



# THE SI'LAILO REDUX

*D. Bruce Johnsen*

Reviewing

JOSEPH C. DUPRIS, KATHLEEN S. HILL & WILLIAM H. RODGERS, JR.,  
THE SI'LAILO WAY: INDIANS, SALMON & LAW ON THE COLUMBIA RIVER  
(Carolina Academic Press 2006)

**A**S BOYS GROWING UP IN THE PACIFIC NORTHWEST my friends and I traveled its highways and byways in search of good fishing at every opportunity. Initially our search was entirely local, limited to the distance we could ride our bikes in a single day. On the first of what would be many such trips with Jon Mass and his two brothers, I remember fishing for Cutthroat trout on a dreary Seattle afternoon across the street from the Value-Mart in a nameless creek no more than six feet across. To my complete surprise, there swam four or five scarred reddened salmon about 15 pounds each, protruding teeth and ominous hooked jaws, spawning in about a foot of water. Quite a sight for a ten year-old boy just arrived from the east coast who had never seen a live fish weighing more than a pound or two. With that picture etched in my memory I began a lifelong fascination with Pacific

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salmon that would eventually spill over to include Pacific Northwest Indians, the Columbia River, and the customary law that once governed all three.

The five species of Pacific salmon – Chinook, Chum, Coho, Pink, and Sockeye – share the remarkable characteristic of being anadromous. They are born in freshwater lakes or streams but eventually make their way to sea where they spend most of their adult lives. In anywhere from one to five years, depending on the species, they return to their stream of birth as a cohort to spawn and die. The cohort, known as a “run,” is one among an unending series of cohorts that make up the “stock” of successive generations. All salmon stocks share a second remarkable characteristic of being extremely heritable. Compared with many other animal species, Pacific salmon are born in large numbers, grow quickly, suffer high mortality, live fairly short lives, reproduce only once, and are extremely fecund. Like insects, the time between generations is short enough, and the struggle to reproduce keen enough, that over the course of a man’s lifetime the characteristics of a given salmon stock can evolve dramatically in response to even minor changes in environment. As one observer reported in 1874, “[e]very river, every brook, every lake stamps a special character upon its salmon ... which is at once recognized by those who deal in or consume them.”<sup>1</sup>

As time passed and our access to transportation improved the search for good fishing took us further from home. By the time we reached driving age we regularly fished the Sammamish Slew, Skagit, Skykomish, Snohomish, Snoqualmie, Stillaguamish, and other local rivers. Friday nights meant meeting at Jon’s house to watch Lowell Thomas’s *High Road to Adventure*, rearrange our fishing vests, make contingency plans about which rivers we would fish first, second, and third depending on the specific overnight weather conditions, and at what dark hour of the morning we needed to

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<sup>1</sup> GEORGE P. MARSH, *THE EARTH AS MODIFIED BY HUMAN ACTION* (1874), at 108.

## *The Si'tailo Redux*



Salmon spawning beds on the Wenatchee River, which drains into the Columbia.

wake up to beat the other fishermen to the best spots. ... We were hopeless.<sup>2</sup>

Around this time, all public high school sophomores in the state were required to take a class in *Washington History*. One of the subjects we studied was the potlatch ceremony common to Indian tribes throughout the Pacific Northwest. With eyes rolling, confident that ancient Indian practices had nothing worthwhile to teach

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<sup>2</sup> Eventually, I should note, we all managed to get dates with girls and to discover the other use for cars and Friday nights, but invariably the second date would be a fishing trip to see if she might be a “keeper.” Third dates were rare.

us (it apparently did not dawn on us that the names of our favorite rivers were mostly Indian), we listened to a dramatization of a tribal chief's oratory as he distributed potlatch gifts to a rival tribe. We learned from the writings of anthropologists that potlatching was "the ostentatious and dramatic distribution of property by the holder of a fixed, ranked, and named social position to other position holders"<sup>3</sup> with the expectation of return gifts at a later time.<sup>4</sup> A display of pure social self-aggrandizement unique unto Pacific Northwest Indian culture that could not possibly be understood through the ethnocentric lens of our own Western culture.

