COLVILLE TRIBES—GRAND COULEE SETTLEMENT

HEARING
BEFORE THE
SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON NATURAL RESOURCES
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
SECOND SESSION
ON
H.R. 4757
TO PROVIDE FOR THE SETTLEMENT OF THE CLAIMS OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION CONCERNING THEIR CONTRIBUTION TO THE PRODUCTION OF HYDROPOWER BY THE GRAND COULEE DAM, AND FOR OTHER PURPOSES

HEARING HELD IN WASHINGTON, DC
AUGUST 2, 1994

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(III)
H.R. 4757, THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION GRAND COULEE DAM SETTLEMENT ACT

TUESDAY, AUGUST 2, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m. in room 1310, Longworth House Office Building, Hon. Karen Shepherd presiding.

Ms. Shepherd [presiding]. The Subcommittee on Oversight and Investigations will come to order for the purpose of hearing testimony on H.R. 4757, the Confederated Tribes of the Colville Reservation of the Grand Coulee Dam Settlement Act.

[Text of the bill, H.R. 4757, follows:]
H. R. 4757

To provide for the settlement of the claims of the Confederated Tribes of the Colville Reservation concerning their contribution to the production of hydropower by the Grand Coulee Dam, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 1994

Mr. MILLER of California (for himself, Mr. RICHARDSON, Mr. INSLEE, Mr. DICKS, and Ms. DUNN) introduced the following bill; which was referred to the Committee on Natural Resources

A BILL

To provide for the settlement of the claims of the Confederated Tribes of the Colville Reservation concerning their contribution to the production of hydropower by the Grand Coulee Dam, and for other purposes.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,
3 SECTION 1. SHORT TITLE.
4 This Act may be cited as the “Confederated Tribes
5 of the Colville Reservation Grand Coulee Dam Settlement
6 Act”.
7 SEC. 2. DEFINITIONS.
8 For purposes of this Act:
(1) The term "Administrator" means the Administrator of the Bonneville Power Administration.

(2) The term "Bonneville Power Administration" means the Bonneville Power Administration of the Department of Energy or any successor Agency, Corporation, or entity that markets power produced at the Dam.

(3) The term "Dam" means the Grand Coulee Dam operated by the Bureau of Reclamation of the Department of the Interior, the power from which is marketed by the Bonneville Power Administration of the Department of Energy.

(4) The term "Settlement Agreement" means the Settlement Agreement entered into between the United States and the Tribe, signed by the United States on April 21, 1994, and by the Tribe on April 16, 1994, to settle the claims of the Tribe in Docket 181-D of the Indian Claims Commission, which docket has been transferred to the United States Court of Federal Claims.

(5) The term "Tribe" means the Confederated Tribes of the Colville Reservation, a federally recognized Indian tribe.

SEC. 3. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—
(1) there is pending before the United States Court of Federal Claims, a suit by the Confederated Tribes of the Colville Reservation against the United States, in which the Tribe seeks to recover damages under the "Fair and Honorable Dealings" clause of the Indian Claims Commission Act, (Act of August 13, 1946, 60 Stat. 1049), and in which, although the matter is in dispute, the potential liability of the United States is substantial;

(2) the claim alleges that the United States has since the construction of Grand Coulee Dam used Colville Reservation land in the generation of electric power, and will continue to use such reservation land for as long as Grand Coulee Dam produces power; and that the United States has promised and undertaken to pay the Tribe for such use and has not done so;

(3) the United States, after years of litigation, has negotiated a Settlement Agreement with the Tribe, signed by the Department of Justice, the Bonneville Power Administration and the Department of the Interior. The Settlement Agreement is contingent on the enactment of the enabling legislation; and
(4) the Settlement Agreement, approved in this Act, will provide mutually agreeable compensation for the past use of reservation land in connection with the generation of electric power at Grand Coulee Dam, and will establish a method to ensure that the Tribe will be compensated for the future use of reservation land in the generation of electric power at Grand Coulee Dam, and will settle the claims of the Tribe against the United States brought under the Indian Claims Commission Act.

(b) PURPOSES.—It is the purpose of this Act—

(1) to approve and ratify the Settlement Agreement entered into by the United States and the Tribe; and

(2) to direct the Bonneville Power Administration to carry out its obligations under the Settlement Agreement.

SEC. 4. APPROVAL, RATIFICATION, AND IMPLEMENTATION OF SETTLEMENT AGREEMENT.

(a) APPROVAL AND RATIFICATION.—The Settlement Agreement is approved and ratified.

(b) ANNUAL PAYMENTS.—The Bonneville Power Administration shall make annual payments to the Tribe as set forth in the Settlement Agreement and shall carry out its other obligations under the Settlement Agreement.
(c) SETTLEMENT.—Consistent with the negotiated terms of the Settlement Agreement, the United States shall join in the motion that the Tribe has agreed to file in Confederated Tribes v. United States, Indian Claims Commission Docket 181-D, for the entry of a compromise final judgment in the amount of $53,000,000. The judgment shall be paid from funds appropriated pursuant to section 1304 of title 31, United States Code and is not reimbursable by the Bonneville Power Administration.

SEC. 5. DISTRIBUTION OF THE SETTLEMENT FUNDS.

(a) LUMP-SUM PAYMENT.—The judgment of $53,000,000, when paid, shall be deposited in the Treasury of the United States and the principal amount and interest on the judgment, shall be credited to the account of the Tribe. These funds may be advanced or expended for any purpose by the tribal governing body of the Confederated Tribes of the Colville Reservation, pursuant to a distribution plan developed by the Tribe and approved by the Secretary of the Interior pursuant to section 3 of Public Law 93–134 (25 U.S.C. 1403): Provided, That any payment to a minor under the distribution plan shall be held in trust by the United States for the minor until the minor reaches the age of 18, or until the minor's class is scheduled to graduate from high school, whichever is later: Provided further, That emergency use of trust funds

•HR 4757 IH
may be authorized for the benefit of the minor pursuant

to regulations of the Bureau of Indian Affairs.

(b) ANNUAL PAYMENTS.—In addition to the lump-

sum payment, annual payments shall be made directly to

the Tribe in accordance with the Settlement Agreement,

and may be used in the same manner as any other income

received by the tribe from the lease or sale of natural re-

sources.

SEC. 6. REPAYMENT CREDIT.

Beginning with fiscal year 2000 and continuing for

so long as annual payments are made under this Act, the

Administrator shall deduct from the interest payable to

the Secretary of the Treasury from net proceeds as de-

fined in section 13 of the Federal Columbia River Trans-

mission System Act, an amount equal to 26 percent of

the payment made to the Tribe for the prior fiscal year.

Each deduction made under this section shall be a credit

to the interest payments otherwise payable by the Admin-

istrator to the Secretary of the Treasury during the fiscal

year in which the deduction is made, and shall be allocated

pro rata to all interest payments on debt associated with

the generation function of the Federal Columbia River

Power System that are due during that fiscal year; except

that, if the deduction in any fiscal year is greater than

the interest due on debt associated with the generation
function for that fiscal year, then the amount of the deduction that exceeds the interest due on debt associated with the generation function shall be allocated pro rata to all other interest payments due during that fiscal year.

SEC. 7. MISCELLANEOUS PROVISIONS,

(a) LIENS AND FORFEITURES, ETC.—Funds paid or deposited to the credit of the Tribe pursuant to the Settlement Agreement or this Act, the interest or investment income earned or received on those funds, and any payment authorized by the Tribe or the Secretary of the Interior to be made from those funds to tribal members, and the interest or investment income on those payments earned or received while the payments are held in trust for the member, are not subject to levy, execution, forfeiture, garnishment, lien, encumbrance, seizure, or Federal, State or local taxation.

(b) ELIGIBILITY FOR FEDERAL AND FEDERALLY FUNDED PROGRAMS.—Funds paid or deposited to the credit of the Tribe pursuant to the Settlement Agreement or this Act, the interest or investment income earned or received on such funds, and any payment authorized by the Tribe or the Secretary of the Interior to be made from those funds to tribal members, and the interest or investment income on those payments earned or received while the payments are held in trust for the member, may not
be treated as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefit to which the Tribe, a tribal member, or household would otherwise be entitled under the Social Security Act or any Federal or federally assisted program.

(c) TRUST RESPONSIBILITY.—This Act and the Settlement Agreement do not affect the trust responsibility of the United States and its agencies to the Tribe and the members of the Tribe.
Ms. SHEPHERD. I would like to take this opportunity to commend the tribes and the Federal agencies for working together to achieve this agreement and the settlement of the tribes' claims related to the inundation of their lands by the Grand Coulee Dam in Washington State, and I look forward to hearing the testimony of the witnesses.

Would you like to come forward now and take your places? And we will begin.

We will take a moment to have opening statements. Representative Smith, do you have a statement?

Mr. SMITH. I have no statement.

Ms. SHEPHERD. Mr. Dooley, do you have a statement?

Mr. DOOLEY. No opening statement.

Ms. SHEPHERD. All right. Thank you. No opening statements today. However, hearing no objection, the statement of Mr. Dickey will be inserted into the record.

[Prepared statement of Mr. Dickey follows:]

OPENING STATEMENT OF HON. JAY DICKEY

Mr. Chairman, thanks for holding this hearing today on H.R. 4757, to settle the Colville Tribes' claims against the U.S. resulting from the flooding of their lands by construction of the Grand Coulee Dam.

