

**TREATY NEGOTIATIONS RELATED TO KOOTENAY NATIONAL PARK:
AN OPPORTUNITY FOR RECONCILING THE INTERESTS OF THE
KTUNAXA/KINBASKET TRIBAL COUNCIL AND PARKS CANADA?**

by

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ABSTRACT

The study identifies and describes selected issues, interests, and options for the future management of national parks within the traditional territory of the Ktunaxa/Kinbasket Tribal Council (KKTC). It consists of three major components: a literature review, informal discussions with government officials, and semistructured interviews with KKTC and Parks Canada representatives.

Kootenay National Park was established in 1920 to promote economic development. Historically, park legislation prohibited hunting in national parks, with no explicit reference to Aboriginal hunting or other traditional uses. The intent of the legislation was to protect and develop national parks as recreational playgrounds. The regulatory scheme does not appear to have extinguished Aboriginal rights, nor does subsequent legislation.

The use and occupation of the Kootenay Region by the Ktunaxa people is supported by ethnographic accounts, Ktunaxa oral history, historical agreements, linguistic studies, park visitor information, and recent archaeological evidence. Although there is currently insufficient evidence to substantiate or repudiate a claim to Aboriginal rights and title in Kootenay National Park, available evidence points to the historical existence of Aboriginal activities in the park.

Recently, Parks Canada has involved Aboriginal peoples in planning and management of new, but not established, national parks. The result is a national patchwork of management regimes dependent on the era in which the parks were established. As a consequence, KKTC is poorly integrated in the conservation efforts of national parks.

Although the interests of KKTC and Parks Canada appear conflicting, recent regulatory amendments establish that traditional Aboriginal activities are acceptable in national parks. The

major obstacle to reconciling the interests of KKTC and those of Parks Canada remains an ideological difference to the conservation of natural resources.

A key federal objective in treaty negotiations is to develop a new relationship with First Nations based on mutual respect and understanding. To do so, Parks Canada and KKTC must initiate a dialogue to explore their respective interests and seek a mutually acceptable solution to their differences and other stakeholder groups.

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CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

Aboriginal and treaty rights in Canada are constitutionally recognized and protected. The nature of Aboriginal rights, however, is poorly understood and evolves with each new legal decision on the issue. To help clarify the scope and content of Aboriginal rights, the federal and provincial governments commenced treaty negotiations with Aboriginal groups in British Columbia. The governments' purpose in negotiating treaties is to define and delineate the rights and obligations of Aboriginal peoples in areas of the province where treaties were never previously negotiated (Canada, Department of Indian Affairs and Northern Development 1995: 8; Canada, Department of Indian Affairs and Northern Development 1993; British Columbia, Ministry of Aboriginal Affairs n.d.: 1).

The federal government has taken advantage of treaty or land claim negotiations processes in other areas of Canada to establish new national parks and involve Aboriginal peoples in the management of these parks (Olsen and O'Donnell 1994: 1-6). In the Kootenay Region of British Columbia, national parks were established long before Aboriginal rights were ever affirmed in the Canadian Constitution. Since the creation of national parks in the Canadian Rocky Mountains, Aboriginal people have been excluded from pursuing traditional practices within park boundaries.

The Ktunaxa/Kinbasket Tribal Council (KKTC) is presently engaged in the British Columbia treaty negotiation process. Kootenay, Yoho, Glacier, and Mount Revelstoke National Parks all lie within the British Columbia portion of KKTC's traditional territory, as delineated in its statement of intent to negotiate a treaty with the federal and provincial governments (KKTC

1993, figs. 1 and 2). KKTC has never been allowed to pursue traditional activities within these parks, nor has it been involved in the management of national parks within its traditional territory.

1.2 PURPOSE

The purpose of this study is to identify and describe selected issues, interests, and options for the future management of national parks within the traditional territory of KKTC. A secondary purpose of this study is to document self-identified interests of KKTC in national parks within their traditional territory. This work will contribute to the development of a common information base and hopefully assist in the eventual resolution of treaty negotiations with KKTC.

It is important to realize that key features of the treaty process are not investigated here including the perspectives of stakeholder groups such as the general public, local communities, and environmental nongovernmental organizations. Moreover, KKTC representatives were not prepared to discuss site specific historical uses of Kootenay National Park as part of this study.

1.3 OBJECTIVES

The objectives of this research are:

- 1) to examine the range of First Nation involvement in the management of national parks in British Columbia and Canada (section 9.2);
- 2) to describe various mechanisms used to increase the involvement of First Nations in the management of national parks (section 5.3.3(c) and 9.2);
- 3) to identify criteria that increase the probability of successfully implementing alternative management regimes in national parks (section 9.5); and
- 4) to identify and detail selected interests of KKTC and Parks Canada in the management of Kootenay National Park (chapter six and seven).

Clearly many other perspectives must be taken into account during the treaty negotiation process which are not considered in this study.

1.4 BACKGROUND AND RATIONALE

1.4.1 Treaty Negotiations

The government of Canada and British Columbia are currently negotiating treaties with First Nations throughout British Columbia. The objective of the federal and provincial governments is to negotiate agreements that will provide certainty of rights to lands and resources in areas where Aboriginal rights have not yet been dealt with by treaty or other legal means (Canada, Department of Indian Affairs and Northern Development 1995: 8; Canada, Department of Indian Affairs and Northern Development 1993; British Columbia, Ministry of Aboriginal Affairs n.d.: 1). The British Columbia treaty process was established for the specific purpose of fulfilling this objective (Canada, Department of Indian Affairs and Northern Development 1991: 4). Treaty agreements will define the rights and benefits that First Nations will exercise and enjoy. These may include full ownership of certain lands, guaranteed wildlife harvesting rights, participation in land and resource management, financial benefits, resource revenue-sharing, and economic development measures (Canada, Department of Indian Affairs and Northern Development 1991: 4).

In British Columbia, land and most natural resources subject to treaty negotiation are under provincial jurisdiction (Canada, Department of Indian Affairs and Northern Development 1991: 3). National parks are a notable exception to this general rule. Federal Crown lands under national park status are the jurisdiction of Parks Canada, which is the responsibility of the Department of Canadian Heritage.

The British Columbia treaty process is a six-stage process with the substantive negotiations taking place in the fourth stage or agreement in principle stage (table 1) (British

Columbia Claims Task Force 1991: 41-47; British Columbia Treaty Commission 1997: 1-32).

This study was designed specifically to generate a common information base to assist in the negotiation of a subagreement on national parks as part of the negotiations of an agreement in principle between KKTC, Canada, and British Columbia.

Table 1. British Columbia Treaty Negotiation Process

Stage of Negotiation	Description
1. Submission of a Statement of Intent	The negotiation process begins when a First Nation sends a statement of intent to negotiate a treaty to the British Columbia Treaty Commission. The commission forwards the statement of intent to the federal and provincial governments and acknowledges its receipt to the First Nation.
2. Preparation for Negotiations	The commission convenes a meeting of the parties within 45 days of receipt of the statement of intent. The meeting provides an opportunity to exchange information, consider the criteria to used to determine the parties' readiness to negotiate, discuss background studies the parties intend to carry out in preparation for the negotiations, and identify in a general way issues to be negotiated.
3. Negotiation of an Framework Agreement	A framework agenda is negotiated to identify the topics for and objectives of the negotiations, and establish a timetable and special procedural arrangements.
4. Negotiation of an Agreement in Principle	During this stage the parties reach the major agreements which will form the basis of the treaty. It should contain the salient points of the final agreement.
5. Negotiation of a Final Agreement	The final agreement will formally embody the principles of the new relationship and the agreement reached in the agreement in principle. It will also provide the implementation plan by which the parties will give effect to the agreements.
6. Implementation of the Treaty	Implementation legislation or authorities may be by each of the parties.

1.4.2 National Parks and Indigenous People

National parks in Canada have historically been set aside to be free of human habitation and traditional resource harvesting. Although industrial resource extraction within national parks was embraced initially as a way of contributing to the national economy, these activities have long been eliminated from national parks. The Canadian concept of national parks closely mirrors the internationally recognized definition which espouses that national parks be "relatively large land areas . . . not materially altered by human exploitation and occupation . . . where the highest competent authority of the country has taken steps to prevent or to eliminate as soon as possible exploitation or occupation"(IUCN, 1980). This philosophical model of conservation does not recognize Aboriginal rights or the aspirations of the local communities who have traditionally lived in an area prior to the establishment of national parks or protected areas. In some instances, Aboriginal and resident people have been forcibly removed from protected areas (West and Brechin 1991).

Globally, many countries have adopted the international definition of national parks. As a result, park policies have often sought to exclude indigenous people from regions designated under protected area status. Such policies disrupt traditional subsistence activities by making it more difficult for individuals or communities to obtain food and practice traditional cultural and spiritual activities. The resulting social and cultural impacts can be devastating for the displaced communities and national parks have, at times, suffered from a lack of local support and increased instances of poaching.

Natural resource management of protected areas is currently in an era of change. There is an increased respect of indigenous rights and values, and a recognition that historical or traditional ecological knowledge can be of value to the management of parks and protected areas. This philosophical change was instigated by documentation of the negative impacts of the

exclusionary model (West and Brechin 1991). A new more participatory model seeks to accommodate local communities and cultures by incorporating them to a greater extent in the establishment and management of national parks. This increased level of participation by local communities, especially indigenous populations, has provided for innovations in park management. New management regimes have provided for the sharing of benefits from protected areas through employment opportunities, monetary compensation, development of a tourism economy, continued habitation within protected areas, and the use of natural resources on a sustainable basis by indigenous populations.

1.4.3 Canadian National Parks and the KKTC Treaty Negotiations

Recently, Parks Canada has attempted to build relationships with First Nations by respecting their rights and interests. This has been achieved by involving First Nations in the establishment and management of new national parks. The increased participation of First Nations has resulted in the establishment of cooperative management boards to oversee the development of park policies in newly established national parks and national park reserves. These arrangements are said to be "without prejudice" to treaty negotiations (Olsen and O'Donnell 1994: 1-6).

Until now, Parks Canada has sought to increase the participation of First Nations only in the establishment of new national parks or through the specific claims process. Parks Canada has never revisited the management regime of existing or established national parks as part of the treaty negotiation process.

KKTC has submitted its statement of intent to negotiate a treaty. The council asserts that four national parks--Kootenay, Yoho, Glacier, and Mount Revelstoke--are situated within the traditional territory of KKTC (KKTC 1993, figs. 1 and 2). These national parks have long been established and are often considered to be part of the "crown jewels" of the national park

system. KKTC has expressed interest in these national parks and has requested the development of an interim measures agreement to protect the interests of the Ktunaxa people in the parks.

This research project has important practical value as it will assist members of both the KKTC and federal government negotiating team in familiarize themselves with the issues, interests, and options related to the national parks within the traditional territory of KKTC. A greater understanding of these critical issues will assist in the eventual resolution of treaty negotiation with KKTC.

1.5 RESEARCH QUESTIONS

1.5.1 Background Information--Treaties and Land Claim Agreements

This section investigates a number of fundamental questions:

- What is the historical relationship between Canada and KKTC?
- What treaty-related discussions have taken place between Canada and KKTC?
- What do historical documents reveal about agreements or discussions between First Nations and government representatives regarding the establishment of national parks within the traditional territory of KKTC?
- What is the basis of the KKTC request for the development of interim comanagement measures with respect to the national parks within their traditional territory?

1.5.2 Developing Alternatives

This section draws on the experience of First Nations and governments in dealing with similar issues:

- What is the range of First Nation involvement in the management of national parks and protected areas, especially with respect to new emerging management regimes in British Columbia, Canada, and internationally?
- What are the existing mechanisms used to increase the involvement of First Nations in the management of national parks?

- What are the constraints on establishing alternative management regimes for national parks?
- What are the benefits and limitations of alternatives management regimes?
- Are there specific criteria which would increase the probability of establishing successful alternative comanagement regimes for national parks?

1.5.3 Specific Information--Relationship between KKTC & Parks Canada

This section documents historical information specific to KKTC and national parks:

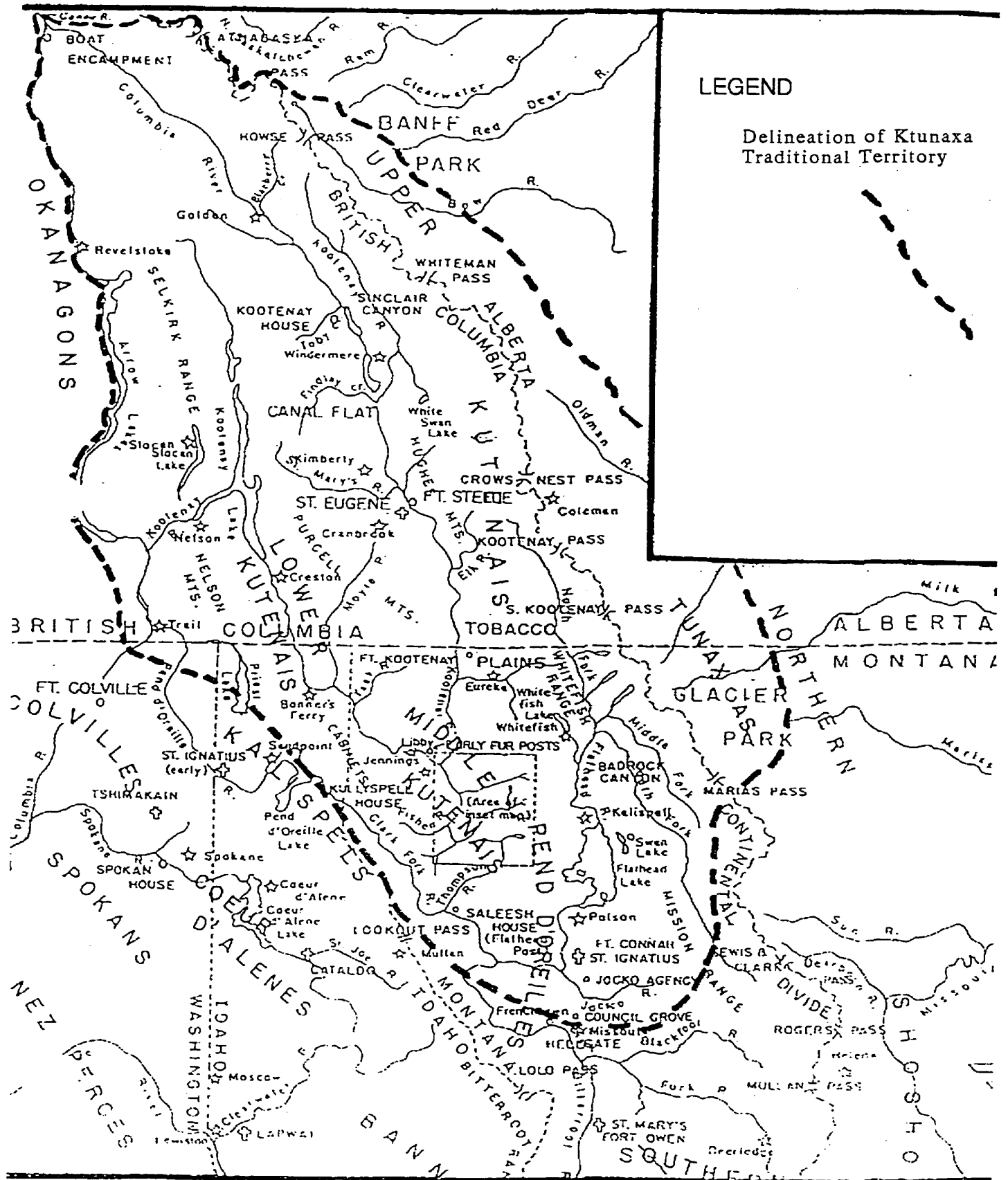
- What is the current mandate of Parks Canada?
- What is Parks Canada's current policy concerning the participation of First Nations in the management of national parks?
- What is the current role and level of involvement of First Nations in the management of Kootenay National Parks?

1.5.4 Identifying Interests and Common Ground

This section explores the interests of the parties to treaty negotiations:

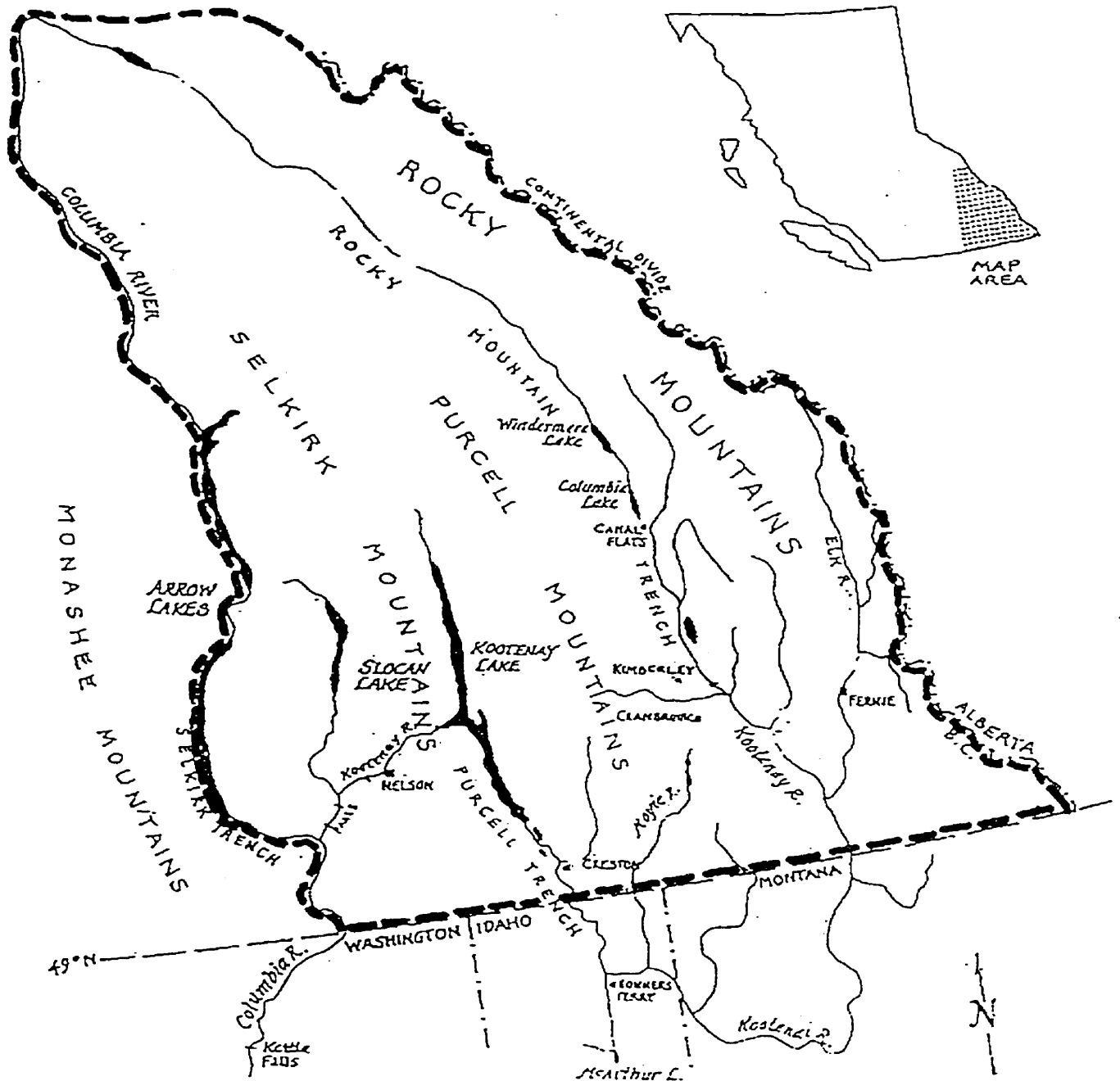
- What are the specific interests of KKTC in the national parks within their traditional territory?
- What are the interests of Parks Canada in the future management of Kootenay National Park following the settlement of treaty negotiations?
- What common ground exists between the parties now?
- What factors limit the emergence of common ground and a future agreement with respect to the management of national parks?

Figure 1: Historical Map of Ktunaxa Nation's Traditional Territory within the Province of British Columbia



Source: Ktunaxa/Kinbasket Tribal Council (1993)

Figure 2: Ktunaxa Nation's Traditional Territory for the Purposes of Treaty Negotiations in British Columbia



Source: Ktunaxa/Kinbasket Tribal Council (1993)

1.6 LIMITATIONS AND SCOPE

The focus of this study is on issues regarding national parks that are likely to arise during treaty negotiations with KKTC. Although these issues transcend the boundaries of any one national park, this study specifically focuses on Kootenay National Park because of the ramifications of the establishment of this park to the management of other national parks within the traditional territory of KKTC. Furthermore, this investigation examines the historical events that led to the establishment of Kootenay National Park, the legal principles surrounding Aboriginal rights and title, and the interests of the federal government and those of KKTC in the future management of Kootenay National Park.

The description of the federal government's interests in long-established national parks as they relate to aboriginal issues is limited by the confidential nature of government documents prepared for use in treaty negotiations. Although Parks Canada has developed interest papers for the same purpose, the content of these documents is privileged information and cannot be divulged in this research paper. In an attempt to compensate for this inherent limitation, three interviews with Kootenay National Park management staff were conducted and Parks Canada's current policies on the management of national parks, and specifically Kootenay National Park, were reviewed.

Nonetheless, the inability to use information specifically developed by Parks Canada for treaty negotiations is a major shortcoming of the paper. If this information had been available to the public, it would have formed the basis for the discussion of Parks Canada's interests in long-established national parks in relation to treaty negotiations, and would have also served as the basis for exploratory discussions with Parks Canada.

An additional shortcoming of the study is that attitudes and perceptions of the general Canadian public, local communities, and nongovernmental organizations towards the

involvement of Aboriginal peoples in the management of national parks were not surveyed. To do so would have required much more time and resources than were available for this research project.

The study also examines comanagement agreements and emerging initiatives in the management of national parks and protected areas. The study does not attempt to provide a comprehensive summary of innovative management regimes. Rather, it focuses on describing and comparing recent initiatives in the management of national parks that are emerging from the settlement of land claims and treaty negotiations in Canada. These new initiatives have been examined in order to identify potential options for consideration in the negotiation of a treaty with KKTC. This study does not supplant the need for treaty negotiations with KKTC, nor does it attempt to identify the most likely outcome of the negotiation of Aboriginal issues and national parks. The eventual outcome must be determined through treaty negotiations with KKTC within the context of other treaty provisions. National parks are only one of many issues to be discussed during this process. Despite its inherent limitations, this study provides an initial common information base which will assist in the negotiation of issues related to Kootenay National Park

1.7 ORGANIZATION OF THE PAPER

This report is divided into nine major chapters, including this introduction. The second chapter describes the methodology used for researching this project, while the theory of interest-based negotiations and its growing popularity in resolving natural resource and environmental management conflicts is reviewed in chapter three. Chapter four describes the history of Aboriginal and non-Aboriginal relations in Canada, with a focus on British Columbia. Events leading to the establishment of Kootenay National Park are also reviewed in this chapter. The evolution of the doctrine of Aboriginal rights and title is detailed in chapter five through a

descriptive summary of key legal decisions on Aboriginal rights and title and a discussion of the ramifications of the *Constitution Act* of 1982. This information provides the legal context for analyzing claims to Aboriginal rights and title. Chapter five concludes with an analysis of the potential existence of the Ktunaxa's Aboriginal rights in Kootenay National Park. This analysis provides the basis for examining the interests of KKTC and those of Parks Canada in Kootenay National Park. Chapter six and seven endeavor to describe the respective interests of KKTC and Parks Canada, and chapter eight provides an analysis of the similarities, compatibility, and conflicts between these two groups. Chapter nine examines potential options for resolving the conflict between KKTC and Parks Canada, specifically focusing on Canadian examples of alternative park management regimes in order to illustrate that collaboration between Parks Canada and Aboriginal groups has resulted in mutually acceptable arrangements in other regions of Canada. Finally, chapter ten draws conclusions and chapter eleven proposes recommendations for finding solutions to the conflict and suggests areas for future research.

CHAPTER 2

METHODOLOGY

2.1 RESEARCH METHODS

The research for this project consisted of three major components. First, an extensive literature review was conducted on a number of subjects including: the historical and legal rationale for treaty negotiations in British Columbia; the history of the establishment of national parks in the Canadian rockies; and recent initiatives in the comanagement of natural resources and in shared decision making processes specifically pertaining to protected areas and resident peoples. The historical research into the establishment of Kootenay National Park was greatly enhanced by archival research previously conducted by Parks Canada. Without this information it would have been difficult to examine the historical context surrounding the establishment of Kootenay National Park.

Second, the interests of the federal government in negotiating treaties in British Columbia were examined, with particular attention to issues related to national parks. This was achieved through informal discussions with federal government representatives between the period of May 1995 and January 1996 at the Federal Treaty Negotiation Office in Vancouver, BC. This phase of the research was particularly useful as it assisted in the identification of critical issues pertaining to treaty negotiations and national parks. It also allowed for first hand knowledge of the interests of the federal government in negotiating treaties with Aboriginal peoples, and for specific research projects on national parks. These projects examined current joint-management initiatives of national parks and protected areas in Canada. This phase of the research was

limited to documented initiatives, and focused primarily on identifying criteria for success, useful experiences, and common problems in joint management of natural resources in Canada. The direct product of this phase of the research is a comparative table of national park provisions in concluded land claim settlements in Canada (table 5).

Finally, the most critical component of this study involved conducting semistructured interviews and focus group meetings with members of KKTC and Kootenay National Park management staff. This phase of the research addressed issues relating to the management of national parks, specifically Kootenay National Park. The information gathered included key issues and interests, institutional and cultural constraints, as well as perceptions, attitudes, and ideas regarding new forms of cooperative management regimes. Seven interviews and three focus groups were held with members of KKTC during a month-long stay on the St. Mary's Indian Reserve, near Cranbrook, BC. In total, thirty-one KKTC representatives participated in the interviews (table 2) and focus group discussions (table 3). The participants consisted mostly of community elders and leaders that were identified with the assistance of Denise Birdstone, KKTC treaty coordinator. Selection of the participants was based on their influence within the community and knowledge of the historical foundation of the traditional Ktunaxa practices, activities, and interests. Interviews and focus groups were tape recorded with the permission of the participants and later transcribed. When a participant felt uncomfortable with tape recording an interview, detailed notes were taken. The discussions were largely unstructured although specific questions were asked relating to general themes which were outlined in a prepared questionnaire (Appendix A). To help ensure the accuracy of the information presented in the discussion of KKTC's interests in Kootenay National Park, and appease concerns of the KKTC leadership over issues of confidentiality, the section describing the interests of KKTC in

Kootenay National Park was submitted to KKTC representatives for review. As such, this section of the paper has been sanctioned for public release by KKTC.

Three interviews were also conducted, recorded, and transcribed with the Kootenay National Park management staff (table 2). The section of this paper describing the interests of Parks Canada in Kootenay National Park was submitted to Parks Canada for review but after two follow-up telephone calls, Parks Canada failed to provide comments.

Table 2. List of Interview Participants

Interview Participants	Background and Experience	Date
<i>KKTC Community Members</i>		
Violet Birdstone	Ktunaxa historian/researcher	Dec 12, 1996
Leo Williams	Elder (St. Mary's Band)	Jan 7, 1997
Malyan Michel	Elder (St. Mary's Band)	Jan 7, 1997
Sophie Pierre	Chief of Ktunaxa/Kinbasket Tribal Council (KKTC)	Jan 13, 1997
Chris Luke	Elder (Lower Kootenay Band)	Jan 14, 1997
Wilfred Jacobs	Elder (Lower Kootenay Band)	Jan 14, 1997
Dan Gravelle	Councilor and band manager (Tobacco Plains Band)	Jan 20, 1997
Ox Eugene	Elder (Shuswap Band)	Jan 23, 1997
Frank Sam	Elder (Columbia Lake Band)	Jan 24, 1997
<i>Parks Canada</i>		
Rod Heitzmann	Archeologist, Parks Canada	Jan 10, 1997
Ken Fisher	Client services manager, Kootenay National Park	Jan 15, 1997
Perry Jacobson	Senior park warden, Kootenay National Park	Jan 15, 1997

Table 3. List of Focus Group Participants

Focus Group Participants	Background and Experience	Date
<i>KKTC Elders Working Group:</i>		
Liz Gravelle	Elder (Tobacco Plains Band)	Jan 10, 1997
Christine Jimmie	Elder (St. Mary's Band)	
Laura McKay	Elder (St. Mary's Band)	
Leo Williams	Elder (St. Mary's Band)	
Rick Gravelle	Participants in elders working group and member of the Tobacco Plains Band	
Pete McCoy		
Chris Sanchez	Director of traditional use study	
Thomas Munson	Environmental protection manager	
<i>Columbia Lake Band Council:</i>		
Alfred Joseph	Chief	Jan 24, 1997
David Burgoyne	Councilor	
Eva Joseph	Councilor	
Rick Nicholas	Councilor	
Beatrice Stevens	Councilor	
<i>Columbia Lake Elders:</i>		
Phyllis Nicholas	Elder	Jan 25, 1997
Jennie Alpine	Elder	
Rose Michel	Elder	
Leo Couture	Elder	
Beatrice Williams	Elder	
Gail Michel	Observer	
Richard Williams	Observer	
Patsy Nicholas	Observer	
Jim Clarricoates	Observer and KKTC social worker	

A nonadversarial and nonjudgmental approach was adopted throughout the interviews and focus group meetings. This was achieved by ensuring participants that representatives of KKTC and Parks Canada would receive a draft copy of the discussion of their interests for review and comment prior to the completion of the paper. This gave participants added confidence that their concerns would be respected because it provided them assurance that they could verify the accuracy of their interview comments and determine their suitability for public release. KKTC took advantage of this opportunity to provide comments and revisions, while the Parks Canada representative did not. While the agency's reluctance could be interpreted as a

limitation of this study, it may also be indicative of the controversial and sensitive nature of the subject material. The review process inevitably prolonged the research period, but ensured that the results more accurately reflected the views of the participants.

The participation of KKTC and Parks Canada representatives in the project was critical in achieving the objectives of the study. For this reason, the research proposal was framed as a tool that would assist both KKTC and Parks Canada in treaty negotiations. The fact that KKTC would benefit from the research secured its participation.

Additional reading of the history of the Ktunaxa people and current national parks management policy specific to national parks in the Rocky Mountains was required following to the interview phase of the research in order to gain a more thorough understanding of the issues raised during the interviews.

2.2 LIMITATIONS OF THE RESEARCH METHOD

There are a number of limitations to the research methods, the most obvious being the brief period of time spent in the field and the small number of interviews conducted. Cultural differences and the nature of open ended questions and focus group interviews sometimes presented difficulties in that it was not always clear if issues raised by one participant were shared by others. Similarly, it cannot be assumed that the issues identified by participants in this study are applicable to all members of KKTC.

The significance of this limitation was somewhat reduced by interviewing influential members of the community, including elders and leaders, and leaving the identification of participants to Denise Birdstone, a community member and a representative of KKTC in treaty negotiations. The selection of participants was based on their knowledge of Ktunaxa history,

their influence in the community, and their willingness to participate. Knowledge of Ktunaxa history was a critical criterion because KKTC negotiators want to ensure that the foundation of treaty negotiations is based on the history and traditions of the communities.

Several Ktunaxa elders were reluctant, however, to discuss site specific historical uses of Kootenay National Park as part of this study. Although this information is being through a traditional use study conducted by the Ktunaxa elders working group, only general Aboriginal uses and commonly recognized site specific uses of Kootenay National Park were discussed with KKTC representatives.

A variety of important stakeholder views representative of the interests of British Columbians and other Canadians are not included in this study. These views include those of the general public, local communities, and environmental nongovernmental organizations.

CHAPTER 3

THE THEORY OF CONFLICT MANAGEMENT AND ITS APPLICATION TO NATIONAL PARKS AND PROTECTED AREAS

3.1 CONFLICTS RELATING TO PARKS AND PROTECTED AREAS

Conflict erupts mainly when people with competing interests and different values interact. Depending on how emerging issues are dealt with, conflict can be useful and may, in fact, be necessary if progress is ultimately to be made. If poorly managed, however, conflict can be counterproductive and destructive, leading to unwanted results and poor relations (Lewis 1993: 123).

Parks and protected area conflicts often involve the protection of park resources on one hand, and the needs of local communities on the other (Lewis 1993: 123). There are several reasons why conflict arises in the context of parks and protected areas, but quite often they involve two dimensions. First, people residing in communities near national parks have substantive needs that come into direct opposition to the needs of the park. For example, people may need grazing land, firewood, building materials, fodder, medicinal plants, and land for hunting. Such needs are often deemed by park managers to be in direct opposition to the basic principle on which parks are founded; the protection of natural resources from human use. Second, conflict arises when insufficient attention is paid to the process of involving local people in park management and decision making (Lewis 1993: 123). The challenge facing park managers is how to manage conflict so that unproductive consequences are avoided, the natural environment is protected, and human welfare is safeguarded (Lewis 1993: 123).

3.2 THE ROLE OF NEGOTIATION

Negotiation is a process by which parties who disagree on an issue come together to design their own solution for resolving a dispute (CORE 1995: 47). At its most basic level, negotiation can be described as a form of communication designed to reach an agreement between parties who share certain interests, but also have divergent views on particular issues (Fisher and Ury 1991: xvi).

Negotiation has played an increasingly important role in resolving land use disputes in British Columbia, and has been endorsed by the British Columbia government as a means of providing the public with a greater role in the decision-making process surrounding land use planning and resource management (CORE 1995: 5-8, 49-50). There is a growing appreciation of the significance and value of negotiated settlements, particularly where public commitment to a decision is required (CORE 1995: 5-8, 49-50). The Commission on Resource and the Environment (CORE) suggested that if properly managed and supported, negotiations can fairly and effectively ensure broadly based, inclusive public participation in decision-making processes, facilitate collaborative problem solving among agencies, and provide a means of resolving intergovernmental disputes, and supplement adjudicative review and appeal processes (CORE 1995: 47-56). Experience has demonstrated that traditional dispute resolution mechanisms, such as legislative and judicial processes, are not effective at creating long-lasting solutions to conflicts which arise from legitimate, but competing, values (CORE 1995: 49). CORE asserted that legislative and judicial institutions are better suited for deciding issues, rather than resolving differences among parties with dynamic relationships and values (CORE 1995: 49).

