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Michael Blumm
Lewis & Clark Law School, blumm@lclark.edu

James Brunberg

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MICHAEL C. BLUMM* & JAMES BRUNBERG**

"Not Much Less Necessary…Than the Atmosphere They Breathed": Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of *United States v. Winans* and Its Enduring Significance

ABSTRACT

A century ago, the Supreme Court decided United States v. Winans, *which upheld the Indian treaty right to cross private property to access traditional fishing grounds in the Columbia River. The* Winans *decision protected critically important cultural and economic practices from white encroachment. The landmark case came as a surprise in an era committed to Indian assimilation and allotment. This article examines the case, its context, its participants, and its contributions to Indian natural resources law.*

The dispute took place at Celilo Falls, the most important Indian fishing site in the Columbia Basin, although the government agents and attorneys viewed it as a test case emblematic of the clash of cultures taking place throughout the Northwest at the end of the nineteenth century. In fact, the article considers in some depth two predecessor cases involving the same tract of land at issue in Winans *and suggests that the Indian agents who pursued the case did so because they saw treaty fishing as an economic lifeline for Indians who had failed at agrarianism on-reservation.*

The district court issued a confusing array of injunctions and opinions that ultimately culminated in dismissal of the case some eight years after it was filed. A direct appeal to the Supreme Court produced an opinion memorable almost as much for its poetic language as for its result. Justice Joseph McKenna, not otherwise known for his lyricism, wrote that fishing at Celilo Falls was "not much less necessary to the Indians than the atmosphere they breathed" and proceeded to rule that their treaty

* Professor of Law, Lewis and Clark Law School.

** J.D. 2006, Lewis and Clark Law School; B.A. 1989 University of Michigan.

rights included the imposition of a "servitude, a right in land" over lands necessary to access their traditional fishing sites. In response to the lower court's conclusion that the treaty language recognizing a tribal "right of taking fish in common with settlers" meant only equality of treatment, McKenna averred that such a result was "certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

The decision's lodestar status is not merely due to its language, however. It established the reserved rights doctrine, which holds that Indian treaties are "not a grant of rights to the Indians but a grant of rights from them—a reservation of rights not granted." Over the last century, the reserved rights doctrine has been immensely important in recognizing tribal proprietary rights to natural resources and in protecting tribal sovereignty. Winans *also reaffirmed the rule that Indian treaties should be interpreted as the Indians, the weaker party, would have understood and rejected claims that state ownership of the riverbed foreclosed federally created treaty rights. Both of these principles endure. Finally, the case recognized treaty fishing rights as property rights that would run against not only the federal government but also burden the state and private parties, a precedent that some recent lower court decisions seem to have overlooked.*

The year 2005 marked a double centennial: 200 years since Meriwether Lewis and William Clark collided with Northwest Indian cultures while navigating the Columbia River[1] and 100 years since the Supreme Court decided the landmark case *United States v. Winans*.[2] The Court in *Winans* announced that mid-nineteenth century treaties, in which Northwest Indian tribes ceded most of their lands to the federal government in exchange for relatively small land reservations, also recognized important tribal off-reservation property rights.[3] Thus, landowners could not exclude tribal fishers from their historic salmon fishing sites at Celilo Falls, the center of the Columbia River salmon fishery. The epic *Winans* decision still seems surprising, since it was the product of an era in which assimilation of Indian tribes was the dominant federal policy;[4] in 1905, the federal government was breaking

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1. *See generally* 5–7 MERIWETHER LEWIS & WILLIAM CLARK, THE DEFINITIVE JOURNALS OF LEWIS & CLARK (Gary E. Moulton ed., 1988).

2. United States v. Winans, 198 U.S. 371 (1905). The year 2005 also marked 150 years since the signing of the treaty the Supreme Court interpreted in *Winans*. *See infra* Part III.

3. *See* 4 WATERS AND WATER RIGHTS §§ 37.01(b)(1), 37.02(a)(2) (Robert E. Beck ed., LEXIS 2004 repl. vol. ed.).

4. *See, e.g.*, DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 141 (Francis Paul Prucha ed., 1973); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell

up Indian reservations in order to encourage the assimilation of tribal members into the American melting pot, thereby combating communistic reservation land holdings while simultaneously promoting Christianity.[5]

Winans, however, proclaimed that the tribes' treaty fishing rights were enduring, not temporary. Justice Joseph McKenna's opinion also declared that the treaty rights burdened not only the federal government that negotiated the treaties, but states and private landowners as well.[6] This far-sighted decision, which still reverberates today,[7] needs to be understood in the context of the history of the region, its peoples, and their fishing practices.

Winans laid down landmark principles of treaty interpretation that today influence courts in diverse fields, including disputes over ownership of submerged lands, tribal membership, criminal jurisdiction, mineral rights, and water rights.[8] The language of the decision is almost

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Jessup Newton ed., 2005); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 16 (1987); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 659 (1984); Indian General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887).

5. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

6. *Winans*, 198 U.S. at 381–82. *Winans* was an 8-1 decision, with Justice Edward White dissenting without opinion. On Justice McKenna, *see infra* note 267.

7. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 224 (1999) (citing *Winans* for its use of the canons of treaty construction and for federal jurisdiction over Indian affairs); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 671, 681 (1979) (citing *Winans* for its treaty interpretation); United States v. Washington, 157 F.3d 630, 639 (9th Cir. 1998) (quoting Justice McKenna's poetic "atmosphere" simile); Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct. for W. Dist. of Wash., 573 F.2d 1123 (9th Cir. 1978) (reiterating that Indians have a special status with regard to fishing rights and state regulation); Bowen v. Doyle, 880 F. Supp. 99, 113 (W.D.N.Y. 1995) (citing the *Winans* concept that tribes "retain all rights not specifically withdrawn by treaty" in deciding that the state lacked jurisdiction to decide a tribal affair); Grand Traverse Band of Ottowa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res., 141 F.3d 635, 639 (6th Cir. 1998) (citing *Winans* for the existence of an access easement across all shorefront land, even if privately owned, as well as for the liberal, pro-tribe treaty construction); Menominee Indian Tribe of Wis. v. Thompson, 161 F.3d 449, 461 (7th Cir. 1998) (denying off-reservation aboriginal fishing rights for tribe, distinguishing *Winans* rights—which were explicit in the treaty—from the Menominee Tribe's, which were not).

Recently, the federal judge in New Mexico's Jemez River water rights adjudication employed *Winans* to uphold governmentally recognized aboriginal water rights that were designed to preserve treaty-time uses. United States v. Abousleman, Civ. No 83cv01041 MV-ACE, at 26 (D.N.M. Oct. 4, 2004) (referring to these water rights as "Winans rights" and citing 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.02(a)(2).

8. *See, e.g.*, cases cited *supra* note 7; Idaho v. United States, 533 U.S. 262, 274 (2001) (ownership of submerged lands); United States v. Dion, 476 U.S. 734, 738 (1986) (tribal membership in eagle feather case); United States v. Wheeler, 435 U.S. 313, 327 (1978) (criminal tribal jurisdiction); Choctaw Nation v. Oklahoma, 397 U.S. 620, 642 (1970) (mineral rights); Winters v. United States, 207 U.S. 564, 577 (1908) (water rights).

poetic, reflective of the best a dominant society can provide to those it has invaded:

> The right to resort to the fishing places in controversy was part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed....In other words, the treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted.[9]

Such rhetoric does not often find its way into Supreme Court opinions, especially from the 1905 Court.[10] Explaining how and why this came to pass is the task of this centennial remembrance.

This article examines both the events that led to the *Winans* decision and its continuing significance today. Section I supplies deep background on the participants and the locus of the conflict that led to the *Winans* case, beginning with pre-human geologic events and continuing with the development of aboriginal dependence on salmon and other subsistence fishing practices. Section II then proceeds to explain the Lewis and Clark expedition and the effects of the ensuing wave of white settlement a generation or two later. Section III analyzes the mid-nineteenth century treaties that recognized the tribes' rights to fish and explores the aftermath of these rights. Section IV tracks the rapid erosion of treaty promises in the face of late nineteenth century pressure from homesteading and an emergent non-Indian salmon fishing industry, culminating in the first court case involving the treaty fishing right—*Spedis v. Simpson*—a case involving the same Celilo Falls fishing site at issue in *Winans*, as well as many of the latter case's participants.[11] Section V discusses in some detail another predecessor case of the *Winans* decision, *United States v. Taylor*,[12] a dispute that anticipated many of the issues that the *Winans* decision would ultimately resolve.

Section VI, the heart of the article, evaluates *Winans* both doctrinally and in terms of its effects on tribal fishing in the Northwest.

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9. *Winans*, 198 U.S. at 381–82.

10. Just one month earlier, the Court handed down its controversial decision in *Lochner v. New York*, 198 U.S. 45 (1905), a 5-4 decision marked by both its divided, fragmented opinion and its laissez-faire economics, striking down labor-friendly legislation and ushering in what became known as the "Lochner Era," in which a thin but activist majority of the Court frequently protected private property and promoted state rights at the expense of socio-economic regulation.

11. Spedis v. Simpson (Klickitat County Ct. July 22, 1884) (on file in Klickitat County, Wash. Archive, File KLK-126).

12. 13 P. 333 (Wash. Terr. 1887).

Section VII explains the enduring effect of *Winans*, in terms of the progeny it spawned, on the Northwest today. The article concludes that the *Winans* doctrine remains an under-appreciated source of tribal rights today. We predict that courts in the twenty-first century will increasingly rely on its bedrock principles to interpret the nineteenth century treaties that gave Northwest tribes the "right of taking fish at all usual and accustomed fishing places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them…."[13]

I. TIMES IMMEMORIAL: THE BIRTH OF A MIGHTY RIVER, FISH, AND CULTURE

A. Volcanoes, Fish, and Floods

Cataclysmic geologic and evolutionary events shaped the stage of the *Winans* dispute. Enormous Miocene lava flows and colossal floods during the ice ages repeatedly threw the Columbia River from its bed, leaving spectacular hexagonal spires of columnar basalt to line the steep banks of the river gorge.[14] In the meantime, ocean salmon first entered the sweet waters of the river, taking an astonishing evolutionary step: they developed the ability to use enzymes to tolerate salinity variation, enabling them to use fresh water rivers as incubators, nurseries, refuges from predation and extreme temperatures, and sources of new food.[15] These fish evolved a metamorphic ability to change their physical shape drastically as they made the transition between salt and fresh water environments, acquiring massive muscles in order to navigate against the rivers' force. This migration of protein from the oceans to the mainland provided food for land carnivores and supported a continental food chain that eventually included humans.[16]

One particularly resilient basalt formation withstood nature's carving forces, creating what was called "Wyam," "the Great Falls," or

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13. Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 953 (1855) (ratified Mar. 8, 1859).

14. JIM LICHATOWICH, SALMON WITHOUT RIVERS: A HISTORY OF THE PACIFIC SALMON CRISIS 14–20 (1999). During the Missoula floods, walls of water pushed westward at breakneck speed as lakes half the size of the present Lake Michigan suddenly broke through their natural dams and let loose their destruction across tens of thousands of square miles. *Id*. at 17–18.

15. DAVID R. MONTGOMERY, KING OF FISH: THE THOUSAND-YEAR RUN OF SALMON 28–30 (2003).

16. MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 31 (2002); Aldo Palmisano, *Why Do Some Fish Normally Live in Freshwater and Others in Saltwater? How Can Some Fish Adapt to Both?*, SCI. AMERICAN.COM, answer posted Jan. 19, 1998, http://www.sciam.com/askexpert_question.cfm?articleID=000B9991-6E9C-1C72-9EB7809EC588F2D7&catID=3 (last visited May 30, 2006).

simply "Celilo." There, a series of rapids presented formidable obstacles to the salmon's upstream run. Salmon and other fish crowded into an area just downstream of the falls, where they rested before fighting to ascend the rapids and surmount the falls. Around this concentration of fish, a culture, and later an industry, was born.

B. The Birth of the Ancient Right of Taking Salmon

At least 9,000 years ago, the earliest fishermen harvested fish from the Celilo Falls region, leaving evidence in the form of fish vertebrae and crude hook-spears as well as oral histories and mythologies.[17] Bands of Cayuse, Nez Perce, Yakama, Klickitat, Paluse, and upper-Chinookian Wasco-Wishram formed a network of fishing and trade that connected the Pacific Coast tribes to peoples several hundred miles inland, in the upper Columbia Basin (now Idaho, Washington, and Montana) and the Great Plains.[18] These fishermen set up both semi-permanent and permanent camps near Celilo Falls. Although each band of fishermen had a traditional spot of generally inheritable private property, many of the best locations at the falls and along the rapids below were shared by the tribes as common property.[19]

Salmon were plentiful during the annual spring, summer, and fall runs. Despite some seasonal unavailability, about a third of aboriginal protein intake came from salmon.[20] Natives felt a spiritual kinship, as well as a stewardship duty, to the animate earth. Because the Indians' spiritual and physical relationship with salmon and water was an essential part of their culture, they acted to protect the bountiful but fragile salmon harvest.[21] Native mores prohibited dumping of trash, waste, discarded fish parts, or even water baled from canoes into the river, since the disrespectful act of dumping into the river might keep the

17. EUGENE S. HUNN & JAMES SELAM, NCH'I-WANA "THE BIG RIVER": MID-COLUMBIA INDIANS AND THEIR LAND 6, 20 (1990). Some of these fishers were likely kin, or at least regional neighbors, of the controversial "Kennewick Man," a traveler who fished the Columbia River a few days' hike upstream. Bonnichsen v. United States, 357 F.3d 962, 966 (9th Cir. 2004) (holding that the "Kennewick Man" was not a "Native American" under the Native American Graves Protection and Repatriation Act so his remains were available for scientific study).

18. *See* BLUMM, *supra* note 16, at 57; JOSEPH E. TAYLOR III, MAKING SALMON: AN ENVIRONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS 24–25 (1999).

19. *See* FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 21 (1986).

20. HUNN & SELAM, *supra* note 17, at 148 (estimates range up to 80 percent for some tribes).

21. *See* BLUMM, *supra* note 16, at 3 ("These 'laws' were enforced by peer pressure and religious taboo, which usually were strong enough to ensure that they were respected"; natives' relationships to fish and the river were essential cultural and spiritual norms.).

salmon from returning.[22] In the myths and legends of the Celilo-based tribes, the salmon were not merely a food supply; the tribes were "salmon-people," and their salmon were a collective spirit and a nourishing vital force.[23]

In the spring, the population in the vicinity of Celilo Falls blossomed from a small handful of bands to thousands of families and fishing units and became the hub of an extensive multicultural trade network.[24] Groups of fishers exchanged dried salmon for many vital items: roots and hides from what is now Montana and Idaho; shell beads from Puget Sound; buffalo products and horses from the Great Plains; obsidian, basketry, and slaves from Northern California.[25]

Annual ceremonies to celebrate the first caught salmon centered on ritualizing the return of the "salmon people" (a term used to describe both the salmon and the fishermen) in a sharing feast.[26] Tribal leaders divided the salmon into small morsels and distributed it among the fishing community. Some tribes bore torches in a rhythmic musical procession to the river, where the carefully preserved skeleton was deposited at the river's deepest point, head pointed upstream, to show the other "salmon people" the way.[27] Judge George Boldt determined that the first salmon ceremony was "a religious rite to ensure that…salmon were never wantonly wasted and that water pollution was not permitted…."[28]

The annual arrival of salmon was a much-anticipated gift for the people who traveled to the Columbia Gorge.[29] The overall economy of the Mid-Columbia consisted largely of "competitive gifting,"[30] in which chiefs established their social status as peaceful leaders and built valuable trade relationships by presenting meaningful gifts. These gifts engendered a reciprocal obligation in the recipients. Gifts were meant to be shared, not factored into the wealth of any individual.[31] The most

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22. COHEN, *supra* note 19, at 24.

23. *See generally* DONALD M. HINES, CELILO TALES: WASCO MYTHS, LEGENDS, TALES OF MAGIC AND THE MARVELOUS (1996).

24. TAYLOR, *supra* note 18, at 24–27. *See also* 5 LEWIS & CLARK, *supra* note 1 (describing in detail the practices of tribes who gathered or lived near Celilo Falls).

25. *Id*. at 24–25 (trade network); HUNN & SELAM, *supra* note 17, at 225 (slave trading).

26. COHEN, *supra* note 19, at 24.

27. *Id*. (discussing the testimony of Frank Wright, a Puyallup Indian, before a congressional subcommittee); HUNN & SELAM, *supra* note 17, at 153.

28. United States v. Washington, 384 F. Supp. 312, 351 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

29. *See* TAYLOR, *supra* note 18, at 24–25.

30. *See Washington*, 384 F. Supp. at 351.

31. For more on the gift economy, see LICHATOWICH, *supra* note 14, at 44–47; TAYLOR, *supra* note 18, at 37–38; *Washington*, 384 F. Supp. at 351 (the "Boldt Decision").

important "gift" was salmon, a gift from nature, which could not be "owned" by any group or person.

