Navigating New Waters:

A Case Study of Settler Colonialism in the Coeur d'Alene Tribe's Legal Fight to Protect its Homeland

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Abstract

The western legal system has historically forced tribes to fight for their sovereignty in legal frameworks that can be antithetical and outright hostile to their value systems, in a court system that relies on conceptions of tribal land and property rights that are steeped in 15th century notions of racial inferiority. This study examines how the Coeur d'Alene Tribe pursued legal affirmation of its ownership of Coeur d'Alene Lake and its tributaries in multiple courts over a period of thirty years so that it could improve its standing in separate but concurrent suits against mining corporations that had polluted the Tribe's waters. The overarching research question guiding this study was: *How has settler-colonialism impacted the Coeur d'Alene Tribe in its battles to assert sovereignty over its land and water?*

An in-depth instrumental case study of the Tribe's legal history related to Coeur d'Alene Lake was conducted using the Tribe's legal archives. Additionally, a document analysis combined with thematic analysis was used to explore one of the Tribe's multiple cases: *Idaho v. U.S.,* 533 U.S. 262 (2001), a case involving the United States and the Tribe suing the State of Idaho for quiet title on the southern third of the lake. Major understandings from this study were 1) Early U.S. Supreme Court pronouncements on the legal status of Indian tribes based the Doctrine of Discovery led to the idea that federal government had "plenary power" over tribes, who were regarded as "domestic dependent nations." This has constrained full recognition of the Tribe's historic and contemporary relationship with and ability to govern the lake, and 2) Federal Indian law is embedded in notions of White supremacy and racial inferiority that persists through both explicit concepts and the repetition of legal precedents that mask racist language that would be unacceptable in any other governmental setting. This research may inform future tribal efforts in environmental and legal battles by providing insights into the limitations of Western environmental law and the possibilities of the application of alternative legal theories that are more culturally resonant.

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Dedication

To my family, for your patience, support, and cheerleading. I love you so very much.

And to the Coeur d'Alene Tribe, whose love and commitment to chatq'ele' inspire this work:

lim lemtsh for sharing your story.

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Chapter 1: Introduction

"The effect of the pollution on my people cannot be measured.

This ground has been consecrated by the bones of the ancestors."

-Henry SiJohn, Coeur d'Alene Tribal Council Member, 1994

In this dissertation, I explore how tribal communities in the United States are constrained by settler-colonial legal structures that limit their attempts to assert sovereignty over their aboriginal homelands, and how legal and academic research is used to perpetuate or resist these structures. Using the written record of the Coeur d'Alene Tribe's battle with the State of Idaho to reassert their ownership of Coeur d'Alene Lake in two U.S. Supreme Court cases, *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997) (*Idaho I*), and *Idaho v. United States,* 533 U.S. 262 (2001) (*Idaho II*), as well as excerpts from related cases such as the ongoing Coeur d'Alene-Spokane River Basin Adjudication, I present an instrumental case study analysis of how federal Indian law continues to erase or ignore tribal political and property rights. Using a critical document analysis of the court proceedings in *Idaho II*, I explore how these rights are presented and understood by the Coeur d'Alene Tribe, the federal government, and the State of Idaho. Additionally, I compare how the Indigenous Rights and Resurgence framework and emerging international law regarding the rights of Nature and ecosystems provide the possibilities for what Tuck and Yang (2016) refer to as "decolonized elsewheres" – opportunities for more profound resistance against colonial legal impositions on tribes like the Coeur d'Alene hoping to protect and restore their relationships with their lands and waters.

Background

In the Coeur d'Alene Basin, in North Idaho, over a century of destructive mining practices have resulted in legacy metals contamination of traditional fishing and gathering lands that have been the heart and soul of the Coeur d'Alene people (National Research Council, 2005). The Coeur d'Alene Tribe has not only had to fight for clean-up and restoration of these lands, polluted by outsiders, but Tribal leaders have spent nearly half a century fighting legal battles to be viewed in the U.S. legal system as having the right to do so. Working in the western legal system has forced the Tribe to channel their core values of spiritual connection and stewardship of these waters into frameworks that ignore any but the most extractive ecosystem services. As with Indigenous communities across the nation, in the U.S. federal governance system the Coeur d'Alene Tribe has historically had to negotiate in spaces that recognize only a commodity/extractive approach to resource management, while ignoring how Indigenous epistemologies are centered on the responsibility to care for its landscape, rather than simply extract from it (Corntassel, 2008). As a result, the Tribe's ability to fully protect its landscape remains stymied while the health of their lands and waters continue to decline (Benson, 2019).

Research Context: The Coeur d'Alene Tribe's Fight to Protect Their Waters

The primary focus for this study will be on the Coeur d'Alene Tribe, the "schitsu'umsh" as they are known in their own language, translated to *those who are found here*. The Coeur d'Alene Tribal people hold an ontological view in which the Creator placed them in the Coeur d'Alene Basin to be the caretakers of the water. All aspects of Coeur d'Alene culture and being are in relation to water, including gathering, hunting, fishing, prayer, burial rituals, transport, and recreation (Reichard, 1947; Sprague, 1999). Villages and homes were located near their water, and their connection with the birds, animals and plants

that shared their homeland was an intimate relationship (Reichard, 1947). The Coeur d'Alene Tribe's homeland stretched over four million acres, from what is present-day Spokane, Washington, to western Montana, and from the southern end of Lake Pend d'Oreille in northern Idaho to the Palouse in eastern Washington and north-central Idaho (Kaizewet, 1885). This landscape encompassed the entirety of Coeur d'Alene Lake, the Coeur d'Alene and St. Joe Rivers, and countless tributaries. Visitors to the regions described scenes of beauty and abundance, including waters filled with trout; wetlands teeming with muskrat, beaver, otter, mink; and meadows full of deer, elk, and berries (Rabe and Flaherty, 1974). The Coeur d'Alene Tribe's ability to live in its landscape was severely damaged by the discovery of a lead and silver vein in the Coeur d'Alene River valley by settlers of European descent in the early 1880s, leading to an influx of miners described by one historian as a "stampede" (Fahey, 1978). By the early 1900's, the toxicity of mine tailings was widely apparent, as the wastes discharged into the river system had so injured the river valley that non-Native farmers had begun claiming damages for livestock deaths. With little regard for the sacred significance of Coeur d'Alene Lake and its tributaries to the Coeur d'Alene people, the Coeur d'Alene Mine Owners Association proposed using the lake for, "an unlimited dumping ground for the Coeur d'Alene mines indefinitely" (Day, as quoted in Fahey, 1978). Though such an explicit plan was not officially recognized on paper, the practice essentially was; upstream dumping of mining wastes over the next century resulted in more than 75 million tons of heavy-metals contaminated sediment coming to rest at the bottom of Coeur d'Alene Lake (Coeur d'Alene Lake Management Plan, 2009). The impact on Tribal members and their land was devastating, as the metals-contaminated sediments poisoned fish, plants, and wildlife through a major portion of their homelands. Gilio-

Whitaker (2019) refers to this callous act of pollution of tribal resources as "wastelanding," stating: "In the settler colonial context where the irreducible objective is attaining Native territory and resources, these bodies and lands are sacrificial and inevitably expendable because they are viewed and treated as worthless" (Gilio-Whitaker, 2019, p. 64). Human health impacts from high levels of lead in the Silver Valley, the center of the mining activity on the upstream Coeur d'Alene River, resulted in a 1983 designation of the area as one of the nation's first Superfund sites. However, it was not until 1998 that the rest of the Coeur d'Alene Basin, including the lake and Spokane River, was included in the Superfund site (National Research Council, 2005). As early as the 1970s, however, the Tribe had initiated attempts to assert its jurisdiction over the lake through various legal means so that they would have legal standing to sue the mining companies for environmental cleanup. Though the resulting court cases have since led the Tribe twice to the U.S. Supreme Court and seen part of its jurisdiction affirmed, some fifty years later, the Tribe finds themselves still embroiled in controversy with continuing conflicts over ownership, water rights, and frustratingly little progress on cleanup (Benson, 2019)

Purpose of the Study

Gilio-Whitaker (2019) calls the American legal system a "rigged game against the environment and their [tribal] own communities" (p.162). She calls on scholar-allies to explore mechanisms to work against or outside the racist underpinnings of federal Indian policy, such as the Doctrine of Discovery, the concept that European arrival in North America carried with it the implicit diminishment of Native sovereignty and title (Gilio-Whitaker, 2019; Wilkins & Lomawaima, 2001). This doctrine, as well as the U.S. Supreme Court decisions that designated tribes with the unique "domestic dependent nation" status and the notion, upheld by the courts, that Congress has plenary power over Indian tribes and

tribal people, are considered by critical scholars like Gilio-Whitaker and Robert A. Williams to be the illegitimate and racist foundation of federal Indian policy (Gilio-Whitaker, 2019; Williams, 1992). This can be seen in the legal constraints imposed on the Coeur d'Alene Tribe, which has been forced to frame its rights to its land and waters within this settler colonial framework. This includes being forced to base its land ownership on western concepts of "title," and requiring, via court rules on expert witnesses, that its history and culture to be authenticated by non-Native scholars using documents written by federal emissaries, missionaries, or military personnel, rather than recognizing the Tribe's members and oral accounts as legitimate claims.

As an attempt to respond to Gilio-Whitaker's call, in this study I present a critical case study[1] of the Coeur d'Alene Tribe's legal efforts to affirm its ownership of Coeur d'Alene Lake that culminated in the U.S. Supreme Court case *Idaho v. U.S.* (2001), using document analysis to contextualize settler colonial narratives in the Coeur d'Alene Tribe's legal battles to reassert its jurisdiction in Coeur d'Alene Lake.

Research Questions

Using data from the transcripts of oral arguments, written briefs, and expert testimonies, I hope to explore the following questions:

1. Has settler-colonialism impacted the Coeur d'Alene Tribe in its battles to assert sovereignty over its land and waters? If so, how?

[1] A critical case study is one win which the case (e.g., in this context, the Tribe's fifty-years of legal efforts to assert ownership over Coeur d'Alene Lake) is deconstructed to explore the underlying structural and historical issues. More exploration of this method can be found in Chapter 3: Research Design and Methods.

a. Are the ideas of property and ownership presented by the primary actors (the State of Idaho, the federal government, and the Coeur d'Alene Tribe) in court proceedings? If so, how?
b. Do the three legal foundations of doctrine of discovery, domestic dependent nationhood, and plenary power appear in the three actors' arguments, as well as court rulings? If so, how?
c. Do the primary actors' arguments legitimize or delegitimize tribal epistemologies and sovereignty? If so, how?

Conceptual Framework

In this study I examine the phenomena of settler colonial legal structures employed in federal Indian and environmental law through the lens of Critical Race Theory (CRT) while braiding together Tribal Critical Theory and Critical Whiteness, both of which emerged from and build on CRT. Delgado and Stefancic (2017) define critical race theory (CRT) as the study of race, racism, and power that developed out of critical legal studies and questions the legal and philosophical underpinnings of western rationalism (p.3). CRT has several core tenets, including that race is not an innate biological element, but a social construct (Delgado & Stefancic, 2017; Harris, 2003). Additionally, CRT views racial inequality as interwoven within the very fabric of American democracy (Tillery, 2009). A third central tenet of CRT is the idea of interest convergence, described by Bell (1980) as the idea that movement towards racial equality only occur when aligned with the interest of dominant (white) culture.

Brayboy (2005) first outlined the tenets of Tribal Critical Race Theory (TribalCrit), explaining CRT fell short when applied to Native America, because "it does not address American Indians' liminality as both legal/political and racialized beings or the experience of

colonization" (p. 428-429). While race and White supremacy are central to TribalCrit, Brayboy (2005) posits the ongoing structure of colonization must be central to understanding Native communities through a critical lens, providing an understanding to frame how contemporary law continues to legitimize the ongoing taking of Indian lands. Woven together, these three theories are used to understand the application of federal Indian law to the Coeur d'Alene Tribe's exercise of sovereignty over its landscape, as well as the discourse of the legal arguments used by the Tribe, the State of Idaho and the U.S. throughout the cases examined here. A fuller description of these theories are explored further in Chapter Two.

Methods/Methodology

This study is a qualitative instrumental case study of the Coeur d'Alene Tribe's experiences during the course of multiple legal proceedings stemming from its efforts to affirm its ownership of Coeur d'Alene Lake, including:

- A federal/Tribal lawsuit against the State of Idaho regarding state park lands within the Reservation;
- An ongoing dispute with Washington Water Power during its federal relicensing proceedings;
- Two federal suits that ended at the Supreme Court, *Idaho v. Coeur d'Alene Tribe* (1997) (*Idaho I*) and *Idaho v. U.S.* (2001) (*Idaho II*).

Stake (2005) states an instrumental case study provides researchers an opportunity to investigate an event and detail its context in order to provide insight into a broader issue. The specific method employed is a critical document analysis (Bowen, 2009), using the court proceedings, which include expert witness reports, depositions, briefings, motions, and the

court decisions themselves. Text from these documents are coded to analyze themes and subthemes within the data.

The use of this level of document analysis provides an opportunity to look at the belief systems of the three principle actors in *Idaho II*, the Tribe, the State of Idaho, and the Federal Government, at a macro-level, through their selection of what is considered legitimate evidence, and at the micro-level, through the crafting of their legal arguments (Hodes, 2018). The use of these documents provides an opportunity to see how settler colonial thought is embedded in the court process by looking at excerpts from written briefs, oral testimony, and judicial rulings. By looking for patterns in language use across the Tribe's legal archive, I examined patterns in word choices and arguments that reveal the belief systems of the three actors about property, land, and water, and each actor's legal rights and responsibilities, as well as how these beliefs were supported by expert witnesses and affirmed or dismissed by the judiciary.

A full description of the document analysis method will be discussed in Chapter Three.

Benefit to the Coeur d'Alene Tribal Community

In his seminal work, Brayboy (2005) states "TribalCrit is praxis at its best," and argues, "no research should be conducted with Indigenous Peoples that is not in some way directed by a community and aimed toward improving the life chances and situations of specific communities and American Indians writ large" (p.440). Members and representatives of the Coeur d'Alene Tribe have invested time and resources into this work by participating on my doctoral committee, providing input and revisions, and sharing Tribal archival resources. The Tribe's input reflects a vested interest in the outcome of my research.

As such, this work must have value to the Coeur d'Alene Tribe and its people, and it is my hope that there are several benefits. First, the story of thirty years of court cases in multiple venues is challenging to encapsulate, given the timespan and legal complexity. By simply providing a chronological overview and in-depth description as part of the case study, my aim is to make the case information more accessible to the broader membership. Secondly, the Tribe not only continues its legal battles for its rights to, and protection of, Coeur d'Alene Lake, but is also embroiled in other local and regional environmental challenges, including salmon restoration and dam removal in the Columbia River system, as well as its ongoing water rights claims. This work may provide insights into alternative legal and political frameworks that the Tribe may consider that more fully encompass its values and its goals for environmental restoration.

Scholarly Contribution

I hope that this case study contributes to the growing body of scholarship that untangles the complex, deeply embedded legal systems that inhibit Indigenous people from realizing its full rights of self-determination in its own lands. Gilio-Whitaker (2019) argues that for justice to occur, scholars must "use a different lens, one with a scope that that can accommodate the full weight of the history of settler colonialism, on one hand, and embrace difference in the ways Indigenous peoples view land and nature, on the other" (p. 12). The Coeur d'Alene Lake cases provide an opportunity to look at how one Indigenous community pushed from within the settler colonial system to achieve some success, and how that community may explore alternative legal pathways to achieve fuller sovereignty in the future.

Positionality

For the past 26 years, I have worked in two Indigenous communities – first, with Samoan communities in both Independent and American Samoa, and for the last 17 years, with the Coeur d'Alene Tribe in northern Idaho. In 2011, I was fortunate to join the Tribe's Lake Management Department as an environmental specialist, where I was tasked with several responsibilities, including conducting outreach and education with both the Tribal and non-Native community throughout the Coeur d'Alene Basin to raise awareness and action to protect Coeur d'Alene Lake water quality, and assisting with the development of the Coeur d'Alene Tribe's water rights claim that was being prepared as part of the Coeur d'Alene-Spokane River Adjudication, initiated by the State of Idaho in 2008. This latter task allowed me to work closely with the Lake Management Director and the Coeur d'Alene Tribe's environmental attorneys who were charged with the daunting task of trying to put together the Tribe's water claim by forecasting community needs for at least the next century for agriculture, domestic, commercial, municipal, cultural and environmental services. The opportunities I have had to work with these colleagues and mentors have spurred my own interest in working to dismantle the extractive colonial systems that I believe threaten not just the Coeur d'Alene Tribe's collective continuance, but our global environmental well-being as we face looming issues of water scarcity and climate change. Through my academic and professional journey, I have continued to have to examine my own complicity in these systems. I am, professionally and personally, a settler in this Tribal community. It is imperative that I recognize how that impacts not only my interpretation of the work done here, but that I continue to interrogate (and invite others to interrogate) whether my study reproduces settler displacement of Tribal voices or creates spaces for those voices.

As a non-Indigenous would-be ally, I recognize my privilege in accessing an archive of legal documents that is of limited access not only to outside scholars, but for now, to the Tribal membership themselves. I have that privilege because of the desire by colleagues and supervisors at the Coeur d'Alene Tribe to make this work meaningful, and their willingness to entrust me with access because of my long-time involvement with the Departments of Education, Lake Management and Natural Resources. I have taken to heart Linda Tuhiwai Smith's (1999) essential question, "Who benefits?" regarding the predatory nature of western research in Indigenous communities. As a student of Indigenous methodologies, I recognize the importance of these methodologies demand for reciprocity: research must give back to the community in which it takes place; it must benefit the Indigenous community. As such, I am committed to respecting Tribal protocols, including the use of the Coeur d'Alene Tribe's research review process, and the sharing of this dissertation for Tribal review to ensure that no information that is not approved by Tribal leadership will be disseminated. I am also committed to working with Tribal and University leadership to share my findings as appropriate in hopes that they may inform future legal scholars, and even more importantly, the next generation of Tribal members and non-Tribal affiliates who will inherit the responsibility of the guardianship and protection of Coeur d'Alene Lake.

Definitions

Throughout this study, I will use the term Indigenous to refer to the communities of people that, in keeping with the United Nations definition, "[have] a historical continuity with pre-invasion and pre-colonial societies that developed on their own territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their

ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems (United Nations: Indigenous Peoples at the UN, n.d.).” Generally, I use this term when broadly discussing communities that include Indigenous groups both inside and outside the United States. Additionally, I use Native or Native American to refer to the Indigenous peoples of the United States when making a cultural and ethnic distinction, versus a political distinction.

The word “tribe” is used to refer to an Indigenous nation that has political recognition as a domestic dependent nation from the U.S. federal government (Weaver, 2001). Both tribe and the word “Indian,” while problematic, imply a political status in the U.S. legal framework. Tribes are political entities with the rights to determine membership, thus when using the words “tribal” or “tribe,” it refers to political status, rather than racial or cultural identity (Weaver, 2001). Finally, I capitalize the word “Tribe” when referring to a specific tribe (primarily the Coeur d’Alene); I use lower-case “tribe” when referring generally to Indigenous nations within the United States.

Chapter 2: Review of the Literature

Statement of the Issue

In this chapter I examine the literature on settler colonialism, as well as critical pedagogies that address the embeddedness of colonial practices in U.S. federal Indian law and policy. Critical Race Theory and Critical Whiteness Theory will specifically be explored to understand how conceptions of property, including knowledge as property, are embedded in dominant U.S. narratives of tribal versus non-tribal communities' history and rights. My research incorporates the lens of settler colonialism to examine ways in which these political/legal frameworks have impacted federal Indian policy generally, as well as specifically within the context of the Coeur d'Alene Tribe. By providing this context, I hope to analyze how settler-colonialism through judicial and legislative actions has impacted tribal ownership of and relationship to land. I will also examine Tribal Critical Race Theory (TribalCrit), as articulated by Lumbee scholar Bryan Brayboy and its emphasis on the endemic nature of colonialism, as well as its attention to sovereignty and tribal pushback through counternarratives. In his 2005 seminal article presenting TribalCrit, Brayboy states

> White supremacy refers to the idea that the established, European or western way of doing things has both moral and intellectual superiority over those things non-western… White supremacy gets played out in colleges and universities. White supremacy is viewed as natural and legitimate and it's precisely through this naturalization that White supremacy derives its hegemonic power. (p.432).

In contrast, there is a growing call for research that upends the intellectual practices that propagate settler colonial legal, political, and academic hegemony. Indigenous Resistance and Resurgence scholarship can provide alternative spaces for discourse on tribal

sovereignty and self-determination by looking outside of our current legal and intellectual regimes to a more equitable future. Like Grande and Brayboy, scholars like Tuck and Yang use the term "refusal," not to deny the need for research, but instead to call for institutions and researchers to dismantle systems that perpetuate dispossession. They state frankly: "[D]ecolonization specifically requires the repatriation of Indigenous land and life" (2012, p.21). I approach this literature review informed by scholars and legal experts who call upon researchers to help through both legal and social scholarship that support social advocacy in the United States in order to decolonize U.S. federal Indian Policy (NARF, 2021; add citations).

The combined application of critical theories will help illuminate the embeddedness of racism and settler colonialism within Federal Indian policy, while Resistance and Resurgence scholarship will help frame how tribes like the Coeur d'Alene Tribe have already, and can continue to, push back against the systemic nature of white supremacy to take back control of their lands and waters.

Theoretical Framework

Critical Race Theory

CRT was initially developed in legal arenas, with scholars like Bell critiquing notions of steady, incremental progression towards racial equality, but has expanded its breadth to be employed in education, sociology, anthropology, and multiple other fields (Bell, 1980; Delgado& Stefancic, 2017). Critical Whiteness Theory builds on CRT by turning its gaze on White society to understand how concepts of who can rightfully claim property and ownership are applied to not just land but even to intangible ideas of knowledge, reifying White privilege and a sense of supremacy (Harris, 1993; Tillery, 2009). Both CRT and

Critical Whiteness Theory are less concerned with the actions of an individual who may display overt racism than with how more covert racism becomes so integrated into policies and practices that they are essentially ignored by even those who profess a rejection of racist principles. Robertson (2015) defines this as systemic racism, explaining that it is "ideology that attaches common meanings, representations, and racial stories to groups that become embedded within social institutions that serve to justify the superordination of white people and the subordination of nonwhite people" (p.128).

Critical Whiteness Theory

Whiteness as Property.

The racial underpinnings of settler colonialism are explored in Cheryl Harris' critical work, "Whiteness as Property (1992),"as she illustrates how concepts of property impact not only tribes, but other peoples of color. Comparing the legalization of tribal land dispossession and the establishment of laws that justify the conception of Black Americans as property themselves. Harris argues that despite striking down slavery and Jim Crow laws, Whiteness as property has become the baseline for the American view of ownership – to (White) American history, to (White) American land, and to (White) American rights. Harris claims that Whiteness is vested in our legal system, stating, "…the law has established and protected an actual property interest in whiteness itself, which shares the critical characteristics of property and accords with the many and varied theoretical descriptions of property (Harris, 1992, p. 1724)."

Harris's work traces not only court decisions like those previously described, but the views of early U.S. leaders, heavily influenced by philosophers like Hobbes and Locke. She illustrates how leaders like James Madison emphasized the nature of property in his writings,

ascribing to it values and rights that he felt should be central to U.S. law. Critically, however, she notes, these values and rights would not be understood to be extended to everyone, but were recognized based on race, creating a system in which both Native and Black Americans would have to renounce their race and/or their culture to own property in a manner that was legally recognized. Harris states, "The effect of protecting whiteness at law was to devalue those who were not white by coercing them to deny their identity in order to survive (Harris, 1992, p. 1744)," explaining through Whiteness alone could individuals pursue education, participate in the political process, seek employment, or even be regarded as a full human in society.

While many of the legal structures that codified Whiteness as property have been disassembled, Harris argues that Whiteness is reified through institutional structures that privilege Whiteness. She argues that the right to determine meaning, e.g., the meaning of our shared history, of the meaning of property, of the value of property, remains vested in Whiteness today. She gives the example of recent court decisions against affirmative action, arguing that by exposing the inequality of opportunity for people of color, "[the rationale for affirmative action] exposes the illusion that the original or current distribution of power, property, and resources is the result of "right" and "merit" (Harris, 1992, p. 1778)." The courts, Harris argues, ignore structural inequality to create a fiction of bias against *White* people, maintaining inequities in education and employment.

Epistemic ignorance

More recent explorations of critical Whiteness theory have examined how, to maintain a system of dominance, White society makes deliberate attempts to disregard more inclusive and accurate narratives, as well as ignore non-Western epistemologies, or ways of

knowing. This perpetuation of "epistemic ignorance," explained by Applebaum (2016) preserves a socially-sanctioned "agreement to not know and *an assurance that this will count as a true version of reality* by those who benefit from the account" (p. 13). Applebaum argues that this refusal to recognize systemic racism is used to shut out issues of injustice and inequality, and this deliberate ignorance is both socially and officially sanctioned, including in academia. Epistemic ignorance can range from claiming "colorblindness" to terminate conversations about race and racism, to the inversion of civil rights to argue freedom of speech and religion to support discrimination (Matias & Newlove, 2017). Kuokkanen (2004) maintains that epistemic ignorance is a form of subtle violence that acts to erase the knowledge and experience of Indigenous and other non-white communities (p. 134). Kuokkanen argues that this erasure benefits white Americans by allowing them to not notice Indigenous existence. Kuokkanen argues that an active epistemic ignorance is practiced in academia, where despite a long history of the study of Indigenous people, Indigenous people and their epistemologies are not regarded as serious subjects, except as an "other" category, preventing broader inclusion of Indigenous perspectives in "mainstream" classes. At the same time, Kuokkanen calls out an academic elite who claim a liberal, non-racist stance while using their privilege to shut down consideration of how they benefit from White supremacy. Kuokkanen states, "… epistemic ignorance is… not a question of some individuals not knowing but rather a systemic problem involving the epistemic foundations of the academy (as well as society at large)" (p.145).

Epistemic ignorance and Whiteness as property are used across multiple fields in the academy to maintain an intellectual hegemony. Reardon and Tallbear (2012) explain how Whiteness is used to argue for legal control of group identity and cite multiple examples of

scientists claiming the right to study Indigenous peoples' bodies, including their DNA. As in the inversion of civil rights claims, Reardon and Tallbear point out how objections from Indigenous communities to being seen as scientific property, researchers push back by arguing that these objections are a "threat" to doing good science. Moreton-Robison (2004) argues that within contemporary academia, Indigenous people continue to be marginalized as people who have "experience," instead of knowledge (p.85). She discusses how within literary fields; the value of Indigenous writing is judged for its authenticity by white audiences, while in conservation, Indigenous peoples are often erased from environmental conceptions of wildness that imagine landscapes as separate from humanity. Moreton argues to push back at epistemic ignorance and the erasure of Indigenous experience in knowledge production, "means academia would have to accept that the dominant regime of knowledge is culturally and racially biased, socially situated, and partial" (p.88).

Tribal Critical Race Theory

In 2005, Lumbee scholar Bryan McKinley Jones Brayboy published his seminal work on Tribal Critical Race Theory (Tribal Crit), addressing gaps in CRT and Critical Whiteness that did not address the unique position of tribes in the U.S. Tribal Crit draws heavily on the work of CRT, but instead of its central tenet being the endemic nature of racism in society, it is the endemic nature of colonization that most impacts the lives of tribal people (p. 429) (Table 1). Brayboy also centers the desire for sovereignty and counter-narratives that recognize different tribes' beliefs and cultures. In contrast to issues of slavery and its aftermath, Tribal Crit focuses on the ongoing dispossession of tribal peoples from their land, as well as attempts to sever tribal people from their ways of knowing through assimilation. Through this lens, Brayboy explains, "TribalCrit endeavors to expose the inconsistencies in

structural systems and institutions – like colleges and universities – and make the situation better for Indigenous students" (p.441). Brayboy argues that academic allies should consider data and research should focus on sovereignty and self-determination, as well as Indigenous ways of knowing.

Critical Race Theory (Delgado & Stefancic, 2017)	**Tribal Critical Race Theory (Brayboy, 2005, pp. 429-430)**
Racism is endemic to U.S. society.	Colonization is endemic to society.
Because racism benefits white Americans, a large segment of the population has little incentive to eradicate it (*interest convergence*).	U.S. policies toward Indigenous peoples are rooted in imperialism, white supremacy, and a desire for material gain.
Race and races are products of social thought, and have no biological basis.	Indigenous peoples occupy a liminal space that accounts for both the political and racialized natures of their identities.
Each race has its own origins and shifting experiences (*differential racialization*).	Indigenous peoples have a desire to obtain and forge tribal sovereignty, tribal autonomy, self-determination, and self-identification.
Every person has overlapping, and sometimes conflicting, identities (*intersectionality*).	The concepts of culture, knowledge, and power take on new meaning when examined through an Indigenous lens.
Minority status brings a presumed competence to speak about race and racism, and *counter-storytelling* can push back against dominant narratives.	Governmental policies and educational policies towards Indigenous peoples are intimately linked around the problematic goal of assimilation.
	Tribal philosophies, beliefs, customs, traditions, and visions for the future are central to understanding the lived realities of Indigenous peoples, but they also illustrate the differences and adaptability among individuals and groups.
	Stories are not separate from theory; they make up theory and are, therefore, real and legitimate sources of data and ways of being.
	Theory and practice are connected in deep and explicit ways such that scholars must work towards social change.

Table 1: Critical Race Theory (CRT) v. Tribal Critical Race Theory (TribalCrit)

Interest Convergence

A key tenet of Critical Race Theory that is also central to Tribal Crit is the idea that because of the significant benefit to White society in maintaining racist and colonial systems, there is little incentive by those who benefit to work to dismantle it, and thus in order to

make change, the majority must see a benefit (Delgado & Stefancic, 2017). Allen (2007) discusses how this tenet of CRT was first applied by Derrick Bell to the Supreme Court decision *Brown v. Board of Education of Topeka* (1954), when he argued that what is often viewed as a civil rights victory was enacted not because of noble moral goals, but because of economic and political pressures on the U.S. government. Bell posited the decision would not have happened if White interests were unlikely to benefit. Allen applies interest convergence to a significant Indigenous legal victory, the Australian *Mabo v. Queensland* decision that found that Aboriginal and Torres Strait Islanders had property rights under Australian common law, repudiating the idea of *terra nullius* ("no one's land"). Allen demonstrates how this decision did not arise simply from a newfound commitment to Indigenous sovereignty on the part of the Australian government, but national and international negative attention to Aboriginal human rights issues. According to Bell's explanation of interest convergence theory, argues Allen, interest convergence that results in decisions like *Brown* and *Mabo* creates benefits that are often more symbolic than substantive (p. 82). Allen details how indeed, the *Mabo* decision resulted in significant settler pushback against Aboriginal rights, including the establishment in Australia of the xenophobic, anti-Aboriginal One Nation party. Additionally, to date, the *Mabo* decision has not resulted in the overall return of Aboriginal lands to Aboriginal ownership. At the same time, Allen maintains that interest convergence remains an important tool "for Indigenous activities to use in "determining when the time may be right to strike for change" (p.87). Allen suggests that Indigenous communities can also create an interest convergence by bringing negative attention to a nation's human rights violations through non-violent protest and judicious use of the media.

The two outgrowths of CRT, critical whiteness theory and Tribal Crit, including ideas of interest convergence, will be applied to the documents in the Coeur d'Alene Lake cases in later chapters to consider how assumptions about western knowledge, culture, and law are normalized and accepted as fact within legal briefs, as well as media, for all parties. Tribal Crit will be useful in examining where and how the Coeur d'Alene Tribe and its allies push back against this normalization with counter narratives. Additionally, the tenet of interest convergence will have utility in exploring the Tribe's appeals to the federal government to represent its interest as the Tribe's trustee, and how willing and under what circumstances the federal government will be to try to restore land and water to the Tribe's jurisdiction.

Settler Colonialism

Settler colonialism is defined as a structural event, rather than a historical one; "an ever-incomplete project whereby colonisers repetitively seek to impose and maintain White supremacy (Wolfe, 2006; 2016)." The settlement of the American West was based on the removal of Native Americans from land deemed valuable for mineral, agricultural or timber resources, but to do so, the United States had to create a legal framework that would morally justify land takings and the violence that accompanied those takings. Pasternak (2014) states that in order to decolonize the law, one must examine under what authority that law is used to govern. To understand how settler colonialism operates today requires looking back centuries to understand how contemporary legal doctrines are built on the erasure of tribal systems and the replacement of those systems with a convoluted system that imposes power over tribal people and tribal land. Blomley (2003) explores the early roots of how Western philosophers like Bentham, Hobbes, and Locke helped shape the American narrative of a lawless land of nomadic savages that provide a foil for the positive, secure order of Western property ownership. For these European philosophers who were foundational to the shaping of the

U.S. government, tribal people were portrayed as wanderers in threatening, disordered landscapes that posed a threat to civilization, justifying their removal (Blomley, 2003; Wolfe, 2006). As this narrative evolved, the United States used not only physical removal, including the removal of tribes such as the Cherokee and Choctaw from their homelands to Indian Country (Oklahoma), but cultural and epistemic removal as a result of efforts to destroy their families and communities. Wolfe (2006) describes how policies such as allotment, boarding school and forced adoptions, religious conversion, resocialization through education, and even gender policies of who had the right to be Indian were designed to eliminate the Native person from the landscape in order to replace them with the settler. These assimilationist policies were and continue to be viewed as less of a moral challenge to the settler society than outright physical violence, as Wolfe describes: "Indeed, depending on the historical conjuncture, assimilation can be a more effective mode of elimination than conventional forms of killing, since it does not involve such a disruptive affront to the rule of law that is ideologically central to the cohesion of settler society (Wolfe, 2006, p 402)."

Understanding settler colonialism as a phenomenon can help understand the way that conceptions of sovereignty, property and land rights are inverted through the white gaze. Calderon (2014) details multiple ways that this inversion pervades the social studies curricula through which most Americans learn their history, including using Bering Strait theories to frame Indigenous peoples as immigrants in order to minimize the significance of their precolonial existence, the "triumph" of "reason" and science over Indigenous knowledge, and the insidious promotion of Manifest Destiny, or the notion that American exceptionalism justified Indigenous removal. Sexton (2016) explains the paradox between how Indigenous and non-Indigenous land claims are considered by the settler:

> In the broadest sense, the problem is posed as the difference between an indigenous and exogenous relation to the land, a problem of the terms of occupation. This frames the question of land as a question of sovereignty, wherein native sovereignty is a precondition for or element of the maintenance or renaissance of native *ways* of relating to the land (p. 587).

Essentially, settler rights are broadly applied, whereas Indigenous rights are parsed down to the barest minimum so that in order to maintain their relationship with their homeland, they must be able to assert their sovereignty over that land. The following section will explore how the evolution of federal Indian policy has been embedded through legislative and jurisdictional actions to expand settler presence and reduce the ability of Indigenous communities to maintain their relationships by eroding tribal sovereignty.

Tribal Property and Tribes as Property in Western Law: Doctrine of Discovery, the Marshall Trilogy, and the Concept of Plenary Power

Concepts of tribal sovereignty and rights to their homelands in the context of U.S. federal Indian policy are considered *sui generis* - not defined by the Constitution, but most frequently by the courts (Levy, 2012). Rifkin (2009) describes the existence of tribal nations in U.S. law as "peculiar," and their legal status as existing outside the regular regime of law (p. 89). This idea of non-European societies as existing outside the law and without legitimate "civilized" systems of governance extends back many centuries to ancient Greek and Roman philosophers who depicted non-Greco-Roman peoples as wild and savage (Williams, 2012). However, it eventually became codified in European law with the issuance of a series of papal bulls in the 15th Century, including the *Romanus Pontifex* and the *Inter Caetera,* that first outlined the justification for Spain, Portugal, and other European nations to take the lands of non-Christian peoples, and then asserted that one Christian country could

not take lands upon which another Christian nation had already staked a claim ("preemptive title") (Miller, 2005). These papal bulls articulated what is collectively referred to as the Doctrine of Discovery (Miller, 2019).

