

# Finding Common Ground: Negotiating Downstream Rights to Harvest with Upstream Responsibilities to Protect—Dairies, Berries, and Shellfish in the Salish Sea

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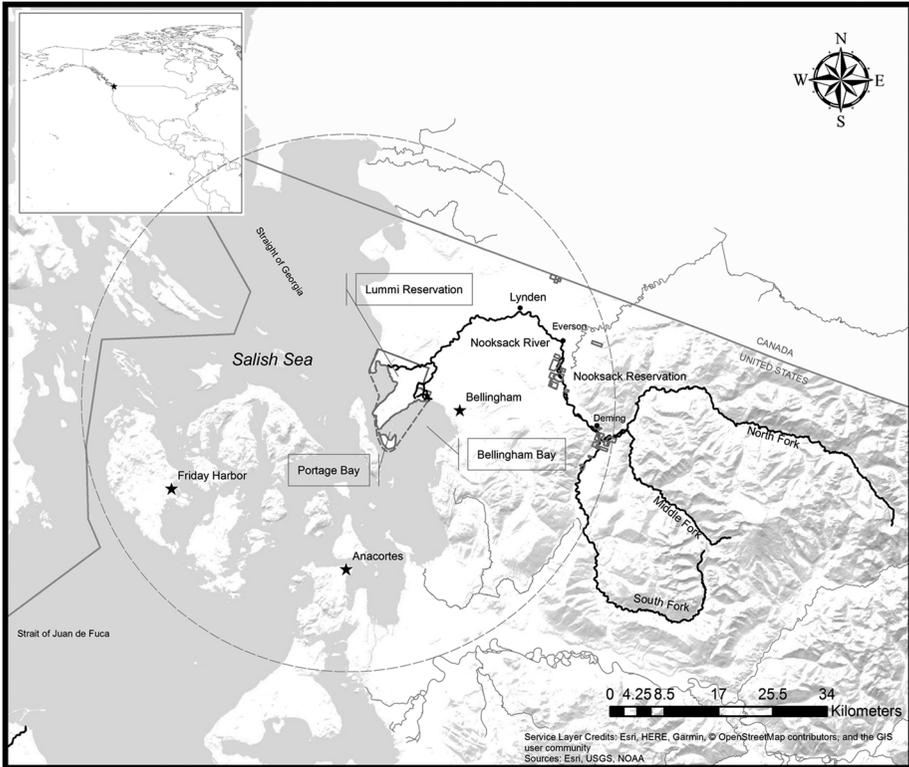
## Abstract

Harvesting shellfish is an important cultural and economic activity for coastal Indigenous communities throughout the Salish Sea. However, for the Lhaq'temish People of Lummi Nation, upstream agricultural pollution has rendered this inherent right impossible for almost two decades. In an attempt to reopen the shellfish beds, Lummi Nation leaders developed the Portage Bay Partnership, which aims to address the upstream pollution problem through relationship building and shared connection to place. The partnership brings to light several key points: (1) efforts to integrate different community views of place to develop a relational approach to shared water governance, (2) the use of legal tools to incentivize relationship building, and (3) the continued challenges associated with competing governance frameworks and worldviews. This partnership opposes a system that has been set up to systemically exclude or disenfranchise Indigenous communities, replacing a governance model based on acquired rights with one that prioritizes relationships and responsibilities.

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**Figure 1**  
Map of the Nooksack River Basin

Cartography by Sylvie Arques.

On January 6, 2017, a historic agreement was signed between two unlikely groups: government leaders from Lummi Nation and agricultural leaders from Lynden, Washington. Lummi Nation (traditionally known as Lhaq'temish—People from the Sea) is an Indigenous, fishing-based community whose ways of life rely on harvesting from the sea, hunting, and gathering. Lynden, Washington, is a settler agricultural community whose main economy is based on dairy and agriculture farming, particularly berries. They are connected geographically through the Nooksack River, and this very connection has historically placed these communities at odds (see Figure 1). The January 2017 agreement, known as the Portage Bay Partnership, was designed as a first step in recognizing and resolving the issues associated with upstream pollution, particularly on the shellfish beds of Portage Bay.

Over the past several decades, increased upstream agricultural activities and subsequent pollution inputs have significantly impacted the water quality of the Nooksack River Basin and the once-thriving intertidal ecosystem, subsequently

limiting Lummi Nation's ability to safely harvest shellfish.<sup>1</sup> Between 1996 and 2006, 735 acres of shellfish beds in Portage Bay were closed due to bacterial contamination (fecal coliform).<sup>2</sup> The bacterial runoff from upstream agriculture and dairy activities causes harm as it overflows into ditches and tributaries that flow into the Nooksack River, and then into Bellingham Bay.<sup>3</sup> Increased monitoring from Lummi Nation and regulatory efforts from the state of Washington and Lummi Nation helped reopen the beds in 2006. A resurgence in bacterial contamination, however, closed the beds again in September 2014. As of April 1, 2019, the beds were conditionally opened for spring harvest but remain closed for winter (during high flow and increased contamination periods). The shellfish closures impact the tribe financially with a conservative estimate of US\$8 million in commercial value lost for the first decade of closure alone (Northwest Indian Fish Commission 2015). These closures are not just an inconvenience or economic burden; they also impact the ceremonial right to harvest and traditional ways of life for the Lummi community and other Coast Salish community members throughout the region.<sup>4</sup>

As described below, the right to fish and harvest shellfish is both an inherent right based on cultural tradition and an acquired right reserved through treaties and associated laws and policies. The right to access is protected in many tribal treaties through access to "usual and accustomed" (U and A) hunting, fishing, and gathering rights. Maintaining a way of life based on fishing, harvesting, and hunting is an inherent right grounded in a social contract that links rights to harvest with responsibility to protect. With settler occupation of Indigenous lands, and the subsequent increased stressors on land and water, the ability to fully exercise these rights has been compromised.

