

**Written Testimony
To the Subcommittee for Indigenous Peoples of the United States,
Committee on Natural Resources,
U.S. House of Representatives**

**Legislative Hearing on H.R. 8286, To take certain Federal land in the State of Washington
into trust for the Lower Elwha Klallam Tribe**

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Chairwoman Leger Fernandez, Acting Ranking Member Obernolte, and distinguished members of the Subcommittee for Indigenous Peoples of the United States, thank you for this opportunity to submit written testimony on H.R. 8286, which would take certain federal land in the State of Washington into trust for the Lower Elwha Klallam Tribe.

I also wish to express my gratitude to Rep. Kilmer for introducing this bill and Rep. Cole for co-sponsoring. And we appreciate the work of our partner at the National Park Service in contributing to the development of this bill.

My name is Frances Charles. I serve as the Chairwoman of the Tribal Council for the Lower Elwha Klallam Tribe. I have been elected to serve on the Tribal Council from 1993 to the present, and for the past twenty years my people have elected me as the Chairwoman of the Tribal Council. During all of this time, the removal of the dams on the Elwha River and the restoration of the ecosystem and salmon fisheries has been a critical goal of the Tribe, to which we have devoted an extraordinary amount of our time, expertise, and resources. Together, with our partner the National Park Service, we have accomplished many monumental objectives but much work remains to fulfill the promise of restoring the ecosystem and the salmon fisheries as made possible by the Elwha River Ecosystem and Fisheries Restoration Act of 1992. This is one of the greatest ecosystem restoration projects ever undertaken in the United States, and the Lower Elwha Tribe is proudly committed to seeing this effort through to the end, when restored runs of our salmon relatives will, after over 100 years, again fill the Elwha River with life.

1. H.R. 8286, to take certain Federal land into trust for the Lower Elwha Klallam Tribe

This bill will transfer certain federal land on the Elwha River on the Olympic Peninsula in the State of Washington into trust and reservation status for the Lower Elwha Klallam Tribe (Lower Elwha or Tribe). Section 3 of the Elwha River Ecosystem and Fisheries Restoration Act, P.L. 102-495, 10 Stat. 3173, October 24, 1992 (EREFRA), authorized the Secretary of the Interior (Secretary) to acquire the property necessary to carry out the dam removal and the restoration of the ecosystem and fisheries on the Elwha River. Subsection 3(c)(3) of EREFRA directed the Secretary to address the suitability of, among other things, the transfer to Lower Elwha of lands acquired for the project outside of the boundaries of Olympic National Park.

Most of the parcels subject to this bill (approximately 1,061 acres) are those that the Secretary acquired for the demolition of the Elwha Dam and ecological restoration of the former Lake Aldwell reservoir that had been impounded by that dam.¹ These lands (often referred to as Project Lands or Aldwell Lands) are located beginning at 4.9 miles upriver from the mouth of the Elwha River. The Lower Elwha Tribe has performed the largest share of the restoration work on these parcels, including revegetation of the former reservoir site and operation of on-reservation hatchery programs that have preserved the native Elwha genetics of four species of anadromous fish.²

The remaining lands transferred by this bill are the three Hill parcels (approximately 16.83 acres) and the Halberg parcel (approximately 4.8 acres), which the Secretary acquired to construct the pipeline conveying surface water to the Tribe's new fish hatchery – the House of Salmon – which was built with EREFRA funds as mitigation for the dam removal project.³ Water for the new hatchery is supplied from the City of Port Angeles's new surface water intake and water treatment plant, which were constructed as mitigation to protect the City's municipal

¹ The Lake Aldwell Parcels are identified on the map entitled Olympic National Park Proposed Transfer of Elwha Lands, Map Number 149/178020, December 2021.

² The Tribe's original hatchery was rendered unusable by the elevated water table resulting from dam removal. The new Lower Elwha fish hatchery maintains programs for Steelhead trout, Coho, Chum and Pink salmon. The Washington Department of Fish and Wildlife (WDFW) maintains the Elwha River Chinook salmon hatchery program.

