



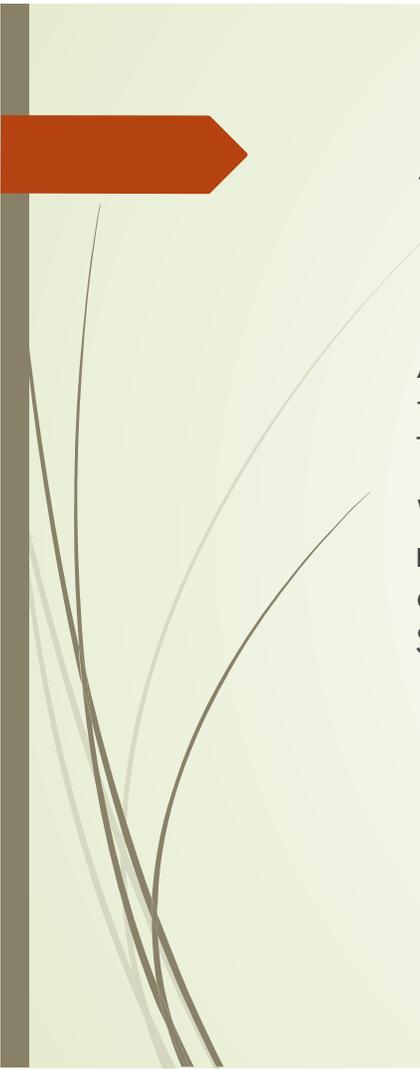
Tribal Natural Resource Issues: Perspectives of The Confederated Tribes of the Warm Springs Reservation of Oregon

A presentation to the Oregon State Bar Environmental & Natural Resources,
Indian Law, Real Estate & Land Use, Government, and Sustainable Future
Sections, September 19, 2018, KARNOPP PETERSEN LLP, Bend, Oregon



Presenters

- ▶ **Josh Newton** -- Josh is a partner at Karnopp Petersen LLP in Bend, Oregon. Josh's practice concentrates on dispute resolution with an emerging emphasis on natural resource and environmental disputes. Josh's practice includes the representation of the Confederated Tribes of Warm Springs.
- ▶ **Robert "Bobby" Brunoe** -- Bobby is an enrolled member of the Confederated Tribes of Warm Springs. He is currently the General Manager of the Branch of Natural Resources for the Confederated Tribes of Warm Springs. Bobby is also the Tribal Historic Preservation Officer for the National Historic Preservation Act. He oversees the protection and enhancement of the Confederated Tribes of Warm Springs' natural and cultural resources, including the protection of the Tribes' treaty-reserved rights both on and off the Warm Springs Reservation.



Abstract

A presentation on the value and management of Tribal natural resources in the western United States, using the lands and waters of the Confederated Tribes of Warm Springs as a guide.

We will guide you through a history of the Tribe and its approach to natural resource management. We intend the presentation to be a spring board for discussion about managing the Tribal natural resources of the western United States in the twenty-first century.



Overview of Presentation

- ▶ Federal Indian Law Policy Overview
- ▶ The Confederated Tribes of Warm Springs Overview
- ▶ The Confederated Tribes of Warm Springs' Management of Natural Resources on and off the Warm Springs Reservation
- ▶ Thoughts About Future Tribal Natural Resource Management in the Western United States



Federal Indian Law Policy Overview

- ▶ Pre-U.S. Constitution (1492 – 1789)
- ▶ Formative Years (1789 – 1871)
- ▶ Allotment and Assimilation (1871 – 1928)
- ▶ Reorganization (1928 – 42)
- ▶ Termination (1943 – 61)
- ▶ Self-Determination and Self-Governance (1961 – present)

Cohen's Handbook



Pre-Constitutional Era (1492 - 1789)

“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them; and for preserving peace and friendship with them.”

