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The Salmon People, Judge Boldt, and the Rule of Law

Reviewed by Charles F. Wilkinson

In my recent book, *Blood Struggle—The Rise of Modern Indian Nations*, I recount the modern Indian sovereignty movement, a revival that has improved Indian education, health, and economic conditions; protected fishing, hunting, water, and religious rights; and reestablished tribal governments as the primary governments on the 58 million acres of Indian reservations, an area larger than the State of Minnesota. Although Indian people still have much to do, I find the Indian movement comparable in its successes to the civil rights, women's, and environmental movements.

One of the foundational accomplishments was the so-called "Boldt decision" of 1974, which declared extensive tribal fishing rights to salmon and laid the groundwork for the impressive tribal salmon management programs that are in the front line of the historic effort to restore the salmon runs of the Pacific Northwest. In the mid-1850s, tribes negotiated treaties with the United States that granted away most of their aboriginal lands but that reserved their right to fish both on the reservations and also at traditional off-reservation sites "in common with all citizens of the territory." During the twentieth century, as environmental damage and overfishing steadily reduced the runs, state enforcement officers began arresting Indians for fishing outside of state laws. The tribes maintained that the treaty guaranteed them the right to half of all the salmon and the right to fish under their own laws. Eventually, the vague treaty provisions reached the courts.

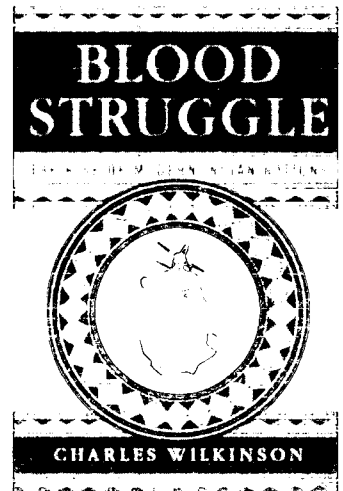
The following is adapted from *Blood Struggle*.

The long and violent salmon wars in the Puget Sound region of Washington, simmering for generations, boiled over in the early 1960s. With fewer fish and many more non-Indian fishers, Washington state fish agencies fixed blame squarely on the Indians. Never mind the well-documented environmental damage caused by dams and other development; never mind that treaty fishers took just 6 percent of the overall harvest. State officers mounted major raids on the Puyallup, Nisqually, and Green Rivers and on Makah fishers in Neah Bay. From there the state enforcement effort expanded to all 23 tribes in northwest Washington, where thousands of Indians exercised treaty fishing rights.

The Muckleshoot Tribe, like most in the Puget Sound area, had seen its lands carved down to a reservation so small that off-reservation fishing was an absolute necessity for these salmon people. Reservation visitors commented on how every home seemed to have fish

spears and drying salmon hanging on interior household walls. In addition to regular salmon meals, Muckleshoot sold fish to buyers from Aberdeen to Seattle as a main source of income.

The tribal fisheries manager, Cecil Moses, headed the Muckleshoot resistance to the state's crackdown. A big, burly man, Moses had the toughest job, working the green chain, at the Weyerhaeuser mill. A follower of the traditional Shaker religion, he dedicated his life to protecting the fishing rights of his people from the non-Indians who, in his words, "just take, take, take." He set the Muckleshoot fishing seasons, strategized with other tribal leaders, organized fish-ins, and endured many arrests and seizures of his canoes. Much later, when the salmon wars finally ended, Moses, like most of the resisters from other tribes, was treated as a returning war hero and served on the tribal council for more than 20 years.



Adapted from
*Blood Struggle—
The Rise of Modern
Indian Nations*

Author: Charles F. Wilkinson

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Wilkinson is a Distinguished University Professor and Moses Lasky Professor of Law at the University of Colorado, and is the author of thirteen books, including the standard casebooks on Indian law and federal public land law, American Indians: Time and the Law (Yale 1987), and Blood Struggle (W.W. Norton 2005).

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The fishing at Muckleshoot, as it always had been, was a family affair. The men did most of the harvesting, working from rock formations with spears and dip nets. Out on the rivers they used aluminum boats and the traditional 20-foot-long red cedar canoes carved with shovel noses to prevent tipping and operated with ornate maple or yellow cedar paddles and fir pushpoles. The women did the cleaning and the precision task of drying the delicate fillets on alder racks. The children were tasked with various chores. Gerald Moses, Cecil's son, looks back jovially at his childhood days as a "pack horse," when he would lug gunnysacks full of 15- to 25-pound chinook from the riverbank up the steep sides of the Green River canyon to the women waiting above.

