

# **“Looking After the Country Properly”: A Comparative History of Indigenous Peoples and Australian and American National Parks**

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*This comparative study of the modern intersection of Indigenous peoples, nation states and national parks documents the evolving diverse attempts by Indigenous peoples to expand their sovereignty over their homelands and the evolution of new management models that allow Native inhabitants of national parks to have some influence on the policies directly concerning their environments and lives. The essay is derived from fieldwork, interviews, Indigenous writings and extensive analysis of government documents specifically relating to the Pitjantjatjara and Yankunytjatjara Aboriginal peoples and Uluru-Kata Tjuta National Park in Australia, and the Nez Perce peoples and the Nez Perce Historical National Park in the United States.*

*Australia initially started the process of turning over management of national parks to their Indigenous inhabitants. Of four parks slated for various kinds of Aboriginal management-sharing models, Uluru (previously known as Ayers Rock) in Northern Territory has been the most successful. In 1985, Australia's federal parliament deeded Uluru-Kata Tjuta National Park to its residents, the Pitjantjatjaras and Yankunytjatjaras. The statute required that the new Aboriginal owners then lease the park back to the federal government, but it also created a Board of Management composed of a majority of Aborigines to construct policies that have attempted to make Uluru-Kata Tjuta into a truly "Aboriginal National Park." This new model fully extending Aboriginal sovereignty has been in operation for 15 years, and a number of changes gradually incorporating the goals and aspirations of the Pitjantjatjara and Yankunytjatjara peoples have graced one of Australia's most well-known tourist attractions.*

*The closest comparable arrangement in the United States is found at the Nez Perce Historical National Park. This national park, created in 1965 and expanded in 1992, embraces 30 sites in four states (primarily in Idaho and also in Oregon, Washington and Montana). It originally sought to tell the history of the Nez Perce primarily from a non-Nez-Perce, Park Service perspective. While the Nez Perce Reservation resides within the purview of the national park and a number of sites can be found on or near the reservation, Indigenous management or even consultation was initially kept to a minimum. Gradually that has changed, and now there is a federal requirement of consultation and partnership among the Park Service, the states, private site managers and the Nez Perce. For the past 10 years, a new model of Indigenous management has emerged at Nez Perce Historical National Park that may be replicated at other national parks in the United States. Nez Perce partnership, nevertheless, is not yet comparable to Pitjantjatjara and Yankunytjatjara Aboriginal management.*

## **I INTRODUCTION**

Indigenous peoples care deeply about their homelands. Even when they have been separated from their birth place and their living and dead relatives, they remember the land, its history and its stories. This is particularly true for those Indigenous peoples who today reside in or near national parks. Tony Tjamiwa, a

Pitjantjatjara elder from Mutitjulu settlement in Australia, has always lived in his homelands, now a national park—Uluru-Kata Tjuta National Park. “Nganana [We are] Pitjantjatjara people. And nganampa manta—our land—nganampa manta is running properly,” explains Tjamiwa. “On nganampa manta panya [our land that I already mentioned], the national park is a new idea. In the olden time, tjamulu, kamilu, mamalu—ngka [our grandfathers, grandmothers, fathers—everybody] was looking after the country properly, running straight.”<sup>1</sup>

Edith Richards and many other Pitjantjatjaras and Yankunytjatjaras who live at Mutitjulu are now directly involved with the management of the Australian national park that is their home. Richards is a ranger. “Uluru-Kata Tjuta National Park is Pitjantjatjara and Yankunytjatjara country,” wrote Ranger Richards and her Aboriginal relatives.

A long time ago white people took this land, Uluru and Kata Tjuta and all around it, from its Anangu [Aboriginal] owners. Anangu won back this land in 1985, and they leased it to the Australian National Parks and Wildlife Conservation Service [“NPWCS”] to run as a national park. Before 1985, Europeans called it Ayers Rock and the Olgas. Now it is back to its original names.

The Pitjantjatjaras welcome Piranpas, all non-Aboriginal people, to Uluru-Kata Tjuta. They say, “Pukulpa pitjama Anaguku ngurakuta—Welcome to *our* Aboriginal Land.”<sup>2</sup>

Similarly, Isluumts [Horace Axtell] reveres the homelands of his people, the Nimiipu—the Nez Perce. A contemporary elder and spiritual leader, he is a repository for his Nez Perce people’s history and traditions.<sup>3</sup> Like Tony Tjamiwa, Horace Axtell lives on his people’s homeland (in Idaho at the Nez Perce Indian Reservation), a portion of which is also part of a national park (the Nez Perce National Historical Park). Created in 1965 by Congress with 24 sites in Idaho both on and off-reservation, the park expanded in 1992 to include 14 additional sites important in Nez Perce history from Washington state, Oregon, Montana and elsewhere in Idaho.

One of the important additions was the Bear Paw Battlefield, location of the 1877 capture of Chief Joseph’s Nez Perce band, near today’s Fort Belknap Indian Reservation in Montana.<sup>4</sup> A century later in 1977, the Gros Ventre and Assiniboine tribes of Montana recognized the centennial of this important event in Nez Perce history and invited the Nez Percés to participate in a special Chief Joseph Memorial Powwow at Fort Belknap and to visit Bear Paw Battlefield.

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1. Tony Tjamiwa, “Tjunguringkula Waakaripai: Joint Management of Uluru National Park” in Jim Birkhead, Terry DeLacy and Laura Jane Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1993) at 7.
  2. Lynn Baker, ed., *Mingkiri: A Natural History of Uluru by the Mutitjulu Community* (Alice Springs, Australia: IAD Press, 1996) at xi [emphasis added]. See also *ibid.* at viii and 4.
  3. Horace Axtell, *A Little Bit of Wisdom: Conversations with a Nez Perce Elder* (Lewiston, Idaho: Confluence Press, 1997) at ix-xi, 3-6.
  4. U.S., Department of the Interior, National Park Service, *General Management Plan—Nez Perce National Historical Park and Big Hole National Battlefield* (Washington, DC: Department of the Interior, National Park Service, 1997) at 1-3, 68-69 [hereinafter *Nez Perce and Big Hole*].

Horace Axtell remembers how he decided to go to Bear Paw and take his father who was blind and in poor health: "I told him where we were going and that his grandfather, my great-grandfather was buried there. I asked him if he wanted to go along. He said [in the Nez Perce language], 'I would. Even though I can't see good, I still want to feel that I'm close to the land where my grandfather is buried.'"<sup>5</sup> So the Axtell family journeyed to Montana.

Once they arrived, the Axtells participated in the special events at the battlefield. Recalls Isluumts,

I took him [my father] out there for the pipe ceremony and drumming and singing, but he stood to the side. Afterwards I showed him where the surrender site was. We didn't want to walk him over there, but I pointed to the direction. I explained the way the hills were and how the trails were. I explained all this in my language to him . . . . He said, 'I've always wanted to come here and I never have. I feel good that I'm here. I feel good that I feel close to where his body is. My grandpa is here somewhere. I've heard a lot of stories about my grandfather. He must have been a very strong man.'<sup>6</sup>

A Nez Perce family reconnected to their past relatives and to their homeland during this visit. The closeness and meaning of the land never is forgotten.

## II THE PAUCITY OF INDIGENOUS NATIONAL PARK HISTORY

The national park is, historically, a relatively new development. Beginning in 1872 with the establishment of the first such national park, Yellowstone National Park in the United States, and shortly thereafter with the Royal National Park in New South Wales, Australia, national parks are now present in almost every world nation. Yet the modern creation of national parks throughout the world and their subsequent operation have not been kind to the land's original inhabitants. More often than not, Indigenous owners have been subjected to humiliation, insult, violence or removal from the parks. Those managing parks frequently have not recognized the value of consulting with the parks' original residents or sharing decision-making power with Indigenous peoples. These actions that darken the history of conservation are only recently being examined by scholars.

Although the United States is the home of the first national park, American historians have not been drawn to chronicling the story of the various parks' Indigenous inhabitants. Robert H. Keller and Michael F. Turek, in their recent book *American Indians & National Parks*, note that of the thousands of books penned about Native Americans and United States national parks, hardly any mention both subjects: "The two monumental works on government Indian policy, Felix Cohen's *Federal Indian Law* and Francis Paul Prucha's *The Great Father*, between them contain one passing reference to national parks. The

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5. Axtell, *supra* note 3 at 92.

6. *Ibid.* at 92-93.

Smithsonian’s *Handbook* on Indian/white relations does not mention parks.”<sup>7</sup> This is in the face of 367 Park Service units where a minimum of 85 have direct relationships with Indian tribes and the fact that Park Service Director Russell Dickenson declared in 1996 that he was unaware “of a single major national park or monument today in the western part of the United States that doesn’t have some sort of Indian sacred area.”<sup>8</sup> The relationships between national parks and Indigenous peoples remain to be considered.

Two recent attempts describe these relationships in terms of efforts by American national parks to remove their Native inhabitants. Philip Burnham, in *Indian Country, God’s Country: Native Americans and the National Parks*, tells us that “the story of [N]ative people and the parks is the story of cultures in conflict: over jobs, money, rights-of-way, water, land, and ultimately over sovereignty—that is, the question of who controls all these resources.”<sup>9</sup> Moreover, punctuating the conflict are numerous agreements, arrangements, grievances and unfulfilled commitments. For Burnham, the history of national parks in the United States and American Indians is either “a costly triumph of the public interest or a bitter betrayal of America’s [N]ative people.”<sup>10</sup> Mark David Spence also expresses these sentiments in his book, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks*.<sup>11</sup> He concludes, “wilderness preservation went hand in hand with [N]ative dispossession.”<sup>12</sup> Spence also explains how parks officials as well as scholars lied about Native connections to the parks when they argued that Indigenous inhabitants had no use for their homelands nor any interest in them. “[N]othing,” Spence demonstrates, “could be further from the truth.”<sup>13</sup>

The first comparative attempt to consider Indigenous peoples and national parks is found in a substantial collection of essays edited by Patrick C. West and Steven Brechin entitled *Resident Peoples and National Parks: Social Dilemmas and Strategies in International Conservation*.<sup>14</sup> In the introduction, West poses several questions that the editors and the authors seek to explore. One particular multidimensional question paraphrased is the subject of this inquiry: assuming

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7. (Tucson: University of Arizona Press, 1998) at xii-xiii. See also, Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, DC: Department of the Interior, Office of Solicitor, 1941) and Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, vols. 1, 2 (Lincoln: University of Nebraska Press, 1984). Reference made to the ‘Smithsonian’s *Handbook*’, denotes the first of the series, *Handbook of North American Indians*, vols. 1-9, ed. by Frederick W. Hodge (Washington, DC: Government Printing Office, 1907-1910) and the new edition, *Handbook of North American Indians*, vols. 10-11, ed. by William C. Sturtevant (Washington, DC: Smithsonian Institution, 1978-1996) (Of 17 planned volumes, 11 are completed).

8. Keller and Turek, *ibid.* at xiii-xiv, quoted from Axtell, *supra* note 3 at 244.

9. (Washington, DC: Island Press, 2000) at 10.

10. *Ibid.*

11. (New York: Oxford University Press, 1999).

12. *Ibid.* at 3.

13. *Ibid.* at 5.

14. (Tucson: University of Arizona Press, 1991). The book contains 29 essays, including articles on national parks in Great Britain, India, Uganda, Swaziland, Israel, Papua New Guinea, Indonesia, France, Costa Rica, Malawi, Colombia, Nepal, Chile, South Korea, United States, Malaysia, Australia, Canada and Zambia.

that Indigenous peoples have special rights to their former resources and homelands in national parks, how might resource preservation, Native traditional uses of the land, Native economic development, cultural presentation and park historical interpretation best be harmonized? In short, who plans? Who decides? And who has political power over the national parks?<sup>15</sup>

Since World War II and, in particular, during the past two decades, two nations—Australia and the United States—developed two different approaches to incorporating Native peoples into national park ownership and management. Their recognition that Indigenous peoples must be included has taken all involved along different paths. National legislation institutionalized experiments with joint management and partnerships in the national parks in the “Wests”<sup>16</sup> of each, and the experiences of Australians and Aborigines at Uluru-Kata Tjuta National Park and Americans and Nez Percés at Nez Perce National Historical Park show the extent of cooperation and respect that modern nation states have developed for Indigenous peoples.

### III THE AUSTRALIAN EXPERIENCE

The first Indigenous-owned national park in the world was created in 1979 at Kakadu National Park on the north tropical river shores of Northern Territory, Australia. Subsequently, Australia’s Parliament passed legislation designating Gurig National Park (previously known as Cobourg National Park) in 1981, Uluru-Kata Tjuta National Park (previously Ayers Rock-Mt. Olga National Park) in 1985 and Nitmiluk National Park (previously Katherine Gorge National Park) in 1989, all located in Northern Territory on Aboriginal land (see Map 1). While each of the parks involved its Aboriginal inhabitants and neighbours in its governance, only Uluru-Kata Tjuta evolved into a model for joint management by its Indigenous owners and the Australian National Parks and Wildlife Service (“ANPWS”).<sup>17</sup> An Australian commonwealth report published in 1994 concluded:

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15. *Ibid.* at xv-xxiv; Keller and Turek, *supra* note 7 at xiv-xv.

16. “Wests” is a relative term, of course. Most Australians would say that Uluru is located in the “centre” rather than the west. Fax communication from Isabel McBryde to John Wunder (4 August 1999).

17. Cobourg (Gurig) National Park, an isolated peninsula jutting into the Timor Sea from Northern Territory, is managed by the Conservation Commission of Northern Territory and governed by a Board of Management that includes eight members, four of whom are Aborigines. The Aboriginal residents have not been able to exercise any decision-making power.

Kakadu National Park has a different kind of management system. This park is very accessible and developed. It is managed by the Australian National Parks and Wildlife Service. While the Aborigines owned and then leased the park, there is no formal management board. Consultation after decisions are made by the ANPWS is more the order of the day, and management is complicated by large numbers of tourists and uranium mining interests.

[T]he formal acknowledgment of Aboriginal special rights in land reserved for conservation purposes has been seen as integral to the processes of an Aboriginal ‘cultural renaissance,’ and a formal ‘power-sharing’ role in the management of parks declared over traditional land is represented as ‘a vital new dimension in the concept of Australian national parks’: an Aboriginal National Park.<sup>18</sup>

How did this significant breakthrough allowing Indigenous peoples’ power-sharing over their traditional lands in national parks occur and how successful has it been?

### The Origins of Uluru-Kata Tjuta National Park

Rising above the spinifex-dominated arid plain of southwestern Northern Territory are two distinctive Australian land formations. One is a singular monolith of arkose, a sandstone rich in feldspar—Uluru, previously known as Ayers Rock. Breathtaking in its power and orange and red brilliant at sunrise and sunset, Uluru rises 1115 feet (340 metres or .21 miles) above the plains and 2839 feet (863 metres or .54 miles) above sea level. Its circumference is 5.88 miles (9.4 kilometres). Nearby is Kata Tjuta, previously known as the Olgas.

Kata Tjuta is composed of 36 rounded conglomerate rock domes. The highest of these rises 1640 feet (500 metres or .31 miles) above the plain or 3496 feet (1066 metres or .66 miles) above sea level. It is believed by geologists that Uluru and Kata Tjuta were once buried in the red earthy sands of the centre of Australia, only to emerge in a time of rapid erosion.<sup>19</sup> (See Map 2.)

