

Tribal Sovereignty: Case Studies

A Guide for Montana High School Teachers



Overview

❖ Purpose

Encourage Montana's high school social studies teachers to integrate information about tribal sovereignty throughout high school government and history courses

Individual slides contained in this power point will visually enhance lesson plans; however, this presentation is not intended to be used as a single lesson on tribal sovereignty.



Introduction

- ❖ Why do high school teachers need this information?
 - ❖ Montana's Constitution, Article X, Section 1(2): "The State recognizes the distinct and unique cultural heritage of American Indians and is committed in its educational goals to the preservation of their cultural integrity."
 - ❖ MCA 20-1-501: schools should encourage students "to learn about the distinct and unique heritage of American Indians" and "all school personnel should have an understanding and awareness of Indian tribes"
 - ❖ To address four of the seven essential understandings developed by Indian educators

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Essential Understandings

- ❖ Indian educators from each tribe gathered to discuss topics for educators and students to learn about Indian people.
- ❖ These topics became the Seven Essential Understandings
- ❖ This presentation addresses the first, fourth, fifth, and seventh Essential Understandings

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Essential Understanding 1

“There is great diversity among the 12 tribal Nations [located in] Montana in their . . . governments.”



Essential Understanding 4

“Reservations are lands that have been reserved by the tribes for their own use [or set aside for tribal use] through treaties, statutes, and executive orders”

“[Historically] land should be acquired from the Indians only through their consent with treaties [because] both parties to treaties were sovereign powers.”



Essential Understanding 5

“Federal Indian policies . . . have affected Indian people and still shape who they are today. Much of Indian history can be related through several major federal policy periods [including the] Treaty Period.”

[The major federal policy periods are Treaty, Removal and Relocation, Allotment and Assimilation, Reorganization, Termination, and Self-determination. See materials from the powerpoint presentation entitled Tribal Relations with the United States: History and Overview.]

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Essential Understanding 7

“Under the American legal system, Indian tribes have sovereign powers, separate and independent from the federal and state governments. However the extent and breadth of tribal sovereignty is not the same for each tribe.”



Content

- ❖ Brief overview of the information presented in *Tribal Sovereignty*
- ❖ Contemporary issues (in the form of 5 cases) highlight differences in tribes' rights depending on treaty language



Learner Outcomes

- ❖ After this presentation, teachers should be able to
 - ❖ Explain how Stevens and Fort Laramie Treaty language affects tribes' rights
 - ❖ Distinguish different ways courts approach treaty language

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General Principle of Sovereignty

Power and Control

The power of a governing body to exercise both legal and physical control over the people, land and resources found within a defined territory

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U.S. Government and Tribes' Sovereign Relations

- ❖ Tribes treated as sovereign nations by U.S. government through treaties and trade
- ❖ Article VI of the U.S. Constitution: treaties are the Supreme Law of the Land
- ❖ Non-Intercourse Act (1790): Congress wanted to protect tribal sovereignty and land; the Act declared invalid any “purchase, grant, lease, or other conveyance of lands” from tribes unless approved by U.S. government

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U.S. Government and Tribes' Trust Relationship

- ❖ The Supreme Court's "Marshall Trilogy" laid the foundation of Indian law, and established a trust relationship between the U.S. Government and tribes
- ❖ Tribal trust land is held in trust for the tribes by the U.S. Government
- ❖ The U.S. Government has duties to manage tribal trust land in the tribes' best interest (to protect the land and the tribes)
- ❖ Tribes may use and reside on tribal trust land, and cannot sell it unless given permission by the U.S. Government



Treaty Tribes: Rights

- ❖ Treaties (and the rights within them) are the supreme law of the land
- ❖ Rights may be express or inherent
 - ❖ Express rights are expressly stated in the treaty
 - ❖ Inherent rights are not expressly stated in the treaty



Inherent Treaty Rights

- ❖ Tribal powers normally associated with a sovereign are inherent
- ❖ Inherent rights are retained by the tribe during treaty negotiations
- ❖ Examples include the right to govern, determine membership, and rights to hunt and fish



Losing Inherent Treaty Rights

- ❖ A tribe may expressly give up inherent rights in a treaty or another legally-recognized document
- ❖ The Constitution allows Congress to expressly divest tribes of treaty rights
- ❖ The Supreme Court has divested some tribes of certain treaty rights (called abrogating treaty rights)
- ❖ The Court has no constitutional authority to abrogate treaty rights



