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Justice Delayed: A Tribal Attorney's Perspective on Elwha River Dam Removal and Ecosystem Restoration

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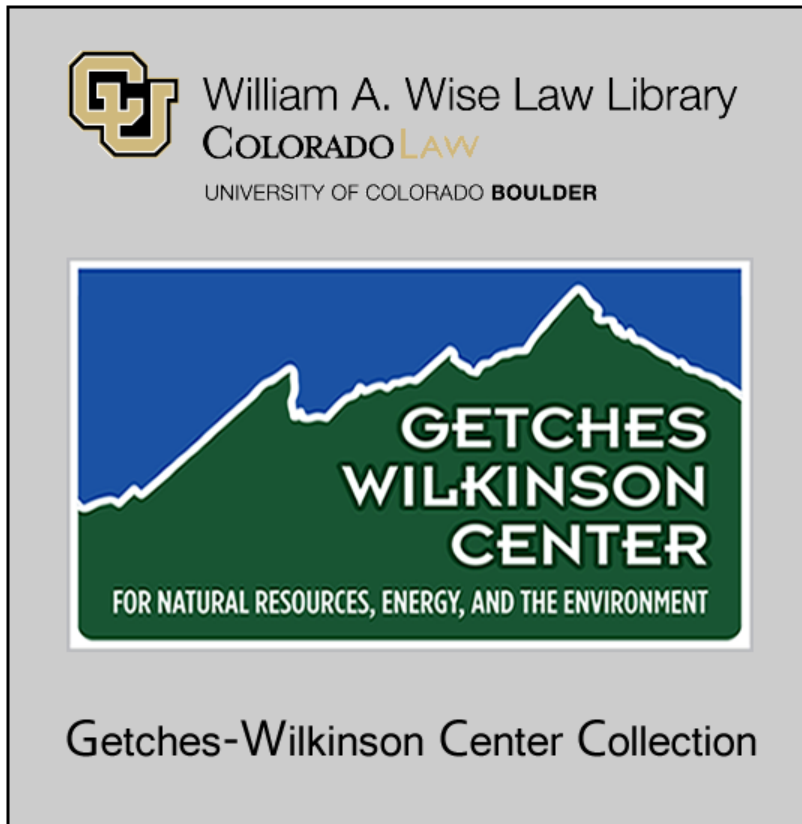
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**JUSTICE DELAYED: A TRIBAL ATTORNEY'S PERSPECTIVE ON ELWHA
RIVER DAM REMOVAL AND ECOSYSTEM RESTORATION**

Panel on Restoration of Ecosystems and Other Natural Resources

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JUSTICE DELAYED: A TRIBAL ATTORNEY'S PERSPECTIVE ON ELWHA RIVER DAM REMOVAL AND ECOSYSTEM RESTORATION

1. The Landscape

The Elwha River drains just under a fifth of Olympic National Park and empties into Freshwater Bay, on the Strait of Juan De Fuca about half-way between the Pacific Ocean and the inland waters of Puget Sound. Port Angeles, Washington, is a few miles to the east; Sooke Harbour and Victoria, British Columbia, are about 20 miles to the north.

The Lower Elwha Indian Reservation sits astride the mouth of the Elwha River. If you were attending the blessing of a cedar canoe log or a first salmon ceremony on a pleasant spring evening there you'd hear the pounding surf and see the distant hills of Vancouver Island to the north. Looking up-valley to the south, you'd see big snow peaks at the heart of the National Park.

If you were there 100 years ago you would have seen the river's mouth sprawled out in a big, messy and incredibly rich estuary, outside what is now the National Park but still an essential component of the Park ecosystem. If you are fortunate enough to be there 10 or 20 years from now, you might watch the rebirth of that ecosystem. And you might wonder what they were thinking when they dammed the Elwha River.

2. Refugees in Their Own Homeland

The Elwha Klallams have lived in the Elwha River country "for as long as anyone can remember." Tribal tradition places the creation site of the Elwha people near the present site of Elwha Dam. Because the Elwha River had the most productive fishery on the north slope of the Olympic Peninsula, the Elwhas thrived. They had villages and seasonal camps along the Elwha, on what is now Port Angeles Harbor, and at a number of other locations in the region

In 1855 the Klallam Indians, including the Elwhas, signed the Treaty of Point No Point. That treaty secured their fishery, but required them to move to a reservation far from their homeland. They refused to leave. Several extended Indian families, displaced from traditional villages, took up homesteads along the Elwha River. They became successful farmers, raising and selling everything from timber to potatoes to oxen. But in 1912, during construction of Elwha Dam at river mile 4.9, the dam's foundation blew out. One Indian homesteader lost everything; several others had their topsoil washed away or their fields covered with flood debris. Fear of further dam failures, increasing poverty, and non-Indian chicanery eventually led to the loss of most of the homesteads.

