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The Paradox of Sovereignty: Contingencies of Meaning in American Indian Treaty Discourse

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INTRODUCTION

American Indian treaties and treaty law may seem to fall solely within the purview of legal methodology and critical analysis, yet the 367 American Indian treaties signed with the US federal government beg for the type of dissection and analysis generally associated with cultural and literary critical theory. The tools by which texts are dissected can elucidate the mutable nature of treaty discourse and cut to the core of the hierarchical power structures inherent in relations between the US government and American Indian nations.

Treaties are discourses that have had, and continue to have, literal real-world impact.[1] Moreover, treaties have created a paradoxical situation for American Indians who push for sovereign political autonomy from the United States: treaties grant and deny sovereignty. In this article, I examine the discourse of American Indian treaties, and subsequent twentieth-century treaty legislation, with a critical eye toward the sociopolitical contingencies, historical and contemporary, that determine how these discourses achieve meaning. Ultimately, I argue that treaties have become "fourth-world" texts that create this paradoxical notion of sovereignty. In understanding the nature of fourth-world texts, current American Indian activists and scholars can effectively influence how treaties create meaning in the twenty-first century.

There are two primary texts for this essay. The first is the Treaty of Medicine Creek (1854) signed in western Washington between the US government and nine American Indian nations.[2] It is the first of ten so-called Stevens Treaties, named after then governor Isaac I. Stevens, signed between 1854 and 1855 (the

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Medicine Creek treaty served as a model for subsequent Stevens Treaties). The second text is Judge George Boldt's 1974 ruling in *U.S. v. Washington,* which is known as the "Boldt Decision."[3] Other western Washington Stevens Treaties will be lightly touched on when appropriate in order to emphasize shades of similarity or difference in Washington State treaty history.[4]

As we shall see, the history of American Indian treaties and subsequent treaty law is replete with critical fascination: shades of semantic meaning, authorial intention, reader-response interpretation, and questions of whether worldviews are culturally specific or can be translated across languages. American Indian treaties could be considered classics of nineteenth-century American fiction. They imply conflict, struggle, and violence; despise the wild and untamed although they lament their imminent disappearance; demarcate boundaries where there were none (however synchronous with geographical boundaries); and become the loci of clashes among diverse religious, cultural, and legal systems. Moreover, through the years the treaties have become a muddle of intentions, interpretations, and politics. Overarching all these concerns are intense power relations because, obviously, the final result of these treaties was to strip indigenous peoples of their lands and resources; make those lands and resources available to colonizing peoples; and intern the indigenous peoples onto small portions of their former lands or remove them entirely from their homeland.

American Indian treaties, however justified by gestures toward saving indigenous cultures or peaceful coexistence with settler communities, were vehicles of colonization that legalized the usurpation of lands and resources. These treaties' authors were driven by meanings and understandings that were contingent on the historical moments in which the treaties were signed. In many late-nineteenth-century treaties, the US government wielded almost complete power during negotiations, which forced the Indians' hands. However, in a type of cosmic irony, those same treaties meant to usurp and disinherit Indians of their ancestral lands and resources were interpreted in the twentieth century to promote Indian sovereignty. The treaties' language hadn't changed one iota, but how they were read changed completely.

TREATY DISCOURSE

It is not within the scope of this article to examine the historical legacies behind European treaty making. The US government adopted the practice from European nations. During the period just after the American Revolution, the American Indian treaties fulfilled the government's desire for peace with powerful tribes and added an air of legitimacy to a fledgling nation. According to Vine Deloria Jr., "The American Revolution revived the idea of Indian sovereignty. Although reciting polite phrases about the equality of man, the American revolutionaries were plainly outside the law of civilized societies in their revolt, and to gain respectability they adopted the most acceptable posture [treaties] to Indians possible with the hope that by demonstrating their ability to act in traditional political terms they could allay the fears of other nations so as to legitimize their activities."[5] By treating

American Indian nations as sovereign entities, the young US government also legitimated its own claims to sovereignty by signing treaties.

The meaning of *treaty* was fluid and often meant a simple parlay or meeting during which no formal document was signed, but rather, in accordance with Indian custom, gifts were given and oral agreements arranged.[6] The first official written treaty between America and an Indian nation, the Treaty of Fort Pitt, was signed in 1778. By the turn of the nineteenth century, the treaty as a written document became the primary vehicle for dealing with American Indians until 1871 when the treaty-making process officially ended.[7] By that time, the US government had signed more than 360 treaties with the indigenous nations within what is now the contiguous United States. It is assumed that negotiation and compromise are at the core of any treaty process, and to an extent this is true in regard to American Indian treaties. But rarely were these treaties made between two equal parties, especially during the mid-nineteenth century. According to Francis Prucha, "even though in the beginning treaties were of a diplomatic nature—being negotiated by separate political powers dealing with each other on grounds of rough equality—very soon the United States came to negotiate the treaties from a position of overwhelming strength."[8] American Indians had been decimated by decades of disease and warfare by the mid-nineteenth century, and thus approached the treaty negotiations as supplicants who knew that, should the negotiations fail, further violence would be the ultimate end.

