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Beyond Mere Ownership: How the Confederated Salish and Kootenai Tribes used Regulatory Control Over Natural Resources to Establish a Viable Tribal Homeland

Jason Williams*

I. INTRODUCTION

Political relationships between Indian tribes and States are inherently contentious. This is especially true when they compete for the same natural resources. In northwest Montana, the Confederated Salish and Kootenai Tribes (the Tribes) of the Flathead Indian Reservation (the Reservation) and the State of Montana have historically disagreed over the right to control Flathead Lake. Although the Tribes owned the southern half of the lake and other waterways on the Flathead Indian Reservation, they were not satisfied with mere ownership. They wanted full control over resources on the Reservation, a demographically and geographically fragmented entity.

This article tells the story of how the Tribes gained control of the south half of Flathead Lake and other reservation waterways, confirmed their treaty right to take fish and wildlife throughout the Reservation, and developed a cooperative relationship with the State to manage fisheries and wildlife on the Reservation. Part II provides a brief history of the formation of the Flathead Reservation. Part III explains how and why the Tribes used litigation to confirm their ownership of the south half of Flathead Lake and other reservation waterways. Part IV discusses how the Tribes confirmed their treaty right to take fish and wildlife on the Reservation and used tribal/state cooperation to exert control over the fish and wildlife on the Reservation. Finally, Part V assesses the Tribes' regulatory authority over the lake, waterways and fish and wildlife on the Reservation. As this paper concludes, the Tribes' far sighted, cooperative approach has established a viable tribal homeland.

II. FORMATION OF THE FLATHEAD INDIAN RESERVATION

The Hellgate Treaty of 1855¹ created the Reservation, reserving the following lands for the Tribes:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and

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1. *The Hellgate Treaty of 1855* (signed July 16, 1855), 12 Stat. 975 [hereinafter *Hellgate Treaty*].

Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, *to a point due west from the point halfway in latitude between the northern and southern extremities of the Flathead Lake*; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, thence southerly along said divide to the place of beginning.²

The Hellgate Treaty granted the Tribes an exclusive right to take fish from rivers on the Reservation and presumptively, from Flathead Lake.³ In addition to creating geographical boundaries, this provision became especially important when the Tribes began working to gain regulatory control over fishing and hunting on the Reservation.

When the Hellgate Treaty was signed, the Tribes consisted of two broad groups: the Salish and the Kootenai.⁴ The Salish, known as the Flatheads, included four Tribes: the Flathead, Pend d'Oreille, Kalispel and Spokane. The Kootenai included three Tribes: the Lower Kootenai, the Upper Kootenai and the Kutona.⁵ Each tribe was a distinct entity, with its own culture and traditions. The individual Tribes eventually came together in a "loose political union" to establish a new homeland.⁶ Although the Reservation was officially established in 1855 by the Hellgate Treaty, it would be more than 100 years before the Tribes consciously asserted their treaty rights within their homeland. In the meantime, non-Indians moved onto the Reservation and began consuming reservation resources.

In 1895, the Montana Legislature began pressuring Congress to open the Reservation to white settlement. Not only was the Flathead Valley beautiful to behold, but also it was ideal for farming, raising livestock, hunting and fishing.⁷ In 1904, the Reservation was opened to white settlement under the Flathead Allotment Act.⁸ Under the Act's provisions, the federal government divided and allocated reservation land. When the allotment dust settled, the Tribes received only 245,000 acres—about 1/5 of the approximately 1.25 million acres contained within the Reservation established by the

2. *Hellgate Treaty* at art. II (emphasis added).

3. "The exclusive right of taking fish in all the streams running through or bordering said Reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." *Hellgate Treaty* at art. III.

4. See James J. Lopach, Margery Hunter Brown & Richmond L. Crow, *Tribal Government Today: Politics on Montana Indian Reservations*, 162 (Rev. Ed., University of Colorado Press 1998).

5. *Id.* at 163.

6. *Id.* at 162.

7. *Id.* at 164.

8. *The Flathead Allotment Act*, Pub. L. No. 58-159, ch. 1945 (April 23, 1904), 33 Stat. 302. The State of Montana and the City of Polson, Montana, would later argue that the Flathead Allotment Act "terminated" the Flathead Indian Reservation. See *infra*, sec. II, part B.

Hellgate Treaty.⁹ On May 2, 1910, the remaining Reservation was officially opened for white settlement.¹⁰ Settlers came in droves.

Allotment and white settlement decimated the integrity of the tribal population on the Reservation. Allotment geographically segmented the Reservation into a vast checkerboard of individual tribal member allotted lands, tribal trust lands and non-member fee lands. The Tribes were left with no central place on the Reservation to call their own. As white settlement continued and demographically fragmented the Reservation, the Tribes continually worked to establish a system of government under the guidance of the Indian Reorganization Act of 1934.¹¹ The Tribes, however, struggled to establish a cohesive government because of the vast diversity of their membership. Eventually, the Tribes chose a system of concurrent jurisdiction with the State.¹²

Meanwhile, non-Indians consumed Reservation resources without tribal consent. For example, in 1938, the Federal Energy Regulatory Commission (FERC) gave the Montana Power Company permission to construct Kerr Dam on the Reservation, blocking the Flathead River, the natural outlet of Flathead Lake. Although the Tribes received royalties from Montana Power Company, they did not directly participate in the royalty negotiations. Further, FERC failed to consider the significance the Flathead River held for tribal cultural traditions.

