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"CROSSED BY THE BORDER": THE U.S.-CANADA BORDER AND CANADA'S "EXTINCTION" OF THE ARROW LAKES BAND, 1890-1956¹

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In 1956, Canada's Department of Indian Affairs declared the Arrow Lakes Band "extinct" and transferred the rich timberlands of the Arrow Lakes Reserve, located not far from Canada's boundary with the United States, to the province of British Columbia. The culmination of a decades-long process in which the government of Canada proactively wielded its self-assumed power to define Indian status and determine band membership, this outcome was also a product of extra-legal assumptions read into its Indian Act that reveal how willing the government was to manipulate its own rules regarding gender and band governance to achieve its goals. Also critical was the presence of the U.S.-Canada border, which transected the traditional territories of the Arrow Lakes (Sinixt) people and forced the reconfiguration of both their identities

¹Preliminary research for this essay was conducted in 1997 under the guidance of Professor Richard White at the University of Washington. I am grateful to him for his thoughtful comments on those early drafts. I am also thankful to Dale Kohler for suggesting this as a research topic; to Murray Adams of Rush, Crane, Guenther & Adams for his comments on an early draft, and to Professor William Bauer and Lawrence Fast for their comments on a recent draft. Although I served as a reservation attorney for the Confederated Tribes of the Colville Reservation in 1994, I did not work on this issue while there.

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and the environment through which they moved. The border rendered the Sinixt people subject to the jurisdictional authority of two separate nation-states, allowing each nation to impose its own criteria for preserving any rights in lands that the Indians had occupied from time immemorial and for formal recognition as a distinct people. Canada's eventual determination that the Sinixt were extinct, as a result, was a function not simply of the application of its own law but of its ability to utilize the international boundary as a tool to terminate its obligations to a people whose presence in this borderlands region predated Canada's establishment as a nation-state by many centuries.

Part of a larger story of conflict between Native forms of social organization capable of evolving over time and the efforts of the U.S. and Canadian governments to redefine those identified as Indians within largely territorial forms of organization in order to facilitate their assimilation, the Arrow Lakes experience reveals the extent to which the international border served not just to divide two different systems of aboriginal law and policy, but also to bind them to one another. Although the United States and Canada adopted somewhat different approaches to defining Indian status and establishing reserves and reservations, both systems of law and policy shared a common purpose: to facilitate the transfer of Indian lands to non-Indians and to place a finite limit on each government's obligations to those it had dispossessed. Although the Arrow Lakes people are unique in being the object of an official determination that they were extinct in Canada, their experience brings into focus the heightened pressure placed on all Native groups along the border to sustain their legal existence on either side given the combined weight of the border's presence and two separate bodies of assimilationist law and policy imposed concurrently on their traditional territories.

ESTABLISHMENT OF RESERVES FOR THE SINIXT PEOPLE

During the early nineteenth century, non-Native travelers to the Arrow Lakes region encountered groups of Native people they and, later, ethnographers identified as Lakes or Arrow Lakes Indians. Archaeological evidence reveals that the Arrow Lakes had been present in the area for many centuries. Given the scattered and seasonal nature of the resources on which they relied, the Lakes (Sinixt) people developed a semi-nomadic pattern of settlement, using the interconnected lakes and rivers of the Columbia River system to travel throughout a territory

that extended north to what is now Revelstoke, British Columbia, and south to Kettle Falls, Washington.²

Ethnographers agree that although the activities of the Sinixt were historically centered on the Arrow Lakes, a gradual southward migration into areas previously utilized but not permanently occupied occurred during the nineteenth century following the establishment of Fort Colville and Fort Shepherd by the Hudson's Bay Company. Additional factors leading to a reduction in the number of Sinixt living in the immediate vicinity of the Arrow Lakes were smallpox and other epidemics that swept through the region during this period. There is also evidence, however, that migratory patterns persisted among Sinixt who wintered near Fort Colville but continued to travel up the Columbia River into the Arrow Lakes region to utilize the plant and animal resources of that area on an annual basis.³

The United States' and Britain's agreement to fix the international border at the forty-ninth parallel in 1846 effectively divided Sinixt territories between the two. Both British and American officers in the area in the 1860s noted that the Sinixt continued to utilize their territories on both sides of the boundary line, a practice that complicated efforts to categorize them as exclusively British or American Indians. In 1861, for example, a lieutenant colonel in the Royal Engineers reported that "Lakes Indians . . . live as much South as north of the 49th parallel . . . so that they must be considered as much American as British subjects."⁴ Government officials on the U.S. side of the border likewise noted the Arrow Lakes' continued utilization of areas both north and south of the forty-ninth parallel, observing that the fact that "they are migratory in habit" made

²The name the Arrow Lakes Indians gave to themselves, *sngaytskstx*, refers to a particular species of trout found in the Arrow Lakes. The term has been rendered in the English alphabet in various ways over time. Randy Bouchard and Dorothy Kennedy, *Lakes Indian Ethnography and History* [report prepared for the B.C. Heritage Conservation Branch, Victoria, B.C., August 1985], 2, 6; *Forty-fifth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1927-1928* (Washington, DC, 1930). I use *indigenous*, *Native*, and *aboriginal* interchangeably to refer to North America's first peoples and use *Indian* as a term of art to refer to those identified as such under the terms of Canada's Indian Act or under U.S. law, or where it is the term used by the original source.

³Bouchard and Kennedy, *Lakes Indian Ethnography*, 13-14, 18, 20.

⁴Report of J.S. Hawkins, lieutenant colonel, Royal Engineers, 5 June 1861, B.C. Archives, Colonial Correspondence, file 736, quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*, 17. In 1862 Hawkins again reported the Arrow Lakes utilized resources on both sides of the forty-ninth parallel and noted the importance of access to the fisheries at Kettle Falls as an element. J.S. Hawkins to J. Cox, 26 March 1862, B.C. Archives, Colonial Correspondence, file 377/5, quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*.

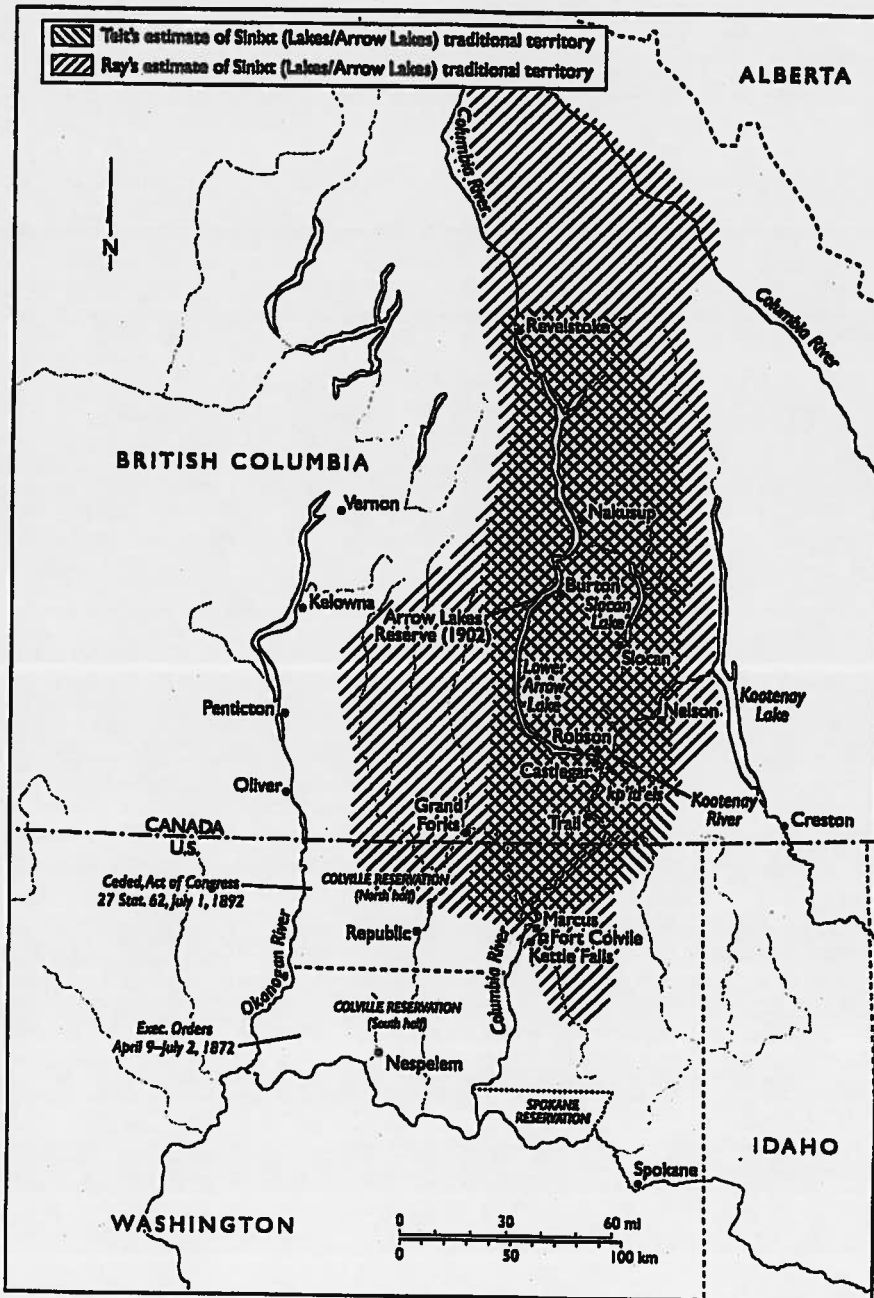
it "exceedingly difficult to make the proper distinction between those entitled to benefit from our government and those of British Columbia."⁵ Although the border had no immediate impact on the ability of the Sinixt to travel freely throughout their traditional territories, by 1880 government officials on both sides of the Canada-U.S. border contemplated using force to prevent the continued migration of trans-border peoples.⁶ Over time, heightened enforcement of the international border made it more and more difficult for the Sinixt to sustain traditional economies by reconfiguring the environments through which they moved and limiting the resources to which they had access. The net effect would be to render them vulnerable in the same regions that had once sustained them both physically and spiritually as a people.