Although some tribal units or bands staked out prime fishing areas, the social more of sharing, rather than that of exclusion, dominated the culture.[32] This native view strengthened the Indians' stewardship over the salmon and its habitat; while ownership was largely communal, tribal leaders, whose concerns included future generations, controlled both access and usufructuary rights.[33] Eventually, new concerns and methods would be predominate at the fisheries, including European notions of natural resources as commodities and fishing in pursuit of corporate profit. Thanks in part to the wisdom of the Court in *Winans*, which recognized an enforceable right to continue historic fishing practices, some remnants of the old native ways remain in the twenty-first century.[34]

II. THE ARRIVAL OF WHITES ON THE COLUMBIA PLATEAU

European explorers Manuel Quiniper and George Vancouver traded with tribes for salmon along the Pacific Coast as early as 1790,[35] but Lewis and Clark were the first whites to reach the Celilo Falls area, documenting pools abounding with otter and banks lined with Indian fishing operations.[36] Over the next half-century, whites would radically transform the culture of the Columbia by taking its natural resources, attempting to Christianize its peoples, and laying claim to prime land

32. TAYLOR, *supra* note 18, at 36–37.

33. *Id.*; BLUMM, *supra* note 16, at 54.

34. Indians harvested salmon using an ingenious array of methods. As the waters thundered around them, fishermen with long, graceful dipnets stood on rocks beside the falls or tied themselves to logs wedged into crevices, waiting for the fish to leap against the torrent in a rush of instinctive athleticism. In calmer waters, fishermen used long spears and catch-hooks, or gillnets. Some used poisonous "caluks," or lomatium, to stun the resting fish, which then floated to the surface. Once caught, salmon were cooked over an open fire and smoked and dried or processed into pemmican, a preserved food made of pulverized, air-dried salmon packed into large bricks. These bricks stayed fresh for months, weighed around 90 pounds, could be moved hundreds of miles in special baskets, and were central to trade. When the salmon runs ended in the late fall, most of the fishing tribes traveled up the valleys that led into the rocky gorge, set up new camps, gathered tubers and huckleberries, and hunted game. In lean times, the pemmican provided protein until the next fishing cycle in the spring. A family unit processed an estimated 3,000 pounds of pemmican each year to sustain themselves, plus another 1,000 pounds for trade. Tribes buried the pemmican in straw-lined holes beneath 12 to 15 inches of soil. Native fishing methods are described in detail in HUNN & SELAM, *supra* note 17, at 117–32.

35. BLUMM, *supra* note 16, at 54.

36. 5 LEWIS & CLARK, *supra* note 1, at 328–29 (observation by William Clark, Oct. 24, 1805).

and fishing sites under the Oregon Donation Act of 1850.[37] By 1855, tensions were at an all-time high in the region. As land and resource disputes increased, violence broke out.[38] Treaties became an imperative to avoid bloodshed.

A. The Effect of White Colonization on Tribal Fishing

Even before whites arrived on the Columbia Plateau, they influenced salmon populations. Around 1730, natives began trading "wild" horses that had escaped from white military camps in the hundreds of miles distant. These horses helped to accelerate the tribal salmon-trade network, allowing fishermen to transport large amounts of goods and technological innovations over great distances, commercially interconnecting peoples who previously had only periodic, limited interactions.[39] The increased contact also facilitated a migration of new European viruses and bacteria from village to village, fueling outbreaks of pestilence that tragically reduced the native population to roughly one-tenth of its pre-contact size.[40]

When Lewis and Clark reached the Mid-Columbia Plateau in 1805, salmon and the people who depended on it were everywhere. The explorers observed salmon teeming in the clear waters of the Columbia. William Clark even suggested that the Indians used the surplus for fuel.[41] The fall 1805 passage of Lewis and Clark was an inventory expedition, searching for a trans-continental passage and gathering information about natives and the natural resources that would fuel western expansion. The explorers were greeted by awestruck natives, some of whom revered the explorers as superhuman gift-bearers descended from the clouds.[42] Both parties maintained friendly commercial transactions and seemed optimistic about future relations.[43]

Fur traders were the first European group to directly affect the salmon populations. The British-owned Hudson Bay Company wanted to leave nothing useful or marketable behind for the rapidly expanding United States, so in the early 1840s, its policy was to eradicate every last beaver in the Oregon Territory.[44] Since beaver dams regulated streamflow and provided breeding and rearing areas, they had been

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37. Oregon Donation Act of 1850, 9 Stat. 496.
38. *See* HUNN & SELAM, *supra* note 17, at 32.
39. *Id*. at 22–27.
40. BLUMM, *supra* note 16, at 56; TAYLOR, *supra* note 18, at 39–40.
41. 5 LEWIS & CLARK, *supra* note 1, at 286 (observation by William Clark, Oct. 16, 1805).
42. *Id*. at 305 (observations by Lewis & Clark).
43. *Id*. at 278.
44. LICHATOWICH, *supra* note 14, at 55–56.

instrumental in keeping the salmon population strong through natural selection.[45] With the decimation of the beaver, salmon runs suffered their first decline due to Euro-American concepts of resource consumption.

B. Mounting Tensions on the Columbia Plateau

Missionaries descended on the mid-Columbia region in the late 1830s and 1840s.[46] From these Christian, agrarian disease incubators, Indians learned agrarian and Christian practices and, eventually, distrust of the white man.[47] Disease that lay incubating in the missions' close confines dealt an annihilative blow to the Indians that culminated in violence. Dr. Marcus Whitman, the missionary at The Dalles, failed to fend off measles and other diseases, which claimed the lives of half the Cayuse tribe.[48] The Cayuse made the apparently rational connection between the superior spiritual power claimed by the missionaries and the ensuing wave of pestilence. Tribal people therefore concluded that Whitman had acquired the "murderous" nature of one who had gained too much spiritual power, yet failed as a healer, a punishable offense in Cayuse culture.[49]

As a result of Whitman's failure to prevent measles and other diseases, and in an effort to prevent the apparent annihilation of the tribe, Cayuse men murdered Whitman and his family members and also took hostages in 1847.[50] The bloodshed at the Whitman Mission sparked widespread panic throughout white settlements. The Oregon legislature quickly commissioned a small army to bring the Cayuse to justice, while a "peace commission," led by Joel Palmer, negotiated the surrender of five Cayuse suspects (all of whom were hung) and their white hostages.[51]

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45. *Id.*

46. Methodists and Catholics established missions in The Dalles in 1838 and 1848. Nat'l Park Serv., U.S. Dept. of Interior, *Whitman Mission NHS—History & Culture*, http://www.nps.gov/whmi/history/timeline4.htm (last visited Feb. 16, 2006); *St. Peter's*, The Dalles, Heritage Trail Press, http://www.heritagetrailpress.com/CHURCH_RECORDS/Parish_St_Peter_The_Dalles_OR.cfm (last visited Feb. 16, 2006).

47. *See* HUNN & SELAM, *supra* note 17, at 39–40.

48. For background on the events surrounding the Whitman murders, see generally RONALD LANSING, JUGGERNAUT: THE WHITMAN MASSACRE TRIAL, 1850 (1993).

49. HUNN & SELAM, *supra* note 17, at 40.

50. *Id.*

51. Among other alleged abuses of justice surrounding the controversial Whitman "Massacre" trial, James Doty, later a leader of Stevens' treaty negotiating team, reported that "a white man in the employ of Dr. Whitman" had incited the Cayuse, and thus was responsible for the murder because he "carried false reports to the Indians camp." JAMES DOTY, JOURNAL OF OPERATIONS OF GOVERNOR ISAAC INGALLS STEVENS OF WASHINGTON

C. Pressure from the East, Panic and Fear in the West, Indians in the Middle

The Treaty of 1846 established the border between British Canada and the United States.[52] Two years later, Congress enacted the Organic Act of 1848[53] to govern the Oregon Territory, which, reflecting the federal role of protecting the tribes, expressly promised that the creation of the territory would not "impair the rights of persons or property now pertaining to the Indians."[54]

Despite the fact that Indian title[55] had not been extinguished, Congress quickly undercut its promise to protect Indian lands by authorizing homesteading in the Oregon Donation Act of 1850.[56] The Donation Act opened the vast Oregon Territory to settlement, offering 320-acre parcels to individual settlers and twice that to married couples[57] while ignoring Indian possession.[58] Indian title did not prevent the federal government from conveying "title" to a settler because Indian title was thought to be merely usufructuary.[59] But actually, the federal government possessed only what amounted to a preemptive right to purchase the fee from the Indian possessors,[60] and the tribes had not yet sold or ceded their lands. Although homesteaded land was "subject only to the Indian title of occupancy,"[61] the existence of this significant encumbrance was not mentioned in the language of the homestead patents. Donation Act grants therefore amounted to premature promises

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TERRITORY IN 1855, at 49 (1978). For a detailed account of this trial and circumstances surrounding it, see LANSING, *supra* note 48.

52. Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

53. An Act to Establish the Territorial Government of Oregon, 9 Stat 323 (1848) (Oregon Organic Statute).

54. *Id*. For the original language, see the Northwest Ordinance, reprinted in 32 J. CONTINENTAL CONG. 334 (1934).

55. *See* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 728, 739 (2004) (explaining Indian title and its extinguishment).

56. Oregon Donation Act of 1850, 9 Stat. 496.

57. *See* TAYLOR, *supra* note 18, at 44.

58. *Id*.

59. In *Fletcher v. Peck*, 10 U.S. 87, 142–43 (1810), Chief Justice Marshall described Indian land rights as usufructuary, an unfortunate mislabeling of property rights that, 145 years later, contributed to a decision that sanctioned government taking of Indian title land without compensation. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); Blumm, *supra* note 55, at 730.

60. *See* Blumm, *supra* note 55, at 738–39.

61. Johnson v. M'Intosh, 21 U.S. 543, 592 (1823).

that created considerable pressure for treaties that would give settlers clear title by extinguishing Indian title.

III. THE TREATIES: THE ROLE OF FISHING RIGHTS IN FULFILLING A PEACEFUL MANIFEST DESTINY

The world views of white settlers and natives collided as homesteaders poured into the Northwest. The federal government attempted to meld the two cultures together—or at least avoid war—through treaty making. Treaties became the vehicles by which the government terminated Indian title establishing Indian land reservations and by which the tribes reserved their ancient fishing, hunting, and gathering rights. Although much of the native population had been decimated by disease, the treaties enabled the whites to push aside the surviving tribal members while making at least a facial attempt to civilize them into agrarians. The attempted agrarian conversion largely failed, but the treaties' recognition of the Indians' fishing rights endures.

A. The Need for Treaties

Peaceful white settlement of the vast new, resource-rich Oregon Territory required systematic termination of Indian title. Through a fevered-pitch campaign, the federal government signed treaties during a seven-month period of 1854 and 1855 that terminated aboriginal title to most of the coveted lands, required tribes to relocate to newly established reservations, and recognized the tribes' "right of taking fish at all usual and accustomed places."[62]

Federal recognition of tribal fishing was an indispensable treaty promise without which some of the treaties certainly would not have been signed. The tribes clearly bargained for the inclusion of these ancient rights.[63] The federal goals of extinguishing Indian title and assimilating the tribes into an agrarian economy contrasted with the tribes' desire to preserve their fishing, hunting, and gathering practices. The treaties accommodated both wishes. On one hand, they attempted to convert Indians into a new way of life that whites believed would complement the influx of agrarian, Christian ways. Thus, the federal government promised federal protection from white expansion or occupation,[64] along with some institutional and infrastructural support in the form of funds for schools, hospitals, and gunsmith, tinsmith, and

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62. *See, e.g.*, Treaty with the Yakima, *supra* note 13, at 952–53.
63. *See* BLUMM, *supra* note 16, at 60–62.
64. *See, e.g.*, Treaty with the Yakima, *supra* note 13, art. II.

blacksmith operations.[65] On the other hand, the treaties' recognition of off-reservation fishing, hunting, and gathering rights[66] became a legal foothold to maintain ancient subsistence ways in a new era. Despite the clash between ancient and new ways, the treaties gave recognition to both.

B. The Treaty Architects and Their Task

The first white men to record what would become known as *Winans* fishing rights in written form were Joel Palmer, an Oregon settler-turned-diplomat, and Isaac Ingalls Stevens, a West Point graduate, an officer in the Army Corps of Engineers, and Washington's first territorial governor.[67] These two were the architects of sweeping change in the Northwest. The ambitious Stevens[68] formed militias, ignoring the cautionary advice of the Military Department of the Pacific (in San Francisco), which warned him to await troops and supplies before proceeding to subdue "hostile Indians."[69] Stevens once said of a Cayuse conflict that "the war shall be prosecuted until the last hostile Indian is exterminated."[70] He aimed to quell the fears of white settlers who remembered the "Whitman Massacre"[71] and other scattered hostilities. Palmer was a respected settler, peace commissioner, and superintendent of Indian Affairs. He and Stevens convinced the Indians that, for their own protection, they should cede their lands to whites, move to reservations, and attempt to become farmers.

Stevens and Palmer placed themselves in the dual roles of being both the mouthpieces and the negotiating agents for the United States in its rush to push westward into disputed lands. They aimed, in the words

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65. *See, e.g.*, *id*. art. V.

66. *See, e.g.*, *id*. art. III.

67. The Senate failed to ratify earlier treaties negotiated by Superintendent of Indian Affairs Dr. Anson Dart in the Willamette Valley because they called for reservations close to white settlements rather than relocating the tribes far from white populations, as in the case of the Southern tribes who had been relocated to Oklahoma the previous decade. *See* KENT D. RICHARDS & ISAAC I. STEVENS, YOUNG MAN IN A HURRY 195 (1993). Many Indians also opposed the Dart treaties because they would force diverse tribes to share reservations on new terrain where they feared disease, and because whites immediately moved onto the land without awaiting treaty ratification. AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY: AN INQUIRY INTO THE TREATY-PROTECTED FISHING RIGHTS OF THE TRIBES OF THE NORTHWEST COAST 15–16 (1975). *See also* BLUMM, *supra* note 16, at 56–57.

68. Not only was Stevens appointed by President Pierce as governor of the Washington territory, a job that included the title of Indian Superintendent, he was also surveyor for a northern railroad route to the Pacific with the Department of War. RICHARDS, *supra* note 67, at 99.

69. DOTY, *supra* note 51, at 5 (Edward J. Kowrach's introduction).

70. *Id*. at 6.

71. *See generally* LANSING, *supra* note 49.

of Judge George Boldt, to "forestall[] friction between Indians and settlers and between settlers and the government."[72] Military officers stationed in the Oregon territory warned that a violent Indian backlash was imminent if settlers continued to infringe on native lands.[73] Ex-Superintendent of Indian Affairs Dr. Anson Dart[74] warned that the Oregon Land Donation Act gave away land already "owned and occupied by a people that the Government has always acknowledged to be the bonafide [sic] and rightful owners of the soil."[75] "A serious difficulty…is unavoidable," Dart continued.[76] With high stakes and looming potential conflict, Stevens (in the Washington Territory) and Palmer (in the Oregon Territory) set to work on procuring a peaceful, massive property rights transfer.

C. The Treaty Negotiations

Despite Dart's justifiable pessimism and a caldron of conflicting interests among diverse Indian tribes and land-hungry white settlers, Palmer and Stevens successfully set the stage for the orchestration of a rapid, massive, peaceful land acquisition. They won the trust, or in some respects, the submission, of wary, disease-wracked native communities.[77]

In treaty council meetings, where the previously drafted agreements were signed by both tribal members and federal negotiators, Stevens demonstrated shrewd political skills. He often waited until key

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72. United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

73. COHEN, *supra* note 19, at 36.

74. *See* RICHARDS, *supra* note 67.

75. Letter from Anson Dart, Superintendent of Indian Affairs, to L[uke] Lea, Comm'r of Indian Affairs (July 19, 1851) (U.S. Office of Indian Affairs, *Letters Received by the Office of Indian Affairs*, 1824–1880, Nat'l Archives Microcopy 234, Roll 607, NADP Doc. D10, *available at* http://www.csusm.edu/nadp/d10.htm). This is one of several letters written by Dart when he resigned. In another letter, he implored the federal government to "not molest[] the Indians, … but on the contrary, [to] treat them kindly." Letter from Anson Dart, Superintendent of Indian Affairs, to [Indian Agent] Spalding (Mar. 1, 1851) (U.S. Off. of Indian Affairs, *Letters Received by the Office of Indian Affairs, 1824–1880*, Nat'l Archives Microcopy 234, Roll 607 (excerpt), NADP Doc. D7, *available at* http://www.csusm.edu/nadp/d7.htm). He also called for deployment of federal troops to protect the Indians from the settlers' lawlessness, opining that "most of the difficulties with these Indians might have been avoided, had a more conciliatory course been pursued on the part of the whites." *Id.*

76. Letter from Dart to Lea, *supra* note 75.

77. Recent estimates put the pre-treaty population losses due to white-induced diseases for some tribes as high as 90 percent. BLUMM, *supra* note 16, at 4 (estimated population decline between 1800 and 1834); TAYLOR, *supra* note 18, at 39–43. *See generally* ROBERT BOYD, THE COMING OF THE SPIRIT OF PESTILENCE: INTRODUCED INFECTIOUS DISEASES AND POPULATION DECLINE AMONG NORTHWEST INDIANS, 1774–1874 (1999).

tribal members—usually chosen or appointed by Stevens himself—gathered before addressing the Indians. When some tribal leaders deferred a week or more, Stevens refused to begin the meeting or allow signing unless the holdouts were brought into the council. This delay frustrated the Indians and subtly turned them against each other.[78] At one such gathering, Stevens addressed an audience of some two hundred Indians. Explaining the treaty language to his listeners, he stated, "Are you not my children and also the children of the great father [the President]?" He continued:

> This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not that fatherly? *This paper secures your fish*. Does not a father give food to his children?[79]

Stevens appealed to the Indians' sense of reason, as well as their connectedness with the salmon, but he finessed the underlying meaning of the treaty. Tribal people well understood the true significance of the agreement, which was to clear Indian title from most of the lands of the Pacific Northwest and to move the Indians onto small reservations. This is why in treaty negotiations they fought tenaciously for recognition of their historic fishing rights in off-reservation areas.

