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P R A C T I C U M

Treaty Indian Hunting Rights

and

The Deer Hunting System in Manitoba

Submitted by: Philip L. Eyler

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TREATY INDIAN HUNTING RIGHTS AND THE DEER HUNTING SYSTEM IN MANITOBA

by

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ABSTRACT

Deer levels in Manitoba have declined markedly over the past twenty years. They have now reached the point where in recent years, there has been no deer hunting season. Although the non-native population has been barred from hunting, the Indian population has not. This has served to focus attention on the special rights of one segment of the population. In the light of the diverse sets of proposals made by various wildlife interest groups, it has been seen as necessary to present a delineation of Indian hunting rights in their proper context.

This practicum has been designed to outline the hunting system of Manitoba within which Indian hunting rights presently operate, and to present some proposals for research both in better defining the existing problem and in areas where solutions may be found.

The primary objective of this study is to define native hunting rights as closely as the prevailing set of laws and judicial decisions allows. Secondary, and some primary, historical research form the background to this question, while an examination of statutes and relevant judicial decisions constitutes the means of determining the extent and limitations of methods and location involved in Indian hunting rights.

In general, the hunting rights of the native population have been judicially expanded over the past few decades; however, they have now reached the limits of liberal interpretation. There

is little chance that hunting rights will be restricted in the future, and the present extent of these rights as outlined in the text will constitute the framework within which the province will have to come to grips with the deer hunting problem. The solutions to Manitoba's deer hunting problems cannot be found in limiting Indian rights to hunt, but must be dealt with through a more rational method of managing wildlife.

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INTRODUCTION

Manitoba is presently faced with a growing hunting problem. Decreasing wildlife habitat combined with increasing hunting pressures have acted to reduce considerably the game population - particularly deer - of the settled areas of Manitoba.[1] In recent years, there has been no deer hunting season while the province searches for new policies to deal with a problem which has been developing for a long time.

Central to the hunting problem is the population level of the white-tailed deer (Odocoileus virginianus). This species is not indigenous to Manitoba and entered the province with the advent of agricultural settlement. Once established, around 1880, the white-tailed deer quickly replaced the indigenous species of mule deer, elk and pronghorn antelope. Up until the end of World War I, the number of white-tailed deer grew along with the influx of settlers. Population levels were constant during the inter-war years, but during World War II, intensification of agriculture led to the destruction of deer habitat as more and more brush areas were cleared. By 1950 the deer population had increased above the estimated carrying capacity and hunting regulations were relaxed to allow hunters to kill either sex of deer. Hunter success reached an all-time high in 1954 under these regulations, and the population was rapidly reduced.

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[1] "Manitoba's Best Hunting Gone Forever", The Tribune (Winnipeg), August 24, 1974, p. 27.

However, a severe winter-kill in 1955-56 reduced the deer population by a further 25%. Hunting began its downward spiral; reduced habitat lowered carrying capacity, and continued winter die-offs and increasing numbers of hunters aggrevated population threats.[2]

At this point, Indian hunting rights began to attract considerable attention. Following a period of decreases and stagnation in their population levels, the number of Indians began to climb in the twentieth century.[3] As long as the deer population was also increasing, game and hunting pressures were more or less in equilibrium. Following 1955, however, deer populations were rapidly depleted in the areas surrounding reserves. "Night-lighting", a now legal practise for Indians, was a widely used method which produced marked criticism among sport hunters. Considerable pressure developed to bring the Indians under provincial game laws.

The downward spiral in the deer population has continued, compounded by heavy winter-kills recently in 1969-70 and 1973-4 which have led to the present situation. Some popular estimates of the deer population of Manitoba in late 1974 were as low as 27,000.[4] With the non-native population already barred from

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[2] "The White-tailed Deer: Why Season Was Closed", The Tribune (Winnipeg), September 26, 1974, p. 59; and personal communication, Dr. Roderick Riewe, Biology Teaching Unit, University of Manitoba.

[3] E. Palmer Patterson II, The Canadian Indian: A History Since 1500 (Toronto: Collier Macmillan, 1972), p. 15. He also points out the relationship between land pressures on growing colonial populations and nationalist movements for parallels with the Indian movement.

[4] "The White-tailed Deer: Why Season Was Closed", Op. cit., p. 59

hunting deer, the treaty rights of the Indians are coming under close examination.

The purpose of this report is to consider briefly the presentdeer hunting system in Manitoba - along with alternatiaves - and to examine in depth the evolution and development of native hunting rights with the objective of identifying problem areas for intensive research.

The terms of reference for this study are restricted to that group which can most conveniently be referred to as treaty Indians. Although strictly speaking, this includes some "non-treaty" Indians such as the Sioux, it is necessary to distinguish between those natives whose rights are recognized by treaty and those who are not legally considered Indians under the terms of The Indian Act.

Because the Natural Resource Institute serves as a public forum for examining problems in resource use, it was felt that research into the background of Indian hunting rights and the positions of various interest groups concerned with deer hunting would serve a useful purpose in focusing public attention on the crucial issues involved.

CHAPTER I

THE MANITOBA DEER HUNTING SYSTEM

Environmental and Economic Factors Governing Supply

Climate

Manitoba lies at the northern limit of the North American white-tailed deer range. Severe winter weather plays an important part in controlling deer numbers in Manitoba. Ransom[1] suggested that low temperatures during the winter led to prolonged periods of negative energy balance in the deer population. During periods of light snowfall, deer were free to travel and browse. However, as snowfall increased, mobility decreased, and with it came a fall in nutrition which often led to the resorption of fetuses. Because of the harshness of the northern climate, Ransom concluded that the adverse effect on birth rates must result in a lower harvest rate. The standard rule of thumb for deer harvest rates in North America is 18%[2], so that the rate for Manitoba would probably be less. However, Moen[3] feels that the negative energy balance can be counteracted by emphasis on a browse[4] intensive ground cover rather than a thick

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[1] A. Brian Ransom, "Reproductive Biology of White-tailed Deer in Manitoba", Journal of Wildlife Management (January, 1967), pp. 114-122, passim.

[2] John D. Black, Biological Conservation With Particular Emphasis on Wildlife (New York: Blakiston Co., 1954), p. 252.

[3] Aaron N. Moen, "Energy Balance of White-tailed Deer in the Winter" 33rd North American Wildlife Conference, Proceedings, 1968, pp. 224-235, passim.

[4] Browse is defined as the leaves, buds, twigs and bark of woody plants.

protective canopy in areas of heavy deer use. To some extent, perhaps, habitat can counteract the adverse effects of climate.

Habitat

White-tailed deer attain their greatest abundance in areas whith a diversity of cover and forage. The optimal mix appears to be 50% brush land (stands of reproductive and small saplings), 25% woodland, and 25% non-forested lands.[5] In this respect, Manitoba's parkland was ideal deer habitat once conditions were suitable for their dispersal northward.

Closely tied to, and inter-related with, habitat are the food habits of white-tailed deer. As a ruminant, the deer's diet consists of browse, herbaceous foods, and certain fruits when available. The first two are the major components of the diet, with browse providing the principle staple in winter. Feeding during the summer is a mixture of browsing and grazing.

The quantity and quality of food provided by the habitat is the most significant factor in determining Manitoba's deer population. Aspen and willow play a major role in deer diet. During spring and summer, this browse contains over 20% protein, but only willow maintains a relatively high protein content into fall. They are also the best sources for phosphorus during spring, but aspen is deficient during fall and winter. Aspen, however, is high in fat content, especially during the fall. Evergreens are important

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[5] Reuben E. Trippensee, Wildlife Management: Upland Game and General Principles (New York: McGraw-Hill, 1948), p. 189.

during the winter because of their ability to hold higher nutrient levels than the dormant deciduous shrubs, forbs, and grasses.[6] Stiteler and Shaw[7] note that deer also eat birch and oak which are used to supplement winter diets. Acorns in particular are a valuable winter supplement.[8]

The Economics of Wildlife Habitat

Most privately held land in rural Manitoba is held by people whose primary objective is to realize the maximum return on capital invested. The Arcadian image of the farm family blissfully living in harmony with nature, sufficient unto itself, simply does not hold. Farming has become as commercialized as any other sector in the modern economy.

The farm is becoming less of a family environment and more of a family business. The modern farm can be split into two units: the business unit and the household unit. As the farm family becomes less concerned with surroundings and more preoccupied with acquiring the latest gadgets, the role of the business unit changes to fulfill the shifting emphasis on economic need. As farmers are drawn into the consumer society, farms become more specialized. Large machinery is introduced - machinery which operates most efficiently in large fields. Obstacles such as swamps, potholes,

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[6] Dietz, Op. cit., pp. 280-281.

[7] W. M. Stiteler and S. P. Shaw, "Use of Woody Browse by White-tailed Deer in Heavily Forested Areas of Northeastern United States", 31st North American Wildlife Conference, Proceedings, 1966, p. 207.

[8] Trippensee, Op. cit., p. 197

sloughs, and small woodlots are drained, filled in, and cut down. Increasing costs in farming make it imperative to secure the maximum return from the land.

Wildlife and wildlife habitat on the whole do not at present yield any economic return and are not included in management decisions. While certain esthetic values to the landowner can be obtained from the presence of wildlife, the trend toward the separation of business and household units tends to minimize this aspect. On the other hand, wildlife presence and hunting activity may constitute concrete costs through crop damage; injured, killed or disturbed livestock; and difficult relations with hunters. The negative, or at best neutral, value of wildlife is thus the primary cause of the decline of wildlife habitat.[9] The accompanying census map of Manitoba (Figure 1), demonstrates this rapid decline in farm woodlots. E. F. Bossenmaier,[10] Senior Wildlife Planner, summed it all up in 1968:

> The basic problem is that the private landowner profits little from the wildlife crop. Consequently, he does little or nothing purposely to raise wildlife. This situation and the trend toward land use intensification are causing the replacement of the wildlife crop in southern Manitoba by other crops which show monetary return to the landowner.

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[9] A. W. Bolle and R. D. Tabor, "Economic Aspects of Wildlife Abundance on Private Lands", 27th North American Wildlife Conference Proceedings, 1962, pp. 258-259.

[10] E. F. Bossenmaier, "Land Development Opportunities for Wildlife in the Turtle Mountain Area", Turtle Mountain Resource Conferance (Winnipeg: Department of Agriculture, 1968), p. 31.

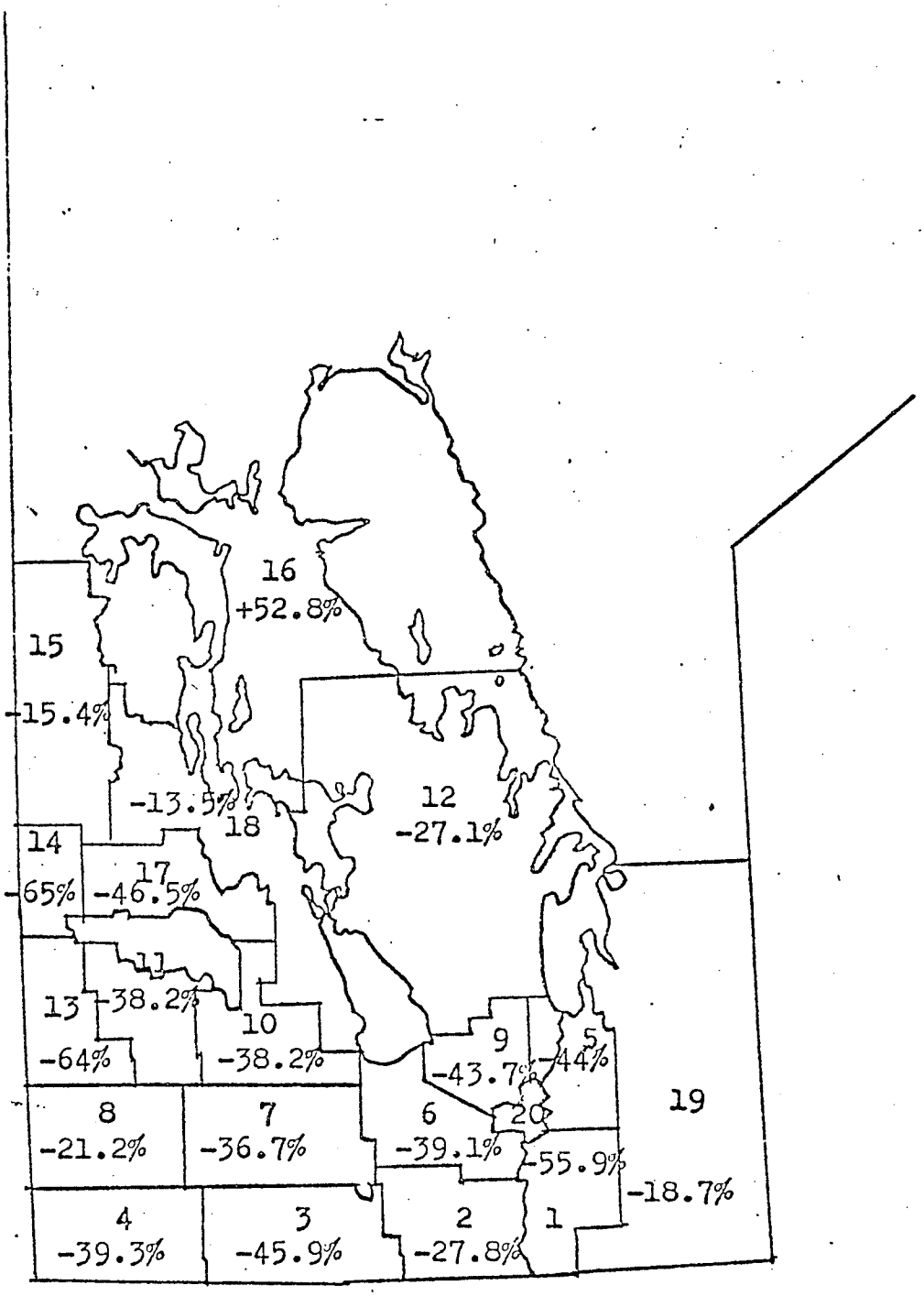

Figure 1: Change in Woodland Acreage of Manitoba Farms by Census Division from 1961 to 1971

Sources: percentages abstracted from 1961 Census of Canada: Agriculture; Manitoba, and 1971 Census of Canada: Agriculture; Manitoba.

This rapid decline in woodland on farms would not be particularly alarming if a high percentage of woodland still remained, either on the farm or in forest reserves. However, the accompanying census maps (Figures 2 and 3) demonstrate that very little farm woodland acreage remains in areas where farming constitutes virtually the only land use. Census division 2 has long had large areas devoid of deer (see Figure 4). Census divisions 3, 4, 8, 10 and 13 each lie in areas previously noted for deer abundance, but which are now suffering most from declining deer populations. Other census divisions with traditionally high deer levels such as 12, 18 and 19 have not suffered significantly due to the relatively low proportion of agricultural use. Yet, the mere existence of woodlands in the census reports does not necessarily indicate deer habitable woodlands. Doan[11] notes that cattle grazing in woodlots is widespread in the Turtle Mountain area - census divisions 3 and 4. Cattle will choose grass, but when it is gone, they will turn to the same shrubs that deer use. Selective browsing will also change the species composition of woodlots by allowing the introduction of new kinds less palatable to deer. Thus, not only the elimination of woodlots but also the increased use of woodlots for cattle grazing is pressuring the deer population levels, particularly in southwestern Manitoba.[12]

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[11] Dr. K. H. Doan, "Wildlife Resources of the Turtle Mountain Area", Turtle Mountain Resource Conference (Winnipeg: Department of Agriculture, 1968), p. 26.

[12] The decline in deer levels as a function of the decline in untouched wildlife habitat is logically consistent and statistically corelateable, but it remains an unproven assumption for the time being.

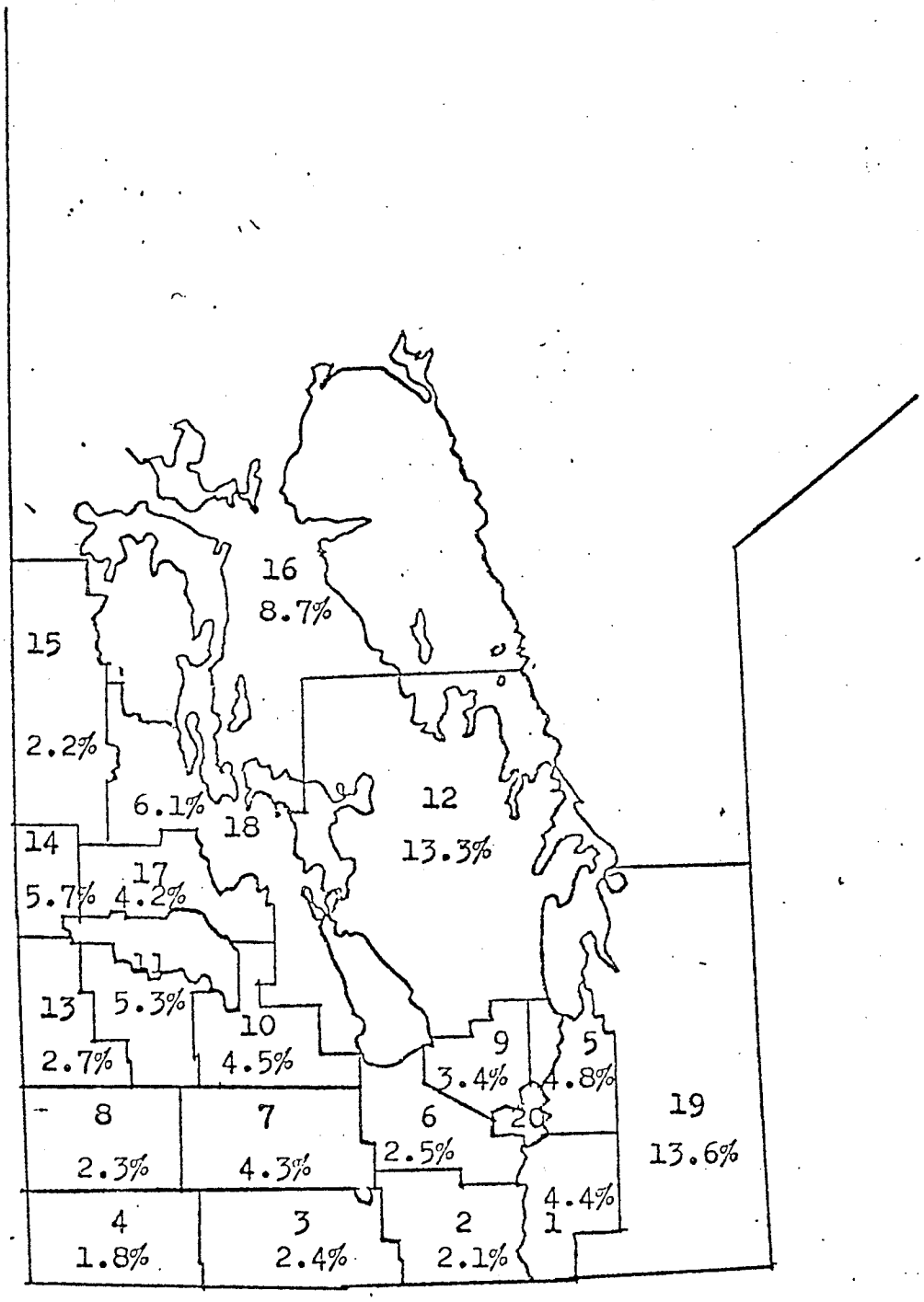

Figure 2: Farm Woodland as a Proportion of Farm Area, 1971

Sources: percentages abstracted from 1971 Census of Canada: Agriculture; Manitoba.