The effect of these treaties was to strip American Indians of nearly all their land holdings and to ghettoize them on minor tracts of land deemed unimportant to nineteenth-century Euro-American society (for example, land that was nonarable, geographically remote, climactically inhospitable). Thus, American Indians became literal prisoners of treaty discourse. Moreover, Indian reservations became the loci of imprisoned peoples who could be guarded rather easily and, if necessary, annihilated. Critical examinations of discourse are of some help here in understanding why treaties were effective vehicles for the suppression of American Indian cultural sovereignty. A treaty is more than a verbal contract between two or more parties; it is also a discursive exercise and as such displays the elements of a discourse. According to researchers at the University of Hawaii at Mānoa, those elements are, first, "the affirmation that social realities are linguistically/discursively constructed. The second is the appreciation of the context-bound nature of discourse. The third is the idea of discourse as social action. The fourth is the understanding that meaning is negotiated in interaction, rather than being present once-and-for-all in our utterances."[9] If we accept the theory that treaties are discourses, then understanding the above elements allows for a broader comprehension of the treaty process. The first element of a discourse is that reality is defined by discourse, and it follows that the boundary delineations within these treaties affected and, to a certain extent, created reality for American Indians in the nineteenth century. The second and third elements of a discourse also apply to treaties: treaty discourse affected a social action whose parameters were bound to the political, social, and cultural contexts of that particular historical moment.

Most important for the discussion here is the fourth element of a discourse that understands the nature of meaning as contingent on negotiation and interaction rather than permanently fixed and unchanged throughout time and place. This will become readily apparent when I examine later legislation, such as the Boldt Decision, that attempted to define the meaning and intention of these original treaties.

THE MEDICINE CREEK TREATY

Reservations were created through treaty negotiations, and the boundaries established were often nebulous and vague. Though treaty discourse promised to keep reservation land intact in perpetuity, later legislation, contingent on contemporary negotiations regarding the meaning of treaty discourse, continued to strip away reservation land until well into the mid-twentieth century. Thus, treaties were exposed as fictions, but fictions that influenced the lived experience of Indian peoples.

To acquire a sense of the nebulousness of the boundaries set out in treaties, we can examine the language of the 1854 Medicine Creek treaty. The treaty's introductory article indicates that the tribes involved were to be considered by the US government as one nation, which, if the tribes understood this consideration, they might have found problematic. Article 1 then delineates boundaries in this fashion:

> The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish [*sic*], or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.[10]

Most notable here is the geographical looseness of the language and the overarching Eurocentric cartographic reading of the landscape as a place where definite borders could be imposed and established. The language approximates a map placed down on physical territory. Yet just as a map is only a representation of reality, so too is treaty discourse. The tribes were to imagine that they were to cede a boundary that started "about midway" between two large bays, then ran in a "southeasterly direction" along the division between

two major rivers and up to the summit of the Cascade Mountains. The Cascades are a long mountain range that split Washington State down the middle, yet they are also impressively wide. Where exactly did that Cascade boundary end? From the summit, the boundary was to run "southerly" along the massive Cascade Range to a "point opposite" the main source of a creek, then to "the coal mine," of which there were many in Washington. From the coal mine, the boundary would range "northeasterly," wind around rivers and islands, and finally head back to its beginning point. This was the territory those American Indian nations ceded.

The language in article 1, which delineates ceded territory, is imprecise and geographically vague, as evidenced by terms such as *southeasterly direction* and *about midway* as well as the idea of an imaginary boundary that runs down the middle of a massive mountain range. Thus, when dealing with ceded territory, the treaty is vague both in terms of language and geography. However, when creating reservations, the treaty becomes more precise. This is especially illustrated in article 2: note the language's precision when it dictates the boundaries of Indian reservations:

> There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use.[11]

The language becomes more precise and focused to include exact acreage figures, land survey markers, and the promise of further surveys and markers when it came to the creation of reservations. The language is similar in another Stevens treaty, the Point Elliot treaty of 1855, which encompassed twenty-two western Washington tribal territories.

Although the discourse of many Stevens Treaties' articles are worthy of analysis, for my purpose here the most relevant and historically important part of those treaties are the articles that delineate off-reservation fishing rights.[12] Here's article 3 in its entirety:

> 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, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shellfish from any beds

> staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.[13]

All ten Stevens Treaties contain this clause in language that is nearly identical. This particular clause, which granted broad fishing rights to Native peoples, incited more than a century of bitterness between Indians and non-Indians in the Northwest. Not long after the treaty was signed, the territory of Washington was granted statehood, and the state government illegally began to assert its jurisdiction over Indian tribes and treaty rights. American Indians protested throughout the twentieth century, most vehemently during the 1950s and 1960s, and used the Stevens Treaties' clauses on fishing rights as the legal footing for their protests. In 1974, the Boldt Decision, in its interpretation of the original treaties, reversed Washington State's creeping jurisdiction over treaty fishing rights and awarded American Indians half of western Washington's lucrative fisheries, which angered many non-Indians in the area. Groups of non-Indian fisherman—commercial and recreational—and state fisheries workers protested the Boldt Decision in cities across western Washington. The wound still festers with these antitreaty/Boldt Decision groups to this day. The thought that one paragraph—one sentence—could cause innumerable confrontations and battles and set off racial hatred that is still scarcely contained in Washington State no doubt would have astonished the treaty's framers.

