

Sustaining our Culture: Management and Access to Traditional Plants

Hibulb Cultural Center and Natural History Preserve –
Tulalip

October 12-13, 2011

The Legal Framework for Treaty Gathering Rights

Presented by:

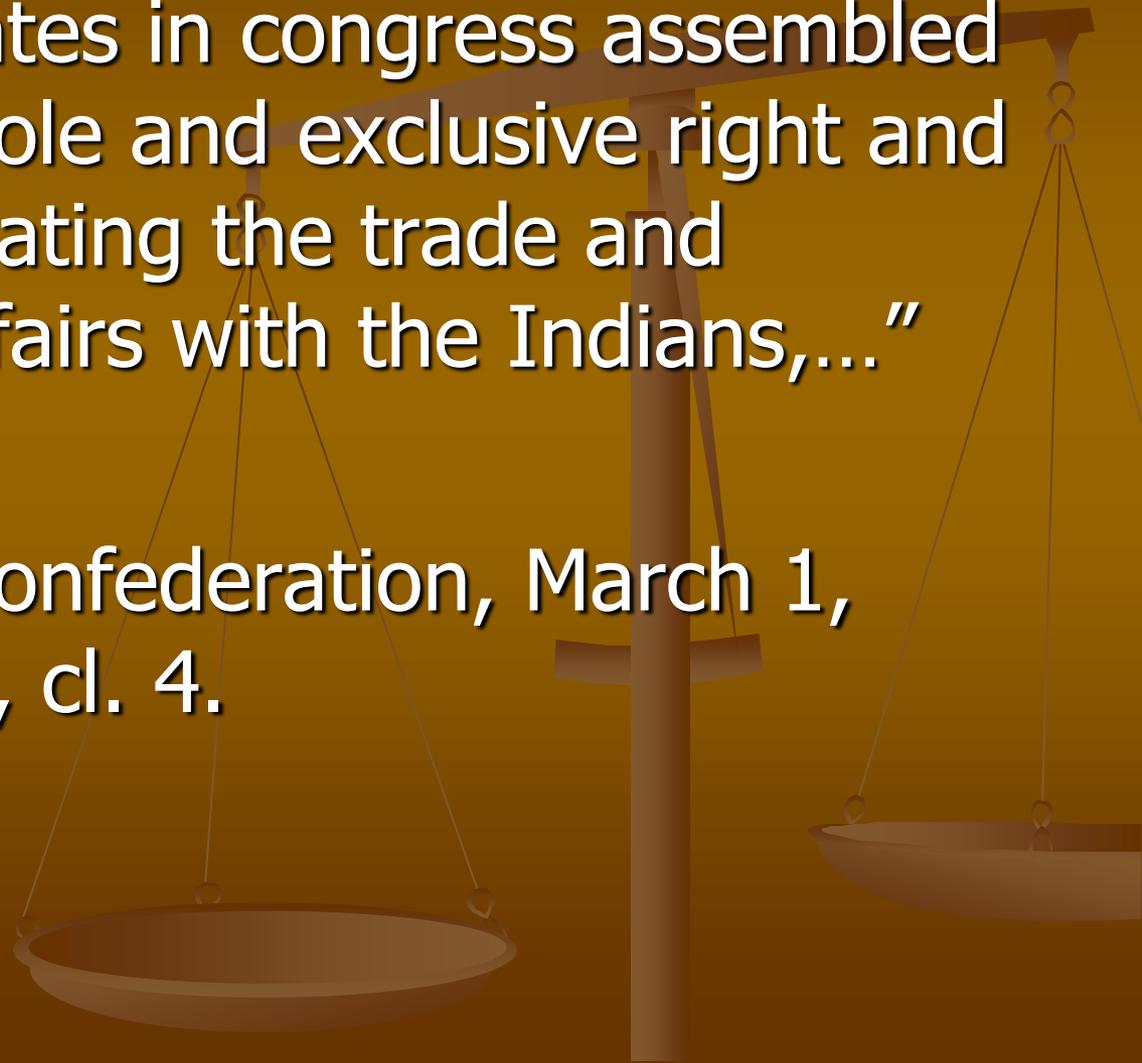
Mason D. Morisset

Attorney at Law
Morisset, Schlosser, Jozwiak &
Somerville
Seattle, WA



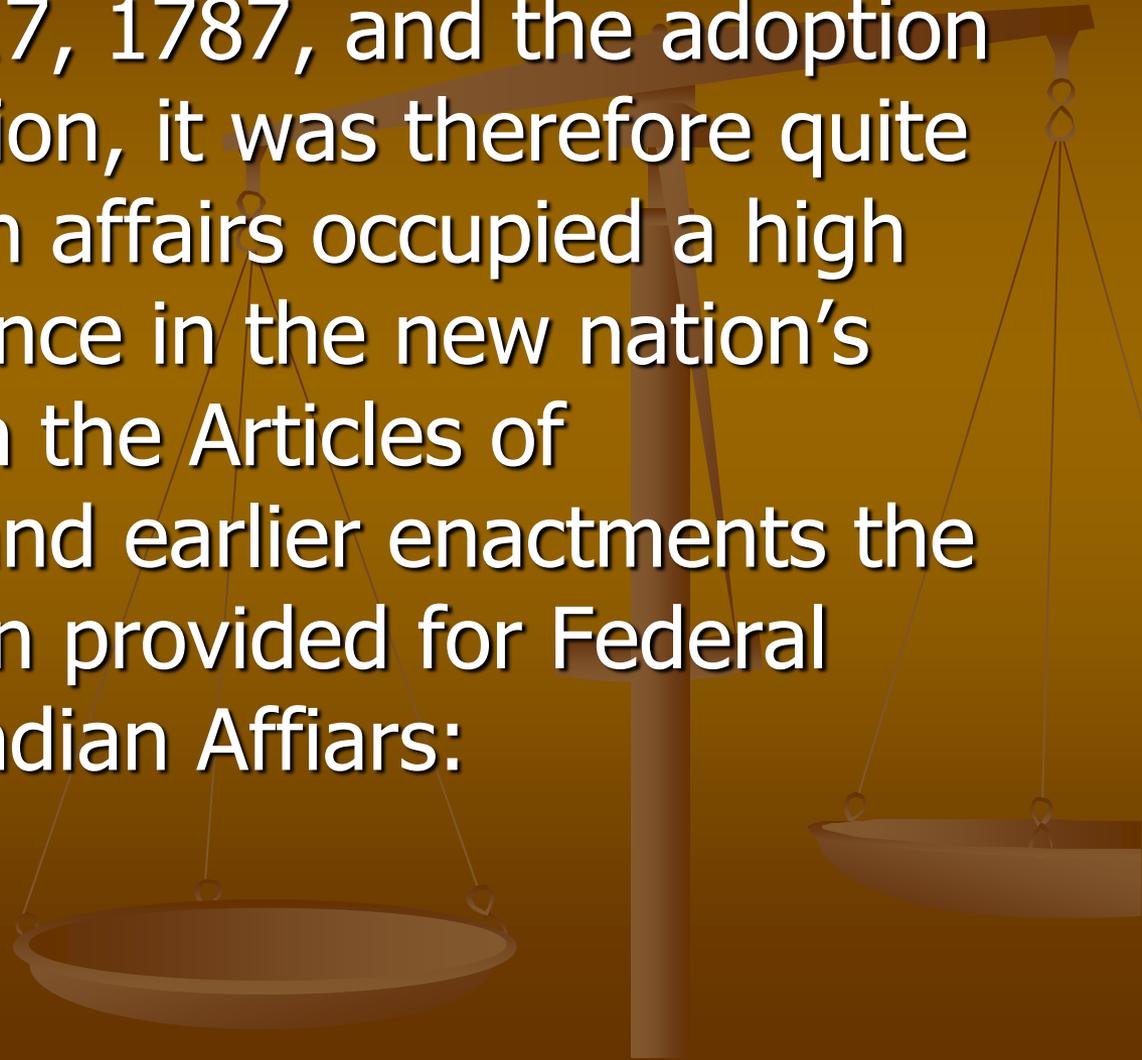
1781: Articles of Confederation

- “The united states in congress assembled shall have the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians,...”
- [1] Articles of Confederation, March 1, 1781; Article IX, cl. 4.