After the issuance of the *Inter Caetera,* Spain, followed by France, England and Holland, issued charters and patents for lands in the Americas based on the notion that the Indigenous occupants of these lands had only "natural" rights, but not "civil" rights to these lands, i.e. rights of occupancy (Miller, 2005). Though colonists, and later federal officials, would continue to make treaties with tribes, the dominant underlying assumption to colonial-tribal land dealings was that Indian title was diminished by their "non-improvement" of the land. Miller (2005; 2019) articulates themes of Discovery that underlie this assumption, including that non-Christians had lesser rights to land sovereignty, that Europeans had a duty to civilize tribal peoples, and that after "discovery," or arrival of Europeans to a land, that tribes automatically lost full ownership of their lands. Royal charters that were issued to colonists explicitly incorporated these concepts; the 1606 Charter of Virginia proclaimed:

> We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a work, which may by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government: DO, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires. (First Charter of Virginia; 1606, April 10).

In 1823, Chief Justice John Marshall embedded these Discovery concepts into U.S. law with the *Johnson v. M'Intosh* decision (21 U.S. 543, 1823). This Court decision, which involved no tribal participants but instead focused on whether a pre-Revolutionary direct purchase of land from a tribe was legitimate, declared that tribes did not have the right to alienate, or voluntarily transfer title of, their lands except to the federal government, which had inherited this preemptive right from the British Crown. In his decision, Marshall articulated the idea of a title of "occupancy" that was inferior to the absolute title of Christian Europeans, and presumed inherited by the United States government (Fricher, 2010; Miller, 2005). Miller (2005; 2019) emphasizes that this historical decision is not a past event, but, together with two subsequent decisions, *Cherokee Nation v. Georgia* (30 U.S. 5, 1831) and *Worcester v. Georgia* (31 U.S. 6, 1832), collectively known as the Marshall trilogy, creates the foundation of every aspect of federal Indian policy today, including the plenary, or absolute, power of Congress over both intergovernmental relationships and the internal governance of tribes over their own people.

In his second seminal decision regarding the "peculiar" status of tribes in *Cherokee Nation v. Georgia*, Chief Justice John Marshall considered the question of whether the Cherokee nation was a foreign state, based on its previous treaty-making with the U.S. government. Marshall at once acknowledged that while the Cherokee had the political organization to maintain war and peace, as well as govern their own internal affairs, their existence within U.S. boundaries made them subject to the power of the United States and thus "domestic dependent nations," stating:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases.

> Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection: rely on upon its kindness and its power; appeal to it for relief to their wants' and address the president as their great father. (*Cherokee Nation v. Georgia,* 1831).

Marshall determined that the Cherokee Nation, who sought to sue the state of Georgia for the wrongful execution of a Cherokee tribal member, was not a foreign state, and thus had no standing for its case. Further, he not only reasserted U.S. title/Indian right of occupancy from the *Johnson v. M'Intosh* decision, but provided the U.S. basis for plenary, or absolute, power of the U.S. government by arguing that the weakness of tribes necessitated the full guardianship of the U.S. over tribal interests (Getches, Wilkinson, Williams & Fletcher, 2011).

In *Worcester v. Georgia,* Chief Justice Marshall reiterated the plenary power of the federal government, but also articulated their sovereignty, emphasizing that the supremacy of treaties in the law is as applicable to treaties with tribes as to foreign nations (1832). In addressing the incursion of Georgia into Cherokee territory, he recognized the Cherokee nation as "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves… (*Worcester v. Georgia,* 1832)."

Taken together, the Marshall trilogy of cases provide the convoluted principles of federal Indian policy. The U.S. maintains that while contemporary federal-tribal relationships are allegedly outlined in a self-determination framework, the U.S. still maintains the right and power to recognize tribes as legitimate nations, including the right to determine when

and how tribes and tribal members can acquire and alienate trust properties (those lands for which the U.S. holds title on behalf of a tribe or tribal members). From these decisions, the U.S. has enacted a myriad of policies designed to diminish tribal sovereign rights to control their land and waters (Miller, 2005). Wolfe (2016) describes these policies as "settler society's need to establish a rule of law with sufficient legitimacy to secure a viable level of consent to a recently promulgated set of social norms," couching what might otherwise be unpalatable to contemporary society in a complex judicial history that masks its racialized history and assumptions of inferiority.

Plenary Power over People: Settling Tribal Lands through Assimilation

For the tribes of the Pacific Northwest, including the Coeur d'Alene Tribe, negotiations with the U.S. government took place in an era of federal Indian policy driven by two parallel forces: first, the desire to remove tribes from the path of the railroads and the expanding populace in the west, and, second, the emerging assimilationist policies articulated by President Grant in his Peace Policy. In March 1871, Congress formally ended treaty-making with tribes, proclaiming, "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty (United States Office of Indian Affairs, 1872, p.83)." Though proclamation this did not negate previous treaties, subsequent settlements would be through executive orders and acts of Congress. The Grant administration had declared an interest in solving "The Indian Problem" in a "humane" way that would convince tribal people through honest dealings of the need to assimilate into dominant society (Sim, 2008). Indeed, the area commissioner for Dakota, Idaho and Montana was not subtle in this message, proclaiming in an annual report to the Office of Indian Affairs:

> I need not urge upon the Department the importance of education, in view of the fact that the civilization and settlement of these people is contemplated by the benevolent designs of Government… Since taking charge I have earnestly counseled these Indians to abandon the chase, adopt agriculture, and conform to the ways of civilization, and shall continue every effort to that end. (United States Office of Indian Affairs, 1872)

But the true dilemma for U.S. federal policy was more plainly stated the following year in the Commissioner's 1873 report:

> First. A radical hindrance is in the anomalous relation of many of the Indian tribes to the Government, which requires them to be treated as sovereign powers and wards at one and the same time. The comparative weakness of the whites made it expedient, in our early history, to deal with the wild Indian tribes as with powers capable of self-protection and fulfilling treaty obligations, and so a kind of fiction and absurdity has come into all our Indian relations… This double condition of sovereignty and wardship involves increasing difficulties and absurdities… so far, and as rapidly as possible, all recognition of Indians in any other relation than strictly as subjects of the Government shall cease. (United States Office of Indian Affairs, p.3)

The "peculiar" status of sovereign tribes had increasingly become an obstacle to white settlement, and the pressure to alter it for expedience was increasing. The language of the U.S. government was shifting, no longer describing tribes as less-powerful nations within U.S. boundaries, but framing them now as less-powerful people reliant on the government for their daily needs. Rifkin (2009) describes this as a retroactive application of the idea of *dependency* that stemmed from their domestic dependent category, characterizing tribal

people as diminished people. And yet when they were plainly successful in adoption of agriculture and the other markers of so-called "civilization," settler language became more naked. In an 1873 article describing the Coeur d'Alene's executive order, an area newspaper stated:

> Recently we have learned that the limits of the reservation have been very greatly enlarged, and General Shanks instead of dealing with the Indians on behalf of the white man dealt with them apparently as their attorney…. The [1867] reservation as first bounded contained about 250,000 acres, but by the boundaries as suggested by Mr. Shanks, the area will be increased 500,000 acres making the entire reservation contain about 750,000 acres. In a country where there is so much good land it sounds a little inconsistent that an objection should be raised against allowing a tribe of Indians such a comparatively limited extent of land, but when it is stated, in addition, that this extension takes in all of the farming country situated on Hangman, Pine and Rock Creeks upon which many farmers have gone with their families and stock, and have made themselves homes, it will be seen where the injustice is. (Walla Walla Union, 1873)

Wolfe (2006) observes the incongruences of settler-colonial discourse, describing it as "resolutely impervious to glaring inconsistencies (p.396)." During the Peace Policy era, tribes were to be confined on a reservation, be educated in western ways, and adopt Christianity, and agriculture (Sims, 2008). Yet when they did so successfully, their demarcation of their boundaries, even after a cession of nearly 90% of their homeland, was pronounced an injustice to their white neighbors.

Grant's Peace Policy of the 1870s failed to achieve peace in the West, but the idea of tribal peoples (versus nations) as dependent for their existence was growing. In the following years, the pressure by would-be humanitarians to increase their assimilationist efforts would impact major policy changes towards tribes, as well as court decisions. Over the next several decades, two notable federal cases, *United States v. Kagama* (118 U.S. 375, 1886), and *Lone Wolf v. Hitchcock* (187 U.S. 553, 1903) would judicially embed the idea that tribal peoples were both incapable of self-governance without the oversight of the U.S., and that because of that dependency, Congress could arbitrarily ignore treaties (and executive orders) when they felt it in their interest in "administer[ing] the property of the Indians (*Lone Wolf v. Hitchock,* 1903)." The *United States v. Kagama* considered the 1885 Congressional legislation, the Major Crimes Act, in which Congress gave itself criminal jurisdiction within tribal boundaries for crimes including murder, arson, and burglary, claiming the inability of tribes to police their own members. The Court upheld the Act, stating:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights… From their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power… the power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. (*U.S. v. Kagama*, 1886)

Rifkin (2009) describes this type of reasoning as an "attempt to locate legitimacy for U.S. jurisdiction in something other than its own imposed circular obviousness (p.107)." The U.S.

confesses to forcing tribes into dependency and then uses that dependency to justify exerting plenary power over tribal people for their own wellbeing. Tribal people, not just tribal lands, would now be viewed as essentially property of the U.S. government.

In 1887, just two years after *Kagama,* Congress passed the Dawes General Allotment Act, which would attempt to accelerate the assimilation of tribal peoples by imposing private ownership of individual land allotments of 40 to 160 acres, while opening any leftover lands within allotted reservations to white homesteading (Bobroff, 2001). Initially the act dictated that allotments would be protected from rapid alienation by being held in trust status by the Federal government for 25 years. In 1906, the conversion to private (fee) status was accelerated with the passage of the Burke Act, which allowed agents representing the Secretary of Interior to convert parcels from trust to fee, enabling land to be sold, encumbered, and taxed (Chang, 2011). Again, the rationale for this act was ostensibly the cause of civilization, but the underlying goal of seizing tribal property was impossible to disguise. Lyman Abbott, a Congregational theologian who served on the Board of Indian Commissioners and claimed to advocate for the wellbeing of the Indian, stated in his comments to the Board in 1885:

> It is sometimes said that the Indians occupied this country and that we took it away from them; that the country belonged to them. This is not true. The Indians did not occupy this land. A people do not occupy a country simply because they roam over it. They did not occupy the coal mines, nor the gold mines, into which they never struck a pick; nor the rivers which flow to the sea, and on which the music of a mill was never heard… Three hundred thousand people have no right to hold a continent and

> keep at bay a race able to people it and provide the happy homes of civilization. (Report of the Board of Indian Commissioners, 1885, p. 844)

Abbott and his fellow Christian reformers argued that only through imposition of private property on the "wild" Indian could he be saved; "With private property would come salvation and civilization (Bobroff, 2001, p. 1571)." Abbott used the idea of *terra nullius*, or empty land, one of the ten elements of Discovery described by Miller (2005), to assert that the existence of tribes was completely void of land claims; they could not own it because they were not properly using it; essentially they were not even present.

The pro-allotment reformers' efforts quickly prevailed. Bobroff (2001) details that of the 67 tribes that were offered a choice regarding allotment between 1830 and 1880, fewer than five percent were in favor (p. 1605). In 1892, the Kiowa, Comanche, and Apache tribes were pressured to accept the allotment in severalty of their reservation, opening up over two million acres to non-Indian settlement, with Indian Commissioners informing them that the federal government could allot their reservation whether they agreed or not (Estin,1984). After unsuccessfully petitioning Congress not to ratify a treaty that would open their lands in 1901, Kiowa chief Lone Wolf retained an attorney, and attempted to block allotment by suing Congress for violating their 1867 Medicine Lodge treaty. In the 1903 Supreme Court *Lone Wolf v. Hitchock* decision (187 U.S. 553), Justice White delivered the majority opinion against Lone Wolf, stating if the Kiowa were to prevail, it would:

> [Ignore] the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially

> limit and quality the controlling authority of Congress in respect to the care and protection of the Indians…
>
> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made… If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.

The rationale for absolute power of Congress over tribes was sealed. While the Marshall trilogy, and *Worcester v. Georgia* in particular, had upheld treaties with tribes as the supreme law of the land, *Lone Wolf* cemented the judicial support for the ability of Congress to abrogate treaties at will in order to make Indian lands available for non-Indian settlement, cementing its plenary power

Bobroff describes the settler narrative that pushed the destructive allotment policy as a perverse story of private property (2001, p. 56). The reformers who wished to "civilize" tribes believed they were "giving" tribes a property system, ignoring the multiple tribal systems of ownership that long pre-dated the arrival of Europeans and their political systems. By imposing their self-proclaimed benevolence, they and the U.S. government were able to erase the cooperative systems of land management with which the Coeur d'Alene and other tribes had successfully sustained their peoples, with the damages persisting into the 21st century.

Federal Indian Policy in the 20th Century: Poorly Disguised Discovery

Though most Americans prefer to think of the inequitable regard for tribal rights as a sin of the distant past, multiple court decisions of the 20th and 21st century have continued to cite, and even expand upon the *Johnson v. M'Intosh, Cherokee, Kagama,* and *Lone Wolf*

decisions and the assimilationist policies of the 19th century that supported dispossession of tribes from their lands. Repeatedly, the language of settler-colonialism occurs, evidenced in language of protection and dependency, and use of the trope of tribes as savage and uncivilized. Additionally, as Goldstein (2008) describes, the modern Court uses past tribal dispossession as method of preempting restoring tribal lands by arguing for what is most expedient for settlers.

In the especially egregious 1955 *Tee-Hit-Ton v. United States* Supreme Court decision, the Court declared that the Tee-Hit-Ton people, a sub-group of the Tlingit people, had no right to compensation after the federal government logged their traditional lands in the Tongass forest of Alaska. The Court states that, "The Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land… (*Tee-Hit-Ton v. United States,* 1955)." Citing *Johnson v. M'Intosh*, the Court informed the Tlingit that use of their ancestral homeland was not a property right, but a right of occupancy that the United States as sovereign could extinguish at any time without any obligation for compensation. Discovery, the Court claimed, was a legal theory that gave the "conquerors," the United States, sovereignty over and ownership of Indian lands. The Court asserted that civilization was a gift from the EuroAmerican settler graciously bestowed upon America's Indigenous people, but that generosity was due to the virtue of the United States, not because of obligation: "Generous provision has been willingly made to allow tribes to recover for wrongs as a matter of grace, not because of legal liability… (*Tee-Hit-Ton v. United States,* 1955). The settler-colonial narrative of the expansion of the United States could not be clearer than in the scathing words of Justice Stanley Reed:

> *"*...every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale, but the conquerors' will that deprived them of their land.*"*

Blomley (2003) argues in theorizing the settler legal framework of property, that for 18th century philosophers like John Locke and Thomas Hobbes whose writings shaped the American political system, casting Indian people as savage was foundational to their argument that they were lawless, and thus had no real claim to property. The arc of these notions of tribal savagery and incompetence, seeded in fifteenth century papal bulls and injected by 17th century European philosophers into U.S. Indian policy, was on plain display as the basis for complete disregard for tribal property rights by the 20th century U.S. Supreme Court.

Even more recent high court decisions have continued to draw on *Johnson v. M'Intosh* to undermine tribal property claims. In the 2005 Supreme Court decision, *City of Sherrill v. Oneida Indian Nation*, the Oneida Tribe sought to assert sovereignty that should have exempted it from paying property taxes to the City of Sherrill and the State of New York on lands purchased within the Oneida's 300,000-acre reservation. At the heart of the case was the original direct conveyance of the lands by tribal leaders to New York in 1795, in violation of the United States' Discovery right that was enshrined in the Trade and Intercourse Acts. These acts, first passed in 1790 and then reaffirmed repeatedly in subsequent iterations, affirmed that the federal government held the sole preemptive right to purchase land from tribes, and prohibited states and individuals from doing so (Goldstein, 2008). When the Oneida reacquired these lands through purchase and assumed they would be

regarded as restored to reservation status, the City of Sherrill argued that they could no longer be regarded as Indian lands. The Oneida attempted to use the Doctrine of Discovery and federal preemptive rights in their favor. Instead, Justice Ruth Bader Ginsburg invoked the legal doctrine of laches, a legal term that asserted that the Oneida waited too long to argue for their rights to govern their property in the courts. "The Tribe cannot unilaterally revive its ancient sovereignty," Ginsburg wrote in her majority opinion, overturning lower court opinions; "We now reject the unification theory of Oneida Indian Nation and the United States and hold that "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold (*City of Sherill v. Oneida Indian Nation,* 2005)." Once privatized, Ginsburg argued, tribes cannot reassert control, as others have settled these lands; to do so would be too disruptive to persons Ginsburg described as "innumerable innocent purchasers." Ginsburg, too, embraced the Lockean notion of undeveloped land as "wild land," upon which settlers have established permanent occupancy through subdivision and buildings, citing the *Johnson v. M'Intosh* decision as a legitimate claim to territory formerly belonging to the Oneida. Ginsburg also seemed to ignore not only that the Oneida Nation had tried to assert their rights but it wasn't until they were financially able to reacquire the land that they could make legal progress. Ginsburg's decision has been criticized by legal scholars for, "its lack of historical depth, its misuse of equitable doctrine, its inadequate normative analysis, and its apparent eagerness to resolve a tough issue on an undeveloped record" (Goldberg, 2009, p. 1032).

In what can often seem conflicting, the U.S. Court has, on occasion, built on *Worcester v. Georgia* to strongly support tribal sovereignty, reminding itself that treaties are to be upheld as the supreme law of the land. Ironically, the very same court that decided *Lone*

Wolf also produced the decision in *United States v. Winans* (198 U.S. 371, 1905) that held that "this court will construe a treaty with Indians as they understood it and as justice and reason demand," the basis for the canons of construction of treaty law that originated in with Marshall's 1832 decision. *Winans* involved the complaint by the Yakama Tribe against non-Indian settlers who were obstructing their ability to fish in a usual and accustomed site on the Columbia River with their own commercial fish wheel. The Yakama's 1855 treaty had guaranteed that right into perpetuity. In the decision of the Court, they rejected the argument that tribal members had no fishing rights greater than that of non-tribal residents of the Washington, and stated that for the Yakama, the rights to fishing places "were not much less necessary to the existence of the Indians than the atmosphere they breathed (*U.S. v. Winans*, 1905)." The *Winans* case built on the tradition of *Worcester v. Georgia* to establish three principles of canon construction – that the courts should: 1) resolve ambiguous expressions in favor of tribes, 2) interpret treaties the way tribes would have understood them at the time they were negotiated, and 3) construe treaties liberally in favor of the Indians (Blumm & Brunberg, 2006). Additionally, *Winans* was a favorable decision for tribal property rights, given the recognition by the Supreme Court that fishing (and hunting) were property rights that required compensation (Blumm & Bronberg, 2006). *Winans* became the basis for numerous tribal treaty cases, including significant fishing rights victories in the 1970s.

Despite *Winans'* significance in upholding tribes' treaty (and property) rights, in recent years the Court, particularly under Chief Justice Rehnquist and Chief Justice Roberts, have frequently ignored canons of treaty construction in favor of settler claims, using settler language. In *Montana v. U.S.* (450 U.S. 544, 1981), the Court determined that the Crow Tribe's treaties with the United States did not reserve ownership of the Big Horn River,

which bisects the Tribe's reservation, to the tribe, but reserved ownership for the U.S. to pass to the state of Montana. In the suit, the Crow Tribe was attempting to limit non-Indian fishing and hunting in order to address game population issues. Completely disregarding the canon that the treaties should be construed as the Crow would have understanding them, and ignoring the principle that treaties reserved rights for tribes, rather than granting them, the decision's author, Justice Potter Stewart stated:

> The 1851 treaty did not, by its terms, formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories… Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed… (*Montana v. U.S., 1981)*

Justice Stewart's decision created several new hurdles for tribes seeking to exercise their sovereignty. First, it demanded that instead of liberally construing treaties, tribes must be able to demonstrate the explicit intent of Congress to grant them rights. Secondly, Stewart's decision dealt a devastating blow to tribal governance by arguing that "[tribal] authority can only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation," and cannot apply to subsequently alienated lands held in fee by non-Indians (*Montana v. U.S., 1981)*." Anything else, Stewart claimed, is "inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Stewart's argument that tribes can only assert jurisdiction over tribally-owned lands where they can prove "undisturbed" use refuses to acknowledge how policies like allotment made maintaining land status nearly impossible for many tribes. The decision goes

further than land, stating: "[T]he powers of self-government… are of a different type. They involve *only relations among members of a tribe.*" Implicit is the assumption that tribes are somehow unworthy of exercising the same jurisdiction over non-tribal citizens that the federal and state sovereigns exercise over visitors within their borders. The *Montana* case specified several exceptions to the limitations of tribal jurisdiction over non-tribal citizens: first, when nonmembers entered into consensual relationships with the tribe, e.g., contracts, and second, when the conduct of the non-citizen has some direct effect on the political integrity, economic security, or, the health or welfare of the tribe. But 80 years after *Winans,* the Court no longer seemed to see the management of natural resources as being as integral to tribal wellbeing as breathing.

The *Montana* decision embodies what Goldenstein (2008) describes as the circular rationale of the Court, which originated in the Marshall trilogy, as linking sovereignty to property. The reasoning carried forth by the Court is this: tribes were occupants, but not full owners of their property. Settlement/development of land is what substantiates property. Property is requisite for autonomy; autonomy legitimizes sovereignty (Goldenstein, 2008). Through this logic, the Crow Tribe can only claim sovereignty where the presence of settlers has not disturbed their occupancy. This rationale was again applied in *Brendale v. Confederated Tribes* (492 U.S. 408, 1989), when the Yakama Tribe's zoning ordinance for its reservation was challenged by non-tribal residents, who claimed the Tribe had no jurisdiction over them as non-Indian. Here, the Court had a split decision: they found that the Tribe had jurisdiction over one property in an area where it owned most of the land because it had the power to exclude non-citizens. On another parcel, however, the Court determined that the Tribe did not have the authority to zone private land because:

> [I]t is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominately owned and populated by nonmembers, who represent 80% of the population, yet lack a voice in tribal governance. Furthermore, to the extent the open area has lost its character as an exclusive tribal resource… the Tribe has lost any claim to an interest analogous to an equitable servitude. (*Brendale v. Confederated Tribes,* 1989).

Not only does the Court again refuse to acknowledge that the presence of nonmembers was foisted on the Tribe by federal legislation, it puts the burden on the Tribe of "retaining its character" if it wishes to govern. Moreover, the Court presents itself as protecting the rights of the settler from the impositions of tribal governance, again implying a difference in the legitimacy of sovereignties. Rifkin (2009) describes this approach as exceptionalizing tribes in a way that accommodates only limited cultural self-determination, while assuming legitimacy of the federal government's overarching sovereignty where no such legitimacy exists. Rifkin explains that, "powers reaffirmed by the court under the rubric of tribal sovereignty are actually are not predicated on the existence of Native peoples as autochthonous ("separate") entities but instead on the authority arrogated by the U.S. government to redefine the status of Native collectivities according to any principle it wishes (2009, p. 107)." When tribal sovereignty is inconvenient for the settler majority, vague exceptions to tribal jurisdiction, such as requiring the tribe maintain the "essential character" of its lands, are created.

Critical Whiteness Theory, Settler Colonialism and Academia

The previous court cases are only a sampling of the codification and legitimization of an American narrative that obliterates tribal claims to property, whether land or water, and

promote the idea of newly "settled" lands. The settler, through the presumption of white supremacy, lays claim not only to land, but subverts even tribal people's claims to tribal identity. Harris (1992) demonstrates how the courts perpetuate the institutional right to determine identity with the case of the Mashpee Wampanoag, where the biological fiction of a racial identity is imposed on a tribe to assert that they no longer exist because they appear white. Here, as in *Brendale*, cultural identity is linked to legitimate ownership of property, creating a framework in which the U.S. legal system maintains the privilege of determining who can claim that identity (Harris, 1992). Ironically, today, nearly 30 years after Harris's article, the Mashpee Wampanoag are still battling for the right to assert their identity, following a U.S. Department of Interior decision made by the Trump Administration to reverse recognition of their reservation and refuse to hold property in trust for the Tribe, a decision just reversed by the Department in late 2021 (Stoico, 2021). The Department of Interior had claimed that the Mashpee Wampanoag could not prove their status as a tribe at the time of the 1934 Indian Reorganization Act, though it did not dispute the long-term occupation of the region by the Mashpee people ("Interior Department Rules," September 8, 2018). For contemporary tribes, property ownership continues to be contingent on the continued benevolence of the United States and the mood of the current administration.

While the work of legal scholars like Robert Williams and Robert Miller provide the important historical context for understanding the creation of U.S. Indian law from the "othering" of Native peoples, Harris's seminal work on examining how Whiteness continues to persist in our perceptions of property and law provides the groundwork for a critical examination of these perceptions in contemporary social and educational institutions.

The combination of critical Whiteness and settler colonialism has particular utility in looking at the role that expert witnesses, usually individuals coming from academia, play in the legal arena. For tribes to authenticate their land claims within U.S. federal systems, they have historically been forced to rely on researchers and academic institutions to substantiate their claims. Katner (2020) explains how the U.S. Federal Rules of Evidence for courts has generally excluded tribes from using their own accounts of their history by privileging written documents over oral histories, though the presumption that written documentation is more accurate than oral history is not inherently accurate. The Indian Claims Commission, for example, established in the 1940s by Congress to hear tribal land claims, initially excluded oral histories because they stated that they, "in point of time, are far removed from the issue in question (Indian Claims Commission, 1962, quoted in Katzen, 2020)," though they later allowed some oral history if it was supported by other evidence. Instead, tribal attorneys primarily had to rely on researchers such as anthropologists and historians to authenticate their claims (Richard, 1998). This practice not only delegitimized tribal voice, as historian Arthur Ray explains in his 2003 essay, "Native History on Trial: Confession of an Expert Witness," but meant that what voice was heard was filtered through the theoretical perspective of the "expert." Additionally, Ray describes how these experts frequently relied on pre-Claims Commission anthropological research that rarely focused on economic, political and land tenure systems because they were steeped in the dominant Lockean notions about property and ownership that regarded tribes as "primitive" (Ray, 261). As a result, the Commission – and likewise, the courts – shut the door to tribal accounts of overlapping territorial boundaries, not to mention consideration of the cultural value of the land (Smith & Neuman, 2008).

Strong (2016) describes how today there are growing spaces for Indigenous voices in ethnohistory, which merges anthropology and critical history methodologies. Strong points to the post-Indian Claims Commission era as a shift in practice, as anthropologists began to integrate a more critical orientation, but notes that still today, practitioners must be sensitive to how even historical descriptions of ideas like "tribe" are colonial remnants. Strong argues that a high degree of reflexivity must be practiced by scholars to ensure they are attentive to language and perspective (2016, p. 38). Strong describes a settler colonial framework as particularly useful as a transformative lens for anthropologists because of its use in illuminating "the project of eliminating and excluding Indigenous peoples found across settler states." Steiman (2016) applies the lens of settler colonialism to Sociology, and discusses how it allows for an examination of tribal history and political actions that not only calls attention to colonialism, but also the application of settler colonialism to educational research within the context of tribal communities because it questions "the structures by which the dominant remain dominant… and specifically within the spaces and places where we make research decisions..." (p.6). Settler colonialism is thus an appropriate lens in which to examine the political/legal structures in which the Coeur d'Alene Tribe has fought for its sovereignty, the ways academic researchers employed by the legal actors impacted those battles, and both past and present spaces of resistance against those settler-colonial structures.

Sovereignty: Resistance, Rights, and Resurgence

A growing number of Indigenous scholars are rejecting the premise that they must work within colonial political and social structures and are looking outside these institutions at alternative frameworks for self-determination. In this section I will examine both the consideration of alternative legal structures in which Indigenous communities may battle for

legal recognition, and of the outright rejection of recognition-based battles in favor of resistance and resurgence movements.

Indigenous communities across the globe have struggled with state ("state" referring to a nation-state, versus a political body within a republic) legal frameworks that diminish or ignore their political, cultural and land claims, and over the last century, have turned towards international legal arenas to argue these claims. Contemporary international law has its roots in 19th century European Law of Nations, when sovereignty began to evolve from a conception of absolute sovereignty of the monarch to a concept of territorial independence with limited constraints, reflecting growing embrace of democracy (Lenzerini, 2006). After World War II, the United Nations proclaimed the rights of nations to be free from colonial domination. However, generally speaking, this right has not been fully extended to Indigenous peoples, for which international bodies have supported the plenary power of their national governments (Lenzerini, 2006). Despite the International Court of Justice declaring in 1975 the underlying premise of the Doctrine of Discovery, *terra nullius* (land belonging to no one, because of the presumed lack of competency by its aboriginal owners) invalid, international bodies have continued to stay out of Indigenous autonomy cases, viewing them as domestic issues (Lenzerini, 2006).

In the United States, tribes appealing to international human rights law to address their case, such as tribal leaders who appealed to international courts following the 1973 deaths of tribal activists at the hands of federal agents at Wounded Knee, found human rights law inadequately protected their claims (Coulter, 2008). Generally, the U.S. Court system has discretion on how it treats international declarations such as the Universal Declaration on Human Rights, with the Supreme Court referring to their "moral authority," but determining

them to be non-binding (Dubinsky, 2010). Still, one of the most significant developments in Indigenous law and policy in recent years has been the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly in 2007 (UNDRIP) (Coulter, 2008). UNDRIP, initially signed by all but Canada, Australia, New Zealand and the United States (CANZUS), is a non-binding, aspirational document that enumerates the collective rights of Indigenous peoples in keeping with binding human rights conventions (Coulter, 2008; Moreton-Robison, 2015). Developed by Indigenous peoples from around the world over two decades, it not only asserts the right to self-determination, but the right to the explicit protection of the environment that is the root of Indigenous existence (Coulter, 2008). Finally signed by the CANZUS nations, it provides a framework for a legal future for Indigenous peoples outside of colonial, Discovery-based political systems. However, as a non-binding document, UNDRIP has no mechanism to compel states to adopt its principles (Moreton-Robison, 2015); however, it may act as moral pressure help create a foundation for future Indigenous cases (Lenzerini, 2006).

Since its adoption, scholars continue to consider how UNDRIP can be used to compel its signatories to comply with its tenets. Most recently, Robison, Cosens, Jackson, Leonard, and McCool (2018) have applied the principles articulated in UNDRIP to three ongoing water conflicts: water allocation in the Colorado River, hydroelectric power and fisheries conflicts in the Columbia River Basin, and water management in the Murray-Darling watershed in Australia. The authors define these basins as sharing a legacy of "water colonialism," whereby Indigenous uses of waters were erased or ignored in favor of extractive uses (Robison et al., 2018). Without explicitly articulating a settler colonial lens, the authors explain how the institutional structures in both the United States and Australia are

ongoing mechanisms of colonialism that have continually marginalized the relationship of Indigenous peoples to these watersheds. The authors argue that UNDRIP provides a framework for a post-colonial recognition of Indigenous water rights, and call on the two countries to integrate Indigenous water rights into domestic law. They call for the recognition of the cultural and spiritual rights of Indigenous peoples, and the appropriate funding to build water governance capacity where it does not fully exist (Robison, et al., 2018). However, though the authors present a clear argument for the application of UNDRIP to domestic water policy, they concede that their call for decolonization of water rests on the moral call for governments to engage in dialogue rather than any legal imperative.

It is for this reason that Moreton-Robison (2015) critiques state reactions to UNDRIP and argues that Indigenous rights literature limits possible futures for Indigenous communities. Moreton-Robison uses Foucault's conception of power to examine how rights frameworks can "facilitate procedures of Indigenous subjugation and mask non-Indigenous investments in relations of patriarchal white sovereignty (2015, p. 131)." Moreton-Robison argues that by making claims to rights within contemporary political systems, the very making of those claims legitimizes the oppressor.

Moreton-Robison explores how the initially-resistant CANZUS nations, home to nearly half of the world's Indigenous peoples, participated in state-scale virtue signaling, both in their initial reluctance to sign UNDRIP, and in their later caveats to its adoption. Moreton-Robison describes the commonalities of the CANZUS countries as ones where "patriarchal white sovereignty as a regime of power is the defining condition of their formations, ordaining them ontologically with a sense of divinity (2015, p. 177)." She argues that these nations, in order to justify their own sovereignty, must at the same time

deny Indigenous sovereignty in order to uphold their legitimacy, and in doing so they try to cloak their actions in virtue. Calling their reluctance to adopt UNDRIP, "domination in the guise of good government (2015, p. 179), Moreton-Robison points out how the United States claimed ownership in international law by limiting how it might be considered, negating Indigenous rights by arguing that only the nation state had the sovereign right to determine the legal status of Indigenous peoples within their border. All four CANZUS nations presented themselves as working virtuously with Indigenous communities to support their rights, and treated UNDRIP as threat to their national sovereignty, even while phrasing their reluctance in declarations of apologies for past wrongs and hopes for productive shared futures together (Moreton-Robison, 2015). Indigenous scholar Jeff Corntassel (2012) calls this type of state behavior "forgive and forget" discourse that he labels a politics of distraction. Instead, Corntassel argues that Indigenous communities should shift their focus away from a rights agenda to one of responsibilities that is re-centered on reconnection with land, culture and community.

In his 2004 essay, "Warrior Scholarship," Taiaike Alfred maintains that colonialism is not a temporal era, but way of existing that disconnects Indigenous people from their relationships with other living beings and the earth. He states:

> …[the] true meaning of "colonialism" emerges from a consideration of how we as Indigenous peoples have lost the freedom to exist as Indigenous peoples in almost every single sphere of our existence. (Alfred, 2004, p.89)

Alfred contends that the attention paid to legal and political governance has come at a cost – the loss of the relationships between family, community and land that are foundational to

Indigenous identity (2005). He calls on Indigenous scholars to work on research agendas that are consistent with traditional teachings and that help revitalize these relationships.

Both Alfred and Corntassel (2012) name the current crises facing Indigenous communities as a spiritual battle. Corntassel posits that engaging in being Indigenous, i.e., daily, place-based cultural practices that rekindle one's land and water relationships, is an active of insurgency, posing a threat to the state. More than rights-and recognition-oriented struggles, he argues, "A community's cultural continuity is premised on direct actions to protect these sacred relationships" (Corntassel, 2012, p. 93).

Corntassel and Alfred frame the true battle for self-determination as one reliant on a renewal of individual and community roles and responsibilities to the land. Both scholars suggest that the sustainability of Indigenous communities is critically dependent not on legal and political recognition but on the ability to transmit stewardship of their lands to future generations through cultural and linguistic practices (Alfred, 2005; Corntassel, 2012). Alfred states, "the first part of self-determination is the self. In our minds and in our souls, we need to reject the settlers' control and authority, their definition of who we are and what our rights are… (Alfred, 2005, p. 97)."

Adam Barker, a First Nations scholar, in his 2015 work, "A Direct Act of Resurgence, a Direct Act of Sovereignty," looks at the Canadian-born Idle No More movement as a collective act of resurgence that moves beyond the rights framework into an assertion of cultural and land relationships and responsibility. Barker examines how this grassroots movement, launched in response to Canadian governmental environmental deregulation, resulted in Indigenous communities around the world holding public demonstrations in spaces such as shopping malls that represent the materialism and

consumption that Indigenous resurgence opposes. Barker considers how the social media-driven pop-up demonstrations of traditional song and dance were received as acts of aggression, merely due to the presence of Indigenous people asserting their Indigneity in perceived non-Indigenous spaces. These assertions, Barker suggests, of "Indigenous place-relationships and social spaces challenge the core of both Canadian political economy and Settler identity" (Barker, 2015, p. 4).