In the 1970s, the Tribes began to display a heightened consciousness of their homeland and its resources. At about the same time, tribal government began to “take on an appearance of an organization of serious purpose and strong will.”¹³ The federal government’s policy towards the Indians changed from one of divide-and-conquer under allotment to promoting self-determination.¹⁴ The Tribes became determined to gain full control of the Reservation. This new self-confidence was evident in the construction of a new tribal community complex as well as the Salish Kootenai College in Pablo, Montana.¹⁵ The Tribes entered into negotiations for Kerr Dam when Montana Power Company’s FERC lease expired in 1985. As a result, the Tribes are slated to gain full regulatory control of the dam in 2015. The

9. Lopach, *supra* n. 4, at 164.

10. *Id.* at 165.

11. *The Indian Reorganization Act*, 25 U.S.C. § 461 (1934).

12. 18 U.S.C. §1162 (1994). Under this scheme, the State had jurisdiction over criminal incidents on tribal lands. Tribes often chose concurrent jurisdiction because they did not have the resources to handle criminal investigations. In 1993, the Tribes partially withdrew from concurrent jurisdiction with Montana. *See* Mont. Code Ann. §§ 2-1-301 to 2-1-306 (2003).

13. Lopach, *supra* n. 4, at 167.

14. *The Indian Self Determination Act* reformed federal Indian policy from that of assimilation into American culture to allowing Indians to pursue their livelihoods based on Indian culture and values, encouraging all Tribes to create self-sustaining, independent economies. Pub. L. No. 93-638, 2, 88 Stat. 2203 (1975).

15. Lopach, *supra* n. 4, at 167.

Tribes also established a solid governmental system and hired attorneys to help exert authority over natural resources.

Although language in the Hellgate Treaty appeared to grant the Tribes exclusive ownership of the south half of Flathead Lake, the effects of allotment and the subsequent geographic and demographic fragmentation reduced the Tribes' ownership of vast portions of their Reservation. After decades of watching non-Indians consume their resources, the Tribes needed to establish a regulatory presence on the Reservation and regain control of their homeland. Although the Tribes took legal action to confirm their ownership and regulatory rights, it was their cooperation with the State of Montana that finally enabled them to retain control of Reservation resources.

III. LITIGATING THEIR WAY TO SOVEREIGNTY: THE VOLATILE LEGAL ROUTE TO ESTABLISHING TRIBAL TITLE TO FLATHEAD LAKE

A. *Montana Power Co. v. Rochester*¹⁶

The Hellgate Treaty appeared to place the southern half of Flathead Lake, a "snow-and-glacier-fed body of water"¹⁷ within reservation boundaries. The plain language of the treaty explicitly stated the Reservation's northern boundary bisected Flathead Lake.¹⁸ The Tribes' confirmation of ownership of the bed and banks of the south half of Flathead Lake, however, did not come easily. The Tribes resorted to litigation to confirm the rights they had clearly been granted in the Hellgate Treaty.

Interestingly, the Tribes were not party to the first lawsuit addressing their ownership of Flathead Lake. *Montana Power Co. v. Rochester* involved the Montana Power Company and its construction of Kerr Dam at the outlet of Flathead Lake.¹⁹ A few years after Montana Power constructed the dam, landowner Eugenia Rochester filed a lawsuit. Rochester owned a summer home on a three-acre tract of land extending into Flathead Lake. She accessed her home via an easement over an isthmus owned in fee simple by tribal member Benjamin Courville. Before Montana Power constructed the Kerr Dam, Flathead Lake water levels were low enough for Rochester to access the isthmus eight to nine months of the year. During high water run-off, however, Rochester could only access her property by boat. After Montana Power built the dam, the water level of Flathead Lake remained near its traditional high water mark year round. Rochester sued Montana Power for continuously submerging the isthmus and easement.

16. *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942).

17. Lopach, *supra* n. 4, at 179.

18. See *supra* sec. II (discussing *Hellgate Treaty* and formation of the Reservation).

19. The Tribes were compensated by Montana Power as part of the licensing agreement of the dam. Montana Power was required to pay annual charges aggregating approximately \$3 million, plus interest, into the U.S. Treasury in trust for the Tribes. *Rochester*, 127 F.2d at 189-190.

The issue before the court was whether a U.S. patent issued for the allotted fee land bordering Flathead Lake conveyed title extending to the low water mark, or alternatively, to the high water mark of Flathead Lake.²⁰ If the patent conveyed to the grantee an ownership interest extending to the low water mark, Rochester could prevail in her claim. If the patent only conveyed ownership to the high water mark, as Montana Power argued, Rochester's claim would fail.

The court upheld the general rule that patents to lands bordering navigable waters, issued by the U.S., conveyed title only to the high water mark.²¹ The court determined that the express language of the Hellgate Treaty confirmed the Tribes' title to the south half of Flathead Lake. Thus, the Tribes owned all submerged land up to the high water mark. The court held, "the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future State to be carved out of the region."²² Because Courville did not hold title to the land, he could not give Rochester an easement, and the court dismissed Rochester's claim against Montana Power. This holding confirmed the Tribes' ownership of the south half of Flathead Lake, up to the high water mark. *Rochester* provided judicial confirmation that the Tribes were the legal owners of the south half of Flathead Lake. This decision eventually became a card the Tribes would use to trump future State and private land owner claims of possession of the south half of Flathead Lake. The Tribes first played this card in the 1970s, when they sued James Namen.

