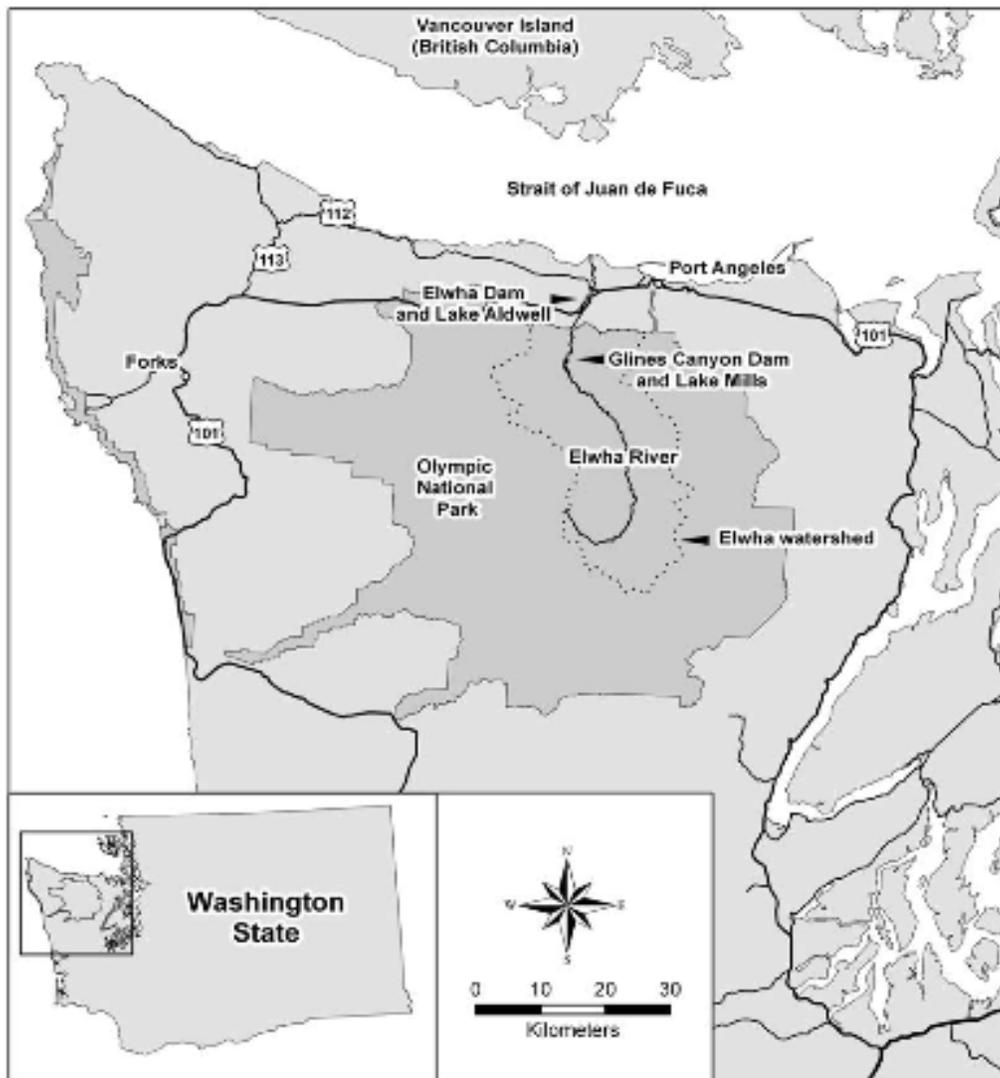


TRIBAL ADVOCACY AND THE ART OF DAM REMOVAL: THE LOWER ELWHA KLALLAM AND THE ELWHA DAMS

Julia Guarino*



United States Dep't. of Commerce & Nat'l Marine Fisheries Serv., Elwha River Fish Restoration Plan, Developed Pursuant to the Elwha River, Ecosystem and Fisheries Restoration Act, Pub. L. No. 102-495, NOAA Technical Memorandum NMFSNWFSC-90, fig. 1 at 2 (2008).

INTRODUCTION: THE TREND TOWARD DAM REMOVAL AND THE ROLE OF TRIBAL ADVOCACY

The lower dam immediately blocked the spawning migrations of salmon and steelhead. As one wades the riffles, fishes the pools, and explores the Elwha and its tributaries above the dam, it becomes clear that the salmon and steelhead are absent. Biologically speaking, the river is a shadow of its former self. Before the Elwha Dam was built, the river produced approximately 400,000 salmon and steelhead a year, with some chinook weighing over 100 pounds. It is an odd experience to be deep in the Elwha River valley, surrounded by healthy forest, viewing a clean and healthy river ecosystem, and comprehend the diminished river. While magnificent, beautiful, and even transcendent, the river exudes a fundamental emptiness that is the legacy of settlement and development—a legacy specifically due to the two aging dams and the historical and economic processes that culminated in their construction.¹

The big dam-building era is over, and though it will be a long journey, we have begun to move toward dam removal for ecological, economic, and social reasons. The Lower Elwha Klallam Tribe has demonstrated, through its role in the removal of the Elwha Dams, that tribal advocacy can be a major force in freeing the rivers of Tribes' historic homelands.

The twentieth century saw an unprecedented frenzy of dam construction in the United States and worldwide. There are now more than

* Getches Fellow, Getches-Wilkinson Center for Natural Resources, Energy, and the Environment; J.D., University of Colorado Law School (2013); B.A., Bard College (2007). With many thanks to Charles Wilkinson for his direction and mentorship, and to Steve Suagee, Robert Elofson, Doug Morrill, and Larry Ward with the Lower Elwha Klallam Tribe for their time, advice, and comments.

¹ JEFF CRANE, FINDING THE RIVER: AN ENVIRONMENTAL HISTORY OF THE ELWHA 3 (2011).

87,000 medium to large-sized dams on America's rivers.² "[I]n the words of former Secretary of Interior Bruce Babbitt, 'we overdid it . . . building, on average, one dam a day, including weekends, since the Declaration of Independence.'"³ These structures were built for flood control, diversion, water storage, and recreational purposes, with little thought to their destructive environmental and social impacts.⁴

The negative impacts of dams on American rivers are numerous. By altering river temperature, water level, oxygen and sedimentation loads, the timing, volume, and velocity of flows and by blocking migration of species, dams completely change the environment in which native flora and fauna developed.⁵ This alteration threatens fisheries, prevents certain types of recreation, and often has a particularly devastating impact on traditional indigenous uses of the water body and the various species that reside in it.⁶

The majority of American dams constructed during the twentieth century were designed with a 50-year life expectancy, and 85 percent of these dams will be 50 or more years old by the year 2020.⁷ As American dams age, the public and the federal government have begun to acknowledge the environmental and social harms that dams cause, and

² ARMY CORPS OF ENGINEERS, NATIONAL INVENTORY OF DAMS, <http://geo.usace.army.mil/pgis/f?p=397:12>: (last visited Nov. 24, 2013). The National Inventory of Dams only includes dams meeting at least one of the following criteria: 1) High hazard classification - loss of one human life is likely if the dam fails, 2) Significant hazard classification - possible loss of human life and likely significant property or environmental destruction, 3) Equal or exceed 25 feet in height and exceed 15 acre-feet in storage, 4) Equal or exceed 50 acre-feet storage and exceed 6 feet in height, in 49 states (excluding Alabama), and Puerto Rico; *CorpsMap: National Inventory of Dams*, ARMY CORPS OF ENGINEERS, <http://geo.usace.army.mil/pgis/f?p=397:1:0> (last visited Nov. 24, 2013).

³ Christine A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641 (1999) (quoting Bruce Babbitt, *Dams Must Be Looked at Critically, With an Eye Toward Environment*, WIS. STATE J. (Nov. 29, 1998)).

⁴ See generally MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1986); See generally STEPHEN GRACE, *DAM NATION* (2012).

⁵ See *Why We Remove Dams*, AM. RIVERS, <http://www.americanrivers.org/initiatives/dams/why-remove/> (last visited Nov. 24, 2013).

⁶ See THE JOHN HEINZ III CTR. FOR SCI., ECON. & ENV'T, *DAM REMOVAL: SCIENCE AND DECISION MAKING* 74-78 (2002) [hereinafter HEINZ REPORT].

⁷ See *Id.* at 34.

federal dam building has essentially ceased.⁸ Furthermore, private parties and the federal government have begun to consider removing dams instead of repairing and relicensing them as they age. On July 1, 1999, Edwards Dam in Maine, the first dam to be removed over the protestations of its owner by order of the federal government, was demolished.⁹ Since 1999, 593 dams have been removed from American rivers, 63 of which came out in 2012.¹⁰

