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Columbia River Tribal Housing: Federal Progress Addressing Long Unmet Obligations

INTRODUCTION

Native American tribes in the Northwest once centered entire societies around the Columbia River, living on its shores and fishing salmon from its waters.¹ Beginning in the 1930s, however, the United States built a series of hydroelectric dams on the river, flooding tribal villages and destroying traditional tribal access to the river for fishing.² Despite promises, these tribes were never compensated properly for their losses.³ Today, many tribal members wishing to fish salmon from the river do so from small plots of land set aside by the government.⁴ Some also live at these sites in makeshift housing, subject to overcrowded and unsafe conditions with limited water and electricity.⁵ There are few other options, however, as the government built only fifteen permanent houses for tribal use in the Columbia River Gorge to replace the many lost.⁶

In 2016, decades after the construction of the first dam, Congress and the Obama Administration made significant progress toward compensating local peoples for these losses. The United States Army Corps of Engineers (the Army Corps) began developing plans to construct a new Indian village in the region, and Congress passed the Water Infrastructure Improvements for the

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1. See *Fisheries Timeline*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/about-us/fisheries-timeline/> (last visited Feb. 9, 2017).

2. *Id.*

3. See Cooper Zietz Eng'rs, Inc., *Columbia River Treaty Fishing Access Sites, Oregon & Washington, Fact-Finding Review on Tribal Housing, Final Report 25* (2013), http://www.eenews.net/assets/2015/12/21/document_daily_01.pdf.

4. Molly Harbarger, *Decrepit Fish Camps Built on Broken Promises*, OREGONIAN (Mar. 11, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/page/tribal_housing_a_run_of_broken.html.

5. *Id.*

6. See *id.*; see also Molly Harbarger, *Celilo's Success Might Be Path Forward for Columbia River Tribal Housing—But It Wasn't Easy*, OREGONIAN (May 20, 2016, 5:00 AM), http://www.oregonlive.com/politics/index.ssf/2016/05/celilos_success_might_be_path.html.

Nation Act (WIIN Act), which authorized additional financial assistance for long-displaced tribal members.⁷

This In Brief describes and analyzes the policy actions which led to this progress. Part I provides an overview of how U.S. energy, environmental, and tribal laws and policies created the current situation. It also summarizes the strategy that a coalition of policy makers employed in 2016 to address the problem. Part II identifies next steps to build on progress and argues that the strategies used to address the Columbia River tribal housing crisis provide a blueprint for policy makers seeking to address longstanding regional tribal justice issues through federal laws.

I. BACKGROUND

A. Tribal Peoples along the Columbia River

For generations, the ancestors of the modern-day Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation, and the Confederated Tribes and Bands of the Yakama Nation relied on the Columbia River salmon runs and associated ecosystems as a central component of their culture and economy.⁸ In 1855, as east coast settlers moved into the area, the Columbia River tribes signed treaties with the United States, ceding most of their lands along the river but retaining a right to fish, hunt, and gather at “all usual and accustomed [fishing] places.”⁹ Many tribal members then continued to live along the river and maintain a way of life centered on fishing.¹⁰

Starting in the 1930s, the federal government constructed a series of hydroelectric dams along the river. Three of them are on the Columbia River between Oregon and Washington: the Bonneville Dam, completed in 1938; the Dalles Dam, completed in 1957; and the John Day Dam, completed in 1968.¹¹ In exchange for electricity, flood control, and river navigation, these massive dams changed a fast-flowing river into a series of wide reservoirs.¹² Their

7. See Letter from Senator Patty Murray, Senator Jeffrey Merkley, Representative Earl Blumenauer, Senator Maria Cantwell & Senator Ron Wyden to Mick Mulvaney, Dir., Office of Mgmt. & Budget, & Doug Lamont, Senior Official, U.S. Dep’t of the Army (Mar. 15, 2017), http://www.murray.senate.gov/public/_cache/files/da277d99-3442-4059-9cfe-c74a2a9213ee/03-15-2017-acoe-omb-letter-columbia-river-tribal-housing.pdf [hereinafter Letter to Mick Mulvaney].