This specific issue is new to me, as is the general issue of settlement of Native American water rights and land claims. If all parties, including the Tribe, the Bonneville Power Administration, the Department of the Interior, and the Justice Department are all agreeable to this proposed settlement, after all these years of litigation, it seems to me we should proceed accordingly, to honor the commitments the federal government initially made to the Tribes.

I look forward to reviewing the testimony and learning more about the history of this settlement.

PANEL CONSISTING OF EDDIE PALMANTEER, JR., CHAIRMAN, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NESPELEM, WASHINGTON; JACK S. ROBERTSON, DEPUTY ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION, DEPARTMENT OF ENERGY; ADA DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; AND, PETER R. STEENLAND, APPELLATE SECTION CHIEF, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. SHEPHERD. Shall we begin with our first panel? Mr. Palmanteer.

STATEMENT OF EDDIE PALMANTEER, JR.

Mr. PALMANTEER. I would be willing to start.

Madam Chairperson, members of the committee, my name is Eddie Palmanteer, chairman of the Colville Tribes. I would like to thank you for this opportunity to testify, along with representatives of BPA, Justice and Interior.

We all support the Colville Grand Coulee Dam Settlement Act. The settlement will end litigation between the Colville Tribes and the United States that has lasted for over 40 years.

There are over 8,000 members of the Colville Tribes. The Colville Reservation was reserved because it provided access to the tribe's traditional salmon fisheries on the Columbia River and had abundant hydropower. When, in 1891, the United States took the north-
ern portion of the reservation with all the good farmland, Congress promised that tribal members would continue to, "enjoy without let or hindrance the right at all times freely to use all water power and water courses."

Although Grand Coulee Dam contributed greatly to the economy of the United States, its construction denied the Colville Tribes the ability to use that site or any other site for its own power development, and it destroyed forever the mighty salmon runs that used to migrate to Kettle Falls on the upper Columbia River and to the tributaries on the reservation.

Two reservation communities, Inchelium and Keller, were covered by the backwaters created when Grand Coulee Dam was built. Many of us were born in homes that today lie under the waters of Lake Roosevelt, as do the graves of many of our ancestors that could not be removed as the waters rose.

This project was originally to be built under a Federal Power Commission license, and we were to get annual payments for our contribution to power production. When the Federal Government took over the project, it promised the same thing. A congressional hearing was held on the Colville Reservation. A Mr. Pete Lemery, Colville representative at the time, testified that the Colville Tribes were entitled to a 10 percent royalty on the power to be produced because the United States had taken the north half of the reservation and was now taking the power site and the fishery.

A few weeks later, Mr. Harold Ickes, the then Secretary of the Interior, as a reply to the Colville request, endorsed a series of letters saying that the tribes should be paid the same annual payments from power they would have received under the Federal Power Act. This was never done.

We have sought justice on this claim since the 1940s. In April of 1992, the Court of Appeals finally held that our view of the law was correct. The court sent the case back for trial with instructions favorable to us. That is when the settlement negotiations began. Negotiations were thorough, sometimes technical, and sometimes heated. However, we all maintained respect for each other, which in large part helped us reach a settlement.

The settlement was based on comparisons with payments to other tribes under the Federal Power Act, a mixture of theories on compensation and a lot of compromise. Members of Congress suggested that we negotiate a settlement before coming to Congress. While we entered these negotiations with some concern, it now is clear that that advice was good.

The settlement provided a lump sum payment for past losses and annual payments for continued use of our resources. The lump sum is paid under the Judgment Funds Distribution Act. That means the Secretary of the Interior and Congress must approve our plan for the use of those funds. Annual payments are to be received by the tribe in the same manner as income for the use of any other tribal natural resource. These funds are budgeted by the tribes annually and the budget is approved by the Department of the Interior.

I would like to conclude my testimony by spending a moment to describe to you how the Colville Tribes went about approving the settlement and what the settlement means to our people. We sent
to each adult member a detailed package identifying the settlement, its terms, and the compromises we had to make to get the settlement. After that, we held meetings throughout the reservation and in some locations within the State to inform our members and let them ask questions. Finally, on April 16th, we held a general meeting at tribal headquarters for people to vote. We have about 5,000 eligible voters of our tribe, of which 2,353 made the trip to our headquarters to vote. Of that number, 2,191 voted in favor of the settlement.

To us, that April election was more than an opportunity to vote on a settlement. It was the gathering of our people to vote on an issue that all felt was critical to our tribes. Members traveled from all over the northwest and from the far corners of the United States to vote. The settlement represented an end to a long ordeal. It is for our elders, I believe, that many of our tribal members voted in favor of the settlement. These elders had waited too long already for us to continue litigation.

Is it full compensation for our loss? The answer has to be no. But is it a fair settlement? We think it is. We have always been a tribe that seeks the reasonable center course in its negotiations and dealings. The United States can do nothing to resurrect the past, but the settlement is a move away from the harms that occurred in the past. It provides a chance for the Colville Tribes to advance and finally to get some benefit from the giant structure on our lands. The settlement provides some measure of compensation to our elders who have suffered more than anyone else. It ends this litigation and honors the commitments made by the United States to the Colville Tribes.

We accept the settlement as a reasonable and fair way to end this litigation.

If I can answer any questions, please feel free to ask.

Ms. SHEPHERD. Thank you, Mr. Palmanteer, and as you know, your statement will be fully entered into the record, as will all of the statements of all of the witnesses.

[Prepared statement of Mr. Palmanteer follows:]
Chairman Miller, members of the Committee, I am Eddie Palmanteer, Jr., Chairman of the Business Council of the Confederated Tribes of the Colville Reservation. On behalf of the Colville Tribes, I would like to thank you for the opportunity to present testimony in support of H.R. 4757, the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act.

I am particularly pleased to be able to testify in support of this historic settlement together with representatives from the Bonneville Power Administration, the United States Department of Justice, and the United States Department of the Interior, all of whom with different local and national interests support this legislation. We have litigated and negotiated with each other fairly, and have arrived at a settlement we all support. The settlement will end litigation between the Colville Tribes and the United States that has lasted over 40 years. It will, as much as possible, correct an injustice that has continued year after year for more than 50 years.
The Colville Reservation was established by President Grant on July 2, 1872. There are over 8,000 members of the Colville Tribes, a confederation of twelve aboriginal tribes and bands. Our Reservation is bounded on the west by the Okanogan River, and on the south and east by the Columbia River. The Reservation is approximately 1.3 million acres. The land was chosen because it provided farming, hunting grounds, the Tribes’ traditional salmon fisheries on the Columbia River and its tributaries, and abundant hydropower. In 1891 the United States required the Tribes to give up the northern portion of the Reservation, with the best agricultural land. When it did so it made specific commitments that tribal members would "enjoy without let or hinderance the right at all times freely to use all water power and water courses ...".

The Grand Coulee dam, which was begun in 1933, was a great boon to the State of Washington and the Northwest, but a disaster to the Colville Tribes. Grand Coulee Dam is built in large part on the Colville Reservation. It irrigated hundreds of thousands of acres, but none on the Colville Reservation. Its construction denied the Colville Tribes the ability to use that site or any other site for its own power development. The Dam destroyed forever the mighty salmon runs that used to
migrate to Kettle Falls on the upper Columbia River and to the tributaries on the Reservation.

The Colville people suffered uniquely as a result of the construction of Grand Coulee Dam. Two Colville towns, Inchelium and Keller, were inundated by the backwaters created when Grand Coulee Dam was built. Today they, with their hundreds of years of history, lie under the waters of Lake Roosevelt, as do the graves of many of our ancestors that could not be removed as the waters rose. In short, Grand Coulee Dam changed forever the livelihood and lives of our people and the very nature of the Colville Reservation. For this, the Colville Tribes received sixty three thousand dollars.

But, when Grand Coulee Dam was built, we were promised more. In 1920, Congress had passed the Federal Power Act, which authorizes the development of hydroelectric power in the United States, through the issuance of federal licenses to state or other public or private developers. Under Section 10(e) of the Federal Power Act, any licensee using Indian lands must pay to the Indian Tribe an annual payment for the use of its land.
The Grand Coulee Dam received its first funding and began construction under a Federal Power Commission permit, which would have assured the Colville Indians annual payments for their contribution to power. Later, Harold Ickes, who was both Secretary of Interior and Director of Public Works, took the project over as an exclusively federal project. At that time, a Congressional hearing was held on the Colville Reservation. A Colville representative testified that the United States had taken the Northern Half of the Colville Reservation with all the farming land, and was about to end our salmon fishing. He asked, how were the people to live. He presented letters showing that the Colville Tribes own to the center of the Columbia River, and said he thought the Colville Tribes were entitled to a 10% royalty on the power to be produced.

A few weeks later Harold Ickes, apparently as a direct reply to the Colville request, endorsed a series of letters saying that the Tribes should be paid the same annual payments from power they would have received if the project had remained one licensed under the Federal Power Act. The payments were to be computed in the same fashion as the payments already approved for Warm Springs and Flathead. But, with the completion of the project, and the coming of World War II, this was never done. Although the Colville Reservation had been devastated, the entire
payment to the Colville Tribes for their contribution to Grand Coulee remained sixty three thousand dollars.

The Colville Tribes have sought justice on this claim since the 1940's. In 1951 we brought suit under the Indian Claims Commission Act. Settlement efforts in the 1970's were blocked by disputes between the Department of Interior and the Corps of Engineers over legal defenses. When no settlement was reached, the Colville Tribes went back to court. In April of 1992, the Court of Appeals for the Federal Circuit unanimously held that the navigational servitude relied on by the Corps did not insulate the United States from liability in an Indian Claims Commission Act case. The Court sent the case back for trial, with instructions favorable to the Colville Tribes. At that point negotiations began.

