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## Boldt decision on tribal fishing rights maintains rippling effects 40 years later

By Rob Carson

The [Tacoma] News Tribune

(Distributed by The Associated Press)

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TACOMA — George Hugo Boldt was not a man anyone would mistake for a revolutionary.

He was a bespectacled and conservative Republican, a former Army officer who grew up in Montana and kept his close-shaved haircut intact throughout the turbulent 1960s and beyond.

Among his many conservative credentials, Boldt was known as the federal judge who in 1970 held a group of Vietnam War protesters called the Seattle Seven in contempt of court and sentenced them to prison for six months.

The only thing about Boldt that could be considered radical was his fondness for plaid sports jackets and bow ties.

And yet .

The court ruling Boldt handed down 40 years ago this week is a decision now recognized as one of the most sweeping documents of economic and social reform in Pacific Northwest history.

The central question in United States v. Washington concerned tribal fishing rights, but ripples from the decision went far and wide.

It changed the empty concept of "tribal sovereignty" into something that needed to be taken seriously — or else. And it transformed the way state and tribal governments interact.

For Washington tribes, it marked the beginning of a renaissance, fueled by money, power and pride.

For four decades, the Boldt decision has shaped political issues in Washington, from those that are purely tribal-based — gambling, tribal sales of cigarettes and gasoline, and tribal law enforcement, for example — to broadly based issues that involve environmental regulation and land use throughout the state.

The decision had consequences for native tribes not only in Western Washington but also throughout the United States — and to some extent for indigenous people around the world.

"People from New Zealand and Australia come to ask us, 'How did you do this?'" said Billy Frank Jr., a Nisqually fisherman made famous by the case. "How did you get the United States government to be on your side?"

The answer, said University of Washington fisheries professor Richard Whitney, who recently appeared with Frank for a filmed chat about the Boldt decision in its 40th year, is that there was nothing radical about the ruling.

It was, in fact, a conservative reading, he said, a strict law-and-order interpretation entirely in keeping with Boldt's character and his view of the law.

"It was one of the most significant decisions of the century," Whitney said. "Not just because of the fishing situation, but because of the fact that a federal judge would look at the law and say, this is what the law requires, and everybody has to live up to it. Not just the tribes and not just the state, but everybody.

"That principle — that we are going to abide by the law — is what keeps this country alive," Whitney said.



Boldt's tough reaction to the Seattle Seven — plus the fact he himself was a sport fisherman — gave tribes serious misgivings when it was announced in 1970 that he would be the judge to preside over the high-profile fishing case.

Hank Adams, who had served as the tribes' unofficial tactician and political organizer through most of the 1960s, considered trying to have Boldt removed, but then thought better of it.

An Assiniboine-Sioux, Adams played a key role in elevating the fishing dispute on the Nisqually and Puyallup rivers to the national stage.

For years, state fisheries managers had restricted net fishing on Puget Sound rivers at certain times of the year to protect salmon runs. Native American fishermen routinely ignored the restrictions, arguing they had a treaty right to fish whenever and however they pleased. And they got arrested.

Beginning in 1964, Adams, Frank, Ramona Bennett and other Native activists began turning the arrests into media events, organizing rallies and inviting Marlon Brando, Jane Fonda, Dick Gregory and other celebrities to the riverbanks to help sway public opinion.

The demonstrations sometimes erupted into brawls, with television cameras capturing the action for the national news.

"The timing was everything," Bennett said Wednesday at a celebration of the Boldt decision held at the Squaxin Island Tribe's casino complex. "It was in the middle of the peace movement and the civil rights movement.

"There was a change going on," she said, "and we got to be part of that change."

At the anniversary celebration — attended by more than 1,000 tribal members from across the state — Bennett, Frank and Adams regaled the crowd with reminiscences of the Fish Wars, describing armed confrontations with police, beatings and repeated jailings.

"We got dragged out of the river and into the jail," Frank said. "We were willing to die for these rights, and we still are."

In 1970, the federal government filed *United States v. Washington* on behalf of the tribes, arguing the state was denying tribes rights guaranteed in treaties signed in the 1850s.

The treaties confined the tribes to reservations but contained a phrase that became critical at trial: "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."

The 203-page decision Boldt delivered Feb. 12, 1974, is complex, but the part most shocking at the time was his formula for deciding how many of the salmon and steelhead should go to the tribes and how many to non-Native Americans.

Boldt interpreted the words "in common with" to mean the tribes were entitled to up to 50 percent of the harvestable catch, an almost inconceivable change considering tribal members made up less than 1 percent of the state population and non-Native fishermen routinely were taking 95 percent of the fish.

It was hard to tell who was more stunned by Boldt's ruling: the state or the tribes. Attorneys representing the tribes had floated the idea that the phrase "in common with" could mean 50 percent, but even they thought it was a stretch.