1787: U.S. Constitution

- By September 17, 1787, and the adoption of the Constitution, it was therefore quite clear that Indian affairs occupied a high level of importance in the new nation's life. Building on the Articles of Confederation and earlier enactments the new Constitution provided for Federal supremacy in Indian Affairs:

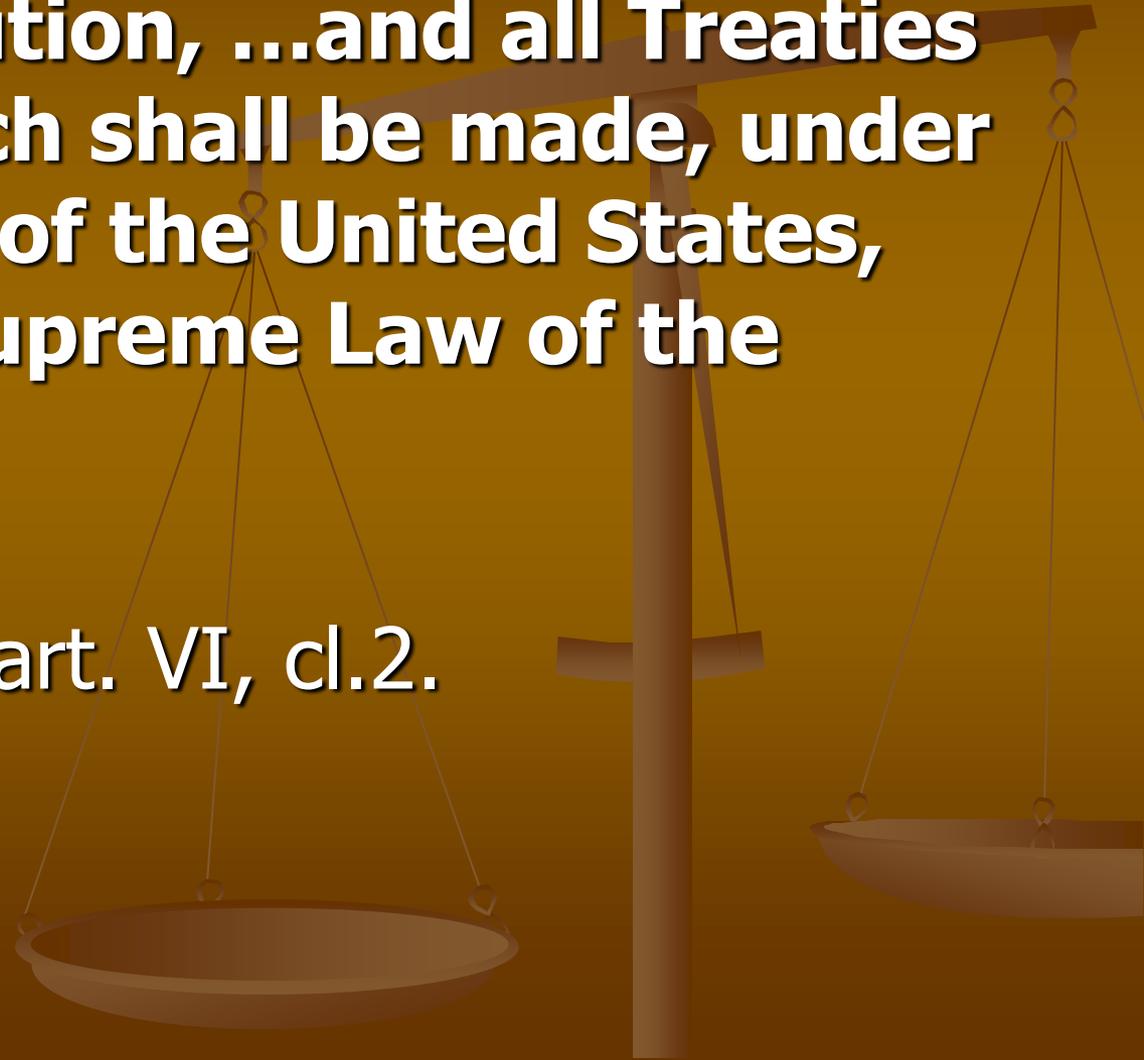


1. The Status of Treaties in American Law

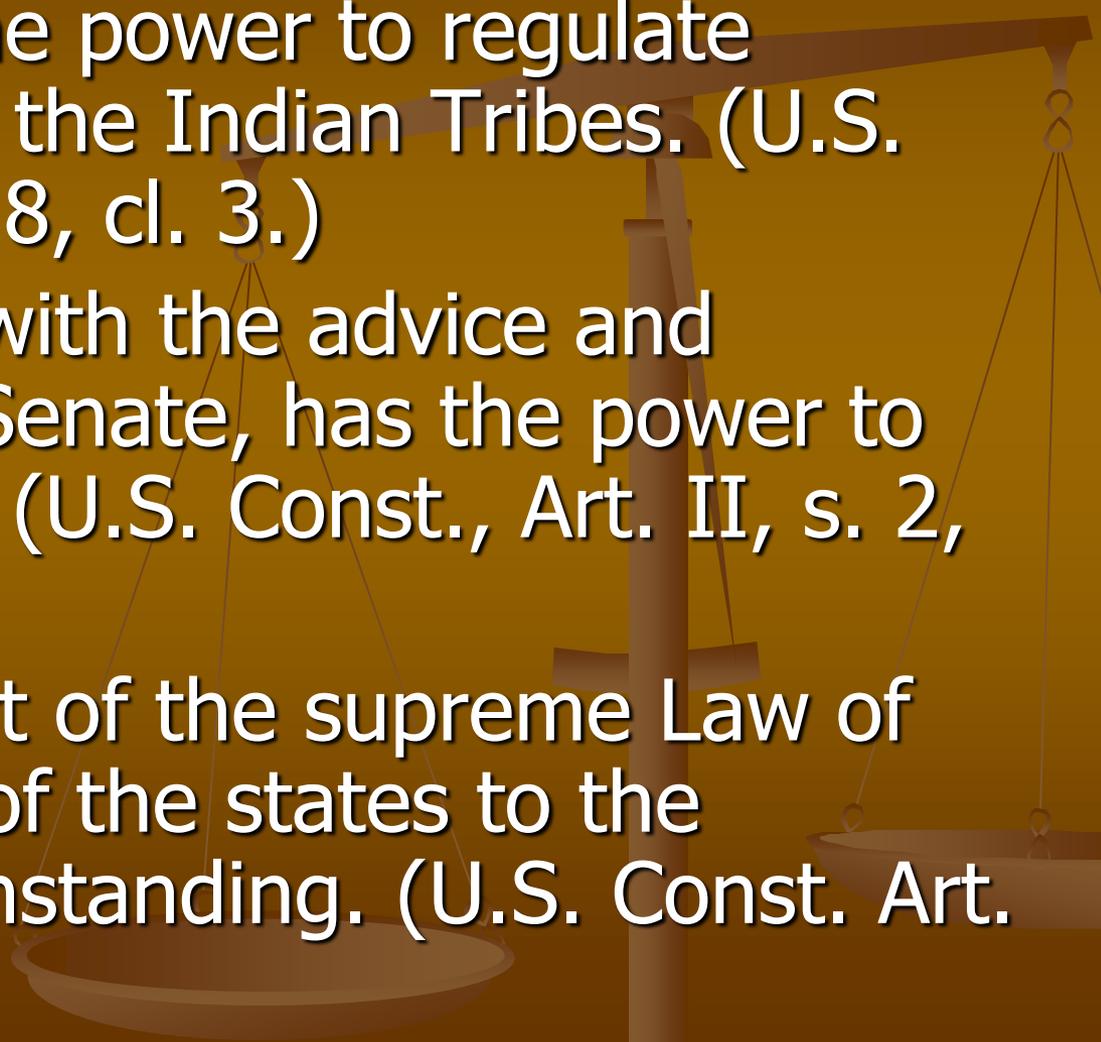
- **“This Constitution, ...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land... .” [1]**



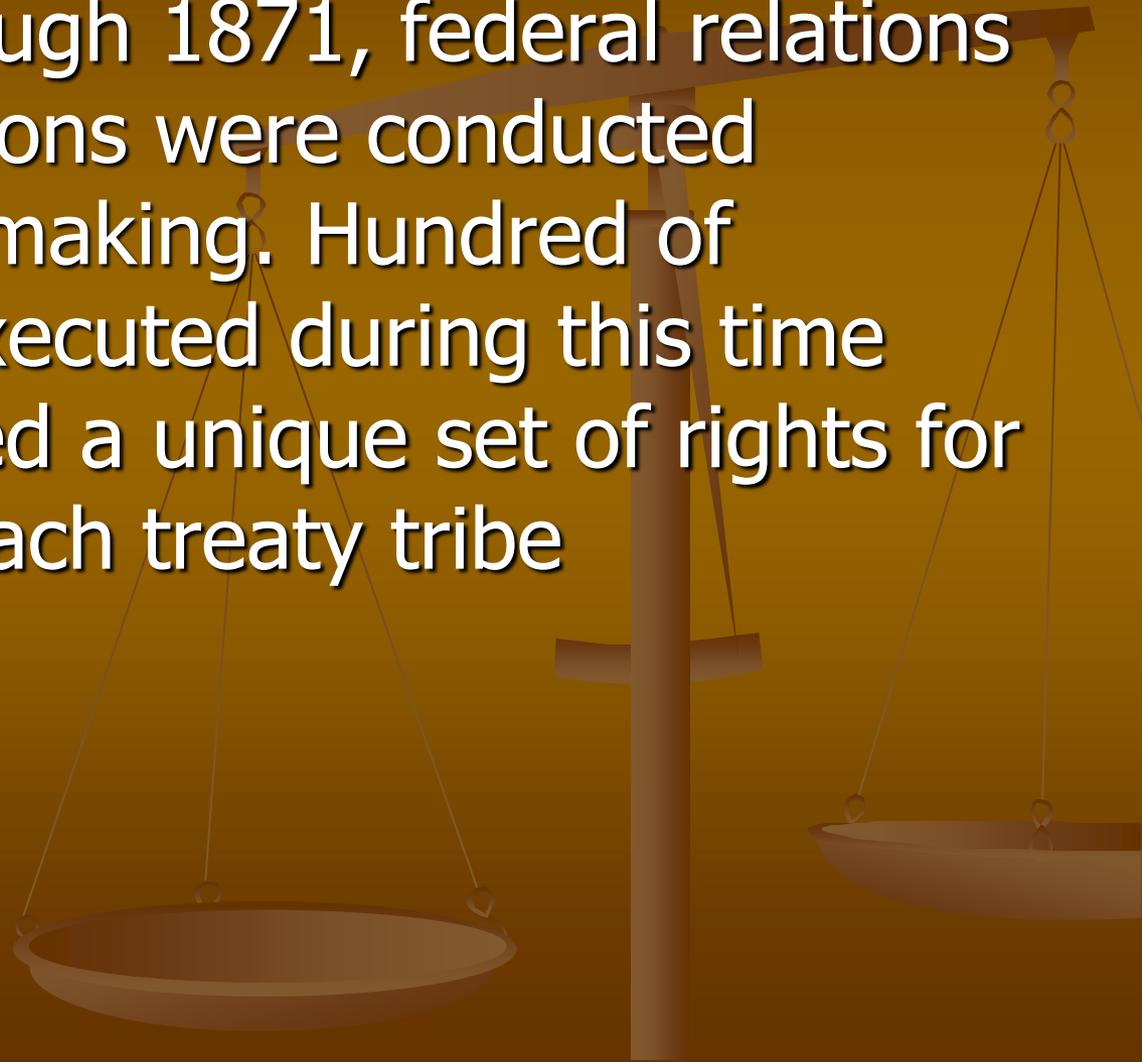
[1] U.S. Const. art. VI, cl.2.