By the end of the nineteenth century, the influx of non-Natives into the area had brought to a head the issue of resolving Native land claims on both sides of the border. On the U.S. side, the Arrow Lakes were included among those permitted to reside on the Colville Reservation, established in northeastern Washington by executive order in April 1872, less than one year after British Columbia joined the dominion of Canada.⁷ As first established, the reservation extended north to the forty-ninth parallel and included a large pocket of fertile land east of the Columbia River. In response to the demands of settlers in the region who also wanted access to the rich agricultural lands east of the river, the U.S. Congress acted almost immediately to redraw the reservation's borders, limiting it to the far rockier and inhospitable terrain west of the Columbia River. When Congress severed the north half of the reservation in 1892 in order to open it to miners, Sinixt territory was among

⁵George A. Paige, Report to the Superintendent of Indian Affairs, 8 July 1865, United States, 39th Cong., 2^d sess., quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*, 17-18.

⁶See Bouchard and Kennedy, *Lakes Indian Ethnography*, 19-20, quoting Canada, Report of the Privy Council (1881), 2-9; United States, Department of State (1882), 1-2.

⁷See attached map. United States, Executive Orders of 9 April 1872 and 2 July 1872 (Ulysses S. Grant), *An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes*, 27 Stat. 62, 1 July 1892. The Arrow Lakes were one of twelve tribes eventually assigned to the Colville Reservation. Others included the Methow, Okanogan, Sanpoil, Colville [both a constituent group and the name assigned the reservation], Nespelem, Chelan, Entiat, Moses-Columbia, Wenatchi, Nez Perce, Palus. Collectively, these tribes are now known as the Confederated Tribes of the Colville Reservation; informally, they are often referred to simply as the Colville Tribe(s), members of which may have ancestral ties to one or more of its constituent groups.



The agreement in 1846 to fix the international border at the forty-ninth parallel divided Sinixt territories between the United States and Britain. (Map by Bill Nelson)

that most affected. Although the U.S. government issued allotments to Native people living in the area that was opened for settlement, many were forced out by newcomers, settling instead on the remaining south half of the Colville Reservation.⁸

The process of establishing a reserve for the Arrow Lakes on the B.C. side of the border was also fraught with delay and ambivalence from the start, partly engendered by the refusal of British Columbia to enter into treaties with a majority of the First Nations whose territories had been incorporated within its boundaries. Instead, B.C. decided to set aside small and scattered reserves that would deny Native peoples in western Canada the larger contiguous land base retained by some U.S. tribes.⁹ In 1875, the provincial and dominion governments appointed a joint commission to determine the number, size, and location of the small reserves to be "allowed" indigenous nations in British Columbia. Although the Indian Reserve Commission was instructed to consider "the habits, wants and pursuits of [each] nation" in determining the location and size of its reserves, the commission also was to take into account "the amount of territory available in the region . . . and claims of white settlers." Both governments assumed that once reserves were established, all remaining land would be available for settlement.¹⁰ Reserves might increase or decrease in size or number over time as the Native population fluctuated, and land no longer used as a reserve would revert to the province.¹¹

On October 4, 1884, Peter O'Reilly, who served as Indian reserve commissioner from 1880 to 1898, reported to the Department of Indian Affairs that he had completed the adjust-

⁸Jessie A. Bloodworth, *Human Resources Survey of the Colville Confederated Tribes, A Field Report of the Bureau of Indian Affairs, Portland Area Office, Colville Agency* (June 1959), 46. See also Lillian A. Ackerman, *A Necessary Balance: Gender and Power among Indians of the Columbia Plateau* (Norman, OK, 2003), 186-37.

⁹See, e.g., Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver, BC, 2002), 86-96.

¹⁰Canada, *Correspondence, Memoranda and Reports submitted to the Royal Commission on Indian Affairs* (Blue Book 12), G.M. Matheson Report, 30 December 1921, 8; Annual Report of the Department of Interior for 1875, pp. xl-lxix, "Indian Land Question in British Columbia." Library and Archives Canada, Record Group [RG] 10.

¹¹Matheson Report, 9. See also Report of the Royal Commission on Indian Affairs for the Province of British Columbia ["McKenna-McBride Commission"], vol. 2 (Ottawa, ON, 1916), Terms of Reference. The commission was appointed in 1912 to resolve ongoing disputes regarding the location and size of reserves in British Columbia. Its popular name was drawn from the names of the two special commissioners who headed it, J.A.J. McKenna and provincial premier Richard McBride. See also Harris, *Making Native Space*, 96.

ment of reserves for the Indians in the Kootenay district, which included areas historically occupied by the Sinixt people. For reasons that are not entirely clear in the written record, no reserve was set aside on behalf of the Arrow Lakes at that time.¹² One factor may well have been that the Sinixt—like other indigenous groups in the region—continued to utilize their lands in traditional ways, traveling within their territories to access resources throughout the year. O'Reilly himself explained that it was difficult to determine the number of Indians who were to live on the reserves he had established because indigenous peoples in the area were "migratory, moving from place to place in different seasons of the year, as suited to their pursuits and requirements."¹³

Also a factor, however, may have been a reluctance on the part of the Sinixt—like other Native groups in south-central British Columbia—to recognize the authority of the Indian Reserve Commission, in the absence of treaty agreements, to confine them to areas that comprised a mere fraction of their traditional territories. R.L.T. Galbraith, who was present at the time of O'Reilly's original pass through the area and later served as Indian agent for the Kootenay district, would testify before the McKenna-McBride Commission in 1914 that, although O'Reilly had taken into account the "little gardens" of the Indians where he had seen or learned of them, they were not consulted in the definition and creation of reserves. As a result, small groups of Indians continued to "squat" outside the reserves O'Reilly had set aside. These Indians, Galbraith explained, were of the opinion that they had proprietary rights in the land and had been opposed from the beginning to British Columbia's efforts to restrict them to reserves.¹⁴ Local settlers were even more adamant. "The Indians appear to be laboring under the impression that all the land is theirs and we think it is high time they were disillusioned," complained the authors

¹²Matheson Report, 8, 10, GR 933, B 1391, *Canadian Indian Affairs*, vol. 1273-78, at 250-51.

¹³O'Reilly to Chief Commissioner of Lands and Works, n.d., vol. 1273-78, 258-60, 265-67. Although this reference is not specific to the Arrow Lakes, it does not exclude them and is consistent with other evidence reflecting such patterns of movement by Arrow Lakes people. See notes 4-6 and note 21.

¹⁴McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 28 October 1914, 72, 75, 78-79. Although this statement does not single out the Arrow Lakes, the attitude is generally attributed to Native groups in the Kootenay area during the period of early settlement; the Sinixt were one of those groups.

of one letter to the commission.¹⁵ "The whole trouble seems to arise from the belief which the Indian has that the whole of this country belongs by right to him," a group of local farmers complained. "So well grounded is this belief in the Indian mind that he lets slip no opportunity of asserting his rights when he is in a position to do so."¹⁶

Native groups in the area were also aware that Canada was unwilling to set aside reserves as large as those established by the United States. O'Reilly explained in 1884 that he had the "utmost difficulty in persuading the Kootenays [a neighboring band] to agree to the boundaries fixed on by me, and which they looked upon as meagre in the extreme, compared with the millions of acres set apart by the United States Government for American Indians, a few miles south of the line."¹⁷ Although local settlers insisted that the amount of land reserved to the Indians was already too great, the Indian agent for the Kootenay Agency—the agency responsible for the region that included Sinixt traditional territories in Canada—expressed concern that the proposed reserves were not large enough to meet the needs of the Indian population in that district.¹⁸ Also an issue, as O'Reilly himself conceded, was the quality of the land set aside as reserves. In 1884, he observed that when he had first arrived "the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their horses and cattle in the most favoured spots." In contrast, he admitted the reserves he had established were, for the most part, "utterly worthless for agriculture, and very inferior for grazing"—implicit evidence that the wishes of Native people had not been taken into account notwithstanding the mandate of the Reserve Commission.¹⁹

Only when the body of an elderly aboriginal man was found on the railroad tracks near Castlegar, B.C., in 1902, did Indian agent for the Kootenay district R.L.T. Galbraith "discover" two bands of Sinixt people. One group was located about five miles from Burton across Lower Arrow Lake and the other at the

¹⁵Acting Secretary of the Creston Board of Trade to McKenna-McBride Commission, 15 May 1915, RG 10, vol. 11024, file 691.

¹⁶Undated memorial from Creston District Farmers Institute and Creston Board of Trade, RG 10, vol. 11024, file 691.

¹⁷British Columbia, *Sessional Papers*, 4th Parl., 3^d sess., 1885, p. xxi following p. 410, quoted in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver, BC, 1974), 220, n. 32.

¹⁸O'Reilly to Superintendent General of Indian Affairs, telegram, 1 September 1887, O'Reilly to Chief Commissioner of Lands and Works, n.d., vol. 1273-78, 259-60.

