



Working with Tribes

SOCIAL UNDERSTANDING AND CULTURAL AWARENESS

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Department of
**FISH and
WILDLIFE***

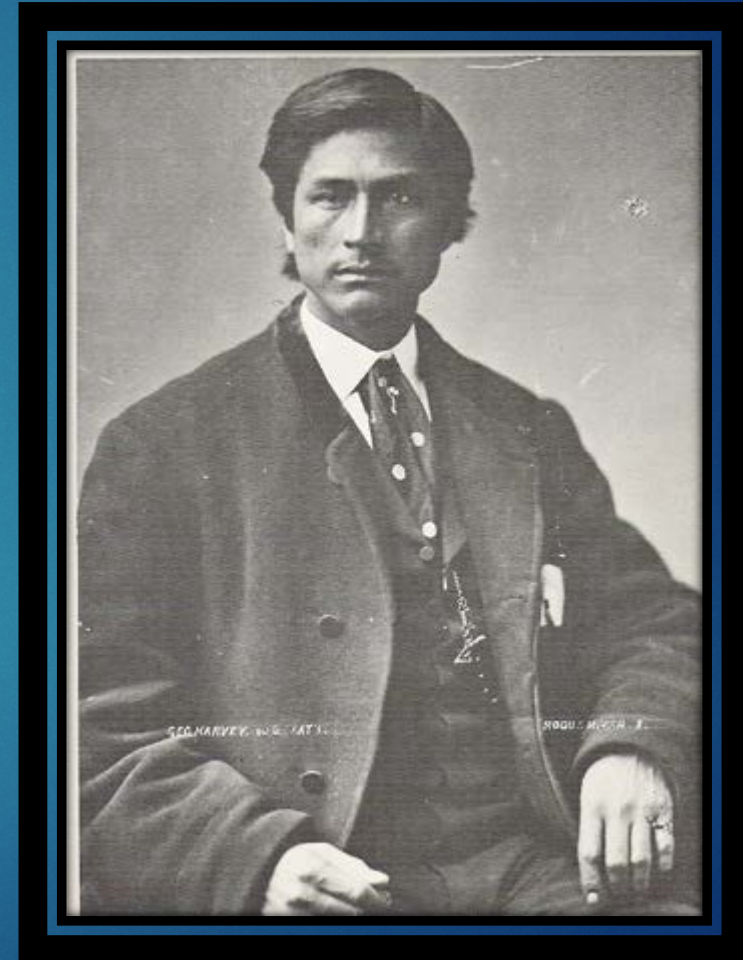
Native American Tribes are here

- ▶ 574 Recognized Tribes in the United States
- ▶ 29 Federally Recognized Tribes in Washington
- ▶ 21 + 2 Treaty Tribes
- ▶ 8 Executive Order Tribes
- ▶ Tribes with Fishing Rights
- ▶ 24 Tribes with off-reservation Hunting Rights
- ▶ Out of State Tribes with rights in Washington

Working with our tribal partners

The overview:

- ▶ History of Tribal Governments
- ▶ Cultural Relevance & Differences
- ▶ Awareness of Native Lifeways
- ▶ Social Characteristics
- ▶ Stewardship
- ▶ Shared Management and Responsibilities
- ▶ Professional Perspective
- ▶ Resiliency



Culture is not a divide.



Although Indian tribes are sovereign, that sovereignty is not absolute. It has been challenged, defined, and battled over throughout U.S. history.



History of Tribal Governments

- ▶ Tribes have been on this Continent and here in the Pacific Northwest for thousands of years.
- ▶ Historically the Makah believe Orca transformed into a wolf, and thus transforming again into Man.



Pre-1492: Pre-Columbus Period

- ▶ Native people lived in organized societies with their own forms of governance for thousands of years before contact with Europeans.



Historic

- ▶ Ancient Chinese Explorers traded with WA Coastal Tribes early 1400's
- ▶ 1513- Spanish explorer Vasco Núñez de Balboa, the first European to sight the Pacific Ocean, when he claimed all lands adjoining this ocean for the Spanish Crown.
- ▶ In the vicinity of the Duwamish River and Elliott Bay where in 1851 the first U.S. settlers began building log cabins, the Duwamish tribe occupied at least 17 villages. The first non-Natives to settle the area were farmers who selected their claims on the Duwamish River on September 16, 1851.

15th Century- The Doctrine Of Discovery

- ▶ Papal Bulls of the 15th century gave Christian explorers the right to claim lands they "discovered" and lay claim to those lands for their Christian Monarchs.
- ▶ Any land that was not inhabited by Christians was available to be "discovered", claimed, and exploited. If the "pagan" inhabitants could be converted, they might be spared. If not, they could be enslaved or killed.
- ▶ The Doctrine of Discovery was promulgated by European monarchies in order to legitimize the colonization of lands outside of Europe. Between the mid-fifteenth century and the mid-twentieth century, this idea allowed European entities to seize lands inhabited by indigenous peoples under the guise of discovery.
- ▶ In 1494, the Treaty of Tordesillas declared that only non-Christian lands could be colonized under the Discovery Doctrine.

1492-1828: Colonial Period

- ▶ In 1792, U.S. Secretary of State Thomas Jefferson declared that the Doctrine of the Discovery would extend from Europe to the infant U.S. government. The Doctrine and its legacy continue to influence American Imperialism and treatment of Indigenous Peoples.
- ▶ The proliferation of colonists created a dominant presence on the East Coast of North America. These colonists acquired Indian lands under the **doctrine of discovery** and signed treaties with the tribes for additional land.
- ▶ Following the Revolutionary War, the newborn United States took pains to maintain peace with the neighboring tribes, but pressure from settlers resulted in increased encroachment, conflict and bloodshed.

Tragic pieces of untold American History

- ▶ Mass execution of 38 Dakota men on December 26, 1862, in Mankato, Minnesota. Ordered by Abraham Lincoln.
- ▶ **Wounded Knee Massacre**
December 29, 1890
- ▶ **Smallpox epidemic** 1852-53 in Western Washington



1828-1887: Removal, Reservation and Treaty Period

- ▶ As the U.S. population and its military strength grew, so did the pressure by the U.S. government on eastern tribes to move West, resulting in forced migration and the creation of treaty reservations. Later, the United States government embarked on an aggressive military policy throughout the West to establish Indian reservations through treaties, acquiring more Indian land.
- ▶ In general, the treaties relinquished land for the right to tribal self-governance on reservations with the protection of the U.S.