Federal Supremacy in Indian Affairs

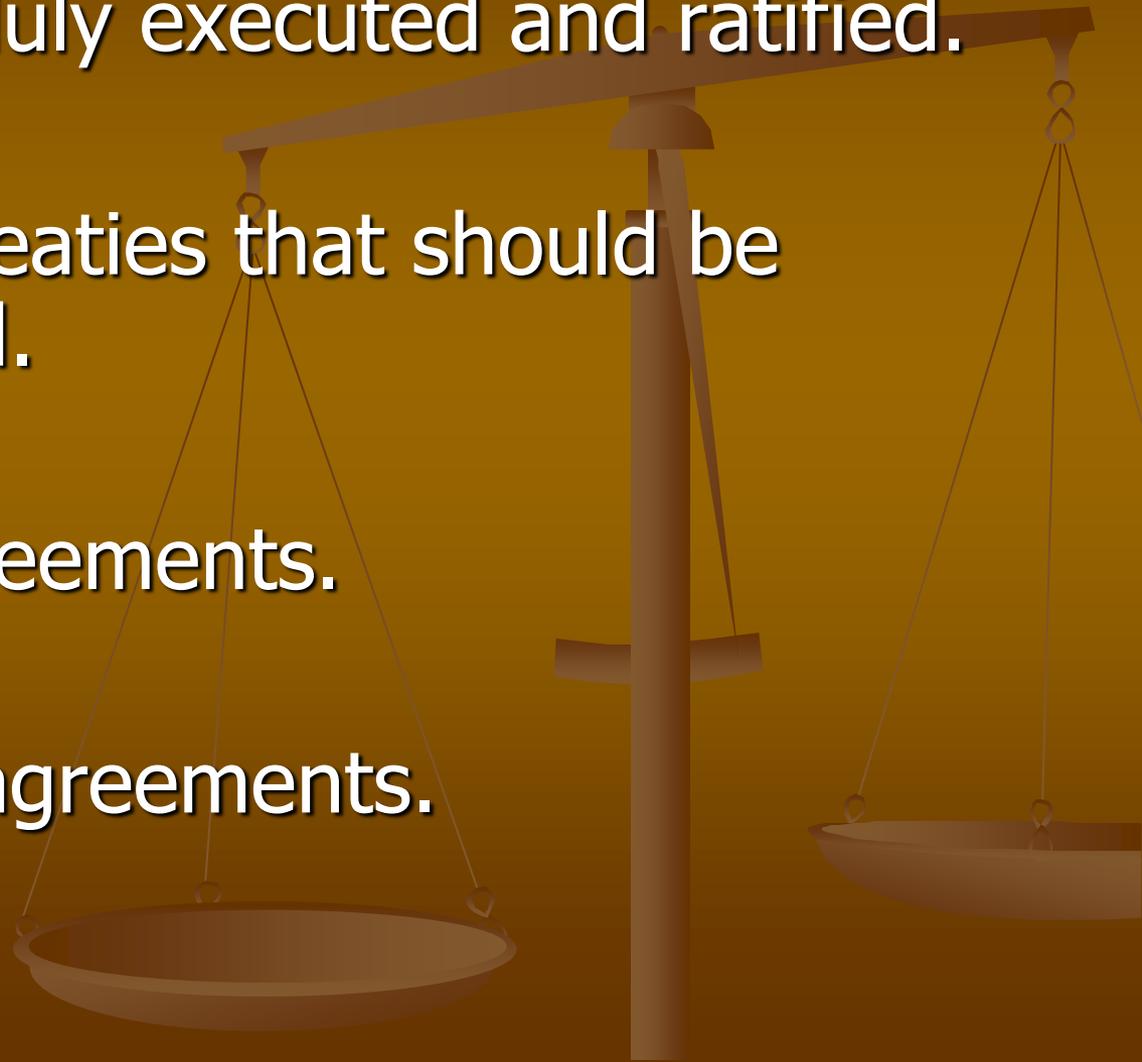
- Congress has the power to regulate Commerce with the Indian Tribes. (U.S. Const. Art. I, s. 8, cl. 3.)
 - The President, with the advice and consent of the Senate, has the power to make Treaties. (U.S. Const., Art. II, s. 2, cl. 2)
 - Treaties are part of the supreme Law of the Land, laws of the states to the contrary notwithstanding. (U.S. Const. Art. VI, cl 2.)
- 

- From 1777 through 1871, federal relations with Indian nations were conducted through treaty-making. Hundred of treaties were executed during this time and each created a unique set of rights for the benefit of each treaty tribe



Treaty Statistics

- - 367 Treaties duly executed and ratified.
-
- - 6 additional treaties that should be considered valid.
- - 73 ratified agreements.
- - 87 unratified agreements.



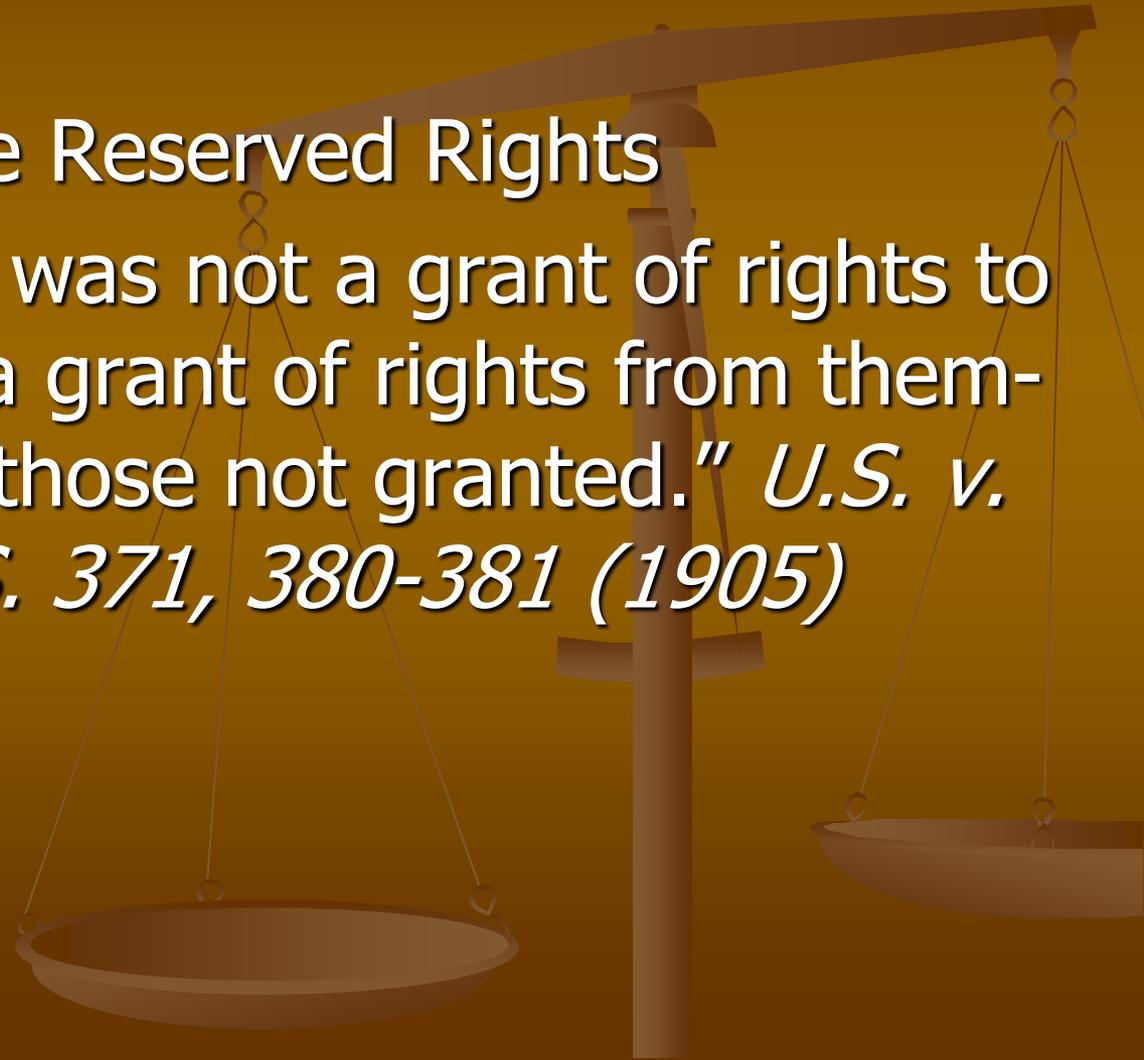
An Example of Northwest Treaty Language:

The right of taking fish at usual and accustomed ground and stations is further secured to said Indians in common with all citizens of the Territory . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. .

