

1-1-2005

Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships

Russel Lawrence Barsh

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 1 (2006)
Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol12/iss1/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

**Coast Salish Property Law:
An Alternative Paradigm for
Environmental Relationships**

By Russel Lawrence Barsh*

In different venues, Pacific Northwest anthropologist and linguist Wayne Suttles¹ and Salish economist Ronald Trosper² have argued that the indigenous peoples of Puget Sound and the Gulf of Georgia—the Coast Salish peoples of the “Salish Sea”—achieved a high degree of economic stability and environmental sustainability through a distinctive regional form of social organization, law, and beliefs.³ This essay focuses on the nature of the Coast Salish legal para-

* Harvard Law School, 1974; Director of the Center for the Study of Coast Salish Environments, Samish Community Preservation Fund (Samish Indian Nation), Anacortes, WA; member (inactive), Washington State Bar Association. Special thanks are due to Professor Wayne Suttles for his exhaustive pioneering work on Coast Salish social organization and human ecology, and his cheerful readiness over the years to advise and correct me. Grateful thanks are also due to the Coast Salish elders that have discussed values and law with me over the past 30 years, in particular Mary McDowell Hansen, Victor Underwood Jr., Jack Kidder, Laura Edwards, Isidore Tom, Sr., Chet Blackinton, Sr., and Victor Underwood, Sr.; as well as my Salish friends and colleagues Kenneth C. Hansen and Sharon Kinley, and Ronald Trosper.

1. Wayne Suttles, *Cultural Diversity within the Coast Salish Continuum*, in *ETHNICITY AND CULTURE: PROCEEDINGS OF THE EIGHTEENTH ANNUAL CONFERENCE OF THE ARCHAEOLOGICAL ASSOCIATION OF THE UNIVERSITY OF CALGARY* 243-249 (Reginald Auger, Margaret Glass, Scott MacEachern & Peter McCartney eds., 1987) [hereinafter Suttles, *Cultural Diversity*]; WAYNE SUTTLES, *COAST SALISH ESSAYS* 26-44 (1987) [hereinafter SUTTLES, *COAST SALISH ESSAYS*].

2. Ronald L. Trosper, *Northwest Coast Indigenous Institutions that Supported Resilience and Sustainability*, 41 *ECOLOGICAL ECON.* 329 (2002).

3. The term “sustainability” is often seen and rarely defined. It is used here to mean a relatively constant, albeit dynamic ratio between humans and the biophysical resources upon which humans depend. Annual fluctuations and long-term trends are inevitable, due to the dynamic nature of the earth’s climate at all time scales; between the short (annual) term and the long (millennial) term, however, humans may organize their activities in ways that reduce oscillations in the supply of food, energy and materials, and maintain human populations at relatively constant levels of well-being.

digim and its implications for managing the living resources of the Salish Sea today. An appropriate starting-point is clarification of the nature of the prevailing paradigm of environmental law.

The Western⁴ legal paradigm is embedded with perverse incentives to consume resources faster than they can regenerate. Some of these subsidies are relatively easy to identify, such as the classification of most fisheries as commons.⁵ Others are hidden in the deepest conceptual structures of Western law, including the concept of property. Legal systems define what can be traded in markets, and thereby determine what people value, acquire, protect and conserve.⁶ In the language of economics, things that cannot be traded, whether for legal or innate physical reasons, are *externalities* (i.e.,

external to markets).⁷ A relatively open market system structured by Western law only optimizes the production and consumption of things that can be secured and defended as property, and traded freely in markets. An open market assigns zero price to externalities and they are consumed without price limitation. The classic example of an externality has been the impact on the quality of the environment.⁸

Until recently, externalities have been the target of non-market protection: rules and regulations prohibiting various kinds of environmental degradation. Restrictions of this kind have grown increasingly controversial and unpopular, not in the least because of the perception that regulatory agencies tend to be expensive, inefficient, and ineffective.⁹ Regulatory mechanisms affect the

4. I use the term "Western" here to distinguish ideas and institutions that were introduced to North America by European nations; many Native American scholars prefer terms such as "Euro-American."

5. H.S. Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 JOURNAL OF POLITICAL ECONOMY 124, 124-142 (1954); JAMES ARTHUR CRUTCHFIELD & GIULIO PONTECORVO, *THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION* 32-36 (1969); WILLIAM E. HALE & DAG FASMER WITTUSEN, *WORLD FISHERIES: A "TRAGEDY OF THE COMMONS?"* (1971); RUSSEL L. BARSH, *THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE* 11-27 (1979); LEE G. ANDERSON, *THE ECONOMICS OF FISHERIES MANAGEMENT* 32, 143-145 (1977); James M. Acheson, *The Lobster Fiefs Revisited: Economic and Ecological Effects of Territoriality in Maine Lobster Fishing*, in *THE QUESTION OF THE COMMONS; THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES* 37-65 (Bonnie J. McCay & James M. Acheson eds., 1987).

6. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30-33 (3rd ed. Aspen Publishers 1986) (1972); UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 3-6 (2000).

7. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 1-44 (1960); see also DANIEL W. BROMLEY, *NATURAL RESOURCE ECONOMICS; POLICY PROBLEMS AND CONTEMPORARY ANALYSIS* (1986); HUGH H. MACAULAY & BRUCE YANDLE, *ENVIRONMENTAL USE AND THE MARKET* 27-29, 39-45 (1977); GORDON TULLOCK, *PRIVATE WANTS, PUBLIC MEANS: AN ECONOMIC ANALYSIS*

OF THE DESIRABLE SCOPE OF GOVERNMENT 176-184, 196-209 (1970); COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS (Steven G. Medema ed., 1998).

8. Bromley, *supra* note 7; Tullock, *supra* note 7, at 176-184; Posner, *supra* note 6, at 33-34 (using wildlife as an example); Elinor Ostrom, *Property Rights Regimes and Common Goods: A Complex Link*, in *COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE* 29-57 (Adrienne Héritier ed., 2002); JONATHAN M. HARRIS, *ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS: A CONTEMPORARY APPROACH* (2002); IAN R. WILLS, *ECONOMICS AND THE ENVIRONMENT: A SIGNALING AND INCENTIVES APPROACH* (1997).

9. Neoclassical theory suggests that regulatory mechanisms are inevitably less efficient and less effective than markets, because they involve creating a costly bureaucracy to try to do what markets already do tolerably well without a bureaucracy: gather information about products and deprive cheaters of their business. Regulation adds additional costly steps to regulated transactions. Tullock, *supra* note 7, at 68; Coase, *supra* note 7; Ronald H. Coase, *The New Institutional Economics*, 88 AMERICAN ECON. REVIEW 72-74 (1998); *The Economics of Transaction Costs* (Oliver E. Williamson & Scott E. Masten eds., 1999); YORAM BARZEL, *PRODUCTIVITY CHANGE, PUBLIC GOODS, AND TRANSACTION COSTS: ESSAYS AT THE BOUNDARIES OF MICROECONOMICS* (1995); see also Russel L. Barsh, *The Red Man in the American Wonderland*, 11 Human Rights 14-17, 36-44 (Winter 1984) (transaction cost analysis of Indian Affairs regulation).

price of property by restricting its use. In certain instances this may create a secondary market for the regulated environmental attributes. For example, the owners of a Superfund site can only realistically sell their property to an entity that is in the business of decontamination, for which federal law also provides direct subsidies. As a general principle, however, regulatory mechanisms do not harness markets.

The search for an alternative paradigm of environmental law has largely focused on two kinds of “market corrections”: (1) market mechanisms that internalize externalities so that they become supply-constrained, such as transferable fishing area quotas (TAQs), transferable pollution rights, or green certification or labeling; and (2) simulating supply-side constraints through taxes on the consumption of resources.¹⁰ Both of these approaches invite criticism under Kenneth Arrow’s theorem that market corrections always cost more than the market failures they address, because they involve additional administrative and en-

forcement costs (“transaction costs”).¹¹ They also run the risk of violating multilateral open market treaties administered by the World Trade Organization and regional bodies such as NAFTA, if they create any preferential effects for domestic producers.¹²

Market correction mechanisms draw upon a particular ethos of human rationality that is historically Western but has long been advanced as universal psychological truth.¹³ The ethos of materialism asserts that humans are motivated, above all, to amass material wealth. To achieve this, they must control the means of producing material, which have changed over the centuries from land (agrarianism); to financial capital and mechanical technology (industrialization); to financial options and control of information (the post-industrial “weightless” economy). Being inherently selfish, humans will not part freely with their accumulated material wealth (means of production as well as products). The state must therefore counteract selfishness through the exercise of centralized, coercive power, as Hobbes

10. Coase, *supra* note 7; Russel L. Barsh, *A Social Theory of Fair Trade, with Special Reference to Indigenous Peoples*, in *PROCEEDINGS OF THE 96TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 279, 282-84 (2002).

11. Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 *Journal of Political Econ.* 328-346 (1950) (The original statement of Arrow’s “Impossibility Theorem”); *see sources cited supra* note 10; Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Nonmarket Allocation*, in *WELFARE ECONOMICS* 389, 389-403 (William J. Baumol & Charles A. Wilson eds., 2001); MANUEL F. COHEN & GEORGE J. STIGLER, *CAN REGULATORY AGENCIES PROTECT CONSUMERS?* 6 (1971); *The Essence of Stigler* 243-264 (Kurt R. Leube & Thomas Gale Moore eds., 1986); ALFRED F. MACKEY, *ARROW’S THEOREM: THE PARADOX OF SOCIAL CHOICE: A CASE STUDY IN THE PHILOSOPHY OF ECONOMICS* (1980)

12. Especially under the Subsidies and Countervailing Measures (SCM) Agreement, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* (Geneva: GATT, 1994), interpreted broadly by

the World Trade Organization in *Brazil—Export Financing Program for Aircraft*, WT/DS70/AB/R (Aug. 2, 1999), paragraphs 7.13 and 156, to prohibit any government action or rule that confers an advantage on domestic exporters. The U.S. has applied the same broad principles to NAFTA disputes with Canada. *See, e.g.*, *Live Swine from Canada: Preliminary Results of Countervailing Duty Administrative Review*, 61 *Fed. Reg.* 52,426 (Oct. 7, 1996); *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 *Fed. Reg.* 15,545 (Apr. 2, 2002).

13. THOMAS HOBBS, *LEVIATHAN* 151 (C.B. MacPherson ed., Penguin Books 1968) (1651) (“The Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power.”); *see also* Gordon Tullock, *supra* note 7, at 33; Fernand Braudel, *THE PERSPECTIVE OF THE WORLD: CIVILIZATION AND CAPITALISM, 15TH TO 18TH CENTURY* 623-625 (Siân Reynolds trans., 1984) (capitalism as a culture).

argued so influentially in *Leviathan*.¹⁴ States may nonetheless differ in matters of policy, giving greater or lesser freedom to individuals' pursuit of material wealth.

For centuries, great philosophical divisions within the West have played out within this shared paradigm. Early liberals such as Locke and Rousseau conceded the necessity of coercive power while insisting that power must be legitimately constituted by collective consent, or contract, while conservative monarchists dismissed the original source of a prince's power as irrelevant.¹⁵ Mercantilists and early capitalists argued that the state was intruding too much in private economic decisions, thereby stifling trade and innovation.¹⁶ On the other hand, communists reacted to the excesses of early nineteenth century industrialization by arguing that the only way to manage human selfishness is complete state ownership of the means of production.¹⁷ Today, North American Republicans, Democrats, and (in Canada) Liberals and Conservatives continue to argue about the use of state power, but they share the assumption that human beings are selfish materialists who gener-

ally must be forced to do any good for others—even for their own children.¹⁸

It may be argued that Western materialist psychology reproduces itself through the globalization of Western military and economic power. When one party holds most of the cards, everyone learns to play by that party's rules, lest they be excluded from the game. People do not fail because they are inherently defective (the argument of "social Darwinism") but rather because they try to play a different game. The strong make the rules, and for the rest, it is a test of survival of the best imitators.¹⁹

The Western materialist paradigm is contested (albeit weakly) within the West by the more extreme Judeo-Christian religious tendencies, and it is challenged globally by non-Western religions and by the worldviews of tribal,²⁰ segmentary,²¹ or "stateless" societies that either lack centralized power or eschew its exercise. At the level of the international community represented by the United Nations, it is easy to find expressions of spirituality and environmentalism; one such example may be found

14. HOBBS, *supra* note 13, at 364-368; *see also* IMMANUEL WALLERSTEIN, *THE MODERN WORLD SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY 144-145* (1974); FERNAND BRAUDEL, *CAPITALISM AND MATERIAL LIFE, 1400-1800 444-445* (Miriam Kochan trans., 1973).

15. Social Contract Theory (Michael Lessnoff ed., 1990); *Social Contract: Essays by Locke, Hume, and Rousseau* (Ernest Barker ed., 1948).

16. Jacob Viner, *English Theories of Foreign Trade Before Adam Smith*, 38 *JOURNAL OF POLITICAL ECON.* 404, 432-436 (1930).

17. VLADIMIR I. LENIN, *THE STATE AND REVOLUTION 84* (International Publishers 1943) (1917) ("The whole of society will have become one office and one factory, with equal work and equal pay.").

18. ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS 152-153* (1975); Vine Deloria, Jr., *Circling the Same Old Rock*, in *MARXISM AND NATIVE AMERICANS 113-136* (Ward Churchill ed., 1983). An exception could be claimed for the

recent emergence of the "faith-based" paradigm in U.S. politics, which draws upon Judeo-Christian spiritual traditions of personal sacrifice and service. However, it is premature to conclude that the trend towards deregulation and redistribution of tax burdens in Congress is driven by confidence in human kindness, or (more likely) a more selfish desire to protect the purses of the more fortunate amongst us.

19. SIR RABINDRANATH TAGORE, *NATIONALISM 38-39* (1917).

20. Tribal societies are organized around kinship rather than residence or citizenship. *See* *ESSAYS ON THE PROBLEM OF TRIBE* (June Helm ed., 1968); JOHN H. MOORE, *THE CHEYENNE NATION: A SOCIAL AND DEMOGRAPHIC HISTORY 7-14* (1987).

