The Clean Energy Conundrum: The Legal Basis for Hydroelectric Dam Removal in the Western United States

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Abstract. Hydroelectric power is considered to be one of the cleanest and cheapest forms of energy generation. As with many "green" power sources, however, there are other costs, primarily environmental damage to the submerged areas behind the dams and depleted salmon populations due to blocked spawning migration. As a result of numerous legal actions by environmental advocacy groups and native tribes, dams that prevent natural salmon migration have been removed. Although there is a large body of scientific literature relating to this issue, this paper clarifies the legal basis for courts to order massive and expensive dam removals to protect salmon populations. The paper employs a normative research method, including reviewing legal cases, texts, academic journals, and treaties, as well as scientific papers surrounding salmon populations and waterways. The research has revealed that there are two primary bases for ordering dam removals, including treaties with several native American tribes as well as long-standing federal statutes. The research outlines the precedent for additional dam removals, but the loss of clean energy sources must be addressed by policymakers.

Keywords: First Nation Treaties, Dam Removal, Habitat Recovery

1 Introduction

"When the last tree has been cut down, the last fish caught, and the last river poisoned, only then will we realize that one cannot eat money."(Cree Nation Proverb). Advocates for protecting our natural environment often face a conundrum where sustainable or "green" development conflicts with other environmental concerns. No more apparent is this quandary than in the restoration of salmon habitats at the expense of hydroelectric power generation. Those seeking to restore and protect salmon habitat have established that there can be little harmony between hydroelectric power and salmon migration. To understand the legal basis for prioritizing salmon habitat over hydroelectric electricity, there must be at least a rudimentary understanding of the science underlying salmon habitat and an appreciation of the history of Native American-U.S. relations.

Over the last 150 years in America, a series of hydroelectric dams have been erected on many large rivers, primarily in the West.[1] The generation of hydroelectric power has decimated anadromous[2] salmon populations.[3] Anadromous fish are

species of fish that mass-migrate from spawning in freshwater rivers. The chum travel down the river to salt water where the majority of their lives are lived. The salmon return to their original spawning habitats to lay their eggs. In addition to impeding salmon migration, hydroelectric dams have had other deleterious effects on the salmon population including changing the natural flow of rivers, which can lead to rising temperatures and flooding in salmon spawning areas. Such impacts taint hydroelectric energy's promise of cheap, clean, and renewable energy.

Since the 1970s, it was apparent that hydroelectric dams were having a severe impact on salmon populations.[4] As a result of rapidly declining stocks of anadromous fish, many Native American tribes have sought redress in the state and federal court systems, fighting to restore salmon habitats. These cases have pitted Native Americans, who view the Pacific salmon as essential to their livelihoods and cultures against non-native fishermen, public utilities districts, and federal administrative agencies.[5]

In addition to protecting salmon habitats and the benefits Native Americans derived therefrom, the cases filed for salmon habitat protection have also shone a light on the fraught relationship between indigenous populations and the legacy of colonization. The mere fact that Native Americans are still fighting to claw back what was rightfully theirs lays bare the painful and shameful history, especially in countries where the colonists, essentially "never left," such as Canada, Australia, and South Africa, in addition to the U.S. [6]

In the U.S., even the nomenclature reflects the tragic history between the U.S. government and the indigenous North American population. In the literature, the terms "Indian," "Native American," and "First Nations' People" are used to identify both the ethnic identity and members of the several tribes and in turn parties to treaties with the U.S. government. [7] This unique relationship wherein several Native American tribes located within the borders of the U.S. have binding, enforceable treaties with the federal government. Most importantly for this discussion, many of the fishing and land use rights are grounded in these treaties. [7]

During the mid- to late-19th century, soon after the British ceded the Oregon territory (what would later comprise the states of Oregon, Washington, and Idaho) to the U.S., settlers in the region began to negotiate with the local tribes for land ownership. In order to take advantage of the local Native American Tribes' vulnerabilities, the U.S. settlers and the de facto regional governments began entering into treaties with the Tribes. These treaties provided peace and land ownership for the settlers and reserved specific tribal lands for the local Native American population. Given the abundance of resources at the time, the U.S. government didn't think twice about enshrining fishing and riparian rights in these treaties. [8]