Treaty of Point Elliott, Jan. 22, 1855. Art. 5. 12 Stat. 927.

2. Interpreting Treaties

- Treaty Rights are Reserved Rights
- "... [T]he treaty was 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. 371, 380-381 (1905)*



Understanding Treaties

- As will be discussed below, in construing a treaty, the courts apply “canons of construction” which provide for liberal construction in favor of Indians^[1]



^[1] *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996).

- The language used in treaties with the Indians should never be construed to their prejudice "[1]

- The language should be interpreted to the benefit of a tribe, as the Indians would have understood the Treaty's terms in the days it was signed. [2]

- [1] *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

- [2] *Fishing Vessel Ass'n*, 443 U.S. at 675

- A treaty is to “be construed, not according to the technical meaning of its words to learned lawyers, but in a sense in which they would naturally be understood by the Indians.”[1]

- Central to the interpretation of treaties is the review of the history and negotiations of the agreement.[2]

- [1] *Jones v. Meehan*, 175 U.S. 1, 5 (1899).

- [2] *Mille Lacs*, 525 U.S. at 202.

- These canons permit courts to look beyond the four corners of a treaty into outside evidence of the history and the parties' understanding of the terms of the treaty when it was drafted. [1]

■ [1] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

3. Treaty Fishing:

- “The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, [T]he treaty was 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. 371, 380-381 (1905)

The Basis of the Right to Fish

- The scope of Tribal fishing in the United States is explored in the NW treaty fishing rights litigation. In that litigation, the Supreme Court construed the “fishing clause” of several 1854 and 1855 Treaties between the Federal Government which provided that the Tribes reserved the “right of taking fish, at all usual and accustomed grounds and stations...in common with all citizens of the Territory.” Treaty of Medicine Creek. *Washington v. Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 662 (1979).

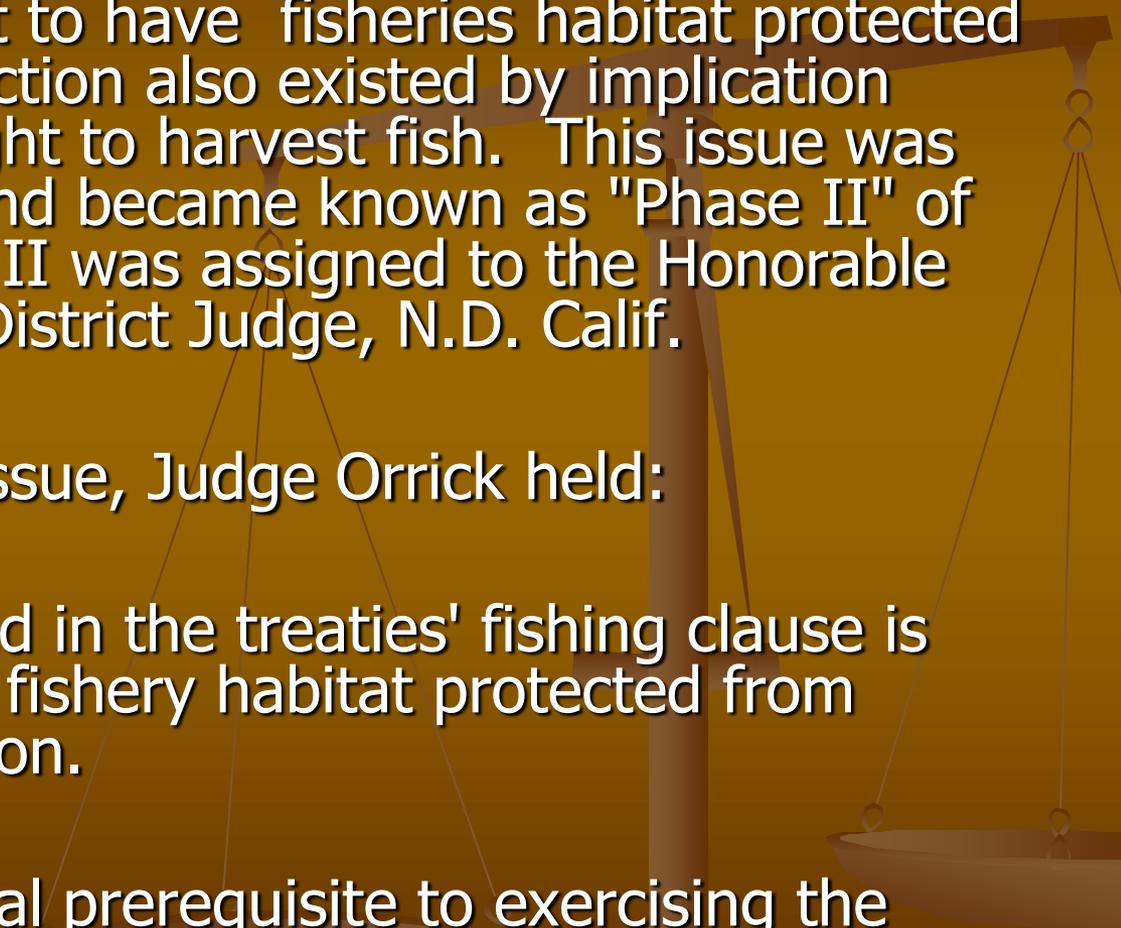
The Scope of the Right to Fish

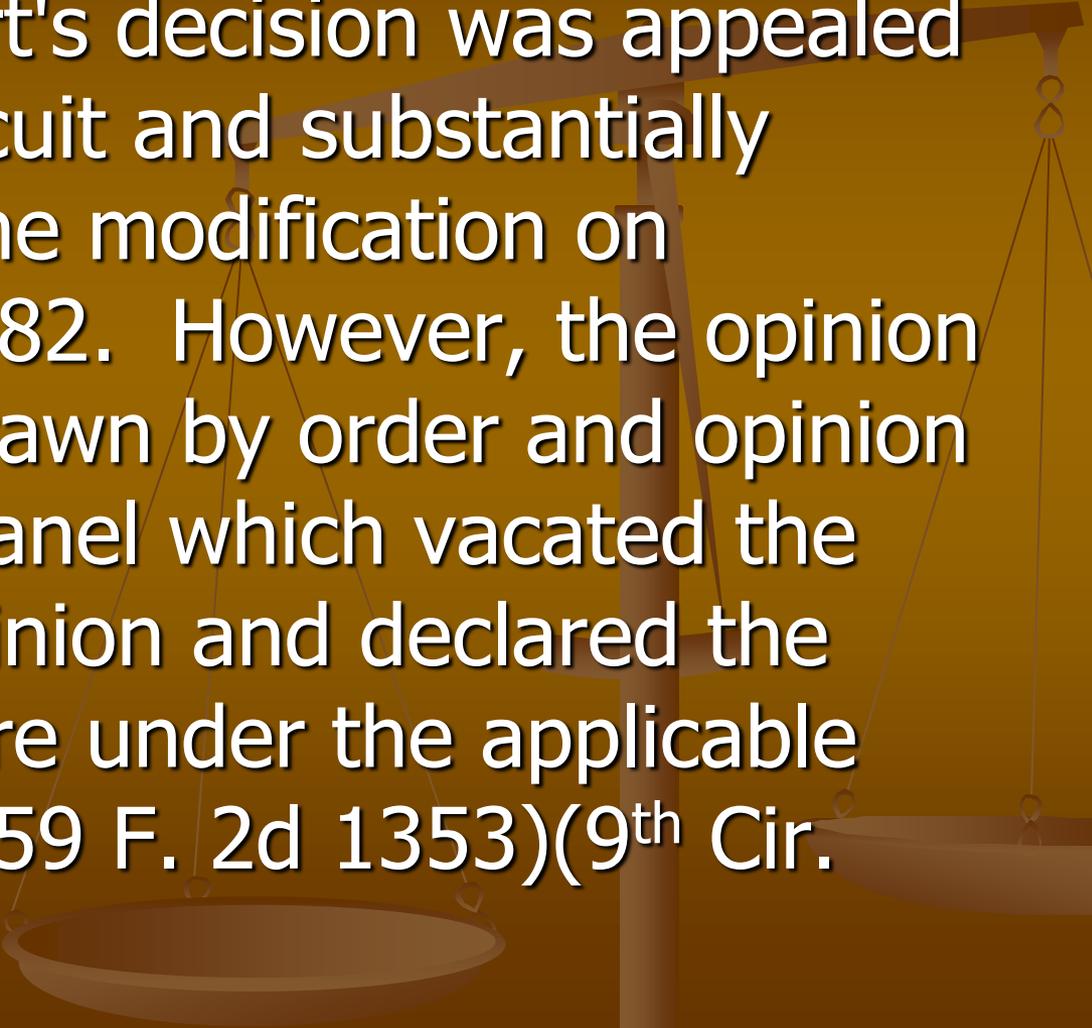
- In affirming a lower court decision entitling tribes to a maximum of 50% of the available harvest at usual and accustomed grounds and stations, the Supreme Court held that the Tribes were entitled to enough fish “. . . necessary to provide the Indians with a livelihood—that is to say a moderate living.” *Washington v. Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 686 (1979).