Northwest Ordinance, 32 J. Continental Cong. 340-41 (1787)



Formative Years (1789 – 1871)

- ▶ U.S. Constitution
 - ▶ Indian Commerce Clause, U.S. Const., Art I., Sec. 8, cl. 3 – gives Congress plenary power to legislate in area of Indian affairs
 - ▶ Treaty Clause, U.S. Const., Art. II, Sec. 2, cl. 2 – gives President, with advice and consent of Senate, to make treaties
- ▶ Trade and Intercourse Acts – regulated trade and intercourse with Indian tribes
- ▶ Indian Removal Act, Act of May 28, 1830, 4 Stat. 411 – authorized the exchange of tribal lands east of the Mississippi River for those west of the River



Formative Years – “Marshall Trilogy”

- ▶ Johnson v. M'Intosh (1823) – first American Indian law U.S. Supreme Court case. Established that the U.S. acquired fee title from Britain under “Doctrine of Discovery” and acquired the exclusive right to extinguish Indian title
- ▶ Cherokee Nation v. Georgia (1831) – described Indian tribes are “domestic dependent nations.” This case is the foundation of the judicially created federal-tribal trust doctrine
- ▶ Worcester v. Georgia (1832) – concluded that the laws of the state of Georgia did not apply in Cherokee country. This case is the foundation of the judicially created tribal sovereignty doctrine



Allotment and Assimilation (1871 – 1928)

- ▶ Appropriations Act of March 3, 1871, 16 Stat 544 - eliminated ability of the United States to contract by treaty with Indian tribes
- ▶ General Allotment Act, Act of Feb. 8, 1887 – Congressional effort to break up Indian Reservations and to assimilate individual tribal members into the larger society
 - ▶ Led to a loss of two-thirds of Indian land from 138 million acres to 48 million acres



Reorganization (1928 – 42)

- ▶ Indian Reorganization Act of 1934, 48 Stat 984
 - ▶ Attempt to encourage economic development, self-determination, cultural pluralism, and revival of tribalism. *Cohen's Handbook*, § 1.05
- ▶ 181 Indian tribes adopted IRA constitutions and corporate charters, including the Confederated Tribes of Warm Springs



Termination (1943 – 61)

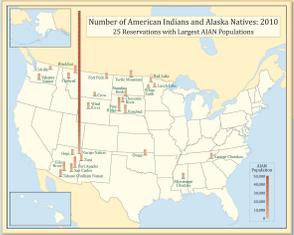
- ▶ Congress terminated the federal recognition of 109 Indian tribes
- ▶ Public Law 280, 67 Stat. 588 (1953) – with exceptions, Congress transferred criminal and civil jurisdiction over Indian lands to state governments
- ▶ BIA Relocation Program – created large urban Indian populations



Self-Determination and Self-Governance (1961 – present)

- ▶ Promotion of tribal self-determination and self-governance without termination of federal trust responsibility
- ▶ Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203
- ▶ Tribal Self-Governance Act of 1994, 108 Stat. 4270
- ▶ Other self-determination acts such as Indian Child Welfare Act of 1978, 92 Stat. 3069
- ▶ In 1970, about 1.5% of tribal services were administered by tribes; now, tribes administer about 52% of those services