³ The Hill and Halberg parcels are also identified on Map Number 149/178020.

and industrial water supply. The Hill and Halberg parcels are contiguous to the Tribe's current reservation boundary and adjacent to the Tribe's fish hatchery pipeline and rights-of-way for the operation and maintenance of that pipeline. These small parcels will be managed in accordance with existing conservation requirements applied to the contiguous reservation lands along the Elwha River corridor, which do not allow hunting given their proximity to tribal buildings, residential areas, and public roadways.

This bill is an important final action to the dam removal project and the restoration of the fisheries. The bill will uphold the federal government's trust and treaty obligations to the Tribe by protecting the federal investment in restoration and conservation of the Elwha River and allowing for the continued restoration of the river ecosystem and fisheries under the Tribe's management. This bill will also protect sacred and cultural homelands by restoring them to the stewardship of the Tribe. Lower Elwha is the only tribe that has been involved in this project and has done more in-water and on-ground work than any agency, including on the very lands transferred by this bill.

2. The Lower Elwha Klallam Tribe

The Tribe is located on the North Olympic Peninsula in the northwestern corner of Washington State. Our Reservation is at the mouth of the Elwha River where it meets the Strait of Juan de Fuca, a body of marine water that also serves as the international boundary with Canada. Our people have inhabited the territory along the Elwha River from the mouth to the upper basin in the Olympic Mountains since time immemorial.

In 1855, the Tribe, expressly represented by the village of Elwha, entered into the Treaty of Point No Point with the United States. While ceding all of our homeland territory to the United States, the Tribe reserved its pre-existing aboriginal rights to fish, hunt and gather in those lands and waters, and agreed to other promises made by the United States.

After the Treaty, the Lower Elwha were essentially a landless people – living as best we could in the Elwha watershed and along Port Angeles Harbor – until the Secretary of the Interior acquired several hundred acres of land at the mouth of the Elwha River in trust for us in 1936-37, under authority of the newly enacted Indian Reorganization Act of 1934. This land was formally proclaimed as the Lower Elwha Reservation in 1968.

It was not until 1974 that the State of Washington's suppression of our treaty rights began to come to an end with the successful fishing rights litigation *United States v. Washington*, which resulted in the well-known Boldt Decision of 1974 that the Treaty Tribes have a right to harvest half of the salmon runs. *U.S. v Washington* is still going on today and the 20 Treaty Tribes have become co-managers, with the State of Washington, of the fishery resources, with sophisticated management and regulatory capabilities.

In 1978, the federal court in *U.S. v Washington* began, in a series of decisions, to delineate Lower Elwha's Usual and Accustomed treaty fishing area (commonly referred to as "U&A"). The first decision is most relevant for purposes of this bill, that Lower Elwha's adjudicated U&A includes, but is not limited to, the waters of the Strait of Juan de Fuca and all the streams draining into it from the Hoko River eastward to the mouth of Hood Canal. *U.S. v Washington*, 459 F.Supp. 1020, 1049 (W.D.Wash. 1978). This Lower Elwha treaty fishing area thus includes the Elwha River and other rivers to the east and west.

3. The Elwha River Dams

During the period between the 1855 Treaty and the 1937 relocation of Elwha Indians to the Elwha River trust lands, one of the major hardships to visit the Tribe began to unfold. In the early 1900s, two dams were built on the Elwha River to provide hydroelectric power to the City of Port Angeles and the booming timber industry. Up until then, the Elwha River had been the most productive salmon river on the North Olympic Peninsula, and was one of few rivers with all six species of anadromous fish—Chinook, Sockeye, Coho, Chum and Pink salmon, and Steelhead trout. The dams were constructed without fish passage, a clear violation of State law at the time, and immediately blocked access to 95% of the river's pristine salmon habitat, seventy-five miles of river and stream. This is illustrated in two maps attached at the end of this testimony. Predictably, this resulted in the immediate decimation of the anadromous salmon and trout populations. The loss of those fisheries, which have significant cultural and economic meaning to the Tribe, was an obvious infringement of the Tribe's treaty fishing rights and proved devastating.

