FISHING FOR A RULE IN A SEA OF STANDARDS: A THEORETICAL JUSTIFICATION FOR THE *BOLDT* DECISION

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In January 2001, several Indian[1] tribes from the Pacific Northwest filed suit in federal court against the State of Washington, alleging that the State had a duty under federal treaties to protect salmon habitat, and that the State's failure to

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[1] There is no widely accepted term or set of terms to denote the indigenous inhabitants of the United States. *See, e.g.*, James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 55 n.1 (1997) (noting differing regional connotations of and differing preferences for terms such as "Indian", "Native American", "aboriginal", and "native"). *Compare* Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 307 n.17 (2004) ("Native American is considered the more politically correct terminology."), *with* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 237 n.7 (1997) ("'Native American' . . . perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity."), *and* Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1827 n.2 (2003) (noting that "native people often refer to themselves as 'Indians'"). Throughout this Note, I use the terms "Indian," "Indians," "Indian tribes," "tribes," and "tribal" to refer to the original inhabitants of the United States, and, specifically, to the members of those tribes that are parties to the Stevens treaties. Given the definitional debate, my decision to use these terms is not an effort to be politically correct, but rather my desire to maintain doctrinal uniformity, since each of the statutes and cases discussed herein specifically use the term "Indian," or some derivation thereof.

maintain dam culverts[2] caused salmon populations to precipitously decline, in violation of that duty.[3] Currently, the culvert litigation remains unresolved, and trial is set for September 2007.[4] Nevertheless, the existence and the terms of the culvert case demonstrate the continuing legal and political importance of a dispute that has continued for more than one hundred years and, in particular, a controversial district court case decided some thirty-three years ago.

At the heart of the tribes' claim in the culvert case is a 1974 federal district court opinion that has defined the shape of modern salmon law.[5] The decision in that case, *United States v. Washington*—commonly referred to as the "*Boldt* decision," after the judge who wrote it—presented a crucial turning point in the Indians' efforts to establish a right to take salmon.[6] Judge Boldt's interpretation of several mid-nineteenth century treaties (colloquially known as the Stevens treaties) yielded two important

[2] Culverts are funnel-like anti-flood mechanisms located near a river or tributary. During periods of increased precipitation, a hatch on the culvert opens to permit water to flow through and prevent flooding. Culverts present a danger to fish because during times of low precipitation, culvert hatches may not open enough to allow for the safe passage of fish. Studies conducted by the State of Washington prior to the culvert case showed that improperly maintained culverts prevented salmon from accessing a significant amount of potentially productive spawning habitat. O. Yale Lewis, III, Comment, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clauses of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 281–82 (2002–03); *see also* Andrew Engelson, *Tribes Fight to Clear the Roads for Salmon*, HIGH COUNTRY NEWS, July 2, 2001, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=10611.

[3] *See* Lewis, *supra* note 2, at 281–82 ("[The culvert case] asks the court to impose a duty on the State of Washington to construct and maintain culverts under state highways so that salmon and other fish have unobstructed passage between their spawning grounds and the sea."); Editorial, *State Duty to Treaties: Fix Culverts*, SEATTLE POST-INTELLIGENCER, Jan. 29, 2001, at B3 (describing the most recent culvert litigation effort); *see also* Rebecca Cook, *States, Tribes Duel Over Culverts*, COLUMBIAN (Vancouver, Wash.), Mar. 17, 2001, at C2.

[4] As of March 11, 2007, the trial is set for ten days beginning on September 24, 2007. Order Setting Trial Date & Related Dates, Duwamish Tribe v. Washington, Civ. No. C70-9213 (W.D. Wash. Feb. 16, 2007).

[5] MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF THE COLUMBIA BASIN SALMON 83 (2002) (describing the *Boldt* decision as one of two decisions marking "the advent of modern salmon law").

[6] United States v. Washington (*Boldt*), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd sub nom.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979).

victories for the Indian tribes party to the treaties. First, Judge Boldt ruled that, subject to certain conditions, treaty tribes are not bound by state regulation and are thus free to self-regulate their fishing activities.[7] Second, Judge Boldt held that treaty tribes are entitled to take 50% of all harvestable salmon.[8]

The links between the culvert case and the thirty-year-old *Boldt* decision are complex. One aspect of the connection is simply political rhetoric. For example, when the case was first filed, Curt Smitch, then the top salmon aide to the former governor of Washington, publicly characterized the culvert litigation as a "*Boldt II*" that could prioritize the rights of Indians above non-Indians.[9] Another part of the tie between the culvert litigation and the *Boldt* decision is historical fiat—the United States District Court for the Western District of Washington in Seattle has retained jurisdiction over any and all issues arising from the *Boldt* decision.[10]

But the culvert case and the *Boldt* decision are also connected by a rich and complicated legal past. The *Boldt* decision's 50% rule was the culmination of almost seventy years of federal case law that slowly expanded the scope of Indian fishing rights.[11] The earliest right recognized by the courts was a "right of access"[12] that permitted Indians to continue their fishing activities in certain locations through traditional methods.[13] This right, however,

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[7] *See Boldt*, 384 F. Supp. at 340–42.

[8] *Id.* at 343. Throughout this Note, I refer to this holding as the "50% rule." The case and its holdings are discussed in detail in Part I.C of this Note.

[9] Lynda V. Mapes, *Another Potential Lightning Boldt*, SEATTLE TIMES, Jan. 17, 2001, at A1.

[10] *See, e.g.*, U.S. District Court Western District of Washington, Special Case Notices, http://www.wawd.uscourts.gov/SpecialCaseNotices/index.htm (last visited Apr. 10, 2007).

> This case, also known as the 'Boldt Fishing Case,' arose in 1970 from disputes among local Native American tribes and the State of Washington over tribal fishing rights. Judge Boldt ruled that the tribes and the State have equal access to the fisheries and equal responsibility for maintaining them. The U.S. District Court has continuing jurisdiction over disputes arising in this case.

Id.

[11] *See infra* Part I.B.

[12] Lewis, *supra* note 2, at 292–93 (characterizing the early decisions regarding the Stevens treaties as recognizing a "right of access" for those tribes party to the treaties).

[13] *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905). This case is discussed in detail in Part I.B.1.

proved inadequate to protect Indian fishing interests, as state regulation increasingly allocated seasonal takes of fish to non-Indian fisherman. Creative state regulators effectively preserved the Indian right of access, allowing them to engage in traditional fishing activities, while at the same time ensuring that the right of access was meaningless because most of the permissible catch went to non-Indian fisherman.[14] Faced with this reality, the courts expanded the treaty language to include an "allocation right"—that is, a right to an amount of fish specifically earmarked for Indian fisherman.[15]

The *Boldt* decision is, first and foremost, about the scope of the allocation right recognized by other courts. The decision was important because the rule it laid down proved both novel and influential. The rule was innovative because courts previously confronted with the treaty language had refused to draw a bright line between the fishing rights of Indians and non-Indians, preferring directives based on standards of reasonableness or the necessity of conserving fish.[16] The rule was influential because by imposing a clear, hard-edged rule of 50% on the treaty language, the *Boldt* decision had a decided impact on the management and use of the Northwest salmon runs.[17]

Despite its influence in the area of salmon allocation,

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[14] *See* Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 46–47 (1973) (noting that the Department of Game's regulations banning "all net fishing in the Puyallup River for steelhead grants, in effect, the entire run to the sports fishermen"); *infra* Part I.B.2.

[15] Some authors have characterized this right as a "right to equitable apportionment." *See, e.g.*, Lewis, *supra* note 2, at 293 ("The right to equitable apportionment guarantees the Indians the right to catch up to half the available fish."). I have chosen to use the more general formulation "allocation right," because, while the idea is similar, the Indians' right to actual fish in the water changed through various determinations in the federal courts. A full "equitable" apportionment arguably did not occur until Judge Boldt handed down the 50% rule. *See infra* Part I.C (arguing that the form of the *Boldt* decision set it apart from past precedent by definitively settling questions about the scope of the allocation right).

[16] *See, e.g.*, United States v. Winans, 198 U.S. 371, 384 (1905) (holding that the Stevens treaties do not "restrain the state unreasonably" from regulating Indian fishing in non-reservation areas); *see also* Tulee v. Washington, 315 U.S. 681, 684 (1942) ("[The Stevens Treaty] leaves the state with power to impose on Indians . . . restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are *necessary for the conservation* of fish.") (emphasis added). These cases are discussed in detail in Part I.B of this Note.

[17] *See infra* Part I.C.

however, the allocation right recognized by the *Boldt* decision has suffered a fate of ineffectiveness similar to the right of access that came before it. The reality is that significant decline in the salmon population has rendered the allocation right almost meaningless, and few tribes, if any, are able to support themselves by traditional fishing activities.[18] The issue is no longer a dispute about Indians' share of the salmon "pie," it is now a dispute about protecting the size of the pie to be shared.[19]

In attempting to impose a duty of salmon habitat protection on the State vis-à-vis the Stevens treaties, the culvert litigation is essentially an attempt to pick up where the *Boldt* decision left off. It is a claim that the tribes not only have a right to take salmon from the water, but also a right to have salmon in the water available for the taking. In this sense, the argument that the 50% allocation right recognized in the *Boldt* decision entails a right to salmon habitat protection is strikingly reminiscent of the rationale that justified expansion of the right of access to the allocation right. As Judge Orrick of the Western District of Washington succinctly formulated the point: "Were [the] trend [of habitat degradation] to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[20] In other words, the prior rights of access and allocation are rendered worthless without a greater protective right. The tribes in fact argued the issue once before in the Ninth Circuit more than twenty years ago, but that case was dismissed on issues of standing.[21] Even more, at least three sophisticated, scholarly articles have rooted Indian rights to salmon-habitat protection in the treaty rights guaranteed by Judge Boldt.[22]

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[18] *See infra* Part II.B.

[19] Lewis, *supra* note 2, at 297 ("The problem for Indians today is not their piece of the pie, it is the size of the pie.").

[20] United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

[21] United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc); *see also infra* Part II.A.

[22] *See* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 489–500 (1998) (arguing for a tribal right to habitat protection as a negative right resulting from Indians' positive right to take fish); Brian J. Perron, Note, *When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it out Empty: The Case for Money Damages When Treaty-Reserved Fish Habitat Is Degraded*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 783 (2001); Lewis, *supra* note 2, at 282 (arguing that courts should recognize the habitat right implicit in the culvert litigation).

Surprisingly, despite these efforts to take the allocation right of the *Boldt* decision beyond a mere right to 50% of catchable fish, there has not yet been much serious consideration or justification of the decision's holdings. If the case for extending Judge Boldt's opinion to salmon conservation is to be made, we must understand why it was important, analyze it critically, and justify its holdings. To achieve these ends, this Note considers Judge Boldt's opinion together with some key insights provided by property theory, namely the literature concerning the choice between "rules" and "standards." Although the Note observes that certain aspects of the opinion are problematic, it further argues that Judge Boldt's narrative subtly embraces key lessons drawn from property theory. Using property theory as a lens through which to view the *Boldt* decision is instructive for two reasons. First, it clarifies why subsequent efforts at conservation through co-management have failed. Second, it suggests how a favorable ruling emulating Judge Boldt's use of a bright-line rule might reconcile the continuing conflict over salmon habitat. In short, understanding the theoretical underpinnings of the *Boldt* decision can help us craft a principled justification of the opinion and identify viable solutions for the future.