American Indians and Alaska Natives in the United States



The Largest Tribal Grouping Populations: 2010

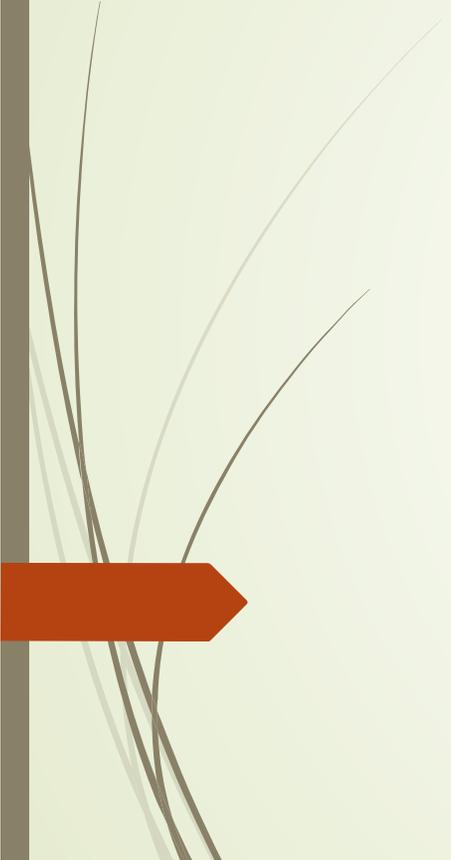
Tribal Grouping	Population	% of Total AIAN Population
Cherokee	288,000	14.1%
Navajo	280,000	13.7%
Chickasaw	250,000	12.2%
Armenian	240,000	11.7%
Choctaw	230,000	11.3%
Black	220,000	10.8%
Cherokee	210,000	10.3%
Cherokee	200,000	9.8%
Cherokee	190,000	9.3%
Cherokee	180,000	8.8%
Cherokee	170,000	8.3%
Cherokee	160,000	7.8%
Cherokee	150,000	7.3%
Cherokee	140,000	6.8%
Cherokee	130,000	6.3%
Cherokee	120,000	5.8%
Cherokee	110,000	5.3%
Cherokee	100,000	4.8%
Cherokee	90,000	4.3%
Cherokee	80,000	3.8%
Cherokee	70,000	3.3%
Cherokee	60,000	2.8%
Cherokee	50,000	2.3%
Cherokee	40,000	1.8%
Cherokee	30,000	1.3%
Cherokee	20,000	0.8%
Cherokee	10,000	0.3%

Percent Distribution of American Indian and Alaska Native Populations by American Indian/Alaska Native Area of Residence: 2010

Area of Residence	Population	% of Total AIAN Population
On a Reservation	285,000	74.1%
Outside a Reservation	100,000	25.9%
Total	385,000	100.0%

Legend

- American Indian Reservations and/or Off-Reservation Trust Land (Native)
- Off-Reservation Trust Land
- Tribal Designated Statistical Area
- American Indian Reservation (BIA)
- State Designated Tribal Statistical Area
- Alaska Native Regional Corporation
- International Boundary
- State Boundary





Sherars Falls, Deschutes River, Oregon



The Confederated Tribes of Warm Springs – The People

- ▶ The Wascoes - the Wasco bands on the Columbia River were the eastern-most group of Chinookan-speaking Indians. Principally a fishing people. Frequent contact with other Indians throughout the region provided for abundant trade
- ▶ The Warm Springs - The Warm Springs bands who lived along the Columbia's tributaries spoke Sahaptin. Unlike the Wascoes, the Warm Springs bands moved between winter and summer villages, and depended more on game, roots and berries. Contact between the Warm Springs bands and the Wascoes was frequent
- ▶ The Paiutes - The Paiutes lived in southeastern Oregon and spoke a Shoshonean dialect. The lifestyle of the Paiutes was considerably different from that of the Wasco and Warm Springs bands. Their high-plains existence required that they migrate further and more frequently for game, and fish was not an important part of their diet

