



Tribes, Treaties, and Time: Will the Indian Peace Commission Ride Again?

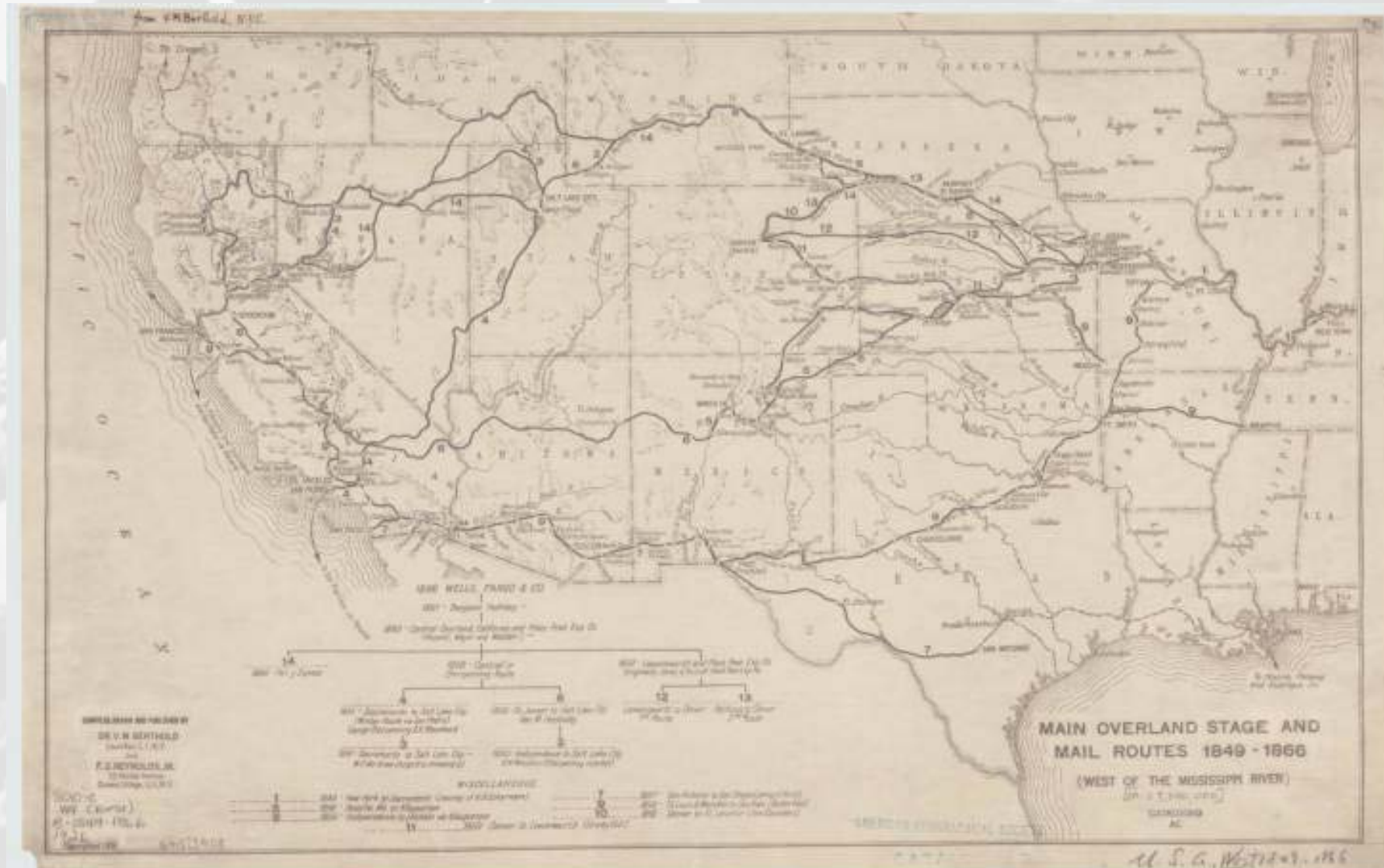
Monte Mills

Alexander Blewett III School of Law ~ University of Montana

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History of the “Peace” Commission