B. *Namen I & Namen II: The Tribes Enter the Legal Fray*

In the early 1970's, James Namen, a non-Indian, began building a marina on the south shore of Flathead Lake, just outside the city of Polson. Namen built several structures extending beyond the high water mark of Flathead Lake, including docks, a breakwater and a storage shed.²³ The Tribes became concerned that some of the construction, especially the breakwater (a land-fill extending approximately 300 to 400 feet into the water), created adverse environmental impacts on the lake.²⁴ In 1972, the Tribes issued Namen a cease and desist order, commanding him to stop construction of the marina. Namen ignored the tribal order.²⁵

20. *Id.* at 189.

21. *Id.* at 192.

22. *Id.* at 191.

23. *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452, 456 (D. Mont. 1974) [hereinafter *Namen I*].

24. Interview with Lloyd Jackson, former Chief of Police for Confederated Salish and Kootenai Tribes and former Shoreline Protection Administrator (Mar. 20, 2003) [hereinafter Jackson interview].

25. *Id.*

The Tribes sued Namen in federal district court, seeking declaratory and injunctive relief. The Tribes contended that because the Hellgate Treaty gave them title to the bed and banks of the south half of Flathead Lake, Namen trespassed on their property when he built structures extending beyond the high water mark.²⁶ They asked the court to enjoin all further trespass and direct Namen to remove the buildings and all structures, including landfills extending beyond the high water mark. Finally, the Tribes requested that Namen restore the lands below the high water mark to their original condition.²⁷ Namen countered that under federal law, all navigable bodies of water on the Reservation were "public highways."²⁸ Namen further argued that Article III of the Hellgate Treaty provided a public right of way for travel across Flathead Lake.²⁹

The court disagreed, holding that as a matter of federal law, the Hellgate Treaty did not grant a right of way for U.S. citizens to use the southern half of Flathead Lake and was not a "public highway."³⁰ However, the court disagreed with the Tribes' contention that they held title to the bed and banks of the south half of Flathead Lake. Instead, the court held that title to the bed and banks of the south half of Flathead Lake were held by the U.S. in trust for the Tribes.³¹ Both Namen and the Tribes appealed.

In the meantime, the Tribes enacted Tribal Ordinance 64A in 1977. Ordinance 64A was a shoreline protection ordinance designed to control docks and other structures extending over the lake bed in order to maintain and improve "the environmental quality of the shoreline."³² Pursuant to federal law, the Department of the Interior approved the ordinance. The Tribes then embarked on a regulatory scheme designed to meet their environmental quality goals for the south half of Flathead Lake.

Overall, the Tribes wanted to create regulatory controls to ensure fair use of the lake.³³ A section of Ordinance 64A required tribal members and non-members who held land in fee on the shores of the south half of Flathead Lake to register with the Tribes' newly created Shoreline Protection Office. Many landowners adjacent to the lake had built docks and other structures extending beyond the high water mark.³⁴ Other landowners had painted or treated their docks with chemicals potentially detrimental to the fish and

26. *Namen I*, 380 F. Supp. at 457.

27. *Id.* at 455.

28. *Id.* at 458.

29. "That if necessary for the public convenience roads may be run through the said Reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways." *Hellgate Treaty* at art. III.

30. *Namen I*, 380 F. Supp. at 458.

31. *Id.* at 462.

32. Jackson interview, *supra* n. 24.

33. *Id.*

34. *Id.*

vegetation in the lake.³⁵ The Shoreline Protection Office and the Tribal Council drafted, and attempted to enforce, regulations to address these problems.

A few years after passing Ordinance 64A, the *Namen* litigation resumed. At the Ninth Circuit Court of Appeals, *Namen* proposed three arguments: (1) the Reservation had been terminated in 1904 by the Flathead Allotment Act; (2) even if the original Reservation still existed, title to the bed and banks of the south half of Flathead Lake was vested in the State, not the United States as trustee for the Tribes; and (3) the Tribes had no power to regulate the way a non-member exercised his riparian rights.³⁶ Besides arguing title to the bed and banks of the south half of Flathead Lake belonged to them, the Tribes sought to enforce Ordinance 64A which gave them power to regulate both existing and future structures on the south half of Flathead Lake.³⁷

In response to *Namen*'s termination argument, the court analyzed the plain language of the Flathead Allotment Act³⁸ and concluded Congress clearly did not intend to terminate the Reservation because "the Flathead [Allotment] Act refers to the Reservation without any indication that it is to be diminished or terminated."³⁹ Further, the court found nothing existed in the legislative history of the Flathead Allotment Act suggesting Congress intended to terminate the Reservation. Thus, the court rejected *Namen*'s claim.

