



# 4. Historical and Legal Rationale



## 4

## Historical and Legal Rationale

The following chapter describes the historical context within which the Executive Order establishing the Colville Reservation was developed, the cause and extent of salmon losses in the Upper Columbia and Okanogan rivers, the effects of those losses on the Colville Tribes and on the citizens of the Okanogan subbasin, and the lack of historical and current mitigation to address those losses.

### 4.1 CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

#### 4.1.1 WHO ARE THE COLVILLE TRIBES

Twelve distinct Indian tribes constitute the Colville Tribes, they include: the Colville, Nespelem, San Poil, Lake, Palus, Wenatchi (Wenatchee), Chelan, Entiat, Methow, Southern Okanogan, Moses Columbia, and Nez Perce of Chief Joseph's Band. Over 8,700 descendants of these twelve tribes are currently enrolled members of the Colville Tribes.

All of the Colville Tribes were – and are – salmon people. For centuries, the cycles of the salmon established the seasonal rhythm of life for Colville Tribal members. The taste, smell, sound, sight, and touch of salmon reside in the collective heart of the Colville Tribes. The individual stories, communal

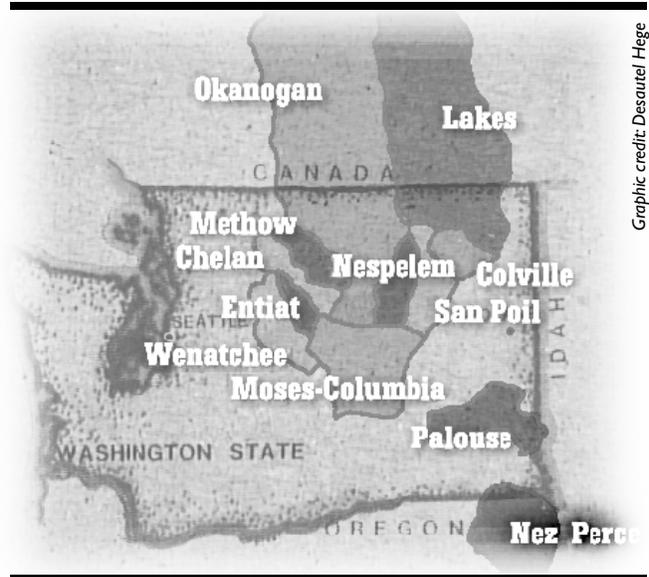


FIGURE 3: Map of Traditional Lands of the Colville Tribes

memories, and formal history of the Tribes are permeated at every level by the cadence of the salmon.

The contemporary Colville Reservation includes approximately 1.4 million acres of land located in north central Washington and is situated primarily in Okanogan and Ferry counties. On its western flank the Reservation is bordered by the Okanogan River and on its southern and eastern edges, by the Columbia River. A straight line, parallel to and approximately 40 miles south of the U.S. Canadian border, defines the northern edge of the Reservation. The Colville Reservation is located in the Cascade Columbia and the Intermountain provinces. The western half of the Reservation is located in the Okanogan subbasin. The Okanogan subbasin currently is the uppermost limit of anadromous fish distribution in the Columbia River.

The Reservation ranges from 790 feet above sea level at the mouth of the Okanogan River to 6,774 feet at the summit of Moses Mountain. Reservation lands consists of a mix of tribally owned lands held in federal trust status for the Colville Tribes; land owned by individual Colville Tribal members, most of which is held in federal trust status; and fee property lands. Some tribal members also hold tribal allotments on lands surrounding the current Reservation.

## 4.2 THE BIG CONTEXT

Over the centuries both the forces of nature and the will of humans have repeatedly transformed the Columbia Basin. Between 12,000 and 11,000 B.C. the debris laden waters of Lake Missoula thundered repeatedly across what is now eastern Washington as the great ice dam on the Clark Fork River gave way, reformed and released again. The resulting floods reinvented the landscape across which they flowed, gouging deep channels and scablands, and carving an altered path for the Columbia River. The receding floods left behind a lunar landscape of misplaced geologic artifacts and scoured channels throughout much of eastern Washington, and transformed the topography of vast segments of the lower Columbia River Basin.

During the last ice age much of the Colville Tribes' traditional lands were covered by the great waves of ice that crawled across the northern latitudes. The Okanogan River Valley, the homeland of a number of the constituent tribes of the Colville Reservation, was sculpted in part by the retreat of one of these massive fingers of ice. As the ice age relented, the receding glacier scoured the wide, smooth contours of the Okanogan Valley and left in its wake a system of chain lakes that is unique to the Canada/U.S. reaches of the Columbia River Basin. Members of the Colville Tribes are descendants of people who have made their homes around the Upper Columbia and Okanogan rivers, and relied on the bounty of those rivers since the time when the waters of the last Lake Missoula flood, and ice of the last Okanogan Valley glacier, made their respective retreats.