The Elwha Dam built in 1913 inundated Indian Valley under the reservoir that became known as Lake Aldwell. This valley, which comprises the lands to be transferred by this bill, is an important cultural and ceremonial location to the Tribe that includes our ancestral village of

Tee-tee-ulth, a once prolific fishing site for Elwha Chinook and Sockeye salmon located on the Elwha River at the mouth of Indian Creek. In addition to Tee-tee-ulth, the valley is the location for other seasonal fishing and hunting camps, lithic processing sites, and sacred lands, including land known as the Creation Site – the location where the Creator bathed and blessed the Elwha people.⁴ Uncountable generations of our people traveled to this site to purify themselves and receive spiritual guidance, a practice that has been restored by the removal of the Elwha Dam.

4. Lower Elwha’s Fight Against the Dams

In the 1970s and 80s, the Tribe challenged the relicensing of the dams on the Elwha River by the Federal Energy Regulatory Commission (FERC).⁵ We officially intervened in the FERC relicensing proceedings for the Elwha Dam in 1976. After we did so, the National Park Service (NPS), and the Washington State Department of Ecology (Ecology) and Department of Fish and Wildlife (WDFW) also intervened. Other federal and state agencies intervened as the challenged proceedings continued. In 1978, the Elwha Dam failed a safety inspection, which prevented the expenditure of funds on the Lower Elwha Reservation for important programs related to flood control, housing, and economic development. In response, the Tribe hired its own consulting and engineering firms and pushed FERC into issuing an emergency dam safety order requiring the repair of the dam.

In the 1980s, the Tribe turned its attention to the issue of fish passage, and the fight expanded. It was clear to the Tribe, the federal agencies, and the conservation groups involved that continued operation of the dams, even with mitigation for fish passage, could never meet the resource goals of the federal agencies, the state, or the Tribe. In 1986, the Tribe intervened in the FERC relicensing of the Glines Canyon Dam, and shortly thereafter the NPS intervened on the basis that the initial construction and continued operation within the boundaries of Olympic National Park was a violation of numerous federal laws.

⁴ Indian Valley is the subject of a Traditional Cultural Property (“TCP”) study being conducted on behalf of the Elwha Klallam as mitigation for the Federal Highway Administration and Washington State Department of Transportation Highway 101 Elwha River Bridge Replacement Project.

⁵ Appendix B “Federal Licensing Chronology” to the Elwha Report provides a summary of the challenges to the dams on the Elwha River. The Elwha Report: Restoration of the Elwha River Ecosystem & Native Anadromous Fisheries, U.S. Department of the Interior (January 1994).

Lower Elwha was one of the most assertive parties seeking removal of the dams. We led the charge, prompting federal and state agencies to intervene. It is important to note that Lower Elwha stood alone as the only Tribe in the fight against the dams. Other tribes may claim some rights or interests in the Elwha River fisheries, but none of them has actively engaged or devoted resources, time, and the hard work that was necessary to achieve dam removal and the ongoing process of ecosystem restoration.

The focus on dam removal as the only viable solution, as advocated by the parties intervening in the FERC proceedings, also posed the potential loss of jobs in the City of Port Angeles, Washington, and surrounding community. Congress recognized that this conflict between the environment, treaty rights, and jobs required a negotiated resolution that could not be achieved through settlement of the litigation. Only compromise achieved through congressional action was capable of restoring the fisheries, protecting the treaty rights of tribes, and minimizing economic impact on the local community. Congress stepped in to bring closure to this long-standing issue.

5. The Elwha River Ecosystem and Fisheries Restoration Act of 1992

In 1992, Congress passed EREFRA to remove the dams and restore the river ecosystem and fisheries. In order to remove the dams, the hydroelectric project lands – dam and reservoir sites –were acquired by the Department of Interior.⁶ The project lands located outside of Olympic National Park that were acquired for this purpose (the Aldwell Reservoir lands comprising 1061 acres) are the subject of this bill (along with the smaller, miscellaneous Hill and Halberg parcels). EREFRA section 3(c)(3) specifically included provisions for Interior to protect the federal investment in restoration of the river and its fisheries by transferring lands to Lower Elwha in trust for housing, cultural, or economic purposes.

