Place, Race, and Names: Layered Identities in *United States v. Oregon*, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor

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While Native American treaty rights are one of the strongest instances of legally protected rights to social and cultural particularity in the United States and internationally, treaties and treaty litigation are also deeply racializing forms of legal discourse. This essay explores the dynamics between law and culture in the United States and the contradictory role played by federal Indian law in the transformation of indigenous identities by examining a current treaty rights case: *United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor.* The essay sets the Colvilles' litigation into its historical and legal context through an analysis of the relationship between the group names, of legal and nonlegal origin, by which Colvilles identify themselves and about which this litigation is centrally concerned. The Colville Tribes have consistently layered their social identities onto a map of permanent places through intra- and intergenerational naming formulas that are used to establish identity and to negotiate historical change and colonization. Federal Indian law has consistently constructed identity in its naming of indigenous groups by decontextualizing and remapping identity to a fixed map of race. Thus, federal legal discourse precludes a consideration of the very aspects of Colville identity that are central to the recognition of the claims put forth in their current litigation.

This essay explores the socially and culturally based identities at stake in a current treaty rights case and the mediation of these identities within a framework of legal rights. Any analysis of federal Indian law must address the historic colonization of Native Americans through U.S. policy and the legally justified destruction of indigenous communities. However, more than either a condemnation or defense of U.S. policy toward Indians in general is necessary for critical studies in federal Indian law. This study examines a more subtle history of colonization, which is

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not reducible to the intention that lies behind the law or the raw exercise of power, but is revealed in the language of the law itself. From the perspective of language, law serves neither simply as a tool for oppression nor as a strategy for resistance, but as both and much more. Such is the case in the litigation that this essay examines: the current attempt by the Colville Confederated Tribes of northeastern Washington State to mediate a recent conflict over their rights to fish off reservation by intervening in *U.S. v. Oregon* (1969),[1] one of a trilogy of landmark treaty rights cases in federal Indian law.

While the Colvilles' litigation explicitly concerns their right to harvest fish and manage fisheries off reservation in the Columbia River Basin—a right whose importance cannot be overestimated for Colville members—more is at stake in this case than the resolution of a dispute. In addition, as in the case of any group or class appeal to shared rights, both the nature of recognizable historical claims/facts and the boundaries of legitimate social identity are being negotiated. Therefore, rather than being a contest between the law and culture understood as two opposing interests, this case has unfolded as different discourses on and narratives about the historical dynamic between law and culture as they affect social and collective identity.

It is in the legal framing of the Colvilles'[2] fishing claims as a treaty right, and the subsequent requirement that they prove the continuity of their collective identity in the terms of the law, that the boundaries through which the courts generally construe social identity can be identified. In the discourse of federal Indian law, the only legitimate form that collective identity can take is a linear, fixed, and singular one. The courts claim to only inscribe and document the facts of any such "authentic" identity and, in turn, declare them intact or defunct. In this manner, the law is presumed to exist wholly outside of the boundaries of tribal identity. Colvilles have represented identity in another form in this case. They have not generally constructed social identity by isolating and drawing boundaries around singular and fixed identities

[1] Because there have been several cases with the parties "United States" and "Oregon," this case is cited throughout as "*U.S. v. Oregon* (1969)." See also text at note 12.

[2] Several conventions are followed here to attempt to clarify the complex names that arise when considering the history in the Colvilles' case. Though the Colville Tribes are generally referred to in the singular form—"the Colville" and the "Colville Tribe"—the plural form is used here to emphasize the confederated nature of this tribal entity. The convention suggested by Jay Miller, of designating these confederated tribes as "Colvilles" and the member tribe that takes the same name as "Colvile," is also followed throughout. Because of the many names used to designate these groups and the complexity of social and historical relations among them, bold type is used to indicate the names of those groups or tribes now confederated as Colvilles when they appear in quotations from ethnographic and legal texts. I have followed no single convention for referring to social-political groups, such as "Indian" and "white," because the social construction of such names and labels is the central concern here. Choices of labels are, then, based on the particular context being discussed, with the goal of using the most specific term possible. Note also that "Indian Tribe" and "Indian Country" are terms of federal Indian law.

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but through techniques that produce a layered form of identity. In their discourse, the law does not exist wholly outside of Colville identity. Rather, both legal and nonlegal aspects of their identity are layered through narrative frames and terms which, though less transparent than those of the court, are nevertheless salient. Thus, while legal discourse has influenced Colville identity, it has done so in a way that is also irreducibly Colville. In addition, the Colvilles have in the past successfully used rights discourse and litigation as a strategy to assert their construal of identity, the attendant facts of their history, and the rights accruing to them.

Rather than examine this case through the set of dichotomies that have generally formed the thread weaving together studies of diverse indigenous communities in the United States—law-whites-oppression and culture-Indian-resistance—this study tells a more complex story of the legal-cultural discourses represented here by examining the tension between the colonizing and decolonizing influences of legal discourses in Colville history. A brief introduction to the circumstances from which their current off-reservation fishing rights litigation has arisen further supports the need to develop such a model for understanding Colville history—and Native America more generally.

The Columbia River forms the eastern and southern boundaries of the Colville Reservation; the Okanogan River forms the western boundary (see Maps 1 and 2). Rivers and the resources they provide have always been key points mapping the history and identity of the members of the 11 indigenous groups confederated today as Colvilles. Fish—principally the five kinds of salmon that were once abundant in the rivers of the Pacific Northwest—have played a fundamental role in the social, economic, and ceremonial organization and institutions of these peoples. Despite the colonial reorganization of social and economic boundaries, these 11 confederated groups, like other tribes throughout the Pacific Northwest, continue to link their identity and assertions of their sovereign rights to fish and to the rivers of the region.

As civil rights movements swept across the United States in the 1960s, the long-standing tension over fishing rights in the Pacific Northwest intensified and exploded. Members of the tribes of the Pacific Northwest held "fish-ins," actions of civil disobedience in which Indians fished off reservation at their traditional fishing sites in spite of Washington and Oregon State regulations denying their rights and despite violent attacks from non-Indian protesters. Subsequently, various Indian Tribes who were named in 19th-century treaties turned to the federal courts to litigate their fishing rights. In a series of landmark treaty rights cases that resulted from this conflict, many Pacific Northwest tribes succeeded in securing affirmation of their right to fish off

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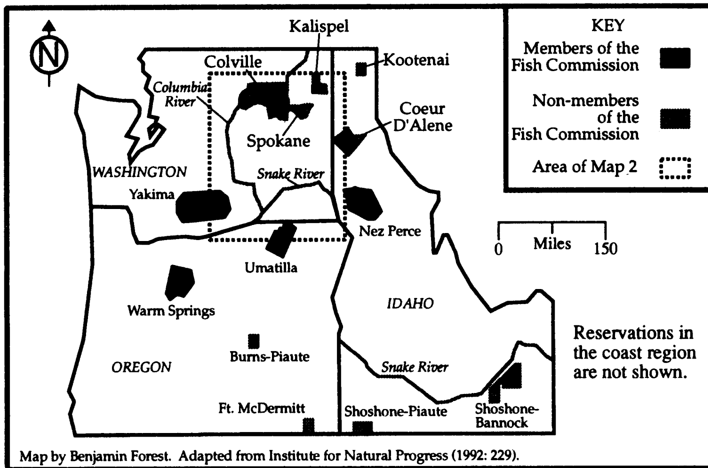
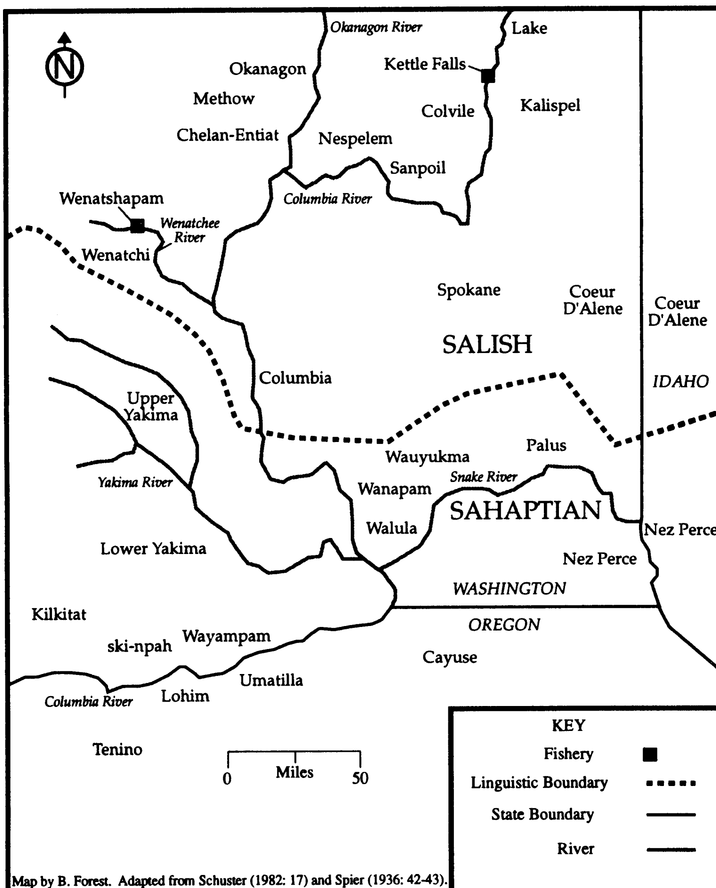
Map 1—Current Member Nations of the Columbia River Intertribal Fish Commission



Map by Benjamin Forest. Adapted from Institute for Natural Progress (1992: 229).

Map 2—Distribution of Dialects in the Columbia River Basin, 19th Century



Map by B. Forest. Adapted from Schuster (1982: 17) and Spier (1936: 42-43).

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reservation at traditional fishing sites. These recent treaty rights victories suggest that the law has and can cut both ways in Indian Country. In addition to being a tool for colonizing indigenous people, the genre of treaty rights is being used by Indian Tribes as a tool for decolonization. The genre of treaty rights may provide one of the strongest examples of the successful transformation of legal discourse from a technique for denying social groups' identities to a strategy for articulating their identities and defending their claims.

The Colville Tribes are seeking to be formally included in one such victory. They are attempting to intervene in *U.S. v. Oregon* (1969), a case in which the off-reservation fishing rights of four other Columbia River Tribes were upheld. Thus, the Colvilles' current case and the issues at stake in this litigation are not new, nor is this the only legal negotiation that concerns fish and rivers in which the Colvilles are now engaged. However, because the Colvilles are attempting to intervene in 25 years of ongoing litigation, their case provides an opportunity to explore the transformation of legal discourse as it unfolds. From this perspective, the Colvilles case exemplifies the shifting boundaries of identity and the law—for the four Columbia River Tribes already named in *U.S. v. Oregon,* whose fishing rights were upheld in this case, are now contesting the Colvilles' claims to off-reservation fishing rights. Here, as in other places throughout Indian Country, the law is being used to negotiate not only Indian-white relations but disputes between indigenous communities as well.

A third factor is essential to understanding the dynamic between social claims and the language of the law in this case. Of the 11 Confederated Colville Tribes, 6 were signatories to the treaties at issue in *U.S. v. Oregon;* the remaining 5 indigenous groups are not named in any treaty with the federal government. The Colvilles are not unique in being a confederation. The majority of Indian Tribes in the Pacific Northwest are confederations of indigenous groups formed in the mid- and late-19th century by way of negotiations with the U.S. government. Nevertheless, because *U.S v. Oregon* (1969) is a treaty rights case, the central questions posed by the court focused on the nature of this confederacy, on what it means to say, "I am Colville," and simultaneously say, "I am Okanagan, Wenatchee (or any combination of the groups making up the Colvilles)." It is not surprising, then, that over the course of the trial, the question of fish gave way not only to the question of who the Colville Tribes are but also to the question of the nature of the legitimate and defensible forms of social identity that can be given voice in the law.[3]

[3] In contrast to the earlier fishing rights cases and other ongoing litigation in *U.S. v. Oregon* (1969) in which fish, fisheries, and conservation issues were central concerns, the question of fish was, in fact, hardly remarked on in the Colvilles' trial. Therefore, this

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At this point, the federal courts have concluded that the Colvilles' claims are contradictory. It is the court's opinion that the Colvilles have not shown that they have maintained their traditional cultural identities (and the treaty rights accruing to those identities), while also maintaining a confederated identity (and the rights held by recognized Indian Tribes). On this basis, in January 1992 the District Court of Oregon, under Judge Malcolm Marsh, denied the Colvilles' attempt to intervene in *U.S. v. Oregon.* In June 1994, the Court of Appeals for the 9th Circuit upheld the district court finding. The Colvilles' request for a rehearing of this case was recently rejected, and they will be appealing to the Supreme Court. The cultural and legal import of the denial of the Colvilles' claims are inestimable for these peoples, whose historical identity is inseparable from fish and rivers.