Yet treaties are a discursive construction whose meaning has always been contingent on multiple tensions and a nexus of sociohistorical contexts. Later legal interpretations of preexisting treaties negotiate meaning along a new nexus of sociohistorical contexts, and tensions arise between those who interpret a treaty to the letter and those who interpret a treaty by taking into account the ethos or zeitgeist of the era in which the treaty was written.[14]

As we will see, Judge Boldt struggled with this tension between strict and broad readings of the Stevens Treaties. His final decision was based on his interpretation of the meaning(s) behind the language used in the 1850s. He even went so far as to include pre–treaty era dictionary definitions in his decision. Yet Boldt displayed acute awareness of the political history that surrounded the dispute over fishing rights in the Northwest and even acknowledged the effects of modern activism in his decision.

THE BOLDT DECISION

Article 3 of the Medicine Creek Treaty explicitly outlines the nature of fishing rights on ceded territory among the signatory tribes. In the decade that followed the treaty signing there is no indication that major problems arose in the fulfillment of these rights. However, after white settlement in Washington State rose dramatically in the late nineteenth century, and with the canning industry's birth, problems became frequent. The acceptance of Washington State in the union coincided with the rise of salmon canneries in the Northwest. Ultimately, Washington State illegally began to assert its

jurisdiction over American Indian treaty rights for economic reasons and, by doing so, implied that its own state laws overruled federal treaty law.[15]

In resolving this treaty issue, Judge Boldt's court had an immense task: it had to examine the historical and legal record of American jurisprudence, not only in Washington State but also within the United States as a whole. The opening paragraph in the "Findings of Facts and Conclusions of Law" section of his ruling illustrates the immense historical scope the Boldt court had to consider in deciding the case.

> This case came on regularly for trial on August 27, 1973, upon the basis of a final pretrial order entered August 24, 1973, and the presentation of evidence concluded September 18, 1973. Counsel for all parties appeared and presented nearly 50 witnesses, whose testimony was reported in 4,600 pages of trial transcript, more than 350 exhibits, pretrial briefs, final oral argument 12/9–10/73 and post trial briefs. In addition to consideration of the above evidence and material by the court, more than 500 proposed findings of fact and conclusions of law, submitted by counsel and annotated to the record, have been checked to determine the accuracy of every citation made by any counsel alleged to support a proposed finding or conclusion. Many of the proposed findings and conclusions were modified and many of the supporting citations were corrected, and additional findings and conclusions not proposed by any party were developed. The court has also read and examined, individually and in relation to one another, every case cited by any party as possible authority concerning any issue in this case, as well as other cases not cited by the parties.[16]

The sheer amount of data the court had to consider in order to come to its conclusion is astonishing. The Boldt court had to untangle the historical record behind the Stevens Treaties, examine the archives of Washington State law, and then find precedence(s) throughout the history of US federal legislation and rulings. The task was daunting. Moreover, after this vast research, Judge Boldt had to make a decision based on his understanding of all the case's facets. The court's decision ultimately favored American Indian treaties. Therefore it is instructive for American Indian scholars to examine the bases by which the Boldt court came to its decision.

In his written decision under the "Negotiation and Execution of the Treaties" section Judge Boldt defined what he saw as the original intended meaning of the Stevens Treaties: "to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area."[17] I believe Boldt's assessment to be partially correct: treaties were designed to extinguish Indian land title. However, the clause about a peaceful and compatible coexistence begs the question—on whose terms? Could the treaties have been inversely devised to allow for miniscule pockets of white settlements while it retained far greater tracts of land for the American Indian nations? Is it conceivable the US government would have signed a treaty that prevented white settlement in

western Washington and insured the removal of those whites already settled in the area, by military means if necessary? Peaceful coexistence at gunpoint seems an apparent contradiction given the lopsided power dynamics and the inherent threat of violence that surrounds the Stevens Treaties.

It is obvious that treaties were meant to extinguish land title, which in turn was to bring about a peaceful coexistence between whites and Indians by ghettoizing American Indians, turning them into agriculturalists, and making them dependent on government support. This "negotiation" process, however, also insured rights to fish on all ceded territories. In his examination of the fishing rights clauses in the Stevens Treaties, Judge Boldt decided that "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 fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish."[18] Thus, the Boldt court awarded signatory tribe members 50 percent of the salmon and harvestable fish in western Washington.

