American Indian Law Review

Volume 29 | Number 1

1-1-2004

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GLACIER NATIONAL PARK AND THE BLACKFOOT NATION'S RESERVED RIGHTS: DOES A VALID TRIBAL CO-MANAGEMENT AUTHORITY EXIST?

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I. Introduction

The Blackfoot Nation, geographically located within northwestern Montana, has long asserted that it has never relinquished its treaty-reserved hunting, fishing, and gathering rights within the original western range of its reservation lands. Today, these lands are a part of the eastern portion of Glacier National Park. The Blackfoot Nation sold this western section of their reservation to the United States in the Agreement with the Indians of the Blackfeet Indian Reservation in Montana of June 10, 1896.[1] However, the Blackfoot Nation specifically reserved the right to hunt, fish, and gather upon the lands designated in the Agreement.[2] Further, the language of the congressional act that created Glacier National Park explicitly provides that valid claims existing within the boundaries of the Park before May 11, 1910 were not affected by the Park's creation.[3] Nevertheless, the National Park Service and Glacier National Park have been unwilling to recognize that the Blackfoot Nation should have more than a cursory role in protecting and exercising their reserved rights within the eastern portion of the park. This comment will analyze the treaty-reserved rights of the Blackfoot Nation and argue that the Blackfoot Nation has the right to significantly participate, in conjunction with the National Park Service, as co-managers in the eastern portion of Glacier National Park. This argument is all the more persuasive when viewed in light of the fundamental Indian law principle that treaties are not "a grant of rights to the Indians, but a grant of rights from them — a reservation of those [rights] not granted."[4] This argument is even more persuasive when examined under the basic Indian law principle that treaties

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1. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, § 9, 29 Stat. 321, 353 (1896).

2. *Id.* § 9, 29 Stat. at 354.

3. 16 U.S.C. § 161 (2000).

4. United States v. Winans, 198 U.S. 371, 381 (1905).

were not "a grant of rights to the Indians, but a grant of rights from them — a reservation of those [rights] not granted."[5]

Part II of this comment will provide a short history of the Blackfoot Nation and describe the Tribe's traditional territorial boundaries. Part III examines the treaties, statutes, and court precedent that have had a direct effect in determining the scope of the Blackfoot Nation's reserved rights and the exercise of those rights within Glacier National Park. Part IV recognizes that the traditional canons of treaty construction, the language of the treaties, and court decisions support a tribal participatory role in the co-management of certain natural resources within Glacier National Park.

II. A Brief Review of the History and Territorial Boundaries of the Blackfoot Nation

The present day Blackfeet Reservation consists of four separate bands that were for many years known as the Blackfoot Nation of Indians.[6] The Pikuni (Piegan), Kainah (Blood), and Siksika (Blackfoot proper) shared the same language, but were organized separately.[7] The fourth band that made up the Blackfoot Nation was the Gros Ventres, a branch of the Arapahoe known as the Falls Indians.[8] The Gros Ventres were separated from their larger tribal organization, drifted west, and subsequently became a part of the Blackfoot Nation.[9] The four bands traditionally occupied the vast territory extending from the north fork of the Saskatchewan River in Canada to the headwaters of the Muscle Shell River, and from the western divide of the Rocky Mountains to 106th East longitude.[10]

The four bands of the Blackfoot Nation were represented at a tribal council, and from that council, one chief was elected.[11] They were a nomadic people and dependent upon the buffalo for almost every facet of their existence.[12] Consequently, they followed the migration of the buffalo and, although they roamed a vast area, each band recognized certain sections of territory as their

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5. United States v. Winans, 198 U.S. 371, 381 (1905).

6. Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101, 104 (1935).

7. RUTH MURRAY UNDERHILL, RED MAN'S AMERICA: A HISTORY OF INDIANS IN THE UNITED STATES 183 (1971 rev. ed.).

8. *Blackfeet et al.*, 81 Ct. Cl. at 104.

9. *Id.*

10. *Id.*

11. UNDERHILL, *supra* note 7 , at 154.

12. *Id.*

"home" territories.[13] The Blackfeet proper and the Bloods occupied the region around the headwaters of the Maria's and Milk Rivers.[14] The Piegans settled in the area between the Milk River on the north and the Maria's and Teton rivers on the south.[15] The Gros Ventres occupied the territory bordering the Milk River, from its headwaters to the territory of the Piegans.[16]

In 1855, after years of intertribal and intratribal warfare, the United States government pursued a treaty to "cultivate good-will and friendship" between bands and to maintain "peaceful relations" with the surrounding nations and tribes of Indians.[17] The resulting 1855 Treaty created the Blackfeet Reservation and marked the end of the wandering, nomadic lifestyle of the Blackfoot Nation. Thereafter, every treaty or agreement the Blackfeet made with the United States drastically reduced the size of Blackfeet Reservation lands.[18] Moreover, the United States disregarded the express reservation of hunting, fishing, and gathering rights in the 1896 agreement, even though the Blackfeet never relinquished these rights, which in turn were never expressly abrogated by Congress.

The controversy over the scope of the Blackfoot Nation's reserved rights still continues almost 150 years later. The history of court decisions addressing this issue have been indecisive, and it is still unclear exactly what the scope of the Blackfoot Nation's reserved rights are in relation to the lands they surrendered to the United States government by way of treaty, agreement, and acts of Congress.