The constant surveillance and threat of arrest took some of the joy and profit out of it. Increasingly, fishers from the Muckleshoot and other tribes had to work the rivers at night: "dark-time fishing." More time went into fighting the state than caring for the equipment and catching the fish. Then, too, the high-visibility conflict created splits within the Indian community. Some tribal leaders, hearing the relentless drumbeat that the off-reservation fishers were "poachers" and "renegades," became openly critical of the resisters.

Many of the confrontations sparked physical violence. Officers forcibly dragged Indian fishermen up rocky banks and landed blows with fists, nightsticks, and long-handled flashlights. Indians usually gave dead weight when arrested, but both sides had their hotbloods. Some of the fishermen fought back, and angry Indian spectators sometimes showered the officers with rocks and chunks of driftwood. With demonstrations rising in support of black civil rights, the states received increased federal funding to quell civil disobedience. In 1964, Billy Frank, Jr., of the Nisqually Tribe, who was to suffer some 50 arrests and gear confiscations going back to 1945, realized the State of Washington was going all out when state officers in riot gear operating a high-speed aluminum boat rammed and capsized his cedar canoe: "These guys had a budget. This was a war."

Although the stalwart presence of Indian fishers on the rivers was a *sine qua non*, the tribes could not prevail

without political and legal strategies. From the Washington tribes, Ramona Bennett of Puyallup, Janet McCloud of Tulalip, Guy McMinds of Quinault, and Hank Adams from Fort Peck, young people all, took the lead.

They knew about, and understood, the federal court opinions. Early in the twentieth century a fish wheel operator in the Columbia, trying to eliminate competition from Yakama dip net fishers, fenced off a traditional fishing site, blocking access by the Yakama. A federal Department of Justice attorney sued on behalf of the Indians. In a leading Indian law opinion, the Supreme Court held in the 1905 *United States v. Winans* case that—regardless of any contrary state laws—federal treaties continued in force and that the Indian fishers had a right to fish at the site even though a non-Indian, Winans, owned the land. Justice Joseph McKenna, who wrote the opinion, underscored the gravity and dignity of the Indian position by stating that the right to fish was "not much less necessary to the existence of the Indians than the atmosphere they breathed." The cases since then had split; the federal decisions usually upheld the Indian position, while the Washington state court decisions supported state regulation of Indian fishing. The treaties, though, were federal law, and under the Constitution federal laws and federal court decisions interpreting them override any conflicting state laws. The tribes seemed to have a solid legal position.

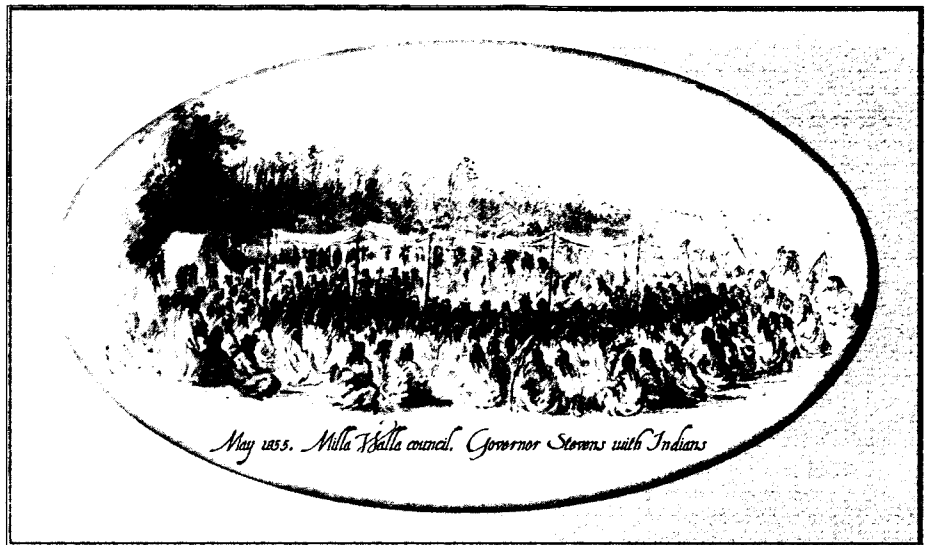
There remained the matter of lawyers. A few tribes could scrape together funds to hire an attorney, but most could not. The War on Poverty provided the saving grace. By the mid-1960s the Office of Economic Opportunity had opened legal services offices for poor people with several located on reservations. In northwest Washington, Seattle Legal Services not only agreed to take on Indian treaty litigation but dedicated an impressive amount of attorney time. Janet McCloud and Hank Adams succeeded in bringing in the Native American Rights Fund, the national nonprofit Indian law firm in Colorado, which also received OEO support. It proved to be a critical move. David Getches from NARF became a mainstay for the tribes.