The basis for the court's ruling was its reading of the original treaty language, in particular the phrase "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."[19] How did the Boldt court, from the vantage point of 1974, decide that particular sentence entitled American Indians to half the fisheries in western Washington? The answer is contained within the Boldt Decision and speaks to that key element of discourse that views meaning as negotiated in interaction rather than being present once and for all in our utterances. Boldt notes in the "Findings of Fact and Conclusion of Law" section of his ruling that

> Although there is no evidence of the precise understanding the Indians had of the treaty language, the treaty commissioners probably used the terms "usual and accustomed" and "in common with" in their common parlance, and the meaning of them as found in a contemporaneous dictionary most likely would be what was intended by the government representatives. The 1828 and 1862 editions of Webster's American Dictionary of the English Language define the terms as follows:
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> *accustomed:* Being familiar by use; habituated; inured . . . usual; often practiced. *common:* Belonging equally to more than one, or to many indefinitely . . . belonging to the public; having no separate owner . . . general; serving for the use of all.
>
> *usual:* Customary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events.[20]

I find it amusing that the wonderful boon according American Indians access to 50 percent of western Washington's valuable fisheries is due in

part to the fact that Judge Boldt procured two copies of *Webster's American Dictionary of the English Language* and construed the meaning of the language in the Stevens Treaties accordingly. Though Boldt does admit that there is no way to know the "precise understanding" American Indians at that time had of the language contained in the treaties, Boldt was mandated by the nature of his position to attempt to understand what the tribal representatives understood at the time. This mandate, though ethnocentric, does allow for a certain flexibility of interpretation. Treaty discourse and the power contained therein were therefore dispersed, through Boldt and his court, to be claimed by American Indians.

CONTINGENCIES OF MEANING

The Boldt Decision had necessarily been influenced by the sociohistoric contexts, including Indian activism over fishing rights, which had shifted the meaning(s) of the Stevens Treaties and discourses throughout the 120 years since they were signed. The Boldt court didn't make its decision in a political vacuum: Boldt's acknowledgment of a century of treaty battles and lack of meaningful communication between Indians and non-Indians, which is examined below, betrays an awareness of contemporary politics. Legal decisions often seem to transcend contemporary contexts and influences, and the ideology of law appears to have supplanted the ideology of religion as the decider of Truth. According to Terry Eagleton, "It is one of the functions of ideology to 'naturalize' social reality, to make it seem as innocent and unchangeable as Nature itself. Ideology seeks to convert culture in Nature."[21]

Because we do not know Justice Boldt's inner thoughts, we cannot speculate the degree to which national and local politics influenced his reading of the treaties and historical record and his subsequent decision. However, his ruling draws awareness to contemporaneous local animosities and problems, and one can divine political influences on much of Boldt's decision: "More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists."[22] On the American Indian side, some of those nonresident opportunists included actor Marlon Brando, whose presence helped bring the fishing protests to national attention. Justice Boldt made a moral judgment about the contemporary political situation that surrounded the fishing debate. The American Indian protesters were vindicated in the end, and it was the antitreaty protesters whose cause was ultimately deemed illegal. But the above paragraph illustrates that the political atmosphere of the 1960s and 1970s influenced Judge Boldt, and the awareness of pro-Indian activism crept into his reading and interpretation of the original treaties.

Boldt's ruling also takes into consideration the notion of fairness and justice. "This court is confident the vast majority of the residents of this state, 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."[23] Again, Boldt made a moral judgment, this time on a grand scale, about the ethical character of Washingtonians in the 1970s. This moral judgment is colored by contemporary contexts and might differ in tone from moral judgments made a century earlier. One wonders what Boldt's inner thoughts were after his decision was made when many of those fair and just Washingtonians erupted in racist demonstrations against American Indians and made disparaging ad hominem attacks against Boldt.

Finally, the Boldt Decision cuts to the heart of the treaty debate: "To this court the evidence clearly shows that, in the past, root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other and act as fellow citizens of equal standing as far as treaty right fishing is concerned."[24]

Besides the need for better communication, the Boldt Decision stresses the need for Indians and non-Indians to meet as equals, at least within the purview of treaty rights. The vagueness of the term *equal standing* needs little belaboring here, as the contradictions are apparent. Leaving aside the fact that many Indians weren't even US citizens until 1924, poverty was endemic among Indians in western Washington during the posttreaty era, and so they had little political control or "equal standing" in terms of the law. After Indians won the Boldt Decision and consequently did not have to pay state fees for harvesting salmon, antitreaty groups believed, and continue to believe, that they did not have equal rights or equal standing with American Indians. Thus, the issue of equal standing has been historically contentious.[25]

The Boldt Decision also exemplifies the contingencies of meaning within treaty discourse and interpretation in its conception of natural resources. A definite understanding of the finiteness of natural resources in the Boldt Decision exists whereas the Stevens Treaties betray no such awareness. This aspect should be stressed heavily. The Boldt Decision delineated a basic lack of communication between non-Indians and Indians and the failure to treat each other as citizens as the root cause of the treaty problem. Although I do not deny the validity of those conclusions (when isn't a lack of communication or the failure to treat others equitably the cause of a problem?), I propose that a fundamental change in the attitudes toward natural resources, in this case salmon, was also one cause of the treaty problems. That change was precipitated by massive population growth in the late nineteenth and early twentieth centuries. It became apparent in the early twentieth century that Washington's salmon runs, which must have seemed limitless to the treaty's framers, were finite and fragile.[26]