All this was rubbish to us (the term "political correctness" had yet to be invented). Indians were "bums," and we knew it. We were sure of it. All you had to do was drive along Skid Row in Seattle and see them by the dozens, bottles in hand, stumbling about in a drunken stupor.

At the beginning of our senior year, Jon Mass moved to Richland, at the confluence of the Yakima and Columbia Rivers in eastern Washington. This opened my outdoor adventures to a whole new realm. In contrast to western Washington's endless green forests, moderate temperatures, precipitous mountains, and relentless drizzle, eastern Washington on the other side of the Cascade Mountains is high arid desert, cold in winter, hot in summer, and often sunny. Rather than green forests, one looks out at seemingly blank expanses of grey-green sage desert, quiet willow draws, lava beds, and naked golden hills often rimmed by basalt outcroppings. This is volcanic country, formed over the centuries by magma spewing, oozing, and bubbling from beneath the earth's surface, ground by generations of glaciers, eroded by eons of wind and water, to create a vast and incredibly fertile basin capable of feeding millions. Bisecting it is the *Mighty Columbia*, spawning right-of-way for all five species of Pacific salmon.

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<sup>3</sup> Helen Codere, *Fighting with Property*, AMERICAN ETHNOLOGICAL SOCIETY MONOGRAPHS, vol. 18, 1950, at 63.

<sup>4</sup> See H. G. Barnett, *The Nature of the Potlatch*, 40 AM. ANTHROPOLOGIST (New Series) 349 (1938).

## *The Si'lailo Redux*

Exactly how do you feed millions? Just add water. Dam the *Mighty Columbia*. Dam it again, and again, and again. The *Mighty Columbia*, as I have always known it, is more nearly a series of lakes that flow almost imperceptibly from one dam to the next. Bonneville, The Dalles, John Day, McNarry, Priest Rapids, Wanapum, Rocky Reach, Chief Joseph, Grand Coulee, these dams back up water from just east of Portland to the Canadian border some 400 miles upstream. They make irrigating the bountiful Columbia Basin possible. Corn, barley, alfalfa, soybeans, potatoes, hops, sugar beets, apples, peaches, pears, cherries, grapes, and more all rely on the Columbia or its tributaries for water. You not only get the benefit of irrigation, you get navigable slack water and hydro-electric power in the bargain; feed millions, move their produce, and power their homes and factories too.

One day while crossing the Columbia River bridge near the town of Vantage on my way to Richland, looking north over the glassy surface of Lake Wanapum to the sheer 1000 foot basalt cliffs that line its banks, I remember being overcome with curiosity about what the river was like before it had been dammed. From my many years of fishing on countless streams in western Washington I had gained a deep appreciation for how water flows, churns, and backs into eddies, how it cuts its channel through rock, gravel, sand, and clay, and how it swells and shrinks, clouds and clears, with run-off and drought. Now the same question came to me writ large. What kind of a river had the *Mighty Columbia* been? With an average hourly flow of hundreds of millions of gallons it must have been a raging torrent. How did the force of all that water resolve itself with the unyielding lava formations? How on earth did salmon overcome these forces on their way to the spawning beds, often hundreds of miles from the sea?



With its remarkable compilation of pre-dam photographs and thorough legal and historical analysis, *The Si'lailo Way* answers these questions and raises and answers many more. It is a carefully researched, brilliantly written, rich, at times ironic, in

some ways flawed, and forgivably partisan recollection, not merely of the River's geology, but of the long line of Indians who fished it and have steadfastly pressed their legal rights to continue fishing it against a torrent of Western intrusions. In their own words, the authors wrote *The Si'lailo Way* to "share the story of how Indian people fought to save the fish and their fishing sites at one of the most stunningly beautiful places on the North American continent — Celilo Falls[,] ... to show that Indian people are not merely passive victims of economic and environmental change, but active and creative agents in our changing world[, and] to underscore how law figures enormously in the lives of Indian people."<sup>5</sup>