By accepting the recommendations of the British Columbia Claims Task Force, Canada and British Columbia endorsed political negotiations as the appropriate process to establish a new relationship, based on mutual trust, respect, and understanding, with First Nations in British Columbia (BC Claims Task Force 1991: 82). This decision was based on the hope that the negotiation represents a more constructive means of achieving mutually acceptable solutions to the unresolved questions of Aboriginal rights and title in British Columbia, than costly winner-take-all litigation.

3.3 INTEREST-BASED NEGOTIATION: THE THEORY AND PRINCIPLES

Negotiation routinely takes the form of *competitive positional bargaining* which focuses on “winning” and “losing”, and often results in either deadlock or compromise (CORE 1995: 48; Fisher *et al.* 1997: 128). Fisher *et al.* (1997) explained that this form of negotiation generally follows standard moves of proposal, rejection, counter proposal, rejection, argument, concession, argument, concession, and so forth. Although the parties involved may look forward to the benefits of a possible agreement, the negotiation often turns into a contest of will—who will last the longest?—rather than a productive forum in which an effort is made to devise a solution that best reconciles the interests of both parties (Fisher *et al.* 1997: 129). Positional bargaining can be useful in providing a clear basis on which to negotiate, but can also damage the parties’ on-going relationship as each side attempts to coerce or intimidate the other (BCTC 1996: 20-21). The consequence of this type of process is that the content of an eventual agreement is likely to suffer and reflect a split between final positions, rather than a solution carefully crafted to meet the legitimate interests of all involved (Fisher *et al.* 1997: 137).

Alternatively, negotiations may involve a cooperative, problem-solving approach to resolving disputes, commonly referred to as *interest-based negotiation* (CORE 1995: 47-56). The goal of interest-based negotiation is to identify, whenever possible, options for mutual gain and interests conflict, and to reach a decision based on objective criteria rather than compromise (CORE 1995: 49; Fisher and Ury 1991: 56-94). This process creates an opportunity for participants to agree to seek an outcome acceptable to all, and presumes a commitment to act on the terms of the eventual agreement (CORE 1995: 49). The motivation to cooperate lies in the realization that the goals of both parties are interdependent. Invariably, one party cannot get what it wants without the support or action of the other (CORE 1995: 47-56). By working together to solve a jointly defined problem, each party gains more than it could by relying on positional bargaining techniques (CORE 1995: 47-56).

For the reasons outlined above, the British Columbia Treaty Commission (BCTC) encouraged parties involved in treaty negotiations to engage in a process suitable to the task of treaty making. This includes the development of new constructive relationships between Aboriginal and non-Aboriginal people (BCTC 1996: 20-21). The commission explained that joint problem-solving is often required in complex treaty negotiations. Negotiators need to address the interests underlying the position of each party in order for options to emerge that will resolve conflict. The commission noted that if the parties do not understand each other's underlying interests, the chances of reaching fair agreements are substantially reduced (BCTC 1996: 20).

Interest-based negotiation consists of four basic principles:

1. *Separate the people and personalities from the substantive problem.* People have strong emotions and depending on their personal and cultural experiences, may have very different

perceptions and ways of communicating. Emotions typically become entangled with the objective merits of a problem. Participants should try to see themselves as working side-by-side, attacking the problem, not each other (Fisher *et al.* 1997: 138-40; Fisher and Ury 1991: 15-39).

2. *Focus on interests rather than positions.* The objective of a negotiation is to satisfy the interests that underlie people's stated positions. Positions often obscure what people really want. Compromising between positions is not likely to produce an agreement that effectively takes care of the human needs that led people to adopt those positions. In contrast, interests are defined as the motivating qualities and values that form the foundation of positions. They can be viewed as the desires, needs, concerns, fears, and hopes of a party or stakeholder. Negotiators must identify the interests that need to be accommodated in order to achieve an agreement (Fisher *et al.* 1997: 138-40; Fisher and Ury 1991: 40-55).
3. *Generate a variety of possible options for mutual gain before trying to reach an agreement.* Negotiators must conceive a wide range of possible solutions that advance shared interests and creatively reconcile differing interests. By searching for creative ways to satisfy each other's interests, negotiators may be able to capitalize on opportunities that increase benefits while minimizing costs (Fisher *et al.* 1997: 138-40; Fisher and Ury 1991: 56-80).
4. *Insist that the result be based on objective criteria.* Where interests are directly opposed, the agreement must reflect some fair and objectively justifiable standard that is independent of the will of either side (Fisher *et al.* 1997: 138-40; Fisher and Ury 1991: 81-94).

Negotiators must also carefully consider the alternatives to a negotiated agreement, commonly referred to as a BATNA (Best Alternative To a Negotiated Agreement), and recognize that these influence the potential for an agreement (Conflict Management Inc. 1991; Gordon 1992).

In contrast to positional bargaining, interest-based negotiation is designed to result in wise agreements (Fisher and Ury 1991: 14). This method may permit participants to reach a gradual consensus on a joint decision efficiently, without all the transactional costs of forging

positions, that eventually must be abandoned (Fisher and Ury 1991: 14). Separating people from the problem also allows participants to deal directly and emphatically with each other as human beings, thus potentially making possible an amicable agreement (Fisher and Ury 1991: 14). Although the eventual outcome of negotiation may not necessarily be the ideal solution of any one party, it is usually an improvement over the continuation of conflict or inadequate compromises, that are often the result of positional negotiation (CORE 1995: 47-55; Gordon 1992).

Moving away from entrenched, polarized positions is extremely difficult, especially when one stakeholder or more feel threatened. For example, the major obstacle to achieving a mutually acceptable agreement with respect to Kootenay National Park is an ideological difference in approaches to the management and protection of natural resources which both parties interpret as a threat to their fundamental needs. Lewis (1993), suggested that a thorough assessment of national park and protected area conflicts requires an examination of:

- issues in a conflict;
- history of a conflict;
- potential stakeholders and their role in a conflict;
- stakeholders underlying interests, both substantive and procedural;
- positions that have been adopted;
- alternative positions that may serve stakeholders' interests;
- ideas stakeholders may have for resolving the conflict;
- relationships among the parties and how they communicate with one another;
- scientific, ecological, and technical aspects of a conflict;
- institutional and legal contexts for a conflict and the institutional and legal avenues for resolving it;
- available resources to deal with a conflict; and,

- any other pertinent information.

This research paper endeavors to document the major issues related to Kootenay National Park and treaty negotiations between British Columbia, Canada, and KKTC. To achieve this objective, the historical reasons for negotiating treaties with Aboriginal peoples in British Columbia, and the historical events which led to the establishment of Kootenay National Park are summarized and discussed in chapter four.

CHAPTER 4

HISTORICAL EVENTS LEADING TO THE ESTABLISHMENT OF

KOOTENAY NATIONAL PARK

4.1 INTRODUCTION

The relationship between Aboriginal and non-Aboriginal people in Canada has been, and continues to be, influenced by history. Many past attitudes, practices, and institutions significantly affect the present. Actions taken by previous governments, for example, influence the lives of Aboriginal people today. It is important, therefore, to reflect on the factors that have contributed to shape the current relationship between Aboriginal and non-Aboriginal peoples.

This chapter provides an historical examination of events that led to the establishment of Kootenay National Park and other long-established national parks within the KKTC traditional territory. This information is essential to appreciate First Nation issues related to Kootenay National Park and the potential negotiation of a treaty with KKTC. This chapter begins with an illustration of historical reasons for negotiating treaties in British Columbia, and then reviews salient events leading to the establishment of national parks in the Canadian Rocky Mountains and the development of the national park policy. The progressive restriction of the Ktunaxa people's hunting grounds and events leading to the establishment of Kootenay National Park in the early part of the twentieth century are also examined.

4.2 EVENTS LEADING TO CONTEMPORARY TREATY NEGOTIATIONS

Treaties are currently being negotiated in British Columbia because of historical, legal, economic, moral, and ethical factors. The fundamental reason that treaty negotiations are taking place in British Columbia, and are also required in other parts of Canada, is because there have been no wars of conquest by which the lands belonging to Aboriginal peoples were acquired by European nations. The land in question cannot be described as having been acquired through discovery or occupation, as it was already occupied by Aboriginal nations (Hamilton 1995: 6). The legal argument that the land was *terra nullius*, meaning a vast and empty wilderness devoid of human occupation prior to the arrival of newcomers, is simply not true. Under principles of natural and common law, no European government or monarch had the right or authority to claim or grant lands which they did not lawfully possess. As a result, treaty negotiations are necessary to resolve land ownership issues and enable Canada and Aboriginal peoples to agree on the extent to which lands and resources can be shared (Hamilton 1995, 6).

4.2.1 Tradition of Treaty Making

Relations between Aboriginal and non-Aboriginal societies during the initial period of contact in Canada were primarily commercial and secondarily, political and military. Although commercial interaction placed additional pressure on natural resources, this alone did not seriously interfere with the established patterns of Aboriginal lifestyle. Rather than undermine that lifestyle, commercial interaction tended to build on the strengths of Aboriginal people such as hunting, fishing, trapping, trading, canoeing, and transportation (RCAP 1996, vol.1 pt.1: 101). Politically, the existence of relatively strong, organized, and politically active and astute Aboriginal nations caused Europeans to reluctantly recognize in practice, and later in law, the

capacity of Aboriginal nations to govern their own affairs, possess their own lands, and conclude treaties (RCAP 1996, vol.1 pt.1: 102).

Treaty making between Aboriginal and non-Aboriginal peoples became an established practice in Canada soon after the arrival of the first European settlers to North America. Treaties involved such matters as trade and commerce, law, peace, alliance, friendship, and the extradition and exchange of prisoners (RCAP 1996, vol.1 pt.1: 122). Treaties of “peace and friendship” provided assurances and securities to Aboriginal people, as well as early colonists. Treaties enabled European colonists to formally establish their presence in Canada, while at the same time, provided a means by which Aboriginal nations could structure their relationship with colonial governments in order to preserve their ancestral lands, systems of governance, and distinct ways of life (RCAP 1993: 10-15; RCAP 1995: 15-23). Treaty making was the process by which Europeans reached political accommodation with Aboriginal nations to live in peaceful coexistence and share the land and resources of what is now Canada (RCAP 1996, vol.1 pt.1: 119).

French settlers were the first to introduce the practice of treaty making in North America (RCAP 1996, vol.1 pt.1: 105-110). Early Aboriginal-French alliances served France’s ambition of colonizing New France through the fur trade, while respecting the desire of Aboriginal peoples to preserve their territories and governmental autonomy (RCAP 1996, vol.1 pt.1: 112-113). The “peace treaty” of 1665 between four Iroquois nations and the French Crown confirmed this alliance and relationship of reciprocity, without purporting to extinguish Aboriginal rights or title to the territory subject in the terms of the treaty (RCAP 1995: 19). This treaty illustrates the efforts made by early colonists to achieve a peaceful coexistence between Aboriginal nations and newcomers to the continent (RCAP 1995: 19).

Similarly, relations between the British Crown and Aboriginal nations were based on principles of alliances and mutual respect, rather than notions of conquest and discovery. The British required the assistance of Aboriginal nations not only in the fur trade, but also in their struggle against France (RCAP 1993: 13). British colonists, however, found themselves in direct competition with Aboriginal people for settlement of land. Unlike the French, who established small pockets of settlement in areas of minimal Aboriginal habitation, British colonization practices required the securing of land already occupied by Aboriginal nations for British colonists to use for agricultural settlement and economic activities. The Royal Commission on Aboriginal Peoples (RCAP) (1993) explained that although the British may have preferred to be in a position to dominate and control Aboriginal nations, reality necessitated the creation of partnerships and alliances (RCAP 1993: 13). This led to the development of a policy whereby lands required for settlement would be secured from Aboriginal owners through formal agreements. Treaties involving land concessions soon became a common feature of British-Aboriginal relations (RCAP 1993: 13). According to RCAP, treaties represented for the British a means less drastic and more orderly than warfare, of securing lands required for settlement (RCAP 1995: 21). This historical evidence points to two fundamental principles on which early British-Aboriginal relations were based: (i) Aboriginal peoples were generally recognized as being members of autonomous political units capable of holding treaty relations with the Crown, and (ii) Aboriginal nations were entitled to territories in their possession unless they voluntarily ceded them away (RCAP 1993, 13).

The second principle of the British-Aboriginal relation has been upheld in recent legal decision both in Canada and in Australia. The existence of Aboriginal title prior to European settlement was first confirmed by the Supreme Court of Canada in the landmark decision of

Calder v. Attorney General of B.C. [1973] 1 S.C.R. 313 (hereafter cited as *Calder* 1973) and reaffirmed in *Delgamuukw v. Attorney General of B.C.* [1997] 3 S.C.R. (hereafter cited as *Delgamuukw* 1997). In *Calder* (1973), the Court recognized that Aboriginal title existed at the time of colonization as a legal right derived from Aboriginal peoples' historic occupation and possession of the land. Justice Judson explained in the decision that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means" (*Calder* 1973: 328).

In *Delgamuukw* (1997), Chief Justice Lamer explained that in order to establish a claim to Aboriginal title, "the Aboriginal group asserting the claim must establish that it occupied the land in question at the time at which the Crown asserted sovereignty over the land subject to the title." The Court determined that in British Columbia, British sovereignty was conclusively established by the *Oregon Boundary Treaty, 1846* (*Delgamuukw* 1997).

The existence of Aboriginal title prior to European settlement was also confirmed in the landmark decision of *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, (hereafter cited as *Mabo* 1992). In this case, the Australian High Court concluded that the Crown must be deemed to have taken the territories of Australia, subject to existing Aboriginal rights in land, even in the absence of the acknowledgment of those rights (*Mabo* 1992). As Justice J. Brennan stated:

An inhabited territory which became a settled colony was no more a legal desert than it was desert uninhabited. . . . Once the 'fictions' of *terra nullius* are stripped away, [t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs [of the indigenous people] (*Mabo* 1992: 58).

4.2.2 *The Royal Proclamation, 1763*: Formal Recognition of a Nation-to-Nation Relationship

The established principles of British-Aboriginal relations were enshrined in *The Royal Proclamation of 1763*. It is a complex legal document with several distinct parts and numerous

subdivisions whose summary is beyond the scope of this paper. However, the main purposes of the proclamation deserve mention since the document has been described by Mr. Justice Hall of the Supreme Court of Canada as the “Indian Bill of Rights”. “Its force as a statute,” he wrote, “is analogous to the status of the *Magna Carta* which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly discovered or acquired lands or territories” (*Calder* 1973: 394-95).

The first purpose of the proclamation was to articulate the basic principles governing the Crown’s relations with Aboriginal nations. The second was to establish the constitution and boundaries of several new settler colonies, the colony of Quebec being one of them (RCAP 1996, vol.1 pt.1: 116). The Crown was to respect Aboriginal peoples and their rights, and Aboriginal lands were to be protected from further encroachment by white settlers. The spirit of the proclamation is captured in the introductory preamble of the legislation:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds (*The Royal Proclamation of 1763*).

Treaties thus became recognized in Canada as the appropriate mechanism for arriving at agreements with Aboriginal peoples. Furthermore, the proclamation set out the procedure that the Crown was to follow when purchasing land from Aboriginal peoples:

In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where, We have thought proper to allow Settlement; but that if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name,

at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper for that purpose (*The Royal Proclamation of 1763*).

British Columbia stands apart from the rest of Canada in its treatment of Aboriginal issues because treaties were never negotiated on a large scale west of the Rocky Mountains (British Columbia Task Force 1991: 6; Tennant 1996: 6). Several reasons have been suggested for this discrepancy, but the one asserted by Chief Justice McEachern in *Delgamuukw v. The Queen*, [1991] 3 W.W.R. 97 (hereafter cited as *Delgamuukw* 1991) and later upheld in 1993 by the majority judgment of the British Columbia Court of Appeal, was that in 1763, British Columbia had yet to be “discovered” by the British (*Delgamuukw v. The Queen*, [1993] 5 W.W.R. 97, hereafter cited as *Delgamuukw* 1993). Thus, since British Columbia was not part of British North America in 1763, the court concluded that the *Royal Proclamation* did not apply to the yet undiscovered colony of British Columbia. Although this argument may hold true, the *Delgamuukw* (1997) decision by Supreme Court of Canada made it clear, that contrary to previous opinion, the source of Aboriginal title in Canada is not the *Royal Proclamation*, but rather the prior occupation of Canada by Aboriginal peoples.

This being said, the spirit of the proclamation bears some influence in British Columbia because the British Columbia treaty process is guided by the federal government’s *Comprehensive Claims Policy*, which RCAP (1995) maintained is an evolution of the *Royal Proclamation* (Canada, Department of Indian and Northern Affairs 1987: 5-6; Canada, Department of Indian and Northern Affairs 1993: 1-2; RCAP 1995: 23-24).

4.2.3 Colonial History of British Columbia

In the early years of the colony of British Columbia, Vancouver Island was treated by the British Crown as a colony separate from the rest of Canada. The Crown gave trading rights on Vancouver Island to the Hudson's Bay Company and instructed James Douglas, the chief factor of the Hudson's Bay Company and later governor of Vancouver Island and British Columbia, to purchase title to fourteen land parcels on Vancouver Island. These agreements, commonly referred to as the *Douglas Treaties*, effectively acknowledged Aboriginal title to land (Tennant 1996: 2). The Aboriginal signatories agreed to surrender their lands in return for money, promises that their villages would be surveyed and kept for their own use, and assurances that their people would be "at liberty to hunt over the unoccupied lands and to carry on our fisheries as formerly" (cited in Plant 1995: 4).

Once mainland British Columbia became part of the colony in 1858, Douglas discontinued the practice of negotiating treaties with Aboriginal communities. Several explanations have been suggested for this change in policy, the most likely reason being a general lack of funds. Tennant (1996), however, suggested an alternative explanation, namely that Douglas may have had ideological objections with the goals of the policy. Tennant submitted that Douglas believed that education, Christianity, and agriculture were the way of the future for Aboriginal people; and that the betterment of Aboriginal people was dependent on their adoption of European ideals. Douglas' views guided the new colony in its dealings with Aboriginal peoples and became an integral part of the British Columbia government's policy of assimilation. This policy sought to "protect" Aboriginal people by reserving for them their villages, agricultural lands, and fishing sites, while throwing the remaining lands open for European settlement (Plant 1995: 4).

Following James Douglas' retirement in 1864, Joseph Trutch became the most influential policy maker in British Columbia. In his role as chief commissioner of lands, Trutch directed the province's native land policy. His tenure influenced British Columbia's Aboriginal policy for the next 120 years and to this day continues to affect Crown-Aboriginal relations. Trutch viewed Aboriginal peoples as scarcely better than savages, primitive creatures comparable to wild animals. This view was shared by the political elite of the province who considered Aboriginal peoples to be morally inferior to Europeans, unworthy of land rights, and unable to carry these rights forward under the new colonial regime (Tenant 1996: 3). Trutch explicitly denied that Aboriginal title had ever existed by advancing the notion that British Columbia was a *terra nullius*. In order to fully deny Aboriginal title, Trutch also had to revise history since the *Douglas Treaties* were explicit proof that the British recognized Aboriginal title to the land. Trutch maneuvered around this awkward evidence by referring to the *Douglas Treaties* as mere friendship pacts necessary to secure amicable relations between the Aboriginal peoples and the white settlers of Victoria (Tennant 1996: 3; Allen and Lusztig 1995: 2). Trutch's notion that British Columbia was an uninhabited territory was finally dispelled by the Supreme Court of Canada in *Calder* (1973), and as previously noted, the same legal argument was also repudiated by the Australian High Court in the *Mabo* (1992) decision.

4.2.4 Division of Power: *The British North America Act, 1867*

The Crown's Aboriginal policy in British North America dramatically shifted between the time of the *Royal Proclamation of 1763* and Confederation in 1867. Following the American Revolution and the War of 1812, the importance of Aboriginal peoples as military allies to the British greatly diminished. Similarly, the critical role that Aboriginal peoples played as trading

partners was reduced with the end of the Montreal-based fur trade industry. With the burgeoning population of British loyalists, settler demand for agricultural land intensified and the spirit of the *Royal Proclamation* was strategically abandoned (RCAP 1995: 28-29). The new objectives of the Crown's Aboriginal policy were modeled on European ideals of salvation through Christianity and the adoption of agricultural practices. The objectives of the Aboriginal policy are well illustrated in the following instructions from the Crown:

[T]he most effectual means of ameliorating the condition of the Indians, of promoting their religious improvement and education, and of eventually relieving His Majesty's Government from the expense of the Indian department, are, --1st. To collect the Indians in considerable numbers, and to settle them in villages with due portion of land for their cultivation and support. 2D. To make such provision for their religious improvement, education and instruction in husbandry, as circumstances may from time to time require. 3D. To afford them such assistance in building their houses, rations, and in procuring such seed and agricultural implements as may be necessary, commuting where practicable, a portion of their presents for the latter. (Sir Kempt 1829)

Indian reserves thus became an essential component of the Crown's Aboriginal policy. Indian reserves were an essential component of the notion of salvation through agriculture and the size of reserve allocations was based on the European concept of land ownership.

Aboriginal reserves were never intended to be self-sufficient. Rather, they were intended to be home bases, doorways to traditional territories where Aboriginal people could pursue subsistence activities such as fishing, hunting, and trading (Plant 1995: 4; Schultz 1971: 30-37). Centuries of oppressive legislation, however, progressively restricted Aboriginal people's ability to pursue their traditional way of life.

Under section 91(24) of the *British North America Act, 1867* exclusive legislative authority over "Indians and Lands reserved for Indians" was assigned to the Dominion government. When British Columbia joined Confederation in 1871, with Joseph Trutch

negotiating the *Terms of Union* for British Columbia, the Aboriginal relations policy of the two colonies had become very similar. Both espoused the principles of “assimilation in conjunction with settlement” on reserves. Two notable differences remained however: (i) the requirement for the Crown to negotiate treaties with Aboriginal peoples prior to settlement by Europeans, and (ii) the size of land allocations for the purposes of Aboriginal reserves. The province argued that in their experience ten acres per family had been found to be more than sufficient to meet the needs of Aboriginal peoples, a drastic difference from the 160 to 640 acres per family of five allocated in the prairie treaties (RCAP 1996, vol.2 pt.2, 477-78; Tennant 1996: 3). Although the *Terms of Union* pays a great deal of attention to “Indian reserves”, effectively giving British Columbia veto power over the size of reserves, the agreement makes no mention of Aboriginal title or the requirement to negotiate treaties (Tennant 1996: 3).

4.2.5 Government Reconciliation on the Size of Indian Reservations

The federal and provincial governments made little progress in resolving the differences between their respective Aboriginal policies until threatened by the possibility of an Indian uprising in 1872 in the Southern Interior of British Columbia (Schultz 1971: 31). The governments quickly agreed to reconcile the differences in their policies by providing Indian nations with sufficient land to meet their individual needs, a substantial departure from the previous Dominion practice of allocating specified amounts of land for each Aboriginal family. The agreement also allowed governments to unilaterally adjust land allocations “in the event of any material increase or decrease hereafter of the numbers of a nation occupying a Reserve, such Reserve shall be enlarged or diminished, as the case may be, so that it shall bear a fair proportion to the members of the Band occupying it” (quoted in Canada 1916: 17). This flexible form of

land allocation left the settler minority to determine the “reasonable [land] requirements” of the Aboriginal communities, this again in mark contrast with the prior practices of the Dominion government (RCAP 1996, vol.1 pt.1: 477-78).

A partial explanation for the Dominion government’s departure from earlier practices is that by the late nineteenth century, the acquisition of territory had also become important to the Dominion for reasons unrelated to Aboriginal relations (RCAP 1995: 31). With the construction of a transcontinental railway, western Canada was opened up for non-Aboriginal settlement. The combined effect of the Aboriginal assimilation policy and the establishment of Aboriginal reserves in British Columbia supported the economic objectives of the Dominion, since the ultimate goal of assimilation was the removal of Aboriginal peoples from the legal landscape of Canada (Cumming and Mickenberg 1974: 119-131; Dickason 1992: 272-289; Fumoleau 1974; Miller 1991: 152-169; RCAP 1995: 31; Taylor 1991: 207; Tobias 1983: 212).

This is a critical point in understanding the historical context within which national parks were established in the Canadian Rocky Mountains at the turn of the nineteenth century. The Dominion government wanted to displace Aboriginal peoples from the land to make room for economic development (RCAP 1995: 31). In conjunction with Indian reserves, national parks provided the means for achieving both objectives. The establishment of national parks not only ensured the popularity of the transcontinental railroad which was vital to the economic development of western Canada (Bella 1987; McNamee 1993: 21-22); the parks also contributed to the displacement Aboriginal peoples from the land base by restricting their traditional territory and removing their ability to practice traditional activities in what are now national parks.

4.2.6 Enactment of the *Indian Act*

With the enactment of the *Indian Act* in 1876, the federal government confined Indians to small federally controlled Indian reserves; established residential schools; prohibited Aboriginal cultural and spiritual expression; and co-opted control of the membership in, and enfranchisement from, Aboriginal political bodies (RCAP 1995: 30). Enfranchisement is described as stripping individuals and families of their Indian rights and status in return for limited civil, political, and economic rights (RCAP 1995: 30). The objective of the *Indian Act*, as expressed in 1920 by Duncan Campbell Scott, deputy superintendent of Indian affairs, was to end the government's responsibility "as the Indians progress into civilization and finally disappear as a separate and distinct people, not by race extinction, but by gradual assimilation with their fellow citizens"(quoted in Grant 1983).

In his report on the federal government's extinguishment policy, Justice Hamilton (1995) criticized the *Indian Act* and the actions of the federal government during the past century, describing them as:

. . . a litany of oppressive and inappropriate policies established in an attempt to control, subjugate and assimilate Indian people. The forceful removal of children to distant schools, the prohibition against voting and seeking the assistance of lawyers, the need for a pass to leave the reserve, and a litany of limitations imposed upon the people all bear witness to this approach. (Hamilton 1995: 11)

Justice Hamilton further noted that Aboriginal people were never consulted to ascertain their satisfaction with the policies designed to assist them. Aboriginal people came to believe that they had no say in matters affecting their lives, allowing the government and its distant bureaucracy to make decisions for them. These historic realities, he observed, provide valid justification for Aboriginal peoples' inherent distrust of government (Hamilton 1995: 11).

4.2.7 Establishment of Indian Reserves in the Kootenays

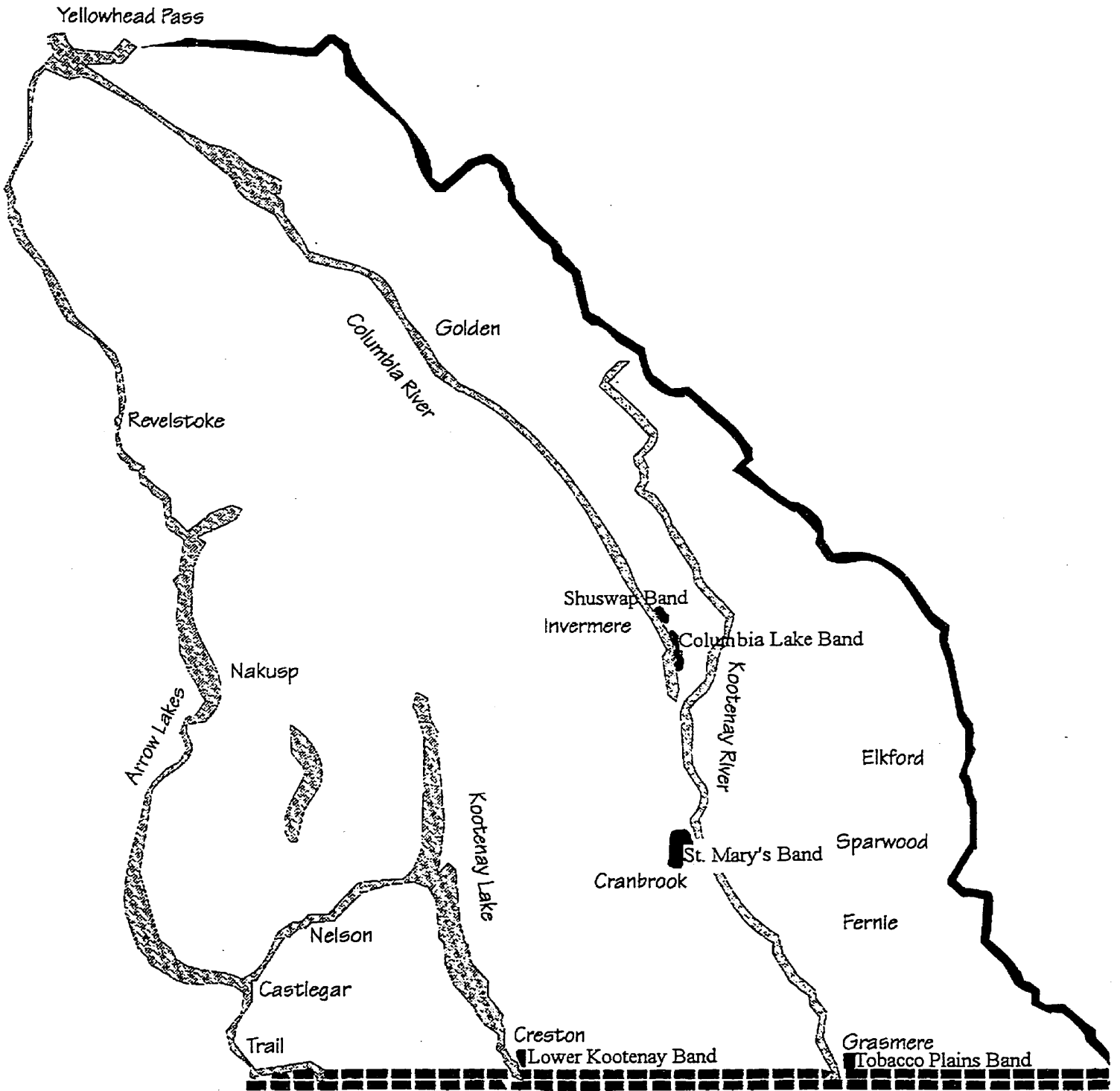
Peter O'Reilly, British Columbia's Indian Reserve Commissioner, set out in 1884 to allocate Indian reserves in the Kootenay Region of British Columbia. His original instructions were to consider the "legitimate pursuits or occupations which they [Aboriginal people] may be profitably following or engaged in" (Vankoughnet 1880). Prior to his departure for the Kootenays, O'Reilly received further instructions from British Columbia's Chief Commissioner of Lands and Works, William Smithe. Smithe instructed O'Reilly not to include any Indian reserves between the upper Columbia Lake and the Kootenay River to ensure that a proposed reclamation scheme could go forward unimpeded by other land interests (O'Reilly 1884). Not surprisingly, historians have come to regard O'Reilly's tenure as reserve commissioner as the period in which the allocation of reserves was driven mostly by the provincial Aboriginal policy which supported the interests of settlers rather than the desires and aspirations of Aboriginal peoples (Cail 1974: 225; Fisher 1977: 180-211; Tenant 1990: 50-51).

Upon his arrival in the Kootenay's, O'Reilly found his meetings with leaders of the Ktunaxa people challenging. He "experienced very great difficulty in dealing with the Indians of the Kootenay country", and added, that in his judgment, the land allocated to the Ktunaxa people would "not materially interfere with white settlement" (British Columbia, Indian Reserve Commission 1884). O'Reilly allocated 18,150 acres to the St. Mary's Band (Cranbrook); 11,360 to the Tobacco Plains Band (Grasmere); 8,320 acres to the Columbia Lakes Band (Windermere); 1,600 to the Lower Kootenay Band (Creston); and 2,700 to the Shuswap Band (Radium) (fig. 3). Chief commissioner Smithe criticized O'Reilly for having allocated relatively large reserves to the Ktunaxa people in comparison to other Indian reserves in British Columbia, accusing O'Reilly of having "over estimated the requirements of the Indians and under estimated

those of the whites” (Cail 1974: 220; Fisher 1977: 203). O’Reilly defended his actions by explaining that the “seemingly large allotments were necessary in light of the Kootenay Indian peoples’ close relationship to the American tribes who had vast reservations” (Smithe 1884) (fig. 4).

Significant to this research were O’Reilly’s observations of traditional Aboriginal practices. These were noted in his *Minutes of Decision* which were forwarded for approval to the Chief Commissioner of Land and Works and the Indian Superintendent of British Columbia (British Columbia Indian Reserve Commission 1884). In his notes, he described the size and quality of the allocated land and the purpose for the each allocation. The minutes also recorded the types of traditional activities practiced by Ktunaxa people, as well as the geographical range in which these activities were pursued. O’Reilly noted with respect to the Ktunaxa people that, “until quite recently, these Indians [Columbia Lake Band] subsisted almost entirely on the products of their *annual hunt on the eastern slope of the Rocky mountains* and on the salmon which formerly were abundant in the Columbia River . . .” [emphasis added] (British Columbia Indian Reserve Commission 1884). He further noted that the Aboriginal people of the Upper Kootenay Region were engaged in “a considerable trade . . . with the Stoney Indians, who cross the mountains to buy horses in exchange for rifles, ammunition, and furs” (fig. 5).

