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Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe's Understanding

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CULTURAL LINGUISTICS AND TREATY LANGUAGE: A MODERNIZED APPROACH TO INTERPRETING TREATY LANGUAGE TO CAPTURE THE TRIBE'S UNDERSTANDING

BY

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Language is a reflection of a thought world. A worldview that has been shaped by place to describe one's identity in space and time does not equate to species relatedness as a default to know one another. In the legal system of the United States, there is acknowledgement of treaties in colonized lands that there are rights granted from the tribes and not to them, and those rights are land-based. Yet, the Indigenous voice is dead before arrival, before it enters the room of science, justice, academe, or otherwise. The exclusion of Indigenous peoples at the table of knowledge and from the power to make decisions within their homelands has proven a detriment to the land, waterways, flora and fauna, and human beings. Nowhere would tribal peoples have agreed to our own destruction, it is and has been a forced hand. This Article explores the changing interpretation of the U.S. Supreme Court canon to construe treaties with Native American tribes as the tribe would have understood them, and why mere translation of Native language to English fails to capture a Native understanding. Through the juxtaposition of western legal analysis and the powerful voice of a Native scientist, this Article illustrates how difficult and yet how necessary it will be to bridge that divide if this

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powerful western nation is to fulfill its sacred promises to Native people. As a contribution to the Issue on the fiftieth anniversary of United States v. Oregon, *this Article looks to the future of federal jurisprudence on the interpretation of treaties with American Indians and envisions one in which reconciliation through an understanding of different worldviews is possible.*

The authors acknowledge that the region surrounding the University of Idaho in Moscow, Idaho is the traditional homeland of the Nez Perce and Coeur d'Alene peoples and that the University sits upon land that was reserved by the Nez Perce Tribe in its Treaty with the United States in 1855. Honor the treaties.

I. INTRODUCTION

A. The Indigenous World View

We are connected to all things. Being connected to all things runs amiss in a Euro-context. The idea goes against the discrete perspective of foundational thinking in the Western European (Western) worldview. From Descartes to Bacon to Hume to academic philosophers teaching droves of students everyday across colonized lands, the world is lived in opposites, discrete, and deduced. As a consequence, the Indigenous voice is dead before arrival, before it enters the room of science, justice, academe or otherwise. It is easier to say we are disconnected from all

things. That is a truthful fact and a sad statement. "All my relations" is taken as a chaotic statement. The teachings are deeper than the chaos that is implied, and would take a lifetime to live and to understand. One cannot generate tribal intent without living this way of life no matter how many pixels of categories make up the mosaic.

Language is a reflection of a thought world. A worldview that has been shaped by place to describe one's identity in space and time does not equate to species relatedness as a default to know one another. The danger of this assumption defies how different and special cultures are to one another and the distinctness of one's own culture within and across species. Also, how special a particular place in the world is that has shaped culture and language for many species in those lands. When one travels to another place there is intrigue into the new lands, culture, and foods. To enter into another's thought world is exciting. Traveling can give us pause to our homelands, to how special our place is, our language and culture.

Colonialism has been a strange traveling "adventure" and permanent occupation. Some of the strangeness comes from the assumptions made by Euro-colonists regarding Indigenous lands. One assumption, in particular, is that Indigenous peoples are a former primitive state of European man and therefore have no new knowledge to contribute. A process of dehumanization follows this assumption justifying massive undertakings such as Manifest Destiny bringing civilization to savages. The idea of travel has lost its intrigue, excitement, and adventure, thus the forced near extinction of a whole thought world, and many thought worlds over the past few centuries. There is a large incentive to gain billions of acres of land; perpetual water rights may grow bountiful amounts of food and various forms of energy can be captured in fossil fuels, hydro, wind, and solar. There are far too many maladaptive traits accepted as the norm of colonized societies to name here and far beyond the scope of this Article. However, there is acknowledgement of treaties in colonized lands that there are rights granted from the tribes and not to them, and those rights are land-based. Nowhere would tribal peoples have agreed to our own destruction, it is and has been a forced hand.

There is a loss of cultural and ecological diversity that is laden with hubris assumptions and contradictions justifying the protection and continuation of the status quo. There are parallels between the loss of ecological processes and those processes of coupled human cultures of Indigenous communities and their respective identities to land. Matrilineal societies give rise to an ethic of the environment that disrupts a patriarchal economic system beholden to racism, misogyny, and many other fears—xenophobia, in particular. In order to continue to plunder the land embodied as a woman, it would logically follow that the peoples whose cultures pay homage to her were to be wiped from the land. The societal move of the Christian state was Manifest Destiny, while on the other hand, justifying the secular West's progress,

scientists—whether Lamarckian or later Darwinian believers—still had underlying assumptions (a mostly obsolete theory of Social Darwinism). The exclusion of Indigenous peoples at the table of knowledge, and the power to make decisions within their homelands, has proven a detriment to the land, waterways, flora and fauna, and human-beings. Therefore, Indigenous peoples are not part of the over-arching responsibility of the Anthropocene and climate change. We cannot be inclusive to human-caused issues we were never party to. Our voice, knowledge, and call to honor the treaties as supreme law of the land has gone unheard, unacknowledged, and ultimately forgotten. For example, a noble commentary in *Nature Climate Change* calls for *Honouring Indigenous Treaty Rights for Climate Justice* to acknowledge the laws protecting Indigenous lands from over-exploitation.[1] The article calls to protect the environment through the laws (particularly at the constitutional level) of the countries where treaties and governments have a responsibility to protect the land in the interest of both parties.[2] Another article, *Co-Management and the Co-Production of Knowledge: Learning to Adapt in Canada's Artic*, studied co-management through the co-production of knowledge and found that the struggle lies amid power inequities and barriers to success from roles of power imbalance.[3] Although these two recent examples do not bring to light the underlying assumption, explicitly therein lies a subvert influence in the relationship between European settlers and Indigenous peoples of Turtle Island (North America). Additionally, because of this assumption as a subvert influence, treaties have been repeatedly broken, sovereignty has been continually diminished, Indigenous rights are being eroded daily, and languages are being lost.

B. Colonizing Language

Nowhere is the loss of Native language and meaning more apparent than when courts must interpret the legal rights reserved by American Indian[4] tribes. For the first half of the United States' existence, and Great Britain before, the preferred method of colonizing North America was through government-to-government agreements: treaties and congressionally ratified agreements. At their core, the bargain struck in those agreements was simple; the United States wanted Indian land and Indian people wanted to preserve their way of life. Nonetheless,

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[1] C.S. Mantyka-Pringle et al., *Commentary: Honouring Indigenous Treaty Rights for Climate Justice*, 5 NATURE CLIMATE CHANGE 798 (2015).

[2] *Id.* at 800.

[3] Derek Armitage et al., *Co-management and the Co-production of Knowledge: Learning to Adapt in Canada's Arctic*, 21 GLOBAL ENVTL. CHANGE 995, 996–97 (2011).

[4] There is an ongoing debate on the use of the word "Indian" to describe a diverse continent and islands of Indigenous peoples. The authors are using the language of the time as this terminology is evolving. *See* Russell Means, *I am an American Indian, not a Native American!*, https://perma.cc/T55D-RTAR (last visited Apr. 30, 2020).

courts have struggled to give meaning to these agreements. Negotiators spoke different languages, and because these agreements were always drafted in the language of the colonizer, it is far from clear that actual treaty terms matched tribal intent.[5] The stark difference in worldviews between colonizing and Indigenous peoples, and the privileging of the English language, combined to distort meaning in the English translation. Invariably, federal negotiators were, at best, recording what they thought the Indians were trying to tell them, most likely what they thought was best for the Indians, and—at worst—drafting the terms to the detriment of the tribes.

In an effort to acknowledge these inequities, the United States Supreme Court has a history, beginning with Chief Justice John Marshall of articulating rules (canons) of interpretation of treaty language and of employing those rules for the benefit of Tribes.[6] Today, the Indian canons of construction are black letter law, requiring that:

> [T]reaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[7]

The Court has rarely deviated from these rules, most often during periods where the Court had justices taking a broad and protective view of states' rights in the United States system of federalism. Most notable are the Rehnquist and Roberts Courts, both of which have adopted a "new subjectivism in Indian law" whereby the Court "beg[a]n to depart from [its] traditional standard, abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests."[8] While some viewed the direction of the Rehnquist–Roberts Courts away from tribal sovereignty and toward state jurisdiction as a sign of things to come, recent rulings—most notably *Herrera v. Wyoming*[9]—suggests a renewed understanding on the Court of the basis and importance of the canons of

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[5] ALVIN M. JOSEPHY, JR., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 318 (1965) (stating that the descriptions of the 1855 treaty negotiations at the Council of Walla Walla indicate that negotiations were done in trade language and often had to be interpreted through several translators to come close to the language of a particular Native language group represented at the Council).

[6] Worcester v. Georgia, 31 U.S. 515, 550–56 (1832) (Worcester is considered the source of the concept that treaty language must be interpreted as the Tribe would have understood it. The majority opinion does not articulate the canon but applies the concept in finding that the Cherokee Nation retained its sovereignty visa vie Georgia and that the laws of Georgia do not apply.).