And Celilo Falls? Beautiful indeed! Now submerged some 50 years and 50 feet by the Dalles Dam, Celilo Falls was viewed by some as "the eighth wonder of the world." Displayed in the many photographs scattered throughout the book, one can almost hear the deafening force of the *Mighty Columbia* as it crashes over Celilo Falls. So great was the force that Indians using nearby railroad tracks to access the fishing grounds in the 1930s were all too frequently struck and killed for their inability to hear or sense the vibration of passing trains. To even approach the falls would take courage, but many of the photos show Indian fishermen precariously cantilevered over boiling white water on makeshift wooden platforms, long-handled dip-nets poised to catch the leaping salmon on their migration to the spawning beds of countless upstream tributaries.

The authors' story starts from respectable first principles, both economic and legal. Economically, they assert that long before there was an environmental movement the Columbia River Indians had solved the "tragedy of the commons" — famously coined by biologist Garrett Hardin to describe the failure of open-access resource regimes. Since time out of mind the various tribes that fished at Celilo Falls had established reciprocal understandings and cultural norms to prevent the disastrous overfishing currently suffered by salmon stocks throughout the Pacific Northwest under command-

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<sup>5</sup> *The Si'lailo Way*, at xxvi.



Indians fishing for salmon at Celilo Falls, Oregon, September 1941.

and-control regulation of open-access commercial ocean fishing. No Indian would harvest too much; turn-taking, sharing, and reciprocity were self-limiting norms. At Celilo, Indian fishing was “aimed at known stocks in known numbers destined for known spawning grounds.”<sup>6</sup> If correct, the Indians of the Pacific Northwest must be counted as remarkable fisheries managers.

Two events helped me arrive independently at this conclusion long before I read *The Si'lailo Way*. The first occurred shortly after my friend moved to Richland. We were hunting ducks late one afternoon on unposted marshland on the Yakima Indian reservation. With Mallards literally streaming at us from every direction in the early twilight, I heard Jon say, “Bruce, I think it’s closing time.” “Nah,” was my response as I slapped the trigger on a low-flying drake. We then heard a calm but distant voice. “You boys will have to stop shooting now.” In the twilight we could just make out a shadowy figure approaching. Short, barrel-chested, and bowlegged,

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<sup>6</sup> *The Si'lailo Way*, at 10.

as he came nearer we could see his flat red weather-beaten face. He had no bottle in hand, walked straight and gently, toes in. He was no bum. We were instantly neutralized by his firm but friendly approach. We talked as darkness closed in. He told us it is bad to shoot ducks when they are coming to water for the night. "If you shoot at them they will not come back to this place. Better to shoot at them in the morning as they leave. That way they will return. You boys come back in the morning if you like."

We thanked him, said good-bye, and left quietly, happy to be doing what we now knew as the right thing and somewhat bewildered at having learned it from an Indian. Years later I would understand the lesson formally as a response to the tragedy of the commons. If no one owns the duck marsh, access is open to all. Competition will lead hunters to rush to shoot ducks ahead of others. Hunting in the evening will become commonplace, as no hunter has an incentive to consider the costs he imposes on others. Others don't count. All hunters suffer, along with the resource itself. A commonly-held norm of hunting only in the morning solves the tragedy and benefits all if it is followed.

The second event occurred when I was in law school, and it would lay the foundation for my subsequent scholarly work on Pacific Northwest Indian fishing and customary law.<sup>7</sup> To escape the mind-numbing rigors of *Corporate Tax*, I enrolled in Professor Rountree's *Law and Anthropology* class. We were required to write a paper. Being at the same time a Ph.D. student in Economics, I decided to write mine on potlatching. I had never much cared for anthropologists' views on potlatching, and after years of studying economics my instincts told me they had missed something along the way. Within an hour of starting my research I was struck by an economic thunderbolt. Prior to European contact, tribal leaders throughout the Pacific Northwest held recognized title to salmon streams and

