

BEFORE THE INDIAN CLAIMS COMMISSION

CONFEDERATED TRIBES OF THE COLVILLE)	
RESERVATION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 181-C
)	(Fisheries Claims)
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 29, 1978

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Parties. The Confederated Tribes of the Colville Reservation constitute an identifiable group of American Indians residing within the territorial limits of the United States, and have the right and capacity under the Indian Claims Commission Act, 60 Stat. 1049, (1946), to bring and maintain the claim presented herein in a representative capacity for and on behalf of the Colville, Lake, San Poil-Nespelem, Okanogan, and Methow Tribes of Indians, sometimes hereinafter called claimants, or claimant tribes. Each of the claimant tribes on whose behalf the claims herein were presented is a tribe, band, or identifiable group of American Indians residing in the United States, and each has been dealt with by the officers and agents of the United States as such since at least 1859.
2. Description of the Fisheries Claim. Claimants allege essentially

that they had special fishing rights in the waters on or adjacent to the Colville Indian Reservation in the present-day State of Washington; that a special relationship existed between claimants and the defendant whereby the defendant was bound in fairness and honor to protect them in their rights; that defendant breached that obligation by dealing with claimants unfairly and dishonorably; and that, consequently, under clause 5 of Section 2 of the Indian Claims Commission Act, supra, at 1050, the defendant is liable in damages to claimants for losses caused them by defendant.

3. Aboriginal Background of Claimants. Claimants, along with the Columbia, Wcnatchee, Chelan, and Entiat Tribes, among others, belonged to what we called in our 1956 decision in Docket 181, 4 Ind. Cl. Comm. 151, an Interior Salish dialect group of Salish speaking Indians. These Interior Salish groups aboriginally occupied the central portion of what is now designated the Plateau Cultural Area, and which in earlier anthropological literature was called the Salmon Area. The Plateau Cultural Area is located between the Rocky Mountains and the Cascade Mountains in the Pacific Northwest region of the United States.

The Interior Salish shared common economic activities and subsistence patterns, had similar basic customs and political organizations and were often interrelated by marriage. They joined with each other to trade, for social intercourse, and often shared available resources.

The earliest known culture of these Salish was characterized by a dependence on fish. This was reported by the earliest explorers in the region. The source of fish was the waters on or adjacent to their aboriginal homelands which the Salish had fished from time immemorial.

4. Aboriginal Homes of Claimants. The aboriginal homes of claimant tribes, as determined by the Commission in the Commission's earlier decisions in Docket 181,^{1/} were located along the upper reaches of the Columbia River and its tributaries in what is now all or part of the counties of Okanogan, Douglas, Grant, Ferry, Lincoln, and Stevens in the State of Washington. The Colville Tribe lived along both sides of the Columbia River from around Kettle Falls down-river to just above Hunters, Washington, and along the lower reaches of the Colville River, a tributary of the Columbia.

The Lake Tribe lived upstream from the Colville, along both sides of the Columbia River as far north as the Canadian border. The San Poil-Nespelem lived downstream from the Colville on both sides of the Columbia in an area known as the Big Bend country, named after the abrupt change

^{1/} See: 4 Ind. Cl. Comm. 151 (1956), and 7 Ind. Cl. Comm. 187 (1959).

in direction of the river from south to west. The San Poil-Nespelem area extended downstream to beyond the mouth of the Nespelem River.

One segment of the Okanogan Tribe, called Southern Okanogan, lived downstream from the San Poil-Nespelem on the Columbia near the mouth of the Okanogan River, and along portions of the Okanogan River northward. Another Okanogan group, called the Northern Okanogan, lived in the Okanogan River area near the Canadian border.

The Methows lived generally down-river from the Southern Okanogans around the mouth of the Methow River. They occupied both sides of that tributary of the Columbia as far north as the town of Twisp, Washington.

5. Effect of Physical Environment on Claimants. The physical environment these Indians lived in shaped their culture. The Plateau Cultural area was basically open and riverine in character, with great variations in altitude, climate, and types of ground cover. The Columbia River system, with its abundance of edible fish, determined settlement patterns and provided these Indians with common access to their prime source of subsistence -- fishing. Claimants were also food gatherers and hunters. Agriculture was of no importance to them aboriginally.

The most significant factors that held claimant tribes to their aboriginal habitats were the cultural attachments to those habitats and the abundance of anadromous fish in the waters on or adjacent to their habitats.

6. Anadromous Fish - Definition. Anadromous fish are fish which ascend fresh water rivers from the sea for breeding and spawning. Such fish spend the bulk of their lives at sea and return only to breed and

die. Their offspring, or fry, migrate to sea from one to three years after hatching. After a usual 4-year life at sea, they return to spawn in the same area that spawned them.

7. Anadromous Fish - Pacific Salmon. The Pacific Salmon is the principal and most numerous genus of anadromous fish that use rivers draining into the northern Pacific Ocean for breeding. The genus has four main species. The four species are commonly called, among a variety of other popular names, spring and fall chinook, blueback or sockeye, silver or coho, and chum. When these species ascend the rivers, they are generally large, mature, adult, highly edible fish. They arrive in great numbers.

Of the four main species only the chum never made great use of up-river spawning, preferring instead tributaries of the lower Columbia. The other three species, plus the steelhead trout, an anadromous salmonoid considered a race of rainbow trout, used the upper Columbia and its tributaries for spawning. In earlier days of defendant's sovereignty over the area, the most plentiful salmon specie in claimants' area of the Columbia was the chinook. This specie divided itself into two (and sometimes three) migrations up-stream each year.

A summary of the times of the year when anadromous fish generally ascended the Columbia River for spawning, and the times thereafter for migration of their fry down the river to the sea, are shown by the following table:

	<u>Adult Upstream Migration</u>	<u>Spawn</u>	<u>Fry Downstream Migration</u>
Spring Chinook	Feb.-June	Sep.-Oct.	1-2 yrs. after hatching
Fall Chinook	July-Oct.	Sep.-Oct.	1-2 yrs. after hatching
Blueback	May-Aug.	Sep.-Oct.	2-3 yrs. after hatching
Chum	Oct.-Dec.	Dec.-Jan.	0-5 yrs. after hatching
Coho	Aug.-Nov.	Sep.-Dec.	1 yr. after hatching
Steelhead Trout	All year	Dec.-Feb.	1-2 yrs. after hatching

8. The Significance of Anadromous Fish to the Salish. From time immemorial claimants' culture, economics, customs, and religion were inextricably interwoven with the abundance of anadromous fish in their aboriginal lands. Fish influenced more of the beliefs and behavior of claimant tribes than any other single cultural component in their society. It governed their communal organizations, their diet, their yearly round of activities, their whereabouts, the location of their villages, even their political system with its emphasis on autonomous communal organization and sharing, positions of leadership, tribal ceremonies, and religious beliefs.

9. Communal Organization and Customs. When the first white men came upon the aboriginal habitats of the Interior Salish, they found them living in politically autonomous villages. The inhabitants generally identified themselves by the names of the villages they came from or the river they lived on. They located their villages along the rivers at relatively permanent sites, and used them year after year, generation after generation. Claimants' villages ranged in size from only two or three lodges to villages with many lodges extending for more than a mile

along the land benches that bordered the rivers. The Lakes had 10 such villages; the Colville, 7; the San Poil, 13; the Nespelem, 8; the Okanogan, almost 40; and the Methow, more than 15.

Claimants tended to occupy their villages more during the fall and the cold winter months. They emerged to engage in customary mid-winter festivities and to hunt. Winter was the best season for hunting. Claimants hunted to supplement the dried fish diet upon which they subsisted during the winter.

In the spring claimants' women dug for roots. The men undertook small game hunting. In summer claimants spent most of their time fishing at the great salmon fishing grounds along the rivers. The main fishing season lasted about 5 months, from May through September. In the fall some of the Indians moved to fall fishing grounds while others went into the mountains to gather roots or to hunt before the winter cycle of village living set in.

None of the claimant tribes, except the Lakes, had developed tribal political chiefs or governing bodies larger than those in the autonomous village units by the time defendant took undisputed sovereignty over them in 1846. The Lakes were reported to have developed some central political organization with a tribal chief by that time.

10. Tribal Ceremonies and Religion. The greatest summer tribal ceremony of the Salish tribes was the First Salmon Ceremony. This ceremony was observed each year under the supervision of a salmon chief. The salmon chief was a person appointed by general consensus of the tribe to supervise a given tribal fishing area. The ceremony was a

meticulously and soberly conducted event because any neglect or irreligious conduct was considered to threaten or destroy the salmon run, the consequence of which would be famine.

