

# **The Tribal Legal Context: Honoring Tribes' Rights in Practice**



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# Tribes are Unique

## Unique Political Status

Sovereign entities; governments engaged in political and cultural self-determination

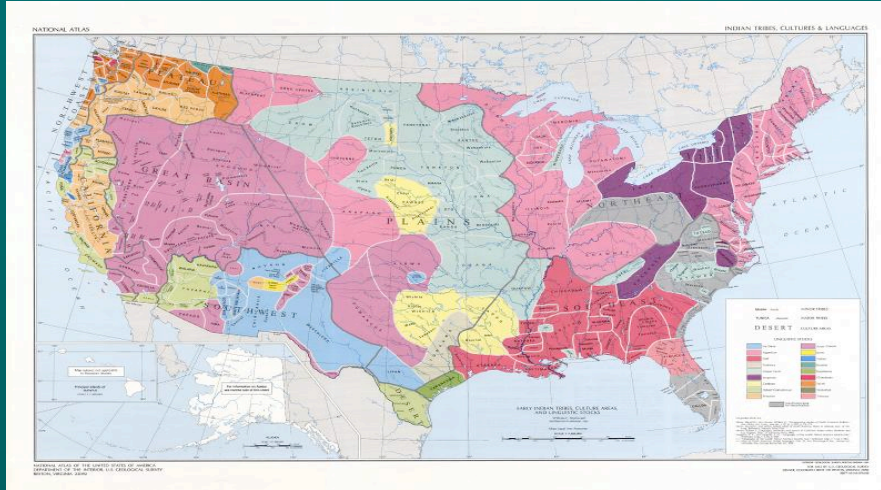
## Unique Legal Rights

Distinct *peoples*; with certain legal rights to the lands and resources on which they have historically depended

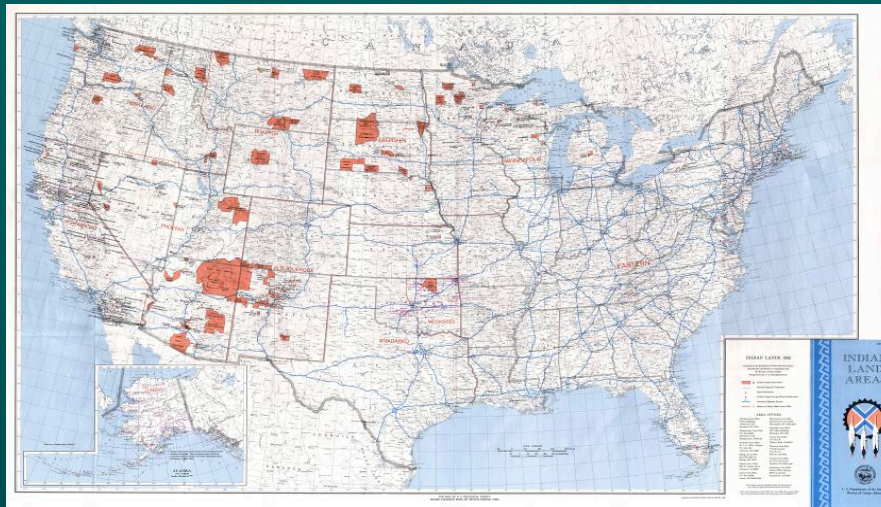
## Unique Historical Experiences

Histories rooted in place; long experience of efforts to exterminate and assimilate; shapes contemporary circumstances and future aspirations