This Note is organized as follows. Part I provides the context and history for the *Boldt* decision. The first Part explains the legal evolution of the tribes' right of access into the greater allocation right, as well as the tribes' initial failed attempt to establish a right to habitat protection. The discussion emphasizes how the *Boldt* decision ended the dispute over the scope of the allocation right but did not settle important questions about salmon conservation. It closes with a discussion of the lasting legacies, both legal and extra-legal, of the *Boldt* decision. Part II focuses on the developments following the *Boldt* decision. After the *Boldt* decision, the attention of both Indians and non-Indians turned to the issue of salmon conservation. Although a full-scale survey of the developments after the *Boldt* decision is beyond the scope of this Note, this Part discusses some of the major conservation efforts since the case and their ultimate failure to effect major changes. Part II concludes by highlighting the relevance of the *Boldt* decision to recent efforts by Indians to achieve habitat protection through litigation. Part III, the heart of this Note, is both a criticism and a defense of the *Boldt* decision. Part III.A criticizes the *Boldt* decision from a historical and textual

perspective. However, Part III.B argues that the decision is defensible when Judge Boldt's narrative is considered from the perspective of property theory. The Note finds that from this new perspective, Judge Boldt's narrative strongly suggests that the 50% allocation was not only justified, but that a similarly definitive rule (or set of rules) is needed in framing the issues surrounding salmon habitat protection.

I. THE REGULATION AND ALLOCATION DISPUTES

A. *The Salmon: Indian Livelihood, Decline, and the Stevens Treaties*

The precarious state of the Northwest salmon runs is well documented. Estimates of the current population compared to historic levels vary, ranging from one-sixth to one-sixteenth of its former size, a drop from between six and sixteen million adult fish during historical peak levels to about one million adult fish today.[23] Although there is disagreement in the comparisons between past and current salmon populations, the fact is that salmon stocks have declined and continue to do so at startling rates. For instance, some types of salmon, such as the Snake River coho, are now extinct.[24] Many others are either threatened or endangered.[25] The cause of the drastic salmon decline is no mystery; it is the result of more than one hundred years of human development and population growth. Human activities such as over-fishing, damming, logging, and pollution have significantly

[23] *See, e.g.*, Kai N. Lee, *Rebuilding Confidence: Salmon, Science, and Law in the Columbia Basin*, 21 ENVTL. L. 745, 751 (1991) (noting that the population of adult salmon in the Columbia Basin has dropped to about one-sixth its former size); John M. Volkman, *The Endangered Species Act and the Ecosystem of Columbia River Salmon*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y. 51, 52 (1997) (noting that the Columbia River salmon population has declined to approximately a million adult fish from "historic peaks ranging from 10 to 16 million").

[24] Volkman, *supra* note 23, at 51.

[25] *See, e.g.*, Threatened Status for Snake River Spring/Summer Chinook Salmon, Threatened Status for Snake River Fall Chinook Salmon, 57 Fed. Reg. 14,653 (Apr. 22, 1992); Endangered Status for Snake River Sockeye Salmon, 56 Fed. Reg. 58,619 (Nov. 20, 1991); U.S. GEN. ACCOUNTING OFFICE, COLUMBIA RIVER BASIN: A MULTILAYERED COLLECTION OF DIRECTIVES AND PLANS GUIDES FEDERAL FISH AND WILDLIFE ACTIVITIES 5 (2004) (describing some the endangered fish species in the Columbia River Basin).

altered the salmon's environment.[26]

The story of human reliance on salmon began thousands of years ago with the earliest Northwest tribes.[27] Before widespread development, salmon played a crucial role in almost all aspects of Indian life, supplying food and currency for trade, and serving as the focal point of seasonal and religious celebrations.[28] Indian tribes such as the Kalapuya, Chinook, Umatilla, Yakama, and Walla Walla made their large yearly catches of salmon an important part of their culture and society.[29]

When white settlers began negotiating with Indians in the 1850s, the tribes emphasized the centrality of the salmon to their culture and livelihood. Many Indians were willing to part with the majority of their land but were unwilling to surrender access to their traditional fishing areas. Indian members and leaders repeatedly expressed to white negotiators their desire to retain fishing rights,[30] and the person responsible for the negotiations, then-Governor of Washington, Isaac Stevens, included language in the treaties protecting the Indians' fishing interests.[31] The agreements, known as the "Stevens treaties," guaranteed Indians (1) the unlimited right to fish on their reservations, and (2) the right to fish "in common with" white settlers in non-reservation waters.[32] Over the next one hundred years, this standard treaty

[26] *See, e.g.*, Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 362–78 (2001) (detailing the major causes of salmon and fish decline in western rivers).

[27] Evidence suggests that Indian fish societies have existed in the Northwest for at least six thousand years. *See* Peter J. Aschenbrenner, Comment, *State Port and the Indian Treaty Right to Fish*, 59 CAL. L. REV. 485, 485 n.1 (1971); CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 159 (2005).

[28] *See* Jack L. Landau, Comment, *Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest*, 10 ENVTL. L. 413, 414–16 (1980); BLUMM, *supra* note 5, at 53–54.

[29] *See* BLUMM, *supra* note 5, at 53–54 (noting that these tribes had rituals and symbolic acts showing an attitude of respect for their dependence on the salmon stocks).

[30] *See id.* at 60–61; *see also* United States v. Washington (*Boldt*), 384 F. Supp. 312, 333 (W.D. Wash. 1974) (noting that Indians were "[r]eluctant to be confined to small reservation bases," and thus "insisted that their people continue to fish as they had beyond the reservation boundaries").

[31] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979) (noting that Governor Stevens "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries").

[32] Each of the Stevens treaties contained a provision substantially identical to

language became the central point of dispute in the battle over the allocation of the salmon.

B. *The Early Access and Allocation Cases*

1. Winans *and* Tulee*: The Recognition of Indians' Right to Access*

After some initial violence, the period following the signing of the Stevens treaties was peaceful.[33] By the late 1800s, however, human demands on the both the river system and the salmon began to strain the relationship between Indians and non-Indians. Technological developments in canneries led to increased harvests.[34] Then, beginning in the 1930s, the construction of dams in the Columbia River Basin greatly threatened vital salmon waters.[35] The effect of the dams on the salmon runs was monumental. "In total, the dams . . . closed off half of all Columbia Basin spawning habitat and brought runs in the remainder of the watershed to ruins."[36]

New developments impacting salmon habitat led to competing claims on fish stocks that frequently excluded Indians. Yet, despite the promise of the Stevens treaties, tribal opposition to these developments at the local level rarely had any effect.[37] By the 1890s, the tribes began seeking recourse through the courts.[38]

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the following passage, taken from the Treaty of Medicine Creek: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." Treaty with Nisquallys, U.S.-Nisquallys, Dec. 26, 1854, 10 Stat. 1132, 1133. The treaties that include similar or identical language are (1) Treaty with the Dwamish &c. Indians, U.S-Dwamish, Jan. 22, 1855, 12 Stat. 927, 928; (2) Treaty with S'klallams, U.S.-S'kallams, Jan. 26, 1855, 12 Stat. 933, 934; (3) Treaty with the Makah Tribe, U.S.-Makah Tribe, Jan. 31, 1855, 12 Stat. 939, 940; (4) Treaty with the Yakamas, U.S.-Yakamas, June 9, 1855, 12 Stat. 951, 953; and (5) Treaty with the Qui-nai-elts, U.S.-Qui-nai-elts, &c., July 1, 1855, Jan. 25, 1856, 12 Stat. 971, 972.

[33] *See* BLUMM, *supra* note 5, at 63; *see also Boldt*, 384 F. Supp. at 334 ("For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by fishing as freely in time, place and manner as they had at treaty time.").

[34] *See* BLUMM, *supra* note 5, at 63.

[35] WILKINSON, *supra* note 27, at 159–60.

[36] *Id.* at 160.

[37] *See id.* at 150–73 (describing history of Indian treaty rights, non-Indian regulation and development, and the conflicts of the two).

[38] *See, e.g.*, United States v. Alaska Packers Ass'n, 79 F. 152, 153 (C.C.D.

As is demonstrated by the discussion below, three themes run through these early cases. First, because private parties and local governments sought either to exclude or heavily regulate Indian fishing activities, the early cases centered on state regulation of Indian fishing activity rather than on allocation, conservation, or habitat protection. However, as the courts grappled with the scope of state regulation of Indian fishing activity, the issue of allocation—i.e., whether the treaties entitled Indians to a certain amount of fish in the water—developed as a limit on state regulatory power. Finally, each of the cases prior to the *Boldt* litigation emphasized the use of relatively vague standards, as opposed to clear and precise rules. The last two of these themes became crucial in the *Boldt* litigation and are central to the discussion in Part III of this Note.

The first Supreme Court case to deal with Indian fishing rights under the Stevens treaties, *United States v. Winans*, is an exemplar of these themes. In *Winans*, the Court was asked to decide whether white settlers who had been granted a license to operate a fish wheel (a mechanism for catching fish) by the State of Washington could exclude Indians from the off-reservation waters without violating the Stevens treaties.[39] The Supreme Court held that the treaty language, giving Indians "the right of taking fish at all usual and accustomed places, in common with the citizens of the territory," imposed a "servitude" or "easement" on land that superseded private claims.[40] Regardless of future

Wash. 1897) (seeking protection for the Lummi Indians in the right to take salmon in the waters adjacent to Point Roberts). *See generally* DANIEL L. BOXBERGER, TO FISH IN COMMON: THE ETHNOHISTORY OF LUMMI INDIAN SALMON FISHING 35–126 (1989) (discussing various Indian fisheries cases from the late 19th and early 20th century).

[39] United States v. Winans, 198 U.S. 371, 384 (1905).

[40] *Id.* at 381–82.

> [The Stevens treaties] imposed a servitude upon every piece of land as though described therein. . . . As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. . . . The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

Id.; *id.* at 384 ("[The treaty] fixes in the land such easements as enables the right

ownership, the Indians retained the right to cross land in their former territory as needed to access fishing waters and the right to occupy such land for the purpose of fishing.[41]

In terms of state regulation of Indian fishing activities, the Court in *Winans* recognized an important right for the tribes. That right protected the tribes' ability to catch fish through a particular kind of activity. This right, however, was *not* a property right that allocated any amount of actual fish to the tribes. The only property right permitted the Indian tribes by the Court was an easement or servitude over the land that the Indians needed to engage in the process of catching fish. This point must be emphasized, because, as will be seen, the right recognized by the Court in *Winans* eventually evolved from a mere right to engage in a certain activity (i.e., fishing) to an actual property right in a set share of harvested fish (i.e., a right *in* fish, not just a right *to* fish).

Another important feature of *Winans* is the form in which the Court delivered its decision. While the Indians prevailed on the narrow issue in the case, dicta in the opinion stating that the treaties do not "restrain the state unreasonably, if at all, in regulation of that right" served to weaken the Court's holding.[42] The practical result of the holding and dicta was that the treaty gave the Indians *some* right to access fishing waters and take fish, but the extent of that right of access remained unclear because the Court failed to explain the extent to which the State could *reasonably* infringe upon it.

The next Supreme Court case to consider the Stevens treaties offered only minimal clarification of the scope of the State's regulatory power. In *Tulee v. Washington*, Tulee, a member of the Yakima tribe, challenged his conviction for net-fishing without a license from the State.[43] He argued that the state law requiring licenses, as applied to him, violated his treaty right to fish.[44] The Court held that "the [Stevens] treaty leaves the state with power to impose on Indians . . . restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are *necessary for the conservation* of fish."[45] The Court then

to be exercised."); *see also id.* at 378 (quoting the relevant treaty language).

[41] *Id.* at 381.

[42] *Id.* at 384.

[43] Tulee v. Washington, 315 U.S. 681, 682 (1942).

[44] *Id.*

[45] *Id.* at 684 (emphasis added).

held the state regulation was "not indispensable to the effectiveness of a state conservation program," and that licensing fees, in particular, could not be reconciled with the Indian's treaty right to take fish.[46] As with *Winans*, the Court provided no general guidance about what it meant by "necessary for the conservation of fish."