THE PACIFIC RAILROADS



CHAP. XXXII. — *An Act to establish Peace with certain Hostile Indian Tribes.*

July 20, 1867.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to appoint a commission to consist of three officers of the army not below the rank of brigadier general, who, together with N. G. Taylor, Commissioner of Indian Affairs, John B. Henderson, Chairman of the Committee of Indian Affairs of the Senate, S. S. Tappan, and John B. Sanborn, shall have power and authority to call together the chiefs and headmen of such bands or tribes of Indians as are now waging war against the United States or committing depredations upon the people thereof, to ascertain the alleged reasons for their acts of hostility, and in their discretion, under the direction of the President, to make and conclude with said bands or tribes such treaty stipulations, subject to the action of the Senate, as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.

SEC. 2. *And be it further enacted,* That said commissioners are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations, to which the government has the right of occupation or to which said commissioners can obtain the right of occupation, and in which district or districts there shall be sufficient tillable or grazing land to enable the said tribes, respectively, to support themselves by agricultural and pastoral pursuits. Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person [s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States: Provided, That the district or districts shall be so located as not to interfere with travel on highways located by authority of the United States, nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad, the Union Pacific Railroad Eastern Division, or the proposed route of the Atlantic and Pacific Railroad by the way of Albuquerque.

SEC. 3. *And be it further enacted,* That the following sums of money are hereby appropriated out of any moneys in the treasury, to wit: To carry out the provisions of the preceding sections of this act, one hundred and fifty thousand dollars; to enable the Secretary of the Interior to subside such friendly Indians as may have separated or may hereafter separate themselves from the hostile bands or tribes and seek the protection of the United States, three hundred thousand dollars.

SEC. 4. *And be it further enacted,* That the Secretary of War be required to furnish transportation, subsistence, and protection to the commissioners herein named during the discharge of their duties.

SEC. 5. *And be it further enacted,* That if said commissioners fail to secure the consent of the Indians to remove to the reservations and fail to secure peace, then the Secretary of War, under the direction of the President, is hereby authorized to accept the services of mounted volunteers from the Governors of the several States and Territories, in organized companies and battalions, not exceeding four thousand men in number, and for such term of service as, in his judgment, may be necessary for the suppression of Indian hostilities.

SEC. 6. *And be it further enacted,* That all volunteers so accepted shall be placed upon the same footing, in respect to pay, clothing, subsistence, and equipment, as the troops of the regular army.

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See post, p. 80.
Commission to treat with hostile Indians, and make treaties, &c.

Commissioners to select a district or districts, subject to the approval of Congress, for a permanent home for certain Indians.

Members of tribes only to enter thereon, without, &c.

Districts not to interfere with travel on highways, nor with certain railroad routes.

Appropriation under this act.

Transportation, subsistence, &c. of commissioners.

Services of certain mounted volunteers may be accepted, if, &c.

Pay, subsistence, &c. of such volunteers, if accepted.

July 20, 1867 – An Act to Establish Peace with Certain Hostile Indian Tribes

Peace Commission: Three Army Officers:

William T. Sherman

Alfred H. Terry

William S. Harney

C.C. Augur

Civilians:

Nathaniel G. Taylor

John B. Henderson

Samuel F. Tappan

John B. Sanborn

Great Peace Commission, 1867-68



“Peace” Commission

Congressional charge:

make and conclude with said bands or tribes such treaty stipulations, subject to action of the Senate, as may remove all just causes of complaint on their part