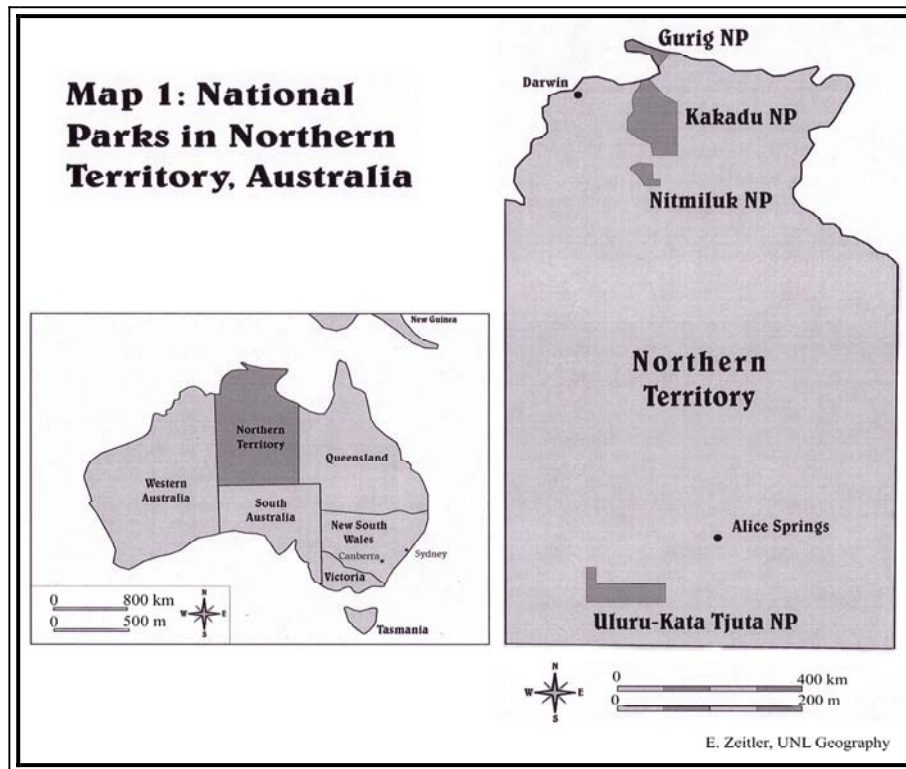
Aboriginal peoples, or Anangu, have lived near Uluru and Kata Tjuta for thousands of years. The history of this occupation is discerned from archaeological evidence, rock art, engravings and the personal oral histories of the Yankunytjatjara and Pitjantjatjara peoples who live at Uluru in the village of Mutitjulu or in other settlements nearby on Pitjantjatjara land. The Anangu are linked to each other and to the land by Tjukurpa, the Traditional Law. Non-Anangu sometimes call this “the Dreaming” or “the Dreamtime,” but this is not approved by Aboriginal peoples who do not believe Tjukurpa has any dream meaning of something unreal or imaginary. Tjukurpa means actions and events representing a spiritual philosophy that is natural, real and true. It includes references to the creation of land forms and land features, to journeys and travels

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For a thorough discussion of these two Australian parks and their Aboriginal inhabitants, see Sally M. Weaver, “The Role of Aboriginals in the Management of Australia’s Cobourg (Gurig) and Kakadu National Parks” in West and Brechin, *supra* note 14 at 311-33. See also J. M. Powell, *An Historical Geography of Modern Australia: The Restive Fringe* (Melbourne: Cambridge University Press, 1988) at 282-283 for commentary on Kakadu National Park, Australian national politics and the uranium industry.

18. Susan Woenne-Green *et al.*, *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia: A Review* (Canberra, ACT: Commonwealth Department of Employment, Education, and Training, 1994) at 272.
19. Uluru-Kata Tjuta Board of Management and Australian National Parks and Wildlife Service, “Uluru (Ayers Rock-Mount Olga) National Park Plan of Management” (Canberra: Commonwealth of Australia, 1991) at 27 [hereinafter “Uluru National Park Plan (1991)”]; Baker, *supra* note 2 at xi, 9-10.

by ancestral beings celebrated in song, dance and ceremony, and to law. Tjukkurpa is the source of how people relate to other people and how people relate to the land.<sup>20</sup>



It was not until the 1870s when English explorers Ernest Giles and W. C. Gosse documented the existence of Uluru and Kata Tjuta for the Piranpa (or Piranypa), the non-Aboriginal people of settler society. They gave English names to the rock forms. Subsequently, several scientific expeditions were sent to the region and they determined that the area did not hold much promise for pastoral or other economic activities. Uluru and Kata Tjuta, nevertheless, were taken from the Yankunytjatjara and Pitjantjatjara peoples in 1920 by Australia and placed in the South West or Petermann Aboriginal Reserve, part of a system of land reserves set aside for Anangu occupation but administered by religious organizations and the Commonwealth.

20. "Uluru National Park Plan (1991)", *ibid.* at 4, 15-16. See also the pamphlets published by the Institute for Aboriginal Economic Development, Australian National University, Canberra, ACT, Australia.



Beginning around 1940, tourists found Uluru. As tourism increased, eastern urban Australians registered a strong identification with Uluru and Kata Tjuta, so much so, that in 1958, Uluru and Kata Tjuta were excised from the South West Reserve and placed under Section 103 of the Northern Territory Crown Lands Ordinance in order for them to be made into a national park. By 1960, 10,000 visitors a year found their way to Uluru,<sup>21</sup> and for the next 19 years, Ayers Rock-Mount Olga National Park was managed by the Northern Territory Reserves Board. During these nearly two decades, a tourist infrastructure was brought to the park. This included a road network, camping facilities, a motel and an airstrip. On Uluru itself, “the chain” was installed—a single link fence with metal poles anchored in holes chipped out of the rock—so that tourists could climb to the top. Anangu were appalled with the desecration of such a sacred place. In 1976, a tourist township called Yulara was created north of the park. All of this activity heightened tensions between Aboriginal residents of the park on the one hand and the Northern Territory park rangers and tourists on the other.<sup>22</sup>

The passing of the *National Parks and Wildlife Conservation Act*<sup>23</sup> that created Uluru-Kata Tjuta National Park in May, 1977, fundamentally altered these relationships. For the time being, the federal government enlisted the Conservation Commission of Northern Territory (“CCNT”) to manage the park. One year earlier, in 1976, Australia’s Parliament passed the *Aboriginal Land Rights (Northern Territory) Act*<sup>24</sup> giving the Anangu the right to claim unalienated Crown land. Geographer J. M. Powell describes the land rights issue for Aborigines as having “strong roots” throughout Australia, but especially in Australia’s centre and north—Northern Territory. Observes Powell carefully, “[w]hite Territorians had been typed as notoriously racist, and there had been a long history of resistance from Aboriginal communities, who had managed to retain some of their traditional ways.”<sup>25</sup> With passage of the *Act*, nearly one-third of Northern Territory was eligible for Aboriginal control. The park quickly became a flashpoint for all Territorians.

In 1979, Anangu put forward their claims for a large area of southwestern Northern Territory including the park, but the Aboriginal Land Commissioner declared that Uluru was alienated Crown land and excluded the park from the claim. Instead, lands north and east of the park were granted inalienable freehold use to the Anangu, and the Uluru-Kata Tjuta Land Trust was created. The very day the Aboriginal Land Commissioner refused to give Uluru and Kata Tjuta to its Indigenous peoples, the Pitjantjatjara Council sent a specific request to the federal government. This request would eventually be realized. They asked the government to “... show its sincerity in relation to Land Rights by offering the Aboriginal claimants a freehold title with a lease back to [ANPWS] and a joint

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21. Bill Bryson, *In a Sunburned Country* (New York: Broadway Books, 2000) at 252. Bryson notes that by the year 2000, 10,000 tourists come to Uluru on average every ten days.

22. Woenne-Green, *supra* note 18 at 282.

23. *National Parks and Wildlife Conservation Act 1975* (Cth) (L. No. 12).

24. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (L. No. 191) [hereinafter *Aboriginal Land Rights Act 1976*].

25. Powell, *supra* note 17 at 281-82.

management program.” The Pitjantjatjara were willing to work with the Piranpa. Observed the Council, “[i]n this way the owners will receive acknowledgment of their interest in the Park and the Australian people at large will still enjoy access to this significant area.”<sup>26</sup>

The federal government listened to the Pitjantjatjara Council, but time was needed to explore, what was termed by the ANPWS, an “uneasy compromise.” Tension persisted inside and outside the park. Northern Territory rangers continued to run the park; the Mutitjulu settlement remained a community within the park and a major tourist attraction. Finally, in 1982, Uluru’s traditional Anangu were offered title to the park and consultation with the park’s managers, the CCNT, but the Pitjantjatjaras and Yankunytjatjaras rejected the federal offer. It turned out to be a very wise decision.<sup>27</sup>

### **Landmark Legislation and Resistance to Aboriginal Park Ownership**

Another three years passed after the Anangu refused to co-manage Uluru and Kata Tjuta with Northern Territory before Australia’s national government offered an extraordinary and path-breaking arrangement to the Pitjantjatjaras and Yankunytjatjaras. In September 1985, Parliament approved the *Aboriginal Land Rights (Northern Territory) Amendment Act* of 1985<sup>28</sup> and the *National Parks and Wildlife Conservation Amendment Act* of 1985.<sup>29</sup> These amendments to existing laws clarified several legal questions, two of which are particularly pertinent. First, they declared that Uluru-Kata Tjuta National Park was, in fact, unalienated Crown land and must be placed in the Uluru-Kata Tjuta Land Trust. Second, the amended laws also provided for a new means by which joint Anangu-Piranpa management of the park could transpire. Moreover, the CCNT managers of the park were replaced by the federal NPWCS. Uluru-Kata Tjuta was at the same time both Aboriginally-owned and federalized.<sup>30</sup>

Not everyone was pleased with these developments. Most unhappy were white pastoral leaseholders in Northern Territory, the new conservative Northern Territory government, some conservationists and the park rangers from the CCNT. Northern Territory had only received self-government seven years earlier in 1978, just before Kakadu National Park was created. Thus, representative democracy began in Northern Territory with a divisive debate over land rights. The new Territory parliament officially warned that Aboriginal land rights should not be “within the legislative province of Canberra.” Since the CCNT supervised the park, the Territory should have final say over its disposition, politicians in Darwin, the Territory’s capital, reasoned. Park professionals believed they should have primary power over the park in order to prove they could work with Aboriginal people on Aboriginal land. They also wanted to

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26. “Uluru National Park Plan (1991)”, *supra* note 19 at 4.

27. Woenne-Green, *supra* note 18 at 284.

28. *Aboriginal Land Rights (Northern Territory) Amendment Act 1985* (Cth) (L. No. 93).

29. *National Parks and Wildlife Conservation Amendment Act 1985* (Cth) (L. No. 94).

30. “Uluru National Park Plan (1991)”, *supra* note 19 at 4, 6.

expand the park by taking in more Aboriginal land. Their position embraced consultation, not power-sharing. A state of mutual hostility formed between Darwin and Canberra, and between the CCNT and the ANPWS.<sup>31</sup>

The resistance did not stop. The Northern Territory government took its case to the Australian people. It blitzed the national media with a campaign entitled “Uluru—A National Park for All Australians or a National Tragedy.” The Territory government protested what they termed “the granting of ‘a national treasure’ to a minority group,” arguing that Northern Territory should have title to the park.<sup>32</sup> They accused the ANPWS of “empire building” at the expense of the CCNT. When the official day to hand over the park to the Anangu, October 26, 1985, arrived, the Chief Minister of Northern Territory prohibited the Territory’s public servants from attending the ceremony and instead allowed a plane to fly over the park with a banner trailing behind it that read “Ayers Rock for All Australians.”<sup>33</sup> What has been called the “hand back” proved to be very important symbolically to Aboriginal peoples. Queen Elizabeth’s representative, the Governor-General of Australia, and Prime Minister Gough Whitlam attended. Anangu responded by placing signs at the entrances to the park that read, “Pukulpa pitjama Ananguku ngurakutu—Welcome to Aboriginal Land.” This Pitjantjatjara phrase became the primary interpretive message for Uluru-Kata Tjuta National Park.<sup>34</sup>

The Yankunytjatjara and Pitjantjatjara peoples were now owners of Uluru-Kata Tjuta National Park, but the legislation required that to own the park they had to lease it to the ANPWS (later renamed the Australian Nature Conservation Agency and then Parks Australia) who would run the park. The first lease signed in 1985 provided an annual rental fee of \$75,000A to be paid to the Anangu along with 20 per cent of the entrance fees, \$15A per person by 2000. The lease had a five-year term subject to renegotiation. In addition, the lease required that Aboriginal traditions be encouraged throughout all aspects of park management, that Anangu be trained for administration and control of the park, that as many Aboriginal people as possible be involved in park operations with adjustments in working hours and conditions made to accommodate Anangu culture, such as to attend ceremonies, and that the park promote Aboriginal language and culture among non-Aboriginal employees and visitors to the park.

The federal law, in addition to the lease, also stipulated that Uluru-Kata Tjuta National Park would be controlled by a Board of Management composed of 10 members serving five-year terms: six members nominated by Anangu traditional owners, four of whom had to be residents of Mutitjulu; one member nominated by the federal minister responsible for tourism; one member nominated by the federal minister in charge of the environment; one scientist

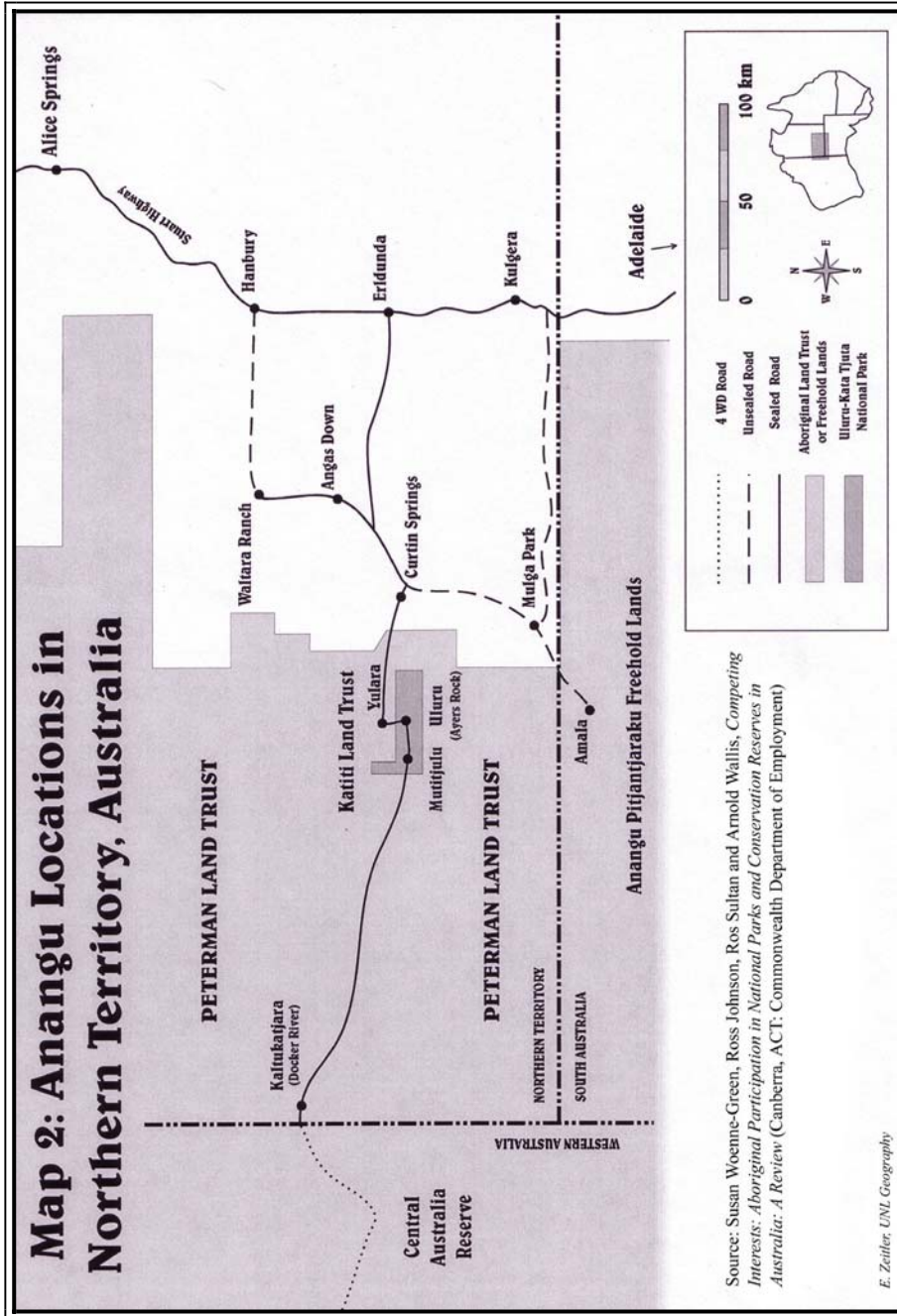
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31. Woenne-Green, *supra* note 18 at 273, 284.