EREFRA section 3(c)(4) also required Interior to protect the water supply from the Elwha River for the City of Port Angeles and its industrial user. As mitigation for dam removal, the City's water intake had to be relocated and a treatment plant constructed to protect water quality from the heavy sediment loads that would be released from behind the former dams.

⁶ The Secretary of Interior's authority under EREFRA was transferred to the National Park Service by Secretarial Order No. 3212 (February 29, 2000).

Also as mitigation, the Tribe's fish hatchery was replaced and relocated with a new facility designed to prevent the extirpation of the Elwha River anadromous fish stocks. As a result, the water intake for the fish hatchery was moved and co-located with City's new surface water intake. NPS thus acquired the Hill and Halberg parcels (approximately 21 acres) for construction of the pipeline that supplies the new fish hatchery with surface water supply from the City's new intake. The transfer of these parcels in the bill to the Tribe is a necessary prerequisite so the NPS can transfer the pipeline infrastructure and rights-of-way for its operation and maintenance.

6. Status of Dam Removal and Ecosystem and Fisheries Restoration; Endangered Species Act Considerations

The two dams were removed from 2011-14 and the work of restoring the ecosystem and fisheries is ongoing. Even prior to demolition, the Tribe's stream and habitat restoration crew had built numerous Engineered Log Jams (ELJs) in the river to direct the energy of the newly liberated river and create various micro-habitats and refugia for fish restoration. With the dams gone, an enormous volume (21 million cubic yards) of accumulated sediment has been released, with much of the sand ending up as a new beach, 90 acres and still growing, and some of it drifting eastward to replenish Ediz Hook, the spit that encloses Port Angeles Harbor. The Tribe's Revegetation Crew has planted native trees and shrubs, and eradicated noxious weeds, throughout the newly dewatered former reservoir sites, not only on the Aldwell lands transferred by this bill but also the upper site behind the former Glines Canyon Dam site within Olympic National Park.

Fish are beginning to recolonize the upper watershed above the Glines site. But the total moratorium on fishing that began in 2011 remains in effect. It will take more salmon life cycles before significant fishing can resume. Inter-agency fisheries scientists, including the Tribe's, have identified four phases for fisheries recovery: Preservation, Recolonization, Local Adaptation, and Sustained Natural Production. Adaptive management of fish recovery is governed by Biological Opinions issued by the National Marine Fisheries Service (NMFS or NOAA Fisheries). Triggers for moving from one recovery phase to the next are based on surveys of returning fish, including fish numbers and natural spawning locations. At this point, recovery is in the process of moving from Preservation to Recolonization.

Compliance with the requirements of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA), has been a critical long-term consideration in Elwha River dam removal and fisheries restoration, particularly with respect to the use of fish hatchery and rearing facilities. In order to remove the very dams responsible for decimation of the salmon runs, the Tribe and the United States had to ensure that doing so would not result in “jeopardy” – in the language of the ESA – to listed fish or undue harm to the remnants of the native Elwha anadromous fish stocks.⁷ Release of the accumulated sediment posed a serious risk of extirpating the remaining native fish, because it could wipe out a whole year-class or generation of juveniles during the time they spend in the river maturing to a point when they are ready to out-migrate to salt water. Accordingly, as a key element of its ESA “no jeopardy” determination for dam removal in July 2012, NOAA Fisheries required the Tribe and the State of Washington to operate their existing hatchery and rearing programs as a “gene bank,” to preserve the unique native genetics of Elwha River anadromous fish.

Indeed, the Tribe has been long at work to ensure the survival of these sacred species. Since the 1970s, the Tribe has operated an on-reservation hatchery with programs for several anadromous species, including stocks still carrying native Elwha River genetics. The Tribe’s old hatchery was rendered unusable due to an elevated water table after dam removal, and EREFRA provided funding for construction of a new state-of-the-art hatchery at river mile 1.2. The WDFW also operates its rearing facility on the Elwha River, 2.5 miles upstream of the Elwha hatchery, where it raises Chinook salmon hatched from Elwha River eggs at an out-of-watershed facility. The goal of Elwha restoration is of course to ensure that all native species be preserved and eventually reproducing naturally in the seventy-five miles of pristine habitat made accessible by dam removal, such that hatchery production may eventually become unnecessary.