D. The Broken Treaty Promises

Stevens and Palmer largely succeeded in effecting a peaceful mass transfer of property rights, but they failed to deal squarely with the tribes in key respects. They enjoyed obvious unequal bargaining power due to their wealth, perceived paternal superiority, military power, and language barriers (the treaties were written in English before negotiations began and translated to the tribes in a simple Chinook jargon that many tribes did not understand).[80] Although the treaties recognized the ancient fishing, hunting, and gathering rights so crucial to the tribes, the documents were silent about how these rights would be

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78. Examples of the friction caused by the close quarters, holdouts, delays, and differing tribal perspectives are documented first hand in Stevens' journal. *See* DOTY, *supra* note 51, at 26–28.

79. *See* THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 177 (Joseph Cone & Sandy Ridlington eds., 1996) (emphasis added).

80. Chinook jargon is a simple lexicon; it is quite doubtful that its 300-word vocabulary was sufficient to convey the subtle nuances involved in land alienation. *See* BLUMM, *supra* note 16, at 60.

protected. Already, access to fishing sites was jeopardized by non-Indian fee ownership of riverfront land. Soon, white-owned industrial interests would compromise the fishing right.

Just two weeks after completing the Walla Walla Council, Stevens advertised in the *Oregon Weekly Times* that the Cascade Territory was open for settlement.[81] The treaties were not yet effective, however, since Congress had yet to ratify them.[82] In fact, Stevens' haste in announcing the availability of the lands led, ironically, to delay in the termination of Indian title by treaty ratification. Violent friction ensued between Indians and the first wave of settlers, who ignored the Indian title. This violence lingered through 1858, delaying ratification of some treaties by Congress until 1859.[83]

By 1861, the Indians had vacated most of the ceded lands and had ceased much of their seasonal migration. They began the long, slow process of attempting to "civilize" themselves on reservations. Bands that had never cohabitated were often commingled on one reservation. The treaties promised federal funds, first for the "breaking up and fencing of farms," then for schools, shops, farm equipment, mills, and hospitals.[84] Over the next few decades, commentators remarked on the progress of the "conquered people," who, despite their "dull" minds and "savage" character, were attempting a civilized agrarian existence.[85] But this existence was certainly not one they chose; it was forced upon them. The Indians were persecuted if they pursued traditional native economic or religious practices.[86] One of the few remaining native cultural protections in the treaties was the salmon harvest, a practice to which the tribes clung tenaciously.

Ironically, the treaties that had been designed to assimilate the tribes became their chief weapon in their fight to protect their ancient

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81. Barbara Grace Liebhardt, Law, Environment, and Social Change in the Columbia River Basin: The Yakima Indian Nation as a Case Study, 1840–1933, at 118 (Nov. 19, 1990) (unpublished Ph.D. dissertation, University of California, Berkeley).

82. In the case of the Yakima Treaty at issue in *Winans*, the Senate did not ratify it until March 8, 1859. Treaty with the Yakima, *supra* note 13.

83. Or. Historical Records Survey, Div. of Prof'l & Serv. Projects, Work Projects Admin., Inventory of the County Archives of Oregon: No. 33, Wasco County (The Dalles) 22 (Feb. 1941) (Official Project No. 65-1-94-25, unpublished document, on file with the Oregon Historical Society Research Library) (noting the delay of a "series of treaties"); AM. FRIENDS SERV. COMM., *supra* note 67, at 36 (describing how General John E. Wool, commander of the Department of the Pacific of the U.S. Army, "argued that if…[militia] volunteers stopped provoking the Indians," the Indians would "become peaceful"). On the post-treaty violence, see Liebhardt, *supra* note 81, at 118–19.

84. Treaty with the Yakima, *supra* note 13, art. IV.

85. *See, e.g.*, A.H., *Yakima Indians: Their New Civilization Closely Inspected*, OREGONIAN, Apr. 2, 1885.

86. HUNN & SELAM, *supra* note 17, at 275.

ways. Article III of the treaties typically "secured…the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them."[87] This reserved right did not seem problematic at treaty time because the land seemed inexhaustible and the fish plentiful. But the next quarter-century would bring sweeping changes. By 1884, native fishing rights would collide with settlers' perceived land rights, a conflict that would require judicial resolution. For more than the next century, the meaning of the treaty words "the right of taking fish in common with" would be debated and litigated. Did these words recognize no special Indian rights beyond those enjoyed by white settlers? Or did the treaty language indicate that Indians had reserved special proprietary rights to fish in order to allow them to practice their ancient ways?[88] A way of life hung on the interpretation of this treaty language.

IV. THE POST-TREATY ERA: OVERCROWDING AND DIMINISHED SALMON RUNS

Article III's recognition of the Indians' historical fishing practices was soon overwhelmed by the rapid white settlement of the region, which threatened not only the Indian way of life, but also the salmon runs on which that culture depended. First mining and grazing and then efficient harvesting methods and unsustainable harvest levels threatened the salmon runs. Next, Indians and whites came into physical and courtroom conflict over access to prime fishing sites.[89]

A. Logging, Mining, and Grazing

As the region became increasingly crowded with settlers and their resource-extractive industries, river quality declined rapidly and tribal access to historic fishing places dwindled. Logging severely

87. Treaty with the Yakima, *supra* note 13, art. III.

88. *Compare* United States v. Winans, 73 F. 72, 74 (D. Wash. 1896) (no special right) *with* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 681–82 (1979) (in addition to an access right, treaty Indians also reserved a share of the harvest).

89. The first recorded case involving treaty-fishing access introduced the locus of what would later become the *Winans* case, a fishery known to whites as "Tumwater" and to natives as "Wisham" or "See-we-pam." Spedis v. Simpson (Klickitat County Ct. July 22, 1884) (located at Klickitat County, Wash. Archive, File KLK-126). *Spedis*, *Taylor*, and *Winans* all stemmed from access disputes at the Tumwater fishery. *See* Transcript of Record at 157–68, United States v. Winans, 198 U.S. 371 (1905) (No. 180) (testimony of Frank P. Taylor); *id*. at 44–50 (testimony of Thomas Simpson); *id*. at 227–29 (Stipulations). *See also* BRAD ASHER, BEYOND THE RESERVATION: INDIANS, SETTLERS, AND THE LAW IN WASHINGTON TERRITORY, 1853–1889, at 150–53 (1999) (discussing *Spedis* and placing it in the context of the "legal culture of the Indians in Washington Territory").

damaged salmon populations. Although less than two-dozen sawmills operated along the rivers of western Oregon and Washington in 1848, just three years later over a hundred mills choked rivers with gill-clogging dust and debris. Logjams blocked access to spawning grounds and raised water temperatures, and runoff from clearcut hillsides polluted breeding and rearing grounds.[90] "Splash dams," used for log transport, held back spring flows and then released them suddenly, inflicting periodic tumultuous poundings that destroyed spawning and rearing habitats as well as fishing sites.[91]

Miners seeking prime streamside real estate displaced or even attacked many permanent, ancient Indian villages on rocky terraces and fertile flat plots near streams.[92] Salmon, trout, eel, crayfish, and freshwater mussels all suffered sharp declines due to water pollution and temperature changes caused by soil displacement from mining and grazing. Some fish were pulverized as they passed through mining pumps, dams, and spray nozzles.[93] Cattle overgrazing destroyed streamside vegetation, resulting in increased water temperatures and less shelter from predation.[94]

B. The Birth of the Canning Industry

Until the invention of canned foods, salmon products were an exotic asterisk appendage to the much larger fur, mining, and logging trades.[95] By the mid-1860s, the first cannery had come to the West Coast, changing the fate of Indian fishing forever.[96] The industrial revolution and a robust American economy fueled investment in canneries.[97] The construction of the transcontinental railroad provided the means for

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90. LICHATOWICH, *supra* note 14, at 60–62.
91. TAYLOR, *supra* note 18, at 56–57.
92. *Id.* at 44.
93. *Id.* at 51. *See also* Stephen Dow Beckham, Oregon History—Indian Wars, http://bluebook.state.or.us/cultural/history/history14.htm (last visited Nov. 7, 2004).
94. TAYLOR, *supra* note 18, at 54–55.
95. The Hudson Bay Company first exported salmon in 1827 and 1829. Under an experiment conducted by Dr. John McLaughlin, Indian-caught fish at Fort Vancouver (now Kelley Point Park in Portland) were salted; repeatedly soaked in briny, super-saturated saltwater; packed into wooden casks; and shipped to Monterey, California, and to New York as "salt salmon." These shipments were unsuccessful: the fish tasted bad and kept for only a few weeks and import taxes made the salt salmon prohibitively expensive. Later, the Hudson Bay Company used a streamlined distribution infrastructure to sell salmon in their stores throughout England as a boutique specialty item. TAYLOR, *supra* note 18, at 60. The first American operation in 1829 was similarly short-lived, operating for only one season. LICHATOWICH, *supra* note 14, at 82.
96. LICHATOWICH, *supra* note 14, at 85–87.
97. *Id.*

global distribution of a seemingly endless stream of this highly marketable, preserved delicacy.[98]

By 1884, less than three decades after the signing of the treaties, 37 canneries operated along the Columbia River.[99] Few employees were Indian, and no cannery was Indian-owned.[100] Commercial harvesters hired whites and Chinese who emigrated in response to the fishing boom. Near the mouth of the Columbia, commercial fishermen worked long hours in fleets of boats with butterfly-shaped sails, towing gillnets. At the mouths of tributaries, they stretched weirs, or salmon dams, some of which captured virtually every salmon swimming upstream.[101] As a result, far fewer fish made it upstream to the Indians' dipnets and spearfishing ponds. By 1884, the scream and thunder of steam engines and the roar of booming railroad commerce reverberated through the Columbia River Gorge. The railroads provided a rapid conduit through which an export explosion of salmon and other resources flowed.[102]

C. Technological Preemption of Indian Harvests: Fishwheels and Motorized Fleets

In 1879, whites introduced the first fishwheel on the Columbia.[103] A kind of mechanized dipnet, the fishwheel was a formidable wood and steel structure that towered high over the heads of its operators, scooping ton after ton of salmon from the river. For the first time, the mighty Columbia was in danger of being over-harvested, as the new machines targeted geographically concentrated populations of specific salmon runs.[104] Salmon dams corralled the fish into the path of giant scoops, which tossed nearly the entire salmon run out of the river and into heaps on the shore or decks. An average fishwheel scooped 40 to 50 tons of salmon each season.[105] By comparison, native fishing

98. *See* TAYLOR, *supra* note 18, at 64.

99. *Id*. at 137.

100. LICHATOWICH, *supra* note 14, at 98–100.

101. TAYLOR, *supra* note 18, at 64. Though aboriginal fishers had also used weirs, the cultural context and scope of their use led to more sustainable effect than weir use in the post-cannery times. Indians imposed limits on weir and net use. LICHATOWICH, *supra* note 14, at 39; TAYLOR, *supra* at 65.

102. TAYLOR, *supra* note 18, at 52, 64 ("[F]ishmongers harnessed…railroads to create a global market for salmon.").

103. IVAN J. DONALDSON & FREDERICK K. CRAMER, FISHWHEELS OF THE COLUMBIA 7 (1971).

104. BLUMM, *supra* note 16, at 53; *see also* TAYLOR, *supra* note 18, at 63–64.

105. ANTHONY NETBOY, THE COLUMBIA RIVER SALMON AND STEELHEAD TROUT: THEIR FIGHT FOR SURVIVAL 28 (1980); THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY, *supra* note 79, at 184. One monster wheel, owned by the Seufert Brothers (later important litigants), landed a whopping 70,000 pounds in one day. *Id*. at 11.

methods were far less wasteful, much more geographically and temporally dispersed, and, thus, more sustainable.[106]

By the turn of the century, at least 76 wheels operated on the Columbia.[107] Canneries processed salmon around the clock but could not keep up with the fishwheels' pace. Thus, large piles of fish lay rotting.[108] As early as 1888, newspaper editorials debated whether wheels were "so destructive to our [fish] supply…that they should be prohibited."[109] One Indian agent reported that an entire salmon run had been captured by a wheel, thereby starving the upriver Palouse tribe, which depended on the run for subsistence.[110]

In 1898, as the *Winans* case was working its way through the courts, gasoline-powered fishing boats were introduced in the lower Columbia and in the ocean. These fleets netted large percentages of salmon runs offshore, before they reached fresh water. The race to harvest salmon thus turned from the rivers to the ocean, partially preempting both Indian fishing industry and white-owned fish wheels as well. A large portion of the salmon industry was now in the hands of the few that could afford offshore boats.[111]

Industrial fishing methods and export profits transformed salmon in only a decade or so from a cherished delicacy to a meat product produced on a massive scale.[112] By 1885, the Columbia Basin supported a bourgeoning global export of this fragile natural resource. Although salmon seemed bountiful, their complex life cycles required a carefully balanced harvest. No such balance was attempted in the nineteenth century, however, and the salmon runs declined rapidly under the combined stresses of overfishing, pollution, and habitat destruction from mining, logging, and grazing.[113] The number of

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106. BLUMM, *supra* note 16, at 66; TAYLOR, *supra* note 18, at 63.

107. DONALDSON & CRAMER, *supra* note 103, at 7.

108. TAYLOR, *supra* note 18, at 64.

109. L.H., *Our Fishing Interests: Are Wheels a Part of a Legitimate Business?*, MORNING OREGONIAN, Dec. 19, 1888. The British author Rudyard Kipling was astounded at the mass of flesh being dumped onto the deck, commenting, after a profanity or two, "Think of the black and bloody murder of it[!]" DONALDSON & CRAMER, *supra* note 104, at 7.

110. L.T. Erwin, *Annual Report of Yakima Agency*, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 297, 299 (1897), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=1160. Agent Erwin resigned that year. *Id*. at 298. In the 1894 report, Agent Erwin "strongly urge[d]" the Department of the Interior to take "definite and decisive action…to restore to the Indians their fishery rights [as the treaty provides]." L.T. Erwin, *Annual Report of Yakima Agency*, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 325, 326 (1894), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=1088.

111. *See* LICHATOWICH, *supra* note 14, at 109–10.

112. From 1866 to 1884, the total Columbia River salmon catch went from 272 tons to over 150 times that amount: 42,160 thousands of pounds. TAYLOR, *supra* note 18, at 122.

113. *See* LICHATOWICH, *supra* note 14, at 63–71; TAYLOR, *supra* note 18, at 50–57.

canneries on the Columbia peaked in 1887; by 1910, most had closed.[114] Thus, the explosive salmon "boom" of the late nineteenth century was followed by a deep "bust" in the early twentieth century, which was felt acutely by tribal people, whose sustenance and culture were jeopardized.

D. Legal and Geographical Preemption of Indian Harvests

In a misguided effort to promote sustainable harvests, beginning around 1880, regulatory commissions in both Oregon and Washington instituted "salmon preserves" and a number of other restrictions such as net-size limits and seasonal closures that applied to fishing in rivers and streams but left off-shore fishing virtually unregulated.[115] This impediment to the exercise of treaty rights effectively preempted the inland Indian harvest in a regulatory sense.

At the same time, scarcity and increasing access difficulties worked a geographic preemption. Indian fishing became an outmoded, endangered practice, no longer an important part of the salmon industry. Yet Indians tenaciously returned to their traditional fishing spots, where salmon were now scarce, and new, non-Indian landowners made access difficult.[116] A deepening conflict developed between Indians and white fee simple owners, who regarded the Indians as trespassers and troublemakers. Traditional, dependable sustenance fishing became a tenuous contentious right, as some Indian sites disappeared and others were taken over by white-owned fishing operations.[117] Tribal fishermen with dipnets and seines were an anachronistic inconvenience to the streamlined fishwheel operations. Whites erected fences around traditional fishing grounds like Tumwater, blocking permanent access paths, right before the eyes of frustrated natives who had fished on those sites their entire lives.[118]

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114. Liebhardt, *supra* note 81, at 456. From 1883 to 1889, a period of massive over-fishing, while the number and inefficiency of the salmon canneries increased, their production plummeted from 43 million pounds to 21 million pounds. TAYLOR, *supra* note 18, at 122.

115. *See* LICHATOWICH, *supra* note 14, at 103–04; COHEN, *supra* note 19, at 42–43; NETBOY, *supra* note 105, at 34–36; BLUMM, *supra* note 16, at 6–7.

116. *See* United States v. Taylor, 13 P. 333, 335–36 (Wash. Terr. 1887) ("The court knows as a matter of common knowledge that these Indians were always tenacious in adhering to past customs and traditions.").

117. *See* LICHATOWICH, *supra* note 14, at 101; Letter from George W. Gordon, U.S. Special Indian Agent, to the Comm'r of Indian Affairs (Jan. 19, 1889) (on file with the National Archives) [hereinafter Gordon Letter].

118. *See Taylor*, 13 P. at 333–34; Transcript of Record *passim*, United States v. Winans, 198 U.S. 371 (1905).

