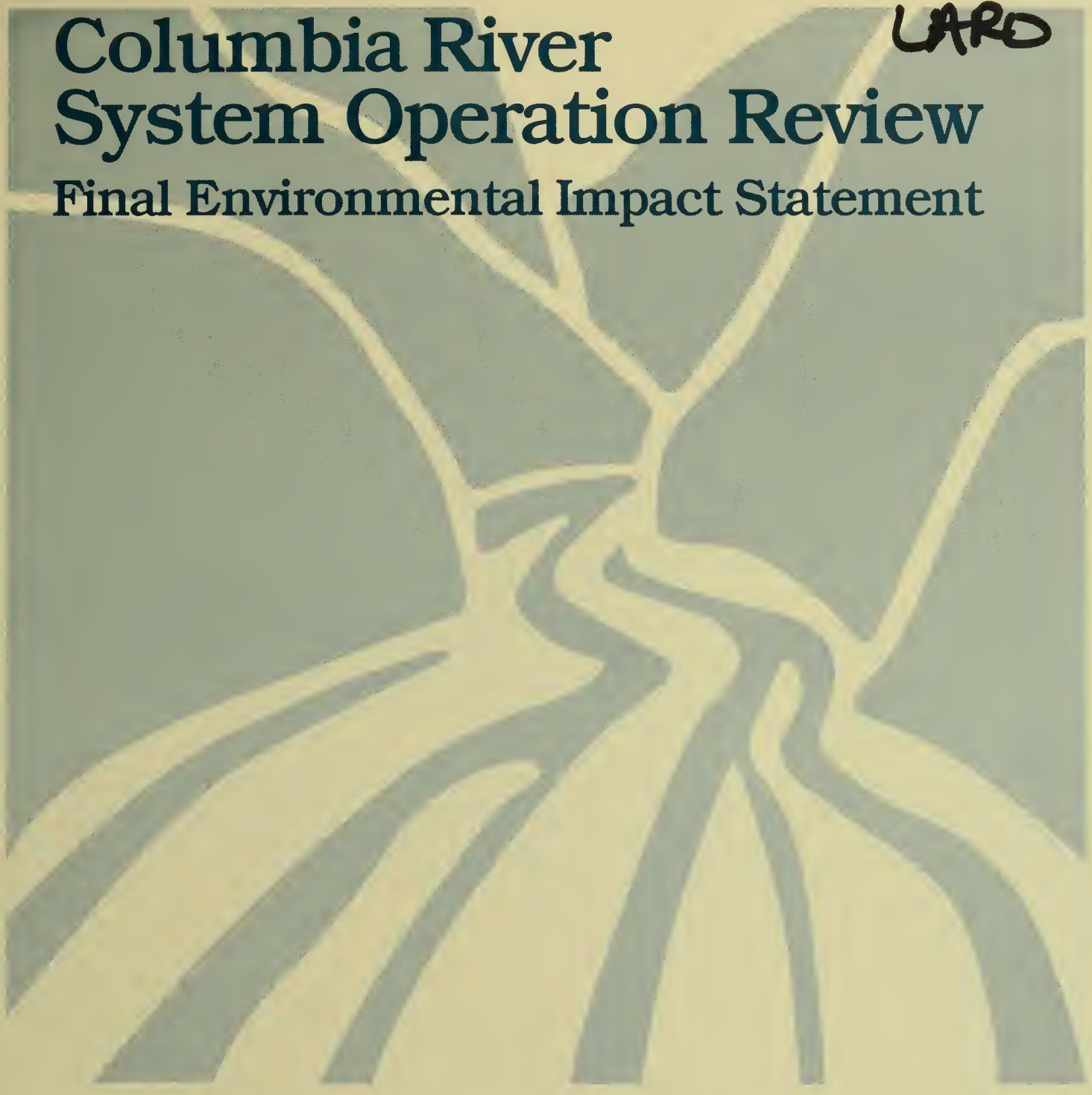
Columbia River System Operation Review

Final Environmental Impact Statement



Main Report Exhibits

BONNEVILLE POWER ADMINISTRATION

US Army Corps of Engineers
North Pacific Division

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

DOE/EIS-0170

November 1995

PUBLIC INVOLVEMENT IN THE SOR PROCESS

The Bureau of Reclamation, Corps of Engineers, and Bonneville Power Administration wish to thank those who reviewed the Columbia River System Operation Review (SOR) Draft EIS and appendices for their comments. Your comments have provided valuable public, agency, and tribal input to the SOR NEPA process. Throughout the SOR, we have made a continuing effort to keep the public informed and involved.

Fourteen public scoping meetings were held in 1990. A series of public roundtables was conducted in November 1991 to provide an update on the status of SOR studies. The lead agencies went back to most of the 14 communities in 1992 with 10 initial system operating strategies developed from the screening process. From those meetings and other consultations, seven SOS alternatives (with options) were developed and subjected to full–scale analysis. The analysis results were presented in the Draft EIS released in July 1994. The lead agencies also developed alternatives for the other proposed SOR actions, including a Columbia River Regional Forum for assisting in the determination of future SOSs, Pacific Northwest Coordination Agreement alternatives for power coordination, and Canadian Entitlement Allocation Agreements alternatives. A series of nine public meetings was held in September and October 1994 to present the Draft EIS and appendices and solicit public input on the SOR. The lead agencies received 282 formal written comments. Your comments have been used to revise and shape the alternatives presented in the Final EIS.

Regular newsletters on the progress of the SOR have been issued. Since 1990, 20 issues of *Streamline* have been sent to individuals, agencies, organizations, and tribes in the region on a mailing list of over 5,000. Several special publications explaining various aspects of the study have also been prepared and mailed to those on the mailing list. Those include:

The Columbia River: A System Under Stress
The Columbia River System: The Inside Story
Screening Analysis: A Summary
Screening Analysis: Volumes 1 and 2
Power System Coordination: A Guide to the Pacific Northwest Coordination Agreement
Modeling the System: How Computers are Used in Columbia River Planning
Daily/Hourly Hydrosystem Operation: How the Columbia River System Responds to Short–Term Needs

Copies of these documents, the Final ElS, and other appendices can be obtained from any of the lead agencies, or from libraries in your area.

Your questions and comments on these documents should be addressed to:

SOR Interagency Team
P .O. Box 2988
Portland, OR 97208–2988

Exhibits

Exhibit

1

Confederated Tribes of the Colville Reservation

Comments to System Operation Review (SOR) Draft Environmental Statement

May 1995

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

COMMENTS TO SYSTEM OPERATION REVIEW (SOR)

DRAFT ENVIRONMENTAL STATEMENT, MAY 1995

COMMENTS BY: ADELINE FREDIN, HISTORY/ARCHAEOLOGY DEPARTMENT

The original Colville Indian Reservation was established by Executive Order of April 09, 1872.

The original Colville Indian Reservation was in existence for less than three months, when it was exchanged for the present reservation under Executive Order of July 02, 1872. Colville Confederated Tribes' still have reserved rights.

The Act of July 01, 1892, divided the present reservation of approximately 2,900,000 acres into the North Half and South Half and restored the North Half consisting of approximately 1,500,000 acres to the public domain.

July 07, 1883, the Moses Agreement was made.
July 04, 1884, the Moses Agreement was ratified.

During the year 1885, and later years, the government moved to the Colville Reservation, the Joseph Band of Nez Perce Indians, and also members of the Palus Tribe.

May 01, 1886, Columbia Reservation was restored to the public domain, except for certain allotted tracts. (Executive Order) Tribes having reserved rights.

March 22, 1906, the South Half consisted of approximately 1,4000,000 acres. After Tribal Members were provided 80 acre allotments, the government authorized and directed the classification appraisal and sale of the balance of the lands, that is, the surplus land after the allotments.

May 03, 1916, the lands in the South Half, which were classified as irrigable and grazing were opened to entry and the lands classified as mineral were made subject to location and disposal under the mineral land laws. The lands classified as timberlands were ,however, not opened to entry.

September 19, 1934, and November 19, 1939, the undisposed lands, including the timberlands which had not been open to entry were withdrawn from any further disposition, until the matter of their return to Tribal ownership was settled.

July 24, 1956, the remaining undisposed lands, in the South Half, comprising approximately 818,000 acres were restored to Tribal Ownership.

System operations area of effect, include but is not limited to Grand Coulee Dam and Reservoir area, Chief Joseph Dam and Reservoir, non-Federal dams and their reservoirs. Only Reservoirs will be used here and not the Lakes. Lakes are identified to be unnatural features created behind each of the dams. The non-federal dams are: Douglas County Public Utility District (PUD), Chelan County PUD, Grant County PUDS, and their reservoirs. The reservoir behind Grand Coulee Dam extends upstream approximately 151 miles. It is, therefore, estimated that the reservoirs upstream and downstream reservoirs totals approximately 660 plus miles of shoreline. The total estimated shoreline miles for all of the reservoirs identified here total over 1,300 miles.

Federal Law requires that any Indian Lands, that are directly effected by a Federal undertaking, the Tribes will be a participant to the Federal undertaking agreements and management plans. The Colville Reservation is directly within the project area and has vested interest by reserved rights identified as traditional and aboriginal territories for Grand Coulee Dam, Chief Joseph Da and Douglas County PUD (Wells Dam). The Colville Tribe also has existing MA allotments within Chelan County PUDS and Douglas County PUD. Grant County PUD is ancestral and aboriginal rights for cultural resources and all of

former Moses Reservation, Colville Reservation and existing Colville Reservation and North Half Colville Reservation.

Tribal members still live and understand their traditional and cultural way of life. They are also educated to technical, scientific studies and standards regarding their own environmental and natural resources. Tribal members who live between these two worlds have an insight to their own traditional teaching that are applicable to technical and scientific standards of today.

Traditional teaching explain spawning behavior and migration behavior that were important to our ancestral dependency on fishery for subsistence and industry. However, the field of science as well as institutions are not willing to explore or to understand how the Indian people applied their traditional teaching to management responsibilities. The Tribal People see their understanding of the environment and natural resources behavior as "common sense". Tribal members' observation of their own understanding of the environment are taken for granted. This is largely due to generations of traditional teaching.

The Reservoirs behind Grand Coulee Dam and the other dams identified above are not natural features as they are man made lakes. The reservoirs have inundated all of the lands that had been occupied and was land use areas to the Tribes for thousands of years. Wetland, watershed areas located along side free flowing rivers have been inundated by reservoirs. Traditional, cultural resources and materials had little or no opportunity to become established above the new water levels. Prime lands located above the new water levels became converted for orchards, farming and private home development. Shoreline areas became converted to recreation use. Nowhere, in the management process did the government set aside lands for natural setting. None of the lands were set aside for traditional use to support our Indian way of life.

The Governments' only interest was to generated power,

at any cost. Tribes' today are taking a look at the effect of these Dams' and how the Tribes' rights were effected by government projects. These rights represent the Tribes' right to land use of ancestral, traditional and aboriginal territories. To fish, hunt and collect their own traditional resources. To understand what percentage of the traditional land use area is still there. Can any of the traditional land use area be restored to the Tribes? What rehabilitation needs to take place to bring land use up to its' traditional land use level? These concerns must be brought up to the same level as wild life mitigation by the Federal Government. Also, to understand these effects, the Tribes' will need support from the government to acquire the information.

Some of the land use setting was cool and damp, that was there when there were free flowing rivers. How high was the cool damp canopy? Can this cool damp canopy, that was important to natural resources setting be recreated? Another question may be, is there lands where these features exist now and can these lands be restored to traditional land use for the Tribes?

There are plants that grow well in damp areas and cannot be found in dry areas. Plants that grow well in wet areas but will not do well in damp areas. There are plants and materials that like dry settings, but grow in a damp canopy setting. Other features that may be important are north and/or south slopes, elevation information, plant communities and how these figure into rehabilitation.

Added to these concerns, is the fact that there was no inventory of plants, plant communities and what land features were important to plants, roots, materials, medicines and other resources that at one time occupied the river environment.

The greatest effect to any one group of people the government has admitted to is the Colville Confederated Tribes. By the one single Dam construction, changed forever the Indian way of life

that had been there for thousands of years. The Tribal ceremonies, religion/religious practices that were important to fishery. Cultures and traditional way of life that were supported by fishery subsistence and industry. Almost overnight, the Indian peoples' way of life was lost, destroyed forever, because of Grand Coulee Dam.

The DRAFT EIS alternative never included any fish by-pass to the upper reaches of the Columbia River system. It must be assumed then, that the Federal Government did not think it was important to consider fish by-pass as an alternative. However, the Colville Tribe believes that the Federal Government has a trust responsibility to include all of the alternatives to be considered. It is therefore the Colville Tribes' request, that a fish by-pass be included as an alternative. Also, to request the Federal Government negotiate with the Colville Confederated Tribes for one or more fish by-pass alternatives.

In reference to System Operations proposed alternative. The reservoirs reaction to all of the alternatives is the same. At the present operating level, the effect of erosion, block slumping and slides are causing affect to archaeological sites, burial sites and traditional resources that are important to the Colville Tribes. Any one of the reservoirs mentioned above behave the same to present pool operating level. Tribal values are based on tradition and culture, these values have no dollar value to refer to. The effects to ancestral burial sites and their own ancestral occupation sites are valued by traditional levels only. System Operations proposed alternatives did not make any provisions for "Tribal Values".

At the other extreme of Proposed Alternatives, is "fish flush" for reservoirs storage projects. Grand Coulee Dam is a Reservoir storage project. The volume of water, that is moved is in itself destructive to lands, cultural resources, fishery, recreation, traditional and cultural use of the water and other natural resources. Any draw down of the reservoir is an effect. An extreme draw down, such as a fish flush

will cause measurable damage to cultural resources that are referenced by Harvey Rice, PhD, see attached statement. The Colville Tribes have not placed any of their concerns at any monitory level. There is a feeling of mental anguish, caused by a loss that cannot be measures. The Federal Government has not made any effort to assist the Tribe in dealing with this mental and emotional loss.

Exhibit

2

System Operation Review of the Columbia River System

Comments of Kootenai Tribe of Idaho

May 10, 1995

KOOTENAI TRIBE OF IDAHO

P.O. Box 1269 Bonners Ferry, Idaho 83805
(208) 267-3519 Fax. No. (208) 267-2960

Systems Operations Review Of The

Columbia River System

Comments Of Kootenai Tribe Of Idaho

May 10, 1995

This is the final report from the Kootenai Tribe of Idaho regarding the Systems Operations Review of the Columbia River System. Since the Tribes comments for the Environmental Impact Statement in 1994, there has been relatively little change in the Tribe's overall view of the review process.

Cultural Resources and the protection of cultural sites is very important to the Tribe. The Reservoir created by Libby Dam (Lake Koocanusa) is especially important due to the negative impacts it has caused during drawdowns. First we are concerned that the fluctuation of the Kootenai River downstream from the dam has had negative effects on the fisheries, system productivity, and biota in all trophic levels. Severe reductions in system productivity and fish biomass have occurred following the completion of Libby Dam. The Kootenai River white sturgeon population is a major concern of the Kootenai Tribe of Idaho. Spawning and survival of this species have been negatively effected by Libby Dam's operations. Subsequently, the Kootenai Tribe of Idaho has been conducting population recovery efforts since 1989.

In late 1994, the Kootenai River white sturgeon population was placed on the Endangered Species list. This had added to our efforts, but due to the listing we have had some important issues addressed One being the need for more a change in Libby Dam operations and the resulting hydrograph. Studies are underway to determine the effects of the reduced fluctuation and other hydrograph alterations to determine their positive effects on white sturgeon spawning activities and subsequent survival. The problem is still that drawdowns of Lake Koocanusa have effects on fisheries issues. Other problems that stem from these drawdowns exist in Lake Koocanusa. When the drawdowns occur, banks are exposed and heavy slumping occurs along either side of the lake. This activity exposes many cultural sites and a protection plan needs to be formulated. The problem is that although we have reserved Treaty Rights in the area, it is not an easy task due to the area being in Montana. We have relied on the Kootenai Band on the Confederated Flathead and Kootenai Reservation in Montana to protect these areas as they have more

direct access and have established communications with relevant agencies for this purpose. No immediate change will probably occur on this issue.

Another concern is in the Lake Pend O'reille area, and the Clark Fork and Pend O'reille rivers. Discharge fluctuations also occur on these rivers with similar resulting impacts as with the Lake Koocanusa issue of site disturbances is the result. Other concerns have not been completely investigated. Although the inventory issue is of concern, the more important issue concerns site protection. A programmatic agreement between the Kootenai Tribe of Idaho and Federal Agencies is a start in the protection of culturally important sites and areas, but it may be some time before an adequate agreement and plan is in place, and operating successfully.

The above concerns are the Tribe's priority at this time, but as with other issues, one issue usually overlaps with others. Other issues that the Kootenai Tribe of Idaho has concerns with or which we have been addressing are: Water Quality, Air Quality, Wildlife, and Flood Control.

Regarding water quality issues, the Kootenai Tribe of Idaho has in place at the Tribal Headquarters, a Water Quality Assessment program under the Supervision of the Kootenai Tribe of Idaho's Environmental Management and Fisheries Departments. The Tribe has been conducting water and sediment quality studies on the Kootenai River and it's tributaries due to concerns that relate back to the white sturgeon population recovery efforts, and the apparent trophic collapse of the Kootenai River ecosystem.

Concerning water quality, definitive recommendations, however, with some exceptions, few negative effects regarding water quality have been reported. These Departments will continue to collect relevant information.

Air Quality issues are similar to the water quality studies. The Kootenai Tribe of Idaho's Environmental Management Department has been studying the air quality of the surrounding area as this has been a concern of the Kootenai Tribe of Idaho for numerous years. Due to prevailing winds, pesticide, and fungicide spraying activities and health related problems and concerns, the Kootenai Tribe of Idaho has in place, monitoring stations that collect samples of air particulates for study. As of yet, no pertinent information as to positive or negative effects has been concluded and these studies will continue.

Social impacts as related to the review process are viewed positively by the Kootenai Tribe of Idaho, as it has been involved in numerous activities related to the SOR. As a result, the Tribe has learned of many issues that we otherwise would not have had the opportunity to address.

Other issues and categories within the SOR and related to the Kootenai Tribe of Idaho are monitored by the Tribe, but will not be included in our comments due to overriding concerns of other issues that have been included in this report.

Sincerely,

Ronald Abraham
Rights Protection Specialist

Exhibit

3

Spokane Tribe of Indians Comments on SOR Process

Spokane Tribe of Indians

P.O. Box 100 - Wellpinit, WA 99040 - Ph. (509) 258-4581/838-3465

CENTURY OF SURVIVAL
1881 - 1981

February 1, 1995

Via FAX to: 503-230-5211

Mr. Randall Hardy
Administrator
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621

RE: System Operation Review (SOR)
Columbia River Hydroelectric System

Dear Mr. Hardy:

The Spokane Tribe has been an active partipant in the SOR EIS review process, sending staff SOR Work Group sessions and other related meetings.

Throughout the SOR process, we have watched the focus of the federal agencies shift with the political winds until, at this late stage in the Review, we observe the agencies with diligence pointing toward a System Operating Strategy (SOS) that favors compliance with the Endangered Species Act (ESA) so save endangered salmon, despite reliable forecasts of ill effects to other resources if ESA considerations are not modified to accomodate other considerations of equal or greater importance.

Our Tribe, along with other Tribes and agencies, has pursued information to provide to the agencies so that alternate strategies could be given due consideration. Our staff and contractors have been attending meetings, reading and commenting on documents, and participating in good faith to provide meaningful input to the agencies. Yet, it is now widely known that the agencies selected a strategy that favors endangered salmon, even before the official close of the comment period on the SOR Draft EIS.

For the Spokane Tribe, the SOS alternative that is being pushed forward threatens to decimate our resident fisheries. The impacts on wildlife habitat, recreation, economic ventures, and cultural resources of the Spokane Tribe are expected to be equally harsh.

Only recently has the full import of the SOR process on the Spokane Tribe's cultural resources been fully revealed. Pre-selection by the federal agencies of an SOS that will devastate cultural sites and traditional cultural practices puts the agencies in the position of possibly violating numerous statutes, including the Native American Graves Protection and Repatriation Act, the Antiquities Act of 1906, the Archaeological and Historic Preservation Act of 1974, the Archaeological Resources Protection Act of 1979, and the National Historic Preservation Act of 1966, as amended. To address cultural resources by merely planning to mitigate for their destruction is not compliant with the intent of federal statutes, including the National Environmental Policy Act (NEPA), which anticipates the examination of alternatives which prevent, rather than merely plan to mitigate for damages.

"Saving the sockeye" has been elevated so high, so fast in the agencies' priorities, the impacts on Spokane Tribal interests have been lowered to an inventory, presumably to be "mitigated," but clearly not to be prevented by altering the agencies' process for selecting a preferred alternative.

We are greatly saddened by the plight of the sockeye and spring and fall chinook. And we are sympathetic to the agencies' predicament. However, we cannot knowingly endorse an Operating Strategy that could lead to the eventual extinction of many more species.

Furthermore, we cannot continue to participate in a process that has a predetermined outcome. Ostensibly a process for participation, the work group meetings have lost much of their usefulness if the SOS has been predetermined by ESA considerations. The agencies appear to be "railroading" the NEPA review to accomodate closure on the EIS, and seem to be unwilling to open the process to full participation by the tribes.

Members of the Spokane Tribal Business Council were led to believe that we were being consulted on a government-to-government basis, and that we would be full and equal partners with the federal agencies in developing a System Operating Strategy that

minimizes damage and maximizes benefit. The President's Executive Order makes it clear that all federal agencies are to deal with Indian tribes as sovereign nations. Bonneville Power Administration's trust responsibility to tribes has been reinforced by Secretary O'Leary's stance for the Department of Energy and Bonneville's development of an explorit Indian policy. Yet, we do not see the government-to-government requirement being fulfilled.

Rather, we see the agencies granting deference to the preferred alternative of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. We see our priceless cultural values being assessed for the costs of mitigation. We see our rights to water, fish, wildlife, and economic security being violated in favor of outspoken special interest groups. We see trust responsibility toward our sovereign nation being ignored, while dubious obligations to other federal agencies have dominated the SOR agencies' analyses of the System Operating Strategies.

Although the Biological Opinion of the National Marine Fisheries Service (NMFS) is driving the SOR EIS, neither the NMFS nor the U.S. Fish and Wildlife Service (USFWS) have consulted with the Spokane Tribe at any point in their evaluation process. The Spokane Tribe, as a member of the Upper Columbia United Tribes (UCUT), has sent numerous letters to the NMFS and USFWS, but received no response whatsoever. The federal agencies have ignored our repeated earnest pleas for consideration, and abrogated their trust responsibility.

The Columbia Basin Fish and Wildlife Authority (CBFWA) has assigned an internal team to address the critical issue of how to best manage upriver storage reservoirs for fish and wildlife while satisfying the need for anadromous fish flows. The CBFWA alternatives are expected in March, 1995. Yet, we see the Northwest Power Planning Council (NPPC) rushing headlong to adopt Anadromous Fish Amendments to the Columbia River Basin Fish and Wildlife Program - before all Resident Fish Amendments have been received and evaluated - apparently to accomodate the pre-selected Preferred Alternative of the SOR.

With full participation and consideration (as we have been led to believe all along would be the case), our collective imaginations might find a solution that enhances flows for anadromous fish without devastating other resources throughout the Columbia River Basin. However, it appears that full participation has been foreclosed by placing ESA in the driver's seat and carrying all other interests along for the ride.

Before the SOR NEPA review proceeds to a Final EIS, our Tribe, and the other Tribes, should be granted true government-to-government consultation. Deferring to NMFS is not "fulfilling trust responsibility." Our interests should be evaluated with equal weight, and we should be given the opportunity to work with the agencies to develop the preferred SOS alternative. Merely responding to an alternative developed and selected by the agencies without true Tribal representation in the decision-making process is not "participation." Informing the Tribe that impacts of the selected SOS will be severe is not "consultation."

I will appreciate hearing from you as soon as possible to set up a meeting at our Tribal headquarters with yourself, Major General Harrell, and/or Mr. John Keys, to discuss our sovereign concerns.

Sincerely,

Warren Seyler
Chairman
Spokane Tribal Business Council

cc: Major General Ernest J. Harrell
Mr. John Keys, III
Mr. Philip Thor
Mr. Witt Anderson
Mr. John Dooley
Mr. William Stelle, Jr.
Mr. Michael Spear
Mr. Angus Duncan

CONTROL NO. [illegible]

FOLDER ID [illegible]

Copy to CRCO 9/25/95

Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

September 14, 1995

To: Ernest J. Harrell, Major General
Commander and Division Engineer
U.S. Army Engineer Division, North Pacific
P.O. Box 2870
Portland, OR 97208-2870

John Keys, Regional Director
U.S. Department of Interior
Bureau of Reclamation
1150 North Curtis Road
Boise, ID 83706-1234

Randy Hardy, Regional Director
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621

Dear Gen. Harrell, Mr. Keys, and Mr. Hardy:

At the meeting with the cultural resource staff of your three agencies on August 29th and 30th, 1995, at the Jantzen Beach Red Lyon, our representatives were notified that the tribes needed to submit our comments on a number of documents before September 25th, 1995, in order for those comments to be considered by the federal agencies. The document under consideration include: Chapter 6 of the Systems Operations Review (SOR) Environmental Impact Statement (EIS) Appendix D, which was given to us at that meeting, Appendix T to the SOR EIS, which will not be given to us until after September 15th; a draft letter to the Advisory Council, which will be given to us sometime in which we received thorough the mail last week. The letter attached to the volumes called for comments to be received before September 27, 1995, in order to be considered for the final EIS.

The Spokane Tribe of Indians, as an affected Native American tribe, reserves the right to comment on these documents and associated actions. Five to twenty working days, however, are not a reasonable period of time in which to review and comment on these important documents.

We do not have the staff time or funding to review and produce meaningful comments on these documents in the time period given. It is also critical that we see responses to our previous comments to the SOR EIS, so that we may give fuller explanations where needed to clear up any misunderstandings of our comments. We do plan, given more time and funding, to fully participate in all of these actions.

We would appreciate your cooperation in extending the scheduling and funding available to review the above documents. Thank you for your cooperation in this matter. We look forward to cooperation in the consideration, planning, and management of our effected cultural resources.

Sincerely,

Warren Seyler,
Tribal Council Chairman

cc: Jim Sijohn
Mary Verner
Robert Sherwood

Exhibit

4

Confederated Tribes of the Umatilla Indian Reservation

Draft Consultation Plan

The Confederated Tribes of the Umatilla Indian Reservation
Department of Natural Resources
Environmental Planning/Rights Protection Program

DRAFT

Consultation Plan

For Input on SOR Consultation, Trust Responsibilities,
Decision Process and Operating Strategies
System Operation Review

Section B

Task 1

"...Jointly define (with SOR lead agencies---BPA, Corps of Engineers and Bureau of Reclamation) the specifics of government-to-government relations through a Consultation Plan. The Consultation Plan will specify the expectations, responsibilities and commitment of the federal government (i.e., SOR agencies) and the CTUIR throughout the SOR process.." (CTUIR Statement of Work).

I N D E X

Consultation Plan

Consultation Plan

1. Background and Purpose:

On December 9, 1994, the Board of Trustees for the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) met with officials of the Bonneville Power Administration (BPA), the Bureau of Reclamation (BOR) and the U.S. Army Corps of Engineers (COE) regarding the System Operation Review. Randall Hardy of the BPA indicated that "...previous consultations with the CTUIR were "inadequate" and that we (SOR agencies) will improve in this area...". One of the results of this meeting was agreement that better communications were desired and identified as a priority for action.

The circumstances surrounding the development and selection of an operating strategy for the SOR is affected by the ever-increasing impacts of time compression and loss of time for adequate consultation. This document is developed as a framework for a "consultation plan". Below is a draft Memorandum of Agreement which sets forth specific expectations and responsibilities of the parties regarding "consultation".

2. Consultation Defined:

Consultation is the formal process of negotiation, cooperation and bilateral policy-level decision-making between the Confederated Tribes of the Umatilla Indian Reservation and the SOR agencies. Consultation is the process of coming to common understanding of the technical and legal issues that affect or are affected by a decision. Consultation is using this common understanding to make a common decision.

3. Objectives of Consultation:

a. Communication - Timely and effective communication between the CTUIR and the SOR agencies is essential to the protection and management of important tribal resources and is critical to the decision-making process.

b. Information - The CTUIR and the SOR agencies require technical and policy information in order to make informed decisions regarding the SOR and important tribal resources.

c. Process for decision-making - The CTUIR and the SOR agencies must agree on a process for making decisions affecting or relating to important tribal resources. The specific steps for decision-making are outlined in the draft Memorandum of Agreement below.

d. The overriding objective is to protect treaty-reserved rights and resources and to fulfill the legal trust obligation owed to the CTUIR by the United States. As an example of a treaty-reserved resource, the CTUIR have developed a salmon policy which will be a focus of consultation and referenced in future CTUIR documents and reports (CTUIR salmon policy attached).

4. Consultation Schedule:

a. April 11, 1995 Technical Meeting. Discuss CTUIR development of SOR alternative and Idaho Department of Fish and Game v. National Marine Fisheries Service (Biological Opinion).

b. April 14, 1995 Policy Meeting. Discuss CTUIR development of SOR alternative and Idaho Department of Fish and Game v. National Marine Fisheries Service (Biological Opinion).

c. April 15, 1995 Technical Meeting. Discuss CTUIR technical and economic modeling for CTUIR SOR alternative. Discuss CTUIR technical and economic modeling for CTUIR SOR alternative.

d. April 28, 1995 Policy Meeting. Discuss CTUIR technical and economic modeling for CTUIR SOR alternative. Discuss CTUIR technical and economic modeling for CTUIR SOR alternative.

e. Pre-Record of Decision. A technical and policy level meeting must be scheduled prior to making a final decision regarding a strategy Record of Decision.

f. Technical Meetings, unless scheduled otherwise, will be scheduled on a quarterly basis between staff and key contacts to discuss, review and propose actions relating to any technical issue related to the System Operation Review.

g. Policy Meetings, unless scheduled otherwise, will be scheduled Biannually or as otherwise agreed pursuant to protocols to be established by the Board of Trustees and the SOR agency heads. Meetings will be scheduled in accordance with the process outlined in the Memorandum of Agreement below. These meetings will scheduled to discuss, review and propose actions relating to any policy-level issue related to the System Operation Review.

h. Priority and focus - Technical and policy meetings will be scheduled as time permits and as conditions require. The attached draft Memorandum of Agreement (MOA) has been drafted to serve as the schedule and process for consultation between the SOR agencies and the CTUIR.

MEMORANDUM OF AGREEMENT

between

THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

and

THE BONNEVILLE POWER ADMINISTRATION,
THE UNITED STATES ARMY CORPS OF ENGINEERS,
and
THE UNITED STATES BUREAU OF RECLAMATION

for

COORDINATION AND CONSULTATION ON
RESOURCE MANAGEMENT ISSUES RELATING TO THE
SYSTEM OPERATION REVIEW

ARTICLE I. PREAMBLE

WHEREAS, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is a sovereign governmental entity representing Native American culture having an interest in the preservation and protection of its Treaty rights and cultural heritage both within the boundaries of the Umatilla Indian Reservation and within the CTUIR's ceded and aboriginal use areas; and

WHEREAS, the CTUIR in the Treaty with the Walla Walla, Cayuse and Umatilla Tribes of June 9, 1855 reserved rights and interests in the lands ceded to the United States encompassing some 6.4 million acres in northeast Oregon, Southwest Washington including a portion of the mainstem of the Columbia and Snake Rivers; and

WHEREAS, the CTUIR and the System Operation Review (SOR) agencies, the Bonneville Power Administration (BPA), the United States Army Corps of Engineers (COE) and the United States Bureau of Reclamation (BOR) recognize that cultural and natural resources and customary use locations are invaluable and critical to the preservation of its treaty rights, cultural heritage, and pursuit of traditional lifeways for present and future generations; and

WHEREAS, the SOR agencies seek to establish and maintain government-to-government relationships with the CTUIR for the purpose of building stable, long-term relationship which result in positive, mutually understood, and beneficial solutions to common situations; and

WHEREAS, the SOR agencies are committed to addressing concerns identified by Tribal governments regarding natural and cultural resource issues within SOR agencies area of responsibility, and to outline specific steps each government will take in establishing and maintaining a government-to-government relationships and is outlining processes for jointly evaluating actions which affect each government.