Although the tribes prevailed before the Supreme Court in both *Winans* and *Tulee*, the vague *form* of the holdings in those cases effectively weakened their meaning. Most importantly, without clear direction from the Supreme Court, lower federal and state courts were left to fashion their own interpretations.[47] During this time, the Washington State courts waffled between supporting state regulations and striking them down.[48] By the 1960s, it was clear to some that *Winans* and *Tulee* were not enough and that the courts needed further direction from either the Supreme Court or Congress.[49]

The unsettled nature of the law had a devastating effect on the Indians whose livelihood hinged on the viability of the fishing rights promised by the Stevens treaties. After *Winans* and *Tulee*, the federal government, which has the responsibility of litigating issues pertaining to the Stevens treaties on behalf of the tribes, did not appeal cases involving the scope of state regulatory power over Indian fishing because it believed that state regulations were permissible if they were "reasonably adapted to the preservation of wild life [sic]."[50] Consequently, a legal malaise settled over the

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[46] *Id.* at 685.

[47] *See, e.g.*, State v. Arthur, 261 P.2d 135, 143 (Idaho 1953) (exempting Indian treaty rights on off-reservation lands from state interference), *discussed in* Landau, *supra* note 28, at 434.

[48] *Compare* State v. Satiacum, 314 P.2d 400, 406 (Wash. 1957) (striking down state regulations because they are "in conflict with the [Stevens] treaty provisions"), *with* State v. McCoy, 387 P.2d 942, 953 (Wash. 1963) (upholding regulation of Indian off-reservation fishing activities on the reasoning that upon joining the Union, Washington "acquired all of the sovereign powers of the original states, including the power to preserve its natural resources, and it cannot be stripped of this power by implication and deduction").

[49] *See, e.g.*, *McCoy*, 387 P.2d at 964 (Donworth, J., dissenting) ("The solution of the problem lies with the Congress. Certainly this court should not disregard the Treaty of Point Elliott [i.e., one of the Stevens treaties] as the supreme law of the land in the absence of controlling precedent from the Supreme Court.").

[50] U.S. COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 66 (1981) (quoting the Solicitor of the Department of the Interior's opinion in 1934 that state fishing regulations validly restricted Indian fishing if

unresolved issues presented by the treaty language. The Supreme Court did not hear another fishing-rights case for almost thirty years after *Tulee*.[51] In the interim, traditional tribal economies failed and Indians grew poor.[52]

2. *Expansion of the Fishing Right: Emergence of the Allocation Right*

The sea change for the tribes came in the 1960s, in the midst of increased regulation by Washington State, declining salmon stock, and growing frustration amongst Indians faced with the loss of their traditional livelihood.[53] In the period directly prior to the *Boldt* decision, two Supreme Court decisions and a federal district court opinion attempted to settle the mounting dispute between Indians and the States over the rights of Indians to fish in non-reservation waters. These cases marked the beginning of important changes in the courts' approach to the promises contained in the Stevens treaties. Most importantly, the right announced in *Winans* and *Tulee* evolved from a mere right to engage in fishing activity to a stronger right that allocated an amount of harvested fish to the tribes.

The first case, *Puyallup I*, was an appeal to the Supreme Court by Puyallup and Nisqually Indians convicted of violating Washington State laws and regulations against the use of certain kinds of nets to fish for salmon and steelhead.[54] The tribes conceded that the nets they used would be illegal if the laws could be validly applied to them, but denied that they could be.[55] Thus, this case, like the others before it, centered on the scope of state regulatory power over off-reservation Indian fishing.

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they were "reasonably adapted to the preservation of wild life [sic] in the waters of the State for the common benefit, and not in its intendment or operation a denial to the privileged Indian community of its right to fish").

[51] Landau, *supra* note 28, at 433 (stating that after *Tulee* there was "a lull in the number of Indian treaty fishing rights cases to go before the Supreme Court, this time of nearly thirty years").

[52] *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 50, at 66.

[53] *See id.* at 67–68; *see also* WILKINSON, *supra* note 27, at 166–67 (characterizing this as a period when the "salmon wars in the Puget Sound Region of Washington, simmering for generations, boiled over in the early 1960s").

[54] Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968).

[55] *Id.* at 396.

Once again the Court chose not to lay down a solid directive, reiterating *Tulee's* "necessary for conservation" principle.[56] In this sense, the Court's use of a general principle made the decision unextraordinary. But the decision went further than *Winans* and *Tulee* because, for the first time, it expanded on the general factors that a state regulation must meet, holding that state regulation is appropriate so long as it is "in the interest of conservation . . . meets appropriate standards and does not discriminate against the Indians."[57] Justice Douglas arrived at this limitation by arguing that the treaty language granting Indians the right to fish "in common with" other non-Indians carried with it a principle of equal protection.[58] Although the Court remanded the case for factual findings on the conservation and the non-discrimination issues,[59] the Court's gloss on the "reasonable and necessary" requirement of *Winans* and *Tulee* planted the seeds for change in the Stevens treaty litigation. The notion that the Stevens treaties embodied principles of equal protection and non-discrimination would become a critical turning point in defining the scope of the Stevens treaties.

The questions that the Supreme Court left unanswered in *Puyallup I* came before Oregon Federal District Court Judge Robert Belloni less than a year after the Court's decision. In *Sohappy v. Smith*, the plaintiff Indians challenged the general manner in which Oregon regulated its fisheries, arguing that particular regulations violated their treaty rights and, more broadly, that their treaty rights required that state regulation meet certain substantive and procedural principles.[60] They sought a broad decree defining the extent of their treaty right to take fish and the manner and extent to which the State may regulate such activity.[61]

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[56] *Id.* at 399.

[57] *Id.* at 398.

[58] *Id.* at 402.

> Since the state court has given us no authoritative answer to the question [of whether the state's prohibition of Indian fishing practices was a "reasonable and necessary" conservation measure], we leave it unanswered and only add that *any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'*

Id.

[59] *Id.* at 403.

[60] Sohappy v. Smith, 302 F. Supp. 899, 907 (D. Or. 1969).

[61] *Id.* at 903–04.

Judge Belloni restated the *Puyallup I* factors necessary for valid state regulation of off-reservation Indian fishing and struck down the state regulations as discriminatory and unjustified as necessary for conservation.[62] While Belloni expanded somewhat on the requirements for a valid regulation, he refused to lay out a set of specific and precise rules, saying that the "court cannot prescribe in advance all of the details of appropriate and permissible regulation."[63]

Before reaching this conclusion, however, Judge Belloni continued the trend the Supreme Court started in *Puyallup I* by outlining a further condition on valid state regulation of Indian fishing activities. He held that the tribes have "an absolute right" to the fishery and "are entitled to a *fair share* of the fish."[64] This "fair share" language derived from the equal protection and non-discrimination principles laid down by the Supreme Court in *Puyallup I*. Building on these ideas, Belloni held that where the State decided to allocate fish as part of its regulatory power, non-discrimination required that the Indians receive a "fair share."[65]

The "fair share" language was a significant change in the law. It was not a full-fledged right that allocated a definite amount of fish to the Indians, but the recognition of a "fair share" for Indians fundamentally altered the right initially recognized in *Winans* and *Tulee*. Where those cases had focused on a right of *access* to engage in fishing, Judge Belloni suggested, for the first time, that the tribes' treaty rights would be violated not only if they were prevented from fishing, but also if they were prevented from sharing in a certain amount of fish in the water.[66] Thus, whether or

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[62] *See id.* at 906–07, 910.

[63] *Id.* at 911.

[64] *Id.* at 911 (emphasis added).

[65] *Id.*

> The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. [*Puyallup I*, 391 U.S. at 398] I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the . . . portion of the stream where the historic Indian places are mostly located.

Id.

[66] *Id.*

> There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The *only effect* will be that some of the fish now taken by [non-Indian] sportsmen and commercial fisherman *must be shared with the*

not the Supreme Court intended it, the language in *Puyallup I* that outlined the factors for state regulation of Indian fishing activities became a basis for expanding Indians' right from a mere right to engage in the activity of fishing, as recognized by *Winans* and *Tulee*, to an *allocation right*—a right to an amount of harvestable fish specifically earmarked for Indian fisherman.

The importance of Belloni's "fair share" rule is further highlighted by the Supreme Court's opinion in the second incarnation of the *Puyallup* litigation in 1973 (about three months before Judge Boldt issued his opinion). On remand from *Puyallup I*, the Washington Department of Fisheries had modified its regulations to allow Indians to fish in the traditional manner. The Department of Game, however, had refused to change its regulations, leaving an entire catch of steelhead salmon solely to non-Indian fisherman.[67] In *Puyallup II*, the Court again struck down state regulation of off-reservation Indian fishing without laying down any clear rule. While the Court emphasized that Indians' treaty rights do not "persist down to the very last steelhead in the river,"[68] the Court held that catchable fish must be "fairly apportioned" between Indian and non-Indian fishermen.[69]

The Court's "fairly apportioned" language was notable for two reasons. First, the standard was strongly reminiscent of Belloni's "fair share" standard. As a result, the Court seemed to be embracing the idea, initially suggested by the non-discrimination principle announced in *Puyallup I*, that tribes had a right to some portion of fish. Even more, the Court's formulation appeared a stronger form of Belloni's "fair share" doctrine because the Court framed the requirement of the treaties as extending beyond the context of state regulation to all aspects of Indian and non-Indian fishing.[70] In other words, after *Puyallup II*, the tribes' right to a

> *treaty Indians*, as our forefathers promised over a hundred years ago. (emphasis added)

Id.

[67] Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 46–47 (1973) (noting that the Department of Game's regulations banning "all net fishing in the Puyallup River for steelhead grants, in effect, the entire run to the sports fishermen").

[68] *Id.* at 49.

[69] *Id.* at 48.

[70] *Id.* ("If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be *fairly apportioned* between Indian net fishing and non-Indian sports

share of the harvest was universal and could not lightly be infringed upon.

The allocation right the Court recognized in *Puyallup II* was a world away from the limited right of access pronounced in *Winans* and *Tulee*. However, by leaving the right stated in vague and flexible terms that necessarily required further delineation by other courts,[71] the decision continued the pattern of refusing to lay down clear directives. In doing so, the Court set the stage for the case that would ultimately decide the scope of the tribes' allocation right.

C. *An End to the Regulation Dispute and the Recognition of a Definitive Allocation Right: The Boldt Decision*

Less than a year after the decisions in *Sohappy*, *Puyallup I* and *Puyallup II*, the United States, as trustee for the tribes against Washington State, brought suit in federal court to settle treaty issues that had arisen between the State, Indians, and non-Indians. Joined by many of the tribes that would be affected by the decision, the United States brought four claims before District Court Judge George Boldt. The tribes sought a declaratory order concerning the scope of their right to fish in off-reservation waters and an injunction enforcing that right against the State.[72] These claims required Judge Boldt to rule on the two specific issues that had been recurring in the federal courts: first, to what extent could the State regulate off-reservation treaty fishing (the regulation issue) and second, whether the Stevens treaties entitled the treaty tribes to any particular portion of the catchable fish (the allocation issue). Furthermore, the tribes alleged that the State had violated their treaty fishing rights by authorizing various activities that

fishing so far as that particular species is concerned.") (emphasis added).

[71] There is no doubt this is precisely what the Court had in mind.

> What formula should be employed [to arrive at a determination of "fairly apportioned"] is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be located, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

Id. at 48–49.

[72] United States v. Washington (*Boldt*), 384 F. Supp. 312, 327–28 (W.D. Wash. 1974).

degraded fish habitat and sought relief for this violation.[73] Thus, they sought to establish that their treaty right to take fish included a right to protection of salmon habitat. However, Judge Boldt reserved this issue for later litigation,[74] and it is discussed in Part II of this Note.

Judge Boldt's approach to the allocation and regulation issues was notably different from those of previous courts. For one, his opinion embraced an impressive breadth and a historical approach. Unlike the prior cases dealing with the Stevens treaties, Judge Boldt considered and sought to understand the complex history of the dispute. The 100-plus page opinion was the result of litigation that spanned over three years, involved arguments from eleven lawyers, contained 350 exhibits, and produced a 4,600-page trial transcript.[75]

Even more significant was Judge Boldt's overwhelming support of the Indians' claims. In answering the regulation question, Judge Boldt held that tribes that met certain qualifying criteria[76] are entitled to regulate their own off-reservation fishing activities,[77] and that the State has only a very limited power to regulate those tribes to the extent "reasonable and necessary to prevent demonstrable harm to the actual conservation of fish."[78] This holding was a victory for the tribes, because it meant the State would no longer have sole authority over such regulation.