As in any treaty rights case, an extraordinary body of evidence has been gathered and presented, from military documents, ethnographies, and personal correspondence to expert and lay testimony, all in an effort to interpret Colville culture and the meaning of the actions of Colville individuals. To do so, federal courts organize and discern in this legally produced archive a relationship between the name "Colville" and the names of the 11 confederated groups that make up the Colvilles, the treaty tribes: the Columbia, Chelan and Entiat, Wenatchee or Peskwas, Palus, and Chief Joseph's Bands of the Nez Perce, and the nontreaty tribes: the Methow/Okanagan, Sanpoil, Nespelem, Colvile, and Lakes. Following the legal procedures for interpreting data gathered in any case in which the rights of Native Americans as members of sovereign groups are being addressed, the court has sought throughout to ascertain the content, and to assess the continuity, of the culture of these confederated groups.

By contrast, this essay explores the ways in which culture is more than a content or structure that must be sealed from time and from change in order to maintain its integrity. It has been demonstrated for some time that culture and collective identity must be viewed as a dynamic relationship between particular "contents" and culturally specific forms or procedures for negotiating the transformation of these contents (Bourdieu 1977; Geertz 1973; Hobsbawm & Ranger 1983; Rosaldo 1980). It has also been shown that such social procedures for negotiating change mediate more than the internal transformation of social groups; they are a means for constant interaction between social groups and external forces (Comaroff 1985; Tambiah 1985). Thus, inquiries into the history of a community's culture must

essay does not address salmon or the effect of indigenous management practices on the development of the law. See McEvoy 1986 for a comprehensive treatment of the transformation of environmental law in the case of the California fisheries and an in-depth analysis that includes an account of indigenous fisheries and historical relations between indigenous and nonindigenous fishing interests.

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consist of more than comparisons that abstract social actors and social practices from their historical context.

In addition to being a focus of the Colvilles' trial, group names are one extremely productive cultural practice for establishing and mediating identity. This essay takes Colville and non-Colville, as well as legal and nonlegal, collective naming practices as a focus in order to reflect on the boundaries of identity at stake in the Colvilles' current treaty rights case. I show that Colvilles layer their identity in relation to particular places, both intra- and intergenerationally, and that they do so through naming formulas. The layered form of identity produced through the use of these naming formulas is not sealed in an archaic past; these cultural practices have been used by Colvilles to negotiate historical change regardless of how abrupt such changes might be, including their entry into colonial and national discourses of rights.

The essay also shows that nonindigenous Americans construct group identity through naming practices but in relation to a logic of race rather than a logic of place. U.S. relations with indigenous communities were established using the decontextualizing and racializing category of Indian Tribes. As Indian Tribes were named as such in founding legal documents, a new form of identity was mapped onto indigenous communities. Federal courts, however, exclude from their cultural inquiries both the historical effects of indigenous forms for constructing and maintaining identity and the effects of procedures for identity-making in U.S. legal discourse. Instead, as in the current litigation of Colville rights, to assess the social claims of living communities the courts use a model of fixed and static Indian Tribes, whose history must unfold in a linear narrative.

In addition to describing some of the essential social practices of Colvilles that must be considered in any inquiry into Colville culture, this essay also seeks to build on the analysis and insight of previous case studies of the fishing rights conflict in the Pacific Northwest (especially American Friends Service Committee 1970), as well as studies of other cases in which tribes' identities have been put on trial. The studies of the Mashpee struggle to gain federal recognition by Campisi (1991), Clifford (1988), and Torres and Milun (1990) represent the diverse approaches to placing Native American rights discourse in a critical context on which this study of the Colvilles case builds. Departing from case studies of federal Indian law that focus on trial proceedings and on the versions of tribal history argued and silenced there, I contextualize the current Colville litigation with an intergenerational analysis of social naming in the genre of treaty rights.

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I. Language, Law, and the Genre of Treaty Rights

Much recent critical writing on the law takes language, narratives, and voices as a focus in order to develop a critique of the traditional notion that law and culture are oppositionally related. In contrast to totalizing characterizations of the structure or content of the law, this scholarship produces descriptions of legal or dispute resolution discourses as sets of institutionalized social practices that are themselves in transformation and localizes these cultural-legal practices by analyzing their use at specific historical moments and in particular places (Mertz 1988:374–75; see also Comaroff & Roberts 1981; Geertz 1983:167–234; Hanks 1986; Merry 1990; Moore 1986). In place of comprehensive generalizations about Western legal systems' instrumental maintenance of relations of inequality, this critical scholarship is exploring, on the one hand, the legal creation and use of such social categories of inequality as race, class, and gender, and on the other hand, the mobilization of rights discourse by the very groups that have been the targets of these legally inscribed categories of difference and inequality (Cohn 1983; Comaroff 1992; Morris 1992; Williams 1991).

From this perspective, the conclusion that the law essentializes social identities in order to reproduce power relations loses its analytic and moral edge, for the law is not working differently than culture does everywhere. Individuals and social groups use cultural practices to essentialize meaning, creating social roles and boundaries around identity, and institutionalizing the relations of deference and power we take for granted—making that which is socially produced appear natural (Silverstein 1979; Tambiah 1985). The law is only one such cultural institution. The question as to *whether* the law essentializes social identity is being displaced by more practical questions, for example: *how* does legal discourse, as one social institution, essentialize? What form does this essentialization take? And what are the larger cultural registers and social indexes through which this process is articulated?

This development in legal scholarship both reflects and can benefit greatly from developments in scholarship about the way language works in any social context (see generally Brenneis 1987; Mertz 1992, 1994). Traditional approaches to the study of language have tended to emphasize the use of language to *refer* to relations and things, providing analyses of the structures of reference embedded in language independent of and distinct from particular social contexts (Silverstein 1979; Volosinov 1986). In this traditional view, the language of the law is understood to only refer to or mirror social contexts and relations of power that are created outside of language and outside of the law (Brenneis 1987; Mertz 1992).

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In contrast, recent theories that analyze language use by speakers in various contexts challenge the hegemony of reference and definition that predominates in theories of language by showing that many functions beyond reference are performed through language. In fact, the referential or semantic level of meaning is dependent on rules for language use and on other features of language whose very nature is to vary with and characterize particular social contexts (Foucault 1972; Silverstein 1976; Tambiah 1985). This contextual structuring of language use is called pragmatics. Thus, language, including legal discourse, is always more than a reflection of social context; it is part of its social/cultural production. In addition, Silverstein (1979) has suggested that our sense that language primarily refers to already extant relationships and things appears to be an ideology common among speakers of different languages. The traditional notion that law merely reflects or rationalizes extralegal phenomena is only one manifestation of this common ideology (ibid., p. 210).

One approach to understanding the relationship between semantic and pragmatic aspects of language highlights the ways in which the content of language is always related to, and dependent on, its form and the fact that such forms are always socially produced. Though language forms that do more than refer to or define things are not readily apparent to us, they perform a great deal of the work of the law. For instance, rules or conventions of speech referring to the function of the legal speech itself (called "metapragmatic" conventions) create certain kinds of relationships, roles, and identities (ibid., pp. 209–10). "I pronounce you" and "I promise you" are legal conventions or formulas that simultaneously refer to the work they are performing and create social relations of marriage and contract.

Even less apparent, though more ubiquitous, are those aspects of speech that are not explicit formulas pointing to or signaling the legal-cultural work they are performing, but those that simultaneously refer to and create or recreate social relations, for example, those social forms that signal or index the boundaries of group identity. One simple but extremely creative index through which group identity is essentialized in English, for example, is the pronoun "we," as in "we, the people." The content, meaning, or reference of this word is not only highly contextual but can also be used strategically to create different kinds of membership or alliance.

A second kind of boundary- and identity-creating speech particularly relevant to this study of treaty rights is names and kinship terms, which "in any society can hardly be characterized by a 'semantic' analysis" (Silverstein 1976:52). Names are always part of a larger socially based system, with its own rules for name giving, and a wider set of values within which names are meaningful

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(Basso 1990:99–138; Mertz 1983; Silverstein 1984). To be named an "American," for example, entails a number of rules of use that have increasingly become an arena of political struggle in this era of anti-immigrancy. To be named an "American" also presupposes a singular and permanent form of membership. Consequently, to be a member of a sovereign Indian Tribe and an American has been a source of tension for both indigenous and nonindigenous people since citizenship was granted to Native Americans *en masse* in 1924 (Hoxie 1984). Such an explicitly hybrid identity contradicts the rules on which nation-state membership seems to be based. In turn, the claim voiced by anti-Indian activists that Indians receive special rights in the United States from this dual status is one manifestation of the tension implicit in the possession and use of names of national membership (Whaley with Bresette 1994). Finally, to be named an "American" and to simultaneously be denied access to the rights that accompany American citizenship suggests that other indexes of identity are being naturalized in American legal discourse. For instance, the fact that Native Americans have been forced to pursue a specific statute for the protection of their religious freedoms over the past 20 years through the American Indian Religious Freedom Act indicates that social constructs are at work in the law that allow Native Americans to be denied constitutional rights to which they should be entitled as Americans (Vecsey 1991).

Though not explicitly carried out in the terms of pragmatic language analysis, a number of recent studies of the law base their critiques on an analysis of this last point: that social boundaries indexed in the law function to create rather than strictly to refer to relations of power and that these cultural indexes essentialize or naturalize social hierarchies along the lines of gender, race, and class, for example. This research follows two interrelated critiques—the critique of legal discourse itself and the critique of scholarly commentaries that address the history of legal discourses as a whole—which I briefly address here in order to set the genre of treaty rights into the context of recent scholarship.

A. Critiques of Legal Discourse

In developing this first kind of critique, Catharine MacKinnon (1993:612) has described the task of analyzing legal discourse as making what are "seemingly ontological conditions . . . become visible as epistemological." In her own work MacKinnon argues that a system of sex inequality is one socially constructed index that is made to appear natural (or ontological in her terms) in legal discourse. Though this structure of power is not explicitly defined or referenced in the law, MacKinnon shows that men are the subjects entitled in and through legal discourse.

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She argues that this socially constructed index not only perpetuates the right of men to dominate and exploit women, but it denies this violence as such, making an environment of violence toward women appear natural and entirely extrinsic to the law. So ubiquitous is this system that the social power of men over women is extended even through the very "laws that purport to protect women" (ibid., p. 613). Thus, "male" and "female" are gendered indexes in legal discourse that do not refer in an unmediated way to men and women as historical actors but to socially inscribed categories through which relations between men and women are negotiated.

In a related critique, Patricia Williams (1991) has shown that this structure of sex inequality works in concert with other indexes of identity in U.S. law. Taking her own genealogy as a point of departure, to MacKinnon's critique Williams adds an intergenerational perspective. Williams describes a form of knowledge in which the socially constructed categories of gender, race, and class, and the intergenerational exploitation perpetuated through the use of these indexes, are made to appear natural. Speaking of her black great grandmother, who parented the children born of nonconsensual sexual relations with her white owner, Williams (pp. 162–63) says:

> Those [women of African descent] who were, in fact or for all purposes, family were held at a distance as strangers and commodities. . . . In the thicket of those relations, the insignificance of family connection was consistently achieved through the suppression of any image of blacks as capable either of being part of the family of white men or of having family of their own: in 1857 the Supreme Court decided the seminal case of *Dred Scott v. Sandford* in which blacks were adjudged "altogether unfit to associate with the white race, either in social or political relations. . . ."
>
> The recognition of such a threshold is the key to understanding slavery as a structure of denial—a denial of the generative independence of black people. A substitution occurred: Instead of black motherhood as the generative source for black people, master-cloaked white manhood became the generative source for black people. Although the "bad black mother" is even today a stereotypical way of describing what ails the black race, the historical reality is that of careless white fatherhood.

Like MacKinnon, Williams shows that the categories of social difference that are used to essentialize group identity in the law go beyond rationalizing the denial of rights to particular social groups. Legal discourses of racial distinction also operate to obscure the reality of historical relations. In addition to the denial of sexual and family relations pointed out by Williams, other social relations remain unaccounted for—the reality of consensual sexual, family, and economic relations between persons of Afri-

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can, European, and Native American descent as well as the reality of a "mixed-blood" America.[4]

Despite the comprehensiveness of their critiques of the social relations historically indexed in the system of rights in the United States, neither Williams nor MacKinnon rejects the discourse of rights. To the contrary, in addition to providing a critique of those who would demand inclusion in the given system of unequal rights, both MacKinnon and Williams argue against the abandonment of rights discourse altogether (MacKinnon 1993:613; Williams 1991:146–65). Both writers' critiques are based on the recognition that, because rights are themselves socially and historically constructed, they are also in the process of transformation. Both writers open the discourse of rights to historical and social critique for this very reason, calling for the transformation of the indexes of personhood and of membership that are produced in rights discourse.