Later, waves of European settlers began to flow across this same landscape. They came first as explorers, fur trappers, and missionaries studding the countryside with trading posts, forts and missions. Gold prospectors followed, washing through the mountains in floods with each new gold strike. Soon settlers arrived, multiplied, and gradually filled the valley bottoms and other arable lands with farms and grazing livestock. By the 1870s wheat farms extended further and further into the Palouse prairies edging out native bunch grass communities. Railroads blasted through the vast open spaces, slicing steel rivers through

prairies and mountains to connect the wheat lands and population centers that lay to the east with communities along the newly developing Pacific Coast. Columbia Basin wheat was transported by rail and ship to provide flour for Asia, Europe, and eastern North America. The development of the lower Columbia River commercial salmon fisheries rose in prominence during this same era and soon cans of salmon followed the rail migration of the wheat.

Within this context of recurrent and accumulating waves of European settlement the individual bands and tribes that today make up the Colville Tribes sought to continue living much as they had for thousands of years. However, their movements, traditional lifestyles and the natural resources upon which they depended, were increasingly constrained or altered by European settlements. Between the late 1700s through the early 1900s epidemics swept through the indigenous populations decimating families, bands, and tribes. Throughout the mid-1800s sporadic, and occasionally sustained conflicts erupted between the region's Indian tribes and the growing populations of white settlers. For the most part, the bands that make up the current Colville Tribes, chose not to engage in these conflicts, but attempted instead, to coexist peacefully with the newcomers.

## 4.3 LEGAL WRANGLING, RESERVATIONS AND TREATIES

### 4.3.1 TREATIES AND TRIBULATIONS

The recitation of history necessary to establish the legal context and rights of Indian tribes can be a numbing litany of broken promises and compacts. However, a brief review of the Colville Tribes' history is essential to understanding the context of this proposal, including the trust obligations of the U.S. Government and the extent of losses experienced by the Colville Tribes.

In 1853 Isaac Stevens was appointed Governor of the newly created Washington Territory. In addition to his duties as Governor, Stevens was charged with surveying a route for a railroad to the Puget Sound. While

engaged in these survey activities, Stevens encountered many Indian tribes and white settlers. Shortly after his arrival in the Northwest, in correspondence to his superiors, Stevens noted the accelerating potential for conflict between the new settlers who increasingly occupied more and more of the fertile valley bottoms and adjoining lands, and the local Indian tribes who had for generations relied on those same lands to hunt, fish, collect food, and establish seasonal camps (Buerge 1998).

Within only months of being dispatched to Washington Territory Stevens recommended that reservations be established and Indian tribes be relocated to the reservations “so far as practicable, so as not to interfere with the settlement of the country” (Buerge 1998). Stevens shortly thereafter embarked on a whirlwind of treaty negotiations. He launched these negotiations with a series of multi-day “Councils” with the region’s Indian tribes, including most of the tribes from eastern Washington. Stevens or his designates identified and selected the tribal representatives who were to participate in these Councils. The Council discussions and subsequent treaty negotiations were conducted in a modified pigeon “Chinook” language, developed primarily to facilitate the fur trade. In many cases the “tribal representatives” who participated in these negotiations did not fully understand the content, or implications of the agreements they signed (Buerge 1998). In short succession in 1855, Stevens secured the Point Elliot Treaty in January, the Yakama Treaty in June, and the Hells Gate Treaty in July. The area ceded under the Yakama Treaty included lands of the Wenatchi (Wenatchee), Chelan, Entiat, and Moses Columbia tribes (all of whom later were relocated to the Colville Reservation). No representatives from the Moses Columbia or Chelan tribes were present at the Yakama Treaty signing (Hart 2001).

The treaties Stevens’ developed with the Yakama and other tribes are important because language inserted in those treaties, particularly language assuring the right of tribal members “to fish and hunt at all usual and accustomed places, in common with citizens of the Territory”, later established the framework within which the Executive Orders and subsequent Agreements with the Colville Tribes were developed.

### 4.3.2 THE 1872 EXECUTIVE ORDER

For nearly a hundred years the U.S. Government’s Executive Branch made treaty arrangements with Indians “by and with the Advice and Consent of the Senate.” Even though the House appropriated money to carry out the treaties, it had no voice in the development of the Indian policy reflected through those treaties. Through legislation introduced in 1867 members of the House attempted to repeal “all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes.” This legislation initially passed but was repealed only months later. After further unsuccessful attempts to gain leverage in federal Indian policy, the House refused to grant funds to carry out new treaties. Finally, the Senate submitted to pressure and supported the House in passing the 1871 Act that forbid the recognition of Indian nations and tribes as sovereign independent nations through treaties. *Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L.Ed.2d 129 (1975) “Antoine”.

On July 2, 1872, roughly a year after Congress abolished the treaty process, President Grant established the Colville Reservation by Executive Order. When the Executive Order was issued in 1872, the Colville Reservation covered roughly 3.1 million acres. At that time, Reservation lands included the present western, southern, and eastern boundaries, (Okanogan and Columbia rivers) but extended on the northern perimeter to the Canadian border. Thus, along with the adjacent Moses Columbia Reservation, established in 1884, the lands reserved for members of the Colville Tribes totaled nearly 7 million acres for a brief period in time.

