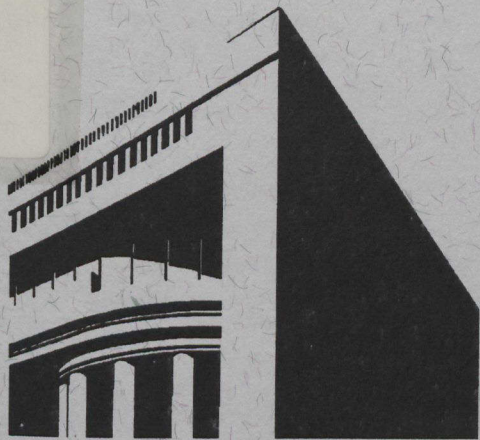


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Treaty Negotiations and the Aboriginal
Fisheries Strategy in British Columbia

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Introduction

Since the 1970s important changes have occurred along the west coast of North America with respect to the Native people's increased control of natural resources. The Coast Salish of the Northwest Coast developed a traditional fishery that not only met their needs for subsistence but had the potential to develop into an integral part of the resource-based economy of the Pacific Northwest. Native people played important roles in

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subsequent years as treaty negotiators. However, the commercial fishery was worked to marginalize Native participation. In addition to the commercial fishery, Native people were also subject to the assimilationist policies of Canada and the United States, which served to further limit Native access to the salmon fishery.

This paper examines the post-contact salmon fishery of the Coast Salish of British Columbia and Washington State especially focusing on recent court cases which have upheld the aboriginal right of access to the resource. Particular attention will be given to the comparative analysis of adjudicated resource rights in Puget Sound and the Fraser River. While there have been several recent studies of the role of Native people in the commercial fisheries of the Northwest (for British Columbia see Pimkerton (1987) and Newell (1993), for Washington State see Cohen (1986) and Boxberger (1989), for southeast Alaska see Price (1990), there have not been any attempts to compare the

differing experiences in Canada and the United States. The purpose of providing insight into resource rights and policy is to provide a basis for future research.

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ABORIGINAL

NON-ABORIGINAL

Introduction

Since the 1970s important changes have occurred along the west coast of North America with respect to the Native people's use and control of natural resources. The Coast Salish of the Northwest Coast controlled a traditional fishery that not only met their needs for subsistence but had the potential to develop into an integral part of the resource-based economy of the Pacific Coast. Native people played important roles in the development of the commercial salmon fishing industry of British Columbia and Washington State (Knight 1978; Boxberger 1989) but this changed dramatically in subsequent years as technological changes and competing labour groups worked to marginalize Native participation. In addition to the economic forces at work Native people were also subject to the assimilationist policies of Canada and the United States, which served to further limit Native access to the salmon fishery.

This paper examines the post-contact salmon fishery of the Coast Salish of British Columbia and Washington State especially focusing on recent court cases which have upheld the aboriginal right of access to the resource. Particular attention will be given to the comparative analysis of adjudicated resource rights in Puget Sound and the Fraser River. While there have been several recent studies of the role of Native people in the commercial fisheries of the Northwest (for British Columbia see Pinkerton (1987) and Newell (1993), for Washington State see Cohen (1986) and Boxberger (1989), for southeast Alaska see Price (1990), there have not been any attempts to compare the differing experiences in Canada and the United States for the purpose of providing insight into resource rights and policy.

Although the Native people whose traditional territories lie along the border between Canada and the United States provide a perfect opportunity to analyze the different impact of the political and economic changes of the respective countries, there are remarkably few studies that attempt to do so. Samek (1986) called for comparative analyses in order to avoid duplicating misguided reforms in policy. Her comparison of Native policy in respect to the Blackfoot of Alberta and Montana represents a seminal work in the field of comparative political analysis (Samek 1987). Recently Miller (1992) presented an analysis of the role of women in the formal political structures of the same groups under consideration here. The Coast Salish of North Puget Sound and the Lower Fraser River, including the Sto:lo and Lummi, became subject to different political bodies, nevertheless they have maintained strong ceremonial and kinship ties across the border. Their differing experiences with political and economic forces are therefore instructive, particularly in respect to the interpretation of aboriginal rights.

