

The Si'lailo Way

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Indians, Salmon and Law on the Columbia River

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Dupris, Joseph C.

The Si'lailo way : Indians, salmon, and law on the Columbia River / by
Joseph C. Dupris, Kathleen Shaye Hill, William H. Rodgers, Jr.

p. cm.

ISBN 1-59460-085-6 (alk. paper)

1. Indians of North America--Fishing--Law and legislation--North-
west, Pacific. 2. Salmon fisheries--Law and legislation--Northwest, Pacific.

3. Waterfalls--Oregon--Celilo--History. I. Hill, Kathleen Shaye. II.
Rodgers, William H., 1939- III. Title.

KF8210.N37D87 2005

343.73'07692'08997--dc22

2005013437

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

This book is dedicated to:

Hank Adams (Assiniboine and Sioux)
Billy Frank (Nisqually)
Charles E. Kimbol, Sr. (Klamath)
who persevered when the odds were against them,

Sam Deloria (Standing Rock Sioux)
whose vision and tenacity have led to a vital Indian presence in the field of law,

Professor Ralph W. Johnson (University of Washington School of Law)
who supported Treaties as a matter of law and integrity,

the Columbia River Tribes,
who have consistently honored their inherent responsibility to the Salmon,

and the committed staffs of the
Columbia River Inter-Tribal Fish Commission,
Klamath River Inter-Tribal Fish and Water Commission, and
Northwest Indian Fisheries Commission
who struggle daily to ensure that the Treaties continue to have meaning and life.

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FOREWORD

Think of the famous treaty fishing rights case of *U.S. v. Washington* and you visualize a court filled with Indian fishermen, anthropologist Barbara Lane carefully and precisely articulating the complexity of Pacific coast Indian culture while a worried state's attorney stares blankly at the Indians, realizing that the state has lost the case although it has yet to be decided.

This picture symbolizes the modern dilemma of upholding legal rights against a background of sportsmen and commercial fishermen who were determined to catch fish until there were no more.

The authors of this impressive and comprehensive book knew that the Indians in the courthouse were but the most recent generation of Indians to march into courtrooms or walk the riverbanks in search of salmon, careful to note the condition of the river and where the fisheries were in great danger—either from modern fishing methods, fish wheels, or greedy settlers who wanted both the land and rivers taken away from the Indians and handed to them.

With most impressive research, readers are taken into the lives of a number of people who had the foresight and courage to preserve the most important resource of the region—the fishing sites that had been traditionally used to provide food for the people. In treaty after treaty, the concern of the Indian leaders was to make very certain that their people and the generations coming after them would have the right to fish at traditional sites on lands that were being ceded, and undisturbed rights to fish on the reservation.

The list of individuals critical to the preservation of the fisheries is impressive, and reflects the story of western settlement as a whole. Beginning with Sampson Tulee, who can be regarded as the vanguard of a generation of patriot chiefs who fought—sometimes single-handedly—to keep fishing rights before the public and in the courts, each chapter covers a person who stood up for his or her beliefs. Some of these people will be unknown to the larger public, but each will feel familiar to those who know Indian country.

They are the familiar pillars of strength around which controversy swirls but cannot overcome.

Who would believe, for example, that among the heroes of the struggle was a modest government employee named George Gordon—who wrote a definitive report on fishing “privileges”—complete with maps and descriptions of particular sites in 1889, the year Washington became a state? His pioneering work laid the foundation for the modern fishing sites claims.

One of the most complex but thorough biographies is that of White Swan, a Yakama Chief who found his people fenced away from their fishing site by the Winans brothers, who had constructed a large fish wheel where Indians once fished. He not only remembered the provisions of the treaties but also served as the plaintiff in the most famous Indian fishing case of all—U.S. v. Winans. This case not only preserved the Yakama’s fishing rights. In its language is the definitive statement of what happens in a treaty—a tribe only cedes what is specifically mentioned as a grant to the United States. It does not cede powers and privileges that are not specifically granted by the tribe.