When the Colville Tribal members were relocated to the Reservation lands, they gave up widespread land and water holdings, and also relinquished extensive improvements made on many of those lands. The preservation of the fishing rights secured in the 1872 Executive Order was essential to securing the agreement of Colville Tribal members to relocate to the Reservation, *Confederated Tribes of the Colville Reservation v. Walton* 647 F.2d 42, 44 (9th Cir. 1981) “Walton”.

### 4.3.3 LOST LAND

The Reservation lands secured for the Colville Tribes were whittled away in one legalized land grab after another to the present 1.5 million acres. In 1888, the first of many land losses occurred when the Moses Columbia Reservation was, for the most part, restored to the public domain. Then in 1891, less than twenty years after the establishment of the 1872 Reservation, the Colville Tribes were “asked” to cede the northern half (North Half) of the Reservation. The North Half included all lands north of a line running parallel to the Canadian border, approximately 40 miles south of the Canadian border. The resulting cession Agreement reduced the Tribes’ remaining lands from approximately 3.1 million acres to the Reservation’s current configuration of roughly 1.5 million acres.

Congress was initially unable to develop legislation to ratify the 1891 Agreement. Instead in 1892 Congress simply enacted legislation to restore the North Half to the public domain. The 1891 cession Agreement contained a crucial clause in Article 6 which stipulated “the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged” (Antoine). After a decade of petitioning and lobbying by the Colville Tribes, Congress finally ratified the 1891 Agreement in the Act of June 21, 1906 and also in a subsequent series of Appropriations Acts between 1906 and 1910. Shortly thereafter, the Colville Reservation was further reduced by the enactment of the Allotment Act of 1887, which opened Reservation lands to homesteaders and which was not repealed until 1935.

### 4.4 LOST SALMON

The upper reaches of the Columbia River once fostered some of the most bountiful anadromous fish runs in the entire Columbia Basin including the famous “June hogs”. Among all the Columbia’s fisheries, the fishery at Kettle Falls – which is presently submerged under the waters of Lake Roosevelt – was second only to the renowned Celilo Falls in its overall ceremonial significance and productivity. In the 1800s, prior over harvest by commercial fisheries in the lower Columbia River, and the extensive habitat degradation that occurred throughout the Columbia Basin, the combined salmon and

steelhead harvest of the Indian tribes in the upper Columbia River was estimated in excess of two million pounds annually (Koch 1976).

In describing the now inundated fishery at Kettle Falls, Angus McDonald, who ran the Fort Colville trading post between 1852 and 1872, wrote, “salmon as heavy as one hundred pounds have been caught in those falls...One basket has caught a thousand salmon in a day” (Howay et al 1907). In 1870, the author of an annual report to the Commissioner of Indian Affairs, described the salmon chief, a Colville Indian, distributing “the salmon among his own and the different tribes of Indians [including San Poil, Spokane, Kalispel, Kootenai, Coeur d’Alene, and Nez Perce] that assemble at Kettle Falls for the purpose of catching their winter’s supply” (Scholz et al 1985). Other accounts note that Indians from as far away as western Montana and the Dakotas came to Kettle Falls to trade buffalo meat and hides for salmon (Reyes 2002). Although it was the preeminent fishery, Kettle Falls was only one of many upper Columbia River fisheries important to the Colville Tribes and other tribes in the region.

The Okanogan River also provided the Colville Tribes with exceptionally important and productive fisheries.



FIGURE 4: Photo of Colville Men Fishing from Rocks at Kettle Falls

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For centuries, bands and families of the Colville Tribes traveled from their winter camps to various fishing sites along the Okanogan River each spring. The various families and bands fished, hunted, and collected roots and berries in the same general areas each year. Some of these sites were also shared with other tribes. In order to take advantage of successive fish runs, most of the more permanent tribal villages were located on or near rivers.



FIGURE 5: Photo of McLaughlin Falls

In the month of April, members of the Colville Tribes fished for suckers along the Okanogan River using traps at McLaughlin Falls and Janis Rapids, and using spears in eddies above the present town of Monse. Steelhead were taken in relatively small numbers beginning in March and April. Fishing for the more numerous Chinook salmon started in May and June and lasted into the fall. Weirs were commonly constructed at a number of locations including sites near the contemporary towns of Monse, Malott, Omak and Oroville. These weirs were supported by poles, which were lashed into tripods and constructed in such a way as to encourage migrating fish to swim into the traps where they were unable to escape. Once the fish were caught in the traps it was relatively simple to spear or net them. Nets were also employed in combination with the weirs at some of the falls or rapids, or in conditions where the water was murky.