Other Elwha families were experiencing similar difficulties staying in traditional villages on Port Angeles Harbor and at other locations along the Strait. By the 1930's the

Elwhas were refugees in their own homeland, moving to increasingly less habitable settings as non-Indians claimed their land and burned their homes. On Port Angeles Harbor the last Indian homes were destroyed at Tse Whit Zen Village and a mill was built on top of one of the largest and richest archaeological sites in North America. Another village and cemetery at the other end of the harbor, Y'innis, was also destroyed and is now under industrial fill at the former Rayonier Mill Site. For a time, Elwha families moved to more exposed parts of Ediz Hook, the spit enclosing the harbor, but they were treated as squatters and driven out in the 1930s.

Finally, in the late 1930s, the Federal Government bought back some of the Elwha lands at the mouth of the river and resettled several Elwha families there. Those lands were proclaimed the Lower Elwha Reservation in 1968. In spite of repeated setbacks, the Elwha Tribe is making a strong comeback in Port Angeles and along the Elwha River. The Tribe has been slowly buying back land, one parcel at a time.

3. Tribal Advocacy: "Oh, Are You Still Here?"

The Elwhas have proven tenacious. That tenacity is perhaps best-captured in the name of an oceangoing cedar canoe they manned during the resurgence of the Northwest canoe-family culture: *Elwha Warrior*. "Klallam" (also written "S'Klallam" or "N'Sklallam") translates as "the Strong People." The Elwha Tribe has been living up to that name.

In the late 1970s Elwha Dam failed to pass a federally-required safety inspection. Because of the risk of flooding, this prevented any federal flood control, housing or economic development expenditures on the Lower Elwha Reservation. Neither the Corps of Engineers nor the Washington Safety-of-Dams program were able to issue an order to fix the dam. The Tribe took over when no other government was able to act effectively. It hired an engineering firm, proved Federal Energy Regulatory Commission (FERC) jurisdiction, modeled the Probable Maximum Flood, carried out the necessary dam structure failure analysis, and simulated a catastrophic-failure bore wave to demonstrate the risk to federal lands on the Reservation. As the result of those efforts FERC issued an emergency dam safety order requiring the repairs recommended by the Tribe. The Tribe was then able to obtain Corps funding of a flood-control levee and to build federally-funded housing on the Reservation.

During the 1980s the Tribe joined the National Marine Fisheries Service and the United States Fish and Wildlife Service in advocating for restoration of the river's anadromous fisheries in FERC's dam licensing process. When it became apparent that the dams and fisheries could not coexist, the Tribe was the first party to move for dam removal. That advocacy eventually won support from the Tribe's federal partners. The Tribe, with those federal partners, then completed the necessary scientific studies and was a key player in the negotiations that led to the Elwha River Ecosystem and Fisheries Restoration Act.

The Tribe has also been successful in other battles, each time trying to accommodate project proponents who, in turn, attempt to ignore the Tribe's growing presence:

- In the 1980s the Tribe joined local governments, other tribes, and environmental NGOs in preventing the southern terminus of the (Alaskan) Crude Oil Transportation System from being sited in either Freshwater Bay or Port Angeles Harbor. After a long battle in state and federal forums, the Northern Tier Pipeline (and the Public Utility Regulatory Policies Act (PURPA) which spawned it) became "an idea whose time has gone."
- PURPA also generated a "gold rush" of small hydro applications which threatened to choke many of the region's still-undammed salmon streams. The Elwha Tribe, with other tribes, was active in regional power planning and in federal appellate court, stopping what looked at the time like a small hydro juggernaut.
- Since the late 1990s, under a Superfund Deferral Agreement with EPA and the State, the Tribe has been a tough governmental partner in the cleanup of the Rayonier Port Angeles Mill Site, one of the largest dioxin sources in the Pacific Northwest. After validation of the most recent tissue samples, the Tribe joined the Clallam County Health Department in closing Port Angeles Harbor to shellfish and bottom fish harvests.
- In the 1990s, represented by Earthjustice, the Tribe sued, and reached a settlement with, the Forest Service after a "sidecast" road failure far above a salmon stream resulted in a cascading debris flow that blew out Salmon habitat downstream.
- Between August 2003 and the present, after bending over backward to accommodate construction of a massive State-owned dry dock at Tse Whit Zen on Port Angeles Harbor, the Tribe stopped the project in order to protect a prehistoric cemetery. Instead of becoming a marine industrial facility, the land will be transferred to the Tribe for cultural resource protection. The dry dock was intended for fabrication of concrete pontoons and anchors for the State's floating bridges. This was the most recent, and hopefully last, example of bureaucratic reluctance to take the Tribe seriously. The cost of that failure, just in highway funds, was about \$100 million.