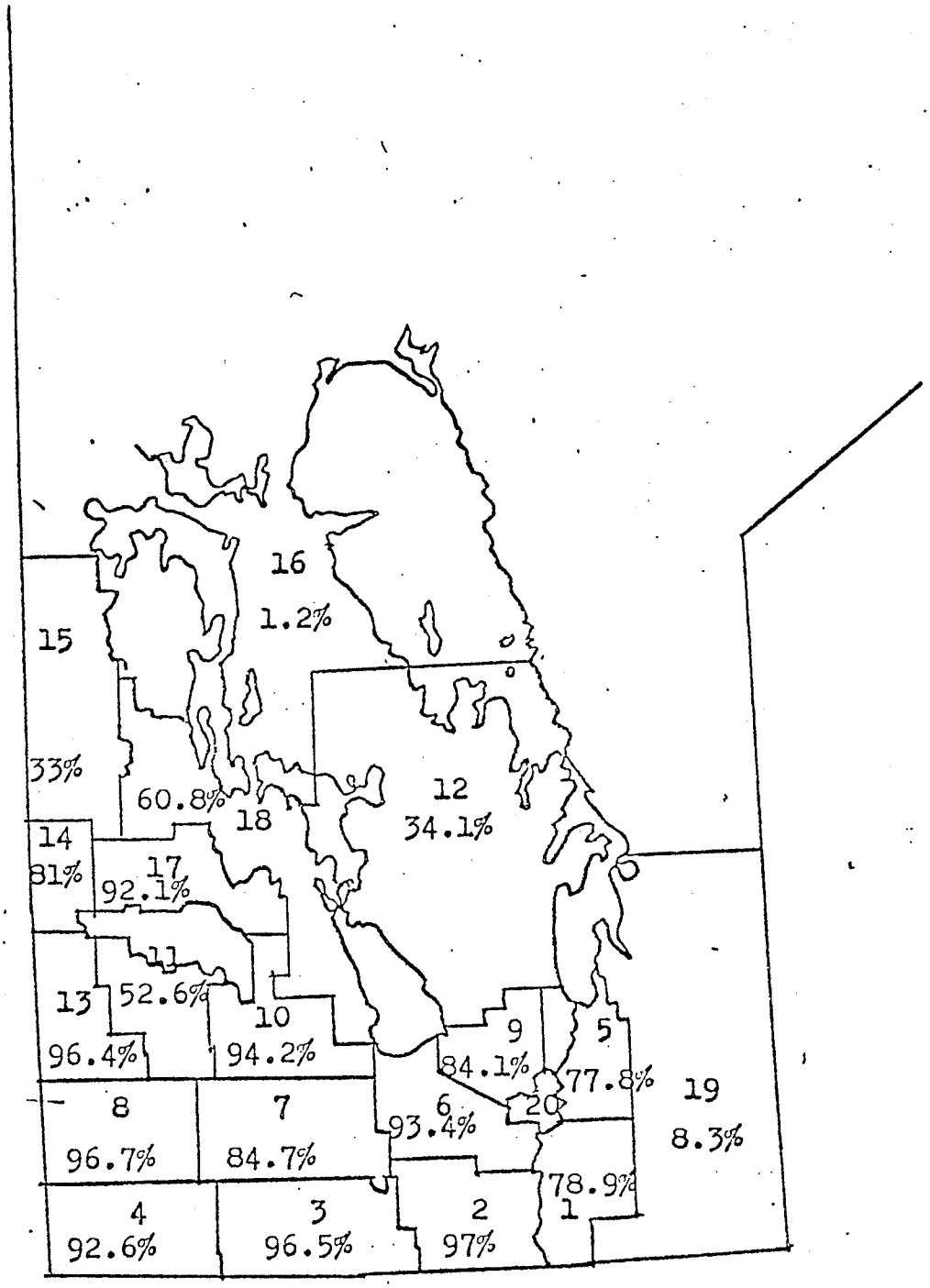

Figure 3: Farm Acreage as a Proportion of Total Acreage, 1971

Source: percentages abstracted from 1971 Census of Canada: Agriculture; Manitoba.

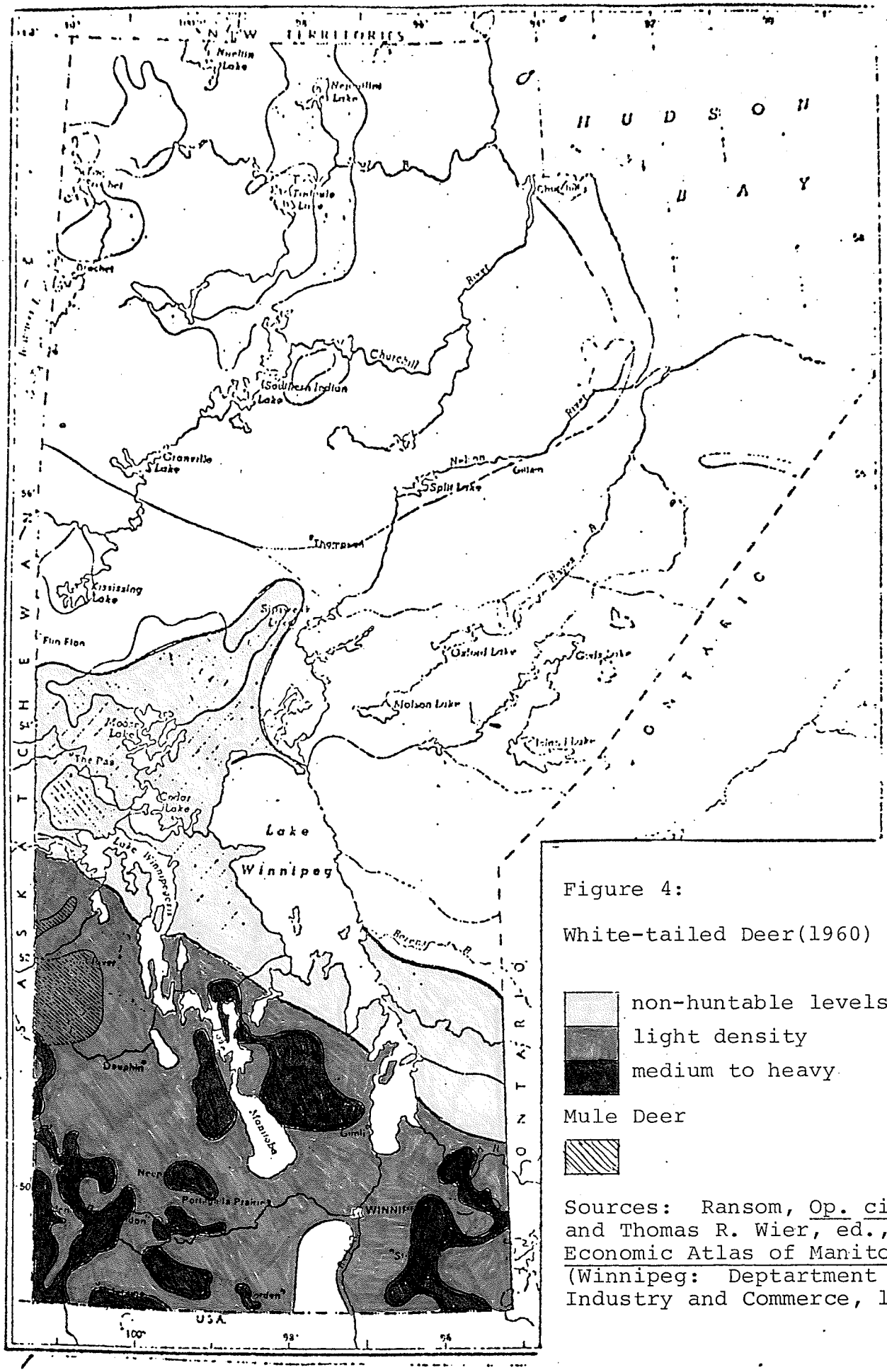

Figure 4:

White-tailed Deer(1960)

non-huntable levels

light density

medium to heavy

Mule Deer

Sources: Ransom, Op. cit. and Thomas R. Wier, ed., Economic Atlas of Manitoba (Winnipeg: Deptartment of Industry and Commerce, 1960).

The major response to dwindling herds in Manitoba has been the attempt to open more farmland to hunters rather than to restore habitat. A 1966 survey of landowners in southwestern Manitoba demonstrated that farmers overwhelmingly felt they should be asked for permission to hunt.[13] Lands had become posted as the increasing numbers of city hunters became a nuisance; in 1970, 15% of the farmlands of the southwest were closed to hunters.[14] The result was the initiation in 1971 of Operation Respect. Organized under the auspices of the Manitoba Wildlife Federation and the Department of Mines, Resources, and Environmental Management (now Renewable Resources and Transportation Services), this measure was originally designed as a safety program, a training program for hunters and fishermen, and above all, an education program in hunter-landowner relations. Signs advising respect for the landowner were put up along with safety zone signs around farm buildings. Hunter courtesy cards were introduced; with space for name, address, and car license. These were designed as an introduction to landowners. Public relations fieldwork was carried out and 2,000 landowners were contacted throughout the province in 1972.[15] Hunter-landowner relations improved considerably; deer population levels did not; in 1974 there was no deer hunting season.

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[13] C. C. Dixon, Agricultural-Wildlife Relationships in a Manitoba Township (Winnipeg: Department of Agriculture, 1966), p. 20.

[14] Personal communication, Jack Howard.

[15] Manitoba Department of Mines, Resources, and Environmental Management, Annual Report for the Year Ending March 31, 1973.

Habitat development has been confined to two more or less sporadic government programs. The Alternative Uses of Land (AUL) program is a joint federal-provincial program administered through ARDA and designed to remove marginal famrland from agricultural production. Although not specifically designed to provide wildlife habitat, it assumes that the better use for marginal lands is normally wildlife habitat. In the Interlake, the FRED program is following the same course. Resources for Tomorrow is a provincially funded program established in 1973 to acquire lands for, among other things, wildlife habitat. In southwestern Manitoba, where the habitat problem is especially acute, however, only 15,529 acres have been acquired by the two programs since 1972.[16]

The deer supply is obviously dwindling, yet many people seem more prone to reversing the equation to find escessive demands. In this formula the Indian becomes the villain. It is officially estimated that the native population takes around 1,900 deer annually in the southwest, with the harvest for 1985 projected at 3,240.[17] This volume is not particularly high in relation to population levels at the moment. The 1970 deer population of 46,000 in the southwest could yield a harvest of 8,300 at an 18% harvest rate. Even the more recent estimates of 19,000 - 20,000 in the winter of 1974-5 are high enough to support the Indian harvest. Yet, the increasing hunting by Indians - with no hunting season for others -

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[16] Ian B. Anderson, et. al., "White-tailed Deer in Southwestern Manitoba" (Unpublished ms, NRI, 1975), p. 62.

[17] Population levels are estimates only. Personal communication, Jack Howard.

is irratating to a large segment of the population, and pressures are rising for some sort of control.

Deer Hunting Demand in Manitoba

It goes without saying that the demand for deer hunting is a function of population. Other variables of course, enter into any formal analysis such as affluence, transportation availability, and hunter success rates,[18] but on the whole, demography will serve as a crude estimate of demand over the short run.

Non-native Demand

Past records show that hunting has never enjoyed as much popularity as in the past quarter century. Even under the duress of the depression in 1936, only 3,699 big game licenses were sold for a population of 711,000 - or a participation rate of .5%. Needless to say, the deer harvest was small: 2,410[19]. However, technological change was rapidly introducing the car, and with it, greater mobility for the urban population. Despite the depression the number of motor vehicles in Manitoba had increased steadily until in 1939 there was just under one auto for every eight people.

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[18] see R. E. Capel and R. K. Pandey, "Demand Estimation in Planning for Intensive Resource Management; Deer and Moose Hunting in Manitoba", 38th North American Wildlife Conference, Proceedings, 1973, pp. 389-403.

[19] Canada Year Book 1937 and Department of Mines, Annual Report, 1936.

With the United States' entry into World War II production ceased; new car sales reached their nadir in 1943 - 20 for the nation[20] - and the number of autos in Manitoba began to decline. Following the war, there was a tremendous unfulfilled demand for cars, and the number of motor vehicles in Manitoba increased by 38% from 1945 to 1948. By 1953, there was one car for every four people. The means to leave the city was now almost universal, and the proof lay in the 45,986 big game hunters who took to the fields and forests in 1951. Big game hunting hit an alltime high participation rate of 5.9% of the population that year. The deer harvest also hit its alltime high: 30,950.[21] In just fifteen years, the number of hunters and their deer harvest had increased more than twelve fold.

In absolute terms, the number of big game hunters (deer hunters comprise roughly seven eighths of this category) has not increased much since the peak in 1951. The average for the early 1970's is 52,769.[22] While the participation rate is just over 5%, this is not spread evenly over the population. The Department of Mines, Resources and Environmental Management reported that in 1969, 2.5% of the population of Winnipeg held deer licenses, while the percentage outside Winnipeg was 6.3%.[23] Urbanization appears to have

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20 Canada Year Book 1952-3, p. 770.

21 Canada Year Book 1956-7, and Dept. of Mines, Annual Reports.

22 Department of Mines, Resources, and Environmental Management, Annual Reports.

23 Personal communication, Jack Howard.

a direct effect on reducing hunting demand.[24] The human population is rapidly declining in the most valuable deer regions and increasing in the marginal northern areas and metropolitan Winnipeg (see Figure 5 and Table I). The results in terms of deer hunting demand are significant. The uncertain factor here is the Resource Region. The non-Winnipeg participation rate is not standard to all economic regions. Even crude projections can not be made for the Resource Region. High participation rates can not be expected from northern areas beyond the range of the white-tailed deer. Yet a certain amount of activity around The Pas and in the southeast can be expected. On the whole however, both the present assigned hunter population for the Resource Region and its projections are over-estimated, so that the overall projections for the province are biased upwards and would more likely show little, if any, increase.

Demographically, there is little indication that demand by non-native hunters will increase markedly. This simple estimation of demand, of course, has its limitations. The basic assumption is a constant differential between urban and rural hunting participation rates. In reality, these will vary as past records demonstrate and the projection presented will be crude at best. Much work remains to be done in establishing a demographic profile of the deer hunter such that participation rates for the various population

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[24] National Research Council, Land Use and Wildlife Resources (Washington: National Academy of Sciences, 1970), p. 44.

TABLE I: Projected Deer Hunting Demand to 1980

Region	Assumed Part. Rate	1971 Pop.	Projected 1971 Hunters	Projected 1980 Pop.	Projected 1980 Hunters	Change
Southwest	6.3%	136,549	8,603	120,259	7,576	-1,029
Wpg. Trading Area	6.3%	151,086	9,518	139,409	8,783	- 735
West Central	6.3%	56,483	3,558	45,876	2,890	- 668
N. Interlake	6.3%	24,024	1,513	21,936	1,382	- 131
Winnipeg	2.5%	553,109	13,828	633,006	15,825	+1,997
Sub-total		921,251	37,020	960,486	36,456	- 564
Resource Region	6.3%	66,729	4,204	127,856	8,055	+3,851
Total		987,980	41,224	1,088,312	44,511	+3,287

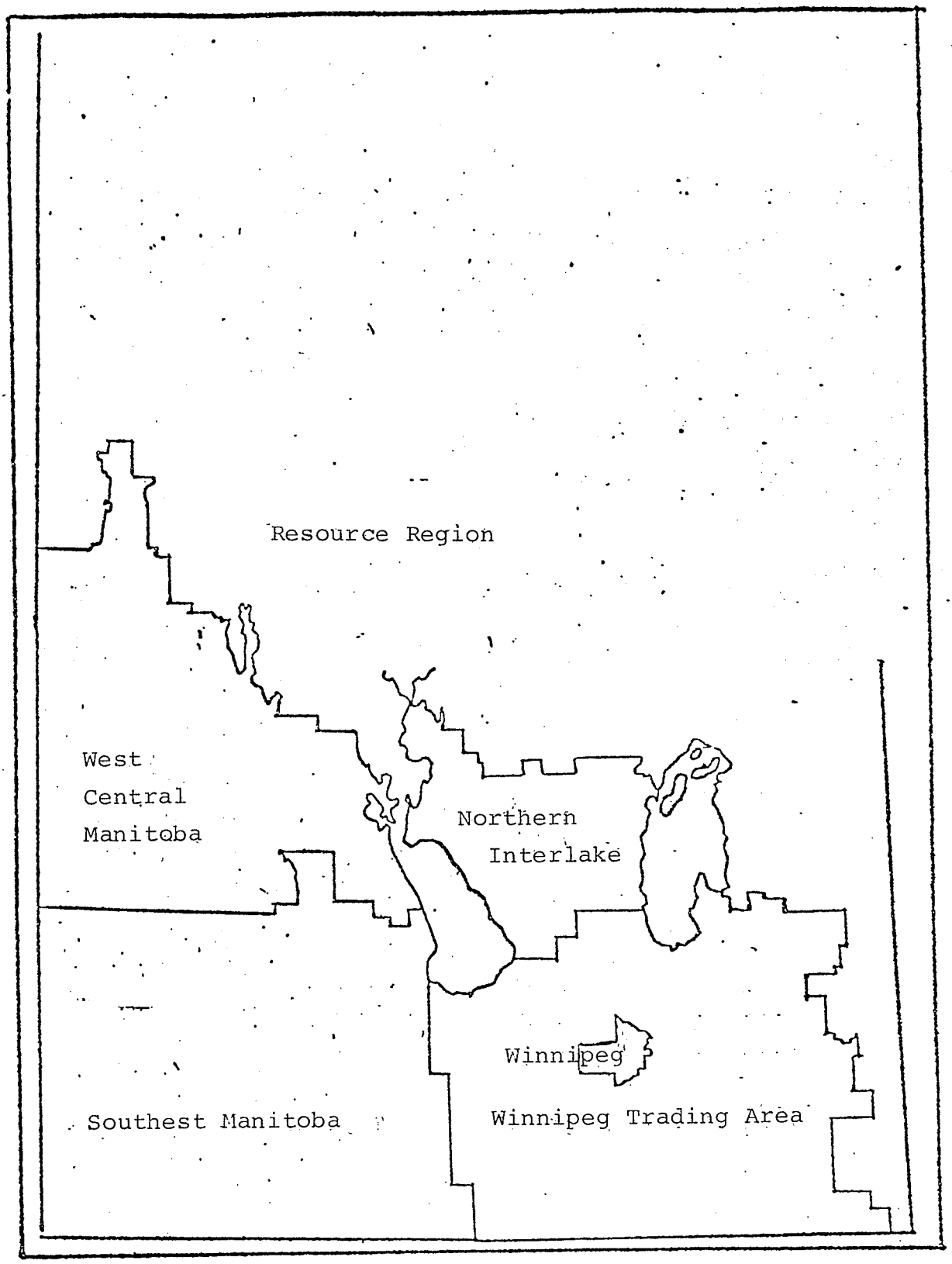

Figure 5: Economic Regions of Manitoba

Source: W. R. Maki, et. al., Population Projections for Manitoba by Region and Town Size - Some Alternatives, 1971-1990 (Winnipeg: University of Manitoba, 1973), p. 35

TABLE II

Population of Manitoba by Region and Rural-Urban Classification: 1971 and 1980

	Winnipeg	
	1971	1980
Urban	553,109	633,006

	Winnipeg Trading Area	
	1971	1980
Rural	97,295	81,797
Urban 500	1,553	820
500 - 1,000	4,861	3,837
1,000 - 2,000	4,078	6,269
2,000 - 5,000	15,466	18,402
5,000 -10,000	14,575	15,220
10,000 -30,000	13,258	13,064
Total	151,086	139,409

	Southwest Manitoba	
	1971	1980
Rural	70,556	49,737
Urban 500	3,014	2,523
500 - 1,000	9,021	9,590
1,000 - 2,000	9,363	9,426
2,000 - 5,000	11,232	12,440
10,000 -33,000	32,463	36,534
Total	136,549	120,259

	West Central Manitoba	
	1971	1980
Rural	32,802	20,738
Urban 500	479	323
500 - 1,000	5,752	6,102
1,000 - 2,000	4,341	4,550
2,000 - 5,000	3,717	3,927
5,000 -10,000	9,392	10,236
Total	56,483	45,876

TABLE II - Continued

Northern Interlake

	1971	1980
Rural	19,490	16,248
Urban 500 - 1,000	1,615	1,364
2,000 - 5,000	2,919	4,324
Total	24,024	21,936

Resource Region

	1971	1980
Total	66,729	127,856

Source: W. R. Maki, et al., Population Projections for Manitoba by Region and Town Size - Some Alternatives, 1971 - 1990 (Winnipeg: University of Manitoba, 1973), pp. 180-250.

concentrations are more clearly delineated and projections more accurately computed.