Dam removal has proceeded on an already grand scale and, despite some public opposition, has almost immediately shown positive results. Recently, the first complete dam removal was performed on the Klamath River, which essentially delineates the Oregon-California border. Less than a month after the removal project finished, salmon have already begun to lay eggs in their ancestral spawning beds upstream from the former dam location.[9] This stunningly positive result was not

unexpected. Scientists have for years drawn a direct line between dam removal and salmon populations, and there have been successes in other ecosystems as well.[10] Essentially the results have proven the theory.

The legal basis for dam removals essentially comes down to prioritizing competing interests. As such, the issue of dam removal presents the following questions: (1) Whether the 1850s era treaties between Native American tribes and the United States (the "Fishing Rights Treaties") supersede the clean energy regulations promulgated by the Federal Energy Regulatory Commission (FERC)?; (2) Whether the Fishing Rights Treaties provide both standing and a legal basis for ordering removal of existing dams and limitations on the construction of future dams?; and (3) Whether there is a scientific basis, as recognized in the jurisprudence surrounding Native fishing rights, for the costly removal of dams that provide cheap, clean power to millions of households?

2 Method

This study employed a combination of normative and empirical research. In determining the legal basis for dam removal and the rights of native tribes, Sources of law, including treaties between native American tribes and the United States, status governing native American rights, and cases enforcing these rights were incorporated into the findings.

Additionally, empirical research explored the science of salmon migration and hydroelectric dams. Research was also conducted on the cost and the results of dam removals that have already been conducted.

3 Result and Discussion

3.1 Analysis of the Legal Relationship between the Native Americans and the U.S. Government

To understand the legal basis for court-ordered dam removal it is important to appreciate the unique relationship between the Native American Tribes and the U.S. Government. Under the U.S. Constitution, the native population is explicitly treated similarly to foreign governments, essentially sovereign states within the U.S. territorial borders. [11] Article I, Sections 3 and 8 specifically similarly treats the Native American Tribes to foreign governments. Section 3 states that "Representatives and direct Taxes shall be apportioned among the several States ... excluding Indians not taxed," and Section 8 affirms that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes." [12]

The history of the relationship between Native American Tribes has been one of balancing the sovereignty guaranteed in the aforementioned treaties while attempting to grant those rights afforded to U.S. citizens. [12] The fourteenth amendment to the U.S. Constitution granted ambiguous citizenship rights to Native Americans, which were later clarified under the Indian Citizenship Act of 1924. [12] There was at the

time, however, a concerted effort to claw back sovereignty from Native Americans and assimilate them, as well as strip them of treaty rights. The legislature attempted to limit the sovereignty of tribal nations,[13] and most nefariously robbed natives of their land under the pretext of benevolent assimilation.[14] This statute ended the recognition of new tribes and ended negotiating and entering into further treaties with existing tribes. Known as the "Dawes Act," this legislation attempted to assimilate Native Americans by offering U.S. citizenship, breaking up tribal communal land sovereignty in favor of individual land ownership that could be appropriated by non-tribal members, and offering modern farming techniques to domesticate the tribal members.

The first Marshall court addressed the rights of Native Americans by holding that private citizens could not purchase land from Native Americans,[15] that the Cherokee nation was sovereign but dependent like a "ward to its guardian,"[16] and the federal government was the sole authority to deal with native tribes.[17]

The 19th century gave way to somewhat improved treatment of Indians in the 20th century. The Supreme Court during the end of the 20th and early 21st centuries has held in favor of Native American Treaty rights. The Court maintained the sovereignty of Native American Tribes and Tribal Lands ensuring various rights. First, the Court solidified a tribe's right to tax activities on tribal lands, both of tribal members and non-members.[18] The Court also recognized the power to prosecute Native American criminal cases,[19] the respect for tribal sovereign immunity,[20] the power of tribal courts to adjudicate civil claims,[21] and the power to evict persons and businesses from Indian lands.[22]

The Court also affirmed the efficacy of Native American tribal treaty rights, holding that such rights remain extant unless and until Congress explicitly legislates a termination of the rights, including payment of just compensation.[23] Most pertinent to the discussion here, is that broad tribal fishing rights remain enforceable.

