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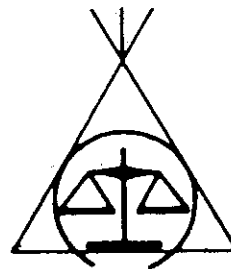
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Background of Treaty Making in Western Washington

The following article is drawn from the exhibit "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century," which Dr. Barbara Lane prepared when she was retained by the U.S. Government as an expert witness on behalf of Indian tribes in U.S. v. Washington. The testimony in her core report, from which this article is summarized, applies generally to all tribes in western Washington.

Judge Boldt drew from her exhibit in delivering his opinion in the case. In that decision he noted the importance of this type of well-documented testimony.

Dr. Lane, a professor of anthropology, has done field work with Northwest Indians intermittently for nearly 20 years. She presently works as a private anthropological consultant.

by Barbara Lane

General Structure of Indian Life

Aboriginally and during the time when the treaties were negotiated, Indian settlements were widely dispersed throughout western Washington. Population density was higher than almost anywhere else in native North America north of Mexico. These two conditions depended upon (a) the peculiar potentialities of the habitat and (b) the successful and efficient utilization of available resources by the native population.

Extensive trade was carried on among Indian groups in western Washington in order to acquire food, food stuffs, raw materials, and manufactured goods not available locally. The trade involved both basic necessities and luxuries of native life. The trade existed because different localities had

different resources. The variation in local habitats is an important factor in understanding the native economy.

Despite the important local differences, it is still possible to make valid generalizations regarding Indian life west of the Cascades during treaty times.

Although the land environment posed difficulties, that of the sea and waterways provided major advantages to Indian existence. The Indians invariably lived next to waterways, traveled upon them, and depended on the resources of the waters for their major livelihood.

**Throughout most of the area salmon . . .
was the staple food and the most important
single food resource available . . .**

Some of the coastal groups engaged in daring feats of marine hunting on the open sea and in the straits. Saltwater and/or freshwater fishing was actively pursued by virtually every adult male throughout the area. Fishing was the universal male occupation. Shellfish collecting was a major occupation of women and girls. Waterfowl were taken on the water, on the tidelands and mud flats, in aerial nets at their flyways, and diving species were taken with underwater nets in the same fashion as fish. Aquatic plants were used for food, medicine, and artifacts such as fishing line, etc.

Throughout most of the area salmon (including steelhead where available) was the staple food and the most important single food resource available to the native population. This is a matter of record, attested to by historic and ethnographic evidence as well as by observations recorded in the years immediately preceding and following the 1854-1855 treaties.

The first-salmon ceremony . . . was essentially a religious rite to ensure the continued return of salmon to the area. The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things . . .

George Gibbs, the lawyer-ethnologist who helped to draft and negotiate the treaties in western Washington, wrote an ethnological treatise entitled the "Tribes of Western Washington and Northwestern Oregon" which was published by the Smithsonian Institution. The monograph was based on observations made in 1854-56 although it was not published until 1877. In it Gibbs reported that "salmon form the most important staple of subsistence."

James Swan, who served as Governor Stevens' private secretary and who published extensively both on coast Indians and on fisheries, wrote in the August 9, 1862 issue of *The Washington Standard*, "The most important fish taken in this Territory, both as regards the quantity and extensive use made of it by the natives for food, is the Salmon, of which there are sixteen distinct varieties, including the trout, which belong to the family of Salmonidae."

A great challenge was posed by the fact that this species could be taken in vast quantities, but only at particular periods of limited duration. To harvest this resource efficiently, the following were needed: (a) equipment of extensive size requiring cooperative effort (e.g., weirs, seines, reef-netting gear); (b) food-preservation techniques (e.g., sun-drying, wind-drying, smoking) and storage facilities (e.g., cedar boxes, baskets, bladders and kelp containers for fish oil, and smoke houses) so that the huge surpluses could be redistributed to people in other areas (e.g., ceremonial exchanges, trade).

The major food acquisition techniques in the area were fishing, hunting of land animals and sea-mammals, the collection of wild foods such as mollusks and other intertidal marine life, berries, and the digging of edible roots, shoots, and bulbs.