Another chapter reviews the violence along the river near Celilo Falls when some young Indians were confronted by toughs headed by a pugilist brought in specifically to harass the Indians and administer redneck self-help instead of obeying the law. Levi Van Pelt, one of the young Indian men, swaggered past the pugilist and, in return, received a severe beating with a club and a bulletwound in his leg. The incident typified the continuing conflict that had been going on at Celilo and other choice fishing locations for more than sixty years. Ordinarily such a case would be handled by the local state court, where the white man’s testimony and claim of self-defense would be decided on the basis of skin color. Instead, in a move that must have startled everyone, federal authorities stepped in and filed a case against Downes, the owner of the land who had built an artificial channel and refused to allow the Indians to use dipnets in it. The case was called *Brookfield Fisheries* and it was designed to not only make the practice of unrestrained violence against Indian fishermen an expensive proposition, it was also meant to bring to an end the practice of using fish wheels and man-made channels to take the majority of the fish at that site. In spite of great confusion on the part of the federal officials—no subpoenas were filed for the witnesses so they could not be paid, and an unbelievably racist characterization of the Indian fishermen was allowed—the judge wrote an opinion that generally protected fishing sites. Unfortunately, he did not sign any orders or issue an injunction, thus virtually nullifying the victory. It took five years for the judge to finally write the decree that protected the Indians’ rights. Justice apparently could be delayed in Washington State until someone remembered the case and asked about its disposition.

This is a splendid book and most impressive is the documentation of the narrative in each chapter. These sources are not the usual general history and law books that provide many quotable summaries of the actual events and speeches. These authors have really worked through the archives and produced credible, precise and relevant sources, most of the time using the actual documents that were in the courtrooms and used by the contending parties.

I believe the book is worth reading, and the bibliography worth the purchase.

Rarely do we see such careful arguments, narratives and sources even when reading books written by the big names in the field. If this book is not persuasive, then nothing can be done that will tell the whole story in the way that these authors do.

Vine Deloria, Jr.

ACKNOWLEDGMENTS¹

Appreciation is expressed to Jack Fiander, Paul Ward, Jody Olney, and the late LeRoy Colfax, of the Yakama Indian Nation; to Ron Whitener, Bob Anderson, and Greg Hicks of the University of Washington School of Law faculty; to Penny Hazelton, Head Librarian at the Marion Gould Gallagher Law Library, University of Washington, and her staff Ann Hemmens, Paul Holcomb, Peggy Jarrett, Cheryl Nyberg, Mary Whisner, Patty Roberts, Vickie Northington, Judy Davis, Reba Tumquist, and Nancy McMurrer; to former UW librarians Sarah Hollingsworth and Molly McCluer; to Pat Wallace and Cynthia Fester; to the tribal attorneys in *United States v. Oregon* and *United States v. Washington* (several of whom have passed away), including David Getches, Mike Thorp, John Bell, Alan Stay, Alix Foster, Mason Morisset, Phil Katzen, Reid Allison, Michelle Hansen, Thomas P. Schlosser, Allen H. Sanders, John Arum, Fawn Sharp, Kevin Lyon, Tim Weaver, Dan Raas, John Hollowed, Stan Pitkin, Stuart Pierson, George Dysart, Alvin J. Ziontz, Jim Hovis, Richard Reich, Mike Taylor, Doug Nash, David Cummings, Russ Busch, Howard Amett, Russel L. Barsh, Marc Slonim; to Joyce Justice and John Ferrell, National Archives, Pacific Northwest Region; Carol E. Hastings, Visual Information Specialist, U.S. Army Corps of Engineers, Portland, Ore.; David Nicandri and Elaine Miller, Washington State Historical Society; the staff of the Oregon Historical Society; Nicolette Bromberg, Visual Materials Curator, Special Collections Division, University of Washington Libraries; Lisa Mighetto, Historical Research Associates, Inc.; Donna Darm and William W. Stelle, Jr., NOAA Fisheries; Usha Varanasi, Northwest Fisheries Science Center, NOAA; Melanie J. Rowland, NOAA, Office of General Counsel; to David and Jill Conrad, Ramona Bennett, Guy McMinds, Lyle Marshall; to Brian Gunn, Lisa M. DeCora, Rion Ramirez, Meena Pallipamu, Yale Lewis, Shelley Pellegrino, Lee Shannon, Claudia Carothers, Lisa Atkinson, and Scott Sufficool; to Spencer Beebe, Elizabeth Woody, and Craig Jacobson of Ecotrust; and