32. “Uluru National Park Plan (1991)”, *supra* note 19 at 4.

33. *Ibid.* at 284.

34. *Ibid.* at 289; Baker, *supra* note 2 at xi; and fax communication from Isabel McBryde to John Wunder (4 August 1999). At the 10<sup>th</sup> anniversary of the “hand back,” another celebration was held at Uluru by the Pitjantjatjaras.



experienced in arid land ecology and land management; and the Director of the ANPWS, the actual lessee. The chair of the Board must be Anangu.<sup>35</sup>

### **The Joint-Management Uluru Model in Operation, 1986-2001**

Beginning in 1986, Aborigines at Uluru-Kata Tjuta National Park began an odyssey that no other Indigenous peoples in the world have experienced. They not only owned their park but they were empowered to manage it and make decisions regarding its management. The history of Uluru’s Board of Management evolved from its early tentative years of planning to its most recent actions making Uluru-Kata Tjuta a truly “Aboriginal National Park.”

The first Board of Management for Uluru-Kata Tjuta National Park served a five-year term from 1986 to 1991. Chaired by Yami Lester, the Board included Tony Tjamiwa, a senior man from Mutitjulu; Graham Griffin, an arid lands ecologist; and Peter Bridgewater, Director of the ANPWS, among others. Mandated to develop a park management plan and then amend or rewrite the plan every five years, the Board was also to make decisions consistent with the plan, monitor the management of the park and advise the federal minister responsible for national parks on future development of the park. All Board meetings were to be conducted in both English and Pitjantjatjara and open to any Anangu. Decisions were to be arrived at by consensus and unanimously adopted without voting, the traditional Aboriginal style for resolving issues. The Board’s organic act stipulated that non-Anangu members of the Board must be sympathetic to joint-management principles and respectful of Anangu culture.<sup>36</sup> When the first Board adopted a management plan for the park, elder Tony Tjamiwa summarized the plan: “in Uluru we’ve got both laws [Aboriginal law and Australian federal law] working together, running side by side.”<sup>37</sup>

It was, of course, one thing for Indigenous peoples to obtain title to a major national park and quite another to be intimately involved in its joint management. In the first meeting, the first Board declared that the new management plan would *begin* the process of outlining the principles of joint management. The Board noted that Uluru-Kata Tjuta National Park “... is an Anangu place, Anangu Park and that Anangu people are going to be involved with the management and work of the Park.”<sup>38</sup> The plan, as written and adopted, truly represented a beginning phase. It explained about Aborigines living within the Park and defined what an Aboriginal National Park was, giving the significance and history of Uluru from the Anangu perspective. Park professionals noted that the plan was unusual because each chapter was bilingual and included a summary in the Pitjantjatjara language. One senior ANPWS official reflected that “[j]oint management,’ if you could call it that, started out on the bare bones

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35. Baker, *supra* note 2 at 6-9.

36. *Ibid.* at 8-9; Woenne-Green, *supra* note 18 at 272-75, 282-89.

37. Woenne-Green, *ibid.* at 286.

38. *Ibid.*

of its legal arse. Basically you could say that they [Aboriginal people] got the title but we kept the park.”<sup>39</sup> That assessment would soon change.

The second Board, appointed in 1991, began a new five-year term. Yami Lester, reappointed by his people, continued to serve as chairman. Also renamed to the Board was Tony Tjamiwa. Of the six Anangu Board members, five were asked to continue on the Board. The Mititjulu community understood the value of continuity and expertise in its representatives. Of the four Piranpa members, three continued on the Board, including Peter Bridgewater and Graham Griffin. The second Board completely revised the original plan and established Tjukurpa, the Traditional Law, as the guiding principle for park management.<sup>40</sup> Tony Tjamiwa observed that “[t]he Tjukurpa is first, up front, then the Board coming up behind, and then Rangers and Anangu behind that, working together to run the Park.”<sup>41</sup> A fundamental change had occurred.

The new plan marked a transition from goodwill to empowerment. It set the involvement of Anangu in the management of the park on a day-to-day level as a primary goal. Liaisons between Mutitjulu settlement members and park officials and between Board members and park officials were institutionalized. Approvals of various scientific surveys of the park were now required both from senior members of the Anangu community as well as the Board. Science had to respect Aboriginal religious and cultural practices. The Board turned down an ANPWS proposal to install a monorail connecting tourist facilities to the park, in part because it would be too disruptive to the environment as well as to Anangu sacred places. The cross-cultural training of Board members and ANPWS officers, both Anangu and non-Anangu, and tourism representatives, such as tour guides and bus drivers, engaged particular attention from the Board. When film crews wanted to work in the park, the Board required constant Anangu supervision. The Board also redressed long-standing insulting interpretations on park signage. The plan required that information provided to visitors must emphasize the spiritual significance of the park to Anangu, and while the Board did not move to prevent climbing Uluru, it decided to de-emphasize it as a park activity and to encourage visitors not to climb. In other words, the second plan put in place a number of regulations that would “Aboriginalize” the park and make Anangu full partners in its daily management.<sup>42</sup>

World recognition of this experiment arrived in 1995 when the Board of Management of Uluru-KataTjuta National Park and Parks Australia [formerly ANPWS] received UNESCO’s Picasso Gold Medal for its efforts to preserve the landscape and Anangu culture and for setting new standards internationally for

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39. *Ibid.* at 273.

40. Uluru-Kata Tjuta Board of Management and Australian National Parks and Wildlife Service, “Uluru (Ayers Rock-Mount Olga) National Park Plan of Management” (Canberra: Commonwealth of Australia, 1996) at v, 11 [hereinafter “Uluru National Park Plan of Management (1996)”].

41. Woenne-Green, *supra* note 18 at 288.

42. *Ibid.* at 286-89; “Uluru National Park Plan of Management (1996)”, *supra* note 40 at 1-109.

world heritage management. The honour of designation as a Biosphere Reserve also came to the park at the International Biosphere Convention.<sup>43</sup>

The third Board recently completed the term from 1996 to 2001. Anangu chose a new chair, Joanne Willmot and that transition occurred smoothly. A member of the ‘Stolen Generation’,<sup>44</sup> those children forcibly taken from Aboriginal families and placed in orphanages or foster homes and who never knew their families, Willmot grew up in Queensland, moved to Adelaide in South Australia, and now lives at Mutitjulu where she has family links.<sup>45</sup> Three other Mutitjulu residents chosen joined Anangu from Docker River (Kaltukatjara), an Aboriginal settlement of sixty permanent residents due west of Uluru in the Petermann Aboriginal Land Trust near the Western Australia

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43. Fax communication from Isabel McBryde to John Wunder (4 August 1999). See also Hilary Sullivan, “Kakadu—Past and Present” in J. and S. Domicelj, eds., *A Sense of Place? A Conversation in Three Cultures* (Canberra: Australian Government Publishing Service, 1989) at 7-14; Isabel McBryde, “Those truly outstanding examples ...”: Kakadu in the Context of Australia’s World Heritage Properties—A Response” in Domicelj, *ibid.* at 15-19; and “Tradition, Significance and Conservation: Kakadu” in Domicelj, *ibid.* at 46-52.
44. See the film *Bringing Them Home*, produced by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission (Canberra, ACT: Australia, 1997); Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs—the Untold Story* (St. Lucia, Queensland: University of Queensland Press, 1997); and Jack Davis *et al.*, eds., *Paperbark: A Collection of Black Australian Writings* (St. Lucia, Queensland: University of Queensland Press, 1990), especially “Brown Skin Baby” by Bob Randall at 297-98:

Yaaawee, yaahaawawee,  
My brown skin baby they take ‘im away.  
As a young preacher I used to ride  
My quiet pony round the countryside.  
In a [N]ative camp I’ll never forget  
a young black mother her cheeks all wet.  
Yaaawee, yaahaawawee,  
My brown skin baby they take ‘im away.  
Between her sobs I heard her say,  
“Police bin take-im my baby away.  
From white man boss that baby I have,  
why he let them take baby away?”  
Yaaawee, yaahaawawee,  
My brown skin baby they take ‘im away.  
To a children’s home a baby came,  
With new clothes on, and a new name.  
Day and night he would always say,  
“Mummy, Mummy, why they take me away?”  
Yaaawee, yaahaawawee,  
My brown skin baby they take ‘im away.  
The child grew up and had to go  
From a mission home that he loved so.  
To find his mother he tried in vain.  
Upon this earth they never met again.  
Yaaawee, yaahaawawee,  
My brown skin baby they take ‘im away.

45. Interview with Isabel McBryde (13 October 1997).

border, and from Areyonga (Moi Moi Donald), an even smaller permanent settlement of twenty Anangu northeast of Uluru and west of Alice Springs in the Haasts Bluff Aboriginal Land Trust. All three communities, classified as major aboriginal settlements, are self-governing and have schools, stores and health centres.<sup>46</sup> Tony Tjamiwa, Graham Griffin and Peter Bridgewater continued to provide continuity from previous Boards. Also, a new Piranpa appointment, Professor Isabel McBryde, an internationally-prominent archaeologist recently retired from the Australian National University in Canberra, brought additional expertise.<sup>47</sup>

McBryde described an early meeting of the third Board. Everyone convened at a meeting room in Mutitjulu for the event. Members of the community joined in along with their relatives and children. The Chair began the meeting by announcing that they were going to start the process of evaluating the park plan, to revise it or construct a new one. Willmot told everyone that they were first going to draw their personal versions of what the park should look like 20 years from 1997. A flurry of activity immediately commenced. Anangu Board members quickly took up their colored pens that they usually carry with them and began to sketch on the paper provided. The Piranpa exhibited confusion. They were not used to visually presenting ideas, but after some awkward moments, they too joined in the projection of the future once they were allowed to use words as well as pictures in the exercise. Most Piranpas drew flow charts.

One of the Anangu members of the Board was called upon to explain his picture. Tony Tjamiwa had drawn a familiar scene near one side of Uluru where an old man was talking to a young boy. He explained that this picture represented a grandfather educating his grandson about the land, the animals and plants of his heritage, and Tjukkurpa. The grandfather was passing along this information so that it would not be lost and so that his grandson could share it with his grandchildren and his Pitjantjatjara and Piranpa friends.<sup>48</sup> It was a poignant reminder to everyone of the value of Uluru to the Anangu.

In early 1999, the third Board completed its draft of the third plan and sent it out for public comment. According to its authors, the new plan is stronger than its predecessors in presenting Anangu views. Much more of the plan is translated into Pitjantjatjara, and for the first time the plan has a number of drawings and paintings, a more familiar medium for many Anangu.<sup>49</sup>

Recent investigative reports of Uluru-Kata Tjuta National Park present a positive assessment of the role played by Indigenous peoples in their homelands,

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46. *Ibid.*; *Northern Territory Aboriginal Communities, 1997* (Alice Springs, NT: Northern Territory Department of Lands, Planning & Environment, 1997) at 3, 5, 10, 14; Northern Territory Government, "Aboriginal Land and Community Map" (November 1996), Sheet 2 of 2.

47. McBryde has written extensively on archeology and ethnohistory in Australia. For discussions on such important issues to Aborigines as "authenticity" and Anangu control of cultural and archeological heritage, see Isabel McBryde, "The Ambiguities of Authenticity—Rock of Faith or Shifting Sands?" (1997) 2 *Conservation and Management of Archaeological Sites* 93 and "The Past as Symbol of Identity" (1992) 66 *Antiquity* 261.

48. Interview with Isabel McBryde (13 October 1997).

49. Letter from Isabel McBryde to John Wunder (February 1999).



hosting many non-Indigenous peoples. But there are danger signs and subtle threats to joint management. For both Uluru-Kata Tjuta and Kakadu, new legislation and amendments to previous federal acts have been proposed in Parliament by the Conservative government of Prime Minister John Howard. A proposed new commonwealth environmental law that has provisions for protected areas under its jurisdiction and amendments to the *Aboriginal Land Rights (Northern Territory) Act* of 1976 under consideration would have strong implications for joint management as presently practiced.<sup>50</sup> These are serious threats to the successful Uluru model.

Nevertheless, the world’s spotlight shone on Uluru-Kata Tjuta National Park when in early June of 2000, the Olympic flame first arrived in Australia. The torch was received by eight Pitjantjatjaras, reported in the international press as “the traditional owners of the surrounding Uluru-Kata Tjuta National Park,” who, in turn, lit the torch of Nova Peris-Kneebone, the first Aborigine to win an Olympic gold medal and who began the circuitous run taking the flame to Sydney.<sup>51</sup> And in Australia’s capital, the National Park Service and the Anangu recently concluded in an official report that “... there is no place for a concept of National Park that ignores the rights, responsibilities and knowledge of the traditional Aboriginal owners of that land.”<sup>52</sup> These rights and responsibilities include Indigenous land ownership and formal, legal commitments to Indigenous power-sharing in park management.

#### IV THE UNITED STATES’ EXPERIENCE

The United States Congress created the first national park in the world. In 1872, President Ulysses S. Grant signed into law the designation of Yellowstone National Park. Previously, in 1864, President Abraham Lincoln had by presidential order set aside lands creating the Yosemite park and placing management of the park in the hands of the relatively new state of California. The park managers at Yellowstone and Yosemite, homelands to Indigenous peoples, immediately set about the business of Indian removal. Yellowstone purged its Native American residents and land claims through a series of treaties and agreements. The legal documents obligated the Blackfeet, Shoshones and Crows to renounce their claims to Yellowstone. Yosemite’s past involved a more direct use of coercion. The U.S. Army in 1851 and 1906 and the Park Service in 1929 and 1969 forcibly removed Miwoks and other Native Americans. Indians still reside at Yosemite in spite of the government’s attempts to displace them

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50. *Ibid.* To be precise, the new legislation includes an environmental protection and biodiversity bill (1998) which has sections relating to protected areas, especially those managed by Parks Australia (ANPWS), and to leasing arrangements at Uluru and Kakadu, and to the composition of the Board of Management. Additional implications for joint management are found in proposed parliamentary amendments to the *Aboriginal Land Rights Act 1976*, *supra* note 24.

51. “Flame arrives in ‘belly of Australia’” *USA Today* (8 June 2000) 2C.

52. Woenne-Green, *supra* note 18 at 272.

from their homelands.<sup>53</sup> Thus, the relationship of Native Americans and national parks in the United States is a difficult one, not unlike those of Aboriginal peoples and the national parks of Australia.

Robert H. Keller and Michael F. Turek in their recent book, *American Indians & National Parks*, document the 20<sup>th</sup> century history of Indigenous peoples and America's preserved landscapes. Using a case study method, Keller and Turek show how national parks throughout the United States have consistently abused their relationships with Native Americans. Unlike post-World War II developments in Australia, the United States chose to remedy Indigenous land title disputes through the Indian Claims Commission which was not authorized to grant titles of unalienated lands to its Indigenous residents or claimants. Thus, there is no national park owned by Native Americans and leased to the federal government in the United States.