The Boldt Decision recognizes the pressures that industrialization and an expanding white population put on salmon fisheries:

> 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, 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 perpetuation of all fish species in copious volume.* The 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.[27]

Thus the Boldt Decision recognized the threats to salmon: non-Indian population growth and industrial development. These threats were accompanied by a shift in cosmology from a traditional American Indian worldview of natural-resource sustainment toward a worldview based on Western notions of progress and economic exploitation of natural resources. The Boldt Decision hints at this cosmological shift when it notes that Indian customs and practice had successfully perpetuated all fish species in copious numbers. Joseph Taylor shows that pressure on precontact Indian fisheries was almost as high as the postcontact pressure, which included commercial fishing, yet the salmon runs continued to be healthy. According to Taylor, "the most recent estimate suggests an aboriginal fishery fully comparable to the industrial fishery in its heyday. . . . If accurate, their research suggests that Indians put considerable pressure on salmon runs yet avoided permanent harm."[28] Taylor attributes the abundance of the aboriginal fisheries to American Indian worldviews and practice: "That Indians did not overfish despite heavy consumption suggests they practiced some sort of restraint. The question is how, and the answer runs to the core of aboriginal culture. Restraint flowed from the concepts and practices of [Pacific Northwest] Indians, who filled their world with spirits that demanded respect. The way they understood this relationship resulted in a series of activities dedicated to propitiating salmon, and although conservation was not the stated purpose, moderation of harvests was the effective result."[29] According to Taylor, these activities "retarded consumption across time and space so significant portions of runs could escape upstream to spawn. Belief and action produced an emotional and material symbiosis between humans and salmon."[30]

The Boldt Decision describes one of these activities, the first-salmon ceremony. Boldt relied on research and testimony from anthropologists, and he concluded in section 6 of "Pre-treaty Role of Fishing among Northwest Indians" that "the first-salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious rite to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of native Indian worldview. Religious attitudes and rites insured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season."[31] In light of the poor state of Washington State's fisheries at the time, the above statement serves almost as

an exhortation to return to a more healthy way of treating natural resources. As was mentioned earlier, Boldt attributed the breakdown and destruction of Northwest fisheries to the pressures of an expanding non-Indian population and non-Indian industrial development, which included new fishing techniques and the advent of commercial fishing. Between the signing of the treaties and Boldt's 1974 ruling, the Indian practices that had so "successfully insured" fish in copious amounts had given way to destructive practices that threatened the very livelihood of those fisheries and the livelihoods of people who depended on them. When we read between the lines of Boldt's decision, we find an interesting comment on America's changing perception of its natural resources. The traditional American metanarrative of natural resources as a limitless, or almost limitless, boon given by the Christian God for the benefit and control of mankind, had changed to a more conservation-oriented narrative concerned with the finiteness of natural resources and methods to protect them from complete destruction. We also read in Boldt's words the hint that he believes pretreaty American Indians might have had a healthier attitude toward the environment.

It is doubtful that the Stevens Treaties' original framers could have envisioned Northwest fisheries as anything but limitless, and I highly doubt they could have imagined that within 120 years of their signing the treaties that Puget Sound would be heavily polluted in certain areas and the salmon runs all but extinct in many rivers save for the fish raised and released by hatcheries. Yet this was the situation in Washington State fisheries when Boldt made his decision, and thus I am not surprised to read overtones of a more conservation-oriented mind-set in his ruling. Therefore I read the meaning behind his ruling as contingent on this shift of understanding and attitude toward America's natural resources.

LANGUAGE AND MEANING

Perhaps nothing illustrates the contingencies of meaning within treaty discourse (both the language of the treaties and the subsequent legislation that surrounds the treaties) better than the interest in the different languages spoken during the treaty process. Because the treaties were written in English, which few Indian signatories spoke, and because the tribes and the treaty framers relied heavily on the use of translators, questions arise in regard to the bearing these facts should have on later adjudications.

Boldt's ruling explicitly addresses this question of mutual comprehension, or incomprehension. In regard to the articles that delineated fishing rights, Boldt notes in the "Negotiation and Execution of the Treaties" section of his decision that

> there is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision "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." A dictionary of the Chinook jargon, prepared by George

> Gibbs, indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish. . . . There appears to be no phrase in the Chinook jargon that would interpret the term in any exact legal sense.[32]

Chinook was the common trade language among Northwest Coast tribes and Europeans and was also used in the Stevens Treaties negotiations. The language was limited in its vocabulary, which raises further questions about how understandable the concepts contained within the Stevens Treaties were to the signatory tribal leaders. Due to the impossibility of answering such a question, Boldt had to rely on legal precedence and his own learned interpretation. In the "Established Basic Facts and Law" section near the beginning of his lengthy ruling, Boldt writes:

> To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the means to acquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved to be ideally suited to that purpose for in less than one year during 1854–1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.[33]