[7] FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2.02 (2012).

[8] David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1574 (1996).

[9] 139 S. Ct. 1686, 1686 (2019).

construction and the need for federal mediation of state interference with tribal sovereignty.

However, the Supreme Court's directive that treaties are to be "construed as the Indians would have understood them,"[10] simply begs the questions of how tribal people understood—and understand—their treaties. Judges today invariably share the same biases and cultural misunderstandings of the federal negotiators of yesteryear. The purpose of this Article is to begin bridging that gap so that courts may finally be able to give meaning to the Supreme Court's canon of construction. To begin that dialogue, this Article explores the canon of construction requiring that treaty language be interpreted as the relevant tribe would have understood it. Part II traces the judicial source and reasoning for the canon, then discusses the sources of evidence that courts have relied on in the decisions regarding tribal hunting and fishing rights in the Pacific Northwest. Part III analyzes the role of culture in the meaning of language and its manifestation in the relation between traditional knowledge (TK)[11] and Native language referencing place and the use of natural resources to shed light on what it means to interpret treaty language as the tribe would have understood it. Part IV concludes with thoughts on how courts may incorporate this more complex understanding of the meaning of Indigenous language in its interpretation of treaties as the tribes would have understood them. Throughout this Article, we juxtapose the first-person narrative of our lead author, Native scientist Sammy Matsaw, with the western legal analysis of his co-authors as a stark reminder of the divide between the two worldviews.

II. THE HISTORY, JUSTIFICATIONS, AND EVOLUTION OF THE CANNONS OF CONSTRUCTION

The foundations of federal Indian law are as old as our Republic. One of the earliest chief justices of the Supreme Court, John Marshall, authored three opinions that would become known as the foundations of United States Federal Indian Law and are referred to as "the Marshall trilogy."[12] The first, *Johnson v. M'Intosh*,[13] although primarily known (and criticized) for the "Discovery Doctrine" justifying acquisition of land through conquest, is of importance to the issues surrounding treaties in

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[10] COHEN, *supra* note 7, at 114.

[11] Here, the use of Traditional Knowledge (TK or Indigenous Knowledge, IK) refers to the well-developed philosophies or conceptual frameworks, ethics, and values that had flourished for thousands of years. Its use is intentional, denoting the broader context of knowledge underpinning the languages of Indigenous peoples however they are understanding TK/IK usage from their homelands. Similar to the broader context of Western knowledge, although, differing in how knowledge is gained and shared; a knowledge that originates from and has relationality with plants, animals, waterways, and lands (all of creation) evolving over space and time.

[12] *Id.* at 251 n.73.

[13] 21 U.S. 543 (1823).

its conclusion that only the federal government (as opposed to private citizens) may acquire land from an Indian tribe.[14] The second, *Cherokee Nation v. Georgia*,[15] although a case that was dismissed for lack of jurisdiction, would become known for its articulation in dicta of the trust relationship between the federal government and Indian tribes stating: "[Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian."[16] The paternalistic "ward/guardian" language used in *Cherokee Nation* has allowed the Court to change the scope of the federal trust responsibility over time, which has often oscillated congruent with federal policy. During some eras, the Court has articulated the relationship as a trust, whereby the federal government is obligated to protect the sovereign prerogatives of the tribes.[17] At other times, however, the court has shifted to the "ward/guardian" language to justify abrogation of tribal sovereignty and near complete federal control over Indian affairs.[18] After the false starts in both *M'Intosh* and *Cherokee Nation*, the third case, *Worcester v. Georgia*,[19] is credited as the point where the Court finally set out the foundational rules that we now know as federal Indian Law. Among other things, the case is credited as the source of the concept that treaty language must be interpreted as the Tribe would have understood it. The majority opinion does not articulate the canon but applies the concept in finding that the Cherokee Nation retained its sovereignty vis-à-vis Georgia and that the laws of Georgia do not apply to the Tribe.[20] In writing for the majority, Justice Marshall states that:

> Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders

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[14] *Id.* at 592 ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

[15] 30 U.S. 1 (1831).

[16] *Id.* at 17.

[17] *See e.g.*, Worcester v. Georgia, 35 U.S. 515 (1832); *Ex Parte* Crow Dog, 109 U.S. 556 (1883); Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Ariz. State Tax Comm'n., 411 U.S. 164 (1973).

[18] *See e.g.*, *Cherokee Nation*, 30 U.S. at 1; United States v. Kagama, 118 U.S. 375 (1886); Ward v. Race Horce, 163 U.S. 504 (1896); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); Montana v. United States, 450 U.S. 544 (1981).

[19] 31 U.S. 515 (1832).

[20] *Id.* at 521.

> from entering their country: and this was probably the sense in which the term was understood by them.[21]

It is in the concurrence by Justice McLean that the actual canon is found:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.[22]

Over time, the manner in which the Court has applied this canon of construction gave rise to a variety of justifications for its use. The practice in international law of interpreting ambiguity against the party whose language the agreement is drafted in provides a legal basis for the canon,[23] as well as providing an explanation for why tribal intent is not considered if the court deems the language unambiguous.[24] However, cases indicate a more normative basis for the canons of construction that are unique to the relationship between the United States and Indian tribes.

First, while relying on the differences between English (the written language of the treaties) and the various tribal languages, courts have gone to great lengths to describe the multiple steps in translation to get from English to the language of a particular band of Indians,[25] and the frequent use of "trade" language for translation[26]—a language best suited to cost negotiation as opposed to homeland designation and reservation of rights. This practice stands in stark contrast to the recording of the Treaty of Waitangi between the British and the Maori people of New Zealand in both English and Maori languages,[27] and recognizes the greater disadvantage to people without a written language and without translators familiar with the variety of native languages represented in negotiations.

Second, the Supreme Court has gone beyond the recognition of a mere language barrier to refer to the "superior" power of the federal

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21 *Id.* at 546–47.

22 *Id.* at 582 (McLean, J., concurring).

23 Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 379 (1989) ("Treaty interpretation in international law seeks to give effect to the parties' intent. When the treaty memorial is in the language of one party, at best imperfectly understood by the other, it is well established that the other party's understanding should define the scope of interpretation.").

24 Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1141 (1990).

25 *See* United States v. Washington, 384 F. Supp. 312, 356 (W.D. Wash. 1974).

26 *Id.*

27 Treaty of Cession, Gr. Brit.-N.Z., Feb. 5, 1840, 29 B.S.P. 1111 [hereinafter Treaty of Waitangi] (treaty text in both languages can be found at https://perma.cc/93DC-PBY4).

government in negotiation with an "unlettered people."[28] Thus, while the canon may appear to be about translation issues, these references suggest the Court considers it further evidence of unequal bargaining power.[29] Scholars have considered this basis as an aspect of the trust doctrine in recognizing the need to protect tribes from the overreach of state government and settlers.[30]

Third, and possibly most importantly, the Supreme Court has indicated that the canon is necessary if we are to assume good faith on the part of the federal negotiator (and by implication, allow the Court to uphold the validity of the treaties).[31] The strongest statement of this occurs in *Winters v. United States*[32] in which Justice McKenna writing for the majority states:

> The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that *the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible.* The Government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.[33]

Scholars relate this basis to the discomfort of the Court with the absence of consent on the part of Indian tribes to the assertion of the plenary power of Congress over their rights.[34] Professor Frickey notes

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[28] *See* United States v. Winans, 198 U.S. 371, 380 (1905) (first quoting Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); then quoting *Worcester*, 31 U.S. 515, 582 (1832)).

[29] Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 J.L. REFORM 681, 681 (1984).

[30] *Id.*; Frickey, *supra* note 24, at 1176–77; David M. Blurton, *Canons of Construction,* Stare Decisis *and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 44 (1999). The trust doctrine as justification for the canons of construction is considered particularly relevant in their extension to statutes. *Id.* at 43. This Article will not address that extension which does not include the canon to interpret as the Indians would have understood the language.

[31] *See* De La Hunt, *supra* note 29, at 687–88; Frickey, *supra* note 24, at 1177.

[32] 207 U.S. 564 (1908)

[33] *Id.* at 576.

[34] Collins, *supra* note 23, at 379; Frickey, *supra* note 24, at 1141 (noting that "[t]he extent to which the canons actually soften the impact of the doctrine is subject to debate"); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993); Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 516 (2004) (noting that "[w]hile Justice Marshall accepted the discovery of America as a 'conquest' that gave legal rights to the colonizers, Marshall invoked the Indian law canons to safeguard against inadvertent loss of Indian sovereignty. Marshall thus tempered U.S. power with responsibility, creating a kind of 'conqueror with a conscience.'").

the inconsistency of plenary power with the concept of democracy stating:

> Even minimal reflection upon the tension between colonization and American constitutionalism should uncover the foundational place federal Indian law occupies in public law. A country that prides itself on following the rule of law, the justifications for colonization uttered by those European explorers and recognized by the Supreme Court itself—to impose Christianity upon the heathen, to make more productive use of natural resources, and so on—do not go down easily in the late-twentieth century.[35]

This appeal to higher principles should not mask the fact that the Court, lower federal courts, and state courts have been uneven in their application of the canons of construction for Indian treaties. While some of the variation has been explained by the substance of the specific litigation with courts more likely to rely on the canons in reference to traditional practices such as hunting and fishing, but to avoid them in jurisdictional battles that would limit state sovereignty[36] or the civil rights of non-Indians within the boundaries of a reservation.[37] But these lines do not always explain the variation. Sadly, some of the variation appears related to the political views of the authoring justice on the role of federalism.