¹⁹*Ibid.*, 258-60, 265-67.

mouth of the Kootenay River near Robson—a place they called *kp'ftléls*. Galbraith later told the McKenna-McBride Commission that neither he nor his predecessor was aware that they were in the area, although they knew that “in the early days many of the Colville Indians had been in the habit of ascending the Columbia river to fish and hunt.” He also admitted, however, that he had encountered a small band he called Gregoire Indians—Gregoire was a Sinixt chief—in the Kootenay region in 1871 but that he lost track of them after they “drifted south of the line.”²⁰ A. Megraw, inspector of Indian agencies, in contrast, reported in 1915 that Galbraith’s predecessor was aware of the band at the mouth of the Kootenay River, but “did not consider them as belonging to his Agency and paid no attention to them.”²¹

On October 25, 1902, the Office of the Indian Reserve Commissioner set aside a reserve of 255 acres for the Arrow Lakes on the northwestern shore of Lower Arrow Lake. Also known locally as Oatscott, the reserve was located some five miles south and across the lake from the town of Burton. According to the Minute of Decision establishing the reserve, six families numbering twenty-two people were assigned to the reserve, half of which consisted of “precipitous granite bluffs.”²² Despite repeated requests by the second group of Arrow Lakes located near the confluence of the Kootenay and Columbia Rivers, Canada failed to set aside an additional reserve on their behalf.

In June 1914, Alexander Christian, describing himself as “one of the few survivors of the band of the Lake (or S. Nai-Toekstet) tribe living at the mouth of the Kootenay River,” contacted the McKenna-McBride Commission on the advice of James A. Teit, a British Columbia ethnographer, to complain that the site on which they lived had not been set aside as a reserve, even though they had requested that this be done two decades earlier.²³ Christian explained that he had been born and lived

²⁰McKenna-McBride Commission, Kootenay Agency, Hearing Transcript, Examination of Indian Agent R.L.T. Galbraith, 28 October 1914, 84–85.

²¹A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, 24 July 1915, RG 10, Department of Indian Affairs, Ottawa.

²²A.W. Vowell to Deputy Commissioner of Lands and Works, Victoria B.C., 25 October 1902, enclosing Minute of Decision—Arrow Lake Indians. British Columbia Archives, GR 2982, box 6. The reserve was confirmed for the “Arrow Lake Tribe” by the McKenna-McBride Commission on March 24, 1915. McKenna-McBride Report, vol. 2, 370. Family names associated with the reserve included Klome, Joseph, and Christian. Census, Kootenay Agency, June 30, 1903.

²³Leslie H. Tepper, *The Interior Salish Tribes of British Columbia: A Photographic Collection* (Ottawa, ON, 1987). Alexander Christian was also referred to as Alex or Alec Christie. McKenna-McBride Commission, Hearing Transcript, 84–85.

his entire life in the area, as had both of his parents and three of his grandparents.²⁴ Recently, however, their land had been encroached upon by members of a neighboring Doukhobor community (a Russian immigrant group that embraced both pacifism and communal land ownership).²⁵ Although the Doukhobors had offered them each one hundred dollars for their homes, Christian and his family—including his brother Baptiste—had refused to leave.²⁶

This was not the first Canadian authorities had heard of the matter. In 1910, it had been brought to the attention of the Department of Indian Affairs by John McDougall, a special commissioner assigned to review the allocation of reserves. He had explained that the small band of Indians living at the mouth of the Kootenay River had "occupied this part from time immemorial[,] the graves of their ancestors as also of their own families are here."²⁷ The band's rights in the area were well established, he reported, and the block of land, as surveyed, was designated a government reserve. Kootenay Indian agent R.L.T. Galbraith concurred, noting that the band and their forefathers had long occupied the area and had considered it a primary fishing and camping site before they settled on it all year round.²⁸ Based on this evidence, A.W. Vowell, Kootenay Indian agent at the time of O'Reilly's visit in 1884 and now superintendent general of Indian affairs, requested that the B.C. lands commissioner withhold the site from preemption or purchase by settlers until the matter was resolved; the commissioner responded that he had directed that the land not be alienated.²⁹

²⁴Declaration of Alexander Christie or Christian, recorded by James A. Teit, 25 June 1914, and submitted to McKenna-McBride Commission, RG 10, vol. 4047, file 356, 200-1.

²⁵Ironically, the Doukhobors' practice of owning their land in common "like the Indians" was itself the basis of a complaint by one of their neighbors to the Royal Commission appointed to investigate their activities in 1912. W. Blakemore, *Report of the Royal Commission on Matters Relating to the Sect of Doukhobors in the Province of British Columbia*, Inquiry at Nelson, B.C., 29 August 1912, GR 793.

²⁶Declaration of Alexander Christie or Christian, 25 June 1914, RG 10, vol. 4047, file 356, 200-1.

²⁷John McDougall to Superintendent of Indian Affairs, 8 January 1910, RG 10, vol. 4047, file 356/200-1.

²⁸R.L.T. Galbraith to A.W. Vowell, Indian Department, Victoria, B.C., 25 January 1910, stating that the Arrow Lakes at the mouth of the Kootenay River were a "bright and intelligent little band, bear a good character, [and embrace] the habits of industry," RG 10, vol. 4047, file 356/200-1.

²⁹A.W. Vowell to Price Ellison, Chief Commissioner of Lands, Victoria, B.C., 21 February 1910; Price Ellison, Chief Commissioner of Lands, to A.W. Vowell, 22 February 1910, RG 10, vol. 4047, file 356/200-1.



Alexander Christian, who described himself as one of the few surviving members of the Lakes tribe living at the mouth of the Kootenay River, complained to the McKenna-McBride Commission that the site on which they had lived for generations had not been set aside as a reserve. (Photo by James Teit, 1914. Courtesy of Canadian Museum of Civilization, 26619)

Further inquiry, however, revealed that the site had been included in a 198-acre Crown grant to a settler named J.C. Haynes in December 1884, just two months after O'Reilly's visit to the Kootenay district.³⁰ Galbraith contacted the executor of Haynes' estate in an effort to arrange for the purchase of ten or fifteen acres on behalf of the band residing there, noting that it was a long-established fishing site and that graves were also located on the property. Although the executor was not in a position to sell at that time, he promised to give the Department of Indian Affairs an opportunity to purchase ten acres. Galbraith, however, heard nothing more from the executor, and just one month later the department concluded that it lacked the funds to pursue the matter further that year.³¹

When no further action had been taken by 1912, ethnographer James Teit himself raised the issue with superintendent of Indian affairs Vowell in Ottawa. He explained that the band at the mouth of the Kootenay River, whom he identified as "Indians of the Lake tribe," had, since 1894, repeatedly requested that a reserve be established at that site. Teit noted that, at the time the matter was brought to McDougall's attention in 1910, the Doukhobors were located on the other side of the Columbia River on land they regarded as less desirable. At the time of writing, however, the band had just learned that the land on which they lived had been purchased that spring by the Doukhobors, who had informed them that they would be evicted in three weeks if they did not leave voluntarily by that date.³²

In response to Teit's report, the Department of Indian Affairs made belated attempts to negotiate the purchase from the Doukhobors of a five- or ten-acre portion of the land on which Alexander Christian and other Lakes band members lived, but these attempts failed. The Doukhobors admitted, however, that the band had long occupied the site, and the Russian immigrants were willing to allow the band members to continue to live on "the same spot where they have been staying for years" as long

³⁰A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, RG 10, Department of Indian Affairs, Ottawa, 24 July 1915, referring to records of the registrar of land titles at Nelson, B.C.; Price Ellison, Chief Commissioner of Lands, to A.W. Vowell, 8 March 1910, RG 10, vol. 4047, file 356/200-1.

³¹R.L.T. Galbraith to Secretary, Department of Indian Affairs, Ottawa, 7 June 1910. See also McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85-86; Assistant Deputy Minister, Department of Indian Affairs, Ottawa, to R.L.T. Galbraith, 15 July 1910, RG 10, vol. 4047, file 356/200-1.

³²James A. Teit to Superintendent of Indian Affairs, Ottawa, 16 May 1912, R.L.T. Galbraith to Secretary, Department of Indian Affairs, Ottawa, 2 July 1910, RG 10, vol. 4047, file 356/200-1.

as they kept to themselves.³³ In September 1912, the Department of Indian Affairs instructed Galbraith to inform the Sinixt Band that it could—or would—do nothing more for them. Instead, they were told not to trespass on land now owned by the Doukhobors to hunt or trap, and to be good neighbors.³⁴

In an effort to arrive at a more satisfactory solution, Teit contacted the inspector of Indian agencies, T.J. Cummisky, but Cummisky was dismissive of the Lakes' claims. If they had really cultivated and occupied the land for as long as two decades, he declared, O'Reilly surely would have dealt with their request.³⁵ In other words, O'Reilly's failure to establish a reserve itself constituted evidence in Cummisky's view that the band's claim had no merit.³⁶ Although the McKenna-McBride Commission would later disagree with Cummisky and find that the band had "suffered grievance both as to their land holding and as to their graves," some of which had been destroyed by the Doukhobors, Cummisky's failure to pursue the matter when he was contacted helped to reduce the alternatives still available.³⁷ On March 24, 1915, the commission designated the land on which the band resided as a "temporary reserve" that was "occupied by consent of the Doukhobors." Because the site had already been granted by the Crown, the commission believed it lacked the authority to designate it a permanent reserve. Instead, it forwarded the evidence it had received to the dominion government, expressing its hope that

³³S. Bray, Chief Surveyor, to Deputy Minister, Department of Indian Affairs, 28 May 1912; Assistant Minister and Secretary, Department of Indian Affairs to R.L.T. Galbraith, 19 July 1912; J.R. Sherbinin, Doukhobor representative, to Galbraith, 7 September 1912. See also Declaration of Abraham Hirst, Justice of the Peace, 6 June 1914 [stating that Christie and his relatives were living on the site when he first encountered them and at the time that the Doukhobors acquired title to the land], RG 10, vol. 4047, file 356/200-1.