8. See *Fisheries Timeline*, *supra* note 1.

9. Treaty with the Yakima, art. 3, June 9, 1855, 12 Stat. 951; Treaty with the Nez Percés, art. 3, June 11, 1855, 12 Stat. 957; see also Treaty with the Walla-Walla, Cayuse, Etc., art. 1, June 9, 1855, 12 Stat. 945; Treaty with the Tribes of Middle Oregon, art. 1, June 25, 1855, 12 Stat. 963.

10. See *Fisheries Timeline*, *supra* note 1 (explaining that villages were not destroyed until dams were constructed).

11. *Columbia River Chronology*, THE NW. POWER & CONSERVATION COUNCIL, <https://www.nwcouncil.org/history/Chronology> (last visited Mar. 16, 2017).

12. See *Columbia Snake River System Facts*, Pac. Nw. Waterways Ass’n, <http://www.pnwa.net/factsheets/CSRS.pdf> (last visited Apr. 24, 2017); see also *The Value of Hydropower in the Northwest*,

construction flooded tribal villages and fishing grounds and dramatically contributed to the rapid decline in the once abundant salmon runs, forever altering a way of life.¹³

In order to convince tribal members to leave their homes prior to flooding from dam construction, the United States promised to rebuild their homes on higher ground.¹⁴ However, the federal government repeatedly broke those promises.¹⁵ In November 2013, the Portland District Army Corps found that between forty-four and eighty-five tribal families living near the Bonneville and Dalles dams did not receive relocation assistance after their homes were flooded.¹⁶ Regional tribes believe the number to actually be much higher, likely in the thousands.¹⁷ The number of families displaced by the John Day Dam remains unknown.¹⁸

B. Fishing Access Sites Set Aside and Used for Housing

While the United States ignored its promise to replace homes, it did slowly take steps to restore limited tribal access to the Columbia River for fishing. This was in accordance with treaty rights, which received growing recognition in courts during the latter half of the twentieth century.¹⁹ By the 1960s, the Army Corps had set aside five “in-lieu” fishing sites associated with the Bonneville Dam.²⁰ These “in-lieu” sites granted tribes exclusive fishing access to the river.²¹ In 1988, Congress authorized the Army Corps to construct additional treaty fishing access sites near the Bonneville, John Day, and Dalles dams.²² These sites provided greater tribal access to fishing the river’s now-endangered salmon.²³ All totaled, there are now thirty-one tribal fishing sites

Pac. Nw. Waterways Ass’n, <http://www.pnwa.net/factsheets/Hydropower.pdf> (last visited Apr. 24, 2017).

13. See *Salmon Species Listed Under the Federal Endangered Species Act*, Wash. St. Recreation & Conservation Office, http://www.rco.wa.gov/salmon_recovery/listed_species.shtml (last visited Feb. 9, 2017).

14. See Harbarger, *supra* note 4.

15. See *id.*

16. Cooper Zietz Eng’rs, Inc., *supra* note 3, at 25.

17. *Id.*; see also *id.* at app. J (written testimony of Chief William Yallup).

18. See *id.* at 26 tbl.4-3.

19. See *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Or. 1969) (holding that tribes were entitled to a fair share of annual salmon harvests produced by the Columbia River System); see also *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 555–56 (D. Or. 1977) (holding that the effect of dam operations on salmon and tribal fisheries should be considered in the context of treaty fishing rights).

20. *Fisheries Timeline*, *supra* note 1.

21. See *In-lieu/Treaty Fishing Access Sites*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/for-tribal-fishers/in-lieutreaty-fishing-access-sites/> (last visited Apr. 24, 2017).