The impact of hunters on deer populations, of course, varies. Demand for deer hunting is one variable, but the associated variable more relevant to game managers is the demand by hunters on deer. Hunter success rates vary from year to year and from region to region so that exact estimates are impossible to calculate. While the province as a whole enjoyed a hunter success rate of well over .50 (deer kills/hunters) in the late 1960's, the average fell to .47 in 1970, and the present minimum acceptable to game managers appears to be .40 when projecting future hunter demands on the deer population. By taking into consideration the number of man days and kills per man day, the length of the hunting season can be set to equate demand with the estimated supply (See Table III).

Native Demand

Demand by the non-native population is a variable which can be more or less checked through the imposition of closed seasons, even allowing for a certain amount of poaching which is certainly likely to increase with higher food prices. Demand by Indians, however, is a variable which can not be effectively controlled or even accurately estimated, but one which is certainly growing. The native population of Manitoba is rapidly increasing both in absolute and relative terms (see Table IV).

Yet, not all Indians are engaged in white-tailed deer hunting, and it is significant that the lowest concentrations occur

TABLE III: Licensed Hunter Participation & Success

	1965	1966	1967	1968	1969	1970
Number of Deer Hunters	30,130	33,106	37,364	43,715	41,192	36,854
Hunter Success	.61	.62	.60	.54	.52	.47
Man Days	81,347	91,022	107,022	121,642	125,833	103,701
Kill/Man Day	.23	.22	.21	.19	.17	.17

Source: Personal Communication, Jack Howard

TABLE IV: The Indian Population of Manitoba 1911 - 1980

Year	Indian Population	Total Population	% Indian
1911	7,876	461,394	1.7
1921	13,869	610,118	2.3
1931	15,417	700,139	2.6
1941	15,473	729,744	2.1
1951	18,300 (Est.)	776,541	2.4
1961	25,861	921,686	2.8
1971	30,254	1,018,236	3.0
1980	40,540 (Est.)	1,128,861 (Est.)	3.6

Source: Canada Year Book, 1945, Canada Year Book, 1967 & Maki, Op. cit., pp. 252-253.

where habitat is declining the fastest and the acknowledged deer problem is the greatest (see Figures 6 and 7). This would suggest that the number of Indians actually hunting deer in the problem areas is low compared to the total native population.

Distribution is only one aspect; it is also important to know how many hunters there are and their demands on the deer population. Maki[25], et al computed the age classes for Manitoba Indians and projected them in the future (see Table V). If one assumes that all male Indians between the ages of 15 and 59 are hunters, then 22.6% would be the estimating factor for determining the number of Indian hunters from gross population figures for a given area (25.5% in 1980), assuming homogeneous age and sex structures for each area. Applying this estimator to the reserve populations for the southwest (census divisions 3, 4, 7 and 8), the number of Indian hunters can be computed at 265. Projected to 1980, the number of Indian hunters would be 401, or 50% greater. Friction with landowners would be likely to increase in the same proportion.

Deer demand by Indians will also increase. The standard estimate of demand used at present is three deer per year per family of five. On this basis, the Department of Mines, Resources and Environmental Management predicts that deer demand by Manitoba Indians will increase from 8,124 in 1970 to 14,622 by 1985.[26]

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[25] Maki, Op. cit., p. 252

[26] Personal Communication, Jack Howard

TABLE V: Age & Sex Distribution of Manitoba Indians, 1971 & 1980

	Manitoba Indian Population, 1971		Manitoba Indians, 1980	
	Male	Female	Male	Female
0 - 4	3,025	2,868	3,515	3,357
5 - 9	2,707	2,619	2,775	2,661
10 - 14	2,170	2,119	3,112	2,920
15 - 19	1,536	1,603	2,579	2,574
20 - 24	1,244	1,184	2,011	1,966
25 - 29	970	793	1,424	1,487
30 - 34	782	663	1,196	1,083
35 - 39	640	565	906	778
40 - 44	545	450	731	647
45 - 49	451	360	596	497
50 - 54	372	303	494	430
55 - 59	305	289	401	333
60 - 64	318	244	316	269
65 - 69	244	178	258	257
70 - 74	192	133	229	196
75 - 79	100	86	150	141
80 +	97	99	127	124
	15,698	14,556	20,859	19,758
	30,254		40,617	

Source: Maki, Op. cit., p. 252

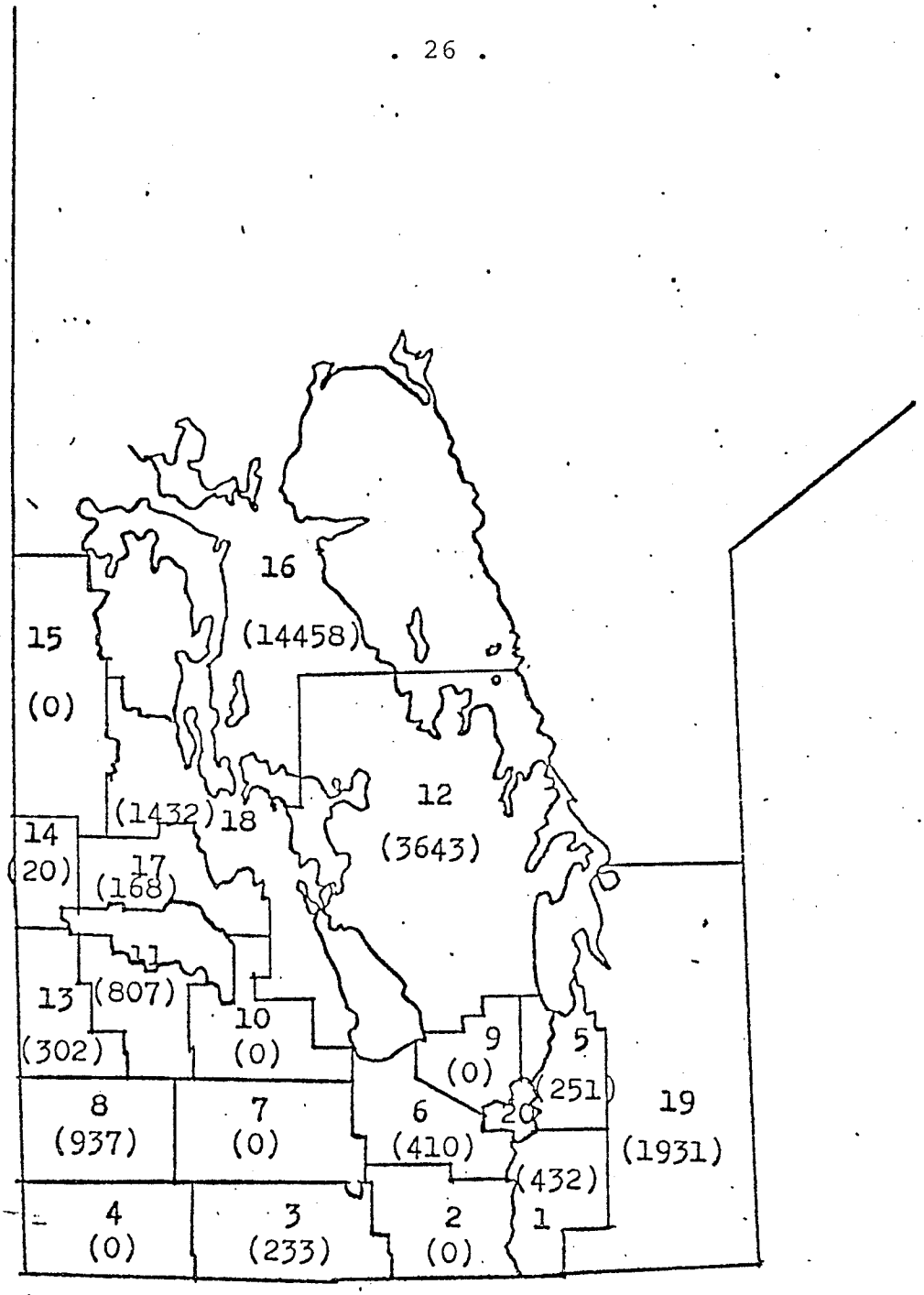

Figure 6: Indian Reserve Populations by Census Division, 1971

Source: 1971 Census of Canada: Population

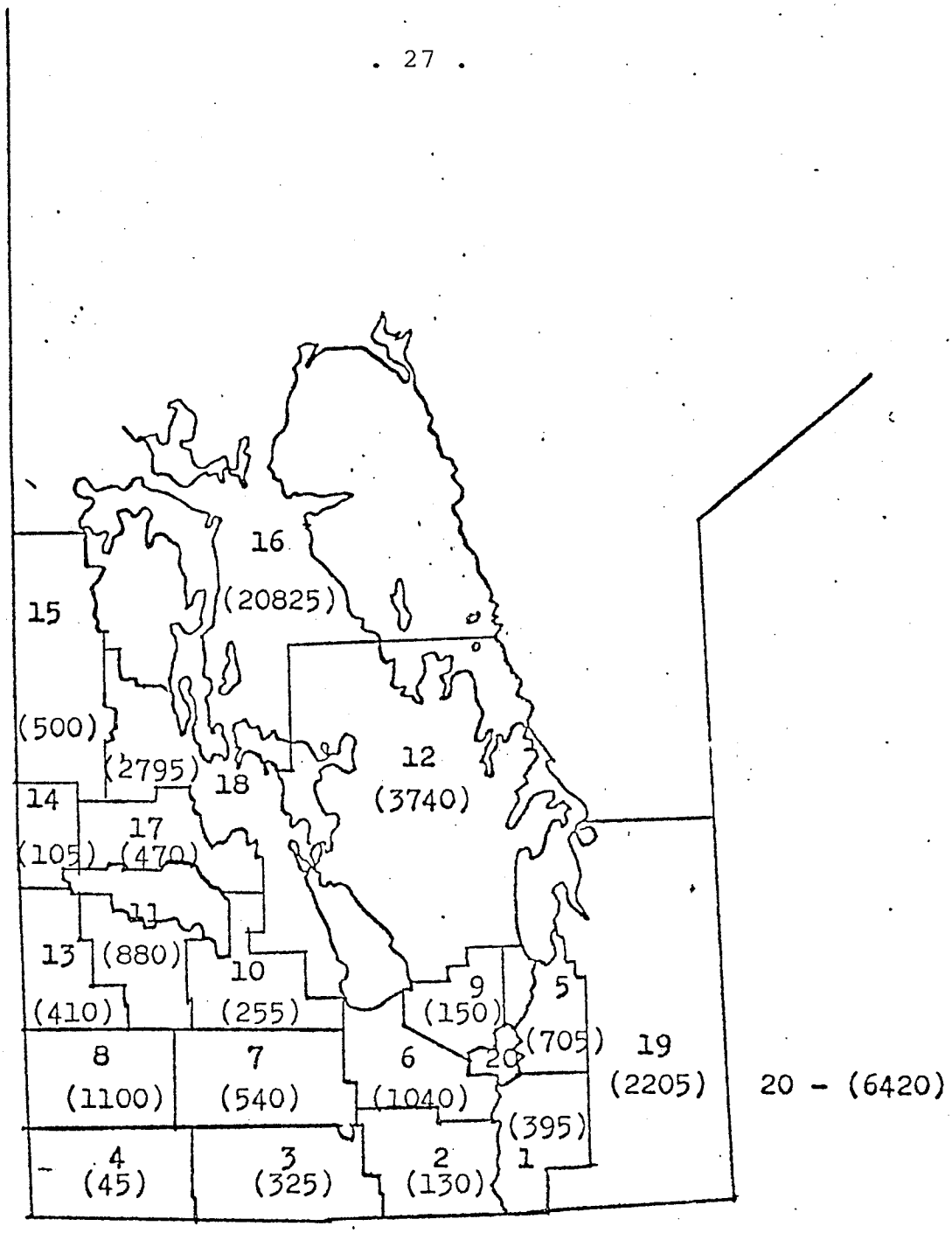

Figure 7: Population of Native Decent by Census Division, 1971

Source: 1971 Census of Canada: Population

Projections such as these, however, are weak, for they assume that the natural increase in the native population will remain geographically fixed and that hunting habits will remain constant. This in fact, may not be the case, and considerable investigation in this area is needed to establish more accurately, the trends in Indian deer demand.

In short, then, deer demand by the non-native population of Manitoba is likely to remain relatively constant (19,030 in 1970; 25,842 in 1971), reflecting harvest shifts due to factors such as varying participation rates and hunting conditions. Indian demand, however, will probably rise significantly from the 1970 harvest of 8,124. This has in the past been considered a problem by some and will likely continue to be seen as a problem in the future.

The Coordination of Suppy and Demand: The Hunting System in Operation

The Concept of Biological Resource Management

The basic rationale behind a biological resource management system is the optimization of resource use. To this end, the practise is not to maintain the resource at its highest level of availability - simple conservation - but rather at its highest level of productivity. Consider the example of a forest. The maximum harvest is achieved by cutting middle aged trees; the marginal rate of growth for an old tree is much less than the marginal rate of growth for a young tree so that a greater extended harvest can be taken by replacing middle aged trees with saplings rather than waiting for middle aged trees to grow larger in old age (see Figure 8).

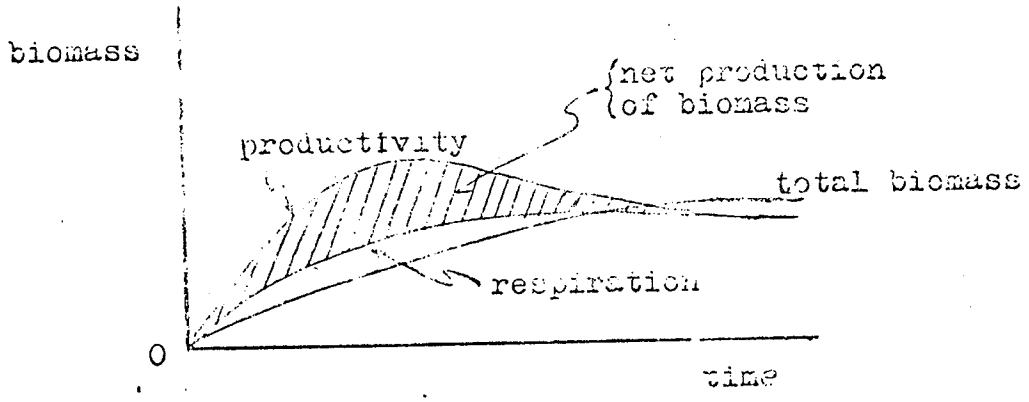

Figure 8

Biomass Productivity

Source: Personal Communication, Dr. D. Punter, Department of Botany, University of Manitoba.

The optimal harvest time occurs at the highest level of productivity rather than when total biomass reaches its maximum.[27] In a similar vein, Gross concluded in a study on optimal yields in deer and elk populations, "If maximum annual harvest is the management goal, manipulation of the population to achieve maximum turnover rate should take precedent over manipulation of the population to achieve maximum size."[28]

It would appear that this hypothesis has not yet been tested on a comprehensive scale in Manitoba. A wildlife management program has gradually evolved in which a system of ad hoc palliatives has been applied as problems arose. For example, game law enforcement now takes 24.5% of the total wildlife management budget. For each prosecution under the provincial Game and federal Migratory Birds Acts, the cost to the province in 1971-2 was $529.89, and over half of these violations were unrelated to wildlife management (improper dress, the carrying of a loaded firearm in a vehicle, etc.).[29] To what extent public pleas for increased enforcement stem from problems with the native population is undeterminable, yet it certainly plays a role. The question, however, is whether or not enforcement is a satisfactory method of achieving optimum wildlife yields - assuming, of course, that optimum yields are the

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[27] Personal communication, Dr. D. Punter, Department of Botany, University of Manitoba.

[28] J. E. Gross, "Optimum Yield in Deer and Elk Populations", 34th North American Wildlife Conference, Proceedings, 1969, p. 383.

[29] Personal communication, Dr. P. Nickel, Director, Natural Resource Institute, University of Manitoba.

goal of provincial wildlife management. It is perhaps noteworthy that in 1971-2 habitat development and maintenance took 9.46% of the total wildlife budget, research took 7.88%, and extension took 10.2%.[30] Certainly, much work remains to be done on deer management in terms of Planning Programming and Budgeting.[31] It may well be worth considering whether or not more emphasis on habitat development and less emphasis on enforcement might be more efficient both in increasing deer availability and perhaps decreasing Indian-landowner friction.