The Tribe’s four hatchery programs and the State’s single program are operated in accordance with Hatchery and Genetics Management Plans (HGMPs) that have been reviewed and approved by NMFS in a December 2012 Biological Opinions under the ESA. From 2012-

⁷ Anadromous fish are those that begin their life cycle in fresh-water streams, migrate to the ocean for several years, and return to their natal streams to reproduce. The Elwha River historically produced all five species of Pacific Salmon as well as Steelhead. Currently, Puget Sound Chinook salmon and Puget Sound Steelhead are listed as threatened under the ESA.

2015, the Tribe, Interior, and NMFS partnered to successfully defend a major ESA lawsuit challenging the adequacy of these HGMPs and NMFS’s Biological Opinions.

Clearly, Lower Elwha has made a major commitment of time, resources, and its own expertise to work closely with our agency partners to make Elwha River dam removal and ecosystem and fisheries restoration a major success story.

7. Disposition of Project Lands to Protect Federal Investment in Restoration

Section 1(c) of H.R. 8286 expressly preserves the requirement of EREFRA subsection 3(c)(3), that following dam removal – and “for purposes of protecting the federal investment in restoration” of the Elwha River and its fisheries – the Aldwell Lands are to be managed in accordance with the policy of Section 1(b) of Public Law 90-542, the Wild and Scenic Rivers Act, 16 U.S.C. §1271, “except that modifications necessary to restore, protect, and enhance fish resources...are hereby authorized.” That subsection of EREFRA also identified the Tribe as one of four entities eligible for transfer of these lands, in trust and reservation status. The other three eligible entities were: NPS, for inclusion in the National Park System; the United States Fish and Wildlife Service (USFWS), for addition to the National Wildlife Refuge System; and the State of Washington, for development and use by the State. Neither NPS nor the State desired the lands. The USFWS conducted a feasibility study and concluded that these lands are of insufficient size and lacking the wildlife and fish values necessary for a National Wildlife Refuge. Accordingly, NPS has identified Lower Elwha as the only authorized entity willing and able to take on the management of these lands to protect the federal investment in Elwha River restoration.

Indeed, Lower Elwha stands willing and eager to take on the stewardship and management of these ancestral lands, to fully realize the promise of a restored ecosystem and fisheries. Any use of these lands for tribal housing or economic development purposes, as provided for in EREFRA, will be conducted in accordance with the need to restore, protect, and enhance the fish resources and the Elwha River as the first priority.

8. Support from State Agencies and Local and Tribal Governments

The Tribe has received letters of unconditional support from the Makah Tribe, City of Port Angeles, and Washington Department of Transportation, all recognizing the years of hard

work put in by the Tribe and the cultural importance of these lands to the Elwha Klallam. We understand that the letters have been made part of the record for H.R. 8286.

A joint letter of conditional support has been submitted by the Jamestown and Port Gamble S’Klallam Tribes (S’Klallam Tribes). This letter supports the transfer of the project lands to Lower Elwha – while acknowledging the presence of the Elwha Creation Site and Elwha village of Tee-tee-ulth – but also seeks protection of the S’Klallams’ understanding of their treaty rights. It must be noted that the hard work of dam removal by Lower Elwha and NPS as its primary partner has already advanced the protection of treaty rights of all Tribes, including the S’Klallam. Ultimately, the ongoing efforts to restore the ecosystem and fisheries will result in the increased natural production of anadromous fish and harvest opportunities in those fisheries.

9. Protection of Treaty Rights Through Continued Adaptive Management and Legislative Savings Provisions in EREFRA and H.R. 8286

The protection the S’Klallam Tribes seek is already accounted for in EREFRA. The savings clause in subsection 8(b) of EREFRA provides: “Nothing in this Act shall affect the rights of any Indian Tribe secured by Treaty or other law of the United States.” Thus, the provision in EREFRA that allows for the transfer in trust of lands to the Elwha Klallam for tribal housing, cultural and economic development purposes, as well as the provision recognizing the transfer of the Aldwell lands, cannot be said to affect the S’Klallam Tribes’ treaty rights.