Like her First Nations colleagues, Leanne Simpson (2016), advocates for resurgence as the critical pathway for self-determination. She argues not for rights, but for justice, meaning the return of Indigenous lands and the affirmation of Indigenous epistemologies and land relationships. She argues that through the revitalization of cultural knowledge and practices, communities can not only imagine decolonized futures but begin to create them. In contrast, she states, a rights framework implies colonial permanence that perpetuates settler colonial structures (Simpson, 2016). Simpson, too, suggests that responsibilities to land are imperative for Indigenous cultures, stating

> If we do not create a generation of people attached to the land and committed to living out our culturally inherent ways of coming to know, we risk losing what it means to be Nishnaabeg within our own thought systems… We simply cannot bring about the radical transformation we seek if we are solely reliant upon state sanctioned and state run education systems. (Simpson, 2016, p. 26).

In his 2014 book, *Red Skin, White Masks*, Glen Coulthard, too, makes a comprehensive argument for refusing a rights framework. He argues that the persistence of settler colonialism, which he describes as a continuing invasion, is perpetuated by any efforts of inclusion in academic and political systems that do not acknowledge the continued

dispossession of Indigenous peoples from their lands and lifeways. While Coulthard's book focuses primarily on First Nations bands, the conflicts it surveys of the federal settler-colonial institutions v. tribal nations conflict is instructive for tribes within the United States as well. Using Marx's theory of primitive accumulation, Coulthard argues that capitalism and settler-colonialism create ongoing structures of violence and dispossession of Indigenous peoples from their land (Coulthard, 2014). Coulthard draws heavily on the work of Franz Fanon, anti-colonial author of *The Wretched of the Earth* and *Black Skin, White Masks,* to which the title of his work pays homage. Coulthard explains in-depth Fanon's theories regarding the impact of colonialism on the colonized, arguing that the skewed power relations between the colonial master and servant result in a situation by which, "the values of the colonizer seep in and limit the possibility of their [the colonized] freedom" (Coulthard, 2014, p. 39). Coulthard concurs with Fanon's argument that in order for the colonized to truly be free, they must "turn away" from the colonial state and society and instead find in their own *decolonial praxis* [author's emphasis] the source of their liberation" (Coulthard, 2014, p.48). Fanon's argument, in fact, is at the heart of Coulthard's work, which argues that after two centuries of Canadian rule, First Nations leaders have failed to make significant gains in sovereignty except for when they have actively fought against the colonial state, such as in the case of Idle No More.

Coulthard argues that the decolonial praxis argued for by Fanon falls short of a sufficient path forward for Indigenous communities, however, because both Fanon and Marx saw Indigenous communities as primitive and overly concerned with looking to the past (Coulthard, 2014). Here, Coulthard argues that Indigenous communities are united by what he terms a "grounded normativity," or a sense of values that are shaped by their place-based

existence. Coulthard argues that the Indigenous values of respect, relationship and reciprocity within and towards the landscape were what defined pre-contact Indigenous communities, and that these values are what can provide an alternative path forward for Indigenous governance that does not look to the colonial state for validation (Coulthard, 2014).

Much of Coulthard's work is in reaction to three forces. First, Coulthard, a member of the Dene First Nation, uses the work of Fanon to explain how his own people have, as he portrays it, devolved from a position of grounded normativity in their fight for land sovereignty, to cooperation with the state (the Canadian federal government) in what is contemporarily termed "recognition." Coulthard argues that Dene leaders have allowed "recognition" of their sovereignty to become a vehicle for primitive accumulation that transfers land and resources to the state, in effect facilitating the acquisition of property by the settler. This process, he argues, uses the word reconciliation, not as a means for healing, but for a way to make First Nations become congruent with the values and capitalist demands of the colonizer (Coulthard, 2014). As a result, sovereignty is limited to what the state is willing to recognize as only the governance of internal policies and cultural practices that do not create conflict or restrict access to resources by settlers (Coulthard, 2014).

Together, Alfred (2005), Simpson (2016), Barker (2015), Corntassel (2012), and Coulthard (2014) make a compelling argument for Indigenous communities, scholars, and allies to look beyond attempting to effect change within settler colonial frameworks, and to instead pursue more transformative efforts for communities to practice their culture and land relationships. In effect, they are calling for what de Oliveira Andreotti et al., (2015), term "system walk out." This presents daunting challenges to institutions that inherently elevate "rational" knowledge systems, where community action is not viewed as commensurate with

academic knowledge, and Indigenous systems have yet to fully be acknowledged as legitimate. Yet at the same time, their argument for the futility of trying to work within the system seems all the more relevant when observing the intransigence of federal and state governments towards a full recognition of sovereignty. Whether it's the reversal of recognition of the Mashpee Wampanoag, the dismissal of the pleas of Standing Rock protestors looking to protect their waters and sacred sites, or the State of Idaho's never-ending objections to the Coeur d'Alene Tribe's sovereignty and property claims, examples abound of settler colonialist impositions on tribes. At the same time, tribal communities are engaging in Indigenous resurgence, participating in canoe journeys, revitalizing spiritual practices, and rekindling land relationships. Recognizing the seeming immutability of federal Indian policy even as tribal voices gain strength leads to the overarching challenge of how tribes and their allies can recognize and effectively dismantle settler colonial structures from within.

For the Coeur d'Alene Tribe, for all its legal successes within the settler-colonial legal framework, the continued decline of the health of Coeur d'Alene increasingly seems to point towards the need to engage in some form of system refusal. In late November 2019, Lake Management Director Phillip Cernera explained the Tribe's decision to abandon its partnership with the State of Idaho in the 2009 Lake Management Plan as a response to increased extractive land use impacts on water quality, and the inaction of state and local officials. "Until we see something else happening, we ain't a part of this game," he stated (Francovich, 2019). As the Tribe continues to battle for the health of its water – and its people – a better understanding of not just its natural resource management options, but legal opportunities that exist beyond its historic approach is critical. Refusing federal and state

legal and bureaucratic systems that stand between it and the return of its waters to health – and Tribal ownership - requires its partners to stand with it in its effort to decolonize its homeland.

Chapter 3: Research Design and Methods

The purpose of this study is to conduct qualitative instrumental case study of the Coeur d'Alene Tribe's experiences in trying to assert its jurisdiction over Coeur d'Alene Lake, which led to two Supreme Court cases, *Idaho v. Coeur d'Alene Tribe* (1997) and *Idaho v. U.S.* (2001), ultimately resulting in the affirmation of its ownership over the southern third of the lake. The study also includes thematic analysis of *Idaho v. U.S.* (2001) to consider how settler colonialism impacts the legal and political context for the arguments made by the Tribe, the State of Idaho, and the federal government, including the narratives and discourse presented by the attorneys, Tribal leaders, elected state leaders, and academic researchers hired by the parties as expert witnesses. The specific method employed will be a critical document analysis using the court proceedings, which include expert witness reports, depositions, briefs, governmental records, and the court decisions themselves. Text from these documents will be coded to analyze themes and subthemes of the data. The study addresses the primary research question:

> Has settler-colonialism impacted the Coeur d'Alene Tribe in its battles to assert sovereignty over its land and waters? If so, how?

Qualitative Research

Case Study Methodology

The case study has a long history of use in qualitative scholarship, though not all scholars believe it is truly a methodology, but instead an approach that is defined by the interest in a case, and not by its methods (Stake, 2008). Others posit that case study *is* a methodology, as a type of design "that may be an object of study, as well as the product of the inquiry" (Creswell, 2012, p. 97). Where there is agreement, though, is that the case is the unit of analysis (Miles & Huberman 1994) that allows in-depth analysis of something of

interest to the researcher. Stake (2008) defines three types of case studies: 1) *intrinsic*, when the researcher has a particular interest in the case itself; 2) *instrumental,* when the researcher has is exploring the case to provide insight into a larger external issue; and 3) *collective* when multiple cases are studied jointly to look at common phenomena that may provide insight into a theory (p. 123). In Chapter Four, through exploration of the Coeur d'Alene Tribe's cases regarding Coeur d'Alene Lake I consider documents from multiple cases, including the Federal and Tribal suit against Idaho for Heyburn State Park, the Tribe's claim of ownership in Washington Water Power's FERC relicensing proceedings, and the Tribe's claims in *Idaho v. Coeur d'Alene Tribe* (1997) and *Idaho v. U.S.* (2001). However, the core questions of these cases and many of the historical exhibits and documents were used repeatedly throughout the proceedings, so they may be regarded as a single phenomenon. The purpose of the study is to consider how settler colonialism is expressed in the language, laws, and policies of the two cases, and how that impacts future legal battles for the Coeur d'Alene Tribe, as well as other tribes wishing to strengthen their sovereignty over their homelands, so this inquiry is best classified as instrumental. Regardless of whether one considers case study as a methodology or an approach, Baxter and Jack (2008) propose that case study "supports the deconstruction and the subsequent reconstruction of various phenomena" (p.544), validating this in-depth process of developing an intimate understanding of the details of case development for the Tribe, the federal government, and the state in order to better understand how their values and worldviews impacted and continue to impact their legal and political approaches.

Hyett, Kenny, and Dickson Swift (2014) conducted an assessment of studies using a case study approaches to develop a framework for assessing the quality of these studies. In

addition to assessing the basic quality of writing, they developed several criteria that were of high relevance to the quality of a qualitative case study, including:

- Is the case adequately defined?
- Is there a sense of story to the presentation?
- Were data sources well-chosen and in sufficient number?
- Do observations and interpretations appear to have been triangulated?
- Is empathy shown for all sides?
- Is the case study particular, descriptive, and heuristic?
- Was the design appropriate to the methodology?

(Hyett, Kenny & Dickson Swift, 2014, p. 3)

The authors found that many of the articles used case study as a method within the context of a larger methodology, and termed these "case reports" rather than case studies, citing their lack of encompassing the entire case and lack of detail about methodology. The authors suggest that a defining factor for the employment of case study as a methodology is the boundaries of the case, which they suggest be broad and include multiple data sources and thick descriptions of the research. Additionally, the authors found that the rationale for choosing the case study as a methodology must clearly lay out the rationale for choosing the case, as well as the theoretical framework (Hyett, et al., 2014). The in-depth exploration of the Coeur d'Alene Tribe's legal history with regards to the lake is an attempt to shed understanding on the oppressive nature of settler-colonialism within a legal framework, and contrast it with the possibilities of Indigenous Rights and Resurgence approaches, thus

placing it squarely in the realm of this theoretical perspective. Thus this case provides a rich opportunity to explore one tribe's experience in working to assert its rights within the existing Western legal framework, and consider the resulting successes and challenges.

Critical Document Analysis

In Chapter 5, I use critical document analysis combined with thematic analysis as the method for conducting an in-depth exploration of one of the legal cases presented in the overall case study. Bowen (2009) defines document analysis as "a systematic procedure for reviewing or evaluating documents – both printed and electronic material" (p. 27). Bowen describes document analysis as a method that can be especially useful in providing intensive, rich descriptions of a single phenomenon, and efficient, unobtrusive away to support in-depth study. Bowen describes three iterative steps to the process: skimming, reading, and analysis (p. 32). This process allows the researcher to determine the suitability of each document and categorize it for understanding larger themes. To develop these themes, I employed critical thematic analysis, described by Lawless and Chen (2019) as providing a means to consider how patterns across the data "are recurrent, repeating, and forceful in ways that reproduce and reinforce social inequalities" (p.95).

Wildemuth (2009) also provides a step-by-step approach for conducting document analysis, with the first step being the conceptualizing the phenomenon of interest and linking it to the needed documents (p.166). Those documents may include official reports, financial statements, letters, diaries, and images. Wildemuth states that two potential limits to the employment of this method include access to documents, and the need for thorough contextual knowledge by the researcher. Both Wildemuth (2009) and Bowen (2009) assert that document analysis should be used in conjunction with a separate method of data

collection. However, in Hodes' (2018) study of a Canadian salmon fishing case involving a conflict between Indigenous and non-Indigenous fishermen (*R. v. Kapp*, 2008 SCC 41), she employs this method in a critical discourse analysis study as a means to understand settler colonial context in a Canadian salmon fishing conflict (*R. v. Kapp)*. Hodes describes critical discourse analysis as a framework for employing this method, using it to frame and code documents describing the history of the case, the infrastructure of the legal system, the text of the case, and the language of the various actors. Hodes refers to this as template analysis, but the basic approach is similar to Bowen; Hodes uses judicial decisions as her original data set, developing categories of codes, and then adding analysis of witness testimonies and legal documents pertinent to the case to explore how the decision itself used settler-colonial language and underlying assumptions of *terra nullius* to claim reverse racial discrimination against policies protecting Indigenous fisheries.

While critical discourse analysis such as that employed by Hodes is useful for examining power inequities, Lawless and Chen (2019) suggest that critical thematic analysis can be more useful as a content analysis method for scholars who lack the linguistic background to analyze syntax and grammar, but who wish to engage in research that looks at imbalances of power in discourse with a goal of achieving social change. Lawless and Chen build on the previous work of Braun and Clarke (2012), who describe thematic analysis as a flexible method that allows the researcher to systematically identify and organize patterns of meaning across a data set, rather than focus on quantitative incidents of word use.

Hall and Wright (2008) argue that this type of analysis can be a stand-alone method, especially within an interpretive paradigm. They conduct a study of content analysis of legal cases, and contrast the thematic coding process used in social science with traditional legal

scholarship, and suggest that while legal scholarly interpretation relies on the authority and knowledge of the scholar, content analysis requires that the researcher lay out cases and themes in a way that others could reproduce them. They trace the history of content analysis of judicial opinions over a fifty-year period, and examine their methodology to determine best practices for using this method. Hall and Wright's work encompasses a generally post-positivist approach to legal content analysis, which has traditionally been used as a way to explain a judicial opinion and to predict future outcomes, using a quantitative analysis of language use. However, they posit that this type of content analysis limits its own potential, stating,

> Studying opinions simply as vessels for bare outcomes or case holdings, while insightful is not fully satisfying because such studies do not take full advantage of the rich reservoir of information within judicial opinions. It would be a waste to study only the skin of cases and to throw away their fruit. (2008, p. 90)

Hall and Wright propose that content analysis should not just look at judicial decisions to understand the employment of legal doctrines, but should be more broadly conventional doctrinal analysis, but also for the application of theoretical approaches, including critical theory.

Given the scope of the Tribe's legal archives, which contains thousands of documents that include the judicial opinions, expert testimonies and witness depositions, letters from federal agents, newspaper clippings from the late 1800s to contemporary times, and more, I believe that document analysis is an appropriate stand-alone method for this study. The archives contain not only the Tribe's perspective, but all of the exhibits, testimony, and

arguments prepared by the federal and state attorneys, allowing for the consideration of multiple perspectives.

Data Collection

Common across descriptions of both case study and document and thematic analysis is the need to identify what the framework is for considering the documents and what will be included in the analysis (Baxter & Jack, 2008; Wildemuth, 2009). The process of data collection requires binding your case to ensure it is achievable (Baxter & Jack, 2008). The list of background materials submitted for the 1997 District Court Case, *U.S. v. Idaho* that culminated in the 2001 Supreme Court *Idaho v. U.S.*(*Idaho II*) case alone includes over 1,400 documents, including books, memoirs, military correspondence, surveyor reports, expert witness reports and depositions, research articles, newspaper clippings and maps, as well as all of the court dockets, briefs and judgements. The entire archive includes all of these, plus additional media and correspondence, as well as information about the 11th Amendment dismissal by the Supreme Court of the Tribe's case in *Idaho v. U.S* (1997), which will be explained in detail in Chapter 4.

In order to establish parameters around the data to make sure that it would be manageable, and because I am most interested in the legal, scholarly, and community perceptions and language around the case, I examined the following types of documents:

- Expert witness reports, testimony, and depositions
- Legal briefings
- Judicial opinions

- Correspondence between the three primary actors (Coeur d'Alene Tribe, U.S. government, and State of Idaho)
- Newspaper articles

It is important to recognize that limiting the sampling frame to the documents discussed above is a potential limitation to the study itself, as omitting documents may lead to oversight of some important context, as well as the implication these documents are of no significance (Hall & Wright, 2008). In this study, I had access to the Tribe's correspondence, as well as internal documents detailing its legal strategies, but I had no such access to State of Idaho or federal archives, which means that their full perspective is not addressed.

The above selection frame still involves a copious amount of data, but in order to sort the documents, I sorted them by importance and relevance by using a document summary form to rapidly skim and determine their relevance for the study. Figure 1, below, displays an adaptation of such a form from Miles and Huberman (1994, p.5) that not only have helped with an initial coding, but assisted my ability to locate documents that were embedded in larger electronic files, allowing for more efficient sorting for later analysis.

Document Name	Document Number and Location	Document Author	Document Date	Review Date
Description of Document				
Event with which document is associated				
Significance or importance				
Summary of contents and key words and phrases				

Figure 1: Sample Draft Document Summary Sheet, adapted from Miles and Huberman, 1994.

While there are multiple approaches to coding that can be employed, Zhang and Wildemuth (2009) suggest that for direct analysis of content the initial coding may start with a theory or relevant research findings, that then allows the researcher to pull themes from the data to extend a conceptual framework. They posit that the theme may be a single issue of relevance. Creswell (2012) suggests using "lean coding," identifying several categories that expand as you iteratively read, test your coding scheme, code, and see what emerges (Creswell, 2012); Miles and Huberman, too, suggest developing a provisional code list, and through the iterative process allowing new themes to surface (1994). Spurgin and Wildemuth (2009) discuss how through this process, the researcher should be looking for both manifest indicators, or the observable use of language, and latent indicators, where concepts may be implied or contextual. Both types of indicators are important as the researcher sorts and develops definitions, characteristics, and sets of code categories.

The overarching framework I employ is settler colonialism, drawing on Critical Race Theory, Critical Whiteness Theory, and Tribal Critical Theory, and my proposed categories refer to the three legal foundations described by Gilio-Whitaker (2019) of Doctrine of Discovery, plenary power, and domestic dependent nations, as well as the fourth category of Indigenous Rights and Resurgence, in order to illuminate areas of resistance. Figure 2 (p. 64) demonstrates some of the language from my guiding theories that I used to initially code my data.

Research questions

The following questions and sub-questions were used to guide my coding as I explored the documents:

1. Has settler-colonialism impacted the Coeur d'Alene Tribe in its battles to assert sovereignty over its land and waters? If so, how?
    a. Are the ideas of property and ownership presented by the primary actors (the State of Idaho, the federal government and the Coeur d'Alene Tribe) in court proceedings? If so, how?
    b. Do the three legal foundations of doctrine of discovery, domestic dependent nationhood, and plenary power appear in the three actors' arguments, as well as court rulings? If so, how?
    c. Do the primary actors' arguments legitimize or delegitimize tribal epistemologies and sovereignty? If so, how?

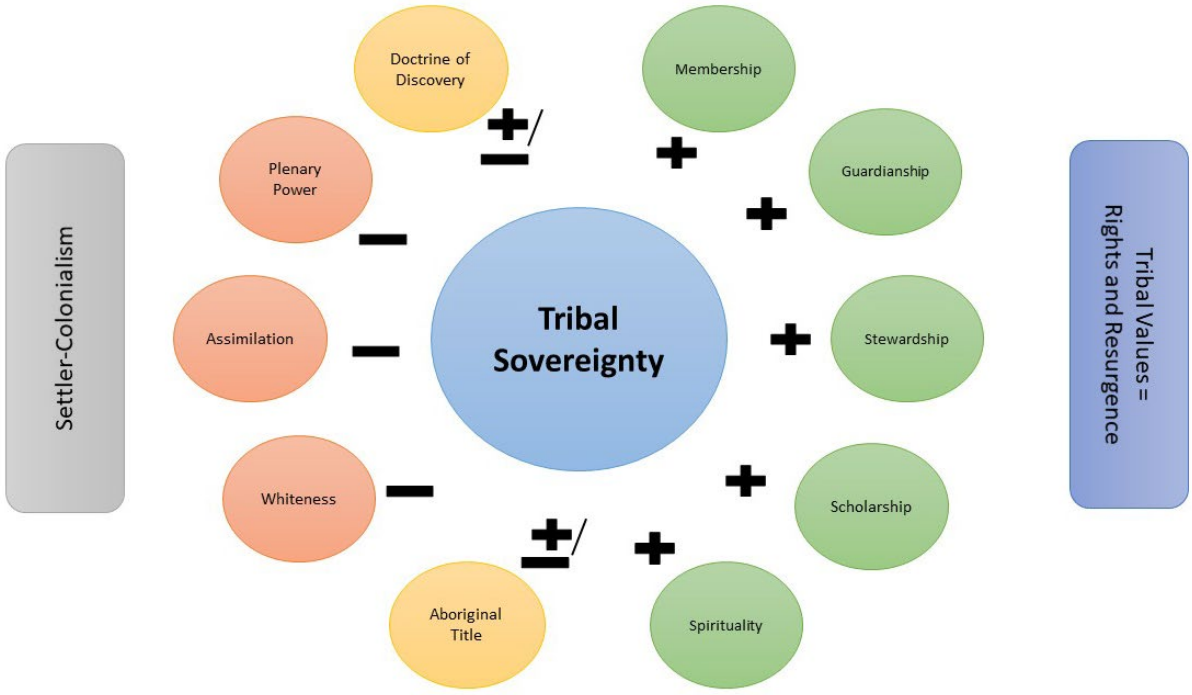

Figure 2: Coding Framework

An additional important consideration in my analysis was the use of legal citations to illuminate how Western historical conceptions of tribal property ownership and rights to its land and water might be conveyed without explicit phrases or keywords. Williams (2005) describes how the repetition of unjust court decisions can perpetuate racism by using previous legal decisions Identifying legal citations is critical to understanding how settler colonial concepts can be embedded in a legal argument, or in judicial decisions, by citing precedent. The doctrine of *stare decisis*, which literally means "to stand by things decided," describes the practice of adhering to previously decided court cases to make a judicial determination (Legal Information Institute, 2021). Part of my coding involved identifying such court cases that were repeatedly cited by the actors that contained overtly racist or

derogatory terms, or used Doctrine of Discovery and the concepts derived from it to justify their arguments and uphold settler colonial concepts within contemporary law (Table 1).

Court Case	Topic	Excerpts	Themes
Fletcher v. Peck, 10 U.S. 87 (1810)	Whether a contract between two individuals could be invalidated by the State of Georgia if the original land grant under which one of the individuals purchased the land from the state was based on fraud.	"that at the time of passing of the act of the 7th of January, 1795, the United States of America were seised in fee simple of all the tenements aforesaid… subject only to the extinguishment of part of the Indian title thereon." (Page 10 U.S. 91) "The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the State." (Page 10 U.S. 87)	Doctrine of Discovery Aboriginal title as expansive right until extinguished Whiteness
Martin v. Waddell, 41 U.S. 367 (1842)	State ownership of navigable waters as a sovereignty derived from the Crown's discovery right	"The English possessions in America were not claimed by right of conquest but by right of discovery. According to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nations by which any portion of the country was first discovered" (Page 41 U.S. 367).	Doctrine of Discovery Aboriginal title as permissive right
U.S. v. Holt State Bank, 270 U.S. 49 (1926)	Submerged lands within the Red Lake Indian Reservation passed to the State of Minnesota under the equal footing document because of the lack of explicit conveyance to the Tribe	"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity…" (Page 270 U.S. 54). "The reservation came into being through a Succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands… The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory, and thus it came to be known and recognized as a reservation. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters, nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state. Without doubt, the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian…" (Page 270 US. 58-59).	Doctrine of Discovery Aboriginal title as permissive right

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)	The Tee-Hit-Ton band of the Tlingit Tribe were not entitled to compensation from the United States for taking of timber in aboriginal territory because	"It is well settled that, in all the States of the Union, the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest, they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties, but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians" (Page 348) U.S. 279). "It is to be presumed that, in this matter, the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race" (Page 348 U.S. 281).	Doctrine of Discovery Aboriginal title as permissive right Plenary power Whiteness

Table 2: Court cases frequently cited in Idaho v. U.S. (2001).

Data Analysis

Document analysis is the method I employed to understand and explore the themes that emerge from the data. Bowen (2009) describes document analysis as an iterative process that enables one to recognize patterns and develop categories from the themes for analysis. Bowen emphasizes that during the process, the researcher is expected to display both objectivity and sensitivity to the data so that they can see what may be subtle cues for meaning. Bowen also discusses the need to evaluate each document that is considered for its contribution, authenticity, credibility, accuracy and representativeness (2009, p. 33). To conduct the thematic analysis of the documents, Braun and Clarke (2012) identify six steps:

1) Familiarize yourself with the data,
2) Generate initial codes,
3) Search for themes,
4) Review initial themes,

5) Define and name themes, and

6) Produce the Report

In order to analyze my data, I engaged in a primarily deductive process that was based in Tribal Critical Race Theory and Critical Whiteness Theory, allowing me to examine the documents with attention to issues of colonization and sovereignty that aligned with my research questions. In following the process identified by Braun and Clarke (2012), my first step was to conduct an initial review of all of the documents in the electronic archives. The documents were stored in folders that were labelled by case year and number, and many of the documents were single .pdf files that contained dozens, if not hundreds, of individual files spanning over a number of years. Because the files are located in a shared internal server, I was restricted from restructuring the filing system. Instead, I created a notation system to attach the folder numbers with the associated cases, as well as a description of each folder's contents. As I noted down significant memos, briefs, or articles, I recorded those in memos for later retrieval.

After my initial review, I narrowed my content frame, and began using the data collection chart in Figure 1 to collect details for each record of interest. I re-read each document at least once, and then used my collection chart to begin to identify themes. As themes begin to emerge from the documents (Figure 2), I used highlighting in different colors to identify these themes in specific quotes. Lawless and Chen (2019) refer to this process as open coding, where patterns of repetition and emphasis first begin to emerge. Closed coding is the second part of the process during which I began to look for the linkages across the discourse presented by each actor over the course of the case to develop more focused themes that address their respective ideologies. Figure 3 (below) illustrates how the

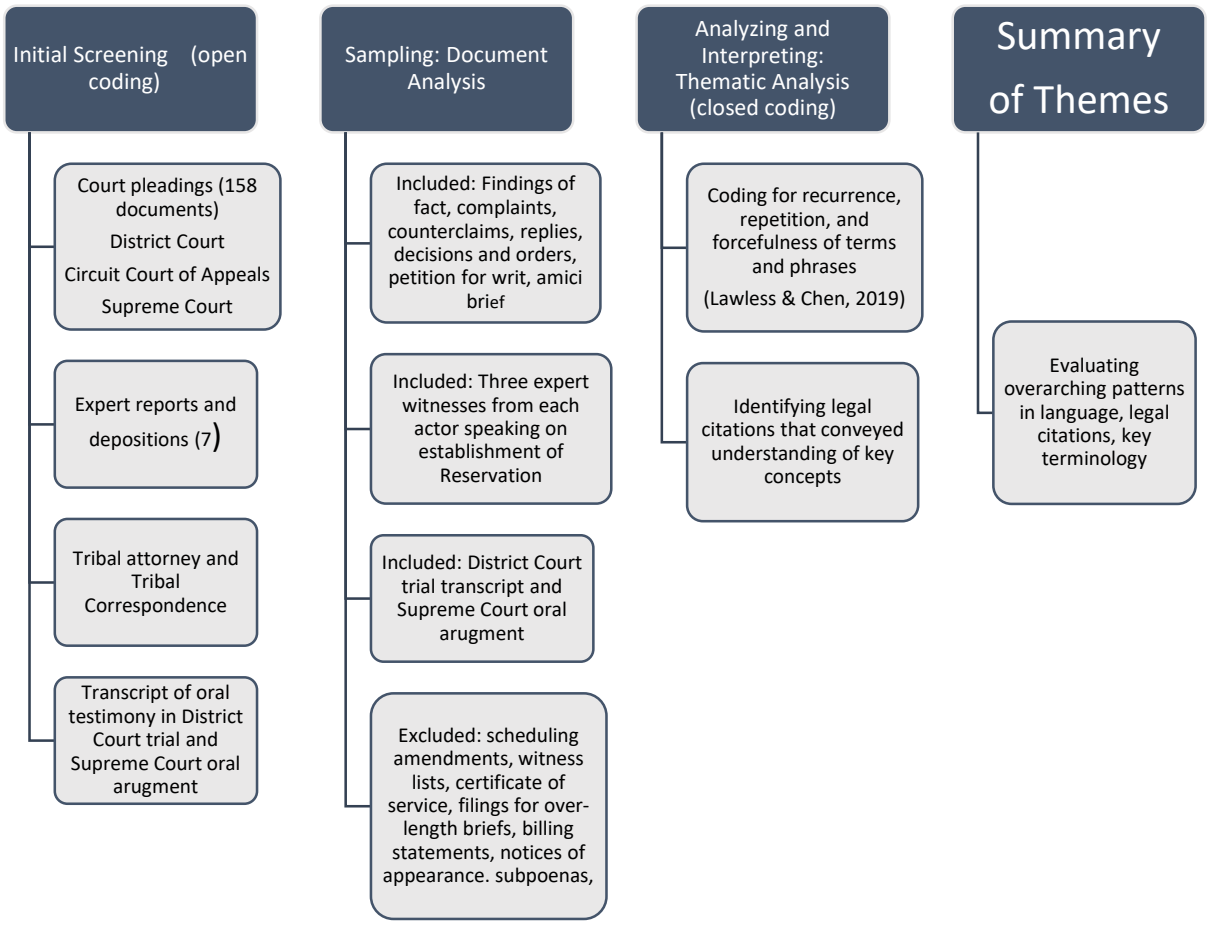

Figure 3: Document and Thematic Analysis process

document analysis and thematic analysis were combined to identify patterns of meanings across the entire case.

Trustworthiness and Authenticity

In qualitative research, proving the rigor and reliability of the study is part of proving its worth (Amankwaa, 2016). Amankwaa equates this rigor in qualitative research to trustworthiness, and describes its four components, first enumerated in Lincoln and Guba (1985), as credibility, transferability, dependability, and confirmability, and recommends that qualitative researchers create a protocol before their study begins. Baxter and Jack (2008) describe key elements of trustworthiness in document analysis as having clear, substantiated research questions, appropriate design, application of purposeful sampling strategies, systematic data collection, and correct analysis of the data, (p.556). Bowen (2009) states that trustworthiness includes a "thick" description of phenomena and an audit trail, so that the process of theory development would be both visible and verifiable" (p.38).

Zhang and Wildemuth describe what the four overall components of trustworthiness should include in content analysis. Dependability is described as coherence of the process. Confirmability requires that others can look through the research results, using the raw data, and support the characterization of the data; the more detailed the documentation, the better. Finally, transferability simply means that the data sets and descriptions that must be rich enough so others can determine transferability. Finally, credibility requires transparency, member checks, and deep knowledge by the researcher (2009, p.323). Creswell (2012) posits that, "to demonstrate credibility, the weight of the evidence should be persuasive" (2012, p.246).

Amankwaa (2016) describes the use of an activities table at the inception of a study to help achieve trustworthiness. The following table is an adaptation of that table that has guided my work in order ensure trustworthiness in this study.

Credibility	
Member Checks	1. Establish a peer group to meet at least twice to review initial coding categories, emerging themes. 2. Keep detailed notes on peer group meetings. 3. Share copies of data analysis for feedback, and record responses.
Transferability	
Thick Description	1. Maintained detailed notes on rationale for determining code categories so that others are able to review and understand how I am seeing patterns. 2. Give as much context in the document summary as possible.
Dependability	
Audit Trail	1. Maintain document summary sheets for every document reviewed for the study. 2. Make sure and date and systematically organize all notes, coding work, and documentation
Confirmability	
Triangulation	1. For data triangulation: use multiple sources whenever possible, e.g. state, federal, tribal briefings, witness reports, and multiple types of documents (letters, news clippings, official documents)

Table 3: Trustworthiness activity plan, adapted from Amankwaa (2016).

Ethical Considerations

Creswell (2003) describes a number of ethical considerations that must be accounted for in any research study, including appropriate permissions, potential for disclosure of harmful information, data ownership and storage, and sensitivity to issues of certain audiences. More broadly, Creswell also asserts that ethical research should demonstrate its inclusiveness of diverse voices, and be able to "raise new possibilities, open up new questions, and stimulate new dialogue. Our research must have transformative value leading

to action and change" (2012, p. 248). As a critical inquiry into issues specific to a Native American tribe, it is all the more crucial that I attend to these considerations. While this study does not necessarily fit into an Indigenous methodology framework, I am informed by Indigenous scholar Maggie Kovach's four ethical considerations for Indigenous research:

> [T]hat the research be in line with Indigenous values, that there is some form of community accountability, that the research gives back to and benefits the community in some manner, and that the researcher is an ally and will not do harm. (Kovach, 2009, p.48)

Permissions

For this study, I sought and received a research permit from the Coeur d'Alene Tribe's Research Review Committee in December 2020. The permit requires that any product of this study be made available to the Tribe, via the committee, at least 30 days before any publication or dissemination for review and permission. In addition to adhering to these terms, I have worked with several Tribal directors, including my dissertation committee member, Dr. Christine Meyer, Natural Resources Director Caj Matheson, and Lake Management Director Phillip Cernera, and have solicited their input and review during data collection and analysis in order to help ensure that I am not misinterpreting data or sharing information that could be detrimental to the Coeur d'Alene Tribe. I also will make a copy of this dissertation and any potential publications available for the Tribe's research library.

All of the archives are physically located within the Tribe's Department of Education, while electronic archives are located on the Tribe's intranet system. Access to the physical archives is closely monitored by the Director of Education. I conducted all of my research within Tribal buildings, and did not remove any physical documents from the archives under

any circumstances, nor did I remove or print any non-public documents from the electronic archive. Additionally, my data is stored on a desktop computer which also has restricted access, and I am the sole user.

Chapter 4: The Coeur d'Alene Tribe's Fight for chatq'ele'

The Coeur d'Alene Tribe

Overview

The Coeur d'Alene Tribe's battles to address environmental damages to its homeland are lengthy and overlapping. This chapter is the instrumental case study of these battles, and will attempt to summarize both the historical events that worked to dispossess the Tribe of its land and water, as well as the multiple legal efforts that preceded and informed the United States and the Tribe's lawsuit against the State of Idaho in federal court and the accompanying environmental suits. In order to understand the context of the case examined in the Chapter 5 critical document analysis, *Idaho v. U.S.* (2001), this chapter will provide an overview of the Tribe's encounters with the United States that led to the establishment of its contemporary boundaries, as well an in-depth exploration of the cases that preceded the final Supreme Court case. These include the Tribe's battle with the State of Idaho over appropriate use of Heyburn State Park, fighting Washington Water Power for recognition of the Tribe's ownership of Coeur d'Alene Lake, the simultaneous filing of natural resource damage suits against the mining companies of the Silver Valley and the suit against Idaho pursuing recognition of the Tribe's ownership of chatq'ele', Coeur d'Alene Lake. Each of these battles spanned over a decade at minimum, reflecting the legal morass Tribal leaders were forced to navigate, fighting frequently simply for their claims to be heard in a courtroom. Additionally, the Tribe's claims were (and remain) hamstrung by a court system that continues to largely define its rights according to legal precedents embedded in the Doctrine of Discovery. This historical context complements the document analysis in Chapter 5 by situating the court case in the 150 years of history and settler encounters that culminated in *Idaho v. U.S.* (2001).