The ceremony itself, more elaborate than any other tribal observance except the winter spirit dance, took place in the spring when the salmon first appeared in great numbers in the river. It involved the ritual catching of the first fish, rigid and elaborate rules for handling it and eating it, the preparation of a sacred kind of soup made from the salmon intestines, and traditional prayers and behavior. The ceremony lasted 5 days.

The basis of religion in the culture of these tribes was the Guardian spirit concept. During youth each person sought a personal tutelary which usually appeared in a vision, speaking as a man but having characteristics of some non-human living thing. The salmon chief nearly always had salmon as a guardian spirit, as did many other Indians as well.

11. Subsistence of the Salish Tribes. Fishing was the most important food gathering activity conducted by the Interior Salish tribes, including claimants. Claimants ate their catch fresh and dried. They stored enormous amounts of dried fish for winter subsistence, and bartered fish with other tribes.

Claimant Indians, especially during winters, supplemented their fish diet with hunting. In other seasons they gathered berries and dug roots. These food sources, however, were never as dependable as fish, which accounted for more than half of their subsistence from time immemorial.

The main fish caught by the claimants in their aboriginal habitats were chinook salmon and steelhead trout. Also available to them were

significant numbers of blueback salmon, some coho, sturgeon, whitefish, suckers, chub, and freshwater trout. None of these, except perhaps for the sturgeon at times, had the significance of the chinook salmon and steelhead. Claimants especially prized the chinook salmon as the finest kind of food, available to everyone, not just families of good fishermen.

12. Principal Fishing Sites of Claimants. In aboriginal times the claimant tribes fished at numerous locations on the rivers and streams that passed through their aboriginal areas. After confinement on the Colville Indian Reservation, the most important fishing locations were on the Columbia River adjacent to the eastern and southern boundaries of the reservation. Exceptions were about four locations up the Okanogan River and at least one up the San Poil River.

Specifically, on the eastern boundary, claimants' main fishing sites were on the Columbia above Kettle Falls, another at Kettle Falls, two south of Sherman Creek below Kettle Falls, one above Hall Creek near a place called Daisy, and one at the mouth of Hall Creek. These locations were in the areas occupied by the Colville and the Lakes. Another, near the San Poil tribal area, was down river from the big bend of the Columbia. Along the southern border there were more fisheries in the San Poil-Nespelem areas, at the mouth of the San Poil, two down-river from there, one at or near where the Grand Coulee Dam is located today, and two at the mouth of the Nespelem River. Other locations were downstream from the Nespelem, and one at the mouth of the Okanogan. The Methows had no fisheries of their own in waters on or adjacent to the reservation. They shared reservation fisheries with other claimants, once they moved

onto the reservation. Of all locations, Kettle Falls was the most productive fishing site used by claimants.

13. Fishing Methods of Claimants. At the main fishing sites the most effective method claimants used to catch fish was the fish trap. A fish trap was a communal weir, the construction of which often entailed substantial danger. The weirs at times completely crossed the smaller rivers. Fish chiefs, whose main duty was to see to an equitable division of the catch, also directed operations of weirs at important sites.

At Kettle Falls huge basket traps were used which yielded tremendous quantities of fish. The basket trap, 10 feet in diameter by 12 feet deep, was hung very near the face of the falls by timbers wedged into the rocks. Fish attempting to ascend the falls dropped into the basket and were then retrieved by the Indians.

There was also extensive individual fishing not only at the primary locations but at countless other locations along the banks and mouths of rivers on or adjacent to aboriginal lands. The methods used included spearing, hooking, netting, weir trapping, and seining.

14. Defendant's Sovereignty Over the Oregon Country. Defendant acquired undisputed sovereignty over the Oregon country by virtue of the treaty with Great Britain of June 15, 1846, 9 Stat. 869. Claimants were resident on their aboriginal lands at the time and immediately became subject to defendant's jurisdiction.

By an 1848 act ^{2/} the defendant, asserting authority over the Oregon country, organized the entire area obtained under the 1846 treaty into the

^{2/} Act of August 14, 1848, 9 Stat. 323.

Territory of Oregon. In an 1853 Act ^{3/} the defendant organized roughly the north half of the Oregon Territory into the Territory of Washington. Claimants were residents of the new territory. In 1859 the reduced Territory of Oregon came into the Union as a state. In 1889 ^{4/} the defendant granted statehood to the Territory of Washington.

15. Provisions of Law Affecting Claimants. In the 1848 act organizing the Oregon country, supra, defendant declared all applicable laws of the United States to be in force in the territory. In section 1 of the act, the defendant, among other things, provided that nothing in the act was to be construed to impair the rights of persons or property then pertaining to the Indians in the territory organized under the act so long as such rights remained unextinguished by treaty. The same section of the act reserved to the defendant the authority to make any regulations respecting Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to do had the 1848 act never been passed.

Section 2 of the 1848 act provided that the rivers and streams in the new territory in which salmon were found, or to which these fish resorted, were not to be obstructed by dams or otherwise, unless such dams or obstructions were so constructed as to allow salmon to pass freely up and down such rivers and streams.

In the 1853 act creating the Territory of Washington, in which claimants lived at the time, the defendant reserved exclusive authority

^{3/} Act of March 2, 1853, 10 Stat. 172.

^{4/} Act of February 22, 1889, 25 Stat. 676.

to itself over the Indians and their property. The appointive governor of the territory was to perform for defendant the duties of Superintendent of Indian Affairs, among other things. The 1853 Act also provided that the laws then in force in the Territory of Oregon were to continue in force in the new Territory of Washington.

Congress, by the Act of June 5, 1850, 9 Stat. 437, authorized the negotiation of treaties with the Indian tribes in the Territory of Oregon to extinguish Indian claims to lands lying west of the Cascade Mountains and to obtain the assent and submission of those Indians to the existing laws regulating trade and commerce with Indians. The act also separated the Office of Superintendent of Indian Affairs for the Territory of Oregon from the authority of the territorial governor. It authorized the appointment of one or more, not exceeding three, Indian agents to assist the Superintendent. In section 5 Congress extended the law regulating trade and intercourse with the Indians,^{5/} or such provisions of the same as might be applicable, so as to cover Indian tribes in the Territory of Oregon.

Congress, by Section 3 of the Act of July 17, 1854, 10 Stat. 305, extended the Preemption Act^{6/} to lands in the Washington and Oregon Territories. The extension applied whether the lands were surveyed or unsurveyed, not rightfully claimed, entered, or reserved under the provisions of the 1854 act, or the acts which the 1854 act amended, or that were excluded by the terms of the Preemption Act, with the exception of unsurveyed townsites or lands settled for business or trade mentioned in section 1 of

^{5/} Act of June 30, 1834, 4 Stat. 736.

^{6/} Act of September 4, 1841, 5 Stat. 453.

the 1854 act.

16. Defendant's Indian Policy Regarding Claimants. Defendant's national Indian policy, which had its beginning years before authority over claimant tribes was asserted, was to restrict the movement of Indians to defendant-sponsored reservations. Lands vacated by Indians under defendant's policy were, almost without exception, settled by white men under defendant's land laws. Another aspect of defendant's policy towards Indians generally was to turn them from the chase, or from the cultures the Indians had, to the more settled ways of white men. Defendant did not exempt claimants from its policy. Soon after the United States sovereignty attached, circumstances began developing that eventually restricted claimants to a reservation.

17. Early Relationships Regarding Fishing Between Claimants and Defendant. Defendant from the time of the earliest of its explorations, and certainly from the time of sovereignty, knew of the Interior Salish fish-related cultures, and, consequently, their dependence on fish. For example, in 1855, the territorial governor reported, among other things, that the main source of food for the Salish Tribes living in claimants' general area was the salmon. This same fact was reported during the same year in Congress.

18. General Course of Dealings. The earliest dealings of officers and agents of the defendant with any of the claimants were conducted with the Colville, Okanogan, and Lake tribes. From the year 1859 on, agents of the defendant charged with administering relations with Indians in claimants' general area reported annually on all claimants. They reported the general location of the lands each occupied, the estimated populations, and, in some instances, the names of chiefs. They also reported the Indians' reliance on subsistence fishing.

In subsequent years, as contact with the white men increased, claimant tribes, theretofore not heavily structured, developed a more centralized political organization for their tribes. The defendant encouraged this and, in dealing with claimants, sought chiefs who could speak for the entire tribe so that negotiations could take place between claimants and defendant's agents and officers.