They conclude that it is not merely propertied, white males nor even the propertied white, male power, historically naturalized in the discourse of individual rights, that must be challenged. For, as this series of descriptors suggests, the subject historically entitled to and animating the content of rights in the United States is neither abstract nor simple but particular and complex—to "white," "male," and "propertied" could be added other descriptors such as "heterosexual," "adult" "parent." Hence, what must be challenged is the cultural ideology that pictures identity as consolidated, single, and fixed, as opposed to complex and hybrid, as well as the practice of indexing "the other" or marginal subjects by such single social indexes as race. If this level of rights discourse is not addressed, the only possible form legal reform can take is the extension of the current structure of rights (one, e.g., that entitles violent relations and rights to exclusive forms of individual and corporate property) to women, African Americans, Native Americans, etc. This approach to reform in rights discourse currently stimulates commonly voiced fears of an endless stream of claims to "special rights." By contrast, MacKinnon and Williams suggest the need for recognizing alternative and more complex forms for indexing identity and the distinct social codes and practices through which identities are formed and legitimated. The development of methods that give an account of such alternative forms is necessary to displace the preconception that identity takes a singular form and the accompanying social and historical denial now determining the limits of legal discourse. This is one critical nexus at which studies of legal discourse are now poised—the relationship between hybrid personal and collective identities. From this

[4] On practices of racial distinction and the form that social and historical denial takes under such practices, see Chandler 1991; Takaki 1993.

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perspective, the critical question of legal discourse is not how we move beyond essentialization, but how we, in fact, continually essentialize our social identities in complex and dynamic ways, and the extent to which social forms for identity making can come to be recognized in the law.[5]

B. Critiques of Discourse about Law

The claims that rights are socially constructed both in terms of content and form and that systems of rights are themselves in transformation are echoed in recent writing that takes legal scholarship as its focus. Our talk about law and disputing is no exception to the general rule that we all essentialize culture whenever we talk and write. Indeed, the relationship between form and content is not irrelevant to commentaries on and histories of modern legal discourse and uses of legal techniques for colonial expansion. When legal scholars index rights discourse as a whole to a single, consolidated set of speakers (the so-called dominant and oppressive group), we make a historical fact—the relatively free access of dominant groups in any society to legal language—appear as though it were natural, as if rights discourse can serve no other purposes than the interests of the "ruling class." When talk of rights is indexed to one set of speakers in legal history and analysis—for instance, "whites" or "men"—we deny not only the use of the law by those who have been colonized through legal discourse but also the contest of identity that is carried out through legal discourse between competing groups or interests within the so-called ruling class. The long and continuing codification of legal discourses in colonial and historical contexts is, in fact, a primary technique for the consolidation of a national citizenry, the "invention of national traditions," and the denial of religious, class, and political differences among so-called consolidated citizens (Berlant 1991; Cohn 1973; Spivak 1988). Therefore, when an entire kind of talk or speech, in this case the discourse of rights, is used to index only one set of

[5] See, e.g., Scales-Trent (1993) and Crenshaw (1989), who argue that the relationship between race and gender must be accounted for in critical legal discourse: "Black women possess two statuses which derive from attributes over which they have no control: membership in the black race and membership in the female sex. The combination of these two statuses creates a new status" (Scales-Trent 1993:282). In the area of indigenous rights, other kinds of change of group definition are being advocated, for example:

> Indigenous peoples, as all colonized peoples, have come to realize the importance of semantics in their quest for self-determination. . . . Although the term "nation" denotes a socio-political construct of European nature, the concept carries with it considerable importance in international debates. Fortunately, among the ranks of indigenous peoples a discussion has begun that calls into question the usefulness of forcing indigenous reality into the forms developed by Europeans. Consequently, new descriptions of the historical organization of indigenous societies, as well as indigenous aspirations, are being formulated. The result may be the evolution of completely novel international relationships between and among peoples. (Morris 1992:57)

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speakers, the form that our essentialization takes is singular in the sense of identity, of time, and of place.

John Comaroff (1994:2) has criticized the tradition of "talk about the law" in scholarship on South Africa that "treat[s] the colonial encounter itself as a linear, coherent, coercive process involving two clearly-defined protagonists, an expansive metropolitan society and a subordinate local population." By contrast, he suggests, "the colonial encounter did not simply set in motion processes of domination and resistance between colonizer and colonized. It also sparked struggles among the colonizers themselves" and among colonized South Africans (p. 4). Thus, he finds a different pattern of rights discourse emerging in the history of South Africa, showing (p. 43) that in addition to being used as strategies for the colonization of black South Africans, the themes of "individual rights" and "aboriginal sovereignty" have been used to consolidate a "white" nation-state by superseding social differences among European settlers and as frames for discourses about rights by black South Africans.

Deessentializing legal discourse in South Africa from one group of social speakers and redescribing different social groups' use of legal discourse, Comaroff shows that legal discourse is a social fact, a set of practices that are themselves in transformation or evolution. He (p. 47) concludes: "[T]he language of the law *sui generis* is reducible neither to a brute weapon of control nor simply to an instrument of resistance. The inherently contradictory character of the colonial discourse of rights—its duality of registers and the double consciousness to which it gave rise—ensured that it would be engaged on both sides of the dialectic of domination and defiance. It still does. Everywhere."

Like other minorities in the United States and many indigenous peoples, Native Americans have been educated in rights discourse through direct legal negotiations, boarding schools, and intense policies of assimilation (Wexler 1991). And like other social groups, Native Americans, as members of a minority in the United States and as members of sovereign nations, are using colonially based rights discourse as a strategy for decolonization. Yet, despite the complexity of voices, genres, and speakers represented in federal Indian law, a majority of studies addressing the history of this extensive and specialized body of law tells a linear historical narrative of the opposition between Indians and whites. In this story, legal discourse signals or indexes only white speakers and serves as a tool for the progressive legal colonization of tribal cultures, that is, either the story of their destruction or their assimilation *en masse*. In either case, the hegemony of the law is seamless and endlessly unfolding across the horizon of the history of Native Americans.[6]

[6] A notable exception is Hoxie 1984, who shows that the campaign to assimilate Native Americans has undergone transformations that have left Native Americans both

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Vine Deloria, Jr. (Standing Rock Sioux), has pointed out that such a linear concept of history is not exclusively a problem of the law. Deloria (1987:89) suggests: "much of what passes for history dealing with Indians and whites is a mythological treatment of the development of policy disguised as history." His comments are not reserved for unsympathetic readings of Indian-white history but for scholars and advocates lining up on both sides of debates about the status of Indians in the United States. He goes so far as to suggest (p. 85) that in many ways "the writing that most needs revision is that which seems to favor Indians. It is not inaccurate, it is simply too generalized and tends to mislead Indians into adopting liberal myths instead of conservative myths." If conservative myths propose that it is only natural that Indians must give way to the civilizing force of state policies, liberal myths see nothing in the history of Indian-white relations but oppression, no effective resistance by indigenous groups to the force of civilization, no effective uses of legal discourse, and mostly anecdotal differences between indigenous groups. These are two sides of the same form of history; in either case the complex historical reality of colonial relations is ignored.[7]

Deloria's critique also implies the need to reconsider non-Indian Americans and their relationship to federal Indian law. Since its beginnings, federal Indian law has been a significant forum for American contests over the boundaries of identity between local, state, and federal powers and between the branches of the federal government. In addition to being founding events in U.S.-Indian relations, the Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, 1822, 1834 (through which the federal government asserted exclusive rights to negotiate with Indians) and the Marshall Trilogy (*Johnson v. McIntosh* 1823, *Cherokee Nation v. Georgia* 1832, and *Worcester v. Georgia* 1833, the foundational legal statements on Indian sovereignty) each in its own time was primarily a contest being carried out between European Americans over the relationship between individual, state and federal powers and rights. Thus, beyond contradictions between whites and Indians, federal Indian law represents the role that different kinds of legal discourse by and about Native Americans

spatially and socially isolated on the periphery of American society. This is in contrast to the early intentions of the campaign to assimilate Native Americans, which imagined that Native Americans would integrate and disappear into American society. Hoxie (1984:244) concludes: "Defined as marginal Americans, tribal members could take advantage of their peripheral status, replenish their supplies of belief and value, and carry on their war with homogeneity. We should be thankful that this is a conflict the Indians are winning."

[7] Berkhofer (1979:113) has noted that both sides in debates over federal Indian policy reflect this mythic form of thinking about Native Americans and history: "Although the specific goals of missionaries and military officers, of philanthropists and politicians have often conflicted, these diverse White officials and policy makers agreed upon the basic nature of the Indian, and therefore their policies, if not their aims, were usually compatible in the larger sense."

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have played, and continue to play, in constructing and mediating diverse identities in the United States.

Predominant models of interpretation that collapse the details of this history of indigenous and nonindigenous groups in the colonization of America into a myth of Indian-white contact permit only two options for indigenous communities—assimilation from one form of identity to another, or the failure to assimilate altogether. Like Comaroff, Deloria argues for analysis that is more rigorous in the data to which it refers, the form of historical change to which it gives voice, and the dimensions of the social relations for which it accounts.

C. The Genre of Treaty Making

Of the 350 treaties ultimately approved by Congress and the genre of treaty making more generally, Deloria (1987:87) has said:

> Breaking treaties is another subject that lends itself to misinterpretation when inadequately researched or understood. The general theme of writers dealing with Indian-white relations when dealing with treaties is to adopt the interpretation that the United States "broke" every treaty it signed with the Indians. So deeply entrenched is this belief that a writer hazards his reputation by suggesting otherwise. . . . The simple fact is that the statement that all treaties have been broken is a moral rather than an historical judgment. Yet when it appears in historical writing without some explanatory comment it takes on wholly different connotations and triggers a set of responses, predictable to the last ounce of emotion, which are unwarranted. Tribes still enforce their treaty rights even though few people believe that the treaties have any efficacy at all.

Deloria also points out that, as a result of the breadth of these negotiated agreements, rarely have entire treaties been broken in any single moment (ibid.). Due to the demands of both federal and indigenous representatives who signed treaty documents, treaties are quite comprehensive. They include, for instance, clauses outlining agreements for the payments of cash annuities to tribal members; lists of services to be provided by the federal government, including educational, economic, and health services; and other reserved tribal property rights, such as the right to fish off reservation. In their construction, treaty contracts are comprehensive interculturally produced documents. In turn, mere phrases of treaty contracts have been the subject of years of litigation in the federal courts by indigenous and nonindigenous groups, and the same treaty may be revisited by the court any number of times.[8]

[8] See also Deloria's (1987:87) brief discussion of severability, the technique whereby "in a treaty one separates the article that is the subject of controversy from the remainder of the document and comments on its validity or relevance in law."

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In addition to pointing to the historic establishment of colonial relations and a set of rights acknowledged in some distant past, treaties are being used as a form of legal discourse through which to envision the future. Treaties, for example, are among the issues around which indigenous peoples are allying at an international level.[9] The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities is one place that this position is being voiced:

> A substantial number of Indigenous Nations may have signed TREATIES and other agreements that pertain . . . to land, water and resources, with non-Indigenous governments during the colonial era. However, these Treaties now lack international recognition and Indigenous Peoples cannot seek remedies under them. Among the goals of the current U.N. Study on Treaties, Agreements, and Other Constructive Arrangements between Indigenous Peoples and nation/states, based upon the findings and recommendations from the Sub-Commission's Special Rapporteur, Dr. Miguel Alfonso Martinez, is to enhance treaty enforcement rights. (International Indian Treaty Council 1994:4)

As this statement suggests, treaties, as a genre of rights discourse, are being used as a model for understanding the nature of nontreaty agreements between indigenous and nonindigenous bodies. In the canon of federal Indian law, such "other agreements" are called "treaty substitutes," which have generally been found to carry the same weight as treaty contracts (Wilkinson 1987: 63–68). It is also clear that more than statements of policy about treaties are being sought by indigenous groups; advocates among and for indigenous peoples are calling for the development of legal procedures that can form the practical basis for implementing and protecting the culturally based rights secured in treaties. In the terms of the language of the law, indigenous people are not only demanding that their sovereign rights be referred to in statements of policy (in the content of the law) but that rules for the interpretation of conflicts over these rights be developed (in the meta-pragmatic rules of legal discourse).

Although U.S. policy toward Native American Indians does not stand up well to international human rights principles in general (O'Brien 1985), recent treaty rights litigation has proven to be one of the most powerful bases for culturally based rights in the United States and internationally. U.S. caselaw has promulgated rules for the interpretation of treaties that are explicitly intended to enable American Indian Tribes to seek legal remedies, rules or canons of construction in U.S. caselaw that go beyond international canons:

[9] See also Barsh & Henderson 1980:270–82, where the concept of "treaty federalism" is developed as an alternative approach to understanding the past and future of Indian Tribes in the United States.

