TAKING THE BITTER WITH THE SWEET: WENATCHI FISHING RIGHTS

By Nolan Shutler*

In 2010, the Ninth Circuit decided United States v. Confederated Tribes of the Colville Indian Reservation, holding that the Wenatchi and Yakama Tribes both have non-exclusive fishing rights in common with the State of Washington. In reaching this allocation, the court relied heavily on the records of the negotiations leading up to an 1855 Treaty that established both tribes' reservation lands as well as the negotiations surrounding an 1894 Agreement that established the Wenatchi fishing rights at the Wenatshapam Fishery. The Wenatchi had previously been barred from asserting these rights at their aboriginal fishery by a 1994 decision but had continued fishing at the location nonetheless. In 2008, the Yakama Tribe brought an action for permanent injunction in district court in order to protect its rights at the fishery under the 1855 Treaty. This action resulted in a favorable decision at the district court level for the Wenatchi; however, both they and the Yakama appealed. The Yakama sought a finding that the lower court erred, and the Wenatchi sought a decision on whether they held primary rights at the fishery. The Ninth Circuit denied both appeals, affirming the lower court's ruling. This Chapter asserts, inter alia, that the Ninth Circuit's primary rights analysis, which creates the "new law" of the case, has both positive and negative effects on tribal sovereignty; but that in the end, the remedy is too little too late for the Wenatchi whose crucial off-reservation fishing rights rely on the very document (procured through deceit) which ceded their rightful ownership of a reservation at the fishery.**

^{*} B.A. English Literature and Culture, Brown University, 2006; J.D. candidate at Lewis & Clark Law School, 2013. The author would like to thank Professor Robert J. Miller for his insightful edits, commentary, and motivation.

^{**} A note about spelling and word choice: Wherever applicable, I have spelled proper nouns as they appear in the original documents and manuscripts; otherwise I have used the modern spelling. This Comment uses the term "Indian" to refer to individuals and groups rather than the more generally acceptable "American Indian," both for brevity's sake and the former term's prevalence in the law. In addition, I use the modern spelling for the Yakama Tribe, except where original documents use the prior spelling, "Yakima."

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"Does our Great Father at Washington think a salmon is an eagle that lives on top of a mountain, or does he think a salmon is a deer that lives in the woods and hills, or does he think a salmon is a mountain goat that lives among the rocks of the snow-covered mountains? Tell our Great Father the Indian does not care for the little trout in the lake, but wants the salmon that lives in the rocky places in the river where the Indian can find him.... We want our fishery in the river where Governor Stephens gave it to us a long time ago." ¹

I. INTRODUCTION

American Indian tribes in the United States understand better than most that "justice delayed is justice denied." Successive policy eras of allotment and termination left many tribes bereft of ancestral lands and

 $^{^1}$ Letter from the Secretary of the Interior, A Copy of an Agreement with the Yakima Nation of Indians, and a Draft of a Bill to Ratify the Same, S. Exec. Doc. No. 53-67, at 20 (2d Sess. 1894).

 $^{^2}$ Laurence J. Peter, Peter's Quotations: Ideas for Our Time 276 (1977) (attributing the classic adage to William Ewart Gladstone (1809–1898), former Prime Minister of Britain).

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cultural practices which they have since fought hard to regain in both the legislature and the courts. Often, where justice is achieved, it is overdue. Generally, tribes fight for sovereignty—the ability to regulate their own land and citizens—and must contend with both the states in whose borders they exist and the federal government whose trust-responsibility dictates a degree of paternalistic control over tribes. Many of the greatest victories for Indian tribes and advocates are had in the legislature, not in the courts. One area of Indian law, however, where tribes have found success is in the assertion of explicit and even implied rights under treaties, specifically, fishing rights.

Treaties evidence the unique "domestic, dependent nation" status that tribes hold vis-à-vis the United States government.⁵ Aside from the obvious features that make up what we think of as a nation—political structures, ethnic identity, cultural traditions, and historical conscience—the relationship that sovereigns have with one another tells the international community and history, just by its very existence, that these two entities are separate and distinct but also share a nation-to-nation relationship. While not without its own wrinkles,⁶ this separate nation status, qualified by the domestic and dependent relationship, yielded the trust doctrine.⁷ Under the doctrine and various treaties, the federal government assumes responsibility for the health and welfare of the indigenous nations. Policy on how it should be applied (and whether it even should be applied) has undergone several

 $^{^3}$ See, e.g., Louis Fisher, Indian Religious Freedom: To Litigate or Legislate, 26 AM. INDIAN L. REV. 1, 1 (2002) (stating that steps to secure the religious heritage of Indians have come from the political branches, not the courts).

⁴ In litigation where tribes assert rights under treaties and other agreements with the government to create reservations, courts have recognized that such agreements preserved both implied and explicit rights enjoyed by Indians prior to creation of the reservation. *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("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 they breathed. 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. 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."); Winters v. United States, 207 U.S. 564, 576 (1908) ("The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?").

 $^{^{5}\,}$ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

⁶ Morton v. Mancari, 417 U.S. 535, 555 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

⁷ Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.").

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iterations in the past two centuries.⁸ Whether the United States has lived up to its trust responsibility is a matter of ongoing debate, but may be fairly rebutted by a glance at the dismal poverty, rates of high school dropout, and alcoholism and drug abuse on reservations.⁹

The losses sustained by tribes are often irretrievable. However, the recent Ninth Circuit decision in *United States v. Confederated Tribes of the Colville Indian Reservation (Colville)*, a ppears on its face to oppose this trend. It decided that the Wenatchi Tribe, a sub-group of the Colville Indian Tribe with citizens living on both the Colville Indian Reservation and the Yakama Indian Reservation, holds treaty fishing rights in common with the Yakama Nation and the citizens of Washington state at their traditional fishing grounds—the Wenatshapam fishery at the confluence of Icicle Creek and the Wenatchee River, near present day Leavenworth, Washington. 11

This decision represents a hard-fought victory in a struggle that has lasted more than a century, but it is a qualified victory. At the time of the

⁸ DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 121–24 (3d ed. 2011) (providing a table which identifies eight distinct policies between the 1770s and the present regarding this federal–tribal relationship).

⁹ M. Wesley Clark, *Enforcing Criminal Law on Native American Lands*, FBI LAW ENFORCEMENT BULL. Apr. 2005, at 22, 22, 24 (discussing the complexities of federal law enforcement jurisdiction on Indian reservations that arise as a result of there being multiple sources of authority and enforcement but no clear distribution of responsibilities); Ruth Steinberger, Dakota-Lakota-Nakota Human Rights Advocacy Coal., Incarcerated Indians: A Continuing Series Revealing Glaring Disparities in the Judicial Systems for American Indians: Part 1: A View of the Distorted Statistics from Initial Police Contact to Denial of Parole, http://www.dlncoalition.org/dln_issues/incarcerated_indians.htm (last visited Apr. 18, 2011) (stating that the median age of Indian prisoners is less than 20 years old while the national median is 34); Susan C. Faircloth & John W. Tippeconnic, III, The Dropout/Graduation Crisis Among American Indian and Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk 4 (2010), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/the-dropout-graduation-crisis-among-american-indian-and-alaska-native-students-failure-to-respond-places-the-future-of-native-peoples-at-

risk/?searchterm=dropout ("Evidence of fundamental educational failure [for American Indians] can be found in schools across the nation, most notably in the form of low graduation and high dropout rates. The alarmingly high rates at which American Indian and Alaska Native students drop out or are pushed out of school is not a new phenomenon, but one that has persisted throughout the 20th and early 21st centuries."); Matthew T. Theriot & Barbara "Sunshine" Parker, Native American Youth Gangs: Linking Culture, History and Theory for Improved Understanding, Prevention and Intervention, 5 J. Ethnicity Crim. Just. 83, 87 (2007) (listing several statistics showing higher victimization rates among Native Americans than among the general U.S. population, including that alcohol-related problems are as much as three times as high); Centers for Disease Control, Alcohol-Attributable Deaths and Years of Potential Life Lost Among American Indians and Alaska Natives-United States, 2001-2005, 57 Morbidity and MORTALITY WKLY. REP. 938, 939 (2008) available at http://www.cdc.gov/mmwr/PDF/wk/ mm5734.pdf (reporting findings that 11.7% of deaths among Native Americans and Alaska Natives between 2001 and 2005 were alcohol-related, while the average for the United States was 3.3%); Michael Riley, Inaction's Fatal Price, Denv. Post, Nov. 12, 2007, http://www.denverpost.com/search/ci_7437278 (last visited July 16, 2011) (quoting sources calling the lack of law enforcement on reservations "outrageous").

¹⁰ United States v. Confederated Tribes of the Colville Indian Reservation (Colville), 606 F.3d 698 (9th Cir. 2010).

¹¹ *Id.* at 701, 715.

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decision, the Wenatchi had waited more than 150 years for the protection of fishing rights at their ancestral fishery. While the District Court of Oregon found an agency's decision to stay research on the Kenniwick Man for several months as "hasty," (in a case in which the Wenatchi tribe joined several other Washington and Oregon tribes in support of the agency's decision to enjoin scientific testing on an ancient skeleton), 12 it took more than twenty years and two separate cases to decide that the Wenatchi have rights to fish at their ancestral fishery, which the court noted "was the hub around which the Wenatchi's cycle of life rotated."13 Moreover, while the Yakama appealed this decision in an effort to overturn the district court's finding that the two tribes held the non-exclusive fishing rights in common (presumably because they wished to hold onto rights to the full fifty percent of the take), the Wenatchi cross-appealed on the grounds that they sought either the only Indian rights at their ancestral fishing grounds, or the primary fishing rights thereon. 14 The Ninth Circuit determined that the Wenatchi have rights but not primary fishing rights. The court cited the fact that the two tribes' fishing rights stemmed from separate agreements and not a "common 'treaty time:" a novel criteria in the determination of primary rights. 15

The *Colville* decision is a careful recitation of the treaty negotiations and history of the fishery. Yet just as interesting as the Ninth Circuit's detailed discussion, is what the court declined to discuss about the current fishery. Certain features in the recent historical landscape must have played a role in the parties' motivations and, while legally irrelevant, are relevant to the fishery's regulatory scheme. In 2003, the Yakama Nation pledged over \$32 million of federal monies to a hatchery less than half a mile upstream from the Wenatshapam Fishery. ¹⁶ And since 2008, the river has seen a steady increase in returning salmon, setting records for the amount of fish at the fishery since the 1938 creation of the dam. ¹⁷ This investment and development in the fishery may not bear a direct relation to the litigation, but in the highly controversial debate over anadromous fish rights in the Northwest, the court must have been aware of the effect its decision would have on the regulatory scheme.

This Chapter is divided into five parts. Part II discusses the legal background of Indians within the United States' justice system, including Indians' nation-to-nation status, treaty rights, and reserved fishing rights. Part III addresses the specific history of the Wenatchi Tribe prior to and after the negotiation of the 1855 Treaty and 1894 Agreements that make up

¹² Bonnichsen v. U.S. Dep't of the Army, 969 F. Supp. 628, 641 (D. Or. 1997) ("I am left with the distinct impression that early in this case the defendants made a hasty decision before they had all of the facts, or even knew what facts were needed.").

¹³ Colville, 606 F.3d at 701, 705.

¹⁴ *Id.* at 700–01. United States v. Skokomish Indian Tribe, 764 F.2d 670, 671 (9th Cir. 1985) ("A primary right is the power to regulate or prohibit fishing by members of other treaty tribes.").

 $^{^{15}\,}$ Colville, 606 F.3d at 714–15.

Yakama Nation to Spend \$32 Million for Coho Rehab, WENATCHEE WORLD, Oct. 20, 2008, http://www.yakima-herald.com/stories/2008/10/20/yakama-nation-to-spend-32-million-for-coho-rehab (last visited July 7, 2011).

 $^{^{17}\,}$ Quinton Smith, $Record\,Sockeye\,Run\,Is\,Off\,the\,Hook,$ OREGONIAN, July 5, 2010, at A1, A4.

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its relationship with the federal government. Part IV summarizes the *Colville* decision. Part V analyzes the decision, and the final part offers the conclusion that while the decision appears to veer from or ignore the course of precedent, it may be a warranted diversion.

II. LEGAL BACKGROUND

Native American Tribes share a special relationship with the United States. Tribes exercise certain sovereign powers over the lands reserved in the various treaties, agreements, executive orders, and legislative documents that make up the field of federal Indian law. This field is variously described as "a maze," "patchwork," and "crazy quilt." Depending on the state in which the reservation is located, the agreement between the tribe and the United States, the enrollment status of the tribal citizen, or other factors, court decisions may differ widely made on similar fact patterns. Practitioners in Indian law, therefore, can only hope that a court will choose one line of precedent over another.

Certain basic principles govern the political status of tribes, their relation to the United States, treaty interpretation, and its application to fishing rights.

A. Discovery, Tribes as "Domestic Dependent Nations," and the Trust Doctrine

European settlers began arriving in America in the sixteenth century and found that the lands they had come to develop were already occupied by between 50 and 100 million people.²² Over 600 distinct ethnic and social groups had subsisted "since time immemorial" on the land which now makes up the United States.²³ Settlers found the normal application of property law

¹⁸ Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

¹⁹ Duro v. Reina, 495 U.S. 676, 680 n.1 (1990) (stating that criminal jurisdiction in Indian Country "is governed by a complex patchwork of federal, state, and tribal law").

 $^{^{20}}$ Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring) (claiming that allowing tribal courts civil jurisdiction over non-citizens would create an "unstable jurisdictional crazy quilt").

 $^{^{21}}$ See Clinton, supra note 18, at 506–07.

 $^{^{22}}$ Jack Utter, American Indians: Answers to Today's Questions 43 (2d ed. 2001); Alan Taylor, American Colonies 40 (Eric Foner ed., 2001).

²³ ROGER L. NICHOLS, AMERICAN INDIANS IN U.S. HISTORY, at xii (2003); see, e.g., Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 775 (1985) (Marshall, J., dissenting) ("The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if nonexclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication." (citing United States v. Sioux Nation of Indians, 448 U.S. 371, 422–23 (1980);

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inconvenient as applied to "aboriginal title," preferring instead to apply the Doctrine of Discovery.²⁵

Aside from the obvious impediment to development that recognition of indigenous title in these lands would have posed, the colonizing Europeans believed that Indians were inferior and lacked a concept of property ownership.26 By violence, disease, fraud, and treaties promising "reserved lands," the British removed Indians from their ancestral homes and displaced them to the west in order to create the first thirteen colonies.²⁷ By the early nineteenth century though, population growth and the rise of Thomas Jefferson's agrarian society militated further expansion.²⁸ Land speculators who had purchased lands in the West prior to the American Revolution, sought to capitalize on this growth by selling territorial lands to settlers.²⁹ But these lands posed a problem: How does one measure the title of land purchased from Indians?