A Model of Aboriginal Resource Use and Control

Figure 1 is a visual representation of the process of inclusion and exclusion that has characterized Native resource use and control in the United States and Canada. While designed from study of the Pacific Coast salmon fisheries it is applicable to other resources as well. By extension I would argue that this model also is applicable to other areas of North America (e.g., the Mikmaq fishery of the Maritimes and the Native fishery of the Great Lakes) and, perhaps, to other areas of the world where indigenous people have similar colonial experiences (e.g. Australia and New Zealand). I have identified two variables, control and access, which characterize the participation of Native peoples in resource exploitation. While the specific process will vary from group

A MODEL OF ABORIGINAL RESOURCE USE AND CONTROL

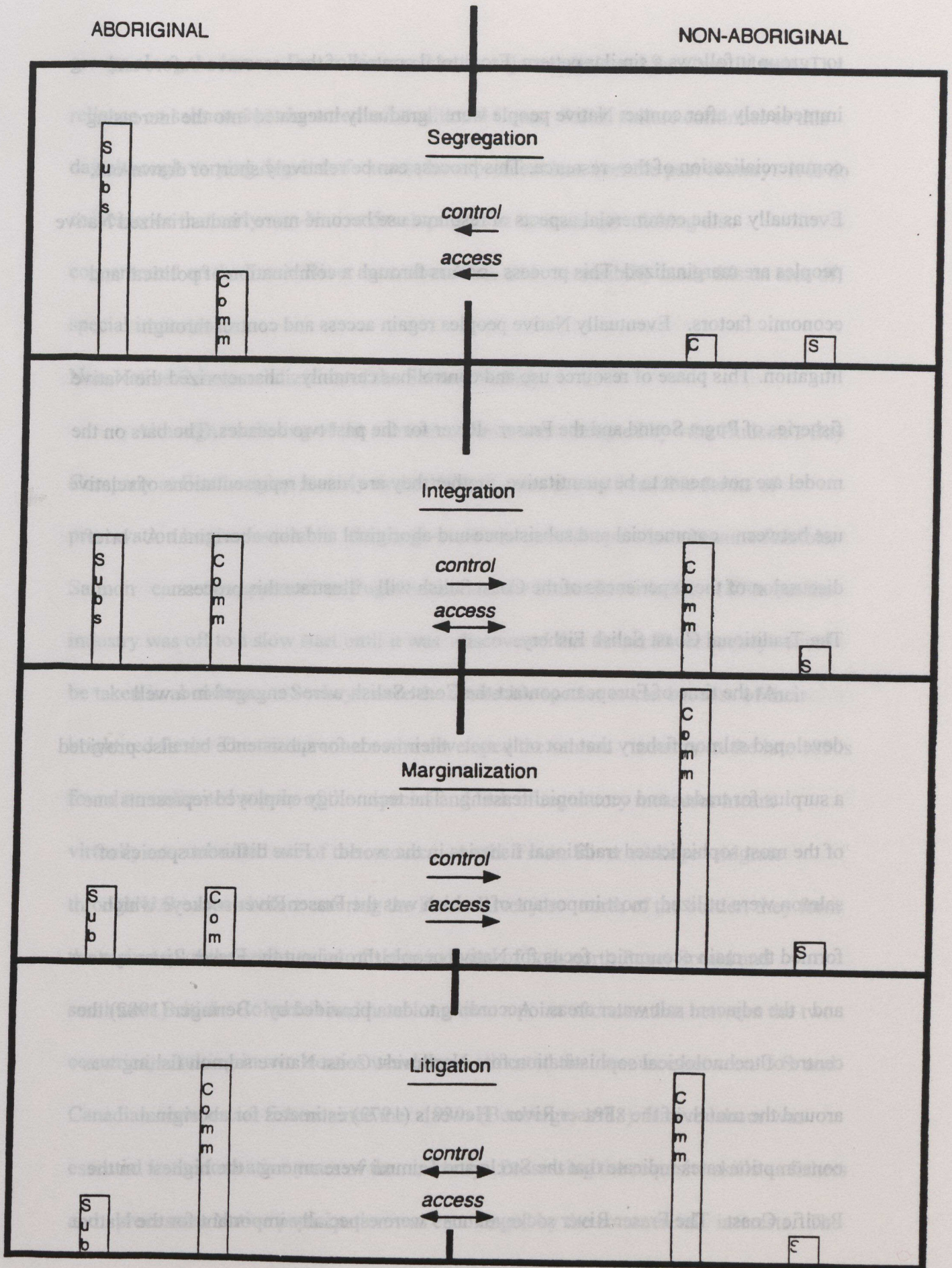


Fig. 1

to group it follows a similar pattern. From total control of the resource before and immediately after contact Native people were gradually integrated into the increasing commercialization of the resource. This process can be relatively short or drawn-out. Eventually as the commercial aspects of resource use become more industrialized Native peoples are marginalized. This process occurs through a combination of political and economic factors. Eventually Native peoples regain access and control through litigation. This phase of resource use and control has certainly characterized the Native fisheries of Puget Sound and the Fraser River for the past two decades. The bars on the model are not meant to be quantitative, rather they are visual representations of relative use between commercial and subsistence and aboriginal and non-aboriginal. A brief discussion of the experiences of the Coast Salish will illustrate this process.

The Traditional Coast Salish Fishery

At the time of European contact the Coast Salish were engaged in a well developed salmon fishery that not only met their needs for subsistence but also provided a surplus for trade and ceremonial feasting. The technology employed represents one of the most sophisticated traditional fisheries in the world. Five different species of salmon were utilized, most important of which was the Fraser River sockeye which formed the main economic focus for Native people throughout the Fraser River system and the adjacent salt water areas. According to data provided by Beringer (1982) the centre of technological sophistication for Northwest Coast Native salmon fishing was around the mouth of the Fraser River. Hewes's (1973) estimates for aboriginal consumption rates indicate that the Sto:lo and Lummi were among the highest on the Pacific Coast. The Fraser River sockeye runs were especially important for the Native