E. The *Spedis* Case

As the nineteenth century drew to a close, intervention by federal Indian agents became increasingly necessary to protect treaty fishing rights.[119] Tension festered at many historic Indian fishing sites and altercations resulted from whites encroaching upon Article III fishing rights.[120] A certain plot of land near the Tumwater fishery became the legal battleground for these conflicts, serving as the locus of both the *Taylor* and *Winans* cases.[121]

Yakama agent Robert H. Milroy was often the on-site enforcer of treaty fishing rights as members of the Yakama reservation frequented the fishery.[122] A fierce advocate for Indian fishermen, Milroy's reports to the Bureau of Indian Affairs showed him to be a proponent of Indian citizenship and a defender of the allotment of reservation land into private ownership.[123] In his short tenure as Yakima agent—he was suspended by President Cleveland in 1885—Milroy stressed that reservations were only a "temporary expedient" aimed at solving the "Indian problem" by "put[ting] up barriers against the inexhaustible greed of the white man from gobbling up all arable lands."[124] According to Milroy, the failure of the agrarian model on-reservation caused most Indians to access fishing sites beyond their reservations in pursuit of salmon.[125] He maintained that the earlier threat of war no longer required the insulation of reservations, and he implored the federal

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119. The tensions at fishing sites led the Commissioner of Indian Affairs to dispatch special federal Indian agent George W. Gordon, who documented the state of affairs at each of the major sites in the 1888 "Gordon Report," which later became an important document in future fishing rights cases. Gordon Letter, *supra* note 117.

120. Treaty with the Yakima, art. 3, 12 Stat. 951 (June 9, 1885).

121. *Taylor*, 13 P. 333; *Winans*, 198 U.S. 371.

122. Letter from R.H. Milroy, Indian Agent, to H. Price, Comm'r of Indian Affairs (Aug. 22, 1884) (on file with Klickitat County, Wash., Archive) [hereinafter Milroy Letter]. Milroy was a Progressive Republican who fought for citizenship for homesteading Indians and helped resolve individual disputes. ASHER, *supra* note 89, at 49–51, 76–78. Milory was not so much concerned with the fulfillment of treaty promises—he described the treaty as a "rude agreement from thirty years ago, called a treaty"—but with the survival of the Indians. *See* R.H. Milroy, *Annual Report of Yakima Agency*, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 196, 202–03 (1885) *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=883. *See also* R.H. Milroy, *Annual Report of Yakima Agency*, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 171 (1884), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=862 [hereinafter 1884 *Report of Yakima Agency*].

123. *See* R.H. Milroy, *Annual Report of Yakima Agency*, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 196, 203–04 (1885), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=883.

124. 1884 *Report of Yakima Agency*, *supra* note 122, at 203–04.

125. *Id*. at 173.

government to grant riverfront land to the tribes so that their fishing culture could be saved from the "avaricious hordes of white fishermen" responsible for the "rapidly diminished" salmon supply.[126]

The *Spedis v. Simpson*[127] controversy demonstrated Milroy's deepening conviction that fisheries should be protected. In *Spedis*, a white landowner used the federal guardian role to pit Indians against one another; he manufactured a conflict, and then sought to resolve it by selling his land to the federal government at a windfall profit.[128]

In 1884, Frank Taylor purchased a land patent for acreage adjacent to the ancient Tumwater fishery from a homesteader.[129] He immediately erected a fence and hired a few local Indians to keep other Indians from accessing their traditional fishing spots. He then leased the exclusive right to fish the site to one Indian, William Spedis. This arrangement incited a dispute in short order. For several weeks, Spedis denied access to native fishermen, who in turn filed complaints with Milroy, the Yakama Indian agent.[130] The conflict came to a head when Spedis forcibly tied up one particularly assertive Indian fisher and held him against his will.[131] In response, a small group of Indians functioning as the Yakama Reservation Police and acting under Milroy's order handcuffed and removed Spedis to the Yakama reservation, treated him roughly, and held him until Milroy showed up and released him.[132] Spedis then successfully sued Indian police member Thomas Simpson (later, the first named individual plaintiff in *Winans*),[133] and five other members of the Yakama police force for holding him against his will and

126. *Id*. at 172.
127. Complaint, Spedis v. Simpson, Klickitat County Ct. (July 22, 1884) (Case KLK-26) (on file with Klickitat County, Wash., Archive).
128. Milroy Letter, *supra* note 122.
129. *Id*.
130. *Id*. The Yakama Nation changed the spelling of its name from "Yakima" in 1993. This article employs that spelling, except with respect to the name of the 1855 treaty.
131. Allegedly, Spedis used more force than necessary. Complaint, Spedis v. Simpson, Klickitat County Ct. (July 22, 1884) (Case KLK-26) (on file with Klickitat County, Wash., Archive).
132. *Id*.
133. According to his testimony, Simpson grew up on the plot of land where the fishwheels stood. Transcript of Record at 44, United States v. Winans, 198 U.S. 371 (1905) (No. 180).

causing him "great pain in body and mind, and…great humiliation."[134] A jury awarded Spedis $500 in damages.[135]

The *Spedis* case reflected the precarious state of treaty fishing rights in the late nineteenth century and led directly to subsequent cases fought by similarly situated litigants that changed the course of treaty interpretation and Indian fishing.[136] The treaties were only 30 years old, but already their general ineffectiveness was clear; the first case to take the Article III rights to court was a contrived, violent, Indian-against-Indian controversy. Milroy's letters indicate that the *Spedis* case was emblematic of white manipulation of the Indians.[137] It would take over two decades, an ineffective decree in the *Taylor* case (described in section V, below), and a decisive victory for the tribes in *Winans* before the Indians would obtain judicial protection of their treaty fishing rights.

During the *Spedis* case, *The Oregonian* cited repeated conflicts, similar to those at the Tumwater fishery, between operators and Indian fishermen at a large fishwheel and supply platform at Celilo Falls.[138] Reportedly, the platform's owner offered to sell the land to the federal government in order to resolve the conflict, at a price to be agreed upon by arbitration. But before these negotiations could begin, an arsonist's fire razed the fully insured station after it had operated for only a few months.[139] The paper's coverage of the event reflects the view of the popular press of the day:

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134. Spedis sought $5,000 in damages from Milroy's officers in district court. *See* Complaint, Spedis v. Simpson, Klickitat County Ct. (July 22, 1884) (Case KLK-26) (on file with Klickitat County, Wash., Archive). According to the complaint by Spedis, "(the officers) did maliciously…violently…assault, beat, bruise…maim…and maltreat the plaintiff…and deprive him of his liberty for a long time." *Id.*

135. The $500 jury award remained uncollected until a forced sale of one of the defendants' belongings three years later brought $156.76. *See* ASHER, *supra* note 89, at 150–52. According to Agent Milroy, after the *Spedis* case, his agents were "careful to use no further violence (than necessary)" (the words "than necessary" were crammed into the margins of a handwritten note). Milroy Letter, *supra* note 122.

136. The conflicts in both *Taylor* and *Winans* originated at the same fishing site—the Tumwater fishery, at the foot of Celilo Falls—and Frank Taylor, the landowner, appeared as a witness in both *Taylor* and *Winans*. *See, e.g.*, Transcript of Record at 265, *Winans*, 198 U.S. 371 (1905) (No. 180).

137. Both Spedis and Simpson appeared for the plaintiffs in the *Winans* proceedings. *See id.* at 86, 176, 186. The patronizing tenor of white-Indian relations of the era is also reflected by Milroy's choice of possessive pronouns when referring to the conflict: he referred to the unnamed fisherman (tied up by Spedis) as "my Indian" and used the term "Taylor and his Indians," not the name "Spedis," when referring to acts by Spedis. Moreover, Milroy alleged that the motivation for the Spedis lawsuit—funded by Taylor—was "part of [Taylor's] tactics to compel the Department (of the Interior) to purchase his claim to the fishery, and pay him ten times its value." Milroy Letter, *supra* note 123, at 3. *See also* ASHER, *supra* note 89, at 72.

138. *The Celilo Fishery*, THE OREGONIAN, Oct. 18, 1884.

139. *Id.*

> [A] treaty was made at one time giving [the Indians] the right [to fish]. *This treaty expired in 1856 (sic)*, and they have continued to fish there ever since without hinderance….The Indians began murmuring as soon as they saw an attempt made to interfere with what they considered their rights in the premises[, and they] became unpleasantly obnoxious. Threats were made of murder, arson and other crimes unless they were allowed to have their own way.…[T]he diaffected (sic) savages…said they would stay there until they were killed before leaving willingly.[140]

The reporter erroneously opined that, because the parcel in question had been granted to the state as a "school lot" upon statehood in 1859, it was no longer burdened by the rights secured by the treaty.[141] The Supreme Court would reject this reasoning even before hearing the *Winans* case.[142]

F. The Allotment Era

With tribal populations decimated by disease and settlers populating the region with vigor,[143] Indian lands became increasingly coveted by whites. According to *The Oregonian* in 1885, the Yakama reservation was "a magnificent country, which could support a population of 30,000 in comfort and plenty," but which was "lying [in] waste in the hands of a few hundred Indians."[144] Agent Milroy made similar observations in his reports.[145] Settlers' eyes widened at the prospect of acquiring "surplus" lands allegedly slept on by the remaining Indians.

The Dawes Act of 1887 made such sales possible. The statute announced the federal government's desire that Indians abandon tribalism and communistic property ownership control by allotting

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140. *Id.* (emphasis added).

141. *Id.*

142. The notion that the federal government could not convey or reserve lands subsequently the subject of state claims under Statehood Acts was rejected by the Supreme Court in *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) (ruling that the federal government could reserve submerged lands under navigable waters prior to statehood if it did so clearly and for important public purposes). Recent applications of this rule include *Idaho v. United States*, 533 U.S. 262, 272 (2001) (concerning the government's pre-statehood reservation of the Coeur d'Alene lakebed for the Coeur d'Alene tribe's reservation); and *United States v. Alaska*, 521 U.S. 1, 33 (1997) (concerning the government's pre-statehood reservation of lands offshore of the Arctic National Wildlife Refuge in the Beaufort Sea).

143. In less than a half-century, native populations decreased by as much as 95 percent, and non-natives had increased in number by 800 percent. BLUMM, *supra* note 16, at 65.

144. A.H., *supra* note 85.

145. 1884 *Report of Yakima Agency*, *supra* note 122, at 171–73.

parcels of land to individual Indians, who could then sell their property after proving themselves to be fully "civilized."[146] Described by President Theodore Roosevelt as "a mighty pulverizing engine to break up the tribal mass,"[147] the Dawes Act ensured that large chunks of tribal lands made their way into non-Indian hands.[148] Consequently, the Puyallup Tribe lost virtually all of its riverside property.[149] The Yakama Reservation became home to three non-Indian towns by 1907, as tens of thousands of acres of prime irrigated farmland were conveyed to non-natives.[150] Over the next century, the Dawes Act would continue to cast its shadow on tribal fishing rights as well, as the settlers, under state law, diverted water from streams for irrigation, reducing fish habitat and contributing to declining salmon runs.[151]

Indian land reservations diminished under policies of allotment, but the Dawes Act and ensuing allotment statutes made no mention of the treaty "right of taking fish." The federal government encouraged the civilization of tribes by allowing them to alienate their land holdings, but simultaneously federal agents like Robert Milroy fought to preserve ancient fishing practices that seemed to contradict the federal goal of converting Indians into agrarians. The best explanation for this dichotomy lies in the reports of Indian agents; they show that the reservations failed miserably as training centers for Jeffersonian yeomen.[152] As buffers for keeping potential conflict at bay, however, reservations succeeded to the point of no longer being necessary. According to Agent Milroy, whites had peacefully surrounded the reservations by the 1880s, inhabiting most of the arable land with little or no conflict with natives.[153] As a result, the reservations' peacekeeping function apparently was no longer necessary. The agents' reports also reveal that the federal government was made aware of the rapid physical

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146. General Allotment Act (Dawes Act), 24 Stat. 388 (1887). *See generally* Royster, *supra* note 5.

147. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 196 (2005).

148. *See* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW 40 (2002) (By 1934, the end of the allotment era, two-thirds of allotted lands—some 27 million acres—had fallen into non-Indian ownership.).

149. COHEN, *supra* note 19, at 53.

150. HUNN & SELAM, *supra* note 17, at 278–79.

151. Perhaps the classic Indian fishing versus settler irrigation case is *Nevada v. United States*, 463 U.S. 110 (1983), where a fractured Supreme Court, per Justice Rehnquist, ruled that the federal government and the Pyramid Lake Pauite Tribe could not reopen a 1944 court decree in which the federal government failed to ask for sufficient water to sustain the tribe's treaty rights to fish in Pyramid Lake. Numerous such fish versus irrigation cases are collected in ROYSTER & BLUMM, *supra* note 148, at 394–461.

152. *See* 1884 *Report of Yakima Agency*, *supra* note 122, at 152–53.

153. *See id.*

and legal displacement of the Indians from their ancient fishing sites and the loss of crucial cultural and economic practices.[154] Surprisingly, the allotment-era policy of breaking up reservations and their tribal communism resulted in tolerance and support for aboriginal fishing, at least among government agents. Fishing offered the Indians an opportunity to develop commercial enterprises, or at least maintain subsistence fishing.

White fee owners and tribal fishermen were philosophically at odds in many respects. The native ideal of a fishing site as the hub of a great communal banquet table, reflective of a holistic spiritual system of nature and stewardship, conflicted with private land ownership paradigms in which trespassing Indians chipped away at profits. While the native gift economy had built-in spiritual, social, and geographical checks to regulate the harvest from within,[155] commodification of the salmon resource resulted in over-harvesting and waste in pursuit of fast profits from distant markets. The sight of dipnet fishermen working the rocks and pools was an eyesore for whites, who preferred less chaotic and neatly organized gardens and orchards and efficient, profitable, mechanized fishing operations like fishwheels. Whites complained of unlawful timber-cutting,[156] noise, theft, trespassing, and other problems resulting from the Indian presence at fishing sites: according to one account, "The Indians…have been a troublesome, drunken lot of fellows" wrote one fishery manager.[157] The stage was set for an epic legal battle over access to fishing sites.

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154. After Agent Milroy's suspension in 1885, several of his Indian Agent successors at the Yakama Reservation were dismissed in short order after each pleaded to the Commissioner of Indian Affairs for assistance in resolving the problems at the fisheries. It is probably no coincidence that, after Agent Jay Lynch was appointed to the post in 1898, he proceeded to omit from his reports any reference at all to the ongoing legal struggles at Columbia Basin fisheries for nearly ten years. *See* Reports of Agents in Washington Territory and Reports of Agents in Washington, *available at* http://content.lib.washington.edu/cgi-bin/queryresults.exe?fg=&CISOOP1=all&CISOBOX1=Yakima+lynch&CISOFIELD1=CISOSEARCHALL&CISOOP2=exact&CISOBOX2=&CISOFIELD2=CISOSEARCHALL&CISOOP3=any&CISOBOX3=&CISOFIELD3=CISOSEARCHALL&CISOOP4=none&CISOBOX4=&CISOFIELD4=CISOSEARCHALL&cisobox1=yakima+lynch&cisobox2=&cisobox3=&cisobox4=&searchall=on&CISOROOT=all.

155. *See* BLUMM, *supra* note 16, at 65–66.

156. Letter from W.H. Holcomb to George W. Gordon, Special Indian Agent (Aug. 14, 1888) (on file with the Nat'l Archives, File: Gordon Report). The Indians needed to cut small trees in order to build temporary shelter, smoke-racks, and dip nets. *Id*.

157. Letter from W.H. Holcomb, Gen. Manger, to George W. Gordon, U.S. Indian Agent (Aug. 14, 1888) (on file with the Natl. Archives, File: Gordon Report).

V. THE *TAYLOR* CASE: FENCING OUT TRIBAL FISHERS

At the Tumwater fishery, tensions continued to run high throughout the 1880s. Frank Taylor sold his 160-acre parcel to a Baptist minister named Orson Daton Taylor, who was not related to Frank.[158] O.D. Taylor was a shrewd opportunist who had traveled to the Dalles under the veneer of missionary altruism, taking charge of the Baptist Church there in 1880.[159] Within two years, he turned from preaching the gospel to buying and selling riverfront land, including the contentious location of the *Spedis* case, at the foot of the rapids below Celilo Falls.[160] The minister then evicted tribal fishermen in order to make room for white fishermen, who promised profitable returns as tenants. Consequently, Taylor strung barbed wire across Indian trails, burned down some of their temporary structures, appropriated others for his own use, and threatened Indians with arrest.[161] He also dynamited the rocky shore to carve out space for four large fish wheels, obliterating several prime native fishing spots.[162] The Tumwater plot was already embroiled in legal battles when O.D. Taylor acquired it,[163] and the Taylors' desires to fence out the Indians would produce the first judicial interpretation of the meaning of the promises contained in article III of the treaties.

A. Agent Milroy's Suit for an Injunction against Taylor's Fence

Recalling the Spedis incident of 1884, Agent Milroy and several Yakama tribal members immediately sought an injunction in federal

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158. There was no blood relationship between the two Taylors.

159. AN ILLUSTRATED HISTORY OF KLICKITAT, YAKIMA, AND KITTITAS COUNTIES: WITH AN OUTLINE OF THE EARLY HISTORY OF THE STATE OF WASHINGTON 111 (1904).

160. By the end of the century, O.D. Taylor became a notorious land swindler and failed developer who was run out of town on fraud charges. Although convicted of fraud, the conviction was later overturned on a technicality. *See* Jeffrey L. Elmer, *Shoe Factory: A Story of Boom and Bust*, DALLES CHRON., June 2, 1959, at E2, *available at* http://homepages.rootsweb.com/~westklic/shoe.html. *See generally* supra note 160.

