, Water Resources Coordinator, Northwest Indian Fisheries Commission (Sept. 26, 1997).

the limited tribal resources, the tribal biologists comprise nearly half of all government biologists, federal, state, and tribal, in the State of Washington.⁸⁶

The tribal movement toward professional resource management is all the more remarkable when we recall the state of Indian country just a generation ago. In the mid-1970s, few tribes had any natural resources departments at all, and if they did, almost all of the staffs were skeletal. What would be the state of our lands and waters in the American West if the federal and state governments were willing to commit such a large percentage of their financial resources to natural resources management?

The Nez Perce Tribe is a leading example of the tribal commitment to protect natural resources. In addition to the capability of the Columbia River Intertribal Fish Commission, the Tribe has a Natural Resources Department with more than 150 employees, approximately 100 of whom work in fisheries. About one-half are professionals — biologists, archaeologists, soil conservationists, foresters, and other disciplines.⁸⁷ The Department has many responsibilities, some of which will be alluded to shortly, and its scope is very substantial. The Tribe is a primary grantee, in the amount of more than \$4 million annually, from the Bonneville Power Administration, for salmon habitat restoration in the Columbia watershed.⁸⁸ Thus, the Tribe is deeply involved in riparian habitat recovery, hatchery production, marking and monitoring of fish, flow regimes, and other management programs.⁸⁹ The Natural Resources Department has begun a Nez Perce language program, works on archaeological projects on the Columbia River and the Nez Perce National Historical Trail, and is reintroducing the traditional horse culture to the youth.⁹⁰

Also, the Tribe has contracted with the U.S. Fish and Wildlife Service so that the Tribe will manage the gray wolf reintroduction program for the entire state of Idaho.⁹¹ When I discussed this program with Jaime Pinkham, the tribal council member who oversees the program, he told me about it at length, concluding by saying that thirty-four wolves had been originally released and that, with five pups this spring, the wolf numbers have risen to fifty-eight. I commented to Jaime, who is quite a formal and restrained person, that he

86. *Id.*

87. Telephone Interview with the Natural Resources Department of the Nez Perce Tribe (Sept. 25, 1997).

88. See NEZ PERCE REPORT, *supra* note 69, at 9.

89. See, e.g., *Spirit of the Salmon*, *supra* note 82.

90. See Richard Peterson, *Nez Perce Trail of Self-Discovery: Horses Help Native American Students Stay on the Path to Learning*, U.S.A. TODAY, Aug. 6, 1997, at 4D.

91. Telephone Interview with Jaime Pinkham, Treasurer, Nez Perce Tribe Executive Committee (Sept. 3, 1997).

should hear the excitement in his voice when he talked about the wolves. We were on the phone, but I could see the smile on his face, when he replied, "Boy, I guess you must be right about *that*."⁹²

V. THE NEZ PERCE TRIBE AND THE FOREST SERVICE

Even this sampling of the tribal responsibilities — which also include a major reserved water rights claim in the Snake River Basin Adjudication — shows how many irons the Nez Perce Tribe has in the fire with respect to natural resources. At the forefront of these responsibilities are the national forests. For millennia the Clearwater and Salmon Rivers had been glory country for the Nez Perce. Most of that high country is now in national forests.

The Nez Perce situation is different from that of any other tribe and is most complicated. Tribal aboriginal lands reach into five national forests: the Clearwater, Umatilla, Nez Perce, Payette, and Wallowa-Whitman. They are spread across three agency regions, with offices in Missoula, Provo, and Portland. The hunting is still good, as is the gathering. The fishing has been devastated but the forests hold many traditional fishing sites and, fundamentally, serve as the watershed for numerous runs upon which the Tribe depends and wants to restore.⁹³

Much to the Forest Service's credit, it has developed a unique and creative administrative structure to facilitate relationships with the Nez Perce. By the mid-1980s the Tribe had raised a number of grievances with the agency. Understandably, the five forests and three regions had difficulties responding in a satisfactory way. It seems to have been Tom Kovalicki, Superintendent of the Nez Perce National Forest, who in 1990 had the idea of establishing a special Forest Service liaison office for the Nez Perce.⁹⁴ The office, with the salary being paid by the Forest Service, was created in 1991. There was no appointment of a "token Indian" to fill it. The liaison position is ably filled by Allen Pinkham, former tribal chairman and a direct descendant of both Chief Joseph and Looking Glass. For both real and symbolic importance, his office is located in the tribal headquarters in Lapwai.