1. In addition, the deforestation of the riparian zone, the overdraw of wells, and the reduction of tributaries have impacted the flow, temperature, and sedimentation of the river, thus negatively impacting salmon runs.
2. Lummi Indian Business Council to EPA Re: Nooksack River Basin Water Quality, Tribal Shellfish Beds, and the Management of Animal Wastes in Washington State, May 27, 2010. Also [www.portagebaypartnership.org](http://www.portagebaypartnership.org), last accessed June 27, 2019.
3. Adding to the pollution, the practice of spraying manure on raspberry bushes to serve as a cheap source of fertilizer has significant impacts—particularly considering the sheer volume of crops. Whatcom County produces 65 percent of the raspberries in the United States, which equates to the largest per capita of red raspberries in the world. Similarly, the region has 183 dairy farms with more than 60,000 cows. A key driver for the dairy production is the Darigold plant in Lynden, which is the fourth largest producer of powdered milk in the United States (Lynden Chamber of Commerce 2019, <https://www.lynden.org/the-lynden-community>).
4. It is important to note that the traditional territory of the Lhaq'temish People far extended beyond the current reservation boundaries. The traditional territory extended West throughout the San Juan Islands and north into Canada. The current reservation boundary is only a fraction of the original territory, with the contemporary boundaries comprised of a five-mile-long peninsula (Lummi Peninsula), bordered by Lummi Bay on the west and Bellingham Bay on the east. In addition, the reservation border includes a smaller peninsula of Sandy Point; the floodplains and deltas of the Lummi River and the Nooksack River, as well as Portage Island, and associated tidelands. Overall, the current territory of Lummi reservation includes seven thousand acres—or thirty-eight miles—of productive tidelands. An estimated 6,590 people live on the Lummi Reservation, with an estimated of 4,800 enrolled Lummi community members who live on or near the Reservation (Lummi Nation 2015, 3). (see Figure 1).

During treaty negotiations in the 1850s, Indigenous communities throughout Coast Salish territory (Salish Sea region) of North America were forced to give up millions of acres of traditional territory and move to reservations in the United States (reserves in Canada). In the treaty negotiations that occurred on the US side of Coast Salish territory, the tribal leaders maintained their right of fishing and hunting in U and A areas. Maintaining the right to access U and A territory is a central component of treaties between tribes and the US government and has been reinforced in the courts, for example, by *United States v. Washington* (1974). It is the federal government's duty to uphold the terms of the treaty, in perpetuity, through what is known as treaty trust responsibility. However, all too often it is the tribes themselves that have had to consistently fight to uphold these rights—re-reminding governments to uphold the treaty trust responsibilities, a (Cohen and Norman 2018; Grossman et al. 2012; McCreary and Milligan 2014; Norman 2015, 2017; Sam and Armstrong 2013; Whyte 2016). Most recently, this fight occurred when Lummi Nation successfully fought off the proposal to build what would have been the largest deep-water marine terminal in the United States, on Lummi's ancestral territory, Xwe'chi'eXen (Cherry Point). Construction of this terminal would have severely impacted the community's ability to fish in their traditional fishing grounds and would have disturbed sacred land. Similar to the Portage Bay Partnership, the Lummi community won this fight through relationship building with key actors. In this case, the Army Corps of Engineers ultimately denied the permit to build and upheld Lummi's treaty rights to harvest. Although Lummi Nation won that fight, another threat is pending with the proposed development of the Trans-Mountain Pipeline in Canada.<sup>5</sup> It is under these circumstances that Indigenous communities such as Lummi engage both legal means and innovate partnerships—like the Portage Bay Partnership—to protect their tribal homelands and waterways. Protecting waterways and upland habitat is critical to maintaining access to traditional foods (commonly referred to as First Foods).<sup>6</sup>

Complicating the issue, federal, state, and local regulatory authorities underprotected the Nooksack River Basin for decades, allowing pollution inputs to go unchecked and riparian zones to be cleared. The lack of consistent enforcement of existing water quality regulations and the lack of financial commitment

5. The terminal, which is planned for construction in Coast Salish territory just thirty miles north of Lummi Nation, would increase the tanker traffic (from five per month to thirty-four), impact fishing access, compromise the ecology of the shoreline, and impact the endangered resident orca population through increased ship noise. As Tulalip Tribes chair Marie Zackuse told Canada's National Energy Board at a hearing in Victoria, British Columbia, "our relatives, the salmon and the killer whales, do not recognize this border. ... As Tulalip people, we share a sacred cultural bond with the killer whales. They are the symbol of our tribe, and it is our responsibility to speak up for them when they are in need" (Northwest Public Radio 2018). Both Lummi and Tulalip tribes are members of Coast Salish tribes located throughout the Salish Sea (which spans Canada and the United States).
6. The term *First Foods* is commonly capitalized in academic literature focusing on environmental and social justice issues to highlight the impacts of dispossession on the well-being of communities.

by state and county agencies to monitor pollution inputs contributed to unhealthy land management practices. This absence of agency accountability and associated pollution inputs compromised the ability of the Lummi community to safely harvest shellfish. Jurisdictional fragmentation throughout Coast Salish territory exacerbated these issues, as pollution inputs and zoning have, historically, not been conducted on a comprehensive, basin-wide scale, although nascent county-wide efforts are currently under way to attempt to remedy this (Whatcom County 2019). It is these circumstances that make the Portage Bay Partnership such an important and innovative approach. (See Table 1 for a detailed timeline of events leading up the Partnership.)