One stark example of this is the Court's jurisprudence during the allotment-assimilation era from the 1880s through the early twentieth century. Following the assimilationist policies of the federal executive and legislative branches, the Supreme Court oscillated between opinions recognizing and abrogating tribal sovereignty during this period.[38] Often leading the assimilationist effort of the Court during this era was Justice Edward White,[39] who has the dubious distinction of having written the majority opinion in both *Ward v. Race Horse*,[40] as well as *Lone Wolf v. Hitchcock*.[41] These opinions are infamous for turning their

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35 Frickey, *supra* note 34, at 383.

36 Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 653 (2011).

37 Frickey, *supra* note 24, at 1200.

38 *Compare Winans*, 198 U.S. 371 (1905), *with Lone Wolf*, 187 U.S. 553 (1903)

39 Prior to service on the U.S. Supreme Court, Justice Edward White had fought for the Confederacy. *History of the Court: Edward Douglass White, 1910–1921*, SUPREME COURT HISTORICAL SOC'Y, https://perma.cc/7F7K-BQKW (last visited Apr. 18, 2020). He and his father, a plantation owner and Governor of Louisiana, believed strongly in state's rights. *Edward Douglass White*, ENCYC. BRITANNICA (Jan. 10, 2020), https://perma.cc/S9XE-K54F; Steven E. Silvern, *Scales of Justice: Law, American Indian Treaty Rights and the Political Construction of Scale*, 18 POL. GEOGRAPHY 639, 648 (1999) ("Both federal and state courts gave legal legitimacy to these scalar perceptions and interpretations of the prominence of state rights, the elimination of Indian political autonomy and the termination of Indian treaty rights.").

40 163 U.S. 504, 507 (1896).

41 187 U.S. at 563. Justice White also joined the majority opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), a landmark case challenging and upholding a Louisiana law compelling segregation on railway cars. Not until 1954 was this reasoning and *Plessy* resounding-

back on the principles laid out in the Marshall Trilogy and instead basing their holdings on the assimilationist and colonialist rhetoric that prevailed in that day. For example, Justice White based his holding in *Lone Wolf*—that Congress may unilaterally abrogate treaties it had entered into with American Indian Tribes—on his view that "[t]hey are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights."[42]

Previously, in 1896, Justice White found that Congress had extinguished the off-reservation hunting rights of the Shoshone-Bannock Tribes on the entry of Wyoming to the Union. [43] Many western states were admitted to the Union through congressional acts that expressly disclaimed any right of the fledgling state to control Indian lands or affairs.[44] However, the Wyoming Organic Act did not contain any language related to Indian tribes.[45] That silence created an ambiguity in the mind of Justice White, who was tasked with determining whether Congress intended the rights guaranteed to the Shoshone-Bannock by treaty in 1868 survived Wyoming statehood just twelve years later in 1890. Ignoring the canons that should have controlled, Justice White instead found that survival of those hunting rights:

> [W]ould . . . render necessary the assumption that congress [sic], while preparing the way, by the treaty, for new settlements and new states, yet created a provision, not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the states already existing.[46]

In so doing, Justice White not only ignored the rule that ambiguities are to be resolved in favor of tribal rights but found that those rights could be *implicitly* abrogated in favor of the rights of newly created states.

The Supreme Court's brief, but damaging, turn away from the entire body of Indian law—including the canons—ended shortly after the Court's decision in *Lone Wolf*. This is not necessarily because the Court had a change of heart, but because it largely stopped taking Indian law cases. By this time, tribal sovereignty had reached its nadir while federal control over Indian affairs, tribes, and people had reached

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ly rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954), holding that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

[42] *Lone Wolf*, 187 U.S. at 567.

[43] *Race Horse*, 163 U.S. at 509.

[44] *See* David E. Wilkins, *Tribal-State Affairs: American States as 'Disclaiming' Sovereigns*, 28 PUBLIUS: J. FEDERALISM, Fall 1998, at 55.

[45] *Id.* Professor David Wilkins suggests that Congress did not include a disclaimer because Wyoming's "territorial governments launched statehood and proposed constitutions that were largely in compliance with federal policies," including a disclaimer in the Wyoming Constitution that mirrors those found in the enabling acts of other states. *Id.*

[46] *Race Horse*, 163 U.S. at 509.

its zenith. This was the era where Indian agents were described as "reservation Czars"[47] and the President would appoint individual tribal members as "chief for a day," just long enough to sign whatever legal documents were put in front of them.[48]

Things began to slowly change by the 1920s. First came the Meriam Report, which helped to precipitate the Indian Reorganization Act.[49] Then, after World War II, wherein American Indians served at higher per-capita rates than any other group,[50] Indian Country was galvanized by the coming of the federal termination policy.[51] The result was a concerted effort by tribal people to have their rights and sovereignty reaffirmed by the Supreme Court.[52]

That effort culminated with the Supreme Court returning to its roots in 1959 with its unanimous decision in *Williams v. Lee*.[53] There, in a case about whether a state court may assume jurisdiction over an on-reservation contract dispute between an Indian and a non-Indian, the Court reaffirmed *Worcester*, calling it "one of [Chief Justice John Marshall's] most courageous and eloquent decisions."[54] Although the Court acknowledged that "[o]ver the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."[55] And with that, the Court ushered in what has been referred to as the "modern era" of federal Indian law,[56] by returning to first principles and reaffirming tribal sovereignty; "the broad principles of [*Worcester*] came to be accepted as law."[57]

The modern era came to an abrupt end with the appointment of William Rehnquist to replace Warren Earl Burger as Chief Justice of the Supreme Court. Dean David Getches marks this point as the adoption by the Court of a "new subjectivism in Indian law" whereby the Court "began to depart from [its] traditional standard, abandoning entrenched principles of Indian law in favor of an approach that bends

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47 DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 221 (7th ed. 2017).

48 ROBERT J. CONLEY, CHEROKEE THOUGHTS: HONEST & UNCENSORED 43 (2008).

49 LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928); 25 U.S.C. §§ 5101–5144.

50 Thomas D. Morgan, *Native Americans in World War II*, ARMY HISTORY, Fall 1995, at 22.

51 *See* Getches, *supra* note 8, at 1591.

52 *See generally* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57–112 (2005); *see also* VINE DELORIA JR., CUSTER DIED FOR YOUR SINS 54–77 (Univ. of Okla. Press 1988) (1969).

53 *See Lee*, 358 U.S. 217 (1959) (holding that Arizona courts are not free to exercise jurisdiction over civil suits by one who is not an Indian against an Indian where cause of action arises on Indian reservation).

54 *Id.* at 219.

55 *Id.*

56 CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987); *see also* Getches, *supra* note 8, at 1574, n.3.

57 *Lee*, 358 U.S. at 219.

tribal sovereignty to fit the Court's perceptions of non-Indian interests."[58] The cornerstone of Chief Justice Rehnquist's "subjectivist" approach was to "[r]etreat from the established canons of construction," by simply "dismiss[ing] the canons by declaring that no true ambiguity exists."[59]

The Court's recent decision in *Herrera*, however, provides a glimmer of hope.[60] Clayvin Herrera is a member of the Crow Tribe, a nation that has long inhabited the central portion of what is today called Montana and Wyoming.[61] Among other treaties, the Crows entered into the 1868 Treaty of Fort Laramie, wherein it ceded over 30 million acres to the United States and promised it would make "no permanent settlement" outside of the Crow Reservation.[62] No payment was made for this land by the United States. Instead, the United States agreed to provide a few buildings, clothing, implements, and other goods necessary for agriculture.[63] Additionally, the United States agreed that, "[t]he Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among whites and Indians on the borders of the hunting districts."[64]

This promise would not last thirty years before it was partially abrogated by the Supreme Court in *Race Horse*.[65] There, the Court was interpreting the 1868 Treaty of Fort Bridger between the United States and the Shoshone-Bannock Tribes, which contained language identical to Article IV of the 1868 Treaty of Fort Laramie.[66] In a decision that was entirely contrary to traditional principles of federal Indian law, the Court concluded that Congress had implicitly abrogated Article IV by admitting the State of Wyoming into the Union "on equal terms with the other states."[67] The Court's reasoning was two-fold. First, it found that because Article IV contained conditions whereby the treaty right would be reduced or lost, the right was not permanent but "essentially perishable" and "temporary and precarious."[68] Second, the Court applied the equal footing doctrine and reasoned that if the treaty right of the Shoshone-Bannocks continued after statehood, "Wyoming, then, will have been admitted into the Union, not as an equal member, but as one

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58 Getches, *supra* note 8, at 1574.