Interpreting Treaties

- ❖ Sometimes a court will determine a tribe's treaty rights by interpreting ambiguous treaty language
- ❖ Court interpretation rules (canons of construction)
 - ❖ Construe treaty language in favor of tribes
 - ❖ Interpret treaty language as tribes would have understood it
 - ❖ Interpret treaties to fulfill U.S. trust obligations (the duties of the U.S. government to protect tribal interests)



Treaty Tribes in Montana

- ❖ Stevens Treaty Tribes: Blackfeet, Confederated Salish and Kootenai
- ❖ Fort Laramie Treaty Tribes: Assiniboine and Gros Ventre (Fort Belknap Reservation), Assiniboine and Sioux (Fort Peck), Crow



Stevens Treaties

- ❖ Each tribe negotiated individually with territorial Governor Stevens (1854-1855)
- ❖ Goals
 - ❖ Establish tribal territory in order to open up remainder to non-Indian settlement
 - ❖ Establish transportation routes
 - ❖ Establish peaceful relationship with U.S. government
 - ❖ Abstain from hostilities and cultivate good-will and friendship
 - ❖ Protect traditional rights



Stevens Treaties Language

- ❖ “...where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes.” ***Treaty with the Blackfeet 1855***

- ❖ “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.” ***Treaty with the Flatheads, etc. 1855***



Fort Laramie Treaties

- ❖ Each tribe negotiated individually with officers of the U.S. military (1851 and 1868)
- ❖ Goals
 - ❖ Establish land under tribal control and land under U.S. control and assign specific land to particular tribes
 - ❖ Compensate tribes for lost game
 - ❖ Create safe passage for non-Indians through erection of roads and forts, and identify Indians who harmed non-Indians

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Fort Laramie Treaty Language

- ❖ Indians “shall have the right to hunt on unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” *Treaty of Fort Laramie with the Crows, 1851*



Comparison

- ❖ “privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon **open and unclaimed land**”

Treaty with the Flatheads, etc., 1855

- ❖ “right to hunt on **unoccupied lands**”

Treaty of Fort Laramie with the Crows, 1851



QUIZ PREP

- ❖ What is the general definition of sovereignty?
- ❖ How has tribal sovereignty been limited by court cases and U.S. law?
- ❖ Name examples of express and inherent treaty rights.
- ❖ What is a court's responsibility when interpreting treaty language?
- ❖ How might a court abrogate a tribe's treaty rights?

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Contemporary Issues Pertaining to Tribal Sovereignty

- ❖ Tribal sovereignty is of great importance to tribes today; issues range from hunting and fishing rights to determining criminal and civil jurisdiction on and off reservation
- ❖ The following court cases highlight current sovereignty issues for tribes in Montana and the State of Montana



State v. Stasso

1977 Montana Supreme Court

- ❖ Can Stasso, an enrolled member of the Confederated Salish and Kootenai Tribes (CSKT), hunt throughout the year on National Forest Service land that is within the tribes' historical hunting ground but outside the Flathead Reservation?



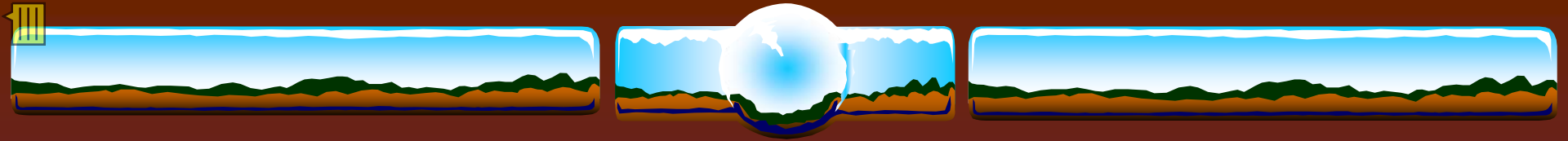
Stasso: Details

- ❖ Stasso shot the deer on land within the historical hunting grounds of the Salish and Kootenai people
- ❖ National Forest Service land is open and unclaimed land (not possessed by particular parties at time treaty was signed)
- ❖ Treaty of Hellgate rights to hunt have not been extinguished