92. *See id.*

93. *See Spirit of the Salmon*, *supra* note 82.

94. Telephone Interview with Jaime Pinkham, Treasurer, Nez Perce Tribe Executive Committee (Sept. 24, 1997).

The Tribe and the Forest Service reached a Memorandum of Understanding in 1992.⁹⁵ Two-day conferences were held in 1991 and 1993. I attended the one in 1993 and was impressed both by the high number of Forest Service employees who attended and by their interest and sincerity.

The agency has also taken steps on a national and regional level. In 1994, President Clinton, in response to requests from tribal leaders, issued a memorandum to all federal agencies acknowledging the government-to-government relationship with tribes and directing all agencies to examine their policies in order to assure that they will be fulfilling the government-to-government relationship.⁹⁶ The national office and several regions in the Forest Service had already adopted Indian policies, but Clinton's memorandum seemed to increase the agency's attention to the issue. In 1997, the Forest Service issued a *Forest Service National Resource Book on American Indian and Alaska Native Relations*.⁹⁷ It is general in many respects, but it is far more accurate and fair with respect to tribal rights than anything the Forest Service, or most other agencies, had previously put out. The government-to-government relationship with tribes is evolving rapidly within the Forest Service.

Nevertheless, as developmental pressures increase, and as tribal capabilities grow, tribes nationally have gradually been asserting their rights more actively in the national forests, especially in the Pacific Northwest and Great Lakes area, where most of the off-reservation rights exist.⁹⁸ The Nez Perce Tribe and the national forests within its aboriginal territory are a leading example of this.

95. Memorandum of Understanding Between the Nez Perce Tribal Executive Committee and the Umatilla, Clearwater, Nez Perce, Payette, and Wallowa-Whitman National Forests, Jan. 14, 1992 (on file with author).

96. See William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) cited in MARY CHRISTINA WOOD, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 749 (1995).

97. See FOREST SERVICE, U.S. DEPT OF AGRICULTURE, *FOREST SERVICE NATIONAL RESOURCE BOOK ON AMERICAN INDIAN AND ALASKA NATIVE RELATIONS* (1997).

98. See, e.g., *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927-28 (8th Cir. 1997); *Lac Courte Oreilles Band v. Wisconsin*, 760 F.2d 177 (7th Cir. 1985); *Kimball v. Callahan*, 493 F.2d 564, 570 (9th Cir. 1974); *Klamath Tribes v. United States Forest Service*, 1996 WL 924509, Civil No. 96-381-HA (D. Or. 1996).

VI. CURRENT DISPUTES BETWEEN THE TRIBE AND THE FOREST SERVICE

The Nez Perce Tribe and the Forest Service have achieved real progress in several areas. Many of the tribal stream restoration projects, designed to bring back the salmon, have been done in the national forests with solid Forest Service cooperation.⁹⁹ The agency also has worked well with the Tribe in its ambitious wolf restoration program.¹⁰⁰ All agree that the Nez Perce National Historical Trail, a joint project of the Forest Service, Park Service, and Bureau of Land Management, has been a major success. The interpretative work along the 1200-mile route from the Wallowa Valley to the Bear Paws has required an enormous amount of research with the Nez Perce, who are deeply knowledgeable about the event that General William Tecumseh Sherman called "the most extraordinary of Indian wars."¹⁰¹ As a general matter, all relations between the Nez Perce and the Forest Service are bettered by the agency's creation of the tribal liaison office.

Yet significant issues remain and they are ones that the Tribe will press with ever-increasing urgency. Two are preeminent. The first involves whether tribal members must pay fees, and be bound by stay limits, when they camp at Forest Service campgrounds while exercising treaty fishing, hunting, and gathering rights within traditional use areas. The second issue involves the nature of the Forest Service's obligation to protect tribal treaty resources, particularly salmon, when the agency engages in resource development, especially timber harvesting.