While the focus of this case is regional, this article helps inform global environmental politics by exploring the impacts of a settler colonial economy on Indigenous economies and communities and the disruption by a colonial presence of the relationship between Indigenous peoples and the natural environment. This disruption has occurred physically through displacement, altering pathways to the natural world (including, but not limited to, overharvesting, destruction of habitat, and external pollution), as well as through political fragmentation and border-making processes. Examining Indigenous-led, innovative agreements that aim to resolve imbalances and assign responsibilities left unattended by nontribal governments is an important exercise that could be useful to apply to other arenas throughout global environmental politics.

There are many academic starting points for this conversation, including Indigenous rights, impacts of colonial economies and governance structures, and environmental and social justice issues. As part of the wider collection of papers in this special issue, this case demonstrates the shift in governance approaches that arises from engaging with Indigenous water relations and political economies. I argue that Lummi Nation is challenging settler colonial governance terms by negotiating the partnership, guided by their own values and economies. This leadership shows grace, resilience, and forgiveness. It also comes from a position of strength. Lummi Nation's approach to the Portage Bay Partnership challenges Western views of resource management and property rights, drawing instead on Indigenous history and practice. By looking to Indigenous-led governance strategies to address economic and land/water use conflicts, this work demonstrates the value of linkages between Indigenous politics and global environmental politics for identifying and developing new forms of respectful, reciprocal governance relations.

## **Making Space for Indigenous Knowledge Systems in Global Environmental Politics**

This article builds on a nascent trend in this journal (and, more broadly, within the field) to engage with Indigenous politics (Bernstein et al. 2018; Eisenstadt and West 2017). Past articles in this journal, for example, have drawn attention to the role of Indigenous rights in transboundary water negotiations and

**Table 1**

## Timeline of Portage Bay Partnership

<i>Time</i>	<i>Event</i>
Presettlement	Coast Salish communities thrived off the bounty of the land and water and had reciprocal relationships with the natural world.
1855	The Point Elliot Treaty was signed between The United States and Coastal Tribes of the Salish Sea (Puget Sound region)—including Chief Seattle (si'ab'siahl), and representatives from the Duwamish, Suquamish, Snoqualmie, Snohomish, Lummi, Skagit, and Swinomish (in order of signing) and Territorial Governor Isaac Stevens. The Point Elliot Treaty established reservation borders and secured U and A rights for hunting and fishing (including shellfish). The Lummi signatory was Chow-its-hoot.
1855	First in Time, First in Right—or Prior Appropriation Doctrine - established through lawsuit involving two mining companies ( <i>Irwin v. Phillips</i> ). California Supreme Court established that first-in-time users - for “beneficial use” - had senior water rights.
1888	Winters Doctrine—Upholding Indigenous communities right to water. However, the right to water only goes back to the date of treaty-signing, rather than the tribes occupation period prior to settler contact.
1948	Federal Water Pollution Control Act. 33 U.S.C. 1251–1387
1972/1977	Federal Water Pollution Control Act was amended into the Clean Water Act.
1974	<i>United States v Washington</i> (Boldt Decision). Reaffirmed treaty-tribes' rights to harvest in U and A areas, interpreted ‘in common with’ to mean 50 percent of total catch, and reaffirmed tribes as co-managers.
1994	Rafeedie Decision—Federal District Court Judge Rafeedie ruled that the “in common” language established in the Boldt decision, applied to shellfish. He ruled that the tribes reserved harvest rights to half of all shellfish from all U and A places, indicating, “A treaty is not a grant of rights to the Indians, but a grant of rights from them.”
1996–2006	Washington State Department of Health closed portions of Portage Bay shellfish sites due to deteriorating water quality associated with bacterial (fecal coliform) contamination. Lummi Nation estimates an average of \$850,000 of revenue loss, per year of closure.
2014–2019	Portage Bay closed for harvesting
2015	Lummi Nation retains lawyer for potential lawsuit regarding shellfish contamination
May 2016	Xwe'chi'eXen (Cherry Point) protected, Army Corps of Engineers denies permit for shipping terminal
May–December 2016	Portage Bay Talks between Lummi leadership and dairy farmers
January 5, 2017	Portage Bay Partnership signed
April 1, 2019	Portage Bay Shellfish Beds Conditionally Re-opened for spring harvest

governance (Cohen and Norman 2018); the importance of multiple knowledge systems (Inoe 2018); and the role of Indigenous peoples in codifying non-Western understandings of relationships to nature (Kauffman and Martin 2018). This work builds on Eisenstadt and West's (2017) paper that engaged with Indigenous belief systems and climate change attitudes in Ecuador. Inoe's (2018) work in the Amazon is particularly salient, as it highlights the need to focus on relationality, that is, the relationship between human and nonhuman worlds in situ. Her article highlights how place-based and highly contextualized knowledge systems based on reciprocity are a fundamental starting point in Indigenous environmental politics, one that is largely absent in Western governance models. This article continues and deepens the work of expanding consideration of the ontologies that shape governance practices and the relationships with the natural world, which, outside of Indigenous politics, remain largely framed through a Western lens.