3.2 Tribal Fishing Rights as the Basis For Dam Removal

One legal basis for ordering the removal of hydroelectric dams is that these dams infringe on fishing rights guaranteed to certain Native American tribes under the aforementioned treaties. Fishing rights today date back to the original treaties entered into force in the mid 1800s.[24]

Ironically, tribal fishing rights were granted in an effort to annex tribal territory. In 1855, Isaac I. Stevens, governor of what was then referred to as theWashington Territory negotiated treaties with many tribes. Fishing rights at the time were immaterial to the westward push, and the treaties were a means to eject native populations from land that would become commercial railway lines. As the idea of land ownership was being imposed on native populations the treaties were seen by the tribes as a way to preserve land from western settlers as well as rival tribes.

At the time, the tribes were essentially giving up their sovereignty for reservation land to preserve their territory against their rival tribe, the Blackfoot.[25] Fishing at the time was both essential to native populations and immaterial to the booming railroads and manifest destiny of the colonial settlers. One treaty giving forming the basis for present day litigation, is the Point Elliot Treaty of 1855, which specifically

preserved tribal fishing rights, stating in Article 5 that:

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 Territory, 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 shellfish [sic.] from any beds staked or cultivated by citizens.[26]

In adopting this language to modern times, courts have had to weigh competing interests of non-tribal fishermen (commercial and individual), as well as overlapping treaty rights. Tribes have often found themselves at odds with other tribes as well as fighting to enforce treaty rights against non-tribal concerns. [27] In the 1970s this litigation was consolidated and a victory for tribal interests was handed down by the federal district court. The “Boldt Decision,” as it has become known, laid the foundation for the preservation of Native American treaty fishing rights.[28] The court decision was a balancing act of sorts and in multiple rounds of litigation between the federal government and state of Washington, the courts allocated half the shellfish and any other marine species with commercial value to Native American claims.[29] The progeny of the Boldt Decision directly supports the tribal claims. for dam removal as a necessity for preserving fish populations and tribal fishing rights.

One particular lawsuit arose as fish populations, particularly salmon, have dwindled because of the impediments to migration posed by hydroelectric dams. See Figure 1 below. The reasoning is that half (as allocated under the Boldt decision) of zero is zero. In other words, the dams themselves were infringing on enforceable tribal fishing rights by decemating salmon populations. The Sauk-Suiattle Indian Tribe expanded on fishing rights as a basis for dam removal, pleading that salmon are living beings and possess inalienable “rights of nature.” \\ This novel argument addressed defendants’ claims that treaty rights are not infringed upon unless tribes are denied the ability to fish, even where fish stocks are depleted.

The Tribe sued for injunctive and declaratory relief to this “bundle of rights.”[30] Cities fought back against greatly expanded rights but faced both legal hurdles as well as a public relations crisis. The tribe on the other hand was on somewhat shaky legal grounds given a novel claim for *in personam* jurisdiction over the Defendant. Understanding their respective positions, the parties settled out of court.[31] The settlement involved modifying the future hydroelectric dams to allow safe passage for salmon to spawn.[32] This case illustrates both difficulties in enforcing fishing rights and the danger of future erosion of these rights grounded in the sovereign treaty regime.