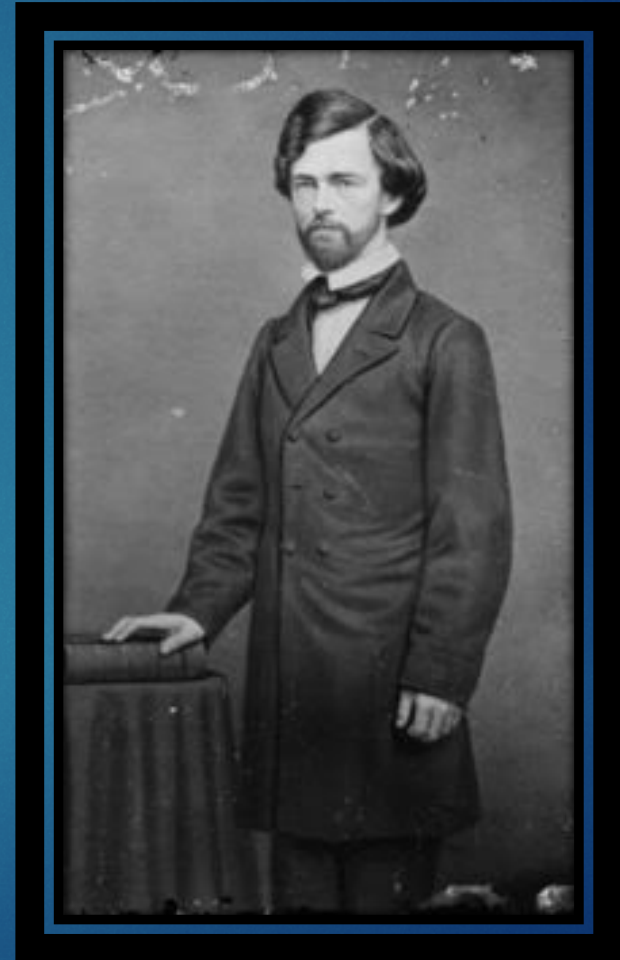



The 1854-1855 Western Washington Stevens Treaties

- ▶ A treaty is a formally concluded and ratified agreement between two sovereign nations. Treaties are signed by the President and must be approved by two-thirds the United States Senate. U.S. Const. Art. II, Sec. 2.
- ▶ 1853 Isaac I. Stevens was appointed Governor of the newly created Washington Territory by President Franklin Pierce. The appointment was a reward for Stevens' support of Pierce's presidential candidacy. One of Stevens' first tasks was to "negotiate" or impose treaties on the Indian nations of Western Washington.
- ▶ U.S. Constitution, Article VI: The U.S. Constitution, federal laws, and federal treaties, shall be the supreme law of the land and binding on states.

Western Washington Treaties

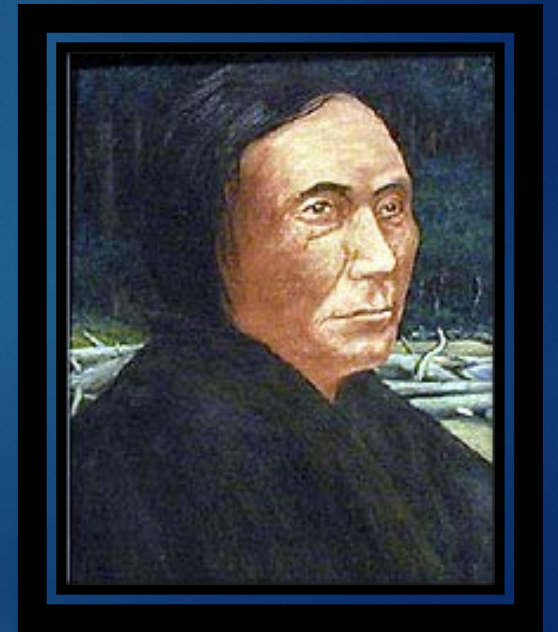
- ▶ Like many politicians of this era, Isaac Stevens was a firm believer in the concept of Manifest Destiny and viewed Indians as a barrier to the inevitable development of American civilization.
- ▶ His task was to consolidate the Indian nations onto reservations and free the land for non-Indian development.



- 
- ▶ In order to streamline the treaty process, Stevens created boiler plate language which utilized the same basic wording for all of the treaties. Stevens saw the Indians as a single group, rather than autonomous sovereign nations. He was unaware of the culture distinctions between the different Indian nations.
 - ▶ *“The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians **in common** with all other citizens of the Territory, and of erecting temporary houses for the purpose of curing them, together with the privileges of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.”*
 - ▶ *Treaty Rights also assure: Health Care, Social Services, Housing, Education.*

Chief Leschi

- ▶ Born in 1808 near what is today Eatonville, Washington, to a Nisqually father and a Yakama mother.
- ▶ Recognized as a leader and a chief by Isaac Stevens to represent the Nisqually and Puyallup tribes at the Medicine Creek Treaty council of December 26, 1854, which ceded to the United States all or part of present-day King, Pierce, Lewis, Grays Harbor, Mason, and Thurston Counties.
- ▶ Some maintain that Leschi either refused to sign and had his "X" forged by another or forced to signed under protest.



Puget Sound War of 1855–1856 and the Battle of Seattle

- ▶ On the morning of January 26, 1856, after months of raids and clashes with federal troops in southern King County and in Thurston County, Native Americans attack Seattle.
- ▶ Previously warned by local Natives, most settlers had barricaded themselves in a blockhouse.
- ▶ The attackers are driven off by artillery fire and by Marines from the U.S. Navy sloop-of-war *Decatur*, anchored in Elliott Bay.



Chief Seattle Suquamish and Duwamish

The Famous 1854 Speech to Territorial Governor Isaac Stevens

- ▶ “The rivers are our brothers.”
- ▶ “The air is precious, for all things share the same breath.”
- ▶ “The earth does not belong to man. Man belongs to the earth.”
- ▶ “If we sell you our land, love it as we have loved it. Care for it as we have cared for it.”
- ▶ “We may be brothers after all.”





1887-1934: Allotment Act

- ▶ An increasing greed for land within the reservations and the desire to have Indians assimilate into mainstream American life resulted in the forced conversion of tribal held lands into small parcels for individual Indian ownership.
- ▶ Over 90 million acres across the Country was taken and given to settlers without compensation to the tribes.



The Indian Citizenship Act of 1924



June 2: Indian Citizenship Act

On this date in 1924, President Calvin Coolidge signed into law the Indian Citizenship Act granting full US citizenship to America's indigenous peoples.
Native American teaching resource collection at: FCIT.USF.EDU/PROJECT/ICA

1934-1945: Indian Reorganization Act

- ▶ A more progressive policy ended the allotment period and began restoring Indian lands. The Federal government created programs and projects to rehabilitate Indian economic life. This period was marked by paternalism of the United States government towards Indian tribes.



1945-1965: Termination Period

- ▶ After World War II over 100 tribes with rich natural resources were identified as being sufficiently acculturated to have their federally protected status removed. State laws were imposed on many tribes, and millions of acres of valuable natural resource lands were taken through forfeiture sales.
- ▶ Federal policy emphasized the physical relocation of Indians from reservations to urban areas.
- ▶ The Western Oregon Indian Termination Act or Public Law 588, signed by President Eisenhower was passed in August 1954 as part of the United States Indian Termination Policy. It called for termination of federal supervision over the trust and restricted property of numerous bands and small tribes, all located west of the Cascade mountains in Oregon. The act also called for disposition of federally owned property which had been bought for the administration of Indian affairs, and for termination of federal services which these Indians received under federal recognition.

Indian Boarding Schools and Assimilation 1860 – 1950's

- ▶ **American Indian boarding schools** were established in the United States during the late 19th and early 20th centuries to educate and assimilate Native American children and youths according to Euro-American standards ("to **civilize** the Indians"). These boarding schools were mandated by the federal government and first established by Christian missionaries of various denominations.



Indian Boarding Schools and Assimilation 1860 – 1950's

- ▶ Indian children were forcibly removed from their families and taken from the reservation.
- ▶ Punishment and Abuse
- ▶ Their traditional culture, lifeways and languages torn from them.
- ▶ In many cases no visitation by relatives or parents, ever.
- ▶ Thousands left with lifelong depression, anxiety and trauma.



1944 National Congress of American Indians (NCAI)

- ▶ NCAI was established in 1944 in response to the termination and assimilation policies the US government forced upon tribal governments in contradiction of their treaty rights and status as sovereign nations.
- ▶ To this day, protecting these inherent and legal rights remains the primary focus of NCAI.