161. Gordon Letter, *supra* note 117. It is likely that, after O.D. purchased the plot in 1892, he merely continued the practices of Frank Taylor. The transcript of record of the *Winans* case describes abuses and intimidation tactics against Indians at the Tumwater fishery. Transcript of Record, *supra* note 133, at 56, 70 (testimony of Charley Dick); *id*. at 68 (testimony of Winneer); *id*. at 83 (testimony of Joe Ko-Lock-en); *id*. at 85 (testimony of Charley Cath-lum-it); *id*. at 91 (testimony of Bill Charley); *id*. at 100 (testimony of William Speedies (Spedis)); *id*. at 105 (testimony of Charley Winnear). For a list of sources, see Leibhardt, *supra* note 81, at 356.

162. Transcript of Record, *supra* note 133, at 47–49 (testimony of Thomas Simpson).

163. *See* Plaintiff's Brief at 35, *Winans*, 198 U.S. 371 (1905) (No. 180) (noting that a warranty deed did not pass from Frank Taylor to subsequent purchasers due to the pending litigation).

district court against Taylor to prevent him from fencing off the Tumwater fishery at Celilo,[164] claiming that the fence obstructed their access to the fishery and prevented their exercise of treaty fishing rights. Citing Article III of the 1855 treaty, the government argued that Indian fishermen possessed a "right of way with free access from [the reservation]…to the nearest public highway, …[and] also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory, and of erecting temporary buildings for curing them."[165] Judge George Turner of the Washington district court in North Yakima held for Frank Taylor, allowing him to keep his fence.[166]

Milroy nevertheless pressed on, convincing U.S. attorneys W.H. White and John B. Allen to appeal to the Washington Territorial Supreme Court in July 1884. Milroy reported that, "after trying in vain by reason to obtain for the Indians free access to said fisheries, I had to resort to law."[167] Before the territorial high court, the U.S. attorneys argued that the treaty provisions should be interpreted to include an implied access easement across Taylor's land and that the fence blocked the exercise of this right and therefore violated the Yakama's treaty rights.[168]

Frank Taylor's lawyers, William Lair Hill[169] and F.P. Mays,[170] advanced two theories in his defense. First, they claimed that the government's granting of patents under the Homestead Act[171] abrogated the Yakama's fishing rights. Hill and Mays maintained that because Indians, like whites, had an opportunity to acquire a fishing right by homesteading on the river, they could have secured the fishing site in fee, but instead they slept on that opportunity.[172] Since the homestead patents were in conflict with a claim of treaty-based access easements,

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164. ASHER, *supra* note 89, at 151.

165. Government Complaint, United States v. Taylor, 3 Wash. Terr. 88, 89 (1887).

166. Judge Turner did not write an opinion. ASHER, *supra* note 89, at 151; United States v. Taylor, 13 P. 333 (1887); Milroy Letter, *supra* note 122, at 41 (explaining that O.D. Taylor claimed the land as Milroy readied his appeal).

167. 1884 *Report of Yakima Agency*, *supra* note 122, at 175.

168. United States v. Taylor, 3 Wash. Terr. 88, 91 (1887).

169. A Grant County judge and former editor-in-chief of *The Oregonian*, Hill was known for codifying the laws of Oregon and Washington into their first cohesive volumes. *See* THE CODES AND GENERAL LAWS OF OREGON (William Lair Hill ed., 1887).

170. Mays later represented the Winans brothers in the case that bears their name, teaming with popular historian, lawyer, and judge Charles H. Carey, who was counsel for the Northern Pacific Railroad during its western expansion and who later started the prestigious Portland law firm now called Stoel Rives. *See generally* CHARLES H. CAREY, A GENERAL HISTORY OF OREGON: THROUGH EARLY STATEHOOD (1971); Stoel Rives: Our History, http://www.stoel.com/about.aspx?Show=961 (last visited Mar. 1, 2006).

171. Act to Secure Homesteads to Actual Settlers on the Public Domain, ch. 75, 12 Stat. 392 (1862).

172. United States v. Taylor, 3 Wash. Terr. 88, 92 (1887).

the defense maintained that "a subsequent act of Congress [authorizing the issuance of patents] in conflict with [a previous treaty's] provisions repeals it pro tanto by implication, just as if it were a previous act of Congress instead of a treaty."[173] Thus, Taylor argued, treaty rights were defeasible, ceasing to exist on parcels subject to the Homestead Act patents. The government responded that the mere issuance of such patents did not "deprive these Indians of a treaty right secured them."[174]

Taylor's second argument was that white property owners had the right to exclude the Indians because exercise of the fishing right and related activities was "in derogation" of a landowner's right to exclusive possession of his land.[175] Under this view, continued treaty fishing access and especially occupation for pasturing and curing were incompatible with Taylor's fee simple ownership. Taylor therefore asserted that he should not be subject to what amounted to an unwritten easement on his property. Besides, according to Taylor, the Indians had "a perfect means of approach, by the common highways, to the navigable streams, and by the navigable streams to the [site]."[176]

B. The Territorial Supreme Court Decision

In 1887, the Territorial Supreme Court unanimously reversed Judge Turner. Justice John P. Hoyt wrote for the court, presciently framing the central issue in terms of Indian intentions: "What did the Indians intend to reserve to themselves by the words, …[the] 'right of taking fish at all usual and accustomed places, in common with citizens of the territory?'"[177] Hoyt reasoned that the Yakama treaty must be "liberally construed in favor of the Indians." Moreover, the treaty language should be interpreted in a way that would "best subserve (sic) the object which the Indians at the time the treaty was made would have been most likely to have desired and understood."[178] Over the next century, courts would employ this reasoning to formulate canons of

173. The Cherokee Tobacco, 78 U.S. 616 (1870); Appelant's Brief, *Taylor*, 3 Wash. Terr. at 93.

174. Appellant's Brief, *Taylor*, 3 Wash. Terr. at 91.

175. Appellee's Brief, *Taylor*, 3 Wash. Terr. at 93.

176. *Id*. Although perhaps technically possible for the strongest paddlers to reach the rocky shores and dip their nets, the 30-mile-per-hour rapids prevented this from being a viable option for subsistence fishing or its appurtenant shoreline activities, as witnesses for both parties testified.

177. United States v. Taylor, 13 P. 333, 334–35 (Wash. Terr. 1887).

178. *Id*. (Here, Hoyt's opinion reflected the government brief, which cited *In Re Kansas Indians*, 72 U.S. 737 (1866), and *Worcester v. Georgia*, 31 U.S. 515 (1832), for the principle of liberal construction of treaties and *The Cherokee Tobacco*, 78 U.S. 616 (1870), and *Taylor v. Morton*, 23 F. Cas. 784 (1855), for the presumption against subsequent acts of Congress reversing a treaty provision)).

treaty construction, interpretive devices employed by the judiciary to compensate for the tribes' unequal bargaining power at the time of the treaties.[179]

The canons function in three ways: to resolve ambiguous expressions in favor of the Indians,[180] to interpret the treaty the way the Indians would have understood,[181] and to construe treaties liberally in favor of the Indians.[182] The seeds of the canons were sown in Chief Justice Marshall's interpretation of the Hopewell Treaty in *Worcester v. Georgia* in 1832[183] but gained prominence in modern Supreme Court jurisprudence in the *Winans* case,[184] where the government argued that the issue "has been fully adjudicated in favor of the Indians" in the *Taylor* decision.[185]

Justice Hoyt then articulated an early version of what is now known as the "reserved rights" doctrine: "the Indians in making the treaty…more likely…grant[ed] only such rights as they were to part with, rather than…conveyed all, with the understanding that certain [rights] were to be at once reconveyed to them."[186] Taylor argued that such an expansive interpretation of the treaty-recognized right would conflict with his fee ownership by reserving to the Indians a right to engage in any conceivable future fishing practices, including creating new "usual and accustomed" sites.[187] Justice Hoyt observed that Taylor's interpretation would create a "floating servitude," effectively suffocating future fee owners' exercise of their ownership rights, a result he claimed the United States would never have intended.[188] Here, Justice Hoyt interpreted the treaty according to the federal government's likely understanding, thus inverting the treaty canon that counsels the judiciary to interpret treaties the way the tribes would have understood. But this interpretation actually worked in the Indians' favor, since it

179. *See* COHEN, *supra* note 4, § 2.02.

180. *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Winters v. United States, 207 U.S. 564, 576–77 (1908).

181. *See, e.g.*, United States v. Winans, 198 U.S. 371, 380 (1905); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Worcester v. Georgia, 31 U.S. 515, 582 (1832).

182. *See, e.g.*, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943); Tulee v. Washington, 315 U.S. 681, 684–85 (1942). On the treaty canons, see generally Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As long as Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?* 63 CAL. L. REV. 601 (1975). The canons of treaty construction were endorsed by both the majority and the dissent in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 218 (1999).

183. *See* COHEN, *supra* note 4, § 2.02[2].

184. 198 U.S. at 380–81.

185. *Winans*, 98 U.S. at 373.

186. United States v. Taylor, 13 P. 333, 335 (Wash. Terr. 1887).

187. *Id.* at 335.

188. *Id.*

rejected Taylor's constricted reading of the treaty right's scope, and instead opted for a workable middle ground: the Indians retained a historic right to fish, but not an ever-expanding one. The issue of the scope of the right would continue to be litigated for decades.[189]

Concerning the issue of the implicit abrogation of the treaty by the Homestead Act, Justice Hoyt dismissed Taylor's logic. The court construed the Homestead Act as "only authoriz[ing] the extinguishment of the title which the government holds at the time of the appropriation, and if the land selected by the settler has at such time any servitude or easement impressed upon it, he takes subject thereto."[190] Homesteaders like Taylor therefore took only that title which the government held at the time of the issuance of their or their predecessor's land patent. And, according to Justice Hoyt, Taylor's title was burdened with implied easements for Indian fishing, stemming from "ancient" fishing practices that had been used "for generations," and recognized in the treaties.[191] This principle would be adopted by the Supreme Court in its *Winans* decision.

C. The Ineffective Decree and the Agents' Fights to Remedy It

Having reversed the district court's decision, the Washington Territorial Supreme Court then remanded the issue to District Judge Turner, directing the lower court to enter a decree recognizing the fishing right and an easement to support it.[192] But Turner's ensuing decree, issued nine months after the territorial court's opinion, narrowly interpreted Justice Hoyt's ruling.[193] Although the decree recognized the native right to fish and the access easement accompanying it, Judge Turner cabined both the Indian fishing season and the physical attributes of the easement. Justice Hoyt's opinion had neither mentioned a fishing season nor limited the scope of the easement, but Turner's decree confined Indian fishing to the summer months and burdened only ten

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189. *See, e.g.*, Seufert Bros. Co. v. United States, 249 U.S. 194 (1919) (treaty fishing right extends to accessing historic fishing places not expressly ceded by treaty language); Tulee v. Washington, 315 U.S. 681 (1942) (treaty fishing right includes insulation from state licensing fees); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973) (treaty fishing right includes insulation from discriminatory state regulation); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (treaty fishing right includes an equal share of the harvest).

190. *Taylor*, 13 P. at 336.

191. *Id*. at 335–36.

192. *Id*.

193. The Supreme Court decision was handed down in January 1887; the Turner decree was issued in October 1887. *See* Gordon Letter, *supra* note 117, at 34–62 (discussing the decree).

acres of Taylor's 794-acre parcel with the easement for passage, structures, pasturing, and fish curing.[194]

Special Indian Agent George W. Gordon, who had been sent by the Commissioner of Indian Affairs to survey and report on the conditions at Indian fisheries, was astonished by the restrictive Turner decree, observing that it provided "not pasturage enough to keep one animal."[195] He reported that the decree's terms regarding what constituted a "temporary structure" were vague and did not clearly indicate whether such structures were to stand during the off-season.[196] Over the next few months, Gordon unsuccessfully campaigned to the lawyers for both parties and to the court to modify and clarify the decree.[197] He arranged a meeting with U.S. attorneys Allen and White at the Tumwater site in December of 1887, but they failed to show.[198] Gordon was then informed by natives at the site that Taylor had taken some of their houses for his own use after ejecting the Indians.[199]

Despite promises by White to seek court modification of the decree, the attorneys assigned to protect the tribes' rights failed to take action.[200] Gordon predicted that there would be serious trouble implementing Turner's October 1887 decree during the 1888 fishing season absent a federal agent at the site.[201] In 1889, Yakama agent Thomas Lang urged U.S. attorney White to sue O.D. Taylor for contempt, astutely commenting that whites intended to "weary the Indians out of all rights they have in the fisheries; and…have annoyed and molested their free enjoyment of their treaty rights under the

194. *Id*. at 34 (total acreage of Taylor's land), 45 (discussing the scope of the easement in the decree).

195. *See id*. at 38.

196. *Id*. at 45–46.

197. *See id*. at 44–62.

198. *Id*. at 46–47.

199. *Id*. at 47.

200. In March 1888, Gordon queried O.D. Taylor and W.P. Mays, whose interpretations of the decree validated Gordon's concerns that the order effectively undermined the Territorial Supreme Court's *Taylor* decision. In April 1888, Gordon again approached Allen and White but, finding no purchase for his concerns, turned to Judge Turner, the decree's author. Turner had just retired into private practice (founding the law firm now named Witherspoon, Kelley, Davenport & Toole, the largest real estate law firm in the Inland Northwest). Turner warned O.D. Taylor that he would be held in contempt of court if he tore down temporary fishing structures or if he failed to give the decree a "liberal construction." Gordon relayed Judge Turner's warning to Taylor, who agreed to not harass the Indians but nevertheless maintained a narrower interpretation of the decree than did Gordon. *See id*. at 48–60.

201. *Id*. at 61–64.

decree."[202] As the agents feared, the federal guardianship protecting Indian fishing rights proved to be inadequate in practice, setting the stage for another legal battle a few years later, this time between native fishermen and the Winans brothers, Taylor's successors.

VI. *UNITED STATES V. WINANS*: THE EPIC CASE

The *Winans* case took nearly nine years to work through the courts.[203] The Supreme Court decision came as a surprise because it seemed to run contrary to assimilation policy at the time. But when viewed in light of local history and the equities and realities of allotment policies and their effect on the reservations, the Supreme Court's decision is understandable. Although the record contains no declarations of their motivations, it seems likely that U.S. Attorney Brinker pursued the case for the same reasons that agents Milroy and Gordon had fought for tribal fishing rights. Reservations had failed in their agrarian goals, and treaty fishing rights were rapidly eroding. As reservations diminished due to allotment, it became especially important to preserve Indian access to fish, a main source of food, ritual, and commerce.

A. Background: The Winans Brothers Step into Taylor's Shoes

Audubon and Linnaens[204] Winans settled on the Columbia Plateau in 1887, purchasing large tracts in Oregon on the east side of Hood River.[205] In 1895, they erected a large fishwheel across the river in Washington on land adjacent to the Tumwater fishery previously owned by O.D. Taylor, the same contentious site at issue in the *Taylor* and *Spedis*

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202. *Report on Tumwater Fisheries*, *in* REPORTS OF AGENTS IN WASHINGTON TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1889, at 295–96 (Aug. 15, 1889), *available at* http://content.lib.washington.edu/cgibin/docviewer.exe?CISOROOT=/lctext&CISOPTR=964.

203. Although the United States filed suit against the Winans brothers in mid-1895, Judge Hanford did not issue a final opinion until 1903. This delay may have been due to a variety of factors, including the relative lack of proactive measures taken by Indian agents after 1898 (Agent Erwyn's replacement, Jay Lynch, failed even to mention Indian fishing in his reports; *see infra* Part VI.C), but the delay was probably due to Judge Hanford's equivocations about injunctive relief, as explained *infra* Part VI.B. Ultimately, his final order in 1903 simply repeated his 1896 opinion but lifted the injunction that had been imposed for eight years. *See infra* Part VI.C.

204. The spelling of the first names of both defendants in the case varies throughout the record; the spellings used in this article are those the Winans brothers used when signing court documents. Residents for some time referred to the area as the "Winans Addition." *See* DELIA M. COON, HISTORY OF EARLY PIONEER FAMILIES OF HOOD RIVER, OREGON 287 (1944), *available at* http://freepages.genealogy.rootsweb.com/~bryajw/HoodRiverPioneers; *see also Will Have an Election on the Library Proposition*, HOOD RIVER NEWS, Mar. 12, 1913, at 1, *available at* http://homepages.rootsweb.com/~westklic/hrcl1913.html.

205. COON, *supra* note 204, at 287.

cases.[206] The Winans brothers were upstanding participants in the building of Hood River, Oregon, and its commerce, but they were feared by Indians.[207] Like Frank Taylor, the Winans brothers hired an Indian, Charlie Dick, to keep the other Indians out of the fishery.[208] Tribal people did not trust the white fishermen or their courts,[209] and the Winans brothers allegedly used "force, intimidation,…threats[,]…and assault" and "tore down and destroyed [the Indians'] temporary houses."[210]

On July 11, 1895, U.S. Attorney William H. Brinker filed a complaint in Washington district court alleging that the Winans brothers had violated the Yakima Treaty by obstructing tribal access to the Tumwater fishery and outlining a variety of intimidation tactics and assaults.[211] The same day that Brinker filed the complaint, Justice Cornelius H. Hanford[212] issued a temporary injunction directing the Winans to "desist and refrain from in any manner obstructing, interfering with, or preventing…[the Indians] from fishing" at Tumwater, and to "desist from constructing, operating, or maintaining fish wheels" anywhere that might interfere with Indian fishing.[213]

206. Transcript of Record, *supra* note 133, at 162 (testimony of Frank P. Taylor). Taylor sold the land to Tyler Woodward of Portland, who entered into a purchase contract with the Winans brothers. *See* Respondent's Brief at 9, United States v. Winans, 198 U.S. 371 (1905); Federal Brief at 33–37, *Winans*, 198 U.S. 371.