groups along the lower Fraser River and in the adjacent Gulf and San Juan Islands. The reliance on salmon that characterized traditional Coast Salish culture continues to this day although varying degrees of access have been evident over the past century. It is no coincidence that early non-Native developments in commercial fishing also concentrated on the Fraser River runs, abundance and accessibility made this an area of special importance.

Non-Native Commercialization of the Salmon Fishery

Although marketing of the salmon resource was attempted by the Hudson's Bay Company at Fort Langley as early as the 1820s it was not until reliable forms of preservation became available that large-scale commercial operations became feasible. Salmon canneries appeared on Puget Sound and the Fraser River in the 1870s but the industry was off to a slow start until it was discovered that Fraser River sockeye could be taken in abundance. Sockeye were the desirable species to can because of their bright red flesh. The entrepreneurs who developed the salmon industry in the late 1800s found an unlimited supply of the species and lack of regulatory measures meant virtually an unbridled use of the resource. As the Fraser River sockeye migrate through U.S. waters before entering the Fraser River just north of the border, they form the mainstay of the commercial fishing industry of both north Puget Sound and southwest British Columbia and have long been a point of contention between the two countries, resulting in two treaties which have allocated the resource between U.S. and Canadian commercial fishers since the 1930s (Boxberger 1988). Native labour was essential in the formative years of the industry. Possessing the requisite skills as fishers and processors Native participation was encouraged by the commercial interests. The

earliest commercial operations purchased the majority of their fish from Native fishers and Native women were employed in the canneries as cutters and packers. Very rapidly the Native people were incorporated into the industry and their economic lives became a mix of subsistence and seasonal wage labour.