Stasso: Important Laws

- ❖ Treaty of Hellgate (1855, Stevens Treaty): CSKT tribal members reserved the “privilege of hunting ... upon open and unclaimed land”
- ❖ Montana Territorial Act (1864): establishment of the Montana Territory does not impinge on Indians’ rights if the rights are “unextinguished by treaty”
- ❖ Montana Game Laws: no hunting out of season



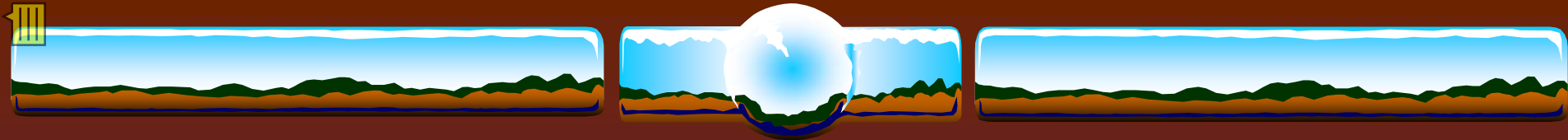
Stasso: Holding

- ❖ CSKT members may hunt on National Forest Service lands within their historical hunting grounds at all times of the year



Question

- ❖ May members of CSKT hunt on private land within their historical hunting grounds without permission any time of the year? Why or why not?



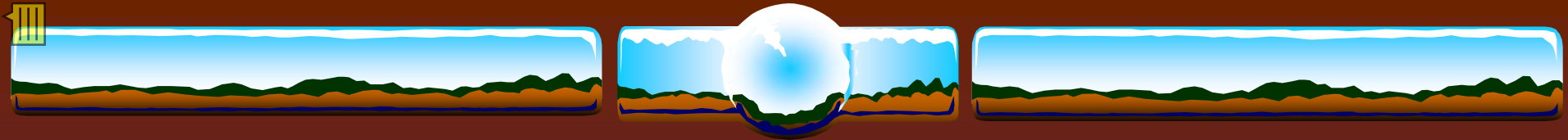
Answer

- ❖ The treaty only refers to unclaimed public lands; therefore, CSKT tribal members may not hunt without permission on private land



Question

- ❖ May a Crow tribal member hunt on National Forest Service lands in their historical hunting grounds any time of year? Why or why not?
- ❖ See if your answer is correct by reading the next case



Crow v. Repsis

1995 10th Circuit Court of Appeals

- ❖ Do members of Crow tribe have an unrestricted right to hunt and fish on public lands within the Crow historical hunting grounds in Wyoming?



Crow v. Repsis: Details

- ❖ Crow tribal member killed an elk on National Forest Service land in Wyoming
- ❖ The National Forest Service land was within the Crow tribe's historical hunting grounds
- ❖ The event occurred after Wyoming elk-hunting season



Crow v. Repsis: Important Laws

- ❖ Treaty with the Crows (1851): Crow members “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon”
- ❖ Wyoming Game Law: must have a Wyoming license to hunt elk in Wyoming



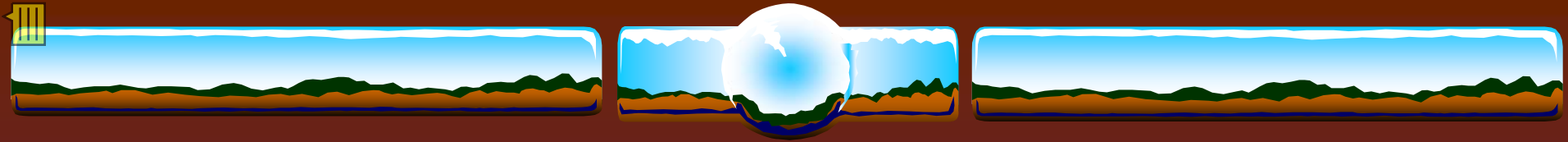
Crow v. Repsis: Same as Stasso?