The Hunting System in Manitoba

The basic rationale in operation in Manitoba appears to be that wildlife is more or less a free good in the economic sense. Legally, ownership is vested in the Crown in right to the province of Manitoba. The privilege to hunt deer is sold through a licensing

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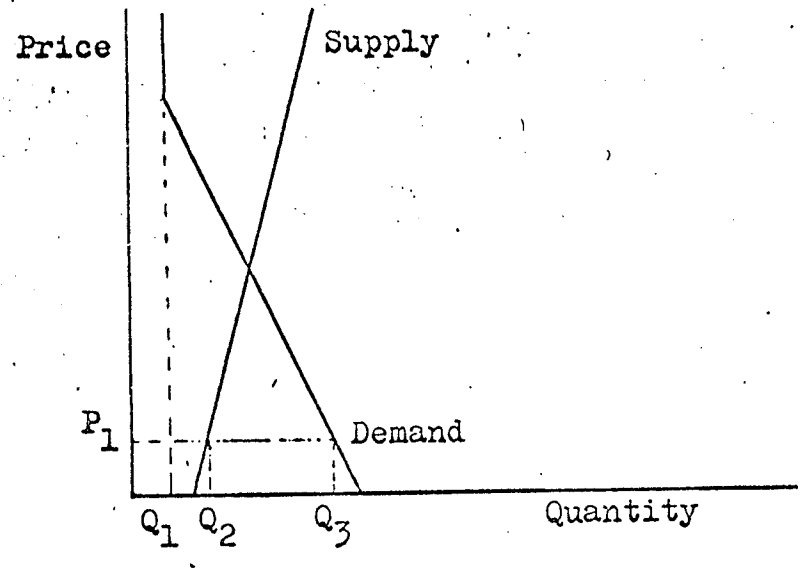
[30] Ibid.

[31] Six steps have been outlined in Planning Programming and Budgeting:
1) Identification of goals and objectives in each area of governmental activity.
2) Analysis of the output of the program in terms of its objectives.
3) Measurements of total costs for not just one year but for several future years.
4) Formulation of objectives and programs extending beyond the simple year of the annual budget submission.
5) Analysis of alternatives to find the most effective means of reaching basic objectives and to achieve these objectives for the least cost.
6) Establishment of analytical procedures utilizing efficiency criteria as a systematic part of budget review.
See J. A. MacMillan, "Evaluation of Resource Development Programs: Regional Application of Planning Programming and Budgeting, Benefit/Cost Systems Analysis", The Allocative Conflicts in Water Resource Management (Winnipeg: Agassiz Centre for Water Studies, 1974), pp. 148-149.

system. The cost to the province in 1971-2 for each deer harvested in this manner has been estimated at $14.00.[32] At a charge of $6.00 per license and a kill success rate of .47, the costs and revenues of deer hunting to the province are roughly in equilibrium.

This accounting balance however, seriously belies an economic balance between supply and demand. At $6.00 per license plus other limited costs such as equipment and transportation,[33] demand for deer greatly exceeds the supply, and to prevent overkill, the province imposes close seasons.



The only regulatable cost in hunting is the license fee. Indians are not subject to this charge so that Q_1 represents a fixed harvest. Q_3 represents the potential demand for deer at the prevailing license

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[32] Personal communication, Dr. P. Nickel.

[33] Total annual hunting expenditures for the average hunter - including license, equipment, and variable transportation costs - was estimated in 1973 to be $113.00. Wayne Cowan, Paul Winston and Richard Johns, "Preliminary Investigation of the Ecological Effects of the Proposed Lowering of Lake Manitoba Level" (Winnipeg: Canadian Wildlife Service, 1973), p. 13.

fee if demand were not artificially restrected to Q_2 by the imposition of a close season. Q_1Q_2 thus, represents non-native demand. It is assumed that the demand curve would have little effect in reducing demand. Similarly, it appears that the supply curve is also inelastic. The supply of deer from private lands is virtually unaffected by any change in the license fee (It may be assumed that a small proportion of any increase in price to the hunter is passed on to the landowner through extension activities such as improved hunter-landowner relations, but this would have a minimal effect on supply). The supply of deer from public lands, however, could be affected through higher license fees. A greater revenue could be used to manage actively the deer populations on Crown lands. That this is not the case is due to two factors: 1) the prevailing sentiment that wildlife is a public good and should not be subject to high charges which would eliminate some segments of the population, and 2) the present practise of channeling all license revenues into the general provincial coffers and drawing therefrom for programs, a practise which does not encourage economic efficiency within wildlife adminstration.

CHAPTER II

REVIEW OF POSITIONS ON INDIAN HUNTING

In a passage symptomatic of the confusion, lack of information and standardization of Indian claims across the prairies, Harold Cardinal wrote:

> . . . Under our treaties we generally were guaranteed the right to hunt and fish over all the lands ceded to the Crown except where such lands were taken up for settlement. Under cases tried in provincial courts, decisions have been reached whereby the native person was allowed to hunt for food on all unoccupied Crown lands in any season, but was restricted by the game laws of the province as to the methods he might use. This ruling prevailed despite the fact that the Indian could not be forced by the province to purchase hunting licenses or observe other provincial game regulations.
>
> Practically, this interpretation meant that we would lose our right to hunt, in spite of our treaties, whenever any supposed important conservation principle was incorporated into a provincial statute.[1]

Cardinal claims to describe the present, but the picture he paints is twenty years old. Court decisions have struck down so many checks on Indian hunting methods, that today in Manitoba, there is virtually no regulation of methods. Cardinal's passage is significant not for its accuracy, but for the accumulated bitterness it represents among

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[1] Harold Cardinal, The Unjust Society (Edmonton: Hurtig, 1969), p. 46.

the native population which the last hundred years have generated.

The National Indian Brotherhood has recommended:

> that the federal government exert its authority with the various provincial governments to amend their legislation to be consistent with federal responsibilities to Indian people and respect for Indian rights, particularly as it relates to those special rights accorded Indian people by treaties in relation to hunting, fishing, trapping, land and mineral rights.[2]

The Manitoba Indian Brotherhood has more fundamentally set out the position of the Indians on hunting. "For us, the Indian tribes of Manitoba, to hunt, fish, trap, and gather is a right which has been vested in Indian people from time immemorial. This is and always has been considered a sacred gift from the creator. Yet, today, there are many regulations and laws which attempt to prevent us from this right."[3] Hunting in the Indians' view is necessary to provide protein for their low income, high starch diet. They feel it is therefore unfair that they should have to have licenses, pay trapline fees, and that game preserves from which they can be barred should be set up next to reserves. Yet, they are also conscious of the decline in game populations. "Our intention is not to secure rights only to see them become nominal and inoperative. It is incumbent upon the federal government in conjunction with the province to provide measures that make these rights viable and operative."[4]

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[2] National Indian Brotherhood, Indians: Land and Resources (Ottawa: National Indian Brotherhood, 1973), p. 33.

[3] The Indian Tribes of Manitoba, Wahbung: Our Tomorrows (Winnipeg: n.p., 1971), p. 19.

[4] Ibid., p. 21.

The recommendations of the Manitoba Indian Brotherhood are as follows:

1. We maintain that the government must recognize hunting, trapping, fishing and gathering rights of Indian people and the need to protect these rights.

2. We urge the Minister to mobilize his resources to restore the right of Indian people to hunt exempt from the Migratory Birds Convention Act.

3. Just compensation must be made for flooded traditional hunting, trapping or gathering lands in kind or in financial terms.

4. It should be possible for Indians to hunt across provincial boundaries where traditional pursuit of game has continued.

5. All registered Indian people should be exempt from having to have a license when hunting for domestic purposes or otherwise. Further, that guiding licenses be supplied free of charge to registered Indian people, by the appropriate Department.

6. It is further recommended that the protection of hunting, fishing, trapping and gathering rights be enshrined in the constitution and in the Indian Act.

7. We submit that Subsection 3(a) and (b), section 46, Chapter 9, the Wildlife Act[5] should be deleted from legislation as contrary

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[5] Any Indian who:
(a) sells or barters a wild animal, pelt, hide, meat or any part thereof; or
(b) gives it or the pelt, hide, meat or any part thereof to a person who is not an Indian: is guilty of an indictable offence and is liable on summary conviction to a fine not exceeding $300.00 or two months in jail or both.

to human and social rights. It is recommended further that this and other provincial regulations which encroach on Indian rights be reviewed by a committee consisting of:

a) Federal representatives

b) Provincial representatives

c) Two elected representatives of the Indian people

d) Legal advisors

and that ths committee research and have recognized powers to recommend to both governments on methods to resolve these conflicts of inter-provincial, intra-provincial conflicts of law, and provincial-federal conflicts.[6]

While there is undoubtedly a certain amount of envy among non-natives of the Indian right to hunt at all seasons, the main objection is more properly placed on methods. There is an obvious clash in outlook between European and Indian ethics which has important repercussions on the observance of Indian hunting rights. The Euro-Canadian has elevated hunting from the subsistence level to the sporting plane; and with this elevation has grown up a set of social taboos governing sportsmanlike conduct. Considerable pressure exists to have these standards applied to Indians. The Indian, in contrast is concerned with food, not fun; and any method of acquiring this food is acceptable. Night-lighting has beome the focal point in this conflict. Yet, while objectionable to the sportsman, this has been a tried, and proven method of hunting among the Indians for many generations.

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[6] Indian Tribes of Manitoba, Op. cit., pp. 23-24

Methods enjoy a certain continuity of tradition, but the economics of hunting have been severely curtailed. The Indian as a provisioning agent has disappeared not only because the fur trade disappeared; it would not necessarily have been difficult to find new markets if the supply of wildlife had been maintained. The economic function of hunting has been eliminated by legal barriers which tie the Indian to subsistence hunting. It is therefore, easy to understand how the Indians view any attempt to curb their customary hunting habits as an attack on their right to hunt. Customary use and removal in time from the actual signing of the treaties have served to obliterate any recognition of limits on their hunting rights. "During negotiations we were told the Crown agreed to our right to pursue hunting and fishing throughout surrendered unoccupied land, we were certainly never told of the line that was afterward written in, 'subject to such regulations as may from time to time be made....'"[7] It is for these reasons that the Indians call for the government to recognize their rights to hunt.

Hunter organizations, in contrast, are interested in limiting Indian hunting rights rather than expanding them. The annual meeting of the Manitoba Wildlife Federation held in June, 1975 passed the folowing resolutions:

> Whereas the white-tailed deer population in Agro-Manitoba is extremely low and the conservation of the breeding stock is of extreme importance;
>
> And whereas the Native Indians of Agro-Manitoba are allowed to hunt irrespective of the existing game laws and as a result are depleting the breeding stock;

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[7] Indian Tribes of Manitoba, Op. Cit., p. 21.

> Therefore, Be It Resolved that we continue to do everything possible to encourage the Provincial and Federal governments to resolve the provisions of the Natural Resources Transfer Act of 1930.
>
> Be It Resolved that Native families be alloted a given liberal quota of Big Game each individual family needs, and that the Provincial Government institute a tagging system so that this can be controlled and enforced.
>
> Whereas our Native people have all the rights and privileges of every other Canadian plus the exclusive right to hunt all year round;
>
> Therefore Be It Resolved that these people should be restricted to the manner of obtaining these animals, especially from hunting by night with the aid of any type of light or lighting device.[8]

One very important corollary to hunter concern for declining deer levels is a degenerating situation in Indian-landowner relations. One regional supervisor for the Department of Mines, Resources and Environmental Management noted:

> Many Indian hunters do not respect the landowner rights. In many cases if Indians are refused permission to hunt on private land the landowner is intimidated by threats of personal or property damage. ... Residents in the hunting areas are afraid to go on the roads at night or to go out in their yards at night. Deer have been shot in farm gardens within yards of occupied farm buildings and along roads and buildings inside of small country towns. ... During the fall of 1974 one person was shot and killed during an argument between an Indian and a landowner over permission to hunt. ... During the fall of 1974 farmers in certain areas formed vigilante committees to keep Indians off their property because government departments would not act.[9]

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[8] Pat Allard, "Manitoba's 31st Annual Convention", Wildlife Crusader summer, 1975, p. 9.

[9] Personal communication, J. D. Robertson to Ian B. Anderson, April 4, 1975.

In essence private property rights and in particular trespass legislation lie at the heart of this aspect of the problem. As one MLA told the legislature in June, 1975, the government

> had better start taking a stand on trespass on private land, and if it is not going to, you're going to see considerably more of the action that you had down in Manitou or LaRiviere or wherever it was last year (murder case).[10]

The deer problem in Manitoba is thus not one with well defined limits. It involves Indian hunting rights, declining wildlife habatat, trespass laws. The Hon. Sidney Green told an MLA, "I say that it is a deer problem and you are making it into and Indian problem."[11] The province must face the facts and accept that it is not an either-or problem, but a combination of many factors which are building up into one big headache.

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[10] Legislative Assembly of Manitoba, Debates and Proceedings, June 11, 1975, p. 3800.

[11] Ibid., p. 3807

C H A P T E R I I I

INDIAN HUNTING RIGHTS AND THE LAW

The common law system of Canada is based on three pillars of varying importance: 1) custom, 2) legislation, and 3) judicial review. By far, it is the latter two which provide the bulk of the evidence on Indian hunting rights; however, custom too provides some significant insights into the functional practise and limits of Indian hunting. Each of these areas must be considered in an investigation of Indian hunting.

Custom

As early as 1693, it was held by a British court that "though a conqueror may make new laws, yet there is a necessity that the former should be in force till new are obtained, and even then some customs may remain."[1] The question thus arises as to what customs obtained in the past and how they are applicable.

It has unquestionably been the custom of the native people to hunt for the majority of their food needs. To a large extent, the human population levels of pre-European America were tied to the abundance of game. It has been hypothesized that significant populations of large mammals in North America were exterminated

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[1] Blankard V. Glady (1963) 4 Mod. 222,225, cited by L. C. Green, "Aboriginal Rights or Vested Rights?", Chitty's Law Journal, 1974, p. 220.

between 12,000 and 5,000 BC due to the ravages of man, and it is probable that early man experienced a population crash at the same time. The resurgence of the native population occured only as other species of animals entered the ecological niches of the extinct animals and as early man embarked on agricultural experiments.[2]

The hunting and gathering society - in addition to environmental influences - was further shaped by the interaction between Indian tribes. Warfare acted not only on Indian populations, but also game populations. Preceeding European steelement, the Ojibway and Sioux of Wisconsin and Minnesota fought for control of a prime strip of hunting ground stretching from the Red River east across the two states which corresponded to the parkland border between plains and forest. This was ideal white-tailed deer habitat. Neither tribe, however, could control the area, and it remained a buffer zone between the two into which only occasional large hunting parties ventured for short periods. The area thus served as a preserve, supplying deer on the peripheries to both groups. When peace was imposed on the two warring groups, the buffer zone became open hunting grounds. The game population was rapidly depleted, and starvation took place among the Indians[3] (see Figure 9).

The situation in Manitoba, in contrast to the fixed frontier

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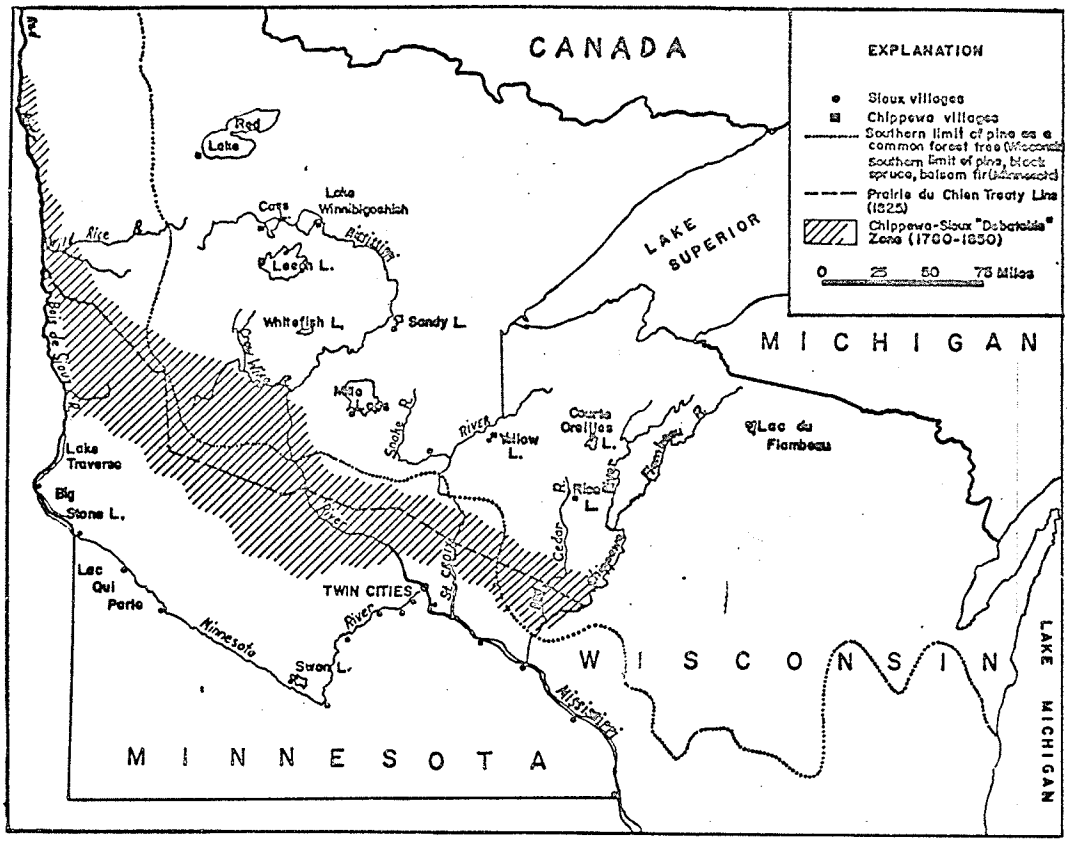
[2] National Research Council, Land Use and Wildlife Resources (Washington: National Academy of Sciences, 1970), p. 3.

[3] Harold Hickerson, "The Virginia Deer and Intertribal Buffer Zones in the Upper Mississippi Valley" in A. Leeds and A. P. Vayda, eds., Man, Culture, and Animals (Washington: American Association for the Advancement of Science, 1965), pp. 60-62.



INTERTRIBAL BUFFER ZONES AND BOUNDARIES IN T HE PERSPECTIVE OF VEGETAL ZONES IN WISCONSIN AND MINNESOTA

Figure 9

Source: Hickerson, Op. cit., p. 53.

between Ojibway and Sioux in Minnesota, was much more fluid and somewhat more peaceful. There was a constant moving west of tribes, and although intertribal clashes are recorded, the trhee main tribes in the south - the Cree, Assiniboins, and Ojibway - generally found themselves allied against the strength of the Sioux.[4] Because of the absense of constant conflict and the lack of a general locational status quo, less is known of the role of buffer zones between tribes as game producing areas in Manitoba.

The Indian complaint that wildlife management areas are set up next to their reserves must be viewed in this context. Under pre-European conditions natural game preserves - often of the highest quality since they were the object of conflict - had occured in the buffer zones between tribes. This maintained the constant reservoir of game which wildlife management areas must now supply. Furthermore, while in precise legal terms the Indians were free to roam where they liked, in practise their movements were inhibited. It is thus not necessarily inconsistent with past custom that wildlife management areas be set up in the neighbourhood of reserves.

It may even be necessary if supply is to be maintained in the fact of the increasing technological efficiency of the hunting methods employed by the Indians. Because survival was the ultimate goal of native peoples, sportsmanship played little if any role in hunting. This has remained the traditional approach of the Indians.

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[4] Walter M. Hlady, "Indian Migrations in Manitoba and the West", Historial and Scientific Society of Manitoba, Papers. Series III, No. 17 (1960-61), pp. 24-38, passim.