By the time defendant began the process of restricting claimants to a reservation in implementation of defendant's Indian policy, each of the claimant tribes was represented by a chief, or chiefs, and their authority and capacity were not questioned by the defendant or the Indians. Once confined to the Colville Reservation, and until the Confederated Tribes of the Colville Reservation was organized in the 1930's, defendant continued to deal with and report on each of the claimant tribes as distinct and separate tribes, except for, perhaps, the Nespelem.

19. Discovery of Gold and Extinguishment of Indian Title. On of January 30, 1855, one A. D. Pamburn advised Territorial Governor Isaac Stevens that fine gold dust had been found at Fort Colville, a white settlement on claimants' aboriginal lands near the Columbia River. Records of the defendant's Bureau of Indian Affairs in evidence in Docket 181 as Petitioners' Chronological Series, Exhibits 1 through 448, indicate that, after the report of the discovery of gold, the defendant carried on an intense program to extinguish Indian title to all lands east of the Cascades and west of the Rockies. In May, 1855, Governor Stevens wrote George W. Manypenny, defendant's Commissioner of Indian Affairs, that treaties had already been made with 5,400 Indians of the Washington Territory, and that in May, June, and July of 1855, he expected to meet in council with some 5,000

Indians east of the Cascades to extinguish "the Indian Title to every acre of land in this Territory."

20. Negotiations with Tribes East of Cascades. Agents of defendant met with a number of tribes east of the Cascades beginning in 1855. For example, a council was held in the Walla Walla Valley in May and June of 1855. A journal kept of the proceedings by James Doty, an agent of the Territorial Governor, shows that the Okanogans were present. He reported that he told the assemblage of Indians that the:

. . . President wished to purchase all their country, but one or more tracts of land would be set aside for them to live upon and to belong to them forever. They would be required to live upon the Reservation: there they could build houses and cultivate farms, and no white man should go upon it without consent of the Tribe, Supt. & Agent. The Government would furnish them schools, mills, and shops of various kinds and proper persons to manage the same, for their exclusive use and benefit and without charge to the Indians. The amount to be paid for their lands would be given them in yearly payments of such Goods and provisions as they might desire. The Homestead provision as in the sixth article of the Omaha Treaty was spoken of. Also that their horses and cattle would be permitted to graze upon unclaimed land. That they would have the right of fishing at their usual places in common with the whites, of gathering roots & berries & travelling upon the highways.

The record of the proceedings also shows that several days later a Colville chief showed up to hear what the Territorial Governor had to say. The record also shows that on June 9, 1855, a treaty was made with the Yakima Tribe, and other Salish Tribes, but excluded the Okanogans and Colvilles. The proceedings show that Governor Stevens wished to place on

the Yakima Reservation the Colville, the Oak-kin-a-kanes (Okanogans), and the Pesquouse (Methows), among others. The Governor reported that during the last day of proceedings the Colville and the Okanogans were excluded from those tribes who would be put on the reservation.

In letters of June 14, 1855, and July 11, 1855, the Governor informed Commissioner George Manypenny that arrangements had been made with the Okanogans and the Colville, among others, to meet in council in the fall. Before the fall council could convene, however, hostilities broke out between the Yakima, with other tribes (but not the claimant tribes) joining them, and the defendant.

On December 4, 1855, the Coeur d'Alene and Colville chiefs met with the Territorial Governor in council. He told them what he had said at Walla Walla, and that: "It is for you to say whether you will sell your lands and what you will have for them." The Governor went on to reassure the Indians that they would not be deprived of their rights. No successful bargaining, however, took place and claimants, along with neighboring Indians became "non-treaty" Indians. In May 1856, the Indian agent at Fort Colville wrote the Governor that the Okanogans were well disposed to bargain for a part of their lands.

Other documents from the records of the Bureau of Indian Affairs indicate that a somewhat anomalous situation developed. In a letter of August 30, 1855, the Governor reported to the Commissioner of Indian Affairs that gold fever had

broken out in the region occupied by the Indians not yet dealt with (which would have included claimants), and that adventurers and miners were coming "thither in thousands." The Governor also remarked that this development only made it the more imperative to lose no time in effecting treaties and placing Indians on reservations. Other evidence shows the defendant's military officials and its Indian officials attempting to protect the Indians' rights while the Governor attempted to negotiate with them. Nevertheless, the defendant at the same time opened the area east of the Cascades to settlement by white men who were mostly miners, or related to that activity. They were protected by the military. At this same time, the treaties that had been negotiated, those with the Yakimas, Nez Perce, and Indians of Middle Oregon, went unratified.

21. Report of the Commissioner of Indian Affairs in 1857. A report showing the direction of the course of dealings with the Interior Salish, among whom were claimants, was the 1857 Report of the Commissioner of Indian Affairs. In it he invites attention to the letter of J. W. Nesmith, Superintendent of Indian Affairs in the Oregon and Washington Territories, dated September 1, 1857, wherein the Superintendent reported that the "land laws which permitted the occupation and settlement of both Washington and Oregon Territories, regardless of the rights of the Indians, render intercourse laws, practically, a nullity." He went on to say that this "anomalous condition of things embarrassed the officers of the (Indian) department -- at every step, and renders an increase of agents absolutely necessary to guard and protect the rights of the Indians, and prevent constant collisions between them and their white neighbors." It was useless, Mr. Nesmith continued, to talk about pacifying

the Indians so long as they were recognized by the Government as having rights to the soil; and that as long as those rights remained unextinguished, the Indians regarded the Government as ignoring them, looking upon every white settler as an emissary sent to rob and despoil them of what they claimed as their inheritance. The Superintendent also noted that none of the promises made by the Government had been fulfilled, and that this was a source of constant dissatisfaction and hostile feeling.

In subsequent reports from defendant's agent, Nesmith, account is given of continued deterioration of relations between defendant and the Indians east of the Cascades. Intrusions of white men intensified, and eventually the rights of the Indians who had not made treaties with the defendant were eclipsed by the rush of settlement.

22. Application of Trade and Intercourse Act. During the Civil War controversy rose over whether the Trade and Intercourse Act applied to non-treaty Indians living in Washington and Oregon. The issue centered around the sale of alcoholic beverages to Indians. Agents of defendant's Bureau of Indian Affairs worked towards the application of this law but failed. Settlement by whites continued under the extension of defendant's land laws. In a letter of October 8, 1862, General Alvord, in charge of the military in the Washington Territory wrote J. J. McGilveay, a United States attorney, a telling summary of the conditions that had developed. He reported, among other things, that as to the Colville country, the Donation Act ^{7/} had been in operation

^{7/} Act of September 27, 1850, 9 Stat. 496.

since 1855, and whites were moving in despite the fact that defendant had never extinguished Indian title. He went on to report:

. . . It is certain that the pre-emption law does not authorize settlements where the Indian title has not been extinguished - But it is unfortunately true that the whole early settlement of this Country, both before and after the organizing of a Territorial government and the passage of the donation act was in utter neglect of the Indian title.

I lament this state of things, and know that it probably caused the former Indian wars, and may cause another. I have instructed the military commanders to protect the Indians in the most efficient manner to the extent of their power, from all aggression and violence, and from all encroachments on their grazing and agricultural lands. Our Indian relations in their present attitude are not according to my wishes - Far from it - They grew out of the policy of the government in stimulating the early settlement of this country, and are also due to the gold mines and the irresistible spread of the whites, in the search for gold. 8/

23. Creation of Stevens County. In January, 1863, the Territorial Legislature of the Territory of Washington created and organized the County of Stevens. The boundaries included nearly all of claimants' aboriginal lands. A year later, the Territorial Legislature merged the County of Spokane, established in 1858, with the County of Stevens, with the county seat at Fort Colville. In 1866, the Territorial legislature memorialized Congress to make a treaty with the Indians in Stevens County so that conflicts with Indians might end.

24. Letter of C. H. Hale, Territorial Superintendent of Indians, in September 1863. In September 1863, C. H. Hale, Superintendent of Indian Affairs,

8/ Docket 181, Petitioners' Chronological Documentary Series, Vol. III, Exhibit 200, at 4.

