Tribes' Unique Political, Legal, and Historical Circumstances: Implications for Research

Nazune Menka & Catherine A. O'Neill*

Introduction

Research involving or affecting American Indian, Alaska Native, and Native Hawaiian peoples is unique, for a variety of reasons. Tribes' unique political, legal, and historical circumstances have numerous implications for those whose work impacts the health of tribal people, land, and resources.

Assumptions, conventions and methods that have been developed for the general population will often be inappropriate where tribal people or tribal homelands are affected. Indeed, they may introduce bias, perpetuate inaccuracies, and lead to decisions that are not scientifically defensible, culturally viable, or legally tenable.

We want to emphasize at the outset that, of course, each Native nation is different. So while we will discuss several common issues, it is always necessary to work directly with the individual tribe or tribes affected.

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In this presentation we will focus on three ways in which tribes are unique:

> Tribes are unique because they are sovereign entities, engaged in political and cultural self-determination.
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> Tribes are unique because they have certain legal rights to the lands and resources on which they have historically depended.
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> Tribes are unique because of their particular historical experiences within the United States – experiences that have too often included prosecution, intimidation, and discrimination. These experiences have shaped everything from tribal resistance to participating in scientific research conceived by outsiders to tribes' regulation of tribal natural, cultural, and intellectual resources.

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* Nazune Menka (Athabascan/Lumbee), M.S.; J.D. Candidate, 2018, University of Arizona College of Law. Catherine O'Neill, J.D.; Professor of Law, Seattle University School of Law. This document transcribes the accompanying presentation, video-recorded in May, 2016; it is indexed to slides in the accompanying slide show. This document was last updated in July, 2016.

Researchers whose work potentially affects tribal resources or who might seek to collaborate with tribal partners need to understand these ways in which tribes are different from other identifiable groups within the general population, and from other governmental entities within the United States.

We will start by discussing the first of these three considerations – that tribes are unique because of their status as sovereign entities. We will define the meaning of central terms, such as "nations," "peoples," and "tribes." We will then explore what tribal sovereignty means – from the perspectives of both tribes and the United States.

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I. Background: Native Nations and Sovereignty

Tribes are unique because they are sovereign entities, engaged in political and cultural self-determination.

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A. Native Nations

American Indian, Alaska Native, and Native Hawaiian peoples have existed for millennia. They existed as independent, self-governing peoples long before European colonizers set foot on this continent, long before the United States became a country.

We use the term "peoples" in the sense that it is understood in international law, that is, as distinct political communities with unique legal status and rights, including rights to self-determination.[1]

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This understanding is reflected in the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly on September 13, 2007[2] and supported by the United States on December 16, 2010.

We use the terms Native peoples, Native nations, and tribes interchangeably, and intend each of these terms to denote a status as sovereign governments.

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[1] *See, generally*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed., 2004).

[2] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

B. Sovereignty

Sovereignty essentially means self-rule – the collective right of a people to govern themselves and to pursue economic, social, and cultural development as they have defined it.

In considering tribal sovereignty,[3] these concepts can be illustrated by asking some basic questions:

> Who crafts the constitution that sets forth the structure of tribal government?
> Who sets and enforces the speed limit on the road into the tribal pre-school?
> Who determines whether a natural resource such as solar, wind, or hydroelectric power will be developed and under what conditions?
> Who issues hunting licenses, delineates the hunting season, and enforces bag limits?
> Who defines what or whom should be taxed and by how much?
> Who establishes the terms under which intellectual and cultural data will be gathered, used, and owned – for example, whether Institutional Review Board-type oversight will be maintained by the tribe?[4]

When the answer to these questions is "the tribal government," the tribe has sovereignty. To the extent that the answer to these questions is "a non-tribal government," tribal sovereignty is compromised.

Sovereignty is an inherent attribute of nationhood. It is not conferred or granted by other entities, including other nation-states. However, a nation's sovereign status may be acknowledged or affirmed by others' statements and acts.

(1) Tribes' Understandings

While the terms "nation" or "tribe" may themselves have been introduced, the concepts of sovereignty and self-determination have deep roots among Native peoples here. Consider, for example, the understandings of sovereignty expressed in these statements by various Native leaders:[5]

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[3] *See, generally*, Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harvard Faculty Research Working Paper Series, March 2004).

[4] This framework for thinking about the scope of tribal sovereignty, and this roster of questions, draws from that posed by Kalt & Singer, *id.* at 5-6.