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<sup>7</sup> Most recently, see D. Bruce Johnsen, *A Culturally Correct Proposal to Privatize the British Columbia Salmon Fishery* (in *SELF DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS*, Stanford 2006).



the territories they drained.<sup>8</sup> Exclusive property rights to salmon streams are costly to enforce, and no economically rational tribal leader would bother to incur the costs unless he expected a compensating reward. As a property rights economist familiar with the anadromous character of Pacific salmon, it was immediately obvious to me that these people husbanded their salmon stocks. They didn't chase around after salmon in the open sea. They waited for them to come back to their home streams, where they carefully harvested them, often with fish weirs, to maximize long-run productivity.<sup>9</sup> No wonder their salmon streams were so prolific by today's standards. No wonder that prior to contact they had achieved such a high standard of living, high population density,<sup>10</sup> and notable wealth accumulation. They were not, as cultural anthropologists uniformly characterized them, *hunter-gatherers* fortunate to reside in a land of plenty and therefore free to engage in the frivolous pursuit of social status. They were sophisticated salmon ranchers. Having since learned that they knew how to transplant salmon from one river to another,<sup>11</sup> there is little doubt in my mind that they engaged in purposeful genetic selection in favor of stocks with preferred characteristics such as average fish size, run timing, run duration, etc.

But why potlatching? The answer was simple once I thought back to those Friday nights at Jon Mass's house. Because different rivers,

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<sup>8</sup> Larger rivers, such as the Nass, the Skeena, the Fraser, and the Columbia were exceptions. Their tributaries rather than their trunks were the subject of exclusive tribal ownership.

<sup>9</sup> A weir is basically a fence stretched across the river that requires the salmon to enter holding tanks from which they can be selected for harvesting or allowed to pass.

<sup>10</sup> Their high population density would not last long. In a reverse *War of the Worlds*, "European" diseases largely benign to Whites, including small pox, malaria, dysentery, measles, and influenza ravaged their numbers in a series of waves. White reports recount entire villages being wiped out. Robert Boyd, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline among Northwest Coast Indians, 1774-1874* (University of Washington Press, 1999).

<sup>11</sup> Gilbert M. Sproat, *SCENES AND STUDIES OF SAVAGE LIFE* (1868), at 220.



Jon Mass is now a licensed fishing guide in Western Washington. Here, he holds a 20 pound Chinook salmon caught on the Humptulips River.

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even those within a few hours' driving distance, can be affected in dramatically different ways by weather conditions, it was obvious to me that exclusive tribal property rights to salmon streams came at a particularly troublesome cost in the form of stream-specific risk. If Tribe A's salmon run is strong, but Tribe B's run is poor owing to inclement weather in the spawning beds years earlier that diminished the number of recruits, Tribe B will be hungry and otherwise unemployed, while Tribe A will be well fed and face ample produc-

tive uses for its scarce labor. The inevitable result will be encroachment by Tribe B on Tribe A's fisheries, and Tribe A is likely to respond with violence. But violence is socially costly, and economic forces invariably lead rational people to avoid it. Owing to the productivity of husbandry investments, Tribe A should be willing and able to pay Tribe B to leave in peace. Compared with open access, both are better off. What is more, by the definition of risk the situation is reciprocal; Tribe A knows it is likely to find itself in the bad state at some point and in need of sharing in Tribe B's bounty.

The war records of the Pacific Northwest tribes are replete with stories of one tribe threatening another with war, only to be met with food and other gifts to appease them. These payoffs evolved into the multi-lateral system of reciprocal wealth transfers among rival tribes we know as potlatching. Indeed, the tribes regarded potlatching as "fighting with property." A host chief would stand in front of his assembled tribe and guests, declare the bounty of his salmon streams to be the result of his superior management skills, and provide stacks of gifts. By accepting the gifts, guests were estopped from denying his skill or his title to the streams that made the gifts possible. Rather than self-aggrandizing oratory for its own sake, the chief's declarations served the important economic function of shaming his rivals into respecting established tribal claims. Oral histories stored in the memories of participants recorded the balance of payments. Tribes that gave more than they received over time elevated their social status in the potlatch hierarchy. Free riders who consistently gave less than they received lost social status and risked becoming outlaws subject to depredations by stronger rivals.