The British Columbia Experience

During the latter part of the 1800s the efforts towards directed assimilation of the Native people of British Columbia was well underway. As Tennant (1990:74-75) points out the “traditional beliefs, practices, and institutions required active dismantling if assimilation was to succeed.” Nevertheless, as the industrial development of the fishery accelerated, beginning about 1880 and continuing until after the turn of the century, the Native people remained a significant force in the industry. In fact, the fishing industry was the “only economic sector in the province in which Indians were well paid and able to maintain a substantial presence” (Tennant 1990:73). By 1919 the British Columbia fishing industry employed nine thousand people, “the majority of whom were Indians. And more than one-third of all salmon fishermen were Indians” (Pearse 1982:151). The Native people adjusted remarkably well to the changes in the fishery and continued to participate as an integral part of the labour force. This participation articulated well with the traditional fishing economy in which the division of labour was between men and women, the men fishing and the women processing the catch. As the fishery became industrialized the Native people fished for cash as well as subsistence and the traditional division of labour persisted. During the 1920s and 1930s the development of larger and more expensive vessels caused the number of Native fishers to decline. This decline, however, was minor in comparison with the drastic decline after World War II.

This displacement was caused by the consolidation of the canning industry and the adoption of more capital intensive fishing technology. From 1950 to 1980 the number of Native-owned vessels fell by two-thirds. The number of Native people employed as crew and cannery workers also dropped. This decline in participation in the fishing industry was a severe economic blow to the Native communities. By 1980 Native fishers accounted for just 15 percent of the salmon fleet and most of the Native vessels were leased from the canneries. The Native people perceived the attrition of their participation in the fishery as the most serious threat to their economic well-being. Several organizations developed in the attempt to reverse this trend, such as the Indian Fisherman's Assistance Program and the Indian Fisherman's Development Board. Since most British Columbia Natives never formally negotiated treaties with the Canadian government it has long been the contention of Native bands and political organizations that aboriginal rights to resources remain. The Constitution Act of 1982 has marked an important turning point for Native people in British Columbia. Although British Columbia Natives have a long history of political activism designed to clarify aboriginal rights to land and resources (Fisher 1977; Tennant 1990) their efforts have generally been thwarted by the province until recently. Native fishing rights were tested in the 1980s by several court cases, the most important of which was the Sparrow case. Ronald Sparrow, a member of the Musqueam band near the mouth of the Fraser River, was arrested in 1984 for using a net longer than allowed by the Fisheries Act. As early as 1868 the Fisheries Act has regulated the Native food fishery in British Columbia and this case was one of the first to question whether the Native fishery was an existing aboriginal right or whether the aboriginal right to fish was extinguished by the Fisheries

Act. In May 1990 the Supreme Court of Canada ruled in *Sparrow v. The Queen* that the Coast Salish right to fish is an existing aboriginal right protected by Section 35(1) of the Constitution Act, 1982. This included the aboriginal right to fish for food, social and ceremonial purposes, a right which takes precedence over other user groups and is second only to conservation of the resource. The court, however, was silent on the right to sell fish commercially. Since this ruling there were a number of lower court decisions concerning the sale of fish by Native people, some in favour, some against. As a result the Fisheries Minister initiated a policy to allow the sale of fish by Native people on a seven-year trial basis (1992 to 1998). In addition to the Sto:lo this policy has been extended to other Native fisheries throughout the province. The Aboriginal Fisheries Strategy has been one of the most contentious issues in the past five years. The Sparrow case hinged on wording in Section 35 of the Constitution which states that "the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed." This has been interpreted to mean rights in existence in 1982. Since the Coast Salish had fished for salmon continuously since British Columbia joined Confederation, albeit under federal provisions allowing a Native food fishery, the right was nevertheless an existing one and gained constitutional authority in 1982 (Sanders 1990:126).

In August of 1996 the Supreme Court of Canada ruled in the *Van der Peet* case that the sale of fish was not an aboriginal right for the Sto:lo. Based on a somewhat hazy test the court determined that selling fish was not "integral" to the culture of the Sto:lo and therefore not protected under Section 35 (1). The implications of this decision are still unclear. Some possible issues will be discussed below.