The court turned to *Rochester* for guidance in analyzing whether the State or the Tribes owned Flathead Lake. The court concluded *Rochester* stood for the "general rule" that the south half of Flathead Lake belonged to the Tribes.⁴⁰ The court relied on evidence and cases subsequent to *Rochester* to confirm this.⁴¹ The court further distinguished the Tribes' ownership contention from the Supreme Court's holdings in *Montana v. U.S.*⁴²

In *Montana*, the Supreme Court held the Crow Tribe did not own title to the bed and banks of the Big Horn River because the 1868 Treaty with the Crow did not expressly convey them.⁴³ Here, however, the Hellgate Treaty expressly conveyed to the Tribes title to the south half of Flathead Lake.

35. *Id.*

36. *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 953 (9th Cir. 1982) [hereinafter *Namen II*].

37. *Id.* at 953.

38. *The Flathead Allotment Act*, Pub. L. No. 58-159, ch. 1945 (April 23, 1904), 33 Stat. 302.

39. *Id.*

40. *Namen II*, 665 F.2d at 960.

41. In 1973, a federal district court reiterated the *Rochester* holding that the Tribes owned the south half of Flathead Lake. *U.S. v. Pollmann*, 364 F. Supp. 995 (D. Mont. 1973). In *U.S. v. Pollman*, a non-member was fishing on the south half of Flathead Lake without a tribal recreation permit. The court upheld the Tribes' authority to regulate recreation on the south half of Flathead Lake because they owned that part of the lake.

42. *Montana v. U.S.*, 450 U.S. 544 (1981).

43. *Treaty with the Crows* (signed May 7, 1868), 15 Stat. 649.

The *Namen II* court found “[i]t would have been pointless, and quite likely deceptive, to have the northern boundary of the Reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians.”⁴⁴ Thus, the court concluded that the Tribes did indeed own the south half of Flathead Lake.⁴⁵

Finally, the court examined the regulatory issue: could the Tribes regulate the riparian rights of non-Indians who owned land bordering the south half of Flathead Lake? The court cited *Washington v. Confederated Tribes of the Colville Indian Reservation*⁴⁶ for the proposition that divestiture of an Indian tribe’s regulatory power occurs only if the exercise of such power “would be inconsistent with the overriding interests of the National Government.”⁴⁷ Here, the court concluded the Tribes’ interest in regulating the bed and banks of a lake to which it held title did not conflict with any overriding federal interest.

Interestingly, the court avoided the Supreme Court’s recent jurisdictional rule from *Montana*,⁴⁸ which could have overruled *Colville*, for it held:

A tribe may regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contract leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. A tribe may... retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect on the po-

44. *Namen II*, 665 F.2d at 962. Further, the *Montana* court looked at the Crows’ reliance on taking fish from the Big Horn River as to whether the intent of the *Treaty with the Crows* was to convey title to the Big Horn River to the Crow. The court found that because the Crow did not heavily rely on fish as a food source, the intent was not there. By contrast, the Ninth Circuit in *Namen II* found that because the Kootenai heavily depended on fishing as a way of life, the intent of the Hellgate Treaty must have been to convey the south half of Flathead Lake to the Tribes. In retrospect, it is interesting to consider the ramifications of fishing in interpreting and determining tribal treaty rights.

45. It is important to note that unlike the Supreme Court’s holding in *Montana*, the *Namen II* court found the Tribes had equal footing against Montana’s interests in receiving title to the bed and banks of Flathead Lake. As a result, the U.S. conveyed title to the bed and banks of the south half of Flathead Lake to the Tribes at the time the Hellgate Treaty was signed. In *Montana*, the court presumed the Crow did not have equal footing to have the bed and banks of the Big Horn River conveyed to them at the time the Crow Reservation was formed. This distinction is crucial, as in the end, the Tribes gained ownership of their portion of Flathead Lake while the Crow did not gain ownership of the Big Horn River.

46. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

47. *Namen II*, 665 F.2d at 963.

48. *Montana v. United States*, 450 U.S. 544 (1981).

litical integrity, the economic security, or the health or welfare of the tribe.⁴⁹

The *Namen II* court, however, recognized that even if the *Montana* rule applied, the Tribes would prevail because: (1) unlike the Crow, the Tribes owned title to the bed and banks of the south half of Flathead Lake; and (2) the regulatory power the Tribes sought fell squarely within the “economic security, health or welfare” exception articulated in *Montana*⁵⁰ because the Tribes’ attempt to regulate the south half of Flathead Lake had “the potential for significantly affecting the economy, welfare, and health of the Tribes.”⁵¹ Certainly, environmental contamination brought by unchecked private development and construction around the south half of Flathead Lake could have a direct impact on the economy, welfare and health of the Tribes. Regardless of the *Montana* rule, the Tribes won the authority to regulate their half of the lake. As a result, Ordinance 64A was fully enforceable. *Namen* and all other landowners on the south half of Flathead Lake were required to abide by the Shoreline Protection Office’s regulations.

Litigation was the Tribes’ only choice to enforce their ownership interest in the south half of Flathead Lake. Judicial confirmation of ownership and the right to regulate the shoreline of the south half of Flathead Lake was the beginning of the Tribes’ continuing efforts to manage the natural resources located on the Reservation.