21. Segmentary societies are comprised of many small autonomous groups such as clans or villages. *See* JOMO KENYATTA, *FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU 179-189* (1965) (describing the Kikuyu government).

in the river of official documents emanating from the 1992 United Nations Conference on Environment and Development²² and its institutional offspring. Yet Member States continue to employ the same materialistic concepts and tools to protect the environment—if they protect it at all—regardless of their expressed cultural and religious differences. A critical observer may well ask whether there is any genuine, alternative approach to development that goes beyond mere words.

This essay is not an original ethnography of a traditional legal system,²³ but it is instead an effort to synthesize the essential principles and reasoning of a non-Western system of property law for comparison with the underlying spirit of our Western legal in-

heritance. It draws chiefly on the work of three scholars who conducted fieldwork among the major Coast Salish peoples living in the Salish Sea in the early to mid-twentieth century: Ernst Haeberlin, who worked with Lushootseed-speaking peoples of the South and Central Sound in the 1910s;²⁴ Sally Snyder, who worked in the Central and North Sound with Lushootseed and Straits-speaking peoples in the 1950s;²⁵ and Wayne Suttles, who worked in the North Sound, Vancouver Island and Georgia Strait with both Straits and Halkomelem-speaking peoples from the 1940s to his death in 2005.²⁶ It also draws upon previous critical studies of Western law²⁷ and comparisons of Native American and Western legal paradigms.²⁸

22. RANEE K.L. PANIABI, *THE EARTH SUMMIT AT RIO: POLITICS, ECONOMICS, AND THE ENVIRONMENT* 19-21, 76-81 (1997). See also *id.* at 317-322 (reproducing the “Principles on Environment and Development” adopted by United Nations Member States at the Earth Summit).

23. See, e.g., KARL N. LLEWELLYN & EDWARD ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN CRIMINAL JURISPRUDENCE* (1941); LEOPOLD J. POSPISIL, *KAPAUKU PAPUANS AND THEIR LAW* (1958); STUART A. SCHLEGEL, *TIRURAY JUSTICE; TRADITIONAL TIRURAY LAW AND MORALITY* (1970).

24. Haeberlin’s original field notebooks have been preserved at the National Anthropological Archives, National Museum of Natural History, Smithsonian Institution, Washington DC [hereinafter Haeberlin notes]. Each notebook is numbered and paginated.

25. Snyder’s field notes and transcripts have been preserved in the Melville Jacobs Collection, University of Washington Libraries, Seattle [hereinafter Snyder notes]; scholarly access is restricted. Notes are arranged by box and folder (e.g., 108(2) is box 108, folder 2) and are paginated. Snyder’s only work drawing on this rich body of original material was her doctoral dissertation at the University of Washington. Sally Snyder, *Skagit Society and its Existential Basis: A Folkloristic Reconstruction* (1964) (unpublished Ph.D. dissertation, University of Washing-

ton), *microformed on UMI Microfilm No. 61-1905.*

26. Wayne Suttles, *The Economic Life of the Coast Salish of Haro and Rosario Straits* (unpublished Ph.D. dissertation, University of Washington, 1951) in 1 *AMERICAN INDIAN ETHNOHISTORY: COAST SALISH INDIANS* 41 (1974) [hereinafter Suttles, *Economic Life*]; Wayne Suttles, *Central Coast Salish*, in 7 *HANDBOOK OF NORTH AMERICAN INDIANS: NORTHWEST COAST* 453-475 (William C. Sturtevant ed., 1990) (overview of the cultures of Puget Sound) [hereinafter Suttles, *Central Coast Salish*]. Other important Coast Salish ethnographies have been published as well, although none explore customary law to the extent that Suttles did. See generally JUNE McCORMICK COLLINS, *VALLEY OF THE SPIRITS: THE UPPER SKAGIT INDIANS OF WESTERN WASHINGTON* (1974); WILLIAM W. ELMENDORF, *THE STRUCTURE OF TWANA CULTURE* (1960); BERNARD J. STERN, *THE LUMMI INDIANS OF NORTHWEST WASHINGTON* (1934).

27. See, e.g., Russel L. Barsh & James Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 *LAW & CONTEMPORARY PROBLEMS* 25 (1976).

28. See, e.g., Russel L. Barsh, *The Nature and Spirit of North American Political Systems*, 10 *Am. Indian Q.* 181 (1986); Russel L. Barsh, *Navajo Tribal Courts, Property and Probate Law, 1940-1972*, 6 *LAW & ANTHROPOLOGY: INTERNATIONALES JAHRBUCH FÜR RECHTSANTHROPOLOGIE* 169 (1991).

I. THE COAST SALISH WORLD

A. Biophysical setting

The Salish Sea is a network of drowned valleys or troughs between two relatively young mountain ranges, the Cascades and the Olympics. During the last glaciation of the Northwest region, the Vashon stade (ca. 15,000-12,000 Before Present (“BP”)),²⁹ a mile of ice covered most of what today is the Salish Sea.³⁰ The weight of the ice sheet depressed the earth’s crust by as much as several hundred feet relative to its pre-glacial contours. As the ice melted, the crust rebounded at a decelerating rate. The land continues to rise slowly. Combined with the dynamic plate tectonics and volcanism of the Pacific Rim as a whole, isostatic crustal rebound contributes to a highly dynamic physical environment in the Salish Sea, in which bays, beaches, rivers, and islands appear and disappear over the centuries—sometimes, in the case of a major earthquake or a tsunami, within minutes.³¹ Climate oscillation is an additional dynamic force, whether it is operating at a decadal

scale (e.g., the El Niño Southern Oscillation) or over several centuries (warming and cooling trends generally accompanied by changes in precipitation and sea level).³²

Glacial scouring and early postglacial floods probably obliterated any evidence of pre-glacial human activity in the Salish Sea. The earliest documented human occupations of the area are roughly 9,000 BP.³³ The biophysical world of these postglacial ancestors of the Coast Salish was very different from the present-day Salish Sea landscape. Climate continued to grow warmer and drier as the land re-emerged from the ice and then from the sea. Mosses and lichens gave way to herbaceous meadows, and eventually gave way to deciduous forests dominated by oak and maple trees.³⁴ Cedar and other familiar Pacific Northwest conifers were relatively late arrivals, appearing only after the shift to cooler and wetter conditions about 4,000 BP.³⁵ The early postglacial landscape resembled today’s central California coast, and archaeological evidence suggests that early postglacial inhabitants of the Salish Sea relied heavily on

29. Biologists and geologists reference age using the terms “Kya” (thousands of years ago) and “Mya” (millions of years ago) while archaeologists generally use the abbreviation BP (“before present”). The archaeological reference system is adopted here.

30. ROBERT BURNS, *THE SHAPE AND FORM OF PUGET SOUND* 39-44 (1985); ARTHUR R. KRUCKENBERG, *THE NATURAL HISTORY OF PUGET SOUND COUNTRY* 20-23 (1991); THOMAS A. TERICH, *LIVING WITH THE SHORE OF PUGET SOUND AND THE GEORGIA STRAIT* 3, 6-9 (1987); JOHN DOWNING, *THE COAST OF PUGET SOUND: ITS PROCESSES AND DEVELOPMENT* 2-4 (1983).

31. Kruckenberg, *supra* note 30, at 18-19; Downing, *supra* note 30, at 4-5; Terich, *supra* note 30, at 8.

32. On climate oscillations, see Vaclav Smil, *THE EARTH’S BIOSPHERE: EVOLUTION, DYNAMIC, AND CHANGE* 251-256 (2002). On sea level rise, see *id.* at 128; Downing, *supra* note 30, at 4-5; Terich, *supra* note 30, at 9-10.

33. Compare JULIE K. STEIN, *EXPLORING COAST SALISH PREHISTORY; THE ARCHAEOLOGY OF SAN JUAN ISLAND* 16-19 (2000) [hereinafter STEIN, *COAST SALISH PREHISTORY*], JULIE

K. STEIN & LAURA S. PHILLIPS, *VASHON ISLAND ARCHAEOLOGY; A VIEW FROM BURTON ACRES SHELL MIDDEN* (2002), and DALE R. CROES, *THE HOKO RIVER ARCHAEOLOGICAL SITE COMPLEX* (1995) with ALAN D. McMILLAN, *SINCE THE TIME OF THE TRANSFORMERS: THE ANCIENT HERITAGE OF THE NUU-CHAH-NULTH, DITIDAHT, AND MAKAH 109-130* (1999) (discussing the Nootkan speaking Coastal peoples immediately to the west of the Salish Sea).

34. Frequent fires favor deciduous trees and herbaceous meadows in the Northwest, while fire suppression tends to produce oligarchic coniferous forests. Jennifer S. Turner & Pamela G. Krannitz, *Conifer Density Increases in Semi-Desert Habitats of British Columbia in the Absence of Fire*, 75(2) *Nw. Sci.* 176-182 (2001); DONALD W. SPURBECK & DAVID S. KEENUM, *WENATCHEE FORESTRY SCI. LAB, FIRE HISTORY ANALYSIS FROM FIRE SCARS COLLECTED AT ICEBERG POINT AND POINT COLVILLE ON LOPEZ ISLAND, WASHINGTON STATE* (2003); see generally JAMES K. AGEY, *FIRE ECOLOGY OF PACIFIC NORTHWEST FORESTS* (1993); JERRY F. FRANKLIN & C. T. DYRNNESS, *NATURAL VEGETATION OF OREGON AND WASHINGTON* (rev. ed., Oregon State University Press 1988) (1973).

35. STEIN, *COAST SALISH PREHISTORY*, *supra* note 33, at 21.

hunting terrestrial and marine mammals.³⁶ It is likely that they also took advantage of naturally abundant food plants, gathering acorns in the growing oak forests (like more recent California Indians) and digging up the starchy bulbs of flowering meadow plants such as camas.³⁷

Several factors caused profound changes in the human ecology of the Salish Sea of 5,000 BP. As the climate grew cooler and wetter, conifers began to invade oak forests and meadows, threatening the supply of wild plant foods.³⁸ Salmon, which cannot tolerate warm water, proliferated rapidly, colonizing a growing number of rivers and streams.³⁹ Cooler conditions also stabilized the polar ice sheet and cordilleran glaciers, slowing the rise of sea levels and

helping to stabilize shorelines and beaches.⁴⁰ The expansion of coniferous forests probably reduced the supply of terrestrial mammals and changed the distribution of food plants for the ancestors of Coast Salish peoples, while the cooling of rivers and stabilization of shorelines made the sea more productive of relatively accessible fish and shellfish.⁴¹ Between 4,000 and 2,500 BP, there is archaeological evidence of intensified use of marine resources, as well as the development of cedar carpentry.⁴² There is also evidence of increasing long distance trade, suggesting the growth of permanent villages and of strong socioeconomic ties between villages.⁴³

Two, possibly three, new technologies facilitated the growth of population, large

36. *Id.* at 21; Roy L. Carlson, *Cultural Antecedents*, in *HANDBOOK OF NORTH AMERICAN INDIANS: NORTHWEST COAST* 60, 65 (William C. Sturtevant ed., 1990).

37. Salish Sea peoples used two species of camas, *Camassia quamash* ("blue" or "common" camas) and *Camassia leichtlinii* ("great" camas), as well as tiger lily, chocolate lily, brodiaea, bracken fern, and many other members of meadow communities that have grown scarcer since the introduction of livestock and European grasses in the nineteenth century. NANCY J. TURNER & HARRIET V. KUHNLEIN, *TRADITIONAL PLANT FOODS OF CANADIAN INDIGENOUS PEOPLES: NUTRITION, BOTANY, AND USE* (1991); Sandra L. Peacock & Nancy J. Turner, "Just Like a Garden" *Traditional Resource Management and Biodiversity Conservation on the Interior Plateau of British Columbia*, in *BIODIVERSITY AND NATIVE AMERICA* (Paul E. Minnis & Wayne J. Elisens eds., 2000); Nancy J. Turner & Sandra Peacock, *Solving the Perennial Paradox: Ethnobotanical Evidence for Plant Resources Management on the Northwest Coast*, in *KEEPING IT LIVING: TRADITIONS OF PLANT USE AND CULTIVATION ON THE NORTHWEST COAST OF NORTH AMERICA* 101-150 (Douglas Deur & Nancy J. Turner eds., 2005) (hereinafter *KEEPING IT LIVING*); Wayne Suttles, *Coast Salish Resource Management: Incipient Agriculture?*, in *KEEPING IT LIVING*, *supra*, at 181-193.

38. Kenneth M. Ames, *Intensification of Food Production on the Northwest Coast and Elsewhere*, in *KEEPING IT LIVING*, *supra* note 38, at 67-100; Kruckenberg, *supra* note 30, at 24-25.

39. Eric B. Taylor, Chris J. Foote & Chris C. Wood, *Molecular Genetic Evidence for Parallel Life-history Evolution within a Pacific Salmon (Sockeye Salmon and Kokanee,*

Oncorhynchus nerka), 50 *Evolution* 401, 401-416 (1996); see also Bruce. P. Finney, Irene Gregory-Eaves, Jon. Sweetman, Marianne S. V. Douglas, & John P. Smol, *Impacts of Climatic Change and Fishing on Pacific Salmon Abundance Over the Past 300 Years*, 290 *SCIENCE* 795 (2000) (attempting to tease apart the climate and human effects on salmon in Alaska, not in Puget Sound).

40. See *supra* note 30.

41. See *supra* note 36.

42. STEIN, *COAST SALISH PREHISTORY*, *supra* note 33, at 17-20; but see Aubrey Cannon, *Assessing Variability in Northwest Coast Salmon and Herring Fisheries: Bucket-auger Sampling of Shell Midden Sites on the Central Coast of British Columbia*, 27 *J. ARCHAEOLOGICAL SCI.* 725 (2000) (providing evidence of continued diversity of subsistence regimes in the region).