The real boon, however, was Judge Boldt's treatment of the allocation question, which concluded without qualification that the

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[73] *Id.* at 328.

[74] *Id.*

[75] WILKINSON, *supra* note 27, at 200; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 50, at 70; FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 6 (1986).

[76] See *infra* note 181 and accompanying text for a full discussion of these criteria.

[77] *Boldt*, 384 F. Supp. at 340–41.

[78] *Id.* at 342; *see also id.* at 340 ("When the qualifications and conditions of a tribe have been fully established in the manner indicated, that tribe shall be relieved of state regulation *except to the extent specified in the below stated conditions*.") (emphasis added); *id.* at 341 (listing as one such condition that the "tribe shall . . . [p]rovide for full and complete fishing regulations which . . . include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing or under direction of this court, to be reasonable and necessary for conservation"); *id.* at 342 (holding that state police power permits a narrow right to regulate treaty fishing to the extent reasonable and necessary for fishery conservation).

treaty language granting Indians the right to fish "in common with" non-Indians entitled Indians to "take up to 50% of the harvestable number of fish."[79] This 50% rule was a considerable departure from precedent such as *Sohappy* and *Puyallup II*. As was discussed in the last Part, those cases held that the Stevens treaties entitled the Indians to some fair share, or fair apportionment, of the fish. However, no prior decision had gone so far as to derive a clear, bright-line rule from the Stevens treaties. As will be seen in the next Part, Judge Boldt's take on the scope of the tribe's allocation right had far-reaching effects.

D. *The Legacy of the Boldt Decision*

1. *The Power of a Rule: Public Outrage*

The *Boldt* decision quickly became a cause célèbre with the public. Most Indians hailed the decision as a vindication of past wrongs and a guarantee of future rights. The decision came at a time of general optimism among Indian tribes. "By the late 1960s and early 1970s, Native people across the country were seeing hope for the fulfillment of the [Indian fishing] treaties."[80]

Most non-Indians, however, did not share the Indians' elation. In fact, the subject of the public's ire became Judge Boldt himself. The media dubbed the opinion the "*Boldt* decision," a label that persisted even after the Supreme Court affirmed the opinion.[81] "Federal marshals . . . cut down a gill net used to hang [Judge Boldt] in effigy in front of the federal courthouse."[82] Bumper stickers on opponents' cars urged citizens to "Can Judge Boldt—Not Salmon."[83] A petition asking Congress to correct the decision gathered over 150,000 signatures,[84] and a petition to impeach Judge Boldt acquired over 80,000 signatures.[85]

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[79] *Id.* at 343.

[80] WILKINSON, *supra* note 27, at 177.

[81] *See* COHEN, *supra* note 75, at 15 ("Rarely is a case called by the name of its presiding trial judge."); WILKINSON, *supra* note 27, at 203 ("Normally, cases are remembered for their Supreme Court opinions, but the Northwest fishing case, *United States v. Washington*, remains forever known as the Boldt decision."); *see also infra* Part III.A (discussing the Supreme Court's opinion affirming Judge Boldt's 50% rule).

[82] WILKINSON, *supra* note 27, at 203.

[83] COHEN, *supra* note 75, at 15.

[84] Landau, *supra* note 28, at 439 n.145.

[85] *Id.*

What was it about the *Boldt* decision that provoked such a strong public reaction? Arguably, both of Judge Boldt's holdings were equally damning to non-Indian fishermen, especially given the sharply declining salmon runs. News coverage at the time, however, reveals that among the issues decided by the court, the one most offensive to the public was the 50% rule. "50 percent" became a tag-line in the public discourse. A non-Indian fisherman's statement in the *Christian Science Monitor* a few years after the decision epitomizes the anger directed at Judge Boldt's rule: "The runs of wild salmon and steelhead trout in Pacific Northwest rivers are dangerously near extinction, and yet for the past four years a federal judge . . . has ruled that a mere 1% of the population is entitled to half the catch."[86] Indeed, the negative perception of the *Boldt* decision persists today. Some non-Indians see the *Boldt* decision as a direct cause of salmon decline.[87] The decision has enraged many non-Indians who see it as inequitable and a threat to a valued resource.

However, the sharp and dramatic nature of the public reaction must also be attributed to the simplicity and clarity of the *Boldt* decision. Because of the clear directive of the 50% rule, non-Indians, Indians and the media understood exactly what the decision meant. Unlike the vague treaty language reserving for Indians the right to fish "in common" with non-Indians, or previous court decisions that required that Indians receive a "fair share" of fish, Judge Boldt's ruling made further determination unnecessary. Judge Boldt put the Indians' entitlement to fish into easily absorbable language, and in doing so definitively settled the allocation issue.[88]

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[86] Dewey Ray, *Northwest Issue Keeps Fires Hot—And Smoky*, CHRISTIAN SCI. MONITOR, Jan. 29, 1979, at 5; *see also* Daryl Lembke, *All's Not Quiet in Puget Sound*, L.A. TIMES, Nov. 25, 1974, at A3 (describing non-Indian frustration, protests, and violence following the *Boldt* decision), Les Ledbetter, *Interests Collide over Puget Sound Fishing*, N.Y. TIMES, Oct. 28, 1976, at 18 (noting that some non-Indian fishermen view the *Boldt* decision as "reverse discrimination" and a "racial quota"), Bill Richards, *Hard Times for Puget Sound Fishermen*, WASH. POST, May 23, 1976, at A1 (describing non-Indian frustration and violence following the *Boldt* decision).

[87] Eijiro Kawada, *Salmon Fishing Only an Echo of the Past*, NEWS TRIBUNE (Tacoma, Wash.), Feb. 17, 2004, at A1 (quoting seventy-eight year old non-Indian fisherman John Blanusa as saying the *Boldt* decision "drained the rivers of all fish").

[88] Indeed, this is exactly what Judge Boldt seemed to have had in mind:

> This court is confident the vast majority of the residents of this state,

The *Boldt* decision thus captured the public's attention because it gave a substantive right to Indians that was easy to understand and effectively limited non-Indian fishing without the need of additional judicial interpretation (other than appeal). That is not to say, however, that non-Indian frustration was entirely misplaced. As will become apparent in Part III of this Note, the *Boldt* decision did not address many important questions about the legitimacy of the 50% rule.

2. *The Power of a Rule: Legal Change*

Judge Boldt's opinion also had a significant legal impact outside of his court's jurisdiction. Most importantly, in 1975 Judge Belloni, the Oregon district court judge who had decided *Sohappy v. Smith* (an opinion on which Judge Boldt had relied at length), adopted Judge Boldt's 50% allocation.[89]

Judge Belloni's use of the 50% rule is notable for two reasons. First, Belloni chose to rely on Judge Boldt's rule even before the Supreme Court affirmed the *Boldt* decision, thus running a serious risk of reversal. Second, Belloni's use of the 50% allocation was a significant move away from his "fair share" approach in *Sohappy* and represented an important change in thinking about the Stevens treaties. Judge Belloni had originally hoped his "fair share" decision would facilitate cooperation between the State and the various treaty tribes.[90] However, in the years following *Sohappy*, the tribes and the State went to court numerous times to resolve issues of salmon allocation.[91] By 1975, Belloni concluded that cooperation would not come without

> whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controversies, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

United States v. Washington (*Boldt*), 384 F. Supp. 312, 329 (W.D. Wash. 1974).

[89] *See* Penny H. Harrison, *The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish*, 16 ENVTL. L. 705, 715–16 (1986) (noting Judge Belloni's frustration at the lack of cooperation among the tribes and the State and his adoption of Judge Boldt's 50% rule in Sohappy v. Smith, No. 68-513 (D. Or. Aug. 20, 1975) (Order at 5)).

[90] *See* Sohappy v. Smith, 302 F. Supp. at 912 ("Both the state and the tribes should be encouraged to pursue . . . a cooperative approach.").

[91] *See* John C. Gartland, Comment, Sohappy v. Smith*: Eight Years of Litigation over Indian Fishing Rights*, 56 OR. L. REV. 680, 693–99 (1977).

further judicial direction, and wanted to settle the dispute between Indians and non-Indians. His order in 1975 implementing the 50% allocation expressed his frustration. "For six years," he wrote, "I have attempted to persuade the states to adopt a comprehensive plan to assure a fair share to all the parties but that plan has not been forthcoming."[92] Judge Belloni's adoption of Judge Boldt's 50% rule showed a change in the approach to the allocation issue. Belloni's 1969 "fair share" doctrine, an imprecise legal standard which had formed the backdrop for the *Boldt* decision in 1974, was eventually replaced by the 50% rule. As will be shown more clearly in Part III, the adoption of this rule represented a significant shift in judicial ethos in the area of salmon allocation.

3. *The Power of a Rule: Allocation Co-Management*

Resolving the allocation issue through the choice of a clear rule also facilitated the first major steps forward for Indians and non-Indians. Despite the public's ire in response to Judge Boldt's opinion, Indians and non-Indians following the decision began to cooperate on an unprecedented level to develop mechanisms to regulate the salmon allocation process. Even before the habitat protection issue played out in the courts, Indians and non-Indians were putting the "salmon wars"[93] of the late '60s and early '70s behind them in an effort to co-manage salmon allocation.

Judge Boldt's 50% ruling played a vital role in facilitating these cooperation efforts. After the decision, both Indians and non-Indians had an equal interest in counting the fish accurately and this aligned interest led to sophisticated and competent allocation systems. For example, state officials and tribes developed complex fish-tagging systems, computer models, and genetic programs to keep track of the salmon population.[94] Inter-tribal coordinating bodies, such as the Columbia River Inter-Tribal Fish Commission in Oregon and the Northwest Indian Fisheries Commission in Washington, were established to provide a forum

[92] Harrison, *supra* note 89, at 716 n.45 (quoting Sohappy v. Smith, No. 68-513 (D. Or. Aug. 20, 1975) (Order at 5)).

[93] *See* WILKINSON, *supra* note 27, at 166 (characterizing this period as the "salmon wars").

[94] Lewis Kamb, *Boldt Decision 'Very Much Alive'*, SEATTLE POST-INTELLIGENCER, Feb. 12, 2004, at A1 (discussing these developments and quoting an attorney for the Indians during the *Boldt* litigation: "The debate on salmon management and catches that we pretty much litigated to death year after year has finally smoothed over").

for Indians to work closely with state governments and agencies.[95]

Unfortunately, the success of Indian and non-Indian cooperation in the area of salmon *allocation* after the *Boldt* decision was not replicated on the issue of salmon *conservation*. As will become apparent in the next Part, absent a clear bright-line rule guiding the interested parties, efforts at co-management stumbled and failed.

II. THE CONSERVATION DISPUTE

After the *Boldt* decision, the focus in the debates over salmon fisheries turned from questions of state regulation and salmon allocation to salmon conservation. This shift in focus was evident in two developments. First, Judge Boldt had reserved the issue of the State's duty to prevent habitat destruction, so litigation on that issue continued after the *Boldt* decision. This stage of the litigation, known as "Phase II," was presided over by Judge Orrick of the Ninth Circuit. Ultimately, it advanced tribal goals only marginally. Second, after the *Boldt* decision, Indians, non-Indians, and the State began co-management efforts to conserve the fisheries resource. Although co-management efforts continue to this day, they have generally proven unsuccessful in halting the decline of the salmon runs. The failure of co-management has fueled tribal efforts to extend the allocation right promised by the *Boldt* decision to include an Indian right to salmon habitat protection. This Part explores these two developments in turn.