The Settlement you have before you was not reached easily. The negotiations involved the Colville Tribes, which appointed a Committee from its council to participate in all negotiations, the Department of Justice, the Department of the Interior, and the Bonneville Power Administration. The negotiations required numerous meetings between the parties both in Washington D.C. and Washington State. Our lawyers had done extensive historical and legal research in the law suit,
which were used in the settlement. The Colville Tribes also employed an economist, who specialized in hydropower, who presented a report showing that fair compensation to the Colville Tribes could be over a billion dollars in back payments and annual payments beginning at $88 million per year. The Bonneville Power Administration brought its considerable resources to the table, and had very different ideas of what would be a fair result.

Negotiations were thorough, with papers exchanged on legal liability, methods of computing compensation, questionable patenting of land at part of the dam site, riverbed ownership, fast land ownership, and comparisons with payments to other Tribes. The discussions were sometimes technical, and at times quite animated. However, the parties, throughout the process, maintained a civility and respect for each other, which in large part was responsible for the success of the negotiations. Always, the parties expressed their various views in good faith, and in an effort to resolve the issues that were advanced throughout the negotiations. In the end, the parties sought a solution that would meet the particular and unique needs of the parties. The final result was based on assessments of success in court, comparisons with payments to other Tribes under the Federal Power Act, a mixture of theories on compensation, and compromise.
We are quite proud to have been party to these negotiations. Early in our discussions, members of Congress suggested that we try to negotiate a settlement before coming to Congress, in the hope that some solution agreeable to all parties could be reached. While we entered those negotiations with some trepidation, it now is clear that that advice was well given, and well taken by the Colville Tribes.

The Settlement Agreement approved by this legislation resolves the claims of the Colville Tribes in Docket 181-D of the Claims Commission, the last Colville Claims under the Indian Claims Commission Act. There are two parts to the Settlement: (1) a judgment to be entered against the United States in the amount of $53 million for past use of the tribal resources and; (2) annual payments to be made by the Bonneville Power Administration starting at $15.25 million to be paid by March 1, 1996, for continuing use of tribal resources. Then, before March 1 of each succeeding year, the Bonneville Power Administration is to pay to the Colville Tribes an amount adjusted up or down from the $15.25 million according to a formula agreed to in the Settlement Agreement. That formula is based on hydroelectric generation at Grand Coulee Dam, the average price BPA receives for the sale of electricity, and the consumer price index.
The Settlement guarantees the Colville Tribes a minimum payment of $15.25 million annually. At the Tribe’s option, any underrun produced by the formula is treated as a loan to be deducted from subsequent payments that would otherwise exceed $15.25 million. This element of the Settlement is particularly important to us. It provides a planning base that allows us to allocate funds in the future based upon some assurance that a minimum level of funding will be available. This provision, and the provisions of the formula, represent the kind of good faith respect for each party’s needs which was an integral part of the negotiation.

The Settlement provides that the $53,000,000 for the past use of Tribal resources will be paid to the Tribes pursuant to 25 U.S.C. 1401, The Distribution of Judgment Funds Act. That Act requires the Secretary of the Interior to approve a tribal plan for the distribution of the funds. The plan is then submitted to Congress. If no action is taken in Congress, the plan is then implemented by the parties.

Under the Settlement Act, annual payments are received by the Tribes in the same manner as income for the use of any other Tribal resource, such as income from timber sales. This is appropriate because the payment represents compensation
for the use of one of the Tribes most valuable natural resource, water power. These funds are budgeted by the Tribes annually, and the budget is approved by the Department of the Interior.

I can not conclude my testimony without spending a moment to describe to you what the Settlement means to the Colville people. I would like to tell you first how the Colville Tribes went about approving the Settlement.

We sent to each adult member a detailed package identifying the Settlement, its terms, and the pros and cons of the Settlement. After that, the Colville Tribes held meetings throughout the Reservation, and throughout Washington State off the reservation, to inform our members and to allow members an opportunity to question Tribal representatives who were involved in the negotiations. Finally, on April 16, the Colville Tribes held a general meeting, which has been our practice with all claims settlements, at Nespelem, the center of our Tribal government, where tribal members were invited to come and vote for, or against, the settlement. As I noted earlier, there are about 8,000 members of the Colville Tribes. Of those, about 5,000 are over eighteen years of age and eligible to vote. Remarkably, 2,353 adult members made the trip to Nespelem to vote. Of that number, 2,191 voted in favor of the Settlement.
To us, that April election day was more than an opportunity to vote on a Settlement. It was like a gathering of nations if you will, of our people, to vote on an issue that all felt was critical to the Colville Tribes. Members traveled from all over the Northwest and from the far corners of the United States to vote.

For our elders who have had to look at Grand coulee Dam since its construction over fifty years ago, the Settlement represented an end to a long ordeal. Each has personal memories of the losses suffered as a result of the Dam. It is for our elders, I believe, that many of our tribal members voted in favor of the Settlement. These elders had just waited too long for compensation to justify continued litigation.

The Settlement puts to rest the litigation, ends the acrimony between the United States and the Tribes over this issue, and provides resources which we and our children need.

Is it full compensation for our loss? The answer has to be no. You have to understand that we have looked at Grand Coulee Dam for a long time. We realize that for the Pacific Northwest the Grand Coulee Dam has made development and
prosperity possible. But for us, it has been a disaster. How much is reasonable compensation for the loss of our fishery, our way of life, our towns where our elders lived? How much must be paid for the destruction of our mother’s and father’s graves? For some of our members no amount of money can fairly compensate the Tribes for this loss.

But is it a fair settlement? We think yes. We have always been a Tribe that seeks the reasonable center course in its negotiations and dealings. The United States can do nothing to resurrect the past or correct the actual harm that it has caused. Thus, we view the Settlement from a slightly different perspective. Yes, it is reasonable to move forward from the harms that occurred in the past. Yes, it provides a chance for the Colville Tribes to advance and to finally get some benefit from the giant structure on its Reservation. When we look at the dam for the first time, it will be something we receive a benefit from. Yes, the Settlement provides some measure of compensation to our elders who have suffered more than anyone else. Yes, it puts an end to litigation which has cost resources and time and kept open wounds festering for so many years.
Yes, the Colville Tribes accepts the Settlement as a reasonable and fair way to end this litigation.

If I can answer any questions, please feel free to ask.
Ms. SHEPHERD. Jack Robertson, the Deputy Administrator of Bonneville Power Administration.

STATEMENT OF JACK S. ROBERTSON

Mr. ROBERTSON. Thank you, Madam Chairperson. It is my pleasure to appear before the House Natural Resources Subcommittee, Oversight and Investigations. We appreciate the historical and close working relationships we have with the subcommittee and look forward to that continuing relationship in the future.

My testimony today will focus on Bonneville's role as proposed in H.R. 4757. Let me say first, before I get into my testimony, that Bonneville is proud to be part of what I think to be an historic agreement. The settlement agreement and subsequent draft legislation represent a sound business decision for Bonneville. The decision ends the Federal Government and Bonneville ratepayer exposure to further litigation and represents a final settlement of this suit for all parties.

In my statement, I will first discuss the rationale for Bonneville's involvement in the legislation and for providing payments to the Confederated Tribes of the Colville Reservation. I will then briefly address the method used in reaching the amount of the settlement. Finally, I will discuss the partial Treasury repayment offset as proposed in the legislation.

The case arose out of statements made by Federal officials to the Colville Indian tribes when the Grand Coulee Dam was under construction in the 1930s. Approximately 7,000 acres of land within the Colville Reservation were taken for use in the Grand Coulee project. The Federal Power Act preliminary license issued to the State of Washington prior to the federalization of the project would have provided that a share of the annual revenues produced by the Grand Coulee project go to the tribe. The subsequent Federal statements could well be read as an undertaking to meet that same obligation.

In 1933, the Secretary of the Interior, Harold Ickes, as has been mentioned, endorsed two letters indicating that, because Colville lands were within both the power site and reservoir areas, the Colvilles should receive a share of the revenue from the sale of the power produced by the dam. Other officials wrote letters attempting to assess the tribes' appropriate share. The appropriate share was never actually determined, and in 1951 the tribe filed suit against the United States to bring about a resolution of the issue.

The Bonneville Power Administration, as part of the Department of the Interior originally, and now the Department of Energy, has marketed the power from the Grand Coulee Dam since the dam began operations in 1942. Bonneville receives the revenues from power generated by the dam, and Bonneville's ratepayers have realized the benefits of Grand Coulee's low-cost power. Therefore, although Bonneville is not named as a party to the litigation, Bonneville understood that its ratepayers would likely be expected to pay a significant portion of any judgment rendered in the case. As I point out in my testimony, the Administration believes that the sharing of costs contemplated in this case between Bonneville and the Department of the Treasury's general fund revenues is reasonable.
This case will not set a precedent for future payments to other tribes or entities. It arose out of a unique set of circumstances surrounding the construction of Grand Coulee Dam. Our judgment that no precedent would be set was a significant factor in our decision to settle the case. The settlement is a reasonable decision based on the government's exposure in litigation.

The settlement reached with the Colville Tribes contains two parts: a lump sum payment from the judgment fund of $53 million for past use of reservation lands, and annual payments from the Treasury's general fund revenues and Bonneville, beginning in 1996, for continued use of reservation lands.