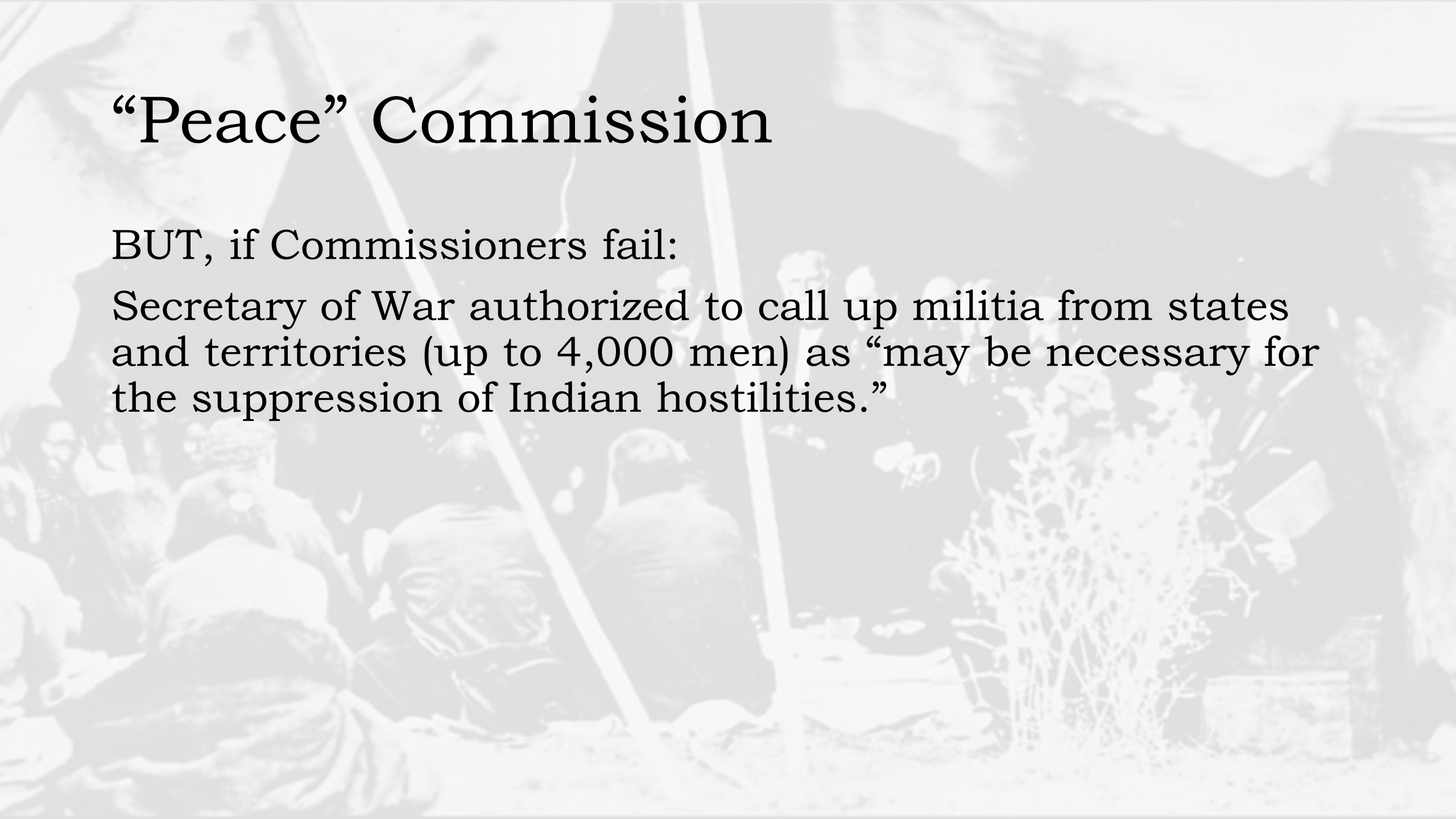
AND at the same time establish security for person and property along the lines of the railroad now being constructed to the Pacific

such as will most likely insure civilization for the Indians and peace and safety for the whites

“Peace” Commission

BUT, if Commissioners fail:

Secretary of War authorized to call up militia from states and territories (up to 4,000 men) as “may be necessary for the suppression of Indian hostilities.”