NOW, THEREFORE, this MOA is made between the parties, the CTUIR represented by the Board of Trustees, and the SOR agencies as represented by Randall Hardy, BPA Administrator, John Keys, BOR Regional Director and General Ernest Harrell, Division Engineer, COE. The parties agree to set forth in this MOA a framework for fostering coordination and consultation on resource management issues, and agree to the terms set forth below.

ARTICLE II. SCOPE OF AGREEMENT

1. Government-to-Government Consultation

   a. The Administrator for BPA or his designate, shall be the responsible official for the purpose of consulting with the CTUIR at the government-to-government level.

   b. The Division Engineer for the North Pacific Division, COE, or his designate shall be the responsible official for the purpose of consulting with the CTUIR at the government-to-government level.

   c. The Regional Director of the BOR or his designate shall be the responsible official for the purpose of consulting with the CTUIR at the government-to-government level.

   d. The Chairman of the Board of Trustees or his designate, shall be the Tribal government official for the purpose of consulting with the SOR agencies at the government-to-government level.

   e. The Chairman of the Board of Trustees for the CTUIR and the SOR agencies shall designate key points of contact for the government-to-government relationship.

2. Definition of Consultation

   a. Intrinsic to government-to-government consultations is the recognition by the SOR agencies of the unique legal status of the CTUIR as recognized by the Treaty of June 9, 1855.

b. The term "consultation" means that the SOR agencies shall provide written notice to the CTUIR of all pending actions, decisions, undertakings and studies relating to the CTUIR.

c. Consultation means that the SOR agencies shall solicit comment and recommendations from the CTUIR relating to any pending action, decisions, undertakings and studies relating to the CTUIR.

d. Consultation means that the SOR agencies recognize the importance of, and the need for, direct tribal participation in all phases of an undertaking which has potential to affect natural and cultural resources protected by treaty, and applicable statutes and regulations. In recognition of the need for direct tribal participation, the SOR agencies may fund tribal participation under terms to be negotiated under a separate agreement.

3. Government-to-Government Coordination

In addition, the SOR agencies shall provide notification to the CTUIR of development projects, surveys, reviews, inventories as well as other programs to facilitate coordination with the CTUIR. The SOR agencies will assure that such projects, surveys, reviews, inventories and programs are consistent with CTUIR rights and interests, as well as consistent with Federal regulations developed for the Native American Graves Protection and Repatriation Act (NAGPRA), the National Environmental Policy Act, the National Historic Preservation Act as amended, the Archeological Resources Protection Act as amended, the American Indian Religious Freedom Act as amended, the Northwest Electrical Power Planning and Conservation Act (NWEPPCA) and other statutory authorities.

4. Procedures

a. The SOR agencies shall notify the CTUIR within 30 days of any plans for new development projects which require a Section 106 (36 CFR 800) review and clearance as required by the National Historic Preservation Act, or of any plans to conduct surveys, inventories, reviews or studies which include human remains, funerary objects, objects of cultural patrimony, sacred objects or cultural resources which are reasonably believed to have originated from CTUIR ceded lands or aboriginal use areas.

b. The SOR agencies shall include with any such notice to the CTUIR the following information:

(1) Description of the proposed project, survey, inventory, review or study, including all relevant background information.

(2) Description of the location of the proposed project using maps and or aerial photographs; location of the survey, inventory, review or study.

(3) Identification of key SOR agency personnel that the CTUIR may contact for more information regarding any proposed project, survey, inventory, review or study.

(4) Identification of all proposed dates planned for any such proposed project, survey, inventory, review or study.

c. The CTUIR shall do the following:

(1) The CTUIR shall distribute SOR agency notifications to the appropriate officials and staff and coordinate review.

(2) The CTUIR shall provide written review comments including recommendations to the SOR agencies within 30 days from the date of receipt of any notification, or within the time specifically requested to complete the review.

(3) The CTUIR shall assist in resolving conflicts or potential impacts identified during the Tribal review of the SOR agency notices.

(4) Where applicable, as part of any comments and recommendations of the CTUIR to the SOR agencies, the CTUIR shall prepare work plans, proposals, scope(s) of work, and budgets which correspond with recommendations provided in any review comments and recommendations.

5. Cooperative Programs

The following areas have been identified by the parties to this agreement as topics of mutual interest. These programs may be considered for more detailed definition at a future date.

a. Public Interpretation and Employee Training

(1) The coordination of SOR agency and CTUIR Tribal

cross-training for interpretive center and museum interpretive programs within the SOR agencies and the Umatilla Indian Reservation.

(2) Consideration by the SOR agencies for the use of Tribal members as cultural resources or other resource area field assistants as employment, training and education opportunities arise.

b. Cultural Resources Management

(1) Consultation between the SOR agencies and the CTUIR concerning the issuance of Archaeological Resource Protection Act (ARPA) permits within the ceded boundaries of the CTUIR within SOR agency administered lands.

(2) The identification of cultural resources and other inventory studies that would be appropriate for setting aside for Tribal involvement.

c. Natural Resources Management

The SOR agencies shall extend opportunities to the CTUIR to review, comment and propose actions which will aide the SOR agencies in fulfilling legally mandated obligations to protect and restore natural resources, which include fish and wildlife resources.

d. Economic Development

(1) The SOR agencies shall extend opportunities to the CTUIR to consider ventures which may benefit the economic interests of the United States government and the CTUIR.

(2) The SOR agencies shall review and consider signing a Indian Preference Agreement to extend contracting and subcontracting opportunities on SOR agency undertakings or projects (P.L. 93-638 7(b)).

ARTICLE III. TERMS AND CONDITIONS

1. Direct contacts between the SOR agencies and the CTUIR are in no way limited by this MOA. Such contacts are essential to promote more effective communication, coordination and consultation. This MOA in no way amends, alters or modifies the Treaty of June 9, 1855, other policies, or jurisdictions of the SOR agencies or the CTUIR.

2. Failure of the CTUIR to respond to any notification under 4 c. above shall in no way be considered a waiver or abandonment of any Treaty-related right with respect to the activity or project referred to in the notification.

3. This agreement will become effective on the date of the latest signature as evidenced below.

4. Amendments, supplements or revisions to this Memorandum of Agreement may be proposed any of the parties to the agreement and shall become effective upon formal approval of all parties.

5. Representatives of the SOR agencies and the CTUIR will meet annually (or as otherwise arranged) to discuss the terms of this document and other matters as necessary.

Memorandum of Agreement
between
The Confederated Tribes of the Umatilla Indian Reservation
and
The Bonneville Power Administration,
The United States Army, Corps of Engineers,
and
The United States Bureau of Reclamation

SIGNATURES

_____ _____
Randall Hardy, Administrator Date
Bonneville Power Administration
U.S. Department of Energy

_____ _____
General Ernest G. Harrell Date
Division Engineer,
North Pacific Division
U.S. Army Corps of Engineers

_____ _____
John Keys, Regional Director Date
Bureau of Reclamation,
U.S. Department of the Interior

_____ _____
Donald G. Sampson, Date
Chairman, Board of Trustees,
Confederated Tribes of the
Umatilla Indian Reservation

Exhibit

5

Confederated Tribes of the Umatilla Indian Reservation

Identification of Trust Resources System Operation Review

The Confederated Tribes of the Umatilla Indian Reservation
Department of Natural Resources
Environmental Planning/Rights Protection Program

Identification of Trust Resources

System Operation Review

Section B

Task 2

Identify Trust Resources related to the System Operation Review

May 1, 1995

I N D E X

Identification of Trust Resources

Abstract:

The United States and the Confederated Tribes of the Umatilla Indian Reservation have a government-to-government relationship as demonstrated by the existing Treaty obligations each has to the other. The United States has a legal obligation to protect and manage resources important to the Tribes in conformance with the terms of the Treaty and in fulfilling its obligations to the Tribes as a trustee. As part of the System Operation Review and in developing an alternative for the Environmental Impact Statement, the Bonneville Power Administration, the Bureau of Reclamation and the United States Army, Corps of Engineers agreed to collaborate with the Confederated Tribes in defining "trust resources". This document is intended to assist in this effort.

Background:

On December 9, 1994, the Board of Trustees for the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) met with officials of the Bonneville Power Administration (BPA), the Bureau of Reclamation (BOR) and the U.S. Army Corps of Engineers (COE) regarding the System Operation Review (SOR). The meeting focused on the adequacy of the SOR Draft Environmental Impact Statement (DEIS) and the process in which it developed.

The SOR agencies and the CTUIR agreed that consultation was lagging and that improvements were needed. It was agreed that better communication was the key element in adequate consultation. The SOR agencies agreed that the SOR alternatives as outlined in the DEIS did not provide sufficient protection to anadromous fish, in particular Snake River Chinook and Sockeye salmon listed as Endangered under the Endangered Species Act.

Tribal representatives emphasized in the meeting that the salmon is extremely important to tribal culture and is a treaty-reserved resource. In this regard, the CTUIR reminded the SOR agencies that in addition to the legal obligations of the treaty, the salmon are a resource to be managed in a manner consistent with the trust obligation of the United States. Further, tribal representatives emphasized that in addition to the salmon, there are many important resources not identified or considered in the SOR process. The SOR agencies and the CTUIR agreed that the term "trust resources" should be defined. The CTUIR offer the following to aid the development of an understanding of the term "trust resources".

Objective:

The ultimate objective of this document is to assist the United States in fulfilling fiduciary obligations to the CTUIR by properly protecting tribal "trust resources". In fulfilling this legal obligation, the SOR agencies and the CTUIR must have a common definition and understanding of the term "trust resources" and this document is intended to assist in this definition.

History:

Aboriginally, the Walla Walla, Cayuse and Umatilla Tribes were separate autonomous Indian Tribes of related plateau culture.[1] The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is a federally recognized Indian Tribe.[2] The CTUIR entered into a treaty with the United States government on June 9, 1855 and ceded to the United States, aboriginal title to 6.4 million acres of land.[3] These ceded lands represent the traditional homeland of the CTUIR. Those lands not ceded by the CTUIR were reserved for their exclusive use and occupation and is recognized as the Umatilla Indian Reservation.

Explicit in the Treaty, the CTUIR reserved the exclusive right to take fish in streams running through and bordering the reservation and the right to resort to all usual and accustomed fishing stations and "... *erecting suitable buildings for curing the same; ... the privilege of hunting, gathering roots and berries and pasturing livestock on unclaimed lands in common with citizens, is also secured to them.*"[4]

As noted before the United States Indian Claims Commission:

> "...*The economic pattern of the three tribes required a seasonal cycle of travel about their respective territories. In the winter, they lived in winter villages on the Columbia and Snake Rivers, or in the lower valleys of their tributaries. In the spring, they*

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[1]The Confederated Tribes of the Umatilla Indian Reservation v. United States, Indian Claims Commission, Docket 264, Petitioner's Proposed Finding of Fact, (January 1959).

[2]*see* Constitution and By-Laws of the Confederated Tribes of the Umatilla Indian Reservation, ratified November 4, 1949.

[3]*see* Treaty with the Walla Walla, Cayuse and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, Ratified March 8, 1859.

[4]*Id.* at Article 1.

moved out of their winter camps and moved southward into the Blue Mountains to dig roots and catch spring salmon in the headwaters of the mountain streams. In the summer and fall, they would move even farther back into the mountains, gathering roots and berries, fishing, hunting elk and deer, and pasturing their livestock. In the winter, they returned to their winter camps. The cycle was repeated year after year, and the members of the Tribes used the same village locations along seasonal routes of travel each year..."[5]

Contemporary members of the CTUIR exercise treaty rights throughout the Columbia River Basin. Hunting, fishing and gathering food and medicinal herbs and plants are carried on seasonally. Tribal members travel to locations that contain important vegetation and minerals used for medicines, clothing, regalia, sustenance, healing and religious ceremony.

Federal Policy - SOR Agencies

U.S. Army Corps of Engineers:

The U.S. Army, Corps of Engineers acknowledges its trust responsibility to Indian Tribes. The COE acknowledge that it has a fiduciary relationship between assets and resources held in trust for Native Americans governments. The COE Native American Policy also recognizes that it has a duty to consult with Native American governments when COE activities affect reservations, treaty rights or other federally recognized rights. The COE policy does not define trust assets or resources but does state that "...*this policy statement is to foster a mutual and beneficial relationship between the Corps and tribal governments by administering undertakings and activities that ... recognize Native American traditional cultural and religious property and freedoms..*".[6]

Bureau of Reclamation:

Trust Assets are defined as "legal interests in property held in trust by the United States for Indian Tribes or individuals, or property that the United States is otherwise charged by law to protect. Examples of resources that could be Indian Trust Assets are lands, minerals, hunting and fishing rights, water rights, and

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[5]Indian Claims Commission, Docket 264, Petitioner's Proposed Finding of Fact.

[6]Draft Native American Policy, U.S. Army Corps of Engineers, North Pacific Division (April 15, 1994).

in-stream flows".[7]

Bonneville Power Administration:

The Bonneville Power Administration (BPA) acknowledges its trust responsibility but does not refer to "trust assets" or "trust resources". However, it does include the protection of traditional cultural resources as part of its trust responsibility and defines them as "distinctive shapes in the natural landscape, natural habitats for important subsistence or medicinal plants, traditional fisheries, sacred religious sites and places of spiritual renewal." Regarding consultation, the policy also refers to "water resources, fish and wildlife resources and other natural resources" as well as the [p]rotection of tribal lifestyle, culture, religion, economy."[8]

Federal Policy - Generally

Department of Interior:

The Department of Interior acknowledges its trust responsibilities and the need to protect trust resources and trust property but does not define them.[9]

Department of Energy:

The Department of Energy (DOE) recognizes a "trust relationship" but makes no reference to "trust assets" or "trust resources". DOE acknowledges that "*some tribes have treaty-protected interests in resources outside reservation boundaries.*" The DOE's policy also includes compliance with all cultural resource protection laws.[10]

Department of Agriculture:

The Department of Agriculture (DOA) acknowledges the unique, legal and political relationship between the United States and

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[7]Indian Trust Asset Policy, U.S. Bureau of Reclamation (July 2, 1993).

[8]Draft BPA Tribal Policy, (Revised) January 27, 1995.

[9]Order No. 3175 (November 8, 1993).

[10]American Indian Tribal Government Policy, U.S. Department of Energy (July/August 1994).

Indian Tribes. The DOA recognizes the legal obligations owed to Indian Tribes under treaties and statutes and further recognizes a responsibility to "protect and maintain the lands, resources and traditional use areas of Indians". The DOA policy does not however, use the terms "trust" or "trust resource".[11]

United States Forest Service:

The United States Forest Service acknowledges its trust responsibilities but makes no mention of "trust resources" or "trust assets", and generally, the Forest Services' policy is the vaguest and least meaningful of any agency.[12]

Environmental Protection Agency:

The Environmental Protection Agency (EPA) acknowledges its trust responsibilities but makes no mention of "trust resources" or "trust assets".[13]

The Executive Office:

President Bill Clinton has directed that "...[e]ach executive department and agency shall asses the impact of Federal Government plans, projects, programs, and activities on tribal trust resources...".[14]

Tribal Policy - Generally

Confederated Tribes of the Umatilla Indian Reservation:

The specific references to fish, game, roots and berries in the Treaty are all considered "trust resources". Additionally, those resources not explicitly mentioned in the treaty are never-the-less "trust resources". A similar conclusion was reached by the United States Supreme Court:

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[11]Department of Agriculture, Policies on American Indians and Alaskan Natives (October 16, 1992).

[12]United States Forest Service, Native American Policy - Friends and Partners (February 1994).

[13]*See* Environmental Protection Agency Memorandum, from Carol Browner, EPA Administrator to Tribal Leaders (March 14, 1994).

[14]59 Fed. Reg. 22951 (April 29, 1994).

> " ....*the Treaty right was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted...*".[15]

This "reservation" of rights is the basis of the tribal definition of "trust resources". As noted by Felix S. Cohen:

> " ....*[S]o long as Indian rights are not voluntarily ceded by the Tribes in treaties or other negotiations which are approved by Congress, they continue in their aboriginal state. Important rights not specifically ceded in a treaty or agreement are considered to be reserved, consistent with the purpose of the United States and the Indians in entering into the transaction...*".[16]

The "reserved rights doctrine" secures to the CTUIR the right to have available for harvest and use all resources upon unclaimed lands within the treaty-ceded lands and all usual and accustomed fishing stations. The Tribes reserved a right in the land itself:

> "...*They (treaty rights) imposed a servitude upon every piece of land as though described therein....The contingency of the future ownership of the lands, therefore, was foreseen and provided for - in other words, the Indians were given a right in the land - the right of crossing it to the river - the right to occupy it to the extent and for the purpose mentioned.....*".[17]

The CTUIR reserve the right to access "unclaimed lands" for the purpose of obtaining vital resources, and to access all "usual and accustomed stations".[18] The CTUIR expect that the United States will manage natural resources in a manner consistent with the legal obligations of the Treaty and with the fiduciary responsibilities of the United States as a Trustee.[19]

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[15]United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49, L.Ed. 1089 (1905).

[16]Felix S. Cohen Treatise on Federal Indian Law, Casebook, Getches, Rosenfelt and Wilkinson (1979).

[17]United States v. Winans.

[18]*See* Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir.) *cert denied*, 375 U.S. 829 (1963).

[19]*See e.g.*, Tulee v. Washington, 315 U.S. 681, 684-85 (1942)(burden resource conservation) United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975)(federal suit to compel state to

Proposed Definition

As the record indicates, the federal courts have usually addressed trust resources in the context of water, money, land, timber, mineral or gas and oil resources, and fish and wildlife.[20] The CTUIR consider all aspects of the natural environment to have some purpose in preserving and sustaining life and subject to the protection of the Treaty. The CTUIR has stated:

> "....*The rights we reserved were the basis of our economy and the core of our culture and religion. These rights include the right to fish at our usual and accustomed fishing stations throughout the Columbia Basin, and the right to a sufficient quantity and quality of water to maintain these fish runs. The Treaty also reserved the right of continued Tribal access to certain lands for hunting, for gathering traditional foods and medicinal herbs, and for religious purposes. **Without the promise that these rights and resources would be protected, our ancestors would not have signed the Treaty...***".[21]

Rather than develop a "list" of "trust resources", the CTUIR view "trust resources" as: A category of natural elements and environs including but not limited to: air and water resources; native fish and wildlife and habitats; native plant life and habitats; mineral deposits; timber and timber related resources; gas and oil reserves; archaeological, cultural and burial sites; fishing, hunting, food gathering and religious sites; and other resources and sites of the natural environment necessary to sustain tribal culture for present and future needs of its members. These

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comply with terms of treaty); Confederated Tribes of the Umatilla Indian Reservation v. Callaway, No. 72-211 (D.Or. August 17, 1973)(enjoining dam operations); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977)(enjoining dam construction).

[20]*See e.g.*, Menominee Tribe v. United States, 101 Ct.Cl 22 (1944)(timber); Menominee Tribe v. United States, 91 F.Supp. 917 (Ct.Cl. 1950)(timber); United States v. Mitchell, 445 U.S. 535 (1980) and United States v. Mitchell 463 U.S. 206 (1983)(timber); Navajo Tribes of Indians v. United States, 364 F.2d 320 (Ct.Cl. 1966)(mineral leases); Dann v. United States, 470 U.S. 39 (1985)(public lands); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.C. 1972)(fish); Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238 (N.D. Cal. 1973)(trust funds).

[21] *See* COLUMBIA BASIN SALMON POLICY, the Confederated Tribes of the Umatilla Indian Reservation (March 8, 1995).

resources which are protected by treaty or are part of tribal culture and economy are considered trust resources".

With regard to the System Operation Review, the following specific trust resources are *currently at risk* and require immediate measures for protection:

a. Water resources - instream flows and water quality.

b. Fish resources - spring chinook, summer chinook, fall chinook, sturgeon, lamprey, sockeye salmon, coho salmon and whitefish.

c. Cultural resources and sites.

d. Usual and accustomed fishing sites.

e. Traditional tribal economy and overall economic stability.

These resources are "trust resources" and are not currently managed or protected by the SOR agencies, under the terms of the Treaty of 1855 or under the terms of the federal trust obligations of the United States government.

Exhibit

6

Confederated Tribes of the Umatilla Indian Reservation

Criteria for the Selection of a System Operating Strategy

Criteria for the Selection of a System Operation Strategy

submitted by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

These criteria were developed directly from communications the CTUIR have previously had with the SOR agencies. The criteria are all equally important (i.e., necessary). In the event of a perceived conflict between resources or System "users" the principle of reducing or zeroing impacts and risks to native biological resources should be adhered to. To do this the assumption that the Federal Columbia River Power System is the Columbia River has to be abandoned. The pre-dam continuous geographic and temporal cycles which dominated life in and on the Columbia River for eons has been changed to a disconnected listing of "islands" which need to be re-linked to create and improve viable and usable resources. "Losses" are to be defined as changes which have already occurred in the Columbia River system as compared to the Desired Future Condition, the natural river. Short-term changes in the ecosystem which derive from activities designed to move the system closer to the Desired Future Condition are defined as "restorative changes."

The responsibilities detailed here are those of the United States Government. The federal government as a whole is the only party who has system-wide responsibilities, rather than just the operation of specific dams, and all these responsibilities are incumbent on the federal government as a whole. Under each key issue identified by the CTUIR, background information is offered and criteria for a legal System Operation Strategy which comports with the effectuation of treaty rights and the U.S. government's execution of its Trust Responsibility, is detailed.

I. Consultation and Coordination; Government-to-Government Relations.

Background: Coordination began in December 1993. CTUIR submitted "communication" and workplan/budget Jan. 1994. No response to communication or proposal. Delay in response by SOR agencies to initiating and effectuating Consultation necessitated 12/9/94 meeting. CTUIR participation in Cultural Resources Workgroup and other workgroups (e.g., Wildlife) has been defined by the SOR agencies on a "stakeholder" basis.

Consultation began with the 12/9/94 meeting, more than five years into the process, after the discarding of more than 70 alternatives and the completion of the Draft Environmental Impact Statement. This meeting resulted in a contract with BPA under which several work products are to be delivered. Under contract with BPA, the CTUIR has developed a consultation plan for effectuation of government-to-government relations with the U.S. government in April 1995.

Criterion: Effective consultation, coordination and communication, in accordance with the DRAFT Consultation Plan prepared by CTUIR, is required to address the issues important to the CTUIR. A legal System Operation Strategy can only be identified by the U.S. government successfully consulting and coordinating with the CTUIR and then fully executing its Trust Responsibility to protect and restore aboriginal and treaty-reserved resources through the project action.

II. Treaty Rights and Trust Responsibility

Background

On June 9, 1855, the United States entered into a Treaty with the CTUIR.[1] The Treaty outlined the cession of certain lands by the Tribes to the United States. The Treaty also provided in perpetuity tribal access to off-reservation lands for root and berry gathering activities, access to hunting areas for small and large game and the right to access all usual and accustomed fishing stations.

The relationship between the CTUIR and the Bonneville Power Administration, the United States Army Corps or Engineers and the Bureau of Reclamation (SOR agencies) is founded on the principal that there exists a Government-to-Government relationship as evidenced by the Treaty of June 9, 1855. In particular, the Treaty established some of the basic elements of this Government-to-Government relationship. The Treaty elements important to the SOR review process are:

The trust relationship: Indian Tribes are not foreign nations, but constitute "distinct political" communities "that more correctly, perhaps, be denominated domestic nations" whose "relation to the United States resembles that of a ward to his guardian", see Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed.25, (1831). The language in Cherokee Nation v. Georgia founded the doctrine of federal trusteesship in Indian affairs.

Tribal governmental status: Indian Tribes are sovereigns, that is, governments, and state law does not apply within reservation boundaries without express congressional consent, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Reserved rights doctrine: Tribal rights, including rights to land and self-government, are not granted to the CTUIR by the United States. Rather, under the reserved rights doctrine, tribes retained ("reserved") such rights as part of their status as prior and continuing sovereigns, see United States v. Winans, 198 U.S. 371 (1905).

Canons of construction: The historical record clearly indicates that the treaty negotiations were awkward given the existing language barrier between the parties. As such, courts generally have adopted fundamental rules and principals which govern the interpretation of written treaties, otherwise known as the "canons of construction". Since the treaties were being transcribed in the English language, the courts have sought to construe the long-term intentions of the parties to the benefit of the weaker party, the Tribes. The canons provide that treaties are to be construed broadly in determining the existence of Indian rights, but narrowly when considering the abrogation of those rights (there must be express legislative intent on the part of the U.S. congress to abrogate any such rights).

The cannons further provide that treaties must be construed to mean what the Indians understood the treaties to mean at the time of treaty negotiation. These cannons of construction have also been applied to agreements, see, Antoine v. Washington, 420 U.S. 194, (1975), to exectutive orders (see, Arizona v. California, 373 U.S. 546, (1963), and statutes dealing with Indians, see United States v. Dion, 106 S. Ct. 2216 (1986); Squire v. Capoeman, 351 U.S. 1, (1956).

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[1] *See* Treaty between the United States and the Walla Walla, Cayuses and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, 12 Stat. 945, ratified March 8, 1859. These three Tribes consititute the Confederated Tribes of the Umatilla Indian Reservation.

Treaty Rights: The CTUIR's right to take fish that pass their usual and accustomed places is a right confirmed by numerous court decisions. See e.q.. Sohappy v. Smith, 302 F.Supp, 899 (D.Or. 1969), aff'd, United States v. Oregon, 529 F2d 570 (9th Cir. 1976); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (Passenger Fishing Vessel). In addition to binding state governments, see Passenger Fishing Vessel 443 U.S. at 682 and n.25, the treaties are also binding on private citizens, see e.g., United States v. Winans, 198 U.S. 371 (1905), and of course, the federal government. Passenger Fishing Vessel, 443 U.S. at 682; see also Confederated Tribes of the Umatilla Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977). Absent specific authorization by congress, Indian treaty rights cannot be abrogated. id., citing Menominee Tribes v. United States, 391 U.S. 404, 413 (1968).

In Passenger Fishing Vessel, the Court painstakingly examined the circumstances surrounding the negotiation of the treaties in an attempt to define the parties' long-term intentions. The Supreme Court emphasized that Governor Stevens invited the tribes to rely on the United States' good faith efforts to protect their right to a fisheries livelihood. Stevens specifically told the tribes: "This paper [the treaty] secures your fish." Id. at 667 n.ll. During the treaty negotiations, "the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent." Id. at 676 (emphasis added). As the Supreme Court stressed: *"...It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries,"....and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish...".*

The courts have responded to these threats to treaty rights by declaring a policy that treaty rights cannot be defeated by technology or other methods not anticipated by the treaty signatories. For example, in United States v. Winans, 198 U.S. 371 (1905), the defendant constructed a fish wheel along the Columbia River and excluded the Indians from one of their usual and accustomed fishing places. Commenting on the effects of improved fishing devices, the Court noted that: *".... wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern harvester for the ancient sickle and flail. It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does...."*

Id. at 382. Thus, although improved technology may be brought to bear on the fishery, that technology cannot be allowed to imperil the rights secured to the parties to the treaty. The Court's intent is clear: absent specific treaty abrogation legislation from Congress, Menominee Tribe v. United States, 391 U.S. at 413 (1968), no one may use any method to deprive treaty fishermen of their fair share of the anadromous fish or access to usual and accustomed fishing places.

Trust Responsibility: The SOR agencies have an obligation to not destroy Indian treaty rights without specific Congressional action. The SOR agencies must use their authority to safeguard that which is the subject matter of federal treaties. The trust responsibility is that special relationship between the United States and Indian tribes. This relationship is part of the very fabric of federal Indian law and it imposes stringent fiduciary standards of conduct on federal agencies in their dealings with Indian tribes. See United States v. Creek Nation, 295 U.S. 103 (1935). See also Northern Cheyenne Tribe v. Hodel, 12 Indian L.Rep. 3065, 3070-71 (D.Mont. 1985; modified on other grounds, 842 F. 2d 222 (9th Cir. 1988).

In Northern Cheyenne Tribe, the court declared that: *"....a federal agency's trust obligation to a tribe extends to actions it takes off a reservation that uniquely impact tribal members or property on the reservation...."* Id. at 3071. In an attempt to save it's coal leasing EIS from invalidation, the Secretary of

the Interior alleged that there was no specific statute or treaty that required the Department to consider the impacts of coal leasing on the tribes as an entity. Id. The Secretary also alleged that his decision to lease the coal was in the "*national interest*" and "*vital to the nation's energy future*." Id. The court declared that: *".....The Secretary's conflicting responsibilities and federal actions taken in the "national interest", however do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights...."*

Id. (citations omitted). Similarly, the SOR agencies must not allow it's obligations to the tribes to become lost in it's concern for the local citizenry. It must accord the treaty rights special consideration and scrupulous safeguards. Management or development activities that affect anadromous fish, fish habitatand water quality also affect the tribes' exercise of their treaty rights. The SOR agencies owe a duty to not only discuss the effects of it's activities on the tribes, but also a duty to safeguard resources of crucial importance to the tribes. This duty is not fulfilled by actions which sanction degradation water quality and fish habitat needed to rebuild anadromous fish runs or development activities that destroy or impact fishing sites. The SOR agencies owe a duty to refrain from activities that will interfere with the fulfillment of treaty rights. Moreover, this duty cannot be performed by engaging in an "accommodation" or "balancing" process between Indian treaty rights and a competing interest. Any such "accommodation" reached by a Federal agency would amount to a de facto abrogation of Indian treaty rights.

In addition to those federal actions taken which have severely impacted tribal culture and economy, such as construction and operation of the FCRPS, several of current Operation Strategies developed by the SOR agencies illegally assign "rights" to those and other actions (e.g., irrigation, barging, aluminum and power production, pollution, development, etc.) by considering the current system as the base case. This assignment violates the terms of the Treaty and ignores the legal trust obligations owed to the CTUIR. An appropriate base case derives from the terms of the Treaty of 1855 and addresses impacts to the Columbia River, Snake River and their tributaries. Further, many current users are acting with full knowledge of their illegal activities (e.g., irrigators spreading federally subsidized water outside legal district boundaries).

In order for the Federal government to fulfill its trust responsibility it must promote, encourage, facilitate, restore and/or recover the native faunal and floral assemblages. This requires native habitat (i.e. natural river). The native fauna and flora have the natural river "encoded" in their genetic makeup. These are species favored by cool, swift water as opposed to species favored by warm (or even hot in the case of 90,000 smolts which died at McNary in 1994), still water (e.g., gulls, northern squawfish, channel catfish, etc.) which have prevailed or usurped native species under the past and current management of the Columbia and Snake Rivers.

Criteria:

A. Fulfill the terms of the Treaty of June 9, 1855, the federal government's trust obligations, the Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, the Religious Freedon Restoration Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, the National Environmental Policy Act and other applicable federal and state laws relating to water quality standards (temprature, dioxin dissolved gas etc.).

B. Identify, protect, and restore trust resources, including but not limited to water, land, all fish traditionally utilized by the Tribes (i.e., fall chinook, spring chinook, summer chinook, sockeye, coho salmons, steelhead (trout), other native trout in their natural range, lamprey, sturgeon,

whitefish, suckers), wildlife, plants, other cultural resources (e.g., language, sites, activities, etc.) including traditional cultural properties, access to these resources and all the places used by the **People** in the course of our use of these resources, i.e. our way of life. The selected System Operation Strategy must be oriented to recover and restore the native faunal and floral assemblages which support the way of life guaranteed by the Treaty. Trust resource values are strictly integrated, that is the various values of individual resources or types of resources cannot be separated out.

C. Measure direct, indirect, and cumulative impacts to trust resources resultant from the operation of the FCRPS compare against an appropriate base case, pre-"project" (i.e., pre-dams). Use of the "current operation" strategy as the base case implicitly attributes property rights to those who benefit under the current operation (e.g., irrigators, barge owners, aluminum producers, etc.). This is in violation of the CTUIR's superior rights to fish, water, usual and accustomed areas, cultural resource protection, and other rights. All activities allowed, facilitated, or provided for by the operation of the FCRPS which usurp, prevent, or trivialize the exercise of these superior rights (e.g., irrigation, barge commodity transportation, power production, etc.) are to be counted as "costs."