Under long-standing provisions of the Federal Power Act, private developers of hydroelectric projects who use tribal lands or water power from Federal dams must pay an annual fee fixed by the Federal Energy Regulatory Commission. Although this case did not arise under the Federal Power Act, it concerned the fixing of payments for the use of tribal lands in a hydroelectric project. Therefore, the parties looked to methodologies employed under the Federal Power Act as a means of reaching a principled settlement agreement.

Under the Act, the Federal Energy Regulatory Commission traditionally has determined fees by either the net benefits method or the profitability method. Following discussions regarding both methods, the settlement was based primarily on the profitability method. Under this method, the annual cost of producing power at the project is subtracted from the share of the developer's annual revenues attributed to the project. The result is the commercial value of the project, which is allocated between the landholders and the developer. Then, based on individual landholdings, each landholder is allocated a specific percentage of the value assigned to the land. The result is the landholder's contribution to the project, which equals the annual fee.

Based in part on Grand Coulee's projected revenues and costs during fiscal year 1995, the first annual payment was fixed at $15.25 million. Subsequent payments are tied to increases in Bonneville's power prices and annual generation at Grand Coulee Dam. Therefore, future payments are a function of three items: the initial payment, the change in Bonneville's rates, and the annual generation of power at Grand Coulee Dam. This formula is beneficial to the Bonneville because it links the payments to the operations of the power system.

If Bonneville maintains stable rates, the payments will remain stable. If power production is down because of a poor water year, the payment will be less. In good water years, the payment will increase.

The settlement is intended to provide the tribes a share of the revenues derived from Grand Coulee Dam. Tying the payments to Grand Coulee's production and Bonneville's revenues fulfills this intention. In addition, the agreement contains floor and ceiling payments to ensure that the increase in payments does not diverge too greatly, in either direction, from the rate of inflation. This provision reduces both parties' risks over time.

Before entering into the settlement discussions with the tribes, the various Federal agencies discussed among themselves the ap-
propriate division of responsibility for settlement payments. The tribes were willing to agree to a settlement only if it provided for both a lump sum payment for past damages and annual payments for continuing damages.

Moreover, they were most concerned with the annual payments. The Federal agencies agreed that a lump sum would be paid out of the Judgment Fund and that Bonneville would make the annual payments. Bonneville agreed to this, based on the understanding that after a settlement was reached, the Federal agencies would determine whether it resulted in an appropriate division of responsibility.

The lump sum payment by the Judgment Fund is $53 million. The present value of the annual payments is approximately $513 million, or 90 percent of the settlement's total value. Under the draft legislation, beginning in fiscal year 2000, Bonneville will receive an offset on its payments to the Treasury equal to 26 percent of each annual payment to the tribes. Together with the lump sum payment, the offset results in the Treasury's general fund revenues paying 30 percent of the total value of the settlement, with Bonneville ratepayers paying 70 percent instead of 90 percent.

The Administration believes that this division of responsibility is acceptable. The 70/30 split recognizes the interest in bringing this decades-long suit to a close. Our analysis indicates that the profitability method would have resulted in a split in the range of 70 percent future costs and 30 percent historical costs.

During the settlement discussions, the parties focused initially on the annual payments. The successful negotiation of the annual payments then reduced contention over the lump sum, allowing the Administration to negotiate a smaller lump sum payment.

In closing, Madam Chairperson, I would like to reiterate that this settlement and the legislation as proposed end the Federal Government's exposure to this litigation, and represents a mutually acceptable settlement and a reasonable business decision for Bonneville. Further, this case does not set a precedent for future payments to other tribes or entities.

I would also reiterate that Bonneville believes the sharing of costs is reasonable, and I stand ready to answer any of the questions the committee may have.

Thank you.

Ms. SHEPHERD. Thank you very much, Mr. Robertson.

[Prepared statement of Mr. Robertson follows:]
STATEMENT OF JACK S. ROBERTSON
BONNEVILLE POWER ADMINISTRATION
U.S. DEPARTMENT OF ENERGY

BEFORE THE
HOUSE NATURAL RESOURCES SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
AUGUST 2, 1994
Statement of Jack S. Robertson, Deputy Administrator
Bonneville Power Administration
August 2, 1994

Mr. Chairman, it is my pleasure to appear before the House Natural Resources Subcommittee on Oversight and Investigations. We appreciate the historical and close working relationship we have with the Subcommittee, and look forward to a continued relationship in that vein.

My testimony today will focus on Bonneville’s role as is proposed in H.R. 4757. The settlement agreement and subsequent draft legislation represent a sound business decision for Bonneville. The decision ends the Federal government and Bonneville ratepayer exposure to further litigation and represents a final settlement of this suit for all parties.

In my statement, I will first discuss the rationale for Bonneville’s involvement in the legislation and for providing payments to the Confederated Tribes of the Colville Reservation. I will then briefly address the method used in reaching the amount of the settlement. Finally, I will discuss the partial Treasury repayment offset as proposed in the legislation.

BPA Involvement

The case arose out of statements made by Federal officials to the Colville Indian tribes when the Grand Coulee Dam was under construction in the 1930s. Approximately 7,000 acres of land within the Colville reservation were taken for use in the Grand Coulee Project. The Federal Power Act preliminary license, issued to the State of Washington prior to the Federalization of the project would have provided for a share of the annual revenues produced by the grand Coulee Project to go to the Tribe. The subsequent Federal statements could well be read as undertaking to meet that same obligation. In 1933, the Secretary of the Interior Harold Ickes endorsed two letters indicating that, because Colville lands were within both the power site and reservoir areas, the Colvilles should receive a share of the revenue from the sale of power produced by the dam. Other officials wrote letters attempting to assess the Tribes’ appropriate share. The appropriate
share was never actually determined and in 1951 the Tribe filed suit against the U.S. to bring about a resolution of this issue.

The Bonneville Power Administration (as part of the DOI and later the DOE) has marketed the power from Grand Coulee Dam since the dam began operations in 1942. Bonneville receives the revenues from power generated by the dam, and Bonneville’s ratepayers have realized the benefits of Grand Coulee’s low-cost power. Therefore, although Bonneville is not named a party to the litigation, Bonneville understood that its ratepayers would likely be expected to pay a significant portion of any judgment rendered in the case. As I point out later in my testimony, the Administration believes that the sharing of costs contemplated in this case between Bonneville and the Department of the Treasury’s general fund revenues is reasonable.

This case will not set a precedent for future payments to other tribes or entities. It arose out of a unique set of circumstances surrounding the construction of Grand Coulee Dam. Our judgment that no precedent would be set was a significant factor in our decision to settle the case. The settlement is a reasonable decision based on the Government’s exposure in litigation.

**Settlement Amount**

The settlement reached with the Colville Tribes contains two parts: a lump sum payment from the Judgment Fund of $53 million for past use of reservation lands, and annual payments from the Treasury’s general fund revenues and Bonneville beginning in 1996 for continued use of reservation lands.

Under longstanding provisions of the Federal Power Act, private developers of hydroelectric projects who use tribal lands or water power from Federal dams must pay an annual fee fixed by the Federal Energy Regulatory Commission. Although this case did not arise under the Federal Power Act, it concerned the fixing of payments for use of tribal lands in a hydroelectric project. Therefore, the parties looked to methodologies employed under the Federal Power Act as a means of reaching a principled settlement amount.
Under that Act, the Federal Energy Regulatory Commission traditionally has determined fees by either the net benefits method or the profitability method. Following discussions regarding both methods, the settlement was based primarily on the profitability method. Under this method, the annual cost of producing power at the project is subtracted from the share of the developer’s annual revenues attributable to the project. The result is the commercial value of the project, which is allocated between the landholders and the developer. Then, based on individual landholdings, each landholder is allocated a specific percentage of the value assigned to the land. The result is the landholder’s contribution to the project, which equals the annual fee.

Based in part on Grand Coulee’s projected revenues and costs during fiscal year 1995, the first annual payment was fixed at $15.25 million. Subsequent payments are tied to increases in Bonneville’s power prices and annual generation at Grand Coulee Dam. Therefore, future payments are a function of three items: the initial payment, the change in Bonneville’s rates, and the annual generation of power of Grand Coulee Dam. This formula is beneficial to Bonneville because it links the payments to the operation of the power system. If Bonneville maintains stable rates, the payments will remain stable. If power production is down because of a poor water year, the payment will be less. In good water years the payment will increase.

The settlement is intended to provide the Tribes a share of the revenues derived from Grand Coulee Dam. Tying the payments to Grand Coulee’s production and Bonneville’s revenues fulfills this intention. In addition, the agreement contains floor and ceiling payments to ensure that the increase in payments does not diverge too greatly, in either direction, from the rate of inflation. This provision reduces both parties’ risks over time.

**Repayment Offset**

Before entering into settlement discussions with the Tribes, the various Federal agencies discussed among themselves the appropriate division of responsibility for settlement payments. The Tribes were willing to agree to a settlement only if it provided for both a lump sum payment for past...
damages and annual payments for continuing damages. Moreover, they were most concerned with the annual payments. The Federal agencies agreed that the lump sum would be paid out of the Judgment Fund, and that Bonneville would make the annual payments. Bonneville agreed to this based on the understanding that after a settlement was reached the Federal agencies would determine whether it resulted in an appropriate division of responsibility.

The lump sum payment is $53 million. The present value of the annual payments is approximately $513 million, or 90 percent of the settlement’s total value. Under the draft legislation, beginning in fiscal year 2000 Bonneville will receive an offset on its payments to the Treasury equal to 26 percent of each annual payment to the Tribes. Together with the lump sum payment, the offset results in the Treasury's general fund revenues paying 30 percent of the total value of the settlement, with Bonneville ratepayers paying 70 percent instead of 90 percent.