The Washington State Experience

Unlike the Native people of British Columbia most Washington Natives have treaty-protected rights to resources. Nevertheless, parallel historical developments in Washington State led to the near total exclusion of Native people from participation in the fishing industry. As the Washington State fishery became increasingly capital intensive and as labour of other ethnicities came to replace Native labour the Native people attempted to assert treaty rights to fish. The policy of the federal government at the time, however, discouraged activities deemed "traditional" and instead pressured Native people to pursue farming as a means to bring about assimilation into the dominant society. Nevertheless the Native people held to the contention that treaties gave them assured rights to fish but the State of Washington consistently refused to recognize Native fishing rights. In the early 1900s the Coast Salish of Washington State came to be restricted to fishing on their reservations and even this activity was suppressed by the state and federal governments. By 1935 the total salmon harvest by Native fishers accounted for less than 3 percent of the total in Washington State. For a short period of time during World War II and for a few years after the Native people enjoyed a short reincorporation into the fishing industry. Then in the 1950s the increasing technological changes and increasing participation by non-Natives led to the exclusion of Native fishers from the industry. This has been attributed to general discrimination and an inability of Native people to access capital, for example, Native property is held in trust by the federal government and cannot be used as collateral and lending institutions will generally not make loans to Native people (Boxberger 1989). In the 1960s Native people began to question the manner in which the fishery had

developed and contested the exclusion of Native people from exercising their treaty right to the resource. Through a series of protests and court cases the Native people eventually gathered support to take the issue to court. Thirteen western Washington tribes entered suit against the state of Washington in 1973. In February 1974 Federal District Court Judge George Boldt ruled that wording in the 1855 treaties was to be interpreted to mean that treaty tribes were to exercise not only a treaty right to fish but also a guaranteed allocation of the resource. Since the State of Washington was unwilling or unable to allocate specifically for a treaty fishery the court set the allocation at 50 percent. This decision was upheld by the Supreme Court of the United States in July 1979. In the ten year period following the Boldt Decision the Native people gradually increased harvest of salmon until they were able to reach the maximum allocation. Since that time the tribes and the state have cooperated to manage the resource in a manner that ensures compliance with the court decision.

A Comparison

Native policy in both Canada and the United States stem from the Royal Proclamation of 1763, in theory if not in actual practice. Briefly stated, the Royal Proclamation ensures that aboriginal rights to land, and by extension to resources, continue until such time as these rights are extinguished by treaty or some other form of agreement. The concept of "extinguishment" thereby becomes a primary concept concerning aboriginal rights and a major point of departure between Canadian and U.S. policy. In general the Coast Salish in Canada have had to demonstrate that aboriginal rights have not been extinguished as a means of protecting those rights under the Constitution. The Coast Salish in the U.S. have had to demonstrate that rights have

been extinguished as a means of reinstating those rights. This has resulted in similar ends but by very different means. The fishing rights decision in Washington State preceded the Sparrow and Van der Peet Decisions by nearly two decades. I suggest here that a review of the experiences of the Coast Salish of Washington State after the Boldt Decision may enable the Native people of British Columbia to avoid similar difficulties that emerged. I identify four problems that arose in the Native fishery of Washington State after 1974 (Boxberger 1989) and suggest ways in which they can be circumvented.

The Issues

At a meeting on the Aboriginal Fisheries Strategy in 1993 Jack Nichol of the Union of Fisheries and Allied Workers would announce that "the Fraser River runs are the healthiest they have been in years." The next year the runs would fail to appear in the numbers expected. Immediately the press placed the blame on Native fishers and the Aboriginal Fisheries Strategy (see Boxberger 1993). The Fraser River fishery is still large but there has not necessarily been more room created for participation in the commercial fishery. Inevitably as participation by Native people increases the internal problems inherent in commercial fisheries will intensify. Over-capitalization, unequal build-up and user-group conflicts have plagued the Native commercial fishery of Washington State. What does this tell us about the future of the Native commercial fishery in B.C.? Under the Aboriginal Fisheries Strategy the Native people of B.C. participate in the sale of salmon but they have not been guaranteed an allocation. Under the Aboriginal Fisheries Strategy the allocation for a Native fishery is about the same as the historic food fishery. This is a major oversight that appears to be missing from the

on-going negotiation process. Over-capitalization of commercial fishing fleets is a phenomenon that results in increased harvest by individual fishers. Investing in more expensive, and more technologically sophisticated, gear requires an increase in individual gear harvest in order to cover the increased expenditures—often as high as 80 percent of the gross yield. The post-1974 build-up of the Lummi fleet illustrates this problem.