Trying to reverse these trends both in academia and in practice requires a critical look at how human–environmental relationships are framed. In a Western framework, the environment is often characterized as a resource that can be commodified or considered in utility terms, whereas Indigenous frameworks often characterize the relationship with the nonhuman world based on reciprocity and relationships, with nonhuman entities considered in rights-bearing terms. In the first, the “right” to a resource is largely disconnected from the “responsibility to protect,” whereas in Indigenous governance frameworks, they are interconnected (Walsey and Brewer 2018). Furthermore, the “right to protect” is also based on a sacred relationship with nonhumans as relatives. Engaging in Indigenous politics and governance provides an important opportunity to broaden the interpretation of plural knowledge systems in practice and theory.

### *Postsovereign, Decolonial Governance*

Over the past two decades, a rich conversation has emerged relating to hollowing out of the state and the role of the local in environmental politics. This conversation has opened up space for critical engagement of Indigenous politics, particularly in light of wider discussion of postsovereign governance and decolonial processes.

Jessop (2004) famously postulates a “hollowing out of the state” in which state-centered approaches are being replaced with regional and nonstate actors, leading to a “rise of the local.” Norman and Bakker (2009), however, show that the rise of the local does not necessarily equate to a greater voice for local participation, particularly in transboundary settings. In fact, their work shows that the hollowing out of the state weakens citizens' and nonstate actors' ability to govern effectively due to lack of financial resources allocated to fulfilling goals. These insights prove useful to consider in the context of demanding enforcement of treaty trust responsibility, while simultaneously opening up space for Indigenous governance models and plural knowledge systems.

Earlier, Karkkainen (2004, 74) offered a postsovereign approach in which “sovereign states and nonstate parties actively collaborate, roughly as equal partners, to address certain kinds of highly complex problems that appear to be beyond the capacity of sovereign states alone to solve.” In this framework, the role of the state is redefined and downsized to that of co-participant in the formation and execution of environmental policy, rather than the exclusive sovereign law-making (Karkkainen 2004). The development of a postsovereign approach provides focus on an ecological, place-based regulatory approach. While managing at the watershed level has long been advocated for and a rich integrated watershed resource management literature exists (Molle 2009), defining a watershed scale has proven complex, at best (Cohen and Davidson 2011). Attempts to address the political-social-economic variations of water governance have been pushed forward through critical geographers such as Swyngedouw (2009), Budds and Hinojosa (2012), and Linton and Budds (2013) through what is broadly known as the hydrosocial approach.

While engagement with a postsovereign, ecological approach is helpful in understanding shifts in environmental governance, a significant gap still remains. This gap relates to different starting points in the relationship with the natural world. Although it is important not to overessentialize the difference between a Western approach to landownership and an Indigenous relationship to the natural environment, it is important to tease out fundamentally different starting points. As Indigenous scholars Walsey and Brewer (2018, 1169) eloquently reflect, “when western management systems built on western ideologies work to control the natural resources Indigenous people rely on for sustenance, these western regimes come to dominate, overshadow, and marginalize Indigenous people’s inherent rights.” Walsey and Brewer reflect on the ongoing impacts of Indigenous fisheries on the Yukon River that are continually impacted by Western policies and laws that are incongruent with the Indigenous populations’ place-based knowledge of and relationship to the river. The different time and space of the managed policies, implanted by newcomers who do not fully understand the complexities of the river, have significant impacts on the Indigenous communities’ ability to maintain a way of life.

For most Indigenous cultures, a starting point for the interaction with the natural environment is based on relationships and reciprocity rather than resources and rights. This article follows such ontological premises and advances a postsovereign/ecological approach by integrating Indigenous models of rights and responsibilities as twinned rather than separate. This reframing in global environmental politics could have substantial impacts if applied broadly.

Thus, when looking for ways that global environmental politics literature can interface with Indigenous sovereignty and the nation-state, a key component is to reframe and open up space for alternative narratives and practice, both in theory and action. This includes a reframing of relationships with the natural environment—moving from an extractive framework to a reciprocal one.

## Situating Myself Within This Work: Methods and Positionality

As a scholar aligning with Indigenous research methodology and feminist and critical geography traditions, it is important that my work engage community priorities in a reflexive manner and that I position myself within the work. In this article, the inability to harvest shellfish because of external pollution is a long-standing issue identified by Lummi Nation and other coastal tribes. The interest in the Portage Bay Partnership, specifically, emerged from priorities set within the Lummi Indian Business Council and within the community. The engagement with the partnership is also based on my ability to witness key events, such as the signing of the partnership, and key discussions with the architects of that partnership. My work is informed by critical scholars who advocate that ethical research necessitates mindfulness of issues of reflexivity, positionality, and power relations, such as Pacheco-Vega and Parizeau (2018), who name this method *doubly engaged ethnography*.

Through this lens, it is imperative that I locate—or position—myself in my own work, engage in work that is meaningful to the communities that I work with, and represent the work in an ethical and transparent way. My roles as a mother, partner, sister, daughter, teacher, mentor, scholar, and environmentalist all impact and influence my work, as does my role as a non-Native scholar at a tribal college. I work alongside and with the Indigenous communities that our school serves. I come from a settler immigrant background, with roots in Italy and Wales.