1. J. Dupris, K. Hill & W. Rodgers, *The Si'lailo Way: Indians, Salmon, and Law on the Columbia River* (2006, Carolina Academic Press).

to Joseph Giovannetti, Marlon Sherman, Diana Ferris, and Lorraine Taggart of Humboldt State University.

We also wish to express our appreciation to our families, including Janet Rodgers, Billy Rodgers and Andrea Rodgers-Harris, Shayleen and Luis Idrogo, David Allen Hill and Martha Sanchez Hill, Megan Dupris, Joseph James Dupris, and Shay RedHorse Dupris for their enduring love, support and patience.

INTRODUCTION

“... I wish I lived closer to the river, to the falls where ghosts of salmon jump.”

Sherman Alexie, 1993*

“Home to the stream of origin with nearly 100% fidelity”

Willa Nehlsen, 1997¹

“...accounts advance at a personal remove—or experiential distance....So great is the distance, in fact, that the [Indian] people whose lives they were are rendered all but invisible.”

Keith H. Basso, 2004, criticizing historical and academic commentary on Indian people²

This is a book about the Native people who have fished on the Columbia River since time immemorial. It celebrates their spirited efforts to save the salmon and their fishing places. Latecomers to the story will miss two legal miracles that undergird this tale. The Indians learned long ago how to manage these fisheries. They avoided the “tragedy of the commons” centuries before Garrett Hardin coined the term to describe open-access resource regimes.³ The Indians also practiced environmentalism before the word existed and when the movement was a potentiality unimagined.

The Indian Tribes of the Pacific Northwest asserted their inherent “right to take fish” during intense treaty negotiations with the U.S. in the 1850s and 1860s. They have held onto it ever since. These treaty properties have proven friendly to the fish. Within the treaties is the most powerful environmental law ever seen on the North American continent. In their capacity to protect the salmon, the treaties reach farther than the Endangered Species Act. They are more demanding than the Clean Water Act and the Superfund Law and the Oil Pollution Act combined. Indians will never voluntarily relinquish these treaties. These nation-to-nation agreements with the United States are the source of their legal leverage, and the fount of their moral authority.

Sadly, progress in the race to save the salmon is measured by the pace at which the dominant society adopts the Indians' agenda for managing the fisheries and protecting the fish. This is happening now with a rapidity that promises to offset the declines in the fishery. Historic management certitudes and stubborn legal obstacles that hampered the fish in the past are being rapidly overthrown in the race to save the salmon. This energetic effort to restore what was known and what did work is already confronting a comfortable skepticism that the salmon are gone and beyond saving. Constituencies for diminishing the fish in the name of progress always have been conspicuous.

But this particular national environmental struggle has an element of optimism that other environmental conflicts lack. It has the Indians on the side of the fish. No environmental battle in this century has been led by advocates more resourceful or more determined than the Indian tribes of the Pacific Northwest. They patrol the watersheds and populate the legal forums that decide the fate of the fish with a patience and diligence unmatched in environmental annals. Since treaty times, the Indians have lost ground in their campaign to protect the fish. They have suffered setbacks by direct divestitures of Indian properties, by the invention of the hydroelectric system, by the seaward expansion of commercial fisheries, by the technology of the hatcheries. Native Americans have seen their management shunned and their treaties pushed aside.

