

# Speech

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## The Politics of Abundance: Towards a Future of Tribal-State Relations

### I

This is the seventh annual summit between the state and the tribes, but the real genesis for this meeting dates all the way back to a century and a half ago, when the federal government induced or forced cessions of aboriginal land in Oregon. Promises made then still frame this summit today. The most fundamental promise was that if the tribes ceded their lands, whether through negotiation or war, they would be secure on smaller homelands which are the reservations of today; that they would not just survive, but thrive; and that they would have a partner in the federal government, who would protect their life-ways and autonomy.

This promise was at the core of federal Indian relations nationwide. The Northwest Ordinance, passed on July 13, 1787, states:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress.<sup>1</sup>

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<sup>1</sup> Northwest Ordinance of 1787, art. III, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 340-41 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50), *quoted in* Mary Christina Wood, *Indian Land and the Prom-*

This pledge promising “utmost good faith” toward tribes, and protection of their lands, was expressly applied to the Oregon Territory by an act passed in 1848.<sup>2</sup> When the state of Oregon came into the Union, it came into, and was bound by, this understanding. So in a very real sense, this summit is about carrying out that pledge today.

My colleague, Robert Williams, has said this about the treaty relationships:

[As far as Indians were concerned,] [t]reaty partners . . . were bound to protect each other’s interests . . . [and] [b]ecause the connections established by a treaty continually had to be kept strong, treaty partners . . . were expected to meet regularly with each other in council. As one Indian speaker tried to explain to his English treaty partners: “[Y]ou may say that Love & Affection may be strong in absence as when present but we say not . . . . Nothing more revives and enlivens affection than frequent conferences.”<sup>3</sup>

And so perhaps we can think of this summit as one of the “frequent conferences” that strengthens the bonds between sovereign partners, so that these bonds can be relied on by each side, and so that the welfare of the state will advance to everyone’s mutual benefit.

When tribal leaders walk into a meeting such as this, they carry on their shoulders a century and a half of state-tribal relations in a very personal way. There are stories told and retold through the generations of Indian families, recounting every battle, misdeed, and breach of good faith on the part of the United States towards their relatives, their clan, their tribe. This is ancestral memory, and it is strong; it is personal.

Anyone who knows of the history of federal policy towards tribes in Oregon might ask if there is any promise left in those words pledging “good faith” towards the tribes. In the history of Oregon tribes, there is massacre; there are confiscated lands and devastated economies; there are trails of tears in which Indian people were wrenched from their homelands and marched under the harshest conditions to new areas; there are mob lynchings,

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*ise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1499 (1994).

<sup>2</sup> For discussion, see Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 382-83 (2001).

<sup>3</sup> ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, 103, 112 (1997).

mob raids, mob murders of innocent Indian children; there is starvation and disease, religious persecution, desecration of sacred sites; and there is federal termination.<sup>4</sup> There is every human rights violation you can think of, and as one Coquille member writes, there is “holocaust.”<sup>5</sup> But through this there is a persistent and vital tribal culture and determined leaders carrying it forth today. Robert Williams writes that in Indian diplomacy, “forgiveness of past transgressions were seen as acts of renewal between treaty partners.”<sup>6</sup>

For me, that statement gained meaning one spring day in April, 1998. On that day, the Nez Perce Tribe brought its elders, its leaders, and members of the Redheart Band all the way from its reservation up in Lapwai, Idaho, to Fort Vancouver, Washington for the first Redheart Memorial Ceremony. In 1877, the Redheart Band had been on an innocent hunting expedition when it was taken captive by the U.S. Army and imprisoned for several months at Fort Vancouver. During the bitterly cold winter at the barracks, a baby boy died. In 1998, the Nez Perce Band returned to this place of imprisonment after 120 years. Assembled there by invitation of the Tribe were the Mayor of Vancouver, the Major General for the Fort, Indian and non-Indian veterans of the area, Nez Perce from all over the Northwest, and citizens of the City of Vancouver.<sup>7</sup> The tribal leader began the ceremony by saying, “We don’t come here looking for an apology. We don’t come here to reopen wounds. We come here to ask you to participate with us in healing this wound.” There followed many speeches, drumming and singing, a sacred pipe ceremony, and an empty saddle ceremony with appaloosa horses that the Nez Perce had brought down from Lapwai—all to honor the ancestors who had been held captive. The horses circled the assembled crowd with empty saddles that bore big, beautiful Pendleton blankets. The Redheart family—direct descendants of those imprisoned—lifted the blankets from the saddles and gave them to the Mayor of Vancouver, the Major General, and to the other government dignitaries. But there were no gifts that day

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<sup>4</sup> See Stephen Dow Beckham, *Federal-Indian Relations*, in *THE FIRST OREGONIANS* 39-54 (Carolyn M. Buan & Richard Lewis eds., 1991).