I have worked at Northwest Indian College since 2001, where I have served as faculty and now department chair of the Native Environmental Science department. After living in the Salish Sea for almost two decades, and raising two children here, I have a deep love and appreciation for the Salish Sea; I am keenly aware, however, that I am a guest here. This land is the ancestral homeland of the Coast Salish Peoples and the traditional territory of the Lhaq'temish People. My thinking is largely shaped by the daily interactions that I have while working at a tribal college. The priorities of the community guide my own research and teaching. Although I have worked at Northwest Indian College for almost twenty years, I recognize that I am an outsider within that community and take deliberate steps to assure that my writing falls within ethical boundaries—through a layering of community-based review processes, academic peer-review processes, and personal reflections. My methodology is inspired and guided by important Indigenous scholars who reflect thoughtfully on Indigenous research methodology, specifically Kovach (2010), Smith (1999), and Wilson (2009), and follows the research policies and practices defined by my college. Makomenaw (2012, 858) helps define *Indigenous research methods* as “where the researcher understands the role of Indigenous history, culture, language, and self-determination in the lives of Indigenous Peoples.” Scholars such as McGregor (2016), Smithers-Graeme (2013), and Lashua and Fox (2007) engage in this approach as a way to continue to destabilize

hierarchies in the academy, while simultaneously debunking the notion of objectivity.<sup>7</sup>

To ensure that what I present in this article is accurate and respectful, I have had this article reviewed by Lummi knowledge holders and community members. Any errors, of course, are my own.

## **Situating the Place: The Physical, Political, and Economic Geography of the Nooksack River**

The headwaters of the Nooksack River start at the glaciers of the Cascade Mountains, meander through rolling foothills, and then drain into the Salish Sea. The seventy-five-mile-long, glacier-fed Nooksack River is a salmon-bearing stream, important especially to the Lummi and Nooksack tribal communities along the river. The current political boundaries of Lummi Nation are at the mouth of the Nooksack River, where the waters drain into Bellingham Bay. The traditional territory of Lummi Nation, however, extends through the San Juan island archipelago and the adjacent mainland. The traditional territory extended north into what is now Canada, east into the Cascades, south to the Stillaguamish River and west into the San Juan Islands, where fishing villages were established (Deardorff 1992). The Usual and Accustomed territory of Lummi Nation has been and continues to be litigated in court cases.

Oral histories provide accounts of salmon returning to the river in such magnitude that the water was no longer visible—only the backs of the silvery salmon were visible as the salmon migrated upstream by the millions (Nugent 1982). Today, the salmon return in only a small fraction of the historic runs. Disturbed upstream and estuarine habitats, increased water temperatures, and reduction of the river's flow have all severely impacted the ecology of the Nooksack River and the ability of the river to provide a habitat for the salmon.

Similarly, agriculture and dairy farms along the river continue to impact the water quality, ultimately contributing to shellfish contamination. The Nooksack flows through the agricultural towns of Everson, Lynden, and Ferndale before reaching Lummi Nation and proceeding to Bellingham Bay, Portage Bay, and the Salish Sea. Both the physical and political geography of the Nooksack River and settlement patterns in the region exacerbate upstream pollution and its impacts on downstream neighbors.

The changing physical geography of the Nooksack River Basin is directly linked to the changing settlement patterns and the associated changes to the landscape. The wave of immigrants who settled in the region in the 1800s brought different values and interpretations of land management. Great effort went into removing the forested landscape to make room for agricultural practices that were familiar to the new immigrants, in this case, dairy farming from the Dutch and Scandinavian influence and, later, berry farming. These changing

7. Dawson et al. (2017) provide an important overview of Indigenous research methods.

land uses not only impacted the physical environment (declining water quality, increased siltation, loss of habitat) but also established a different interpretation of the relationship with the landscape. The Coast Salish communities had thrived for millennia throughout the Salish Sea region by working in a reciprocal relationship with the natural environment. The newcomers had different interpretations of the natural world and imported their ideas of agriculture and economy from a different geographical and philosophical context. These differing visions of the lands and waters of the Salish Sea region created the context for conflicts between settler farmers and Indigenous communities—and could not be reconciled within a colonial legal framework. The development of the Portage Bay Partnership, detailed in the next section, reveals efforts by Lummi Nation to move beyond those divides, although the negotiations of the partnership reveal a complex interplay between Western legal tools and Indigenous relationship building.

### The Portage Bay Partnership: Finding Common Ground

The signing of the Portage Bay Partnership Agreement occurred in the Lummi Indian Business Council (LIBC) chamber office. Walking into the LIBC office, through four large cedar pillars—reminiscent of longhouse architecture—the words “Lhaq’ temish/People of the Sea” are carved above the entryway. As you enter the council chambers, a large circular medallion hangs behind the council seating area with the words “Lummi Nation—1855 Treaty Tribe” carved into the wood. These two reminders speak to both the inherent and acquired rights of harvesting from the sea.

On the day of the signing, January 5, 2017, the council chamber was packed and emotions ran high. A diverse range of people—Lummi leadership and community members, Lynden farmers and families, local and state governmental officials, students and faculty from Northwest Indian College, and members of the press—were gathered to witness this historic event. For many of the dairy farmers in the room, this was their first time in the LIBC Administration Building.