43. My interpretation of the archaeological record is somewhat different than proposed by my colleague Dana Lepofsky. See Dana Lepofsky, *Biocomplexity, Ecological Resilience, and Culture Change* (February 16, 2004) (unpublished paper presented at the American Association for the Advancement of Science 2004 Annual Meetings, on file with author). Lepofsky views the emergence of a regional network of villages as response to climate-induced stress, *id.*, while I think it more likely involved taking advantage of new forms of abundance that resulted from the change in climate regime. We nevertheless both agree with Trosper, *supra* note 2, that there was little fundamental change in Coast Salish environmental relationships from 2,500 to 250 BP.

settlements, and extensive trade ties: large scale fishing operations; food and plant cultivation; and, possibly, clam harvesting. Salmon follow distinct migration paths, making it possible to harvest very large numbers of salmon with relatively little effort by placing a substantial barricade of some kind in their way, such as a trap or weir.⁴⁴ Building such a structure depended on mobilizing a considerable amount of labor. Locating, installing, and operating it successfully demanded specialized individual expertise, particularly in the case of the Northern Straits Salish (San Juan and Gulf Islands) reef-net.⁴⁵ Reef-nets were (and still are) set in deep nearshore rip channels, where the movements of the fish are predictably guided by currents and tides.⁴⁶ Until the twentieth century, the large nets were woven of cedar and nettle twine, which was a laborious task but yielded a durable product.⁴⁷

44. Compare Russel L. Barsh, *The Economics of a Traditional Coastal Indian Salmon Fishery*, 41 HUMAN ORGANIZATION 171 (1982) with Ashahitaro Nishimura, *Cultural and Social Change in the Ownership of Stone Tidal Weirs*, in MARITIME ADAPTIONS OF THE PACIFIC 77-88 (Richard W. Casteel & George I. Quimby eds., 1975) (Japanese customary use of weirs and customary fishing rights).

45. Suttles, *Economic Life*, *supra* note 26, at 152-180; DANIEL BOXBERGER, TO FISH IN COMMON: THE ETHNOHISTORY OF LUMMI INDIAN SALMON FISHING 14-18 (Univ. of Washington Press 1999) (1989); Russel L. Barsh, Northern Straits Salish reef netting as habitat enhancement: Human coupling of upland and aquatic ecosystems in the Salish Sea (February 16, 2004) (unpublished paper presented at the American Association for the Advancement of Science 2004 Annual Meetings, on file with author).

46. Interview with Cleve Vandersluys, in Friday Harbor, WA (Jan. 28, 2004,) (Vandersluys set reef-net anchors for the fleet in the 1940s-1950s); interview with Malcolm Lee, in Shaw Island, WA (Aug. 12, 2002) (Lee was a highly successful "watcher" on reef-net boats for 18 years). Unlike river traps and weirs, which take advantage of the confinement of migrating salmon by the banks of the stream, reef netting takes advantage of the fact that migrating salmon follow invisible underwater currents.

47. Suttles, *Economic Life*, *supra* note 26, at 234-237.

48. Richard Rathbun, "Fraser River & Puget Sound, 1895; Interviews & Field Notes; Investigation by Joint

Samish Indian reef-net fishermen interviewed in 1895 reported landing up to several thousand sockeye salmon on each turn of the tide.⁴⁸ Once cleaned, split, and dried in the summer sun, such abundance could last the winter and be traded widely without spoiling. Hence, the florescence of Coast Salish culture can be attributed at least in part to industrial-scale fishing technology.

The second new technology was cultivation; strictly speaking, a system of shifting horticulture⁴⁹ using fire, weeding, and hoeing to promote the growth of food plants. As conifer forests engulfed oak forests and meadows, Coast Salish people learned to set clearing fires that killed conifer seedlings, suppressed the growth of undesirable grasses and herbs, and recycled nutrients.⁵⁰ Frequent burning would have

Fishery Commission." NARA Record Group 22, Entry 44: "Records of the Joint Committee Relative to the Preservation of the Fisheries in Waters Contiguous to Canada and the United States, 1893-95," Boxes 22-23 (four bound volumes of typed transcripts of interviews with Dick Edwards and Joseph Cagey).

49. Horticulture refers to gardening that packs a diversity of useful plants into a very small space, rather than growing a single crop (a "monoculture") over a very large area. Agriculture is land-intensive and when mechanized, energy intensive, while horticulture is relatively labor-intensive. Roy A. Rappaport, *The Flow of Energy in an Agricultural Society*, 225 Sci. Am. 117, 117-132 (September 1971).

50. On the instrumental use of fire to alter Northwest forest ecosystems, see generally ROBERT BOYD, INDIANS, FIRE, AND THE LAND IN THE PACIFIC NORTHWEST (1999). For the archaeology of Coast Salish burning, see Dana Lepofsky, Emily K. Heyerdahl, Ken Lertzman, Dave Schaepe & Bob Mierendorf, *Historical Meadow Dynamics in Southwest British Columbia: A Multidisciplinary Analysis*, 7(3) CONSERVATION ECOLOGY 5 (2003), available at <http://www.consecol.org/vol7/iss3/art5> (last visited Sep. 26, 2005); Dana Lepofsky, Douglas Hallett, Ken Lertzman, Rolf Mathewes, Albert (Sonny) McHalsie, & Kevin Washbrook, *Documenting Precontact Plant Management on the Northwest Coast; An Example of Prescribed Burning in the Central and Upper Fraser Valley, British Columbia*, in KEEPING IT LIVING, *supra* note 37, at 218-239. For a broader geographical perspective, see FIRE, NATIVE PEOPLES, AND THE NATURAL LANDSCAPE (Thomas R. Vale ed. 2002).

maintained oak savanna, parkland maple forests, and open meadowlands, thereby promoting deer and elk habitat as well as space for gardens.⁵¹ Camas dries and stores at least as well as potatoes; once roasted and caramelized, it can be stored even longer.⁵² Recent research indicates that annual hoeing and periodic burning would have increased yields significantly and supported large-scale camas production.⁵³ Coast Salish camas gardens were observed and described in the nineteenth century, but it is not clear how intensely cultivated and extensive they were.⁵⁴ In any event, camas could be produced on a very large scale provided that there was sufficient local expertise (burning) and adequate peak-season labor (hoeing, weeding, harvesting).

Investigations of a possible third technological innovation have only just begun. Clam harvesting, drying, and trade on a large scale was reported by early explorers and practiced well into the twentieth century.⁵⁵ Kwakiutl people built long rock jetties to protect and enlarge their clam beaches on the Broughton Archipelago, located at the

northern limit of the Salish Sea.⁵⁶ Whether Coast Salish people also constructed “clam gardens” is not known, but it seems plausible, if only because northern Coast Salish villages were in direct contact with Kwakiutl and harvested clams in large quantities from similar habitats.⁵⁷ Assuming that clam gardens were more widespread in the Salish Sea, they also represent a means of greatly increasing production by combining technical expertise (design and alignment of rock jetties) with the ability to meet high labor demands (construction, hoeing, harvesting).

Fixed gear fisheries, camas cultivation, and clam gardens share a third important characteristic: all benefit from consistent supervision or control of specific sites on the land or in the sea, or in other words, something akin to ownership.

B. The Social Universe⁵⁸

The Coast Salish world was an ocean of actual and potential relatives. One term, *s'yáʔyaʔ* [L] “relative or friend” (compare *cəx^w s'yáʔyaʔ* [L] “in-law”)⁵⁹ can apply to everyone that has a social connection of

51. See sources cited *supra* at note 50.

52. Suttles, *supra* note 37.

53. Brenda R. Beckwith, *The Queen Root of this Clime: Ethnoecological Investigations of Blue Camas (Camassia leichtlinii (Baker) Wats., C. quamash (Pursh) Greene; Liliaceae) and its Landscapes on Southern Vancouver Island, British Columbia (2004)* (unpublished Ph.D. dissertation, University of Victoria) (on file with the University of Victoria).

54. Sally Snyder collected evidence of transplanting camas from mossy “balds” (rock outcrops) in the islands to gardens close to settlements. Snyder notes, *supra* note 25, at 108(2): 90, 109(2): 55, 109(3): 92.

55. Suttles, *Economic Life*, *supra* note 26, at 65-69; William R. Belcher, *The Ethnohistory and Archaeology of Shellfish Utilization in Puget Sound*, 32 NORTHWEST ANTHROPOLOGICAL RESEARCH NOTES 133 (1998).

56. John Harper, President, Coastal and Ocean Resources, Inc., Presentation at the Center for Earth and

Ocean Research, University of Victoria, *Clam Gardens of the Broughton Archipelago: A Case for Pre-contact, Large-scale Mariculture in Queen Charlotte Strait* (Dec. 14, 2005). Douglas Deur has also reported the use of rock jetties by Kwakiutl to create wetland gardens for the production of food and medicinal plants. See Douglas Deur, *Tending the Garden, Making the Soil: Northwest Coast Estuarine Gardens as Engineered Environments*, in *KEEPING IT LIVING*, *supra* note 38, at 296-327.

57. See Suttles, *Economic Life*, *supra* note 26, at 65-69. The author has surveyed parts of the San Juan Islands for clam gardens at the suggestion of John Harper, thus far unsuccessfully.

58. Unless otherwise stated, the “ethnographic present” here is the nineteenth century Coast Salish world described to observers 50-150 years ago. The spirit behind these practices persists today, to a greater extent than the practices themselves.

59. When Coast Salish terms are introduced, they are followed by [L] for Lushootseed and [S] for

some kind with the speaker. The fundamental ethos of social life was accumulating more friends and socializing with more of the universe around us.⁶⁰ Friends were made by: marriage; initiation into the “smokehouse”⁶¹ together; business partnerships, such as joint ownership of a fishing site or trade brokerage;⁶² the giving of a name; and, alliances between families forged in the feast hall. Coast Salish kinship was broad, inclusive, gender-blind, and unconcerned with biological descent, unlike Western kinship with its historical emphasis on patrilineal ancestry and inheritance, and its more recent focus on the nuclear family.⁶³ Coast Salish kinship may seem paradoxical. People went to extraordinary lengths at social gatherings to recount, explain, compare, and sometimes debate their individual ancestries,⁶⁴ which in the end demonstrated that they were *all* re-

lated. The question in Coast Salish law was generally not *whether* two people are related, but the quality or strength of their connections to a particular ancestor. This may determine which of them had a better claim (**st’áyəd** [L]) to something of value.

The Coast Salish social world extended beyond humans to other visible, as well as invisible, beings. People formed relationships with (visible) animals such as dogs, which were often given names and lived in human houses.⁶⁵ They also formed relationships with powerful “wild” animals such as killer whales, cougars and wolves, which were also sometimes raised at home as evidence of a person’s power.⁶⁶ Invisible beings included: the spirits of all the humans and animals that had lived before (**skáyu** [L] “ghosts”); beings that could confer gifts of

Northern Straits. These adjacent Coast Salish languages are mutually unintelligible; however, there are cognates in all Coast Salish languages. See LUSHOOTSEED DICTIONARY (Dawn Bates, Thomas Hess, & Vi Hilbert eds., rev. ed. 1994) (Coast Salish language of South-Central Puget Sound). There currently is no comparable work on Straits Salish, although the first comprehensive work on the Halkomelem language of the lower Fraser River and southern Vancouver Island is in press. WAYNE SUTTLES, MUSQUEAM REFERENCE GRAMMAR (forthcoming 2006).

60. SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 20.

61. On the smokehouse religion and its significance in Coast Salish cultural life see PAMELA AMOSS, COAST SALISH SPIRIT DANCING: THE SURVIVAL OF AN ANCESTRAL RELIGION (1978); Russel L. Barsh, *Banishing the Spirits: Indian Agents and the Pacific Northwest Winter Dance Religion*, 39 *Journal of the West* 54 (2000).

62. As Snyder relates,

Two men customarily handled exchange of food for their ‘relatives.’ The Upper Skagit man was **daxa’Ixəd** who lived in the village of **s-ba’lixw** near Concrete on Lake Shannon at the present Baker River. The Lower Skagit was **keke’dlb** at **bza’zale** who handled negotiation to upriver for the people of Penn Cove. If a person had 50 strings of clams he wished to trade he contacted **keke’dlb** to make the transaction with **daxa’Ixəd** for some commodity of his people. Upriver people wanted dried clams and downriver

people wanted dried meat. The Swinomish never journeyed upriver farther than Mount Vernon since they could not handle shovel-nose canoes, and the river was much swifter then.

Snyder notes, *supra* note 25, at 108(5): 8 (Interview with Amelia Dan).

63. FERNAND BRAUDEL, AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM 68-71 (Patricia M. Raynum trans., 1977); Elsie Clews Parsons, *The Family* 327-336 (1906). No less a figure than Alexis de Tocqueville recognized the relationship between inheritance laws, family structure, and the emergence of capitalism and liberal democracy in Western society. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 51-54 (J.P. Mayer ed., George Lawrence trans., 1969).

64. In this respect, Coast Salish kinship is not strictly genealogical. Social ties (where a person was born, who raised them, whom they treat as their parents or siblings) are important, while evidence of maternity and paternity in the biological sense are rarely considered. This makes it very difficult to convert a Coast Salish family history into a conventional “family tree,” posing difficulties for groups trying to prove they are “Indian” to the satisfaction of federal bureaucrats. Russel L. Barsh, *Political Recognition: An Assessment of American Practice*, in WHO ARE CANADA’S ABORIGINAL PEOPLES? RECOGNITION, DEFINITION, AND JURISDICTION 230-257 (Paul L.A.H. Chartrand ed. 2002).