There is, however, a legacy of limited cooperation. Keller and Turek cite only the Nez Perce National Historical Park as a model partnership of Indigenous occupants and governmental management, but they did not research its evolution. "We regretfully pass by the model 'partnership park' managed by the Nez Perce tribe since 1965," write Keller and Turek, "as well as failed attempts to create similar partnerships with the Gila River Pima at Snaketown in Arizona and the Zuni at Cibola in New Mexico."<sup>54</sup> These latter two parks are termed representative of "a modern era in park/Indian relations." Further attempts to create "partnership" parks with the Pimas and Zunis in 1971 and 1988 failed because the Indian partners did not approve of the arrangements. What then is meant by "partnerships" in U.S. national park management and what might it mean to Native Americans? How successful has cooperative management worked? To understand this concept in terms of Indigenous relationships with national parks, a review of the history of the Nez Perce National Historical Park and what has been termed the United States' most effective Indigenous national park "partnership" is necessary.

### **The Origins of the Nez Perce National Historical Park**

Nez Perce country, to which the Nez Perce National Historical Park is devoted to preserving and interpreting, is located near the junction of three states: Idaho, Oregon and Washington. The Nez Percés, or Nimiipu, have resided there continuously for over 11,000 years. Much of the land is rolling, rich wheatlands—the Palouse—in Washington state, but in Oregon and Idaho, the rivers and streams pierce a more rugged terrain. The Nimiipu trace their origins to the

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53. Keller and Turek, *supra* note 7 at 23-29. For Yosemite relationships, see also Rebecca Solnit, *Savage Dreams: A Journey into the Landscape Wars of the American West* (New York: Vintage Books, 1995) at 288, quoted in Keller and Turek, *ibid.* at 23 and Spence, *supra* note 11 at 57-70 and 103-32.

54. Keller and Turek, *ibid.* at 29.

Kamiah Valley near the forks of the Clearwater River, located on the current Nez Perce Indian Reservation in rugged north central Idaho.<sup>55</sup>

Nez Percés first came to the close attention of the United States in 1831 when Wep-tes-tse-mookh Tse-mookh (Black Eagle), Ka-ow-poo (Of the Dawn), Heh-yookts Toe-nihn (Rabbit Skin Leggings) and Ta-weis-se-sim-nihn (No Horns) journeyed to St. Louis and surprised its residents by requesting information about Christianity. A cacophony of religious denominations responded, but the American Board of Commissioners for Foreign Missions acted first, sending Henry and Eliza Spalding to Nez Perce country where they set up a mission near the Clearwater. Nearly three decades earlier, during their expedition to the Pacific, Meriwether Lewis and William Clark dropped in on the Nimiipu at Weippe Prairie, a traditional Nez Perce harvest area for camas roots. The Nez Percés treated the Americans well, but contact with the Lewis and Clark Expedition did not result in an immediate furtherance of relationships between the United States and the Nimiipu.<sup>56</sup>

The 1830s, 1840s and 1850s brought more missionaries, fur traders, the first settlers on the Oregon Trail and gold miners to Nez Perce country. At this time, the Nimiipu were settled in numerous villages along the Clearwater and Snake rivers in Idaho: six villages between the Grande Ronde River and Wallowa Mountains in northeastern Oregon and three villages in the southeast corner of Washington. After the resolution of a dispute over Oregon between the United States and Britain resulted in the *Oregon Treaty* of 1846,<sup>57</sup> American military forces arrived in the Pacific Northwest.

At a council convened in 1855 by Isaac Stevens, Washington Territory Governor and Joel Palmer, Superintendent of Indian Affairs for Oregon, a variety of tribal leaders, including several representatives of the Nez Percés, signed agreements that set aside Idaho reservation land for all Nez Percés. Many Nez Percés believed then and still believe the treaty to be fraudulent because Stevens, not the Nez Percés, chose the leaders who signed the document. Nevertheless, the United States sought to make this agreement and a subsequent land cession in 1867 a reality, eventually with force, and this led to the United States-Nez Perce War in 1877, a crucial event in Nez Perce history.<sup>58</sup>

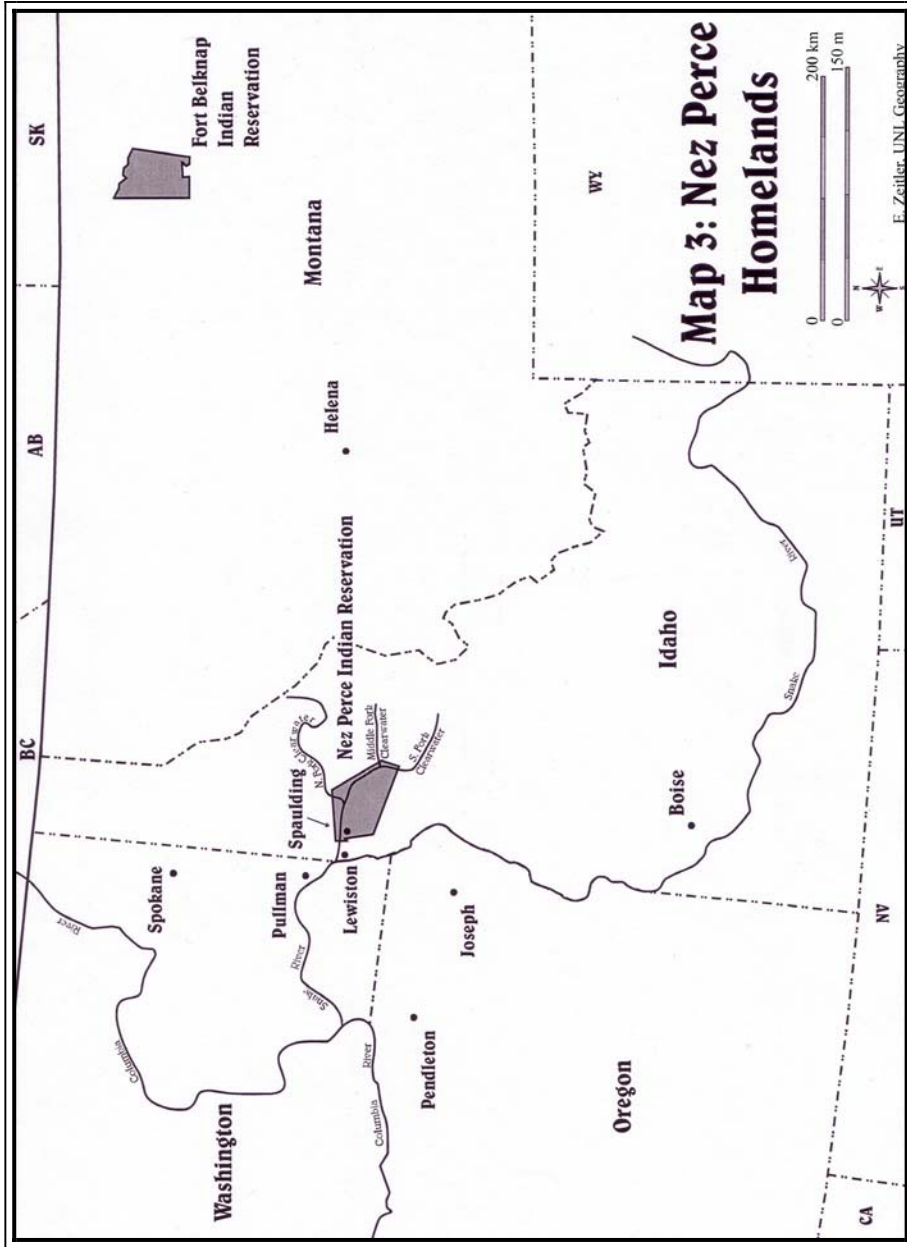
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55. U.S., Department of the Interior, *Nez Perce Country* (Official U.S. National Park Handbook for the Nez Perce National Historical Park), Handbook 121 (Washington, DC: National Park Service, 1983) at 6 [hereinafter *Nez Perce Country*]; *Nez Perce and Big Hole*, *supra* note 4 at 4.

56. Bob Chenoweth, “The Spalding-Allen Collection” [unpublished] at 2-3 [hereinafter “The Spalding-Allen Collection”]; Steven L. Grafe, “Still They Look Handsome: The Spalding-Allen Collection” (Summer 1997) 22 *American Indian Art Magazine* at 35-36; Stephen E. Ambrose, *Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening of the American West* (New York: Simon and Schuster, 1996) at 298-304.

57. Treaty with Great Britain, in regard to limits westward of the Rocky Mountains [Oregon Treaty of 1846], 9 Stat. 869 (1846).

58. Ted Catton, *Nez Perce National Historical Park Administrative History* (Missoula, MT: Historical Research Associates, 1996) at 1-3; Merrill D. Beal, “I Will Fight No More Forever”: *Chief Joseph and the Nez Perce War* (Seattle: University of Washington Press, 1963) at 4-5; Alvin M. Josephy Jr., “The People of the Plateau” in *Nez Perce Country*, *supra* note 55 at 82-89.



Non-treaty Nez Perce leaders Looking Glass and Joseph led their people east and north through Idaho, Wyoming and Yellowstone National Park, Montana, almost to Canada. Many Nez Percés chose to settle at the Idaho reservation; a few escaped to Canada. Promised they could return to the Idaho reservation, instead Joseph and his followers were, upon capture in northern Montana, shipped on box cars to Oklahoma, where many died. Eventually the remaining Nez Percés returned to the Pacific Northwest, but Joseph and his band were not permitted to live on the Nez Perce Reservation. He died and is buried on the Colville Reservation in central Washington state where Nez Percés today still reside (see Map 3).

By 1960, Nez Percés numbered approximately 2100. Over 60 per cent lived on their Idaho Reservation, although a number resided at Colville and on the Umatilla Reservation in northeastern Oregon. The Nimiipu speak a dialect of the Shahaptian language, Nimiipuutimpt, which translated means “the People’s language.” It is related to the language of their neighbours, the Umatillas of Oregon and the Yakamas of Washington. Of those residing in Idaho, 70 per cent were unemployed and approximately another 10 per cent held seasonal part-time jobs; Nez Perce families in 1960 earned an average income of \$950 per year. Understandably, Nimiipu leaders saw economic development as a primary concern and tourism seemed to have some potential for the tribe.<sup>59</sup>

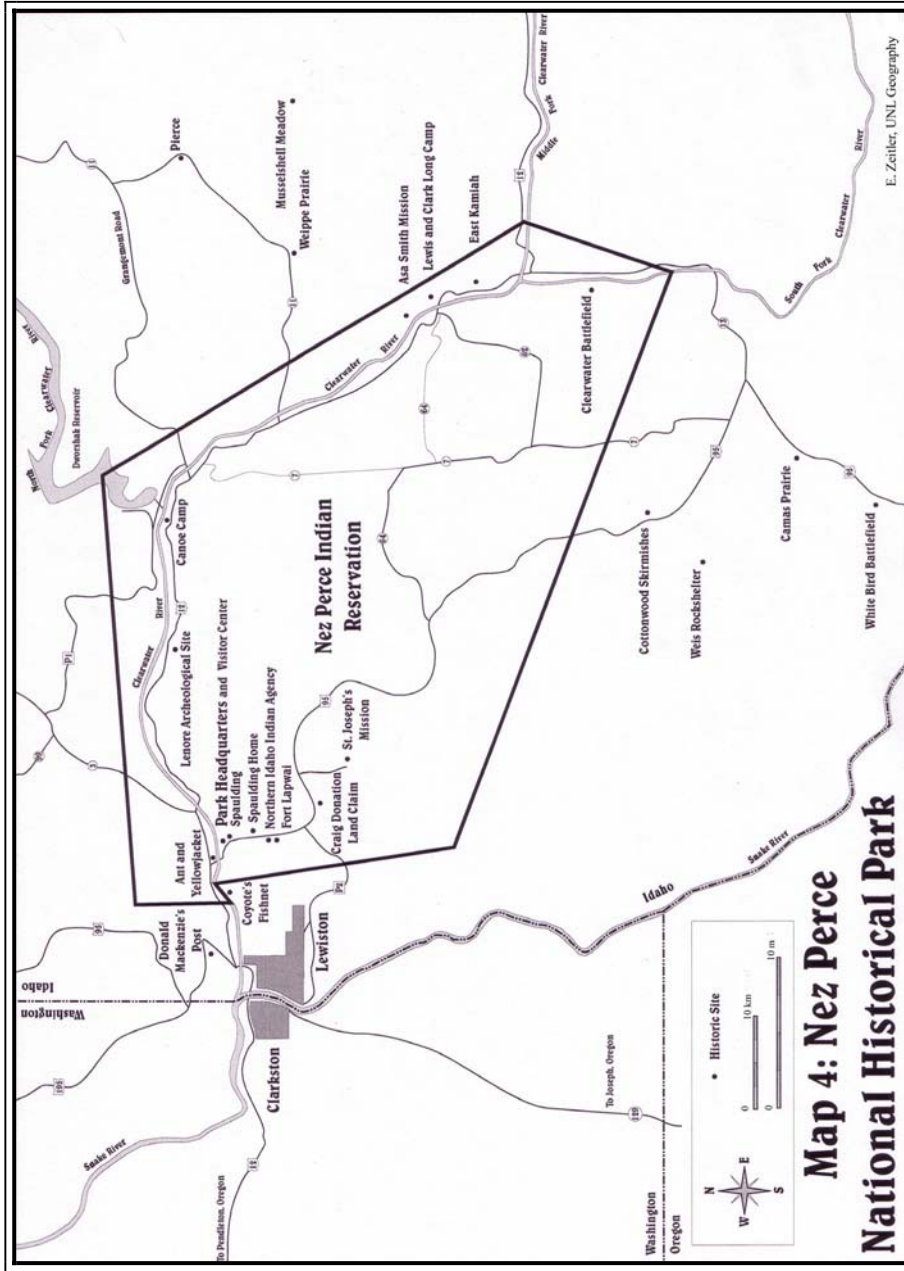
Nez Perce economic interests converged with those of non-Indians in the region. As early as 1920, local whites proposed to the state of Idaho and the U.S. government the commemoration of the Spaldings with a park, and in 1936, Idaho dedicated the Spalding State Park with the Spalding home and surrounding acreage set aside for picnic grounds, footpaths and an arboretum. Local women, members of the Daughters of the American Revolution, who had spearheaded the park drive, however, remained unsatisfied. They wanted a museum and they argued that tourism demanded it. In 1962, the federal government completed Highway 12 between Lewiston, Idaho and Lolo, Montana. This scenic road, the Lewis and Clark Highway, brought thousands of tourists for the first time to the settlement of Spalding and the city of Lewiston through the Nez Perce Reservation.<sup>60</sup> By the early 1960s, local leaders of women’s organizations and the Lewiston Chamber of Commerce, together with the Nez Perce Tribe, favoured establishing a national historical park to develop, promote and preserve Nez Perce country’s history.

In order to create a national park, assessments of needs, feasibility and obstacles must be made. In 1963, through a grant from the U.S. Area Redevelopment Administration, the federal government contracted with the Armour Research Foundation to see whether a Nez Perce National Historical Park was justified. The submitted report stipulated to the feasibility of a “tourist and historical facilities program” that included a museum or visitor centre, an

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59. Axtell, *supra* note 3 at 216; Catton, *ibid.* at 8-9.

60. Catton, *ibid.* at 5-8.



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amphitheatre, an Indian village and a tourist services complex.<sup>61</sup> More importantly, this memorandum represented the earliest formal recognition of the desirability of joint park management by the Nez Perce tribe and the National Park Service (“NPS”). A visitor centre, deemed the key to success, required an administrator who could coordinate the management of scattered sites both on and off-reservation.