FIGURE 6: Photo of Colville Women Smoking Salmon at Kettle Falls, Circa 1939

Salmon were elemental to the lives of the Colville Tribes. Salmon provided the primary protein source for the Colville Tribes. Members of the Southern Okanogan band, for instance, ate 4 to 5 times as much salmon as game. During the fishing season, Colville Tribal members took enough salmon to last through the year, drying large quantities for use throughout the year. They also used some of this salmon for trade. Like many other tribes, the members of the Colville Tribes celebrated the changing seasons associated with major harvests of salmon, deer and distinctive roots and berries, with celebratory ceremonies and feasts.

#### 4.4.1 LOST CULTURAL LEGACY

One of the most significant ceremonies to all of the Columbia Basin tribes, including the Colville Tribes, is the ceremony celebrating the arrival of the first

returning salmon. The First Salmon Ceremony welcomes the return of the first Chinook salmon. The ceremony was initiated when the first Chinook of the season was caught at a communal weir. The communal fishing sites at Kettle Falls and Okanogan Falls were under the direction of a Colville salmon chief who oversaw construction of the fishing equipment, fishing activities including the initiation of the fishing season, distribution of the fish, and the rituals associated with the First Salmon Ceremony. The Colville Tribes' first salmon celebra-

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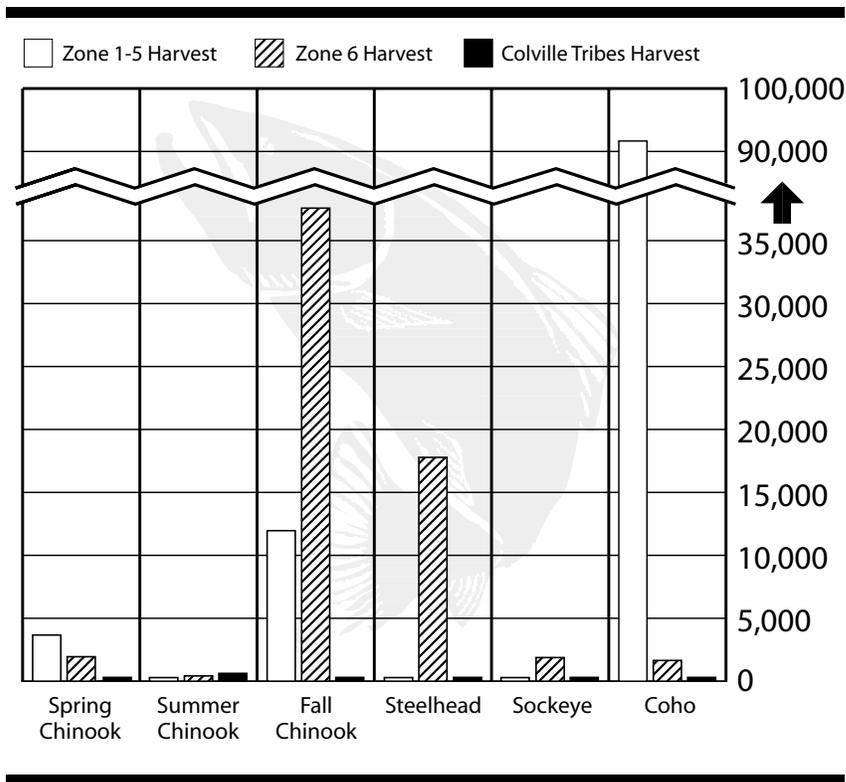


FIGURE 7: Comparison of Columbia River Anadromous Fish Harvests, Average 1991-2000

tion lasted 5 days and was an important social and cultural event.

This celebration of the returning salmon was part of historical lifeblood of the Colville Tribes and represents a vital cultural legacy that was passed down from one generation to the next for many hundreds of years. Today, the Colville Tribes no longer hold a First Salmon Ceremony. All anadromous salmon have been extirpated from the waters above Chief Joseph Dam and the presence of salmon in the remaining rivers and tributaries around the Colville Reservation has been significantly compromised.

As a result of the extirpation of anadromous fish from the majority of the Colville Reservation, Tribal members have been forced to rely entirely on very meager remaining anadromous fisheries in the Okanogan River subbasin and mainstem Columbia River at the base of Chief Joseph Dam. These sole remaining fisheries provide only a limited summer/fall Chinook salmon fishery immediately below Chief Joseph Dam, an irregular sockeye fishery and more recently, a limited Chinook fishery in the Okanogan River.