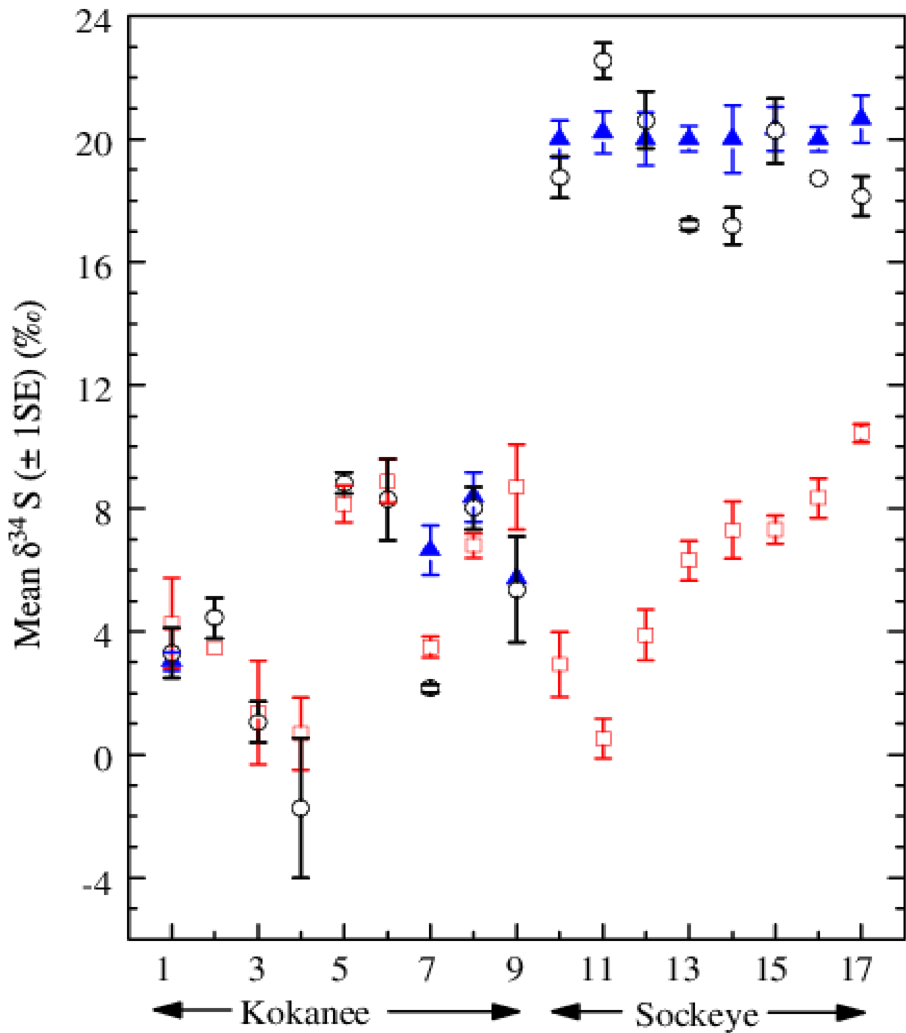

Fig. 1. Figure 1 provides a statistical analysis of the differential salmon populations.

3.3 Procedural History of Dam Removal Litigation

Tribes up and down the West coast of the U.S. have brought cases against municipalities and utilities to exercise treaty fishing rights and seeking removal of hydroelectric dams. These cases have sought relief for violation of the sovereign treaty rights, the 4th and 14th amendments to the U.S. Constitution, and the American Indian Religious Freedom Act (AIRFA).[33] The claims have been filed in tribal courts, federal courts, and state courts, all containing an claims for declaratory injunctive relief.[33] Many tribal court cases have been dismissed on jurisdictional grounds and the remaining cases have wound their way through courts, alternative

dispute fora, and of course the “court of public opinion.”[34]

Often, before an appeal could be heard, the parties have settled out of court. For example, the city of Seattle agreed to modify the dams in order to allow passage around the dams both upstream and downstream but did not open the door to broader claims, pushing back against the “rights of nature” claims.[32] Tribes have been reluctant to settle because a settlement, while expedient and helpful to fish populations, stop short of solidifying their rights.[35]

Additionally, the role of Native Americans as caretakers of the natural environment is supported by the jurisprudence arising from the AIRFA. The AIRFA was enacted as a counterbalance to the colonial missionary activities to allow Native American religious beliefs and practices to flourish in perpetuity.[36] The courts have regularly read this act as protecting the stewardship role of native populations in protecting their ancestral lands and the natural environment therein.[37] The line of cases mostly deals with burial grounds and not animal protection, and extending this jurisprudence to salmon protection may be a stretch.