In less litigious efforts, the Tribe has quietly been restoring salmon streams west of Port Angeles and winning international recognition for these accomplishments.

4. The Elwha River Dams and the Declining Fishery

Elwha Dam, a fine example of destructive “progress,” was completed about 5 miles upstream from the river mouth in 1913. At that time the State of Washington had a statute requiring fish passage facilities whenever an obstruction was placed in a stream transited by anadromous fish. In September of 1911 the local game warden noticed that fish were unable to migrate past the newly constructed (but unstable) dam and reported the same to State Fish Commissioner J.L. Riseland. There then followed discussions concerning installation of fish passage facilities.

In 1913, after the dam foundation had blown out and been repaired, a new Fish Commissioner, L.H. Darwin, said he could not waive the statutory passage requirement but suggested a way around it. Darwin proposed that Olympic Power Company, the dam owner, take advantage of a clause which allowed the *State* to obstruct fish passage for the purpose of capturing fish and spawning them artificially at State hatcheries.

The law gives the state permission to obstruct streams for this purpose and I have no serious doubt that under the circumstances ... we could join [a state hatchery's] obstruction onto yours and that you would thereby be relieved of the necessity of erecting a fishway for the state [*sic*] has a right to stop the fish anywhere and make use of them for artificial propagation purposes.

Letter from L.H. Darwin to T.T. Aldwell, August 20, 1913. The power company agreed. Unfortunately, despite Darwin's portentous name and clever machinations, the salmon did not adapt to their new situation and the hatchery was soon abandoned. Each year salmon return to the base of Elwha dam and no one fails to notice that they are not making it upstream.

A second dam, Glines Canyon Dam, was completed in 1927 about eight miles upstream of Elwha Dam.

The Elwha people watched, year after year, as the salmon runs declined. Bea Charles, a tribal elder testifying before a Senate committee in 1992, described the big (100-pound fish were not uncommon) Chinook with a kind of awe: “I know. I was there. I saw them.” The Elwha Act was passed that year. Fifteen years later Bea told the National Park leadership, gathered in the gym at the Elwha Community Center, that she had been waiting for dam removal but she no longer expected to be there when the salmon come back.

5. The Legal History of the Elwha River Dams

The Secretary of the Interior's 1994 *Elwha River Restoration Report* provides a good summary of the Elwha River dams' legal background (Executive Summary at xi-xii):

The Elwha and Glines Canyon Dams were constructed on the Elwha River. Elwha Dam was constructed from 1910 to 1913 without fish passage facilities and does not have a Federal license to operate. The Glines Canyon Project was constructed from 1925 to 1927, was licensed by the Federal Power Commission for a period of 50 years in 1926, and has received annual licenses since 1976. The privately-owned projects' combined average annual generation of 18.7 megawatts of energy serves Daishowa America's [now Nippon's] Pulp and Paper Mill in Port Angeles, Washington, supplying about 38% of the Mill's power needs. The contemporary Federal licensing process began when the Crown Zellerbach Corporation (previous owner) submitted license applications to the Federal Power Commission (precursor to the Federal Energy Regulatory Commission) ... for the Elwha Project in 1968 and the Glines Canyon Project in 1973 (Projects).

Since 1911, the Elwha and Glines Canyon dams have blocked anadromous fish passage to more than 70 miles of the Elwha River and its tributaries, limiting anadromous salmon and trout production to the lower 4.9 miles of the river below Elwha Dam. As a result, all 10 native Elwha River anadromous fish runs (*i.e.* spring and summer/fall chinook, coho, pink, chum and sockeye salmon, winter and summer runs of steelhead, sea-run cutthroat trout, and native char) have been severely diminished and the ecosystem disrupted, especially within a large portion (19%) of Olympic National Park. Numerous wildlife populations within the basin are suspected to have declined.