# Tribes' Political and Legal Status

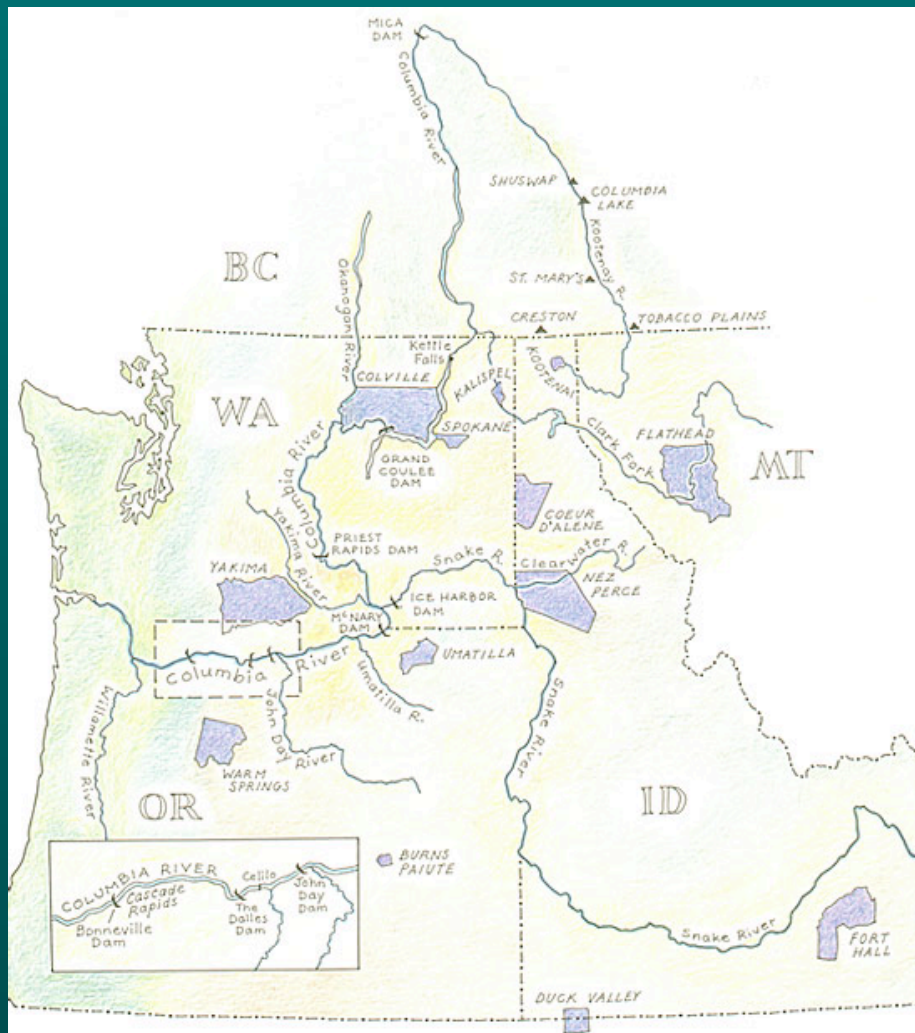


“The very term ‘nation’ so generally applied to [Indian tribes], means ‘a people who are distinct from others.’ The constitution . . . admits their rank among those powers who are capable of making treaties.”



*Worcester v. Georgia*  
31 U.S. (6 Pet.) 515 (1832)

# Tribes' Legal Rights



By means of treaties, tribes ceded certain rights; but all those not expressly relinquished were retained

Treaties represent “not a grant of rights to the Indians, but a grant of rights *from* them, -- a reservation of those not granted.”

*U.S. v. Winans*  
198 U.S. 381 (1905)

# Treaty of Point Elliott

**“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians . . .”**

**Washington v. Washington State  
Commercial Passenger Fishing  
Vessel Ass'n, 443 U.S. 658 (1979)**

**“Governor Stevens and his associates were well aware of the ‘sense’ in which the Indians were likely to view assurances regarding their fishing rights. During negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor’s promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians’ assent.”**

**Washington v. Washington State  
Commercial Passenger Fishing  
Vessel Ass'n, 443 U.S. 658 (1979)**  
“It is absolutely clear, as Governor Stevens  
himself said, that neither he nor the  
Indians intended that the latter ‘should  
be excluded from their ancient fisheries,’  
and it is accordingly inconceivable that  
either party deliberately agreed to  
authorize future settlers to crowd the  
Indians out of any meaningful use of  
their accustomed places to fish.”

# Treaties: Parties' Understandings

Compact; covenant; charter

“The constitution [declares] treaties already made, as well as those to be made, the supreme law of the land . . .”

*Worcester v. Georgia*

31 U.S. (6 Pet.) 515 (1832)

# **“Treaty Interpretation: How Long Does it Take to Get it Right?”**

**Professor William H. Rodgers, Jr.**

<b><u>Issue</u></b>	<b><u>Date Prevailed</u></b>	<b><u>Time</u></b>
<b>Access</b>	<b>1905</b>	<b>50 years</b>
<b>New Technologies</b>	<b>1919</b>	<b>64 years</b>
<b>Displacements by Fixed Gear</b>	<b>1947</b>	<b>92 years</b>
<b>Self-Regulation</b>	<b>1974</b>	<b>119 years</b>
<b>Tragedy of the “Commons”</b>	<b>1979</b>	<b>124 years</b>
<b>Environmental Protection for the Fisheries</b>	<b>2007</b>	<b>152 years</b>

# Legal Interpretation

**“The treaty clauses regarding off-reservation fishing ...secured to the Indians rights, privileges and immunities distinct from those of other citizens.”**

***U.S. v. Washington***

**384 F. Supp. 312 (W.D. Wash. 1974)**

# Legal Interpretation

“The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded *and cannot erode* the right secured by the treaties . . .”