4. HABITAT: THE TREATY ENVIRONMENTAL RIGHT



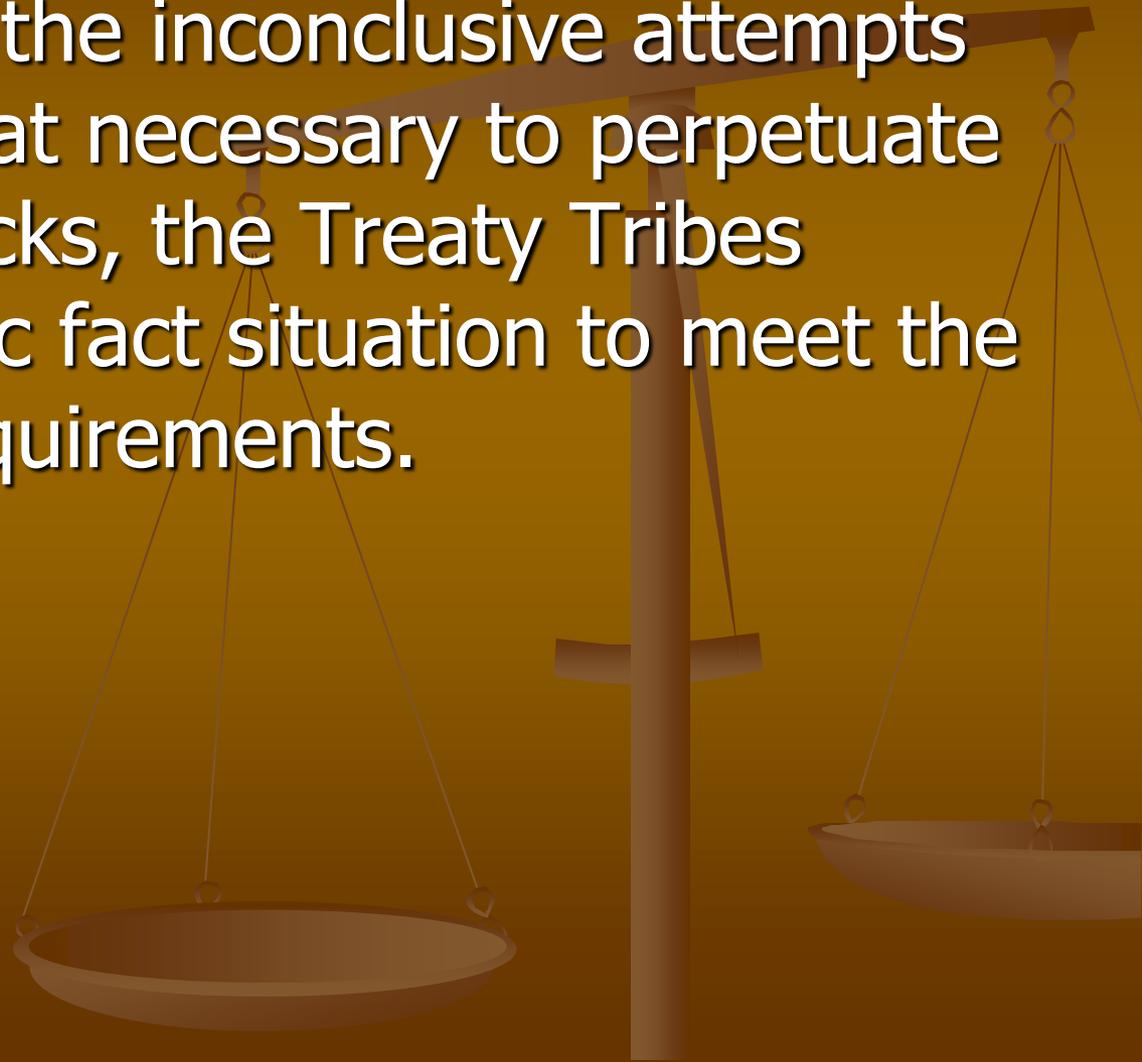
Phase II (Habitat) litigation

- In the initial complaints filed in massive treaty rights case of *United States v. Washington*, the United States government and tribal governments alleged that an "environmental" right to have fisheries habitat protected from adverse state action also existed by implication from the reserved right to harvest fish. This issue was bifurcated for trial, and became known as "Phase II" of the litigation. Phase II was assigned to the Honorable William Orrick, U.S. District Judge, N.D. Calif.
 - In dealing with this issue, Judge Orrick held:
 - Implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.
 - The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.. *U.S. v. Washington*, 506 F. Supp. 187 at 203 (1980)
- 

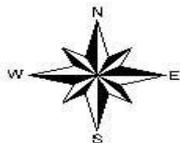
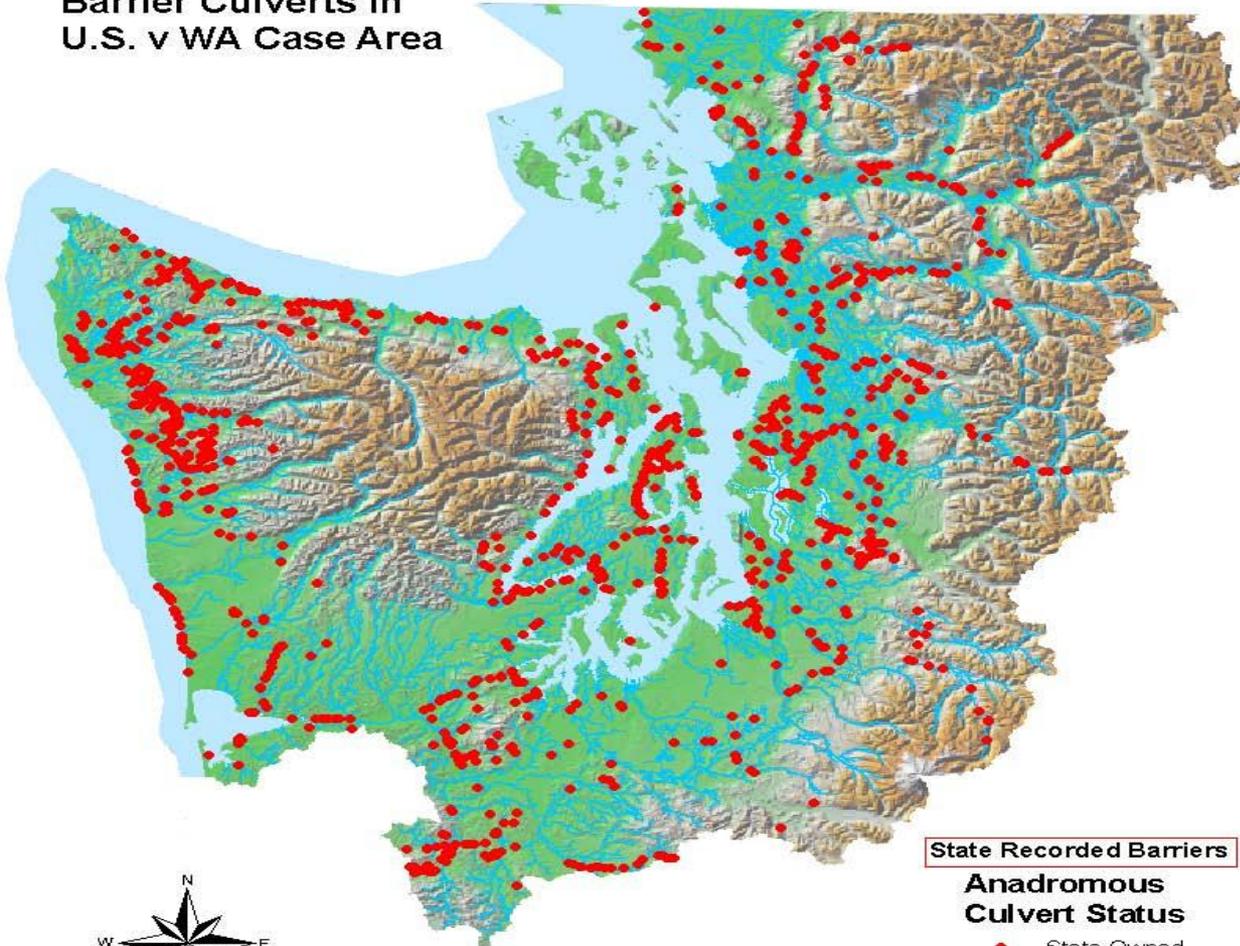
- 
- The district court's decision was appealed to the Ninth Circuit and substantially upheld with some modification on November 3, 1982. However, the opinion was later withdrawn by order and opinion of an *en banc* panel which vacated the district court opinion and declared the appeal premature under the applicable federal rules, (759 F. 2d 1353)(9th Cir. 1985)

The Treaty Tribe's Quest for Habitat Protection

- Frustrated with the inconclusive attempts to protect habitat necessary to perpetuate healthy fish stocks, the Treaty Tribes sought a specific fact situation to meet the Ninth Circuit requirements.