Figure 3: Delineation of the Ktunaxa Nation's Traditional Territory within British Columbia



Source: Ktunaxa/Kinbasket Tribal Council (1995)

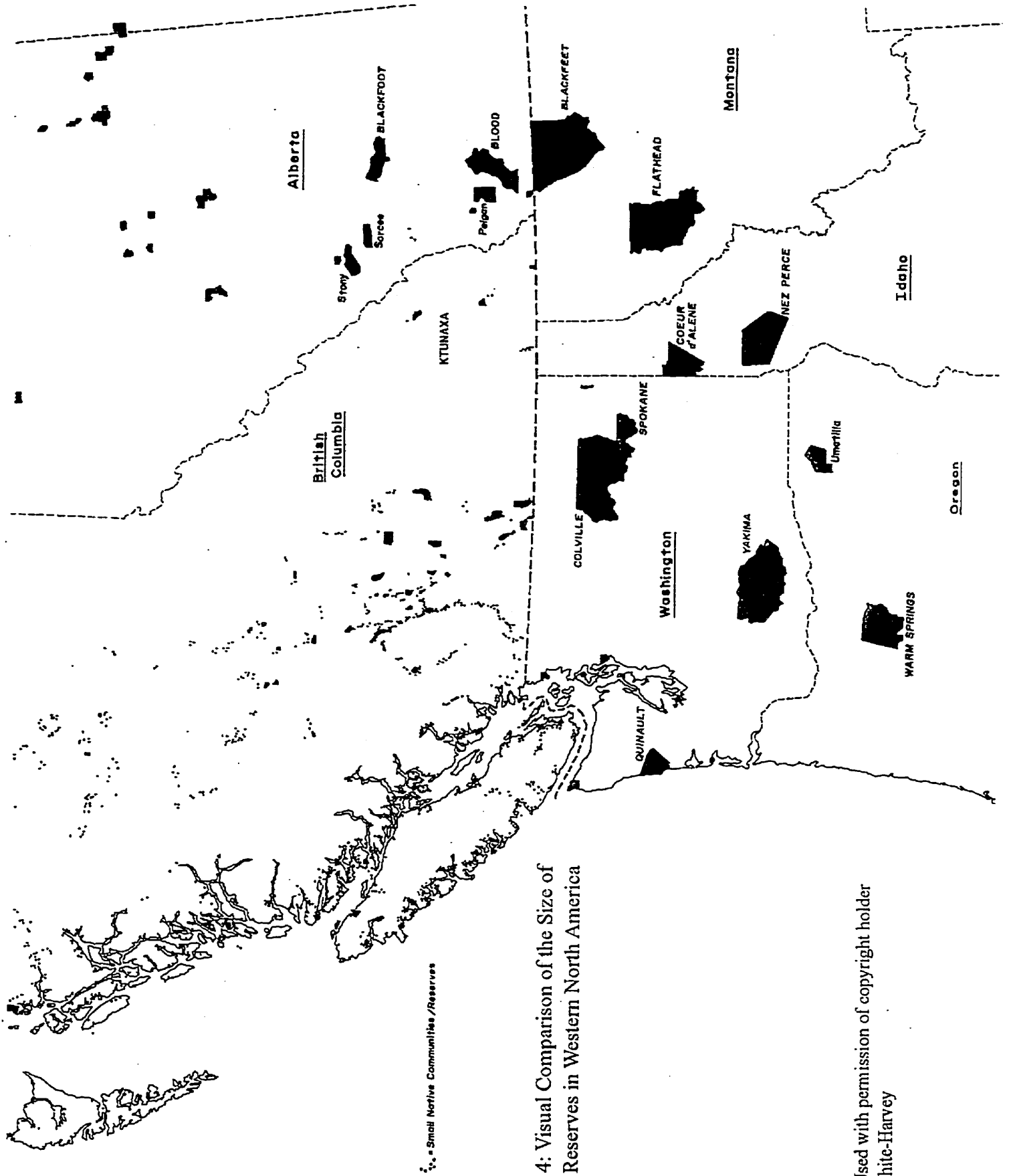


Figure 4: Visual Comparison of the Size of Indian Reserves in Western North America

Source: Used with permission of copyright holder Robert White-Harvey

Figure 5. Historical Account of the Establishment of Indian Reserves in the Kootenay Region of British Columbia

*Excerpts from a letter written December 14th, 1884,
by Indian Reserve Commissioner P. O'Reilly, Victoria, B.C.
to the Superintendent-General of Indian Affairs in Ottawa*

Sir, I have the honor to inform you that, as previously reported of the 11th June, I proceeded to Kootenay . . . and arrived at Wild Horse Creek on the 4th July, where I was met by "Isadore," the chief of the Upper Kootenay Indians, accompanied by most of his tribe.

I explained the object of my visit, and invited them to show me what lands they most desired to have reserved; owing, however, to their excessive demands, and not being provided with a competent interpreter, I decided to defer the consideration of their land question, and to proceed to the 'Tobacco Plains', 60 miles south, . . . where a portion of the tribe resides, "David" being sub-chief.

I found "David" . . . quite as unreasonable in his demands as "Isadore" had been, claiming the whole country from the boundary line to the Columbia Lakes, an area of 1,100 square miles, and I had great difficulty in inducing him to listen to any proposals to the contrary. He repeatedly referred to the large reserves allotted by the United States Government to the Indians . . . and compared them with the small he asked for . . . and complained that Kootenay Indians had received nothing at the hands of the Dominion Government, though the Crees, Blackfeet and Stoneys, on the other side of the mountains, had been furnished with stock, seed, implements, and even rations

. . . Having made a thorough examination of the most suitable localities, I reserved for the use of this tribe a tract of land containing 11,360 acres, consisting principally of open rolling ground, interspersed with belts of timber; pine, larch, and fir. The houses of this branch of the Kootenay tribe are situated in immediate proximity to the boundary line; they have four acres of land cultivated as gardens. . . .

. . . This reserve is principally valuable as stock-range; the snowfall generally being light and the Indians drive their horses and cattle here in the spring, when grass is not to be found elsewhere.

On the 22nd July I returned to Wild Horse Creek, and lost no time in apprising the Indians of my readiness to confer with them. They waited upon me in a body, headed by chief, 'Isadore'; no result was obtained however for several days. The chief stated that he would not accept any limits to his reservation, unless they included the whole valley of the Kootenay, and Columbia rivers, (from the International boundary line), and followed the base of the Rocky Mountains to the Boat landing on the Columbia River (Kinbasket Lake). He also refused to give a census of his people, the number of their stock, etc. . . .

. . . I decided upon the limits of Reservation No.1 . . . bounded by the St. Mary's, and Kootenay rivers. . . . It contains 18,150 acres; of this some 5,000 acres are of small value; being partly wash gravel flats on the St. Mary's river extending the whole length of the southern boundary; and the remainder a ridge of rough, stoney, lightly timbered land, situated in the centre of the reserve. The principal value of this reservation is the range to the west, containing approximately 5,000 acres of excellent bunch grass; and the swamp lands to the East. . . .

... On this reserve ... about 16 acres were cultivated without irrigation; the soil is poor, and gravelly, and crops are consequently light.

The principal village ... of 47 houses, is situated on the south bank of the St. Mary's river, on the property of the Rev. Father Fouquet; the "St. Eugene Mission" has been established by the Roman Catholics ... and here the Indians congregate during the winter months.

On the 5th of August I arrived at the Lower Columbia Lake (Lake Windermere), the place of residence of another portion of the Kootenay tribe, and whom 'Moyeas' is the chief. Here, again, I was met by request for a greater area of land than I considered necessary, although their demands were not so excessive ... and I found them to be more amenable to reason. They also had a greater claim to favorable consideration; as they had evidently done their best to fence, and cultivate such portions of the land as could be irrigated; and had erected comfortable houses for themselves ... I decided to allot them

... 8,320 acres. ... Of this 100 acres is cultivable; the remainder is broken, rolling and gravelly, lightly timbered with pine and fir; and more or less rocky as it approaches the base of the mountains. ...

... On completing my work in the Upper Kootenay Valley, I proceeded to visit that of the Lower Kootenay ... on the 26th of August. ...

... The Indians asked that land be given them on the right bank of the Kootenay river, about 2 1/2 miles north of the International boundary line. I acceded to request, and made reservation No.4 though most reluctantly, for a more worthless piece of land, in its present condition cannot be imagined.

Of the 1,600 acres so reserved, 1,200 are swampy marsh land. ... Should the Kootenay reclamation scheme be carried out, the whole ... could be brought into cultivation. ... The remaining 400 acres ... are absolutely worthless. ...

... This branch of the Kootenay tribe is the least advanced in civilization, being far removed from any white settlement. Formerly, they crossed the Rocky Mountains to hunt, but buffalo being exterminated, they now depend principally on fish and berries. ... They number fifty-two men, thirty-five women and seventy-three children, a total of 160, of whom 'St. Pierre' is the sub-chief.

In conclusion I think it well to state again that I experienced very great difficulty in dealing with the Indians of the Kootenay country, their demands for large tracts of land were induced by the reasons I have before given, but I am glad to say that finally they appeared satisfied with the allotments made for them, and which, I believe, will not materially interfere with white settlement.

4.3 ESTABLISHMENT OF NATIONAL PARKS IN THE ROCKY MOUNTAINS

Issues surrounding the establishment of Kootenay National Park transcend the administrative boundaries of the park. The agreement which led to the establishment of the park effectively restricted the Ktunaxa people's access to traditional resources not only within the

newly created park, but also in all other national parks within their traditional territory. For this reason, it is important to review the events which led to the establishment of Kootenay National Park and also to discuss the policy decisions that influenced the early management of national parks. These early policy decisions continue to affect the Ktunaxa people by influencing their use of traditional resources within national parks.

Most Canadians view national parks as an integral part of their national heritage, a natural legacy to be passed on to future generations (Bella 1987). However, the motives behind the establishment of the original national parks in Canada were far different than those for preserving them today (McNamee 1993). The first Canadian national park, Rocky Mountain Park, was created in 1885 in the spirit of economic development. The park was viewed as a perfect complement, a natural amphitheater to the bath houses being developed at the hot springs in Banff by the Canadian Pacific Railway (CPR). It was felt that Rocky Mountain Park, known today as Banff National Park, would attract tourism to the region, thus ensuring the popularity of the railway (Bella 1984, Marty 1984, McNamee 1993). The railway would, in turn, open western Canada to economic development (RCAP 1995: 31). National parks were an essential component in the Dominion government's dream of a transcontinental railway.

Although Banff was the primary show piece of the rockies for the CPR, national parks were also created along the railway in British Columbia with the objective of raising the popularity of the entire railway line. Banff National Park was extended west along the CPR right-of-way into British Columbia in 1886. This western-most portion of the park was renamed "Yoho" after 1930 (Bella 1987: 21-3, 163-4). Glacier National Park was created the same year as Yoho to provide yet another site for the prestigious CPR tourist lodge, and to lighten the dining carts that had to be hauled over Roger's Pass (Bella 1987: 22, 164). Jasper

National Park was created when Grand Trunk, an old rival of the CPR, built a second transcontinental railroad through the Yellowhead Pass just north of Banff where hot springs had also been found. Grand Trunk was forced into receivership in 1916 and its assets combined to form the Canadian National Railway (Bella 1987: 22, 164). The only reserve established during this period without a railroad passing through it was Waterton Lakes, which was designated a national park in 1910 as the result of popular pressure requesting a Canadian national park to complement the already popular Glacier National Parks in the United States. The lake straddles the Canada/U.S. border and was formed, in part, to take advantage of the commercial opportunity created by American boaters visiting the Canadian end of the lake (Bella 1987: 164). Like Waterton, Revelstoke National Park was also created in response to public pressure. Local civic leaders wanted a road to the summit of Revelstoke Mountain and felt that if a national park were created around the mountain, the cost of road construction would be defrayed by the federal government. The park was established in 1914 but the road was not completed until the late 1920's (Bella 1987: 165).

4.3.1 National Parks Policy

The federal parks policy discriminated against Aboriginal peoples from its very inception. The policy prevented Aboriginal peoples from participating in traditional subsistence activities within national parks, while at the same time, allowing tourists to engage in activities such as sports hunting and fishing, and encouraging industrial resource extraction such as logging and mining (Bella 1987; Marty 1984: 57; McNamee 1993: 20; Rollins 1993: 75). The Dominion government saw no contradiction between resource extraction, the enjoyment of the national parks by the public, and the exclusion of Aboriginal peoples (Bella 1987: 2; Rollins 1993: 75).

The basis for the original park policy was a 1886 report prepared for the Department of the Interior by W.F. Witcher, the former Dominion commissioner of fisheries (Marty 1984: 57; Whyte 1985: 67-69). In his report, Witcher wrote that “large game and fish, once various and plentiful in this mountainous region, are now scattered and comparatively scarce. Skin-hunters, dynamiters, and netters, with Indians, wolves and foxes, have committed sad havoc” (quoted in Whyte 1985: 67-68). His recommendations, which to this day continue to influence national park policy, led to the original national park wildlife regulation and protection policies. Despite the destruction of wildlife and fish stocks in the area, Witcher favored sport hunting in the park, with an eye to the revenue that would be generated (Marty 1984: 57; Whyte 1985: 68). He recommended that predatory animals such as the wolves, coyotes, foxes, lynxes, skunks, and wildcats be exterminated, and that Aboriginal peoples be excluded from hunting in the national park (Marty 1984: 57). He suggested that “those who now invade that territory are stragglers and deserters from their own reserves, where they are well cared for in food and clothing at the public expense” (quoted in Marty 1984: 57). Consequently, he argued that Aboriginal people should not be permitted to hunt in national parks.

Witcher’s report was notable not only for its Victorian ideals of wildlife management, but also for its erroneous representation of Aboriginal peoples (Marty 1984: 57). Historical records reveal that Aboriginal peoples residing in the plains and Rocky Mountains, in the late 1800’s, were faced with widespread starvation and the inability to produce the food, clothing, and shelter required for their survival that resulted from the mass destruction of the buffalo (Marty 1984: 57; RCAP 1996, vol.1 pt.1: 66).

Although the minister of interior elected not to exterminate all of the predatory animals, as suggested by Witcher, he did reserve the right to make laws for “the preservation and

protection of game and fish, and of wild birds generally.” Eventually, hunting was entirely prohibited within national parks (Marty 1984: 57). Dominion park regulations, however, were not enforceable in British Columbia because the Dominion government lacked the legislative authority to enforce wildlife regulations within that province (Cory 1913, 1914). The federal government’s inability to enforce its own park regulations tainted federal-provincial relations until the matter was finally resolved thirty years later with the federal government’s commitment to complete the Banff-Windermere Highway and the establishment of Kootenay National Park in 1920.

4.3.2 Restricting the Traditional Hunting Grounds of the Ktunaxa: An Inadvertent Recognition of the Ktunaxa’s Traditional Territory?

By 1891, the Ktunaxa people had been confined to Indian reserves by the Indian agent of the Kootenay District and were instructed to remain on reserve throughout the summer to care for the potato harvest. Traditional hunting, the mainstay of two thirds of the community, was only to be pursued in the fall. This policy was designed to protect wildlife during the breeding season (Vowell 1891a) and to assist Aboriginal peoples’ transition from a “nomadic” lifestyle to one more consistent with European ideals of stationary agricultural communities (RCAP 1995: 29; RCAP 1996, vol.1 pt.1: 267-72). After surviving through two consecutive years of “sickness and misery because of insufficient food supplies in the springtime” (Vowell 1891b), the Ktunaxa people complained to the Indian agent that while they were confined to their reserve to care for the potato harvest, the Stoney Indians (Stoneys) of Alberta were allowed to hunt and trap at will within the traditional hunting grounds of the Ktunaxa (Canada, deputy of the supt. gen’l of Indian affairs 1891; Vowell 1891b).

In response to this information, the Department of Indian Affairs considered restricting the hunting of the Stoney for fear that continued contact between the Ktunaxa and the Stoney would eventually allow the Ktunaxa to uncover additional improprieties in the treatment of Aboriginal people in British Columbia in comparison to those in Alberta (Vankoughnet 1891).

Such knowledge, it was argued, could lead to unrest among the Indians of British Columbia:

The Kootenay Indians are mainly self supporting, trusting to their hunting grounds, and fishing, to a --?-- extent for their means of subsistence, and it seems scarcely advisable that Indians, otherwise provided for, and not belonging to this Province, should be permitted to encroach upon these hunting grounds which are none too much for the support of those depending upon --?-- big --?-- Kootenay Indians. . . . For many reasons I do not think it wise to allow or encourage any intercourse between the Indians of British Columbia and those of Rocky Mountain, as such association is certain to lead to more or less disquiet --?-- amongst the Indians of B.C. (sic) (Vankoughnet 1891).

Frustrated over the inability of the federal government to resolve the dispute, Chief Isadore of the St. Mary's Band informed Indian Agent Phillips of his intention to travel to the Blood Reserve in Alberta to resolve the hunting dispute (Vowell 1891b). The federal government intervened and requested that the Kootenay Indians refrain in future from speaking or trading with the Stoney. Additionally, the government asked the Ktunaxa people to restrict their hunting to within their own hunting grounds (Vowell 1893a). To ensure the compliance of the Ktunaxa, Hayter Reed, the Commissioner of Indian Affairs, sought the cooperation of the Northwest Mounted Police asking them to "frustrate" any attempt by the Kootenay Indians to reach the Blood Reserve in October 1893 (Canada, supt. gen'l of Indian affairs 1891). In contrast, the commissioner elected not to prevent the Stoney Indians from hunting in British Columbia because the Dominion government would incur additional cost for providing the Stoney with supplies which would otherwise have been acquired through hunting related activities such as trade and barter. These additional costs, it was argued, did not justify the

Crown's intervention. The commissioner was also concerned that without sufficient employment on reserve, the Stoney Indians would turn to "mischief" (Reed 1893).

By 1893, the Dominion government had developed a solution to the issue of the Stoney hunting in British Columbia, which it believed would be acceptable to both the Kootenay and Stoney Indians (Daly 1893; Phillips 1893a; Reed 1893; Vankoughnet 1893a, 1893b; Vowell 1893a, 1893b). The federal government convened representatives of the Ktunaxa and Stoney to a meeting in Golden, British Columbia. The representatives agreed that the "watershed between the Province and the Territories" would be the "dividing line between the respective hunting grounds" of the Ktunaxa and Stoney. The Ktunaxa would limit their hunting to the western side of the Rocky Mountains and the Stoney would limit their hunting to the eastern side of the Rockies (Phillips 1893b; Vowell 1893c).

This solution was verbally agreed upon. However, the Stoney later renounced their support for it, claiming that their representatives had no authority to speak on behalf of their people (Canada, deputy supt. general of Indian affairs 1895; Forget 1895; Vowell 1895a). Furthermore, the Stoney claimed the "territory East of the summit of the first ridge West of the watershed or main summit of the Rocky Mountains" as part of their hunting grounds (Vowell 1895b). Once again the Dominion government convened a meeting between the Stoney and the Ktunaxa, and included the Kinbasket Band in the discussions (Reed 1895a, 1895b). On September 27, 1895 the parties agreed in writing that:

The Stonies shall have the privilege of hunting as far West as the Columbia and Kootenay Rivers, and that in return the Kootenay Indians, and the Shuswap Indians shall have the privilege of hunting as far East as the base of the Rocky Mountains, on the Eastern slope thereof.

And that this mutual concession is made with the distinct understanding that the Game Laws of British Columbia, and the North West Territories, as the case may be, shall be strictly observed, and that any infraction of the said Game Laws by the Stonies of British

Columbia, or by the Kootenays or Shuswaps, in the North West Territories, shall be considered sufficient reason for withdrawing the concession above made, from the Band or Bands to which the Party, or Parties belong. (Memorandum of Agreement 1895).

Pielle, a headman of the St. Mary's reserve at the time, explained his reasons for supporting the agreement:

Long ago there were plenty of buffaloes, and the whiteman told us a time would come when they would all disappear. That seemed incredible, they were so numerous. We therefore could not believe it, nor would the Stonies. The Whiteman, however, had said the truth, the buffaloes are all gone. They the Whiteman told us that deer which were but a few years ago, as numerous as flies in the foot hills of the Rocky Mountains, would also go, because they were being hunted in all seasons. We again disbelieved this, but that also has come to pass.

Now the whiteman tells us that the other fur-bearing animals will in turn soon disappear, unless well protected. Twice the Whiteman's word has proved true, although we disbelieved it at the time. We believe his word now, and in the fear that the rest of the game will soon be no more, we are devoting our attention to farming, and cattle raising. The game must be protected and for seven months, from Spring to Fall, we keep to our fields. What do the Stonies do, during that time? They come and hunt and kill everything before them. The Stonies say formerly you hunted on our side of the Mountains, why do you object now if we come on your side? Our reason is that we were told by Whitemen, to stop the Stonies coming this side, in order to preserve our game. What I say now I think in my heart, but I am like Abel, I am willing to do anything the big Chief will advice (sic) (Deputy Superintendent General of Indian Affairs 1895).

At the time of these agreements, hunting for personal consumption by "Indians and settlers in unorganized districts" of British Columbia was unrestricted (*BC Game Protection Act, 1895. S.C.B. c.23*). With amendments in 1896 to the *BC Game Protection Act*, it became illegal for "non-resident Indians" to hunt in British Columbia (*BC Game Protection Amendment Act, 1896. S.C.B. c.22*). The amendment states that "it shall be unlawful for Indians not residents of this Province to kill game at any time of the year (*BC Game Protection Amendment Act, 1896. S.C.B. c.22*)." By 1901, this amendment to the *BC Game Protection Act* was deemed sufficient by the Department of Indian Affairs to annul the "compact" previously agreed upon by the

Ktunaxa, Kinbasket, and Stoney people (Eberts 1901; Laird 1901a, 1901b; McLean 1901). However, the Stoneys continued to hunt in British Columbia unaffected by the amended legislation while the provincial and federal governments debated whose responsibility it was to enforce game regulations on Aboriginal people (Brown 1902; Fulton 1905; Laird 1905; Macleod 1902; Pincher Creek Detachment of the N.W.M.P. 1904; Ross 1905). The question remained unresolved for several years (Canada, deputy superintendent general of Indian affairs 1905; Vowell 1905). In the absence of clear legal direction, the province finally assumed responsibility for enforcing its game laws and the Stoneys were made to abide by provincial regulations (Markle 1905; Canada, secretary of Indian affairs 1902; Vowell 1905).

4.3.3 Establishment of Kootenay National Park

By 1912, the federal and provincial governments were once again arguing over the application of “game” laws in British Columbia. This time, however, the dispute revolved around the application of “game” laws within Dominion parks and forest reserves (Cory 1912). The federal government wanted to administer Dominion parks as “absolute game preserves” in accordance with the *Dominion Forest Reserves and Parks Act* (1911) regulations (Harkin 1913; Newcombe 1912). These regulations stated that:

Hunting: 76. In any portion of a forest reserve proclaimed as a game preserve no game shall be hunted, taken or killed and any further regulations necessary for this purpose may be made by the Minister.

Fishing: 78. Fishing in any other manner than by angling and trolling is prohibited. (b) Angling or trolling is prohibited except by permit. (c) Every British subject resident in the province for which it is issued shall be eligible for an angling and trolling permit (Canada, Department of the Interior 1911).

The federal government's desire to administer parks and forest reserves as "game" refuges was juxtaposed with the provincial government's interest in having a uniform set of hunting regulations applied consistently throughout the province (Harkin 1914; Rothwell 1913). Provincial legislation prevailed because the federal government did not have title to the land base within the national park and forest reserves (Canada, Department of the Interior 1913; Cory 1913, 1914). Consequently, individuals bearing valid hunting licenses were permitted to hunt within Glacier, Yoho, and Mount Revelstoke National Parks during open hunting season, in direct contravention of the *Dominion Forest Reserves and Parks Act* (1911).

The hunting regulation governing national parks was amended in 1915 and made even more restrictive. It read:

61. "Game" shall mean and include all animals and birds protected by the regulation, and the heads, skins and every part of such animals and birds. No person shall hunt, take, kill wound, injure or destroy or pursue with such intent any game within the parks, and except as expressly authorized by these regulations no person shall have in his possession . . . any game or any fish killed or procured within the Park (Canada, Privy Council Office Records, No. 486).

This amendment had little impact on the administration of national parks within British Columbia until 1919, when the provincial government was compelled to seek the assistance of the federal government in order to complete construction of the Banff-Windermere Road (Canada, Department of the Interior 1919). Embarrassed by its inability to complete its share of the highway, the provincial government capitulated to the demands of the federal government (Johnson 1919). In return for completing the highway, the provincial government granted the federal government exclusive jurisdiction and title to all Dominion parks situated within British Columbia, and transferred to the federal government the area covering the roadway and a five-mile (eight-km) wide strip of land on either side of the roadway to be used for Dominion park

purposes and an additional portion of land between the roadway and Yoho National Park (British Columbia 1916; Canada 1928; Johnson 1919; Randolph 1916; Spero 1919). This land transferred as part of the agreement later became known as Kootenay National Park (Cory 1920).

Although the Banff-Windermere Road agreement was reached in 1916, it was not until 1920 that the provincial government transferred control of the land to the federal government, and not until 1921 that the inconsistencies between the provincial "game" regulations and the *Dominion Forest Reserves and Parks Act* were removed (Cory 1922; Johnson 1921). Kootenay National Park was thus designated and proclaimed as a national park on April 20, 1920.

Ironically, the appropriateness of the name "Kootenay" was noted in a memorandum requesting approval of an order-in-council for the establishment of Kootenay National Park:

In accordance with the agreement between the Province and Dominion re: the Banff-Windermere road, the British Columbia Government has transferred to the Dominion for Dominion Park purposes the area covering the roadway and a strip of land extending five miles on each side thereof. It is, therefore, desirable that this area be proclaimed a Dominion Park under the Dominion Forest Reserves and Parks Act. In addition to the area of the road there is a small area between the present Yoho Forest Reserve which it is suggested should be included in this Park. It is a suitable park area and is only accessible via the Rocky Mountains or the Kootenay Park. The Forestry Branch has approved of having this area included in the park. A memorandum to Council to establish this area a Dominion Park to be known as the Kootenay Park is hereunder recommended for approval. The Kootenay Park for this new Park seems suitable as any name could be found since it lies in what is known as the Kootenay country. Undoubtedly *all this district used to be the hunting grounds of the Kootenay Indians* in the early days and besides this name is euphonious and will be the only Dominion Park given an Indian name.

The effective result of the Banff-Windermere Highway agreement was the broad scale application of federal legislation to national parks within British Columbia. With the stroke of a pen, any existing Aboriginal rights or title to the land base within Yoho, Glacier, Revelstoke, and Kootenay National Parks were effectively nullified; and the ability of the Ktunaxa to hunt and fish in this part of their traditional territory was lost. Removing the ability of the Ktunaxa to

hunt in what are now national parks effectively eliminated the *raison d'être* for many other traditional activities which were practiced concurrently and were integral to the Ktunaxa culture. Examples include the gathering of foods and trade commodities as well as the pursuit of spiritual wellness. The federal government's disregard of Aboriginal rights and title, however, was consistent with official government policy in British Columbia. Treaty rights were not an issue since treaties had never been signed in that province.

However, the denial of Aboriginal rights and title does not necessarily amount to the effective extinguishment of Aboriginal rights. To determine if Aboriginal rights continue to exist in long-established national parks in British Columbia, it is necessary to examine recent legal decisions on the issue of Aboriginal rights and title.

CHAPTER 5

LEGAL FOUNDATION FOR TREATY NEGOTIATIONS AND THE ISSUE OF ABORIGINAL RIGHTS IN LONG-ESTABLISHED NATIONAL PARKS

“... we all need to understand that native title is not solely a legal issue. Native title is a question about the kind of community we are and the maturity with which we view our history. The debate may have begun in the courts but the questions it raises cannot be answered purely by legal decisions.”

(Australian Aboriginal Social Justice
Commissioner, Mick Dodson)

5.1 INTRODUCTION

Landmark legal decisions on the issue of Aboriginal rights and title provided the impetus for governments to begin treaty negotiations with Aboriginal peoples in British Columbia and in other regions of Canada. Contemporary legal decisions are also important because they provide guidance and direction to government negotiators when formulating the positions advanced at the treaty negotiating table. However, it is important to recognize that, to date, no legal decision from any level of the court has been taken on the issue of the continued existence of Aboriginal rights in long-established national parks. In the absence of clear legal direction, it is necessary to review the body of law commonly known as the doctrine of Aboriginal rights and title in conjunction with the national parks regulatory scheme to determine the likelihood that Aboriginal rights continue to exist in Kootenay National Park.

This chapter details the evolution of the doctrine of Aboriginal rights and title through a descriptive summary of the key legal decisions on Aboriginal rights and title and a discussion of the ramifications of the *Constitution Act* (Canada, 1982). Rather than attempt to interpret the legal decisions, this chapter examines the substance of decisions on Aboriginal issues in order to

reveal how the concept of Aboriginal rights and title has been progressively refined through reforms to the Canadian constitution and successive legal decisions by the Supreme Court of Canada. What emerges from the Supreme Court decisions are general principles that should be used to guide relations between Aboriginal and non-Aboriginal peoples.

5.2 ABORIGINAL RIGHTS AND TITLE IN CANADA

5.2.1 *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313

The *Calder* (1973) decision by the Supreme Court of Canada sparked the development of the modern legal framework for the articulation of Aboriginal rights and title in Canada. In *Calder* (1973), the Nisga'a people of northwestern British Columbia brought forth an action seeking a declaration that their Aboriginal title to their ancestral homelands had never been extinguished (RCAP 1996, vol.1 pt.1: 222). The Nisga'a lost the case on a legal technicality, with the Supreme Court rejecting the Nisga'a lawsuit on procedural grounds, but the decision was heralded as a partial victory for the Nisga'a and other Aboriginal peoples (Berg *et al.* 1993: 228). The Supreme Court unanimously held that the Nisga'a possessed Aboriginal title to their ancestral lands at the time of British Columbia's entry into Confederation, but split evenly on the determination of whether that title still existed. Mr. Justice Hall, speaking for himself and two other judges, held that the Nisga'a had an existing Aboriginal title based on their original use and occupancy. Conversely, three other members of the Court, led by Mr. Justice Judson, ruled that whatever title the Nisga'a may once have had, had since been extinguished. Justice Judson did not, however, reject the concept of Aboriginal title based on original use and occupation, stating that:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there,

organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their own lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was “dependent on the will of the Sovereign”.

The *Calder* (1973) decision is significant in that it strongly supported the Nisga’a proposition that Aboriginal title in British Columbia was based on Aboriginal peoples’ historical occupation of the land, and not derived from the *Royal Proclamation* or any other legislative act (RCAP 1996, vol.1 pt.1: 222, Berger 1982: 219-54). The decision led the federal government to announce its willingness to negotiate comprehensive land claim settlements in areas of Canada, including British Columbia, Quebec and the northern territories (Canada, Department of Indian and Northern Affairs 1981; Canada, Department of Indian and Northern Affairs 1987). However, the British Columbia government’s refusal to participate in treaty negotiations effectively rendered the process unworkable since British Columbia holds title to virtually all Crown land in the province (Foster and Macklem 1996: 16). The question that remained following the *Calder* (1973) decision was whether or not Aboriginal title had been extinguished before British Columbia joined confederation. The Supreme Court answered this question in subsequent legal decisions.

5.2.2 *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487

The *Baker Lake* (1979) case involved the Inuit people of Baker Lake in the Northwest Territories, who asserted the existence of Aboriginal title over an undefined portion of the Northwest Territory around the community of Baker Lake. Mr. Justice Mahoney of the federal Court of Canada (Trial Division), held that the Inuit of Baker Lake had an occupancy based

Aboriginal title to the Baker Lake area and that Aboriginal title was recognized by common law, although it was subject to being abridged, or infringed upon, by competent legislation (RCAP 1996, vol.1 pt.1: 222). He set out the elements that must be established to demonstrate

Aboriginal title as follows:

- (1) the claimants and their ancestors were members of an organized society;
- (2) the organized society occupied the territory over which they assert Aboriginal title;
- (3) the occupation was to the exclusion of other organized societies; and
- (4) the occupation was an established fact at the time sovereignty was asserted by England (*Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487).

Justice Mahoney found that all these requirements were met by the Inuit of Baker Lake.

The only remaining question, therefore, was whether their Aboriginal title had been extinguished by the transfer of the lands to the Hudson's Bay Company or by the subsequent admission of Rupert's Land into Canada. He found that neither action had the effect of extinguishing the Inuit's Aboriginal title, since no clear and plain intention to extinguish Aboriginal rights had been demonstrated by the Crown. The Federal Court judgment was not appealed. This case is important because it clearly indicated that Aboriginal title can coexist with settlement or development by non-Aboriginal people (RCAP 1996, vol.1 pt.1: 222-23).

5.2.3 *Constitution Act, 1982*

The issue of Aboriginal rights and title reached a turning point in 1982 with the patriation of Canada's constitution and the inclusion of provisions in the *Constitution Act* (1982) which entrenched and protected Aboriginal and treaty rights. Entrenchment of Aboriginal ancestral and treaty rights in section 35(1) of the *Constitution Act* changed the landscape of Aboriginal rights in Canada. Two sets of provisions in the *Constitution Act* pertain directly to Aboriginal peoples, each serving a different function (Funston and Meehan 1994: 142). Section 25 of the *Canadian*

Charter of Rights and Freedoms protects “Aboriginal, treaty or other rights or freedoms” of Aboriginal peoples from erosion and infringement by other guarantees contained within the charter. This clause helped interpret the relationship between the charter guarantees and other constitutional provisions relating to Aboriginal rights. Section 35 of the *Constitution Act* recognized and affirmed “existing” Aboriginal and treaty rights, defined who Aboriginal peoples are, guaranteed rights to male and female Aboriginal persons equally, and provided government commitments to not change the parts of the Constitution dealing directly with Aboriginal peoples unless a constitutional conference has first been held to discuss proposed amendments.

Section 35 reads:

- (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, ‘Aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed to male and female persons.

The inclusion of Aboriginal and treaty rights in the constitution confirmed the body of common law, often referred to as the doctrine of Aboriginal rights, and elevated this doctrine to the status of constitutional law (Slattery 1982-3, 1985, 1987). This doctrine, affirmed in Supreme Court rulings, held that Aboriginal rights and title were not extinguished by the Crown’s assertion of sovereignty over North America (Slattery 1985).

Prior to 1982, however, many Aboriginal and treaty rights were restricted by the cumulative effect of federal and provincial legislation. An immediate issue that arose from the wording of section 35 was whether or not the right existed as of 1982 when the protection clause was entrenched in the constitution (Funston and Meehan 1994: 144). The first opportunity for

the Supreme Court of Canada to interpret section 35 of the *Constitution Act* came in *Sparrow v. The Queen* [1990]. Two other significant decisions by the Supreme Court, however, preceded the *Sparrow* (1990) decision.

5.2.4 *Guerin v. The Queen*, [1984] 2 S.C.R. 335

In *Guerin* (1984), the Musqueam Band of southwestern British Columbia sued the federal government for breach of trust with respect to reserve land that had been leased to the Shaughnessy Golf Club in the late 1950s. The Supreme Court of Canada ruled that the federal government was in a fiduciary relationship with Indian bands, and, as such, had a duty to properly manage surrendered reserve lands (RCAP 1996, vol.1 pt.1: 223). The Court found that the federal government had mismanaged the surrendered lands and awarded the Musqueam Band \$10 million in damages.