In addition, the savings clause (or disclaimer) that Rep. Kilmer has proposed for this bill, with which Elwha Klallam concurs, provides: “Nothing in this Act shall be interpreted as affecting treaty rights under the Treaty of Point No Point.” The inclusion of this language in the bill will further protect the S’Klallam Tribes from any effect that the transfer of the project lands in trust and reservation status for the Elwha Klallam may otherwise have on those rights. These lands proposed for transfer to the Tribe in the bill were previously under federal ownership, which likewise, would not have extinguished tribal treaty rights. Change in title and vesting of reservation status to the Tribe similarly is not an act of abrogation of treaty rights and the disclaimer language makes that clear.

Moreover, EREFRA subsection 3(c)(3) requires that the transfer to Elwha Klallam of lands in trust be done in accordance with a management plan to be prepared by the Tribe in consultation with the Secretary of Interior. The management plan will be consistent with both the

purposes of the transfer of the lands in trust for the Elwha Klallam enumerated in subsection 3(c)(3), including tribal housing, cultural and economic development, and the protection of the federal investment in restoration. The ongoing restoration requirements will be governed in large part by the Biological Opinions and adaptive management practices explained in Section 6 above.

For purposes of providing the S’Klallam Tribes with the protection they are seeking for the exercise of their treaty rights, the consultation with Secretary of Interior on the management plan will provide an opportunity for the S’Klallam Tribes to engage on those aspects of the plan that involve fishing, hunting and gathering in a manner consistent with: (1) the respective treaty rights of the Elwha Klallam and the S’Klallam Tribes; (2) the restoration of the lands, ecosystem, river and fisheries; (3) the purposes for the transfer of land in trust affected by this bill; and (4) the trust responsibility of the United States toward the three Tribes.

Nothing further needs to be added to this bill. The protections sought by the S’Klallam Tribes for the exercise of their treaty rights under the Treaty of Point No Point are accounted for. No new legislative language is needed beyond the inclusion of the savings clause that Representative Kilmer proposed for this bill, which is the standard disclaimer language used by Congress on a consistent basis.