³⁴Assistant Deputy Minister, Department of Indian Affairs, to R.L.T. Galbraith, 2 October 1912; Galbraith to Deputy Minister, 2 October 1912, RG 10, vol. 4047, file 356/200-1.

³⁵T.J. Cummisky, Inspector of Indian Agencies, to J.D. McLean, Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 21 December 1912, RG 10, vol., 4047, file 356/200-1.

³⁶Cummisky's view is especially ironic given O'Reilly's observable lack of communication and interaction with the Native bands for whom he was setting aside reserves in favor of a focus on efficiency. See Harris, *Making Native Space*, 172-74.

³⁷J.G.H. Bergeron to Secretary of State, Ottawa, 25 March 1915, RG 10, vol. 4047, file 356/200-1.

the government would act on the Indians' request so that the needs of the band could be provided for.³⁸

In response to the commission's request, the Department of Indian Affairs sent A. Megraw—who had replaced Cummsky as inspector of Indian agencies—to attempt yet again to negotiate with the Doukhobors for the purchase of five acres on behalf of the small band. Although the department instructed Megraw to inform the Doukhobors that the department intended to consider legal action to recover the property if they did not cooperate, the Doukhobors again refused to sell any part of the land.³⁹ Megraw himself discouraged any legal action on behalf of the Sinixt. Although there was reason to believe that the Crown grant to Haynes had been based on his fraudulent declaration that the land was unoccupied and not "part of an Indian Settlement," Megraw argued that the failure of the Sinixt to object "to issuance of the Crown Grant or subsequent possession under the Crown Grant" made "the chances of obtaining cancellation . . . rather remote." It was also unlikely that the department would prevail in such an action, he added, because Haynes was deceased.⁴⁰ Ironic as it would have been for the courts to require that the band object to the Crown grant in 1884 when the department itself was unaware of the grant as late as 1902, and even though the death of a person who has made a false declaration is not dispositive of the resulting claim, the department did not pursue the matter.⁴¹

In addition to discouraging any legal action to protect the interests of the Sinixt, Megraw urged the department not to

³⁸McKenna McBride Commission, "Minute" of 24 March 1915, RG 10, vol. 4047, file 356/200-1.

³⁹S. Bray, Chief Surveyor, to Duncan Scott, Department of Indian Affairs, 10 April 1915; J.D. McLean, Assistant Deputy Minister and Secretary, Department of Indian Affairs, to A. Megraw, Inspector of Indian Agencies, Vernon, B.C., 19 April 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁰A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915, citing the Land Act of British Columbia, RG 10, vol. 4047, file 356/200-1. Ironically, Haynes was involved in at least one other questionable land acquisition. In 1875, he applied to purchase 4,245 acres near Osoyoos known to be used by Native peoples in the area but not yet reserved to them. Although the Indian Reserve Commission allotted that land to the Indians who occupied it in 1877, a clerk mistakenly changed the township numbers in transcribing its Minute of Decision. Haynes, reportedly aware that the commission had intended to reserve the land for the Indians, took advantage of the clerk's error to obtain a Crown grant before anyone else realized the mistake. Cail, Land, Man, and the Law, 222-23. If a person who made a false declaration has died, the question becomes whether the subsequent owner had notice of the defect in the title.

⁴¹Alexander Christian, Statement Submitted to McKenna-McBride Commission, 25 June 1914.

establish a permanent reserve on behalf of the Lakes band. Ignoring the corroborating statements of other settlers who had lived in the area for years, Megraw insisted that Christian's declaration that he had lived on the land near Robson for years was "at so many points" untrue. The absence of any evidence that their presence was brought to O'Reilly's attention in 1884, Megraw reiterated, reflected that the Lakes' claim to that site was a "comparatively recent discovery on their part."⁴²

Megraw saw the presence of the Canada-U.S. border as an additional reason to discount the Lakes' claim: he urged the department to take the position that it was absolved of any responsibility for this group of Lakes because they also had ties to areas outside Canada. Reports he had received suggested that "this particular Band or family of Indians . . . appear to have been Nomads and distinctively American in their affiliations." An old boat captain familiar with the Columbia River and the Arrow Lakes, he explained, had told him that these Indians "followed the freeze-up from Arrow Head to Robson" every year.⁴³ Yet Megraw's admission that these Indians had formerly "looked upon the entire length of the Arrow Lakes and the Kootenay River between Kootenay Lake and the Columbia River as hunting and fishing ground" is itself evidence that both he and the Department of Indian Affairs were aware that the small band located at the mouth of the Kootenay River was part of a larger group with longstanding ties to the Arrow Lakes region.

It was also Megraw's opinion that, even if the department was responsible for the band at the mouth of the Kootenay River, the government had already done all that was necessary by establishing a small reserve near Burton. Ignoring Galbraith's efforts to have a reserve set aside for this band even after the Oatscott reserve was established, Megraw surmised that Galbraith had set aside the 255-acre reserve on the western shore of Lower Arrow Lake near Burton based on the assumption that the Robson band would also move there. Although Galbraith had expressly told the McKenna-McBride Commission that it was not feasible to move this band to the Oatscott reserve because of "friction between the Indians of the two localities arising out of an old murder case," Megraw insisted that their refusal to move to that reserve negated any claim they had to a reserve of their own.⁴⁴ If they had been "bona fide British Columbia Indians and there were reasonable grounds for hoping that they

⁴²Megraw to Department of Indian Affairs, 24 July 1915.

⁴³*Ibid.*

⁴⁴McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85-86; Megraw to DIA, 24 July 1915.

would make some effort to live on and cultivate any land in British Columbia that might be procured for them," Megraw declared, he would be willing to overlook what he considered their disregard of the truth. But, in his opinion, the entire matter could be summed up simply as a plan to obtain \$1,000 in return for the land they had lost and to "spend it down in Washington."⁴⁵

Megraw also wrote to Alexander Christian, south of the border at the time, to inform him that he believed that much of what Christian had sworn to in the declaration submitted to the McKenna-McBride Commission was untrue. Christian, he suggested, had hidden from the commission the fact that a reserve had been established on behalf of the Arrow Lakes Band near Burton. "I want you to tell me why you have not lived on that land up the Columbia River and are not living on it now?" Megraw demanded in his letter. "British Columbia Indians should not be living in Washington state."⁴⁶

Christian responded that he did not know of anything he had declared that was untrue, noting that Megraw had not stated in his letter just what he thought he had lied about. Describing himself as a B.C. Indian, Christian explained that the \$1,000 he had requested as compensation for the land he had lost would allow him to buy a new piece of land in Canada and to build a home there.⁴⁷ The Department of Indian Affairs, however, was content to rely on Megraw's assessment of the matter and disregarded Christian's response. Instead, it decided to take no further action to secure the land at the mouth of the Kootenay River for the band that resided on it, to compensate them for its loss, or to find an alternate site for a permanent reserve.⁴⁸ Those who remained had effectively been rendered squatters in their own homes, surrounded by Doukhobors who had "ploughed the land right up to the Indians' fence," destroying graves and parts of an orchard that they had planted.⁴⁹

⁴⁵A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915, RG 10, vol. 4047, file 356/200-1. The Doukhobors had reportedly paid \$95 an acre for the land that Galbraith had estimated two years earlier could be obtained for \$35 to \$40 an acre. R.L.T. Galbraith to Department of Indian Affairs, 2 August 1912.

⁴⁶A. Megraw, Inspector of Indian Agencies, to Alec Christian, Roseburg, Washington, 14 June 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁷Alec Christie to A. Megraw, Inspector of Indian Agencies, 25 June 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁸J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, to R.L.T. Galbraith, 4 August 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁹McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85-86.

By 1915, both Baptiste and Alexander Christian, realizing the implications of a situation that had resulted in their being confined to a fraction of the land on which they had lived at the sufferance of the new owners, had moved to Marcus, Washington, just south of the Canada-U.S. border. There their wives, both Arrow Lakes individuals listed on the rolls of the Colville Reservation, had each been allotted 160 acres.⁵⁰ One witness before the McKenna-McBride Commission urged Canada to work in concert with the United States to limit Canada's obligations to its indigenous peoples. All land in which Indians had an interest on both sides of the border should be considered in determining whether they were entitled to a reserve in Canada, he argued, so accepting an allotment on the U.S. side of the border would also operate to bar any claim on the Canadian side. He had been told by a U.S. senator that it was U.S. policy to do this only with Indian consent, but he had been assured that Canada's adoption of a more stringent policy would have "considerable influence" in Washington, D.C., pressuring policy-makers there to tighten their rules.⁵¹

Galbraith, in contrast, refused to remove Baptiste Christian's name from the Kootenay Agency rolls even after he moved to Marcus, noting that Baptiste insisted he held the allotment only on his wife's behalf and would one day return to Canada. Although he chose not to live on the Oatscott reserve or on the few acres now in the hands of new owners near Robson, he continued to consider himself "a King George man."⁵²

THE TERMINATION OF THE ARROW LAKES RESERVE AND THE "EXTINCTION" OF THE ARROW LAKES

The failure to establish a permanent reserve on behalf of the Sinixt whose homes were located at the confluence of the Kootenay and Columbia Rivers was just one factor that con-

⁵⁰Extract of Precis Report of the Testimony of R.L.T. Galbraith before the Royal Commission, Victoria, B.C., 28 October 1914; A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, RG 10, vol. 4047, file 356/200-1. In 1906, Canada's Indian Act was amended to provide that five years' foreign residency was grounds for denying Indian status. This section, however, would not yet have applied to Baptiste and Alexander Christian, who had only recently moved south to join their wives. Indian Act, R.S.C. 1906, c.81, s.13.