207. Transcript of Record, *supra* note 133, at 86 (testimony of Charley Cath-lum-it); *id*. at 89 (testimony of Bill Se-hi-am).

208. *Id*. at 55–56 (testimony of Charley Dick); *id*. at 67–68 (testimony of Winneer); *id*. at 79 (testimony of Sam Tan-a-washa).

209. After Milroy's dismissal in 1884, subsequent Yakama agents curtailed their involvement in resolving disputes over tribal fishing. The Winans brothers threatened Indians with white courts, saying that, if they trespassed, they would "have them in Goldendale" (the nearest county jail). *Id*. at 56, 70 (testimony of Charley Dick); *id*. at 68 (testimony of Winneer); *id*. at 83 (testimony of Joe Ko-lock-en); *id*. at 86 (testimony of Charley Cath-lum-it); *id*. at 91 (testimony of Bill Charley); *id*. at 100 (testimony of William Speedies); *id*. at 105 (testimony of Charley Winnear).

210. *See id*. at 66 (describing an assault by one of Winans' men).

211. The complaint was originally filed against "John Doe and Richard Roe Winans,…whose true names are unknown." Federal Complaint filed July 11, 1895, Transcript of Record, at 1–3, *Winans*, 198 U.S. 371.

212. Five years earlier, Judge Hanford had upheld Justice Hoyt's 1887 *Taylor* decision by rejecting O.D. Taylor's claim that Washington's statehood in 1889 should result in recission of old territorial-era rules like treaty fishing rights. United States v. Taylor, 44 F. 2, 3 (D. Wash. S.D. 1890).

213. Transcript of Record, *supra* note 133, at 14–15 (Order of July 11, 1895). Judge Hanford modified the injunction in November 1896 in response to a stipulated agreement between the government and the Winans brothers specifying the fishing sites to which the Indians would have "free egress and ingress" and also where they could erect temporary houses and pasture horses, as called for in the treaty. *Id*. at 20 (Order of Nov. 19, 1895).

B. The District Court Decisions

In the fall of 1895, the Winans brothers, represented by Hill and Mays (as Taylor had been), responded to Brinker's complaint by maintaining that the court lacked jurisdiction and asserting that no relief was appropriate.[214] In March 1896, Judge Hanford overruled their demurrer, but his opinion included an interpretation of article III of the treaty that did not bode well for the Indians. He distinguished the Indians' exclusive on-reservation rights from their off-reservation "in common with" rights, stating that "[i]t would not be a fair construction of the treaty" that areas outside the reservation should be "set apart and surveyed for the exclusive use of the Indians…as places for temporary buildings, or for the pasturage of horses or cattle."[215] Judge Hanford interpreted the treaty language "in common with the citizens of the territory"[216] as either reserving for or granting to[217] the Indians (1) exclusive rights to fish on their reservations and (2) "in common with" rights—that is, equal to those of white citizens—to fish off their reservations.[218] But Hanford claimed that the equality implicit in the "in common with" language implied the absence of other rights.[219]

Judge Hanford's interpretation of the nature of the Indian off-reservation treaty rights led him to conclude that these rights did not survive the government's issuance of homestead patents to the Winans' predecessors.[220] Thus, the tribes could not erect temporary structures or

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214. *Id*. at 18 (Defendants' Demurrer). The Winans alleged that the court lacked jurisdiction because the amount in controversy did not exceed $2,000. *Id*. at 24.

215. United States v. Winans, 73 F. 72, 74 (D. Wash. S.D. 1896).

216. *Id*. (recognizing "the right of taking fish at all usual and accustomed places in common with citizens of the Territory") (citing Treaty between the United States & the Yakama Nation of Indians, 12 Stat. 951, 953 (1855)).

217. The court stated, "It is plain that the treaty, whether considered as a grant from the United States government to the Indians or as a reservation by the Indians, secures to the Indians rights of two kinds…." *Winans*, 73 F. at 74. The Supreme Court decision in *Winans* would resolve this issue in favor of reserved rights. *See infra* notes 274–279 and accompanying text.

218. *Winans*, 73 F. at 74 ("The language of the treaty indicates that the purpose was to secure to the Indians equality of rights with citizens in the matter of fishing, hunting, gathering roots and berries, and pasturing horses and cattle, and in the use and occupation of unclaimed land for the erection of temporary buildings….").

219. *Id*. ("[T]he enumeration of other rights secured to the Indians by express words negatives any possible presumption of rights by mere implication.…"). Four years earlier, Judge Hanford had concluded that a similar "in common with" treaty fishing promise gave the Makah Tribe "only an equality of rights and privileges in the matter of fishing, whaling, and sealing." United States v. The James G. Swan, 50 F. 108, 111 (N.D. Wash. 1892).

220. *See Winans*, 73 F. at 74 ("The theory that lands conveyed by government patents, after being so conveyed, and appropriated by individual citizens, still remain subservient to use and occupation by the Indians, for travel over the same, otherwise than by lawfully established public highways, and for camping grounds, finds no support in the provisions

pasture horses on the Winans' land,[221] and the judge specifically refused to order the Winans to "permit the Indians to make a camping ground of their property while engaged in fishing."[222] Yet he concluded that excluding the Indians from the Tumwater fishery due to the Winans' fishwheels was "plainly an invasion of the rights of the Indians under the treaty."[223] Judge Hanford therefore maintained the injunction preventing the Winans brothers from blocking Indian access to Tumwater while concluding that the reserved treaty right to erect temporary shelters did not survive on private property.[224] The confusing distinction Judge Hanford drew between access and temporary shelters might have been due to the fact that he viewed the Winans brothers' fishwheels as claiming a monopoly of the Tumwater fishery, or due to his view that the Winans' fee simple title was incompatible with temporary Indian shelters, or perhaps both. But the distinction was clearly not based on the text of the treaty.[225]

Four months later, in July, in response to requests to modify the injunction, Judge Hanford issued another order to the Winans brothers reiterating his directive not to interfere with Indian access to the Tumwater fishery, including operating fishwheels that obstructed Indian fishing and from "obstructing any road or highway."[226] But curiously,

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of the treaty…."). The court noted that it "might be a good argument" to maintain that the government should not have issued the homestead patents, but having done so, it was "now too late" to protect the treaty rights short of purchasing the lands in question from the Winans brothers. *Id*. at 75.

221. *Id*. at 75 ("[T]he right of the Indians to erect temporary buildings on any particular spot of ground, according to the terms of the treaty, as I construe it, ceased when the title to that land was transferred from the government, and became vested as private property.").

222. *Id*. The language of article III of the Treaty with the Yakamas reads, "[T]he right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Treaty between the United States & the Yakama Nation of Indians, 12 Stat. 951, 953 (1855). Hunting, gathering, and pasturage rights, since they were limited to "open and unclaimed land," could be reasonably construed not to apply to private lands. *See, e.g.*, State v. Buchanan, 978 P.2d 1070, 1081–82 (Wash. 1999) (citing federal and state cases supporting the proposition that publicly owned lands are open and unclaimed). *See also* ROYSTER & BLUMM, *supra* note 148, at 507–08 (discussing the case law). However, the right of erecting temporary buildings was not limited to "open and unclaimed lands," instead, extending to all "usual and accustomed places." In short, its scope is coextensive with the "right of taking fish," making Judge Hanford's attempt to distinguish the scope of the access right from the right to erect temporary buildings completely atextual.

223. *Winans*, 73 F. at 75 (internal punctuation omitted).

224. *Id*. ("[T]he bill states facts sufficient to require the court to enjoin the defendants from interfering with the Indians in the enjoyment of their common right of fishery.…").

225. *See* Treaty between the United States & the Yakama Nation of Indians, *supra* note 222.

226. Transcript of Record, *supra* note 133, at 65–66 (Order of July 11, 1896).

given his March opinion distinguishing the Indians' access rights from their "campground" rights, Judge Hanford expanded the injunction to prohibit the Winans from "interfering with the temporary houses…on the lands adjacent" to the fishing places.[227] He made no attempt to explain how this result was consistent with his earlier March opinion.

To further complicate matters, in September 1896, just two months later, when Brinker, the U.S. Attorney, sought to enforce the modified injunction, Judge Hanford was not sympathetic. He refused to hold the Winans brothers in contempt for fencing their property to block trails that the Indians customarily used to reach the river. Instead, he ruled that, since the fence did not obstruct any road connecting the highway to the river, it did not offend the injunction.[228] Apparently, so long as one means of access to the river was available, there was no treaty violation.

Then, in November 1896, in response to another Brinker motion, Judge Hanford referred the case to a special master, S.C. Henton, to take testimony from both Indians and whites on the nature of the obstructions inhibiting Indian fishing.[229] At a May 1897 hearing, numerous witnesses testified before Henton. Displaced Indian fishermen detailed their personal histories at the fishery, each with a distinct perspective on the changes that had occurred over the previous quarter-century. Like the paths that wound down to the fishery, the life story of each testifying Indian was interrupted by barbed wire, threats of bodily harm, fear of being taken to jail, and the specter of an end to lifelong rituals and livelihoods. Former courtroom adversaries Thomas Simpson[230] and William Speedies[231] also testified for the government, as did several whites, including a steamboat captain,[232] a settler who had resided adjacent to the Tumwater fishery since 1850,[233] and a Methodist minister who had lived among the Indians since 1860.[234] These witnesses explained a way of life whose existence was threatened by white encroachment. The Indian witnesses gave their understanding of the

227. *Id*. at 66.

228. *Id*. at 68–70 (Order of Sept. 10, 1896). This reasoning echoed the trial court decision in *Taylor*, which narrowly construed the scope of the Indians' access rights. *See supra* note 167 and accompanying text. But that decision was reversed by the Washington Territorial Court, which prohibited the blocking of "any servitude or easement impressed" on the lands, apparently embracing all traditional means of access. United States v. Taylor, 13 P. 333, 335 (Wash. Terr. 1887). For more information on the Territorial Supreme Court decision, see *supra* notes 177–178, 186–191 and accompanying text.

229. Transcript of Record, *supra* note 133, at 71 (Order of Nov. 12, 1896).

230. *Id*. at 86–96 (testimony of Thomas Simpson).

231. *Id*. at 176–81 (testimony of William Speedies).

232. *Id*. at 214–28 (testimony of Captain M. Martineau).

233. *Id*. at 228–40 (testimony of J.H. Covington).

234. *Id*. at 203–14 (testimony of J.H. Wood).

nature of their fishing right, and how they thought their fishing was protected by the treaty. Some Indians remembered firsthand the signing of the treaty, which they thought promised that "as long as this world stays here [the Indians] will have all the salmon [they] want in [the Columbia] all the time."[235]

C. Inertia Sets In, Agents Disengage: 1897 to 1903

For the next six years, from 1897 to 1903, the conflict festered. In October 1897, Henton submitted the testimony to Judge Hanford, but the judge took no action until 1902. L.T. Erwin, the Yakama agent in 1897, complained in his annual report that the "delay is working a very great hardship" on the Indians, and that in the meantime "white men are fencing up all the fisheries…thus depriving [the Indians of their]… considerations of the treaty."[236] That year agent Erwin was replaced by Jay Lynch, who thereafter failed to so much as mention Indian fishing in his annual reports until after the Supreme Court's *Winans* decision.[237]

Finally, after considering the testimony and holding another hearing in May 1902, the court decided to dismiss the case and dissolve the injunction on February 23, 1903,[238] nearly eight years after the government initiated the suit. In this decision, Judge Hanford finally abandoned, without explanation, the distinction he tried to draw earlier between access rights and rights to build shelters.[239] He simply referred back to his 1896 ruling, declining to rehash what "ha[d] been heretofore said" nearly seven years earlier, and merely restated that the treaty only put the Indians "on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights."[240] Holders of

235. *Id.* at 98 (testimony of White Swan). *See also id.* at 112–17 (testimony of Moses Strong); *id.* at 86–96 (testimony of Thomas Simpson).

236. *Report of Yakima Agency*, *in* REPORTS OF AGENTS IN WASHINGTON 297, 298 (Aug. 31, 1897), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=1160.

237. *See Report of Superintendent in Charge of Yakima Agency*, *in* REPORTS CONCERNING INDIANS IN WASHINGTON 386, 387 (Aug. 22, 1906), *available at* http://content.lib.washington.edu/cgi-bin/docviewer.exe?CISOROOT=/lctext&CISOPTR=1413. Lynch's reports are all viewable from the University of Washington Library's Digital Collection, *at* http://content.lib.washington.edu/index.html.

238. Transcript of Record, *supra* note 133, at 73–74 (Mem. Decision on the Merits, Feb. 23, 1903). The case was formally dismissed on May 28, 1903. *Id.* at 75–76.

239. *See supra* notes 220–228 and accompanying text.

240. Transcript of Record, *supra* note 133, at 73–74 (Mem. Decision on the Merits, Feb. 23, 1903). Between his 1896 decision and his 1903 dismissal, Judge Hanford had rejected a claim quite similar to that involved in the *Winans* case concerning Lummi Tribe fishing on Fraser River sockeye runs adjacent to Point Roberts near the border between the United States and British Columbia. The federal government alleged that tribal fishermen were excluded from their traditional fishing sites by a series of fish traps operated by the Alaska

homestead patents like the Winans brothers could therefore exclude tribal fishermen from the fishing sites because they could exclude whites as well. On November 16, 1903, the government appealed Judge Hanford's decision to the Supreme Court.[241]

C. The Supreme Court Decision

The *Winans* case arrived at the Supreme Court on direct appeal on January 30, 1904. Arguing the case for the government was Solicitor General Henry M. Hoyt.[242] Charles Carey argued for the Winans brothers, with Franklin Mays on the brief.

1. The Government's Argument

Solicitor Hoyt began his argument by observing that the Celilo Falls fishery "is and always has been a famous one…[probably] the best place on the Columbia River."[243] The government acknowledged that the tribes "objected to the transfer of their lands until assured by the Government as to the[ir] fishery rights."[244] According to Hoyt, the tribes did not claim exclusive fishery rights, only "rights in common with

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Packers Association for their nearby cannery. But Judge Hanford concluded that there was no violation of the Treaty of Point Elliot's promised "right of taking fish" because the treaty "secure[d] to the Indians equality of rights, co-equal with the rights of citizens, and not exclusive rights at any particular places." United States v. Alaska Packers' Ass'n, 79 F. 152, 155 (N.D. Wash. 1897). Judge Hanford specifically rejected the idea that the treaty recognized any proprietary rights, like easements, and erroneously concluded that the federal government had possessed fee title to lands in Indian possession prior to the treaty. *Id*. at 156; *contra infra* note 256. Judge Hanford cited both this decision and his 1892 decision in *The James G. Swan*, *supra* note 219, in dismissing the *Winans* case. Transcript of Record, *supra* note 133, at 73–74 (Mem. Decision on the Merits, Feb. 23, 1903).

241. Transcript of Record, *supra* note 133, at 411 (Assignment of Errors, Nov. 16, 1903). The Evarts Act of 1891 authorized direct appeals to the Supreme Court from district courts in cases involving the validity or construction of treaties. Evarts Act, ch. 517, § 5, 26 Stat. 826, 827–28 (1891).

242. Hoyt, who was not related to the judge who wrote the *Taylor* opinion, *supra* notes 178–191 and accompanying text, was the son of a Pennsylvania governor and a Theodore Roosevelt appointee. He served as Solicitor General from 1903 to 1909. After a successful decade in finance, he found a use for his Yale law degree by turning to politics. Shortly after arguing *Winans*, Hoyt was instrumental in restoring many Indians onto the recently gutted Dawes Roll, thus protecting their property rights. *See* Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249 (1908) (requiring the Secretary of the Interior to restore named Indian allottees to approved rolls of citizenship in the Choctaw and Chickasaw Nations). Hoyt's motion in the *Garfield* case is reproduced at http://www.genealogy4all.org/4Mar 1907.html.

243. United States v. Winans, 198 U.S. 371, 371 (1905) (internal punctuation omitted).

244. *Id*. at 372.

citizens."[245] Moreover, he maintained that "[t]he Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument."[246] Hoyt asserted that "the spirit" of Indian treaties, plus the fact that the Winans brothers were clearly on notice (via actual knowledge) of the tribal claims, made their land patents conditional, not absolute, because "Congress…never divested the Indians of the [fishery] right," even though it had not made any land patents expressly conditional, since a grant of a patent "without proper reservations" could not "divest valid vested rights."[247]

The government also noted that fishwheels, such as those operated by the Winans brothers, were "very destructive," harvesting "salmon by the ton…not only rapidly diminishing the supply but…soon totally destroy[ing] it."[248] This de facto claim of an exclusive right was inconsistent with both English and American law, which disfavored exclusive rights to fisheries.[249] Further, Solicitor Hoyt contended that the *Taylor* decision by the Washington Territorial Court had already resolved the question of tribal rights. According to Hoyt, the Indian servitude to cross riparian lands to access their historic fisheries was not "a broad and vague" one but "a clear and limited one," and the government recognized this right "long before the private grants by patent were made."[250] The government had the authority to recognize such pre-statehood rights "when the Federal power was in full control, during the territorial status."[251] The tribal right was therefore "not merely meritorious and equitable; it [was] an immemorial right like a ripened prescription."[252] Thus, Hoyt maintained that the subsequent homestead

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245. *Id*. But, according to the government, the tribes "cannot cross the lands [owned by the Winans] to reach the fishery and are without any right whatever except what the defendants allow as a matter of grace." *Id*.