[5] Excerpted from the transcripts of video-recorded statements by the tribal leaders, available on the website of the Native Nations Institute (NNI). "Located on Tohono O'odham Nation traditional homelands, … [NNI] was founded in 2001 by The University of Arizona and the Morris K. Udall and Stewart L. Udall Foundation as a self-determination, self-governance, and development resource for Native nations. It is housed at the university's Udall Center for Studies in Public Policy. NNI assists in building capable Native nations that can effectively pursue and ultimately realize their own political, economic, and community development objectives. This effort, which we call nation building, is the central focus of NNI's programs." http://nni.arizona.edu/about-us.

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Wilma Mankiller, Cherokee Nation
https://nnigovernance.arizona.edu/wilma-mankiller-governance-leadership-and-cherokee-nation

"I think that the sovereign rights of tribes are inherent. And I think that when thinking about that sovereign it's important to remind everyday Americans that tribal governments existed before there was a United States government and that many tribes, including the Cherokee Nation, had treaties with other governments before they had a treaty with the first U.S. colony."

"So the definition of sovereignty is to have control over your own lands and resources and assets, and to have control over your own vision for the future, and to be able to have absolute, to absolutely determine your own destiny."

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Brian Cladoosby, Swinomish Indian Tribal Community
https://nnigovernance.arizona.edu/honoring-nations-brian-cladoosby-sovereignty-today

"If you give Indians the resources, time, and opportunities to solve any problems we face, there is nothing we can't do. That's sovereignty."

"We need our non-Indian friends and institutions, but the best solutions to problems in Indian Country always come from Indian Country. That's sovereignty."

"We've been solving problems in Indian Country for thousands of years. That's sovereignty."

"We'll keep solving them if our friends live up to their promises and let us take care of our own future."

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Frank Ettawageshik, Little Traverse Bay Bands of Odawa
https://nnigovernance.arizona.edu/frank-ettawageshik-reforming-little-traverse-bay-bands-odawa-constitution-what-we-did-and-why

"We, the Little Traverse Bay Bands of Odawa Indians, speak through this document to assert that we are a distinct Nation of Anishinaabeg of North America that possess the right to self determination, freely determine our political status, freely pursue our economic, social, religious and cultural development and determine our membership without external interference. These same rights and principles that the Little Traverse Bay Bands of Odawa

> *Indians acknowledge to be inherent among other peoples, nations and governments throughout the world. We recognize their sovereignty and pledge to maintain relations with those peoples, nations and governments who acknowledge those same fundamental rights and principles and who recognize the sovereignty of the Little Traverse Bay Bands of Odawa Indians."*

Having considered some tribal perspectives on Native nations' sovereignty today, we turn now to the perspective of the United States.

(2) United States' Understanding

While the concept of self-rule is straightforward, tribal self-rule has not been recognized and supported in its fullest sense on this continent. Rather, tribal sovereignty is understood by the United States to have particular contours. This understanding, moreover, is complex and evolving.

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(a) Early United States

Native nations' distinct sovereign status has long been affirmed by the United States.

1. Treaties

This understanding is evidenced in part by the fact that the United States entered into treaties with tribal nations. For example, the Supreme Court, in one of its earliest cases dealing with tribes' status within the emerging United States, stated:

> "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."[6]

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Joseph Kalt and Joseph Singer, scholars of tribal governance and Indian law, put it this way:

> "The very act of *treating* is a nation-to-nation form of intergovernmental interaction."[7]

[6] Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832)
[7] Kalt & Singer, *supra* note 3, at 9.

Kalt and Singer go on to explain:

> "Most, but not all, tribes entered [into] treaties with the United States….The resulting treaties did not and do not absorb the tribes into the United States; rather, the reverse is true. The treaties recognize and preserve tribal sovereignty: In return for giving up almost all the land in the U.S., the U.S. made promises to the tribes. It promised to respect their rights over reserved land, and to recognize that those lands would be governed by tribes, not by the state governments."[8]

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Indian law scholar Rob Williams observes that treaties were often created to form alliances between Native and European nations -- or at least to set the terms for the co-existence of Native and European peoples on this continent.[9] As Williams elaborates:

> "The European invasion of North America in the seventeenth and eighteenth centuries left the continent's indigenous tribal peoples with little choice but to meet head-on the numerous challenges of creating and sustaining cooperative relationships and firm alliances with the newcomers to their lands…. To prevent European encroachment on their territories and independence, tribes throughout eastern North America strengthened and renewed ancient political institutions, reinvigorated old alliances and tribal confederacies, and in many instances sought to "link arms together" with European newcomers through treaties negotiated according to indigenous North American visions of law and peace in a multicultural world."[10]

2. Constitution, Other Sources

Tribes' status as sovereigns within the tri-partite federal system is also recognized by the U.S. Constitution. Indian law scholar Matthew Fletcher explains:

> "The Constitution delineates the authorities, duties, and limitations of the United States in relation to the state governments, but the structure and text of the Constitution recognizes two other kids of sovereign entity – foreign nations and Indian tribes. As Justice O'Connor once stated, Indian tribes are the 'third sovereign'."[11]

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[8] *Id.* (citations omitted).
[9] Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994).
[10] *Id.* at 983-84.
[11] MATHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 1.2 (2016).

(b) Indian Law Principles

From the United States' perspective, however, tribes' sovereign status is unique, with complex and evolving contours. These contours have been determined over the years not only by treaties and the Constitution, but also by Acts of Congress, and Supreme Court caselaw.

Fletcher observes that three general, fundamental principles of federal Indian law can be derived from these sources.

> "First, Congress's authority over Indian affairs is plenary and exclusive. As a concomitant principle, the federal government holds obligations to Indian tribes and individual Indians known as the trust responsibility.
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> Second, state governments have no authority to regulate Indian affairs absent express Congressional delegation or granted in accordance with the federal government's trust obligations.
>
> Third, the sovereign authority of Indian tribes is inherent, and not delegated or granted by the United States, but can be limited or restricted by Congress in accordance with its trust responsibility. Congress must clearly express its intent to abrogate an aspect of tribal sovereignty."[12]

Each of these three principles warrants discussion in far more detail than we have time for here. Nonetheless, with even this summary, we can begin to appreciate that the United States' understanding of tribal nations' sovereignty is different from its understanding of foreign nations' sovereignty. We can see that, from the perspective of the United States, the sovereign status of the Lummi Nation or the Hopi Tribe or the Forest County Potawatomi Community is different from the sovereign status of France.

While the United States on the one hand clearly recognizes tribes within its boundaries as a "third sovereign" within the federal system, the U.S. on the other hand also clearly asserts limitations on tribal self-rule. Most notably, as Fletcher puts it "Congress asserts – and the Supreme Court recognizes – a plenary power over Indian affairs."[13] The specter of this sweeping, potentially absolute congressional power remains as a qualification on more robust claims of tribal sovereignty.

(c) Eras of Federal Indian Law and Policy

Additionally, it is important to note that the United States' understanding of its relation to tribal nations has fluctuated dramatically throughout American history – officially embracing policies as divergent as encouraging nation-to-nation treaty-making, to "terminating" tribes as governmental entities, to forcing

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[12] *Id.*
[13] *Id.* at §2.3.

the assimilation of Native people into the mainstream of non-Native society -- to, finally, in the present era, affirming tribal sovereignty and supporting tribal self-determination.[14] The divergent and often conflicting goals of these historical eras have left a legacy that continues to present extraordinarily complex challenges for tribal governance today.

Yet, every U.S. presidential administration since the 1960s has denounced former efforts to exterminate tribal governments and assimilate tribal people, and has instead called for enhancing tribal sovereignty, and increasing tribal self-governance -- as a means of encouraging economic development and social well-being. For more than five decades, then, United States' Indian policy has been in what is known as the "Self-Determination Era."[15]

(d) The Current Era

During this era, there have been numerous examples of efforts within Congress and the Executive branch to honor the federal government's commitment to tribal self-determination and to support tribes' efforts to enhance tribal governance, develop tribal economies, and improve the health and prospects of tribal members. However, while official federal policy continues to affirm tribal sovereignty, the judicial branch in particular has recently moved in the opposite direction. As Kalt and Singer observe:

> "Over the last decade in particular, the Supreme Court has moved repeatedly to limit tribal powers over nonmembers. Lower courts have fed this process with decisions that increasingly rein in the ability of tribal governments to govern commerce and social affairs on their reservations."[16]

When tribes exercise their sovereignty or jurisdiction, it is still frequently the case that their authority to do so is challenged in court. If the Supreme Court remains hostile to tribes' claims, tribes' ability to govern – to exercise their sovereignty in practice – is threatened.