National Congress of American Indians (NCAI)

NCAI Principles

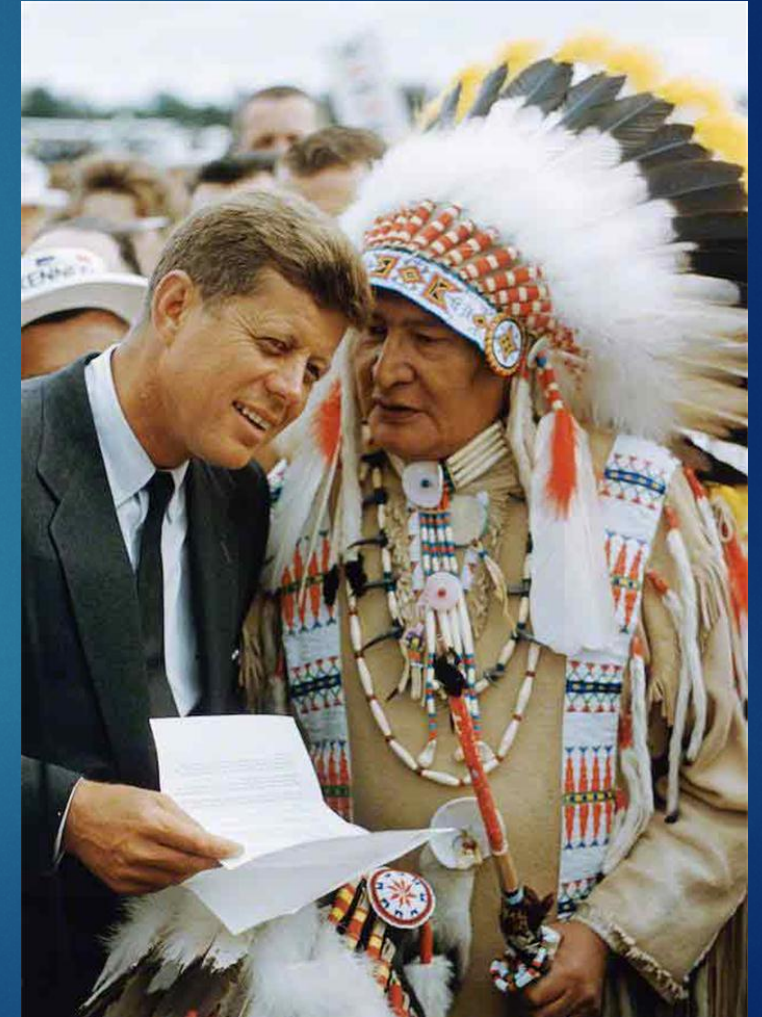
- ▶ To secure and preserve American Indian sovereign rights under treaties and agreements with the United States, as well as under federal statutes, case law, and administrative decisions and rulings.
- ▶ To protect American Indian traditional, cultural, and religious rights.
- ▶ To educate the general public regarding American Indian and Alaska Native governments, people, and rights.

NCAI Embassy of Tribal Nations, Washington DC



1965-present: Self-Determination Era

- ▶ President Kennedy was a first light of hope.
- ▶ In the late 1960s there was a growing recognition of the need to strengthen, rather than eliminate, tribal governments. Indian Civil Rights Act of 1968
- ▶ In 1970, President Nixon made a clear break with termination policy. He declared termination a failure and asked Congress to repudiate it. He also encouraged Congress to pass legislation designed to enhance tribal autonomy.
- ▶ Through a series of Executive Orders, President Nixon reaffirmed the trust responsibility of the Federal government to the tribes.



1975- Indian Self-Determination and Education Assistance Act

- ▶ In 1975, Congress enacted **the Indian Self-Determination and Education Assistance Act**
- ▶ Acknowledged the Federal government's trust responsibilities and directed the Bureau of Indian Affairs and Indian Health Services to turn over many of the services performed by those agencies to the tribes themselves.
- ▶ This lead to Tribal Self Governance

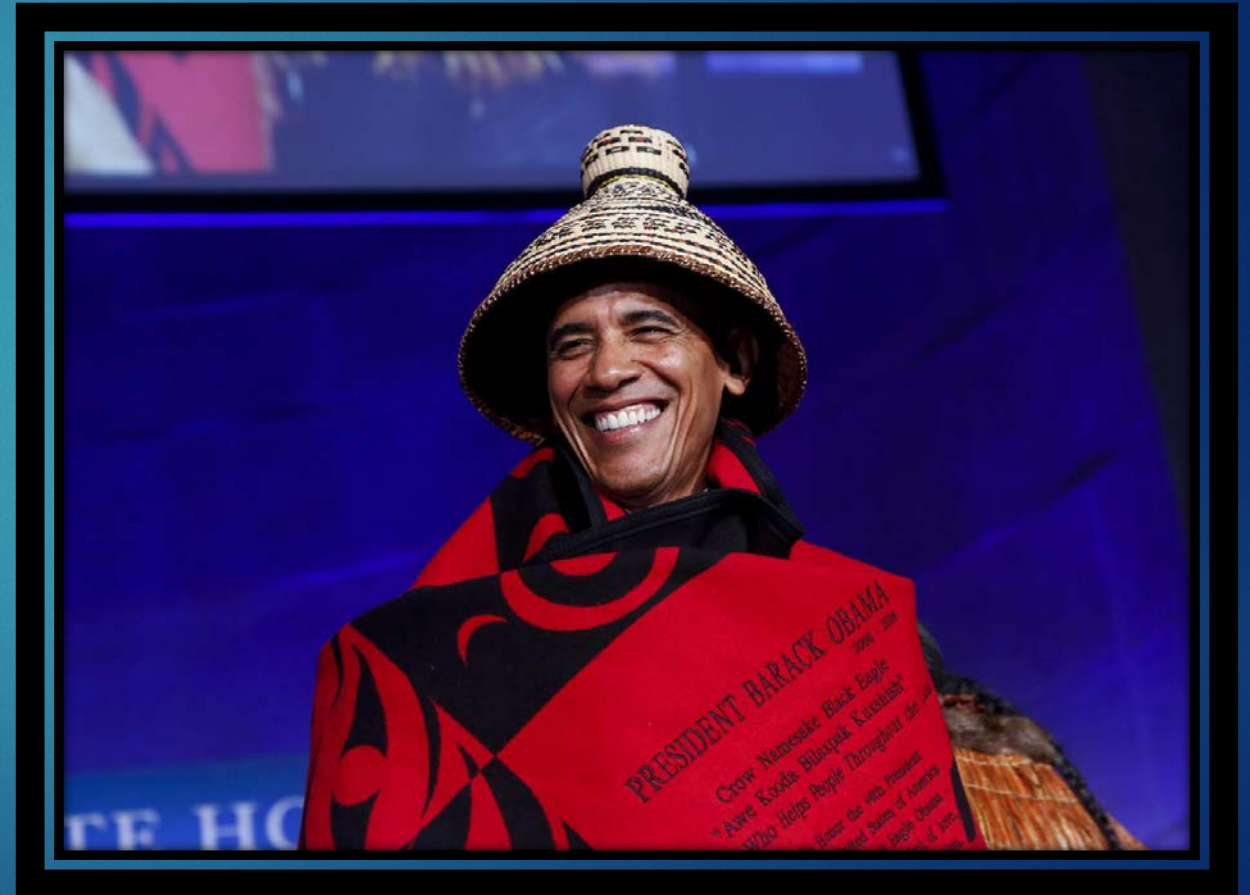
Indian Self-Determination and Education Assistance Act of 1988

- ▶ Congress reaffirmed this policy, stating: “In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable Tribal governments, capable of administering quality programs and developing the economies of their respective communities.”



Indian Self-Determination and Education Assistance Act of 1988

- ▶ Presidents Ford, Carter, Reagan, Bush, Clinton, and Barak Obama have all reaffirmed the policy of self-determination either by reauthorizing the Executive Orders originally issued by Nixon or by issuing additional Executive Orders. With control over their own lands and resources.
- ▶ Tribes have made great strides toward reversing crippling economic blight and reviving their unique culture and societies.