Those Who Were Found Here

The Coeur d'Alene people refer to themselves as the "schitsu'umsh," or "those who are found here" (Frey & Stensgar, 2012). The Coeur d'Alene Tribe's traditional landscape extends from Lake Pend Oreille in northern Idaho to Spokane Falls in eastern Washington, and east to the Clark Fork River in western Montana, as well as south to the north Fork of the Clearwater Rivers and the Palouse River. Historically, the schitsu'umsh people traveled to places like Kettle Falls on the Columbia River for trade and fishing, as well as east to the plains of Montana for buffalo hunting (Frey & Stensgar, 2012). The heart of their territory, though, was Coeur d'Alene Lake and its tributaries, which provided abundant fish and game habitat. According to archaeological evidence, the ancestors of the schitsu'umsh have continously resided in the area for over 10,000 years (Sprague, 1999). Prior to several waves of smallpox that preceded the arrival of EuroAmericans, the Coeur d'Alene population was estimated at about 5,000 people (Frey & Stensgar, 2012). The population was generally recognized in three major bands whose villages were primarily located around the lake and Spokane River, in the Coeur d'Alene River valley, and at the St. Joe River valley (Boas & Teit, 1985).

In his written expert testimony for the Coeur d'Alene Tribe's suit against Asarco Mining, anthropologist Roderick Sprague (1999) described the centrality of Coeur d'Alene Lake and its surrounding waters to every aspect of the Tribe's lifeways: material, cultural, economic, spiritual, and transportation. Reviewing a number of archaeological surveys conducted over the 20th century, Sprague details that *no* pre-contact village sites were located away from navigable waterways (1999, p. 17). Repeated surveys of bays around the lake have demonstrated that "any place tested on the lake shore has evidence of human occupation including the late prehistoric and early historic periods" (Sprague, 1999, p. 21). The Coeur

d'Alenes' activities were organized around a seasonal calendar that saw the various bands traveling to various sites around their landscape for gathering camas, hunting game at high elevations, trade, fishing for salmon, and social and recreational activities (Sprague, 1999). Sprague (1999) also asserts that the Coeur d'Alene Tribe was less engaged in trade than neighboring tribes, perhaps because of the abundance of food and material available in their homeland, and they were protective of the lake, which they shared with no one.

History of Coeur d'Alene Reservation Boundaries

The Coeur d'Alene people were tragically impacted by the arrival of EuroAmerican settlers decades before their first contact with non-Native people. Successive waves of smallpox, beginning in the 1770s, decimated the Tribe, reducing its population by as much as ninety percent by the mid-1800s and disrupting its social, cultural, and political integrity (Frey & Stensgar, 2012).

The first recorded contact with non-Natives was documented by the Lewis and Clark expedition in 1806, when William Clark described meeting three "Skeet-so-mish" men who detailed the lake and Spokane Falls to the explorers (Frey & Stensgar, 2012, p. 59). This encounter was swiftly followed by the arrival of fur traders who engaged the Tribe in trapping and exchange for beaver furs (Sprague, 1999). But for the Coeur d'Alene Tribe, it was not until the arrival of Jesuit missionaries in the early 1840s that they experienced the beginnings of the imposition of the assumptions of Discovery elements through the work of the Catholic priests to undo adherence to traditional subsistence practices. Father Joset, the Coeur d'Alene Mission Superior tasked by the Jesuits with the conversion of the Tribe to Catholicism, wrote "They must be made industrious, and the obvious means to it is the farm" (n.d., as quoted in Woodworth-Ney, 1996, p. 62). The Coeur d'Alene Tribe embraced

agriculture, but as a supplement to traditional hunting, fishing, and gathering, which the community members continued to consistently practice (Woodworth-Ney, 1996). However, the Tribe's success with agriculture was not enough to stave off the settler hunger for land. In the decades to follow, the creation of Washington Territory and the hurried treaty-making of territorial Governor Isaac Stevens resulted in large-scale cessions of neighboring tribal lands to the federal government and rapid increases in non-Indian settlers into the area (Woodworth-Ney, 1996). By the early 1860s, the Jesuits had developed friendly relationships with U.S. military officers and began pressuring the Coeur d'Alene people to move from their lands in the Coeur d'Alene River valley and around the lake to the fertile Palouse in their southern territory (Woodworth-Ney, 1995). The Tribal leaders were not oblivious to the injustices of the settler perspective. Coeur d'Alene chief Peter Wildshoe argued:

> If this is what you call "civilization," then why can't we go east where all the whites are. We would just pick out some land and tell them to move aside, because "We want your best land!" (n.d., as quoted in Woodworth-Ney, 1996, p.152)

As non-Indian settlers continued to move into the area to pursue mining claims, the leadership of what was now Idaho Territory wanted to reduce the Tribe's presence and secure settler interest in the area. Conveniently, territorial Governor David Ballard just happened to also be the territory's superintendent of Indian affairs (Woodworth-Ney, 1996). Without consulting the Tribe, in 1867, he drew up boundaries for a reservation that was then established by executive order by President Andrew Johnson – a reservation that not only excluded most of Coeur d'Alene Lake and its tributaries, but even the Catholic mission (Woodworth-Ney, 1996). However, neither the Tribe nor the missionaries were informed of the executive order, and the Coeur d'Alenes continued to farm, hunt, fish and gather across

their territory until rumors about potential removal from their homeland led Tribal leaders to petition the federal government to officially negotiate so that they might protect their boundaries (Woodworth-Ney, 1996). Their subsequent negotiations with federal agents in 1873 resulted in the establishment of a reservation that included Coeur d'Alene Lake, the lower Coeur d'Alene and St. Joe river valleys, and the southern bank of the Spokane River – as well as a cession of nearly 4,000,000 acres of their traditional lands (Figure 4, p. 75) (Woodworth-Ney, 1996).

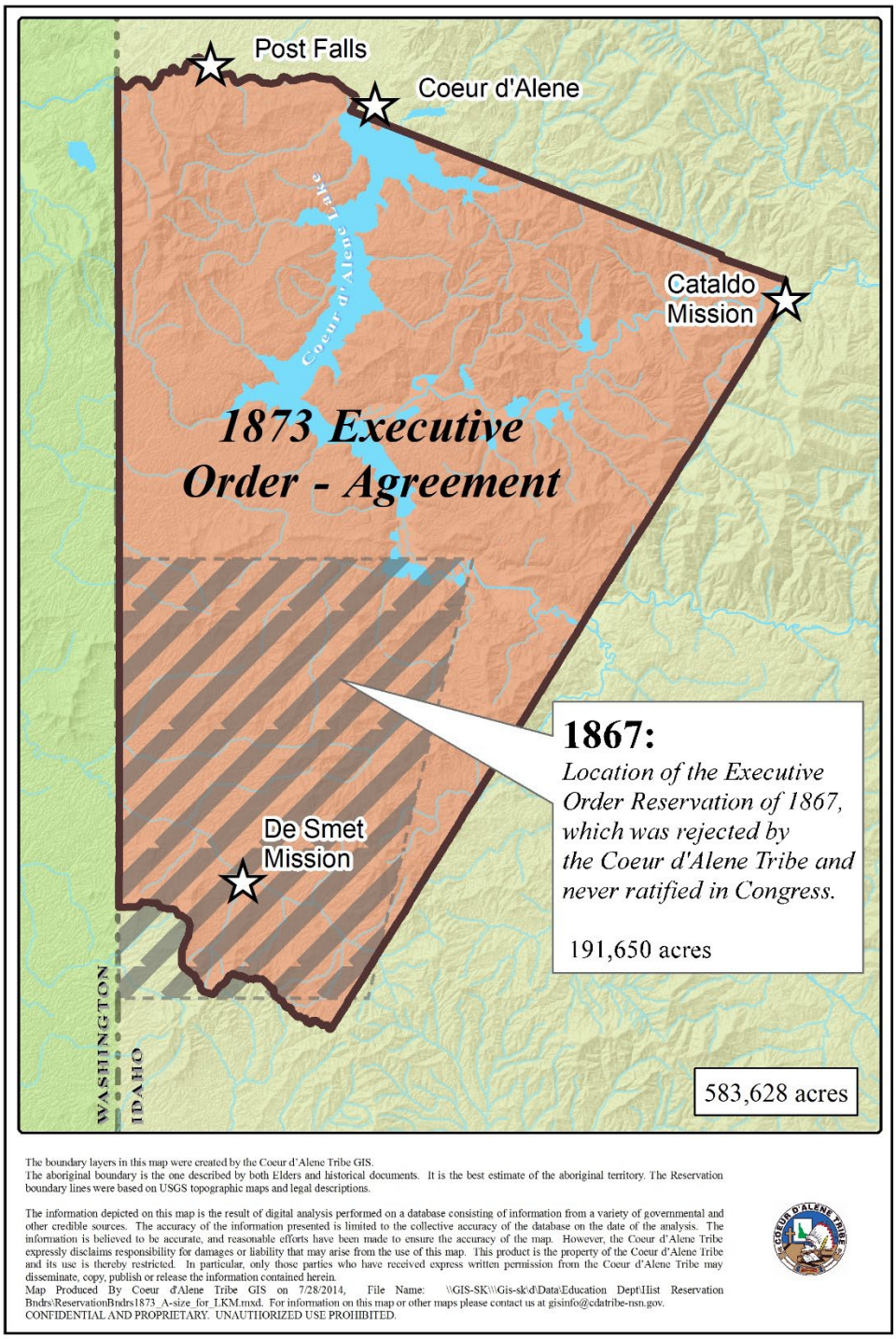

Figure 4: 1873 Reservation Boundaries.

Despite the repeated praise from Bureau of Indian Affairs staff and area settlers for the Tribe's skill in agriculture, or perhaps because of it, it would only be a matter of a few years before increased encroachments by White settlers led to further cessions in its territory (Sprague, 1999). In 1878, as miners began to come to the area, the United States established a military fort, Fort Coeur d'Alene (later renamed Fort Sherman), at what had been the largest Coeur d'Alene village at the northern end of the lake (Hart, 1996).

In 1883, A.J. Prichard discovered gold along the north fork of the Coeur d'Alene River, bringing in a rush of miners who, though not as successful in their search for gold, over the next two years discovered a lucrative silver vein (National Research Council (NRC), 2005). Within a year of Prichard's initial discovery, thousands of new settlers were pouring into the area, and new communities were being established in the areas just to the east of the Tribe's mission at Cataldo, many encroaching into the boundaries of the 1873 Reservation (NRC, 2005). By this time, Coeur d'Alene leaders were becoming increasingly worried about the failure of the United States government to ratify their 1873 agreement, concerned that absence of ratification encouraged further encroachments on their lands. An 1885 petition to the President and Secretary of the Interior from Chief Andrew Seltice and a number of Coeur d'Alene leaders lamented "that all the lands of your petitioners, so by them owned and herein described, have been taken possession of by the Whites without remuneration or indemnity, except that portion now by them occupied as the present Coeur d'Alene Reservation" (Kaizewet, 1885, as cited in Peltier, 1999, p.38), and implored the government to confirm what remained through ratification of their boundaries and delivery of payment, which had never been received. An 1887 agreement with the U.S. agreed to provide $150,000 to the Tribe for its 1873 cession, promising that "the Coeur d'Alene Reservation shall be held

forever as Indian land… and no part of said reservation shall be ever sold, occupied, open to White settlement, or otherwise disposed of without the consent of the Indians residing on said reservation (Woodworth Ney, 1996, p.347).” By 1888, however, the pressure was on for the Tribe to cede more lands as White settlers sought minerals and timber within the Reservation (Woodworth-Ney, 1996). The Tribe was well aware of the Dawes Act and the national push to take even more tribal lands. An 1888 letter from J.D.C. Atkins, Commissioner of Indian Affairs, to the Senate quotes the area Indian special agent as writing of the Coeur d’Alene:

> While on the reserve we held a general and well-attended council of the Indians in order to obtain their views in regard to taking their lands in severalty, and after a clear understanding as to what was desired by the Government, they decided by a unanimous vote adversely to taking in severalty otherwise than they now hold them. These Indians, as you are doubtless aware, are settled on farms of their own selection, are self-supporting and making gratifying progress in agriculture, while they have good schools and their children generally being educated (Atkins, 1888, as cited in Peltier, 1999, p.75).

The Tribe, well-regarded by its neighbors and Indian Affairs staff alike, was initially successful in temporarily staving off allotment of its lands, but later in 1889 negotiated the cession of almost 185,000 additional acres of the northern portion of its reservation for the sum of $500,000 and on the condition of the ratification of its previous agreement. Since the Tribal members “cultivate the soil extensively, live in comfortable houses, dress like the Whites, [and] wear short hair,” the Commissioner of Indian Affairs explained, he approved what he remarked was a large sum of money for Indians (Peltier, 1999, p. 80). By 1891 both

the old and new agreements had been ratified (Woodworth-Ney, 1996). For the time being, the Tribe's adoption of what White society deemed correct habits – and its successful administration of its lands - supported its rights to its own property, governed under its own values.

Cotroneo and Dozier (1974) describe the Coeur d'Alene Tribe for the two decades after its final executive order negotiations as believing itself safe from further White encroachment (p. 406). The Tribe continued to prosper economically in its smaller reservation, continuing to farm, hunt, fish, gather, and govern its land through traditional cooperative governance systems. Soon after the Supreme Court's 1903 *Lone Wolf* decision that pronounced the absolute power of Congress over tribes, however, Congress appropriated monies for the survey of the reservation for allotment, and in 1906, an appropriation act directed the Department of the Interior to begin allotting 160-acre parcels to each tribal member. Tribal leaders traveled to Washington D.C. to implore the government to honor its promise to protect their lands in perpetuity, but the Commissioner of Indian Affairs essentially informed them that plenary power meant they had no recourse (Cotroneo and Dozier, 1974). Chief Peter Moctelme promoted the idea of actively resisting allotment but was threatened by the federal government with being removed from his own reservation (Hart, 1996). By 1909, about one-quarter of reservation lands had been allotted to Tribal members, and the U.S. prepared to open the remaining "surplus" lands to non-Indian settlement. A special edition April 1909 issue of the Coeur d'Alene Evening Press was headlined: "Passing of Historic Tribe: Hand of Civilization Rests Heavily on the Red Man," even as its contents detailed the potential for new settlers to take advantage of the "streams [that] teem with fish," the area's beauty, the timber resources, and the fertile lands now

available with the opening of the Reservation for homesteading (Coeur d'Alene Evening Press, 1909). From the settler perspective, the Coeur d'Alene Tribe was to fade away from the path of commercial and resource development, so that the town of Coeur d'Alene could achieve its destiny as "the residence town for the wealthy clans of all its neighboring cities because of its natural advantages, its beautiful lake, delightful climate and magnificent scenery and its railroad facilities which will permit the businessmen to reach it in the evening after their day's labors are over (Coeur d'Alene Evening Press, 1909)."

The opening of the Coeur d'Alene Reservation through allotment was the nadir for the Coeur d'Alene Tribe (Cotroneo and Dozier, 1974). The 160-acre parcels were smaller than the parcels many Tribal members had already been farming. Allotments were issued almost exclusively in the southern agricultural areas of the reservation in order to break up Tribal ownership around the lake. Furthermore, the 1906 Burke Amendment permitted the rapid alienation of Indian lands from trust status (held by the U.S. government for the Indian allotment owner) to fee simple when the U.S. Department of Interior deemed the owner "competent." This conversion would result in that land being subjected to local and state taxes, sometimes unbeknownst to the owner, resulting in enormous land loss through foreclosure or confiscation. By 1933, Cotroneo and Dozier (1974) reported that Coeur d'Alene Tribal members had lost 40% of their allotment holdings through these means, as well as through sales by the individual tribal allotment owners. On a national scale, Bobroff (2001) details how 60 million acres of Indian land were opened to White homesteading via allotment; an additional 23 million acres were lost after conversion to fee status, frequently through deceptive means. For the Coeur d'Alene Tribe, the loss of land coupled with the rapid influx of White settlers resulted in social and cultural disruptions that undermined its

governance systems, its economic success, and its ability to carry out its lifeways in its homelands. In a sad irony, by 1921 only four Coeur d'Alene families were still farming their own land (Cotroneo and Dozier, 1974).

The taking of lands from within the Reservation did not simply benefit individual homesteaders. In 1908, 6,774 acres of land surrounding the southern waters of Coeur d'Alene Lake were reserved from allotment by Congress to be conveyed to Idaho for a public park, with proceeds deposited into the Treasury. The timing of this reservation was arranged by Senator Weldon Heyburn, who wanted to ensure that the lands were reserved before they could be allotted to Tribal members or opened for homesteaders (Cox, 1988). Heyburn telegraphed then-Secretary of the Interior James Garfield on January 6, 1909 requesting:

> Please fix and wire me here amount necessary for legislative [*sic*] to appropriate to pay for land in Park created last session of Congress out of Coeur d'Alene Indian reservation. I suggest that the price to the state should be nominal in view of the use being public (Heyburn, 1909).

A follow up memo two days later sent by Agent Charles Worley, the BIA Superintendent for the Reservation, noted that he had the land appraised at $1.25 an acre, even though "the saw mills would no doubt bid more" (Worley, 1909, p.1) The lands were then sold to Idaho for $11,379 on June 18, 1911, or roughly $1.68/acre, with the condition that the only allowable use of these lands was as a public land; should they be used differently, the federal government could repossess those same lands (*State of Idaho, et al. v. U.S. and the Coeur d'Alene Tribe of Indians*, 1987). In comparison, the average price per acre in the Mountain West for 1910 was $22.16 (U.S. Bureau of the Census, 1933, p.17). Though the funds paid by Idaho to the United States were ostensibly for the benefit of the Coeur d'Alene Tribe, a

1979 memo from the Department of the Interior to Senator Henry Jackson, Chair of the Congressional Committee on Energy and Natural Resources regarding Idaho's leasing of homesite parcels stated:

> A 1908 Appropriations Act, 35 Stat. 70, 78, authorized the transfer of the Tribe's lands, without the Tribe's consent, to the State of Idaho. Although the Tribe was to be paid the then appraised fair market value for the lands, the monies were spent for the expenses of the Coeur d'Alene Agency of the Bureau of Indian Affairs, an expense normally appropriated by Congress (Martin, 1979, para. 5).

Shortly thereafter, Charles Worley, BIA superintendent who had been busy appraising Coeur d'Alene lands during the Allotment period, left the department (involuntarily) and went on to form a land syndicate with area bankers, that would "make every effort to gain possession of the 59 allotments on which the government is ready to issue patents to Indians upon proper showing" (Coeur d'Alene Evening Press, p. 2, March 18, 1910; Watkins, 1996). The combination of Congressional actions, aggressive and unscrupulous land speculators like Agent Worley, and the social and economic upheaval that accompanied the opening of the Reservation lands to non-Native settlers resulted in such a rapid loss of land that by 1933, the Tribe owned just 62,400 acres, or less than 20% of the land within the Reservation boundaries. Additionally, some 45,000 of those acres were leased to non-Natives (Dozier, 1962).

Stemming the Flood of Land Loss

While initially the federal government would aggressively promote its policy of assimilation, by the 1920s, it was obvious that the allotment policy had only worsened economic conditions for tribes. In 1928, the Institute for Government Research (today known

as the Brookings Institute) issued the Meriam Report, a study of economic and health conditions across reservations. It did not mince words in its assessment of allotment:

> It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction (Meriam, 1928, p.7).

Though the language of the report perpetuated the idea of tribes as "primitive," it also detailed the failings of allotment, substandard health provisions, underqualified teachers, and a general lack of respect, stating:

> Indians are entitled to unfailing courtesy and consideration from all government employees. They should not be subjected to arbitrary action… Leadership will recognize the good in the economic and social life of the Indians in their religion and ethics, and will seek to develop it and build on it rather than to crush out all that is Indian (Meriam, 1928, p. 22).

The Meriam Report led to reform of Indian policy that resulted in the passage of the Wheeler-Howard Act of 1934, commonly referred to as the Indian Reorganization Act (Prucha, 1975). The act ended allotment and authorized the Secretary of Interior to restore to tribal ownership "surplus lands" that had not been deeded over to homesteaders, and to purchase lands within reservations to restore to tribes (Prucha, 1975). Over the next several decades, Congress would restore over 800,000 acres of lands to tribes, much of which were repurchased from homesteaders who were not able to complete their claim (Sutton, 1982). In 1958 Congress restored 12,877 acres of "vacant and undisposed-of ceded lands" to the Coeur

d'Alene Tribe, although none of those lands were adjacent to the lake (Public Law 85-420, 1958).

Environmental Dispossession

The arrival of White settlers in Coeur d'Alene Tribal territory was accompanied by environmental changes that effectively impacted them as property takings even before the discovery of gold and silver. Morrissey (1997) describes how the fur trade's near-eradication of the beaver and the introduction of non-Native plants and animals had an ecological impact that was documented by government officials as early as 1870. But it was the discovery of the silver-lead vein in the reaches of the upper Coeur d'Alene River that would both lead to direct dispossession of Tribal lands and the most persistent and devastating environmental changes that continue today to dispossess the Tribe of its traditional relationship to its waters.

The pressure for the Coeur d'Alene Tribe to cede the mineral-rich lands of the northern and northeastern parts of the 1873 Reservation began almost immediately after the discovery of the silver vein, with the deceitful argument that the Tribe simply didn't use those lands anyway, despite the existence of the Tribe's Sacred Heart Mission on the Coeur d'Alene River, and documented protestations of Tribal leaders about trespasses on their lands (Hart, 1996). Hart, (1996) cites a letter from Idaho Territorial Delegate T.F. Singisen to the U.S. Secretary of the Interior requesting that the entirety of the Coeur d'Alene Reservation east of the lake be "restored to the public domain," falsely asserting,

> This portion of the said reservation is not now, nor never has been occupied by the Indians, and in the present mining excitement in the Coeur d'Alene Mountains, to retain their portion of the Reservation for the Indians will prove a fruitful source of

> trouble to the miners and settlers, as well as to the Government, without proving in the slightest degree beneficial or useful to the Indians (p. 159).

By 1886, ores were being shipped for smelting, and the growing population of new settlers began putting heavy pressure on both the area's timbered hillsides and its renowned trout fishery. Prior to mining, Tribal members consumed cutthroat from the lake and its tributaries at a rate of about 42,000 fish per year, with fishing being the center of the Tribe's economic activity (Ridolfi, 2016). But by 1888, newspapers already reported Canyon Creek, a tributary to the South Fork that had heavy mining activity, as being discolored and devoid of trout (Hart, 1996). Mallet (2013) describes how at the turn of the century, anglers reported catching 50-100 sizable trout in the St. Joe River in a matter of a few hours, but commercial fisherman began dynamiting Coeur d'Alene tributaries for trout to sell in Spokane and to mining camps; by 1932, scientists were noting that catching trout at the mouth of the Coeur d'Alene River was a rarity (Hart, 1996; Mallet 1932). A mill-building boom in the late 1880s saw the construction of more than one hundred mills that would discharge metal-laden mine tailings into the South Fork of the Coeur d'Alene River. Quivik (2004), an industrial historian who served as an expert witness for the federal government in its trial against Asarco, detailed how in 1897 one mid-size mill, the Tiger-Poorman, discharged 75,000 tons of tailings into Canyon Creek. Additionally, as technology and metals demand evolved, new ore processes resulted in finer wastes and tailings higher in zinc that were more readily carried downstream into Coeur d'Alene Lake (Quivik, 2004).

As these discharges, containing lead, arsenic, cadmium, zinc, and other heavy metals, made their way through the river valley, their toxic effects impacted area farmers. One of the

first lawsuits, initially filed in 1903 by the Hill brothers, sought $12,000 in damage from the Standard and Mammoth mining companies, who, by discharging into Canyon Creek were:

> hereby poisoning the said lands of the plaintiffs, so covered with waste, for agricultural, grazing, farming, townsite and residence purposes, and poisoning and rendering the well water on said premises unfit for any use, and killing and blasting fruit trees, vines, groves and other vegetation thereon, and rendering the use and occupation of said premises as a home dangerous to the health of the plaintiffs. (*Hill v. Standard Mining Company, et al.,* 1906, para. 228).

The mining companies did not try to deny the deadly impacts of their discharges. Instead, they argued that were the Court to recognize the damages claim, that surely the result would be the collapse of the mining industry in the Silver Valley, and they insisted that the Idaho Constitution's prioritization of water for mining uses over agriculture prohibited such nuisance claims. The Court disagreed, and ordered the companies to pay the damages, stating that the right to use water did not equate to a right to discharge that water to downstream users in a toxic state (*Hill v. Standard Mining Company, et al.,* 1906). In the same year as the Hill decision, however, a separate judge supported the mining companies' arguments in *McCarthy et al. v. Bunker Hill et al.* (1906). When plaintiffs requested an injunction against mining discharges, the judge refused to stop the mines' discharges, stating that to do so would mean that the Silver Valley would "again become the abode of silence and the wild fauna [ignoring the previous human inhabitants]," and that the claimants were making "wild assertions" about livestock poisoning "without justification" (*McCarthy et al. v. Bunker Hill et al.,* 1906, para. 983). The judge ended his opinion by stating that the claimants would be more successful if they simply requested damages rather than an

injunction to the discharges. The Court of Appeals later affirmed this decision, and an attempt to have it heard by the Supreme Court was denied (*McCarthy v. Bunker Hill & Sullivan Mining & Concentrating,* 1909). A separate class action damages case was filed by 65 farmers: *Doty et al. v. Bunker Hill & Sullivan Mining & Concentrating* ended in 1910 with a damages award of one dollar to the lead plaintiff. Nearly all of the co-claimants removed themselves from the final case and were later found to have signed pollution easements with the mining companies (Casner, 1989).

Still, less than twenty years later, the Bunker Hill and Sullivan Mining Company would attempt the same argument for a damages case, and again, the Ninth Circuit Court of Appeals would find that the Idaho Constitution gave the mining industry priority appropriation rights, but not an unfettered right to pollute (*Bunker Hill & Sullivan Mining & Concentrating Co., et al. v. Polak*, 1925). In both the 1906 and 1925 cases, the mining companies paid the damages, but continued their discharges. In 1930, yet another suit against Bunker Hill made its way to the Court of Appeals when a farmer again sought damages for the loss of livestock poisoned along the South Fork of the Coeur d'Alene River. However, in this case, Bunker Hill produced one of the easements for pollution they had obtained from the previous landowner in 1910, and the judges upheld the right of the mining company to continue discharging (*Luama v. Bunker Hill & Sullivan Mining & Concentrating Co. et al.,* 1930). The pollution continued unabated, but not unnoticed.

In 1929, the Coeur d'Alene Press began a series of articles describing the toxic Coeur d'Alene River as the "Valley of Death" (Mix, 2016). In response, in 1931 the State of Idaho created a Coeur d'Alene River and Lake Commission and sought federal assistance from the Bureau of Mines and Department of Interior for conducting studies. The investigations found

that both the Coeur d'Alene River and Lake had lead levels that were 17.5 to 22.5 parts per million higher than the drinking water standard, and that fish from the lake, when transferred into the river, died within 72 hours of exposure to river waters (Mix, 2016, pp. 36-38). The response of the mining companies was to stop discharging their tailings directly into the river, and instead discharge through a combined dredge into the wetlands around Cataldo's Sacred Heart Mission, known as Mission Flats, where over the next thirty-five years about 10 million cubic yards of sediments would be deposited (Mix, 2016).

The dredge was the extent of pollution abatement measures that would voluntarily be taken by the mining companies. In 1937, Vardis Fisher, in his Idaho guidebook written for the Federal Writers Project, described the Coeur d'Alene River and its surroundings as follows:

> On the right, too, as the highway leaves the western end of town [Mullan], is the river, but it is not the lucid stream of a mile ago. It has been diverted to the mines here, impregnated with poison, and turned free. It now looks like a river of lye. Or better, it looks as if all the dirty clothes in the world had been washed in it… Below it [the Bunker Hill Mine] the river bottoms look like a caricature of a graveyard, and above it the denuded mountains declare the potency of lead (p. 332-333).

Though the downstream users and recreational community may have decried the impacts of heavy metals on agriculture and tourism, political leaders seemed uninterested in supporting their concerns. In a 1971 Idaho Law Review article examining water-related environmental cases and regulation in the state since its formation, author Theodore Wood noted that all the cases against the Silver Valley mining companies prior to his writing

involved private individuals, and not a single suit involved the state, federal or a local government seeking to address the water quality issues of the Coeur d'Alene watershed. Wood dryly noted, "[W]ater polluters often represent rather large economic interests within a community, and therefore exert a rather considerable amount of influence and power in political and business circles" (p. 100). Furthermore, not one of the court cases cited above, nor the Fisher travel guide, nor even the recent work on the environmental history of the Silver Valley by Michael Mix that details all the court cases through the listing of the site on the National Priorities List in the early 1980s speculate on, or even mention at all, the impact of this ecological poisoning on the Coeur d'Alene Tribe.

Beginning the Legal Battles for Coeur d'Alene Lake and Surrounding Lands

To fully understand how the Coeur d'Alene Tribe would be forced to pursue its claim to the ownership of Coeur d'Alene Lake all the way to the Supreme Court – twice - in hopes of addressing its ongoing environmental and historical dispossession and restoring its ability to carry out its responsibility and relationship to the Lake, it requires understanding the complex legal underpinnings that would necessitate thirty years of complicated legal battles (Figure 5, p. 92). The following section will detail how the Tribe pursued each step of these battles, including its suit against Washington Water Power for water storage, which entailed

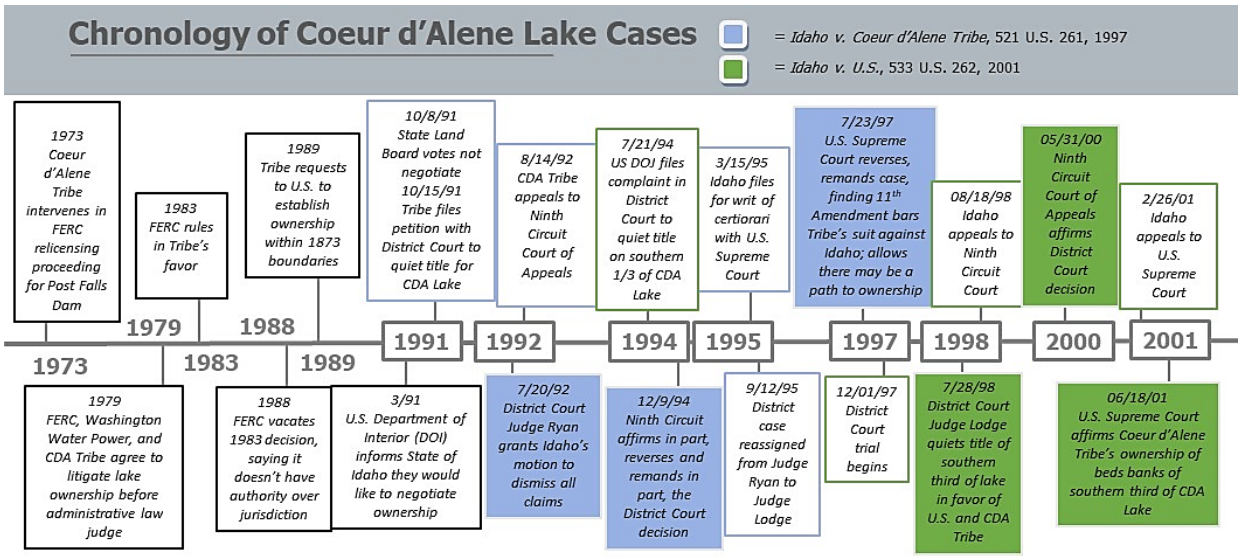

Figure 5: Chronology of Coeur d'Alene Lake cases

actions by the corporation that co-occurred with the Reservation's allotment and the carving out of Heyburn State Park from Tribal ownership in the early 1900s.

The Heyburn Cases

In 1977, in what would be a lengthy and complicated battle, the federal government and the Tribe initiated a suit against the State of Idaho, pressing for the reversion of Heyburn lands to U.S. ownership for the Tribe's benefit based on the leasing of park lands to private homeowners along the lake, which they considered a violation of the 1911 patent that mandated the land's public use. A 1979 fact sheet issued by the Tribe explained its position that the park had been removed from the Reservation with no consultation or consent by the Tribe, nor was payment ever received (Coeur d'Alene Tribal Council, 1979). When the District Court determined in Idaho's favor, after an initial appeal the U.S. chose not to further pursue the case, leaving the Tribe to appeal to the Ninth Circuit Court of Appeals alone (*Idaho v. Hodel and Coeur d'Alene Tribe of Indians,* 1987).

The State of Idaho moved to dismiss the appeal, claiming the Tribe had no beneficial interest in a federal right of re-entry should the patent revert to the United States. The Court of Appeals held in Idaho's favor regarding its leasing practices, stating "If Congress had wished to prohibit such a widely accepted practice, it certainly would have done so expressly in the Act of 1908 [when Congress carved out the land for the purposes of a park]" (*Idaho et al. v. Hodel and Coeur d'Alene Tribe of Indians,* 1987, para. 26). However, it remanded to the District Court the question of whether the Tribe had beneficial interest. Unlike homestead lands, the Court agreed with Idaho's argument that Heyburn lands could not be compared to the surplus lands restored in 1958, as they were not "vacant," but used as a park. Further, the State's rebuttal to the Tribe's claim that it had never agreed to the sale of Heyburn, nor received payment was a letter from Agent Worley claiming their unanimous consent, though as the Tribe's attorney Robert Dellwo noted in his 1980 appeals brief, no documentation or evidence of this consent could be found despite ample documentation from earlier Tribal cessions (Andrus, C., Dellwo, R., Idaho & United States, 1980). The Court sided with the State, and, also indirectly referencing *Lone Wolf,* stated:

> Even assuming that no agreement had been reached, the Heyburn land sale would still be valid. The Supreme Court in *Rosebud Sioux Tribe v. Kneip, supra,* faced this very issue and held that a lack of consent was not fatal to a United States sale of Indian land (*State of Idaho v. Andrus*, 1982, para. 20).

Though the District Court had once again seemingly barred the door to the Tribe, it again appealed, and this time the Ninth Circuit found that the Tribe did indeed have a beneficial interest but remanded it again to the District Court for further consideration (*State of Idaho v. Andrus, 1983).* This time, the Court of Appeals found that the 1908 Congressional

Act that removed the park from Tribal ownership did not clearly extinguish the Tribe's beneficial interest, and that rather than *Lone Wolf*, canons of construction warranted interpretation in favor of the Tribe. Idaho attempted to appeal to the Supreme Court, but its petition was denied. However, on remand, the District Court issued a memo holding that only the United States could act to terminate the patent (*State of Idaho v. Hodel,* 1987, para. 1291). Idaho wanted to ensure that the door stayed closed to the Tribe and sought declaratory judgment that its use of the park was in compliance with the 1911 patent. Once again, the Tribe appealed, and this time the Ninth Circuit focused its decision on the leases themselves, deciding that Idaho's practice of leasing to private homeowners was not grounds for forfeiture of the patent (*State of Idaho v. Hodel,* 1987, para.1297). Though the case was not a victory for the Tribe, it now had demonstrated to the State of Idaho and to the public that it was willing to commit significant legal and financial resources to the protection of the lake and its surrounding lands. From the outset of the case, the Tribe's briefings had cited the State's neglect of the park, and the Tribe's position regarding its ownership of the lake, stating clearly, "The lakes in Heyburn Park and the minerals under the land are still owned by the Tribe, or at least held in trust by the United States for the Tribe, to the high water mark thereof" (Dellwo, 1975, p.7).