In a series of three decisions, the fourth Chief Justice of the Supreme Court, John Marshall, sought to resolve this legal question and in so doing, created the trust doctrine.30 The "Marshall trilogy," or "Cherokee Cases,"

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Tulee v. Washington, 315 U.S. 681 (1942))).

²⁴ Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567 (1823) ("[T]he whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."); see Robert J. Miller et al., Discovering INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 21-22, 25 (2010).

²⁵ See generally, Robert J. Miller, The Doctrine of Discovery in American Indian Law, 42 IDAHO L. REV. 1 (2005) (discussing the role of the Doctrine of Discovery in the colonial era and its continuing implications today).

²⁶ Robert J. Miller, Economic Development in Indian Country: Will Capitalism or Socialism Succeed?, 80 Or. L. Rev. 757, 764-65 (2001).

27 ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325-26 (1990); see also UTTER, supra note 22, at 80.

²⁸ Kent Richards, *The Stevens Treaties of 1854–1855: An Introduction*, 106 Or. Hist. Q. 342, 342 (2005) ("Jefferson's policy for Native Americans featured farming as the key element. For Jefferson—and perhaps most Americans in the nineteenth century agrarianism represented not only an economic endeavor but also a way of life that fostered initiative, independence, and democracy.").

²⁹ King George passed the 1763 Royal Proclamation in order to restrain westward growth, which had precipitated the French and Indian War and continued across the Atlantic as the Seven Years War (1756-1763). FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766, at 518, 568-69 (2000). George Washington himself was a speculator in the business, who deeply opposed the Crown's 1766 Act (though he supported such measures undertaken later by the United States). Miller, supra note 25, at 43 (citing Letter from George Washington to James Duane (Sept. 7, 1783), in 27 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 134-36, 139 (John C. Fitzpatrick ed., 1938)). As to concerns for the Indians, Washington reassured compatriots that the Indians would die or be assimilated before their land rights became a problem. Letter from George Washington to James Duane, supra, at 136-37, 140.

30 Recognizing in the first instance that American Settlers had claimed the lands by violent conquest, but reasoning that the "fierce" nature of the Indians required such violence, the Court held that only the federal government, and not private citizens, could "obtain[] by purchase or conquest" lands from the tribes, thereby invalidating scores of titles and investments in the burgeoning West. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 545-46, 587, 590 (1823) ("[T]he

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forms the basis of the trust doctrine: the nation-to-nation relationship between the federal government and tribes is both a limit on tribal sovereignty as well as an affirmative responsibility of the United States to reserve certain lands and rights from state acquisition or interference. Ultimately, the cases grew out of early federalist efforts to limit state power.³¹

However, by 1871, Congress grew weary of treaty-imposed burdens under the trust doctrine and put an end to treaty-making. Policy had shifted with an eye towards assimilation, and in 1887, Congress passed the General Allotment Act, Mhich divided the reservations into fee parcels among tribal citizens. Ostensibly, Congress intended for the Act to encourage assimilation and engender a sense of ownership in individual Indians; however, it had the effect of decreasing trust land from 138 million acres to 48 million acres between 1887 and 1934. By allotting property within the reservation to individual Indians, Congress was able to avoid treaty-imposed responsibilities and to open up more lands to white settlement. Individual Indians often defaulted within a generation or two, unable to maintain property under state law taxation, and were forced to sell their land to non-

tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."). Though it provided a rationale for the use of violence, the *Johnson* opinion helped to establish the political status of Indian tribes in the United States, which in the long run helped to minimize the extinguishment of Indian title and affirm tribal sovereignty. WILLIAMS, supra note 27, at 325-26; 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, 776-77 (2004). In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1 (1831), the court distinguished Indian tribes from sovereign, independent nations, as well as states, and referred to the tribes instead as "domestic dependent nations." Id. at 16-17. This paternalistic concept provided the basis for a finding that the Supreme Court lacked jurisdiction to hear the Cherokee Nation's complaint regarding a slew of prejudicial laws passed by the State of Georgia, but in dictum it also created the trust doctrine. See id. at 17 ("Their relation to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."). It was not until 1875, that federal courts had subject matter jurisdiction to hear such cases. 28 U.S.C. § 1331 (2006). Finally, in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543, 590-91 (1832), Marshall held that the laws of the states have no effect on tribes residing within state boundaries. Instead, the federal government, under the Constitution, has "exclusive jurisdiction in regulating intercourse with the Indians." Id. at 591; see also U.S. Const. art I, § 8, cl. 3.

³¹ Ironically, this decision placed the federal government at greater risk by dividing the Court and the Executive. President Jackson is reputed to have said: "John Marshall has made his decision, now let him enforce it!" *But see*, ROBERT V. REMINI, THE LEGACY OF ANDREW JACKSON: ESSAYS ON DEMOCRACY, INDIAN REMOVAL, AND SLAVERY 25, 30 (1988) (arguing that Jackson would not have said this reputed statement).

³² Act of Mar. 3, 1871, 16 Stat. 566 (1871) (codified as amended at 25 U.S.C. § 71 (2006)).

 $^{^{33}}$ General Allotment Act, ch. 119, 24 Stat. 388 (1887), *repealed* by Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006).

³⁴ Padraic I. McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151, 27 Am. INDIAN L. REV. 421, 422 (2002–2003).

Indians.³⁵ Finally, deprived of their "aboriginal title," many tribes were decimated—what little land they had was now gone, their tribes were no longer recognized political entities, and their children were disabused of Indian language and practice.³⁶

In the wake of the assimilative efforts of the Allotment Era, the federal government made movements towards total termination of tribal recognition beginning in 1953 and continuing into the 1960s. The During what is now known as the Termination Era, the federal government sought to terminate the trust relationship altogether by taking reservation lands out of trust, and dismantling tribal governments. In the realm of criminal jurisdiction, Congress passed Public Law 280 in 1953, which provided certain states with jurisdiction over Indian offenses that had previously been the federal government's responsibility to prosecute, relieving itself of its own trust duties to enforce laws in "Indian Country."

Indian trust lands lost to Allotment or Termination may be irretrievable; however, tribes have been very successful in gaining a political stronghold in the United States⁴⁰ and proving President Washington incorrect in his assessment of the Indians' ability to survive.⁴¹ While much of this success has come by way of political maneuvering, tribes have also had some limited success in court.⁴² Treaties are by far the strongest tool in litigation, partly because of the interpretive principles developed by courts, and partly because of the nature of the document.⁴³ It is a powerful reminder of the nation-to-nation relationship between the United States and tribes. Moreover, because of particular provisions, treaties reserve to tribes off-reservation rights in water, game and fish, and other easements, which as legislative acts between the tribe and the federal government are superior to state law.⁴⁴

³⁵ See, e.g., WILLIAM C. CANBY, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 23–24 (5th ed. 2009) (discussing the effects of the General Allotment Act on Indian ownership of allotted lands).

³⁶ See David H. Getches et al., Cases and Materials on Federal Indian Law 141–42 (5th ed. 2005) (discussing the effect of the allotment, assimilation, and the Dawes Act on Indian political autonomy, culture, and traditions).

 $^{^{37}}$ Canby, supra note 35, at 27 (citing H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953)).

³⁸ Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006), and 25 U.S.C. §§ 1321–1326 (2006)).

³⁹ 18 U.S.C. § 1151 (2006) (defining "Indian Country").

⁴⁰ See Fisher, supra note 3, at 1 ("Any expansion of Indian rights is most likely to come from statutes, presidential leadership, agency regulations, and the political process.").

⁴¹ Letter from George Washington to James Duane, *supra* note 29, at 136–37, 140.

 $^{^{42}}$ See, e.g., Fisher, supra note 3, at 14–15 (discussing successful court decisions supporting tribal hunting rights).

⁴³ See Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 409–28 (1994) (describing treaty rights activism); see also, e.g., Winans, 198 U.S. 371, 381 (1905) (holding that treaty was a grant of rights from Indians and therefore fishing rights not mentioned in the treaty were retained by tribe); Winters v. U.S., 207 U.S. 564, 575–77 (1908) (finding that treaty reserved implied water rights).

⁴⁴ U.S. CONST. art. VI, cl. 2.

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B. Treaty Interpretation

Treaties evidence the nation-to-nation status that tribes possess vis-à-vis the federal government. It grew out of this initial constitutional relationship, but after the creation of countless reservations, expanded to recognize the loss of the Indian's traditional modes of survival: "[d]eprived of a land base large enough to supply their subsistence, [the Indians] became dependent on federal rations promised in treaties." This separate nation status is unique in the world with regard to indigenous peoples and serves as a model for other countries where Europeans have colonized aboriginal lands. 47

Likewise, the trust doctrine serves as a guiding principle in the interpretation of treaties. It manifests itself in two ways: 1) treaties are to be understood in the manner that the signing Indians would have understood them, and 2) ambiguities in treaty making are to be resolved in favor of Indians.⁴⁸

First, treaties are to be read as the Indians would have understood their terms at the time of treaty-making.49 Federal courts have recognized the essential challenges that language posed for the creation of meaningful compacts between the government and tribes.⁵⁰ Indians spoke a wide variety of languages, most unwritten, that each had their own variants and dialects. In the Northwest, for instance, in order to communicate as travel and trading increased in the early nineteenth century, the various Indian, French, Spanish, British, Russian, and American groups developed the Chinook Jargon.⁵¹ Of course this language developed out of necessity in order to communicate regarding fairly basic matters and would have been unable to capture many of the complex legal matters described in the treaties. Moreover, since these treaties were often attended by elements of duress and fraud, the courts are careful to determine the exact nature of what the Indians understood the treaty to convey.⁵² Under the same reasoning which is applied to adhesion contracts in contract law, federal courts have, therefore, found this interpretive framework to be more than simply a equitable consideration, but indeed the principle of treaty interpretation.53

Second, courts consider ambiguities in treaties and agreements made with the Indians in the light most favorable to the Indians.⁵⁴ Under the above

⁴⁵ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

⁴⁶ GETCHES ET. AL. supra note 36, at 141.

⁴⁷ See Duane Champagne, From First Nations to Self Government: A Political Legacy of Indigenous Nations in the United States, 51 Am. Behavioral Scientist 1672, 1675–76 (2008).

⁴⁸ Canby, *supra* note 35, at 122.

⁴⁹ Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

⁵⁰ Jones v. Meehan, 175 U.S. 1, 11 (1899).

 $^{^{51}\,}$ George Lang, Making Wawa: The Genesis of Chinook Jargon 127–28 (2008).

⁵² Choctaw Nation, 397 U.S. at 630–31.

 $^{^{53}}$ See Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 882 n.10 (1962) (explaining history of concept).

⁵⁴ Jones, 175 U.S. at 11; Choctaw Nation, 397 U.S. at 631.

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interpretive rule and because treaties represent a grant from the Indians and not to the Indians, ambiguity in the text should be interpreted to the benefit of the Indian party. Indeed, courts also apply this canon of construction broadly to agreements and executive orders negotiated with Indians such that the documents "are to be resolved from the native standpoint. These canons of construction do not imply a "special privilege" that contradicts constitutional principles of equal protection; instead, it is important to remember that Indians hold a political, non-racial status in the United States, that historical disparities militate for some level of equitable consideration, and most importantly, that these treaties were essentially adhesion contracts.

Thus, in the context of the political relation between the federal government and tribes, an interpretive view that validates the disadvantaged bargainer is consistent with common law treatment of adhesion contracts. The treaties themselves were creatures of Western legal tradition, and no tribe ever solicited the government to enter into one. Modern courts seem loathe to admit that often Indians signed these treaties under threat of annihilation.⁵⁸ Rather than void the treaties, therefore, it is simpler to construe the treaties in a manner favorable to tribes—to view the treaties as if, in the first place, they actually were for the benefit of the tribes. This legal fiction is preferable in light of the dearth of legal remedies to which a tribe has access outside of treaty enforcement.

C. Reserved Fishing Rights

In order to understand the greater social and legal context in which the Ninth Circuit's recent Colville decision operates, it is crucial to understand the role of fish in traditional Indian culture, the background of Indian fishing rights in general, and in particular the background of those fishing rights in the Northwest.

⁵⁵ Winans, 198 U.S. 371, 381 (1905) ("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 they breathed. 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. 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.").

⁵⁶ U.S. v. Washington, 235 F.3d 438, 442 (9th Cir. 2001).

⁵⁷ Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

⁵⁸ See, e.g., Andrew Dominique Pambrun, Sixty Years on the Frontier in the Pacific Northwest 95 (1978) (relating from the perspective of an interpreter the conversation between Isaac Stevens and the Indians at the Walla Walla Council of 1855).

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1. Importance of Salmon

For tribes in present day Northern California, Oregon, Washington, Idaho, Canada, and Alaska, salmon represent more than simply a source of food; they are essential to life and culture itself. Anadromous fish hatch in shallow freshwater streams hundreds of miles inland from the ocean and in the early spring return to the ocean. Salmon hatched at these locations return to the very same streams to spawn again. From time immemorial the Columbia Plateau tribes of the Northwest followed these fish runs. The various Indian tribes depended on the fish for subsistence throughout the year; and their annual harvest festivals celebrated the bounty of the salmon with dances and ceremonies as well as drying and curing the fish for use later in the year. Indeed, the salmon were "were not much less necessary to the existence of the Indians than the atmosphere they breathed."

⁵⁹ E. Richard Hart, *The History of The Wenatchi Fishing Reservation*, 13 W. LEGAL HIST. 163, 202–03 (2000); RICHARD SCHEUERMAN, THE WENATCHEE VALLEY AND ITS FIRST PEOPLES: THRILLING GRANDEUR, UNFULFILLED PROMISE 16 (2005) ("The process of selection and change over several hundred thousand years of North Pacific glaciation separated out several species of Salmonidae including the five members of the genus Oncorhynchus ('Hooked Snout') that migrated so extensively and were of such significance to the Columbia River tribes."). These five species are Steelhead trout (rainbow) (*Oncorhynchus mykiss*); Chinook (king, tyee) (*Oncorhynchus tshwawytscha*); Silver (Coho) (*Oncorhynchus kisutch*); Chum (dog, white) (*Oncorhynchus keta*); and Sockeye (blueback) (*Oncorhynchus scouleri*). Gold Seal, Pacific Salmon: Five of a Kind, http://www.goldseal.ca/wildsalmon/species.asp (last visited Jul. 9, 2011); AlaskaSalmon.com, Steelhead Trout Salmon, http://www.alaskasalmon.com/types-of-salmon/steelhead/ (last visited Jul. 9, 2011). The Wenatchi had names for each seasonal variation of each fish in both the Sahaptin and Salish languages. SCHEUERMAN, *supra*, at 16.