D. Explicitly protect and restore water quality and recognize the Tribes superior water rights, for both consumptive (for lands reserved and for tribal member use) and non-consumptive (instream; throughout lands reserved for and ceded by the CTUIR) uses. Any allocation or distribution of water from the Columbia River by the federal or state governments can only be done under this cognizance and with the highest priority allocation or distribution of water for fish passage, fish habitat, water quality (instream flows), and tribal member use in the exercise of their Treaty Rights.

E. Provide access to and Tribal management of cultural resources, including explicit protection of "cultural resources" as the pools are drawn down. It must be explicitly recognized that the Federal Government has this responsibility irrespective of the System Operation Review. Further, the selected alternative should provide a measure of ethnic privacy and opportunity to propogate a living culture and heritage, and a measure of relevance to learn and teach language, a cultural resource,

F. In accordance with the Federal government's responsibility to recover Threatened and Endangered native fishes, the selected Strategy must explicitly favor these native species of anadromous and resident fish (e.g., fall chinook, summer chinook, spring chinook, sockeye salmons, bull trout) and in accordance with the Federal government's responsibility to protect and restore treaty-reserved resources, the selected Strategy must explicitly favor native fishes which have been extirpated from parts of their range (e.g., sockeye salmon, coho salmon). The Strategy should clearly be consistent with U.S. v. OR conservation standard and rebuilding goals from Columbia River Fish Management Plan (i.e. levels of fish populations which provide opportunity to harvest at pre-Treaty levels[2]). The selected alternative should provide a clear path to recovery to harvestable levels. The benefits to the CTUIR and other resource-dependent residents, to the regional economy and to the federal taxpayers which would be derived from recovery of these

[2] According to speech by Ted Strong, Executive Director, Columbia River Intertribal Fish Commission, given June 1992, pre-treaty harvest and harvest prior to construction of Bonneville Dam was 90 fish per tribal member.

species should be compared against the costs associated with the probability of extirpation/extinction[3].

G. Explicitly consider the additional cumulative, direct and indirect impacts (e.g., availability of food, employment, poverty, health, income, etc.) to the CTUIR's economy as a result of the operation and construction (i.e. configuration) of the Federal Columbia River Power System. Again, compare the impacts from each alternative against an appropriate base case, pre-dams.

H. The selected alternative should fairly distribute benefits and costs. Those who have previously benefitted are to share proportionately in the costs. Those who have subsidized the costs of running the current system (i.e., sport, commercial, and tribal fishers, Tribal members, etc.) should explicitly benefit from a new System Operation Strategy. Customers of products produced through the exploitation of the Columbia and Snake Rivers for irrigation water, power, transportation must more equitably share in paying the true cost of products (i.e., production plus environmental externalities, etc.).

III. Geographic and Topical Scope

Background: The "project area" is currently defined by the SOR agencies as being limited to only 14 federal projects on the mainstem Columbia and Snake "Rivers" (out of a total of 150-200 dams, nearly all of which are "federal" due to funding, construction, or licensure, throughout the Columbia River Basin). This violates NEPA because of the fragmentary analysis which does not consider cumulative, direct and indirect impacts as a result of all current, past and future projects which may foreseeably interact with the "project." CTUIR defines the project area as the entire Columbia River Basin. Further, several other ongoing federal projects overlap the project area and directly or indirectly (i.e., foreseeably) interact with the System Operation Review. Under NEPA, the interaction of these several projects and the SOR must be explicitly addressed through identification of key issues, cumulative effects analysis, mitigation measures, etc.

Criterion:

A. For a system operation strategy to comply with NEPA, the U.S. government must consider the "project" area to entail the entire Columbia River Basin, including, explicitly, the Columbia above Grand Coulee, all Columbia tributaries, and the entire Snake River Basin, including all tributaries.

B. There must be explicit linkages to Interior Columbia Basin Ecosystem Management Project, System Configuration Study, Canadian Entitlement Agreement, PNCA, Northwest Power Act, Endangered Species Act, Clean Water Act., In-lieu fishing sites (again cumulative effects, and again, projects with which the current project may foreseeably interact). This includes the explicit assumption that Columbia Basin public lands (e.g., National Forests) are managed consistent with improved trust resources (i.e., recovery and restoration of Treaty-protected fishes to harvestable levels).

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[3] The monetary costs of extirpation/extinction are derivable as there are several state and federal programs which are designed to artificially maintain or reintroduce fish into watersheds from which they have been extirpated (e.g., fall, spring, summer, and coho salmon in the Umatilla River Basin).

Exhibit

7

Confederated Tribes of the Umatilla Indian Reservation

System Operating Strategy (SOS 9d) "Rights Protection and Implementation of Federal Trust Responsibility"

CTUIR System Operation Strategy (SOS 9d) "Rights Protection and Implementation of Federal Trust Responsibility"

submitted by the Confederated Tribes of the Umatilla Indian Reservation

Operation of the Columbia River by the U.S. government has led to the development of many conflicts between competing "interests." In many cases, the conflict between Treaty rights and other economic interests was created by Federal actions. To assist the Federal government in carrying out its duty to restore our Treaty resources, it was necessary to develop a new strategy for implementation by the Federal government in the matter of the "System Operation Review." No Strategy among the "Final Operating Strategies" will allow the Federal government to meet its fiduciary obligations.

The CTUIR System Operation Strategy (SOS 9d), "Rights Protection and Implementation of Federal Trust Responsibility," implements the CTUIR Columbia Basin Salmon Policy ("Salmon Policy"). The Strategy has been developed with guidance from the Salmon Policy and the Selection Criteria developed by the CTUIR under contract to the Bonneville Power Administration. The measures in Strategy 9d lead to replication of the natural and hydrologic function of the Columbia and Snake Rivers (i.e., pre-project hydrograph[1]). As such, the Strategy mimics mainstem conditions which once nurtured the largest salmon runs in the world. This alternative requires the integration of the System Operation Review and the System Configuration Study as structural changes will need to be made to the lower Snake dams and John Day dam to accommodate fish passage during and after implementation of this Strategy. See Fig. 1 for expected impacts of the CTUIR System Operation Strategy to the CTUIR economy, to the regional economy, and to the federal taxpayer.

[1] Current reference is the ``DFOP 3 (short term)/DFOP 4 (unregulated case)'' scenario developed by Bob Heinith, Earl Webber, Bob Ringo, and Mal Karr, CRITFC, 3/28/95.

Fig. 1. Expected Economic Effects of Benchmark Scenarios

Alt.\ Economy	Regional (NW) Economy	Federal Taxpayers	CTUIR Economy
Pre-contact (ca. 1800) (No equivalent Strategy - this case needs to be characterized in order to use as "base case" for cumulative effects analysis)	Positive (i.e., productive, self-sustaining, resilient to disturbance; allowed for ceremonial, subsistence, and commercial use of resources)	N.A. (Tribal "taxpayers" benefitted through an economy that honors family and community; Tribal wealth measured by wealth of "poorest" member)	Positive (Fully supported CTUIR cultural assets; regionally important economy known for fish, horses, trading from West Coast to Great Plains, etc.)
CTUIR Strategy (SOS 9d)	Positive (i.e., productive, self-sustaining, resilient to disturbance; allowed for ceremonial, subsistence, and commercial use of resources)	Positive (i.e. a reduction over time in contribution of federal taxpayers to support Northwest regional economy)	Positive (re-creation of watershed and ecosystem health to support a diverse, self-reliant, respectful, regional community and culture)
Biological Opinion (marginally different than existing condition) (SOS 2d)	Negative (due to decreased economic diversity, continued increase in environmental externalities and the decrease in regional economic health which follows)	Negative (continued cost which, in the end, will have proved futile; i.e. the fish go extinct)	Negative (Treaty of 1855 continues to be violated; salmon and other native species go extinct; human health problems increase, etc., i.e., diminished Treaty trust resources)
Existing Condition (SOS 2c) (This is not considered to be a "viable" Operating Strategy but rather a statement of where we are at)	Negative (waring over who kills the last salmon; lack of competition for private and public dollars; huge Federal bureaucracy destabilizes local economy)	Negative (Federal taxpayers prop up NW economy through such things as commodity price support payments, payment of WPPSS debt, irrigation infrastructure development, etc.)	Negative (Treaty-reserved resources and economy severely degraded by Federal actions which allowed private interests to secure or use reserved resources)

I. Immediate Actions Necessary to Prevent Extinction of Treaty-Protected Salmon and to Comply with the Treaty of 1855 and Federal Law

In accordance with the Salmon Policy and the Federal government's fiduciary trust responsibility, the Federal government will take immediate measures throughout the Columbia River Basin to prevent the extinction of Treaty-protected salmon.

A. The intial phase (1995) entails drawdown of John Day to minimum operation pool (elev. 257.5 ft.); drawdown of lower three Snake dams (Ice Harbor, Lower Monumental, and Little Goose) to minimum operation pool, and drawdown of Lower Granite pool to elevation 710 ft., which, combined with appropriate target flows/spills, will improve smolt outmigration. Water necessary to implement these streamflows should come from releases of uncontracted stored water, the purchase or lease of senior water rights and assignment of those rights to instream flow, reservoir drawdown, and the cessation of waterspreading ("unauthorized use;" irrigation of lands outside of district boundaries).

B. The Federal government must take immediate measures for the direct improvement of water quality to, at a minimum, meet state and federal water quality standards/criteria, especially toxics, temperature, dissolved oxygen; to include monitoring and proactive enforcement of water quality standards.

C. The Federal government must take immediate measures for the direct improvement of mainstem and tributary habitat conditions for passage, rearing and spawning of salmon, sturgeon, eels, and other native fish.

D. The Federal government must take immediate measures toward the direct restoration and protection of treaty-reserved wildlife habitat consistent with (pre-dam) historical physical and biological conditions; this will require a riverine, riparian, and wetland restoration strategy to be prepared by the Tribes and appropriate Federal entities;

E. The Federal government must immediately analyze cumulative impacts (compared to pre-dam base case) along all mainstem projects.

F. Fish passage efficiency (FPE; percentage of smolts which do not go through turbines) should be 80% or greater at all dams. Dissolved gas standard should be maintained at 120-125% (average) to allow for increased spill necessary to meet 80% FPE. For research purposes, and operationally, if continued increases in survival occur, a dissolved gas standard of 135% should be tested/implemented.

G. Water Usage

1. **The Federal government must recognize and begin to protect senior Tribal instream water rights in the Columbia River, Snake River and all appropriate tributaries for salmon, sturgeon, eels, and other native fish;**

2. All irrigation and other water diversions must be gated, gauged, monitored, and screened to assure the legal diversion of water. Water conservation measures must be required prior to delivery of water in order to reduce currently legal out-of-stream needs for water. Economically unjustifiable uses of water, such as the growing of surplus crops

must be discouraged. All uses, withdrawals, or diversions which are currently illegal under Tribal, Federal or State law must be ceased immediately. All uncontracted stored water must be released for the augmentation of instream flows for fish.

H. Dams and other passage barriers within Columbia Basin tributaries must be removed or modified to allow free passage of migrating Treaty-protected, native, anadromous and resident fish.

I. The Federal government must also immediately:

1. assist in the development of harvest and escapement goals, in coordination with Tribes and States, which enable the recovery and restoration of all salmon and other native fish, and provide for a Tribal fishery which meets the needs of Tribal members for cultural, religious, subsistence, and economic purposes; for the CTUIR, interim goals have been developed (Fig 2);

2. identify all killers of salmon (e.g., dams) as "harvest" and utilize U.S. v. Oregon conservation standards appropriately;

3. provide for Treaty-reserved Tribal harvest prior to harvest by dams, irrigation, agriculture, grazing, timber harvest, and the Alaskan and Canadian fisheries;

4. rescind the definition of "evolutionarily significant unit," which is currently preventing the recovery and restoration of Treaty-protected salmon;

5. install adequate supplementation facilities (hatcheries and acclimation ponds) in the upstream portions of the Columbia Basin (including Snake Basin and tributaries) to enable and facilitate the restoration of the salmon and other native fish to their traditional habitat in sufficient numbers to provide for increasing populations and Tribal fisheries;

6. replace "concrete-to-concrete" hatchery management with a restoration-based "gravel-to-gravel" use of supplementation;

7. begin to identify, assess, and curtail impacts to Columbia River salmon survival and productivity from loss of tidal swamps, marshes, and flats in the Columbia estuary; Canadian and Alaskan fisheries, offshore foreign fisheries, ocean water quality degradation from human activities, and the disrupted food chain processes.

II. Other Actions Which Must Begin Immediately to Comply with the Treaty of 1855 and Federal Law

A. Provide and protect in-lieu or usual & accustomed fishing sites. In accordance with the Treaty of 1855 and more recent agreements made by the Federal government, it remains necessary to explicitly ensure that Tribal members have access to the rivers for fishing purposes. Some traditional usual and accustomed fishing sites may be restored, however, most locations will continue to be inundated for some time. In-lieu sites will be necessaary.

B. Protect cultural resources by developing short-term and long-term management strategies including the identification of funding to implement the strategies. Such strategies would include developing historic preservation plans and agreements that will bring the SOR agencies into

Anadromous Fish Population and Goal Summaries for CTUIR Ceded Area Subbasins

Subbasin	Species	Current Pop. (5 yr. Avg 1989-1993)	Goals	% of Goals
Umatilla	CHS	1100	11,000	
	CHF	600	21,000	
	COHO	2000	6,000	
	STS	2000	9,670	12%
		5,700	48,000	
Walla Walla	CHS	0	5,000	
	CHF, COHO, CHUM	0	?	
	STS	2,000	11,000	
		2,000	16,000	12%
Tucannon	CHS	567	3,000	
	CHF	40	2,000	
	COHO	0	?	
	STS	500	2,500	
		1,100	7,500	15%
John Day	CHS	2,100	7,000	
	CHF, COHO	0	?	
	STS	20,000	45,000	
		22,100	52,000	42%
Grande Ronde	CHS	1,600	16,400	
	CHF	50	10,000	
	COHO	0	3,500	
	SOCK	0	2,500	
	STS	13,000	27,500	24%
		14,650	59,900	
Imnaha	CHS	900	4,000	
	CHF	20	2,000	
	STS	5,000	10,000	
		5,920	16,000	37%
TOTALS	Salmon	9,300	106,000	9%
	Steelhead	42,500	94,000	45%
	All	52,000	200,000	26%

Fig. 2 Interim Anadromous Fish Population Goals

complicance with the National Historic Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). Identify and protect cultural resouces under a management plan developed and implemented by the Tribes and funded as a part of doing business by BPA, COE, and BOR.

C. Take those actions necessary at the Hanford Nuclear Reservation to ensure the cessation of contamination of the Columbia River, to include subsurface "dams," pumping and treating of contaminant plumes and surface restoration (native vegetation, etc.).

III. Near-Term Actions to Prevent the Extinction and Initiate Agressive Restoration of Treaty-Protected Salmon and to Comply with the Treaty of 1855 and Federal Law

The "long term unregulated case" (phased approach in one direction [down] toward targets 5-10 years out) includes drawdown to natural river elevations at John Day dam and the lower four (4) Snake dams and releases from Mica, Hungry Horse, Libby, Albeni Falls, Dworshak, and Brownlee to meet minimum flows for fish movement (based upon the mean stream flow, adjusted for storage for the period of record 1927-1978; Columbia river Water Management Reports 1981, 1990; see Table 1) and address water quality problems (temperature primarily) from April through September.

A. By 2000, lower four (4) Snake River dams are to be drawn down to natural river elevations (Lower Granite 597, Little Goose 500, Lower Monumental 400, Ice Harbor 322 ft above msl). There becomes a need to address (i.e mitigate) changes in commodity transportation and the disposition of sediment stored behind these dams (sediment is primary technical factor limiting drawdowns).

B. By 2005, drawdown John Day dam to natural river elevation (150 ft above msl). There becomes a need to need to address commodity transportation, irrigation withdrawals and sediment currently stored behind John Day (see above).

C. Spills should continue to be implemented to meet 80% fish passage efficiency April 15-June 15 and at least 90% June 15-September 15.

D. Begin the effective passage of reintroduced salmon, sturgeon, eels and other native juvenile and adult fish through the Hells Canyon complex of dams and also through the upper Columbia (i.e. Chief Joseph and Grand Coulee) dams by by natural means (i.e., not trucking or barging);

E. Continue efforts to implement provisions in I.B.-I. above.

F. By 2000, Tribal, Federal, State governments, in coordination with local communities, must implement a New Energy Plan for the Pacific Northwest which reduces the energy production burden on the Columbia and Snake Rivers and facilitates the restoration of Treaty-protected fishes.

Table 1. Long Term Unregulated Case Minimum Flows

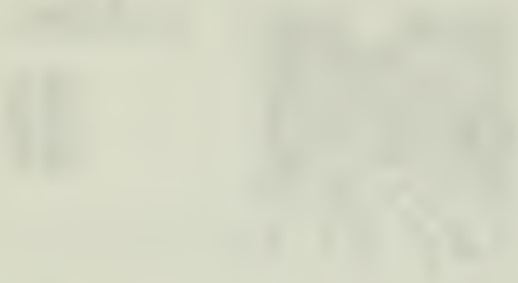
	Minumum Flows (kcfs)							
	April1	April2	May	June	July	August1	August2	Sept.
Mica	6	8	29	58	58	46	34	22
Hungry Horse	4	6	7	6	3	1.5	1.5	1.5
Libby	7	9	26	35	20	10	9	7
Albeni Falls	25	31	55	68	34	16	12	12
Priest Rapids	100	140	295	358	214	130	92	69
The Dalles	210	235	426	483	265	170	113	99
Dworsh.	10	13	16	11	4	2	2	2
Brownlee	28	32	28	25	12	10	10	12
Low. Gr.	70	94	122	113	40	21	21	21

Exhibit

8

Confederated Tribes of the Umatilla Indian Reservation

Analysis of the System Operation Review Draft Environmental Impact Statement



Analysis of the System Operation Review Draft Environmental Impact Statement

prepared by

Confederated Tribes of the Umatilla Indian Reservation

September 1995

CTUIR's Analysis of the System Operation Review Draft Environmental Impact Statement

An analysis is herein provided of System Operating Strategies (SOSs) proposed in the Columbia River System Operation Review Draft Environmental Impact Statement (SOR DEIS), including the preferred alternative (PA; the 1995 National Marine Fisheries Service (NMFS) Biological Opinion on the "Hydrosystem") and SOS 9d, proposed by the CTUIR. **SOS 9d was designed to fulfill the United States Government's Trust Responsibility to the CTUIR. It is our conclusion that no other alternative fulfills this Trust Responsibility.** The proposed Tribal **action** features recovery and enhancement of sustainable Tribal trust resources in perpetuity, consistent with Tribal policies, and the 1855 Walla Walla, Umatilla, and Cayuse Treaty with the United States government which guaranteed rights and resources to members of the CTUIR throughout the Columbia Basin.

The analysis is arranged in the following general format, roughly corresponding to the SOR DEIS itself:

I. NEPA Requirements and Trust Responsibility/Trust Assets Protection
II. Scope of the DEIS
III. Purpose and Need
IV. Affected Environment
V. Facilities and Operations of the Existing Coordinated System
VI. System Operating Strategies
VII. Columbia River Regional Forum
VIII. Public Involvement and Coordination
IX. Conclusion

I. National Environmental Policy Act Requirements and Trust Responsibility/Trust Assets Protection

Our analysis indicates several problems with regard to compliance of the SOR DEIS with both the letter and the intent of the National Environmental Policy Act (NEPA).[1] NEPA reflects the Congressional goal of elevating the role of agencies with environmental expertise within the federal bureaucracy.[2] Indian Tribes are specifically included among those "comment agencies" from whom the lead agencies must solicit

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[1] 42 U.S.C. §§ 4321-4347

[2] NEPA § 102(2)(C) states:

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

comments.[3] Nevertheless, the way the SOR process has been conducted so far has effectively denied meaningful participation by the CTUIR.

An essential element of informed decisionmaking is involvement of all relevant parties at the outset of the process:

> *Permitting the submission of views after [an administrative decision has been made] is no substitute for the right of interested persons to make their views known to the agency in time to influence the [administrative] process in a meaningful way.*[4]

Timely involvement in the SOR process has not been able to occur here. Additionally, a full range of reasonable alternatives has not been developed and presented. The SOR agencies have inadequately addressed Indian aboriginal rights, treaty-secured rights, Indian Trust Assets, and your Trust Responsibility in the particular context of a NEPA analysis intimately involving such issues, contrary to established case law.[5]

The U.S. Supreme Court has previously emphasized "the distinctive obligation of trust incumbent upon the Federal Government in its dealings with these dependent and sometimes exploited people."[6] This principle has long dominated the Federal Government's dealings with Indians.[7] The SOR DEIS acknowledges the Trust Responsibility the SOR agencies have toward the management and protection of treaty-secured resources. In relevant part, the SOR DEIS reads:

> *...Finally, as representatives of the United States, the Federal agencies have an overall obligation to uphold their Indian trust responsibilities.*[8]

This scant mention of such an immense legal obligation on the part of the Federal Government is cause for Tribal concern. The comments above illustrate in detail some of the specifics of the federal Trust Responsibility. The CTUIR seeks to participate in the decisionmaking process where important resources are an issue. The CTUIR and the SOR agencies need to jointly define the specifics of the government-to-government relationship and to define how to protect treaty-reserved resources. To aid the SOR

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[3] 40 C.F.R. § 1503.1(a)(2)(ii).

[4] Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 720 (8th Cir. 1979) (quoting City of New York v. Diamond, 379 F. Supp. 503, 517 (S.D.N.Y. 1974)).

[5] See Northern Cheyenne Tribe v. Hodel, 12 Indian L.Rep. 3065, 3070-71 (D. Mont. 1985), modified on other grounds, 842 F.2d 222 (9th Cir. 1988).

[6] Id. (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

[7] Id. (citing United States v. Mason, 412 U.S. 391, 398 (1973); Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); United states v. Candelaria, 271 U.S. 432, 442 (1926); McKay v. Kalyton, 204 U.S. 458, 469 (1907); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); United States v. Kagama, 118 U.S. 375, 382-384 (1886); Cherokee Nation v. Georgia, 5 Pet. 1, 17 (1831)).

[8] SOR pDEIS, p. 5-101, December 1993

agencies and the CTUIR in this task, each of the SOR agencies are guided by an established Indian Policy.[9]

The SOR DEIS fails to uphold the Trust Responsibility of the United States and constitutes a *de facto* abrogation of the CTUIR's Treaty rights. By ignoring or refusing to consider SOS alternatives which protect and restore treaty-secured fisheries resources, the SOR agencies have failed to meet their fiduciary responsibility towards the CTUIR and other tribes. Further, all of the identified SOR DEIS alternatives fail to comport with federal case law relating to the CTUIR's treaty rights. Therefore, no single alternative currently under consideration in the DEIS is viable because the alternatives themselves were not developed within this framework and pursuant to this constraint.

Management or development activities that affect anadromous fish production or habitat, tribal fishing and hunting sites, or other treaty-reserved resources also affect the exercise of our Treaty Rights. The SOR agencies have a duty to not only discuss the effects of their activities on the CTUIR, but also a duty to safeguard resources of crucial importance to the CTUIR. This duty is not fulfilled by actions which sanction degradation of fish habitat needed to rebuild anadromous fish runs or development activities that destroy or impact fishing sites. Further, this duty is not fulfilled when SOR agency action(s) or inaction(s) destroy or adversely impact Treaty-reserved fishery resources.

Where impacts to Treaty-secured resources and Indian Trust Assets are foreseen from federally-proposed actions, a NEPA analysis (and the resulting environmental impact statement) **must examine and analyze physical, social, economic and cultural effects particular to the tribe.**[10] In Northern Cheyenne Tribe v. Hodel [11] , the district court held that

> *It appears obvious that the Department [of the Interior] was required to consider the impacts, including social and economic impacts, of federal coal development on the Northern Cheyenne community.*[12]

The court found the EIS fatally flawed, stating that

> *The EIS . . . does not acknowledge the existence of the tribal government and its powers and responsibilities, does not recognize that the reservation is culturally distinct within the region . . .. Throughout the EIS it appears that discussion of the social, economic, and cultural impacts of federal coal development on the Northern Cheyenne Tribe, either as a*

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[9] listed in text below.

[10] Northern Cheyenne Tribe v. Hodel, 12 Indian L.Rep. 3065, 3070-71 (D. Mont. 1985), modified on other grounds, 842 F.2d 222 (9th Cir. 1988).

[11] Id

[12] Id. at 3068.

tribal entity or simply as people affected by the sale, has been systematically excluded.[13]

It seems prudent to re-visit the SOR EIS with a better appreciation for the views expressed by the federal district court in Northern Cheyenne Tribe v. Hodel.

The CTUIR also has doubts about the range and analyses of actions and alternatives. We question not only whether Indian rights and resources have been satisfactorily addressed, but also whether the actions and alternatives now included in the SOR DEIS have been sufficiently analyzed in terms of cumulative impacts and effects.[14]

The SOR agencies' compliance with other applicable statutes and authorities is uncertain and is a matter worthy of further examination. The ESA's Section 7 requirement for consultation on actions that may affect listed species is implicated by the large number of negotiations and other activities in which you are already engaged regarding power sales contracts, the Pacific Northwest Coordination Agreement, and the Canadian Entitlement Allocation Agreement.[15]

Social Impact Assessments (SIAs) are mandated parts of EISs[16]. The SOR agencies must use both "natural and **social** sciences."[17] The SOR agencies used only statistical evidence of social impacts and dismissed as insignificant any impacts that could not be measured. However, "[q]uantitative social science methodologies often rest on highly speculative maneuvers, whereas qualitative methodologies may be solidly empirical, involving little if any speculation."[18]

For the social impact analyses, the DEIS needs to be explicit about the form of identifiable social theory, method or technique used in the analyses. "The [EIS] information must be of high quality. "Accurate scientific analysis . . . [is] essential to implementing NEPA."[19] "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements."[20] Scientific integrity is not limited to biological scientific integrity. Congress designed the procedural requirements of NEPA to force agencies to take "a

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[13] Id.

[14] See City of Tenakee Springs v. Clough, 915 F.2d 1308, 1313 (9th Cir. 1990); Sierra Club v. Penfold, 857 F2d 1307, 1320-21 (9th Cir. 1988) (where several actions have a cumulative or synergistic environmental effect, the consequences must be considered in an EIS); 40 C.F.R. § 1508.7.

[15] See Letter from Theodore Kulongoski, Attorney General, State of Oregon, to Randall Hardy, Administrator, Bonneville Power Administration, et al., re: "Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act Arising from Operation of the Federal Columbia River Power System" (Nov. 29, 1994).

[16] 40 C.F.R. §§ 1502.6, 1508.8(b) (1990).

[17] 42 U.S.C. § 4332(A) (1988)(emphasis added).

[18] James P. Boggs, *NEPA in the Domain of Federal Indian Policy*, 19 Envt'l Affairs 38 n. 29 (1991).

[19] 40 C.F.R. § 1500.1(b)(1990).

[20] 40 C.F.R. § 1502.24 (1990).

hard look" at precisely those complex or uncomfortable issues that agencies tend to avoid.

For example, the Ninth Circuit reprimanded the BLM for assuming it could treat a tribe as just another group of citizens that a proposed coal leasing program might affect. The court noted that the BLM had to consider the tribe as culturally distinct and consider the impacts to that culture from the proposed program.[21]

Furthermore, Appendix C-2 on Transportation does not fulfill the judicial directive to conduct a full NEPA analysis of the juvenile fish transportation program; it does little more than justify the existing program.

A. Canons of Construction

Treaties are to be broadly construed. The historical record clearly indicates that the treaty negotiations were awkward given the existing language barrier between the parties. As such, courts generally have adopted fundamental rules and principals which govern the interpretation of written treaties, otherwise known as the "canons of construction". Since the treaties were negotiated using the English language, the courts have sought to construe ambiguities in treaty language to the benefit of the weaker party, that is, the tribes. The canons provide that treaties are to be construed broadly in determining the existence of Indian rights, but narrowly when considering the abrogation of those rights. There must be express legislative intent on the part of the U.S. Congress to abrogate any such rights. The canons further provide that treaties must be construed to mean what the Indians understood the treaties to mean at the time of treaty negotiation.

In Passenger Fishing Vessel[22], the Court painstakingly examined the circumstances surrounding the negotiation of the treaties in an attempt to define the parties' long-term intentions. The Supreme Court emphasized that Governor Stevens invited the tribes to rely on the United States' good faith efforts to protect their right to a fisheries livelihood. Stevens specifically told the tribes: "This paper [the treaty] secures your fish."[23] During the treaty negotiations, "the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent."[24]

B. Review of Access Rights

Courts have invoked the Winans[25] doctrine on numerous occasions. In 1977, the Corps of Engineers was enjoined from building a dam that would have flooded treaty-

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[21] Northern Cheyenne Tribe v. Hodel, 842 F.2d 224 (9th Cir.), *modified*, 851 F.2d 1152 (9th Cir. 1988).
[22] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)
[23] Id. at 667 n.11.
[24] Id. at 676 (emphasis added).
[25] United States v. Winans, 198 U.S. 371 (1905).

protected usual and accustomed fishing places.[26] In Confederated Tribes v. Alexander, the Court found:

> *Some of the Indian fishing stations on Catherine Creek will be inundated by the reservoir which the dam will create....Such flooding will deprive the Indians of the right to occupy the fishing stations and of their right to access for that purpose. Whatever the merits of the government's mitigation program, the treaty right to fish at all usual and accustomed stations will be destroyed as to those stations within the reservoir....In order to nullify treaty rights in this way, Congress must act expressly and specifically. The right to destroy Indian rights will not be inferred from a general project authorization such as that for this dam....Specific congressional authority is required for such action by defendants....*[27]

II. SCOPE OF THE SOR DEIS

The geographic and topical scope of the SOR DEIS is too narrowly defined. It needs to be broadened so as to include all dams and other hydropower facilities in the Columbia River Basin, and all federal actions related to managing them. The scope of the analysis must encompass those actions and impacts that are connected, cumulative, and/or similar, and must include an evaluation of the impacts that are direct, indirect, and cumulative.[28] The DEIS, in its current format, excludes this level of analysis because of the limited geographical scope of the environment under consideration.

The fundamental emphasis throughout the DEIS is on management and enhancement of the hydropower generation system, and the alternatives identified in the analysis appear as though they were driven primarily by Northwest power generation interests. **Alternative development**, by definition, **should be driven by all key issues**, such as fisheries restoration and protection, water quality, etc.. Furthermore, the narrow scope of the DEIS effectively excludes the environmental analysis from addressing the key issues surrounding fish runs in the Basin as a whole and from considering the direct, indirect, and cumulative effects of the alternatives.

The narrow topical scope of the analysis and inclusion of only selected projects in the Basin while excluding other hydropower facilities and activities in the upper reach of major tributaries (such as the middle and upper Snake River) does not fulfill the stated purpose and need of the DEIS. It also does not provide an adequate framework to address Treaty Rights, natural resource issues, and the Trust Responsibility of the federal agencies. Limiting the analysis in this manner is inconsistent with the Treaty of

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[26] see Confederated Tribes of the Umatilla Indian Reservation v. Alexander 440 F.Supp. 553 (D.Or. 1977).

[27] Id. at 555, 556

[28] 40 C.F.R. § 1508.25.

1855, the trust responsibility, and environmental laws and regulations, such NEPA, which requires integration and evaluation of actions that are connected, cumulative, or similar and evaluation of impacts that are direct, indirect, and cumulative[29]. Obviously, all dams and facilities in the Columbia Basin are interconnected and have connected and cumulative effects upon the Tribes' rights to these natural resources.

Throughout the SOR DEIS, the agencies refer to the need for evaluating operations of the Columbia River dams as a "system" and profess to include all facilities that affect multiple uses of the river environment. However, the scope of the analysis contained in the DEIS is limited to only 14 of the 27 major dams in the Columbia River Basin. Moreover, there are in excess of 250 facilities in the Basin that potentially affect Treaty Rights and resources that should be integrated into the "system" analysis. For example, the SOR DEIS excludes from consideration in its analysis all Snake River water above Hells Canyon and all Non-Treaty Storage Agreement (Canadian) water. The agencies should include both, as they were asked to during the scoping stage (see section below, "Public Involvement and Coordination").