In 1974 there were thirty-five to forty Lummis who gill netted with small skiffs on or near the reservation. Two Lummis operated purse seine vessels. Suddenly faced with the opportunity to harvest many more fish than in previous years the Lummi fleet was physically incapable of expanding their take. Nevertheless, by 1985 the Lummi were the strongest fishing tribe in western Washington, taking, in some years, close to half of the entire treaty allocation. The Lummi fishery after the Boldt decision used three vessel types. The common method of fishing at the time of the Boldt decision was the gill net skiff, which was used for river and in-shore fishing. These boats are about seven meters in length, are powered by twenty-five to forty horsepower outboard motors and use hand-pulled nets. Such skiffs are operated by one person, although the fisher will sometimes take along a family member for crew. These fishing boats represent a capital investment of from under US\$1,000 to as much as US\$5,000, with the nets costing another US\$2,000 to US\$5,000. The most significant post-Boldt buildup was of the Lummi power gill net boats. These boats range between seven and 14 meters in length and represent a capital investment of US\$35,000 to US\$50,000, with the nets costing from US\$10,000 to US\$25,000. The power gill netters use large inboard/outboard engines and hydraulic reels to work the nets. They are large enough so that the fisher

can live aboard for several days and therefore fish a considerable distance from home port. The present Lummi purse seine fleet consists of vessels ranging in cost from US\$100,000 to US\$750,000 each, with the net costing another US\$40,000 to US\$50,000. These vessels are drum operated, are 15 to 25 meters in length and require a crew of four or five. Purse seiners use a "power skiff," a four meter long boat with a powerful diesel engine used to haul the net around in a circle. Power skiffs represent another sizeable investment, from US\$15,000 to US\$20,000. The Lummi purse seine fleet increased from two in 1974 to thirty-five in 1992. Needless to say, most vessels are heavily financed by non-tribal lending institutions. With the increase in each gear type there was a concomitant need to increase catch to cover the capital investment and operating costs. It has been estimated that a purse seine vessel must yield over US\$265,000 annually to meet minimal operating costs, a power gill net US\$50,000 and a skiff gill net US\$25,000 (Boxberger 1989:173). With the allocation of salmon limited plus the other tribes seeking to increase their harvest of the allocation, it very quickly became apparent that the Lummi fleet had become seriously over-capitalized in a relatively short period of time. The major problem associated with over-capitalization is that most fishers operate at a deficit. It has been estimated that the average annual income of Lummi fishers is US\$5,000, far below the yield necessary to meet minimum operating expenses and achieve a moderate income (Boxberger 1989:173-174). In contrast to the guaranteed allocation in the Native fishery of western Washington, the Native people of B.C. have no guarantee that the right of harvest for sale will continue after 1998. As the Native fleet builds it will require a certain proportion of the resource to remain viable but if access to the resource is restricted the results could be

devastating. In addition if uneven buildup of various band fleets goes unchecked the situation described for the Lummi could be replicated. Commonly conflicts within user groups emerge as a result of increased resource extraction. To use the Lummi example again, by 1985 the Lummi were capable of harvesting over half of the total Native allocation for the twenty-four tribes of western Washington State. This was the result of economic, political and environmental factors. Once the Native treaty share was allocated, there was no mechanism to equitably allocate the resource among the treaty tribes. The Lummis entered the fishery with large scale gear putting them at an advantage over the other tribes using smaller gear. In addition, the location of the Lummi tribe is such that they have access to the U.S. share of Fraser River sockeye and thereby take most of the Native share of the U.S. allocation under the Pacific Salmon Treaty (see Boxberger 1988 for a discussion of the effect of the Pacific Salmon Treaty on the Lummi fishery.) The treaty tribes of western Washington are restricted to fishing within their traditional use areas (called "usual and accustomed areas"). The usual and accustomed areas of the Lummi are ideally situated to intercept many of the runs of salmon entering Puget Sound as well as the Fraser River runs. The Fraser River system likewise presents an allocation problem, particularly for the up-river bands. Since Native fishing rights only extend to traditional use areas, those bands nearer the mouth of the river have first opportunity at harvest. With the build-up of the Native fleet the pressure to increase harvest has given an advantage to those down-river groups. To overcome the potential for inter-band conflicts it is essential that a mechanism for allocation be adopted before unequal build-up reaches a critical point. In western Washington allocation among the twenty-four treaty tribes is facilitated by the