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13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Treaty with the Blackfeet, Oct. 17, 1855, art. 2, 11 Stat. 657, 657. Article 2 states:

> The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other, and cultivate mutual good-will and friendship. And the nations and tribes aforesaid do furthermore jointly and severally convenant, that peaceful relations shall be maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defense, against the following-named nations and tribes of Indians, to wit: the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arcs, and Auncepa-pas bands of Sioux, and all other neighboring nations and tribes of Indians.

Id.

18. *See generally* Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657; Act of May 1, 1888, ch. 213, 25 Stat. 113; Agreement with the Indians of the Blackfeet Indian Reservation, *supra* note 1, § 9, 29 Stat. at 353.

III. The Treaties, the Courts, and the Statutes: Clarification Averted

A. The Treaties

On October 17, 1855, Congress created the Blackfeet Reservation immediately east of the Rocky Mountains, located within what is now northwestern Montana.[19] The Treaty stated that the Blackfeet would "enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes."[20] The 1855 Treaty was abrogated when new boundaries for the reservation were established by agreement on February 11, 1887 and ratified by Congress on May 1, 1888.[21] The 1888 Agreement set the western boundary of the reservation as the summit of the main chain of the Rocky Mountains, which encompassed the

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19. Treaty with the Blackfeet, Oct. 17, 1855, art. 3, 11 Stat. 657, 657-58. Article 3 states:

> The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted [sic] privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof. Provided, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow territory.
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> And provided, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements, or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting-ground.
>
> And provided further, That the rights of the western Indians to a whole or a part of the common hunting-ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie.

Id.

20. *Id.*

21. Act of May 1, 1888, ch. 213, 25 Stat. 113.

eastern portion of present day Glacier National Park.[22] In 1895, a commission was sent by the United States government to the Blackfeet Reservation to negotiate for the purchase of the strip of the Rocky Mountains on the western portion of the Reservation.[23] The government suspected that the area might contain valuable minerals, especially copper, that could be exploited and mined.[24] The Blackfeet refused the government's first offer of $1 million, but after extended negotiations agreed to accept $1.5 million, provided that they would reserve their hunting and fishing rights in this section of land, which was originally described in the 1888 Agreement.[25] In Article I, the Agreement stated that the Blackfeet would "reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State of Montana."[26] The Agreement was signed on September 28, 1895 and the Fifty-fourth Congress ratified the agreement with the Act of June 10, 1896.[27]

B. The Creation of Glacier National Park

On May 11, 1910, Congress created Glacier National Park.[28] The Park lies in the rugged northern Rocky Mountains of northwestern Montana. It encompasses 1,013,572.42 acres and is home to one of the most diverse ecosystems in the United States.[29] The Blackfeet traditionally utilized the eastern portion of Glacier for hunting, fishing, gathering, and religious ceremonies.[30]

In 1896, the Blackfeet sold the mountainous western portion of their reservation to the United States government.[31] The Act of June 10, 1896

22. United States v. Kipp, 369 F. Supp. 774, 775 (D. Mont. 1974) (holding that Blackfeet tribal members do not have to pay the Park's entrance fee).

23. *Id.*

24. *Id.*

25. Agreement with the Indians of the Blackfeet Indian Reservation, *supra* note 1, § 9, art. I-II, 29 Stat. at 354.

26. *Id.*, § 9, art. I, 29 Stat. at 354.

27. *Id.* at 357.

28. 16 U.S.C. § 161 (2000).

29. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FINAL GENERAL MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1: GLACIER NATIONAL PARK, A PORTION OF WATERTON-GLACIER INTERNATIONAL PEACE PARK FLATHEAD AND GLACIER COUNTIES, MONTANA 3-4 (July 15, 1999), *available at* http://www.nps.gov/glac/pdf/gmp1.pdf [hereinafter FINAL GENERAL MANAGEMENT PLAN].

30. *Id.* at 4.

31. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, *supra* note

provided that the Blackfeet would retain the right to hunt and fish upon these lands.[32] The Act of May 11, 1910 provided that any existing claim would not be affected by the creation of the park, implicitly recognizing, and never explicitly abrogating, the reserved rights of the Blackfeet to hunt and fish within this portion of the Park.[33]

C. Canons of Treaty Construction, Congressional Power of Treaty Abrogation, and the Trust Obligation

The Supreme Court has recognized three canons of treaty construction, which were designed to recognize the federal government's unique trust responsibility toward Indian tribes.[34] First, treaties are to be interpreted as the Indians themselves would have understood them.[35] Second, ambiguities in the language of the treaty are to be resolved in favor of the Indians.[36] Third, treaties are to be liberally interpreted in favor of the Indians.[37]

The Supreme Court established that Congress has the power to abrogate Indian treaties, subject to an indication of clear and plain intent.[38] The Supreme Court's modern test for congressional abrogation of a tribal reserved right is found in *United States v. Dion*.[39] *Dion* holds that a treaty will not found to be abrogated unless there is "clear evidence" that Congress considered the conflict between its intended action and Indian treaty rights, and chose to resolve that conflict by abrogating the treaty.[40]

Furthermore, the United States owes a trust obligation to Indian tribes. Chief Justice John Marshall first articulated this obligation in *Cherokee Nation v. Georgia* when he stated that Indians

> occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right

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1, § 9, art. I, 29 Stat. at 354.

32. *Id.*, § 9, art. I, 29 Stat. at 354. The pertinent part of the 1896 Agreement states: "That said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof." *Id.*

33. 16 U.S.C. § 161 (2000).