Integration of all facilities, resources, and river uses occurring in the entire Basin is required in order to fully address the key, system-wide issues and provide a long-term management framework within which to protect treaty rights and effectively manage natural and cultural resources in a sustainable manner. A more comprehensive, objective, and complete analysis would ensure that: 1) key, system-wide issues related to treaty rights and the natural resources upon which these rights depend, drive alternative development, and 2) the purpose of and need for the SOR is thoroughly achieved. Failure to provide for meaningful participation, and properly consider a full range of alternatives subjects SOR and the responsible federal agencies to liability for violating NEPA and their Trust Responsibility.

The CTUIR have identified key procedural, topical, and geographical deficiencies in the Columbia River SOR DEIS. The CTUIR was not consulted early in the SOR development process; this procedural deficiency directly resulted in the topical and geographical deficiencies that exist in the SOR DEIS. As discussed above, topical deficiencies include the CTUIR's treaty-reserved rights, federal trust responsibility, restoration of anadromous salmonid fisheries consistent with the treaty rights, cultural resources protection and management, and baseline Columbia Basin resource conditions. Geographic deficiencies are glaring. Although current federal policy seeks to address natural resource management holistically at the watershed and ecosystem scale, the SOR DEIS severs the Columbia Basin into disjointed pieces. Large geographic portions of the watershed and entire storage/hydropower generation facilities are then thrown out of the analysis altogether.

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[29] 40 CFR 1508.25

III. Purpose and Need

A. Purpose

The Purpose and Need sections of the DEIS (Chapter 1) reflect the SOR agencies misinterpretation of the legal requirements of the United States to perform actions which protect trust resources and honor the terms of the Treaty of June 9, 1855. The SOR agencies move forward with the SOR study, seeking to develop an SOS which meets the needs of "river users" (i.e., hydropower, irrigation, and barging etc.). The nature and scope of the SOR, as delineated as "Purpose and Need", is inappropriately too narrow given the insufficient review or regard to the use of the river by the treaty Tribes for fishing and cultural activities. The following excerpts summarize the agencies intentions:

> *The Federal agencies..decided to use the pending expiration of several long-term agreements involving power production as an opportunity to review future operations of the Columbia River...they hoped to achieve a coordinated river system operation that better meets the needs of all river users...to decide on a coordinated strategy to balance conflicting demands on the system...*[30]

This narrow focus for reviewing future operations of the Columbia River system is contrary to the respective legal obligations of each agency to manage and protect important resources reserved by the Treaty of June 9, 1855. The Tribes assert that the decision(s) regarding the operation of the Columbia River "system", must be congruent with the Tribes' rights secured by the treaty. More definition and discussion within the DEIS is needed regarding this obligation to treaty-secured resources. Failure of the agencies to re-examine the Purpose and Need of the SOR increases the risk of selecting an SOS that is contrary to the terms of the treaty. The nature of the relationship between the SOR agencies and the Tribes requires that the *Purpose* of the SOR be forged in the "treaty furnace."

The SOR agencies explain the supporting factors that give definition to *Purpose* by diffusing elements into three categories: (1) resources, (2) institutional, and (3) legal/regulatory. The trust and treaty-secured resources of the Tribes must be included in the definition of *Purpose*. The SOR DEIS in contrast states:

> *...the obligations of the SOR lead agencies..policies, and relevant management plans. The purposes also represent the concerns of regional users, either expressed during the scoping process at the beginning of the SOR, or supported through participation during the analysis...*[31]

As noted by the Tribes previously, the agencies have not adequately consulted on a full range of issues at the beginning of the SOR. The lack of early consultation with the Tribes is the primary factor that has resulted in limiting the scope of review, the definition of

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[30] SOR DEIS, p.1-1, July 1994.

[31] SOR DEIS p.1-4.

Purpose and ultimately in the final selection of an SOS. The Tribes have reiterated to the SOR agencies the need to broaden the scope of the SOR (including the Purpose). The Tribes assert that legal obligations under Federal Indian law, Federal policy and the Treaty of June 9, 1855 require the agencies to broaden the purpose of the SOR. By limiting the *Purpose* of the SOR in this way, the SOR agencies evidently intend to violate the Treaty of June 9, 1855. It is therefore obvious that the agencies do not intend to protect and manage Tribal rights and resources except when and if such resources do not impinge on the operation of the hydro-projects. Although the SOR agencies did not take actions to list Snake River chinook and sockeye salmon as endangered, the SOR DEIS provides an opportunity for meaningful evaluation of SOR agency compliance with trust obligations, the legal terms of the Treaty of June 9, 1855, and the Endangered Species Act.

A partial list of *Resource Purposes* include: provisions for an economic, reliable, and environmentally sound power system; an adequate supply of irrigation, municipal, and industrial water; an economic and dependable flood damage reduction and public safety system, a waterborne transportation capability, and to provide opportunities for recreation on lakes and reservoirs. No doubt, these resources serve as the primary foundation for the entire study. The long term agreements with Canada (Pacific Northwest Coordination Agreement and the Canadian Entitlement Allocation Agreements) regarding water storage, hydro-electricity and flood control are irrelevant without the hydro-projects in place.

The remainder of the *Resource Purposes* list includes: provisions for equitable treatment of fish and wildlife; to protect and preserve threatened, endangered, and sensitive species; to protect and preserve cultural resources; to protect and enhance socioeconomic well-being and to protect and enhance environmental quality. Close examination of this list reveals that the treaty is not utuilzed as a benchmark or reference point, thus providing no foundation to effect the decision-making process. The SOR reveals in part:

> *...the reality is that the need to recover threatened and endangered salmon, specifically, and all salmon generally, has taken precedence over other considerations...the single most immediate and salient issue in the SOR is the recovery of endangered runs of wild salmon on the Snake River...*[32]

The listing of Snake River chinook and sockeye salmon (both are treaty-secured resources) as Endangered Species is evidence that something is wrong regarding management decisions affecting these resources. At present, the evidence is overwhelming that the "management decisions" in question relate directly to the placement and operation of hydroelectric dams on the Snake and Columbia Rivers that are the major sources of anadromous fish mortality. If the recovery of endangered runs of salmon are truly driving the SOR, then the *Purpose* of the SOR should be expanded to include SOS alternatives which incorporate salmon management regimes which comport to the trust and treaty obligations of the federal government to ensure that salmon runs are not on the brink of extinction, but rather, are healthy abundant runs as envisioned by Tribal signatories to the Treaty.

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[32] SOR DEIS p.1-1, July 1994.

The *Purpose* of the SOR as mentioned above, includes a Legal and Regulatory outline. The Legal and Regulatory Purposes provide the basis of making river management decisions and are intended to:

a. Implement recommended near-term actions within existing authority;
b. Identify areas where new authority is required to implement recommended long-term actions;
c. Satisfy existing contracts;
d. Comply with environmental laws and regulations.

Although it would seem that this *Purpose* would include the legal obligations of the Federal government to honor treaty provisions, the SOR does not. The Purpose for the review may have as its central theme management decisions relating to river operations, the definition of "Legal" and "Regulatory" *Purpose* must include the treatys and the trust obligations of the Federal government. Protection and enhancement of the CTUIR's Treaty-secured and trust resources must be incorporated in the definition and discussion of the purposes of the SOR. In contrast, the DEIS merely states that its purposes

> *[R]eflect the obligations of the SOR lead agencies . . . as identified in authorizing legislation, agency policies, and relevant management plans*[33].

The "obligations of the SOR lead agencies" are embodied in far more than this scant list. They include, and the SOR DEIS should explicitly delineate, the duties and obligations that have arisen under the extensive body of Federal Indian Law. This encompasses treaties, statutes, regulations, executive orders, case law, policies and international covenants and agreements as well. Failure to recognize these additional constraints, and their applicability to the SOR and mainstem operations themselves, perfectly exemplifies the shortcomings of the DEIS and the process used to arrive at it., A brief outline and accompanying descriptions of some of the applicable constraints are enclosed herein as "Appendix 1: Federal Indian Law and Other Applicable Constraints." Most of this information has already been made available to the SOR agencies in prior correspondence.[34]

In addition to obligations "identified in authorizing legislation, agency policies, and relevant management plans," they are also defined by aboriginal rights, the Treaty of 1855 and the rights it guarantees, the United States' trust responsibility and concurrent duty to protect trust assets, and numerous Indian policies (including President Clinton's April 29, 1994, Memorandum, the Department of Energy's Indian Policy, the Bureau of Reclamation's Indian Trust Assets Policy, the Department of the Interior's Order No. 3175, the Department of Agriculture's Indian Policy, the Forest Service's Indian Policy, and the Environmental Protection Agency's Indian Policy).[35]

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[33] SOR DEIS, Main Report at 1-4.
[34] See CTUIR's January 1994 Communication; CTUIR's December 1994 Comments
[35] See Appendix 1: Federal Indian Law and Other Applicable Constraints (enclosed).

In addition to the inadequate list of the sources of lead agencies' obligations that in turn were used to formulate the SOR's purposes, the DEIS also states that:

> *The purposes also represent the concerns of regional users, either expressed during the scoping process at the beginning of the SOR, or supported through participation during the analysis.*

This statement reflects the continued lack of understanding by the SOR agencies of who the Tribes are (sovereign government), what the Tribes rights are (title to land was ceded, **rights to continue to use the land, water and other resources the Tribes have used for millenia, were reserved**), and what the responsibility of the agencies, as the trustee, is with regard to the protection and restoration of CTUIR trust resources.[36]

The SOR agencies must reevaluate the Purpose of the SOR and consider the inclusion of these important legal obligations of the United States, that is, to review the operations of the Columbia River system and select an operating strategy that does not imperil treaty-secured resources as a matter of honoring treaty rights and in conformance with the fiduciary standard of conduct as a trustee.

B. Need

The SOR agencies define the need for the SOR in similar fashion as Purpose with the resulting definition limiting the study at the disadvantage of the Tribes. In part:

> *The underlying need to which the three agencies are responding is a review of the multipurpose management of the Columbia River system. To meet this need, four actions are being considered in the comprehensive review of Columbia River operations encompassed by the SOR These actions are: (1) developing and implementing a coordinated system operating strategy for managing the multiple uses of the Columbia River system into the 21st century; (2) providing interested parties with a continuing long-term role in system planning and operations through a Columbia River Regional Forum (Forum); (3) renegotiating and renewing the Pacific Northwest Coordination Agreement (PNCA); and (4) renewing current agreements or developing new Canadian Entitlement Allocation Agreements (CEAA).*[37]

A close examination of the *Need* reveals that the multipurpose management of the Columbia River system does not truly intend to consider a strategy that provides for the needs of anadromous fish. The legal obligations of the SOR agencies to meet requirements to protect and restore anadromous fish runs under the Endangered Species

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[36] See "Identification of Trust Resources", April 1995, prepared by the CTUIR under contract to the BPA.
[37] SOR DEIS, p.1-2, July 1994).

Act and the Treaty of June 9, 1855 requires that a fifth action be included as the basis for review. By defining *Need* in this fashion, the agencies promote the fiction that the operation of hydroelectric dams for maximum power and the passage of anadromous fish is possible.

The need for the SOR process as defined by the lead federal agencies is aimed at a balancing of the competing uses in the Columbia River system (SOR DEIS 1.1.1. pg.I-2). This does not account for the devastating impacts these multiple uses have had on the anadromous fishery resources in the basin, with hydropower being "a major factor in the decline of some salmon and steelhead runs to a point of near extinction".[38] Therefore, a major need in the SOR process should be to fulfill the fish and wildlife mandates of the NWPA with particular emphasis placed on biological objectives to achieve "equitable treatment" [39]. This effort must be textually consistent with S839b (h)(7) which requires that the Council, with action by the federal river managers, to defer with deference to the agencies' and tribes' scientific knowledge and recommendations. Inconsistencies between recommendations to protect, mitigate, and enhance the fish and wildlife must give "due weight to the recommendations, expertise, and legal rights and responsibilities" of agencies and tribes.[40] A review of the recent court decisions indicates how the NPPC fish and wildlife program is binding on the federal agencies as a provision *in* the NWPA.

Further, with the decline of anadromous fish due to the destruction of river habitat and lack of passage, the *Need* for review of the Pacific Northwest Coordination Agreement (PNCA) and the Canadian Entitlement Allocation Agreements (CEAA) should include actions which may alter the existence of the projects altogether. **The current DEIS illustrates the agencies intention of moving forward with no real regard for possible contingencies that will require (order) compliance with the terms of treaties with Tribes or mandates to truly restore anadromous fish under the Endangered Species Act, or otherwise.**

IV. Affected Environment

The Columbia and Snake Rivers were once the most productive and greatest salmon producing river systems in the entire world--supporting Indians and their cultures and economies for time immemorial. The Columbia Basin was biologically diverse and sustained plant and animal life in balance with natural disturbances and processes. The health of the river is crucial to the survival of the CTUIR. Within the lifetime of many Tribal people alive today (not just elders) the water from the Columbia could be consumed without treatment and there were enough fish and eels for a family to survive.

In accordance with the CTUIR Selection Criteria and Strategy (9d) and consistent with the CTUIR Columbia Basin Salmon Policy, **the "affected" environment is the**

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[38] 126 Cong. Rec. H10687 (1980).
[39] 16 U.S.C. S.839b(h)(ll)(A)(i)(ii)
[40] 16 U.S.C. S 839b(h)(7))(emphasis added)

productive and unpolluted environment the CTUIR and other tribes enjoyed and expected in perpetuity at the signing of the Treaty of 1855, prior to the hydroelectric dams ("project"). It was an environment which provided an **annual average harvest of more than 5 million salmon** to Tribal members out of runs which numbered 10-16 million, according to the Northwest Power Planning Council[41]. To be able to continue to fish and live the rest of the annual/life cycle was what the Tribes understand and expected of the Treaty of 1855. This environment has been modified in such a way by the construction and operation of the Federal Columbia "River" Power System (FCRPS) on the **Columbia River** that it is no longer possible to exercise Treaty Rights promised by the United States Government in the Treaty of 1855.

In order to understand how these changes have effected the culture and economy of the CTUIR, the "base case" (i.e., pre-dam) must be described in order to adequately address the direct, indirect, and cumulative effects the Columbia "River" Hydropower System has caused within the basin. The affected environment forms the baseline from which to compare past and existing conditions of the basin as well as the starting point for assessing management activities proposed by Federal agencies responsible for managing the Columbia and Snake Rivers and protecting natural, biological, and cultural resources as required by the United States' fiduciary responsibilities to the CTUIR. Without the "pre-dam" base case no one knows how much of the CTUIR's trust resources have been destroyed or given to other parties.

A. Pre-Dam Affected Environment

For time immemorial, members of the CTUIR honored, respected, and lived in harmony with the natural world. **Water, all indigenous fish, wildlife, and plant resources within the basin are culturally significant, and therefore constitute trust resources**. Fish, wildlife, plant life, air, water, and land are nurtured and utilized by Tribal members for subsistence, ceremonies, medicinal, and economic purposes, which directly and indirectly contributes to a culture and an economy reliant on the health and sustainability of aquatic and terrestrial ecosystems. Protection/management is a matter of tradition, language, and is locally enforced.

Prior to the 1940's, development and loss/destruction of natural and biological resources had been significant in the Basin from a combination of irrigation, farming, and non-Indian commercial fishing. After the 1940s, native habitats began to disappear very quickly as once abundant sagebrush dominated landscapes interspersed with riparian forests and wetland habitats were directly effected by inundation/flooding caused by construction of dams.

Prior to hydroelectric development in the Columbia River Basin, salmon and steelhead had access to about 13,000 stream miles of natural spawning and rearing areas (NPPC 1986).

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[41] The productivity of the Columbia River basin had already be reduced by 50-60% by the 1930's primarily due to destructive livestock grazing occurring since the 1850's, massive non-indian commercial "fishing," and mining destruction of floodplains.

This habitat represented abut 163,000 square miles and was utilized by sockeye, spring, summer and fall chinook, coho, chum salmon, and steelhead. Former (pre-development) salmon and steelhead run sizes were estimated to be 10 to 16 million (NPPC 1986). These thriving populations were likely limited only by natural functions such as the carrying capacity of the habitat. The return of offspring to parent ratio was always positive (5 to 10 : 1) which allowed for reseeding of habitats to full capacity, even with the effects of a naturally fluctuating environment and Indian fisheries.

Appendix 3, "Assessment of the Effect on Trust Resources of the Confederated Tribes of the Umatilla Indian Reservation From Alternative System Operating Strategies for Columbia/Snake River Flows," (hereinafter called the "Meyer Report")[42] using several published and other resources provides additional information regarding "pre-dam" and/or pre-"project" trust resources and their condition. Material and cultural well-being are described, measured, and compared in three stages, pre-contact, Treaty to early 1900's, and present.

At the eclipse of the "pre-dam" era the problems which have befallen the great salmon runs were predicted by several scientists in the 1930's prior to dam construction.

> *Each [development on the Columbia] will challenge the knowledge and ingenuity of the fishery conservationist and, perhaps even more, will test the courage and spirit of those administrators whose duty it may be to preserve and maintain our fishery resources. They will be subjected to continuous and unpleasant pressures by groups who will be interested in the development of our water resources for other purposes, regardless of the importance of the fisheries .... it must be expected that the various means provided for the preservation of our migratory fishes will be exceptionally costly.*
>
> *As I see it, one of the chief difficulties in the way of a satisfactory solution to the problem of dams and migratory fishes lies in the fact that there is no centralized or coordinated effort possible under the present state of disorganization.*
>
> *Many of us, however, feel that the value of the fishery resources is not to be measured entirely by the economic importance of the commercial fisheries, but that, as biological resources that can be preserved into an indefinite future by proper care, or can be utterly destroyed by lack of that care, they are worthy of consideration far beyond their immediate economic value.* [43]
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> *Protection of this [Columbia River salmon] has been a constant battle. Over-exploitation has been continuously fought. Unscreened irrigation ditches in the upper reaches of the river have led fingerlings out into fields to die when the*

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[42] Meyer Resources, Inc., "Assessment of the Effect on Trust Resources of the Confederated Tribes of the Umatilla Indian Reservation From Alternative System Operating Strategies for Columbia/Snake River Flows," Project Completion Report, September 1995.

[43] Rich, W.H. 1940. Fishery problems raised by the development of water resources. Pages 176-181 in Dams and the problem of migratory fishes. Fish Commission of Oregon, Department of Research, Contribution No. 2, Salem.

water dries up. Finally, the greatest danger of all dams for electrical energy and irrigation - threatens the future of the Columbia River salmon run.

Perhaps the greatest lesson to be drawn from what is happening on the Columbia is the need for a careful and complete survey before any such development project is undertaken. Had this been done in the case of the Columbia River certain vital facts would have been brought out. It would have been established that no experience in the past shows how to reconcile high dams with the migratory habits of such important fish as the salmon. It would have shown that there is no knowledge of what would be likely to happen to the schools of fingerlings when, returning to the ocean, they encountered 'the heavy flow of water through large turbines. It would have demonstrated that to change the Columbia River into a series of great lakes would result in the destruction of the spawning places of the salmon; change the food supply now available to the migrating fingerlings; and bring such fish as bass who naturally feed on fingerlings. [44]

Some people may take the stand that no one should retard the natural development of the country, and that our salmon resources are not as important as the production of electricity. Promoters are pushing plans to build more dams on the Columbia and to turn this big stream into a system of lakes to aid inland waterway transportation. This will change the whole biological character of the river and put an end to the salmon industry... [45]

Contrary to the impression created by certain self-constituted critics who, although uninformed as to the true situation, have aired their pessimistic views in the press, we have no reason to believe that the Columbia River salmon are in danger of extinction. The difficulties in the way of their successful migration and spawning have been foreseen and provided for. By the program of careful and intelligent planning which I have outlined, we feel confident that the preservation of the great national resource of Columbia River salmon is assured.[46]

The U.S. Government, in ignorance of the importance of the fish to the tribes and of its responsibility to protect the tribes' assets, as their trustee, went ahead and built the dams/destroyed the fish.

B. Post-Dam Affected Environment

The post-dam affected environment is contrasted sharply with the pre-dam environment (see also Tables above). The once free-flowing, cold water river ecosystem of the

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[44] Finley, W.L. 1935. Salmon or kilowatts: Columbia River dams threaten great natural resource. Nature Magazine. August:107-108.

[45] Finley, W.L. 1936. Are salmon now sold down the river?: What is the attitude of the Commissioner of Fisheries? Nature Magazine, August:107-108.

[46] Bell, F.T. 1937. Guarding the Columbia's silver horde. Nature Magazine, January:43-47. [response of Commissioner of Fisheries to Finley]

Columbia Basin was an oasis, teeming with life throughout the year. The Columbia and Snake Rivers and their tributaries were highly productive and resilient and were depended upon to provide nourishment and the lifeblood of the Columbia Plateau. Following construction of dams and operation of the Columbia "River" for hydropower, commercial transportation (i.e., navigation), irrigation, and other uses, the cold water ecosystem was subsequently converted to a series of warm water reservoirs with associated host of warm water "game species" and consequent lack of substrate, cover, and riverflow capable of supporting salmonids.

In less than 150 years, Indian people have seen the water become sick and the salmon, symbolic of the circle of life and the interdependent system, become frail and weak--on the verge of extinction. A small fraction of the once teeming millions of salmon that historically returned to the basin to nourish the river systems and all inhabitants of the Columbia Plateau region now return to complete the cycle of life. Because of dams and intense human exploitation of natural and biological resources in the past century and a half, the future of the spirit of the salmon (Wy-Kan-Ush-Mi Wa-Kish-Wit) is endangered with extirpation from the Columbia Basin.

Development of dams in the Columbia Basin inundated and destroyed hundreds of thousands of acres of riverine, wetland, and upland habitats, covered traditional hunting, gathering, and fishing areas, buried pre-historic village sites and sacred Indian burial grounds, and hamstrung the natural environment for the benefit of a few. Changes to this once productive and resilient system have been catastrophic, bearing resemblance to few naturally occurring events that could cause such immense modification of an interdependent system. The salmon survived immense natural events such as the "Spokane Floods," which the USDI-Geological Survey and other researchers have indicated occurred up to one hundred times. Salmon survived these events which were the result of natural laws, but have been utterly decimated by the application of non-Indian laws, policies, ignorance, greed, and technology.

Today, our fishing areas on the Columbia River are inundated and the tributaries no longer provide salmon for traditional fishing and necessary spiritual ceremonies. Intensive, poorly regulated commercial exploitation of the land, water, and their inhabitants has also depleted and degraded hunting areas, rooting digging grounds, and wild berry gathering areas. Regional habitat diversity and viability of aquatic and terrestrial organisms has been, and continues to be, reduced due to direct, indirect, and cumulative changes in the landscape including landscape level fragmentation of riverine and upland corridors and conversion/degradation of native habitats.

The effects of hydropower development and operation, irrigation, draining wetlands, logging and road development, mining, agriculture, livestock grazing, and other "traditional" uses in the basin have resulted in decimation of the Tribes Trust Resources. The once free-flowing, cold water riverine ecosystem that characterized the Columbia Basin for time immemorial prior to non-Indian settlement has been converted to a shallow, warm-water reservoir ecosystem with associated myriad of non-

native aquatic species tolerant of environmental conditions that are inherently lethal to salmon and other native cold water aquatic resources.

Appendix 3, "Assessment of the Effect on Trust Resources of the Confederated Tribes of the Umatilla Indian Reservation From Alternative System Operating Strategies for Columbia/Snake River Flows," (hereinafter called the "Meyer Report")[47] using several published and other resources provides additional information regarding "pre-dam" and/or pre-"project" trust resources and their condition. Material and cultural well-being are described, measured, and compared in three stages, pre-contact, Treaty to early 1900's, and present.

1. Fisheries and Fish Habitat

Today the once mighty Columbia and Snake Rivers are harnessed and controlled. The river hydrograph is completely regulated for "flood control," irrigation, "navigation," and power generation. Indigenous biological resources are forced to compete and attempt to survive in an ever fluctuating, artificial and hostile world. Warm, contaminated water, lack of oxygen, and absence of cover habitat effect the ability of many biological resources to fulfill their life histories. The very fabric of life in the Columbia Basin has unraveled and now supports only bigmouth minnows, bass, crappie, shad, walleye, and other organisms[48] that compete with salmon for available resources. The Columbia and Snake Rivers are also now aggressively exploited by commercial and recreational fishermen for warm water game fish, now that the salmon are largely gone. Fifty years ago 50 to 100 pound salmon attracted thousands of fishermen who came to the Columbia Basin not only to fish, but to witness the symbolic Columbia River salmon fishery--a fishery on which the Pacific Northwest became legendary.

Table 1 compares the current five year average adult returns with the interim goals of the CTUIR for salmon and steelhead. **The only run in the entire Columbia Basin which meets the goal is the Hanford Reach fall chinook, which spawn in one of only two free-flowing reaches of the Columbia River system.**[49]. Remove the Hanford Reach run from the salmon average and goal and the result is that little more than 6,000 fish are returning to areas from which the goal is more than 100,000 (< 6%).

The steelhead populations are further toward meeting the goals, however, none of them exceed even 50% of the goal. Steelhead throughout the basin are generally selected for by the state fish and wildlife agencies for sport fishing. Therefore the

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[47] Meyer Resources, Inc., "Assessment of the Effect on Trust Resources of the Confederated Tribes of the Umatilla Indian Reservation From Alternative System Operating Strategies for Columbia/Snake River Flows," Project Completion Report, September 1995.

[48] though some of these species are native (e.g., shad, some bass, squawfish), current conditions have allowed their populations to explode.

[49] other is Hell's Canyon which is above four mainstem Columbia dams and four lower Snake dams which have succeeded in decimating fall, spring, summer, and sockeye salmon populations to the extent that they are all listed as "Endangered" under the Endangered Species Act.

hatcheries and habitat programs of the states support a steelhead fishery. This is usually, under the degraded habitat conditions and severe passage problems extant throughout the basin, at the expense of coho salmon and native resident fisheries. As a result coho and native resident fishes are extirpated, endangered or sensitive throughout the basin. Finally, it should be recognized that the goals in Table 1 are those of the CTUIR only. It should be obvious that other Tribes and states, as fishery co-managers, have additional goals that are not being met under the current management scenario.

Table 1. Anadromous Fish Population and Goal Summaries for CTUIR Ceded Area Subbasins

Subbasin	Species	Current Populations 5 yr. avg.	Status [1]	Goals	% of Goals
	CHS	750	FX	11,000	
	CHF	650	FX	21,000	
Umatilla	COHO	1,200	FX	6,000	
	STS	1,750	DS	9,670	9%
		4,350		48,000	
Walla Walla	CHS	0	EX	5,000	
	CHF, COHO, CHUM	0	EX	?	9%
	STS	1,500	DS	11,000	
		1,500		16,000	
Tucannon	CHS	400	DD	3,000	
	CHF	100	DD	2,000	
	COHO	0	EX	?	
	STS	700	DS	2,500	
		1,200		7,500	16%
John Day	CHS	2,000	DS	7,000	
	CHF, COHO	0	EX	?	
	STS	20,000	DS	45,000	42%
		22,000		52,000	
Grande Ronde	CHS	1,100	DD	16,400	
	CHF	20	DD	10,000	
	COHO	0	EX	3,500	
	SOCK	0	EX	2,500	
	STS	12,000	DS	27,500	22%
		13,120		59,900	
Imnaha	CHS	600	DD	4,000	
	CHF	10	DD	2,000	
	STS	5,000	DS	10,000	
		5,610		16,000	35%
Columbia (Hanford Reach)	CHF	50,000	S	50,000	100%
Snake (above LGD)	CHF	440	DD	10,000	4%
TOTALS	Salmon	56,270		166,000	34%
	Steelhead	41,950		94,000	45%
	All	98,220		260,000	38%

[1/] Status: EX=extirpated, FX=formerly extirpated & now increasing, DD=depressed & declining, DS=depressed but stable (S)

Tables 2a and 2b show the generalized sources and causes of human-induced mortality to salmonids in the Columbia River basin, and the resultant decreases in survival, by life history stage. Two things are most evident from these tables. First, most sources of mortality are related, either within a single life history stage (e.g., sedimentation, high stream temperatures, low dissolved oxygen [poor riparian conditions] all partially result from unrestricted livestock grazing), or across life history stages (e.g., passage problems caused by irrigation diversion/hydroelectric dams on tributaries and mainstem - redds dewatered, low streamflows, improper fish screens, slowed migration, turbines, high stress, disorientation, inadequate ladders - are related to irrigation and power withdrawals from the "River").

Second, the most drastic reduction in survival for any life history stage is the smolt stage (fresh water migration; 84%). This is almost entirely due to the construction and operation of the Columbia River "hydrosystem." Loss of habitat (through inundation and blockage), slowed migration through the slackwater pools; increases in water temperature (due to large volumes of water to catch and hold solar energy) and the resultant increases in pathogens, disease, competition and predation from warm-water exotics and native fish (such as bigmouth minnow whose population has skyrocketed since inundation); direct losses from the turbines, and the overall resulting high stress levels all directly relate to the construction and operation of the "hydrosystem." ODFW, using a conservative 22% mortality per dam,[50] shows that for Snake River juvenile "wild" spring chinook entering Lower Granite Reservoir, 86% die as a result of construction and operation of the "hydrosystem."[51] From Table 2b we can see that previous to dam construction, mortality of juvenile salmon during fresh water migration was 9%.

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[50] combined passage mortality at each dam; the COE uses 18% and 9% for modeling despite the fact that the range is 32% to 9% and the fishes' existence are "Endangered."

[51] ODFW, 1994, "What's Killing the Fish? Estimated Mortality For a Run of Snake River Wild Spring Chinook.

Table 2a. Gravel to Gravel Mortality Factors, Columbia Basin Salmonids

Life History Stage	Mortality Factors	Cause of Problem(s)
EGG - FRY	sedimentation	logging, grazing, mining, unimproved roads
	high temperatures	irrigation withdrawals, poor riparian conditions[52]
	low dissolved oxygen	low flows, high temp, sedimentation
	redds dewatered	irrigation withdrawals, reservoir fluctuation
FRY - SMOLT	high temperatures	diversion (e.g., irrigation), poor riparian conditions
	low streamflows	diversion (e.g., irrigation), poor riparian conditions
	high scour flows	channelization, wood removal (e.g., logging, grazing)
	toxic pollution	ag. chemicals, effluents, Hanford, mining
	poor habitat/cover	high temp, channelization, vegetation and wood removal (e.g., logging, grazing)
	competition and predation	low flows, poor cover, high water temps.
SMOLT (fresh water migration)	habitat loss	no river - slackwater pools; more than 90% loss in mainstem
	irrigation canals	improper fish screens, dewatered reaches
	slowed migration	slackwater pool habitat; 80% decrease in velocity
	predation, temperature & disease	warm slackwater pool habitat
	turbines	reservoirs operated to maximize power generation and transportation of juvenile fish at expense of fish passage in the river[53]
	high stress	decimation of habitat, bypass systems/barging operated for power generation not fish, increased predation, disease, pathogens,
	toxic pollution	ag. chemicals, effluents (eg. pulp & paper), Hanford
ADULT (ocean smolt to adult)	predation	natural
	harvest	heavy pressure on international fishery
	poor feed	El Nino currents
ADULT (Columbia River)	harvest	mainstem fisheries
	passage over dams	disorientation, inadequate ladders, and attraction
	pollution	chemicals, effluents, high temps.
	poor management	fish removal at dams
ADULT (tributaries)	harvest	tributary fisheries
	poor management	fish removal at weirs
	prespawning loss	high temps., poor holding habitat

[52] "riparian conditions" are to be considered the in-channel and near channel elements which directly create fish habitat (e.g., large wood, clean substrate, shade cover/cool temperatures)

[53] the Fish Passage Center in Portland reported for the week of July 17-21, 1995 that the Technical Management Team (federal agency representatives) rejected requests to meet Biological Opinion target flows at McNary Dam. They further reported that NMFS recommended that McNary be operated outside the 1% efficiency range (efficient operation of the physical plants at the dams) in order to reduce spill and maximize transportation.