Tribes today continue to exist as distinct sovereigns within the boundaries of the United States. They are governments, with obligations to ensure the health and well-being of their citizens. The Preamble to the Constitution of the Quinault Indian Nation, for example, emphasizes the tribe's responsibility to preserve its "land base, culture and identity."[17] Tribes are, in this respect, not unlike the state and United States governments, alongside which they act in our tri-partite system. Although the contours of the relationship between these sovereigns have shifted over time and remain complex, tribes are recognized as having a unique political and legal status. This status sets tribes apart from every other community or group that might be affected by decisions about natural, cultural, or intellectual

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[14] *See, generally*, *id.* at §1.3.
[15] *Id.*
[16] Kalt & Singer, *supra* note 3, at 3.
[17] QUINAULT INDIAN NATION, CONSTITUTION OF THE QUINAULT INDIAN NATION (1975), http://209.206.175.157/Quinault%20constitution.htm.

resources. This status differentiates tribes from other identifiable groups within the general population, and from other governmental entities with whom researchers might seek to collaborate.

Now we turn to the second way in which tribes are unique.

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II. Tribes' Legal Rights to Lands and Resources

Tribes are unique because they have certain legal rights to the lands and resources on which they have historically depended.

A. General Legal Rights of Tribes

Tribes have various rights to use the lands and resources on which they have historically depended; these rights have been recognized in countless treaties, agreements, and executive orders and have been affirmed in numerous court decisions. Here, again, it is important to note that each tribal nation is different, and that various tribes' rights have been recognized by a range of legal mechanisms. The legal bases recognizing Alaska Natives' rights, for example, differ from those affirming Native Hawaiians' rights, and so on, and it will always be necessary to research and understand the law applicable to a particular tribal nation. Still, it is possible to highlight some generalities across tribes.

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According to the leading treatise, Felix Cohen's Handbook of Federal Indian Law:

> "Tribes generally retain exclusive rights to the use of land and resources within their territories, unless those rights have been abrogated by treaty or statute."[18]

Many tribes also have non-exclusive rights to the use of land and resources outside of their territories or reservations.

> "Many tribes … reserved hunting, fishing, and gathering rights on lands ceded to the federal government by treaty, or by agreement subsequently ratified by statute."[19]

These rights to access, harvest, and use natural resources are rights that inhere in specific tribes. Fishing rights, for example, belong to a particular tribe – for example, the Nez Perce tribe or the Penobscot Nation – and not to "Indians" more generally as a racial or ethnic group.[20] While these rights can be

[18] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW §17.01 (2012 ed.).
[19] *Id.* at §18.04.
[20] *See* Kalt & Singer, *supra* note 3, at 13.

exercised by individual Nez Perce or Penobscot tribal members, the rights are not individual rights but a tribal right – that is, the right is a sort of property right that belongs to the tribe itself.

Federal support for tribal management of their natural resources – like federal support for tribal governmental authority more generally – is complex and evolving. As is the case more generally, the three branches of the federal government have taken a variety of actions that have sometimes enhanced and sometimes undermined tribal use and management of the lands and resources to which they have rights.

In the discussion that follows, we will examine one example – that of treaty-secured fishing rights held by tribes in the Pacific Northwest.[21] This example is useful in part because it pertains to off-reservation rights that have been reserved by the tribes – a category of tribes' unique rights that is often misunderstood – and in part because it illustrates federal courts' role in recognizing the scope and reach of tribal rights to use and manage tribal natural resources.

B. Example of Pacific Northwest Treaty-Secured Fishing Rights

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Tribes in the Pacific Northwest are fishing peoples. Fish and all of the lifeways that go with the fish are essential to tribal health and well-being, today as in the past. Every facet of managing, harvesting, distributing, and honoring the fish is woven into the fabric of tribal life.

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For the fishing tribes, these lifeways pre-dated European contact. Tribes' *rights* to fish are thus aboriginal in origin. By means of various treaties the tribes in the Pacific Northwest ceded vast expanses of their aboriginal lands to the United States. The tribes, however, *reserved* the right to continue to fish, hunt, and gather – and secured a guarantee from the United States that this right would be protected in perpetuity.