Post Falls Dam

The Post Falls Dam, located just east of the Washington-Idaho state line on the Spokane River, has long been intertwined in both the jurisdictional and pollution issues surrounding Coeur d'Alene Lake. Currently owned and managed by Avista Corporation, formerly known as Washington Water Power, the dam was initially constructed by Frederick Post after Post purchased the land and water around the area today called Post Falls from Coeur d'Alene Tribal Chief Andrew Seltice in 1871 (Watkins, 1996). This purchase was

affirmed by Seltice in a notarized statement in 1889, when Seltice noted that the purchase was made before any land had been ceded to the United States (McCann, 2005; Watkins, 1996). McCann (2005) notes that this sale of tribal land to an individual prior to treaty-making by the United States would have been in violation of the federal Trade and Intercourse Acts, as well as *Johnson v. M'Intosh*, which codified the Discovery-based right for only the federal government to purchase land from tribes. Nevertheless, the industriousness of Mr. Post must have impressed Congress, as that purchase was included unquestioned in the Congressional 1891 ratification of the Tribe's 1889 land cession agreement (*Idaho v. United States,* 2001). Post constructed a dam, but it did not raise the level of Coeur d'Alene Lake. As the expansion of mining exploded in the final decade of the 1800s, mining executives begin discussing possibilities for increasing electrification of the Silver Valley via hydropower (Watkins, 1996). A prescient gentleman, R.K. Neill, began negotiating with mining companies for a purchase agreement, purchased about 270 acres Frederick Post's land and water in 1900, and established the Coeur d'Alene Transmission Company. Quickly, Washington Water Power, which already had established downriver dams and seeing the potential for development, purchased Neill's property and water rights in 1902 (Watkins, 1996).

Washington Water Power begin raising the level of the dam and running electrical lines in 1903, completing the dam's expansion in 1906. The higher dam level raised the summer lake level by 15 feet, flooding about 22,000 acres of wetlands around the southern lake and inundating some 20 miles of the St. Joe River (McCann, 2005; Watkins, 1996). The flooding was met with great objections from White farmers along both the St. Joe and Coeur d'Alene Rivers, the latter was also inundated up to Cataldo. Several hundred of the farmers

threatened lawsuits. In the course of defending itself, Washington Water Power repeatedly cited that its rights for water power development stemmed directly from Post's 1871 purchase from the Tribe. The company offered to pay farmers easements for $20 an acre, totaling about $114,000 in 1908. Many refused, and instead pursued their case to the Idaho Supreme Court, resulting in settlements for as much as $37/acre, though the St. Maries Gazette bemoaned the losses to the farmers of lands it claimed was worth $150 to $200 an acre (*St. Maries Gazette,* 1911, as cited in Watkins, 1996).

Meanwhile, the flooding of Coeur d'Alene Tribal lands was being dutifully supervised by Indian Agents Sams and Worley, who issued a joint report to the Commissioner of Indian Affairs in 1908 that asserted that the flooded lands, traditional fishing, hunting and gathering areas for the Tribe, had little value other than for growing hay. They stated:

> We would respectfully suggest that if the Washington Water Power Co. could be prevailed upon to pay the sum of say $1.25 per acre damage on the amount of land involved, because of the retention of the water during the dry season, the same to go to the Indians, that it would be a greater sum that they would probably receive otherwise (Agents Sams and Worley, 1908, as cited in Watkins, 1996, p. 34).

In 1909, Washington Water Power paid the federal government for the Coeur d'Alene Tribe, $7,801 for 6,240 acres of flooded land. Watkins (1996) notes that the company's attorney, A.A. Crane, was paid $25,000 for his work in Washington, D.C., to finalize the deal (p.36). The St. Maries Gazette stated the amount paid for the Tribe's land, "might indeed be adequate compensation for the Indians, but what of the white men?" (St Maries Gazette, March 12, 1909, quote in Watkins, 1996, p.36). A later case brought forth by a Tribal

member, Clarence Butler, whose allotment was flooded, noted that the actual value of his land was about $90/acre. A 1913 Indian Affairs memo regarding his case noticed the failure of the now-dismissed Sams and Worley:

> To place the most charitable consideration on [their] actions, however, subsequent facts disclosed that they were either grossly ignorant of land values in the territory under their jurisdiction or willfully and knowingly cooperated with the representatives of the [Washington Water Power Company] (Reeves to Layne correspondence, as cited in Watkins, 1996, p. 132).

After repeated complaints against Agent Worley by Tribal members, he was dismissed by Indian Affairs in late 1909 and immediately employed by Washington Water Power as an advisor (in addition to his previously-mentioned entrepreneurial efforts in land speculation) (Watkins, 1996). However, no attempts were made by the federal government to rectify the gross underpayment to the Tribe for its lost lands.

Tribal leaders were fighting multiple battles simultaneously: the dam, allotment, Heyburn, and rapid encroachment by White settlers. Peter Moctelme, now head chief for the Coeur d'Alenes, was not only resisting allotment for the Tribe, but also trying to protect his own ferry, dance hall, and other property on the lakeshore. Meanwhile, correspondence between the Indian Affairs in 1908 and Agents Sams and Worley noted that "[Indians] should be encouraged to take the most desirable lands, which the office believes are in the western part of the reservation, not the bottom lands of the St. Marys river where the Indians are presently located…" and more pointedly, "Peter Moctilma [*sic*] inciting Indians to resist allotment. He should be dealt with summarily as example [*sic*]" (as quoted in Watkins, 1996, pp.121-122). As the development of the park became a factor, Washington Water Power

attorney Crane wrote to Senator Heyburn, worried that Moctelme would be allowed to keep his lands in the area, “This lake is included in the Park just created and if a lot of these renegade Indians are allowed the shore of the lake, they will ruin the park (Crane to Heyburn, May 17, 1908, as cited in Watkins, 1996, p. 124). Moctelme, threatened with removal from his own reservation, conceded to the federal government, and received $500 for his properties on the lake.

For the next fifty years, the Tribe would struggle with the blunt impacts of allotment. Loss of land continued outright or through leasing to non-Native farmers. Despite passage of the Indian Reorganization Act in 1934, the Coeur d’Alene Tribe did not immediately form a tribal council under the new federal policy, with Moctelme and other traditional leaders having lost their taste for working with the federal government. It was 1947 before the Tribe would formally reorganize, develop a tribal constitution, and formally elect new leaders, enabling it to pursue restitution for some land loss through the Indian Claims Commission (Fahey, 2001). This latter effort lasted over a decade and resulted in an award of just over $4.6 million to the Tribe in 1958, enabling them to begin purchasing back lands lost through allotment and investing in economic development, namely farming and forestry. By 1970, investments in housing, infrastructure, and business ventures changed the Tribe’s trajectory enough that its enrollment began to increase (Fahey, 2001). By this time, federal policy had shifted again, this time to a policy of self-determination that would see support, financial and political, for expanded Tribal self-governance.

In 1967, Washington Water Power Company applied to the Federal Power Commission (now the Federal Energy Regulatory Commission, or FERC) for a license for its Spokane River projects, including four downriver facilities, but not including the Post Falls

Dam, as the company claimed its rights there predated the Commission's jurisdiction (Federal Power Commission, 1972; McCann, 2006). The Spokane Tribe filed as an intervenor, requesting that both the Post Falls Dam and the Little Falls Dam be included in the licensing process, but agreeing to delay consideration of those two facilities so as not to impede a dam reconstruction in the city of Spokane (Federal Power Commission, 1972). The Coeur d'Alene Tribe and Department of Interior then also joined as intervenors. Washington Water Power had little interest in seeing the Coeur d'Alene Tribe's ownership recognized by the Commission, as the result would inevitably require fees for water storage. After the company agreed to add Post Falls to the license in 1979, the Commission, now FERC, convened a hearing on whether Coeur d'Alene Lake, Black Lake, and the St. Joe River were defined as tribal lands. Washington Water Power claimed that the waters were conveyed to the State of Idaho in its 1890 admission to statehood, while both the Tribe and the Department of Interior argued that the United States held title to the beds and banks of those waters within the Reservation on behalf of the Tribe (13 FERC ¶ 63,051, 1980). Washington Water Power's primary argument rested on the Tribe's Reservation being established by executive order, rather than treaty, claiming that the executive branch of the government had no power to grant title to the Tribe, conveniently overlooking that just half a century prior, the company had argued its own ownership of the land and waters surrounding the dam were based on the Tribe's authority to grant that title to Frederick Post (13 FERC ¶ 63,051, 1980). The administrative law judge concurred, maintaining that because Congress only ratified the Tribe's 1887 and 1889 agreements in 1891, a year after Idaho's statehood, they could not claim ownership of waters that would have been automatically conveyed to Idaho under the

equal footing doctrine (13 FERC ¶ 63,051, 1980). In 1981, FERC approved the license for the Post Falls facility.

Both the Department of Interior and the Tribe appealed the Commission's decision, and in 1983, FERC reversed its position, pointing out Washington Water Power's inconsistency in claiming its own title based on the 1891 Congressional ratification of Tribal ownership of the waters it was ceding in the 1887 and 1889 agreements, and then claiming that the Tribe did not also have beneficial title to the submerged lands of the southern end of Coeur d'Alene Lake. The reviewing judges also cited case law that would support the conveyance of title by the federal government when the agreement was negotiated, not when it was ratified (25 FERC ¶ 61,228, 1983). The commissioners remanded the case back to an administrative law judge to negotiate annual charges to the Tribe by Washington Water Power.

The Tribe's victory was short-lived. Washington Water Power continued to appeal, and on May 17, 1988, FERC vacated its previous decisions on ownership, claiming it did not have the authority to determine title to submerged lands, simply stating, "The parties, if they wish, may proceed in an appropriate judicial forum" (43 FERC ¶ 61,254, 1988). If the Tribe was going to be able to be able to address the plethora of environmental impacts to the lake, much less press for compensation for the power company's near-century of flood impacts within the Reservation, it would have to look elsewhere for judicial confirmation of its ownership.

Preparing for Battle

Despite the setback by the FERC decision, the Tribe began organizing its position to take on the State of Idaho and Silver Valley mining companies for two parallel fights:

ownership of Coeur d'Alene Lake and responsibility for its cleanup – battles that would embroil the Tribe for the next twenty years. In 1983, the Environmental Protection Agency (EPA) had listed the Bunker Hill Mining and Metallurgical Complex on its Superfund National Priorities List, with initial efforts focused on addressing the human health impacts in the Kellogg area from the Bunker Hill smelter (NRC, 2005). The same year, the State of Idaho filed a natural resource damage claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) against Bunker Hill/Gulf, Asarco, and Sunshine mining companies, and in 1986 settled for $4.5 million that were then used to clean up tailings in the Canyon Creek area (Villa, 2003).

The focus on human health risks in the upper Coeur d'Alene Basin was certainly appropriate; in the 1970s, more than 75% of children in the community had blood lead levels over 40 μg/dl (the Centers for Disease Control says there is no safe level of lead exposure, but prior to 2012, children were considered as having a level of concern if their blood lead was 10 μg/dl or higher) (Centers for Disease Control, 2021; von Lindern, Spalinger, Petroysan, & von Braun, 2003). But the urgency of the human health needs in the Silver Valley meant that there would be no immediate focus on the ongoing pulses of heavy metals into the Coeur d'Alene River and Coeur d'Alene Lake. In 1986, a water quality study conducted by EPA showed continued high rates of mortality in trout, as well as zooplankton and minnows in the waters of the South Fork of the Coeur d'Alene River. Additionally, sediment samples showed that "severe" levels of heavy metals were found throughout the river, and the northern two-thirds of the Coeur d'Alene Lake (Hornig, Terpening, & Bogue, 1986). A 1987 study of the lake's hypolimnion (deepest waters) showed oxygen levels as low as 4 mg/L - well below water quality standards and raising concerns about metals being

released from the lake bed (Woods & Beckwith, 1996). That same year, EPA offered a glimmer of hope to the Coeur d'Alene Tribe that it might be able to take more control over pollution when it amended the Clean Water Act to allow tribes to qualify for regulatory authority in establishing water quality standards (EPA, 1990). In 1986, EPA had begun allowing EPA to apply for regulatory authority through an approval process called "treatment as a state" under the Safe Drinking Water Act; this opportunity was extended to include CERCLA, and then the Clean Water and Clean Air Acts. The initial criteria for tribes relied on the premises laid out in the *Montana v. U.S.* case: a tribe was required to demonstrate to EPA that authority over non-tribal members affected "the political integrity, the economic security, or the health or welfare of the tribe" (Environmental Law Reporter, 1998, quoting *Montana v. U.S.*, para. 566, 1981).

The Tribe moved quickly to exploit this new opportunity. In 1989, Tribal Council members met with EPA, Department of Interior, and Department of Justice to inform them of their desire to participate in Bunker Hill settlement negotiations and remedial investigations regarding heavy metals in the lake (Millan, 1990). The Tribe also submitted an application for treatment as a state, but was initially stymied by the State of Idaho filing its own concerns over Tribal jurisdiction (Stensgar, 1990). In a January 29 letter to EPA, Idaho Governor Cecil Andrus cited the cases of *Montana v. U.S.* (1981) and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation* (1989) to argue that the Tribe's small percentage of land holdings meant that Idaho had unfettered jurisdiction over water quality on fee lands within the Reservation boundaries (Andrus, 1990). In order to sidestep those concerns, the Tribe, EPA and Idaho signed an "agreement of cooperation" that Andrus described as "an agreement to "clean up Lake Coeur d'Alene without concern as to who owns the lands

around it" (Collison, 1991, p. A5; Stensgar, 1990). Some cooperation did, in fact, ensue: in January 1991, at the request of both Idaho Department of Health and Welfare, Division of Environmental Quality, and the Coeur d'Alene Tribe, the U.S. Geological Survey initiated a two-year study of Coeur d'Alene Lake to look at how nutrients in the lake were potentially interacting with metals in the lake sediments (Woods & Beckwith, 1996).

Meanwhile, the Tribe, having had FERC vacate its ownership decision, began preparing to do just what FERC had suggested: seek judicial affirmation of its ownership of the lake through the federal court system so that it could strengthen its voice in addressing the lake's health. Beginning in 1988 and 1989, the Tribe filed three formal requests to the Department of Interior to file a suit on the Tribe's behalf, and all three requests were ignored by the Tribe's federal trustee (Coeur d'Alene Tribe, 1991). In 1989, the Tribe contracted attorney Ray Givens to represent it in the litigation regarding the Tribe's rights regarding Washington Water Power, and in 1990, they expanded his charge to address the Tribe's rights to ownerships of the bed and banks of all waters within the 1873 Reservation boundaries and address natural resources injury from mining and other activities (Coeur d'Alene Tribe, 1990). Ray Givens and his law partners would go on to lead the Tribe's legal battles for nearly three decades. Givens and the Tribal Council moved quickly to push the federal government to represent the Tribe in its battles. In a September 1989 letter to the Department of Justice's Environmental Enforcement Division, Givens signaled the Tribe's intent, informing them that the Tribe owned the bed and banks of the Coeur d'Alene River from Cataldo downstream, the bed and banks of the Lake, and the bed and banks of the south side of the Spokane River channel, and thus had a natural resources claim that should be represented in federal negotiations with Gulf/Bunker Hill (Givens, 1989). Shortly thereafter,

the Tribal Council passed a resolution hoping to finally compel the federal government to take up its trust responsibility, stating:

> Whereas, the State of Idaho is attempting to exercise and dominion and control over the beds and banks of the various lakes and rivers held in trust for the Coeur d'Alene Tribe by the United States of America; and
>
> Whereas the Federal Energy Commission has ruled that it does not have jurisdiction to determine ownership…
>
> Whereas the Coeur d'Alene Tribe of Idaho is pursuing a Superfund National [*sic*] Resource Damages Claim for natural resource damages done to the various lakes and rivers by mining and industrial pollution…
>
> Now, therefore, be it resolved that the Coeur d'Alene Tribe of Idaho reiterates its request that the United States, as part of the fiduciary duty and trust responsibility owed the Coeur d'Alene Tribe of Idaho by the United States, initiate appropriate legal proceeding to judicially establish that the Coeur d'Alene Tribe of Idaho owns the bed and banks of all lakes and rivers within the exterior boundaries of the 1873 Coeur d'Alene Reservation boundaries, or fully fund the Coeur d'Alene Tribe of Idaho to do so… (Coeur d'Alene Tribe, 1989, pp.1-2).

Though it would be several years before the United States would formally intervene on behalf of the Tribe, the Department of Interior began preparing for litigation, identifying potential expert witnesses, and honing its position, but refraining from a formal commitment. By 1991, the Tribe was done waiting, and launched its first volley. On March 15, 1991, Givens wrote to the Idaho Attorney General on behalf of the Tribe, stating its intent to file suit to quiet title, but inviting the possibility of negotiation for both the northern two-thirds

and the southern waters (Givens, 1991a). Meanwhile, Idaho quietly sought to determine the federal government's stance, and in turn, the federal government sought out opportunities for a negotiated resolution. In a 1991 seven-page confidential letter from the Department of Interior to Idaho Attorney General Larry EchoHawk, U.S. attorney Thomas Sansonetti referred to the question of the northern two-thirds of lake as "complex," sidestepping the Tribe's claim that it owned the entirety of the lake having never received compensation from the federal government, but straightforwardly stating the U.S. position that it was the trustee of the southern-third of Coeur d'Alene Lake for the benefit for the Tribe (Sansonetti, 1991, p. 6).

The State of Idaho's initial response to the Coeur d'Alene Tribe's declaration was to engage in discussions, and to hold public meetings around the Coeur d'Alene Basin regarding potential negotiations. Several key stakeholder groups quickly voiced their concerns. The Coeur d'Alene Chamber of Commerce asked the Tribe to address its members' worries about changes in management practices and asked Tribal Chairman Ernie Stensgar, "If this is a valid claim, why wasn't it made years ago?" (Coleman, 1991). Additionally, an old Tribal nemesis, Washington Water Power, soon publicly staked its position on the issue and began lobbying against any state participation in negotiations. Its attorney Jerry Boyd, who had represented the corporation during the FERC hearings, and Mike Newell, an attorney representing the Coeur d'Alene Lake Property Owners Association, created a new organization: The Coeur d'Alene Lake Users Association. By early June, the organization, chaired by Newell, began hosting public meetings and distributing information. A fact sheet prepared by the organization outlined how Tribal ownership might result in regulation of boats, fishing, swimming, and recreational uses,

"without public participation and without any accountability to the public" (Coeur d'Alene Lake Users Association, 1991, p. 1), and asserting, "If the state loses its control of the lake for the benefit of all of the public, nothing prevents the Tribe from managing the lake in any way it chooses" (p. 2). The Association invited community members to a June 19 meeting at the Coeur d'Alene Resort, where they encouraged them to pressure Idaho's Board of Land Commissioners to refuse negotiation and instead sue the Tribe (Givens, 1991c). Unfortunately for the Association, the meeting was largely attended by Washington Water Power staff, as well as several members of the White supremacist group the Aryan Nations, who wished to join forces against Tribal ownership, embarrassing the organizers (Givens, 1991c).

Nonetheless, the public pressure seemed to have an effect. The Tribe grew increasingly frustrated with Idaho's lack of response to its offer to negotiate. In a July 22 letter to the Idaho Land Board, Tribal Vice-Chairman Lawrence Aripa expressed the Tribe's frustration, and suggested, "You must be listening to the special interests who have polluted, privatized and profited from Lake Coeur d'Alene and now see it in their interest to force a court battle" (Oliveria, p. B1, 1991). The Tribal Vice-Chairman's letter also enumerated multiple possibilities that the Tribe was willing to consider, including co-ownership, a joint management board, and exchanges of lakefront property for lake bed, and expressed frustration that the Board was taking months simply to consider whether or not to negotiate (Aripa, 1991). The Idaho Board of Land Commissioners (the Land Board) was composed of officials designated in the Idaho Constitution, Article IX, Section7, and included Governor Andrus, State Auditor J.D. Williams, Secretary of State Pete Cenarrusa, Attorney General Larry EchoHawk, and Jerry Evans, the Superintendent of Public Instruction. Under the state

constitution the Land Board had direction and control of Idaho public lands. Its response, penned by Williams, professed the Board's surprise that the Tribe had made a decision about negotiation, claiming the Board had had only a few months to consider the Tribe's ownership claim, while the Tribe had been considering ownership since 1972 (Williams, 1991).

Despite the Tribe's offers, in a letter written that August, Governor Andrus expressed to businessman Duane Jacklin that he and the other members of the Land Board would not negotiate unless it was a monetary settlement being discussed, but stated "to voluntarily give up our ownership of part of the bed of Lake Coeur d'Alene is a mistake I am not about to make" (Andrus, 1991). Yet on August 22, the very same date that Andrus penned his message to Jacklin that no negotiation would take place unless it was a federally-funded payment to the Tribe, Attorney General EchoHawk wrote to Givens claiming the Land Board would need another two months to evaluate the Tribe's claim, with no mention of the Governor's caveats (EchoHawk, 1991). Days later, the Coeur d'Alene Chamber of Commerce issued a statement claiming that the Tribe had no expertise or resources to improve lake quality that and Tribal ownership would adversely impact area businesses (*Cd'A chamber backs state*, 1991).

The Tribe had reason for its urgency in wanting a resolution to the ownership question. Facing a filing deadline, on July 31, 1991, the Tribe filed its first major judicial suit of the decade, a Natural Resources Damage suit filed in District Court against nine mining companies under CERCLA authority, demanding that they restore or replace natural resources damaged by mining (Cabe, 1991). Repeatedly, the Tribe, through its official resolutions, correspondence, and public statements tied its ownership claims directly to its

desire to address ecosystem health. Upon filing suit, Chairman Stensgar issued the Tribe's statement:

> For 100 years, the mines in Shoshone County have scarred and poisoned the land and fouled the waters. Many hills and valleys are so poisoned that no plants will grow. For years no fish could live in the waters. Now the few that can survive are not fit to eat (Cabe, 1991, p. 1).

As anticipated, the mining companies responded almost immediately that the Tribe lacked jurisdiction. By the end of the year, several of the companies, led by Asarco, filed a counterclaim against the Tribe that claimed the Tribe had no rights to the lake and that in fact the Reservation itself had been "extinguished" with allotment (Givens, 1991d).

In early October, the Tribe reached out to the State, once again seeking resolution. This time, the entire Tribal Council signed a letter to the Commissioners with more forceful language, having been made aware of the Governor's comments to Duane Jacklin. The Council wrote:

> We understand that some might think that the Coeur d'Alene Tribe would be willing to accept a monetary settlement in exchange for its ownership of Lake Coeur d'Alene and the related waters. Let us be perfectly clear. Lake Coeur d'Alene is not for sale (Coeur d'Alene Tribe, 1991b, p.1).

The State responded. On October 8, in a 3-2 vote, the Land Board voted not to proceed with negotiations with the Tribe (Givens, 1991e). On October 15, 1991, the Coeur d'Alene Tribe filed suit in the U.S. District Court against the State of Idaho to quiet title on Coeur d'Alene Lake.

Idaho I and *II*

The cordial dialogue that had generally characterized relations between the Tribe and the State evaporated quickly with the Tribe's filing. On November 13, the State of Idaho moved to dismiss the Tribe's claim based on sovereign immunity from suit, based on the 11th Amendment of the Constitution, which limits federal courts from hearing citizen suits against states (Clark & Jackson, n.d.). This move accelerated the Tribe's pleas to the United States to intervene on the Tribe's behalf (Givens, 1991f) and generated vociferous protests from Tribal leaders. Responding for the Tribe to the State's motion, Councilman Henry SiJohn floated the possibility that the Tribe would consider declaring war for the lake, accusing Idaho of escalating confrontation by attempting to deny the Tribe judicial process (Bender, 1991; Bond, 1991).

The United States responded to the Tribe with assurances from the Department of Interior that it was now soliciting the Department of Justice to take action on the case and promising careful review (Sansonetti, 1991b). It would be three years and a worrisome loss by the Tribe in the U.S. District Court before the United States would finally file suit on behalf of the Tribe to quiet title (Figure 2, p. 38)

The Tribe's initial suit, *Idaho v. Coeur d'Alene Tribe* (521 U.S. 261, 1997), or *Idaho I*, was filed by each of the seven individual members of the Coeur d'Alene Tribal Council, Ernie Stensgar, Lawrence Aripa, Margaret Jose, Dominick Curley, Al Garrick, Norma Peone, and Henry SiJohn, as well as on behalf of the Tribe, against the State of Idaho and each of the individual Land Commissioners. It sought a declaratory judgment that the waters within the 1873 Reservation boundary were for the exclusive use, occupancy, and enjoyment of the Tribe (*Coeur d'Alene Tribe of Idaho v. State of Idaho*, 1992). The Tribe's strategy was attempting to overcome the State's sovereign immunity by holding the state officials

responsible for violating federal law, citing a 1908 case, *Ex parte Young (Coeur d'Alene Tribe of Idaho v. State of Idaho,* 1992). On June 17, 1992, District Court Judge Harold Ryan presided over a hearing on the State's motion. Judge Ryan issued his decision a month later, rejecting the Tribe's strategy as an "end run" and granting the motion to dismiss, rejecting the suit against the State as well as against the state officials. Judge Ryan did not stop with the dismissal based on sovereign immunity, however, but dismissed the Tribe's claim to lake ownership outright, without the Tribe fully being able to present its claim to the court (LaVelle, 1999). Judge Ryan characterized the Tribe's claim as "indefensible," and stated, "… the State of Idaho is and always has been in rightful possession of the beds, banks, and waters of all of the navigable watercourses at issue in this case" (*Coeur d'Alene Tribe of Idaho v. State of Idaho*, 1992, para.1452). Citing the *Montana* (1981) case, Ryan asserted that the Tribe had no claim to ownership and maintained that the Tribe could not present any violation of federal law by Idaho officials (Bucy, 1998).

Within weeks of Judge Ryan's dismissal, the Tribe filed its appeal with the Ninth Circuit Court. While awaiting its resolution, the Tribe continued to be frustrated with the lack of action on the part of the United States. It was concerned that if its ownership case were to be ultimately rejected at the Supreme Court level, the U.S. could be barred from entering its own case on the Tribe's behalf (Coeur d'Alene Tribe, 1992). The Department of Interior continued to press the Department of Justice for any form of assistance, including the filing of an *amicus* brief on behalf of the Tribe, but Givens pressed for more involvement, reasoning, "Intervention by the United States would immediately vest the Court with jurisdiction and the case would automatically be remanded for decision on the merits" (Givens, 1992, p.1). Givens stressed that the Tribe badly needed Federal intervention in both

its appeal as well as in its case against the mining companies, who, he explained, were trying to dismiss the Tribe's natural resource damages case for lack of ownership. In November 1993, still awaiting the appeals court hearing, the Tribe passed a resolution requesting Bureau of Indian Affairs to support its litigation costs, noting in the resolution that Judge Ryan had denied the Tribe's claim without hearing any evidence and that while the Department of Interior had filed two litigation requests from the Department of Justice, it had yet to hear a response (Coeur d'Alene Tribe, 2003).

Finally, in 1994, the United States took action, filing a complaint on July 21 against the State of Idaho to quiet title on the lake within the Coeur d'Alene Reservation for the use and benefit of the Tribe. The Tribe and the State of Idaho were now engaged on two fronts: *Idaho I,* the Tribe's appeal, and preparation for intervention in the U.S. complaint. The two cases would overlap for the next three years (Figure 4, p. 87). The Tribe moved quickly to intervene in the U.S. complaint, filing as an intervenor in October 1994, continuing to claim the entirety of the lake within the 1873 Reservation boundaries on the basis of its aboriginal title (Coeur d'Alene Tribe Motion to Intervene as a Plaintiff, 1994). Meanwhile, the parties in *Idaho I* had submitted their arguments to the Ninth Circuit Court of Appeals in February of that year, and a decision was issued in December 1994. The judges affirmed Judge Ryan's dismissal of the suit against the State of Idaho, upholding Idaho's sovereign immunity claim but reversing and remanding portions of the decision. The Ninth Circuit found that the Tribe had a credible claim to the property that could be heard and that the Tribe had the right to sue state officials (*Coeur d'Alene Tribe of Idaho v. State of Idaho,* 1994, Section III). Additionally, the judges repudiated Judge Ryan's dismissal of the Tribe's claim to ownership, stating "The district court without discussion improperly dismissed this claim"

(*Coeur d'Alene Tribe of Idaho v. State of Idaho,* 1994, Section IV*)*. The merits of the Tribal ownership claim were remanded to the District Court, this time assigned to Judge Edward Lodge. Idaho, however, immediately petitioned to the Supreme Court in March of 1995, and in 1996, Judge Lodge eventually terminated the case at the District level without prejudice based on this appeal (*Coeur d'Alene Tribe v. Idaho,* 1996).

In Fall 1996, the Supreme Court granted Idaho's petition for writ of certiorari, issuing its decision on June 23, 1997. The Court's decision focused on whether the federal courts could hear the claim against state officials (and not the State), but did not address ownership. In a 5-4 decision with the majority authored by Justice Kennedy, the Court ruled for Idaho officials' sovereign immunity (*Idaho v. Coeur d'Alene Tribe of Idaho,* 1997). Though he allowed that the merit of the Tribe's case was not being considered, Kennedy cited Western legal decisions about sovereignty and water stretching back to the Magna Carta, and Idaho's interest in its waterways as critical to its sovereignty in a way that seemed as "particular and special circumstances," to demand special consideration of state sovereign immunity (*Idaho v. Coeur d'Alene Tribe of Idaho,* 1997, para.287). Justice Sandra Day O'Connor, while concurring, authored her own opinion, which critiqued Kennedy for using such a "vague balancing test" to determine whether the Tribe could seek relief in federal court (*Idaho v. Coeur d'Alene Tribe of Idaho*, 1997, para. 296). Instead, O'Connor's opinion simply stated that the Tribe's quest for declaratory relief would have had the same effect as a quiet title case, and thus a suit against state officials was equivalent to the suit against a state, which is barred by sovereign immunity (*Idaho v. Coeur d'Alene Tribe of Idaho,* 1997).

The judicial end of the road for the Tribe's suit for the entirety of Coeur d'Alene Lake had arrived. In a press release responding to the decision, Ray Givens stated on behalf of the Tribe:

> We are disappointed with the decision. It does not change the Tribe's resolve to establish its ownership of all of Lake Coeur d'Alene. This decision only causes delay. The ownership of the northern portion of Lake Coeur d'Alene will now have to be decided another day, in another lawsuit, possibly in another court (Givens, 1997).

The Tribe now focused all of its attention on preparations for the upcoming trial in the U.S. District Court, where the Tribe's claim to the northern two-thirds would not be supported by its trustee, nor would the federal government lend its support to the Tribe's claim for the waters adjacent to Heyburn State Park, which was barred from consideration by Judge Lodge during the trial. In fact, the federal government directly and indirectly countered the Tribe's claims. In its initial complaint, the U.S. asserted that the Tribe had ceded the northern two-thirds of Coeur d'Alene Lake in 1889, and seemed to attempt to skirt the Heyburn issue, saying that the U.S. had withdrawn and reserved Heyburn lands from allotment, but none of the beds and banks of the southern one-third of the lake and St. Joe River were ever ceded (United States Complaint, 1994). Thus in its answer and counterclaim, Idaho asked the Court to dismiss the U.S. complaint with prejudice and quiet title for Idaho explicitly with the beds and banks within park boundaries, as well as waters within the current boundaries of the Reservation (State of Idaho Answer to Complaint and Counterclaim, 1994). In response, the Tribe's motion to intervene cited the inadequacy of U.S. representation, citing its unwillingness to argue for the entirety of the lake, and its

inconsistent history regarding the Heyburn claims stemming back to the *Idaho v. Andrus* cases (Coeur d'Alene Tribe Memorandum in Support of Motion to Intervene, 1994).

The United States' reaction to the Tribe's intervention was divided. The Tribe had filed to intervene through intervention *of right*, a right based on its interest relating to the disposition of property that the claimant does not feel is being adequately represented, and *permissive* intervention, or that which had a shared defense with the U.S. action as a common question of law (Legal Information Institute, n.d.). The U.S. requested that the district court deny the Tribe's intervention of right, responding to its concerns that the U.S. could not and would not include the Tribe's proposed argument for aboriginal title, nor its claim for the entirely of the lake, including Heyburn, by claiming:

> Adequate representation does not require the United States to raise or rely on each and every possible legal theory requested by a tribe… As the Supreme Court long ago recognized, "there can be no more complete representation than that on the part of the United States in acting on behalf of these (Indians) [citations omitted] (U.S. Response to Coeur d'Alene Tribe's Motion to Intervene, 1994, pp.4-5).

In addition to defending the adequacy of its legal representation, the United States also argued that the Tribe's claim to the northern waters and Heyburn was broadening the scope of litigation in a manner that the federal government was not prepared to defend (U.S. Response to Tribe's Motion to Intervene, 1994). Judge Lodge was not convinced, and in his order granting the Tribe permission to intervene through both avenues noted the "equivocal nature" of the U.S.' willingness to entertain Tribal concerns (Memorandum Decision and Order, 1995, p.5).

For the next several years, the United States, the Tribe, and the State would be embroiled in back-and-forth filings, amending and re-amending complaints and responses, laying out witness lists, requesting time extensions, requesting length of brief extensions, attempting to have the case dismissed, responding to motions to dismiss, and determining a schedule for expert witness testimony, depositions, and trial. The Tribe continued to hone its case for Heyburn, with no support from the United States.

The crux of the actors' arguments lay in several elements: 1) whether the executive actions by the federal government reflected clear intent to include submerged lands in the 1873 Reservation, 2) whether Congress ratified the 1873 Executive Order's inclusion of submerged lands and display a clear intent to defeat the assumption of equal footing title by the State of Idaho, and 3) whether subsequent events after Idaho's statehood evidenced the state's lack of title to submerged lands (Memorandum Decision and Order, 1998, July 28). On these points, the United States and the Tribe coordinated their responses, using in-depth expert reports on historical documents to support their contention that federal agents were well aware of the Tribe's connection to water for multiple uses. The State of Idaho argued throughout the case that the Tribe's agricultural successes were the rationale for their reservation, eliminating any need for subsistence fishing access, which was the only reason the State mentioned as potentially justifying a need for lake ownership (State of Idaho's Response to Coeur d'Alene Tribe's First Requests for Admission and Interrogatories, 1997). But beyond the Tribal and federal parallel arguments supporting executive and congressional affirmation of the Tribe's water-based culture, the Tribe made an additional argument: that of aboriginal ownership in addition to "recognized title" (Motion to Intervene by Coeur d'Alene Tribe, 1994, October 20, p. 4). This legal argument, that the Tribe's sovereign interest in its

lands since time immemorial existed beyond a western title claim affirmed by federal actions, would be raised at each level of the case.

When the nine-day district court trial at last took place in December 1997, Judge Lodge issued an order precluding Heyburn from consideration. Given that the U.S. was not claiming Heyburn, the judge argued, the Tribe alone could not sue the State of Idaho for quiet title, not because of lack of evidence, but because once again the State's sovereign immunity under the 11th Amendment barred adjudication of the matter (Order, 1997, p. 2). Once again, the Tribe had the courtroom door barred to its claim – at least partially.

On July 28, 1998, seven years after the Tribe first filed in District Court in *Idaho I,* and four years after the United States filed its claim, Judge Lodge issued his decision, affirming quiet title of the southern-third of Coeur d'Alene Lake to the United States with the Tribe as beneficiary (Memorandum Decision and Order, 1998, July 28). Judge Lodge specifically noted the importance of the expert witness testimony presented by Tribal and federal witnesses that laid out the significance of the Tribe's historical use of the lake and its tributaries. However, in two final footnotes, Judge Lodge made two significant statements: first, that the Court's decision considered lands only within the present-day boundaries of the Reservation, implicitly emphasizing the open question of the northern lake. Secondly, Judge Lodge noted that because the federal claim was supported by the evidence, he did not need to decide whether aboriginal title applied to submerged lands, and so it, too, remained an open question (Memorandum Decision and Order, 1998, July 28, p. 35).

The Tribe responded quickly to the district court's decision. In a press release on that same day, Chairman Ernie Stensgar stated:

> Stewardship. That's the most important goal right now for Lake Coeur d'Alene. We've always maintained that the Lake belongs to our Creator, but he put the Coeur d'Alene Tribe here to take care of it and protect it… This decision has been a long time coming but it's worth the wait. The Coeur d'Alene Tribe has always owned the Lake. We've been here on its shores for thousands of years. This decision simply confirms what the Tribe and our Creator already knew (Stensgar, 1998, July 28).