In this context it is important to also bear in mind that unlike many other northwest tribes, the Colville Tribes fish only for ceremonial and subsistence purposes – not for commercial gain. Yet, the Colville Tribes’ remaining fisheries are not adequate to meet even these modest ceremonial and subsistence purposes. Over the last several decades the Colville Tribes’ average annual combined salmon and steelhead harvest has been limited to 930 fish. Figure 7 illustrates the extreme paucity of the Colville Tribes’ harvest relative to the harvests in the Columbia Basin fisheries Zones 1 to 5, and Zone 6

#### 4.4.2 LOST RUNS, LOST ABUNDANCE, AND LOST DIVERSITY

The factors contributing to the dangerously compromised populations of wild salmon returning to the upper Columbia River can be abbreviated in three broad categories: first is the decimation of salmon populations caused by the enormous commercial cannery industry that flourished on the Columbia River in the nineteenth century; second is the extensive habitat degradation that occurred throughout the

Columbia Basin (including increasing and competing demands for water, accelerated timber harvest, secondary impacts from agriculture, and the sheer momentum of human expansion with its associated development), and; third is the transformation of the Columbia from a free flowing river to a series of impoundments punctuated by hydroelectric projects. Clearly, numerous other factors have also contributed to the decline of wild salmon including political, economic, and jurisdictional considerations; lack of adequate knowledge regarding the interrelationships of ecosystems and species; the role of early hatchery programs, and some current programs, in weakening and homogenizing wild salmon stocks; and finally broad environmental influences such as ocean conditions.

During the reign of the commercial salmon canneries the large spring and summer Chinook of the upper Columbia Basin were the most highly prized of the five Pacific salmon and steelhead runs. The impact of the vast commercial canneries was disproportionately felt among the populations of upper Columbia Basin Chinook.

While the commercial factory-scale canneries were extraordinarily detrimental to salmon runs, smaller operations throughout the Columbia River Basin also took a significant toll. At the local level, during the 1850s and 1860s two early Okanogan Valley settlers, Benjamin MacDonald and John Utz, effectively commercialized the successful fishing techniques of the local tribes by building a weir across the Okanogan River. They trapped up to 20 wagon loads of salmon a day in their mechanism, and in a somewhat perverse turn of events sold their catch back to the local Indians.



FIGURE 8: Photo of Salmon Cannery, Probably Aberdeen, Washington, Year Unknown

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By 1874 more than half of the historical salmon run that entered the Okanogan subbasin had been destroyed by lower river commercial fisheries. The Colville Tribes had lost roughly three-quarters of their fishery by 1884 and by 1890 runs of salmon to the Okanogan subbasin were almost completely destroyed (Ray 1972).

## 4.5 LOST MITIGATION

### 4.5.1 GRAND COULEE AND CHIEF JOSEPH DAMS

Beginning with the completion of Rock Island Dam in 1933 the construction of the hydropower projects adjacent to and below the Colville Reservation proceeded in a relentless succession of poured concrete. Bonneville Dam was completed in 1938, Grand Coulee in 1941, McNary in 1954, Chief Joseph in 1955, The Dalles and Priest Rapids in 1959, Rocky Reach in 1961, Wanapum in 1963, Wells in 1967, and finally the John Day Dam in 1968. In all, eleven dams have directly altered the Colville Tribes' access to stable self-sustaining populations of anadromous fish.

Although the hydroelectric projects on the Columbia River have provided substantial benefits in terms of electricity, irrigation and flood control, the trade-offs have been considerable. The Colville Tribes are particularly, and uniquely, affected by these trade-offs. On one hand they are a salmon people with indelible ceremonial and subsistence ties to salmon, while on the other hand the Colville Tribes are dependent on hydropower revenue generated at Grand Coulee Dam, which is the source of the Tribes' annual payments under the Grand Coulee Dam Settlement of 1995.

No dam had as profound an effect on the Colville Tribes as Grand Coulee. The completion of Grand Coulee blocked access by all anadromous fish to

approximately 1,140 lineal miles of habitat above it (Scholz et al 1985). Huge areas of valuable fish and wildlife habitats along the Columbia River were inundated. In a 1947 report on the Columbia Basin Project, the Bureau of Reclamation acknowledged, “many valuable [salmon] breeding areas have been totally eliminated by construction of dams wholly unprovided with fishways.” The report’s author continued, “...a large part of the spawning and rearing areas originally available has either been completely eliminated or so seriously reduced as to be useless” (U.S. Bureau of Reclamation 1947).