Boldt acknowledges that without the treaty process there would have been continued warfare with Indian tribes; thus the treaties saved lives. As Boldt was well aware, the Washington treaties were signed at a time when American Indians were not US citizens; therefore his ruling reads as though he was satisfied with the treaty process in that it saved non-Indian lives. As for the "immediate and imperative national needs," the word *immediate* seems appropriate (treaties were needed immediately to avoid further confrontation between Indians and white settlers who invaded Indian land), but *economic* is a more apt term than *imperative*, I think, for the treaties opened up, as was their main intent, the vast wealth (that is, timber, fisheries, coal, gold) of that "rugged and then primitive area" for non-Indian exploitation.[34]

In the second section of the quotation, Boldt recognizes the limitations of language in the treaty process. It is indicative of his interest in how meaning was created during the treaty process or, more specifically, how the

signatory tribes' representatives understood that meaning. This interest can also be seen in Boldt's choice of precedence for his ruling, for in the same "Established Basic Facts and Law" section he cites an 1899 Supreme Court ruling on a similar treaty matter:

> In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[35]

The tenor of this quotation, which echoes throughout Boldt's own ruling, offers a precursory statement about the nature of discourses: they are context bound, and therefore meaning is negotiated in interaction, rather than being present in our utterances. Boldt believes it is imperative for the law to construe treaties according to how Indians in previous centuries naturally understood the language contained in the treaties. That a non-Indian judge should think himself able, a century later, to divine the natural understanding of Indian treaty signers smacks of cultural arrogance and ethnocentrism. Yet there are benefits to this type of mandate in that there is leeway in construing the written word of treaties: one can find a pro-Indian slant, as Boldt did when he determined that the Stevens Treaties granted half the salmon and game fish in western Washington to signatory tribes. In his stated concern for a fair and just resolution, Boldt could just as easily have construed the "usual and accustomed" and "in common with" treaty phrasings to be relative to the area's population demographics. Instead, he construed "usual and accustomed" to mean the fishing grounds within the entire traditional tribal homeland and "in common with" to mean 50 percent.

We also find, in the 1899 Supreme Court statement, a shrewd understanding about the types of power relations involved in nineteenth-century treaty making. In its determination of the Indians' role as unlearned, unlettered supplicants in the treaty process, the Supreme Court made possible subsequent sympathetic, pro-Indian readings of history even as it affirmed the supposed superiority of Euro-American culture. What was needed was a century of Indian activism and diligence in regard to treaty rights in order to hold the government accountable to its own federal law.

That Boldt cited this particular quotation shows his mind-set as he formulated his own reading. According to the Supreme Court, the United States is and was an "enlightened and powerful nation," master of the written word and its legal system, whereas Indians are (present tense here is interesting) a "weak and dependent people" who have mastered neither written language nor the alien legal system with which they dealt during the treaty-making process and, due to the language barrier, had to rely on interpreters to explain what their post-treaty realities would be.

The statement extends a modicum of legal maneuverability to American Indians and affirms the US Supreme Court's role as the ultimate arbitrator in deciding the fate of Indian tribes. Therefore, by entering into the twentieth-century court battles over treaty rights, Indian tribes tacitly acknowledged, at least in the eyes of the Supreme Court, the US legal system's position and authority to determine their fate as Indian nations. To put it plainly, tribes yielded the autonomous sovereignty inherent in any independent nation to the authority of the United States.

Indian tribes were forced to use the US legal system. The original treaties stripped the tribes of their land, and subsequent legislation followed similar patterns. Because many Indian populations were far too miniscule to resist these depredations militarily, US courts became the new battleground. The yielding of complete sovereignty then should be understood in these contexts. When faced with physical annihilation, Indian tribes entered into treaty negotiations. Later, when faced with cultural annihilation, tribal activists engaged in protests while tribal leaders negotiated within US courts.

According to the 1899 Supreme Court ruling, the job of the US legal system in deciding treaty cases must include an attempt to comprehend the mind-set, worldviews, and understandings of nineteenth-century American Indians involved in treaty negotiations. As demonstrated by Boldt, these attempts to understand the historical contexts of Indian treaties will always be influenced by the contemporary political climate in which the legal system must operate. Thus, the political activism that surrounded Northwest fishing rights during the 1950s and 1960s; the effects of the Red Power era; Judge Boldt's own education and code of ethics; and even perhaps a new awareness of historical injustices toward American Indians, all played a role as Boldt sat down to review and write his ruling, which ultimately favored treaty rights.

TREATIES AS FOURTH-WORLD TEXTS

In 1992 Gordon Brotherston published *Book of the Fourth World,* a powerful scholarly examination of Native American literature that examines pre-Columbian texts from Mexico, Central America, and South America. Brotherston's title was a gesture toward the placement of the western hemisphere in Eurasian cartography. The term *fourth world* carries heavy historical baggage because it connotes a primitive world: one whose cultures languish at the bottom of the Social Darwinian evolutionary totem pole and await betterment through contact with the other three worlds. Yet Brotherston

also sees the fourth world as a place of potential, of unrecognized power and resistance despite, according to Brotherston, being the only "world" to undergo thorough dispossession.[36] In keeping with a current shift in modern indigenous parlance, which has co-opted the term *fourth world* to promote pro-Indian stances, Brotherston desires to retrieve the term from its negative connotations and breathe into it a new spirit of scholarly resistance.