The Tribe moved quickly to begin exercising its newly-affirmed jurisdiction, and established a "Lake Transition Team" to consider how it could begin regulating encroachments, boating, fisheries, water quality, and waterfront development using existing and new environmental regulations (Givens, 1998, August 22). By December 1998, the Tribe adopted an Interim Lake and River Management Code, essentially mirroring state code until it could develop more specific regulations (Coeur d'Alene Tribe Resolution, 1998).

As the Tribe built out its code and regulations, the State of Idaho issued an unsuccessful motion to Judge Lodge requesting that the Tribe be prevented from asserting that jurisdiction while the State filed an appeal with the Ninth Circuit Court, arguing that the Tribe's assumption of jurisdiction would disrupt the "settled expectations" of waterfront property owners (State of Idaho's Brief in Support of Motion for Stay and Injunction Pending Appeal, 1998, August 18).

The Tribe, prepared for the State's appeal, filed its own rapid motion to the Court of Appeals, stating that the State's appeal was premature, arguing that Judge Lodge was remiss in his decision not to decide on Heyburn, so there was not yet appellate jurisdiction and the case should be remanded to the District Court (Coeur d'Alene Tribe's Motion to Dismiss, December 16, 1998). The Tribe's motion to dismiss was succinctly dismissed without

prejudice by the Ninth Circuit, and scheduling briefs and trial dates quickly began again (Order, 1999, January 15). After approximately a year of another flurry of briefs, responses, and cross-appeals, all focusing largely on the same legal arguments as the district case, culminating in a hearing in December 1999, the Ninth Circuit Court released its unanimous decision on May 2, 2000. The appellate judges' support of Judge Lodge's determination refuted the State's continued argument that the purpose, per Congress, of the Coeur d'Alene Reservation was solely agricultural, stating:

> [I]t is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889… What matters, however, is Congress's awareness that the 1873 reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution (Decision, 2000, May 2, p.10).

The appellate judges, like Judge Lodge, noted that the Tribe's continued legal argument for aboriginal title need not even be considered, as Congressional intent was clear (Decision, 2000, May 2, p. 8), and they upheld the district court's refusal to adjudicate the Tribe's claim to the submerged lands in Heyburn.

Idaho would not be deterred, despite the judges' resounding affirmation of the federal and Tribal case. Within two months, it had petitioned for writ of certiorari with the U.S. Supreme Court, arguing that "The court of appeals' decision upsets a century of State ownership… the unique role that Coeur d'Alene Lake has played in the history of Idaho is jeopardized by the recent decision of the Ninth Circuit Court of Appeals" (Petition for a Writ of Certiorari, 2000, July). On December 11, 2000, writ was granted (Brief for the United States, 2001, March 21). After hearing oral arguments in April 2001, on June 18, 2001, the

case reached the end of its legal journey with a five-four decision quieting title in favor of the U.S. for the Tribe. Again, based on the expert reports, in a decision authored by Justice Souter, the affirming justices remarked on the Tribe's use of the lake for food, fiber, transportation, and cultural and spiritual practices. Though the justices, too, did not speak directly to the Tribe's aboriginal title theory, they did recognize its interest in jurisdiction, stating, "A right to control the lakebed and adjacent waters was traditionally important to the Tribe" (*Idaho v. United States,* 2001).

On October 20, 2001, the Tribe formally gathered to celebrate. Ironically, owning no parcels of land adjacent to the lake, they gathered that morning at Rocky Point in Heyburn State Park to offer prayers of thanksgiving. Council Fires reporter Rosie Peone described the jubilant experience:

> The sound of their voices carrying over the lake, rolling into the hills on the opposite side and to the heavens above was heart-warming and spine-tingling. As the songs were coming to a close, a bald eagle soared over the water and the sun broke through the fog sparkled on the water, shining rays of light on the people as though it were a sign of approval from above over what was happening. It was so moving, no words can describe the spiritual nature of the experience. (Peone, R., 1991).

After the Victory

The Tribe's battle for the restoration of Coeur d'Alene Lake, both politically and environmentally, did not end on June 18, 2001 (Figure 6, p. 120). Indeed, the Tribe's attorneys, including Ray Givens and his associates, were busily engaged in the natural resource damages trial against Asarco, Hecla, Sunshine Mining and Union Pacific Railroad that same year. Since 1991, the Tribe, later joined by the U.S. Departments of Interior and

Agriculture, had collected massive amounts of data on water quality, fish, waterfowl, sediments, riparian plants, and game to evaluate the extent of ecological contamination from

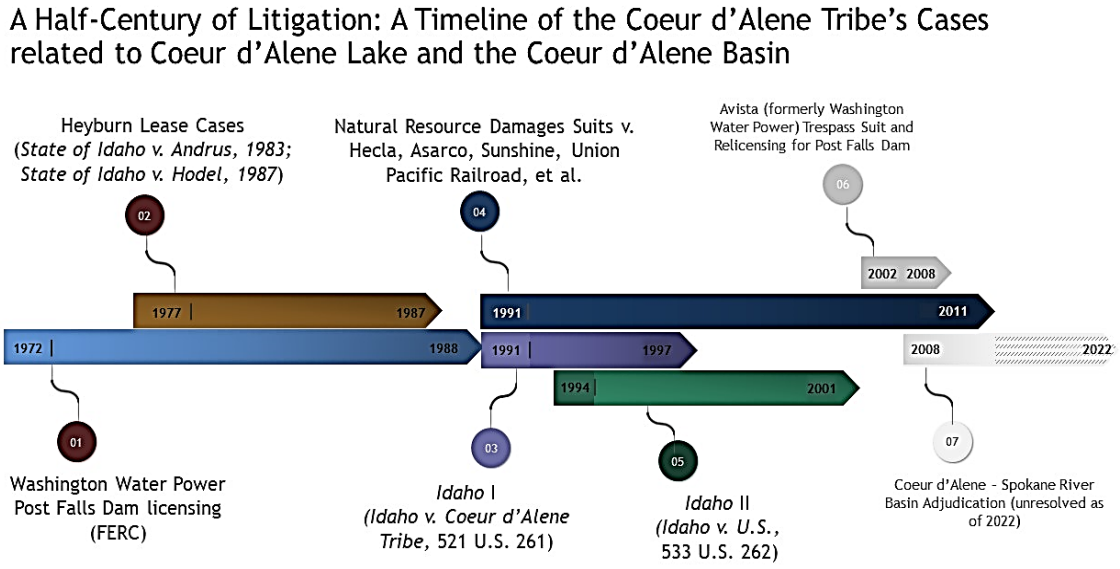

Figure 6: Tribal legal battles related to Coeur d'Alene Lake.

the widespread deposition of mine tailings in order to hold the mining corporations culpable (Department of the Interior, Department of Agriculture, & Coeur d'Alene Tribe, 2007).

The trial took some 78 days, and included 8,695 exhibits and 16,000 pages of testimony, and was overseen, too, by Judge Edward Lodge of the Idaho District Court (*U.S. v. Asarco,* 2003). In Judge Lodge's determination on the companies' liability in the case, using expert investigations of historical mining records of mine tailing releases, he ruled that Asarco was responsible for 22% of the mining waste in the Basin, and Hecla for 31% (The Tribal and federal claims against Sunshine were resolved in early 2001) (*U.S. v. Asarco,* 2003, para.1105). The Tribe's standing in that case had been strengthened since Judge Lodge's 1998 decision; in his determination on Trusteeship, he noted that both the Tribe and the State owned the submerged lands. However, much like the jurisdiction case, his ruling was only a

partial victory: though he stated that Coeur d'Alene Lake's health was at risk, he determined that "Cultural uses of water and soil by Tribe are not recoverable as natural resource damages" (*U.S. v. Asarco,* 2003, para. 1106). His justification for this determination stated, "While the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource "belong or be connected as a rightful part or attribute" for purposes of trusteeship analysis" (*U.S. v. Asarco,*2003, para. 1117). Once again, the Tribe's relationship to its waters would be largely set aside beyond that which fit neatly into the scope of the Court's legal framework.

In all, the environmental lawsuits led by the Tribe and the United States against Asarco and Hecla would result in nearly $750 million in settlement monies being allocated for both Superfund cleanup and natural resource restoration. Under the consent decree issued by Judge Lodge, Hecla would pay $263.4 million plus interest to the U.S., Tribe, and State of Idaho, with $60 million being allocated to natural resource restoration, $4 million to the Tribe for its past costs, and $2 million for the Tribe and State's joint lake management plan. Additionally, $10 million of the natural resource damages were to be specifically allocated for restoration of Coeur d'Alene Lake (*U.S. v. Hecla,* 2011). Together with Asarco funds from its claims settled with the Tribe in 2005 and the U.S. in 2008, about $140 million would be dedicated to "restore, replace or acquire the equivalent natural resources injured by mining" (Coeur d'Alene Tribe, et al., 2011), an effort that is ongoing today.

Just as the natural resources damage suits were moving towards resolution, yet another legal front would emerge: water rights adjudication. In 2008, the State of Idaho initiated the Coeur d'Alene – Spokane River Basin Adjudication (CSRBA) to adjudicate surface and ground water claims (Northern Idaho Water Rights Adjudications –

Commencement, 2008). While western water law relies on the prior appropriation doctrine that bases priority on when a water user first *uses* the water, tribal water rights are different in that they are reserved on the date of reservation establishment, and based on the purpose of the tribe's reservation (Hedden-Nicely, 2014). Though water rights are adjudicated in state courts, because of a 1952 law, the McCarran Amendment, waiving federal sovereign immunity on water rights cases, the U.S., as the Coeur d'Alene Tribe's trustee, was required to enter the adjudication to file claims on the Tribe's behalf (Hedden-Nicely, 2014). The U.S. entered 353 claims on behalf of the Tribe, which eventually joined the litigation (*United States v. State*, 2019). The U.S. and Tribe filed claims for a number of different purposes, including domestic, commercial, municipal and industrial claims, in-stream flows to support fish habitat, irrigated agriculture, and wetlands, springs and seeps for cultural and ecological purposes. Seventy-one of the claims were to support fish habitat across the Basin (Hedden-Nicely, 2020). The district court used many of the facts from *Idaho II* to determine what the purposes of the Reservation were, and in 2017 issued its judgement that the Coeur d'Alene Reservation was created for the primary purposes of agriculture, fishing, and hunting, and that claims beyond these purposes would be disallowed (*United States v. State,* 2019).

The district court determination was not a total loss to the Tribe. Once again, it had been facing an attempt by the State of Idaho to persuade the Idaho court that the sole purpose for the Reservation was agriculture, echoing its *Idaho II* argument (Reply Brief of the State of Idaho 2018, May 21). Nonetheless, the court's decision had disallowed many of the cultural needs for water, as well as contemporary commercial and industrial uses, as if the Tribe's need for water was frozen in time in 1873 at the time the Reservation was established. The Tribe and United States appealed the decision to the Idaho Supreme Court,

and in 2019, were successful in gaining judicial affirmation of the Reservation having a homeland purpose, requiring water for domestic, agriculture, hunting, fishing, plant gathering and cultural uses (*United States v. State*, 2019), though industrial and commercial uses were still denied. Additionally, the Idaho Supreme Court affirmed the district court's disallowing the Tribe's claims for flows to support fish habitat in off-reservation areas, claiming that the Tribe had, through its 1889 agreement with the United States, abrogated its off-reservation water claims, "even if the current science suggests the water eventually fulfills a purpose on tribal-owned land" (*United States v. State,* 2019, para.356). The Court's decision was not unanimous; in a partial dissent on in-stream flows, Chief Justice Burdick wrote a strong commentary on the need to consider canons of construction, and spoke plainly:

> The upshot of all this is that Congress set aside the water necessary to achieve the purpose of fishing by providing instream, non-consumptive water rights to preserve the fish habitat. Because some of the fish species native to the Coeur d'Alene Lake spawn into the rivers and streams before returning to the Lake, Congress impliedly set aside the water necessary to maintain the fish habitat there, too. After all, one can't fish if there are no fish. And if there are no fish if the fish can't spawn… To properly understand why I disagree, it's worth remembering what exactly the Majority claims that the Tribe gave up. To the Tribe, water was of paramount importance… (*United States v. State,* 2019, para. 363).

Looking forward: battles yet to be won

Though the Tribe won yet another substantive – yet incomplete – victory at the Idaho Supreme Court, the CSRBA is far from over. The Idaho Supreme Court decision may have, at least temporarily, settled decisions on what claims the U.S. and Tribe were entitled to, but

now they must wrestle with the State of Idaho on quantifying what those claims entail. Additionally, the Tribe faces ongoing opposition from property rights organizations such as the North Idaho Water Rights Alliance (NIWRA), Coeur d'Alene Lakeshore Property Owners Association, and the North West Property Owners Alliance, who have continued to fund legal efforts to oppose any water claims by the Tribe. One prominent organizer, Pam Secord, chair of the NIWRA, has repeatedly sown hyperbolic claims about Tribal water rights, stating, "What happens if we [non-tribal residents] if we don't get water right? We have to get permission from the Tribe to drink some water? That is pretty offensive to us" (Selle, 2015). NIWRA Attorney Norm Semanko, speaking to the Northwest Property Owners Alliance at a 2021 membership dinner, presented his legal efforts on minimizing the quantity the Tribe could claim:

> Why does NWPOA care? Why do the other groups care? Because if you insert new rights into a system, large rights, it can interfere with *your* rights. All of the sudden, your water right, your settled expectations for you, your family, your community, your business, is out the window. You're injured (Semanko, 2021, September 14).

Presenting his strategy for proposed settlement, Semanko claimed to have won the Idaho Supreme Court decision for his clients in part of a battle to "protect our way of life for our kids and grandkids" (Semanko, 2021, September 14), and vowed to continue pursuing the case on behalf of these organizations until federal (Tribal) claims were subordinated to those of the state.

And what of the health of Coeur d'Alene Lake? Despite cooperatively developing a voluntary joint lake management plan with the State of Idaho that was adopted in 2009, the Coeur d'Alene Tribe has been disappointed with the continued decline of water quality in the

lake. Though *Idaho II* affirmed the Tribe's jurisdiction in southern Coeur d'Alene Lake waters, the Tribe still is hindered by restricted jurisdiction over the predominantly fee (privately-held) lands surrounding it, so deleterious, unregulated land use practices continue to contribute nutrients that are reducing oxygen levels and increasing algae growth in the lake, resulting in the resuspension of toxic heavy metals at its depths (Benson, 2019). In late 2019, the Tribe officially pulled out of the Lake Management Plan, stating its concerns over lack of action to protect the lake and a desire to see more federal involvement (Jackson, 2019, December 5.). In response, the state requested that the National Academy of the Sciences conduct a review of water quality data collected by both the Tribe and the Idaho Department of Environmental Quality (Francovich, 2019), a review that is expected to be completed in late 2022.

The likelihood of increased federal involvement being widely welcomed in the region is slim. Idaho has been the fastest-growing state in the United States for the past five years, predominantly from in-migration, with a many new residents in north Idaho citing its conservative politics as their motivation (Geranios, 2022, March 7). Unlike the 1990s, when the occasional conservative Democrat like Cecil Andrus could still be elected governor, today all state-wide and congressional positions are held by Republicans, as are 82% of legislative seats in a state that seems to be moving far more to the political right (Scigliano, 2022, January 18). In a region where environmental regulation was already unpopular and unfettered property rights are the goal, the Tribe is unlikely to have widespread local support for future environmental battles. As it has for the past fifty years, for the Tribe to address the never-ending environmental challenges that continue to plague Coeur d'Alene Lake, now

exacerbated by climate change, it will need to continue to take the long view in its legal battles and consider novel legal strategies.

Despite long odds and an at-times hostile political climate, the Coeur d'Alene Tribe has succeeded in affirming its ownership of Coeur d'Alene Lake, enabling it to hold powerful corporations responsible for their century of contaminating the watershed. But the limitations imposed on Tribal legal arguments reduced its millennia of connection to the lake and rivers to a category of "mere occupancy" with ownership claims that could only be validated with the blessings of outside (non-Native) experts and the support of the United States government. Williams (2005) describes Indian law as practiced in the era of the Supreme Court during William Rehnquist's leadership, 1986-2005, as "a perpetually reinscribed, judicially validated language of Indian racial inferiority in a modern, sanitized form of color- blind and color- clueless legal discourse" (2005, p. 143), relying on 19th century stereotypes. Williams posits that the practice of Indian law derived from the Marshall trilogy that depends on title that is vested in discovery doctrine can never fully realize tribal sovereignty, arguing:

> [T]he problem with any approach to protecting Indian rights that relies upon the principle of racial discrimination perpetuated by the Marshall model is that those rights are never really safe under the Supreme Court's Indian law. The model's acceptance of the European colonial- era doctrine of discovery and its foundational legal principle of Indian racial inferiority licenses Congress to exercise its plenary power unilaterally to terminate Indian tribes, abrogate Indian treaties, and extinguish Indian rights, and there's nothing that Indians can legally do about any of these actions (Williams, 2005, p.151).

As the above case chronology has demonstrated, the Tribe has succeeded in persuading judges and justices that water was and is important enough that even non-Native officials would have advocated for the Lake's inclusion in Reservation boundaries in 1873, in 1887, and 1889. However, for the Coeur d'Alene Tribe to be able to move past the limitations of Discovery Doctrine into a full realization of its ownership of its land and water and the protection of its homeland will require approaches that can begin to dismantle these colonial limitations.

Chapter 5: Findings

This chapter examines the themes of the court briefings, responses, testimony, and judicial decisions that emerge from a critical document analysis of *Idaho II* (*Idaho v. United States,* 2001), as well as the themes found in the reports and testimony of several of the expert witnesses used by the parties. As described in Chapter 4, *Idaho II* spanned seven years of court proceedings, beginning with its initial filing in District Court in 2004 by the United States and culminating in the 2001 ruling by the Supreme Court finding in favor of the United States and the Coeur d'Alene Tribe.

This section will be broken down into three sub-sections to address the two overarching themes to the data set: 1) Settler colonial logics, 2) Indigenous resistance through the expression of Coeur d'Alene values, and 3) The role of the expert witness in supporting the three actors' claims. Within the theme of settler colonialism, there are two major subthemes: Doctrine of Discovery and Whiteness. Indigenous resistance is primarily seen through the expression of the core values of guardianship and spirituality, although it is also expressed, though in a limited fashion, through claims of aboriginal title. At the center of the tension between these two themes is the understanding of Tribal sovereignty and the ability of the Coeur d'Alene Tribe to exercise self-determination in relation to its homeland, including the waters that have been central to its existence since time immemorial.

The third section, that of expert witness testimony, is examined separately because of its importance in shaping the decisions of the judiciary. Though there were seven expert witnesses in the U.S. District Court case, this section focuses on two whose testimony was particularly impactful for very different reasons. Additionally, the contrast between the treatment of the testimony of witnesses who were named "experts" versus the testimony of

Coeur d'Alene Tribal Elders who were highly knowledgeable in their culture, history, and language is explored.

The purpose of this study is to use the braided theories of Critical Race Theory, TribalCrit, and Critical Witness Theory to analyze one of the multiple cases that was pursued by the Coeur d'Alene Tribe in order to restore its sovereignty over Coeur d'Alene Lake. The research questions being explored are:

1. Has settler-colonialism impacted the Coeur d'Alene Tribe in its battles to assert sovereignty over its land and waters? If so, how?
    a. Are the ideas of property and ownership presented by the primary actors (the State of Idaho, the federal government, and the Coeur d'Alene Tribe) in court proceedings? If so, how?
    b. Do the three legal foundations of doctrine of discovery, domestic dependent nationhood, and plenary power appear in the three actors' arguments, as well as court rulings? If so, how?
    c. Do the primary actors' arguments legitimize or delegitimize tribal epistemologies and sovereignty? If so, how?

Organization of findings

Though the case study presented in Chapter 4 included documents pertaining to the entire 30-year span of the Tribe's litigation efforts, for the purpose of manageability, this content analysis was limited to the documents pertaining to *Idaho II,* including the District Court, Ninth Circuit Court, and Supreme Court hearings that culminated in *Idaho v. United States,* 533 U.S. 262, 2001. These documents included more than 2,000 pages of motions,

trial briefs, and orders, as well as the 1,740 pages of transcript of the ten-day District Court trial, and the 36-page transcript of the oral arguments presented to the Supreme Court.

Given the extent of data set and the overlapping nature of the themes, I expand on the two overarching themes in the data, and then present how these themes are evidenced in the documents and transcripts by the major actors in the court events: The Coeur d'Alene Tribe, the United States, the State of Idaho, and, in the third section, the expert witnesses called to support each side during *Idaho II.* At the center of the tension between the two themes is the understanding of Tribal sovereignty and the ability of the Coeur d'Alene Tribe to exercise self-determination in relation to its homeland, including the waters that have been central to its existence since time immemorial. At times, concepts such as ownership and title shift and are even presented in contradictory ways by the same actor as the case moves through the courts.

Part I: Settler Colonial logics

Within the theme of settler colonialism, there are two major subthemes: Doctrine of Discovery and Whiteness. Additionally, the concepts of plenary and power and domestic dependent nationhood, both derived from Discovery Doctrine, were also clearly observed, as the major question addressed by the courts became centered not on what the Coeur d'Alene Tribe's millennia of occupation of its lands meant to the Tribe, but on whether or not Congress deemed that occupation important enough to include submerged lands in its reservation.

Sub-theme	Concept
Doctrine of Discovery	Legal doctrine holding that European powers, based on degree of civilization and Christianity, held fee title upon "discovery" of lands.
Terra nullius	Belief that lands not enclosed and cultivated are owned by no one.
Plenary power	Absolute power of Congress over tribes and tribal people.
Domestic dependent nationhood	Guardian-ward status, United States as protector of tribes.
Whiteness/White supremacy	Ability to own property is not only based on labor, but race-based (Harris, 1993); uses language of competency, civilization, savagery.
Aboriginal title as mere occupancy	Sometimes referred to as Indian or Native title; this frames occupancy and use as the right to use the land at the federal government's will.

Table 4: Settler-colonial themes across the data set.

The Coeur d'Alene Tribe

In analyzing the content of the Tribal statements, testimony, and legal briefs, two clear and distinct narratives emerge: the first were the legal arguments that the Coeur d'Alene Tribe presented, framed entirely in Western legal doctrine, and the second is that of the Tribe's traditional relationship with its homeland that was spoken from a non-Western perspective. Though the legal documents speak to the Tribe's historical relationship with the lake, this discourse was generally only found in the Tribe's argument for aboriginal title. There is no instance of presenting this relationship as the Tribe's customary form of governance.

In the Tribe's initial appearance in the documents in *Idaho II*, in its Memorandum in Support of its Motion to Intervene (1994, p. 4), the Tribe first presented its argument for aboriginal title as part of a two-pronged claim as follows:

> It is the Tribe's position that it holds "aboriginal title" to the Lake as part of its aboriginal ownership of the entire area [of aboriginal territory, citing the Indian

> Claims Commission] ... It is also the Tribe's position that it holds "recognized title" to the Lake as a result of the 1873 Executive Order and Agreements of 1887 and 1889. The Tribe is also the beneficially interested party of the trust or fiduciary relationship with the United States…. These lakes and rivers have been the heart and lifeblood of the Coeur d'Alene Tribe since time immemorial. The Tribe's sovereign governmental interest in the property in question is of the highest possible magnitude. (1994, p. 4)

In this excerpt, aboriginal title was presented as ownership until extinguished by the U.S. This argument appears repeatedly as the Tribe amends its claims over the next two years, and is repeated nearly verbatim in its final Third Amended Complaint and Answer to Counterclaim in Intervention, filed in 1996. Additionally, even as this initial language spoke to the Tribe's relationship to the lake as the center of its existence as a people, such statements acknowledged, rather than resisted, the authority of Doctrine of Discovery and the domestic dependent nation status of the Tribe by explicitly stating that Tribal "recognized" title, meaning title considered legitimate by Western courts, is that which is dependent on executive agreements, and noting the trustee status of the federal government.

The Tribe also acknowledged repeatedly by presenting as a statement of fact, the United States' Discovery rights to its territory. In its first Amended Complaint and Answer to Counterclaim in Intervention, the Tribe stated:

> By virtue of the Treaty with Great Britain in 1846, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks at issue herein subject to the Tribe's right of exclusive use and occupancy under the doctrine of aboriginal Indian title. (1994, p. 3)

This statement, as well as the Tribe's claim to aboriginal title within a Discovery framework, was found in each trial brief and claim.

United States

The United States was the lead plaintiff in *U.S. v. Idaho*, based on its role as the Tribe's trustee. Its own discourse around the Tribe's rights was inconsistent. Once the United States filed the case in 1994, its attorneys seemed dismissive of the Tribe's role in arguing for the lake. In its response to the Tribe's Motion to Intervene, the United States argued, using its status as guardian to its Tribal ward:

> Decisions taken by the United States whether or not to include various aspects of a particular claim cannot amount to "inadequate representation" … As the Supreme Court long ago recognized "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of these (Indians)." (United States Response to Coeur d'Alene Tribe's Motion to Intervene, 1994. p. 4-5)

In a footnote in that same document, the United States seemed not only dismissive of the aboriginal title theory that the Tribe was attempting to introduce, but dismissive of the Tribe's right to request it:

> When the specific legal issue of the efficacy of aboriginal title as a viable theory to establish title to all or any portion of Lake Coeur d'Alene finally gets addressed in this action, the United States will present and argue those legal theories it deems fit and proper to support its quiet title action. (United States Response to Coeur d'Alene Tribe's Motion to Intervene, Footnote 7, p. 5)

Both of these excerpts convey several ideas. First, the United States presented itself as the more competent legal actor to represent the Tribe's interests, with the Tribe presented

as a junior partner in the case. Additionally, the United States, as the Tribe's guardian, insinuated its role as protector of the Tribe's best interest in a manner that seemed at best, paternalistic. This not only evoked the domestic dependent nation role of the U.S.-Tribal relationship, but by implying that the Tribe was less competent to develop and present legal theories, evoked issues of Whiteness. Nonetheless, the United States eventually presented an aboriginal title argument, together with several other reasons supporting its assertion that Congress *conveyed* title (note that the legal definition of conveyance is a transfer of property), at once recognizing the Tribe's property rights while at the same time implying that the Tribe's current property rights stemmed from Congress's plenary power.

In his oral arguments at the District Court Trial, U.S. Attorney Hank Meshorer articulated three exigencies, or urgent needs, that supported this congressional conveyance. The first, Meshorer argued, was "that the tribe was inextricably dependent on the lake and waters for its survival" (Transcript of Oral Argument, *U.S. v. Idaho,* 1997, p. 5). Here the United States seemed to recognize the Tribe's longstanding relationship with the lake, though not by going so far to articulate the dependence as a full property right. Meshorer's second argument took a very different tack, claiming:

> The second (exigency[2]) was the eminent presence of violence, the potential for violence, and the actuality of violence… The United States took steps to quell those hostilities for the safety of the parties involved. (p. 5)

This argument was repeated again several times throughout his oral arguments, as he later stated: "[Idaho Territorial Governor Bennett] said the tribe demanded these fishing

[2] The actual trial transcript refers to three exsiccoses. Exsiccosis is medical term for dehydration. It is this author's belief that the transcript mistypes the word "exigency," a term used frequently throughout the written briefs.

rights and we had to give it to them and we did give it to them. Violence was very much in people's mind, so was this extinguishment issue" (p. 11). Preventing violence may certainly have been a concern of the federal government; in 1858, it had just experienced the ending of the Seminole wars, one of the most protracted and costly military engagements in U.S. history, with Seminole insurgencies costing as much as forty million dollars (Stephanopoulos, 2006). That same year, Coeur d'Alene Tribal warriors had stood their ground against Colonel Steptoe and his troops' incursions in their territory, demonstrating the Tribe's willingness to take arms to defend their homeland. The United States was not interested in the human or financial cost of violence. Yet at the same time, at no time since the Coeur d'Alene Tribe's involvement in the 1858 Steptoe Battle and Wright's campaign of retribution was there documentation of any threats by the Tribe, nor actions taken against settlers. Yet in Meshorer's arguments, by repeatedly invoking violence on the part of the Tribe, the U.S. seems to be playing on the trope of Indians as savages, from whom future settlers needed to be protected. Regardless of the underlying thought, both here and in the legal documents, the United States presented the potential for violence as a rationale for Congressional action.

Finally, Meshorer explicitly laid out the third exigency, the need to address the Tribe's aboriginal title. He stated:

> The third (exigency[3])… [was] that extinguishment of aboriginal title required the Government do something, or to have done something and until the United States had done something that title still existed. Aboriginal title in its existence precluded entry by white homesteaders, where they could gain good title to the land. (p. 6)

[3] See above comment.

Meshorer gave a brief but evocative summation again of these three exigencies for Congressional Action: “The tribe was dependent on water for its subsistence, aboriginal title had not been extinguished. There was violence present everywhere, it was in the air.” (p.20) Again, this repetition of an unrealized threat of violence presented the Tribe as a danger to settlers, eliciting stereotypes of the violent savage who was a threat to U.S. goals.

Surprisingly, though, these three exigencies werearticulated not only in the U.S. oral arguments, but they were eventually taken up in the Tribe’s briefs. In its trial brief for the District Court, the Coeur d’Alene Tribe was the plaintiff presenting arguments that contained elements of Discovery, acknowledgement of aboriginal title, concern for the settler, and the specter of violence:

> At the time of Idaho statehood, the United States retained legal authority and ownership of the submerged lands within the 1873 Reservation.
>
> There were other purposes for the creation of the Coeur d’Alene Reservation in 1873. They are: 1) The United States wanted to keep the peace and prevent a major Indian uprising in the Inland Pacific Northwest; 2) the United States obtain the cession of the Tribe’s aboriginal or Indian title to the lands outside the Coeur d’Alene Reservation for homesteading, a railroad right of way and other purposes; 3) the United States wanted to settle the Coeur d’Alene Tribe out of the way of... future homesteaders. (Plaintiff-Intervenor Coeur d’Alene Tribe’s Trial Brief, 1997, p. 6).

Yet despite these settler presentations of the rationale for “conveying” the lake to the tribe, it was the United States, not the Tribe, that presented the Tribe’s original rationale of guardianship for entering the case (addressing the contamination of the lake and watershed) at the Supreme Court. During oral arguments before the justices, U.S. Attorney David

Frederick, who had taken over the case from Hank Meshorer, responded when asked by Chief Justice Rehnquist, "why does [the lake] matter to the Indians,":

> There are certainly are very serious issues at stake here. Tribal ownership of the south – Tribal ownership of the southern third of Lake Coeur d'Alene implicates such issues to which the tribe can have a role in anti-pollution measures for the lake, what consequences would flow from pollution of tribally owned lands, as well as to the extent to which the Tribe could regulate non-Indian uses on the southern third of the lake. (Transcript of Oral Argument, *Idaho v. U.S.,* 2001)

At this stage of the case, as previously mentioned, the plaintiffs' briefings had been narrowed down to focus on the question of whether Congress believed that the lake was of enough importance to the Tribe to legally ensure that its ownership was included in the Reservation boundaries. But it was the United States, not the Tribe, during oral arguments, who reminded the justices of the "why" of the case: The Tribe's desire to carry out its responsibilities as guardian.

Over the course of the cases, the United States generally supported the more expansive idea of Aboriginal title as one that the federal government need to extinguish before settlers could arrive, until its final brief to the Supreme Court, where it seemed to congratulate itself on its magnanimity in negotiating the 19th century cessions with the Tribe:

> As this Court's decisions would subsequently establish, Congress would have no legal need to seek the Tribe's agreement or to pay for cession of aboriginal lands outside the Reservation because it had the power unilaterally to extinguish the Tribe's aboriginal title without compensation [citing *Tee-Hit-Ton*]. Congress also could have

> reduced or repealed the 1873 Reservation without the consent or payment to the Tribe [citing *Lone Wolf*]. (Brief for the United States, 2001, p. 39)

In one of its final submissions to the Court, the United States seemed determined to maintain its power with this reminder of its ability to quickly change from a recognition of a concept of Discovery right as preemptive, to Discovery right as permissive. Additionally, by invoking *Tee-Hit-Ton* and *Lone Wolf*, the United States legitimized two Court rulings based entirely on racist conceptions of tribes, demonstrating that the idea of Whiteness as an entitlement to tribal property because of their perceived inferiority, still informed the United States' legal reasoning.

The State of Idaho

From the inception of the case, the State of Idaho staked its argument that the State was rightful title holder for Coeur d'Alene Lake firmly in Discovery Doctrine, repeatedly denying that the Tribe had any right or title to its waters. In its initial Answer and Counterclaim, the State responded to the U.S. suit by denying "any inference that the Coeur d'Alene Tribe had any ownership, title or right of exclusive possession in the beds and banks of Lake Coeur d'Alene prior to the cession." (1994, p. 2) The State argued that the United States acquired its Discovery right from Great Britain in 1846, and then held that right until Idaho's admission to statehood, stating "[T]here was no authorized federal conveyance, to the Coeur d'Alene Tribe or any other party, of the beds and banks claimed by the United States in this action."

The State of Idaho's primary argument in response to the Tribe's aboriginal title claim to the lake was to contend that aboriginal title could not apply to water, arguing:

> The Coeur d'Alene Tribe did not hold aboriginal title to the beds and banks of navigable waterways and the nature of aboriginal title, being based on exclusive occupation, does not allow its application to the beds and banks of navigable waterways, which, by their very nature, are incapable of exclusive occupation. (State of Idaho's Response to Coeur d'Alene Tribe's First Request for Admission and Interrogatories, 1997, p. 5.)

This argument, repeated through every stage of the case, is illustrative of Whiteness in that it argues that ownership is based on what the State deems appropriate use. It was also based on the vesting of title over navigable waters in the sovereign, which is a Discovery right, and not a sovereignty right that the State believed the Tribe could possess. Citing *Martin v. Waddell* (1842) in its Brief in Support of Motion for Summary Judgement, the State claimed, "From earliest times, it has been understood that the aboriginal title of Indian tribes did not include title to the beds and banks of navigable waterways" (p. 22). Phrases like "from earliest times" and "it has been understood" are normative language that imply a global observance of property rights in relation to water and land, erasing tribal perspectives and claims.

As to the State's interpretation of Tribal ownership through Aboriginal title, it rested firmly on the "permissive" camp, explaining its conception of Aboriginal title as:

> European explorers arriving in North American [*sic*] found the continent already occupied by aboriginal inhabitants. In order the protect the rights of the original inhabitants, the doctrine of aboriginal title was invented… [citing *United States v. Cook,* 1873; a case in which the United States ruled that the rights of Indians were of occupancy alone] "The right of the Indians to their occupancy is as sacred as that of

> the United States to the fee, but it is a right of occupancy only. (State of Idaho's Brief in Support of Motion for Summary Judgement, 1997, p. 22).