By the time Congress prepared a bill to this effect, a variety of limitations had been imposed by interested parties. Local non-Nez Perce interests wanted the proposed park restricted to Idaho although Nez Perce country expanded beyond the state. Others favored the imposition of strict financial guidelines, including the prohibition of any provision forcing private land owners to sell historically-significant property for the park. And the prevailing sentiment by park partisans placed the focus of the park on 19<sup>th</sup> century Nez Perce history, primarily the 1877 war and the intersection of the Nimiipu with white settlers. Most importantly, management of a proposed park would rely solely with the NPS.<sup>62</sup>

### **Constructing an Indigenous National Park Without the Indians**

In 1965, Congress, with the approval of President Lyndon Johnson, created the Nez Perce National Historical Park. Originally the park included 24 separate sites—described by the NPS as “beads on a loosely strung necklace”<sup>63</sup>—covering nearly 12,000 square miles (see Map 4). Of the sites, seven are off-reservation and 17 are found within the Nez Perce Indian Reservation. The sites constitute a rosary of colonial orthodoxy: two glorify the fur trade; four acclaim Christian missionaries; four beatify the comings and goings of Meriwether Lewis and William Clark; one exalts the Idaho gold rush; three venerate battles in the Nez Perce confrontation with the U.S. Army; and two anoint a United States fort and Indian agency buildings. Eight sites directly relate to Nez Perce history and culture (see Table 1).

Historically American Indians, like Australian Aborigines, have had their worst relationships with state agencies. It has been state governments who have most often attempted to take Indigenous lands and abuse Indian peoples. From the origins of the Nez Perce National Historical Park, the state of Idaho owned and managed 13 of the 24 park sites, including nine sites on reservation land. The U.S. Forest Service managed three other sites and private owners managed two sites. Even though the NPS owned and managed only four of the 24 sites, the park organic act mandated that the Park Service act as primary manager and make management agreements with each site constituent. Only two original sites

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61. Joseph H. Fraser, *A Survey of the Recreational and Tourism Resources in the Nez Perce Country*, vol. II of *The New Perce Country*, prepared by the Armour Research Foundation for the U.S., Bureau of Indian Affairs (June 1963) [unpublished], quoted in Catton, *supra* note 58 at 15.

62. *Ibid.* at 11-18.

63. *Nez Perce Country*, *supra* note 55 at 26.

involved joint management by the NPS, the Bureau of Indian Affairs (“BIA”) and the Nez Perce tribal government.

**Table 1: NEZ PERCE NATIONAL HISTORICAL PARK**

NEZ PERCE NHP SITES	LOCATION	MANAGEMENT	SUBJECT FOCUS
1. Donald MacKenzie’s Pacific Fur Company Trading Post	off reservation	State of Idaho	fur trade
2. Coyote Fishnet	off reservation	State of Idaho	Nez Perce culture
3. Ant & Yellowjacket	on reservation	State of Idaho	Nez Perce culture
4. Spaulding Mission	on reservation	U.S. Park Service	Christian missionaries
5. Spaulding Home	on reservation	privately owned and managed	Christian missionaries
6. Northern Idaho Indian Agency	on reservation	jointly managed: U.S. Park Service, BIA, Nez Perce tribal government	U.S. Indian Agency
7. Fort Lapwai	on reservation	jointly managed: U.S. Park Service, BIA, Nez Perce tribal government	U.S. Army
8. Craig Donation Land Claim	on reservation	State of Idaho for private owner	fur trade
9. St. Joseph Mission	on reservation	privately managed for Catholic Church	Christian missionaries
10. Cottonwood Skirmishes	on reservation	State of Idaho	U.S.-Nez Perce War
11. Weis Rockshelter	on reservation	State of Idaho	Nez Perce culture
12. Camas Prairie	on reservation	State of Idaho	Nez Perce culture
13. White Bird Battlefield	on reservation	U.S. Park Service	U.S.-Nez Perce War
14. Clearwater Battlefield	on reservation	State of Idaho	U.S.-Nez Perce War
15. East Kamiah	on reservation	U.S. Park Service	Nez Perce culture
16. Asa Smith Mission	on reservation	State of Idaho	Christian missionaries
17. Lewis & Clark Long Camp	on reservation	State of Idaho	Lewis & Clark
18. Canoe Camp	on reservation	U.S. Park Service	Lewis & Clark
19. Lenore	on reservation	State of Idaho	Nez Perce culture
20. Weippe Prairie	off reservation	State of Idaho	Nez Perce culture
21. Pierce	off reservation	State of Idaho	gold mining
22. Musselshell Meadow	off reservation	U.S. Forest Service	Nez Perce culture
23. Lolo Pass	off reservation	U.S. Forest Service	Lewis & Clark
24. Lolo Trail	off reservation	U.S. Forest Service	Lewis & Clark

Thus, of the 24 sites, the state of Idaho managed the majority and only two involved partnership with the Nez Percés. Not one site in the park was under the sole management authority of the Nez Percés. The oldest model and only “partnership” with Indigenous peoples claimed by the National Park Service could be labeled a “partnership” by only the most imaginative.

The first official national park handbook for the park, *Nez Perce Country*, describes Nez Perce culture and historic sites in telling ways.<sup>64</sup> At Coyote Fishnet, an off-reservation mountain site managed by the State of Idaho, Nez Perce stories about the land are couched in the term “legends.” In Ant and Yellowjacket, another state-managed site, this one on the reservation, the Park Service alludes to its importance in “Nez Perce mythology.” Missing from the

64. *Nez Perce Country*, *supra* note 55. See especially, 188-89.



handbook are the concepts and words of Nez Perce world views, the founding of the Nez Perce nation, or Nez Perce creation beliefs.

We, however, learn from the handbook that the “first white to be born in Idaho” arrived at the Henry and Eliza Spaulding Home, the fifth site at the park located on the reservation. At the Cottonwood Skirmishes site, state-managed NPS rhetoric informs us that “[b]oth the Nez Perces and the U.S. Army seemed equally surprised at the overwhelming Nez Perce victory.” From the Camas Prairie site, the Nez Perce rode off to start the “Nez Perce War of 1877.” These statements simply are not historically accurate. Later at the Clearwater Battlefield, the Park Service observes, “the facts of the war almost have a ring of fiction.”<sup>65</sup>

Direct involvement of the Nez Perce with the park occurs only at sites four, six and seven. At site four, the Spaulding Mission, the NPS is the primary manager. This site serves as the headquarters of the park and has a modern visitor centre controlled by the Park Service. Permanent exhibits at a museum in the visitor centre feature Nez Perce fineries; Nez Perce contacts with whites, with emphasis on the Lewis and Clark Expedition and a Jefferson peace medal given to the Nez Perces; and the horse and the Nez Perces. The curator is hired by the Park Service. A cemetery next to the Mission includes the Spauldings, other missionaries, white teachers and Indian agents. This is owned by the Park Service. Also interred are many Nez Perces. That part of the cemetery is owned by the Nez Perce tribe but is managed by the NPS.

Sites six and seven involve joint management agreements among the Park Service, BIA and Nez Perce tribal government. Site six houses the Northern Idaho Indian Agency in Lapwai on the reservation. According to the handbook, this building is hard to find on the site at Old Fort Lapwai, deactivated as a military garrison in 1884. The BIA maintains the Indian agency that serves the Nez Perces, as well as the Coeur d’Alenes, Kootenais and Kalispels. Also located here are Nez Perce tribal government offices. Site seven is Fort Lapwai itself and the grounds.<sup>66</sup>

Thus, the Nez Perce National Historical Park was constituted as a national park dedicated to the history of the Nez Perces but rarely involved the Nez Perces. The sites chosen involved key places central to Nez Perce history and culture, but their initial interpretation rarely reflected their significance to the park’s nearby Indigenous residents. The National Park Service did not intend to involve the Nez Perces either through consultation or a joint-management model. This all changed when expansion for the park activated all of its constituents, including the Nez Perce tribe.

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65. *Ibid.* at 194, 196, 200.

66. *Ibid.* at 190-94.

### Park Expansion and Expressions of Nez Perce Sovereignty

One of the traits of American national parks that strains relationships with Indigenous peoples is the bureaucracy's near constant desire to expand the physical nature of parks, often at the expense of Indian-held lands adjacent to or near the parks. True to form, expansion almost immediately became a goal for the Nez Perce National Historical Park, although increasing the number of park sites eventually involved taking only one new site on Indian lands, that on the Colville Reservation in Washington state. The Park Service argued that its primary concern embraced the full development of the theme of Nez Perce history and this necessitated careful expansion, but expansion nevertheless. Interestingly, in the legislative process needed for expansion to occur, the Nez Percés successfully asserted their desire for a much greater partnership at the park.

Only four years after the creation of the Nez Perce National Historical Park, the Park Service investigated new sites in Oregon as potential additions. They did so at the request of the Oregon congressional delegation. This did not result, however, in an expanded park. A study was completed, but no congressional action proved forthcoming. In 1987, the Park Service's regional office organized a task force to review the 1969 study and to look into the suitability of other sites to add. This resulted in a 1989 draft report identifying 13 possible new sites in Idaho, Montana, Oregon and Washington.<sup>67</sup> Encouraged by this incomplete report, Senator James McClure, Republican from Idaho, offered a bill, S. 2804, to amend the 1965 Nez Perce park organic act.<sup>68</sup>

On June 28, 1990, the Senate Subcommittee on Public Land, National Parks and Forests held a hearing on McClure's bill. The proposed law expanded the ability of the National Park Service to acquire and develop new sites in Oregon, Washington, Montana and Idaho as well as Wyoming and Oklahoma for the Nez Perce National Historical Park. The original 1965 law confined the park premises to the state of Idaho. Of 13 specific new sites for possible acquisition listed, there were three in Idaho, two on the border between Idaho and Washington state, two in Washington, three in Montana and three sites in Oregon (see Table 2). Two of the Oregon sites—the Joseph Canyon Viewpoint and Old Joseph's Gravesite and Cemetery—had been investigated in the 1969 report. McClure's bill also restricted how these sites could be obtained—only when a seller willing to part with land could be officially contacted—and increased the funds available for development from \$4.1 million to \$9.3 million and for land acquisition from \$630,000 to \$2.13 million.<sup>69</sup>

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67. *Miscellaneous New Mexico Public Lands Bills and Nez Perce National Historical Park Addition: Hearing Before the Sen. Subcomm. on Public Lands, National Parks and Forests and the Comm. on Energy and Natural Resources*, 101st Cong. (1990) (statement of Jerry L. Rogers, Associate Director, National Park Service) at 28.

68. To amend the Act of May 15, 1965, authorizing the Secretary of the Interior to designate the Nez Perce National Historical Park in the State of Idaho, and for other purposes, S. 2804, 101st Cong. (1990), *ibid.* at 21-23.

69. *Ibid.* at 21-23, 28-29.

**Table 2: PROPOSED NEW SITES FOR NEZ PERCE NATIONAL HISTORICAL PARK**—Senator James McClure’s Original 1990 Bill to Amend the 1965 Park Organic Act

PROPOSED SITE	STATE
1. Tolo Lake	Idaho
2. Looking Glass’s 1877 Campsite	Idaho
3. Buffalo Eddy	Washington and Idaho
4. Doug Bar	Washington and Idaho
5. Camas Meadows Battle Sites	Idaho
6. Joseph Canyon Viewpoint	Oregon
7. Old Joseph’s Gravesite and Cemetery	Oregon
8. Traditional Campsite at the Fork of the Lostine and Wallowa Rivers	Oregon
9. Burial Site of Chief Joseph the Younger	Washington
10. Nez Perce Campsites	Washington
11. Big Hole National Battlefield	Montana
12. Bear’s Paw Battleground	Montana
13. Canyon Creek	Montana

Senator McClure offered several rationales for park expansion in Senate subcommittee testimony. First, the amendment had bipartisan senatorial support from most of the proposed sites’ senators—Washington’s Brock Adams, Democrat; Montana’s Max Baucus, Democrat; Conrad Burns, Republican; and Idaho’s Stephen Symms, Republican. No senators from Oregon were yet on board. McClure also noted that his legislation “has the strong support of the Nez Perce Tribal Executive Committee, the governing body of the Tribe, located in Lapwai, Idaho, that is so much a part of the history of our Nation and the more recent history of the Pacific Northwest.”<sup>70</sup> However, no Nez Perce testified nor were any documents introduced indicating official tribal action.

In McClure’s testimony, he outlined the basic reason for the park—to tell the history of the Nez Percés. The problem, as McClure saw it, was that restricting site development to Idaho prevented the telling of the entire Nez Perce story. The problem, as some Nez Percés may have seen it, was Senator McClure’s understanding of Nez Perce history as limited to the story of Chief Joseph and the Nez Perce War of 1877. His bill, he claimed, “would expand the Nez Perce park to include sites ranging from Wallowa County in northeastern Oregon, Chief Joseph’s birthplace and a crucial part of the 1877 war, to the Bear Paw Battlefield in Montana, where the Nez Perce surrender occurred.” McClure also noted that Chief Joseph’s “final resting place” in a graveyard in Nespelem, Washington on the Colville Indian Reservation would be included. After the surrender, Nez Percés were forced to live in Oklahoma and McClure’s bill included this journey as a possible place for future sites. In his testimony, McClure grandiosely claimed that the “Nez Perce War” was “the last military action in which the United States of America and an Indian Tribe were engaged in hostilities.” Somehow Senator McClure had forgotten about Geronimo or Wounded Knees I and II, to mention only a few such actions. He concluded with an emotional appeal to his fellow senators, pleading that adding the sites would

70. *Ibid.* (statement of Senator James A. McClure) at 24-25.

be both “a fitting tribute to Chief Joseph’s memory” and “an inspiring commentary on the centennial spirit that binds our states in the Northwest ... through which Chief Joseph traveled.”<sup>71</sup> Washington, Idaho, Wyoming and Montana had just celebrated their statehood centennials in 1989 and 1990.

The only other testimony before the committee appeared to slow down Senator McClure, but only temporarily. Jerry L. Rogers, Associate Director of the National Park Service, came forward and recommended that Congress defer action. He testified that the Park Service report was only a preliminary study and that cost estimates had not been adequately investigated. Senator McClure questioned Rogers. He wanted to move ahead, but McClure asked whether any of the sites were unsuitable. Rogers responded that none were although some needed to be treated cautiously, particularly the camp sites in Washington state. McClure would not hear of it. He shifted the discussion. “Can you tell the committee when you will have completed that review?” Rogers said he could not. McClure: “Is it a matter of weeks, months, or years?” Rogers: “Probably a matter of months.” McClure then closed by urging Associate Director Rogers to finish promptly “because we do want to move this bill.” After Rogers responded that the bill language offers too much detail and perhaps it could be altered, McClure curtly dismissed Rogers, and the chair of the subcommittee Senator Jeff Bingaman, Democrat from New Mexico, closed off testimony on the Nez Perce National Historical Park additions in order to get to his own New Mexico land business also scheduled before the committee.<sup>72</sup>

The McClure bill next surfaced four months later in October of 1990, before a meeting of the full Senate Committee on Energy and Natural Resources chaired by Senator Bennett Johnston, Democrat from Louisiana. Johnston brought forward McClure’s bill and offered a series of amendments. Four sites were to be deleted, including Doug Bar in Washington and Idaho, Joseph Canyon Viewpoint, Old Chief Joseph’s Gravesite and Cemetery, and the Traditional Campsite in Oregon. All of Oregon’s sites were to be taken out of the bill. Perhaps Oregon’s senators had objected. Johnson also proposed adding five new Montana sites (see Table 3). He then added language that would make the whole park concept of dispersed sites very unmanageable. All sites of the park were to be managed by the district in which they were located, so the Idaho and Washington sites would be administered by the Pacific Northwest Region of the Park Service but the new Montana sites were to be handled by the NPS’s Rocky Mountain Region office.<sup>73</sup>

Significant new language in this bill suggests the first sign of Nez Perce intervention. The revised bill required that Indian trust land included in the park could only be added with the agreement of the Indigenous owners. In addition, another amendment stipulated that “the Secretary of the Interior may cooperate with the Nez Perce Tribe or the administering agency, as the case may be, in

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71. *Ibid.*

72. *Ibid.* (statement of Jerry L. Rogers, Associate Director, National Park Service) at 29.

