

Introduction

Bison, the Legacy of Building an Empire, and Hope

The Fort Peck Indian Reservation encompasses just over 2 million acres of rolling grasslands and prairies along the Missouri River in far northeastern Montana. Rising from the banks of the “Mighty Mo” in the south and nearly reaching the United States–Canada border in the north, the reservation is vast, alive with undulating terrain and near constant wind. At its southern edge, one can stand on the riverbank, gaze out over the prairies, and almost see history unfolding among the waving grasses. At least, one can see the history one knows.

For many Americans, especially those steeped in this nation’s long collective obsession with western movies and the associated mythos, the reservation’s landscape almost immediately calls to mind bison herds, John Wayne, cattle drives and trusty sidekicks, and of course, the ever-present scenes involving cowboys and Indians, battling it out for land, glory, and country. At Fort Peck, that imagery is not as distant as it might be on other reservations. The history of this place is closely connected to many of the elements of those movie westerns, with trappers, cowboys, tribes, and grazing bison forming essential features of the storyline. Today, the main thoroughfare through these tribal lands, US Highway 2, known as the “Hi-Line,” parallels the iconic route of the Great Northern Railroad, built during the height of the federal government’s western settlement push in the 1800s.¹ Still traversed by Amtrak’s Empire Builder train service, the modern rail line takes passengers from the upper Midwest to the Pacific on a journey many may still view as their own personal fulfillment of President James Polk’s Manifest Destiny.

¹ See *Burlington Northern Railroad v. Fort Peck Tribal Executive Board*, 701 F. Supp. 1493, 1496 (D. Mont. 1988), *aff’d in part, dismissed in part sub nom Burlington Northern Railroad Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991) (“The [railroad] right-of-way passed through lands of the 1874 reservation which were eventually included within the boundaries of the Fort Peck Indian Reservation as established by the Act of May 1, 1888”).

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But for a whistle-stop in the reservation's main hub of Wolf Point, those train passengers, along with many others passing through the reservation, likely do not linger on the more complex and challenging aspects of its history or even stop to consider what it means to be on a reservation. They probably don't go home and research the tribes who have lived there since history began and who still call this reservation home. They might imagine that any indigenous people they see are members of the same tribe and miss the complexity that has arisen and evolved since members of the Assiniboiné nation and the Sisseton, Wahpeton, Yanktonais, and Teton Hunkpapa Sioux bands began sharing this reservation in 1871.² And they would likely have no way of knowing that, unlike many other Indian tribes, the tribes of the Fort Peck Reservation were not removed to reservations far from their original homelands. But, while the view of the reservation's landscape from the whistle-stop visit evokes classic tales of the American West for the citizen of mainstream America, the reservation's history also reveals the deeper and more nuanced story of how the American legal system long ago expanded the nation's reach into Indian Country.

That story begins with the region's indigenous peoples – the Assiniboiné and Sioux tribes – who were first beset by trappers and fur traders traveling along the Missouri and served as real-time witnesses to Lewis and Clark's famed western survey expedition. For them, history grew complicated around the treaty era of the mid-1800s, and that story resonates for many other tribes. The primary motivation behind the mid-century treaties with the Fort Peck tribes was the federal government's dual desire to preserve peace with, yet acquire territory from, the Oceti Sakowin (as the bands of the so-called Great Sioux Nation referred to themselves) in eastern Montana and the Dakotas, so that European American settlers could move through Sioux lands in peace.³ By treaties signed in 1851, then again in 1868, the United States and various bands of Oceti Sakowin agreed on the terms of passage, settlement, and peace, in what crystallized as a government-to-government relationship.⁴ Despite the treaties, this period was fraught with tension, and it was not until after the military conflict at the Battle of Little Bighorn (or Greasy Grass, as many of the plains tribes refer to it) in 1876, the federal government's subsequent taking of the Black Hills from the Sioux, and the forced establishment of other Sioux reservations in the Dakotas, that the Fort Peck Reservation was created in 1886.⁵

Within 25 years, however, the federal government changed the terms of the 1886 agreement, this time by carving up reservation lands and distributing parcels to

² *Fort Peck Assiniboiné & Sioux Tribal History*, FORT PECK TRIBES, http://www.fortpecktribes.org/tribal_history.html.

³ Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 501 (2018).

⁴ *Id.* at 501–2.