Thanks to Nobel Laureate Ronald Coase's pioneering work on the economics of transaction costs,<sup>12</sup> property rights econo-

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<sup>12</sup> Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), and *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

mists have made tremendous progress understanding non-market exchange. My work on the Pacific Northwest tribes shows that potlatching is readily understood through the ethnocentric lens of Western culture once informed by a healthy dose of property rights economics. The Pacific Northwest Indians were and are *Homo economicus*. They jealously defended tribal property rights to salmon streams and other resources, as vested in their tribal leader. They revered without shame their leader's accumulation of wealth and his ability and willingness to share it with others in an economically meaningful way. Although they suffered their own tragedies of the commons – their wholesale depletion of sea otter populations shortly following European contact being just one example<sup>13</sup> – when it came to Pacific salmon they were much better at solving them than Western settlers, who naively took the region's prolific salmon runs as a given.

That they solved the tragedy of the commons at Celilo Falls is especially remarkable because Celilo was not a *terminal* fishery. Fishing at Celilo violated what the authors tout as the number one rule of Indian law: "Salmon fisheries are to be concentrated on known stocks in terminal areas, with each fishery managed with close oversight, accountability, and easily administered sanctions."<sup>14</sup> Fishing at Celilo actually intercepted salmon on their way to the terminal spawning beds. On its face, all tribes would have been better off if fishing at Celilo had been prohibited by mutual agreement. The primary factor opposing this conclusion is that salmon begin to deteriorate when they enter fresh water. All else being equal, those fish that were to be harvested were more valuable if taken at Celilo than in the spawning beds of upstream tributaries. But all else was equal only if the Si'lailo took great care to discriminate in their harvesting to avoid undue fishing pressure that hindered upstream

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<sup>13</sup> It is pretty well settled that North American peoples hunted any number of large mammal species to extinction starting around 10 thousand years ago. See, e.g., Vernon L. Smith, *The Primitive Hunter Culture, Pleistocene Extinction, and the Rise of Agriculture*, 83 J. POL. ECON. 727, 729 (1975).

<sup>14</sup> *The Si'lailo Way*, at 3.

tribes in their efforts to husband stocks. If it is true that the Si'lailo actively coordinated with upstream tribes, the transaction costs of avoiding the tragedy of the commons at Celilo must have been less than the reduction in the value of the fish owing to deterioration between Celilo and the spawning beds.



Why do some cultures succeed at managing certain resources when others fail? “Circumstance,” to be sure, but the common thread is differences in the cost of transacting to define and enforce exclusive property rights. Law normally serves to reduce transaction costs, but in some cases transaction costs may be driven higher by established law that was appropriate for one set of circumstances but is inappropriate and slow to change as circumstances change. English settlers brought with them the common law, which, ever since the signing of the *Magna Carta* (1215), recognized the public’s right to fish in tidal waters and beyond absent legislation to the contrary. Ownership of fish in these waters went to he who first captured them<sup>15</sup> – the so-called “law of capture,” exemplar of an open access resource regime. With open access and strong demand, a fishery is subject to a race to first possession. No one has any particular incentive to save a salmon so it can spawn and perpetuate its line. Rather, the incentive is to harvest now, before the other guy does so. All those early hours my fishing buddies and I had to wake up to beat the other guys to the best fishing spots can be attributed to the law of capture.