Through it all, though, the Tribes have never surrendered the conviction that they had solved the problem of salmon management. They believe they had achieved a perpetual protection of the fisheries that modern managers would describe as "sustainable." They believe this because their ancestors built their system upon an understanding of salmon behavior as sophisticated as any on earth. The life strategy thrust upon these fish is called anadromy or "up-running." This is a behavioral strategy where the fry are born in fresh water, reared until they become juvenile "smolts" (at the age of one year or two), and travel to sea to grow to adults. The adults return to the place of their birth to spawn and die.⁴ Incredibly, they deliver themselves to the very spot that sustained them in their birth.

Western scientists believe that the "homing" instinct is most likely a "learning" process dependent on a detection of scents in the waters of origin. It works to reduce genetic exchange among populations, and is based on the evolutionary rule that any place tolerant enough to rear the parent must be acceptable for the offspring. This "homing" tendency is much admired by humans. There is scarcely a dry eye among those fortunate enough to have seen the sudden darkening of waters that marks the return of adult salmon to their ancestral home. Some years ago the author, Charles Wilkinson, went for a hike

alongside an unnamed stream in the Cascades.⁵ He felt a sudden “chill” that comes when the sun goes behind the clouds. He reached for his jacket, only to realize that the cloud on the water came not from above, but below. The stream had been darkened by the simultaneous arrival of its migratory residents—home again after a 10,000-mile journey.

Most general accounts of salmonid populations of the Pacific are content to identify five species of anadromous salmon—the chinook (or king), the sockeye (red or blueback), pink (or humpy), coho (or silver), chum (or dog); and one species of anadromous trout—the steelhead.⁶ All have different behavioral patterns. The fishing people know these variations in intimate detail. The chinook are known for their size and strength (stories speak of individuals five feet in length, 145 pounds in weight),⁷ the sockeye for their variety and incredible stamina (“Lonesome Larry,” now stuffed and displayed in the Burke Museum on the Seattle campus of the University of Washington, was one of the last of his kind to reach Redfish Lake on the upper Salmon River in Idaho, 900 miles from the Pacific Ocean), the chum for their blue-collar dependability and homing precision, the coho for their speed, agility, and fighting spirit, and the pinks for their mob-like enthusiasm.

The steelhead are known for their intelligence, stealth, reluctance, and ferocious fighting ability. They are the sportsfishers’ first love. They have figured in no small way in the political and legal contests that have enveloped the Northwest’s anadromous fish.

Darwin’s evolutionary process isn’t easily cabin ed at five or six salmonid species. Biologists recognize hundreds of separate stocks of salmonids in the U.S. alone.⁸ A stock is a population of fish separated by geography, timing, or locale. Ordinarily, it is referred to as a “run”—for example, the Puyallup River Winter Steelhead Run, the Yakima River Spring Chinook Run. These “stocks” or “runs” are not technically species. A Skagit River steelhead from Puget Sound could interbreed with one from the Yakima River in the Columbia system if given the opportunity. But these populations are on their way to becoming species.

Genetic distinctions among these multiple stocks are an ongoing subject of study. The extraordinary diversity of these salmonid populations is nature’s way of responding to the finely drawn challenges of environmental variation. Thus, the Elwha River chinook are famous for their size, the humpies of the Graywolf River for their beauty, the Solduck coho for their jumping ability. It is this fantastic and ancient diversity that is being squeezed into oblivion by recent events that have laid claim to the rivers and streams of the Pacific Northwest.

The behavioral feats wrought by thousands of years of salmon evolution astound and amaze. The fish are relentlessly adaptable—which bodes well for their future. Change is mere fuel for their tenacity.