During the 1980s, the FERC licensing process became extremely contentious and drawn out, due primarily to national policy implications of licensing a project within a National Park, the inability to design fish and wildlife mitigation measures capable of meeting Federal, State, and Indian Tribe resource goals, and legal challenges by conservation groups (*i.e.* Seattle Audubon Society, Sierra Club, Friends of the Earth, and Olympic Park Associates). Continued attempts to resolve FERC licensing issues were certain to result in protracted litigation, and considerable delay and expense for all parties, including the federal government. Failure to reach consensus would lead to the courts deciding vital issues without the opportunity for rational compromise. Verdicts [*sic*] would be narrowly defined by the issues taken before the courts, resulting in a piecemeal approach to the problem when a comprehensive solution is needed.

To resolve these conflicts, Congress enacted a legislative settlement of the issue. The Elwha River Ecosystem and Fisheries Restoration Act was signed into law as Public Law 102-495 by President Bush on October 24, 1992. P.L. 102-495 represents a negotiated solution that provides an avenue to negate lengthy and costly litigation, protect 300 jobs at the Daishowa America Mill, contribute to numerous jobs throughout the region through restoration activities and increased commercial and recreational fishing and tourism, support economic development for the Lower Elwha S'Klallam [*sic*] Tribe, restore a national park ecosystem, contribute to the understanding and improvement of restoration techniques, and

assure protection of municipal and industrial water supplies. Removal of the dams and restoration of the ecosystem and native anadromous fisheries would also promote tribal fisheries and the Federal trust responsibility to affected Indian Tribes.

The goal of the Elwha River Ecosystem and Fisheries Restoration Act is the “full restoration of the Elwha River ecosystem and native anadromous fisheries” (section 3 (c)). The Act authorized the Secretary of the Interior to acquire the Projects and remove the dams if he determined that their removal was necessary to meet this goal. The Secretary was to develop a report documenting his conclusion and provide it to Congress no later than January 1, 1994. Additionally, the Secretary was directed to include in the report information on dam retention alternatives that would provide less than full restoration.

.... As the result of these investigations, the Secretary has determined that removal of both the Elwha and Glines Canyon dams is the only alternative that would achieve the goal of full restoration of the Elwha River ecosystem and native anadromous fisheries.

6. FERC Proceedings and Impasse

It took all the resources available to the Tribe just to establish FERC jurisdiction over Elwha Dam (it was built before enactment of the Federal Power Act (FPA)), prove that dam was unsafe in a “design flood,” prove that dam failure would have catastrophic consequences on the Elwha Reservation, and obtain an emergency dam safety order. But compared to obtaining suitable fisheries mitigation in subsequent proceedings to license Elwha Dam (Docket 2683) and relicense Glines Canyon Dam (Docket 588), dam safety was the easy part.

The dams cut off 70 miles of anadromous salmonid habitat, most of it inside a national park and protected from development. The 5 miles that remain below the lower dam have been severely degraded by altered flow, nutrient and sediment regimes, and by thermal loading. It quickly became clear, during interagency consultation and investigation in the FERC licensing process, that the river has vast unused habitat, but that viable salmon runs could neither be maintained nor restored while the dams remained in place.

The river’s legendary Chinook salmon, listed as “threatened” under the Endangered Species Act along with the rest of the Puget Sound Distinct Population Segment, were down to a remnant hatchery and naturally-spawning population. Those that still returned to the river and migrated as far as the base of Elwha Dam were

concentrated in a small area and exposed to heat stress and disease, with resulting fish kills.

Fisheries mitigation, including fish ladders, trap-and-haul, whatever, would be ineffective in moving adult spawners upstream. Juvenile Chinook planted in the upper reservoir during fisheries studies could not even find their way to the spillways, let alone to whatever experimental downstream passage facilities the dam owner might propose. In short, after a great deal of additional mitigation-facility investment for a relatively small amount of energy, the runs would continue to decline.

The Tribe also knew that Elwha Dam, not far upstream from the Reservation, still had major structural issues, especially during seismic loading and overtopping. The Tribe, which had the most direct stake in the outcome of whatever fisheries mitigation and safety conditions FERC might impose in new licenses, was less than sanguine about FERC's willingness to order meaningful protection, even if such measures were feasible. In January of 1986 the Tribe intervened in the licensing proceedings and moved for removal of both dams. The environmental interveners followed suit later that year.