34. United States v. Peterson, 121 F. Supp. 2d 1309, 1315 (D. Mont. 2000).

35. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

36. Winters v. United States, 207 U.S. 564, 576 (1907).

37. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943).

38. Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right*, 30 ENVTL. L. 279, 291 (2000) (discussing the foundational principles of Indian law).

39. 476 U.S. 734 (1986).

40. *Id.* at 740.

> of possession ceases — meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.[41]

However, the trust obligation has become a convoluted doctrine, and has been used by the United States not only to protect the rights of tribes, but also to infringe upon their inherent rights and sovereignty.[42]

D. The Blackfoot Nation in the Courts: A History of Indecision

The Blackfoot Reservation and Glacier National Park have been at odds over the validity and extent of the Blackfoot Nation's reserved rights within Glacier since the creation of the park.[43] The Blackfeet continue to argue that the eastern portion[44] of Glacier is part of their traditional tribal domain.

In 1935, the Blackfoot Nation brought suit against the United States, asserting that the creation of Glacier National Park amounted to a governmental taking, as it deprived them of the right to hunt and fish on the tract of land that they had sold to the United States under the Act of June 1, 1896.[45] The United States Court of Claims held that the act creating Glacier National Park abrogated the 1896 treaty rights and authorized the Secretary of Interior to preserve the park and to protect the fish and game within its boundaries.[46] The court focused on the 1896 Agreement's language which reserved the Blackfeet's right to hunt and fish upon those lands.[47] The Agreement stated, "[t]hat the said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States."[48] The Court interpreted

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41. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

42. Goodman, *supra* note 38, at 291.

43. The following is a short list of cases that have dealt specifically with the issue of reserved rights of the Blackfeet and Glacier National Park: Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101 (1935); United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974); United States v. Peterson, 121 F. Supp. 2d 1309, 1320 (D. Mont. 2000).

44. *See* Agreement with the Indians of the Blackfeet Indian Reservation in Montana, *supra* note 1, § 9, art. I, 29 Stat. at 354.

45. *See Blackfeet et al.*, 81 Ct. Cl. at 101, 102.

46. *Id.* at 115.

47. *Id.* at 114.

48. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, *supra* note 1, § 9, art. I, 29 Stat. at 354.

"public lands" narrowly, which went against Supreme Court precedent and traditional canons of treaty construction that had spanned more than one hundred years.

The use of the technical definition of "public lands" is clearly against the traditional canons of treaty interpretation. In *Jones v. Meehan*, the Supreme Court stated that a "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[49] As Judge Smith opined, some fifty years later after the court of claims decision, in *United States v. Kipp*, when discussing the meaning of "public lands" in the 1896 Treaty: "[I]t is inconceivable that the Indians understood that there was hidden in the questioned phrase a privilege in the United States to terminate the reserved rights by changing the character of the public ownership."[50] In 1832, the Supreme Court held in *Worcester v. Georgia* that treaties should be interpreted as the Indians who entered into them understood them.[51] In *Choate v. Trapp*, the Supreme Court, relying on *Winters v. United States*,[52] reasoned that any ambiguities in the treaty should be resolved in favor of the Indians.[53] Furthermore, treaties must be liberally construed in favor of the Indians.[54] The *Choate* Court explained:

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49. 175 U.S. 1, 11 (1899).

50. 369 F. Supp. 774, 777 (D. Mont. 1974).

51. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

52. Winters v. United States, 207 U.S. 564, 576-77 (1908).

53. 224 U.S. 665, 675 (1912).

54. *Id.* Perhaps the Supreme Court gave its clearest articulation of this idea in *Jones v. Meehan* when it stated:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones, 175 U.S. at 10-11.

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . .[55]

The traditional canons of treaty construction, as expressed by the Supreme Court prior to the 1935 *Blackfoot et al.* decision, provide clear evidence that the Court of Claims erred in their decision to abrogate the reserved rights of the Blackfeet to hunt and fish within the ceded portion of Glacier National Park.

Additionally, the Court reasoned that before the creation of the park in 1910, the Blackfeet, "did not exercise to any appreciable extent the rights reserved in [the 1896 agreement], to hunt and fish in and remove timber from the land ceded in the agreement, and such rights were authoritatively terminated," by the creation of Glacier National Park.[56] The Court's reasoning implies that the Blackfoot Indians were not entitled to compensation, and lost the right to hunt and fish in Glacier National Park because they had failed to exercise their reserved rights.[57] The interpretation of the Court of Claims is adverse to the canons of treaty construction, the Unites States trust obligation to the tribes, and court precedent, because the failure of an Indian tribe to exercise reserved rights does not constitute the grounds for abrogation of those rights. As early as 1905, in *United States v. Winans*, the Supreme Court held that treaties did not grant rights to the Indians, but that treaties were grants of rights from them to the United States.[58] In other words, a reservation of rights are those rights that a tribe has decided to keep.[59]

It is clear that during the negotiation phase of the 1896 Agreement, the Blackfeet were resistant to the sale, and wished to retain their hunting and fishing rights within the strip of land in the western portion of their

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55. *Choate*, 224 U.S. at 675.

56. Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101, 115 (1935).

57. H. Barry Holt, Note, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and* United States v. Hicks, 16 ENVTL. L. 207, 241 n.213 (1986).

58. 198 U.S. 371, 381 (1905).