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> It should be noted that the international dimensions of these treaties have been supplemented in two important respects by the courts of the United States. First, the canon of construction for these treaties requires that they are to be interpreted as the native negotiators . . . would have understood them. Second, treaties are to be interpreted liberally by the courts, with ambiguities resolved in favor of indigenous interpretations. (Morris 1992:66; citations omitted)

Such interpretive guidelines represent an attempt by the courts to recognize not only the structure of another culture but also the role played by that structure in the interpretation of any treaty negotiation and resulting treaty contract. These guidelines are extremely general and onerous, presupposing both a repertoire of interpretive tools on the part of federal courts and the translatability of indigenous interpretations into the terms of the court. Nevertheless, they represent a powerful and unparalleled legal procedure.[10]

Should the treaty right itself be upheld in litigation, the court then goes on to a second interpretive task—an assessment of the status of the tribe making the treaty claim. Extended inquiries are carried out to assess the relationship between the culture and political organization of the treaty tribe(s) and the tribe(s) placing treaty claims before the court. A number of criteria for defining Indian Tribes are found in U.S. caselaw (see sec. II); however, contemporary "native interpreters" at this stage of litigation find no standards requiring a "liberal interpretation" of culture. Judicial decisions always render a metanarrative about the change or continuity of the cultural identity of the relevant Indian Tribes, which then forms the basis for the court's assessment of the integrity of tribal identity. Changes from some singular, permanent, authentic, and original form of tribal organization indicate to the court breaks in tradition, and are often the basis for the court's conclusion that a tribe's identity has dissolved, is illegitimate, or is constructed on an arbitrary basis (see Lyotard 1988 for a more general description of this phenomenon in litigation).

At issue in this second stage of interpretation is not merely the fact that the court demands some particular content of identity be proven by tribes. As important is the fact that federal approaches to interpretation presuppose a particular form that legitimate collective identity takes. While caselaw has explicitly stated that Indian Tribes have the right to change (Wilkinson 1987:68–74), in the metanarratives produced at this second stage of treaty rights litigation, the courts tend to deny the abrupt dev-

[10] Mertz (1988a) compares the extensive treatment of Native American history in U.S. litigation that has resulted from these canons of construction to the dearth of black history in colonial South African policy. Mertz uses *United States v. Washington* (1974), described below, as a case in point.

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astation, loss of population, and reorganization of relations among indigenous peoples that resulted from contact with Europeans; the abrupt transformations imposed on indigenous peoples through the law; and the cultural forms through which indigenous communities have negotiated such violent changes.

As Elizabeth Mertz (1988b:375) has noted about collective attempts to use legal discourse generally:

> [W]here the focus is upon social groups gaining a voice in legal outcomes, the "speaker" is generally a court or legislature, through whose case-law or statutory language a group's voice is translated. As we shall see, even where a group's political views or legal positions are adopted in a court's opinion, there remains a serious question as to whether we are hearing the group's voice or that of the court. A very different kind of narrative control is implicated here, for the social groups are clearly not "telling their own stories." Rather, they are seeking to hear their story acknowledged in authoritative legal texts; they gain control not by writing the texts themselves, but by exerting some sort of influence over the narrative produced by others.

Treaty rights litigation is an extreme instance in U.S. law of the phenomenon Mertz describes, for the stories that are told in the opinions in treaty rights cases are not only the stories of the dispute at hand or the treaty contract in any given case; they are also stories of the history of the culture and collective identity of indigenous groups in their entirety.[11]

Yet, while the court produces extensive narratives about tribal cultures and maintains a powerful control over the stories told by and about tribal members, no account of the culture of the court, or the creative force of the social indexes at work in the law, is produced in the genre of treaty rights. Even when the court acknowledges, for example, that the term "Indian Tribe" is inadequate to account for the diversity of social identity among indigenous peoples, as did Judge Marsh in his opinion in the Colvilles case, it argues that no more adequate definition can be found in the law. And, rather than taking account of the role that the law has played in constructing the very concept of Indian Tribes, the court maintains that in the law there exist only rules and procedures for defining tribal cultures, while tribal cultures exist entirely outside of the law. Indeed, the court's fundamental cultural presupposition is that it is not a cultural institution at all.

The remainder of this essay aims to bring into relief the dynamic between some of the major cultural forms, legal and nonlegal, indigenous and nonindigenous, relevant to the Colvilles'

[11] Of course, other narratives may be invoked by attorneys and incorporated into judicial opinions in treaty rights cases—stories of nonindigenous communities, of the "public interest," and of nature itself. Nevertheless, the two-step interpretive procedure described above necessitates that the core of treaty litigation include judicial interpretations of treaty events and the continuity of tribal cultures.

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current fishing rights litigation. The enormous historical and anthropological detail presented by the Colvilles' attorneys and the attorneys for those Indian Tribes contesting the Colvilles cannot begin to be addressed in a single essay. Instead, starting with the contemporary fishing rights dispute and then looking back, I develop an intergenerational perspective on the identities at stake in this case. Because names are such a ubiquitous fact of culture through which group identity is created, maintained, and transformed, they are the focus for an analysis which takes the abrupt transformation of social relations in colonial contexts as its only presupposition.

II. The Legal Precedent: Resolving Disputes through Language and Names

The treaties at issue in the Colvilles' current litigation have been previously considered by the federal courts for a number of purposes. Among these treaty revisitations is the case in which the Colville Tribes are attempting to intervene, *Sohappy v. Smith* (1969), which was consolidated with *U.S. v. Oregon* (1969) in 1968.[12] *U.S. v. Oregon* (1969) is one of a trilogy of landmark fishing rights cases to come out of the Pacific Northwest over the past 30 years in which a single phrase, "the right of taking fish at all usual and accustomed places," has been scrutinized and interpreted by the federal courts.[13]

This flurry of litigation arose out of violent disputes between Indian and non-Indian fishers and years of litigation in the state courts, litigation that resulted in the denial of treaty-based fishing rights at the state level. This political, economic, legal, and cultural dispute escalated for years before the federal government stepped in to assist the numerous indigenous groups whose treaty rights were being violated and to protect indigenous fishers, whose lives as well as livelihoods were threatened. This "Indian-white" dispute finally evolved into a conflict between local-state interests and the federal government, for while the federal

[12] *Sohappy* was brought by Yakima tribal members seeking to affirm their treaty rights. *U.S. v. Oregon* was initiated by the federal government to affirm the treaty fishing rights of all the tribes in the Columbia River Basin. Numerous legal actions, judicial orders, and negotiated agreements have resulted over the past 26 years. See especially American Friends Service Committee (1970:200–208), Cohen (1986), and Wilkinson & Conner (1983) for complete information.

[13] In addition to *U.S. v. Oregon* (1969) and *United States v. Washington* (1974) discussed below, this includes *Puyallup Tribe v. Department of Game* (1968). *United States v. Oregon* (1969) was upheld on appeal, and the *Puyallup* and *United States v. Washington* decisions were largely upheld by the Supreme Court. See especially Institute for Natural Progress (1992) for a concise review of these cases and American Friends Service Committee (1970) and Cohen (1986) for an account of the history of these cases and the larger context out of which they arose. This larger context and the Native American activism in the Pacific Northwest around fishing rights has been said to have "plainly foreshadowed the American Indian Movement and other militant organizations of the 1970s" (Institute for Natural Progress 1993:222).

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court found in favor of Indian Tribes, non-Indians at the state and local level continued to harass Indian fishers.

> In 1978, the Ninth Circuit Court of Appeals . . . went on record comparing the situation in the Northwest to that earlier experienced during the Civil Rights era in Georgia, Mississippi and Alabama: "Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate the decree of a federal court witnessed in this century." (Institute for Natural Progress 1992:224)

United States v. Washington (1974), known as the Boldt decision, established and continues to operate as among the most far-reaching powerful precedents in treaty-based fishing rights in U.S. caselaw. In that case Judge Boldt of the District Court of Washington not only found in favor of off-reservation fishing rights; he found that the tribes of Washington State retained the right to up to 50% of the annual catch of fish based on treaties signed in the mid-19th century. Following the general canons of construction outlined above, Judge Boldt consulted experts to assist him in reconstructing 19th-century tribal culture, including a reconstruction of the definition of the phrase "all usual and accustomed places" in Chinook jargon, the 19th-century trade jargon in which the treaty negotiations of the 1850s were carried out. Largely on the basis of his interpretation of this phrase in Chinook, Judge Boldt found in favor of the tribes' treaty rights. Such an analysis of the definitions of words—their referential meaning—is a significant resource for inquiries into the interpretation of indigenous treaty signatories. However, as is shown below, such analysis of the content of language or its referential level of meaning, as distinct from its pragmatic forms, is only one interpretive tool for reconstructing the relationship between language and culture relevant to treaty rights cases.

Having interpreted the treaties at issue in favor of Indian fishing rights generally, Judge Boldt went on to the second stage of treaty rights litigation—to assess the relationship that contemporary Indian Tribes have to these secured rights. The court's rationale for this second stage of treaty rights litigation is described by Judge Marsh in his opinion in the Colvilles' current case: "The 'sole purpose' of requiring proof of tribal status is to ensure that the group asserting treaty rights is the group named in the treaty" (*United States v. Oregon* 1992:1567). This assessment of collective names and identity focuses on the cultural and political organization of Indian Tribes. The criteria or qualities whereby "the maintenance of an organized tribal structure" are generally assessed are (1) attributes of sovereignty, (2) recognized political entity by the United States, (3) legitimate procedures for establishing identity, and (4) a continuous, separate, and cohesive Indian cultural or political community (ibid.) Many of the plaintiff tribes in *United States v. Washington* were denied their rights on

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the basis of Boldt's interpretation of the status and continuity of their tribal structure with regard to these criteria. These tribes continue to struggle with the legacy of the "Boldt decision." The mixed result of *United States v. Washington* are a poignant example of Mertz's (1988b:375) caution that "even where a group's political views or legal position are adopted in a court's opinion, there remains a serious question as to whether we are hearing the group's voice or that of the court." Nonetheless, the Boldt decision remains a victory in the fight for off-reservation fishing rights, and has been upheld by the Supreme Court and followed by the federal court in recent cases in Wisconsin, Michigan and Minnesota (see Whaley with Bresette 1994).

The precedent set in *United States v. Washington* (1974) was applied in an amending order in 1974 to *U.S. v. Oregon* (1969), the case in which the Colville Tribes are seeking to intervene. As stated above, *U.S. v. Oregon* (1969) is a consolidation of two cases. The conflict from which the litigation arose began between members of the Confederated Tribes and Band of the Yakima Nation and the state of Oregon. Ultimately, through a series of interventions, three additional tribes of the lower Columbia River—the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho—and the states of Idaho and Washington intervened as parties to this case. In *U.S. v. Oregon* (1969) Judge Belloni of the District Court of Oregon found that the treaties secured the right to fish at "all usual and accustomed places" in the Columbia River Basin. The court also affirmed that these four lower Columbia River tribes are legitimate successors to these treaties.

To permit these tribes to exercise this right, the court went further, naming these four Tribes, who had in the meantime formed the "Columbia River Intertribal Fish Commission," and requiring that they be included along with federal, state, and commercial entities in managing and regulating fisheries in the Columbia River Basin. The District Court of Oregon, now under Judge Malcolm Marsh, continues to maintain and actively exercise its jurisdiction over the Columbia River Management Plan which was required by and negotiated by these parties as a result of *U.S. v. Oregon* (1969) (*United States v. Oregon* 1992:9; see also Wilkinson & Conner 1983). Thus, *U.S. v. Oregon* (1969) and *United States v. Washington* (1974) have set a precedent for more than tribal rights to fish. This litigation has contributed to the transformation of property rights discourse, that is, to the development of a policy and procedure for the co-management of natural resources. It has also contributed to the development of a hybrid or multiparty form of regulatory discourse and a procedure for deliberation that reflects the reality of the overlapping jurisdictions that rivers and fish imply (Wilkinson & Conner

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1983:108). This precedent has provided momentum for use of the policy of "co-management" as a means of resolving jurisdictional disputes elsewhere, both in and out of the courts (Pinkerton 1989; Whaley with Bresette 1994).[14]

U.S. v. Oregon (1969) also provides the first of several instances of the creative cultural force of naming relevant to the Colvilles case. In naming the four tribes of the Columbia River Intertribal Fish Commission as *the* representative of tribal interests in the Columbia River Basin, the court laid the groundwork for the conflict with which the Colvilles are currently faced. Thereafter, the fishing activities that Colville members had long conducted off reservation became legally contestable. Hence, the conflict in the current Colvilles' case is not extrinsic to the law but was produced in part by the court's act of legal naming as a means to resolve this regional social, political, and economic dispute.