The Administration believes that this division of responsibility is acceptable. The 70/30 split recognizes the interest in bringing this decades-long suit to a close. Our analysis indicates that the profitability method would have resulted in a split in the range of 70 percent future costs and 30 percent historical costs. During the settlement discussions, the parties focused initially on the annual payments. The successful negotiation of the annual payments then reduced contention over the lump sum, allowing the Administration to negotiate a smaller lump sum payment.

Conclusion

Mr. Chairman, in closing, I would reiterate that this settlement and the legislation as proposed end the Federal government’s exposure to this litigation, and represents a mutually acceptable settlement and a reasonable business decision for Bonneville. Further, this case does not set a precedent for future payments to other Tribes or entities.

I would also reiterate that Bonneville believes the sharing of costs is reasonable.

I stand ready to answer any questions you may have.
Ms. SHEPHERD. Ms. Deer, representing the Department of the Interior.

STATEMENT OF ADA DEER

Ms. DEER. Madam Chair and members of the committee, it is with great pleasure that I come before you today to testify in favor of enactment of H.R. 4757.

Originally, an agency of the state of Washington planned and obtained a permit to develop a hydroelectric dam on the Columbia River on the Colville Indian Reservation. That license contained a provision to share the benefits of the dam with the Colville Tribes by agreeing to make annual payments to the tribe for its use of the tribe’s land to produce hydropower.

However, in 1933 the United States took over the project under the National Industrial Recovery Act. That same year the Senate Committee on Indian Affairs held a hearing on the Colville Reservation, and the question arose whether the tribe would still receive annual payments even though the Federal Power Act did not require the Federal Government to obtain a license or make annual payments when it developed and operated a dam project directly. A few weeks later, Secretary of the Interior Harold Ickes endorsed correspondence indicating that the Colvilles should receive a share of the revenue from the sale of power produced by the dam.

Over the next several years, the Federal Government moved ahead with construction of the Grand Coulee Dam, but somehow the promise that the tribe would share in the benefits produced by it was not fulfilled. The Bonneville Power Administration was created within the Department of the Interior to market the power that would be produced by the Grand Coulee and other dams in the Columbia River system.

Plentiful production of electricity from the Grand Coulee Dam stimulated aluminum production and helped the U.S. armed forces equip themselves for World War II. This cheap source of power has transformed the economy of the entire Pacific Northwest region.

But for the Confederated Tribes of the Colville Reservation, the impact of the Grand Coulee project was just the opposite. The power that affected the tribe was not the water surging through the turbines, but the water backing up behind the dam, flooding the villages that had been their home for generations. The Colville shared only marginally from these great economic benefits.

Although the government seemed to have forgotten its promise, the tribe did not. The wall of concrete a mile wide and 550 feet tall and the vast lake over what had once been their homes were a daily reminder. After the Second World War, Congress enacted the Indian Claims Commission Act, which allowed tribes to bring suit for redress where they believed the government had taken actions against their interests that were not “fair and honorable.”

Forty-three years ago, on July 3, 1951, the Confederated Tribes of the Colville Indian Reservation filed suit under this act for the Federal Government’s failure to permit them to share in the benefits of the Grand Coulee Dam.

This case has dragged on for decades. In the late 1970s, more than a quarter century after the suit was filed, the Federal Government established a negotiating team to seek an honorable settle-
ment to the case. Although at the time the head of the U.S. negotiating team, then Interior Department Solicitor Leo Krulitz admitted that the Colville people, "have been treated shabbily." It took until April 21, 1994 to negotiate a settlement approved by both the Confederated Tribes of the Colville Indian Reservation and the executive branch of the Federal Government. It is that settlement which I am today urging this committee and the whole Congress promptly to approve.

Because the tribe has waited so long for us to keep our promise, and because the benefits to the American people from this dam partly built on the tribe's territory has been so great, fairness has required that the settlement be large. This settlement will be, in fact, the largest settlement or judgment received by a tribe in any case brought before the Indian Claims Commission Act. For the 52 years that the tribe was not paid what was promised to them, the Indians will receive a lump sum payment of $53 million to be paid within 45 days after the bill becomes law. Beginning no later than March 1, 1996, the tribe will receive $15.25 million each year for so long as the waters flow through the Grand Coulee turbines. The parties have also reached agreement on annual adjustments to take into account revenue fluctuations and inflation over the years.

From the lump sum payment, the Colville Tribe has decided to provide an immediate payment of $5,937 to each member of the tribe. The Council has chosen to make this initial distribution in this way to ensure that its elders receive immediate benefit from the settlement, since they have borne this burden and waited for its resolution for so long. From the future annual payments, the Colville Tribes will be able to meet the needs of its future generations.

After this bill becomes law, when members of the tribe see the massive wall of concrete and the lake behind it each day, we hope they will see them less as wrong inflicted on them by a government that forgot its promises and more as a continuing contribution to their future.

As for the rest of us, I am reminded of the words of Justice Black in dissent in litigation about another dam flooding the lands of another tribe's territory: "Great nations, like great men, should keep their word." When the Congress enacts and the President signs this legislation, we can all be proud that we are, at last, acting as a great nation should.

This concludes my prepared statement, and I will be happy to answer questions.

Ms. SHEPHERD. Thank you very much.

[Prepared statement of Ms. Deer follows:]
STATEMENT OF ADA DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON NATURAL RESOURCES, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS ON H.R. 4757, "COLVILLE INDIAN TRIBES."

Good Morning, Mr. Chairman and Members of the Committee. It is with great pleasure that I come before you today to testify in favor of enactment of H.R. 4757.

Originally, an agency of the State of Washington planned and obtained a permit to develop a hydroelectric dam on the Columbia River on the Colville Indian Reservation. That license contained a provision to share the benefits of the dam with the Colville Tribes by agreeing to make annual payments to the Tribe for its use of the Tribe's land to produce hydropower.

However, in 1933 the United States took over the project under the National Industrial Recovery Act. That same year the Senate Committee on Indian Affairs held a hearing on the Colville Reservation and the question arose whether the Tribe would still receive annual payments even though the Federal Power Act did not require the Federal Government to obtain a license or make annual payments when it developed and operated a dam project directly. A few weeks later Secretary of the Interior Harold Ickes endorsed correspondence indicating that the Colvilles should receive a share of the revenue from the sale of power produced by the dam.

Over the next several years the Federal Government moved ahead with construction of the Grand Coulee Dam, but somehow the promise that the Tribe would share in the benefits
produced by it was not fulfilled. The Bonneville Power Administration was created within the Interior Department to market the power that would be produced by the Grand Coulee and other dams in the Columbia River system.

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Although the Government seemed to have forgotten its promise, the Tribe did not. The wall of concrete a mile wide and 550 feet tall and the vast lake over what had once been their homes were a daily reminder. After the Second World War Congress enacted the Indian Claims Commission Act, which allowed tribes to bring suit for redress where they believed the Government had taken actions against their interests that were not "fair and honorable."

Forty-three years ago, on July 3, 1951, the Confederated Tribes of the Colville Indian Reservation filed suit under this Act for the Federal Government’s failure to permit them to share in the benefits of the Grand Coulee Dam.
This case has dragged on for decades. In the late 1970s, more than a quarter century after suit was filed, the Federal Government established a negotiating team to seek an honorable settlement to the case. Although at the time the head of the U.S. negotiating team, then Interior Department Solicitor Leo Krulitz, admitted that the Colville people "have been treated shabbily," it took until April 21, 1994, to negotiate a settlement approved by both the Confederated Tribes of the Colville Indian Reservation and the Executive Branch of the Federal Government. It is that settlement which I am today urging this committee and the whole Congress promptly to approve.

Because the Tribe has waited so long for us to keep our promise and because the benefits to the American people from this dam partly built on the Tribe's territory has been so great, fairness has required that the settlement be large. This settlement will be, in fact, the largest settlement or judgment received by a Tribe in any case brought under the Indian Claims Commission Act. For the 52 years that the Tribe was not paid what was promised to them, the Indians will receive a lump sum payment of $53 million to be paid within 45 days after this bill becomes law. Beginning no later than March 1, 1996, the Tribe will receive $15.25 million each year for so long as the waters flow through the Grand Coulee turbines. The parties have also reached agreement on annual adjustments to take into account revenue fluctuations and inflation over the years.

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distribution in this way to ensure that its elders receive immediate benefit from the settlement, since they have borne this burden and waited for its resolution for so long. From the future annual payments, the Colville Tribes will be able to meet the needs of its future generations.

After this bill becomes law, when members of the Tribe see each day the massive wall of concrete and the lake behind it, we hope they will see them less as wrong inflicted on them by a government that forgot its promises and more as a continuing contribution to their future. As for the rest of us, I am reminded of the words of Justice Black in dissent in litigation about another dam flooding the lands of another Tribe’s territory: "Great nations, like great men, should keep their word." When the Congress enacts and the President signs this legislation, we can all be proud that we are, at last, acting as a great nation should.

That concludes my prepared statement; I would be happy to answer questions.
Mr. STEENLAND. Good morning, Madam Chairperson and Members of the committee. My name is Peter Steenland and I am pleased to appear before you today on behalf of the Department of Justice to testify on H.R. 4757.

You have already heard from the plaintiffs in this lawsuit that is the subject of the hearing. And, you have heard from two Federal agencies. They have given you their perspective on this. We have provided the committee with a very lengthy statement. I guess it is only appropriate for a lawsuit that has gone on for more than 40 years that we do.