C. The Joint Board Cases: Vested Non-Indian Interests Created by Allotment of the Reservation

The *Namen II* victory was only the beginning of the Tribes’ efforts to manage the natural resources of the Reservation. In 1985, drought plagued the Reservation and depleted streams and reservoirs to critical levels. Farmers and ranchers on the Reservation consumed scarce water recklessly. In one instance, the Jocko River, a main waterway on the southern portion of the Reservation, was bulldozed from its natural flow to benefit a rancher.⁵²

In July 1985, the Tribes sued the Bureau of Indian Affairs (BIA) in *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. Flathead Irrigation and Power Project* (hereinafter *Joint Board I*). The Tribes claimed the BIA violated the Tribes’ right to take fish, because it allowed ranchers to divert water from tribal waterways.⁵³ The Tribes sought

49. *Id.* at 565-566.

50. *Id.*

51. *Namen II*, 665 F.2d at 964.

52. Interview with John Carter (March 20, 2003) (Carter has served as Tribal Attorney since 1983).

53. *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. Flathead Irrigation and Power Project*, 616 F. Supp. 1292 (D. Mont. 1985).

a federal injunction to prevent the BIA from depleting streams and reservoirs that served as natural habitat for tribal fisheries.⁵⁴ The Tribes based their argument on their exclusive right to take fish and the reserved water rights guaranteed to the Tribes in the Hellgate Treaty.⁵⁵ Prior to a judicial determination, however, the Tribes and the BIA entered into a settlement agreement establishing minimum in-stream flows for particular streams and minimum levels for particular reservoirs. Thus, the court did not reach the issue of whether the Hellgate Treaty guaranteed the Tribes a reserved right to take fish.⁵⁶

As litigation proceeded that summer, the Tribes tried another approach to ensure regulation of the Reservation's waterways. In 1985, the Tribal Council passed the Aquatic Lands Conservation Ordinance (ALCO), designed to protect the quality of the Reservation's aquatic habitat.⁵⁷ Like Ordinance 64A, ALCO produced waterway protection regulations which were to be carried out by the Shoreline Protection Office. A portion of the regulations required all Reservation residents to obtain a permit before beginning or repairing any existing "project" which physically altered aquatic land on the Reservation.

As the Tribes worked towards implementing ALCO, the drought continued into 1986, and the Tribes and residents of the Reservation faced the same water scarcity as they had in 1985. The settlement agreement between the Tribes and the BIA from the previous summer expired on October 31, 1985. As a result, the Tribes found themselves back in court. In *Joint Board of the Flathead, Mission and Jocko Irrigation District v. U.S.* (hereinafter *Joint Board II*), the irrigators sought injunctive relief, alleging the BIA failed to develop a joint water management plan for the Reservation.⁵⁸ In the meantime, the BIA established interim flows to determine how much water irrigators could use. The court granted the irrigators an injunction, holding that the BIA must allocate all Reservation water in a manner that was "just and equal."⁵⁹ The Tribes appealed.

When *Joint Board II* reached the Ninth Circuit Court of Appeals, the Tribes again argued their treaty right to take fish had priority over any right of the irrigators to Reservation water.⁶⁰ The Tribes successfully argued this priority right, and the court held:

54. *Id.* at 1294.

55. *Hellgate Treaty*.

56. Although the court did not reach the merits of the case, it did conclude that the proper forum for adjudication of water rights on the Reservation was with the State courts. *Joint Board I*, 616 F. Supp. at 1297.

57. The Tribes passed ALCO on December 13, 1985. The Secretary of the Interior approved ALCO in accordance with the provisions of the Tribal Constitution on December 20, 1985.

58. 646 F. Supp. 410 (D. Mont. 1986).

59. *Joint Board II*, 646 F. Supp. at 426.

60. *Joint Board of the Flathead, Mission and Jocko Irrigation Districts v. U.S.*, 832 F.2d 1127 (9th Cir. 1987) [hereinafter *Joint Board III*].

any aboriginal fishing rights secured by treaty are prior to all irrigation rights. Neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority.⁶¹

Thus, the exclusive treaty right of the Tribes to take fish trumped water right claims used for other purposes by non-members.⁶²

This was a powerful decision for the Tribes in their struggle to control the water on the Reservation. Now, the Tribes had multiple legal tools with which to control Reservation resources. *Namen II* affirmed the Tribes' ownership of the southern half of Flathead Lake. Ordinance 64A gave the Tribes the right to regulate the shoreline along the south half of Flathead Lake. *Joint Board II* affirmed the Tribes' right to preserve fishery waters on the Reservation. Ordinance 87A gave the Tribes the right to regulate the Reservation's waterways.⁶³ For the Tribes, however, this was not enough. Simply having the right to regulate tribal resources was different than exercising that right. The Tribes needed to accomplish the latter.

IV. FROM TRIBAL OWNERSHIP TO TRIBAL CONTROL: ASSERTING TRIBAL REGULATORY CONTROL OF RESERVATION RESOURCES

A. *Litigation as the Tribes' First Step Towards Regulatory Control of Resources*

In 1986, the Tribes enacted Ordinance 44D, asserting their exclusive regulatory jurisdiction over all fishing, hunting and trapping on the Reservation.⁶⁴ Following the Department of Interior's approval of Ordinance 44D, the Tribes began negotiating with the State to create an agreement for regulating hunting and fishing by non-members within Reservation bounda-

61. *Joint Board III*, 832 F.2d at 1132.

62. The irrigators appealed to the Supreme Court, but certiorari was denied. *Joint Board of the Flathead, Mission and Jocko Irrigators Districts v. U.S.*, 486 U.S. 1007 (1988).