The heart of the problem involves reconciling the prerogatives and missions of two of the American West's most important and distinctive entities, Indian tribal governments and the Forest Service. I have already recounted some aspects of the Nez Perce Tribe's history, traditions, and local rights. The Forest Service, so well known in the West, needs less of an introduction, but let me say this about the agency, which I have had the pleasure of writing and teaching about, and serving as an informal and sometimes formal advisor to, for more than twenty years.

99. Examples of successful cooperative projects include fish passage improvement and riparian protection on Lolo Creek, sedimentation pond construction on the Haysfork/Glory Hole, riparian protection on McComas Meadows, road obliteration on Pappoose/Squaw Creek, and the Johnson Creek Restoration Project.

100. See generally Jim Robbins, *Return of the Wolf: A Biological Recovery Becomes a Cultural Victory for the Nez Perce Tribe*, WILDLIFE CONSERVATION, Apr. 1997.

101. See FOREST SERVICE, NAT'L PARK SERVICE, BUREAU OF LAND MANAGEMENT, PAMPHLET NO. R1-94-108, NEZ PERCE NATIONAL HISTORIC TRAIL (1994).

The national forests were first created in 1891, and, during the first part of the twentieth century, rose to prominence under the executive orders of Theodore Roosevelt. President Roosevelt designated nearly 150 million acres of national forest land, three-quarters of the present system.¹⁰² At least as important was the visionary Gifford Pinchot, who instilled a mission and sense of idealism. These were America's best lands and would serve a great many of the public's needs in the generations and centuries to come. The Forest Service, as stewards, would govern these lands through high-quality professional land management.¹⁰³

Pinchot's vision became real-world fact and, even today, the Forest Service is rightly honored for the quality and integrity of its employees. The agency still gets the cream of the crop from the natural resources colleges. Since World War II, however, even as the quality of the agency remained high, the luster has dimmed. By 1965, the national timber harvest soared to 11 billion board feet a year, eleven times higher than in Pinchot's days, and the Forest Service took on a bias toward timber production as part of its institutional personality.¹⁰⁴ The cut had to get out first, then the other needs would be met.

A related problem, an insularity from public opinion and values, emerged. The idea that forest professionals know best has worn increasingly thin in a nation where public officials are expected to be held accountable to the public will. This is especially true in the American West, which has boomed from 17 million people to 57 million since World War II and which is defined in considerable part by the deep forests over which people expect to have their say.¹⁰⁵

Since 1989, Congressional appropriations and court injunctions have driven the cut down from 11 billion board feet to 4 billion, but deep concerns remain about the impacts of long-term, high-yield forestry.¹⁰⁶ Nowhere is this more true than in central Idaho, where the national forests are the critical watersheds for wild salmon and steelhead and the quicksilver majesty and inspiration — the life — they give to the rivers. The Forest Service remains a capable agency, and timber domination is receding in favor of a broader view of what a forest is, but a bias toward timber production still skews many decisions.

102. See CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 18 (1987).

103. *Id.*

104. See *id.*; see also *West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945, 954 (4th Cir. 1975).

105. See Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, and the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 670 (1997).

106. *Id.* at 682.

On the issue of the campgrounds, Nez Perce people — at least a hundred, perhaps more — use the national forests with some regularity (others prefer to use places on the reservation or, for fishing, on the Columbia or at other sites not within the forests).¹⁰⁷ The main purposes are fishing for salmon, hunting, mostly for deer and elk, and gathering for such items as huckleberries, kowse, camas, and bear grass. For the Forest Service, the rules are sensible as general public policies: the fees (\$5.50 per day per camp site) help defray maintenance expenses and the stay limits (14 days) prevent "hogging" of choice spots. From the Nez Perce side, the policies violate the treaties and amount to an affront to their traditional uses. There is also a practical aspect to the fees issue: the Tribe's two casinos have brought in some jobs, but unemployment remains at 28%.¹⁰⁸

After the Nez Perce brought the issue to a head in the 1980s, Region One of the Forest Service requested a formal opinion from the Office of General Counsel in the Department of Agriculture.¹⁰⁹ The Forest Service memorandum to legal counsel stated that "it is the position of the three Forests in this Region that free camping by Tribal members is not provided in the Treaty of 1855. . . . We feel the Tribe is subject to the same reasonable rules . . . as they apply to the public in general."¹¹⁰

In 1992, the Office of General Counsel wrote an opinion upholding the Forest Service's position.¹¹¹ The quixotic opinion cited only one case on point, *United States v. Kipp*,¹¹² which struck down an entrance fee to Glacier National Park, asserted against Blackfeet treaty hunters. One doubts that the opinion was discussed with tribal attorneys or, for that matter, with experts in Indian law such as those in the Solicitor's Office in the Interior Department.

