Dam Building and Removal on the Elwha: A Prototype of Adaptive Mismanagement and a Tribal Opportunity

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The Elwha Dams— Why All the Excitement?

The prospect of removal of the Elwha River dams is remarkable for four reasons—

- **The perpetrators got in through a devious wave of law-breaking that can only inspire warm thoughts of corrective justice.**
- **They destroyed ten magnificent runs of anadromous fish—among them the famed Elwha River chinook unequaled in size and strength on this earth.**
- **The dam removals afford opportunity for a scientific study of restoration that has the experts raring to go.**
- **Setting things right will be a celebratory event in Indian country that goes far beyond the Lower Elwha reservation that sits at the base of the Olympic Peninsula in the Straits of Juan de Fuca.**

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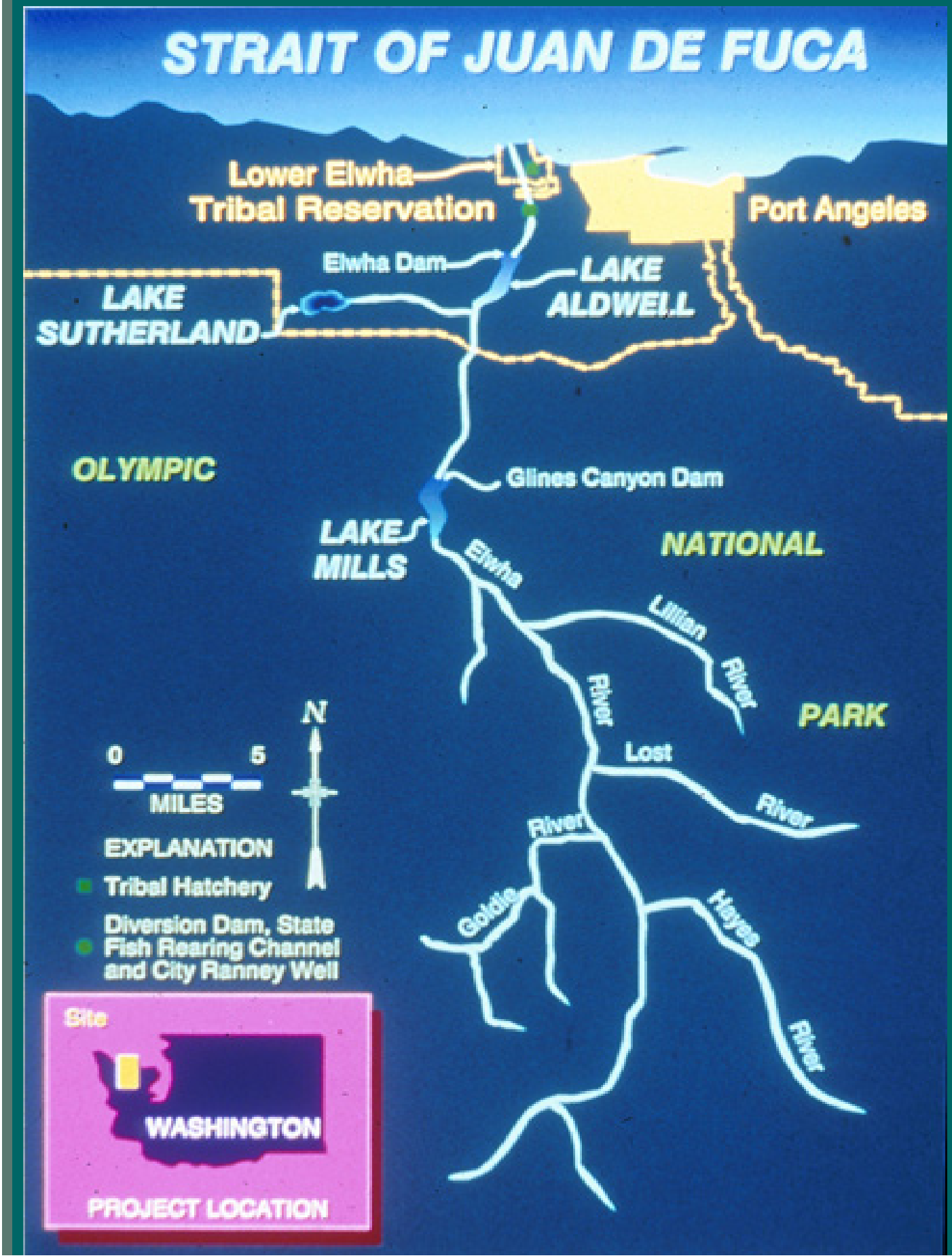
STRAIT OF JUAN DE FUCA
Lower Elwha Tribal Reservation
Port Angeles
Elwha Dam
LAKE ALDWELL
LAKE SUTHERLAND
OLYMPIC
Glines Canyon Dam
LAKE MILLS
NATIONAL
Elwha
Lillian River
River
PARK
Lost
River
River
Goldie
Hayes
River
N
0
5
MILES
EXPLANATION
Tribal Hatchery
Diversion Dam, State Fish Rearing Channel and City Ranney Well
Site
WASHINGTON
PROJECT LOCATION


594011-1-2


OLYMPIC POWER COMPANY'S WORKS AND CAMP
NEAR PORT ANGELES WASH.
P. WISCHMEYER - SEATTLE - P 19

The Elwha Dams— Awe in the Recollections of the Fish

the "narrow canyons" and "big rapids of the Elwha on the Olympic Peninsula acted as a biological filter, which selectively admitted only the largest and strongest spring Chinook to the spawning grounds. Over thousands of years, the run evolved into a race of giants, with individual fish commonly weighing over 75 pounds and many over 100 pounds. Over thousands of years these large spring Chinook salmon evolved to survive in the rugged habitat of the Elwha River."

Jim Lichatowich, SALMON WITHOUT RIVERS: A HISTORY of the PACIFIC SALMON CRISIS 132 (1999, Island Press, Wash., D.C.) (footnote omitted).

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The Elwha Dam— Giddy with the Prospects of Recovery

[A great experiment in restoration ecology awaits us at points] past the dam and the reservoir and into the hills and canyons of the Olympic National Park. I think of the river flowing through those green hills and canyons. It is still wild and nearly pristine, having been protected for over fifty years by the Olympic National Park. Because it has been protected, the river above the dams retains its natural attributes in an undisturbed condition, except one— the giant silver fish.