Washington Territory, wrote the Commissioner of Indian Affairs that,

. . . After a year's experience with the study of the workings of the present system of conducting Indian Affairs, I am well satisfied that radical change should be made in our mode of treatment towards the Indians. I do not consider the language as any too strong when I say, that for us to negotiate treaties with them as it is usually done is little better than a farce. We profess by such an act to recognize their equality in status and in power, and to clothe them with a national existence which does not at all pertain to them. Instead of thus exalting them in mere form, they should be treated as they really are, the wards of the government, and as such entitled to the kindest consideration and care at our hands. For the lands necessarily taken from them the government should evince its magnanimity in making ample provision for their protection and welfare. I do not, therefore, propose to have any treaty made either with the Chehalis or Colville or any other Indians within the bounds of this superintendency who have not yet been made parties to any treaty. Whatever may be done for these Indians in the way of providing an agent to take care of and employes [sic] to instruct them in various useful vocations, and furnishing them with agricultural implements, tools, stock, clothing, &c., will be more kindly received by them, and considered as presents and favors, to be given or withheld at pleasure, instead of a consideration which they have the right to expect and demand. In this way, too, we shall avoid the violation of treaty stipulations. Some such course as I have thus indicated will, I believe, be more satisfactory to the Indians themselves, and will in the end be both safe and more economical to the department. ^{9/}

25. Letter of September, 1866, from Agent G. A. Paige to the Bureau of Indian Affairs. In 1865 an Indian agency was established by defendant at Fort Colville with supervision directly over claimants. The agent in charge, G. A. Paige, wrote the Bureau of Indian Affairs in September 1866, about confining the Spokane Indians on the Flathead Reservation, that,

^{9/} Ibid., Exhibit 210

. . . The Spokanes are not the only Indians with which it will be necessary for the Government to treat, but there are other tribes, and bands, living in the north eastern part of this Territory closely allied to them speaking the same language and following the same pursuits whom it will be necessary at no distant day to locate upon a Central Reservation after their right, and title to the Country shall have been extinguished. The Indians, referred to are the "Colvilles", "O'kanagans", "Sanpoels" and smaller bands. All living on the Columbia River and its tributaries west of 117 "Meridian" and numbering about Sixteen hundred souls. All the leading Indians of these tribes are anxious to treat with, and cede their Country to the U. S. Government and their neighbours the Spokanes can be easily included in the same treaty and located on the same Reservation with but little additional expense to Government. None of them however will consent to abandon their "Fisheries" and remain eastward, but they all request that a "Reservation" for them will be established within their own country.

Second. All the above named tribes, and bands, including the "Spokanes" residing in Washington Territory, and draw at the least five-eighths of their subsistence from the "Salmon Fisheries" on the Columbia River and its tributaries. But the Indians living to the eastward of us in Idaho and Montana being wholly cut off from this source of Bounty by the falls of the Spokane and Pend-O'-rielle are widely different in their habitats, and pursuits, from those of Washington Territory. As these falls are both located a little west, of Washington, and Idaho, boundary effectually prevents the run of Salmon eastward in those streams.

Third. There are more than Two thousand Indians under my charge not treated with. Now, even, if they were to consent to give up all their accustomed means of support Relinquish their "Fisheries" Remove to the Flat Head Reservation and become consolidated with Indians of widely different pursuits, some time must necessarily elapse before they could adapt themselves to the new state of things and become self sustaining. Some of them would never. In the meantime the great expense of removing, and subsisting, them, would fall upon the Government, and would far over balance the expense attending the establishment of a Reservation in their own country. 10/

26. Establishment of the Colville Indian Reservation. In 1868, the Superintendent of Indian Affairs for the Washington Territory urged the Commissioner of Indian Affairs to set apart a reservation for the Indians in the Colville District, similar to that established for the Yakimas. A year later, defendant's Commissioner of Indian Affairs stated in a circular letter that the policy of defendant was to localize all the Indians upon reservations to be selected either by the Indians themselves, or for them by the defendant, and that the Indians were to be instructed in agricultural pursuits and the arts of civilized life.

In the 1869 Report of the Commissioner of Indian Affairs, the Commissioner, after pointing out that claimants along with other Indians in the area should not be dealt with by treaty, and that they should be dealt with as wards of the Government, recommended that they be located upon a suitable reservation somewhere south and west of the Colville Tribe's area "near to a favorite salmon fishery, resorted to by thousands of Indians." The Commissioner also recommended that a regular agent be appointed for the claimants and that an arrangement be made with them for a surrender of their lands.

The territorial Superintendent of Indian Affairs wrote the Commissioner of Indian Affairs during the same year, 1869, recommending a reservation "of suitable dimensions, including the fisheries south and west of Old Fort Colville." This would have included Kettle Falls and possibly other fisheries. The same superintendent went on to mention that Kettle Falls was "a favorite salmon fishery, where thousands of Indians resort every year during the

fishing season, and this fact makes the locality all the more valuable as an Indian reservation." There is other evidence in the record corroborating the recognition by defendant through its agents of the fishing activities of claimants as a factor in creating the reservation.

27. Controversy Regarding Location of the Reservation.

The claimants were not consulted or formally treated with regarding their fishing, or the establishment of a reservation prior to the establishment of the 1872 reservation. Despite that, great controversy arose over the location of the proposed reservation. The controversy was primarily between defendant's agents. Certain agents of defendant, especially those in direct charge of claimants, recommended that the best reservation for the Indians would be one carved out of the claimants aboriginal lands west and north of the Columbia river. Such a reservation, they argued, would include the most important fisheries. The area they proposed also included land west of the Okanogan River, and a strip of land east of the Columbia at Kettle Falls. This was to protect claimants' most productive fishing sites as well as to include within the reservation Indians who had long been settled in permanent homes near the rivers.

Other agents of defendant, including some high in defendant's governing structure, wanted entirely different lands east of the river for claimants. This land was more arable, they contended, and had adequate fishing to sustain claimants. This group won out initially, when defendant, by the Executive order of April 8, 1872, set aside lands east of the Columbia River in the northeast corner of the Washington Territory as claimants' reservation.

28. Rejection of the April 8, 1872 Reservation. Claimants rejected outright the lands selected east of the Columbia. They refused to consider moving voluntarily from their aboriginal lands. Their agent-in-charge reported that their main objections were that the site chosen was not carved out of their home lands, and that they were to receive no compensation for lost lands.

White men in the region also protested. Many of them were already permanently settled east of the Columbia, engaged in mining, or other pursuits, and did not want to give up any lands in use by them to the Indians.

29. The Executive Order of July 2, 1872. Defendant, reacting to the protests and rejection of the site chosen in the April 8, 1872, Executive order, issued the Executive order of July 2, 1872, rescinding the first selection. The new order provided that in lieu of lands east of the Columbia river, the Indians would be given lands west and north of the Columbia river as their reservation. The new reservation was carved mostly out of their aboriginal lands, and included most of what defendant's agent-in-charge had recommended. The new reservation was bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the boundary with Canada. The land west of the Okanogan River, and the strip of land east of the Columbia near Kettle Falls, originally recommended to be included in the reservation by the Indian agent in charge of claimants, were not included.

For years after the final selection of reservation lands made in the July 2, 1872, Executive order, agents in charge of claimants tried unsuccessfully to have the boundaries changed so as to include a six-mile wide strip of land east of the Columbia near the Kettle Falls, and a strip west of the Okanogan River. The agents recommended and wanted these lands not only to protect Indians permanently settled in these two small tracts, but also to protect claimants largest fisheries in those areas.

30. Relations after the Establishment of the 1872 Reservation. The July 2, 1872, reservation was established for the same eight tribes included in the earlier reservation east of the final reservation tract. These were claimants and the Calispel, Spokane, and Coeur d'Alene tribes. The non-claimant tribes were never moved on to the reservation, but were later placed on other reservations.

The Executive order gave the Secretary of the Interior, the highest placed agent of the defendant charged with the administration of Indian affairs, authority to locate such other Indians on the reservation as he saw fit. The Secretary later located the Columbia, Wenatchee, Chelan, and Entiat tribes on the reservation.

Defendant, through its agents directly in charge of claimants, encountered great difficulty in removing to the reservation claimant tribesmen who lived outside of the reservation boundaries. The main source of difficulty was their reluctance to vacate their aboriginal lands and fishing locations. The process of removal was not completed until 1892. Once removed to the reservation, the formerly off-reservation claimants continued to fish and make use of their catch as the main source of their subsistence.

31. The Agreement of May 19, 1891. In accord with defendant's Indian policy, Congress enacted the Act of August 19, 1890, 26 Stat. 336, 355, and appointed a Commission to negotiate with the Indians of the Colville Reservation regarding reservation land which the Indians might be willing to dispose of. An agreement was entered into on May 19, 1891, subject to ratification by

Congress, ceding the north half of the reservation. This was the first written agreement of any kind ever participated in by claimants with defendant.