Ideally, customary law on the Columbia River should have trumped the law of capture. Collectively, we would all be better off. The trouble in practice is that tribes, cultures, nations, civilizations, and their conflicting laws, compete in an open-access commons subject to no higher authority than their own “representatives,” who are seldom loyal agents for the common good. *The Si'lailo Way* is ultimately about the clash of two civilizations in a

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<sup>15</sup> See Douglas C. Harris, *FISH LAW AND COLONIALISM THE LEGAL CAPTURE OF SALMON IN BRITISH COLUMBIA* (University of Toronto Press, 2001), at 29, 31.

practical economic and legal vacuum. One should not unduly fault English law for the ensuing tragedy. English law in the age of exploration asserted sovereignty to newly discovered lands, some think smugly so. But apparently foreseeing the many looming tragedies in advance it also had the good grace to hold that aboriginal peoples retained the right to occupy and use their traditional lands unless formally divested by “conquest, cession, or purchase.”<sup>16</sup>

The ability of a civilization to use its own law to reach beyond itself, even if only in principle, is truly a remarkable badge of enlightenment when seen in the historical context of the clash of civilizations in which losers have often been, and continue to be, ruthlessly exterminated.<sup>17</sup> As with my fishing buddies and I, one might say Western settlers took a somewhat sophomoric approach to the Northwest Indian tribes. Rather than relying on *pareto* efficiency – in which an action is taken only if no participants are made worse off – Western settlers defaulted to *Kaldor-Hicks* efficiency – in which an action is taken if winners could, in theory, afford to compensate losers to make them no worse off, actual compensation being an unnecessary formality where the losers are “them” and the winners are “us.” This approach has cost the Northwest Indians much, but heavy-handed hubris is a far cry from wholesale slaughter.



Legally, the authors start from the first principle that the Columbia River tribes were never conquered. True. In lieu of being conquered, and with both sides anxious to avoid violence, the tribes ceded much of their traditional lands to the federal government by treaty in 1855. It was an intensely negotiated deal. On the face of the document, and by all accounts of the proceedings, the Indians were not duped. In addition to specific reserved lands, the tribes jealously insisted on retaining their rights to fish along the Columbia at their usual and accustomed places. This clearly included their

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<sup>16</sup> *Johnson v. M'Intosh*, 8 Wheaton 543 (1823).

<sup>17</sup> Indeed, such events are well documented among American Indians, including the Northwest Indian tribes. Franz Boas, *KWAKWIKWUTL ETHNOGRAPHY* (1966), at 47.

fishing sites at and around Celilo Falls. The treaty that came out of the Walla Walla and Wasco councils secured, among other things, "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 together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."<sup>18</sup> The fiduciary rule of interpretation imposed by English law for this and other Indian treaties is that the words are to be given the meaning ascribed to them by the Indians.

It was not long before these rights, clear in principle, began to cloud in practice with the torrent of Western settlers. First came an attempt in 1865 by the corrupt Superintendent of Indian Affairs in Oregon, J.W. Perit Huntington, to fraudulently induce the Warm Springs tribes to abandon their Columbia River fishing rights. Under the ruse that the Indians were merely signing a treaty agreeing to carry passes for their own protection when off the reservation, Huntington allegedly replaced page one of the document with another on which, in addition, the Indians relinquished their fishing rights in exchange for \$3500 in farm implements (\$3.50 per head).<sup>19</sup> The authors are quite right in concluding that the Indians would never have sold their fishing rights for such a meager sum. Fishing for salmon at Celilo is what made them them, and no people would sell out their *raison d'être* so cheaply.

Next came the enclosure movement. The right to erect buildings, hunt, gather roots, etc., on unclaimed land is nearly meaningless if all suitable land is claimed by settlers holding title under the Donation Act that fails to mention Indians' reserved treaty rights. The right to fish is a cruel joke if access is denied. Even with access, the right to fish is diminished to the vanishing point if White settlers are free to dynamite channels and erect fixed fish wheels that trump traditional fishing spots or to employ floating fishwheel scows, both capable of intercepting more fish in a day than the Si'lailo would harvest in a season. These tireless mechanical contrivances worked

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<sup>18</sup> *The Si'lailo Way*, at 34.