A. *Phase II Litigation*

Despite the outcry resulting from his opinion, Judge Boldt did not decide all of the issues originally before him in 1975. He had postponed litigation of the Indians' claim that their treaty rights included a right to salmon habitat protection.[96] In addition, his adoption of the 50% rule raised a new issue: should the 50% determination include hatchery-bred fish?[97] The ultimate

[95] *See* BLUMM, *supra* note 5, at 83–85.

[96] United States v. Washington (*Boldt*), 384 F. Supp. 312, 328 (W.D. Wash. 1974).

[97] Hatchery-bred fish are those fish raised in man-made hatcheries for eventual release into the wild. Once released, they "mature and reproduce in the same manner as natural fish." United States v. Washington (*Phase II*), 506 F. Supp. 187, 197 (W.D. Wash. 1980).

determination of these Phase II issues marked an important shift from the *Boldt* decision's pro-Indian holdings. They also heavily influenced the development of the conservation efforts that followed and continue today.

The first decision in Phase II overwhelmingly supported the tribes' claims. Judge Orrick held that the Stevens treaties first granted tribes a right to take hatchery-bred fish,[98] and second entitled tribes to an "environmental right" to protection of the salmon runs.[99] Judge Orrick took a simple, common-sense approach in reaching these holdings, focusing on whether denying the Indians' claim would effectively make Judge Boldt's allocation holding meaningless. Regarding the hatchery-bred fish issue, Judge Orrick concluded that given the widespread prevalence of hatchery-bred fish amongst wild fish, excluding them from the 50% allocation rule would jeopardize "the right for which" the Indians had "traded millions of acres of valuable land and resources."[100] On the habitat issue, Judge Orrick reasoned environmental protection for salmon was necessary or else the Indians' "right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[101] The states, according to Judge Orrick, could impede the tribes' right to habitat protection only if habitat protection was no longer necessary to protect the tribal right to a moderate standard of living via fishing.[102] The idea that the allocation right (i.e., the 50% rule) entitled the Indians to a right of habitat protection was a subtle departure from the *Boldt* decision. However, the reasoning was the same that had initially led to the recognition of the allocation right—without the second right, the first was at risk of being rendered worthless. Using this approach, Judge Orrick thus found implied rights to habitat protection and hatchery-bred fish grounded primarily in Judge Boldt's 50% holding and in the Indians' right to fish.

The tribes' Phase II success did not survive appeal. The appeals court accepted Judge Orrick's inclusion of the hatchery-

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[98] *Id.* at 200–02.

[99] *Id.* at 202–05.

[100] *Id.* at 198–99.

[101] *Id.* at 203.

[102] *Id.* at 205, 207–08 (noting that the "duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs").

bred fish in the tribes' right to fish, but rejected his holding regarding habitat protection.[103] Relying on language in the Supreme Court's affirmation of the *Boldt* decision[104] the Ninth Circuit held that the Stevens treaties did not entitle the tribes to a moderate standard of living but instead to an allocation of 50% "subject to a revision *downward* if moderate living needs can be met with less."[105] In other words, the "moderate standard of living" standard acted as an upper limit, or ceiling, on the tribes' entitlement to fish, not as a lower limit or floor. The appeals court thus undermined the key component of Judge Orrick's opinion—without a guarantee of a moderate living standard through fishing, Indian tribes did not have an implied right to habitat protection.[106] Without a lower limit on the actual number of fish to which the Indians were entitled, the 50% rule guaranteed only a share of whatever fish were available. It did not require measures to maintain or increase the number of fish available. Habitat protection, according to the court, needed to come through "reasonable steps" taken by both the States and the tribes.[107]

This decision was a substantial disappointment to the Indians who had litigated the issue for almost a decade. But the story did not end there. A year later, the Ninth Circuit, sitting *en banc*, upheld the resolution of the hatchery issue but vacated the ruling concerning habitat protection.[108] Relying on principles of judicial discretion, the court held that it could not decide the issue with only the facts it had at the time. It postponed resolution of the issue for "concrete facts which underlie a dispute in a particular case."[109] The Ninth Circuit thus halted the journey of the Stevens treaties through the courts.

The two Ninth Circuit decisions following Judge Orrick's opinion in fact reflected a significant change in judicial ethos, one that put hope in Indian and non-Indian cooperation, rather than

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[103] United States v. Washington, 694 F.2d 1374, 1380–81 (9th Cir. 1982), *rev'd en banc*, 759 F.2d 1353 (9th Cir. 1985).

[104] *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687 (1979). The Supreme Court's opinion affirming Judge Boldt's 50% rule is further discussed *infra* in Part III.A of this Note.

[105] United States v. Washington, 694 F.2d at 1377.

[106] *Id.* at 1380–81.

[107] *Id.* at 1381.

[108] United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc).

[109] *Id.* at 1357.

judicial intervention. The panel decision expressed the view that the *Boldt* decision laid the foundation for future co-management strategies for preserving the salmon runs:

> Despite the difficulties of the past, we believe that the *ground rules* existing as of this decision—a percentage allocation of fish to the Indians with a 50% maximum, and hatchery fish included in the allocation—*form a sufficiently clear and enforceable scheme to allow competing fishermen* . . . to put the dispute-ridden past behind them and proceed with a new emphasis on good faith cooperation, and protection and enhancement of the resource.[110]

This observation was, in some sense, accurate. As was discussed in Part I.D, co-management efforts regarding salmon *allocation* had proven quite successful after the *Boldt* decision. To the courts, the success obtained in the co-management of salmon allocation suggested that a definitive rule on the question of salmon habitat preservation was unnecessary. Conservation co-management, however, has consistently failed to meet the lofty expectations of the courts.

B. *The Development and Failure of Conservation Co-Management*

Co-management efforts to preserve salmon habitat at first seemed promising. The tribes and the state government cooperated to an unprecedented degree to develop co-management conservation strategies.[111] At the federal level, comprehensive recovery plans, such as the passage of the 1980 Northwest Power Act, were initially met with optimism.[112]

Today, however, such optimism in conservation co-management strategies is rare. Those who once hailed developments such as the Northwest Power Act today have few good things to say about them.[113] The salmon stocks continue to

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[110] United States v. Washington, 694 F.2d at 1381 n.14 (emphasis added).

[111] *See* BLUMM, *supra* note 5, at 85; *see also* WILKINSON, *supra* note 27, at 159 (describing a lack of cooperative conservation measures in the early 20th century).

[112] *See, e.g.*, Lorraine Bodi, *The History and Legislative Background of the Northwest Power Act*, 25 ENVTL. L. 365, 367 (1995) ("Fourteen years ago, we were optimistic—incredibly and, in hindsight, naively optimistic—about these legal prescriptions to save the salmon. We thought that the Northwest Power Act answered all of our needs.").

[113] *See id.* at 365 ("It is depressing to talk about salmon restoration and the

decline and few Indians and non-Indians are able to support themselves by fishing alone.[114] A persistent view is that co-management has done little to alter the status quo in the policies governing salmon habitat.[115] In fact, one of the few things that Indians and non-Indians seem to agree on is that attempts at conservation co-management have created complicated processes that lack substantive conservation value.[116]

That co-management efforts have been bogged down is illustrated by the myriad of regulations and authorities that govern salmon conservation. The complexity of the regulatory framework governing the Columbia River Basin has increased exponentially during the thirty years since the *Boldt* decision. At the federal level alone, there are no less than eleven agencies with some substantial authority or activities in the region.[117] Each of these agencies is directed to conduct action directly or through a combination of ten federal statutes.[118] The number of laws,

Northwest Power Act . . . . So little progress has been made over a period of many years. The promise of salmon restoration that was a central tenet of the Act has never been realized.").

[114] *See, e.g.*, *Decision that Struck Like a Boldt*, COLUMBIAN (Vancouver, Wash.), Feb. 13, 2004, at C2 (noting that "[i]n recent years, dwindling fish runs and a commercial market undercut by cheaper, farmed Atlantic salmon have discouraged many young members of [one Indian tribe] from fishing").

[115] *See, e.g.*, Don Sampson, *One Tribe's Perspective on "Who Runs the Reservoirs"*, 26 ENVTL. L. 681, 681 (1996) (decrying the Northwest Planning Council's "rigid adherence to status quo river operations").

[116] *See id.* at 682 (noting that the meaningfulness of tribal participation in planning committees is questionable because the process is "nothing less than slow strangulation by paperwork and process"); *see also* BLUMM, *supra* note 5, at 216 (arguing that additional process created by the Endangered Species Act "has yet to produce significant improvements in Columbia Basin salmon runs"). Non-Indians have expressed similar concerns about conservation efforts. *See, e.g.*, Kawada, *supra* note 87, at A1 (quoting non-Indian fisherman John Blanusa, "You guys [i.e. Indians and the State] are going to study until the last fish is gone").

[117] U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 6–9 (listing and describing the respective responsibilities of the Bonneville Power Administration, the U.S. Army Corps of Engineers, the Bureau of Reclamation, the U.S. Forest Service, the Bureau of Land Management, the U.S. Fish and Wildlife Service, the Bureau of Indian Affairs, the National Marine Fisheries Service, the Environmental Protection Agency, the Natural Resources Conservation Service, and the U.S. Geological Survey).

[118] *Id.* at 10–12 (briefly describing the relevant measures of the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act, the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), the Fisheries Restoration and Irrigation Mitigation Act of 2000, the Mitchell Act, the National Forest Management Act, the Federal Land Policy and

regulatory bodies, and groups increases significantly at the state and local levels. The many levels of bureaucracy at federal, state, and local levels have rendered meaningful co-management almost impossible.

The current frustration surrounding the failure of conservation points to a single, overriding problem in the analysis of the Phase II courts that previously decided the habitat issue. Those courts were correct to note that the *Boldt* decision allowed Indians and non-Indians to cooperate on the allocation issue. But they made a critical mistake when they assumed that such cooperation could occur in the area of conservation without direction from another hard-edged rule. As the tribes once again turn to the courts to assert a definitive right to salmon habitat protection, it is likely that the principles embodied in the *Boldt* decision will once again define the course of modern salmon law. Extending the decision requires critical reflection. Understanding, critiquing, and justifying the rationale of the *Boldt* decision are the goals of the next Part of this Note.

III. A JUSTIFICATION FOR THE *BOLDT* DECISION: THE THEORETICAL BASES FOR A PROPERTY RULE

Given the enduring 50% allocation rule and the open legal door on the habitat issue, the *Boldt* decision is worthy of critical analysis. The analysis here is done in two parts. The first part presents one of the most doctrinally difficult questions left unanswered by the *Boldt* decision: How did Judge Boldt transform the imprecise, standard-like language of the Stevens treaties and prior precedents into a concrete 50% rule? Using the Supreme Court's affirmation of the *Boldt* decision as a foil, Part III.A explores how Judge Boldt dealt with precedent, history, and text in fashioning the rationale behind the 50% rule. It concludes that, while Judge Boldt was exceedingly thorough in his opinion, there are many problems with the explicit justifications he gave for the rule.

Part III.B takes this analysis a step further, arguing that a single-minded focus on the problems in the *Boldt* decision ignores the deeper foundation that underlies it. An examination of the choice between "rules" and "standards," as informed by property

Management Act of 1976, the National Wildlife Refuge System Administration Act of 1966, and the National Indian Forest Resources Management Act).

theory, leads to the conclusion that the value of the *Boldt* decision derives from a narrative that reflects important and persuasive principles of property law.