65. Suttles, *Economic Life*, *supra* note 26, at 102-105.

66. E.g., ELMENDORF, *supra* note 26, at 114-115.

power (**sqəlálitut** [L]); and, beings that were terrifying or dangerous (**sáálqəb** [L] or **sá'əbqəm** [S]). Relationships with non-humans, whether or not they were visible, tended to be personal and did not extend to the person's human relatives and friends in any functional way. There was at least one important exception: certain non-human beings were regarded as patrons of entire villages.⁶⁷ Thus everyone from the Snohomish village near the present-day city of Everett was associated with the killer whale, and everyone from the Snohomish village at Priest Point was associated with moss.⁶⁸

Before Coast Salish people built European style frame houses and lived in towns or reserves (a change that took place gradually between the 1850s and 1910s), the basic units of society were the house (**é'łəŋ** [S]) or **ʔálʔal** [L]), and the household (**ámət** [S] or **álʔtx^w** [L] "room").⁶⁹ The house was a large post-and-beam structure that operated like a condominium.⁷⁰ A considerable labor was required to cut, shape, and peg together the cedar posts that formed the frame. As a result, only influential people with many "friends" could mobilize the labor to raise a house frame, and the builders (often as a partnership) were viewed as the

"owners" of the house.⁷¹ They enjoyed the privileges of carving or painting their personal symbols on the main posts and doorframe, hosting feasts, and counseling the residents.⁷² Up to a hundred family groups ("households") shared the use of a house. Each household was responsible for providing split cedar board to cover their section of the house. Boards were tied to the frame and thus easily moved. A household could freely choose to leave one house for another; they simply took their boards with them. Boards were also moved seasonally for use at temporary camps.⁷³

Neighboring houses often affiliated through marriage ties and trade amongst the owners, forming aggregations (**x^wélŋəx^w** [S]). Each house or cluster of closely affiliated houses was a relatively autonomous city-state, with a year-round population ranging from a few hundred to several thousand.⁷⁴ Affiliated houses shared a reach of a river, a bay or fjord, a group of islands, or even larger and more complex territories. The Snohomish alliance extended from the headwaters of the Snohomish River in the Cascade Mountains to its estuary, across the bay to Whidbey Island, and from there to the opposite shores of Puget Sound on the Olympic Peninsula.

67. Anthropologists use "totem" to refer to the guardian spirit of a kin group such as a lineage or clan, but this term has no Coast Salish equivalent. The term "totem" itself was originally borrowed from *nindódem*, an Chippewa word that refers to the speaker's family and his/her *personal* protecting spirit or guardian. NICHOLAS PERROT, *THE INDIAN TRIBES OF THE UPPER MISSISSIPPI VALLEY AND REGION OF THE GREAT LAKES* 259-260 (Emma Helen Blair trans., 1996). "Chippewa" refers to the same cultural and linguistic group as "Ojibway" or "Anishinabe."

68. Haeberlin notes, *supra* note 24, at 38:22. In the Fijian mountains, where I did fieldwork in 1970, I was a member of a patrilineal clan, the *Emalu*, which was associated with a salamander and the *bua* flower.

69. Suttles, *Economic Life*, *supra* note 26, at 272-274, 494. A household may be compared to a present-day nuclear family. Compare **x^wámət**, a "house section,"

and **k^wátaq** [L], a cattail house mat.

70. Suttles, *Economic Life*, *supra* note 26, at 256-260; Wayne Suttles and Barbara Lane, *Southern Coast Salish*, in *HANDBOOK OF NORTH AMERICAN INDIANS: NORTHWEST COAST* 485-502 (William C. Sturtevant ed., 1990), at 491-492 [hereinafter Suttles & Lane, *Southern Coast Salish*].

71. See *supra* note 70.

72. Haeberlin notes, *supra* note 24, at 28:21. The house as a whole was common property in the sense of a condominium apartment building; however, only the owner carved or painted the symbols of his spirit power on the house posts. *Id.* at 1:13, 37:15.

73. The owner and residents of a house decided whether to accept newcomers; if the house frame had to be extended to accommodate newcomers, all of the residents helped with construction. Snyder notes, *supra* note 25, at 108(2): 44.

74. Coast Salish houses were typically several hun-

House affiliations secured a variety of resources. The Snohomish feast hall near present-day Everett, for example, could draw on exotic animal hides and wool from the mountains, year-round upriver supplies of meat and freshwater fish, and an abundance of shellfish and salmon from salt water. Biologically connected ecosystems were socially connected through house alliances. Through wider networks of kinship and trade, widely separated and diverse ecosystems throughout the Salish Sea and beyond were linked socially as well. Enmeshed in a regional web of social relationships, each Coast Salish household could assert claims to widespread, highly diverse biological resources. Diversification of resource use was arguably an effective response to the biophysical vagaries and “patchiness” of the Salish Sea.⁷⁵ Households responded to annual variations in patch richness by asserting claims to the use and product of patches controlled by “friends.”

Conceptions of personal identity were traditionally anchored in the house of one’s

birth or early childhood. Hence ʔálʔaltəd [L] (“homeland”) is literally “one’s own house,” and an individual will self-identify using the term tulʔál [L], which, like the German *von*, means to come from a particular place.⁷⁶ By contrast, “tribe” is a relatively recent policy instrument of European administration that contradicts the traditional Coast Salish social paradigm.⁷⁷ Anthropologically, a “tribe” is a bounded social unit; there is some genealogical separation between tribes and a number of real or imagined cultural distinctions between their members.⁷⁸ Historically, Coast Salish people were divided by fiat into geographically distinct “tribes” for the purpose of settling them on reservations (U.S.) or “Indian reserves” (Canada).⁷⁹ “Tribal” boundaries crosscut Coast Salish kinship ties and established a different equation between kinship and territory. Under customary law, stronger kinship ties meant a stronger, but never exclusive, claim to territory. Under post-contact U.S. and Canadian “Indian law,” tribal membership not only became lineal and restrictive,⁸⁰ but it also became the

dred feet long, winding along the beach if they could not be rectangular. Surrounding the main residence were outbuildings such as the women’s menstrual house, storage sheds, and smaller homes for lower class people (closer to the water, and hence less protected). A very influential house might grow into a village of several residences and (like the great Snohomish house, héboləb) surrounds itself with čalkw [L], defensive trenches like a medieval European castle. Suttles & Lane, *Southern Coast Salish*, *supra* note 70, at 291-292. For descriptions of particular fortified villages and redoubts, see Snyder notes, *supra* note 25, at 108(10): 36-41 (Skagit fortifications at Snaetlum Point near Coupeville); 108(7): 93 (Nuwhaha fort on Bow Hill); 108(10): 86-87 and 109(3): 79 (Upper Skagit fortified village near present-day Mount Vernon); 109(1): 28-29 (Swinomish palisade on Sullivan Slough).

75. SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 45-63.

76. The root ʔal [L] simply connotes a location in time and space, so it would be reasonable to translate the word for “house,” ʔál ʔal [L], literally “place-place,” as a “real place.” Bates et al., *supra* note 59, at 6.

77. Boxberger, *supra* note 45, at 12; ALEXANDRA HARMON, INDIANS IN THE MAKING; ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 7-8, 204-205, 248 (1998).

78. Morton H. Fried, *On the Concepts of “Tribe” and “Tribal Society,”* in *ESSAYS ON THE PROBLEM OF TRIBE* 3, 11 (June Helm, ed. 1968). A tribe is a kinship group and a cultural group but not necessarily a contiguous geographical unit.

79. Canada used the anthropological term “bands” (connoting a lower level of organization than tribe) until the 1980s, when the term “First Nations” came into wide public use—although the Indian Act still refers to “bands.” See, e.g., R.S.C., c. I-5, § 28 (1985) (Can.).

80. Federal bureaucrats administered tribal membership until the 1930s in the U.S. and the 1980s in Canada. Control of membership has shifted gradually to tribal bureaucrats under the provisions of constitutions and legislation enacted by elected tribal leaders. In both countries, and all but a handful of Indian communities, a person must prove lineal descent from a tribal member, and some minimum

exclusive basis for territorial claims.⁸¹ However, to make matters more confusing, land claim payments have been based on lineal descent regardless of present-day tribal membership,⁸² and treaty rights (such as fishing) are based on the aggregate ancestry of each tribe.⁸³

II. Conception of Humanity and Property

A. Elemental concepts

Core concepts of Coast Salish law are embedded in Coast Salish languages. Four concepts familiar to English speakers are particularly relevant to the present study: wealth; class; ownership; and, cleanliness.

1. “Wealth.” “Wealth” can be rendered as **?iʔáb** [L] or **?iʔém** [S], and it is most often heard in its nominal plural form **siiʔáb** [L] or **siiʔém** [S], a polite form of address at ceremonial gatherings. Popular translations of **siiʔáb** include “high-class people,”

“fine people,” or “noblemen,” but the root **?abs-** is simply a possessive. Therefore, **siiʔáb** are people that possess something. What they possess need not be material, but it also can be intangibles such as intellectual property and spiritual powers. The suffix **-abš** [L], which sounds similar, refers to the people that belong to, or come from, a particular place. Indeed, the “wealth” of **siiʔáb** is conceived in terms of amassing widespread kinship ties rather than amassing material wealth.⁸⁴ Because generosity attracts allies and potential in-laws,⁸⁵ feasts are important as a way of witnessing important transactions and building even greater wealth. Of feasts, elders interviewed 50 years ago explained that “things revolved and then in time they get the things back.”⁸⁶ The recipients of gifts are “under obligation” to reciprocate.⁸⁷ “It is a real debt.”⁸⁸ “Wealth,” then, consists of having many in-laws and debtors.

proportion of “Indian blood” or Indian ancestry. Many tribes and bands also have residence requirements. Barsh, *supra* note 54, at 245-246; Russel L. Barsh, *Who Is “Indigenous?”: A Survey of State Practice*, in *ABORIGINAL RIGHTS LITIGATION* 93, 95-96 (Joseph E. Magnet & Dwight A. Dorey eds., 2003).

81. Both U.S. and Canadian law restrict the right to live on parcels of reserved Indian land to the members of specified tribes or bands. 25 U.S.C. §§ 179-180; Indian Act, R.S.C., c. I-5, §§ 20, 30-31 (1985) (Can.). In the U.S., but not in Canada, parts of territories originally reserved for Indians were subsequently opened to settlement or sale, resulting in a characteristic “checkerboard” of relatively more and less protected tracts of land; and the extent to which the tribe retains jurisdiction over parcels acquired by non-Indians remains hotly contested. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 349-372, 612-632 (1982).

82. Russel L. Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 1, 20 (1982).

83. Russel L. Barsh, *Backfire from Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons*, 4 W. LEGAL HIST. 85, 98-99 (1991). In other words, all members of Tribe A have the right to fish wherever any ancestor of any of the members of Tribe A customarily fished. *Id.* This necessarily leads to overlapping “usual and accustomed fishing grounds,” and breaks down the traditional principle, discussed *infra*, that fish-

ing rights are inherited as family property.

84. “Things” in the sense of personal possessions are **igʷs** [L] or **aʔukʷ** [S].

85. Snyder notes, *supra* note 25, at 109(1): 48 (Interview of Amelia Dan: “good will and alliance[s]”). Generosity is also regarded as proof of spiritual power. *Id.* at 109(2): 51 (Andrew Joe).

86. *Id.* at 108(2): 62 (Alfonso Sampson).

87. *Id.* at 109(1): 48 (Amelia Dan).

88. *Id.* at 109(3): 59 (Tom McLeod). Thus when Dick Edwards’ wife died, his brothers gave him enough money to hold a memorial feast and give a few dollars to each invited guest; the guests eventually helped him raise another \$700 in gifts. *Id.*

The Indians never gave something for nothing. Every time they give something, like if a girl was getting married and took some beaver hides, my beaver hides would be counted and then later if I needed help, the party would return the hides and add more. And going back and forth helping people, you become indebted to them because of the additional payments that they make back to you. It’s just like a revolving fund.

Id. at 58.

Wealthy people traditionally arranged marriages for their children, taking “careful consideration of the possibility of gain from the alliance.”⁸⁹ The family of a particularly desirable woman, on account of her lineage and skills, would condition their approval on a substantial payment.⁹⁰ Many women earned renown in trades such as herbal medicine, basket making and weaving,⁹¹ and payment as a condition of marriage was regarded as compensation for the loss a woman’s contribution to household production. A man with a good name could have expected to marry well, and he might have been offered wives without having to pay for them, just to make him an in-law.⁹² Even people from humble origins could advance socially through marriage, if they acquired a reputation for being skilled, “hard workers.”⁹³ In this regard, Coast Salish society was arguably more oriented toward individual effort and achievement than middle-class European society, which suffered from a precarious balance of power between old landed

aristocracies and new, meritocratic family networks that derived their wealth (like Coast Salish peoples) from production and trade.⁹⁴

2. “Class.” In Coast Salish culture, wealth arose from “class”⁹⁵ because “class” was the source of family ties and of family teachings or “advice.” Family teachings, **ǰǰʔusadad** [L]⁹⁶ or **snəps** [S], included proprietary knowledge of the family’s history, traditions, and genealogy, as well as certain arts and skills that are not shared with outsiders. Low-class people are **sʔqəyíqəlʔ** [L] (“ignorant,” or more literally “know-nothings”) or **áwənə snəps** [S] (“without teachings”). The parents and grandparents were to blame: “They didn’t give their children advice” in the form of family stories.⁹⁷ “Those stories *have* to have a meaning; they’re where advice really comes out. The warning comes right out in those stories, and the other guys who think they know so much don’t bother to evaluate those stories.”⁹⁸ “Unlike the higher-ups,” low-class people “didn’t get an education.”⁹⁹

89. *Id.* at 109(1): 14 (Amelia Dan). Families “arranged marriages into tribes where hunting and fishing was [sic] better than in one’s own territory. . . . Marriages were also arranged with up-river people with practicality in mind, mountain-goat wool being an object in these cases.” *Id.* at 109(1): 2, 17. Families also arranged marriages with neighboring settlements to form a defensive perimeter: their in-laws “took care of trouble” headed their way. *Id.* at 108(2): 53-64. Similarities between upper class marriages in Europe and the Salish Sea were not lost on Coast Salish people; one elder explained to Haeberlin that the “Chief would try to marry his children to chiefs of other tribes (like [the] Kaiser).” Haeberlin notes, *supra* note 24, at 28:11 (Henry Sicade); *see also id.* at 28:32, 30:6-9, 36:25-6.

90. The traditional doctor Little Sam paid 40 blankets, 2 slaves, and a canoe for his wife Annie. *Id.* at 10:8.

91. “That’s why they had so many wives, a different wife in each department.” Snyder notes, *supra* note 25, at 180(2): 34.