⁸ Beginning in the 1960s, an international environmental and social movement concerned about the effects of dams began to grow, and large dam construction faced new political and legal opposition. DAVID P. BILLINGTON, DONALD C. JACKSON, & MARTIN V. MELOSI, U.S. DEPT. OF THE INTERIOR & BUREAU OF RECLAMATION, *THE HISTORY OF LARGE FEDERAL DAMS: PLANNING, DESIGN, AND CONSTRUCTION IN THE ERA OF BIG DAMS* 383 (2005). Since the 1990s, the federal government has acknowledged that “[t]he dam building era in the United States is now over.” Marc Reisner, *The Fight for Reclamation*, HIGH COUNTRY NEWS at 8 (Mar. 20, 1995), http://www.hcn.org/issues/31/874/print_view (last visited Nov. 24, 2013). “The big dam era left a powerful structural and economic legacy, but it was a legacy that presents challenges to society in terms of making the best use of America’s water resources.” BILLINGTON ET AL., *supra*, at 412. Although large dam construction is no longer politically feasible in the United States, a similar story is unfolding in the debate over pipeline construction. As with large dams, pipelines can threaten ecosystems, communities, and cultural resources. See, e.g., Dr. Janet Swan, *Assessing the Environmental Impacts of Pipelines*, PIPELINES INTERNATIONAL (Sept. 2009), http://pipelinesinternational.com/news/assessing_the_environmental_impacts_of_pipeline_s/008361/ (last visited Nov. 24, 2013); TIM WILLIAMS, PARLIAMENT OF CANADA INDUSTRY, INFRASTRUCTURE AND RESOURCES DIVISION, *PIPELINES: ENVIRONMENTAL CONSIDERATIONS* (2012). The Keystone XL pipeline, which is proposed to extend from Alberta, Canada to the Gulf Coast of Texas, has been a major source of environmental controversy in recent years. See, e.g., *Keystone XL Pipeline*, FRIENDS OF THE EARTH, <http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline> (last visited Nov. 24, 2013). The Department of State is currently finalizing an Environmental Impact Statement for the project, *New Keystone XL Pipeline Application*, U.S. DEPT. OF STATE, <http://keystonepipeline-xl.state.gov/> (last visited Nov. 24, 2013), and construction is anticipated to begin in 2015. *Keystone XL Pipeline: About the Project*, TRANSCANADA, <http://keystone-xl.com/about/the-project/> (last visited Nov. 24, 2013). Meanwhile, environmental groups, tribes, and others remain vocally opposed to the project and the federal government has been inconsistent in its support. See, e.g., Ben Brumfield, *Oil, Money and Politics; EPA Snags Keystone XL Pipeline*, CNN (Apr. 23, 2013); Steve Mufson, *Keystone XL Pipeline Raises Tribal Concerns*, WASHINGTON POST (Sept. 17, 2012).

⁹ *Edwards Dam and Kennebec Restoration: A Brief History of Edwards Dam*, NATURAL RESOURCES COUNCIL OF MAINE, <http://www.nrcm.org/historyedwards.asp> (last visited Nov. 24, 2013).

¹⁰ *63 Dams removed to restore rivers in 2012*, AM. RIVERS (2012) <http://www.americanrivers.org/assets/pdfs/dam-removal-docs/2012-dams-removed.pdf> (last visited Nov. 24, 2013).

As with the Edwards Dam, the removal of the Elwha and Glines Canyon Dams on the Elwha River in Washington began with a dam relicensing procedure by the Federal Energy Regulatory Commission (FERC).¹¹ As with many dams being considered for removal, the health and preservation of the salmon runs has been a central issue for all parties.¹² The salmon have certainly been a driving force for the intensive advocacy undertaken by the Lower Elwha Klallam Tribe, which first filed a motion to intervene in the FERC proceedings for both dams in 1986.¹³ Eventually the Tribe was able to engage federal agencies and local stakeholders in the removal process, which officially began with a dam removal ceremony on September 17, 2011.¹⁴

This article will explore the role played by the Lower Elwha Klallam Tribe in the removal of the Elwha Dams, discussing Elwha life and livelihood before the dams, the motivations and forces behind the building of the dams and their effect on the Tribe, the decision to remove the dams, and finally the dam removal process that is now underway on the Elwha River. This article emphasizes the unique role of the Lower Elwha Klallam Tribe in the removal process, which has stretched over more than thirty years. The Tribe's success in achieving the removal of a dam that has interfered with its traditions and way of life for a century, should serve as a model for other tribal nations in advocating for dam removal in their traditional homelands.

I. LOWER ELWHA KLALLAM LIFE BEFORE THE DAMS

On the northwest edge of the continental United States, in some of the quietest and most rain-drenched lands in all of North America, runs the glacier-blue Elwha River. It arises

¹¹ See Peter Lavinge, *Dam(n) How Times Have Changed*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 451, 464-65 (2005).

¹² See generally Peter J. Carney, *Dam Removal: Evolving Federal Policy Opens a New Avenue of Fisheries and Ecosystem Management*, 5 OCEAN & COASTAL L.J. 309 (2000).

¹³ Motion of Lower Elwha Indian Tribe for intervention, consolidation etc. re Crown Zellerbach Corp., F.E.R.C. Docket No. P-2683, P-588 (Federal Energy Regulatory Commission, Jan. 27, 1986), available at http://elibrary.ferc.gov/idmws/doc_info.asp (last visited Nov. 24, 2013).

¹⁴ See Ted Warren, *Ceremony Marks the Start of Elwha Dam Removal*, ASSOCIATED PRESS (Sept. 17, 2011).

from the Elwha Snowfinger, a perennial snowfield in Washington's Olympic National Park, and flows 45 miles northward through basalt canyons and old-growth forest before spilling into the Strait of Juan de Fuca. The river traverses the reservation of the Lower Elwha Klallam Tribe, a people who have relied on the river's salmon for physical, spiritual, and cultural sustenance for millennia.¹⁵

A large flat rock pocketed with two hollows stood beside the Elwha River before it was inundated by the Glines Canyon and Elwha Dams.¹⁶ Lower Elwha Klallam ancestors explain that this was the place where the creator scooped dirt from the earth to form the people, and then bathed and blessed them in the river.¹⁷ The earliest archeological evidence of human activity on the Peninsula, dating to 12,000 years ago, was discovered near Sequim, Washington in 1977.¹⁸ In August of 2003, the (at least) 2,700-year-old Klallam village of Tse-whit-zen was unearthed by a construction project adjacent to Port Angeles Harbor.¹⁹

The Klallam, whose name means "strong people,"²⁰ historically lived along much of the northern Olympic Peninsula's coast.²¹ The Klallam people, like many tribes in the Pacific Northwest, historically relied heavily

¹⁵ Wendee Nicole, *Lessons of the Elwha River: Managing Health Hazards During Dam Removal*, ENVIRONMENTAL HEALTH PERSPECTIVES (2012), <http://ehp.niehs.nih.gov/120-a430/> (last visited on Nov. 24, 2013).

¹⁶ Jamie Valadez, *Elwha Klallam*, in NATIVE PEOPLES OF THE OLYMPIC PENINSULA: WHO WE ARE 21 (2002).

¹⁷ *Id.*

¹⁸ NATIVE PEOPLES OF THE OLYMPIC PENINSULA: WHO WE ARE 7 (2002) [hereinafter WHO WE ARE].

¹⁹ The dating of this site is based on the oldest of a random sampling of artifacts uncovered at the site. Jamie Valadez & Carmen Watson-Charles, *čix'wícən*, LOWER ELWHA KLALLAM TRIBE, <http://elwha.org/tsewhitzen.html> (last visited Nov. 24, 2013); Russell W. Busch, *Tribal Advocacy for Elwha River Dams Removal on Washington's Olympic Peninsula*, 2 GOLDEN GATE UNIV. ENVTL. L.J. 5, 6 (2008).

²⁰ ROBERT H. RUBY, JOHN A. BROWN, & CARY C. COLLINS, A GUIDE TO THE INDIAN TRIBES OF THE PACIFIC NORTHWEST 35 (1986).

²¹ *The S'Klallam: Elwha, Jamestown and Port Gamble*, in NATIVE PEOPLES OF THE OLYMPIC PENINSULA: WHO WE ARE 18 (2002); *Villages and Government*, LOWER ELWHA KLALLAM TRIBE, <http://elwha.org/cultureandhistory/villagesandgovernment.html> (last visited Nov. 24, 2013); RUBY, ET AL., *supra* note 20, at 35-36.

on salmon fisheries,²² as well as hunting and gathering for their subsistence, developing an extensive trade network.²³ All five species of pacific salmon found in the Northwest were caught by the Klallam in the Elwha River: chinook, coho, pink, chum, and sockeye salmon.²⁴ Especially prized were the tye, or the chinook salmon, which could reach 100 pounds each.²⁵ “Because of salmon, the Pacific Northwest Indians developed one of the few hunter/gatherer societies in the world that consistently produced more food and material wealth than it needed for subsistence.”²⁶

European exploration of the Pacific Northwest Coast began in the late 1500s,²⁷ but the first recorded contact between Klallam peoples and Europeans occurred on July 21, 1790, when Spanish explorer Manuel Quimper anchored near the mouth of the Elwha River.²⁸ With the Europeans, came disease against which the Klallams and other American

²² The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

United States v. Winans, 198 U.S. 371, 381 (1905).

²³ In pre-treaty times Indian settlements were widely dispersed throughout Western Washington. There was considerable local diversity in the availability and importance of specific animal, plant and mineral resources used for food and artifacts. (FPTO § 3-32) But one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life. (Ex. G-17o, pp. 286-287; Exs. USA-20 to 30 and 53; Exs. G-21 to 26). These fish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy.

United States v. State of Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

²⁴ GRACE, *supra* note 4, at 155; *Historic Anadromous Fish Runs in the Elwha*, NAT'L PARK SERV., <http://www.nps.gov/olym/naturescience/historic-anadromous-fish-runs-in-the-elwha.htm> (last visited Nov. 24, 2013).

²⁵ Phillip M. Bender, *Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 219 (1997).

²⁶ O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied By the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 286 (2002-03) (citing AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 3 (1970)).

²⁷ WHO WE ARE, *supra* note 18, at 11.

²⁸ *The S'Klallam*, *supra* note 21, at 18.