The lead-up to the agreement went beyond the months of negotiations between the dairy farmers and Lummi leadership. Rather, it was part of a wider process of addressing issues of water rights and territorial control in the region. In this region, like many regions in the western United States, water rights are established through what is known as first in time, first in right. This right—referred to as the *prior appropriation doctrine*—was used to assure settlers that they would have access to water, with an emphasis on supporting mining and agriculture investments.<sup>8</sup> Central to this doctrine is that the water be used for “beneficial use,” which was largely defined as mining, farming, or household use. The genesis of this doctrine came largely to support the gold rush activities of the mid-1800s. Although Indigenous communities clearly had established first-in-time status, they consistently ended up with *last-in-right* access, as their water

8. <https://nationalaglawcenter.org/overview/water-law/>, last accessed June 27, 2019.

uses were not seen as economically productive. The first case to challenge the water diversions that were impacting Indigenous communities was *Winters v. United States* (1888), involving the Fort Belknap Tribe (located in the state of Montana) whose water from the Milk River was being diverted by encroaching settlers. The US Supreme Court affirmed the Fort Belknap Tribe's position, recognizing the need for water rights to maintain self-sufficiency, which was considered implicit in the establishment of reservations. Complicating matters, however, the rights are interpreted in Western law as having been established on the start date of the reservation rather than as extending over the much longer presettlement timeline (Thorston 2006). This means that first in time continues to be interpreted through a colonial lens.

In the Portage Bay case, downstream water pollution and the resolution of water rights are intertwined and are part of a longer history of Lummi Nation efforts to safeguard their territory. The start of the negotiations for the Portage Bay Partnership occurred in May of 2016, after Lummi Nation had successfully blocked the deep-water marine terminal at Xwe'chi'eXen (Cherry Point), as discussed above. With the threat of that development project behind them—at least temporarily—Lummi leadership was able to focus more fully on the Nooksack River Basin, water rights, and the ongoing issue of shellfish contamination.

In an effort to resolve the wider issue of senior water rights<sup>9</sup> (referred to locally as a global water initiative or settlement) between the agricultural and Lummi communities, it was critically important to work with dairy farmers and bring them to the table for conversation. As former chairman Timothy Ballew II (who spearheaded the Portage Bay Partnership initiative) explained in a conversation with the author in 2019, the partnership was both about addressing the impacts of downstream pollution on shellfish harvesting and addressing the larger issues of senior water rights. Thus the pollution issue is intertwined with the broader issue of establishing water rights. Prior to the agreement, minimal progress had been made between the communities to address the chronic water quality issue and subsequent shellfish contamination. Recognizing the need to shift the dialog, Lummi Nation announced in 2015 that they had retained a lawyer and planned to litigate for the damages caused by upstream pollution. However, Lummi leadership saw an opportunity to try a new approach—one that would replace incentives and penalties with relationships.

Between May and December 2016, tribal leaders and the farmers met regularly to discuss possible solutions. Although the threat of litigation<sup>9</sup> remained, the aspiration was to articulate a solution based on trust and good intent—to carve out a different path forward of dialog and problem solving. To help foster this, discussions took place in the kitchens and living rooms of those impacted. Several generations after colonial settlements disrupted Coast Salish lands, members of each community are participating in a partnership to reconcile their different worldviews and find a meaningful way forward in a reparative way.

9. Senior water rights are connected to first-in-time, first-in-right status.

The farmers who joined the partnership were a cohort of leaders in Lynden's dairy community who wanted to work toward a joint solution. On the Lummi side, the leadership of the conversation came from the chairman and council members (who are also lifelong fishers). In a conversation that I had with then-chairman Ballew in 2017 about the partnership, he reflected that the partnership centered around finding common ground and building relationships. Agreeing to work together collaboratively with the upstream neighbors—even a small percentage of the dairy farmers—took a tremendous amount of trust building and moving beyond a rhetoric of difference. Identifying common themes was critical in moving forward with the partnership. The negotiators recognized that both communities were interested in maintaining family tradition and preserving a traditional way of life, although the time frames (a few generations vs. hundreds of generations) and practices (agriculture vs. harvesting) were different. In addition, spirituality and connection to a higher being—and higher purpose—also played an important role in the negotiations. Praying before meals, for example, although perhaps in different ways and to different Creators, is common to both communities. These commonalities provided a practice through which to discover and strengthen shared norms, focusing on similarities rather than differences.

Even though only seven farmers (of the approximately 140 farms in the region) initially signed on to the partnership, its negotiation was widely viewed as an important first step in regional reconciliation and improving the health of the waterway. On their website, for instance, the Portage Bay Partnership describes their efforts:

This Partnership is a very important first step in what the signers believe will be a positive, long term working relationship between Whatcom's family farmers and the Lummi Nation. This relationship is vital to address a number of issues important to the Tribe and to the future of farming. It is a recognition that tribal treaty rights are a concern for farmers and the entire community. It is also a recognition by the Lummi leaders that preserving a future for farming [is] in the Tribe's and community's interest as well as farmers'.<sup>10</sup>

Similarly, Rich Appel, a dairy farmer and key member of the team that developed the partnership, reflected,

While this first step involves a number of actions aimed at addressing water contamination, we believe the most important element is the beginning of a more positive, constructive and beneficial working relationship between the farmers and the Lummi Nation.<sup>11</sup>

10. [www.portagebaypartnership.org](http://www.portagebaypartnership.org), last accessed June 27, 2019.

11. <https://nwtreatytribes.org/lummi-farmers-agree-protect-portage-bay/>, last accessed June 27, 2019.

