AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 23:4 (1999) 159–173

COMMENTARY

The Shell(Fish) Game: Rhetoric, Images, and (Dis)Illusions in Federal Court[1]

JAY MILLER

For several weeks in 1994, I observed a federal court case held to determine the treaty rights of Washington state tribes to take shellfish—broadly defined to include all marine life other than fin fish. Having been an expert witness in other subproceedings of this same *United States* v. *Washington* (also known as the Boldt Case), I was particularly interested to watch and examine an important case as a non-participant. I was also a known quantity to the Native, or plaintiff, side and thus was able to overcome the great suspicion, or virtual paranoia, characteristic of such trials. Having seen and overheard racially charged expressions by non-Natives in the courtroom, I realized how justified these psychological defenses are. Herein, my aim is simply to present an ethnography of the trial, as I understood it with the help of friends and legal advisers, giving special attention to the terminology and ideology used throughout.[2] Description and discussion of the event is divided into three parts.

The trial led to the court's memorandum decision and order of 20 December 1994, a week-long hearing on the decision's implementation. Later, the court's decision on 28 August 1995 turned on the issue of equity, or equitable factors, and compromised tribal hopes. Until that time, the judge had scrupulously upheld the priority of treaty over other rights, giving tribes a sense of fair hearing. Of particular note was a statement by the judge, in which he summarized his understanding of the legal issues, an unheard of revelation.

Jay Miller holds degrees from the universities of New Mexico, Rutgers, and Princeton and conducts research throughout Native North America. He has taught at universities and tribal colleges in the United States and in western Canada.

THE SHELLFISH CASE (18 APRIL–4 MAY 1994)

Between December 1854 and 1855, tribes in Washington state signed nine treaties with Governor Isaac Stevens. Although the tribes ceded lands to the state, they reserved the "right to take fish in usual and accustomed places in common with the citizens of the territory." In 1974, during the federal court case *United States* v. *Washington*, Judge George Boldt determined that these treaties permitted tribes to take 50 percent of the harvestable salmon in the ceded area. Five coastal treaties also included a clause affirming the right to take shellfish except at "any bed staked or cultivated."[3] Since Washington has 2,400 miles of inland coastline, the potential digging area is enormous.

The state, having lost the Boldt decision, opposed Native shellfish fishing, denying or arguing away any continuing treaty rights. State officials, sixteen tribes, and the United States negotiated, but failed to agree on percentages for commercially important sea urchins—served in Japan to celebrate the emperor's birthday—and geoducks, or huge clams. Tribes, knowing that the treaties entitled them to 50 percent of the fish, were willing to take only 35 percent in the interest of an out-of-court settlement, but the state refused and court convened for *United States* v. *Washington*, subproceeding 89-3, at the Federal Building in Seattle, scheduled for three weeks.

Witnesses

As in any trial, the overall process began with the pleadings. In this case, a plea for a request for determination was made, alongside a request for a question-and-answer period devoted to document presentation. This latter request, which was a response to witnesses' questions and depositions, was made to ensure that a lawyer never posed an unclear question to a witness during the trial. The deposition was not only used in pre-trial planning, but also was kept nearby during the trial to ensure consistency between deposition and testimony. If a variation between the two attestations was uncovered, he or she could be impeached.

Because American law, like its Anglo-Saxon source, is adversarial, a side presents the proof only minimally necessary to support its case in as logical a fashion as possible. Testimony is neither thorough nor exhaustive in terms of facts. Decisions are based on law, precedents, prior determinations, and evidence. Unlike academia, where scholars constantly seek to improve their knowledge, testimony is expected to be forever fixed. Expert witnesses appear in court to give their opinion, providing their basis for doing so.

After testimony, during cross-examination, witnesses may be challenged or attacked for their opinion and its basis. Only after each expert witness submits a final report is he or she deposed to fix that testimony. Depositions may be wide-ranging since specificity is only an issue in the court itself. Since the witness is under oath, questions can be used to test areas of competence and pet theories, helping to determine creditability. Does he say one thing and mean another? Is he succinct and clear? Indeed, depositions can be much more vicious than testimony, where the thin veneer of civilization is maintained and expected.

Logical inconsistencies may help or hurt the party. For each question, a foundation must be laid to proceed logically and consistently through the topic. To testify about a tribal ordinance to backfill clamming holes, for example, a tribe must establish that such a regulation exists, that it applies to specific beaches, and that the witness watches the backfill occur.

By putting a witness on the stand, the lawyer adopts his or her testimony, regardless of how damaging it may be. On the other hand, a lawyer can call an adverse witness—someone from the opposing side—to drag out supporting information and discredit the remainder of that testimony.