<sup>5</sup> See George B. Wasson, Jr., *The Memory of a People: The Coquilles of the Southwest Coast*, in *THE FIRST OREGONIANS*, *supra* note 4, at 87.

<sup>6</sup> WILLIAMS, *supra* note 3, at 113.

<sup>7</sup> Dean Baker & Stephanie Thomson, *Peaceful Reminder*, *THE COLUMBIAN* (Vancouver, Wash.), Apr. 23, 1998, at A1.

for the Nez Perce, for who in non-Indian society would have thought that gifts would be given at this occasion where the wounds of history still bled in the tears of Nez Perce people?

But at every annual Redheart Memorial since, the Mayor has brought gifts, not just any gifts, but real gifts from the heart. At one ceremony he presented two sacred pipes to the Nez Perce tribal elders. He had them fashioned by an expert craftsman from a huge old cedar tree that had blown down at Fort Vancouver the prior winter.<sup>8</sup> This tree had been alive during the time the band was held captive. The Mayor had asked the craftsman to make the pipes in the tradition of Nez Perce pipe-making. To do that, the craftsman had many meetings with the Nez Perce elders, and he produced drawings on paper that held the design created from their ancient traditions. The Nez Perce elders accepted these pipes with tremendous gratitude, and they said that the pipe-making tradition was about to vanish with the passing of their elders, and now that they had designs on paper, this tradition could be passed on to future generations. The Mayor of Vancouver, through this gift, had helped preserve a vital part of Nez Perce tribal culture. That day, hearts were filled, and the citizens of Vancouver were very proud of their Mayor.

And so every generation holds this promise of good faith, and it is up to every generation to renew it. It is not a question of ability; it is a question of will. The will to carry out good faith springs from understanding, and that is the field that tribal and state leaders till together at these summits.

## II

My colleague Charles Wilkinson writes that the historic task of tribes is to preserve “workable islands of Indianness within the larger society.”<sup>9</sup> When tribal and state leaders engage in diplomacy at these summits, they bring agendas filled with issues important to them. Disease control, homeland security, environmental protection, social services, education, and economic development are all issues of vital concern to both tribal and state governments. On so many of these issues, the coopera-

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<sup>8</sup> Dean Baker, *Nez Perce to Return for Tribal Ceremony*, THE COLUMBIAN (Vancouver, Wash.), Mar. 30, 2002, at C1; Joel Davis, *Prepared for Nez Perce Ceremony*, THE OREGONIAN (Portland), Apr. 16, 2002, at B2 (picture of pipes).

<sup>9</sup> CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 122 (1987).

tion of state and tribal government creates a stronger outcome more beneficial to all citizens of Oregon—Indian and non-Indian alike. There is so much to be gained by both sides through sharing information, joint planning, cooperative agreements, and even jurisdictional delegation where it makes sense.

We all know, however, that some issues present themselves as conflict, or competition. In the past so many issues between tribes and states became embroiled in what I call the “politics of scarcity” and became a fight over resources. And so it is gratifying to see the leaders of both sovereigns searching for commonality, because beneath so many conflicts lies the potential for joint abundance accomplished through joint action.

I would like to draw upon an example from the field of natural resources law to demonstrate the difference between engaging in the politics of abundance and the politics of scarcity. It is a poignant example carried on the backs of the magnificent salmon of this region, for they have been the real messengers of tribal and state policy over the last 150 years. Salmon are those great creatures that are important to all of the citizens of this region—Indians and non-Indians alike. Tom Jay writes, “[T]he salmon is at least the soul of this biome . . . . The salmon travels in our hearts . . . . The deep resonance between the salmon of the heart and the salmon of the world is the note of our dwelling here.”<sup>10</sup>

Nearly every tribe in Oregon has relied on salmon for millennia. At treaty times, there were ten to sixteen million fish returning to the Columbia River alone, and a few million to the combined coastal streams of Oregon. The rivers ran thick with salmon. At Celilo Falls on the Columbia near what is now the Dalles Dam, Indians would gather from all around the region to trade fish for other goods.