<sup>19</sup> *Id.*, at 49.

around the clock and completely failed to discriminate between different salmon stocks, making resource management in the spawning beds by upstream tribes a crap shoot.

Even with the fishwheels prohibited by law and the fishwheel scows confined, the Indian right to fish is a will-o-the-wisp if they are excluded from the fishery for insufficient Indianness owing to diluted blood or the adoption of White ways, or are confined to noncommercial “subsistence” fishing using only traditional Indian methods. The right to fish is hollow if curing sheds and habitation on the fishing grounds are removed by force, legitimate or not. The right to fish is legal fiction if trial judges refuse to issue injunctions in keeping with the spirit of hard fought appellate victories perfecting the right to fish. The right to fish is a memory if traditional fishing grounds lay submerged under 50 feet of water behind dams that dramatically hinder upstream migration.

These are merely examples of the many intrusions the Columbia River tribes suffered on their reserved right to fish at their usual and accustomed places. The authors carefully recount the many legal battles by Indians unwilling to let go of their fisheries – some lost, some won, some hollow in the vacuum of common law precedents and the glacial pace of Federal courts.



One of the Northwest Indians’ most important legal victories came in the 1974 decision of Judge George Boldt in *U.S. v. Washington*.<sup>20</sup> Even a recognized exclusive right to fish for salmon at usual and accustomed places makes management of salmon stocks impossible with commercial ocean fishermen indiscriminately intercepting most salmon before they enter the river. The “Boldt” decision found that the Puget Sound Indians’ treaty fishing rights included the right to fish in any manner, using any method, for any purpose, that they included the right to self management of the fishery, and that the right to fish “in common” with Whites gave them a 50:50 allocation of the allowable catch.

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<sup>20</sup> 384 F. Supp. 312 (1974).



## *The Si'lailo Redux*

As sport fishermen, my friends and I were incensed, and we were not alone. How could a federal court restrict our right to fish as we had always done? A popular bumper sticker displayed a metal bolt and two nuts with the word “is” between them. Court orders were defied. In what the Ninth Circuit described as “one of the most serious challenges to a federal district court’s authority in the history of the Republic,”<sup>21</sup> Judge Boldt’s court was forced to take over management of a large share of the fishery from defiant state regulators.<sup>22</sup>

Knowing what I now know, it seems incredible that sport fishermen could have blindly placed so much faith in the command-and-control methods of Washington State regulators, who, like their counterparts all over the world, have systematically driven salmon stocks to the brink of extinction. Sport fishing interests are best served if salmon stocks are prolific and well managed, as they had been for thousands of years before European contact, the Si'lailo way. Whether sportsmen buy their fishing licenses from the local Indian tribe or the State of Washington should otherwise be a matter of indifference.



**T**he *Si'lailo Way* may be best seen as a species of advance advocacy. By weaving together a stunning compilation of photographs witnessing the powerful beauty of the pre-dam Columbia, compelling stories of the Indian characters who have fought legal battle after legal battle to sustain their fishing rights, and extensive documentary evidence from primary sources, the authors clearly hope to gain readers’ sympathy for the Indians’ cause. A reasonable and skeptical reader not so inclined toward the Indians might draw different conclusions from the extensive facts the authors report, but the book is clearly one more important step in the Indians’ long and arguably legitimate journey to recapture the fisheries reserved for them by treaty, intact, free of dams and other intrusions.

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<sup>21</sup> U.S. v. Washington, 573 F.3d 1118, 1126 (1978).

<sup>22</sup> *The Si'lailo Way*, at 281.

But wait! The Coase Theorem tells us that if the cost of transacting is sufficiently low a resource will go to its highest and best use regardless of who owns it. A simple thought experiment is to ask what the Indians of the Columbia River would do collectively if, say, their exclusive right to derive income from the River – from salmon, from irrigation, from river travel, and from hydro-electric power – was magically restored. Would they breach the dams and opt to forgo other profitable uses to completely restore their salmon fisheries? The economically rational answer is that they clearly would not, in spite of all high-sounding political rhetoric to the contrary. All the salmon imaginable from a carefully managed Columbia River fishery would not stack up to all that produce, all that low-cost transportation, all that hydro-electric power. Our potlatch would be bigger than theirs. The authors acknowledge how innovative, adaptive, and commercially minded the tribes were. Even though salmon fishing is their *raison d'être*, they would very likely tolerate substantial continued intrusions on the fishery while making incremental adjustments to intelligently balance competing interests, no doubt leaving most dams intact.