A. *Judge Boldt's Unanswered Questions*

One way to understand the *Boldt* decision's 50% rule is to place it in the context of Judge Boldt's desire to obtain finality on the Stevens treaties. Judge Boldt was cognizant of precedents such as *Winans*, *Tulee*, and the *Puyallup* cases and was critical of their inability to deal definitively with the treaty language. Judge Boldt in fact *began* his opinion with a lengthy exploration of past decisions that ended with the observation that "[s]uprisingly little judicial attention . . . has been given to this rather standard treaty language."[119] Citing Justice Douglas's majority opinion in *Puyallup II*, Judge Boldt opined that:

> [W]hatever [the Supreme Court] may have added to or taken from the right to exercise the off reservation treaty fishing rights of the . . . tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court . . . in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties . . . .[120]

To Judge Boldt, the lack of direction on the meaning of the Stevens treaties created a positive need for guidance from a court willing to "finally settle" the dispute.[121]

The result of Judge Boldt's desire to end the allocation dispute is a holding that is doctrinally unsatisfactory for a number of reasons. One problem is Judge Boldt's own explanation for the 50% rule. Judge Boldt explained his reasoning behind the 50% rule in the following passage (worth quoting in its entirety):

> By dictionary definition and as intended and used in the Indian treaties and in this decision[,] "in common with" means *sharing equally* the opportunity to take fish at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fisherman at usual and

[119] United States v. Washington (*Boldt*), 384 F. Supp. 312, 338 (W.D. Wash. 1974) (quoting State v. Moses, 483 P.2d 832, 834 (Wash. 1971)).

[120] *Id.* at 338.

[121] *Id.* at 330.

> accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .[122]

This passage, along with a footnote (discussed below), are Judge Boldt's justifications for the 50% allocation. The questions Judge Boldt leaves unanswered are many. Why is the 50% allocation appropriate? Even more importantly, why is *any* percentage appropriate? Other parties had suggested different allocations during litigation,[123] but Judge Boldt discussed none of them, not even the arguments supporting 50%.

On a textual level, Judge Boldt's reading is cramped. Replacing the treaty language "in common with" with the phrase "sharing equally" may or may not be plausible, but even if it is, it does not necessarily yield a 50% rule. It is arguable that "in common with" means something else altogether—for example, sharing proportionately. Even if one grants that "sharing equally" is the right reading, it still glosses over an important question about *who* shares equally: the collectives of non-Indians and Indians or the individual members of those collectives.[124]

Even if a 50% rule is appropriate, it is not evident why the rule extends to Indians' *commercial* fishing. In a paragraph directly before the language cited above, Judge Boldt acknowledged "beyond doubt" that "at treaty time the opportunity to take fish for *personal subsistence* and *religious ceremonies* . . . was the single matter of utmost concern to all treaty tribes."[125] In the next passage, however, Judge Boldt

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[122] *Id.* at 343 (emphasis in original).

[123] COHEN, *supra* note 75, at 7–10 (noting that various parties suggested a range of treaty right formulations, such as the claim that the treaty tribes had (1) no right to any salmon; (2) a right to one-third; (3) a right to take "enough to live by"; and (4) a right to take "an equal share").

[124] We can slice this even thinner. If it is the case that the collective non-Indians and Indians have a right to take 50% of the salmon, then it is more plausible for the 50% rule to follow from the treaty. But this reading does not solve the problem because it raises the further question of whether *each tribe* is a distinct collective. If, on the other hand, the rule applies to *individuals* (i.e., each Indian and non-Indian shares equally in the right to fish), then the 50% rule does not follow at all. On this reading, it is more reasonable to conclude that if the collectives have any right, it is only proportional to the size of their individual membership.

[125] United States v. Washington (*Boldt*), 384 F. Supp. 312, 343 (W.D. Wash. 1974).

applied the 50% allocation to commercial fishing.[126] The explanation for this about-face is contained in a cryptic footnote:

> The court has found and hereby affirms that Indians fished for commercial purposes at and prior to treaty times and have the right to do so now and in the future. If and when any question is raised by any party pertaining to commercial fishing by Indians, it will be heard and determined by the court.[127]

Like the passage with which it is associated, this footnote raises some concerns. On one reading, it seems as if Judge Boldt is explaining how a repeated tradition has become the equivalent of a common-law rule. At the same time, the statement could be seen as amounting to a claim that the treaty extends to commercial fishing because Judge Boldt thinks it should, regardless of a certain degree of uncertainty. In fact, one could read the footnote's second sentence to indicate Judge Boldt's doubts about the right to commercial fishing; if he were confident in that conclusion, there would have been no need to remind the parties of the possibility of challenging it in the future.

Compounded with these textual problems is the most significant problem with the opinion, Judge Boldt's treatment of precedent. To understand this criticism, it is helpful to think of the 50% rule as encapsulating three concepts. The first is the general allocation right—that is, an Indian right to an amount of fish specifically earmarked for Indian fisherman. As was argued previously, the idea of the allocation right developed over time, through litigation in prior courts.[128] In this sense, the *Boldt* decision was in line with the precedents, and can even be seen as an extension of the principles of fairness and non-discrimination those courts previously recognized.

However, the 50% formulation in the *Boldt* decision has two other components to it—its form (a rule) and its substance (50%). Neither of these aspects of the *Boldt* decision follow clearly from the *Sohappy* and *Puyallup* cases. Those decisions found no reason to find that the treaty language mandated a definitive outcome, and therefore relied on vague standards rather than clear allocations.[129] For those courts, the meaning of the Stevens treaties was not something easily fleshed-out in hard-edged rules, but was an

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[126] *Id.*

[127] *Id.* at 343 n.29.

[128] *See supra* Part I.B.2.

[129] *See supra* Part I.B.

allocative right sensitive to the facts and circumstances of each case.[130] These precedents thus exacerbate the problems with the *Boldt* decision highlighted here. Furthermore, the precedents bring two specific issues to the fore: How can Judge Boldt reason from vague standards laid in precedent to reach a rule of "50%"? Even more, is such a rule consistent with binding past decisions?

The answer to these questions divided the Supreme Court when the *Boldt* decision came before it on appeal. Justice Stevens's majority opinion upholding the *Boldt* decision gave a creative defense of the 50% rule. Justice Stevens argued that while the fixed allocation was "not mandated" by past cases, it was consistent with the Court's third *Puyallup III* decision dealing with steelhead trout.[131] In that case, the Court, per Justice Stevens, upheld a federal district court's imposition of a 45-55 percent rule to allocate steelhead trout among treaty and non-treaty fishermen.[132] Now, Justice Stevens analogized Judge Boldt's reasoning to that of the district court being reviewed in *Puyallup III*; like that court, he claimed, Judge Boldt started "with a 50-50 division" and adjusted "slightly downward."[133]

Justifying the suggestion that Judge Boldt had departed "slightly downward" required a careful reading of the *Boldt* decision. Judge Boldt had written that the exercise of the tribes' right to take salmon was limited by certain factors, including "the geographical extent of the usual and accustomed fishing places," "the limits of the harvestable stock," and "the tribe's fair need for fish."[134] By emphasizing this language and characterizing it as a "slightly downward" formula, Justice Stevens placed the *Boldt* decision in line with precedent, but also narrowed the opinion in the process. To Justice Stevens, the "central principle" reflected in Judge Boldt's opinion was that Indians have the right only to secure fish "so much as, but no more than, is necessary to provide

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[130] *See, e.g.*, Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48 (1973) ("What formula should be employed [to arrive at a determination of "fairly apportioned"] is not for us to propose.").

[131] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979) (discussing Puyallup Tribe v. Dep't of Game of Washington (*Puyallup III*), 433 U.S. 165 (1977)).

[132] *Puyallup III*, 433 U.S. at 177.

[133] *Fishing Vessel*, 443 U.S. at 685.

[134] United States v. Washington (*Boldt*), 384 F. Supp. 312, 402 (W.D. Wash. 1974).

the Indians with a livelihood—that is to say, *a moderate living*."[135] Although "the maximum possible allocation to the Indians is fixed at 50%, the minimum is not."[136] The minimum would "be modified" by the district court "in response to changing circumstances."[137] Through this analysis Justice Stevens made explicit the limiting factors Judge Boldt identified so that the allocation of 50% would be decreased in accord with the moderate living principle.

This reading of the *Boldt* decision placed it in line with Supreme Court precedent in two ways. For one, it agreed with cases such as *Puyallup III*, which had also used the "slightly downward" formulation in the context of a percentage-based rule. Secondly, by making the 50% rule a *ceiling* and not an unalterable allocation, the *Boldt* decision looked much more like the standards laid-down in *Winans*, *Tulee*, and the first two *Puyallup* cases.

Three justices, led by Justice Powell, objected to the majority's opinion on three grounds. Powell's first contention was textual: "Nothing in the language of the treaties indicates that any party understood that . . . the Indians would be guaranteed a percentage of the catch."[138] Powell's second line of attack was that the opinion misread the history of the treaty negotiations. That history, according to Powell, best supported the treaties as reserving to the Indians "rights of access alone."[139] But Powell's third, and main argument, was that both the Supreme Court and Judge Boldt were untrue to the precedents. Powell saw the standard created by *Winans* and related cases as specifically reserving for Indians no "affirmative right to a specified percentage of the catch."[140] Instead, Powell argued that it was more consistent with precedent to consider the Indians' treaty

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[135] *Fishing Vessel*, 443 U.S. at 686 (emphasis added).

[136] *Id.*

[137] *Id.* at 687. Justice Stevens provided an example of what he had in mind:

> If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

Id.

[138] *Id.* at 698 (Powell, J., dissenting).

[139] *Id.* at 699.

[140] *Id.* at 703.

rights as primarily a right to access and use their traditional fishing grounds.[141] Although the Court allowed an allocable percentage of fish in *Puyallup II*, Powell maintained that the case was inapplicable to the issue before Judge Boldt. "[T]o the extent language in *Puyallup II* may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties."[142]

Given the problems with the decision as well as Justice Powell's misgivings concerning the 50% rule, there is a good argument that the public's animus towards Judge Boldt was correctly placed. On this view, it is not unreasonable to see Judge Boldt's stated rationales for the 50% rule as derivative of his own notions of fairness, rather than any established legal principle. However, as will be made clear in the following section, dismissing the *Boldt* decision for these reasons deprives the rule laid down by the *Boldt* decision of its significant theoretical richness.

B. *Judge Boldt's Property Narrative: The Theory Behind a Rule*

Despite the problems with the *Boldt* decision outlined in the previous Part, the opinion still has value. By focusing on Judge Boldt's narrative and some key theoretical insights about the proper choice of legal form (in particular, the choice between rules and standards), this Part argues that recognizing and understanding the theoretical underpinnings of the decision allow for a well-developed understanding and principled defense of the opinion.

It is important to understand the limits and purposes of this endeavor. Of course, it is impossible to rewrite either the *Boldt* decision or past precedents to formulate agreement between them. Even with this limitation, the analysis here promotes an understanding of the 50% rule that both supports the *Boldt* decision from a theoretical perspective and justifies extending the principles underlying the *Boldt* decision to the unresolved habitat issue implied by the recent culvert litigation.

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[141] *See id.* at 701–05.

[142] *Id.* at 704. Powell also dismissed the relevance of *Puyallup III*, arguing that the context which gave rise to the need for a regulation in that case showed that it was "of little assistance in deciding the issue in the present cases." *Id.* at 704 n.6.

1. *The Conceptual Difference Between "Rules" and "Standards"*

The Stevens treaties presented Judge Boldt with a choice between using a "rule" or a "standard" as a mechanism of legal direction. The choice was significant; rules and standards are two very different legal "forms."[143] The dichotomy has been explained by comparing, for instance, a law requiring a driver to travel no more than sixty-five miles per hour to a law directing drivers to travel "no faster than reasonable."[144] The first law is a clear rule: a driver traveling sixty-six miles per hour violates the law. The second law is a standard: whether a driver traveling sixty-six miles per hour violates the law hinges on the meaning of "reasonable," and will likely require adjudication of the meaning of "reasonableness."[145] Generally, laws that create absolute deadlines,[146] or age[147] and decibel limits,[148] are rules, while laws employing terms like "good faith," "due care," "fairness," and "reasonableness" are standards.[149] Thus, a law giving Indians the right to take up to 50% of all harvestable fish (a rule) is fundamentally different from a law allowing Indians to take a "reasonable" harvest (a standard).