Washington State Barrier Culverts in U.S. v WA Case Area



8 4 0 8 16 24
Miles

Culvert data Sources:
WDFW/DOT FPDSI database 12/2006
DNR Culvert database 12/2006
Note: (1) Map does not depict anadromous barriers of
WA State Parks Dept. or other state agencies not in
FPDSI/DNR provided databases.

State Recorded Barriers

Anadromous Culvert Status

• State Owned
Barrier Culvert
(1337)

— Select
Streams

PI.Ex.: AT-184

C70-9213, 01-1

Admitted: _____



- **Rasmussen Creek (Clallam County)** - Two round culverts under State Route 112 had been built on a steep slope, so the water velocity was too high for most fish swimming upstream. Engineers replaced the culverts with a single concrete archway spanning the stream - ideal "natural" conditions for fish passage

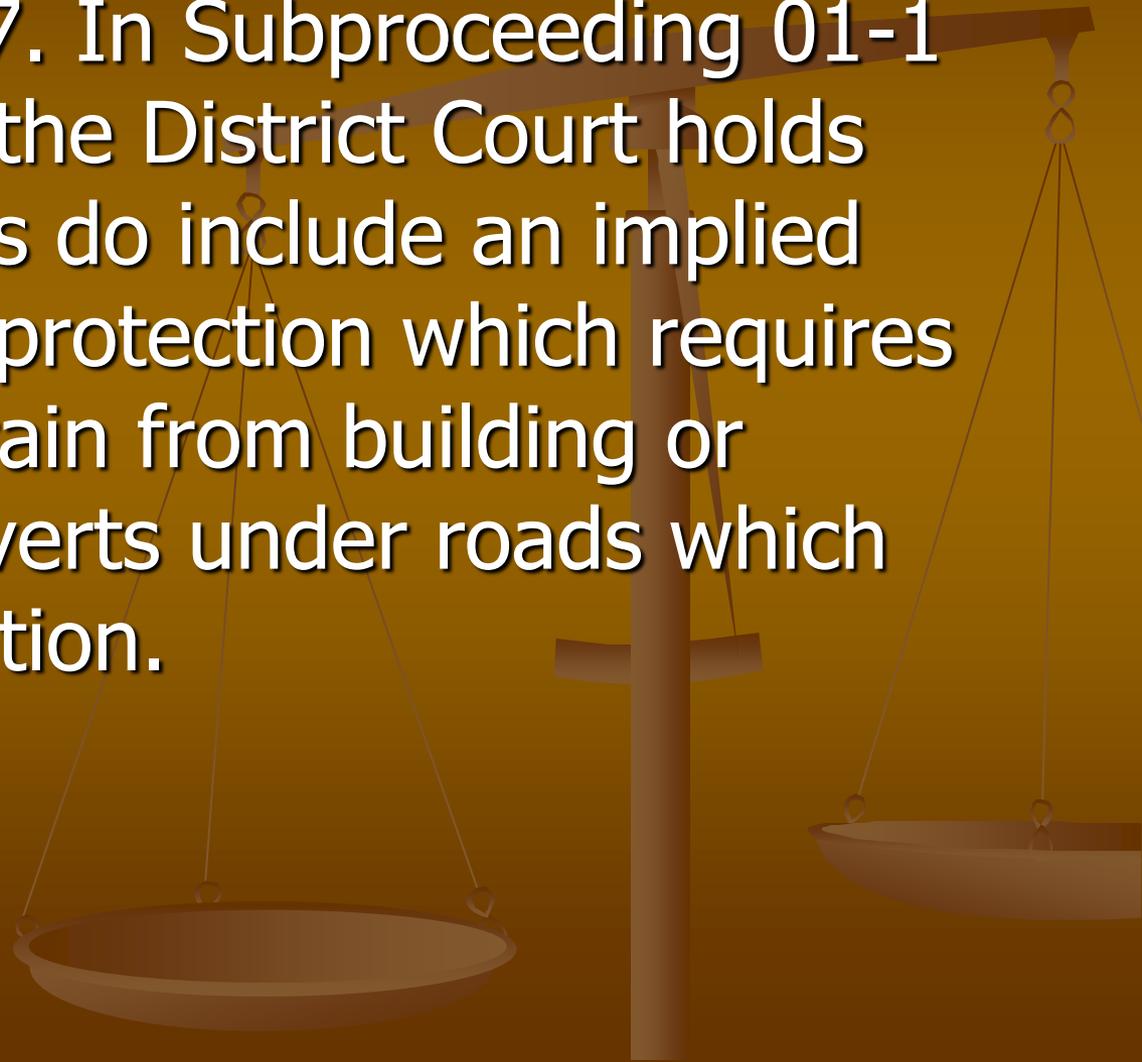
<http://www.fhwa.dot.gov/environment/wildlifecrossings/fish.htm>

The Tribes Begin the “Culvert” Case

- In 2001, 16 years after the Ninth Circuit’s ruling, the Tribes begin a new U.S. v. Washington Subproceeding (# 01-1 (Culvert Case) in District Court claiming that the Treaties include an implied right to habitat protection and that 100’s of state owned culverts illegally block fish habitat and fish migration.

The Court Confirms a “Habitat” Right

- August 22, 2007. In Subproceeding 01-1 (Culvert Case), the District Court holds that the Treaties do include an implied right to habitat protection which requires the state to refrain from building or maintaining culverts under roads which block fish migration.

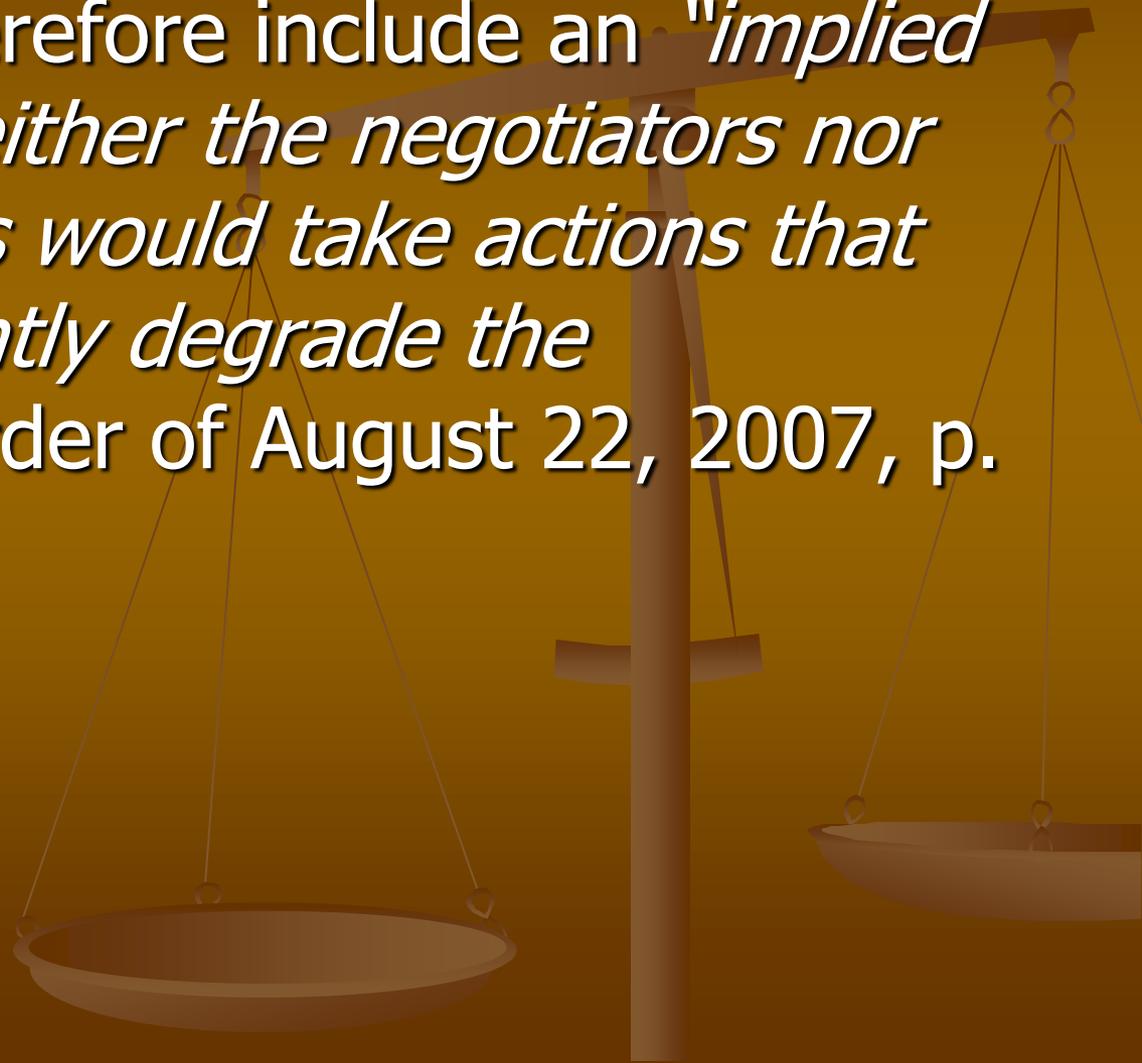


The Court's Conclusion

- “The Court hereby declares that the right of taking fish, secured to the Tribes in the Steven’s Treaties, imposes a duty upon the State to refrain from building or operating culverts ... that hinder fish passage and thereby diminish the number of fish....”
- *U.S. v. Washington*, No. 9213, Subproceeding 01-1, USDC, WD Wash, Order of August 22, 2007, Docket No. 388