Much dissatisfaction from the Indians erupted over the May 19, 1891, agreement. Because of past grievances against the United States, the San Poil and Nespelem protested entering into any agreement of any kind with defendant and they refused to sign the one proposed in May, 1891. They also argued that many of those who did sign, had no authority to do so. The Treaty Commissioners reported, however, that out of the 685 male Indians over 18 years of age on the reservation, 506 signed the May agreement.

Article 6 of the agreement provided, among other things, that the right of the claimant tribes to hunt and fish in common with all other persons on lands not allotted to the Indians would not be taken away or in any way abridged.

32. Special Fishing Rights. Under the foregoing circumstances, the Commission concludes that claimants possessed special fishing rights to take fish in the rivers running through or adjacent to their aboriginal lands, and that once they were confined to the Colville reservation such rights continued uninterrupted and unimpaired.

The Commission further concludes that the establishment of the 1872 reservation in the context of the circumstances outlined in the foregoing findings carried with it, in addition to any aboriginal aspect of fishing, the establishment of special rights to take fish in the waters on or adjacent to the reservation.

33. Diminution of Fish-Development by Commercial Fishing. Commercial fishing existed on the lower Columbia River as a significant enterprise as early as 1861. The development of the industry was centered near the estuary of the Columbia River. The first fish cannery began operations in 1866 and by 1883, the number of canneries had reached 39.

In 1872, the total catch for the industry was about 17 million pounds of fish. The catch reached a peak in 1883 with a catch of over 42 million pounds. Thereafter, yearly production varied. In 1887, for example, the catch dropped to 24 million pounds. Two years later, the catch reached a low -- only 21 million pounds were caught. Production was back up in 1894 to 33.3 million pounds, and in 1895 a new high was hit of over 43 million pounds. Thereafter, another decline set in and by 1899 another low was reached.

Catches continued in cycles over the subsequent years. By 1910, for example, production had risen gradually from the 1899 low to just over 35.3 million pounds. The next year, 1911, was a new all-time high with annual production rising to 49,480,008 pounds of fish. In the years following 1911, production continued to vary, from highs in the 40 million pound bracket to lows below 30 million pounds. The cyclical catch pattern, after a high of 42 million pounds in 1925, however, went into a general decline, and by 1943 reached a low of less than 15 million pounds of fish caught.

In the early years, the commercial fishing industry caught mainly spring and summer chinook. These fish were highly marketable by the commercial fishermen. They were also the largest and the most numerous fish. Commercial interests also caught steelhead in great numbers. This had an early effect on the claimants' upper river fisheries because the chinook and steelhead were the most numerous of the fish caught by claimants. Later, as the fish declined and demand increased the fishing industry took all types of salmon.

34. Government Regulation of Fishing. Government regulation of the fishing industry began as early as 1866 by the State of Oregon and defendant's Washington Territory. These two jurisdictions established a fishing season and gear regulations. Other regulations followed, and by 1919 defendant authorized a fishery compact between Washington and Oregon that permitted joint efforts for the regulation, protection, and preservation of fish in the Columbia River over which both states had concurrent jurisdiction, and in other waters within either state which would affect that concurrent jurisdiction. 40 Stat. 515. The states continue as the prime regulators to the present day. The regulations, insofar as they are revealed in the evidence, were primarily for the conservation and preservation of anadromous species, and not for the direct benefit of claimants.

The defendant, through its agents, made attempts to assist the states in conservation with studies, surveys, and reports to Congress. At no time, did defendant represent to the states or to the commercial fishing industry, that it had any interest in protecting the Indian

claimants' fishing rights. In fact, defendant did nothing to protect such rights.

35. Diminution of Fish-Development in the Pacific Northwest.

The Pacific Northwest began accomodating white settlers almost immediately after defendant assumed sovereignty over the area in 1846, years before defendant established a reservation to confine claimants. The settlement of the Pacific Northwest during the 1860's furnished a ready market for the commercial fishing industry, then in its infancy.

The development of the Pacific Northwest and the towns or settlements there included the development of mining, lumbering, and farming in the Columbia River area. These activities affected the spawning grounds of the anadromous fish. Studies made by defendant and state authorities, especially of the Okanogan River spawning areas, show that the waters of the Columbia and the Okanogan, were affected by run-off of chemicals from mines and mills. Other evidence indicates that lumber cutters, farmers and others clearing the lands, cut away foliage over spawning waters which protected the natural conditions conducive to spawning. There is also evidence indicating that settlers dammed up tributary streams of the Columbia for irrigation purposes.

All of the foregoing developments contributed to the decline of anadromous fish in claimants' waters. There is no evidence in the record to show that defendant did anything to protect claimants against the

harmful effects, the general development of the area had on claimants' fishing activities.

36. Dam Construction in the Columbia River. On June 10, 1920, Congress passed the Federal Water Power Act, 41 Stat. 1063. This act created the Federal Power Commission with broad powers, inter alia, to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, and other projects necessary or convenient for the development, transmission, and utilization of power across, along, from, or in any of the navigable waters of the United States. Congress also authorized an enormous federal dam building program around this time. As a result of these developments, several dams were built on the Columbia River which affected claimants' fishing rights.

The Federal Power Commission, on January 20, 1930, issued a license to the Washington Electric Company, a private utility company incorporated under the laws of the State of Maine, to build the Rock Island Dam on the Columbia River some 453 miles from the Pacific Ocean. In 1933, the defendant itself, as a federal project, began building the Bonneville Dam in the Columbia about 145 miles from the Pacific Ocean. In the same year the defendant began building the Grand Coulee Dam on the Columbia some 653 miles from the ocean.

37. The Rock Island Dam. The Rock Island Dam was completed in 1933. It impounded waters of the Columbia River to a level 51 feet above the low-water level of the river. The Federal Power Commission, among other things, required that the licensee provide free passage for . migrating fish both up and down the river during construction to safeguard fish life and propagation in accordance with plans approved by the Secretary of Commerce. The licensee built two fish-ladders under plans approved by the Secretary, and completed them by the beginning of the 1932 runs.

The blueback salmon readily found the ladders and arrived upstream in good condition, though delayed and in fewer number. The blueback, however, spawned for the most part below the Colville reservation, mainly in spawning grounds adjacent to or below the Okanogan River.

The chinook and steelhead, the most plentiful fish relied on by claimants for subsistence, had great difficulty in passing the dam or in using the ladders. They preferred the swifter waters of midstream where no fish ladders were built. The blockage resulted in a serious drop in anadromous fish passing through claimants' best fisheries at Kettle Falls and on the San Poil. The extent of the drop is illustrated by a table of chinook catches recorded for Kettle Falls for years before and after the dam was completed, based on an eyewitness account, as follows:

NUMBER OF CHINOOK REACHING KETTLE FALLS 1929-1934

Year	No. of Chinnok Caught	Average	Year	No. of Chinook Caught	Average
1929	1,353)		1932	400)	
))	
1930	1,000)	1,284	1933	263)	267
))	
1931	1,500)		1934	139)	

The problem regarding the chinook and steelhead was solved somewhat when defendant required the licensee to install a third fish ladder to accomodate the swift water fish. This ladder, opened in 1938, partially restored the chinook and steelhead runs thereafter. This was, however, of little help to claimants' main fisheries at the San Poil and Kettle Falls, because a new dam, the Grand Coulee, being built at that time about 40 miles upstream from the mouth of the Okanogan, would close off forever the runs of all anadromous fish to claimants' fisheries after 1939.

38. The Bonneville Dam. The defendant began building the Bonneville Dam in 1933. The location was astride the Columbia River about 500 miles downstream from the claimants' reservation. Its height was such that it was to impound water to a level of 59 feet above normal. Great public concern was expressed over the possible destructive effect on the fish life of the entire Columbia River basin above the dam. This area accounted for propagation of about 75% of the anadromous fish population.

In response to this concern, the defendant and state authorities employed able biological and engineering skill to investigate the

requirements for fish protection. The United States Fish and Wildlife Service, the Washington State Department of Fisheries, the Oregon Fish Commission, and the Army Corps of Engineers engaged in extensive cooperative efforts to devise a solution to the anticipated loss of fish because of the dam.

The defendant alone expended \$6,500,000 for fish protective devices in 1937, and many more millions in later years for maintenance, operation, and other purposes, related to fish protection. The devices succeeded in passing upstream large numbers of anadromous fish. Losses were not in excess of 4%. The Bonneville Dam had little effect on claimants' fishing.