The two leading cases, neither of which is cited in the OGC opinion, are *United States v. Winans*¹¹³ and *Tulee v. Washington*,¹¹⁴ both United States Supreme Court opinions construing the 1855 Yakama treaty. The Yakama treaty is, of course, one of the Stevens treaties, with relevant off-reservation rights language identical to the Nez

107. Telephone Interview with Allen Pinkham, Forest Service Liaison to the Nez Perce Tribe (Sept. 23, 1997).

108. *Id.*

109. See Memorandum from John T. Drake, Director of Wilderness, Recreation, and Cultural Resources, Region I, to the Office of the General Council (Sept. 18, 1991) (on file with author).

110. *Id.*

111. Nez Perce Tribe Off-Reservation Reserve Gathering Rights, Opinion of the Deputy Regional Attorney (Jan. 28, 1992).

112. 369 F. Supp. 774 (D. Mont. 1974).

113. 198 U.S. 371 (1905).

114. 315 U.S. 681 (1942).

Perce treaty. In *Winans*, the question was whether Yakama tribal members could fish at traditional off-reservation fishing sites within their aboriginal territory that had since been transferred to homesteaders by federal patents. The patents made no mention of Indian off-reservation rights.

"[T]he treaty," the *Winans* Court found in upholding the rights, "was not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted."¹¹⁵ "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."¹¹⁶ The Court then made it clear that the off-reservation rights are real property rights: "They imposed a servitude upon every piece of land as though described [in the treaty.]"¹¹⁷ The "servitude" the Court spoke of has since been described as including both a profit (a property right to take natural resources from the land of another) and an easement (a property right to cross the land of another).¹¹⁸

In 1942, the Court visited a narrower issue, nearly identical to the Forest Service situation, in *Tulee*. The question was whether the State of Washington could require a license fee from Yakama fishermen.¹¹⁹ The Court held that the 1855 treaty "forecloses the state from charging the Indians a fee of the kind in question here," adding that "the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve."¹²⁰

Tulee involved a state fee, and there are ways that federal authority over Indians differs from state authority, but I see nothing that would make *Tulee* inapplicable to the Forest Service fee and time limit restrictions. To be sure, Congress could abrogate the Nez Perce treaty rights (although there is no likelihood that such a thing would happen), but the Forest Service has no such authority.¹²¹ *Winans* and *Tulee* have both been approved in modern times.¹²²

115. 198 U.S. at 381.

116. *Id.*

117. *Id.*

118. *See, e.g., COHEN, supra note 24, at 450.*

119. *Tulee*, 315 U.S. at 682.

120. *Id.* at 684-85.

121. Only Congress has the authority to abrogate Indian treaties, *see, e.g., United States v. Dion*, 476 U.S. 734 (1976), and the courts will strike down agency action contrary to Indian rights when the agency has acted outside of its delegated authority. *See, e.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (under the general public land

Another point raised by the Forest Service, that recognizing a special status for Indians would violate the equal protection guarantee, is a matter that many fair-minded people have wondered about. Constitutional law, however, is clear on the subject. Treaties were negotiated on a government-to-government basis between sovereign Indian tribes and the United States. Treaties with Indian tribes, as a matter of constitutional law, are no more race-based than are treaties with China or Mexico.¹²³ Such treaty rights are not racial classifications but are contract and property rights reserved by one government in negotiations with another government.¹²⁴