In 1988 the interveners asked FERC to issue a declaratory order stating that it lacked jurisdiction to relicense Glines Canyon Dam because the project is in a national park. In 1990 FERC ruled against the interveners, asserting that it was empowered to relicense the dam. (FERC had already ruled that it had jurisdiction over Elwha Dam, which is downstream from the Park.) The Tribe, Commerce and the environmental interveners appealed that order to the Ninth Circuit Court of Appeals.

Glines Canyon Dam was built and given a 50-year license before Olympic National Park embraced the Glines Canyon Project. In 1976, when the original license expired, the dam and ancillary structures were on private inholdings within the Park. While the structures were in the Park, they were not on Park land. But another part of the project, the *reservoir*, was on park land. FERC agreed that the FPA, 16 U.S.C. 797a, prohibited it from issuing initial ("original") licenses within national parks, but took the position that it could issue a *subsequent* license for a project that was located within park boundaries designated *after* issuance of the initial license.

7. Why We Needed an Act of Congress

The Ninth Circuit appeal never went to argument.¹ Regardless of the outcome in the appellate courts, the parties knew that jurisdiction in the Park was only a threshold issue, that the appeals and whatever licensing proceedings remained would be long and unproductive. Even if they were successful in protecting their turf, FERC and the power industry it represented would end up with a hollow victory: a project within a national park killing off unique and endangered salmon runs. And as the Tribe's economic

¹ Briefs were filed by all parties, including Interior as *Amicus Curiae*, in Ninth Circuit Dockets 91-70351, 91-70357, and 91-70359. They are available by whatever means the circuit uses to provide access to 1991 pleadings. Administrative pleadings and orders in FERC Dockets 588 and 2683 may be available from FERC's electronic database.

consultant later showed during Interior's environmental review, any license requiring reasonable fisheries mitigation would provide little return on the applicant's investment. One possible outcome would be that the dam owner would refuse a tendered license containing equitable fisheries measures and abandon the projects. There would then follow untried and prolonged nuisance litigation seeking to have the dams abated at the owner's expense.

Because the dams were privately owned and thus subject to the FPA, these "nobody wins" scenarios seemed inevitable. At that point our main concerns were getting out from under the FPA (including the very powerful agency, industry and congressional interests behind it) and funding dam removal. A Fish and Wildlife Service official suggested that we treat the Elwha like a water project, negotiating a solution and seeking federal funding to support it. Subsequently, discussions between Congressional staff, representatives of James River (then the dam owner), Daishowa America (then the power customer), and the fisheries agencies developed that concept and led to a way out of FERC:

- The United States would buy the projects for \$29.5 million and provide replacement power at a favorable price. Federal ownership would take the projects out of FERC jurisdiction, and out of the battle between hydropower advocates and conservationists.
- The Secretary of the Interior would then report to Congress on the prospects for fisheries restoration with and without the dams. If dam removal became the preferred alternative, Interior would remove them.
- Interior would mitigate the effects of dam removal and was explicitly required to protect the quality and availability of Elwha River water claimed under two water rights held by the City of Port Angeles: 50 cubic feet/second for municipal uses and 150 cfs for industrial uses.

The 1992 text of the Act can be found at:

<http://www.nps.gov/olymp/naturescience/upload/ElwhaAct.pdf>

8. The Ironies of Federal Funding

That was the core deal; United States taxpayers would bear the cost of removing the dams and protecting Port Angeles' water supply from the effects of sedimentation. Unfortunately, and perhaps cynically, Congress only authorized funding "for expenditure through the Assistant Secretary for Fish, Wildlife, and Parks and ... for expenditure through the National Marine Fisheries Service." Each agency is subject to low budget caps and neither has the ability to obtain the sort of large appropriations needed to pay for a major water project. To this point, the Park Service has managed to accumulate sufficient yearly appropriations to acquire the dams, pay for a complex environmental

review process, fund design of some dam removal and mitigation components, and pay what it hopes will be the cost of replacing and improving Port Angeles' water works.

Although the Secretary's 1994 Report described the Elwha Act as a way of avoiding "a piecemeal approach to the problem," Congress forced funding to be segmented to such an extent that all we are sure of is this: the United States owns two fish-killing dams; the City of Port Angeles, long an opponent of dam removal, gets new water works costing somewhere in the \$75 million range; and it remains to be seen whether and when Congress will appropriate enough money for dam removal and other mitigation.² Right now it looks like the United States will not be able to get the dams out of the way of those patiently returning salmon—if ever—until at least 20 years after the Elwha Act was signed and a century after the first dam blocked the river.