This novel or *Sui Generis* argument of the Tribes lacks support by existing precedent. In the present case, the Plaintiff argues in Paragraph 8.1 of its claim for declaratory relief that “[salmon] possess inherent rights to exist, flourish, regenerate and evolve, as well as inherent rights to restoration, recovery and preservation.”[33] Beyond treaty claims Tribes have plead for the protection of rights including:

> The right to pure water and freshwater habitat; the right to a healthy climate system and natural environment free from human caused global warming impacts and emissions and declare defendant’s conduct threaten and imperils plaintiffs’ rights and significantly impacts their health, welfare, safety and economic security within their aboriginal territory and that such impact is felt [by tribal members]. [33]

The acts of omission of the City of Seattle violated the 1855 treaty and the 4th and 14th Amendments. Enforcement of Indian riparian and fishing rights has been well-protected by the courts. [8] Language of Indian treaties securing a “right of taking fish … in common with all citizens of the Territory” was not intended merely to guarantee Indians of the Pacific Northwest access to usual and accustomed fishing sites and an “equal opportunity” for individual Indians, along with non-Indians, to fish, but instead secures to the Indian tribe the right to harvest a share of each run of anadromous fish that pass through tribal fishing areas.[35]

In the present case the city of Seattle moved to dismiss the claims of the Sauk-Suiattle Tribe on purely jurisdictional grounds,[31] and the order was granted by the trial court.[34] Given the long line of legislative and judicial precedent, it was highly unlikely that the tribal court of appeals would have reversed the sound ruling of the tribal trial court.While this case did not reach an adjudication on the merits of the case, the 9th Circuit in its dicta addressed the efficacy of these rights[33] and the only question remaining was the extent to which the Defendant-city’s actions infringed on these rights. As a matter of law, the Tribe should prevail on its first claims.

3.4 Rights of Non-human Species or “rights of nature.”

While most of the litigation seeking removal of hydroelectric dams is legally founded on tribal fishing rights, separate litigation has been based on rights to preservation of the natural environment. This litigation has faced an uphill battle. There has been little progress in convincing courts to protect animal species or other ecosystems in the same manner as legal protection for humans.

Plaintiffs have brought suits seeking standing on behalf of wild animals, plants and aquatic ecosystems like rivers and lakes, essentially seeking protection of the "rights of nature."[38] In one such case, plaintiff, the Animal Volunteer Association, sought injunctive relief to compel an environmental impact statement (EIS) of a proposed culling of goat populations by the U.S. Navy. The 9th Circuit Court of Appeals held in favor of the Navy, holding that the plaintiffs lack standing to compel an EIS under 42 U.S.C. §§ 4132, 4332. [39] The 9th Circuit relied on the case of *Sierra Club v. Morton*, to deny standing to file a claim on behalf of the goat population. Noting that the limitations under this precedent strips vulnerable ecosystems of a legal protection, many in the environmental legal community have advocated for a reexamination of the standing principle.[40] Specifically, it has been argued that the inherent differences between animals and other types of property warrant different treatment when deciding the standing issue.

There are some legal arguments that have found traction in Supreme Court dissenting opinions, specifically Justice Blackmun's "Passionate, strongly worded dissents" in environmental law standing cases. [41] The Court, however, while not shutting down a standing argument altogether, established a threshold that only human plaintiffs can establish standing by pleading actual harm caused by environmental threats. Essentially, harm to nature alone is insufficient.[35][42]. This sets a nearly insurmountable hurdle and instead invites pretextual claims of harm to humans.

Under the Humane Society and Sierra Club cases, there is some room to argue standing by proof, however tenuous, that humans are harmed by the actions or omission of a defendant. In the absence of such an offer of proof, the standing issue will likely continue to fail in U.S. federal jurisdictions.