⁵¹Guy Lowenberg [mining engineer] to McKenna-McBride Commission, 13 October 1914, RG 10, vol. 11024, file 691.

⁵²Extract of Précis Report of the Testimony of R.L.T. Galbraith before the Royal Commission, Victoria, B.C., 28 October 1914.

tributed to Canada's eventual finding that the Arrow Lakes were extinct in Canada. Also important in producing this result was the Department of Indian Affairs' management of the one reserve it did establish near Burton, as well as its persistent—and extra-legal—habit of conflating place and identity, reserve and band.

Located on the western shore of Lower Arrow Lake on land edged by steep cliffs, the Oatscott reserve was virtually inaccessible by road. For that reason, several of the Sinixt families that had settled there moved to Burton, five miles to the north across Lower Arrow Lake, where they could find work and their children could attend school.⁵³ In 1916, the McKenna-McBride Commission had identified steamboat as the only means of access to the reserve.⁵⁴ By the time the termination process had been set in motion, steamboat service was no longer available, and it was possible to reach the reserve only by traveling "83 miles from Vernon over a very poor road" often blocked by snowslides in winter.⁵⁵ Given the inaccessibility of the reserve, the number living on it had dropped to eight by 1924 and to six by 1936.⁵⁶

In 1932, the Department of Indian Affairs, increasingly interested in effecting a sale of the timber on the reserve after B.C. declared its intention to build a road through the area, raised the question of whether the Arrow Lakes Reserve should even be retained by the Indians. The immediate trigger was a report that Frank Joseph, who, the department assumed, was the only living male member of the Arrow Lakes Band, had been seriously injured by a heifer that wandered onto his property. Unwilling to pursue any action for damages against the owner of the heifer on Joseph's behalf, the department instead instituted an investigation to determine whether it could relieve its own financial and administrative responsibility to remaining band members by selling the timber on the reserve before it reverted to the province.⁵⁷

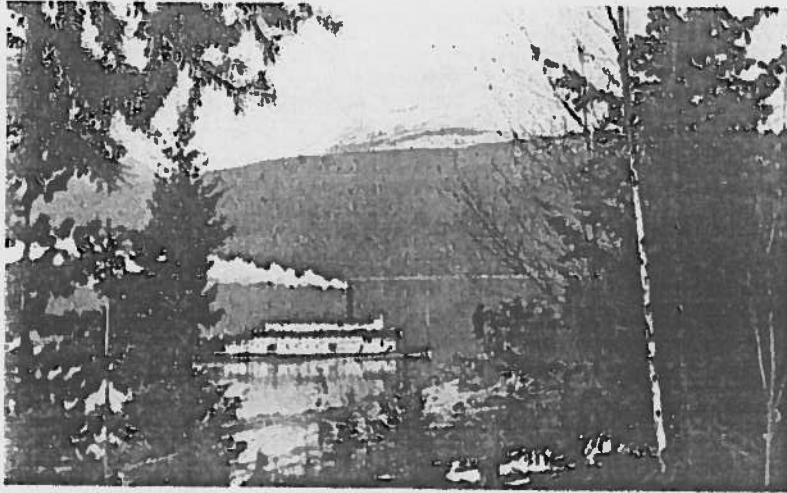
⁵³A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915, A.W. Vowell to Deputy Commissioner of Lands and Works, Victoria B.C., 25 October 1902 [for description of landscape], British Columbia Archives, GR 2982, box 6.

⁵⁴McKenna-McBride Report [table listing "steamboat" as the only means of access in 1916].

⁵⁵R.H.S. Sampson, Superintendent, Okanagan Indian Agency, to U.S. Arneil, Indian Commissioner for British Columbia, 9 September 1953, file 164/1-11.

⁵⁶D.M. Hett, Superintendent, Okanagan Indian Agency, memorandum re censuses prepared for the Arrow Lakes Reserve, 20 September 1955, F.S. Ryckman to James Coleman, 18 March 1935, RG 10, Department of Indian Affairs, file 982/1-1.

⁵⁷F.S. Ryckman to Chas. C. Perry, Assistant Indian Commissioner for British Columbia, 14 August 1932, RG 10, Department of Indian Affairs, file 982/1-1.



The disappearance of sternwheelers such as the S.S. *Minto*, above, ca. 1920, increased the isolation of the Arrow Lakes Reserve. (Courtesy of Royal BC Museum, BC Archives, 193501-001)

Joseph, however, was clearly concerned that both Arrow Lakes identity and the reserve be preserved. A few weeks before he died of his injuries on September 7, 1932, he inquired whether his four stepchildren could be made members of the Arrow Lakes Band under the terms of the Indian Act.⁵⁸ The stepchildren were willing to become Arrow Lakes Band members, but only if transfer of their band membership was not conditioned on the requirement that they live on the reserve, since they did not want to live in such an inaccessible place. Joseph also inquired whether the Columbia Lake Indian with whom he shared his trap line could be adopted as a member of the Arrow Lakes Band, even though the trap line partner was also concerned about the inaccessibility of the reserve in

⁵⁸Frank Joseph to F.S. Ryckman, 26 August 1932, F.S. Ryckman to R.H. MacIntosh, Provincial Constable, 7 September 1932, F.S. Ryckman to Chas. C. Perry, Assistant Indian Commissioner for British Columbia, 10 September, 1932, RG 10, Department of Indian Affairs, file 982/1-1. The stepchildren were members of the Lower Kootenay Band. Although the Indian Act would have provided for the automatic transfer of his wife's band membership to his own after their marriage, the membership of his stepchildren was not assumed because it was derived through their natural father. Canada, Indian Act, R.S.C. 1906, c.81, ss.2(f) (ii) and (iii), s.15.

winter.⁵⁹ The B.C. Indian commissioner deemed it unclear why Joseph had not moved his family to the reserve, but he agreed that they were not required to live on the reserve to effect a transfer of band membership. The commissioner was unwilling, however, to allow the man with whom Joseph worked to transfer his membership.⁶⁰ Although Canada's Indian Act presumed that the band membership of a woman was readily transferable—and her Indian status erasable—on her marriage to a non-band member or a non-Native regardless of her own wishes, it did not allow for the transfer of a man's band membership based on close personal ties or even a request from an individual who was effectively the chief of the band.⁶¹

The gendered provisions of the Indian Act also would prove useful in the decades following Frank Joseph's death, during which the Department of Indian Affairs became increasingly concerned with securing the sale of the timber on the reserve. To do so, the department had to obtain a release of that timber, either by determining that no surviving band members existed or by identifying a sole surviving member able to sign such a release. This process was facilitated by Indian Act provisions that allowed the department to eliminate from consideration women who married non-band members. The situation would be complicated by the department's own carelessly kept and often inaccurate records, as well as its lack of understanding of the complex interrelationships among Native peoples in an area that extended along both sides of the international boundary.

By the mid-1930s, the department's efforts to identify a sole surviving member of the band had come to focus on a woman named Annie Joseph, who had been listed as the wife of Louis Joseph on the 1903 census for the Arrow Lakes Reserve. In March 1935, James Coleman, Okanagan Indian agent, contacted Kootenay Indian agent F.S. Ryckman regarding an Annie Joseph living on the Okanagan Reserve with a partner who was an Okanagan Band member. If Louis Joseph was still alive, Coleman declared, she "should be returned to where she belongs," even though she had lived on the Okanagan Reserve since around 1920 and had "caused no trouble." On being informed that Louis Joseph was indeed deceased, Coleman summarily announced that he would simply add Annie Joseph's name to the Okanagan

⁵⁹Ryckman to R.H. McIntosh, Provincial Constable, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁰Chas. C. Perry, Assistant Indian Commissioner for British Columbia, to F.S. Ryckman, 18 August 1932, RG 10, Department of Indian Affairs, file 982/1-1.

⁶¹Canada, Indian Act, R.S.C. 1906, c.81, s.2(f)(iii), s.15.

register, ignoring that she was not married to her Okanagan partner. "So that," he declared, "settles that!"⁶²

Annie Joseph, however, refused to agree to this proposal. Instead, she insisted on continuing to identify herself as an Arrow Lakes Band member even though she lived on the Okanagan Reserve. Given her resistance to the proposed transfer, Coleman agreed that she could be retained on Arrow Lakes Band records. Annie Joseph did not know of any other surviving members of the Arrow Lakes Band, he added, and was willing to sign a surrender of the timber on the Arrow Lakes Reserve. Should the Indian Act require that a male band member sign a surrender of timber, however, Coleman suggested that her companion could be made a "temporary member" of the Arrow Lakes Band for purposes of signing the surrender.⁶³ Doubly ironic in light of the department's earlier refusal to permit the adoption into the Arrow Lakes Band of the male Indian with whom Frank Joseph shared his trap line, Coleman's proposal also ignored that the Indian Act made no provision for such "temporary" transfers of band membership, whether for a man or a woman.