1999 Lichatowich at 135.

The Elwha Dam— Optimistic in the Trek Ahead and in the Eventual Outcome

"Today, a few spring chinook return to the Elwha River below the lower dam. The genes of those few surviving fish still hold the memory of the wild river crashing through canyons and flowing through mountain meadows heavy with the scent of cedar and fir. Locked away in those genes is the memory of survival in a rugged and beautiful landscape. The river and the fish have been separated for eighty years. But if the river is ever released from the grip of the Elwha Dams, the spring chinook will have little trouble recolonizing their former habitat. The studies and impact assessments have been completed, and it seems possible and feasible to restore the Elwha. All we need now is more political courage and a new vision for the salmon."

1999 Lichatowich at 135.

The Elwha Dam—Spectacular in Its Maladaptive Deception

"Dams on the Elwha River in Olympic National Park provide the classic case of enduring, illegally constructed dams. Located on the northern end of Washington's Olympic Peninsula, the Elwha harbored all five North American species of Pacific salmon, including legendary monstrous chinook that reached over 100 pounds. The river flows from the interior of the Olympic Mountains through a gorge before dropping to empty into the Strait of Juan de Fuca. The opportunity to dam the river at the gorge to produce power (for markets not yet then in existence) led Thomas Aldwell, a Canadian with backing by Chicago investors, to dam the Elwha. Built between 1910 and 1913, Aldwell's first dam lacked both provision for fish passage and a solid foundation. It failed because of engineering shortcomings but was soon rebuilt, again without the required fish passage."

David R. Montgomery, King of Fish: The Thousand-Year Run of Salmon 181-82 (2003, Westview Press, Perseus Books Group, Boulder, Colo.).

The Elwha Dam—Spectacular in Its Maladaptive Deception

"This illegal fish barrier created a political problem for the newly elected governor of Washington, Ernesst Lister. His creative fish commissioner, Leslie Darwin, came to the rescue. Darwin proposed to Aldwell's company that they build a fish hatchery instead of a fishway. Although this would not satisfy the law, Darwin saw a novel way around this technicality. He suggested that if the company built a hatchery that was physically connected to the dam, then the dam could be considered an official, state-sanctioned fish obstruction for the purpose of supplying the hatchery with eggs. Governor Lister liked the idea so much that he persuaded the state legislature to endorse building hatcheries instead of providing for fish passage at new dams."

David R. Montgomery, King of Fish: The Thousand-Year Run of Salmon 181-82 (2003, Westview Press, Perseus Books Group, Boulder, Colo.).

The Elwha Dam— Resentments It Has Caused

"In the case of the Elwha River the United States has allowed private hydroelectric developments to stop a treaty-guaranteed reservation fishery for 75 years. It has permitted exploitation of the river at the expense of the families who can least afford to underwrite it, increased the poverty of the Tribe by drastically reducing its principal economic resource, caused the depletion of reservation beaches, and forced the Tribe to live downstream from an unsafe Dam"

Lower Elwha Tribal Council 1989

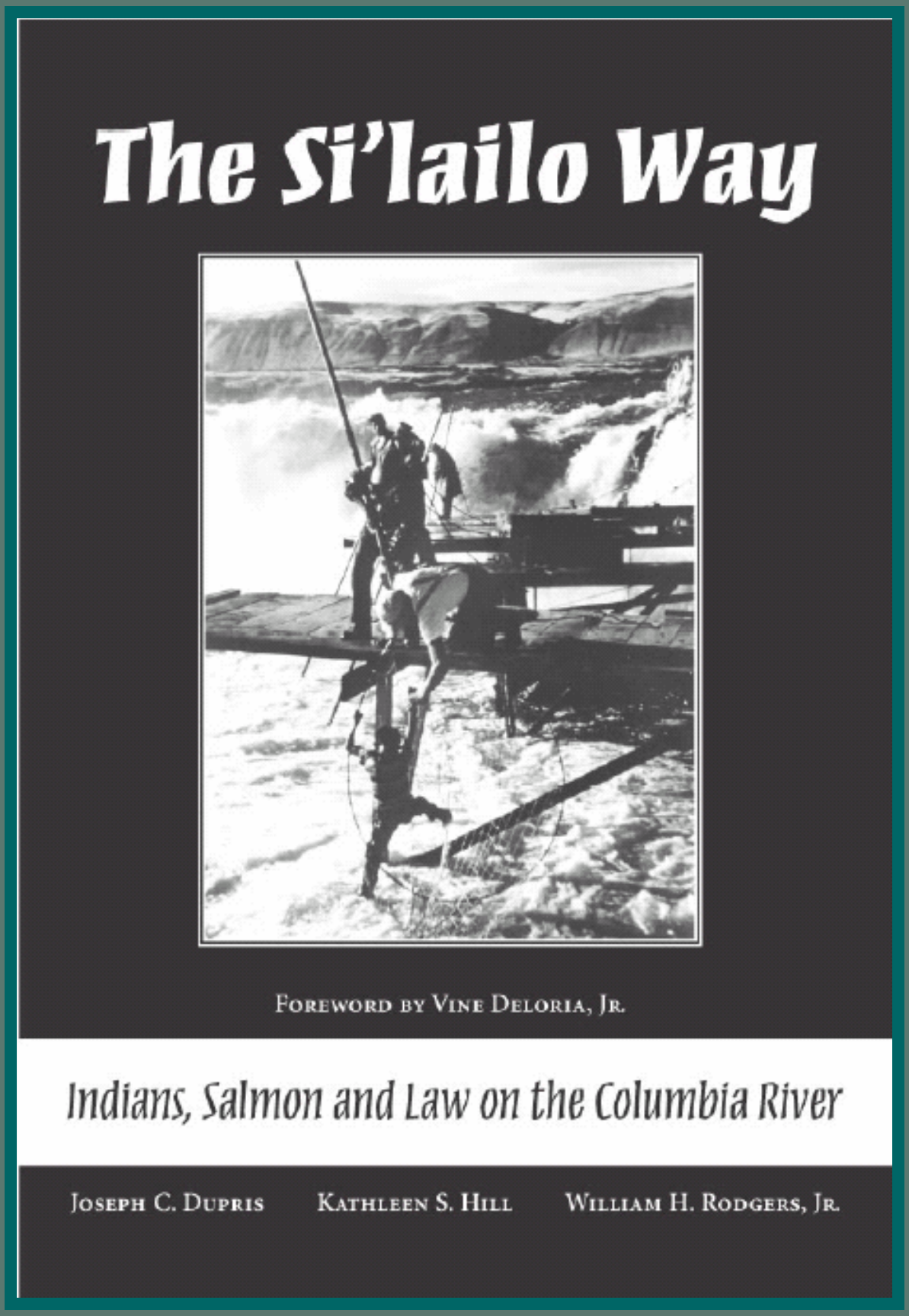
Brochure on Elwha River Restoration, Lower Elwha Klallum Tribe, Port Angeles, Washington, undated (but distributed Feb. 2005)