59. *Id.*

reservation.[60] It was only after they had negotiated for the clause in Article I,[61] which expressly reserved those rights, that they agreed to the sale.[62] This is a convincing indication that the Blackfeet believed they would reserve the right to hunt and fish in the ceded area in perpetuity.

Glacier National Park's *Final General Management Plan and Environmental Impact Statement* appears to put great weight on the 1935 *Blackfeet et al.* Court of Claims decision.[63] The pertinent language of the case is included in Appendix A, Legislation and Designations, and is the only court decision that is reprinted in the plan.[64] The excerpt from the Court of Claims decision found in the General Management Plan is notated in the margin as "a finding of fact."[65] The quotation from the *Blackfeet et al.* decision, which is identified as a "finding of fact," states:

> Prior to the act of May 11, 1910, the Indians of the Blackfeet Reservation did not exercise to any appreciable extent the rights reserved in the aforesaid agreement of September 26, 1895, to hunt and fish in and remove timber from the land ceded in the agreement, and such rights were authoritatively terminated by the limitations of the act of May 11, 1910.[66]

The treatment of this case in the Final General Management Plan and Environmental Impact Statement may be an indication that Glacier National Park is aware that the courts have not definitively decided the issue of the Blackfeet's reserved rights within the eastern portion of the park, and are relying on the Court of Claims decision to deny the Blackfeet the exercise of their reserved rights.

The second case to address the issue of the Blackfoot Nation's reserved rights within Glacier came about thirty-nine years after the *Blackfeet et al.* decision, in *United States v. Kipp*.[67] Woodrow Kipp, a Blackfoot Indian, entered Glacier National Park without paying the required entrance fee and

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60. *See* United States v. Peterson, 121 F. Supp. 2d 1309, 1320 (D. Mont. 2000).

61. Agreement with the Indians of the Blackfeet Nation Reservation of Montana, *supra* note 1, § 9, art. I, 29 Stat. at 354.

62. *See Peterson*, 121 F. Supp. 2d at 1312.

63. FINAL GENERAL MANAGEMENT PLAN, *supra* note 29, app. A at 291, 299.

64. *Id.*

65. *Id.*, app. A at 300.

66. Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101, 115 (1935).

67. 369 F. Supp. 774 (D. Mont. 1974).

was arrested.[68] This case provides an enlightening discussion and historical treatment of many of the reserved rights that are at issue today, but strongly indicates that, "[n]othing is involved in this case but the bare right of entry, and nothing said here purports to pass upon the nature or quantum of any other rights."[69] The court ruled that the 1896 Treaty must be interpreted in light most favorable to the Blackfeet, and that there was no indication that the Indians intended to terminate their reserved rights within the park through the sale.[70] The court used selections from the negotiation proceedings as evidence that the Blackfeet considered the matter of their reserved rights as paramount.[71] Perhaps a quote from a Blackfoot Indian named Big Brave best sums up the importance the Blackfeet placed on their reserved rights when he said, "I raise my hand for every man, woman and child on this reservation. What I say they say. I raise my hand to say that we want to hunt game, fish, and cut timber in these mountains."[72]

Conversely, the 1935 Court of Claims decision in *Blackfeet et. al* appears, on its face, to ignore the value that the Blackfeet placed on the land in question.[73] In what seems to be directly at odds with the finding in *Kipp*, the Court of Claims reasoned that, "neither the representatives of the Government nor the Indians themselves attached great value to the lands involved."[74] The Court of Claims also said, "[t]he real or even reasonable value to the [Indians] of the hunting grounds, in the way of game and wild animals, has not been proven."[75]

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68. *Id.* at 775.

69. *Id.* at 778 n.15.

70. *Id.* at 777.

71. *Id.* at 776-77. Examples of other statements that expressed the Indians' concerns were made by White Calf: "From Birch Creek to the boundary line is what I now give you. I want the timber because in the future my children will need it. I also want all the grazing land. I would like to have the right to hunt game and fish in the mountains." *Id.* at 776 (quoting Proceedings of Councils of the Commissioners Appointed to Negotiate with Blackfeet Indians (Sept. 21, 1895)). Further: "We will sell you the mountain lands from Birch Creek to the boundary line, reserving the timber and grazing lands, for one and a half million." *Id.* (quoting Proceedings of Councils of the Commissioners Appointed to Negotiate with Blackfeet Indians (Sept. 25, 1895)).

72. *Id.* at 777 (quoting Proceedings of Councils of the Commissioners Appointed to Negotiate with Blackfeet Indians (Sept. 25, 1895)).

73. Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101, 142 (1935).

74. *Id.* at 133.

75. *Id.* at 122.

The *Kipp* decision found that the Blackfeet did place value on the lands to be sold, and reiterated the language of the 1896 Agreement, that the Blackfeet wished to reserve their hunting and fishing rights before they would agree to the sale.[76] The language in *Kipp* should call into question the reasoning and motives of the Court of Claims in reaching their decision. A close read of *Blackfeet et al.* reveals judicial prejudice towards the Blackfeet, and in light of this and the reasoning in *Kipp*, it should not be given much weight in determining the reserved rights of the Blackfeet within the eastern portion of Glacier National Park.