For thousands of sport and commercial fishermen, the ruling was a bombshell. It cut their catch in half and put most out of business.

Boldt was mocked on bumper stickers — "Can Judge Boldt, not Salmon" — "A dead Boldt is a good Boldt." — and was hanged in effigy in front of federal courthouses.

Forty years later it is difficult to imagine the extent of the outrage and indignation the Boldt decision caused.

Fawn Sharp, currently president of the Quinault Nation on the Olympic Peninsula, had barely learned to walk when Boldt handed down his ruling.

She doesn't remember the day of the decision, but she said she would never forget the anger and resentment she felt from white people for years afterward. Sharp recalls being afraid to go to the white fishing town of Westport because Native Americans had their tires slashed there.

"Westport was like a no-no place," she said. "There was a lot of fear."

Boldt also ruled that tribes had the right to regulate the fishing of their members, independent of state laws and regulations. That, in the eyes of many non-Natives, was an unacceptable and un-American position because it granted a small portion of the population "special rights" over others.

"You can't have superior rights," said Jack Metcalf, a state senator at the time and later a U.S. representative. "You can't have a hereditary aristocracy that has more rights than other people."

Many nonnative fishermen refused to obey federal bans on fishing, and the state refused to enforce them. Slade Gorton, the Washington State attorney general at the time, vowed to appeal the ruling (which he did without success) to make sure it was vacated.

James Johnson, then an assistant attorney general and now a member of the Washington State Supreme Court, called Boldt's decision "an aberration" and said he was confident it would be overturned.

The state's resistance led the Ninth Circuit Court of Appeals to compare Washington with states in the Deep South that refused to abide by federally mandated desegregation.

"Except for some segregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century," appellate court justices said of the Boldt decision.

The irony of the Boldt decision is that the 50/50 allocation formula, which appeared to be the most revolutionary aspect, turned out to be largely meaningless, at least as it related to salmon.

A handful of well-financed Native American fishermen profited in the years immediately following the ruling, but by then the salmon fishery in Puget Sound was so nearly destroyed by development and logging there was little left to fight over. The tribes' annual harvest is lower now than in 1974.

More significant was the extent to which Boldt's decision reinforced the notion of tribal sovereignty and elevated the legal status of the treaties.

Boldt said the state and tribes should "co-manage" fishing resources off the reservations. Further readings of the case established that the state has an obligation to protect fish habitat, to ensure the tribes' rights to fish in perpetuity.

That created a powerful legal incentive to protect the environment and include tribes in land-use decisions.

The Boldt decision and its allocation formula were extended to include shellfish, including the multimillion-dollar geoduck harvest.

The legal status it gave the treaties and the concept of tribal sovereignty figured prominently in the Puyallup Land Claims Settlement and the state's accords, which made possible the tribes' highly profitable gaming operations.

As the tribes celebrate the anniversary of the Boldt decision this week, yet another federal court sub-proceeding is in the news — one that could cost the state an estimated \$1.9 billion.

The treaty tribes argued that hundreds of culverts installed at road crossings by the state block fish from passing through them and therefore reduce the amount of harvest available to the tribes. Last year, a federal court judge gave the state a 17-year deadline to fix the fish-blocking culverts.

"We prefer to collaborate with the state," said Frank, head of the Northwest Indian Fisheries Commission since it was founded immediately after Boldt. "However, the state's unwillingness to work together and solve the problems of these salmon-blocking culverts in a timely manner left us with no alternative except the courts."

"The fight never stops," Frank said. "You fight for your culture, your way of life."

Last modified: February 10, 2014 6:32PM

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**Zac Garripoli** · Top Commenter · Port Angeles, Washington

"The salmon fishery in Puget Sound was so nearly destroyed by development and logging there was little left to fight over." Bingo. This is where I believe Judge Boldt dropped the ball: rather than a quota, he should have guaranteed access and ordered that the resources be preserved and enhanced. Half of nothing is nothing. Netting across the mouths of rivers to guarantee a percentage of a harvest, is counterproductive. And, some tribal members have prospered, even as others do poorly. There will always be some inequality, but it shouldn't be codified in law.

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**Gregory Thomas** · Top Commenter · Central Washington University

the judge made the fatal mistake of believing the tribes were actually conservation oriented when in fact they are only interested in the dollar. they were left to enforce their members, collect their own catch data and ended up keeping all of that secret. their participation in the NOF is a total joke but WDFW will never challenge them on any front. so as 'co-managers' of our shared resources, they get a big F. every action since that time has focused on high profile grand sanding, culverts, while tribal members continue to overharvest at will. in the end, the fish suffer from this approach and that means our shared resource continues to diminish. conservation oriented, indeed!

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**Allen Brannin** · Top Commenter

Boldt gave one percent of the population 50% of the fish and let them police themselves. Recipe for disaster which it has been.

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