Northwest Indian Fisheries Commission. The commission, however, is advisory, it has no regulatory powers and should a tribe disagree with the management recommendations it can choose to pursue its own course of action. Having twenty-four tribes involved in regulating the fishery, combined with the State of Washington and input from federal agencies, has created a regulatory nightmare. In British Columbia, where even more bands are involved, the allocation and management process is even more complex. The Sto:lo represent the largest Native fishery in British Columbia and they control the lower reaches of the Fraser River system. While the Sto:lo have organized there is no mechanism for inter-band management on a larger level. Thus far the Department of Fisheries and Oceans has assumed the management of the resource but systems of co-management are being worked out elsewhere in B.C. and will likely come into play on the Fraser system as well. Additionally the allocation within bands is an important consideration too. Management of the Lummi fishery is administered by the Lummi Fisheries Office, which answers to upper levels of administration directly responsible to the tribal council. The council, however, is within the control of purse seine owners and their families which administer the fishery in a way that benefits them directly. Purse seine vessels take upwards of two-thirds of the total Lummi harvest although they compose less than 10 percent of the total number of fishers. Immediately after the Boldt decision the tribe was in a position to enter the fishery as a tribal enterprise, but the lack of an allocation process discouraged tribalism. On the contrary, it precipitated stratification brought about by differential access to the resource. Though the Boldt decision returned the resource to the Lummi, the fishery was developed through external financing, external technology, and external management

principles. The Lummi fishery replicated the structure of the non-Native fishery, especially its structural problems. Increasingly the Lummi fleet has been unable to support itself through participation in the salmon fishery alone. As a result the tribes have pushed to extend their treaty rights to other species, such as halibut, crab and bottom fish, and have purchased permits to fish in other areas, such as Alaska. Predictably as the Native people of British Columbia increase participation in the salmon harvest there will be movement to other species, such as halibut, herring, bottom fish and shellfish. This will inevitably generate similar problems that historically occurred in the salmon fishery. It is essential that the resolution of these problem areas be dealt with before the build-up of the Native fleet makes it impossible.

Conclusion

For the past twenty years the Coast Salish of western Washington have adjusted economically to guaranteed access to the salmon resource. While some individuals have prospered the fishery has not fostered economic growth at the tribal level. Unemployment on the reservations remains high and tribes have had to seek other avenues of economic development. The First Nations of British Columbia can learn a great deal from the western Washington example and take precautionary measures to avoid the pitfalls inherent in resource development. Particularly as the First Nations enter treaty negotiations with the federal and provincial governments the nature of use and control of natural resources is a contentious issue. There must be some guarantees to the fisheries resource built into the treaty process and the bands must consider alternative models of resource development as a means of utilizing the resource for the maximum good of all band members. Unfortunately the one treaty process that has

reached the point of agreement-in-principle has set dangerous precedence for the Native salmon fishery of British Columbia. The Nishga'a treaty is the only one nearing stage five of the six-stage process. This agreement contains no provision for a treaty-assured allocation of the salmon resource. Without such protection in place inevitably the Native people will find themselves excluded from access to the resource which plays such an important role in their cultures. In relation to fisheries the Nishga'a agreement-in-principle specifies that they will receive \$11.5 million towards the purchase of commercial fishing vessels and licenses. This at a time when the federal government is attempting to reduce the number of commercial fishing vessels through a buy-back program. Second there are no constitutionally entrenched Nishga'a commercial fishing rights as part of the treaty. This is a serious omission that other bands should heed in their on-going negotiation processes. Without the protection of treaty the right to harvest salmon for sale is doomed to end with the completion of the Aboriginal Fisheries Strategy in 1998.

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