

Salmon for Sale

Tribes, Treaties, and Fishing Rights

by Mary Christina Wood

Our Resources

A RED PICKUP TRUCK WAS PARKED at the side of Highway 55, which heads through McCall, Idaho and down to the parched Salmon River country. On the windshield of the pickup a cardboard sign announced: *SALMON*. I pulled over and met Dan and Lori Enick. Dan wore a brown shirt with a coiled rattlesnake drawn on the front and Lori a black jacket with red letters that spelled *Nez Perce Tribal Gaming*.

Dan walked to the back of their pickup and pulled away a tarp that covered a bed of ice and 18 whopping summer Chinook salmon, ranging from 16 to 30 pounds. Like the rivers they swim in, salmon make state borders seem irrelevant. These salmon had swum nearly a thousand miles to return to their headwaters for spawning, a journey that had taken them from the Pacific Ocean up the Columbia River, the Snake River, the Salmon River, and into their natal waters of the Rapid River. Salmon are the threads that connect places and people across the region. Dan and Lori had caught these in the early hours of the morning, in the Rapid River 40 miles away.

Like the rivers they swim in, salmon make state borders seem irrelevant.

McCall, Idaho nestles up against the Frank Church Wilderness. Tourist season was beginning, and my presence on the side of the road encouraged others to pull over and take look at the salmon. As I stood there, I wondered how many people on Highway 55 that day understood the significance of buying treaty salmon caught by Nez Perce

Indians in their aboriginal territory. Every fish sold by Dan and Lori Enick represented a victory in a massive 150-year societal struggle, still waged across the territory of the Pacific Northwest.

Beginning in the 1840s, White settlers swarmed into the territory

that is now Oregon, Washington, and Idaho. Tribes such as the Nez Perce had been living in the region, exercising aboriginal control over the lands and waters, for thousands of years. The federal government recognized these nations as sovereign governments and negotiated treaties with them to purchase their land. Through these treaties, the United States gained title to nearly all of the Pacific Northwest, with most tribes retaining ownership of only a small part of their homelands, now called *reservations*. The government turned much of the ceded land into homesteads for settlers. Road maps of today give no clues to the aboriginal territory that marked governmental borders just 150 years ago.

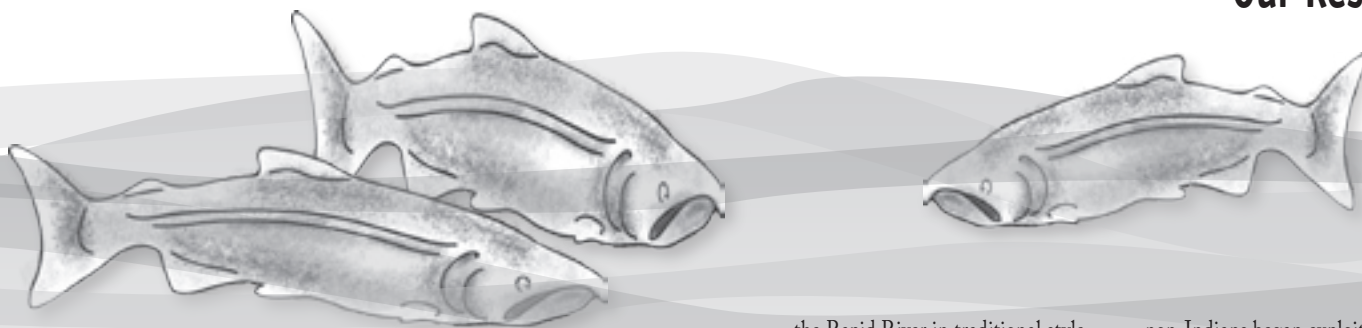
The tribes of the region engaged in far-ranging exploitation of natural resources, and several different tribes often shared fishing sites in common. The Columbia River was the "great table where all the Indians came to partake," as one witness in a treaty rights case described. Resorting to these fishing places was essential to survival, "not much less necessary to the existence of the Indians than the atmosphere they breathed,"

in the words of the Supreme Court near the beginning of the twentieth century. Tribal leaders relied on the government's repeated promises that they would be secure in their way of life if they lived within confined areas constituting their reservations.



Because of the critical importance of salmon to their people, many tribal leaders unequivocally reserved rights to fish in perpetuity at their usual and accustomed fishing sites located off the reservations. These treaties contained a clause that secured the Indians the "right of taking fish at all *usual* and *accustomed* places" in common with citizens of the Territory. These sites are commonly referred to as U&A sites.

These U&A sites exist throughout much of the Pacific Northwest where tribal fishing took place at treaty times. Tribal fishing at U&A sites is a property right that is older than and superior to any private property rights later acquired by landowners. Today, numerous Northwest fishing tribes, including the Klamath, Warm Springs, and Umatilla Tribes of Oregon, continue to exercise their treaty rights to



fish. The Rapid River is a U&A site for the Nez Perce, but a hatchery now produces the bulk of the fish to compensate for damage done by the Hells Canyon complex of dams.

Why Indians Have a Commercial Right to Salmon

Commercial fishing was central to the native economy long before White settlement. The great Celilo Falls, now inundated by The Dalles Dam, has been called the *Wall Street of Native America* by anthropologists, because it drew Indians from places up and down the coast and the Great Plains to trade foods and furs for fish. The treaties guarantee rights to fish for ceremonial, subsistence, and commercial use. Tribal fishing remains a vital economic enterprise today that also carries considerable cultural significance, because salmon are held sacred by tribal people. At the beginning of the salmon runs, ancient First Salmon ceremonies take place in longhouses

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throughout the Pacific Northwest, representing an unbroken spiritual legacy that extends back thousands of years.

Hanging out of the Enicks' truck were long poles with intricate netting at the end—dip nets, all handmade by Dan. Expert fishermen, Dan and Lori had netted their salmon from

the Rapid River in traditional style. But many Indians today also fish from motorized boats using gillnets—a common sight above the Bonneville Dam during the salmon runs.

Some critics view the use of modern technology as out of synch with tribal tradition. The truth is that damming the rivers in the Columbia River Basin triggered the need for new technology by creating huge slack-water lakes behind the dams. Others wonder why tribes have special privileges of fishing on the rivers. The simple answer is that the tribes never granted these rights away, and these rights formed the consideration for ceding tribal territory to the United States. The Supreme Court has described the treaties as *contracts* between *nations* containing promises that endure despite the passage of time. Longstanding fiduciary principles define the scope of the federal government's trust obligations to the tribes regarding these promises.

When Lori told me her salmon were two dollars a pound, I was struck by the meagerness of this amount in view of the cost in time and money the tribes have spent to protect their treaty rights. Even three decades ago, the sight of Indians selling fish along a highway would have incited racism, and perhaps violence, in many parts of the Pacific Northwest.

The Fishing Wars

A scarcity of any resource often breeds hostility. Not long after the tribes signed the treaties guaranteeing their rights to fish in perpetuity,

non-Indians began exploiting the fish. Canning technology, combined with European markets, helped create an insatiable demand for the salmon. A non-Indian fishing industry, exploiting new technology, grew at a rate beyond sustainable harvest levels. At the same time, industrialization, agriculture, and urbanization advanced across the Pacific Northwest in the 20th Century, ravaging ecosystems and leaving dams, clearcuts, mining waste, pollution, and population or development sprawl in their wake. These assaults unraveled natural systems supporting salmon, so that by the 1970s rivers that had run thick with salmon a half-century before provided only scant returns. Even the Columbia River Basin salmon fishery—once the world's largest commercial fishery—collapsed, wiping out more than 100 native stocks. Many other stocks still hover at the brink of extinction.

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State fish and wildlife agencies responded, early on, by targeting tribal fisheries for harvest cutbacks. As one Yakama Indian put it in testimony, "The White man's progress had diminished the fish runs, and therefore, the Indians had to stop fishing to protect what was left. This is not what we were promised at the Treaty Grounds."



Our Resources

In the 1970s, when the states closed nearly all of the Indian commercial fisheries, tribal fishermen asserted their treaty rights through fish-ins—peaceable fishing that was met with government SWAT teams and multiple arrests. The locations of these clashes included the Rapid River.

In 1974, Indian treaty rights went to trial. A federal district court judge issued the famous Boldt decision, affirming treaty rights to fish in Washington State. Non-Indian protests ensued, and Judge Boldt was hung in effigy. Washington state officials refused to comply with his ruling. The crisis culminated in a landmark case, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, in which the Supreme Court announced that the tribes had the right to 50 percent of the share of harvestable fish—a resounding affirmation of treaty fishing rights. In a related case, the Supreme Court found that the states could regulate Indian fishing for purposes of conservation, but that such regulation could not discriminate against the Indians, as it clearly had in the past.

Ironically, even as the tribes were enforcing their rights to fish, salmon stocks plummeted even more as a result of relentless environmental destruction.

Environmental Collapse of Fish Stocks

Ironically, even as the tribes were enforcing their rights to fish, salmon stocks plummeted even more as a result of relentless environmental destruction. By the 1980s, the stunning legal victories of the prior decade seemed nearly irrelevant. Treaty rights devolved into mere paper rights, because there were so few fish left to harvest. Beginning in 1990, some stocks were listed under the Endangered Species Act (ESA). The situation was so severe that non-Indian fishermen, previously hostile towards their tribal counterparts, came to realize that everyone was in the same boat. Environmental groups joined with fishing interests to challenge the primary culprits of salmon decline.

The foremost problem was, and continues to be, hydro-operations. The Snake River species have to negotiate eight major dams on their migration to and from the ocean. Dubbed *serial killers* by some, these dams account for over 90 percent of the mortality to the most imperiled stocks. By the late 1990s, a national dam-breaching movement was underway, and in 2000, Oregon Governor John Kitzhaber joined the chorus of tribes, non-Indian fishing interests, and conservationists calling for the removal of four Snake River dams. But the National Marine Fishery Service (NMFS), the federal agency charged with implementing the ESA, failed to force major changes to the hydro-system. Many believe the agency lacks the political will to carry out the ESA.

Publicity over the ESA listings engenders a common misperception that tribal fishermen are selling endangered fish. The tribal fishing at Rapid River and other places is directed towards hatchery stocks, not the wild stocks listed under the ESA. Nevertheless, there is, inevitably, the incidental taking of wild fish. When the take reaches a certain level, the fishery closes to allow adequate escape-ment of adults to spawning grounds to

Treaties may prove to be the most potent environmental laws in restoring the region's salmon resource.

sustain the species. Some still accuse Indians of taking *the last fish*, but such blame ignores the systemic causes of fish decline. The overriding threat to salmon comes from dams and habitat destruction, taking a toll that leaves very few fish to harvest. Because of drastic curtailments over the past three decades, the harvest now accounts for a fraction of human-induced mortality on the listed stocks—less than 10 percent, compared with the more than 90 percent direct mortality attributed to hydropower operations.