⁶⁰ Salmon in Idaho, for instance, travel over 900 miles at an elevation change of 6500 feet in order to make their way to and from the ocean. Smith, *supra* note 17, at A4.

⁶¹ Robert T. Lackey et al., *Wild Salmon in Western North America: The Historical and Political Context, in* Salmon 2100: The Future of Wild Pacific Salmon 13, 21 (Robert T. Lackey et al. eds., 2006).

⁶² SCHEUERMAN, supra note 59, at 37.

⁶³ Winans, 198 U.S. 371, 381 (1905). The creation myth explaining the origins of the Wenatchi and other Columbia Plateau tribes recounts how the Creator, Haw'iyuncútun, directed all of the Animal People to make preparations for human beings as the land was ideal for survival; once there, Coyote, the changer, brought salmon to the people to reward them for their graciousness. SCHEUERMAN, *supra* note 59, at 9–10. According to legend, Coyote told the people:

Every Spring you must have a big feast . . . to celebrate the coming of the salmon. Then you will thank the salmon spirits for guiding the fish up the streams to you, and your Salmon Chief will pray to those spirits to fill your fish traps. During the five days of the feast, you must not cut the salmon with a knife, and you must cook it only by roasting it over a fire. If you do as I tell you, you will always have plenty of salmon to eat and to dry for winter

ELLA E. CLARK, INDIAN LEGENDS OF THE PACIFIC NORTHWEST 97 (1953). The Wenatchi also celebrated festivals for the seasons of wild berries and roots throughout the year, but even with the addition of these other staples, salmon accounted for approximately a third of their diet. Hart, *supra* note 59, at 203; SCHEUERMAN, *supra* note 59, at 37, 39 ("Other plant foods utilized by the Wenatchi were the roots of wild potato, wild onion, tiger lily, cattail, wild celeries, and pine nuts.").

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2. Winans—Not a Grant to the Indians, but from the Indians

In *United States v. Winans*, the Supreme Court determined that a tribe may reserve through treaty provisions the right to fish and hunt at "all usual and accustomed" places. ⁶⁴ In this case, the court held that the Winans brothers, who obtained a license from Washington to erect a fish wheel on the Columbia River, could not exclude the Yakama from crossing their private land and catching the fish. ⁶⁵ Not only did the brothers erect fences that kept the Yakamas and other tribes from accessing their usual and accustomed fishing grounds, but the fish wheel they had erected was such an efficient method of catching the salmon that it limited the take available for the Yakama Tribe. ⁶⁶ Moreover, under the interpretive principles summarized above and the plain language of the treaty, it simply could not be denied that this right was one that the Indians intended to reserve for themselves. Under the trust doctrine, the federal government necessarily has to protect this right from the interference of the state or else be subject to takings claims. ⁶⁷

It likewise follows that the regulation of the state does not apply to the Indian fishermen while fishing under their reserved treaty rights at usual and accustomed locations unless "necessary for the conservation of fish." Moreover, while at their usual fishing grounds, the state may not place unreasonable restrictions on the structures and devices used by the Indian fisherman. While these decisions may seem to unfairly favor tribal citizens who represent a small portion of the population by giving them a right to fish free of regulation based purely on their Indian status, that is an incomplete description of the right as the courts have determined it. As an initial limitation on Indian fishing rights are the tribe's own regulations. These treaty rights are not based on the fact that the claimants are Indians, but rather on their specific tribal status, and therefore, their specific *treaty* rights: "The treaty protects only the fishing grounds of signatories, not of the after-affiliated tribes." Thus, the 'usual and accustomed places' are those of the tribe that signed the treaty.

⁶⁴ Winans, 198 U.S. at 371–72; see also Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (finding also that a tribe may reserve off-reservation hunting and fishing rights by looking to similar treaty language).

⁶⁵ Winans, 198 U.S. at 384.

 $^{^{66}}$ David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 125 (2001).

⁶⁷ See Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (holding that, despite Termination, the Menominee Tribe retains hunting and fishing rights, more specific congressional action being required to destroy property rights granted by treaty and compensable as property).

⁶⁸ Tulee v. Washington, 315 U.S. 681, 684 (1942).

⁶⁹ Sohappy v. Hodel, 911 F.2d 1312, 1319 (9th Cir. 1990).

 $^{^{70}\,}$ Fronda Woods, Who's in Charge of Fishing, 106 Or. Hist. Q. 412, 435 (2005).

⁷¹ Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, 178–79 (9th Cir. 1981); see also State v. Goodell, 734 P.2d 10, 12 (Or. App. 1987) (holding that members of various bands of Chinook Indians who never signed ratified treaties with United States had no treaty rights to use their usual and accustomed fishing locations).

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3. Fishing Rights in the Northwest

United States v. Washington, decided by District Judge George Hugo Boldt, held that Indians fishing in the State of Washington have a right to take up to fifty percent of the fish. This decision immediately caused an uproar—citizens of the state, with no knowledge of the treaty rights and only a vague notion of the American Indian history in their area, burned the judge in effigy and rallied against the federal interference with state gaming regulations as an unconstitutional application of law. Senator Slade Gordon, then attorney general, appealed the decision to the Ninth Circuit, which affirmed the reasoning of the district court. Finding that the central reasoning was sound and that the laws of the federal government which authorized the creation of the treaty pre-empted the state regulations, the Ninth Circuit essentially affirmed Judge Boldt's decision. In subsequent litigation, the district court took continuing jurisdiction over the case because of the state's refusal to enforce federal rules.

In addition to their immense value to the tribes, as well as the economic value that salmon hold for commercial fisherman, their decreased numbers are likewise a driving factor behind the contentious nature of the dispute. Dams like the Grand Coulee Dam, and other detrimental factors, have reduced the Columbia River salmon population to less than ten percent of what it was when Lewis and Clark's expedition arrived in the Northwest. But multiple parties are invested in conserving salmon stocks and are therefore motivated to find regulatory schemes that benefit everyone. Working together, the states, the tribes, and the federal government have helped to fund significant hatchery projects, fish ladders, and habitat restoration in order to increase the salmon population in the Columbia basin. These efforts have shown some success, but have not curtailed litigation surrounding the fishery.

 $^{^{72}}$ United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), $\it aff'd$, 520 F.2d 676 (9th Cir. 1975).

 $^{^{73}\,}$ Charles Wilkinson, Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way 58 (2000).

⁷⁴ United States v. Washington, 520 F.2d 676, 682 (9th Cir. 1975).

⁷⁵ *Id.* at 693.

⁷⁶ United States v. Washington, 384 F. Supp. at 405, 408 (currently assigned to Judge Ricardo S. Martinez); see also, Janet Davis Gray, Note, Fishing Vessel Association: Resolution of Indian Fishing Rights Under Northwest Treaties, 16 WILLAMETTE L. REV. 931, 942–43 (1979–80).

⁷⁷ NORTHWEST POWER AND CONSERVATION COUNCIL, BRIEFING BOOK 6 (2007) available at www.nwcouncil.org/library/2007/2007-1.pdf (noting that during the 1870s, total salmon runs on the Columbia were between ten to sixteen million fish); Smith, *supra* note 17, at A1 (stating that the sockeye runs alone prior to 1938 were around three million, whereas there were 213,000 in 2008).

⁷⁸ Woods, *supra* note 70, at 434–35.

⁷⁹ André J. Talbot & Peter F. Galbreath, *Salmon Restoration—A Native American Perspective from the Columbia River, in* SALMON 2100: THE FUTURE OF WILD PACIFIC SALMON, *supra* note 61, at 551, 560–61.

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III. HISTORICAL BACKGROUND

Here, an historical overview of the Wenatchi from their existence prior to European settlement to the signing of the 1894 Agreement will provide the reader with the context necessary to understand the full background of the Ninth Circuit's decision in *Colville*.

A. The Wenatchi and Other Tribes of the Columbia Plateau Prior to White Settlement (? –1800)

The Wenatchi Tribe is one of the fourteen distinct tribal groups residing on the Colville Reservation, which comprise a federally recognized confederated tribe. ⁸⁰ Wenatchi have lived in and around the Wenatchee Valley since time immemorial. ⁸¹ The Wenatchi were one of several groups who together made up the tribes of the Middle Columbia of the Columbia Plateau Indians residing in present day Washington; a group which includes dozens of other tribes such as the Snoqualmie, Columbia-Sinkiuse, Kittitas, and the Yakama-Palouse: ⁸²

In the pivotal decade of the 1850s, five distinct bands comprised the Wenatchi with closely related neighboring tribes upstream including the Entiat, Chelan, and Methow. Unlike the Plains Indians, however, the Wenatchi were a "tribe" less in a political sense than linguistic and geographic.... Rather, each band was autonomous under the leadership of its own headmen and was known by a distinctive name. The westernmost band, the Sinpusq'isoh, was generally headquartered in the vicinity of their famous fishery.... ⁸³

These tribes shared social, religious, and political practices but considered themselves distinct groups. ⁸⁴ Tribal leaders, or "headmen," had authority based on knowledge and diplomacy, but none were considered "Head Chief" of the various tribes. ⁸⁵

⁸⁰ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,810 (Oct.1, 2010).

⁸¹ Courts often use the phrase "time immemorial" to describe Indian relations back to property rights that pre-exist colonial settlement. *See, e.g.*, Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 775 (1985) (Marshall, J., dissenting) ("The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if nonexclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.") (citing United States v. Sioux Nation of Indians, 448 U.S. 371, 422–423 (1980); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); and *Tulee*, 315 U.S. 681, 684–85 (1942)).

 $^{^{82}\,}$ Scheuerman, $supra\, {\rm note}\, 59,$ at xxii.

⁸³ *Id.* at 35.

⁸⁴ *Id.* at xxii.

 $^{^{85}}$ See Alvin M. Josephy, Jr., The Nez Perce Indians and the Opening of the Northwest 286–90 (abr. ed. 1971) (indicating that Kamiakin, a noted Yakima leader, was mistakenly

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No records exist to determine exactly how long it has been "since time immemorial," but scientific findings and Indian narratives indicate that it is a very long time. Scientists have postulated that the last major flood of the Columbia Plateau would have been roughly 13,000 years ago. ⁸⁶ Even given the range allowed by the scientists' carbon-dating, ⁸⁷ that would imply that the Ancestors of the current Indians could probably have inhabited the land since before recorded history in the Western world. Indeed, the discovery of 9,300-year-old remains in Kennewick, Washington establishes that humans were probably in the area since at least that time. ⁸⁸

In addition to seasonal migrations, which followed the wild harvests, the Wenatchi and related bands traveled extensively for trade with other Indians. After the introduction of horses on the Columbia Plateau in the 1730s, they traveled as far east as the plains of present day central Montana to trade with the Blackfoot. They also traveled south to Celilo Falls, which served as a trading spot between Sahaptin and Coastal Salish tribes. At The Dalles, the Wenatchi traded furs, roots, pemmican, feathers, clothing, and horses. These items were then transported north for trade with the Okanogan, San Poil, and other tribes of the Upper Columbia. But at least 200 Wenatchi stayed at the Wenatchapam Fishery at the forks of the Wenatchee and Icicle rivers yearlong and in the summer that number swelled to over 3,000 Indians from the various Middle Columbia Tribes.

B. Contact with Non-Indian Traders

The Wenatchi and other tribes were amicable with the non-Indians, but the Indians were nevertheless wary of non-Indian incursions into their territory.³³ Disputes arose when non-Indians punished Indians (sometimes by hanging) for stealing various dry goods, which the Indians perceived as just

considered the head chief of several of the Middle Columbia tribes by non-Indians unfamiliar with the tribes' organization).

⁸⁶ Donal R. Mullineaux et al., *Age of the Last Major Scabland Flood of the Columbia Plateau in Eastern Washington*, 10 Quaternary Research 171, 178 (1978).

⁸⁷ See id. at 178 (noting that the uncertainty in radiocarbon dating ranges from tens of years to a few hundred years).

 $^{^{88}}$ Glynn Custred, *The Forbidden Discovery of Kennewick Man*, 13 ACAD. QUESTIONS 12, 13 (2000).

 $^{^{89}}$ See Scheuerman, supra note 59, at 36 (noting that visits to the Blackfoot areas could last several years).

⁹⁰ Id. Celilo Falls is recognized as the oldest continually habited location in North America. WILLIAM DIETRICH, NORTHWEST PASSAGE: THE GREAT COLUMBIA RIVER 52 (1995). Prior to the construction of The Dalles Dam in 1957, The Dalles-Celilo Reach was probably the most productive inland fishery in North America. Cain Allen, "Boils Swell & Whorl Pools": The Historical Landscape of The Dalles-Celilo Reach of the Columbia River, 108 OR. HIST. Q. 546, 547 (2007).

 $^{^{91}\,}$ Scheuerman, $supra\, {\rm note}\, 59,$ at 36.

⁹² Hart, *supra* note 59, at 165

 $^{^{93}}$ See Josephy, supra note 85, at 290–91 (noting that Chief Owhi, who was closely related to the Wenatchi, had a reputation for friendliness but was concerned when he heard of McClellan's intentions in the area).

payment for their gestures of welcome. Moreover, even before the arrival of the traders, the Indians of the Columbia Plateau had already begun to feel the devastating effects of epidemics and their population was quickly receding. Figures from this era are subject to debate by historians, but Mooney puts the Piskwau group, including the Wenatchi tribe, at around 1,400 persons in 1780, lathough Lewis and Clark calculated the Wenatchi at 820. Plate 1853, the combined population of Wenatchi, Okanogan, and Columbia Indians was estimated at 550; and by 1905, only 93. As a point of comparison, between the passage and expiration of the Donation Land Claim Act, the territorial population rose from 8,000, to 30,000.