Table 2b. Decrease in Survival Due to Resource Management Decisions, by Life History Stage[54]

Life History Stage	Estimated Survival - Natural Factors	Estimated Survival - add human-related factors	Descrease in Survival
EGG - FRY	80%	20%	75%
FRY - SMOLT	10%	5%	50%
SMOLT (fresh water migration)	55%	9%	84%
ADULT (ocean smolt to adult)	20%	15%	25%
ADULT (Columbia River)	80%	50%	38%
ADULT (tributaries)	50%	20%	60%

[54] these values were derived from numerous sources and generalized to cover all salmon species.

Today, the natural spawning and rearing areas available to anadromous fish in the Columbia River Basin have been reduced to about 8,900 stream miles or 7,800 square miles (NPPC 1986). The inaccessibility of about 4,000 stream miles, due to hydroelectric development (i.e. blockage) represents a 31 percent decrease from pre-development times. Current salmon and steelhead populations above Bonneville Dam have plummeted to below one-half million (about 200,000 total salmon and 200,000 steelhead). **Annual fish losses due to non-Indian exploitation of the CTUIR's Trust Resources are now estimated at 10 million and cumulative losses would be in the hundreds of millions.**

In addition to habitat blockages, significant accessible spawning and rearing habitat has been lost due to development of mainstem pools. There are 643 miles of accessible habitat in the mainstem Columbia and Snake Rivers above Bonneville Dam but only 150 miles (23%) remain free flowing (50-miles of the Hanford reach and 100 miles between Lewiston and Hells Canyon Dam) for fall chinook spawning. The lack of free flowing river has not only eliminated spawning habitat but has also created increased travel time for all downstream migrating smolts using it as a migration corridor. Smolt travel time from tributary production areas to the Pacific Ocean formerly took a matter of weeks where now it takes up to two months. Under historical free-flowing conditions, the Snake River's water speed exceeded 5 mph compared to today's water flows which are below 1 mph with Lower Granite Dam at full pool.

Mainstem pools are also responsible for significant temperature changes in the mainstem Columbia and Snake Rivers. Pre-development temperatures rarely exceeded 70° F for more than a few days in the late summer and fall. Temperatures today often stay in the low 70's for two to three months due to the extended heat capture and retention in the slow moving reservoirs. These temperatures impact upstream migrating adult fall chinook and create increased stress and predation on juvenile migrants.

A generalized analysis of factors causing death of Columbia Basin salmonids shows that mortality naturally occurs throughout all life history stages from gravel to gravel (Table 2b). **The life stage where mortality has increaced the most since pre-development times is the downstream migration or smolt stage. The increase in man-caused fish mortality is approximately six times that experienced by fish affected by natural factors only. If actions to adderss fish mortality are implemented in proportion to current mortality factors, most attention will be necessary in the mainstem Columbia and Snake River corridors where smolt mortality occurs.**

The CTUIR has adopted interim salmon and steelhesd rebuilding goals of about 300,000 adults returning to ceded area subasins annually (Table 1). Current returns are approximately 100,000, 32% of the goal. Current salmon runs (about 56,000) comprise only 27% of the CTUIR rebuilding goal of 211,000. Without the Hanford Reach fall chinook run, all other salmon runs total about 6,000 and comprise only 3% of the CTUIR ceded area salmon rebuilding goal. Most ceded area salmon and steelhead runs are depressed and declining or have been extipated (Table 1). Salmon runs in the Umatilla Basin are

designated as "formerly extirpated" due to the recent success of the Umatilla fisheries restoration program.

2. Wildlife

A small fraction of the diversity of native biological resources within the Columbia Basin, such as a few species of waterfowl, have been able to adapt to habitat loss and alteration as some of their basic life history requirements have been replaced by "artificial" habitats (i.e., foodplots, artificial wetlands, and reservoirs). A much larger proportion of the diversity of species that once flourished in the basin--the salmon, steelhead, sturgeon, eel, the symbolic bald eagle (also dependent on salmon), otter, mink, rabbits, sage and sharp-tailed grouse--have been unable to adapt to these large scale modifications since their habitat and life history requirements cannot be met in artificial, isolated, and highly fragmented "islands" of habitat. Fragmentation and conversion of natural habitats has had, and continues to exert, profound effects on the long-term viability and health of ecosystems and processes and functions that evolved over time and space in the Columbia Basin.

As noted above, hundreds of thousands of acres of riverine and native upland habitats were eliminated as the Columbia and Snake Rivers were exploited for hydropower production. Connected development including relocation and construction of railroads, towns and cities, power transmission lines, dikes, rip-rap, channelization, and road development also effected large portions of the basin.

Once abundant riverine and upland wildlife habitats are now dominated by highly fragmented islands of remnant wetland complexes distributed in isolation from other connecting habitats. Travel corridors for mammalian species are gone, swallowed up by four-lane freeways, railroads, highways, and agricultural fields. Disturbance and harassment of wildlife resources is high, with continuous and unending freeway traffic, constant train and barge traffic, recreational boaters, and windsurfers. Wildlife refuges intended to offset or mitigate habitat losses from development of dams and inundation caused by reservoirs are intensively managed to optimize duck and goose harvest. Many of the previously abundant and viable wildlife resources that once flourished in the Basin are now considered rare and either listed under the Endangered Species Act or considered candidates for protection under the Act due to reduced viability and inability to adapt to landscape level habitat alterations.

With the first dam (Bonneville in 1938) and subsequent dams in the lower and middle mainstem Columbia River (McNary, The Dalles, and John Day in 1953, 1957, and 1968 respectively) and the lower Snake River, irrigation and widespread inundation of native fish and wildlife habitats occurred. **Habitat loss assessments conducted under the Northwest Power Act identify significant loss of wetland, island, and upland habitats within the Columbia Basin as a result of dam construction and inundation**. Increased irrigation opportunities and conversion of native shrub-steppe habitats, made possible by the dams and their respective reservoirs, also led to the conversion of millions of acres of native habitat to agricultural fields.

3. Hanford Reach/Nuclear Reservation

The operational impacts of Priest Rapids Dam on the Hanford Reach of the Columbia River, the last unimpounded relatively free-flowing, non-tidal stretch of the Columbia in the United States are not sufficiently disclosed in the Wildlife Appendix. The current assessment fails to describe significant diurnal riverflow fluctuations resulting from the run-of-river Priest Rapids facility. Nowhere in the document are the significant and drastic hourly and daily river elevation fluctuations addressed. CTUIR staff concur with the statement on page 4-55 where it is noted, "Rates of increase of flow and period of initiation of drawdown are the primary factors influencing the character of habitat within the Hanford Reach and ultimately the distribution of wildlife species. Not only do gradual increases and decreases in the system maintain system integrity, they accommodate behavioral adaptation to a dynamic habitat." No such gradual changes occur, but rather, the changes are what the SOR agencies themselves describe as "catastrophic"[55].

However, the full scope of ecological implications associated with river elevation changes within the Reach is not described. Diurnal river elevation changes ranging as high as 8 feet over a 24 hour period causes significant effects on riverine, riparian, and wetland habitats and the fish and wildlife resources dependent upon these habitats. Indeed, rapid and continual river elevation/flow changes, particularly during critical reproductive and rearing periods, affects the overall productivity of the Hanford Reach and downriver areas. These effects are completely ignored in the SOR DEIS.

The affected environment and the effects of the alternatives must be reevaluated by first incorporating existing and future operations of Priest Rapids in order to provide a comprehensive analysis of the effects the hydropower system has on the ecological conditions of the Columbia Basin. Ignoring these well known operational impacts does not constitute full disclosure as required by NEPA and only serves power production and irrigation interests at great expense to natural and biological resources.

In addition, discussion about environmental contamination resulting from past and present operations of the Hanford Nuclear Reservation must be included in the affected environment discussion for the Hanford Reach. Operation of the network of dams in the middle Columbia River can influence contaminant transport by causing redistribution of contaminated sediment and discrete radioactive particles.

Operation of the hydropower system also effects groundwater discharge via shoreline and riverbed seeps and springs and bank storage along the Hanford Reach shoreline, which affects the flux of contaminated groundwater into the Columbia River. All of these interdependent interactions of the natural environment and the unnatural regulation of the hydrology of the Columbia River must be integrated into the

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[55] P. Thor, Cultural Resources Working Group meeting, 2/7/95

discussion for the Hanford Reach in order to comprehensively understand the influence of hydropower development on natural and biological resources.

4. Toxic Pollution

Our tribal resources, such as salmon and the water that gives them life, are under assault. Toxic pollution from a multitude of sources has harmed the health of salmon, threatening in turn the health of tribal members and future generations. The United States permits toxic pollution to flow from factories, farms and forests into the sacred waters of the Columbia River, which under the Treaty should have been protected for fish, wildlife and Indians themselves. This violation of the Treaty has threatened our health and infringed on our rights. After 140 years, we are still waiting for our Treaty rights to be honored.

The United States permits harmful amounts of toxic pollutants to taint our rivers, lakes, streams and the creatures who call them home. Furthermore, the United States fails to fully, fairly and adequately enforce non-Indian laws and regulations when toxic pollutants are discharged in clear violation of their terms. When Indians violate non-Indian laws, such as by fishing "illegally," we are sent to federal prison. When government agencies, large corporations, businesses, and gigantic forestry, farming and ranching operations pollute our fish, our waters, our soil and our air, they are not punished. Instead, we are told by the United States that they must be given time to correct the problem, and that we must consider the detrimental financial impacts to the non-Indian economy of making them stop their illegal activity.

To continue to allow dangerous toxic pollution to enter the waters, air and lands of the Pacific Northwest, and the bodies the Indians who draw their life from these resources, would be inconsistent with the law, would breach the United States' Trust Responsibility to these Tribes and would be a continuation of the institutional racism which has already devastated these Tribes' economy, religion and culture.

The burden should be on the producers and users of toxic pollution and substances to prove that they may be safely discharged or used; the burden should not be on those who may be unwillingly and unknowingly subject to their harmful effects to prove that they are unsafe.

Past impacts from discharge of toxic pollution and use of toxic substances on tribal resources must be fully mitigated. The analysis of impacts to tribal resources must include local, regional and cumulative impacts. The baseline for determining impacts will be the condition of the resources at the time of the Treaty of 1855.

In evaluating the human and environmental effects of toxic pollution and compounds, the limits and inadequacies of the scientific process must be considered, the cumulative and synergistic effects of all toxic pollutants and substances must be addressed, and the immunological and other non-carcinogenic (as well as carcinogenic) effects must be fully examined.

The President's Declaration on Environmental Justice must be honored and obeyed, in both letter and spirit, in formulating policies and implementing decisions regarding toxic pollutants and substances and their impacts on Indians, their environment, and all the natural elements that make up the web of life.

The United States government has a Trust Responsibility to protect all our treaty resources for us. Resolution to the toxic pollution problem must be consistent with the law. It must address the past violations of our Treaty rights. Our lives, existence and very spirit are been inextricably intertwined with the natural world and all it has to offer. We cannot allow that web to be damaged or broken.

5. Regional Economy

Wes Cooley, Republican member of the U.S. House of Representatives, proclaimed at his "town hall" meeting in Pendleton on Wednesday (8/9/95):

> "No more free handouts--We just can't afford it any longer."

Rep. Cooley would be flabbergasted at the handouts distributed throughout the Columbia Basin to irrigated agriculture and the Direct Service Industries, at the expense of fish. Niemi, MacMullan and Whitelaw (dba ECONorthwest, Eugene, OR), in Economic Consequences of Management Strategies for the Columbia and Snake Rivers[56] (hereinafter called the ECONorthwest report, Appendix 2), report that **the federal taxpayer subsidizes irrigated agriculture in the Columbia Basin by more than $1.3 billion per year** (see Appendix 2, Figure 3.7). This figure includes foregone revenues and power purchases to replace water not run through the turbines ($150-300 million per year), subsidized electric rates, sediment-related damage, unauthorized irrigation, subsidized irrigation facilities, the subsidized river transportation system, direct payments for price supports, etc.

The ECONorthwest report makes the point that though agriculture and other "water-intensive" industries made major contributions to the region's economy in the past, they have been essentially stagnant or in decline for most of the past 25 years. They concluded that if residents of the region want to have more job opportunities and higher incomes in the future, they will have to look to other industries. In addition, **sacrificing fish and their habitat to theoretically generate jobs and incomes in the "water-intensive" industries eliminates jobs and incomes in other industries and reduces the economic welfare of those who value fish and habitat.**

The largest component of the subsidized "water-intensive" industries are the Direct Service Industries (DSIs). The DSIs consume about 16% of electricity consumed in the region and 25-30% of the electricity sold by BPA. Eight aluminum companies account

[56] see Appendix 2. Much of the following discussion is based on this report. Where figures are quoted, readers should see Appendix for citations.

for 90% of total DSI sales. Five other industries, pulp and paper (non DSI), primary metals (non-DSI), chemicals (non-DSI), lumber and wood processing, and food processing, account for 22% of the electricity consumed in the region. **The rates the DSIs, other industries, and irrigated agriculture pay are heavily subsidized by other ratepayers in the Northwest.**

In 1992, the Bureau of Reclamation paid less than 1.0 cent per kilowatt hour for Columbia Basin Project water[57], aluminum DSIs paid 2.1 cents, industrial customers served by public utilities paid 2.6 cents, irrigators served by public utilities paid 3.0 cents, 3.4 cents for private, and industrial customers paid 3.6 cents for private. Residential and most commercial customers paid 4.2 and 5.1 cents for electricity from public and private utilities, respectively. Despite these subsidies, employment and earnings related to these industries has been flat or declining over the last 25 years. The ECONorthwest report concludes that to continue to subsidize these industries is terribly inefficient for they reduce the job opportunities elsewhere in the economy. This includes not only jobs for tribal members, but also, for instance, the 10,000 non-indian fishing jobs (and $250-500 million annually) in the Northwest lost over the last 10 years due to diminished anadromous populations.[58]

The existing economy rides on the back of the resources which the Federal Government holds in "Trust" for the CTUIR and other tribes in the region. Instream flow rights for fish are ignored in the rush to give away the tribes' resources. The fish themselves are "taken" "incidentally" by killing them with turbines, polluted water, and Rube Goldberg-style collection, bypass, and transportation systems. Hatcheries were built downstream of the Zone 6 fishery to favor "sport" fishers and produce predominately steelhead, a favored "sport" fish. Fish habitat and habitat for native wildlife has been inundated, all but decimating the economic contribution of these resources to indian and non-indian families throughout the region. This decimation has had negative "multiplier" effects on human health, social structure, and general, economic opportunity.

V. Facilities and Operations of the Existing "Coordinated" System

The existing system is anything but "coordinated." Dams block passage to 31% of the basin, turbines and "Rube Goldberg"-designed fish bypass facilities (McNary) kill juvenile fish, and those fish that are allowed to pass out of the basin must do so in barges and trucks. Snake River Fall Chinook coded wire tag estimates indicate that somewhere between 550 and 600 fall chinook mortalities are attributable to harvest while 11,00 adult mortalities are attributable to passage through the hydro system. [59]

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[57] according to the Soliciter General's report Columbia Basin Project has the highest acreage on which unauthorized irrigation ("waterspreading") occurs in the country.

[58] See letter from Northwest Sportfishing Industry Association to Governor John Kitzhaber dated August 16, 1995.

[59] Id.

Hatcheries, designed to replace the upriver stocks impacted by the dams ended up being built (predominately below Bonneville Dam) and managed for non-indian sport fishery. Wildlife habitat is flooded and replaced with wildlife "areas" for lake-based, warm-water species. The river and the wildlife habitat are not operated for the benefit of native species, in their native proportions, nor for the benefit of the CTUIR trust resources (See "Identification of Trust Resources," CTUIR, May 1995).

Programs and facilities, as currently designed and operated, assign "rights" illegally (i.e., assignment of resources and/or lands which were promised to the CTUIR in the Treaty of 1855 and supported by the intervening case law). The benefits of this illegal assignment of rights accrue to a small group at the expense of resources to many (i.e., subsidy).

Past attempts to maintain or restore declining salmon numbers all made, and relied upon, the assumption that technology could "fix" the damage caused by disregard for the underlying, interconnected processes of nature which gave rise to and sustained the great salmon runs of the Columbia Basin - that a relatively simple solution could replace the complexity of nature. Naturally these attempts failed.

As the Columbia Basin was progressively developed to reap the full benefits of hydropower, agriculture, forestry, mining, and urbanization, periodic attempts were made to ameliorate the resultant declines in salmon production. Dams were equipped with fish ladders for returning adult salmon, and bypass facilities for outmigrating smolts. Large scale hatchery programs were funded to replace production lost from areas flooded or blocked by dams. Screens were required on irrigation diversions. Laws were promulgated but not enforced to restore and maintain water quality and quantity and to protect ecosystems on which imperiled species depended on survival. Smolts were collected and barged around dams. Billions of dollars have been spent over the years to maintain salmon production in the Columbia River Basin.

Nevertheless all these efforts have proven inadequate to maintain anadromous fish numbers. The lesson is inescapable: technical solutions cannot maintain salmon populations in the face of massive disregard for, and destruction of, the ecosystems within which salmon evolved. If the remaining salmon are to be preserved and restored to meaningful levels, the natural structure and functions of the salmon's ecosystems, combined with wise use of technical expertise must be foremost. Accomplishing this requires a common understanding of habitat requirements of salmon relative to the present conditions they face in the Columbia River Basin.

For example, a recent study by the USFWS demonstrated that fall chinook juveniles showed approximately a seven times improvement in survival down the Snake Rivers when cool water from Dworshak Reservoir was released during their 1995 downstream migration. The life history of the salmon tells us that downstream migrating smolts prefer cool and high (snowmelt) flows that naturally occur in the spring and early summer. It should be no surprise that most fall chinook die while traveling through the Snake and Columbia River reservoirs at temperatures in the 70's (° F) and at the same

time are forced through incredibly mechanized screening, sorting, holding, crowding, loading, transporting, and unloading systems. Major fish kills (90,000) at the "state-of-the-art" McNary smolt collection facility and acceptance of status quo mortality levels (**NMFS Hydrosystem BO gives consent to a mortality level of up to 10,000 fall chinook smolts per day at each Columbia River hydroelectric project**) attest to the severity of this problem. What is more surprising is the lack of attention under "fish recovery" efforts to fix what is broken.

Another example of flawed technology is hatchery programs (to mitigate for lost runs) that operate on a concrete to concrete basis while natural runs (gravel-to-gravel) continue to decline and/or go extinct. Again, the salmon life history tells us that salmon return to natal areas, therefore rebuilding runs will require putting fish back into the habitat where they were lost. This action by itself, however, will be fruitless if mainstem mortality factors are not addressed. Successful salmon restoration programs are and will be those which apply fixes to what is most broken (see gravel to gravel salmon mortality factors, Table 2b) and those which utilize more natural instead of technical/mechanized solutions.

IV. System Operating Strategies

The SOR DEIS evaluates seven system operating strategies for fourteen federal storage and run-of-river dams on the Columbia and Lower Snake Rivers. By December 1994, after the conclusion of the DEIS comment period, there were five additional strategies which were not analyzed in the DEIS. In spring 1995 an additional strategy, the 1995 Biological Opinion (BO) resulting from the IDFG v. NMFS settlement (also not analyzed in the DEIS), was added. In the preliminary Final EIS distributed in September 1995, the 1995 BO is described as the "Preferred Alternative" (PA). In June 1995 the CTUIR submitted an alternative which implements with the Endangered Species Act, the Federal Government's Trust Responsibility, and the CTUIR Columbia Basin Salmon Policy. The CTUIR alternative SOS 9d is the only alternative which will lead to the restoration of Snake River salmon runs to levels (see Table 3) which support significant harvest, however, the SOR agencies have chosen not to fully analyze 9d as they consider it too costly.

Table 3. Projected Total Harvest of Upriver Spring Chinook[1] Under Four Operating Strategies[2]

System Operation Strategy	Snake River Fish - Zone 6 Harvest (x 1000)	Snake River Fish- Trib. Harvest (x 1000)	Total Snake River Fish Harvest (x 1000)	Total Columbia R. Fish Harvest- Zone 6 (x 1000)	Total Snake and Columbia River Harvest (x 1000)
1a	negligible	neg.	neg.	neg.	neg.
PA/1995 BO	12.2	2.1	14.3	8.2 - 16.3	22.5 - 30.6
DFOP2[3]	57.2	12.0	69.2	25.7	94.9
9d (CTUIR)[4]	57.7	12.2	69.9	25.8	95.7

[1] Includes spring chinook salmon in the Columbia Basin above Bonneville Dam
[2] Modeled by Earl Webber, Columbia River Inter-Tribal Fish Commission
[3] Detailed Fish Operating Plan, version 2. This calls for drawdown of the lower four Snake River dams to natural river level and drawdown of John Day to spillway crest.
[4] Detailed below under VI A.

Each strategy is comprised of.a combination of dam operational measures affecting seasonal or year-long pool elevations and river flows. Certain of these measures involve reservoir drawdowns, to varying degrees, and releases from upstream storage reservoirs. These measures are aimed at improving downstream flows required for migratory juvenile salmon, including species which have been listed under the Endangered Species Act. The DEIS describes the effects of each SOS on anadromous and resident fish, wildlife, water quality, power generation, flood control, irrigation, navigation, and recreation.

The SOR Alternatives Analysis Group, utilizing the Pacific Northwest Coordination Agreement (PNCA) that provides for the coordination of power generation in the basin, resulted in the use of five alternatives being evaluated[60] . This accounts for a minimum of 50% of the alternatives evaluated in the SOR DEIS when you eliminate pre-ESA and Current Operations. Thus a good share of the alternatives adopted for analysis did not incorporate the current status of the salmon stock, which we thought was the key resource issue of concern.[61] **A significant influence was therefore incorporated into the SOR process by the structure and purpose of the PNCA which does not include adequate provisions for fish and wildlife. This shows a structured alternative analysis process that favors power production at the expense of salmon.** This is an approach which does not comport with reality. The September 1995 edition of "Update" [62] puts the current capacity glut in perspective: **"[t]he West**

[60] SOR DEIS pg. 1-13, 1.3.2
[61] SOR DEIS pg.I-15, 1.4.1
[62] Northwest Power Planning Council, Volumbe 12, Number 9

Coast has a substantial surplus of electricity, at least enough for three cities the size of Seattle" (emphasis added). Neither does this approach meet NEPA requirements.

None of the alternatives, or System Operating Strategies (SOS), that are in the SOR DEIS are designed, as 9d is, to recover all listed species of Snake River salmon. SOS 1a and 1b, Pre-Salmon Summit/ESA Operations, most scientists would contend, has led directly to the pre-extinction status these formerly bountiful runs now suffer. SOS 2c and 2d represent incremental improvement of flows and no or minimal drawdown. This does not address the significant changes in management needed and ordered by the court if the Snake River runs are to be brought back from the brink of extinction. SOS 4 is an out-and-out ignorance of the purpose and need for the document, that is to recover Snake River stocks, by managing for stable pools, recreation, resident fish and "wildlife."

SOS 5b, "natural river" operations, and SOS 6b and 6d, "drawdowns," involve seasonal drawdowns which may work for spring chinook, will certainly not work for fall chinook, and, by drafting 100 and more feet **and refilling** each year would cause large disruptions in the "ecosystem" adjacent to the pools. Strategies 9a, 9b, and 9c were added after the DEIS was released in July 1994, first appearing to the CTUIR in a list fo "Columbia River System Operation Review Final System Operating Strategies Draft - December 9, 1994." These involve seasonal drawdowns, upstream releases of water, and spill based on daily average total dissolved gas.

These alternatives, designed for hydropower generation and not fish, ignore important knowledge about basic salmon life history requirements that cannot always be conclusively evaluated through quantitative methods. As an example, the Corps model analysis is based on assumptions that favor smolt transportation by barge and disfavor spill, target flows, and in-river migration as a viable tool to reduce in-river smolt migration losses. This goes against the biology of the fish. Therefore, these assumptions led to erroneous conclusions.

The agencies have not developed full range of alternatives as required under NEPA. The alternatives developed don't meet the specified purpose of the "project" by favoring "resources" or "uses" not compatible with restored anadromous fish species. Anadromous fish are seen as a "cost" by the agencies. This bias is built into the analysis by using SOS 1a, "Pre Salmon Summit Operations," as the base case. When the CTUIR submitted an alternative which will restore anadromous fish we were told by Randy Hardy, BPA Administrator, that it was "too expensive." However, throughout the analysis only measures to restore Endangered fish are costs. The massive subsidies, through reduced electricity rates, "free" water for transportation of commodities, taxpayer-subsidized facilities such as locks, irrigation diversion dams and canals, etc. to Direct Service Industries and irrigated agriculture are not counted as costs.

An example is that water spilled to move juvenile fish downstream is charged (foregone revenues and power purchases) against each alternative which includes these

measures, yet water which is removed for irrigation (10% of annual flow[63]; estimated at $150-300 million per year in foregone revenue) or which is sent through the locks instead of the turbines is not charged against any alternative which continues to allow these measures. The bias is not necessarily against fish, but rather, for stable storage pools for facilitation of maximum power generation and generating flexibility.

This bias is also reflected in the costs for implementation of the 1995 Biological Opinion, according to McCullough Research, power system planners and economists, in there report "System Operation Review: A Report to the Confederated Tribes of the Umatilla Indian Reservation"[64] (hereinafter called MR report). The MR report references the "BPA Table of BO Cost Components." The MR report states, "[o]ur first impression of BPA's analysis was that, overall, the table appeared to be part and parcel of a pervasive tendency to overstate the cost of fish programs...well trained bureaucrats know which way the estimates are expected to go and the totals are often surprisingly high...this is one of these cases."[65]

The MR report uses as an example the comparison of fully allocated cost of energy at 26 mills versus the 37 mills stated in the DEIS. The MR report further states that "[m]ost of Bonneville's cost estimates are poorly documented and represent more of a public relations exercise than a thoroughly researched and thought out evaluation of the real cost of the alterations to hydro operations proposed by the BO."[66] The report then details an evaluation of estimates of seven cost components which is summarized in Tables 4a, 4b, and graphically in Figure 1. Tables 4a and 4b show that BPA estimates BO costs at $179.6 million annually, including drawdowns in year 2001, while an "alternative" estimate of costs by MR showed them to be less than half that, $86.64 million. Finally, the MR report suggests that 1) expected revenue losses under the BO will likely not be as large as projected because the spill is not very significant and what is really happening is a shifting energy from times of high market to times of low market, not to no market; and 2) the increase in thermal plants in the Northwest will remove the seasonality in the energy market and couple it to fuel costs rather than runoff.

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[63] See ECONorthwest report (App. 1)

[64] McCullough Research, "System Operation Review: A Report to the Confederated Tribes of the Umatilla Indian Reservation," August 1995 (Appendix 4)

[65] MR report at 22

[66] MR report at 23

Table 4a. BO Costs: BPA Estimates

BO Costs: BPA Estimates

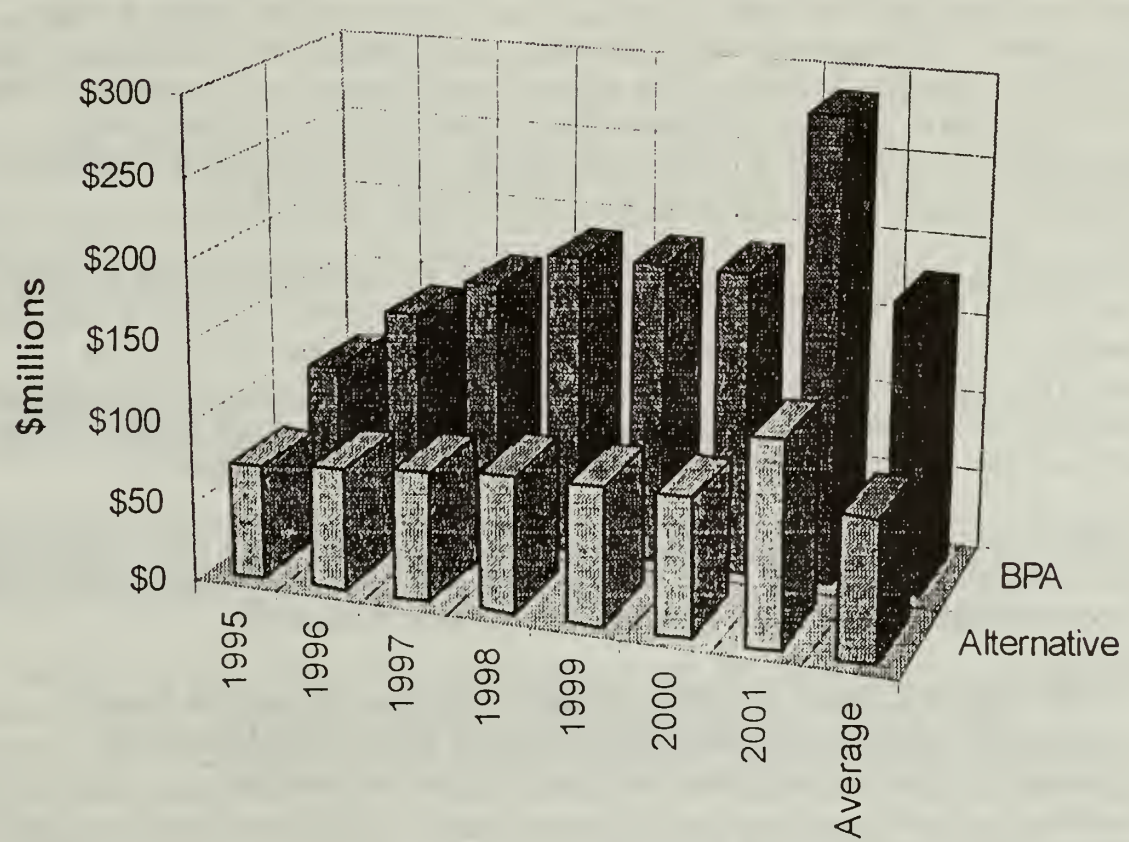
Year	Energy	Reserves	John Day Flex	1% Peak Efficiency	Upper Snake Acquisition	Idaho Power Shaping	Planned Investment	Contingent Investment	Fish Program	Totals
1995	$76	$0	$0	$9	$0	$5	$0	$0	$11	$101
1996	$61	$17	$16	$9	$0	$5	$0	$0	$32	$140
1997	$60	$19	$16	$9	$0	$5	$5	$12	$39	$165
1998	$59	$20	$16	$9	$0	$5	$12	$27	$40	$188
1999	$59	$20	$16	$9	$0	$5	$12	$27	$40	$188
2000	$59	$20	$16	$9	$0	$5	$12	$27	$40	$188
2001	$50	$19	$16	$9	$16	$10	$26	$102	$39	$287
Average =>	$60.57	$16.43	$13.71	$9.00	$2.29	$5.71	$9.60	$27.86	$34.43	$179.60

Table 4b. BO Costs: Alternative Evaluation of BPA's Components

BO Costs: Alternative Evaluation of BPA's Components

Year	Energy	Reserves	John Day Flex	1% Peak Efficiency	Upper Snake Acquisition	Idaho Power Shaping	Planned Investment	Contingent Investment	Fish Program	Totals
1995	$57	$0	$0	$0	$0	$2	$0	$0	$11	$70
1996	$57	$0	$0	$0	$0	$2	$0	$0	$16	$75
1997	$57	$0	$0	$0	$0	$2	$1	$3	$16	$80
1998	$57	$0	$0	$0	$0	$2	$3	$7	$16	$85
1999	$57	$0	$0	$0	$0	$2	$3	$7	$16	$85
2000	$57	$0	$0	$0	$0	$2	$3	$7	$16	$85
2001	$57	$0	$0	$0	$16	$5	$7	$26	$16	$126
Average =>	$57.00	$0.00	$0.00	$0.00	$2.29	$2.70	$2.40	$6.96	$15.29	$86.64

Figure 1. BPA and Alternative Evaluation of BO Cost Estimates Compared



Further bias is exemplified by the portrayal of full pool scenario as being beneficial for recreation, resident fish and wildlife, and alternatives which drawdown or spill or require more natural flows are seen as negative for these resources. This strict correlation of recreation use, for example, with reservoir elevation, ignores substitution. The SOR assumes that if the John Day pool comes down, boaters will simply stay on land and not move upstream to McNary or downstream to the The Dalles reservoirs or change to "river" recreation. This neither considers that recreation, resident fish, and wildlife use will potentially improve through implementation of SOS 9d nor supports the purpose and need for the project, to recover Snake River stocks.