I think what would be most helpful would be for me to very briefly summarize our testimony from the perspective of the government’s litigators, because you have heard from the BPA and Interior, and gotten their perspective.

This is a very important legislative settlement of a very difficult and troublesome case. H.R. 4757 provides a legislative settlement of a lawsuit that was filed by the tribes in 1951. We are very happy and very proud to say that by working diligently and in good faith, the tribes, Bonneville Power, the Department of the Interior, and our Department have been able to fashion a proposed settlement which everyone thinks is fair. We all appear before you today to recommend it as an appropriate resolution of this dispute.

The government’s liability in this case goes back to the “fair and honorable” dealings clause of the Indian Claims Commission Act which Congress passed on August 13, 1946. The Indian Claims Commission Act provides that for any tribal claims of wrong under those provisions, they had to be filed within five years of August 13, 1951, or they would be time-barred. The time bar has been, in our view, an essential and important component of that act. The Confederated Tribes of the Colville Reservation timely filed this lawsuit in 1951. In our judgment, for this reason, the legislative settlement of this lawsuit will not serve as a precedent for the settlement of claims by Indian tribes that did not file claims in a timely manner.

As has been suggested this morning, the tribes and the Federal Government have been actively involved in settlement negotiations now for some time. These negotiations have resulted in a proposed settlement agreement that has two components: one is a lump sum award to compensate the tribe for lost power revenues from 1942 to the present, and the other is a future annual revenue-sharing plan. The lump sum payment would be made by an agreed judgment in the Court of Claims and paid from the judgment fund. The annual payments would come from revenues derived from power-sharing generated at the Grand Coulee Dam starting in 1996.

Madam Chairperson, Members of the committee, in our judgment, the Federal Government is not that well postured for a victory on this claim which has been pending for over 40 years. Absent the settlement, we could well litigate it for another 10 years and the outcome could easily be a significant cost to the taxpayers and to the public. For that reason, we do not believe that further
protracted litigation would serve the interest of justice, or the American taxpayers.

We have been given terrific assistance by the tribe in reaching a resolution here. The Solicitor of the Interior Department, John Leshy, has been very helpful. The General Counsel of the Bonneville Power Administration has played an integral role in these mediation and negotiation efforts; and our own staff, with members of the Justice Department, have done a terrific job. We are very proud of all of them.

We are proud of this agreement, and we urge your consideration and approval of it.

Thank you.

Ms. SHEPHERD. Thank you very much.

[Prepared statement of Mr. Steenland follows:]
PETER R. STEENLAND  
APPELLATE SECTION CHIEF  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  

BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES  

CONCERNING  
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION  
GRAND COULEE DAM SETTLEMENT ACT  
H.R. 4757  

PRESENTED ON  
AUGUST 2, 1994
Mr. Chairman and Members of the Committee--

My name is Peter R. Steenland and I am pleased to appear before you on behalf of the Department of Justice to testify on H.R. 4757, the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act.

Introduction and Summary -- H.R. 4757 provides for a legislative settlement of Confederated Tribes of the Colville Reservation v. United States, Docket No. 181-D, a lawsuit filed by the Tribes in 1951 before the Indian Claims Commission. We are pleased to state that by working diligently and in good faith, the Tribe, the Bonneville Power Administration (Department of Energy), the Department of the Interior and our Department have been able to fashion a proposed settlement which all think fair and which we can all recommend to you as an appropriate resolution to this dispute. We are very proud of that joint effort.

This case concerns the government's alleged denial of power revenue benefits to the plaintiff Indian Tribes from construction and operation of the Grand Coulee Dam project, which utilized the Tribes' lands and water power rights. The dam was completed in 1942 and has been generating hydroelectric power since that time without any payments to the Tribes. The dam is maintained and operated by the Department of the Interior, Bureau of Reclamation, and the power is marketed by the Bonneville Power Administration of the Department of Energy.

The Indian Claims Commission Act of 1946 provides that any tribal claims for wrongs under its enabling provisions had to be filed within five years of August 13, 1951, or they would be time barred. The time bar has been, in our view, an essential and important component of Act. The Confederated Tribes of the Colville Reservation timely filed this lawsuit in 1951. For this reason, the legislative settlement of this action will not serve as a precedent for the settlement of claims by Indian tribes that failed to file their claims in a timely manner.

The Tribes and the federal government have been actively engaged in settlement negotiations for over a year. These negotiations have resulted in a proposed settlement agreement. The proposed settlement has two components. One is a lump sum award to compensate the Tribes for lost power revenues from 1942 to present, and the other is a future annual revenue sharing plan. The lump sum payment would be made by an agreed judgment in the Court of Federal Claims and paid from the Judgment Fund.
under 31 U.S.C. § 1304. The annual payments would come from revenues derived from power generated at the Grand Coulee Dam starting in 1996.

The federal government is not well postured for a victory on this claim which has been pending for over 40 years. Thus we do not believe that further protracted litigation would serve the interest of justice or those of the American taxpayers.

DISCUSSION

This lawsuit involves a claim of entitlement by the Confederated Tribes of the Colville Reservation to a share of the power revenues attributable to the Grand Coulee Dam and the Franklin D. Roosevelt Reservoir on the Columbia River in the State of Washington, from the time of its construction and operation.¹

¹. The Confederated Tribes of the Colville Reservation --

A brief history of the Colville Reservation is helpful here. The reservation was carved out of an extensive region in the Pacific Northwest that included the ancestral lands of a number of Indian bands. Those bands later became members of the Confederated Tribes. The government acquired title to the region which was the aboriginal domain of the Tribes by a Treaty with Great Britain on June 15, 1846. The reservation was later created by

This particular Docket, No. 181-D, was stayed pending resolution of other actions within Docket No. 181. In Dockets 181-A and B, which were consolidated, the Indian Claims Commission awarded the Tribes $3.5 million for land claims in 1967. In 1978, the Indian Claims Commission awarded the Tribes $3.257 million in Docket 181-C for the loss of their fisheries as a result of the construction of the Grand Coulee Dam.
the Executive Order of President Grant on July 2, 1872. The boundaries of the 3,000,000 acre reservation were described as being "bounded on the east and south by the Columbia River, on the West by the Okanogan River, and on the North by the British possessions."

The decision to build the Grand Coulee Dam -- This dispute arose when the government decided to construct the Grand Coulee Dam on the Columbia River adjacent to the reservation. From 1927 to 1931, at the direction of Congress, the Corps of Engineers investigated the Columbia River and its tributaries. The Corps' report listed a number of sites, including Grand Coulee, where power could be produced at low cost, and recommended that the development be performed by local governmental authorities or private utilities under the Federal Power Act of 1935. Under Section 10(e) of the Federal Power Act, licensees must pay Indian tribes for the use of reservation lands.

Shortly thereafter, the Columbia Basin Commission, an agency of the State of Washington, applied for, and in August 1933 received a preliminary permit from the Federal Power Commission for the water power development of the Grand Coulee site. When the project was federalized, however, the preliminary permit was cancelled. Instead, the federal government, which is not subject to the Federal Power Act, undertook to build the dam. That action precluded commercialization of water power by the Tribes. The government began building the dam in the mid-1930's. A letter dated December 5, 1933, to the Supervising Engineer
regarding the Grand Coulee and the power interests of the Tribes, with the approval signature of Secretary of the Interior Ickes, states:

This report should take into consideration the most valuable purpose to which the Indians' interests could be placed, including the development of hydro-electric power.

We cannot too strongly impress upon you the importance of this matter to the Indians and therefore to request that it be given careful and prompt attention so as to avoid any unnecessary delay.

Also, a letter dated December 5, 1933, to the Commission of the Bureau of Reclamation and endorsed by Interior Secretary Ickes, stated that "it is necessary to secure additional data before we can advise you what would constitute a reasonable revenue to the Indians for the use of their lands within the [Grand Coulee] power and reservoir site areas." And a letter dated June 4, 1935 from the Commissioner of the Bureau of Reclamation requested that additional data be secured to determine "a reasonable revenue to the Indians for the use of their lands within the power and reservoir site areas."

The Dam, after a series of Acts appropriating funds for the continuation and eventual completion of the project, began to generate hydroelectric power in 1941 and was completed in 1942.

Pursuant to the Act of June 29, 1940, the Secretary of the Interior compensated the Tribes $63,000 for some 3,000 acres of lands taken as a result of the Dam project. However, the compensation made to the Tribes did not include remuneration for
power related values taken by the government, and the Tribe is not presently given a share of the ongoing revenues from power generation.

This litigation -- After the enactment of the Indian Claims Commission Act, the Tribes timely filed this action in 1951, contending that the government must pay compensation for the hydroelectric power generated by the flow of the Columbia River over the tribal lands taken in aid of the Grand Coulee Dam. Ultimately, the government filed a motion for partial summary judgment arguing that the Tribes were precluded from recovering any compensation because Congress, in authorizing the Dam, exercised its constitutional powers to promote and aid navigation for the public good. It asserted that this proper exercise of the navigational servitude legally foreclosed any attempt by the Tribes to recover compensation for water power values stemming from the flow of the Columbia River. The government further argued that it had not assumed or breached any trust relationship, special or otherwise, when it took certain tribal lands to build the project.

The Tribes responded with a cross-motion for partial summary judgment arguing that, even if the navigational servitude was properly exercised by the government, the servitude was subordinate to claims initiated under the extra-legal grounds of recovery provided in the "fair and honorable dealings" clause of the Indian Claims Commission Act. The Tribes further argued that notwithstanding any exercise of the navigational servitude, they
were entitled to recover power revenue benefits under the Indian Claims Commission Act's fair and honorable dealing clause.