“Peace” Commission

- August 1867 – October 1868:
 - Medicine Lodge Creek – Kiowa, Comanche, Kiowa-Apache – Oct. 1867
 - Report – Jan. 7, 1868:
 - Two territories as reservations
 - Revise intercourse laws with the Indian tribes
 - Fire all superintendents, agents, special agents – replaced with “competent and faithful”
 - Treaty with the Navajo, Sioux, tribes near Union Pacific Route
 - Ft. Laramie – Sioux, Crow, Northern Cheyenne and Arapahoe – Apr.-July 1868
 - Sherman/Tappan – Navajo – June 1868
 - Fort Bridger – Eastern Shoshone and Bannock – July 1868

Treaty with the Crows (May 7, 1868)

Council at Ft. Laramie, November 12, 1867:

We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you however, the right to hunt upon it as long as the game lasts.*

-Commissioner Taylor

Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868

Upon this reservation [the 'great father in Washington'] wishes you to go with all your people as soon as possible, and to make it your permanent home, but with permission to hunt wherever you can find game. In a few years the game will become scarce and you will not find sufficient to support your people. You will then have to live in some other way than by hunting and fishing.

-General Augur, Fort Bridger, July 3, 1868

“Peace” Commission

- Final Report – Oct. 9, 1868:
 - “the time has come when the government should cease to recognize the Indian tribes as ‘domestic dependent nations’ except so far as it may be required to recognize them as such by existing treaties, and by treaties made but not yet ratified”
 - Abrogate off-reservation rights in Medicine Lodge Creek treaty and use military force
 - Transfer BIA back to Department of War

Treaty with the Crows (May 7, 1868)

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, *but they shall have the right to hunt on the 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.*

Ward v. Race Horse, 163 U.S. 504 (1896)

The right to hunt, given by the treaty, clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right depend on whether the land in the hunting districts was unoccupied public land of the United States. ...

Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the territory was essentially perishable, and intended to be of a limited duration.

Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995)

The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. ...

[and, after creation of the Big Horn National Forest, t]hese lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. Thus, the creation of the Big Horn National Forest resulted in the “occupation” of the land.

Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999)

Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.

[*Race Horse*] has been qualified by later decisions of this Court.

The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was “clearly contemplated” when the Treaty was ratified.

Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999)

Rehnquist, C.J., *dissenting*:

Today the Court appears to invalidate (or at least substantially limit) *Race Horse*, without offering any principled reason to do so.

MAY 7, 2013 CROW TRIBAL LEGISLATURE

JAR No. 13 -09

Introduced by Chairman Darrin Old Coyote
Crow Tribal Executive Branch

Co-Sponsored by Senator Conrad J. Stewart
Black Lodge District

A Joint Action Resolution Titled:

**A JOINT ACTION RESOLUTION OF THE CROW TRIBE TO ENACT AND
DECLARE OFFICIAL CROW TRIBAL POLICY OF FULLY EXERCISING OFF-
RESERVATION HUNTING RIGHTS PURSUANT TO THE 1868 FORT LARAMIE
TREATY**

Legislative Findings:

WHEREAS, Article V, Section 2(a) of the Crow Tribal Constitution vests the Crow Tribal Legislature (hereinafter "Legislature") with the power and duty to promulgate and adopt laws and resolutions in accordance with the Crow Tribal Constitution and federal law for the governance of the Crow Tribe; and

WHEREAS, Article IV, Section 4(a) of the Crow Tribal Constitution provides that the "general duties" of the Executive Branch Officials shall include the duty to implement all laws, resolutions and policies duly adopted by the Legislature; and

WHEREAS, the Crow Tribe has always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival; and

WHEREAS, the 1851 Fort Laramie Treaty, which is recorded in the United States session laws at 11 Statutes at Large 749, recognized in Article V that the territory of the Crow Nation is recognized as follows: "[C]ommencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth;" and

WHEREAS, Article V of the 1851 Fort Laramie Treaty further provides that the Crow Tribe did not abandon or prejudice any rights or claims to any other lands and, further, that the Crow Tribe not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described; and

**NOW, THEREFORE, BE IT HEREBY RESOLVED BY THE EXECUTIVE BRANCH
AND LEGISLATURE IN SPECIAL SESSION:**

Section 1. Establishment of Tribal Policy. The policy of the Crow Tribe shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States which are located within the traditional Crow homeland, as set out in the 1851 Fort Laramie Treaty, along with all such lands as located in traditional Crow territory according to tribal oral history.