73. Comm. on Energy and Natural Resources, “Nez Perce National Historical Park,” S. REP. NO. 101-494 at 1-4 (1992).

research into and interpretation of the significance of any site ... .”<sup>74</sup> Such language suggests that Nez Perces were told by Park Service employees that they could not consult with them until NPS received statutory permission. Congress adjourned before more action was taken.

**Table 3: PROPOSED AMENDMENTS TO THE MCCLURE 1990 BILL AMENDING THE 1965 NEZ PERCE NATIONAL HISTORICAL PARK ORGANIC ACT**

PROPOSED NEW SITES	STATE
1. Virginia City	Montana
2. Lolo Pass	Montana
3. St. Mary’s Mission	Montana
4. Bannack State Park	Montana
5. Pompeys Pillar	Montana

PROPOSED DELETED SITES	STATE
1. Doug Bar	Washington and Idaho
2. Joseph Canyon Viewpoint	Oregon
3. Old Chief Joseph’s Gravesite and Cemetery	Oregon
4. Traditional Campsite at the fork of the Lostine and Wallowa Rivers	Oregon

On July 30, 1991, a new sponsor, Senator Mark Hatfield, Republican from Oregon, reintroduced S. 2804 in the Committee on Energy and Natural Resources with three old sponsors: Senators Burns of Montana, Symms of Idaho and Adams of Washington. Once again rewritten, the committee assigned the proposal a completely new bill number, S. 505.<sup>75</sup> In the interim, Nez Perces had been very busy. First, they met with the city officials from Joseph, Oregon, then with representatives from the Park Service and the Forest Service, and then with the owners of the property that surrounded Old Chief Joseph’s Gravesite. They reached an understanding on the minimum acreage needed to preserve and interpret the site, and the Nez Perces encouraged the U.S. Forest Service to conduct purchase negotiations. Moreover, in the newly amended act, Section 6c contained the following words: “In order to ensure the cultural and historical accuracy of the interpretation sites of the Nez Perce country, the Secretary shall consult with officials of the Nez Perce tribe.”<sup>76</sup> This was a significant breakthrough for Indigenous peoples who had relationships with American national parks. Although joint management had yet to be achieved, consultation would be more than merely suggested; at the Nez Perce National Historical Park, consultation with Native inhabitants now constituted a park requirement.

Other revisions brought back into the park mix the state of Oregon and Hasotino Village, a new Idaho site, but specifically deleted Oklahoma. The Congressional Budget Office completed and appended a budget analysis

74. *Ibid.*, “Changes in Existing Law, Pub. L. No. 89-19” at 7-8.

75. Comm. on Energy and Natural Resources, “Amending the Act of May 15, 1965, Authorizing the Secretary of the Interior to designate the Nez Perce National Historical Park in the State of Idaho, and for other purposes,” S. REP. NO. 102-130 at 1-4 (1993).

76. *Ibid.* at 3-4, 13.

justifying the additional funds for acquisition and development already provided. Also back on the hill came Jerry L. Rogers from the Park Service who now supported the amendments, including consultation with the Nez Perce tribe.<sup>77</sup>

Rogers gave the Park Service view on park expansion. He testified that there were two reasons for expansion. First, restricting the park to Idaho prevented telling a complete history of the Nez Percés, frustrating the park's purpose. That complete history, according to Rogers, still embraced providing "the visiting public with a much better understanding of the problems and events that culminated in the 1877 Nez Perce war."<sup>78</sup> Nez Perce history, for Park Service leadership, remained time-locked in the 19<sup>th</sup> century. And second, Rogers envisioned expansion building upon a partnership system that had worked so well. Rogers praised the management agreements with federal, state, tribal and private interests. He described the agreements as ranging from the simple to the complex and he concluded, "[w]e have found this arrangement to be quite effective in achieving the level of protection and interpretation that is necessary."<sup>79</sup> Rogers then noted that an interpretive station at Old Chief Joseph's Gravesite and a new visitor centre at Bear Paw, Montana would need to be built.

Rogers concluded his testimony with a ringing call to the ages, expounding on how the new Nez Perce National Historical Park would include sites that,

have played a leading role in shaping the history and development of the West, beginning with the first contact between Lewis and Clark and the Nez Perce at Wippe [P]rairie in 1805. The Nez Perce War of 1877 was an event that not only deeply affected its participants and their descendants for generations, but reached beyond to stir the emotions of an entire nation. We now have before us the opportunity to finally interpret the whole story of the Nez Perce, their country, and their impact on American history.<sup>80</sup>

Allowing the Nez Percés a final say in the interpretation of their own history in their own park stayed beyond any part of this debate.

The sites in the final version of the expansion bill, however, represented a political return to the sites listed in the original McClure bill. The only changes found Doug Bar now located in Oregon and Idaho, not Washington and Idaho, and Hasotino Village in Idaho added. There were 14 sites authorized for acquisition. Oklahoma remained deleted, but the Nez Perce consultation requirement stayed. This bill passed the committee on a unanimous vote and was approved by the Senate. The House next took up the bill from the Senate, and while there were attempts to delete sites and to challenge the ability of the Park Service to obtain private property, the Senate bill was accepted by the House,<sup>81</sup>

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77. *Ibid.* at 2; statement of Jerry L. Rogers, Associate Director, National Park Service at 4-7.

78. *Ibid.* at 8.

79. *Ibid.* at 9.

80. *Ibid.* at 10.

81. Comm. on Interior and Insular Affairs, "Designating the Nez Perce National Historical park in the State of Idaho," H.R. REP. NO. 102-258 at 1-10 (1993).

and on October 30, 1992, after a presidential signature, a new improved Nez Perce National Historical Park became federal law.<sup>82</sup>

### **The Required Indigenous Consultation Nez Perce Park Model in Operation, 1992-2001**

Since 1992, consultation at the Nez Perce National Historical Park has taken on several dimensions. Perhaps most importantly, “required consultation” has been construed by the Park Service to mean working with the Nez Percés prior to and during planning, rather than simply informing the Nez Percés after the completion of NPS planning. The Park Service legally interpreted its mandate to consult within an international law framework rather than within a non-legal construction of the term, but consultation has been a dynamic process.

One way to compare the change that resulted from the park expansion act is to analyze memorandums of understanding between the Park Service and the Nez Perce tribe both before and after 1992. In 1989, the two reached an accord, attested to by Allen V. Pinkham, Chairman of the Nez Perce Tribal Executive Committee and Roy Weaver, Superintendent of the Nez Perce National Historical Park, on fighting fires that might break out on the Nez Perce Indian Reservation. The NPS agreed to respond to fires on the reservation if requested by the Nez Percés and pay park employees for their time fighting fires. Park employees were to take direction from an “Incident Commander” or a Nez Perce tribal official in command at the scene of the fire. The Nez Perce agreed to pay tribal members fighting fires and to “recognize the significance of historic and prehistoric resources on Federal lands within Nez Perce National Historical Park and not disturb ground surfaces in suppression activities except at the direction of a responsible National Park Service Official.”<sup>83</sup> In essence, each would help the other to put out wild fires, but any fires near park sites required park officials to be in charge.

After 1992, in subsequent agreements, this imbalance moved towards greater parity. For example, in 1995 the Department of Fish and Game for the State of Idaho and the Park Service reached a new agreement over the preservation, interpretation, development and administration of the Tolo Lake Site in the Nez Perce National Historical Park. For the first time, Idaho agreed to review and revise all interpretive text of signs and markers at Tolo Lake after consultation with both the Idaho Historical Society and the Nez Perce Tribe, and specifically to “provide for the Tribe to review and approve all proposed interpretive text prior [to] construction of any interpretive signs and markers.” Thus, while not an

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82. Act of October 30, 1992, Pub. L. No. 102-576, 106 Stat. 4770 at 4770-71.

83. U.S., Department of the Interior, National Park Service, “Memorandum of Understanding between National Park Service and the Nez Perce Tribe [regarding wild fires],” Agreement No. NEPE-89-01 (January 1989).

official signatory of this agreement, the Nez Perce Tribe attained approval power over the presentation of Nez Perce history at this site to the public.<sup>84</sup>

To enhance park planning and consultation, the superintendent of the Nez Perce National Historical Park, beginning in 1994, initiated an annual conference held in the autumn at nearby locations, where Park Service officials and employees convene together with on and off-reservation Nez Percés. These gatherings, termed “reservation-to-reservation meetings,” are designed to revise the park Master Plan<sup>85</sup> and to address issues of mutual concern. They are well attended by Nez Perce delegates, including Nez Perce tribal appointees, from the Nez Perce Indian Reservation, Colville and other locations, and descendants of the Nez Perce-United States War journeying from Oregon, Washington, Idaho, Montana and Canada. In addition, a host of non-Indian scholars and historians who have researched and written books about the war join in the meeting. Nez Perce elders address the people assembled and provide important commentary on the Master Plan. It is an open meeting and non-Nez Perce representatives from the various site constituencies also attend.<sup>86</sup>

At the very first meeting, a Nez Perce elder asked the superintendent, “[a]re you really sincere about Nez Perce history?”<sup>87</sup> With this serious and fundamental question lingering in the air, the Park Service has begun to respond with deeds and actions. Most Nez Perce believe that a good faith effort is being made and, as a result, the Park Service has gained credibility among tribal people. Ron Pond says that these annual affairs now constitute a reunion for many. Every tribe in the region has representatives who come. Moreover, there are upper and lower Nez Percés, and the lower band of Joseph descendants have opened the meetings. Already traditions have begun. There is a religious and national commonality at play. Pond notes that the “Park Service does not realize the true identity of all the Nez Percés at the meeting,” but nevertheless the link binding the tribe and Park Service prevails to make the meetings successful.<sup>88</sup>

These meetings have greatly enhanced cooperation and partnership at the park. In 1998, the Park Service and the Nez Perce Tribe agreed to a formal “Cooperative Agreement,” signed by Franklin C. Walker, Superintendent of the Nez Perce National Historical Park and Samuel N. Penney, Chairman of the Nez Perce Tribal Executive Committee. A Nez Perce, Otis Halfmoon, served as official Park Liaison for the negotiations. Among the numerous provisions is another significant concession to Nez Perce knowledge of their own history: “the Park recognizes the importance of the accounts of Nez Perce elders as primary to

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84. U.S., Department of the Interior, National Park Service, “Cooperative Agreement between the State of Idaho Department of Fish and Game and the Nez Perce National Historical Park for the Preservation, Interpretation, Development, and Administration of the Tolo Lake Site Designated as a Component of Nez Perce National Historical Park,” Agreement No. 1443-CA9370-95-003 (August 1995) especially at 2-3.

85. During the presidency of Frank C. Walker, the first Master Plan was developed. This process began in 1994 and resulted in a National Park Service publication in 1997. See *Nez Perce and Big Hole*, *supra* note 4; and Catton, *supra* note 58 at 46.

86. E-mail communication from Ron Pond to John Wunder (5 April 1999).

87. Telephone interview with Ron Pond (21 April 1999).

88. *Ibid.*



the understanding and interpretation of the ‘Nez Perce Campaign of 1877’ ... .’ Each section of the Agreement reiterates a mutual respect. Such language as “this Cooperative Agreement in no way restricts the parties from participating with other public and private agencies ... ,” “[n]othing in this agreement shall obligate either party in the expenditure of funds ... ,” and “[t]he parties agree that each will be responsible for their own actions ... ” permeates the document.<sup>89</sup>

A certain amount of mutual respect has built up between the Park Service representatives on-the-scene and the Nez Perce tribe. In 1998, Superintendent Walker sent a cover letter to the members of the National Resources Subcommittee of the Nez Perce tribe informing them that in the final draft of the Cooperative Agreement he had previously circulated, he had incorporated all of the Nez Perce suggestions for revision. In a personal aside, Walker wrote, “[f]inally, I would like to take this opportunity to express my appreciation for the solid working relationship we have developed over the years ... .”<sup>90</sup> Such respect is enhanced with a greater Nez Perce presence within the Park Service. As of the year 2000, five Nez Perces held full-time permanent positions at the park and NPS annually allotted several part-time summer jobs to tribal members.<sup>91</sup>

This respect has resulted in instances of clear cut deference to Nez Perce culture and greater involvement of the Nez Perces in park administrative decisions. Of particular importance to the Nez Perce are how the Park Service administers holdings of Nez Perce cultural property and collections and the way in which NPS handles matters that pertain to burial remains found on or near park sites. Specific loan agreements involve Nez Perce families and the curator of the Nez Perce National Historical Park. In 1998, Mylie Lawyer, the great grand-daughter of Hol-lol-sote-tote, or Chief Lawyer, agreed to place on loan her collection of artifacts, documents and photographs with the park in its visitor centre. The park agreed to provide proper storage and security, something all Nez Perce families value, and to guarantee all Nez Perce tribal members access to the collection. The collection could not be loaned to other institutions, but could be exhibited under proper Nez Perce conditions.<sup>92</sup> Similarly, Earl Conner, for the Conner family agreed in 1999 to loan a genealogy of Chief Joseph’s family and notes from a 1928 meeting of the survivors of the 1877 Nez Perce-

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89. U.S., Department of the Interior, National Park Service, “Cooperative Agreement between Nez Perce National Historical Park and the Nez Perce Tribe,” Agreement No. 1443-CA9370-98-001 (January 1998).

90. Franklin C. Walker, Superintendent, Nez Perce National Historical Park to Natural Resources Subcommittee, Nez Perce Tribe, Lapwai, Idaho (14 January 1998).

91. Interview with Bob Chenoweth, Curator, Nez Perce National Historical Park (2 May 2000).

92. U.S., Department of the Interior, National Park Service, “Incoming Loan Agreement from Douglas R. Nash, Green Creek, Idaho, to provide security and proper curatorial storage and care for the Lawyer Family Collection” (17 November 1998); “Agreement for the Loan of Artifacts from Douglas R. Nash to Nez Perce National Historical Park,” Accession 527 (8 January 1999).

United States War to the Park Service.<sup>93</sup> These invaluable historical documents and artifacts are now entrusted to the NPS.

Park curator Bob Chenoweth values and depends upon Nez Perce advice and knowledge. When new materials are received, Horace Axtell comes to purify the collection in a private ceremony. Several items have been removed from the permanent display upon Nez Perce objection to showing sacred artifacts. A cultural resources program has been jointly developed with the tribal government. Tribal leaders realized, beginning in the 1970s, that important documents and artifacts were being pawned, stolen or destroyed by poor storage practices, and they have taken action to prevent their loss.<sup>94</sup> With the acquisition of the Spalding-Allen Collection, an extensive private collection of Nez Perce artifacts, the Park Service has an important cultural property responsibility it shares jointly with the Nez Perce.<sup>95</sup> In general, Chenoweth sees the park, and the visitor centre especially, as a “halfway house.” There is a responsibility to respect and accommodate Nez Perce culture.<sup>96</sup>

Matters of repatriation have also by necessity involved the park and the tribe. On at least 30 occasions, remains have been repatriated. If the Park Service needs archeological expertise, it now contracts with the Nez Perce tribe which has its own archeological program and trained tribal archeologists. This is particularly necessary if the NPS has an on-reservation project. Typically, if the Park Service discovers human remains, it immediately stops work and informs the tribal office. Tribal officials and archeologists are then sent out and an informal repatriation is handled without having to resort to bureaucratic or legal mechanisms. The tribe then reburies remains with proper Nez Perce protocol. This works better for all concerned, say park officials, and enhances the climate of mutual respect.<sup>97</sup>

The Nez Percés and other Native American nations can also look to other federal legislation in order to obtain greater participation in national park management. In 1994, a law passed provided for contractual flexibility for Indian

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93. U.S., Department of the Interior, National Park Service, “Incoming Loan Agreement from Earl E. Conner, Pendleton, Oregon, to secure storage and approved research purposes for various papers regarding chief Joseph’s genealogy and minutes of 1928 meeting of the survivors of the Nez Perce War of 1877” (15 March, 1997). See also U.S., Department of the Interior, National Park Service, “Incoming Loan agreement from Titus Paul, Lewiston, Idaho, and Mesa, Arizona, to provide storage, exhibition, research, photography, publican, and other uses consistent with Nez Perce National Historical Park’s mission for the Titus Paul Collection” (5 February 1993).