The Claims Court granted the government's motion for summary judgment and dismissed the petition, holding that the navigational servitude was superior to all the Indian legal, equitable, and moral claims presented in this case. On appeal, the Federal Circuit affirmed-in-part and reversed-in-part and remanded for trial, holding that while plaintiff had no legal and equitable claim based on the navigational servitude, they did have a viable moral claim based on the "fair and honorable dealings" provision of the Indian Claims Commission Act of 1946. See Confederated Tribes of Colville Reservation v. U.S., 964 F.2d 1102 (Fed. Cir. 1992).

With the Federal Circuit's ruling that the Tribes' moral claim under the "fair and honorable dealings" provision of the Indian Claims Commission Act survives the defenses raised in government's motion for summary judgment, the historical record will become the focus in the litigation.

While this litigation was underway, in 1975, the Senate Committee on Appropriations directed the Secretaries of the Interior and Army to open discussions with the Tribes to assess a resolution of this dispute. S. Rep. 94-505, p. 79. Pursuant to that directive, a task force, consisting of the Departments of the Interior and Army, and the Bonneville Power Administration, issued a final report in September 1980.
The report was approved by the Secretary of the Interior. It concluded among other things that there was "no question but that the Tribes would be entitled to compensation had the projects been built and operated by the Federal Power Act licensees," and that the Tribes would have received a reasonable benefit as fixed by that Commission pursuant to Section 10(e) of the Federal Power Act. The report further suggested that the legal defenses of the United States be exhausted with respect to the navigational servitude before further action be taken regarding the Tribes' power claims. With the recent Federal Circuit decision in this action, that has, in effect, been done.

In this action, the federal historical record will be tested under the standard set by Aleut Community v. United States, 480 F.2d 831, 839 (Ct.Cl. 1973), for establishing a fair and honorable dealings claims:

There must be a showing [1] that the United States undertook an obligation, a "special relationship," [2] the obligation was to the Tribe, [3] that the United States failed to meet its obligation, and [4] that as a result the Tribe suffered damages.

For its part, the Federal Circuit has already stated that it is undisputed that the Tribes were attempting commercial development of the Columbia River from riparian lands upstream of the Grand Coulee Dam prior to construction and that the government knowingly interfered with and frustrated the endeavors of the Tribes. Moreover, with respect to Tribes' efforts to develop their water power interests, that Court stated that "the
United States itself knowingly interfered with and frustrated the endeavors of the Colville Tribes."

The resolution reached in the proposed settlement does not constitute an admission of liability. In fact, we would vigorously contest liability if the Tribes' claim were litigated. But, we are prepared to recognize that the record, in this timely filed claim, can be read to reflect an undertaking by the United States with respect to power values. Because of that we think it is fair and just to fashion a complete resolution of this long-standing claim. We believe that we have crafted such a complete resolution in the proposed settlement.

**VALUATION**

The Grand Coulee Dam has been generating electric power since 1941. Therefore, for an assessment of past damages in this action, we look at power values for fiscal years 1942 to 1994, a fifty-two year period. Although the project has been generating power since 1941, it has never paid any rental or annual charge for power values to the Tribes. Had the project continued under the original license as a non-federal project subject to Section 10(e) of the Federal Power Act, the Tribes would have received a reasonable annual payment fixed by the Federal Power Commission (which is now the Federal Energy Regulatory Commission).

After extensive negotiations, the Tribes and the government arrived at an agreed $53 million lump sum for back payments since 1942 in settlement of the Tribes' timely claim for lost power revenues in the operation of the Grand Coulee Dam. For
settlement of future claims, BPA and the Tribes have agreed to an annual payment of $15.25 million starting in 1996 based on a percentage factor of the annual profits from the Dam's operations.

CONCLUSION

It is our judgment that settlement is both warranted and feasible. We believe that the settlement agreement signed by the Department of Justice, the Department of the Interior, and the Bonneville Power Administration of the Department of Energy is fair and in the interest of all concerned parties. We therefore recommend that H.R. 4757 be enacted into law.

That concludes my prepared testimony. At this time, Mr. Chairman, I would be pleased to respond to questions or comments from you or other Committee Members.
Ms. SHEPHERD. We are now open for questions.
Mr. Smith.
Mr. SMITH. Thank you, Madam Chairman.
Mr. Robertson, welcome to the steamy east.
Mr. ROBERTSON. Thank you, Congressman.
Mr. SMITH. He and I come from Oregon, so we understand what good weather is really like.

I wanted to ask you what the effective rate impact on BPA ratepayers will be because of the estimated $15 million annual payment.

Mr. ROBERTSON. Mr. Smith, the specific rate impacts of this can’t be determined yet. It will clearly add incrementally to rate pressures. It is designed to allow us to shape this rate pressure into our rates by 1996. Between then and now, as you know, we are going through a major overhaul of our rates and our business approach to power marketing.

So, it is complicated to say what precisely will occur in terms of rate pressures. It will add, obviously, an additional $15 million to a roughly $2.3 billion Bonneville base budget.

Mr. SMITH. Minimal, minimal rate increase, $15 million to $2.3 billion?
Mr. ROBERTSON. Yes, right.
Mr. SMITH. Do you have any idea what the litigation, Mr. Steenland, has cost the Federal Government and the taxpayers over this issue?

Mr. STEENLAND. The litigation, Congressman, has been an important component of one of our divisions in the Justice Department. I don’t have the exact numbers, but I can say with a great deal of confidence that we have expended over 1,000 hours within the past two years working on this case.

Going back 40 years, it is a harder to quantify because we didn’t keep exact records on attorney time over that period. For some period, the case was relatively dormant, but as the records indicate in the statements provided this morning, it did begin to heat up in the mid-1970s. So I think that we can justify this on the basis of expenses both in terms of cost to the Justice Department and the potential exposure to the Judgment Fund, as well, which is where the much larger number would come from, if we continued to litigate this case and we got a judgment that was much higher than this settlement.

Mr. SMITH. So, roughly, you have identified $1 million?
Mr. STEENLAND. Yes, sir.
Mr. SMITH. Yes.
Mr. Palmanteer, how much has litigation cost the tribes? Do you have any idea?

Mr. PALMANTEER. We have two attorneys', contracts with two different firms, one firm who initially initiated the case, and the recent firm that has been handling the case for us. But it is a contingency contract where they will receive a total of 10 percent of the annual payments that the tribe will receive for the first 10 years. It will be split equally between the two firms.

Mr. SMITH. Okay. Thank you.
Mr. Steenland, you have seen and, I am sure, read the testimony of the Spokane Indian Tribe, which they will present here in a mo-
ment. And I heard the explanation that you made that this is not a precedent, yet we do know that in other areas of the law, the statute of limitations is a figment of the current imagination about whether it should apply or not.

It seems to me a very good case could be made in 1951 for the Spokane Indians, simply because they had no attorneys, and in those days they were not informed of our laws. If you were the plaintiffs' attorney, wouldn't they have a fair case?

Mr. STEENLAND. Congressman, what I would suggest is this, that that question be bifurcated if we can, split into two parts in terms of first saying, is H.R. 4757 an appropriate resolution of litigation that has in fact been pending for well over 40 years? Have the Justice Department and the Interior Department and BPA done well in terms of the taxpayers, in compromising a certain liability, have we done a good job there?

Mr. SMITH. I would say no. It took you 50 years to get it done.

Mr. STEENLAND. Well, perhaps we should have done it more quickly. But today is better than next year or better than four years down the road. I think that the Spokane case presents a different question, because that is not litigation; that does not have the certainty of an adverse judgment. That is why we are here; we are the litigators.

That presents a policy question. And that is something that, you know, perhaps Interior might want to address. Our focus is simply that we think we have brought an appropriate resolution of a difficult case to this committee.

Mr. SMITH. I am not arguing that point with you, except to ask you again, if there were not a statute of limitations issue here, would the Spokane Tribe have an equally important and an equal right to a judgment?

Mr. STEENLAND. If we did not have a statute of limitations, then the Spokane Tribe would have to file its own lawsuit.

Mr. SMITH. I understand.

Mr. STEENLAND. And after it filed its lawsuit, Congressman, we would make an assessment as to what the vulnerability or liability of the United States might be for that claim.

Mr. SMITH. Right.

Mr. STEENLAND. We haven't done that, because it hasn't filed that lawsuit.

Mr. SMITH. Well, I know, but you are ducking my question a little bit. Similar circumstances could be applied to the Spokane as are here applied. After all, their land was taken, their land was inundated to a smaller extent—with a smaller tribe, understandably. But I guess my point is, and I will ask you again to say this is no precedent and rest your case on the question of the statute of limitations; I am only saying the Congress of the United States could lift those in one swoop of the hand.

Mr. STEENLAND. There is no doubt, Congressman, that if the Congress thinks it is appropriate to waive the statute of limitations, it certainly has the opportunity and the ability to do so; and it may very well be that the Department of the Interior might want to take a look at this and make a recommendation to the Congress as to whether or not that should be done. All I am saying, sir, is
that from our perspective as the litigator, it is inappropriate for us to make a pass on that.

Mr. SMITH. Well, unless you wanted to retire and go to work for the Spokane.

Ms. Deer, I would like for you to comment on this question.