In order to take these foods as they became available at certain places and seasons, it was necessary for people to range over the country to be on hand when the camas bloomed or the berries ripened or the salmon began to run. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained

in their winter villages and live more or less on stored foods—dried meat and berries and dried and smoked fish. Fresh fish and other foods were harvested during the winter. That season, however, was devoted primarily to intra- and intervillage ceremonies and manufacturing tasks. This was the time when people were congregated into the largest assemblages, occupying long multifamily houses made of split cedar planks. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, claim digging, harvesting camas, berry picking, and other economic pursuits. People moved about to resource areas where they had use rights based on kinship or marriage. Such rights were clear cut and important in native society, but were not readily discernible to outside observers of Indian life. Ambiguity was compounded even for observant resident settlers because families did not necessarily follow the same particular pattern of seasonal movements every year. This gave non-Indians the impression that there was no stable political organization. The winter village had no "head chief" or "village council." Leadership and authority tended to be task oriented with the appropriate specialist taking over leadership according to the occasion, e.g., hunting party, communal fish drive, raiding party, life crisis ceremony.

Native society was hierarchial, in which upper-class people, commoners, and slaves were recognized. In parts of the region, stewardship rights and duties over resource-producing areas such as clam beds, reef-net locations, cranberry bogs, or camas beds were inherited.

The dense populations, stratified social organization, and complex ceremonial life which characterized native culture in western Washington was made possible because of the effective utilization of available resources and the highly efficient means of redistributing periodically available surpluses.

The initial effect of the influx of non-Indians into western Washington was to increase the demand for fish both for local consumption and for export.

Function of Fishing in Indian Life

The first-salmon ceremony, which was general through most of the area, differed in detail and was celebrated over different species from community to community. This was essentially a religious rite to ensure the continued return of salmon to the area. The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured that salmon were never wantonly wasted and that water contamination was not permitted.

Elmendorf (1960:62) gives the following comments for the Twana (Shokomish) based on field work which began some 20 years prior to publication.

Most ritually determined acts with reference to river fishing had to do with the salmon run and were directed toward insuring its continuance. The river had to be kept clean before salmon started running. HA [informant] defined the period as starting in early August (for the Skokomish), before the first king salmon came. From this time no rubbish, food scraps or the like might be thrown in the river; canoes were not bailed out in the river; and no women swam in the river during menstrual seclusion. The object of these precautions was to insure that the salmon would want to come.

In native society, surplus food could be converted into wealth (canoes, blankets, slaves, shell ornaments). Dried or smoked salmon was easily stored and transported. At the same time, keeping qualities were of limited duration. Surplus preserved salmon was usually consumed or distributed within the year.

Non-Indians did not engage as fishing competitors on any scale until the late 1870s.

Distribution was effected through complex exchange systems involving voluntary gift giving to kin and friends, reciprocal gifting to specified affinal kin which sometimes became competitive, intercommunity feasting, potlatching, and outright sale and trade beyond the local community and sometimes over great distances.

Trade was carried on to secure salmon species which did not run in local streams. Sometimes trade was for salmon of the same variety as that available locally. According to ethnographic accounts, people claimed to be able to taste differences between salmon of the same kind taken in different bays or streams.

Salmon were traded in the Puget Sound area from across the Cascade Mountains. Gibbs (1877:170) described the commerce as follows:

The trade between the two districts was once considerable. The western Indians sold slaves, haikwa, kamas, dried clams, &c., and received in return mountainsheep's wool, porcupine's quills, and embroidery, the grass from which they manufacture thread, and even dried salmon, the product of the Yakima fisheries being preferred to that of the sound."

The initial effect of the influx of non-Indians into western Washington was to increase the demand for fish both for local consumption and for export. Almost all of this demand, including that for export, relied on Indians to supply the fish.

Non-Indians did not engage as fishing competitors on any scale until the late 1870s.

Available evidence suggests that Indian fishing increased in the pretreaty decade for three major reasons: (1) to accommodate increased demands for local non-Indian consumption and for export; (2) to provide money for the purchase of introduced commodities like calico, flour, and molasses; and (3) to obtain substitute non-Indian goods for native products no longer available because of non-Indian movement into the area.