The Elwha Dam—Chronology

- 1855 Point-No-Point Treaty Signed
- 1859 Point-No-Point Treaty Ratified
- 1910 Construction of Elwha Dam Begins (RM 4.9)
- 1912 Foundation of Elwha Dam Fails
- 1914 Agreement reached to build a fish hatchery because dams were built in violation of fish laws requiring fish passage
- 1922 State Fish Hatchery Abandoned
- 1926 Construction of Glines Canyon Dam (RM 8.0)
- 1934 About 30 families were living on or near Ediz Hook (14 families were assigned land at the Lower Elwha.) Other families were forced off Ediz Hook.
- 1936 Land Purchased under the Indian Reorganization Act for Lower Elwha along the Elwha River.
- 1938 HR 4724 passes creating the "Olympic National Park"
- 1968 Lower Elwha Reservation is established.

The Elwha Dam—Chronology

- 1975 Tribal Fish Hatchery Built
- 1987 Federal Set-Back Levee built in the lower valley.
- 1992 Lower Elwha becomes a self-governance Tribe.
- 1992 President Bush signs Elwha River Ecosystem and Fisheries Restoration Act (P.L. 102-495)
- 1995-1999 Congress appropriates $37.9 million to fund federal acquisition by the DOI to purchase two dams.
- 2000 Congress appropriates $22 million for the first phase of the Elwha River Restoration Project.
- 2000 Commemorative Declaration signing
- 2000 DOI purchases two dams from Fort James
- 2000-2004 Congress appropriates $74.9 million for Elwha River Restoration Project


The Si'lailo Way
Foreword by Vine Deloria, Jr.
Indians, Salmon and Law on the Columbia River
Joseph C. Dupris
Kathleen S. Hill
William H. Rodgers, Jr.

The Stevens' Treaties

Nine Stevens Treaties (with Fishing Clauses)

(omitting Treaty with the Blackfeet)

- Treaty of Medicine Creek, 10 Stat. 1132 (Dec. 26, 1854), Kappler's Indian Treaties at 661;
- Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855), Kappler's at 669;
- Treaty with the Quinault and Quileutes, 12 Stat. 971 (July 1, 1855), Kappler's at 719;
- Treaty of Neah Bay, 12 Stat. 939 (Jan. 31, 1855), Kappler's at 682;
- Treaty of Point no Point, 12 Stat. 963 (Jan. 26, 1855), Kappler's at 674;
- Treaty with the Walla Walla, Cayuse, and Umatilla, 12 Stat. 945 (June 9, 1855), Kappler's at 694;
- Treaty with the Yakima, 12 Stat. 951 (June 9, 1855), Kappler's at 698;
- Treaty with the Nez Perces, 12 Stat. 957 (June 11, 1855), Kappler's at 702;
- Treaty with the Tribes of Middle Oregon, 12 Stat. 963 (June 25, 1855), Kappler's at 714.

The Stevens' Treaties

Seven Times to the U.S. Supreme Court

- United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905);
- Seufert Bros. Co. v. United States, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919);
- Tulee v. State of Washington, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942);
- Puyallup Tribes v. Dep't of Game, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) (Puyallup I);
- Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973) (Puyallup II);
- Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) (Puyallup III);
- Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

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

- The Indians' fishing right is a "property" right – as good as any "easement" known to law
- This property right cannot be obliterated by state licenses or federal homestead grants
- The treaty did not simply acknowledge that Indians had the same rights as other citizens; it promised something more
- The treaty rights were not a gift from the government; they were a holdback, a retention of what the Indians already had

The Will of Sampson Tulee

***Tulee v. State of Washington*, 315 U.S. 681 (1942)**

- **Bequeaths his fishing sites**
- ***"continued on and on, passing from generation to generation to the descendants of my children"***

"The Strongest Environmental Law in the World"

Treaty of Medicine Creek, 1854, art. 3:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians . . ."

VIRTUALLY IDENTICAL LANGUAGE in TREATY of POINT-NO-POINT

Treaty between the United States of America and the S'Kallums Indians, Concluded at Point no Point, Washington Territory, 12 Stat. 933, 934 (Jan. 26, 1855)

Article IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, that they shall not take shell-fish from any beds staked or cultivated by citizens.

The Boldt Decision

Demonstrators protest the Boldt Decision, September 1976) (*Seattle Times*)