But the demands placed upon them are unforgiving. Today, an adult sockeye heading upstream on the Columbia towards the Snake confronts a sternly designed salmon intelligence test that could have been put together by Dr. Watson himself.⁹ There are 14–18 turbines and 18–21 spillway bays at the four lower Columbia River dams. There are another 6 turbines and 8–10 spillway bays at the four lower Snake River dams. Many combinations of operating modes are possible. Each can put a different demand on the behavior of adult upriver migrants. Beginning the maze, a fish must find an acceptable fishway entrance, enter it, and move through it to find the fish ladder entrance. She must “learn” how to use the ladders. Each dam is structurally unique. The operation of the powerhouses and spillways is changing continually. At each dam the “learning” process starts anew. Each of the ladders brings a new set of problems in the form of erratic attraction flows, unexpected eddies, varying water temperature, unwelcome debris, clumsy ladder maintenance, crowding competitors (such as shad). Humans constantly interfere with their trapping, collecting, experimenting, monitoring and counting activities.

Despite the Indians’ best protective efforts, the great fish have lost ground in these demanding environments. They have disappeared from 40% of their historic range on the Columbia River and are down in numbers by an order of magnitude.¹⁰ The Wilderness Society prepared one of the best-known early pictures on the plight of the salmon in 1993.¹¹ It shows that all but one (pinks) of ten species of anadromous fish are “extinct” or “at risk of extinction” throughout “the majority” of their historical ranges in the Pacific Northwest and California.

Today, the designated federal savior of the salmon is NOAA Fisheries, whose latest prescriptions for the Endangered Species Act-listed Columbia River stocks (called the revised 2004 Biological Opinion) are almost certain to be repudiated by the federal courts for the fourth time late in 2005.¹² A more discouraging mix of high politics, slippery science, rising power costs, and stubborn economic interests would be hard to find.

This is the grim reality against which the assertions of the Indian Tribes have been tested for the last two decades. If their management is so fine, people say, why are the salmon in such desperate straits? If their law is so strong, why do the fish suffer so? The Indians have an answer. They know that their management has been scorned and their law denied. Their voices are heard and their evidence is presented in the following pages.

This book is about Indians “going to law” to protect both the salmon and their own inherent right to harvest them. They did this with an enthusiasm born of cultural, spiritual and economic desperation. For nearly 150 years the Indian people and Indian Tribes have been the eye in the center of a legal storm that contested the fate of the fisheries. They supplied the moral compass that guided this law to favor the fish. Slowly and imperfectly, their sympathetic view of the fisheries has been incorporated into law. This mission to protect the fish has not been won. It has not been lost. And it will never be abandoned.

The Indians thought they had saved their fisheries in the treaties of the 1850’s. But their access was denied, and it was not opened by law until 1905. Their attempts to use new fishing technologies were not approved by law until 1919. The displacement of Indian fishing sites by the fixed gear of their adversaries was a constant not constrained by law until 1947. Indians were denied the legal authority to regulate their own fisheries, although they always did so. A court said they could in 1974. Indian fishing people suffered bodily injury in violent collisions with landowners and police authorities—usually without recompense because of lapses in legal process. Indian fisheries were obliged to endure destructive interlopers because lawyers found an incurable tragedy in the treaty right to fish “in common.” No legal fix was discovered until 1979.

The Indians said the U.S. lacked authority to destroy their historic fisheries at Celilo Falls. They won supportive legal ground *after* the U.S. destroyed the fisheries behind The Dalles Dam on March 24, 1957. Indians did not believe that “conservation” was a manipulable device for allocating the fisheries to their adversaries. They won judicial vindication in 1969. They insisted their fishing grounds could not be flooded by government dams, but if they were, new grounds should be provided in mitigation. It took 63 years to prove the point; tangible “in lieu” mitigation arrived in the year 2002. They said money could never compensate for loss of the fisheries, but when forced to accept it, they interpreted the payments as representing temporary *intrusions* on their fishing properties, not permanent *repealers*. They left open the option that looms large today—removal of the dams and restoration of the fisheries. They were obliged to litigate the issue of whether the “fish” mentioned in the treaties included hatchery fish. They thus faced the prospect that their fisheries could be eliminated by the simple expedient of destroying natural stocks. They did not turn aside this incentive to do irreparable environmental damage to the fisheries until the mid-1980s.

They challenged environmentally destructive activities in the watersheds, winning stunning victories in the 1980’s, but suffering setbacks in the 1990’s.