92. Haeberlin notes, *supra* note 24, at 35:4.

93. Snyder notes, *supra* note 25, at 108(2): 15 (Joseph Joe).

94. DE TOCQUEVILLE, *supra* note 63, at 51-54; Braudel, *supra* note 63, at 68-71.

95. When Coast Salish people speak of “class,” or of someone being “high-class,” they employ a term such as **aʔkʷ** [L], which refers to a category or group of people.

96. This is derived from **ǰǰǰ** [L] “mind” or conscious thought; compare **ǰǰǰadad** [L] a spell or “mind over matter.” The same root appears in Lushootseed words referring to reasoning and counting.

97. Snyder notes, *supra* note 25, at 108(2): 11-12 (Andrew Joe).

98. Andrew Joe called lower-class people **tuʔlasʔád**, “out of the way people,” which he translated as “low down people,” and added “[t]hey’re lower-grade with ignorance in public.” *Id.* Such people were viewed as idlers and comprised the lowest class of Coast Salish villages. SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 17-23.

99. Snyder notes, *supra* note 25, at 108(2): 16 (Joseph Joe); *see also* JUNE McCORMICK COLLINS, VALLEY OF THE SPIRITS; THE UPPER SKAGIT INDIANS OF WESTERN WASHINGTON 125 (1974).

A family preserved its wealth and status by keeping teachings within the family. “If you know your class of people and tell histories (family trees), you are not supposed to tell anything outside your own line. It is their own secret.”¹⁰⁰ Since claims to share the use of productive property such as fishing sites must be based on kinship, as described in greater detail below, a high-class person was better able to set out a convincing claim than a low-class person because a high-class person knew the stories about his family’s connections with the custodian of the site and how he was related to them. Furthermore, families avoided liaisons with “know-nothings,” thereby isolating low-class households socially and depriving them of marriage ties through which they might gain useful knowledge.¹⁰¹

Coast Salish class was not a caste system, however. A low-class person could always gain social status by demonstrating his or her merit through productivity, which usually involved seeking the patronage of a powerful spirit that could help them gain great wealth and hosting four successive feasts to demonstrate the extent of their earned wealth.¹⁰² Another escape from low-class status was the marriage of an exceptionally skilled young woman into a high-class household.¹⁰³ Coast Salish family teachings included “Cinderella” stories to make the point, like their middle-class European counterparts, that honesty, skill and hard work led to wealth and good marriages for even the

poorest and most unhappy children.

3. “Ownership.” There is no conceptual term in Coast Salish for “ownership” as such. The possessive term **g^wa?** [L] (“one’s own,” as in the phrase **ti ds^wg^wa?**, “it’s mine”) derives simply from **?a?** [L] (“to be”). Thus in Coast Salish discourse, things just “are” connected with certain people; “it’s his canoe” rather than “he owns that canoe.” This may suggest to legal scholars an absence of much concern about property. On the contrary, the basis for asserting “mine-ness” is often expressed in specific ways. For example, the suffix **-uʔ** [L] refers to ancestry, family origins, or inheritance: as in **təstəd uʔ** (“power to run the pole derived from [his] ancestors”) or **sduhúbšuʔ čəd** (“I am of [descended from] the Snohomish people”).¹⁰⁴ Distinctions are also made for the fruits of “work,” **yáyus** [L], and the gifts of **s’qəlálitut** [L], a “dreaming” or spirit power. Property comes to people through different kinds of relationships that are incommensurable. Having a spirit power is fundamentally different than earning property through hard work or acquiring privileges through kinship in terms of derivative rights and responsibilities.

Fishing grounds, shellfish beds, and other productive places are fiercely defended as exclusive property. “Should anyone come in and fish and create any kind of trouble, he would be ordered off the premises,” one elder has explained, “and such persons using the territory would not be

100. Snyder notes, *supra* note 25, at 109(2): 88 (Alfred Edwards).

101. I use the past tense here because class is no longer as salient in Coast Salish society as it was a century ago. Elders I know frequently refer to the low-class background of tribal politicians and bemoan the fact that people today are too ignorant to appreciate the significance of good breeding and traditional advice.

102. As Joseph Joe explained, “to get that spirit to be high-class, and try in this way to bury one side (the low ancestry) of the lowness down.” *Id.* at 108(2): 16.

103. See *supra* text accompanying note 97.

104. Bates et al., *supra* note 59, at 244. A variation uses the suffix **-aʔ**, referring to a member of a category or class: **sduhúbšaʔ čəd**, “I am one of the Snohomish,” but this does not imply the basis or source of the association. *Id.* at 29.

welcomed unless he had a family tie with the owners [or] was invited.”¹⁰⁵ It is not always easy to determine who may be excluded. Wide-ranging kinship ties mean that everyone is related to some degree, and has a claim, however remote or weak, to the property of everyone else. However (as discussed in greater detail *infra*), a person’s knowledge of the names, stories, songs and ceremonies associated traditionally with property such as a fishing site is evidence of an inherited and therefore legitimate claim.

4. “*Cleanliness.*” There is likewise no specific Coast Salish term for “stewardship” or “management” in the sense used today in relation to environmental issues. However, the Coast Salish concept of cleanliness, **kʷiʔát** [L], is arguably synonymous with stewardship. It conveys the sense of spiritual purity, and isolation from noise or contamination. Before someone seeks a powerful spirit helper, does traditional “work” or “doctoring,” or goes to sing in the smokehouse, it is necessary to bathe and fast because spirit beings are repelled by the smells of people and human food.¹⁰⁶ Understandably, one can only bathe properly and become clean in a clean place. In the case of a fishing or shellfish harvesting site, cleanliness can mean a minimum of human disturbance of the landscape, apart from than respectful activities that enhance the health and abundance of wildlife and plants.

Although the concept of cleanliness has spiritual implications, it is not identical

105. “And this kind of thing was about the only kind of thing they ever quarreled about because it was their livelihood,” she added, noting that “[f]amilies would sometimes use intermarriage as a means of reducing tension and possible friction” over valuable resource sites. Snyder notes, *supra* note 25, at 109(1): 25, 32 (Amelia Dan); see also *id.* at 108(2): 58-60 (Alfonso Sampson).

106. Suttles, *Economic Life*, *supra* note 26, at 327-328.

107. *Id.*

108. Two kinds of dogs were considered valuable: hunting dogs, and a special breed of “woolly dogs” that

with the concept of holiness or sacredness, **ʔáʔáʔ** [L]. Sacredness is associated with the power of spirits, while spiritual cleanliness is something that humans are capable of making and destroying through their actions. The root **ʔáʔ-** simply means vast, abundant, awesomely numerous, hence **ʔáʔáʔ** implies boundlessness or infinity.

B. Categories of property

Intangibles such as knowledge and technical skills occupy a much larger place in Coast Salish law than tangible forms of property. This focus is reflected in the number of Coast Salish terms used to classify intangibles such as songs and spirit powers, as well as by the frequency, intensity, and persistence of disputes over claims to intangibles, which may persist for generations.

The following classification draws heavily on Suttles’s effort to systematize Coast Salish property law a half-century ago.¹⁰⁷ Some categories are explicit in Coast Salish law and are associated with distinctive terms of art. Suttles proposed additional categories on functional grounds, i.e., by grouping things that tend to be treated similarly, although they do not form an explicitly named category in Coast Salish languages.

Personal property. This group proposed by Suttles includes food, tools, clothing, houses, household furnishings, and dogs.¹⁰⁸ Articles of personal property are individually owned, and can be used, shared, donated, or sold freely to others.¹⁰⁹

were shorn for making yarn. Dogs were given names and treated with much the same sense of family membership as “pets” amongst Europeans. *Id.* at 103; Russel L. Barsh, J. Megan Jones & Wayne Suttles, *History, Ethnography, and Archaeology of the Coast Salish Woolly-Dog, in People and Dogs* (Lynne Snyder ed., forthcoming 2006).

109. Haeberlin notes, *supra* note 24, at 2:29-30 (William Shelton). To sell is **xʷuyub** [L], as distinguished from **wəš** [L], to “distribute” or give away for some purpose, for example at a feast. To pay what you owe for trade or social debts is **tʔás** [L]; to give a handshake or pay a doctor **qʔəlúsəd** [L].

Upon the death of the owner, personal property is either distributed while the body is still in the house, or, if “it was *too* personal, it is burnt or buried with the body.”¹¹⁰ Removing personal property such as beads from a burial is dangerous because the owner will come looking for them.¹¹¹ On the other hand, boats and houses that were shared by a family are generally not destroyed but instead redistributed within the family.¹¹²

Legal tender. This group proposed by Suttles comprises goods that are acceptable for the payment of debts incurred in trade or in the feast hall. It includes shell strings and shell ornaments,¹¹³ the currency of Coast Salish society before the arrival of Europeans, as well as European coins and currency. It also includes certain symbolically charged goods such as blankets, drums, fine clothes and (in the past) slaves¹¹⁴ that are distributed at feasts to satisfy social obligations as opposed to business debts.¹¹⁵ Legal tender is contextual: an article of clothing may be given or sold as personal property or used to

pay a social debt, for example; its status can only be determined from the circumstances. On the whole, the highest-value items are more appropriate for use as legal tender. An attractive printed tee shirt can be given away as a souvenir to guests at a feast, but to regard the gift as creating or paying a social debt would certainly bring shame on the name of the host. Distributing expensive hand-made traditional cedar-bark or deerskin clothing to important feast guests or business partners, by comparison, would meet with public approbation.

Power. As described above, Coast Salish peoples conceive of a world teeming with invisible beings, human (ancestors that had gone to the other side) and non-human. The invisible world can be contacted in dreams and visions, and invisible beings can take pity on humans and confer special gifts on them such as stamina, abundance, and artistic and technological skills. Power shares some of the characteristics of patents, trademarks, and professional licensing in mainstream intellectual property law.¹¹⁶

110. *Id.* at 34:13-14, 37 (Sam Cassimere). Burial was typically in a box or “canoe” that was suspended in the branches of a tree, rather than placed in the ground. Suttles, *Economic Life*, *supra* note 26, at 473-475.

111. For this reason, when the author’s research program conducts archaeological studies, very personal items such as beads are left where found, whether or not they are physically associated with human remains.

112. Snyder notes, *supra* note 25, at 108(2): 43-44.

113. Shell money was made from local clamshell beads, *tcaú ʔai*, or imported dentalium shells (*Dentalium pretiosum*), *s-ʔúlx*. Haeberlin notes, *supra* note 24, at 5: 17-8, 23-6. A shell brought from the north coast (probably the northern or pinto abalone, *Haliotis kamtschatkana*) was also valued greatly. *Id.* at 5: 27-8.

114. A clarification of Coast Salish “slavery” is appropriate here. Captives taken in raids, and people of very low social status, were expected to do the bidding of *sii ʔab* until they were either ransomed, or earned their freedom through skill, hard work, or marriage. See Wayne Suttles, *The Ethnographic Significance of the Fort Langley Journals*, in *THE FORT LANGLEY JOURNALS, 1827-1830*, at 163-210 (Morag Maclachlan et al. eds., 1998). The term

s’túdəq [L] (“slave”) implies being socially *separate* rather than owned. Perpetual chattel slavery appears to have been more typical of the Pacific Coast of British Columbia and Alaska than the Salish Sea; these “Northern” peoples frequently raided the Salish Sea for slaves, much as Europeans raided the west coast of Africa. *Id.*

115. A hybrid form of legal tender frequently seen today in the feast hall is a blanket with dollar bills pinned to it. Distributions at contemporary feasts include valuable articles (such as blankets) for important guests, who are thereby placed under obligation to repay them, as well as more ordinary gifts (beads, tee shirts, inexpensive shawls or throw-rugs, and even Tupperware) for the audience as a whole. Author’s personal observations, 1974-present.

116. It may be appropriate to observe here that Western philosophy also attributes many extraordinary skills, including scientific as well as literary, musical and artistic genius, to “inspiration,” which has its linguistic roots in Latin term *spiritus* or spirit, at first a god(ess) and later the Holy Spirit of Christian philosophy. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, s.v. “inspiration.” Like Western law, Coast Salish law distinguishes between skills that arise from hard work and talents or gifts that defy material explanation, and treats both as (intellectual) property.

Coast Salish peoples distinguish two classes of power. Spirit beings collectively known as **x^wném** [S] or **x^wdáb** [L] confer **sk^wánásən** [S] songs that empower the singer to see and manipulate the invisible world, and thereby to heal or to kill. An “Indian doctor” can acquire more than one of these potentially dangerous powers, and sometimes “steal” a power from others.¹¹⁷ “A doctor had to learn patience and self-control, in order not to harm people.”¹¹⁸ It should be understood that “Indian doctors” deal largely with spiritual illnesses, such as the theft of people’s souls by “monsters”¹¹⁹ or being “stung” by another Indian doctor.¹²⁰ Although spirit doctors are generally men, women have been known to acquire **sk^wánásən**.¹²¹ Women more frequently become herbal healers and midwives by studying with older practitioners rather than acquiring spirit power, and usually pay for the knowledge.¹²² Like spirit doctors, however, midwives and other organic healers must be paid for their remedies.¹²³

117. Suttles, *Economic Life*, *supra* note 26, at 333-339.

118. *Id.* at 347. “It was a dangerous affair to get **x^wdáb**. A person had to have great courage.” Haeberlin notes, *supra* note 24, at 34:20. A **x^wdáb** might appear to him, and kill him if he ran away or did not do as he was told. *Id.* Even if a person had received spirit power as a youth, he or she might wait until middle age to convene a “telling” of the experience and become a doctor. *Id.* at 31:17-18.

119. Monsters are known as **s^ʔÁálqəb** [L] or **sÁ'éləqəm** [S]. The implication is something that has a strange or uncanny sound.

120. Doctors are each specialized, according to their powers. Haeberlin notes, *supra* note 24, at 1:10, 28:35-6, 31:8-9, 33:12, 35:11-12; Snyder notes, *supra* note 25, at 108(2): 84.