In the summer of 1853, Captain George B. McClellan and about sixty of his men entered Wenatchi territory on an exploratory mission accompanied by the Kittitas Chief Owhi, and met the Wenatchis. Dut even prior to this first meeting, "[t]he Wenatchi and their Columbia-Sinkiuse neighbors knew of McClellan's movements in the region and some expressed concern about his intentions. Apparently overlooking "the significance of Kamiakin's irrigated vegetable gardens and barley field, the tribe's cattle herds, or the priests' bountiful orchard," McClellan expressed the intentions of the United States to build a road over the Cascade Mountains to Puget Sound (he did not mention anything about a railroad). After several days of meetings, Chief Owhi agreed to allow McClellan to build his road: "This seemed the reasonable course to avoid what tragedies had befallen the Indians of the East and California.... For [his] part, McClellan... surely approved of

⁹⁴ In 1813, the Astorian, John Clarke, hung a Palouse Indian who returned a goblet that he had taken. Scheuerman, *supra* note 59, at 54; *see also* James P. Ronda, Lewis and Clark Among The Indians 172 (1984) (explaining that the Indians took goods not out of a lack of respect for personal property, but to compensate themselves for services rendered and to force the Europeans to respect them).

⁹⁵ Leslie M. Scott, Indian Diseases as Aids to Pacific Northwest Settlement, 29 Or. HIST. Q. 144, 144 (1928) ("Indian population lost heavily in the Pacific Northwest during the half century that preceded Oregon Trail migration. Probably eighty per cent of the native peoples were swept away by the white man's diseases. Along the Lower Columbia River, among the Chinookan tribes, the aboriginal destruction reached ninety-five per cent. Some tribes were exterminated. Without this desolation of the savages, settlement by ox-team pioneers would have been delayed one or two decades, and then would have encountered the protracted horrors of savage warfare.").

⁹⁶ JAMES MOONEY, The Aboriginal Population of America North of Mexico, 80 SMITHSONIAN MISCELLANEOUS COLLECTIONS, 1928, at 1, 16; cf. Access Genealogy, Wenatchi Indian Tribe Location, http://www.accessgenealogy.com/native/washington/wenatchee_indian_tribe_location.htm (last visited Apr. 15, 2011) (noting that at least one scholar believes that Mooney's estimation of the Wenatchi in 1780 is considerably low).

⁹⁷ Access Genealogy, *supra* note 96.

 $^{^{98}}$ Scheuerman, supra note 59, at 61.

 $^{^{99}}$ John McA. Webster, Report of Agent for Colville Agency, H.R. Doc. No. 59-5, at 357 (1906).

¹⁰⁰ Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496 (1850).

¹⁰¹ SCHEUERMAN, *supra* note 59, at 61.

¹⁰² Josephy, *supra* note 85, at 291; Scheuerman, *supra* note 59, at 3.

¹⁰³ SCHEUERMAN, *supra* note 59, at 3.

 $^{^{104}}$ Id. at 4. McClellen's geologist, George Gibbs, wrote, "it is difficult to imagine" that the Columbia Plain would ever serve "any useful purpose." Id.

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Tecolekun and Owhi's request for protection of the historic Wenatchi fishery."¹⁰⁵ The Indians were wise to be skeptical of McClellan, and Kamiakin and other chiefs had already begun mobilizing forces.¹⁰⁶

Isaac I. Stevens secured appointment as the Territorial Governor in 1853, then also assumed the title of Territorial Superintendent of Indian Affairs and was named the supervisor of the Northern Pacific Railroad survey. The slight and irascible man was essentially the Napoleon of the Northwest. Over the course of a single year, Stevens negotiated ten Indian treaties at eight separate councils and secured from the Indians the vast majority of the lands that comprise present day Washington. Though modeled on the George Manypenny Treaties that sought to incorporate President Jefferson's agrarian ideals, in truth, Stevens and others in the federal government viewed these treaties as "temporary expedient[s]' that were expected to provide a safe haven until tribal members became 'enterprising and prosperous American citizens."

C. The Yakama Treaty of 1855

Normally, at the conclusion of treaty negotiations both parties agree to set down their weapons and abide peaceably by the terms of the treaty. However, that was not the case with the Yakama Treaty of 1855, in signed at the Walla Walla Council of the same year, because in this case there was no dispute. Instead, the treaty was for the sole purpose of removing an impediment to progress: for Stevens, settlement was progress, and it could

¹⁰⁵ *Id.* at 21; *see, e.g.*, Indian Commissioner Mix on Reservation Policy, Annual Report of the Commissioner of Indian Affairs (1858), *reprinted in* Documents of United States Indian Policy 92, 93 (Francis Prucha ed., 2d ed. 1990) ("The policy of concentrating the Indians on small reservations of land, and of sustaining them there for a limited period, until they can be induced to make the necessary exertions to support themselves, was commenced in 1853, with those in California. It is, in fact, the only course compatible with the obligations of justice and humanity, left to be pursued in regard to all those with which our advancing settlements render new and permanent arrangements necessary.").

¹⁰⁶ A.J. SPLAWN, KA-MI-AKIN: LAST HERO OF THE YAKIMAS 22–24 (1944). Elsewhere, communications between government agents and tribal leaders were less cordial. Large wagon trains deviating North from the Oregon Trail over Naches Pass entered into Yakama territory on their way to Puget Sound, offending the tribes; and in the same year as this meeting, forty-seven white settlers died from Indian attacks. KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY 192 (Wash. State Univ. Press 1993) (1979).

¹⁰⁷ SCHEUERMAN, supra note 59, at 61-62

¹⁰⁸ RICHARDS, *supra* note 106, at 16. Stevens displayed his megalomania in a speech made to the Territorial Legislative Assembly in 1854: "In this great era of the world's history, an era which hereafter will be the theme of epics and the torch of eloquence, we can play no secondary part of we would. We must of necessity play a great part if we act at all." SCHEUERMAN, *supra* note 59, at 62.

 $^{^{109}\,}$ Richards, supra note 28, at 347; RICHARDS, supra note 106, at 197–234.

 $^{^{110}}$ Richards, supra note 28, at 347 (quoting Francis Paul Prucha, The Great Father 317 (1984)).

 $^{^{111}}$ Treaty with the Yakamas, U.S.–Yakama Nation of Indians, June 9, 1855, 12 Stat. 951 (1855) [hereinafter Yakama Treaty].

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not be completed without first extinguishing aboriginal title in the land. ¹¹² It is little wonder, then, that the years following the signing of the treaty were fraught with violence—resistance and defiance on the part of the Indians and retaliation on the parts of the United States Army and the Civilian Militia. Therefore, the Yakama Treaty of 1855 may be one of only a very few treaties that actually started a war. ¹¹³

Stevens' objective in the treaty negotiations was to extinguish aboriginal title and open up land to settlement and development. 114 Stevens called more than seventeen distinct tribes to the council at Walla Walla, but signed only three treaties; the treaty he signed with the "Yakima" was really an agreement with a confederation of fourteen tribes. 115 Stevens recognized that the tribes were distinct political units, but "for the purposes of this treaty" he "considered [the tribes] as one nation, under the name of 'Yakama.'" 116 Stevens spoke at length, for over a week, extolling the virtues of reservation life, but the chiefs were unimpressed; after a half century of trading and dealing with settlers, the Indians were not "naïve primitives, but... owned horses, cattle, and cultivated lands. The Walla Walla Council was a negotiating session between parties whose capacity to draw upon a common set of assumptions about the past and future was closer than often assumed."117 While some of the tribes' leaders demonstrated a willingness to cede lands for a reservation, others, such as the Walla Walla and Cayuse of the northern tribes were dismayed by the idea of a distant southern reservation.118

After a week of continued negotiations, Stevens grew impatient.¹¹⁹ Chief Owhi addressed the council, "Shall I say that I will give you my land? I cannot say, I am afraid of the almighty.... My people are far away, they do not know your words," and in response to further protests of a similar nature, Stevens concluded bluntly: "The papers will be drawn up tonight." The following morning, when Kamiakin and other tribal leaders prepared to leave the council grounds, Stevens was outraged and threatened that should they leave, Kamiakin's Yakama would "walk in blood knee deep." At Stevens' further insistence and the urging of fellow chiefs, Kamiakin as well as thirteen others, including Tecolekun of the Wenatchi, signed the treaty

¹¹² SCHEUERMAN, supra note 59, at 62.

¹¹³ RICHARDS, *supra* note 106, at 239–44.

¹¹⁴ Id. at 215 (quoting Stevens as having said: "I confidently expect to accomplish the whole business, extinguishing the Indian title to every acre of land in the territory").

¹¹⁵ For example, in attendance at the treaty were also Nez Perce, Cayuse, Walla Walla, Wenatchi, and other northern tribes. Scheuerman, *supra* note 59, at 63–65; *see also*, Clifford E. Trafzer, *The Legacy of the Walla Walla Council, 1855,* 106 Or. Hist. Q. 398, 398 (2005); Yakama Treaty, *supra* note 111, at 951 (listing the fourteen tribes).

¹¹⁶ Yakama Treaty, supra note 111, at 951.

¹¹⁷ SCHEUERMAN, supra note 59, at 64 (quoting RICHARDS, supra note 106, at 220).

¹¹⁸ Id.

¹¹⁹ Pambrun, *supra* note 58, at 95.

¹²⁰ SCHEUERMAN, supra note 59, at 64.

 $^{^{121}}$ Pambrun, supra note 58, at 95.

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against their will. ¹²² Of particular interest to the Wenatchi and the *Colville* decision is Article X:

[T]here is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations. ¹²³

At the end of the negotiations, the Yakama had been persuaded to surrender its interest in 29,000 square miles in return for a reservation of less than 2,000 square miles and \$650,000. 124

Miners and speculators were already making their way north through the valley as the chiefs signed the treaty, and well before its ratification. The treaty opened cession lands "not actually occupied and cultivated by said Indians in 1855, and not included in the reservation" to settlement; but the federal government had neither ratified the treaty nor set aside the reserved lands. The duress incurred at the treaty table and the arrival of self-entitled non-Indians on Indian ancestral lands prompted many of the tribes and bands to attack white settlers. This fighting drew the attention of the Army, who fought the Indians on dual fronts from Fort Simcoe and Fort Dalles. Initial campaigns were unsuccessful and, despite disagreement with the Army, Stevens raised a civilian militia, which mercilessly attacked villages of women and children. 129

Throughout these battles, the Wenatchi remained relatively uninvolved.

130 Indeed, the Wenatchi took this opportunity instead to confirm their peaceful intentions and seek out government agents who would be

¹²² SCHEUERMAN, supra note 59, at 65.

¹²³ Yakama Treaty, supra note 111, at 954 (art. X).

¹²⁴ SPLAWN, *supra* note 106, at 35–36.

¹²⁵ ROBERT H. RUBY & JOHN A. BROWN, INDIANS OF THE PACIFIC NORTHWEST: A HISTORY 95–97 (1981).

¹²⁶ Yakama Treaty, *supra* note 111, at 952 (art. II).

¹²⁷ SCHEUERMAN, *supra* note 59 at 71; SPLAWN, *supra* note 106, at 38 (citing the treaty as a primary source of conflict); LUCULLUS VIRGIL MCWHORTER, TRAGEDY OF THE WHAK-SHUM 15 (Donald M. Hines ed., 1994) (claiming that Chiefs Owhi and Kamiakin did not intend to sign the treaty, believing their signatures were a mark of friendship).

¹²⁸ SCHEUERMAN *supra* note 59, at 71, 73, 80–81.

¹²⁹ *Id.* at 77 ("Theoretically [the Oregon and Washington Militias] were to be under the authority of the army, but, in fact, the territorial governors granted them independent command under appointed 'colonels.' This deepened the wedge between the military ... who sought to resolve issues through honest negotiation, and the civilians under the Governor Stevens who preferred to war against the Indians in the interior. Accordingly ... [the] Oregon Volunteers and ... Washington Volunteers massacred entire villages, plundered missions and murdered and mutilated the great Walla Walla chief, Peopeo Moxmox in their attempts to crush the 'savages.' Believing all Indians to be guilty of precipitating the war, they did not distinguish between those who were hostile and peaceful.").

¹³⁰ Hart, *supra* note 59, at 165–68.

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willing to mark the boundaries of the Wenatshapam fishery. ¹³¹ First in 1856, Chief Skamow met with Colonel George Wright, who actually marked boundaries for a six-mile reservation around the fishery and reiterated that the United States would honor the Treaty; ¹³² then two years later Captain J.J Archer, upon learning that Skamow and others had helped protect white settlers from raiding Indians, stated his intention to make sure an eight-square mile reservation was marked out. ¹³³ By the late summer of 1858 the Army had successfully subdued the Indians through "scorched earth" destruction of their villages. ¹³⁴ Throughout all of this, the Wenatchi, persisted at their fishery, believing that eventually the government agents would survey their reservation as promised. ¹³⁵

D. End of the Treaty Era, Allotments, and the 1894 Agreement

By the 1880s, there were still very few permanent American settlers living in Wenatchee Valley, ¹³⁶ but recent legislation threatened the Wenatchi's territory and gave the Indians reason for concern. Passage of the Indian Appropriations Act of 1871 marked the end of the treaty era as the United States' Indian policy turned from conciliation to assimilation. ¹³⁷ To this end, Congress passed legislation under the Indian Appropriations Act of 1875 that came to be known as the Indian Homestead Act because it extended the Homestead Law of 1862 to Indians, allowing individual Indians to claim parcels of off-reservation land that would remain inalienable for five years without renouncing tribal status. ¹⁴⁰ Few Indians took advantage of these land grants, but even as early as 1869, the Board of Indian Commissioners began

 $^{^{131}}$ Id. at 165–66. Chief Harmelt recounted the words of Chief Skamow (or Shamouck as in the record) at the time: "I have laid this stick down here, and I will not raise it up against you . . . I want to keep my land. I don't want to be moved from this Wenatshapam to any other place. If I am moved I will be treated badly. This country is just like my mother. From this land I receive food for my own tribe. The Wenatshapam River is just like my mother. I get my salmon out of there and have good food. Just the same as my father or my mother raises me as a child, this is the way I am raised by this country." Council Proceedings (Dec. 18, 1839–Jan. 6, 1894), S. Exec. Doc. No. 53-67, at 26 (1894).

¹³² Hart, *supra* note 59, at 165–66.

 $^{^{133}\,}$ Id. at 166; S. Exec. Doc. No. 53-67, at 27.

¹³⁴ SCHEUERMAN, supra note 59, at 84.

¹³⁵ Hart, *supra* note 59, at 167.

¹³⁶ *Id.* at 171–72; ANN BRILEY, LONELY PEDESTRIAN: FRANCIS MARION STREAMER 17–18, 23, 90–93 (1986) (providing excerpts of the transient journalist Francis Marion Streamer, who traveled extensively in the area and, visiting the Wenatchee Valley in 1882, found only one other Caucasian, a priest named Father Grassi).

¹³⁷ The Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566; see also, Cohen's Handbook of Federal Indian Law 74–77 (Nell Jessup Newton et al. eds., 2005).