This error is repeated throughout the DEIS. No trains for commodities, indigenous wildlife, or native riverine fish species are allowed as substitutes because it would not support the *a priori* decision made by the SOR agencies to maintain stable storage. This represents a bias against riverine recreation, coldwater fish and wildlife diversity, and Indian Trust Assets. In other words, any action/alternative which upsets the *status quo* is identified as a cost or a negative without consideration of basic economic principles such as substitution and supply and demand, and basic scientific principles such as applying a consistent methodology to all cases of a comparison.

This bias led the agencies to conclude that it is better for cultural resources to drown them rather than have them accessible to tribal members for their continuing use. An *a priori* assumption that inundation best protects cultural resources still led to the conclusion that 86-100% of cultural resources will be impacted by any of the strategies the agencies have developed. By contrast, the CTUIR strategy would greatly reduce these impacts by development of a management plan and law enforcement.

This overall bias has prevented the SOR agencies from conducting a valid or accurate analysis. Interestingly, the **SOR DEIS itself admits that none of the SOS alternatives under consideration protect tribal rights, interests or resources:**

> **Generally, key Native American interests--principally, access to and protection of natural and cultural resources sites--would be poorly served by all of the SOS alternatives, with few exceptions.**[67]

Combined with this startling (and accurate) admission is an example of the agencies' transparent attempts to reduce "Native American interests" to merely those related to "cultural resources sites." Salmon--their continued existence and the ability to enjoy their sustained harvest--are a paramount interest, one that BPA and the other agencies conveniently chose to sweep under the rug.

In developing a System Operation Strategy, the SOR agencies must ensure that any such strategy protects tribal access to these treaty-secured resources. The agencies also must act to ensure that such resources are available for tribal harvest in such numbers so as to fulfill the intent of the parties to the Treaty of 1855.

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[67] SOR DEIS, Main Report at 4-125.

A. System Operation Strategy 9d: "Rights Protection and Implementation of Federal Trust Responsibility"

To assist the Federal government in carrying out its duty to restore our Treaty resources, it was necessary to develop a new strategy for implementation by the Federal government in the matter of the "System Operation Review." No Strategy among the "Final Operating Strategies" will allow the Federal government to meet its fiduciary obligations.

The CTUIR System Operation Strategy (SOS 9d), "Rights Protection and Implementation of Federal Trust Responsibility," implements the CTUIR Columbia Basin Salmon Policy ("Salmon Policy"). The Strategy has been developed with guidance from the Salmon Policy and the Selection Criteria developed by the CTUIR under contract to the Bonneville Power Administration. The measures in Strategy 9d lead to replication of the natural and hydrologic function of the Columbia and Snake Rivers (i.e., pre-project hydrograph[68]). As such, the Strategy mimics mainstem conditions which once nurtured the largest salmon runs in the world. This alternative requires the integration of the System Operation Review and the System Configuration Study as structural changes will need to be made to the lower Snake dams and John Day dam to accommodate fish passage during and after implementation of this Strategy.

1. Immediate Actions Necessary to Prevent Extinction of Treaty-Protected Salmon and to Comply with the Treaty of 1855 and Federal Law

In accordance with the Salmon Policy and the Federal government's fiduciary trust responsibility, the Federal government will take immediate measures throughout the Columbia River Basin to prevent the extinction of Treaty-protected salmon.

a. The intial phase (1995) entails drawdown of John Day to minimum operation pool (elev. 257.5 ft.); drawdown of lower three Snake dams (Ice Harbor, Lower Monumental, and Little Goose) to minimum operation pool, and drawdown of Lower Granite pool to elevation 710 ft., which, combined with appropriate target flows/spills, will improve smolt outmigration. Water necessary to implement these streamflows should come from releases of uncontracted stored water, the purchase or lease of senior water rights and assignment of those rights to instream flow, reservoir drawdown, and the cessation of waterspreading ("unauthorized use").

b. The Federal government must take immediate measures for the direct improvement of water quality to, at a minimum, meet state and federal water quality standards/criteria, especially toxics, temperature, dissolved oxygen; to include monitoring and proactive enforcement of water quality standards.

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[68] Current reference is the "DFOP 3 (short term)/DFOP 4 (unregulated case)" scenario developed by Bob Heinith, Earl Webber, Bob Ringo, and Mal Karr, CRITFC, 3/28/95.

c. The Federal government must take immediate measures for the direct improvement of mainstem and tributary habitat conditions for passage, rearing and spawning of salmon, sturgeon, eels, and other native fish.

d. The Federal government must take immediate measures toward the direct restoration and protection of treaty-reserved wildlife habitat consistent with (pre-dam) historical physical and biological conditions; this will require a riverine, riparian, and wetland restoration strategy to be prepared by the Tribes and appropriate Federal entities;

e. The Federal government must immediately analyze cumulative impacts (compared to pre-dam base case) along all mainstem projects.

f. Fish passage efficiency (FPE; percentage of smolts which do not go through turbines) should be 80% or greater at all dams. Dissolved gas standard should be maintained at 120-125% (average) to allow for increased spill necessary to meet 80% FPE. For research purposes, and operationally, if continued increases in survival occur, a dissolved gas standard of 135% should be tested/implemented.

g. Water Usage

> i. **The Federal government must recognize and begin to protect senior Tribal instream water rights in the Columbia River, Snake River and all appropriate tributaries for salmon, sturgeon, eels, and other native fish**;
>
> ii. All irrigation and other water diversions must be gated, gauged, monitored, and screened to assure the legal diversion of water. Water conservation measures must be required prior to delivery of water in order to reduce currently legal out-of-stream needs for water. Economically unjustifiable uses of water, such as the growing of surplus crops must be discouraged. All uses, withdrawals, or diversions which are currently illegal under Tribal, Federal or State law must be ceased immediately. All uncontracted stored water must be released for the augmentation of instream flows for fish.

h. Dams and other passage barriers within Columbia Basin tributaries must be removed or modified to allow free passage of migrating Treaty-protected, native, anadromous and resident fish.

i. The Federal government must also immediately:

> i. assist in the development of harvest and escapement goals, in coordination with Tribes and States, which enable the recovery and restoration of all salmon and other native fish, and provide for a Tribal fishery which meets the needs of Tribal members for cultural, religious,

subsistence, and economic purposes; for the CTUIR, interim goals have been developed (Fig 2);

ii. identify all killers of salmon (e.g., dams) as "harvest" and utilize U.S. v. Oregon conservation standards appropriately;

iii. provide for Treaty-reserved Tribal harvest prior to harvest by dams, irrigation, agriculture, grazing, timber harvest, and the Alaskan and Canadian fisheries;

iv. rescind the definition of "evolutionarily significant unit," which is currently preventing the recovery and restoration of Treaty-protected salmon;

v. install adequate supplementation facilities (hatcheries and acclimation ponds) in the upstream portions of the Columbia Basin (including Snake Basin and tributaries) to enable and facilitate the restoration of the salmon and other native fish to their traditional habitat in sufficient numbers to provide for increasing populations and Tribal fisheries;

vi. replace "concrete-to-concrete" hatchery management with a restoration-based "gravel-to-gravel" use of supplementation;

vii. begin to identify, assess, and curtail impacts to Columbia River salmon survival and productivity from loss of tidal swamps, marshes, and flats in the Columbia estuary; Canadian and Alaskan fisheries, offshore foreign fisheries, ocean water quality degradation from human activities, and the disrupted food chain processes.

2. Other Actions Which Must Begin Immediately to Comply with the Treaty of 1855 and Federal Law

a. Provide and protect in-lieu or usual & accustomed fishing sites. In accordance with the Treaty of 1855 and more recent agreements made by the Federal government, it remains necessary to explicitly ensure that Tribal members have access to the rivers for fishing purposes. Some traditional usual and accustomed fishing sites may be restored, however, most locations will continue to be inundated for some time. In-lieu sites will be necessaary.

b. Protect cultural resources by developing short-term and long-term management strategies including the identification of funding to implement the strategies. Such strategies would include developing historic preservation plans and agreements that will bring the SOR agencies into complicance with the National Historic Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). Identify and protect

cultural resouces under a management plan developed and implemented by the Tribes and funded as a part of doing business by BPA, COE, and BOR.

c. Take those actions necessary at the Hanford Nuclear Reservation to ensure the cessation of contamination of the Columbia River, to include subsurface "dams," pumping and treating of contaminant plumes and surface restoration (native vegetation, etc.).

3. Near-Term Actions to Prevent the Extinction and Initiate Agressive Restoration of Treaty-Protected Salmon and to Comply with the Treaty of 1855 and Federal Law

The "long term unregulated case" (phased approach in one direction [down] toward targets 5-10 years out) includes drawdown to natural river elevations at John Day dam and the lower four (4) Snake dams and releases from Mica, Hungry Horse, Libby, Albeni Falls, Dworshak, and Brownlee to meet minimum flows for fish movement (based upon the mean stream flow, adjusted for storage for the period of record 1927-1978; Columbia river Water Management Reports 1981, 1990; see Table 4) and address water quality problems (temperature primarily) from April through September.

a. By 2000, lower four (4) Snake River dams are to be drawn down to natural river elevations (Lower Granite 597, Little Goose 500, Lower Monumental 400, Ice Harbor 322 ft above msl). There becomes a need to address (i.e mitigate) changes in commodity transportation and the disposition of sediment stored behind these dams (sediment is primary technical factor limiting drawdowns).

b. By 2005, drawdown John Day dam to natural river elevation (150 ft above msl). There becomes a need to need to address commodity transportation, irrigation withdrawals and sediment currently stored behind John Day (see above).

c. Spills should continue to be implemented to meet 80% fish passage efficiency April 15-June 15 and at least 90% June 15-September 15.

d. Begin the effective passage of reintroduced salmon, sturgeon, eels and other native juvenile and adult fish through the Hells Canyon complex of dams and also through the upper Columbia (i.e. Chief Joseph and Grand Coulee) dams by by natural means (i.e., not trucking or barging);

e. Continue efforts to implement provisions in I.B.-I. above.

f. By 2000, Tribal, Federal, State governments, in coordination with local communities, must implement a New Energy Plan for the Pacific Northwest which reduces the energy production burden on the Columbia and Snake Rivers and facilitates the restoration of Treaty-protected fishes.

Table 4. Long Term Unregulated Case Minimum Flows

	Minumum Flows (kcfs)							
	April1	April2	May	June	July	August P1	August P2	Sept.
Mica	6	8	29	58	58	46	34	22
Hungry Horse	4	6	7	6	3	1.5	1.5	1.5
Libby	7	9	26	35	20	10	9	7
Albeni Falls	25	31	55	68	34	16	12	12
Priest Rapids	100	140	295	358	214	130	92	69
The Dalles	210	235	426	483	265	170	113	99
Dworshak	10	13	16	11	4	2	2	2
Brownlee	28	32	28	25	12	10	10	12
Low. Gr.	70	94	122	113	40	21	21	21

B. Cultural Resources

The tribes culture, economics and way of life are directly depended upon Salmon. Drawdowns necessary for restoration of salmon runs are also in the best interest of cultural resources. With drawdowns, traditional cultural properties could be managed for the exercise of Treaty Rights. Former usage areas and sites could then be identified and the impacts to the sites ascertained. The tribes could then make recommendations as to how to best restore and manage these resources. In contrast to this, the SOR DEIS claims that inundation would be best for "cultural resources." Coincidentally, this claim allows the SOR agencies to manage for stable storage.

A review of the Cultural Resources Appendix and the methodology to ascertain the impacts of SOSs to "cultural resources" revealed several omissions, assumptions based on the desired (by the SOR agencies) outcome, and indications that the whole process of analyzing impacts to "cultural resources" was not thought out since the outcome was already known. These include:

1. no analysis of impacts to cultural resources other than "stones and bones" of conventional (i.e. inadequate) archeology; this means **no recognition or analysis of impacts to fish (as a cultural resource), to usual and accustomed fishing sites or village sites or trading areas or other use sites/functions/values** which are an integral part of the cultural resource of the CTUIR other than those connected with "artifacts" and then only an indication of the impacts to the "artifacts" themselves, not what they represent in cultural value;

2. an *a priori* assumption that inundation is the least impactive state or that it causes no impact at all; this was later found to not be true, but **no effort was made to add inundation as an impact;**

3. an *a priori* assumption that cultural resources will be impacted from system operation and that the impacts will be dealt with later (i.e. after the SOR ROD is signed, sealed and delivered); **no effort was made to feedback the impacts to cultural resources into the alternative development process**; it was explained that it was "outside the scope of the project" (where have I heard that before?);

4. no full range of alternatives under NEPA (i.e. no alternative which fully mitigated past, ongoing, proposed and cumulative impacts to cultural resources; see c. above);

5. no "no action" alternative to compare system operation with; i.e. no baseline condition of "no projects" to compare the impacts of system operation; no idea of where in the world of impacts the environment currently is in, will be in under the different alternatives already developed, or could be under an **alternative which is designed to protect cultural resources;**

6. **no comparison or idea of what the relative magnitude of each type of impact (i.e. exposure, shoreline erosion, inundation)** to the narrowly defined cultural resources is or would be.

This is all the more disconcerting in that Cultural Resources was supposed to be (according to the SOR agencies) the key issue for "Native Americans."

A three-dimensional analysis is needed to understand the impacts to all cultural resources (cultural resource type x project x type of impact) for each alternative which includes a weighting (agreed to by the Tribes) of the relative magnitude of each type of impact (inundation, erosion, exposure) and a comparison against a "no project" condition to ascertain where in the world of impacts we have been, where we are, where the agencies propose we go, and where the CTUIR can send us.

"The analysis assumes that inundation is a relatively benign impact, since it prevents most kinds of erosion and site exposure."[69]. The interpretation of the actual data presented in the document is flawed by this basic assumption. This assumption is seemingly based upon the amount of time a site may be exposed and partially because of supposed increase in erosion potential.

This does not reflect the importance of tribal members continuing to use those resources to enhance and restore aspects of their cultures. Drawdowns for instance may provide access to areas that had been previously inundated and may allow tribal members to utilize these areas for traditional, cultural, religious, or other uses. Drawdowns also will aid in the restoration of salmon stocks in the Columbia Basin. This is crucial because many of the properties that the tribes are concerned about are directly related to salmon and without the salmon a crucial element in the significance of the Columbia is absent.

The geomorphological model clearly points out that no matter which of the SOR agencies' System Operating Strategies is selected there is an adverse effect on cultural resource properties (CTUIR's SOS 9d was not modeled). Depending on what alternative you choose 86-100% of known cultural properties are impacted. The data in the geomorphological model identifies the kinds of impacts and that each of these kinds of impacts occurs on each alternative to one degree or another.

Inundation has long been known to the tribes as an adverse effect but even in the last several decades archaeologist have also recognized that inundation is an adverse effect on cultural properties. The National Reservoir Inundation Study (NRIS), prepared by the USDD-Army Corps of Engineers, concluded after 5 years of study that:

> "1) the effects of fresh water inundation is overwhelmingly detrimental; 2) some resources are more susceptible to adverse impact than others; 3) site protection is a viable mitigation alternative to excavation only in

[69] SOR-DEIS, Appendix D, page 3-11

limited circumstances; and 4) archaeological mitigation plans should be incorporated into reservoir construction plans as early as possible (Nickens 1990:1)."

The results of the SOR analysis further substantiate many of these destructive qualities of hydro-operations and cultural resource sites.

Under the drawdown scenarios the actual time cultural resource properties are exposed is the greatest. It is suggested that this may lead to increased access to cultural properties therefore encouraging traffic, looting and or vandalism as well a making the site susceptible to wind erosion. One problem of this analysis is that vandalism and wind erosion occur on stable storage reservoirs as well as on drawn down pools. Vandalism and looting occur on a regular basis along the river and in the region even in during stable storage operations. Stable storage in fact may actually enable vandals and looters water access for site destruction and robbery. "Stable" pools are a misnomer as the shoreline can fluxuate as much as eight feet a day during regular operations causing impacts to cultural properties on a daily basis. Other pools regularly experience drawdown causing site damage and exposure.

The erosion potential from weather factors is not necessarily increased, but, rather a change in erosion processes occurs. Some of the actual wave erosion characteristics have actually buried cultural resources properties preventing them from being exposed. This is still an adverse effect because in some cases such siltation effects will prevent tribal members from accessing some significant places and resources.

The cultural resources analysis in the Cultural Resources Appendix was conducted to simulate a 50 year time span simulating wave erosion potential and site exposure suggests that stable storage will actually have the most dramatic effects. The results of the quantitative analysis as stated in the DEIS indicates; "When reservoirs are high for longer periods of time such as under SOS 4 options, site exposure decreases, but shoreline erosion increases." Conversely, alternatives that involve large drawdowns such as the SOS 5 options, cause more site exposure but less shoreline erosion than other alternatives." This suggests that for the scientific integrity of the cultural resource properties that drawdowns are actually the best alternative for the protection of cultural resources because drawdowns allow for site recordation, site stabilization efforts and minimizes shoreline erosion.[70]

Even during a drawdown there are federal laws such as the Archaeological Resources Protection Act (ARPA) that enable the SOR Agencies to protect cultural properties. Basically, there has been very little done by these agencies in the way of public education about protecting such resources. Historically the three SOR Agencies have done little to allocate resources to address ARPA , public education, or any non Section 106 (National Historic Preservation Act) concerns. The agencies are attempting to address SOR as an undertaking under Section 106 of the National

[70] SOR DEIS Main Report 4-119

Historic Preservation Act when in actuality this is but part of the problem. Further the same drawdown effect has occurred on many reservoirs in the region due to drought. The agencies have done very little to address concerns about vandalism and access to those areas.[71] An ongoing long-term management strategy is required by law.

C. Wildlife

Allen Childs and Carl Scheeler (CTUIR Wildlife Biologist and Program Manager, respectively) have been involved in the Corp of Engineer's SOR Wildlife Technical Group addressing the impacts of the John Day reservoir drawdown to wildlife habitats. Estimated costs for mitigating impacts to wildlife habitats from Biological Opinion (BO) drawdown to minimum operating pool (MOP), as estimated by the SOR wildlife group, could be as high as $70 million. This large cost is largely the result of the extreme impact to the existing "mitigation" resources by drawdown to MOP. The proposed hydrograph and fluctuation of the pool would not only destroy virtually all habitats that have developed as a result of the existing operations, but would effectively prevent the re-establishment of those specific habitats along the new pool margins. The large cost of "mitigating" the impacts to wildlife are being portrayed by opponents to the drawdown as another reason such actions are unacceptable.

The Corp of Engineers has been mandated to assure mitigation prior to drawdown and **has chosen** to address these impacts under a separate mitigation evaluation rather than the ongoing Power Planning Council Program. Under the Power Planing Council's Program, the CTUIR and other Regional Wildlife Working Group members have proposed the "Wildlife Plan" as an amendment to the Council's Program for 1995. The Wildlife Plan would among other things, address inconsistencies in the way the original losses assessments were conducted through development of a standardization process, incorporate futures analysis and annualization of losses not completed in the original losses assessments and complete an operational impacts assessment.

The operational impacts resulting from John Day reservoir drawdown should be incorporated into the Wildlife Plan's operational assessment rather than under a disjunct COE process. The COE should immediately fund completion of the Wildlife Plan development at approximately $2.5 million . This strategy has several benefits. First and most important, this potentially high cost line item could be "deferred" to a later date. Second, the funding for mitigating these impacts would not be prioritized above the mitigation for construction inundation losses such as Wanaket. It makes little sense to mitigate for the most recent impacts when there remains such a large debt on the original losses.

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[71] A DRAFT Review of Cultural Resources Concerns of the Systems Operation Review Environmental Impact Statement Cultural Resources Appendix,
August 28, 1995, Prepared by Thomas Bailor, Michael Burney, Audie Huber, Jeff Van Pelt
Confederated Tribes of the Umatilla Indian Reservation
Cultural Resources Protection Program
Prepared For Bonneville Power Administration

Third, the direct funding for BPA Wildlife mitigation is severely limited. Funding of another planning effort will not be a priority over implementation of on the ground efforts to mitigate. By funding the Wildlife Plan via COE, the assessments would be completed without impact to BPA's direct budgets for fish and wildlife. And last, these construction/inundation losses will have been assessed system wide and incorporated into the Council's Wildlife Program through regional consensus process while the draw down losses would not be. By incorporating the drawdown losses into the Regional Wildlife Plan, we would assure a comprehensive, technically correct assessment of the operational losses basin wide.

Another key issue surrounds the potential effects of the BO operations or the Tribal alternative on mitigating for the original inundation losses. Both alternatives would expose acreage presently counted as lost due to inundation. **The Tribal alternative would provide an unparalleled opportunity to cost effectively mitigate on-site and in-kind**. Land acquisition costs would be eliminated as the land is already in its COE condemned status under water. All habitat values would be on the positive side of the ledger while virtually all other acquisition/protection and enhancement projects would provide only credit for habitat improvements above and beyond the existing wildlife values on the protected lands.

This in effect would create the one-for-one or acre-for-acre mitigation ratio that BPA has always wanted. There would still be restoration costs and additional operational and annualized impacts that would require further mitigation. However, the lions share of the impacts from the John Day project would be addressed. We have tested the waters on some of these possibilities with NPPC Wildlife Staff and with some of our wildlife coalition partners in the region and believe we would have broad support. This is particularly true of the notion of funding the Wildlife Plan via COE drawdown mitigation.

D. Water

The expressly reserved treaty fishing right carries with it an impliedly reserved water right sufficient to fulfill the primary purpose for which a reservation was created.[72] Where preservation of ancestral fishing traditions was a primary purpose in establishing a reservation, the water right has a priority date of time immemorial.[73] Unlike state-granted water rights under the prior appropriation system, this right is not lost by non-use, and may be transferable from one use to another.[74] Indian reserved water rights include enough water to satisfy future as well as present needs.[75]

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[72] Winters v. United States, 207 U.S. 564 (1908).

[73] United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied 460 U.S. 1015 (1983).

[74] See Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985), cert. denied 475 U.S. 1010 (1986).

[75] Arizona v. California, 373 U.S. 546 (1963).

The priority dates of Indian reserved water rights are for the most part senior to those for non-Indian uses, dating at least to when the reservation was established, and to time immemorial for pre-existing uses. However, the federal government has consistently failed to adequately represent tribal rights in water adjudications. Current federal policy favors final determination of basin-wide water rights so as to provide water users certainty as to their entitlement. Under the 1952 McCarran Amendment, states can bring the federal government in to state court in state-wide adjudications, thus allowing states to determine the scope of Indian water rights. Where the U.S. has even minimally represented tribal interests in prior water rights claims, an ensuing court decree will be binding on those tribes.[76] State adjudication processes are costly, cumbersome (potentially involving thousands of claimants) and time-consuming, possibly taking decades before reaching any resolution.

Nevertheless, on repeated occasions the U.S. Court of Appeals for the Ninth Circuit has found a treaty-based water right to minimum instream flows for fish.[77] Recently, in a non-treaty-related case the U.S. Supreme Court recognized that antidegradation is an integral part of the Clean Water Act's water quality standards, and that water quantity is an enforceable water quality standard. Here the Court made clear that existing instream water uses and the water quality necessary to protect those uses must be maintained.[78] Thus, where fish spawning and rearing is a beneficial use of a stream, the water quality, including sufficient instream flows, must not fall below a level required to protect and preserve that use.

Flow augmentation is an important component of the restoration of mainstem flow velocities. However, none of the alternatives would achieve adequate velocities. Flow augmentation must be used in conjunction with other methods of increasing velocities so as to achieve the velocities described in the DFOP. Many options for obtaining additional water for instream flow augmentation simply were not addressed. Others were only inadequately addressed.

The primary means of flow augmentation discussed appears to place the burden of providing fish flows on the Bureau of Reclamation solely. The DEIS discusses Reclamation activities to obtain water from such sources as uncontracted storage space, studies to identify locations in which to build new dams, water rental, purchases and "dry-year" option contracts.

Reclamation's activities in these areas is commendable. Conspicuously absent from these actions, however, is any discussion of reallocation of water illegally used by irrigators or other users. Reclamation is developing a process for resolving the

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[76] See Nevada v. United States, 463 U.S. 110 (1983).

[77] Muckleshoot Indian Tribe v. Trans-Canada Enterprises, 713 F.2d 455 (9th Cir. 1983), cert. denied 465 U.S. 1049 (1984); U.S. v. Adair, supra; Walton, supra; Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States , 832 F.2d 1127 (9th Cir. 1987), cert. denied 486 U.S. 1007 (1988); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

[78] Pub. Util. Dist. No. 1 v. Wash. Dept. of Ecology, 114 S. Ct. 1900 (1994).

problem of water spreading. So far, Reclamation has ignored the connection between the illegal consumptive use of water and devastated salmon populations. This is despite the fact that one of the critical causes of salmon mortality is inadequate instream flows.

Our treaty water rights, having a time immemorial priority date, take precedence over the desires of irrigators to legalize their previously illegal uses of water. Water spreading can no longer be dealt with in a vacuum while pretending that there is no connection to the crisis of salmon extinction in the Columbia-Snake Basin.

The Inspector General's Audit from earlier this year found that fully half of the Reclamation projects engaged in water spreading were located in the Columbia-Snake Basin.[79] The reallocation of water which has been used illegally and mitigation for the impacts of water spreading in the past must be included as means for augmenting instream flows.

In addition, Reclamation should not limit its water acquisition efforts to the Upper Snake. All Reclamation projects within the Columbia-Snake Basin should contribute water for instream flow augmentation. The Bonneville Power Administration and the U.S. Army Corps of Engineers should also shoulder the burden of obtaining additional water which can be used for instream flow augmentation. They should explore all options available for doing so.

In addition, acquisition of additional water supplies for fish flow augmentation must be a primary objective and accomplishment of the agencies' negotiations of the Pacific Northwest Coordination Agreement, the Canadian Entitlement, the Canadian Entitlement Allocation Agreement, the assured operating plan for Canadian Treaty Storage, and the detailed operating plan for Canadian Treaty Storage. Given the significant need for increased water supplies for fish flow augmentation, failure by the involved agencies to include this issue in these negotiations would be a serious breach of the agencies' Trust Responsibility to this and other Tribes in the region.

If changes in flow regime to benefit fish are considered as impacts affecting the cost of power, then all other user's activities should be given the same treatment as well. Such an assessment should recognize **actual** costs to hydropower and include discussion of issues such as consumptive versus non-consumptive use of the system's water supply.

Consumptive uses remove the water from the system permanently. For instance, water used for irrigation is taken up by plants and does not return to the system. The higher up in the system the water is permanently removed, the greater the impact. For

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[79] U.S. Department of the Interior, Office of Inspector General, Audit Report: Irrigation of Ineligible Lands, Bureau of Reclamation, Report No. 94-I-930, July 1994. The report concluded that "the majority of the water delivered to ineligible lands could have have [sic] been used to enhance stream flows for declining fisheries or to reduce potentially toxic irrigation drainage." Cover Memorandum of report, from Joyce N. Fleischman, Acting Inspector General, to the Secretary of the Interior, July 13, 1994.

instance, consumptive uses in the Upper Snake mean lost power generation for all the hydropower facilities downstream in the Lower Snake and in the Columbia. The cost of the lost power generation due to irrigation and other consumptive uses must be quantified and included in the economic analyses.

Non-consumptive uses which leave or return the water instream mean that the water is still available for power generation. For instance, changes in flow regime for salmon still provide for power generation, although not necessarily at peak demand times. The fact that instream flows for salmon still generate power must be recognized.

When water use is changed from consumptive uses (such as irrigation) to non-consumptive uses (such as fish flow augmentation), more water is available for power generation. Again, this is especially true when the water comes from the Upper Snake. These additional power generating **benefits** of fish flow augmentation must be included in the economic analyses.

The costs of illegal water uses, such as water spreading, must also be included in the economic analyses. Water spreading increases consumptive use of the system's water supply, making less water available for hydropower generation. Again, this cost is passed on to the power users of region.

Concerning the regional economic effects of drawdowns and reallocation of irrigation water in the upper Snake, the substance and conclusions of the ECONorthwest report and the U.S. Department of Agriculture's report on this issue should be included. The report is entitled Salmon Recovery in the Pacific Northwest: A Summary of Agricultural and Other Economic Effects (AIB-699), U.S. Department of Agriculture, Economic Research Service, June 1994.

E. Juvenile Mortality and Migration/Transportation

The preliminary weighted average turbine mortality estimates determined from the NMFS study for Lower Granite and Little Goose Dams was between 18% and 8%, respectively, and within the range of empirical estimates reported by earlier investigators. In contrast, the most optimistic mortality rate was applied under CRISP1.4 for the remainder of the river below Little Goose Dam. Other reliable research shows turbine mortalities for other projects ranged from 9-32%.

Increased stress, post-release mortality, and impacts to homing from transportation are not considered. Therefore, the SOR analysis makes inaccurately optimistic assumptions about the effectiveness of juvenile fish transportation, and inaccurately pessimistic assumptions about salmon mortalities due to nitrogen gas supersaturation during spill.

The evaluation of the hydrosystem operation alternatives in the Corps' Juvenile Fish Transportation Program (JFTP) Appendix fails to specifically prescribe measures that would immediately help to rebuild all salmon stocks. Instead, the focus is on long-term

actions, particularly the apparent trade-offs between transportation and improving in-river migration through drawdown. The draft does not rigorously address implementation of alternative measures such as increased spill and flow commitments in the near term.

The issues on transportation that form the basis for the court required review are skewed toward justification of the existing program and do not adequately address the environmental consequences of actions as required in the NEPA (Section 1502.16).

The draft's reliance on the benefits of transportation is not supported by the all of the available scientific information. The Corps' does not adequately address the scientific concerns that have been raised by the tribes regarding the merits of JFTP. Many of these have been raised by the tribes since inception of the program and have been further substantiated by an independent scientific peer review (Mundy, et al. 1994) which found that:

1. **There is no standard for hydroelectric project survival for listed salmon that is based upon a schedule of rebuilding.** Unless a minimum level is maintained for them to at least persist, the issue of the effect of transportation is moot.

2. Fisher's (1993) data and analysis show that **survival of the transported salmon is related to physical conditions in the river, including the hydroelectric operation of the system, despite the transportation effort**.

3. Available evidence is not sufficient to identify transportation as a primary or supporting choice for salmon recovery in the Snake River Basin.

4. The **ability of transportation to improve returns to the spawning grounds is not supported by research results as relative survival was only measured to the point of transportation**. Further as discussed by the Ad Hoc Transportation Review Group (1992) transportation was detrimental to this life cycle phase.

5. **No specific information on transportation of fall chinook** is available for the Snake River Basin so insufficient information is available to determine the merits of effort for this species.

6. An undetermined number of control fish were subsequently collected and transported at downstream collector dams. If such treatment is significant, as indicated by some of the literature, then resulting T/C ratios are inaccurate.

In addition, alternative statistical analysis of transportation seems warranted based on the divergent views on benefits by regional fisheries staffs. As an example, the variability in the T/C ratios was questioned (Mundy 1994). An analysis of the

significance of differences between return rates of transport and controls based on the Poisson variance rarely were significant at the 0.05 level. Other analytical concerns were also raised regarding the conceptual design of transport studies. These concerns have not been addressed by the Corps' and they should be in order to meet the intent of the court for a "hard look" at the program in relation to future river operations.

The most recent survival estimates from the NMFS 1993 Pilot Survival Study (Iwamota et al., 1994) were incorporated into the analysis of this issue. This study was not supported by the tribes, the state fish and wildlife agencies or the U.S. Fish and Wildlife Service, yet the findings from the study are primary model input values for analysis of transportation in relation to river operation alternatives. We feel the study was conducted under the most favorable of conditions that included operation of turbine units within 1% of the peak efficiency. Under normal river operation we know that such operational conditions are not maintained throughout the migration (NMFS 1993). This lessens the validity and application of the recent mortality estimates for the remaining downstream projects as well as the uniformity of the mortality estimates during normal project operation.

The estimates of hydropower generation losses appear to have no basis whatsoever in fact. (SOR estimates that Snake River drawdowns (alternative 6a) will sap 229 megawatts at $181 million, while the NPPC staff calculates just 25 megawatts at $21 million.) For all one can discern from SOR, these grossly inaccurate and inadequate estimates of hydropower impacts are the result of bad modeling. Certainly Appendix I provides no documentation for the models used in the SOR analysis.