Non-Indians' Understanding of Indian Fishing

Available evidence suggests that despite superficial awareness on the part of some of the treaty commissioners that there were special rites, ceremonies, and observances concerning fish and fishing, there was little real understanding of native belief systems. They were regarded at best as interesting, at worst as examples of heathen superstition. As noted earlier, the major concern of the first salmon ceremonies was to insure the periodic return of salmon to their accustomed spawning grounds. A theme in local Indian mythology deals with a period in the past in which malevolent individuals blocked streams to prevent the salmon coming up.

George Gibbs, in a letter to Colonel Ripley under the date of July 21, 1857, described a tactic used in the recent hostilities in the Duwamish-Puyallup-Nisqually drainage areas. The following excerpt is from a draft of the letter. I have not seen the one actually sent.

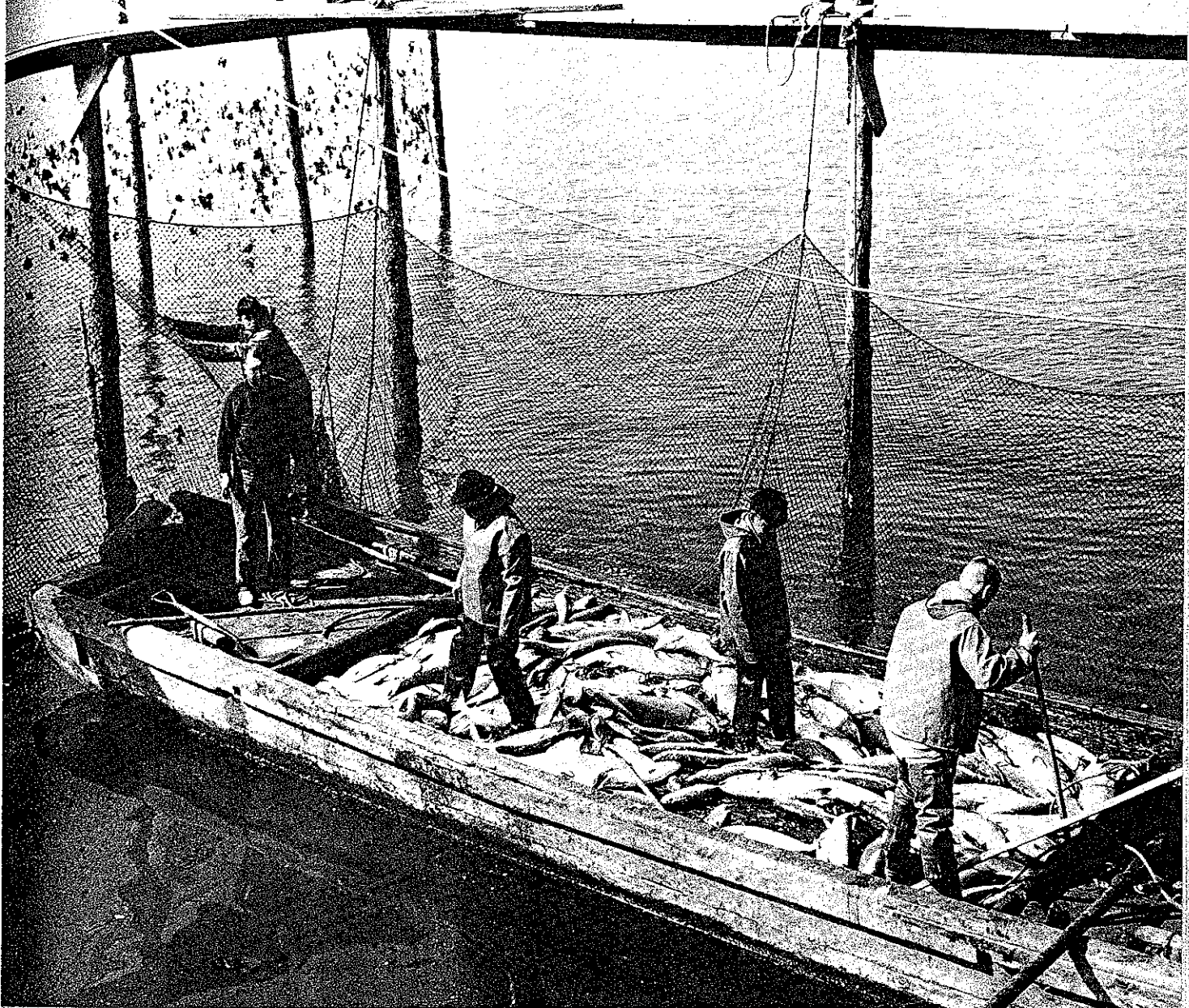
The Salmon is everywhere the great staple of winter provision. It ascends in vast schools all the streams far up into the mountains. During the war, Col. Casey very sagaciously cut off the hostile tribes from this resource by constructing weirs at the mouths of the rivers in the hostile district, and thus alarmed the most obstinate bands into submission to avoid starvation.