Mr. Justice Dickson rejected the notion that Indian title was simply a personal right, stating rather, that Aboriginal title was *sui generis* in nature. In other words, Aboriginal title is a unique interest in the land specific to individual Aboriginal groups which cannot be adequately described in terms of English land law (RCAP 1996, vol.1 pt.1: 223-24). The Court characterized this Aboriginal interest in land as a pre-existing legal right not created by the *Royal Proclamation*, the *Indian Act*, or any other executive order or legislative provision.

5.2.5 *R. v. Sioui*, [1990] 1 S.C.R. 1025

The *Sioui* case involved four brothers from the Huron Band of Lorraine, Quebec, charged under the regulations of the *Quebec Parks Act* with damaging trees and making fires outside of designated campsites. The Supreme Court unanimously held that the Hurons of Lorraine have

treaty rights to practice their traditional customs under a 1760 document issued by the British to the Wendat, the ancestors of the Huron Band members.

The immediate issue in *Sioui* was whether the Indian people of the Lorraine Reserve were entitled, within the scope of the treaty, to practice certain ancestral religious rites which included the cutting down of trees and the making of fires in Jacques Cartier Park. The Court acknowledged that the Wendat were well settled at Lorraine and made regular use of the territory covered by the park long before 1760. The Court also held that the 1760 document, often referred to as the *Murray Treaty*, protected the free exercise of religion and customs by the Wendat in the territory covered by the park.

The Crown argued that the Huron had to exercise their rights, subject to the province's legislation and regulations designed to protect the park and other users. The Supreme Court of Canada disagreed, finding in the treaty itself an intention by the signatories of the agreement that the right of the Huron to exercise their customs be reconciled with the needs of the settler society to expand (RCAP 1996, vol.1 pt.1: 225). Confronted with the conflicting interests of the Crown and the Huron, the Court decided to balance the respective interests of the two parties by stating that, "protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is, in my opinion, the most reasonable way of reconciling the competing interests." The Court held that the right of the Huron to exercise traditional practices in question was not incompatible with the rights of the Crown or the purpose of the protected area (RCAP 1996, vol.1 pt.1: 225).

5.2.6 *R. v. Sparrow*, [1990] 1 S.C.R. 1075

The *Sparrow* (1990) decision was the Supreme Court of Canada's first opportunity to interpret section 35 of the *Constitution Act* (1982). The case involved Ronald Edward Sparrow, a member of the Musqueam Band, who was charged under regulations of the *Fisheries Act* with using a drift net longer than that permitted by the terms of the Band's Indian food fishing license (RCAP 1996, vol.1 pt.1: 226). In the landmark ruling, the Supreme Court held that the Musqueam Band had an unextinguished right to fish for food, social, and ceremonial purposes but that there was insufficient evidence on the issue of justification of the Crown's intention to infringe upon that right to determine the innocence or guilt of Mr. Sparrow.

More importantly, the Court ruled that Aboriginal rights stem from the traditional use and occupation of land by Aboriginal peoples. The Court determined that the phrase "existing aboriginal rights" in the *Constitution Act, 1982* must be interpreted flexibly to *permit the rights to evolve over time*. Aboriginal rights in existence in 1982 are not simply the historical form of activities or rights that were carried out in the distant past, nor are they the vestige of rights that remain after all Crown regulations are taken into consideration. They are the modern equivalent of activities, customs, and traditions that Aboriginal peoples practiced prior to the arrival of European settlers. Although the Crown has the ability to regulate Aboriginal and treaty rights, legislation that affects the exercise of Aboriginal rights must be justified according to legitimate governmental objectives. Aboriginal rights continue to exist unless they have been extinguished prior to 1982 by an action of the Crown that clearly intended to do so. The Crown's intention to extinguish an Aboriginal or treaty right must be "clear and plain".

The *Sparrow* (1990) decision set forth a legal framework for determining the existence of Aboriginal and treaty rights in Canada. The Supreme Court of Canada outlined four steps that are involved in analyzing the merits of a case under s. 35(1) of the *Constitution Act, 1982*:

- Step 1: Are existing Aboriginal or treaty rights involved? The Aboriginal group must establish that a particular Aboriginal or treaty right actually exists. To do this the Aboriginal group must demonstrate historical connection to the Aboriginal practice they claim is a right and to the territory over which the right is said to be exercisable.
- Step 2: Has the Aboriginal or treaty right been extinguished? The Crown must prove that there was a “clear and plain intention” to extinguish a particular right.
- Step 3: If there is no extinguishment of the Aboriginal or treaty right, has this right been infringed upon? The onus is on the Aboriginal party to show, *prima facie*, that the legislation in question places an adverse restriction on the right. At this stage, a court will examine questions such as:
- a) What are the characteristics or incidents of the right? In making this determination courts must be sensitive to the Aboriginal perspective on the meaning of the right.
 - b) Is the limitation reasonable?
 - c) Does the legislation impose undue hardship?
 - d) Does the legislation deny the holders of the right their preferred means of exercising the right?
- Step 4: If there is an infringement, is the infringement justified? The onus is on the federal government to justify its infringement, keeping in mind the special trust relationship and responsibility of the federal government for Aboriginal peoples. At this stage a court will examine questions such as:
- a) Is there a valid legislative objective such as conservation or public safety? The objective must be substantial and compelling and more than simply “public interest”.
 - b) Has there been as little infringement as possible in order to effect the desired result of the legislation?
 - c) Has fair compensation been paid in cases of expropriation?

d) Has the Aboriginal group been consulted? (Funston and Meehan 1994: 144-47)

In *Sparrow* (1990), the Crown admitted the existence and scope of the Aboriginal right. Consequently, the Court made only cursory comments on the test required to determine the existence of Aboriginal rights, indicating that the determination of Aboriginal rights and title must be undertaken on a case-by-case basis. The Court did not outline the factors to consider in determining which traditional activities could be considered to be Aboriginal rights. The scope of Aboriginal rights was later clarified in *Van der Peet* (1996).

5.2.7 *Van der Peet v. The Queen* [1996], 4 C.N.L.R. 177 (S.C.C.)

Dorothy Van der Peet, a member of the Sto:lo First Nation of southwestern British Columbia, was charged with violating the *Fisheries Act* by selling fish caught under the Indian food fish license. The Supreme Court ruled that Ms. Van der Peet failed to demonstrate that the exchange of fish for money or other goods “was an integral part of the distinctive Sto:lo culture which existed prior to contact” with Europeans, and therefore this activity was not protected by section 35(1) of the *Constitution Act, 1982*.

The Court held that Aboriginal rights exist in Canada as a result of the prior occupation of the land by Aboriginal peoples and the social organization and distinctive cultures of Aboriginal peoples on that land. Aboriginal rights exist because of the simple fact that “when Europeans arrived in North America, *aboriginal peoples were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (*Van der Peet* 1996) [emphasis added]. This fact alone, the Court explained, “*separates*

aboriginal peoples from all other minority groups in Canadian society and . . . mandates their special legal, and now constitutional status” (Van der Peet 1996) [emphasis added].

The Court reiterated its finding that Aboriginal rights were not created by section 35(1) of the Constitution, section 35(1) merely elevated to constitutional status rights that already existed and were recognized in common law (e.g., *Calder 1973*). The Court stressed that the purpose of section 35(1) is to reconcile the fact that Aboriginal people “lived on the land in organized societies with their own practices, traditions, and cultures”, with the assertion of the sovereignty of the Crown. Substantive rights of Aboriginal peoples must be defined in light of this purpose.

Aboriginal rights, the Court explained, are particular to individual Aboriginal groups and cannot be determined on a general basis. In order to be considered an Aboriginal right, an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming that right. An integral element of an Aboriginal culture is defined as an activity of central significance to an Aboriginal society, and must be shown to have existed prior to European contact. Furthermore, in order for a practice, custom, or tradition to be a defining characteristic of an Aboriginal culture, it must be considered distinctive to that society.

The *Van der Peet* (1996) decision was one of three decisions released simultaneously by the Supreme Court of Canada. The Court indicated that the *Van der Peet* (1996) decision should be read in conjunction with the other cases because of the similarities between them. The Supreme Court’s decision in *Gladstone* (1996) is of particular relevance to this research because it provides an elaboration of the extinguishment test first outlined in *Sparrow* (1990).

5.2.8 *Gladstone v. The Queen* [1996], 4 C.N.L.R. 65 (S.C.C.).

Donald and William Gladstone, members of the Heiltsuk Band of northwestern British Columbia, were charged with attempting to sell herring spawn-on-kelp without a commercial license in violation of the *Fisheries Act*. The Supreme Court ruled that the Heiltsuk Band possessed an unextinguished Aboriginal right to trade herring spawn-on-kelp on a commercial basis, since the exchange of herring spawn-on-kelp for money or other goods on a scale which could only be described as commercial was a central, significant, and defining feature of the culture of the Heiltsuk prior to European contact. As such, the exchange and trade of herring spawn-on-kelp was determined to be an integral part of the distinctive culture of the Heiltsuk Band.

The Court's decision was significant because it marked the first time that an Aboriginal group demonstrated the existence of a commercial Aboriginal right; and because the Court provided an elaboration of the extinguishment test set out in *Sparrow* (1990), as well as a refinement of the justification test. In reaching its decision, the Court determined that although the Crown need not have expressly referred to its intent to extinguish an Aboriginal right in order to have done so, it nevertheless had to demonstrate that the exercise of an Aboriginal right was more than simply subject to a regulatory scheme. The Court held that Order-in-Council P.C. 2539 of the *Special Fisheries Regulations for the Province of British Columbia* cannot "be said to express a clear and plain intention to extinguish the Aboriginal right of the Heiltsuk Band," even though the text of the regulation explicitly prohibits Aboriginal peoples from selling or trading fish commercially. To illustrate, the text of the 1894 regulation reads as follows:

Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers:

And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only, and to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: –

2. *Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.* [emphasis original]

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish.

Section 8(2) of the regulation was revised in 1915 to read:

2. *An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose. . . . An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.* [emphasis original]

The Court held that the intent of these regulations were to ensure that conservation objectives were met and that special protection for Indian food fisheries continued. As such, the purpose of the legislation “was not to eliminate aboriginal rights to fish commercially”. The Court went on to state that, “failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.” The inability to practice an Aboriginal right because of government regulation does not eliminate or extinguish the existence of that right. This is a key element of the principle of

continuity which asserts that Aboriginal rights may continue to exist today, even though they have not been openly practiced during the last century because of government regulation.

Having determined that an Aboriginal right existed and was infringed upon by regulation, the Court turned its attention to the question of justification. The Court held that in circumstances such as *Gladstone* (1996), where an Aboriginal right has no internal limitation, the doctrine of Aboriginal rights requires that government demonstrate that it has taken the existence of Aboriginal rights into account when allocating resources, and that it has respected the fact that Aboriginal rights have priority over the exploitation of the resource by other users. The Court suggested that compelling and substantial objectives other than conservation may be considered valid justification to infringe on Aboriginal rights. Because Aboriginal peoples are part of the broader Canadian society, valid objectives could include the pursuit of economic and regional fairness, and the recognition of historical dependence on a resource by non-Aboriginal people. The essence of the Court's decision is that the reconciliation of Aboriginal rights with the rest of Canadian society is dependent on the successful attainment of shared objectives.

The Supreme Court of Canada was given the opportunity to apply the refined justification test in the cases of *Adams* (1996) and *Côté* (1996). Both appeals involved offenses under the *Quebec Fishery Regulations* and the decisions were released simultaneously because of the similarities in the issues raised in the cases.

5.2.9 *Adams v. The Queen* [1996], 4 C.N.L.R. 1 (S.C.C.) and *Côté v. The Queen* [1996], 4 C.N.L.R. 26 (S.C.C.)

In both of these cases, the Supreme Court ruled unanimously that the fishery regulations were unenforceable against the accused because they enjoyed Aboriginal and treaty rights within

their traditional territory. However, in *Côté* (1996) the Court held that the provincial regulation requiring a nominal fee for entering the controlled harvest zone by motor vehicle did not unjustifiably infringe the accused ancestral right to fish for food.

a) *Adams v. The Queen* [1996], 4 C.N.L.R. 1 (S.C.C.)

The case involved a Mohawk man charged with fishing without a proper license in Lake St. Francis, Quebec, in violation of the *Quebec Fishery Regulations*. The fundamental issue before the Supreme Court was whether or not Aboriginal rights could exist without the Aboriginal group having title to the land on which the traditional activity was exercised. The Supreme Court held that:

... the doctrine of Aboriginal rights is not solely concerned with land but also covers all Aboriginal interests arising out of native people's historic occupation and use of ancestral lands. Aboriginal rights can be incidental to Aboriginal title but need not be; they are severable from and can exist independently of Aboriginal title.

Where an Aboriginal group can demonstrate that a particular practice, custom, or tradition was integral to its distinctive culture, the group does not have to show that its connection with the piece of land on which the activity took place was sufficiently significant and central to their distinctive culture to establish a claim to land.

The Court explained that the reason why Aboriginal rights are not inexorably linked to Aboriginal title is that some Aboriginal peoples were nomadic, changing the location of their settlements depending on the season as well as other circumstances. This mobile lifestyle does not alter the fact that nomadic peoples relied on the land for their survival prior to European contact, and that many of the customs, practices, and traditions that were integral to the distinctive cultures of nomadic peoples took place on the land. The Court cautioned that the

Aboriginal rights recognized and affirmed by section 35(1) should not be understood or defined in a manner which excludes some of the very rights the provision was intended to protect. Moreover, intermittent use of an area, in this case Lake St. Francis, was sufficient for the Mohawks to demonstrate that their reliance on the fish of this lake for food was a significant part of their culture, irrespective of the fact that this area may not have been part of their traditional hunting or fishing grounds.

The Court also discussed the infringement step of the *Sparrow* (1990) test and suggested that the identification of infringements under section 35(1) of the *Constitution Act, 1982* should be approached differently than those under the normal setting of the *Canadian Charter of Rights and Freedoms*. The Court proposed that in light of the Crown's unique fiduciary relationship with Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime that risks infringing Aboriginal rights in the absence of some explicit guidance:

If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow (1990) test. [emphasis added]

In this instance, the regulatory scheme was found to be an unjustified infringement of the Mohawks' Aboriginal rights.

b) *Côté v. The Queen* [1996], 4 C.N.L.R. 26 (S.C.C.)

This case involved members of the Algonquin people who were charged with failing to pay the required access fee for entering a controlled harvest zone in the Outaouais region of

Quebec. In addition, one of the accused, Côté, was charged with fishing without a valid license in contravention of the *Quebec Fishery Regulations*. The core issues raised in this appeal are whether the appellants enjoyed an unextinguished Aboriginal right or treaty right to fish within the controlled harvest zone, and whether the federal and provincial regulations infringed these rights and could be justified under the framework set out in *Sparrow* (1990).

The Supreme Court held that fishing for food within the boundaries of the controlled harvest zone had been a significant part of the life of the Algonquins since the time of contact with the first European settlers. The Court found that even though the Algonquins may never have enjoyed real and exclusive possession over the territory within the controlled harvest zone because of their nomadic lifestyle and small numbers, they nevertheless possessed Aboriginal rights to the territory within this area. The Court reiterated its finding in *Adams* that there is no persuasive reason why the practices, customs, and traditions integral to a distinctive Aboriginal culture should be limited to those activities associated with a continuous and historical occupation of a specific tract of land. Nevertheless, a protected Aboriginal right may have an important link to the land on which it was pursued. For this reason, an Aboriginal practice, custom, or tradition entitled to protection as an Aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of an activity prior to contact. Hence, an Aboriginal right will usually be defined in site-specific terms, with the result that the right can only be exercised upon a specific tract of land. If such practices, customs, and traditions continued following contact in the absence of specific extinguishment, such practices, customs, and traditions are entitled to constitutional recognition subject to the infringement and justification tests outlined in *Sparrow* (1990) and *Gladstone* (1996).

Because the provision of the *Quebec Fishery Regulations* enacted a blanket prohibition on fishing in the absence of a license, and do not prescribe any criteria to guide or structure the exercise of the minister's discretion, the provisions were found to impose undue hardship and interference with the accused preferred mode of exercising his right. This infringement was deemed unjustified since it did not take place pursuant to compelling and substantial objectives, and was not consistent with the Crown's fiduciary obligation to Aboriginal peoples. The Court reiterated that the right to fish for food is a right which should be given first priority after conservation objectives are met.

5.2.10 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R.

The *Delgamuukw* (1997) decision by the Supreme Court of Canada was extremely significant because it represented the first opportunity for the Court to pronounce itself on the general nature and content of Aboriginal title. The implications of the decision go far beyond the scope of this paper, however, it is important to highlight key aspects of the decision that have direct implications on the issue of Aboriginal rights and title in long-established national parks.

The case involved a claim by the Gitksan and Wet'suwet'en people of northwestern British Columbia of Aboriginal title to separate portions of 58,000 square kilometers traditional territory. The Supreme Court ruled that a new trial was required because it was inappropriate for the Court to consider the merits of the case since the pleading had been amended from its original claim of ownership and jurisdiction, and the claimants had amalgamated the individual claims by each house into two communal claims, one advanced by each nation. More importantly, however, Chief Justice Lamer provided guidance to future trial judge which serve as the Court's first comprehensive treatment of the issue of Aboriginal title.

Chief Justice Lamer indicated that Aboriginal title is distinct from other proprietary interests because of its *sui generis* nature and the fact that it is inalienable and cannot be transferred, sold, or surrendered to anyone other than the Crown. Aboriginal title the Court determined, encompasses the right to exclusively use and occupy land for a variety of purposes, not limited to practices, customs, or traditions integral to the distinctive Aboriginal culture. The use of Aboriginal title land is limited, however, and must be consistent with the Aboriginal groups attachment to the land to ensure future use and occupation. Aboriginal communities cannot utilize land held pursuant to Aboriginal title in ways that would undermine the inherent and unique value of the land (*Delgamuukw* 1997).

The Court outlined a test for demonstrating the existence of Aboriginal title. To establish a claim to Aboriginal title, an Aboriginal group must demonstrate that it occupied the land in question at the time the Crown asserted sovereignty. The appropriate time frame for British Columbia is 1846 when the British conclusively established sovereignty with the signing of the *Oregon Boundary Treaty*. In determining proof of occupancy, both the common law and the Aboriginal perspective must be taken into account. Occupation must have been exclusive at the time of sovereignty to demonstrate Aboriginal title. Proof of occupation, the Court suggested, could be established in a variety of ways, “ranging from the construction of dwellings through cultivation and enclosure of fields, to regular use of definite tracts of land for hunting, fishing, or otherwise exploiting resources” (*Delgamuukw* 1997). The Court did not exclude the possibility of joint title arising from shared exclusivity, and suggested that the common law “develop to recognize Aboriginal rights as they were recognized by either *de facto* practice or by Aboriginal systems of governance” (*Delgamuukw* 1997).

The Court reaffirmed that Aboriginal rights are not absolute and may be infringed if this infringement furthers a compelling and substantial legislative objective and is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. Activities identified by the Court as compelling and substantial in nature include: the development of agriculture, forestry, mining, and hydroelectric power; the general economic development of the interior of British Columbia; the protection of the environment or endangered species; and the building of infrastructure and the settlement of foreign populations (*Delgamuukw* 1997). The Court indicated that three dimensions of Aboriginal title influence the standard of scrutiny and the form of the fiduciary duty. First, the right to exclusively use and occupy the land; second, the right to choose the use of the land, subject to inherent limitations; and third, the inescapable economic component of the land itself. For these reasons, the Court suggested that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by involving Aboriginal peoples in the decisions taken with respect to their lands, and providing financial compensation when Aboriginal title is infringed (*Delgamuukw* 1997).

The Court also indicated that because of the nature of Aboriginal rights, rules of evidence must be adapted to allow oral histories and similar types of evidence to be accommodated and treated on an equal footing with other more familiar types of historical evidence. Failure to do so, would effectively deny Aboriginal peoples the ability to prove rights which originated in times when there were no written records of the practices, customs, and traditions that Aboriginal peoples engage in (*Delgamuukw* 1997). Chief Justice Lamer concluded his comments by encouraging the parties to negotiate “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown,” noting that, “we are all here to stay.”

5.2.11 Summary of Legal Principles

The *Constitution Act, 1982*, in combination with the legal decisions on the issue of Aboriginal rights and title, form the foundation of the doctrine of Aboriginal rights and title in Canada. Although the Supreme Court of Canada has clearly indicated that the scope and content of Aboriginal rights must be determined on a case-by-case basis, the body of law commonly known as the doctrine of Aboriginal rights and title provides some guidance as to the determination of the continued existence of Aboriginal rights and title of the Ktunaxa people in Kootenay National Park.

The Court has stressed that the substantive rights of Aboriginal people must be defined in light of the purpose of section 35(1), which is to reconcile the fact that Aboriginal people lived on the land in organized societies prior to the Crown's assertion of sovereignty. The courts have indicated that Aboriginal rights stem from the historical use and occupation of land by Aboriginal peoples and that Aboriginal rights are particular to a specific Aboriginal group. In order to be considered an Aboriginal right, an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right and have existed prior to the arrival of European settlers. The activity need not, however, be associated with the continuous historical occupation of a specific tract of land by an Aboriginal group.

Prior to the recognition and protection of Aboriginal rights and title in the *Constitution Act*, the Crown had the ability to unilaterally extinguish Aboriginal rights. However, in order to have done so, the Crown must demonstrate that it had a "clear and plain" intention to extinguish the Aboriginal right. Failure by the Crown to recognize an Aboriginal right within a legislative scheme, and the failure to grant it special protection, do not constitute the "clear and plain" intent necessary to extinguish an Aboriginal right. The inability of an Aboriginal group to

practice a particular activity because of government regulation does not eliminate or extinguish the existence of that right. The Crown does have the ability to restrict the exercise of an Aboriginal right but the justification to do so must be based on compelling and substantial objectives such as the conservation of natural resources, the safety of the public, the pursuit of economic and regional fairness, and the recognition of the historical dependence of non-Aboriginal people on a resource. However, the Crown must demonstrate that in allocating a resource, it has taken into account the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the resource by other users.

5.3 POTENTIAL EXISTENCE OF ABORIGINAL RIGHT(S) IN KOOTENAY NATIONAL PARK

5.3.1 Introduction

The previous section described the legal framework outlined by the Supreme Court of Canada for analyzing claims to Aboriginal rights and title. It has been shown that while claims to Aboriginal rights must be examined on an individual basis, certain general principles, known as the doctrine of Aboriginal rights and title, provide guidance in determining the existence of Aboriginal rights.

This chapter addresses the issue of whether or not the Ktunaxa people once had Aboriginal rights in the area now encompassed within Kootenay National Park, and if so, did the application of the national parks regulatory scheme necessarily extinguish those rights. The analysis follows the framework outlined by the Supreme Court of Canada: documenting first the historical pattern of use of the area by the Ktunaxa people, and then examining the regulatory scheme to determine the purpose of the legislation. The analysis does not investigate whether

Aboriginal rights have been infringed or the government's justification for doing so. This latter step in the legal framework is left to subsequent chapters which describe the respective interests of KKTC and Parks Canada in Kootenay National Park.

5.3.2 Historical Use and Occupancy of the Ktunaxa Traditional Territory

Traditional Lifestyle

Little documented information exists on the history of the Ktunaxa people. However, from available information, namely ethnographic accounts and Ktunaxa oral history, it is apparent that the lifestyle of the Ktunaxa was historically a nomadic one where small family groups moved systematically across a vast territory to support their hunting and gathering economies (Johnson 1989). According to the Kutenai Language Task Force (KLTC) (1989), the Ktunaxa people moved from site-to-site depending on the seasonal availability of food sources, typically crossing the Rocky Mountains to hunt buffalo on the eastern slopes of the mountain range in spring and early summer, and again in late fall or winter. They returned to the Columbia Trench in intervening periods to exploit the more varied resources of the region (Heitzmann 1998a: 4).

Schaeffer (1982) documented the seasonal pattern of the Michel Prairie Kootenai (St. Mary's Band) prior to the introduction of the horse:

In winter they journeyed eastward well into the eastern foothills of southwestern Alberta to hunt bison. Mostly, they seemed to have ranged between Crowsnest Lake and Waterton Lakes, but a number of their campsites extended east to the junction of the Oldman and Bow Rivers.

This, and other hunts were carried out on foot, supplemented with snowshoes during most of the winter season. At times they penetrated for some distance into the grasslands to pursue free herds, to raid the Shoshoni Indians, or to visit friendly tribes, such as the Cree. According to Kutenai informants, the Blackfoot were not resident in the foothills of extreme southwestern Alberta at this time.

The Michel Prairies band were said to have used dog travois for transport in the level, tree-free country east of the Divide . . . There is a tradition among modern Kutenai of this group impounding buffalo east of the Rockies . . . The Michel Prairie people took advantage, as did all the Upper Kootenai, of the buffalo's habit to escape the severe winter storms of the open plains. Thus winter hunting parties moving eastward from the mountains usually encountered scattered buffalo in the vicinity of Crowsnest Lake. There the animals were run into snow drifts in the broken county of Crowsnest Valley, killed with spear or bow and arrows, butchered and the meat cured nearby . . . In spring, the Michel Prairie band moved westward across the Divide, via Crownest Pass, to plant tobacco and to engage in fishing, gathering and upland game hunting . . . Between planting and harvesting seasons, they hunted elk and other game in Elk River valley. At other times they used to join the Tobacco Plains band in hunting moose and elk north of Columbia Lakes, occasionally going as far north as Golden, B.C.

The Michel Prairie people are believed to have taken fish in Whiteswan Lake during the summer excursion west of the Divide and occasionally in winter in the foothills streams east of the Divide . . . Apparently at times some of the Michel Prairie group moved north to the Columbia-Windermere Lakes for the fall migration of salmon. Others moved across the Rockies for the fall buffalo hunt, traveling south to Crownest Pass and across the west side.

A Stoney informant, George McLean, reported in 1926 that:

The Kootenays and the Stonies always lived in the Rocky Mountains. The only time they traveled on the prairie was early in the fall and in the spring. When they wanted to hunt the buffalo the Stonies and Kootenays were together . . . They came over the Whiteman's pass, the Kootenay pass, the Kananaskis pass (Canmore), the Bow River pass (west of Banff), the Saskatchewan, and the Crowsnest. When the Kootenays did not come over, the Stonies went over to their side. They kept on that way for years . . . (quoted in Barbeau 1965: 135).

The nomadic lifestyle of the Ktunaxa enabled them to conserve the precious natural resources they depended upon by distributing the impact of sustenance activities throughout a large area, rather than concentrating it on small land base (KLTC 1989). In the "Kutenai Nation Resource Book", the KLTC (1989) described the traditional diet of the Ktunaxa people as consisting mainly of meat and fish, supplemented with berries, wild greens, root bulbs, nuts, and seeds. Moose, deer, elk, buffalo, and caribou are described as having once been:

. . . plentiful and very important to the survival and well being of the Kutenai people. These animals were used for food, clothing, and tools. Smaller animals such as the rabbit,

beaver and muskrat were trapped for food and clothing. Some of the animals were hunted only during a certain time of year. Most of the fish and game were dried for winter use (KLTC 1989: 29).

The task force went on to explain that through experience, the Ktunaxa people:

... learned to select foods in proper amounts to supply the body with the nutrients it needs. Respect for the land and the food it provided led to the wise use of animals, fish, and plants. Very little was wasted (KLTC 1989: 30).

These traditional pursuits are still practiced today by the Ktunaxa and are of vital importance to the survival of their culture.

Traditional Territory of the Ktunaxa

Historically the Ktunaxa people lived in the western foothills of the Rockies along the Kootenay and Columbia Rivers. Their favorite food gathering areas are said to have been:

... northerly to Revelstoke and Golden including the Columbia Valley; east of the Rockies, to the Plains region for buffalo; south into Montana, Idaho, and the eastern part of Washington state for roots and plants and as far west as the Arrow Lakes for fish and fowl (KLTC 1989: 31).

The entire traditional territory of the Ktunaxa people is described as encompassing:

Those lands adjacent to the Kootenay River; from the Big Bend of the Columbia River north of Donald Station: Thence southerly, including all of the Kootenay Sinuosities, to that part of Montana, U.S.A. known as Elmo; thence westerly to the Bonner's Ferry area of Idaho, U.S.A.; thence northerly to the Upper Arrow Lakes area of British Columbia, Canada; thence easterly across the Big Bend of the Columbia River to the summits of the Rocky Mountains. . . . It is not an impossibility that the Kootenay people used and occupied a greater area of land extending north to the present site of the City of Edmonton, Alberta, and South to the city of Missoula, Montana in the United States. (Kootenay Land Claim and Declaration 1981)

The expansive traditional territory of the Ktunaxa people is substantiated by the writings of David Thompson, one of the earliest European explorers in the Rockies. In his diaries he recorded that:

... all these Plains, which are now the hunting grounds of the [Blackfoot] Indians, were formerly in full possession of the Kootenae [Ktunaxa], northward; the next the Saleesh [Flathead] and their allies; and the most southern, the Snake Indians [Shoshoni] and their tribes, now driven across the mountains (quoted in Tyrrell 1916: 204).

In 1811, a fur trader by the name of Alexander Henry the Younger noted while investigating the Clearwater River, a tributary of the Saskatchewan River, "that the remains of some of the dwellings of the Kootenays, built of wood, straw and pine branches" similar to dwellings "along Riviere de la Jolie Prairie and Ram River." He concluded that:

this gives us every reason to suppose that nation formerly dwelt along the foot of these mountains, and even as far as our present establishment [Rocky Mountain House], near which the remains of their lodges are still to be seen (quoted in Whyte 1985: 25).

Near the Kootenay Plains on the east slope of the Rocky Mountains, Younger noted:

We encamped at the upper end of the Kootenae Plain . . . I observed near the foot of the Rocks in the rear on the Plain the remains of an Old Kootenae Camp, where the wood of their tents were still standing. Some of them were constructed with Poles nearly in the same manner as our Indians of the Plains, and I presume covered them with Leather in the same manner. But by far the greatest part were constructed in a manner covered with Pine branches and grass, and some were made of split Wood thatched over with grass . . . Formerly that nation used to frequent this place for the purpose of making dried provisions . . . as Buffalo are always numerous, and the Grey Sheep are in abundance . . . Moose and Red Deer are also plenty (quoted in Gough 1992: 508)

The use of the vast traditional territory of the Ktunaxa was not exclusive, as portions of the territory were shared with neighboring Aboriginal groups. Teit (1909) noted that one of the areas for which there may be a conflicting claim is the area north of Canal Flats which is occupied by the Kinbasket Band of the Shuswap Nation. However, the Kinbasket Band settled in Invermere around 1840 and did so with permission of the Ktunaxa Nation (Violet Birdstone

1996). It should also be noted that the Kinbasket Band has affiliated itself with the Ktunaxa Nation for the purposes of treaty negotiations (KKTC 1993).

The long-term occupation of the Columbia Trench and Kootenay River by the Ktunaxa is also supported by linguistic studies. The Ktunaxa language is distinct from other North American native languages. Morgan (1980) found that:

The genetic relationship between Kootenay and Salishan is not close enough to warrant classifying Kootenay as a Salishan language. Kootenay is a single member language which is coordinately related to the Salishan family in a language stock which can be called Kootenay-Salishan

This distinctiveness is interpreted by linguists as a good indication that there has been little movement in a resident population (Heitzmann 1998c).

Traditional Use of Kootenay National Park

Archeological knowledge in the Upper Columbia and Upper Kootenay valleys is limited, and consists mainly of selected area inventories and a small number of impact assessment studies and archeological excavation (Heitzmann 1998a: 2). Because of the scarcity in available archeological evidence it is impossible to conclusively demonstrate a direct association or continuity between the historical human use of Kootenay National Park and the present day Ktunaxa people. However, historical agreements, Ktunaxa oral history, national park visitor information, and recent research into the influence of humans on the landscape and ecology of national parks, all provide a good indication that the Ktunaxa people historically utilized the area now within Kootenay National Park.

As noted in chapter four, the Dominion government facilitated an agreement between the Ktunaxa people and the Blackfoot Confederacy delineating their respective hunting grounds.

The agreement clearly lays out that the hunting grounds of the Ktunaxa encompassed the area of land now within the boundaries of Kootenay National Park.

The historical significance of the hot springs at Radium, BC, to the Ktunaxa people is well recognized by Parks Canada. The historical use of the hot springs by the Ktunaxa for their healing properties is, in fact, documented in a Parks Canada pamphlet entitled “Nipika, a story of radium hot springs” (1978), and depicted on a mural inside the bath house.

The cultural importance to the Ktunaxa people of the paint pots near Vermilion, BC, is also well recognized by Parks Canada and briefly depicted in an interpretive sign at the edge of the trail leading to the site. The paint pots are a series of cold springs that rise near the source of the Vermilion River (Heitzmann 1998a: 23). The springs have created several mineral rich pools of greenish color and an open area of iron oxide deposit. This material is known as ochre or vermilion (Heitzmann 1998a: 23).

Heitzmann (1998a) explained that Aboriginal peoples throughout North America valued red ochre and attributed a spiritual significance to it. Red ochre was used widely as an essential paint for pictographs (rock paintings), ceremonial clothing, tipis, and medicine. Some Aboriginal groups even sprinkled red ochre during burial ceremonies (Heitzmann 1998a: 23).

Both the Ktunaxa and Stoney peoples utilized the paint pots at Vermilion. According to records of the Stoney oral history, only certain people within the tribe could acquire red ochre at the paint pots. The Stoney believed that there are spirits around the paint pots that can be heard talking, singing, or whistling (Barbeau 1965: 209).

In the late nineteenth century and early twentieth century, the paint pots were mined commercially for the ochre which was used as paint coloring. The ochre beds were plowed or

scraped into low ridges and the iron oxide clay was then likely bagged in sacks for removal (Heitzmann 1998a: 23).