Harvest controls alone will not bring back the fish. For recovery to happen, the region needs to restore the natural systems sustaining fish. The Snake River dams provide a mere five percent of the power capacity in the Northwest, confer irrigation to only 13 farmers and—contrary to a common misconception—provide no flood control benefits. Operation of the dams is, primarily, for the purpose of maintaining the navigation system for Lewiston, Idaho, at a federal annual subsidy of \$98 million. Northwesterners may con-

Trust Responsibility and the Environment

When native nations relinquished the vast amount of their lands to the federal government, they often retained a smaller land base (now called a reservation) as well as rights to hunt and fish in locations apart from these reservations. In the case of the Northwest fishing treaties, these off-reservation sites are referred to as **“usual and accustomed” sites**. As part of the treaty, the federal government promised to protect the tribes’ retained lands and resources so that the tribes could maintain their independent existence, identity, and way of life. Despite this, the ecosystems tribes rely on have been destroyed through logging, hydrosystem operations, urban development, pollution, and other factors, causing immense loss in tribal fisheries and other resources. Ecosystem protection largely falls in the hands of federal agencies operating under numerous federal statutes, such as the Clean Water Act and the Endangered Species Act. Federal agencies such as the Forest Service, Bureau of Land Management, Fish & Wildlife Service, Bureau of Reclamation, and the U.S. Army Corps of Engineers routinely make management or permitting decisions that directly affect the fishing rights retained by many tribes. Courts have emphasized that agencies must carry out their statutory duties in a manner that protects tribal lands and resources. Interpreting the duty of protection, however, rests with the courts. To fully enforce the trust obligation, courts must be familiar with the ecological needs of native people. (*Please see Carol Barbero’s interview in this issue of Oregon’s Future—Ed.*)

Mary Christina Wood

clude that such limited societal benefits do not justify irreparable harm to the region's signature species, and the crippling of a fishing industry.

Supporting Tribal Fishing

Some believe that all fishing (even tribal) should end until the stocks recover. Yet this view fails to recognize the important legal role tribal fishing may play in restoring salmon. This fishing falls under the authority of treaties, which confer the oldest property rights in the land. Judges realize

that treaty-fishing rights are useless without fish to be taken. Some courts have interpreted the treaty right as including an implicit right of environmental protection for the fisheries. The issue is now pending before a federal district court in Washington. Treaties may prove to be the most potent environmental laws in restoring the region's salmon resource.

I bought the fish from Dan. The sheer cultural importance of this salmon would make my eating it a real privilege. But not everyone shares

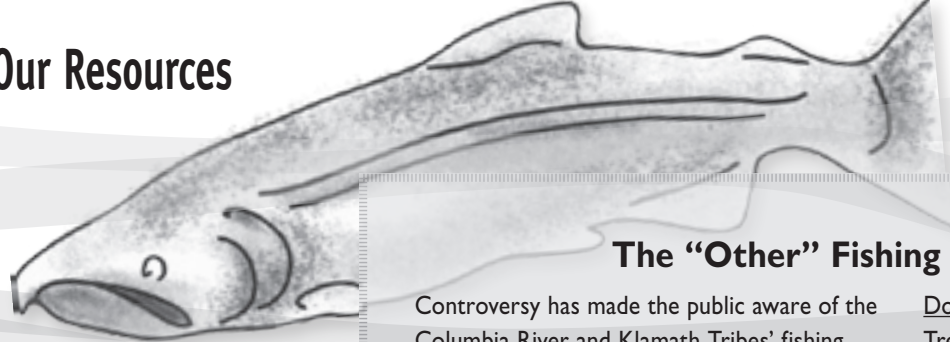
that appreciation. Helen Chenoweth, former U.S. Representative from Idaho, questioned why salmon should be protected as an endangered species as long as it is available in cans in the supermarket. Some McCall cars still display the bumper sticker, "*Can Helen, not salmon.*"

Salmon farms can produce plenty of canned salmon, so much that they are beginning to threaten the economic base of fishermen like Dan and Lori Enick. Farming poses a significant threat to the natural resource of

salmon, because farmed salmon can get loose and compete with wild species. Fortunately, farmed salmon offends the palates of even those who don't care about conservation. Farmed fish, which are the artificial versions of the real thing, are raised in confined pools. They don't match the succulent flesh of salmon freely nurtured by Northwest rivers and the ocean. The meat of farmed salmon is often so white from lack of nutrients that fish farmers inject red dye to create the appearance of a real salmon. The weakened salmon



Cello Falls, which is no longer visible due to flooding by The Dalles Dam, has tremendous cultural, historic and legal significance to Columbia River Tribes and indigenous people worldwide.



immune systems get fortification from a load of antibiotics—an unwelcome additive that causes even the indiscriminating consumer to recoil.

When people question whether they should eat real salmon from the Columbia River and its tributaries, I tell them it helps resource recovery by supporting a fishing industry advocating strongly for wild salmon restoration. Even more meaningful, the purchase of treaty fish supports a 10,000-year old regional fishing economy. That kind of gratification is not found in cans, nor does it come by paying \$14 per pound, for wild salmon flown in from Alaska's Copper River.

Dan carefully wrapped my 20-pound Rapid River salmon and placed it in my car. As I drove away I glanced at my rear view mirror to see once again that brown cardboard sign which read: *SALMON*.



Mary Christina Wood is a Professor of Law and Dean's Distinguished Faculty Fellow at the University of Oregon, School of Law. She teaches Federal Indian Law, Wildlife Law, Property Law, and other environmental courses. She has published extensively on issues involving treaty rights and wildlife regulation. She wrote this piece in McCall, Idaho, where she spends her summers.

The "Other" Fishing Tribes in Oregon

Controversy has made the public aware of the Columbia River and Klamath Tribes' fishing rights and their historical ties to the river and lake that are their namesakes. Meanwhile, the other six federally recognized tribes in Oregon have been reclaiming their cultural ties to salmon and other marine and riverine life and working to protect them.

In 1980 the Confederated Tribes of Siletz sued for restoration of fishing and hunting rights, which hadn't been re-established or defined when the tribe regained its status as a federally recognized tribe in 1977. The result of the federal court action was a consent decree in the early 1980s between the state, the United States, and the tribe. With non-Indian fishing interests and the state opposed to any commercial fishing by Siletz, the tribe agreed to the limitations of a cultural, or subsistence, fishery. Within this and other constraints, the tribe regulates its members' fishing and hunting and gathering.

As a part of its reinstatement as a federally recognized tribe, the Confederated Tribes of Grand Ronde entered into a similar consent decree in the mid 1980s with the state regarding its fishing and hunting activities.

Could the Siletz and Grand Ronde (and other Oregon coastal tribes) have successfully pressed cases for fishing rights, even asserting treaty fishing rights, rather than settling in consent decrees? We don't really know. The ratified Joel Palmer treaties* with Oregon coastal tribes (1853-55) did not mention fish or fishing.

However, some of the tribes that are part of the Siletz and Grand Ronde confederations did reserve fishing rights in the 1851 Anson Dart treaties*. The Clatsop, Tillamook, and some of the Chinook people, for example, were included in these treaties. Vine Deloria, Jr. and Raymond J. Demallie, scholars and authors of

Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions,

1775-1979, argue that these treaties should be considered valid because Congress recognized them and based legislation on them even though the Senate did not ratify these 1851 treaties.

Both tribes—as are all nine federally recognized tribes in Oregon—are active in fish and wildlife restoration, often in conjunction with state and federal efforts. The Siletz are leading a public-private project to bring back sea otters to Oregon coastal waters, a key to restoring the complexity and health of the marine community off our shores. Along with the Columbia River treaty tribes, other government entities, and citizen groups, the Siletz and Grand Ronde are working on the Portland Harbor clean-up and are trying to secure fish protection and mitigation for fish losses in the relicensing agreement for the powerhouse at Willamette Falls.

The Cow Creek; Coos, Lower Umpqua, and Siuslaw; and Coquille Tribes are working with Oregon Department of Fish and Wildlife and local watershed groups on fish restoration. The tribes are also revitalizing the cultural and spiritual practices that have tied them to the salmon for countless generations.

The Burns-Paiute have been participating in the Northwest Power and Conservation Council's Columbia Basin Fish and Wildlife Program for over a decade. Tribal elders and cultural leaders emphasize that the Paiute, too, relied on salmon.

**Treaties with Indian tribes are often referenced, as they are here, by the name of the lead negotiator for the United States.*

Laura Berg
Editor of the revised edition of
The First Oregonians

The Wànapa Energy Center

Beyond Gaming to Community Development

Our Resources

FORUM

by J.D. Williams, former
Managing Attorney,
Umatilla Indian Reservation

Sovereignty is a word that evokes visions of kings and old Europe to most non-Indians.

But to Native Americans, tribal sovereignty means *freedom*, plain and simple—freedom to determine their own destiny, to figure out how, on their own, to keep their communities and cultures thriving while surrounded by a much larger non-Indian society. An Indian tribe determines its own destiny by taking on the responsibility of a sovereign—providing police and fire protection to its citizens and residents, social services and land use planning, healthcare and housing, and building an economy that provides a tax base and jobs. For the Confederated Tribes of the Umatilla Indian Reservation in northeastern Oregon, this has been their role for thousands of years. The tribes' latest effort in economic development is a partnership with the Eugene Water and Electric Board

(EWEB), the City of Hermiston, and the Port of Umatilla to build a 600 megawatt natural gas-fired power plant on tribal lands just east of the City of Umatilla—the Wànapa (meaning “by the river”) Energy Center.

When the Cayuse, Umatilla, and Walla Walla Tribes signed a treaty in 1855, they reserved to themselves a small homeland and the power to run their own affairs on that reservation, while ceding roughly 6.4 million acres to the United States for land-hungry settlers. In 1949, they created their first constitutional form of government. They developed a tribal court system, police force, and land use planning in the 1970s. By the 1980s, they owned a few small businesses—a mini-mart, grain elevators, recreational lake site, and a tribal farm. But unemployment

remained high on this reservation of approximately 173,000 acres just east of Pendleton. In 1992, the tribes provided only 159 job positions, and 37 percent of tribal members were unemployed.

Along with high unemployment, came the usual social problems that all poor rural communities face. In 1990, almost 39 percent of people living on the reservation fell below the federal poverty line.

Because of the ready availability of water, natural gas, and electric transmission lines, the tribes decided to pursue building an electric generation plant on the site.

The tribes went looking for help. They needed water for the plant, local support, and a public or municipal utility that valued the environment and had the savvy to help choose a good developer. As a result, in 2000 the

But the tribes, worried that gaming's popularity may fade over time, are actively looking for ways to diversify their economy.

Then, in 1995 the tribes opened the Wildhorse Gaming Resort. Along with it came a hotel, RV park, tribal museum, and golf course. Unemployment remained high but dropped to 17 percent by 2000. Since the casino opened ten years ago, the tribes have become a major economic engine for Umatilla County; as of September 2003 employing over 1,040 people, with about 49 percent non-Indians. The estimated payroll in 2001 was \$30 million. From a \$7.5-million operating budget in 1992, the tribes have grown to a \$97-million operating budget in 2004.