63. The Tribes' right to regulate rivers and streams on the Reservation under ALCO was challenged by two non-members in *Middlemist v. Dept. of Interior*, 824 F.Supp. 940 (D. Mont. 1993), *aff'd*, *Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994). The *Middlemist* line of cases essentially said the tribal non-members had to exhaust tribal adjudicatory and regulatory avenues prior to bringing a claim in the federal court system. As a result, the non-members brought their case in the tribal court system where the Tribes' right to regulate non-members under ALCO was upheld.

64. It is important to mention the significance of the Tribes' goals in enacting Ordinance 44D. Just a few years earlier, the Supreme Court had held in *Montana* that the Crow had no jurisdiction to regulate nonmember fishing on fee owned land within the exterior boundaries of the Crow Reservation. Although the *Joint Board* cases established that the Tribes, in essence, owned the Reservation's waterways, more than one-half the Reservation was land owned in fee by non-members. The Tribes likely knew they were going to face opposition to any regulation they passed.

ries. After two years of negotiations, the Tribes and the State reached an agreement in December 1988. Although the State legislature passed an enabling statute that would have allowed the State to carry out its part of the agreement, outgoing Governor Ted Schwindin refused to sign the agreement and proposed modifications regarding jurisdiction and court forum.⁶⁵ When Governor Stan Stevens took office in 1989, he also refused to sign the agreement.

In April 1990, the Tribes began enforcing Ordinance 44D, which declared the Tribes' right to regulate hunting and fishing by all people, including non-members, on (1) the south half of Flathead Lake, (2) the Flathead River and (3) fee lands owned by the State and non-members, within the boundaries of the Reservation. Because the State refused to execute the agreement, the Tribes were forced to pursue further litigation.

In *Confederated Salish and Kootenai Tribes v. Montana*, the Tribes sought judgment on two issues.⁶⁶ First, did the Tribes have authority to regulate fishing on the south half of Flathead Lake? Second, what was the extent of the Tribes' authority to regulate fishing on the remainder of the Reservation?⁶⁷

The court relied on *Namen II* to resolve the first issue. Because *Namen II* reaffirmed *Rochester*, it was clear the Tribes owned the south half of Flathead Lake up to the high water mark.⁶⁸ Thus, the court concluded that the State had no right to assert its fishing regulations against anyone—tribal members or non-members—on the south half of Flathead Lake.

Resolving the second issue was more complicated. The State argued it was unreasonable to allow the Tribes exclusive power to regulate nonmember fishing on the Reservation, because approximately 85% of the Reservation's population was composed of non-members.⁶⁹ The State relied on *Montana* and *Brendale v. Confederated Tribes and Bands of the Yakama Indian Nation*⁷⁰ in arguing it had the right to regulate hunting and fishing by tribal non-members on the Reservation. Additionally, faced with the Tribes' equally compelling ownership argument, the *CSK Tribes* court took a unique approach to resolving the issue, focusing on the different standards the Tribes and the State set for their fishing regulations. The court noted tribal fishing regulations were much more restrictive than those of the State, and were based on biological studies.⁷¹ The court recommended the State

65. Tribal attorney John Carter speculated that Gov. Schwindin refused to sign the agreement because he did not want to saddle the incoming administration with the burdens of this rather unique tribal/state agreement. John Carter interview, March 20, 2000 *supra* n. 54.

66. 750 F. Supp. 446, 450 (D. Mont. 1990) [hereinafter *CSK Tribes*].

67. *Id.*

68. *Id.* at 450.

69. *Id.*

70. 492 U.S. 408 (1989) (holding an Indian tribe has no authority to impose zoning ordinances on "open" fee lands owned by non-members within the exterior boundaries of an Indian Reservation).

71. *CSK Tribes*, 750 F. Supp. at 451.

adopt special, emergency regulations to conform its rules for the Reservation to those of the Tribes.⁷² The court also recommended the Tribes and the State continue working towards an agreement. The parties resumed negotiations, and their agreement closely followed the *CSK Tribes* decision.

The final agreement looked nearly identical to the agreement negotiated under the Schwindin administration.⁷³ In October 2002, Governor Judy Martz's office renewed the state/tribal Bird Hunting and Fishing Agreement (the Agreement). In a letter to the Tribes, Governor Martz referred to the Agreement as a "model of State/tribal mutual assistance that has successfully forged close cooperation for the benefit of our respective resources and our citizens."⁷⁴ This was the third time the Tribes and the State renewed their Agreement—evidence it is working well. A closer look at the Agreement reveals the reasons for its success.

*B. Institutional Structures for Tribal/State Cooperation:
The Flathead Reservation Fish and Wildlife Board*

An important aspect of the Agreement authorizes the creation of a Flathead Reservation Fish and Wildlife Board (the Board). The Board consists of seven members: three appointed by the Governor of Montana, three appointed by the Tribal Council and one appointed by the U.S. Fish and Wildlife Service. The Agreement calls for technical committees consisting of state, tribal and federal personnel to develop written cooperative resource management plans to ensure conservation and reasonable use of the Reservation fisheries and bird resources. The Agreement then requires these plans be presented to the Board for approval and implementation.⁷⁵

Originally, the Board's only function was to create licensing and regulations for fishing and hunting by non-members on the Reservation.⁷⁶ The Board was also charged with overseeing enforcement of the regulations they created for the Reservation. Both the Tribes and Montana have appointed game wardens to police the Reservation. In recent years, the Board's role has evolved to include overseeing fish and wildlife management across the Reservation.