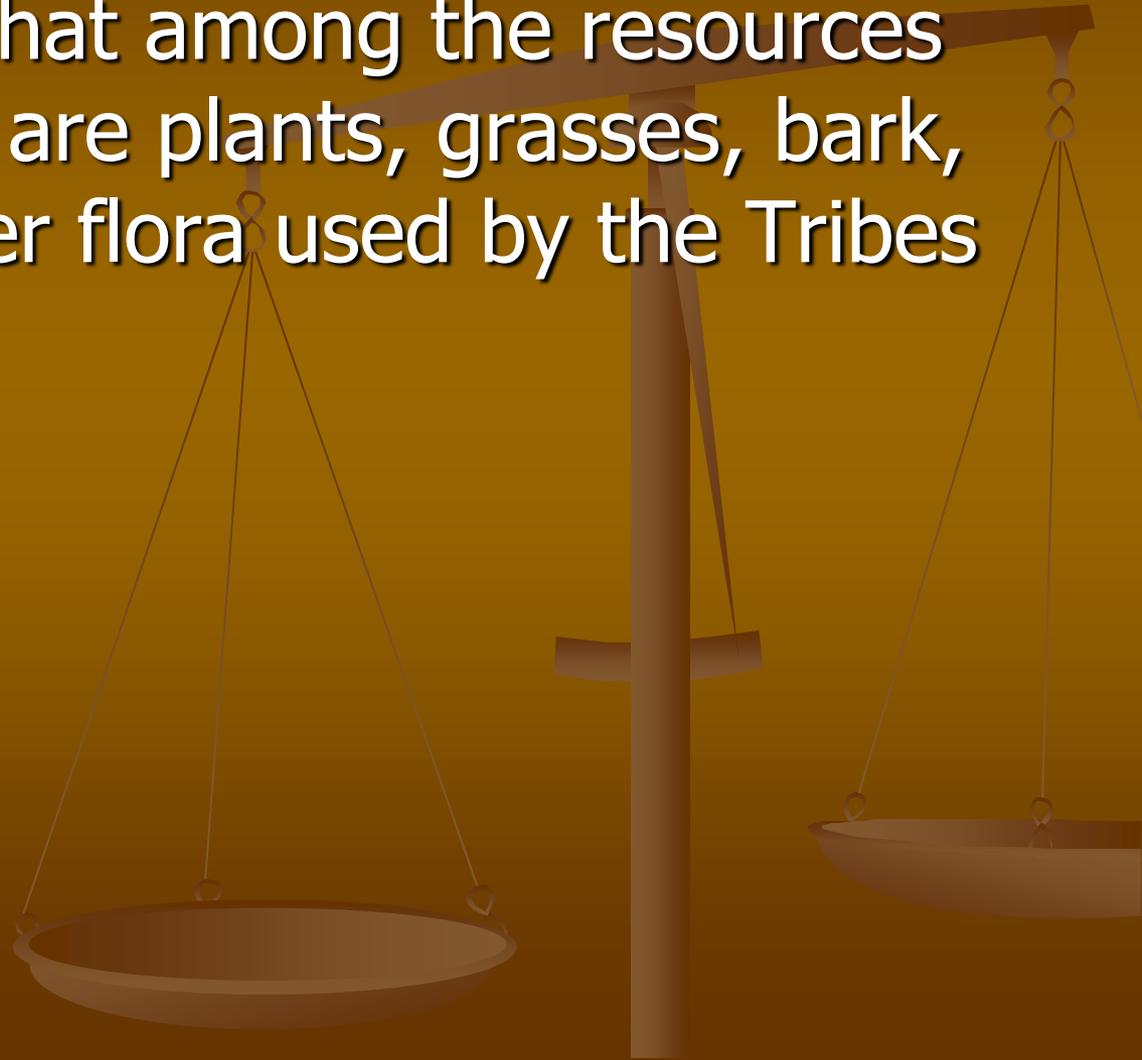
THE RULE OF LAW

- The treaties therefore include an *"implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource...."* Order of August 22, 2007, p. 11.



Does this ruling apply to gathering?

- It would seem that among the resources to be protected are plants, grasses, bark, berries and other flora used by the Tribes



AND GATHERING RIGHTS

The Need to Protect Treaty Gathering Rights



An Example of Treaty Gathering Language:

ARTICLE V: The right of taking fish . . . is
further

secured to said Indians . . . together with the
privilege of hunting and gathering roots and
berries on open and unclaimed lands. . .





Gathering and using natural
flora and fauna are of immense:
cultural importance as well as
sustenance.