Like Brotherston, I am intrigued by this notion of fourth-world texts, and will co-opt the term to apply it to American Indian treaties. Treaties have become fourth-world texts, by which I mean they have become reinvented, reinterpreted texts that promote the sovereign potential of American Indian nations while they hold on to certain baggage that negates that very sovereignty. Moreover, the legal framework behind treaties has been exposed as a social construction rather than natural truth. To state it plainly, Indians have learned the shell game called American law, and in that long education have exposed the arbitrariness of the law when it deals with American Indian nations. Instead of serving some vague notion of justice, the American legal system has been complicit in its suppression of treaty rights in order to maintain existing power structures. According to Pierre Bourdieu, "As the quintessential form of a legitimized discourse, the law can exercise its specific power only to the extent that the element of arbitrariness at the heart of its functioning (which may vary from case to case) remains unrecognized."[37] Ultimately, American Indians have peered behind the American legal system's curtain and viewed its arbitrariness. Although this recognition is not necessarily new, the ability of American Indians to manipulate a legal system for their own good is rather recent.

To call treaties fourth-world documents is to imbue them with this recognition of their arbitrariness in order to manipulate them in a fashion that, though not intended by their original framers, provides Indian nations with a powerful legal footing. It is highly doubtful that the framers of the Stevens Treaties (Governor Stevens included) could have envisioned that, a mere 120 years after those documents were signed, as a minority group that comprises about 1 percent of Washington State's population, American Indians would be legally granted in an American court half the fisheries within the area affected by the treaties. But this was the reality as created by the 1974 ruling in regard to the meanings of the Stevens Treaties. Boldt's ruling is dependent as much on the survival, presence, and protests of American Indians as it is on some metaphysical notion of the law as he understood it at the time. To put it plainly: the Boldt Decision is a testament to American Indian resistance to assimilation, disempowerment, and legal disenfranchisement.

Now some readers may have paused when I stated earlier that as fourth-world texts these treaties both promote and negate sovereignty. The Boldt Decision gives an opportunity to clarify such a seeming incongruity. Gaining the right to half the fisheries in Washington State can and should be viewed as a major step toward sovereignty by the Stevens Treaties' signatory tribes. Yet in the gaining of those treaty rights, the tribes tacitly recognized the authority of the American legal system to make ultimate pronouncements that affected

their reality. In short, the tribes played by the US government's rules, and played well. However, a truly sovereign nation should not have to pay fealty to the jurisdiction of another nation's legal system. Therefore, there is need for vigilance and activism in regard to the promotion and protection of treaty rights, especially in America's current politically conservative era. The main concern for Indian tribes, scholars, and activists should be: what one US court has granted, another US court, in a different future context, could take away. I see these treaty rulings in this incongruent fashion of promotion and negation of Indian sovereignty, and it is with this awareness in mind I deem them fourth-world texts. Thus, treaties as fourth-world texts express the sovereign potential of American Indian nations and serve as reminders of the forces aligned against that sovereignty.

NOTES

1. I have to mention the now commonplace notion that the United States has broken every treaty made with American Indians. Essentially this is true if we accept the premise that treaties are agreements between, or among, independent nations. Accordingly, the US government has passed laws against tribes that interfered with their sovereignty and thus broke the essential premise on which treaties are based: that the nations involved are sovereign. However, if one were to look at the specific articles of every single treaty, the questions of when and how specific articles were broken often becomes muddled, which is not to say treaties weren't broken. I simply want to put forth the notion that saying every treaty has been broken often precludes an analysis of treaty particulars.

2. The nine American Indian nations in question are the Homamish, Puyallup, Steilacoom, Nisqually, Squaxin, Sahewamish, Tapeeksin, Squiaitl, and Stehchass.

3. I will use the terms *Boldt Decision* and *Boldt ruling* synonymously throughout this article. I have chosen these particular texts for several reasons. First, I have researched and studied the Stevens Treaties, which include the Treaty of Medicine Creek, and the Boldt Decision far more than the other 360-plus Indian treaties. Second, I grew up in the territory ceded by these treaties and affected by the Boldt Decision. Third, I was five years old when the Boldt Decision was passed, and I can still recall the negative impact the decision had on race relations in the state of Washington; in writing this article I've tried to contextualize and understand that particular period of my childhood.

4. Specifically, the treaties of Medicine Creek (1854), Point Elliot (1855), Point No Point (1855), Quinault (1855), and Neah Bay (1855). The Stevens Treaties are available online. See Charles J. Kappler ed., "Indian Affairs: Laws and Treaties," http://digital.library.okstate.edu/kappler/Vol2/toc.htm (accessed 26 July 2006). I am aware that there were tribes made landless by the Stevens Treaties and later legislation. The grievous status of these landless tribes needs to be addressed. For information on these landless tribes, see K. D. Tollefson, *"The Political Survival of Landless Puget Sound Indians,"* *American Indian Quarterly* 16, no. 2 (Spring 1992), 213–35.