"Attitudes" and United States v. Washington

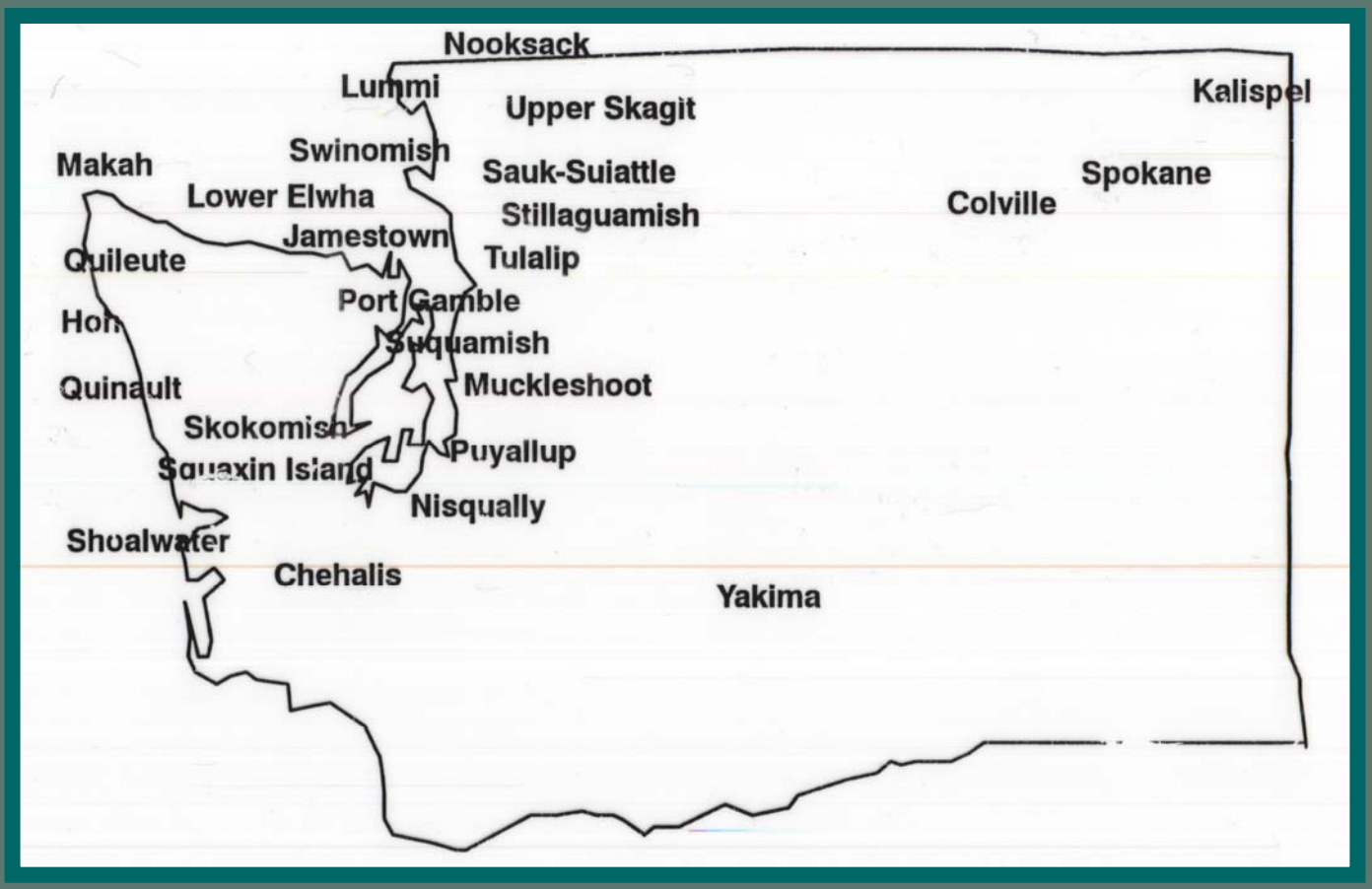
***See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979), quoting the U.S. Court of Appeals for the Ninth Circuit:**

The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases … , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

Treaty Interpretations: How Long Does it Take to Get it Right?

Issue	Date Prevailed	Time
Access	1905	50 years
New Technologies	1919	64 years
Displacements by Fixed Gear	1947	92 years
Self-Regulation	1974	119 years
Tragedy of the "Commons"	1979	124 years
Environmental Protection for the Fisheries	Not Yet	152 years
"Conservation" Manipulation	1969	114 years
"In Lieu" Sites	2002	63 years
Share of Revenues from Dams	1993	50 years

Tribes in Washington State



Historic Timeline on the Fall of Fisheries Protection on the Elwha

- 1848—Congress' no-obstruction law for the Territory of Oregon
- 1881—Before statehood, the territorial legislature makes it a crime to place "any obstruction" in the rivers of the territory frequented by salmon for spawning without constructing a "suitable fishway" (Territory of Washington, Code of 1881, § 1173)
- 1889-90—This protective measure is re-enacted by Wash. Sess. Laws 1889-90, p. 107, § 8 ("said dam or obstruction may in the discretion of the court, be abated as a nuisance").
- 1894—Thomas T. Aldwell buys a "homestead" on the Elwha with power site potential and makes plans for a hydroelectric dam and reservoir

Historic Timeline on the Fall of Fisheries Protection on the Elwha

- 1910—Adwell, together with partner, George A. Glines, form the Olympic Power & Development Company;
- 1912—Enormous fish losses begin;
- June 4, 1914, Washington Fish Commissioner Leslie Darwin writes to Thomas Aldwell, President, Olympic Power & Development Co.: "It is out of the question for us to allow another run to beat its brains out against that dam." (Bruce Brown, Mountain in the Clouds. A Search for the Wild Salmon 71 (1982).
- 1914—the "agreement" that would entail a hatchery (soon abandoned), the payment of $2500 (that did not happen) and housing for a hatchery manager (did not happen either) (Droker documents)

Historic Timeline on the Fall of Fisheries Protection on the Elwha

- 1915—Fishway requirements repealed by Fisheries Code (Laws of 1915, ch. 31); hatcheries allowed in lieu of fishways;
- 1946—Ernie Brannon, 51 years with the Department of Fisheries, catches a 70-pounder ("the last really big fish" and keeps it in his freezer for tourist pictures) (Brown at 103) ("By the time Brannon retired in 1973, the fish had been freezer burned to the consistency of styrofoam and had lost half of its original weight").

Salmon Law

Act of Congress establishing a Temporary Government for the Territory of Oregon, §12, 9 Stat. 323, 328 (Aug. 14, 1848):

And be it further enacted, that the rivers and streams of water in said Territory of Oregon in which Salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed to allow salmon to pass freely up and down such rivers and streams.

Territory of Washington Code of 1881:

SEC. 1173. Any person or persons who may build any dam of any kind, or place any obstruction of any kind for any purpose whatever, in any of the rivers in Washington Territory, frequented by salmon for the purpose of spawning, shall construct a suitable fish way by which said fish may reach the water above said dam, or obstruction; and it shall be unlawful for any person or persons to close any river of this territory by placing across the same any stakes, seines, drag or gill nets, which may prove an absolute bar to the passage of fish frequenting the same for the purpose of spawning. Any person violating the provisions of this section may be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail not exceeding one year.

Reenacted by Wash. Sess. Laws 1889-90, p. 107, § 8 ("said dam or obstruction may, in the discretion of the court, be abated as a nuisance"), repealed by the Fisheries Code of 1915 (Laws of 1915, ch. 31).

Let's bring forth a definition of ADAPTIVE MANAGEMENT

"Adaptation" means "shaped for survival"

"Structures and behaviors useful to an organism in a particular environment are adaptations"

"Woodpeckers (Darwin's favorite example) get their living by climbing tree trunks and extracting insects from bark. Adaptive features include a thick skull, 'shock absorber' neck construction, chisel bill, long, barb-tipped tongue, claws like grappling hooks and stiff tail feathers for stability."