For example, the Treaty of Point Elliott provides that "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory...."[22]

However, it did not take long before the tribes' treaty-secured fishing rights were threatened, as European settlers sought to bar tribal access to traditional fishing places; to prohibit tribal members from fishing by physical violence or the threat thereof; and to use fishing devices and methods that took the bulk of the fish for themselves. Thus, the tribes soon found themselves in court having to defend their rights. And the tribes have had to continue this effort into the present.

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[21] This discussion draws heavily from Catherine A. O'Neill, *Fishable Waters*, 1 AM. INDIAN L. J. 181 (2013).
[22] Treaty with the Duwamish, Jan. 22, 1855, U.S.-Duwamish, art. V, 12 Stat. 927 (1859).

Over the years, U.S. courts have affirmed several important aspects of the tribes' treaty-secured rights to take fish. Early on, the courts emphasized that all of the rights not expressly relinquished by the tribes were retained. This remains a crucial tenet of federal Indian Law. According to the U.S. Supreme Court, treaties represent "not a grant of rights to the Indians, but a grant of rights *from* them – a reservation of those not granted."[23]

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U.S. courts have also held that the right to take fish necessarily includes a right of access to tribal fishers. As explained in Cohen's Handbook of Federal Indian Law:

> "Off-reservation hunting, fishing, and gathering rights are servitudes over the burdened lands. Neither states nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights."[24]

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In the 1970s, in a well-known case titled *U.S. v. Washington* but often referred to as "the Boldt Decision" after the federal district judge who authored it, the court found that:

> "The treaty clauses regarding off-reservation fishing …secured to the Indians rights, privileges and immunities distinct from those of other citizens."[25]

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Other facets of the right to take fish have also been adjudicated by U.S. courts over the years, including, importantly, tribal governments' status as co-managers, along with the state of Washington, of the off-reservation fishery resource.

Most recently, in a subproceeding of *U.S. v. Washington*, the federal district court has been called upon to address a threat to tribes' treaty rights posed by environmental degradation.

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In what is known colloquially as the Culverts case, filed in 2001, the tribes cited evidence that the state of Washington had improperly maintained culverts around the state, with the result that miles and miles

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[23] United States v. Winans, 198 U.S. 371, 381 (1905).
[24] COHEN, *supra* note 18, at §18.04.
[25] United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974).

of salmon habitat were blocked. This contributed to a decline in salmon numbers and thus an erosion of tribes' ability actually to *exercise* their treaty-guaranteed right to take fish.

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In 2007, the district court sided with the tribes. Judge Martinez quoted the Supreme Court's earlier work in the *U.S. v. Washington* line of decisions, which had inquired into the treating parties' likely understandings at the time the treaties were negotiated in the 1850s.

> During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and [] *Governor [Stevens]'s promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent*.[26]

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Judge Martinez next spoke to the parties' likely understandings regarding the prospect of environmental degradation. He observed, "[i]t was not deemed necessary to write any protection for the resource into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary."[27]

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He then quoted historian Joseph Taylor:

> During 1854-55, white settlement had not yet damaged Puget Sound fisheries. During those years, Indians continued to harvest fish for subsistence and trade as they had in the past. Given the slow pace of white settlement and its limited and localized environmental impact, Indians had no reason to believe during the period of treaty negotiations that white settlers would interfere, either directly through their own harvest or indirectly through their environmental impacts, with Indian fisheries in the future. During treaty negotiations, Indians, like whites, assumed their cherished fisheries would remain robust forever.[28]

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[26] Order on Cross-Motions for Summary Judgment, United States v. Washington, 2007 WL 2437166 at *7 (W.D. Wash.) (quoting State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, internal citation omitted, emphasis added by Judge Martinez).
[27] *Id*. at *9.
[28] *Id.* (quoting Declaration of historian Joseph E. Taylor, III).

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Thus, Judge Martinez concluded:

> [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. 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.[29]

The significance of the Culverts order was widely and immediately recognized. Although the state of Washington and the tribal parties attempted to settle upon a schedule for the state to fix its stream-blocking culverts, they were unsuccessful so went back to court in 2010. In March of2013, Judge Martinez again sided with the tribes.

Judge Martinez decided this case in view of the discrete set of facts before him, carefully avoiding a broad, acontextual pronouncement about the scope of treaty protections for fish habitat. Yet, the Culverts decision can fairly be read to confirm the point that, as successors to the negotiators, federal and state governments may be held to account for the actions they take – or permit others to take – that significantly compromise the treaty resource.