Although *U.S. v. Oregon* (1969) has evolved through a series of interventions by states and tribes, the fact that the Colville Tribes did not attempt to intervene until 1989 is cited among the facts relevant to the denial of their claims by both the district and appeal courts. During the 1960s and 1970s, as the Pacific Northwest fishing rights litigation was at its peak, the Confederated Tribes of the Colville Reservation were defending their sovereign rights in the arena of federal policy. While litigation in the 1960s and 1970s marked a high point in Native American rights discourse, federal policy did not. From the 1950s through the 1970s the United States adopted a policy of "termination" toward Indian Tribes, a policy through which the federal government's responsibilities toward Indian Tribes were to be permanently ended through House Concurrent Resolution 108. The federal government initiated this process by selecting a handful of tribes for termination, among them the Colville Tribes.[15]

The Colville Tribes fought for their right to maintain their status as a federally recognized Indian Tribe for almost 15 years, until the era of termination began to give way to the current era of federal Indian policy, the era of self-determination, represented by the Indian Education and Self-Determination Act of 1975. As Deloria has noted, the Colville Tribes provided leadership at the national level in the fight against the devastating federal policy of termination. In turn, this period of Colville leadership may mark a high point in public awareness of and knowledge about the Colville Tribes. Yet, as Deloria (1988:75)

[14] Treaties may yet be found to have further implications in this crisis: "A second phase [of *United States v. Washington*], still pending, questions whether . . . the treaties might be construed as protecting the fish themselves against destruction of their habitat" (Institute for Natural Progress 1992:223).

[15] See Deloria 1988:72–77 for a review of the Colvilles struggle against termination and a discussion of the policy of termination more generally.

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also noted at the time, "Interest on the Colville termination has not been great because the problem of fishing rights in the same area has received all of the publicity." Given the life-and-death battle in which the Colville Tribes were engaged as a result of federal policy and the interventionist nature of this case, it seems ironic that the court would now question the Colvilles' late intervention in the arena of fishing rights litigation.

The Colville Tribes have also been involved in activism and legal negotiations since the 1970s that directly concern the loss of the natural and cultural resources resulting from hydroelectric dams on the Columbia River. The Grand Coulee Dam, the largest hydroelectric dam in the United States, was opened in 1939 on the southern boundary of the Colville Reservation. This dam is located 100 miles south of the Kettle Falls fishery, which was an important center of social and economic activity in the upper Columbia region until the dam destroyed the falls. Kettle Falls and 11 indigenous communities located on the Columbia River between Kettle Falls and the dam were submerged under Lake Roosevelt, the impoundment created by the dam. In addition to destroying this particular fishery, the dam proved devastating to the anadromous salmon population. The construction of the Grand Coulee Dam, coupled with a second dam, the Chief Joseph Dam, has left the Colville Tribes with no access to active fisheries within or on the boundaries of the Colville Reservation. The Colville Tribes have just negotiated a settlement that has been decades in the making with the federal government and the Bonneville Power Company for losses sustained by the opening of the Grand Coulee Dam. This concurrent legal discourse, which figures so formatively in the story of fish, identity, and Colville history, was not part of the relevant narrative constructed by the court, because it is not part of the history of the treaties relevant in *U.S. v. Oregon* (1969).

As the Colvilles' case has evolved, many essential elements of the legal discourse produced in *U.S. v. Oregon* (1969) have shifted. In contrast to the earlier litigation in *U.S. v. Oregon*, both the federal and relevant state governments have refrained from actively participating in the litigation of the Colvilles' case, voicing no support for or opposition to the Colvilles' intervention. Attorneys for the Confederated Tribes and Bands of the Yakima Nation have taken the lead in contesting the Colvilles' claims. Attorneys for the Nez Perce Tribe have also submitted briefs and oral arguments. Whereas earlier litigation focused on Indian and non-Indian interests and on the purported threat to the fish population should Indian rights to off-reservation fishing be upheld (American Friends Service Committee 1970), concerns over conservation were absent from the trial proceedings in the Colvilles case. Finally, in contrast to the earlier conflict, the Colville Tribes' legal battle has received little public attention.

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Because the phrasing of the relevant treaties was considered and upheld in *U.S. v. Oregon* (1969), the questions faced by the court in this case are limited to the issue of the Colville Tribes' relationship to these treaties—to the issue of naming and the question of the "maintenance of organized tribal structure." The fact that only six of the tribes confederated today as Colvilles were signatories to this treaty framed the court's inquiry at trial. The bulk of the evidence from military documents and social-scientific documentation and the testimony presented by and elicited from expert anthropologist and lay tribal witnesses took the form of descriptions of and narratives about the indigenous signatories to the treaties at issue and their ultimate relocation to the Colville Reservation and membership in the Confederated Colville Tribes. The evidence and the essential arguments were submitted in advance. The three-day trial in July 1991 was limited to a questioning of the written testimony of the expert witnesses and the testimony and questioning of lay tribal members. In his findings Judge Marsh concluded: "such an amalgam of arguments—of maintaining distinct organized tribal structures while also 'merging' into the Colville Confederacy—becomes inconsistent with itself" (*United States v. Oregon* 1992:1570). This was the basis of his denial of the Colvilles' claims.[16]

In framing the question of Colville identity in this manner, Judge Marsh construed the Colvilles' relationship to this treaty in either/or terms: either they are legitimate descendants of signatories to these treaties or they are something else; either they have maintained a linear and seamless identity or there are gaps in this identity and, hence, a loss of their integrity as communities with defensible rights (on this form of legal reasoning about identity in federal Indian law, see Clifford 1988:341). In construing membership in this singular fashion, the court is drawing on culturally based notions of identity that are as deeply embedded in the interpretive framework of the contemporary court as they were in the several centuries of treaty making. In addition, while the present-day court intends to account for and favor tribal interpretations of treaty events, it excludes from its discourse an account of indigenous and nonindigenous procedures of identity formation. These presuppositions about identity are a blind spot in federal Indian law and in American legal culture more generally.

[16] I cannot emphasize too strongly the fact that this is a particular construal of the evidence and testimony. On the basis of evidence and testimony the Colville Tribes attorneys have repeatedly shown that the Colville Tribes fulfill even the court's problematic criteria for assessing tribal structures.

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III. Identity, Places, and Names in the Pre-national Context

The 11 Confederated Colville Tribes did not share a single aboriginal territory, a single political organization, or the same language, though 9 of the tribes spoke dialects of Interior Salish. These are not, however, the traditional criteria on which collective identity was based in the Columbia Plateau region, where all these tribes resided. (The Columbia Plateau extends from the Rocky Mountains, on either side of the U.S.-Canadian border, to the Cascade Mountains.) Ironically, despite the nomadic characterization of indigenous peoples in the narratives produced in federal courts, places of residence on the Columbia River and its tributaries have always been among the primary indexes of group identity among the tribes confederated today as Colvilles. Thus, rather than begin where the court does, with the rather abstract notion of political organization, I begin with one place important to all the groups currently confederated as Colvilles.

On the upper Columbia, just north of the current northeastern corner of the Colville Reservation, is the site where Kettle Falls (or *Swah-netk-qhu,* as it is known in Interior Salish), one of the largest and most abundant fisheries on the Columbia River, was located (Miller 1990:6).[17] Salmon caught at Kettle Falls was fundamental to the symbolic and industrial economy throughout the upper Columbia region, with fish constituting up to half the diet of the indigenous groups in that vicinity (Chance 1973). Before construction of the Grand Coulee Dam, to the extent that any single place could be called the center of this area, Kettle Falls was that place (Cline et al. 1938:75).

Each summer the Colvile were joined at Kettle Falls by the members of other Interior Salish- and non-Salish-speaking communities from throughout the region to fish, trade, visit, and establish intergroup alliances including marriages:

> Besides the 700 to 1,000 **Colvilles** and 300 or so **Lakes**, the Kalispels also came in large numbers. . . . Other tribes that sent representatives in great regularity were the **Okanagan**, **Sanpoil**, Spokan, Chewelah, and the Kutenai. Smaller numbers came from the **Columbia**, Similkameen, Flathead, Coeur d'Alene, **Palus, Nez Perce, Piscous, Methowy,** and Shushwap tribes. August was the favorite time to come, after the Colvilles and their

[17] For information on the Kettle Falls fishery, see Miller 1990; Teit 1930; Ray 1933; Cline et al. 1938; Chance 1986. I must emphasize that selective "slices" of these and other ethnographic sources, all of which became part of the legal discourse in this case, are presented here. I have also chosen to avoid specialized terms of anthropology. So, e.g., the use of the term "family" in what follows is a gloss used for clarity. It should, however, be noted that the kinship system throughout this area is both bilateral (equal recognition of maternal and paternal sides of the family) and extended (the core family group consisted of children, parents, and grandparents; in fact, where grandparents had died, new grandparents might be adopted).

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> closer allies had had the fishery more or less to themselves for almost six weeks. . . . As many as two to three hundred lodges were observed at the fishery in the last century, and through the season three to five thousand people would have been present. (Chance 1986:42; the tribes highlighted include all the groups now confederated as Colville Tribes)

The Kettle Falls fishery was managed ceremonially, under the guidance of the Colvile Salmon Chief, who directed appropriate uses of fishing gear, the river, and the fish. The Salmon Chief daily distributed the fish among those present. This use of the word "chief," which is common usage in ethnographic and ethnohistorical texts, must be distinguished from a strictly political index. The role of the Colvile Salmon Chief has generally been understood by ethnographers as ceremonial rather than political (Ray 1933). What are characterized in ethnographies and histories as "political activities" were carried out primarily at the village level throughout the region. However, this distinction does not resolve the problem, for, whether ceremonial or political, chiefs were never entitled to act as representatives able to speak for their communities. As Verne Ray (1933:112) has noted of chiefs at the village level among the Sanpoil and Nespelem:

> All adult members of a village, male and female, were entitled to a place in the general assembly. All members had equal rights; these included the right to speak and vote. . . . Only the chief called meetings of the assembly but he referred all matters of importance to the people in this manner. . . . At other times his status was identical with any other member.

After the Salmon Chief ceremonially began each fishing season, some members of these indigenous groups stayed to fish, game, and visit while others traveled to gather resources elsewhere. The spring, summer, and fall were marked by these fishing, hunting, and gathering routes. In the winter, families moved with their harvests to permanent village sites, usually located along the river systems in the area. Throughout the winter families traveled to more strictly social and ceremonial gatherings. The Plateau region was mapped by these social, symbolic, and economic cycles of visiting; ceremonial events; and hunting, fishing, and gathering. As these flexible but well-determined routes suggest, the Plateau region was marked by the continual interaction of individuals and families associated with different places. Collective indigenous membership was associated with places on these routes, not with summer fishing sites but primarily with winter villages or locations. Among all the tribes of what is today eastern Washington State, permanent winter village sites/locations formed the basis of "political" or group membership (Spier 1936:5). This well-established cyclical pattern, associated with long-standing places of indigenous activity, is what the contemporary court, including the appeal court in the Colvilles case, has

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characterized as a nomadic life (*United States v. Oregon* 1994:6797, 6801).

This place-based form of membership in the middle and upper Columbia area has been widely commented on by anthropologists. Spier argued that among Okanagans "nationality" was not understood in terms of nativity but of major residence (Cline et al. 1938:87). Verne Ray (1933:109) stated that among the groups known today as Sanpoil and Nespelem, "[t]he inhabitants of a village were known by the name of that village plus the prefix 's' or the suffix 'x^{u},' or both. No term existed for any larger political aggregation, but there was a name for the more inclusive dialectic division." Elsewhere Ray (1939:8) offers another example of the use of this Interior Salish naming formula:

> An example is the village of Kartaro, situated midway between Sanpoil and Southern Okanogan centers. . . . If specifically asked, a non-native resident of Kartaro will give the village of former residence; but if merely questioned, "What is your nationality?" the invariable response is, "I am Skartaro [ska · γ' x^{u}]."

As this example suggests, indexing membership to place in this manner does not indicate a static code of identity. This form of identity is not comparable to identity based on any ascriptive or permanent characteristic such as race or caste, or on membership in a single village community, for the boundaries between these communities were relatively open ones.