The paint pots were and continue to be culturally significant to the Ktunaxa people because of the ceremonial importance of ochre and the considerable historical trade and commerce of ochre with other Aboriginal groups. In a recent consultation effort between Parks Canada and KKTC on the potential designation of the paint pots as a national historic site, the KKTC representatives made it clear that the area continues to hold cultural significance for them. KKTC representatives expressed both concern over the management of the site and a desire to resume the collection of ochre for cultural purposes (Heitzmann 1998a: 23).

The influence of Aboriginal people on the landscape and ecology of national parks within the Canadian Rockies is also slowly beginning to be recognized. The preliminary report of the Kootenay National Park ecohistory project noted the importance of fires in the regeneration of forest ecosystems within the Rocky Mountain Parks. The report argued that fires, including those purposely set by humans, are an essential process in ecosystems within national parks because they create openings or clearings such as meadows and corridors, and affect plant species composition by favoring grasses over forbes. This, in turn, enhances foraging habitat for bison and ungulate population, the primary food source of Aboriginal people (Heitzmann 1996: 5).

Fire suppression since the establishment of Kootenay National Park has drastically reduced range habitat for wildlife (Van Egmond 1990: 102). Using air photo coverage from 1945 to 1978, Van Egmond observed a drastic reduction of meadows in Kootenay National Park from approximately 40% of all montane area to less than one and one half percent (Van Egmond 1990: 102). This reduction in foraging habitat has apparently contributed to the decline of elk

population in the park from approximately 1000 to less than 200 since the 1920s (Heitzmann 1996: 4). According to the study, “by ensuring open forest and meadows in Kootenay National Park, the Aboriginal people could have increased ungulate populations by at least a factor of five, a strong incentive to burn less productive forests” (Heitzmann 1996: 4).

Hallett (1996) examined core samples from the bottom of lakes in Kootenay National Park to measure the change in vegetation over time. The study determined that fire activity contributed to changes in the vegetation mosaic of the Kootenay Valley, but the research failed to detect the influence of humans in the generation of fires, mainly because the time intervals used in the study were too broad (40-80 years) to detect the impact of Aboriginal burning (Hallett 1996: 83). Similarly, in a recent archeological study of Kootenay National Park, Heitzmann (1998) found that although direct evidence of the role of Aboriginal people in maintaining meadows by igniting fires could not be identified, it cannot be concluded that humans did not have a causal role in creating openings in the forest (Heitzmann 1998: 19).

The archeological study examined five sites and found that human use of the area occurred repeatedly in the past, even though no large stratified or intensively occupied sites were located. The study uncovered various stone tools, projectile points and lithic material originating from the Top of the World Plateau which is located in the southeastern British Columbia portion of the Ktunaxa traditional territory. Blood protein residue on some of the tools indicated that buffalo, deer family (deer/elk/moose), hare, bear, and canids were all hunted in the past in the park area. Faunal remains indicated that mountain sheep were also hunted at high altitude (Heitzmann 1998: 19).

Although there is presently insufficient archeological evidence to either substantiate or repudiate the claim to Aboriginal rights and title in Kootenay National Park, the evidence does

point to the historical existence of Aboriginal activities in the park. This evidence includes the historical agreement in 1895 between the Ktunaxa and the Stoney people that the federal government facilitated; the documented historical Aboriginal use of the Radium Hot Springs and the paint pots near Vermilion, BC; the early findings of the ecohistory project; the results of the recent archeological study in Kootenay National Parks; and, the traditional knowledge and oral history of the Ktunaxa people. For this reason, it is reasonable to argue that contrary to the opinion of park authorities (Fisher 1996), the Ktunaxa people used the area now within Kootenay National Park for far more than simply a traveling corridor during yearly expeditions to the prairies in order to hunt buffalo. The compact between the Ktunaxa and Stoney people indicates that the area within Kootenay National Park was an integral part of the traditional territory of the Ktunaxa people. The ecohistory project and the traditional knowledge and oral history of the Ktunaxa people indicate that the land base within the park was used to sustain the traditional lifestyle and economy of the Ktunaxa people. Parks Canada's documents describe the cultural significance of the Radium Hot Springs and the economic significance of the paint pots to the Ktunaxa people. Although the existence of Aboriginal rights in Kootenay National Park is ultimately a factual issue for the courts to determine, it is reasonable to argue, that based on available evidence, Aboriginal rights once existed in the area now within Kootenay National Park. What remains to be determined is if those rights continue to exist today.

The basis for this argument is consistent with the direction given by the Supreme Court of Canada in *Delgamuukw* (1997) with respect to the evidentiary nature of Aboriginal oral history. In *Delgamuukw* (1997), the Court held that in assessing claims to Aboriginal rights and title, laws of evidence must be adapted to allow oral history and similar types of evidence to be accommodated and treated on an equal footing with other more familiar types of evidence such

as historical documents. Failure to do, the Court noted, would impose an impossible burden of proof on Aboriginal people and preclude any claims to Aboriginal rights.

It is also important to recognize the deterrents for both Parks Canada and KKTC to collecting archeological evidence within the context of treaty negotiations. Currently, the British Columbia treaty negotiation process only requires that First Nations submit a map of their traditional territory as part of their statement of intent to negotiate a treaty with Canada and British Columbia. It does not require First Nations to substantiate their land claim with archeological evidence (British Columbia Claims Task Force 1991: 42; British Columbia Treaty Commission 1993: 4).

Such evidence would be of value only in legal proceedings. The Ktunaxa have little incentive to defray the cost of archeological research if Parks Canada's management policies remain the same and continue to exclude Aboriginal activities from long-established national parks. Similarly, Parks Canada has little incentive to conduct or permit archeological studies if the potential outcome of such research is to substantiate claims to Aboriginal rights and title to areas within long-established national parks. This is particularly relevant to this research, and will be explored in chapter seven given Canada's stated interests in national parks within the context of treaty negotiations.

5.3.3 National Park Regulatory Scheme: Its Significance for Aboriginal Peoples

a) *National Parks Act*

To determine if Aboriginal rights continue to exist in Kootenay National Park, it is essential to examine the *National Parks Act* in conjunction with the supporting regulations, while taking into account recent legal decisions on Aboriginal rights. The fundamental issue at stake is

whether or not the application of the *National Parks Act* prior to 1982, extinguished the right of the Ktunaxa people to pursue traditional resource harvesting activities within the park.

As illustrated in chapter four, the national park legislation in effect when Kootenay National Park was established in 1920 was the amended *Dominion Forest Reserves and Parks Act* (1911). The legislation banned hunting and restricted fishing activities within Dominion parks. The legislation did not purport to extinguish Aboriginal rights or title.

Subsequent national park legislation was established in 1930 and later amended in 1988. Section 6 of the *National Parks Act* (1988) confers considerable power to Parks Canada in respect to the establishment of national parks:

6. (1) Public lands within the parks shall not be disposed of or located or settled on, and no person shall use or occupy any part of such lands, except under the authority of this act or the regulations. . . .

.....
(4) The Governor in Council may authorize the Minister to acquire otherwise than by expropriation any lands or interests therein for the purpose of enlarging a park in establishing a new park and to purchase, expropriate or otherwise acquire any lands or interests therein for other park purposes.

Section 8.1.1 and 8.1.2 of the act enact a blanket prohibition on wildlife hunting within national parks:

8. (1.1) Every person who, in a park, hunts, disturbs, confines or is in possession of wildlife of any species included in Part I of Schedule II [threatened species], or who is in possession either in or outside a park of such wildlife killed or captured in a park, is guilty of an offense and liable. . . .

(1.2) Every person who, in the park, hunts, disturbs, confines or is in possession of wildlife of any species included in Part II of Schedule II [protected species], or who is in possession either in or outside a park of such wildlife killed or captured in a park, is guilty of an offense and liable.

Without a doubt, the *National Parks Act* has the effect of denying everyone, irrespective of race and origin, the ability to hunt in national parks. For this reason, Notzke (1994) has argued that

prior to the passage of the *Constitution Act, 1982*, Parks Canada was in a position to ignore both treaty rights and Aboriginal rights when establishing national parks (Notzke 1994: 245). As previously detailed in chapter four, the creation of Canada's first national park set a precedent for the establishment of future national parks in Canada by effectively reducing the Stoney people's hunting grounds and barring them from accessing sacred sites and pipestone quarries (Chief John Snow 1977: 46, 68, 87; Chief Frank Kaqutis, quoted in Scace and Nelson 1986: 137f). Given the historical precedent, it appears that a natural consequence of the application of the *National Parks Act* is the *de facto* extinguishment of Aboriginal rights.

However, in *Gladstone* (1996) the Supreme Court determined that restrictions on the exercise of Aboriginal rights do not necessarily result in their extinguishment. Failure to recognize an Aboriginal right, and failure to grant it special protection, do not constitute "clear and plain" intent to extinguish an Aboriginal right. Although the Crown may not be required to expressly refer to its intention to extinguish an Aboriginal right in order to do so, it nevertheless must demonstrate that the exercise of an Aboriginal right was more than simply subject to a regulatory scheme. Therefore, Aboriginal rights may continue to exist even though they may not have been openly practiced during the last century because of government regulation.

Considering the specificity of the regulations examined in *Gladstone* (1996), it is reasonable to argue that the *National Parks Act* does not demonstrate a sufficiently "clear and plain" intent to extinguish Aboriginal rights. Historically, the *Dominion Forest Reserves and Parks Act* (1911) simply prohibited anyone from hunting in national parks with no particular attention paid to traditional Aboriginal hunting. It is much more likely that when establishing national parks in the Canadian Rockies, and developing the original national park policy, that the

Dominion government was simply unaware or choose to ignore the existence of treaty rights and disregard the potential existence of Aboriginal rights.

Parks Canada may contend that the *Dominion Forest Reserves and Parks Act* (1911) and the subsequent *National Parks Act* (1988) differ from the *Special Fisheries Regulations for the Province of BC* examined in *Gladstone* (1996) on the grounds that legislation has greater Parliamentary or legal force, than an order-in-council. Irrespective of legal nuances and deliberations, however, the historical purpose of the national parks regulatory scheme was not to extinguish Aboriginal rights but rather to protect and develop national parks as playgrounds for Canadians and “the people of the world” (Harkin 1917). Parks Canada may argue that this necessarily excluded the traditional activities of Aboriginal people since Aboriginal people were viewed as “uncivilized savages”, unworthy of Canadian citizenship. However, this approach would clearly undermine the very purpose of section 35(1), which is to reconcile the fact that Aboriginal people lived on the land in organized societies prior to the Crown’s assertion of sovereignty, by perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing societies (Côté 1996).

b) *Ecological Integrity*

Parks Canada has recently embraced ecological integrity as the primary objective of national parks. This is reflected in section 5.1.2 of the *National Parks Act* (1988) which specifies that the primary way in which this objective is to be fulfilled is through the protection of natural resources. Ecological integrity is defined in *Parks Canada Guiding Principles and Operational Policies* (1994) as managing ecosystems in such a way that ecological processes are maintained and genetic species and ecosystem diversity are assured for the future (Parks Canada

1994: 119). Ecosystem protection is described as the combination of regulatory and public education programs and resource management activities, aimed at ensuring that ecosystems are maintained in as natural a state as possible (Parks Canada 1994: 33-34, 121).

Recent amendments to the *National Parks Act* (1988) reveal that the primary objective of national parks is not necessarily incompatible with traditional resource use. Section 5.7 allows certain Aboriginal peoples to pursue traditional harvesting activities in Ontario and Newfoundland:

5. (7) The Minister may authorize persons of designated classes to engage in traditional renewable resource harvesting activities in any National Park established
 - (a) in the district of Thunder Bay in the Province of Ontario; or
 - (b) in the districts of St. Barbe and Humber West in the Province of Newfoundland

Section 5.10 bestows traditional resource harvesting rights in wilderness areas to Aboriginal peoples with land claim or treaty agreements at the discretion of the minister, on condition that the activity does not impact the wilderness character of the area:

5. (10) Notwithstanding subsection (9), the Minister may authorize activities to be carried on in a wilderness area, subject to such conditions as the Minister considers necessary, for purposes of
 - (d) the carrying on of traditional renewable resource harvesting activities authorized pursuant to subsection (7) or any other Act of Parliament; or

Finally, section 7.1(ee) allows for the regulation of traditional renewable resource harvesting activities by order-in-council so long as the activity was authorized pursuant to subsection 5.7:

7. (1) The Governor in Council may, as he deems expedient, make regulations for
 - (a) the preservation, control and management of the parks;
 - (b) the protection of the flora, soil, waters, fossils, natural features, air quality and cultural, historical and archaeological resources;
 - (c) the protection of the fauna, the taking of specimens thereof for scientific or propagation purposes and the destruction or removal of dangerous or superabundant fauna;

- (d) the management and regulation of fishing, and the protection of fish, including the prevention and remedying of any obstruction or pollution of waterways; . . .
-
- (ee) the control of traditional renewable resource harvesting activities authorized pursuant to subsection 5(7)

Although the *National Parks Act* (1988) seems to provide Aboriginal peoples with a legislative guarantee of continued access to renewable resources within national parks, subsection 5.7 limits Aboriginal activities to national parks within specific regions of Ontario and Newfoundland. Neither the act nor the delegate regulations outline specific criteria used to limit the minister’s administrative discretion to regions within the provinces of Ontario and Newfoundland, or to guide the application of the minister’s discretion. As a consequence, the end result is the inequitable treatment of Aboriginal peoples across Canada depending on where and when the national parks were established.

c) *Parks Canada Guiding Principles and Operational Policies* (1994)

Parks Canada’s policy provides further evidence that traditional harvesting rights are not necessarily incompatible with the mission of national parks. The policy states that “in parks where there are existing Aboriginal or treaty rights, the exercise of these rights will be respected” and allowed to continue after the negotiation of land claim agreements or treaties (Canada 1994: 24-25). The policy even foresees that due to the constitutional status of such agreements, treaties would supersede Parks Canada’s policy and effectively amend the *National Parks Act* (Canada 1994:25). The potential existence of Aboriginal rights is also recognized in section 1.4.10 which states that “existing Aboriginal and treaty rights of the Aboriginal peoples of Canada will be honored. These may be defined in treaties and comprehensive claim agreements.”

However, the emphasis of Parks Canada's policy and section 1.4 is on the establishment of new national park agreements. In fact, section 1.4.11 only makes reference to the establishment of new national parks and does not address the issue of Aboriginal or treaty rights in long-established national parks:

1.4.11 In areas subject to existing Aboriginal or treaty rights or to comprehensive land claims by Aboriginal peoples, the terms and conditions of *park establishment* will include provision for continuation of renewable resource harvesting activities, and the nature and extent of Aboriginal people's involvement in park planning and management. [emphasis added]

The lack of reference to Aboriginal and treaty rights in long-established national parks effectively creates a policy vacuum in *Parks Canada Guiding Principles and Operational Policies* (1994).

It is also indicative of Parks Canada reluctance to recognize the existence of Aboriginal rights in long-established national parks.

5.4 CONCLUSION

It is clear from the national park regulatory scheme that traditional renewable resource harvesting activities are not necessarily incompatible with national park objectives.

Furthermore, from the review of recent legal decisions on Aboriginal rights and title, and the evidence of the historical use of the area now within Kootenay National Park, it is doubtful that the application of the *Dominion Forest Reserves and Parks Act* (1911) and the subsequent *National Park Act* necessarily extinguished the right of the Ktunaxa people to hunt for food within Kootenay National Park. Moreover, there is nothing to suggest that other practices, traditions, and customs integral to the Ktunaxa culture which took place within the park boundaries have been extinguished.

Some may argue that Parks Canada is justified in prohibiting the right of the Ktunaxa people to hunt within the park because it would be unfair to allow an Aboriginal group to do so while disallowing all others this right. However, since the goal of treaty negotiations is to develop new relations between Aboriginal and non-Aboriginal peoples, such justification should be discussed at the negotiation table rather than determined unilaterally by the government. Coexistence can only be achieved through a candid discussion of interests. Ingrained positions fuel animosity and solidify the adversarial nature of relations between Aboriginal peoples and the government. This, in turn, leads to misunderstanding and misconceptions of the respective interests of Aboriginal peoples and of governments.

The courts have provided the impetus for modern-day treaty negotiations in British Columbia and other parts of Canada. The reconciliation of Aboriginal rights and title with the assertion of sovereignty by the Crown requires a more practical approach than litigation. Interest based negotiation provides a more appropriate mechanism for resolving the century-old issues of Aboriginal rights and title.

CHAPTER 6

KTUNAXA/KINBASKET TRIBAL COUNCIL INTERESTS IN NATIONAL PARKS

6.1 INTRODUCTION

The previous chapter applied the legal framework established by the Supreme Court of Canada for analyzing claims to Aboriginal rights and title. From this analysis it is reasonable to argue that the Ktunaxa people once used the area of land now within Kootenay National Park. Furthermore, it is doubtful that the national parks regulatory scheme necessarily extinguished the Aboriginal rights of the Ktunaxa people in areas now within national parks. A major shortcoming of the legal framework for analyzing Aboriginal rights is that it is based on a winner-take-all approach rather than on a process more appropriately suited to the reconciliation of fundamental differences and the development of new constructive relationships between Aboriginal and non-Aboriginal people.

This section of the paper, which includes the next three chapters, explores an alternative approach to litigation by documenting the respective interests of KKTC and Parks Canada in Kootenay National Park. Moving away from entrenched, polarized positions, however, is extremely difficult when one or more stakeholder feels threatened. As will be illustrated, the major obstacle to achieving a mutually acceptable agreement with respect to Kootenay National Park is a difference in ideology which each party interprets as a threat to its fundamental needs. Parks Canada is concerned that the very foundation of national parks in Canada is threatened by the interests and desires of KKTC, while KKTC feels that its cultural identity is threatened by the current management regime in long-established national parks. The objective of this section is

to document the interests of both KKTC and Parks Canada in Kootenay National Park in order to initiate a dialogue, in an effort to identify common ground between the interests of the parties.

6.2 INTERESTS OF THE KTUNAXA/KINBASKET TRIBAL COUNCIL

We lived a nomadic lifestyle, following the vegetation and hunting cycles throughout our territory for over 10,000 years. We lived in harmony with the earth, obtaining all our food, medicines and materials for shelter and clothing from nature. We are the protectors of our territory, a responsibility handed to us from the Creator. Our existence continues to centre on this responsibility.

Denise Birdstone
St. Mary's Indian Band
Cranbrook, British Columbia, 3 November 1992
(Quoted in RCAP 1996 vol.2, pt.2: 448)

The Ktunaxa people feel a special relationship to the land and its resources. The Royal Commission on Aboriginal Peoples (RCAP) described this relationship as both spiritual and material: the basis of a subsistence livelihood and the foundation of communities, but also the means of affirming the community's connection to the past and securing the future of the culture and society (RCAP 1996, vol.2 pt.2: 448).

RCAP explained that Aboriginal people view land as more than simply the surface of the earth. Their notion of land includes the subsurface as well as the rivers, lakes, shorelines, the marine environment, and the air (RCAP 1996, vol.2 pt.2: 448). Land is said to be at the core of Aboriginal identity, a source of profound spiritual and moral values. Central to Aboriginal people's worldview is the belief that land and resources are living entities that deserve respect and protection (RCAP 1996, vol.2 pt.2: 436).

Malyan Michel, an elder of the St. Mary's Band, explained that for her "every tree and blade of grass has a purpose. The earth is like a human, what they're taking from within the earth is like taking blood from a person" (Malyan Michel 1997).

To understand the importance of land to Aboriginal people it is important to recognize that human communities are held together by traditions (King and Townsend, n.d.). In turn, these traditions form the basis of society, nationhood, and governance. For Aboriginal people, these traditions are intricately tied to the land because of the way they have traditionally lived their lives. Not surprisingly, land touches every aspect of their life: conceptual and spiritual views; securing food, shelter, and clothing; cycles of economic activities including the division of labor; forms of social organization such as recreation and ceremonial events; and systems of governance and management (RCAP 1996, vol.2 pt.2: 448).

Leo Williams (1997), an elder of St. Mary's Band, explained that the Ktunaxa people's relationship to land and resources is derived from the stewardship responsibility assigned to them by the Creator:

Aboriginal people being told by the Creator to take good care of the land and they would be rewarded. In 1492, North America was the richest country in the world. We lived in harmony, we adapted to the land, we didn't want to destroy it. To our own way of life we lived by the land, we took what we need, never took what we wanted. Right now I'm rich, richer than you will ever be because I believe in what was given to me. Take what you need, never take what you want; taking what you want is the destruction.

A fundamental message of RCAP was that for Aboriginal peoples land is not simply a commodity to be bought and sold; it is an inextricable part of the Aboriginal identity, deeply rooted in moral and spiritual values. This message was echoed during discussions with elders of the Ktunaxa people. Leo Williams explained that for the Ktunaxa, land is as valuable as life itself. According to the Ktunaxa world view "natural resources do not belong to individuals, they

belong to the Creator. In order to properly manage the resources we should only take what we need” (Leo Williams 1997).

6.2.1 Concern Over Wide-Scale Environmental Degradation

Several interviewees raised serious concern over what they perceived to be the uncontrolled industrial extraction of natural resources and the resulting environmental degradation. They identified clear-cutting as a major cause for concern because of the associated environment impacts including stream degradation, slope destabilization, and devastation of important wildlife habitat. Malyan Michel (1997) recalled going to collect plants and herb for medicinal purposes and being shocked by the degree of environmental devastation in a particular watershed:

Some years ago I went down that mountain. As a little girl I know that my mother and a friend used to pick something along the little creek. I went up in there and this is what made me cry. On the big mountain it was all clear cut and nothing. I finally came to that little creek and it was dry. It breaks my heart to see the way they did it (Malyan Michel 1997).

Malyan Michel (1997) went on to explain that the loss of natural habitat not only prevented her from collecting culturally significant resources but also contributed to the loss of cultural knowledge:

I know this kind of medicine but I forget what it is called. I know the plant but there was nothing because it grows in damp, they grow along the creek but the creek was dry, there was nothing.

One time a doctor asked me about my own medicine and I laugh in his face. I told him if I knew my own medicine I would not be sitting in his office. This is what I told him: it was your grand parents that made us loose our religion, our medicine, our way of life.

Rick Gravelle (1997) of the Tobacco Plains Band observed that the industrial harvesting of forest resources has caused significant adverse affects on the community:

They did all their logging on the tops of the mountains, just below the tree line, back in the 50's, 60's, 70's. That changed our whole run-off system because in the springtime the

sun comes out, warms up, there's no shade to slow down the run-off process; so as soon as it starts running up there, it causes a lot of erosion and that pollutes our streams. It's bad for our fish and now everywhere they log the streams.

I remember when I was a kid I could go anywhere with my dad and I could get out and just about drink out of any stream I wanted to without getting sick. Now days, you can't go and you can't just drink out of a stream. There's so much pollution and if it's not pollution it's parasites, now. It was the white people who brought the parasites, the ones that are in the deer right now. It came from a hippie colony established in the 60's down in Colorado. Now that's in the animal, it's in the mule deer and they're high in the mountains. So when their dung goes right into the water and we drink that water, it all comes from one place and that's man-made destruction in everything that is out there.

Leo Williams (1997) attributed much of the environmental degradation to the commercialization of natural resources. He felt that “we are turning the whole world into a mall. Selling the rivers, the fish and the timber” and cautioned that “when they [dominant society] look at the tree they wonder how much money they can make. Same when they look at water and fish. Everything they look at they put a price on it, but by putting a price on it you destroy it” (Leo Williams 1997). Malyan Michel (1997) shared his concern and felt that “the whole problem with non-natives, is that you see everything in dollar signs. When they exchange medicine for dollars there’s no more strength in the medicine because it’s spoiled by the dollar sign. That’s the way it is and I’m telling you.”

6.2.2 Protecting the Environment

Although the participants acknowledged that the national parks had protected part of their traditional territory from resource extraction and urban settlement, most felt that establishing national parks and protected areas was an ineffective means of protecting land and natural resources. Liz Gravelle (1997), an elder of the Tobacco Plains Band, suggested that “preserving national parks is not going to help the rest of the country. . . . If we are going to do

something it's got to be spread throughout the whole country." Pete McCoy (1997), a member of the Tobacco Plain's Band, concurred and wondered:

Why would you want to create a monument of things that were [an example of what the traditional territory once looked like] when you can manage it [traditional territory] our way and have it like that all the time. That's what the park is, a monument [example] of what their [non native] successes would be if they managed it [traditional territory]. A little section of what they have. The whole thing [traditional territory] could be like that with proper management.

Instead, the participants suggested that an integrated resource management approach linked to principles of sustainable resource use would be a more appropriate means of protecting the land.

Chief Sophie Pierre (1997) suggested that "we have to move away from the notion that we are managing land, move away from the concept of human use of the land. We have to protect the land, the wildlife, the trees. Protect biodiversity so that the land can sustain itself because if it can't sustain itself, it can't sustain us."

6.2.3 The Ktunaxa People's Perception of National Parks

Many participants viewed national parks as large land areas set aside for the enjoyment and benefit of humans, but to the exclusion of Aboriginal people. They suggested that national parks were established to ease the concerns of environmentalists who objected to widespread industrial extraction of natural resources. They felt that national parks are currently managed to satisfy the recreational interests of wealthy individuals (Liz Gravelle 1997). Several elders suggested that because industrial resource extraction had been restricted within national parks, land within these areas provide an indication of what the traditional territory of the Ktunaxa was like prior to the onset of industrialization (Pete McCoy 1997; Malyan Michel 1997; Leo Williams 1997). Several participants submitted that if the Ktunaxa people had retained a role in the management of land and resources throughout their traditional territory, more of the

Kootenay Region would resemble national parks (Pete McCoy 1997). Many considered national parks as arbitrary and artificial boundaries which unnecessarily restrict free access of the Ktunaxa to natural and cultural resources within their traditional territory (Wilfred Jacobs 1997; Malyan Michel 1997).

The participants all agreed that no formal relationship has ever existed between Parks Canada and KKTC. According to Chief Sophie Pierre (1997), the only time Parks Canada communicates with the tribal council is when a new employment equity program comes on stream and Parks Canada needs Aboriginal employees to fill seasonal positions. Otherwise, Parks Canada does not consult or involve KKTC in any of its planning or management decisions (Columbia Lake Band Council 1997; Ox Eugene 1997; Chief Sophie Pierre 1997). This federal policy has undoubtedly influenced the KKTC's perception of national parks.

6.2.4 Impacts of National Parks on the Ktunaxa People

The creation of national parks in the Canadian rockies coincided with the establishment of Indian reserves in British Columbia. Because these events took place within a few years of each other, and because a great deal of time has elapsed since the creation of these national parks, it is difficult to disassociate the impacts of the national parks from other government policies and actions. Nevertheless, because national parks are discrete land areas managed under a single regulatory scheme, it is possible to document how the establishment of the national parks has affected the Ktunaxa.

As mentioned above, most participants acknowledged that the national parks had protected certain regions of KKTC's traditional territory from resource extraction and human settlement (Violet Birdstone 1997; Phyllis Nicholas 1997; Chief Sophie Pierre 1997; Chris

Sanchez 1997). However, the participants suggested that the negative impacts of the national park regulations which consistently excluded traditional Aboriginal activities from within national parks far overshadowed and negated any benefits. As Phyllis Nicholas observed:

I guess there's some good about putting the park there. But then there's others deals that we're not allowed to. You know something that would fit - like you know soapberries, there's lots of soapberries out there. And like other things, you know like pick there and we can't. But then they're protecting stuff there too but there also we can't do what our ancestors done.

When there was no road there they still get there. You're speaking of the red earth [ochre], they used to go all the way there to take some. That's what they used for their . . . [paint] you know. Everybody went there and got them that red earth and now we don't do that. Properly, how do you put it now? We're not allowed to take stuff out of there or even break a branch.

Dan Gravelle (1997), councilor and the band manager for the Tobacco Plains Band, explained that denying the Ktunaxa the use of their traditional land base is the equivalent of alienating part of KKTC's traditional territory since both effectively suppress the cultural expression of the Ktunaxa people. Dan Gravelle (1997) was also concerned that even though traditional sites have been protected by their inadvertent inclusion within the national parks, they may still be disturbed or eroded by tourists who may be unaware or insensitive to the cultural importance of these sites. Unfortunately, the likelihood of this occurring is far too real for the Ktunaxa who have witnessed the desecration of culturally significant sites within the Top of the World Provincial Park after a television broadcast of a documentary film describing the sites (Thomas Munson 1997). According to King and Townsend (n.d.), damaging traditional cultural places may profoundly effect a communities sense of itself and of its past.

The vast majority of negative impacts identified by the elders can be attributed to the exclusionary policy of past and current park management regimes. The impacts consist of the inability of the Ktunaxa people to practice traditional activities such as gathering of plants,

berries and medicines; harvesting of roots and fish; hunting of wildlife; and freedom to participate in religious ceremonies. As Leo Williams (1997) explained:

When they came in to establish these parks, they were suppose to pay so much for compensation to the Indians for taking away their hunting grounds, fishing grounds, and where they gather plants, medicinal plants, and other things like that. At Vermilion where they have the paint pots, those things that were put in Ktunaxa [Kootenay] Park, we're not allowed to take out.

That's until they say they want us to practice our culture now. And they fence in a lot of what our ancestors used to do, used to use for medicinal purposes and the paint pots.

Rick Gravelle (1997) of the Tobacco Plains Band concurred:

The Kootenay River, if you follow it right up to the very very end, all the way up the headwaters, it's in the park. And some of those plants and things we use to use for medicine and stuff. People weren't able to go up there and get them, and a lot of that was lost. And some of those plants don't grow in the lower elevation, they just grow up in the headwaters and things.

The elders felt that by excluding all subsistence harvesting activities, the national park regulatory scheme denies them their preferred use of the natural resources. Chris Sanchez, the Director of the Traditional Use Study for the Ktunaxa, explained that a Ktunaxa elder would choose to go to a national park for reasons far different from those of a non-Aboriginal traveler:

If you were to ask Malyan [a Ktunaxa elder] to go to those parks, she's probably not going to go sit at a picnic table, have a picnic lunch, throw her waste into the basket, and then drive out. There are other things that you are going to go there for, that we are going to go there for. Emphasis is placed on other things, still primarily the traditional use in the area. Things that we gather, things that are important to us.

According to Chris Sanchez (1997), establishment of the national parks also divided family units by creating an artificial boundary between the Aboriginal people of British Columbia and those in Alberta. The inability of Ktunaxa people to freely travel through national parks profoundly affected the relationships between the Ktunaxa, the Stoneys, and the Scarcee:

Catering to the social current of the time and changing political whim, everybody thought that Indians were going to kill all the animals. . . . So at that point they said there's no more hunting allowed here, so then we continued to cross there and then there was concern that

they can still make bows and arrows even if you take their guns when they enter the park. So at some point it was made policy that native people were not to cross there at all.

My understanding is that this had profound effect on the relationship between Kootenay people, the Stoney people, and the Scarcee or Tsu-tina as well, because there was intermarriage, there was communication, there were very complex agreements between our people and their people regarding salmon fishing, buffalo hunting, and control of resources. So before the establishment of the park there were agreements in place, treaties if you will. There were understandings between people that there needed to be sustainable management of fish and wildlife in the area and it happened many times. This understanding was disavowed by people of a frame of mind; we don't know that, we're going to do this, and we don't care what was there before hand.

And when they came and created controlled conditions of nature which I think was much more damaging to the natural habitat and the environment they also completely separated several nations and tore families apart. It was 50 years before some of those people realized who their families were and they could afford vehicles and gas to cross through the park. Using the park areas to separate people should never have been an issue in the first place.

Although it is difficult to determine if the national park regulations were solely responsible for this impact, it is evident that the national parks policy contributed to the disruption of the social fabric of the Aboriginal communities in the vicinity of the Rocky Mountain Parks.

6.2.5 Improving the Relationship of KKTC and Parks Canada

a) *Recognition of History*

Several KKTC representatives who participated in the interviews and focus groups felt that the relationship of KKTC and Parks Canada could be improved and suggested ways of doing so. The suggestions all involve enhancing Parks Canada's awareness of the history and culture of the Ktunaxa. The initial step would involve improving Parks Canada's understanding of the history of the Ktunaxa which preceded the establishment of the national park, and the role the Ktunaxa people played in modifying and shaping the ecosystem currently protected by national parks. The second step would be to acknowledge the important contribution of the Ktunaxa people in the development of transportation corridors that were later used by European

explorers. Both of these historical refinements could be prominently depicted in interpretive information available to visitors. The third step, potentially the most difficult for Parks Canada, would involve recognizing that the Ktunaxa culture continues to exist today and is not ancient history. This symbolic gesture which first appears to be fairly innocuous could create a serious dilemma for Parks Canada because of the important ramifications such an acknowledgment could have for current management practices in long-established national parks. If Parks Canada were to recognize the historical and continuing existence of the Ktunaxa culture, the Ktunaxa people could reasonably argue that in order to ensure the continued viability of their culture, they need to be able to participate in activities which they view as integral to their culture. These could include participating in cultural activities and sustainable traditional resource harvesting activities within national parks.

b) *Traditional Activities*

Historically, the Ktunaxa people engaged in subsistence harvesting activities throughout their traditional territory. Chris Sanchez (1997) pointed out that “the first thing that needs to be asserted is that those lands [park area] were used just like any other lands.” National parks were treated no differently than any other land area within their traditional territory. Individual family members engaged in specific harvesting activities depending on their interests and their responsibility to the family unit, but these activities were often practiced in combination with other activities. Leo Williams (1997) explained:

You do one thing but that does not mean you alone. We traveled by groups. I might have hunt, he might have been fishing, those women might have been gathering plants, roots, and fruits. It doesn't mean that I was alone when I got there. Being there, occupying these places shows that we were there, our ancestors were there, those lands were used. Not just one thing when you ask me if I was there, I was following my tradition. The tradition of my ancestors. They taught me to do it; without them I wouldn't know the place.

Because of the traditional Ktunaxa lifestyle, their Aboriginal rights can best be described as a bundle of inseparable activities or interconnected customs, traditions, and practices. As Chris Sanchez (1997) noted, Aboriginal activities are more appropriately viewed as the basis of a lifestyle rather than individual pursuits:

It was a very holistic use. You can't ask Leo to go and talk about this plot of land and ask: "Did you hunt here?" and he says yes and then you write down "O.K. he hunted here" and then leave. Because if you hunt there then you camped there, and if you camped there then you gathered there, if you gathered there then you interacted with things there. Then you are looking at habitation, it's all very connected.