59 *Id.* at 1620–22; *see also*, Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases* 16 PUB. LAND L. REV. 1, 18 (1995) (noting that under Rehnquist the Court often "interpreted what seems an ambiguous statute against Indian interests.").

60 *Herrera*, 139 S. Ct. 1686, 1686 (2019).

61 *Id.* at 1691.

62 *Id.* at 1692; Treaty with the Crows, art. II, May 7, 1868, 15 Stat. 649.

63 *Herrera*, 139 S. Ct. at 1692–93.

64 *Id.* at 1693 (quoting Treaty with the Crows, *supra* note 62, at 650).

65 *Race Horse*, 163 U.S. 504 (1896).

66 *Herrera*, 139 S. Ct. at 1694.

67 *Race Horce*, 163 U.S. at 514.

68 *Id.* at 515.

shorn of a legislative power vested in all the other states of the Union."[69] The Supreme Court's reasoning in *Race Horse* abrogating the Shoshone-Bannock's off-reservation hunting right in Wyoming was subsequently extended to the Crow Tribe's off-reservation hunting rights by the Tenth Circuit in the 1995 case, *Crow Tribe of Indians v. Repsis.*[70]

The Supreme Court's 1999 decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[71] however, breathed new life into the Crow Tribe's off-reservation hunting rights. At issue in that case was whether a number of bands of Chippewa continued to have usufructuary rights in lands ceded by the Tribe in 1837.[72] The State of Minnesota argued that "the Indians lost these rights through an Executive Order in 1850, an 1855 Treaty, and the admission of Minnesota into the Union in 1858."[73] In a decision remarkable for its deviation from the Rehnquist Court's typical "subjectivist approach" to Indian law cases,[74] Justice

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69 *Id.* at 514.

70 73 F.3d 982 (1995).

71 526 U.S. 172 (1999).

72 *Id.* at 176.

73 *Id.*

74 The decision is particularly noteworthy for its treatment of the 1855 Treaty. That treaty included a sweeping cession:

> The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

Id. at 184. That cession included the lands where the Tribe's usufructuary rights had been reserved in 1837. The State of Minnesota argued that this was unambiguous language of cession. The Court, however, found that:

> This sentence, however, does not mention the 1837 Treaty, and it does not mention hunting, fishing, and gathering rights. The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights.

Id. at 195. As a backstop to this, the Court went on to note:

> [T]o determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Id. at 196 (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)). The Court then analyzed the language of the Act authorizing the 1855 Treaty negotiations, the negotiation instructions, and the negotiation transcript to determine whether either the United States or the Tribe understood the Treaty to include a cession of off-reservation usufructuary rights. *See id.* at 197–99. Ultimately, the Court concluded:

> [T]he historical record provides no support for the theory that the second sentence of Article 1 was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty, but it does support the theory that the Treaty, and Article 1 in particular, was designed to transfer Chippewa land to the United States. At the

O'Connor found that none of these events abrogated the Tribe's usufructuary rights.

Important for our purposes, *Mille Lacs* systematically deconstructed the twin-pillars of the *Race Horse* decision.[75] First, the Court dismissed the notion that treaty rights can be "temporary and precarious," finding that such an approach is "too broad to be useful."[76] Second, the Court "entirely rejected the 'equal footing' reasoning applied in *Race Horse*."[77] *Race Horse*'s equal footing analysis was premised on the notion that tribal usufructuary rights cannot be reconciled with state sovereignty and therefore, newly admitted states should not be burdened with treaty rights that do not exist in the original states.[78] The *Mille Lacs* Court found this to be a "false premise."[79] Pointing to a bevy of cases decided subsequent to *Race Horse*,[80] the Court concluded:

> [A]n Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources of the State. Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.[81]

Rather than adopt the misguided analysis from *Race Horse*, the Court refocused on the proper analysis based upon foundation principles: "[*Mille Lacs*] drew on numerous decisions issued since *Race Horse* to explain that Congress 'must clearly express' any intent to abrogate Indian treaty rights. The Court found no such 'clear evidence' in the Act admitting Minnesota to the Union, which was 'silent' with regard to Indian treaty rights."[82]

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very least, the historical record refutes the State's assertion that the 1855 Treaty "unambiguously" abrogated the 1837 hunting, fishing, and gathering privileges. Given this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights.

Id. at 200.

[75] *Id.* at 203–08.

[76] *Id.* at 206.

[77] *Herrera*, 139 S. Ct. at 1686.

[78] *See Race Horse*, 163 U.S. 504, 514 (1896).

[79] *Mille Lacs*, 526 U.S. 172 (1999).

[80] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Antoine v. Washington, 420 U.S. 194 (1975); Missouri v. Holland, 252 U.S. 416 (1920); Kleppe v. New Mexico, 426 U.S. 529 (1976); *Winans*, 198 U.S. 371 (1905); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

[81] *Mille Lacs*, 526 U.S. at 204.

[82] *Herrera*, 139 S. Ct. at 1696 (citations omitted) (quoting *Mille Lacs*, 526 U.S. at 202) (citing United States v. Dion, 476 U.S. 734, 738–40 (1986); *Passenger Fishing Vessel*, 443 U.S. at 690; *Menominee*, 391 U.S. at 413).

That is how things stood until Clayvin Herrera followed a herd of elk across the boundary of the Crow Reservation into Wyoming's Big Horn National Forest.[83] He was charged by the State of Wyoming with taking elk out-of-season and without a state license.[84] Herrera attempted to base his defense at trial on Article IV of the 1868 Treaty of Fort Laramie.[85] However, the trial court prohibited him from making a treaty-based defense and he was convicted.[86] Herrera raised the same defense on appeal, but the Wyoming state appellate court found that *Mille Lacs* had not entirely repudiated *Race Horse* and that Mr. Herrera was precluded from raising a treaty-based defense after the Crow lost the same argument in *Repsis*.[87]

The Supreme Court made short work of these arguments.[88] First, after reaffirming the analysis from *Mille Lacs*, the Court clarified:

> We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs* "it must be regarded as retaining no vitality" after that decision. To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.[89]

The Court's repudiation of *Race Horse* fed directly into whether Mr. Herrera was precluded from making his treaty-based defense. The Court began by acknowledging that "[u]nder the doctrine of issue preclusion 'a prior judgment . . . foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a [previous case].'"[90] However, an important exception exists where "there has been an intervening 'change in [the] applicable legal context.'"[91] Looking to its treatment of *Race Horse*, the Court concluded that "this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force."[92] As a result, the Court moved on to the merits of Mr. Herrera's treaty-based defense.

On the merits, the Court refocused the inquiry onto foundation principles:

> If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and

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83 *Id.* at 1706.

84 *Herrera*, 139 S. Ct. at 1693.

85 *Id.*; Treaty of Fort Laramie, Sioux-U.S., Apr. 29, 1868.

86 *Herrera*, 139 S. Ct. at 1693.

87 *Id.* at 1693–94.

88 *Herrera*, 139 S. Ct. at 1694.

89 *Id.* at 1686 (quoting Limbach v. Hooven & Allison Co., 466 U.S. 353, 361 (1984)).

90 *Id.* (second and third alteration in original) (quoting New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001)).

91 *Id.* at 1690 (quoting Bobby v. Bies, 556 U.S. 825, 834 (2009)).

92 *Id.* at 1698.

> Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[93]

The Court looked to three places to determine whether the requisite "clear evidence" might exist in this case.[94] First, it looked to the language of the Wyoming Statehood Act; second, to the 1868 Treaty of Fort Laramie; and finally, to the historical record.[95]

Looking to the Wyoming Statehood Act, the Court reiterated the foundational rule that the presumption is that treaty rights remain unless expressly abrogated. Looking to this rule, the Court found the Statehood Act "'makes no mention of Indian treaty rights' and 'provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act.'"[96] As a result, unlike *Race Horse*, where the Court presumed the termination of the Shoshone-Bannock's treaty rights at Wyoming statehood, the Court here found "[t]here simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the 'clear evidence' this Court's precedent requires."[97]

The Court next considered whether the 1868 Treaty of Fort Laramie expressed an intent for the Crow Tribe's off-reservation hunting rights to expire upon Wyoming's statehood. Recall that the Court in *Race Horse* described the identical language found in the 1868 Fort Bridger Treaty to be "essentially perishable" and "temporary and precarious."[98] That reasoning was repudiated by the Court in both *Mille Lacs* and *Herrera*. Instead, the Court returned once again to foundation principles, this time to reiterate that treaties must be interpreted consistent with the canons of construction:

> A treaty is "essentially a contract between sovereign nations." Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," and the words of the treaty must be construed "in the sense in which they would naturally be understood by the Indians."[99]

The Court found that the Treaty itself listed out the conditions upon which the Treaty hunting right would be terminated and found that "Wyoming's statehood does not appear on this list."[100] The Court likewise applied the canons to its analysis of the historical record. After sifting through the record as presented by both parties, the Court