During the trial, each witness is subjected to direct and cross-examination. Then the witness may be questioned in redirect examination by his or her own lawyer to explicate, clear up, or correct difficulties. Though rare, further questioning can be sur redirect, sur recross, and so on in alternation.[4] However, each round is constrained by the scope of the questions asked during the proceeding examination, narrowing the focus each time. Such testimony can become tedious and delay the trial.

The Judge

This judge was brilliantly effective at moving testimony along so that the trial ended after two weeks. When assigned to the case from California, where he lives, he was disconcerted that such fishing rights disputes had continued for more than two decades without final resolution. He convinced the new chief judge to issue a sunset order that would wrap up all pending cases. It soon became apparent, however, that such an order was premature. The order was ultimately reversed, to the amazement of several lawyers unfamiliar with adaptable judges.

Parties to this case included the plaintiffs—a group of United States attorneys and sixteen tribes—and the defendants—three assistant attorney generals for Washington state, attorneys for commercial shellfish growers, and two groups of attorneys representing private landowners who feared that their waterfront properties would be invaded by tribal members in pursuit of shellfish. Cultural diversity and Native rights were either foreign or unknown to these landowners. As they often expressed to each other, they could not understand how something done in 1855 could apply to them in 1994.

Until the 1950s, Washington sold its low tidelands to private individuals, placing these landowners—only allowed into the case at a late date—in a rare position of ownership. Needless to say, the uplands and the tidelands owners were wealthy. During lunch breaks, these people could be heard discussing travel plans, yacht clubs, and children, who were frequently discussed in terms of sororities and social activities. Social standing among other Euramericans dominated their discussions. They presented themselves as concerned citizens, even though many had placed cesspools on their beaches and had otherwise damaged local marine ecology, information that was withheld from the record.

Prior to the trial, lawyers, sometimes with clients, gathered to discuss strategy. Because law is based on consistency, regardless of the current elected gov-

ernor or attorney general, the state lawyers steadily pursued an argument, discredited by Boldt, that tribes ceased to exist the moment their leaders signed any treaties. The three state lawyers were carefully selected to present a spectrum of personal styles. All were male, suited, and corporate, but the eldest was calm, slow, deliberate, and seemingly reasonable; the youngest was friendly and outdoorsy; and the middle-aged one was gaunt, tense, and abrupt—he was clearly there to stir things up and present the hard line. The youngest state lawyer had to consort with a tribal counterpart constantly to keep track of the exhibits and prepare the final list, which included a set of unresolved documents relating to what they announced in court as "dead and missing anthropologists."

Before the trial, the judge ruled that: (1) for purposes of the treaty, shellfish were indeed fish, intended to be treated the same as fin fish; and (2) each tribe had to prove its usual and accustomed (UnA throughout) shellfishing areas.

In consequence, the trial was to determine the legal meaning of what came to be called the Shellfish Proviso. This stipulation prohibited Native harvesting from "any bed staked or cultivated." In this case, most attention was directed at the meaning of the word *cultivated.*

Each tribe hired anthropologists to document their shellfishing sites, which they asserted were coterminous with their fishing UnAs as determined during the original Boldt case. The state attempted to force each tribe to provide a calibrated listing of each location by size, species, and season, but they were thwarted. Based on a previous subproceeding in which two tribes were pitted against each other, the state assumed that tribes would attack each other's witnesses if they had contesting land claims.

In the months preceding the trial, tribal lawyers worked out a stipulation—an agreement among parties to a case deciding how to handle a matter of joint concern—to minimize cross-examination of tribal expert witnesses. Using the terminology provided by Boldt, each expert specified grounds (general locations) and stations (specific locations) based on available treaty-time documentation, tribal tradition, and shell middens in the salmon UnA. It is worth noting that such documentation is due to the fortuitous efforts of men like George Gibbs, a college graduate employed by Governor Stevens and motivated by a strong intellectual curiosity about Native peoples in California and Washington. Because he was both a reporter on local ethnography and a witness to many of the treaties, his notebooks in the Smithsonian did much to win the Boldt decision for these tribes. Thus, by an accident of history, Euramerican law was forced to deal with a rare documentary record favorable to Native rights.

The state and other defendants entered the trial arguing that the tribes, even if they won, were incapable of protecting public health or managing the shellfish resource. Therefore, the tribes' lawyers put tribal fishery officers on the stand to indicate that tribes already were capable of managing the fin fishery in compliance with state and federal laws. Health issues were settled by entering into an agreement with a Washington state branch that would co-manage health issues in order to safeguard tribal members and the public

from polluted or dangerous shellfish. A tidelands-owning physician was put on the stand to answer questions about the nearest bathroom to his beach because such sanitation related to public health.