The Culture

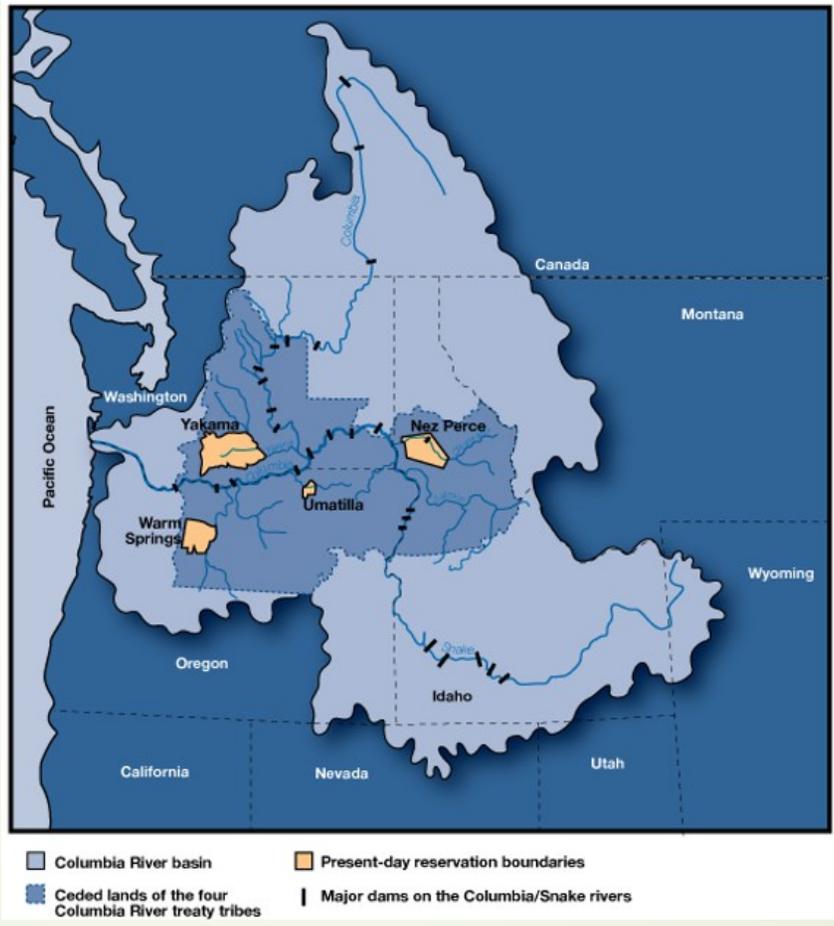


- Resources important to the tribes:
 - Water, fish, wildlife, roots and berries. These are in an order that was given to the tribes by the Creator.
- Why is this important for you to know?
 - These are what guide our way of life spiritually. They provide our connection to the land and help guide us with management decisions.



The Confederated Tribes of Warm Springs – Treaty of 1855

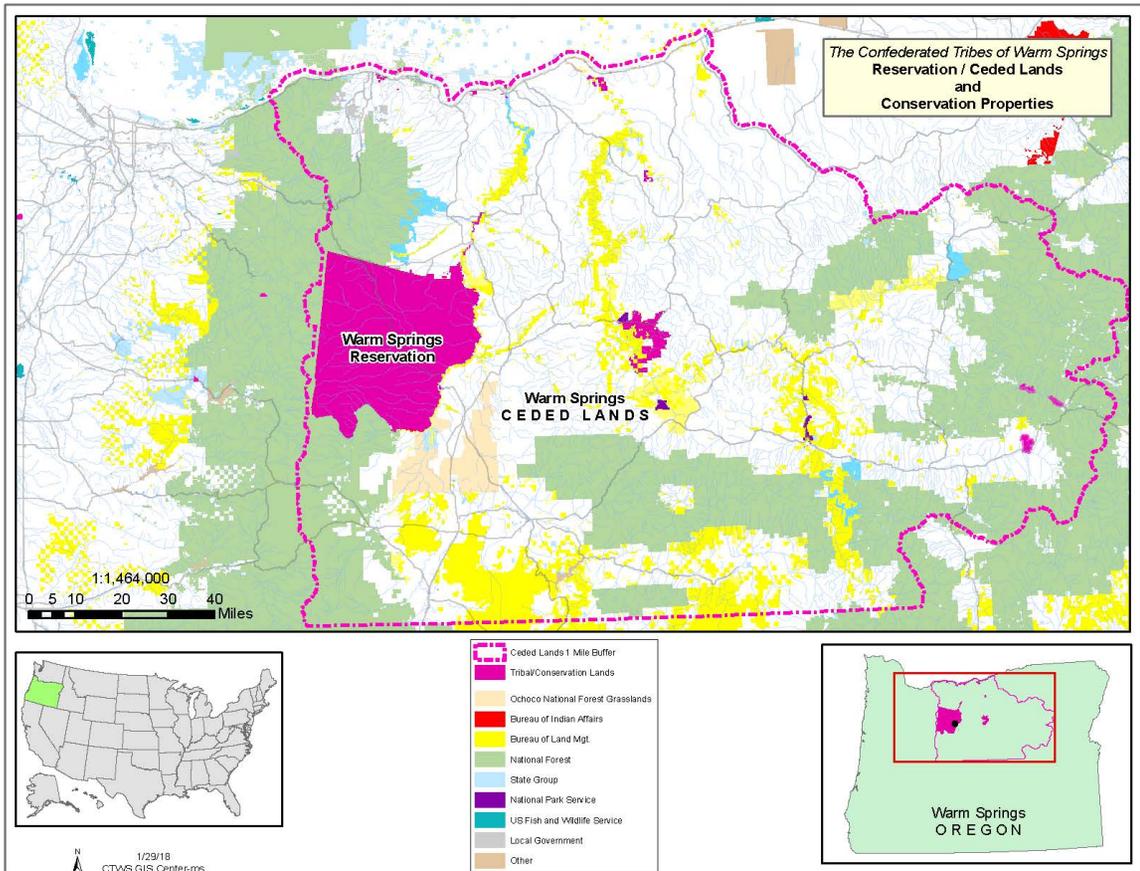
- ▶ The Confederated Tribes of Warm Springs is the legal successor in interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963
- ▶ One of four Columbia River treaty tribes
- ▶ The Treaty cedes approximately 10 million acres of land to the United States
- ▶ The Treaty reserves a 640,000 acre reservation in the Deschutes Basin in north central Oregon as a permanent homeland The Confederated Tribes of Warm Springs
- ▶ The Treaty reserves certain sovereign rights to go outside (or “off”) the reservation to hunt, fish, gather roots, berries, medicines and to pasture livestock