These two different forms are present throughout the legal system, but in the universe of property law, scholars suggest that rules are essential to the establishment of property rights.[150] There is expansive literature on the topic that gives a good deal of

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[143] *See* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000). Note that treating rules and standards as neat and clearly distinct categories may involve some oversimplification. It is possible that paradigmatic rules and paradigmatic standards are poles on a spectrum, rather than a pure dichotomy. However, even if it requires some oversimplification, the dichotomy remains useful for theoretical ends. *See id.* at 30 (arguing that "despite this fluidity . . . it is possible to classify most legal pronouncements as standards or rules, based on their core characteristics").

[144] *Id.* at 23.

[145] *Id.*

[146] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 583 (1988) (discussing early common law rules pertaining to mortgages).

[147] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

[148] *See* Korobkin, *supra* note 143, at 36.

[149] Kennedy, *supra* note 147, at 1688.

[150] *See* Rose, *supra* note 146, at 577 (noting that "rules are the very stuff of property").

attention as to when one legal form is more desirable than the other.[151] Although Judge Boldt did not expressly enter that debate, his opinion implicitly incorporates many of the classic arguments for choosing a rule over a standard.

2. *The Scarcity Narrative*

Judge Boldt's choice of a rule over a standard can be seen as justified by two related conditions, increased scarcity and increased value of a commonly-shared resource. Property scholars have recognized that the more limited and valuable a resource becomes, the more likely it is that property laws will take the form of clear rules.[152] Harold Demsetz defended this claim in an article published less than a decade before the *Boldt* decision.[153] Relying on anthropological accounts of fur-trading Indians on the Labrador Peninsula, Demsetz argued that the Indians developed private property rights in fur-bearing animal habitat in response to increasing demand for fur and increasing scarcity of fur-bearing animals.[154]

These scholars have also argued that these clearer rules develop in these circumstances for good reason. Demsetz maintained that rules developed for purposes of ease, efficiency, and utility. Rules are uniquely situated to accommodate the needs created by increased scarcity and demand. Rules provide strong direction and tell everyone exactly where they stand.[155] As Carol Rose has put it, rules "signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests."[156] Conversely, standards carry uncertainty about the application of a law in a given situation. One does not know the scope of a legal right under a standard unless they "go

[151] *See, e.g.*, Kennedy, *supra* note 147, at 1687–1713; Korobkin, *supra* note 143, at 23 n.4.

[152] Rose, *supra* note 146, at 577–78 (citing Blackstone, Demsetz, and Posner as examples).

[153] *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PROC. 347 (1967).

[154] *Id.* at 350–54.

[155] *See* Rose, *supra* note 146, at 577; *see also* Korobkin, *supra* note 143, at 25 ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts. Consequently, under a rule it is possible for citizens (with good legal advice) to know the legal status of their actions with reasonable certainty *ex ante*.").

[156] Rose, *supra* note 146, at 577.

through the pain and trouble of getting a court to decide the issue."[157]

Rules also create different incentives. By telling property-holders and non-property-holders where they stand, rules create incentives for rights-holders to protect, maintain, and use their property. These incentives are not present in a standard-based system of communal ownership. Consider, for example, a communal system where everyone is permitted a "reasonable" catch of fish each day. Under such a system, the costs associated with each individual's exercise of her communal right are borne by the community as whole. There is no incentive for preservation because there is no guarantee that a fish left in the water by Fisher *A* one day will not be caught by Fisher *B* in the next. A rule establishing a property right, however, gives a right-holder an incentive to maximize her value by taking into account the future and present competing claims. Fisher *A* can now establish a claim that guarantees her preservation efforts are not snatched away by Fisher *B*. The rule forces other fishers either to break the law and be subject to attendant damages or to negotiate with Fisher *A* over the property.[158] In common property law parlance, rules are said to force rights-holders to internalize (i.e., bear the costs of) the externalities (i.e., the effects) attendant with the use of limited resources. For the salmon situation, a rule-based system that, for example, caps the number of fish caught encourages each fisherman to play a part in future conservation efforts.[159]

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[157] Rose, *supra* note 146, at 579*; see also* Korobkin, *supra* note 143, at 25–26 ("Standards . . . require adjudicators . . . to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule. Consequently, under a standard, citizens cannot know with certainty *ex ante* where a legal boundary would be drawn in the event a set of specified facts come to pass.").

[158] In fact, rules are often said to facilitate negotiation because the delineation of clear rights limits the number of competing claims, making agreement more likely.

[159] Reliance on this line of argument is sometimes over-optimistic and may be misused. The Ninth Circuit, for example, used similar reasoning in declining to decide the habitat issue in Phase II. *See supra* Part II.A. As mentioned earlier, there is a good argument that the Ninth Circuit missed the point because of the different issues raised by the separate *allocation* and *conservation* disputes. While a rule-based regime in the area of *allocation* was sufficient in settling major debates over allocation, experience has taught that the regime is not enough to deal with difficult questions about *conservation*. Because of the difference between allocation and conservation, the fact that the 50% allocation rule has not led to effective conservation measures does not affect the underlying

Increases in demand and scarcity also make rules more likely and useful because they alter the costs associated with rule creation. Despite the utility of rules, the costs associated with creating a rule tend to be higher. Where the parties affected by a rule cannot realistically bargain around its results, it is important to get the details of the rule right, but this tends to take time, deliberation, discussion, and perhaps technical expertise. Such costs are often higher than the costs associated with creating standards. However, these high costs are a necessary consequence of rule-making because the specificity needed for rule-creation is greater than for a standard.

Conversely, while the costs of *creating* a standard may be lower, the costs of interpreting and applying a standard (e.g., litigation, mediation) tend to be higher. Increases in demand and scarcity of a limited resource, however, make the added costs normally associated with the establishment of rules bearable. According to the analysis suggested by Demsetz, increased scarcity makes the extra costs of rule-creation bearable because of the increased value derived from the clarity and efficiency of a rule-based regime.[160] In other words, as a resource becomes scarce, there is a greater need to dispute claims on that resource. Absent such scarcity, there is little need for someone to worry about whether someone else is using a disproportionate share of the resource. On this view, scarcity leads to an increased need for easily applicable and enforceable rules, and thus by avoiding the costs of litigation and enforcement involved with standards, rules become more valuable.

Judge Boldt's narrative resonates strongly with this scarcity narrative. The narrative begins by describing the easygoing era directly following the negotiations between Governor Stevens and the tribes. Indians and non-Indians fished without conflict during this period:

> [A]ll of the tribes extensively exercised their treaty rights by fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured

strength of this argument.

[160] *See* Demsetz, *supra* note 153.

perpetuation of all fish species in copious volume.[161]

Although the Stevens treaties were on the books, enforcement in the early part of their existence proved unnecessary because competition over the fishing resource was low.

But this rosy state of affairs did not last forever. Increased non-Indian settlement and development on the rivers eventually placed added demand on the salmon runs and kicked off the allocation struggle. As Judge Boldt put it, "[t]he first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization."[162]

Disputes over the fish runs resulted from the lack of any clear definition of a property right. To Judge Boldt, the evidence showed that the "root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing."[163] Judge Boldt observed that the Indians' right to fish "is the treaty provision most frequently in controversy and litigation."[164]

Judge Boldt may not have written in terms of internalizing externalities, but it is the essence of his opinion. Like Demsetz' sociological observation, Judge Boldt's narrative focused on the problems that occurred in the midst of increased demand and scarcity and the lack of clear property rules. This uncertainty hindered fair use of the resource and made negotiation between the parties almost impossible.

Recognizing the scarcity narrative is valuable because it informs much of the opinion. For example, Judge Boldt's optimism in his opinion[165] makes sense because the creation of a

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[161] United States v. Washington (*Boldt*), 384 F. Supp. 312, 334 (W.D. Wash. 1974). "For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing." *Id.* at 333.

[162] *Id.* at 334.

[163] *Id.* at 329.

[164] *Id.* at 340.

[165] *See, e.g.*, *id.* at 329–30.

> Some commendable improvement in [tribal-state relations] has developed in recent years but this court believes high priority should be given to further improvement in communication and in the attitude of every Indian and non-Indian who as a fisherman or in any capacity has responsibility for treaty right fishing practices or regulation. Hopefully that will be expedited by some of the measures required by this decision.

50% property right could (and did) facilitate negotiation over allocation of the common resource. The scarcity narrative even helps to explain the impressive scope of the *Boldt* decision[166] as a consequence of the high costs typically associated with rule-making.

The most valuable insight supplied by the recognition of the scarcity narrative is a better explanation of the source of the 50% rule, albeit an incomplete one. The justification is incomplete because it does not justify the precise *substance* of the rule, only its form. But even with this fault, the scarcity narrative is important because it provides a persuasive reason why Judge Boldt chose to give his decision a hard-edged form. To Judge Boldt, a standard such as the right to fish "in common" or take a "fair share" of the fish could not deal with the increased value and scarcity facing the parties vying for use of the fish runs. A final settlement to the dispute lay not in the creation of additional standards that would require more litigation, but rather a clear rule that conformed with notions of equity and fairness.

3. *Of Fools and Scoundrels: Self-Determination and the Individualistic/Altruistic Ethic*

The previous Part argued that the *Boldt* decision reflects a scarcity narrative drawn from property theory. Another explanatory theory of the *Boldt* decision overlaps with the Demsetz narrative but is distinct in its own right. This theory is based on Duncan Kennedy's work tying the choice between rules and standards to a choice between two different ethics.[167] Kennedy associates the motivation behind standards with a sort of communal altruism focused on flexibility, sharing, sacrifice, and fairness.[168] Under this view, lawmakers may favor standards over rules, or even soften rules by injecting them with standards, in order to counteract the harsh consequences of hard-edged rules.[169]

Id.

[166] *See supra* Part I.C.

[167] *See generally* Kennedy, *supra* note 147.

[168] *See id.* at 1710, 1717, 1737–51; *cf.* Rose, *supra* note 146, at 605 ("[T]he rhetoric of [standards] focuses on the flexibility and willingness to make adjustments that longterm [sic] dealings normally offer.").

[169] *See* Kennedy, *supra* note 147, at 1750–51; *see also* Rose, *supra* note 146, at 597–98 (suggesting that where we rely on strict rules, e.g., property recording rules, minor and technical violations can lead to overly harsh results, such as forfeiture).

Rules are considered harsh because, in order to facilitate clear outcomes, they must be made relatively simple and rigid. They cannot take account of every morally relevant feature of the "totality of the circumstances." So outcomes that are formalistically and legally correct according to a clear rule may not always align with a community's sense of right and wrong. The decision to choose a standard instead of a rule is often guided by the recognition that both "fools" and "scoundrels" exist and that under a system of strict rules there is a strong possibility the latter will swindle the former via their more intimate knowledge of highly technical rules.[170] Standards help to address this fool-scoundrel interaction by giving adjudicators a certain level of discretion to find the right answer.

While clear, hard-edged rules can be criticized from the "altruistic" perspective, they might be defended from a different, more individualistic ethic. Individualism, as Kennedy describes it, focuses on self-reliance and the idea that "I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others."[171] Under the individualistic ethic, "justice" does not require empathy or sharing, but rather the right to be left to one's property without interference from the outside world.[172] From this perspective, fairness is adequately provided for when clear rules establish the ground rules of social competition. If the rules are clear and consistently applied, then each may take care to protect themselves. Furthermore, this individualistic preference for clear rules can be backed by *laissez-faire* and efficiency-based arguments.[173] Economic development is fueled by individuals' efforts to develop their existing rights and acquire new ones, and they have the surest incentive to do this under a system of clear rules. Scoundrels may sometimes manipulate some fools, but, the individualist argues, the overall good of the citizenry will prevail under a system of rules.[174]

Much of Judge Boldt's opinion reflects individualist rhetoric.

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[170] *See* Rose, *supra* note 146, at 599–601.

[171] Kennedy, *supra* note 147, at 1713.

[172] Rose, *supra* note 146, at 606 (noting that Adam Smith once defined "justice" to mean "prevent[ing] the members of a society from encroaching on one anothers [sic] property, or siezing [sic] what is not their own").