246. *Id*. (emphasizing that the treaty was "not merely one of peace and amity…but a treaty of cession of lands…on considerations duly expressed, one of which was the fishery rights now contended for").

247. *Id*. at 372–73.

248. *Id*. at 372.

249. *Id*. at 373 (citing British and American cases as well as secondary sources supporting this proposition).

250. *Id*.

251. *Id*. at 374 (citing, inter alia, Shively v. Bowlby, 152 U.S. 1 (1894) (holding that the federal government can create private rights in submerged lands prior to statehood, despite the "equal footing" doctrine under which the states succeed to the title of submerged lands after statehood)). The Supreme Court would later extend this reasoning to uphold federally created property rights after statehood. *See* Arizona v. California, 373 U.S. 546, 597–98 (1963) (recognizing federal reserved water rights created by executive order subsequent to statehood).

252. *Winans*, 198 U.S. at 374 (citing Barker v. Harvey, 181 U.S. 481 (1901) (distinguishing)).

patents the government issued did not "invariably and inevitably convey an absolute title beyond all inquiry and free of every condition."[253]

The government closed its argument by suggesting that a decision upholding the tribal right would respect "the reasonable rights of both parties; restricting the fish wheels, if they can be maintained at all, as to their number, method and daily hours of operation."[254] Yet judicial recognition would not create an "exclusive right" in the Indians, as it would "be just to restrict them in reasonable ways as to times and modes of access to the property and their hours for fishing. But by some proper route, following the old trails, and at proper hours, with due protection for [the Winans brothers'] buildings, stock and crops, free ingress to and egress from the fishing grounds should be open to the Indians, and be kept open."[255]

2. *The Winans Brothers' Argument*

The Winans brothers' attorney, Charles H. Carey, responded by mischaracterizing the federal interest in the pre-treaty, pre-statehood Oregon territory as "invested with the fee of all the lands and waters included therein."[256] Carey erroneously contended that Indian title was "merely a right to perpetual occupancy of the land," although he accurately acknowledged that it was the tribes' decision to surrender their rights, however characterized.[257] But he also mistakenly claimed that tribal "title to the reservations was of no higher character" than Indian title.[258]

According to Carey, the tribe "neither reserved nor did they acquire a title by occupancy to the lands bordering their usual and customary fishing grounds." They had instead only a temporary right "to fish, hunt, and build temporary houses upon public lands, in common with white citizens…."[259] Carey maintained that the Yakama's treaty "imposed no restraint upon the power of the United States to sell the lands in controversy,…and it cannot be assumed that the

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253. *Id*. *See also*, *e.g*., Eldridge v. Tresevant, 160 U.S. 452 (1896).

254. *Id*. at 375.

255. *Id*.

256. *Id*. *See also* Blumm, *supra* note 55, at 728–30, 740–41 (arguing that the discovery doctrine has been mischaracterized as leaving the natives with merely occupancy title, when in fact they possessed the fee, and the government had only an exclusive right of purchase, or a right of preemption). A more accurate description of the state of title in the pre-treaty Oregon Territory would characterize the federal property interest as a right of preemption, with the Indians holding the fee simple. *Id*.

257. *Winans*, 198 U.S. at 375.

258. *Id*. *But cf.* United States v. Sioux Nation, 448 U.S. 371 (1980) (holding that reservation title is protected by the Fifth Amendment's compensation clause).

259. *Winans*, 198 U.S. at 375–76.

Government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia."[260] The gravamen of Carey's case was that, because the Winans brothers could exclude whites from their patented lands, "Indian rights[,] being of no higher nature[,] were likewise revoked and extinguished."[261]

Carey claimed that Washington statehood, through the equal footing doctrine,[262] gave title to "the shore and lands under water,"[263] which was another exaggeration, since the scope of lands implicitly conveyed by the federal government at statehood is limited to lands submerged beneath navigable waters and does not include shorelands.[264] Carey also argued that the express intention of the U.S. and the Yakama Nation representatives at the treaty council was "incompetent and inadmissible" if it would "tend to vary the plain stipulations of the treaty."[265] According to Carey, the treaty language "in common" signified that

> both whites and Indians could use such implements and methods of fishing and hunting in the exercise of their common rights as they saw fit, and the use of fish wheels by the whites in the customary runways of the fish which did not exclude the Indians from fishing elsewhere, would not deprive the Indians of their common right.[266]

This interpretation of the treaty language would be decisively rejected by the Supreme Court.

3. The Court's Opinion

The Court decided 8-1 in favor of the government, with Justice White dissenting without expressing an opinion. The Court's opinion was written by Justice Joseph McKenna, who accurately focused on the pertinent treaty language, stating "the right of taking fish in common

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260. *Id*. at 376.

261. *Id*. This was the argument that carried the day in the lower court. *See also supra* notes 218–222 and accompanying text.

262. *See generally* 4 WATERS AND WATER RIGHTS, *supra* note 3, § 30.01(a), (b)(2).

263. *Winans*, 198 U.S. at 376 ("The title to the shore and land under water is incidental to the sovereignty of a State…and held in trust for the public purposes of navigation and fishery….Control and regulation shall be exercised subject only to the paramount authority of Congress with regard to public navigation and commerce.").

264. Arizona v. California, 373 U.S. 546, 596–97 (1963).

265. Defendant/Respondent's Brief at 36, *Winans*, 198 U.S. 371.

266. *Id*.

with the citizens of the Territory."[267] The district court had interpreted this provision to place the Indians outside their reservation only on an "equal footing" with white citizens without proprietary rights.[268] But Justice McKenna observed that this interpretation left the tribal fishers with essentially no treaty rights outside their reservation.[269] He found this to be inadequate in memorable words: "This is certainly an impotent outcome to negotiations and a convention, which seem to promise more and give the word of the Nation for more."[270]

Justice McKenna also faulted the lower court for failing to interpret the treaty in light of Indian intentions and Indian understandings, and for failing to recognize the fundamentally inequitable nature of the bargaining that produced the treaty language:

> [W]e have said that we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules."[271]

The Court explained the circumstances under which the treaties were negotiated in almost poetic terms: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere that they breathed."[272] Recognition that

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267. *Id*. at 379 ("The pivot of the controversy is the construction of [the treaty language quoted above]."). Justice McKenna was a William McKinley appointee, taking his seat on the Court in 1898 and serving until 1925. *See* THE OXFORD COMPANION TO THE SUPREME COURT 539 (Kermit L. Hall ed., 1992). He was, according to one account, the "living embodiment of the Horatio Alger myth, rising from poverty to a seat on the U.S. Supreme Court." *Id*. at 539. A four-term Republican congressman from California, he was appointed to the Ninth Circuit in 1892 by Benjamin Harrison on the recommendation of California Senator Leland Stanford. Five years later, President McKinley nominated him to fill the seat vacated by another Californian, Stephen J. Field. Justice McKenna's opinions "were marked by grace and aptness of phrase." *Id*. at 539. Although he did not write many majority opinions, "his opinions reveal a strong nationalism, practicality, and sound social judgment with relation to developing federal power and its impact on the states." *Id*. at 540.

268. *See supra* notes 218–219 and accompanying text.

269. *See Winans*, 198 U.S. at 380 ("[I]t was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty.").

270. *Id*.

271. *Id*. at 380–81 (citing Choctaw Nation v. United States, 119 U.S. 1, 30 (1886); Jones v. Meehan, 175 U.S. 1, 44 (1899)).

272. *Id*. at 381.

the tribes gave up so much land in the treaties weighed heavily in the Court's interpretation. In light of how much they lost, Justice McKenna concluded that what the tribes expressly retained in the treaty were permanent rights, which could perhaps be limited as a result of changed conditions but not lost.[273]

The nature of the tribal treaty rights was greatly influenced by the Court's critically important recognition that "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[274] This observation established the reserved rights doctrine in Supreme Court jurisprudence.[275] The Court explained that due to the nature of the treaty negotiations—with tribes, not with individuals, and involving large tracts of land—the result could not be recorded in individual deeds.[276] Yet the expressly reserved "right of taking fish" created an enforceable "right in the land" that burdened subsequent land grants.[277] In short, the treaty created "a servitude upon every piece of land as though described therein."[278] This servitude "was intended to be continuing against the United States and its grantees as well as against the State and its grantees."[279]

Carey, counsel for the Winans brothers, emphasized that the treaty-created servitude was a non-exclusive, "in common" right. He claimed that as part of the state's authority to regulate fishing, it could license fishwheels because "wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail."[280] Justice McKenna acknowledged that "[i]n the actual taking of fish white men may not be confined to a spear or crude net," but he nevertheless ruled that "it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does."[281] The Winans brothers' attempt at monopoly, with an assist from

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273. *Id*. ("New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away.").

274. *Id*.

275. *See, e.g.*, 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.01(b)(1).

276. *Winans*, 198 U.S. at 381 ("The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein.").

277. *Id*. ("The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.").

278. *Id*.

279. *Id*. at 381–82.

280. *Id*. at 382.

281. *Id*.

the state's license, coupled with the claim that the Indian harvest was an inferior technology, did not move the Court, which observed that "[i]f the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess."[282] The Court's determination to interpret the treaty in favor of the weaker party made the Winans brothers' claimed monopoly especially unlikely.

Nor was the Court concerned that the Winans brothers' patent contained no mention of the tribal servitude. The Court concluded that the federal land department lacked the authority to grant exemptions to the treaty promises. It "ma[de] no difference, therefore, that the patents issued by the Department are absolute in form[, since t]hey are subject to the treaty as to the other laws of the land."[283]

Finally, Carey argued for the Winans brothers that the admission of Washington into the Union in 1889, "upon an equal footing with the original States," eliminated the ability of the federal government "to grant nor retain rights in the shore or to the lands under water," since that authority was implicitly conveyed to the state in the statehood act.[284] The Court quickly disposed of this argument, relying on *Shively v. Bowlby*, an 1894 decision in which the Court indicated that the federal government had the authority to grant territorial submerged lands prior to statehood for proper public purposes.[285] Justice McKenna made clear that extinguishing Indian title, thereby opening land for settlement and paving the way for statehood, was a proper purpose.[286] However, he went on to suggest that the state could regulate the exercise of the right: "Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."[287] This authorization of state regulation, subject only to a

282. *Id.* The Court stated that the state's license for the fish wheel lacked authority to, and was not intended to "exclude the Indians.…What rights the Indians had were not determined or limited." *Id.* at 384. Instead, any limitations would come from the courts, not the state. *See infra* note 289 and accompanying text.

283. *Id.* at 382.

284. *Id.* at 382–83. *See generally* 4 WATERS AND WATER RIGHTS, *supra* note 3, § 30.01(b)(2) (discussing the "equal footing" doctrine, under which states implicitly obtain title to lands submerged beneath navigable waters within their jurisdiction as a consequence of statehood).

285. Shively v. Bowlby, 152 U.S. 1, 48 (1894) (ruling that the federal government may grant submerged lands under navigable waters prior to statehood in order to fulfill international obligations, to improve commerce, or for other public purposes).

286. *Winans*, 198 U.S. at 384 ("And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'").

287. *Id.*

vague reasonableness standard, would produce a glut of ensuing litigation.[288]

Despite this apparently broad authorization of state regulation, the Court was unwilling to let the state determine the nature of the tribal rights, stating that this chore "was a matter for judicial determination."[289] There would be numerous opportunities over the next century for the courts to fulfill the role envisioned by the *Winans* Court to articulate the nature of tribal fishing rights.

VII. THE CONTINUING SIGNIFICANCE OF THE *WINANS* DECISION

Because of its poetic language,[290] *Winans* would be worthy of citation a century later. But the case also laid down principles that have endured thorough the twentieth century and will do so in the twenty-first. Some are less well appreciated than others, and some courts have apparently forgotten or do not understand them.[291] This section explains its principal contributions to Indian law jurisprudence a century after the fact.

A. Construing Treaty Language as Tribes Would Understand

The *Winans* decision was not the first case to hold that courts must interpret Indian treaties as the tribes would understand. Chief Justice Marshall had employed Indian understanding to interpret terms in the Treaty of Hopewell with the Cherokee in his 1832 decision in *Worcester v. Georgia*. That decision held that the laws of Georgia had no force in Cherokee country and "[p]rotection does not imply the destruction of the protected."[292] And just a half-dozen years prior to *Winans*, the Court looked to Indian understanding in determining that tribal laws of inheritance governed under a treaty with the Chippewa.[293] The *Winans* decision cemented this rule of interpretation, and its use was central to the outcome of the case.

Tribal fishers had thought that "the right of taking fish" language in the treaty ensured their right to pursue their historic fishing practices, although the treaty made no mention of how private property

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288. *See* cases cited *infra* notes 334–344 and accompanying text.
289. *Winans*, 198 U.S. at 384.
290. *See supra* notes 270–272 and accompanying text.
291. *See infra* notes 327–328 and accompanying text.
292. Worcester v. Georgia, 31 U.S. 515, 518 (1832). Marshall interpreted the treaties based on the Indians' understanding throughout his opinion. *See, e.g.*, *id.* at 552–55, 582.
293. Jones v. Meehan, 175 U.S. 1, 11 (1899).

or state regulation might affect those practices. The *Winans* Court would not let such developments frustrate the tribal understanding, noting that the tribes were "unlettered" and unlikely to comprehend "technical rules."[294] Moreover, the federal government owed the tribes "care and protection." Therefore, the Court's role was to "counterpoise the inequality" in the treaty negotiations by emphasizing the context and the substance of tribal rights while overlooking technical details.[295]

The *Winans* Court's endorsement of the rule of interpreting treaties according to tribal understanding was at least partially a reflection of the Court's recognition of the fundamental inequality of bargaining evident in the treaty negotiations.[296] In the years since the *Winans* decision, the rule of interpreting treaties according to tribal understanding has been pivotal in several landmark cases[297] and was recently endorsed by all members of the Rehnquist Court.[298]

B. Creating the Reserved Rights Doctrine

Aided by the rule of construing treaty language in light of tribal understanding, the *Winans* Court created the reserved rights doctrine. The Court announced that "the treaty was not a grant of rights to the Indians, but a grant of right[s] from them,—a reservation of those not granted."[299] This method of treaty interpretation, combined with the rule of construing the treaty language as the Indians would have understood, has profound consequences, since it means that treaties preserved all proprietary rights and sovereign control not conveyed away.[300]

Best known in the context of water rights,[301] the reserved rights doctrine recognizes that treaties often reserved natural resources necessary to carry out the purpose of their reservations. Reserved rights include not only water, but also usufructuary rights like hunting, fishing,

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294. *See Winans*, 198 U.S. at 380–81 (citations omitted).

295. *Id*. at 380–81 (citations omitted).

296. *See* COHEN, *supra* note 4, § 2.02[2] (also noting the relevance of the structural sovereignty of the tribes).

297. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (finding that the tribe's reservation included timber and minerals within the reservation as "constituent elements" of the land). Choctaw Nation v. Oklahoma, 397 U.S. 620, 631–32 (1970) (finding that the tribe's reservation included the bed of a navigable river).

298. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200, 218 (1999) (rule embraced by both the majority and the dissent).

299. *Winans*, 198 U.S. at 381.

300. In 1978, the Court added that retention of some sovereign authority of tribes, like criminal jurisdiction over non-Indians, would be "inconsistent with their [dependent] status." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (citation omitted).

301. *See* 4 WATERS AND WATER RIGHTS, *supra* note 3, ch. 37.

and gathering.[302] Reserved rights are essentially treaty-recognized aboriginal rights.[303] As recognized aboriginal rights, they are "prior and paramount,"[304] defeating competing resource claims.

The reserved fishing rights in question in *Winans* were expressly mentioned in the Yakama Tribe's treaty. The Winans brothers had actual notice of their continued use in the years following the treaty, as evidenced by the numerous conflicts over the years at the Tumwater fishery near Celilo Falls.[305] But most reserved water rights are implied from the purposes of treaties and, therefore, competing water users had more questionable notice of the nature of these tribal claims.[306] Whether express or implied, all the reserved rights cases trace their roots to the *Winans* decision.[307]

The *Winans* strand of reserved rights preserves uses that pre-dated the treaties that protect them. For example, the "right of taking fish at all usual and accustomed places" at issue in *Winans* aimed to preserve traditional tribal fishing at historic fishing locations like Celilo Falls. Thus, water rights associated with *Winans* reserved rights carry a "time immemorial" priority date,[308] and they are commonly non-consumptive.[309] Other reserved rights, designed to protect new uses (like

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302. *See, e.g.*, *Mille Lacs*, 526 U.S. 172 (1999) (discussing hunting, fishing, and gathering rights).

303. *See* 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.02(a)(2).

304. William H. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MIN. L. INST. 631 (1971).

305. *See supra* notes 129–138, 140, 160–167, 201–202, 206–210 and accompanying text.

306. The seminal case is *Winters v. United States*, 207 U.S. 564 (1908). *See* 4 WATERS AND WATER RIGHTS, *supra* note 3, §§ 37.01(b)(2), 37.02(a)(1).

307. See 4 WATERS AND WATER RIGHTS, *supra* note 3, §§ 37.01(b)(1), 37.02(a)(2).

308. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983); Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. United States, 832 F.2d 1127, 1131–32 (9th Cir. 1987).