One project the Board oversees is securing native trout populations throughout the Flathead system.⁷⁷ At a February 26, 2003, Board meeting, members from both the Tribes and the Montana Department of Fish, Wild-

72. *Id.*

73. The Agreement negotiated by the Schwindin administration had a five-year term, whereas the post-litigation agreement entered into by the State and Tribes has a four year term. Otherwise, no substantive modifications were made to the Agreement. John Carter interview (March 20, 2003).

74. Letter from Gov. Judy Martz to D. Fred Matt, Tribal Chairman (Oct. 15, 2002).

75. Interview with Ray Ayelsworth, current board chairman (March 18, 2003).

76. Interview with Ralph Goode (April 3, 2003).

77. The Flathead System encompasses Flathead Lake and the Flathead River, including the North and Middle Forks and their tributaries.

life and Parks (FW&P) reported their cooperative efforts at monitoring, assessing and researching bull trout populations on the Reservation.

Another aspect of co-management in the Flathead system allows the Tribes to conduct fishing derbies on the south half of Flathead Lake. Although Montana law prohibits fishing derbies,⁷⁸ they can hold many benefits for fisheries management. For example, biologists can gauge the relative health of fish populations by seeing what types and how many fish are harvested from Flathead Lake. Fishing derbies also help remove non-native fish, such as lake trout, from the Flathead System.

The Board also oversees a plan for managing the white sturgeon. State, tribal and federal biologists are researching the status of the white sturgeon as a native fish species to Flathead Lake. As of February 26, 2003, FW&P and the Tribes conducted thirty eight interviews with tribal elders, scientists, and the general public, inquiring about the status of white sturgeon as a fish native to Flathead Lake, and the potential impacts of re-releasing it into the lake.⁷⁹ Interviews with tribal elders have revealed traditional songs indicating the white sturgeon previously existed in Flathead Lake. Other interviewees were more skeptical about whether the white sturgeon was native to Flathead Lake.⁸⁰

These examples show just a few of the results of the Agreement. In the last ten years, the Agreement has helped non-members living on the Reservation become aware of the Tribes' cultural perspectives in relation to Flathead Lake. Additionally, the Tribes have gained an understanding of the interests of non-members who appreciate Flathead Lake and other parts of the Reservation for its diverse recreational opportunities.⁸¹

More importantly, the Agreement provides an alternative to resource management litigation. By providing a forum for institutional dialogue among fish and wildlife professionals from both the State and the Tribes, resource management can be determined by resource management professionals rather than politicians, lawyers and judges. Further, the institutional dialogue between the Tribes' and the State's fish and wildlife professionals has built the Tribes' credibility. These successes resulted from the years of litigation detailed above. Now the Tribes and the State work together to resolve important fisheries issues on the Reservation. In its thirteenth year of existence, the Agreement is a shining example of cooperative resource management.

78. Mont. Code Ann. §§ 23-5-165, 87-3-121 (2001).

79. Report delivered by Barry Hanson regarding the Plan to the Board (February 26, 2003).

80. John Stromnes, *Sounds fishy . . . or does it?*, The Missoulian, p. C-1, (March 27, 2003) (The article examines whether a 181-pound white sturgeon landed by Leslie Griffith in 1955 was actually caught in Flathead Lake, among other sightings, stories and tribal cultural indicators of whether the white sturgeon is native to Flathead Lake. Griffith's mounted sturgeon is on display at the Polson-Flathead Historical Museum in Polson).

81. Ray Ayelworth interview (March 18, 2003).

V. ASSESSING THE TRIBES' SUCCESS IN RE-ESTABLISHING A VIABLE
TRIBAL HOMELAND

Legally, the Tribes may have been lucky to initiate the litigation to gain control of the south half of Flathead Lake and the Reservation's waterways when they did. In the last twenty years, Indian law has undergone a substantial overhaul. The courts have continued to tinker with *Montana* and its applications.⁸² For example, if a non-member owning land in fee on the south half of Flathead Lake wanted to appeal a regulation issued by the Shoreline Protection Office, it is unclear whether a tribal court would have jurisdiction to hear the complaint. In *Montana*, the Supreme Court articulated the reach of tribal jurisdiction when it held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation."⁸³ Is regulating the shoreline of Flathead Lake "necessary to protect tribal self-government?" Clearly, arguments can be made for both sides. Is regulating the shoreline of Flathead Lake necessary to control internal relations within the Tribes? An argument can be made that regulating the shoreline has nothing to do with the internal relations of the Tribes.