Ray (1933:109) has argued that among the Sanpoil and Nespelem it was the exception rather than the rule for individuals to maintain a single residence throughout their lives. Individuals and families might relocate for any number of reasons. Marriage, for example, between members of various villages and dialect groups was common throughout the region, marriage rules for residence with a woman or man's parents were often flexible, and serial monogamy was not uncommon. These are only a few of the factors that might influence residence and, hence, the use of the Interior Salish naming formula for identifying one's group membership. Even these few ethnographic details begin to reveal the potential density of the layering of an individual's identity as a member of a "political" community through time, in relation to a relatively permanent map of winter village sites/locations.[18]

[18] See Ray 1933:14–21 for a list of such permanent villages located on the rivers of the Columbia River Basin. See also his p. 11 for a list of Salish terms used by the Nespelem and Sanpoil, in which the technique of attaching a nominal prefix and a suffix meaning "the people" is the form used to refer to other indigenous groups from throughout the areas. This form was, then, not only used in self-identification by village but to refer to other groups by area/dialect. Ray's list suggests that this naming formula and a place/location of residence is more important in understanding the essentialization of identity throughout the area than is the more static European notion that "political organization" can be distinguished on the basis of whether groups were organized by village *or* tribe. In this regard, Anastasio 1972 has suggested a network of intergroup relations based on

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This highly localized pattern of identification and community deliberation has generally led both ethnographers and the courts to characterize the indigenous peoples of the middle and upper Columbia Plateau region as having an "informal political organization," because no single political structure or individual controlled or determined the relationships between communities. However, though social relations were not highly elaborated in terms of a regional hierarchy of permanent roles, they were highly elaborated through this intragenerational pattern. Says Ray (1933:110): "This constant shifting and intermixture created a strong feeling of unity among these otherwise independent villages. . . . Moreover, the various villages made use of the same hunting and berrying grounds. These grounds were not considered either village or group property. No concept of real property existed." Instead of a concept of fixed, individual or corporate real estate, cultural procedures existed for negotiating social relations at the local level, among them this naming procedure, through which those individuals entitled to participate in community deliberations about the use of local resources were recognized.[19]

To this intragenerational layering is added an intergenerational dimension of collective identity, which was also indexed to place. Besides identifying oneself with regard to one's present residence, individuals identified themselves by way of their genealogy, including, at least, both of their parents' parents. Rather than simply using a personal name to refer to one's grandparents, in this genealogical formula each grandparent was identified with a particular place or area:

> Present day informants have great difficulty in answering the apparently simple question, to what tribe or triblet do you belong. This is because the majority combine in their immediate ancestry affiliation with a number of local groups. That this is not at all a recent phenomenon is evidenced by the early accounts, which record the pride displayed in studied intermarriage with other peoples, especially in the aristocratic classes. (Spier 1936:5)

Hence, while an individual's self-identification might index several places successively within his or her lifetime, when that same individual was indexed genealogically by children and grandchildren, he or she came to be associated with a particular place/

"task-groups" is a more accurate way of describing social life than this "village-tribal" dichotomy.

[19] Of course, other forms of property did exist in these communities. Of the Okanagan, for example, it has been argued, "Food sites and tribal territory theoretically belong to the tribe, but all friendly tribes are welcome to share the hunting, fishing and food gathering sites at any time. All other property is strictly personal. Husband and wife do not have common possessions. Even stored food is not a common possession. It belongs to the woman and is hers to barter away as she sees fit. There are three types of inheritable properties: material possessions, personal names, and power" (Cline et al. 1938:91).

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area. The routes mapped by family visiting during the winter and by the movement of relatively small groups of extended families (children, parents, grandparents) to regular sites for gathering resources in the spring, summer, and fall, suggest that intergenerational relations indexed a set of places from which families were likely to choose in determining their annual economic and ceremonial round. Thus, while neither one's "political" membership nor one's genealogy granted permanent abstract "rights" to real estate, both indexed places where the shared rights to such resources were historically exercised. At the intersection of these intra- and intergenerationally indexed aspects of identity, collective membership was essentialized by being layered into space and time, rather than out of them, and cultural formulas of naming provided a way of negotiating this transformation over time.

In her tribal history, Mourning Dove (*ca.* 1887–1936), a Colvile-Okanagan-Lake writer, related one account of first contact and the beginning of the era in which these networks of names and places were fundamentally reorganized.

> The first white explorer to enter our country was David Thompson of the Northwest Trading Company of Montreal, a rival in the fur trade with the great Hudson's Bay Company. Thompson came down the Columbia River in the late spring of 1811 and arrived at the falls [Kettle Falls] while people were busy with the chinook/king salmon run. He saw fish traps lining both sides of the river. My great-grandfather, Chief See-wehlken, welcomed this small party of travelers, including several half-breeds, which my people had never seen before. As a good host, he gave them the finest salmon. (Miller 1990:149; citations omitted)

Due to the prosperity of Kettle Falls, over the next five decades this area became a significant site for the contest between British and American fur trading interests and, in the background, for the negotiation of the boundary between Canada and the United States. Again, as reported by Mourning Dove,

> In 1821 the Northwest Company merged with Hudson's Bay, which began a post at Kettle Falls in 1825 named for Andrew Colvile, London governor of the company. The name of the fort was transferred to my tribe by usage over time. Before then, visitors knew us by several names. Early French-Canadian trappers called us les Chauderies (the Kettles) and Americans knew us as the Kettle, Bucket, Cauldron, and Pot Indians. Always we were linked with the falls. (Ibid., p. 150; citation omitted)

More than a mere change of name occurred in this pre-national colonial period of exchange. The shift in the practice of group naming described by Mourning Dove is twofold. While these indigenous communities continued to be associated with a place, a shift from an identification with Colville winter villages

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to their summer site occurred. Second, there was a shift from a hybrid, layered index of identity to a permanent and timeless index. Whether the name was "les Chauderies," "Kettle," or "Colville," local Europeans and European Americans used these names to designate permanent and ascribed membership in an aggregation of villages that was considered to be a discrete group or tribe of Indians. That a particular, personal European name "Colvile" came to be used to refer to these people is secondary to these shifts in the mapping of identity. The Colville share with other indigenous groups of the Plateau this consolidation of identity in tribal terms. Other groups were generally identified not with personal English names but with names of Interior Salish or other indigenous languages of origin, names that pointed to an area, dialect, and/or predominant geographical feature through which aggregations of communities were identified. All such names were used as permanent and singular indexes of these groups *as tribes* and of the members of these groups *as Indians*. These new names initiated a decontextualization of indigenous identity, a remapping from indigenous into tribal terms.

Over time the name of the far-off Hudson's Bay governor came to be associated not only with Kettle Falls and the indigenous groups living in the vicinity of the falls but also with the richness of natural resources throughout the area—to the east of the Colville Reservation, for example, is the town of Colville, located in the fertile Colville Valley. The use of Andrew Colvile's personal name indexed and continues to index not only the political colonization of indigenous peoples but also the economic colonization of an entire region. That the people living in the Kettle Falls area in the late 19th century as well as the confederated tribes are called "Colville" suggests the centrality of Kettle Falls to the economic colonization of the upper Columbia region. As a result of this economic colonization during the prenational colonial period, new kinds of social relations and new cyclical routes were mapped into the indigenous context (Chance 1973; Ackerman 1988).

Among those new relations was, for example, the marriage of indigenous women to fur traders residing at the trading post at Kettle Falls. The majority of employees at Fort Colville married indigenous women (Chance 1973:83). As a result a new kind of name, the family names of European men, entered Colville history through marriage. The children of indigenous women and nonindigenous men were given European first and last names, as were the children of converted parents and those children who attended boarding schools (Miller 1990:96, 150–52). Yet, even with regard to personal names, this transformation followed indigenous patterns rather than non-Indian ones, using the technique of layering we have already seen with regard to collective names (ibid., pp. 74, 96). Mourning Dove herself is an example

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of this layering with regard to personal names. I have found 12 personal names associated with Mourning Dove, each name indexing particular events or relationships in her life, some of Interior Salish origin and others being English in origin, some used as terms of reference and others being gifts that she simply possessed. Her names represent distinct kinds of names given and used in different contexts and for different purposes.[20]

In summary, though all the tribes now confederated under the name Colville did not share a single political organization, nor did they necessarily identify with villages once located on the current Colville Reservation, members of all these groups traveled annually to Kettle Falls, as well as to other regional fisheries, and intermarried and established other intergroup alliances in their travels there. In the generations immediately preceding the precolonial era, and in the generation during which colonial contact was made, a significant factor in the formation and performance of group identity was a set of intra- and intergenerational naming procedures for creating, maintaining, and layering identity in relation to place. These practices were traditional foundations of continuity and cultural essentialization, as they were a means for negotiating change over time. There were and continue to be differences between the indigenous groups now confederated as the Colville Tribes (see Ray 1939). However, this introduction to only one cultural procedure for establishing social identity and membership begins to suggest the outlines of the form of identity they shared. The influence of colonial naming in the pre-national period set into motion other cultural forms, in which collective identity was abstracted from specific and permanent places, a process that foreshadowed the form taken by the legal names that come to be associated with the indigenous groups of this region in the national period.

However, these shifts in personal and collective names initiated in the pre-national colonial period had a profound but limited influence on the self-identification of these people as social groups. As late as 1933 Verne Ray (p. 9) could still make the claim of the tribal names "Sanpoil" and "Nespelim": "The natives themselves have never adopted these designations. A man's nativity is still indicated by the old village group name, consisting of the village name plus a personifying prefix and suffix."

IV. Race, Place, and Names in the National Context

In 1846 the boundary between the United States and Canada was established by treaty, initiating the nationalization of the Pacific Northwest. The region, already populated by fur traders and

[20] On personal names see Ray 1933:113–14; Cline et al. 1938:104–5. See also Silverstein 1984 where the pragmatics of personal names are more generally addressed.

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missionaries around centers of economic activity, was opened by the federal government for the mass settlement of "whites," or more accurately, nonpropertied, European American men, and, sometimes, their families. Disputes between highly localized indigenous groups and transient nonindigenous "settlers" immediately intensified. The presence of U.S. military forces in the region swelled in response to such conflicts. It was at this time that Fort Colville at Kettle Falls was transformed from a trading post to a military post.

Simultaneous to Washington being granted the status of territory in 1853, the federal government sent Isaac Ingalls Stevens as first governor and acting superintendent of Indian Affairs. Stevens was to deal with the "Indian problem," to survey routes for a transcontinental railway, and to separate "Indians" and "whites," which he did through a legal discourse of racial indexing (American Friends Service Committee 1970:18–40). His original plan for Washington was to "remove the various tribes and bands in the Northwest to one or two large relocation areas—not reservations in the sense of reserved partitions of their own, but rather other land to which they would be relocated" (ibid., pp. 20–21). He used the genre of treaty making with the intention of reducing differences between diverse "Indian tribes and bands," denying as well the intermarriage and commerce between indigenous and nonindigenous people already well under way at this point (American Friends Service Committee 1970:18–40 outlines Stevens's campaign).

Stevens was ultimately forced by indigenous negotiators to make his way across Washington territory, making many treaties that reserved portions of land for numerous confederations of indigenous groups, from the Olympic Peninsula to Montana. Beginning on the coast and moving inland, Stevens invited "Indian representatives" to meetings at which he intended to outline treaties and persuade indigenous representatives to sign these agreements. As he moved east along the Columbia River, Stevens's negotiations became increasingly difficult. He was forced not only to negotiate with representatives from many indigenously defined areas; he was forced as well to incorporate indigenous demands directly into the texts of these treaties. Even then, indigenous leaders disputed the results of treaty negotiations—contesting federal interpretations of what had transpired in these negotiations and complaining of the failure of U.S. promises to stop incursions into Indian territory by the nonindigenous population.

In addition to attempting to colonize "Indians," Stevens intended to consolidate a "white" national citizenry through treaty making. Through treaties the federal government attempted to assert national rather than local authority over property rights and over boundary disputes between indigenous and nonindige-

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nous people. The formula followed by treaties explicitly addresses this; the Yakima Treaty of 1855 (art. 2), for example, states: "nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." Despite such clauses, settlers continued to resist federal policy, incursions by nonindigenous people into indigenous communities continued, and violence throughout the region continued to escalate. With both indigenous and nonindigenous people contesting the results of these treaty negotiations, "Indian Wars" broke out in the wake of Stevens's negotiations. As a strategy for solving the national "Indian problem," then, treaty making was neither a seamless nor a singular event. Nevertheless, in 1854 and 1855 Stevens managed to make eight treaties, including the three treaties at stake in the Colville Tribes' current case, the treaties signed at the Walla Walla Council held in July 1855 in Walla Walla, Washington.[21]

At the Walla Walla Council Steven intended "to lump Spokans, Cayuses, Wallawallas, Umatillas, and Nez Perces together in the Nez Perce country, and to place on a single reservation in the Yakima country all the tribes and bands along the Columbia River from The Dalles on the south to the Okanogan and Colville valleys on the north" (American Friends Service Committee 1970:33). Thus, Stevens intended that two treaties and reservations would include all the Columbia River Tribes. Ultimately, three treaties resulted from the Walla Walla Council—the Yakima, the Umatilla, and the Nez Perce Treaties of 1855—while treaties with the Spokans and the groups located in the Okanogan and Colville Valleys in the upper Columbia region were postponed to allow Stevens time to reach his next scheduled negotiations with the Blackfeet, who were perceived as a military threat. As compared with many of tribes with whom treaties were signed, the "tribes and bands of the Okanogan and Colville valleys" were perceived as less of a military threat by the federal government (Miller 1990:152–53).