For Chief Sophie Pierre (1997) it is important that the Ktunaxa people be able to exercise these activities throughout their traditional territory, including national parks:

We should be able to practice some traditional activities that took place within the traditional territory for thousands of years. The park is something that non-Aboriginals set aside and yet we practiced the same activities there that we carried out throughout the Rocky Mountain Trench.

Many participants indicated an interest in reviving certain customs, traditions, and activities that were historically practiced by the Ktunaxa people but abandoned because of park regulations. Phyllis Nicholas (1997) indicated that the very reason certain traditional activities have not been openly practiced has been for fear of reprisal:

They make it sound that we just don't want to do those things. They must remember they don't want us to do that. How can we do it, when they don't allow us to do it? How can we do it? We start doing that, they throw us in jail and say we're breaking the law.

Chris Luke (1997), an elder of the Lower Kootenay Band, suggested that traditional activities could be reintroduced to national parks on an experimental basis, a concept similar to the principles of adaptive management:

There has to be a trust agreement to try something, to allow certain activities to take place. If it doesn't work then you get out. We can find some way of having the activity monitored, that way it would be positive for our people and everyone involved.

c) *A Role in Management and Decision Making*

Several participants indicated a need to establish a formal relationship between Parks Canada and KKTC to ensure effective communication, and to provide a role for KKTC in the planning and management of national parks (Dan Gravelle 1997; Chief Sophie Pierre 1997; Chris Sanchez 1997; Leo Williams 1997). Leo Williams (1997) explained that the desire of the Ktunaxa is based on a need to be recognized and respected as equal members of Canadian society:

We talk about land claims and people think we're going to take the land back away from them and kick them out. No it's not that, the government wants equality. We want to be recognized and have a voice in parliament. That is what we are after--we're not after the land--we're after recognition; it's our Aboriginal right to be recognized. And the only way we can help you develop these park is if we have a voice in parliament. That's equality.

Similarly, Chris Sanchez (1997) felt that a formalized relationship is necessary to ensure that the views and opinions of KKTC are respected and considered in the decision-making process. He suggested that without some form of jurisdiction and control, the desires and recommendations of KKTC would otherwise be disregarded:

We can create a wonderful program, which Canada may not respect because they did not give it any teeth. You can have the cure for cancer, but unless you have a way to create prototype medicine nobody is going to know. No one will hear about it, it's going to ripen upon the vine. Even if we have this great idea which will make that park three times as enjoyable, I can submit my paper or proposal, that doesn't mean they have to do anything.

Because there is no money or resources there tends to be very little interest . . . Again the question comes back to comanagement and communication . . . Unless people get along and communicate, unless people respect each other enough to listen to ideas and to make an informed decision. If you look at the top 10 people who make decision for Parks Canada, how many First Nations people do you see there? Probably none.

Leo Williams (1997) noted that the success of such an approach is dependent on effective communication and open-minded discussion:

They have to come to us and speak with us. A lot of them have come already and some of them were discouraged by the things we say and maybe you too will be discouraged. You have to look within us, you have to learn about us.

The success of a shared decision-making approach also depends on the respect of the individuals, their value system, and their knowledge base. Unfortunately, Aboriginal concepts of resource management and ecological knowledge have not been honored in the past because they differ profoundly from those of other Canadians (RCAP 1996, vol. 2 pt 2: 425). Chris Sanchez (1997) suggested that certain social and political principles common to many First Nations have guided the behavior of Aboriginal people with respect to resource access and use:

People are starting to realize that maybe we [dominant society] don't know the best way to do it. And a lot of people are offended by the fact that native people may know how to do that better, they just don't like that If you look at a particular park, it could be the way that we think and a way that has maintained some of these very pieces of land for a long time. . . .

There are just so many factors, but a lot of knowledge around land use planning and management of resources are systems that are the same all around the world. We weren't the only people to start fires to keep a healthy forest, but people act like we were these roaming mongrels who went where we saw deer and didn't understand the land any better than that. But there is very explicit direction that we have within our own community of what to do and what not to do and they are not that different from what other people do.

There is this image of native people, that they are somehow still backwards or uncivilized. So many Canadians will not take our suggestions at face value because we don't have our degrees or seats in professional organizations.

Even if communication could be improved, a major obstacle still remains. Parks Canada and KKTC have fundamentally different views regarding the appropriate level of protection required for land and resources within national parks. Chief Sophie Pierre (1997) explained that for KKTC it is important to protect natural resources so that those resources will be available for future generations to use:

In the Top of the World Provincial Park our people went to gather rocks and make tools. We lobbied hard for them to protect that area as a park so that it would be protected in its natural state. This was important because others were going and taking the rocks, and the area was being depleted at a rapid rate. But we wanted it protected for future generations to

access, so that they could have access to the rocks and understand the way we made tools and weapons.

In the true sense of the word 'park' these rocks will not be available for future generations to benefit from. *The purpose was to protect it so that we could continue to use it.* [emphasis added]

Several participants indicated that the traditional use of natural resources by the Ktunaxa people is necessary to ensure the sound management of land and resources, and that their use is balanced by a stewardship responsibility. Pete McCoy (1997) explained that for the Ktunaxa, management and use are not separate functions:

Denying the use of part of our land is not management. To manage the land properly you got to use it. To have the full use of the land, you have to use it. Certain plants would die, animals would die. Animals would get sick if you crowd them in one park, plants would die. So that's not management in that park, that's denial of the use of land.

For thousands of years Indians lived on this land and did good with it. It survived, it's healthy, we managed it. We used it when we could use it. When they couldn't use it, they moved on until they were suppose to go back, they relocated themselves, that's management.

Many participants also pointed out inconsistencies in Parks Canada's determination of allowable uses. The elders indicated that although Aboriginal uses are banned from the park, mass tourism is permitted. Most felt that impacts associated with traditional Aboriginal activities pale in comparison to the impacts of Highway 93 which runs through Kootenay National Park. Chris Sanchez (1997) noted:

How natural can you have that land when you keep ushering people in to look at the beauty? It's going to change by virtue of putting in plumbing, bathrooms, rest areas; you got to have gas stations somewhere in there. There are cars going through, there is pollution; these people are probably not throwing everything in the garbage can like they should.

So it's the paradox of taking a piece of land and saying this is going to be natural, it's going to be wilderness, it's going to be somewhere where we can go and retreat from everything else, yet we all get into an RV or a car and we drive in.

For a shared decision-making process to be effective, Parks Canada and KKTC would need to reconcile their divergent views on the objectives of national parks and arrive at a mutual understanding of the significance of national parks.

6.2.6 Synopsis

The desire of KKTC to participate in traditional activities and reaffirm its role in the jurisdiction and control over land and resources within its traditional territory, should not be interpreted as a simply a power struggle between Aboriginal people and government. The Ktunaxa people continue to feel a special responsibility to protect the land within their traditional territory and do not recognize Parks Canada as the sole custodian of the land currently within national parks (Dan Gravelle 1997). The Ktunaxa are not solely interested in obtaining a greater share of natural resources, their desires have deeper cultural significance. According to RCAP, the recognition, accommodation, and implementation of Aboriginal rights and jurisdiction over land and resources is absolutely critical to achieving the level of self-sufficiency and self-reliance desired by Aboriginal communities (RCAP 1996, vol.2 pt.2: 557-68)

CHAPTER 7

FEDERAL INTERESTS IN KOOTENAY NATIONAL PARK

7.1 INTRODUCTION

The key objective of the federal government in negotiating treaties with Aboriginal peoples in British Columbia is to achieve certainty with respect to land and resources by replacing the exercise of undefined Aboriginal rights over a First Nation's traditional territory with the exercise of defined treaty-based rights (Canada 1995: 12). The stated interest of the federal government in national parks is: "to negotiate Aboriginal rights in existing federal parks" (Canada 1995: 20). According to the draft federal interest paper entitled *British Columbia Treaty Negotiations: The Federal Perspective* (1995), these rights may include the participation of Aboriginal peoples in cooperative management regimes, special economic, employment, and training opportunities, and rights to harvest wildlife. The federal interest paper makes it clear, however, that "in the interest of protecting the public interests, the federal government will not favor the negotiation of arrangements that would provide for the exercise of traditional activities in established national parks" (Canada 1995: 20). The distinction made in the federal interest paper between existing and established national parks is important to highlight. The federal government has determined that the interests of Canadians in established national parks are different from those in other existing federal parks, mainly national park reserves. To clearly understand why the federal government does "not favor" the pursuit of traditional Aboriginal activities in established national parks such as Kootenay National Park, it is necessary to review

the current management regime of this park while paying particular attention to the present involvement of KKTC in the management of the park.

7.2 KOOTENAY NATIONAL PARK

Kootenay National Park encompasses 1406 km² of land along the western side of the Continental Divide. The park consists essentially of a 7.5-km strip of land on either side of Highway 93, formerly known as the Banff-Windermere Highway, which follows the Vermilion and Kootenay River Watersheds (fig. 6). The park is one of five national parks representative of the Canadian Rocky Mountains. Taken together, Banff, Jasper, Yoho and Kootenay National Parks constitute a contiguous management unit of 20,160 km² known as the Rocky Mountain Park Block (fig. 7) (Canada 1988: 11). Parks Canada emphasized in the most recent management plan for Kootenay National Park that these four national parks are to be managed in a consistent manner (Canada 1988: 18). The stated purpose of the Rocky Mountain Park Block is to protect and preserve a significant part of the Canadian section of the North American cordillera, including a representative cross-section of flora and fauna, for the appreciation, understanding, and enjoyment of present and future generations (Canada 1988: 7). The paramount objective of national parks, as described in the park management plan, is to provide the highest level of protection or, where appropriate, preservation to natural resources and processes as well as cultural resources, while providing year-round opportunities for visitors to enjoy the wilderness character of national parks (Canada 1988: 7). This dual objective is also reflected in the national park policy, however, the policy clearly stated that the first priority of Parks Canada is the long-term protection of the ecological and commemorative integrity of national parks (Parks Canada 1994: 14, 16, 25). The management plan for Kootenay National Park also stressed that

the mandate of national parks applies “not only to the protection of natural resources, but also to archaeological and historical resources” (Canada 1988: 13).

7.2.1 Protection and Management of Heritage Resources

Parks Canada is the lead agency responsible for the protection of natural resources in national parks. The park management plan directed Parks Canada to give resource protection precedence over visitor use and facility development (Canada 1988: 29). In accordance with its World Heritage Site designation, Kootenay National Park seeks to protect outstanding examples of significant ongoing geological processes, biological evolution, and *human interaction with the natural environment* (Canada 1988: 30) [emphasis added]. In addition, the park seeks to protect features or areas of exceptional national beauty, and natural habitats where threatened species of animals or plants of outstanding value still survive (Canada 1988: 30). In order to meet its objectives, Kootenay National Park is said to be managed on an ecological basis with the cooperation and coordination of other national parks as well as provincial agencies responsible for adjacent lands. Particularly relevant to this research project is the direction the management plan provided with respect to the protection and management of natural areas, cultural resources, hydrologic and aquatic resources, vegetation, fire, wildlife, and fish. An important aspect of the management plan, within the context of this paper, is that the only mention of the Ktunaxa is in reference to their prehistoric use of the park. The plan makes no reference to the incorporation of KKTC’s interests in the development of the park, even though the park is within its traditional territory.

a) *Natural Areas*

The Redstreak-Sinclair and Wardle-Verendrye Areas in Kootenay National Park are said to represent natural environments unaltered by human activity where ecological processes can operate undisturbed (Canada 1988: 41). These areas are important scientifically because they provide valuable benchmarks of natural systems and processes, and are unique to the national park system (Canada 1988: 13). According to the park management plan, a greater understanding of these areas “will assist the development of comprehensive and ecologically based management strategies” to minimize the influence of humans on the resources and natural processes elsewhere in the park (Canada 1988: 41). Other important or representative natural resource themes in the park include:

- the geological and physiographic features of the western ranges, and the internationally significant fossil beds associated with Cathedral Escarpment;
- the geomorphological features associated with fluvial and glacial processes of erosion and deposition;
- the headwaters of the Vermilion River system, as well as thermal springs in Sinclair Canyon and the paint pots mineral springs; and,
- the major vegetation zones and wildlife populations representative of the western ranges.

b) *Cultural Resources*

The management plan specified that cultural resources include both archaeological and historic resources. To ensure their protection, a comprehensive inventory of cultural resources has been undertaken in high-use areas (Canada 1988: 39). The management plan recommended that a study of the prehistoric and historic use of the park as a travel corridor be undertaken (Canada 1988: 39). However, according to Heitzmann (1998a) no specific studies of the historic

or prehistoric use of the park as a travel corridor have been commissioned and little is known of this use of the park.

Surprisingly, the important human history themes cited in the management plan all revolve around the transportation history of this natural corridor and the historic exploitation of park's resources. These themes are said to include:

- prehistoric use of the park by the Kootenai Indians;
- activities of early European explorers such as Thompson, Simpson, and Sinclair;
- settlement and development of the Columbia Valley;
- industrial extraction of natural resource from the park; and,
- early tourism and recreational activities in the park (Canada 1988: 13).

c) *Hydrologic and Aquatic Resources*

Most of the Vermilion, Simpson, and Kootenay River Watersheds are encompassed within Kootenay National Park. The management plan directed Parks Canada to “endeavour to ensure the protection of the natural flow patterns of rivers” and minimize stream channel manipulation (Canada 1988: 33). In the plan, Radium Hot Springs and the paint pots mineral springs are regarded as significant hydrological resources rather than symbolic cultural resources.

d) *Vegetation and Fire Management*

Kootenay National Park contains a diverse vegetation complex. The management plan emphasizes that priority is placed on protecting the vegetative communities by minimizing the potential interference with natural processes which modify the vegetative structure and composition (Canada 1988: 34). Although Parks Canada recognizes that fire is an important natural process which plays an important role in ensuring the succession of vegetation, and in maintaining the stability and diversity of the park ecosystems, the management plan specifies

that the practice of fire suppression will continue even though the success of the suppression policy has altered the natural ecological balance of the park (Canada 1988: 34-35).

The management plan makes no mention of the influence of past human activities on forest composition and structure, mainly because the information on past human activities collected through the ecohistory project was not available when the plan was developed in 1988 and updated in 1994.

e) *Wildlife Management*

Kootenay National Park provides habitat for a diverse array of wildlife species including populations of large predatory species native to the area (Canada 1988: 36; Eagles 1993: 173). The management plan directs Parks Canada to take actions to ensure that representative wildlife populations are maintained in the park (Canada 1988: 36). These actions are directed towards preventing, mitigating, and counteracting the influence of humans on park wildlife (Canada 1988: 36-37). Hunting is forbidden in the park. This ban is considered important because it helps maintain fish and wildlife populations, and facilitates wildlife viewing since the animals become accustomed to the nonthreatening presence of human beings (Eagles 1993: 173; Fisher 1997)

f) *Fisheries Management*

The Canadian Parks Service policy allows sport fishing in Kootenay National Park. The stated management objective for fishery resources is to ensure the protection of aquatic ecosystems and maintain viable native fish populations (Canada 1988: 38). Catch limits and seasonal closures are the primary tools used to manage sport fishing. The management plan does not give priority to, or make special allowance for, traditional Aboriginal fishing.

7.2.2 Visitor Use

The vast majority of visitors to Kootenay National Park are day-users seeking a range of opportunities from roadside facilities including picnic sites, viewpoints, and pull-offs. Most of the activity is focused on the aquacourt (Radium Hot Springs) and the Marble Canyon-Paint Pots area. The park provides designated viewing and pull-off opportunities with picnic sites to facilitate enjoyment of the park experience (Canada 1988: 61). A variety of recreational activities are carried out in the park but motorized transportation is said to be the most popular activity. Other activities include cross-country skiing, canoeing, kayaking and rafting, bicycling, horseback riding, and sport fishing. Commercial horseback riding operations are not permitted in the park (Canada 1988: 75-76).

To ensure that the natural and cultural resources are protected, visitor use is restricted to designated trails and campsites, while backcountry camping is not permitted. Backcountry is defined in the management plan as portions of the park that are inaccessible by private vehicle. The majority of Kootenay National Park is zoned for primitive backcountry use (fig. 6). Prohibitions against backcountry camping are intended to concentrate recreational impacts to designated areas of the park and minimize impacts on the outlying areas (Canada 1988: 45-57). Existing facilities include 275 km of maintained trails, twelve backcountry campsites, and one backcountry shelter.

7.2.3 Synopsis of KKTC Involvement in the Management of Kootenay National Park

In recent years, Parks Canada has attempted to build positive relations with First Nation communities whose traditional territories encompassed or intersected natural regions not represented in the National Parks System Plan (Olsen and O'Donnell 1994: 2). Parks Canada has

focused its efforts on forging relations with First Nations whose traditional territories coincided with Parks Canada's interest in establishing new national parks (Olsen and O'Donnell 1994: 1-5). In British Columbia, the Nuu-chah-nulth Tribal Council, the Ditidaht First Nation, and the Haida Nation have all benefited to some extent from this new initiative (Berg *et al.* 1993: 242-246). By contrast, Parks Canada has made little effort to improve relations with First Nation communities adjacent, or in close proximity, to already established national parks. The lack of KKTC involvement in Kootenay National Park is a prime example of the distinction made by Parks Canada between existing and established national parks.

Currently, KKTC is not involved in the management of Kootenay National Park. According to park officials, there is no formal relationship between Parks Canada and KKTC, and there are no agreements or understandings to consult or involve the Aboriginal community in the planning, operation, or management of the national park. Limited communication takes place between Parks Canada and KKTC and these exchanges generally concern special employment opportunities or specific projects such as the ecohistory study that is currently underway. According to Ken Fisher (1997), the Client Services Manager for Kootenay National Park, if KKTC was ever to have a role in the national park, this would have to be determined on a case-by-case basis and take place under terms and conditions established by Parks Canada.

7.2.4 Synopsis of Federal Interest in Kootenay National Park

The overarching interest of the federal government in managing Kootenay National Park is to protect the natural and cultural resources of park. Parks Canada appears to have determined that the preservation of natural habitats and cultural sites in long-established parks necessarily requires the exclusion of all extractive uses of natural resources from these parks, fishing being

the notable exception. Accordingly, in Kootenay National Park and all other national parks within KKTC's traditional territory, Parks Canada does not provide special consideration for subsistence Aboriginal practices. Indeed, priority is given to sport fishing and other visitor activities.

According to Dearden and Rollins (1993), Parks Canada's apparent determination that traditional subsistence activities are irreconcilable with the mandate of long-established national parks is supported by the conservation and preservationist movement. The authors stated that for many park advocates, the aspirations of Aboriginal peoples are seen as "antithetical" to the purpose of national parks (Dearden and Rollins 1993: 3-4).

Excluding extractive uses from the Kootenay National Park allows Parks Canada to establish natural benchmarks, or control sites, for research into the natural evolution of ecosystems. Perry Jacobson (1997), Senior Park Warden for Kootenay National Park, explained that the preservation of natural habitats enables researchers to study how human activities influence land and natural resources outside of national parks. However, the management plan indicates that only two areas within the park, Redstreak-Sinclair and Wardle-Verendrye, are essentially free from human activities and therefore suitable for research purposes.

Eagles (1993) stated that national parks not only serve as ecological benchmarks for science but also help preserve genetic diversity; conserve critical ecological processes; protect extraordinary natural features; provide repositories for yet undiscovered natural products contained in soils, fungi, plants, and animals; and serve as models for developing sustainable resource use strategies outside of protected areas. Because national parks provide many ecological benefits, Eagles (1993) argued that all aspects of a park have some intrinsic value. However, not all aspects of a park are valued equally by those who have an interest in them

(Eagles 1993: 160). People value what they consider to be important and this varies according to individual and collective preferences, as well as differences between individuals, socioeconomic groups, and urban and rural people (Stankey and Clark 1992). Nepstad and Nilsen (1993) suggested that values associated with forest landscapes are also applicable to protected areas such as national parks. These include commodity, amenity, environmental quality, ecological, spiritual, and public use.

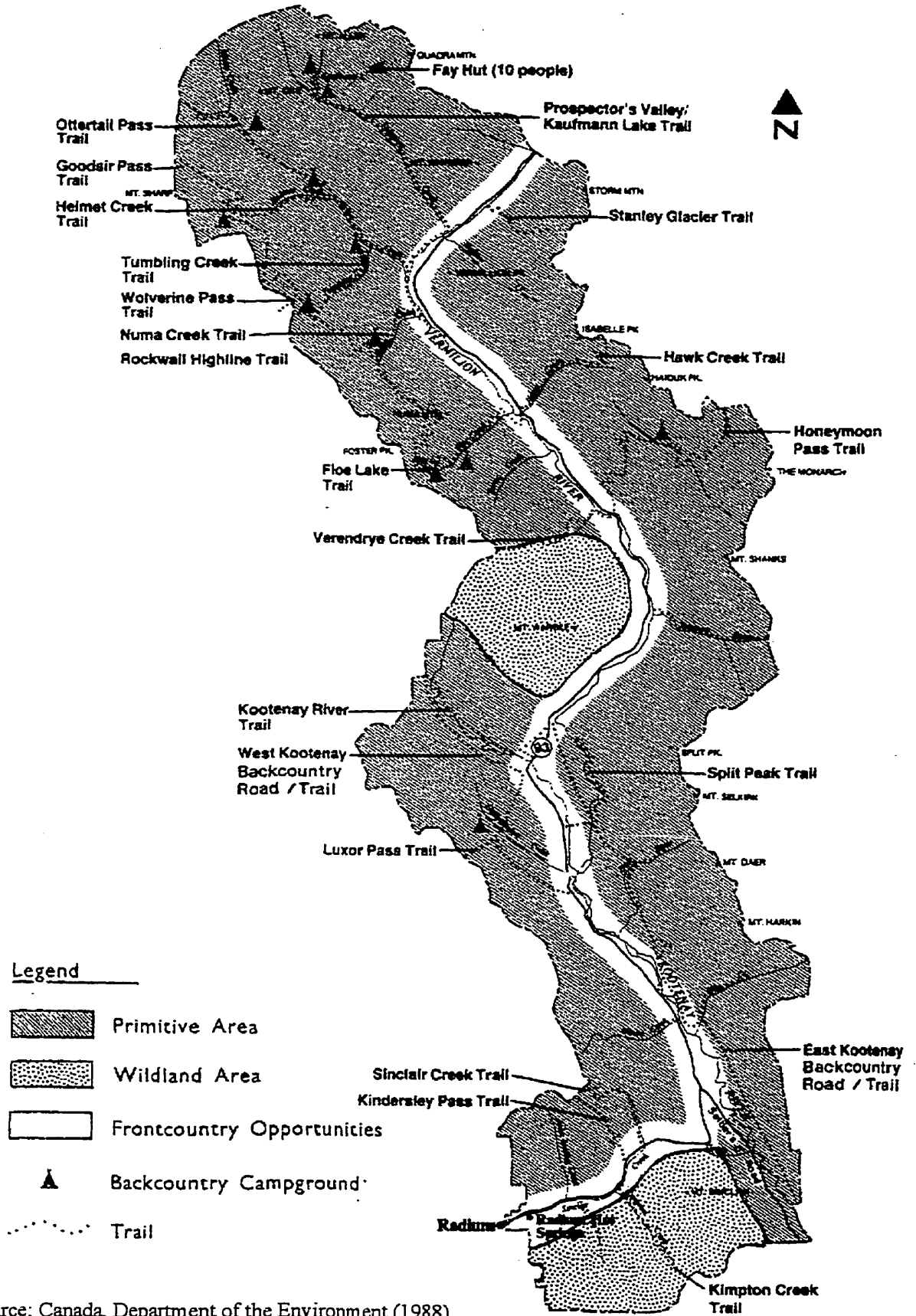
The 1994 update to the management plans of the four mountain parks suggested that only through the integration of human values and scientific knowledge can national parks be managed on a long term, environmentally sustainable basis (Canada, Department of Canadian Heritage 1994: 4). The integration of “sound principles of ecosystem science” with “social values and community needs” were claimed to be the foundation of a new and emerging approach to decision making in national parks (Canada, Department of Canadian Heritage 1994: 4).

Although Parks Canada acknowledges that the area contained within Kootenay National Park was historically used by Aboriginal people, it regards these traditional activities as elements of ancient history mainly associated with the movement of people to and from the prairies (Canada 1988: 13, 39, 113; Ken Fisher 1997). The federal government does not favor considering the pursuit of traditional activities in established parks because it believes that such activities may jeopardize the ecological integrity of the parks and undermine the very objective of national parks. Parks Canada is also concerned that modern harvesting techniques would lead to the unsustainable use of park resources because the harvesting effort, or the intensity of the traditional activities, would be greater than what it was historically and concentrated on smaller areas instead of distributed throughout the entire traditional territory (Perry Jacobson 1997). Moreover, Parks Canada believes that little additional knowledge of ecosystem evolution would

be gained by allowing traditional activities in long-established parks, since it would be practically impossible to replicate the historical conditions that prevailed when Aboriginal people did utilize the areas within national parks (Perry Jacobson 1997).

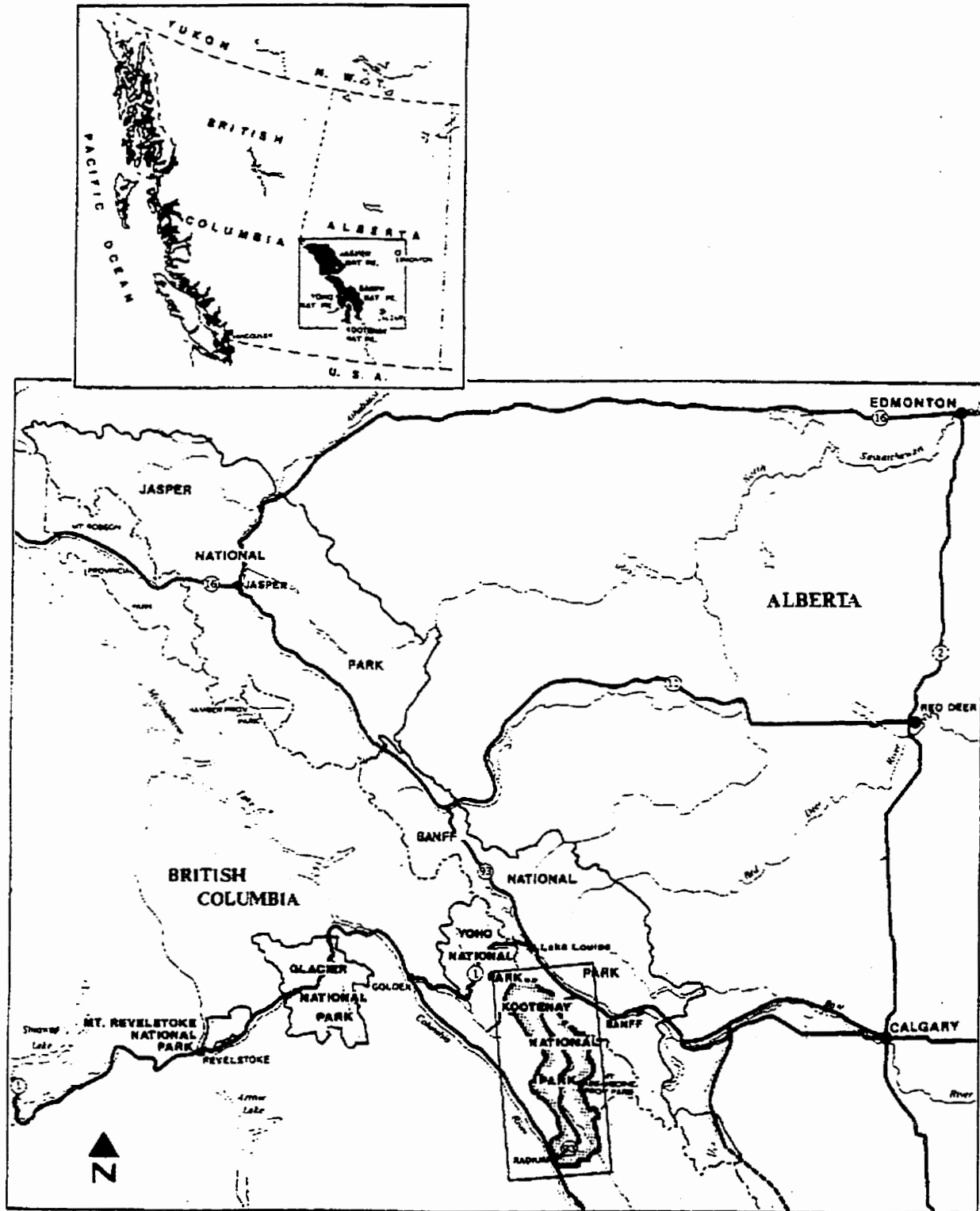
It can therefore be reasonably be argued that Parks Canada's foremost concern is that the interests of KKTC are not isolated to a single national park and that Aboriginal issues transcend the boundaries of national parks, provinces, and other traditional territories. This argument is supported by the fact that: (i) KKTC's traditional territory transcends provincial, and international boundaries; (ii) the Siksika Nation of Alberta is currently negotiating a timber claim to Castle Mountain which lies within Banff National Park (Banff-Bow Valley Study 1996: 13); and (iii) the Stoney Indian Band of Alberta has requested for several years the negotiation of a specific land claim to the area within the Rocky Mountain parks (Chief John Snow 1977). Allowing traditional activities in one long-established national park could be perceived as a precedent for other First Nations and other national parks, including those in Alberta. This would necessarily complicate the management of national parks and potentially require a fundamental restructuring of the current management regime in the Rocky Mountain parks. Considering governments' aversion to change, it is unlikely that the prospect of reevaluating the current management of long-established national parks will be viewed positively.

Figure 6: Kootenay National Park: Backcountry Opportunities and Facilities



Source: Canada, Department of the Environment (1988)

Figure 7: Kootenay National Park within Regional Context of the Rocky Mountain Park Block



Source: Canada, Department of the Environment (1988)

CHAPTER 8

IDENTIFICATION OF COMMON GROUND

8.1 ANALYSIS OF INTERESTS

Parks Canada and KKTC share similar conservation objectives but disagree as to the fundamental reasons for protecting national parks. Although they agree that land and natural resources need to be protected from industrial resource extraction, they disagree on the means of achieving this objective as well as the reasons for protecting national parks. Several factors contribute to the divergence in interests, the most notable being the limited scope of Parks Canada's mandate and the difference in assumptions underlying Parks Canada and KKTC's decision-making processes.

The interests of Parks Canada in land and resources is limited to the area of land contained within national parks by the scope of their legislative mandate. Although Parks Canada has recently embraced the principles of ecosystem management, which require them to take into account human activities outside the boundaries of national parks, they have limited ability to influence activities outside national parks. By contrast, the Ktunaxa people have expressed interest in land and resources throughout their entire traditional territory and feel that the designation of small pockets of land as protected areas is an insufficient and inadequate means of protecting natural resources. The Ktunaxa feel that an integrated resource management approach with a focus on protecting biodiversity would constitute a more appropriate means of protecting natural resources. Although the provincial government has endeavored through initiatives such as the Commission on Resources and Environment (CORE) process and the

Protected Areas Strategy (PAS) to develop an integrated land use plan for the Kootenay Region which protects biodiversity, KKTC did not fully participate in these land use initiatives for fear that these discussions would prejudice its eventual negotiation of a treaty (CORE 1994: 43-44).

Parks Canada and KKTC also share a common respect for the environment which translates into an attitude of humility towards nature. Both realize that many factors influence the dynamics of ecosystems and that several of these factors remain unidentified or poorly understood. An element of uncertainty always prevails in management decisions surrounding natural resources. However, the way in which this attitude of humility influences resource management decisions differs significantly between Parks Canada and KKTC because of the different assumptions underlying the decision-making processes of each party.

Parks Canada gives first priority to the protection of ecological integrity in its decision making, the premise being that adherence to this principle will protect the integrity of national parks for future generations. The underlying assumption for long-established national parks which informs the decision-making process is that these parks have essentially been free of human use and occupation in the past (Bella 1987: 152; IUCN 1980; McNeely 1993: 251). As such, the principle of ecological integrity has been used to rationalize suppressing natural and human-induced disturbances, as well as to justify the *status quo* because of the uncertainty associated with specific management decisions. Uncertainty surrounding the potential impacts of allowing traditional Aboriginal uses in long-established national parks necessitates a risk adverse approach to decision making. Management decisions have, in turn, contributed in themselves to modification of the ecosystems protected within the national parks. The *Banff-Bow Valley Study* (1996: 122-23) noted that the distribution, structure, and composition of forest communities have been substantially modified in the Bow Valley because of management

decisions, such as the prevention and suppression of fires. The study criticized Parks Canada's decision-making process noting the absence of a consistent process and predictable outcomes; the lack of a formal means to appeal decisions, except to the minister; political or ministerial interference in local decisions; and a lack of criteria and policy to guide superintendents in the use of their discretionary powers (Hildebrand 1995, quoted in *Banff-Bow Valley Study* 1996: 296-98).

The study strongly recommended that all future management decisions about human use be based on the precautionary principle (*Banff-Bow Valley Study* 1996: 426). As the name implies, the principle emphasizes that care and caution be exercised when changes to the natural environment are contemplated. The study listed a set of commonly accepted premises as the basis of the precautionary principle:

- nature is valuable in its own right;
- government must be willing to take action in advance of full, formal, scientific proof;
- people proposing a change are responsible for demonstrating that the change will not have a negative effect on the environment;
- today's actions are tomorrow's legacy; and
- all decisions have a cost. Exercising caution may mean some people must forgo opportunities for recreation or for profit (*Banff-Bow Valley Study* 1996: 426).

It is likely that the precautionary principle and its accepted premises will be adopted and applied to other national parks. It is also likely that the precautionary principle will guide future decisions surrounding the traditional use of natural resources by Aboriginal peoples within national parks.

For KKTC, the attitude of humility translates itself into a philosophy of living within the natural limits of the environment and only taking from the land what is required to sustain oneself and one's community (Chris Sanchez 1997; Leo Williams 1997). The elders commented

that in their view, the traditional use of land and resources had evolved over time to become part of the forces which influence ecosystems, and that their use was historically within acceptable limits because it had not detrimentally impacted the land and its resources (Pete McCoy 1997; Phyllis Nicholas 1997; Chief Sophie Pierre 1997). However, this use of natural resources was based on historical needs and traditions. The needs of the Ktunaxa people have changed since European contact (Ox Eugene 1997). For this reason, reconciliation necessarily requires that mutually acceptable limits be placed on the harvesting of all natural resources.