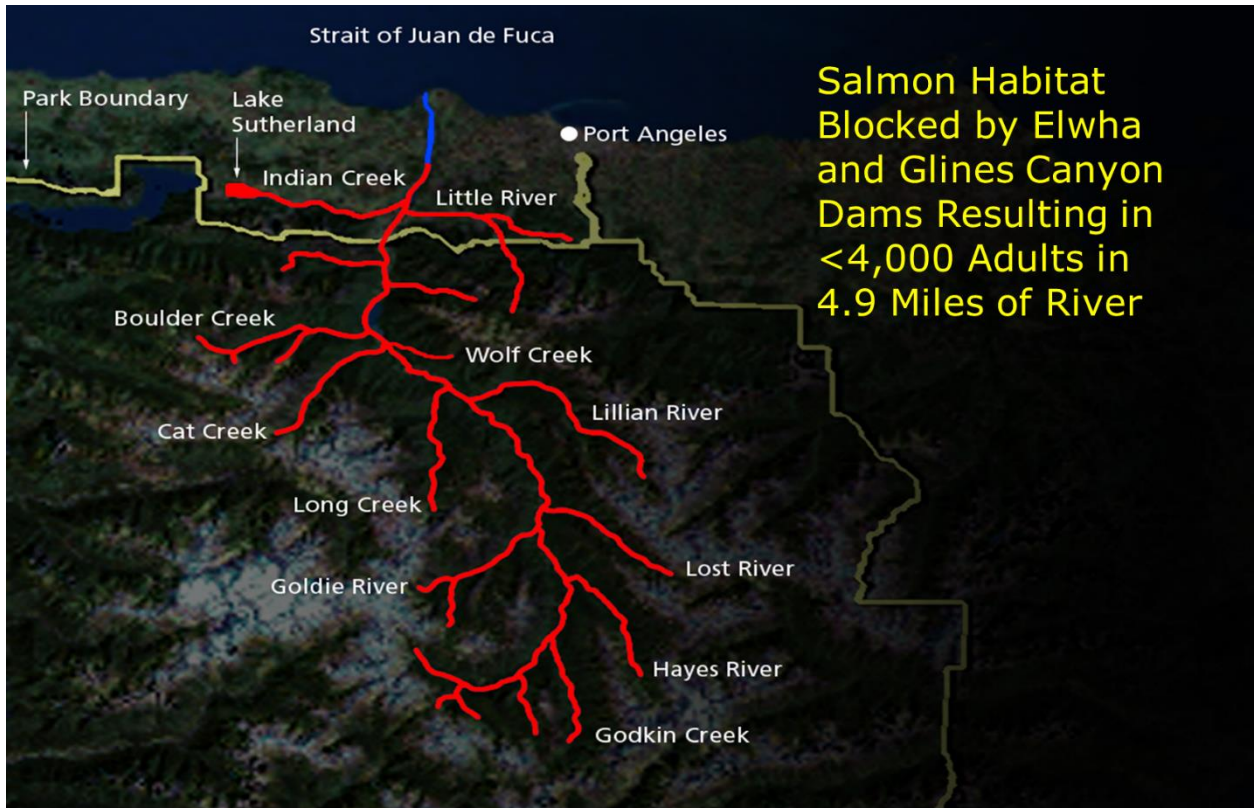
10. In Closing

The Lower Elwha Klallam Tribe has invested heavily in the fight for dam removal and has worked tirelessly toward the goal of a restored Elwha River. We have been involved in every aspect of this historic process, from hands-in-the-earth and waders-in-the-river to peer-reviewed scientific papers and federal appeals court legal briefs and everything in between. We have almost certainly spent more time than any other party working on the Aldwell Lands to restore the native vegetation and the habitat in the river. An appendix listing examples of these actions is included with this testimony. This Congress has the opportunity to take one of the final legislative actions necessary to complete this historic dam removal and ecosystem restoration project: the transfer of these ancestral lands, in trust and reservation status, to the Lower Elwha Klallam Tribe.

Once again, the Tribe is most grateful for the opportunity to present this testimony about a matter of profound importance to the Tribe’s history and its future.

**Appendix of Actions taken by the Lower Elwha Klallam Tribe
To Accomplish Dam Removal and Restoration of the Elwha River and Its Fisheries.**

- Worked to oppose the relicensing of dams without adequate mitigation for salmon fisheries and to obtain the support of NPS and NMFS for these efforts.
- Successfully achieved the enactment of EREFRA in 1992 (which set up this land transfer), along with allies in Congress and in the federal agencies.
- Worked to prepare for the impacts of dam removal.
 - Constructed numerous ELJ's for habitat.
 - Built new state of art hatchery to preserve native fish genetics, which enabled NMFS to approve dam removal under ESA.
 - Upgraded flood control levee.
 - Dedicated a couple hundred acres of Reservation land west of the levee to habitat.
- Worked to achieve restoration and adaptive management after dam removal.
 - Defended anti-hatchery lawsuit with US.
 - Operated fish hatchery to prevent extirpation of Elwha River fish stocks.
 - Revegetated the Aldwell lands.
 - Built more ELJs.
 - Monitored the fish returns.
 - Published peer-reviewed scientific papers with agency partners.
 - Worked with agencies both to ensure adherence to terms of applicable BiOps and also to develop potential updates to ESA criteria.
 - Worked with City of Port Angeles and NPS to design soft armoring and ELJ solution to erosion at surface water intake and City's Rainey Well intake.
 - Opposed NPS Hot Springs Road Realignment Project for failure to adequately protect fisheries; that project planning is starting over with a new EIS.
 - Worked with FHWA and WSDOT on fisheries mitigation package for replacement of Highway 101 Elwha River Bridge.



Location Map