I should underscore the nature of the access right in the national forests under the 1855 Nez Perce treaty. The National Park Service has made many accommodations to Indian traditional people. Examples include waiving the entrance fees at Glen Canyon National Recreation Area for local Navajos, allowing some gathering of cactus at Saguaro National Park by Tahono O'odam people, allowing private ceremonies for Pueblo people at Anasazi sites in Grand Canyon National Park, and, out of respect for Indian religions, requesting tourists not to walk under Rainbow Bridge or climb Devil's Tower in Wyoming during the month of June.¹²⁵ But all of these accommodations were made in aboriginal lands that had been ceded without any tribal reservation of rights. Because special tribal rights normally cease unless off-reservation rights are expressly reserved in a treaty, the Park Service made these accommodations, not because treaties required it to, but as a matter of good departmental policy. The Park Service took these steps because the tribes were former owners of the lands in question and because the traditional religions are important, and have intrinsic value. "The Park Service," Robert Arnberger once told me, "is a protector of ideas as well as land."¹²⁶

laws, the Secretary of the Interior cannot dispose of tribal lands); *Cramer v. United States*, 261 U.S. 219 (1923) (attempt to convey Indian land to a railroad through a federal land patent is void). See generally, COHEN, *supra*, note 24, at 225-28.

122. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 (8th Cir. 1997); *United States v. Washington - Phase II*, 506 F. Supp. 187 (W.D. Wash. 1980); see also *Northwest Sea Farms, Inc. v. United States Army Corps of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996).

123. See *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

124. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979); see generally COHEN, *supra* note 24, at 653-658.

125. Telephone Interview with Patricia Parker, Chief, American Indian Liaison Office, National Park Service, (Sept. 29, 1997). See also Chris Smith & Elizabeth Manning, *The Sacred and Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997, at 1.

126. Interview with Robert Arnberger, Superintendent, Grand Canyon National Park, in Denver, Colo. (Mar. 1997).

Thus it may well be that the Forest Service should voluntarily accede to the Nez Perce campground requests as a matter of good policy, out of respect for history and former land ownership. But the Nez Perce situation is different. The treaty did reserve expansive property rights, which remain fully in force.

The three Forest Service regions dealing with the Nez Perce seem willing to keep their minds open on this issue. Jim Caswell, Supervisor of the Clearwater National Forest, will request a new opinion from the Office of General Counsel on the matter of campground fees and stay limits.¹²⁷ My guess is that a fresh look will result in a very different assessment.¹²⁸ But this is part agency politics as well as law; emotions within some sectors of the Forest Service run deep, and it takes study and learning to appreciate the stature of Indian treaty rights. In November, 1996, the Regional Forester for the Southwest Region wrote this to the Regional Forester in Missoula:

We believe that to extend this right to camp at developed sites without charge and without a stay limit is an unsustainable and unsupportable expansion of those rights. . . . If we were to enter into an agreement with the Nez Perce, why would we expect their demands to stop at campgrounds? . . . These demands not only raise the legal question of treaty rights but also the legal issue of equal protection under the equal protection clause of the Constitution. We doubt treaty rights supersede the constitutional rights of all citizens to equal protection.¹²⁹

The second current issue involves the extent of the Forest Service's duty to manage the national forests in a manner that protects treaty rights. The question is presented most starkly with respect to

127. See Letter from James L. Caswell, Forest Supervisor, Clearwater National Forest, to Samuel N. Penney, Chairman, Nez Perce Tribal Executive Committee (May 20, 1996) (on file with author).

128. Since the Bellwood Lecture was given, upon which this article is based, the Nez Perce Tribe and the Forest Service have completed negotiations resulting in a Memorandum of Understanding (MOU). See Memorandum of Understanding Between the Nez Perce Tribe and the Northern Region, Intermountain Region, and Pacific Northwest Region of the United States Department of Agriculture, Forest Service, R-4 Agreement No. 30-MOU-98-001, May 5, 1998. The MOU will waive camping fees and stay limits for tribal members on the National Forests which are located within the 1855 Nez Perce Treaty lands. The MOU has been signed by the Chairman of the Nez Perce Tribe and is in force. While it evidences significant progress, the MOU does not finally resolve the issue. The MOU will be reviewed annually and either party can terminate the agreement at any time. See *id.* at ¶15.