Getting to the agreement relied on a combination of goodwill, taking the time to get to know neighbors, and asserting legal rights related to treaty protection. The agreement began the process needed to resolve decades of environmental damage related to manure runoff and associated bacterial contamination in the Nooksack River and along its shorelines. The spirit of the agreement was captured by then Chairman Ballew:

We want to work together to protect water for all and to return it to the productive state it once was. The Portage Bay Partnership is an opportunity for the Lummi to safeguard our harvesting communities by working with farmers to address all sources of water contamination.<sup>12</sup>

Besides the desire to work collaboratively with Lummi Nation, an added benefit for the farmers was protection from future litigation. The partnership indicates that farmers who sign on to this partnership—and maintain the goals in good faith—will be immune from future lawsuits that address the issue of past damages. Still, while the group of initial farmers has led the way for others to join, progress has been slow to date. The hope is that many of the dairy farmers in the room during the initial signing will eventually sign on to the agreement, although no additional farmers had signed on at the time of writing.

### *Collaborative Governance and Its Challenges*

The collaborative governance structure followed only after the formation of relationships between the community members—even if they were nascent. The architecture of this mechanism has three central pillars: individual farm management plans, financial compensation for restoration of beds, and the development of a legal framework. Importantly, the Portage Bay Agreement included an initial payment of US\$600,000 to the Portage Bay Shellfish Recovery Fund, which is used to restore the impacted shellfish beds. This payment—which was raised by the group of seven dairy operators who signed the agreement in combination with state funding—was an acknowledgment of how past practices negatively impacted Lummi Nation. The payment is only a small portion of the actual losses, and two years after the payment, no further payments had been made. Despite this lag, this payment is generally seen as an important step in reconciling the financial impact of the pollution.

The Partnership Agreement outlines a process to develop Water Quality Improvement (WQI) plans for individual farms in the Lynden community. The process allows for Lummi representatives, farmers, and agreed-upon experts to collaboratively develop the plans. As of April 2019, however, negotiations have stalled after the dairy farmers did not accept the expert suggested by Lummi Nation to develop facility-specific WQI plans. A letter to re-initiate these

12. <https://nwtreatytribes.org/lummi-farmers-agree-protect-portage-bay/>, last accessed June 27, 2019.

discussions was sent in early 2019 to the dairy farmers by the current LIBC chairman. To date, however, negotiations have not resumed.

This stalling is not surprising considering the different starting points, worldviews, and political structures that influenced the land practices that led to the shellfish pollution. As Mitch Moorlag of Edaleen Dairy, a negotiator for the farmers, stated, “While farms were major contributors of contamination in the past, today there are multiple causes that must be addressed.” Merle Jefferson, executive director of the Lummi Natural Resources Department, further reflected, “Farms are not wholly responsible for the contamination, but the farms that have joined the partnership are stepping forward as leaders in fixing it, and we hope others will follow their example.”<sup>13</sup> Still, even with mixed willingness from dairy farmer participants to accept current responsibility for water contamination, the partnership has enabled Lummi and Lynden communities to begin to address the damage; for instance, Moorlag also commented that “this partnership enables us to work with Lummi leaders and others in the community to more effectively address the water contamination that keeps the shellfish beds from reopening.” It remains unclear when (or if) the negotiations will resume. However, the governance architecture that was created represents an innovative, Indigenous-led governance solution and holds potential not only for addressing pollution pathways and water quality but also for re-orienting Indigenous-settler relationships along the river.

As discussed in the section below, a significant distinction between Western/colonial governance mechanisms and Indigenous governance is a managerial regime that fragments rights and responsibilities and those that pair them through reciprocal relationships, a starting point for many Indigenous cultures (Cajete 2000; Tallbear 2011; Todd 2014, 2017; Walsey and Brewer 2018; Watts 2013; Wilson 2014). Examining these frameworks provides ways forward for further collaborative approaches.

## **Rights and Responsibilities/Inherent Rights, Reciprocity, and Respect**

### *Inherent and Acquired Rights*

To explore the pairing of rights and responsibilities, it is important to understand the difference between inherent and acquired rights. Understanding this distinction provides a critical lens under which to engage Indigenous worldviews and frameworks within global environmental politics.

Over the course of two decades working within (and alongside) Indigenous communities on the traditional territory of Lummi Nation, I have come to understand the difference as critical. I have learned through these teachings that an inherent right is a right that is divine and that these rights are passed

13. <https://nwtreatytribes.org/lummi-farmers-agree-protect-portage-bay/>, last accessed June 27, 2019.

down from the Creator from family to family through generations and held in sacred responsibility. Inherent rights are also considered a social contract that families have with the natural world, and they are born from place (Nadasdy 2003). The fabric of life and ways of being are in situ, in context to the place called home. This place-based social structure includes legal and governance systems that guide the relationship with the nonhuman world. These tenets are underscored in Indigenous scholarly writings (e.g., Cajete 2000; Vaughan 2018; Walsey and Brewer 2018) and are present in oral history traditions. For the Nooksack River, this relates to important work, such as the First Salmon Ceremony and other practices that both honor and feed the nonhuman relatives.

The linking of rights and responsibilities, underpinned by reciprocity and respect, is found throughout Indigenous communities the world over. Vaughan (2018), for example, describes the intergenerational relationships to tidal lands of the Hawaiian island of Kaua'i in her book *Kaiaulu: Gathering Tides*. Here she describes the Hawaiian word *ho'ihi'i* as meaning "to make sacred"—to treat something with reverence and respect. Her masterful autoethnography shows how fishing is steeped in traditions of reciprocity, where men's and women's *kuleana* (right, privilege, concern, responsibility) is to maintain "respectful, reciprocal relationships between people and resources, which together constitute community." Here the community belongs to—and is not separate from—the natural environment. This belonging comes with both rights and responsibilities. Although each Indigenous community has their own unique relationship with place, the accountability and relationship between place and humans are common themes throughout Indigenous communities (Cajete 2000; Hayman 2015).