In *Kipp*, the court looked to the language of the act that created Glacier National Park. The court cited the specific language of the Act of May 11, 1910, creating Glacier National Park, which states in pertinent part:

> [A]ll persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry existing under the land laws of the United States [before May 11, 1910] or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land . . . .[77]

The *Kipp* court found that the language of 16 U.S.C. § 161 did not extinguish the reserved rights of the Blackfeet within the park.[78] The court relied upon *United States v. Payne*,[79] in which the Supreme Court held that the letter and spirit of a treaty must be taken into consideration because congressional intent to alter a substantial right created by treaty, which in effect abrogates a treaty, is not to be taken lightly.[80] The court reasoned that the Blackfeet would not have understood that their reserved rights would be terminated by changing the character of public ownership.[81] Furthermore, the court noted that, "[t]he

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76. *See generally Kipp*, 369 F. Supp. 774 (D. Mont. 1974).

77. 16 U.S.C. § 161 (2000).

78. *Kipp*, 369 F. Supp at 778.

79. 264 U.S. 446 (1924).

80. *Kipp*, 369 F. Supp. at 778 (construing the rule laid out in *United States v. Payne* that a treaty "should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, pro tanto, abrogate, the treaty, is not to be lightly attributed to Congress.").

81. *Id.* at 777. The 1896 treaty was instigated by the government in an attempt to gain valuable mineral rights that were thought to have existed in the mountainous western portion of the Blackfeet Reservation. Judge Smith stated:

> It does not do violence to the agreement to hold the words 'so long as the lands shall remain public lands of the United States' were used to distinguish between

Indians were told that the agreement expressed their wishes and were not told that under the agreement the United States could alter the character of its ownership and defeat the reserved rights."[82] In its final analysis, the court held that the Blackfoot Nation's reserved rights were not extinguished by the creation of Glacier National Park.[83] The court concluded that Woodrow Kipp had a right to enter the eastern portion of the park because it was at one time within the boundaries of the Blackfeet Reservation.[84]

The most recent case to address the issue of the reserved rights of the Blackfeet, and the context of those rights, as they can be exercised in the eastern portion of Glacier National Park, was *United States v. Peterson*.[85] This case directly addressed the issue of whether the Blackfeet possess a reserved right to hunt and fish in Glacier National Park and whether this right was abrogated by Congress when the park was created.[86] The court held that the Blackfeet have no right to hunt in the ceded portion of Glacier National Park.[87] However, the case is silent on the right to fish.

The court reasoned that the factual dispute over the Blackfoot Nation's reserved right to hunt in the ceded portion of the park must be considered in light of the meaning of the events that took place and the language that was used in the 1896 agreement.[88] The three traditional canons of construction were considered to determine this question.[89] With the three canons of treaty construction in mind, the court addressed two issues in order to determine the Blackfoot Nation's reserved rights.[90] The court first asked, "[D]id the Indians understand the 1896 Agreement to mean that they retained the right to hunt

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> the lands which would move into private ownership by reason of mineral entries and those which would remain in the ownership of the United States. It is inconceivable that the Indians understood that there was hidden in the questioned phrase a privilege in the United States to terminate the reserved rights by changing the character of the public ownership.

Id.

82. *Id.* at 777.
83. *Id.* at 778.
84. *Id.*
85. 121 F. Supp. 2d 1309 (D. Mont. 2000).
86. *Id.* at 1310.
87. *Id.*
88. *Id.* at 1314.
89. *Id.* at 1315; *see* sources cited *supra* notes 32-33.
90. *Peterson*, 121 F. Supp. 2d at 1315.

in the ceded lands?"[91] Second, the court asked, "[D]id Congress abrogate the 1896 Agreement when it created Glacier National Park?"[92]

To determine the first question, the disputed language of the 1896 Agreement was examined. The pertinent part of the Agreement stated "[t]hat the said Indians hereby reserve and retain the right to hunt upon the said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State of Montana."[93] The court reasoned that to accept the argument that the Blackfeet understood that the establishment of a national park would no longer make the ceded portion of the park "public lands" would be to ignore all three canons of treaty construction.[94] It was found that the Blackfeet understood that their reserved rights would continue indefinitely, and that without a specific provision retaining the right to hunt and fish, the deal would not have been made.[95] In light of these facts, the court held that the Blackfeet retained their reserved right to hunt in the eastern portion of Glacier National Park.[96]

To determine the second issue of treaty abrogation the court looked to *Dion* to determine if Congress clearly intended to resolve the conflict by abrogating the treaty.[97] The court reasoned that the most pertinent piece of legislation that demonstrated congressional intent to abrogate the treaty was 16 U.S.C. § 170.[98]. This statute governs hunting and fishing in the park and states, "[a]ll hunting or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of said park . . . ."[99] The court held, that although the statute did not explicitly refer to the Blackfeet's reserved hunting rights, the congressional intent was clear that hunting was incompatible with the creation of the park, and therefore Congress abrogated the treaty right.[100]

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91. *Id.*
92. *Id.*
93. *Id.* at 1316 (quoting Agreement with the Indians of the Blackfeet Indian Reservation, *supra* note 1, § 9, art. I, 29 Stat. at 354).
94. *Id.*
95. *Id.*
96. *Id.* at 1318.
97. *Id.* (citing United States v. Dion, 476 U.S. 734 (1986)).
98. *Id.* at 1319.
99. *Id.* (quoting 16 U.S.C. § 170 (2000) (prohibiting hunting in Glacier National Park)).
100. *Id.* at 1320.