3.5 Jurisdiction of Tribal Courts

Given that the recent line of dam removal cases have been filed in tribal courts, it is important to understand their jurisdictional limits. Interestingly, many of the dams giving rise to claims by tribes are located within tribal territorial boundaries, or the rivers affected by the dams flow through tribal lands.

Tribal court jurisdiction has been prosecuted since the sovereignty of tribal territory was first formally recognized. The question arises whether tribal courts can have in personam jurisdiction over non-tribal parties, including municipalities including the city of Seattle. The legitimacy of modern (since U.S. independence) tribal courts was first recognized in the 1883 Supreme Court decision in *Ex parte Crow Dog*.[43] The case arose from the killing of Spotted Tail, a Lakota tribal member, by another tribal member, the defendant Crow Dog. The killing and all other predicate acts took place on tribal land which is the modern-day Rosebud Sioux reservation located in the state of South Dakota.[43] Rather than imposing a prison sentence as would have been the law of the then Dakota Territory, the tribal court

instead ordered restitution in the form of “goods and provisions” to the victim’s family, in following with tribal traditions.[43] The victim’s family did not appeal or oppose the sentence, but the U.S. federal government intervened and invoked its plenary jurisdiction, taking away the tribal courts power to deal with any “serious” crime involving tribal members and or occurring on tribal land. The case was removed to federal court for resentencing.[44]

This action and ruling were in line with the legislative and executive actions of forced assimilation, often presented under the guise of “civilizing” Native Americans and making them citizens equivalent with other U.S. citizens. Stripping the court's autonomy not coincidentally came at a time where the same congress was stripping tribes of their resource-rich ancestral lands.[45] Over time, the jurisprudence recognized and respected tribal sovereignty, including tribal court jurisdiction.

Along with greater recognition of Native American sovereignty and the formalization and recognition of tribal treaties, Tribes also increasingly relied on tribal courts to resolve disputes, both criminal and civil. Along with embracing traditional culture and rejecting forced assimilation, there was also a push to preserve “Native Justice” and resolve disputes according to tribal traditions without outside intervention. [46] Legislation has expanded tribal court jurisdiction over matters on tribal land and among tribal members.[47] However, tribal court jurisdiction has never been extended to non-tribal members.[48] The Supreme Court broadly held that Indian tribes cannot exercise powers "expressly terminated by Congress" or "inconsistent with their status" as "domestic dependent nations.” In these cases seeking dam removal, while the courts have not squarely addressed *in rem* jurisdiction, where dams or their effects are located on tribal lands, there are other avenues for tribal court jurisdiction for which litigants could attempt to avail themselves.

4 Conclusion

Despite setbacks faced by Tribes that have attempted to solidify broader rights through the process of seeking dam removal, the results have proven beneficial to salmon habitats. The research has shown that the tribal lawsuits have accomplished three things. First, the settlement with the city of Seattle whereby the city agreed to modify its Skagit River dam to allow safe passage of salmon upstream and downstream, was a major accomplishment and likely the primary objective of Tribe in the first place. This line of dam removal cases also pulls focus to other issues facing Native Americans. Third, the original Elwha dam removal case and its progeny have demonstrated judicial recognition of the need to restore salmon habitats.

For the tribes, the removal of dams has been the goal, regardless of legal basis for doing so. It is important, however, to address that the tribes have sought the legal paths of enforcing treaty fishing rights, bringing cases on behalf of the threatened species and/or ecosystem, and asserting the jurisdiction of tribal courts, which may of course be more sympathetic to tribal claims. From a legal standpoint, it is difficult to draw conclusions from cases that were never fully prosecuted or appealed to the highest court. Again, establishing a legal precedent has not been the tribes’ goal. Only the issue recognizing the enforceability of tribal treaty fishing rights has made it far

enough to become settled law. The issues of standing to assert the "rights of nature" or the expanded jurisdiction of tribal courts will have to wait for a dam removal case that cannot be settled. Meanwhile, the solidification of tribal fishing rights and more importantly the post-dam removal comeback of salmon populations across the west of the U.S. and elsewhere should be celebrated and replicated.

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