They resisted salmon interceptions by distant and poorly managed fisheries, and won partial legal successes including the 1999 changes in the Pacific Salmon Treaty. They continue to question the boldest and strongest environmental laws, including the Endangered Species Act, showing that it suffers from the legal diseases of complexity and of limited ambition for recovery. They offered constructive improvements.

These fishing people met their share of rash judges and vindictive lawyers and cautious bureaucrats. When necessary, they went around them and over them and through them. Their own conduct reflects the relentless adaptability of the salmon that are part of their lives. They have been the creative fire that lit itself. They have never lost sight of their vision for the fish, nor of the necessity of winning allies to their cause. In pursuing protection for their fisheries, they defined environmental justice for themselves.

This book has become by accident a study of creative moments in the history of fisheries law. Students of creative thought¹³ would be quick to recognize the Columbia River fishing Indians as prime candidates for close attention. Creative people tend to be great risk-takers, as the Indians are, prompted by circumstances or desperation to try another way. They tend to be outsiders, as the Indians are, untrammelled and unafraid of settled conventions that stifle the objections of the established order. They tend to be lateral thinkers and seekers of new ways, as Frank Sulloway says, because “change favors the underdog.”¹⁴ They tend to be incurable optimists because the future has to be better. They tend to be annoyingly persistent because nothing has quite worked yet. They tend to be dangerous leveragers, as John Holland says, creating much from little, in search of an emergence of something better.¹⁵ They tend to be eloquent, good with words and clever with metaphor,¹⁶ as they develop simulations that offer a better future.

We wrote this book to share the story of how Indian people fought to save the fish and their fishing sites at one of the most stunningly beautiful places on the North American continent—Celilo Falls.

We wrote this book to display the moving photographs and written records that will forever attest to the precious value of this place known as Si'lailo.

We wrote this book to set the record straight, to show that Indian people are not merely passive victims of economic and environmental change, but active and creative agents in our changing world.

We wrote this book to underscore how law figures enormously in the lives of Indian people. This law can be a positive influence and a useful weapon but it can be (and has been) turned against Indian interests with cruel and vindictive enthusiasm.

We hope the readers will appreciate how the Indian tribes and individual Indian people have expended, and continue to expend, their energies, imaginations, and lives to save a world that we all remember and cherish.

We therefore give special recognition to

- Sampson Tulee—the Yakama Indian who went to the Supreme Court and who recorded his dreams for Si'lailo in his last will and testament (Chap. One);
- Lawyer and Looking Glass, the Nez Perce chiefs who negotiated a lasting and enduring treaty fishery (Chap. Two);
- William Chinook—the Wasco Indian from Warm Springs who saved his tribal fisheries from destruction by law (Chap. Three);
- George W. Gordon—the Indian agent who showed how to protect the fisheries in a world that disbelieved him (Chap. Four);
- White Swan—the Klickitat / Wisham / Yakama chief who was the lead plaintiff—and the intellectual force—behind the first great treaty fisheries case in the U.S. Supreme Court (Chap. Five);
- George Olney, the Yakama Indian, who dared to challenge the status quo by going fishing with a horse seine (Chap. Six);
- Sam Williams, the Cowlitz / Yakama Indian whose entrepreneurial spirit led him to experiment with a scow wheel (Chap. Seven);
- George A. Charley, the Chinook / Shoalwater / Quinault / Chehalis Indian who carried his fishing fights to football players and federal judges (Chap. Eight);
- Levi Van Pelt, the Umatilla Indian who started a grand legal campaign by the simple expedient of being shot (Chap. Nine);
- Clarence G. Davis, the trustee who understood his responsibility, and who did his job without fear or favor (Chaps. Ten, Eleven);
- The Goudy brothers, Lawrence, Melvin, Moses, and Alphonse, Yakama Indians, who took back what had been taken from them (Chap. Twelve);
- Abe Showaway, the Walla Walla, Cayuse, and Umatilla Indian who utilized his Native intelligence and training to create a map that differed from that of his adversaries (Chap. Thirteen);
- Tommy Thompson, the Wyam Indian whose character, name, and example infuses the very mist that rises from Celilo (Chap. Fourteen);
- George Meninick, the Skiin-pa / Yakama Indian, who defended his fisheries with breathtaking oratory (Chap. Fifteen);