39. Grand Coulee Dam. The defendant began building the Grand Coulee Dam on the Columbia River in 1933, and completed it in 1940. Defendant anchored one end of the dam on claimants' reservation at a point about 40 miles upstream from the mouth of the Okanogan River. By 1939, the structure reached a point in construction that ended forever the upstream migration and spawning of anadromous fish above the dam, and the downstream migrations of fry. The dam impounded water to a level 370 feet above low water and was built without fish ladders because it was impractical to do otherwise.

40. Claimants' Protests and Defendant's Responses. Correspondence and other information in the record of this case indicate that claimants protested the diminution of anadromous fish at their reservation almost continually from the early peak years of the commercial fishing industry to recent times. Most of their concern was expressed in messages to their

superiors in Washington, D. C., by defendant's Indian agency representatives who were responsible for the welfare of claimants under defendant's policies.

Defendant's responses failed to develop efforts to preserve the large number of fish that the claimants wanted restored to the waters on or adjacent to their reservation.

Claimants protested dam building as early as 1924 when the superintendent of schools on the reservation, an agent of defendant representing the interests of the Indians on the Colville reservation, wrote his superiors in Washington that if a proposed dam at Priest Rapids, far downstream from the reservation, was erected to a height of 90 feet, fishing would be wiped out, and he recommended that defendant give indemnity to the Colville Indians for the destruction of a material food supply.

Claimants subsequently protested the building of each dam along the Columbia River that they thought would damage the already depleted fishing resources available to them. In January 1932, the Colville Indians wrote the defendant's Commissioner of Indian Affairs asking for information on the proposed Grand Coulee Dam because of fear that the dam would destroy their ability to fish at Kettle Falls and at Keller (San Poil) fisheries. The Indians, according to the letter, were under the impression that they had treaty rights to catch fish at Kettle Falls.

The Indians also petitioned defendant's Corps of Engineers in 1932 to protest the proposed Grand Coulee Dam because it would destroy the fisheries at Kettle Falls and in the San Poil River, thus depriving the

tribes of an important source of food. Other correspondence in the record indicates that reservation agents of defendant who represented the Colville Reservation Indians, among whom were claimants, fully informed other agents of defendant such as the Corps of Engineers and the Bureau of Reclamation, of the damage the building of the Grand Coulee Dam would do to claimants' fishing and to their food supply. The defendant's Commissioner of Indian Affairs wrote in April, 1932, to the Commissioner of the Bureau of Reclamation, also an agent of defendant, regarding the protests from the Indians, and urged that the fishing rights of these Indians be considered.

The Commissioner of the Bureau of Reclamation responded that due consideration would be given to the fishing rights of the Indians. Defendant's agents eventually concluded, however, that the Indians had no legal rights to fish other than those held in common with white men, and no redress was made. Defendant's agents also decided that it was impractical to attempt to save fish spawning grounds above the proposed Grand Coulee Dam, but that efforts should be made to transfer spawning to grounds below the dam.

Subsequent protests made by the Indians of the Colville Reservation related to the above adverse decisions and requested compensation. The Indians also attempted to obtain a special jurisdictional act from Congress to get redress for, among other grievances, the loss of their rights to fish. All their efforts failed.

41. Protests of Others and Defendant's Response. The prospective effect of the impassable fish barrier to be formed by the proposed Grand Coulee Dam generated strong public protest over anticipated losses of fish. Protests were most intense from the commercial fishing interests who operated fisheries downstream from the dam and from the states of Washington and Oregon who regulated fisheries.

From the very onset of the Grand Coulee project, the defendant's agents responsible for fish protection began responding to complaints with plans and studies designed to save the fish. Beginning in 1933, defendant's agents made extensive studies, some in cooperation with the states of Washington and Oregon, regarding this problem. As a result, numerous reports, memoranda, and other documentation were produced over the following years bearing on defendant's problem of fish protection. The main ones are described below.

42. The Report of the Preliminary Investigations into Possible Methods of Preserving the Columbia River Salmon and Steelhead at the Grand Coulee Dam. In 1938 a "Report of the Preliminary Investigations into Possible Methods of preserving the Columbia River Salmon and Steelhead at the Grand Coulee Dam" was prepared by the State of Washington, Department of Fisheries, in cooperation with the defendant.

The preliminary report stated, inter alia, that the proposed dam would eliminate access to 1140 linear miles of spawning and rearing

areas, 279 miles of which lay between the dam and the boundary with Canada, and 861 miles of which extended into Canada itself. The purpose of the report was to propose a method for the preservation of these runs of fish.

The proposed solution was to transfer spawning from above the dam to areas below the dam. The areas chosen already supported an anadromous fish population, and had a small capability compared to that of the spawning areas upstream from the dam. The successful operation of the plan depended on the chosen areas being in the best possible condition for the reproduction of salmon. The report, however, observed that such was not the case.

The preliminary report indicated that most of the spawning grounds below the Grand Coulee were not in condition to accomodate the project, and in many instances not susceptible to rehabilitation. Irrigation, mining pollution, change in water temperatures, erosion, and other deterring factors brought on by the rush of white men's civilization accounted for most of the conditions.

The report gave extensive consideration to conditions in the Okanogan River which formed claimants' western border. Most of its ability to accomodate anadromous fish spawning had been destroyed.

43. The Secretary of the Interior's Board of Consultants. After issuance of the 1938 preliminary report, the Secretary of the Interior, an agent of the defendant who, among his many duties, was in charge of

Indian Affairs, appointed a board of consultants in October 1938, to work on the fish problems of the Upper Columbia River. The board, among other things, reviewed the progress of the plan presented by the preliminary report, made findings regarding it and other factors dealing with the fish problem, and reported back to the Secretary. Their report, dated February 8, 1938, contained two sections.

The first section of the Board's report dealt with the immediate need for temporary action to take care of the 1939 fish runs, and with certain features of the general plan implemented after the issuance of the preliminary report (finding of fact No. 42, supra). This meant that the fish expected for the 1939 run would be lost to claimants because the dam would have obstructed the river forever by that time.

The board estimated that 90 percent of the fish reaching the Rock Island Dam would have spawned beyond the Grand Coulee Dam. The Board also found that to develop spawning grounds in the areas below the Grand Coulee (the Methow, Entiat, Wenatchee, and the Okanogan Rivers) presented problems that could not be overcome immediately.

The only other portion of the report affecting claimants' situation concerned steelhead trout. The Board recommended that, since steelhead was a popular game fish, a game fish hatchery should be built to raise other species of trout to replace the steelhead destroyed by the Grand Coulee Dam. These substitute fish, of course, were to be land-locked, not anadromous fish. The board made no mention of the subsistence

catch by Indians of anadromous steelhead trout. It concerned itself only with the recreational aspect of trout fishing.

44. Board of Consultants' Report - Section II. The second portion of the Board of Consultants' report was submitted to the Secretary of the Interior on March 9, 1939. It approved the plan presented by the preliminary report. Essentially, this plan was to relocate the runs of fish that naturally spawned above Grand Coulee to the four tributary streams between the Rock Island Dam and the Grand Coulee Dam, and to rehabilitate conditions in those streams. The Board considered the fish problem only in relation to commercial and sporting interests and at no time mentioned the claimants' fishing rights.

45. The Grand Coulee Fish Salvage Program -- Subsequent Developments. The Secretary of the Interior approved the preliminary report plan with certain amendments, and it became known as the Grand Coulee Fish Salvage Program. The program was subsequently implemented and reviewed by various agencies of the defendant. In a 1947 report from the Bureau of Reclamation to the Secretary of the Interior, the Bureau reported that the implementation of the salvage program began with portions of the 1939 run, and then noted a drastic drop in anadromous fish runs for the following years. In 1943 the relocated runs began to increase, and have done so every year since. None of the increasing runs have restored to claimants the fish previously available to them.

46. Conclusory Finding on Liability. The Commission concludes from the foregoing findings, the evidence, and the entire record in this case that the defendant, in its special relationship with claimants regarding fishing rights, failed to protect those rights. Defendant is liable to claimants under clause 5 of section 2 of the Indian Claims Commission Act, supra, for the loss of subsistence experienced when, of defendant's actions and neglect, claimants were no longer able to fish successfully in the waters on or adjacent to their reservation.

47. Claimants' Calculation of Damages -- Generally. Claimants request total damages in the amount of \$13,526,097. They divide damages into two aspects: (a) damages resulting from defendant's allowing others, during the period from 1872 to 1939, to take excessive quantities of anadromous fish downstream so that sufficient fish to satisfy claimants' special rights did not reach their fishing grounds on and adjacent to the Colville reservation; and (b) damages for the post-1939 virtual elimination of runs of anadromous fish to claimants' fishing grounds above the mouth of the Okanogan River, resulting from defendant's construction of dams and defendant's other activities on the Columbia River during the period from 1930-1941.