Let's bring forth a definition of ADAPTIVE MANAGEMENT

But we know that every adaptation can unfold only within the constraints of history. This is why elephants cannot fly and never will:

> **"One of Darwin's enduring demonstrations was that adaptations are usually not marvels of perfection at all, but historical compromises. On closer examination they usually turn out to be jerry-built contraptions—products of unique, opportunistic history."**

Richard Milner, The Encyclopedia of Evolution: Humanity's Search for Its Origins 3, 4 (1990, Facts on File, Inc., New York, N.Y.).

Let's bring forth a definition of ADAPTIVE MANAGEMENT

One of these great "contraptions" is the Panda's Thumb

See William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers and Effective Law*, 65 U. COLO. L. REV. 25 (1993).

Let's bring forth a definition of ADAPTIVE MANAGEMENT

"MANAGEMENT" is the easy part of this definition:

"the act, manner, or practice of managing, supervising or controlling"

OR

"the persons who manage a business establishment, organization, or institution"

The American Heritage Dictionary 761 (Second College ed., 1982, Houghton Mifflin, Boston).

Thus "ADAPTIVE MANAGEMENT" is a BEHAVIORAL CHANGE USEFUL to an ORGANISM (think woodpecker or head of fisheries agency) that finds itself in a PARTICULARLY CHALLENGING ENVIRONMENT

1912
What was the first great adaptive management discovery on the Elwha?

It was that you could have environmental laws (with all the good feelings and charitable responses they draw) AND you could decline to enforce them, which could earn you another full roster of friends and supporters.

ADAPTIVE MANAGEMENT NUMBER ONE

Thus Fisheries Manager Darwin in 1912 discovers that you can have a fish-protection law (of some adaptive value) AND not enforce it at the same time (by calling it egg-collection) (also of adaptive value). Were he a woodpecker, it was as if he were blessed simultaneously with a "THICK SKULL" *and* a "LONG, BARB-TIPPED TONGUE"

This Darwin (Leslie not Charles) had stumbled upon the adaptive utility of the WIN-WIN, which can be defined as

> **"convincing self-deception that makes it appear that two antagonistic aims are simultaneously achievable."**

This WIN-WIN of the Elwha Darwin (environmental laws without enforcement) has proven to be one of the more robust breakthroughs in the history of adaptive management. For "managers" in all walks of life, this particular deceit has been likened in significance to the discovery of fire, upright gait and early speech in human evolutionary history.

1915

What was the second great adaptive management discovery on the Elwha?

It was that you could destroy the fish incidentally to economic development AND you could make the world better by promising a hatchery. This was another win-win—A gets the development and B gets HOPE for bigger fish and more fish.

ADAPTIVE MANAGEMENT NUMBER TWO

At this moment in 1915, Gov. Lister of Washington was sufficiently astute to describe the disaster on the Elwha not as a MOMENT of REGRET but as a CELEBRATORY OPPORTUNITY. He was convinced that the destruction of the Elwha stocks (offset, of course, by the *promise* of a hatchery) was not a bad thing but a good one. All stocks and every river needed the same chance to improve that he had brought to the Elwha. So Governor Lister found it conveniently adaptive to spread the myth that the IMAGINED PRODUCTIVITY of hatcheries could far eclipse nature's past efforts now only recorded in receding memories of the Elwha.

ADAPTIVE MANAGEMENT NUMBER TWO

A few entries in the mythological history of Adaptive Management Two—

"an almost idolatrous faith in the efficacy of artificial culture"

John M. Cobb, U.S. Bureau of Fisheries, 1917 [1]

"in its 120-year history, the net effect of hatcheries has been negative"

Independent Scientific Group, Northwest Power Planning Council, Sept. 10, 1996 [2]

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1. Pacific Salmon Fisheries, App. III to the Report of U.S. Commissioner of Fisheries for 1916, Department of Commerce, Bureau of Fisheries 94 (1917) (Bureau of Fisheries Document No. 839).

2. Return to the River: Restoration of Salmonid Fisheries in the Columbia River Ecosystem—Development of Alternative Conceptual Foundation and Review and Synthesis of Science underlying the Columbia River Basin Fish and Wildlife Program of the Northwest Power Planning Council 397 (Sept. 10, 1996) (Pre-pub. Copy).

ADAPTIVE MANAGEMENT NUMBER TWO

A few entries in the mythological history of Adaptive Management Two—

Hatcheries offered a win-win temptation politicians could not resist: river development and fish production. All could be overcome by "promising fish for everyone."

Joseph E. Taylor III, 1999 [3]

"science is clear and unambiguous; as they are currently operated, hatcheries and hatchery fish cannot protect wild stocks"

Dr. Robert Paine, University of Washington, 2004 [4]

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3. Making Salmon: Economy, Culture, and Science in the Oregon Fisheries, Precontact to 1960, at 75 (1999, U. Washington Press, Seattle)

4. Policy Review in *Science* Calls for Bush Administration to Protect Wild Salmon," Press Release, University of Washington & Dalhousie University, March 25, 2004.

ADAPTIVE MANAGEMENT NUMBER TWO

Like the myth of WIN-WIN, the myth of HATCHERY PLENTY proved enormously serviceable to the fish managers. The Washington Department of Game embraced it, refined it, practiced it, extended it, and drove itself to extinction believing in it. A clear case of a deliberately undertaken measure of ADAPTIVE MANAGEMENT that proved to be dreadfully maladaptive.

1992

What was the third memorable adaptive management discovery on the Elwha?

It was the invention of a PUBLIC-PRIVATE PARTNERSHIP, which can be defined as a

> "joint enterprise in which the public assumes all risks and costs while private entities enjoy all profits and benefits."

Elwha River Ecosystem and Fisheries Restoration Act

Pub. Law 102-495, 106 Stat. 3173 (Oct. 24, 1992):

- **authorizes the Secretary of Interior to acquire the Elwha and Glines Canyon projects upon a determination "that removal of the Project dams is necessary for the full restoration of the Elwha River ecosystem and native anadromous fisheries";**
- **declares that consideration for acquisition of the projects "shall be $29.5 million and no more";**
- **directs the Secretary to prepare a report on the acquisition of the projects and "plans for the full restoration of the Elwha River ecosystem and the native anadromous fisheries."**
- **The report was issued in June of 1994 and concludes that removal of the dams is the only alternative that would result in "full restoration" of the Elwha River ecosystem. The report includes an Elwha River Restoration Project Schedule that would include preparation of an Environmental Impact Statement.**

ADAPTIVE MANAGEMENT NUMBER THREE

When private and municipal interests are deeply implicated in the creation and ongoing management of environmentally destructive dam projects, the recommended ADAPTIVE response is a PUBLIC-PRIVATE PARTNERSHIP. This means the public (the U.S., here the Secretary of Interior and the National Park Service) undertakes—

1. **to pay full value to the private project owners ("$29 million and no more") to acquire the projects;**

ADAPTIVE MANAGEMENT NUMBER THREE

2. to give the private owners a full and complete release from the consequences of their ninety years of destructive management (Section 3(b): acquisition of the projects "shall be conditioned on a release of liability providing that all obligations and liabilities of the owner and the local industrial consumer to the United States arising from the Projects, based upon ownership, license, permit, contract, or other authority, including, but not limited to, project removal and any ecosystem, fish and wildlife mitigation or restoration obligations, shall, from the moment of title transfer, be deemed to have been satisfied."