Technology, however, has allowed a much greater degree of effectiveness by hunters, and in the absense of a self-imposed sense of sportsmanship or conservation, game levels are seriously threatened by unchecked hunting. With the apparent absense of any ability to impose hunting seasons on Indians, there has arisen a suggestion from some quarters that the Indians be restricted to hunting procedures in use before the treaties were signed.[5] But there custom provides continuity. Night-lighting, for example, did not arise with the development of electrical or automotive technology; it was in practise long before. One Ojibway chief wrote in 1850:

> I remember being at the foot of Rice Lake, Canada West (near Peterborough, Ontario), with others on a hunting tour in the night. Soon after nine o'clock, we hear the animal feeding in the grass by the shore. Having a lighted candle, we placed it in a three-sided lantern; opening one side, the light was thrown upon the deer only. By this contrivance we were enabled to approach so near it in our canoe, that it appeared to be but ten or fifteen paces from us. I drew my bowstring - the arrow winged its way - the deer made a few short leaps, and died.[6]

Technology has thus merely been adapted to the customary manner of hunting.

In essence, therefore, custom supports the Indian side of the debate over hunting methods. Custom, however, is a weak

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[5] Personal communication, A. Murray, Assistent Deputy Minister, Renewable Resources, Province of Manitoba.

[6] George Copway (Kah-Ge-Ga-Gah-Bowh, Chief of the Ojibway Nation), The Traditional History and Characteristic Sketches of the Ojibway Nation (Toronto: Coles, 1972 (1850)), p. 28.

point in practise on which to base law, especially if there is not a concensus of opinion concerning that custom.

Treaties and the Development of Hunting Legislation

Central to the whole problem of special hunting rights for Indians is the subject of their original treaties. The necessary first step in determining the status of Indian hunting rights is therefore, to return and review the treaty material - both official and unofficial - and its background. Since the treaties signed by the Indians are not generally uniform, it is necessary to review each of the initial treaties with the purpose of either establishing different rights for different groups or a uniform intent which in many cases, failed to manifest itself in individual treaties. The treaties covering the prairies are Numbers 1 through 10 while the treaties directly relevant to Manitoba are Numbers 1 through 7 (see Figure 10). However, supporting information is to be found in the Robinson Treaties (1850) for northern Ontario.

The Indian Movement in Canada today claims the Royal Proclamation of 1763 as its Bill of Rights. The British government at the conclusion of the Seven Years War found it

> just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are

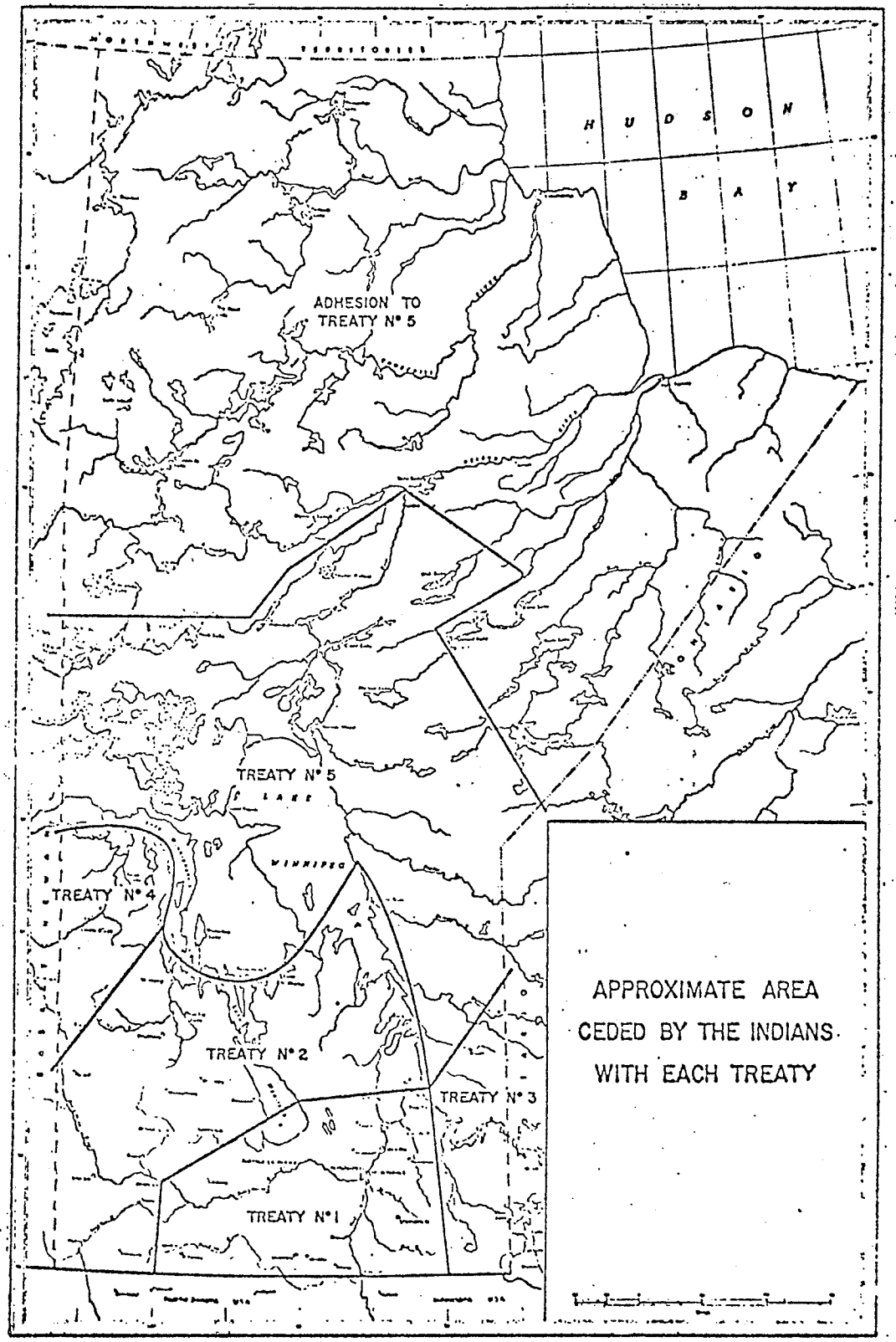
HUDSON BAY
ADHESION TO TREATY N° 5
TREATY N° 5
TREATY N° 4
TREATY N° 2
TREATY N° 3
TREATY N° 1
APPROXIMATE AREA CEDED BY THE INDIANS WITH EACH TREATY

Figure 10

reserved to them, or any of them, as their Hunting Grounds.[7] The authorities went on to prohibit any land transfers from Indians to non-Indians. However, the government continued, "if at any Time any of the said Indians should be inclined to dispose of said lands the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians."[8] Narvey has demonstrated that the Proclamation applied to the Hudson Bay Company lands as much as any other lands to the west of the Alleghenies, and thus the Indians on the prairies were confirmed in their ownership of the land.[9] When the Honourable Company surrendered its claims to the territory in 1869 in return for £300,000, the Dominion found itself the legal government, but not the owner, of the Northwest Territories. However, it was as much a result of the unrest leading to the Riel Rebellion of 1870 as respect for legal precedents which impelled Ottawa to send treaty negotiators into the new territories to extinguish Indian land claims in 1871.

The Robinson Treaties

Alexander Morris, Lieutenant-Governor of Manitoba and negotiator of Treaties 3, 4, 5, and 6, noted that "the main features of the Robinson Treaties - vis. annuities, reserves for the

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[7] Adam Shortt and A. G. Doughty, eds., Documents Relating to the Constitutional History of Canada, 1759-1791 (Ottawa: King's Printer, 1918), Part I, p. 166.

[8] Shortt and Doughty, Op. cit., p. 167.

[9] Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763, The Common Law and Native Rights to Land within the Territory Granted to the Hudson's Bay Company", Saskatchewan Law Review, Vol. 38, No. 1 (1974), passim.

Indians, and liberty to fish and hunt on the unconceded domain of the Crown" were followed by those negotiating the treaties in the Northwest Territories.[10] The precedent for Indian hunting rights was therefore established before the Manitoba treaties were considered. In the Robinson Treaties, the government undertook to make £2,000 cash settlements with annuities of £600 in one case and £500 in the other, to provide reservations, and

> to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, or occupied by them with the consent of the Provincial Government.[11]

The conduct of Indian affairs in Upper and Lower Canada remained under imperial control until 1860. The British government was notoriously niggardly in its colonial expense accounts and cut costs wherever possible. Lord Elgin, Governor-General of the United Canadas, wrote in 1850 that the transfer of Indian affairs to the provinces, however, would only add another burden to an already financially overburdened government and contribute to "the taunts of the annexationists."[12] Thus, the conduct of Indian affairs remained under-financed, and when it came time to extinguish the land

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[10] Alexander Morris, The Treaties of Canada with The Indians of Manitoba and the North-West Territories (Toronto: Coles, 1971 (1880)), p. 16.

[11] Canada, Dept. of Indian Affairs, Indian Treaties and Surrenders (Toronto: Coles, 1971 (1981)), Vol, I, pp. 148 and 149.

[12] J. M. S. Careless, The Union of the Canadas (Toronto: McClelland and Stewart, 1967), p. 154.

claims of the Indians in the Lake Huron and Lake Superior districts, W. B. Robinson was not authorized to offer the same terms as far as annuities were concerned as previously. The Indians balked at this, pointing to a recent settlement by the Americans south of Lake Superior and higher annuities elsewhere in Upper Canada. Robinson reported:

> I explained to the chiefs in council the difference between the lands ceded heretofore in this Province and those then under consideration, they were of good quality and sold readily at prices which enabled the Government to be more liberal, they were also occupied by the whites in such a manner as to preclude the possibility of the Indian hunting over or having access to them: whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few locations by mining companies....[13]

Robinson further explained the rationale for reservations and hunting rights, "... by securing these (reservations) to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from then their usual means of subsistence and therefore, have no claims for support, which they no doubt would have preferred, had this not been done."[14] Under financial duress, therefore, the British government offered lower cash terms on two counts: 1) the quality of the land ceded was believed to be lower and hence worth less, and 2) the expected lack of

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[13] Morris, Op. cit., p. 17.

[14] Mooris, Op. cit., p. 19.

settlement would allow the Indians to maintain their traditional hunting life, a valuable saving to the treasury. A certain interchangeability between hunting rights and annuities was thus implied. This idea is still current in some circles. During the 1951 debate on the new Indian Act, one MP stated, "Where the Indians find it necessary to hunt and fish in order to live, and that privilege is denied them because of the growth of civilization, ... provision should be made to make up their loss."[15] This in essence was written into the Robinson treaties.

> The said William Benjamine Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Governement of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be generously pleased to order....[16]

The only way in which the land ceded to Canada would produce revenues

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[15] Canada. Debates of the House of Commons, February 21, 1951, p. 757.

[16] Canada, Department of Indian Affairs, Indian Treaties and Surrenders, Op. cit., pp. 148 and 150

was through land sales and leases.[17] Extensive alienations from the Crown reserves would entail restrictions on Indian hunting rights, but they would be compensated for through higher annuities.

The government of Upper Canada had indeed foreseen no inordinately large revenues accruing from the area. Legislation in 1845-6 had set the price of mining properties purchased from the Crown at four shillings per acre which was converted in 1861 to $1.00 per acre.[18] However, the law was easily circumvented and one company alone, the Montreal Mining Company, acquired 170,156 acres dispersed throughout the province for 42.5¢ per acre.[19] Timber leases were set in 1851 at two shillings, six pence per square mile,[20] but little interest was shown in the low quality timber of the new areas.

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[17] Sudbury and the mining district to the west lie within the Robinson Treaty area; however, mining royalties were clearly not envisoned as producing revenue for the government. The idea of mining royalties was virtually inconceivable in 1850. Only in Britain, of all the European countries, were the rights of the landowner to all minerals except gold and silver made absolute. This legal tradition developed in the 16th and 17th centuries as a result of opposition to interference by the Crown in economic activities (J.U. Nef, The Rise of The British Coal Industry, London: George Routledge and Sons, 1932, Vol. I, p. 266), and became an integral part of 19th century laissez-faire liberalism. A vestige of the Royal Perrogative in gold and silver reappeared in Ontario in 1862 when a 2.5% royalty on gold ore was enacted, but this was repealed in 1864. It was re-enacted in 1868, but again repealed in 1869. Mining royalties were not again collected in Ontario until the Cobalt area was opened up in 1914. (J.E. Middleton and Fred Landon, The Province of Ontario - A History: 1615 - 1927, Toronto: Dominion Publishing Co., 1927, pp. 505-7 and Adam Shortt and A. G. Doughty, eds., Canada and Its Provinces, Toronto: T. A. Constable, 1914, Vol. 18, p. 638.)

[18] Middleton and Landon, Op. cit., pp. 505-6.

[19] Shortt and Doughty, Op. cit., p. 618.

[20] George C. Wilkes, Taxation of the Forest Industries in Ontario (Toronto: University of Toronto Press, 1954), p. 7.

Land sales for agriculture were virtually ruled out, except in certain limited regions such as around the Sault.

After 1867, however, revenue from the Robinson Treaty areas increased markedly. Although mining and farm lands had generally kept to expectations, forestry began to bring in tremendous revenues. Following Confederation, Ontario lost much of its source of revenue through the transfer of many taxation privileges to the federal government. In 1868, Premier John Sandfield Macdonald announced, "The government wishes to avert the dire resort to direct taxation by husbanding the timber which constitutes so large a portion of the real wealth of the country."[21] New regulations increased timber fees by 50% in 1869.[22] At the same time, new technological developments were increasing the demand for timber lands. The first pulp and paper mill had been built in 1866, and the ability to use low quality wood quickly pushed the industry into the northern forests.[23] In addition to leases, the privilege of acquiring a lease was put up for bids. In 1872, a 5,031 square mile tract north of Lake Huron was leased for a bonus of $592,601 ($117.79/sq. mile). Average bonuses increased to $532 per square mile in 1881, $2,859 in 1887 and $3,657 in 1892.[24] Large private tracts were created from which

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[21] Middleton and Landon, Op. cit., p. 379.

[22] Ibid., p. 492

[23] A. R. M. Lower, Settlement and the Forest Frontier in Eastern Canada (Troonto: Macmillan, 1936), p. 113.

[24] Morris Zaslow, The Opening of the Canadian North: 1870 - 1914 (Toronto: McClelland and Stewart, 1971), p. 161.

the Indians could be legally barred from hunting, while at the same time, the government enjoyed huge revenues which regularly led to budget surpluses of between $2,000,000 and $6,000,000.[25]

In 1873, the Indians became aware of the increasing wealth which the lands they had ceded were producing and petitioned the government for an increase in annuities. The federal government was quick to respond affirmatively and granted retro-active increases from 1851. The source of the payments, however, was not so easily settled. Ontario contended that the federal government was responsible for the payments since all debts relating to Indian annuities had been assumed by the federal government at the time of Confederation. Ottawa, in contrast, insisted that the payments were to be made from the land revenues, and since control of lands had gone to the founding provinces, this entailed the responsibility on the part of Ontario to pay any increases in annuities arising from increased land revenues. The issue was submitted to arbitration and was eventually settled in favour of Ottawa. Ontario appealed the result and the case was reversed in the Supreme Court of Canada. Ottawa then appealed to the Privy Council which upheld the finding in favour of Ontario.

The final judgment, which was not delivered until 1897, involved major implications for Indian treaty rights. The Dominion

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[25] Ibid., p. 149.

government

> contended that the covenant to pay the increased annuities was in effect and by necessary implication a covenant to pay out of the lands surrendered ..... the lands having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians should be observed and carried out by that province. The province got the benefit of the increased value and profits of the land, and it was equitable that it should bear the burden of any increased annuities resulting from those increased profits under the terms of the treaties.[26]

The Privy Council, however, decided otherwise.

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.[27]

The Indians of the Robinson Treaty areas were thus allowed compensation for the potential loss of their hunting rights in the privately owned lands, but it was granted as a matter of generosity rather

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[26] Richard A. Olmstead, ed. Decisions of the Judicial Committee of the Privy Council (Ottawa: Queen's Printer, 1954), Vol. I, pp. 390 - 391 (Attorney-General for Canada v. Ontario, 1897 A.C. 199)

[27] Olmstead, Op. cit., p. 401.

than rights stemming from the treaties. The increase granted in 1873 came at a time when the government found it politically expedient to mollify Indian discontent and thus achieve security in the West. The Privy Council decision of 1897 came on the eve of the great wave of immigration which established conclusively Canada's hold on the West. The government was not apt to be so generous again.

The Major Treaties

Despite Morris' claim that the Robinson treaties formed the basis for the prairies' treaties, the legally ambiguous clause relating annuities to land revenues was omitted. For Alexander Morris, the primary concern was to establish Canada's claims to the Northwest and pre-empt American expansion. As early as 1867, he had told the House of Commons, "The people of the United States are ... going in, and if they find no established institutions or organized Government, they will form an Association and commence a Government of their own."[28] The necessity was therefore to establish a Canadian population on the prairies as soon as possible, and this was the avowed official policy of the Conservative government. Sir John A. Macdonald noted, "It would be injudicious to have a large province which would have control over lands and might interfere with the general policy of the Government in opening up

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[28] P. B. Waite, Arduous Destiny: 1874 - 1896 (Toronto: McClelland and Stewart, 1971), p. 10.

communications to the Pacific, besides the land regulations of the Province might be obstructive to immigration."[29] Control of lands and natural resources thus remained in the hands of the Dominion government in order to foster settlement. It was openly acknowledged that the land was potentially rich, but as matters stood, it was worthless without settlement. With government policy focused on settlement, there was no real though of revenue from the lands. One twentieth of the land in the fertile belt was to be chosen by and given free of charge to the Hudson Bay Company under the terms of the transfer. In addition to a cash subsidy by the Dominion, the Pacific Railway was to receive a grant of 50,000,000 acres with further subsidies of 25,000 acres per mile of branch line in Manitoba and 20,000 acres per mile in the territories.[30] For the Métis, the government set aside 1,400,000 acres. Of the remaining lands it was hoped that homesteaders would settle with a registration fee of $10 per 160 acre grant. Provision was also made for limited purchases of unappropriated Crown lands at $1 per acre.[31] Little revenue would thus accrue to the government from the disposal of lands, and there is little wonder that the government did not base annuities on land revenues. Furthermore, by 1973 the potential problems of such a course of action had become obvious.

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[29] Chester Martin, Dominion Lands Policy (Toronto: McClelland and Stewart, 1973 (1937)), p. 12.

[30] Canada, House of Commons, Sessional Papers, 1873, No. 13

[31] Canada, House of Commons, Sessional Papers, 1871, No. 20.