But the tribes, worried that gaming's popularity may fade over time, are actively looking for ways to diversify their economy. In the late 1990s, the tribes began exploring ways to develop a 195-acre parcel of tribal industrial land located near the Columbia River. It lies just east of the City of Umatilla, is bordered on two sides by lands owned by the Port of Umatilla, and is also zoned for commercial develop-

City of Hermiston, the Eugene Water and Electric Board (EWEB), and the tribes decided to develop a power plant together. In 2001, the Port of Umatilla joined the partnership. When residents of Hermiston commented on the proposed project at a public meeting, no one raised any objections to the city partnering with the tribes. But Hermiston's partnering with EWEB raised eyebrows as residents voiced concern that people from the west side of the state did not understand the east side's issues and way of life. That city residents distrusted other non-Indians more than they distrusted the tribes speaks volumes about how far the tribes had come in being seen as good business partners by their neighbors in northeastern Oregon. Ed Brookshier, Hermiston's City Manager, later said, “The tribes approach things in a very business-like fashion. We've always had a good working relationship with them. And they have always kept their end of the bargain on any project with which we have been involved.”



The tribes and their partners hope to structure the development so that all four of them can use the project's electricity to generate new revenues to pay for public services, stabilize electricity costs for their residents, and use the availability of power to attract new economic development.

When asked why he thought Hermiston should be involved with the Wānapa Energy Center, Mr. Brookshier explained that, "it represents a potential substantial source of new general revenue to the city at a time when other cities in the state are really struggling to maintain their service levels due to limitations on property taxes and the general economic climate." He added that "the availability of power—roughly four times our current usage—offers real benefits as a competitive advantage in attracting new industry into the community, and for the city's municipal utility to deliver lower-cost electricity to our citizens."

Kim Puzey, General Manager, Port of Umatilla, described why he was excited to be participating in Wānapa,

Ports operate under legislative mandates to expand trade and diversify the economy. Partnerships are essential to accomplishing these purposes. When Wānapa was conceived several stars aligned, like market conditions and the potential infrastructure enhancement to the Port's neighboring industrial lands—roads, natural gas, electric and water/sewer lines, along with a source of power that the Port could use to attract development to port lands.

But Mr. Puzey added, "In some ways, the most compelling reason for participation by the Port in such a project is to set the stage for more cooperation with the tribes on other issues that effect economic development in our region, such as water rights."

From EWEB's perspective, according to Randy Berggren, EWEB's General Manager, "Wānapa provides us an opportunity to acquire, with very limited risk, a reliable, environmentally

"The tribes approach things in a very business-like fashion. We've always had a good working relationship with them. And they have always kept their end of the bargain..."

acceptable, and cost effective source of electricity to satisfy the demands of our customers and to meet the energy needs of the region."

The tribes, Hermiston, and EWEB originally chose Williams Companies of Tulsa, Oklahoma as their developer because it was willing to meet their high standards for environmental mitigation. Those working on Wānapa liked to joke that they were the only project in America that could claim to have Indians, cowboys, hippies, and Okies all working together.

Because of restructuring brought on by energy trading scandals and an economic slowdown, Williams Companies sold their interests in the project to Diamond Generating Corporation, a Los Angeles based subsidiary of Mitsubishi Corporation, that was not involved in energy trading and had solid experience in developing power plant projects. Diamond has carried forward the permitting process, with the same commitment to environmental mitigation.

Since the project is located on Indian land, the federal government has handled the permitting for the site. The Environmental Protection Agency (EPA) is doing the air quality permit, which was issued in July of this year. The Bureau of Indian Affairs (BIA) and the Bonneville Power

Administration (BPA) are handling the environmental impact studies. During scoping meetings last year, no opposition was voiced. At one public hearing in Hermiston, no one from the public even attended. The few comments received expressed concerns about possible cumulative air quality impacts that would impact the ability of wheat farmers to continue their traditional plowing and field burning practices. One neighbor was not happy with having to look at a steam plume. Other comments expressed concern about impacts to the region's available industrial water supply since Wānapa will use water from the port's regional water supply system. Those issues were addressed in the environmental impact statement (EIS). The BIA issued its record of decision late last year, which went unchallenged.

Facing budget shortfalls, Umatilla County and the local school district expressed concern about impacts to their services and about whether Wānapa would offer financial support to them to offset such impacts. Because Wānapa is on tribal land, it pays tribal instead of state property taxes. The tribes and their partners have expressed their desire to be good neighbors and their hope that the project will be able to provide financial support for any impacts it has on local government services. However, until the project is actually closer to being financed the developer is reluctant to commit to specific dollar amounts, but the tribes have discussed community development funds and similar arrangements.

Because the pipelines and electric lines connecting to Wānapa will all cross non-Indian land, which is under state jurisdiction, the tribes and their partners have been working closely with the state's agencies to coordinate information and seek state permits. The state, concerned mostly about air quality impacts, wants assurance that the project will meet federal air quality standards under the Clean Air Act, like any other power plant. In response,

the tribes and their partners committed early on to pushing the environmental mitigation envelope, hoping to set a new standard for future natural gas-fired power plants developed in Oregon.

Mr. Berggren explains, "Wānapa offers a unique opportunity to establish an innovative and substantial environmental mitigation program through the Wānapa Environmental Foundation. This collaborative effort with our partners will pay for important environmental projects to mitigate impacts to air, land, and water resources."

As the tribes and their partners work to develop Wānapa, they've caught the attention of Salem in more ways than one. The governor's office, hoping to see more economic development on the east side, has been supportive and plays a key role in coordinating between the state's agencies and the tribes. State Senator Dave Nelson from Umatilla County believes that "the creation of power plants is key to economic development and reliable, reasonably priced power for our region." Commenting on Wānapa's unique partnership between tribes, local governments and a private developer,

...electric lines connecting to Wānapa will all cross non-Indian land, which is under state jurisdiction,...

he said, "Partnerships are how these projects work. You have to create them between public entities, private players, and especially the area's stakeholders."

Depending on market conditions, the tribes and their partners hope to see construction begin on Wānapa



before the end of 2008. However, financing on the project is unlikely to occur until sufficient demand develops with the recovering economy. With the benefits of the project's location, the environmental review complete and the issued air permit, and the unique opportunity to lower the costs of the project through tribal involvement, Wānapa is likely to be the next natural gas-fired power plant built in northeast Oregon or southeast Washington.

The tribes and their partners are hoping to sell the power to regional public utilities, independently owned utilities, and other power purchasers, through fixed or variable sales, heat rate options, or summer and winter peak sales. In addition, they have been offering power purchasers the opportunity to have an ownership interest in the project.

Key to selling the power is the ability to move the power west along BPA's transmission lines. The tribes and their partners have been working with BPA to use public financing to help fund BPA's construction of a new 500 kV transmission line.

Mitigating Impacts

Wānapa Energy Center will be a 600-megawatt, natural gas-fired, combined-cycle power plant using the same clean burning, high-tech processes being used by most other new natural gas generation facilities in the Pacific Northwest today. However, the tribes, EWEB, and their partners are committed to providing a superior environmental mitigation package that they hope will set the new standard for

such projects in the region. Through the use of an environmental foundation, they hope to see the vast majority of the mitigation money spent regionally. They also hope to see projects that simultaneously mitigate for air impacts and improve water quality—such as purchasing and creating vegetative buffers along watersheds, an important issue for the tribes in particular, because of the central role salmon play in their culture and way of life.



J.D. Williams is an attorney in Portland who represents Indian Tribes in a variety of matters, including the Umatilla Tribes and their Wānapa Energy Center. Before moving to Portland, he spent eight years on the Umatilla Indian Reservation as their managing attorney. Mr. Williams is a member of both the Oregon and Washington bars. He spent two years in the Peace Corps as an agricultural extension agent. Originally from Louisiana, his family works in the timber industry.

The Combined-cycle Power Plant

A combined-cycle power plant uses two different types of technologies to produce electricity. The first cycle burns fuel inside a turbine. Hot combustion gases pass directly through the turbine's blades turning a shaft that drives an electric generator. In the second cycle, heated exhaust air coming out of the gas turbine is harnessed to run a heat-recovery steam-driven generator. Most combined-cycle power plants in the US burn natural gas and convert about 58 percent of the energy used to run them into electricity. Older, conventional gas turbines are approximately 38 percent efficient. Natural gas combined-cycle plants also produce electricity more efficiently than other processes such as oil-fired plants. In contrast, nuclear power is about 60 percent efficient and cheaper than gas. Hydropower is 90 percent efficient because hydro does not use fuel to generate heat. Because water is not consumed, and therefore free, hydro is also the most economical—about a third the cost of nuclear and coal and roughly a quarter the cost of natural gas plants. Please note that these comparisons do not account for what are known as externalities—in this case, the economic costs of negative impacts to the environment. In Oregon and Washington, electricity from hydropower meets about 85 percent of electricity demand each year.

Natural gas turbines are commonly used for peak supply (high demand times) because they are more quickly taken on and off-line than other plants. They are also relatively small, easier to locate near populated areas, compared to nuclear, hydro-powered, or coal-fired plants—and much cheaper to build.

Jay Hutchins, Executive Editor

Layperson to Layperson

Introduction to Doug Dompier's Interview

by Jay Hutchins, Executive Editor *Oregon's Future*

In this interview, Doug Dompier describes the co-management system that has evolved for the harvesting and production of fish in the Columbia River Basin under the Northwest Power Planning and Conservation Act of 1980 (the Power Act). This act authorized the Bonneville Power Authority to administer the “conservation” piece of the act as well as power management in the Federal Columbia River Power System (FCRPS).

The largest hydropower system in the world, the FCRPS has 32 dams and spans four states: Idaho, Washington, Oregon, and Montana. Public and private utilities also operate dams in the Columbia River Basin. A number of dams in Canada are utilized for flow augmentation of waters heading for downriver, power-generating dams.

The Army Corps of Engineers operates eight large dams on the lower Columbia and Snake rivers that affect the habitat and migration of anadromous salmon and steelhead species. The Northwest Power and Conservation Council, created by the Power Act, develops the plans administered by BPA to manage power and mitigate the effects of these dams

on wildlife habitat. Members of the council are appointed by the governors of Idaho, Montana, Washington, and Oregon. The first Northwest Power and Conservation Plan was created in 1982 and the fifth plan was approved in December 2004. These plans are supposed to balance the region's need for power with the interests of salmon and other stakeholders.

Conflicts of interests naturally arise between environmentalist groups,

These plans are supposed to balance the region's need for power with the interests of salmon and other stakeholders.

tribal fishers, sport fishers, commercial fishers, and wildlife managers as well as those navigating the river for transportation, irrigators, and those buying and selling power.