... despite superficial awareness on the part of some of the treaty commissioners ... there was little real understanding of native belief systems.

It seems more likely to me that the Indians feared a permanent destruction of the runs in those rivers, rather than any immediate problem with supplies. My reasons for this opinion lie in the ritual and mythic preoccupation with insuring that the runs continue, but other evidence would seem to support this view.

A pioneer Puyallup valley resident discussing the hostilities of October 1855 many years later, had this to say (Meeker 1905:309)

... Fish abounded in all the streams at that season of the year, and if interrupted at one place the women could find the salmon abundant elsewhere. Here was the spectacle of an army with strongholds as large as the field to be occupied,



Swinomish. Trap netting salmon at Skagit Bay BIA photo, 1965.

with food in all parts, even up to the most impenetrable forests of the foothills.

It is astonishing how abundant these salmon are found in the small streams and even rivulets of the headwaters of the greater rivers below

. . . The food could be obtained for many months, and even a supple accumulated for the later season when the salmon would disappear from the streams. When the final end came considerable supplies were captured and destroyed, silent witnesses of the industry and determined cooperation of the women in, to them, this great struggle.

From Meeker's account it appears that there was no immediate threat of starvation. This seems to me to support the view that the Indians were concerned about longer-range effects.

The role of fishing in the native economy was more readily appreciated by non-Indians than the intricacies of the native exchange systems and the social role cooperative enterprises such as reefnetting and weir construction were probably not realized. What was clear was that the Indians depended upon fishing for their livelihood and that they could not be removed from their fisheries without destroying them.

In a report dated March 4, 1854, George Gibbs made a number of suggestions and recommendations relative to the treaties to be negotiated in Washington Territory. He commented in part (Gibbs 1967:28):

To remove the Indians altogether into any one impracticable, for the western verge has been reached. To throw the fishing tribes of the coast back upon the interior, even were the measure possible, would destroy them

The contribution made by Indian fishermen to the Territorial was also recognized.

There was clearly misunderstanding of Indian fishing "rights" and there was evidently no perception of Indian self-regulation. It was incorrectly assumed that the Indians recognized no private rights in taking fish.

Discussion of Indian concepts of fishing "rights" requires some examination of specific localities used and gear and techniques employed as these affected the manner in which "rights" were conceived.

The fishing areas used were basically of five kinds: (1) freshwater lakes; (2) freshwater streams and creeks draining into the various inlets; (3) shallow bays and estuaries; (4) the inlets and the sound; and (5) the straits and ocean.

Customary use rights varied according to the type of locale and the gear being used. Winter villages were located along the salmon streams, at the heads of inlets near the mouths of such streams and on protected coves and bays. The major requirements in the location of winter villages were shelter from the elements and from surprise attack, suitable beach or bank for launching canoes and for storing them above high water mark, and access to firewood, fresh water and fishing stations.

The larger and more important villages were usually located at particularly lucrative fishing places: at the forks of a river where weirs could be set up; at the outlet of a river into a lake; and at the heads of inlets near the mouths of the salmon streams. Other large villages were located on the saltwater in protected coves and bays.

There is no evidence of any attempt by the settlers to impose regulatory controls over Indian fishing prior to, at the time of the treaty negotiations, or for some time afterwards.

During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages. During the spring, summer, and fall, people moved about to fish at more distant fishing grounds.

In general, I think it is correct to say that the freshwater fisheries were controlled by the locally resident population. During the winter season, the local residents were the exclusive users. At other seasons use rights at these locations and other within the territory of a particular group would be extended to visitors from other localities.

Visitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality. Certain of these visitors would have use rights because they were related to local residents. Others might request permission to fish and such permission was normally

extended provided that amicable relations existed between the local people and the visitors.