Tribal fisherman at Celilo Falls on the Columbia River circa 1950s

Photo courtesy of the Columbia River Inter-Tribal Fish Commission



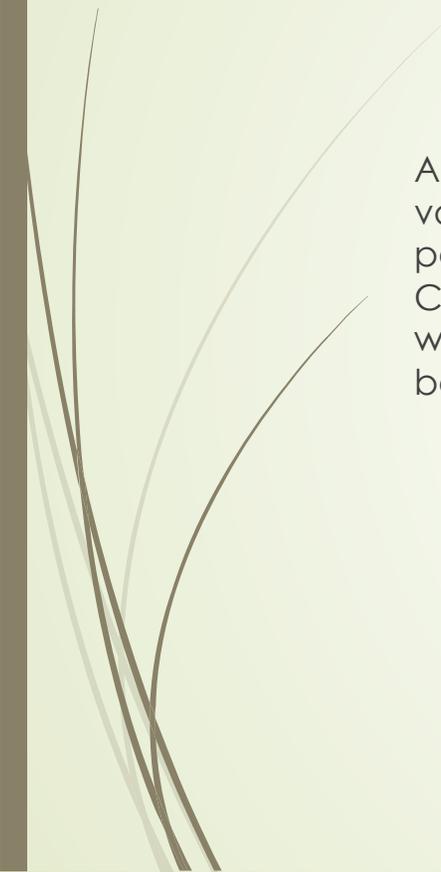


The Confederated Tribes of Warm Springs – Key Governing Documents

- ▶ Treaty of 1855
- ▶ Tribal Constitution and Bylaws, Approved February 14, 1938
- ▶ Corporate Charter, Ratified April 23, 1938
- ▶ Declaration of Sovereignty of June 25, 1992



Declaration of Sovereignty Excerpt



At the time of creation the Creator placed us in this land and gave us the voice of this land and that is our law. Ultimate sovereignty is vested in the people, who received their sovereign authority in the form of laws given by the Creator and by the land itself. We shall, as we always have, live in balance with the land and never use more of our precious natural resources than can be sustained forever.