Dompier is mainly concerned with the conflict of interest between the tribes and the state agencies managing the production of fish in the hatcheries of the Columbia River and its tributaries. This subject rarely makes headlines as much as so many

other Columbia River issues.

The term refers to restoring or maintaining fish spawning habitats as well as producing hatchery fish to maintain fish stocks for commercial, sport, and tribal harvest. In general hatchery salmon are not allowed to reproduce in the wild because fish biologists at the National Oceanic and Atmospheric Administration's fishery division (NOAA) believe they may be genetically inferior to—and could weaken the stock of wild salmon if allowed to interbreed.

The term *fishery* refers to the harvesting of fish and the associated industries, regulations, and laws for commercial, sport, and tribal fishing. Salmon are anadromous fish which means they migrate downriver into the ocean for their adult life cycle and then return to spawn in the streams where they were hatched or where they were placed in the river by hatchery managers. This puts each generation of hatchery fish wholly under the control of the hatcheries, which are primarily operated by state agencies with funds from the federal government and public and private power companies. The system is managed to the point where surplus hatchery fish—after they are destroyed—are sometimes helicoptered in sacks and dumped in the spawning streams of wild salmon to nourish natural spawning grounds.

Only tribal fishers can catch wild fish in the Columbia basin—hatchery fish are marked by cutting off their adipose fin to distinguish them from wild stocks. Treaty rights affirmed by the Boldt decision in 1974 dictate

that—collectively—members of treaty tribes are entitled to catch half of the harvestable fish destined to pass what are known in treaties as the “usual and accustomed places.” If the state managers want to restrict a commercial or sport fishery for conservation, tribal fishers are entitled to catch up to half the total regulated amount at there traditional fishing sites. In his interview Dompier reveals the ways he believes hatchery managers have manipulated harvesting by tribal fishers via controlling production.

A well-known critic of the state and federal fishery agencies, Doug Dompier claims that, in many important instances, the current hatchery program is more responsible for the decline of salmon than the dams impeding their passage up and down the river. His critics include environmentalists who want to remove the dams and federal and state wildlife managers who point out that the decline in salmon is affected by many things including ocean cycle conditions and damage to spawning habitats from cattle grazing, mining, logging, road construction, and industrial pollution that have nothing to do with either the dams or the hatcheries. Although his ideas are controversial and he is an emotional raconteur, even those who disagree with his views speak respectfully of his detailed examination of events in his book, *The Fight of Salmon People: Blending Tribal Tradition with Modern Science to Save Sacred Fish*.

An interview with
Douglas W. Dompier,
biologist and author
of *The Fight of Salmon
People: Blending Tribal
Tradition with Modern
Science to Save Sacred Fish*.

Conducted by
Jay Hutchins,
Executive Editor
of Oregon's Future

Tribes, States, and Environmentalists

Conflicts of Interest in the Columbia Basin Hatchery System

I understand that fish production and harvest on the Columbia River system are administered through a collaboration known as co-management. Who are the co-managers and what do they actually do?

DD: The principal co-managers on the Columbia River system are the Washington Department of Fish and Wildlife, the Oregon Department of Fish and Wildlife, the Idaho Department of Fish and Game, and the four treaty tribes of the Columbia River Inter-Tribal Fish Commission—the Warm Springs, Umatilla, Nez Perce, and the Yakama. The federal fishery agencies and other Columbia Basin tribes have a more limited management role.

In the arena of habitat and habitat restoration, the managers make recommendations, whereas in the arena of harvest these co-managers actually make the decisions about who catch the fish, how many to catch, and where to catch them. These and production choices are the key decisions of the managers.

Fish habitat and mitigation were concerns at the time of the initial dam construction and were addressed in the Mitchell Act in 1938. What was the purpose of the Mitchell Act and whose interests was it intended to serve?

DD: The Mitchell Act was passed in 1938 at the time the Bonneville Dam and Grand Coulee Dam were being built. The federal government knew these projects would impact the salmon. The Mitchell Act provided authority to build hatcheries in Washington, Oregon, and Idaho. When the act went into effect it looked pretty good, but the agencies at the time had no political clout and just no way to get the necessary funds to build hatcheries.

Following World War II, the Corps of Engineers entered a huge dam-building era. So who do you think was tapped to fund the mitigation programs? The Corps of Engineers. They turned around and gave funds to the Fish and Wildlife Service, who then contracted with Washington and Oregon to build hatcheries. Although Idaho was included in the legislation to build hatcheries, none were built there.

Columbia River Basin



The federal dams on the lower Columbia River were originally constructed for navigation, flood control, irrigation, and economic development as part of the Roosevelt Administration's New Deal in the West. The 4 dams on the lower Snake River in eastern Washington were primarily for power, irrigation, and navigation. The modern hatchery system was first envisioned under the Mitchell Act of 1938 and anticipated the need to support habitat affected by the construction of these federal dams.

What guided state interests when building the hatchery system?

DD: At the time the hatchery construction program began, the most powerful fishing constituents were the commercial fishers. Sport fishers were just people out there having a little fun. Therefore, the hatcheries were originally built mainly to serve the commercial fishers. To better accomplish this most of the hatcheries were built below The Dalles Dam. This is just below the now-submerged Celilo Falls—once one of the most sacred and productive fishing grounds of the native population and a famous trading area.

This all took place in an era when the states were at odds with tribal fishers and were not honoring their treaty rights to fish in their traditional fishing grounds, which the tribes had insisted on when they ceded land to the US. The fishery agencies wanted to eliminate the tribal fishery whose first traditional fishing ground on the mainstem was at Celilo Falls, one of the sites referred to in treaties as the “usual and accustomed places” or U&A sites. The Indians in Washington, Oregon, and Idaho were protest fishing and many of them were thrown in jail up into the early seventies.

So, how did state control of the hatcheries project affect the salmon habitat and stocks?

DD: What resulted was this massive hatchery program in the lower Columbia River system—below The Dalles Dam—mainly for tule fall Chinook and coho.

Tule is a fall Chinook that spawned in the lower river mainstem and tributaries below Celilo Falls. Because it did not have the stamina, it could not jump Celilo Falls. Not one hatchery built under the Mitchell Act program was built above Celilo Falls until the tribal fishery at Celilo had been destroyed in flooding caused by construction of The Dalles Dam.

The species from the Snake system in Idaho, eastern Washington and Oregon, and the mid-Columbia—the areas above the mainstem dams—were the most heavily impacted because the fish had to travel through the entire system, and the managers were not raising mid and upper-river fish. These species were never supported, or what we refer to as *mitigated*, by the Mitchell Act hatchery system. So, the fishing grounds not supported included many of the U&A sites, similar to Celilo Falls.

How did Native American tribes along

the Columbia River Power System become more active in management of the fishery?

DD: Prior to the Belloni and then the Boldt decision in 1974 in federal court and the subsequent formation of the Columbia River Inter-Tribal Fish Commission in 1977, tribes along the Columbia were looked at by the fishery agencies as just another user group who did not have any voice in the management of the fish. The tribes objected to that, because from their perspective they have always been managers, and according to their culture they have been here as long as the salmon. They also negotiated treaties 150 years ago that gave them a sovereign right to take fish at those U&A sites.

The Belloni and Boldt decisions re-established the treaty tribes as major stakeholders in salmon management. Belloni in '69 reaffirmed the reserved treaty rights of the tribes and Boldt in '74 determined that half of the salmon harvest destined to pass their “usual and accustomed fishing places,” belonged to the tribes if they could catch it.

My understanding, however, is that these two rulings addressed neither salmon decline nor management of the fish production.

DD: Remember that most of what has happened has been directed by the federal court, in Belloni and Boldt and other decisions that recognized the tribes' rights to the harvest. These decisions were all in the arena of harvest. The courts never ruled on fish production. Fish production was never mentioned in any treaty—in 1850s, no one imagined that production would be an issue.

Even though the tribes are co-managers, it is very easy for the states and the federal agencies to co-opt tribal positions, because there is no firm court case that directs anyone to listen to the tribes on fish production. So the way the tribes have tried to deal with the situation, over the course of the last 25 years, is to use the courts to come to some agreements on fish production.

In 1980, the Northwest Electric Power Planning Act established the Pacific Northwest Electric Power and Conservation Planning Council, whose purpose included developing a Fish and Wildlife Program that protected not only spawning grounds, but addressed the tribes' need to influence production on the Columbia and its tributaries. At the time,

the tribes anticipated a reprogramming the hatchery system that would give of them more say in the production of salmon. What happened?

DD: Under the Northwest Power Act, the tribes proposed recommendations for reprogramming the hatchery system and constructing hatcheries on their reservations. However, the state and federal managers did not want anything changed. The managers knew what the tribes were up to, and that the tribes wanted to use hatchery-reared fish to restore natural spawning grounds, so they tried to block the tribes' recommendations. The Power and Conservation Council adopted the recommendations even though the state agencies opposed them. But within two years things began to change. Chairman Dan Evans, the ex-governor of Washington, was gone, a few of the other original council members had also left, and all of a sudden the Council became more and more political as more and more political appointments were made to the council.

Who was appointing council members?

DD: The governors of Washington, Oregon, Idaho, and Montana. As the council became more political, the tribes lost control of the planning and implementation process.

And there was no Indian presence on the council?

DD: No Indian presence. When the council representation became more state oriented rather than region-oriented the tribal policy representatives dropped out. Pretty soon our policy people stopped going to council meetings. Instead, tribal staff members started covering the meetings,





trying to protect their individual tribal programs. And that's basically where it is today.

I understand that there are now a few hatcheries actually run by the tribes. How many of these tribal hatcheries are there?

DD: The Yakama and Nez Perce hatcheries are operated mostly by the tribes. In addition, the Umatilla and Warm Springs Tribes jointly developed hatchery programs with the Oregon Department of Fish and Wildlife. Oregon operates the hatcheries; the tribes operate adult traps, holding facilities, and acclimation facilities, but they do not really control production.

I understand that a major issue for you and many of the tribes is that important stocks have become extinct, and the state agencies have not helped mitigate this by raising these stocks in the hatchery system?

DD: Yes, a graphic and disturbing example of what I am talking about is the sockeye in Idaho. The Idaho Department of Fish and Game has wasted millions of dollars to maintain them as some kind of a museum piece, but they were actually the agency that destroyed the sockeye. This sounds pretty harsh, but believe me they were the ones that built the small barrier dams at the outlets of the lakes in Idaho where the sockeye once migrated and reproduced. In addition, they poisoned those lakes to remove the sockeye.

(Sockeye is commonly understood to be the English version of the Coast Salish word suk-kegh or sukkai, red fish. Most sockeye spawn in or near lakes, where the juveniles spend 1 to 3 years before migrating to sea. There also is a non-anadromous form called kokanee —Ed.)

Why was the Sockeye not considered a sport fish?

DD: Because Sockeye didn't bite a hook and line. It was as simple, and I think as stupid as that.

Can you give me an example of how agencies use production to manipulate the tribes' right to harvest?