- ❖ *Stasso*: tribal member can hunt on unclaimed land that was once a part of the tribe's historical hunting grounds
- ❖ BUT, a prior U.S. Supreme Court case abrogated Crow treaty rights to hunt and fish on unoccupied lands because “game no longer existed; hunting would undermine conservation; federal lands are occupied”



Crow v. Repsis: Holding

- ❖ The Federal Court in *Crow v. Repsis* decided that, since the Supreme Court decision that abrogated Crow treaty rights had not been overruled, the rights are still abrogated
- ❖ Without the treaty rights, Crow tribal members do not have an unrestricted right hunt and fish on public lands in Wyoming



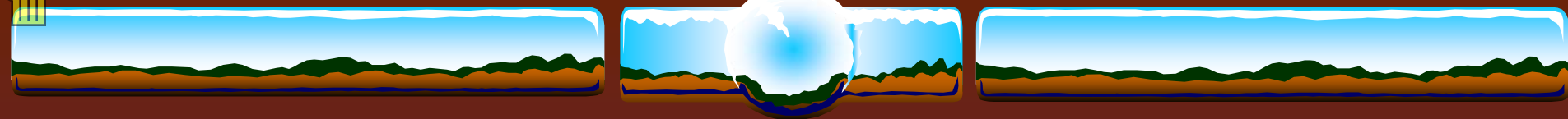
Question

- ❖ Does the Supreme Court have the power to abrogate a treaty right without restriction?



Who has the Power to Abrogate Treaty Rights?

- ❖ The Constitution gives the right to make treaties to presidents (with congressional approval)
- ❖ The right to make treaties has, in the past, also allowed congress and the president to abrogate treaties
- ❖ Tribes may abrogate their own treaty rights
- ❖ There is no constitutional authority allowing courts to abrogate treaty rights



Montana v. U.S.

1981 U.S. Supreme Court

- ❖ Did the treaties that established the Crow Reservation give the Crow the authority to regulate hunting and fishing by non-Indians on the Big Horn River (which flows through the reservation)?



Montana v. U.S.: Treaties

- ❖ First Treaty of Fort Laramie (1851): tribes did not “surrender the privilege of hunting, fishing, or passing over” treaty lands
- ❖ Second Treaty of Fort Laramie (1868) (establishing the Crow Reservation): tribes have “absolute and undisturbed use and occupation” of the land, and non-Indians could not “pass over” the reservation



Montana v. U.S.: Important Laws

- ❖ Dawes Act (General Allotment Act 1887, Crow Allotment Act 1920): allowed non-Indians to purchase Reservation land; today, 28% of Crow Reservation land is owned by non-Indians
- ❖ Crow Tribal Council Resolution 74-05: prohibits non-members from hunting and fishing on the Reservation



Montana v. U.S.: Holding

- ❖ Usually tribes have inherent sovereign rights to self-govern (including the right to make rules about hunting and fishing) – inherent rights don't have to be expressly delegated in a treaty
- ❖ BUT the Court decided that the Crow tribe didn't need to own the river bed to self-govern
- ❖ So, the treaty had to EXPRESSLY delegate the right to own the river bed to the Crows



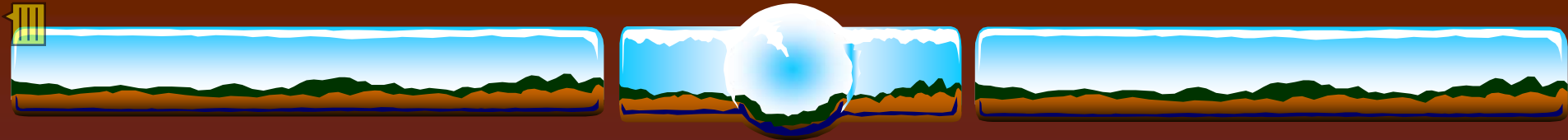
Montana v. U.S.: Holding

- ❖ Since neither of the treaties expressly gave the Crow Tribe ownership of the bed of the Big Horn River, the Crow Tribe can't regulate hunting and fishing of non-Indians on the Reservation



Question

- ❖ The Crow treaty DOES expressly give the tribe hunting and fishing rights within tribal boundaries.
- ❖ Does the Supreme Court's decision that the tribe can't regulate fishing affect the tribe's rights to hunt and fish?



Answer

- ❖ Probably. If non-members can fish on the reservation without regulation, there will be fewer fish available for tribal members.



Question

- ❖ If the Court's decision does affect the Crow's expressly-given right to hunt and fish, could it mean the Court abrogated the Crow's treaty right to hunt and fish?