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In view of the potential import of this decision, it is perhaps unsurprising that the State of Washington filed an appeal to the Ninth Circuit in May of 2013. The Ninth Circuit has heard oral argument in this case, but, as of May, 2016, has yet to issue its decision.[30]

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We wish to emphasize that this is but one example, and that the analysis we have summarized here applies specifically to this example, i.e., that of treaty-secured fishing rights. However, this example highlights the fact that tribes have legal rights to lands and resources that are distinct from any fishing privileges enjoyed by non-tribal citizens; it highlights the fact that tribal governments have co-management authority for the fish resource – a sovereign authority that extends beyond their reservation borders; it highlights the reserved nature of the tribes' fishing right – that it is not a special right bestowed by the federal government but an aboriginal right retained by the tribes; and it highlights the role of U.S. courts in delineating the scope of the right in practice – for good or for ill. All of these

[29] *Id.* at *10.

[30] On June 27, 2016, the Ninth Circuit affirmed the district court's ruling in favor of the tribes. U.S. v. Washington Case No. 13-35474 (9th Cir. 2016), https://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/27/13-35474.pdf.

points would need to be understood by a researcher whose work implicated tribal harvest, use, or management of the fish resource.

A third way in which tribes are unique also needs to be appreciated by researchers seeking to collaborate with tribes: tribes and tribal people have particular historical experiences that are not shared by other individuals or groups within the United States.

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III. Tribes' Unique Historical Experiences

Tribes are unique because of their particular historical experiences within the United States – experiences that have too often included prosecution, intimidation, and discrimination. These experiences have shaped everything from tribal resistance to participating in scientific research conceived by outsiders to tribes' regulation of tribal natural, cultural, and intellectual resources.

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Throughout American history, even into the modern era when the United States had formally recognized tribal sovereignty and officially embraced tribal self-determination, tribes and tribal people have experienced violence, prosecution, intimidation, discrimination, and other harms when they have sought to exercise their rights to use and manage their natural, intellectual, and cultural resources. These decades, in fact, have contained many grim chapters, during which the United States government sought literally or figuratively to "kill the Indian" -- to destroy tribal languages and cultures, to impose Christian religions, to dismantle tribal ownership of their homelands, and to thwart Native peoples' ability to fish, hunt, gather and otherwise manage their resources.

These years also witnessed physical and ethical abuses by government- and university-supported scientists.

Tribal people were deeply traumatized by these experiences; they still remember them and talk about them. Tribal people carry the scars of these days, and these scars, understandably, affect their responses to outside researchers hoping to collaborate with tribes. Many non-tribal researchers, however, have not been sufficiently aware of tribes' historical circumstances – generally and with respect to particular tribes – and thus have not appreciated the ongoing legacy of these traumatic experiences. As a result, they have too often misinterpreted data or misframed research questions; prioritized projects that were of little benefit to the tribe that was the "subject" of their study; exploited intellectual, cultural, or biological data and materials for unauthorized purposes; or employed conventions, assumptions, and methods that were not appropriate.

While tribal governments today may seek to encourage research that will be of benefit to the tribe, at the same time, they may be wary of government- and university-supported scientists.

A. History and Legacy of the Fishing Wars in the Pacific Northwest

Consider, for example, the need to appreciate the history and legacy of the "fishing wars" if one is seeking to understand fish consumption practices among tribal people in the Pacific Northwest and to interpret data afforded by conventional fish intake surveys – which take a snapshot of contemporary fish consumption rates.

As Barbara Harper and Jamie Donatuto point out, the conventional approach is not culturally appropriate and thus leads to results that are not accurate.[31] They identify six common methodological flaws when conventional approaches are simply applied to assess tribal fish intake. They also emphasize the fundamental error that is made when researchers focus on contemporary practices given that tribal people's contemporary fish intake is "suppressed" relative to historical or "heritage" practices. That is, tribes are able to harvest and consume less fish today due to depletion and contamination of the fish resource; lack of access to fishing places; shellfish harvesting closures; and years of prosecution, intimidation, and gear confiscation. The resulting fish consumption rate derived by conventional research methods will therefore be biased downward.

Importantly, given that these tribes have treaty-secured rights to harvest and consume fish, an appropriate research question from tribes' perspectives might not be to ascertain contemporary, suppressed practices but might instead be to ascertain "heritage" rates consonant with the robust intake guaranteed by treaties. This would be matter for each tribe to determine for itself, of course, but recent surveys of tribal fish consumption practices by the Lummi Nation and by the Nez Perce tribe have pursued such alternatively framed research questions.