DD: In the early 1980s, *(after passage of the Northwest Power Act—Ed.)* state agencies attempted to de-commercialize steelhead trout. The state fishery agencies started taking the position that they didn't want anybody selling steelhead. When the commercial sale of steelhead was banned in Oregon, all the state managers classified it as a sport fish to limit the tribal harvest and sale of steelhead. Production programs for steelhead as a sport fish were expanded in the upper Columbia River system while hatchery production of some upper river species, such as coho, was terminated.

(Steelhead is a salmonid and an anadromous form of rainbow trout that sometimes is capable of spawning more than once. The common name for the steelhead is steelhead trout. Both steelhead and rainbow trout can produce either form depending on stream conditions.—Ed.)

Why did they single out steelhead to survive?

DD: Steelhead was a good sport fish that was readily caught in hook and line fisheries. For the Indians, steelhead was viewed as a survival salmon, because it was always available—always in the river—even through the lean winter months when food was in limited supply, which of course also makes it available for the sport fishers for an extended period.

I want to know more about what happened with the coho and why the hatcheries stopped releasing them above the dams because of the steelhead issue. I know the story is very complex, but didn't the reason have something to do with the tribes using gillnets to catch coho?

DD: When The Dalles Dam inundated Celilo Falls, the fishery agencies believed they had eliminated the tribal fishery. However, the tribal fishers resorted to fishing in the reservoirs using gillnets anchored along the shore. Because coho and steelhead adults are similar in size

and migrate upriver at the same time, the tribal harvest of coho, using smaller mesh gillnets, also resulted in the harvest of steelhead, which the agencies beginning in 1969 now managed solely for sport fisheries. To prevent the tribal harvest of steelhead, the fishery agencies terminated coho release programs above the tribal mainstem fishing areas. Ultimately, steelhead became the most reared and released of any salmon species in the Snake River system. *(Gillnets snag the gills of fish—Ed.)*

I know an important issue you bring up in your book is cutting fins off of hatchery-raised fish to separate them from wild stocks. Could you explain how the marking program works and why the tribes do not accept it?

DD: What has happened is that by segregating them from the wild fish some people have come to demonize hatchery-raised fish. They are called hatchery fish, like there's something bad about them. I use the term hatchery-reared fish.

They remove the adipose fins, a small fleshy fin behind the dorsal fin, in the hatcheries because that is where the agencies have control of those fish. Today nearly every hatchery-raised salmon has its adipose fin cut off. When they do that, they create a visual mark. Non-Indians are allowed to keep only fish with the adipose fin removed. That's where we're at now on the Columbia.

(Most hatchery-reared fish that are not caught are killed by fishery managers so they can not return to spawn with wild stocks—Ed.)

Why does the adipose fin exist?

DD: There is no good explanation as to why the fin exists, however, some research done in California in the 1960s on rainbow trout, which is the same species as steelhead, found there was about a 30 percent lower survival rate for those fish that had the adipose fin removed. Today, I don't think the fishery agencies are interested in finding out more about this—it might challenge the policy of marking.

I understand that the tribes object to the program.

DD: The tribes objected to this practice of cutting the fin and they have continued to object since it started. Tribal managers want these fish to be able to come back to provide for harvest,

and those not caught to be allowed to return to the rivers and spawn in their natural habitat.

The state and federal fishery managers do not want these fish spawning in their natural habitat. They claim these fish are genetically inferior to wild salmon and that if they are allowed to spawn, they will weaken the wild stocks of these species.

The tribes want some of the hatchery-reared fish released with all their fins so that more fish will make it back to the habitat to spawn. Right now there are some unmarked hatchery salmon as a result of harvest agreements, but the numbers are very small compared to the total number of the fish released. This is simply because the tribes do not have the legal authority to influence production.

Now, I understand that there are conservationists concerned that the genetic stock of the hatchery fish will weaken the stocks of the wild fish; this seems to be one of their rationales for wanting to remove the dams.

I think restoring the river to its natural state is a very good cause, but I don't think we should sacrifice the salmon to do that. The salmon deserve more than that.

DD: This position on their part, I believe, is disingenuous. The point in these genetic theories is that hatchery fish are inferior, that they've been domesticated; lost their fitness, not good enough. This theory has been developed by the agencies that are cutting the fin off—the state and federal fishery agencies. Now, some of the environmentalists look at this as an opportunity. If the runs are restored using hatchery-reared fish, as the tribes advocate, then these groups no longer have a legitimate cause for restoring the river to its natural state. I think restoring the river to its natural state is a very good cause, but I don't think we should sacrifice the salmon to do that. The salmon deserve more than that.

Because of all the hatchery programs that really became active in the 50s, there is not a river—not a single river in the Columbia River system—that has not already had hatchery-reared salmon released in it at some point. People have romanticized the wild fish, and this isn't right.

My sport fishermen friends tell me the wild fish look different.

DD: Yes, they are different. They have all of their fins attached.

Do you think there is a genetic difference between hatchery-reared and wild fish?

DD: Unlike many of the state and federal managers and some environmental groups, I don't think the hatcheries have that much impact on the genetics. The real impact is on the stock overall. Basically, the hatchery managers do not let hatchery-reared fish spawn naturally, which would allow them to interbreed with the wild population. This is going to have an impact in rivers whose wild stocks are dying out. These wild fish are never going to be helped, and the species that evolved in these habitats are going to trickle down to nothing. That's what we see happening.

I want to take us to the present, with these rulings by Federal Judge James Redden that the federal government must have an effective mitigation plan or the Snake River dams are going to come down. But actually, which fishery did the dams destroy?

DD: I always think it's amusing when I hear a non-Indian, a constituent of the fishery agencies, particularly the commercial fishers say, "Those Snake River dams killed our fish." Well, the Mitchell Act program was the major program designed for mitigation on the Columbia River. The fishery managers co-opted the Mitchell Act for the commercial fishermen. Rather than build hatcheries on the Snake River system, they used the money for the commercial fishery below the Celilo Falls.

It wasn't the Snake River dams that killed the fish on the Snake River system. It was the commercial over-harvesting of Chinook, coho, and steelhead runs and habitat degradation prior to the 1940s, before the Snake River dams were built.

I was at Cascade Hatchery on Eagle Creek the other day, and I noticed there are no fish coming up above that small dam they've built there above the hatchery. Why don't they let fish spawn above that small dam?

DD: Originally when they built the hatchery, a barrier was constructed so that if any fish came up, they could be diverted into the hatchery. The reason is that some of the hatchery's water supply comes from that creek above the dam. Agencies are very, very reluctant to allow salmon to go above hatcheries because of the various diseases that the salmon carry, which can contaminate the hatchery water supply.

Diseases the hatchery-reared fish carry?

DD: All salmon carry pathogens that cause diseases. Remember, these fish coming back from the ocean are destined to die—die from something. In a natural habitat and a natural spawning cycle, the viruses and bacteria they carry are simply washed down the river and dispersed in the large volume of water. If they die above the hatchery and in the hatchery water supply, those pathogens are going to flow into the hatchery.

An interesting example of this happened in Dworshak National Fish Hatchery in Idaho. This to me is a classic case of what happens when you mess with the fish. They selected for early-spawning fish, because these fish provided the best fish for the sports fishery. Between the hatchery and the dam there's about a mile of river where steelhead spawn naturally. The result was that at Dworshak, the hatchery fish became infected with the IHN virus from the steelhead spawning above the hatchery.

It is important to understand that no one has changed the genetics here, just used incubation technology, and selected certain genetic components that serve the state and federal agencies and their constituents, the sport and commercial fishers.

Can you give me some anecdotal support of your view that these hatchery fish should be allowed to spawn in the natural habitat?

DD: In 1987, the tribes finally got a court order that provided for coho production programs in the upper Columbia River. However, part of the agreement required that the fish be released so that they could all be harvested upon return and not allowed to spawn—this is called a *terminal* fishery.

These coho were released into the Yakima and Umatilla rivers. Within two years, the first adult coho began to return to the Umatilla River. However, because the state did not want to see coho runs increased and the agreement with the tribe required the fish to be used in terminal fisheries, the then Director of Fisheries for ODFW, Jim Martin, sent his people to Threemile Dam on the lower Umatilla River to ensure none of the coho were allowed to pass that location. Those not caught by the fishers were trapped and clubbed to death.

Kathryn Brigham, a member of the Umatilla Fish and Wildlife Committee, disagreed with this decision. She was angry and frustrated, but she was unable to prevent the destruction of the fish. However, by the following year she prevailed and the policy was reversed; the adult coho were allowed to pass the dam and spawn in the natural habitat. Following the success of the Umatilla Tribe, the Yakama Nation and Nez Perce Tribe also used the authority of the *US v. Oregon* court case to begin releasing coho in natural production areas of the rivers on their reservations and ceded areas.

Do you have another story that favors letting these hatchery-reared fish spawn?

DD: Officially, the wild coho in the Snake River became extinct in 1986. Well, as we speak here today, in Idaho coho are spawning in the Clearwater River system. And they're spawning because the Nez Perce Tribe, beginning in 1996, decided to put coho back into the Clearwater over the objections of the Idaho Department of Fish and Game. In fact, the tribe had to have tribal law enforcement personnel go with them to protect them from the Idaho Department of Fish and Game when they released these fish into the natural habitat. Within two years, the fish were back and spawning in the gravel of the Clearwater. Now I say this to you: do you think those fish care that they came from a hatchery? I bet you they are just as happy as can be, spawning in the Clearwater.

The bear that comes down and picks up that fish when they start spawning, or the eagle that swoops down and picks up that carcass after it's done spawning and uses it for its own survival also couldn't care less. As far as the

habitat is concerned, these are coho. I am afraid that the real struggles of the tribes to return the salmon to the habitat has not been played out in the public arena as much as it should have been.

Thanks Doug.



Douglas Dompier began his career as a fish biologist on the Columbia River in 1972, working for the National Marine Fisheries Service. Major assignments included development of mitigation plans under the authority of the Fish and Wildlife Coordination Act. In 1979, the Columbia River Inter-Tribal Fish Commission hired him and gave him the task of developing a Fisheries Technical Service Division for the Commission. Over his 33 years of work, Mr. Dompier developed a deep appreciation and understanding of how fish production in the Columbia River system shaped the salmon runs. In his recently published book *The Fight of the Salmon People: Blending Tribal Tradition with Modern Science to Save Sacred Fish*, he expands considerably on the topics he has discussed here.

Columbia River Compact

Washington and Oregon, through what is known as the Columbia River Compact, share authority to regulate the commercial harvest of salmon on the main stem of the Columbia River. Commercial fishing seasons, including those of the tribes, are set by consensus. Establishment of commercial seasons that were discriminatory to the tribes ultimately led to the tribes filing a lawsuit in 1968 known as *US v. Oregon* (also known as the Belloni Decision). Following the court victory in 1969, the tribes began to increase their involvement in management of Columbia River salmon as they reasserted their treaty rights. That involvement continues to expand as the tribes are recognized more and more as co-managers of salmon resources.