The Columbia River salmon resource was shared by many tribes and bands. As one Indian fisherman said, the Columbia River was a “great table” where many tribes would come together and partake.<sup>11</sup> Almost incredibly, native governance kept human consumption of salmon in harmony with Nature’s limits. You see, harvest must always be limited to allow enough fish to escape to spawning grounds so as to perpetuate the species. The

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<sup>10</sup> Tom Jay, *The Salmon of the Heart*, available at [http://thelateralline.com/tom\\_jay/salmonoftheheart.html](http://thelateralline.com/tom_jay/salmonoftheheart.html) (last visited Mar. 8, 2005).

<sup>11</sup> *Seufert Bros. Co. v. United States*, 249 U.S. 194, 197 (1919) (quoting district court opinion).

tribes of the Columbia River, and across this entire region, perfected a system, refined over thousands of years, to manage harvest so the species would return in perfect abundance. The fact that different tribal peoples shared in this resource makes these customs and laws all the more remarkable.

According to oral histories from the Columbia River region, there was a headman and a fishing committee stationed at Celilo Falls during the fish runs. These leaders would calculate the runs and figure out not only how many salmon overall could be taken, but how the allocation would occur between various tribal groups, including groups far upriver in Idaho and at Kettle Falls, Montana. They let fish pass through Celilo, escaping harvest, to provide for upriver harvest needs *and* for adequate spawning.<sup>12</sup> They practiced the politics of abundance for the common benefit of all. At the core of this governance was a powerful self-restraint. Even during times of starvation, the tribal leaders would not allow more harvest than the resource could sustain.

Ceremony was a vital part of this resource management. Tribes across the region had First Salmon ceremonies when the first salmon returned in the spring after the winter. No salmon could be caught before this ceremony occurred to express reverence and gratitude for this creature that had sustained life through the ages. In the native tradition, these spiritual expressions ensured the return of the fish, and the return of fish assured the renewal and continuation of human and all other life in the Basin. Indian people still gather at Celilo Falls and longhouses throughout the region to hold these spring ceremonies. For many tribes, salmon is the defining aspect of their culture. As stated in the Warm Springs, Yakama, Umatilla, and Nez Perce Tribes' salmon restoration plan, "[w]ithout salmon returning to our rivers and streams, we would cease to be Indian people."<sup>13</sup>

And so when the federal government came to the Columbia

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<sup>12</sup> For discussion and sources, see Wood, *supra* note 2, at nn. 56-58 and accompanying text; see also *United States v. Washington*, 384 F. Supp. 312, 334 (W.D. Wash. 1974) (noting "strictly enforc[ed] tribal customs and practices which . . . for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume").

<sup>13</sup> COLUMBIA RIVER INTER-TRIBAL 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 [hereinafter SPIRIT OF THE SALMON], 2-4 (1996), quoted in Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 3 (2000).

River treaty tribes 150 years ago asking for land cessions, the tribal leaders made clear in the treaties their rights to forever fish at their fishing grounds off the reservations. The Columbia River tribes relied on this treaty promise when they ceded thirty-eight million acres of land in the Pacific Northwest to the federal government.

But after the tribes gave up their ceded lands, the states of Washington and Oregon took over control of the salmon harvest, and a huge commercial non-Indian fishery grew. New technology spurred unprecedented indulgence in this resource. Gill net fishing began, canneries opened, and new forms of transportation accessed an insatiable export market. After thousands of years of sustainable management by tribes, states allowed massive resource depletion with little thought to sustaining the resource. And so the runs began to collapse.

On the heels of this collapse in the 1950s and 1960s came a surge of industrialization and urbanization across the entire Pacific Northwest, in virtually every watershed used by salmon. Clearcuts replaced forests, industries polluted the waters, developers tore up wetlands, cities dumped sewage into rivers, and the federal government constructed a hydro and reclamation system on the Columbia, the Snake, the Klamath, and on other rivers. These dams became a death knell to a huge percentage of migrating salmon. The dams can kill over ninety percent of the juveniles of some species.<sup>14</sup> By 1995, the National Marine Fisheries Service would declare, “Few examples of naturally functioning aquatic systems (watersheds) now remain in the Pacific Northwest.”<sup>15</sup> Half of the historic range of Pacific Salmon has been extirpated. These actions continue, and so it is that, after just 150 years of state and federal management, the non-Indian society has brought the salmon to the brink of extinction. Nearly all stocks are imperiled, many are listed under the Endangered Species Act, and many are already extinct. In the Columbia River alone, wild salmon runs are at two percent of their historic levels.