The defense lawyers' argument—based on language imposed by the Supreme Court in another salmon subproceeding—that tribes were entitled to take these resources only in so far as they provided a "moderate living"—was particularly ironic. As someone at the trial commented, only in America can the most recent immigrant aspire to riches, while the courts, arguing that Natives can only earn a moderate income from their own ancient resources, refuse the same right to the original inhabitants of this land. Thus, both sides put economists on the stand to testify about the statistical basis of a moderate income.

The plaintiffs presented their entire case first, then witnesses for the defense took the stand. This was followed by a final rebuttal by the plaintiffs. As this was federal court, great formality was required. Everything went through the judge and was subject to his approval. No sudden or unexplained moves were allowed. A lawyer, as council, had to ask the judge for permission to approach the clerk or witness, or to step away from the central podium. The judge was assisted by two clerks: one, the court's clerk, sat at a lower front desk, while the other, the judge's clerk, sat mid-height on the side opposite the witness box. By contrast, state courts have a bailiff and a clerk, and lawyers can get in the witnesses' face.

From the judge's seat high on the bench, the right hand (south) side of the court was occupied by the plaintiffs and the left (north) side by the defendants. On a few occasions, one or two of the oldest men owning shellfish companies sat at the table between their lawyers. A podium stood in the middle between the sides, where the presenting lawyer stood facing the judge. Because each of the sixteen tribes had a lawyer, they sat in two rows, one at the table and another on chairs behind.

The judge was adamant about keeping the proceedings moving without bitterness or bickering. In addition, he insisted that there would be no attacks on either expert or lay witnesses, emphasizing that an expert witness was there to give an opinion, while a lay witness testified according to their personal interests and experiences. For tribes, elder lay witnesses also carried the burden of representing their understanding of an oral culture in lieu of written legal documents.

Beginning with the pre-trial hearing, the judge stated that he was concerned with proving "ultimate fact," which he defined at the end of the trial as fact that emphasizes only those elements of the case that must be proven. All exhibits would have to be tied to witness testimony. Redundant or repeated testimony would not be allowed because it would slow the proceedings. As he put it, "Don't bring in any gingerbread." The case would be decided by the evidence presented and by the existing law. He said that he would remain neutral during the proceedings. Lawyers were to be concerned with custom, practice, and conduct at the time of the 1855 treaties. Each side was expected to use its own witnesses to prove its case, not try to discredit or turn a witness from the other side. Discrediting the opposition would achieve nothing

since it gave the parties the appearance of being directed toward either embellishment or deception.

The Plaintiffs

Opening statements were made by both sides, each explicitly stating what they intended to prove during the proceedings. Lawyers seemed particularly concerned with the treaty makers' meaning of the terms *staked* and *cultivated.* The defendants, most emphatically the shellfish growers, attacked a well-known historian for his account of a Northeastern "fishing expedition," which actually was a report on legitimate fieldwork meant to help the prosecution explain the shellfish industry's lingo and special laws. Because of this heightened attack, plaintiff lawyers began to refer jokingly to this witness as the anti-Christ, emphasizing that the state had to discredit him to hope to win.

The first witness was an archeologist who specialized in the study of shell middens. He used a map to tell how frequent and ancient such shell refuse sites were in the case area. The use of audiovisuals made the structure of the court very clear: the map, screen, or image was presented to the judge's best advantage. Though the room was packed with people, only the judge had a clear view. He made the decision, it was his courtroom, and everyone played to him.

From that first Monday afternoon to the next morning, the famous historian was on the stand describing the motives of the treaty negotiators, who intended the many small reservations to act as bases from which Natives could continue to harvest throughout their larger resource area. Shellfish were important in this plan because they provided both ready food for the gatherers and ready cash when sold.

From 1854 to 1855, nine states had laws distinguishing natural and cultivated beds, as opposed to "claimed and occupied." Such laws also allowed for restrictions on access according to season, residence, and other selective criteria. Further, this clause in the treaties protected the early shellfish industry, now represented by the modern growers.

During defendant attacks on this historian, the judge reiterated that a side would prove its case only through its own witnesses, not by trying to discredit a witness for the other side. Several of the defendant lawyers were plainly baffled by such a strategy. In fact, throughout this trial, the judge was generally hostile to any lawyers' games, seeking a fair and honest hearing about what was said and done at each treaty signing, emphasizing reported statements, conduct, and behavior.