129. Memorandum from Charles W. Cartwright, Jr., Regional Forester, Southwestern Region, to Region One Forester Regarding Nez Perce Tribal Relations (Nov. 7, 1996) (on file with author).

the impact of timber harvesting and road building on the salmon runs.

As a continuation of the process that began with the Northwest Forest Plan, which dealt with the spotted owl habitat in the so-called "westside" forests, the Forest Service and BLM are now preparing a plan — the Interior Columbia Basin Ecosystem Management Plan — that will govern activities on the "eastside."¹³⁰ A draft Eastside EIS was completed in April 1997, and the agencies are deep into completing the final EIS.¹³¹

The draft plan took the position that the agencies' duty is only to maintain the viability of all species. Basically, viability is the standard for keeping a species off the endangered and threatened species list.¹³² The tribes believe, on the other hand, that the treaties require a higher standard: in their view, the United States, as trustee, must take actions to provide for harvestable runs of salmon — not just viable runs, but strong, healthy runs that will allow for a harvest of fish by both Indian and non-Indian fishers as well as sufficient escapement to maintain the runs' viability.¹³³ There is deep opposition to the harvestable-runs standard among some Forest Service leaders because it might well reduce the timber cut by, for example, reducing or eliminating cutting in roadless areas and requiring conservative buffer zones, say, 300 feet on each side of perennial streams.¹³⁴

The treatment of the issue in the draft Eastside EIS reflects the agency's discomfort with recognizing special treaty rights that are different from the rights of other groups. The result is a schizophrenic document. In one place, the draft EIS says that "agencies must carry out their activities in a manner that protects Indian trust assets, avoids adverse impacts when possible, and mitigates impacts where they cannot be avoided."¹³⁵ Anadromous fish runs are expressly included as "trust assets."¹³⁶ Yet, elsewhere the document concludes that "trust responsibilities remained undefined" and that the trust obligation and treaty rights amount only to a "procedural duty" fulfilled through a "government to government consultation process with tribal governments."¹³⁷ In other words, the trust and the treaties re-

130. See U.S. DEPT OF AGRIC., FOREST SERVICE, U.S. DEPT OF THE INTERIOR, & BUREAU OF LAND MANAGEMENT, EASTSIDE DRAFT ENVIRONMENTAL IMPACT STATEMENT (Vols. 1 & 2) 1997) [hereinafter EASTSIDE DRAFT].

131. See *id.*

132. See generally Wood, *supra* note 96, at 733, 794-800.

133. See *id.*; see also *Spirit of the Salmon*, *supra* note 82, at v (stating as an objective the restoration of "anadromous fishes to historical abundance in perpetuity").

134. See, e.g., *Spirit of the Salmon*, *supra* note 82, at Chart 5B-8.

135. EASTSIDE DRAFT, *supra* note 129, at 2-219.

136. *Id.* at 2-218-19.

137. *Id.* at 2-219.

quire no substance, only consultation — just as with all citizen groups. Then, when the draft Eastside EIS reaches the harvestability issue, it concludes that “[t]he extent to which there may be a legal obligation imposed on the Federal government to provide” harvestable runs to fulfill tribal treaty rights “is not an issue which will be resolved in this document.”¹³⁸

Granted, this is an exceedingly difficult question with a great many ramifications. It may well be the single most important issue in the entire plan for it directly affects federal land management activities throughout most of the Interior Columbia Basin. How, then, can the agencies possibly conclude that it will not be decided in the plan? Of course, the real answer is that the issue has been decided: the agencies will in fact manage according to the lower viability standard, thus rejecting the strongest single basis for protecting the salmon, the Endangered Species Act included.

At this point, a few things need to be said. In many respects, the draft Eastside EIS treats Indian issues in a detailed, serious, and responsible way. The document could not have been written even a few years ago. The Forest Service and the BLM, due to tribal perseverance, professionalism, and an influx of new personalities and ideas at all levels of the two agencies, are being responsive to Indian concerns in ways never seen before.¹³⁹ But that cannot justify what is ultimately another bow to the idea that tribes are just another user group without special legal rights. Nor can recent and impressive progress justify ducking an issue of such transcendent importance to the land, rivers, and people of the Interior Columbia Basin.