309. *See* State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 764 (Mont. 1985). As explained by the Ninth Circuit, a *Winans* water right for hunting and fishing "consists of the right to prevent other appropriators from depleting the streams [sic] waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411. But *Winans* water rights are not invariably non-consumptive. The test is whether they preserve pre-existing rights, rather than create new rights (as *Winters* rights do). *See, e.g.*, 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.02(a)(2). In *United States v. Abousleman*, Civ. No. 83-1041 MV-ACE, at 26 (D. N.M. 2005), the judge in the Jemez River water rights adjudication employed *Winans* to uphold governmentally recognized aboriginal diversionary water rights that were designed to preserve treaty-time uses, referring to these consumptive water rights as "*Winans* rights."

irrigated agriculture), have reservation priority dates and are usually diversionary in nature.[310]

The scope of the rights reserved has been an enduring source of controversy since the *Winans* decision. In 1978, in a non-Indian case, the Supreme Court ruled that the scope of reserved water rights was measured by what was necessary to fulfill the "primary purpose" of the reservation.[311] This result was not necessarily inconsistent with the *Winans* decision, since Justice McKenna held that the purpose of the Yakama Treaty was to extinguish Indian title, establish Indian reservations, and "define rights outside of them."[312] Although the Supreme Court has never applied the "primary purpose" test to Indian reserved rights, lower courts have. Astonishingly, one court recently employed that test to deny that a tribe with a treaty promising "the right of taking fish" had proved that its reservation had a fishing purpose.[313] A decision much more faithful to the concern of the Court in *Winans* for construing the scope of the rights reserved in light of Indian understanding was a district court decision holding that the amount of water reserved for the Klamath reservation's fishing purpose was that sufficient to produce "productive habitat."[314] But that decision was vacated on appeal as not being ripe.[315]

Also faithful to the concern of the Court in *Winans* for supplying a judicial "counterpoise" to the inequities in treaty bargaining is the rule, employed by many lower courts, that the measure of the rights reserved is that necessary to fulfill tribal needs.[316] A needs-based standard was

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310. *See, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 46–47 (9th Cir. 1981). These are so-called *Winters* rights. *See* 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.02(b).

311. United States v. New Mexico, 438 U.S. 696, 707 (1978) (interpreting the National Forest Organic Act).

312. United States v. Winans, 198 U.S. 371, 379 (1905) ("The object of the treaty was to limit [Indian] occupancy to certain lands, and to define rights outside of them.").

313. Skokomish Indian Tribe v. United States, 401 F.3d 979, 989 (9th Cir. 2005) (7-4 decision) (en banc), *amended by* 410 F.3d 506 (9th Cir. 2005). This decision was subjected to withering criticism in William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam Decision*, 35 ENVTL. L. 397 (2005). The amended decision deleted its most erroneous reserved rights interpretations.

314. *Adair*, 723 F.2d at 1276–78

315. United States v. Braren, 338 F.3d 971 (9th Cir. 2003). The controversy was not ripe because the state's quantification standard, to which the federal government and the tribe objected, was only a preliminary decision, appealable administratively and in the state courts. *Id*. at 976.

316. *See, e.g.*, Washington v. Wash. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979) ("The central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.").

rejected four decades ago by the Supreme Court in the context of reserved water rights supporting new uses,[317] although that decision has undergone some erosion,[318] and it has not been widely applied to reserved rights for pre-existing uses like fishing rights.[319] There remains considerable uncertainty in how to measure the scope of tribal reserved rights to natural resources, but the concept of reserved rights has been firmly fixed in Indian law since the *Winans* decision.

C. Treaty Rights as Property Rights

An overlooked legacy of the *Winans* decision was the Court's express recognition that treaty rights were property rights. Justice McKenna referred to the treaty as creating "a right in the land," impressing "a servitude upon every piece of land as though described therein," and fixing "easements" as necessary to enable the fishing right to be effectively exercised.[320] This servitude has been described as a piscary profit a prendre, a property right well known at common law.[321] Moreover, the *Winans* Court made clear that these rights burdened non-parties to the treaty, as one would expect from a property right. This burden on federal grantees, the states, and state grantees[322] has been ignored by some courts.[323]

The Supreme Court recognized that hunting and fishing rights were compensable property rights nearly 40 years ago.[324] Almost 30 years ago, the Ninth Circuit expressly ruled that non-Indian fishers were

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317. Arizona v. California, 373 U.S. 546, 600–01 (1963) (adopting a fixed measure of the scope of the reserved right for irrigation—"practicably irrigable acreage"—because "[h]ow many Indians there will be and what their future needs will be can only be guessed").

318. *See In re* Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 35 P.3d 68, 78–81 (Ariz. 2001) (adopting a multi-factor balancing test that included historic uses, current needs, and future plans).

319. *See* cases cited in 4 WATERS AND WATER RIGHTS, *supra* note 3, § 37.02(c)(3), n.251–57, 263–69.

320. United States v. Winans, 198 U.S. 371, 381, 384 (1905) (explaining the tribal rights in property terms, apparently as an answer to the Winans brothers' claims that the treaty gave the tribes only a license, revocable at federal will); *id.* at 375–76 (relying on Ward v. Race Horse, 163 U.S. 504 (1896) (ruling that treaty hunting and fishing rights on unoccupied lands were abrogated when Wyoming entered the Union without a disclaimer of jurisdiction over Indian country in its statehood act), although the *Winans* decision made no express attempt to distinguish *Ward v. Race Horse*)).

321. *See generally* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407 (1998).

322. *Winans*, 198 U.S. 381–82 ("And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.").

323. *See infra* notes 327–328 and accompanying text.

324. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

bound by treaty rights.[325] More recently, the same appellate court ruled that private landowners could not exclude tribal shellfish harvesters from their lands.[326] All of these results confirm the *Winans* decision's insight that treaty rights are property rights.

Nevertheless, at least one court seemed unaware of the property nature of treaty fishing rights, suggesting that the Nez Perce Tribe's fishing right was a mere treaty right, not a property right, and therefore the tribe could not obtain damages from a private party.[327] This failure to comprehend the property nature of the treaty fishing rights also seems to have influenced the Ninth Circuit's recent holding that the Skokomish Tribe could not collect damages against a utility whose dam operations damaged the tribe's fish runs.[328] Both of these decisions reflected an inadequate understanding of what the Supreme Court decided a century ago in *Winans*.

D. Defeating the State's "Equal Footing" Argument

The Court's ruling in *Winans* that treaty rights were property rights should have mooted the state's argument about its acquiring property rights in the tribe's "usual and accustomed" fishing places. But Carey, counsel for the Winans brothers, maintained that when the state of Washington was admitted to the Union in 1889 "'upon an equal footing with the original States', she became possessed, as an inseparable incident of her dominion and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original States."[329] This "equal footing" claim, which was partly an argument that the state owned these lands, and partly a contention that it possessed exclusive regulatory control over them, "subject only to the paramount authority of Congress with regard to public navigation and commerce,"[330] was flatly rejected by the Court. Justice McKenna found it inconsistent with *Shively v. Bowlby*, an 1894 decision that ruled that the federal government could

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325. Puget Sound Gillnetters Ass'n v. United States Dist. Ct., 573 F.2d 1123, 1132–33 (9th Cir. 1978), *aff'd* 443 U.S. 658 (1979).

326. United States v. Washington, 135 F.3d 618 (9th Cir. 1998).

327. Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 811–12 (D. Idaho 1994) (attempting to distinguish the Supreme Court's *Menominee Tribe* decision). The *Nez Perce Tribe* decision was criticized in Blumm & Swift, *supra* note 321, at 481–89.

328. Skokomish Indian Tribe v. United States, 401 F.3d 979, 980 (9th Cir. 2005), *amended* 410 F.3d 506 (9th Cir. 2005). *See* Rodgers, *supra* note 313.

329. *Winans*, 198 U.S. at 376. Although Carey did not cite it, the case establishing the proposition that new states obtained title to lands submerged beneath navigable waters (not shorelands) was *Pollard v. Hagen*, 44 U.S. 212 (1845).

330. *Id*. at 376.

create property interests in lands submerged below navigable waters prior to statehood.[331]

Shively held that the federal authority to grant interests in territorial submerged lands extended to fulfilling international obligations, improving the lands for commerce, and carrying out "other public purposes."[332] The Court in *Winans* thought the peaceful extinguishment of Indian title and opening land for settlement was a sufficient public purpose, and "surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'"[333] Thus, the Court dismissed the state's "equal footing" argument.

States have pursued equal footing arguments often since the *Winans* decision, and occasionally they have prevailed.[334] Absent a clear expression of federal intent—as in the Yakama Treaty at issue in *Winans*—title to lands submerged beneath navigable waters passes to the state upon admission to the Union, even submerged lands in Indian country.[335] The Court has recently found sufficient federal intent to reserve the bed of Lake Coeur d'Alene for the tribe, defeating the state of Idaho's equal footing claim.[336] Equal footing claims are confined to lands submerged beneath navigable waters; the Supreme Court has rejected

331. *Id*. at 383 (citing Shively v. Bowlby, 152 U.S. 1 (1894)).

332. *Id*. at 383–84 (quoting *Shively*, 152 U.S. at 48).

333. *Id*. at 384.

334. Perhaps the most notable recent state victory concerned the Big Horn National Forest in Wyoming, where the Tenth Circuit ruled that the Crow Tribe retained no off-reservation hunting and fishing rights from its treaty recognizing the tribe's "right to hunt on occupied lands of the United States so long as game may be found thereon." Crow Tribe of Indians v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995). The court in *Repsis*, refused to follow a contrary interpretation given the same treaty by the Idaho Supreme Court in *State v. Tinno*, 497 P.2d 1386 (Idaho 1972), maintaining that the case was governed by *Ward v. Race Horse*, 163 U.S. 504 (1896) (a treaty hunting right was only temporary in nature, defeasible either by statehood or by lands that ceased to be part of hunting districts), viewing that case as "compelling, well-reasoned, and persuasive." *Id*. at 994. However, the Supreme Court subsequently limited *Ward v. Race Horse* to situations in which Congress did not intend treaty rights to survive statehood. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 208 (1999) (noting that *Race Horse* rested on the "false premise" that treaty usufructuary rights are irreconcilable with state regulation).

335. Montana v. United States, 450 U.S. 544, 555–56 (1981) (treaties with the Crow Tribe did not contain language strong enough to overcome the presumption against pre-statehood disposition of submerged lands); *cf*. Choctaw Nation v. Oklahoma, 397 U.S. 620, 634–35 (1970) (upholding a pre-statehood grant to the tribe based on historical circumstances and fee simple conveyance).

336. Idaho v. United States, 533 U.S. 262 (2001). *See also* Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918) (upholding a pre-statehood grant of islands and surrounding waters for the benefit of Indians).

state equal footing-based ownership claims to lands that are not submerged.[337]

Another potential for state control over treaty rights beyond the equal footing doctrine concerned the *Winans* Court's assurance that an "in common" treaty fishing right did not "restrain the state unreasonably, if at all, in the regulation of the right."[338] The opaque nature of this phrase led to generations of litigation, including several Supreme Court cases.[339] The Court first ruled that the phrase did not allow state licensing of the treaty fishing right,[340] but then affirmed that the state could regulate treaty fishing if the regulation did not discriminate against tribal harvests and was "reasonable and necessary" for conservation.[341] But the Court was quickly forced to strike down a facially non-discriminatory state ban on net fishing because it was in fact discriminatory, as it restricted only Indian harvests while allowing non-Indian hook-and-line fishing.[342] Then, after upholding a harvest allocation under which the state and a tribe divided up the harvest,[343] the Court ruled that the treaty language promising "the right of taking fish in common with" others implied an equal sharing of harvests between treaty and non-treaty fishers.[344] Thus, the treaty fishing right, recognized as a reserved property right to access historic fishing grounds in *Winans*, has evolved into a negative right to be free of state licensing fees and discriminatory regulation as well as an affirmative right to a half-share of the harvest by *Winans*' progeny.

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337. Arizona v. California, 373 U.S. 546, 596–98 (1963).

338. *Winans*, 198 U.S. at 384.

339. *See* ROYSTER & BLUMM, *supra* note 149, at 508–10 (summarizing the case law).

340. Tulee v. Washington, 315 U.S. 681 (1942) (no state licensing because tribal members would not have understood at treaty time that they would have to pay the state to exercise their treaty rights and because the state could not show that the licensing was indispensable for effective conservation of the fishery).

341. Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) (Puyallup I), which was criticized in Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972) (accurately predicting that "conservation" was too vague a term, and that the state would soon be "conserving" fish for non-Indian harvesters whose fees were an important source of state revenue).

342. Puyallup Tribe v. Dep't of Game, 414 U.S. 44 (1973) (Puyallup II) (treaty prohibits facially non-discriminatory measures that discriminate in fact).

343. Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977) (Puyallup III) (discounting the fact that the tribal harvests were taking place on-reservation and suggesting that the place of harvesting migratory fish like salmon was less important than the fair apportionment of the "in common" fishery).

344. Washington v. Wash. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (recognizing that the tribal share was a maximum of 50 percent of the harvest, which could be reduced if the tribe's livelihood—or "moderate living"—needs could be satisfied with less).

VIII. CONCLUSION

The centennial of *United States v. Winans* is well worth observing. The decision was in every respect a monumental one. It involved a long-standing controversy over a resource of enormous significance (salmon). It concerned a site (Celilo Falls) that was of transcendent significance.[345] It pitted an older civilization against an advancing civilization that was "crowding out" the old with new technologies like fishwheels and canneries. Finally, it produced a Supreme Court opinion that endures as a seminal interpretation of Indian proprietary rights to natural resources. Even if the *Winans* decision did not establish the reserved rights doctrine, it would be worthy of remembrance.

But, of course, *Winans* did establish the reserved rights doctrine, which remains a cornerstone of both tribal proprietary rights and sovereign authority because under it tribes retain all rights that they have not conveyed away.[346] In the words of Justice McKenna, a treaty "was not a grant of rights to the Indians, but a grant of right[s] from them,—a reservation of those not granted."[347] Combined with the principle of interpreting Indian treaties as the tribes would understand, confirmed in the *Winans* decision,[348] reserved rights provide tribes with important resources that they control in the twenty-first century.

Winans also made clear that the rights tribes reserved include property rights that burden non-parties to the treaties, including private landowners and states.[349] This aspect of the *Winans* decision seems to have not been understood by some recent courts.[350] Finally, *Winans* rejected expansive state proprietary and jurisdictional claims, which, had they been accepted, would have left tribal members at the mercy of hostile state officials.[351] But the Court's ambiguous language concerning

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345. The *Winans* decision, however, could not save Celilo Falls from drowning beneath the reservoir created by the federal dam at The Dalles in 1957. *See generally* DVD from Oregon Sea Grant, *Celilo Falls and the Remaking of the Columbia River* (Joe Cone ed., 2005).

346. An exception to the statement in the text concerns tribal authority over non-members, which the Supreme Court has interpreted to be inconsistent with the tribes' dependent status. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) (prohibiting tribal criminal jurisdiction over non-Indians); Montana v. United States, 450 U.S. 544 (1981) (limiting tribal civil regulatory authority over non-Indians to exceptional circumstances); Nevada v. Hicks, 533 U.S. 353 (2001) (restricting tribal civil jurisdiction over state officials on-reservation).

347. United States v. Winans, 198 U.S. 371, 381 (1905).

348. *See supra* notes 271, 294–296 and accompanying text.

349. *See supra* notes 277–279, 320–322 and accompanying text.

350. *See supra* notes 327–328 and accompanying text.

351. *See supra* notes 285–286, 329–333 and accompanying text.

the role of state regulation sowed the seeds of litigation throughout the remainder of the twentieth century.[352]

The *Winans* story would not have been possible without Indian agents like Robert Milroy[353] and government attorneys like William Brinker,[354] who saw the conflict at Celilo Falls as a test case, emblematic of conflicts between historic fishing and private landowners and state regulation throughout the Columbia Basin. The agents' motivations seem to have been a surprising outgrowth of allotment policies. Although allotment aimed to improve the tribes' economic condition by destroying the communal nature of reservation lands and creating private property for tribal members to become capitalists, the program failed miserably.[355] At the same time, the agents saw the preservation of historic tribal fishing practices as central to the economic survival of tribal members in the wake of what they viewed as the failure of the reservation system.[356] Thus, ironically, their view was that the preservation of communal fishing practices served the same goal as the parcelization of reservation lands—to help make tribal members part of the economic life of the early twentieth century Pacific Northwest.[357] Without that perspective, there almost certainly would have been no case for the Supreme Court to decide.

Fortunately, there was a *Winans* decision, and today we celebrate the centennial of the case for its language, its reasoning, and its result. Above all, more than the poetic language, and even the foundation of the reserved rights doctrine, the *Winans* decision reflected a judicial attitude that was intolerant of injustice. As Justice McKenna explained, the judicial role was to provide a "counterpoise" to the inequities of the treaty negotiations.[358] That attitude is notably absent from some recent decisions.[359] We think a better understanding of *Winans* and its meaning may help prevent similar judicial mistakes. We hope this centennial remembrance will produce better informed litigants and contribute to better reasoned judicial decisions in the future.

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352. *See supra* notes 287–288, 338–339 and accompanying text.
353. *See supra* notes 122–137, 145, 152–153, 164–167 and accompanying text.
354. *See supra* text accompanying and following note 211 and following note 227.
355. *See generally* Royster, *supra* note 5.
356. *See supra* notes 152–154 and accompanying text.
357. *See supra* text following note 154.
358. United States v. Winans, 198 U.S. 371, 380–81 (1905).
359. *See supra* notes 327–328 and accompanying text. *See generally* Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449 (2000).