If Manitoba was of little direct value to the federal government, it was also deemed of limited hunting value to the Indians. In 1778, pemmican was discovered by the fur traders, and buffalo meat became the staple food. Winnipeg thus achieved its importance due to its location at the edge of both the prairies and the fur-yielding forests. Between the 1820's and the 1860's the Métis organized immense hunts which netted about 200,000 buffalo a year. Slaughters by Americans at the southern end of the migration route only added to pressures on the herds. As early as 1820 buffalo were scarce around Fort Garry; no buffalo herds were seen in Manitoba after 1861. Indians were already starving in the western prairies by the 1850's.[32] The forest areas north and east of the prairies fared little better in many places. The heavily forested Shield did not support large numbers of game animals, but those which could be easily killed were quickly taken by the Coureurs de Bois who averaged up to eight pounds of meat per day per man while traveling and by the Indians both for themselves and for the fur traders.[33] Indian hunting pressures increased with time. The Ojibway were encouraged by the fur traders to move west into Manitoba because their proficiency in hunting was superior to that of the indigenous Swampy Cree.[34] When large game was unavailable, the fur traders

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[32] Anne Innis Dagg, Canadian Wildlife and Man (Toronto: McClelland and Stewart, 1974), pp. 27-9

[33] Ibid., p. 27.

[34] William Patrick O'Brien, "Robert Macdonald: A Biographical Study from 1829 - 1860 and a History of the Forces which Influenced His Career" (unpublished paper, University of Manitoba, 1972), p. 5.

showed a prodigious appetite for small game. During the winter of 1709-10, it is reported that the 80 resident men of Fort Nelson on Hudson Bay ate 90,000 partridges and 25,000 hares along with geese and fish.[35] That the Shield continued to support the Indians is a function more of their declining population due to disease than the abundance of game. The Ojibway, 35,000 strong in 1650, fell to 25,000 in 1764, and between 1783 and 1794, their numbers dropped to 15,000.[36] Small pox, which appeared on the lower St. Lawrence in 1635 was decimating the Sioux, Cree, Piegans, and Assiniboines by 1738.[37]

By the mid-nineteenth century hunting rights had taken on a paramount importance more as a matter of survival than the preservation of a way of life. During the treaty negotiations, the Indians were wary of preserving their hunting rights; but at the same time, they were anxious to learn the farming techniques which would ensure survival. One band at Norway House requested and received a reservation west of Lake Winnipeg where the land would be more fertile.[38] The plains Indians of Treaty 6 requested cattle, hoes, spades, scythes, whetstones, axes, hay forks, ploughs, harrows, and seed which were also granted.[39] Part and parcel with

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[35] Dagg, Op. cit., p. 27.

[36] O'Brien, Op. cit., p. 6

[37] Diamond Jenness, The Indians of Canada (Ottawa: Queen's Printer, 1955 (1932)), pp. 251-2.

[38] Morris, Op. cit., p. 167.

[39] Ibid., p. 215.

the government offer of reservations was agricultural assistence. It is clear, therefore, that the federal government, in negotiating the treaties with the western Indians, had in mind the provision for the Indians' ability to support themselves either through farming or hunting, but above all, through farming since it was foreseen that game would rapidly disappear.

Treaties Number 1 and 2 make no specific reference to hunting rights for the Indians involved; however, they were clearly intended to go hand in hand with Indian title to reservations. Wemyss Simpson, negotiator of the treaties, told the Indians:

> These reservations will be large enough ... to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail.... When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when the lands are needed to be tilled or occupied, you must not go on them any more.[40]

These treaties were later revised in 1875 because of certain claims which the Indians said had been promised but not fulfilled by the government. However, the acknowledged right of the Indians to hunt had been so conserved that it did not occur in the list of grievances. But the limitations on hunting rights remain ambiguous, and it can

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[40] Morris, Op. cit., p. 29.

only be concluded that they are meant to be the same as those set forth in the other prairie treaties.

Treaty Number 3 is much more precise as to the hunting rights of the Indians and limitations thereon.

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[41]

The hand of Morris and influence of the Robinson treaties are obvious here; however, Morris took the added precaution of limiting the right to hunt freely by control under Dominion legislation.

Out on the plains in 1874, Morris told the Indians:

> The Queen knows that Her red children often find it hard to live. She knows that Her red children, their wives and childrent, are often hungry, and that the buffalo will not last forever and She desires to do something for them. More than a hundred years ago, the Queen's father said to the red men living in Quebec and Ontario, I will give you land and cattle and set apart reserves for you, and will teach you. ... We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men

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[41] Canada, Indian Treaties and Surrenders, Op. cit., Vol. I, P. 305.

> settled upon this land, and you have the right of hunting and fishing just as you will have now until the land is actually taken up.[42]

And again the hunting rights of the Indians in Treaty Number 4 were set forth and clearly limited.

> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping, and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, or other purposes, under grant or other right given by Her Majesty's said Government.[43]

Treaties Number 5 and 6 likewise contained these provisions and limitations.

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering, or any other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[44]

Treaties Number 6 and 7 are the most revealing of the

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[42] Morris, Op. cit., p. 171.

[43] Canada, Indian Treaties and Surrenders, Op. cit., Vol. I, p. 315.

[44] Canada, Indian Treaties and Surrenders, Op. cit., Vol. II, pp. 18-19 and 37.

treaties, for here the Indians explicitly requested hunting regulation. One plains chief had written to Lieutenant-Governor Archibald, "Our country is getting ruined of fur-bearing animals, hitherto our sole support, and now we are poor and want help - we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle - our country is no longer able to support us."[45] When Morris arrived to negotiate the treaty, he was requested to preserve the buffalo. Morris reported:

> In connection with the aiding of the Indians to settle, I have to call attention to the necessity of regulations being made for the preservation of the buffalo. These animals are fast decreasing in numbers, but I am satisfied that a few simple regulations would preserve the herds for many years. The subject was constantly pressed on my attention by the Indians, and I promised that the matter would be considered by the North-West Council.[46]

Morris was quick to impress upon the Indians that they would also be governed by the game statutes. He told them, "The North-West Council is considering the framing of a law to protect the buffaloes, and when they make it, they will expect the Indians to obey it."[47]

In 1876, Dr. Schultz, a Manitoba MP, attempted to bring the impending extinction of the buffalo before Parliament, but the issue was dismissed. During the next session Schultz, with the

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[45] Morris, Op. cit., p. 171.

[46] Ibid., pp. 194-5.

[47] Ibid., p. 241.

support of other western members, again raised the issue of preserving the buffalo, and again the federal government dismissed the issue. The Minister of the Interior replied that the local government of the Northwest Territories "could probably devise a cheaper and better plan than this parliament, it being on the spot, and more familiar with the matter."[48] Thus, in March, 1877, the Council of the North-West Territories passed a Game Ordinance. Slaughter for sport or pelts was prohibited; the use of less than half a pound of flesh was considered evidence of this crime. Closed seasons were imposed, but Indians were somewhat exempted "in circumstances of pressing necessity" or "to satisfy ... immediate wants."[49]

When Treaty Number 7 was negotiated in 1877, David Laird, the new Lieutenant-Governor, told the Blackfeet:

> The Great Mother heard that the buffalo were being killed vary fast, and to prevent them from being destroyed her Councillors have made a law to protect them. This law is for your good. It says that the calves are not to be killed, so that they may grow up and increase; that the cows are not to be killed in winter or spring, excepting by the Indians when they are in need of them for food.[50]

Needless to say, Treaty Number 7 contained the standard limitations on Indian hunting rights which had already been implemented.

> And Her Majesty the Queen hereby agrees with Her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as

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[48] Canada, Debates of the House of Commons, 1877, p. 993.

[49] G. F. G. Stanley, The Birth of Western Canada (Toronto: University of Toronto Press, 1966 (1936)), p. 223.

[50] Morris, Op. cit., p. 267.

> heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by Her Government of Canada, or by any of Her Majesty's subjects duly authorized therefor by the said Government.[51]

Problems soon arose in the territorial Buffalo Ordinance. The measure was difficult to enforce, and the Indians were hardly united in support. Sitting Bull, an American Sioux refugee in no way connected with the signing of the treaties, asked, "When did the Almighty give the Canadian Government the right to keep the Indians from killing the buffalo?"[52] Thus, in 1879 the Buffalo Ordinance was repealed. The buffalo and Indians were left to fend for themselves, and the inevitable decline in buffalo led to starvation among the Indians. The result was considerable antipathy towards the white man, to say the least, and when Riel chose the time for his second rebellion, he was not without Indian allies. During Canadian negotiations with Big Bear's band, a list of Indian grievances was made. The government agent reported, "He (Big Bear) referred to the extermiation of the buffalo that they relied so much upon for their support and that the influx of white men would lead to the extermination of many other animals and fish which helped them to live."[53]

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[51] Canada, Indian Treaties and Surrenders, Op. cit., Vo. II, p. 57.

[52] Stanley, Op. cit., p. 223.

[53] Ibid., p. 342.

Indians Not Covered by Treaties

Preliminary to the actual signing of treaties was a government effort to determine which Indians actually occupied the lands of the Northwest Territories according to accepted custom. The Sioux at one time, held part of the British Northwest, but were expelled by a union of Ojibway, Cree and Assiniboines. They were not, therefore, deemed to have any valid land claims in Canada. However, as a result of the numerous Sioux Indian wars in the United States - commencing in Minnesota in the 1860's, moving west gradually, and culminating in Custer's massacre - various bands of refugee Sioux began to wander through the Canadian prairies from Portage westward.

The Sioux brought with them, a reputation which caused no small amount of alarm in the Red River Settlement,[54] and the federal government, busy signing treaties with the other tribes, felt it expedient to assign reserves to the wandering Sioux also. In 1873, Alexander Morris was authorized to grant a Sioux reserve as a matter of grace rather than right, and he warned the Sioux not to allow any more of their brethren to come in. Provision for these reserves was thus made through general orders-in-council rather than any federal agreement with the Sioux.[55]

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[54] Canada, House of Commons, Sessional Papers, 1873, No. 23. This involves correspondance concerning the Sioux problem, but is early and incomplete. An Order-in-Council, June 6, 1879, provides for payment to the Queen's Printer for gathering together all papers from various government departments concerning America refugee Indians for a limited internal and confidential publication. This is unavailable at the moment, however, but might shed more light on the exact status of the Sioux.

[55] Order-in-Council, January 4, 1873 and April 24, 1873.

The Sioux were assigned reserves throughout the Northwest Territories. There were originally five in present day Manitoba (the boundaries were extended westward in 1881), of which, four survive. The Turtle Mountain Reserve was surrendered in 1907 and the residents moved. After several other locational changes, the Sioux were finally established on the Bird Tail Reserve (No. 57), Oak River Reserve (No. 58), Oak Lake Reserve (No. 59), and Portage la Prairie Sioux Indian Villiage (No. 8a).[56]

The Sioux Indians in Manitoba therefore, enjoy no treaty rights per se. However, as a matter of form, the federal government has extended to them, the privilege of similar status to treaty Indians. Although the Sioux' hunting rights are not enshrined in a formal treaty, and hence open to change by legislative action without recourse to the courts, federal responsibility for Indians still precludes provincial regulation of Sioux hunting.

The Development of Hunting Legislation

In 1889, following the supression of Riel, the government of the Northwest Territories enacted a comprehensive set of game laws, going further than the original Buffalo Ordinance, and again covering Indians as well as whites. However, the times had changed. The provincial rights advocate Sir Alexander Mackenzie, who had thrown responsibility for game laws back onto the territorial government, had been replaced as Prime Minister by the centralizing

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[56] Contran LaViolette, OMI., The Sioux Indians in Canada (Regina: Marian Press, 1944), pp. 108 - 116, passim.

Sir John A. Macdonald. The territorial game ordinance was disallowed by the federal government; the Minister of Justice advised the Governor-General in 1890:

> It will be observed that in Treaties Nos. 4 and 7, the right of regulating hunting and fishing is vested in "the government of the country, acting under the authority of Her Majesty," whereas in Treaties Nos. 5 and 6 such regulations are to be made by the government of the Dominion of Canada.
>
> The undersigned is inclined to the opinion that the authority referred to in both cases is the Dominion government or parliament, but whatever doubts there may be as to the meaning of the phrase "the government of the country acting under the authority of Her Majesty" there can be none as the meaning of the phrase "Her government of the Dominion of Canada", and that the treaties contained in these words, purport to secure to the Indians the right to pursue their avocations of hunting and fishing, subject to any regulations made by your Excellency in Council.
>
> The Ordinance now under review purports to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to.
>
> The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of Your Excellency's government, to see that none of the treaty rights of the Indians are infringed without their concurrence.
>
> The undersigned desires also to observe that (it) may be doubtful whether the Northwest assembly has authority to legislate in respect to hunting and fishing upon the public domain

> of Canada. He does not, however, deem it necessary to do more than call attention to this point, as bearing upon possible future legislation in the Territories, inasmuch as the Ordinance in question would lead to a violation of the terms of the treaties above referred to.[57]

This disallowance in no way precluded cooperation between the territorial and federal governments. The Indian Act was revised in the same year to permit Dominion approval of hunting legislation in respect to Indians.

> The Superintendent General (of Indian Affairs) may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the Province of Manitoba or the Western Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said Province or Territories as the case may be, or to Indians in such parts thereof as to him seems expedient.[58]

In 1893, the Northwest Territories Council again ennacted general game regulations with the proviso that:

> This ordinance shall only apply to such Indians as it is specifically made applicable to in pursuance and by virtue of the powers vested in the Superintendent General of Indian Affairs of Canada by section 133 of The Indian Act as enacted by 53 Victoria, chapter 29, section 10.[59]

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[57] W. E. Hodgins, ed., Correspondence, Reports of the Minister of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation, 1867 - 1895. (Ottawa: Government Printing Bureau, 1896), pp. 1255 - 1256.

[58] Canada, Statutes of Canada, 53 Victoria (1890), Chapter 29, section 10, subsection 133.

[59] Canada, Northwest Territories Council, Ordinance No. 8, 1893, section 19.

And the federal government reciprocated with the Order-in-Council:

> Public Notice is hereby given in pursuance and by virtue of section 133 of the Indian Act (as enacted by 53 Vic., chap. 29, section 10) that on and after the first day of January, A. D. 1894, the Laws respecting game in force in the North West Territories shall apply to the following Indians, that is to say: -
>
> | Name of Band | Location of Reserve | Agency |
> |---|---|---|
> | Enoch | Birdtail Creek | Birtle |
> | Oak River | Oak River | Birtle |
> | Oak Lake | Oak Lake | Birtle |
> | Kah-do-min-ie | Turtle Mountain | Birtle |
>
> (and other reserves further west)[60]

Furthermore, the federal government did not restrict itself to passive acquiesence to territorial legislation, but in response to the demand for regulated hunting and conservation measures, passed the Unorganized Territories' Game Preservation Act in 1894.[61] Following the annual list of proscribed animals and close seasons, the act noted that these animals could be taken

> By Indians who are inhabitants of the country to which this Act applies, and other inhabitants of the said country. But this exception does not apply to buffalo, bison, or musk oxen during the close seasons for these beasts.[62]

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[60] Order-in-Council, June 1, 1893, Canada Gazette, July 3, 1893, P. 10. What is unusual and important here is that although the Order-in-Council purports to deal with Indian reserves in the Northwest Territories, the first four mentioned above lay within the boundaries of Manitoba as extended in 1881.

[61] The territorial council legislated for the organized sections of the Northwest Territories - those previously ceded by treaty - while the Dominion Parliament took care of legislation for the unorganized areas - generally north of the prairies.

[62] Canada, Statutes of Canada, 57-58 Victoria (1894), Chapter 31, section 8(a).

Thus, federal action and provincial or territorial action with federal approval could be and was applied to restrict the hunting rights of Indians in line with the provisions written into the treaties.

Within this tangled web of ambiguous Indian positions, federal policy pronouncements, and federal policy reversal over game laws, Manitoba had to evolve her own set of hunting regulations. Generally, Manitoba's game legislation remained constant with respect to Indians until 1930. The first game act of 1876 (one year before the original Buffalo Ordinance of the territories) provided that:

> This Act shall not apply to any Indians within the limits of their reserves, with regard to any game actually killed at any period of the year for their own use only and not for purposes of sale or traffic.[63]

Outside the reserves, Indians were therefore, held to obey provincial game laws. In essence this was little different from the legislation of the Northwest Territories which was disallowed in 1890. However, the federal government was more closely involved in the administration of the territories than in Manitoba, and this clause in the Manitoba legislation was probably overlooked in Ottawa.

Complications in enforcement arose because the Superintendent General of Indian Affairs made little effort to utilize

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[63] Manitoba, Statutes of Manitoba, 39 Vict., Chap. 24; 42 Vict., Chap. 10; 46 & 47 Vict., Chap. 19, Part IV; 53 Vict., Chap. 32. The wording was slightly altered, but in essence remained the same, in 1900. 63 & 64 Vict., Chap. 14; 9 Ed. VII, Chap. 22; 6 Geo. V, Chap. 45; 14 Geo. V, Chap. 21.

the clause in the Indian Act of 1890 which empowered him to bring Indians under the scope of provincial game laws. Indian hunting rights had already become a minor problem at the turn of the century. The provincial game guardian reported in 1910:

> I find a great deal of trouble in enforcing the Game Act in the vicinity of the Indian reserves, owing to the fact of certain Indian bands continuing to claim that they have the right to hunt game at any season of the year outside the limits of their reserves.[64]

In 1908, the game guardian had attempted to prosecute several Fort Alexander Indians for hunting violations. They claimed exemption and appealed to the Indian Affairs Department which announced that the Fort Alexander Indians did not come under the Superintendent General's proclamations. Legal action was dropped. The game guardian then undertook his own investigation to find out how extensive the Superintendent General's hunting proclamations were, and after examining the Canada Gazette he found that the most recent proclamation had been the Order-in-Council of 1893 for the Northwest Territories.[65] Although he felt that the four reserves in Manitoba covered by the Order-in-Council could be regulated by the province of Manitoba, they could not, for the Order-in-Council was clearly

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[64] "Report of the Game Guardian" in the Annual Report of the Department of Agriculture and Immigration, Manitoba Legislative Assembly, Sessional Paper #13, 1910, p. 535.

[65] Manitoba Legislative Assembly, Sessional Paper #13, 1910, Op. cit., p. 535.

meant as an adjunct to Northwest Territories legislation. No federal Orders-in-Council bringing Indians under provincial game laws were ever issued for Manitoba.

Nevertheless, hunting licenses and close seasons were enforced for the Indian population wherever possible. Annual sales of licenses to Indians, which averaged 30 to 40 before World War I, jumped to 356 in 1914.[66] While the number of licenses sold is low, it must be remembered that the Indian population was low at that time. The northern boundary until 1912 was roughly the 53rd parallel - about 50 miles south of The Pas. In 1911, the number of Indians in Manitoba was 6,104 and the boundary extensions of the following year brought the population up to 10,373.[67] Game legislation had foreseen this boundary extension, and the Game Act of 1909 had provided for open hunting north of the 54th parallel for whites and Indians alike.[68] It would in all liklihood have been impossible to enforce regulations in such a remote area in any event. Game legislation was thus concerned primarily with the Indian bands of the pre-extension province, the population of which can be estimated by assuming constant proportions (60% of the Indian population living in the south). Not all of these would have been practising hunters, however, and assuming that only males between

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66 Ibid., Sessional Paper #13, 1915, p. 598

67 Canada Year Book 1914, pp. 638-639

68 Manitoba, Statutes of Manitoba, 9 Ed. VII, Chap. 22.

the ages of 16 and 65 hunted, the maximum number of Indian hunters in the southern half of Manitoba would have been 1,540.[69] Or approaching it from another position, Indian Affairs reported the number of Indians deriving their living from hunting, trapping, and fishing as 2,080;[70] if 60% were in the southern half of the province, only 1,248 Indians would be active hunters. Either way the sale of hunting licenses was significant in relation to the number of Indians, particularly considering other occupations (agriculture, 216; stock raising, 172).[71]

It is possible that legal grounds may exist for the recovery of these license fees since the practise was clearly ultra vires should it be considered worth the effort. However, it must be noted that "Indian" in terms of license sales records was defined, not in terms of legal status, but as an occupation which may or may not include Métis (see Appendix I for records).