The underlying differences in assumptions behind the resource management decisions of Parks Canada and KKTC guide their respective determination of an appropriate human use of national parks and fuels the inherent tension between their interests in long-established national parks. These interests can be categorized in terms of the desires, needs, concerns, fears, and hopes of the parties to a dispute (Fisher and Ury 1991). The respective interests of Parks Canada and KKTC in long-established national parks are categorized and compared in table 4.

The interests of Parks Canada generally involve retaining their decision-making authority, maintaining the status quo, ensuring the continued support by Canadians for national parks, and providing equal treatment to all visitors. Conversely, the interests of the Ktunaxa/Kinbasket are based on restoring and reviving elements of the traditional lifestyle, reaffirming their role in the management of land and resources, ensuring the accurate depiction of their history and culture, and securing opportunities for economic development and capacity building.

Although the interests of Parks Canada and those of KKTC may first appear conflicting, recent amendments to the national parks policy (1994), which deal explicitly with the recognition of Aboriginal rights in newly created parks, reveal that the interests of Parks Canada and those of KKTC are not necessarily irreconcilable (Parks Canada 1994: 24-25). However, as

long as Parks Canada persists in believing that historically, national parks have essentially been free from human use and occupation, the respective interests of Parks Canada and KKTC will remain incompatible, and the emergence of common ground elusive. Tensions that exists between the interests of Parks Canada and those of KKTC reflect an outdated view of human beings as separate from nature. This view of nature influenced the development of the initial national parks policy in 1886 and continues to guide the management of long-established national parks in Canada.

Table 4. Comparison of Interest between Parks Canada and KKTC

Interests	Parks Canada	KKTC
<i>Desires</i>	<ul style="list-style-type: none"> • define and delineate Aboriginal rights • minimize any disruption to the existing management regime • ensure the ecological integrity of national parks • protect natural benchmarks for scientific research • facilitate visitor use 	<ul style="list-style-type: none"> • revive and continue to practice elements of traditional lifestyle including: <ul style="list-style-type: none"> • free access to and within national parks • travel freely to and within national parks • harvest traditional foods • collect traditionally significant resources • gather traditional plants and medicines • hunt, trap, and fish • teach, conduct, and demonstrate ceremonies of traditional and spiritual significance • seek cultural and spiritual inspiration • use shelter and facilities essential to the pursuit of these activities • reaffirm their role in the management of land and resources
<i>Needs</i>	<ul style="list-style-type: none"> • retain ultimate jurisdictional authority • ensure the integrity of the National Park System Plan 	<ul style="list-style-type: none"> • recognition of history and culture • respect for historical rights • respect for tradition and knowledge • ensure viability of culture • formal relationship with Parks Canada
<i>Concerns</i>	<ul style="list-style-type: none"> • traditional activities could jeopardize ecological integrity of national parks • traditional activities could undermine the foundation of national parks • unsustainable resource exploitation • public safety could be at risk 	<ul style="list-style-type: none"> • degradation of the environment • desecration of cultural resources • alienation of non-Aboriginal community
<i>Fears</i>	<ul style="list-style-type: none"> • erosion of national park values • reduction in size of Rocky Mountain Park Block • additional financial constraints • loss of public support 	<ul style="list-style-type: none"> • erosion of culture • continuation of the status quo
<i>Hopes</i>	<ul style="list-style-type: none"> • divert attention to areas outside of national park boundaries • increase visitor use • economic self-sufficiency 	<ul style="list-style-type: none"> • community self-reliance • economic diversification • improved relations with Parks Canada

8.2 FACTORS LIMITING THE EMERGENCE OF MUTUALLY ACCEPTABLE SOLUTIONS

8.2.1 Conflicting Views on Land

Parks have high levels of support in urban areas of Canada for both conservation and recreational reasons, but are very unpopular with many Aboriginal and non-Aboriginal residents of rural and remote parts of Canada who have seen their customary uses of particular areas eliminated or severely restricted by the creation of national parks (RCAP 1996, vol.2 pt.2: 522-23). Disputes over issues such as park creation and industrial forestry have revived century-old conflicts over customary rights and state management of natural resources (RCAP 1996, vol.2 pt.2: 523). RCAP described this conflict as an inherent tension between two very different conceptual views of 'public lands'. The Crown's definition of public lands provides a right to the state to set aside large areas of land in the public interest to which access is strictly controlled. This concept conflicts with an older view of public lands which can be used to provide communities and individuals with customary rights of access to the forests, with resource use being subject to community, not state control. Superimposed upon this debate is a clash of two fundamentally different visions of land itself. What Aboriginal people view as their traditional territory is treated by governments and society as Crown or public lands. The policy which prevailed in Canada for more than a century and shaped the present situation, supported confining Aboriginal people to reserves and assumed state control over the land base (RCAP 1996, vol.2 pt.2: 428).

8.2.2 Customary versus State Management of Natural Resource

Griggs (1990) pointed out that conventional approaches to resource management in Canada draw their inspiration from the work of Gordon (1954) which first translated the problem of managing the fishery or fish into a workable theory of economics. Gordon's work was based on the assumption that fishers act in self-interest, even if such behavior imposes costs on the wider community of resource users. This thinking was immortalized by Hardin (1968) in an article entitled *The Tragedy of the Commons*. Hardin's scenario described how common property resources are doomed to overexploitation unless the state assumes responsibility for their protection. This argument has provided the rationale for conventional resource management ever since (Griggs 1990: 1).

The conventional solution to Hardin's 'tragedy' has been for government agencies to assume the management of land and natural resources on behalf of the Crown. Government agencies developed legislation and regulations, made land and resource use policies, and issued guidelines. The same agencies who set forth the policies also controlled access to and use of land and resources, and monitored and enforced these policies. In making resource decisions, RCAP clearly illustrated that Crown agencies have consistently ranked Aboriginal interests at the very bottom of the allocation list (RCAP 1996, vol.2 pt.2: 464-526). In this respect, state management has meant that natural resources had to be protected from their former users.

In Canada, as in the developing world, a policy to protect resources against their former users dictates both how resource rights are allocated and how certain kinds of development are permitted (RCAP 1996, vol.2 pt.2: 522). For example, customary Aboriginal uses were consciously excluded by regulation and policy from parks and protected areas established on Crown lands. Banff and Yellowstone National Park served as models for designating and

managing parks and protected areas throughout the world, and remain a significant part of the corporate memory of land and resource management agencies in Canada, one that, until recently, has made it difficult to involve Aboriginal people in management decisions (RCAP 1996, vol.2 pt.2: 522). Consequently, parks have been extremely unpopular among Aboriginal and indigenous people throughout the world.

Under the state management system, authority has traditionally been centralized with decisions being taken by top executives and passed down to the field level for implementation. The environment has traditionally been reduced to conceptually discrete components such as forests, fish, wildlife, water and parks, all managed independently of each other. This has improved somewhat since governments committed themselves to the principles of sustainable development and integrated resource management, but the infrastructure of resource management agencies continues to reflect long standing government policies and practices, as well as the training of resource managers in distinct disciplines such as forestry, biology, and planning. Managers invariably bring to their jobs the systems of knowledge and understanding that prevail in those disciplines, and those systems have become part and parcel of the corporate memory and institutional interest of resource management agencies (RCAP 1996, vol.2 pt.2: 525). These disciplines share common objectives including a focus on the resource itself rather than the resource users. Although this focus has had many positive benefits, it has consistently overlooked already existing cooperative communal management systems (Griggs 1990: 10-20).

8.2.3 Lack of Cross-Cultural Awareness

Most Canadians, including resource managers, are generally unaware of the history of the Aboriginal presence in what is now Canada. As Canadians, we commonly assume that when

Europeans first arrived in North America they found a vast wilderness dotted with occasional Aboriginal settlements. For many, national parks represent wilderness areas 'untrammelled by humans'. This lack of historical awareness, combined with a general lack of understanding of the substantial cultural differences between Aboriginal and non-Aboriginal people, have created divisions within Canadian society.

8.2.4 Local Experience versus Scientific Knowledge

Another essential feature of modern management systems is the fundamental divide between managers and users. Managers, in effect, become the owners, or at least the custodians of resources on public lands, while those who use resources - hunters, fishers, recreational boaters, trappers, loggers - become their clients. As with parks, the guiding principle is that the best way for state managers to protect resources is to control or exclude users. This principle assumes that only managers have knowledge, which is scientifically based, and gives little weight to the experience and customs of people who harvest resources (RCAP 1996, vol.2 pt.2: 525-26).

8.2.5 Demand for Greater Public Involvement in Decision Making

Reconciling the interests of Parks Canada and KKTC will inevitably require structural changes to the current administration and jurisdiction of national parks. Such reforms face the task of not only challenging conventional wisdom, but also overcoming bureaucratic inertia and the potential resistance from those users who currently enjoy benefits from the present system (Griggs 1990: 27). However, as the Banff-Bow Valley Study (1996) revealed, many Canadians, including KKTC, want a larger role in the planning and management of national parks.

Canadians have expressed a desire for greater control over broad policy decisions, the zoning and

allocation of resources on Crown lands, and the management of land and resource at the local level (Banff-Bow Valley Study 1996).

Pressure from Aboriginal people has resulted in experiments in shared jurisdiction and shared management. Examples of collaborative or participatory decision making have been developed as part of land claims agreements in northern Canada. These agreements may provide valuable examples of innovative approaches to the management of national parks which reconcile the interests of Parks Canada and those of Aboriginal people. These agreements have essentially redefined the relationship between the Crown and Aboriginal governments by first respecting the rights of Aboriginal people, and secondly, by incorporating Aboriginal people in the management of land and natural resources.

CHAPTER 9

OPTIONS DEVELOPMENT: ALTERNATIVE MANAGEMENT REGIMES

9.1 INTRODUCTION TO COMANAGEMENT

The term comanagement has been loosely used to refer to a variety of institutional arrangements in which governments share management functions and responsibility with a wider community (Griggs 1990: 32). Sometimes referred to as joint management, joint stewardship, collaborative or shared decision making, comanagement is essentially a form of power sharing between governments and members of society. Although the relative balance of power and the details of the implementation structures can vary greatly depending on the particular circumstances, all comanagement arrangements involve the participation of community members in the decision-making process.

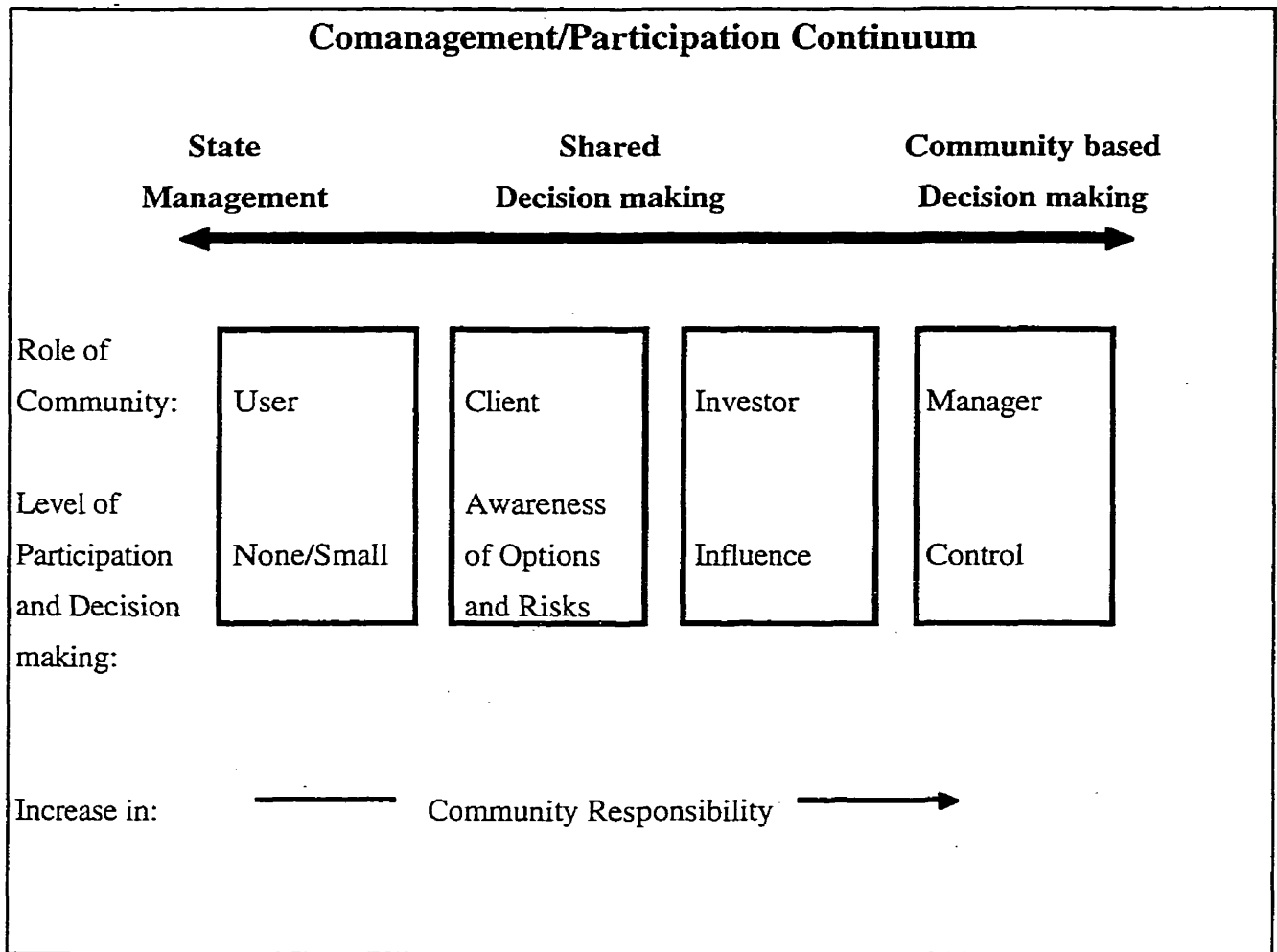
Comanagement can be viewed as a continuum of varying levels of community involvement in the decision-making process. At one end of the continuum, the state retains full jurisdiction and management authority over resource use and allocation (fig. 8). In this context, resource management and resource use are seen as separate functions. The current management regime in Kootenay National Park and other long-established national parks described in chapter seven within the traditional territory of KKTC typify this form of management regime. At the opposite end of the continuum, resource use and management are guided by customary laws and principles. The middle ground between these polarized management strategies is characterized by collaborative decision-making processes and more equitable arrangements between resource users and government. As governments devolve decision-making power and control over

resources to communities, the balance of power shifts from government to the resource users. In the field of resource and environmental management, shared decision making, or comanagement, essentially represents a compromise between a community's objective of self-determination and government's desire to retain control and management authority over land and resources.

According to Griggs (1990), comanagement initiatives are essentially attempts to: (i) encourage community independence and self reliance; (ii) provide support for more 'appropriate' management; and (iii) counter conflict among stakeholders by establishing systems in which all resource users accept greater responsibility for the management of resources. Such arrangements seek to redefine the relationships between all interested parties so that incentives to work cooperatively are promoted and conventional roles of managers and users as guardian and villain are modified.

In order to reconcile the divergent interests of Parks Canada and KKTC with respect to the use and management of long-established parks, it is important to identify options that could be considered during negotiations. Rather than examine all possible combinations of management strategies, the scope of the options identification is limited mainly to Canadian examples. The rationale for limiting the scope of the identification is based on the assumption that existing examples of comanagement strategies for national parks in Canada provide an indication of the minimum range of options that the federal government is willing to consider. Although creative solutions from other parts of the world may be of value, these arrangements may not accurately reflect the constraints, or fully incorporate the interests, of the Canadian government.

Figure 8. Visual representation of the comanagement/participation continuum



Adapted from: World Bank. 1995. *World Bank Participation Sourcebook*. Social Policy and Resettlement Division.

An important caveat to this assumption has been expressed by critics of the British Columbia treaty process who have argued that elements of northern agreements are inappropriate in British Columbia because resource management structures already exist in this province, and the population demographics of British Columbia are far different from those of northern Canada. Others indicated that comanagement systems do not replace existing resource management agencies, they simply create an additional layer of bureaucracy. Conversely, advocates of local management control have argued that most comanagement initiatives do little more than offer resource users token involvement in decision making (Kearney 1989: 85-102).

Regardless of such criticism, comanagement agreements appear to have reconciled the divergent interests of governments and Aboriginal people in northern Canada.

9.2 CANADIAN EXPERIENCE WITH COMANAGEMENT ARRANGEMENTS

There have been a number of attempts to institute comanagement regimes, particularly in response to Aboriginal peoples' objection to industrial resource extraction and their desire to retain a traditional lifestyle based on hunting, gathering, and fishing. In fact, comanagement of land and natural resources has been an integral component of all northern land claims agreements. Northern territorial arrangements specify the shared management responsibility of the government and First Nations with respect to fish, wildlife, and national parks, *if these parks were established concurrently with the land claim settlement*. Interestingly, prior to the settlement of land claims there were no national parks in Northern Canada because Aboriginal communities did not support the establishment of national parks. This illustrates the necessity of involving First Nations in the management of national parks in order to ensure community support for national parks.

There is a major difference between national parks in northern Canada and the long-established national parks in the traditional territory of KKTC. The northern parks were established as part of land claims negotiations whereas the latter were established at the turn of the century without the involvement of Aboriginal peoples.

9.2.1 Comanagement of National Parks in Northern Canada

National parks were established as part of the Champagne and Aishihik, the Vuntut Gwitchin, the Nunavut, and the Inuvialuit land claim settlements. In each case, a management

structure was created to advise or make recommendations on the planning, management, and development of the parks. Depending on the agreement itself, the duties of the management structure may have been strictly limited to the national park or they may have included broader responsibilities and powers for the allocation and management of wildlife throughout the claim area. Typically, an equal number of government and First Nation representatives were appointed to the management bodies, but ultimate decision-making authority remained with government.

The agreements not only ensured that First Nations obtained a role in the management of the national parks, they also recognized the continuing traditional harvesting rights of the First Nations and their proprietary interests in significant spiritual and cultural sites and resources. The agreements provided specific training, employment and economic opportunities for First Nations members in the operation of national parks (table 4).

Comanagement agreements have also been successful in British Columbia where crisis management led to their development. Hawkes (1995) documented one of the longest standing and best known resource use conflicts in Canada that was eventually resolved through the development of a comanagement agreement. Throughout the 1970s and 1980s, members of the Haida Nation and environmentalists joined forces to lobby for the permanent protection of the South Moresby area of the Queen Charlotte Islands, British Columbia. The dispute was finally resolved with the establishment of a national park reserve. The agreement between the Haida Nation and Canada includes similar provisions as the northern land claims agreements, but is unique as it contains parallel statements on sovereignty, title, and ownership of the archipelago. The agreement does specify, however, that the Haida Nation and Canada agree to work together

to protect and preserve the archipelago's natural environment and Haida culture for the benefit and education of future generations (Gwaii Haanas/South Moresby Agreement 1990: 1-11).

A similar agreement where an Aboriginal group retained, or in this case, reclaimed title to a section of a national park, took place in Australia as a result of the *Aboriginal (Northern Territory) Land Rights Act, 1976*. Under the terms of the act, the traditional Aboriginal owners were granted freehold title to a third of the land currently contained within Kakadu (Ayers Rock - Mount Olga) National Park. In turn, the Aboriginal owners agreed to lease the land back to the government to be managed as a national park (Cordell 1993:105-113). The lease agreement provided the Aboriginal people with: (i) an acknowledgment of their right to live on their land and to freely practice their culture; (ii) a majority representation on the park governing board; (iii) a share of the park's income from tourism, special employment, and economic opportunities; and (iv) rent for the use of the land as a national park (Cordell 1993:105-113; Wellings 1993: 1-7). This example is important because it illustrates a possible alternative outcome to a negotiated agreement, otherwise known as a BATNA (Best Alternative To a Negotiated Agreement).

Table 5: Comparison of National Park Provisions in Concluded Land Claim Settlements in Canada

C&A—Champagne and Aishihik First Nation
 CPS—Canadian Parks Service (Parks Canada)
 CYI—Council of Yukon Indians
 IIBA—Inuit Impact Benefit Analysis
 NWMB—Nunavut Wildlife Management Board

Summary of Issues and Provisions				
ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
Establishment	Establishment pursuant to <i>National Parks Act</i> , R.S.C. 1985, c. N-14.	Establishment pursuant to <i>National Parks Act</i> , R.S.C. 1985, c. N-14	Establishment pursuant to <i>National Parks Act</i> .	Establishment pursuant to <i>National Parks Act</i> .
Modification of Park Boundaries	Consent of C&A required for removal of lands from national park status.	Consent of Vuntut Gwitchin required for removal of lands from national park status.	Extensive public consultation must be conducted prior to removal of lands from national park status.	Consent of the Inuvialuit required for the removal of lands from national park status.
Ultimate Decision Making Authority	The federal minister.	The federal minister.	The federal minister.	The federal minister.
Planning & Management	In accordance with <i>National Parks Act</i> , R.S.C. 1985, c. N-14; subject to terms of chapter 10, schedule A.	In accordance with <i>National Parks Act</i> , R.S.C. 1985, c. N-14; subject to terms of chapter 10, schedule A. CPS must establish a visitor reception and information center.	Subject to the provisions of the IIBA. CPS must develop a management plan within 5 years.	Managed as a wilderness-oriented park (i.e. maintain to the greatest extent possible its undeveloped state). Any change in the character of the park requires consent of the Inuvialuit.
Management Structure	Park Management Board	Renewable Resource Council	a) Joint Inuit/government planning and management committee b) Nunavut Wildlife Management Board	Wildlife Management Advisory Council (North Slope)

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<i>Composition</i>	50/50 representation from federal government and First Nations.	50/50 representation from federal government and First Nations. Members must reside within the traditional territory of the Vuntut Gwitchin and be familiar with renewable resources within it.	50/50 representation from federal government and First Nations.	50/50 representation from federal government and First Nations.
<i>Role & Responsibility</i>	Recommends to the minister matters pertaining to the development and management of the park.	Recommends to the minister matters pertaining to the development and management of the park.	a) May advise the minister, the NWMB, or other agencies on all matters related to park management. Makes recommendations for the development of a park management plan. b) Approve plans for management and protection of wildlife habitats.	Advise the appropriate minister on park planning and management and recommend a management plan.
Active Management	CPS will offer C&A any fish or wildlife harvested for management purposes unless required for scientific purposes or as evidence in a court of law.	CPS will offer Vuntut Gwitchin any fish or wildlife harvested for management purposes unless required for scientific purposes or as evidence in a court of law.	Not specifically addressed.	Not specifically addressed.
Access	Yukon Indian persons have the right of access without consent from the government for all noncommercial purposes.	Yukon Indian persons have the right of access without consent from the government for all noncommercial purposes.	Routes and location of access to the park are subject to the IIBA.	Not specifically addressed.

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<p>Allowable Traditional Activities</p> <p><i>Harvesting</i></p> <ul style="list-style-type: none"> • Fish & Wildlife 	<p>C&A have the exclusive right to harvest for subsistence. This right includes the right to possess and transport the parts and products of harvest.</p>	<p>Vuntut Gwitchin have the exclusive right to harvest for subsistence. This right includes the right to possess and transport the parts and products of harvest.</p> <p>On request of the Vuntut Gwitchin to the minister, non Vuntut Gwitchin may be authorized to harvest.</p> <p>Sport fishing permitted, recognizing that the right to hunt for subsistence is a higher priority.</p>	<p>The Inuit have the unrestricted right of access for the purpose of harvesting on all lands, water, and marine areas.</p>	<p>Inuvialuit have the exclusive right to harvest game. This right includes the right to possess and transport legally harvested game and to sell the non edible products.</p> <p>Sport fishing is permitted.</p>
<ul style="list-style-type: none"> • Trees 	<p>C&A have the right to harvest for purposes incidental to the exercise of harvesting right.</p>	<p>Vuntut Gwitchin have the right to harvest for purposes incidental to the exercise of harvesting right.</p>	<p>Not specifically addressed.</p>	<p>Not specifically addressed.</p>
<ul style="list-style-type: none"> • Edible Plants 	<p>C&A have the right to harvest for subsistence. This right includes the right to possess and transport the parts and products of harvest.</p>	<p>Vuntut Gwitchin have the right to harvest for subsistence. This right includes the right to possess and transport the parts and products of harvest.</p>	<p>Not specifically addressed.</p>	<p>Not specifically addressed.</p>
<p><i>Ownership</i></p>	<p>No rights of ownership were ceded.</p>	<p>No rights of ownership were ceded.</p>	<p>Not specifically addressed.</p>	<p>Nothing in this section gives the Inuvialuit a proprietary interest in any wildlife.</p>

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<i>Limitations and Restrictions on Harvesting</i>	<p>All C&A harvesting rights are subject to recommendations from the board and legislation for the purposes of conservation, public health, or public safety.</p> <ul style="list-style-type: none"> • <i>Migratory Birds Convention Act, R.S.C. 1985, c.M-7</i> 	<p>All Vuntut Gwitchin harvesting rights are subject to recommendations from council and legislation for the purposes of conservation, public health, or public safety.</p> <ul style="list-style-type: none"> • <i>Migratory Birds Convention Act, R.S.C. 1985, c.M-7</i> • <i>1985 Porcupine Caribou Management Agreement</i> • <i>1987 Canada-USA Agreement on the Conservation of the Porcupine Caribou Herd</i> 	<p>The right of access is subject to the terms of the IIBA and the laws of general application.</p>	<p>The Inuvialuit harvesting right is subject to the laws of general application respecting public safety and conservation.</p> <ul style="list-style-type: none"> • <i>Migratory Birds Convention Act, R.S.C. 1985, c.M-7</i>
<i>Administration, Allocation, or Regulation of Harvesting</i>	<p>C&A may manage, administer, allocate, or regulate the exercise of the harvesting right. C&A may be required to maintain a registry of harvest.</p>	<p>Vuntut Gwitchin may manage, administer, allocate, or regulate the exercise of the right as well as harvesting by beneficiaries of adjacent settlements. Vuntut Gwitchin may be required to maintain a registry of harvest.</p>	<p>The NWMB has primary responsibility for wildlife harvesting. Part of its function is to establish and modify total allowable harvest levels, and adjust the basic needs level.</p>	<p>The Inuvialuit are responsible for the allocation of quotas among themselves, and are entitled to harvest the total allowable harvest.</p>

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<i>Fees & Permits/Licenses</i>	Upon consultation with the board, the minister may require that a permit/license system be implemented. No fee shall be assessed for the permit.	Upon consultation with the council, the minister may require that a permit/license system be implemented. No fee shall be assessed for the permit. Fees shall not be levied for non commercial uses or the exercise of harvesting right. Although proof of enrollment may be required.	Subject to bilateral agreements, the Inuit shall have the free and unrestricted right of access for the purpose of harvesting to all lands, water and marine areas. No fee, levy, rent, or like tax shall be assessed for occupation associated with the purpose of wildlife harvesting.	For the purpose of conservation, the minister may require the Inuvialuit to obtain permits, licences, or other authorization to harvest game. No fee shall be assessed for the permit.
<i>Harvesting Methods</i>	C&A have the right to employ both current and traditional harvesting methods and equipment.	Vuntut Gwitchin have the right to employ both current and traditional harvesting methods and equipment.	Subject to the terms of the IIBA.	The harvesting right includes the right to use present and traditional methods and to possess the appropriate equipment.
<i>Give, trade, barter, sell</i>	C&A have the right to give, trade, barter, and sell, for domestic purposes only, the products of the harvest among themselves and other Yukon Indian people. C&A have the right to give, trade, barter, and sell non edible products of harvest to any other person.	Vuntut Gwitchin have the right to give, trade, barter, and sell, for domestic purposes only, the products of the harvest among themselves and other Yukon Indian people. Vuntut Gwitchin have the right to give, trade, barter, and sell non edible products of harvest to any other person.	Inuk have the right to dispose freely of any wildlife lawfully harvested, subject to laws of general application.	The Inuvialuit may trade, barter, or sell, for subsistence use, game products with other Inuvialuit beneficiaries.
<i>Trapping</i>	C&A have the exclusive right to harvest furbearers for the purpose of selling pelts.	Vuntut Gwitchin have the exclusive right to harvest furbearers. Vuntut Gwitchin are responsible for allocation of trapping opportunities.	Furbearers may be harvested by an Inuk, a person with a valid general hunting license, or a person who as been approved by the hunters and trappers organization.	The Inuvialuit have the exclusive right to harvest furbearers throughout the Western Arctic.

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<i>Cabins, camps, caches, & trails</i>	C&A have the right to establish, expand, and maintain cabins, camps, caches, and trails necessary and solely used to exercise their harvesting right. The location of such cabins, caches, and trails must conform with the park management plan.	Vuntut Gwitchin have the right to retain and maintain cabins, camps, caches, and trails necessary and incidental to the exercise of their harvesting right. Expansion and establishment of cabins, camps, caches, and trails must conform with the park management plan.	Inuit may establish outpost camps in parks, except where the establishment of such camps is inconsistent with the requirements of the park management plan. Site location shall be determined in accordance with the terms of the IIBA.	The Inuvialuit have the right to use existing facilities associated with their game harvesting activities and to establish new facilities after consultation with the management authority. The location of new facilities shall be determined on the basis of the park management plan.
<p>Economic Opportunities</p> <p><i>Employment Parity</i></p>	Canada is required to establish a hiring policy whereby the ratio of Yukon Indian people employed in public service positions in the park reflects the ratio of Yukon Indian people to the total population within the traditional territory of the C&A (i.e., 40%).	<p>CPS is required to prepare an impact and benefit plan.</p> <p>50% of park employees will be of Vuntut Gwitchin descent. Hiring criteria will include knowledge of Vuntut Gwitchin language, culture, society, and traditions.</p>	<p>CPS is required to negotiate an IIBA prior to establishing a national park in the Nunavut Settlement Area.</p> <p>Preferential hiring and training of Inuit to be negotiated in the IIBA.</p>	<p>Opportunities should be provided to the Inuvialuit on a preferred basis.</p> <p>The predominant number of persons employed in the operation and management of the park should be Inuvialuit. CPS shall provide training to assist the Inuvialuit in qualifying for such employment.</p>
<p>Contracts</p> <ul style="list-style-type: none"> • Construction and Maintenance of: <ul style="list-style-type: none"> <i>Trails</i> <i>Roads</i> <i>Facilities</i> 	C&A have the right of first refusal. C&A have the right of first refusal.	<p>Vuntut Gwitchin have the right of first refusal.</p> <p>Vuntut Gwitchin have the right of first refusal.</p>	Opportunities in relation to all park services are to be negotiated during IIBA. Preferential treatment to qualified Inuit contractors or ensure that contractors give preferential treatment to Inuit.	Opportunities should be provided to the Inuvialuit on a preferred basis.

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<ul style="list-style-type: none"> Others 	C&A have the right of first refusal on: <ul style="list-style-type: none"> use of horses 	CPS will include, where appropriate, a criteria requiring knowledge of Vuntut Gwitchin culture & history, or Vuntut Gwitchin employees.		
<i>Tourism Ventures</i>	C&A have the exclusive opportunity to provide: <ul style="list-style-type: none"> Commercial horse riding operations Commercial motor assisted boat tours 	Vuntut Gwitchin have the exclusive opportunity to provide dog sled trips.	Subject to the terms negotiated in the IIBA.	Inuvialuit shall have the right of first refusal to provide organized wildlife viewing trips.
<i>Business Opportunities</i>	C&A have the right of first refusal to establish retail outlets within traditional territory of C&A. C&A have the right of first refusal to acquire new licences/permits in the first year of the establishment of a quota system for commercial river rafting opportunities on the Alsek River.	Vuntut Gwitchin have a preemptive option on all business opportunities.	Inuit have the right of first refusal to operate all business opportunities and ventures that are contracted out within the parks. Provisions of the IIBA will specify the seed capital for expert advice, tourism package and promotion.	Inuvialuit shall be invited to participate in the planning process for any development on the lands available for development and in economic opportunities arising out of such development.
<ul style="list-style-type: none"> Limited Entry 	25% of commercial river rafting opportunities on Alsek River will be available to C&A.	50% of businesses will be owned by Vuntut Gwitchin firms.	Subject to the terms negotiated in the IIBA.	

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
Heritage Resources	C&A shall own and manage heritage resources found on settlement lands, as well as moveable heritage resources found on its traditional territory if these are directly related to their history & culture. Priority in the allocation of government resources for the development and management of heritage resources shall be given to C&A heritage. Government shall provide documentation of heritage sites & moveable heritage resources.	Vuntut Gwitchin shall own and manage heritage resources found on settlement lands, as well as moveable heritage resources found on its traditional territory if these are directly related to their history & culture. Priority in the allocation of government resources for the development and management of heritage resources shall be given to Vuntut Gwitchin heritage. government shall provide documentation of heritage sites & moveable heritage resources.	Provisions for the protection and management of archeological sites, and sites of religious and cultural significance are to be negotiated in the IIBA.	Not specifically addressed.
Interpretive Display & Signs	Southern Tutchone language will be included.	Gwitchin language will be included.	Information disseminated or communicated to the public shall be equally prominent in one or more of Canada's official languages and in Inuktitut.	Not specifically addressed.
Names	C&A will be consulted prior to naming or renaming of places or features.	Vuntut Gwitchin will be consulted prior to naming or renaming of places or features.	Official names of places shall be reviewed by the Heritage Trust and may be changed to traditional Inuit place names.	Not specifically addressed.
Sale of Traditional Handicraft	During interpretive programs primarily related to C&A.	Not specifically addressed.	Not specifically addressed.	Not specifically addressed.