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<sup>14</sup> See sources cited in Wood, *supra* note 13, at 10, n. 45.

<sup>15</sup> NAT'L MARINE FISHERIES SERV., PROPOSED RECOVERY PLAN FOR SNAKE RIVER SALMON V-1-2, V-1-3, (Mar. 1995), *quoted in* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 767 (1995) (on file with author).

This collapse has unfathomable consequences for tribes. As one Umatilla leader said in 1994:

Our economic base has been devastated, and my people are suffering . . . . It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fishermen for thousands of years. It is our life, not just our economy.<sup>16</sup>

When the runs began to collapse, the politics of scarcity took hold, and states began to crack down on tribal fishing, closing Indian fishery after Indian fishery. The Columbia River tribal harvest dwindled to one half of one percent of historic harvest. A Yakama Tribal Council member described what he called the “enforcement of the non-Indian’s concept of ‘conservation.’” He said:

My ancestor . . . who signed the treaty, accepted the word of the United States—that this treaty would protect not only the Indian way of life for those then living, but also for all generations yet unborn . . . . [T]he white man’s progress had diminished the fish runs, and therefore, the Indians had to stop fishing to protect what was left. This is not what we were promised at the Treaty Grounds.<sup>17</sup>

Tribal fishermen persisted in their treaty fishing, believing they had the legal right to do so, and more importantly, a cultural mandate. Courageous Indians had fish-ins, and the states made arrests. These fish-ins ignited enormous hostility from non-Indian fishermen who felt that the Indians were taking, as they saw it, the last fish. Protests erupted into violent conflicts throughout the Northwest, all stained by racism. Professor Charles Wilkinson describes the confrontations on the banks of the Nisqually River in Washington:

During the runs . . . [t]here were scores of raids . . . ugly, heart-rending brawls. In time, the banks of the Nisqually merged with the schoolhouse steps of Little Rock . . . . The game wardens . . . would descend the banks in a stone-faced scramble towards a few Nisqually men in a canoe . . . unloading salmon from a gillnet . . . and drag the men up the rugged banks to-

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<sup>16</sup> *Water Spreading: Hearing on Water Use Practices on Bureau of Reclamation Projects Before the House Comm. on Natural Resources, Subcomm. on Oversight and Investigations*, 103d Cong. (1994) (statement of Antone Minthorn, Chairman, Confederated Tribes of the Umatilla Indian Reservation), available at 1994 WL 14190354, quoted in Wood, *supra* note 15, at 741-42.

<sup>17</sup> See *Hearings Before the Columbia River Fisheries Task Force 5* (Oct. 28, 1992) (testimony of Jerry Meninick, Yakama Nation), quoted in Wood, *supra* note 13, at 27-28.

ward the . . . vehicles . . . . The billy clubs made their thuds . . . . The stench of tear gas hung in the air . . . . As with all the blood struggles of minority people for freedom the world over, a sorrow, a poignancy shared the air with the tear gas.<sup>18</sup>

When the politics of scarcity dominate relations between tribes and states, the climate becomes hostile. So it has been true with fish conflicts, water conflicts, land conflicts, and any other conflict over a vital natural resource. The politics of scarcity create a powerful divisiveness that often masks a greater, deeper, problem common to both sides. Those non-Indian fishermen who protested Indian fishing were fighting over breadcrumbs. The fisheries had collapsed as a result of actions from *their* government. But rather than focusing their attention on reforming the practices of their own government, they focused on the fight over the last fish.