48. Claimants' Proposed Damages for 1872-1939 Period. In support of proposed damages for the 1872-1939 period, claimants relied on information furnished by their three expert witnesses: Dr. Verne Ray,

an anthropologist; Dr. David L. Koch, a fish biologist; and Dr. Henry Vaux, Jr., a natural resources economist. These experts were offered to show (a) the quantity of anadromous fish the Columbia River system was capable of producing on a sustained yield basis from 1872 through 1930; (b) the quantity of such fish historically present annually in the claimants' fisheries on and adjacent to the Colville Reservation; (c) the quantity of such fish the Indians historically took from their fisheries; (d) the reduction in the quantity of fish available in such fisheries during the period from 1872 to 1939 resulting from commercial overfishing downstream; and (e) the claimants' conception of damages sustained by them as the result of such reduction. These factors are outlined as follows:

(a) The quantity of anadromous fish the Columbia River system was capable of producing on a sustained yield basis: To compute the quantity of anadromous fish the whole Columbia River system was capable of producing on a sustained yield basis, claimants relied on Dr. Koch's testimony. Dr. Koch began with the annual commercial catch statistics, compiled by defendant's agents for each species of Columbia River anadromous fish for the period 1866 through 1972, and calculated the average quantity as follows:

Chinook salmon	25,182,000 lbs. annually	
Blueback salmon	848,000 "	"
Coho salmon	2,895,000 "	"
Steelhead trout	1,468,000 "	"

(b) The quantity of anadromous fish historically present annually in claimants' fisheries on and adjacent to the Colville Reservation.

Claimants, to determine the quantity of anadromous fish historically present annually in claimants' fisheries on or adjacent to the Reservation, again relied on Dr. Koch's testimony. Dr. Koch considered the individual species of anadromous fish using the Columbia in relation to the type and availability of spawning and rearing areas in the entire Columbia River system.

He reduced his findings to percentages. He found that 11 percent of the Columbia's chinook, 15 percent of the bluebacks, 1 percent of the coho, and 5 percent of the steelhead spawned above the Grant Coulee Dam. He also found that 20 percent of the bluebacks spawned in the Okanogan River. Dr. Koch computed the poundage of the up-river spawners. He assumed that the commercial catch excluded a one-third escapement population necessary for the perpetuation of the various species. He found that, less escapement, there were 2,770,000 pounds of chinook, 423,000 pounds of blueback; 39,000 pounds of coho; and 101,000 pounds of steelhead, or a yearly average of 3,333,000 pounds of fish passing through claimants' fishing waters. If escapement population was added, the figure rose to about 5 million pounds of fish per year. These figures, based primarily on commercial catch records, represent, according to Dr. Koch, the fish historically present annually in claimants' fisheries.

(c) The quantity of anadromous fish the Indians historically took from their fisheries: Claimants concede that the reservation Indians did not take all of the fish that were historically present annually in their fisheries. To compute an historical catch, Dr. Koch resorted to the testimony of Dr. Verne F. Ray, claimants' expert anthropologist, to establish that salmon and steelhead provided about 50 percent of claimants' sustenance annually; that the average consumption of fish was one pound per day per Indian; and that average population of all nine tribes on the Colville Reservation from 1872 through 1939 was about 6,500.^{11/} These population figures are higher than those reported by government agents in charge of the nine tribes on the reservation during the period 1872-1939 because, claimants contend, not all of the Indians were counted. Dr. Koch then computed an historical annual harvest of about 2,373,000 pounds of fish for the Indians or about 47 percent of the total fish calculated to be annually present in reservation fisheries. Dr. Koch rounded the result to 2,350,000 pounds of fish annually.

(d) The reduction in the quantity of fish available in claimants' fisheries during the period from 1872 to 1939 resulting from commercial overfishing downstream: To lay a foundation for showing the reduction in the quantity of fish available in claimants fisheries from

^{11/} In addition to claimants, the nine tribes included the Columbia, Wenatchee, Chelan, and Entiat Tribes added to the reservation by defendant after 1872.

1872 to 1939. claimants reviewed the evidence placed in the record of this case showing the phenomenal growth of the commercial fishing industry, and referred to evidence showing the resulting impact on the up-river Indians. As for the impact on the up-river Indians, claimants showed that as early as 1877 they were suffering a lack of food because of the depletion of fish by the down-stream commercial fishing. They also referred to other evidence showing depletion into the 1930's. Most notable of the species diminished, according to Dr. Koch, was the chinook, which was by far the most important fish to claimants.

Dr. Koch attempted to quantify the effect of commercial fishing on claimants' fisheries by taking the commercial catch records for each species of anadromous fish, and applying the percentages of such catches that represented Okanogan and up-river Columbia spawners to determine the quantities of fish that would have been available in claimants' fisheries had the fish not been removed by commercial fishing. Dr. Koch's calculations, figures in five-year increments, produced a total of almost 200,000,000 pounds of fish from the Colville Reservation waters removed by the commercial catch over the years, as follows:

<u>Year</u>	<u>Fish Attributable to Colville Fishing Areas Removed by Commercial Catch</u>
1866-1870	359 *
1871-1875	1,578
1876-1880	2,753
1881-1885	3,464
1886-1890	2,310
1891-1895	3,332
1896-1900	3,710
1901-1905	3,502

* Numbers are presented in thousands of pounds.

<u>Year</u>	<u>Fish Attributable to Colville Fishing Areas Removed by Commercial Catch</u>
1906-1910	2,874
1911-1915	3,413
1916-1920	3,774
1921-1925	3,023
1926-1930	2,693
1931-1935	2,226
1936-1940	2,050

(e) The damages sustained by the Indians as a result of the reduction of fish normally in claimants' fisheries: Claimants at this point bifurcate their reasoning in calculating money damages they contend were sustained by them as a result of the overfishing downstream by the commercial fisheries. They reason that the excessive downstream fishing not only diminished the quantity of fish available to them each year, but that the escapement necessary to perpetuate the fish population in their fisheries did not take place in some years. This, claimants argue, also is a loss to them.

To calculate the first of these two different losses, Dr. Koch began by establishing an actual fish catch by claimants for each of the years from 1872 through 1939. To do this, he merely subtracted figures arrived at in the table above, reproduced as Column (B) in the table below, from the 5 million pounds of fish historically available annually in reservation waters that he calculated earlier. The results of his calculations are reflected in Column (C) in the table below.

Dr. Koch's next step was to compute a loss of fish. He did this by subtracting the actual catch (the figures in Column (C)) from the 2,350,000 pound historical catch previously established. (The historical catch represents what the Colvilles annual catch would have been had there been no depletion down through the years.) The results of these calculations are represented in Column (F) in the following table, and when expanded out of the five-year increments represented come to over 93.5 million pounds of fish lost over the 67-year depletion period.

To compute the escapement loss Dr. Koch reasoned that depletion of the escapement population occurred whenever the total number of fish removed from the Colville fisheries (Column (B) plus Column (C)) exceeded 3,333,000 pounds of fish annually. The 3,333,000 pounds represents the fish available to be caught in the reservation waters (i.e. 5,000,000 pounds less one-third escapement for preservation of the species). The results of Dr. Koch's calculations are shown in Column (I) of the following table, and when expanded out of the five-year increments add up to a loss of almost 40 million pounds of fish.

FIVE-YEAR INCREMENTAL CATCHES AND LOSSES
OF THE COLVILLE CONFEDERATED TRIBES

Year	Fish Attributable to Colville Fish- ing Areas Removed by Commercial Catch (B)	Fish Actually Caught by the Colvilles (C)	Fish lost to the Colville Catch (F)	Depletion of Escapement Population by Commercial Fishery (I)
1866-1870	359*	2181*	169*	0*
1871-1875	1578	1608	742	0
1876-1880	2753	1056	1294	476
1881-1885	3464	722	1628	853
1886-1890	2310	1264	1085	241
1891-1895	3332	784	1566	783
1896-1900	3710	606	1744	983
1901-1905	3502	704	1646	873
1906-1910	2874	999	1351	540
1911-1915	3413	746	1604	826
1916-1920	3774	576	1774	1017
1921-1925	3023	929	1421	619
1926-1930	2693	1084	1266	444
1931-1935	2226	1304	1046	197
1936-1940	2050	1386	964	103

* Numbers presented in thousands of pounds.