This was the first time the tribes relied on a much honored historian, while the state continued to be represented by a regional college historian noted for his role as a hired gun in proceedings against Native rights. The tribal historian relied on a manual for northeastern shellfish growers from treaty times, located at the Washington territorial library and available to Governor Stevens and his staff at the time these disputed treaties were drawn up. This was to show that the term *cultivated* did not have a common frontier meaning associated with farming, but instead referred to the specified

destruction and replacement of native species with introduced shellfish. In other words, *cultivated,* in this context, referred to the deliberate generation of a bed where none had existed before. Examples from the shellfish industry in pre-pollution New York City and nearby coastal areas—the area in which Stevens grew up and worked for the coast survey—strengthened the historian's argument. Later, during rebuttal, he quoted a letter from an early island settler who made it clear that *cultivation* was intended to "get wild nature out"; that is, to replace any native plants and habitats with distinctly European crops and plants.

For the rest of that first week, each plaintiff tribe presented an anthropologist to testify to its UnA fishing places as determined by the original Boldt decision. The United States put a famous anthropologist on the stand who had represented tribal interests since the Boldt case. She amassed period documents, particular Gibbs reports, and ethnographical information in support of fishing. After her testimony, tribal fishery experts and elder lay witnesses took the stand, personalizing this information and expressing the importance of shellfish.

Elders insisted that the hard work of digging shellfish contributed to Native self-esteem and that such collection involved both religious and ceremonial activities, along with economic and subsistence ones. During a cross-examination by the defendant's council, a Native witness was subjected to a condescending compliment that he "was known to be a good worker."

An interesting subplot underlay these proceedings. A claim by the Upper Skagit, who gained an upriver reservation only in recent decades, claimed that they were legally "successors in interest" of the Nuwhaha, a coastal shellfishing band identified in a treaty but "unclaimed" by any reservation. At least a third of Upper Skagit members have Nuwhaha ancestors, primarily through the political marriage of their own prophet and a high-ranking Nuwhaha (Lower Samish) woman, the daughter of Petius.[5] Members of two other bands that settled with the Upper Skagit also used territories on the saltwater.

On Tuesday, May 27, the plaintiffs announced they would rest, thereby agreeing to abide by the judge's final decision.

The Defendants

Defendants began their case by putting a retired and controversial anthropologist on the stand to opine that treaties were intended to disappear after a time, diminishing and extinguishing the rights that the United States granted the tribes. Of course, the tribes disputed this, insisting that they reserved rights to themselves at treaty times. Eventually, according to this anthropologist, Natives were expected to become "good old Christian farmers," regardless of the abundance of timber and fish throughout the Northwest. Decisions were made in Washington, D.C., where Thomas Jefferson's tidewater yeoman farmer was the American ideal. In time, tribes would substitute potatoes and wheat for shellfish and, by implication, salmon, an argument already denied by Boldt.

Defendants argued that Stevens understood that the state was going to develop, resulting in construction, pollution, and, eventually, the loss of fish

and other natural resources. Such fish depletion, according to the defense, was inevitable. In response, the tribes argued that even if Stevens knew about future development, he still guaranteed the perpetual right to salmon and, by implication, did the same with shellfish. In fact, the main reason for fish reduction was the state's miserable attempts at resource management. Based on their success with salmon returns, tribes showed that they could do a much better job of managing shellfish. Tribes were ever resourceful, harvesting whatever species was ready. Thus, even though manilla clams, introduced from the Philippines, have replaced the native little neck clams, Natives easily added them to their diet. Similarly, they adapted to the Pacific oyster that replaced the native Quilcene species. Moreover, tribal lawyers reminded the judge that under case law standards ambiguities in the treaties have to be interpreted to the benefit of the tribes.

Two other anthropologists also appeared for the state. One was an archeologist who insisted that shellfish were of minor importance to the Native economy because venison was a bigger and better source of nutrition. She said nothing about seasonal demands for shellfish when game was scarce or inedible. The other anthropologist remained faithful to the record, but asserted that Native peoples ceased to be tribal the moment they accepted wage labor and joined the money economy. Since the state has always tried to divorce tribes from their treaties by arguing such claims, the state lawyers highlighted this convoluted argument, which the tribal lawyers took to calling the "wages of sin" theory: the idea that accepting money somehow kept people from retaining their indigenous identity.

While the state and growers were presenting testimony, the judge was attentive, although occasionally contentious or caustic. That Wednesday was Daughter's Day and, when a group of elementary school girls quietly entered the courtroom to stand in the back, he remarked, "Another group of expert witnesses."