Doug Dompier

Fall-out from the Boldt and Belloni Decisions

Many non-Indian communities that were dependent on commercial fishing were outraged by the Boldt decision. A buy-back program for commercial fishing boats eased the pain to some degree, but for a number of years opponents of the decision vociferously and dramatically protested it, staging mass fish-ins in opposition to Indian rights. The US Supreme Court first refused to hear an appeal then upheld Boldt's decision after Slade Gorton, then Attorney General of Washington State, managed to maneuver a hearing on a related issue in 1979.

It is important to note that the issue in both the Boldt and Belloni Decisions was about reserved rights, not rights granted from the US to tribes. Over 25 major tribes, including the Warm Springs, Yakama, Nez Perce, and Umatilla, have treaty language identical or nearly identical to the Treaty of Medicine Creek. Please see Boldt and Belloni in the glossary.

Jay Hutchins, Executive Editor

An interview with
Jaime A. Pinkham,
Watershed Director
for the Columbia River
Inter-Tribal Fish
Commission

How the Nez Perce Returned to Oregon

Jaime, tell me about your background.

JP: I received a forestry degree from Oregon State in 1981. It wasn't until 1990 that I moved home to work for the Nez Perce Tribe. While at home, I managed the full complement of the tribe's natural resource programs, including fisheries, wildlife, forestry, cultural resources, and land services. I was also twice elected and served as treasurer on the Nez Perce Tribal Executive Committee, which is the tribe's governing council.

Can you tell me a little about the history of the Nez Perce and why they were away from their homeland in Oregon for so many years?

JP: The short story is that before treaties with the United States, the Nez Perce had exclusive use and occupancy of over 13 million acres in what is today northeastern Oregon, southeastern Washington, and most of north-central Idaho. We also traveled to the plains to hunt buffalo and traveled down the Columbia River to fish. After our first treaty in 1855, gold was discovered on our reservation and the US coerced the tribe into a second treaty in 1863, which required the Nez Perce to move to a reservation in Idaho. (*The Nez Perce reservation is located in north-central Idaho, near the state border with Washington.*)

However, not all of the bands signed the 1863 treaty, including Chief Joseph's Wallowa band. Chief Joseph had made a pledge to his dying father Old Chief Joseph that he would never give up the lands that held his father's body.

The federal government did not respect the individual autonomy of the different bands. So, in 1877 they attempted to force the bands who hadn't signed the treaty onto the reservation in Idaho. General O.O. Howard gave them an ultimatum saying that the bands had to leave their homelands and move to the reservation whether they signed the treaty or not. It was these actions that eventually led to war in 1877.

What happened next?

JP: For five months, the army pursued the Nez Perce as they attempted to make their way to freedom in Canada. However, they were captured in Montana and sent to Kansas, then Oklahoma. Eight years later, they were allowed to return to the Northwest, but not to their original homelands. Some of the bands were given a choice to either go to the reservation in Idaho or live on the Colville Reservation in Washington. Joseph's band was looked upon as being the instigator of the war and people were afraid that if he lived in Idaho the White settlers would try to take revenge against him—he was seen as the Red Napoleon. So they had no choice but to live in exile on the Colville Reservation. Joseph and his band were never allowed to return to the Wallowa Valley.

Chief Joseph had made a pledge to his dying father Old Chief Joseph that he would never give up the lands that held his father's body.

I understand the Nez Perce have now moved back into Oregon using the Tribal Lands Project within the Trust for Public Lands (TPL). How did this come about?

JP: Actually, the Nez Perce project was among the trio of initial projects in the nation where TPL teamed up with tribes. Shortly after the Nez Perce project, TPL took the initiative to put together a Tribal Lands Program. They formed a tribal lands advisory

council, which included, from Oregon, Chairman Antone Minthorn of the Confederated Tribes of Umatilla, former Congresswoman Elizabeth Furse, and former Senator Mark Hatfield.

What is the Trust for Public Land?

JP: TPL is a national, nonprofit, land conservation organization that ensures livable communities for future generations. TPL connects people and land, and nowhere can you find a community that's more spiritually and physically connected to the land than in Indian country. (*TPL has the Tribal Lands Program that, since 1993, has assisted 35 tribes in 13 states with acquiring or otherwise protecting 64,751 acres of land as part of 42 projects—Ed.*)

How did you become involved with this project to get the land in Oregon back for the Nez Perce? When did all this happen?

JP: A provision of the Northwest Power Act (*Northwest Power Planning and Conservation Act—Ed.*) requires that the fish and wildlife impacts caused by of the construction and operation of the federal hydro system be mitigated. The act established the Northwest Power and Conservation Council (NPCC), with the purpose of preparing a regional fish and wildlife plan. Bonneville Power Administration (BPA), which markets the power produced by the federal dams, is obligated to dedicate a portion of their revenues to implement the plan.

When I was the Nez Perce Tribe's natural resource manager, Keith Lawrence (the wildlife program manager) and his wildlife staff were aggressively working on a wildlife mitigation plan for Dworshak Dam in Idaho. Just as we were sewing up the Dworshak project we began to focus on unmitigated wildlife habitat (*damaged habitat—Ed.*) caused by the dams on the lower Snake River.

About the same time, Hans Magden, a local landowner, was working with the TPL to find a new owner for his land in Joseph Canyon in northeastern Oregon. He had been an airline pilot and fell in love with the land when he flew over it. However, he was an off-site landowner,

and he wanted the land to be managed for conservation. Peter Pacquet with NPCC suggested that the Nez Perce would be an ideal partner and TPL approached us with the idea.

So the owner was motivated and you started working with TPL?

JP: Yes, TPL would handle the transaction and they exercised an option on the property, which gave us time to work with NPCC, BPA, and interested parties to put the project proposal together. This was our first acquisition in 1997. Eventually we acquired over 16,200 acres, including acquisitions of land that returned us as landowners once again to southeastern Washington.

Were these lands put into a federal trust the way that land in Cascade Locks would have to be if the Confederated Tribes of Warm Springs are granted permission to build a casino there?

No, the Nez Perce Tribe holds title to these lands, not the federal government.

Trust Lands

Trust lands are lands that are held in trust by the US government for Indian tribes and individuals. The federal government holds legal title to that land, while the tribe or individual tribal member holds beneficial title and may sell their land only with approval of the Secretary of the Interior.

Why does tribal law exist on these lands even if it is not in the federal trust for Indian land?

JP: Our treaty reserved in perpetuity our hunting rights within our ancestral homeland. The lands we acquired in Oregon are within that homeland. The tribe, as a sovereign government, has its own law enforcement and court system, so the exercise of our treaty rights on these lands is under tribal jurisdiction.

You also had to develop relationships with local government to get a chance to make this all work, right?

JP: Yes. When we pitched the idea to Angus Duncan, who was then an Oregon member of the NPCC, he advised us to run the concept past the Wallowa County Commissioners. Fortunately for us, Si Whitman had already done great work in the county forming relationships. At the time, Si was the tribe's fisheries manager and had pioneered the tribe's return, getting us a foothold in the community as a capable fisheries manager. I feel that what contributed to making our wildlife efforts successful is the fact that Si laid a good foundation through developing relationships with the ranchers, the irrigators, and local government on the fisheries front.

What did you have to do to get the county to go along with the plan?

JP: Angus pointed us in the right direction—to Pat Wortman, who was then a county commis-

sioner. Keith Lawrence and I met with Pat and we pitched him the idea over coffee and donuts. We told him we were looking at becoming landowners in northeastern Oregon under the auspices of the Power Act for wildlife mitigation. Pat was enthusiastic about the project but he had three requests of us: Don't erode the county's tax base; Be good neighbors by putting out wildfires and controlling noxious weeds; And be kind to the local economy by allowing opportunities for grazing or timber harvesting on those properties if it is feasible.

We are a wildlife managing agency, as is the state of Oregon.

We responded, "Sure, we can work these issues out." We did successfully work out an MOU—Memorandum of Understanding—with the county that satisfied their concerns.

Please talk a little more about the tax issue with the county.

JP: Wallowa County has a large federal land base and they were concerned about more and more private land leaving the tax rolls and eroding their tax base. We had treaty rights and sovereignty to protect, which made the task of dealing with the tax issue complex. The sovereign government of the Nez Perce would not consent to pay property taxes. Fortunately, TPL and BPA came up with a creative solution by setting up a trust fund that would make payments in lieu of taxes. In the end, the tribe is not paying property taxes yet the county is receiving revenues.

So how did Wallowa County actually support the sale? Were there public hearings?

JP: Wallowa County—along with over 20 other parties—wrote letters of support. And, with the MOU in place we sealed the county's approval.

The project proposal also went through a deliberative review process as outlined in the NPCC's program. It was an open, public process each step of the way and the project proposal was subject to scientific review.

So you received the land through TPL, and the money came from BPA wildlife mitigation funds. How are the Nez Perce qualified to manage this land?



JP: The tribe has the institutional capacity and expertise to manage natural resources in our ancestral homeland both on reservation and off. We are a wildlife managing agency, as is the state of Oregon. Our treaty guarantees our right to have access to and harvest resources from the lands we ceded to the US, and more, we also have the right to participate as stewards to protect and enhance our treaty-reserved resources. The federal agencies, including BPA, have a trust responsibility and government-to-government relationship with us.

And—consider this: Nowhere has any community in the West sacrificed so much in the face of progress and development as native communities. Land was torn from our grasp, along with the abundant natural resources that provided our physical and cultural sustenance. And today, in a turnabout, no western community has achieved more in the face of adversity to restore and protect the environment than the same tribal communities.

How is this looked at by the tribes, BPA, and the states?

JP: The Nez Perce Tribe is working with BPA to help them meet their fish and wildlife obligations under the Power Act as well as satisfy their trust responsibility and treaty commitments to us. It is more than the tribe who benefits from this project. The mitigation effort serves the entire Columbia Basin by implementing on-the-ground projects to address the federal hydro system's adverse effects on fish and wildlife. Creating and managing wildlife habitat helps us sustain healthy populations of big game, especially by providing vital over-wintering ranges. Sustainable populations serve the tribal community in protecting treaty-reserved rights, and also enhance sports and subsistence hunting opportunities for non-Indians. There are also economic contributions that local communities gain in hunting, recreation, and tourism dollars.

So, a way of providing good management of the land was to give the land under Power Act mitigation directives to the Nez Perce to manage.

JP: Yes. There is a management plan in place for the property. We have also secured operation and maintenance funds to support

A tremendous injustice was inflicted upon the Nez Perce by the 1863 treaty and the war in 1877. The historical scar will always exist, but in time the scars upon the land and the people can begin to heal.