While Stevens was ultimately forced the alter his intentions with regard to the Walla Walla council, the three treaties signed there and the use of treaties as a genre of legal discourse transformed social relations in the region in unintended ways. The federal court acknowledges these unintended effects, as shown in the following quote from Judge Marsh's opinion in the Colvilles case.

> As the parties agree, Indian culture at the time of the Stevens treaties was vastly more complex than the treaties recognized. . . . This awkwardness is further exacerbated by the *nature of the treaties themselves* which were designed and created by

[21] Trafzer (1993) critically reviews the available scholarship on the Walla Walla Council.

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> Governor Stevens in haste, at a time when he was under pressure from the federal government to extinguish Indian title to all lands and relocate Indians to reservations. See *United States v. Washington,* 520 F.2d 676, 688 (9th Cir. 1975) ("tribes" in western Washington were *constructed arbitrarily* by Stevens for convenience in negotiating treaties). Through Governor Stevens and the treaty commission, small tribes or bands were grouped or consolidated into *larger tribal units that became entities* with which the United States negotiated the treaties., United States v. Washington, 384 F.Supp. 312, 354–55 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed. 97, *reh'g denied* 424 U.S. 978, 96 S.Ct. 1487, 47 L.Ed. 2d 750 (1976). (Emphasis mine)

More than merely referring to already established indigenous identities, these tribal designations created new forms of membership. It is these tribal designations of legal origin that the federal government now recognizes as the basis for its government-to-government relationship with indigenous communities. However, the court neglects to note that this legal use of names is itself cultural and structured, for such linguistic improvisations are never as arbitrary as the quotation from Judge Marsh's decision implies. To understand the nature of these effects of language use in treaty documents, I will address the text of the Yakima Treaty of 1855 for a moment, which along with the Nez Perce Treaty are the court's focus in the Colvilles' attempt to intervene in *U.S. v. Oregon* (1969).

The Yakima Treaty of 1855 does not give a name to the land reserved for the "Yakima Nation." Throughout the document it is designated as "said Indian reservation." Instead, as is typical of the genre of treaty contracts, the preamble opens with the names of the Indian Tribe or Indian Nation for whom this Indian reservation was established:

> the Yakama, **Palouse**, **Pisquose**, **Wenatshapam**, Klikatat, Klinquit, Kow-ws-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief.

It is not the confederation of such indigenous groups of the Plateau region that makes the relationships established in this treaty transformative. Individuals, whole villages, and larger groups under the influence of especially persuasive leaders allied for many reasons. What is unique to the Yakima Nation created by Stevens is the form this confederation takes. Here, the colonial practice of naming that began a process of decontextualizing indigenous identity with regard to place is carried a step further. This long list of colonially produced names is consolidated under the designation of one Indian Nation, which is formed as a per-

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manent confederation based exclusively on the notion of shared race. This act of legally naming the "Yakama Nation" created an entity that is not strictly indigenous but tribal, with rights based on race. Drawing on the larger American cultural index of race predominant in the mid-19th century, the remainder of the Yakima Treaty refers to these groups only as "said Indians."

Following the preamble in which these tribes are named, the first 2 articles of the 11 that compose the Yakima Treaty go on to refer to "places" without regard to indigenous villages or routes. These articles are essentially long lists of geographical features as they were designated in common usage among non-Indians—"Mount Rainier," "the Cascade Mountains," "Lake Che-lan," "the Columbia and Snake Rivers." In contrast to identifying places with regard to cyclical routes or village sites, these names are used only to index the boundaries around two spaces—the boundaries that demarcate the space to which "aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest" and the boundaries that demarcate the space reserved for "aforesaid confederated tribes and bands of Indians." This replacement of indigenous names linked to places with names of places that define/create abstract and racialized space is part of the cultural ideology embedded in the legal discourse of treaty making.

Whereas the opening framing of this treaty document decontextualized indigenous identity by indexing indigenous groups with regard to racial distinctions, indigenous identity was subsequently recontextualized with regard to another set of names, names that stand for a whole other U.S. cultural set of presuppositions about identity and forms of membership, names to which the confederated "Yakama Nation" is indexed. The Yakima Treaty concludes with Stevens's signature; the names (of Salish, Sahaptian, and English origin) of 14 indigenous leaders and their x-marks, beginning with that of Kamiakin (who was unwillingly designated by Stevens as "head chief" of the Yakima Nation); and the names of the 10 assistants, witnesses, and interpreters present at the signing. The use of these personal names as signatures essentially brought this treaty contract into existence and signified that which was made central to the tribal identity which was legally constituted in the Yakima Treaty. Attaching an x-mark to the names of these indigenous leaders was not only a novel use of personal names but a transformation of the relationship between personal and collective names as media for negotiating identity.

The use of these names as signatures presupposed a permanent and one-to-one relationship between individual leaders and individual "tribes and bands," which, as shown above, contradicts the layered identity of any individual. Such use of personal names as the markers of the collective intention of regional and

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dialect groups also contradicts the village-, residence-, or work-group-based social organization described above. In place of communities identified with particular places, the form or formula for using personal names followed in this treaty document identifies these communities with the intention of these select and representative indigenous leaders, whose personal names were used as a proxy for the democratic deliberation of local communities. In place of identifying chiefs who acted as leaders of their communities, this use of names transformed the role of chief to representatives of their community, thereby politicizing their role. The creative result of this use of personal names as indexes of collective membership was the establishment of these male indigenous leaders, these "head chief, chiefs, headmen, and delegates," as the founders of the "Yakima Nation." Having racialized and decontextualized the rights of entire indigenous groups, the Yakima Treaty of 1855 effectively reinvests these rights in these representative individuals and their descendants. Thereafter, these names came to operate not unlike a title to property; whoever "has" these names possesses the rights that accrue to them by way of this treaty. Personal names, particularly names of important civil and spiritual leaders, were always of great value and inheritable. In their use as signatures, these already significant names took an additional kind of meaning and value by being incorporated into the legal discourse of property and contract.

Ultimately, while the Yakima and other treaties were *framed* by these nonindigenous uses of naming, Stevens was also forced by indigenous negotiators to include language in the treaty *content* that directly incorporated their intentions as representatives of the distinct indigenous groups listed in the preamble—their voices as leaders, rather than as representative signatories (American Friends Service Committee 1970:18–40). Thus, article 3 of the Yakima Treaty reserves the right for "said Indians" to hunt, fish, and gather "at all usual and accustomed places" outside of racialized reservation spaces. Going even further in specifying these rights, article 10 designates a particular fishery in the ceded territory, "the Wenatshapam Fishery," to which these tribes retained rights through these vested individuals.[22]

The Yakima Treaty that resulted from these contentious negotiations represents a layering of national and indigenous intentions, both intentions being equally culturally based. Insofar as this treaty contract intended to relocate Indians by mapping the legal boundaries between Indians and whites, the rights secured in the treaty refer to or index a racial typology; the rights con-

[22] The remainder of the articles of the Yakima Treaty address the payment of annuities to the confederation, the provision of services to the confederation by the federal government, the exclusion of alcohol from the reservation, and the confederation's dependence on the federal government.

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ferred are associated with blood[23] and are ascribed through a set of indigenous leaders, whose signatures represent the original intentions of indigenous groups as tribal communities. Insofar as this treaty also secured "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land" (art. 3), the Yakima Treaty also represents indigenous intentions. The referent for rights here is not blood or race but the right of area/dialect groups to particular places and to the routes connecting these places. These are not described as exclusive rights but as rights that are layered or shared with non-Indians residing in common resource areas.

Historical contradictions have arisen in the wake of the hybrid intentions inscribed in the treaties negotiated between Stevens and indigenous leaders in the 1850s. The Yakima Treaty of 1855 is a case in point. While some communities of the middle and lower Columbia River ultimately relocated to the Yakima Reservation, becoming member groups of the Confederated Tribes and Bands of the Yakima Nation, the federal government has found that the "Yakama Nation" designated by Stevens failed to come into existence (*Confederated Tribes v. United States* 1970; *Confederated Tribes v. Yakima Tribes* 1974). This contradiction is not extrinsic to the law, but was produced by the use of names in treaty making. Who are the successors to this nonexistent nation and what kind of relationships the signatory tribes have to this nonexistent nation are the questions the court now faces in the Colvilles' attempt to intervene in *U.S. v. Oregon* (1969).

V. The Layering of Legal Names in the Tribal Context

Because the treaties signed at the Walla Walla Council were made primarily with leaders of indigenous groups of the southern Plateau, or lower Columbia tribes, the indigenous groups of the middle and especially the upper Columbia, including the Kettle Falls area, appear only in the background of most historical studies of this event. A great deal of ethnographic material produced by or under the aegis of some of the most renowned anthropologists of the late 19th and early 20th century (including, among others, Franz Boas and Leslie Spier) addresses these communities. But because the members of these relatively pacifist middle and upper Columbia groups remained for the most part neutral in the Indian Wars that broke out in the wake of treaty making, the groups neither demanded the immediate at-

[23] See Jaimes 1992b for a critique of the racializing method of indexing identity and membership imposed by the blood-quantum standard, whose roots can be traced to these first encounters.

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tention of the federal government nor have commanded a great deal of attention from historians of Indian-white relations relative to other indigenous groups in this area. In addition, as explained below, the Colville Tribes did not form as a confederation until years after the treaty negotiation of 1854–55, during a period that has generally interested historians of Indian-white relations much less. Hence, if the history of Native America generally lies on the margins of most American histories, the historical dimensions of evolving Colville culture might be characterized as on the margins of the margin. For this very reason Colville history challenges myths imbedded in scholarship on Native America and, more generally, highlights the contours of struggles to gain recognition for socially and culturally based claims in an atmosphere dominated by these myths and by the structures of denial that accompany them.

The account of the treaties that resulted from the Walla Walla Council shows the hybrid nature of the treaties themselves—both the abrupt imposition of a racial-tribal index through the framing of legal discourse that works to reduce social and cultural differences among "Indians" (and among "whites") and the continuous indigenous resistance to this framing; indeed their insistence on maintaining different relations to such treaty negotiations and to the confederations of tribes or nations named in treaties is inscribed in these documents. Colville history does not depart from this pattern; the Colville only differ in the kind of relationship they ultimately have to these treaties.

As stated earlier, Isaac Ingalls Stevens intended to include the indigenous groups of the "Okanogan and Colville valleys in the north" in the treaties signed at Walla Walla. Retrieving accounts of Colville history from the margins, Mourning Dove reports in her tribal history that her great uncle, Chief Kinkanawah, the last formal Colvile Salmon Chief, was at the Walla Walla Council but "as a spectator" (Miller 1990:153). In addition, Stevens visited several times at Kettle Falls before and after the Walla Walla Council in hopes of signing a treaty with these upper Columbia River Tribes. Mourning Dove relates the story of Stevens's visit to Kettle Falls after the Walla Walla Council in 1855:

> Stevens met with Chief Jerome Kinkanawah and his tribe during a council at the falls. They could not reach an agreement for a treaty. The Indians were reluctant to sign because so many were away for spring root digging that the council was not representative. Stevens promised many things, saying, "This is your land. No white man shall take it away from you without your consent." This impressed everyone, and the treaty was postponed for a later time. But this never happened because shortly after this meeting Stevens went to war against other Indian Tribes. . . . Before Stevens could return, he was called east by

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> the 1860 Civil War, and he died with great honor for his country at the Battle of Chantilly. The Indians did not get this news for many years, so the old people continued to wait for him. (Miller 1990:153–54)

As Mourning Dove's account suggests, the fact that the Colville Confederation was not established by treaty is a result of both internal or local and external or national forces, forces that exceed the dichotomies of Indian-white and treaty and nontreaty tribes. Four factors are cited here, factors that ultimately worked against the groups of the Okanogan and Colville Valleys as potential treaty signatories: (1) the upper Columbia insistence on negotiations about particular places (like other communities of the Plateau, upper Columbia communities resisted radical relocation); (2) their insistence on not merely a majority but a consensus in decisionmaking (the traditional Colvile annual cycle of gathering resources meant that a significant portion of members were away from their "communities of deliberation" outside of a limited number of winter months—in this instance it appears that it was primarily women who were away for root digging at the time of Stevens's negotiations); (3) these communities' withdrawal from the "Indian Wars" due to traditional leaders who advocated for peaceful relations with the nonindigenous population; and (4) the shift in national focus and U.S. military forces that resulted from the Civil War. These local and national factors slowed the entry of upper Columbia groups into legal discourse in writing. The establishment of a relationship between these groups as Indian Tribes and the federal government was postponed almost 20 years after the Walla Walla Council.

In April 1872, the year after treaty making was ended by Congress, the Colville Reservation was finally established in the Colville Valley, east of the Columbia River, through a treaty substitute, by an executive order of President Ulysses S. Grant. The reservation was established for the indigenous communities of the Okanogan and Colville Valleys and for "Indians as the Department of Interior shall see fit to locate thereon" (*United States v. Oregon* 1992:1579). In July 1872 a second executive order was issued moving the reservation to the west, "across the Columbia River, opening the prime Colville Valley to white settlement" (Miller 1990:226 n.20). Finally, in 1892 the northern portion of the Colville Reservation was removed from the reservation by executive order, leaving Kettle Falls beyond the boundaries of the current Colville Reservation.