Answer

❖ Yes



U.S. v. Kipp

1974 Montana District Court

- ❖ Can Blackfeet tribal members enter the part of Glacier National Park that was once part of the Blackfeet Reservation without paying the entrance fee?



U.S. v. Kipp: Details

- ❖ When Glacier Park was created, it included the strip of land obtained by the U.S. from the Blackfeet Tribe in 1895
- ❖ The Blackfeet contract with the U.S. expressly reserved the tribes rights to hunt and fish on the land they gave up, as long as the land remained “public.”
- ❖ Is Glacier Park public land?
- ❖ The answer is in the canons of construction



U.S. v. Kipp: Important Laws

- ❖ Stevens Treaty of the Blackfeet (1885)
- ❖ Contract in which U.S. Government obtained strip of land from Blackfeet Tribe (1895): “Indians shall have the . . . right to go upon any portion of the lands and to cut and remove therefrom wood and timber, . . . hunt . . . and to fish in the streams thereon . . . so long as [the lands remain] public.”



Canons of Construction

- ❖ A court will interpret ambiguous language using canons of construction
 - ❖ Construe treaty language in favor of tribes
 - ❖ Interpret treaty language as tribes would have understood it
 - ❖ Interpret treaties to fulfill U.S. trust obligations (the duties of the U.S. government to protect tribal interests)



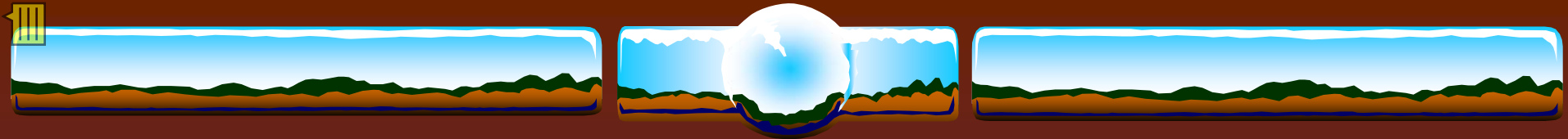
U.S. v. Kipp: Holding

- ❖ Blackfeet tribal members expressly reserved their rights to enter, gather firewood, hunt and fish on the land they gave up
- ❖ The court determined that Blackfeet tribal members would have interpreted “public” to mean all lands not in private ownership
- ❖ Therefore, Glacier National Park is public land



U.S. v. Kipp: Holdings

- ❖ Congressional intent to abrogate a treaty right must be express
- ❖ Congress did not expressly deny Blackfeet tribal members the right to enter the Park
- ❖ Therefore, the statute creating Glacier National Park (and allowing the Park to establish entrance rules and fees) did not abrogate the Treaty of the Blackfeet
- ❖ The Blackfeet tribe's rights are still in effect



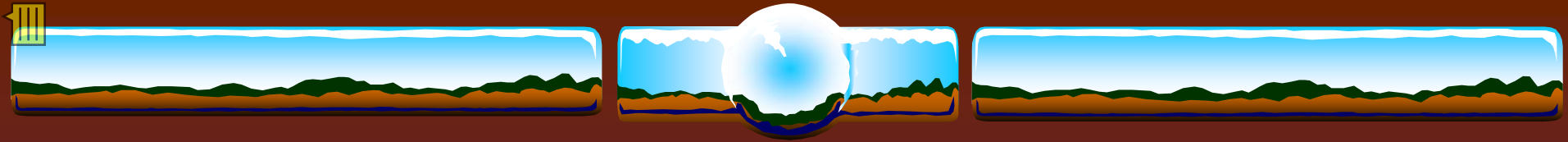
Question

- ❖ How do you compare this holding with the *Montana v. U.S.* holding?



Answer

- ❖ The holdings are difficult to reconcile
- ❖ In *Kipp*, the court used the canons of construction
 - ❖ Construed the treaty in favor of the tribe
 - ❖ Decided Blackfeet Tribe's treaty rights are retained unless Congress expressly abrogates them
- ❖ In *Montana*, the Supreme Court changed the canons of construction
 - ❖ Did not construe treaty in favor of the tribe
 - ❖ Decided Crow Tribe's inherent treaty rights are not retained unless Congress expressly gives them



Question

- ❖ May Blackfeet tribal members enter the part of Glacier National Park that was once part of their reservation and hunt and fish?