9. Science Issues

I will not attempt to summarize the various "technical issues" that, in addition to legal and policy issues, had to be resolved. Instead, a full discussion can be found in the Environment Impact Statements published by the National Park Service. These can be found by linking to the Elwha River Restoration Documents webpage at:

<http://www.nps.gov/olym/naturescience/elwha-restoration-docs.htm>

10. Where Do We Go from Here?

"Torpedo the dams, full speed ahead." This inversion of Farragut's famous order, offered at a celebration of the Elwha Act's passage, seems appropriate. Like the fish who keep faith by returning to the base of the lower dam, the Tribe has waited patiently for the day when the dams come down. But the Congressional settlement that was supposed to be a faster alternative than litigation has bogged down in appropriations. Dam removal still remains in doubt as construction costs rise. And it is by no means certain that future administrations will request continued funding and future congresses will provide it.

² Restoring the river's natural sediment regime will raise surface and ground water elevations, requiring relocation of a tribal hatchery; elevation of a setback levee; and replacement of septic systems with sewage collection, transport and treatment alternatives.

NRLC 25th Anniversary Conference
Dam Removal from a Tribal Perspective
Russ Busch: draft of general outline

1. Introduction
 - a. The Elwha River's Geographic Setting
 - i. Olympic National Park
 - ii. The Elwha and Glines Canyon Dams
 - iii. The Elwha Reservation
 - b. Putting the Elwha into the Conference Context
 - c. My involvement
 - i. "Victory has 100 fathers..."
2. The Elwha Tribe's Treaty Fisheries
 - a. The Pre-Treaty Fishery
 - i. All Indigenous Anadromous Species
 - ii. Legendary Chinook Salmon
 1. 'I know, I saw it'
 - b. "Seemed to promise more and give the word of the nation for more..."
3. The Elwha Tribe's Homeland
 - a. Promise of a Reservation not Fulfilled
 - b. Elwha River Homesteads and Public Domain Allotments
 - i. The Dam Safety Problem
 - ii. The Tendency of Indian Lands to End up in Non-Indian Ownership
 - c. Refugees in Their Own Land
 - d. Acquisition of Reservation Lands
 - i. 1930s
 - ii. Current Program
4. The Brave New World of Hydropower and Industry
 - a. Construction of the Elwha Dam
 - b. Initial dam failure
5. Decline of the Fishery
 - a. 'We were out there trying to save those big fish'
 - b. The Hatchery Deal
 - i. Failure of the Elwha Chinook Hatchery
 - ii. Preservation of the Genetic Stock
 - c. How to Engineer a Sterile Ecosystem
 - i. Loss of Ocean-to-Glacier Nutrient Transport
 - ii. Loss of Habitat Structure and Diversity
 1. River
 2. Estuary
 - d. Fisheries Held on for a While
6. Listing and Loss
 - a. Pink, Chum and Sockeye
 - b. Coho and Steelhead
 - c. Chinook
7. Dam Safety Proceedings
 - a. Elwha Tribe's Efforts
 - i. Morrison and Maierle Dam Failure Simulations
 - b. FERC Steps Up
8. FERC Licensing Proceedings

NRLC 25th Anniversary Conference
Dam Removal from a Tribal Perspective

Russ Busch: draft of general outline

- a. Motions for Dam Removal
 - b. Interior Reluctance
 - c. USFWS/NMFS Studies
 - d. Mitigation with the Dams in Place
 - i. Feasibility
 - ii. Cost
 - e. The Sediment Problem
 - i. Sediments as Pollutants
 - ii. Sediments as an Ecological Resource
 - iii. Increased Flood Risks
 - iv. The Cost of Sediment Management
 - f. The FERC Jurisdiction Issue
 - i. FERC's Administrative Proceedings
 - ii. The Ninth Circuit Appeal
9. Settlement in Congress
- a. The Process
 - b. The Players
 - c. The Deal
 - i. Politics that “*is* Local”
 - ii. Politics that is not
 1. “the taxpayers in Ohio?”
 - d. The Elwha Fisheries and Ecosystem Restoration Act
 - i. Summary
 - ii. Hyperlink
10. Implementation of the Act
- a. Money
 - b. Water Rights
 - c. Mitigation
 - d. Delay
 - e. Irony
 - i. At this Point the US can only Fund Mitigation for the Project's Biggest Opponent
 - ii. The Projected Dam Removal Date Coincides with the 100th Year in which Chinook Salmon have Returned and Held at the Base of Elwha Dam
11. What do We do Now?