¹³⁸ The Indian Appropriations Act of 1875, ch. 131, § 15, 18 Stat. 402, 420, reprinted in 1 Indian Aff. L. & Treaties 23 (Charles J. Kappler ed., 1904).

¹³⁹ Homestead Act of 1862, ch.75, 12 Stat. 392 (1862).

 $^{^{140}}$ Francis Paul Prucha, American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900, at 233-34 (1964).

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seeing the potential for allotting the reservations into individual parcels in order to encourage Indians to settle into agrarian lifestyles. 141

On April 9, 1872, President Grant issued an Executive Order creating the Colville Reservation; ¹⁴² by summer, he issued a second Executive Order, which moved the reservation to the west, excluding certain native lands and rivers and shrinking the overall size. ¹⁴³ At a council held at Priests Rapids with General O. O. Howard in 1878, Indian Chiefs Moses and Harmelt again lobbied for reservation of the Wenatchi fishery, and the General made the recommendation to Washington. ¹⁴⁴ But as with the three previous statements reassuring the Wenatchi, this too would prove to be an empty gesture. And between 1883 and 1887, the government opened up settlement and mining on the Columbia Reservation, north of Colville and bordering Canada, giving Indians who resided there the choice of one-square mile allotments or transfer to the Colville Reservation. ¹⁴⁵ Congress later ratified easements and cessions that further shrank the Colville reservation ¹⁴⁶ (this land was eventually returned to trust status in 1956). ¹⁴⁷

The Wenatchi, who by now numbered less than 200, planned for the fact that they might never be allotted their reservation at the Wenatshapam fishery and sought out homestead surveys. By 1887, their claims came into conflict with those of white settlers, often fraudulently surveyed by the Benson Syndicate. The Commissioner of Indian Affairs directed special agent George W. Gordon to investigate the conflicting claims, and he visited the valley and spoke with settlers who claimed to have witnessed Colonel George Wright marking out the boundaries of the Wenatshapam between Icicle River and Peshastin Creek. Gordon recommended that Wright's correspondence be searched for the exact locations of the markings, but added that because there was then a white settlement overlapping the location (then called Mission), the reservation could be moved upstream at the Icicle fork where there were only white squatters, or, better still, moved eight or ten miles up the creek where there was no one. Isi

¹⁴¹ Report of the Board of Indian Commissioners, November 23, 1869, reprinted in Documents of United States Indian Policy 130, supra note 105, at 131–34.

 $^{^{142}}$ Gov't Printing Office, Executive Orders Relating to Indian Reservations: From May 14, 1855 to July 1, 1912, at 195 (1912).

¹⁴³ Id.

 $^{^{144}}$ See Hart, supra note 59, at 169.

¹⁴⁵ Agreement with the Columbias and Colvilles, ch. 180, 23 Stat. 79, 80 (1883), reprinted in 2 INDIAN AFFAIRS, LAWS AND TREATIES 1073, 1073–74 (Charles J. Kappler ed., 1904).

¹⁴⁶ See, e.g., Act of Jul. 1, 1892, ch. 140, 27 Stat. 62, 63 (opening part of the Colville reservation to non-Indian settlement); Act of Feb. 20, 1896, ch. 24, 29 Stat. 9 (extending mineral laws to the northern half of the Colville reservation lands).

¹⁴⁷ Act of Jul. 24, 1956, ch. 684, 70 Stat. 626.

¹⁴⁸ Hart, *supra* note 59, at 173, 175.

¹⁴⁹ *Id.* at 175; Francois D. "Bud" Uzes, LS, *The Fabric of Surveying in America: Surveying in California*, THE AM. SURVEYOR, Mar.–Apr. 2005, at 46, 50, *available at* http://www.amerisurv.com/content/view/3926/150/.

 $^{^{150}\,}$ Hart, $supra\, \mathrm{note}\ 59,$ at 175–76.

¹⁵¹ *Id.* at 177.

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By 1890 when Wapato John sent a letter to General Howard asking what had become of the Wenatchi reservation, at least three official recommendations had been made to the Commissioner of Indian Affairs to survey it. ¹⁵² No action was taken; instead when the Great Northern Railroad submitted plans that required going directly through the center of the proposed reservation, the Secretary of the Interior approved the plans within two months. ¹⁵³ Less than a year later, engineering and grading crews were already working on the line west of the Cascades. ¹⁵⁴ In 1892, the Yakima Indian Agent, Jay Lynch, sent a letter to the Commissioner asking whether the Wenatchi's fishery reservation had ever been surveyed, and the Commissioner directed Lynch to undertake the survey. ¹⁵⁵

Each subsequent attempt by the government to plot the survey was an effort to move the reservation away from the desired and agreed upon lands. As Gordon before him, Lynch assumed that the reservation would be better located further in the mountains at the head of the Wenatchee River where it flows from Lake Wenatchee. Of course, the Wenatchi as well as the other settlers in the area with whom Lynch spoke recalled that the intended location for the reservation was at the fork of the two rivers. One such settler reported having observed Lynch turning around before even making it up to the lake because of high water, and moreover, fixing the location on the basis of a defective map. Nonetheless, within about a month the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the President create the reservation by executive order, and shortly thereafter President Benjamin Harrison did so.

It took another year for the commissioner to hire a surveyor to actually complete the work in Wenatchee Valley, at which point the Great Northern Railroad had completed their work in the area. ¹⁶⁰ This development and the erroneous guidance of past agents affected where the surveyor could mark the boundaries of the reservation, and upon completion, he commented that only "a few salmon" made it up that far and that while there were some trout, they did "not appear to be abundant or easily caught." ¹⁶¹

Chief Harmelt and the Wenatchi noticed the agent incorrectly plotting the survey and asked him to correct it; he lied and told them: "I have no

¹⁵² Id. at 178–79.

 $^{^{153}}$ Id. at 180; Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 (1875) (granting railroads the right of way through the public lands of the United States). Under the law, lands subject to the act must be unencumbered property in the public domain—Indian trust land, of course, is a serious impediment to clear title. Id. \S 5, 18 Stat. at 483.

 $^{^{154}}$ Hart, supra note 59, at 181.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 182–83.

¹⁵⁷ *Id.*

 $^{^{158}}$ Letter from J.J. Mathews to the Secretary of the Interior (July 6, 1893), $\it in$ S. Exec. Doc. No. 53-67, at 9–10 (2d sess. 1894).

¹⁵⁹ Hart, *supra* note 59, at 182.

¹⁶⁰ *Id.* at 184–85 (noting that the final spike connecting the rails to the pacific had been driven on January 6, 1893, and that the official survey of the reservation began on August 10, 1893); SCHEUERMAN, *supra* note 59, at 117–19.

¹⁶¹ Hart, *supra* note 59, at 186.

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power nor authority to change the location." Further protests fell on deaf ears, and before the faulty survey could even be submitted for approval to the general land office, the Commissioner of Indian Affairs requested the Interior Secretary for leave to negotiate a cession of the lands on the grounds that it was incorrectly surveyed. 163 In a further example of the government's deception, and despite the common understanding that the Indians on the Yakima Reservation were distinct from those residing in the Wenatchee Valley, the Indian Agents persisted in contacting the Yakama Tribe, on the Yakima Reservation, 100 miles from the fishery where Harmelt and the Wenatchi were wintering.¹⁶⁴ Nevertheless, the agency recognized that the Wenatchi should be present; the acting Secretary of the Interior at the time, William Sims, wrote that "[t]he rights of such Indians in land or fishing privileges should be taken into consideration and protected." However, in the end, that was the exact opposite of the purpose and effect of the 1894 Agreement.

The behavior of the government's agents at the negotiations evidence what any modern court would describe as fraud. Harmelt and several other Wenatchi had traveled to the Council Proceedings a long distance through deep snow only to discover that they would not receive the fishery that had been promised. 166 Erwin reiterated that he had no power to move the reservation and suggested instead that the Indians profit by the government's mistake by selling the improperly surveyed reservation, 167 to which Chief Harmelt responded: "I can not steal money from the Government. The land don't belong to us and we have no right to sell it." 168 Erwin tried a different tack: "[I]f you agree to sell, you will be selling a privilege and not a property."169 To this, the Yakima Captain Eneas

¹⁶² Id. at 187.

¹⁶³ Id. at 188.

 $^{^{164}}$ Letter from D.M. Browning, Commissioner of Indian Affairs, and William H. Sims, Acting Secretary of the Interior, to John Lane, Special Agent, and L.T. Erwin, Indian Agent (October 13, 1893), in S. Exec. Doc. No. 53-67, at 15-17 (2d sess. 1894) ("In view however, of the formidable protests that have been made against the establishment of a reservation of so large an extent for so useless a purpose at this late day, the suggestion was made, and the matter reported to the Department, that it would be more beneficial to the Indians and relieve the fears of the settlers if an offer of money was made to the Indians for a cession and surrender of all their rights to the land and fishery reserved under the tenth article of the treaty of June 9, 1855 ... The Department concurring in these views, the Acting Secretary of the Interior has directed that negotiations be entered into with the Yakima Nation of Indians for said cession.") (emphasis added); Letter from James H. Chase to The Commissioner of Indian Affairs (August 28, 1893), in S. EXEC. DOC. No. 53-67, at 11 (2d sess. 1894) (clarifying that the Wenatshapam Fishery land in question was approximately 100 miles from the Yakima Reservation).

¹⁶⁵ Letter from William H. Sims, Acting Secretary of the Interior, to the Commissioner of Indian Affairs (Oct. 2, 1893), in S. EXEC. DOC. NO. 53-67, at 14-15 (2d sess. 1894).

¹⁶⁶ Letter from A. G. Tonner, Acting Commissioner, to the Secretary of the Interior (March 11, 1898) in Reports of Inspection of the Field Jurisdictions of the Office of Indian Affairs, 1873-1900, YAKIMA AGENCY, 1886-1900, microformed on M1070, roll 59 (National Archives).

¹⁶⁷ COUNCIL PROCEEDINGS (DEC. 18, 1839–JAN. 6, 1894), S. EXEC. DOC. NO. 53-67, at 25 (2d sess. 1894).

¹⁶⁸ Id. at 27.

¹⁶⁹ Id. at 25.

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responded, "It seems to me you whites think the Indians are just like beasts and don't know anything about land. . . . I am not going over to my friend's house and throw him off his place and tell him I would get rich and fat off of his place." ¹⁷⁰

Finally, Erwin offered to "give" the Wenatchi allotments in the valley where their reservation properly should have been as well as fishing rights appurtenant to the land if they would agree to sell the reservation. ¹⁷¹ Harmelt explained that he was uncomfortable accepting such an offer without the consent of the whole tribe, and so he and the other Wenatchi traveled back to the valley. ¹⁷² Once gone, however, the council reconvened and Agents Erwin and Lane continued to press the Yakamas who were present; they objected: "I will not sell this piece of land away from the Wenatchee Indians that owns [sic] the land." ¹⁷³ Erwin persisted though, claiming that he had received a letter from a non-Indian settler, Mr. Chase, as representative of the Wenatchi, who said they wanted to sell. ¹⁷⁴ Without a strong stake in the disposition, the Yakama needed only to find a fair price and they would be done with the negotiations.

The Yakamas agreed to a sum of \$20,000.¹⁷⁵ Once the Yakamas consented to the amount it was to be deposited into *their* reservation funds to be used for irrigation and other tools on the Yakama Reservation.¹⁷⁶ It was not until 1900 that the Department of the Interior sent an allotting agent, William E. Casson, who for the next two years endeavored to convince the Wenatchi not to take allotments but rather to go onto the Colville or Yakama Reservations.¹⁷⁷ Casson ended up allotting only twenty-two parcels of land that accounted for a little more than ten percent of the agreed upon acreage of the original Wenatchi Reservation, and, as if to spite those who had not gone to the reservation, he converted all twenty-two allotments from trust to fee patents so that they were alienable and taxable.¹⁷⁸ Thus, "[w]ithin a few

¹⁷⁰ Id.

¹⁷¹ Id. at 26-27.

¹⁷² Hart, *supra* note 59, at 192; *see also*, S. EXEC. Doc. No. 53-67, at 30 ("Many of these here people never saw that land, and you are asking them to sell it. They all understand what you said to them, but the Indians over at Wenatchee did not hear your statements here today. I myself alone have heard what you said; and if all the Indians over at Wenatchee would hear what you said, then they would decide on this land. I think those people [ought] to know about this matter, then let the decision come afterwards.").

¹⁷³ S. EXEC. DOC. No. 53-67, at 33.

¹⁷⁴ *Id.* James Chase was a local settler from Mission who deeply disapproved of the reservation, and wrote several letters to the Secretary of the Interior petitioning for the government's purchase of the reservation in order to facilitate non-Indian settlement of the area. *See e.g.*, *id.* at 7–8, 11–12 ("This Wenatchee Valley is very isolated and a new county must of necessity soon be formed; a reservation in the midst of it will be very objectionable.").

¹⁷⁵ SCHEUERMAN, supra note 59, at 122.

¹⁷⁶ *Id*; Agreement between John Lane, Special Agent, L.T. Erwin, Indian Agent, and Yakama Nation of Indians (Jan. 8, 1894), *in* S. EXEC. DOC. No. 53-67, at 35 (2d. sess. 1894).

¹⁷⁷ Hart, *supra* note 59, at 198.

¹⁷⁸ Id.

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years, largely as a result of taxes and fees that were imposed, all of the Wenatchi homesteads were lost to whites." ¹⁷⁹

IV. THE COLVILLE DECISION 180

A. A Disagreeable Decision in District Court

Modern litigation of the Yakama and Wenatchi fishing rights began in 1968 when the United States filed suit against the State of Oregon on behalf of four tribes seeking a declaratory judgment on the rights to take fish from the Columbia River and its tributaries. The District Court of Oregon ruled that the Yakama Indian Nation, the Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho were all entitled to a "fair share" of the Columbia River salmon. Is In the ensuing appeal, the State of Washington intervened in 1974, and the State of Idaho in 1983, Is and as a result the District of Oregon adopted a "comprehensive fish management plan" in 1988. In 1989, the Colville tribe intervened as well on behalf of five constituent tribes.