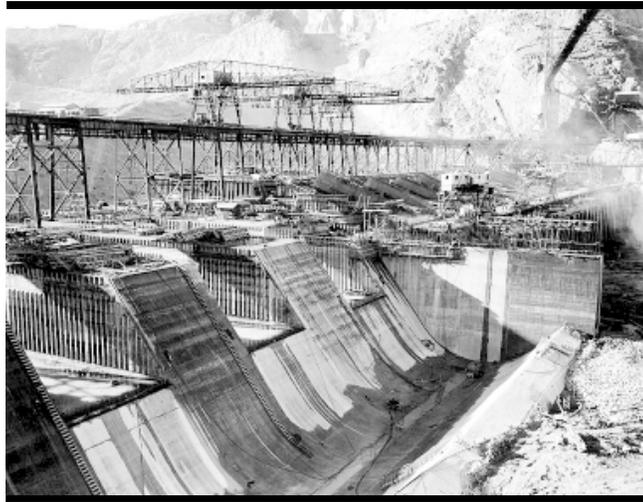


FIGURE 9: Photo of Spillway Construction at Grand Coulee Dam, 1937

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In 1917 Ephrata attorney William Clapp, garnered the support and enthusiasm of Ephrata area residents, and eventually the State of Washington, for the construction of Grand Coulee Dam. The Dam was initially conceived as an irrigation and flood control project that would green the desert of central Washington while also providing flood control for downstream communities. Electricity generation was not a project priority at the outset. Preliminary feasibility studies were conducted in the 1920s and initial excavation of the site began in 1933. Early designs were for a “low dam” and included provision of fish passage facilities similar to those constructed at Bonneville Dam. However, a second option was also developed for a “high dam” that would sit approximately 200 feet higher to provide for increased power generating capacity. In 1935, responding in large part to growing demand for additional electricity, Congress reauthorized construction of Grand Coulee as a “high dam.”

In 1937 the Bureau of Reclamation signed an agreement with Washington Department of Fisheries (WDF) under which WDF would develop a recom-

mended approach to mitigating for the losses of anadromous fish caused by construction of Grand Coulee Dam. In response, WDF in coordination with the U.S. Bureau of Fisheries (now the USFWS) presented two options. The first was an appraisal of the viability of constructing fish passage above Grand Coulee Dam. The WDF report concluded that the engineering challenges and potential biological effects associated with constructing passage over a dam as high as Grand Coulee were not surmountable. The second option, which WDF recommended, centered on construction of a system of mitigation hatcheries. This option included construction

of a fish trapping facility at Rock Island Dam and of a system of four hatcheries — one hatchery at Leavenworth, and three tributary sub-stations to be located on the Entiat, Methow, and Okanogan rivers.

Congress authorized construction of the mitigation hatcheries. The trapping facility at Rock Island Dam, the hatchery at Leavenworth and the hatchery sub-stations on the Entiat and Methow Rivers were completed. However, the Okanogan River hatchery was never constructed. Complications related to the proposed location of the hatchery, in combination with severe funding restrictions resulting from the onset of World War II, effectively mothballed the project. For many years, the promised fourth hatchery was mostly forgotten. The Colville Tribes reintiated the question of the fourth hatchery in the 1980s and in 2000 the U.S. Bureau of Reclamation agreed that the full, authorized mitigation for construction of Grand Coulee Dam was still not complete and could be pursued.

Chief Joseph Dam was completed in 1955 and like its upstream neighbor, it too was built with no provision for fish passage. Chief Joseph Dam blocked anadromous fish access to another 50 miles of the Columbia River. In all, roughly 37% of all anadromous fish losses

in the Columbia Basin occurred in the areas blocked by Grand Coulee and Chief Joseph dams (Scholz et al 1985).

#### 4.5.2 COMPOUNDING THE EFFECTS OF UNMET MITIGATION

Below Grand Coulee and Chief Joseph dams nine more hydroelectric projects (four federal and five non-federal) hinder anadromous fish passage between the ocean and the Okanogan subbasin. While it is true that over the last two decades fish passage mortalities associated with those nine dams have been significantly reduced, depending on river flows, passage still claims 35 to 70% of outmigrating juvenile Chinook salmon, and over 20% of the returning adults. Historically the fish mortality percentages were much higher. Over a period of 50 to 60 years, the composite impacts of downstream hydropower mortalities on the viability of naturally-spawning populations of Chinook in the Okanogan subbasin have been devastating.

The precarious numbers of salmon in the Okanogan subbasin are also due in part to long-standing mitigation inequities that extend well beyond the missing fourth Okanogan hatchery. Notably, the Colville Tribes have never received the initial federal salmon mitigation that other subbasins in the Columbia Cascade Province received. In addition, the federal government never provided Okanogan anadromous fish hatchery mitigation to the Colville Tribes for the loss of adult and juvenile fish that pass through the four Corps of Engineers' hydroelectric projects on the Lower Columbia River. Fish mortalities at these four projects alone are currently estimated to range from 4 to 10% per project for juvenile salmon and about 2% for adults. Before the recent improvements of fish passage systems and operations at the dams these losses were historically much higher.

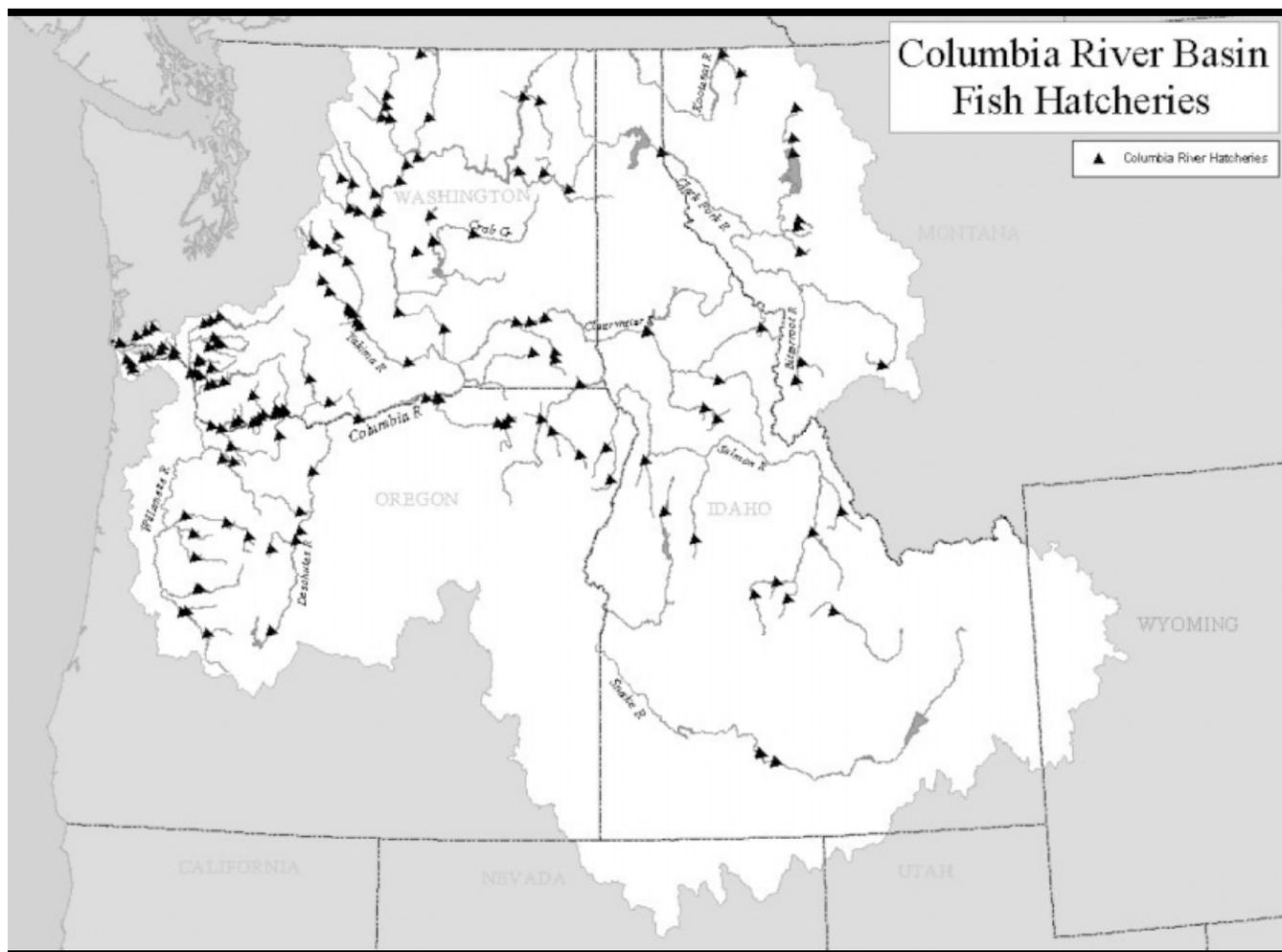
The vast majority of the Mitchell Act hatcheries, which were built specifically to provide mitigation for losses caused by the Columbia River federal hydropower projects, were constructed in downstream locations. Benefits from the Mitchell Act hatcheries have flowed almost exclusively to lower Columbia River tribes, commercial fisheries, and downstream and ocean

based recreational fisheries. The Mitchell Act program has done nothing to contribute to maintaining viable salmon populations in the Okanogan subbasin. Moreover, fisheries directed toward Mitchell Act hatchery progeny have further depleted the runs of fish destined to spawn in the waters around the Colville Reservation.

In discussing the disproportionate concentration of hatcheries on the lower Columbia River, the authors of the Council's *2003 Draft Artificial Production Review and Evaluation Basin-Level Report* explain, "Hatchery managers reported planned releases of 235,690,000 juvenile fish of all species from hatchery programs in the U.S. portion of the Columbia Basin. Approximately 88% or 207,734,500 fish are planned releases of anadromous salmonids below the fish passage barriers at the Chief Joseph and Hells Canyon dams. The largest proportion, (42%) occurs in the Lower Columbia Province, as a result of earlier attempts to provide fish for the ocean and lower river commercial fisheries" (NPCC 2003).

The substantial unmet mitigation owed to the Colville Tribes has been further compounded by the structure of formulas used to determine mitigation levels for the mid-Columbia Public Utility District (PUD) dams. These formulas, which were based on the average run sizes of salmon and steelhead in a 10-year period during the 1970s and 1980s (Bugert 1998), do not account for the fish that would have been produced at the missing fourth Okanogan hatchery. Additionally, most of these post-dam runs were supported in large part by the initial hatchery mitigation programs funded by the PUDs and the federal government. Since the Colville Tribes did not receive the initial mitigation from the construction of federal and PUD dams, the basis for the new agreements further discounts the obligations to the Colville Tribes.