Early in 1937, Andrew Irwin, who had replaced Ryckman as Indian agent for the Kootenay region, took it upon himself to resolve the outstanding matter of the sale of the timber on the Arrow Lakes Reserve, informing the Department of Indian Affairs that it had been conclusively established that Annie Joseph was "the last surviving adult member" of the Arrow Lakes Band and that she was willing to sign a surrender of the timber at any time.⁶⁴ D.M. MacKay, now Indian commissioner for British Columbia, asked Irwin to let him know whether the reserve was actually used or occupied by the Indians. In the same letter, MacKay also requested Irwin's opinion as to the

⁶²James Coleman, Indian Agent, Okanagan Reserve, to F.S. Ryckman, 14 March 1935, RG 10, Department of Indian Affairs, file 982/1-1. Annie Joseph's move to the Okanagan Reserve appears to have been motivated by tragedy. She left the Arrow Lakes Reserve to go live on the Okanagan Reserve after her husband and all their children had died. George S. Pragnell, Inspector of Indian Agencies, to Andrew Irwin, Indian Agent, Kootenay Agency, 14 May 1937.

⁶³James Coleman to F.S. Ryckman, 22 March 1935, RG 10, Department of Indian Affairs, file 982/1-1. The Indian Act had replaced traditional governing structures with an exclusively male band governance structure in which women had no role. See, e.g., Jo-Anne Fiske, "Political Status of Native Indian Women: Contradictory Implications of Canadian State Policy," in *In the Days of Our Grandmothers: A Reader in Aboriginal Women's History in Canada*, ed. Mary-Ellen Kelm and Lorna Townsend (Toronto, 2006), 339-41.

⁶⁴Andrew Irwin to Department of Indian Affairs, 11 February 1937. Although Annie Joseph had borne three sons, all three were deceased. F.S. Ryckman to James Coleman, 18 March 1935, file 9/3827, RG 10, Department of Indian Affairs, file 982/1-1.

"quantity, quality and value" of both the land and the timber on the reserve, noting that the province had recently applied for a right-of-way to build a road through the area.⁶⁵ Irwin responded that the primary value of the reserve was in its trees: much "good quality of fir that would make excellent timber," cedar trees that would make "the best of telephone and telegraph poles," as well as some "birch and fir of a poorer quality" that would provide "a good cordwood proposition after the highway had been completed." It would be possible to obtain a good price for the timber, he added, because the reserve was accessible from Lower Arrow Lake.⁶⁶

But Irwin had to retract his pronouncement that there was only one surviving member of the Arrow Lakes Band. His records also listed three others who, at the very least, would be entitled to a share of any proceeds from a sale of timber: Frank Joseph's daughter and two of the stepdaughters whose band membership had been transferred to the Arrow Lakes in the months before his death in 1932.⁶⁷ Although Irwin believed that Joseph's remaining stepdaughter had died, he would learn, on tracking down Joseph's widow, that all three of her daughters were very much alive.⁶⁸ The fact that two had married Indians living on other reserves, however, meant that their band membership had been transferred to their husbands' bands based on the operation of the Indian Act regardless of whether this was their own intention or desire. Just one was still unmarried and thus was an Arrow Lakes Band member in the eyes of the Department of Indian Affairs.⁶⁹

Inconsistencies in the department's own records caused officials repeatedly to conflate the identities of individuals with similar names; these inconsistencies also were a persistent source of confusion throughout the decades leading up to the department's eventual determination that the Arrow Lakes

⁶⁵D.M. MacKay, Indian Commissioner, to Andrew Irwin, Indian Agent, Kootenay Agency, 17 March 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁶Andrew Irwin to D.M. MacKay, 27 March 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁷Irwin to Department of Indian Affairs, 11 February 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁸Irwin to George S. Pragnell, Inspector of Indian Agencies, 4 June 1937, RG 10, Department of Indian Affairs, file 982/1-1. Frank Joseph's widow was excluded from consideration by her remarriage to a Lower Kootenay Band member.

⁶⁹Irwin to D.M. MacKay, 13 August 1943; MacKay to Irwin, 20 August 1943, RG 10, Department of Indian Affairs, file 982/1-1. See also Canada, Indian Act, R.S.C. 1906, c.81, ss.14, 15.

Band was extinct.⁷⁰ The officials' impatience at each juncture, however, focused not on the quality of their own recordkeeping but on the people they sought to categorize. "The woods," Irwin complained at one point, "are full of Annie Josephs." At another, he was forced to admit that he had spelled even the English married name of one of Joseph's daughters in two entirely different ways, and that the two people his records seemed to describe were in fact one person.⁷¹

In June 1937, new questions were raised regarding Annie Joseph's apparent ties to the Colville Reservation on the U.S. side of the international border. George Pragnell, inspector of Indian agencies, reported that she had told him during an interview that she had been baptized in Ward, Washington, near Kettle Falls on the Colville Reservation, but had been born on the Arrow Lakes Reserve. Given her place of birth, Pragnell was willing to identify her as an Arrow Lakes Band member able to sign a surrender of timber on the reserve. Should a male be required for that purpose, he added, her companion, an Okanagan Band member, remained ready and willing to become a temporary member of the Arrow Lakes Band. The problematic—and extra-legal—nature of this maneuver, first proposed by Coleman, is evident in Pragnell's own uncertainty about the effect of such a temporary transfer of band membership on the Okanagan man's wife—from whom he was separated but not divorced—and their children, all Okanagan Band members.⁷² Because both band membership and Indian status itself was derived through a woman's father or husband under Canada's Indian Act, they would presumably lose their status during that period.

In June 1943, Irwin informed the secretary of the Indian Affairs Branch, now a part of the Department of Mines and Resources, that "it is becoming more apparent daily that the Arrow Lakes Band of Indians will soon become extinct." The Arrow Lakes Reserve, Irwin reported, had long since been abandoned and "[n]ot one of these Indians will ever return."⁷³ Although the department was satisfied that no one continued

⁷⁰Irwin to MacKay, 16 October 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷¹Irwin to Pragnell, 4 June 1937, Irwin to MacKay, 16 October 1943 [conflating Auld and Ott].

⁷²Pragnell to Irwin, 14 May 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁷³Irwin to Secretary, Indian Affairs Branch, Department of Mines and Resources, 23 June 1943, RG 10, Department of Indian Affairs, file 982/1-1. [For clarity and convenience, I continue to use "department" as the short form for what was formerly the Department of Indian Affairs, even though it was temporarily designated a "branch."]

to reside on the reserve, the problem of determining who could be authorized to sign a surrender of the timber remained. To complicate matters further, the Okanagan Band member who had agreed to a temporary transfer of band membership to the Arrow Lakes Band had died. Irwin thus inquired anew of Alfred Barber, who had replaced Coleman as the Indian agent for the Okanagan Agency, regarding Annie Joseph's whereabouts. Barber replied that she continued to live on one of the Okanagan reserves, although she spent extended periods of time with friends and relatives in Washington State, no doubt including Sinixt who lived on or near the Colville Reservation.⁷⁴ In the meantime, however, B.C.'s Indian commissioner, D.M. MacKay, appears to have concluded that the department would be best served by a finding that there were no surviving Arrow Lakes Band members. He called into question Annie Joseph's claim that she had been born on the Arrow Lakes Reserve. If there was no surviving male member of the band able to sign a surrender of the timber, he added, the department could simply sell the timber, after which the reserve itself and any associated funds "would revert to the Province."⁷⁵

In his eagerness to reach the conclusion that the Arrow Lakes Band was extinct, however, MacKay had also overlooked Frank Joseph's still unmarried stepdaughter, and, in September 1943, she was identified as the sole surviving member of the Arrow Lakes Band.⁷⁶ In October, MacKay also identified an alternate reason to deny Annie Joseph's status as an Arrow Lakes Band member, questioning whether the Louis Joseph to whom Annie had been married was in fact an Arrow Lakes Indian—notwithstanding that he was listed on the original 1903 census for the reserve—and not "an American Indian of the Colville Reserve." If it could be determined that he was an American Indian, MacKay declared, this would resolve the matter.⁷⁷ MacKay appears to have assumed that this would mean that Annie Joseph had become a Colville tribal member by marriage and thus need no longer be considered a member of the Arrow Lakes Band on that basis—extending the logic of the Indian Act across the international boundary into the United States,

⁷⁴Alfred H. Barber, Indian Agent, Okanagan Agency, to Andrew Irwin, 5 August 1943, RG 10, Department of Indian Affairs, file 982/1-1. Coleman had been appointed inspector of Indian agencies.

⁷⁵D.M. MacKay to Irwin, 20 August 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁶Irwin to MacKay, 13 September 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁷MacKay to Irwin, 7 and 19 October 1943, RG 10, Department of Indian Affairs, file 982/1-1.

although U.S. law did not provide for the automatic transfer of a woman's tribal membership on her marriage to a non-tribal member or a non-Indian man. In March 1944, MacKay followed up with a request that Irwin send him a copy of an earlier statement Annie Joseph had signed declaring "that she was the wife of Louie Joseph and married him at Colville some years ago."⁷⁸ Irwin complied but noted that her identity as an Arrow Lakes Band member—the subject of repeated inquiries over the course of the preceding decade—was "pretty well established" even though the marriage itself had taken place at the Colville Indian Agency.⁷⁹

Having decided that Annie Joseph was indeed a member of the Arrow Lakes Band and, apparently, able to sign a surrender of the timber on the reserve even though she was not male, the department allowed the matter to rest. When Annie Joseph inquired in fall 1944 about the long-anticipated timber sale, Irwin informed her that the timber had been sold in November 1943.⁸⁰ Over the course of the next year, Annie Joseph wrote repeatedly to Indian Affairs officials asking why she had not yet received her share of the proceeds from the timber sale. Each of her inquiries was met with the explanation that the department was continuing its investigation of Arrow Lakes Band membership and that she would be notified when a distribution date was identified.⁸¹ In March 1946, MacKay declared Annie Joseph the sole surviving member of the Arrow Lakes Band and directed that she receive a monthly payment of \$25

⁷⁸MacKay to Irwin, 13 March 1944, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁹Irwin to MacKay 28 March 1944, James Coleman, Inspector of Indian Agencies, to Annie Joseph, 15 May 1944, RG 10, Department of Indian Affairs, file 982/1-1.