Indian hunting remained an issue, particularly in Saskatchewan where it was believed that the moose population was being exterminated. At a federal-provincial Commission of Conservation conference held in Ottawa in 1919, D. C. Scott, the Deputy Superintendent General of Indian Affairs, gave the department's official policy.

> From time to time, by proclamation, we have brought Indians under the provisions of the provincial game laws ... (but)

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69 Figures abstracted from Canada Year Book 1914, pp. 638-639

70 Ibid., p. 641

71 Ibid.

> the Indian, who has to maintain himself on his hunting grounds by killing animals for food, is entitled to a measure of sympathy. ... Our fixed policy is to endeavour to induce the Indians to obey the laws passed by the Provincial authorities for the conservation of Wild-life and the preservation of game, and to endeavour also to investigate the laws to meet any special conditions that surround the present mode of life of the natives.[72]

In other words, Indian Affairs was now prepared only to employ moral suasion in order to gain compliance with provincial legislation; outright proclamation to give provincial legislation the force of law was to be used for the most part only to protect species in real danger of extinction such as buffalo and musk oxen.

These subtle changes initiated by the bureaucracy, however, were not communicated to the Ministers in charge. Arthur Meighen, Minister of the Interior and soon to become Prime Minister, felt in 1920 that

> The Indian outside his reserve must comply with any provincial restrictions with respect to hunting or the preservation of game. The Indians have sometimes resisted the imposition of these restrictions by the provinces, but the policy of the department has been to get them to comply. On the reserve itself, I am disposed to think, the Indian is not to restricted, and his aboriginal rights to hunt in that reserve are quite free from any provincial law. I do not want to give that as a final opinion, but that is my impression.[73]

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[72] Canada, Commission of Conservation, National Conference on Game, Fur-Bearing Animals and Other Wildlife (Ottawa: King's Printer, 1919), pp. 20-21.

[73] Canada, Debates of the House of Commons, 1920, p. 3,280.

An unspoken feud between the prairie game guardians and Indian Affairs fumed throughout the 1920's. The Social Service Council of Canada, a federation of women's organizations, called for "a fair and sympathetic" enforcement of game laws with respect to Indians at its 1922 Winnipeg convention.[74] The province of Manitoba had apparently stopped selling hunting licenses to Indians in 1920 (see Appendix I), but in Rex v. Rodgers (1923) the Manitoba Court of Appeal ruled that although the province had no competence to regulate hunting and trapping on the reserves, on leaving the reserves Indians became subject to provincial laws.[75]

Although conflicts continued at the administrative level - never rising to the status of a major constitutional conflict - the issue of Indian hunting rights was more or less settled and formalized in the Manitoba Natural Resources Act of 1930.

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[76]

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[74] Canadian Annual Review, 1922, p. 416.

[75] Rex v. Rodgers (1923), Western Weekly Reports, 1923, Vol, 2, p. 353.

[76] Maurice Ollivier, ed., British North America Acts and Selected Statutues, 1897 - 1962 (Ottawa: Queen's Printer, n.d.), p. 396.

In line with the Natural Resources Act, the Manitoba Game Act was amended by the provincial legislature.

> Notwithstanding the provisions of this Act, and so far only as is necessary to implement the provisions of the "Manitoba Natural Resources Act", it shall be lawful for any Indian to hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indians may have the right of access.[77]

Yet, herein also lay the basis for the constitutional debate which followed.

Judicial Review and Indian Hunting

The Natural Resources Act marked the beginning of the liberalizing trend in Indian hunting rights. Year round hunting rights were clearly established, and this was regarded by Indian Affairs as "an important and gratifying departure in the interests of the hunting and fishing Indians."[78] Yet this was the only clear cut delineation of Indian hunting riths. Present practise is based on judicial interpretation of the treaties and statutes rather than strict Parliamentary prescriptions. The Natural Resources Act, while opening the way for a more liberal treatment of Indian hunting rights, raised two fundamental questions: 1) how far did provincial regulations, to which Indians were to be subject, go before they infringed on the rights of Indians to hunt at all seasons for food, and 2) since Indians had the right to hunt on all "unoccupied " Crown lands,

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[77] Manitoba, Statutes of Manitoba, 1930, Chap. 15, sec. 70.

[78] Canada, "Report of the Deputy Superintendent General of Indian Affairs for 1929", Annual Departmental Reports 1928-29 (Ottawa: King's Printer, 1929), p. 8

what constituted "unoccupied", and further, what constituted the right of access to occupied lands.

The Limits of Provincial Regulation of Methods

Wildlife is held in trust by the Crown in right of the province of Manitoba; the province of Manitoba therefore may determine under what conditions wildlife may be hunted. However, the Dominion retains the prerogative of legislating for the Indian population. Provincial legislation is valid only in areas in which legislation is allowed and only if legislation does not conflict with federal legislation. The questions arise, therefore, of whether or not the province of Manitoba is competent to govern the practises of Indians when hunting, and whether or not such legislation conflicts with federal legislation.

The Natural Resources Act specifically states that

> Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof....

The important proviso, however, was also added, that

> the said Indians shall have the right ... of hunting, trapping and fishing game and fish for food at all seasons of the year....[79]

These two clauses along with the treaties and their negotiation contexts, serve as the basis for judicial decisions since 1930. Since identical clauses appeared in the Natural Resources Acts of

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79 Ollivier, ed., Op. cit., p. 396.

Manitoba, Saskatchewan, and Alberta, and because these three provinces are covered by more or less similar treaties, the Canadian judicial decisions relevant to Manitoba come from the three prairie provinces. It should be noted, however, that the doctrine of precedents binds lower courts to higher court decisions only within the same hierarchy so that Manitoba courts are not bound by decisions of the provincial courts of Saskatchewan and Alberta but they are bound by the Supreme Court.[80]

In 1932, the Alberta Superior Court held that treaty Indians could hunt for all kinds of wild animals, regardless of size or age,and that they could be hunted by any means on unoccupied Crown lands. McGillivray, J. A. noted:

> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate.... It is true that Government regulations in respect of hunting are contemplated in the treaty but considering that treaty in its proper setting I do not think that any of the makers of it could be any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown lands.[81]

The case was decided on the merits of the points peculiar to it,

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[80] Personal Communication, Professor Cameron Harvey, Faculty of Law, University of Manitoba.

[81] Rex v. Wesley (1932), Western Weekly Reports, 1932 Vol. 2, p. 337.

however, and was not all inclusive since many non-treaty Indians are also engaged in hunting.

Nevertheless, any regulation of Indians - treaty or non-treaty - hunting for food was judged beyond the jurisdiction of the province in 1963 by the Supreme Court of Canada. Several Indians had been charged with night-lighting near Portage la Prairie in 1961. The local magistrate acquitted them; the Crown appealed to the Court of Appeals for Manitoba which reversed the conviction; the Indians then appealed to the Supreme Court of Canada which again acquitted them. Freedman, J. A., who presented the dissenting opinion in the Manitoba Court of Appeal, was upheld by the Supreme Court in his opinion that

> The fundamental fact of this case as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes. By sec. 72(1) of the Game and Fisheries Act, RSM, 1954, ch. 94, and by sec. 13 of the Manitoba Natural Resources Act, RSM, 1954, ch. 180, the special position of the Indian when hunting for food is acknowledged and recognized. The clear purpose of these sections is to secure to the Indians, within certain territories, the unrestricted right to hunt for game and fish for their support and sustenance. The statement in sec. 13 of the Manitoba Natural Resources Act that the law of the province respecting game and fish shall apply to the Indian is, in my view, subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only

in the manner and at the times prescribed by the Act.[82] The Supreme Court felt that the reasoning used in Rex v. Wesley applied also in this case. However, the decision was based not so much on treaties as the intention of statutes. Whereas non-treaty Indians such as the Sioux could have been regulated under the Rex v. Wesley decision, they could not under the ruling of Prince and Myron v. Reginum.

The doctrine of precedent binds all courts in Manitoba to the Supreme Court's ruling on this case, and in 1971 the Supreme Court's precedent was applied in a case far removed from the essence of the right to hunt. A type of bullet banned from hunting on the grounds of unreasonable cruelty to animals was used by an Indian in eastern Manitoba. On prosecution he was found not guilty by reason of the province having no authority to regulate the methods of the Indian when hunting for food.[83] The Crown's appeal of the finding was similarly dismissed.[84] It is symptomatic of the poor structure of the existing legal framework that laws governing humane hunting can be disregarded even though they entail no burden on the native person. Clearly there can be no hardship imposed by requiring one type of bullet to the exclusion of another.

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[82] Prince and Myron v. Reginum (1963), Western Weekly Reports, 1963, Bol. 46, p. 121.

[83] Regina v. McPherson (1971), Western Weekly Reports, 1971, Vol. 1, p. 299.

[84] Ibid., 1971, Vol. 2, p. 640.

The native population, however, does not have a carte blanche in hunting methods, as evidenced by Regina v. Myran, Meeches, et al. (1973). The Wildlife Act prohibits hunting "in a manner that is dangerous to other persons in the vicinity, or ... without due regard for the safety of other persons in the vicinity."[85] When a case came up involving dangerous hunting by an Indian, it was ruled:

> It is of importance to emphasize that s. 10(1) imposes no restrictions on Indians as to the kind of game they may hunt or as to the time and method of hunting. It only provides that they should exercise their right with due regard to the safety of others, including people of their own status.[86]

In sum, laws relating to Indian hunting methods can be divided into four potential categories:

1) laws regarding timing
2) laws regarding sportsmanship
3) laws regarding humane treatment of animals
4) laws regarding hunting dangerous to other people.

The first category has been placed beyond provincial jurisdiction by statute. The second and third categories have been judicially ruled beyond provincial competence. The fourth has been judicially determined to be within provincial jurisdiction.

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[85] Revised Statutes of Manitoba 1970, Chapter W140, sec. 10(1).

[86] Regina v. Myran, Meeches, et al. (1973), Western Weekly Reports. 1973, Vol. 4, p. 512.

Legislative authority is not necessarily tied to provincial ownership of wildlife; and in the case of Manitoba, jurisdiction falls short of control over Indian hunting methods. Section 91(24) of the B.N.A. Act reserves to the federal government control over Indians.[87] The federal government has stipulated that:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.[88]

As far as the regulation of Indian hunting methods goes, this appears to include only provincial jurisdiction over civil rights accorded by section 92(13) of the B.N.A. Act.[89] While it is not explicitly set forth as a criterion in judicial decisions, it could be suggested that the standard for provincial jurisdiction over Indian hunting methods is the presence of a possible tort. In other words, wherever methods may cause a civil wrong to another person, the province is competent to regulate Indian hunting methods.

The Role of Property Rights in Limiting Indian Hunting Rights

If the province can not effectively regulate Indian hunting

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87 Statutes of Canada, 30 & 31 Victoria, Chapter 3, section 91(24).

88 Statutes of Canada, 1951, Chapter 29, section 27 (The Indian Act).

89 Statutes of Canada, 30 & 31 Victoria, Chapter 3, section 92(13). Civil rights do not here have the some connotation as in the U.S., ie. human rights. Rather, they refer to matters of civil law - those issues involving torts, or personal wrongs between individuals.

there is at least one other factor serving to limit Indian hunting rights - property rights. There are three fundamental categories of land classification germane to the subject of Indian hunting: 1) occupied Crown land, 2) unoccupied Crown lands, and 3) privately owned land.

The Natural Resources Act guaranteed Indians the right to hunt "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." However, from this clause have arisen definitional problems involving "unoccupied Crown lands" and "right of access"

The definition of "unoccupied Crown land" began its evolution in 1935 when a treaty Indian was charged with hunting in a Saskatchewan game preserve. Turgeon, J. A. concluded:

> ... I take it that when the Crown, in the right of the province, appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be "unoccupied Crown lands" within the meaning of par. 12 of the agreement. ... but it is also argued that the land of this game preserve is land to which the Indians have a right of access and that they are authorized to shoot on it because of that right.[90]

On this point, Martin, J. A. noted:

> Indians undoubtedly have a right of access to certain reserves set apart for them and upon which they reside, but they have no right of access to game preserves beyond that accorded to all other persons and they are subject, as all other persons

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[90] Rex v. Smith (1935), Western Weekly Reports, 1935, Vol. 2, p. 443.

are, to the provisions of sec. 69 of the Game Act.[91]

This interpretation was further extended in a 1942 Saskatchewan decision to include provincial forests. Lussier, P.M. interpreted "unoccupied Crown lands" to be "synonymous with the words 'open for disposition'."

> And so, having found that the unoccupied Crown lands referred to in the agreement are those that are still open for disposition under the Provincial Lands Act, 1931, and that they do not include forest reserves, and having found that the Indians as such has (sic) no special or statutory right of access to such reserves, I hold that (the restriction of Indian hunting in forest reserves) is therefore quite within the legislative field of provincial jurisdiction.[92]

However, this trend in increasingly strict interpretation of "unoccupied Crown lands" was reversed in 1953 in the case of Regina v. Strongquill. McNiven, J. A. of the Saskatchewan Court of Appeal ruled:

> If the legislature by setting apart certain Crown lands as forest reserves ... can convert them into occupied lands then it could set apart all Crown lands on a forest reserve and thus defeat the paramount object of par. 12. The legislature has no power to do indirectly what it cannot do directly.[93]

As far as "right of access" went, Procter, J. A. noted:

> The area was open to any visiting hunters who had a license and they were permitted to hunt over that area which is Crown lands. Such being the case the accused had, apart from other legislation, the same "right of access" to the

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91 Ibid.

92 Rex v. Mirasty (1942), Western Weekly Reports, 1942, Vol. 1, p. 352.

93 Regina v. Strongquill (1953), Western Weekly Reports, 1953, Vol. 46, p. 121.

Crown land in the said reserve....[94]

Simple "right of access" gave Indians the right of hunting out of season anywhere, provided permission of the landowner was given. An Alberta District Court ruled in Regina v. Little Bear that permission given by a private landowner constituted "right of access" and entitled Indians to hunt on the land concerned no matter what the season.[95] "Right of access" was given its most broad interpretation by the Supreme Court of Canada in Prince and Myron v. Reginam in which it was ruled:

> In the absence of a prohibition, either by the posting of notices pursuant to sec. 76(2) of said (Game) Act or otherwise, a person has access to private, occupied land for hunting purposes; cultivation of the land is immaterial. Preservation of common-law rights as to trespass does not affect this right of access. Such land is land to which an Indian "may have the right of access" within the meaning of sec. 72(1) of the said Act.[96]

Under this 1963 Supreme Court ruling, anyone - including Indians - had the right to hunt over unposted private lands.

The Hunter Trespass Committee of the Manitoba Wildlife Federation, headed by Judge Alan Scarth, reviewed the pertinent

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[94] Ibid.

[95] Regina v. Little Bear (1958), Western Weekly Reports, 1958, Vol. 25, p. 580.

[96] Prince and Myron v. Reginam (1963), Western Weekly Reports, 1963, Vol. 46, p. 121.

section of the Wildlife Act[97] and concluded:

> that the landowner is required to give notice that the hunting and killing of animals on his land is forbidden ... (and) that the onus is on the landowner to proceed by private prosecution. He has to prove that he had the proper signs up and that the hunter did not have permission.[98]

Heated debate on this point took place in the Manitoba legislature in the summer of 1975. The Hon. Sidney Green told the legislature:

> That is not true. A farmer does not have to post his land to say that you cannot come on the land, and we ... put that on the license, that the fact that you have a license does not mean that you have a right to go on the farmer's land.[99]

Some ambiguity thus remained as to the exact interpretation of the trespass laws. Only recently has the issue been settled. Regina v. Myran, Meeches, et al. (1973) was appealed and went to

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[97] Posted Lands.
40(1) The owner or lawful occupant of land other than Crown land may give notice that the hunting and killing of animals is forbidden on or over the land or any part thereof by posting and maintaining signs of at least one square foot in area on or along the boundary of the land facing away from the land at intervals of not more than two hundred and twenty yards with the words "Hunting by Permission Only" or "Hunting NOT Allowed" or words to the like effect.

Hunting Forbiddon on Posted Lands.
40(2) A person who hunts wild animals upon or over any land in respect of which notice is given as prescribed in subsection (1) without the consent of the owner or lawful occupant thereof, is guilty of an offense and is liable, on summary conviction or private prosecution, to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding one month, or to both such a fine and such imprisonment.

[98] "Report of the Hunter Trespass Committee of the Manitoba Wildlife Federation" (unpublished manuscript 1974), p. 2.

[99] Legislative Assembly of Manitoba, Debates and Proceedings, June 11, 1975, p. 3806.

the Supreme Court. Hall, J. noted, "I think it may be opportune and appropriate to make some observations upon the phrase "right of access" on the occasion of, though not as a ground of decision of, the present appeal." After noting the Supreme Court's ruling in Prince and Myron v. Reginam (1963) he concluded:

> ... I must say that if the quoted words of Miller, C.J.M. are a correct statement of the law, the results are far-reaching; any person can enter any land in Manitoba which is not posted and hunt thereon without permission of the owner, at least until ordered off; the carrying of a fire-arm immunizes an act which would otherwise be trespass. I would have grave doubt that this can be the law. ... Although the point does not fall squarely before us for decision in this appeal, I think it can properly be said that there is considerable support for the view that in Manitoba at the present time hunters enter private property with no greater rights than other trespassers....[100]

Thus, the present status of the Indians' fluctuating right of access to hunting lands is as follows:

1) Private lands - Indians have the right to hunt on lands to which access has been granted by the owner. They do not have the right to hunt on private lands if permission is denied or if they have not enquired about permission.

2) Unoccupied Crown lands - Indians have the right to hunt freely over these lands; the problem lies in

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[100] Myran, Meeches et al. v. The Queen (1976), Western Weekly Reports, 1976, Vol. 1, p. 196.

identifying them. Where the status is not obvious, they must fall outside the designated category of occupied lands.

3) Occupied Crown lands - For the purposes of Indian hunting, the Wildlife Act designates five classes of land as occupied:

a) a refuge
b) a provincial recreation area
c) a provincial forest
d) a wildlife management area
e) a community pasture.[101]

Such a statutory designation, however, is not necessarily conclusive. Provincial forests in Saskatchewan have already been judicially declared unoccupied. Although Manitoba courts are not bound by this decision, a court challenge in Manitoba may well result in the same conclusion. Furthermore, the list is somewhat dificient in that it leaves out of consideration such provincial lands as unoccupied road allowances which in many areas form strategic strips of habitat between farms.