E. The Controversy Over Defining "Public Lands"

The definition of "public lands" has generated much controversy in the litigation over Blackfoot Nation treaty reserved rights.[101] Title 43 U.S.C. § 1702(e) defines "public lands" as, "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management . . . ."[102] The statutory definition is not controlling when interpreting Indian treaties because treaties are to be interpreted as the Indians themselves would have understood them.[103]

The *Peterson* court held that it was not credible to suggest that the Blackfeet Tribe would have contemplated that the lands sold under the 1896 Agreement would cease to be "public lands" with the establishment of a national park.[104] In *Kipp*, the court reasoned that the United States had no right to unilaterally alter the nature of land ownership and extinguish the reserved rights of the Blackfeet by utilizing the statutory definition of "public lands."[105] Based upon the interpretation of the definition of "public lands," which is consistent with the decision in *Kipp*, *Peterson* held that the Blackfeet retained the right to hunt in the eastern portion of Glacier National Park.[106] It was only with the decision on the second issue in *Peterson*, which held that Glacier National Park's goal of wildlife conservation was inconsistent with Indian hunting rights, that the Blackfoot Nation's treaty reserved right to hunt within the park was abrogated.[107]

However, the *Peterson* court noted that the Blackfeet believed that they would also reserve fishing and gathering rights within the ceded lands of the park.[108] The court in *Peterson* ruled that hunting was incompatible with the goals of Glacier National Park, and did not specifically address the issues of fishing and gathering.[109] Implicit in the holding is the idea that as long as a reserved right does not interfere with the goals of Glacier National Park, then

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101. *See generally* Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101 (1935) (discussing the definition of "public lands"); United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974); United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000).

102. 43 U.S.C. § 1702 (2000).

103. United States v. Winans, 198 U.S. 371, 380 (1905).

104. *Peterson*, 121 F. Supp. 2d at 1316.

105. *Kipp*, 369 F. Supp. at 776-77.

106. *Peterson*, 121 F. Supp. 2d at 1318.

107. *See generally* United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000).

108. *Id.* at 1318.

109. *Id.* at 1318-19.

that treaty reserved right was not abrogated by the creation of the park. Furthermore, this agreement should be viewed within the confines of the tenet that treaties were not a grant of rights to the Indians, but a grant of rights from them.[110]

Consistent with the ruling in *Peterson* and *Kipp*, the Court of Appeals of Washington in *Washington v. Buchanan*, held that Buchanan, a Nooksack tribal member, had a treaty reserved right to hunt the Oak Creek Wildlife Area, because the express terms of the Point Elliot Treaty of 1855 extended the right to hunt "anywhere in the territory that was opened and unclaimed."[111] The court determined that the Oak Creek Wildlife area was open and unclaimed land within the meaning of the treaty, which specifically reserved the right to hunt and fish outside the Nooksack reservation.[112] Similarly, the language of the 1896 Agreement with the Blackfeet specifically reserved the right of the Blackfeet to hunt and fish outside of the reservation.[113] *Buchanan* notes that several courts have determined that national park lands will be considered open and unclaimed if the Indians themselves would have understood the language of the treaty in this way.[114]

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110. *Winans*, 198 U.S. at 381.

111. Washington v. Buchanan, 941 P.2d 683, 685 (Wash. Ct. App. 1997).

112. *Id.*

113. Agreement with the Indians of the Blackfeet Indian Reservation, *supra* note 1, § 9, art. I, 29 Stat. at 354.

114. *Buchanan*, 941 P.2d at 686 (citing Confederated Tribes v. Maison, 262 F. Supp. 871, 873 (D. Or. 1966)) (finding that the Walla Walla Treaty of 1855 allowed the Tribe to hunt without restriction on lands not claimed by settlers which border their reservation, including the lands designated as the Umatilla and Whitman National Forests); Holcomb v. Confederated Tribes, 382 F.2d 1013 (9th Cir. 1967) (finding that the Confederated Tribes of Umatilla Indians had the right, under the Treaty of 1855, to hunt for subsistence purposes on unclaimed lands without restriction or control under the game laws and regulations of the State of Oregon); State v. Miller, 689 P.2d 81 (Wash. 1984) (finding that the Point No Point Treaty of 1855 protected tribal hunting rights and in order to abrogate this right the state must demonstrate that the regulation is both reasonable and necessary for conservation and that application of the regulations to the tribal members is necessary for conservation purposes); State v. Chambers, 506 P.2d 311 (Wash. 1973) (finding that a member of the Confederated Tribes and Bands of the Yakima Indian Reservation did not have the right to hunt on private land because the land was not open and unclaimed under the spirit of the treaty). Interestingly, the *Chambers* court stated

> [The] rights of gathering roots and berries, pasturing livestock and hunting were confined to 'open and unclaimed land.' This then left them free to wander at will, to pick roots and berries, pasture their livestock and hunt as they had from the beginning of time. They were restricted only in those areas staked out by the white man as his own place to settle.

Id. at 315.

Public lands, if unoccupied by settlers, are considered to be open and unclaimed as long as the use is consistent with treaty reserved rights.[115]

IV. Reserved Rights and the Right to Co-Manage

A. Do the Blackfeet Have a Reserved Right to Co-manage Fish and Fish Habitat Within the Eastern Portion of Glacier National Park?