121. Haeberlin notes, *supra* note 24, at 30:31-2, 31:33-5, 33:27-8.

122. *Id.* at 40:27 (Little Sam); Snyder notes, *supra* note 25, at 180(2): 82. Abortifacient teas have been “the secret of certain women [who] would not impart the knowledge of this medicine without being paid well.” Haeberlin notes, *supra* note 24, at 37:20 (Little Sam).

123. *Id.* at 36:29.

124. Some spirit patrons could grant a variety of

Spirit beings known as **skəlálitut** [L], **s^ʔəliə**[S] or **sk^wínánəʔ** [S] confer other kinds of songs known as **siúən**. Some **siúən** guarantee the singer success and wealth in pursuits such as fishing, hunting, gambling, or fighting; others simply identify the spirit that made the gift.¹²⁴ Different **skəlálitut** not only have different songs, but individuals who have the same **skəlálitut** may also sing differently.¹²⁵ “The same spirit does not act in the same way to each person whom he meets.”¹²⁶ Some **skəlálitut** tend to reappear from generation to generation within the same family or geographical area, while others can be obtained by anyone that works hard for them.¹²⁷ In either case, **skəlálitut** must be earned and cannot simply be inherited. If someone repeats a spirit song they have heard, it does not transfer the power of the particular **skəlálitut**.¹²⁸

People earn power by working hard and making themselves spiritually “clean” by swimming, bathing, diving, and fasting.

different powers, while others were quite specialized in their gifts. For example, only a person with **tcádʔu**? spirit could make cedar duck decoys for catching seals and ducks; if made by someone else it wouldn’t work. Haeberlin notes, *supra* note 24, at 35:2 (Sam Cassimere); see also Collins, *supra* note 99, at 151-153.

125. Haeberlin notes, *supra* note 24, at 7:11-12.

126 *Id.* at 1:2-5.

127. *Id.* at 10:9-10; Suttles, *Economic Life*, *supra* note 26, at 327, 371. It is also widely held that some spirits only come to people that belong to certain “tribes,” which is another way of suggesting that the ancestors tend to confer power on their own descendants. Haeberlin notes, *supra* note 24, at 35:8-11 (Sam Cassimere). “When a person dies his powers stay here and follow them (his people) around.” Snyder notes, *supra* note 25, at 108(2):77, 87. Great power is only found among individuals who “come from that kind of family,” and is gained “partly through training . . . and partly through being looked upon with favor by that spirit.” *Id.* at 109(1):10-11 (Amelia Dan).

128. Haeberlin notes, *supra* note 24, at 4:7 (Frank LeClair). In any case, the deceased’s song should only be sung by someone that actually has the same power lest the spirit cause trouble. Snyder notes, *supra* note 25, at 108(2): 77.

Families have traditionally sent both boys and girls to fast and bathe for power so they can eventually be “successful” at something. An Indian doctor may try to help his son find a **skʷənásən**; a weaver may advise her daughter about finding a **skəlálitut**.¹²⁹ Instruction is also required. “It’s like education nowadays,” an elder explained, “you can’t do anything unless you have it.”¹³⁰

Suttles identified a number of “clusters” of power songs that Coast Salish peoples consider related, although there is no simple correlation between types of songs, types of power, and particular spirit beings (Table 1).¹³¹ Not all songs are power songs. So-called war songs, **siwénəqʷ** [S], function like a flag: they are sung to identify the song-owner’s family, house, or village, not only in

battle but also at feasts.¹³² Successful people often acquire personal wealth songs, which they share with the other residents of their house or village. Wealth songs can also be sung to identify a community on important occasions.

People claiming some kind of power must also demonstrate it publicly. The spirit dance or winter dance, **pígʷəd** [L] or **smílə** [S], is a seasonal forum for the performance of songs associated with spirit power.¹³³ But someone could conceivably simply copy songs and dances, claiming a power they do not actually possess. Thus there is a “strict tradition that you were never to advertise that you had a certain spirit or any spirit unless you *knew* you really had it and

could back it up,” for example, by effecting cures or calling fish into your nets.¹³⁴ While power comes from the invisible world, it must be demonstrated in public, in ceremonial as well as practical ways, before it is legally acknowledged.

Inheritances. The Coast Salish terms **s č’a3acebs** [L] or **čiləḡən** [S] refer to fam-

Table 1. Categories of Coast Salish power songs (siúʔəñ), after Suttles.

Straits	Lushootseed	Sources and associations
weʔqéén	tubšádad	Black; hoof rattles, war; wolf, cougar, owl
sqéyup	sqáip	Red; hoof rattles, war, doctoring; knife, blood
qʷóχʷqən	qʷóχqəd	Cedar; tástəd (“power pole”)
skʷəniltč	skʷədiltč	Cedar, sockeye salmon; divination, finding fish
skékʷəł	skágʷəł	Hunting; “good eyes”
stəláméχən	sióəd	Cedar cane; an “ordinary” song
siəmén	tíyúłəbàχad	Sun, wealth (from iʔém); similar to híʔidəʔ
títʔəu	-----	White bird down; hunting; Semiahmoo people

129. Parents may “inspire” their children to attract the same power. Snyder notes, *supra* note 25, at 109(1): 31.

130. *Id.* at 108(2): 38-39.

131. Suttles, *Economic Life*, *supra* note 26, at 366-380.

132. *Id.* at 423.

133. Collins, *supra* note 99, at 183-189; SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 200-203; AMOSS, *supra* note 61. These performances were punished by U.S. officials in the early twentieth century. Barsh, *supra* note 41. The most dramatic displays of power at dances involve special ceremonial tools such as **təstid** (“power poles”) and **skʷdilič** [L] or **skʷəniltč** [S] (“power boards”). Tools used by dancers are hidden away in a safe place when they are idle or following the death of the owner, to prevent them from

hurting people. Snyder notes, *supra* note 25, at 109(1): 10. However, a design could be conveyed or inherited. Suttles, *Economic Life*, *supra* note 26, at 371 (Tommy Bobb “inherited” Billy Edwards’ spirit power and used power boards of the same design).

134. Snyder notes, *supra* note 25, at 109(1): 10-11. Henry Sicade explained that a doctor had to gain “lots of experience and success in curing before he was recognized.” Haeberlin notes, *supra* note 24, at 28:35. People doubted that a particular person really had spirit power if they “never saw him do anything” to substantiate the claim. *Id.* at 30:33. Such a person would gain a bad reputation: “He has no power; he just bluffs.” Collins, *supra* note 99, at 173. For stories of how Doctor Joe had to “prov[e]” his power to heal, see Snyder notes, *supra* note 25, at 109(2): 4.

ily inheritances; they are also used nowadays to refer to the cultural legacy or patrimony of a “tribe.” Inheritances in the narrower sense include: the personal or “legal” *names* used at ceremonial events; certain ritualized *performances* or **čxʷtén** [S], including some healing and initiation ceremonies;¹³⁵ *traditional designs*, including symbols painted on houses¹³⁶ and masks;¹³⁷ and, *resource-harvesting sites* or *estates* such as fishing grounds, shellfish beds, and meadows

where important plants such as camas, berries, and nettles are gathered or cultivated.¹³⁸ Although it is the general rule that people inherit from both their maternal and paternal kin, certain categories of property tend to be gendered. Hunting and fishing places tend to pass to male relatives,¹³⁹ for example, while **sxʷáixwe** masks¹⁴⁰ and spindle whorls¹⁴¹ tend to pass through owners’ female kin.

Personal names continue to be particularly valuable inheritances. Names tend to be associated with particular places and families, but may pass through other family lines and “tribes” from generation to generation.¹⁴² A name is the property of the person who bears it. It can be bestowed on another, but the transfer must be paid for and wit-

Table 2. Categories of Coast Salish property, after Suttles.

Categories		Examples
Personalty		Tools, food, houses, dogs
Legal tender		Shell money, blankets, canoes
Spirit power	Doctoring xʷdáb [L]	Healing spirit-caused illness
	Wealth skəláitut [L]	Fishing, hunting, gambling
Inheritances čiléhən [S]	Names	Formal “feast hall” names
	“Ordinary” songs	War songs, feast songs
	Performances čxʷtén [S]	Healing societies, naming, burial
	Designs	Masks, house posts
Private knowledge	Harvesting sites	Fishing, hunting, camas gardens
	Spells siuʷwín [S]	Hunting, racing, war
	Skills	Technology, weaving, herbal healing
	Family teachings snóps [S]	Family history, genealogy

135. Cleansing or crisis-resolution rituals are performed by small groups of dancers carrying distinctive regalia such as the **sxʷáixwe** mask. They are family property but spoken of as belonging to the individual family members that hold custody of the regalia and know the songs. Suttles, *Economic Life*, *supra* note 26, at 407-409.

136. For example, the co-owners of the last Samish longhouse on Guemes Island, **qʷəŋʔqəŋé ɬ**, each painted one of the two posts supporting the main roof beam: one symbol is the **skʷdíli č**, the “power boards” used in spiritual healing and communicating with the spirit world; the other is a rainbow representing the under-the-water power to grow rich from fishing. Both symbols are regarded today as the property of the direct descendants and of the Samish “tribe,” more or less jointly. The one surviving post is in the custody of the Samish Indian Nation, after being rediscovered in the collection of the Washington State (Burke) Museum, Seattle, by the author and collections manager Laura Phillips.

137. Certain healings societies, such as **sxʷáixwe**, perform costumed and masked. Each **sxʷáixwe** mask has a story and genealogy. *See*

Suttles, *Central Coast Salish*, *supra* note 26, at 468.

138. “Fishing and camping places belonged to families” and were “family inheritance” according to Joseph Joe. Snyder notes, *supra* note 25, at 108(2): 44.

139. “Fishing and camping places and other means of livelihood passed to a man’s sons.” *Id.* at 109(1): 10 (Interview of Amelia Dan).

140. Suttles, *Economic Life*, *supra* note 26, at 408-413; Haeberlin notes, *supra* note 24, at 10: 17-9 (Johnny Williams). At a February 14, 2003 meeting of the Samish Tribal Council that I attended, my friend Rita Louis, of Samish and Musqueam ancestry, was able to identify the matrilineal ownership of a **sxʷáixwe** mask that I had photographed at the American Museum of Natural History (New York City) based on the elements of its design.

141. Suttles, *Central Coast Salish*, *supra* note 26, at 460-462.

142. Suttles, *Economic Life*, *supra* note 26, at 399. “They gave names so people could remember where they’re from.” Snyder notes, *supra* note 25, at 108(2): 36-7. Thus, for example, a Duwamish name would remind the bearer of his or her Duwamish ancestors.

nessed at a feast.¹⁴³ At a naming feast, guests may challenge the host's right to bestow the name or the worthiness of the candidate to receive it.¹⁴⁴ The name of a deceased may be bestowed by his direct descendants, or it may be held in trust for as-yet unborn descendants.¹⁴⁵ More than one person may receive the same name, although usually not in the same community. Nearly a century ago, Henry Sicade explained that this sharing of great names helped link all of the "tribes" together.¹⁴⁶ "It was an offence to take the name of the ancestor of some other family" without their consent, and if the other family "made a row" the dispute could only be settled by feasting them.¹⁴⁷ "Bitter quarrels sometimes arose between two people who wanted the same name" and could only be settled by a big payment.¹⁴⁸ This has not changed. If anything, the loss of other culturally significant forms of tangible and intangible property has increased the social significance of acquiring important names.

After great names, the most valuable and potentially contentious inheritances are

143. Haeberlin notes, *supra* note 24, at 21:15; Suttles, *Economic Life*, *supra* note 26, at 403, 405. Unlike formal or "legal" names, names given casually could not be inherited. *Id.*

144. "A man, before he dies, might in a way give his name to a son, and the son would have to give a potlatch to make his name legal after his father, grandfather or uncle (predecessor) dies." Snyder notes, *supra* note 25, at 108(2): 35. The gift may be challenged if it appears inappropriate to the guests at the feast; for example, a warrior's name should be given to a warrior. *Id.*

145. Suttles, *Economic Life*, *supra* note 26, at 404. Just as the inheritance of name is bilateral, names themselves are not gendered: a man could take a woman's name, or vice versa. *Id.*

146. Haeberlin notes, *supra* note 24, at 28:5.

147. *Id.* at 40: 35-36.

148. *Id.*

149. *Id.* at 1: 11. According to Henry Sicade, "[p]icking [and] fishing-grounds were [the] property of different tribes . . . [b]ut one tribe could ask permission

resource-harvesting sites. According to William Shelton in a 1915 interview, a family or people was free to hunt and fish anywhere in their customary territory, while others could also hunt and fish there "if they had friends or relatives in the other country. If they were strangers, then it may mean that they were looking for trouble and the stranger might get into danger," but due to widespread intermarriage, "there was no sharp dividing line between the countries of two tribes."¹⁴⁹ Free access to resource sites is an *individual* inheritance, however, in the sense that the strongest claim to rightful use is lineal descent from a rightful user.¹⁵⁰ More attenuated kinship connections require explanations, hence the importance of formally asking for permission: the request must be stated and justified genealogically.¹⁵¹ This in turn underscores the importance of **snéps** [S] or family teachings. An ignorant person cannot formulate a convincing claim to anything. The requirement of asking permission necessarily implies the existence of an arbiter of kinship claims, which (as described *infra*) is tradi-

from another tribe to fish [or] pick in their territory. This permission was hardly ever refused. If permission was not asked, it was regarded as an invasion" and might trigger conflict. *Id.* at 28:18. In his interview notes, Haeberlin used the term "tribe" when "family" or "house group" would have been more accurate. It is likely that Haeberlin's informants used "tribe" when speaking English (Haeberlin took his notes in English rather than in Coast Salish and apparently did not understand any Coast Salish languages) because it was a word they thought "Bostons" (white Americans) would understand.

150. "Should a man die and leave property, like a family fishing or hunting site, it becomes the joint property of the surviving children who were obliged to care for an ageing mother." Snyder notes, *supra* note 25, at 109(1): 10 (Amelia Dan).