94. Interview with Bob Chenoweth (2 May 2000).

95. U.S., Department of the Interior, National Park Service, “Incoming Loan Agreement from the Nez Perce Tribe of Idaho to the Nez Perce National Historical Park, covering Spalding-Allen Collection” (30 May 1996); U.S., Department of the Interior, National Park Service, “Memorandum of Understanding between Nez Perce Tribe and Nez Perce National Historical Park, to bring about the acquisition of the Spalding-Allen Collection of Plateau materials by the Nez Perce Tribe and ensure their long-term care” (7 March 1994); “Spalding-Allen Collection”, *supra* note 56 at 1-14; and Grafe, *supra* note 56. An agreement facilitated the acquisition of this major collection from the Ohio Historical Society with the Nez Perce tribe assuming ownership with repository at the park visitor centre, complete with a joint supervisory committee. On a very much smaller scale, this is comparable to the Australian Uluru-Kata Tjuta National Park legislation.

96. Interview with Bob Chenoweth (2 May 2000).

97. *Ibid.*

tribal governments,<sup>98</sup> and a new section, Title IV, entitled “Tribal Self-Governance” was attached.<sup>99</sup> Official federal policy to establish and encourage tribal self-governance, continued the trust relationship,<sup>100</sup> but “an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities”<sup>101</sup> would be implemented. Lest this be interpreted to apply to only educational and social programs offered through the Bureau of Indian Affairs, further language in the law allowed Indian nations to negotiate plans and administer programs and services “administered by the Department of the Interior, other than through the Bureau of Indian Affairs.”<sup>102</sup> Such programs and services include those with “special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”<sup>103</sup> This legislation thus applies to national parks and the National Park Service, and for them partnerships with direct consultation with Native peoples can have new meanings.

Partnerships for Indigenous peoples and United States national parks are clearly in developmental stages. They remain far from the Australian model of joint management agreements and Indigenous park ownership and they represent limited partnerships at best, but, at least for several American parks, tribal consultations are required. A greater consultative role for the Nez Perces is guaranteed in the Nez Perce National Historical Park. In the first pages of the Park Service handbook for the Nez Perce National Historical Park, Chief Joseph is quoted about how he intended to adjust to his new relationship with the United States government after the war and his surrender: “If the white man wants to live in peace with the Indian, he can live in peace. There need be no trouble. Treat all men alike.” Joseph continued, “[g]ive them all the same law. Give them all an even chance to live and grow. All men were made by the Great Spirit Chief. They are all brothers. The earth is the mother of all people, and all people should have equal rights to it.” Joseph concluded with a request and a bow to the law of his captors. “Let me be a free man—free to travel, free to stop, free to work, free to trade, where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to think and talk and act for myself—and I will obey every law, or submit to the penalty.”<sup>104</sup>

As Nez Perces engage the 21<sup>st</sup> century, they have yet to achieve all of the freedoms Joseph articulated so forcefully a century and a quarter ago. Under coercion and capture, and under violations of traditional military practices of the time and international law, Joseph recognized that the forces he was confronting

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98. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 at 4272-77.

99. *Ibid.* at 4272.

100. *Ibid.* at 4277.

101. *Ibid.* at 4271.

102. *Ibid.* at 4273.

103. *Ibid.* at 4274.

104. *Nez Perce Country*, *supra* note 55 at 10.

would not allow him to obey his people's traditions, his nation's law. Today, more than ever before, Nez Perces have a say in decisions affecting Nez Perce National Historical Park. But this empowerment is still dependent upon on-site park leadership and Department of the Interior interpretations of the statutes governing Indigenous partnerships. Because Nez Perces do not own the Nez Perce National Historical Park and because Nez Perce traditions are not legally required to be respected for management of the park, and because Nez Perce law clearly is not the official law of the park, there still remain no legal guarantees of direct Indigenous involvement in managing American national parks.

## V CONCLUSION

Over the past 20 years, two models of Indigenous national park management, that of Uluru-Kata Tjuta National Park in Australia and Nez Perce Historical National Park in the United States, have evolved. They vary from a system of Indigenous park ownership and joint park management set in place in Australia for the Pitjantjatjaras and Yankunytjatjaras to the required Indigenous management consultation implemented in the Pacific Northwest of the United States for the Nez Perces. They offer two distinct legal approaches to the expressed goals of Native peoples, the vast majority of modern nation-states and the United Nations; movement towards greater cultural autonomy and political power for Indigenous peoples within their homelands.

These two models highlight significant legal differences. In basic ways, they represent the intersection, or some might say, collision, of customary law and statutory law. Three fundamental legal developments distinguish Uluru-Kata Tjuta National Park and one other national park in Australia from all other attempts throughout the world to reconcile Indigenous peoples with their homelands once appropriated for colonial reserves. First, by statutory law, the Pitjantjatjaras and Yankunytjatjaras were granted fee simple title to Uluru-Kata Tjuta National Park. As Indigenous owners, they then leased the park to the Australian federal government. Second, statutory law established Tjukurpa or traditional Aboriginal law as the guiding principle for management of the park. All regulations governing park management had to be reconciled with traditional law. And third, statutory law authorized the creation of a Board of Management to operate the park. The Board was numerically controlled by majority Anangu representation chosen from Pitjantjatjaras and Yankunytjatjaras living within or nearby Uluru-Kata Tjuta.

Understanding the application of these three legal concepts to the actual exercise of sovereignty over their homelands by the Pitjantjatjaras and Yankunytjatjaras is crucial. As Indigenous owners and primary managers of a national park that is their own homeland within a federal and colonial environment, Aborigines have gone about the business of exercising their legal rights with care, fairness and firmness. It appears that customary law and Australian federal law can work together, even in the face of a federal government that is less than happy with the arrangement. One could argue that

had not common law title been granted to the Aborigines, they would not have had the leverage to withstand the hostility of the state or federal government. Should the federal government grow weary of the lease, title would automatically revert to the Aborigines and a crisis would be at hand for what many non-Aboriginal Australians consider a national treasure.

Of the three legal aspects present in this revolutionary action in Australia, the most potentially significant is the use of traditional law, Tjukurpa, for governing the park. The ramifications are profound. The creation of park planning documents that are culturally-ascribed combines traditional law with statutory law in an administrative law framework. The principles are Anangu; the applications are backed by the power of statutory force. The mere establishment of an Anangu base for making policy has had visible results in terms of touring and park sign labeling, and has made the entire nation and the world’s visitors aware of the sovereignty, both real and potential, of the Pitjantjatjaras and Yankunytjatjaras.

This is not the situation for the Nez Percés. At the Nez Perce Historical National Park, all three elements that are enabling to Aborigines in Australia are missing. The Nez Perce do not own the park, although they do own some land adjacent to the park. They do not have power over management of the park. However, statutory law instructed the NPS to consult and the NPS and Nez Perce have managed to work in good faith to resolve governance issues. As long as leadership at NPS is conducive to Nez Perce partnership, as long as NPS personnel respect the traditional law of the Nez Perce or interpret federal law within a Nez Perce framework, such as when dealing with the discovery of human remains or burial goods on park property, then a kind of Uluru model can function at Nez Perce Historical National Park.

Smoothness of management and successful implementation of customary law over Nez Perce homelands, however, should not be confused with the achievement of sovereignty. At any point, after consultation, NPS personnel may choose to ignore customary law in the implementation of park policy. The Nez Perce, after consultation, have no recourse if they believe that an action taken violates Indigenous rule making. Moreover, there is no power vested in Nez Perce tribal members over the Park Service. Although tribal members have been hired by the Park in significant ways over the past decade, and although the Nez Perce clearly have had influence over the presentation of the park to outsiders, should a dispute arise, the Nez Perce tribal government may exercise influence but not decision-making power. This is because none of the three legal developments fundamental at Uluru exist in the partnership as defined by statutory law at Nez Perce Historical National Park.

Given these tentative steps taken by national governments to achieve limited forms of sovereignty for Indigenous peoples in national parks, it is important to ask: does national context make a difference? It does when circumstances of national attention are required in order to set up a governing model. That most certainly was true for the legislative history of both Uluru and Nez Perce. But the strength of the Australian model has helped mitigate the pressures of changing

national governments and evolving national issues. National parks, by their very definition, are defined and dependent on national governments, and they are all too often the subject and site of political conflict. Insulating and protecting various forms of Indigenous sovereignty within this framework is not an easy task. Australia's experience shows that, at least at present, it can be done.

These models are significant to 21<sup>st</sup> century national park management throughout the world. Many other nations and Indigenous peoples are wrestling with their implications. For example, in 1999, Canada began the preliminary stages of creating a new wilderness reserved area along the vast interior spine of the Rocky Mountains in northern British Columbia. George Smith, Conservation Director of the Canadian Parks and Wilderness Society, addressed issues surrounding the British Columbian Muskwa-Kechika Management Area. Many constituents have an interest in preserving wilderness parks and developing wilderness areas: for British Columbia, they include oil and gas, logging, trapping, fishing and tourist industries; conservationists, urban Canadians and rural white Canadians who are subsistence farmers and live off the land; local and provincial governments; and Indigenous peoples. In order to reach consensus and to manage this huge wilderness region, Smith noted that all of the constituents "must change the nature of government." The goal is multi-stakeholder consensus, he argued, and to achieve such harmony, parliamentary legislation institutionalized a Public Advisory Committee ("PAC"). The PAC includes representatives from all of the constituencies, with four First Nations seats reserved for Indigenous peoples. Although they have played an active role at the first meetings of the management advisory committee, British Columbia's First Nations stay vigilant and engaged.<sup>105</sup> This is but another experiment in its initial stages.

Further knowledge for First Nations, Parks Canada and the British Columbia government has come from a recent visit in 2002 by Parks Canada Aboriginal Affairs Secretariat Director Linda Simon and Gitksan Hereditary Chief Elmer Derrick to the island of Taiwan. They visited Taroko National Park, where Taiwan's national government has created a new park in which its Indigenous inhabitants, the Atayal, are co-managers. Atayal elders together with Taiwanese park officials and other interested parties have initiated a planning process that is mapping the park and exploring the cultural and economic dimensions of the mountains of Taoyuan County. They have yet to discern the important specific legal considerations that may govern the new park.<sup>106</sup>

During the past decade, the First Nations of Canada and the Canadian government have sought to resolve long-standing sovereignty issues. In part, they were brought on by a number of court decisions litigating important Native rights disputes. Renewal of the treaty-making process has gripped several

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105. George Smith, "Preserving a Wilderness Ecosystem" (Canadian Studies Forum: Environment, Peace-Keeping and Sovereignty, University of Nebraska-Lincoln, 24 February 1999) [unpublished].

106. Canada, Department of Foreign Affairs and International Trade, "Aboriginal Co-Management of National Parks—The Canada Experience" (August 2002), online: *Aboriginal Planet* <[http://www.dfait-maeci.gc.ca/aboriginalplanet/archives/august2002/art6\\_intro-en.asp](http://www.dfait-maeci.gc.ca/aboriginalplanet/archives/august2002/art6_intro-en.asp)>.

provinces, with the official federal Canadian view generally represented in the decision of the *Delgamuukw* case. “[T]reaty-making,” wrote the presiding judge, “is the best way to respect Indian rights ... .” Treaty negotiations include working out specific agreements with regard to parks and protected areas. The Task Force to Review Comprehensive Claim Policy stated in 1985 that “a treaty with First Nations peoples ... should begin with a stated recognition that the First Nation has Aboriginal rights in the territory and the treaty area, and then should clearly outline the principles that will guide the new relationship.” Later, the Annual Reports of The Canadian Human Rights Commission in 1990 and again in 1991 stipulated that new treaties must find “a ‘workable balance’ between the desire of Aboriginal people to preserve their rights and the desire of government to clarify the legal status of the land question.”<sup>107</sup> It would appear that the groundwork has been laid for a Uluru-like model for Canadian national parks, but whether the will to carry through remains strong may depend upon national and provincial contexts.

Ambivalence also shapes the emerging American experience.<sup>108</sup> Breakthroughs for Native peoples occurred in 1999 when the U.S. National Park Service and the Timbasha Shoshones announced they had reached an agreement on joint management and the transfer of ownership to Indigenous peoples of a portion of the Death Valley National Park in southern California. NPS had removed the Timbasha Shoshones from the park several decades ago, but the Shoshones maintained contact with their land base and now they have reached a stage whereby they can own and develop some of the park land with federal statutory approval.

The agreement negotiated would allow the Timbasha Shoshones to acquire 300 acres near the park visitor centre where the tribe plans to build fifty houses, a culture centre, a building for tribal government offices and an inn. The Shoshones also are to have exclusive use of an adjacent 1,000 acres and will co-manage with the NPS 300,000 acres of the park to be called the Timbasha Natural and Cultural Preservation Area. In addition, Timbasha Shoshones would

107. First Nations Education Steering Committee *et al.*, “What Are Treaties, and Why Are They Being Negotiated?” in *Understanding the B.C. Treaty Process*, 2d ed., (1998) online: <<http://www.bctf.ca/social/AboriginalEd/TreatyProcess/report.html>>.

108. For a consideration of the dismal Alaska national park situation for Native Alaskans, see Theodore Catton, *Inhabited Wilderness: Indians, Eskimos, and National Parks in Alaska* (Albuquerque: University of New Mexico Press, 1997) and Claus-M. Naske’s review of this book in (1998) 29 *Western Historical Quarterly* 532.

For a stronger advocacy of Native American presence in one of America’s most famous national parks, see Jesse Larner, *Mount Rushmore: An Icon Reconsidered* (New York: Thunder’s Mouth Press/Nation Books, 2002). The front and back book jacket state:

Today Rushmore exists in several dimensions of irony. It is in the heart of Lakota Sioux country, yet all of its honorees were deeply involved in the national project of wiping out the American Indian. It was the passion of an obsessed sculptor who believed deeply in the American ideals of freedom and democracy, but who was also a high-ranking member of the Ku Klux Klan and a virulent racist. It is carved on a mountain that came into the possession of the United States through the abrogation of an 1868 treaty with the Lakota. These factors, even if not widely known, affect the message of the monument, and have made it a political object in a way it was never intended to be.

receive fee simple ownership of 6,000 acres in Nevada and California, land currently administered by the federal Bureau of Land Management.

Although the proposal represented a compromise, both the tribe and the Park Service publicly stated that each viewed the agreement as fair. Barbara Durham, Timbeshah Shoshone tribal administrator, said that with the agreement, “[t]he Park Service is recognizing that we have a right to be here.”<sup>109</sup> Don Barry, Assistant Secretary for Parks and Wildlife in the Department of the Interior, called the agreement “a new template on how to deal with Native Americans in the national parks.”<sup>110</sup> The new Bush administration installed in 2000, however, has yet to approve or implement this agreement, but even if this proposal is partially installed, the United States will have moved a step beyond the Nez Perce model and further towards the Uluru model.

Thus, although change is tenuous and often slow to occur, the relationships of Native peoples to national parks throughout the world have evolved legally. Most governments now recognize that national parks involve Indigenous homelands and frequently concern Native residents. At present, the Uluru-Kata Tjuta National Park in Australia’s vast Central desert and, to a lesser extent, the Nez Perce National Historical Park in the U.S represent the most significant steps in an on-going process. Although other parks, even within the two countries, have yet to implement these models, more and more there is movement towards a meaningful recognition of Indigenous sovereignty in national parks.