⁸⁰Irwin to Annie Joseph, 2 October 1944, 13 November 1944, RG 10, Department of Indian Affairs, file 982/1-1. Curiously, there is no signed surrender of timber in the file.

⁸¹Annie Joseph to Indian Agent, Kootenay Agency, September 1944 [undated], 10 November 1944, 20 January 1945, 6 February 1945, 12 March 1945, May 1945 [undated], and 9 June 1945. Indian Agents, Kootenay Agency, to Annie Joseph, 2 October 1944, 13 November 1944, 13 January 1945, 26 January 1945, 10 February 1945, 21 March 1945, and 4 June 1945. Andrew Irwin left the Kootenay Agency during this time, and James Coleman filled in until he was replaced by J.D. Caldwell in 1945 and then by J.V. Boys in 1946, RG 10, Department of Indian Affairs, file 982/1-1.

as compensation for the timber that had been sold.⁸² No other disbursement of the monies received from the sale of timber on the reserve appears to have been made.

In December 1948, responsibility for the Arrow Lakes Reserve was transferred from the Kootenay to the Okanagan Indian Agency. In 1952, the superintendent for the Okanagan Indian Agency, R.H.S. Sampson, proposed that the Arrow Lakes Reserve be amalgamated with that of the Okanagan Band near Vernon, British Columbia, in order to preserve the remaining timber resources for "the Indians." Sampson noted that Annie Joseph, now 74 and still deemed the only surviving Arrow Lakes Band member, had lived on the Okanagan Reserve for roughly forty years. He assured his superiors that Annie Joseph's consent to the amalgamation of the Arrow Lakes Reserve would be forthcoming and that the matter had been discussed with the Okanagan Band Council, which was prepared to recommend it. In November 1952, the Okanagan Band Council agreed to the amalgamation. Five months later, on April 17, 1953, Annie Joseph signed a declaration averring that she was the only surviving member of the Arrow Lakes Band and consenting to the amalgamation of the Oatscott reserve with that of the Okanagan.⁸³ What Annie Joseph almost certainly did not realize was that this would mean that the remaining capital funds held in trust for the Arrow Lakes Band would be transferred to the Okanagan Band for the benefit of its members alone and that she and former Arrow Lakes Band members "would gain nothing" from the amalgamation.⁸⁴

Ironically, the Indian Affairs Branch, now transferred from the Department of Mines and Resources to the Department of Citizenship and Immigration, also balked, suddenly concerned that the real purpose of the amalgamation was to circumvent the dominion government's agreement with British Columbia that unoccupied and unused Indian reserves would revert to the province.⁸⁵ R.H.S. Sampson, superintendent for the Oka-

⁸²D.M. MacKay to J.V. Boys, Indian Agent, Kootenay Agency, 5 March 1946, RG 10, Department of Indian Affairs, file 982/1-1. The \$25 was \$10 per month more than the \$15 that MacKay would normally have distributed and took into account Annie Joseph's age and life expectancy. In March 1946, department records reflect that "the balances to the credit of the Arrow Lakes Band" were \$1,534.40 in capital and \$108.10 in revenue. *Ibid.*

⁸³R.H.S. Sampson, Superintendent, Okanagan Indian Agency, to U.S. Arneil, Indian Commissioner for British Columbia, 27 September 1952, RG 10, Department of Indian Affairs, file 164/2-2 [Okanagan Agency].

⁸⁴L.L. Brown, Superintendent, Reserves and Trusts, to R.H.S. Sampson, 23 June 1953, file 164/1-11.

⁸⁵See note 11 and accompanying text.

nagan Indian Agency, candidly admitted that this had indeed been the purpose of the proposed amalgamation.⁸⁶ When Annie Joseph died on October 1, 1953, the amalgamation was allowed to lapse.⁸⁷ Although she had been persuaded to agree to the amalgamation of the Arrow Lakes Reserve in the last years of her life—concerned, perhaps, as an old woman, with making ends meet—she died an Arrow Lakes Band member. On January 5, 1956, the Indian Affairs Branch declared the Arrow Lakes Band extinct and transferred the Arrow Lakes Reserve to the province of British Columbia.⁸⁸ During the years that followed, much of the site where the Arrow Lakes Reserve was located, together with a substantial section of traditional Sinixt territories, was submerged by the flooding behind High Arrow Dam at Castlegar, British Columbia.⁸⁹

THE INTERSECTING PATHS OF LAW AND HISTORY

The Canadian government's determination that the Arrow Lakes were extinct brought to a close a decades-long investigation marked by an inherent conflict between the government's duties to Canada's indigenous peoples and its own interest in limiting its obligations to them.⁹⁰ The primary objective of that investigation was always to secure the sale of the timber on the Arrow Lakes Reserve in the wake of British Columbia's decision to build a road through the area. Another element leading

⁸⁶L.L. Brown, Superintendent, Reserves and Trusts, Department of Citizenship and Immigration, Indian Affairs Branch, to R.H.S. Sampson, 23 June 1953, RG 10, Department of Indian Affairs, file 164/1-11.

⁸⁷R.H.S. Sampson to U.S. Arneil, 5 October 1953, RG 10, Department of Indian Affairs, file 164/1-11.

⁸⁸Canada, Order in Council P.C. 1956-3 (5 January 1956).

⁸⁹Cathy English, Curator, Revelstoke Museum, to Father Kowrach, 27 October 1984. The dam is now known as the Hugh Keenleyside Dam. Although no records have been found that provide a direct link between the decision to terminate the Arrow Lakes Reserve and plans to flood the area, the potential of this area as a source of hydroelectric power was first studied in the 1920s. By 1944, the United States and Canada had established a joint international commission in anticipation of utilizing the Columbia River basin for this purpose. Neil A. Swainson, *Conflict over the Columbia: The Canadian Background to an Historic Treaty* (Montreal, 1979), 39-41; Canada, Departments of External Affairs, Northern Affairs, and National Resources, *The Columbia River Treaty and Protocol: A Presentation* (April 1964), 21.

⁹⁰See, e.g., Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3^d ed. (Saskatoon, SK, 2004), 8, noting that "this enforceable, equitable, and fiduciary obligation has placed a high onus on the Crown when acting or making decisions on behalf of Indians."

to the finding of extinction was the government's inaction at critical junctures, including its failure to establish a sustainable reserve either at the mouth of the Kootenay River or near Burton. The flawed procedures involved in each of these processes combined to produce the conditions that allowed the government to erase the Arrow Lakes as a people formally recognized as indigenous to Canada under the law.

Canada's ability to declare the Arrow Lakes Band extinct was in part a product of its strict application of the Indian Act's criteria for determining band membership. By allowing the government, unilaterally, to strike women who married outside the band from band rolls, these provisions proved, at least in the short term, to be an even more efficient tool for eliminating band members from consideration than the blood quantum requirements of U.S. law.⁹¹ Canadian officials treated these rules as inviolable when their purpose was to limit access to rights associated with Indian status. Their treatment of the Arrow Lakes, however, demonstrates the extent to which they were willing to manipulate the same criteria when their object was otherwise, as reflected, for example, in their presumed authority to transfer people from one band roll to another temporarily or without regard for individual identity, even when the Indian Act made no provision for such arbitrary transfer.⁹²

Another critical factor that colored the ways in which Indian Affairs representatives interpreted and applied the Indian Act were colonialist—and sometimes extra-legal—assumptions about who an "Indian" was and how he or she should live.⁹³ For example, nothing in the Indian Act's definition of *Indian* required that a band member reside on a reserve to retain Indian status, yet Indian agents regarded the refusal of Arrow Lakes Band members to move to or remain on the one small reserve set aside for them as evidence of lack of interest in maintaining their identity as Arrow Lakes. This in spite of the agents' own records stating that the absence of a usable road into the reserve made it inaccessible for all practical purposes. Indian

⁹¹See, e.g., *Indian Reorganization Act*, 1934, P.L. 73-383. And see Canada, *Indian Act*, R.S.C. 1906, c.81, s.2(f)(iii), s.15.

⁹²For a discussion of the constructed nature of tribal identities south of the border, see Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley, CA, 1998).

⁹³For a discussion of the destructive binaries that framed colonialist assumptions such as those espoused by Indian Affairs officials, see Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham, NC, 2005), 7. The binaries that were applied to Natives-newcomers included, for example, traditional-modern, subsistence-capitalist, past-future, collective-individual. *Ibid.* See also Harris, *Making Native Space*, 265.

Affairs representatives' persistent habit of conflating the terms *band* and *reserve* and referring to membership not in a band but in a reserve also contributed to their conclusion that those who did not live on reserves were not interested in maintaining their identity as aboriginal people. At every stage, the Sinixt people's ability to negotiate the changing political and economic landscape around them by adapting older ways of constructing kinship, economic, and social organization was turned against them, even as their continued mobility within their traditional territories was seized upon by Indian Affairs officials as a means to dismiss their claims. The Sinixt, in short, were both too modern and too traditional to fit neatly within the colonialist assumptions that structured the Indian Act and informed the way in which it was applied by Indian Affairs officials.