Indian populations had no immunity,²⁹ and the Native population of the Northwest declined approximately 80 percent from an estimated 180,000 pre-European contact to between 35,000 and 40,000 by the late 1800s.³⁰ This decline in population had a devastating effect on the peoples and cultures of the Olympic Peninsula.³¹ In 1855, the Klallam, Chemakum, and Skokomish signed the Treaty of Point No Point with the United States government,³² which importantly guaranteed the tribes “[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States.”³³ The Klallam “understood that a reservation was to be established for them between Sequim and Dungeness Bay,” but instead were ordered to remove to the Skokomish Reservation on Hood Canal.³⁴ Most refused and remained in their traditional territory, some acquiring land by purchase or homesteading,³⁵ but many lived as squatters or exiles in their own homeland. As settlers encroached on their traditional territory, some Klallam villages were consistently and forcibly relocated.³⁶ In the 1930s, the United States Secretary of Interior began taking land into trust for certain groups of Klallam peoples under the authority of the newly enacted Indian Reorganization Act of 1934.³⁷ During this period, Klallam Indians from the various aboriginal villages eventually became three separate federally recognized Klallam Tribes: the Lower Elwha Klallam, the Jamestown S’Klallam, and the Port Gamble S’Klallam.³⁸ A little over 300 acres of land were taken in trust for the Lower Elwha Klallam in 1936-37, which was later formally proclaimed as the Lower Elwha Klallam Reservation in 1968.³⁹ Together, with a few hundred

²⁹ ROBERT BOYD, *THE COMING OF THE SPIRIT OF PESTILENCE* 4 (1999).

³⁰ *Id.* at 3.

³¹ CRANE, *supra* note 1, at 34-35.

³² *The S’Klallam*, *supra* note 21, at 19; see also BRUCE BROWN, *MOUNTAIN IN THE CLOUDS: A SEARCH FOR THE WILD SALMON* 81-82 (1982).

³³ Treaty of Point No Point, U.S.- S’Klallams Indians, art 4, Jan. 26, 1855, 12 Stat. 933 available at <http://digital.library.okstate.edu/kappler/vol2/treaties/skl0674.htm> (last visited Nov. 24, 2013).

³⁴ *The S’Klallam*, *supra* note 21, at 19; RUBY, ET AL., *supra* note 20, at 36-37.

³⁵ *Id.*

³⁶ LOWER ELWHA KLALLAM TRIBE, *supra* note 16, at *Villages and Government*; Busch, *supra* note 19 at 7-8.

³⁷ 25 U.S.C. § 461 (2006); RUBY, ET AL., *supra* note 20, at 37.

³⁸ *The S’Klallam*, *supra* note 21, at 18.

³⁹ Valadez, *supra* note 16, at 26; *Villages and Government*, *supra* note 21.

additional contiguous acres of tribal trust land, this small reservation sits at the mouth of the Elwha River.⁴⁰



Map of Washington's Tribes, WASHINGTON TRIBES, <http://www.washingtontribes.org/default.aspx?ID=48> (last visited Nov. 24, 2013).

As with their reservation, the Lower Elwha Klallam waited more than a century to see the federal government take action to protect the Tribe's treaty right to continue to take fish in their traditional territory. In 1974, Federal District Court Judge George Boldt "issued one of the most sweeping and significant judicial rulings in the history of the Pacific Northwest,"⁴¹ affirming the Tribes' rights to take fish under the treaties and guaranteeing them 50 percent of the harvestable fish available in traditional tribal fishing grounds.⁴² The Supreme Court affirmed Judge

⁴⁰ *Culture and History*, LOWER ELWHA KLALLAM TRIBE, <http://www.elwha.org/cultureandhistory.html> (last visited Nov. 24, 2013).

⁴¹ CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 55-56 (2000).

⁴² See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

Boldt's decision in a related case in 1979,⁴³ but that did nothing to redress the continued denial of the Lower Elwha Klallam Tribe's treaty fishing rights by the destructive force of the Elwha and Glines Canyon Dams on the Elwha River.⁴⁴ Reservation life and the loss of the salmon completely disrupted the Klallam people's thriving culture. Adeline Smith, a tribal elder, recalled life before the dams:

The Klallams were a huge tribe. This stamp-sized place [now occupied by a few tribal members near Port Angeles] was not the tribe. There was a big village at the Hoko, a great big village at Psyht, at Clallam Bay, at Deep Creek. Everyone had a village and they were all Klallams. People who lived up the river hunted, then came down the river and exchanged. That way everybody tasted everything.⁴⁵

II. BUILDING THE ELWHA DAMS

In 1862, eight years after the Lower Elwha Klallam signed the Treaty of Point No Point, President Lincoln established Port Angeles as a townsite, though most of the land was officially held as a military reserve until 1894.⁴⁶ Thomas Aldwell, who moved to Port Angeles in 1890, began to plan for a hydropower dam on the Elwha River to serve the growing city

⁴³ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

⁴⁴ The "Boldt decision" has had a tremendous impact on the lives and livelihood of Washington State tribes, but the right to environmental protection of fish habitat for the preservation of the species has not been guaranteed as part of a tribe's right to harvest. See Lewis, *supra* note 26, at 281-82 ("The fishing rights guaranteed by the fishing clause of the Stevens Treaties between the United States and the Indians of Western Washington should be considered a trinity of rights: a right of access, a right of equitable apportionment, and a habitat right . . . Without judicial recognition of a habitat right, anadromous fish populations will continue to perish and the treaty fishing right will become even emptier than it already is."). Western Washington Treaty Tribes and the State of Washington are currently in the Ninth Circuit litigating aspects of the habitat right in the "culverts" subproceeding of *United States v. Washington*, Ninth Circuit Nos. 13-35474 and 13-35519, a topic beyond the scope of this article.

⁴⁵ Charles Wilkinson, *The Olympic Peninsula's Elwha River: Prisoner of History, Harbinger of Hope*, in *AWAY OUT OVER EVERYTHING: THE OLYMPIC PENINSULA AND THE ELWHA RIVER* 71 (2004).

⁴⁶ PORT ANGELES: THE AUTHENTIC NORTHWEST, PORT ANGELES REGIONAL CHAMBER OF COMMERCE 17 (2013), available at <http://www.portangeles.org/files/821.pdf>. (last visited Nov. 24, 2013).

in the early 1900s.⁴⁷ In 1908, Aldwell formed the Olympic Power and Development Company to assemble the land and funding necessary to build the Elwha Dam.⁴⁸ Olympic Power began construction on the dam at a site 4.9 miles above the mouth of the 45-mile-long river in 1910, hoping to attract pulp mills to Port Angeles.⁴⁹

A Washington state law was in place in 1910 requiring fish passage facilities in all new dams, but when construction was completed in 1912 the one hundred and five-foot Elwha Dam had none.⁵⁰ Game warden James Pike wrote to Fisheries Commissioner Riseland with despair in the fall of 1911:

I have personally searched the Elwha River & Tributaries above the Dam, and have been unable to find a single Salmon. . . . I have visited the Dam several times lately . . . and there appear to be [t]housands of [s]almon at the foot of the Dam, where they are continually trying to get up the flume. I have watched them very close, and I am satisfied now that they cannot get above the Dam.⁵¹

A tribal member, Mel Elofson, recalled a similar scene recounted by his grandmother:

When the lower dam first went in, our homestead site was only about half a mile away from it, so she was able to walk down there. When the salmon returned in the summer and

⁴⁷ *Biographical Note, Guide to Thomas T. Aldwell Papers, 1980-1951*, UNIVERSITY LIBRARIES, <http://digital.lib.washington.edu/findingaids/view?docId=AldwellThomasT4082.xml> (last visited Nov. 24, 2013).

⁴⁸ *Id.*

⁴⁹ *Tearing Down The Elwha River Dam*, POPULAR MECHANICS (Feb. 10, 2006), <http://www.popularmechanics.com/science/environment/water/2294301> (last visited Nov. 24, 2013).

⁵⁰ Bender, *supra* note 25, at 220.

⁵¹ BROWN, *supra* note 32, at 65. In a 2006 interview for Popular Mechanics, Brian Winter, fisheries biologist and project manager for the National Park Service, made an eerily similar observation: "When the light is right . . . you can see them down there - adult salmon, waiting to swim upriver, waiting for the dam to be gone." See also *Tearing Down The Elwha River Dam*, *supra* note 49.

the fall they came back in huge hoards, and they were jumping, jumping, jumping, trying to get past this structure. A lot of them died and didn't even spawn. Thousands and thousands of fish died that first year because they had no passage.⁵²

As Bruce Brown asserts, in *Mountain in the Clouds: A Search for the Wild Salmon*, there is little mystery about why Fisheries Commissioner Riseland took no action against Olympic Power given the economic interests at play in the Pacific Northwest at the turn of the 20th century.⁵³ The financial interests of the mineral, timber, water, and fishing industries held heavy sway in Washington state politics, so it is perhaps unsurprising that Washington's fish passage laws were not enforced during the construction of the Elwha Dam.⁵⁴

From the beginning, members of the Lower Elwha Klallam Tribe were opposed to the Elwha Dam, which inundated a traditional village site and the Tribe's Creation Site.⁵⁵ Feelings of resentment were heightened amongst tribal members when in 1912 the base of the dam, which was built on a gravel deposit and had not been tied into bedrock, blew out.⁵⁶ "The only warning the Klallam families who were sitting down to dinner had was the barking of their dogs at the roar of water and breaking tree trunks."⁵⁷ This event is remembered as "the time when there were salmon in the trees."⁵⁸ There were no deaths or injuries, but the Tribe was left with extensive property damage and a lasting fear of the dam, which never was

⁵² Wilkinson, *supra* note 45, at 70.

⁵³ BROWN, *supra* note 32, at 66.

⁵⁴ *Id.*

⁵⁵ See LOWER ELWHA KLALLAM TRIBE, *supra*, note 16 at *Dam Timeline, Effect on the People*.

⁵⁶ See Roger Oaks, *American Field Guide: Historical Background on the Elwha River Dams*, PBS, available at <http://www.pbs.org/americanfieldguide/teachers/salmon/history.pdf> (last visited Nov. 24, 2013).

⁵⁷ Valadez, *supra* note 16, at 28.

⁵⁸ BROWN, *supra* note 32, at 108.

ted to bedrock, even after being rebuilt.⁵⁹ As former Tribal Chairperson Frank Bennett said, “I guess they don’t care if a few Indians drown.”⁶⁰

In 1912, as Olympic Power began to reconstruct the Elwha Dam, the newly elected governor appointed Leslie Darwin to replace Riseland as Fisheries Commissioner.⁶¹ Unlike his predecessor, Darwin began to enforce fisheries laws, cracking down on widespread tax fraud and wasteful cannery processes.⁶² However, Darwin was still not prepared to fully enforce the laws against Olympic Power, and proposed that the company build a hatchery in lieu of fish passage facilities.⁶³ The law provided for no such work-around, but Darwin’s solution soon became the norm in Washington State.⁶⁴ The hatchery on the Elwha River was short-lived, closing in 1922,⁶⁵ while salmon runs on the river continued to decline.⁶⁶ In 1925, construction began on the Glines Canyon Dam at river mile 13.6, which was completed without fish passage facilities under a Federal Power Commission license in 1927.⁶⁷ Before removal began in September, 2011, the Elwha and Glines Canyon Dams collectively prevented salmon runs from reaching seventy miles of spawning habitat.⁶⁸

III. THE DECISION TO REMOVE THE ELWHA DAMS

We cherished it, and we respected it. . . We didn't waste it, we used every bit of it. . . I may not see the abundance of fish come back in my lifetime, but I would like to see it come back for my grandchildren, my great grandchildren, and the

⁵⁹ CRANE, *supra* note 1, at 62.

⁶⁰ Brian D. Winter & Patrick Crain, *Making the Case for Ecosystem Restoration by Dam Removal in the Elwha River, Washington*, 82 NORTHWEST SCIENCE 13 (2008), available at <http://www.bioone.org/doi/pdf/10.3955/0029-344X-82.S.I.13> (last visited Nov. 24, 2013) [hereinafter Winter, *Ecosystem Restoration*].

⁶¹ BROWN, *supra* note 32, at 66-69.

⁶² CRANE, *supra* note 1, at 70-71.

⁶³ Bender, *supra* note 25, at 221-22.

⁶⁴ Bender, *supra* note 25, at 221-22.

⁶⁵ Quotes from Tribal Members regarding Dam Removal, LOWER ELWHA KLALLAM TRIBE, <http://www.elwha.org/effectsontheelwhaklallampeople.html> (last visited Nov. 24, 2013).

⁶⁶ CRANE, *supra* note 1, at 86.

⁶⁷ See LOWER ELWHA KLALLAM TRIBE, *supra* note 16, at *Dam Timeline*, *supra* note 55; Bender, *supra* note 25, at 219-20, 228.

⁶⁸ Carney, *supra* note 12, at 322.

rest of my people, the following generations to come. It was a gift from our Creator; it was our culture and heritage.⁶⁹

Our elders – nobody would listen to them, their voices weren't heard – until the late 1960s or 70s and there was a lot of opposition immediately. It was unheard of to remove the dams. It took a lot of educating. . . . We are protectors of the salmon. Salmon and us are like family to each other. We need each other. A lot of the people who opposed are now in agreement that they need to come out. That is how we won the battle, just by educating.⁷⁰

The Lower Elwha Klallam Tribe has been advocating for the removal of the Elwha and Glines Canyon dams since the dams' construction in the early 20th century.⁷¹ The Federal Energy Regulatory Commission (FERC) process by which private hydropower dams are licensed provided the Tribe with an opportunity to intervene in an effort to restore the river and its salmon fisheries.⁷² This occurred in 1986 when the tribe filed a motion to intervene.⁷³ This intervention soon gained the support of several environmental groups.⁷⁴ In 1992, after a protracted administrative process, Congress passed the Elwha River Ecosystems and Fisheries Restoration Act, which directed the United States Department of the Interior to study the feasibility of the river and fisheries restoration.⁷⁵ In the 1995 "Elwha Report," the Secretary of Interior recommended removal of both dams,⁷⁶ and in 2000, the federal

⁶⁹ Quotes from Tribal Members regarding Dam Removal, *supra* note 65 (quote from Tribal elder Beatrice Charles).

⁷⁰ Wilkinson, *supra* note 45, at 76 (quote from former Lower Elwha Klallam Tribal Chairperson Dennis Sullivan).

⁷¹ CRANE, *supra* note 1, at 87.

⁷² See generally 18 C.F.R. §§ 5.1-5.31 (2013).

⁷³ See *supra* note 13.

⁷⁴ Adam Burke, *River of Dreams*, HIGH COUNTRY NEWS, Sept. 24, 2001.

⁷⁵ Elwha River Ecosystem and Fisheries Restoration Act Pub. L. No. 102-495, 106 Stat. 3173 (1992).

⁷⁶ PHILLIP A. MEYER & RICHARD LICHTKOPPLER, U.S. BUREAU OF RECLAMATION, NATIONAL PARK SERVICE, AND LOWER ELWHA KLALLAM TRIBE, ELWHA RIVER RESTORATION PROJECT: ECONOMIC ANALYSIS FINAL TECHNICAL REPORT, at iii (1995) [hereinafter PHILLIP A. MEYER, ET AL., ELWHA REPORT].

government purchased both dams from then-owner Daishowa America Co., Ltd.⁷⁷ The primary source of funding for the Elwha River Restoration Act came from the National Park Service Construction Budget. In 2009, the American Recovery and Reinvestment Act⁷⁸ provided the remaining funding necessary to accomplish removal of both dams, which began in September of 2011.⁷⁹

A. *The Federal Energy Regulatory Commission Process for Dam Removal*

Under the Federal Power Act (FPA), most privately owned hydropower projects must be licensed by FERC.⁸⁰ When the Elwha Dam was completed in 1913, the FPA was not yet in existence and the dam was not initially licensed.⁸¹ The Glines Canyon Dam, however, was granted a 50-year operating license during its construction in 1926 by FERC's predecessor the Federal Power Commission.⁸² Crown Zellerbach Corporation, which purchased the Elwha Dam from Olympic Power in 1919 and subsequently constructed the Glines Canyon Dam,⁸³ filed a license application for the Elwha Dam in 1968, and an application to relicense Glines Canyon Dam in 1973.⁸⁴ FERC consolidated the applications into a single process in 1979.⁸⁵

⁷⁷ Adam Burke, *River of dreams*, HIGH COUNTRY NEWS, Sept. 24, 2001, <http://www.hcn.org/issues/211/10739/> (last visited Nov. 24, 2013).

⁷⁸ American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

⁷⁹ *Olympic National Park, Washington: Elwha Frequently Asked Questions*, NAT'L PARK SERV., <http://www.nps.gov/olym/naturescience/elwha-faq.htm> (last visited Nov. 24, 2013).

⁸⁰ See generally 16 U.S.C. § 791-828(c) (2006) as amended; 18 C.F.R. §§ 5.1-5.31 (2013). See also FEDERAL ENERGY REGULATORY COMMISSION, DIVISION OF HYDROPOWER ADMINISTRATION AND COMPLIANCE: COMPLIANCE HANDBOOK (2004).

⁸¹ S. 2527, Elwha River Ecosystem and Fisheries Restoration Act, 102nd Congress S. Rep. 102-447 (1992) (Report by Mr. Johnston, from the Committee on Energy and Natural Resources).

⁸² *Id.*

⁸³ Bender, *supra* note 25, at 222.

⁸⁴ Winter, *Ecosystem Restoration*, *supra* note 60, at 14.

⁸⁵ *Id.* (FERC concluded that "the two hydroelectric projects were hydraulically, electrically, and operationally interconnected" and the two proceedings should be considered together so that "the combined impacts could be assessed." This is not the only instance in which FERC has consolidated a licensing process, but the practice is not discussed in FERC's relicensing regulations).

When issuing a license under the FPA, FERC is required by both the FPA and the Electric Consumers Protection Act (ECPA)⁸⁶ to consider impacts to fish and wildlife.⁸⁷ The ECPA further requires FERC to include recommendations by “National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies”⁸⁸ in licensing decisions. FERC must also consider the recommendations of “Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.”⁸⁹ Although FERC was slow to take up its responsibility to prioritize ecosystem preservation, the agency has begun to respond to the policy shift that has made environmental preservation a national priority.⁹⁰ The Elwha River “battle,” as one of the seminal cases of federally ordered

⁸⁶ Electric Consumers Protection Act of 1986 16 U.S.C. § 791a (2006).

⁸⁷ See *generally* 16 U.S.C. § 797(e)(2006); 16 U.S.C. § 803(a)(2006). These provisions have had profound effects on hydropower development and relicensing nationwide. Federal agencies now often require hydropower facilities to install ‘fish ladders’ or other fish passage devices to enable fish migration to preserve these species. These requirements, however, are extremely controversial, both because environmental advocates argue they are often ineffective, and hydropower developers and operators argue they are unnecessarily costly. Recently, hydropower operations have challenged the fish passage requirements as constituting a taking of private property without just compensation under the Fifth Amendment because of the financial impact on the facility, thus putting additional pressures on federal and state efforts to protect wildlife from hydropower impacts. Moreover, the Energy Policy Act of 2005 reduced leverage for environmental interests in the FERC licensing process by allowing project owners a trial-type procedure to challenge licensing conditions and authorizing FERC to select alternative licensing conditions to those conditions proposed by resource agencies, if the alternatives are ‘adequate’ but less costly. There has been significant litigation, in some cases spanning decades, regarding the conflict between hydropower development and aquatic species.

Alexandra B. Klass, *Energy and Animals: A History of Conflict*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 159, 177 (2012) (citations omitted).

⁸⁸ 16 U.S.C. § 803(j)(1)(2006).

⁸⁹ 16 U.S.C. § 803(a)(2)(B)(2006).

⁹⁰ Once responsible for promoting the increased utilization of hydropower for an industrializing nation, the Federal Energy Regulatory Commission now finds itself in the position of protectorate of the environment. This policy shift is making it possible for governmental agencies to consider dam removal as a viable alternative to long-standing practices of automatically issuing new permits when existing projects come up for relicensing.

Carney, *supra* note 12, at 310.

dam removal labeled it, was likely a driving force in this policy shift by FERC.⁹¹ The Lower Elwha Klallam Tribe played a vital role in challenging Crown Zellerbach Corporation's license applications by intervening in the FERC process when Crown Zellerbach first applied in 1986.⁹²

When the Lower Elwha Klallam intervened in the FERC relicensing process on the Elwha River, the ECPA had not yet been passed, and FERC was not yet required to give special consideration to the Tribe's position. Furthermore, FERC did not believe that it had the power to order dam removal under the FPA.⁹³ When the dams initially came up for relicensing, the Fish and Wildlife Service, the National Marine Fisheries Service, the National Park Service (NPS), and the Washington State Department of Natural Resources also approached the habitat management aspect of relicensing by proposing mitigation alternatives, without considering removal as an option.⁹⁴ When the ECPA was passed in 1986, however, FERC solicited comments to consider its options if a project did not meet the ECPA's new, more stringent environmental standards, and in 1994 FERC declared that it had the authority to order removal at a dam owner's expense.⁹⁵

The Lower Elwha Klallam Tribe was the first intervener in the FERC licensing process to officially call for dam removal on the Elwha River in January, 1986, followed by a coalition of environmental groups made up of

⁹¹ [In the 1980s], the idea of removing an operating hydroelectric dam for the purpose of ecosystem restoration (rather than for safety reasons) was considered a heretical idea by FERC, Congress, federal resource agencies, and most main-stream environmental groups. In a few short years, a precedent setting battle formed over dam removal for ecosystem restoration. Today, dam removal is a high profile, main-stream environmental issue . . . The Elwha case also foreshadowed many new pressures to reform the hydro relicensing process in the US.

Charles Gowan, Kurt Stephenson, & Leonard Shabman, *The Role of Ecosystem Valuation in Environmental Decision Making: Hydropower relicensing and Dam Removal on the Elwha River*, 56 ECOLOGICAL ECONOMICS 508, 512 (2006).

⁹² *Id.*; See generally 18 C.F.R. § 385.214 (2006).

⁹³ Gowan et al., *supra* note 91, at 512.

⁹⁴ Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. No. 102-495, 106 Stat. 3173 (1992) (Statement of Nicholas Ladanza, Chief, Habitat Conservation Branch, Northwest Region, National Marine Fisheries Serv., National Oceanic and Atmospheric Administration, Dept. of Commerce).

⁹⁵ Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339-01 (Jan. 4, 1994).

the Seattle Audubon Society, Friends of the Earth, Olympic Park Associates, and the Sierra Club.⁹⁶ That same year, the Tribe received water resource funds through the Bureau of Indian Affairs, with which it was able to fund studies of the Elwha River and its fisheries.⁹⁷ Those studies clearly demonstrated that dam removal was not only a viable option, but was in fact more economically feasible than adding fish passage facilities to the dams.⁹⁸ During the 1980s, the Tribe worked to bring together a diverse coalition of stakeholders in the region around dam removal, which resulted in a settlement agreement.⁹⁹ In 1991, FERC distributed its Draft Environmental Impact Statement (EIS) regarding the relicensing of the Glines Canyon and Elwha Dams for public comment.¹⁰⁰ However, in 1992, before FERC's EIS could be finalized, Congress stayed the FERC process by adopting the stakeholders' settlement agreement in the form of the Elwha River Ecosystem and Fisheries Restoration Act

⁹⁶ Motion of Lower Elwha Indian Tribe for intervention, consolidation etc re Crown Zellerbach Corp., F.E.R.C. Docket No. P-2683, P-588 (Federal Energy Regulatory Commission, Jan. 20, 1986), available at http://elibrary.ferc.gov/idmws/doc_info.asp (last visited Nov. 24, 2013); *Elwha River Ecosystem and Fisheries Restoration Joint Hearing Before the Subcommittee on Energy and Power of the Committee on Energy and Commerce and the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries and the Subcommittee on Interior and Insular Affairs on H.R. 2527*, S. Hrg. 102-739 at 150 (1992). (Testimony of Shawn Cantrell, Assistant Northwest Representative, Friends of the Earth).

⁹⁷ Telephone interview with Robert Eloffson, Lower Elwha Klallam Tribal Fisheries Manager 1976-78, and Elwha River Restoration Director 1991-93, and 2001-present, (Sept. 17, 2013) [hereinafter, Eloffson, Interview].

⁹⁸ *Id.*

⁹⁹ After years of negotiation, a unanimous agreement was reached regarding a process to restore Elwha River fisheries and to make the ultimate decision regarding whether removal of the dams would be necessary to achieve restoration. The parties to this settlement, which became the Elwha Act, included numerous Federal Departments and Agencies (including FERC, the National Park Service, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, and NOAA); the Tribe; the State, Clallam County, and the City of Port Angeles; private hydropower, industrial, and economic development interests; commercial and sport fishermen; and the environmental community. Lower Elwha Tribal Defendants' Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement at 6, *Wild Fish Conservancy v. Nat'l Park Serv.*, No. 3:12-CV-05109-BHS (W.D. Wash. 2012) (Doc. 26).

¹⁰⁰ See *Final Environmental Impact Statement on Elwha River Ecosystem Restoration*, NAT'L PARK SERV. (June 1995), <http://www.nps.gov/oly/naturescience/loader.cfm?csModule=security/getfile&PageID=136255> (last visited Nov. 24, 2013) [hereinafter 1995 EIS].

(Elwha Act).¹⁰¹ The Elwha Act required the Secretary of Interior to perform a study of the Elwha River and to release a report to identify the actions that would be necessary to achieve “full restoration” of the river’s ecosystem and anadromous fish population.¹⁰²

B. Environmental Impact Statements

The final Elwha Report, prepared by the Secretary of Interior with collaboration from the Department of Commerce and the Lower Elwha Klallam Tribe, was submitted to Congress in 1994.¹⁰³ The Elwha Act removed FERC’s authority to issue a final licensing decision, but FERC nonetheless released its Final EIS to the public in 1995.¹⁰⁴ Both documents recommended removal as the preferred alternative.

Although the Elwha Report made extensive use of FERC’s analyses, the distinct power granted to the Secretary of Interior by the Elwha Act to accomplish “full restoration of the Elwha River ecosystem and the native anadromous fisheries,” required a new set of technical reports, and three new EISs.¹⁰⁵ These would consist of: (1) a Programmatic EIS to recommend the best action for full restoration of the ecosystem; (2) an Implementation EIS to recommend the best means to achieve the action recommended in the Programmatic EIS; and (3) an optional third supplemental EIS in the case of “significant new circumstances or information relevant to environmental concerns and bearing on the selected action or its impacts.”¹⁰⁶

When the Final Programmatic EIS was released in 1995, the preferred alternative was the removal of both the Glines Canyon and Elwha dams.¹⁰⁷ Although a Final Implementation EIS was released in

¹⁰¹ Elwha River Ecosystem and Fisheries Restoration Act Pub. L. No. 102-495, §5(a), 106 Stat. 3173 (1992).

¹⁰² *Id.* at § 3.

¹⁰³ PHILLIP, A. MEYER ET AL., ELWHA REPORT, *supra* note 76.

¹⁰⁴ Elwha River Ecosystem and Fisheries Restoration Act Pub. L. No. 102-495, §5, 106 Stat. 3173 (1992); See 1995 EIS, *supra* note 99.

¹⁰⁵ *Id.* at §3.

¹⁰⁶ *Elwha River Ecosystem Restoration Implementation, Final Supplement to the Final Environmental Impact Statement*, NAT’L PARK SERV. (July 2005) (hereafter 2005 EIS).

¹⁰⁷ 1995 EIS, *supra* note 99.

1996,¹⁰⁸ a Final Supplemental EIS was released by the NPS in 2005 in order to address “changes to water supply, water quality, and flood control mitigation.”¹⁰⁹ All three EISs center around the return of the salmon and the resulting benefits to the river and the surrounding ecosystem as the justification for dam removal.¹¹⁰

C. *Funding the Removal*

Although the proposal to remove the dams gained widespread support by the early 1990s, United States Senator for Washington State Slade Gorton consistently remained one of the few vocal opponents of removal.¹¹¹ Senator Gorton feared that removal of the dams would be “an unmitigated disaster and an economic nightmare.”¹¹² Although he was originally a co-sponsor of the Elwha Act, Senator Gorton withdrew his support when it became clear that dam removal was the preferred alternative.¹¹³ It appears that Senator Gorton’s opposition was based in large part on his concern that removal of the Elwha dams would become precedent for breaching the Snake River dams as well.¹¹⁴ Throughout the administrative process, the Tribe also found allies in Senator Bill Bradley,¹¹⁵ Representative Norm Dicks,¹¹⁶ and others in Congress.¹¹⁷

¹⁰⁸ *Final Environmental Impact Statement on Elwha River Ecosystem Restoration*, NAT’L PARK SERV. (Nov. 1996), <http://www.nps.gov/olym/naturescience/loader.cfm?csModule=security/getfile&PageID=136253> (last visited Nov. 24, 2013).

¹⁰⁹ 2005 EIS, *supra* note 106, at iv.

¹¹⁰ Carney, *supra* note 12, at 330-31.

¹¹¹ Bender, *supra* note 25, at 227.

¹¹² Klein, *supra* note 3, at 708 (quoting Sam A. Verhovek, *Returning River to Salmon, and Man to the Drawing Board*, N.Y. TIMES (Sep. 26, 1999)).

¹¹³ CRANE, *supra* note 1, at 157.

¹¹⁴ WILLIAM R. LOWRY, DAM POLITICS: RESTORING AMERICA’S RIVERS 146-47 (2003).

¹¹⁵ Senator Bradley was involved in the dam removal process on the Elwha River beginning when he served as Chair of the Water and Power Subcommittee of the Senate Committee on Energy and Natural Resources, which had jurisdiction over the Elwha Act. He continued to be an advocate for the Elwha River dam removal project even after leaving office in 1997. See Sen. Bill Bradley, Keynote Address, Dinner hosted by the Lower Elwha Klallam Tribe, Port Angeles, WA (Sept. 16, 2011) *available at* <http://turtletalk.files.wordpress.com/2011/09/sen-bradley-elwha-remarks.pdf> (last visited Jan. 8, 2014).

¹¹⁶ Long-time supporter of the dam removal effort and co-sponsor of the Elwha Act. See Sen. Bradley, *supra* note 114 (“Norm Dicks is the Elwha settlement’s hero. He made the

Finally, the Elwha and Glines Canyon Dams were purchased by the federal government in 2000 for \$29.5 million, as authorized by the Elwha Act,¹¹⁸ and Senator Gorton lost reelection the same year.¹¹⁹

Despite purchase of the dams, funding for removal and ecosystem recovery of the dams continued to stall, even after Senator Gorton left office in 2001. Deconstruction was originally scheduled for 2009, but rising costs delayed the project's start date to 2012.¹²⁰ The final \$54 million needed was provided by the American Recovery and Reinvestment Act of 2009, commonly referred to as the "Stimulus," which allowed deconstruction to begin a year ahead of schedule.¹²¹ Steve Suagee, General Counsel to the Tribe, recalls the collaborative effort of the Tribe, environmental groups, and their allies in Washington to secure the final funding needed for dam removal—an "example of the Tribe's ability to call on relationships that had been in development for 20 years or more."¹²²

law work. I know it is a small thing, and it is far less than he deserves, but please, God, please grant Norm Dicks the first 100 pound salmon caught on the Elwha").

¹¹⁷ Elofson, Interview, *supra* note 97; Telephone interview with Steve Suagee, Lower Elwha Klallam Tribal Counsel, phone interview (Sept. 20, 2013) [hereinafter Suagee, Interview]; See also Sen. Bradley, *supra* note 115.

¹¹⁸ PHILLIP, ELWHA REPORT, *supra* note 76.

¹¹⁹ See GORTON, THOMAS SLADE, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, available at

<http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000333> (last visited Nov. 24, 2013).

¹²⁰ Warren Cornwall, *Stimulus Money Will Speed Elwha Dam Removal*, SEATTLE TIMES, (April 22, 2009),

http://seattletimes.nwsourc.com/html/localnews/2009105595_webelwah22m.html (last visited Nov. 24, 2013).

¹²¹ See generally American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

We just didn't have the money before,' said [U.S. Representative Norm] Dicks, whose 6th Congressional District includes Clallam and Jefferson counties, Wednesday morning.

'We've been doing \$20 million a year, and now we'll have the money to go forward. This is a big deal because we are able to accelerate the project,' he said.

Paul Gottlieb, *Federal Stimulus Funds Jumps Elwha Dams Removal Date Ahead a Year*, PENINSULA DAILY NEWS (April 22, 2009),

<http://www.peninsuladailynews.com/article/20090423/news/304239995> (last visited Nov. 24, 2013).

¹²² Suagee, Interview, *supra* note 117.

IV. THE ART OF DAM REMOVAL

The Elwha's beauty could serve as a model, an icon, of Pacific Northwest Rivers. The deep green pools; the wide gravel beds with rich, aerated riffles; the variety of cobble and larger rocks in the riverbed—all suggest a perfect Pacific Northwest River, one that should roil with bright red and green-hued spawning salmon.¹²³

As detailed in the Introduction to this article, America was lured in the name of “progress” into a frenzy of dam-building that has devastated ecosystems and indigenous cultures. Nonetheless, it must be acknowledged that dams have “played a critical role in the settling of the United States,”¹²⁴ particularly in the American West, by supporting agriculture, delivering domestic water supplies, facilitating transportation, allowing for industrial development, and providing emissions-free hydropower.¹²⁵ At times, dams have, in fact, been important means of providing water for settlement agreements with Indian Tribes.¹²⁶ However, many dams, such as the Elwha and Glines Canyon dams, have outlived their purpose.¹²⁷

Once past the half-century mark, dams begin to degenerate:
Concrete walls degrade, earthworks erode and seep,

¹²³ CRANE, *supra* note 1, at 1.

¹²⁴ RIVER ALLIANCE OF WISCONSIN & TROUT UNLIMITED, DAM REMOVAL: A CITIZEN'S GUIDE TO RESTORING RIVERS 18 (2000).

¹²⁵ HEINZ REPORT, *supra* note 6, at x, 4 (2002); GRACE, *supra* note 4, at 154.

¹²⁶ For example, Lake Nighthorse, which was filled in 2011, was an important component of a water settlement between the Ute Mountain Ute Tribe, the state of Colorado, and the Federal Government. See, e.g. Bruce Finley, *Federal settlements give Colorado tribes a share of water rights*, THE DENVER POST, Nov. 10, 2011.

¹²⁷ While dams serve a number of human needs, society has developed ways to address many of these needs without dams. For instance, flood control can often be accomplished more effectively and for less money by restoring wetlands, maintaining riparian buffers, or moving people out of the floodplain. Updating antiquated irrigation systems and replacing inappropriate crops can dramatically reduce the need for dams and reservoirs in the arid West. Rather than plugging rivers with multiple hydropower dams, a cheaper and less environmentally harmful solution is to use existing energy efficiency technologies.

Dam Removal: Frequently Asked Questions, AM. RIVERS, <http://www.americanrivers.org/initiatives/dams/faqs/> (last visited Nov. 24, 2013).

spillway gates rust and lose tensile strength, and sediment clogs reservoirs, reducing their capacity. In the worst-case scenario, an aging dam could fail, causing catastrophic flooding. As maintenance and liability costs rise, economic returns drop. Many older dams are obsolete. Many others, including the Elwha and Glines Canyon dams, need upgrades such as fish passage structures that would cause the power they produce to soar above market prices.¹²⁸

As dams become increasingly inefficient, and ecosystem costs become a greater part of the economic calculation, dam removal is now being seen as a reasonable option.¹²⁹ “The principal removal efforts to date involve dams that fragment streams and block salmon spawning runs.”¹³⁰ A host of state and federal agencies will continue to play a role in dam removal as a solution to the increasing ecological, safety, and economic concerns posed by aging American dams.¹³¹

¹²⁸ Tearing Down The Elwha River Dam, *supra* note 49.

¹²⁹ *Id.*

¹³⁰ HEINZ REPORT, *supra* note 6, at 47.

¹³¹ Several federal agencies can create or enforce policies to control and remove public and private dams, including FERC, Interior, the Environmental Protection Agency, the Army Corps of Engineers, and the Department of Agriculture. Relevant statutes include: the [Clean Water Act] CWA, [Endangered Species Act] ESA, and National Environmental Policy Act (NEPA) . . . as well as the Federal Power Act of 1920 (Pub.L.16 USC 791a), Electric Consumers Protection Act (ECPA) of 1986 (P.L. 99-495), National Historic Preservation Act (NHPA) of 1966 (P.L. 89-665), western water rights law, Small Watershed Rehabilitation Amendments of 2000 (Pub .L. 106-472), Indian Dam Safety Act of 1994 (Pub. L. 103-302), National Dam Safety Program, and FERC Dam Safety Program.

Id. at 61. State agencies and water law also play a role in the regulation of dam safety. *Dam Removal: Frequently Asked Questions (FAQs)*, AM. RIVERS, <http://www.americanrivers.org/our-work/restoring-rivers/dams/background/faqs.html> (last visited Nov. 24, 2013).

A. *The Mechanics of Removing the Elwha and Glines Canyon Dams*

The art of dam removal is complicated, and is highly dependent on the river, the dam, and the goals of removal.¹³² With “removals like the Elwha Dam . . . the construction is undertaken in careful steps, almost surgically, to not only avoid stream damage but also to keep dam removal contractors, their equipment, and people downstream out of harm’s way.”¹³³ For both dams, this process began by lowering the reservoirs behind the dams to the level of the existing spillways.¹³⁴ For the Elwha Dam, engineers then built a temporary spillway and cofferdams designed to divert the river’s flow into the spillway.¹³⁵ Once the base of the Elwha Dam was dry, the dam was removed, and the original channel restored.¹³⁶ The Glines Canyon dam, on the other hand, is being disassembled through a “notching process.”¹³⁷ This process involves removing the concrete of the dam to the level of the water and creating temporary spillways on alternating sides of the dam.¹³⁸ The three major considerations in removing large dams such as those on the Elwha River are: (1) recognizing and resolving the equities of current water users (in the case of the Elwha, this involved the paper mill and other water users); (2) draining the reservoir; and (3) removing the dam structures. Once these steps are completed, ecosystem restoration can begin.

¹³² See *How Are Dams Removed?*, AM. RIVERS, <http://www.americanrivers.org/our-work/restoring-rivers/dams/background/how-are-dams-removed-show.html> (last visited Nov. 24, 2013).

¹³³ *Id.*; See also *Tearing Down The Elwha River Dam*, *supra* note 49.