Caples Dave, the Klickitat Indian, deprived of food in the midst of plenty, who envisioned a world with strong environmental laws (Chap. Sixteen);

Wilson and Henry Charley, the Yakama Indians who knew more about the laws of commercial fishing than the U.S. Supreme Court (Chap. Seventeen);

Thomas Yallup, the Rock Creek / Yakama Indian, whose indigenous knowledge and convictions never trembled in the face of Western science and technology (Chap. Eighteen);

Jason Rau and Charles Strom, the Yakama Indians who are striving today to define the proper role of hatcheries (Chap. Nineteen);

Frank Winishut, the Warm Springs Indian who put “in-lieu restoration” back into Indian and environmental laws (Chap. Twenty);

Irene Brunoe, the Warm Springs Indian who invented “compensation out of revenues” that would help millions of people worldwide who have lost their homes to dams (Chap. Twenty-One); and

Alex Saluskin, the Yakama chief who said “no” and “no” again to The Dalles Dam that would take his precious Celilo Falls (Chap. Twenty-Two).

Joseph C. Dupris, Lakota-Cheyenne River Sioux

Kathleen S. Hill, Klamath/Modoc/Paiute

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March 2005

Endnotes

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Life 126 (1995, Basic Books, N.Y., N.Y.). Compare Jim Lichatowich, *Salmon Without Rivers: A History of the Pacific Salmon Crisis* (1999, Island Press, Wash. D.C., Covelo, Calif.) with David R. Montgomery, *King of Fish: The Thousand-Year Run of Salmon* (2003, Westview Press, Boulder, Colo.).

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8. See Columbia River Intertribal Fish Comm’n, *Wy-Kan-Ush-Mi Wa-Kish-Wit: Spirit of the Salmon—The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes*, Vol. 1 at 9-4 (Review Draft, June 15, 1995) (defining “stock” as fish that spawn together in a particular stream but do not interbreed with others.) Compare 1996 Academy Study at 78–79 (explaining that the management concept of “stock” is much broader and coarser than a biological definition of stock).

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10. 1996 Academy Study at 2.

11. The Wilderness Society’s Bolle Center for Forest Ecosystem Management, *Pacific Salmon and Federal Lands: A Regional Analysis* (Oct. 1993) (status report on ten salmon species—fall and spring/summer chinook, winter/summer steelhead, sea-run cutthroat, Dolly Varden char, along with coho, chum, sockeye, and pink.).

12. The main web page is at <http://www.nwr.noaa.gov/> (visited March 4, 2005). The revised 2004 Biological Opinion, dubbed “Consultation on Remand for Operation of the Columbia River Power System and 19 Bureau of Reclamation Projects in the Columbia Basin (Biological Opinion on Remand)” is at http://www.salmonrecovery.gov/R_biop_final.shtml (visited March 4, 2005). Court rulings include *Idaho Dep’t of Fish & Game v. Nat’l Marine Fisheries Service*, 850 F. Supp. 886 (D. Ore. 1994) (invalidating 1993 BiOp); *American Rivers v. Nat’l Marine Fisheries Service*, Civ. No. 96-384 (D. Ore. 1996), *aff’d* 109 F.3d 1484 (9th Cir. 1997) (upholding while criticizing 1995 BiOp); *Nat’l Wildlife Federation v. NMFS*, 254 F. Supp. 2d 1196 (D. Ore. 2003) (invalidating 2000 BiOp); *Nat’l Wildlife Federation v. NOAA Fisheries*, ___ F. Supp. 2d ___ (D. Ore. May 26, 2005) (Judge Redden invalidates 2004 BiOp).

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