In fact, the tribes have the better of the argument over harvestability. The Supreme Court has never squarely ruled on the question but several lower courts have handed down strong trust and treaty opinions on similar issues.¹⁴⁰ Just one opinion, which does not directly involve federal activities, held to the contrary.¹⁴¹

The case most closely on point came down in October 1996. In *Klamath Tribes v. United States Forest Service*,¹⁴² the Tribe challenged timber sales in the Winema and Fremont National Forests in Oregon on the ground that the sales violated off-reservation hunting, fishing, trapping, and gathering rights under the 1864 treaty. District

138. *Id.* at 2-222.

139. See discussion *supra* pp. 19-20.

140. See *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985); *Northwest Sea Farms v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Confederated Tribes of the Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

141. *Nez Perce Tribe v. Idaho Power Co.* 847 F. Supp. 791 (D. Idaho 1994).

142. 1996 WL 924509, Civil No. 96-381-HA (D. Or. 1996).

Judge Haggerty noted that the courts have not defined "the precise scope of the federal-Indian trust relationship" but that "[t]here is no doubt . . . that the government's trust responsibility extends to the protection of treaty rights."¹⁴³ There is, the Court concluded, a procedural duty to consult with tribes "to avoid adverse effects on treaty resources."¹⁴⁴ "Moreover, the federal government has a substantive duty to protect 'to the fullest extent possible' the tribal treaty rights, and the resources on which those rights depend."¹⁴⁵ The court then issued an injunction against the timber sales.

There is a sensible mechanism for the Forest Service (along with the BLM in the case of the Eastside Plan) to resolve the campground issue and the viability-harvestability issue, which seems so fundamental to the whole Eastside Plan that a reviewing court might well require reconsideration if the agency does not resolve it in the final plan.

In June 1997, Interior Secretary Babbitt and Commerce Secretary Daley issued a joint secretarial order, national in scope, on tribal rights and the ESA.¹⁴⁶ The order was negotiated over a period of six months between a delegation of high-level administrative officials and a broad-based tribal delegation. It happens that Nez Perce tribal council member Jaime Pinkham and I both participated in these negotiations on the tribal side. I raise the possibility of using the tribal-ESA process here, not out of any pride of authorship in what was a classic group effort, but simply because the process, which has been widely praised as a model for the government-to-government relationship, achieved the goals of both parties and my guess is the same could well be true here.

The tribal rights-ESA process was a formal negotiation in which protocols were jointly developed to guide the proceedings. Critically, both sides had full opportunity to present their perspectives.¹⁴⁷ This was especially important for the tribes, whose perspectives were history-based, legally complex, and, for most people new to Indian policy, counter-intuitive. The issues were at least as difficult and sweeping, both scientifically and politically, as the viability-harvestability issue. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the two agencies that administer the ESA), like the Forest

143. Civil No. 96-381-HA, at 20.

144. *Id.* at 21.

145. *Id.*

146. American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, Secretarial Order No. 3206, June 5, 1997; *see also* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063 (1997).

147. *See* Wilkinson, *supra* note 146.

Service, are passionately committed to their particular statutory missions. Those agencies, like the Forest Service, did not initially think of themselves as agencies that in some situations must, as trustees, administer Indian policy and treaties.¹⁴⁸

The negotiations over "harmonizing" the ESA and tribal rights were hard and long. But, like all good negotiations, they avoided conflict by crafting a fair, highly practical approach that satisfied the parties and that established a solid working relationship based on mutual respect and understanding.

In all government-to-government relationships, there are times for consultation and times for negotiations. There is a huge difference between the two. In recent years the Forest Service has acknowledged its duty to consult. Now it is time to acknowledge the duty to negotiate in the right circumstances. In the case of the campground issue, a solution acceptable to both sides may have emerged precisely because the parties negotiated a memorandum of understanding, which will be reviewed annually.¹⁴⁹ Government-to-government relations need to continue as the memorandum is implemented and need to be employed in a serious way on the harvestability issue through federal-tribal negotiations.