The situation with regard to saltwater fisheries appears to have been slightly more complicated. Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This was especially true if shellfish beds were present. In the deeper waters of the bays, hugh flotillas of canoes would gather to troll for the salmon as they gathered in the bays just prior to their entry into the rivers.

Meeker (1905:64) offers a first-hand account of fishing activities at the end of May or early June in 1853

As we drew off the tide from the mouth of the Puyallup River, numerous parties of Indians were in sight, some trolling for salmon, with a lone Indian in the bow of his canoe, others with a pole with barbs on two sides fishing for smelt, and used in place of a paddle, while again, others with nets, all leisurely pursuing their calling, . . .

People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish. At some of the major fishing locations, like Commencement Bay, people from other drainage system would also congregâte to join in the fishing.

The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such were used as fishing areas by anyone travelling through such waters. However, both within the straits and off the west coast in the open sea there were halibut banks known to the Indians, used by them, and claimed as private property. Other private property rights to saltwater fisheries were recognized reefnet locations in the straits. Among the Makah, ownership of halibut banks was held in the name of the chief as steward for his local kin group and retainers. With the Lummi reefnet locations, the situation was different. Individuals owned specific locations on the reef which they received by heirship. Owners of locations then hired relatives and friends to work with them in preparing the gear and fishing the site.

Based on his observations made in the mid-1850's and apparently without knowledge of either Makah or Lummi fisheries, Gibbs (1877:186) stated

As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.

As intimated by the foregoing discussion, Gibb's generalization requires modification to cover adequately a range of local situations. His characterization is acceptable if it is understood to refer to saltwater fisheries and if it is understood that certain exceptions existed, notably in the halibut, cod, and sockeye fisheries.

As regards freshwater fisheries, all subsequent information about fishing and everything else known about western Washington Indian cultures indicate clearly defined property concepts. Ownership rights to specific fishing areas were well developed; at the same time, use rights were freely granted. Gibbs' statement appears to be concerned with use rights. If so, his characterization is useful, provided that the contexts and limitations noted above are understood.

Before Indian title had been extinguished, the Donation Act had thrown open land to settlement and induced non-Indians to migrate and take up land claims.

Controls over Indian Fishing

Indian control was by accepted, customary modes of conduct rather than by formal regulations involving enforcement and sanctions. With regard to salmon, it was necessary that the first fish from the run be treated ritually. In connection with this and the restrictions on defiling the river prior to the run, Elmendorf (1960:63) commented

No special authority enforced the taboos on polluting the river prior to the beginning of the run. There was also no special "fish watcher" or ceremonial lookout for the beginning of the run, although everyone in every Twana community was on the alert for this event.

Controls over fishing were necessary in cooperative efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the time at which the weir was opened to allow upstream escapement for spawning and/or supply of upriver fishermen.

Techniques such as spearing or trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.

Generally, individual Indians had primary use rights to locations in the territory where they resided and secondary use rights in the natal territory (if this was different) or in territory where they had consanguineal kin. Subject to such individual claims most groups claimed exclusive fall fishing

rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

There is no evidence of any attempt by the settlers to impose regulatory controls over Indian fishing prior to, at the time of the treaty negotiations, or for some time afterwards.

There is, however, evidence of Indian refusal to permit white fishermen access to privately owned fishing areas. Michael Simmons, who helped Governor Stevens negotiate all the treaties in western Washington, and who subsequently had an important career in the Indian Service, wrote of the Makah in his 1858 annual report as Indian Agent for Puget Sound district (Simmons 1858:583)

Four gentlemen from California, have taken claims and established a trading post and fishery at Waada. They have been there for about nine months and have uniformly treated the Indians well; bought all the fish and oil they could bring for sale, (these Indians catch many whales) at liberal prices, yet they refuse to let them fish on the banks.

Second, Indian fisherman, like all fisherman, shifted to those locales which seemed most productive at any given time. The productivity of local sites varied with (1) volume of water in a stream at a particular season or year, (2) amount of mud or silt present at a given time, and (3) alteration in the watercourse due to flooding, log jams, and other natural causes. The use of particular sites varied over time. There were traditional fishing locations which were used for as long as people could remember, but these were not fixed and unchanging because the watercourses themselves were not immutable and unalterable.