151. *Id.* at 109(2): 88 (Interview of Alfred Edwards, emphasizing that it was important to know one's own genealogy and keep it a family secret); *id.* at 108(2): 58 (Interview of Alfonso Sam, discussing the importance of intermarriage to gain access to resources through stronger kinship ties).

tionally an individual steward representing the family with the strongest historical associations with the estate.

Private knowledge. A great deal of useful proprietary knowledge is acquired by learning from other humans, rather than coming as spirit gifts. This secular knowledge includes **dáʔadad** [L] or **siúʔínʔ** [S] or “spells,” including the secret names of things, which when spoken compel them to obey.¹⁵² In the past, spells were often used in hunting and fishing. Spells are ordinarily family secrets that are taught to children, and rarely shared with others, although some may be sold or performed for a payment.¹⁵³ For example, the family of **Letsqéʔdɛb**, a promi-

nent nineteenth century Snohomish leader, possessed a spell and charm for protection from sharks. The story was public, but the actual spell was a secret, and the charm was kept in a secret hiding place.¹⁵⁴ A descendant of **Letsqéʔdɛb** carved a copy of the shark-proof charm for Haeberlin to place in a museum, but it is presumably useless because the spell was not recorded.¹⁵⁵

The practical as well as ritual expertise involved in harvesting technologies such as reef nets, duck nets, or tidal weirs is also private knowledge.¹⁵⁶ Access to technology has traditionally begun by finding a relative “who knew how to do it,” and was agreeable to sharing know-how in exchange for apprenticeship labor.¹⁵⁷ A “handshake” is

152. Spells have been described as the “original” language shared by all beings, first taught to humans by the Transformer, **Xéʔis**. Suttles, *Economic Life*, *supra* note 26, at 390. The root in Lushootseed is **dáʔ**, “a name,” with a transitive suffix that implies “acting on something.” Examples include charms for love, to make someone else’s paddle break, to win a race, to avoid falling in the mountains, to slow down the sun to get home on time, or to manage the rain. Haeberlin notes, *supra* note 24, at 38:19-21. Many spells were used with physical “charms,” but elders are adamant that they only work if the spell is properly enunciated. *Id.* Other spells, known as **čé-lin** [S], were sung. Suttles, *Economic Life*, *supra* note 26, at 387.

153. Suttles, *Economic Life*, *supra* note 26, at 390. Little Sam, a Snohomish healer of wide renown a century ago, explained that:

Best medicine was kept secret. Only 2 or 3 people in tribe know about such medicine. Each tribe would have different medicines. This type of ‘strong’ medicine was called **dáhadad**. This was different from **xʔdáb**. The latter was *not* transmitted in the proper sense of the word from father to son, but **dáhadad** was. . . . The main thing in **dáhadad** were the magic formulas. People who have never been instructed in **dáhadad** do not know these formulas. A woman might have **dáhadad**. It was handed down from generation to generation. A person might get some instruction in **dáhadad** from an old person who was not his father & grandfather, pro-

vided he paid heavily for this instruction. But in such a case the magic would not ‘stick’ the way it would if it was passed on from father to son. In case of the paid instruction the person would gradually forget the words of the formulas after say 10 years or so.

Haeberlin notes, *supra* note 24, at 38: 19-21.

154. *Id.* at 35:6, 37:21, 39:1-5.

155. *Id.* Similarly, Little Sam produced a scale model of a “power pole” for Haeberlin, now in the custody of the American Museum of Natural History, New York City, AMNH Catalog Number 50.2/522, which I was assured is totally harmless because it was never actually used by someone with power. Interview with Victor Underwood, Jr., Samish elder and cultural teacher, in Anacortes, WA (Feb. 28, 2004).

156. Suttles, *Economic Life*, *supra* note 26, at 391. Weaving and basketry are also treated as proprietary skills that must be learned from a willing relative. Collins, *supra* note 99, at 67-71; NETTIE KUNEKI, ELSIE THOMAS & MARIE SLOCKISH, THE HERITAGE OF KLICKITAT BASKETRY; A HISTORY AND ART PRESERVED 13-15 (1982); interview with Irene Bjerky, Lower Fraser River basket-maker, in Anacortes, WA (Feb. 28, 2004) (discussing how designs are associated with particular families). Andrew Joe told Sally Snyder the story of one wealthy Skagit leader who married low-status women that were famous mat-weavers, not only to create wealth for him but also presumably to train his daughters. See Snyder notes, *supra* note 25, at 108(6): 4, 108(6): 11.

usually expected as well.¹⁵⁸ Apprentices may eventually teach what they have mastered, always acknowledging their teachers, and usually only after their teachers' active lifetimes have come to an end.¹⁵⁹ Control of know-how by families and house-groups was the basis of maintaining competitive advantage in trade networks.¹⁶⁰ "The salmon of the Klickitat was highly prized by the [Nisqually]," for instance, "since it was dried in a way as to give the salmon a certain flavor which the [Nisqually] were not able to produce."¹⁶¹ Likewise, the Snohomish bought their flint arrowheads from the Snoqualmie in the Cascade Range and sent slaves and shell money to the Makah at Neah Bay on the Pacific seacoast to buy superior canoes.¹⁶² Coast Salish people have always valued useful inventions and treated the knowledge as property. The first person to discover something useful is called **d^zix^w** [L], "forefather" or "ancestor."¹⁶³ Some useful knowledge is not owned, however, such as the use of willow or bitter cherry bark teas to treat colds. "Everybody [from] different tribes knew about these."¹⁶⁴

157. As Snyder related,

Since the people had different ways of fishing they wouldn't know how to fish in very strange territory. For example, the Lower Skagit couldn't fish up-river very well because they didn't have the proper equipment, and vice versa for the up-river people; the Upper Skagit couldn't fish in the San Juans because they can't use Samish equipment. Like the up-river people could never catch halibut or they couldn't use (didn't know how to use) the kind of canoe that they have down here. That is why a young man presents a lot of blankets to the girl's family when he wishes to marry. If he can't afford to pay, he stays with the girl's family, and so then he has to learn all the new ways, probably, from his father-in-law.

Snyder notes, *supra* note 25, at 109(2): 111-112.

158. In my personal experience as a participant in feasts, healing ceremonies and "burnings" (feasts for departed ancestors), a handshake is routinely conceived of as a donation, a gift of gratitude freely given in recognition for something done by a respected elder who has not discussed a price.

Family teachings or "advice," **snəp** [S] or **sniw** [L], including family history, genealogy, the origins and genealogy of formal or legal names, and family-specific versions of stories, arguably constitute the most important kind of private knowledge.¹⁶⁵ High-status people maintained their estates by determining which children to teach the names and stories, by which means they limited future claims to the use and inheritance of all valuable tangible and intangible property.¹⁶⁶ Although Suttles described private knowledge as distinct from inheritances, there is considerable conceptual and practical overlap between the two categories. Inheritances are somewhat more public and collective in nature, while private knowledge is more individual and secret, but both tend to be acquired by virtue of kinship. A fishing site may be shared by a large number of lineal and collateral kin, while the use of specialized fishing technology at the same site is likely to be restricted to a small subset of worthy, closely related individuals that have recognized skills and power as well as

159. Interview with Victor Underwood, Jr., *supra* note 165.

160. In practice, therefore, the customary law of private technological knowledge is similar to the treatment of know-how in mainstream intellectual property law: a combination of secrecy and restrictions on the use or transmission of the know-how for some period of time as a limitation on competition with the teacher.

161. Haeberlin notes, *supra* note 24, at 28:27. In turn, the Nisqually reputedly made better baskets than the Klickitat. *Id.* at 28:28; 33:28.

162. *Id.* at 34:6, 37:6.

163. *Id.* at 36:29-30. This term shares a common root with "wisdom," **x^wdik^w** [L]. Bates et al., *supra* note 59, at 83.

164. *Id.* at 38:23.

165. Suttles, *Economic Life*, *supra* note 26, at 395; SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 8-9.

166. "I suspect that restricting the knowledge of the names of ancestors enabled those who knew to control their bestowal on their own descendants." *Id.*

a claim to access rights. The result is to broaden the benefit of resources to a wide circle of relatives, and to restrict the control of the *manner of use* of resources to a few individuals who demonstrate particular spiritual and ethical merit.

III. Ownership and Responsibility

A. Social obligations

In Coast Salish philosophy, the accumulation of property is not an end in itself, rather, it is the means of acquiring capital—*social capital*—the true source of personal status and wealth. Wealth is measured in people (as described *supra*): a wealthy person has many “friends” in many places.¹⁶⁷ Wealth consists not so much in the accumulation of goods or money, but in the accumulation of potential future claims on others’ goods and services.¹⁶⁸ By analogy to Western economics, a wealthy Coast Salish person holds many people in debt. As Suttles has argued, Coast Salish economic organization manages risk by promoting broader social networks and diversifying households’ resource harvesting options.¹⁶⁹ Greater production of property (growth) takes a back seat to greater density of social ties and obligations (mobility).

The arbiter of wealth in Coast Salish society is the individual’s good name, that is, the extent to which an individual earns, lives

up to, and renews the repute of a formal traditional name.¹⁷⁰ There is a term for someone “who had a big name but pulled it down,” *xáʔc̓n̓* [L],¹⁷¹ in social terms a kind of prodigal child that dissipates the wealth of a family by failing to keep up with obligations. Someone that lives in material poverty but keeps a good name can command wide influence and allegiance; someone that hoards goods and lives in material comfort but is stingy in meeting social obligations becomes a pariah.¹⁷²

If a good name is the standard of wealth in Coast Salish society, social obligations are the savings bank of social capital. Obligations must be distinguished from “debts” in Western legal systems. “Debt” implies a legally enforceable duty to pay a fixed sum at a prearranged time. While debts in this sense are not unknown to Coast Salish customary law, in my experience they are relatively uncommon and insignificant.¹⁷³ Social obligations are less explicit, by comparison, and less precise with respect to amount and time. They arise from social situations, such as an invitation to a feast, rather than contract. Yet their satisfaction must be witnessed in the feast hall, and has an immediate effect on the good name and status of the debtor.¹⁷⁴ Failure to satisfy an obligation publicly and generously, in a way that attracts public approbation, has severe consequences for the debtor’s family and community.¹⁷⁵

The spirit of Coast Salish obligations is

167. See *supra* text accompanying note 60.

168. See *supra* text accompanying note 84.

169. When a man marries his children far and wide it “raises him up.” Haeberlin notes, *supra* note 24, at 5:5-6 (Charlie Jules). Marriage ties diversify the family’s portfolio of skills and physical assets, including safe harbors in far-flung villages. SUTTLES, COAST SALISH ESSAYS, *supra* note 1, at 20-24; Suttles, *supra* note 114, at 197.

170. Suttles, *Central Coast Salish*, *supra* note 26, at 464-465; Collins, *supra* note 99, at 220-221.

171. Haeberlin notes, *supra* note 24, at 1:18 (William Shelton). Compare *xícił* [L], “shame.”

172. *Id.*

173. Fur traders reported debts with relatively explicit terms and conditions among Coast Salish peoples, see, e.g., Suttles, *supra* note 118, at 194-195, but the nature of these legal arrangements may have been influenced by the practices of the Hudson Bay Company and American Fur Company.

174. Snyder notes, *supra* note 25, 109(3): 58 (Interview of Tom McLeod).

175. Likewise, it was considered appropriate to settle all disputes, including homicide, through payment of compensation negotiated by the affected families’ spokesmen or “lawyers.” *Id.* at 35:5 (Sam Cassimere); see also Suttles, *supra* note 114, at 197-206 (synthesis of early observations of Coast Salish dispute resolution).

expressed in a story told by Josephine LeClair nearly a century ago. Her grandmother had found a wolf that had a bone stuck in its throat and pulled the bone free, saving the wolf from dying in agony. When the wolf offered to repay her, she said “You need not pay me now, but remember me and give me something later.”¹⁷⁶ The wolf went on its way, but Josephine’s grandmother found a deer left for her at the same place for the next five years. In traditional terms, both human and wolf had behaved well; generously, leaving the other party free to choose how, when, and in what coin to reciprocate.¹⁷⁷

Although the most important obligations arise from public feast hall transactions such as marriages, namings, and memorials, the same general principles apply to private transactions involving power, knowledge, and inheritances. Coast Salish peoples believe that unpaid work may be faulty or ineffective.¹⁷⁸ If a healer is not paid well, the cure will fail.¹⁷⁹ By the same logic, if a cure fails, payment already made should be returned by the healer.¹⁸⁰ Likewise, inherited names “were the only legal names” because they were paid for.¹⁸¹ Private knowledge such as fishing skills and charms must also be paid for, but if it does not work, a partial refund may be expected of the teacher.¹⁸² The general rule, then, is that payment effectuates the transfer or use of property, like the rule of consideration in

Western contract law. The adequacy and nature of the consideration is not determined by contract, however, but is left to the free will of the debtor, secured by the debtor’s good name. This has an important leveling effect. In the court of Coast Salish public opinion, a social debtor must be generous, which is to say that everyone pays in proportion to his or her means. The rich pay proportionately more, rather than proportionately less to meet their social responsibilities. Instead of taxing the rich by means of a standardized levy and redistributing to the poor through institutionalized aid, the Coast Salish system places the equivalent of a steeply progressive sales tax on all payments for services.

B. Merit, status and stewardship

Inheritances are inchoate until relatives of the owner, living or recently deceased, assert claims. Since long-distance marriage is encouraged, a multitude of households are potential claimants to the property of an important person or *ʔiʔáb* [L].¹⁸³ Everyone within a reasonable genealogical proximity to the former owner shares an interest in the property, but *control* of the property must pass to individuals.¹⁸⁴ In the case of a hunting or fishing site, a great many descendants may share the use of the wildlife but one or two persons are regarded as the actual owners. By analogy to Western law,

176. Haeberlin notes, *supra* note 24, at 9:14-15.

177. *Id.*

178. *Id.* at 12:25-36 (outlining several stories that emphasize the importance of paying for others’ expertise: “I will do well for what I have been paid.”).