Answer

- ❖ Yes. A court has already held, based on the *Kipp* case and the Treaty of Blackfeet, that Blackfeet tribal members may hunt and fish in Glacier Park.



Question

- ❖ May Blackfeet tribal members enter the part of any National Forest land that was once part of their reservation and hunt and fish without a Montana license?



Answer

- ❖ It is highly likely that, based on *Stasso* and *Kipp*, a court would hold that Blackfeet tribal members may hunt and fish on National Forest land without a Montana license



*Confederated Salish and
Kootenai Tribes (CSKT) v.
Namen*

1982 9th Circuit Court of Appeals

- ❖ May Jim and Mary Namen, owners of Jim's Marina on Flathead Lake (on the Flathead Reservation), and non-members of the CSKT, build and maintain docks on the lake?



CSKT v. Namen: Details

- ❖ Jim's Marina built docks into the southern part of Flathead Lake in Polson
- ❖ CSKT alleged Jim's Marina (1) trespassed by building docks into the lake and (2) violated the Shoreline Protection Ordinance by interfering with tribal fishing rights and degrading the water



CSKT v. Namen: Details

- ❖ Namen said the Flathead (Allotment) Act terminated the Flathead Reservation
- ❖ Namen also said CSKT doesn't own the lake bed and so the tribal laws don't apply to him



CSKT v. Namen: Important Laws

- ❖ Hellgate Treaty (1855): defined boundaries of the Flathead Reservation as including the southern half of Flathead Lake
- ❖ Allotment Act (1887) and Flathead Act (1904): allowed non-Indians to purchase Reservation land
- ❖ CSKT “Shoreline Protection Ordinance” (1977): regulates structures on the southern half of Flathead Lake



CSKT v. Namen: Holdings

- ❖ The Allotment Act did not terminate the Flathead Reservation because Congress did not expressly state it intended termination when it created the Act
- ❖ The U.S. government holds the lake bed in trust for the CSKT
- ❖ The CSKT may restrict buildings on the lake according to its laws



Question

- ❖ Compare *CSKT v. Namen* (the tribe owns and controls the lake bed) with *Montana v. U.S.* (the tribe does not own or control the river bed)
- ❖ Why a different holding?



Answer

- ❖ Because the Hellgate Treaty expressly refers to Flathead Lake, thus conveying use and management of to the lake bed to the tribes
- ❖ The Crow Treaty did not expressly convey the Big Horn River to the Crow Tribe



Question

- ❖ The Hellgate treaty expressly gave ownership of the lake bed to the CSKT
- ❖ Do you think ownership of a lake contained within reservation land **MUST** be expressly given in the treaty, or is it inherent in the creation of the reservation?



Answer

- ❖ *Montana v. U.S.* might say it must be expressly given, but *U.S. v. Kipp* might say the ownership of the land and waters on a reservation is inherent



Question

- ❖ Based on the cases you've studied, do you think the Crow Tribe can regulate docks on the Bighorn River?



Answer

- ❖ The CSKT treaty gives the tribe express ownership of the bed of Flathead Lake
- ❖ But the Crow Treaty does not give the tribe express ownership of the Bighorn River
- ❖ *U.S. v. Montana* would say the Crow Tribe's right to regulate docks on the river must be express in the treaty



Final Question

- ❖ In January, 2006, Montana Attorney General Mike McGrath and Montana Governor Brian Schweitzer had to decide whether Nez Perce tribal members could hunt bison on public land in the Gallatin National Forest outside Yellowstone Park.
- ❖ What did the State of Montana decide?
- ❖ What information do you need to answer this question?



Additional Information

- ❖ The Nez Perce Tribe signed a Stevens Treaty
- ❖ The Nez Perce Treaty states that the tribe has the “the privilege of hunting . . . upon open and unclaimed land”
- ❖ The Gallatin National Forest is part of the Nez Perce Tribe’s historical land



Answer

- ❖ The Nez Perce Tribe's treaty rights allow the tribal members to hunt on "open and unclaimed land" that was part of their historical hunting grounds
- ❖ National Forest Service land is "open and unclaimed land" according to the *Stasso* case
- ❖ Nez Perce tribal members may hunt bison in the Gallatin National Forest