And so many years were lost in court battles—years and years of ghost fish never returning to their natal waters because the environmental damage was so devastating. Years of state and federal neglect towards those deep underlying problems, brought on by governments that were over-indulgent to an unbounded greed of present generations. Finally, in 1979, a landmark ruling came down from the United States Supreme Court, declaring that the tribes had treaty rights to take fifty percent of the harvestable fish.<sup>19</sup>

In Oregon, federal district court Judge Belloni presided over the treaty fishing litigation. He knew that the state of Oregon would continue to resist tribal fishing. He became known as a peacemaker for an unprecedented step he took. He asked the tribes and the states to come together, as co-managers of this shared salmon fishery, and manage the harvest jointly. He presided over negotiations between the four Columbia River Tribes, the states of Oregon and Washington, and the federal government that culminated in the Columbia River Fish Management Plan.<sup>20</sup> Today, natural resource law professors from across the country look to this plan as a model of co-management between states and tribes.

Something remarkable happened as a result of the tribes and

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<sup>18</sup> CHARLES WILKINSON, *MESSAGES FROM FRANK'S LANDING* 38 (2000).

<sup>19</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685-87 (1979).

<sup>20</sup> The CRFMP was approved in *United States v. Oregon*, 699 F. Supp. 1456, 1469 (D. Or. 1988).

states managing their harvest together. The politics of scarcity faded into the politics of abundance. By getting together in frequent meetings with a joint purpose of harvest management, some profound commonalities emerged. The fisheries biologists and harvest managers for both the states and tribes turned their focus towards the urgent fight for fish recovery, towards abundance for all. Non-Indian commercial fisherman began to realize that they were, after all, in the same boat with tribal fishermen, and they always had been. They realized that very soon there would be no fish to fight over unless they joined efforts against a much broader threat—the unraveling of Nature across salmon watersheds. And it did not take long for those same commercial and sports fishing groups that had been belligerent towards tribal fishermen just a decade and a half earlier to join with tribes in testimony before state and federal agencies, and before Congress, demanding the recovery of salmon. The tribes and fishing groups kept a separate presence in these hearings, and they expressed different cultural orientations towards the fish, but they were a united front. And soon the lawyers for these non-Indian fishing groups realized that treaty rights were probably the firmest legal foundation for forcing changes to the federal dam operations that kill these fish. For the first time ever, non-Indian fishing groups testified in *support* of treaty fishing rights.

I'll never forget one spring day in 1994 when the politics of scarcity and the politics of abundance became quite vivid for me. It was nearly twenty years after the violent fish wars of the 1970s had ended, but state and tribal relations were tested again when spring Chinook runs in the Columbia River collapsed to half of the size of the worst run in history. The state's fishermen had already taken their share before biologists realized there was a calamity, and so the only way to save the run was to cut back on the Indian fishing. The tribes cut back on all forms of fishing, but they needed salmon for the longhouses to perform their First Salmon ceremonies. The Columbia River was in such collapse that the tribes could not meet even bare minimum needs from their regular treaty fishing sites on that great river.

This was an unprecedented cultural crisis. Every First Salmon ceremony today represents a link in an unbroken spiritual lineage extending back thousands of years. The longhouses had never lacked enough fish in the memory of Indian people. Without enough fish for the ceremonies, the ceremonies could not as-

sure the return of the fish. Indian culture stood with those fish at the brink of extinction.

But there were ample fish returning that year to Willamette Falls on the Willamette River in Oregon. The Yakama Nation decided it had no other choice than to assert its treaty rights there. The Yakamas considered that site a fishing ground guaranteed by treaty, but pursuant to its agreement with Oregon, tribal fishing had not occurred there for fifty years. Over that stretch of time, the site had become popular for non-Indian sports fishing; in fact, those fishermen viewed Willamette Falls as their exclusive recreational domain.

When the Yakama Nation asserted treaty rights, the state of Oregon objected and made arrests of tribal fishermen.<sup>21</sup> For a brief time, it seemed that the clock would turn back twenty years to the ugly fish wars. But state and tribal officials met several times, government-to-government, and finally came to an agreement allowing the Yakamas to do ceremonial fishing for a few days. On that day, the Director of the Columbia River Inter-Tribal Fish Commission said, "The spirit of good neighbors is nourishment to the heart."<sup>22</sup>

I went to Willamette Falls to observe the treaty fishing. Before the fishing started, the Yakamas held a ceremony open to Indians and non-Indians alike to awaken the spirits of their ancestors.<sup>23</sup> A fisherman for one of the longhouses said, "These traditional lands used by our forefathers lay dormant all these years . . . . Before we can open them up and use the resource, we must commemorate and acknowledge our ancestors and pay our respects to them."<sup>24</sup> There was a feast in which the Indians shared with the non-Indians every last bit of salmon which had been frozen from the year before. Looking over to the river, there were traditional wooden platforms, only about eighteen inches wide, suspended one hundred feet over the thunderous falls. They had been made using the technology and expertise that Indian fishermen have developed over millennia. The fishermen walked out onto these scaffolds with a confidence that only thousands of

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<sup>21</sup> Joan Laatz & Roberta Ulrich, *2 Yakamas Cited for Illegal Fishing*, THE OREGONIAN (Portland), May 3, 1994, at A1.