After the state experts, shellfish growers appeared on the stand. While they had previously appeared in court wearing slacks and jackets, they dressed in jeans and pressed work shirts when they were scheduled to testify. This ploy presented an image of the wholesome American farmer, which they called themselves at any opportunity. All of their rhetoric and imaging was that of earnest farmers, living embodiments of Jefferson's yeoman. A foreman for the growers, who has since been appointed to a public relations position, actually contorted himself in the witness box so he faced the judge while explaining oyster farming. Widows and wives took the stand to testify to the grower's interests. During the trial, the growers arrived for the 9 A.M. opening, while their wives came an hour or so later. This was an obvious attempt to show that these farmers' families were wholesome: that their wives has just come from sending their children off to school and putting their households in order. During breaks, they discussed growing up in all-white neighborhoods and wished that the overloaded south side, where the tribal lawyers sat, would fall off the seventh floor.

Interestingly, plaintiff women lawyers cross-examined these women witnesses. The plaintiff lawyers were highly diverse, while defense lawyers were all

corporate males. One grower, a bird-like widow, so shrewdly directed her testimony that she never reappeared on the stand after a break. The other growers, all men, were questioned by a tribal lawyer whose ancestors came from India and, in consequence, was known as the "double Indian lawyer."

Growers testified to their labor, ranging from efforts to control predators like moon snails, crabs, and starfish to the creation of artificial tide pools by diking a beach. They increased their yields by seeding beaches, owned or leased from the state, with clam spat and oyster eyed larvae.

During the proceedings, a defense lawyer stood up and said, "I have three questions, your honor," and then proceeded to ask four. The judge responded, "I count." When an officer of the largest grower company (founded in 1890, now with 160 employees) testified that the price of geoduck had just been set at state auction at $5.50 a pound, the judge joked that the high price was hard to believe because "it was the ugliest creature I have ever seen." Smiles passed through the courtroom when lawyers recalled that the judge, while visiting various parties involved in the case during October of 1993, was squirted with water by a geoduck that the youngest defense lawyer accidentally held in the wrong way.

At the end of Thursday, a plaintiff lawyer and a lawyer for the landowners stepped to the podium and announced that they had reached an agreement on the nature of title. The "origin of title" was a sensitive issue during the trial since the landowners wanted to assert that title originated from the state, while the tribes traced it to their aboriginal ownership and treaty cessions. As the tribal lawyer was ending his reading of the stipulation, the other lawyer loudly added a final sentence, never written down or agreed upon. After an intense exchange at the podium, with the judge calmly asking the lawyers to settle it between themselves, the agreement came to naught. The next day, a tribal lawyer kept an officer from a title company from testifying, thus forcing the original agreement, without the shouted addendum, to stand, keeping title origins vague.

State witnesses included officials from Parks and Recreation, who testified about public access to shellfish beaches and regulations for "dived shellfish," such as sea urchins and geoducks. After mentioning that geoducks lived to be up to one hundred years old, the judge asked if they were still edible. After searching for a snappy answer, the official said that they still have sex when they are eighty; the judge smiled and said they were still edible.

On Monday, 2 May 1994, testimony became awkward and unpleasant as lay witnesses for the private landowners took the stand. A man who left commercial fishing after the Boldt decision tried to impugn an entire tribe for camping on his beach, exercising their treaty right. Throughout, the judge urged such testimony to keep moving, saying, "Don't spoon-feed me." He was extremely careful to hear people out, provided they did not become redundant. He would comment, cajole, and, in one case, browbeat to keep the trial moving. The only lawyer to challenge him was told to write his questions in a memo due at a specific time. Instead, the lawyer stayed absent for the next few days. The judge was careful to act in such a way as to cut off any appeal rights based on charges of unfairness. His actions in doing so were brilliant.

During a lunch recess, landowners sitting in the courtroom discussed how their lawyers had convinced them to put only small landowners on the stand because they would appear more sympathetic to the judge than the "fat cats."

A woman who has made a career out of testifying against a neighboring tribe insisted from her understanding of the law that "Indians" were each given allotments and allowed to sell them for fee simple title. In other words, everything proceeded from the Great White Father in D.C. When she first moved to the area, she thought it would be interesting to learn about Northwest Indian culture (she lives next to a museum), but reality set in when Natives began fishing in her waters and clamming on her beach. An older man who supplemented his income by selling shellfish from his beach was careful to explain that the only person who had ever stolen from him was a man he had hired to dig his clams—the implication being, or course, that a Native may have been the culprit.

A teacher from a community college took the stand to explain how he surveys and counts shellfish populations on beaches. During rebuttal, a marine biologist with a doctorate degree testified to all the methodological and theoretical errors involved in such a plan.