In 1994, the Colville tribe appealed the court's denial of intervention on behalf of five of its constituent tribes, including the Wenatchi, arguing that these tribes were parties to the 1855 Treaty. With no explanation as to why Colville had waited over twenty years to assert these rights and upon consideration of an extensive record amassed during a three-day bench trial, the court denied the intervention motion. The Ninth Circuit affirmed the district court's denial, thereby foreclosing the Wenatchi from exercising treaty fishing rights under the 1855 Treaty. The reasoning supporting this holding was that, while normally "[r]ights under a treaty vest with the tribe at the time of the signing of the treaty . . . Indians later asserting treaty rights must establish that their group has preserved its tribal status." The district court found that the tribes had not maintained their tribal status because they had refused to relocate to the reservation, and only later were subsumed into the Colville Confederacy. The Ninth Circuit reasoned that

¹⁷⁹ Id. at 198-99.

¹⁸⁰ See also Case Summary, United States v. Confederated Tribes of the Colville Indian Reservation, 41 Envil. L. XX,XX (2011).

 $^{^{181}}$ United States v. Oregon (*Oregon I*), 29 F.3d 481, 482–483 (9th Cir. 1994) (citing Sohappy v. Smith, 302 F. Supp. 899, 903–904 (D. Or. 1969)).

¹⁸² Sohappy, 302 F. Supp at 911.

¹⁸³ Oregon I, 29 F.3d at 483.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Id.

¹⁸⁷ Id. at 482–83.

¹⁸⁸ *Id.* at 486.

¹⁸⁹ *Id.* at 484 (citing United States v. Washington, 520 F.2d 676, 692 (9th Cir. 1975); United States v. Washington, 641 F.2d 1368, 1372–73 (9th Cir. 1981)).

¹⁹⁰ United States v. Oregon, 787 F. Supp. 1557, 1570–71 (D. Or. 1992), aff'd, 29 F.3d 481.

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such evidence was merely one factor in a larger factual inquiry, which was whether the group had "maintained sufficient political continuity." In short, the Ninth Circuit affirmed the district court in a decision that was stunningly insensitive to the plight of the Wenatchi and other Salish tribes of the Middle Columbia who chose not to be herded onto the reservation as Stevens brusquely dictated.

The Wenatchi were denied their rights for not going on to the reservation, which the court saw as evidence that the Wenatchi had failed to maintain political cohesion, 192 this, despite the fact that Article X of the Treaty specifically reserved trust land for the Wenatchi. Even more exasperating is the fact that the court fundamentally misunderstood the concept of treaty rights; it distinguished the case of the Muckleshoot Indians who, despite signing separate treaties, all came together and exercised their treaty rights continuously throughout the period in question.¹⁹⁴ The critical issue for the Ninth Circuit then, rather than the plain meaning of the treaty and subsequent 1894 Agreement, was "whether the tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights." This analysis is troubling for three reasons: 1) how does a tribe lose fishing rights that belong to them in the first instance; 196 2) how does a tribe access its usual and accustomed fishing grounds in order to exercise continuous use, when there is a fence blocking access;¹⁹⁷ and 3) how could the Wenatchi have abided by Article X, under which they would have needed to stay at Wenatshapam, and, at the same time, go to the Yakama reservation?¹⁹⁸

The Ninth Circuit's prior decision in *Oregon I*, failed to adequately consider the historical record and the way in which the Indians would have understood it. The court chose not to address the difficulties faced by the Wenatchi, but instead relied on the fact that the Yakama did go to the reservation, and did continuously exercise their treaty rights under the

¹⁹¹ United States v. Oregon, 43 F.3d 1284, 1284 (9th Cir. 1994).

¹⁹² Oregon I, 29 F.3d at 485-87.

¹⁹³ See supra note 123 and accompanying text.

¹⁹⁴ Oregon I, 29 F.3d at 485 ("The crucial factor which supported our analysis regarding the Muckleshoots, and which distinguishes them from the tribes before us, was that the Muckleshoot Tribe had continuously asserted treaty fishing rights and had always been recognized as the entity possessing these rights.").

¹⁹⁵ Id

¹⁹⁶ Cf. Winans, 198 U.S. 371, 381 (1905) (concluding that Indians had always possessed fishing rights and that "the treaty was not a grant of rights to the Indians, but a grant of right from them").

¹⁹⁷ Emily Heffter, *A Forgotten Tribe, a Lost Homeland,* SEATTLE TIMES, Jul. 17, 2003, http://community.seattletimes.nwsource.com/archive/?date=20030717&slug=wenatchi17m (last visited Apr. 25, 2011) ("[T]ribal elder Tillie George, 74, presses her hands to her chest to show the heaviness in her heart as she watches hatchery salmon swim on the other side of a chain-link fence at the site of the tribe's traditional fishery. The salmon at the fishery are off-limits to everyone but the Yakamas.").

¹⁹⁸ Hart, *supra* note 59, at 202, n. 119 ("[U]nder the 1855 Treaty, the Wenatchi were to stay on the Wenatchapam Fishing Reservation, where they then lived, and were under no obligation to move to the Yakama Reservation. The decision thus seems fundamentally wrong as applied to the Wenatchi.").

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treaty, while the Wenatchi tribe did not. ¹⁹⁹ Yet it was clear to some federal Indian agents as early as 1897, that the government had perpetrated fraud against the Wenatchi; Indian Inspector McConnell, when he saw this record, wrote the Secretary of the Interior a scathing criticism of the government's actions:

Are we a nation of thieves and unmitigated scoundrels? Are we devoid of all sense of honor? Does seventy millions of people because of their superior numbers and intelligence propose, little by little to deprive the sorely depleted tribes in the west of the small patrimony their more magnanimous conquerors—the early settlers in this country gave them? or more properly speaking, allowed them to retain. After wresting from them the heritage which had descended to them from generation to generation. Will the interest of private individuals, or the greed of corporations be allowed to sully our national honor? Must men like myself who assisted in redeeming the wilderness and who are to-day powerless to undo the wrongs which were partially of our doing, bow our heads in humiliation at the recital of the falsity of the promises we have made?²⁰⁰

The acting Commissioner of Indian Affairs responded tersely, blaming the Wenatchi tribe, claiming its citizens had "slept upon their rights by failing to have said fishery definitely located." The Ninth Circuit likewise relied on the notion that the Wenatchi had "slept on their rights," by, essentially, not acting more like the Yakama. 2022

In this previous decision, the Ninth Circuit completely ignored the equitable considerations that, under the canons of construction, a court must consider. Thus, the most recent *Colville* decision can be seen as a corrective to this earlier holding; both in the sense that it carefully considered the historical record and because it weighed that record appropriately. Furthermore, despite this prior holding, Wenatchi tribal citizens continued to fish at Wenatshapam during the entire course of this earlier case and the *Colville* case.

The *Colville* case began in 2003 when the Yakama sought and obtained an injunction to prevent Wenatchi fishers from infringing on the Yakama's

¹⁹⁹ Oregon I, 29 F.3d at 486.

²⁰⁰ Hart, *supra* note 59, at 197 (quoting McConnell to Secretary of the Interior (Sept. 21, 1897), REPORTS OF INSPECTION OF FIELD JURISDICTIONS OF THE OFFICE OF INDIAN AFFAIRS, *supra* note 166.

 $^{^{201}}$ Letter from A. G. Tonner, Acting Commissioner, to the Secretary of the Interior (March 11, 1898) in Reports of Inspection of Field Jurisdictions of the Office of Indian Affairs, supra note 166.

²⁰² Oregon I, 29 F.3d at 486 ("The Yakima Nation has thus continually exercised the offreservation fishing rights and continued the fishing culture of the original signatories to the 1855 treaty. The constituent tribes with which we are concerned have not."); cf. City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 221 (2005) ("[T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.").

rights at Wenatshapam.²⁰³ The district court ruled that res judicata prevented the Wenatchi from arguing they held rights under the 1894 Agreement.²⁰⁴ However, the Ninth Circuit reversed this ruling; distinguishing between the 1855 Treaty and the 1894 Agreement, it found that the latter was not an amendment, but rather a contract for the sale of lands that was an exchange of distinct benefits.²⁰⁵ On remand, the district court found that the 1894 Agreement provided fishing rights and land in exchange for the Article X reservation.²⁰⁶ This Ninth Circuit decision arises from the Yakama appealing and the Wenatchi cross-appealing. The Yakama argued that the district court erred in finding what it characterized as an "implied agreement."²⁰⁷ And the Wenatchi argued that either the district court erred in finding any fishing rights for the Yakama at the Wenatshapam Fishery or, in the alternative, that it erred by not finding the Wenatchi fishing rights superior.²⁰⁸

B. Summary of the Colville Decision

The Confederated Tribes and Bands of the Yakama Indian Nation (Yakama) and the Confederated Tribes of the Colville Indian Reservation (Colville) on behalf of their Wenatchi constituent Tribe (Wenatchi) both cross-appealed the United States District Court for the District of Oregon's holding as to an 1894 treaty agreement that the Yakama and Wenatchi share fishing rights in common at the "Wenatshapam Fishery" near present-day Leavenworth, Washington. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, holding with regard to the Wenatshapam Fishery (1) that the 1894 negotiations' intent was to grant the Wenatchi fishing rights there, (2) that the Yakama did not sell their fishing rights, and (3) that both tribes retain non-exclusive fishing rights there and the Wenatchi do not possess "primary rights."

The "Stevens Treaties" sought to quickly extinguish Indian title and rights by consolidating several tribal entities to facilitate easier treaty making. Indeed, the Treaty with the Yakamas²¹⁰ (1855 Treaty) recognized fourteen separate tribal entities as a single tribe.²¹¹ These tribes were not related in any significant way, other than geographically, and did not share a

²⁰³ Colville, 606 F.3d 698, 706–07 (2010).

 $^{^{204}}$ Id. at 707.

²⁰⁵ U.S. v. Oregon (*Oregon II*), 470 F.3d 809, 816 (2006).

 $^{^{206}\,}$ U.S. v. Oregon, No. 68-513-KI, 2008 WL 3834169 at *14 (D. Or. Aug. 13, 2008).

²⁰⁷ First Brief on Cross-Appeal of Plaintiff-Intervenor Appellant Confederated Tribes and Bands of the Yakama Indian Nation at 15, *Colville*, 606 F.3d 698 (2010) (Nos. 08-35961, 08-35963), 2009 WL 4921544.

 $^{^{208}}$ Second Brief on Cross-Appeal of Appellee and Cross-Appellant Confederated Tribes of the Colville Reservation at 51, 59, $\it Colville$, 606 F.3d 698 (2010), (Nos. 08-35961, 08-35963), 2009 WL 4921545.

²⁰⁹ Colville, 606 F.3d at 701, 715.

 $^{^{210}}$ Yakama Treaty, supra note 111.

²¹¹ Id. at 951.

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common language, let alone a singular bargaining interest. 212 In addition to specifications of the size and boundaries of the Yakama reservation, the treaty granted exclusive rights to fishing in the waters on or adjacent to the reservation, and also reserved "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."213 Article X of this treaty, at the behest of Wenatchi tribal leaders, set aside a second reservation at the Wenatshapam Fishery (Article X Reservation), which the terms of the treaty recognized would be surveyed sometime in the future by order of the President.²¹⁴

The Ninth Circuit recognized that during the next forty years the Wenatchi continued to fish at the Wenatshapam location, believing they would be secure in their possession of the fishery, and the Department of the Interior never conducted any survey of the area agreed upon.²¹⁵ Eventually, prompted by the Yakama Reservation Indian Agent, the Secretary of the Interior authorized a survey in 1893. The Ninth Circuit never directly addresses the Indian Agents' deceptive practices in the record but allows the record to speak for itself, noting that the Article X Reservation was never surveyed at Wenatshapam and was instead made further off in the mountains away from the river.²¹⁷

Furthermore, the court took no issue with the fact that Congress only considered the government's record in its decision to ratify the 1894 agreement, which contains only the complaints and comments of white settlers, letters between the Indian agents, and the bare record of the Council Proceedings. 218 Moreover, far from acting as advocates or guardians for the Indians, Agents Lynch, Erwin, and Lane all acted to protect the interests of the settlers and the railroad. To its credit, however, the Ninth Circuit did incorporate E. Richard Hart's detailed article on the Treaty and subsequent Agreement regarding the Wenatshapam Fishery and the agents' various acts of dishonesty.²¹⁹

The Ninth Circuit recounted the Council Proceedings, and in doing so glossed over a significant glitch. In December of 1893, acting on the

²¹² See SPLAWN, supra note 106, at 29–37 (describing the Council of Walla Walla, a meeting between these tribes, as a tense meeting of rival factions who were unable to present a consistent front—all but one chief was ultimately disappointed with the land cession).

²¹³ Colville, 606 F.3d at 701–02 (quoting Yakama Treaty, supra note 111, 12 Stat. at 953).

²¹⁴ Id. at 702 (quoting Yakama Treaty, supra note 111, 12 Stat. at 954 ("[S]aid reservation shall be surveyed and marked out whenever the President may direct.")).

²¹⁵ Id.

²¹⁷ Id at 702-03. This injustice did not go fully unnoticed by the Ninth Circuit. Documents in the congressional record at that time evidence a recognition by both the Senate and settlers that the reservation was not "new," but rather "the fulfillment of a treaty obligation," and also that, despite the name "Yakama" in the treaty, the Wenatchi were the specific, intended beneficiaries of the Article X reservation land. Letter from D.M. Browning, Commissioner, to James H. Chase (July 18, 1893), in S. EXEC. Doc. No. 53-67, at 8-9 (2d sess. 1894); Letter from James H. Chase to D.M. Browning, Commissioner (August 28, 1893), in S. EXEC. DOC. NO. 53-67, at 11-12 (2d sess. 1894).

²¹⁸ Colville, 606 F.3d at 709.

²¹⁹ Oregon II, 470 F.3d 809, 812 n.3 (2006).

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authorization of the Department of the Interior, 220 Agent Erwin proposed to the four Wenatchi leaders present on the Yakama Reservation that they sell their mountain reservation in return for allotments in the Wenatchee Valley and federally protected fishing rights.²²¹ He indicated that the Department intended for the Indians to retain "the lawful use of the fisheries in common with the white people."222 Here, unfortunately, the Ninth Circuit misconstrued the record, concluding that the Wenatchi leaders eventually agreed to the transfer at \$1.50 an acre, when in fact several historical accounts express a different sentiment: Chief Harmelt was brushing off the cost when he said: "I am well satisfied between you two. Whatever [the Yakama] ask for the land that is my same price."²²³ He had not yet agreed to the bargain, but with that statement was rather re-establishing his interest, which was that the allotments, if made, would adjoin the fishery.²²⁴ The court reads the record to reflect that an agreement between the Wenatchi and Erwin had been established, and only the price was subject to change.²²⁵ Given, however, the language barrier and Chief Harmelt's attitude throughout the negotiations (that he wished to maintain the land at the fishery as a reservation), it is difficult to imagine that there was a true meeting of the minds here in the way the court interpreted. A deeper reading of the record shows that in fact, Yakama leaders eventually agreed to the transfer on behalf of the Wenatchi.

