

12-15-2017

Conservation Easements: A Flexible New Tool for Washington Tribes, A Case Study of the Lower Elwha Klallam Tribe

David P. Papiez
Seattle University School of Law

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Papiez, David P. (2017) "Conservation Easements: A Flexible New Tool for Washington Tribes, A Case Study of the Lower Elwha Klallam Tribe," *American Indian Law Journal*: Vol. 6 : Iss. 1 , Article 7.
Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol6/iss1/7>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

CONSERVATION EASEMENTS: A FLEXIBLE NEW
TOOL FOR WASHINGTON TRIBES, A CASE STUDY
OF THE LOWER ELWHA KLALLAM TRIBE

David P. Papiez

CONTENTS

I. INTRODUCTION	326
II. LOWER ELWHA KLALLAM TRIBE.....	327
A. <i>River Restoration & Protection Efforts</i>	327
B. <i>Elwha Corridor and Clallam County</i>	329
III. OFF-RESERVATION LAND PROTECTION	331
A. <i>Fee Acquisition or Conservation Easement</i>	332
1. Fee Acquisition	332
2. Conservation Easement.....	334
a. <u>Legal Framework</u>	335
b. <u>Incentive Options</u>	336
i. <u>Purchase</u>	336
ii. <u>Donation & Tax Incentive</u>	337
iii. <u>Hybrid</u>	341
c. <u>Monitoring and Long-Term Management</u>	342
B. <i>Independent Effort or Partnership?</i>	343
1. Independent Efforts.....	343
2. Partnership	345
IV. ELWHA PROTECTION CORRIDOR APPLICATION.....	346
A. <i>Fee Acquisition or Conservation Easement?</i>	347
B. <i>Incentive Program</i>	347
C. <i>Independent Effort or Partnership?</i>	350
V. CONCLUSION.....	351

CONSERVATION EASEMENTS: A FLEXIBLE NEW TOOL FOR WASHINGTON TRIBES, A CASE STUDY OF THE LOWER ELWHA KLALLAM TRIBE

*David P. Papiez**

I. INTRODUCTION

Native American tribes in Washington State are often faced with the desire to protect¹ culturally or environmentally significant off-reservation land. Historically, tribes have been left with few options to pursue off-reservation land protection outside of the traditional fee-to-trust approach, which can be an expensive, lengthy, and complex process. However, following passage of Washington House Bill 1277 in 2013, federally recognized Indian tribes can now hold conservation easements, providing a new tool for tribes to achieve land protection objectives.

This Note focuses on the Lower Elwha Klallam Tribe and explores the process and options available to Washington tribes to protect off-reservation land. Effort has been made to present a high-level depiction of a dense field, with particular attention placed on the use of conservation easements as a flexible new tool for Washington tribes. Part One of this Note introduces the Lower Elwha Klallam Tribe and the Elwha Protection Corridor; Part Two walks through the options available to Washington tribes to protect off-reservation land; and Part Three presents options available to protect the Elwha Protection Corridor.

* J.D. Candidate, Seattle University School of Law, 2018; B.A., Political Economy and History, College of Idaho, 2005. This note is dedicated to the people of the Lower Elwha Klallam Tribe, whose perseverance toward removal of the Elwha and Glines Canyon dams is an inspiration. I would like to extend special thanks to Professor Catherine A. O'Neill for her guidance and wisdom, without which I would not have been able to complete this project. I would also like to thank Professor Eric D. Eberhard for his valuable feedback. Finally, many thanks to the American Indian Law Journal for all the helpful suggestions and edits in the publication of this Note.

¹ In this Note, the terms “protect” and “protection” describe an approach to the management of land within the Elwha Watershed that supports recovery of the natural salmon runs and sustains them into the future. This definition does not preclude fish harvest or other traditional Indian land uses.

II. LOWER ELWHA KLALLAM TRIBE

The Lower Elwha Klallam Tribe (“LEKT”) of the Olympic Peninsula has made its home along the shores of the Elwha River for centuries.² The LEKT thrived within a robust regional Native American economy prior to the arrival of European explorers and settlers from the eastern United States.³ However, in 1855 the Treaty of Point-No-Point ceded LEKT land to the United States and marked the beginning of a period of forced separation from the River which defines the tribal home.⁴ During this time two dams were constructed on the Elwha River; the Elwha Dam was completed in 1913, and the Glines Canyon Dam was completed in 1927.⁵ While construction of the dams was celebrated at the time by some for the industrialization they were purported to represent, the Elwha Dam decimated salmon runs by blocking the upper forty miles of the river to fish migration.⁶

A. River Restoration & Protection Efforts

After years of hard work by the LEKT, to which this Note cannot adequately bear testament, Congress authorized removal of the Elwha and Glines Canyon Dams in 1992, some eighty years after the first dam was completed.⁷ Although it would take an additional twenty years, both dams were removed by the summer of 2013 and the river once again flows free.⁸ However, the project is not yet complete, and further protection for the lower Elwha watershed may serve to enhance and sustain the recovering salmon runs.⁹

While this Note argues that conservation easements may provide the tool to achieve this objective, it is critical to first note and reiterate the rights reserved to the LEKT under the Treaty of

² *Historical Village Sites*, LOWER ELWHA KLALLAM TRIBE, <http://www.elwha.org/cultureandhistory/historicalvillagesites.html> [<http://perma.cc/ZLZ6-KD8C>]; JEFF CRANE, FINDING THE RIVER: AN ENVIRONMENTAL HISTORY OF THE ELWHA 17 (2011).

³ See CRANE, *supra* note 2, at 16.

⁴ TREATY OF POINT-NO-POINT, 12 Stat. 933 (Apr. 29, 1859).

⁵ See CRANE, *supra* note 2, at 7.

⁶ *Id.*

⁷ Elwha River Ecosystem & Fisheries Restoration Act, Pub. L. 102–495, 106 Stat 3173 (October 24, 1992) [hereinafter Restoration Act].

⁸ LYNDIA V. MAPES, ELWHA: A RIVER REBORN 157 (Kris Fulsaa ed., 2013).

⁹ APPENDIX I, INTERIOR REPORT TO CONGRESS 179 (1994).

Point-No-Point (the “Treaty”) and the modern cases upholding those rights. Section 5 of the Treaty states:

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 privileges of hunting and gathering roots and berries on open unclaimed land.¹⁰

In *United States v. Winans*, the Supreme Court took an important early step to reaffirm that the rights contained in Section 5 were *reserved* to the tribes rather than *given* or *granted* by the Treaty.¹¹ The landmark Boldt Decision¹² in the long-running *United States v. Washington* litigation held that the right of taking fish at usual and accustomed grounds and stations includes:

Every fishing location where members of a tribe customarily fished from time to time at and before treaty time, however distant from the then usual

¹⁰ See TREATY, *supra* note 4, at § 5.

¹¹ *United States v. Winans*, 198 U.S. 371, 381 (1905).

¹² Following a three-year trial, Judge Boldt invoked the canons of treaty interpretation to decide that Washington State's regulatory scheme systematically discriminated against the tribal fishing right by closing historic fishing sites to net fishing (at the time of trial the tribes were harvesting just 2% of the salmon). Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 11–14 (2017). Judge Boldt determined that the treaty “right of taking fish” required a fair allocation of harvests, and he define the treaty language “in common with” to mean a property right to half of the harvests. *Id.* Judge Boldt’s decision, which directed the State to limit non-treaty fishing to meet this treaty obligation, generated widespread public outrage and resistance. *Id.* The State exacerbated the situation by claiming that it lacked authority to implement the injunction, and the Washington State Supreme Court agreed. *Id.* In 1979, the United State Supreme Court largely affirmed Judge Boldt in *Washington v. Commercial Fishing Vessel Association*. *Id.* Justice Stevens, also applying the canons of treaty interpretation, construed the treaty fishing right language to preserve for the tribes a *supply* of fish—not merely an *opportunity* to fish. *Id.* He cited Governor Stevens' specific promise that the salmon would provide a continuous “source of food and commerce.” *Id.* According to the Court, the treaties prevented the State from “crowding the Indians out” of the tribal fishery and guaranteed the tribes a fishing livelihood, up to 50% of the harvests. *Id.*

habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.¹³

Further, the federal district court held that the Treaty language, “in common with all citizens of the United States,” reserves to the tribes a right to take up to 50% of the annual fish harvest, subject to the right of non-treaty fishers to do the same.¹⁴

Under these Treaty-reserved rights, landowners within the LEKT’s usual and accustomed fishing grounds are arguably already prohibited from engaging in land uses that have a negative impact on the salmon runs. However, the courts have been reticent to interpret the off-reservation reach of these tribal rights, particularly when private property owners are impacted.¹⁵ In the absence of such enforcement, this Note promotes the use of conservation easements as a possible solution.

B. *Elwha Corridor and Clallam County*

The Elwha River stretches some forty-five miles from its headwaters deep within the Olympic Mountains to its mouth on the Straits of Juan de Fuca, which lies approximately ten miles west of downtown Port Angeles, Washington.¹⁶ The entire Elwha River watershed encompasses 205,000 acres, of which 83% lies within

¹³ *United States v. State of Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975).

¹⁴ *Id.*

¹⁵ In 1980, during Phase II of the *United States v. Washington* litigation, the District Court for the Western District of Washington held that the Tribes’ right to “a sufficient quantity of fish to satisfy their moderate living needs” (as previously held in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979)) entailed a “right to have the fishery habitat protected from man-made despoliation” (the “Environmental Issue”). *United States v. State of Washington*, 506 F. Supp. 187, 194 (W.D. Wash. 1980) (“*Washington II*”). In 1985, sitting *en banc*, the Court of Appeals for the Ninth Circuit vacated the district court’s decision, concluded that the Environmental Issue was too broad and varied to be resolved in a general and undifferentiated fashion, and that the issues of human-caused environmental degradation must be resolved in the context of *particularized* disputes. *United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985) (*en banc*) (“*Washington III*”).

¹⁶ See CRANE, *supra* note 2, at 7.

Olympic National Park.¹⁷ Due to the protections afforded to the river watershed located within the Park, this Note focuses on the portion of the watershed that lies outside of the Park. Although the land enveloped by and adjacent to the former Lake Aldwell¹⁸ (the “Project Land”) lies outside the Park, the Project Land is not part of this analysis.¹⁹ Rather, this Note focuses on the remaining 34,000 acres of the Elwha watershed (the “Elwha Protection Corridor”).²⁰ Land ownership within the Elwha Protection Corridor includes (1) the LEKT, (2) the state of Washington, (3) residential and agricultural users, and (4) limited commercial interests.²¹

The Elwha Protection Corridor is entirely located within Clallam County, which spans nearly the entire northern length of the Olympic Peninsula.²² Clallam County is a relatively large county comprising small rural communities with a total population of just 74,000.²³ Historically, the timber industry dominated Clallam County, but it has declined as logging on the Olympic Peninsula has ebbed over the last several decades, and the economy has struggled to rebound.²⁴ Unemployment currently hovers around 9%,²⁵ which is one of the highest in the State.²⁶ These characteristics heavily influence the options addressed in Part Three of this Note.

¹⁷ *The Elwha Watershed*, NAT’L PARK SERVICE, Feb. 28, 2015, <https://www.nps.gov/olyml/learn/nature/the-elwha-watershed.htm> [<https://perma.cc/S8Y7-ERCB>].

¹⁸ Lake Aldwell was the reservoir created by the Elwha Dam; Lake Mills, located within Olympic National Park, was the reservoir created by the Glines Canyon Dam.

¹⁹ Restoration Act, *supra* note 7 (section 3 contemplates various uses for the Project Land following removal of the Elwha dam, including transfer to the LEKT. Based on the current understanding that the Federal Government will soon transfer the Project Land to the LEKT, it will not be included in this analysis).

²⁰ See Exhibit A (Elwha River Watershed).

²¹ See CLALLAM COUNTY, WA, ASSESSOR, <http://www.clallam.net/assessor/> (last visited Nov. 28, 2016) [<https://perma.cc/7UH2-G8LK>].

²² See Exhibit A (Elwha River Watershed).

²³ CLALLAM COUNTY ECONOMIC DEVELOPMENT CORPORATION, <http://www.clallam.org/clallam-county-profile-.html> (last visited Dec. 5, 2017) [<https://perma.cc/7NVS-VXTR>].

²⁴ Jim Vleming, *Clallam County Profile*, WASH. STATE EMPLOYMENT SECURITY DEP’T, Dec. 2015, <https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/clallam-county-profile> [<https://perma.cc/WY2Z-T94S>].

²⁵ See *supra* note 21.

²⁶ See Vleming, *supra* note 24. The principal economic sectors include (1) marine trades, (2) forestry, (3) advanced composites, (4) healthcare, and (5) tourism. See ECON. DEV. CORP., *supra* note 23.

III. OFF-RESERVATION LAND PROTECTION

Land protection and restoration in Washington is a dynamic and evolving enterprise involving numerous parties and a diversity of interests.²⁷ In some instances, this dynamic nature is reshaping the way that both land protection and restoration are being pursued.²⁸ For this reason, understanding the “state of affairs” within an area targeted for protection is necessary prior to developing an off-reservation land protection strategy. For example, the rising prevalence of land ownership and/or management by Real Estate Investment Trusts (“REITs”) and Timber Investment Management Organizations (“TIMOs”) in western Washington is changing the way that some local land trusts pursue their objectives.²⁹ In some cases, this has expanded the use of conservation easements where fee acquisition had been the traditional approach of choice.³⁰ For example, “Working Forest Conservation Easements” are gaining influence within regional conservation organizations.³¹

²⁷ Interview with Joseph Kane, Executive Director, Nisqually River Trust, in Olympia, Wash. (Feb. 17, 2017) [hereinafter Kane Interview]; Interview with Michael Hagen, Executive Director, Hoh River Trust, in Port Angeles, Wash. (Mar. 17, 2017) [Hereinafter Hagen Interview].

²⁸ Hagen Interview, *supra* note 27; Kane Interview, *supra* note 27.

²⁹ Kane Interview, *supra* note 27; A Real Estate Investment Trust (REIT) is a company that invests in and manages a portfolio of real estate, with the majority of the trust’s income distributed to its shareholders. Black’s Law Dictionary (10th ed. 2014); 26 U.S.C. § 856 (2015). A Timber Investment Management Organization (TIMO) is similar to a REIT, with the exception that TIMO’s are primarily comprised of private equity investors such as pension plans, endowments, insurance companies, and family offices. HANCOCK TIMBER RESOURCE GROUP, HTGR COMPANY OVERVIEW 1 (Jul. 1, 2016). REITs and TIMOs are a concern within the conservation community because they tend to emphasize short-term investment returns—driven by shareholders who require high returns in a relatively truncated period of time—rather than managing timberland for long-term returns as part of a larger and more strategic business model. Mark B. Lapping & Sandra L. Guay, *Changing Times: Shifting Rural Landscapes*, 15 VT. J. ENVTL. L. 103, 119 (2013).

³⁰ While some local land trusts that are primarily focused on land restoration have traditionally favored fee acquisition, the rising cost of such acquisitions—due in part to TIMO-created competition—has driven a conservation easement based approach to counter this rising influence.

³¹ A Working Forest Conservation Easement (WFCE) is an easement designed to protect working forests in which the harvesting of timber and other forest products is sustained in perpetuity along with related conservation values. Dan Tesini, *Working Forest Conservation Easements*, 41 URB. LAW. 359 (2009).

Following this threshold inquiry, Washington tribes face two principal questions when seeking to protect off-reservation land. The first is whether to pursue fee acquisition, conservation easements, or perhaps a combination of both. The second is whether to pursue an independent effort or a partnership through some level of community involvement. Both of these questions present advantages and disadvantages that are discussed below.

A. *Fee Acquisition or Conservation Easement?*

Following the passage of Washington House Bill 1277 (HB1277), Washington tribes can pursue protection of off-reservation land through either fee acquisition or conservation easements. A central consideration when weighing these two approaches is whether the tribe's primary objective is the protection of off-reservation land in its current state, or whether restoration is needed to achieve tribal goals.³² As discussed further below, fee acquisition may be preferable when restoration is the primary objective, while conservation easements may be preferable when the objective is to maintain the land in its current condition.³³

1. Fee Acquisition

In the context of this analysis, the term “fee acquisition” refers to the common understanding of land acquisition in which a party (or parties) agrees to sell, and another party (or parties) agrees to purchase, a parcel of land for an agreed price.³⁴ There are two

WFCEs can be tailored to meet the particular needs of a given landowner or holding organization and to protect the unique attributes of a particular piece of property. *Id.* At their best, WFCEs are capable of prohibiting damaging forest management practices and implementing sustainable forestry principles, promoting desired forest conditions, achieving landscape-scale conservation at the regional level, and sustaining local forest product economies. *Id.* For example, a working forest conservation easement would likely include terms to (1) extend the period of time between tree harvests [i.e., from every 30–40 years to every 80 years]; (2) restrict tree harvests to “patch cuts” or “major thinnings” rather than the traditional “clear cut” [such selective cuts may even allow for the development of old growth]; and (3) increase riparian buffer zones [i.e. a minimum of 150 feet]. *See Kane Interview, supra note 27; see Hagen Interview, supra note 27.*

³² *See* ELIZABETH BYERS & KARIN M. PONTE, THE CONSERVATION EASEMENT HANDBOOK 48 (Laura Jorstad et al. eds., 2nd ed. 2005).

³³ *Id.*

³⁴ *See* JOSEPH W. SINGER ET AL., PROPERTY LAW: RULES, POLICIES, & PRACTICES 746 (Vicki Been et al. eds., 6th ed. 2014).

principal options for the tribal acquisition of off-reservation land in fee including (1) dedication of the land to the federal trust (hereinafter “fee-to-trust”), or (2) holding the land in fee.

Under the fee-to-trust approach, a tribe purchases land targeted for protection (likely at market rates) and applies for the land to be committed to the federal trust (“Trust Land”) through the Bureau of Indian Affairs (BIA).³⁵ Trust Land refers to land held in trust by the United States for the benefit of a tribe or individual Indian.³⁶ If successful, the fee-to-trust process culminates in the Secretary of the BIA accepting legal title to the land in the name of the United States in trust for the tribe.³⁷ This multifaceted process can be time-consuming and expensive, and it often leads to legal opposition by states and other interests opposed to the trust designation.³⁸ States commonly challenge fee-to-trust designations based on (1) a removal of trust land from the state property tax rolls, and (2) jurisdictional concerns about the tribe’s ability to adequately police the trust land.³⁹ Additionally, an Environmental Impact Assessment under the National Environmental Policy Act (or “NEPA”) is typically triggered by a fee-to-trust designation, and this procedure can add additional time and expense to the fee-to-trust process.⁴⁰

An advantage of the fee-to-trust approach is that it provides tribes with the most robust level of legal protection. With this robust interest, a tribe has autonomous control over land use and may freely pursue its objectives. This can be a desirable approach when the property contains highly sensitive resources that need careful management or restoration.⁴¹ Additionally, trust land is exempt from

³⁵ Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, & History*, 49 IDAHO L. REV. 519 (2013).

³⁶ FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW §15.03 at 968 (NELL J. NEWTON ET AL., 2005 ED.) [hereinafter COHEN].

³⁷ *Id.* (Trust Land can be located inside or outside of the reservation boundary); *see id.* at §15.07[1][b].

³⁸ Pommersheim, *supra* note 35.

³⁹ *Id.*

⁴⁰ 25 C.F.R. § 151.10(h) (2017) (requires an applicant to provide information that allows the BIA Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures); “The [BIA] Secretary’s approval of [a fee-to-trust designation] constitutes a ‘major Federal action’ for purposes of NEPA,” which triggers the need for an environmental impact assessment. *See* COHEN, *supra* note 36, at § 10.08.

⁴¹ *See* BYERS & PONTE, *supra* note 32, at 28. While restoration activities are possible through the use of conservation easements, this approach typically

state property taxes.⁴² Conversely, as mentioned above, fee-to-trust acquisition can be expensive, time-consuming, and subject to legal challenge. Further, the tribe will be responsible for all costs of ownership.

Alternatively, because there is no requirement that tribal land be committed to trust, tribes can simply purchase land in fee and not apply for dedication to the federal trust. However, land owned by a tribe in fee is subject to state property taxes⁴³ and other expenses that may, in the long run, outweigh the fee-to-trust undertaking.

While tribes have been increasingly successful funding land acquisition, maneuvering the gauntlet of the fee-to-trust application process, and thwarting legal challenges, the drawbacks of the fee-to-trust approach illuminate the need for a less time consuming and more cost-effective alternative.⁴⁴

2. Conservation Easement

A conservation easement is a private agreement between a landowner (grantor) and a beneficiary (grantee), through which the landowner agrees to forever (for “perpetuity”) restrict the use of his or her land.⁴⁵ While these “restrictive” conservation easements are by far the most common, conservation easements can also include terms imposing affirmative obligations on landowners.⁴⁶ The restrictions and obligations built into a conservation easement can take many forms and will be specifically tailored to the encumbered land.⁴⁷

requires additional negotiations and/or agreements with landowners regarding specific restoration activities. This requirement can add significant complexity to the undertaking, particularly if the property has changed hands since the easement was granted.

⁴² See COHEN, *supra* note 36.

⁴³ *Id.* at § 8.03(2)(b).

⁴⁴ See generally Pommersheim, *supra* note 35.

⁴⁵ See BYERS & PONTE, *supra* note 32, at 7.

⁴⁶ For example, a conservation easement that imposes affirmative obligations on a landowner might require that the landowner engage in certain restorative activities designated by the tribe holding the easement as necessary to restore the habitat to thriving salmon hatchery.

⁴⁷ See BYERS & PONTE, *supra* note 32, at 14.

a. Legal Framework

A traditional conservation easement is a “negative servitude,” or a restriction held by another on what an owner is permitted to do with his or her land.⁴⁸ Conservation easements can be *appurtenant* easements (i.e., the benefit runs with a particular parcel of land), although *in gross* conservation easements (i.e., the benefit attaches to a person or entity) are far more common.⁴⁹ Conservation easements are authorized by statute and, thus their features will vary from state to state.

Washington State’s relevant statute can be found in Wash. Rev. Code. § 64.04.130, which defines a conservation easement as:

A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, ***federally recognized Indian tribe***, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. Any such right or interest constitutes and is classified as real property. All instruments for the conveyance thereof must be substantially in the form required by law for the conveyance of any land or other real property.⁵⁰

Critically, Wash. Rev. Code § 64.04.130 was amended in 2013 by HB1277 to include federally recognized Indian tribes as organizations that can legally hold or acquire conservation easements.⁵¹

⁴⁸ SINGER, *supra* note 34, at 516. Note, however, the previously mentioned exception that some conservation easements impose affirmative obligations on landowners. Thus, such conservation easements elude classification under conventional common law terms.

⁴⁹ *Id.* at 516–17.

⁵⁰ WASH. REV. CODE. § 64.04.130 (2016).

⁵¹ Abigail Pearl & Hunter Elenbaas, *Wash. Envtl. Law Year in Review*, 3 WASH. J. ENVTL. L. & POL’Y 347 (2013).

b. Incentive Options

Research has shown that landowners are primarily motivated to grant easements by a desire to protect their land or by “goodwill,”⁵² but there are additional incentives that factor into the equation. Conservation easements can be acquired through three principal methods including (1) purchase, (2) donation, or (3) a hybrid approach in which some form of consideration is offered in exchange for the donation.⁵³ The donation of a conservation easement is the most common method of conservancy,⁵⁴ in large part due to the substantial tax benefits associated with the donation, but the less frequently pursued hybrid method may represent a more flexible approach.

The creation of a conservation easement is a detailed and multi-step process,⁵⁵ the basic elements of which will be discussed below. Valuation of the property under consideration is the first step in creating an easement, regardless of the incentive approach. Initially this may be accomplished through informal means but, eventually, a qualified appraiser will have to be retained to perform a formal evaluation.⁵⁶ The appraiser will calculate the Fair Market Value (FMV) of the land with and without the conservation easement in place.⁵⁷ Because a conservation easement at least in part restricts the use of land, generally the FMV of the encumbered property will be reduced once the easement is in place. Accordingly, this is one of the key considerations discussed below.

i. Purchase

Once a qualified appraiser calculates the FMV of the land proposed for conservation with and without the conservation easement in place, the two resulting values can be used to calculate a purchase price. The purchase price equals the FMV of the land prior to the conservation easement less the FMV of the land with the conservation easement in place.⁵⁸ For example, if a parcel of land

⁵² BYERS & PONTE, *supra* note 32, at 80.

⁵³ *Id.* at 23.

⁵⁴ *Id.* at 80.

⁵⁵ See generally BYERS & PONTE, *supra* note 32.

⁵⁶ BETH ROSE MIDDLETON, TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION 13 (2011).

⁵⁷ *Id.*

⁵⁸ *Id.*

was valued at \$400,000 prior to placement of the easement, and \$300,000 with the easement in place, the purchase price of the conservation easement would be \$100,000.

The advantage of this approach is that it is relatively straightforward for both the landowner and the tribe. The disadvantage of this approach is that it can be expensive to the tribe. Conservation easement values have ranged from less than 10% to more than 90% of a property's unrestricted FMV.⁵⁹ In general, the highest easement values arise from very restrictive conservation easements on tracts of developable open space in areas where development pressure is intense.⁶⁰ Of course, there are many variables that influence the purchase price of an easement, but excessive cost can quickly create an insurmountable financial challenge for tribes.

ii. Donation & Tax Incentive

Due to the potentially high cost associated with purchasing conservation easements, donation is an appealing approach for tribes. The donation of conservation easements may also be desirable to landowners because of generous federal (and sometimes state) tax benefits associated with the donation; however, to receive the tax benefits associated with the donation, numerous requirements must be met. Also, it is important to note that the tax benefits associated with the donation of a conservation easement depend on whether the donor is categorized as an individual or a corporation.

In order to qualify for a federal income tax deduction, the Internal Revenue Code (IRC) requires a *qualified conservation contribution*, which entails the contribution of a *qualified real property interest*, to a *qualified organization*, exclusively for *conservation purposes*.⁶¹ These requirements are the same for both individuals and corporations.⁶²

⁵⁹ *Id.* at 91.

⁶⁰ *Id.*

⁶¹ I.R.C. § 170(b)(1)(E)(i) (2015); I.R.C §§ 170(h)(1)(A),(B),(C) (2015); Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U.L. REV. 1057, 1058 (2006).

⁶² I.R.C. § 170(b)(2)(A) (2015).

A qualified real property interest is defined as a restriction, granted in perpetuity, on the permitted use of the real property.⁶³ This definition includes conservation easements or other interests in real property that under state law have attributes similar to an easement.⁶⁴ Under the IRC, a federally recognized Indian tribe constitutes a qualified organization.⁶⁵ For a conservation easement to fulfill the conservation purpose requirement, it must fall into one of three categories.⁶⁶ The category most applicable to this analysis encompasses conservation purposes for “*the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.*”⁶⁷

For individuals, the value of a qualified conservation contribution can be deducted by an amount up to 50%⁶⁸ of the donor’s adjusted gross income (AGI) in the year of the donation.⁶⁹ If the conservation easement’s value exceeds 50% of the donor’s income, the excess may be carried forward and deducted (again, subject to the 50% limit) over the next fifteen years.⁷⁰ For example, if an individual with an AGI of \$100,000 donated a conservation easement worth \$200,000, he or she would be able to deduct \$50,000⁷¹ in the year of the donation and, assuming no change in AGI, \$50,000 in each of the three subsequent years until the full value of the donation had been recognized.

For corporations, the value of a qualified conservation contribution can be deducted by an amount up to 10% of the donor’s taxable income in the year of the donation.⁷² If the conservation easement’s value exceeds 10% of the donor’s income, the excess

⁶³ I.R.C. § 170(h)(2)(C) (2015).

⁶⁴ Treas. Reg. § 1.170A-14(b)(2) (2015); Wash. Rev. Code § 64.04.130 (2017).

⁶⁵ I.R.C. § 170(h)(3)(A) (2015); I.R.C. § 170(b)(1)(A)(v) (2015); I.R.C. § 170(c)(1) (2015); I.R.C. § 7871(a)(1)(A) (2009).

⁶⁶ I.R.C. § 170(h)(4) (2015).

⁶⁷ I.R.C. § 170(h)(4)(A)(ii) (2015); *see also* Kueter & Jensen, *supra* note 61.

⁶⁸ Ordinary income property or short-term capital gain property is subject to a 50% deduction cap, while long-term capital gain property is subject to a 30% deduction cap.

⁶⁹ I.R.C. § 170(b)(1)(E)(i) (2015); I.R.C. § 170(b)(1)(G) (2015); LAND TRUST ALLIANCE, INCOME TAX INCENTIVES FOR LAND CONSERVATION, <https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation> [<https://perma.cc/P36Z-USZS>] [hereinafter LAND TRUST ALLIANCE].

⁷⁰ I.R.C. § 170(b)(1)(E)(ii) (2015); *see* LAND TRUST ALLIANCE, *supra* note 69.

⁷¹ This example, and those that follow, represents a simplified deduction illustration. The actual annual deduction will depend on the particular taxpayer and will likely vary slightly from this neat, whole number.

⁷² I.R.C. § 170(b)(2)(A) (2015).

may be carried forward and deducted (again, subject to the 10% annual limit) over the next five years.⁷³ For example, if a corporation with a total income of \$400,000 donated a conservation easement worth \$200,000, it would be able to deduct \$40,000 in the year of the donation and, assuming no change in total income, \$40,000 in each of the four subsequent years until the full value of the donation had been recognized.

Individuals, and corporations to a lesser extent, may be able to take advantage of certain direct and indirect federal estate tax and state property tax benefits associated with the donation of a conservation easement. Under Washington State law, county assessors must take conservation easements into consideration when establishing the market value of the land subject to the easement.⁷⁴ Because the creation and donation of an easement generally lowers the market value of encumbered land, the easement can indirectly benefit the individual landowners by lowering or eliminating estate tax when they transfer land to relatives.⁷⁵ Similarly, a reduction in market value will also result in lower state property taxes for both individuals and corporations.⁷⁶ Under the Open Space Taxation Act of 1970, landowners can apply to have “open space”⁷⁷ land valued at the “current use” rather than the “highest and best” use.⁷⁸ Such a classification would also result in a lower market value and thus reduce state property taxes. A final option is a direct exemption from state property taxes under Wash. Rev. Code § 84.36.260. This

⁷³ I.R.C. § 170(d)(2)(A) (2015).

⁷⁴ WHIDBEY CAMANO LAND TRUST, CONSERVATION EASEMENT Q&A, Nov. 26, 2016, <http://www.wclt.org/what-we-do/protect-your-land/conservation-easements-q-a/> [<https://perma.cc/CK3X-HEB2>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Wash. Rev. Code § 84.34.020 (2017); WASH. STATE DEPT. OF REVENUE, OPEN SPACE TAXATION ACT FACT SHEET 1 (Jan. 1, 2017) [hereinafter FACT SHEET]. “Open space” land is broadly defined to include, among other qualifications, (1) any land zoned for open space by a comprehensive official land use plan adopted by a city or county or (2) any land in which preservation in its present use would conserve and enhance natural or scenic resources. *Id.* While many Washington cities and counties have adopted such land use plans (i.e. Clallam County Code 27-08), in the absence of such a provision the latter category should capture most conservation easement applications.

⁷⁸ Wash. Rev. Code § 84.34.010 (2017); Wash. Rev. Code § 84.34.020 (2017); Once a parcel of land is so classified, a removal of the designation will trigger an additional tax obligation equal to the tax savings realized over the previous seven years and a possible 20% penalty. *See* FACT SHEET, *supra* note 77, at 6.

provision, however, is strictly construed.⁷⁹ The State of Washington cannot currently offer any income tax incentives to landowners who grant conservation easements because Washington does not have a state income tax.

While this donative approach has the benefit of being significantly less expensive than the outright purchase of an easement, there are still associated costs. Although the recipient of a conservation easement is not required to fund the appraisal or other transaction costs,⁸⁰ a tribe will likely have to shoulder some of this burden.

The most pressing challenge of the donative approach is the relatively small cohort of landowners to which it will appeal. To benefit from the tax deduction discussed above the grantor must have income to offset, and this typically implicates wealthy individuals and corporations. As such, this approach is more likely to be successful when the land within a targeted area is largely owned by such individuals and entities.⁸¹ This approach will be less successful if the land within the impact area is primarily comprised of smaller parcels owned by low to middle-income individuals.

⁷⁹ Wash. Rev. Code § 84.36.260(a) (While preservation of “native plants or animals, or biotic communities, or works of ancient human beings or geological or geographical formations...and not for the pecuniary benefit of any person or company” qualify for exemption from ad valorem taxation, the code further requires that land so designated “shall be open to the general public for educational and scientific research purposes subject to reasonable restrictions designed for its protection”).

⁸⁰ See BYERS & PONTE, *supra* note 32, at 57.

⁸¹ As a general note, the mere ability of an individual or corporation to realize an income tax benefit from the donation of a conservation easement should not be conflated with a de facto desire to do so. Rather, in some instances landowners may even be vehemently opposed to the placement of a conservation easement. This is a particularly important consideration when dealing with corporate landowners. For example, if a timber corporation owns land within an area targeted for protection, the placement of a conventional conservation easement would likely be unappealing because it would restrict or prohibit the harvesting of trees—a result that is antithetical to a timber corporation’s business. However, in such situations all is not lost, and this scenario in part illuminates the development of working forest conservation easements. See *supra* note 30. While the viability of such an approach will be entirely based on the tribe’s goals, the particulars of the land in question, and the interests of the landowner, a working forest conservation easement may constitute an alternative approach for tribes to pursue.

iii. *Hybrid*

The third and final approach to incentivize the granting of conservation easements is a broad category that can encompass many different transactions in which some level of consideration is offered to landowners. Thus, this approach is essentially a “hybrid” of the purchase and donation approaches discussed above. There are two basic concepts within this category—the bargain sale and the quid pro quo contribution—and underlying both is the basic assumption that a landowner’s charitable deduction must be reduced by the value of any consideration received.

On one end of the hybrid spectrum is a transaction known as a bargain sale. A bargain sale is a transaction in which the landowner sells the conservation easement to an organization for less than its FMV (i.e., some portion of the conservation easement is purchased and some portion is donated).⁸² In this situation, the landowner is required to reduce the amount of his or her donation by the purchase price.⁸³ Recalling the example above in which the landowner donated an easement worth \$100,000, imagine instead that the landowner received \$25,000 in cash in return for the donation. In this situation, the landowner would be required to reduce the value of his or her charitable contribution to \$75,000.⁸⁴

On the other end of the hybrid spectrum is a transaction in which the landowner receives some form of non-cash consideration for donation of the easement. Using the same basic example, imagine that instead of \$25,000 in cash the landowner received an all-expense paid multi-day fishing excursion with a FMV of \$10,000 in return for his or her easement donation. In this case, the taxpayer would have to reduce the amount of his or her charitable contribution from \$100,000 to \$90,000. This is referred to as a quid pro quo contribution.⁸⁵

The broad nature of this approach makes it a desirable alternative to the strict purchase and donation approaches discussed above because it allows for the creation of a flexible incentive program that can be customized to meet the needs of individual

⁸² *Id.* at 288.

⁸³ Treas. Reg. § 1.170A-4.

⁸⁴ It should be noted that the bargain sale approach has additional ramifications for the landowner’s basis in the property, but this will not be discussed herein.

⁸⁵ *Charitable Contributions: Quid Pro Quo Contributions*, IRS, Aug. 12, 2017, <https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contributions-quid-pro-quo-contributions> [<https://perma.cc/F3GV-5GM3>].

landowners. This flexibility is particularly valuable when dealing with economically and politically diverse property owners.

c. Monitoring and Long-Term Management

As discussed above, the potential to protect off-reservation land at far less expense than an outright purchase is one of the principal benefits associated with the use of conservation easements. However, the holders of conservation easements are still responsible for managing and enforcing the easements in perpetuity.⁸⁶ This responsibility obligates the easement holder to regularly monitor its easements, document the monitoring, maintain contact with easement landowners, and enforce easement terms if they are violated.⁸⁷ Additionally, most reputable land trusts are accredited by the Land Trust Accreditation Commission (LTAC), which means that they have completed a rigorous review process to demonstrate fiscal accountability, strong organizational leadership, sound transactions, and lasting stewardship of the lands they conserve.⁸⁸ LTAC accreditation imposes significant financial requirements, perhaps the most challenging of which are robust stewardship and litigation reserve funds.⁸⁹ The necessity to effectively police

⁸⁶ See BYERS & PONTE, *supra* note 32, at 143.

⁸⁷ *Id.*

⁸⁸ *The Accreditation Seal*, LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org/about/about-the-seal> [<https://perma.cc/8LR4-Z7HU>]. The LTAC accreditation process is a substantial undertaking with a projected timeline of 12–15 months. *Id.* More than just marketing fluff, the LTAC and the accreditation program were created by the Land Trust Alliance in the wake of a scandal at The Nature Conservancy in 2003 that rocked the entire land trust community. David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST (May. 4, 2003), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062600803.html> [<https://perma.cc/C4SC-JU7G>]. Subsequent investigations by Congress and the IRS culminated in threats to severely restrict the favorable tax incentives under I.R.C. § 170 for conservation easement donation; however, the Land Trust Alliance's voluntary adoption of the accreditation process resolved the issue. Marc Campopiano, *The Land Trust Alliance's New Accreditation Program*, 33 *ECOLOGY L.Q.* 897, 897 (2006). Accordingly, the land trust community views the accreditation process as a pillar of maintaining public trust and views unaccredited organizations with skepticism.

⁸⁹ LAND TRUST ACCREDITATION COMM'N, ACCREDITATION REQUIREMENTS MANUAL: A LAND TRUST'S GUIDE TO UNDERSTANDING KEY ELEMENTS OF ACCREDITATION 56 (2016) [hereinafter LTAC MANUAL], <http://www.landtrustaccreditation.org/storage/downloads/RequirementsManual.pdf> [<https://perma.cc/4EXX-DM2F>]. There is a saying in the land trust community that it is not the first owner you need to worry about, but rather the second

participating landowners can be a challenging and time-consuming effort, but it is absolutely critical if the conservation easement is to have any effect. While the hope is that the cost of these efforts will be lower than the carrying costs associated with fee ownership (i.e. maintenance, upkeep, and taxes), there will still be a cost for the tribes now and into the future.

B. *Independent Effort or Partnership?*

Once a tribe has determined how it plans to pursue its off-reservation land protection objectives (i.e., fee acquisition or conservation easement and, if applicable, the incentive approach), the second question it must consider is whether to pursue an independent effort or seek the formation of a partnership with a new or existing organization.

1. Independent Effort

Federally recognized Indian tribes in Washington can both hold and grant conservation easements either independently or through the formation of a tribally managed land trust.⁹⁰ Common benefits associated with these approaches include the tribe's ability to (1) independently control the conservation process, (2) promote tribal autonomy, (3) bolster confidence to create self-driven, self-determined conservation strategies, and (4) capitalize on

owner. Telephone Interview with Tom Sanford, Exec. Dir., N. Olympic Land Trust (Mar. 23, 2017). While the landowner that initially grants a conservation easement will presumably live by the easement's terms, successive owners may be less inclined to do so. *Id.* In these situations, the organization that holds the easement needs to enforce the terms of the agreement, and this enforcement generally requires funding. *Id.* To this end, the LTAC imposes strict financial reserve requirements for ongoing stewardship and the inevitable legal defense. *Id.*

⁹⁰ If a tribe chose to create a new tribally managed land trust (a "Native land trust") it would have to meet various IRS requirements regarding the source of funding. Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENVTL. L.J. 477, 520–21 (2008). "The 'public support' test set forth in I.R.C. § 170(b)(1)(A) requires that a land trust prove that a 'substantial part of its support' comes from a 'governmental unit'—which includes tribes—or 'from direct or indirect contributions from the general public.'" *Id.* at 520 (footnote omitted). "If for some reason a Native [land] trust cannot meet the requirements set out in I.R.C. § 170(b)(1)(A)(vi), it still can ensure tax deductible donations for its grantors by organizing itself as a 501(c)(3) organization." *Id.* (footnote omitted).

independent knowledge of the local ecosystem and resource management expertise.⁹¹ Common disadvantages include (1) the steep learning curve associated with an entirely new undertaking; (2) the expense of establishing the program, associated processes, and ongoing administration; and (3) the ongoing demands of enforcement.

Examples of conservation easements held by federally recognized Indian tribes in Washington are limited due to the short time that has elapsed since the passage of HB1277. Indeed, there is a relatively short national history to draw from as well. The first conservation easement was acquired by a federally recognized Indian tribe in 1997 when seven California tribes collaborated on the creation of an easement to protect nearly 400 acres of the Sinkyone rainforest of northern California.⁹² The Skokomish Tribe is presently the only tribe in Washington to directly hold conservation easements, holding two which encumber approximately thirty acres along the Skokomish River.⁹³ It is currently more common for Washington tribes to be the grantor of conservation easements.⁹⁴ An early example of this latter trend is the Quinault Tribe's 2005 grant of a 4,000-acre conservation easement to the United States Department of the Interior.⁹⁵

⁹¹ An independent tribal effort may provide the mechanism through which tribes can resume management of aboriginal lands and resources. *See id.* at 525. Historically tribes worked with Earth's natural processes to facilitate abundance and natural wealth through the generations. *Id.* Re-vesting tribes with the role of resource manager may convey benefits to society extending well beyond the tribal interests involved. *Id.*

⁹² *See* MIDDLETON, *supra* note 56, at 52.

⁹³ NAT'L CONSERVATION EASEMENT DATABASE, <http://www.conservationaleasement.us/reports> (last visited Dec 5, 2017) [<https://perma.cc/E7P4-T3ZF>].

⁹⁴ *Id.*

⁹⁵ Blaine I. Green, *One Size Does Not Fit All: Different Approaches to Conservation & Development of Tribal Resources*, in BEST PRACTICES FOR PROTECTING NATURAL RESOURCES ON TRIBAL LANDS 77 (2015), WL 9194948 (The Quinault Tribe issued the conservation easements following a decades-long dispute surrounding the land, which had been mistakenly omitted from the reservation, and the issuance of a biological opinion by the U.S. Fish and Wildlife Service that timber harvests would jeopardize marbled murrelet habitat. In exchange for the perpetual conservation easement, the Tribe received \$32.2 million as payment for the diminished use of the land. The Tribe continues to hold fee to the land and manages it pursuant to restrictions contained in the easement. The easement restricts timber harvests and dictates that the land shall be managed for the benefit of the marbled murrelet. The transfer was completed

2. Partnership

A partnership with a new or preexisting organization is the alternative to an independent tribal effort. Such partnerships can take a variety of forms, but a partnership with an external land trust or “land conservancy” is the most common that tribes have historically pursued to achieve off-reservation land protection. A land trust is a non-profit organization that conserves land by acquiring conservation easements or purchasing fee title to property.⁹⁶

Partnerships with preexisting organizations can provide tribes with a number of benefits including (1) the ability to piggy-back on preexisting expertise and resources,⁹⁷ (2) the opportunity to foster a broad-based effort,⁹⁸ and (3) the ability to nurture established community relationships.⁹⁹ The disadvantages of external partnerships include (1) the possibility of incongruous objectives, (2) a shared management structure that may not be compatible with tribal objectives, and (3) the possibility of diminished tribal autonomy with respect to off-reservation land protection.¹⁰⁰

There are numerous examples of tribal partnerships with external land trusts in Washington. A prominent example is the partnership between the Nisqually Land Trust and the Nisqually Tribe which, since 1989, have worked together to acquire and manage critical land within the Nisqually River watershed.¹⁰¹ The land trust is not managed by the Nisqually Tribe, but the two organizations have worked closely through the years and continue to do so.¹⁰² The Nisqually Land Trust has protected over 5,000 acres to date.¹⁰³ A similar partnership can be found closer to home (for the LEKT) between the Jamestown S’Klallam Tribe and the North

in 2005 and protects the largest nonpublic block of old growth forest west of the Cascade Mountains.).

⁹⁶ See MIDDLETON, *supra* note 56, at 7–8.

⁹⁷ *Id.* at 165; *see also supra* note 81.

⁹⁸ MIDDLETON, *supra* note 56, at 108.

⁹⁹ See CRANE, *supra* note 2, at 133.

¹⁰⁰ See generally MIDDLETON, *supra* note 56.

¹⁰¹ NISQUALLY LAND TRUST, <http://nisquallylandtrust.org/> [<https://perma.cc/JBP5-829U>].

¹⁰² *Id.*

¹⁰³ *Id.*

Olympic Land Trust.¹⁰⁴ These two organizations have worked together over the past twenty years to protect over 100 acres of riparian land along the Dungeness River.¹⁰⁵ The Salmon Defense organization is an example of a collaborative effort among northwest tribes to protect salmon habitat.¹⁰⁶ Although Salmon Defense does not presently hold any conservation easements, it demonstrates the efficiencies that can be achieved when tribes collaborate toward common objectives through the device of an inter-tribal nonprofit entity. A final and particularly relevant example of conservation partnership exists between the LEKT and Olympic National Park. This collaborative effort worked to collect seeds and grow native plants for the Project Lands when the dams were removed.¹⁰⁷

While external partnerships can be beneficial to tribes, such relationships may also leave tribes vulnerable to the evolving landscape of land protection and restoration in Washington. For example, the Hoh River Trust recently merged with The Nature Conservancy.¹⁰⁸ While mergers occur in every industry, robust stewardship obligations, legal reserve requirements, and fundraising challenges may make land trusts particularly susceptible.¹⁰⁹ Accordingly, if a tribe forms a partnership with a land trust, and that organization subsequently merges with another entity, the tribe may find that the new entity does not share the same objectives and perspectives of its original partner.

IV. ELWHA PROTECTION CORRIDOR APPLICATION

As discussed above, the LEKT has a variety of options to choose from when seeking to protect the Elwha Protection Corridor. These options are discussed below.

¹⁰⁴ MIDDLETON, *supra* note 56, at 164.

¹⁰⁵ *Id.*

¹⁰⁶ SALMON DEFENSE, <http://salmondefense.org/> [<https://perma.cc/9NE3-KGML>].

¹⁰⁷ MAPES, *supra* note 8, at 89–90.

¹⁰⁸ *See* Hagen Interview, *supra* note 27.

¹⁰⁹ *Id.*

A. *Fee Acquisition or Conservation Easement?*

The Fair Market Value (FMV) of the land within the Elwha Protection Corridor, the LEKT's financial capacity, and the nature of the desired land interest will be three primary considerations for the Tribe when deciding whether to pursue fee acquisition or conservation easements.

If the FMV of the land within the Elwha Protection Corridor is within the financial capacity of the Tribe, it may be prudent to pursue a fee acquisition approach.¹¹⁰ As noted above, Clallam County's remote location and somewhat depressed economy may indicate the presence of such a scenario.¹¹¹ In addition to the cost of acquisition, the Tribe may also want to consider the challenges and complexities of a possible fee-to-trust designation (if the Tribe decides to pursue this approach), as well as the future carrying costs of the land to be acquired. Depending on the outcome of this analysis, the Tribe may decide that conservation easements present a less expensive and equally viable approach to achieve tribal objectives. There is also the possibility that fee acquisition may simply be too expensive in some or all instances, which would necessitate a conservation easement-focused approach. As a final consideration, when the land in question is of a particularly fragile or relevant nature, or if substantial restoration is envisioned, fee acquisition may be the more desirable approach despite the higher cost. In such situations, the Tribe may wish to pursue fee acquisition regardless of cost.

B. *Incentive Program*

If the LEKT decides to pursue the use of conservation easements, selection of the incentive program should begin with a close examination of land ownership within the Elwha Protection Corridor. As noted above, donation, and the associated federal income tax deduction, is the traditional conservation easement incentive approach. However, this approach will only be appealing to parties with annual income to offset, and this generally implicates wealthy individuals and corporations. Such parties are more likely to own high-value land. For example, smaller, high-value parcels in

¹¹⁰ This possibility presupposes that landowners are interested in selling. The selling price for the land of an unwilling landowner may quickly escalate.

¹¹¹ See Vleming, *supra* note 24.

geographically desirable locations may be an indication of wealthy landowners. These parcels will likely have a high per-acre value. Comparatively, large privately held parcels, or holdings that encompass numerous smaller parcels, may be an indication of corporate ownership. The high value of such land is generally tied to the vast size of the holding, rather than a high per-acre value. However, in both scenarios the traditional conservation easement approach may be appealing.¹¹²

As noted above, the Elwha Protection Corridor, at just 34,000 targeted acres, is smaller than other river watershed protection zones in the region, and generally contains a large number of small parcels held under diverse ownership. In comparison, the Hoh River watershed, on the western slope of the Olympic Mountains is 162,000 acres,¹¹³ with just 35,000 acres within Olympic National Park.¹¹⁴ This leaves 127,000 acres of the watershed ripe for protection.¹¹⁵ Landownership within this area includes the State of Washington, The Nature Conservancy,¹¹⁶ and private timber companies,¹¹⁷ and encompasses large swaths of forest land.¹¹⁸ On an even larger scale, the Nisqually River watershed is

¹¹² See *supra* note 81 (The desirability of conservation easements to corporate landowners will depend on the current and future land use, as well as other business considerations).

¹¹³ See USGS 12041200 Hoh River at US Highway 101 near Forks, WA, U.S. GEOLOGICAL SURV., http://waterdata.usgs.gov/nwis/inventory/?site_no=12041200&agency_cd=USGS [<https://perma.cc/GD2H-8DAH>] (last visited Dec. 5, 2017).

¹¹⁴ HOH INDIAN TRIBE, 2016 STATE OF OUR WATERSHEDS REPORT: HOH RIVER BASIN 35 https://geo.nwifc.org/SOW/SOW2016_Report/Hoh.pdf [<https://perma.cc/JW37-Z3T6>].

¹¹⁵ 10,000 of the remaining 127,000 acres—generally land adjacent to the thirty-mile stretch of river between the Park and ocean—has been designated as high priority by The Nature Conservancy. THE NATURE CONSERVANCY, <http://www.washingtonnature.org/fieldnotes/hoh-announcement-nature-conservancy-hoh-river-trust> [<https://perma.cc/7ZJG-KCEZ>].

¹¹⁶ Prior to its acquisition of the Hoh River Trust, The Nature Conservancy previously owned approximately 3,000 acres in the Hoh watershed. Following the acquisition, The Nature Conservancy owns closer to 10,000 acres.

¹¹⁷ Private timber companies within the Hoh watershed include (1) Rayonier Washington Timber Company, (2) Fruit Growers Supply Company, and (3) Pacific West Timber Co (WA LLC). JEFFERSON CTY., WASH., ASSESSOR, <https://jeffcowa.maps.arcgis.com/home/index.html> (follow “Land Records Mapping Application” hyperlink; then pan to the Hoh River watershed and zoom in to observe land parcels and ownership).

¹¹⁸ See HOH INDIAN TRIBE, *supra* note 114.

330,000 acres,¹¹⁹ with just 64,000¹²⁰ acres within Mount Rainier National Park. This leaves 266,000 acres of the watershed ripe for protection.¹²¹ Landownership within the Nisqually watershed is more complex than that of the Hoh. While large swaths of federal, state, and privately owned forest land dominate the upper watershed, the lower watershed is more developed and contains small towns, the Nisqually Indian Reservation, and the sprawling Joint Base Lewis-McChord.¹²²

Accordingly, the characteristics of the Hoh and Nisqually watersheds facilitate land ownership by parties to which the conventional conservation easement approach may be appealing. Comparatively, the Elwha Protection Corridor's small overall size, prevalence of smaller parcels, diverse ownership, and geographic location may necessitate a more flexible incentive approach to promote meaningful land protection.

To facilitate the granting of conservation easements within the Elwha Protection Corridor, the LEKT may want to consider a hybrid incentive program based on (1) goodwill, (2) federal and state tax benefits, and (3) consideration. Goodwill is a critical element of all conservation easements, and to stimulate goodwill participation a clear vision of the benefits of land protection must be conveyed. As under the conventional approach, landowners who donate will qualify for the Federal income tax deduction provided under I.R.C. § 170 (potentially offset by the value of consideration offered), benefit from lower state property taxes due to the reduced assessed value of their property, and may qualify for further savings under the Open Space Taxation Act.

Regarding consideration, the LEKT would have considerable latitude to create an "amenity package" to incentivize the granting of conservation easements. Under the Bargain Sale approach, the Tribe could offer some level of cash consideration to

¹¹⁹ USGS 12089500 *Nisqually River at McKenna, WA*, U.S. GEOLOGICAL SURV., http://waterdata.usgs.gov/nwis/inventory/?site_no=12089500&agency_cd=USGS [<https://perma.cc/3TAK-HW4R>].

¹²⁰ Estimate.

¹²¹ Of the remaining 266,000 acres, 5,125 have been protected to date by the Nisqually River Trust along the river's eighty-mile run from its headwaters within Mount Rainier National Park to its mouth on Nisqually Reach. NISQUALLY LAND TRUST, *supra* note 101.

¹²² *Maps & Data*, PIERCE CTY., WASH., <http://www.co.pierce.wa.us/index.aspx?nid=491> (follow the "Interactive Mapping" hyperlink; then pan to the Nisqually River watershed and zoom in to observe land parcels and ownership) [<https://perma.cc/6VMW-JP64>].

landowners if tribal resources allow. Alternatively, under the Quid Pro Quo approach, the Tribe could offer landowners various other forms of non-cash consideration that may or may not have a corresponding cash value. Examples of non-cash consideration include (1) junior/non-voting membership in a new community organization [if such an approach was adopted by the Tribe], (2) various forms of recognition such as identification at a commemorative center, and (3) participation in regularly scheduled group events, cultural or otherwise. If the Tribe chooses to create such a program, it is important to keep in mind that they will create ongoing obligations. Thus, the extent to which these forms of consideration are incorporated must keep the long-term commitment in mind.

C. Independent Effort or Partnership?

The decision whether to pursue an independent effort or seek a partnership will have to be based on careful consideration by the LEKT, which may include the advantages and disadvantages discussed above. As a first option, the Tribe could pursue an independent effort. If the Tribe selected this course of action, it would have maximum latitude to sculpt its land protection plan.

Alternatively, the LEKT could pursue a community partnership with an existing organization. If the Tribe were to pursue this route, the North Olympic Land Trust is a prominent land trust active in Clallam County that may be capable of partnering with the LEKT.¹²³ In addition to this organization, the City of Port Angeles and Clallam County are qualified organizations with which the LEKT could partner.

A third possible option the LEKT could pursue is the creation of a new community-based organization that is managed by the Tribe and includes key community organizations and individuals. The LEKT has already established solid, reciprocal relationships with the local community through the long struggle to remove the Elwha dams. Therefore, it is likely that such an effort

¹²³ NORTH OLYMPIC LAND TRUST, <https://northolympiclandtrust.org/> [<https://perma.cc/WM6V-65Z7>]; MIDDLETON, *supra* note 56, at 164 (The North Olympic Land Trust [NOLT] is particularly active in Clallam County and, as of 2009, had protected 1,811 acres through fifty-seven conservation easements and five land acquisitions. NOLT worked extensively with the Jamestown S’Klallam Tribe to purchase conservation easements encompassing seventy acres of the floodplain near the mouth of the Dungeness River.).

would be well-received. The creation of a new community organization would allow the LEKT to sculpt the particular conservation objectives of the organization rather than attempting to mesh its objectives for the Elwha Protection Corridor with the objectives of a preexisting organization. Additionally, the formation of a new organization would allow the LEKT to select which external organizations to include and in doing so help manage and align interests. The LEKT could, for example, grant board appointments to those organizations to which it is most closely aligned. The new organization could take the form of a land trust, or it could be organized under provisions of tribal law.¹²⁴ Under such an approach, the LEKT would benefit from the expertise of external organizations, while also retaining control of the new organization's direction and vision.

V. CONCLUSION

Conservation easements are a flexible new tool that can allow Washington tribes to pursue off-reservation land protection objectives at far less expense than previously possible, while also affording a high level of flexibility to meet the needs of both tribes and landowners. Although somewhat legally complex, with adequate preparation and planning, conservation easements can be a cost-effective and efficient tool.

¹²⁴ An example of such provisions can be found in Squaxin Island Tribal Code § 6.32.010.

Exhibit A
Elwha River Watershed¹²⁵



¹²⁵ *The Elwha Watershed*, NAT'L PARK SERV., <https://www.nps.gov/olym/learn/nature/the-elwha-watershed.htm> [<https://perma.cc/23EB-6X9C>].