Last on the stand for each side were economists, testifying to the "moderate income" constraint imposed by the United States Supreme Court. A private consultant with a master's degree computed his figures for poverty level and moderate income on the basis of U.S. census figures. Another witness, a full professor with island property, used county median income since it set a figure at which 50 percent of tribal members were above and 50 percent were below. The professor added in non-monetary income from federal housing, medical, and gambling benefits (phrased as collective goods) because, he said, tribes are communal. On the basis of his absurd figures, a particular reservation would earn $6.5 million in 1994, or $58,000 a person. As this calculation was stated, a member and employee of that reservation quietly poked his chairman and asked for a raise.

The professor made much of a government handbook listing available federal grants, including 10 percent solely for Native use. He assumed thereby that any Native was not only eligible, but also entitled to such grant funds. Needless to say, landowners were fascinated by this volume, assured that it explained Native sources for funds.

The next day, the consultant economist systematically criticized the professor's testimony.

Closing Arguments

The lead lawyer for the plaintiffs began his final remarks on Wednesday, May 4, at 9:35 A.M. He explicitly covered five topics: (1) relief requested; (2) the meaning of treaty wording as already determined by seven Supreme Court rulings; (3) the meaning of "staked or cultivated" at treaty times; (4) free access to tidelands at low tide, day or night; and (5) the "moderate living" issue.

"Relief" is the legal term defining a party's wants to the judge. In this case, the plaintiffs asked that: (1) tribes have a right to 50 percent of all legal shell-

fish; (2) they may fish with or without historic evidence; (3) the tribes can conduct such fishing rights at all UnAs; (4) tribal members maintain the right to regulate the harvest; (5) harvest and health issues involved with tribal fishing will be co-managed with the state; and (6) an injunction against the state be filed for their attempts to enforce their version of the local laws.

The judge freely asked questions during the presentation, seeking to define the parameters of shellfish availability. The lawyer took pains to explain how it was possible to harvest clams growing under oysters, in case landowners tried to prevent a harvest by sprinkling oysters over a clam bed. But, at base, all the tribes wanted was their treaty right to take half the shellfish after the legal determination of conservation protections.

Defense lawyers for the landowners argued for diminishing treaties, requesting relief that the judge dismiss with prejudice any tribal claims to private tidelands because any diggers should have to obtain permission from the owners. The Supreme Court has had to make seven decisions affecting the salmon fishery because "there are no private property rights in water," but the judge had now to decide how treaty rights apply to real estate where the phrase "staked or cultivated" can only have its accepted, ordinary meaning.

Another lawyer for the owners described the settlers represented by Governor Stevens as the "real heroes [who] made something of Washington." He also said that Natives were never expected to be paid as much as others, so considerations of "moderate living" should be based on 1855 values.

Lawyers for the shellfish growers thanked the judge for a speedy trial before asking that he protect the fruits of their labor where the meaning of "staked or cultivated" must be the plain dictionary sense. Growers were farmers who maximize the world around them, they argued, so that cultivation could only mean to work the shellfish beds. Therefore, the law should agree that they make something from nothing. The grower's primary lawyer emphasized his American spirit, seen through his time serving as a Marine Corps officer, to contrast subtly with the famous historian's 1960s activism, who was "too clever by half."

During plaintiff's rebuttal, lawyers emphasized that tribes did not want the shellfish that used to be under the Seattle Kingdome, only half of what was available now. At treaty times, the legal meaning of *staked* applied to buoys and markers in deep water making short-term holding places before transport, while *cultivated* referred to wholesale biological replacement.

In his final remarks, the judge thanked everyone for all the hard work and said he would decide the case relying on the Supreme Court's rulings as binding precedents, adding that the final transcript ran to thirteen volumes. He called for final briefs in two weeks, soon amended to twenty-one days, and asked that they address limitations on persons, times, places, and administrative concerns within the relief requested. The final arguments by each side had to state the findings of ultimate rather than evidentiary fact. As mentioned earlier, the judge explained that "ultimate fact" referred to elements of the case that must be proven. For example, in a case of negligence, lawyers must prove there was indeed negligence. A week later, defendants were to submit their final statement.

At 2:42 P.M. on May 4, the clerk adjourned the court and released the witnesses from their sworn oaths to tell only the truth.

After 4 P.M. on 20 December 1994, "near the end of the day," fax machines received the judge's decision affirming the treaty right to half the shellfish on all beaches at all times. The tribes were, of course, delighted. The timing, thwarting evening papers and broadcasts, defused any threatened immediate hostile action by the landowners and created chaos among the media trying to fit it into their late news.