(a) It shall be tribal policy to consider the term "unoccupied lands of the United States" as contained in Article IV of the 1868 Fort Laramie Treaty to include all federal lands managed by the United States Forest Service as national forests and national grasslands, all federal lands managed by the National Park Service as national parks and national recreation areas, all federal lands managed by the United States Fish and Wildlife Service as national wildlife refuges, and all federal lands managed by the Bureau of Land Management as national monuments, national recreation areas, and all such other BLM lands managed for multiple-use or resource preservation, and all federal lands managed by the Army Corps of Engineers and Bureau of Reclamation. All federal lands specifically designated by the United States Congress under statute as off-limits to hunting generally shall be honored as such by the Crow Tribe.

(b) It shall be tribal policy to consider the phrase "so long as game may be found thereon" as contained in Article IV of the 1868 Fort Laramie Treaty to include all native species of animals found in the traditional Crow homeland as identified in the 1851 Fort Laramie Treaty. Such species shall include but not be limited to: buffalo, elk, mule deer, white-tailed deer, black bear, grizzly bear, big horn sheep, shiras moose, grey wolves, pronghorn antelope, mountain lion, bobcat, wolverine, badger, beaver, sharp-tailed grouse, ruffed grouse, sage grouse, blue or dusky grouse, prairie chicken, wild turkey, waterfowl, birds of prey, and all fur-bearing animals.

(c) The Crow Tribe intends to enact regulations governing the exercise of all off-reservation treaty hunting conducted by Crow tribal members through an amendment to the Crow Fish and Game Code as contained in Title 12 of the Crow Law and Order Code. Such regulations shall, at a minimum, include procedures for issuance of treaty licenses, the establishment of treaty-hunting seasons, harvest quotas, enforcement procedures including penalties for violations, inter-governmental agreements including cooperative habitat improvement projects, and other conservation-based regulatory measures.

(d) Enrolled members of the Crow Tribe, pursuant to the Fort Laramie Treaties of 1851 and 1868, may take native species of animals, including but not limited to the aforementioned list in Section 1(b), permitted to be taken under Crow tribal law. All animal species federally-listed as endangered or threatened under the Endangered Species Act and all animal species otherwise specifically protected from hunting under federal statutory law shall be honored as protected by the Crow Tribe. Enrolled members engaged in treaty-hunting shall at all times have a current tribal identification card in their possession. It shall be unlawful for any non-member to accompany a tribal member engaged in off-reservation treaty hunting.

Herrera v. Wyoming, No. 17-532



Herrera v. Wyoming, No. 17-532

QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

Herrera v. Wyoming, No. 17-532

- Solicitor General:
 - The Crow did not lose their right under the 1868 Treaty to hunt on unoccupied lands of the United States when Wyoming became a State.
 - The establishment of the Bighorn National Forest did not itself render lands within that forest occupied under the 1868 Treaty.
- Wyoming:
 - When reading the treaty in its historical context—a time when the United States sought to sequester tribes from incoming settlements and allow a transition to agriculture—the temporary nature of the hunting right becomes evident.
 - Wyoming's statehood was not just a legal event, it was a recognition the once wild frontier was no more.

Herrera v. Wyoming, No. 17-532

- Wyoming (cont.):
 - The members of the *Race Horse* Court, having lived through the three decades of western expansion after the Civil War, were well-positioned to interpret the language of [the Crow Treaty]. They had watched the buffalo disappear from the Great Plains, leaving nomadic tribes like the Crow Indians to adapt or vanish.

... their analysis was informed by more legal and historical context than the parties here could ever present.

Herrera v. Wyoming, No. 17-532

- Herrera's reply due December 13, 2018
- Argument likely in January





Thank you!

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