5. Vine Deloria Jr., "Self-Determination and the Concept of Sovereignty," in *Economic Development in American Indian Reservations*, ed. Roxanne Dunbar Ortiz (Albuquerque: University of New Mexico Press, 1979), 22–23.

6. See ch. 1 in Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994).

7. The treaty process ended on 3 March 1871. For context, see ch. 12 in Prucha, *American Indian Treaties.*

8. Ibid., 6.

9. College of Social Sciences, Department of Anthropology, University of Hawaii at Mānoa, "Discursive Practices," http://www.anthropology.hawaii.edu/programs/specialization/discpage.htm (accessed 25 July 2006).

10. Charles J. Kappler ed., "Treaty with the Nisqually, Puyallup, etc., 1854," http://digital.library.okstate.edu/kappler/Vol2/treaties/nis0661.htm#mn1 (accessed 26 July 2006), 661–62.

11. Ibid., 662.

12. For instance, the Stevens Treaties banned indigenous slavery. Article 11 in the Medicine Creek treaty states that "the said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter." Given that these treaties were signed in 1854 and 1855, a decade before the Emancipation Proclamation, it might be of interest to historians of American slavery that the federal government took a clear stand against indigenous slavery while it refused to make the same pronouncement against black slavery. Though there was a push to prevent slavery in western territories, the economic benefits of Indian slavery accrued only to Indians, and thus could be halted without hurting the economy of white America, while black slavery was still too lucrative to be prohibited.

13. Kappler, *Treaty with the Nisqually*, 662 (emphasis in original).

14. The tension in interpreting treaties is similar to that found in various schools of thought on interpreting the US Constitution. The formalists' theory of strict constructionism (and its milder half-brother, originalism), which purports that the Constitution's meaning is limited strictly to the text's words alone, and no outside sources, especially contemporary sources, are necessary in its interpretation, finds itself in constant tension with the theory of broad construction, which states modern interpretations need to take into account the spirit of the times in which the Constitution was written and the modern needs of the nation and citizenry. The tension is furthered by the overlying debate about whether the Constitution's framers intended future judges to mold its statutes to accommodate modern needs. This rather simple encapsulation of a large and bitterly fought issue exemplifies, I believe, what happens when Indian treaties come under the scrutiny of US courts.

15. There were three US Supreme Court cases that dealt with creeping jurisdiction in Washington State during the early-to-mid-twentieth century: *U.S. v. Winans* (1905), *Suefert Bros. Co. v. U.S.* (1919), and *Tulee v. Washington* (1942). It is worth noting that in all three cases the US Supreme Court reversed discriminatory rulings by the Washington State courts.

16. Judge George Boldt/Center for Columbia River History, "Document: Boldt Decision," http://www.ccrh.org/comm/river/legal/boldt.htm (accessed 26 July 2006), 348.

17. Ibid., 355.

18. Ibid., 343 (emphasis in original).

19. This phrase is found in Medicine Creek treaty's article 3, Quinault treaty's article 3, Point No Point treaty's article 4, Neah Bay treaty's article 4, and Point Elliot treaty's article 5.

20. Boldt, *Decision*, 356 (emphasis in original).

21. Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minneapolis Press, 1983), 135.

22. Boldt, *Decision*, 329.

23. Ibid.

24. Ibid.

25. Boldt determined Indians have a treaty right to half the fisheries in Washington State whereas non-Indians have a privilege. The difference may seem semantic, but those privileges come at the state government's pleasure and thus can be amended or revoked far easier than a federally granted treaty right.

26. The decline of Northwest salmon fisheries is well documented in ch. 2 of Joseph E. Taylor III, *Making Salmon: An Environmental History of the Northwest Fisheries Crisis* (Seattle: University of Washington Press, 1999).

27. Boldt, *Decision*, 334 (italics added).

28. Taylor, *Making Salmon*, 22–23.

29. Ibid., 27.

30. Ibid., 36.

31. Boldt, *Decision*, 351.

32. Ibid., 356.

33. Ibid., 330.

34. One might question whether a current judge would use the term *primitive* to describe the Northwest Coast's land and tribes. A contemporary judge might want to reconsider these generalized, negative-connoting pronouncements.

35. Cited in Boldt, *Decision*, 330–31. This quotation demonstrated the paradox of sovereignty. A treaty is an agreement between two independent nations, yet the Marshall Trilogy deemed American Indian nations to be domestically dependent, and this dependency is further echoed by the above 1899 Supreme Court cite.

36. For context, see the prologue in Gordon Brotherston, *Book of the Fourth World: Reading the Native Americas through Their Literature* (Cambridge: University of Cambridge Press, 1992).

37. Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Judicial Field," trans. Richard Terdiman, *Hastings Law Journal* 38 (1987): 805–53. Cited in Sidner Larson, "Rhetoric and American Indians," *Wicazo Sa Review* 17, no. 2 (Fall 2002): 7.