¹³⁴ See *Dam Removal - Overview*, NAT’L PARK SERVICE, <http://www.nps.gov/olym/naturescience/dam-removal-overview.htm> (last visited Nov. 24, 2013); Mark Knowlin, *Special Report: How the Elwha Dams Will be Removed*, SEATTLE TIMES (Sept. 17, 2011), <http://seattletimes.com/flatpages/specialreports/elwha/elwhadamremovalgraphic.html> (last visited Nov. 24, 2013); *How to Tear Down a Dam*, POPULAR MECHANICS (Feb. 10, 2006), <http://www.nps.gov/olym/naturescience/upload/Elwha-Dam-in-Popular-Mechanics-2.pdf> (last visited Nov. 24, 2013).

¹³⁵ See *Dam Removal - Overview*, NAT’L PARK SERVICE, <http://www.nps.gov/olym/naturescience/dam-removal-overview.htm> (last visited Nov. 24, 2013).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

B. Lower Elwha Klallam Tribal Leadership in the Planned Ecosystem Restoration on the Elwha River

Salmon have been the major driving force behind the advocacy for dam removal on the Elwha River.¹³⁹ For Lower Elwha Klallam Tribal members, survival and restoration of the salmon runs are critically important for cultural, historical, and dietary reasons.¹⁴⁰

‘This story is about the fish,’ said Frances Charles, [Chairperson] of the Lower Elwha Klallam Tribe. ‘The tribe looks forward to the return of the chinook, and the abundance of fish from the stories our ancestors have been telling us about since the dams went up. We used to have salmon and other species out there, and we want them back and revived for our children, and our children’s children.’¹⁴¹

When the Elwha Dam was constructed at river mile 4.9 in 1913, it blocked anadromous fish from more than 70 miles of river habitat in which they had historically spawned and reared.¹⁴² This beautiful reach of pristine river, much of which is permanently protected within the Olympic National Park, is still prime salmon habitat—“salmon heaven.”¹⁴³ With the dams now in place, remaining spawning habitat in the lower reaches of the river has been damaged by higher water temperatures and trapped sediment, which in the naturally flowing river had provided nutrients and material for spawning beds.¹⁴⁴ “The river went from producing more than 390,000 salmon and sea-run trout in 1910 (based on habitat available to

¹³⁹ “The concept that dam removal of this magnitude might be a viable option in the FERC licensing/relicensing process only gained momentum when a growing body of evidence showed that significant gains in salmon abundance would only be possible by removing the dams.” Winter, *Ecosystem Restoration*, *supra* note 60, at 16.

¹⁴⁰ See discussion in section II *supra* of Lower Elwha Klallam fishing rights and tribal use of historic fish runs.

¹⁴¹ \$27 Million Awarded To Remove Elwha Dams; Salmon Numbers Expected To Go From 3,000 to 300,000, THE COLUMBIA BASIN FISH & WILDLIFE NEWS BULLETIN (Aug. 27, 2010), <http://www.cbbulletin.com/396072.aspx> (last visited Nov. 24, 2013).

¹⁴² 2005 EIS, *supra* note 106, at 135.

¹⁴³ CRANE, *supra* note 1, at 7; See also GRACE, *supra* note 4, at 155.

¹⁴⁴ 2005 EIS, *supra* note 106, at 136.

the fish and fish-production modeling) to fewer than 3,000 wild native anadromous fish today.”¹⁴⁵

In 2008, pursuant to the Elwha Act, the Lower Elwha Klallam Tribe, Olympic National Park, the Washington Department of Fish and Wildlife, the United States Fish and Wildlife Service, and the Northwest Fisheries Science Center of the National Marine Fisheries Service published the Elwha River Fish Restoration Plan, which presents a scientific framework for restoring the ecosystem and fisheries on the Elwha River as part of dam removal efforts.¹⁴⁶

Prior to that, in 2005, the Natural Resources Division at Olympic National Park formed the Elwha Research Consortium in order to study the scientific impacts of dam removal on the Elwha River ecosystem.¹⁴⁷ The core participants in the Consortium were the Olympic National Park, the Lower Elwha Klallam Tribe, United States Geological Survey Biological Resources Discipline, National Oceanographic and Atmospheric Administration Fisheries, Olympic Park Institute, Western Washington University, and Peninsula College in Port Angeles.¹⁴⁸

The Elwha is a perfect test of whether removing dams can help restore a river. The lessons learned from restoring the Elwha will be in every ecology book for the next 50 years. The Elwha Research Consortium—based on teamwork, strategic partnerships, and scientific collaboration—will tell the tale.¹⁴⁹

¹⁴⁵ *Id.* at 135.

¹⁴⁶ LARRY WARD, ET AL., U.S. DEPT OF COMMERCE, ELWHA RIVER FISH RESTORATION PLAN—DEVELOPED PURSUANT TO THE ELWHA RIVER ECOSYSTEM AND FISHERIES RESTORATION ACT, PUBLIC LAW 102-492, NOAA TECHNICAL MEMORANDUM NMFS-NWFS-90 (2008).

¹⁴⁷ Jerry Freilich, *The Science of Large Dam Removal: Removing Dams on the Elwha River, Olympic National Park*, 2007 GEORGE WRIGHT SOCIETY CONFERENCE PROCEEDINGS 186.

¹⁴⁸ *Id.*

¹⁴⁹ Freilich, *supra* note 146, at 188.

As of March 16, 2012, the Olympic National Park announced that the Elwha River is again flowing through its natural channel,¹⁵⁰ and in the summer of 2012, fish were again spawning above the site of the former Elwha Dam.¹⁵¹ The complete success of the ecosystem restoration efforts and salmon recovery, however, will only be evident in time.

CONCLUSION: LESSONS LEARNED FROM THE ELWHA RIVER

We know what the River wanted because it always had a voice. [The Lower Elwha Klallam Tribal people] have listened to the Elwha and listened to the life in the Elwha for more generations than can be counted. They spoke for the Elwha with a voice that never wavered, never left any doubt about what the river was calling for. The Lower Elwha Klallam [T]ribe, its leaders and members, cared for the River, lived from the river, and brought the River's voice to every audience that could be found.¹⁵²

The removal of the Elwha dams is historic, and will serve as an inspiration and a model for many large-scale watershed and ecosystem restoration projects to come.¹⁵³ By the late spring of 2012, the Elwha Dam had been completely dismantled.¹⁵⁴ During the summer of 2012, scientists

¹⁵⁰ *Welcome Home, Elwha!*, NAT'L PARK SERV. OLYMPIC NAT'L PARK DAM REMOVAL BLOG (Mar. 16, 2012), <http://www.nps.gov/olymp/naturescience/dam-removal-blog.htm> (last visited Nov. 24, 2013).

¹⁵¹ *Fish Already Returning To Elwha River After Dam Removal*, NAT'L OCEANIC & ATMOSPHERIC AGENCY FISHERIES SERV., http://www.nmfs.noaa.gov/stories/2012/07/07_20_2012_elwha_restoration_video.html (last visited Nov 24, 2013).

¹⁵² Bradley, *supra* note 115.

¹⁵³ Dam removal advocates will be watching the restoration of the Elwha River closely. Its success may provide the impetus to breach other aging dams, including the four massive structures that block the lower Snake River in eastern Washington, and the 168-ft.-tall Matilija Dam on a tributary of Southern California's Ventura River. Elofson will be keeping an even closer watch on the free-flowing waters. Like Winter, he got involved in the Elwha project right out of college. Now 53, he hopes to hike upriver and catch a coho before he retires.

Tearing Down The Elwha River Dam, *supra* note 49.

¹⁵⁴ Jeremy Schwartz and Paul Gottlieb, *Updated—More Repairs Needed at Water Plant, Will Likely Hold up Elwha River Dam Removal Work*, PENINSULA DAILY NEWS (May 5, 2013); *Removal of Last Dam on Olympic Peninsula's Elwha River on Hold*, ASSOCIATED PRESS (Apr. 23, 2013)

were amazed to find that wild steelhead had already made their way well above the site of the former Elwha Dam.¹⁵⁵ These wild fish joined approximately 60 released native steelhead and 600 released native salmon, some of which successfully spawned in the newly opened riverbed.¹⁵⁶ In August 2012, the Lower Elwha Klallam Tribe performed the first salmon ceremony and blessing to welcome the salmon home above the dam for the first time in over a century.¹⁵⁷ The Glines Canyon Dam removal was temporarily stalled due to water quality issues downriver,¹⁵⁸ but deconstruction has resumed and the Park Service expects that the removal will be completed on schedule in 2014.¹⁵⁹

http://www.oregonlive.com/environment/index.ssf/2013/04/removal_of_last_dam_on_olympic.html (last visited Nov. 24, 2013) (federal officials had hoped to complete removal of the Glines Canyon Dam ahead of schedule, by summer 2013, but the heavy sediment discharge from behind the dam clogged the water treatment intake on the lower river, requiring an upgrade to prevent long-term sedimentation problems for the Port Angeles water supply. NPS officials put the dam removal on hold while the treatment plant was upgraded).

¹⁵⁵ Fish Already Returning To Elwha River after Dam Removal, *supra* note 151.

¹⁵⁶ *Id.* The Lower Elwha Klallam Tribe's new fish hatchery, which was completed in 2011, is a state-of-the art facility designed to support river restoration efforts. This role is particularly vital in light of water quality issues as sediment load from the former reservoir sites makes its way down stream over the next five years or so. There is a five-year moratorium on the salmon and steelhead fishery in the Elwha, which will end in 2017, and the Tribe's Natural Resources staff expect that some subsistence fishing may resume as early as 2018, while commercial fisheries may be possible by 2020. Currently the Tribe is involved in litigation over potential negative effects of the hatchery stock on wild fish genetics, but the Tribe firmly believes that the hatchery serves a vital role in the process of river restoration and the prevention of the extirpation of species during the process of dam removal. Interview with Larry Ward, Lower Elwha Kallam Tribe Fish Hatchery Manager (Nov. 14, 2013); Interview with Doug Morrill, Director of Natural Resources for the Lower Elwha Kallam Tribe, (Nov. 14, 2013); Elofson, Interview, *supra* note 97; see also Suagee, Interview, *supra* note 117.