Third, a number of important fishing sites recorded in treaty times are no longer extant because of post-treaty man-made alterations in watersheds and water systems. Diversion of water for power purposes has lowered the carrying power of some streams and dried up others; engineering for flood control has altered the course of rivers; canal-cutting has lowered lake levels; and land fill operations have obliterated still other fishing stations. When sites are demolished, their existence is eventually forgotten.

It is clear that many Indians continue to regard salmon in a light which is quite different from that of non-Indians.

Fourth, other sites are still extant but are no longer used by Indian fishermen because the appropriate Indian gear for those particular sites has been outlawed by the State or because competing users, not necessarily fishermen, have made utilization of these sites by Indian fishermen unfeasible. In still other instances, extant usual and accustomed sites are no longer fished because the species

taken in treaty times have been destroyed by post-treaty events. Alteration of water temperature and water level, industrial pollution, and the fencing of spawning creeks by private land owners are some of the causes.

Negotiation and Execution of the Treaties

Purpose of Treaty as a Whole

The Indians had received constant assurances from white settlers and from government representatives that they would be compensated for lands which were being settled on and for loss or destruction of native property incident to white settlement. The Indians were concerned that these things be done by mutual agreement.

George Gibbs became a key member of Governor Stevens treaty commission and helped to draft the treaties as well as to negotiate them. In a report dated March 4, 1854, Gibbs made a number of suggestions relative to the treaty negotiations which began later that year. Apparently referring to the fact that there were no outstanding unratified treaties in Washington Territory, Gibbs observed

No conventional arrangements, strictly so speaking, are known which need action on the part of the government; but the assurance has everywhere been given by the whites, settling among the Indian tribes, that Congress would compensate them for the lands taken.

The United States was concerned to extinguish Indian title to the land in Washington Territory legally, in order to forestall friction between Indians and settlers and between

settlers and the government. The Act creating Oregon Territory provided that Indian land title should be extinguished by treaties. Before Indian title had been extinguished, the Donation Act had thrown open land to settlement and induced non-Indians to migrate and take up land claims. This state of affairs concerned the new Governor of Washington Territory and his attitude was shared by the Commissioner of Indian Affairs, George W. Manypenny, who wrote to Stevens under date of April 4, 1854:

With you, I feel anxious that Congress should immediately make provision for extinguishing the Indian title to lands in Washington Territory.

Further, until treaties were concluded and reservations were established, it was impossible to enforce the trade and intercourse laws regulating traffic in liquor and commercial relations in Indian country.

Meaning of "The right of taking fish, at all usual and accustomed grounds and stations, is further secured"

Apparently this language originated with George Gibbs, who drafted the treaties in western Washington, although the suggestion itself was made earlier by at least one other party.

In a report submitted in 1853, E.A. Starling, Indian agent for Puget Sound offered the following suggestions (italics mine):

I would recommend that, when treaties are made with these tribes, their future homes be all included in one reservation—each tribe having the

Swinomish. Fishing with a beach seine net. BIA photo, 1965



extent of its reservation marked off—and their fishing grounds be granted them; and over the reservation, that the law regulating trade and intercourse with the Indians, and any other law relating thereto, be extended with full force.

There is no record of the Chinook jargon phrase actually used in the treaty negotiation. In my opinion, it would have been possible to convey the meaning of the above language adequately through the medium of Chinook jargon. The English word fish is "pish" in Chinook jargon. Presumably this generic term was used in the treaty talks and it is likely that it would have been understood by the Indians in the same sense as the whites.

There is no mention of restrictions as to purpose, time, or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. It is my opinion that no such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue—the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. I believe that both parties intended the Indians to continue full use of their fishing places, even though most lands adjacent to fishing waters were ceded.

Meaning of "in common with all citizens of the Territory"

This language appears to have been introduced by Gibbs. There is no record of the Chinook jargon translation which was used in the treaty negotiations. There is nothing in the official record to suggest that the U.S. intended "in common" to connote future control by "citizens" over Indians. It is my opinion, based partly on evidence in the official record and partly on inference from ethnographic data, that at least some of the Indian parties expected to exercise control over "citizens" fishing at usual and accustomed Indian fishing sites.

There is no clear evidence as to whether "in common" was intended to connote fishing at the same place, or on the same run, or at the same place on the same run, or something else. Stevens asserted that Indian and non-Indians fishing techniques were so different as to preclude competition, but this information was incorrect.