<sup>22</sup> Roberta Ulrich, *Indians Get OK to Fish the Falls*, THE OREGONIAN (Portland), May 6, 1994, at A1.

<sup>23</sup> Joan Laatz, *Awakening the Spirits*, THE OREGONIAN (Portland) May 2, 1994, at A1.

<sup>24</sup> *Id.*

years of ancestral practice can engrain in the bloodline—knowing no doubt that a slip could result in drowning—and they put their dipnets into the frothing falls to catch the few salmon that made it that far. They were fishing that day with spiritual purpose, with the restraint engrained in their tradition, to keep their culture alive, to keep the fish returning to the rivers, to sustain life across the region.

Just a few yards below them, catching the fish first as they swam upriver, were the non-Indian sports fishermen. And they made a remarkable sight. They formed what they called a “hog line” across the river.<sup>25</sup> They fish like this every year at Willamette Falls. To form the hog line, they anchored a series of boats, gunnel-to-gunnel, in a line that stretched clear across the river with no breaks. Multiple fishing rods were fixed at the back of each boat. The fishermen relaxed and enjoyed soda and chips until there were strikes on the line. This hog line formed a virtual gauntlet to salmon moving upstream towards the falls, and a lot of fish were caught. There was no reverence on the hog line that day. There was only indulgence.

And so these fish swimming back to spawn in their natal waters passed through the technology of 10,000 years, from hog line to ceremonial platform. But despite the cultural differences, there was no violent eruption in the sports fishing crowd. There was a sobering mood that descended over the hog line that day brought about by a stark awareness that state and federal agencies had failed to protect this incredible fishery resource. One fisherman said to a reporter, “I welcome the Indians here because I don’t think, without their influence, the government’s going to do anything.”<sup>26</sup> The day led me to believe that the politics of scarcity are driven by indulgence, and the politics of abundance driven by restraint.

Over the ten years since that day, the Columbia River tribes have carried forth the politics of abundance in their diplomacy. They created *Wy-Kan-Ush-Mi*, *Wa-Kish-Wit* (“Spirit of the Salmon”),<sup>27</sup> a recovery plan with goals for restoring salmon to historical abundance. The plan’s “life cycle” approach to salmon management has been emulated by federal and state biologists ever since. The plan is visionary, inspired by the needs of genera-

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<sup>25</sup> Roberta Ulrich, *Fishing Rites*, THE OREGONIAN (Portland), May 1, 1994, at D1.

<sup>26</sup> Laatz, *supra* note 23.

<sup>27</sup> See SPIRIT OF THE SALMON, *supra* note 13.

tions far out into the future. Yet this vision is applied in the most practical terms, with consideration of the region's economy and the jurisdictional complexities that frame salmon recovery. The tribes took this plan to the states, to the federal government, and to the public, and they had numerous summits and hearings on it.

The tribes took action on the ground to bring back fish. The Umatilla Tribe brought its sovereign partners to the table to create a plan for getting fish back to the Umatilla River. Over time, the state of Oregon had allocated all of the water from a reach of this river to irrigators, so the river ran dry for a stretch before entering the Columbia. When fish returned from the ocean to spawn, they literally had no water to swim in at the lowermost stretch of the Umatilla. In crafting a plan, the Umatilla Tribe searched for common goals and a strategy that would not harm their farming neighbors. So they spearheaded a project that pumps Columbia River water to the Umatilla to re-water that dry section. When water started flowing, fish returned for the first time in seventy years. Fish come back now in the thousands—so many that they now support an Indian and non-Indian fishery. This project is a wonderful example of good faith diplomacy carrying out the politics of abundance.