Similar relationships hold within the Lummi community and other Coast Salish tribes.<sup>14</sup> In this case, an inherent right is a right to fish, to hunt, to live near the waters, and to provide for your family, all of which are matched by a duty to care for the animals, plants, waterways, lands, and shorelines of the region. Through such pairing of rights and responsibilities, Coast Salish communities not only survived for thousands of years from the bounty of the Salish Sea—they thrived.

The rich ecosystems of the coastal waters of the Salish Sea provided ample food, with a nutritious diet of salmon, halibut, crabs, clams, berries, bulbs, nettles, seaweed, duck, deer, and goat. In the Lummi governance system, policies, laws, and structures are built into cultural protocols and passed down through family lines, stories, and ceremony. Gifting protocols through potlatch and ceremonies continually redistribute wealth.<sup>15</sup> The ethos was, and remains, one of collectivism, where everyone thrives and everyone has a role.

14. See Ballew and Julius in the Salish Sea Speakers Series, [www.nwic.edu/life-on-campus/degrees-and-certificates/b-s-in-native-environmental-science/](http://www.nwic.edu/life-on-campus/degrees-and-certificates/b-s-in-native-environmental-science/), last accessed June 27, 2019.
15. A potlatch is a gift-giving feast practiced by Indigenous peoples along the Northwest Coast, including Coast Salish communities. The potlatch distributes wealth through gifting, as well as establishing claims to names, and affirms family status. As part of assimilation policies,

Acquired rights, in contrast with inherent rights, are assigned to Indigenous communities by foreign, colonial governments. They are the rights that have been codified and reserved through various legal processes (including, but not limited to, treaty negotiations). Acquired rights are framed through a Western legal lens, where the starting point assumes separation of humans and the nonhuman world and rejects metaphysics and theism as a premise for law (Cajete 2000). As McGregor (2016, 69) writes, “inherent rights imply Indigenous rights ... that exist outside of colonial legal processes, and that precede and were not dissolved by colonization.” This follows from Dale Turner’s (2006) work exploring how Indigenous people can assert their legal and political distinctiveness. Turner advocates for a broader intellectual conversation about the meaning of Indigenous rights, sovereignty, and nationhood as they relate to Indigenous philosophies and Western European tradition. Indigenous legal scholars consistently discuss how colonial frameworks (acquired rights) are out of context for and jeopardize the spirit of Indigenous law (Boelens and Vos 2014; Borrows 1997, 2002, 2016; Borrows and Coyle 2017; Boyd 2017; Craft 2014, 2017; McGregor 2012, 2014, 2016; Napoleon and Friedland 2016). A colonial legal framework also fails to respect the complex cosmology that links rights and responsibilities.

### **Concluding Reflections: Reframing Contemporary Governance to Pair Rights and Responsibilities**

The signing of the Portage Bay Agreement was not just about the partnership between Lummi Nation and Lynden, Washington—two different communities joined together by a common river. The partnership is about the beginning of a new era, in which Indigenous leadership is fostering innovative partnerships to work toward shared goals across diverse communities. This partnership opposes a system that has been set up to systemically exclude or disenfranchise Indigenous communities, replacing a governance model based on acquired rights with one that prioritizes the linkages between rights and responsibilities. The partnership models a governance framework that is based on Indigenous belief systems, specific to place and based on values of relationships and reciprocity. However, as seen in the ongoing struggles of sustaining the partnership, this work also highlights the difficulties in overcoming colonial law and the devastating impacts of environmental degradation and unchecked resource extraction.

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governments outlawed potlatch from 1884 to 1951. Despite these laws, potlatch continued and remains important to Coastal Indigenous communities today. The U’mista Cultural Center (2018) in Alert Bay describes potlatch as follows: “The potlatch refers to the ceremony where families gather and names are given, births are announced, marriages are conducted, and where families mourn the loss of a loved one. The potlatch is also the ceremony where a chief will pass on his rights and privileges to his eldest son.”

The partnership also comes from a place of strength—in which the innovations are grounded in community values—and the expectation that treaty obligations will be upheld. In the leadership of this Partnership Agreement, Lummi Nation shows grace, forgiveness, resilience, and long-term thinking. Similarly, the willingness of a cohort of forward-thinking farmers to make themselves accountable for past practices—both through financial compensation for past damages and also by changing farming practices—is an important step forward to realigning management practices in consideration of the health of the whole river basin (and downstream neighbors).

The Portage Bay Partnership rejects solely operating through the lens of acquired rights as the framework for protecting Lummi Nation shellfish operations and instead turns to a relational, reciprocal model of watershed care. Such a governance arrangement reflects a postsovereign/ecological approach, by twinning rights and responsibilities into the regional political economy of farming, fisheries, and land use. The conditional opening of the Portage Bay shellfish beds in April 2019 shows that although progress is slow and difficult, it is possible with perseverance.

The partnership also fosters accountability and transparency in land practice behaviors. Realigning fragmented governance systems and grounding work in place open up space for more innovative, Indigenous-led agreements. Investing in partnerships based on trust, shared values, and connection to place will undoubtedly continue to reverse the environmental damage that is reducing access to First Foods and limiting Indigenous ways of life. This partnership provides a way forward that not only supports Indigenous rights but also contributes to better land practices. That is, linking rights with responsibilities at a watershed scale requires navigating through different governance frameworks and ontologies. Although there is currently a stall in the negotiations, much can be gained by examining the process and structure of the governance architecture.

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