In a letter to George W. Manypenny, Commissioner of Indian Affairs dated December 30, 1854, transmitting the Treaty of Medicine Creek, Governor Stevens commented on the treaty provision regarding the taking of fish as follows

It may be here observed that their mode of taking fish differs to essentially from that of the whites that it will not interfere with the latter.

They catch salmon with spears in deep water and not with seines or weirs.

The Puyallup Indians who were party to the Treaty of Medicine Creek were using both seines and weirs

extensively at the time that Stevens wrote and had been doing so for some years previous. I am unable to account for his assertion that the Indians did not use seines or weirs. I suppose it is possible that Governor Stevens was ignorant of the facts, although it is hard to credit this. The other members of the treaty commission were certainly aware of Indian methods of taking fish and according to the official treaty notes the subject of Indian fisheries was thoroughly discussed by Stevens, Doty, Simmons, Shaw, and Gibbs prior to the Treaty of Medicine Creek.

In my view, the most likely Indian interpretation of the "in common" language would be that non-Indians were to be allowed to fish without interfering with continued pursuit of traditional Indian fishing. I think it most likely that the government intended to provide for non-Indian participation in fishing with no thought that this would require any restriction of Indian fishing.

. . . fishing provides a basis for cultural identity and a cohesive force in Indian society.

Signing the Treaties

Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs." The basis for choice were friendliness to Americans, real or apparent status in their communities, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the U.S. to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes," each of which had been assigned a "head chief." The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

Communication

It is hazardous to judge the extent of communication of either specific terms or of underlying purposes and effect without a transcript of the actual Chinook jargon used to interpret the treaties. We have no knowledge that any Indian present at any of the treaties understood English. It is a matter of record that many, if not most of those present, did not even understand Chinook jargon. It is also a matter

of record that the official interpreter, Shaw, spoke no Indian language and had to use Chinook jargon to interpret the treaties, which were then re-interpreted into the various Indian languages by Indians who understood the jargon. The double translation resulted in the Indians receiving the information at third hand and increased the potential for confusion.

Chinook jargon, a trade medium of limited vocabulary and simple grammar, is inadequate to express precisely the legal language embodied in the treaties. Its inadequacy was commented upon by both Indians and non-Indian witnesses to the treaty negotiations.

The views of Leschi, one of the Nisqually chiefs who repudiated the treaty, are set out in a letter from Dr. William F. Tolmie of the Puget Sound Agricultural Company at Fort Nisqually to Fayette McMullen, Governor of Washington Territory dated January 12, 1858. Dr. Tolmie referred to a trip Leschi had made in spring 1855 to search out a young relative of his who had been taken to Oregon in 1849 by the Indian agent of that time, Mr. Thornton. In the following excerpt from Tolmie's letter, I have supplied the emphasis:

Leschi has lately informed me and his statement is corroborated by others that he wanted his cousin from Albany to be interpreter for the Nisqually tribe, as in dealing with the whites on such momentous affairs as the sale of their lands he felt the great disadvantage the Indians labor under, in having no better medium of communication than the Chenook Jargon. Finding however, that his cousin had forgotten the Nisqually language, he did not urge his return.

It was clear and unequivocal intent and understanding on the part of both Indians and whites at the treaty-signing that the reservations were to be residential bases from which the Indians were to continue to utilize the total environment, including specifically all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population.

Comparison of Current Function of Fishing in Indian Life with Same at Treaty Time

Western Washington Indians appear to have discontinued most outward religious forms such as the first-salmon ceremony and some associated beliefs, while retaining other beliefs and certain traditional attitudes and feelings regarding salmon and their environment. An analogy might be drawn with those Christians who do not attend church or

pray, but who nonetheless feel bound to the Christian faith and whose lives are much influenced by it. It is clear that many Indians continue to regard salmon in a light which is quite different from that of non-Indians.

Trade in fish was a vital component of aboriginal life in western Washington. During the 1850s, 1860s, and 1870s, Indian fishing and Indian trade in fish formed an integral part of the pioneer economy. As non-Indians began to compete in the fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.

For many Indians, fish continue to provide a vital component in their diet. For others, fish is not a necessary dietary item although it remains an important food in a symbolic sense. (Thanksgiving turkey is not essential for physical survival, but contributes to our spiritual well-being because it provides an emotional link with our past.) Few habits of human beings are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than nutritional need. For many Indians, salmon remains important in an economic, nutritional, and symbolic sense.