[173] *See* Kennedy, *supra* note 147, at 1745–48; *see also* Rose, *supra* note 146, at 607–08.

[174] *See* Kennedy, *supra* note 147. at 1716.

For instance, Judge Boldt emphasized the independence of Indian self-determination from congressional legislation. "Ever since the first Indian treaties were confirmed by the Senate, Congress has recognized that those treaties established *self-government* by treaty tribes."[175] To Judge Boldt, congressional legislation dealing with tribal affairs, such as the Indian Civil Rights Act, showed "the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government."[176]

Judge Boldt built on this individualistic focus on tribal self-determination by establishing the 50% rule. Given the past failures of the State to enforce treaty rights, the Indians, it might have been thought, stood to benefit from imposition of a more understanding and flexible legal form such as a standard. To Judge Boldt, however, the problem was not the imposition of an unfair rule. Instead, the problem was an unclear and under-enforced standard that rendered the Indians unable to keep outsiders from interfering with their valid exercise of a property right.[177] Judge Boldt therefore emphasized that fishing lay at the core of Indian identity[178] and that he intended his holding to create a hard-edged rule that would solidify that identity by putting Indians on an equal footing with non-Indians.[179]

The altruistic ethic also plays a strategic role in the opinion. In addition to the 50% rule, Judge Boldt held that under certain conditions, Indians are entitled to self-regulation of their off-reservation fishing and that state regulation must be limited to conservation-only purposes. These holdings take the shape of two standards, one of which is a "pure standard" and another that is less so.

Judge Boldt's first holding regarding the question of state regulation was that tribes meeting certain criteria—such as

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[175] United States v. Washington (*Boldt*), 384 F. Supp. 312, 339 (W.D. Wash. 1974) (emphasis added).

[176] *Id.* at 340.

[177] *See supra* Part I.B (characterizing the period after *Winans* and *Tulee* as a "legal malaise" due to lack of enforcement).

[178] *Boldt*, 384 F. Supp. at 358 ("Subsequent to the execution of the treaties and in reliance thereon, the members of the Plaintiff tribes have continued to fish for subsistence, sport and commercial purposes at their usual and accustomed places. *Such fishing provided and still provides an important part of their livelihood, subsistence and cultural identity*.") (emphasis added).

[179] *Id.* at 343 (noting that the 50% rule "emphasiz[es] the basic principle of sharing equally in the opportunity to take fish" among Indians and non-Indians).

organization, expertise, and competence—were entitled to self-regulation.[180] Judge Boldt set-out this criterion in the classic standard language, employing phrases and terms such as "readily available," "suitable form," "reasonable," and "necessary."[181]

But this language did not leave the Indians with only a pure standard, because Judge Boldt also identified several tribes that already met the criterion.[182] The effect of this determination is very important because it gives direction to the standard. In a sense, Judge Boldt created a precedent that later courts must follow. By playing the dual roles of rule-maker and adjudicator, Judge Boldt transformed his pure standard into something more

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[180] *Id.* at 340–42.

[181] *Id.* at 340–41. This part of the opinion reads much like a statute. In its entirety, the section reads:

> QUALIFICATIONS
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> The tribe shall have:
>
> (a) Competent and responsible leadership.
>
> (b) Well organized tribal government reasonably competent to promulgate and apply tribal off reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.
>
> (c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.
>
> (d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.
>
> (e) An officially approved tribal membership roll.
>
> (f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters.
>
> CONDITIONS
>
> The tribe shall:
>
> (a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.
>
> (b) Permit monitoring of off reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.
>
> (c) Provide fish catch reports, as to both on and off reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

[182] *Id.* at 341 ("The uncontradicted evidence shows that for a considerable time the Quinault and Yakima tribes have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than the regulations of Fisheries and Game.").

like a rule.[183] Of course, the effort was not as clear-cut as the 50% rule, but it did provide a higher level of support for the Indians than would a pure standard.

This approach is contrasted with Judge Boldt's treatment of the issue of when state regulation of Indian fishing is proper (rather than when tribes may self-regulate). In that instance, Judge Boldt adhered to purely "standard" language, emphasizing that the State may not regulate Indian fishing unless it is deemed to be "*reasonable and necessary* to prevent demonstrable harm to the actual conservation of fish."[184] Moreover, Judge Boldt limited "conservation" to mean "those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish."[185]

The individualistic and altruistic ethics provide theoretical justifications for why Judge Boldt used two very different methods in deciding these very similar issues. The well-articulated standard regarding tribal self-regulation is in accord with the same individualistic concerns that formed the basis of the 50% rule. Judge Boldt realized that he could not control every decision whether a given tribe meets the required qualifications for self-regulation. However, by specifically identifying those tribes that had already met his criteria, Judge Boldt foreclosed the State's argument that no tribe met the criteria (or that very few tribes met the criteria). By arming the tribes with a pseudo-rule, Judge Boldt added to the tribes' rights and, in turn, their ability to self-govern in accordance with the individualistic ideal.

Using the same approach to define the State's regulatory power would have effectively given the State the benefit of a hard-edged rule and the authority to direct tribal fishing. But Judge Boldt was not inclined to increase the State's power in that arena because he was deeply suspicious of the State's use of regulatory power in the name of conservation. To this end Judge Boldt noted that it was:

> [U]nfortunate . . . that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly

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[183] *See* Korobkin, *supra* note 143, at 29 (noting that "[j]ust as a pure rule can become standard-like through upredictable exceptions, a pure standard can become rule-like through the judicial reliance on precedent").

[184] *Boldt*, 384 F. Supp. at 342 (emphasis added).

[185] *Id.*

> true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians.[186]

This concern echoes the altruistic ideal. It suggests that Judge Boldt saw the State as the "scoundrel" and the tribes as the "fool," and he felt that a rule permitting state regulation had too much potential for abuse. Thus, the altruistic ethic led Judge Boldt to opt for the more flexible standard, one that took decision-making from the State and vested it in the courts.

Ultimately, Judge Boldt's different legal forms make sense when we consider that each is tied to a different ethic. When the issue turned on Indians' identity and self-determination, Judge Boldt erred on the side of rigidity, imposing either a clear rule (the 50% allocation) or a rule-like limited standard (the conditions necessary for tribal self-regulation). When the issue involved the power of the State to inhibit the tribes' self-determination, Judge Boldt erred on the side of flexibility, imposing a pure standard in the hopes of curbing state abuse of power.

4. *The Rule of Law: Legitimacy and the Jurisdictional Struggle*

The final theoretical argument for Judge Boldt's holding, and in particular the 50% rule, grows out of the court's need for legitimacy. The discussion of altruism and individualism touched on legitimacy concerns peripherally, but it is worth discussing them in depth. One view is that rules tend to bolster legitimacy. This is so partly because rules play on the deep-seated (but simplistic) view that a judge's job is merely to apply rules to particular factual situations.[187]

Rules give the impression of legitimacy also because the process of formulating a rule is more opaque than the process for creating a standard.[188] As Duncan Kennedy put it, "the discretionary elements in the choice of a norm to impose are obscured by the process of justification that pops a rule out of the

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[186] *Id.* at 338–39.

[187] Kennedy, *supra* note 147, at 1708.

[188] This is most true after a rule is created. At the time when a rule is created, however, such opaqueness may actually foster illegitimacy because the source of the rule is not clear. These two factors in fact seem a good description of the experience of the Judge Boldt's 50% rule—the period directly following the ruling saw much opposition, but eventually the rule gained acceptance and legitimacy, ultimately pushing Indians and non-Indians towards compromise on the allocation issue. *See supra* Part I.D (discussing the public outrage and co-management allocation systems that developed following the *Boldt* decision).

hat of policy, precedent, the text of the Constitution, or some other source of law."[189] A rule eliminates the discretionary element available to courts that must apply it. By giving the impression that a judge's "hands are tied," a rule setting a clear directive eliminates, or appears to eliminate, the possibility of alternative outcomes.[190]

Judge Boldt's awareness of potential legitimacy and jurisdictional problems also influenced his decision. On a legitimacy level, Judge Boldt portrayed himself as the proper rule-applying authority. Judge Boldt emphasized that his decision was required by law, and expressed his hope that the parties to the case would "accept and abide" by the decision "even if adverse" to their commercial and recreational activities.[191] This rule-centric view of the judicial role seemed aimed at Judge Boldt's intent to breathe legitimacy into his opinion and hopefully overcome a tradition of state-sanctioned subversion of treaty fishing.

Jurisdictionally, the 50% rule reduced the abilities of state courts and state agencies to water down the tribes' treaty rights. It created a precise allocation, effectively leaving the state courts and agencies with the sole task of deciding which fish would fall into the universe of "harvestable fish."[192] By shifting the discretionary state element from questions of proper allocation to questions of which fish will fall into a set allocation, Judge Boldt tactically eliminated a major source of state abuse.

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[189] Kennedy, *supra* note 147, at 1708.

[190] *Id.*

> A standard is often a tactically inferior weapon in jurisdictional struggle, both because it seems less plausible that it is the only valid outcome of the reasoning process and because it is often clear that its application will require or permit resort to 'political' or at least non-neutral aspects of the situation.

Id.

[191] *Boldt*, 384 F. Supp. at 329.

[192] *Id.* at 343.

IV. CONCLUSION: THE POTENTIAL OF ANOTHER "LIGHTNING BOLDT"

Each of the interrelated theoretical threads presented in the previous Part—the scarcity narrative, the individualistic-altruistic ethic, and jurisdictional/legitimacy concerns—helps us to make better sense of the *Boldt* decision. Although the decision may be problematic when read solely in terms of law and precedent, incorporating these property theories makes Judge Boldt's narratives and perspectives clearer and more defensible. Even if Judge Boldt neither saw nor formulated his arguments in precisely these terms, it is highly likely that they, or similar concerns, colored his opinion.

Teasing out the theories at play in the *Boldt* decision accomplishes two goals. First, such an understanding of the *Boldt* decision provides an overall view of the law surrounding the Stevens treaties and salmon conservation. It makes possible a generalized summation of salmon conservation success and failures. Where interested parties have been guided by clear directives like the 50% rule, there has been progress in the form of successful negotiation and co-management efforts.[193] However, where there have been standards, efforts at co-management have failed as parties attempt to fill in for themselves the gaps left open in the law.[194]

Beyond this positive goal, these theories also inform future conservation strategies. The factors Judge Boldt focused on in 1974 are just as pertinent today, if not more so. The relevance of the scarcity narrative has increased with the further decline in salmon runs. Similarly, the failure of co-management efforts and the frustration they have caused in the last twenty years is explained by the separate individualistic and altruistic ethics and the jurisdictional and legitimacy concerns underlying Judge Boldt's opinion.

As the Indians' claim to a treaty right to salmon habitat protection continues to be litigated, as in the recent culvert case,

[193] *See supra* Part I.D (discussing the allocation co-management efforts that developed following the *Boldt* decision).

[194] *Compare supra* Part I.D.3 (discussing successful co-management efforts), *with supra* Part II.B (discussing the failure of conservation co-management strategies).

these theoretical points, combined with recognition of the dire state of the salmon population, strongly support the view that a clear, hard-edged rule (or set of rules) is needed to facilitate future salmon conservation efforts. Although such rule creation may not be easy (indeed, the *Boldt* decision indicates that it will not be) such a rule or set of rules could take many forms. The right need not mandate a return to the "pristine environment" of pre-development era.[195] In the culvert case, for example, recognition of a treaty-based right to habitat protection could require clear identification of those culverts that pose a danger to fish, and a requirement that the state fix those culverts within a clearly-defined period of time. For the tribes who are once again using the courts to give meaning to the promise of the Stevens treaties, the lessons of the *Boldt* decision and the history of the Stevens treaties litigation is that the *form* by which their treaty-based fishing right is expressed is almost as important as the *substance* of the right itself.

[195] *See* Blumm & Swift, *supra* note 22, at 490 (discussing the fear by some courts that an Indian right to habitat protection would mandate a return to conditions prior to the Stevens treaties).