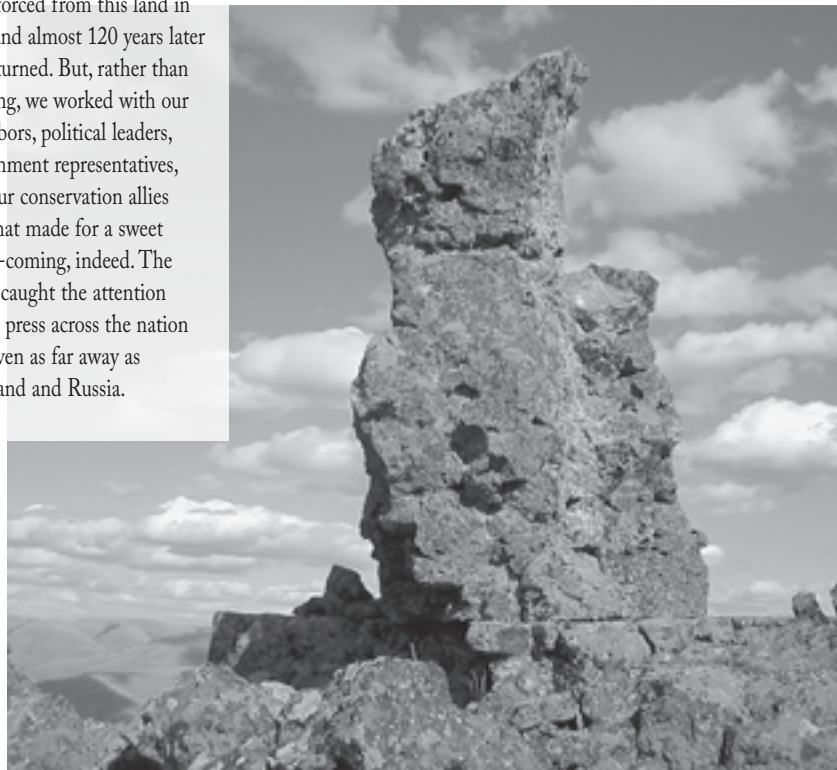
management goals and requirements. It is safe to say that the tribe is a long-term steward—we've been at this for over 10,000 years and expect to remain in our ancestral homelands in perpetuity.

There's more to this besides getting land into tribal ownership for wildlife mitigation. This was also a story about soothing old wounds. A tremendous injustice was inflicted upon the Nez Perce by the 1863 treaty and the war in 1877. The historical scar will always exist, but in time the scars upon the land and the people can begin to heal. The Nez Perce were forced from this land in 1877 and almost 120 years later we returned. But, rather than fighting, we worked with our neighbors, political leaders, government representatives, and our conservation allies and that made for a sweet home-coming, indeed. The event caught the attention of the press across the nation and even as far away as Thailand and Russia.

It has been an interesting journey, full of setbacks, court cases, and triumphs. Chuck Hudson, one of the forum editors for Oregon's Future, told me that the Nez Perce have continued to hunt and fish in northeastern Oregon ever since they were forced to leave.

JP: Before the modern-day return of the Nez Perce to northeast Oregon as landowners, Nez Perce tribal members exercised their treaty hunting and fishing rights there all the while. Hunting and fishing were fundamental to Nez Perce survival, physically and culturally, well before treaty negotiations, and it continues today. Sure, there were times of conflict over scarcity and jurisdiction. For a while my grandfather had to buy a hunting license, and the states also tried to enforce their regulations on our fishing and hunting needs. We had no choice but to fight for our rights in court, such as in *US Oregon*, which assured an equitable share of fish harvest for the Columbia River Inter-Tribal Fish Commission tribes and began the discussions on fisheries production goals.

The tribal treaty negotiators assured that future generations of Nez Perce would continue to hunt and fish across our traditional home-



lands, and by signing the treaty the federal government pledged to protect that right. Today, not only do we continue to exercise our treaty hunting and fishing rights but we also actively manage the resources that those rights are dependent upon.

Thank you Jaime.



Jaime A. Pinkham is the Watershed Department Manager for the Columbia River Inter-Tribal Fish Commission (CRITFC) in Portland, OR. Before moving to Portland, he spent over 12 years working for the Nez Perce Tribe, where he was twice elected to the tribal council and was the department manager overseeing the Tribe's natural resource programs. He has held positions with the Trust for Public Land, Washington Department of Natural Resources, and Bureau of Indian Affairs. He currently serves on various boards including the Governing Council of The Wilderness Society, the Native Nations Institute for Leadership, Management and Policy through the Morris K. Udall Center at the University of Arizona, Potlatch Corporation's Citizens Advisory Committee in Idaho, and the Bonneville Environmental Foundation. He received a degree in forestry from Oregon State University. He also sings traditional songs with the Nez Perce Nation Drum, and is a great-great-great-great grandson of Old Chief Joseph.

The Trust for Public Land and the Tribal Lands Program

The Trust for Public Land (TPL) is a national, nonprofit, organization that conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come. TPL created the Tribal Lands Program in 1999 to work with tribal communities to acquire and protect their ancestral homelands. Partnerships with tribes help assist them in meeting their land conservation, natural resource restoration, and cultural heritage objectives by getting land directly under tribal ownership and stewardship, or under public ownership where tribal values can be protected.

According to its own charter, the Tribal Lands Program is based on the idea that "restoration of tribal lands is fundamental to the preservation of tribal heritage and history, economic survival of Indian communities, and for conservation of precious natural resources for physical subsistence."

Other TPL projects in Oregon include:

Acquisition of the 777-acre Miller Island in Oregon, which has enabled the Warm Springs, Umatilla, Yakama, and Nez Perce Tribes to protect this site's extraordinary cultural value and use the island for re-internments of ancestral remains that were returned to them under the Native American Graves and Repatriation Act.

Protection of Wocus Point, an important burial site in Oregon's Klamath Basin, from looting and vandalism of its gravesites by placing it in federal ownership.

Assistance given to the Confederated Tribes of the Umatilla Indian Reservation to acquire nearly 2,400 acres along the shores of the Columbia River in Oregon. This land was acquired with funds from Bonneville Power Administration for wildlife mitigation and will be managed for the benefit of the wildlife resources and the region's citizens.

(From: <http://www.tpl.org>)

THE KLAMATH BASIN: Too Many Promises of Water

by Carl Ullman

IN THE SPRING OF 2001 THE Secretary of the Interior curtailed delivery of water to the Klamath Reclamation Project (KRP) in southern Oregon and northern California. This was the first time since its inception nearly 100 years ago that full deliveries had not been provided to the Project. The Secretary had determined, based on the best available science, that in order to avoid further jeopardy to endangered, treaty-protected fisheries in the Klamath watershed it was necessary to curtail deliveries to the KRP. This action signaled a long overdue recognition that there is a water crisis in the Klamath Basin of southern Oregon and northern California. It precipitated a media and political firestorm. Although portrayed by some as a complete divestiture of water from all agriculture in the basin, in fact over two-thirds of basin agriculture received full allocations, and even the KRP received more than 70,000 acre feet of water late in the irrigation season.

**“Fish vs. farmers”
is as misdirected
as “cows vs.
fishermen”
or “potatoes
vs. Indians.”**

The water crisis in the Klamath Basin is often portrayed by the press and agricultural interests as a “fish vs. farmers” clash of values. This description is both incorrect and destructive to finding cooperative solutions to a problem that

all basin water interests face. The problem involves people and livelihoods on all sides, and is the inevitable consequence of long-standing, unresolved conflicts coupled with the driest water year on record (in 2001) and, undoubtedly, more dry years to come.

The current situation concerns many groups. Indian communities up and down the Klamath River and non-Indian fisheries over a vast stretch of the Oregon-California coast are involved, as well as the KRP agricultural community that absorbed the brunt of the 2001 drought, feeling for the first time the effects of too many government commitments and too little water. “Fish vs. farmers” is as misdirected as “cows vs. fishermen” or “potatoes vs. Indians.” The situation is no more—and no less—than people in conflict over management of a sharply limited resource on which various groups have legitimate claims, and on which their livelihoods depend. In addition, the sustainability of the basin ecosystem is at stake—the basin is home to many exquisitely important wildlife refuges that also are in desperate need of adequate water.

Viewed correctly, the basin water situation presents a unique opportunity to develop a policy showing that economic and environmental concerns can be productively balanced, and that the honor of the United States can be upheld in its dealings with both indigenous peoples and its other citizens. This is of supreme importance because the basin is at a critical juncture. The Klamath Basin can be the centerpiece of a federal policy balancing nature and the economy, or it can

be left to descend into decades of divisive litigation and strife.

Too Many Promises— More Water Than Nature Can Provide

Indian Tribes: Proponents of the “fish vs. farmers” description generally begin their analysis with the Reclamation Act of 1902, the 1905 legislation authorizing the Klamath Project, and the water promises that flow therefrom. Of course, history did not begin with those pronouncements.

Prior to those enactments it was necessary for the United States to secure title to land for the project (and, of course, for many other purposes) by treating with the Klamath and Modoc Tribes and the Yahooskin Band of the Snake Indians (hereinafter the Klamath Tribes), who had resided in the Klamath Basin and been in possession of the lands for thousands of years. This was done in the Treaty of October 14, 1864, in which the tribes ceded 20 million acres of what is now Southern Oregon and Northern California—including the lands of what would become the Klamath Reclamation Project. The treaty reserved to the tribes certain rights that they had always held, including the right to continue relying on the fisheries and other resources which had supported them for millennia. These are not rights granted to the tribes by the United States, but rights held by the tribes for centuries and simply retained by the tribes in the treaty.

These treaty rights protect not only the tribal fisheries and other water-dependent resources, but the water necessary to support those

resources. Similar commitments were made, by executive order rather than treaty, to the Yurok, Hoopa Valley, and Karuk Tribes in California. Because of the tribes’ aboriginal presence in the Klamath Basin their water rights enjoy the most senior priority dates in the basin. Western water law, therefore, strictly applied, requires that these rights be fully satisfied before water is delivered to any other user.

**No mention was
made of the pre-
existing promises
of water to the
Klamath Tribes.**

The Klamath Reclamation Project: Early in the 20th century, federal goals of settling the West and advancing homesteading policies led to the diking off and draining of many thousands of acres of marshlands and the recruitment of farmers to occupy and develop the land. Recruiting flyers included promises of enough water to make the desert bloom for anyone willing to put in hard work in an undeveloped land. As the century unfolded, returning military men were also invited to the basin to homestead and farm with the promise of federally supplied water. No mention was made of the preexisting promises of water to the Klamath Tribes.

The Klamath Project has grown from a few thousand acres to more than 200,000 acres. A breathtaking system of dams, canals, drains, pumps

BIRDS OF THE KLAMATH BASIN

While concerns about endangered species, particularly endangered and threatened fish, often dominate public discussions of Klamath Basin water supplies and ecosystem degradation, one of the more remarkable qualities of the region is its abundant bird life. Beyond their intrinsic value, these birds offer an important measure of the overall health of the ecosystem; not only for birds, but for people and other wildlife as well.