IMPLEMENTATION (8–15 MAY 1995)

A year later, the judge returned to Seattle for an evidentiary hearing on how he should implement his decision. The parties to the case were to testify to their concerns in the interests of a fair and regulated outcome. Lawyers knew that these hearings also served to "preserve a record" of the judge's fairness. Every party was given a chance to express its concerns, thereby waiving any right to an appeal.

During the week, each party amazingly maintained the same position they held during the trial, including an ordinary definition of "staked and cultivated." Now, however, the definition of "natural bed" had become the focus of concern. While the judge was asking for help with effective procedures, the defendants acted as though they had not already lost the case. Shellfish biologists for the tribes and the state played a leading role in seeking legal protection for each species. They made clear that minus, or low, tides occur during the day in the summer but at night in winter. As some landowners feared, tribes would have to harvest beaches after dark in the winter months.

Lawyers for these landowners tried to convince the judge to have tribal diggers wear brightly colored tags, "like people do on ski slopes," he said. The judge then quickly ended any discussion of what he called a "scarlet letter." A lawyer for the state ended his summary in an arrogant manner, saying that, at treaty times, "Indians were not to question the motives of the settlers." Lawyers for the growers expressed the greatest concern, pleading for protections for their family industry and seeking ways to minimize any intrusions.

After a week brought no resolutions or useful strategies, the judge firmly asked everyone to reconvene Monday morning with explicit statements of their concerns and how these could be addressed by his final decision. On Friday afternoon, filling twelve pages (896–907) of the transcript, the judge summarized, without notes, his view of the legal issues of the case. Since judges rarely reveal their thoughts, except in written opinions, or undertake to teach the general public, such remarks were taken as an enormous gesture of his goodwill.

In the most reassuring way, the judge addressed the tideland homeowners and the growers on the issue of proper allocation, raising the kinds of questions he wanted answered on the next Monday.[6] He did not intend "to either disrupt or destroy the businesses of the commercial growers" or to subject homeowners "to headlong and aberrational invasions." He continued, saying,

> When this country was a territory and it was occupied by the tribes, these tribes, their predecessors, were occupying these lands, the United States asked them to get off the land and to locate themselves onto reservations, to reside and live on reservations, so that the remainder of the area could be settled by settlers who would come in. And that would minimize the conflict between the tribes and the new settlers.
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> The Indians agreed to do this in these treaties that were discussed in this case in 1854 and 1855 where the agreement by the Indians ceding all their land, which has sometimes been called their aboriginal title to the area which they occupied fully and freely, ceding it to the United States and agreeing to this treaty to remain on the reservation, except, and very importantly to them, they stated they wanted to reserve and did reserve and the United States secured to them the right to continue fishing in all of the usual and customary places that they have fished off the reservation. The right to fish, hunt, and other things was not limited to the reservation. And the United States made a solemn promise to protect those rights and it is in the treaty and in the historical notes leading up to the adoption of the treaty.

As a result of Judge Boldt's 1974 decision, fishing UnAs were determined and upheld by the Supreme Court, along with his quantification that "in common" meant 50 percent of the allowable harvest. This judge, however, initially thought this was a tortured interpretation. Moreover, because the state sold off the tidelands to private owners, the issue has been greatly complicated. In any other state, tidelands are public property, free to all within legal limitations.

> I am talking out loud here so that the lawyers will be prepared.... So I am looking at this objectively. I am not here, for example, to further the notion that is sometimes heard that I have an obligation to the tribes to make up for past historical oppressions or disadvantages that they may have suffered. This has nothing at all to do with this. This is a pure matter of contract. They are here asserting contract rights that they had with the United States, and this is all this case is about.
>
> So the court is going to make every effort to fashion the remedies, and I will tell the lawyers that you should not expect the court to come up with all these little details. You know, the court may establish parameters, but the details have to be worked out in good-faith manner by counsel and the parties.

DECISION BY COURT (28 AUGUST 1995)

The final decision was sent, confirming the memorandum decision in favor of the plaintiff tribes. Their costs were to be paid by the state. The decision also involved, by fiat, the issue of equity, or judicial attempts, at a protective fairness to rebalance factors in regard to today's shellfish growers, who "are, effectively, innocent purchasers." In the past, courts have used equity as a means of forcing monetary compensation on tribes in place of desired land

or resources that they would have preferred. "Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively."