It was fully apparent how critical fed-

eral support would be. The federal lawyers would bring litigation experience and, in the case of George Dysart with the Interior Department, deep expertise in Indian law. Litigation on the treaties would require extensive—and expensive—expert testimony, which the federal government would support. Moreover, no one had any doubt about the credibility it would add to the tribes' case if the trial began with a Department of Justice attorney rising to his feet in a high-ceilinged federal courtroom to pronounce, "Your Honor, on behalf of the United States of America, I represent the plaintiff Indian tribes in this action." Courageously and adeptly, Dysart and Stanley Pitkin, the United States attorney for western Washington, pressed higher-ups for the United States, as trustee for the tribes, to sue the state on behalf of the tribes. Finally, in September 1970, the justice department launched *United States v. Washington* in Federal District Court in Tacoma. Most of the Washington tribes intervened.

The very first event, the assignment of the case to Judge George H. Boldt, was hardly auspicious for the Indian side. Boldt, an Eisenhower appointee, had earned a reputation as a hard-nosed judge who handed out stiff sentences in criminal cases. He ran a tight ship in the courtroom. In the trial of Vietnam protesters called the Seattle Seven, the defendants repeatedly disrupted the courtroom to the point that continuing the trial would be futile. Frustrated, Judge Boldt finally declared a mistrial, but he was not finished. He proceeded to sentence the Seattle Seven to six months in jail for contempt of court—and refused to lift the sentences for the Christmas holidays. Those and other stories left the Indians and their lawyers rolling their eyes.

The trial began in Tacoma on August 27, 1973. When the diminutive man entered the packed courtroom in his robe and ever-present bow tie and seated himself behind the bench, no one could know Judge Boldt's predispositions, if any, toward the case. The many Indian people in attendance, who had long believed that the federal judiciary would deliver them justice, watched anxiously. Strange that it would come down to this judge in this regal-looking wood-paneled room. The treaties, the sovereignty, the hopes, all to



be decided by this judge in this room.

Thirty years later the Nisqually fisherman Billy Frank, Jr., recalled the day well: "We had a whole lot of bad experiences with the state courts. The judges were finding us guilty and throwing us in jail. When we did get a good decision, the state supreme court would reverse it. Then Judge Boldt took our case. We knew he was a conservative judge. In some of the early hearings he made some statements we took as sympathetic. When he was put on the Pay Board [by President Nixon], our case went to another judge, who was really disappointing. Then, when Judge Boldt came back from the Pay Board, it was a big step. It gave us hope. Still, we had a lot of doubts. We looked around, it was standing room only, and it was all red-necks, sports fishermen. These guys got there first and took all the seats. They wanted to show their power. I remember thinking, 'I hope this place isn't rigged.'"

As he stood in the back of the courtroom that day, Billy Frank knew that the cause to which he had dedicated his adult life was nearing a climax. Would this trial be a charade—"rigged"? Or would his fervently held vision of justice be served? This was his tribe's last stand, and the moment of truth was at hand.

* * *

The lengthy, sprawling trial in *United States v. Washington*—Judge Boldt considered arguments from eleven lawyers, heard nearly 50 witnesses, received 350 exhibits, and analyzed testimony in a 4,600-page trial transcript—turned ulti-

The Supreme Court said long ago that any ambiguities in treaty language must be resolved in favor of the Indians.

Some lawyers in the case believe that the words of the elders “won the case.”

mately on historical evidence, for Boldt’s job was to say what the cryptic treaty language meant in defining Indian off-reservation rights as: “the right of taking fish . . . in common with all citizens of the territory.” Did the state have any role in regulating Indian fishing? Did the “right of taking fish” mean that the tribes had the sovereign authority to do their own regulating? Did “in common with” allocate a share of the fishery to the tribes? How large a share?

In recreating these ancient negotiations, Judge Boldt was required to give the benefit of the doubt to the tribes. The Supreme Court said long ago that any ambiguities in treaty language must be resolved in favor of the Indians. The United States had written the treaty in its own language and, being militarily superior, could impose its terms. The law has always, as a matter of fairness, construed contracts between unequal parties (such as consumer agreements with banks and insurance companies) in favor of the weaker parties. The rule of reading Indian treaties in favor of the tribes also derives from the United States’s trust obligation to act in the best interests of the tribes.

This trial about the deep past hinged on the testimony of Dr. Barbara Lane, an anthropologist from the University of British Columbia. Lane, authoritative and precise, speaking in her clipped Canadian accent, described the treaty negotiations and the backdrop of Native life in great detail. Judge Boldt gave her the highest judicial compliment, calling her findings “exceptionally well researched and reported.” Comparing Lane’s testimony with that of Dr. Carroll Riley, the state’s expert, Judge Boldt concluded that “in summary, the court finds that where their testimony differs in any significant detail, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified.” Years later Judge Boldt validated in simple terms the iron determination of the Indian treaty negotiators: “Historically, the Indians would never sign a treaty unless they’d retained their prerogatives to fish in their usual and accustomed places.”