Within the contiguous United States, the Klamath Basin is probably the most important migratory bird stopover site on the entire Pacific Flyway. Six Klamath Basin National Wildlife Refuges (Lower Klamath, Tule Lake, and Clear Lake in northern California and Klamath Marsh, Upper Klamath, and Bear Valley in southern Oregon) preserve much of what remains of the Klamath wetlands. Its historic wetlands, which included 185,000 acres of shal-

low lakes and freshwater marshes, attracted peak fall concentrations of over six million waterfowl (e.g. ducks, geese, and swans) and abundant populations of other water birds. Although less than twenty-five percent of historic wetlands remain; eighty percent of all Pacific Flyway waterfowl (approximately 2 million birds in the fall and 1.25 million in spring) still utilize and rely on the Klamath.

In addition, the Klamath Basin sustains one of the largest populations of wintering Bald Eagles in the contiguous United States (numbering up to 1,000), significant breeding concentrations of Greater Sandhill Crane, and the islands at Clear Lake National Wildlife Refuge host one of only two remaining nesting colonies of American White Pelicans in California.

While the diverse habitat in the Klamath Basin supports 274 regularly occurring species of birds, many of these are in jeopardy. Federal or state governments currently list nine bird species that regularly occur in the Klamath as endangered or threatened; more than 70 others are considered by these same authorities or Audubon's WatchList to be of concern. These declining or vulnerable bird populations result primarily from degradation, fragmentation, or wholesale loss of the critical habitats on which they rely.

The existing Klamath Project legislation is hopelessly outdated and insufficient even in today's world, let alone the future. New legislation is needed that makes important bird habitat and refuge water needs a purpose of the Klamath Reclamation Project.

Dave Eshbaugh, Executive Director, Audubon Oregon



and other facilities was developed by the United States. Homesteaders repaid the costs of development, albeit at little or no interest. Hundreds of families now depend on the project for their livelihoods.

State Water Permits: As the 20th century progressed and the population grew, the states of Oregon and California issued state water rights permits to hundreds, perhaps thousands, of applicants

for water use throughout the basin, outside the project lands. The states felt no obligation under the federal/tribal treaties and executive orders, so state permits were issued without regard to prior water commitments

to tribes. State interpretations of the federal commitments of water for the project were not harmonized with federal interpretations, and state permitting proceeded at its own pace independent of prior federal commitments to project water users.

So here, again, an additional class of water claimants was allowed to blossom without reconciling its expectations with those of the tribes or the project water users. This class, like the others, feels justified in claiming a legitimate right to Klamath Basin water.

Wildlife Refuges: Home to several important wildlife refuges, such as the Tule Lake and Lower Klamath refuges, the Klamath Basin is often called the "Everglades of the west" and "a crown jewel of the national refuge system." Unfortunately for the refuges, they were in part a mere afterthought in the development of the basin. While President Teddy Roosevelt created the first refuge as early as 1908, full establishment and protection of the refuges was not completed until much later. Powerful interests favored homesteading of as much basin land as possible with the result that most of the refuges hold a relatively junior priority date to water. Even in an average water year they must struggle with inadequate water availability.

Instability on All Fronts

Three elements of Klamath Basin life—the Indian and other fishing communities, the agricultural communities, and the ecosystem itself—form a triangle in which the instability of any one corner destabilizes the other two. Right now, all three are unstable.

Fisheries: At stake for the tribes is the fabric of their societies. Fisheries are extremely important to the physical and spiritual well-being of these peoples. The factors that led to the descent of the coho salmon and sucker fisheries onto the

Endangered Species lists have had devastating effects—most dramatically demonstrated by the loss of over 30,000 salmon that died of bacterial and parasitic diseases in the shallow waters at the mouth of the Klamath River in the fall of 2002. These resources, which once helped the poorest of the poor cope with their situation, are no longer available.

Non-Indian fishing communities have also suffered. The Klamath River was once a key source of anadromous fish that are born in fresh water, migrate to the ocean where they spend most of their lives, and return to their native streams to spawn and die. Klamath ranked behind only the Columbia and Sacramento River systems in terms of productivity. Recently, however, coastal communities have witnessed the loss of thousands of jobs and millions of dollars as a result of declining fish abundance due, in part, to the withdrawal of water from the Klamath for other uses.

Agriculture: There are roughly 450,000 acres of irrigated agriculture

in the Klamath Basin. In 2001, about half of those acres went without water. While this left half of the basin's farmers and ranchers with a nearly normal water year, the impact on families who were denied water in 2001 was telling. However, in addition to the usual farm supports, federal emergency payments of \$55 million were made directly to basin farmers, significantly softening an otherwise severe blow. Still, some people will surely be unable to continue farming and will need to change their lives substantially and involuntarily, though others may see this as the opportunity to implement an existing decision to quit.

Ecosystem: The plight of the refuges is symptomatic of the degradation of the basin's ecosystem. Severe water quality and quantity problems are brought about by the loss of tens of thousands of acres of wetlands and the destruction of riparian areas adjacent to water bodies of all types. The basin's ability to support even a fraction of its once abundant wildlife is deeply compromised.

What is to be done?

Restoring stability to the Klamath Basin requires addressing the two fundamental problems that drive the current situation—over-appropriation of water and ecosystem degradation. These are great challenges. Unfortunately, most of the basin's political leadership has not felt comfortable addressing these topics and has resorted instead to a search for quick-fix remedies, including the canard that amending the Endangered Species Act will somehow provide immediate and lasting relief. These approaches are futile.

Until the too-many-promises problem is addressed there can be no stability. Demand reduction is unavoidable because even in average water years Nature does not provide enough water to meet all demands, and in dry years the situation becomes even worse. The 2001 shut-off of one-third of basin agriculture and the loss of over 30,000 salmon in 2002 are undeniable demonstrations of this fact. Equally illustrative is the imminent demise of the fisher-

ies if agricultural water needs are given unbridled priority. The real question, then, is whether systems of governance will take control of this demand reduction process or, instead, will allow it to take place in destabilizing paroxysms.

Until a large and lasting commitment is made to ecosystem restoration, Upper Klamath Lake will continue to be toxic to fish and its tributaries will be unable to deliver a stable water supply. The quick-fix approach requires amending the Endangered Species Act, followed by a quick overhaul of the Clean Water Act and a heartless abrogation of commitments to Indian peoples. These things, even if they were possible, would not be effective; the resulting cesspool in Upper Klamath Lake and the ensuing species extinction would not restore stability or produce an unlimited supply of water.

Given the large federal presence in the Klamath Basin, if the Bush Administration follows through in calling attention to, and addressing, the real problems of the basin, then real and effective solutions can be found. The early signs were encouraging and various basin water interests have engaged in serious negotiation, but solutions remain elusive.

Trust Relationship and the Klamath Water Crisis

By the time of the Treaty of 1864 the tribes had lived self-sufficiently in the Basin for about 10,000 years, if one accepts the studies of modern anthropologists—or forever, if one accepts the tribes' origin myths. In any case, while wanting to open the land for non-Indian settlement the Government had neither the wherewithal nor the desire to support the Indians but, instead, wanted—as the Indians did—to allow the tribes to continue their self-sufficient ways. Thus, part of the Treaty agreement was a reservation to the tribes of the fisheries upon which they depended, and a promise by the United States to protect those resources to the tribes. This obligation continues today. The US is obliged to protect the fisheries reserved to the Klamath Tribes in the Treaty of 1864 (and to the California tribes where the history is different in form, though not in substance, in Executive Orders). Through various court rulings and administrative actions this has become known as a “trust obligation” under which the US actually owns legal title to Indian property, including fisheries and water rights, and holds those assets in trust for the beneficiary tribes. It must manage those resources for the tribes' benefit.

Carl Ullman

Update to Ullman's Article on the Klamath Water Crisis

Nature has dampened emotions in the Klamath Basin in the last few years by providing more water. But there has been little progress toward resolving the hard conflicts that provoked the crisis of 2001.

The government has spent millions on a "water bank" that pays farmers to idle their fields or irrigate with well water, freeing up the lake and river water for fish. It was always billed as a temporary measure to ease tension until more solid solutions emerged. But it has caused tensions of its own as an eight-fold increase in pumping from wells has drawn down the water table two to eight feet over wide areas, the US Geological Survey found.

Farmers argue that what they need most of all is some confidence of a reliable water supply. But lawsuits, wrangling among agencies, and the idiosyncrasies of weather leave Klamath's limited water flow unpredictable as morning fog.

The Bush administration made the Klamath Basin a priority after it captured the national spotlight in 2001, creating a cabinet-level panel and dedicating millions of federal dollars. The government built a new screen

across Upper Klamath Lake's main outlet of irrigation water to keep young suckers from being drawn into it. Agencies are also planning to remove an aging dam that blocks essential sucker habitat on the Sprague River. Biologists had argued for both moves for many years. Tribes and environmental groups are trying to use relicensing of Pacificorp's dams on the Klamath River as an opportunity to push for the return of salmon blocked by the dams. California has called for studying the possibility of removing these dams.

Federal and state agencies have launched a broad plan to better coordinate habitat recovery and water management, to encourage wider restoration of wildlife habitat throughout the Klamath River drainage from Southern Oregon to Northern California. But the spending has begun to wane and many stakeholders fear the window of opportunity to bring lasting change to the basin may be closing.

Perhaps the most striking, and promising, changes in the basin are those that locals from farmers to tribes have carried out quietly, without much fanfare or government direction though sometimes with the help of federal funds. Farmers have used lasers to level fields and taken other steps to make the most of every drop of irrigation water they get. Many are simply individuals working on their own, trying to make their land more useful to wildlife. More organized groups include a Portland-

based non-profit called Sustainable Northwest which has joined with the Yainix Ranch in the Sprague River Valley, at the upper end of the Klamath drainage, to find ways for ranching and environmental restoration

to coexist. Similar efforts elsewhere in the basin have rejuvenated wide spans of wetlands that filter water and provide refuge to waterfowl, and rebuilt stream habitat that shelters fish.

But it is clear that real solutions remain years away.

*Michael Milstein,
reporter covering the Klamath Basin*

Until the too-many-promises problem is addressed there can be no stability.



Carl Ullman is the Director of the Water Adjudication Project for the Klamath Tribes in Chiloquin, Oregon. He represents the tribes in water and other natural resource issues in state and federal court and legislative and agency proceedings. He has practiced in the fields of Indian law for twenty four years and water law for seventeen years. He previously served as Attorney General of the Federated States of Micronesia, and as Managing Attorney of the Office of the Reservation Attorney of the Quinault Indian Nation. Mr. Ullman earned his LL.M. from Yale University in 1988, his J.D. from the University of Washington in 1976 and his B.A., cum laude, at Knox College in 1970. He is admitted to practice in Washington and Oregon, the Ninth Circuit, the Supreme Court of the United States, and the Supreme Court of the Federated States of Micronesia.