Nevertheless, this 1894 Agreement served as the keystone to the Wenatchi's fishing rights at Wenatshapam. Indeed, given the fact that Colville had been barred from asserting rights under the 1855 Treaty by the court's previous decision, the later Agreement was the platform of the Wenatchi's argument. This is the central irony of the case, and it highlights the central irony of many similar documents executed between tribes and the United States, which is that these "agreements" are often the only method a tribe has to prove its particular rights. Therefore, in litigation, a tribe is loathe to point out the many ways in which an agreement may be invalid.

²²⁰ This authorization provided both that Agent Erwin would employ a Stenographer in order to keep a complete record of the negotiations and that the "rights of such Indians [living near Wenatshapam] in lands or fishing privileges should be taken into consideration and protected." Letter from Commissioner of Indian Affairs to John Lane, Special Agent, L.T. Erwin, Indian Agent (Oct. 13, 1893), *in* S. EXEC. DOC. No. 53-67, at 16–17 (2d sess. 1894).

 $^{^{221}}$ See Council Proceedings (Dec. 18, 1839–Jan. 6, 1894), S. Exec. Doc. No. 53-67, at 28 (2d sess. 1894).

²²² Id.

²²³ Colville, 606 F.3d at 704.

^{224~} S. EXEC. DOC. NO. 53-67, at 32 ("Now, I am going to tell you what I am doing about my living on my own place I want my own tribe to live with me, and then I can see that they do right.").

²²⁵ Colville, 606 F.3d at 704–05.

²²⁶ *Id.* at 707 ("The 1894 Agreement was not set forth as an amendment to the 1855 Treaty. Rather, it was an agreement for the sale of the Wenatshapam Fishery that had been given to the tribes of the Yakama Nation by the 1855 Treaty, with specific benefits being reserved for the Wenatchi Tribe, which had continued to reside and fish there.") (quoting *Oregon II*, 470 F.3d 809, 816 (2006)).

²²⁷ Second Brief on Cross-Appeal of Appellee and Cross-Appellant, *supra* note 208, at 32–33.

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In January 1894, after the Wenatchi leaders had returned to Wenatshapam, 150 miles away, the Department proposed by telegraph a lump sum of \$15,000 for the Article X Reservation. In response to the Yakama leaders protesting the absence of the Wenatchi, Erwin promised, "[j]ust what we said to those Wenatchee Indians we will carry out." Satisfied, a Yakama representative counter-offered to relinquish all rights in the Wenatshapam Fishery in return for \$20,000. The Department accepted this offer and, along with 246 citizens of the Yakama Nation, signed the 1894 Agreement. The Ninth Circuit reasoned that in the first article, the agreement extinguished all Yakama rights in the Wenatshapam Fishery, while the second article indicates the consideration given for this relinquishment, as well as an acknowledgment that the Wenatchi would be allotted land in the vicinity of where they lived or elsewhere. The government again failed to make this allotment, and in 1902 and 1903 removed the Wenatchi to the Colville Reservation.

The Ninth Circuit applies separate standards of review to the factual findings of the district court, including issues of negotiators' intent, and to the district court's interpretation of treaties. Thus it reviewed the historical record for clear error, while it reviewed treaty interpretations de novo.²³⁴ Moreover, given the special nature of past dealings between the United States and Indians, the court went on to enunciate relevant principles of interpretation—specifically, the canons of construction previously discussed.²³⁵ In considering whether to limit its analysis of the 1894 Agreement to the four corners as the Yakama suggested, the Ninth Circuit first returned to its 2006 opinion in which it found the relevant provisions of the agreement ambiguous.²³⁶ It then turned to the proposition that, given the language barrier and legal sophistication of the parties to these treaties, a court should construe treaty language as the American Indians would have understood it, and resolve any ambiguities in favor of them.²²⁷ Such an interpretative framework, the Ninth Circuit concluded, necessarily required it to look beyond the four corners of the 1894 Agreement. 238 Given that the

²²⁸ Colville, 606 F.3d at 704.

²²⁹ Second Brief on Cross-Appeal of Appellee and Cross-Appellant, *supra* note 208, at 42 (quoting S. Exec. Doc. No. 53-67, at 33).

²³⁰ Colville, 606 F.3d at 704–05.

²³¹ *Id.* at 705.

 $^{^{232}}$ Id. The court's reasoning here warrants some explanation: while the 1894 Agreement extinguished the exclusive rights of the Yakamas at Wenatshapam, it did not cede their rights to fish at usual and accustomed places, of which Wenatshapam was one. Id. at 711–12. For the Wenatchi, the 1894 Agreement acted as a separate contract to secure those "usual and accustomed" fishing rights. Id. at 711.

 $^{^{233}\ \} Oregon\ I\!I\!,\,470\ F.3d\ 809,\,811\ (2006).$

²³⁴ Colville, 606 F.3d. at 708 (citing United States v. Idaho, 210 F.3d 1067, 1072 (9th Cir. 2000)).

 $^{^{235}\ \}mathit{See\,supra}\,\mathrm{notes}$ 48–58 and accompanying text.

²³⁶ Colville, 606 F. 3d at 708.

²³⁷ Id. at 709 (citing Jones, 175 U.S. 1, 11 (1899)); Choctaw Nation, 397 U.S. 620, 631 (1970).

²³⁸ Colville, 606 F.3d at 708–09 (citing Choctaw Nation, 318 U.S. 423, 431–32 (1943); Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999)). This was critical for the Wenatchi, as

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Agreement itself is silent as to Wenatchi fishing rights, the Ninth Circuit therefore considered the transcript of the negotiations to determine how the tribal leaders understood the terms of the agreement.²³⁹

The Ninth Circuit's review of the record supported the district court's finding that the Indian leaders present at the 1894 negotiations would have understood the terms to provide non-exclusive fishing rights to the Wenatchi at Wenatshapam. The court cites evidence from both Yakama leaders and federal negotiators that the Agreement would preserve the fishing rights of the Wenatchi. So, despite the ambiguity inherent in the 1894 Agreement itself, the Ninth Circuit concluded that its effect was to secure the Wenatchi rights. Of course, the court could have reached this result even in the absence of such evidence by turning to the relevant principles of interpretation; any ambiguity in the document should be interpreted in favor of Indians.

Consequently, the Ninth Circuit held that the 1894 Agreement to sell the Article X Reservation also did not extinguish the Yakama's fishing rights at Wenatshapam. The Ninth Circuit declined to adopt the Wenatchi's proposed interpretation, finding instead that the Yakama's cession was limited to its Article X rights in the land around the fishery and did not extend to rights not explicitly ceded—in other words, its rights to fish at all usual and accustomed places. Adhering to the United States Supreme Court's holding in *Winans* that a treaty or agreement is not a grant of rights to the Indians, but a grant of rights from them, the Ninth Circuit reasoned that the 1894 Agreement merely ceded the tribe's *exclusive* fishing rights reserved by the 1855 Treaty. But, as the later agreement would have been understood by the negotiating parties, the Yakama retained its *non-exclusive* fishing rights.

Finally, the Ninth Circuit held that the Wenatchi did not hold rights superior to those of the Yakama, but that both tribes held non-exclusive

S. Exec. Doc. No. 53-67 and the expert testimony of Richard E. Hart provided immense insight into how the Indians would have understood the treaties. *See Coleville*, 606 F.3d at 709.

²³⁹ Colville, 606 F.3d at 709.

²⁴⁰ *Id.*

 $^{^{241}}$ Including a promise made on the record by Agent Erwin that "you shall have the lawful use of the fisheries in common with the white people." COUNCIL PROCEEDINGS (DEC. 18, 1839–JAN. 6, 1894), S. EXEC. DOC. No. 53-67, at 28 (2d sess. 1894).

²⁴² Colville, 606 F.3d at 709.

²⁴³ *Id.* at 712.

²⁴⁴ The Wenatchi would have had the court read the qualifying phrase, "as set forth in article 10 of said treaty aforesaid," as surplusage describing the location at which the Yakama were ceding all rights. Second Brief on Cross-Appeal of Appellee and Cross-Appellant, *supra* note 208, at 51–52; Agreement with the Yakima Nation of Indians in Washington, art. I, Jan. 8, 1894, 28 Stat. 320, 320 (1894) ("The said Indians hereby cede and relinquish to United States all their right, title, interest, claim, and demand of whatsoever name or nature of[,] in, and to all their right of fishery, *as set forth in article 10 of said treaty aforesaid*, and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery." (emphasis added)).

²⁴⁵ Colville, 606 F.3d at 712.

²⁴⁶ Winans, 198 U.S. 371, 381 (1905).

 $^{^{247}\,}$ Colville, 606 F.3d at 712.

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fishing rights in common with the state. First, the court noted that the "primary rights" analysis developed in *United States v. Skokomish Indian Tribe*²⁴⁸ and *United States v. Lower Elwha Tribe* (*Lower Elwha*),²⁴⁹ depends upon an analysis of pre-treaty control of the contested rights when two tribes have signed treaties at the same "treaty time." Since the 1894 Agreement secured the Wenatchi rights and the 1855 Treaty secured the Yakama rights, there was no common "treaty time" at which to determine primacy or control of the Wenatshapam Fishery. Secondly, the Ninth Circuit observed that the 1894 Agreement did not reserve Wenatchi rights in existence prior to 1855, but was a grant of new rights independent of the previous treaty. Thus, regardless of actual control of the Wenatshapam Fishery prior to 1855, the Wenatchi would still lack the 1855 Treaty rights to prompt a "primary rights" analysis.

V. CRITICISM OF THE PRIMARY RIGHTS ANALYSIS IN COLVILLE

The Ninth Circuit's decision in *Colville* severely limits the application of primary rights. Whether this represents progress in the law depends on who is asking. Obviously, individual tribes would prefer to have the ability to regulate a fishery, especially in the Pacific Northwest where the take may vary widely from year to year, is highly sensitive to environmental factors, and may be fairly limited. In this way a tribe can control its own percentage and divvy up remaining fish (if they choose to permit other tribes to take). In fact, this is essentially the role that the pre-treaty Wenatchi played at the Wenatshapam fishery.²⁵³ On the other hand, the court demurring from a decision of historical fact regarding which tribe had control over a certain location more than a hundred years ago promotes both judicial efficiency as well as a certain abstract tribal sovereignty. This Part first analyzes the court's two findings from the previous Part, and then discusses the relative merits of the existence of "primary rights."

A. Problems with the Colville Analysis

1. Abrogation or Ignorance of Lower Elwha and Skokomish Indian Tribe

In *Colville* the court altered the primary rights test by placing the focus on whether the two tribes formed treaties with the United States at roughly the same time, and in so doing abrogated or ignored the prior analyses. The

 $^{^{248}\,}$ 764 F.2d 670, 673–74 (9th Cir. 1985)

²⁴⁹ 642 F.2d 1141, 1144 (9th Cir. 1981).

 $^{^{250}\,}$ See Colville, 606 F.3d at 714.

²⁵¹ Id. at 714-15.

²⁵² *Id.* at 715.

²⁵³ Second Brief on Cross-Appeal of Appellee and Cross-Appellant, *supra* note 208, at 63 (describing the Wenatchis' "regulatory supervision"); SCHEUERMAN, *supra* note 59, at 42 ("Often during late summer, thousands of Indians from other mid-Columbia tribes would join [the Wenatchi] at a grand gathering to council, trade, socialize and race horses.").

Lower Elwha court did not focus on whether the tribes' treaties were made during roughly the same time but rather the relations of the tribes prior to the period of treaty-making; ²⁵⁴ in that case the Makah challenged a decision, arising from the continuing jurisdiction of the court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n. ²⁵⁵ The Makah Tribe sought review of the finding that the Lower Elwha Indians had primary rights on the Hoko River because they had the ability to exclude the Makah at the time they signed their respective treaties. ²⁵⁶ The Makah challenged on two separate grounds: 1) that evidence of custom, or "anthropological principle," was insufficient to prove that the Lower Elwha had the ability to exclude the Makah in the 1850s, ²⁵⁷ and 2) that "considerations of law and equity require that it be allowed to share the rivers."

First, with regard to evidence of custom, the Ninth Circuit relied on *United States v. Top Sky*²⁵⁹ for its holding that evidence of historic practices (such as battle acumen) is sufficient as long as it is probative on the issue. Second, with regard to the considerations of law and equity, the court relied on the *Winans* rule that "[t]he treaties 'secured,' or reserved, to the tribes their pre-treaty rights to take fish," in order to determine that present day "hardship to the Makah cannot deprive the Elwha of vested treaty rights." Finally, the court determined that even if the Makah can show that they were capable of attacking the Lower Elwha and fishing at the locations they claimed to control, "[t]hese instances of Makah fishing on Elwha territory do not destroy the Elwha Tribe's primary right." Furthermore, "[t]emporary occupancy by friends or raiding by enemies does not destroy the exclusive occupancy required for aboriginal title... once exclusive occupancy has been established."

As applied to the present case, it is difficult to imagine a stronger argument for a finding of primary rights for the Wenatchi. The Wenatchi were a party to the same 1855 treaty as the Yakama, and more than evidence of custom, the Wenatchi had an incredibly detailed account of their pretreaty use of the fishing grounds at Wenatshapam. Furthermore, the Yakama do not have equitable concerns in the same manner as the Makah—the Yakama are a relatively wealthy tribe with access to fishing grounds throughout the state whereas the Makah's access is much more limited. The

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<sup>254</sup> Lower Elwha, 642 F.2d at 1144.
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²⁵⁵ 443 U.S. 658, 674–85 (1979).

²⁵⁶ Lower Elwha, 642 F.2d at 1142.

²⁵⁷ *Id.* at 1143.

²⁵⁸ *Id.*

²⁵⁹ 547 F.2d 486, 487 (9th Cir. 1976).

 $^{^{260}\,}$ Lower Elwha, 642 F.2d at 1143.

²⁶¹ Id. (citing Winans, 198 U.S. 371, 381 (1905)).

²⁶² *Id.*

 $^{^{263}}$ *Id.* at 1144.

²⁶⁴ *Id.* (alteration in original) (quoting Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 70 (1979)).

²⁶⁵ E.g., SCHEUERMAN, *supra* note 59, at 35–37, 40, 42 (providing a dedicated study of the Wenatchi); Hart, *supra* note 59, at 164–65 (providing a dedicated study of the Wenatchi).