The nontreaty indigenous peoples who settled on the Colville Reservation are the Methow-Okanagan, Nespelem, Sanpoil, Colvile, and Lakes. Though these groups are generally characterized in federal Indian law as the "original Colville Tribes," they, too, were forced to relocate. As was typical across the United States, the movement of members of these groups to the Colville

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Reservation was an extended and shifting process that lasted decades. Nevertheless, these tribes are so thoroughly distinguished in federal Indian case law on the basis of this dichotomy between treaty and nontreaty tribes that the history of these five groups was considered irrelevant to the proceedings in the Colvilles current litigation. Such an approach to history is a case in point of Deloria's (1987:89) claim that "much of what passes for history dealing with Indians and whites is a mythological treatment of the development of policy disguised as history." The transformations of group identity that took place among all indigenous communities in the Plateau region are more complex than the dichotomy of treaty and nontreaty tribes suggests. This is one opposition, embedded in the racializing terms given by federal Indian law, that is made to appear a natural rather than a historical fact.

While the upper Columbia Tribes of the Okanogan and Colville Valleys waited for the return of Isaac Ingalls Stevens and the creation of a treaty intended by both the federal government and indigenous elders and residents, the legally named and treaty-created entity of the Yakima Nation failed to come into existence. In the wake of the Walla Walla negotiations, six indigenous groups whose leaders were signatories to the Yakima and Nez Perce Treaties of 1855 became "such other Indians" and settled on the Colville Reservation, rather than on the Yakima and Nez Perce reservations identified in the treaties.

Indigenous representatives of the Peskwas (Wenatchee), Chelan-Entiat, and Columbia communities, located along Lake Chelan and the tributaries of the Columbia River directly to the west of the Colville Reservation, were signatories to the Yakima Treaty of 1855. In addition to traveling to Kettle Falls to fish, these middle Columbia groups also fished at the Wenatshapam Fishery, the single place identified by name in the Yakima Treaty. These groups shared the Interior Salish language with the original tribes of the Colville Reservation, while the majority of signatory tribes at the Walla Walla Council were Sahaptian-speaking communities. As a confederation, under the leadership of their designated political chief, Moses, these communities resisted relocation to the reservation reserved for them in the Yakima Treaty, negotiating directly with the federal government for another decade. Finally, beginning in 1883 and continuing over the next three decades, these groups relocated to the Colville Reservation.

Two Sahaptian-speaking communities ultimately relocated to the Colville Reservation—the Palus and Chief Joseph's Band of the Nez Perce. These are the only Sahaptian-speaking groups that are known to have regularly traveled to the Kettle Falls fishery (see the list on p. 1206). Like members of the Columbia Confederacy, the Palus communities residing to the south and west of the Colville Reservation refused to relocate to the reservation

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designated in the Yakima Treaty. This is particularly significant in that Kamiakin ("a Yakima chief of mixed Yakima, Palouse, Nez Percé and Spokane descent"; Trafzer 1993:87), who was unwillingly designated by Stevens as the "head chief" in the Yakima Treaty, led the group of Palus who settled on the Colville Reservation. Kamiakin was a leader in the armed resistance to relocation to the Yakima Reservation in the Yakima Wars that erupted following the treaty council at Walla Walla. Finally, "After Kamiakin's death in 1877, his family and band moved to the Colville Reservation, where they reside to this day" (ibid., p. 96). Last, and most renowned of all to the general American public, Chief Joseph, who was among the Nez Perce representatives to sign the Nez Perce Treaty of 1855 at Walla Walla, was invited by Chief Moses to settle on the Colville Reservation. Following this invitation, Chief Joseph negotiated the final relocation of his band of Nez Perce from Oklahoma Territory to the Colville Reservation in 1885.

The story of the relocation of indigenous people in the Pacific Northwest is, thus, not told through the narrative details of treaty-signing events alone. The relationship of indigenous groups to the tribal identities established in these treaties remained a matter of contention among indigenous communities and Americans for a half-century. Because treaties vested rights in the descendants of treaty signatories, wherever the treaty signatories and their communities finally settled or moved, they carried these reserved rights with them as long as they maintained cohesiveness as communities. Hence, these signatory groups developed differing kinds of relationships to these treaties as founding events.

For those groups who settled on treaty-designated reservations, such as the Confederated Tribes and Bands of the Yakima Nation, treaties form the basis for their identity as Indian Tribes, identities that are recognized by the federal government and in the language of the law. Their relation to Indian Country—the geographic boundaries of their sovereign space—and the legal establishment of their rights to traditional routes and places occur within this single document. They can invoke their identity and rights as tribes and as indigenous communities with a single name, their tribal name.

For indigenous groups whose ancestors signed treaties such as those confederated under the name of the Confederated Colville Tribes, treaties are the origin only for legal recognition of their rights to traditional routes to hunting, fishing, and gathering sites. Their identity in the law is not singular. The establishment of their identity as members of federally recognized Indian Tribes, with permanent sovereign spaces, was postponed until after treaty making. These Colvilles must invoke different legally inscribed names in order to index different sets of rights—the

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indigenous group names by which they are designated in treaty contracts and/or the names of tribal leaders who were signatories to treaty contracts to index their right to places, and the use of the name "Colville" to index their rights as Indian Tribes. The six treaty groups that are members of the Colville Confederated Tribes are not recognized by the federal government as Indian Tribes themselves. The Colville Tribes are the only legal entity that can represent their rights to resources places off the Colville Reservation. The federal government has elsewhere affirmed the Colville Tribes' right to represent these groups with regard to monetary damages (*Confederated Colville Tribes v. United States* (1970); *Confederated Colville Tribes v. Yakima Tribes* (1974)). Thus far the federal court has denied their right to do so with regard to off-reservation fishing rights.

Nontreaty groups such as the "original Colville Tribes," for local and national reasons, have a more tenuous basis in legal discourse for recognition of off-reservation rights to traditional routes and particular places. Ironically, a case brought by the Colville Tribes themselves sets the strongest precedent for non-treaty-based off-reservation rights in federal Indian law. In *Antione v. Washington* (1975) the Court upheld Colville rights to hunt off reservation on the basis of an agreement negotiated with the federal government (see Wilkinson 1987:63–65). However, the Colvilles' current crisis with regard to off-reservation fishing highlights the kinds of ambiguities and contradictions that persist in the discourse of federal Indian law.

The situation now faced by the Confederated Colville Tribes in their case in progress, then, represents the continuum of relations indigenous communities have to the law in the United States, as well as the limits of the law to recognize tribal forms of self-definition that are at the foundation of their sovereignty. At one end of this continuum are those treaty groups who are situated precariously but firmly in the law, with access to some of the strongest legal procedures for making culturally based claims. These are tribes whose origins in the law are singular and inscribed in the genre of treaties for historical and geographic reasons. At the other end of this continuum are those nontreaty groups, many of whom have not been able to receive even the most meager level of recognition from the federal government, who have little access to legal protection for their historically and culturally based rights. The origin of many of these groups *as Indian Tribes* remains to be formulated.[24] Though agreements between these groups and the federal government exist, the litigation or consideration of their claims to historical rights and the recognition of their social identities are carried out primarily

[24] See Clifford 1988, Torres & Milun 1990, and Campisi 1991, who discuss the case of the Mashpee Tribes (*Mashpee Tribe v. New Seabury Corp.* 1979), who have been refused federal recognition as an Indian Tribe.

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through inquiries that approximate the second step in treaty rights litigation—an assessment of the continuity of their cultural and political organization.

For all indigenous Indian groups in the United States the circumstances now faced by the Colville Tribes reveal the outlines of legal discourses about Native American cultural and political organization—a discourse that simultaneously uses a racial index to essentialize indigenous groups to a single ascriptive characteristic, and a legal ideology that presupposes that the nature of all social identity is consolidated, permanent, and fixed. Though these legal-cultural discourses have little to do with the continuity of indigenous practices, both are indispensable to successfully establishing and arguing culturally based rights in federal Indian law. This is one irony embedded in federal Indian law: to establish their claims in the courts, indigenous-tribal communities are forced to limit the presentation of their case to an ideology or model of culture that denies the layering of identity implicit in all cultural formations of identity. This does not mean that tribes construct historical continuities simply to meet the standards of the court. This only means that the courts' narratives of tribal continuity are always partial, excluding from their accounts the discontinuities imposed on indigenous communities through the language of treaties and the social-racial concept of Indian Tribes, as well as the essentializing cultural procedures through which such colonial discontinuities were/are negotiated by indigenous groups.

VI. Conclusion

In the Colvilles' current case, the court has suggested that the use of more than one name represents a discontinuity, break, or gap in their tradition. To the contrary, what is essential to historically evolving Colville culture is not a singular form or a method of change that approximates the idea of cultural assimilation from one form to another but, among other cultural practices, "simple" formulas for indexing membership intra- and intergenerationally, which produce such highly elaborated identities through time and in relation to place that "we" continue to find ourselves unable to define this identity, while "they" negotiate this richly layered social and political identity every day.

The seminal study of the fishing rights dispute and the resulting litigation in the 1960 and 1970s in the Pacific Northwest concluded that communication and cross-cultural understanding, not a battle over conservation techniques and limited resources, was the foundation of this conflict. These authors claimed that any "serious attempt to understand or to resolve with equity the fishing rights dispute" must take cultural difference into account. They concluded:

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> The principle surviving part of the traditional inheritance—the invisible, attitudinal part—has much to do with how the Indian views himself and the world and how he relates himself to his environment. It largely determines both what he feels is important and how he will try to communicate about it. Language itself is a more significant factor than may at first appear. Although English is the first language in virtually all Indian homes in western Washington today, the constructs of the Indian tongues still affect the understandings and thought styles, even of many persons who have no actual knowledge of any Indian language. (American Friends Service Committee 1970: 145)

I have tried here to explore this point, that forms of language use are as significant in essentializing identity as the language in which they are used. Indeed, forms of language use may persist when the lexicon of any language may have moved from foreground to background.

This essay forms a critical, if introductory, history of the relevant legal and nonlegal names in this case to try to begin to address this dynamic between cultural pragmatics and legal discourses of rights. Names are only one among many cultural forms through which social groups essentialize their identity. Nevertheless, legal and nonlegal naming practices in this case begin to suggest the subtlety with which social and cultural rights must be addressed. The history of the Colville Confederated Tribes is a rich resource for understanding both the pragmatics of cultural diversity and the evolution and contradictions of rights discourse. Theirs is a tradition in which the process of group essentialization and formation is not primarily about drawing boundaries around identity but rather about crossing, mediating, and layering identities. Theirs is also a culture in the United States that continues to use a form for indexing identity to cultural maps that are thicker than blood.

Therefore, to identify oneself today with a place of primary political membership, with the Colville Reservation, and to identify oneself by way of the location-dialect areas of one's parent's parents for the purposes of land and resource use is one such construct that is analogous to and consistent with traditional forms of collective identification among indigenous groups of the middle and upper Columbia River. At trial, this formula for identification was used by the majority of tribal witnesses for the Colville, the use of which visibly and repeatedly frustrated a court in search of singular statements of identity. When one witness was asked by Judge Marsh how Colville individuals identify with the bands making up the Colville Confederation and to use herself as an example, the witness responded that she is Wenatchee, Methow, and Okanagan. Judge Marsh asked if she couldn't say which of these tribal/ancestral identifications was most important to her. She refused, stating, "I wouldn't want to disappoint

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either of my parents." Her response was met with silence, and the court moved on.

This anecdote suggests that uses of English by indigenous Indians, narratives told in English by any social group in contemporary litigation, and pragmatic forms of expression merit no less interpretive rigor than that applied by Judge Boldt in assessing native interpreters' understandings of the phrase "all usual and accustomed places" in the Chinook jargon in *United States v. Washington* (1974). Thus, this anecdote also suggests that in addition to developing critiques of the silencing and exclusion of social voices in the law, critical legal discourse must address the silences of the court and the gaps in the discourse of legal proceedings to which they point. The limits and the possibilities of litigation in federal Indian law depend on the degree to which the court can recognize the nonracial indexes of social identity that are exemplified in Colville discourse; the historical facts/information to which these indexes point; the contradictions, discontinuities, and productive effects of legal discourse; and the layering of indigenous, tribal, and national social and economic relationships onto the map of Native America. Because treaty rights are an exceptionally strong example of the transformation of law from a technique for colonization to a strategy of decolonization, case studies of the cultural pragmatics in cases such as the Colvilles have relevance not only for federal Indian law but also have much to say about the current limits and possibilities of rights discourse more generally.

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