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93 *Id.* (citation omitted) (quoting *Mille Lacs*, 526 U.S. 526 U.S. 172, 203 (1999)).
94 *Id.*
95 *Id.*
96 *Id.* (quoting *Mille Lacs*, 526 U.S. at 203).
97 *Id.* at 1698–99 (quoting *Mille Lacs*, 526 U.S. at 203).
98 *Race Horse*, 163 U.S. 504, 515 (1896).
99 *Herrera*, 139 S. Ct. at 1699 (citations omitted).
100 *Id.*

concluded "the historical record is by no means clear."[101] The Court then properly resolved this ambiguity in favor of the Tribe.[102] Ultimately, the Court found:

> Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire on its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.[103]

A second question addressed by the Court was whether Crow tribal members had lost their right to hunt within the Bighorn National Forest, the location where Mr. Herrera had been hunting.[104] Recall that the treaty right reserved by the Crow Tribe in 1868 was the right to "hunt on the unoccupied lands of the United States."[105] Wyoming argued that lands reserved by the United States as national forests were categorically "occupied" as that term was contemplated in the treaty.[106] In addressing this question, the Court once again relied upon the canons of construction, holding that "[t]reaty analysis begins with the text, and treaty terms are construed as 'they would naturally be understood by the Indians.'"[107] The Court construed the treaty by examining its text and the circumstances surrounding the treaty's creation and ultimately concluded that "the Crow Tribe would have understood the word 'unoccupied' to denote an area free of residence or settlement by non-Indians."[108] As a result, the Court found: "Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty."[109]

The Court was careful to note two limitations on its holding, however. First, it noted that "not that all areas within the [national] forest[s] are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was 'occupied' within the meaning of the 1868 Treaty."[110] Second, the Court noted that "[o]n remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe

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101 *Id.* at 1700.
102 *Id.*
103 *Id.*
104 *Id.* at 1700–01.
105 *Id.* at 1693 (quoting Treaty with the Crow Indians, art. IV, May 7, 1868, 15 Stat. 650).
106 *Id.* at 1701 n.5.
107 *Id.* (quoting *Passenger Fishing Vessel*, 443 U.S. 658, 676 (1979)).
108 *Id.* at 1701–02.
109 *Id.* at 1703.
110 *Id.* (citing State v. Cutler, 109 Idaho 448 (1985)).

members exercising the 1868 Treaty right is necessary for conservation."[111]

The Court's turn back to the canons of construction in *Herrera* is significant. However, as the late Professor Philip Frickey has observed, "[c]anons are mere formulations. Standing alone, a canon cannot be expected to control judicial outcome, particularly in a context removed from the one that gave birth to the canon."[112] In other words, reaffirming these canons simply begs the question: how do we know how a tribe would have interpreted their treaty?

III. LINGUISTICS AND THE RELATION BETWEEN TRADITIONAL ECOLOGICAL KNOWLEDGE AND NATIVE LANGUAGE REFERRING TO PLACE

A. Cultural Linguistics and Legal Evidence for the Meaning of Language

The ultimate goal for treaty interpretation is to understand the intent of both the United States and the tribe in negotiating and executing the treaty.[113] That understanding is typically developed through examination of three separate but intertwined sources of information: 1) the document itself, 2) the circumstances surrounding the development of the document, and 3) the history of the tribe that is party to the treaty.[114] The evidence brought to bear toward each of these sources of information is filtered through the canons. The treaty is to be viewed "'with any ambiguities resolved in favor of the Indians,' and the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'"[115]

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111 *Id.*

112 Frickey, *supra* note 34, at 428.

113 *Passenger Fishing Vessel*, 443 U.S. 658, 675–76 (1979).

114 *See Winans*, 198 U.S. 371, 380–81 (1905); Winters v. United States, 207 U.S. 564, 575–77 (1908); Arizona v. California, 373 U.S. 546, 598–600 (1963); *Menominee*, 391 U.S. 404, 406 (1968); *Antoine*, 420 U.S. 194, 197–200 (1975); *Passenger Fishing Vessel*, 443 U.S. at 664–670; *Mille Lacs*, 526 U.S. 172, 196 (1999); Idaho v. United States, 533 U.S. 262, 265–73 (2001); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011–13 (2018); *Herrera*, 139 S.Ct. at 1698–1700; *see also* Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981) ("To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created."); United States v. Adair 723 F.2d 1394 (9th Cir. 1984) (noting that water rights case "depends on an analysis of the intent of the parties to the . . . [t]reaty, as reflected in its text and surrounding circumstances."); United States v. Washington, 853 F.3d 946, 963 (9th Cir. 2018); United States v. Washington, 384 F. Supp 312, 360–50 (W.D. Wash. 1974) (including analysis on "Pretreaty Role of Fishing Among Northwest Indians," "Treaty Background," "Negotiation and Execution of the Treaties," and "Post-Treaty Indian Fishing."); Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634, 636 (D. Or. 1956).

115 *Herrera*, 139 S. Ct. at 1699 (first quoting *Passenger Fishing Vessel*, 443 U.S. at 676, then quoting *Mille Lacs*, 526 U.S. at 206).

Courts rely on expert testimony from linguists to determine how a tribe would have understood the terms of their treaty. The 1972 Idaho Supreme Court case *State v. Tinno*[116] provides a textbook example of how linguistics has been used to interpret treaties.[117] The Court there was considering the meaning of Article IV of the Treaty of Fort Bridger with the Shoshone-Bannock Tribes.[118] Again, that treaty included the promise that the Tribes "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[119] The question posed was whether "to hunt" includes fishing.[120] The court turned to the "expert testimony of Dr. Sven S. Liljeblad, a professor of anthropology and linguistics at Idaho State University, relating to the term 'to hunt' as the term was generically used in the languages of the signatory Indians."[121] The expert testified that neither the Shoshone Tribe nor the Bannock Tribe separated hunting and fishing in their language; instead, the Shoshone verb, *tygi*, and the Bannock verb, *hoawai*, both refer to the process of obtaining wild food, whether fish, game, or plants.[122] The court also considered notes taken by a United States General participating in the negotiations indicating that both hunting and fishing were discussed.[123] Using this evidence, the court concluded that the words "to hunt" in the treaty include a fishing right.[124]

A similar approach was taken by the Supreme Court during the 2019 term in *Washington State Department of Licensing v. Cougar Den, Inc.*[125] The Court there sought to discern how the Yakama Nation would have understood the term "in common with," as it related to the Nation's treaty right to travel.[126] Using linguistics, Justice Gorsuch found that "[i]n the Yakama language, the term 'in common with' . . . suggest[ed] public use or general use without restriction.'"[127] Based on this, the Justice concluded "the evidence suggests that the Yakamas understood the right-to-travel provision to provide them 'with the right to travel . . . without being subject to any licensing and permitting fees related to the exercise of that right.'"[128]

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116 State v. Tinno, 497 P.2d 1386 (Idaho 1972).
117 *Id.* at 1389.
118 *Id.*
119 *Id.* (emphasis omitted).
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 1390.
125 139 S. Ct. 1000, 1017 (2018) (Gorsuch, J., concurring).
126 *Id.* at 1016.
127 *Id.* at 1017 (quoting Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)).
128 *Id.*

Notwithstanding these strong signals, courts have been spotty at best in developing a rigorous methodology for discerning historical tribal understanding of the terms of treaties. However, as more people with Indigenous heritage have entered the academe, scholarship is moving closer to an understanding of native language. This Section will focus on the meaning of native words through the lens of cultural linguistics. The part following this Section will turn to traditional ecological knowledge to inform language reserving rights to use and occupy land and natural resources. While the goal is to understand the meaning of treaty language at the time it was written, that understanding must evolve as new approaches to unpacking their meaning are developed.

One of many ways to honor the original intent of tribal people in coming to these treaties is to better understand the words through their eyes. Cultural linguistics provides us with that opportunity.

B. Ethno- and Cultural Linguistics

Cultural (and ethno-) linguistics explores how the interaction among a group of people reflects their conceptualization of the world around them.[129] Scholars of cultural linguistics refer to language as the "collective memory bank" of a people,[130] reflecting "the cultural knowledge that emerges from the interactions between members of a cultural group across time and space."[131] Cultural linguistics looks at the emergent aspects of language including: 1) how language is used to form mental models of what is observed in time and space in the world around us as well as our own practices as a community of people and reflects the shared assumptions about the meaning of language;[132] 2) how language is used to reflect classification of concepts reflecting the broader meaning associated with a single word;[133] and 3) how metaphors may reflect cultural understanding of ourselves and our place in space and time.[134]

The authors do not claim expertise in cultural linguistics. Instead, we refer to it as an example of the increasing understanding of the depth of meaning in language. It represents a field of western science struggling to translate meaning from the language of other cultures and

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129 Farzad Sharifian, *Cultural Linguistics*, 28 ETHNOLINGUISTIC 33, 34 (2017); GARY B. PALMER, TOWARD A THEORY OF CULTURAL LINGUISTICS 35, 37 (1996).