The State even questioned whether an Aboriginal title claim could even be considered, given its interpretation of Discovery as unfettered power over all territory within the United States:

> Moreover, the issue of aboriginal title is irrelevant to the present proceedings, since such title, even if it applied to submerged lands, would not rebut the presumption of state legal title. Under the doctrine of discovery, the United States owned fee title to all land within the continental United States, whether occupied by Indian tribes or not" [cites *Johnson v. M'Intosh*]. (State of Idaho's Brief in Support of Motion for Summary Judgement, 1997, p. 38)

In the same brief, the State demonstrated elements of Whiteness in explaining the perceived incommensurability of Tribal sovereignty with Discovery rights and plenary power:

> At the time, a tribal veto over this sovereign decision [the United States holding submerged lands in trust for Idaho] based on the tribe's prior occupancy would have been unthinkable, and it is just as unthinkable today. Indian tribes simply cannot overrule congressional policy. (State of Idaho's Brief in Support of Motion for Summary Judgement, 1997, p. 24)

Those elements of Whiteness, too, were pervasive in the State's statement regarding the potential impact of Tribal ownership as a threat to the non-Tribal settler:

> If the United States and Tribe were successful, these protections would disappear; indeed, the Lake would be managed primarily for the benefit of the 1300 members of the Coeur d'Alene Tribe. Locking up such a precious resource for the exclusive benefit of a select few is counter to America's legal tradition of retaining title of

> submerged lands in trust for all members of the public. (State of Idaho's Brief in Support of Motion for Summary Judgment, July 3, 1997, p. 2)

Coupled with the State of Idaho's assertion of Discovery rights were its repeated attempts to challenge the importance of the lake and the fishery to the Tribe. In its Suggested Findings of Fact, the State claimed, "There is no clear consensus among anthropologists that the Coeur d'Alenes were primarily a fishing tribe… fishing in Lake Coeur d'Alene and its associated rivers was just one of many forms of subsistence available to the Tribe" (State of Idaho's Suggested Findings of Fact and Conclusions of Law, 1997 p. 4). In its accompanying trial brief, repudiating U.S. claims that violence was an exigency, the State reversed this concept to argue that the *lack* of violence undermined the claim of Congressional conveyance, stating "[T]he Tribe failed to demonstrate that, unlike other tribes, they had resorted to violence "to assure their respective reservations included a water resource"" [citation omitted] (State of Idaho's Trial Brief, 1997, p. 5). According to the State, the Tribe's willingness to engage in diplomacy was evidence of a lack of real interest in their water.

Settler-colonial depictions of what was deemed "right" behavior to be recognized by their neighbors and by Congress were also plentiful. The Trial Brief for District Court also asserted of the Tribe's motivations, "The Tribe eventually concluded that in order for white settlers to recognize and respect their rights they must take up and improve their lands" (State of Idaho's Trial Brief, 1997, p. 9). Additionally, the State focused the Tribe's perceived progress towards "civilization" as moving them away from fisheries, stating in its Ninth Circuit Court opening brief:

> The documents submitted to Congress in the 1880s stated that "[t]here are few Indians in the entire country… who are as far advanced." It was reported that the

> members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like whites, wear short hair, and in all other respects live and do as white people do… In contrast to the documents describing the Tribe's agricultural achievements, there is no evidence suggesting that Congress believed the Tribe to be dependent on fisheries. (Appellant's Opening Brief, 1998, p. 37-38)

This last statement was yet another assertion of both plenary power and Whiteness, as implicit is the idea that the only matter of concern is what Congress believed, not the Tribe.

Finally, as the case progressed beyond the District Court to the Ninth Circuit and the Appellate Court, the State increased its rhetoric about the potential threat to non-Indians that would accompany Tribal ownership. In its Brief in Support of Motion for Stay and Injunction Pending Appeal, the State fretted:

> Members of the general public bought lakefront and riverfront property, secure in the knowledge that understate management, they would always have access to the waterways. They obtained permits to construct docks, and purchased boats to enjoy the Lake. All of these settled expectations are now in question due to the change in ownership of the Lake and River. (1998, p. 4).

The State also attempted to position itself, not the Tribe, as the true steward and guardian of Coeur d'Alene Lake. In its Petition for Writ of Certiorari to the Supreme Court, Idaho presented itself as the entity with a lasting relationship to the waters,

> The court of appeals' decision upsets a century of State ownership. For over 100 years Idaho has safeguarded Coeur d'Alene Lake and the St. Joe River as vital public resources… Since statehood, it has protected the public's interest in the open use of Coeur d'Alene Lake. (2000, p. 9)

This reversal, as well as the concerted effort to deny the Tribe's use and reliance on the lake demonstrates how, as scholar Patrick Wolfe explains, settler society appropriates the land relationship, while erasing to destroy the Tribal claim (2006).

Some of the most blatant and colorful evocations of Discovery Doctrine and settler rights came not from the State of Idaho, but from an Amici brief filed in the Supreme Court case by the attorney generals of ten states, and authored by the California State Attorney General's Office. The brief, which was also signed by the attorney generals of Alaska, Arkansas, Alabama, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington and Wyoming in support of the State of Idaho, embraced the Discovery Doctrine and the sovereignty of states over waters, stating: "With the Revolution, the people of the thirteen original States assumed the sovereignty of the crown and with it, title to their navigable waters" (Brief of the States of CA et al, 2001, p. 9). The brief, citing *Martin v. Waddell* (1842), declared: "This principle of sovereign waters, held in public trust, is rooted in ancient and medieval law, and reflected in the Magna Carta. These traditions were carried to the new world from the beginning" (p. 12-13). As with the State of Idaho, the signers of this amici brief implied that there is one body of legitimate law: that of the European law of nations. The notion that tribes had their own systems of law regarding land and property was completely absent from the entire brief.

The brief also raised the idea that the Tribe cannot or would not properly protect the lake, nor settler interests, again reversing the concept of who had the longest claim to waters, and asking,

> Is it beyond conception that in the absence of public trust protection, the bed of this remarkable body of water could at some future time be filled and used for commercial

> development or other purposes inconsistent with the people's ancient rights? (2001, p. 21)

The signers of the brief, most of who came from states with significant amounts of tribal lands within their boundaries, embraced only the guardian/ward relationship between the U.S. and tribes while ignoring tribal sovereignty altogether, claiming:

> There is room in our federal system for States, tribes, and the national government. When the constitutional function of States as sovereigns can be reconciled with the federal stewardship of native peoples, there is no reason to strain for results that will only put further strains on our federal scheme. (2001, p. 27)

Returning to Idaho, in its final oral argument before the Supreme Court, the Idaho attorney, Steven Strack, was asked by Justice O'Connor, "Why does the State care [about lake ownership] as a practical matter?" His response, demonstrating concern for the settler and evoking the savage image, was: "We care because the majority of the users on the Lake are not Indians and because of that we have a significant interest in protecting their safety" (Transcript of Oral Arguments, *Idaho v. U.S.,* 2001).

Part II: Indigenous resistance and Coeur d'Alene values

Indigenous resistance was primarily seen through the Coeur d'Alene Tribe's expression of the core values of guardianship and spirituality, although it was also expressed, though in a limited fashion, through claims of aboriginal title.

Resistance Themes	Concept
Indigenous resistance: relationship and spirituality	Sense of oneness, relationship with human and non-human members of the community.
Indigenous resistance: responsibility and guardianship	Reciprocal care for land and water

Indigenous resistance: aboriginal title as ownership	Title regarded as a "future right in which title was held by the discovering sovereign, but the tribes held "current use and occupancy rights" (Miller & Ruru, 2008, p. 852).

Table 5: Themes of Indigenous Resistance.

The language of the public statements and testimony of Coeur d'Alene Tribal leaders presented a plainspoken and clear contrast to the "legalese" of many of the court documents. In a 1991 memorandum discussing negotiation versus litigation of lake ownership, the Tribe stated:

> There is a cycle, or interrelationship between all aspects of nature. All things interrelate. Every type of waste or pollution that is added to the waters affects some other aspect of nature. Lead retards children. Zinc kills fish. Fertilizer runoff and sewage increases algae growth. Fills destroy spawning grounds. The fishery in the Coeur d'Alene River and the lakes has been largely destroyed. Birds and animals die of lead poisoning and abandon the area. The water potato is no longer fit to eat. The water is no longer drinkable. The State of Idaho has shown that it is unable or unwilling to protect the lakes and rivers from those who have allowed their waste to pollute the waters. The Coeur d'Alene Tribe is asserting its ownerships to ensure that future pollution is reduced and past pollution is cleaned up. (Coeur d'Alene Tribe, 1991, p. 2)

The Tribe's rationale as presented in Tribal voices stressed not just the damages to its subsistence fishery and water potato, but its sense of responsibility to all living things impacted by mining waste. Years later, this relationship was again presented in the District Court trial testimony from Tribal leaders. In Chairman Stensgar's testimony to the court on December, 9, 1997, he wasasked why the Tribe is pushing for ownership. He gaves his response:

> It was a very bad time, a solemn time, Your Honor, in our council chambers when we talked about Lake Coeur d'Alene filing suit against the State of Idaho for ownership. Every member of the tribal council spoke about the lake and we covered the whole spectrum from people in their 30s to those who are elderly, Mr. Aripa and Mr. SiJohn, and so we expressed different perspectives on the lake, but probably the important thing was the feeling that we received from our individual families… [here he spends some time talking about the periods of time where he was away from the lake, at school, and in Vietnam, and his feelings of homesickness for the lake]…
>
> And I looked at our council as they spoke and an attorney talked to us and he said, would you consider a settlement, and at that time the tears came down, and as we spoke we told him, how do you sell something that belongs to everyone, it was so impressing to us, this place was ours to protect and to keep and it belonged to all of us and there was just not any way we could give up that. (Transcript of Oral Argument, *U.S. v. Idaho,* p. 1062).

Stensgar's testimony illustrated his sense of responsibility as a leader, as well as a guardian of the lake.

When Tribal elder Mariane Hurley was called to testify about her role as a cultural teacher, and asked by Attorney Ray Givens, "When you talk to school children… what do you tell them about how Coeur d'Alenes view themselves in relation to the earth and to the water and the air and plants and animals?" she responded:

> I tell them that when the creator put us here on this earth he told us that this land was for us, and we must care for it, we must take care of it…

> [Explaining her father's teachings] He told me that the waters, the air, the land, all of those things are a part of me, we are all one, and the only way that I can survive in this world is if I don't forget what was given to me, what was provided for me, don't forget the old ways, even though you are taking up some new ways. (Transcript of Oral Argument, *U.S. v. Idaho,* p. 858-859).

Again, a sense of responsibility to the natural world was evidenced, as well as the spiritual belief that underlines this value. After Mariane's testimony, Tribal Vice-Chairman Lawrence Aripa was called to the stand and asked about his sense of the what the meaning of boundaries may have meant to Seltice and his contemporaries. Aripa responded:

> [A]nd so what they had meant, if you tell me you are going to use this as a boundary, as a line, that is all you have to do, and I'll believe it if you believe it and you stick by it and I'll stick by it, and so that was an understanding rather than making a line, and to honor that is something that was very important. You honored going into another tribe's territory to fish or visit or whatever you wanted to do, but there was no—they've always had that belief. You can't sell your mother and the Earth is our mother. (U.S. v. Idaho Trial transcript, December 8, 1997, p. 131 of 184).

Here, not only is the sense of responsibility to the land evoked, but also a sense of responsibility to other humans, a value today described by the Tribe as membership, but translated from the Coeur d'Alene words *t'ul schint*, which describes being a good member of one's community. Chairman Stensgar testifies the following day, recalling their efforts to negotiate with state officials, "If you heard Mr. Aripa talk when we talked about the land, we're talking about our universe, they are one… (*U.S. v. Idaho,* Trial Transcript, December 9, 1997, p. 1063).

On June 18, when the Supreme Court decision affirming the Tribe's ownership was issued, Chairman Stensgar states, "It makes us stand a little taller. The lake is the heartland of our country. It was inconceivable to anyone of Coeur d'Alene descent to think that our ancestors would give away our heartland" (Silverman, 2001). Stensgar pledged that the Tribe would be a steward, not simply for the Tribe, but for the greater community.

Statements and testimony from Tribal Council and Tribal members rarely explicitly conceived of Coeur d'Alene Lake in terms of property, but rather as part of their existence that they were hoping to protect. However, in examining each level of court judgements, very little of the Tribe's contemporary spirituality and guardianship was evident in judicial statements. Rather, acknowledgement of the general historic dependency on lake resources was made, but there is little sense of this relationship as a *right* of the Tribe, and in fact, the Tribe's claim to aboriginal title, where the only explicit discussion of non-subsistence uses in the Tribe's claims appears, is not even considered by the judges and justices in their decisions.

The Coeur d'Alene Tribe's Depiction of Aboriginal Title

The conception of aboriginal title in the Tribe's arguments was generally presented as the broader conception of full sovereignty until extinguished by cession and purchase, as demonstrated by Chairman Stensgar's accompanying affidavit, in which he states:

> The Coeur d'Alene Tribe never received any compensation for any portions of Lake Coeur d'Alene or any navigable water courses or waters lying within the 1873 Reservation boundaries nor has such compensation been sought because the Tribe has never ceded the beds and banks of such navigable water courses or waters. (Stensgar, 1994, p. 2)

In 1997, the Tribe responded to the State of Idaho's repeated attempts to parse Aboriginal title for land as distinct water, and cited a Ninth Circuit decision that aboriginal title applied to lands and waters, "The thrust of the State's argument is that title to submerged lands is so special that it simply cannot be part of aboriginal title. This is not supported by the prior cited Indian Claims Commission decision, Ninth Circuit decisions, or Congressional Action" (Response to Idaho's Motion to Dismiss, 1997). However, the Tribe's response did not make a property claim outside of Discovery Doctrine but argued instead that its aboriginal title was validated by the United States executive, judicial and legislative branches.

The Expert Witnesses

The role of the expert witness was highly significant in this case. These witnesses were generally academic researchers whose credentials were tied to their graduate work and roles as academic leaders in their institutions and in their fields. Seven individuals' expert testimony was presented during the District Court trial, including two who were contracted by the United States, four who were contracted by the Tribe, and one contracted by the State of Idaho. The purpose of these witnesses was to provide evidence for the plaintiff and dependents arguments regarding the historical dependence of the Tribe, the negotiations between the Tribe and the federal government during and after the various land cessions, the development of the Tribe's agricultural economy, and what survey boundaries meant regarding lake ownership. There are strict rules about who may be considered an expert witness that have been determined through various Supreme Court decisions. Unlike lay witnesses, expert witnesses must be disclosed ahead of trial. Additionally, expert witnesses must meet four qualifications for their testimony to be permitted:

1) Their scientific or specialized knowledge will help the court determine a fact or understand an issue,
2) Their testimony is based on sufficient facts or data,
3) The testimony comes from reliable methods, and
4) They have applied those methods to the facts of the case (Kreiter, 2016).

Expert witnesses are expected to play a different role than the plaintiffs or defendant in a case; instead, they are expected to provide "objective" information to educate the court, "with knowledge that lies beyond the realm of ordinary judgement and experience": (Ray, 2003, p.254).

None of the seven expert witnesses presented by the Tribe, State, or U.S. were Tribal, or members of other tribes. Their expertise was based on their study of tribes as outside researchers, through personal and/or professional interest. Of the seven witnesses, three were the primary witnesses to speak to the historical documents surrounding the creation of the Coeur d'Alene Reservation. Richard Hart, who had been employed by the United States to research the Tribe prior to filing the case, served as the primary federal witness, while John Fahey, an Eastern Washington University faculty member and regional historian who had written on historical issues in the Basin, was contracted as the Tribe's primary historical witness. The State of Idaho contracted only one expert witness, Dr. Kent Richards, a Central Washington University professor who had written on Isaac Stevens and his interactions with Washington tribes. The following analysis will focus primarily on the work of Richards and Hart; the former because of its illustration of poorly-conducted research, and the latter because of the ways in which it both legitimizes and delegitimizes Tribal claims.

During the course of their testimony, each of the witnesses were questioned as to their objectivity, if and how they sought peer review of their work, and their recognition in academia, through their involvement with professional associations and peer-reviewed journals (Transcript of Oral Argument, *U.S. v. Idaho,* 1997). None of the witnesses were asked if they were viewed as legitimate sources of information by the Coeur d'Alene Tribe, nor were they asked about any longstanding relationships with the Tribe, although Dr. Richards was asked during cross-examination by U.S. Attorney Hank Meshorer if he had ever consulted with the Tribe on his findings (Transcript of Oral Argument, *U.S. v. Idaho,* 1997). Dr. Richards had not consulted with any Tribal members.

Dr. Richards throughout his expert report was notable for depicting the Coeur d'Alene Tribe as rapidly adopting an agrarian lifestyle, and claimed that the Tribe did so with little interest in protecting their historical homeland or their waters. He wrotes in his expert report:

> There is no indication in the executive orders, or in the historical record relating to the orders, that there was any intent by the government to convey Lake Coeur d'Alene or other navigable waters to the tribe, that the tribe asserted a right to the lake or other waters, or that there was any purpose intended in establishing the reservation other than to set aside agricultural and grazing lands for use by the Coeur d'Alenes and other tribes. (Richards, 1996, p. 2)

Richards largely ignored or minimized historical correspondence between Tribal leaders and the federal government that emphasize the Tribe's relationship to the lake, even going so far as to attribute letters from government officials expressing the need to include the lake and rivers in the reservation for fisheries as the result of Jesuit priest

Father Cataldo's wish to include the mission. His insistence, both in his expert report and his oral testimony at the District Court trial that Tribal insistence on its waters was really just the work of the Mission priests was also a form of Whiteness, emphasizing the role and voice of White intervenors and delegitimizing the Tribe's agency in negotiations.

Richards also ignored or minimized Tribal resistance to federal policies and the encroachment of settlers. He erroneously claimed that the Tribe embraced allotment, ignoring the active protestations of Chief Moctelme:

> As noted above, there was little, if any, Coeur d'Alene opposition to allotment of the reservation as the process served to confirm the land distribution that had taken place beginning as early as the 1860s with the start of the move to the Latah region. During the allotment process there is no evidence that the Coeur d'Alenes made any effort to claim Lake Coeur d'Alene or any rivers as tribal community property. (Richards, 1996, p. 121).

After the district court trial, Richards' testimony was brutally addressed by the United States in its post-trial Proposed Supplemental Findings of Fact (1998). U.S. Attorney Hank Meshorer wrote in a lengthy critique of Richards' methodology for his report:

> Unsubstantiated statements and conclusions are meaningless as expert testimony. Facts must reflect the contents of documentary evidence and must bear the scrutiny of corroborative analysis. Under these standards both the oral and written evidence of Kent Richards, the sole expert testimony offered by the state, should be discarded entirely as completely unsubstantiated by the facts of this case. (p. 2)

Meshorer asserted that Richards, in trying to argue that the Tribe was in the process of moving away from the lake in the 1960s, fabricated a story about the Tribe being consulted

on the 1867 Reservation, presented a narrative that "flies in the face of the evidence," and presented a book about Andrew Seltice written after his death as his firsthand account of the late 1800s (Proposed Supplemental Findings of Fact, 1998, p. 18).

As a result, in his final order, Judge Lodge dismissed Richards' work as unconvincing, found that the Tribe was dependent on the Lake and rivers in 1873, and rejected the State's argument that the Tribe was an agrarian society (Decision and Order, 1997, p. 21).

United States expert witness Richard Hart, together with Roderick Sprague, was most extensively cited by the judges and justices in their final decisions. Extensive and well-documented, Hart's testimony generally supported the cultural dependence of the Coeur d'Alene Tribe on the lake and its tributaries, and refuted the State's contention that the Tribe had moved to an agrarian society by 1873. His expert report detailed the year-round reliance of the Tribe on fishing for survival, and its cultural and spiritual reliance on water (Hart, 1996). However, his testimony and reporting, too, unquestioningly embraced Doctrine of Discovery as the justification for United States ownership. In his description in his summary report, Hart noted, "At the time that the United States exercised sovereignty over the Coeur d'Alene territory, the tribe was dependent on fishing for subsistence" (1996, p. 10). His representation of aboriginal territory was aligned with the Discovery right of preemption, as he notes:

> The Coeur d'Alene still claimed their aboriginal lands and knew that the United States had yet to conduct a treaty of cession with them. Territorial and United States officials recognized Coeur d'Alene title to their territory, including the lakes and

> rivers, and understood that the United States needed to negotiate a treaty of cession. (Hart, 1996, p. 25)

Hart opposed the Coeur d'Alene Tribe's claim of Aboriginal title to the entirety of the lake: "Rights to the use of the lake in the ceded area were also sold by the tribe. The cession line clearly goes one mile south across Lake Coeur d'Alene, and thence a mile east across the lakebed" (Hart, 1996, p. 44). Additionally, Hart dismissed the Tribe's claims to the waters of Heyburn and ignored the lack of documentation of Tribal consent, deferring instead to the plenary power of Congress, stating "Records of Congressional debate tend to confirm Congress' intent to include the lakes. A contemporary map shows that the line drawn to encompass the park was drawn to include the three bodies of water" (Hart, 1996, p. 47). Like his federal contractor, Hart seemed to waiver between supporting the Tribe's sovereign claims and supporting the United States' Discovery Rights. Hart's conclusions exemplify how even an expert historian who was well-versed in federal Indian law and policy seemed unable to imagine tribal sovereignty outside the boundaries of a *Johnson v. M'Intosh* (1823) framework that automatically diminished tribal sovereignty in the context of United States' claims.

During the course of the trial, the Coeur d'Alene Tribe also called several Tribal leaders, elders and community members to testify as lay witnesses. As previously discussed, Tribal Vice Chairman Lawrence Aripa was asked to testify, both as an elected leader, and an oral historian. When he was questioned by Tribal Attorney Ray Givens as to his perception of what the understanding of Tribal leaders regarding boundaries may have been, the State of Idaho objected to his testimony. Strack objected:

> Your Honor, I am going to object to this line of questioning and his testimony. It seems that we're getting into an area where Mr. Aripa is being asked to render an opinion as to what his tribal leaders meant at a time based on his expertise in the Coeur d'Alene language. Mr. Aripa has not been rendered as an expert and not been qualified as an expert, and it seems as if we are going way beyond the realm of facts here. (Transcript of Oral Argument, *U.S. v. Idaho,* 1997, p. 863)

The Court sustained the objection, agreeing with the State's delegitimizing Lawrence Aripa's use of oral history. Later, Lawrence's relative Felix Aripa, Tribal elder and one of the last fluent speakers of Coeur d'Alene was called to testify, and, as Coeur d'Alene is his first language, gave his testimony in the language, to be translated by Lawrence. Soon after questioning begins, the following exchange occured:

> Question (Givens): Did they [Felix's uncles] tell you about what life was like on the Coeur d'Alene Reservation in the 1860s, '70s, and early '80s?
>
> Strack: Your Honor, I am going to object on the grounds of hearsay."
>
> Givens: Your honor, it is clearly hearsay, there is no question about that, but it's probably hearsay that will be of benefit to the Court in terms that there has been testimony previously that the Coeur d'Alene culture handed down their traditions in an oral manner and that what the fathers told their sons, told their nephews, was how the culture continued… There has been testimony that the anthropologists used exactly this sort of testimony as a basis for their conclusions as to what life was, and in this situation it is a rare opportunity to have an individual who is late in life but was born to his parents late in their lives so that we can go back and hundred and twenty years to get a glimpse of what life was like at that time.

> Strack: Givens is not a trained anthropologist and doesn't know how to ask the right questions. (Transcript of Oral Argument, *U.S. v. Idaho,* 1997, p. 927-928)

In response, Judge Lodge determined the attorneys need to research the rules hearsay rules, and asked Felix to step down, adjourning court for the day. The next morning, Givens withdrew Felix's testimony and did not bring him back to the witness stand, stating:

> [T]he Evidence is difficult because the issue that the Court is being asked to decide is the intent of people now dead regarding events that happened 125 years ago, and that is very difficult thing to do in the traditional ways of presenting evidence to the Court. (Transcript of Oral Argument, *U.S. v. Idaho,* 1997, p. 933)

In his final arguments before the District Court, Givens referred back to the Tribal testimony, and attempted to recenter the Tribal narrative about the spiritual and cultural relationship to the lake stating:

> The anthropologist, Dr. Ray, talked about anthropology. The surveyor, Mr. Willett, talked about surveying. The historian, Mr. Fahey, talked about history. The economist, Dr. Powers, talked about economics. But maybe the most powerful and moving evidence in the whole case was in fact by the Coeur d'Alene tribal members. The Coeur d'Alene --Coeur d'Alene -- I get kidded about it because I say it a little wrong -- but the phrase, Quaowee'l t'e spe'is [*sic*] to speak from the heart, and I don't know when in my lifetime I have ever heard more heartfelt testimony than was offered in this courtroom." (Transcript of Oral Argument, *U.S. v. Idaho,* 1997, p. 1677)

Nonetheless, there waas no reference to any of the Tribal members' statements in Judge Lodge's decision. Though it is difficult to assess how the oral testimony in the case may have

impacted his decision, the written record provides no evidence that the Tribal members' conceptions of property and land relationship were considered.

The Outcomes: the District, Ninth Circuit, and Supreme Court Judgements

U.S. District Court Judge Lodge was arguably the most embedded of the triers of *U.S. v. Idaho*, presiding over three years of briefs, motions, and counterclaims, as well as the ten-day trial. His own response to these documents seemed to evidence an expansive understanding of Aboriginal title. In his Findings & Order Allowing Intervention by the Coeur d'Alene Tribe, Lodge ruled against the United States' motion to deny the Tribe intervention by right, noting

"[I]ntervention is necessary to protect the Coeur d'Alene Tribe's interest and the representation of the existing parties is inadequate to protect the Coeur d'Alene Tribe's interests." (1994, pp. 1-2). As is previously discussed, Lodge rejected the State's argument that the Tribe was agrarian in 1873, or that the purpose of the Reservation was for agriculture. Moreover, Lodge's decision emphasized the Tribe's overall dependence on water, and not simply fishing, and there was minimal reference to the U.S. claim of potential violence as an exigency, only referring to the need to "avoid hostilities." Judge Lodge did not cite *Tee-Hit-Ton*, *Johnson v. M'Intosh*, or *Martin v. Waddell* in his ruling. The core of Judge Lodge's decision was the finding that Congress intended to convey title to the Tribe based on its demonstrated use of its waters. However, Judge Lodge avoided having to deliberate whether the Tribe's aboriginal right included both land and water by ending his decision there. He noted in a footnote:

> In light of the Court's conclusion, it need not decide whether the doctrine of aboriginal title applies to submerged lands, and if so, whether the Tribe's aboriginal

> title to the submerged lands remains unextinguished. (Memorandum Decision and Order, 1998, Footnote 27)

The Ninth Circuit Court of Appeals unanimously affirmed Judge Lodge's decision arriving at essentially the same conclusions. In their decision, the appellate judges also avoided making a judgement on the Tribe's aboriginal title claim, stating:

> We conclude that Congress's actions prior to statehood clearly indicate its acknowledgement express recognition, and acceptance of the executive reservation, thereby establishing its intent to defeat the State's title… In light of our decision, we need not reach the Tribe's alternative arguments for affirmance. (Decision, 2000, p.8)

The appellate judges also refuted the State of Idaho's argument about the documentation of the Tribe's move to an agrarian culture, declaring:

> Thus it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889… What matters, however, is Congress's awareness that the 1873 reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution." (Decision, 2000, p. 10)

Both Judge Lodge and the Ninth Circuit Court judges elevated the importance of plenary power by focusing on Congressional intent and ignoring the meaning and importance of aboriginal title.

As for the United States Supreme Court, while they affirmed the lower courts' rulings and generally followed their summaries, their decision, authored by Justice Souter, is notable for what it deliberated on that was *not* referenced by Judge Lodge. Unlike the District Court,

the Supreme Court decision referred to the absolute power of Congress to take Coeur d'Alene Tribal land that was considered "aboriginal" at will, noting:

> Hence, although the goal of extinguishing aboriginal title could have been achieved by congressional fiat [citing *Tee-Hit-Ton*], and Congress was free to define the reservation boundaries however it saw fit, the goal of avoiding hostility seemingly could not have been attained without the agreement of the Tribe. (*Idaho v. U.S.,* 2001, p. 277)

Additionally, as with the lower courts, the majority opinion did not wish to consider the Tribe's aboriginal claim:

> The District Court and Court of Appeals accepted the Untied State's position that it had reserved the submerged lands, and that Congress intended that reservation o defeat Idaho's title. They did not reach the Tribe's alternative theory that, notwithstanding the scope of any reservation, the Tribe retained aboriginal title to the submerged lands, which cannot be extinguished without explicit action by Congress… The Tribe does not press its unextinguished-aboriginal-title argument here. (*Idaho v. U.S.,* 2001, p. 274

It is also notable that in the dissent, authored by Chief Justice Rehnquist, he was entirely dismissive of the Tribe's relationship to the lake, as well as any rights it may have to Coeur d'Alene Lake, stating:

> Even accepting the District Court's conclusions regarding the Tribe's dietary habits… it does not necessarily follow that Congress intended to reserve title in submerged lands… It is perfectly consistent with the assumption that Congress wanted to preserve the Coeur d'Alene Indians' way of life to conclude that, if Congress meant

> to grant the Tribe any interest in Lake Coeur d'Alene, it was more likely a right to fish and travel the waters rather than withholding for the Tribe's benefit perpetual title in the underlying lands. (*Idaho v. U.S.,* 2001, pp. 286-287)

Summary

This chapter has presented a critical document analysis of many of the legal briefings, motions, and claims, as well as oral testimony and expert reports, and judgements associated with the case referred to as *Idaho II, Idaho v. United States,* 533 U.S. 262 (2001). My analysis drew on a framework based on Tribal Critical Theory, Critical Whiteness, and Indigenous Resistance to address how the various actors in this case regarded concepts of property and rights related to Coeur d'Alene Lake. As illustrated in the excerpts here, while Tribal leaders were consistent over the decade of the case timeline in the centrality of their physical, cultural and spiritual relationship to the lake, within the confines of court documents the Tribe's legal arguments conformed to western Discovery Doctrine-based property law. The United States, charged with trust responsibilities, used arguments that both upheld and demeaned Tribal sovereignty, while the State of Idaho appeared to dismiss any claims to rights of ownership presented by the Tribe or the United States. All three actors at times used language that drew on stereotypes of Indigenous people, whether as agents of violence or as individuals undergoing a civilizing process.

Expert witnesses played a significant role in influencing court judgements. Yet these witnesses, too, shaped their arguments within a Discovery framework. In exploring thousands of pages of documents, not one example of a rejection of the United States' Discovery claim as being based in its treaty with Great Britain was found. Additionally, the Tribe's own testimony as to its historical and cultural ties to Coeur d'Alene Lake were

observed to be given less, if any, weight by the courts in their decision-making, in comparison with the expert testimony and reports prepared by outside academics.

Chapter 6: Conclusion and Implications

The purpose of this study was to examine how the multiple facets of settler colonialism impacted the Coeur d'Alene Tribe's efforts to affirm its sovereignty and jurisdiction over Coeur d'Alene Lake by providing an in-depth examination of its legal history with the federal government and the State of Idaho. This history, spanning nearly two centuries, is illustrative of the continual fight against territorial and cultural dispossession, fueled by both a legal framework still steeped in racist ideas of Indigenous peoples and historic and contemporary settler views towards Indigenous land rights. Despite the Coeur d'Alene Tribe's consistent voice as guardians and stewards of Coeur d'Alene Lake, they have been forced, even in contemporary times, to battle in what Walter Echo-Hawk, citing Chief Justice Marshall's infamous words from *Johnson v. M'Intosh* (1823), refers to as the Courts of the Conqueror, courts that continue to, "legitim[ize] the appropriation of their property and the decline of their political, human, and cultural rights as Indigenous peoples at the hands of the government" (Echohawk, 2012, p. 4). After three decades of efforts, often stymied by lack of federal rulings that precluded it from presenting its case, at last the Coeur d'Alene Tribe was successful in legally affirming its rightful claim to the southern third of Coeur d'Alene Lake. However, while the Tribe's victory advanced its standing in its concurrent environmental battles with the mining companies that reaped commercial benefits from the land despite damaging the ecology and landscape, its ability to manage the Lake and its waters is still largely dependent on a context that regards its ownership as reliant on federal beneficence. Furthermore, as evidenced by the language of the federal judiciary, the federal legal staff in the case, and the State of Idaho, Tribal sovereignty and rights to land

and water are still framed in the limitations of the Doctrine of Discovery, preventing the full ability of the Tribe to live out its values and relationship to Coeur d'Alene Lake.

Discussion

In this case study of the Tribe's legal history related to Coeur d'Alene Lake and accompanying document analysis of one of the cases, I applied Critical Race Theory, Tribal Critical Race Theory, and Critical Whiteness to better understand not just the outcome of the court rulings, but the underlying assumptions and motivations of the three governments and their legal representatives involved. The exploratory questions that guided my analysis were:

a. Are the ideas of property and ownership presented by the primary actors in court proceedings? If so, how?
b. Do the three legal foundations of doctrine of discovery, domestic dependent nationhood, and plenary power appear in the three actors' arguments as well as court rulings? If so, how?
c. Do the primary actors' arguments legitimize or delegitimize tribal epistemologies and sovereignty? If so, how?

Using a document analysis of the extensive legal archive of these cases owned by the Coeur d'Alene Tribe provided me with documentation of how settler colonialism was reified through federal policies as well as the judicial process. In the case of the Coeur d'Alene Tribe, the 19th century documentation of Settler-Tribal interactions by federal agents, military personnel, surveyors, newspapers, and by Congress has been critical in the 21st century determination of what rights the Tribe has to its homeland. Adams-Campbell, Falzetti, and Rivard (2015) describe how this type of historical archive was used to substantiate a paper trail for the United States that would be used as its basis for federal power. They suggest:

> [The historical archive] can play a direct and essential role in establishing and maintaining the righteous fiction of the nation-state and its fundamental desire to disavow the existence and rights of indigenous peoples and communities. In the settler state, information collected about colonized others is not organized separately from the rise of the state; rather the story of the dispossession and dispersal of indigenous peoples is *subsumed* within the story of the state… (2015, p.110)

Likewise, the story of the Coeur d'Alene Tribe and its relationship to its homeland has been subsumed within the story of westward expansion and settler desire for land and natural resources. The very crux of its case was determined not by its millennia of occupation and use of the Coeur d'Alene watershed and its own customary, values-driven law, but on whether the 1873 United States Congress believed that the Tribe's subsistence use of the lake combined with the interests and protection of White settlers necessitated "conveying" the water to the Tribe. The historical archive was used by the federal government to defend its role as the trustee/ward of Coeur d'Alene Tribal interests and by Idaho to attempt to convince the courts that the Tribe had "advanced" enough in adopting western agricultural practices that its occupancy and use of the Lake was no longer relevant. The historical archive and its interpretation by non-Tribal expert witnesses were the determining factors in the decisions of the governing District court, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court, even as they ignored the Tribe's own legal case for its Aboriginal title.

In the following sections, I analyze some of the key themes that emerged from the analysis of the Tribe's legal history. Many of the themes are overlapping, as legal notions derived from Doctrine of Discovery are inherently steeped in Whiteness.

Property and ownership

For the Coeur d'Alene Tribe, Tribal member discourse surrounding Coeur d'Alene Lake was largely devoid of a specific expression of property, but the idea of ownership was implicit in statements by Chairman Ernie Stensgar and Vice-Chairman Lawrence Aripa, both of referring to the lake as "ours." However, this expression of ownership was generally conveyed within an expression of relationship to the lake and wanting to protect and guard it. The Tribe's ownership within the legal documents was expressed through its Aboriginal title claim, which was made within a Discovery framework, citing the Tribe's exclusive right of use and occupancy "prior to the assertion of sovereignty over such areas by the United States" (*People of Village of Gambell v. Clark, 1984*, cited in Coeur d'Alene Tribe's Response to State's Motion for Summary Judgement, 1997, p. l6). However, the Aboriginal title claim was never considered by the judges, and the Tribe's customary law was largely ignored.