In regards to the classification of occupied Crown lands, it can perhaps be suggested that tort law may be used as a criterion. Wherever the possibility of a civil wrong is significant, Indian hunting could be prohibited. Provincial recreation areas would obviously fall in this category. On community pastures the threat

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[101] Revised Statutes of Manitoba 1970, Cap. W140, section 49.

of property loss would serve as grounds for prohibition. Refuges and wildlife management areas, however, would not fall into this category in terms of tort law, but special consideration should be taken for areas specifically designated for the purposes of wildlife management, so long as this classification is not abused. Provincial forests fall into neither category. Other than in certain areas and at certain times, the possibilities of personal harm or property loss are remote, and wildlife population is merely the by-product of forestry. It may be useful, therefore, to assess the benefits and costs of open Indian hunting in provincial forests, especially since these areas have already been opened to Indian hunting in Saskatchewan.

CHAPTER IV

ALTERNATIVES

Alternative Hunting System

In order to avoid the problems and pitfalls of reforming from scratch, it is usually helpful to examine the operation of other types of systems already in operation. In this respect, three examples are sketched out for consideration, two from the United States - New York and Texas - and one from West Germany.

Hunting Management in New York (Central Catskills Region)

Despite the proximity of New York City, the southern part of the state of New York contains a relatively large amount of wildlife habitat which is intensively hunted. The availability of wildlife habitat is primarily a function of low agricultural productivity, particularly in the Catskills. The intensity of hunting is a function of state public relations programs.

Increasing annoyance with city hunters had led to the gradual posting of private lands which by the 1950's had eliminated large tracts of private wildlife habitat from sport hunting. This process was aggravated by the distribution of land ownership. State held forest lands were generally located on hill sides and tops, while private lands lay in the valleys and faced on access roads. Since the valleys were generally posted, access to state lands was severely restricted.

In 1957, the legislature authorized the Fish and Game Division to implement programs which would open private lands to hunting. District Fish and Wildlife Management Boards were set up composed of one member each from organized sportsmen, landowners, and the Board of Supervisors from each county in the districts. These were supplemented in an advisory capacity by members from the local Forest Practise Act Districts and the County Soil Conservation Districts. The purpose for these management boards was to promulgate ideas and programs for improving hunter-landowner relations and opening private lands for hunting.

Cooperative Agreements with landowners were reached offering such inducements to open lands for hunting as technical services, planting stock, wildlife habitat improvement aid, and subscriptions to the New York State Conservationist. "Safety Zone" signs were erected around farmstead areas. The Cooperative Agreement, however, provided specifically that "the Cooperator shall not charge a fee or rental for the privilege of hunting, fishing or trapping on lands covered by this agreement." McKeon, et al. have summed up the program of New York's Game Management Boards; "The basic philosophy behind the operation of this area is one of giving sportsmen a place to hunt without obligation other than law-abiding and courteous behaviour."[1]

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[1] W. H. McKeon, W. P. Hollister, & M. Rodak, "Public Hunting as a Game Management Tool in Southeastern New York", 31st North American Wildlife Conference, Proceedings, 1966, passim and p. 321.

The key to the success of New York's hunting scheme, of course, can only be the continued low value of land for purposes other than wildlife habitat. In terms of opportunity cost, wildlife has a low value, and it is only on this premise that a hunting system based on an appeal to social responsibility and the psychic benefits of wildlife can successfully operate.

Texas

In the 1920's the increasing scarcity of game led to the development of a commercial hunting system. Formal legislation in 1925 provided the basis and stimulus for the rapid spread of this system throughout the state. While increasing deer levels can not be attributed entirely to commercialized deer hunting, it has certainly encouraged an improvement in habitat availability.

In the main deer hunting areas of central Texas, the return to the landowner averaged $1.07 per acre in 1965. Prices for deer range leases vary from a few cents to $3.00 per acre for prime habitat, and this can be distributed as costs to the hunter on a season, hunter-day, or land unit-day basis so that costs to hunters range from minimal to high. Four basic types of leasing arrangements are employed:

1) Season leases usually provide that a hunter or group of hunters will have exclusive hunting privileges for specified game species for the season. Quotas are set by the landowner, but within the limits established by the state.

2) The day-hunting system allows large numbers of hunters access on a day basis and is becoming more popular in the big game areas.

3) A hunting "broker" or "outfitter" system coordinates the activities of groups of landowners. All hunting rights are assigned to one person who then operates the whole as a single unit.

4) The most recent version of commercial hunting is to charge directly for the animal. This has been applied mainly to imported exotic species for which Texas law provides no close season.

The commercial hunting system has had may beneficial repercussions. Many hunting groups have held season leases on single deer ranges for as long as 35 years and have developed proprietary interests in the quality of wildlife habitat. A more exact knowledge of the location of hunting parties has led to increased safety. The system has also helped to distribute hunting pressures more evenly over the available range.[2]

A commercial system arose in Texas primarily due to the lack of public lands. Less than 1,000 square miles remain in the public domain so that hunting must necessarily be carried out on private lands. With the competing land use between agriculture and wildlife habitat, it was almost inevitable that a commercial system be implemented in order to meet the demand for hunting.

West Germany

Hunting in West Germany is not managed on a democratic basis. The privilege of hunting is limited on economic grounds.

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[2] J. G. Teer & N. K. Forrest, "Bionomic and Ethical Implications of Commercial Game Management Programs", 33rd North American Wildlife Conference, Proceedings, 1968, pp. 192-204, passim.

In order to qualify for a hunting license, one must not only pass a number of legal and skill tests, but also have a place to hunt, and this may cost up to $5,000 per year. The revier, or hunting preserve, may be owned by the state or by the individual. However, in no case is hunting free. As a result, there are only about 220,000 licensed hunters (less than 0.4% of the population) in West Germany.

The high economic value of game has led to an intensive management approach in West Germany. The unstated objective is to maintain the highest possible yield of game compatible with the existing agricultural or timber practises in any given area. Game areas are carefully managed by foresters or trained game managers. The Wildlife Institute at the University of Göttingen provides specialized training in game management to the doctoral level and conducts research in wildlife ecology and biology, game laws and legal problems, game damage control, and diseases.

While exact correlations are not possible due to different species and variations in habitat type and distribution, a crude comparison demonstrates an impressive productivity in the German hunting system. West Germany has an area almost twice that of New York (96,000 sq. mi.: 50,000 sq. mi.), yet the deer take is much greater than 2:1.

Deer Harvests; 1967-8

New York	West Germany
79,481 white-tailed deer	552,308 roe deer
	27,668 red deer
	6,646 fallow deer[3]

[3] J. S. Gottschalk, "The German Hunting System, West Germany, 1968" Journal of Wildlife Management, January, 1972, pp. 110-118.

Where the economic value of game and hunting is high, wildlife management techniques and productivity will improve. In New York, where deer are treated essentially as free goods, productivity tends to be lower than in West Germany, where deer are carefully guarded and managed as an important economic good. On the other hand, there are no economic restrictions on hunting by New Yorkers.

An Alternative Method of Dealing With Indian Hunting Rights

By and large, Canada is further advanced in dealing with Indian hunting rights than the United States. Hunting rights in the U.S. vary from tribe to tribe according to treaty arrangements. The Menominee of Wisconsin, for example, have had a great deal of trouble maintaining what few hunting rights they had. Their treaty guaranteed them unregulated hunting only on their reserve. One of the legal implications of their accession to self rule in 1954 was the loss of even these limited rights.[4] In 1968, however, the U.S. Supreme Court returned these reservation rights.[5]

The factor which makes the restriction of open hunting rights to reserves operative in the United States is the immense size of reservations relative to Canadian counterparts. The 3,270 Menominees live on a 234,000 acre reservation.[6] The Bad River Indian

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[4] W. A. Brophy & S. D. Aberle, eds., The Indian: America's Unfinished Business (Norman: University of Oklahoma Press, 1966), pp. 199 & 204.

[5] "1974 Report of the Indian Relations Committee", 64th Convention of the International Association of Game, Fish and Conservation Commissioners, pp. 182-3.

[6] Brophy and Aberle, Op. cit., p. 199.

Reservation on Lake Superior in northern Wisconsin comprises almost 125,000 acres; almost all of the reservation's residents live in the town of Odanah (population: 531 in 1961). In 1961 a study was conducted of deer hunting on the reservation.

Indians generally employed three methods of hunting. In the summer, as long as vegetation provided cover, they waited by natural and man-made salt licks. In the fall, they night-lighted until the first snows, when this method was no longer effective. Stalking took over in the winter until the "taste of winter browse" made deer meat undesireable, generally in February. The greatest hunting pressures took place in the fall, when seasonal summer employment was over and the popular night-lighting was practised. Despite such methods, it was found that the Indians actively practised conservation measures by not taking adult does in the early season. Kill rates generally substantiate Manitoba estimates; during 1955-56, 2.3 deer per hunter were harvested, and during 1956-57, 3.2 deer per hunter were taken.[7] Although pre-dating the snowmobile revolution, this study holds some interesting leads for investigation in Manitoba. The major point, however, is that given large tracts of land, the native population can conserve the deer population.

In Canada, the practise was not to concentrate all local bands of Indians into large reserves, but to maintain an extensive system of small local reserves. The result has been that off-reserve hunting has been readily available and extensively used. This

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[7] R. S. Cook & J. B. Hale, "Deer on the Bad River Indian Reservation", 26th North American Wildlife Conference, Proceedings, 1961, pp. 450-2.

limited size of reservations has often provided the grounds for Indians to call for separate hunting preserves exclusively for their use - a practise already in use in the Northwest Territories.[8] The recent James Bay settlement has allotted Indians and Eskimos exclusive hunting rights over 60,000 square miles of territory.[9] In Canada, where Indian hunting rights have become an issue, the trend has been to set aside additional areas solely for Indian use. This does not preclude the use of the land by the Crown for other purposes, but merely ensures that game will not be taken by non-natives.

It may be of some value to investigate Indian conservation methods in these other areas with an eye to setting aside a significant off-reserve hunting area exclusively for Indian use as a pilot project. While such a project might be applicable to eastern Manitoba or the Interlake, it would not be appropriate to the southwest where Crown land is in short supply. Here it might be worthwhile investigating the combination of exclusive Indian hunting territories with a commercialized hunting system in which Indian responsibility would cover not only deer conservation but also any property damage caused by hunting.

Further west, a proposal has been made which could possibly be implemented not only in areas of exclusive Indian hunting, but

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[8] René Fumoleau, As Long As This Land Shall Last (Toronto: McClelland and Stewart, 1975), p. 298.

[9] "Native Land Claims", The Tribune (Winnipeg), January 26, 1976.

also in open hunting areas. Based on the acknowledgement that Indians sometimes abuse their treaty hunting rights, the Saskatchewan Indians have proposed that native people be appointed as assistant conservation officers. They would thus be in a position to prevent such abuses, while at the same time, their knowledge of deer and hunting behaviour would place them at the advantage in policing hunting.[10]

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[10] Personal communication, McCall Monias, Director of Research, Manitoba Indian Brotherhood.

C H A P T E R V

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The present deer problem in Manitoba is mainly a result of disequilibrium between supply and demand. Various factors govern the supply side of which habitat is the major stumbling block. Habitat is declining rapidly on private lands, particularly in the southwest. This is occuring primarily because there is no established mechanism by which farmers can acquire any economic benefit from bushlands.

Three alternative hunting systems exist to what is basically the Manitoba approach to game as a free good:

1) A hunting system based on the premise that bushlands have a low opportunity cost, and therefore, farmers require only marginal compensation for use by hunters, usually in the form of hunter education and courtesy in order to eliminate economic damage.

2) A market system in access rights to land for hunters which accounts for both the opportunity costs of bushlands and public demand for hunting so that an equilibrium is more or less self maintaining, usually at a low price level in the presence of low population densities and abundant marginal farmland.

3) A market system similar to the former, but one in which high demand and low land availability result in high prices and a class oriented system of hunting privileges.

Demand for deer hunting in Manitoba is composed of two basic factors: the Indian population and the non-Indian population. Demand for deer by the Indian population will probably increase significantly; demand by the non-native population probably will not increase significantly. The former cannot be regulated effectively by the provincial government in regards to hunting, although it has responsibility for game. The latter group can be regulated; however, it also has control over the majority of the supply of deer and is not likely to maintain this supply if it provides no benefit and creates problems with trespassing, whether by Indians or non-Indians. There has thus been a great deal of attention focused on Indian hunting rights, mainly with the hope of finding some manner of bringing them under the scope of provincial regulation, a process which avoids the major issue.

Of the three broad bases of Canadian common law - custom, statutes, and judicial decision - none explicitly sets out the limits of Indian hunting rights. Custom provides a great deal of the moral support for the Indian case, but custom is a weak support. The original basis of limitations, the treaties, are disputed. Treaties 1 and 2 say nothing at all about hunting rights. Treaties 3, 4 and 5 give the federal government explicit jurisdiction over hunting regulations, but the Indians claim this was not included in the original negotiations. While there is some evidence that restrictions were covered further west, these have little bearing on Manitoba. Some Indians have neither treaties nor aboriginal rights; but are treated as having equal status; these too come under federal jurisdiction.

In the past, particularly before 1920, the province unconstitutionally exercised its authority to regulate and license Indian hunting. The Natural Resources Act of 1930 guaranteed Indians the year round right to hunt for game on all unoccupied Crown lands and lands to which they had access. Otherwise, they were to be subject to prevailing provincial legislation. Judicial interpretation has since ruled that the rights to hunting take precedence over any prevailing provincial laws so that in effect, methods cannot be regulated except in cases of dangerous hunting. Land access rights include private lands only with the explicit permission of the owner and unoccupied Crown lands. Five classes of wildlife producing Crown lands have been designated "occupied" for the purposes of Indian hunting: refuges, provincial recreation areas, provincial forests, wildlife management areas, and community pastures. However, provincial orests have already been judicially treated as unoccupied despite provincial statutes in Saskatchewan, and the same could happen in Manitoba.

The solutions to the deer hunting problem in Manitoba must be found within these parameters; Indian hunting rights are fixed and cannot be manipulated. Alternatives exist for altering the basic hunting system to reflect the cost of deer to the landowner through a commercialized hunting system. At the same time, other trends in Canada indicate a movement toward territorial exclusivity in Indian hunting which can be used to insure a continued supply of wildlife for the Indian, provide an incentive for conservation, and reduce friction with landowners.

Proposals for Further Research

1) An in depth investigation should be made of the demand for white-tailed deer in Manitoba. This should include both major demand groups: the native and non-native population. A re-assessment of the "three deer per family of five per year" formula in estimating Indian demand should be undertaken considering such factors as changing life style, migration projections, and the effects of increasing efficiency added to hunting through such technological advances as the snowmobile. Demand by the non-native population should be considered in the light of proven disparites in participation rates between city and rural residents and with specific reference to demographic trends.

2) On the supply side, intensive research should be undertaken in the area of alternative hunting systems. The adaptibility of a commercialized deer hunting system to the Manitoba setting should be closely examined. At the same time, an attempt should be made to assess accurately, the true costs to the province of wildlife maintenance for a more precise estimate of the cost of harvesting one deer so that the 95% of the population which does not hunt may decide for itself whether it is subsidizing or should subsidize a nominal cost "democratic" hunting system.

3) Investigations should be made into the feasibility of setting up a pilot project granting exclusive hunting rights and the responsibilities going with them to a selected Indian band for a specified territory near their reserve. This should include two

types of land: Crown land and private land to which rights of access have been freely negotiated either ghrough promises of good conduct or monetary considerations.

4) Consideration should also be given to the feasibility of appointing native conservation officers with the purpose of reducing the abuse of treaty hunting rights and more effectively policing wildlife areas.

5) Perhaps most importantly, the province should undertake a program of hunter and landowner education designed to make widely known the practise, nature and extent of treaty Indian hunting rights and the complexities of wildlife management, both in the technical and economic aspects.

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APPENDIX I

Calculation of Present Value of Past Big Game License Fees Collected from Indians in Manitoba

Because the province was not constitutionally entitled to charge hunting license fees for Indians, it may be of some use to compute the possible value of these past fees to Manitoba Indians.

Game Branch reports are sketchy at best and several years - 1922 to 1924 - are missing entirely. Furthermore, accounting procedures were far from accurate. However, Table I presents the available data. This data is presented as listed in the records; no explanation of "Indian" occupation was given. Starting with the earliest years it can be seen that the number of licenses sold corresponds with the total number of occupational group members which include "Indians". It is clear, therefore, that license fees were being collected from Indians. However, in the later period "Indian" occupations began to disappear completedly while the number of licenses sold and licenses issued began to vary erratically. The transition year when licenses were no longer actively sold to Indians appears to be 1920. At this time, Charles Barber's term of office ended, and this probably corresponded with a change in policy. For the purposes of computing the present value of past Indian license fees, 1919 is taken as the terminal year. These values are listed in Table 2.

The values presented are not given as absolute values for any claims, but are merely listed for the consideration of any interest groups.

Table 1

Data on Provincial License Sales; 1905 - 1929

Year	Licenses Sold	Total Number of Occupations for Licenses Issued	Number of "Indian" Occupations
1929	2,886 @ $5.00	2,861	0
1928	2,470 "	2,519	2
1927	2,394 "	2,398	3
1926	1,468 "	1,463	0
1925	1,369 @ $5.00	1,358	0
1924			
1923			
1922			
1921	2,846 @ $4.00		
1920	4,982 "	5,623	8
1919	5,124 "	5,124	23
1918	3,576 "	4,236	15
1917		4,207	54
1916	6,518 "		
1915	5,323 @ $4.00	5,323	40
1914	9,136	9,136	99
1913	8,150	8,150	356
1912		6,351	36
1911	5,567	5,567	15
1910	5,455	5,455	42
1909	4,696 @ $2.00	4,696	36
1908	3,821	3,821	43
1907	3,302 @ $2.00		
1906	2,583 @ $2.00	2,583	37

1905 and before: no records kept.

Sources: Sessional Papers of Manitoba and Annual Reports of the Department of Agriculture and Immigration, 1905-1929.

Table 2

Present Value of Past Indian License Fees to 1919

Year	Big Game License Fee	Number of Indians	Total Indian Fees	Estimated Present Value at 5% Interest Compounded Annually
1919	$ 4.00	23	$ 92.00	$ 1,484.51
1918	4.00	15	60.00	1,016.58
1917	(4.00)	54	216.00	3,824.64
1916	4.00	-	-	-
1915	4.00	40	160.00	3,138.08
1914	(4.00)	99	396.00	8,155.32
1913	(4.00)	356	1,424.00	30,791.15
1912	(2.00)	36	72.00	1,634.76
1911	(2.00)	15	30.00	715.20
1910	(2.00)	42	84.00	2,102.69
1909	2.00	36	72.00	1,892.38
1908	(2.00)	43	86.00	2,373.43
1907	2.00	-	-	-
1906	2.00	37	74.00	2,251.52
				$59,398.16

Figures in parantheses indicate extrapolations.

Sources: Sessional Papers of Manitoba and Annual Reports of the Department of Agriculture and Immigration, 1906 - 1920.