130 *Id.* at 38 (quoting NGŨGĨ WA THIONG'O, DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE (1986)).

131 *Id.*

132 *Id.* at 40–41 (referred to as "cultural schema").

133 *Id.* at 43–45 (referred to as "cultural categories"). In reference to the noun classification system of an aboriginal people in Australia, Sharifian states, "[t]his system of noun classification is entrenched in Murrinh-patha cultural categorisation, which in turn is based on the Murrinh-patha world-view. For instance, as Walsh argues, the fact that fresh water, fire, and language are classified separately indicates that each holds a prominent place in the culture of the Murrinh-patha." *Id.* at 44.

134 *Id.* at 45–46 (referred to as "cultural metaphors").

may be useful in helping western judicial systems unpack that meaning. While federal courts have long allowed oral history, anthropology, and Native mythology to inform translation of Native language in court proceedings,[135] the fact that English language mental models do not provide a cultural basis to understand this information as the Tribe would, hinders the use of this information in judicial proceedings.[136] This notion of having to look beyond the so called "plain meaning" of translated language is captured in the following statement about the problems of intercultural communication:

> In recent years several studies have shown that in certain contexts, intercultural communication, and in particular miscommunication, reflect differences in the ways in which various groups of speakers conceptualise their experiences. In doing so they draw on their own cultural schemas, categories, and metaphors. Wolf and Polzenhagen observe that "cross-cultural variation at the conceptual level calls for a strongly meaning-oriented and interpretive approach to the study of intercultural communication" and that is what Cultural Linguistics has to offer.[137]

Similarly, Western science is beginning to acknowledge the value of traditional ecological knowledge in providing a holistic approach to understanding complex systems.[138]

> *Vignette by Sammy Matsaw*: I was sitting in on a meeting as a program manager for the Shoshone-Bannock Tribes' Fish and Wildlife department. One of our elders and the director was talking about our treaty rights and the differences between treaties of the lower [Columbia] river tribes i.e. Confederated Tribes of the Umatilla, Yakima, Nez Perce, and Warm Springs. Their treaty language says, "to fish in common with settlers"

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135 *See, e.g.*, *Tinno*, 497 P.2d 1386, 1389 (Idaho 1972).

136 *See, e.g.*, Navajo Nation v. United States Forest Serv., 479 F.3d 1024 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008).

137 Sharifian, *supra* note 129, at 49 (citation omitted). Sharifian goes on to note that in the context of international negotiations:

> they are very likely to need to convey cultural conceptualisation found in one language by means of cultural conceptualisations found in another. In other words, the process of translation or cross-cultural rendering of cultural conceptualisations can be difficult since languages encode the culturally differentiated and hence historically entrenched ways in which speakers have conceptualised their world in the past and continue to do so in the present. As a result, finding sets of words that successfully capture equivalent cultural conceptualisations in another language can become complicated, depending on the degree to which the two cultures have been in contact and, as a result, have similar although perhaps not identical cultural conceptualisations.

Id. at 53.

138 *See, e.g.*, Deborah McGregor, *Coming Full Circle: Indigenous Knowledge, Environment, and Our Future*, 28 AM. INDIAN Q. 385, 385–410 (2003).

> while ours says "to hunt." During the *Tinno* case, Sven[139] said our language for "to hunt" meant to gather wild foods. Of course, they're going to listen to a white guy who is an expert in our language over our own people? It was good either way because they understood our language doesn't translate to English and we say to gather wild foods as in hunting, fishing, trapping, and gathering our foods. But the old ones said it meant more than that, it meant to gather your things up, go out on the land, camp, and gather wild foods.
>
> To me when the more I talked with my own generation about the ideas in *tygi* or *hoawai*, the Shoshone or Bannock word for "to hunt," respectively, it seems there was so much more to our language. Language for Shoshone and Bannock peoples, and Indigenous peoples of North America, are made up of mostly verbs whereas English and Latin based languages are made up of nouns. For example, in English one would call a writing utensil a pen, a pencil, a marker and so on whereas with Shoshone-Bannocks we say "gimme the thing to write with." When we talk about *tygi/hoawai* it seems there must be learning and teaching in there as well. Teaching and learning about the seasonal round, the dances, the songs, the stories, where to go, where to set up camp, what's there, what's in season, and so on. *Tygi* and *hoawai* moved within and among the ceremonies of Shoshone and Bannock ways of living in our sacred homelands and waterways. I can imagine our ancestors deliberating the language of the treaties over the years. I say treaties and years plural because the Fort Bridger Treaty of 1868 was among the dozens of previously negotiated treaties over decades of settlers trying to come to an agreement with the local Tribes. How they must've thought, "someday we can teach them about how to live within our homelands through our ceremonies, teachings and way of life." Naïve? Maybe, maybe not.

The observations presented in the vignette above highlight the many gaps in understanding that exist between Native and Eurocentric worldviews. The first step toward filling these gaps—and thereby finally honoring tribal intent when construing treaties—is to understand how tribal people think differently than those from non-Indian communities. Those differences are manifold, but we highlight three here: 1) philosophical differences in time and space; 2) miscommunications caused by direct translations; and 3) misunderstandings developed by tribal use of verb-based thought worlds.

1. Philosophical Differences of Time and Space

Benjamin Whorf, an anthropologist and linguist, proposed a theory of linguistic relativity through his studies of Mayan and Hopi languages. He states:

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139 Dr. Sven S. Liljeblad (1899–2000), was a professor of anthropology and linguistics at Idaho State University who gave expert testimony of signatory tribes during *Tinno*, 497 P.2d 1386, 1389 (Idaho 1972).

> I find it gratuitous to assume that a Hopi who knows only the Hopi language and the cultural ideas of his own society has the same notions, often supposed to be intuitions, of time and space that we have, and that are generally assumed to be universal. In particular, he has no general notion or intuition of *time* as a smooth flowing continuum in which everything in the universe proceeds at an equal rate, out of a future, through a present, into a past; or, in which, to reverse the picture, the observer is being carried in the stream of duration continuously away from a past and into a future.[140]

From this, Whorf goes on to distinguish the thoughts and ideas of Hopi peoples' metaphysics, asserting that humans can come to similar views of the universe through very different thought worlds. Joseph Subbiondo, linguist and president of the California Institute of Integral Studies, has found Whorf's writings and studied them in the context of critiquing Western science notes:

> Western culture has made, through language, a provisional analysis of reality and, without correctives, holds resolutely to that analysis as final. The only corrective lie in all those other tongues which by aeons of independent evolution have arrived at different, but equally logical, provisional analysis.[141]

Certain assumptions usually remain implicit in the language of English speaking Euro-descended peoples—assumptions that do not challenge the power, privilege, and land given to them by Indigenous peoples who signed treaties.[142] There is a bias in the implicit structure of English speaking peoples shaping certain assumptions. In most cases these certain types of assumptions are believed to be universal such that the implicit idea of a scientist is usually a white male, in a white lab coat. The implicit reality is that he is also believed to be cis-hetero male with a wife and nuclear family, Christian, Anglo, patriot, middle-class, etc. The uniformity is a part of the goal of scientific research in order to find universally applied solutions, a monoculture of science and its application. There is an interplay where science affects society and vice-versa in unforeseen ways such that the implicit become ubiquitous. The dangers of unquestioned assumptions imbedded in implicit meaning. What assumptions are shaped by language and which are shaped by methodology? If colonialism is a culture of colonizing Indigenous lands and asserting a supremacy through one spoken language, does that make Western frameworks (i.e., Western science) the best? Without any

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140 Benjamin L. Whorf, *An American Indian Model of the Universe*, 16 INT'L J. AM. LINGUISTICS 67, 67 (1950).

141 J.L. Subbiondo, *Benjamin Lee Whorf's Theory of Language, Culture, and Consciousness: A Critique of Western Science*, 25 LANGUAGE & COMM. 149, 157 (2005), https://perma.cc/G9VT-SVQZ.

142 *See* David A. Bell, *Columbia River Treaty Renewal and Sovereign Tribal Authority under the Stevens Treaty Right-to-Fish Clause*, 36 PUB. LAND & RESOURCES L. REV. 270, 273–98 (2015).

research or analysis into these linguistic assumptions, how would we ever know?

2. Direct Translation Often Fails to Grasp Meaning

We do know that Indigenous languages are usually bounded by a particular place. They are also verb-based because there was/is more interest in processes and relationships (the use of past tense reflects the extinction/endangerment of Indigenous languages happening today). The idea, feeling, and conversation is not about an object per se but about the processes of energy around a particular set of objects. For instance, Kevin Locke (Lakota name: Thokéya Inážiŋ, meaning "The First to Arise") is Lakota (Hunkpapa band) and Anishinaabe, a fluent Lakota language speaker, and educator states the following:

> Lakota is really specific in terms of the describing of different processes. For instance, *-ȟléčA* which means the idea to tear. If you tear something with your fingers it's, *yuȟléčA*. If you tear something with your teeth, *yaȟléčA*. If you tear something with pressure, *paȟléčA*. If you tear something with your foot, *naȟléčA*. If the wind blows and tears something its, *woȟléčA*. And it goes on, there's more than this. But I'm just trying to emphasize the fact that the Lakȟóta language offers a different perspective, a different angle on the world we live in.[143]

We can learn that Lakota language as Indigenous peoples reveals another frame of thought focused on processes and relationships rather than cause and effect and other categories as seen in English and other European languages. In the Lakota language, there is more interest in the processes of energy than there is in the object per se. If we were to apply this to a network or food web analysis, we would see more interest in the flow through nodes, not necessarily the nodes themselves. Thus, it follows that we see ourselves as part of nature rather than separate from nature. In contrast, English thinking speakers see categories and therefore use a language to imply a discrete separation from nature.