179. “If a **dáhadad** doctor was not paid for his services, then he would apply the herbs without putting the **dáhadad** power into it. Then the medicine would not be more effective than water.” *Id.* at 38:19-21 (Little Sam); *see also* Snyder notes, *supra* note 25, at 108(2): 19 (“They give [the healer] valuable[s] for his work, because if there is a mistake for a singer, it endangers his [the patient’s] life.”). A doctor must be established be-

fore charging for services. *Id.* at 108(2): 39.

180. Haeberlin notes, *supra* note 24, at 31:33 (John Seattle); *id.* at 34:15 (Sam Cassimere).

181. Snyder notes, *supra* note 25, at 108(2): 37.

182. Haeberlin notes, *supra* note 24, at 36:29-30.

183. SUTTLES, COAST SALISH ESSAYS, *supra* note 1, 18-19.

184. “Wherever they had a hunting-ground they always had a man living there to hold it for the tribe.” Snyder notes, *supra* note 25, at 108(6): 77 (Alfred Edwards). “Families might own special fishing grounds, but you had to ask the owner to let someone fish there.” *Id.* at 109(2): 68; *see also id.* at 108(2): 58.

these individuals hold the property in trust for the rest of the kin group that can make legitimate claims as heirs. As trustees for their relatives, “owners” avoid limiting the use of the property by other heirs. However, an “owner” that is generous¹⁸⁵ and a good steward can manage the property in a way that earns renown, makes “friends” and attracts advantageous marriages. Everyone that uses the property comes under obligation to reciprocate in some way.

The choice of an individual owner or custodian for an inheritance is based broadly on merit. What constitutes merit may depend on the particular property. A fishing site is likely to be entrusted to someone with an “under the water” spirit power such as *Yáxəməł* [S], *Tíyúłəbàxəd* [L], or *dx^w-Híʔidəʔ* [L] that is good for getting wealth by catching fish.¹⁸⁶ Evidence of possessing such a power must be demonstrated by using the fishing site very productively. A valuable fishing site is therefore entrusted to an exceptional fisherman—someone possessing the skills, knowledge, social influence, and professional self-interest to manage the fishery sustainably. Indeed, the custodian of a valuable fishing site may be said to labor under two mutually reinforcing kinds of self-interest in the site’s long-term productivity: continuing to be able to harvest large quantities of fish to distribute at feasts and continuing to be able to share the use of the site generously with relatives who ask to fish there. Feasting and sharing will both make the custodian’s name great, and make the custodian wealthy in social obligations. Furthermore, a great name can be bequeathed to a

custodian’s offspring,¹⁸⁷ together with the site-specific teachings that would give them favorable odds of acquiring a spirit power, and eventually inheriting the site.

In this way good stewardship is rewarded with high social status and considerable economic security in the form of social obligations (calls on others’ resources), and these rewards can be inherited by deserving offspring. Although productive resources such as hunting and fishing sites are conceptualized as the joint property of large kinship groups, they have individual managers with strong incentives to conserve as well as share.

C. Principles into practice

It is difficult to ascertain the long-term sustainability of Coast Salish economies or the extent to which customary law contributed to sustainability. Archaeological evidence from scattered excavations around the Salish Sea suggest a significant shift in focus from hunting large terrestrial and marine mammals to large-scale harvesting and processing of fish, waterfowl, and shellfish about 2,500 years ago, after which there was little apparent change in diet or procurement methods until the arrival of Europeans in Mexico.¹⁸⁸ One focused study of a number of adjacent occupations on Georgia Strait suggests continued variability in diet and human numbers over the past 2,500 years, however.¹⁸⁹ Lepofsky observes that the appearance of large-scale fishing technology was preceded by a change in the regional climate regime towards cooler, wetter conditions, and suggests that Coast

185. Sometimes the custodian demands payment for the privilege, whereas others may be “good-hearted” and consent out of generosity, which makes their names even greater. *Id.* at 109(2): 68, 73.

186. Haeblerlin notes, *supra* note 24, at 34: 17-19, 35: 4. “Power boards,” *sk^wdili č* [L] or *sk^wənílč* [S], are also said to be good “for getting salmon and other fish.” *Id.* at 10: 17-18.

187. The term “offspring” is used here to underscore the fact that a custodian might favor grandchildren, the children of siblings, or even the children of cousins, over his or her own.

188. Trospen, *supra* note 2; STEIN, COAST SALISH PRE-HISTORY, *supra* note 33, at 16-24.

189. Cannon, *supra* note 42.

Salish peoples adapted to the more volatile climate by developing new technologies such as reef-nets,¹⁹⁰ and by organizing the wider regional scale social and trade networks that Suttles refers to as the Coast Salish Continuum, and regards as the defining institution of Coast Salish cultures.¹⁹¹

Until finer-scale data on changes in Coast Salish population and harvesting over time at the decadal scale are available,¹⁹² the social and environmental sustainability of Coast Salish civilization must remain largely conjectural. It is difficult to ignore the fact that early European explorers and settlers enjoyed a great abundance of fish and shellfish, after thousands of years of Coast Salish harvesting,¹⁹³ and that many traditionally important food species such as Chinook salmon and native “Olympia” oysters are today threatened or endangered.¹⁹⁴

IV. CONCLUSION

In principle, Coast Salish law rewards individual skill and hard work; motivates individuals to produce and share abundance; promotes an all-inclusive kinship amongst peoples; and discourages freeloading. By inference, it is also a design for sustainability, although Coast Salish elders

do not make the connection explicitly. The most important living resources are family inheritances but they have individual “owners” or custodians, whose good names depend on their generosity. Hence a place that may employ and feed hundreds of people is entrusted to a single manager for a lifetime, whose status, marriage prospects, and the status and prospects of his/her entire extended family will turn on the continued flow of products—fish, wildlife, food plants—from the estate. Unlike a public servant, whose identity is obscure and employment is secure, a Coast Salish custodian is motivated to be very visible, and therefore very accountable. A custodian must continue to be personally generous to all comers, and cannot hide behind bureaucratic procedures or rules: nearly everyone can make some kind of plausible claim on the custodian’s own personal wealth.¹⁹⁵ By comparison, a fish or wildlife regulator is not promoted for conserving fish, and does not give away the fish saved from his/her own stock. In our “modern” legal system, bureaucrats give away other people’s wealth but not their own, hence they have little incentive to conserve; indeed, bureaucrats often try to satisfy all of their constituents (that is, user groups or “stakeholders”) by giv-

190. Dana Lepofsky, Ken Lertzman, Douglas Hallett, and Rolf Mathewes, *Climate Change and Culture Change on the Southern Coast of British Columbia 2400-1200 cal. B.P.: An Hypothesis*, 70 *AMERICAN ANTIQUITY* 267-293 (2005); see also Norman A Easton, *The Underwater Archaeology of Straits Salish Reef-netting* (1985) (unpublished M.A. thesis, University of Victoria) (on file with the author) (discussing the antiquity of reef nets).

191. Suttles, *Cultural Diversity*, *supra* note 1.

192. See Russel L. Barsh, *The Importance of Human Intervention in the Evolution of Puget Sound Ecosystems*, in *PROCEEDINGS OF THE PUGET SOUND RESEARCH CONFERENCE* (2003), available at http://www.psat.wa.gov/Publications/03_proceedings/PAPERS/ORAL/1a_bars.pdf (last visited Sept. 23, 2005); Russel L. Barsh, *Shell Middens Yield Rich Cultural Deposits for Fine-scale Modeling of Pre-industrial Ecosystems*, 21 *RESTORATION ECOLOGY* 311 (2003).

193. JOSEPH E. TAYLOR III, *MAKING SALMON; AN ENVI-*

RONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS 39-67 (1999); BARSH, *FISHING RIGHTS CONTROVERSY*, *supra* note 5, at 23-50; Boxberger, *supra* note 45, at 61-102; MacClachlan, *FORT LANGLEY JOURNALS*, *supra* note 11, at 37, 125, 155; Charles H. Townshend, *Report of observations respecting the oyster resources and oyster fishery of the Pacific Coast of the United States*, in *REPORT OF THE COMMISSIONER OF FISH & FISHERIES* 1889-91, at 343-372 (1893).

194. Washington Department of Fish and Wildlife, *Species of Concern in Washington State*, <http://wdfw.wa.gov/wlm/diversty/soc/soc.htm> (last visited July 1, 2005) (status of Washington wildlife under the state and federal Endangered Species Acts).

195. See JAMES ATCHESON, *THE LOBSTER GANGS OF MAINE* (1988) (classic study of customary law proprietary fishing); see also JAMES R. MCGOODWIN, *CRISIS IN THE WORLD’S FISHERIES: PEOPLE, PROBLEMS, AND POLICIES* 123-142 (1991).

ing away more fish than they have.¹⁹⁶ Treating fish as shared or common property creates perverse incentives for harvesters to catch more fish than they are likely to eat or sell. Furthermore, since a harvester cannot “save” fish for the next season: any fish she leaves uncaught will be caught by another harvester.¹⁹⁷

Intellectual property forms the basis of Coast Salish property law. Without family teachings, a person does not know which estates to claim, or how to use them. Without a close kinship connection with the traditional owners of an estate, a person cannot acquire the teachings that pertain to it. In this way intellectual property controls access to all real property in Coast Salish law. The primacy of intellectual over real property means that a person must be part of a respected family, and must be hard working and intelligent, as a *pre-condition* of acquiring access to real property. “Ignorant” persons are excluded from managing or using realty, except as the employees or “slaves” of people of substance and education (*sii’ém*). Social class, in the special sense that it exists in Coast Salish cultures, determines who holds responsibility for the conservation of living resources. But class is not a static grouping. Birth into a high-class family confers definite advantages, but

each individual must also earn and publicly demonstrate personal merit, including the skill and “inspiration” (spirit power) to make estates sustainably profitable.

The importance of the incentive system embedded in traditional law is highlighted by the fate of Puget Sound salmon fisheries after judicial implementation of Coast Salish treaty fishing rights in 1974.¹⁹⁸ The federal court rejected arguments that fishing sites are individually or family-owned, and chose instead to allocate fishing areas by “tribe.”¹⁹⁹ By court order, then, traditional custodians were divested of their control of access to fishing sites, and replaced by elected tribal leaders, tribal government bureaucrats and biologists. Freed from kinship restrictions on their access to particular sites, Coast Salish fishermen moved their gear to the most productive sites (highest catch per unit of effort), regardless of their kinship relations with the traditional custodians, and these sites were fished more heavily.²⁰⁰ Valuable traditional reef-net sites in the San Juan Islands historically had one or at most two “owners” and supported up to a dozen “gears” (nets); after the court’s decision, purse seine boats from seventeen different “tribes” descended on each of these sites.²⁰¹ Reef-net harvests fell from thousands of fish

196. See BARSH, FISHING RIGHTS CONTROVERSY, *supra* note 5, at 12-16; Barsh, *supra* note 83, at 85-102. Similarly, Canada set quotas for the North Atlantic cod fishery unsustainably high to satisfy fishers and industry. Jeffrey A. Hutchings & Ransom A. Myers, *What Can Be Learned from the Collapse of a Renewable Resource? Atlantic Cod, Gadus morhua, of Newfoundland and Labrador*, 51 CANADIAN JOURNAL OF FISHERIES AND AQUATIC SCIENCES 2126-2146 (1994); Jeffrey A. Hutchings, Carl Walters & Richard L. Haedrich, *Is Scientific Inquiry Incompatible with Government Information Control?*, 54 CANADIAN JOURNAL OF FISHERIES AND AQUATIC SCIENCES 1198-1210 (1997).

197. Gordon, *supra* note 5; CRUTCHFIELD AND PONTECORVO, *supra* note 5, at 12.

198. *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *aff’d sub nom. Washington v. Washington State Commercial*

Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

199. *United States v. Washington*, 520 F.2d at 690-691 (citing *Whitefoot v. United States*, 293 F.2d 658, 693 (1961)).

200. Barsh, *supra* note 5, at 77-102; Barsh, *supra* note 83, at 99-101; Russel L. Barsh, *Common Goods and the Economics of Salmon Escapement Goals*, in INTEGRATION: PROMISES AND PROBLEMS IN THE NORTHWEST SEAFOOD INDUSTRY 56, 61-62 (Rodner R. Winget ed., 1982).

201. Russel L. Barsh, *Ethno-genesis and ethno-nationalism from competing treaty claims* (May 13-14, 2005) (unpublished manuscript presented at the University of Washington, Conference on Pacific Northwest Indian Treaties in National and International Historical Perspective, on file with the author) (describing evidence submitted by various tribes to justify their claims to fishing rights in the San Juan Islands).

per tide per gear, to a few hundred fish per season.²⁰² This is not to lay the blame for declining stocks and harvests entirely at the door of Coast Salish treaty fishermen. Habitat loss and the failure of state regulators to scale back non-treaty fishing adequately to accommodate the treaty harvest are undoubtedly also major factors.²⁰³ The point is simply that tribal fishermen were no longer self-regulating²⁰⁴ and they contributed to the decline of salmon stocks that they had managed to conserve for centuries—as piles of confiscated nets at tribal fishery department offices attest poignantly.

202. Russel L. Barsh, field notes 2002-2004 (on file with the author) (including interviews with Jack Giard, Pete Granger, Ralph Lilly, and John Trenens, all of whom fished traditional reef-net sites on Lopez and Stuart Islands, and with Cleve Vandersluys, who set anchors for the reef-net fleet from the 1940s to 1960s).

203. Puget Sound Action Team, Office of the Governor, State of Washington, 2005-2007 Puget Sound Conservation & Recovery Plan 27 (2005), available at http://www.psat.wa.gov/Publications/biennialplan/pscrp_05-07_final-web.pdf (last visited Dec. 21, 2005) (“The causes of salmon declines have been broadly categorized as habitat destruction, harvest management, hatchery management, and hydropower projects.”). The plan gives highest priority to habitat protection and restoration. *Id.* at 2.

204. See Russel L. Barsh, *Netukulimk Past and Present: Míkmaq Ethics and the Atlantic Fishery*, 37 J. CANADIAN STUDIES 15 (2002) (comparing recent changes in the Canadian lobster fishery).