To understand one facet of Harper and Donatuto's observations about the flaws in conventional methods and assumptions, researchers need to appreciate the legacy of the "fishing wars" of the 1960s and 1970s. Some fishing families had their gear confiscated during these years, and, deprived of the means to earn their livelihood, they were never able to scrape together the money to buy new boats and gear. Families that had, for generations, always had fish to eat, today are forced to look elsewhere for work and food, and are often forced to participate in the cash economy or to rely heavily on government commodity foods.

[31] Jamie Donatuto & Barbara L. Harper, *Issues in Evaluating Fish Consumption Rates for Native American Tribes*, 28 RISK ANALYSIS 1497 (2008).

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Consider, for example, the following accounts by tribal fishers and their families:[32]

Georgiana Kautz and Nugent Kautz, Nisqually

GK: "They [tribal fishermen] started going to jail. There were fights along the river. I mean, these guys [Washington State Department of Game and other State enforcement officers] were out to hurt you. There weren't just doing simple things. They wanted to hurt you, and they wanted to hurt you bad. They'd carry these long flashlights and it was like they were terrorizing the Indians. It was really a hard time and a real struggle, you know, and that's what's so angering is when these guys [tribal fishermen] went to jail, we'd sit home and we'd starve as families. But, you know, it didn't matter to them. But I think the battles were hard – it was hard on families….When we got done, we didn't have anything. They took our boats. They took our nets. Did they take our fish too?"

NK: "Yeah."

GK: "They just took everything from you."

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Phil Martin, Quinault

"Our guys got shot at. They got beat up. They got equipment stolen, and torn up. Just so much happened down there. But we're still – we're still in there fighting."

B. History and Legacy of the Havasupai Experience with University Researchers

To take a second example, consider the need to appreciate the history and legacy of the Havasupai tribe's experience with university researchers.[33]

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[32] Excerpted from *Back to the River*, (video-recording, 2014), https://vimeo.com/58718115. "Back to the River tells the story of the treaty rights struggle from pre-Boldt era to tribal and state co-management. The movie includes the voices and personal accounts of tribal fishers, leaders and others active in the treaty rights fishing struggle." Unedited interviews are available at tribalvoices.salmondefense.org for reuse and remix under a Creative Commons Attribution-NonCommercial 3.0 Unported License.

[33] *See, e.g.*, National Congress of American Indians, American Indian & Alaska Native Genetics Resources Center, "Havasupai Tribe and the Lawsuit Settlement Aftermath," http://genetics.ncai.org/case-study/havasupai-Tribe.cfm.

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The Havasupai tribe's reservation is located near what is now the southwest corner of the Grand Canyon National Park. In the 1960s the Havasupai developed a working relationship with an Arizona State University anthropologist, John Martin. Because the tribe trusted Martin they approached him in 1989 to ask for assistance in determining why the incidence of diabetes had drastically increased. Martin in turn approached a geneticist at Arizona State University (ASU), Therese Markow, to assist in determining if genetic factors were increasing the tribe's risk, as had recently been found to be the case with the Pima Indians.

From 1990 to 1994 blood samples were taken from 100 Havasupai tribal members who had signed a broad consent form authorizing the use of these samples for medical studies. Eventually it was determined that genetics did not play a role in increasing the tribe's diabetes levels. However, unbeknownst to the tribe, the blood samples continued to be used by researchers for other studies purporting to inquire into schizophrenia, metabolic disorders and alcoholism in the tribal population. Later, an ASU graduate student used the blood samples that were still stored in the university's freezers to conduct research for his dissertation. The unauthorized uses of tribal DNA did not come to light until a tribal member present at the doctoral student's dissertation presentation asked if the student had permission to use Havasupai blood for his research.