The Federal Government has clear trust obligations to the Colville Tribes to protect the reserved fishing rights and associated resources ascribed to the Colville Tribes. The current levels of mitigation not begin to meet these obligations.



Source: Northwest Power and Conservation Council, Draft APRE Report 2003-17

FIGURE 10: Location of Hatcheries within the U.S. Portion of the Columbia River Basin

### 4.6 LEGAL CHALLENGES TO RIGHTS SECURED IN THE EXECUTIVE ORDER AND AGREEMENTS

In the 1970s the validity of the Colville Tribes’ 1891 Agreement was challenged when the State of Washington sought to prosecute a Colville tribal member for hunting on public lands within the ceded North Half in violation of state law. The U.S. Supreme Court ruled that the 1891 Agreement was properly ratified, that the Agreement is the equivalent of a treaty for Supremacy Clause purposes, and that the State of Washington has no authority to apply its hunting and fishing laws to Colville tribal members hunting and fishing on the North Half. The Court noted that the

effect of the 1891 Agreement was to “preserve” hunting and fishing rights secured under the 1872 Executive Order (Antoine). The hunting and fishing rights for the ceded North Half also include gathering rights and the reserved water rights recognized in the Walton case to support fish restoration and preservation and to support wildlife and plant habitat.

The Supreme Court in Antoine contrasted the language in Article 6 of the 1891 Agreement, “...shall not be taken away or in anywise abridged...” with counterpart language in the 1855 Stevens Treaties with other Northwest Indian tribes. For example, “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory,” *U.S. v. Winans*, 198 U.S. 371, 378 (1905), which is the language from Article 3 of the 1855 Treaty with the Yakima—and

commented that Article 6 of the 1891 North Half Agreement presents a “stronger case” for a “flat prohibition” on any qualification of the right (Antoine).

Consistent with the reserved fishing and other rights described above, the members of the Colville Tribes and its members continue to harvest anadromous fish in the Columbia and Okanogan Rivers within the Colville Reservation and North Half. The territory encompassed by these rights includes the entire length of the Okanogan River within the United States (approximately 75 river miles) and the Columbia River within the United States above the Okanogan confluence (160 river miles), as well as all tributaries within that 3 million acre area. These reserved rights are generally analogous to the fishing rights of other Northwest tribes that arise under the 1855 treaties. The Colville Tribes’ fishing and water rights are federally protected tribal assets or property rights which all agencies of the United States have a trust responsibility to protect (see *Klamath Water Users Protection Association v. Patterson*, 204 F.3d 1206 [9th Cir. 2000]).

## 4.7 RIPPLES IN A POOL WITHOUT MANY SALMON

Salmon are part of the cultural identity of many communities in the Northwest – not just that of the Indian tribes. The Chinook and sockeye salmon fisheries in the Okanogan subbasin are vital to the economic health of these largely rural and economically fragile communities. The price paid in the upper Columbia Basin, in terms of depressed, listed, and extirpated anadromous fish; loss of habitat; and loss of ecosystem functionality has been greater than anywhere else in the Columbia Basin.



FIGURE 11: Photo Contemporary Fishing in the Okanogan Subbasin

Chris Fisher

The ecological costs of providing power and flood control have fallen predominantly on the communities and ecosystems of the upper Columbia River. Yet, as noted previously, the mitigation for the hydro-power projects that provide those same benefits is located almost entirely in the lower portions of the Columbia River. The economic and ecological costs associated with the historical frenzy of the commercial salmon industry were also borne disproportionately by the communities in the upper Columbia.

Finally, harvest management today (e.g. *U.S. v Oregon*), is also disproportionately targeted to benefit downstream communities with little acknowledgement of the importance of ensuring adequate returns of salmon and steelhead to the upper Columbia River.

In concert with the efforts of the Colville Tribes many local citizens as well as state and federal agencies, members of Canadian First Nations, and government agencies in Canada, have contributed to the protection and restoration of migration, spawning and rearing habitat for anadromous fish in the upper Columbia, and specifically in the Okanogan subbasin. Yet the ripple effects associated with the enormous salmon losses and historically inadequate mitigation continue to undermine the contemporary communities and economies of the upper Columbia River.

The integrated management programs that would be implemented through the CJDHP will go a long way towards beginning to correct these longstanding inequities by helping to restore viable populations of naturally-spawning summer/fall Chinook salmon to the Okanogan subbasin. In the Columbia Basin, the long-term recovery and sustainability of salmon and steelhead runs depends on cooperative, consistent and persistent action by fishery co-managers, hydrosystem managers, as well as numerous local governments and citizens throughout the Columbia Basin. Establishing

and maintaining partnerships between private land-owners, agencies, non-governmental organizations, and tribes is essential to recovering and protecting salmon populations. The commitment to the citizens of the region and to the recovery of Chinook in the upper Columbia that would be signaled by the implementation of the CJDHP is vital to building and sustaining these important partnerships.