By expanding the five-year incremental loss figures of fish in Columns (F) and (I) for the years 1872-1939, Dr. Koch concluded that the total losses to claimants over the 67-year period came to 133,621,000 pounds of fish.

To convert this enormous fish loss into terms of money, claimants rely on Dr. Vaux. Dr. Vaux, in his testimony, took the poundage loss above and multiplied it by a "raw salmon" price he established. To establish his price, Dr. Vaux testified that the price of raw salmon for packers

during the period 1889-1892 was 43 percent of the price of packed salmon. Using this percentage factor, Dr. Vaux then computed the price of raw salmon for each of the years during the period 1872-1939. His computations came to \$4,829,770 attributable to loss of catch, and \$1,946,560 attributable to loss because of depletion of escapement population, or a grand total of \$6,776,330, the amount claimed by claimants for the 67-year period.

49. Claimants' Calculation of Damages for the Post-1939 Period.

The approach used by the claimants for this period to calculate damages for the total loss of their fisheries due to the building of the Grand Coulee Dam, was to capitalize the value of an annual catch at an appropriate interest rate. Claimants' witness, Dr. Vaux, also made these calculations for claimants.

Dr. Vaux started with Dr. Koch's testimony that the Colvilles would have taken 2,174,925 pounds of fish from the upper Columbia in 1939 had there been no depletion of the anadromous fish runs in prior years. Dr. Vaux then multiplied this poundage by his "raw salmon price" of 9 cents for 1939. He established this price in the same manner as he established prices over the 67-year period, as explained earlier in these findings. His result came to \$195,743.25

Dr. Vaux then established an interest rate of 2.9 percent to capitalize his annual income figure. This interest rate is the same as the

yield on long-term federal bonds in 1939. Dr. Vaux concluded that the investment needed to return \$195,743.25 in perpetuity at an interest rate of 2.9 percent was \$6,749,767, the amount claimed for this phase of damages.

50. Defendant's Calculation of Damages. Defendant calculated no damages due claimants because of losses from 1872-1939 on the ground that none had been proved. Defendant proposed a measure of damages as of 1940, the first year that claimants experienced a total lack of fish above the Grand Coulee Dam. Defendant relied upon its expert, Mr. Bernard C. Meltzer, a qualified appraiser, for this phase of its case.

In his approach, Mr. Meltzer sought to determine what income the Indians, as fair market sellers or lessors, would have received had they sold or leased fishing rights in the waters on and abutting the Colville Reservation to a ready, willing, and able buyer. Mr. Meltzer's first step was to establish an estimate of the Indians' total actual annual catch at the Kettle Falls fishery. Using Kettle Falls catch records for the years 1929-1938, Mr. Meltzer concluded that the Indians total catch in 1930 did not exceed 2,055 fish. He chose 1930 as the year to begin his calculations because that year coincides with defendant's contention as to when the federal Government actually came upon the Columbia Basin scene.

The next step was to establish a price of salmon. Mr. Meltzer reached a price of 20 cents a pound in 1940. His basis was the average prices of Columbia River canned salmon from 1910-1946 taken from the Pacific Fisherman Yearbook, 1947. This price, 20 cents per pound, would have included all the labor, capital, risk, entrepreneurial skill and marketing costs required to market salmon at wholesale.

Mr. Meltzer then established an average weight of 22 pounds each for salmon caught in the Columbia. By multiplying the average weight by the number of fish caught, 2,055, Mr. Meltzer arrived at the total catch value of \$9,042 for 1940.

Mr. Meltzer reasoned that the owner of fishing rights, unless he planned to go into the fish business, would not have received the catch value had he sold the rights. Mr. Meltzer testified that the owner would have received a royalty based on the fair market value of the resource.

To determine an appropriate royalty rate, Mr. Meltzer considered the one-eighth standard royalty for oil and gas then prevalent, and the more recent 20 and 25 percent for especially productive oil lands; the royalty figures typical for sand and gravel resources which ran between 10 cents to 25 cents a ton, or from 4 to 7 percent; and royalties for other natural resources having a higher unit value such as metals, or minerals, where royalties of up to 10 percent were common. Mr. Meltzer concluded that salmon, assumed by him to be a

valuable resource, commanded a premium royalty of 15 percent. Mr. Meltzer then concluded that the royalty income claimants would be entitled to annually was 15 percent of \$9,042, or \$1,356.

Mr. Meltzer's final step was to capitalize the proposed annual income royalty at applicable money rates. He reviewed Federal Reserve discount rates of 1 percent; and yields on high grade municipals of 2.5 percent, U. S. Government bonds at 2.26 percent, triple A bonds (Moody's) at 2.84 percent, industrial bonds at 5.3 percent, railroad bonds at 5.41 percent, and utilities at 5.99 percent. Mr. Meltzer considered these rates to be for high grade financial situations with minimum risk. To reach a final discount rate for a fishing right royalty income Mr. Meltzer began with a mean, safe rate of 4 percent, then doubled this to 8 percent because of the economic risk he associated with the fish business, then added an additional 1 percent for non-liquidity of the fishing right asset, and another 1 percent for management (for time and money spent by an owner of an asset in protecting his investment), to reach a final rate of 10 percent.

Mr. Meltzer capitalized the annual royalty income of \$1,356 at 10 percent, or \$13,560. He rounded this figure to \$13,600, the sum he calculated to be the damages, or value lost, by claimants due to the building of the Grand Coulee Dam.

51. Commission's Computation of Damages. The Commission finds no ascertainable fish losses by claimants during the depletion period, 1872-1939; and, consequently, calculates no damages for that period.

The preponderance of evidence establishes that the average consumption of fish by the Indians of the Colville Reservation was, prior to any depletion that took place, about a pound a day per tribesman. The population of the claimants in 1940 was about 2,677 tribesmen. That many tribesmen would have consumed a total of 977,105 pounds of fish that year had there been no depletion.

The average price for fish at wholesale in 1940 was about 20 cents a pound, as established by defendant's expert, Mr. Meltzer. The Commission finds that if claimants had to replace the lost fish in 1940 with market purchases, such purchases would have been made at wholesale similar to purchases by institutional buyers at the 20 cents per pound price. The subsistence value of claimants' fishing rights as of 1940 would have been the 20 cents price times the annual catch of 977,105 pounds, or \$195,425.

The Commission finds that a reasonable capitalization rate for an annual subsistence income from fish in 1940 is 6 percent. An investment necessary to produce annually \$195,425 at a 6 percent rate is \$3,257,083.

CONCLUSIONS OF LAW

Based upon the foregoing findings, the evidence of record, and the law, the Commission concludes as a matter of law that:

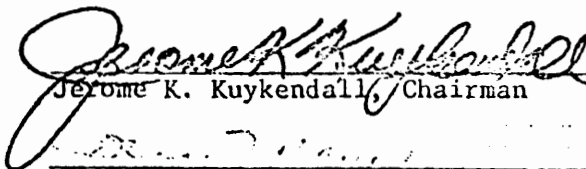
1. Claimants, each of whom is a tribe, band, or identifiable group of American Indians residing in the United States, had a "special relationship" with the defendant by virtue of the course of dealings between the defendant and the claimants regarding their subsistence fishing in the waters on or adjacent to the Colville Indian Reservation in the State of Washington;

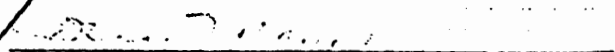
2. As a result of this special relationship the defendant was morally obligated under clause 5 of section 2 of the Indian Claims Commission Act to protect claimants in their fishing from the time the defendant placed claimants on the Colville Reservation;

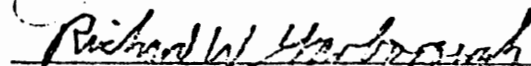
3. The defendant is liable under clause 5 of section 2 of the Indian Claims Commission Act for ascertainable damages caused claimants by defendant for failure to protect such fishing rights in the sum of \$3,257,083;

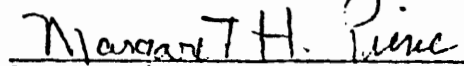
4. The defendant is not liable for interest on the foregoing ascertainable damages; and, therefore,

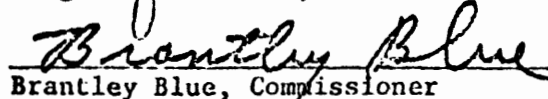
5. The claimants are entitled to recover from the defendant the sum of \$3,257,083, less allowable gratuitous offsets, if any.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner