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**Treaty Implied Rights To Habitat Protection:
Impacts on the Elwha River Controversy**

presented by

John C. Ruple

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of the requirements for

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**TREATY IMPLIED RIGHTS TO HABITAT PROTECTION:
IMPACTS ON THE ELWHA RIVER CONTROVERSY**

By

John C. Ruple

A MASTER'S THESIS

**Submitted to
Michigan State University
in partial fulfillment of the requirements
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ABSTRACT

TREATY IMPLIED RIGHTS TO HABITAT PROTECTION: IMPACTS ON THE ELWHA RIVER CONTROVERSY

By

John C. Ruple

Washington State's Elwha River was historically home to one of North America's largest salmon runs. Salmon runs on the Elwha River have declined precipitously since construction of two hydroelectric dams in the early part of the twentieth century. The dams' impacts, and the subsequent loss of salmon have fallen disproportionately upon the members of the Lower Elwha S'Klallam Indian Tribe. This Thesis applies case study methodology and legal research to ascertain what, if any legal obligation to protect the river's spawning habitat arises out of historic treaties between the tribe and the United States Government.

Analysis of case law relating to treaty interpretation and fishing rights indicates that such a right probably exists. However, political realities may make such an assertion difficult and do not guarantee river restoration. The tribe may improve its case by re-framing the issues involved to focus on concerns over dam safety.

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This Thesis is dedicated to the loving memory of my parents, Donald and Joelyn.

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To David Duffy, thank you for keeping it all in perspective, and your continued reminders of what is, and always will be important. Your biting insight and candor have played an immeasurable role in keeping me going and making me finish. A very special thank you is owed to the friends and colleagues too numerous to mention who have questioned, critiqued, and most importantly motivated me throughout this process.

*The responsibility of any nation,
and the particular responsibility of elected officials of any nation
is not to justify what has passed for legality
but to anticipate the conditions and problems of tomorrow
and attempt to deal with them.*

– Vine Deloria Jr. 1974

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CHAPTER ONE

INTRODUCTION

STATE OF PACIFIC SALMON

The severe and precipitous decline of Pacific Salmon is well documented. “Pacific Salmon have disappeared from forty-percent of their historical range in Washington, Oregon, Idaho, and California over the last century and many remaining populations are severely depleted in areas where they were formerly abundant.”¹ According to the Worldwatch Institute, only ten percent of the region’s approximate 1,000 historic stocks are considered even somewhat healthy.²

Species decline has been attributed to many causes; over fishing by commercial, recreational, and Indian fishermen, ill fated artificial propagation efforts, riparian and terrestrial development, agricultural runoff, and most importantly - hydroelectric dams. The Worldwatch Institute notes that habitat modification, and dams in particular, are responsible for an estimated 99% of salmon losses in the Pacific Northwest.³

Concern over declining stocks has lead to the creation of regional and international scientific commissions charged with discovering the causes of species decline. These commissions have gone beyond placing blame for historic losses, recommending steps to insure the continued survival, and eventual increase in salmon populations.

¹ COMMITTEE ON PROTECTION AND MANAGEMENT OF PACIFIC NORTHWEST ANADROMOUS SALMONIDS, BOARD ON ENVIRONMENTAL STUDIES AND TOXICOLOGY, COMMISSION ON LIFE SCIENCES, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 2 (1996) [hereinafter UPSTREAM].

² LESTER BROWN ET AL., STATE OF THE WORLD 1996 at 65 (1996).

³ *Id.* at 64.

Fundamental changes in fisheries and habitat management are needed; how habitat management is conducted will have a direct impact on inhabitants of the Pacific Northwest. The wide range of interests involved, together with the ubiquitous nature of externalities that accompany any scenario necessitates that many groups must make sacrifices to insure the salmon's return. Cortland Smith, at the 1995 Sea Grant National Issues Forum stated it well.

Resource managers cannot shirk from the fact that [fisheries management] is about allocation as well as conservation... allocati[ve] conflicts are basically about different preferences [treaty vs. non-treaty fishers, water for power vs. water for salmon, wild fish vs. hatchery fish, etc.] and we have to work out a way to deal with these different preferences...decid[ing] what is most important.⁴

THE IMPACTS OF HYDROELECTRIC DAMS

The physical, biological, and chemical impacts of dams are numerous, and historically, were often overlooked or ignored when pursuing flood control, navigation, irrigation, or hydroelectric development. Many of the consequences of dams are immediate, such as inundated riparian lands while others, such as channel hardening are cumulative and long term in nature, appearing long after the projects have been completed. Many of the most pervasive impacts simply were not anticipated in our nation's head-long pursuit of development and industrialization. Even where the impacts were obvious, engineers often underestimated the difficulty of the technological fix.

Salmon mortality remains high despite spending an estimated 1.5 billion dollars over the last 13 years to implement fish passage measures on the Columbia and Snake

⁴ Sea Grant, National Issues Forum Summary Report: *Can America Save its Fisheries?* 15 (1995).

Rivers. The series of dams on the Columbia and Snake River systems kills an estimated eighty-five to ninety-five percent of migrating smolts.⁵ Dams are estimated to kill between thirty-four and fifty-seven percent of adult salmon returning to spawn.⁶ Increased mortality is partly due to a decrease in the speed of instream flows, making it more difficult for smolts to migrate downstream. Smolts can no longer ride the river's natural flow to the mouth of the river and the salt water environments that are home for most of their adult lives. Smolts must expend more energy in their effort to travel downstream. The increased migration time leaves smolts exposed to predation for a longer period of time, and can interfere with smolts' natural transition from a freshwater to a saltwater environment.

The stagnation of reservoirs, and the increase in surface water exposed to solar radiation can raise water temperatures behind the dams. Winter water temperatures tend to be higher than normal and summer temperatures below normal, with maximum and minimum temperatures occurring later in the year than in the absence of the dams.⁷ Altered thermal regimes can affect migratory behavior, competition and predation, as well as altering habitat, the food web, and the incidence of disease.⁸

Likewise, dam passage takes a significant toll. It is debatable how severely downstream migrating smolts are impacted, but significant amounts are destroyed by juvenile bypass systems.⁹ These impacts are cumulative and increase with each

⁵ Smolts are juvenile salmon.

⁶ NATIONAL PARK SERVICE ET AL., FINAL ENVIRONMENTAL IMPACT STATEMENT: ELWHA RIVER ECOSYSTEM RESTORATION IMPLEMENTATION 3 (1996) [hereinafter IMPLEMENTATION FINAL].

⁷ UPSTREAM, *supra* note 1 at 229.

⁸ *Id.* at 195-196.

⁹ Estimated bypass mortality averages 5-7% at each dam on the Columbia and Snake River systems. *Id.* at 234.

successive dam. Upstream migrants are similarly affected, their numbers reduced as they are forced to navigate fish-ladders or trap and haul facilities.¹⁰

Spilling water, though necessary to facilitate passage of juvenile salmon, and reduce turbine mortality has major affects on water quality. Dissolved oxygen and nitrogen levels can be adversely affected. Nitrogen super saturation often exceeds 110% of normal,¹¹ leading to a physiological condition akin to nitrogen narcosis, what scuba divers refer to as, “the bends.”¹²

Dam passage facilities such as fish ladders or barging operations can mitigate some of the impacts, but they address a symptom of the problem, not its root causes. Such fish passage facilities have been required by Washington State law since 1890,¹³ but were never constructed as part of either of the two dams on the Elwha River. This was likely due to the developers’ haste, concern with cost containment, and the State’s reluctance to put limits on what was seen as needed economic development.

STATE OF THE ELWHA RIVER AND ITS SALMON

The Elwha River is a small but pristine river contained primarily within Olympic National Park on the Olympic Peninsula of Washington State. Maps of the project area are shown in Figure 1 and 2. The river historically supported one of the richest salmon populations in North America. Reports by Spanish explorer Manuel Quimper speak of

¹⁰ Interdam losses on the Columbia River have been estimated at up to 25%. *Id.* at 232.

¹¹ The National Marine Fisheries Service recommends that gas super-saturation be limited to 110%. NATIONAL MARINE FISHERIES SERVICE INDEPENDENT PANEL ON GAS BUBBLE DISEASE 1994; as reported in UPSTREAM, *supra* note 1 at 242.

¹² UPSTREAM *supra* note 1 at 229, 242.

¹³ 1889-90 Wash. Laws 106-07, *amended* 1893 Wash. Laws 270.

purchasing salmon weighing over 100 pounds from local Indians during the summer of 1790.¹⁴

The Elwha River is unique in terms of its diversity as well as both the number and size of fish residing in it. It is one of the few rivers in the contiguous United States that supported all the anadromous salmonids [genus *Oncorhynchus*]¹⁵ native to the Pacific Northwest.¹⁶

Construction of two dams, one in 1910, the other in 1926, completely blocked the river and access to 93% of the river's spawning habitat. Both dams are privately owned and were built without fish ladders or other passage facilities. This was a known violation of state law, but was initially overlooked by the state because of the dams' remote locations and the need for regional economic development. Native anadromous fish stocks declined precipitously after dam construction, from an estimated 380,000 prior to dam construction to around 3,000 in 1995. Existing stocks of nine of the ten native anadromous species are faced with extinction if no action is taken. The tenth species, the Sockeye, is already presumed extinct within the Elwha river-basin (NPS 1996, 12 & 125).¹⁷

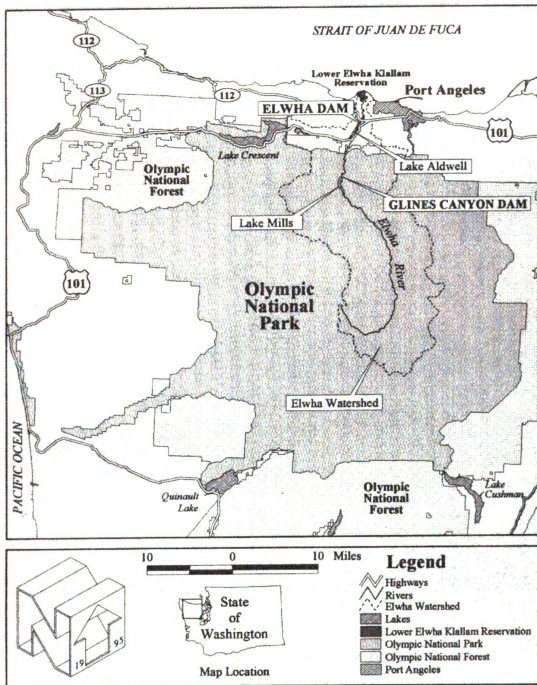
¹⁴ BRUCE BROWN, MOUNTAIN IN THE CLOUDS 61 (First University of Washington Press ed. 1995) (1982).

¹⁵ Anadromous fish are species which hatch in fresh water, migrate to salt water for the majority of their life-cycle, and return to freshwater, usually the same stream where they hatched, to reproduce.

¹⁶ Robert Wunderlich et al., *Restoration of the Elwha River Ecosystem*, 19 FISHERIES 12-13 (1994).

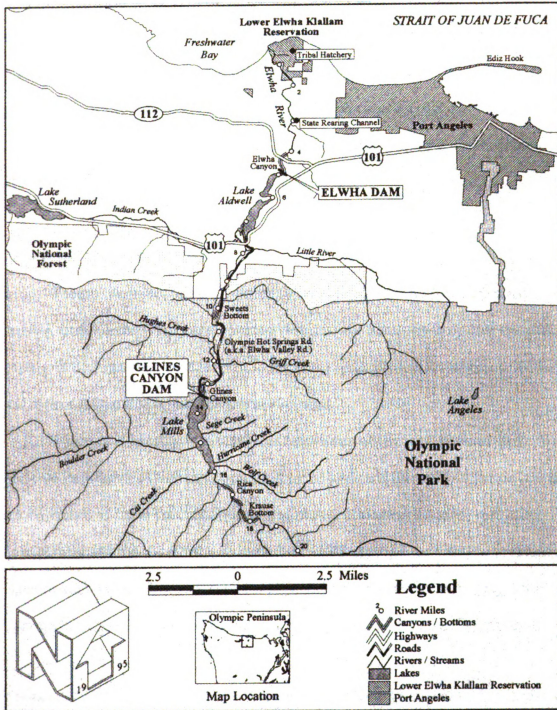
¹⁷ Brood stock is available and Sockeye can likely be reintroduced if their habitat requirements can be met. See IMPLEMENTATION FINAL, *supra* note 6, at 12,125.

Figure 1. Project Area Map.¹⁸



¹⁸ NATIONAL PARK SERVICE ET AL., DRAFT ENVIRONMENTAL IMPACT STATEMENT: ELWHA RIVER ECOSYSTEM RESTORATION 2 (1996) [hereinafter IMPLEMENTATION DRAFT].

Figure 2. Close Up Map of Project Area.¹⁹



¹⁹ *Id.* at 24.

A petition for Endangered Species Act (ESA) listing of Elwha River Pink Salmon was denied in late 1995 when the National Marine Fisheries Service (NMFS) issued a finding that the run no longer constituted a genetically distinct species.²⁰ This is largely due to transplanting and artificial propagation programs which take fish from one river to provide brood stock elsewhere, significantly intermixing otherwise genetically distinct populations. Hatcheries have not been used for the propagation of pinks on the Elwha since the 1920s, but other regional efforts have significantly reduced river to river diversity.

“PLAYERS” IN THE DILEMMA

The two dams are privately owned by Diashowa America Corporation and provide approximately thirty-eight percent of the power necessary to operate the pulp and paper mill near the mouth of the river.²¹ The mill produces paper for telephone books and is the Clallam County’s sixth largest employer.²²

The river originates deep within the boundaries of Olympic National Park. The National Park Service (NPS) manages most of the park, and the eighty-three percent of the watershed which is contained within it to protect ecological integrity, restricting development and road building within the Park. NPS assumed the lead role in restoration planning following a bitter jurisdictional dispute with the Federal Energy Regulatory Commission (FERC). The dispute was resolved in 1992 when Congress intervened,

²⁰ Endangered and Threatened Species: West Coast Pink Salmon Petition Determination, 60 Fed. Reg. 192 (1995).

²¹ IMPLEMENTATION DRAFT *supra* note 18 at 154.

²² *Id.* at 153.

passing the Elwha River Ecosystem and Fisheries Restoration Act,²³ mandating the full restoration of the river and its anadromous fishery, charging NPS with the task. The initial NPS proposal for river restoration commonly known as the, “Elwha Report” was co-authored by the Lower Elwha S’Klallam Tribe, the U.S. Fish and Wildlife Service, Bureau of Reclamation, Bureau of Indian Affairs, National Marine Fisheries Service, and Army Corps of Engineers, and concludes that removal of both dams is the only way to comply with the Elwha Act’s mandate.

The Lower Elwha S’Klallam Tribe²⁴ occupies a reservation near the mouth of the river. The tribe was officially recognized by an 1855 treaty which guarantees the Tribe, “the right of taking fish, at all usual and accustomed grounds and stations...in common with all citizens of the territory.”²⁵ This same provision was used in six different treaties,²⁶ and signed by twenty different tribes within the state of Washington.²⁷ The provision does not specifically address many of the pressing questions that have arisen with increased salmon scarcity, forcing the courts to infer intent based on the meaning of historic treaties. The meaning of the fishing provision is subject to interpretation and has been the subject of intense litigation which will be discussed at length in the following chapters.

²³ Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. No 102-495, 106 Stat. 3173 (1992) [hereinafter The Elwha Act, or the Act].

²⁴ Several different spellings of Klallam are commonly used. Clallam is the preferred spelling for the county within which the project resides. Clallam, Klallam and S’Klallam are all used to refer to the Indians. S’Klallam was the original spelling and unless contained in a direct quotation, the spelling S’Klallam will be used hereinafter since it is the spelling currently used by the tribe.

²⁵ Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933.

²⁶ Treaty of Medicine Creek, Aug. 26, 1873, 10 Stat. 1132; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, *supra* note 25; Treaty of Neah Bay, Oct. 21, 1873, 12 Stat. 939; Treaty of the Yakimas, Jun. 9, 1855, 12 Stat. 951; Treaty of Olympia, Nov. 4, 1873, 12 Stat. 971.

²⁷ Hoh, Lower Elwha Band of Clallam Indians, Lumi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble Band of Clallam Indians, Puyallup, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalit, Upper Skagit, and Yakima Nation.

The Lower Elwha S'Klallam Tribe is both culturally and financially dependent on the river for survival. The river valley is, according to legend, the place of the Tribe's creation and thus central to their cultural identity. Salmon are the cultural foundation of the coastal tribes of the Pacific Northwest, analogous to the Plains Indians' perception of, and reliance on buffalo. Likewise, the resources contained in the river are central to the tribes economic survival and provide the backbone of the native diet. The Tribe has therefore been a leader in the push for river restoration and dam removal.

Senator Slade Gorton, the senior senator from the State of Washington, and chair of the Senate Interior Appropriations Committee has proven to be an influential player in the Elwha dilemma. As Chair of the Interior Appropriations Committee, Senator Gorton can assert significant influence over funding of dam removal. Senator Gorton originally voted in favor of the Elwha Act which called for restoration of the Elwha River and its native anadromous fisheries. His support has since eroded, and while outwardly remaining guarded in his remarks, he has stated that he no longer supports dam removal, but will accept it if it receives Congressional approval.²⁸ Senator Gorton claims that, contrary to the findings of the four NPS EISs, other, more cost-effective ways are available to restore the salmon. It remains unclear how the rest of Congress can fund dam removal if he refuses to let appropriations bills out of committee.

One could speculate that much of Senator Gorton's reluctance to support dam removal stems from his role as State Attorney General in much of the modern litigation involving interpretation of the treaty fishing provision. As Attorney General, Slade Gorton staunchly argued that contrary to the vast body of case law, no special obligation

to Indian tribes exists. "In nearly every dispute heard in federal court, the state not only lost the case, but also received a reprimand from the court."²⁹ Repeated defeat on issues involving Indian fishing rights appears to have reinforced his antagonism towards projects providing substantial benefit to tribal communities.

The federal government plays a significant role in the resolution of the Elwha conflict. As previously noted, Congress passed the Elwha Act. Additionally, in recent years each administration has articulated a formal American Indian policy which directs executive department agencies in their dealings with federally recognized tribes. The Clinton administration has taken this one step farther, requiring each agency to promulgate policies which ensure that the administration's policy is implemented as intended.³⁰

The federal courts play an equally important role in interpreting the meaning and intent of historic treaties, and in defining the nature of the relationship between the federal government, the several states, and the 500 plus federally recognized Indian tribes. Even though the current administration is generally supportive of Indian rights, the federal courts are heavily weighted by conservative appointees of the Reagan and Bush administrations. These justices have proven to be sympathetic to states' rights, often at the expense of Indian rights.

²⁸ Senator Slade Gorton, *Can We Build Up Salmon by Tearing Down Dams?*, SEATTLE POST-INTELLIGENCER July 22, 1994, at A13.

²⁹ State of Washington, Government to Government Program Summary 2 (1989).

³⁰ See President's Memorandum for Heads of Executive Departments and Agencies, April 29, 1994, 59 Fed. Reg. 22951, codified as part of the Indian Self-Determination and Education Act, 25 U.S.C.A. § 450 (1997).

IMPORTANCE AND RELEVANCE TO PACIFIC SALMON MANAGEMENT

Michael Pyle discusses the possible removal of the Elwha and Glines Canyon dams in an article appearing in the *STANFORD ENVIRONMENTAL LAW JOURNAL*. Mr. Pyle makes the important point that dams have a life of 50 - 100 years before the concrete begins to fatigue and the reservoirs fill up with sediment. This life may of course be extended with dam modification and sediment management; both of which are extremely expensive. Mr. Pyle notes that in the coming years we will be faced with a large number of dams which have outlived their usefulness or have become either a safety or environmental hazard. With this in mind, dismantling of the Elwha and Glines Canyon dams will provide valuable lessons on how to remove large dams. Hydroelectric and flood control dams have previously been removed, but never any as large as those on the Elwha River.³¹

The Elwha Restoration Project clearly reflects the recommendations made by the National Research Council (NRC), a branch of the National Academy of Sciences that, “habitat reclamation or enhancement activities should emphasize rehabilitation of ecological processes and function ... [e]xisting artificial structures that appear to be

³¹ The 440 long, 56 foot high Grangeville (Harpsters) Dam, on the South Fork of Idaho's Clearwater River was removed in 1963. The Sweasy Dam on the Mad River in California was removed in late 1969 and early 1970. The 45 foot high and 1060 foot wide Lewiston Dam on the Clearwater River in Idaho was removed in 1973. (Brian D. Winter, NOAA Technical Memorandum NMFS F/NWR-28, *A Brief Review of Dam Removal Efforts in Washington, Oregon, Idaho, and California* (April 1990). The Fort Edward Dam, on the Hudson River was removed in 1973, resulting in severe downstream pollution from the release of PCBs contained in sediment trapped behind the dam. (See Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 STAN. ENV. L.REV. 97-143 at 110 (1995)). PCBs do not pose a problem at either the Elwha or Glines Canyon dams since no upstream development has occurred. Planning is also underway to remove the Ringdale Dam on Malibu Creek in California, the Edwards Dam on Maine's Kennebec River (Pyle at 105-6, 108), the Enloe Dam on the Similkameen River in Oregon, The Savage Rapids Dam on the Rouge River in Oregon, The Cascade Dam on the Merced River in California (within Yosemite National Park), and the Upper Lost Man Creek Dam in Redwood National Park, California (Winter at 7-10).

impeding natural recovery should be removed.”³² The Elwha provides a unique opportunity to test these recommendations since 83% of the watershed is protected within Olympic National Park boundaries and most other adverse impacts on salmon originating within the watershed can be ruled out.³³

The NRC further notes that American Indians must be included in rehabilitation efforts, and that their inclusion will benefit everyone in the long run.³⁴ The Elwha dilemma reflects elements of many pressing policy questions and will provide the context necessary to review and clarify federal Indian policy and its application.

Professor Charles Wilkinson succinctly notes the importance, and indeed the urgency of clarifying the doctrines of Indian law.

Lack of a reasonably well defined matrix of doctrine also undercuts one of the most encouraging developments in Indian country - the increasing willingness of tribes and states to settle their differences extrajudicially. The growing atmosphere of cooperation is inevitably premised upon the existence of doctrinal benchmarks to guide parties at the bargaining table. There is urgency of a considerably grand scale to this need to channel the scattering forces and build predictable doctrine.³⁵

Federal Indian policy is undergoing radical change. The government is moving rapidly away from its historical position of controlling and dictating what happens in Indian country to one where tribal governments are recognized and treated as sovereigns. In the words of Secretary Babbitt, “we are not going to do for, we are going to do with.”³⁶ The Elwha dilemma provides a unique opportunity to analyze the changing face of Indian

³² UPSTREAM *supra* note 1, at 366.

³³ NATIONAL PARK SERVICE ET AL., FINAL ENVIRONMENTAL IMPACT STATEMENT: ELWHA RIVER ECOSYSTEM RESTORATION 27 (1995) [hereinafter RESTORATION FINAL].

³⁴ UPSTREAM, *supra* note 1, at 376.

³⁵ CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 9 (1987).

³⁶ Press Briefing by Secretary of the Interior Bruce Babbitt and Assistant Secretary of the Interior for Indian Affairs Ada Deer, April 29, 1994.

policy and evaluate what elements have been most effective, both for the resource in question and for native peoples.

Documenting the changing nature of federal policy pertaining to management of Indian trust resources, and clarifying its direction will fill a significant gap in the literature and be of use in resolving conflicts over management of Indian trust resources. As Secretary Babbitt noted in his April 29, 1994 press briefing, there is an enormous interest in resource issues and salmon are of particular importance to tribes in the Northwest. Research into the development and evolution of Indian trust resource policy should be particularly useful to tribal governments and resource managers at all levels. The lessons learned from the Elwha dilemma transcend the boundaries of the study area and provide valuable insight into the government's obligations in management of Indian trust resources.

PROBLEM STATEMENT

In any attempt to clarify Indian policy we must first attempt to resolve differing legal opinions over the rights due treaty signatories. Central to the Elwha dilemma is the question of habitat protection; does the tribe possess a legal right to unspoiled habitat as part of its right to salmon? If so, does this right extend far enough to require reparation of damaged habitat? Is it politically or economically feasible to assert such a right?

The impacts of dams on salmon populations are clear. The Elwha dilemma exemplifies the problems facing contemporary fisheries managers and provides the context to review what rights are reserved by historic treaties, and what obligations the federal government has respect to treaty reserved resources. The Elwha provides a

particularly useful study area because development within the watershed has been limited, reducing the number of intervening variables which could potentially affect the viability of salmon populations. The questions presented by the Elwha dilemma are *not* if dams adversely affect salmon populations, but rather, how to deal with stock declines resulting from dams. This analysis attempts to define, what is the federal government's legal obligation as trustee of Indian resources when it comes to salmon and habitat management?

RESEARCH QUESTIONS

The heart of this analysis deals with American Indian policy, and how it may affect the resolution of the Elwha dilemma. This research project attempts to answer four questions, clarifying whether an environmental servitude exists requiring the protection of salmon habitat, and if so, how such a servitude may affect the outcome of the Elwha dilemma. Analysis of Indian policy questions is tied to the Elwha both to control the scope of analysis, and because as will be discussed later, the courts will not accept abstract analysis. The four research questions addressed in this research project are:

- 1) What is the legal basis of federal Indian policy with respect to Indian trust resources? How has this policy developed over time?
- 2) What rights do treaties create, and do treaties create an environmental servitude requiring the federal government to protect salmon habitat?
- 3) In the event that such a servitude does exist, does the federal government have a duty to restore damaged salmon habitat to abide by the purpose and intent of historic treaties?
- 4) Is there a need for a change in federal Indian policies with respect to treaty reserved resources? If so, what changes are needed and why?

METHODOLOGY

The analysis contained in this thesis reflects what Yin defines as case study research, “an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between the phenomenon and the context are not clearly evident; and in which multiple sources of evidence are used.”³⁷

Case study methodology is appropriate according to the four criteria advanced by Yin. First, this analysis addresses questions such as how Indian policy has developed, how it may be applied to a particular dilemma, and why Indian policy is so important. Second, the dilemma does not lend itself to experimental control over behavioral events; we must observe the resolution of the dilemma as it reveals itself in order to test the validity of theoretical constructs. Third, the focus is on contemporary events. Much of the analysis involves discussion of historic treaties and judicial decisions, however, this analysis is meant to be illustrative, illuminating ongoing attempts to resolve the dilemma presently at hand. Finally, the events described are unique, both in terms of scale and scope. Dams have been removed on other rivers, but never dams of the size discussed here. The existence of the project within a National Park and the role and extent of tribal interests make the Elwha dilemma extremely unique. Moreover, the analysis is intended to shed light on an issue with national implications.

The analysis contained in this thesis is primarily exploratory in nature, however, elements of descriptive and explanatory analysis will be incorporated. In order to ensure construct validity is maintained, multiple sources will be used as much as possible; all

³⁷ ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 23 (1984).

documentation will be reviewed, prior to publication, by experts in the field; and to the extent that it is possible, a chain of evidence will be established.

It is important to recognize that case studies, like experiments are not meant to be generalized to other, outside populations. Case studies, like experiments, are intended to be compared to theoretical propositions. The resulting theory may then be applied to other situations, but any predictive or explanatory analysis is always conducted in relation to theoretical constructs. To do otherwise is to compare apples and oranges without having any criteria to justify the comparison.

ASSUMPTIONS AND STUDY LIMITATIONS

The analysis forthcoming is premised upon the assumption that the National Park Service's (NPS) findings regarding the need for, and feasibility of dam removal are correct. It is the opinion of the author that the depth and breadth of NPS's analysis,³⁸ combined with the numerous and diverse co-authors,³⁹ and broad coalition of support,⁴⁰ strongly support this assumption. It should however, be noted that many of NPS's findings are disputed by a local citizens group called Rescue Elwha Area Lakes (REAL).⁴¹ REAL's comments and counter proposals, though obviously heart felt, are

³⁸ See the four most recent environmental impact statements; IMPLEMENTATION DRAFT, *supra* note 18, IMPLEMENTATION FINAL, *supra* note 6, RESTORATION FINAL, *supra* note 33, and DEPARTMENT OF INTERIOR ET. AL., THE ELWHA REPORT: RESTORATION OF THE ELWHA ROVER ECOSYSTEM AND NATIVE ANADROMOUS FISHERIES (1994) [hereinafter THE ELWHA REPORT].

³⁹ Co-authors of the four most recent Environmental Impact Statements (EISs) include the Lower Elwha S'Klallam Tribe, Bureau of Reclamation, U.S. Fish and Wildlife Service, Bureau of Indian Affairs, National Marine Fisheries Service, and U.S. Army Corps of Engineers.

⁴⁰ See comments and letters contained in the EISs: THE ELWHA REPORT, *supra* note 38 at Appendix M, RESTORATION FINAL, *supra* note 33 at 131-652, and IMPLEMENTATION FINAL *supra* note 6 at 103-243.

⁴¹ REAL's concerns are most succinctly contained in their comment letters, see note 36 *supra*. Their principal concerns are 1) that it is unrealistic to assume sufficient funding can be attained to ensure dam removal and habitat restoration. 2) The river can be restored and salmon rehabilitated without requiring

often premised upon unrealistically narrow and restrictive assumptions,⁴² or lack factual substantiation,⁴³ and will therefore not be thoroughly discussed.

The tribes position on river restoration, as represented in the body of literature grounding this analysis clearly indicates that the tribe's primary concern is in restoring the river and its once plentiful salmon. Financial compensation cannot fully heal the social, cultural, or religious wounds that have accompanied dam construction and fisheries depletion. No attempt will be made to place a dollar value on these injuries since it appears highly unlikely that the tribe would accept financial compensation.

It is important to be very careful when extrapolating from the Elwha dilemma to other issues of Indian trust resource management. As will be discussed at length in Chapter 4, the numerous and conflicting precedents and legal theories, many of which are extremely dated combine to make Indian law and policy an extremely unpredictable field. The intent of this analysis is to test the usefulness of theories regarding Indian trust doctrine and apply them to fisheries management. The reader should be careful not to generalize to other situations, but limit generalization to theoretical constructs.

Furthermore, when discussing precedents and judicial interpretations, the reader must remember that litigants are bound only by decisions of courts which have jurisdiction. Thus, cases cited from the 10th Circuit Court may clarify an issue, and provide a strong persuasive argument, but they are not a binding precedent since the

dam removal. 3) Therefore, potential adverse impacts on downstream well owners. 4) Dam removal will adversely affect water quality, and the habitat requirements of species that now rely on the habitat created by the impoundments. 5) Dam removal will result in a loss of recreational opportunities.

⁴² See Dr. Robert Crittenden *Rescue Elwha Area Lakes: A Sane and Economic Plan to Restore Salmon to the Elwha* (1996) (available from author).

⁴³ See Videotapes: Olympic Peninsula Video and The Elwha River Video (available from author), plan referred to at note 38 *supra*, and comment letters referred to at note 36 *supra*

study area is within the 9th Circuit's jurisdiction.⁴⁴ Similarly, where forum jurisdiction⁴⁵ is disputed, as is common in disputes involving water rights, the appropriate and controlling precedent will depend on the forum in which the case is heard.

Discussion of the federal government's duty to the tribes will be limited to interpretation of treaty rights and fiduciary responsibility as trustee of treaty reserved natural resources. In order to keep the scope of this project manageable, the statutory requirements pertaining to religious or cultural issues will not be developed. The American Indian Religious Freedoms Act⁴⁶ and possibly even the Native American Graves Protection and Repatriation Act⁴⁷ may be tangentially applicable. Discussion of their relevance to the conflict may provide for fruitful future research.

⁴⁴ A disagreement among the Circuits is generally considered to provide a persuasive argument for review by the Supreme Court.

⁴⁵ Adjudication of water rights is generally conducted in state court, while questions of treaty fishing rights merit federal review. Initial jurisdiction can be critical to Indian litigants success since federal courts are generally more protective of treaty rights.

⁴⁶ 42 U.S.C.A. § 1996 (1997). American Indian Religious Freedoms Act.

⁴⁷ 25 U.S.C.A. § 3001 (1997). Native American Graves Protection and Repatriation Act.

CHAPTER TWO

THE ELWHA RIVER AND IMPACTS OF DAM CONSTRUCTION

THE WATERSHED

The Elwha River runs north out of Washington State's Olympic Peninsula which is dominated by Olympic National Park. The Park's original 682,000 acres were designated in 1938 and expanded to 855,000 acres in 1940. The river itself is only forty-five miles long, but together with over 100 miles of tributaries, drains 321 square miles of the peninsula. Eighty-three percent of the Elwha River drainage is contained within the Park, and the watershed accounts for approximately twenty percent of the Park's total area.⁴⁸ The size of the river and its watershed are not what make the river so unique. The river is unique primarily due to the pristine nature of the watershed. The vast majority of the watershed is under federal management as public lands and has never experienced the pressures of development or resource extractive industries.

The Elwha River has a gradient of up to sixteen percent⁴⁹ and an average discharge of 1,507 cubic feet per second near Port Angeles. This reflects the upper 269 miles, or eighty-four percent of the drainage. Discharges fluctuate widely due to seasonal snow melt and flows many times the average are common.⁵⁰

The Elwha River's headwaters are on the east flank of Mt. Olympus which rises within the Park to 7,965 feet above sea level. The drainage lies within the rain shadow of

⁴⁸ RESTORATION FINAL, *supra* note 33, at 27.

⁴⁹ *Id.* at 28.

⁵⁰ IMPLEMENTATION DRAFT, *supra* note 18, at 106.

the mountain and the basin is characterized by mild, wet winters and cool, comparatively dry summers. Precipitation varies dramatically throughout the basin and is much heavier at higher elevations. The climate is transitional between the drier conditions of the east and wetter western coast, supporting an extremely diverse vegetative community. Vegetation is dominated by Hemlock and Douglas-fir, but includes more than 167 different species of vascular plants.⁵¹

The Elwha River basin is home to a large animal population. Mammals include the Roosevelt elk, black bear, black-tailed deer, and mountain lion. Smaller mammals occurring in the river basin include raccoons, muskrats, mink, river otter, and beaver; Pine martin and Pacific fisher are also thought to exist within the project area. Another fifteen species of small mammals are found in the drainage and supply the majority of the food base within the study area. Mammal populations have not been extensively studied within the watershed, therefore little is known regarding actual population numbers or migration patterns.⁵²

Numerous aviary species exist within the watershed. These include eleven species of raptors, and an array of waterfowl, including the trumpeter swan. Species of special concern within the basin include the bald eagle, marbled murrelet, northern spotted owl, and steller sea lion; all of which are listed as either threatened or endangered under the Endangered Species Act (ESA).⁵³ One other candidate species, the bull trout, exists within the project area; a formal listing determination is expected in the near future. Four additional species are considered, “of concern” to the U.S. Fish and Wildlife

⁵¹ ELWHA REPORT, *supra* note 38 at 18.

⁵² IMPLEMENTATION DRAFT, *supra* note 18, at 131-132.

⁵³ 16 U.S.C.A. § 1531 (1997), list of protected species contained at 50 CFR § 17.11.

Service and five state candidate species and four sensitive plant species exist.⁵⁴ At least twenty-two species feed upon salmon or salmon carcasses and would likely benefit from the increased salmon stocks resulting from dam removal.

The National Marine Fisheries Service is currently reviewing the status of the chum, chinook salmon, steelhead and searun cutthroat trout within the State of Washington to determine if listing under ESA is necessary.⁵⁵ On October 4, 1995, the National Marine Fishery Service (NMFS) and National Oceanic and Atmospheric Administration (NOAA) denied a petition for ESA listing, publishing a determination that neither the Elwha Pink Salmon nor the lower Dungeness River Pink Salmon constitute a genetically distinct species.⁵⁶

DEVELOPMENT OF THE ELWHA AND GLINES CANYON HYDROELECTRIC PROJECTS

In 1910 construction began on the Elwha Dam, 4.5 miles from the river's mouth. The dams developer was the Olympic Power and Development Company (OPDC), headed by Thomas Aldwell, a wealthy Canadian investor who had immigrated in 1898.⁵⁷ In 1926 OPDC began construction of the Glines Canyon Dam, at river mile 8.5. The Elwha Dam is approximately 450 feet long, 105 feet high and created the 2.8 mile long impoundment known as Lake Aldwell. Despite legal requirements⁵⁸ and repeated contact with state officials no accommodations were made for fish passage at the Elwha Dam.

⁵⁴ IMPLEMENTATION DRAFT, *supra* note 18, at 134-140; and IMPLEMENTATION FINAL, *supra* note 6, at 49-50.

⁵⁵ IMPLEMENTATION DRAFT, *supra* note 18, at 140.

⁵⁶ 60 Fed. Reg. 192, October 4, 1995.

⁵⁷ ELWHA REPORT, *supra* note 38, at 9.

⁵⁸ "Washington's first legislature had passed a law in 1890 requiring the construction of fish passage devices, such as fish ladders, on dams 'wherever food fish are wont to ascend'. This law, which was part of the states wider fishery authority concerning the length of the commercial fishing seasons, empowered

With the Elwha Dam completed, water began to fill the reservoir, and on the last day of October 1912, the dam's foundation blew out, taking with it a downstream bridge. "The blowout was the result of a failure to provide a secure foundation down to bedrock under the gravity dam."⁵⁹ The S'Klallam, many of whom live in the floodplain several miles downstream remember the blowout, "as the time when there were salmon in the trees."⁶⁰

The dam had been bedded on a deep gravel deposit and water pressure blew out the foundation. Various methods of repair were attempted. It was finally decided to fill the hole with debris and seal the fill with a "mattress" made of fir boughs weighted in place by dirt and rock. Later a layer of "gunnite" (a type of concrete) was sprayed on top of the fill. What resulted, and what exists today, is a jury-rigged patchwork of trees, rock, dirt, and concrete held in place by gravity and the original concrete structure which "bridged" the blowout. That conglomeration of materials, assembled by trial-and-error to hold back a large mountain river, is the capping irony in the history of the Elwha Tribe's attempts to live in peace.⁶¹

The Glines Canyon Dam is 210 feet tall and 270 feet across at its widest point, creating the 2.5 mile long impoundment, Lake Mills. Like its predecessor, the Glines Canyon Dam was built without passageways for salmon. Most likely, passage was not required since the river was already blocked downstream. Together, Lake Aldwell and

the commissioner of fisheries to levy fines for violation and obtain court orders for the removal or modification of illegal dams. Federal fisheries law, which was passed piecemeal during the last two decades of the nineteenth century, also required consideration for the passage of salmon, but left enforcement at the discretion of the U.S. Army Corps of Engineers". BROWN, *supra* note 14, at 64. The Corps of Engineers is ironically one of the nations most prolific dam builders. See also 1889-90 Wash. Laws 106-107, *amended* 1893 Wash. Laws 270.

⁵⁹ ELWHA REPORT, *supra* note 38, at 9.

⁶⁰ BROWN *supra* note 14 at 108.

⁶¹ Lower Elwha S'Klallam Tribe, *A Recent History of the Elwha River* 2-3 (no date given) (available from Washington State Archives, Washington State Governor Booth Gardner, Support Files, Elwha Dam, 1989-90, Box 29).

Lake Mills have a combined storage capacity of 48,000 acre feet of water, inundating 5.3 miles of riverine, and 715 acres of lowland habitat.⁶²

The salmon passage issue did not escape the state's notice. In 1911 James Pike, the Clallam County Game Warden made an impassioned appeal to J.L. Riseland, Washington State Commissioner of Fisheries. In his letter, Pike noted that no salmon were visible above the dams and thousands of salmon were trapped at the base of the dam, unable to migrate upstream. Pike went on to predict that the runs would be lost if action was not taken.⁶³ Unfortunately, the Commissioner of Fisheries proved reluctant to enforce the act and sat idly by. Salmon runs on the Olympic Peninsula appeared inexhaustible, the region was remote, and in the opinion of many, the region was deeply in need of economic development.

Eventually, a "compromise" was reached between the State of Washington and the Olympic Power and Development Company. The, "compromise" called for construction of a fish hatchery at the base of the dam in lieu of fish passageways. The arrangement was much less a compromise than the result of pressure applied to Aldwell. On June 14, 1914 the Commissioner finally made a stand. In a letter to Aldwell, Riseland stated:

I am sorry that you have made no response to my last query to you relative to the hatchery at the foot of the Elwha Dam... unless I hear from you in some positive manner in five days, I shall issue an order for you to erect a fishway... It is out of the question for us to allow another run to beat its brains out against that dam.⁶⁴

⁶² RESTORATION FINAL, *supra* note 33, at 27.

⁶³ BROWN *supra* note 14 at 63-64.

⁶⁴ *Id.* at 71.

Faced with the prospect of having to erect a fish ladder, Aldwell quickly signed an agreement with the state, committing to donate land for a hatchery and \$2,500 for its construction. The hatchery proved unsuccessful and was abandoned in 1922 - never to be re-opened. It did represent somewhat of a victory for Aldwell in that he was able to avoid the expense of constructing a fish ladder, the cost of which vastly exceeded that of a hatchery.

The idea of hatcheries increased in popularity, and in 1915 the State of Washington passed a law allowing for their construction in lieu of fish passageways.⁶⁵ This set a precedent that has been criticized as being largely responsible for the depletion of the Pacific Salmon.

Hatcheries are blamed for the decrease in salmon size and stocks for several reasons. In an attempt to control operating costs, hatchery fish are usually raised on an accelerated schedule and released into the wild at the earliest date possible. This results in successively shorter life stage development and smaller size at maturity. Conditions within rearing facilities are extremely crowded and dramatically different from conditions in the wild. Fish are raised in cement tanks and fed pelletized feed supplemented with vitamins, minerals and antibiotics. These conditions do not facilitate adaptation to the wild and allow for the rapid transmission of infectious diseases. Secondly, in order to propagate fish, eggs and sperm must be taken from wild salmon. Often these fish are taken from another river and are not well suited for the unique conditions of the river system their progeny are transplanted into. Traditionally, the largest fish are sought for egg and sperm stocks, thus, the wild stocks that remain have suffered from a loss of both

⁶⁵ Laws of Washington 1915, ch.31 Sec. 79.

the strongest specimens and genetic diversity. This mixing of runs is responsible for the lack of a genetically distinct gene pool cited in the National Marines Fisheries Service's decision not to grant protection to Dungeness and Elwha River salmon stocks pursuant to the Endangered Species Act.⁶⁶

PHYSICAL IMPACTS OF THE ELWHA AND GLINES CANYON DAMS

The Elwha River was historically known to produce some of the largest salmon runs on the Olympic Peninsula. Few historical records exist documenting the size of the fishery. Estimates are that the Elwha River once supported annual populations of between 300,000 and 400,000 wild salmon and seagoing trout. Fewer than 3,000 remain today.⁶⁷

The most well known of the ten historic species is the Chinook or King Salmon. These are the largest salmon of all - up to 125 pounds, and five feet or more in length. None of the large fish exist today, a few fish up to fifty pounds occasionally return, but they are extremely rare.⁶⁸

The dams block fish passage to ninety-three percent of traditional spawning and rearing habitat.⁶⁹ A ninety-nine percent reduction in native salmon resulted. An increase in spring and summer water temperature from two to four degrees Celsius⁷⁰ has resulted in higher incidences of diseased and physiologically stressed fish. The nutrient flow necessary for the production of invertebrates, the primary food source for juvenile salmon

⁶⁶ *Supra.*, note 20.

⁶⁷ IMPLEMENTATION DRAFT, *supra* note 18, at 29.

⁶⁸ BROWN *supra* note 14 at 61.

⁶⁹ IMPLEMENTATION DRAFT, *supra* note 18, at 1.

⁷⁰ ELWHA REPORT, *supra* note 38, at 37.

has been reduced significantly since dam construction, further limiting current stock sizes. Trapped sediments and woody debris have not been allowed to replace similar materials which have been lost downstream, resulting in the loss of valuable spawning habitat and the severe degradation of the spawning grounds that remain.⁷¹ The reduction of spawning grounds has forced the congregation of all remaining salmon into a few miles of habitat. This habitat is severely overcrowded and seasonal stream nitrification results.

The present stocks are primarily the result of hatchery propagation efforts. These efforts have proven to be only marginally effective and have been hampered by disease. Disease problems within the river have been attributed to a lack of genetic diversity in the hatchery stocks, their close confinement, and increases in temperature resulting from the upstream reservoirs.⁷² The importance of pathogens cannot be over stressed as some Washington hatchery stocks are entirely infected with Bacterial Kidney Disease. Even more disturbing is the States repeated release of fish known to be diseased.⁷³

Wildlife composition has been dramatically impacted by the reduction of salmon carcasses associated with stock depletion. The reduction in salmonids returning to spawn has reduced the nutrient matter available to juvenile salmonids, aves and terrestrial species. An increase in salmon carcasses would benefit at least twenty-two different species of birds and animals.⁷⁴

⁷¹ This has had a similar detrimental effect on shellfish habitat.

⁷² For a scathing review of hatchery propagation efforts see Gary K. Meffee *Techno-Arrogance and Halfway Technologies: Salmon Hatcheries on the Pacific Coast of North America*, 6 CONSERVATION BIOLOGY, 351-352 (1992).

⁷³ BROWN, *supra* note 14, at 116-117.

⁷⁴ IMPLEMENTATION DRAFT, *supra* note 18, at 272.

The dams have taken their toll on the river as well. Average annual river erosion and transport are estimated at 280,000 cubic yards, which has been reduced by ninety-eight percent since dam construction.⁷⁵ The dams have trapped an estimated 17.7 million cubic yards of sediment.⁷⁶ As a result, the downstream channel has been hardened and downcut from one to five feet.⁷⁷

Channelization has the positive effect of reducing the frequency of flood events; deepening the channel requires more water volume to overflow the banks. Dam removal would not directly affect the likelihood of flooding because both dams are presently operated in a, “run of the river mode” and their capacity is not utilized for retention of peak volume flows. Indirectly, dam removal would lead to increased sediment accretion and an increase in bed load which would thereby reduce channel volume and increase the likelihood of flood events. The severity of flooding would increase as channel capacity decreases.⁷⁸ The increased incidence of flooding would be more reflective of historic patterns. Recent development in the flood plain and meander path will require construction of levies in order to protect private property; these have been included in the planning effort put forth by NPS. However, when considering the likelihood of a severe flood event one cannot ignore the previous breach of the Elwha Dam, or the manner in which it was patched. The Federal Energy Regulatory Commission (FERC) recently issued a preliminary operation report on the dam, classifying it as having a, “high hazard potential” since the result of a dam failure would be catastrophic.⁷⁹

⁷⁵ RESTORATION FINAL, *supra* note 33, at 30.

⁷⁶ IMPLEMENTATION FINAL, *supra* note 6, at 9.

⁷⁷ RESTORATION FINAL, *supra* note 33, at 27.

⁷⁸ *Id.* at 106-107.

⁷⁹ Federal Energy Regulatory Commission, *prelicense operation report* (Oct. 2, 1996).

A ninety-eight percent reduction in downstream sediment yields has caused 75 to 150 foot shoreline recession east of the river's mouth.⁸⁰ Reduced sediment has allowed the estuary at the river's mouth to recede from a historic length of a half mile to its present length of approximately 300 feet. Sediment accretions to the marine cliffs near the river's mouth has been reduced by fifty-five percent, requiring extensive engineering to protect the Ranney well collector which supplies drinking water to the town of Port Angeles (population 17,710). Similarly, sediment accretion to Ediz Hook, the sand spit which protects the town of Port Angeles and its port facilities have been reduced by thirty-five percent, requiring \$10,000,000 in fortifications and an annual commitment of approximately \$100,000 by the Army Corps of Engineers to control further erosion.⁸¹

IMPACTS ON THE LOWER ELWHA S'KLALLAM TRIBE

The S'Klallam Indians are part of a group of Indians collectively known as the Coastal Salish, or Salishan. The Salish ranged from southern British Columbia through Washington, south to the Columbia river. The Salish were sedentary tribes with permanent settlements, generally located near fall and winter fishing grounds. Seasonal camps were used during spring and summer salmon runs. Permanent settlements consisted of wooden plank structures commonly known as longhouses. Buildings were usually built in a line along the beach, with their doors facing the ocean. The coastal Salish relied primarily on fishing, hunting, and gathering roots and berries for subsistence.

⁸⁰ RESTORATION FINAL, *supra* note 33, at 30.

⁸¹ *Id.* at 27-30.

Historically the S'Klallams were believed to occupy up to 15 villages.⁸² It is difficult to say how large these villages usually were, early accounts are few and inconsistent. Later reports are plagued by inconsistencies and do not reflect the severe population decline that resulted from epidemics of smallpox and other diseases. Reverend Eells 1889 account notes that twenty years previously, there were 2 ½ to 5 times as many Indians.⁸³

The Klallam head chief had said that 500 Indians have been killed by the saloons at Dungeness within twenty years. This is probably an exaggeration, but not a very wide one. The diseases consequent upon licentiousness and consumption have caused the death of many. At a very early day, too, small-pox undoubtedly worked great destruction, and whooping cough and measles have made havoc among the children. All of these diseases except consumption were introduced by the whites.⁸⁴

Census data are contained in Figure 3. According to Eells, The Elwha were formerly one of the largest and most independent bands, with sixty-seven Indians around 1880.⁸⁵ All but five or six lived near the mouth of the river while the others established homesteads up river.⁸⁶

⁸² Gunther's 1927 ethnography notes fifteen villages existing at different point in time. Eells notes thirteen, plus those living on the Skokomish Reservation in his 1880 census, and only eleven villages in his report to the Smithsonian which was released in 1889. See Erna Gunther, *Klallam Ethnography*, 1 UNIVERSITY OF WASHINGTON PUBLICATIONS IN ANTHROPOLOGY 5, 173-314,; Myron Eells, Smithsonian Institution, *The Twana, Chemakum and Klallam Indians, of Washington Territory*, 1 ANNUAL REPORT OF THE BOARD OF REGENTS OF THE YEAR ENDING JUNE 30, 1887, 605-681 (1889).

⁸³ It is unclear when this section of the report was written; no later than June of 1887, but possibly much earlier. See Eells, *supra* note 82, at 612.

⁸⁴ Eells, *supra* note 82, at 613.

⁸⁵ *Id.* at 608.

⁸⁶ MYRON EELLS, THE INDIANS OF PUGET SOUND: THE NOTEBOOKS OF MYRON EELLS 18 (1985).

Figure 3. S’Klallam Population Census

1841 ¹	1845 ²	1855 ³	1862 ⁴	1878 ⁴	1881 ⁴	1885 ⁴	1892 ⁴	1923 ⁵
420	1760	926	1300	550-597	481	380	331	296

¹ Conducted by Wilkes; only about half of the tribe counted (Eells 1985; 31).

² Conducted by Finlayson of Hudsons Bay Co. (Eells 1985; 31).

³ Conducted by Dr. G. Gibbs when treaties were signed (Eells 1985; 31).

⁴ Reported by Commissioner of Indian Affairs (Eells 1985; 31).

⁵ (Gunther 1927; 181).

Bruce Brown reports that as early as 1791 the S’Klallam suffered from, “epidemics of the white diseases that had turned their land into a ‘slaughter house of human beings.’”⁸⁷ In 1855 smallpox was introduced when a sailing ship on route from San Francisco to Seattle lost most of its crew, throwing the bodies, clothes, and bedding over the side. The Indians picked up items as they washed ashore and, “died like flies” in the winter of 1855.⁸⁸

Erna Gunther authored the most widely known and comprehensive study of the S’Klallam people base on field work conducted during the winters of 1924 and 1925. Most of this research was conducted near the present day town of Sequim on the west coast of the Olympic peninsula. Little discussion was made relating to the Elwha area, possibly because the Elwha dam was already in place and the Glines Canyon dam was under construction. It is highly likely that the extensive development in the area impacted the community and reduced the authors interest in the area.

The S’Klallams referred to themselves as Nuxsklai’yem,⁸⁹ meaning, “strong people.”⁹⁰ Eells credits Captain Kendrick with the first contact in 1789, Manuel Quimper made contact one year later in 1790, and Captain George Vancouver in 1792.⁹¹

⁸⁷ BROWN, *supra* note 14, at 81.

⁸⁸ *Id.* at 81.

⁸⁹ Eells spells this Nu-sklaime, agreeing to its meaning as “strong people” see Eells, *supra* note 82, at 607.

In 1855 the S'Klallams signed the Treaty of Point No Point,⁹² believing that it protected not only their right to access their usual and accustomed fishing grounds and stations, but allowed them to stay in the villages they occupied at the time the treaties were signed.⁹³ However, the treaty called for their relocation to the Skokomish Reservation on the other side of the Olympic Peninsula.⁹⁴ Land on the Skokomish reservation was scarce, and many of the S'Klallams refused to move. Some remained in their village on the shores of the Strait of Juan de Fuca until they were displaced by development of the town of Port Angeles. Others were forced to live year-around at the summer village on Ediz Hook which was battered by winter storms coming in from the Pacific. This group was forced to relocate when the U.S. military seized the land for a military base.⁹⁵ Other groups fared similarly, trying to stay close to their ancestral lands, but being forced out by loggers and settlers. During the 1930's the U.S. government re-assessed it's treatment of the tribe, discovering that the tribe was essentially landless and destitute. In response, the government purchased several acres in the floodplain of the Elwha River. In 1968 a presidential proclamation established this as the Lower Elwha Reservation.⁹⁶

The Reservation is not only in the floodplain, but directly below the patchwork Elwha Dam.⁹⁷ For many years the tribe had to live in fear that the Power Company

⁹⁰ Gunther, *supra* note 82, at 177.

⁹¹ Eells, *supra* note 86, at 25.

⁹² Treaty of Point No Point, *supra* note 25.

⁹³ The Lower Elwha S'Klallam Tribe, *A Recent History of the Elwha River*, *supra* note 60 at 1.

⁹⁴ Treaty of Point No Point, *supra* note 25 at Articles 2,3.

⁹⁵ *A Recent History of the Elwha River*, *supra* note 93 at 1.

⁹⁶ *Id.* at 2; ROBERT H. RUBY, & JOHN A. BROWN, A GUIDE TO THE INDIAN TRIBES OF THE PACIFIC NORTHWEST 28 (1992).

⁹⁷ Both dams are classified "as having a high hazard potential due to the potential for loss of life and significant property damage in the event of a failure." Additionally, the Elwha Dam has been plagued by a

would suddenly and without warning open the dam's spillways to prevent a stressing of the dam during high water. Such releases sent torrents of water raging suddenly down upon the lower valley.⁹⁸

The Lower Elwha S'Klallam Tribe has been hit hard by construction of the two dams, losing access to the free flowing river and the salmon that are crucial to their way of life. As Eells notes, salmon were the Indians "staff of life."⁹⁹ The importance of the salmon, and the tremendous impact a loss of salmon has had cannot be overemphasized. Mark Davis and Robert Zannis' observations state it well.

If people suddenly loose their 'prime symbol', the basis of their culture, their lives loose meaning. They become disoriented, with no hope. A social disorganization often follows such a loss, they are often unable to ensure their own survival...The loss and human suffering of those whose culture has been healthy and is suddenly attacked and disintegrated are incalculable.¹⁰⁰

Salmon are to the coastal tribes what buffalo were to the plains Indians. Coastal tribes have been fishing for salmon for 8,000 years, making extensive use of fish for 4,000 years, and have been preserving fish for over 2,000 years.¹⁰¹ Ashwell likens Indian's reliance on salmon to the white-man's reliance on bread, noting that salmon was the Indian's most basic food source.¹⁰² Dried salmon were a medium of exchange, traded with inland tribes and tribes east of the Cascade Mountains. Loss of salmon is not just the loss of a food source, but undermines the foundation of Indian society. Eells notes that

long history of negative safety reports - and hesitancy on the part of its owners to address these concerns. FEDERAL ENERGY REGULATORY COMMISSION, OFFICE OF HYDROPOWER LICENSING, DRAFT ENVIRONMENTAL IMPACT STATEMENT, PROPOSED ELWHA (FERC NO. 2683) AND GLINES CANYON (FERC NO. 588) HYDROELECTRIC PROJECTS, WASHINGTON 2.8 - 2.10 (Feb. 1991); see also *A Recent History of the Elwha River*, *supra* note 93 at 4-6.

⁹⁸ *A Recent History of the Elwha River*, *supra* note 93 at 4.

⁹⁹ Eells, *supra* note 82, at 621.

¹⁰⁰ Quoted in WARD CHURCHILL, FANTASIES OF THE MASTER RACE 194-195 (1992).

¹⁰¹ MAXIMILIEN BRUGGMANN, INDIANS OF THE NORTHWEST COAST 41 (1989).

¹⁰² REG ASHWELL, COAST SALISH: THEIR ART, CULTURE AND LEGENDS (1978).

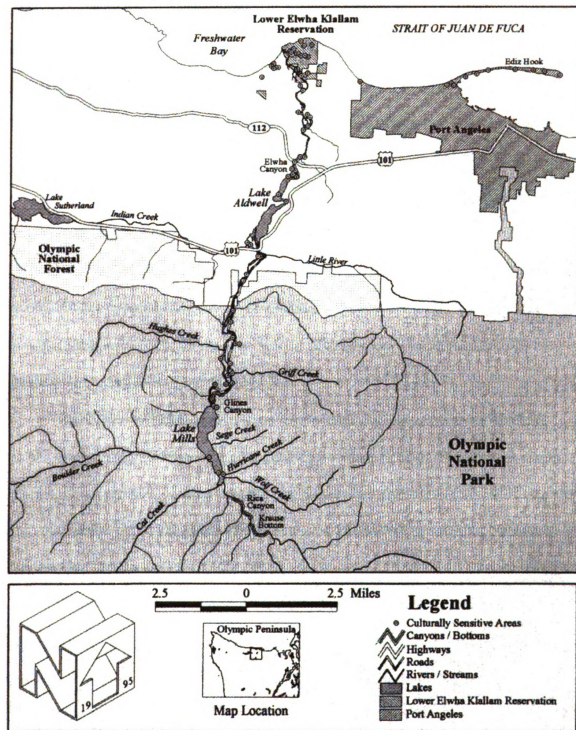
the S’Klallam also heavily utilize ten species of shellfish; populations of which have been drastically reduced due to a reduction in sandy beaches at the river’s mouth.¹⁰³

In the Chinook jargon, the word “tyee” meant “chief” and was used for people as well as the largest of the chinook salmon. Coastal Indian’s believed that salmon were really people who lived in a large house at the bottom of the ocean. In spring, they donned their salmon disguises and offered themselves to humans as food. Great care and ceremony was involved in the treatment of all salmon caught in order to insure they would return again the following year. The tribe considers the river and its salmon to be their most treasured cultural assets, and the foundation of their way of life.

The loss of the Elwha as a free flowing river has been extremely destructive to S’Klallam culture. The number and density of cultural sites is shown in Figure 4. Inundated riparian areas include at least two S’Klallam settlement sites, one near the confluence of the Elwha River and Indian Creek, the second site is reported to be about twenty miles upstream. Additionally, two seasonal camps and three smokehouses have been located within the basin. A single grave has been located within the project area and contains over forty skeletons. This many bodies, all interned together, indicates that they succumbed to either war or disease. Burial grounds are associated with all permanent settlements and more are thought to exist, although their exact location is unknown.¹⁰⁴

¹⁰³ Eells, *supra* note 82, at 621.

¹⁰⁴ ELWHA REPORT, *supra* note 38, at Appendix L 205-209.

Figure 4. Cultural Site Map¹⁰⁵¹⁰⁵ DRAFT *supra* note 18 at 149.

Tribal members have also lost access to sacred sites including the creation site where, according to legend, the creator made the S’Klallam people. The creation site is now inundated by Lake Aldwell. Also inundated is a site where people went to cleanse themselves and receive spiritual guidance.¹⁰⁶ This may be the site Eells refers to as, “tamanous water”, the site where the Elwha band gained their power over other bands of Indians.¹⁰⁷

The Thunderbird, a significant figure in S’Klallam stories was a powerful figure, blessed with extraordinary spiritual powers and accorded with much respect. The Thunderbird causes thunder by clapping its wings, and shoots lightning from its beak to kill the whales upon which it feeds. The Thunderbird is so large that it darkens the heavens when it flies over.¹⁰⁸ According to oral history, the Thunderbird’s home is located within the Elwha River Valley.¹⁰⁹

The Prophecy Hole, just above the Elwha dam is a site where the S’Klallam people went to seek guidance and get a glimpse into their futures. Even though the site has not been destroyed, construction has limited the tribe’s ability to fully utilize the site. Six other named sites exist within the project area, but little is known about their use or significance.¹¹⁰

The treaty of Point No Point,¹¹¹ was signed by Territorial Governor and Superintendent of Indian Affairs Isaac Stevens and four coastal tribes¹¹² in 1855. In

¹⁰⁶ *Id.* at Appendix L 205.

¹⁰⁷ Eells, *supra* note 82, at 673.

¹⁰⁸ *Id.* at 253-258.

¹⁰⁹ ELWHA REPORT, *supra* note 38, at Appendix L 205-209.

¹¹⁰ *Id.*

¹¹¹ Treaty of Point No Point, *supra* note 25.

¹¹² The signator tribes were the Lower Elwha S’Klallam, the Port Gamble S’Klallam, the Jamestown S’Klallam and the Makah.

return for title to traditional lands, the government agreed to protect the right to off reservation fishing, “at all usual and accustomed places, in common with the citizens of the Territory...”¹¹³ The fishing provision is vague by current standards and has been subject to intense litigation, much of which will be discussed in Chapter Three.

It will be argued in Chapters Four and Five that the dams are inconsistent with the Federal fiduciary obligation to maintain Indian fishing resources. The analysis contained in this research is limited to the Lower Elwha band because they have been most severely effected, loosing not only fish but culturally important lands. The Lower Elwha S’Klallam have also taken the most active role in seeking river restoration. The Stevens Treaties reserve tribes the right to fish at all usual and accustomed grounds and stations, and the Elwha River falls within the ancestral domain of the Lower Elwha S’Klallams. As such, any other tribe wishing to fish there must seek tribal permission to do so.

Construction of the Elwha Dam preempted the majority of salmon resources secured by the lower Elwha S’Klallam Tribe in the treaty of Point No Point, and has exacted a brutal cultural toll. The impact on the tribe, both social and economic, has been severe. The 1990 census shows per-capita income to be \$5,000 - a third of that for Washington State as a whole. Thirty-five percent of the tribe live below the poverty level, four and a half times the state at large. Unemployment is also thirty-five percent, over six times the state level. Unemployment figures may be misleading as seasonal unemployment may reach as high as eighty percent.¹¹⁴

¹¹³ Treaty of Point No Point, *supra* note 25.

¹¹⁴ IMPLEMENTATION DRAFT, *supra* note 18, at 153.

The Lower Elwha S’Klallam Tribe has played an active role in pushing for ecosystem restoration. The Tribe strongly supports removal of both dams,¹¹⁵ and is an active participant in the restoration planning process. They are co-authors of the four most recent Environmental Impact Statements.

DAM LICENSING AND SALMON PROTECTION

In 1926 the Federal Power Commission (FPC) issued a fifty year license for the Glines Canyon Project. The Elwha project never received a license. The Elwha project was not initially required to secure a license since it was constructed prior to passage of the Federal Power Act of 1920.¹¹⁶ It is under dispute whether a license is presently required. The two facilities have a combined generating capacity of approximately 18.7 mega-watts; about thirty-eight percent of the needed power for Diashowa America’s pulp and paper mill in Port Angeles.¹¹⁷

The initial licensing application for the Elwha project was filed by Crown Zellerbach (the previous owner) in 1968, see Figure 5, Sequence of Events. Five years later, the Glines Canyon project came up for re-licensing. Applications were submitted to the Federal Energy Regulatory Commission (FERC) which was required to determine whether the dams were in the public interest and to assess the value of the fishery. In addition, the National Environmental Policy Act (NEPA)¹¹⁸ requires completion of an

¹¹⁵ “BE IT RESOLVED, the Lower Elwha Klallam Tribe considers dam removal to be the alternative most likely to serve the best interests of both the Tribe and the larger community in the Port Angeles Area...BE IT FINALLY RESOLVED, the Tribe directs its officers, staff attorneys and other technical representatives to take appropriate actions to ensure that...restoration of the river, with its vast potential, is accomplished.” Lower Elwha Tribal Council, Resolution No. 10-89 (Feb. 8, 1989).

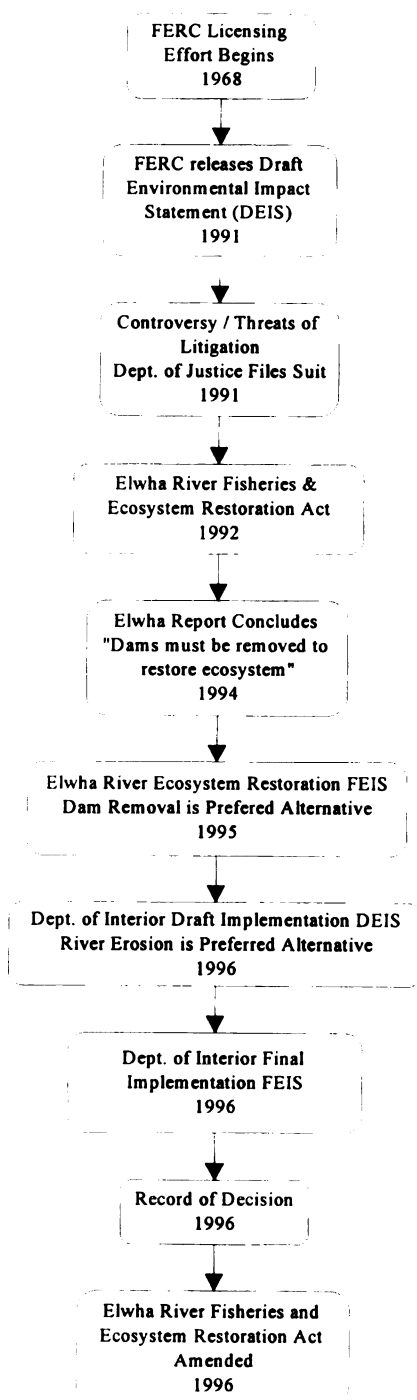
¹¹⁶ Federal Power Act of 1920, ch. 285, Part III § 321 [320], (current version at 16 U.S.C.A. § 791 (1997)).

¹¹⁷ IMPLEMENTATION DRAFT, *supra* note 18, at 23.

¹¹⁸ See 42 U.S.C.A. § 4332 (c) (1997).

Environmental Impact Statement (EIS) for any, “major Federal action” such as dam re-licensing, which may adversely affect the physical environment. Issuance of a fifty year license for either dam was stayed while the impact assessment process was underway; one year licensing permits have been issued for the Glines Canyon Dam since 1976.¹¹⁹

¹¹⁹ The Elwha Act, *supra* note 23 at § 5(a).

Figure 5. Sequence of Events¹²⁰

¹²⁰ THE ELWHA REPORT *supra*. Note 38 at 25.

Two years after the application for re-licensing was made, the Washington State Department of Fisheries entered into an agreement with the dam's owners not to oppose the issuance of annual permits during the impact assessment process. In return Crown Zellerbach agreed to operate the dams in a, "run of the river mode" to mirror, as closely as possible, natural processes.¹²¹ They also agreed to provide 23.6 percent of the construction and operating costs for a rearing facility to produce up to 360,000 pounds of juvenile Chinook Salmon. The facility produces only Chinook and has been hampered by disease problems resulting in production consistently below capacity.¹²²

The highly contentious licensing process culminated in the release of the first EIS, the FERC Draft Report in 1991. The primary bone of contention was jurisdiction. The National Park Service (NPS) claimed jurisdiction over licensing since the Glines Canyon Dam lies within the Park's borders, NPS also argued that they should act as lead agency for licensing since the Federal Power Commission (FPC), predecessor to the Federal Energy Regulatory Commission (FERC) had not been created at the time the dams were constructed. FERC contended that it should maintain jurisdiction since it is normally responsible for hydroelectric plant licensing. Further, FERC noted that only one dam is within the Park, and that both dams were completed prior to the Park's establishment. Since the dams were built prior to Park expansion FERC contended they were not the Park's responsibility.¹²³

¹²¹ ELWHA REPORT, *supra* note 38 at 10.

¹²² *Id.*

¹²³ David E. Ortman and Tasneem Nahar, *Free the Elwha!*, COASTAL ZONE '93 COASTAL ZONE: PROCEEDINGS OF THE SYMPOSIUM ON COASTAL AND OCEAN MANAGEMENT VI 166-182 at 172-177 (1993).

Much of NPS's concern over the dams can be attributed to their policy to, "...restore natural aquatic habitats and the natural abundance and distribution of native aquatic species, including fish, together with the associated terrestrial habitats and species."¹²⁴ The dam also runs counter to Olympic National Park's objective to, "...conserve, maintain, and restore, where possible, the primary natural resources of the Park and those ecological relationships and processes that would prevail were it not for the advent of modern civilization."¹²⁵ These are important considerations since the Elwha Act requires consideration of alternatives, "consistent with the management plan of the Park, the rights of any Indian tribe secured by Treaty or other federal law and applicable State law."¹²⁶ The National Marine Fisheries Service and Pacific Salmon Fisheries Management Council's, "Fisheries Management Plan for Commercial and Recreational Salmon Fisheries off the Coast of Washington, Oregon, and California" provides additional weight by advocating habitat restoration as the preferred means to restore salmon to their historic levels.¹²⁷ This recommendation is mirrored by the National Research Council's recommendation that, "[r]iverine-riparian ecosystems and biophysical watershed processes that support aquatic productivity should have increased protection."¹²⁸

In 1986, the tribe petitioned the Court for, and was awarded intervenor status in the Elwha proceedings.¹²⁹ The tribe staunchly opposed FERC's handling of the licensing

¹²⁴ IMPLEMENTATION DRAFT, *supra* note 18, at 349.

¹²⁵ *Id.*

¹²⁶ The Elwha Act, *supra* note 23 at § 3(c)(2).

¹²⁷ IMPLEMENTATION DRAFT, *supra* note 18, at 349.

¹²⁸ UPSTREAM, *supra* note 1, at 364-365.

¹²⁹ As a recognized intervenor the tribe has ensured itself a role in the proceedings. Had they not been granted intervenor status they would have been forced to search for other avenues to guarantee their involvement. One of the strongest of such handles appears to be section 106 of the National Historic

process. FERC appeared to support the issuance of a fifty year renewal which would have been extremely difficult to repeal. The licensing process was further complicated by a horde of recognized intervenors and a suit between DOI and FERC over who had principal jurisdiction over licensing.¹³⁰

Congressional intervention in the form of Public Law 102-495, “The Elwha River Ecosystem and Fisheries Restoration Act” followed in 1992. The act was sponsored by Representative Swift of Washington State and passed both houses on a voice vote before being signed into law by President Bush.¹³¹ The Act mandated the full restoration of the Elwha River ecosystem and its native anadromous fisheries. The Act directed the Secretary of Interior to determine if the removal of the dams would be required to achieve habitat restoration, and if so, to develop a plan for removal. The Act allocated up to 29.5 million dollars to purchase the dams, right of ways and properties needed to enable dam removal, *if* removal proved necessary for ecosystem restoration. The Act resolved the jurisdictional issue, placing the ball squarely in the Park Service’s court. In October 1994 the National Park Service released its first Draft Environmental Impact Statement (DEIS) known as the, “Elwha Report”.

IS DAM REMOVAL NECESSARY?

In its initial DEIS, (“The Elwha Report”), NPS examined five different scenarios, comparing them to the mandate of the Elwha Act in an attempt to determine if dam

Preservation Act (16 U.S.C.A. 470 (1997)) and its subsequent regulations (36 CFR 800 (July 1, 1996)). Section 106 could prove invaluable to other tribes faced with similar situations.

¹³⁰ ELWHA REPORT, *supra* note 38, at xi.

¹³¹ 138 Congressional Record 142 part V, H11858 (1992); 138 Congressional Record 143 part III, S17357 (1992).

removal would be necessary for habitat restoration. The scenarios for ecosystem and salmon restoration reviewed in the Elwha Report were:

- 1) The no action alternative.
- 2) Retrofitting both dams to facilitate increased fish passage.
- 3) Removal of the Elwha Dam and retrofitting of the Glines Canyon Dam.
- 4) Removal of the Glines Canyon Dam and retrofitting the Elwha Dam.
- 5) Removal of both dams.

The no action alternative is not considered an acceptable option, it would almost surely result in the extinction of the Elwha River salmon and does not meet the requirements of the Elwha Act. Likewise, it does not comply with NPS or Olympic National Park policies, and furthermore, it interferes with the viability of the salmon secured in the Treaty of Point No Point. The no action alternative served as a baseline by which to compare all other alternatives. In comparing the alternatives consideration was given to multiple criteria; performance related to these criteria vary widely between alternatives and subsequent implementation strategies. The only alternative that meets the Act's mandate for restoration of the ecosystem, complies with NPS and Olympic National Park policies, and protects tribal resources is removal of both dams. A comparison of the long term consequences of various restoration alternatives is contained in Figure 6. Prospects for restoration of salmon under each alternative are contained in Figure 7., numbers and species of salmon expected by alternative are contained in Figure 8.

Figure 6.¹³² Long term consequences of various restoration alternatives.

	Removal of Both Dams	Removal of G.C. Dam	Removal of Elwha Dam	No Action
Restore ecosystem	can be accomplished	cannot be accomplished	cannot be accomplished	cannot be accomplished
Fluvial process	recovery of river and near shore habitat	no notable improvement over status quo	no notable improvement over status quo	status quo loss of river and near shore habitat
Water quality	erase lake warming, increased turbidity	beneficial reduction in water temps	beneficial reduction in water temps	status quo water quality
Anadromous fisheries	see figure 4	see figure 4	see figure 4	see figure 4
Living marine resources	near-shore shift back to sandy bottom species	status quo maintenance of rocky substrate species	status quo maintenance of rocky substrate species	status quo maintenance of rocky substrate species
Vegetation	recover 715 acres	recover 425 acres	recover 290 acres	status quo loss of 715 acres
Wildlife	wildlife can be fully restored	wildlife cannot be fully restored	wildlife cannot be fully restored	wildlife cannot be fully restored
T & E species	increase in bald eagles	continued impacts to bald eagles	potential increase in bald eagles	continued impacts to bald eagles
Recreation	loss of both lakes, recover 5.3 miles of river	loss of Lake Mills, recover 2.5 miles of river	loss of Lake Aldwell, recover 2.8 miles of river	retain both lakes, status quo loss of 5.3 mail of river
Power	loss of 18.7 avg. mega-watts	loss of 11.1 avg. mega-watts	loss of 7.6 avg. mega-watts	retain 18.7 avg. mega-watts
Cultural resources	loss of both dams, potential recovery of cultural sites	loss of Glines Canyon Dam, inundation of important sites	loss of Elwha Dam, potential recovery of some sites	status quo inundation of cultural sites and resources

¹³² ELWHA REPORT, *supra* note 38, at 62.

Figure 7.¹³³ Restoration Prospects for Stocks of Anadromous Salmonids Native to the Elwha River

	Removal of Both Dams	Removal of G.C. Dam	Removal of Elwha Dam	No Action
Fall chinook salmon	excellent	fair/good ^a	fair/good ^g	poor ^a
Spring chinook salmon	good	fair/good ^a	fair/good ^g	poor
Coho salmon	good/exc. ^c	fair/good ^a	fair ^g	fair
Winter steelhead	excellent	good ^a	fair ^g	fair ^a
Summer steelhead	good	good	fair ^g	fair
Pink salmon	good	poor/none ^b	poor ^h	poor/none ^b
Chum salmon	good	poor/none ^b	poor ^h	poor/none ^b
Sockeye salmon	fair/poor ^f	poor/none ^c	fair/good ^f	poor/none ^c
Cutthroat trout	good	unknown ^d	unknown ^d	unknown ^d
Native char	good	unknown ^d	unknown ^d	unknown ^d

^a Significant uncertainties associated with reservoir, spillway, and Eicher screen passage mortality as well as degraded habitat and water quality.

^b Inability of juveniles to survive reservoir passage and continued degraded habitat indicated there is little chance of successful restoration of these stocks.

^c Lack of brood stock and expected low probability of successful passage through Eicher screens makes restoration of sockeye unlikely.

^d The ability of cutthroat and native char to successfully navigate the proposed passage facilities is unknown.

^e Existing coho stocks should be sufficient to restore run.

^f Habitat within Lake Sutherland rated as marginal.

^g Significant uncertainties associated with reservoir and spillway passage, degraded habitat and water quality, and unscreened intake.

^h Continuation of habitat degradation and inundation.

¹³³ *Id.* at 35.

**Figure 8.¹³⁴ New Wild Production (Number of fish/year) for Salmon and Steelhead
and Years to Recovery ¹**

	No Action ²	Dam Retention	G.C. Removal	Elwha Removal	Proposed Action
chinook	1,500-2,000	16,060 fish 29-33 years	25,670 fish 29-33 years	20,020 fish 29-33 years	31,360 fish 21-25 years
coho	<500 ³	24,960 fish 29-32 years	31,190 fish 22-25 years	27,680 fish 26-29 years	34,570 fish 15-18 years
chum	200-500 ³	0	0	negligible	36,000 fish 18-21 years
pink	0-50	0	0	negligible	274,286 fish 16-20 years
steelhead	<500	7,297 fish 29-32 years		8,272 fish 30-35 years	10,100 fish 15-18 years
sockeye	0	0	0	6,500 fish 12-20 years	6,500 fish 12-20 years

¹ Assuming no outplanting. Outplanting may reduce recovery time by as much as half.

² These figures are estimates of current production of wild anadromous fish in the Elwha River. No Action would not result in any additional salmon or steelhead.

³ All Elwha chinook and coho are considered a composite of wild and hatchery stocks.

¹³⁴ IMPLEMENTATION DRAFT, *supra* note 18, at 50.

DIVERTING THE RIVER, REMOVING THE DAMS AND MANAGING SEDIMENT

Once NPS reached the conclusion that dam removal was the only way to meet the Act's mandate, the question became how to best remove the dams. If either one or both dams were removed water would have to be diverted around the structures while they were dismantled and removed. This process may disturb sediment causing potentially lethal downstream turbidity. Subsequent sediment management techniques will be critical to species survival and downstream habitat protection. All alternatives include timing dam removal to avoid high turbidity during spawning seasons.

The first river diversion and dam removal alternative reviewed called for construction of diversion tunnels around the dams. The primary advantage of tunneling is that it would allow for better control of reservoir levels in the event of extreme stream flows. The primary disadvantage is high cost. The second alternative calls for diversion via surface channels. The advantage would be lower construction costs, while the disadvantage would be an inability to control the level of the reservoir. The third alternative is low level diversion through the dam. The final alternative examined calls for notching the top of the dams and installing gates to regulate the flow. Once the reservoir had been lowered, the dams could be demolished and removed a piece at a time. The primary advantage is cost savings. Comparison of estimated diversion costs is contained in Figure 9.

Figure 9. ¹³⁵ **Comparison of Estimated Diversion Costs.**

	Cost, G.C. Dam, \$million[†]	Cost, Elwha Dam, \$million[†]
Diversion tunnel	12.37	14.53
Surface diversion channel	---	8.59
Low level diversion	8.44	---
Notch through dam	9.12	---

[†] estimated cost in 1992 dollars

While the dams are being removed, and after their demolition, the major concern becomes how to manage the 17.7 million cubic yards of sediment trapped behind the two dams. Nine sediment management alternatives were reviewed. They fit into the general categories of sediment removal, erosion, retention, or a combination of measures. The specifics of how to go about dam removal aren't directly relevant to the analysis at hand and therefore will not be discussed at length. A comparison of sediment management alternatives, including cost, is contained in Figure 10.

¹³⁵ ELWHA REPORT, *supra* note 38, at Appendix F 36.

Figure 10. Sediment Management Alternatives¹³⁶

SCENARIO	GENERAL APPROACH	LOCATION OF TRAPPED MATERIAL	FINAL LOCATION OF MATERIAL									CONSTRUCTION COST (\$MIL)	CONSTRUCTION TIME (Years)	AVERAGE RIVER SSC LEVELS (mg/l)
			TYPE OF MATERIAL	LAKE MILLS			LAKE ALDWELL							
		COARSE		FINE	COARSE	FINE	COARSE	FINE						
			SALTWATER UPLAND DISPOSAL RELOCATE TO LAKE ALDWELL RETAIN IN LAKE	SALTWATER UPLAND DISPOSAL RETAIN IN LAKES	SALTWATER UPLAND DISPOSAL RETAIN IN LAKES	SALTWATER UPLAND DISPOSAL RETAIN IN LAKES	SALTWATER UPLAND DISPOSAL RETAIN IN LAKES	SALTWATER UPLAND DISPOSAL RETAIN IN LAKES						
1	REMOVAL	FERC LICENSEE APPROACH-MECH (1)	*	*	*	*	*	*		97.3	8	[2]		
2		FERC LICENSEE APPROACH-DREDGE (1)	*	*	*	*	*	*		194	8	[3]		
3	EROSION	COMPLETE WASHOUT	*	*	*	*	*	*		94.7		1000		
4		ERODE TO LAKE ALDWELL	*	*	*	*	*	*		167	6	1500		
5	RETENTION	RETAIN ALL MATERIAL IN LAKE AREA	*	*	*	*	*	*		62.9	4	[3]		
6		ERODE DELTA-RETAIN IN LAKE	*	*	*	*	*	*		55.2	4	800		
7	COMBINATION	ERODE DELTA-WASHOUT SILT AND CLAY	*	*	*	*	*	*		50.2	3	1500		
8		REMOVE AND WASHOUT	*	*	*	*	*	*		97.1	6	1500		
9		REMOVE AND WASHOUT	*	*	*	*	*	*		193	6	1500		

¹³⁶ ELWHA REPORT, *supra* note 38, at Appendix F 96.

The implementation of the NPS recommendations is dependent on the appropriations process which is controlled in part by Senator Gorton. As was discussed in Chapter One, rapid action appears unlikely as long as Senator Gorton can exert his power as Chair of the Interior Appropriations Committee.

Chapter Four will address the questions of what rights the tribe possess, and what are the federal government's obligations with respect to these rights. These will become increasingly important questions as the tribe is forced to seek other means to force action.

CHAPTER THREE

AMERICAN INDIAN POLICY

HISTORICAL PHASES OF FEDERAL AMERICAN INDIAN POLICY

Two general themes have emerged in the complex, and often contradictory history of federal Indian Policy. The federal government has vacillated between policies of assimilation and self-determination. Assimilative policies have thrown Indians into the proverbial melting pot in an attempt to integrate them into “mainstream” society. Under policies of self-determination, the federal government has recognized the unique relationship between recognized tribes and the federal government. Self determination allows tribes to retain control over their own affairs rather than be subsumed by sometimes hostile state or federal governments.

PRE-CONSTITUTIONAL (BEFORE 1789)

The roots of federal Indian policy date back to initial European contact. Initial European contact occurred around 1532, and early relations between tribes and those arriving from Europe were generally amicable. The few settlers arriving from Europe were vastly outnumbered, and often dependent on the hospitality of the natives to survive in the “new world”. American Indians provided material aid, and educated the first settlers in the skills necessary to survive in North America. Tribes maintained the option



of allying with any of the colonial powers, and later, the fledgling government of the United States.¹³⁷

At the request of the Emperor of Spain, Franciscus de Victoria provided the first analysis of the rights of aboriginal people, and the correlative duty born by Colonial powers. Victoria's analysis heavily influenced early relations between Indians and European settlers. Victoria's first conclusion was that the Indians were the true owners of all North American lands. Since Indians were the owners, discovery could not be used to convey title to the Spaniards, nor could title be granted by either the Emperor or Pope. In the absence of a "just war", only voluntary cession of title by the Indians could justify annexation of title. Furthermore, so long as the Indians allowed Spaniards to travel, trade and protect their rights within Indian country, Spain could not wage a just war. Therefore the only way to secure sovereign title was through the consent of the Indians themselves. Much of Victoria's advice was adopted by the Spanish Emperor, and has been widely accepted by writers on international law.¹³⁸

Cohen notes three critical assumptions within the finding that land must be acquired through treaties.

- 1) Both parties to the treaty are sovereign powers.
- 2) The Indian's have original title to the lands in question.
- 3) Acquisition of Indian lands must be controlled by the federal government rather than individuals.¹³⁹

In early treaty negotiations, Indians bargained from a position of strength. As more settlers arrived, they brought with them the liquor, weapons, and disease that

¹³⁷ Charles F. Wilkinson, and John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows or Grass Grows upon the Earth" - How Long a Time is That?*, 63 CAL. LAW REVIEW 601 (1975).

¹³⁸ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 46-47 (William S. Hein Co. 1988) (1941).

inflicted almost unimaginable hardships; hardships often intentionally inflicted in order to hastily grab land.¹⁴⁰ Tribal bargaining power quickly eroded as the Europeans strengthened their hold on North American Territory.

Early treaties had the positive effect of affirming tribal sovereignty, and ownership of land. As Cohen noted, and the Courts have repeatedly held, treaties are documents entered into between two sovereign governments. The signing of a treaty implicitly recognizes the legitimacy and sovereignty of the parties involved. The simple recognition of Indians as sovereign nations has provided the basis for much of the current body of federal Indian law and policy. Between 1778 and 1878, more than 600 treaties and agreements were signed between the fledgling federal government and the Indian tribes of North America.¹⁴¹

DEFINING A NATIONAL POLICY 1789 TO 1871

The United States Constitution only tangentially addresses issues of government relations with Indians. The Commerce Clause states, “The Congress shall have the power...to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”¹⁴² The Constitution elevates any treaties negotiated with, and signed by the United States to the status of, “supreme laws of the land.”¹⁴³ The effect of these provisions has been the subordination of state control to the discretion of federal

¹³⁹ *Id.* at 47.

¹⁴⁰ Churchill documents the intentional distribution of smallpox contaminated blankets in an attempt to eliminate resistance to non-Indian settlement, citing WAGNER AND STEARN, *THE EFFECTS OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN* 44-45 (1945) and Sherburn F. Cook *The Significance of Disease in the Extinction of the New England Indians*, 45 *HUMAN BIOLOGY* 485-508 (1973). See WARD CHURCHILL *INDIANS ARE US? CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* 34-35 (1994).

¹⁴¹ VINE DELORIA JR., AND CLIFFORD M. LYTLE, *AMERICAN INDIANS*, *AMERICAN JUSTICE* 3-4 (1983).

¹⁴² U.S. CONST. art. I § 8, cl. 3.

government. Whenever a conflict arises federal supremacy preempts state jurisdiction unless the federal government explicitly delegates authority to the states.

The first formal attempt to define a national policy began with the passage of the Indian Trade and Intercourse Acts, beginning in 1790 and continuing on to 1834. The laws became the baseline for American Indian policy, defining its fundamental elements as:

- 1) Protection of Indian Rights to their land by setting definite boundaries for the Indian Country, restricting whites from entering the area except under certain controls, and removing illegal intruders.
- 2) Control of the disposition of Indian lands by denying the rights of private individuals or local governments to acquire land from the Indians by purchase or any other means.
- 3) Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.
- 4) Control of the liquor trade by regulating the flow of intoxicating liquor into Indian Country and then prohibiting it altogether.
- 5) Providing for the punishment of crimes committed by one race against members of the other and compensation for damages suffered by one group at the hands of the other, in order to remove the occasion for private retaliation which led to frontier hostilities.
- 6) Promotion of civilization and education among the Indians, in the hope they might be absorbed into the general stream of American society.¹⁴⁴

Three enduring Supreme Court opinions handed down between 1823 and 1832, and collectively known as the Marshall trilogy remain significant and commonly cited to this day. In *Johnson v. McIntosh*,¹⁴⁵ Marshall departed from the theories put forth by Victoria and opined that the doctrine of discovery gave the federal government title to land, but that the Indians' rights were not extinguished entirely, merely "impaired". In

¹⁴³ *Id.* at art. 6, cl. 12.

¹⁴⁴ FRANCIS PAUL PRUCHA AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, 1-3, 43-50 (1962).

¹⁴⁵ 21 U.S. 543 (1823).

effect, the Indians' rights to their land is good against all third parties, but these rights are maintained only at the discretion of the federal government.

Chief Justice Marshall more clearly defined this relationship eight years later in *Cherokee Nation v. Georgia*,¹⁴⁶ declaring the Indian nations to be "domestic dependent nations." He found that the tribes were subject to the protection and superior political power of the federal government; tribes did however maintain sufficient sovereignty to manage their own affairs.

The third case of the trilogy, *Worcester v. Georgia*¹⁴⁷ extended and clarified the notion of limited sovereignty implied in *Cherokee Nation v. Georgia*. The *Worcester* decision explicitly recognized the sovereignty of the Cherokee Nation, enjoining the state of Georgia from extending its power over the Cherokee Nation's land.

The opinions of Chief Justice Marshall are generally considered to be favorable to Indians, but it is unclear whether this was Marshall's true intention. Lloyd Burton notes that the Chief Justice was a staunch federalist, and that the opinions he authored may more accurately reflect an attempt to strengthen and protect the power of the federal government.¹⁴⁸ The opinions making up the Marshall trilogy all reinforce the federal government's power with respect to jurisdiction over Indian affairs while simultaneously limiting the scope of state authority.

Passage of the Indian Removal Act on May 28, 1830¹⁴⁹ marked a turning point in federal Indian policy. The Act announced the beginning of officially sanctioned removal and relocation of tribes to reservations established for their sole occupation. Removal is

¹⁴⁶ 30 U.S. 1 (1831).

¹⁴⁷ 31 U.S. 515 (1832).

¹⁴⁸ LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 32 (1991).

most commonly associated with the, “Trail of Tears” and the forced march of the five civilized tribes¹⁵⁰ to what is now Oklahoma. However, removal refers to the pervasive policy of removing Indians to lands reserved for them and occurred in most parts of the country, including the Pacific Northwest.¹⁵¹

ALLOTMENT AND ASSIMILATION (1871 TO 1928)

The era of treaty making ended in 1871 with the passage of the, “Treaty Statute.”¹⁵² The Statute ended the treaty making process, while guaranteeing continued recognition of all previously ratified treaties. In reality, very little change occurred, and the federal government continued to make “agreements” until 1914. The only difference between an agreement and a treaty is that the former must be ratified by both houses of Congress, while the latter requires only the approval of the Senate.¹⁵³ These “agreements” are elevated to the status of, “supreme law of the land” just as treaties are.¹⁵⁴ Passage of the Major Crimes Act¹⁵⁵ in 1885 permitted the federal government to assume jurisdiction over major felonies committed by Indians against Indians or non-Indians alike and occurring on Indian land. The Act was passed in reaction to the Supreme Court’s holding in *Ex parte Crow Dog*¹⁵⁶ that federal courts did not have jurisdiction over the murder of an Indian, by another Indian within Indian territory. Prior

¹⁴⁹ ch. 148, § 4 Stat. 12 (1830)(incorporated as part of 25 U.S.C.A. § 174 (1997)).

¹⁵⁰ The Cherokees, Choctaws, Chickasaws, Creeks and Seminoles.

¹⁵¹ DAVID H. GETCHES ET. AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 57 (1979).

¹⁵² ch. 120, § 16 Stat. 566 (1871)(current version at 25 U.S.C.A. § 71 (1997)).

¹⁵³ WILKINSON, *supra*, note 35 at 8.

¹⁵⁴ See *Antoine v. Washington* 420 U.S. 194, 201-202 (1975).

¹⁵⁵ 18 U.S.C.A. § 1153 (1997).

¹⁵⁶ 109 U.S. 556 (1883).

to passage of the Act, tribes retained exclusive criminal jurisdiction over felonies committed within Indian country

Prior to 1887 reservation land was held in trust for the benefit of by the tribe as a whole. With passage of the General Allotment Act,¹⁵⁷ more commonly known as the Dawes Act, reservation lands were allotted to individual Indians. Allotted lands were to be held in trust, by the federal government for twenty-five years, until the Indians had acquired the skills necessary to manage their own affairs. Lands not allocated were returned to the federal domain, and then often opened to homesteaders, with the tribes receiving modest compensation for the sale of their lands.

Amendments made to the Act in 1891¹⁵⁸ gave the Secretary of Interior discretionary power to lease lands which individual Indians could not personally use or improve. The Burke Act of 1906¹⁵⁹ gave the Secretary of Interior power to grant title prior to expiration of the trust period. The results of the Dawes Act and its amendments were two fold. 1) Tribal holdings were reduced from 138 million acres in 1887 to 48 million acres in 1934; of these 20 million acres were desert or semiarid and useless for farming without extensive irrigation.¹⁶⁰ 2) The sell off of Indian lands resulted in a checkerboard pattern of ownership which to this day confounds jurisdiction and management.

The first major test of Indian fishing rights, and the fishing provision contained in the Stevens Treaties was dealt with by the Supreme Court in 1905. In *United States v.*

¹⁵⁷ ch. 119, § 1, 24 Stat. 388 (1887)(current version at 25 U.S.C.A. § 331 (1997)).

¹⁵⁸ See ch. 383, § 1, 26 Stat. 794 (incorporated at 25 U.S.C.A. § 331 (1997)).

¹⁵⁹ 34 Stat. 182 (1906).

¹⁶⁰ DELORIA AND LYTTLE, *supra* note 141 at 10.

*Winans*¹⁶¹ the court affirmed the tribes right to access their usual and accustomed fishing grounds and stations. The decision marked a significant development in treaty interpretation by ruling that treaties are to be construed as a, “grant of rights from [the Indians] – a reservation of those rights not granted.”¹⁶² *Winans* will be discussed at length in Chapters Four and Five.

In 1907 the Supreme Court, in *Winters v. United States*,¹⁶³ handed down a critically important decision with regard to Indian water rights. The Court’s decision affirmed the tribe’s right to use water passing through their reservation even though the right was not explicitly defined in the treaty creating the reservation.

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.¹⁶⁴

Winters set a precedent which has become increasingly important with the passage of time, affirming the reserved rights doctrine first established in *Winans* and extending it to resources not explicitly dealt with in treaties.

Passage of the Indian Citizenship Act of 1924¹⁶⁵ made all Indians born within the borders of the United States citizens of the U.S., securing them the same rights as most other citizens. Thus, with passage of the Act, Indians became citizens of both their tribe and the United States.

¹⁶¹ 198 U.S. 371 (1905).

¹⁶² *Id.* at 381

¹⁶³ 207 U.S. 564 (1907).

¹⁶⁴ *Id.* at 576-577

¹⁶⁵ 43 Stat. 253 (1924) (repealed by Pub L. 94-579, title VII § 702 (1976)).

REORGANIZATION AND SELF GOVERNANCE (1928 TO 1945)

1928 marked another turning point for Indian policy with the publication of, “The Problem of Indian Administration”, more commonly known as the, “Meriam Report.” The report documented the abhorrent living conditions on reservations, calling for a significant increase in federal funding for health and education, an end to the policy of allotment, the encouragement of tribal self governance. The report lead to the eventual passage of the Indian Reorganization Act, or IRA of 1934¹⁶⁶ which ended the policy of allotment, openly encouraged tribal self-government, and established a revolving loan fund to help with economic development. The result was a reduction in the Department of Interior’s discretionary powers and an increase in the autonomous power of tribes. Tribes had two years to accept the act; 181 accepted (129,750 Indians) while 77 tribes rejected it (86,365 Indians).¹⁶⁷

Tribes that accepted the IRA were required to adopt a tribal constitution and formal government. Even though the encouragement of tribal self government is widely supported, it has had negative consequences for many Indians. Many of the original governments were imposed by the BIA and have been described as puppet governments. Many, but certainly not all current tribal governments are criticized as being dominated by progressive Indians, often at the expense of excluding traditional leaders from the governing process. Sometimes this exclusion has occurred deliberately, sometimes inadvertently. Many tribes have been faced with fractured leadership between the more assimilative, recognized tribal governments and the unrecognized traditional leaders. The problems of reconciling these divisions and developing a form of government that

ch. 576, § 1, 48 Stat. 984 (1934)(current version at 25 U.S.C.A § 461 (1997)).

reconciles traditional cultural values and a capitalist economy. Two striking example of this occurred on the Oglala Sioux Reservation in the early 1970's.¹⁶⁸

TERMINATION (1945 TO 1961)

The entrance of the United States into World War II brought with it a change in fiscal priorities, away from tribes and towards the war effort. Budgets that had increased with publication of the Meriam Report shrank drastically with the Great Depression, and later, the Second World War.

The Indian Claims Commission Act of 1946¹⁶⁹ provided Indians with their first forum to sue the federal government for damages over the loss of Indian lands. Claims had to be filed by 1951;¹⁷⁰ 671 were filed, not all of which were resolved as of 1988. Prior to the Act's passage, tribes had to get special authority from Congress to seek damages before the court of claims; 140 such special acts were passed.¹⁷¹

Like other federal action ostensibly intended to aid tribes, the Act has several significant limitations.

- 1) The process is slow, consuming valuable time and resources the tribe could expend elsewhere.
- 2) Tribes are not eligible for interest accruing from the government's breach of its trust responsibility.

¹⁶⁷ DELORIA AND LYTLE, *supra* note 141 at 15.

¹⁶⁸ The explosive results of this division are discussed at length, and from two divergent positions by PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* (1992) and STANLEY DAVID LYMAN, *WOUNDED KNEE 1973: A PERSONAL ACCOUNT* (1991). Lyman's account is harshly criticized in WARD CHURCHILL, *INDIANS ARE US: CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* (1994) see especially chapters eight, nine, and ten. The loss of traditional leaders has been a major concern to the American Indian Movement (AIM) who's position is well documented VINE DELORIA JR., *CUSTER DIED FOR YOUR SINS* (1976).
¹⁶⁹ ch. 959, § 1, 60 Stat. 1049 (1946)(omitted from 25 U.S.C.A. § 70 in that the commission was terminated on Sept. 30, 1978).

¹⁷⁰ Tribes may of course continue to sue after 1951, however they must find a different cause of action under which to bring suit.

¹⁷¹ GETCHES ET. AL. *supra* note 151 at 311.

- 3) The Court must also subtract "gratuitous offsets" such as provision of food, blankets, and health care.
- 4) The Act applies only to federal takings and not to state, local, or individual actions.
- 5) Tribal legal council must be approved by the Secretary of Interior; this is an obvious conflict of interest since the Secretary is often the subject of suit.
- 6) Any damages paid must go to individual tribal members rather than the tribe as a whole. This is significant in that successful action does not benefit the tribe as a whole and can further fracture successful tribes.
- 7) A suit before the Court precludes the tribe from any further legal action arising out the case.

The McCarran Amendment of 1952¹⁷² returned Congress to the issue of water

rights, addressing forum jurisdiction for water rights disputes. With passage of the amendment, water rights issues were moved out of federal and into state courts. This can be a significant disadvantage to Indian litigants because in general, state courts have been much less sympathetic to tribes than the federal judiciary. Furthermore, many state judges are either elected or politically appointed, making them subject to more intense political pressure. The Supreme Court recognized this in its 1976 decision in *Colorado River Water Conservation District v. United States*¹⁷³ where it chose to retain concurrent federal jurisdiction rather than completely abdicate jurisdiction to the states. It is also worth considering that how the case is defined can affect forum jurisdiction. If fisheries issues are considered secondary to general stream allocation, state courts may arguably have jurisdiction. As would be expected, a significant portion of recent litigation has centered around the issue of forum jurisdiction.

¹⁷² ch. 651, Title II, § 208 (a)-(c), 66 Stat. 560 (1952)(current version at 43 U.S.C.A. § 666 (1997)).

¹⁷³ 424 U.S. 800 (1976).

Passed in 1953, Public Law 280¹⁷⁴ aimed to allay fears of lawlessness on the reservations, and the perceived accompanying threat to non-Indians. The statute transferred civil and criminal jurisdiction out of the hands of the federal government and to the states. The initial transfer of power was complete, invalidating tribal jurisdiction. This originally act applied only to the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin but later amendments allowed for additional states to assume jurisdiction.

A significant problem with PL 280 was its failure to fund the services imposed upon the states. This left states short of law enforcement officers, judges, probation officers, and jail space. The unfunded mandate also resulted in reservation left completely without police protection. The more obvious problem is the loss of control over tribal affairs and the correlative undermining of tribal sovereignty.

Significant changes occurred to the statute in 1968 with the passage of the Civil Rights Act. As revised, states could no longer assume jurisdiction over the objections of affected Indians. Future assumption of jurisdiction had to be accomplished one reservation at a time rather than on a state wide basis, as was previously the case. However, reservations which had already come under state control were unable to reassume law enforcement matters.

SELF-DETERMINATION (1961 TO PRESENT)

In the early 1960's the pendulum began to swing back in favor of tribal self governance, due in large part to an increase in judicial and legislative activity relating to

¹⁷⁴ 67 Stat. 588 (1953)(current version at 18 U.S.C.A. § 1162 (a) (1997)), parallel provision for civil

American Indians. During the 1970's the Supreme Court heard thirty-three Indian law cases, more than in the areas of anti-trust or consumer law.¹⁷⁵ Seven cases were heard in 1984 alone. Setbacks did occur, but overall the court's opinions were favorable. The Court's more recent decisions resulted in an expanded recognition and application of the powers of self-governance, and a general exclusion of reservations from the realm of state governance.

Passage of the Indian Civil Rights Act of 1968¹⁷⁶ extended most provisions of the U.S. Constitution's Bill of Rights to tribal members when dealing with their tribal governments. The Act also allowed states to "retrocede" jurisdiction to the tribes on matters where it had previously assumed control.

The Indian Self-Determination and Education Assistance Act of 1975¹⁷⁷ encouraged tribes, through grants and contracts, to assume administrative responsibility of programs previously administered by the Bureau of Indian Affairs or Indian Health Service.¹⁷⁸ The Indian Child Welfare Act of 1978¹⁷⁹ addressed the problem of adoption of Indian children by non-Indian guardians. The Act made it more difficult for non-Indians to adopt Indian children, and encouraged adoption by tribal members. The intent being to retain Indian children's ties to their native culture and heritage.

jurisdiction contained at 28 U.S.C.A. § 1360 (a) (1997).

¹⁷⁵ AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 16 (1994).

¹⁷⁶ 25 U.S.C.A. § 1301 (as amended)(1997).

¹⁷⁷ Pub. L. 93-638, §2, 88 Stat. 2203 (1975)(current version at 25 U.S.C.A. § 450 (1997)).

¹⁷⁸ Recent amendments make this one of the most powerful tools for tribes to secure funding, training, and equipment from the federal government.

¹⁷⁹ Pub. L. 95-608 (1978)(current version at 25 U.S.C.A. § 1901 (1997)).

The American Indian Religious Freedom Act (AIRFA)¹⁸⁰ recognized the importance of religious freedom and directed federal agencies to insure their policies do not abrogate religious freedom. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)¹⁸¹ provided for the protection of Indian remains and cultural items, as well as the repatriation of any such items possessed or controlled by the federal government or museums.¹⁸² NAGPRA applies only to federal projects and does not require privately funded museums or private collectors to return Indian remains in their position.