¹⁵⁷ Arwyn Rice, *Lower Elwha Klallam Tribe Ceremoniously Welcomes Salmon Back Into Upstream River*, PENINSULA DAILY NEWS (Aug. 16, 2012), <http://www.peninsuladailynews.com/article/20120817/news/308179982> (last visited Nov. 24, 2013).

¹⁵⁸ Sediment loads in Lake Mills behind Glines Canyon Dam were as expected, but the water treatment plant near the mouth of the Elwha's water intake filtration system failed. Although dam removal has resumed, the water treatment plant is not yet back in operation as of November, 2013. Interview with Doug Morrill, Director of Natural Resources for the Lower Elwha Kallam Tribe (Nov. 14, 2013).

¹⁵⁹ Paul Gottlieb, *Elwha Water Plant Clog Fixed, So Work Begins Again on Tearing Down Glines Canyon Dam*, PENINSULA DAILY NEWS (Oct. 3, 2013).

The Lower Elwha Klallam Tribe provides one of several examples of the power of tribal advocacy in natural resource management of lands, waters, and wildlife that are of cultural importance to the tribes.¹⁶⁰ Competing priorities of tribes, non-Indian citizens, state, local, and federal governments, and environmental organizations do not always align, and there is a long way to go before tribes are consistently and meaningfully involved in decisions affecting their lands and the resources on which they have always depended. But tribes like the Lower Elwha Klallam have already successfully asserted their traditional understandings of and dependence on the land and its resources, and invoked their unique

¹⁶⁰ Like the Lower Elwha Klallam Tribe, the Nisqually Indian Tribe's treaty reserved fishing right has been damaged by overfishing and development on the Nisqually River and in the Puget Sound. In 1912, Tacoma Power built the first diversion dam on the Nisqually River, which was replaced by the Alder and LaGrande dams in 1945. *United States v. Washington*, 384 F. Supp. at 368-69. FERC renewed the license for both dams in 1997, and the Nisqually Indian Tribe was involved in the development of that license. *Id.* at 369. Even before *U.S. v. Washington*, as Judge Boldt described, the Nisqually were involved in developing fisheries management schemes, in order to protect their resource. *Id.* The tribe currently participates in the Nisqually River Task Force, and runs a sophisticated Natural Resources Department, which manages several programs, including a Salmon Recovery Program, a Salmon Enhancement project, an Environmental Management project, and a Harvest Management Program. *Natural Resources*, NISQUALLY INDIAN TRIBE, <http://www.nisqually-nsn.gov/content/natural-resources> (last visited Nov. 24, 2013). The Nisqually Tribe Natural Resources Department additionally serves as the Nisqually River Salmon Recovery Lead Entity under the authority of Washington's Salmon Recovery Act. RCW §77.85 (2009); *Habitat Recovery Work Schedule: Nisqually River Salmon Recovery*, WASH. STATE RECREATION & CONSERVATION OFFICE, http://www.hws.ekosystem.us/prun.aspx?p=Page_89901fef-078a-47c8-9c7b-f3c0c259700a&sid=220 (last visited Nov. 24, 2013). The Nisqually Tribe has and will continue to serve as a leader in the battle to protect the salmon on the Nisqually River. Similarly, the Klamath, Hoopa Valley, Karuk, and Yurok Tribes, who have inhabited the Klamath River basin since time immemorial, are actively involved in an effort to remove four hydropower dams from the Klamath River Basin in Southern Oregon / Northern California. See generally JIM DOWNING, LAYPERSON'S GUIDE TO THE KLAMATH RIVER, WATER EDUCATION FOUNDATION (2011). It is hazardous to predict the course of future political events in the Klamath Basin given the great number of stakeholders, the long history of conflict, and the hydrological realities in the basin. But there are enormous political and legal forces that are pushing for the removal of dams and the improved water quality, increased water flows, and protection of endangered species that will result. The tribes in the Basin will undoubtedly continue to play a prominent role in this debate; their existence depends on a return of the fish species that, for thousands of years, gave them their identity and their sustenance. Daniel McCool, *Rivers of the Homeland: River Restoration on Indian Reservations*, 16 CORNELL J.L. & PUB. POL'Y 539, 553-54 (2007).

status as sovereign nations and beneficiaries of the special trust relationship with the federal government.¹⁶¹ As one scholar puts it,

[t]he impoverishment of nature affects every American citizen, but it poses particularly severe threats to Native America because tribal populations today are not mobile. Sovereignty and culture are tied to a fixed, remnant land base. Environmental damage originating outside of reservations jeopardizes traditional economies, cultural ways of life, and the health of tribal citizens.¹⁶²

Tribes are thus well situated to become the foremost experts on protecting the natural resources in their traditional territories, and to take the leading role in the political process, which many like the Lower Elwha Klallam have chosen to do.

In some ways, the Lower Elwha Klallam Tribe was in an ideal position to develop the strong coalition that eventually achieved the removal of the Elwha Dams.¹⁶³ After all, the Elwha Dams produced little power and served no irrigation purposes, and the majority of the River's watershed lay within the boundaries of a National Park.¹⁶⁴ As Lower Elwha Klallam Tribal leaders point out, their opportunity to unite the interests of the larger community were unique, although much of the strength of those collaborations simply came with relationship-building over time and the

¹⁶¹ Given the enormous impact that water development has had on Indian people, it is not surprising that they would play a major role in efforts to restore rivers. Today there are hundreds of river restoration projects taking place across the nation. Many, but not all, of these involve dam removal. Since 1912 about 465 dams were removed in the United States. Since 1999, another 145 dams have been removed. However, dam removal is just one aspect of river restoration; many rivers are partially restored while dams on the same river are maintained. Indian tribes are the primary leaders of some of these restoration efforts, but the more typical modus operandi is for tribes to participate in a broad coalition of stakeholder groups that work together to restore rivers.

Id. at 543.

¹⁶² Mary Christina Wood & Zachary Welcker, *Tribes As Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARVARD ENVTL. L. REV. 373, 375 (2008).

¹⁶³ Elfoson, Interview, *supra* note 97; Suagee, Interview, *supra* note 117.

¹⁶⁴ *Id.*

accompanying development of political strategy.¹⁶⁵ The Tribe, which has always emphasized the importance of natural resource management within the Tribal government, additionally had the benefit of a Natural Resources Department comparable to any state or federal agency.¹⁶⁶ However, as more tribes reach cooperative agreements, take advantage of statutory schemes that encourage tribal management, and assert treaty or similar reserved rights under federal law, the future of culturally and ecologically sound management of tribal resources appears ever brighter.¹⁶⁷ As Senator Bradley remarked during a dinner celebrating the Elwha Dam removal on September 16, 2011:

Each of us owes the Lower Elwha Klallam Tribe the greatest possible gratitude for their unceasing efforts over decades to bring back the River's life. To tell us all what the River needed. And we owe the Tribe the greatest deference and respect for the burdens its people and society have borne because of what was done to the River 100 years ago.¹⁶⁸

The Elwha River must still achieve full recovery, but the return of the fish is a promising sign for the revival of the ecosystem and the cultural heritage of the Lower Elwha Klallam Tribe.¹⁶⁹ The Tribe will

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Wood & Welcker, *supra* note 162 at 393-95 (discussing the failure of statutory conservation schemes currently in place to protect tribal interests, and the importance of tribal use of “new ways to extend their environmental prerogatives outside reservation boundaries” as part of the “growing Native environmental sovereignty movement”).

¹⁶⁸ Bradley, *supra* note 115.

¹⁶⁹ It defies experience-hardened cynicism whenever any big public works project is under budget and ahead of schedule. But the Elwha has served up something even better: life itself, in the form of ocean-going fish answering to the imperatives of love and death. Not long ago, scientists were stunned to find wild steelhead trout scouting habitat well past the site where the Elwha Dam had stood for nearly a century. They didn't expect fish to return this soon . . . The dams choked off one of the greatest salmon bounties in the United States. They were built to service a pulp mill, and once the mill outlived its purpose, the Indians of the Lower Elwha Klallam Tribe began to dream of big Chinook, some up to 80 pounds, coming back to a river wild once again—a ghost dance, in its way. After an initial act of Congress authorized dam removal in 1992, it took two decades of persistence by the tribe, the National Park Service and lovers of wild land and feisty fish to guide the \$325 million project through much turbulence . . . The investment here will not only return a river to its natural state, but lays the foundation for a wild

continue to shape the future course the Elwha River takes by playing a vital role in the restoration efforts.¹⁷⁰ “We were told it was insurmountable,” Robert Elofson, long-time Elwha River Restoration Director for the Lower Elwha Klallam said, “but as a tribal people working to make change in your ancestral homeland, you are not going anywhere, and you have a long time to get things done.”¹⁷¹



Julia Guarino, *Regeneration begins at the former site of the Elwha Dam* (Nov. 14, 2013)

salmon fishery like no other in the 48 states. Imagine having a place, two hours and change from the 3 million people of the Seattle metro area, that looks like Alaska’s Kenai Peninsula—and has the fish to bring in visitors to expand what is already a thriving tourist industry.

Timothy Egan, *Biological Boomerang*, N.Y. TIMES, July 26, 2012.

¹⁷⁰ *River Restoration*, LOWER ELWHA KLALLAM TRIBE, <http://www.elwha.org/tribalprograms/riverrestoration.html> (last visited Nov. 24, 2013).

¹⁷¹ Elofson, Interview, *supra* note 97.