1978- American Indian Religious Freedom Act

- ▶ In 1978 Congress passed the **American Indian Religious Freedom Act (AIRFA)** to protect and preserve American Indians' rights to believe, express, and practice their traditional religions. In the past other Federal laws, such as laws intended to protect wilderness areas and endangered species, have at times conflicted with access to sacred sites and possession of animal-derived sacred objects. AIRFA clarified that federal laws passed for other purposes were not intended to conflict with Indian rights to practice their traditional religions.

1978- American Indian Religious Freedom Act

- ▶ Years before 1978 it was forbidden by government policies for indigenous people in the United States to practice ceremony for prayer or Potlatches for memorials, name giving's, large gatherings, etc...



Native American Graves Protection and Repatriation Act (NAGPRA)

- ▶ Enacted in 1990, protects Indian human remains and cultural items from intentional excavation and removal, inadvertent discovery, and illegal trafficking. This Act also requires the “repatriation” of human remains and other cultural items held by federal agencies or federally assisted museums or institutions.



1960's and '70's conflict over Indian Fishing rights in Washington State

- ▶ **The Fish Wars** were a series of civil disobedience protests in the 1960s and '70s in which Native American tribes around the Puget Sound pressured the U.S. government to recognize fishing rights.



1960's and '70's conflict over Indian Fishing rights in Washington State



The aftermath of history

- ▶ Prejudice
- ▶ Stereotype
- ▶ Suppression
- ▶ Segregation
- ▶ Social injustice
- ▶ Equality of rights
- ▶ Cultural Identity



Lets Take a Break



Sohappy v. Smith

- ▶ Along with the combined *United States v. Oregon*
- ▶ In 1969 the court further held that the state is limited in its power to regulate treaty Indian fisheries.
- ▶ Among other things, the court held that the state may only regulate when reasonable and necessary for conservation, provided: reasonable regulation of non-Indian activities is insufficient to meet the conservation purpose, the regulations are the least restrictive possible, the regulations do not discriminate against Indians, and voluntary tribal measures are not adequate.

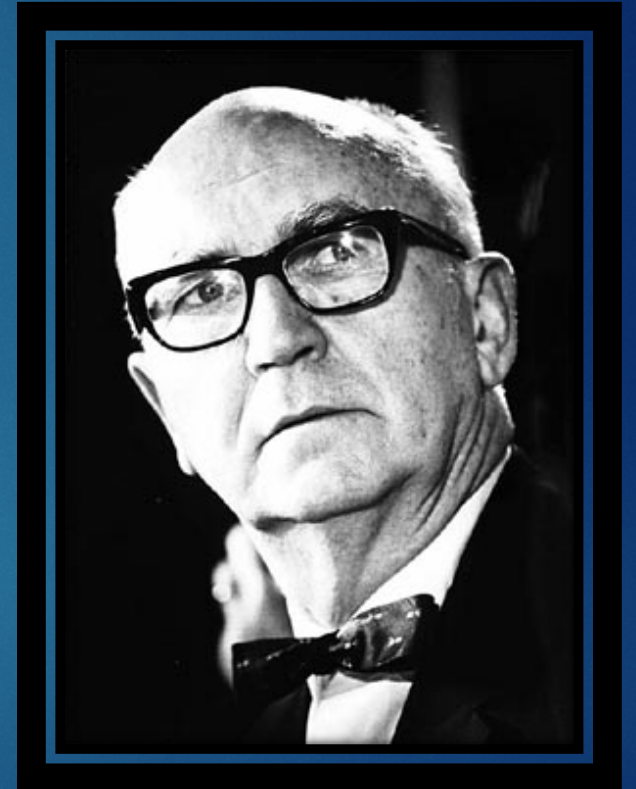
United States v. Oregon

- ▶ United States v. Oregon is the Federal court proceeding first brought in 1968 to enforce the reserved fishing rights of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes and Bands of the Yakama Nation. Case was only recently administratively closed in 2018.
- ▶ In his 1969 decision, Judge Robert C. Belloni of the Federal District Court for the District of Oregon ruled that state regulatory power over Indian fishing is limited because treaties between the United States and the tribes in 1855 reserved the tribes' exclusive rights to fish in waters running through their reservations and at "all usual and accustomed places, in common with citizens of the Territory."

1974- The Boldt Decision

United States v. Washington

- ▶ On February 12, 1974, Federal Judge George Boldt (1903-1984) issues an historic ruling reaffirming the rights of Washington's Indian tribes to fish in accustomed grounds and stations. The "Boldt Decision" allocates an "equal share" of the annual catch to treaty tribes, which enrages other fishermen.
- ▶ Later that same year, Judge Belloni reached the same holding, the Columbia River treaty tribes' were entitled to 50 percent of the harvestable runs destined to reach the tribes' usual and accustomed fishing stations.



Tribal Hunting: State v Buchanan

- ▶ In December 2000, as a result of the Buchanan decision, WDFW with the assistance of the State Attorney General's (AG) office entered into an agreement with the four tribes that signed the 1854 Medicine Creek Treaty (Puyallup, Nisqually, Muckleshoot and Squaxin Island), and prosecutors for Thurston, Mason, Lewis, Pierce and Grays Harbor counties.
- ▶ Because of an imprecise description in the treaty, the location of the southern boundary of the Medicine Creek cession area had been a source of disagreement between the Medicine Creek tribes and the state.

State v Chamber

~Open and Unclaimed Land

- ▶ Federal and state courts have ruled that public land is “open and unclaimed” unless it is being put to a use that is inconsistent with tribal hunting.
- ▶ For example, in *U.S. v. Hicks*, a federal district court ruled that the Olympic National Park was not “open and unclaimed” because one of its purposes is the preservation of native wildlife and because hunting is generally prohibited in the park.
- ▶ In contrast, national forests have been held to be “open and unclaimed.” In *State v. Chambers* (1973), the Washington Supreme Court stated that private property is not “open and unclaimed,” but a tribal hunter may not be convicted unless such private property has outward indications of private ownership observable by a reasonable person.

The Culvert Case

- ▶ A continuation of the 1974 US v Washington case.
- ▶ Fish blocking culverts contribute to the loss of spawning and rearing habitats for the salmon resource.
- ▶ Diminished and destroyed hundreds of miles of salmon habitat and fish production.
- ▶ The suit challenges only barrier culverts under state roads that affect salmon runs passing through the tribes' usual and accustomed areas fishing areas, as defined in United States vs. Washington.

The Culvert Case cont.

- ▶ The Ninth Circuit held that the treaties instead guaranteed “that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes.”
- ▶ On that basis, the panel held that the treaties require Washington to replace culverts under state roads that restrict salmon passage. The court ordered the State to replace hundreds of culverts, at a cost of several billion dollars, even though it is undisputed that:
 - ▶ (1) the federal government—the lead Plaintiff— specified the design and granted permits for the overwhelming majority of culverts at issue, and
 - ▶ (2) many culvert replacements will have no benefit for salmon because of other non-State owned barriers to salmon on the same streams.

Centennial Accord

- ▶ Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington
- ▶ The Centennial Accord illustrates the commitment by the parties to implementation of the government-to-government relationship, a relationship reaffirmed as state policy by gubernatorial proclamation January 3, 1989.
- ▶ This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.

Centennial Accord

- ▶ “The Centennial Accord is a foundational building block of our evolving government-to-government relationship. It is always an honor to meet with tribal leaders. A vibrant and thriving tribal culture is important for all Washingtonians. It is part of who we are as a state.”
-- Gov. Jay Inslee





Millennium Agreement reaffirms the Accord

- ▶ Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium
- ▶ The work of the 1999 Tribal and State Leaders' Summit will be the foundation upon which our children will build.
- ▶ A stronger foundation for tribal/state relations is needed to enable us to work together to preserve and protect our natural resources and to provide economic vitality, educational opportunities, social services and law enforcement that allow the governments to protect, serve and enhance their communities

Declaration on the Rights of Indigenous Peoples

- ▶ The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on Thursday September 13, 2007.
- ▶ The Declaration is the most comprehensive statement of the rights of indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in international human rights law.
- ▶ Many NW Tribes provided testimony related to the protection of their rights.
- ▶ The Declaration has not been formally ratified by the Senate and thus is not binding federal law, but President Obama strongly supported it.



Treaty Rights at Risk Initiative

- ▶ *“We are losing the battle for salmon recovery in western Washington because salmon habitat is being damaged and destroyed faster than it can be restored.” ~Billy Frank*
- ▶ Western Washington Tribes began with development of a white paper outlining the issues and offering solutions for the protection of tribal treaty rights and recovery of salmon habitat. Calling in the Federal Government to **take charge** and protect treaty guaranteed resources by addressing habitat.

Treaty Rights at Risk

- ▶ In July of 2011 Billy Frank Jr. and a delegation of Western Washington Tribal Leaders presented the Treaty Rights at Risk (TRAR) Whitepaper to the White House.
- ▶ Treaty tribes called for federal government to align its agencies and programs and lead a more coordinated salmon recovery effort.
- ▶ Urging the United States to take charge of salmon recovery because it has the obligation and authority to ensure both salmon recovery and protection of tribal treaty rights.

Treaty Rights at Risk

- ▶ Habitat Restoration and Conservation – Immediate Needs
- ▶ Development
- ▶ Permitting
- ▶ Local Government Regulations
- ▶ Water Quality Standards
- ▶ Water Quantity
- ▶ Climate Change
- ▶ Ocean Acidification
- ▶ industry



Modern Tribal Governments

- ▶ **Tribal Sovereignty in the United States** is the concept of the inherent authority of indigenous tribes to govern themselves within the borders of the United States.
- ▶ **Self-Governance** provides Federally recognized tribes the authority to manage their own government, flexibility to restructure their programs and address Tribal priorities and needs, and exercise their own authorities.
- ▶ Through **Self-Governance** Tribes are able to re-design programs to meet Tribally specific needs without diminishing the United States' trust responsibility to Indian peoples and Tribes."

Tribal Authority and Structure

Treaty

Tribal Constitution

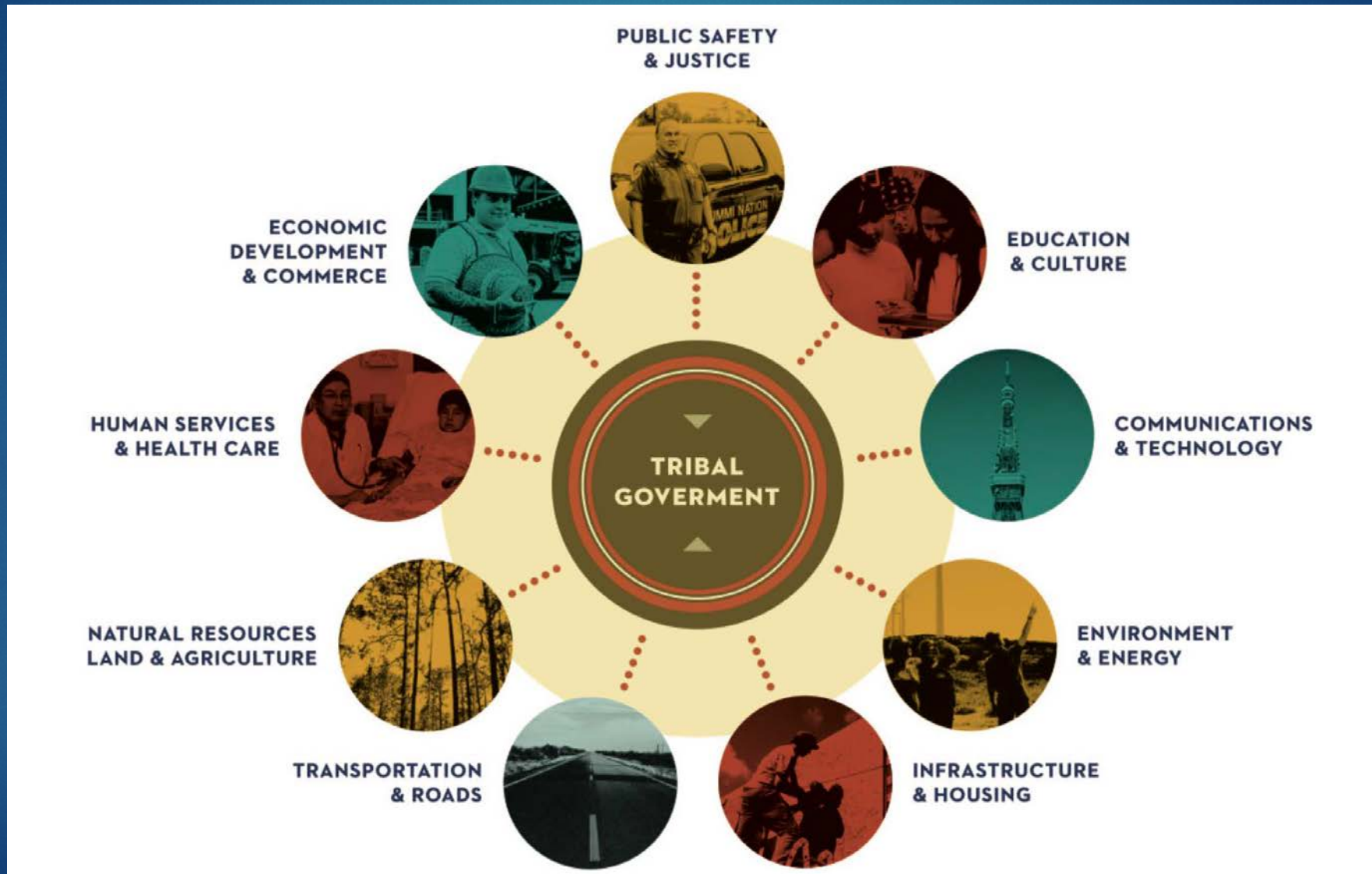
Tribal Bylaws



Typical Tribal Governmental Structure



Tribal Governments today



Tribal Capacity in Resource Management and Ecology

- ▶ Native People are very connected and reliant on their Natural Resources.
- ▶ Ecosystem based approach to Management.
- ▶ Advancements in science and data collection.
- ▶ Today tribes base management decisions on science and maintain their historic position.



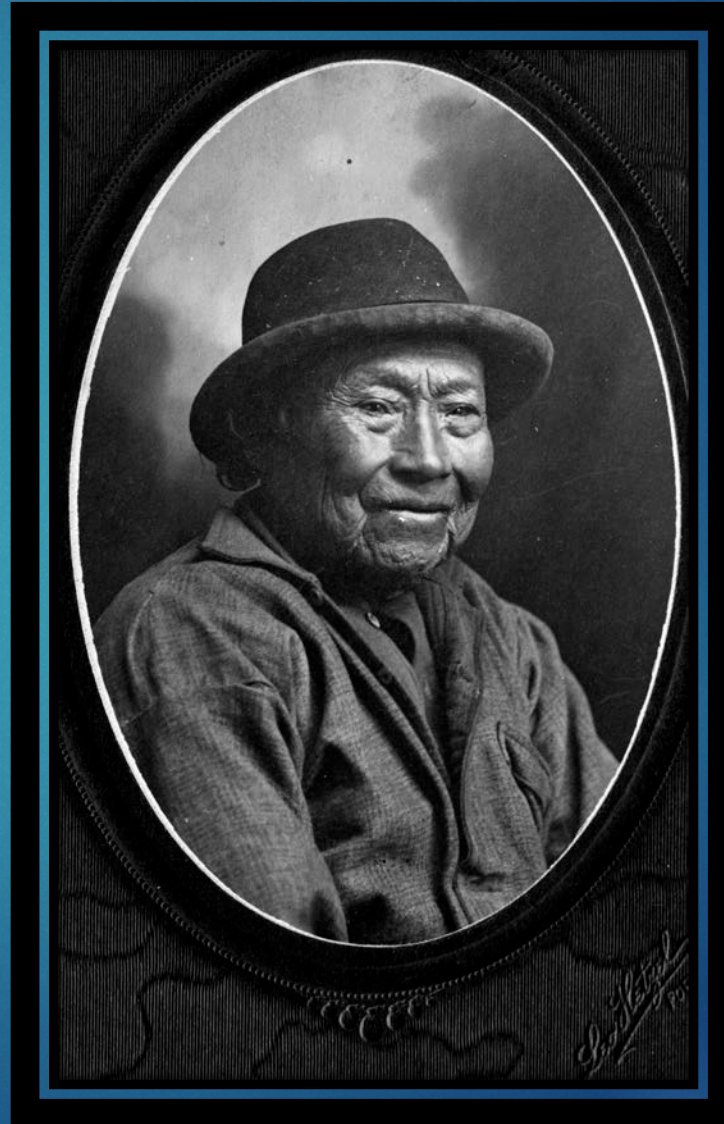
To Work Effectively with Tribal Governments