Breaching dams along the Columbia will never happen in any kind of wholesale way. No court would make such a ruling no matter how legally correct, and even if one did Congress would quickly undo it. On the scale of breaching Columbia River dams and disrupting the lives of millions of citizens who have legitimate investment-backed expectations for their continuance, law is hopelessly intertwined with politics. A focused incremental approach is quite plausible, however. It is also economically appropriate because the discounted present value of all the salmon harvestable for eons from a well-managed fishery must weigh heavily in the social calculus. As part of that calculus, formal recognition should be given to the Pacific Northwest Indian tribes as superior managers of Pacific salmon stocks deserving of recapturing their treaty fishing rights wherever practicable.

With two Elwha River dams on Washington's Olympic Peninsula scheduled to be dismantled, hope runs high that the river's once tremendous salmon runs will be restored. The resident Klal-

## *The Si'lailo Redux*

lam tribe should be given the right to manage the Elwha fishery, using fish weir technology if it so desires. The stage should be set to allow the tribe to repurchase the 50 percent White interest in the fishery established by Judge Boldt, including the right to protect the salmon from depredations at sea. This buyout is in keeping with how the Pacific Northwest tribes handled title disputes. Rather than fight, claimants often held a “rivalry potlatch,” in which each participant offered potlatch gifts to the other. The one that offered the most established his superior claim, and the loser received the gifts as compensation. A *pareto* efficient outcome.



Glines Hydroelectric Dam and Powerhouse, Elwha River Hydroelectric System, Clallam County, Washington.

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Given the dramatic superiority of river-based Indian fishing over commercial ocean fishing, I have little doubt who the winner would be, the main sticking point being exactly how the Klallam would obtain financing. But investment bankers know how to arrange financing for profitable projects, and this is surely one of them. A

likely source of financing is Congress, which might be prevailed upon to provide tribes throughout the Pacific Northwest with meaningful compensation for past takings where the proceeds are to be used to restore, if only incrementally, a once prolific salmon fishery. With compensation in hand, they could buy shares in a tribal corporation – call it *Potlatch, Inc.* – to fund and share in the Klallam's project. Another source of funding might be the legions of socially responsible investors anxious to find a comforting place to store their wealth. Currently, these investors place their money in mutual funds managed by investment advisers whose notions of social responsibility are maudlin at best, counterproductive at worst, and who in any event are pretty much incapable of influencing anything in a socially meaningful way.<sup>23</sup> Buying shares in a tribal corporation could make a real, and positive, difference to a real people engaged in real socially valuable projects.

With a few more favorable legal rulings to provide added leverage and pave the way for river-based fisheries management, meaningful compensation from Congress, the assistance of investment bankers to set up the deal and raise added capital, and a few more compelling works such as *The Si'lailo Way*, the Pacific Northwest tribes may be able to establish a worldwide reputation for being the sophisticated salmon ranchers they once were. Success on the Elwha is essential. With that, other dams will come down, perhaps on the Deschutes and other downstream tributaries of the Columbia. Perhaps better fish ladders can be built on lower Columbia dams to open up meaningful Indian fisheries on successive upstream tributaries. No solution will give everyone what they want, or think they deserve, but an incremental approach provides hope. My hope is that one day Jon Mass and I will be able to fish for big Chinook salmon with Indian licenses so that we don't have to wake up in the dark of night to do it.



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<sup>23</sup> D. Bruce Johnsen, *A Critical Look at Socially Responsible Investing*, 43 JOURNAL OF BUSINESS ETHICS 219-222 (2003).