Barbara Lane had company on the witness stand. Toward the end of the trial, Indian elders testified and told,

sometimes in their own languages, their stories of the salmon people and the treaties. Some lawyers in the case believe that the words of the elders “won the case.” Judge Boldt was rapt, never taking his eyes from Lena Hillaire, Lena Smith, Forrest “Dutch” Kinley, and Esther Ross as they recounted their stories of the rivers, land, ceremonies, and salmon. They related too what their grandfathers had told them about treaty time, confirming and deepening Dr. Lane’s academic testimony. Lena Smith said that “once when my grandfather was picked up for fishing and put in jail, we went to the jailhouse, and they were talking about the treaty. Isaac Stevens [the principal federal negotiator] said to our chiefs that if there was a river or a creek where the Indians fished before, they could fish there after the treaty.” Dutch Kinley testified in a similar vein: “We gave up our land without any restrictions. But when it came to hunting and fishing, we wanted exclusive rights in certain areas. We felt that we were giving the citizens a right to fish in common with us.” A lawyer for a non-Indian commercial fishing association then testified Kinley on cross-examination:

Q: Mr. Kinley, you just said a moment ago that you believe the Indians have exclusive fishing rights to certain locations. I want to point out the obvious: that you certainly were not present at the treaty negotiations, nor have you talked to anyone who was at them, have you?

A: No. My father died at 103 years old, and I think it’s been the tradition of our people—you have history books; our people, the duty of our old people was to inform us about our family and about our rights. I think that this is a tradition that has been as accurate as your history books.

Judge Boldt handed down his historic opinion in *United States v. Washington* on February 12, 1974—he intentionally chose Lincoln’s birthday—finding for the tribes on every major point. He had immersed himself in the case, explaining later that he had spent “days and days on end reading all the great decisions on

Indians and fishing rights. Over and over again, all the great minds who dealt with the problems of Indians put in their opinions that we were taking away from the Indians their rightful heritage." The 203-page decision, replete with historical analysis, worked from the premise that the best understanding of the term "in common with" at treaty time was that the tribal and federal parties meant to divide the resource equally, on a "50-50" basis: The treaties meant to allow tribes an opportunity to harvest one-half of the salmon passing their off-reservation fishing places.

The Boldt decision, as *United States v. Washington* became known, set off an explosive reaction from fishing organizations and state agencies. A group called the Steelheaders vociferously led the charge for the sports fishers, but commercial fishers faced the greatest impact; most of the increased Indian allocation (tribal fishers took only about 6 percent before the decision) came from the non-Indian commercial take. There is no underestimating the effects on the non-Indian commercial fishers. Many had to abandon their craft and relocate. Their families and communities suffered. A state and federal "buyback" program to retire commercial boats helped ease the transition, but the new allocation regime did not settle in until well into the 1980s. In the meantime, it was the Indians who now confronted the fish-ins. "Massive illegal fishing continued for years following the decision," wrote Fay Cohen, author of a leading study on the Boldt decision and its aftermath. In 1977 alone the non-Indian fishers illegally took an estimated 183,000 salmon.

The protesters both ridiculed and defied Judge Boldt. Bumper stickers blared: "Can Judge Boldt, Not Salmon"; "Let's Give 50 Percent of the Indians to Judge Boldt." Federal marshals had to cut down a gill net used to hang the judge in effigy in front of the federal

courthouse. More disturbing, state officials were slow to prosecute violators of Boldt's decree; when they did, state judges—covertly undermining the supreme law of the land—usually dismissed the charges.

Eventually the Boldt decision gained acceptance by even its staunchest opponents. The federal court of appeals affirmed it in 1975, and the Supreme Court declined to hear it a year later. State officials, led by Attorney General (later U.S. Senator) Slade Gorton, still refused to give in. Taking a circuitous procedural route, in 1979 they managed to reach the Supreme Court, which, this time issuing a full written opinion, affirmed Judge Boldt's ruling in virtually all respects. In a statement that has few parallels in American jurisprudence, the Court quoted from an earlier court of appeals opinion and underscored the sweep of the Boldt decision, the extreme nature of Washington's response to it, and the epic nature of the issues at bar: "The State's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the State's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."

Normally, cases are remembered for their Supreme Court opinions, but the Northwest fishing case, *United States v. Washington*, remains forever known as the Boldt decision. Written and carefully documented by a respected judge after protracted proceedings, the decision carries a rare credibility. Minority rights, judicial courage, morality, generations of Native persistence, and the truth of history converged in the federal courthouse in Tacoma in 1974 to create the kind of elevated justice to which our system can sometimes rise. ■

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