3. Verb-Based Thought Worlds

The fixation on objects and seeing nature as objects creates a divisiveness such as human-nature division or conflict. Where civilization takes natural resources, converting nature for the needs of humans in the view of nature providing ecosystem services, nature for the Indigenous is viewed as one in the same:

> ". . . all of nature is in me, and a bit of myself is in all of nature."[144]

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143 DVD: Rising Voices / Hótȟaŋiŋpi, Revitalizing the Lakota Language (Florentine Films/Hott Productions, in association with The Language Conservancy, Dana Claxton, Alayna Eagle Shield, Milt Lee & Yvonne Russo eds., 2015).

144 JOHN (FIRE) LAME DEER & RICHARD ERDOES, LAME DEER, SEEKER OF VISIONS 137 (1973).

From this quote we were once more interested in the *is*, the *being-ness* of life, our connection and fluidity between us and us between all of creation. In a contemporary English lens of the world we are preoccupied with the *it*, the *object* of life. The being-ness of life is where we want to get back to, our languages and our way of thought. If the being-ness of life is of interest and forms our ideas about science then we have much to re-claim, to call our own. We have maintained a hunting-gathering-fishing tie to the land that still informs our science thinking and practice. Viola Cordova, the first Native American woman to receive a Ph.D in philosophy, receiving it in 1992 from the University of New Mexico. She states:

> They saw themselves as existing in a web of highly interrelated and interdependent "substances": air, water, other beings, and land. They maintained their life force by ingesting the life force of other beings. No less respect was due a wild onion than a deer. "Eat it," my father would say to us, "we took its life that we might continue our own." Eating was a holy sacrament; a thanksgiving to the creatures that provided us life.[145]

The teachings Viola is sharing in the quote above sheds light on the idea of a matrices of thought underlying implicitly in the words from her father. We would go a bit farther as to say that not all ideas need to be said, as we understand one another's actions and it is those actions that represent an unspoken truth of who we are. Language is vital and necessary, but is not the end all, be all of reconnecting our thought patterns with our reality and world.

C. Traditional Ecological Knowledge Shapes Mental Models of Nature

There are very few fluent speakers of Indigenous languages. Not to say the impacts of the language do not remain, they do. Part of the implicit nature of language is its spirit, and without being fluent in one's language the spirit of the language lives on. The language is from the land and when we go back out onto our homelands the language is there. Similar to niche concept theory,[146] a species will match to their behavioral characteristics and genetic traits to their surrounding environment, so do humans with language. Language, as a behavioral characteristic, is a response of the lands we live within. Forcing a foreign language onto Indigenous lands is similar to building fences, roads, dams, plowing crops, and extracting minerals. The call from Indigenous peoples has been what we do to our lands, we do to ourselves, an agentic relationship. There are few fluent speakers of Indigenous languages just as there are few places untouched by

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145 Viola Faye Cordova, Time, Culture, and Self, *in* HOW IT IS: THE NATIVE AMERICAN PHILOSOPHY OF V.F. CORDOVA 171, 173 (Kathleen Dean Moore et al. eds., 2007).

146 *See generally* G. Evelyn Hutchinson, *Concluding Remarks*, 22 COLD SPRING HARBOR SYMPOSIA ON QUANTITATIVE BIOLOGY 415 (1957).

colonialism. We are all living in a recent story of how our lands are being destroyed much like our stories of the past. Indigenous peoples have experienced similar change before.

Indigenous storytelling of climate change are theoretical anchors. As an explanation of phenomena these stories are held as "theories" that indigenous communities adapt, are regenerative, and take on the responsibilities before us and how we live in our homelands.[147] This contrasts with colonialism, defined as a "policy or practice of acquiring full or partial political control over another country, occupying it with settlers and exploiting it economically."[148] "It" being our homelands, there is a lack of theoretical anchors similar to Indigenous peoples. Theoretical anchors are grounded in the sacredness of place that, "'[t]heory' isn't just an intellectual pursuit—it is woven within kinetics, spiritual presence and emotion, it is contextual and relational. It is intimate and personal, with individuals themselves holding the responsibilities for finding and generating meaning within their own lives."[149] Settlers with a colonial mindset act in funny ways, such that as a product of Western European paradigms there is a denial of climate change because scientific theory is only for academics, whereas Indigenous "theory" is for everyone.[150] Being anchored to a homeland forbids denial of homeland destruction.

Indigenous Knowledge cannot be defined and shouldn't be. Scholars James Youngblood Henderson and Marie Ann Battiste offer a conceptualization as such:

> Perhaps the closest one can get to describing unity in Indigenous knowledge is that knowledge is the expression of the vibrant relationships between people, their ecosystems, and other living beings and spirits that share their lands. . . . All aspects of knowledge are interrelated and cannot be separated from the traditional territories of the people concerned. . . . To the Indigenous ways of knowing, the self exists within a world that is subject to flux. The purpose of these ways of knowing is to reunify the world or at least to reconcile the world to itself. Indigenous knowledge is the way of living within contexts of flux, paradox, and tension, respecting the pull of dualism and reconciling opposing forces. . . . Developing these ways of knowing leads to freedom of consciousness and to solidarity with the natural world.'[151]

Traditional Ecological Knowledge (TEK) is understood from the perspective of a Eurocentric lens, which extracts from Indigenous Knowledge what it perceives as science knowing from Indigenous

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147 *See* Leanne Betasamosake Simpson, *Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation*, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y, 2014, at 1, 7.

148 *Colonialism*, LEXICO, https://perma.cc/6PLU-8QQX (last visited Apr. 18, 2020).

149 Simpson, *supra* note 147, at 7.

150 *Id.* at 7–9.

151 *See* Deborah McGregor, *Coming Full Circle: Indigenous Knowledge, Environment, and Our Future*, 28 AM. INDIAN Q. (SPECIAL ISSUE) 385, 390 (2003).

peoples. However, an explanation of TEK is better described by Indigenous scholar Martha Johnson who states the following:

> [A] body of knowledge built up by a group of people through generations of living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. The quantity and quality of traditional environmental knowledge varies among community members, depending upon gender, age, social status, intellectual capability, and profession (hunter, spiritual leader, healer, etc.). With its roots firmly in the past, traditional environmental knowledge is both cumulative and dynamic, building upon the experience of earlier generations and adapting to the new technological and socioeconomic changes of the present.[152]

TEK *is* a relationship with land and Creation, not just *about* a relationship with land and Creation. Gregory Cajete, Tewa Indian from the Santa Clara Pueblo and Professor of Native American Studies and Language Literacy Sociocultural Studies at the University of New Mexico, where he is a leading expert on the integration of Indigenous knowledge in education and science states:

> Native people traditionally lived a kind of communal environmental ethics that stemmed from the broadest sense of kinship with all life. The underlying aim of the science of ecology, therefore, the understanding of the web of relationships with the "household" of Nature, is not modern science's sole property. Understanding the relationship scientifically is not enough—living and nurturing these relationships is the key. This is the ecology of the Native community.[153]

Regardless of the different tribal nations of the authors represented here in the above quotes, there is a distinction, *is/about*, as relationships with ecosystems are viewed differently, shaping a different worldview from European thinking. Reconciling these differences in the present for Indigenous peoples becomes difficult when past, present and future generations live in an English-speaking worldview. Needing to define what Indigenous Knowledge, Traditional Knowledge, or Traditional Ecological Knowledge is, is necessarily dangerous.

Evidence of TEK can been seen in many Indigenous cultures by their relationships with their homelands. For instance, a seasonal round as depicted by Shoshone language instructor Drusilla Gould at Idaho State University shows how the people move about the land through the seasons by solstices, equinoxes, and moon phases.[154] As those times

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152 *Id.* at 393.

153 *Id.* at 394.

154 Drusilla Gould et al., *The Mathematical Ecology of the Shoshoni and Implications for Elementary Mathematics Education and the Young Learner*, 40 J. AM. INDIAN EDUC. 1, 16 (2001).

come, they sing songs and dance to welcome in the season.[155] Each season is marked by moon phases informing when to hunt, gather, and fish for certain species of plants and animals. All of this is done randomly to take what is needed and no more from one population, so as not to wipe out a whole population. Moving about the land was important because it established a respectful, giving and taking relationship with life-sustaining living and non-living entities. Thus, it also follows why we speak in verbs because it is the moving across the land driving the basis of our cultures such as values, customs, protocols, ethics, and traditions. Unlike Western culture where the noun is the primary focus of a sentence, the noun is secondary to the action-based culture. We move place to place. We give our songs, dances, and tobacco in relationship with taking of life. We are primarily interested in verbs, the doing. *Tygi* and *hoawai* are seminal to our way of living and always will be.