Similar biases that assumed the inevitable demise of indigenous ways of life were reflected not only in the terms of the Indian Act itself but also in the assumption of Indian Affairs officials that migration or relocation was both willful and permanent, even though their own failure to respond to requests for a sustainable reserve had helped to produce these movements. The notion that indigenous peoples were already doomed was also reflected in their choice of the term *extinct* to describe the circumstances of the Arrow Lakes in 1953. Even though they were well aware that Arrow Lakes people with clear ties to areas incorporated into Canada's land base continued to exist just south of the international border, their characterization of the Arrow Lakes as extinct destroyed any ready vehicle for reestablishing a presence in Canada, in effect substituting legal fiction for historical fact.

Also key to Canada's ability to sever its ties to the people who had historically occupied the region surrounding the Arrow Lakes was the U.S.-Canada boundary, which allowed Canada repeatedly to eliminate individuals who maintained ties to kinfolk or traditional territories across the international border from consideration as Canadian Indians. Without the presence of a parallel system of law based on similar foundational principles south of the border, Canada might have found it more difficult to truncate its obligations to Sinixt who had cross-border ties or to adopt a policy of presumed reciprocity pursuant to which the acceptance of an allotment on one side of the international boundary operated to bar the same on the other, even if there was evidence that parts of Sinixt traditional territories had been incorporated by both nations.

Canadian officials also ignored the extent to which the decision of Sinixt people such as the Christian brothers to settle across the border was essentially coerced—a product of Canada's

own failure to establish a permanent reserve or to investigate the apparent fraud associated with a settler's acquisition of Crown title to Sinixt land at the mouth of the Kootenay River without the Sinixts' knowledge or consent. Instead, the Christian brothers' recognition that Canada's failure to establish a permanent reserve meant they would be best served by joining their wives on the Colville Reservation was seized upon by the Canadian government to characterize them as American Indians for whom it had no responsibility—effectively “defining [them] out of existence.”⁹⁴ The international border, in effect, served as a conceptual veil, utilized both to obscure the claims of those who went south and to mark those who returned as intruders.

Canada's decision to terminate the Arrow Lakes Reserve became a foregone conclusion following Annie Joseph's death in 1953, the same year that the United States restructured its own Indian law and policy around the newly articulated goal of termination. Ironically, the Colville Reservation was among those identified for termination by the U.S. government; it survived only after a hard-fought battle that lasted more than a decade between reservation-based leaders and off-reservation advocates of termination.⁹⁵ Although Canada did not emulate the United States in adopting a formal termination policy and the experience of the Arrow Lakes Band stands as an exception insofar as the formal finding of extinction is concerned, this episode demonstrates the extent to which the Indian Act was capable of being used to reach the same result, particularly effective when deployed in conjunction with the border to sever aboriginal claims.⁹⁶

In recent years, Canadian law and policy has undergone profound changes. In 1982, the Charter of Rights and Freedoms formally recognized the rights of those who qualify as aborigi-

⁹⁴See Patricia Nelson Limerick, *Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987), 338, noting that law was an effective tool for “defining Natives out of existence.” In excluding those who relocated south of the border from consideration as Arrow Lakes Band members, Canada imposed a far higher standard on the Arrow Lakes and other Native peoples than it did on British subjects of European ancestry, who would not have lost their status as British subjects simply by residing or owning land in Washington State.

⁹⁵See, e.g., Alvin J. Zions, *A Lawyer in Indian Country: A Memoir* (Seattle, WA, 2009), 135–36; Ackerman, *A Necessary Balance*, 175–78.

⁹⁶Canada made just one brief foray in the direction of adopting a formal termination policy in 1969, when the Trudeau government tabled the White Paper that proposed that the Indian Act be abolished and that the Canadian government's obligations to all Indians in Canada be terminated. *Canada, The Statement of the Government on Indian Policy, 1969*, often referred to as the White Paper. The White Paper was later withdrawn in the face of intense opposition from Native leaders across Canada.

nal peoples of Canada.⁹⁷ Canadian courts are still in the process of determining who qualifies. To date, courts have held that formal band status is not a requirement in this context. Courts have also held that the identification of an indigenous group as an aboriginal people of Canada—even where no formal treaty relationship was established, as is the case in large parts of British Columbia—gives rise to a duty on the part of the Canadian government to consult with that group regarding the use of land and resources lying within the boundaries of its traditional territories.⁹⁸ This raises the legal question of who is entitled to assert existing rights—never relinquished by treaty—on behalf of the Sinixt Nation. It also raises complex questions about the historical significance of the international border in the eyes of the Canadian courts.

Yet to be determined by the courts is whether Sinixt descendants of individuals listed on Canadian band rolls or others identified as Arrow Lakes who settled on the Colville Reservation are entitled to recognition as an aboriginal people of Canada even though they have dual status as American Indians. Given the termination of the Arrow Lakes Reserve in British Columbia, to deny the historical ties of their descendants living in Washington State to Sinixt territories north of the border is, arguably, to absolve Canada from its duty to consult with the indigenous people who once occupied the Arrow Lakes area regarding the use of their ancestral territories.⁹⁹ In the context of considering this question, it is worth noting that the lack of tolerance for dual status is itself a legacy of the same colonial structures, the consequences of which section 35 of the Charter of Rights and Freedoms was intended to rectify. Ironically,

⁹⁷*Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11, s.35, providing that (1) "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed", and (2) "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

⁹⁸See *Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 2004 SCC 73, 245 D.L.R. (4th) 33.

⁹⁹Individual Sinixt born on the Colville Reservation have made increasing efforts, despite the lack of formal recognition, to attend to sacred sites and ancestral graves north of the border. See, for example, Paula Pryce, *Keeping the Lakes Way: Reburial and Re-creation of a Moral World among an Invisible People* (Toronto, ON, 1999). Individual Sinixt who are members of the Colville Tribes have filed cases in B.C. courts in an effort to establish a right to be consulted or to protect areas of historical importance to the Sinixt people. See, e.g., *Campbell et al. v. Minister of Forests and Ranga of British Columbia*, Vancouver Registry, No. S107353 (2011). Several Indian bands in Canada, including both the Kootenay and the Okanagan, also assert rights to some sections of Sinixt traditional territories based on descent or other considerations.

in demonstrating the ability to adapt to various imposed identities even as they maintained a clear sense of themselves as Arrow Lakes, it is the Sinixt who reflected the more sophisticated understanding—now shared by historians in various fields—of identity as multiple and inherently layered.

Paradoxically, by creating a space where a distinct Arrow Lakes identity could be preserved, the reservation and allotment system in the United States, together with the international border—which had served as an effective tool in cutting off the rights of Sinixt people who wanted to preserve their ties to their traditional territories in Canada and to maintain their identity as an aboriginal people of Canada—may have helped to preserve claims that would otherwise have no chance of recognition. On the one hand, the inclusion of the Sinixt as one of the Confederated Tribes of the Colville Reservation depleted the numbers of those who remained on Canadian band rolls, aiding in Canada's determination that they were extinct. On the other hand, clumsy as its own reservation system was, U.S. tolerance for larger reserves allowed some Sinixt to maintain ties to one part of their traditional land base—a relationship that itself remains central to their identity as a distinct people—and, in so doing, to preserve their formal identity as Arrow Lakes, even as other descendants were incorporated into other bands or denied Indian status altogether through the application of Canada's Indian Act.

In much the same way that indigenous people have been able to redirect the category of "Indian"—originally deployed to facilitate their eventual demise—to protect their historic rights, the same border that both nations' governments used to sever their traditional territories also served, in this instance, to create a space that helped to sustain the Arrow Lakes as a formally recognized people. The fact remains, however, that their location on the U.S. side of the international border and their classification as American Indians is less a product of any intention to cross a boundary that post-dated their presence in the area by many centuries than it was of the fact that "the border crossed them."¹⁰⁰

As long as the law continues to rest on the flawed premise that non-Indians are best able to determine the authenticity of aboriginal identities, whether Canadian or American, the

¹⁰⁰This is a slogan that has been embraced by peoples along the U.S.-Mexico border and elsewhere whose traditional territories have been divided by newer national boundaries. See, for example, "We didn't cross the border, the border crossed us": Students Protest Operation Gatekeeper," *San Diego City Times*, July 10, 2008; "We didn't cross the border, the border crossed us": Movements and Struggles of Migration in and around Europe," The Frassanito Network [website posting newsletters], <http://www.allincluded.nl/index.php/crossing-borders-newsletter/203-frassanito>, May 2006.

process of decolonization contemplated by Canada's Charter of Rights and Freedoms remains incomplete. One of a growing number of scholars who have argued for the decolonization of both U.S. and Canadian Indian law and policy, Paige Raibmon asks "what a just, less destructive notion of authenticity might look like."¹⁰¹ Acknowledging the trans-border histories and identities of borderlands peoples whose traditional territories spanned the Canada-U.S. boundary offers one place to begin, the likelihood that Canadian courts will be asked to issue a definitive ruling on the matter raises for their U.S. counterparts the reciprocal question of how American courts will respond.

¹⁰¹Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham, NC, 2005), 207. See also Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, BC, 2011), 228-30; James Youngblood Henderson, "Postcolonial Ledger Drawing: Legal Reform," in *Reclaiming Indigenous Voice and Vision*, ed. Marie Battiste (Vancouver, BC, 2000), 161-71; Harris, *Making Native Space*, 293.

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