Spokane woman, Ellen Andrews
Moon in traditional elk-Tooth dress

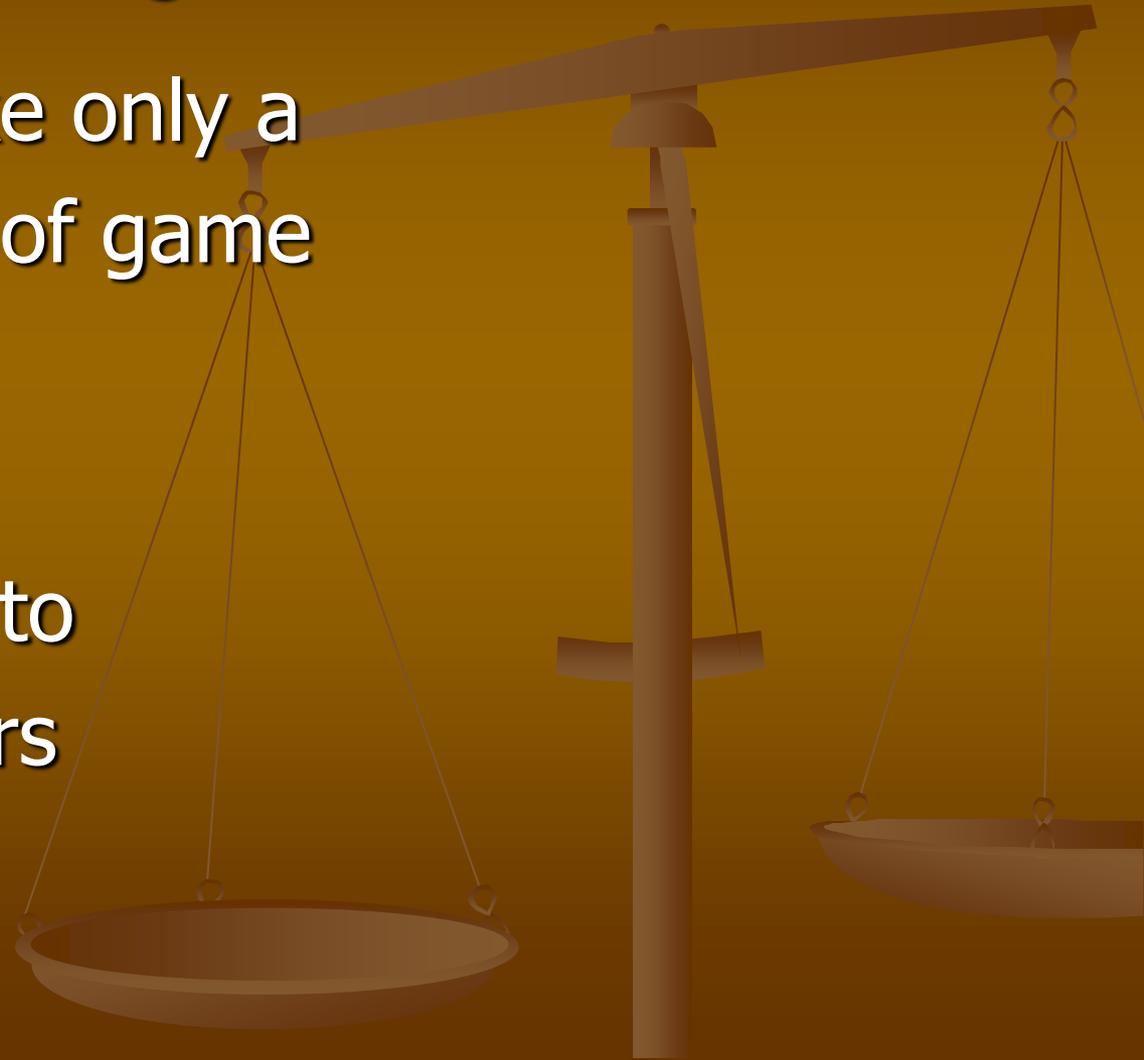
Examples of use of Grass and Bark



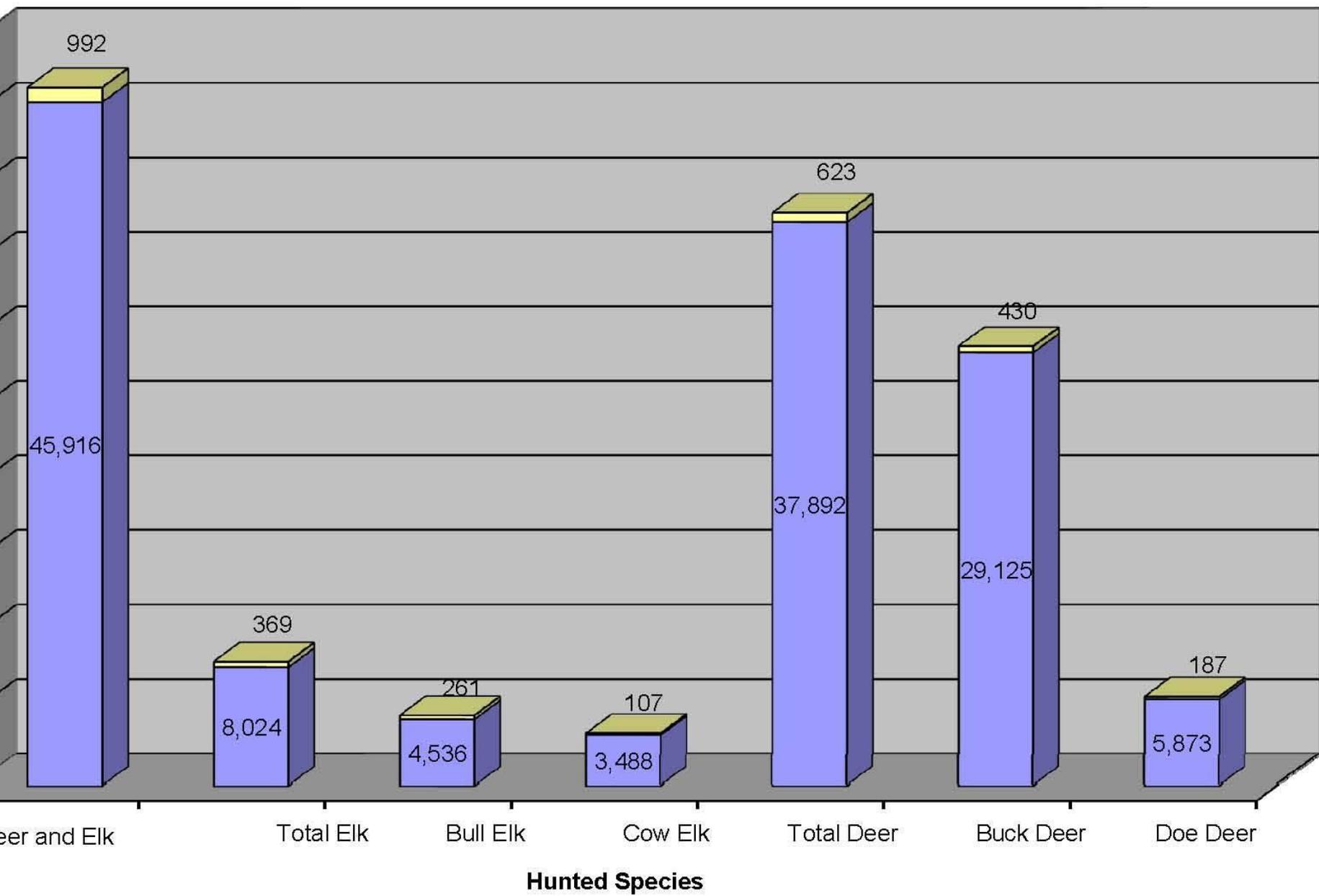
A good Example of Inadequate Tribal Access is Illustrated by Tribal Access to Hunting...

Tribal hunters take only a small percentage of game in the state...

Most game goes to non-Indian hunters

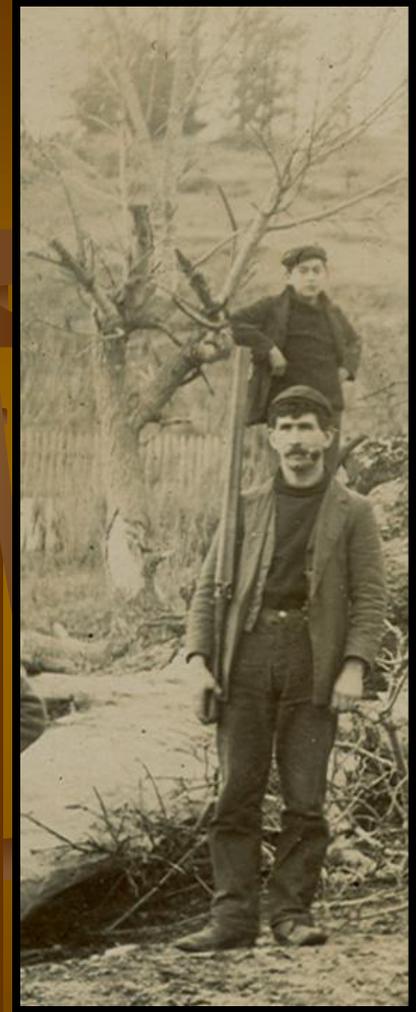


State Hunters Tribal Hunters



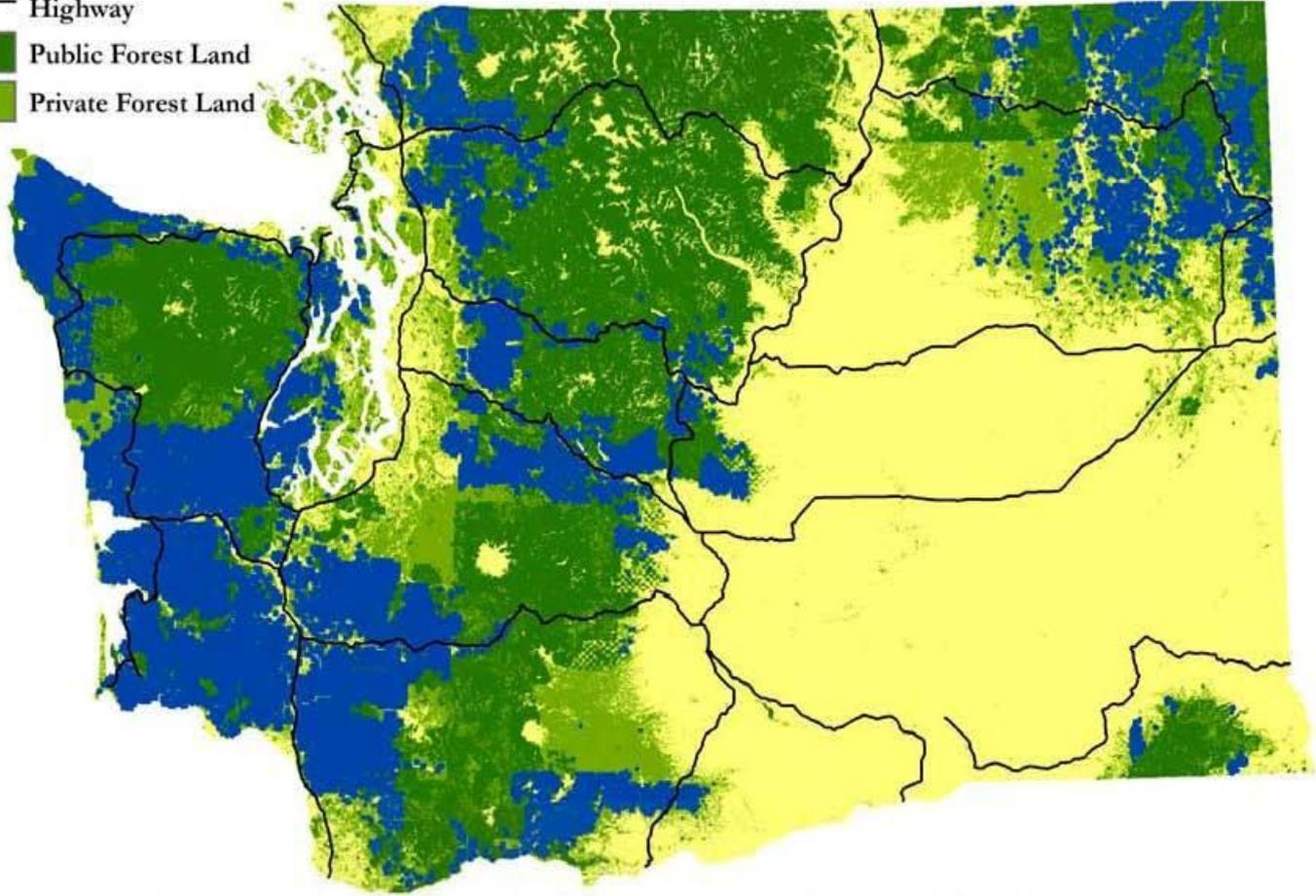
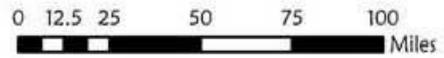
TO REMEDY THIS, many of the Western Washington Treaty Tribes are seeking affirmation of access to exercise treaty hunting and gathering rights

Vast public and private lands are subject to the reserved gathering right.



James Family Ancestors
Swinomish Reservation

- Presence of Industrial and Large Non-Industrial Forestland
- Highway
- Public Forest Land
- Private Forest Land



Thank You