⁵ Burlington Northern Railroad, *supra* note 1, at 1496.

individual tribal households.⁶ This process, known as allotment, involved offering the individual parcels to tribal members initially, but if none stepped forward to claim the allotments, the statute allowed the government to open up the unclaimed, or “surplus” lands to non-Indian homesteaders.⁷ As a result of this law, today’s Fort Peck Reservation is mostly owned by non-Indians whose families settled the surplus lands or whose predecessors bought those surplus lands from the federal government.⁸ The tribes and some of the estimated 6,000 of their 10,000 members retain less than 1 million surface acres within the reservation’s boundaries.⁹ On a map, this history leaves the reservation looking like a confusing checkerboard, with tribal, individual Indian, non-Indian, and other lands scattered in different rectangular blocks of color across the entire reservation.

Looking across these lands from the train station, though, one would not see the boundaries, nor could one see or understand the innumerable federal laws, regulations, and court decisions that continue to affect the reservation, its residents, and their daily lives, based largely on who owns which square of the checkerboard. As later chapters discuss, ownership of squares on the checkerboard has come to define the reach of competing sovereigns and that legal framework complicates the rights of indigenous families to raise their children, the rights of tribes to stimulate their economies, and the rights of tribal courts to adjudicate disputes involving tribal members, among other matters.

Beyond the imposition of federal law, those passing through the Fort Peck Reservation also may not recognize the presence of a sovereign government overseeing day-to-day life on the reservation: the government of the Fort Peck Tribes. The tribes first adopted a written constitution in 1927, but their government, culture, and society date back to a period that tribal members call “time immemorial” – or the beginning.¹⁰ Despite centuries of attempts to decimate them, the creation of federal legal authority over their affairs, and the ongoing challenges of governing a reservation owned mostly by non-tribal members, the tribes are engaged in the daily governmental tasks of serving and protecting their communities. Like all governments, some of the challenges facing the tribes are social, including protecting women and children from domestic violence and other crimes; some are environmental, involving development of oil and gas resources nearby, potentially bringing major pipelines; and others involve choices of how to regulate and, sometimes, stimulate the reservation economy.

⁶ The General Allotment Act period: 1887 to 1934, AMERICAN INDIAN LAW DESKBOOK § 1:12.

⁷ *Id.*

⁸ COLBY L. BRANCH, INDIAN LANDS – SURFACE ACCESS AND USE, (Rocky Mountain Mineral Law Foundation, Paper No. 7, 2005. n. 201).

⁹ *Fort Peck Assiniboiné & Sioux Tribal History*, FORT PECK TRIBES, http://www.fortpecktribes.org/tribal_history.html.

¹⁰ *Id.*

Although visitors to the area may not see or feel it, tribal sovereignty courses like the consistent wind through the reservation's hills and waving grasslands. In putting that sovereignty to work for the people of Fort Peck, the tribes have developed all manner of governmental programs. Of those, the effort closest to the heart of the reservation, both geographically and emotionally, might be obvious to those peering out the windows of a passing Empire Builder train. Smack in the center of the reservation's 3,200 square miles, there are 200 freely roaming bison, many of which are genetically pure wild bison relocated from Yellowstone National Park, descendants of the wild bison species that once freely roamed the continent's plains. The Turtle Mound Buffalo Ranch is owned and operated by the tribes, who, since reintroducing bison in 1999, have steadfastly worked to expand their numbers and territory across the reservation. As the tribes' Fish and Game Department makes clear to potential hunters who purchase licenses to pursue them, "[t]hese are not penned Buffalo."¹¹ They are wild animals, roaming the northern plains as their ancestors did for eons before the arrival of the railroad and the mass slaughter that followed.

While these bison are only remnants of the immense historic herds that supported the Sioux and other tribal societies across the Great Plains for centuries, these animals are neither livestock nor simply an effort at economic development for the tribes. Instead, as Robbie Magnan, head of the tribe's Fish and Game Department remarked when Yellowstone bison first came to the reservation in 2011, the bison represent "the beginning of a whole new chapter for [both] the bison and for [the Tribes]."¹² Reconnecting tribal people to bison "brings us right back to where we were," said Magnan.¹³ Like Magnan, another tribal member working to restore bison to different tribes also noted the bison's restorative value: "[r]econnecting with [bison] is a great cultural endeavor [that is] very important for cultural revitalization . . . to help heal from atrocities of the past, from genocidal [acts], boarding schools, and the impact of colonization."¹⁴

Bison restoration efforts like those at Fort Peck are emblematic of tribal efforts to reconnect and revitalize tribal cultures across Indian Country and beyond. Recent decades have seen watershed moments for indigenous Americans in the centuries-long and never-ending battle to preserve their cultural values, identity, and sacred aboriginal lands. Nevertheless, tribes, tribal members, and other indigenous peoples continue to face the long legacy of federal and state laws that conflict with and

¹¹ Turtle Mound Buffalo Ranch, FORT PECK TRIBES FISH & GAME DEPARTMENT, <http://www.fortpecktribes.org/fgd/buffalo.htm>.