For the State of Idaho, Tribal title to its waters simply could not exist. Repeatedly, in documents such as requests for admission of facts, the State denied the Tribe could even hold title to submerged lands, because, the State claimed, submerged lands could not be occupied. Additionally, the State of Idaho repeatedly asserted that with Discovery, the Tribe's right of ownership ended when the territory was claimed by the United States. For the United States, its presentation of the Tribe's rights to the lake was entirely dependent on the United States claim to title on the Tribe's behalf. While the United States sometimes seemed to lean towards an expansive view of Aboriginal title, as noted in Chapter 5, at the Supreme Court, its footnote citing *Tee-Hit-Ton* seemed a strategic reminder that the Tribe's use and occupancy of its homeland was at the will of the benevolent conqueror. The federal need to

remind the Coeur d'Alene Tribe of its place in the legal hierarchy seemed intentional, lest the Tribe go too far in pushing at the federal impositions on its sovereignty. As Critical Whiteness scholar Cheryl Harris noted in a 2020 reflection on her seminal work, "… [A]sserted expectations of the dispossessed challenge and threated to undo established expectations… Stability is a paramount value… outweighing other normative and justice concerns regarding racial dispossession" (p. 9).

Doctrine of Discovery, domestic dependent nationhood, and plenary power

In the United States, settler colonialism as it relates to Indigenous peoples is manifested in the foundations of federal Indian policy that shape tribal-federal relationships, derived from the Doctrine of Discovery, and used to maintain what Miller and Ruru (2008) term a "property theory based in fiction" (p. 917), which is essentially the belief that non-Christian, non-European peoples land rights were subordinate to those of "discovering" European nations upon their arrival in the Americas and around the globe. The Doctrine of Discovery became shrouded in legitimacy through the repeated citation and interpretation of judicial decisions such as *Johnson v. M'Intosh* (1823) and *Cherokee Nation v. Georgia* (1831) that today enables jurists to avoid confronting its racist underpinnings. Over the course of *Idaho v. U.S.* (2001) (*Idaho II*), this doctrine was both explicitly cited by the State of Idaho as the rationale for U.S., and thus state, sovereignty over navigable waters, and implicitly referenced by the state, the federal government, and the judges and justices through legal citations of cases like *Tee-Hit-Ton, Marshall v. Waddell,* and *Johnson v. M'Intosh* itself. All of the actors, including the Coeur d'Alene Tribe, implicitly legitimized the settler colonial authority of the United States by recognizing through case fillings that

refer to the 1846 treaty with Great Britain as the inception of U.S. sovereignty over the Pacific Northwest.

All of the legal actors in this analysis appeared to accept the legal role that the United States played as the trustee for its dependent nation/ward Coeur d'Alene Tribe, and for the Tribe, the power dynamics the federal trustee role created were profound. In the cases that preceded the federal court filings, most notably the Heyburn Park cases, the United States alternated by fulfilling its role as trustee for the Tribe in arguing for its status as the beneficial interest in the park patent, and then abandoning the effort at the District Court, leaving the Tribe to appeal the case alone. In the federal cases, the United States scarcely responded to the Tribe's appeals for litigation support for four years despite the Tribe repeatedly noting that without U.S. support, 11th Amendment-based sovereign immunity claims would likely (and ultimately did) thwart its efforts to take on the State in federal court. Once the case was filed in *Idaho II*, the U.S. undermined the Tribe's claims to the entirety of the lake, as well as to the waters in Heyburn State Park, even when documentation showed that the federal government had never compensated the Tribe for these lands. Judge Lodge ultimately refused to hear the Tribe's claims without the U.S. being willing to present them as its trustee. Thus, ultimately the Tribe was reliant on the willingness of the U.S. to argue by the Tribe's side to even make its case for lake ownership. Krakoff (2004) asks, "What kind of sovereignty can it be that depends, for its continued existence, on the pleasure of a branch of government of another nation?" (p. 1119). The United States presented itself as acting in the Tribe's best interest in working to quiet title to only a discrete portion of the lake, even while ignoring its own role in the dispossession of the Coeur d'Alene people from their lands in the

19th century, effectively legitimizing those actions by refusing their consideration in the courtroom.

The plenary power of Congress, too, loomed large throughout the case, as again, all legal actors implicitly legitimized the investment of the United States Discovery rights in the federal legislature. In fact, a major component of the State's argument was that the 1873 Executive Order approved by President Grant was insufficient to recognize Tribal ownership over its Reservation until ratified by Congress. In the State's Motion for Summary Judgement, it argued, "[E]xecutive orders designating reservations were only ""effective to withdraw from sale the lands affected and to grant the use of the lands to the [tribe]"" (p.8) and later stating, "Indian tribes simply cannot overrule congressional policy" (State of Idaho's Brief in Support of Motion for Summary Judgement, p. 24). For the State of Idaho, the Tribe had no rightful claim to ownership of any waters, but a mere right of occupancy, unless Congress explicitly granted that claim prior to statehood.

The United States and the Coeur d'Alene Tribe did not dispute Congress's plenary power, perhaps believing arguing its legitimacy to be futile, but instead rested their counterargument on the fact that Congress had the power to defeat State title to submerged lands based on its recognition of the public interest of waters remaining under Tribal control. Thus, the use of expert witnesses and historical documents was not simply used to uphold Tribal sovereignty and the canons of construction that would have supported a Tribal understanding of what Reservation boundaries meant, but to demonstrate to the judiciary that Congress recognized the Tribe as still "using" the water for subsistence fisheries. Indeed, the Tribe hired expert witness Thomas Power simply to demonstrate that the Tribe's agricultural production prior to Congressional ratification of its cessions in 1891 would have been

inadequate replacement of the fishery, so Congress, based on Commissioner of Indian Affairs reports, would have recognized the Tribe's continued dependence on its waters.

The legitimacy of Tribal epistemology and sovereignty

Perhaps the most troubling aspect of this case study and analysis was observing that within the courtroom, a Coeur d'Alene Tribal epistemology of relationship and reciprocity with land and water had very little recognition as a form of customary governance. Additionally, the notion of inherent Tribal sovereignty predating the existence in the United States, in over a thousand pages of court proceedings, was scarcely evidenced outside of the Tribe's own claim for Aboriginal title. The United States made only one – though significant – use of the word sovereignty in reference to the Coeur d'Alene Tribe, noting in its Brief in Opposition to the Defendant State of Idaho's Motion for Summary Judgement that at the turn of the [20th] century, "The Reservation's sovereignty continued to be recognized" (1997, p. 27). As for the State of Idaho, based on repeated assertions denying any right of ownership by the Tribe to its homelands, it is apparent that it possessed little to no support for inherent sovereignty.

Unfortunately, this erasure of Tribal culture, ideas of land relationship, and even the marginalization of Coeur d'Alene witnesses during *Idaho II* court proceedings is far too common in the Western legal arena. As Hodes (2018) describes: "Through text, talk, legal and political action, colonial mythologies are often reproduced through discourse as common sense or accepted knowledge reified as truth, reality and/or fact" (. p.72). Mignolo (2007) describes how language use provides evidence of how the colonized are "denied the possibility of participating in the production, distribution, and organization of knowledge" (p. 492). Additionally, as scholars Matsaw, Hedden-Nicely, and Cosens (2020) note, "Nowhere

is the loss of Native language and meaning more apparent than when courts must interpret the legal rights reserved by American Indian tribes" (p. 418). The testimony of Lawrence and Felix Aripa, both revered elders as well as former and current elected Coeur d'Alene leaders, in the U.S. District Court trial regarding how their ancestors' conceptions of ownership meant they would not have conceived of selling the lake were minimized in favor of the interpretations of federal negotiators and ignored outright by the State of Idaho. The two men, traditionally raised and fluent in the Coeur d'Alene language, were esteemed in their community as having extensive knowledge of Coeur d'Alene culture and land relationship, yet their testimony was either ignored or referred to as hearsay. Matsaw, et al. (2020) describe this as an uneven application by the District Court of the canons of construction, which should have weighted the two men's testimony regarding the Coeur d'Alene Tribe's understanding of events, but instead favored the federal explanation. This ability to ignore the canons of construction, the scholars posit, seems to occur frequently in jurisdictional issues like the battle for lake ownership that would limit state sovereignty, i.e., when the canons pose the most inconvenience to the settler-state (Matsaw, Hedden-Nicely, & Cosens, 2020).

This dismissal of land relationship and meaning is part of an overall pattern of judicial erasure of tribal sovereignty. Sovereignty in the judicial system has been limited by its being defined as territorial control and jurisdiction, rather than in a broad and encompassing view that recognizes relationship and reciprocity as forms of governance in and of themselves. This narrow view of sovereignty is embedded in Whiteness that, as Searle and Muller (2019) explain, "serves to push 'Indigenous sovereignty claims toward the pole of 'subjectivity' while granting the everyday imposition of white sovereignty an aura of

'objective authority'" (p. 414). Whiteness elevated the role of non-tribal expert witnesses with little to no knowledge of the Coeur d'Alene Tribal community over the role of Coeur d'Alene Tribal elders with rich oral history from family who were contemporary to many of the events of the case; Whiteness elevated the plenary role of Congress in recognizing Tribal subsistence use while ignoring millennia of pre-United States Tribal governance over its homeland. Whiteness permitted the State of Idaho to repeatedly and forcefully argue that the Tribe could not have ownership over its own waters because the Magna Carta and English Common Law had vested in the Crown, and then the federal government, and then the state, sovereignty over navigable waters. Lipsitz (1995) has presented what he terms, "a possessive investment in Whiteness" to describe how Whiteness "never has to speak its name, never has to acknowledge its role as an organizing principle in social and cultural relations" (p. 369). That invisible racializing force explains why a state assistant attorney general can declare unchallenged that it would be implausible that an Indian tribe could have authority that Congress does not, that his colleagues from surrounding states could declare in their amici brief that tribal jurisdiction over water is a threat to the "ancient" rights of settlers, and the United States can state that it was inconceivable that it would not act on the best interest of a tribe in its legal representation. Whiteness allows the federal judicial branch to repeatedly cite cases that derive from 19th and 20th century ideas of racial inferiority like *Tee-Hit-Ton* and *Marshall v. Waddell* and ignore earlier court precedents like *Fletcher v. Peck* and *Worcester v. Georgia* that, even while based on Discovery Doctrine, at least recognize tribal nations as having sovereignty that predates this nation's founding. And finally, it is Whiteness that continues to hamstring the Coeur d'Alene Tribe's continued efforts to protect its homeland, as it is forced back into the courtroom by the State of Idaho to reargue its rights

not to its submerged lands, but the water that flows over them in its contemporary water rights adjudication; a parsing of the ecosystem into meaningless components that is repugnant to a Tribal epistemology.

Implications for the Coeur d'Alene Tribe

To engage in the question of what it means to decolonize law,

we must ask by what authority a law has the authority to be invoked and to govern.

Pasternak, (2014)

Legal scholar and former special rapporteur to the United Nations Permanent Forum on the rights of Indigenous peoples James Anaya has stated that Indigenous peoples' rights must be based on the principle of self-determination, already widely acknowledged as international customary law (Anaya, 1996). He states, "[O]ngoing self-determination requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis" (1996, p. 82). For the Coeur d'Alene Tribe, the ability to enjoy full self-determination in its economic, social, and cultural development requires continual pushback against the continued impositions of the settler-colonial state, including pushing back against legal structures that deny it its ability to fully realize what the contemporary United States professes, through its endorsement of the UN Declaration on the Rights of Indigenous Peoples and other related human and civil rights conventions. In the wake of the Tribe's narrow victory in *Idaho II* persist overwhelming environmental challenges, especially in regards to the legacy mining waste that rests at the bottom of Coeur d'Alene Lake (Coeur d'Alene Lake Management Plan, 2009). These challenges remain today, now exacerbated by the threat of climate change combined with rapid population growth in the region that is taking its toll on Tribal lands and resources. In

an era of increasing attention to Indigenous rights, it begs the question, what alternative pathways exist for the Coeur d'Alene Tribe to expand its ability to govern and protect its homeland, and what alternatives are present that can help dismantle a settler-colonial legal framework that is ultimately based on 500-yea- old church decrees? There are two potential avenues that might be considered by the Tribe. The first is that of working to dismantle colonial assumptions through moral pressure and explicit articulation of the racist underpinnings of court decisions. The second avenue is essentially a complete repudiation of the existing system that may align more to what scholars like Corntassel, Alfred, and Coulthard suggest; in essence, a return of a more Indigenous-based approach of a responsibility-based legal framework through a Rights of Nature approach.

Approach 1: Exerting moral authority and naming the racism

Realizing the rights of self-determination for the Coeur d'Alene Tribe in its future environmental battles may involve a multi-pronged approach using changing international norms, including the recognition that human rights and colonialism are at odds, and explicit articulation of the underlying racism inherent to contemporary U.S. law and policy.

Critical race and Indigenous legal scholar Robert Williams (2005) has long called for legal pushback against the racial stereotypes that are perpetuated both explicitly and through *stare decisis.* He acknowledges that too often tribal attorneys are hesitant to openly confront racist laws and decisions because they are concerned they might antagonize the judges and secure a loss in the courtroom. But he asserts:

> The justices… must be confronted with the fact that they are perpetuating a particularly bad habit when they continue to rely upon the racist nineteenth-century precedents and accompanying judicial language of racism generated by the Marshall model in their present-day Indian rights opinions… The justices need to be

> confronted with the racist way they are deciding Indian rights cases in twenty-first-century America. (2005, p. 163)

Williams (2005) calls for a decolonizing strategy that "seeks to convince the color-blind… justice of the need to engage in process of 'mental correction'" (p. 165) in addressing Indian law. He encourages attorneys and Supreme Court justice alike to engage in an effort of reflecting on court citations and precedents to note what stereotypes case law may be drawing on to inform their arguments and decisions.

Law professor and scholar Adam Crepelle takes Williams' recommendations one step further in his article, "Lies, Damn Lies, and Federal Indian Law" (2019). His argument mirrors that of Williams, comparing attorneys who cite the *Lone Wolf* decision with those who would cite the now-taboo egregiously racist Supreme Court decision *Dred Scott v. Sandford*, which asserted the supposed inferiority of African Americans. Crepelle states bluntly: "[M]uch of the current practice of federal Indian law is, in fact, incompatible with modern standards of legal ethics" (2021, p. 532). Indeed, the Idaho State Bar's Rules of Professional Conduct state that:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. (Idaho Rules of Professional Conduct, 2014, p. 66).

Crepelle is clear in his solution: "Lawyers who attack tribal sovereignty using jurisprudence rooted in anti-Indian ideology should face ethical challenges by opposing counsel" (2021, p. 568). Crepelle also notes that judges, too, should be called out for unethical behavior when

they cite racist, anti-Indian decisions. In addition to confronting lawyers and judges with ethics charges when they use racist language or cite racist cases, Crepelle calls for an additional solution: education. Currently most law students are not required to take Indian law, but adding this requirement to the Uniform Bar Exam would broaden the legal community's understanding of the racist underpinnings of Indian law.

For the Coeur d'Alene Tribe, this approach of explicitly articulating the racist nature of its opponents' legal arguments could be fruitful in the short-term. In its recent litigation with the State of Idaho and the North Idaho Water Rights Association (NIWRA) in pursuing its water rights claim, NIRWA's attorney made the following statement:

> A detailed review of the agreements, Executive Orders and Congressional actions involving the Coeur d'Alene Reservation reveal a purposeful and deliberate purpose: promoting an agrarian lifestyle on a diminished reservation. This is to the series of events involving the Fort Belknap Reservation that was at issue in the first federal reserved water right case of *Winters v. United States* (1908), in which the purpose of the diminished reservation was "to become a pastoral and civilized people, not for the "habits and wants of a nomadic and uncivilized people" [citations omitted]. (Semanko., 2018, p.5)

Overlooking the erroneous legal assertion that the Coeur d'Alene Reservation was diminished, the NIWRA attorney presented this statement as if by merely citing precedent, it makes the racism of the statement less repugnant. The NIWRA attorney went on to claim that fishing was not a primary purpose of the reservation, ignoring the outcome of *Idaho II*, and cites *Lone Wolf v. Hitchock* to "confirm plenary power of Congress over Indian reservation lands" (Semanko, 2018, p. 4). Under Crepelle's approach, should the Tribe be presented with

future such legal claims, it may consider filing an ethics claim with the Idaho State Bar against attorneys who continue to misrepresent or distort Tribal history and sovereignty. Not only would this approach perhaps result in attorneys engaging in the type of reflexive practice called for by Williams and deter future such arguments, but the impact could potentially even educate those who are represented by such attorneys, forcing them to consider the Tribe's property rights in a new and more expansive light.

A second pressure point for the Coeur d'Alene Tribe may be the citation of the United Nations Declaration on the Rights of Indigenous Peoples, to which the United States is a signatory. As previously described, Robert Williams has called for an excising of the Marshall Model from federal Indian policy (2005). However, recognizing that this excision would create a vacuum in how to address the tribal-federal relationship without relying on the Doctrine of Discovery, Williams points to emerging international law addressing Indian rights. He points out that just as Chief Justice John Marshall once drew on international law to inform federal Indian law for two centuries, it should once again inform the U.S.- tribal relationship; in particular, citing the then-draft UN Declaration on the Rights Indigenous People (Williams, 2005). Since the publication of Williams' work, the Declaration was adopted by the U.N General Assembly in 2007, and was finally signed by the United States' executive branch in 2010 (Echo-Hawk, 2016). The Declaration, an aspirational but non-binding document, was the result of several decades of work by Indigenous peoples around the world, and draws on existing human rights conventions with a goal of remedial justice and self-determination for Indigenous peoples harmed by colonialism (Echo-Hawk, 2019). Some key articles of the Declaration on the Rights of Indigenous People (UNDRIP) include:

- Indigenous peoples have the right not to be subjected to forced assimilation or destruction of their culture (Article 8).
- Indigenous peoples shall not be forcibly removed from their lands or territories (Article 10).
- Indigenous peoples have the right to manifest, practice, develop and teach their spiritual traditions, and the right to maintain, protect, and have access in privacy to their religious and cultural sites (Article 11).
- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (Article 25).
- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise or acquired. States shall give legal recognition and protection to these lands, and shall do so with respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned (Article 26) (United Nations, 2008).

As Walter Echo-Hawk has noted, the Declaration is intended to be integrated into the domestic agendas of the signatory nations through their own legal systems. Echo-Hawk (2019) calls on legal scholars and Indigenous advocates to rise to the task of considering developing law that supports the goals of the Declaration, and notes that for the United States, these are “sea change recommendations” (p.16). The UNDRIP has yet to be tested in a U.S. courtroom, and it has yet to be ratified by the U.S. Senate, but Indigenous organizations such as the Native American Rights Fund (NARF) are advocating for tribes to

cite it as a persuasive authority. NARF has developed an UNDRIP implementation toolkit for tribes with examples of how it can be advanced through tribal resolutions, administrative law, case law, and customary law (Tribal Implementation Toolkit, 2020). To address environmental battles, NARF suggests using UNDRIP to design environmental protection policies that address cultural and spiritual protection, to inform climate change planning, and to codify traditional ecological knowledge, and specifically citing supporting UNDRIP articles (Tribal Implementation Toolkit, 2020). The Coeur d'Alene Tribe may wish to revisit existing its existing codes related to water and land governance to integrate language from UNDRIP. However, because of the relatively recent development of guidance such as that developed by NARF, it remains to be seen how UNDRIP-based language, whether in code or in legal proceedings, is viewed by domestic courts.

Approach 2: Rights and Resurgence -The Rights of Nature Movement

Indigenous rights scholar Jeff Corntassel has argued that contemporary self-determination arguments, including some of those stemming from the development of UN-DRIP, center the colonizing nation by focusing on its political and legal recognition, through the colonizer lens, of Indigenous nations. Corntassel argues that this leads to the persistent dismissal of the relationship between Indigenous communities and the natural world, and their responsibilities to it (Corntassel, 2008). He states:

> In order for indigenous self-determination to be meaningful, it should be economically, environmentally, and culturally viable and inextricably linked to indigenous relationships to the natural world. (Corntassel, 2008, p.108)

Corntassel cites the example of Mary and Carrie Dann, two Western Shoshone sisters who petitioned to the Inter-American Commission and the United States, citing international

human and political rights covenants to support their lack of due process and equality under the law, after the United States forcibly removed them and their livestock from their ancestral homelands in Nevada. Despite the support for the Dann sisters' claims in those international arenas, the United States has persistently ignored international rulings. Corntassel (2008) argues this demonstrates how using existing legal rights-based strategies can give an "illusion of inclusion," whereby international declarations and covenants cannot live up to the promise of protecting Indigenous rights within domestic court systems, making these agreements little more than paper rights (p. 115). Corntassel argues, too, that true self-determination is more than political, but is spiritual and relational, and relies on the ability to transmit traditional knowledge and cultural practices – an ability that is threatened by ongoing environmental challenges. He calls for a concept of sustainable self-determination that acknowledges Indigenous responsibilities for maintaining ecosystem integrity and re-centers Indigenous values and traditional governance systems (2008).

The Coeur d'Alene Tribe's victory in *Idaho II* seems to support Corntassel's position that victories that promise rights in the Western legal setting do not result in the restoration of ecosystem function or the ability to restore cultural relationships to the land, i.e., sustainable self-determination. Thus, a second promising approach that the Coeur d'Alene Tribe may wish to explore is the growing movement to recognize the rights of non-human species and ecosystem function, captured in the Rights of Nature movement (Stone, 1974). The concept was first articulated in western legal scholarship by Professor Christopher Stone in his 1974 article, "Should Trees Have Standing," where he noted that even though a shift from Nature as property to an entity with legal standing might at first be inconceivable in a Locke-driven property framework. His article, written in response to a Sierra Club legal challenge to a

Walt Disney corporation proposed ski resort development in a national forest that was in front of the Supreme Court, proposed recognizing the standing of forests, oceans, and rivers so that their interests might be represented in court (Stone, 1974).

Though Stone's argument did not directly impact the Supreme Court majority decision in the early 1970s, it has recently picked up momentum as legal scholars and environmental advocates increasingly note the urgency for greater ecological protection and the need for a fundamental shift in western orientation toward the natural world (Miller, 2019; Zelle, Wilson, Adam, & Green, 2021). Internationally, fourteen foreign countries have recognized rights of nature within their legal system (Ochoa, 2021). Additionally, tribal nations in the United States, including the Navajo Nation, the Ponca Nation, the White Earth Band of Ojibwe, and the Yurok Nation have adopted code or amended their constitutions to recognize rights of Nature, rights of plants, and rights ecosystems (Zelle, Wilson, Adam, & Greene, 2021). Ochoa (2021) explains that the Rights of Nature framework embraces the relationship between humans and human-species as a dynamic network instead of a hierarchy, making it more congruent with Indigenous epistemologies. Additionally, Ochoa notes that Rights of Nature still aligns with UNDRIP, which recognizes the rights of Indigenous peoples to their knowledge systems, practices, culture, and the ability to conserve and protect their environment. Ochoa reasons:

> [If] the epistemics and ontological perspectives of indigenous communities are to be fully regarded, such that indigenous understandings of the relationship of the human and non-human in nature are to be incorporated into dominant juridical thought and jurisprudence when claims regarding nature are at issue, legal ordering can no longer maintain the view that humans are the only legitimate subjects of law… (2021, p.27).

While Rights of Nature legal arguments have resulted in courtroom victories internationally, such as the successful petition for recognition of the rights of the Whanganui River in Aotearoa New Zealand, in the United States, they are largely untested. Indeed, a 2017 suit filed by attorney Jason Flores-Williams for the Colorado River Ecosystem attempting to gain legal personhood for the Colorado River was dismissed from court (Miller, 2019). Tribes, however, are picking up the legal mantle, and in 2021, the White Earth Ojibwe filed suit in its own tribal court for the rights of Manoomin (wild rice), while the Sauk-Suiattle Tribe has filed in its tribal court for the rights of salmon (Linzey, Fiander, & Bibeau, 2022). Basing their suits on their respective tribal customary law, these two tribes are rejecting a Discovery Doctrine framework and engaging in legal resistance. Their suits, intended to address the environmental damage wrought by an oil pipeline (White Earth) and fish-blocking dams (Sauk-Suiattle) are framed not in rights, but in their sense of responsibility and guardianship towards their non-human relatives (Linzey, Fiander, & Bibeau, 2022). By filing in their own courts, the tribes intend to establish a court record for tribal recognition of Rights of Nature that they believe will become a steppingstone to federal courts. States Thomas Linzey, senior attorney for the Center for Democratic and Environmental Rights, which is assisting with the cases, for Rights of Nature advocates, it is "past the time of should we or could we… We make the journey by walking it" (Linzey, Fiander & Bibeau, 2022).

Like its southern neighbor, the Nez Perce Tribe, which in 2020 recognized via tribal resolution the rights of the Snake River (Nez Perce Tribal General Council, 2020), the Coeur d'Alene Tribe may benefit from considering governmental action via resolution or code to recognize the rights of the Coeur d'Alene ecosystem, and perhaps pursuing a path for

establishing legal personhood within its own courts for the Lake. This is a long-term strategy that advocates like Thomas Linzey recognize may take a decade or more to realize fruit in a United States courtroom. However, it holds great promise for radically reordering environmental law in a way that recognizes the responsibilities of human beings to the species with whom they share their air, land, and water. Additionally, even before they reach judicial determination, such resolutions present a declaration of tribal commitment to guardianship and stewardship for the future and a chance to push back against the ongoing settler-colonial imposition of notions of land and water as property to achieve sustainable self-determination.

Implications for Educators

In Bryan Brayboy's (2021) articulation of Tribal Critical Race Theory, he emphasizes the importance of story, both as theory and as moral guideposts for tribal people. The Coeur d'Alene story of its fight for its lake, as well as the ways that state and federal government systems have worked against Tribal self-determination, is one that must be accessible to the Coeur d'Alene Tribal community, especially its youth. It is essential for transmitting the Tribe's values of guardianship and stewardship that were embodied in these battles to future Tribal leaders. Yet to date, there is no comprehensive written account for a public audience that summarizes the Tribe's multiple legal battles or centers the voices of Tribal leaders in their efforts to protect and restore their ancestral lands. Remedying this gap should be a priority for the Coeur d'Alene Tribe and its allies. TribalCrit calls upon scholars to face the inconsistencies in professed dominant values of equity and human rights by hearing stories like the Coeur d'Alene Tribe's and working to address the power imbalances for the betterment of tribal communities (Brayboy, 2021). TribalCrit demands educator action. For would-be educational allies of the Coeur d'Alene Tribe, particularly those educators teaching

on or near the Coeur d'Alene Reservation, that will require working collaboratively with the Tribe to identify and develop resources, including speakers, written materials, and community events, that can help educators fill in what is largely absent from K-12 education.

To do justice to an educational effort that will adequately center the Coeur d'Alene Tribal story is an effort that calls, too, to academic allies at the university level to support the Coeur d'Alene Tribe through changes to teacher education. Coeur d'Alene Tribal scholar Shawna Campbell-Daniels, in her doctoral work on pre- and in-service teacher education, identified four themes for teacher preparation that will transform the existing educational paradigm and adequately address teacher pedagogies and practices (2021). These themes represent stages that decolonizing teacher education will address:

1. The establishment of community connections through relationships, community engagement, and place and cultural-based professional development,
2. Place consciousness, including an awareness of the community practices and funds of knowledge that helps educators unlearn their assumptions about tribal communities,
3. Holistic and ongoing professional development that is community- and land-based, ensuring that the educator can appreciate tribal sovereignty and values, and
4. Transformational desettling, a stage in which teachers can identify settler colonial assumptions across their curriculum and work to present more inclusive and accurate information. (Campbell-Daniels, 2021).

The rich story of the Coeur d'Alene Tribe, from its pre-contact relationship with its landscape to its contemporary efforts to protect and restore its waters, lands, foods, and medicines from historical and looming environmental damage, presents essential place-based source material for educators to develop inclusive curriculum that touches a broad array of

subjects, including civics, environmental science, and history. While the Coeur d'Alene Tribal experience is especially critical for regional educators, the core issues in its story have application for any educators attempting to decolonize their teaching of United States history. The Coeur d'Alene Tribe's legal battles demonstrate how, as Brayboy (2005) articulates, federal policies toward Indigenous people were and are rooted in imperialism. Recognizing this can help educators achieve transformational desettling and apply the lessons from the Coeur d'Alene experience across their curriculum. By deeply exploring the context of the Coeur d'Alene Tribe, teachers can better support students in understanding the context of current events such as Indigenous movements regarding oil pipelines and dam removal – issues that cannot be fully understood without an understanding of the history of federal policies and tribal experiences in the U.S. court system. This is key for not only supporting tribal students but for all students. Jaime and Russel (2019) note, "If teachers are not educating students with accurate information about Indigenous people, then those students grow up continuing the cycle of colonization" (p. 88).

To support teachers in this process, teacher preparation programs have a responsibility to provide coursework that engages teachers in place-based learning and confronts them with a full and accurate history of their region that employs the nine tenets of TribalCrit (Brayboy, 2005). Increasingly, states are adopting educational standards that support such efforts. In 2016, the Idaho State Department of Education adopted Social Studies standards that include the meaning of tribal sovereignty, the impacts of colonization on tribal lands in Idaho, and the relationships between tribal, state, and federal governments as part of the required standards for Grade 4 (Idaho Content Standards, 2016). Unfortunately, today's political climate poses a threat to these necessary changes. As of 2022, seven states

have banned the use of critical race theory in their schools with another sixteen states that have pending legislation to do so (World Population Review, 2022). Supporting teachers in implementing these content standards will require not only the development of curriculum materials and training, but careful navigation of the political landscape.

Implications for Future Research

Both the Rights of Nature Movement and UNDRIP presents the potential for much greater recognition of tribal sovereignty in its broadest conception; one that allows for tribes to live within their customary legal systems in relationship with and responsibility to their homeland. However, as Echo-Hawk has noted, the challenge of developing a strategic legal framework for embedding this in U.S. law and policy remains. Future research on how scholars and practitioners may look for opportunities to carry out the charge of UNDRIP is badly needed. For tribes like the Coeur d'Alene who have seen their spiritual and cultural relationships with their landscape minimized or ignored by federal Indian policy, UNDRIP provides a promising path forward, but has yet to be presented in the U.S. judicial system in a meaningful way.

The role of academia

In addition to the need to explore non-Lockean based conceptions of property that can honor and respect tribal sovereignty and epistemologies, there is also an ongoing need for academics across subject areas to reflect on their own role in upholding or dismantling Whiteness in federal Indian policy. The history of academia in Indian Country has been at best, problematic. For better or for worse, tribes and their attorneys have been forced to rely on academic researchers to authenticate their land claims. At the same time, what academia has regarded as legitimate knowledge has undermined tribal experiences. Price (1981), an

EPA attorney writing about using court expert witnesses in the American Indian Journal, provided such an example in describing how expert witnesses could build their expertise by having, for example, “lived for several months among the northern pueblos (p. 18).” In contrast, Price (1981) suggests attorneys use “softer evidence of use and occupation” such as interviews with elders, or study of tribal mythology “purporting to chronicle the tribe’s history,” but that such “soft” evidence meets with resistance, because “native testimonies are “based on self-serving utterances made by informants who have a vested interest in the fruits of the litigation” (p.18-19). Yet with no evident irony, Price (1981) recommends how archaeological, anthropological and linguistic evidence and letters from “traders, negotiators, military, attaches, government officials, presidential representatives and Indian agent reports” could support Indian claims of their occupation of their lands (p. 19). This mirrors the experience of the Coeur d’Alene Tribe, which saw the testimony of its elders and leaders diminished by painting their knowledge as hearsay while the testimony of the expert witnesses was regarded as worthy simply based on their experiences with the peer review process or status within the academic community. This elevation of western research (i.e., science) documenting and legitimizing Native American history and experience remains pervasive not just in court experiences like the Coeur d’Alene Tribe’s, but across academia; Mignolo (2009) aptly described the tokenizing of non-western epistemologies, “As we know: the first world has knowledge, the third world has culture; Native Americans have wisdom, Anglo Americans have science” (p.2).

Today, institutions of higher education that produce the attorneys, anthropologists, historians, and linguists called on for their expertise in the courtroom continue to be overwhelmingly populated by white faculty, with some 78% of faculty across the United

States who identify as white, in contrast to less than 1% identifying as Native American (National Center for Education Statistics, 2018). Gilio-Whitaker (2019) describes how the lack of Indigenous perspectives and knowledge systems can hurt both legal and environmental justice efforts:

> Academics in environmental studies, Native studies, and other disciplines educate students on the histories and principles of environmental justice in different communities, but they face a dearth of literature on the topic from which to teach on the topic relative to Indigenous peoples… Lawyers with expertise in federal Indian law often are also neither versed in environmental justice history or principles nor are aware of other critical work by historians and other academics that inform environmental justice praxis (p. x)."

Without efforts to bridge these divides, and to address the marginalization of tribal perspectives within academia, tribal efforts to break down deep-seated racialized perspectives about the worth and legitimacy of their respective knowledge and governance systems will be limited. Given how tribal histories, cultures, family structures, belief systems, and governance and land relationships are minimized or erased in the dominant educational systems of most academic faculty, there remains a need for more scholarship to explicitly explore the impacts of settler-colonialism on tribal communities if academic institutions are to integrate this knowledge into their curriculum and research and be partners to tribes in dismantling the colonial state of federal Indian law and policy in the United States.

Final Thoughts

For many reasons, this case study and analysis was challenging to my notions of justice and my own interpretation and views of the Tribe's fight to protect Coeur d'Alene Lake. I approach this material as a settler; some of my own family first came to Idaho to seek their potential fortune in the rich silver veins of Coeur d'Alene Tribal aboriginal territory. My formative education in Idaho public schools was steeped in Whiteness, most notable in my childhood memories of a 4th grade Idaho history course that taught me about the positive contributions of missionaries and mining but left me ignorant of their impact on Idaho tribes; in fact, it left me ignorant of the existence of some of these tribes altogether. Addressing my own emotions, as well as my complicity in the settler state, has made for a complicated and sometimes painful unpacking of my individual role as a member of the Reservation community, and my role as a White researcher.

I feel it is important to clarify that nothing in this analysis should be interpreted as a criticism of the amount of work, heart, and true courage that was put into these legal battles by the Tribal leadership, membership, and its representatives. For me, this story truly is a David and Goliath-type battle where a relatively small but passionate and committed tribe took up their case against a politically unfriendly state, not to mention wealthy mining corporations, with only the support of a frequently fickle trustee. Having already witnessed in my professional life the Coeur d'Alene Tribe's commitment to Coeur d'Alene Lake, understanding the scope of what preceded its 2001 Court victory has only deepened my admiration and respect for the schitsu'umsh people. It is my sincere hope that this analysis can provoke and inform discussions about alternative legal realities that respect and uphold the values of the Coeur d'Alene people so they can envision a day when their lake can be healthy again.

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Appendix A - Tribal Research Permit

January 25, 2021

To Whom It May Concern:

Laura Laumatia presented her application for a research permit for her dissertation research, "Navigating New Waters: Challenging Settler-Colonial Ideas of Property and Knowledge in Academic Research" to our Interdisciplinary Research Review Committee on December 12, 2020. The initial screening committee has approved her application, and looks forward to updates on the progress of the project.

As a reminder, by accepting the terms of the Tribe's research permit, Ms. Laumatia has committed to:

- Sharing a draft of her dissertation for review by the committee,
- Notifying the committee about any submissions for publication, whether to peer-reviewed journals or for conference abstracts, and allowing time for committee review (30 days),
- Ensuring that a final copy of any publications are filed with the Tribe's Education Department and Strategic Initiatives and Development Office for cataloging.

As a reminder, any violation of the terms of the research permit may result in penalties, including civil penalties and/or exclusion or removal from the Coeur d'Alene Reservation, as per the Coeur d'Alene Tribal Code 51-12.01.

Concerns or questions about this process can be made in writing to me electronically at cmeyer@cdatribe-nsn.gov, or via mail at Director of Education, Coeur d'Alene Tribe, P.O. Box 408, 150 A Street, Plummer, ID 83851. Good luck in your research endeavors!

Sincerely,

Dr. Christine Meyer
Director, Coeur d'Alene Tribe Department of Education
Chair, Interdisciplinary Research Review Committee