- ▶ Do your homework first and foremost!
- ▶ Study the history
- ▶ What is the story of the tribe?
- ▶ Read their Treaty
- ▶ Read their Constitution
- ▶ Review their website, newsletters, current media



To Build Trust on the ground

- ▶ Be respectful
- ▶ Be open and honest
- ▶ Acknowledge their capacity
- ▶ Compare but not compete



To Building Trust in the Field

- ▶ Early engagement
- ▶ Consultation & coordination
- ▶ Information sharing
- ▶ Take into account shared interests
- ▶ Take into account tribal sovereignty and Treaty Rights



To Build Trust in Tribal Meetings & Consultations

- ▶ Acknowledge everyone in the room, especially Elders.
- ▶ Be upfront, transparent, honest and open. Even when in disagreement.
- ▶ Do not hesitate, stall or beat around the bush. You will be respected more for being upfront and forthcoming.
- ▶ Do not give false expectations.

To Build Trust in Tribal Meetings & Consultations

- ▶ Tribal Representatives continually have issue with long drawn-out process.
- ▶ Tribal Representatives like to streamline strategies, projects and decisions whenever possible.
- ▶ Include tribal participation in advisory or workgroup forums whenever possible.
- ▶ Don't break your word... If you make a commitment, stick to it and be sure to follow through. People will measure you on that alone, so keep your word.

Economic Development in Indian Country – Based on Sovereignty

- ▶ Casinos, Resort Hotels, Retail and Grocery Stores, Gas Stations, Tobacco Sales, Commercial Fisheries and Seafood Processing, Manufacturing, Recreational Businesses, Ranching, Farming, Energy Development, Broadcasting....
- ▶ Tribes are investing revenue in Education, Healthcare, Care for Elderly, Infrastructure, Roads, Housing, Social Services, Sustainable Natural Resources and Environmental Protection
- ▶ Tribes operate at different and varying capacities. Not all tribes are the same.

Political Position

- ▶ Political Clout
- ▶ Treaty Rights
- ▶ Sovereignty
- ▶ Strong Legal Representation
- ▶ Lobby at State and Federal Levels
- ▶ Political Offices in Local, State and Federal
- ▶ Inter-Tribal Government Coordination
- ▶ Trustee Relations with Federal Agencies



A common philosophy, the circle,
different directions, different
perspectives.



Questions





Working with Tribes

LEGAL HISTORY AND BRIEFING ON CO-MANAGEMENT

SENIOR COUNSEL JOE V. PANESKO



Washington
Department of
FISH and
WILDLIFE

Disclaimers

- ▶ Most things are not absolute. For many statements included in this training, there are likely exceptions and nuances that exist.
- ▶ This presentation should not be construed as offering legal advice.
- ▶ The opinions expressed herein are solely those of the individual author.

Treaty as Contract

- ▶ Many indigenous peoples of the Pacific Northwest signed treaties agreeing to “cede” their territorial claims in exchange for established reservations and promises of support by the federal government.
 - ▶ Certain off-reservation rights reserved in treaty (i.e. hunting & fishing)

Shorthand: “Treaty Tribes”

Executive Order Tribes

- ▶ Some tribes refused to sign treaties, or were not offered treaties.
- ▶ Some of these “non-treaty” tribes were acknowledged by federal government through executive orders, and some reservations created thereby.

Shorthand: “Executive Order Tribes”

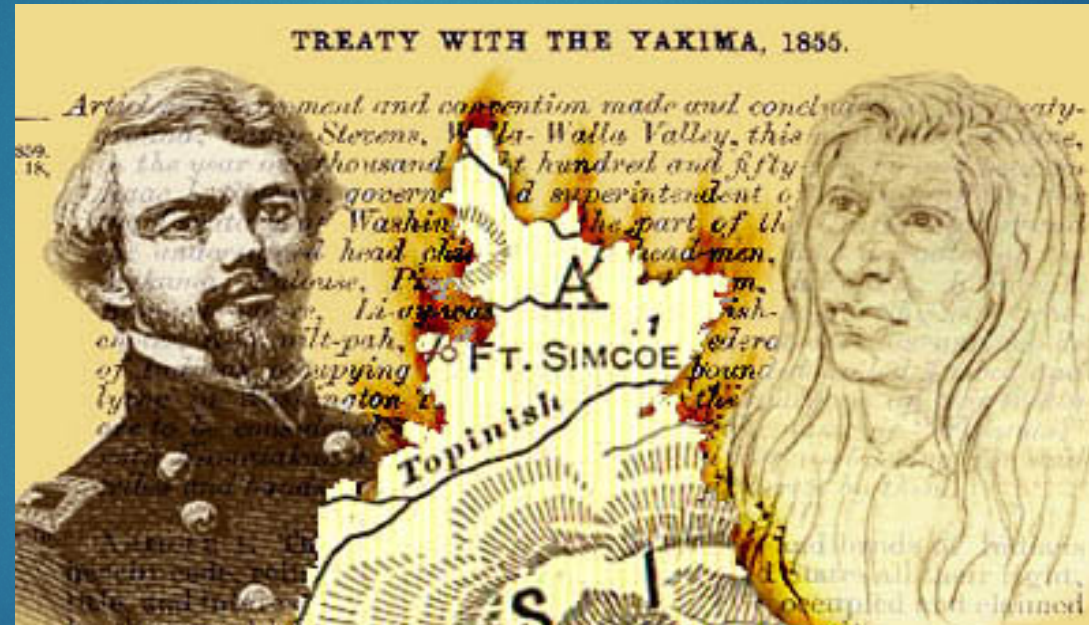
Granted Versus Reserved Rights

- ▶ Treaty rights are not rights granted to the tribes, rather they are **rights reserved** by the tribes. Tribes held these rights from time immemorial as part of their sovereignty.
- ▶ Treaty rights belong to tribes, and are not the property of any individual tribal member.
- ▶ Only tribal members may exercise treaty hunting and fishing rights.
- ▶ Members of one tribe cannot exercise the treaty rights of another tribe.