Historically and to the present day, taking, preparing, eating and trading fish have been important functions in Indian communities. As such, fishing provides a basis for cultural identity and a cohesive force in Indian society.

Traditional Indian fishing methods were highly efficient. These methods survived where Indians were allowed to maintain them; that is, where they were not outlawed or where Indians were not prevented access to areas where the methods were feasible. When necessary, or appropriate, Indians have adopted new techniques and gear. Indians no longer fish from dugouts, just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and white no longer use cotton or linen nets.

Indians of western Washington continue to fish for most of the species for which they have always fished. A few are no longer utilized because they are now rare (e.g., eulachon) or because they are no longer in demand (e.g., dogfish for oil). Salmon and halibut remain today, as in pre-European times, the fish of major interest both for consumption and for exchange.

Tribal Identity

Continued existence of viable Indian communities, "tribes," "bands," and so on, is not dependent upon nor coterminous with federal recognition. There may be biological, cultural, and geographic continuity since pre-treaty times, as in the case of the Sauk-Suiattle, for example, without federal recognition.

Continuing Indian identity is evidenced by (a) overt traits of aboriginal Indian culture which continue into the present (e.g., language, food preservation methods, games such as lahal, the "bone game," winter dances with the associated

spiritual beliefs, art forms, kinship and social links); (b) aboriginal forms which have been melded with introduced ideas to create new, but uniquely Indian features (e.g., the Shaker Church, Indian sweaters, and the modern invention, the Coast Salish spinning device); and (c) persistence of traditional knowledge and belief in the importance of that knowledge (e.g., community histories, location of fishing sites, myths, tales, and songs). This knowledge is as relevant to Indian identity as the knowledge of American history is to the "Americanism" of all of us.

Attitudes Toward Rights and Powers Secured and Established by the Treaties within the 25 Years Post-Treaty

Throughout the area Indians consistently attempted to assert their treaty protected fishing rights as evidenced by efforts to maintain control of their fishing sites and by litigation concerning these issues. Non-Indian activity over the years has served to erode the value of Indian fisheries. River fisheries have been destroyed because of power development and use of rivers for navigation and transport. In-shore fisheries have been destroyed through building of breakwaters and harbor development. In addition, these and off-shore fisheries have been depleted by over-fishing by non-Indians. These activities evidence an unawareness of or lack of concern with treaty provisions. In the first two decades after the treaty making, the Indians were able to enjoy their treaty-protected fishing rights without much difficulty. Later, the State actively opposed treaty fishing provisions and sought to curtail Indian rights for the benefit of non-Indian citizens.

Specific Conclusions

Interpreting the Treaty

It was the clear and unequivocal intent and understanding on the part of both Indians and whites at the treaty-signing that the reservations were to be residential bases from which the Indians were to continue to utilize the total environment, including specifically all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population. Also it was clear

that there was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory. The contribution was seen to be primarily in the fisheries. Indian understandings were similar.

No post-treaty regulations as to time, place, manner or purpose of their taking fish were anticipated by the Indians, nor is it likely that this was envisaged by the treaty commission. Indians did not anticipate a requirement that they permit non-Indians to fish at their usual and accustomed places, such as weirs, reefnet locations, and privately-owned halibut banks, while the Indians fished there. The "in common with" language must have been understood and intended by both parties to assure non-Indians an opportunity to engage in fishing, but not at the expense of existing Indian claims and rights. Undoubtedly the Indians understood that the non-Indians would share access to saltwater seine and troll fisheries. Indians had no reason to expect that it would become necessary for the State to limit non-Indians' harvest to provide an Indian harvest.

The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory.

The very fact that the United States made treaties indicates that the federal government was concerned to integrate Indians into the new order by peaceful and legal means. Legal recognition of pre-existing Indian tenure and use rights is evidenced in the alienation of Indian lands by treaty-arranged compensation. Indian fishing rights were specifically exempted from such alienation, and this is further attested by the fact that no compensation was arranged for their extinguishment.

In my opinion, the "in common" language was intended to allow non-Indians to fish subject to prior Indian rights specifically assured by treaty. □