The bulk of the decision detailed the implementation plan, to be followed by all parties in compliance with federal and state laws, for conserving these resources as a sustainable biomass. In addition, the decision documented the appointment of special masters from the tribes, state, growers, and owners to oversee this plan and resolve disputes.[7]

CONCLUSIONS

Throughout the trial, by prearrangement, participants manipulated images and rhetoric in hopes that these would work to their own advantage. While Natives did not appear in distinctive costume—they generally wore jeans and flannels—growers went out of their way to look the part of farmers. Cultural issues of home security, privacy, value, military service, and frontier history were all paraded before the judge as lawyers calmly addressed the legalities involved. The focus throughout was on the judge, who appeared bright, interested, and reasonable. Tribal members, who had good reason to be concerned, were reassured but, based on past betrayals, never completely relaxed. While treaty rights were extolled throughout the trial, there was a lingering sense of waiting for the other shoe to drop, as it finally did when the term *equity* appeared in the final decision to impose considerations of here and now corporations against the supposedly all-important historical precedence of the 1855 treaties. The veneer of due process and proper procedure placing treaty rights above all others was exposed by this finale, which, one tribal member said, was like the judge ending the long wait by saying "gotcha!" or, in the long view of Native history, "gotcha again!"

NOTES

1. Unless otherwise noted, quotations throughout this article come from the author's notes compiled largely at the Federal Building in Seattle during the case *United States* v. *Washington*, sub-proceeding 89-3, and its follow-up meetings. These happenings took place between 18 April 1994 and 28 August 1995. Quoted remarks are intended to capture a sense of the trial's legalese and arguments.

2. Like my previous work on the modern Tsimshian potlatch—see Jay Miller, *Tsimshian Culture: A Light Through the Ages* (Lincoln: University of Nebraska Press, 1997)—I planned this article to describe this trial in detail, so as to pull the reader into the experience. Trials, as another kind of public ritual, deserve similar treatment, especially since the outsider's coverage of the famous Mashpee case was so ignorant and abysmal. See James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988) and Jack Campisi, *The Mashpee Indians, Tribe on Trial* (Syracuse University Press, 1991).

3. Only the 1855 Makah treaty specifically mentioned the right to take whales, an ancient and honorable tradition, now being revived, among these towns and their Canadian relatives along the west coast of Vancouver Island.

4. As in the word "surcharge," sur- means to carry to excess.

5. The Upper Skagit were politically and religiously centralized through the efforts of Skagit Prophet sdlibebtked, the founder of the Campbell or Camel family. The prophet's father was born at Nespelem, now the headquarters of the Colville Reservation in north central Washington, near Grand Coulee Dam. After moving across the Cascade Mountains, he married a woman from the native town at the mouth of the Snohomish River, where the prophet was born and raised until he married a woman from the village on Clear Lake on the Upper Ṡkagit River. During one of his frequent visits to his Interior Salish relatives, the prophet met Father Eugene Casimir Chirouse, an early and important Oblate missionary, then actively involved in the Catholic mission among the Yakama. After the 1855 Treaty War, Chirouse moved to the Tulalip Reservation in 1863, then ended his career among the Canadian Okanagan.

The prophet and priest worked closely, particularly in translating liturgy into Lushootseed. Apparently, they communicated with each other using the Okanogan dialect of Interior Salish. The prophet established his own longhouse near Marblemount, at the junction of the Cascade and Skagit, where he led Catholic services in the summer and Native spirit dances in the winter. His links with Chirouse expanded his base of authority into Euramerican contexts.

When the prophet's first wife died, he married the daughter of Petius, widening his political base, although she seems to have outranked him. This woman later assumed the chiefly name of a famous male relative—yagʷaɬo—and went everywhere with an escort of body guards and attendants who acted on her behalf. Sometimes she is misidentified as her own daughter by the prophet, who also used the same name. Petius was chief at Bayview and a signer of the Point Elliot Treaty. On the Upper Skagit Reservation, the main street is named Duwhaha Drive since, although the treaty spelling is Nuwhaha, Lushootseed changed sounds from nasals to dentals, so the N became D and M became B.

6. By noting that Natives "fully and freely" occupied their territories, the judge distinguished himself from the colonial thinking that still persists in the neighboring province of British Columbia, where Chief Justice Allen McEachern decided 8 March 1991 to agree with federal and provincial governments of Canada, which "consider the territory in question to be Crown land—land that belongs to the Queen, by the colonial right of sovereign nations to claim unoccupied [!?] land." See Antonia Mills, *Eagle Down is Our Law, Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press, 1994), 5.

7. This decision, of course, was taken to the Ninth District Court of Appeals, which upheld it on 28 January 1998 and amended it on 25 September 1998. On 5 April 1999, the Supreme Court refused any further appeals, thereby upholding this decision.