22. Southern California Indian Land Transfer Act, Pub. L. No. 100-581 § 401, 102 Stat. 2938 (1988).

23. *Salmon Species Listed Under the Federal Endangered Species Act*, *supra* note 13.

along the Columbia River.²⁴ They are generally small sites with parking, boat ramps, fish cleaning tables, restrooms, and drying sheds.²⁵

For years, these sites were the only available tribal land near the Columbia River.²⁶ Out of a need for housing and desire to be close to the river, many tribal members lived at these sites for extended periods of time.²⁷ The Bureau of Indian Affairs initially attempted to evict the permanent inhabitants of the first five “in-lieu” sites.²⁸ The Ninth Circuit, however, held that the tribes should be allowed to access these sites under “the same conditions that existed on the flooded lands,” including permanent occupation.²⁹ Despite that ruling, the government did not construct additional infrastructure for permanent residence.³⁰ Additionally, the court’s holding only applied to the five “in-lieu” sites at the time, and the government subsequently constructed the additional twenty-six sites for seasonal use only.³¹ As a result, the current conditions of the sites are abysmal, particularly during fishing season; they are overcrowded, unsanitary, and unsafe.³² Tribal members live in makeshift housing with limited water and electricity, and with an insufficient budget to keep up with general operational and maintenance needs.³³

C. *The Path toward Compensation*

Prior to 2016, advocates took numerous steps to generate awareness about the conditions and related backstory of uncompensated losses.³⁴ These efforts were led by the Columbia River Inter-Tribal Fish Commission, an inter-tribal government organization whose work includes managing maintenance and law enforcement at the fishing sites.³⁵ As a result of these efforts, certain members of the Oregon and Washington Senate and congressional delegations took notice.³⁶

24. *In-Lieu/Treaty Access Fishing Sites*, *supra* note 21.

25. Letter from Paul Lumley, Exec. Dir., Columbia River Inter-Tribal Fish Comm’n, to U.S. Senate Comm. on Indian Affairs 5 (Sept. 14, 2016), <http://www.indian.senate.gov/sites/default/files/upload/images/9.14.16%20Paul%20Lumley%20Testimony.pdf>.

26. *See* Harbarger, *supra* note 6.

27. *See* *Sohappy v. Hodel*, 911 F.2d 1312, 1319 (9th Cir. 1990).

28. *See id.* at 1315–16.

29. *Id.* at 1320.

30. *See* Harbarger, *supra* note 4.

31. *Id.*

32. Letter from Paul Lumley to U.S. Senate Comm. on Indian Affairs, *supra* note 25, at 7–8.

33. *Id.* at 5–7.

34. *See Columbia River Tribal Housing*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/for-tribal-fishers/river-housing/> (last visited Mar. 16, 2017); *see also Addressing the Tribal Housing Crisis Along the Lower Columbia River*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://critfc.org/wp-content/uploads/2013/01/housing-congressional-visit-req.pdf> (last visited Mar. 16, 2017).

35. *CRITFC Mission & Vision*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/about-us/mission-vision/> (last visited Apr. 25, 2017).

36. *See* Earl Blumenauer & Jeff Merkley, Opinion, *Congress Must Address Tribal Housing Crisis on the Columbia River*, OREGONIAN (Apr. 10, 2016, 11:27 AM), <http://www.oregonlive.com/>

1. Agency Action and Congressional Action – Existing Construction Authority

In October 2015, Oregon Democratic Senators Jeff Merkley and Ron Wyden, Washington Democratic Senators Maria Cantwell and Patty Murray, and Oregon Democratic Representative Earl Blumenauer came together (known as “the Northwest Congressional coalition”) to pursue their first policy action addressing this issue.³⁷ They publicly urged the Army Corps to clarify what authority the agency already had—if any—to address the situation and what further authority it would need from Congress.³⁸