ADAPTIVE MANAGEMENT NUMBER THREE

3. to assume all costs and liabilities associated with dam removal and restoration; and
4. to find the funds to do this within the normal budget appropriation process.

Section 4 (Ecosystem and Fisheries Restoration)

(a) [Effective after a report and following acquisition of the projects by the Secretary of the Interior], the Secretary is authorized and directed, subject to the appropriation of funds therefore; to take such actions as are necessary to implement—

(1) the definite plan for the removal of the dams and full restoration of the Elwha River ecosystem and native anadromous fisheries;

ADAPTIVE MANAGEMENT NUMBER THREE

(2) management of lands acquired . . . ; and

(3) protection of the existing quality and availability of water from the Elwha River for municipal and industrial uses from possible adverse impacts of dam removal.

(b) The definite plan . . . must include all actions reasonably necessary to maintain and protect existing water quality for the City of Port Angeles, Dry Creek Water Association, and the industrial users of Elwha River Water against adverse impacts of dam removal. The cost of such actions, which may include as determined by the Secretary, if reasonably necessary, design, construction, operation and maintenance of water treatment or related facilities, shall be borne by the Secretary. *Funds may not be appropriated for the removal of the dams unless, at the same time, funds are appropriated for actions necessary to protect existing water quality* (emphasis added).

Is it possible to imagine another version of PUBLIC-PRIVATE PARTNERSHIP? An ADAPTIVE MANAGEMENT road not taken?

[Section 107 of the Damfund Law, 42 U.S.C.A. § 9607(a)]:

Notwithstanding any other provision or rule of law [and subject only to limited defenses]—

(1) the owner and operator of a fish-destructive dam;

(2) any person who at the time of fish destruction owned or operated the dam;

(3) any person who by contract, agreement, or otherwise acquired energy from a fish-destructive dam, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe;

(B) any other necessary costs of response incurred by any other person; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss.

1992

What is the fourth remarkable adaptive management discovery on the Elwha?

This is the invention of PREEMPTIVE MITIGATION, which means that the mitigation must precede the project and not follow in its wake. As far as I know, this has never happened before in the history of environmental law. There have been 10,000 occasions where mitigation has followed the project—usually never catching up. this is the language from Section 4(b) I am talking about:

> **Funds may not be appropriated for removal of the dams, unless, at the same time, funds are appropriated for actions necessary to protect existing water quality.**

❖ **This is a functional "hold harmless" clause for the City of Port Angeles, the Dry Creek Water Ass'n, and the industrial users of Elwha River water.**

ADAPTIVE MANAGEMENT NUMBER FOUR— PREEMPTIMVE MITIGATION

In the entire history of U.S. dam-building, the "natural order" of things has been to build the project, *then* quibble over environmental mitigation and its implementation. In the strange new world of dam removal, adaptive management recommends an extraordinary new course of PREEMPTIVE MITIGATION. It works in three steps—

- **Abandon all inquiry as to whether illegal fish construction impairs or qualifies property rights secured**
- **Under a win-win theory protect completely all entitlements (water rights, power-generation capacities, all values of operation associated with the "incidental kill" of fish and destruction of habitat)**
- **Treating present owners as victims, insist that removal cannot happen without concurrent mitigation (Section 4(b) ("Funds may not be appropriated for removal of the dams, unless, at the same time, funds are appropriated for actions necessary to protect existing water quality").**

What Does the Lower Elwha Tribe get under the 1992 Elwha River Ecosystem and Fisheries Restoration Act?

— As background, remember that Senator Slade Gorton

- lost (in 1979) his overall campaign to destroy the treaty fisheries)
- had seen (starting in 1980 with Judge William Orrick's Phase 2 decision) an acceleration in use of the Indian treaties to protect fisheries habitat
- lost (by 1985) his 12-year campaign (begun while he was Attorney General) to divest the tribes of any and all hatchery fish

"The Announcement of our Benevolence"

***State v. Towessnute*, 89 Wash. 478, ____, 154 P. 805, 807 (1916) (Bausman, J.):**

. . . .

These arrangements were but the announcement of our benevolence, which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy, and whom we have so often permitted to squander vast areas of fertile land before our eyes.

The Value of Precedent

Honorable Frederick Bausman, Supreme Court of Washington, Feb. 4, 1916.

"At these spots the Indian shall have equal, but not more than equal rights"

Honorable Slade Gorton, Attorney General of Washington, Feb. 28, 1979, on the seventh occasion the Stevens' fishing treaties came before the U.S. Supreme Court.

"Our view is that the treaty language secured for the Indians a right to participate in a common fishery from which they otherwise might have been excluded. In other words, the treaties guaranteed in perpetuity an equal opportunity fishery."

Tribal References and Advantages in 1992 Elwha River Ecosystem and Fisheries Restoration Act

- Planning and design of the law permits removal of the project dams upon determination by the Secretary that removal "is necessary for the FULL RESTORATION of the Elwha River ecosystem and native anadromous fisheries and that funds for that purpose will be available for such removal within two years after acquisition" (§ 3(a))

  ("FULL RESTORATION" is undefined in the Act)

Tribal References and Advantages in 1992 Elwha River Ecosystem and Fisheries Restoration Act

- The U.S. "release of liability" to the "owner and local industrial consumer" does not extend to liabilities to the tribe (§ 3(b)):

  Provided, that the United States may not assume or satisfy any liability, if any, of the owner or local industrial consumer to any federally recognized Indian tribe nor shall such liability to the Tribe, if any, be deemed satisfied without the consent of such Tribe.

Tribal References and Advantages in 1992 Elwha River Ecosystem and Fisheries Restoration Act

- In the course of implementation of the plan to remove the dams and pursue "full restoration" of the ecosystem and fisheries, Congress denies a purpose to create "and entitlement for which a claim against the United States may be made under the Tucker Act"; the point here is to foreclose any claims under the Indian trust doctrine (§ 4(c)).