Most recently, in *Nevada v. Hicks*,⁸⁴ the Supreme Court indicated that the status of land may be only one consideration in determining whether an Indian tribe can exert regulatory jurisdiction over non-Indians.⁸⁵ Prior to *Nevada v. Hicks*, the Supreme Court's primary focus in resolving jurisdictional issues had focused on the status of the land. The Court stated "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over non-members."⁸⁶ Although this language was only dicta, it is indicative of where the Court may be going in future cases. Thus, if the dicta in *Nevada v. Hicks* was pushed to its ultimate conclusion, the Tribes' ownership of title to the bed and banks of the south half of Flathead Lake may not guarantee the Tribes regulatory jurisdiction over non-members owning land adjacent to the lake. This interpretation could unwind the en-

82. See, *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (concluding that a claim must be exhausted in the tribal court system prior to removal to the federal court system unless the assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith"); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492, U.S. 408 (1989) (holding that a tribal court does not automatically have jurisdiction to hear a matter just because the claim falls within one of the two *Montana* exceptions); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (exhaustion of a claim in tribal court is not required but based on comity); *Atkinson Trading Company, Inc. v. Joe Shirley, Jr.*, 532 U.S. 645 (2001) (holding the Navajo did not have inherent authority to tax an on-Reservation trading post because it could not satisfy either *Montana* exception). This is only a sampling of the cases which have modified the general rule enunciated in *Montana*.

83. *Montana*, 450 U.S. at 564.

84. *Nevada v. Hicks*, 533 U.S. 353 (2001).

85. *Id.* at 360 (holding "ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of non-members is necessary to protect tribal self-government or to control internal relations").

86. *Id.*

tire regulatory scheme the Tribes have developed over the last twenty years. Indeed, the Shoreline Protection Office would no longer be able to enforce its regulations against non-members. The Board that has done so much work to cooperatively manage fish and wildlife on the Reservation could become no more than a footnote in history.

If the holding in *Nevada v. Hicks* unraveled the Tribes hard-won regulatory scheme, a shining example of a positive tribal/state relationship could be destroyed and the treaty rights that the Tribes have fought hard to confirm would be weakened. Lastly, and most importantly, the relationships tribal members and non-members have developed, and the relatively amicable way they handle issues involving Flathead Lake, could be jeopardized.⁸⁷ In one sense, tribal member/nonmember relationships are built like a house of cards: one unexpected blow can send the entire structure tumbling.

Fortunately, these musings are mere speculation.⁸⁸ So far, the cooperative relationship developed by the Tribes in both its relationship with the FW&P and with nonmember landowners has negated the need to test the redefined limits of tribal regulatory jurisdiction in the courts. As a result, the Tribes' control of their lake, rivers and streams remains intact. The elaborate tribal/state fish and wildlife management scheme is not only intact, but also working well. All eyes are on the Supreme Court and Congress to see if their next move may be the heavy hand that sends this intricate, delicate relationship tumbling.⁸⁹

VI. CONCLUSION

More than one hundred years after signing the Hellgate Treaty, the Tribes still lacked a viable "homeland." Fragmentation of the Reservation brought on by federal Indian policy had disenfranchised and discouraged the Tribes. In the 1970s, however, the Tribes began to build the confidence needed to gain full control of their Reservation and establish a "homeland."

87. It is important to note that the Tribes are currently involved in ongoing litigation with the Montana Department of Natural Resources ("DNR") over water rights on the Reservation. The relationship between the Tribes and the DNR is contentious, to say the least. Perhaps the DNR can borrow a page from the Montana FW&P on how to engage in a cooperative relationship with the Tribes.

88. It appears, however, that some of these theories may be put to the test. Recently, the Coeur d'Alene Tribe of Indians gained control of a portion of Lake Coeur d'Alene in northern Idaho. See *Idaho v. U.S.*, 533 U.S. 262 (2001). Thus, they are in a very similar situation in which the Tribes were in twenty years ago. The Coeur d'Alene Tribe has contacted Lloyd Jackson to see how he and his staff implemented shoreline controls so many years ago. Jackson told the Coeur d'Alene Tribe that patience was the key. "I was kicked off the land and called everything imaginable," Lloyd Jackson interview (March 20, 2003). Jackson also faced a challenge since many of the land-owners were "judges, lawyers and doctors" that had summer homes on the south half of Flathead Lake. A similar situation exists on Lake Coeur d'Alene.

89. It is worth hypothesizing that maybe the reason there appears to be little success with tribal/state relationships is because the courts and Congress refuse to set a consistent policy for tribal civil and regulatory jurisdiction. How can Indian Tribes and States enter into negotiations and work together to resolve the complex issues associated with dual sovereigns when the status and reach of tribal jurisdiction appears to be in a State of constant change?

Fortunately, litigating to spur cooperation was a method that worked well for the Tribes. It took litigation to establish tribal ownership that was granted in the Hellgate Treaty. Having established ownership by judicial decree in *Namen II* and the *Joint Board* cases, the Tribes sought to exert the full extent of that ownership by implementing regulatory controls over the shoreline of the south half of Flathead Lake, the rivers and streams on the Reservation and hunting and fishing throughout the Reservation. In each of these instances, the Tribes used litigation to compel the State and individual landowners to adhere to tribal controls. In the aftermath of this litigation, the Tribes cooperated with their former opponents to ensure enforcement of tribal regulations.

The Tribes' use of cooperation as a method of exerting sovereignty has prevented re-litigation of issues under the less favorable standards enunciated by the post-*Montana* Supreme Court. As a result, a once fragmented Reservation subject to exploitation of its resources is now overseen by tribal and tribal/state entities that carry out the will of the Tribes. Although a substantial part of the Reservation is owned by and populated with non-members, the Tribes have exerted enough control to ensure that their lake and the waterways on the Reservation will be preserved. The Tribes have exerted enough control to successfully re-establish a viable tribal "homeland."