This summer, the state of Oregon stood side by side with the four Columbia River Treaty tribes in litigation demanding that the federal government spill enough water for fish in its hydro operations. Together the tribes and the state were victorious. Judge Redden ordered the federal dam operators to spill water for salmon.<sup>28</sup> It was a courageous ruling; never before had a federal judge ordered the federal government to manage its hydrosystem in a certain way. Without the state of Oregon standing firmly with the tribes, that ruling might not have happened. *That* is practicing the politics of abundance, and there will be more salmon for Indian and non-Indian fishermen three years from now when those juveniles return to spawn because the state of Oregon and tribes stood together, in partnership as sovereigns.

### III

And so the story of the salmon has much to tell us about the hope of creating mutual agendas in summits such as this. Yet

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<sup>28</sup> Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-6940-RE, 2004 WL 1698050 (D. Or. 2004).

there is a possibility that runs deeper than mere agendas. Tribal leaders come to these summits expressing a uniquely tribal world view, a wisdom of governance perfected over millennia. This governance has a distinct focus on family, community, ceremony, environment, and dispute resolution that could provide new ways of thinking about the issues that state officials face today. Of course, there is no monopoly on the art of governance, and certainly state leaders bring a wealth of experience to these summits that can be shared with tribal leaders. But because tribal leaders have heard quite a lot about the Great White Father's wisdom over the last century and a half, I'd like to focus on what *tribal* wisdom can contribute to the art of governance.

Again the salmon lead us to the possibility of exchange at this deeper level.

In the area of natural resources management, there is a real dysfunction legal scholars are beginning to confront. The centrifugal force of this field is a principle that government should sustain the natural resources for future generations. This principle is at the core of the public trust doctrine, which says that the government acts as a trustee of wildlife and other critical resources, and that it must use its authority to ensure that these resources are not depleted by present generations. Every major federal environmental law, including the Endangered Species Act, incorporates this principle.

But in natural resources management, this basic legal mandate is often not carried out. The mandates are there to protect wildlife and other resources, but the *will* on the part of state and federal leaders to carry out these mandates is not there. There is tragic proof of this in the Pacific salmon crisis. The will of these leaders is constantly tested by powerful interests who want to indulge in the resources for their own gain without regard to the future. They pressure their leaders to allow this indulgence. And that indulgence inevitably leads us into the politics of scarcity. The dysfunction that results is evident not only in the Northwest, but across the nation. Every devastated watershed, every new mile of sprawl, and every new clearcut reflects excessive indulgence. This is a very deep failure in government, and its effects will be felt by every citizen living today and tomorrow.

Professors like myself are asking what creates the *will* of leadership to provide for Nature and to provide for future generations. We do not have a clear answer, but we do know that tribal

governance has managed natural resources sustainably for thousands of years, especially with respect to salmon. And this will has held firm against extraordinary pressures, even starvation. This will derives from a distinctly tribal worldview. A Umatilla leader expressed it once when he said, “My ancestors understood that we are only borrowing this Earth and its resources from our children.”<sup>29</sup> I imagine you have heard similar statements in these summits, and you can certainly find these words on the pages of history.

For tribal leaders, the trust responsibility towards future generations is heartfelt. Restraint is created not by a written code, but by a culture of reverence towards Nature, reinforced by natural law—a spiritual set of laws—expressed in ceremonies. Ceremonies continually affirm a connection with nature, with ancestors, and with future generations, and they fortify the *will* to make good on those connections. Tribal elders and leaders go out to the rivers, where they sing and pray for the return of the salmon just as their ancestors did. There is *will* created in that act to preserve this marvelous species, and there is a turning away from indulgence that satisfies only the present generation. Ceremonies engrain the wisdom of self-restraint that keeps guiding leaders towards the politics of abundance. That wisdom shapes the native art of governance in natural resources law.

For most state and federal leaders, the connection to future generations is often abstract; it is rarely heartfelt. And so the trust responsibility that lies at the core of the laws is often not carried out. I was struck by a recent statement of a federal fisheries spokesman who was explaining the new federal plan for the Columbia River hydrosystem. This new plan openly states that recovering salmon is no longer the goal of the agency. Spokesman Brian Gorman said, “We are doing the right thing by the law and by the fish. The Endangered Species Act does not mandate recovery; it mandates a recovery plan. That’s different from recovery.”<sup>30</sup> Such officials allow actions that will cause the extinc-

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<sup>29</sup> *Water Spreading*, *supra* note 16.