Tribal References and Advantages in 1992 Elwha River Ecosystem and Fisheries Restoration Act

- The Tribe gets a 99-year lease of lands on Ediz Hook, Clallum County, "for the purposes of the construction and operation of a tribal cultural facility, such as a longhouse or a museum, and associated interpretive and parking facilities" (§ 6(b)).
- With regard to preparation of the report regarding removal, tribes are mentioned in the consultation duties of the Secretary (§ 3(d)).

Tribal References and Advantages in 1992 Elwha River Ecosystem and Fisheries Restoration Act

- In the course of exploring alternatives in lieu of dam removal, the Secretary is obliged to act in ways "consistent with" the "rights of any Indian tribe secured by treaty or other Federal law, and applicable state law" (§ 3(b)(2)).
- Four million dollars are authorized to be appropriated "to acquire by purchase, and hold in trust in reservation status for the benefit of the Lower Elwha Klallum Tribe, lands in Clallum County, Washington, for housing, economic development, and moorage for the Tribal commercial fishing fleet."

1985

What was the fifth memorable adaptive management discovery on the Elwha?

This is the recognition that major aspects of the restoration challenge can be signed to the CONSENSUS ACCORD, which can be defined as an agreement among high parties (usually nations or states) to disguise their differences and paper them over with platitudes and nonsense.

ADAPTIVE MANAGEMENT NUMBER FIVE

What is a "CONSENSUS ACCORD"?

A jovial accord among parties who agree to agree, notwithstanding that these parties know little, represent nobody, and agree on nothing. The only persons with standing to object to CONSENSUS ACCORDS are soreheads, losers, spoilers not at the table, and India tribes. Hence, the proper ADPATIVE course for a fish manager is to surrender to a CONSENSUS ACCORD.

No one in his right mind would fight a CONSENSUS ACCORD.

CONSENSUS ACCORDS

One of the Great CONSENSUS ACCORDS in the Pacific Northwest is the—

PACIFIC SALMON TREATY

See the Northwest Salmon Crisis 273-76 (1996, Cone & Ridlington, eds., Oregon State Un. Press, Corvallis).

Will this CONSENSUS treaty make the world safe for the restored Elwha fish runs?

***Salmon Spawning & Recovery Alliance v. Gutierrez*, 2006 WL 2620421, at *1, 5 (W.D. Wash. 2006) (challenge to continued allowance under the Pacific Salmon Treaty of "the harvest by Canadian fishermen of excessive numbers of certain stocks of Chinook salmon from U.S. waters"; during renegotiations during 1999 the State Dep't consulted with NMFS that produced a BiOp extolling the PST as having "a positive effect on the survival of certain endangered Chinook salmon stocks because harvest rates would be reduced (as compared to fishing with no treaty)"; Canadian fisheries take 25% or more of U.S. ESA-listed chinook; "In 2005, NMFS issued a BiOp regarding Puget Sound fisheries, acknowledging that Canadian harvest of Nooksack River-origin Chinook is well above the rate necessary to rebuild that population" and that the combined U.S.-Canadian harvest rates were "too high" on other U.S. stocks to allow recovery; no standing on causation or redressability grounds because "it cannot be said that the BiOp or the Treaty is *causing* the overfishing"; (ed.) thus there is no way to improve any "action" that made things incrementally better but not good enough).**

(Michael Thorp, Eric Redman)

DELAY

John Ritter, "Washington will destroy dams to revive a river," U.S.A. Today, May 3, 2007:

. . . .

"The Elwha dams, built in the early 1900s, were to come down in 2009, until the National Park Service announced a delay last week until 2012 because water related projects will take longer than expected to finish. Four other dams in the Northwest will be cleared away over the next three years."

. . . .

"The Elwha River project, which won state approval in March, could be a model for how to bring a river back to life, environmentalists and biologists say. Hundreds of small dams have been torn out around the country in recent years but none as high as the 210-foot high Glines Canyon, the taller of the two on the Elwha.

What are the two most recent ADAPTIVE MANAGEMENT techniques to appear on the Elwha?

Number six is BASELINE OBLITERATION, which can be defined as a conscious avoidance of understanding of the way things were and an elimination of monitoring to determine existing conditions. Perpetuating ignorance on these subjects is adaptive because it prevents critics from evaluating success or failure.

What are the two most recent ADAPTIVE MANAGEMENT techniques to appear on the Elwha?

Number seven is the enactment of DUPLICATIVE LAWS, which is a win-win if ever there was one. You get credit for the same law twice. Gov. Gregoire of Washington has put the weight of her office behind a sappy Puget Sound Partnership, which promises to deliver "fishable / swimmable" waters in Puget Sound by 2020.

BASELINE

How fast is the decline?

Jeremy B.C. Jackson, Scripps Institution of Oceanography, who popularized the idea of "shifting baselines" in a 2001 Science article chosen by Discover magazine as the most important discovery of the year:

"Virtually nothing remains of the vibrant, diverse coral reef communities I helped describe [in Jamaica] in the 1970s," says Jackson.

Causes of the Decline? BASELINE

Jackson et al., "Historical Overfishing and the Recent Collapse of Coastal Ecosystems," 293 Science 627 (July 27, 2001)

> **"Ecological extinction caused by overfishing precedes all other pervasive human disturbance to coastal ecosystems, including pollution, degradation of water quality, and anthropogenic climate change. Historical abundance of large consumer species were fantastically large in comparison with recent observations."**

How sweeping is the decline?