In order to meet NEPA and agency requirements, work groups will need to identify Impacts to specific Indian trust assets (e.g., lands, minerals, hunting **and** fishing rights, and water rights) located on Indian reservations or belonging to tribes and/or tribal members. Significant beneficial or adverse Indian Impacts and proposed mitigation will need to be described in narrative and, when possible, quantitative terms.

F. Effects of the Alternatives

All System Operation Strategies would inherently effect trust resources within the Columbia Basin, as the Columbia "River" hydropower system has for the past half century. Individual strategies designed to return portions of the Columbia and Snake Rivers to near natural conditions (i.e., near-natural hydrograph, free-flowing river) would create both short and long-term benefits to terrestrial and aquatic biological resources. Non-native species, highly productive in warm water reservoirs, would be negatively effected by returning the Columbia reservoirs to a free-flowing, cold water aquatic ecosystem. Reducing populations of many of these non-native species would greatly benefit indigenous species by reducing competition for available forage and habitat, and reducing predation.

Proposed system operation strategies that call for seasonal reservoir drawdowns would likely prevent re-establishment of wetland and riparian plant communities. Loss of

existing wetland and riparian habitat under seasonal reservoir drawdowns would be permanent since the reservoirs would be re-filled following the drawdown period. Operating the "system" in this matter would effectively prevent re-establishment of wetland and riparian habitats along the reservoir margins. Conversely, permanent drawdown of the reservoirs to natural river would expose thousands of acres of currently inundated river margin, which could be revegetated and restored to native plant communities and habitats. Permanent drawdown would also eliminate the need to mitigate for wildlife habitat losses offsite through fee-title acquisitions since onsite mitigation acreage would be made available through reservoir drawdown. The proposed CTUIR System Operation Strategy (9d) would effectively re-connect riverine and riparian habitat throughout a large portion of the basin and allow for re-establishment of several thousand acres of wetland and riparian habitats.

Provided the Columbia River ecosystem is restored and appropriately allowed to function as a system, including providing cool, clean water and relatively stable river elevation, the development of native plant communities along the Columbia and Snake River corridors would more than compensate for the short-term effects expected from drawdown of one or more reservoirs. The river would be allowed to once again meander within its floodplain to reestablish natural braids and channels. Native vegetation (as well as some exotic species without preventative measures) would revegetate these areas within several years as the river-margin, side channels, and backwater areas become re-established following reduced reservoir elevation caused by drawdowns. These same features repeated naturally over of the millennia in the Columbia Basin as a result of the natural hydrograph and hydrologic and geomorphic functions and processes.

Under the CTUIR's SOS 9d, restoration of Trust resources would be facilitated by relatively natural processes, near natural hydrograph, implementation of only minimal mitigative measures. Conversely, two and/or four month drawdowns as currently identified in the DEIS, would prohibit establishment of shallow water, wetland/riparian, and upland shrub habitat due to significant reservoir fluctuations and seasonally unnatural peaks in the hydrograph. Compensation for these habitat losses under alternatives that proposed seasonal drawdowns would be extensive because of the type of habitat lost, the amount of habitat effected, and the need to mitigate onsite impacts, offsite and potentially out-of-kind.

5. Economic Consequences of CTUIR's SOS 9d

See Table 5 for expected impacts of the CTUIR System Operation Strategy 9d and other "strategies" to the CTUIR economy, to the regional economy, and to the federal taxpayer.

Table 5. Expected Economic Effects of Benchmark Scenarios

Alternative\ Economy	Regional (NW) Economy	Federal Taxpayers	CTUIR Economy
Pre-contact (ca. 1800) (No equivalent Strategy - this case needs to be characterized in order to use as "base case" for cumulative effects analysis)	**Positive** (i.e., productive, self-sustaining, resilient to disturbance; allowed for ceremonial, subsistence, and commercial use of resources)	N.A. (Tribal "taxpayers" benefitted through an economy that honors family and community; Tribal wealth measured by wealth of "poorest" member)	**Positive** (Fully supported CTUIR cultural assets; regionally important economy known for fish, horses, trading from West Coast to Great Plains, etc.)
CTUIR Strategy (SOS 9d)	**Positive** (i.e., productive, self-sustaining, resilient to disturbance; allowed for ceremonial, subsistence, and commercial use of resources)	**Positive** (i.e. a reduction over time in contribution of federal taxpayers to support Northwest regional economy)	**Positive** (re-creation of watershed and ecosystem health to support a diverse, self-reliant, respectful, regional community and culture)
Biological Opinion (marginally different than existing condition) (SOS PA)	**Negative** (due to decreased economic diversity, continued increase in environmental externalities and the decrease in regional economic health which follows)	**Negative** (continued cost which, in the end, will have proved futile; i.e. the fish go extinct)	**Negative** (Treaty of 1855 continues to be violated; salmon and other native species go extinct; human health problems increase, etc., i.e., diminished Treaty trust resources)
Existing Condition (SOS 2c) (This is not considered to be a "viable" Operating Strategy but rather a statement of where we are at)	**Negative** (waring over who kills the last salmon; lack of competition for private and public dollars; huge Federal bureaucracy destabilizes local economy)	**Negative** (Federal taxpayers prop up NW economy through such things as subsidized water and electricity, commodity price support payments, irrigation and "navigation" infrastructure development, etc.)	**Negative** (Treaty-reserved resources and economy severely degraded by Federal actions which allowed private interests to secure or use reserved resources)

The SOR agencies have used "voodoo" economics to account for costs and benefits of the Strategies (see "Regional Economy" above). Water for fish is charged to fish; water for irrigation, transportation, recreation, etc. is not charged to alternatives which protect these uses. The SOR agencies further seem to have trouble keeping the stated purpose and need, to recover Snake River stocks, in mind. For example, the "Final" EIS spends one and one-half pages (including a table) on the effects of SOS 9d on anadromous fish, while spending more than three pages on the impacts to "recreation." Other subsidies (again see "Regional Economy") to the DSI's, other industrial water users, irrigation, etc. are also not included on the balance sheet.

The ECONorthwest report calculated the annual cost to irrigated agriculture which relies on the Ice Harbor and John Day pools at $9 million for alternative 5b, the closest Strategy to 9d for which data is available.[80] This $9 million, put in perspective, is approximately 0.6% of the subsidies provided to irrigated agriculture by federal taxpayers. Even if the number increases by a factor of two (i.e., to $27 million), it is still less than 2% of taxpayer-provided subsidies. It is ironic that BPA alleges that SOS 9d would be too expensive, costing "$1.08 billion" above SOS 2c (a non-viable option), a mere half-billion dollars above the PA (estimated at $400-500 million annually), when the taxpayers are subsidizing more than $1.3 billion annually to irrigated agriculture alone (not including foregone revenue and power purchases resultant from sending wheat-filled barges through the locks instead of sending the water through the turbines). Additional subsidies from ratepayers and taxpayers flow to the DSIs and other industrial users in the form of electricity sold below the cost to other consumers (i.e. people), and in some cases below the cost of generating the electricity, an actual out of pocket expense.

With regard to the impacts of SOS 9d on waterborne transportation, the ECONorthwest report helped us to understand that, "[b]y failing to acknowledge the factors that will likely influence the demand for waterborne transportation in the future, and by excluding the cost of externalities generated directly and indirectly by barge traffic, the agencies have biased their analysis in favor of the waterborne-transportation sector at the expense of salmon and salmon habitat."[81] SOS 5b increases costs of waterborne transportation relative to SOS 1a (non-viable strategy) by $22 million annually. Figures for taxpayer-provided subsidy[82] to the barge transportation industry and grain shippers are not separable or available, however, 70% of all barge traffic is wheat and during the summer months after harvest, this raises to 90%. Continuing the taxpayer-provided transportation subsidy for agricultural and other products through subsidizing truck and railroad services, would at least remove the need for pools for transportation, thereby improving fish habitat and passage.

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[80] ECONorthwest Report at 51

[81] ECONorthwest Report at 52

[82] Federal taxpayer dollars built, maintain, and operate the locks at all lower Snake and mid- and lower Columbia dams. Operators of barges, farmers, etc. do not pay to use the facilities.

Table 3 (above) shows the calculated total upriver spring chinook salmon harvest levels under SOS 2c (no action), the PA (the 1995 NMFS BO), DFOP2, and SOS 9d. The table shows that as a result of implementation of SOS 9d, harvest levels increase up to three times the harvest levels of the PA. Nearly 100,000 fish would be available for harvest compared to 22,000 to 30,000 fish under the PA. This increase could translate into $1,000 per capita benefit to tribal fishers. This improvement would increase under assumed proportional restoration of other stocks to $3,000 per capita for all species and would provide additional "jobs" through processing.[83] None of this (i.e., the economic impact to the CTUIR and tribal members of the Strategies) is analyzed in the SOR DEIS.

VII. Columbia River Regional Forum

The DEIS also addresses alternative decision-making forums for guiding future dam operations, and Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement obligations tied to the operating strategies.

The proposed Regional Forum is to provide a new collaborative approach for tribal, state and federal fish and wildlife agencies to help shape future river operations. However, the decisionmaking is retained by the federal agencies and there are no provisions in the process to assure the that Treaty Rights and co-management authority would be given any more consideration than currently exists.

The Regional Forum at best duplicates the role and function of the Northwest Power Planning Council. The Forum poses a danger that the agencies will view this mechanism as fulfilling their obligations to deal with the Tribes as independent sovereign nations on a government-to-government basis, which it does not. The Federal Advisory Committee Act (FACA)[84] does not apply to government-to-government consultations between the United States and Indian Nations. Any asserted application of FACA would constitutes a de facto abrogation of reserved treaty rights by the federal government. Such a claim is wholly contrary to fundamental principles and doctrines of Federal Indian Law that have evolved over centuries, as manifested in the U.S. Constitution, treaties, statutes, executive orders, policies and court decisions

Commitment to government-to-government relations and due regard for Trust Responsibility and Indian Trust Assets is widely proclaimed by the federal government, yet fulfillment of this commitment has been lacking in the SOR process. As an example, it is suggested that the Columbia River Regional Forum envisioned in the SOR DEIS would be subject to the FACA.[85] To the extent that non-federal, non-tribal participants are involved, this may be correct. On the other hand, **the Forum cannot**

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[83] See Meyer Report

[84] See supra note 105 and accompanying text.

[85] Pub. L. No. 92-463, 86 Stat. 770.

serve as a substitute for government-to-government consultations between the United States and a sovereign Indian Nation.

A separate, government-to-government relationship--solely involving the federal government and an Indian Tribe--is essential to maintain and honor Treaty Rights, the Trust Responsibility and the official policies referred to above. This would remain a necessity no matter what decision is ultimately made on the formation of a regional forum.

VIII. Consultation, Coordination and Public Involvement

Contrary to the assertions of the SOR agencies in the DEIS, consultation with the CTUIR thus far has been inadequate. It has not taken place in terms of a government-to-government relationship consistent with President Clinton's Memorandum and the various department and agency policies. The SOR DEIS demonstrates little awareness of Indian Trust Assets as such. Consultation on a government-to-government basis with the CTUIR is necessary to ensure proper identification, assessment, and analysis of potential impacts to them.

The CTUIR appreciate the efforts extended thus far by the SOR agencies in their attempts to foster better coordination in this complex and daunting process. However, merely printing our earlier correspondence without devoting much attention to integrating the concerns it expressed is not consultation, nor does it comply with the above policies and pronouncements.

Through the Treaty of 1855, we reserved certain rights throughout a large portion of the Columbia and Snake River Basins. Yet no consultation with us regarding these rights and the resources to which they attach has occurred in connection with development or analysis of SOR actions and alternatives. For example, the CTUIR has yet to be contacted for consultation purposes as required under Section 5 of the Native American Graves Protection and Repatriation Act,[86] Section 110 of the National Historic Preservation Act (as amended in 1992),[87] and Section 470cc(c) of the Archaeological Resources Protection Act.

The CTUIR first learned of the System Operation Review at a public scoping meeting at the Red Lion in August 1990. Rick George, CTUIR Environmental Planning/Rights Protection Program Manager attended the meeting. Mr. George stated at the meeting that the CTUIR needed to be kept involved, that the mainstem Columbia and Snake Rivers needed to be fixed to prevent the extinction of salmon, and that fixing the mainstem was critical (i.e., necessary and of immediate need). In an informational letter sent to the CTUIR in June 1991 (DEIS, p. 8-3) we learned that as a result of the "public" meetings SOR issues, concerns, and opportunities were defined, the

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[86] 25 U.S.C. § 3003.

[87] 16 U.S.C. § 470h-2.

geographic and topical scopes were addressed, a time schedule was determined to govern the process, and the role of the public was decided.

Despite the claim that the issues, geography and jurisdiction were established after "coordination with . . . Indian tribes," no such coordination occurred between the SOR agencies and the CTUIR until a meeting in December, 1993. By this time, the issues, geography and jurisdiction had been well decided through the process of the SOR agencies actively involving those groups whose vision of the Columbia River (slackwater pools, power generation, commodity and juvenile fish transportation) matched the agencies. Others, including sovereign governments whose resources have been and continue to be under attack by the Federal Government, were avoided or ignored, and attempts were made to "buy" the support of certain groups.

In August, 1992, another letter was sent to tribal chairpersons offering to "brief" tribal governments and "coordinate" with them during "full-scale analysis." However, from July, 1991, to August, 1992, work groups representing 10 key river uses had already defined values and developed and screened 90 initial system operation alternatives. Ten "candidate" strategies were formulated from these 90 alternatives and, up to that point, the CTUIR had received one informational letter. The August, 1992, letter to tribes "included information on how the tribes could get involved in the SOR." However, as noted above, values and key issues had already been identified, a fairly large body of work had already been performed, and critical decisions had already been made.

The SOR agencies have stated that "representatives of several of the tribes have participated in SOR work groups from the beginning, because they have special interests in those river uses or functions." Inferring nothing regarding other tribes, the CTUIR does not have a "special interest." The CTUIR is a sovereign nation with policy, law, and technical expertise, all of which are formulated with the expectation that the federal government will uphold the terms and provisions of the Treaty of 1855. Adherence to the Treaty and the United States' Trust Responsibility means that the federal government will consider and propose only those actions which are consistent with the Treaty of 1855, the protection and restoration of resources important to the CTUIR, and the body of statutes and case law which has developed since treaty signing and ratification.

In January, 1993, the tribes were invited to a meeting to "initiate coordination" on the cultural resources appendix. Initiation of coordination with the CTUIR and other tribes on cultural resource management is seen as a positive step. Nevertheless, the CTUIR was not consulted in this process from its inception. The work group solicited help from the tribes in September, 1993, for obtain information needed to complete its appendix. At this point, the critical decisions had been made, the work group had already developed and screened alternatives, and the "full-scale analysis" had been ongoing for over a year.

In April, 1993, nearly three years after the initiation of the project, the Indian Coordination Group was formed. Arrangements were finally made for a presentation by the SOR agencies to the CTUIR in December, 1993. At this point it was explained that the CTUIR would have 30 days to comment on the 400-plus-page preliminary DEIS before it is sent to Washington, D.C. for lead agency headquarters approval. The CTUIR was further informed that additional time to comment would be available once the DEIS was released for full public review.

The SOR agencies attempts to coordinate and consult with the CTUIR consistently presume that we can simply be kept informed, and invited to participate like any other public group. Moreover, Indian Tribes are often seen as just another "special interest" group whose "use interests" simply can be balanced or accommodated with other interest groups. This is impermissible. The total lack of tribal coordination on cultural resource matters until May, 1993--three years after the project began and long after alternatives had been developed and screened--clearly illustrates the SOR agencies' basic lack of understanding of the CTUIR's sovereignty, its Treaty Rights, and their own Trust Responsibility.

IX. Conclusion

Umatilla Example

The Umatilla River Basin salmon runs are unique in that they are increasing. This contrasts to all other upper Columbia and Snake River salmon populations which are decreasing. A little over a decade ago the Umatilla River had no salmon and nearly no water remaining in the stream. Today, annual Umatilla River salmon returns range from 4,000 to 8,000. A portion of three goals for adult returns (fisheries, broodstock, and natural production) are already being realized.

The CTUIR took a lead role in developing and coordinating a Umatilla Basin fisheries restoration program. Creative solutions to complex problems involving multiple interest groups were identified and implemented. Specific projects are flow augmentation/water acquisition, hatcheries, satellite fish release facilities, ladders, fish screens, fish trap & haul, fish habitat enhancement, and fisheries research to measure how well fish are re-establishing. An important research principle was to implement aggressive actions first and then evaluate results; not study what fish need (already known) before implementing actions.

No alternatives considered for Umatilla Basin fisheries restoration contained "status quo" operations. Obviously, fish were extinct and major changes had to occur. No interest group was put "out of business" but it was agreed that a better multi-resource balance must be regained. The Columbia River with competing interests mirrors the Umatilla story. The scope is larger but the principles are the same. With many Columbia River salmon runs gone and more approaching extinction, some of the factors effecting salmon survival (like the Umatilla) must be changed. In a multiplicative relationship of management factors

throughout the salmon's life history, if even one factor is a "zero", the whole product (adult fish returns) is a zero.

CTUIR is hopeful that the fish restoration principles successfully applied within the Umatilla Basin can also be applied to restoring Columbia Basin Fisheries.

Exhibit

9

Coeur d' Alene Tribe
Review Comments on SOR Preliminary Final EIS

REFERENCE:

COEUR D'ALENE TRIBE

ROUTE 1 • BOX 11-F.A.
TRIBAL HEADQUARTERS
PLUMMER, IDAHO 83851
(208) 686-1800 • Fax (208) 686-1182

October 2, 1995

Mr. Philip Thor
SOR Managers
% Columbia River Coordination Office
825 N.E. Multnomah Street, Suite 1110
Portland, Oregon 97232-1235

Dear Mr. Thor:

The Coeur d'Alene Tribe has received its copy of the Preliminary Final Environmental Impact Statement concerning the Columbia River System Operation Review (SOR). The Tribe requests the following comments and the attached review be included in the final EIS.

The Coeur d'Alene Tribe has previously expressed its objection to the Columbia River System Operation Review process in general. The Tribe particularly noted its objections to the failure of the interagency team to include the Tribe in the early stages of this Systems Operation Review when it would have been particularly useful for affected tribes to work with the three agencies on a government to government basis to determine the scope of the review, its objectives and alternative plans for managing the Columbia River System.

We feel the final EIS should indicate that from the beginning of the SOR process, as early as 1990, tribes affected by the SOR asked for participation in the process. Tribes were informed at that time their participation was not required and that since then tribes have been distrustful of the sincerity to include tribes as co-managers of the SOR.

As you know, the Preliminary Final EIS document is quite lengthy and very complex. The task of developing a coherent and manageable approach for the Columbia River System is an equally daunting one that demands a comprehensive, holistic approach to managing the Columbia River System. We have noted our objections previously to the inherent limitations of this EIS; that it does not consider the impacts of private dams, or what will be the proper relationship between the

Canadian government, the three agencies, the Federal government and the tribes to effectively manage the Columbia River System.

While these comments are not intended to be a formal review of the PFEIS, we expect that the following comments be made part of the final EIS and for any Record of Decision which is forthcoming. The Tribe expects language affirming an arrangement for co-managing cultural sites be included in the final EIS. A government to government consultation meeting involving the three agencies and the Coeur d'Alene Tribe was held in Boise, Idaho on July 12, 1995. At the Boise meeting the heads of the three agencies committed to an arrangement for co-management of cultural resources.

In addition to the co-management arrangement for cultural sites, the Tribe also requests that funding be provided directly to individual tribes, respectively, to assist the tribes in fulfilling their roles as co-managers of their own particular cultural sites and resources. This funding is essential for effective tribal participation and also reinforces the government to government relationships that a project of this magnitude requires.

Appendicies F and S concern fish and wildlife. The Tribe has expressed its comments to the interagency team regarding the almost total depletion of anadromous fish runs in the Columbia River, including the extension of the runs above Grand Coulee Dam. This letter contains preliminary comments regarding the negative impacts the Columbia River hydro-electric system has had on the Coeur d'Alene fish resources. We ask that these comments be included in the final EIS.

Sincerely,

Ernest L. Stensgar, Chairman
Coeur d'Alene Tribe

REFERENCE:

COEUR D'ALENE TRIBE

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**THE COEUR D'ALENE TRIBAL
COMMENTS REGARDING THE PRELIMINARY FINAL
DRAFT OF THE COLUMBIA RIVER SYSTEM OPERATION REVIEW
ENVIRONMENTAL IMPACT STATEMENT**

The Coeur d'Alene Tribe requests the following comments be made a part of the final EIS.

We are requesting that any reference contained in the EIS show the Tribe's official name as **COEUR D'ALENE TRIBE.** (see page 12-1) (Capitalization is for emphasis purposes to catch the eye of the reviewer.)

The Coeur d'Alene Tribe is extremely concerned that the SOR EIS is so complex a logical choice for management of the entire Columbia River System is impossible. There are too many trade offs, too many dams which do not fall under the scope of the EIS, large amounts of interpretative modeling done with a small amount of actual data, an unknown in terms of the Canadian portion of the system, and finally the entire interplay of how the system will be operated in context with the listing of the anadromous fish species and the Kootenai River White Sturgeon.

As stated on page 1-15 of the PFEIS, the SOR is supposed to be designed to help better resolve the conflicts between resources. It is further stated that "the issue is not so much what decisions will be made, but how those decisions will be made". The Tribe is concerned with the number of compromises necessary to reach these management decisions. For instance, with all the resource decisions subject to the Endangered Species Act (ESA) classification and the resulting Biological Opinion (BO), as well as the needs of the developed industries adjacent to the River, how will this all be balanced? We recognize the System will never return to the original "run of the river" pre-dam conditions, but what will the ultimate costs be as the attempt is made to operate the system to meet all perceived goals?

Main Report

Issues related to anadromous fish and resident fish are shown on page 1-17. The Coeur d'Alene Tribe lost all access to

anadromous fish at their fishing sites due to the construction of Grand Coulee Dam. Therefore the resident fish issue increases in importance, not from the standpoint of a sports fishery or a business which serves the sportsmen, but as substitution for the lost anadromous fish stocks. From the view point of the Coeur d'Alene Tribe resident fish programs and anadromous fish programs should be balanced. Both resources are equally important to the respective Tribes and one should not be sacrificed over another.

Wildlife and wildlife habitats are listed as issues on page 1-17. Mitigation for loss of riparian wildlife habitat has taken less priority than other issues. In many cases the mitigation requires acquisition of offsite lands which can be used in lieu of the original lands. This is expensive, and will become increasingly more expensive with the future increase in land values. Habitat restoration around the reservoirs will continue to be difficult to reclaim with fluctuating pool levels.

Finally on page 1-18 it is stated "Native Americans, professional and amateur archaeologists and historians, and state and Federal agencies are particularly interested in protecting the region's cultural resources". One of the main themes throughout all the meetings held with the Tribes of the region was their demand for co-management of the cultural resources, with adequate funding levels to give the Tribes assurances that cultural sites would be protected. This is not addressed in a forthright manner anywhere in the entire SOR EIS.

We acknowledge that eventually programmatic agreements will be in place which will address site specific needs. However, the Coeur d'Alene Tribe has serious doubts that this issue will ever be properly addressed without a firm commitment by the Federal agencies for co-management and funding. As an example, the Coeur d'Alene Tribe has provided a draft programmatic agreement which could be utilized by the Federal agencies as a base document to which the individual Tribal programmatic agreements could be tiered. This document was completed early in 1995. To date there has been no response from the three agencies regarding their thoughts about the Tribal issues.

Section 2.2.1 on page 1-21 states that the various parties involved in the SOR have divergent views on the definition and appropriate treatment of cultural resources. Further in the section there is the statement that the SOR agencies have attempted to incorporate the tribes's views in the impact

analysis and will continue to consider them while developing mitigation plans. Appendix D more fully covers this aspect of how cultural resources are defined. The Coeur d'Alene Tribe wants to emphasize that the professional definition contained in Section 301 of the National Historic Preservation Act does not meet the Tribe's needs. It is our continued hope that the Federal agencies will finally accept the Tribal viewpoint in this matter.

Included with this report is a copy of page 2-23 which contains a typo error showing the duplication of a statement in two separate paragraphs.

In the On-Reservation Resources section on page 2-27, the document provides a poor definition of Indian lands. The Coeur d'Alene Tribe requests the SOR definition be replaced with the following which was taken from 18 U.S.C. & 1151 (1976):

> Indian lands means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Page 2-28 lists tribes which have extensive areas used for crops or grazing. You should include the Coeur d'Alene Reservation in this list because of the 345,000 acres within the reservation, 141,665 acres are agricultural.

At the top of page 2-31 the EIS lists common examples of Indian trust assets. Land, air and cultural sites should be included with this listing because these resources are definitely a trust asset.

In the Cultural Survival section on page 2-31, water quality is indicated as a human health risk due to pollution of the lower Columbia River fish by heavy metals, chemicals and radiation exposure. Water quality itself should be examined for what is occurring in the Columbia River system and how it affects human health. For example, the dumping of 400 tons per day of slag into the Columbia River by the Cominco mill

at Trail, British Columbia, should be addressed in this section. What effects has this had on human health and natural resources of the area?

On page 9-3 the PFEIS lists those tribes which attended the September 29, 1993 coordination meeting in Spokane Washington. The Coeur d'Alene Tribe was not listed when in fact the Tribe attended the meeting. This omission should be noted in the final EIS.

Page 9-7 shows how the tribes were included in the Cultural Resources Work Group meetings. The lack of tribal involvement has been well documented in this report as well as in the past responses by other tribes.

Due to the restricted time constraints imposed by the SOR managers the Coeur d'Alene Tribe could only conduct a cursory review of the following Appendices:

Appendix B: Air Quality

The Coeur d'Alene Tribe did a quick review of this appendix and had several concerns which should be addressed by the SOR managers:

- We have concern for the "downwinders" of the reservoirs; for example, consider the amount of powdered slag which has been deposited into the Columbia River by Canadian sources. When drawdown occur this material becomes dry powder on the exposed shore. What happens then to those recreation users of Lake Roosevelt when the slag becomes windborn? The PM-10 fugitive dust particles from this material may contain hazardous chemicals from the milling process, and should be evaluated by the SOR managers.

- What type of on site air quality monitoring has been done to establish the base levels of fugitive materials from the reservoirs, especially during pool drawdowns in the dry months?

- While it is true that there are low resident populations in the vicinity of the reservoirs, the fact that Lake Roosevelt, Lower Granite and John Day have recreational use exceeding 1,000,000 individuals indicates a potential problem with fugitive dust particles.

- How are the tribes adjacent to the reservoirs affected by fugitive dust and PM-10 materials?

- Has any testing been done to determine chemical pollution of the lands adjacent to the reservoirs, especially those which may have heavy metals associated with the materials deposited into the Columbia River.

- The Tribe is concerned with the effects of high winds funnelling through the Columbia River valley and the ability of these winds to transport PM-10 material. We use the deposition of high amounts of Mt. St. Helens ash onto the Coeur d'Alene Reservation in 1980 as an example of these wind deposits.

Appendix D: Cultural Resources

The Cultural Resource Working Group began to involve the tribes in the SOR process after the September, 1993 meeting in Spokane, Washington. Resulting from these meetings the appendix lists numerous tribal issues and concerns starting on page 1-1.

1.1.1.6b states that fish restoration should be considered in power sales agreements. The bigger issue should be the inclusion of restoration projects, ESA costs, etc. equally to all the groups which adversely impact the Columbia system. The Federal dams are not the only negative impact on salmon stocks, wildlife losses, reduction of air and water quality or destruction of cultural sites. While the Federal agencies fall under the various acts of Congress, realty shows that the private dams, irrigation interests, etc. cause as great an impact on these resources. The Bonneville Power Administration has been forced to absorb these costs which should really be spread to all the users of the system.

Section 1.5.1 continues to show the exclusion of the Tribes from the scoping process for the SOR. Why did the agencies utilize the lead agency cultural resource specialists and coordinators (Tier 1), and then expand this group to include counterparts from cooperating agencies (Tier 2) in the initial scoping process? How much was lost by not including the tribal experts in this initial process?

Section 1.5.2 states that "no public coordination was undertaken because it was not possible to describe the Federal action comprehensively ...". Tribes are governments and should be treated as such.

Section 1.5.4 discusses the screening phase, and how the alternatives affect the cultural resources. While the full pool alternative is regarded as the optimum for cultural resource protection, it should also be noted in this section that all alternatives will adversely affect cultural resources.

Section 2.11.1, Affected Area, states that projected effects at non-Federal projects are not within the scope of the SOR. We continue to be totally against this concept. If the entire system is to be considered a management unit then all users of the Columbia River system should be looked at in the SOR. We also disagree with modeling the system using assumed data related to the operations in Canada rather than being based on actual studies.

Section 4.5.3, Albeni Falls, states the cultural sites are mostly complete. Based on conversations with Tribal elders we have doubts this is true. Many sites are now inundated and have not been reported by the individuals who know of their existence. The Coeur d'Alene Tribe questions the intertie agreement entered into by BPA with other agencies to do the cultural studies at this location. Why were the local tribes not contracted with instead of the Federal agencies?

We have concerns about what happens to the cultural sites located on the non-Federal dams in the Columbia River system. Have the cultural sites been surveyed and registered according to all applicable federal laws? Who reviews the work and insures compliance? How are the cultural sites protected and what involvement do the various tribes have in this process?

We agree with the statement on page 5-9 that the system operation has an adverse cumulative effect on all cultural resources. Without adequate protection and management of these resources how will these adverse effects be reduced or eliminated? We are afraid that eventually the Federal agencies will say there are not enough funds available to meet the applicable laws and not mitigate any losses.

As has been mentioned previously, the Federal management responsibilities shown in Chapter 6 require a programmatic agreement (PA). Unfortunately, we do not see much action in this regard. The Coeur d'Alene Tribe expects to hold the Federal agencies to task in developing the overall agency level PA, including government-to-government consultation on this matter. Additionally, the individual PA with the Tribe

requires future meetings to smooth out the final points after the general agreement has been developed.

Based on the government-to-government consultation process held in Boise, Idaho this past July the Coeur d'Alene Tribe expects the three SOR agencies to develop a policy establishing co-management responsibilities for cultural resources with the Tribes, including adequate funding levels. The Coeur d'Alene Tribe would like acknowledgment to be included in the EIS and resulting Record of Decision (ROD). of the need for the SOR agencies to establish this policy.

Appendix M: Water Quality

This is a very complex appendix, with little tribal involvement in its preparation. The Coeur d'Alene Tribe could find little information presented on the Spokane River or the Coeur d'Alene River basins. Heavy metal loading from the Coeur d'Alene River basin is quantified by a large amount of data available which should have been placed in the Appendix. As mentioned on page 1-5 of the Appendix, the limitations to the study are clear:

- Only the main stem of the Columbia River and Snake River were assessed.

- The linkage to contamination from point sources is lacking.

System regulation can be accurately modeled for water quality impacts associated with water temperature, dissolved gas saturation and suspended sediment. All remaining parameters are assessed qualitatively.

With over 1500 NPDES permits in Idaho, Oregon and Washington there should be more additional information and modeling available on fecal coliform, Biochemical Oxygen Demand (BOD), Total Suspended Solids (TSS), Dioxin, metals, Total Phosphorus and other nutrients. Metals and nutrients from the Coeur d'Alene Basin and Canada should also be analyzed.

There is <u>no</u> mention of Total Maximum Daily Load Requirements under Section 303(d) of the Clean Water Act (page 2-11 and 2-12). There are 62 basins in Washington under a 5 year program and 6 designated basins in Idaho. Tribal water quality standards (such as the Colville Tribal Water Quality Standards) and future proposed tribal clean water act programs may be affected by this system regulation.

Stormwater discharges are another water quality impact to be considered.

Technical Exhibit H (the HEC-5Q Model Water Quarterly) is very good but very complex. We suggest that a summarized chemical analysis be placed in the first chapters of the appendix. This clarification may make the preferred alternative impacts easier to understand.

Appendix O: Economic and Social Impacts

Reference is made to a July, 1995 document prepared for the Confederated Tribes of the Umatilla Indian Reservation. This document titled "Economic Consequences of Management Strategies for the Columbia and Snake Rivers" was prepared by ECONorthwest of Eugene, Oregon.