<sup>30</sup> Rebecca Clarren, *Dams Will Stand, Salmon Be Damned*, HIGH COUNTRY NEWS, Oct. 11, 2004 (quoting NOAA Fisheries spokesman Brian Gorman), available at [http://www.hcn.org/servlets/hcn.Article?article\\_id=15043](http://www.hcn.org/servlets/hcn.Article?article_id=15043) (last visited Mar. 8, 2005). The latest NOAA Fisheries Service biological opinion uses the continued existence of the Columbia River dams as a baseline from which to measure future actions, thereby removing the dam-removal option from consideration. NOAA Fisheries, Endangered Species Act—Section 7 Consultation: Biological Opinion 1-9

tion of species as if it were everyday business.

I hope state leaders will listen deeply to the tribal words spoken in these summits, because they carry a wisdom of governance that might fill a void in state and federal governance. State and federal leaders might apply this wisdom to their own governing task within their own legal structure. A spark of native wisdom was evident in a fairly recent case before the Supreme Court of Nevada dealing with irrigation withdrawals that are drying up Walker Lake. The question in *Mineral County v. State Department of Conservation and Natural Resources* was whether the state of Nevada could continue to allow these withdrawals. In construing the public trust doctrine, a concurring Justice repeated the words of Chief Seattle:

This we know: The Earth does not belong to Man, Man belongs to the Earth. All things are connected, like the blood which unites one family. We do not weave the web of life, we are but a strand in the web of life. What we do to the web we do to ourselves.

The Justice concluded, “The public expects this unique natural resource to be preserved . . . for all of us . . . always.”<sup>31</sup>

Somewhere along the way, that Justice of the Nevada Supreme Court has been influenced by tribal wisdom and saw its application in the work of the court. The words of Governor Kulongoski, spoken at this summit today, reflect that he too has been touched by tribal wisdom and is bringing it to bear in the work of the state.

My colleagues and I could identify about 200 state and federal leaders that *today* hold the fate of the salmon in their hands. Literally, they hold the fate of a species that has not only been on this earth in some form for perhaps five million years, but has supported human life in Oregon for at least 10,000 years. If we were to make a list of such individuals, we would include, by name, the governors of Oregon, Washington, Idaho, and Montana, the members of the Northwest Power Planning Council, the head of NOAA Fisheries Service, and the heads of the Bonneville Power Administration, Bureau of Reclamation, and the Army Corps of Engineers. We would include from the Columbia

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(Nov. 30, 2004), available at [http://www.salmonrecovery.gov/R\\_biop\\_final.shtml](http://www.salmonrecovery.gov/R_biop_final.shtml) (last visited Mar. 8, 2005).

<sup>31</sup> *Mineral County v. State Dep't of Conservation and Natural Res.*, 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring).

River Basin states officials from every fish and wildlife agency, water agency, environmental protection agency, state lands agency, coastal zone authority, and some key irrigation districts. The list goes on.

If we could assemble all of these people in one room, I would try to impress upon them the historic role they have as a result of the western legal system, which gives them such truly awesome power over Nature. These people may not know their position in history. I would want to tell them that they hold the *power* of governance on which rests the fate of this magnificent species and ancient tribal salmon culture. But then I would ask these leaders if they have the *wisdom* needed to guide this power. I would ask tribal leaders to join these officials in the same room and share again those words that their ancestors have repeated over and over—words that embody natural harmony, words that reach towards abundance for all generations.

My wonderful colleague, Rennard Strickland, once wrote, “[I]f there is to be a post-Columbian future—a future for any of us—it will be an Indian future . . . a world in which this time, . . . the superior worldview . . . might even hope to compete with, if not triumph over, technology.”<sup>32</sup>

Destiny has created a truly historic role for many of you at this moment in time. Perhaps the greatest enrichment that can be gained from this summit is a collective will, shared by tribal and state leaders alike, to practice the politics of abundance in everyday decision-making; for only if that will is strongly rooted in the hearts of leaders will there be any hope of a secure future for the citizens and creatures of this region.<sup>33</sup>

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<sup>32</sup> RENNARD STRICKLAND, *Afterward*, in TONTO'S REVENGE 130 (1997).

<sup>33</sup> For legal background of Columbia River Basin treaty fishing rights and other tribal natural resource issues, see Wood, *supra* note 13; Wood, *supra* note 2; Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act As Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197 (1998); Wood, *supra* note 15; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109 (1995); and Wood, *supra* note 1.