Jeremy B.C. Jackson, :

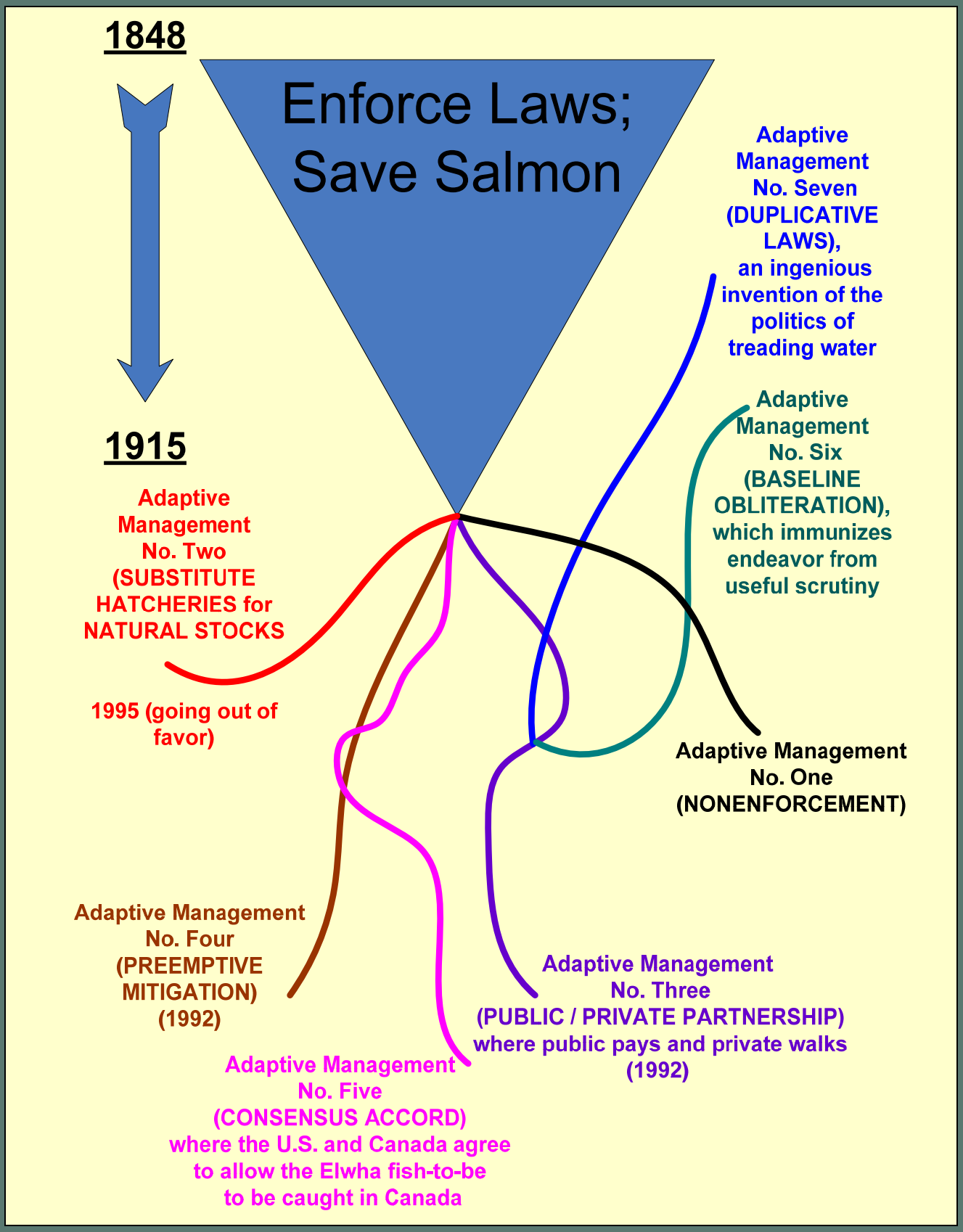
"Between overfishing, coastal development and coral bleaching, the ecosystem has been degraded into mounds of dead corals covered by algae in murky waters."

Warren Cornwall, "Huge task faces Puget Sound's anointed savior," Seattle Times, May 20, 2007 (on the new "kingpin" of the Puget Sound Partnership):

"Ruskelshouse is quick to say he's not advocating 'the Seattle way'—talking forever but avoiding action. But his style is clearly defined by bringing together groups with broadly varying interests and opinions to work together.

'I don't personally believe you can force the individual to change the way they interact with the environment through government,' he said last week in his downtown office."

Adaptive Management on the Elwha



Ivy Anderson, Protecting the Salmon: An Implied Right of Habitat Protection In the Stevens Treaties, and Its Impact on the Columbia River Basin, 24 Vt. L. Rev. 143 (1999) (has Gorton "threat" to use Elwha funds to prevent attacks on Columbia River dams).

William T. Pyle, Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers, 14 Stan. Envt'l L. J. 97 (1995).

Phillip M. Bender, Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest, 17 J. Land Res. & Envt'l L. 189 (1997).

Marc Reisner, The New Water Agenda: Restoration, Deconstruction, and the Limits to Consensus, 20 J. Land Res. & Envt'l L. 1 (2000).

There is a lawsuit brought by the Indian tribes to enforce the STRONGEST ENVIRONMENTAL LAW ever brought to bear to protect Puget Sound

- The "Culvert Case" (*U.S. v. Washington*), filed Jan. 2001, alleged –
  - improperly maintained culverts blocked access to at least 249 linear stream miles of habitat
  - 407,464 square meters of productive salmon spawning habitat

"Culvert Case," continued

- 1,619,831 square meters of productive salmon rearing habitat
- loss of 200,000 adult salmon we otherwise would have

Tribes v. Road Builders

— let me add another story on tribal motivation to protect Puget Sound and its waters

This case was argued before Hon. Ricardo S. Martinez in the U.S. District Court in Seattle on February 1, 2007

- Was the Governor there to file a supporting brief on behalf of the tribes? NO.
- Or the Puget Sound Partnership? NO.
- Or interested legislators? NO.
- An Amicus Brief was filed by the Washington Association of Counties—and this group opposed what the tribes were trying to accomplish

Washington Association of Counties, Memorandum in Support of the State's Motion for Summary Judgment, Sept. 29, 2006, p. 6.

"The Tribes are seeking to force the State, and presumably later, the counties, to immediately repair all fish-blocking culverts. . . . [Absent specific language in the treaties], neither the State nor the counties can be found to have a duty to immediately return every culvert to a condition that allows for the same flow of fish as existed prior to the erection of the culvert. . . ."

Washington's Opposition to [Tribes'] Motion for Partial Summary Judgment [in the Culvert Case], Sept. 27, 2006, pp. 18, 19:

"The Tribes' claim, carried to its logical conclusion, would give them a right to demand restoration of 1855 conditions and to control all future land management decision in the *United States v. Washington* case area. . . . The potential scope of the right sought by the Tribes cannot be underestimated."

NOAA, Final Rule Listing Determination for Puget Sound Steelhead, 72 Fed. Reg. 26722, 26732 (May 11, 2007):

"the principal factor for decline for Puget Sound steelhead is the present or threatened destruction, modification, or curtailment of its habitat or range. Barriers to fish passage and adverse effects on water quality and quantity resulting from dams, the loss wetland and riparian habitats, and agricultural and urban development activities have contributed and continue to contribute to the loss and degradation of steelhead habitats in Puget Sound."