Tribes in WA

- ▶ 29 Federally Recognized Tribes
 - ▶ 21 Treaty Tribes
 - ▶ 8 Executive Order Tribes
- ▶ 3 “out-of-state” Treaty Tribes with treaty hunting or fishing rights in WA jurisdiction
- ▶ Additional Non-Federally Recognized Tribes

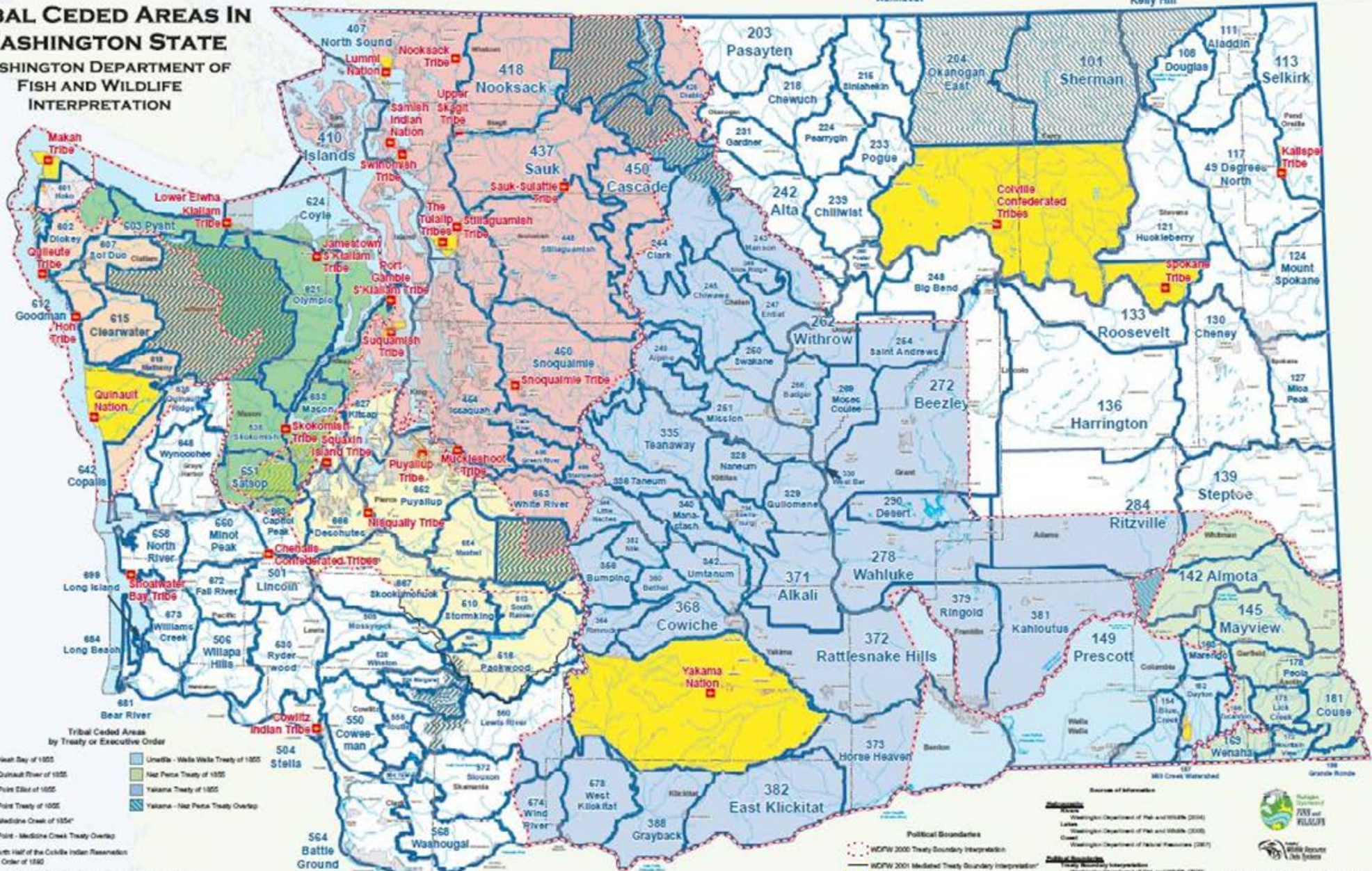
Stevens Treaties



Treaty	Indian Tribes	Location and Date
Treaty of Olympia	Quinault, Hoh, and Quileute	Qui-nai-elt River January 25, 1856
Treaty of Point No Point	Jamestown S'Klallam, Port Gamble S'Klallam, Lower Elwha, Skokomish	Point No Point, Suquamish Head January 26, 1855
Treaty of Point Elliott	Lummi, Nooksack, Stillaguamish, Swinomish, Upper Skagit, Suquamish, Sauk Suiattle, Tulalip, and Muckleshoot	Point Elliott January 22, 1855
Treaty of Neah Bay	Makah	Neah Bay January 31, 1855
Treaty of Medicine Creek	Nisqually, Puyallup, Squaxin Island, Muckleshoot	Medicine Creek December 26, 1854
Treaty with the Yakamas	Yakama confederated tribes and bands	Camp Stevens, Walla Walla Valley June 9, 1855

TRIBAL CEDED AREAS IN WASHINGTON STATE

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE INTERPRETATION



- Tribal Ceded Areas by Treaty or Executive Order**
- Treaty of North Bay of 1855
 - Treaty of Quinalt River of 1855
 - Treaty of Point Elmer of 1855
 - Point No Point Treaty of 1855
 - Treaty of Medicine Creek of 1854
 - Point No Point - Medicine Creek Treaty Overlay
 - Former North Half of the Colville Indian Reservation Executive Order of 1840
 - Umatilla - Waiilatpu Treaty of 1855
 - Nez Perce Treaty of 1855
 - Yakama Treaty of 1855
 - Yakama - Nez Perce Treaty Overlay

* The southern boundary of the ceded areas of the Medicine Creek Treaty, as represented in this map, represents a modified enhancement and management line (see Thomas Burgan and Morris Uebelacker, June 2001).

* This map does not depict tribally asserted traditional hunting areas.

Washington Administrative Code 230-12-053 Section 4



- Hydrography**
- Rivers and Streams
 - Water Body

- Political Boundaries**
- WDFW 2000 Treaty Boundary Interpretation
 - WDFW 2001 Modified Treaty Boundary Interpretation*
 - Location of a Federally Recognized Tribe
 - 2011-12 Game Management Unit
 - County Lines
 - Urban Area
 - National Park - NO HUNTING

- Source of Information**
- Base**
 - Washington Department of Fish and Wildlife (2014)
 - Washington Department of Fish and Wildlife (2008)
 - Washington Department of Natural Resources (2011)
 - Political Boundaries**
 - Washington Department of Fish and Wildlife (2010)
 - Washington Department of Fish and Wildlife (2011)
 - Washington Department of Natural Resources (2011)
 - Washington State Tribal Directory (2011)
 - Urban Centers
 - Washington Department of Transportation (2010)

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Map Produced July 2017
Revised December 2017

Hunting and Fishing Treaty Language

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- ▶ *The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territory...together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands."*

Historic State interpretation of treaty fishing rights

- ▶ WA Supreme Court held in 1916 that “in common with” means Indians are subject to state fishing laws
- ▶ *State v. Towessnute*, 89 Wash. 478; *State v. Alexis*, 89 Wash. 492. Upheld criminal fishing convictions of Yakama members for violating state regulations.
- ▶ The State Supreme Court vacated Towessnute in 2020.

Historic State interpretation of treaty rights – focus on fishing

- ▶ *Tulee v. Washington*, 315 U.S. 681 (1942): held that WA cannot require tribal fishers to pay fishing license fees that are both regulatory and revenue-producing—treaty language precludes State from charging a fee.

1960s: Department of Game v. Puyallup Tribe

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- ▶ 3 decisions by the United States Supreme Court clarifying scope of treaty fishing rights. State has no ability to regulate tribal fishing, with the exception of tribal fishing activity if it threatens the existence of the species.

1960s Litigation

- ▶ 1968: *Sohappy v. Smith & United States v. Oregon* (cases merged): Treaty fishing rights on Columbia River
- ▶ 1970: *United States v. Washington* (Judge Boldt): Treaty fishing rights in Puget Sound, Straits, and north Coast
- ▶ 1974: Judge Boldt's main ruling upholding treaty fishing rights.