The above document provides an excellent review of the economic and social analysis prepared by the SOR managers relating to the various alternatives for managing the Columbia River system.

Two analyses were conducted in the ECONorthwest document analysis. The first critiques the methodology employed in the SOR draft EIS. In addition to commenting on the general methods and assumptions reported in the SOR draft EIS, specific shortcomings associated with the analysis of the irrigated agriculture and waterborne transportation sectors were highlighted. In the second analysis estimated economic consequences of the CTUIR's proposal to allocate more water from the Columbia and Snake rivers to anadromous fish were considered.

The Coeur d'Alene Tribal staff has reviewed the document and feel it raises many valid points which can be used to support rationale which protect the anadromous fish stocks, resident fish programs and wildlife issues. We feel this document should be addressed by the SOR managers and the points raised be evaluated for inclusion in Appendix O.

Appendix S: Fish and Wildlife Coordination Act Report

The draft Coordination Act Report (CAR) included with the PFEIS is not the latest version as prepared by the U.S. Fish and Wildlife Service. Our information indicates that the SOR managers were aware a revised version would be prepared for inclusion in the PFEIS, yet they chose to incorporate the initial draft. The revision was provided the Coeur d'Alene

Tribe by letter dated September 11, 1995. Our review is based on this latest draft.

On July 31, 1885, the Tribe responded to the Columbia Basin Fish and Wildlife Authority request to review the draft CAR covering the SOR. At that time written comments were made concerning the draft document and requested that the points we raised be included with the CAR. In addition, staff members had several discussions with members of the Columbia Basin Fish and Wildlife Authority regarding our comments. Many of our concerns were included in the revised draft of the document.

We wish to call attention to figures 1, 3, and 4 on pages 6, 8 and 9 of the CAR. As a very simplistic and direct visual aid these figures show what has happened to the Columbia River system and the anadromous fish runs. Especially graphic is the influence of the dams constructed in the early and middle 1970's and the reduction in spring chinook salmon runs.

If the Federal agencies are really interested in saving salmon stocks then a close look must be taken at changing how the system is operated. The CAR should make an effort to describe the chronology of the construction of the dams and develop an analysis for each dam evaluating the adverse effects on the salmon stocks. It is recognized that Federal structures are the subject of the SOR. However the privately owned utility dams in the Columbia system should be also considered when looking at the reduction in salmon stocks.

On page 3 the CAR incorrectly states the tribes were involved with the SOR process. On numerous occasions the Coeur d'Alene Tribe joined other tribes in raising the issue that the tribes of the Columbia Basin were not initially involved in the scoping process of the SOR. This lack of participation was not changed by the SOR managers until September of 1993. This caused many problems related to the way the tribes feel the process has worked. It is important to either change the way page 3 of the CAR is written, or acknowledge that the tribes feel left out of the process.

While fish and wildlife issues are covered in the CAR, water quality appears to be either downplayed or ignored. The quality of water plays an important part of the whole system. Little research or documentation of the needs of the fish within the system have been developed to address the adverse effects of farm chemicals, waste dumping by industry, sediment loading to the system and poor flushing of the whole

river due to the reservoirs. The CAR does not mention this lack of information. The only references which may reflect water quality relate to water temperatures and dissolved gases.

The Columbia River ecosystem is entirely too complex to study in a short 3 or 4 year time frame. Too much of the system is ignored, as discussed in the January 13, 1995, letter from the Fish and Wildlife Service to Randy Hardy. Due to political considerations no attempt has been made to correlate the influence the Canadian portion of the system or the upper Snake system into the SOR process. As mentioned in the Fish and Wildlife letter, it appears that treaty negotiations will result in an agreement outside the framework of the SOR, potentially resulting in further adverse effects on the fish and wildlife of the system. The CAR does not mention this in the document.

It should be noted that the upriver tribes have never been fully compensated for losses sustained from the construction of Grand Coulee and Chief Joseph dams. The Enhancement and Restoration Matrix covers mitigation which addresses base case or current operating strategies and does not address past mitigation for early damages, ie: actual construction and subsequent operation of Grand Coulee. We feel this would also apply to the tribes in the Snake River system. The Coeur d'Alene Tribe fears that the Biological Opinion (BO) will ultimately adversely affect the Tribe in its efforts to develop adequate resident fish substitutions for the loss of salmon runs. The CAR does not address this in the document.

We fully agree with the last 3 paragraphs on page 11 of the September 11 draft of the CAR. Additionally, the list of recommendations shown on pages 18, 19, and 20, as well as the Mitigation, Enhancement and Restoration Matrix shown in Appendix A of the CAR should become an integral part of the preferred alternative of the SOR as well as the Record of Decision.

REFERENCE:

COEUR D'ALENE TRIBE

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November 2, 1994

SOR Interagency Team
P.O. Box 2988
Portland, Oregon 97208-2988

The Coeur d'Alene Tribe has conducted a preliminary review of Appendix D, Cultural Resources, Columbia River System Operation Review, Draft Environmental Impact Statement. The Tribe would like to have the following comments incorporated into the EIS, with the understanding that more detailed comments will be submitted upon the conclusion of the formal review being conducted under Contract Number 94BI32728.

The Coeur d'Alene Tribe's issues and concerns are as follow:

The Coeur d'Alene Tribe considers the SOR to be 50 years too late. Our input is similar to placing the cart before the horse and expecting the load to get to market with no trouble. Where was the request for government to government consultation before the SOR process steamrolled the Tribal reviews? The Tribes have stated in many meetings with the SOR Federal agencies that they question what value will be placed on the Tribes' comments in relation to the whole SOR process. It appears the whole process is demeaning to the Tribes.

Sections 1.3, 1.4.1, 1.4.2 and 1.4.3 all relate to how the Cultural Resources Working Group (CRWG) was formed and how it related with the Tribes. Section 1.3 mentions "trust responsibility", yet no mention is made of what this means to the SOR group, or how important this concept is for the Tribes. Section 1.4.1 and 1.4.2 both identify that Tribes were not in the development of system alternatives or initial screening process. Rather the Tribes were either contracted to make comments, or ignored because "CRWG determined that it was not possible to coordinate effectively with Indian tribes ...". Further, Section 1.4.3 states that "CRWG agreed that other factors affecting specific cultural sites would be taken into account in determining appropriate management or treatment measures once the operating strategy was chosen". Due to the sections listed above, we question the viability of the whole Cultural Resource Appendix based on the lack of Tribal input at the start of the SOR process.

Exhibits D, E, F, G and H from the 5 contracting Tribes all expressed grave concerns with the Cultural Resource Appendix as prepared by the SOR. The Coeur d'Alene Tribe agrees with each concern, and the lack of involvement by the Tribe in any planning stage of the SOR.

The definitions used to identify Cultural Resource areas are confusing and incorrect. We agree with the concerns expressed in Exhibit F, by the Confederated Tribes of the Warm Springs Indian Reservation, and Exhibit G, by the Confederated Tribes and Bands of the Yakima Indian Nation. The definitions used in the Appendix D do not account for the spiritual aspects of the culture of the Native Americans.

Consider for example as comparison what the public outcry would be if Arlington National Cemetery were to be located behind a dam and flooded. We all know what the spiritual value is for that area, and should not the same consideration placed on the burial places of the Native Americans?

Section 2.2.2, page 2-3, quotes the Yakima Indian Nation as follows: "The cultural and spiritual components of resources cannot be separated from other aspects of the resources. The proper balance must be nourished and renewed between the People and continuing creation of the Earth." Yet the following paragraph in the SOR document expresses the CRWG appendices from a technical nature, ignoring completely the close spiritual and cultural ties the Native Americans have with the earth. It is as if nobody was listening. Therefore, what value does the SOR place on the various Tribal comments?

Section 2.3.2, page 2-6, relates to the historical uses of the Upper Columbia, Kootenai, Pend Oreille and Flathead Rivers. No mention is made of the Coeur d'Alene Tribe and its use of the Pend Oreille River and lake. Yet interviews conducted by the cultural staff of the Tribe show historical use of this area by the Coeur d'Alene Tribe. Additionally, the map shown in Figure 2-1 does accurately reflect the use of the Pend Oreille system by the Coeur d'Alene Tribe. The map reflects linguistic families, not "on the ground" use or the close ties the Tribes of the area have with each other.

A main point of concern with Appendix D is the complete lack of recognition of all the Tribes within the Columbia basin covered by the SOR. Each Tribe is unique and has its individual culture. Yet in Section 2.3.3 only a brief description was made of the Colville and Nez Perce Tribes.

Section 2.3.5, page 2-10, relates to usage of the Lake Pend Oreille area by the Upper Kalispel and the Kootenai Tribes. Yet this area was also used by the Coeur d'Alene Tribe and the Pend Oreille Tribe, as documented through interviews with Tribal elders.

Any action regulating the Columbia River System will cause damage to the cultural sites of the Tribes. Unfortunately the review of the system is 50 years too late and, short of full removal of the dams, there is probably no way to eliminate the adverse effects caused by exposure of the river banks. It is important to recognize that any drawdown, and resulting bare ground, causes the exposure of burial sites, camp sites and petroglyph areas to looting and destruction. These areas are sacred to the Tribes and their protection is of vital necessity.

The September 9, 1994, 9th Circuit Court of Appeals action regarding the Northwest Power Planning Council's 1992 Strategy for Salmon may have a tremendous effect on the proposed SOR alternatives. It may be that in almost every case the effect of this decision will be a disaster to the protection of cultural sites. The SOR alternatives operate on the assumption that there will be water behind the dams to protect the cultural sites. What happens if mandated discharges are required to aid the salmon and large fluctuations occur in the reservoir levels?

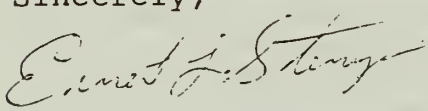
The Federal agencies must recognize that those sites which are not identified by the Federal agencies will not be released by the Tribes. We do not believe the agencies will keep the locations confidential due to the number of federal employees with the agencies, the possible release through Freedom of Information Act disclosure requests, and the overall distrust Native Americans have as a result of past Federal actions.

The Coeur d'Alene Tribe has burial and sacred sites behind Albeni Falls Dam, as well as in the slack water area of the Spokane River. Many of these sites are not known by Federal agencies. The Coeur d'Alene Tribe feels the ultimate protection of these sites should rest with the Tribe. This means funding must be provided directly to the Tribes by the Federal agencies to allow for protection activities. This will prevent strangers invading our relatives' resting place with the handling of the remains and artifacts, which would be a sacrilege to us as Indian people.

In closing, the Coeur d'Alene Tribe wants Bonneville Power Administration, U.S. Corps of Engineers and Bureau of Reclamation to address the Tribe as a sovereign nation and on a government to government basis. Second, as proclaimed by President Clinton on April 29, 1994, there needs to be a re-affirmation of the Federal government's commitment to the fulfillment of the trust responsibilities to the Indian nations. This requires open consultation on a government to government basis with each Tribal government. Third, assurances must be given to the Coeur d'Alene Tribe that we retain sole authority and jurisdiction on all issues with our respective territory.

Additionally, these comments to the EIS developed for the SOR group do not fully address the concerns of the Coeur d'Alene Tribe in relation to Appendix D or the concerns the Tribe has with the fisheries appendixes. Final comments will not be forthcoming from the Tribe until the middle of 1995 when all the data obtained through interviews of Tribal elders have been completed. Therefore, the Tribe wishes to make the point that any "no response" from the Tribe should not be considered as "consent" on any Federal action.

Sincerely,



Ernest L. Stensgar, Chairman
Coeur d'Alene Tribe

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COEUR D'ALENE TRIBAL POSITION STATEMENT RELATED TO THE SYSTEM OPERATION REVIEW MANAGEMENT GROUPS' ATTITUDES TOWARD THE 14 COLUMBIA RIVER TRIBES

The Coeur d'Alene Tribe, as one of the 14 Columbia River Tribes, is located in the upper reaches of the basin and has been adversely affected by the construction of the main stem dams on the Columbia River. As the result of the construction of Grand Coulee Dam in the 1930's the Tribe lost all salmon resources which were a major food source to the Tribal members. With the construction of the Albeni Falls Dam on the Pend Oreille River the Tribe lost additional valuable fishing and wildlife lands, as well as numerous cultural sites.

As a result of these losses the Tribe is very concerned with the way the Columbia River system is managed, and the effect of the changes in reservoir levels have on cultural sites of the Tribe. This concern has been manifested in the Tribal participation in the development of the System Operation Review (SOR) Environmental Impact Statement. However the Tribal representatives to the SOR meetings have felt a high level of frustration because the SOR managers refuse to acknowledge the sovereign relationship all the Tribes have with the Federal Government, and the technical expertise they bring to the SOR in the form of questions, information, and cultural insight.

Therefore, the Coeur d'Alene Tribe wishes to lodge a protest to the heads the Bureau of Reclaimation, Bonneville Power Administration and Army Corps of Engineers which are involved with the development of the System Operation Review Environmental Impact Statement. This protest is in the form a position statement covering the following issues:

* The SOR managers refuse to recognize the need to meet with each Tribal Government in a **"GOVERNMENT TO GOVERNMENT CONSULTATION"**. Further the managers are failing to address the Federal Trust Responsibility to Indian Tribes in the planning and formulation of policy related to the operation of the Columbia River.

* The Tribes feel the managers are practicing Ethnic Perceptibility in the form of racial discrimination and elimination. The managers appear to have attempted to actively stifle any involvement by the Tribes in the SOR process from the very conception of the process.

* The SOR managers refuse to accept the Native American definition and understanding of Cultural Resources as being holistic, meaning that ALL resources and sites are a part of the culture. The managers appear to only use the "bones and stones" definition of Cultural Resources.

* The SOR managers appear to be adverse in involving the Tribes in the development of Programmatic Agreements. Each time the Tribes attempt to work with the SOR managers a newly formatted Agreement is developed by the managers and no formal response provided to the samples developed by the Tribes. As with the SOR process, the Tribes were involved in the development of these Agreements late in the whole process, and only after the managers realized the Tribes HAD to be legally involved.

* The SOR managers have repeatedly stated the SOR will be completed in August of 1995 with the Record of Decision (ROD) issued. Yet some of the Tribes are operating under contracts to produce data for the Environmental Impact Statement, with the data to be provided after the August 1995 date. The Tribes feel the current data is incomplete, inaccurate, or of such a small data base that meaningful computation cannot be done. Regardless of numerous protests by the Tribes, the managers will not delay the final date of the SOR.

* The SOR managers, as a result of the comments received to the draft EIS, have developed new alternatives to the SOR. They will not allow the Tribes to fully review the effects of these new alternatives and then comment to the EIS. While the Tribes feel these new alternatives constitute a need for a revision to the EIS, the managers will not allow additional time to do an adequate review of the effects. The Tribes feel this is in violation of treaties as well as federal statutes and laws.

The Coeur d'Alene Tribe is formally requesting an extension to the SOR environmental impact Statement time lines. The Tribe is formally requesting the heads of each agency investigate the activities of the SOR managers in the way they are conducting themselves in working with the Tribes. Finally, the Tribe is requesting that the Tribes have a representative on the decision making board which will develop the final alliterative for the SOR Record of Decision.

JUNE 30, 1887 AGREEMENT WITH COEUR D'ALENE INDIANS

ARTICLE 1: Possessed a large and valuable tract of land lying in the Territories of Washington, Idaho and Montana. Indians have never ceded land to the United States. Settlers and owners deriving title from the United States. Indians never compensated for land.

ARTICLE 2: Coeur d'Alene Indians cede, grant, relinquish and quit claim to the United States all lands in said Territory except land of their present reservation.

ARTICLE 3: Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing around Spokane Falls may be removed to the Coeur d'Alene Reservation.

ARTICLE 4: And it is further agreed that the tribe or band of Indians known as Calespels, and any other band or non-reservation Indians may be removed to the Coeur d'Alene Reservation.

ARTICLE 5: In consideration of the foregoing cession and agreement it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6: It is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars. The first year , thirty thousand dollars, and for fifteen years, eight thousand dollars. The remaining portion of thirty thousand dollars shall best promote the progress, comfort, improvement, education and civilization.

ARTICLE 7: It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and they will judiciously use the money, then said payment shall be made to them in cash.

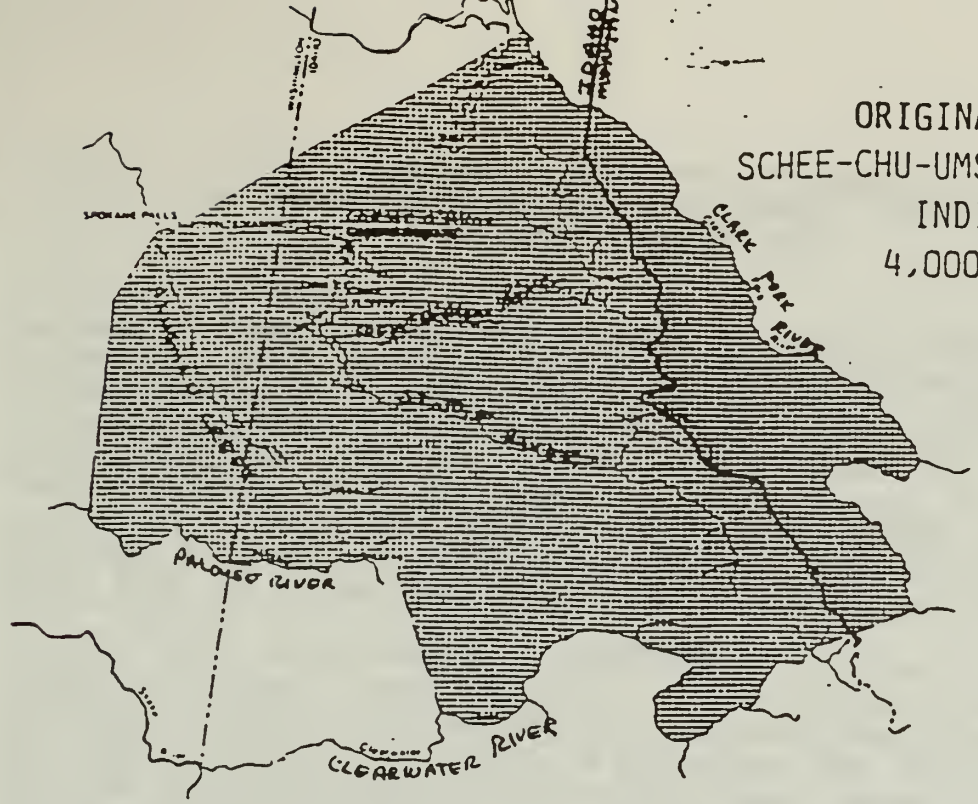
ARTICLE 8: It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article 7,shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians.

ARTICLE 9: It is further agreed that in the purchase for distribution of said articles for the benfit of said Indians.

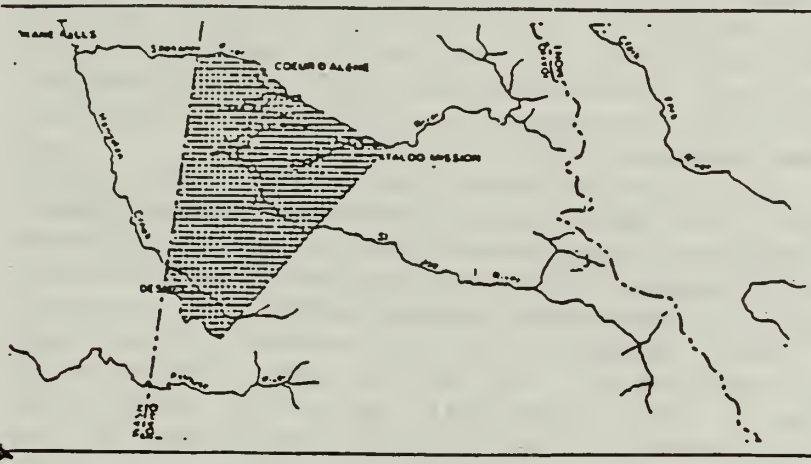
ARTICLE 10: It is further agreed that in the employment of engineers, millers, merchanics, and laborers of every kind, preference shall be given in all cases to Indians. It shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11: Will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

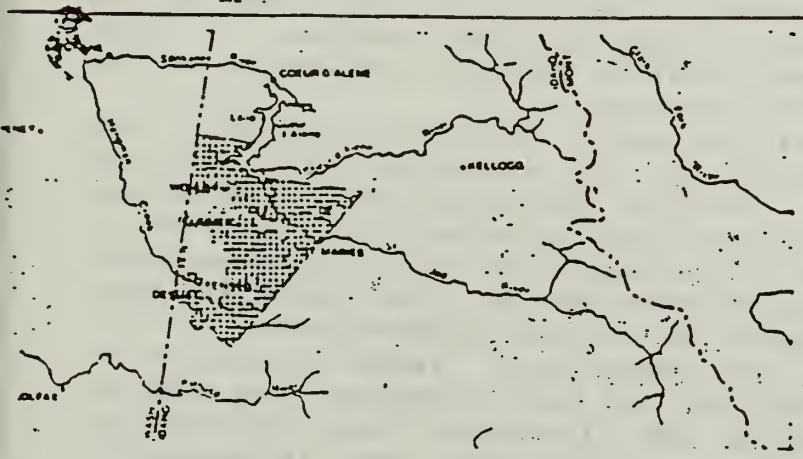
ARTICLE 12: In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene Tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge the minister in charge, and the chief of that tribe he is a fit person to reside among the Indians.



ORIGINAL TERRITORY
SCHEE-CHU-UMSH (COEUR D'ALENE)
INDIAN TRIBE
4,000,000 ACRES



1873 RESERVATION
(1873 Executive Order,
Confirmed by 1887 Treaty)
590,000 ACRES



1889 RESERVATION
345,000 acres

1908,1909 ALLOTMENTS
(in white)
58,000 ACRES LEFT IN
INDIAN OWNERSHIP

COEUR D'ALENE RESERVATION HISTORY

COEUR D'ALENE TRIBAL HISTORY
CULTURAL RESOURCES & POSITION STATEMENT
BY BINGO SIJOHN

Our story begins when the Creator put the animals on Mother Earth. The stories of the Animal People has been here since the beginning of time. They have been handed down from generation to generation from Mother/Father to Daughter/Son to Grandchildren. The history of the Coeur d'Alene Tribe has been telling of the stories and of the way the animals formed Mother Earth into formations of rivers, gorges, mountains, valleys and lakes. It is the the belief of the Coeur d'Alene, through myths and legends that the "Schee-chu-umsh" was placed here by the Great Spirit to take care of this area.

In the mid 18th century of the Coeur d'Alene Tribe lived in an aboriginal area of approximately 4,000,000 acres located in Idaho parts of Washington and Montana. Marked by cool, wet winters and warm dry summers the are dominated by Pend Oreille Lake, Coeur d' Alene Lake, Hayden Lake, Coeur d'Alene River, St. Joe River and the Spokane River. The tribe depended on these water resources for their livelihood and transportation. It was mainly used for cultrual and spiritual beliefs of all tribal families. The Coeur d' Alene Tribe has members who are descendants of the Pend Oreilles and Spokanes who was placed here in 1874.

Each of these Salishan tribal groups found their respective areas blessed with game and food. The salmon runs ascended to the highest streams, still not blocked by any dams or falls. The resident fish teemed in abundance. Remember that several thousand years eariler, Indians had fished and canoed on many lakes.

On September 10, 1809, David Thompson having entered Idaho from the north began to erect substantial log houses near the site of the present town of Hope on the northeast shore of Lake Pend Oreille. To the east at the mouth of the Clarkforks River was an emcampment at Indian Meadows of Pend Oreille Indians. The descendants of this band of Pend Oreille Indians now reside on the Coeur d'Alene and the Flathead Reservation.

The Coeur d'Alenes/Pend Oreilles had at least 32 villages. The bands originally had different names, but shared a common dialect of the Salish Indian language. In time they referred to themselves as the "Schee-chu-umsh" from the word meaning the found ones. Early fur traders called them the Skitswish or Coeur d'Alenes which means heart of a pointed awl or Pointed Hearts. The Coeur d'Alenes were known as shrewd bargainers in trading transactions.

They hunted deer and elk in their mountains, fished for salmon on Hangman Creek, the Little North Fork of the Clearwater and down at Spokane Falls. They went across the Bitterroot Pass for buffalo near Helena and Great Falls, Montana, dug camas and bitterroot in the fields at Spangle, Tensed and Emida and also picked huckleberries on their mountains. Some even had large herds of cattle and horses. But, in time, plagues and epidemic spread up the Columbia and over the Rockies from early traders and immigrants, contaminating these bands that had no immunity to these previously

unknown European diseases. Smallpox epidemics swept through the Tribe in the early 1800's. Original Indian population estimates vary from 3,000 to 4,000, based on the number of village sites.

A Coeur d'Alene head chief who lived near Kingston from about 1660 to 1760 had great visionary powers. His Raven Spirit would circle and tell of the presence of game or of approaching enemies, or future events and then return to inform the Chief. In a vision experience Circling Raven was told of a new kind of medicine man (The Black Robes) who would come to the Coeur d'Alenes to help them face their troubles in the changes that the white man would bring to their lands.

The Pend Oreille and Coeur d'Alene Indians appeal for a resident Missionary was so insistent that Father DeSmet decided to send a Black Robe to them during the following Autumn. Father Nicholas Point and Brother Charles Huet were the Missionaries detailed by Father DeSmet to establish a permanent mission among the Coeur d' Alenes.

During the eventful history of the Old Mission its lights have gleamed a welcome to the Indian, Explorer, Engineer, Soldier, Packer, Hunter and the Prospector. Its walls have echoed the fiery oratory of Indian Chiefs. The solemn chant of sacred music. The sounds of joyful revelry and in later years the rifle crack of labor warfare.

The trade market involved most of the tribes in the northwest. The items traded included weapons, furs, meats, and tools. The coastal tribes possessed obsidian which could be fashioned into the sharper tools used by our ancestors.

The Coastal and Upper Columbia Tribes traded salmon for meat that was not available to them in their region. The shrewd dealings of the Coeur d'Alenes made trading very difficult for prospective traders. History recalls the tribe as "always getting the better deal".

SOR INDIAN POLICY ISSUES CDA Resolution 67 (95)

WHEREAS, The Coeur d'Alene Tribal Council has been empowered to act for and on behalf of the Coeur d'Alene Tribe pursuant to the Revised Constitution and By-Laws, adopted by the Coeur d'Alene Tribe by referendum, November 10, 1984, and approved by the Secretary of the Interior, Bureau of Indian Affairs, December 21, 1984; and

WHEREAS, The Coeur d'Alene Tribe as one of 14 Columbia River Tribes, has attempted to be an active member of the Culture Resource Working Group which is developing management alternatives for the operation of the Columbia River System while mitigating for damages to the important and sacred cultural sites in the river system; and,

WHEREAS, After over a year of meetings with the System Operating System (SOR) group in which all the 14 Columbia River Tribes have attempted to make the Federal Agencies of the SOS Management Team and Working Groups understand the unique sovereign trust relationship the agencies have with the Tribes; and

WHEREAS, After the meeting of February 8, 1995, in Portland, Oregon, when the full SOR Administrative Management Group was again implored to recognize the cultural importance of the Tribal resources, and to allow the Tribes to be a part of the decision process in developing the preferred alternative for the SOR Environmental Impact Statement; and,

WHEREAS, In direct opposition to the April 29, 1994, mandate given by President Clinton that the Tribes were to be consulted on a Government to Government basis, the Tribal representatives felt they were slighted and shown no respect by the SOR managers for the Tribal input.

NOW THEREFORE BE IT RESOLVED, the Coeur d'Alene Tribal Council has been informed of the events related to the meetings with the SOR managers as well as the Tribal Caucus held on February 9, 1995, in which the Tribal representatives prepared the following position statement; and,

67(95)

FURTHER BE IT RESOLVED, that the Coeur d'Alene Tribal Council approves the position statement and authorizes the Chairman to prepare the appropriate letters of complaint to the various heads of the Federal Agencies requesting a full investigation into the way the SOR is being developed utilizing input from the Columbia River Tribes.

CERTIFICATION

The foregoing resolution was adopted at a meeting of the Coeur d'Alene Tribal Council held at the Tribal Headquarters, near Plummer, Idaho on Feb 16, 1995, with the required quorum present, by a vote of 5 FOR and 0 AGAINST. 1 OUT

Ernest L. Stensgar, Chairman
Coeur d'Alene Tribal Council

Marjorie E. Zarate, Secretary
Coeur d'Alene Tribal Council

Exhibit

10

Confederated Tribes of the Colville Reservation Comments on the SOR Preliminary Final EIS

Colville Confederated Tribes

P.O. Box 150 - Nespelem, WA 99155 (509) 634-4711

September 25, 1995

Philip Thor
Bonneville Power Administration
BPA-MGC
825 NE Multnomah Street,
Suite 1110
Portland, OR 97208-2988

RE: Request for Comments on the Columbia River System Operation Review Preliminary Final Environmental Impact Statement

Philip Thor:

Thank you for providing the Colville Confederated Tribes (CCT) with the opportunity to comment on the SOR Preliminary Final Environmental Impact Statement. However, with the information that you provided which stated that the Federal Agencies may or may not consider any comments to the document that may be offered by the Tribes' at this time, and the extremely limited amount of time offered for comments on a huge document, it seems that any effort we might make to provide reasoned and meaningful comment is an exercise in futility.

The CCT is very concerned that the Preliminary Final Environmental Impact Statement was presented for comment prior to the release of the Federal Agency responses to the comments on the DEIS. At the time of this writing, Appendix T, which is said to have the comments of the Tribes and the responses of the Agencies has yet to be received by the CCT Departments which have concerns. The Agency response to the comments will undoubtedly, influence future relationships between the CCT and the Federal Agencies. We view the lack of response to our previous comments with suspicion and as a possible strategy on the part of the Federal Agencies to keep the CCT in the dark until the Agency agenda is met.

It is unfortunate that it is the decision of the Federal Agencies that the EIS process will continue on the Agency established schedule in spite of the objections of the Tribes. The objection to the schedule was based upon the fact that Indian participation was included late in the process and that important decisions were made before legitimate Indian concerns were expressed or included.

From the standpoint of cultural resources, the EIS process has, for the most part, failed. No agreements (PA's) have been reached by the participants in the process and the Federal agencies have decided to employ measures that are to be applied when agreement cannot be reached. The Agencies are now on a crash course to provide documentation to the Advisory Council on Historic Preservation within a time frame that will not delay the EIS compliance schedule.

This documentation to the Advisory Council requires consultation with the affected Tribes, among nine other requirements. It is doubtful that the Federal agencies can meet the "nine other Requirements" within the time allotted, but it would seem that meaningful consultation with the affected Tribes is virtually impossible. The CCT feels that meaningful consultation has not yet taken place.

Furthermore, the Federal agencies have made the decision, apparently without consultation with the Tribes, that there will be a PA developed between the Advisory Council, the SHPOs, and the Federal agencies that will specify in that there <u>will</u> be PA's developed with each of the Tribes. It seems presumptuous on the part of the Federal agencies to determine that this process will be executed even before it has been determined if the individual Tribes wish to participate and furthermore, to indicate that agreement <u>will</u> be reached seems presumptuous to the point of arrogance.

A number of Indian concerns have been acknowledged by the Agencies in the Preliminary Final EIS, but there is a vast difference between the listing of concerns and the addressing of concerns. Federal Agencies may feel that the EIS process is now complete, that the Tribes have been consulted. Meetings and contracts with Indian Tribes can now be documented and the "boxes" of the EIS requirements can be filled.

Agencies should be aware that the CCT and other Tribal entities are very discouraged by a process that left them out at the onset, ignored their requests for additional time to catch up and which acknowledges Indian concerns, but then fails to address the concerns.

Beyond this letter, no effort at comments to the Preliminary Final SOR will be made by the CCT due to the limited time offered and the statement that has been made by the Federal Agencies that comments made at this time may or may not be considered. Because

of this, it is the position of the CCT that our opportunity to provide meaningful comments to the Columbia River System Operation Review Environmental Impact Statement has been foreclosed and that our formerly expressed concerns and comments have not been addressed.

Sincerely,

Joseph A. Pakootas

for Mathew Dick, Jr., Chairman
Colville Confederated Tribes

DOE/BP-2758
November 1995
2320