¹² Laura Zuckerman, *Montana Tribes Ready for Historic Return of Buffalo*, REUTERS (May 8, 2011, 1:49 PM), <https://www.reuters.com/article/us-buffalo-tribes-montana/montana-tribes-ready-for-historic-return-of-buffalo-idUSTRE7471YE20110508>.

¹³ *Id.*

¹⁴ Angus Thuermer Jr., *In Restoring Buffalo, Tribes Seek to Restore Communities*, NATIONAL PARKS TRAVELER (2012), <https://www.nationalparkstraveler.org/2017/09/bison-west-returning-bison-landscape>.

frustrate, if not specifically aim to destroy, vital elements of their culture. At Fort Peck, the influence of these destructive laws is seen in the confounding state and federal bureaucracies that classify bison as threats in order to manage and control their interaction with the non-indigenous cattle industry and impede the transfer of wild bison from Yellowstone to the reservation. In fact, each year, hundreds and sometimes thousands of wild bison are legally slaughtered on the edge of Yellowstone in order to maintain a separation between bison and cattle considered so vital to non-tribal ranchers.

Like Fort Peck's bison restoration, over the last generation or so, tribes have developed new tools for enhancing and protecting their cultural values and properties. But, the current legal structure – even laws purporting to protect indigenous cultural identity, cultural resources, and places of cultural significance – remain grounded in broader federal and state interests that severely limit effective consideration of tribal perspectives and values. Indeed, dating to its inception upon the Declaration of Independence, the American government's structure, policies, and legal system have been rooted in the goal of eliminating indigenous peoples and erasing their separate identity. Initially, this goal arose from religious biases and colonial racism. Later, it evolved into the more nuanced – but no less destructive – aim of “assimilation.”¹⁵ Targeting indigenous culture has been a particularly effective means of accomplishing these larger goals. In fact, even where Congress has addressed these limitations, the implementation and interpretation of the laws seeking to protect tribal interests often fail to fulfill the purposes that Congress intended for them. And yet, like the bison that once again roam the plains of the Fort Peck Reservation despite their near annihilation a century ago, indigenous cultures are now overcoming the long legacy of those efforts and turning the law to their benefit.

This book aims to empower those who seek to advance tribally driven cultural preservation projects, initiatives, and priorities. Using examples like bison restoration, the battle over sacred sites like those near the Standing Rock Sioux Reservation of North Dakota and the Bears Ears of southeast Utah, and many others, we hope to illustrate the ways in which tribal, state, and federal law can be used to protect and support tribal cultures and cultural objectives. As set out in greater detail in Chapter 4, the central challenge of these efforts is an underlying clash of fundamental values, a challenge reflected in the complex jurisdictional framework applicable to tribal authority (Chapter 2), the seeming inability of federal law to ensure even basic protections for Native American religious practices (Chapter 3), the impotence of federal cultural resource protection laws (Chapter 5), and threats to tribal cultural properties posed by gaps in intellectual property laws (Chapter 8). Beyond highlighting those flaws and disjunctions, however, the book also makes

¹⁵ Chad W. Swenson, *South Dakota v. Bourland: Drowning Cheyenne River Sioux Tribal Sovereignty in a Flood of Broken Promises*, 39 S.D. L. REV. 181, 190 (1994).

clear how tribes (Chapter 5) and tribes and states (Chapter 7) are working diligently to reshape historically rigid legal structures in new and innovative ways.

We wrote this book for anyone committed to or interested in developing the next chapters of the ongoing story of indigenous people and their cultures in the United States, especially the tribal leaders, grassroots activists, and lawyers who will lead that effort. Thus far, the story of America's treatment of those who were here first has revealed much about the nation's inability to live up to its founding principles. But, despite immense challenges, the efforts of indigenous populations to protect and revitalize their connections to their homelands, spiritual sites, and places of cultural importance, is a story of survival, hope, and even success. As attorneys and scholars of the law, we believe that the next part of the story will require creative approaches to bend American law and the American legal system further toward tribal interests. While recent events have shown the potential for such reform, the future of this country inevitably will see more tribal voices in the halls and courtrooms of non-Indian-controlled governments across the country. As these voices grow in number and in influence, they will ensure that their cultures, which existed before any of those other governments, will continue to thrive well into a distant and uncertain future.

We hope those voices find power in these pages.