In March 2016, the Army Corps announced it had existing authority under the Flood Control Act of 1950 to construct an Indian village to replace flooded housing associated with the Dalles Dam.³⁹ The agency found that this authority was included in the initial authorization to construct the dam but had never been exercised.⁴⁰ Beyond this, however, the agency determined it had no additional legal authority to address losses associated with the Bonneville or John Day dams and would need Congress to pass legislation to allow it to act further.⁴¹

Following this announcement, the Northwest Congressional coalition quickly used the fiscal year 2017 appropriations process to demonstrate support for the Army Corps acting under this finding.⁴² In April 2016, the Northwest Congressional coalition successfully advocated for the inclusion of supportive language in the fiscal year 2017 Energy and Water Development Appropriations Reports which passed out of committee in both the House and Senate.⁴³ The language in both reports encouraged the Army Corps to act on existing authorization and complete a development plan for an Indian village associated with the Dalles Dam.⁴⁴ The passage of this language by Republican-controlled committees in both chambers suggested bipartisan congressional support behind Army Corps action.⁴⁵

opinion/index.ssf/2016/04/congress_must_address_tribal_h.html; *see also* Letter from Representative Earl Blumenauer, Senator Ron Wyden, Senator Patty Murray, Senator Maria Cantwell & Senator Jeffrey Merkley to Jo-Ellen Darcy, Assistant Sec’y, U.S. Dep’t of Army (Nov. 2, 2015), https://blumenauer.house.gov/sites/blumenauer.house.gov/files/migrated/images/pdf/110215_Darcy_letter.pdf.

[hereinafter Letter to Jo-Ellen Darcy]

37. Letter to Jo-Ellen Darcy, *supra* note 36.

38. *Id.*

39. *See* Letter to Mick Mulvaney, *supra* note 7.

40. *See id.*

41. Letter from Representative Earl Blumenauer, Representative Herrera Beutler & Representative Dan Newhouse to Representative Bill Shuster, Representative Peter DeFazio, Representative Bob Gibbs & Representative Grace Napolitano (May 13, 2016) [hereinafter Letter to Bob Gibbs & Grace Napolitano] (on file with author).

42. *Id.*

43. S. REP. NO. 114-236, at 41 (2016); H. REP. NO. 114-532, at 56 (2016).

44. S. REP. NO. 114-236, at 41; H. REP. NO. 114-532, at 56.

45. *See* Press Release, Senator Jeff Merkley, Merkley and Murray Announce Key Appropriations Win to Address Tribal Housing Needs in the Columbia Gorge (Apr. 14, 2016), <https://www.merkley.gov>.

The Army Corps has already started planning for the construction of an Indian village to compensate for losses at the Dalles Dam.⁴⁶ In February 2017, the agency dedicated up to \$1.56 million within existing agency funds for a village development plan, and potentially \$1.49 million more.⁴⁷ In order to ultimately build this village, however, Congress will need to provide additional funding in future appropriations bills.⁴⁸

2. Congressional Action – New Construction and Study Authority

Due to the exhaustion of existing Army Corps authority, the Northwest Congressional coalition included new authorizing language in the WIIN Act to further address unmet obligations.⁴⁹

The WIIN Act is over seven hundred pages, and includes the 2016 version of the Water Resources Development Act, a policy bill Congress traditionally passes every two years to authorize federal water infrastructure projects across the country.⁵⁰ The Northwest Congressional coalition, this time supported by two Republican representatives from Washington (Jaime Herrera Beutler and Dan Newhouse), advocated for the inclusion of a small policy provision in this large bill to grant additional authorization to the Army Corps to address tribal housing and unmet obligations.⁵¹ They succeeded.⁵² The final bill, which passed both chambers, authorizes the Army Corps to provide assistance to the known number of tribal families displaced by the Bonneville Dam.⁵³ The Portland District Army Corps identified forty-one to forty-nine such families in their 2013 fact-finding report.⁵⁴ Because many, including regional tribes,

senate.gov/news/press-releases/merkley-and-murray-announce-key-appropriations-win-to-address-tribal-housing-needs-in-the-columbia-gorge.

46. See Press Release, Senator Maria Cantwell, Senators Cantwell, Murray, Merkley, Wyden, and Rep. Blumenauer Urge Federal Government to Dedicate Future Funding, Address Unmet Obligations to Columbia River Treaty Tribes (Mar. 15, 2017), <https://www.cantwell.senate.gov/news/press-releases/senators-cantwell-murray-merkley-wyden-and-rep-blumenauer-urge-federal-government-to-dedicate-future-funding-address-unmet-obligations-to-columbia-river-treaty-tribes->

47. *Id.*; see Molly Harbarger, *Funds Found for Columbia River Tribes' Owed Houses at the Dalles Dam*, OREGONIAN (Feb. 13, 2017), http://www.oregonlive.com/politics/index.ssf/2017/02/funds_found_for_columbia_river.html.

48. See generally Bill Heniff, Jr., Cong. Research Serv., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS (2012) (explaining that most agencies and programs are funded through an annual appropriations process).

49. Letter to Mick Mulvaney, *supra* note 7.

50. *Water Infrastructure Improvements for the Nation (WIIN) Act*, Transp. & Infrastructure Committee, <http://transportation.house.gov/wrda-2016/> (last visited Mar. 16, 2017); see Guy McCarthy, *Proposed Water Law Package Has Lode Residents Picking Sides*, UNION DEMOCRAT (Dec. 8, 2016, 9:53 PM), <http://www.uniondemocrat.com/home/4887646-151/proposed-water-law-package-has-lode-residents-picking>.

51. See Letter to Bob Gibbs & Grace Napolitano, *supra* note 41; see also Letter to Mick Mulvaney, *supra* note 7.

52. See Letter to Mick Mulvaney, *supra* note 7.

53. WIIN Act, Pub. L. No. 114-322, § 1178(c), 130 Stat. 1628, 1675 (Dec. 16, 2016).

54. Cooper Zietz Eng'rs, Inc., *supra* note 3, at 25.

believe this number to be too low,⁵⁵ the bill also allows the Army Corps to study further unmet obligations that may have been previously overlooked near the Bonneville Dam.⁵⁶ Finally, it requires the Army Corps to conduct a study to determine the number of tribal members displaced by the construction of the John Day Dam, which has yet to be assessed, and recommend an assistance plan for tribal members displaced by its construction.⁵⁷ Because it is an authorizing bill, however, funding for these actions must come from annual appropriations bills.⁵⁸

II. ANALYSIS

A. Next Steps

The utilization of existing authorization and passage of new authorizations to compensate tribal members for lost housing were important first steps. Next, Congress should provide funding to maximize results. To best facilitate this, the Army Corps, in consultation with affected tribes, should request necessary appropriations from Congress in order to complete authorized work on an Indian village associated with the Dalles Dam and provide authorized compensation to tribal members displaced by the Bonneville Dam. Supportive members of both chambers have and should continue to advocate for the inclusion of funding for the Army Corps' work at every possible stage during the coming years.⁵⁹

Because Congress has authorized the Army Corps to further study the exact numbers of displaced peoples, such studies may uncover additional homes destroyed by the government.⁶⁰ Thus, Congress and the Administration should be ready to continue pursuing available legislative vehicles to compensate for these losses. While it remains unknown if the new Administration will take up this charge, advocates should point to bipartisan support and previous success on these initiatives in a Republican-controlled Congress to avoid partisan posturing.

Replacing lost housing, however, does not address the entire problem. It will not immediately address the current conditions at the existing fishing sites.⁶¹ Therefore, as Congress continues to pursue compensating tribal members for losses, it should also simultaneously pursue actions to clean up

55. *Id.*; see also *id.* at app. J (written testimony of Chief William Yallup).

56. § 1178(c), 130 Stat. at 1675.

57. *Id.*

58. Bill Heniff, Jr., Cong. Research Serv., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 1 (2012).

59. See Letter to Mick Mulvaney, *supra* note 7.

60. See § 1178(c), 130 Stat. at 1675.

61. *C.f.* Molly Harbarger, *Oregon, Washington Leaders Want Fire Safety, Sanitation for Columbia River Fishing Sites*, OREGONIAN (July 14, 2016, 2:38 PM), http://www.oregonlive.com/politics/index.ssf/2016/07/columbia_river_new_bill_senate.html.

tribal fishing sites and increase the budget currently allocated for maintaining the sites.⁶² Senator Merkley offered legislation to do this, and it was passed out of the Senate Committee on Indian Affairs on March 29, 2017.⁶³ It has not yet received a vote on the Senate floor.⁶⁴ Similar legislation was also introduced by Representative Blumenauer in the House.⁶⁵

B. A Blueprint for Similar Success

Congress and the Obama Administration have made meaningful progress to compensate tribes for homes destroyed by the construction of hydroelectric dams on the Columbia River. This progress provides an important example for policy makers seeking to address similar tribal justice issues in the future. Policy makers approached this problem by using a series of small actions in multiple legislative and administrative policy vehicles. The Northwest Congressional coalition applied pressure on the Army Corps to act.⁶⁶ The Army Corps uncovered decades-old authority to construct an Indian village to compensate for losses and began to plan for this construction, setting money aside for this work.⁶⁷ The Northwest Congressional coalition used the appropriations process in the House and Senate to demonstrate congressional support for the Army Corps' work.⁶⁸ It also successfully included language in the WIIN Act to authorize the Army Corps to provide compensation for displaced tribal members at the Bonneville Dam and to further study additional unmet obligations.⁶⁹

Each of these actions alone are arguably small. Together, however, these actions represent meaningful progress to address a longstanding tribal justice issue in the Northwest. In working toward each of these steps, policy makers avoided partisan opposition.⁷⁰ They also built bipartisan support for WIIN Act authorizing language.⁷¹ The success of this strategy demonstrates that when combining a series of small policy actions and insulating them from partisan

62. *See id.*

63. Press Release, Senator Jeff Merkley, With Bipartisan Support, Senate Committee Passes Bill to Improve Safety and Sanitation at Columbia River Tribal Fishing Sites (March 29, 2017), <https://www.merkley.senate.gov/news/press-releases/with-bipartisan-support-senate-committee-passes-bill-to-improve-safety-and-sanitation-at-columbia-river-tribal-fishing-sites>.

64. S.669 – *Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act*, Congress.gov, <https://www.congress.gov/bill/115th-congress/senate-bill/669/all-actions> (last visited Apr. 15, 2017).

65. H.R.1630 – *Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act*, Congress.gov, <https://www.congress.gov/bill/115th-congress/house-bill/1630/all-actions> (last visited Apr. 15, 2017).

66. *See* Letter to Jo-Ellen Darcy, *supra* note 36.

67. *See* Press Release, Senator Maria Cantwell, *supra* note 46.

68. *See* S. REP. NO. 114-236, at 41 (2016); H. REP. NO. 114-532, at 56 (2016).

69. Letter to Mick Mulvaney, *supra* note 7.

70. *See* Press Release, Senator Jeff Merkley, *supra* note 45.

71. Letter to Bob Gibbs & Grace Napolitano, *supra* note 41.

opposition, there is a path forward to address issues of tribal justice through federal law.

CONCLUSION

The federal government should have responded to the devastating impact of the Columbia River dams on Northwest tribes decades ago. Instead, obligations were ignored, and too many tribal people have lived in abysmal conditions for too long. The right group of policy makers, however, noticed and took meaningful steps to address this problem in just one year. More must be done, but this progress provides an important example of how success is possible.

Stephanie Phillips