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109. “Tribe Makes Deal for Park Land” *New York Times* (27 February 1999) 21.

110. *Ibid.*



# Law, Theory and Aboriginal Peoples

GORDON CHRISTIE\*

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## V CONCLUSION

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*To some Aboriginal people domestic Canadian law is alien and oppressive. In this paper one source of this perception is explored, the argument digging below the surface of the law to layers of theory and world-view which conflict with the sensibilities of Aboriginal peoples.*

*I argue that a liberal vision underlies and animates the law, and that while grounded in this vision, the law cannot protect the interests of Aboriginal peoples. In analyzing how the law approaches the protection of Aboriginal interests, an alternative liberal argument focused on group autonomy is also considered. Examining the debate between liberal theorists about how best to protect Aboriginal interests reveals the threat liberalism in general presents to Aboriginal peoples. In adhering to deeper shared visions about the self, the community and the state, and in engaging in the shared mission of transposing these visions onto the lives and worlds of Aboriginal peoples, liberal theorists reveal liberal theory as one source of the perception of oppression.*

*The perception that the law is oppressive ultimately issues, however, from the law's grounding in a particular intellectual tradition. In exploring an approach highly critical of liberal legal theory, in tracing connections and commonalities between the philosophical groundings of both liberal and critical legal theory, this line of inquiry highlights the cultural divide between Western theorists and the worlds of Aboriginal peoples. Working towards a world in which Aboriginal interests can be appropriately protected does not mean translating these interests into group rights so they can be fit into the matrix of rights in Canada, just as it does not mean understanding these rights as reflective of group autonomy, and does not mean recognizing that the "fluid and dynamic" interests of Aboriginal peoples can be better served through progressive democratic measures. Rather it is essentially a matter of respecting the ability of Aboriginal peoples to continue to define who they are, a potential for self-definition which includes their capacity to project both their own theories and their particular forms of knowledge.*

## I INTRODUCTION: PERCEPTIONS OF THE LAW

Over the last few decades hundreds of Aboriginal people have moved into the legal field, as lawyers, judges and legal scholars. Many question their roles within the system, yet feel compelled to continue on. Aboriginal jurists commonly perceive the law as alien and oppressive<sup>1</sup>—not "our" law, but "colonial law," that of the "oppressor."

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1. Mary Ellen Turpel, "Home/Land" (1991) 10 Can. J. Fam. L. 17 [hereinafter "Home/Land"] and "Aboriginal Peoples and the Canadian *Charter*: Interpretative Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 [hereinafter "Interpretative Monopolies"]; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999) [hereinafter *Journeying Forward*]; John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 and "Sovereignty's Alchemy: An Analysis

Non-Aboriginals may find this perception confusing, for they likely think of the law as one of the few institutions in Canada which by and large works for the benefit of Aboriginal peoples, protecting Aboriginal rights from interference both from the government and Canadian society. Those with some historical knowledge may agree there is little to commend in the history of the law in Canada, but would most likely argue this is only history, that today the law shines as a beacon of hope for all Canada's Aboriginal peoples.<sup>2</sup> Undoubtedly many who have such a view of the law recognize contemporary challenges facing those who would champion Aboriginal causes within the law. Nevertheless, the general non-Aboriginal perception seems to be that the law has acknowledged Aboriginal rights, and that the fundamental challenge centres on working out the appropriate crystallization of these rights in the Canadian legal/political landscape.

Clearly someone's perceptions are mistaken. Either the law is an institution protecting the interests of Aboriginal peoples (however imperfectly at the moment), or the law maintains conditions of oppression. This paper explores one source of the common Aboriginal perception, investigating and developing an argument to the effect that the law not only commonly fails to adequately protect the interests of Aboriginal peoples (that it does not merely operate "accidentally" to hinder the aspirations of Aboriginal peoples), but that given its theoretical underpinnings it cannot but fail to protect these interests.

The domestic legal system as an institution is a social and historical construct, a structure built of words and meanings, designed to promote certain values in an ordering system.<sup>3</sup> The construct itself is grounded in a vision of how Canadian society should be structured and how the law as an integral component of society should work within this structure. This vision is the product of centuries of Western thought, as generations of Canadian (and Imperial) law-makers have worked out how they think modern societies should be constructed, and, in particular, how the modern Canadian state should be constituted. Canadian society is the product of centuries of visioning and re-visioning how this particular nation-state, (first a colony, then a parliamentary democracy, now a constitutional democracy) should be structured. While individuals within this historical intellectual tradition may each have had different views about how the law should work within the ever-evolving nation-state, broad principles and values came to form the fabric out of which is woven modern Canada and its

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of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537 [hereinafter "Sovereignty's Alchemy"]; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) [hereinafter *Peace, Power, Righteousness*]; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous Law Journal* 1.

2. Some would even go beyond this, arguing that the law currently functions to unfairly benefit Aboriginal peoples, that it offers special unwarranted protection for questionable rights. See, for example, Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).
3. I am not here committing to the social construction thesis that the law as a whole is nothing more than a social construction. The elements I listed, on the other hand, are all clearly human constructs and dependent for their form and content on notions about how the law ought to function.

legal system. It is this broad vision, incorporating (however imperfectly) particular principles about the nature of the good and the right, principles themselves grounded in theories of the self, the community and the state, that comprises the theoretical underpinning of the law.

Here I endeavour to look below the law, to that substrata of vision which brings life to the law and is framed in terms of theory. It is underlying theory which attempts to channel Aboriginal aspirations into new forms and paths, and which some Aboriginal people maintain remains as the core of colonialism in Canada. This substrata of vision is provided by liberalism, with liberal legal theory giving structure and coherence to the law in Canada.<sup>4</sup> One argument I advance here is that, as a liberal institution, the law cannot protect the essential interests of Aboriginal people.

My critique aims to probe below liberal structures, to explore deeper theories about the self, the community and the state upon which liberal theory rests. In doing so, the thesis expands to advance the argument that it is not so much that liberalism lacks the capacity and legitimacy to adequately address the needs and wants of Aboriginal communities, but that as one thread emerging from a particular cultural and intellectual history, legal liberalism merely illustrates the danger posed when a legal theory grounded in one intellectual history and tradition attempts to cast its web of principles, values and fundamental arguments onto the lives of peoples grounded in separate and unique cultural and intellectual histories. It is this fundamental intellectual colonialism that underlies the perception that while the law now ostensibly protects “Aboriginal rights,” it remains alien and oppressive.

## II LAW AND THEORY

### Approaching the Law From Various Critical Perspectives

The law is always “ought” momentarily crystallized, as it expresses one set of *values* captured in a system meant to promote these values in a society desirous of living in and through them. As an institution whose purpose is to bring a certain kind of order to relationships between people, between people and resources, and between people and the state, snapshots can be taken such that the order can be studied and internally criticized. Nevertheless, the law itself is not a

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4. To say theory gives structure and coherence to the law, that it underlies the law, is not to say ideology (understood as a system of biased beliefs operating through an institution) underlies the law. Any humanly constructed instrument with a purposeful design is constructed in accord with some sort of architectural plan. This plan has to have some vision of how this instrument is to function, and so one must say the law is designed to further certain values and aims. I am loosely using the term “theory” to point to that plan. The theory underlying the law is not itself a system of biased beliefs. However, one might argue—even persuasively—that below this theory-determined institution lies another sub-level, that the aims and values around which the architectural plan is conceived are not those the law actually advances (when operating as intended), which would be to move towards the notion that at its root the law is an ideological instrument. While this sort of suggestion lies just below the surface in this paper, it is not what the paper is meant to argue for.

lifeless monolith whose inner nature is to be discovered and described, but a normative theoretical construct constantly being created and reinforced from within, constantly asserting that *these* values ought to be promoted in *this* way.<sup>5</sup>

Most modern theorists write prescriptive texts, for they begin with the presumption that the law is a social construct, malleable and instrumental in nature. These theorists embrace visions of an ideal world, however incomplete or incoherent their particular visions may be. They measure the law according to its fit with their theories about the good and the right. While they may not have at hand visions of systems up to the task of replacing that which they criticize (and many criticize on the basis that the law fails to satisfactorily promote the values society has tried to advance in generating this particular legal system), they identify a clash between the system they study and the values and principles they believe it ought to promote.

There are two sorts of prescriptive analysis with which a scholar might engage. On the one hand, scholars might undertake to criticize the law from the standpoint of the very theory about the good and the right it purports to embody. These scholars agree the law ought to promote the values and principles it has been designed around, but find fault with how this project of building a world of crystallized value has been carried out. This I call “internal prescriptive criticism.” On the other hand, scholars may find fault with the very theory about the good and the right underlying the law as it currently exists. There are any number of independent theories about the good and the right at play in the Western world, any one of which could serve as underpinning for the law as a social institution. Scholars arguing that the law ought to be designed around values and principles contained within one of these other theories would be engaged in what we could term “external prescriptive criticism.”

There are also theories about the good and the right to be pulled out of intellectual traditions that rest on philosophical grounds completely independent of the intellectual traditions of the West. Gazing at Canadian domestic law from these vantage-points may be to look across a chasm. This chasm is the result not only of the fact that theorists exploring from a non-Western perspective are not clearly members of the community from which issue both dominant legal theory and “standard” critical alternatives, but also from the lack of culturally-shared histories and philosophies. Thus, criticisms launched from these non-Western foundations may differ not only on intellectual grounds, but on culturally determined perspectival grounds.

In exploring the perception of some Aboriginal people that domestic Canadian law is alien and oppressive, we begin with a description of the law, a description which articulates that vision of society which animates the law,

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5. Those who purport to engage in “doctrinal analysis” are typically engaged in what could be characterized as a *form* of prescriptive theorizing, as they engage in analysis of doctrine for the purpose of pointing out areas of internal incoherence or inconsistency, and as such study and criticize from a perspective promoting *values* of consistency and coherence. See Vincent Wellman, “Authority of Law” in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996) 573 [hereinafter “Authority of Law”].

giving it life and guidance. In unpacking how the law approaches the question of the protection of Aboriginal interests, we also consider an internally critical perspective, the perspective of a liberal theorist, examining an argument to the effect that the liberal project must be rethought, as more must be done to further the aim of protecting Aboriginal culture by respecting the autonomy of Aboriginal communities. In examining this sort of internal criticism, however, we will begin to see how debate between liberal theorists about how best to protect Aboriginal interests masks the threat liberal theory presents to Aboriginal peoples. In adhering to deeper shared visions about the self, the community and the state, and in engaging in the shared mission of transposing these visions onto the lives and worlds of Aboriginal peoples, liberal theorists reveal liberal theory as the problem, not as a source of any acceptable solution.

To flesh out this problem, an approach critical of liberal legal theory is examined. Teasing out the connections and commonalities between the fundamental groundings of both liberal and critical legal theory underscores the cultural divide between (a) philosophies underlying both domestic law and suggestions for reform and (b) Aboriginal lives and worlds. It is not a problem of working out how Aboriginal interests can be translated into group rights and fit into the matrix of rights in Canada, just as it is not a problem of understanding these rights as reflective of group autonomy, and not a matter of recognizing that the “fluid and dynamic” interests of Aboriginal peoples can be better served through progressive democratic measures. Rather, it is essentially a question about the ability of Aboriginal peoples to continue to define who they are, a potential for self-definition which includes their capacity to project their own theories and particular forms of knowledge.

### **Underlying the Law: Liberalism and Liberal Theory**

When we turn our gaze to the law in Canada we witness an institution built on a bedrock of liberal values and principles, with legal theorizing, both descriptive and internally prescriptive, centred around liberalism. This is understandable, given that Canada is a liberal democracy. But liberal values and principles are so pervasive and all-encompassing they often escape attention:<sup>6</sup> descriptive theorists fail to acknowledge that the law they aim to describe promotes liberal ideals and principles, and prescriptive theorists, by and large, begin with a liberal stance, calling the law into question on the basis of its fit with their particular articulation of liberalism.

Concepts of rights, freedom and autonomy are so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse. Furthermore, the pervasiveness of liberalism excuses (at least partly) the presumptions of most prescriptive theorists, for they want to be active in the dominant discussion. Engaged as they are with their fellow liberal-thinkers,

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6. John Gray, *Endgames: Questions in Late Modern Thought* (Cambridge: Polity Press, 1997) at 51[hereinafter *Endgames*].

living in a society structured by liberal thought, they may give little notice to the fact they are enveloped in a particular culture, one adrift in a sea of alternative cultures.<sup>7</sup> This is clearly illustrated in the current debate between liberals and communitarians, as some have noted that this debate may be defused and tamed through efforts at bringing communitarian insights into liberal theorizing, efforts we see, for example, in the more recent work of John Rawls and Will Kymlicka.<sup>8</sup> Communitarians, far from being “deep critics” of liberalism, are committed to essentially the same values and principles upon which rest liberal theory, which makes the process of resolving the “conflict” between the two camps a matter of working out how the self is situated in and related to a community and culture. It should be acknowledged, however, that being immersed in a sea of liberal thought does not by itself account for the way in which theorists work within the liberal paradigm, for the pervasiveness of liberal thought in modern Western societies is enhanced by the fact that theorists seem either convinced of the truth of liberal theory or resigned to its power.<sup>9</sup> Either way they may find it unproductive to criticize the law from any standpoint other than liberal theory.

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7. The term “culture” is inordinately elastic, capable of capturing a wide variety of notions and describing a wide variety of activities and objects in the world. In this work I propose a middle path, tying this term down to collectivities formed through shared structures acting to connect people into self-described and self-defined groups both physically and by providing meaning and purpose to the collectives pulled together. This captures both “ethnic” cultures, formed through shared language, traditions and beliefs (the shared structures), and “political” cultures, formed through shared visions of the good life, embodied in social, economic and political institutions. I will speak, then, of the liberal culture (one which could be generalized across nations, or restricted within Canada’s borders) and the cultures of Aboriginal peoples (themselves capable of identification on political grounds, but also “ethnically”).
8. Ronald Beiner makes this point in “What’s the Matter With Liberalism?” in A. Hutchinson and L. Green, eds., *Law and Community: The End of Individualism?* (Toronto: Carswell, 1989) [hereinafter *Law and Community*] at 38-41 [hereinafter “What’s The Matter With Liberalism?”]. He notes that the recent Rawls (in, for example, “Kantian Constructivism in Moral Theory: The Dewey Lectures” (1980) 77 *J. of Phil.* 519 [hereinafter “Kantian Constructivism”]) and Amy Gutmann (in “Communitarian Critics of Liberalism” (1985) 14 *Phil. and Public Affairs* 308) have both simply capitulated one of the main points of communitarianism, that “liberal ideals are historically generated, the product of a particular, specifically modern culture and of a shared liberal tradition.” Furthermore, on the charge of “atomism,” that liberalism is grounded in an overly simplistic and erroneous notion of the individual self, liberals can (a) reply that many classical liberals (e.g. John Stuart Mill) never held such a view and (b) explicitly incorporate into liberal theory a notion of the self as constituted by community values and beliefs, while preserving the notion that the self nevertheless must be free to question these values and even to reject them if that is deemed reasonable. In that regard Will Kymlicka’s *Liberalism, Community and Culture* (Oxford: Clarendon, 1989) [hereinafter *Liberalism, Community and Culture*] is illustrative.
9. Will Kymlicka is both taken with liberal theory and asks that those interested in developing defenses for cultural rights resign themselves to doing so within liberal theory, as to do otherwise would be wasteful, given liberalism’s entanglement with the law:

For better or worse, it is predominantly non-[A]boriginal judges and politicians who have the ultimate power to protect and enforce [A]boriginal rights, and so it is important to find a justification of them that such people can recognize and understand ... Aboriginal rights ... will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.

*Liberalism, Community and Culture, ibid.* at 154. It is difficult to say whether Kymlicka fails to fully appreciate the exercise of power this thinly veils, or whether he appreciates the threatening nature of this position, but is resigned to its inevitability.