The Confederated Tribes of Warm Springs – Governing Structure

- ▶ An eleven member Tribal Council serves as the governing body for the Tribe
- ▶ There are two Tribal executive officers that serve at the pleasure of Tribal Council
 - ▶ Secretary-Treasurer/CEO – oversees four divisions of the Tribal Government
 - ▶ Chief Operating Officer – oversees four branches of the Tribal Government, including the Branch of Natural Resources
- ▶ The Tribal Council is supported by various committees, commissions and boards



The Confederated Tribes of Warm Springs – Enterprises

- ▶ Warm Springs Power and Water Enterprises
- ▶ Warm Springs Timber Company
- ▶ Indian Head Casino
- ▶ Warm Springs Ventures
- ▶ Kah-Nee-Ta Resort and Spa
- ▶ Warm Springs Composite Products
- ▶ Warm Springs FAA UAS Test Range
- ▶ Warm Springs Credit Enterprise
- ▶ Warm Springs Telecom
- ▶ Warm Springs Geo Visions
- ▶ The Museum at Warm Springs
- ▶ Warm Springs Cannabis
- ▶ High Lookee Lodge



Co-Ownership of the Pelton Hydroelectric Project

- ▶ Tribe is co-owner and joint licensee of the Pelton Hydroelectric Project, which is the largest hydropower project within the State of Oregon
- ▶ Warm Springs Power and Water Enterprises is responsible for managing the Tribe's interests in the Project
- ▶ An important part of the Project license is a fish passage plan, which aims to restore self-sustaining runs of anadromous fish in the upper Deschutes River above the Project



The Confederated Tribes of Warm Springs Management of Natural Resources

- ▶ On-Reservation Management
 - ▶ The Branch of Natural Resources (BNR) manages most of the natural resources on-Reservation with the support of various Tribal Committees
 - ▶ BNR has seven departments: cultural resources, range and agriculture, forestry, fisheries, wildlife, water and soil, and GIS
 - ▶ Integrated Resources Management Plan
- ▶ Off-Reservation Management
 - ▶ Recognized by United States and State of Oregon as governmental co-manager of resources
 - ▶ BNR along with Tribal Committees manage the Tribe's off-Reservation natural resources



Key Considerations When Working with the Confederated Tribes of Warm Springs

- ▶ The Tribe's culture matters
- ▶ The Tribe's sovereignty matters
- ▶ The Tribe's obligation to future generations (seven to be exact) matters
- ▶ The Tribe's relationships with others matters
- ▶ The Tribe prefers collaborative, interest-based, decision-making
- ▶ The Tribe recognizes and respects the public good associated with judicial precedent
- ▶ The Tribe's interests throughout its aboriginal lands are broad and enduring



The Future of Tribal Natural Resource Management in the Western United States

- ▶ What are the key challenges facing policymakers relating to Tribal natural resource management in the Western United States?
 - ▶ Climate change, population growth, urbanization, others?
- ▶ What services do the lands and waters provide?
 - ▶ Private goods/public goods?
- ▶ What are the implications for the emerging markets for ecological services, such as carbon markets and instream water rights?



The Future of Tribal Natural Resource Management in the Western United States – Cont.

- ▶ What is the role of the civil justice system in shaping normative behavior as it relates to natural resource management?
- ▶ Are international law concepts helpful, e.g., UNFCCC and U.N. Declaration on the Rights of Indigenous Peoples?



Other Questions?



Authority

- ▶ Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963
- ▶ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed. 2012) [hereinafter, COHEN'S HANDBOOK]
- ▶ Howard G. Arnett, Of Counsel, Karnopp Petersen LLP and Adjunct Professor of Law, University of Oregon
- ▶ Confederated Tribes of Warm Springs Website <https://warmsprings-nsn.gov/> [last visited 9/16/2018]
- ▶ Confederated Tribe of Warm Springs, Department of Fisheries Website <https://fisheries.warmsprings-nsn.gov/> [last visited 9/18/2018]