“In common with” = equal shares

- ▶ Tribes collectively get 50%....
- ▶ River by river, run by run approach for anadromous fish with each tribe having a right to some portion of the total tribal share that passes through their U&A. Massively complex.
- ▶ Inter-tribal sharing not subject to State oversight.
- ▶ For shellfish and non-migratory species, these fishery resources are allocated geographically.

State has almost no say in tribal fishing activity

- ▶ State ability to regulate treaty fishing is extremely narrow:

The state can regulate the exercise of treaty harvest rights only when necessary to achieve a legitimate conservation necessity purpose, the regulations are the least restrictive possible, and when undertaken in a non-discriminatory manner.

Managing a shared resource

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- ▶ While neither Tribes nor State can dictate what the others do, their rights are to a common, but limited resource. Harvest decisions by all must be coordinated.
- ▶ Post 1974 Boldt decision: continued, extensive disputes attempting to manage the shared resource.
- ▶ Court-created Fisheries Advisory Board: avg. of 1 dispute per week in the early 1980s. Avg. of 4 emergency motions to court per year.
- ▶ Court docket became so confusing amongst the disputes, court created “subproceeding” tracking system

From Confrontation to Cooperation

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- ▶ Governor Spellman and others approached tribal leaders with an effort to work more cooperatively.
- ▶ Annual North of Falcon state-tribal fishery negotiation process was born in the mid-1980s.
- ▶ Some salmon management plans and consent decrees incorporated cooperation and co-management concepts.

Endangered Species Act Issues

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- ▶ The listing of Chinook salmon further complicated state and tribal fishing—requiring federal consultation for proposed fisheries that could adversely impact Chinook to avoid ESA liability.

The Culvert Subproceeding

- ▶ 1980: district court ruled treaty fishing rights required State to refrain from degrading fish habitat if it deprived tribes of moderate living needs. Ruling vacated by 9th Circuit, en banc, in 1985.
- ▶ New dispute in 2000: Fish blocking culverts contribute to the loss of spawning and rearing habitats for the salmon resource.
- ▶ Diminished and destroyed hundreds of miles of salmon habitat and fish production.
- ▶ The subproceeding focuses only on barrier culverts under state-managed roads that affect salmon runs passing through the tribes' usual and accustomed areas fishing areas, as defined in *United States vs. Washington*.

The Culvert Case cont.

- ▶ The Ninth Circuit held that the treaties guaranteed “that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes.”
- ▶ Held Washington must replace culverts under state roads that restrict salmon passage. The court ordered the State to replace hundreds of culverts, at a cost of several billion dollars over the course of years, even though it is undisputed that:
 - ▶ (1) the federal government—the lead Plaintiff— specified the design and granted permits for the overwhelming majority of culverts at issue, and
 - ▶ (2) many culvert replacements will have no benefit for salmon because of other non-State owned barriers to salmon on the same streams.

Differences between U.S. v. Oregon & U.S. v. Washington

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- ▶ Number of tribes
- ▶ Case area
- ▶ No fixed determination of U&As in US v. Oregon.
- ▶ Far fewer legal disputes in US v. Oregon.
- ▶ CRITFC & NWIFC

Tribal hunting rights

...together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands...

- ▶ There is no “United States v. Washington” litigation seeking a declaration of the meaning of the hunting and gathering language.
- ▶ Most cases interpreting the language have involved Indians raising a treaty right defense to a state or federal criminal hunting charge.
- ▶ What are “open and unclaimed lands”
- ▶ Where can they hunt?

State v. Chambers 1973

Washington State Supreme Court decision

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- ▶ Unlicensed Yakama tribal member harvested a deer on private, fenced rangeland (which was not posted with signs) a short distance from an unoccupied house.
- ▶ Private land is not “open and unclaimed.” Private land needs “outward indications of such ownership observable to a reasonable man,” thus preventing entrapment.
- ▶ Indications: Fencing, signs, buildings, cultivation, gates...

United States v. Hicks 1984

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United States District Court, Western District of Washington State

- ▶ Quinault Indian charged with killing 3 elk in Olympic National Park, where hunting was prohibited.
- ▶ “Open and unclaimed” includes public lands so long as those lands are managed for purposes consistent with hunting.
- ▶ A national park set assigned for protection of an elk herd where hunting is prohibited is not “open and unclaimed.”
- ▶ Observes that the treaty right of hunting, being tied to “open and unclaimed” lands, was intended to be a defeasible privilege that could change over time as the state was settled more.

Open and Unclaimed Lands

“Open and unclaimed lands” are public lands that are being managed in a way that is consistent with hunting.

Yes

No

US Forest Service

National Parks

BLM

University Lands

DNR

Military Reservations

WDFW Wildlife Areas

WA State Parks

State v. Buchanan 1999

Washington State Supreme Court

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Buchanan

- ▶ Nooksack tribal member harvested two bull elk without state license and out of season.
- ▶ Court ruled that a tribe's treaty hunting right extends to the areas ceded to the United States by that tribe, and may also include other areas "used for hunting and occupied by the [tribe] over an extended period of time" (i.e., areas the tribe traditionally used for hunting).
- ▶ Opinion does not define a method to determine traditional use.
- ▶ Some tribes maintain their hunting right extends to open and unclaimed lands throughout the territory.

Commission Policies

Policy C-3607: April 3, 1998

- ▶ Acknowledges and respects sovereignty.
- ▶ Overlapping jurisdiction creates a co-management relationship.
- ▶ Commitment to co-management for preservation of healthy fish and wildlife populations.
- ▶ Cooperation with tribes on enforcement protocols.

Commission Rules

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- ▶ **WAC 220-413-170:** Southern boundary of Medicine Creek ceded area
- ▶ **WAC 220-413-160:** Colville Reservation
No big game, grouse hunting, trapping by non-Indians
- ▶ **WAC 220-440-060:** Wildlife damage
Tribal members may assist under certain conditions.

Hunting Co-Management Agreements

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- ▶ Geographic scope (Generally, ceded area)
- ▶ Regulation sharing
- ▶ Harvest information sharing
- ▶ Wildlife management meetings
- ▶ Damage hunt participation
- ▶ Private Industrial Timberlands
 - ▶ Available for tribal hunting under certain conditions
 - ▶ Lease vs. permits, etc.
- ▶ Enforcement protocols
 - ▶ Information sharing, referrals, public safety regulation

Managing Common Resources

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- ▶ Cooperation
- ▶ Consultation
- ▶ Co-Management
- ▶ Government-to-Government

Motivated by respect of sovereigns.

Motivated by a practical realization that we can often achieve more by working together rather than confrontation.

Consultation obligations

- ▶ Centennial Accord in 1989, Governor Booth Gardner
- ▶ Millennium Agreement in 1999, Governor Gary Locke
 - ▶ Commitments for cabinet agencies under the Governor to coordinate with Tribes on agency decisions that impact the Tribes.
 - ▶ Invitation for all state agencies to do the same
 - ▶ More info on goia.wa.gov

Legal Obligation

- ▶ State agencies must “Make reasonable efforts to collaborate with Indian tribes in the development of policies, agreements, and program implementation that directly affect Indian tribes and develop a consultation process that is used by the agency for issues involving specific Indian tribes;”

RCW 43.376.010(1).

Takeaways

- ▶ The fish and wildlife resources are shared resources between the State and sovereign Treaty Tribes.
- ▶ Decisions and actions by the State or Tribes can affect the rights and interests of the others.
- ▶ Working cooperatively will almost always be easier than disagreement, dispute and litigation that has uncertain outcomes.
- ▶ Hard question: Does co-management equal veto rights?
- ▶ Demanding expectations: government-to-government consultation before acting on matters that impact tribal interests.

QUESTIONS?