The conservative appointments of the Reagan and Bush administrations began changing the shape of the federal judiciary by the mid 1980's, drastically affecting Indian litigation. According to Lloyd Burton, "the hopes that a right-wing federal judiciary oriented towards states' rights would fulfill its trust obligation in protecting Indian treaty rights were becoming dimmer and dimmer."¹⁸³ Tribes have become increasingly reluctant to bring suit, fearing the more conservative bench may be supportive of states rights at the expense of tribal sovereignty.

CANONS OF JUDICIAL CONSTRUCTION

Indian sovereignty is based on occupation of North America prior to the arrival of Europeans. The wars and treaties that followed abrogated the Indian's right to own the

¹⁸⁰ Pub. L. 95-341 (1978)(current version at 42 U.S.C.A. § 1996 (1997)).

¹⁸¹ Pub. L. 101-601, 104 Stat. 3048 (1991)25 U.S.C. § 3001 (1997).

¹⁸² Unfortunately, the courts have not always upheld the purpose and intent of these acts. *Lyng v. Northwest Indian Cemetery Protection Association* (485 U.S. 439 (1988)) provides a striking example. The Court failed to enjoin either the construction of a logging road or a timber harvest that resulted in the destruction of culturally and religiously significant lands. "Nowhere in the law [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforced individual rights." (485 U.S. 439, 455 (1988)).

territory upon which they lived and transferred land title to the government of the United States. The federal government's right to control traditional Indian lands stems from the doctrines of discovery and conquest¹⁸⁴ which have been applied despite Victoria's arguments discussed *infra*. The two competing lines of thought are reconciled somewhat in *Worcester v. Georgia*¹⁸⁵ which ruled that recognized tribes retained all the powers of a sovereign government not explicitly delegated away by treaty. Thus, as stated in *Winans*, treaties must be construed as a, "grant of rights from [the recognized tribes]" to the federal government, and a "reservation of those [rights] not granted."¹⁸⁶

Nationwide, over 52 million acres of land are now held in trust for tribes or individual Indians.¹⁸⁷ This represents approximately three percent of their traditional land base.¹⁸⁸ At present there are over 510 federally recognized Indian tribes,¹⁸⁹ 27 of which are within the State of Washington. These tribes have a level of sovereignty roughly analogous to that of a state government, and somewhat less than a foreign nation. Tribes retain the right to self governance, taxation, and to be free of state intervention. However, as mentioned earlier, this is subject to judicial interpretation and Congressional discretion. The sheer number of tribal governments, their anomalous governmental status, variations in the infrastructure and administrative resources, and the lack of a clear delineation of jurisdiction create the potential for conflict. This conflict often pits states

¹⁸³ BURTON *supra* note 135 at 60.

¹⁸⁴ DELORIA AND LYTLE, *supra* note 141 at 26.

¹⁸⁵ 31 U.S. 551 (1832).

¹⁸⁶ 198 U.S. 371, 381 (1905).

¹⁸⁷ JAMES B. REED AND JUDY A. ZELIO, EDs., STATES AND TRIBES: BUILDING NEW TRADITIONS 3 (1995); WILKINSON, *supra* note 35 at 7-8; Mary Christina Wood, *Protecting the Attributes of National Sovereignty: The Trust Doctrine Revisited*, 1994 Utah Law Review 1477 (1994) [hereinafter Wood 1994].

¹⁸⁸ Wood 1994 *supra* note 187 at 1477.

¹⁸⁹ DAVID H. GETCHES ET. AL., CASES AND MATERIAL ON FEDERAL INDIAN LAW 8 (1993). However, not all native nations are recognized by the federal government.

against tribes. The conflict noted in the Supreme Court's 1885 decision in *United States v. Kagama*¹⁹⁰ remains relevant today. "[Tribes] owe no allegiance to the State, and receive from them no protection. Because of the local ill feeling, the people of the state where they are found are often their deadliest enemies."¹⁹¹

Federal Indian policy is inherently nebulous, being based in large part on the numerous treaties entered into with Indian tribes and often involving significant judicial interpretation. These treaties are, as Charles Wilkinson points out, exceedingly general and "time-warped." "Many of the basic rights of Indian tribes depend upon constructions of treaties, statutes, and executive orders promulgated during the nineteenth century or even the eighteenth century."¹⁹² "In modern times, the Court has been required to allocate Pacific Salmon and steelhead worth millions of dollars annually based mainly on the treaty provision that tribes would be granted the right to fish 'in common with the citizens of the territory.'"¹⁹³

A vast amount of litigation appearing before the Supreme Court involves Indian laws. "[F]rom 1970 to 1981, Indian laws constituted close to one-fourth of the Court's interpretations of laws enacted during the nation's first century."¹⁹⁴ Over the years, several canons of judicial interpretation have developed, guiding resolution of disputes involving American Indians. The generally accepted canons of interpretation, as reported by Professor Vine Deloria Jr. are:

- 1) Ambiguities in treaties are to be construed in favor of the Indian claimants.

¹⁹⁰ 118 U.S. 375 (1885).

¹⁹¹ *Id.* at 384

¹⁹² WILKINSON *supra* note 35 at 13.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.* at 14.

- 2) Indian treaties are to be interpreted as the Indians would have understood them.
- 3) Indian treaties are to be liberally construed in favor of the tribes.
- 4) Treaties reserve to Indians all rights that have not been granted away.¹⁹⁵

RECENT ADMINISTRATION'S AMERICAN INDIAN POLICY

REAGAN (1980-1988)

Under the Reagan administration, Indian policy was treated in much the same way as federal domestic policy. The administration espoused a policy advancing expansion of state governments while streamlining the federal bureaucracy. "[R]esponsibilities and resources should be restored to the governments which are closest to the people served."¹⁹⁶ The administration's 1983 Indian policy statement sought a similar reduction in federal involvement by strengthening the governmental authority of tribal governments. This was accompanied by a pledge to maintain the continued financial assistance to the tribes.

The principal focus of the Reagan administration's policy was economic development of impoverished reservation economies. This policy relied, to a great extent, on the free market and the introduction of private capital. President Reagan's statement of Indian policy notes that:

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources...both the Indian tribes and the nation stand to gain from the

¹⁹⁵ DELORIA AND LYTLE, *supra* note 141 at 48; see also Allen H. Sanders and Robert L. Otsea Jr., *Protecting Indian Natural Resources: A Manual for Lawyers Representing Indian Tribes or Tribal Members* 1-2 (1982) and *Supplement to Protecting Indian Natural Resources: A Manual for Lawyers Representing Indian Tribes or Tribal Members* 1 (1988).

¹⁹⁶ The White House, Office of the Press Secretary, Statement by the President, *Indian Policy* 3 (Jan. 24, 1983)(available from the National Indian Law Library).

prudent development and management of the resources found on Indian land.¹⁹⁷

President Reagan's statements were met by somewhat skeptical applause from the

National Congress of American Indians (NCAI). A public statement made by NCAI's Executive Council, "...applaud[ed] this reaffirmation of the self-determination principles implemented in the last decade and support[ed] this Administration's expressed future policy of consultation and dialogue with Tribal governments prior to federal policy and program decisions." However, this was immediately followed by a critique of the, "lack of communication by this Administration towards American Indians...coupled with the disproportionate domestic budget cut borne by tribal governments."¹⁹⁸ The budget cuts were so severe that Patrick Morris referred to the administration's policy as, "Termination By Accountants."¹⁹⁹

BUSH (1988-1992)

American Indian Policy under the Bush administration was essentially an extension of the policies of the Reagan administration. It was not until the later half of his term in office that President Bush issued an American Indian policy statement. In his statement, President Bush reaffirmed the government to government relationship between federal and tribal governments; recognizing the unique status of tribes as, "quasi-sovereign domestic dependent nations." The president's statement of policy contained

7. at 4.
Public Statement, Executive Council Meeting, National Congress of American Indians 1 (Jan. 28, 1988) (available from the National Indian Law Library).
Patrick C. Morris, *Termination by Accountants: The Reagan Indian Policy*, 16 POLICY STUDIES JOURNAL 731-750 (1988).

very little substantive material to either define the relationship between governments, or clarify how the administration would approach Indian affairs.

CLINTON (1992-PRESENT)

American Indian policy under the Clinton administration centers around the recognition of the unique relationship between the federal government and the many federally recognized tribes. President Clinton, in remarks to tribal leaders made on April 19, 1994 declared three principles to guide the federal government in implementing its policies. His first principal was a recognition of and respect for tribal values, religion, identity and sovereignty. The president's second principle was that:

[w]e must dramatically improve the federal government's relationships with the tribes and become full partners with the tribal nations....It is the entire government, not simply the Department of Interior, that has a trust responsibility with tribal governments. And it is time that the entire government recognized and honored that responsibility.²⁰⁰

The third principle; the goal of a better and more equal partnership, more empowered tribes, and more efficient government, "must be to improve the living conditions of those whom we serve".²⁰¹

On the same day as his address, President Clinton issued a memo to the heads of executive departments and agencies. This memo signaled an attempt to clarify the unique and complex relationship between federal and tribal governments. The memo directed agencies to consult, to the greatest extent possible, with tribal governments. Additionally, the memo directed the federal government to assess the impact of

the White House, Office of the Press Secretary, *Remarks by the President in Historic Meeting with American Indian and Alaska Native Tribal Leaders 2* (April 29, 1994)(available from the author).
supra note 30.

government plans and programs on tribal trust resources, and to take the necessary steps to remove procedural impediments to effectively working with tribes.²⁰²

The President's policy was further reinforced by Secretary of Interior Babbitt's order²⁰³ mandating meaningful consultation with tribes whenever trust resources would be either directly or indirectly affected. The order was replaced by a chapter in the Department of Interior's Departmental Manual²⁰⁴ which outlines each bureau's policies and procedures to ensure they meet their obligation to treaty tribes. These policies vary considerably from department to department. The differences may be due to several causes such as the size of the department, their work load, the extent to which their actions affect tribal resources, or departmental reluctance to embrace these responsibilities.

WASHINGTON STATE'S AMERICAN INDIAN POLICY

The relationship between states and federally recognized tribes is limited by federal primacy. The commerce clause of the United States Constitution places responsibility squarely upon the shoulders of the federal government.²⁰⁵ Likewise, the Constitution states that, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."²⁰⁶ Yet, as a 1991-92 survey conducted by the National Conference of State Legislators (NCSL) points out, even when state governments have officially recognized Indian sovereignty, that status is often not

1. Secretary of Interior's Secretarial Order 3175
U.S. Department of the Interior, Protection of Indian Trust Resources Procedures 512 DM 2 (Nov. 1985).
U.S. CONST. art. I § 8, cl. 3.

understood or acknowledged by many state officials.²⁰⁷ “State leaders...usually assume that they have jurisdiction over any matter not granted specifically to the national government,” forgetting or ignoring the Constitution’s broad grant of power over Indian affairs to the federal government.²⁰⁸

Within Washington State there are twenty-seven federally recognized tribes. In 1989 the state and tribes entered into the, “Centennial Accord” which was signed by the Governor and the tribal chairs of each of the federally recognized tribes. The agreement recognized that the confrontational approach previously taken by the state had been unproductive, while more recent attempts at negotiated settlements to disputes over resource management had been much more fruitful. The agreement, “commits the state and the tribes to attempt to resolve all issues of mutual concern through negotiation,” and requires agencies to develop a process for implementation and a plan for accountability.²⁰⁹

As outlined in the Program Summary, the benefits of government to government relations include:

- 1) Improved communication between the state and the tribes.
- 2) Establishment of relationships that will allow substantive discussion.
- 3) Recognition of sovereign status of Indian tribes.
- 4) Provision of opportunities to avoid expensive court costs.
- 5) The agreement allows the state and the tribes to maintain more control over issue resolution rather than leaving settlement up to a federal court.²¹⁰

²⁰⁶ *Id.* at art. 6, cl. 12.

²⁰⁷ NATIONAL CONGRESS OF STATE LEGISLATORS, STATES AND TRIBES BUILDING NEW TRADITIONS 9 (1995) [hereinafter NCSL].

²⁰⁸ *Id.* at 5.

²⁰⁹ State of Washington, Government to Government Program Summary, *supra* note 29 at 3.

²¹⁰ *Id.* at 3.

Unfortunately, even the power of this clear and concise agreement is unclear. An unnamed tribal leader responding to the NSCL survey commented that, “[t]he Governor of Washington issued a proclamation of sovereignty, but the attorney general stated that it had no effect.”²¹¹

²¹¹ NSCL *supra* note 192 at 9.

CHAPTER FOUR

ENVIRONMENTAL RIGHTS AND HABITAT PROTECTION

CURRENT FISHERIES MANAGEMENT

Current Washington State policies regarding habitat protection and fisheries enhancement recognize the importance of salmon to the state economy and call for habitat improvement projects, including migration improvement, spawning bed rehabilitation, and habitat restoration. However, efforts and policies continue to rely heavily on artificial propagation.²¹² Furthermore, the legacy of long and bitter litigation casts an omnipresent shadow over planning and management activities. The history of antagonism is often difficult to set aside, and frequently threatens to paralyze co-management. Participants are reluctant to do anything which may send the issue back to the courts.

Tribal involvement in salmon management has increased sharply in the wake of the litigation which dominated the 70's and 80's. *Phase I* affirmed the tribes' right to participate as co-managers of fisheries resources within the State of Washington. Tribes retain exclusive management authority over on-reservation hunting and fishing, and Indian fishing at off-reservation usual and accustomed grounds and stations. The tribes' management authority is tempered only by the states' ability to regulate harvest for the purpose of conservation. The Washington Department of Fish and Wildlife manages non-Indian fishing in cooperation and consultation with the tribes of the state to promote multiple uses, including conservation.

In 1974 the tribes which were parties to litigation in *U.S. v. Washington (Phase I)* (including the Lower Elwha Band of S'Klallam Indians) formed the Northwest Indian Fisheries Commission to provide a common tribal voice and assistance in promoting biologically sound fisheries management. The Commission provides technical assistance to member tribes and assists in coordinating management practices.

Two years later the Magnuson Fishery Conservation Act²¹³ was signed into law. The Magnuson Act created the Pacific Fisheries Management Council which manages fisheries between 3 and 200 miles of Washington State's coastline. The Council consists of both state and tribal representatives.

The 1985 Pacific Salmon Treaty²¹⁴ between the United States and Canada addressed the complexity of managing fish species that traverse international as well as state and tribal boundaries. The treaty established the Pacific Salmon Commission, an eight member bilateral advisory board. The board includes tribal representatives and provides tribes with a mechanism for, and voice in the larger issues of Pacific fisheries management.

Two examples of co-management are the joint management plan for Puget Sound that emerged in 1984, and the joint management plan for ocean and coastal river fisheries. Co-management didn't come easily; both plans are the result of litigation.²¹⁵ In

²¹² See Washington State Wildlife Policy: U.S. Fish and Wildlife Service State Summary: Washington <<http://www.fws.gov/laws/state/washin.html>>.

²¹³ Pub. L. 94-265, 90 Stat. 331 (1976)(current version at 16 U.S.C.A. 1801 (1997)).

²¹⁴ Pub. L. 99-5, § 2, 99 Stat. 7 (1985)(current version at 16 U.S.C.A. 3631 (1997)); the Treaty does not modify any of the terms or provisions of the Stevens Treaties, see 384 F.Supp. 312, 411 (W.D. Wash. 1974).

²¹⁵ Concurrent jurisdiction was established as a result of *Phase I* litigation, see 384 F.Supp. 312; 410,420 (W.D. Wash. 1974). The issue resurfaced in *Hoh v. Baldrige*, "[t]he plaintiff, defendant, and intervenor-defendant are directed to confer and negotiate promptly and in good faith on provisions for a long-term plan for management of fisheries and fish stocks here involved." 522 F.Supp. 683, 692 (W.D. Wash. 1981).

1986 tribes, state agencies, environmental groups, and private timber owners developed the Timber, Fish, and Wildlife Agreement. The agreement recognized the potentially significant impacts of logging on spawning habitat and resulted in adoption of measures to identify best management practices for timber harvesting in order to protect watersheds and salmon streams.

In addition the Lower Elwha S’Klallam Tribe is a member of the Point No Point Treaty Council. The Council is a cooperative management organization made up of the Lower Elwha S’Klallam, Jamestown S’Klallam, Port Gamble S’Klallam, and the Skokomish. The Council coordinates and supplements the actions of each individual tribe.

The dealings between the tribes and the State of Washington are based on the principles advanced in the Centennial Accord which was signed in 1989. The Accord commits the state and tribes to pursue cooperative solutions over costly and time consuming litigation.

Despite advances in cooperative management two problems continue to cast a shadow over the Elwha dilemma. The first is the difficulty in developing a cooperative management agreement without a clear understanding of the rights and responsibilities of the co-managers. Cooperative management means two different things if the tribes have a treaty *right* to unspoiled habitat, or if their *desire* for habitat protection must be balanced against other stake holders’ desires for competing uses. Second, cooperative management doesn’t appear to clarify the Elwha dilemma. It isn’t clear how far cooperative management extends in licensing of privately owned hydroelectric projects.

States, and tribes which have petitioned for and been granted “treatment as States” pursuant to the Clean Water Act²¹⁶ may impose quantitative as well as qualitative instream flow requirements on FERC licensed hydroelectric projects. The lower Elwha S’Klallam have not assumed management authority, and even if they had, section 5(a) of the Elwha Act bars issuance of a permanent license for either project and mandates issuance of annual licenses under the operating conditions which were in effect as of September 1, 1992, until the federal government assumes title.

Furthermore, all parties supporting dam removal appear reluctant to undertake meaningful steps to improve the existing habitat on the Elwha River for fear that it may adversely affect the coalitions ability to see the dams removed. There is also the fiscal reality of securing the funding for major activities which may be nullified, or even destroyed if, and when the dams are removed.

It does appear that the licensing agency must, at a minimum, consider tribal interests in its decision. To ignore these interests would constitute a breach of the government’s fiduciary duty as executor of tribal resources held in trust. The agencies role regarding consultation and cooperative management, though based on a wealth of statutory and case law are to a great extent dependent upon agency policies. As mentioned earlier, these policies vary considerably from executive department agency to agency.

²¹⁶ 33 U.S.C.A. §1377 (e) (1997).

CONSTITUTIONAL ENVIRONMENTAL RIGHTS?

The unique nature of the relationship between Indian tribes and the federal government is inextricably tied to the Constitution.²¹⁷ It is therefore worth asking whether the federal Constitution creates an enforceable right to environmental protection that would affect either Indians or non-Indians. In 1972 the District Court for the Southern District of Texas addressed the issue of constitutional environmental rights in *Tanner v. Armco Steel*.²¹⁸ At issue was whether air pollution generated by the steel plant, and allegedly affecting the health of the people living downwind, violated the downwind communities Constitutional right to environmental protection. The court found that the Federal Constitution, “in its entirety” cannot be used to assert an environmental right, and that the due process clause cannot be applied to private parties. Furthermore, neither the Ninth nor the Fourteenth Amendments embody a legally assertable right to a, “healthful environment.”

[F]rom an institutional viewpoint, the judicial process, through Constitutional litigation, is peculiarly ill-suited to solve problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as application of specialized expertise, it would appear that the resolution is best consigned initially to the legislative and administrative process. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to regulate to the ad hoc process of ‘government by lawsuit’ in the midst of a statutory vacuum....This court holds that no legally enforceable right to a healthful environment, giving rise to an action for damages is guaranteed by...the Federal Constitution.²¹⁹

²¹⁷ U.S. Const. Art. 1 § 8 Cl. 3, and Art. 6 Cl. 12.

²¹⁸ 340 F.Supp. 532 (S. D. Texas 1972).

²¹⁹ *Id.* at 536-537

TRUST DOCTRINE

Public trust doctrine dates back to 529 A.D. and the Institutes of Justinian, “by the law of nature, these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea...”²²⁰ The fundamental premise is that these things are of such basic import that they should be protected, by the sovereign, for the good of all. Public trust doctrine has become an increasingly important doctrine in modern environmental and natural resource law, augmenting statutory law, and filling the gap which often arises. As with any trust there are three parts:

- 1) The corpus, or body of the trust which is managed for the benefit of the beneficiary.
- 2) The beneficiary, or the person who receives the benefits; in the case of public trust doctrine this is the general public.
- 3) The trustee, or the person who manages the assets contained in the trust.

The Supreme Court’s ruling in the hallmark trust case, *Illinois Central Railroad Company v. Illinois*²²¹ found the public trust doctrine to be beyond abdication. “The State can no more abdicate its trust over property in which the whole people are interested...than it can abdicate its police power in the administration of government and the preservation of peace.”²²²

In its 1970 decision in *Pepke v. Building Commission*,²²³ the Supreme Court of Illinois handed down an opinion allowing private citizens to sue for enforcement of the government’s trust responsibility.

²²⁰ J. INST. 2.1.1.

²²¹ 146 U.S. 387 (1892).

²²² *Id.* at 453.

²²³ *Pepke v. Building Commission*, 263 N.E.2d 11 (S.Ct. of Illinois 1970).

If the Public trust doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of the trust, must have the right and standing to enforce it. To tell them they must wait upon governmental action is often an effectual denial of the right for all time.²²⁴

The government's role as overseer and trustee of Indian resources is very similar to its role as protector of the common good which underlies public trust doctrine. Indian trust doctrine, as it is discussed here, closely parallels public trust doctrine, encompassing the three parts mentioned previously, and with the tribe as beneficiary. In this manuscript, Indian trust doctrine and Indian trust resource management are used interchangeably and refer to the management of any resource, reserved by the tribe, and overseen by the federal government. These resources may be financial, governmental, environmental, or environmental.

The precise legal basis and extent of the trust responsibility is somewhat difficult to define, arising out of, and subject to judicial interpretation. Trust doctrine is not founded on doctrines of either statutory or Constitutional law, but is a product of the courts, and dating back to the Supreme Court's decision in *Cherokee Nation v. Georgia*.²²⁵ This decision recognized the unique relationship between Indians and the government, and the government's duty to protect them and their property.²²⁶ According to the holding in *California v. Watt*,²²⁷ the government's obligation can arise out of treaties, statutes, or executive orders.

Like public trust doctrine, Indian trust resource management reflects the idea that reserved resources should be protected by the government for the good of the

²²⁴ *Id.* at 18.

²²⁵ 30 U.S. 1 (1831).

²²⁶ *Id.* at 17.

community; in this case the tribe or individual Indian. According to Woods, this relationship is best expressed as the duty to protect a stable and separate land base, viable tribal economy, tribal self-government, and cultural vitality.²²⁸ The concept has been applied to an extremely broad range of issues, including virtually everything of value or importance to tribes or individual Indians. Because of its latitude and almost universal applicability, Indian trust doctrine remains one of the most powerful tools in Indian law.

Unfortunately, the amorphous roots of Indian trust doctrine have allowed it to develop in a scattered and often inconsistent manner.²²⁹ Despite its ambiguity, Woods argues that the government's trust duty must encompass three obligations:

- 1) A degree of protection sufficient to protect the tribes way of life.
- 2) An affirmative obligation to prevent environmental threats from developing into actual harms, and
- 3) An obligation to restore reservation environments that have been damaged due to the government's neglect.²³⁰

Five important questions must be asked regarding Indian trust doctrine and the management of any resource reserved to Indians and overseen by the federal government.

- 1) What is the specific trust resource?
- 2) For whom is it being managed?
- 3) By whom is it being managed?
- 4) What are the best interests of the beneficiary? and
- 5) To what standards can the trustee be held?

For the purpose of this analysis, the objects of the trust are the traditional fisheries of the Elwha River, the cultural values associated with it, and the habitat necessary to make these productive. These resources are to be managed for the benefit of the Lower Elwha

²²⁷ *California v. Watt*, 658 F.2d 1290 (9th Cir. 1981).

²²⁸ Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH LAW REVIEW 109, 113 (1995) [hereinafter Wood 1995].

²²⁹ *Id.*

S'Klallam tribe, and by the federal government, which is held to at least the ordinary standard imposed on a private fiduciary,²³¹ or the higher standard created by the decision in *Seminole Nation v. United States*.²³²

One of the difficulties in applying Indian trust doctrine is that the best interests of the beneficiary are often difficult to define. As noted in a review of Peter Matthiessen's book, *INDIAN COUNTRY*,

the real problem with the fiduciary obligation lies at a deeper level and suggests a more fundamental difficulty with all Indian law and policy: no one, not even the Indians themselves, seem to know where the best interests of the Indians as a whole do lie amid the restricted range of options presented by the dominant culture.²³³

As nebulous as the beneficiaries best interests may be, the obligations borne by the fiduciary remain clear. Despite the less stringent standards mentioned earlier, it is generally considered that the federal government, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."²³⁴ These standards presumably controls since they were handed down by the Supreme Court. Even though the standard is fairly clear, the government has often done a less than admirable job living up to its obligation as trustee. "[D]espite the federal government's long-standing obligation to protect Indian natural

²³⁰ *Id.* at 141-142.

²³¹ *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct.Cl. 1966).

²³² 316 U.S. 286, 296-97 (1942).

²³³ Book Note, 98 HARVARD LAW REVIEW 1104, 1105 (1985) (reviewing PETER MATTHIESSEN *INDIAN COUNTRY* (1979)).

²³⁴ *Supra.* note 232.

resources, they have been left unprotected, subject to, at best, benign neglect and, at worst, outright theft by unscrupulous companies.”²³⁵

There may come a time when different elements of the public interest are at odds with each other. Such was the case in *National Audubon Society v. Superior Court*,²³⁶ better known as *Mono Lake*. At issue was how to reconcile the City of Los Angeles’ need for water with the need to protect the unique and valuable Mono Lake ecosystem from the adverse effects of reservoir draw downs. The court adopted a balancing strategy, noting that legitimate and valuable public interests were being served by both the public trust doctrine and appropriative water rights system.

The reconciliation of competing trust obligations is particularly important where Indian trust resources come in conflict with the trust resources of other competing parties. How to reconcile the conflicting obligations was precisely the question that came before the Court in *Nevada v. United States*.²³⁷ The Court concluded that the rigid standards of Indian trust administration do not apply in full force when the government is forced to simultaneously advance competing interests.

The United States undoubtedly owes a strong fiduciary responsibility to its Indian wards. [cases omitted] It may be that where only a relationship between the government and the tribe is involved, the law respecting the obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United State. But where Congress has imposed [additional responsibilities] upon the United States, in addition to its duty to represent Indian tribes...the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.²³⁸

²³⁵ Special Committee on Investigations of the Senate Select Committee on Indian Affairs. Final Report and Legislative recommendations. S.Rep. No. 216, 101st Congress. 1st session, 137-138 (1989).

²³⁶ 658 P.2d 709 (S. Ct. of California 1983).

²³⁷ *Nevada v. United States*, 463 U.S. 110 (1982).

²³⁸ *Id.* at 142.

This reduces the government's obligation to protect Indian resources, but does not completely absolve the government of its responsibility. As Charles Wilkinson points out, "[t]o be sure...the court may conclude that obligations to other parties predominate, but the special duty to protect Indian resources does not vanish simply because other interests are involved."²³⁹

The analysis that follows combines discussion of Indian trust doctrine with statutory law. The breadth of analysis is important since, as the Supreme Court has noted, "[a]ny federal government action is subject to the United States' fiduciary responsibility towards the Indian tribes."²⁴⁰ This fiduciary duty may act to supplement inadequate standards and serve to fill gaps in the statutory law.²⁴¹ Furthermore, even though litigation most frequently involves property rights, the trust obligation is not limited to property.²⁴² Therefore statutes and Indian trust doctrine must be synthesized in order to accurately assess and interpret the duty owed to tribes and tribal members.

THE PHASE II DECISION

The preeminent document concerning Indian fishing rights is the treaty entered into by the tribe or tribes in question and the federal government. The six treaties negotiated by Washington Territorial Governor Isaac Stevens all contain the same fishing

²³⁹ WILKINSON, note 35 *supra* at 85.

²⁴⁰ *Nance v. EPA* 645 F.2d 701, 711 (9th Cir. 1981) *cert. denied* 454 U.S. 1081 (1981).

²⁴¹ Wood 1995, *supra* note 228 at 141.

²⁴² *Pyramid Lake Paiute Tribe v. United States Department of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990)

provision.²⁴³ “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory...”²⁴⁴

The meaning of these 27 words has spawned almost limitless litigation. On seven separate occasions the Supreme Court has taken up the scope and meaning of the fishing clause in the Stevens Treaties.²⁴⁵ How the courts have previously interpreted the meaning of this phrase, and how they continue to interpret it may affect not only the tribes of the Pacific Northwest, but all Americans.

The meaning of the rights guaranteed by the Stevens Treaties was most exhaustively dealt with in the proceedings of *United States v. Washington*. Early on in the proceedings, District Court Justice George Boldt bifurcated the proceedings into two phases. *Phase I* dealt with whether the treaties’ fishing clause entitled Indians to a specific allocation of the salmon and steelhead trout within the case area. Judge Boldt ruled that “the treaty language securing the Indians the right to take fish...in common with all citizens entitles them to up to 50 percent of the harvestable fish passing through the tribes’ usual and accustomed fishing grounds.”²⁴⁶

On appeal, the decision was affirmed by the 9th Circuit Court of Appeals, with only minor changes to the apportionment formula.²⁴⁷ The Supreme Court affirmed and adopted Judge Boldt’s construction of the treaties, and upheld, with slight modification,

²⁴³ The six treaties are listed *supra*, at note 24.

²⁴⁴ Treaty of Point No Point, *supra*, note 25.

²⁴⁵ *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1918); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

²⁴⁶ 384 F.Supp. 312; 343-244 (W.D. Wash. 1974).

²⁴⁷ 520 F.2d 676 (9th Cir. 1975).

the amended allocation formula.²⁴⁸ “[T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, that necessary to provide the Indians with a livelihood - that is to say, a moderate living.”²⁴⁹ What in fact constitutes a moderate living is unclear, regardless of how it is defined. The dismal economic conditions of most reservations are a strong testament to the fact that they have come nowhere near reaching a, “moderate living.”

Phase II decided whether the allocation determined in *Phase I* included hatchery-bred or artificially propagated fish; and whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation.²⁵⁰ The initial phase of the proceedings was presided over by Judge Orrick of the U.S. District Court for the Western District of Washington State. Judge Orrick replaced Judge Boldt who was forced into retirement due to deteriorating health.

In response to the issue of hatchery propagated fish, Judge Orrick found in favor of the United States, (acting on its own behalf and as trustee of tribes),²⁵¹ granting a motion for summary judgment:

²⁴⁸ *Passenger Vessel*, *supra* note 223.

²⁴⁹ *Id.* at 686.

²⁵⁰ *United States v. Washington (Phase II)*, 506 F.Supp. 187 (1980).

²⁵¹ The following tribes, or their predecessors in interest were parties to the treaties at interest and intervened in the litigation: Muckleshoot, Nisqually, Puyallup, Squaxin Island, Lummi, Nooksack, Sauk-Suitttle, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit, Lower Elwha Band of Clallam, Skokomish, Makah, Yakima, Hoh, Quileute, and Quinalts. These are the only tribes bound by the court's decision. The precedent may control future litigation, but the choice of an appropriate precedent is always subject to dispute and becomes increasingly unpredictable when the specifics of the dispute at hand differ from the case which may be cited as precedent. The tribes are represented in most legal proceedings pursuant to 25 U.S.C. § 175 (1997) which requires that “in all states and territories where there are reservations or allotted Indians, the United States Attorney shall represent them in all suits at law and in equity”. Representation is not required in all situations, see *Rincon Band of Mission Indians v. Escondido Mutual Water Company* 459 F.2d 1082 (9th Cir. 1972).

The inescapable conclusion is that if the hatchery fish were to be excluded from the allocation, the Indians' treaty secured rights to an adequate supply of fish - the right for which they traded millions of acres of valuable land and resources - would be placed in jeopardy. The tribes share would steadily dwindle and the paramount purpose of the treaties would be subverted.²⁵²

Judge Orrick reached a similar conclusion on the motion for summary judgment on the environmental issue:

The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. . . . Were this trend [of environmental degradation of habitat] to continue, the right to take fish would eventually be reduced to the right to dip ones net in the water...and bring it out empty....In this case, there can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. . . . It is equally beyond doubt that the existence of an environmentally- acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purpose of the fishing clause.²⁵³

The motion for summary judgment did not reach the issues of whether the State was in violation of the tribe's environmental right, and if so, what relief would be warranted. This issue was to be resolved in later proceedings.²⁵⁴

On appeal of the *Phase II* ruling, a three justice panel of the Ninth Circuit Court substantially affirmed Judge Orrick's. The Ninth Circuit later agreed to hear the case en banc, before a panel of eleven justices. The en banc panel affirmed the lower court's ruling on the hatchery issue, and vacated its holding on the environmental issue. The court found that Judge Orrick's declaratory judgment on the environmental issue did nothing to either clarify or settle legal relations between the parties, and in short, raised

²⁵² *U.S. v. Washington* 506 F.Supp. 187, 198-199 (W.D. Wash. 1980).

²⁵³ *Id.* at 203, 205.

²⁵⁴ *Id.* at 202 n. 57

more questions than it answered. The court could not rule on the merits of the case since it involved a speculative or hypothetical problem, “The legal standards that will govern the State’s precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.”²⁵⁵

This left the issue essentially unresolved and subject to case by case review. The court’s conclusions were further confused by the five minority opinions included in its decision.

On appeal to the Supreme Court, the petition for Certiorari was denied.²⁵⁶ The denial of the petition for cert., is not an affirmation of the Ninth Circuits en banc ruling and does not constitute a precedent since the Court never heard arguments. The Supreme Court bases its decision to hear a case on the importance of issues at hand and the consistency between Circuit Court rulings. The Court’s denial of a petition for cert. does however close the issue at hand and precludes further appeal.²⁵⁷

REACTIONS TO PHASE II

The Circuit Court’s dismissal of the environmental aspect of *Phase II*, and the Supreme Court’s affirmation of the lower Court’s decision has been highly criticized.

Law Professor Gary D. Meyers provides a scathing rebuff of the Courts’ findings.

What emerged from the tangled web woven by the en banc panel is, at best, confusion. The decision to vacate the environmental portion of the district court opinion was not based on substantive merit but rather on a

²⁵⁵ *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (1985).

²⁵⁶ *United States v. Washington (Phase II)*, cert. denied, 96 S.Ct. 877 (1985).

²⁵⁷ DANIEL BRONSTEIN DEMYSTIFYING THE LAW, AN INTRODUCTION FOR PROFESSIONALS 12-13 (1990)

finding that Judge Orrick exceeded his discretion in a declaratory judgment action.²⁵⁸

Professor Meyers went on to support the district court's ruling, arguing that the treaties must be construed liberally as to established an environmental servitude. Professor Meyers also argued that contrary to the Circuit Court's ruling, the declaration of an environmental right would resolve more confusion than it would create.

Judith W. Constans provided a similar rebuke to the Ninth Circuit's findings and provides an alternate explanation of the court's ruling. As Ms. Constans notes,

The unstated policy reason for the appellate court's decision may be that the court would rather not extend its judicial involvement in fisheries management to administration of habitat management as well. The Boldt decision [*Phase II*] met with extensive state resistance, which forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. In light of that experience, the court might develop a natural reluctance toward further involvement in administratively difficult treaty interpretations.²⁵⁹

Such considerations may have affected the court's decision, but they in no way absolve the court of its duty to resolve judicable controversies appearing before it. Measures to address the environmental servitude created by the district court's *Phase II* ruling are contained in existing legislation such as the National Environmental Policy Act of 1969,²⁶⁰ and can be implemented without necessitating a significant increase in involvement on the part of the federal judiciary.

To say that the question of environmental degradation is merely hypothetical ignores the vast body of scholarly evidence to the contrary. The arguments made as part

²⁵⁸ Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OREGON LAW REVIEW 771-797, 781 (1988).

²⁵⁹ Judith W. Constans, *The Environmental Right to Habitat Protection: A Sohappy Solution - United States v. Washington*, 759 F.2d 1353 (9th Cir.), cert denied, 106 S.Ct. 407 (1985), 61 WASHINGTON LAW REVIEW 731-760, 738 (1986).

of the *Phase II* litigation are not specific to a particular occurrence of environmental degradation, but speak to a systemic problem in fisheries management. Even though this problem is quite pervasive, it is hardly any broader than the questions of allocation which the Supreme Court chose to review. Furthermore, the hatchery issue that the Court chose to address is an interpretive question no more speculative than the environmental question they brushed aside.

TREATY INTERPRETATION

The en banc *Phase II* decision not only confuses an already murky area of law, it flies in the face of the substantial volume of case law related to the fishing provision of the Stevens Treaties. As far back as its 1899 decision in *Jones v. Meehan*,²⁶¹ the Supreme Court ruled that treaties must be construed, “not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”²⁶²

During the meeting of the Treaty Council of Point No Point, Governor Stevens made his interpretation of the fishing clause clear.

Are you not my children and also the children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper [the treaty] is such as a man would give to his children, and I will tell you...this paper secures your fish. Does not a father give food to his children?²⁶³

²⁶⁰ Pub. L. 91-190, § 2, 83 Stat. 852 (1970)(current version at 42 U.S.C.A. § 4321 (1997)).

²⁶¹ 175 U.S. 1 (1899).

²⁶² 175 U.S. 1, 11 (1899); more recently see, *Passenger Vessel*, *supra* note 223 (treaty interpretation), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (statutes), *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (Indian tax immunity), *McClannahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973) (treaties and statutes), *Arizona v. California*, 373 U.S. 546, 600 (1963) (executive orders),

²⁶³ BROWN, *supra* note 14 at 131; a similar promise was made to the Yakimas, see *Fishing Vessel*, *supra* note 223 at 667.

The signatory tribes never would have agreed to a treaty which guaranteed them half of the available fish while simultaneously giving someone else the right to totally destroy the same runs. In its analysis, the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Passenger Vessel)* concluded that, “In sum, it is fair to conclude that when treaties were negotiated neither party realized or intended that the agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.”²⁶⁴

A second significant outcome of *Passenger Vessel* was the Court’s conclusion that, “the purpose and language of the treaties are unambiguous; they secure the Indian’s right to take a share of each run of fish that passes through tribal areas” rather than, “merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.”²⁶⁵

Passenger Vessel may be more significant in that it analogizes the tribes’ common fishing rights to a cotenancy.

The logic of a 50% ceiling is manifest. For an equal division – especially between parties who presumptively have treated with each other as equals – is suggested, if not necessarily dictated, by the word “common” as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement of the surrounding circumstances.²⁶⁶

²⁶⁴ *Passenger Vessel*, *supra* note 245 at 669.

²⁶⁵ *Id.* at 679.

²⁶⁶ *Id.* at 686 n.27 (citations omitted).

Such an interpretation is consistent with the Supreme Court's ruling in *Puyallup Tribe v. Department of Game of Washington (Puyallup I)*²⁶⁷ whereby the State of Washington's right to regulate Indian fishing for the purpose of conservation was upheld. The converse of the Court's ruling being that as cotenents, the state must, for purposes of conservation, regulate non-Indian fishing.

In short, the purpose of the fishing provision was to guarantee Indians the right to continue fishing. The intent of the treaty clause is clear, to provide the Indians with the resources necessary to satisfy subsistence and ceremonial needs. To deny the right to habitat protection is to undermine the purpose and intent of the treaties allowing non-Indians to reap the benefits of the cotenency implied in *Puyallup I* while releasing them of any duty to protect the body of the trust.

The obligation to protect habitat is consistent with the purpose and intent of the fishing provision of the Stevens Treaties. And the intent of the treaties, as interpreted by the Indians, is the most basic cannon of judicial interpretation.

HABITAT PROTECTION UNDER ESA

The assertion that Tribes have an implied right to habitat protection is consistent with recent interpretations of the Endangered Species Act.²⁶⁸ Not only does the Act protect listed species, but it protects the habitat upon which they depend. Federal Agencies are commanded to, "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species

²⁶⁷ 391 U.S. 392 (1968).

²⁶⁸ 16 U.S.C.A. § 1531 (1997).

or threatened species or result in the destruction or adverse modification of habitat of such species.”²⁶⁹

The Endangered Species Act (ESA) specifically prohibits “taking.” “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”²⁷⁰ The Department of Interior’s regulations implementing ESA define the statutory term “harm” as follows: “[h]arm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²⁷¹

The validity of the department’s definition was upheld by the 9th Circuit Court²⁷² in *Palila v. Hawaii Department of Land and Natural Resources (Palila I)*,²⁷³ and (*Palila II*).²⁷⁴ In *Palila I* and *II*, the court found habitat protection necessary for survival of the endangered Palila (*loxioides bailleus*), and that habitat protection was not only implied in, but required by the purpose and intent of the Act.

The assertion that species protection is intimately tied to habitat protection was further bolstered by the decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²⁷⁵ *Sweet Home* affirmed the Secretary’s definition of “harm” within the

²⁶⁹ *Id.* at § 1536(a)(2).

²⁷⁰ *Id.* at §1532(19).

²⁷¹ 50 C.F.R. § 17.3.

²⁷² The Ninth Circuit Court of Appeals deals with all district court cases originating out of the state of Washington, therefore their decisions are a binding precedent for litigation over the Elwha dilemma originating in federal court.

²⁷³ 639 F.2d 495 (9th Cir. 1981).

²⁷⁴ 852 F.2d 1106 (9th Cir. 1988).

²⁷⁵ 115 S.Ct. 2407 (1995).

meaning of “take” - “significant habitat modification or degradation that actually kills or injures wildlife” as reasonable.

ESA cannot be brought to bear directly on the Elwha dilemma because none of the salmon species involved are protected by the act. ESA, and the cases which affirm it do however provide support for the assertion that species cannot be protected independent of their required habitat.

Indirectly, ESA may be applicable since the dams are largely responsible for the decline in salmon stocks. Several of the other species within the project area are protected under ESA and rely on salmon, or salmon carcasses for food. By allowing a project to reduce, by over ninety-nine percent, and to continue reducing, a listed species primary source of food, the federal government and the dam owners may have violated ESA’s regulatory prohibition against harming protected species. The Department of Interior’s regulations clearly forbid disruption of a protected species, “essential behavioral patterns, *including...feeding.*”²⁷⁶ This argument has not been ruled upon by a court of law, so there is no case law to site as precedent. However, the federal judiciary has upheld the Department of Interior’s regulations implementing the act and would appear bound to uphold the provision here, provided that the provision can be factually supported to the court’s satisfaction.

²⁷⁶ 50 C.F.R. § 17.3 (1996).

RESERVED RIGHTS DOCTRINE AND MINIMUM INSTREAM FLOWS

Equally germane to the environmental question is the reserved rights doctrine that emerged out of the litigation in *Winters v. United States*.²⁷⁷ The issue litigated in *Winters* was whether an Indian reservation, created by an act of Congress, included rights to the water flowing across the reservation even if these rights were not specifically included in the treaty between the tribe and the federal government.

The court found that the Indian reservation in question was created with the express intent of helping the plains Indians adopt a sedentary, agricultural lifestyle, and that a water right was implied in the creation of the reservation. The reservation was in an arid region and agriculture would not have been feasible without extensive irrigation. Without a stable and secure water source the reservation would be useless and could not be expected to fulfill its stated purpose. “By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should be applied to determine between inferences, one which would support the purpose of the agreement and the other impair or defeat it.”²⁷⁸ Based on its conclusion, the Court restrained the appellant from either constructing or maintaining dams which would prevent water from flowing to the reservation. Equally significant, the tribe secured its water rights in perpetuity and could not lose unutilized rights. This later finding is an important departure from the, “use it or lose it” rule which dominates western water rights.

²⁷⁷ 207 U.S. 564 (1907). The reserved rights doctrine actually emerged two years earlier, in 1905, with *Winans*, *supra* note 245, but is most commonly associated with water rights and *Winters*.

²⁷⁸ *Winters*, *supra* note 163.

The 1963 decision in *Arizona v. California*²⁷⁹ resolved two important questions left unanswered in *Winters*. The court found that, in terms of the amount of water reserved, it is enough to irrigate all practicably irrigable acreage on the reservation, and that it should be a sufficient amount to satisfy the future as well as the present needs of the tribe. When applied to fisheries purposes, the amount of water has been measured by spawning, rearing, and migration needs.²⁸⁰ In terms of the reservation date used in calculating withdrawal priorities, the date the Indian reservation was created shall be applied.²⁸¹ *United States v. Adair*²⁸² strengthened this right by ruling that when tribes exercised aboriginal title to fish on the lands and waters in question, prior to creation of the reservation, the priority date of the water reservation for fishery purposes was time immemorial.²⁸³

The Wyoming Supreme Court, in its 1988 ruling in *Shoshone Tribe v. Wyoming*²⁸⁴ affirmed the implicit intent of the treaty in question to reserve water rights to the tribe. It extended the concept of reserved rights to fisheries when there is a fisheries provision within the treaty or the tribe is heavily if not totally dependent on fishing. However, being partially dependent on fishing is not enough to reserve a water right for fisheries.

²⁷⁹ 373 U.S. 546 (1963); *affirmed* 460 U.S. 605 (1983).

²⁸⁰ *Colville Confederated Tribes v. Walton* 647 F.2d 42 (9th Cir. 1981); *cert. denied* 102 S.Ct. 657 (1981).

²⁸¹ The doctrine of prior appropriations is most prominent in the arid west and states, in essence, the user with the earliest appropriations date has the first right to the extraction and use of water. Appropriations dates are usually granted as a result of development and utilization of water resources. The owner may use as much or as little water as they wish, and later rights will only be filled after all senior rights owners have been satisfied.

²⁸² 723 F.2d 1394 (9th Cir. 1984).

²⁸³ See also *Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987) *cert. denied* 486 U.S. 1007 (1988); and *United States v. Anderson* 736 F.2d 1358 (9th Cir. 1984).

²⁸⁴ 753 P.2d 76 (Wyoming Supreme Court 1988).

Appeal of the courts decision was closed when the Supreme Court denied a petition for certiorari.²⁸⁵

The *Shoshone* decision is consistent with the 1978 decision in *United States v. New Mexico*²⁸⁶ which addressed water reserved for a National Forest. The court concluded that the extent of the right reserved is determined by the importance of the purpose for which it is reserved.

Where water is necessary to fulfill the very purpose for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the U.S. intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation...the U.S. would acquire water in the same manner as any other public or private appropriator.²⁸⁷

The *New Mexico* test, as it became known was applied in *Colville v. Walton*²⁸⁸ in 1981. *Colville* dealt with a hydrologic system contained completely within reservation boundaries, and water rights on a new lake and river system replacing fishing grounds that had been lost to hydroelectric development on the Columbia River. The court ruled that when the purpose of the reservation is unclear, its meaning must be construed liberally, and that an implied reservation of water exists for the maintenance and development of replacement fishing grounds. However, if the tribe uses its water right to develop replacement fisheries, it loses its right to historic grounds and stations. It is possible that the court feared an attempt by the tribe, to secure remediation of historic grounds which had been inundated by dams on the Columbia River.

²⁸⁵ 488 U.S. 1040 (1989).

²⁸⁶ 438 U.S. 696 (1978).

²⁸⁷ *Id.* at 702.

²⁸⁸ *Colville Confederated Tribes v. Walton (Walton I)* 647 F.2d 42 (9th Cir. 1981), cert. denied 102 S.Ct. 657 (1981).

A significant aspect of *Colville* was the Court's reaffirmation of *Winters*, ruling that the reservation's water right could not be lost based on the tribe's failure to fully utilize its apportionment. This is a significant departure from the traditional interpretation that, under a system of prior appropriation, the right holder must either, "use it or lose it". A right not developed or used over a set period of time would be lost.

In 1985 the Ninth Circuit Court of Appeals made another important ruling in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*.²⁸⁹ *Kittitas* found that reservoir releases to protect downstream redds were appropriate in light of the treaty rights owed to the Yakima Nation.²⁹⁰ Much of the Court's discussion dealt with concerns over whose rights were superior with the Court eventually concluding in favor of the Yakima Nation.

The Ninth Circuit reached an identical conclusion in its 1987 opinion on *Joint Board of Control v. United States*.²⁹¹ The case involved the Bureau of Indian Affairs' reservoir operating strategy which maintained minimum flows for the protection of Indian fishing rights at the expense of withdrawals for irrigation. The court found that, "[o]nly after fishery waters are protected does the BIA, acting as officer-in-charge of the irrigation project, have a duty to distribute fairly and equally the *remaining* waters among irrigators of equal priority."²⁹²

In spite of the extensive litigation on the quantitative aspects of tribal water rights, very little litigation has occurred addressing qualitative aspects of instream flows. *United*

²⁸⁹ 763 F.2d 1032 (9th Cir. 1985).

²⁹⁰ The Yakima Nation signed a treaty in 1855 containing the same fishing provision as the Treaty of Point No Point (*supra*. note 25).

²⁹¹ *Supra*. note 283.

²⁹² *Id.* at 1132.

*States v. Anderson*²⁹³ marked an important exception holding that the quantity and quality of water reserved are intimately connected. “The quantity of water needed to carry out the reserved fishery purposes is related to water temperature rather than to simply minimum flow.”²⁹⁴

ACCESS TO USUAL AND ACCUSTOMED GROUNDS AND STATIONS

In 1977 the United States District Court in Oregon handed down a ruling in a case with strong parallels to the Elwha dilemma. In *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*²⁹⁵ the tribes sought to enjoin the construction of a dam, contending that it would infringe upon their treaty guaranteed fishing rights. The Court found that the reservoirs created by the proposed dam would inundate the tribe’s usual and accustomed grounds and stations upstream from the dam thus destroying steelhead runs above the dam. Chinook salmon would also be impacted, and their protection would require implementation of extensive measures to mitigate the adverse impacts of the dam. The effectiveness of mitigation became a mute point since the loss of the treaty right to fish at all usual and accustomed grounds and stations would be destroyed.

The court cited to *Menominee Tribe v. United States*,²⁹⁶ noting that the only way to legally nullify a treaty right is through Congressional action. “Since the dam would take treaty rights without proper authorization, plaintiffs are entitled to relief.”²⁹⁷ Judge

²⁹³ 591 F.Supp. 1 (W.D. Wash. 1982).

²⁹⁴ *Id.* at 5.

²⁹⁵ 440 F.Supp. 553 (D. Oregon 1977). Since the matter was addressed in a different District Court, it is not a binding precedent for the District Court for the Western District of Washington, the court of original jurisdiction for matters involving the Elwha. However, the Oregon court’s opinion provides a strong persuasive argument.

²⁹⁶ 391 U.S. 404 (1968).

²⁹⁷ *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, *supra* note 277 at 556.

Beloni went on to issue a declaratory judgment, noting that dam construction was distant enough that an injunction was unnecessary. However, the Judge's declaratory judgment stated that, "[i]t is expected that without injunction, the Corps of Engineers will seek proper authority for their project."²⁹⁸

The preeminent case discussing tribal access to fishing stations is the Supreme Court's 1904 decision in *United States v. Winans*.²⁹⁹ The respondents had constructed a fish wheel³⁰⁰ on the Columbia River, outside the reservation and had received an operating license from the State of Washington. The Yakima Nation brought suit, complaining that the Winans' denial of their right to access the river was a violation of their treaty rights. The Court found that the respondents could not absolutely exclude the Indians from the fishery.

More relevant to the issues raised in the Elwha dilemma, the court commented that:

[I]t needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the land held in common. In the actual taking of fish...it does not follow that [non-Indians] may construct and use a device which gives them exclusive possession of the fishing places.³⁰¹

A dam appears to be little different from a fish wheel in that both severely restrict, if not abrogate entirely, a tribes right to access fishing stations. They have an additional similarity in the destruction they reap upon salmon stocks, effectively denying tribes the ability to take salmon by annihilating the stocks themselves

²⁹⁸ *Id.*

²⁹⁹ *Supra*, note 245.

³⁰⁰ A fish wheel is a device for catching fish which can destroy huge portions of runs, catching salmon by the ton.

³⁰¹ *Winans*, *supra* note 245 at 382.

*Muckleshoot Indian Tribe v. Hall*³⁰² adds additional weight to the access argument. The *Muckleshoot* court found that injunctive relief was in order to protect the tribe's usual and accustomed fishing grounds from the construction of a 1200 slip marina.

It is also worth noting that an 1859 appraisal of S'Klallam lands concluded that, "[n]o separate valuation has been placed on the fishing or shell-fish. Any value considered would be to what extent the adjoining uplands provide access for this food from the water and adjoining tidelands."³⁰³ It follows that to deny access drastically reduces the market value of the land. The value of the land is inextricably tied to the availability of the local fishery, therefore, to deny the tribe a viable salmon population makes the land essentially valueless. The cultural and religious values are likewise reduced, the cost of which is even more difficult to measure – if it can be calculated at all.

SHELLFISH

As mentioned *infra*, the tribes of the Pacific Northwest did not subsist entirely on salmon, but relied on many additional sources of food. Significant among these was, and remains to be, shellfish. Like salmon, shellfish have been adversely impacted by construction of the Elwha and Glines Canyon dams. Dam construction prevented the natural maintenance of the delta and tidelands; this reduction in sand material has resulted in a sharp reduction in shellfish as their necessary habitat is lost to increasingly rocky substrate.³⁰⁴

³⁰² 698 F.Supp. 1504 (W.D. Wash. 1988).

³⁰³ Owen and Lietz, *Appraisal of S'Klallam Indian Lands* 1859, K-1 (1969).

³⁰⁴ IMPLEMENTATION DRAFT *supra* note 18 at 247-248,286; IMPLEMENTATION FINAL *supra* note 6 at 50,148.

Shellfish do not appear to be as significant to the tribes of the Pacific Northwest as salmon, either culturally or economically. However, they are significant in both regards and their loss in addition to the loss of salmon bolsters the tribe's case for river restoration. As a co-litigant in *United States v. Washington (Shellfish)*³⁰⁵ the Lower Elwha S'Klallam secured the absolute right to fifty percent of shellfish from natural beds within the tribe's usual and accustomed grounds and stations.³⁰⁶ Tribes may be able to argue that the dams continued existence effectively precludes their right to harvest shellfish in much the same manner as it precludes their right to catch salmon.

More significantly, *Shellfish* may limit the scope of damages available to the tribe even if they are able to successfully assert that a violation of their treaty rights has occurred. In crafting his opinion, Justice Rafeedie observed that regional development by non-Indians had occurred for over 100 years prior to the tribes assertion of a right to harvest shellfish. The non-Indians who purchased beach front property clearly thought they were acquiring unencumbered title. In such an instance it becomes incumbent upon the court to equitably balance the interests of the tribes against the interests of private property owners and commercial shellfish growers peaceful enjoyment and/or commercially developing their property.³⁰⁷

³⁰⁵ 873 F.Supp. 1422 (W.D. Wash. 1994), 898 F.Supp. 1453 (W.D. Wash. 1995), affirmed 86 F.3d 1499 (9th Cir. 1996).

³⁰⁶ 898 F.Supp. 1453, 1457 (W.D. Wash. 1995).

³⁰⁷ See also *Yankton Sioux Tribe of Indians v. United States* 272 U.S. 351 (1926) (whereby the Supreme Court approved monetary damages in lieu of restoration of a 648 acre tract of land), *South Carolina v. Catawba Indian Tribe, Inc.* (1986) 476 U.S. 498 (Justice Blackman, in dissent acknowledged that equitable consideration might have limited the remedies available had the tribe prevailed on its claim to 144,000 acres), and *United States v. Imperial Irrigation District* (S.D. Calif. 1992) 799 F.Supp. 1052 (monetary damages awarded over restoration of tribal lands).

Justice Rafeedie went on to note that since the tribes have historically fished for ceremonial and religious reasons as well as economic need, their rights cannot be absolutely vindicated with money damages.

Moreover, the Tribes argued persuasively that intangible benefits will inure to their members from exercising their right to fish, such as the cultural value of participating in a traditional activity and the self-esteem of being gainfully employed. These benefits would be lost were the Court to substitute monetary relief for the right to fish.³⁰⁸

Since the court did not deal with damages in its decision it is unclear how the valuation or balancing questions would be dealt with.

³⁰⁸ 898 F.Supp. 1453, 1458-59 (W.D. Wash. 1995).

CHAPTER FIVE

APPLICATION OF INDIAN POLICY AND LAW

THE ELWHA ACT

The Elwha River Ecosystem and Fisheries Restoration Act has gone a long way towards resolving the conflict over river restoration. The Act mandates full restoration of the Elwha River ecosystem, clearly indicating that dam removal is a restoration method worthy of consideration. The Elwha Act's stated commitment to river restoration may initially appear to make much of the analysis undertaken as part of this research project unnecessary or even irrelevant. However, the reader must remember that the Elwha Act operates independent of any obligations owed to the tribe and does not resolve important questions regarding treaty rights to protected salmon habitat.³⁰⁹ To rely solely on the Elwha Act does little to resolve, or even significantly clarify the federal government's duty to tribes.

There are several compelling reasons why the Act should not be interpreted to preclude issues of Indian rights, and why in fact the question of a treaty-secured environmental right is so important. The Act attempted to resolve a conflict which continues to exact a heavy toll from the residents of the region independent of questions regarding the legal obligations owed to the Lower Elwha Tribal Community.³¹⁰ The primary intention of the Act is not to aid the tribe, but to protect, and indeed restore the

³⁰⁹ See The Elwha Act, *supra* note 23 at § (8)(b) "Nothing in this Act shall affect the rights of any Indian Tribe secured by Treaty or other law of the United States.

³¹⁰ See The Elwha Act, *supra* note 23 at § (3)(b) "The United States may not assume or satisfy any liability, if any,...to any federally recognized Indian Tribe nor shall such liability to the Tribe, if any, be determined satisfied without the consent of such Tribe".

once plentiful salmon runs of the Elwha River. Tribal benefits are recognized as important, but are secondary to and the result of habitat and fisheries restoration.

The Act recognizes that Indians have been adversely affected by the loss of salmon but fails to recognize the unique and challenging nature of the relationship between the federal government and the affected tribes. Without recognizing the tribe's unique standing in law, the Act is unable to clarify what rights the tribes possess, or how these are to be protected. The most critical of these is the right to harvest salmon, and the continued existence of the habitat which is required for salmon reproduction. Access to sufficient high quality spawning and rearing habitat is the most fundamental biological requirement for salmon survival, and therefore the condition which provides the foundation for the treaty fishing provision. These issues are simply not addressed in the Elwha Act.

This is not a passing issue. The tribe has been pushing for restoration of the Elwha River for years. The parties interested in river restoration, including the tribe, have been researching possible alternatives, and calling for river restoration for over a quarter of a century, yet definitive action has not been taken. Being able to establish that an environmental right exists, and that the federal government has breached its fiduciary responsibility as manager of the tribe's trust resources may provide another tactic to encourage speedy implementation of river restoration.

One of the reasons for passage of the Elwha Act cited by its sponsor, Representative Swift (D-WA) was that the Elwha Act could potentially prevent costly and time consuming litigation. Of particular concern to Congressman Swift was the risk of a suit by the Lower Elwha S'Klallam tribe. "We already have lawsuits by the

environmentalists with regard to the Endangered Species Act, we have lawsuits filed by the Parks Department [sic] against FERC, we have a possible lawsuit by the Elwha Indians...[t]his is a way in which all of the relevant problems could be resolved.”³¹¹

It is equally important that the reader remember that discussion of tribal environmental rights cannot be addressed in the absence of a pressing, justiciable controversy. The Ninth Circuit clearly noted that “the State’s obligation will depend for its precise legal formulation on all the facts presented by a particular dispute.”³¹² The court could not rule on the existence of an environmental right based on the litigation in *Phase II* because the question was not “ripe” for adjudication.³¹³ Removing the issues of habitat protection from the realm of the hypothetical and applying the law to a particular case is therefore necessary to clarify the larger issues implicated in this analysis.

Despite the federal court’s hesitance to deal with the assertion of a general right to quality habitat, they have been willing to reach it when tied to a specific controversy. This is most clearly evidenced in the Endangered Species Act’s (ESA) protection of critical habitat.³¹⁴ When ESA has not been implicated the courts have continued to protect the right to habitat protection in specific instances where reductions of instream flows, or development may endanger either the reproductive potential of salmon or the tribe’s ability to access the resource.³¹⁵

³¹¹ 138 CONG. REC. H11858 (daily ed. October 5, 1992) (statements of Rep. Swift).

³¹² *PHASE II*, *supra* note 233 at 1357.

³¹³ The ripeness doctrine is “the principle that the federal courts require an actual, present controversy, and therefore will not act when the issue is only hypothetical or the existence of a controversy merely speculative” (Black’s Law Dictionary 923 (abridged 6th Ed. 1991, 923)).

³¹⁴ See *Babbitt v. Sweet Home*, *supra* note 275, *Palila I*, *supra* note 273, and *Palila II*, *supra* note 274.

³¹⁵ See *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, *supra* note 270; *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp 1504 (W.D. Wash. 1988); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985); and *Joint Board of Control*, *supra* note 260.

As mentioned earlier, and strongly supported by the writings of Professor Woods,³¹⁶ Indian trust doctrine and statutory law are complementary, not mutually exclusive. The issues presented by the Elwha dilemma directly reflect the need to consider Indian trust doctrine when interpreting the Elwha Act. The Act alone captures neither the complexity of the situation nor the true extent of the government's obligations.

WASHINGTON STATE'S SALMON ENHANCEMENT PROGRAM

The intent of this research project has been to clarify the rights reserved by the Treaty of Point No Point, and if the tribe is entitled to protection or restoration of salmon habitat. This manuscript is not meant to be an exhaustive review of statutory law, and relies on statutory law only to the extent that that it clarifies trust doctrine.

Washington State's Salmon Enhancement Program³¹⁷ is such a law. It specifically addressed impediments to fish passage and habitat restoration. The code is vague as to the extent of the obligation it vests with the state and fails to fund implementation, despite its limitations, the code deserves recognition.

The department's habitat division shall work with cities, counties, and regional fish enhancement groups to identify and expedite the removal of human-made or caused impediments to anadromous fish passage. A priority shall be given to projects that immediately increase access to available and improved spawning and rearing habitat for depressed, threatened, and endangered stocks.³¹⁸

Standing alone, the statute probably lacks the power to force dam removal. When considered together with the Elwha Act, trust doctrine, and the plethora of agency

³¹⁶ See Wood *supra* notes 187 & 228.

³¹⁷ ARCW 75.50.160 (1996).

policies dealing with salmon habitat,³¹⁹ the statute expands the depth and breadth of the legal argument for dam removal and habitat restoration.

RECENT LEGISLATIVE DEVELOPMENTS

Several significant legislative developments have occurred since initiation of this research project. The most significant of these was an amendment made to the Elwha Act as part of the 1997 omnibus spending bill.³²⁰ The amendment was introduced directly to the floor by Senator Slade Gorton in the closing days of the Congressional session. No testimony was given and no discussion heard. The amendment gave the State of Washington the opportunity to purchase both dams from the federal government once title had transferred from James River to the federal government. The state could purchase the two projects for one dollar each, if it entered into a, “binding agreement to remove the projects within a reasonable amount of time.”

According to the amendment, the state would be required to provide for the full restoration of the Elwha River ecosystem and meet most the other obligations presently born by the Secretary of Interior. However, the precise meaning of, “binding agreement”, “reasonable amount of time”, and “full restoration” are left undefined. It also appears that the state would not be required to comply with the findings documented in all, or even any of the existing Environmental Impact Statements. The state appears to have the discretion to initiate an entirely new assessment process. It is left unstated if the federal government would make funds available to aid with decommissioning and

³¹⁸ *Id.*

³¹⁹ See, for example, Department of Interior, Protection of Indian Trust Resources, 512 Departmental Manual 2 (1995).

removal of the dams. Lacking a clear statement of financial support on the part of the federal government, the state would apparently need to come up with the entire sum on its own.

Given the ambiguity of the amendment, the financial costs associated with taking over ecosystem restoration, and the potential for costly litigation, it becomes difficult to imagine why the state would wish to acquire title to the dams. To purchase the dams would burden the state with a multi-million dollar liability. One is left to wonder why a senior and very experienced legislator would propose such an ambiguous and apparently self-defeating amendment. One interpretation is that Senator Gorton is in effect telling the state to put its money where its mouth is. This would of course put the Senator in the awkward position of opposing the wishes of the apparent majority of his own constituency.

A second interpretation is that the intent of the amendment is to further confuse the situation and forestall Congressional action – but this is obviously a highly speculative interpretation. Given the Senator's history of antagonistic relations with the tribes of the Pacific Northwest, this does not seem entirely unreasonable. The author contacted Senator Gorton's office by phone, letter, and electronic mail, but as of publication no explanation for the amendment, or explanation of the Senator's position has been received.

To the tribe, the most disturbing section of the amendment is contained in its last sentence which repeals a number of sections of the original act, *if* the state of Washington acquires title to the dams. Most of the provisions repealed are requirements placed upon

³²⁰ Pub. L. 104-208, 110 Stat. 3009 (1996)

the Secretary of Interior to assess alternatives and have either already been completed, or would become the state's obligation if they chose to purchase the projects. However, section seven deals with appropriations for tribal land acquisition and development. If the state were to acquire title, the provision of up to \$4 million for expansion and economic development on the reservation would be repealed. As significant as this potential loss appears to be, it pales in comparison to the tribes' professed concern over salmon restoration and is therefore considered beyond the scope of this analysis.

It is important to note that neither the Elwha Act, nor any other law completely overshadows the Treaty of Point No Point. Treaties are equivalent in law to the Constitution, and as such are considered the supreme law of the land. More recent statutes may supersede parts of the treaty, but they do not absolve parties of the duties created by the treaty. The Elwha Act for instance, while resolving the need for habitat restoration does not relieve FERC, the Park Service, the Fish and Wildlife Service, or anyone else of their fiduciary obligation to protect Indian fishing rights. Unless the terms of the treaty are legislated away by an act of Congress, they remain in force, no matter how neglected they may become.

The other significant legislative development was the recent introduction, into the Washington State Senate, of Senate Bill S5136. The Bill would provide \$3.5 million in state funds for the construction of fish ladders and an additional \$500,000 for the planting of fish between the dams and to facilitate their downstream migration. The bill appears to be dead in committee; until the end of the current legislative session the possibility of resurrection cannot be dismissed.

The bill was soundly criticized by Dr. Brian Winter, the Elwha Project Coordinator for NPS. In an article printed in *THE COLUMBIAN*, Dr. Winter attacked the plan, noting that it would not help chum salmon, the most threatened run and would result in a net loss of chinook. Furthermore, it would aid hatchery fish rather than wild stocks of coho and steelhead.³²¹ An unspoken concern was that an interim fix may reduce the immediacy of the issues at hand, or be misinterpreted by legislators on the opposite coast as a resolution of the problem. Either interpretation could seriously endanger the efforts to see the dams removed.

INSTREAM FLOWS AND INDIAN TRUST DOCTRINE

The vast majority of previous litigation concerning the extent to which the federal government is required to protect salmon spawning habitat has centered around maintenance of instream flows. The argument that tribes maintain “aboriginal title”, or at least a very early appropriation date, and that their water rights are both unrevocable and justly utilized to protect migration or spawning habitat has been repeatedly upheld.³²² Unfortunately, such issues, while insightful and persuasive, are not central to the conflict at hand. Elwha River salmon stocks do not suffer from irrigation draw downs, but rather blocked access to critical habitat.

An instream flow argument is possible; ironically it is not a lack of water but the inhibition of the river’s natural fluvial processes that becomes the issue. A reduction in the river’s ability to transport particulate organic matter and the gravel necessary to

³²¹ *THE COLUMBIAN*, January 23, 1997.

³²² The permissible uses may include maintaining fisheries, and any other use consistent with the reservation’s purpose. See *United States v. Adair* 723 F.2d 1394 (9th Cir. 1984).

maintain spawning beds adversely affect salmon stocks. If the tribe chose to make an argument based on the qualitative elements of instream flows it would be entering virtually uncharted territory. The bigger problem with such an assertion is that it does not address the blockage of access to spawning habitat that is largely responsible for species decline. Despite this major limitation, an assertion of the need to protect instream flows may prove valuable in showing that fish ladders, trap and haul, or other attempts to facilitate migration are insufficient to secure treaty protected fisheries resources.

ACCESS AND TRUST DOCTRINE

In addition to protecting instream flows, the federal courts have repeatedly affirmed the tribe's right to access their usual and accustomed fishing grounds and stations.³²³ The access issue can be brought to bear on the Elwha dilemma by noting that the creation of the two reservoirs inundated historic fishing grounds and stations. Access to these sites can only be restored by returning the river to its original condition, and this of course requires dam removal. Again, the argument centers on the tribe's ability to take fish and not on the existence of salmon to take. The critical issue is not the tribe's access, but the salmon's access to sufficient, high quality habitat.

The issue of access to spawning habitat may prove difficult to address on larger river systems such as the Columbia or Snake, where multiple and significant factors have lead to species decline. The inhibited ability of Columbia or Snake River salmon to

³²³ See *Winans*, *supra* note 245 (construction of a fish wheel restricting access to off reservation fishing grounds was a violation of treaty rights), *United States v. Washington (Shellfish)* 898 F.Supp 1453 (1995) (right to gather shellfish existing on private property), *Muckleshoot Indian Tribe v. Hall* 698 F.Supp 1504 (1988) (enjoining construction of a marina which would have eliminated a portion of one of the tribes usual and accustomed fishing areas), and *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*,

migrate upstream cannot be addressed apart from the impacts of terrestrial or riparian activities. The fact that terrestrial and riparian issues do not significantly affect the Elwha dilemma significantly narrows the scope of issue to be addressed. This in turn allows for the establishment of a clear precedent on the issue of access to critical habitat that can then be brought to bear on more complex river systems. The Elwha conflict can be seen as part of a larger set of issues; what obligations are due, and how must the government act to meet its obligation with respect to the management of Indian trust resources. The Elwha provides the vacuum necessary to control for the intervening factors which are present on other, larger river systems. This vacuum allows critical spawning habitat to be addressed independent of other controversies.

STATUTORY HURDLES TO APPLICATION OF TRUST DOCTRINE

The government's decision to allow the continued destruction of tribal resources amounts to an abrogation of the federal government's role as trustee of tribal resources and therefore constitutes a breach of the government's fiduciary responsibility.³²⁴ An explicit hurdle in its quest for restoration is the Elwha Act's provision barring suit under the Tucker Act.³²⁵

supra note 270 (declaratory judgement issued requiring Congressional approval for construction of a dam that would destroy the tribes usual and accustomed fishing stations).

³²⁴ See *United States v. Kagama* 118 U.S. 375 (duty to protect Indian trust resources), *Pyramid Lake*, *supra* note 218 (trust duty is not limited to management of tribal property, but instead extends to any federal governmental action), *Northern Cheyenne Tribe v. Hodel* 12 I.L.R. 3071 ("a federal agencies trust obligation to a tribe extends to action taken off a reservation that uniquely impacts tribal members or property on a reservation"), and *United States v. Mitchell (Mitchell II)* 463 U.S. 206 (fiduciary relationship arises whenever the executive branch contains extensive control over Indian property; fiduciary responsibility arises out of circumstances rather than intent).

³²⁵ See The Elwha Act, *supra* note 23 at § (4)(c) "Nothing in this section shall be construed as an entitlement for which a claim against the United States may be made under the Tucker Act".

The Tucker Act³²⁶ grants the U.S. Court of Federal Claims “jurisdiction to render judgement upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department, or upon any express or implied contract with the United States.”³²⁷ Jurisdiction, as the Court pointed out in *Mitchell I*.³²⁸ is not the same as a waiver of sovereign immunity,³²⁹ and a waiver of sovereign immunity cannot be inferred but must be expressly granted.

Two years later in *Mitchell II*³³⁰ the Supreme Court chose to revisit its earlier discussion of sovereign immunity. The Court maintained that the, “Tucker Act does not create any substantive right enforceable against the United States for money damages...[a] substantive right must be found in some other source of law, such as the Constitution or any Act of Congress, or any regulation of the executive department.”³³¹ Thus, the tribe must show that a source other than the Tucker Act (such as the Treaty of Point No Point, or the government’s trust responsibility) “can fairly be interpreted as mandating compensation by the federal government for the damages sustained.”³³²

Breach of trust responsibility allows the tribe to seek compensatory damages. “[G]iven the existence of a trust relationship, it naturally flows that the government should be liable in damages for the breach of its fiduciary duties.”³³³

³²⁶ Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified, as amended, in scattered sections of 28 U.S.C.A.).

³²⁷ 28 U.S.C.A. § 1491 (a)(1) (1997); See also the Indian Tucker Act, 28 U.S.C.A. § 1505 (1997, as amended) (granting jurisdiction for Indian claims).

³²⁸ 445 U.S. 535 (1980), citing *United States v. Testan* 424 U.S. 392 (1976) and *United States v. King* 395 U.S. 1 (1968).

³²⁹ Sovereign immunity is defined as “a judicial doctrine which precludes bringing suit against the government without its consent” (Black’s Law Dictionary 970 (Abridged 6th Ed. 1991)).

³³⁰ 463 U.S. 206 (1983).

³³¹ *Id.* at 216

³³² *United States v. Testan* 424 U.S. 392, 400 (1976).

³³³ *United States v. Mitchell (Mitchell II)* 463 U.S. 206, 226 (1983); see also *White Mountain Apache Tribe v. United States* 11 Cl.Ct. 614 (1987) (held government liable for damages from mismanagement of tribal range and timberland; affirmed 5F.3d 1506 (1993), cert. denied 114 S.Ct. 1538 (1994)).

An obvious danger of asserting a claim for breach of fiduciary duty is that it may lead to monetary damages rather than restoration of the river, and acceptance of money damages would most likely extinguish future claims. This makes action under the Tucker Act, or any other statute that would lead to a ruling by the Court of Claims unlikely since the Court of Claims can only grant money damages. It is highly likely that the tribe would not be satisfied with money damages regardless of their amount, but would consider the worth of the river and its salmon to be beyond economic valuation. This was the case in *United States v. Sioux Nation*³³⁴ where a multi-million dollar award for damages was seen by the Oglala Sioux tribe as insufficient compensation for their loss of the Black Hills. The Oglala Sioux entered into a stipulation with the government, halting payment of their share of the award due to concern that acceptance of money damages would extinguish their land claim.³³⁵

The combined weight of recent judicial opinion demonstrates what may be characterized as a trend in the law which should control any litigation arising out of the Elwha dilemma. The Lower Elwha S'Klallam Tribe can make a strong argument that habitat protection is necessary to protect their treaty rights. However, the cases which establish this trend all deal with the management of existing projects, or the enjoinder of planned projects. Since litigation calling for the dismantling of an existing project has not occurred, it is unclear how the courts would deal with such an issue.

Even though the *Phase II* decision chose not to address the alleged existence of an environmental right, the vast body of case law indicates that such a right does in fact

³³⁴ 448 U.S. 371 (1998).

exist, even if it must be established on a case by case basis. To separate the question of habitat protection from the question of allocation addressed in *Phase I* undermines the purpose and intent of the treaties. Without a stable and viable population of salmon, the treaties are not worth the paper they are printed on. And without the habitat necessary to guarantee the survival of the salmon there is no way to guarantee a stable and viable population.

LITIGATION V. NEGOTIATION

It was noted earlier that the Elwha Act was passed in part as an attempt to head off a possible suit by the Lower Elwha S'Klallam Tribe. A suit by the tribe would likely have argued that the dams are a violation of the tribes treaty protected fishing rights. It should also be noted that the passage of the Elwha Act, and the resulting Environmental Impact Statements have strengthen the tribe's claims considerably. It has been clearly demonstrated that dam removal is feasible. Furthermore, dam removal is the only way possible to restore once plentiful salmon to the Elwha River. The assessment and documentation occurring pursuant to the Elwha Act provide the tribe with extensive evidence of *how* to restore the river once their right to restoration has been secured.

The EISs and other research conducted clearly indicate that the benefits of dam removal do not accrue solely to the tribe, but to the state and region as a whole. Equally damming to the proponents of dam retention are the findings of Dr. John Loomis of Colorado State University. These findings indicate that the benefits of dam removal

³³⁵ Stephen Cosby Hanson, *United States v. Sioux Nation: Political Questions, Moral Imperatives, and National Honor*, 8 AMERICAN INDIAN LAW REVIEW 459-484 (1981) (originally published in UNIVERSITY OF WEST LOS ANGELES LAW REVIEW, 1981).

significantly exceed the costs incurred. Dr. Loomis' best estimate concludes that dam removal will provide net benefits of 138 million dollars over each of the next ten years to residents of the state of Washington alone. If benefits are expanded to include all Americans they rise to 3.5 billion dollars – far outweighing the cost of dam removal.³³⁶

If the federal government fails to move ahead with ecosystem restoration in a timely manner, or if the state acquires the projects but fails to move ahead with due diligence the tribe's case will continue to improve and the likelihood of a suit will increase. Hopefully the threat of such suit will have sufficient weight to affect an equitable solution. Protracted litigation does not serve the best interests of any party involved. All will suffer from a continued decline or extinction in salmon stocks. Litigation also shifts scarce resources away from resource stewardship and other valuable government programs.

The volume of case law available to substantiate an environmental right, combined with the documentation contained in the numerous EISs strongly support river restoration. This documentation, combined with the Elwha Act's provision that, "the United States may not assume any liability, if any,...to any federally recognized Indian Tribe nor shall such liability to the Tribe, if any, be deemed satisfied without the consent of such tribe"³³⁷ provides a powerful tool to assert at the bargaining table. If a cooperative solution remains untenable, the tribe can make a very strong case before the courts.

³³⁶ John Loomis Ph.D. *Measuring the Economic Benefit of Removing Dams and Restoring the Elwha River: Results of a Contingent Valuation Survey* 28 (February 1995) (Department of Agricultural and Resource Economics, Colorado State University, Fort Collins, CO 80523) (available from author).

POSSIBLE ANTI-INDIAN BACKLASH

Historically, the assertion of Indian fishing rights has been fraught with conflict. Before the Lower Elwha S'Klallam tribe chooses to assert an environmental right to habitat protection they should carefully weigh the possible gains against the potential for an anti-Indian backlash.

In the early 1960s and 70s treaty tribes in Washington State began aggressively asserting their treaty fishing rights. Tribes began conducting, "fish ins" in protest of state laws which severely restricted Indian fishing rights. These laws often effectively abrogated treaty reserved rights. The tribes' assertions of treaty rights were countered by retaliatory action on the part of state fisheries officials. "Vigilante sport fishermen joined state fisheries in policing and harassing the Indians, stealing their boats and slashing their nets, and sometimes shooting at them."³³⁸

Hostilities peaked in 1974 when U.S District Court Judge George Boldt ruled in favor of Indians, granting them the right to half the fish passing through their usual and accustomed grounds.³³⁹ Prior to the Boldt Decision, Indians were responsible for approximately two percent of the salmon catch within the State of Washington,³⁴⁰ increasing the tribal catch to fifty percent obviously did not bode well for the state's non-Indian commercial or sport fishing industry. Disgruntled non-Indian fisherman hung Judge Boldt in effigy. Not stopping at symbolic violence, vigilantes rammed Coast

³³⁷ The Elwha Act, *supra* note 23 at § 3(b).

³³⁸ DONALD A. GRINDE AND BRUCE E. JOHANSEN, *ECOCIDE OF NATIVE AMERICA: ENVIRONMENTAL DESTRUCTION OF INDIAN LANDS AND PEOPLE* 150 (1995).

³³⁹ See *United States v. Washington (Phase I)*, discussed in Chapter 3, *infra*.

³⁴⁰ CONE, JOSEPH AND SANDY RIDLINGTON, EDS., *THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY* 191 (1996).

Guard vessels charged with enforcing the court's orders and even shot at Coast Guardsmen on at least one instance.³⁴¹

Anti-Indian sentiment and retaliation was not limited to non-Indian fishermen. Washington State courts ordered the state Department of Fisheries to abandon promulgation of orders and enforcement of regulations, which had been ordered as part of the federal court's decree. The U.S. District Court for the Western District of Washington countered by entering a series of orders enabling it, in conjunction with the U.S. Attorney and other federal law enforcement agencies, "to supervise those aspects of the state's fisheries necessary to the preservation of treaty fishing rights."³⁴²

In an attempt to settle the dispute and restore, "constitutional equilibrium" Washington State Attorney General Slade Gorton proposed the outright purchase of Indian fishing rights. Tribes summarily refused to accept Gorton's offer which they viewed as tantamount to termination.³⁴³

In the latter half of the 1990s fishing disputes came to Wisconsin and the Great Lakes region. The Chippewas were subjected to violent harassment and racial slurs by non-Indians during the Indian spearfishing seasons of the late 1980s. Antispearfishing slogans included: "save a walleye; spear a squaw" and, "Custer had the right idea". Some of the strongest protests were stopped by a lawsuit filed by the American Civil Liberties Union on behalf of the tribe.³⁴⁴

³⁴¹ GRINDE AND JOHANSEN, *supra* note 338 at 153.

³⁴² *Passenger Vessel*, *supra* note 245 at 673-674; orders contained in 459 F.Supp. 1020 (W. D. Wash. 1978), affirmed at 573 f.2d 1123 (9th Cir. 1978).

³⁴³ GRINDE AND JOHANSEN, *supra* note 338 at 153-154.

³⁴⁴ *Id.* at 160-162.

Though a palpable tension remains between Indian and non-Indian fishermen, the level and intensity of violence has diminished, due in part to judicial intervention and in part to an increased awareness of the parties mutual interest in improving fisheries management. Non-Indian fishermen, both commercial and recreational have recently begun to recognize that an assertion of a treaty right to habitat protection may provide them with significant benefits as well. Half of nothing is nothing. Rather than quibble over the distribution of the proverbial pie, habitat protection provides a means to increase the size of the pie to the benefit of all. Non-Indian fishermen stand to gain half of any increase that does occur.

All parties are beginning to realize that habitat modification is the most significant cause for stock decline, and that without a dramatic change in the way salmon habitat is managed existing stocks will continue to decline.³⁴⁵ However, if stocks increase, so to does the take available to commercial and recreational fishermen - Indian and non-Indian alike. An assertion of tribal rights could benefit all parties dependent on salmon stocks by increasing the total catch available.

Mutual interest does not however represent a panacea; the externalities inherent in fisheries management decisions are ubiquitous. While the fishing industry, tribes, and environmentalists alike herald fisheries restoration, more stringent management of terrestrial and riparian development will undoubtedly impose a cost on developers, farmers, and the timber industry just to name a few.

The successful assertion of a tribal right to habitat protection would have economic consequences far exceeding the fifty percent allocation arising out of *Phase I*.

³⁴⁵ See generally, UPSTREAM, *supra* note 1.

If such a right were asserted on a river system like the Columbia, terrestrial activities including but not limited to farming, logging, and residential development would have to consider their impact on tribal fisheries resources. It has already been mentioned repeatedly that such activities are not considered to be a significant factor in the demise of the Elwha River ecosystem. However, the precedent set by a treaty rights driven removal of the dams on the Elwha would have sizeable impacts to say the least.

Apprehension over the possible development of a river restoration precedent based on treaty rights may likely pose the most significant hurdle to establishment of a duty to protect the habitat upon which treaty protected fisheries depend. Ironically, concern over the consequences of a successful assertion of a treaty right to environmental protection may prove to be a strong lever in out of court negotiations.

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

Before reaching the conclusions and recommendations, some of the more critical issues upon which this analysis is based deserve to be revisited. Briefly revisiting the assumptions and limitations inherent in the study, reviewing the research questions, and proposing areas which need future research should clarify and focus the recommendations and conclusions that follow.

ASSUMPTIONS AND LIMITATIONS

The primary assumption prefacing the research contained within this thesis is deference to the findings reported in the four most recent environmental impact statements.³⁴⁶ Deference is given to these findings due to their depth, breadth and the diversity of the co-authors.³⁴⁷ It is accepted as fact that dam removal is the only way to fully restore the river and fulfill the mandates of the Elwha Act. Likewise, the EIS team's conclusion that dam removal is technologically feasible is accepted as fact.

The body of information which provides the foundation for this analysis reflects the Lower Elwha S'Klallam Tribe's commitment to habitat restoration. At no point has the tribe attempted to quantify the economic costs resulting from their loss of salmon. Likewise, the extensive litigation conducted by the tribes of the Pacific Northwest concerning the fishing provision of the Stevens Treaties has never sought to abandon fishing rights in favor of financial compensation. Furthermore, proposals made during

³⁴⁶ *Supra* at note 38.

³⁴⁷ *Supra* at note 39.

the late 1970's to buy out Indian fishing rights within the State of Washington were summarily rejected.³⁴⁸ There is no reason to infer that the Lower Elwha S'Klallam would find money damages to be an acceptable solution to their problems. Likewise, money damages would clearly not address the statutory constraints affecting the Elwha dilemma. Therefore, no attempt has been made to quantify the value of tribal fishing rights, or address the possibility of compensation for continued abrogation of rights.

The statutory constraints acting upon the Elwha dilemma and discussed *infra*. are not meant to be an exhaustive review of statutory law. Rather, statutes are discussed to the extent which they can be used to clarify the rights implied in historic treaties, and the fiduciary duty owed to the Lower Elwha S'Klallam Tribe. The application of other laws, both federal and state may affect the eventual resolution of the dilemma.

The reader must be very careful when attempting to extrapolate the lessons learned regarding treaty fishing rights to conflicts elsewhere. One very important consideration is that the Stevens Treaties all contain an explicit statement regarding fishing rights. This is not the case in all treaties; where such a statement is lacking the tribes must first establish an implicit reserved right to take fish and game.³⁴⁹ This must be antecedent to an assertion of an environmental right. Prefacing an environmental right on an implicit right to hunt or fish will lengthen the chain of rights that must be established, making assertion of the right to protected fish or wildlife habitat even more tenuous.

³⁴⁸ GRINDE AND JOHANSEN *supra* note 338 at 153-154.

³⁴⁹ "Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims (179 Ct.Cl. 496) that the language 'to be held as Indian lands are held' includes the right to fish and hunt." *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

Also, the physical characteristics of the Elwha are quite unique, thus limiting the ability to infer elsewhere based on the circumstances of the Elwha conflict. The number of interests which are in conflict on and around the Elwha River are far fewer than on the Columbia or Snake River systems, and the most significant issues of concern are quite different so particular care must be taken in extrapolating to other river systems. It is extremely difficult to find precedents which cut to the heart of the Elwha dilemma, and it should be equally difficult to apply any judicial precedent arising out of the Elwha dilemma to issues occurring elsewhere.

Despite the difficulty extrapolating from the specific facts of the Elwha River restoration controversy, more general conclusions can be drawn. Many of the difficulties associated with the restoration effort are illustrative of more fundamental, systemic problems plaguing Indian affairs. These lessons may be readily generalized and should serve to invite discussion of the federal government's legal obligations in dealing with tribal governments. Such discussion may lead to the conclusion that the government's obligations cannot be met, consistently, without systemic change.

REVIEW OF RESEARCH QUESTIONS

What is the legal basis of federal Indian policy with respect to Indian trust resources? How has this policy developed over time? Trust obligations can arise out of treaties, statutes, or executive orders.³⁵⁰ The most significant of these, when addressing the tribes' assertion of a right to habitat protection are the rights reserved according to treaties. Treaties are legally binding agreements, negotiated at arms length between two

³⁵⁰ See *California v. Watt*, 658 F.2d 1290 (9th Cir. 1981).

sovereign governments. These treaties were not a grant of rights to the Indians, but a grant of rights from them, thereby implicitly containing a reservation of those rights not expressly granted away.³⁵¹

The conditions of American Indians have changed radically since European contact and tribal autonomy has been significantly restricted, however, tribes are reserved all powers not expressly granted away by treaty or abrogated by an act of Congress.³⁵² As semi-sovereign domestic dependent nations,³⁵³ tribes are significantly dependent upon the federal government for protection of their rights; and the federal government is held to the, “most exacting fiduciary standards” when administering resources held in trust for the benefit of the tribes.³⁵⁴

Over the years, the relationship between the federal government and the numerous recognized tribal governments has changed and evolved. Policies have varied from administration to administration, fluctuating back and forth between assimilation and self-determination. Often the federal judiciary has been called upon to define responsibilities and uphold the fiduciary responsibility of the government.

What rights do treaties create and do they create an environmental servitude requiring the federal government to protect salmon habitat? The Stevens treaties do not specifically address the issue of habitat protection. At the time of treating, there was no reason to believe that the salmon resources of the Pacific Northwest were anything but inexhaustible. The thought that the pressures of development would eventually lead to

³⁵¹ *Winans*, *supra* note 245 at 381.

³⁵² See *Passenger Vessel*, *supra* note 245 at 690; and *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

³⁵³ See *Worcester v. Georgia*, 31 U.S. 515 (1832); and *Cherokee Nation v. United States*, 30 U.S. 1 (1831).

the destruction of salmon runs was beyond anyone's comprehension.³⁵⁵ Therefore the existence of a right to habitat protection must be inferred base on the purpose and intent of the treaties.³⁵⁶

The courts have proven reluctant to address the theoretical existence of an environmental right, preferring to deal with it on a case by case basis.³⁵⁷ The result is an incremental process that is far from complete. A trend in the law is beginning to emerge, indicating that an environmental right does in fact exist.³⁵⁸ However, the courts have frequently chosen to sidestep the issue and base their ruling on other grounds.³⁵⁹ The speculative reason for this is that the courts understand the tremendous implications of any ruling which creates such an expansive right. If a legally articulated and enforceable right to unspoiled habitat does exist, it will affect everything from dam operation, to agricultural and forest practices to the maintenance of storm drains. The courts are understandably wary of judicially mandating such expansive changes in society; changes which may arguably be best left to Congress.

In the event that such a servitude does exist, does the federal government have a duty to restore damaged salmon habitat to abide by the purpose and intent of historic

³⁵⁴ *Seminole Nation*, *supra* note 232 at 296-297.

³⁵⁵ See *Passenger Vessel*, *supra* note 245 at 669.

³⁵⁶ See *United States v. Washington (Shellfish)*, 873 F.Supp. 1422, 1429 (W. D. Wash. 1994) ("courts begin with the premise that parties intentions dictate interpretation of treaty", citing *Choctaw and Chickasaw Nation v. United States*, 179 U.S. 494, 538 (1900) (when the parties could have more easily expressed a particular intent by an alternate choice of words, the chosen words can be interpreted NOT to express that intent), and citing *Choctaw Nation v. United States*, 318 U.S. 423 (1943) ("treaties may, when necessary, be interpreted in light of the historical surrounding circumstances")).

³⁵⁷ See *Phase II*, *supra* note 233 at 1357.

³⁵⁸ See *Joint Board of Control*, *supra* note 283; *Kittitas Reclamation District v. Sunnyside* 763 F.2d 1032 (9th Cir. 1985); *Confederated Tribes of the Umatilla Indian Reservation v. Walton (Walton III)*, 752 F.2d 397 (9th Cir. 1985); and *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984)

³⁵⁹ See *Washington State Department of Fisheries v. Federal Energy Regulatory Commission*, 801 F.2d 1516 (9th Cir. 1986); *National Wildlife Federation v. Federal Energy Regulatory Commission* 801 F.2d

treaties? Possibly the greatest danger of a successful assertion of a legally enforceable right to unspoiled habitat is the possibility that the courts may choose to balance the trust obligation owed to the tribes against that owed to the other citizens of the union. In such instances it is highly likely that the interests of the Indian minority may be ballanced away in favor of the non-Indian majority. It is also possible that the courts may determine that historic harms cannot be undone and restoration is impossible, choosing instead to require the payment of money damages. Money damages, though immediately beneficial will not address the root problem or cultural and religious losses³⁶⁰ and an award of money damages will forever bar the “successful” tribal litigant from ever achieving habitat restoration.

Is there a need for a change in federal Indian policies with respect to treaty reserved resources? If so, what changes are needed and why? There is a need for better articulation of the fiduciary obligation that federal employees are, at least theoretically held to. Likewise, there is a need for clarification of how conflicts between the federal government’s fiduciary duty to tribes must be dealt with in light of often competing duties to other beneficiaries.

More importantly, administrators need to recognize the interconnections between tribes and others who will benefit from improved management of treaty reserved natural resources. Increasing the populations of naturally spawning salmon provides benefits to many populations in addition to tribal interests. Managing resources for a single beneficiary further inhibits already strained lines of communication. This is not to say

1505; *Northwest Indian Cemetery Protection Association v. Peterson* 795 F.2d 688, 697 n.10 (9th Cir. 1986).

³⁶⁰ See *Shellfish*, 898 F.Supp. 1453, 1458-1459 (W. D. Wash. 1995).

that non-Indians' benefits accruing from exploitation of Indian trust resources should be allowed to override tribal interests, rather that the participants interests should not be dismissed as mutually exclusive.

The difficulty maintaining government to government relations with over 500 tribes is self-evident. There is a clear need for changes which assure the government's legal obligations will be met, and which facilitate conflict resolution. Establishment of an executive department agency, charged with overseeing the federal government's tribal relations, and which can act as an ombudsman should problems arise would go a long way towards improving relations. The Bureau of Indian Affairs (BIA) is particularly ill-suited to fill such a role because of its potentially conflicting obligations as trustee and program administrator. Because of these potential conflicts, the BIA should not be charged with an oversight responsibility; another agency should be created to carry out these oversight duties. Other recommendations are contained in the Conclusions section *infra*.

AREAS FOR FUTURE RESEARCH

Several issues have emerged which are deserving additional research. Notable among these is the need for additional and exhaustive research into the applicability of statutory remedies not addressed by this research effort. Clarification of the limits to extrapolation merits further exploration, particularly when applied to treaties which do not contain an explicit statement regarding the reservation of hunting and fishing rights.

It is beyond question that salmon are intimately tied to the religion and culture of coastal Indians of the Pacific Northwest. It is not clear what the federal government's

obligation is regarding the protection of living cultural or religious resources. The divergent world views held by Indian and non-Indian society contribute to the confusion over rights and obligations. Clarifying the definitional standards applied to cultural resources may prove useful in determining how best to resolve conflicts over competing and conflicting uses.

An issue closely related to cultural resource definition is the affect different damage regimes have on tribal society. Can money damages adequately compensate Indian or tribal plaintiffs for their loss of those resources or items most intimately linked to their culture or religion? What are the long term social and economic consequences of the loss of culturally significant resources and the payment of money damages as compensation? Have the courts applied the same standards to Indian and non-Indian plaintiffs alike?

The question of restoring the Elwha River is responsible for long standing tensions between residents of the region. It is uncertain, but highly likely that differences in the information base between communities contributes to the difficulties experienced in attempting to reach a conclusion. Similarly, anything that inhibits communication can be expected to interfere with the timely resolution of the underlying conflicts. Establishing a baseline assessment of the information held by different constituents, and the flow of information between parties may shed light on underlying factors which inhibit resolution. Assessing these barriers is the first step to developing a strategy to surmount them.

CONCLUSIONS

The cannons of construction that have developed over years of treaty based litigation clearly indicate that treaties are to be liberally construed in favor of the Indians,³⁶¹ not as the treaties would have been interpreted by learned lawyers, but how they would have been interpreted by the Indians who often didn't understand the language.³⁶² Ambiguities should likewise be interpreted in favor of the Indians,³⁶³ and most importantly, treaties reserve to the Indians all rights which have not been expressly granted away.³⁶⁴ Application of these rules of construction to the Treaty of Point No Point seems to favor the argument that the tribes retain the right to unspoiled habitat, provided that they are able to show specific evidence of environmental harm.

The existence of a treaty-protected and legally enforceable environmental right, and the extent of any right that is found to exist, must be evaluated on a case by case basis.³⁶⁵ It appears that the existence of such a right should be upheld, provided the facts of a particular case can substantiate the assertion. However, the surest way to achieve these results may be to argue based on other, more established legal grounds such as protection of the instream flows necessary to insure migration and reproduction.

Case by case litigation increases the level of uncertainty. Congress, and to a lesser extent federal courts, have vacillated in their treatment of American Indians; the same kind of vacillation can be seen in their treatment of natural resources. As the policy pendulum swings back and forth it has repeatedly injured the Indians who are often

³⁶¹ See *Passenger Vessel*, *supra* note 245.

³⁶² *Id.* at 666-667.

³⁶³ *Id.*

³⁶⁴ *Id.* at 690; and *Menominee Tribe v. United States* 391 U.S. 404, 413 (1968).

³⁶⁵ *Phase II*, *supra* note 245 at 1357.

poorly represented in legislative or policy circles. Tribes are often poorly equipped to deal with the swinging pendulum because they are heavily dependent on both natural resources and congressional action, yet they do not have a voice in the process reflective of their significant interest.

The situation presented on the Elwha River is factually different from the majority of litigation that has preceded it. The unique nature of the Elwha dilemma is analogous to the proverbial double edged sword; it is difficult to apply existing precedents to the issues at hand. Despite the vast body of previous litigation arising out of the Stevens Treaties and addressing Indian fishing rights issues, the situation presented on the Elwha River is so unique that many of the existing precedents must be stretched to fit. Likewise, any precedent that does result from litigation involving the Elwha River will be difficult to apply elsewhere. The latter will hopefully temper the courts' hesitance to deal with the existence of a tribal right to unspoiled habitat while the former undoubtedly increases the uncertainty inherent in pursuing a legal action to force river restoration.

Simply proving the existence of a treaty right to unspoiled habitat may not be sufficient to achieve the desired results. *Shellfish* clearly indicates that treaty rights may not be exerted without regard for the rights of non-Indians who had no reason to anticipate that their rights might be encumbered by antecedent treaty rights.³⁶⁶ In instances where this is the case, the courts appear to have the discretion to balance the equities of the parties involved.³⁶⁷ Furthermore, it appears likely that the court may

³⁶⁶ 898 F.Supp. 1453, 1457-58.

³⁶⁷ *Id.* at 1458-59.

conclude that there is no practical way to undue any damage that has occurred and therefore money damages may be the only recourse available.³⁶⁸

Money damages can address some of the economic problems borne by the tribes, but they do nothing to stop the continued loss of traditional cultural and religious identity. Money does not appear to address the root problem, but merely gloss over the more painful and immediately treatable symptoms. The doctrine of *Res judicata*³⁶⁹ may prove to be the final nail in the tribal coffin, precluding further litigation on the issue.

Realizing the precarious nature of litigation and the potential for undesirable results, the tribe may be best served by pursuing an extra-judicial settlement. As much as a possible negative treatment might hurt the tribe, a positive ruling would be equally harmful to tribal opponents. The uncertainty associated with turning resolution over to an outside source should provide a strong incentive to bring parties together. Face to face discussion, possibly involving outside mediation may be the best - and quickest way to begin salmon protection and restoration - regardless of what means are implemented.

Senator Gorton is the fulcrum around which all parties must work to achieve a resolution. As Chair of the Interior Appropriations Committee, Senator Gorton holds tight control over the purse strings necessary to fund the project. As long as he remains in Congress, he will continue to exert significant power as the senior Senator from the

³⁶⁸ The Sioux Nation sought restitution for loss of the Black Hills in *United States v. Sioux Nation of Indians* 448 U.S. 371 (1980). They won the case, but the Court concluded that return of the Black Hills was not possible and chose instead to award money damages. Unhappy with money damages, the Oglala Sioux entered into a stipulation with the federal government halting payment of their share of the award in order to keep the possibility of future legal action alive. See *Stephen Cosby Hanson, United States v. Sioux Nation: Political Questions, Moral Imperatives, and National Honor* 8 AMERICAN INDIAN LAW REVIEW 459 (1981).

³⁶⁹ "Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent

state of Washington, even if he does not continue to retain his current position as committee chair. Going head to head against him will likely only strengthen his resolve and lengthen the process.

RECOMMENDATIONS

Recommendations flow naturally from the conclusions stated above. There is a clear and demonstrable need to improve our understanding of the obligations due to treaty tribes as these obligations relate to the management of natural resources upon which tribes depend. It likewise appears that increasing resource manager's understanding of the basis in law for special treatment of tribal interests may lead to less confrontation in management decisions. Improving communication between all involved parties will hopefully lead to better understanding of the intricacies involved in protection of tribal resources.

Direct and meaningful discourse may not be possible barring outside mediation. Years of misunderstanding and animosity cloud, if not entirely preclude efficient and effective cooperative management. Impartial mediation may help all parties better define the responsibilities and correlative rights possessed by all involved, clarifying the basis from which to begin negotiation. Without direct discussion parties are forced to guess at the underlying intentions of groups they see as antagonistic to their best interests. Lacking an explanation, distrust and concern over hidden agendas continues to fester, making mutually acceptable solutions even more difficult to attain.

Bringing together groups which have traditionally been considered antagonists has rarely been easy and may not lead to the best resolution for any individual party, yet it reduces the likelihood of bitter litigation and moves issues from confrontation into action. Examples of the power of interaction between traditionally adversarial groups are the Timber Summit which arose out of controversy over protection of habitat for the endangered Northern Spotted Owl, and the Timber, Fish and Wildlife Agreement mentioned *supra*.

Mediation does not bar future litigation. Conversely, as long as the shadow of mutually disadvantageous litigation looms over negotiations, all parties maintain a vested interest in working together. The Elwha River does not present a range of solutions which are necessarily mutually exclusive. Increasing salmon populations provides wide ranging benefits to Indians and non-Indians alike and ample room for a win-win solution.

Proponents of dam removal must recognize Senator Gorton's long-standing history of confrontation with American Indians, and his tendency not to support environmental legislation. With this in mind, the tribes interests may best be served by finding another way to frame the argument. If they can frame their argument in a way that is more reflective of Senator Gorton's philosophical bent, they may have better results. Such an argument may expedite by either creating a political imperative, or a situation where the Senator can claim victory. One potential argument that shows promise and has not been significantly developed as of yet is the issue of dam safety. If the dam can be shown to endanger the lives of those living downstream, removal may become a political imperative.

Appealing to the interests of the larger community may bolster the argument favoring dam removal. The economic benefits of dam removal accrue to a broad constituency. Framing the issue so as to highlight the positive economic consequences of ecosystem restoration may help the project make political sense to Senator Gorton.

At a more general level, communication between the federal and tribal governments is hampered by the number of tribes and the vast range of tribal governmental resources. The logistics of maintaining government to government relations with over 500 tribes is a near impossible task. Likewise, resolving the conflicts which naturally arise is difficult under the present system. Possibly the best thing that could happen would be the establishment of a federal agency, sufficiently funded and empowered, to act as a liaison between tribes and the federal government. This agency could act to insure that the government lives up to it's legal obligation, and provide someone akin to an ombudsman who can represent tribes when they feel their rights have been neglected or violated. An ombudsman may be able to step in and encourage meaningful cooperation, thus averting the bitter and costly litigation which has so often characterized and polarized government to government relations. The establishment of such an agency would allow fundamental reorganization of the Bureau of Indian Affairs, resolving the Bureau's presently conflicting mandates. The time may be ripe for such a change.

The longer debate goes on the fewer salmon will remain. The salmon don't have the time for partisan bickering and political posturing. What the salmon need is for all involved parties to set aside their grievances and sit down, face to face, to resolve the problems at hand. Returning the once mighty runs of salmon to the Elwha River is a goal

that benefits everyone; we can ill afford to get caught up on the details of the best means to do this if it forces us to sacrifice the end goal.

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