ISSUES	Champagne & Aishihik (Kluane National Park)	Vuntut Gwitchin (Vuntut National Park)	Nunavut (Auyuittuq, Ellesmere Island, North Baffin National Parks)	Inuvialuit (Ivavik National Park)
<i>Burial Sites</i>	No access by visitors without the express written consent of the C&A.	No access by visitors without the express written consent of the Vuntut Gwitchin.	Protection and management of significant sites is subject to the terms of the IIBA.	Not specifically addressed.
<i>Dispute Resolution Mechanism</i>	Dispute Resolution Board Canada and CYI jointly appoint three members.	Dispute Resolution Board Canada and CYI jointly appoint three members.	Arbitration process subject to the terms negotiated in the IIBA.	Arbitration Board Canada appoints five members, including the chair and vice chair, and Inuvialuit appoint three.

9.3 BENEFITS OF COMANAGEMENT AGREEMENTS IN THE CONTEXT OF NATIONAL PARKS

9.3.1 Benefits to First Nations

The benefits of comanagement agreements to First Nations in the context of national parks are fairly obvious. They enable First Nations to partly reaffirm their role in the management of land and resources within their traditional territory, while ensuring that their views and opinions are incorporated in the decision-making process. They protect a portion of a First Nation's traditional territory from industrial resource extraction through enforcement of the *National Parks Act*. Comanagement agreements also recognize the rights of Aboriginal people to pursue traditional harvesting and cultural activities within national park(s), and provide a measure of protection to the First Nation that these rights will not be eroded through the discretionary power of future governments. Usually, the agreements also include special economic and employment opportunities for members of the Aboriginal community. Moreover, these kinds of arrangements allow the Aboriginal communities to acquire management expertise, experience and authority at a comfortable pace (RCAP 1996 vol. 2, pt. 2: 679).

9.3.2 Benefits to the Federal Government

The benefits of comanagement to the federal government are much more subtle and may partly explain the government's reluctance to consider Aboriginal rights in long-established national parks. Increasing the involvement of First Nations in the management of national parks can create a powerful alliance between Parks Canada, First Nations, and the protected area movement to lobby against industrial resource extraction in or around national parks (Dearden and Rollins 1993: 6). First Nations can assist Parks Canada in conducting environmental

research and stewardship efforts, and enhance the visitor experience through cultural and natural history interpretation programs. In this era of budgetary cut backs and financial restraint, alliances such as these can be vital to the continued protection of national parks. Management efforts can also be enhanced if the decision-making process allows for local, highly specific knowledge to be incorporated into decisions. First Nations often develop a refined understanding of the environment and accumulate a great deal of knowledge of ecosystem processes and structure through their relationship with land and resources (Griggs 1990: 34-37). By capitalizing on the skills, knowledge, and creativity of Aboriginal people, Parks Canada can make more informed management decisions. Furthermore, involving First Nations in the decision-making process may reduce the potential for future challenges by First Nations to the authority of Parks Canada. By explicitly taking into account the views and aspirations of First Nations in the planning and management of the national parks, the relationship between Parks Canada and Aboriginal people shifts from “custodian vs. villain” to one of shared responsibility.

Parks Canada’s operational policy (1994) and the federal interest paper on treaty negotiation (1995) both distinguish between the future involvement of First Nations in existing and established national parks. Given this stated dichotomy, it appears that the benefits of comanagement arrangements to Parks Canada are insufficient to convince the federal government to consider such arrangements in long-established national parks. The obvious explanation for this dichotomy is that Parks Canada requires the support of local Aboriginal and non-Aboriginal peoples to establish new national parks; whereas old national parks do not require the approval of any particular group as they have already been established. This criterion, however, does not respect the fact that Aboriginal rights and title have yet to be explicitly defined and delineated in British Columbia and more specifically in the traditional territory of KKTC.

Irrespective of the status of a particular national park, the comanagement of national parks in Canada is still a relatively new initiative. Current arrangements have evolved either out of crisis management or through land claims negotiation. As a result, the agreements are of a legal nature, and for this reason, are inherently inflexible. As such, little effort has been taken to objectively evaluate and learn from these experiences. RCAP (1996), however, has evaluated other comanagement agreements in Canada and has provided some insights into how comanagement regimes can be improved upon.

9.4 EVALUATION OF COMANAGEMENT ARRANGEMENTS

In its evaluation of comanagement arrangements in Canada, RCAP (1996) recommended that these arrangements could be improved in a number of ways. These include: incorporating cross-cultural sensitivity and flexibility in the operations of comanagement structures; ensuring appropriate representation of community groups in the decision-making process; separating technical advice from decision making to ensure objectivity; and developing a management environment which is receptive to traditional ecological knowledge.

9.4.1 Operations

RCAP (1996) suggested that the way in which boards or committees operate can be as important as their actual powers. The language used during meetings, the role of traditional knowledge, the location of meetings, provisions for training and employment, access to independent expertise, and adequate funding, were all identified as important factors affecting management structures. RCAP (1996) also cautioned that operating mandates and techniques need to remain flexible and adaptable: "there is a danger that operating mandates and techniques

can become so fixed in stone that they tend to obstruct rather than assist in implementing the spirit of the agreements” (RCAP 1996 vol.2, pt.2: 675).

Communication is also identified as an important function of comanagement. Effective communication is crucial because traditions of decision making and implementation can vary substantially between government agencies, non-Aboriginal board members, and Aboriginal communities (RCAP 1996 vol.2, pt.2: 675). RCAP (1996) observed that many comanagement boards have tended to operate more in the style of government than of traditional Aboriginal communities. For example, most boards make decisions on a majority vote basis rather than by consensus.

9.4.2 Representation

Because most comprehensive land claims settlements have been in the far north where there are few other interested parties, the boards have usually consisted of an equal number of Aboriginal representatives and civil servants. In more populated regions similar agreements may be inappropriate. Increasingly Canadians demanding a greater role in public decision-making processes, particularly with respect to conservation and environmental protection. Although the role of the public on management boards will be a subject for negotiation between Aboriginal and non-Aboriginal governments, careful consideration must be given to the way in which stakeholders are identified and represented in the management system (RCAP 1996 vol.2, pt.2: 676).

9.4.3 Technical Advice

In the opinion of RCAP (1996), management boards supplement existing resource management structures, but do not replace them. Most boards do not have the resources nor the

capacity to obtain independent technical advice, and must rely on the expertise of resource management agencies. This has led some Aboriginal board members to question the objectivity of the information they rely upon to make decisions (RCAP 1996 vol.2, pt.2: 676-77). As a possible solution, RCAP (1996) proposed increasing the capacity of existing secretariats at the community, regional, and tribal level; and establishing joint resource centers to act as central and independent sources of technical information on conservation and management issues. RCAP (1996) also identified the need to train Aboriginal people in relevant disciplines.

9.4.4 Recognizing and Incorporating Traditional Knowledge

Aboriginal self-management systems are based on what is often referred to as traditional ecological knowledge. According to RCAP (1996), the success of comanagement systems in accounting for and incorporating traditional knowledge varies widely. Key terms in biology and resource management do not always have direct translations in Aboriginal languages. The way in which Aboriginal harvesters define scarcity and abundance may differ substantially from the way resource managers define concepts such as surplus and sustainable yield (RCAP 1996 vol.2, pt.2: 678). For this reason, the commission argued that the language of resource management is far from unambiguous, especially from a cross cultural perspective. Cross cultural education is therefore crucial to the success of comanagement.

9.5 CRITERIA FOR INCREASING THE SUCCESS OF COMANAGEMENT ARRANGEMENTS

There is no agreed upon recipe to ensure the success of comanagement systems. Griggs (1990) suggested that it may be the variability of comanagement arrangements that ensure their success. Each arrangement can be carefully sculpted to the individual context and tailored to the

needs, aspirations, and concerns of local communities and resource management agencies. Only in this way can comanagement be made 'appropriate' to local circumstances. Nevertheless, the theory of comanagement does suggest certain criteria or principles to follow in order to increase the likelihood of success. The following criteria are adapted from the work of Griggs (1990) and Hawkes (1995), who have developed criteria based on the work of Pinkerton (1989), Ostrom (1990), Berkes (1994), East (1995), Reed (1990) and Witty (1993).

1. Mutually Acceptable Objectives

The comanagers of the national parks must agree upon clearly defined objectives for a management regime. A common vision is essential to minimize conflicting interests, optimize the objectivity of appointees, and ensure the independence of the management structure.

2. Conservation and Ecological Integrity

A management system must be able to protect the resource base. All forms of degradation must be prevented and priority given to the protection of ecosystem integrity, recognizing that resource use has shaped the ecosystem.

3. Information Management

The management system must encourage all users and comanagers to share information and increase the pool of available knowledge. Additional research requirements may be identified, and the terms and conditions of future research should be determined jointly. A mechanism may be required to merge the research priorities of users, government agencies, and research institutions.

4. Community of Users

Comanagers of the resource and the community of users must be clearly defined, otherwise equity of access will be problematic. In addition, the rights of resource users must be clearly identified. This is especially important for the comanagement of national parks since access by outsiders to the land base is encouraged, and allowable uses are defined according to historical uses and occupation of the land base within the parks. Spatial boundaries should also be clearly delineated and ideally correspond to readily identifiable biophysical features such as watersheds.

5. Reciprocal Obligations

A system should clearly specify the responsibilities and obligations of comanagers and resource users alike and avoid relying on altruism. A formal agreement should be developed by the group and agreed to by all members. Such a formal agreement is essential for establishing an environment of trust and common understanding among a group, and for ensuring that the commitment to comanagement is maintained (Griggs 1990: 38). Agreements should include the terms of financial commitments and specify sources of funding.

6. Allocation

A management system should adopt a clear mechanism for determining the size and spatial distribution of all resource allocations, and clearly identify the beneficiaries of resources. It is not necessary that resources be distributed equally among resource users, but the allocation must be perceived to be fair. The extent of rights and their transferability must also be clearly addressed. Specific details as to what constitutes an agreement--unanimity, majority, consensus--should be made explicit. It should also be made clear as to where ultimate control resides, either with resource users, at the level of an elected board or committee, or with some superior management body such as a government agency (Griggs 1990: 38)

7. Monitoring and Enforcement

A mutually acceptable method for monitoring and enforcement should be established.

Agreements should include details as to how compliance will be maintained, how departures from the rules will be corrected, and what sanctions will be imposed. Evidence suggests that compliance is most enduring and successful when participants are involved in monitoring (Ostrom 1990). The management system should not, however, rely on altruism, nor portray users as potential villains. Instead, it should recast resource users in the roles of comanagers with equally valid stakes in resources (Griggs 1990: 38)

8. Dispute Resolution Mechanism

There should be an established process for resolving disputes and a clear alternative mechanism for achieving decisions in the interim. Mediation and arbitration are both appropriate dispute resolution mechanisms, but reliance on arbitration and the courts should be minimized.

9. Community Development

Comanagement of national parks can lead to direct and indirect economic benefits. These benefits are important for the economic diversification of Aboriginal communities which can minimize the communities' economic reliance on natural resources within national parks. Local community benefits should include direct hiring and training of staff for operations and management. To assist the employment of local community members, the employment screening and selection process should be reoriented, where necessary, to eliminate cultural barriers. Indirect benefits, such as preferential access to contract employment, should also be encouraged (Hawkes 1995: 57).

10. Progressive Learning

The management system should explore creative options to improve management. Informed debate over options should be seen as a part of the process of mutual learning. This becomes especially important in a cross-cultural setting where worldviews may be unfamiliar or

poorly understood. The management system should facilitate the education of all participants through the dissemination of information and ideas (Griggs 1990: 39).

11. Adaptability

A management system should not be so rigid that it cannot respond to changing needs and circumstances. This is especially challenging for treaty negotiations where the outcome of negotiation is a static document which enshrines the rights, benefits, and obligations of the signatories.

CHAPTER 10

CONCLUSION

10.1 INTRODUCTION

The intent of this paper was to identify and describe selected issues, interests, and options in the future management of national parks within the traditional territory of KKTC. The intent was not to suggest or predetermine the eventual outcome of the negotiation of issues related to national parks between KKTC and the federal and provincial governments. This approach to the research was taken specifically to avoid prejudicing the eventual resolution of treaty negotiations with KKTC.

This paper documents the history of the conflict between Parks Canada and KKTC with respect to the management of Kootenay National Parks. To do so it reviews: the legal and institutional contexts of the conflict, the positions and the underlying interests of Parks Canada and KKTC with respect to the management of Kootenay National Park, the current relationship between Parks Canada and KKTC, and potential avenues for reconciling the divergent viewpoints of KKTC and Parks Canada with respect to national parks. The issues surrounding Aboriginal rights in long-established national parks are value laden and therefore complex. For this reason they will not be easily resolved.

10.2 HISTORICAL CONTEXT

Past government practices have shaped the relationship between Parks Canada and KKTC. Practices which, according to Parks Canada, reflected the beliefs and priorities of

Canadians, led to the exclusion of traditional Aboriginal activities from national parks in the Canadian rockies in the late 1800s.

Since the establishment of the first national parks, Parks Canada has adapted its management practices to reflect changes in public perception of the role and purpose of national parks (Canada, Department of Canadian Heritage 1994: 2). Policy amendments have generally been applied broad scale throughout the national park system. However, recent amendments which provide for the respect and exercise of existing Aboriginal or treaty rights in national parks appear to only apply to new national parks and not to long-established national parks. This discrepancy in Parks Canada's policy also manifests itself in the federal interests paper on treaty negotiation in British Columbia, and is a result of the continued influence of historical perceptions of national parks as wilderness preserves free from human use and occupation on Parks Canada's current management regime.

10.2.1 Exclusion of Human Activities in National Parks

The foundation of the protected area movement in Canada and elsewhere in the world is based on the belief that national parks are wilderness areas untouched or essentially free from human activities (Bella 1987: 152; McNeely 1993: 251). This view of national parks prevailed when national parks were first established in the Canadian rockies, and today, continues to inform the relationship between Parks Canada and KKTC. Not surprisingly, treaty negotiations are perceived by supporters of national parks and protected areas as a potential threat to the integrity of national parks. The national park and protected area movement is concerned that treaty negotiations could be settled by transferring land currently within national parks, or by allowing traditional subsistence activities within long-established national parks (Bella 1987:

152). Yet the view that national parks as essentially untouched wilderness areas is based on a lack of awareness of the historical relationship between Aboriginal peoples and their habitat, and the role that people play in maintaining biodiversity in forest ecosystems (McNeely 1993: 251).

10.3 HUMAN INFLUENCE ON NATIONAL PARK ECOSYSTEMS

Recent research, such as the ecohistory project in Kootenay National Park, found that terrestrial habitats have been substantially altered by people, and that past human activity took place in what are now considered to be national parks. Forest composition and structure have been greatly influenced by past human settlements, the collection of forest products, the selection of plant and animal species of particular interest to people, and activities specifically designed to enhance wildlife populations. So-called pristine forests are, in fact, forests that have undergone significant modification. Virtually all of our planet's forests and grasslands have been affected by the cultural patterns of human use (McNeely 1993: 251). The result is an ever-changing landscape of managed and unmanaged patches of habitat whose diversity is reflected in their size, shape, and arrangement (McNeely 1993: 252).

When society decides that a particular ecological snapshot is worthy of special protection, it should consider the needs, desires, and aspirations of the people who helped mold that landscape and who will need to adapt to changes in their use of the land. In recent years, Parks Canada has taken steps to involve Aboriginal peoples in the planning and management of new national parks but remains reluctant to involve Aboriginal peoples, including KKTC, in the management of long-established national parks. The result is a patchwork of management regimes dependent on the era in which the individual national parks were established. For KKTC, the result is a poor integration of their communities in the conservation efforts of

national parks, an outcome which has helped shape KKTC's view that national parks are sanctuaries for wealthy tourists to visit.

10.4 LEGAL PRINCIPLES

The Supreme Court of Canada has clearly indicated that the purpose of section 35(1) of the *Constitution Act* (1982), is to reconcile the fact that Aboriginal people lived on the land in organized societies prior to the Crown's assertion of sovereignty. While the Constitution is silent on the nature, scope, and extent of Aboriginal rights, the Court stressed that the substantive rights of Aboriginal people must be defined in light of the purpose of section 35(1) of the *Constitution Act* (1982). The Court indicated that Aboriginal rights stem from the historical use and occupation of land by Aboriginal peoples, and that Aboriginal rights are particular to a specific Aboriginal group. For this reason, such rights are to be determined on a case-by-case basis. To be considered an Aboriginal right, an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right. The activity need not, however, be associated with a continuous historical occupation of a specific tract of land by an Aboriginal group.

Prior to the recognition and protection of Aboriginal rights and title in the *Constitution Act* (1982), the Crown had the ability to unilaterally extinguish Aboriginal rights. In order to have done so, the Crown must have demonstrated that it had a "clear and plain" intention to extinguish the Aboriginal right. Failure by the Crown to recognize an Aboriginal right within a legislative scheme, and the failure to grant it special protection, do not constitute the "clear and plain" intent necessary to extinguish an Aboriginal right. The inability of an Aboriginal group to practice a particular activity because of government regulation does not eliminate or extinguish

the existence of that right. The Crown does have the ability to restrict the exercise of an Aboriginal right but the justification to do so must be based on compelling and substantial objectives such as the conservation of natural resources, the pursuit of economic and regional fairness, and the recognition of the historical dependence of non-Aboriginal people on a resource.

Although general principles can be drawn from case law, there is no definitive legal answer to the nature, scope, and extent of the Aboriginal rights of the Ktunaxa people in Kootenay National Park, or other long-established national parks. Nevertheless, it can be argued that it is doubtful that the *Dominion Forest Reserves and Parks Act* (1911) necessarily extinguished the rights of the Ktunaxa people to pursue practices, traditions, and customs integral to their distinctive culture within national parks inside their traditional territory. Furthermore, given the Court's decision in *Sioui* (1990), and recent amendments to the *National Parks Act* (1988) and *Parks Canada Operational Guidelines and Policies* (1994), it can be argued that Aboriginal rights are not necessarily incompatible with the purpose and objectives of national parks.

10.5 POTENTIAL AVENUES FOR RECONCILIATION

Park related conflicts, both here in Canada and elsewhere in the world, have often been resolved through the creation of partnerships between local communities and protected area management agencies. The agreements generally involve attempts to provide local communities with benefits from a park, to include local people in the decision making and management of a park, to inform local people about the conservation values of a park and improve the cross-cultural awareness of park managers, and lastly efforts to jointly identify information and research needs. These partnerships demonstrate that the interests of Aboriginal peoples can

often be reconciled with the interests of protected area management agencies. However, for these partnerships to achieve a certain degree of success, park managers need to reevaluate their perception of national parks and the assumptions underlying their management regime.

RCAP (1996) recommended that First Nations in the treaty negotiation process refrain from selecting existing parks and protected areas as Category I lands, otherwise referred to as settlement lands, unless the interests of the First Nation in a specific parcel clearly outweigh the interests of the Crown. Settlement lands are generally regarded as areas where First Nations have full rights of ownership and primary jurisdiction over land use. Examples where an exception would be justified include instances in which reserve lands were unlawfully or fraudulently surrendered in the past, where all or part of a park or protected area is of outstanding traditional significance to an Aboriginal group, or where a park occupies a substantial portion of a First Nation's traditional territory. Rather than selecting existing parks as settlement lands, RCAP (1996) recommended that existing parks and protected areas be considered for selection by First Nations as Category II lands, where the Crown and the First Nation would share the rights of governance and jurisdiction, and an agreement would recognize the respective rights of both parties (RCAP 1996 vol. 2, pt. 2: 586-87).

Although RCAP's (1996) recommendations provide useful direction for land selection in treaty negotiations, they provide little guidance on how to reconcile the interest of Aboriginal people to utilize national parks for traditional purposes, including resource harvesting. Reconciliation of such interests with the current management regime in long-established national parks is not a trivial matter, and can only be achieved through negotiation and a candid discussion of the party's needs, desires, concerns, fears, and hopes. Some issues such as wildlife hunting are highly contentious and may not be supported by national park advocates or the

public in general. However, other traditional activities integral to the distinctive culture of the Ktunaxa people may be much less controversial and supported by the public.

The issue that arises is one of scale. The Ktunaxa people historically pursued resource harvesting activities throughout their traditional territory, distributing the impact of resource harvesting activities over a large area. Many of the natural resources once used by the Ktunaxa have been detrimentally impacted by industrial development. The Ktunaxa may, as a result, view Kootenay National Park as a repository of natural resources, but the rate of use must be managed to ensure the sustainability and protection of the resources in the park. It must be recognized, however, that the efficiency of modern harvesting techniques is far different from those of the past. For this reason, sustainability and resource protection may be best achieved through adaptive management by monitoring land uses and evaluating their impacts. Flexibility must therefore be built into management decisions. Consequently, interim measures, which can be developed to be more flexible than treaties, may serve as useful building blocks towards an eventual treaty with KKTC.

The federal and provincial governments must demonstrate leadership and initiative in negotiating treaties with Aboriginal groups, but they must also recognize and respond to the larger interests of Canadian society in the treaty negotiation process and in the management of natural resource in general. The treaty negotiation process provides Aboriginal peoples a forum to negotiate their future involvement in the management of natural resources. Public support is critical to the success of the negotiated arrangements. Since national parks are highly valued by Canadians, it is essential that treaty arrangements be developed in consultation with public advisory groups, and that bridges be developed between the arrangements negotiated with KKTC and the public's desire for greater involvement in the management of national parks.

CHAPTER 11

RECOMMENDATIONS

The British Columbia treaty process is the mechanism by which Canada, British Columbia, and First Nations are attempting to reconcile long outstanding issues surrounding Aboriginal rights and title. One key objective of the federal government is to develop a new relationship with First Nations based on mutual respect and understanding. Instead of arguing over the legitimacy of the Aboriginal rights of the Ktunaxa people in existing or long-established national parks, Parks Canada and KKTC should initiate a dialogue to explore their respective interests in national parks and seek a mutually acceptable solution that would reconcile their interests.

This would require that Parks Canada reexamine the underlying assumptions behind its current management of existing national parks to determine which Aboriginal activities, if any, are acceptable uses of the parks and under what conditions. To achieve this, Parks Canada will invariably need to enhance its cultural awareness of the Ktunaxa people. Parks Canada should focus on identifying ways of accommodating the aspirations of KKTC while still achieving its objective of protecting the ecological integrity of national parks.

Similarly, KKTC needs to evaluate its interests in national parks within its larger interests in land and resources within its entire traditional territory. Given the national and international significance of national parks in the Rocky Mountains, as well as the stated interest of the federal government in existing national parks, it is unlikely that the federal government will be receptive to transferring national parks as settlement lands to KKTC. Nevertheless, the KKTC may be able to play a role of increased importance in the management of national parks.

National parks could serve as a repository of natural resources not readily available outside of park boundaries but traditionally important to KKTC. As such, national parks could play a role in reaffirming the cultural identity of KKTC and assisting in the intergeneration transmission of skills and values. If KKTC determines that sustainable harvesting of natural resources within national parks is an interest important enough to be pursued during treaty negotiations, efforts should be undertaken to identify potential limitations to the exercise of traditional activities which would reassure Parks Canada.

What needs to be clearly understood is that the involvement of KKTC in the management of existing national parks does not spell the demise of the national park system, nor is it a panacea for resolving the pressing economic and social needs of the Ktunaxa people. National parks are but one of many issues that need to be addressed during forthcoming treaty negotiations.

Efforts to reconcile the interests of KKTC and Parks Canada could be assisted by further research. This would include research into: the historical pattern use by the Ktunaxa of specific sites within Kootenay National Park; the significance of this use to the Ktunaxa culture; the influence of past human activities on the ecology of Kootenay National Park; the attitudes and perspectives of Canadians towards the sustainable Aboriginal use of park resources; and the corporate culture of Parks Canada that leads the agency to distinguish between Aboriginal activities in existing versus established national parks.

APPENDIX A
KKTC Representatives--Interview

Introduction:

1. Which band are you a member of?

Assessment of Past Relationship :

2. Are you aware of any understandings/agreements which involve Ktunaxa/Kinbasket people and Kootenay National Park?

Probe: What are they?

Are they written?

" " verbal?

Note: If NO to Question 2, go to question 7

3. Have any of these understanding/agreements had a **positive impact** on yourself, your band, or Tribal Council?

Probe: In which way?

4. Have any of these understanding/agreements had a **negative impact** on yourself, your band, or Tribal Council?

Probe: In which way?

5. Are there any understandings/agreements with the national parks which you would like to see modified?

If so, please DESCRIBE?

6. a) Are there any understandings/agreements with the national park which you think should be completed? (i.e. Do you feel that there are agreements which might improve relations between your band and the Parks?)

b) Any which you would not like to see completed?

Assessment of Potential Conflict:

7. Has the national park had any positive impacts on you, your band, or your Tribal Council?

Probe: How?

fi Has it provided job opportunities?

fi Has it protected your lands (surrounding lands)?

fi Has it protected harvesting rights?

8. Has the national park had any **negative** impacts on you, your band, or your Tribal Council?

Probe: How?

fi Has it prevented you from earning a living?

fi Has it interfered with subsistence activities (hunting, fishing, trapping, gathering)?

fi Have park visitors damaged any cultural resources?

9. **Overall**, has the national park had a **positive** or **negative** impact on yourself, your band, or Tribal Council? Has this always been the case?

fi If **POSITIVE**, how might it be made even **more positive**?

fi If **NEGATIVE**, are there any actions which might be taken to **improve the relationship** between the national park and your band?

Identification of Land Values

10. I've recently been reading about aboriginal peoples perspective on land, can you help me understand how the Ktunaxa/Kinbasket people value or perceive land and natural resources?
11. Given what you've told me, what do you think of the idea of setting aside areas of land as national parks or protected areas in order to preserve and protect natural resources?

Interests Identification:

12. Do you think that you share common interests with the park management?
Probe: What are they?
13. Are there any activities that you wish you could practise or participate in within the boundaries of Kootenay National Park?
Probe: What are they?
14. The courts talk alot about activities integral to First Nation culture, do the activities you mentionned fall within this categorization?
15. Do you believe that these activities could threaten the ecological integrity (value) of the park?
Probe: Why?

Building a New Relationship:

16. Overall, how would you **describe** your band's **relationship** with the national park (and/or its managers)?
17. a) Are you aware of any efforts that have been taken to improve relations with the national park, or its managers?
b) Were they successful?
18. Do you think the relationship between your band and the park is similar to the relationship other bands have with the park?
19. Are there any additional comments you wish to make regarding the relationship between your band and the national park(s)?

20. Do you have any other comments?

Anonymous or Qualitative Descriptors of Individual

21. Political orientation (circle)
traditionalist or progressive?

22. Socio-economic:
Age? Gender?

THANK YOU FOR YOUR COOPERATION

APPENDIX B
Park Official--Interview

Introduction:

1. a) How long have you worked at Kootenay National Park?

b) Have you worked in other parks where you had dealings with Aboriginal people (Indians)?
Probe: If YES, how would you characterized these dealings?

Assessment of Past Relationship :

2. Have you been part of any discussions related to understandings or agreements which involve the Ktunaxa/Kinbasket people and the national park(s), specifically Kootenay National Park ? (i.e. formalized consultation process)
Probe: If YES, what are they?
 Are they written?
 Are they verbal?
3. Are you aware of any other understandings/agreements which involve the Ktunaxa/Kinbasket people the national park(s), and again Kootenay National Park specifically? (i.e. cooperation and communication)
Probe: If YES, what are they?
 Are they written?
 Are they verbal?

Note: If NO to questions 2 and 3, go to question 7

4. Have any of these understandings/agreements had a positive impact on the national park?
If so, WHY?
5. Have any of these understandings/agreements had a negative impact on the national park?
If so, WHY?
6. Are there any understandings/agreements involving the Ktunaxa/Kinbasket people and the park which you would like to see modified?
If so, please **DESCRIBE**.

Building New Relationships:

7. a) Are there any understanding/agreements involving Aboriginal people and/or their reserve lands and the park which you think **should be contemplated or completed?** (i.e. do you feel that there are agreements which might improve relations or make resource management easier?)

b) Any understanding/agreements which **should not** be contemplated or completed?
8. a) Are you aware of any efforts which have been taken to **improve** relations with the Ktunaxa/Kinbasket people in the past? What are they?

- b) Were they **successful**?
9. Are you aware of any other strategies for improving relations with the Aboriginal people which have not been used but could be helpful? If so, what are they?

Assessment of any Conflict:

10. a) Have there been any cases where the actions of the Ktunaxa/Kinbasket people living on reserves located in the vicinity or adjacent to the park have had a positive effect upon the park?
- b) a negative effect?
11. Overall, do you think that the national park has had a **positive** or **negative** impact upon the **Aboriginal people** living within the area (i.e. on reserves)?
12. a) Do you feel the **present relationship** between the national park and the Ktunaxa/Kinbasket people is **positive** or **negative**? Has this always been the case?
- b) if **POSITIVE**, how could it be made even better?
- c) if **NEGATIVE**, how might this situation be improved?
13. Are there any additional comments you wish to make regarding the relationship between Aboriginal people and/or their reserve lands and the national park?

Identification of Land Values

14. You know Kootenay National Park much better than I do, can you explain to me the value of the national park?
15. Do you think you share any common interests with the KKTC with respect to Kootenay National Park?

Opportunities within Kootenay National Park:

16. Kootenay National Park is very different from other national parks that were or currently are subject to treaty negotiations. But I wonder if certain treaty provisions that were agreed to elsewhere in Canada are transferrable or are even worth considering in Kootenay National Park? Can you help me understand how some may be applicable and others may not?
- a) economic opportunities? Why?
- b) protection of heritage resources? Why?
- c) harvesting of natural resources? Why?
- d) temporary residency? Why?
- e) involvement in the planning and management? Why? - Advantages/Disadvantages

Note: Are there clear yet flexible means of deciding upon

- a) acceptable native use of park land*
- b) conservation of wildlife*
- c) associated economic and cultural factors*

17. Do you see any advantages of involving the Ktunaxa/Kinbasket people in the activities/programs of the national park?

Opportunities outside Kootenay National Park:

18. Can you think of any opportunities related to the national park that the KKTC may be able to take advantage of (after the settlement of the treaty)?

19. Do you have any other comments?

THANK YOU FOR YOUR COOPERATION

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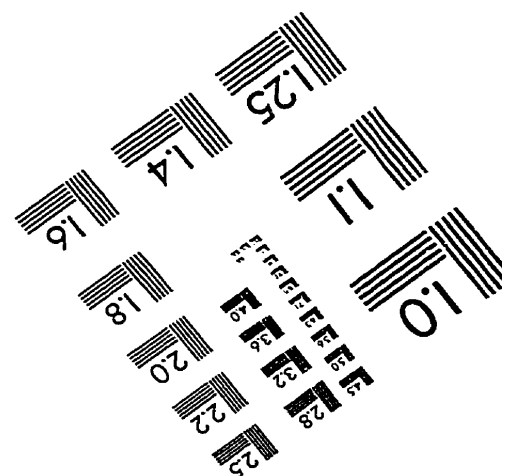
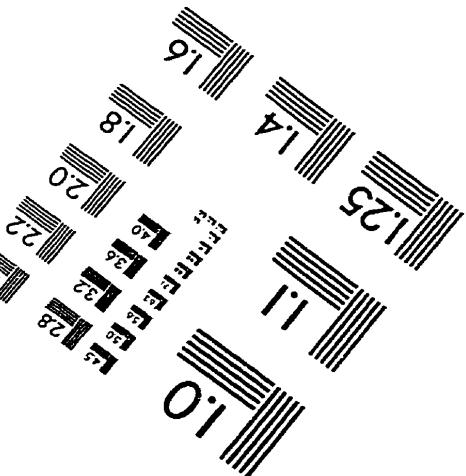
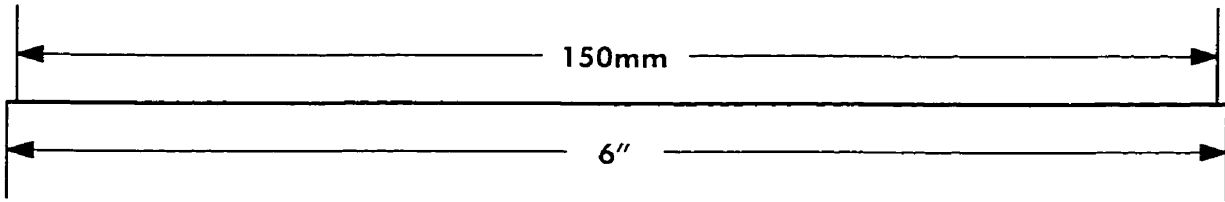
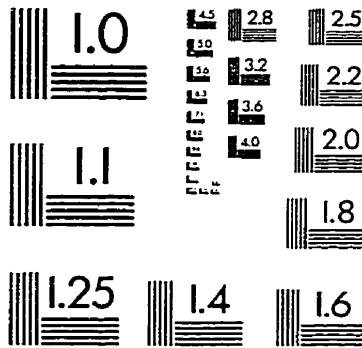
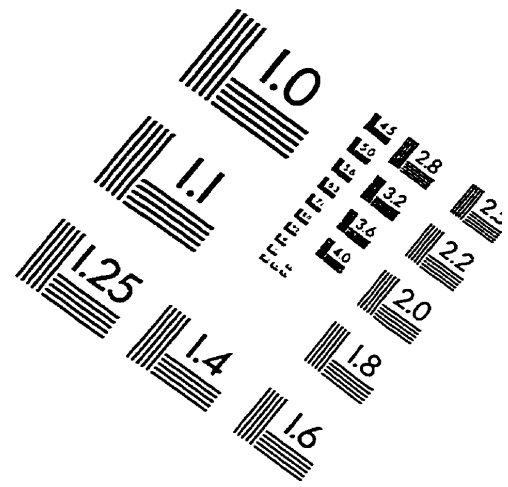
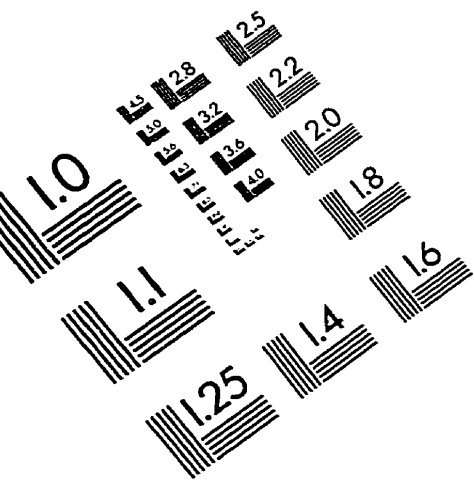
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