VII. CONCLUSION

In 1855, the Nez Perce deliberately and forcefully preserved its rights to hunt and fish and gather on all the lands it relinquished, and all the later relinquishments of land kept that original promise in place. Forty-six years later, Congress gave the President authority to proclaim national forests. But the treaty rights remained unimpaired. Congress can eliminate these treaty rights, just as it can eliminate any property rights within this nation, but it has never done so. The treaties came first and the national forests are subject to them. The treaties, every bit as much as the Organic Act of 1897, the National Forest Management Act, and the National Environmental Policy Act, are among the fundamental laws that the Forest Service must obey and administer.

The treaty rights, and the sovereignty that underlies them, are not some kind of latter-day lawyers' trickery. Fishing really *was*, as the United States Supreme Court put it, not much less necessary to Indian people than the atmosphere they breathed.¹⁵⁰ They would not, and did not, agree to give it up. And the Nez Perce are and have al-

148. See Wood, *supra* note 96, at 770-800.

149. See *supra* note 128.

150. *Winans*, 198 U.S. at 381, quoted in text at note 116, *supra*.

ways been a real government. Ask any political scientist or anthropologist who has studied their long history. Go to a tribal council meeting in Lapwai today.

When we take the time to look close and long, why would we give a lesser dignity to a Nez Perce treaty right, which is property, than to a hardrock mining claim, a grazing lease, or a timber contract? Does not the treaty right have at least the same dignity? Is it not quite easy to conclude that the treaty right has a higher dignity?

Why would the Forest Service just consult, rather than negotiate, with the Nez Perce government? Does not the Forest Service sometimes negotiate, as well as consult, with a mining company, a ranch, a timber company, and the state? Why not with the Tribe? Why does not the Forest Service view the Nez Perce as a co-manager, as do the federal and state agencies on the Columbia?

In a certain sense, the answers may lie less with the Forest Service and more with the Tribe. After the treaties, the tribes were kept down so long, more than a century, living in the far, shadowy corners of our society. Then, in modern times, the tribes somehow put together one of the most inspiring social movements in this or any other century. Yet the essential accomplishment of reinvigorating sovereignty meant that the Nez Perce, like the other tribes, had a great deal to do: fight a gut-wrenching poverty, heal the ravages from the bottle we brought here, cure new kinds of diseases, fend off discrimination in the schools and the workplaces, build up the infrastructure of government, and heal the mainstem to the River of the West.

In time the Nez Perce Tribe has come to the Forest Service. Now, in the 1990s, this proud and principled agency has learned that the old negotiated laws are laws governing the Forest Service and that the tribes are sovereigns in government-to-government relationships with the Forest Service.

Negotiations are needed on some, but not all, subjects because Forest Service officials, like any officials, need to explore the whole context — all the facts and history, all the laws and policies and positions, all the equities, and all the possibilities. Taking the time to know those things, especially the possibilities, is what builds the essential trust and flexibility that allow negotiations to succeed.

I recognize that tribes are not always easy for Anglo institutions to deal with. Tribal leaders are busy and stretched too thin. Indian people often can be suspicious and insular. One tribal leader said to me, "This may be hard to believe, but I'm telling you that my people are still terrified of white people." However, another told me, "If they show us the respect of coming to the reservation and drinking a lot of

coffee, the trust will come." More and more Anglo institutions are learning that.

In the end, the ultimate fact about the Nez Perce Tribe is that the Indian way lives on. Our society is not a land-based society. Nez Perce society is. Most of us do not know the places where our ancestors lived in 1855. The Nez Perce know exactly where theirs did.

There are a great many ramifications to this. One is that there is a lasting sorrow, because there is no pain like the pain of land-based people who have lost their land. But there are opportunities for the Forest Service, for all of us, at the Nez Perce reservation, where the land is still the mother's breast. The Nez Perce can be spectacular partners in land management. They know a lot about the land and they have put a lot — as much as they possibly can — into it.

Our society, through the courts and various federal officers (including some of those in our oldest land management agency), has already taken important steps to honor the promises — the laws — made in 1855. Our legal system has displayed some toughness and some staying power. But questions still hover over the old plains and mountain land from the upper Salmon to the Palouse: Have we done all that our own laws require? Are we at last willing to move beyond grudging acceptance to an honest welcoming of Nez Perce sovereignty? Have we brought the full measure of justice to the aboriginal lands of the Nez Perce and to the rivers that still run in their blood?