*U.S. v. Washington*

384 F. Supp. 312 (W.D. Wash. 1974)

# Treaties: Legal Interpretation

“[N]either the treaty Indians nor the state . . . may permit the subject matter of these treaties to be destroyed.”

*U.S. v. Washington*

520 F.2d 676 (9<sup>th</sup> Cir. 1975)

# Treaties: Legal Interpretation

## “Phase II”

District court addressed “whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation.”

*U.S. v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980) *vacated by U.S. v. Washington*, 759 F.2d 1353 (9<sup>th</sup> Cir., 1985)

# Treaties: Legal Interpretation

## “Culverts”

District court addressed “whether the Tribes’ treaty-based right of taking fish imposes upon the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage.”

*U.S. v. Washington*, Subproceeding 01-01,  
Order at 5 (August, 2007)

# Treaties: Legal Interpretation

**“Stevens specifically assured the Indians that they would have access to their normal food supplies now and in the future.”**

**“[T]he representatives of the Tribes were personally assured during the negotiations that they could safely give up vast quantities of land and yet be certain that their right to take fish was secure.”**

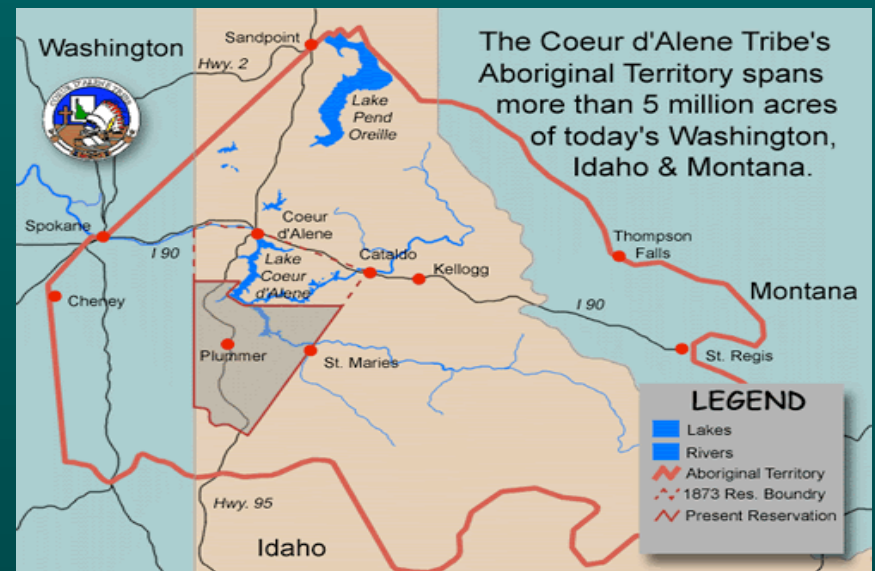
**Subproceeding 01-01, Order at 11**

# Treaties: Legal Interpretation

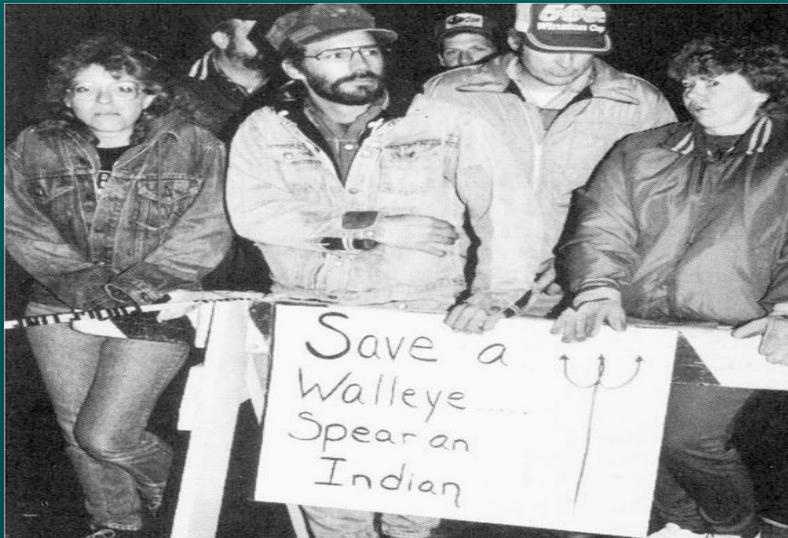
*“These assurances would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.”*

Subproceeding 01-01; Order at 11

# Tribes' Historical Experiences



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