Storytelling is a matrix of human experiences over time. The pattern system or matrices of thought to which the language speaks of and represents is a tool to make that representation more fluid. When the language is absent, it has been shown the pattern system remains and is reflected in recent research.[156] The study showed a precociousness to ecological orientation in Menominee children, although they don't disclose a fluency of language. The study was designed using the English language and Western tools of science. Yet, the results demonstrated the culturally based epistemological orientations of the Menominee people that was implicit in the nature and spirit of language. Fluency of Indigenous languages is important to preserving different ways of knowing and knowledge. It would behoove the scientific enterprise to co-lead this effort with the peoples of whose lands they are occupying. We call on scientists to be true to their fundamental interest in seeking knowledge by embracing Indigenous languages and thinkers. The scientific community should shape culturally based epistemological orientations, thus bringing new knowledge from Indigenous cultures.

We now review some of the recent research that reveals the distinct relationship Indigenous peoples have with land and nature. For example, in *Cultural Mosaics and Mental Models of Nature*,[157] there are significant differences of how cultural groups such as Indigenous and non-Indigenous peoples see themselves on the land as a part of nature and apart from nature, they foreground and background this relationship with nature, respectively. This is important because as they explain, the "cultural framework theories provide individuals with skeletal principles for meaning making, including beliefs about what sorts of things are relevant, worthy of attention and in need of

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155 *Id.* at 11.

156 Megan Bang et al., *Cultural Mosaics and Mental Models of Nature*, 104 PROC. NAT'L ACAD. SCI. 13,868, 13,869 (2007).

157 *Id.*

explanation."[158] Specifically, in hunting experiences there are differences that provide perspectives of human relationship with nature, plants and animals, and the land. In the Euro-American sense hunters follow a set of protocols such as, but not limited to, a uniform, an ethic, and shared stories of hunting experiences.[159] The Euro-American experience is categorical, whereas in the foregrounding of, *all of nature is in us, all of us is in nature*,[160] our experiences are not necessarily focused on person, place, or thing. Rather, there are more nuanced interests in non-categorical processes. This sentiment is illustrated in Cordova's quote of her father's teachings[161]—that a life force transfers through eating and ingesting traditional foods thereby eating is a taking of daily sacrament so that life goes on. From the English perspective our teachings are complicated because they go against the ideas of separation. In a highly interrelated connection of life forces we are experiencing both science and spirituality at the same time. We do not separate those two ideas in the transfer of life to life through eating. For us it is complicated to practice a science way of thinking in one box, eating in another, and praying in another.

IV. TO INTERPRET AMERICAN INDIAN TREATIES AS THE TRIBES WOULD HAVE UNDERSTOOD THEM

Indigenous peoples of Turtle Island tell stories about the roles of plants and animals for their survivance[162] and adaptively in the twenty-first century in a formation of red pedagogy[163] upon highly modified landscapes to riverscapes from continued settlement.[164] These stories are "contracts" between Indigenous peoples and life forms, and the environment (water, land, and sky) they rely upon.[165] Within the

158 *Id.* at 13,868.

159 *See* Sammy L. Matsaw, *Teachings from the Land of my Ancestors: Knowing Places as a Gatherer, Hunter, Fisher and Ecologist*, *in* PLACE-BASED LEARNING FOR THE PLATE: HUNTING, FORAGING, AND FISHING FOR FOOD (Joel B. Pontius et al. eds., 2020).

160 *See* LAME DEER & ERDOES, *supra* note 144.

161 Cordova, *supra* note 145, at 173.

162 *See generally* Gerald Vizenor, *The Ruins of Representation*, 17 AM. INDIAN Q. 7 (1993).

163 *See* SANDY GRANDE, RED PEDAGOGY: NATIVE AMERICAN SOCIAL AND POLITICAL THOUGHT 15 (Rowman & Littlefield eds., 2015). "Rather than narratives solely recounting destruction and demise, Native stores about Native history tend to focus on what White Earth Ojibwe scholar Gerald Vizenor has called *survivance*—a narrative incorporating themes of survival and resistance that insist on the inclusion of the Native presence." *History of Survivance: Upper Midwest 19th-Century Native American Narratives*, DIGITAL PUB. LIBR. AM., https://perma.cc/V9A3-32CP (last visited Apr. 23, 2020).

164 Paul Goble has written numerous children's books recounting traditional indigenous stories. *See* PAUL GOBLE, THE LEGEND OF THE WHITE BUFFALO WOMAN (2002); PAUL GOBLE, THE GREAT RACE OF THE BIRDS AND ANIMALS (1991); PAUL GOBLE, ALL OUR RELATIVES: TRADITIONAL NATIVE AMERICAN THOUGHTS ABOUT NATURE (2005).

165 Freshwaters Illustrated & Columbia River Inter-Tribal Fish Comm'n, *The Lost Fish: The Struggle to Save Pacific Lamprey*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N (2013), https://perma.cc/K7R2-4CHC.

agreements human beings are to take care of them as they sacrificed themselves to take care of Indigenous peoples. Because of the "contractual" relationship, Indigenous peoples *remember to remember* at intervals within the seasons to pay homage to life forms and the environment.[166] The seasonal ceremony can begin in spring paying homage to "Traditional Foods," also known as "First Foods" in the Pacific Northwest, through varying customs and traditions, usually dependent on the bounded space of each tribe.[167] The ceremonies continue throughout the year through a seasonal round: central to moon and sun phases (i.e., months, equinox, and solstice), while acknowledging the plants and animals, and the environmental phase of the harvest time through song and dance. However, driven mainly by a highly modified landscape, climate change, and a mass extinction event primarily because of colonization and its derivatives (i.e., industrialization, capitalism, etc.), these forces have continued to endanger and threaten Indigenous culture, identity, language, and sovereignty.[168] The time is now to re-evaluate treaties as the tribes would have understood them, on their terms, without Euro-what-have-you intervention.

The hunting and fishing rights in the Treaty of Fort Bridger with the Shoshone-Bannock Tribes of the Fort Hall Reservation have been interpreted in two strikingly different cases discussed above. In the 1896 Supreme Court case of *Race Horse*, the Court gave no meaning to the understanding of the Tribes, interpreting their rights as "temporary and precarious"[169] and thus easily abrogated by the admission of a state to the union.[170] In the Idaho Supreme Court case, *Tinno*,[171] the court admitted expert testimony on linguistics and concluded that because the Tribes did not separate hunting and fishing in language using the Shoshone verb *tygi* and the Bannock verb *hoawai* in reference to obtaining wild food, the words "to hunt" in the treaty include a fishing right.[172] *Tinno* illustrates the understanding of language that must be entered in cases interpreting treaty language.

Tygi/hoawai as a set of learning processes that can be thought of as, but not limited to, part of a living and nurturing of relationships with land and Creation through a seasonal round. Experimental processes as a continual study design honoring time (i.e., moon phases, equinox, and solstice) and space (i.e., usual and accustomed use areas bounded by the four directions) by a set of protocols, customs, and traditions. Shared through communications of art expressed in song, dance, paintings,

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166 ROBIN KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE AND THE TEACHINGS OF PLANTS (2013).

167 Cordova, *supra* note 145.

168 DANIEL R. WILDCAT, RED ALERT! SAVING THE PLANET WITH INDIGENOUS KNOWLEDGE, 39 (2009).

169 *Race Horse*, 163 U.S. 504, 510 (1896).

170 *Id.* at 509–10.

171 *Tinno*, 497 P.2d 1386 (Idaho 1972).

172 *Id.* at 1389–90.

pictographs, and language. Daily celebrations with a beingness of eating, adorning, and honoring the gathering of wild foods to care for ourselves, our families, communities and ecosystems we moved in and out of, on water and land, regenerating and adapting Shoshone-Bannock knowledge since time immemorial. Accordingly, when we give weight to the verb-thought world the definition of "to hunt" in the English language, a noun-thought world, it is quite limiting to the ideas-feelings-spiritual sense of the Shoshone-Bannock treaty signatories and how they would have understood *tygi/hoawai. Tygi* and *hoawai* have much more meaning than the English translation "to hunt." The Shoshone-Bannock ancestors would have understood to hunt as to gather wild foods, including fishing. The idea to gather wild foods does not stop there.

"[C]ulture should not be understood as individual traits, but rather as the constellation of ways in which people think, act, and make sense of the world."[173] Only by acknowledging the deep cultural and ethnic roots of language through the evidence admitted in court cases, interpreting treaties with American Indian tribes, may the courts of the colonizer begin to reconcile the conflicting world views and begin to address the sacred responsibility to the Indigenous peoples of Turtle Island (America).

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173 Bang et al., *supra* note 156, at 13,872.