In *United States v. Peterson*, the court solidified the prohibition on hunting when it held that, "[t]he language of the statute . . . reflect[s] 'an unmistakable and explicit legislative policy choice' that the Blackfoot Tribe should not be allowed to hunt in any portion of the Park under any circumstances.'"[116] In *United States v. Kipp*, the court recognized that members of the Blackfeet Tribe retained the right of entry, under the 1896 Agreement and the Act creating the park, to the eastern portion of Glacier National Park.[117] The court in *Peterson* agreed with *Kipp*, stating, "[t]he purpose of the Park was not incompatible with the tribal members' rights of entry," but cautioned, "the purpose of the Park is incompatible with tribal members' right to hunt."[118] However, the *Peterson* and *Kipp* courts did not definitively answer or address the reserved fishing rights of the Blackfeet within the eastern portion of Glacier National Park.[119]

The Act of August 22, 1914, which prohibited hunting within Glacier, grants the Secretary of the Interior the power to "make rules and regulations governing the taking of fish from the streams or lakes in the park."[120] When a statute is in place that restricts a treaty reserved right, Congress can examine the interests of Indians that conflict with the conservation purposes of the statute, and provide a narrow exception that delineates the extent to which Indians will be able to exercise that right.[121] The extent of the Blackfoot Nation's reserved fishing right inside Glacier National Park has yet to be determined by the courts. However, courts have recognized that tribes may exercise their sovereign authority off-reservation, in matters that involve the continued use and protection of natural resources which are tied to their

115. *Buchanan*, 941 P.2d at 686 (citing Hicks v. United States, 587 F. Supp. 1162, 1165 (D.C. Wash. 1984), *rev'd on other grounds*, 978 P.2d 1070 (Wash. 1999)).

116. 121 F. Supp. 2d 1309, 1320 (D. Mont. 2000).

117. 369 F. Supp. 774 (D. Mont. 1974).

118. *Peterson*, 121 F. Supp. 2d at 1320.

119. *See generally id.*; *Kipp*, 369 F. Supp. 774.

120. 16 U.S.C. § 170 (2000).

121. United States v. Dion, 476 U.S. 734, 743-44 (1986).

reserved rights, as an incident of such reserved rights.[122] Because tribes have the ability to protect off-reservation natural resources that impact their reserved rights, the Blackfeet should have a right to co-manage the protection of fish habitat and fisheries within the ceded eastern portion of Glacier National Park. Ed Goodman's article, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right*, makes a persuasive argument that the doctrines of tribal sovereignty include the right to participate as co-managers in protecting off-reservation reserved rights.[123] Goodman notes that many tribes have entered into agreements with federal agencies that provide for an increased managerial role in resource decision making.[124] Furthermore, the Blackfeet's right to co-manage natural resources within the eastern portion of the park is strengthened when the 1896 treaty is interpreted as the Blackfeet themselves would have understood the treaty. Because fishing is allowed within Glacier National Park, and the Blackfeet interpreted the 1896 Treaty as a reservation of their right to fish within the park,[125] it can be argued that the Blackfeet would have understood that they had a continuing right to participate in the management of the fisheries resource. The right to manage this resource is intertwined and inseparable from the right to fish within the eastern portion of Glacier National Park, which is a reservation of a right not granted under the 1896 Agreement.

The Blackfoot Nation's treaty-reserved right to fish within the eastern portion of Glacier National Park should also include the right to protect the habitat upon which the exercise of the reserved right depends.[126] In an often quoted opinion, the United States District Court for the Western District of

122. Goodman, *supra* note 38, at 333 (discussing various cases that have upheld off-reservation treaty reserved rights). These cases include *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), where the Court upheld the exercise of regulatory jurisdiction of off-reservation fishing as part of the Yakima Indian Nation's reserved rights; *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), where the Court found that the Klamath Tribe's reserved rights survived termination of the Tribes; *Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987), where the Court ruled that the Band had the reserved right to harvest resources on public lands and to regulate tribal hunting and fishing on those lands.

123. Goodman, *supra* note 38, at 282.

124. *Id.*

125. *Peterson*, 121 F. Supp. 2d at 1318.

126. *See* Goodman, *supra* note 38, at 294 (discussing notion that a tribe's right to protection of habitat can be reasonably inferred from existing case law).

Washington reasoned that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[127]

The United States owes an obligation of trust to the Indian tribes.[128] This trust obligation is substantive as well as procedural.[129] The substantive trust obligation, within the context of treaty reserved rights, is defined as the obligation of the United States to ensure that tribal resources are protected.[130] The procedural trust obligation to the tribes should include the obligation to enter into "meaningful tribal participation" with tribes when tribal reserved rights are at issue.[131] As Ed Goodman points out in his article, in order to achieve the substantive result of protecting treaty-reserved rights, the United States must involve tribes in the procedural process, "not merely as commentators, but as sovereign governments with power sharing capacity."[132]

The Indian Self-Determination and Education Assistance Act supports the assertion that tribes should be given the co-management authority to protect off-reservation reserved rights.[133] 25 U.S.C. § 450 recognizes that tribal governments need an "effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities."[134] Furthermore, Indian self-determination coupled with the statutory authority governing conservation efforts on government lands strengthens the tribal co-management argument.[135]

Title 16 of the United States Code generally regulates conservation efforts on government lands.[136] 16 U.S.C. § 670 states in pertinent part that "[n]othing in this title shall enlarge or diminish or in any way affect (1) the rights of Indians or Indian tribes to the use of water or natural resources or their rights to fish, trap, or hunt wildlife as secured by statute, agreement, treaty, Executive order, or court decree . . . ."[137] Although the role of tribal governments in the decision making process is not clearly defined, tribal participation must be substantive and substantial, rather than merely advisory,