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Ninth Circuit may have considered the fact that the Yakama had other equitable concerns, such as a \$32 million investment in the hatchery located less than a mile upstream from the fishery at issue. However, this reasoning is not presented in the case, which instead places the focus on the time at which the treaties (that give rise to the rights) were signed, rather than whether control was exercised prior to the treaty-signing time. In denying primary rights to the Makah, it was important that the tribe had exclusive control of the fishery, where in *Colville* it was important that the Wenatchi's rights in the fishery stemmed from the separate 1894 Agreement.

Skokomish Indian Tribe elaborates on the two prongs of Lower Elwha, clarifying that the factors to consider "were [not] a rigid formula or test, but rather... useful as an analytical tool."268 Moreover, Skokomish Indian Tribe provides a clear definition for what exactly primary rights are: "[a] primary right is the power to regulate or prohibit fishing by members of other treaty tribes."269 As applied to the Wenatchi, a less rigid formula would appear on its face to yield a clear-cut case for this right to regulate. First, under the Ninth Circuit's interpretation of the 1894 Agreement and the surrounding historical evidence, it is clear that the Wenatchi believed the Wenatshapam fishery would be a reservation for its benefit, and then later, that they would at least possess land there in fee. Moreover, the Wenatchi exercised permissive control over the fishery prior to the 1855 Treaty.²⁷⁰ However, what the Wenatchi fail to mention in the brief and what the Ninth Circuit declines to rely upon, is the fact that the Wenatchi are not a federally recognized tribe, and, even under the prior tests, may not have been able to exercise primary rights for that reason.²⁷¹

2. What about Winans?

By holding that the 1894 Agreement did not reserve Wenatchi rights in existence prior to 1855, the Ninth Circuit narrowly avoided contravening the *Winans* rule that treaties reserve to a tribe pre-treaty fishing rights. Here, under the *de novo* standard of review, the court could have easily looked to the record and determined that the Wenatchi had permissive control over the fisheries at the time the 1855 Treaty was signed by the Wenatchi and Yakama Tribes and, applying the *Lower Elwha* and *Skokomish Indian Tribe*

²⁶⁶ Yakama Nation to Spend \$32 Million for Coho Rehab, supra note 16.

 $^{^{267}\ \}textit{Colville},\,606\ \text{F.3d}\,698,\,714\text{--}15\ (9\text{th Cir.}\,2010).$

²⁶⁸ Skokomish Indian Tribe, 764 F.2d 670, 673 (9th Cir. 1985).

²⁶⁹ *Id.* at 671.

²⁷⁰ Second Brief on Cross-Appeal of Appellee and Cross-Appellant, *supra* note 208, at 63 n.37 ("[W]hen a lot of people came, the Wenatchis were very generous, and they tried to organize the fishery so everybody could have a place to fish, so there wouldn't be disputes.") (quoting Mr. Hart's testimony at trial).

²⁷¹ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,810–14 (Oct. 1, 2010).

²⁷² Winans, 198 U.S. 371, 381 (1905).

²⁷³ Colville, 606 F.3d 698, 708 (2010) ("We review the district court's interpretation of treaties, statutes, and executive orders *de novo.*") (citing *Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000)).

decisions, found primary rights in the Wenatchi. However, it persisted in maintaining precedent and refused to overrule Oregon I, finding that the Wenatchi, as well as other tribes that chose not to reside on the Yakama Reservation, extinguished treaty rights under the 1855 treaty by failing to maintain political unity. 274 The Wenatchi were successful in asserting rights under the 1894 Agreement that are, at least for them, the exact same fishing rights, save for the fact that the Yakama's 1855 rights of exclusivity at the fishery were really for the Wenatchi's benefit. Without explicitly saying so, the Ninth Circuit avoids finding primary rights in a tribe who lacked cohesiveness throughout the period in question. It is troubling however, that a tribe's inability to maintain political cohesiveness due to the onslaught of American culture should actually divest them of rights held since time immemorial.

B. Jurisprudential Concerns with Primary Rights

The Colville decision essentially limits primary rights to fact situations that are highly similar or identical to those of *Lower Elwha*. In one sense this can be viewed as a positive direction for Indian law precedent because it narrows the conditions under which a federal court imposes superior rights in a fishery, and allows tribes to make cooperative decisions in order to regulate and control take. From a jurisprudential standpoint, courts will want to limit their involvement in inter-tribal disputes that may arise with regard to one tribe's regulation to which other tribes might object. Insofar as it increases judicial efficiency, one need only consider how a federal judge would feel about being put in the position of "counting fish." Indeed, stepping back from the primary rights allocation likewise motivates tribes to negotiate the apportionment of the take and encourages inter-tribal cooperation. This has the effect of removing federal courts from a position of authority over inter-tribal relations, and in turn creating more opportunity for the exercise of sovereignty. Of course, it can also be argued that ceding this authority to tribes is similar to the federal government ceding its trust responsibilities. In sum, the Ninth Circuit's decision in *Colville* treads lightly on a divisive area of the law, but, nevertheless, it fails to consider some factors in its analysis.

First, while the court went into great detail regarding the Wenatchi's history at the Wenatshapam fishery, it excluded any mention of either the Yakama's historical use of the fishery or their modern day improvements. The Ninth Circuit never discussed the possibility of the Yakama's potential adverse possession claim. The injunction in 2003 evidences a hostile intent to exercise dominion over the property, as does the fence that was erected. One can only assume that it is irrelevant to the court's primary rights decision (which impact would seriously alter the regulatory landscape) that

tribe to proceed against others for an equitable apportionment of shared fishery).

²⁷⁴ Id. at 706, 715.

²⁷⁵ See, e.g., United States v. Washington, 573 F.3d 701, 711 (2009) (declining to allow one

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the Yakama have plans to spend over \$32 million dollars in federal Bureau of Indian Affairs funds at the hatchery within the next seven years. Focusing instead on the Wenatchi's historical use, it altogether avoided any sort of adverse possession argument, instead relying on two factors: 1) whether there was a common treaty time out of which the conflicting rights at usual and accustomed places arise; and 2) the status quo at that common treaty making time. The court gave no indication of why this analysis prevails logically over the *Lower Elwha / Skokomish Indian Tribe* rule, and, in the final analysis, places little emphasis on the second factor.

In addition, the *Colville* decision overlooks the relative bargaining power of the two tribes. One cannot help but notice a parallel between the Colville Court's primary rights analysis and the Wenatchi's 19th century plight in the effect of surrounding financial ventures. Not once in the conversation with Stevens in 1855, or Erwin in 1894, did either of those negotiators discuss their underlying motivations to develop the railway. Only McClellan was forthright with the Wenatchi;277 from then on the whites with whom they spoke constantly dissembled their true intentions. History can now see that Stevens sought conquest of the Northwest as a means to political power, 278 and that Erwin was a great friend to the railways. 279 For their part, the Wenatchi merely sought the fishing reservation that had been promised and were content to peacefully wait for the government's performance on its contract; instead the government begrudgingly allotted them land, which, due to taxes, quickly left tribal citizens' possession. As a small, peace-loving fishing village, the Wenatchi had no chance against the machinations of the federal agents. In the modern era, it appears the Wenatchi have learned this lesson. The Colville court was well aware of Chief Harmelt's attempts to regain the reservation and must also have been aware of the tribe's modern struggle for the reservation. But here, of course, the Wenatchi only argued for fishing rights; and while they no longer had any legal claim to the reservation, the court may have been swayed by their moral claim to some interest in the ancestral fishery. Nevertheless, the Wenatchi is not a federally recognized tribe but rather a member tribe of the Colville Confederacy, whereas the Yakama is not only one of the largest tribes in the Northwest, but has a sizable reservation with exclusive, on-

²⁷⁶ Yakama Nation to Spend \$32 Million for Coho Rehab, supra note 16; John Trumbo, Groups Aim to Spend Money on Fish, Not Court, TRI-CITY HERALD, Sept. 19, 2008, http://www.tri-cityherald.com/2008/09/19/321810/groups-aim-to-spend-money-on-fish.html# storylink=misearch (last visited Jul. 7, 2011) ("Federal agencies and tribes will work together as partners on the ground to provide tangible survival benefits for salmon recovery,' according to a statement released after the agreement by eight government agencies known as the Salmon Caucus.").

 $^{^{277}~}See\,\mathrm{SPLAWN}, supra\,\mathrm{note}\,\,106,$ at 21–22.

 $^{^{278}}$ RICHARDS, *supra* note 106, at 97.

²⁷⁹ Hart, *supra* note 59, at 190; Virginia de Leon, *Tribe Longs for Home*, SPOKESMANREVIEW.COM, Sept. 8, 2003, http://www.spokesmanreview.com/news-story.asp? date=090803&ID=s1407366 (last visited Apr. 25, 2011) ("Erwin, who was closely aligned with the railroad and local whites who were against the reservation, misled the Wenatchi and the U.S. government by telling them that the reservation was in the wrong place.").

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reservation rights. In terms of regulatory capacity and expertise, the Yakama clearly have more to offer, which cuts against a finding of primary rights in the Wenatchi. For better or worse, the court does not reach these questions, and looks instead to the record.

VI. CONCLUSION

The *Colville* opinion exemplifies the power of the historical narrative in Indian law. It is nearly impossible for a court to deny fishing rights such as those now solidified in the Wenatchi of Colville in light of such a rich record of events surrounding the fishery. Here, the official record itself is rife with indications of betrayal and fraud on the part of the government officials. However, as is often the case, it fails to capture the whole picture. Indeed, there is clear evidence outside of the official record to bring an issue of duress or to interpret the validity of the treaty in the first place. The tribal leaders signed their names under the threat of the annihilation of their peoples, and as further evidence of the tribes' resistance, within less than a year, several of those leaders would die in battle and while captured, fighting to maintain their ancestral homes. Of course, at this stage it would be fatal to any tribe's legal claims to deny the validity of its treaty. Ironically, the very document of deceit is now their document of delivery, finding for the Yakama, under the 1855 Treaty, and for the Wenatchi, under the 1894 Agreement, the vestigial rights to their way of life.

It nearly goes without saying that not all tribes are as "lucky" as the Wenatchi. Beyond the detailed factual record compiled by the government, there are also several historical accounts by noted historians, as well as a feature-length documentary. Few tribes will have recourse to this broad of an array of information or to be able to call expert witness historians at trial to prove the legitimacy of facts that the tribal people and locals in town have known for generations.

Moreover, it should not be overlooked that the Wenatchi were wise enough not to "shoot the moon;" past experience dictates that a tribe's chances of success on the merits are much greater when what they ask for is only a piece of what they are owed. Here the treaty language of 1855 reserved land for the Wenatchi in the amount of "one township of six miles square" or about thirty-six square miles, ²⁸¹ the 1894 Agreement purports to extinguish that reservation, which is at least, how the Ninth Circuit views the disposition of this "reservation." The Agreement, then, is for the sale of the reservation, reserving within it the fishing rights. Indeed, how the Indians would have understood this, and how they did understand it, was that they had sold the falsely surveyed reservation several miles to the north

²⁸⁰ E. Richard Hart and Richard Scheuerman each have written detailed accounts of the Wenatchi History (which are cited extensively in this Comment), and a feature-length film, entitled "False Promises: The Lost Land of the Wenatchi" (available for purchase at http://www.filmakers.com/index.php?a=filmDetail&filmID=1120) was aired throughout the Northwest.

 $^{^{281}\,}$ Yakama Treaty, $supra\, {\rm note}\,\, 111,$ at 954.

²⁸² Colville, 606 F.3d 698, 707 (9th Cir. 2010).

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in exchange for money and adjoining allotments at their fishery in a somewhat smaller amount.

Essentially, the court's decision avoids recognition of Wenatchi's primary rights in order to avoid adjudicating between tribes, but also to avoid recognition of the full, and disturbing, history. The court has the power to, and does, avoid discussing the issue of the fraud and abuse around the Wenatshapam Fishery reservation. By establishing the rights sold in the 1894 Agreement, the court validates "new rights" that a tribe had become barred from asserting under its original treaty. Then why not allow the Wenatchi primary rights? To recognize the Wenatchi's history at Wenatshapam is to recognize that history of fraud and violence. It is convenient (and helpful to the tribe) to validate the 1894 Agreement, but it also cedes the last piece of legal power that the Wenatchi could have claimed to distinguish their unique interest in the fishery.

The parties did not brief the issue, nor of course, did the court consider the possibility that instead of mere fishing rights at the confluence of the Icicle and Wenatchee Rivers, the Wenatchi deserve a reservation under the terms of the 1855 Treaty because of the fraud committed against them in 1894. This argument did not escape the imagination of Chief Harmelt, who personally went to Washington D.C. twice to speak before Congress. In 1933, when Harmelt was in his eighties, the Wenatchi hired attorney Frederick Kemp to submit a contract to the Indian Office, essentially making this argument. For two years Kemp and the Wenatchi never heard back from the department; then in 1935 when the Wenatchi opposed the Indian Reorganization Act Constitution for the Colville Reservation, Commissioner of Indian Affairs John Collier canceled the contract with the tribe.

However, all hope is not lost for the Wenatchi; their recent public exposure has forced their case in front of the state legislature, which backs the tribe's request for land near Leavenworth in federal forestlands. While there does not appear to be development on this front, the tribe has seen support in the United States Senate. There is hope yet that the Wenatchi may some day have a reservation in the Wenatchee Valley.

²⁸³ *Id.* at 705.

²⁸⁴ Hart, *supra* note 59, at 200.

²⁸⁵ *Id.* at 200–02.

²⁸⁶ "[In 2003], both the state Senate and House of Representatives passed resolutions to back the tribe's claim to federal forestland. Their plight also has bent the ear of Sen. Patty Murray D-Wash., who is now considering legislation that would launch a study on the feasibility of a land transfer to the tribe." De Leon, *supra* note 279; Heffter, *supra* note 197 ("The study, involving the U.S. Departments of Agriculture and the Interior, would include public hearings and historical research to determine whether it would be feasible to transfer some national forestland to the Wenatchis. Eventually, the tribe wants as many as 20,000 acres of the Wenatchee National Forest near Leavenworth for a reservation. Instead of a separate Wenatchi Reservation, the Colville Confederated Tribes would control the land.").

²⁸⁷ 140 Cong. Rec. S8117 (daily ed. June 30, 1994) (Sen. Murray: "Mr. President, The Confederated Tribes of the Colville Reservation have contributed greatly to the success of my region of the country, and will continue to do so for many generations to come. It is time for the United States to recognize the contributions that have been made. Therefore, it is with conviction that I urge my colleagues to vote with me for passage of this act. Thank you.").