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This pointed question revealed that "free, prior and informed consent" was lacking in the Havasupai case. As Kim TallBear has observed, the affront was not only to the individuals whose blood and therefore DNA was misused, but also to the tribe as a whole: Tribal self-determination is threatened when "[r]esearchers, funders, government agencies, and non-governmental organizations decide what constitutes legitimate and ethical research in Indian Country."[34]

Additionally, several months later, an ASU investigation discovered two dozen published articles based on the blood samples that Markow had collected. One of the papers posited that the Havasupai tribe had migrated across the Bering Strait – a suggestion that directly contradicts the tribe's traditional origination stories which identify their origins in the Grand Canyon. TallBear takes issue with "researchers [who] study American Indians and become *the* experts that represent us to the world."[35] She observes that scientists' statements about the origins of Native Americans are "debatable from both genetic and anthropological points of view" and argues that:

> "a more important problem is that such statements are authoritative claims to power—the power to define and represent American Indian peoples, to determine according to particular

[34] Kim TallBear, *"Native American DNA": Implications for Citizenship and Identity* 11 (Undated ASU Working Paper, on file with authors).
[35] *Id.* at 8.

> biological and anthropological criteria (not American Indian criteria) which aspects of our bodies, histories, and kinship relations *count* as *true* and *real* in understanding American Indian identity."[36]

In the Havasupai case the researchers substituted their ways of knowing for the tribe's ways of knowing, presenting their perspective as an "objective" "scientific" truth. There are numerous potential issues when researchers are taken to "speak for" a tribe.

For example, as the National Congress of American Indians notes, "if a migration study suggests that a tribe originally came across the Bering Strait from Asia, the results of the study might have political implications and [be used to] challenge tribal sovereignty and land rights."[37]

The Havasupai case illustrates a host of troubling issues. It is important to understand and learn from the history of this and other research efforts in tribal communities. These historical experiences, among other things, may continue to color tribes' responses to outside researchers.

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IV. Toward Respectful Collaboration

As Stuart Harris has argued, the time has come for a new model in which tribes' governmental status is respected; tribes' unique concerns for control over their natural, intellectual and cultural resources and data are addressed; and – crucially – tribes and tribal members are viewed as collaborators in and not subjects of scientific research.

[SLIDES 35 & 36]

This new model, notably, is consonant with the various rights recognized by the UN Declaration on the Rights of Indigenous Peoples.

In closing, we offer a few observations on this new model.

As the National Congress of American Indians (NCAI) has stated:

> Increasingly, tribal leaders acknowledge that research is a key tool of tribal sovereignty in providing data and information to guide community planning, cross-community coordination, and program and policy development….Tribes have used research as a tool of sovereignty to address issues like water quality, early childhood education, cancer, diabetes, and elder care.[38]

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[36] *Id.* at 8-9.
[37] National Congress of American Indians, *supra* note 33.
[38] National Congress of American Indians, *Walk Softly and Listen Carefully' Building Research Relationships with Tribal Communities* 4 (2012),

However, while Native people are "one of the most studied groups in the United States" there is, paradoxically, a dearth of quality data and research that is reliable and relevant to tribal governance – to tribes' efforts to shape policies and develop solutions to the social problems they face.[39] Tribes today are seeking to address this dearth.

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To this end, NCAI offers a set of "core values" for consideration in framing respectful research partnerships involving or affecting tribes.

1. Indigenous knowledge is valid and valued.
2. Culture is always a part of research and thus research cannot be culturally neutral.
3. Responsible stewardship includes the task of learning how to interpret and understand data and research.
4. Tribes must exercise sovereignty when conducting research and managing data.
5. Research must benefit Native people.[40]

Further, NCAI emphasizes that:

> It is crucial for researchers entering into sustainable partnerships with [Native] communities to develop an understanding and respect for: (1) Indigenous cultures and knowledge; (2) tribal sovereignty…; and (3) [tribes'] historic[al experiences] and present-day context.[41]

As Kim TallBear urges, perhaps the most vital step toward ensuring observance of these "core values" and respect for tribes' cultures, sovereignty, and historical experiences is "expansive tribal governance of research."[42] That is, tribes can issue laws, regulations, and policies to manage natural, intellectual, and cultural resource use; to govern use and ownership of tribal data; to craft and enforce tribal ethical protocols; and to otherwise set the terms under which research affecting tribal lands, resources, people, and culture will be conducted.

Several tribal nations have undertaken such governance efforts. These can serve as models for other tribal nations – and should be respected by outside researchers.

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http://www.ncai.org/attachments/PolicyPaper_SpMCHTcjxRRjMEjDnPmesENPzjHTwhOlOWxlWOIWdSrykJuQggG_NCAI-WalkSoftly.pdf.

[39] *Id.* at 14.
[40] *Id.* at 10.
[41] *Id.* at 11.
[42] TallBear, *supra* note 34, at 11.