127. United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).
128. Seminole Nation v. United States, 316 U.S. 286, 296 (1942).
129. Goodman, *supra* note 38, at 299.
130. *Id.*
131. *Id.*
132. *Id.* at 303.
133. 25 U.S.C. § 450 (2000).
134. *Id.* § 450(a)(1).
135. 16 U.S.C. § 670-698 (2000).
136. *Id.*
137. *Id.* § 670m.

in order to insure that the right to protect the habitat, which flows from treaty reserved rights, is meaningful.[138]

B. A Brief Addendum: Glacier National Park and the Reintroduction of Buffalo

As a "Plains" tribe, the Blackfeet traditionally were dependent upon the buffalo for almost every facet of their existence.[139] Consequently, the Blackfeet should have a right to co-manage a meaningful buffalo reintroduction program within the ceded eastern portion of Glacier National Park.[140] This idea stems from the fact that Plains tribes have inherent sovereignty to manage off-reservation natural resources that were once part of treaty based reserved rights.[141]

In *Idaho v. United States*, the Ninth Circuit determined that inherent tribal sovereignty includes management of environmental and natural resources for tribes that were historically dependent upon fishing and were given treaty reserved rights to submerged lands before statehood, even though the submerged lands fall outside of the reservation's present day boundaries.[142] The reasoning in *Idaho* may be analogously invoked under current circumstances to support the reintroduction and management of buffalo within Glacier National Park. The Blackfeet were historically dependent upon buffalo and traditionally utilized the eastern portion of Glacier National Park as a hunting ground. The eastern area of the park was once part of the Blackfeet Reservation and the Blackfeet still possess treaty-reserved rights, based upon the 1896 Agreement. Both the *Peterson* and *Kipp* courts recognized that the Blackfeet possess reserved rights in the eastern portion of the park.[143] Although the right to hunt inside the park was abrogated by the

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138. Goodman, *supra* note 38, at 302 (arguing that it is critical for the United States to recognize the necessity of including tribal governments in the decision making process in order to protect treaty reserved rights).

139. Blackfeet, Blood, Piegan & Gros Ventre Nations or Tribes of Indians v. United States, 81 Ct. Cl. 101, 104 (1935).

140. H. Scott Althouse, *2000 Ninth Circuit Environmental Review: Idaho Nibbles at* Montana*: Carving Out a Third* Montana *Exception for Tribal Jurisdiction over Environmental and Natural Resource Management*, 31 ENVTL. L. 721 n.294 (2001) (discussing the general idea that tribes may have a right to engage in a meaningful buffalo reintroduction program based upon their inherent tribal sovereignty to manage natural resources).

141. *Id.*

142. Idaho v. United States, 533 U.S. 262 (2001).

143. *See generally* United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974); United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000).

creation of Glacier National Park, the Blackfeet arguably have a right to preserve the resources within the park that flows from of their reserved rights.

One of the edicts of Glacier National Park is the protection and preservation of wildlife within the park.[144] The reintroduction of buffalo within the park would further the goals of the park. It would restore a species that was once a valuable part of the Glacier ecosystem and re-establish an animal that has tremendous cultural, spiritual, economic, and historical value to the Blackfeet. To further support this assertion, Parks Canada, the Canadian sister agency to the National Park Service, has proposed the reintroduction of buffalo in Waterton Lakes National Park,[145] a part of the Waterton-Glacier International Peace Park that shares a common border with Glacier National Park.

V. Conclusion

The Blackfeet Tribe has a reserved right to co-manage natural resources within Glacier National Park. Although the right to hunt was specifically abrogated by the creation of Glacier National Park,[146] the right of entry still exists.[147] In addition, the 1896 agreement reserved the Blackfoot Nation's right to fish within the ceded portion of the park.[148] Fishing is allowed within the park boundaries, and the Blackfeet have an inherent and continuing right to participate in the management of that resource based upon the 1896 Agreement and the statutory language of 16 U.S.C. § 161, which the *Kipp* court held unequivocally did not abrogate the treaty-reserved rights of the Blackfeet within Glacier National Park.

The Blackfoot Nation should have the right to pursue a meaningful buffalo reintroduction program within the eastern portion of Glacier National Park. The buffalo had a tremendous cultural significance to the Blackfeet, so significant that the Blackfeet ensured that the 1896 Agreement reserved rights

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144. 16 U.S.C. § 170 (2000).

145. Charles E. Kay & Clifford A. White, *Reintroduction of Bison into the Rocky Mountain Parks of Canada: Historical and Archaeological Evidence*, *in* CROSSING BORDERS IN PARK MANAGEMENT: PROCEEDINGS OF THE 11TH CONFERENCE ON RESEARCH AND RESOURCE MANAGEMENT IN PARKS AND ON PUBLIC LANDS 143 (2001). The Canadian proposal also suggests that hunting by First nations may be required within the parks to control the bison population. *Id.* at 148.

146. *Peterson*, 121 F. Supp. 2d at 1320.

147. *Kipp*, 369 F. Supp. at 777.

148. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, *supra* note 1, § 9, art. I, 29 Stat. at 354.

to buffalo, and it follows that the right to participate as co-managers with Glacier National Park was reserved as an essential component of that right.[149] The reintroduction of buffalo would not work against the goals of Glacier National Park, but would in fact restore a once valuable part of the ecosystem of Glacier.

149. *See* Goodman, *supra* note 38, at 322 (stating in general that a tribe's right to participate in the co-management of their reserved rights was reserved as an essential component of the right).