Ms. DEER. Yes. The Spokane Tribe has raised this issue of their claim for compensation arising out of the construction of the Grand Coulee Dam, and we at Interior are willing to look more closely at the merits of their equitable claim and take whatever steps might be appropriate, based on that closer look. The legislation now before the committee is framed as a settlement of long-standing litigation brought by the Colville Tribe to which the Spokane Tribe is not a party, and its consideration should not be delayed.

Mr. SMITH. So you don't want to fuss around with this piece of legislation right now with respect to the Spokane issue is what I hear you saying.

Ms. DEER. Well, I believe the legislation should proceed, but the injustices to the Spokane Tribe need to be recognized.

Mr. SMITH. Would Interior support a stand-alone bill to release the statute of limitations so that the Spokanes could enter a lawsuit?

Ms. DEER. We would have to submit this to our lawyers and others. But speaking personally, myself—

Mr. SMITH. All right. It is probably not fair of me to ask you that question.

Mr. Robertson, do you have anything to add to this discussion?

Mr. ROBERTSON. Well, I will just reiterate, what we were faced with. We were brought into this case relatively late, actually in April, I think, of 1993. Just to reinforce the point, there was a clear case here that was filed within the appropriate time historically, and we feel proud of the fact that we will play at least a significant role in helping resolve this issue after 40 years of uncertainty.

We want to encourage you and the committee to move forward on this bill. We think speed is important and action is important, and so we are focused on this particular claim and the rightful resolution of it.

Mr. SMITH. All right. Well, thank you. Thank you all.

I frankly believe this is a precedent piece of legislation. I don't see how in the world anybody can look at it differently. The question remains for fairness for the Spokanes.

Thank you.

Ms. SHEPHERD. Thank you, Mr. Smith.

I have a couple of questions I would like to ask as well.

Mr. Palmanteer, can you talk to this panel about something you left out of your testimony, which I would be really interested in knowing about; and that is, what was the economic damage to your tribe as the result of the Grand Coulee Dam? It was well enumerated that there weren’t many benefits. Was there economic damage?

Mr. PALMANTEER. Well, as I mentioned slightly in my testimony, the loss of a tribal power site, the loss of the lands that were inundated by the backwaters of the Grand Coulee Dam and the loss of income from the production of power in the past years; I guess we
did not have the opportunity to use those funds that we should have had coming in the past years for our tribal needs.

Ms. SHEPHERD. To what degree did the Colville Indians depend on the salmon fishing industry to sustain their people?

Mr. PALMANTEER. The salmon fishery represented a way of life for our people. The salmon were a regular part of our diet, and the loss of that fishery changed our way of life, actually. We had to change our living habits because we didn't have that staple for our basic diet. If we wanted to eat salmon, we had to buy it in the store or go get it from a neighboring tribe that still had a fishery, and it basically changed our way of life by losing the salmon.

Ms. SHEPHERD. Thank you very much.

I am not sure who the most appropriate person is to answer my next question, perhaps Mr. Robertson or Mr. Steenland.

It is pretty clear that the benefits of the Grand Coulee Dam flow primarily to the people of the Northwest, and yet after the year 2000, there is an offset payment that will be borne by the American taxpayer; and I would just be interested in knowing what justification there is for that.

Mr. ROBERTSON. The settlement in its totality represents a contribution both from the taxpayers and a significant contribution from the ratepayers—a 70/30 split, as I described in my testimony. Looking historically over 50 years, we think that the split is fair and reasonable, based on the requirements to settle.

In lieu of any legislation, looking back again historically and prospectively, the burden of the lawsuit would rest on the taxpayers of the United States exclusively. It takes legislative relief, in the form we have suggested in the judgment here, to transfer—we think appropriately—a significant portion—70 percent—of this responsibility to the ratepayers. This is because the ratepayers have historically benefited and will prospectively benefit from the power generation at Grand Coulee.

So, in a complex historical picture and in the mix of exposures that would come if the lawsuit continued, we thought that this constituted a fair and reasonable settlement between the taxpayers and the ratepayers. We proposed that and came to settlement within the executive branch.

Ms. SHEPHERD. All right. Thank you very much.

I, too, would like to commend you on the settlement, because of course there is always cause to cheer when any legal case is settled, I think, but this one in particular, being as long-standing as it is and having incurred as much injustice as it has.

Ms. Deer, let me just ask you if you have anything further that you would like to add in terms of the Spokane Indian issue.

Ms. DEER. Well, basically, in my previous statement I made my position clear. I would ask that the committee look at the situation there and make a determination based on the request of the Spokane Tribe.

Ms. SHEPHERD. All right. Thank you very much.

Mr. Barrett, would you like to ask some questions?

Mr. BARRETT. I don't have any questions, Madam Chairman.

I want to welcome Ada Deer, who is a fellow Wisconsinite, and I was pleased to see you here this morning—and to congratulate you. I used to work in the Federal courts and there was nothing
that I liked to see more than a settlement in a case, and it looks like that is what we are looking at here today, and so I congratulate everyone.

Ms. SHEPHERD. Thank you.

We will now turn to the second panel, if we can, please. This is a panel that will deal more specifically with the issue of the Spokane Indian tribe.

Mr. Seyler, Warren Seyler, welcome to the committee, and we are open for your testimony. Of course, it will be put entirely into the record.

STATEMENT OF WARREN SEYLER, CHAIRMAN, SPOKANE TRIBE OF INDIANS, WELLPINIT, WA

Mr. SEYLER. Thank you, Madam Chairperson and Members of the subcommittee for this opportunity to testify on H.R. 4757. Accompanying me is our attorney, Patrick Smith, who is available for questions and may have a few comments.

I am here today on behalf of the Spokane Tribe to ask for your help. Specifically, I ask for your recognition of the Spokane Tribe's right to fair and honorable treatment by the United States Government for the Grand Coulee project. We have prepared briefing books for the committee, which will provide more detailed background on this issue. My testimony today summarizes our key concerns.

The reservoir behind Grand Coulee Dam flooded two tribes. We are one of those two tribes. Our reservation is smaller than the Colville, but the impacts to our people were as severe. We are both victims of the same misconduct.

Our ancestors buried their dead on the banks of the Spokane and Columbia Rivers with their heads pointing down river. We did this because our life, culture, economy and religion centered around the Spokane and Columbia Rivers. We were river people. We were a fishing tribe.

The Spokane River, named after our people, was and is the center of our world. That is why when the Spokane Reservation was established in 1881, it expressly provides that the entire adjacent river bed of the Columbia and Spokane Rivers is part of the Spokane Reservation.

Because of Grand Coulee Dam, the Spokane River is now an arm of Lake Roosevelt. The western and southern boundaries of our reservation, our best lands and fishing sites, lie at the lake bottom.

In 1978, the United States Indian Claims Commission ruled that the United States Government’s conduct in building Grand Coulee Dam was unfair and dishonorable and, therefore, awarded the Colville Tribe over $3 million for fishing losses. In 1992, the Appeals Court for the Federal Circuit ruled that the Colvilles’ claim for power value, based on the same standard, was not barred. This resulted in the recent settlement that brings us here today.

The Spokane Tribe was subjected to the identical misconduct by the United States Government as the Colville Tribe. Both tribes were equally deceived. In 1933, when construction on Grand Coulee Dam began, the Commissioner of Indian Affairs recommended, in writing, compensation to both tribes in the form of annual payments. It never happened.
Grand Coulee Dam is one of the largest concrete structures in the world and this Nation's largest producer of electricity. It has produced enormous benefits for others in subsidized irrigation, cheap electricity and water pumped to the Columbia Basin. Gross electricity sales from Grand Coulee Dam are approximately $400 million each year.

The Spokane Tribe has subsidized this cheap electricity for 53 years through the loss of our cultural, religious, burial, power and irrigation sites. We have never been compensated for the destruction of our fishery or for the contribution to Grand Coulee power production. The total compensation the Spokane Tribe has received from the United States Government is $4,700. Yet, every day the Grand Coulee project produces millions of dollars in benefits to our trustee and others.

I am here today requesting that this injustice not go unanswered, that the United States Government recognize our contributions and sacrifices. Many of the Spokane claims are barred by statutes of limitation. Unlike the Colville, our tribe did not have attorneys to advise us to file a claim for Grand Coulee before the August 1951 filing deadline set forth in the Indian Claims Commission Act, nor did the BIA advise us how or when to file this claim, as provided in the Act. The BIA office serving our reservation was located 100 miles away on the Colville Reservation. Unlike the Colville, whose government was organized and functioning years before the filing deadline, our tribal government organized, and our constitution was approved, only two months before the filing deadline in 1951.

We are requesting that Congress include as a separate title to this bill a waiver of the statute of limitations to allow the Spokane Tribe to seek just and equitable compensation from the United States Government resulting from construction and operation of Grand Coulee Dam.

There is ample legislative precedent for Congress to do so. In our briefing book, at pages 15 through 17, we cite many examples of where Congress has waived the statute of limitations and other technical defenses where justice and equity so required. A most recent example of this concerns the taking of Indian lands on the Fort Berthold and Standing Rock Reservations for the construction of the two Federal dams on the Missouri River, the Garrison Dam and the Oahe Dam.

In 1992, having found that the $12 million each Missouri River tribe originally received was completely inadequate in light of the devastating and disproportionate share of the impact borne by those tribes, Congress enacted the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Program Act. Congress appropriated $149.2 million for the three affiliated tribes and $90.6 million for the Standing Rock Sioux tribe.

In another example, Congress waived the statute of limitations for the Zuni Tribe, because, quote, the Zuni Indian tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951. Numerous other examples are cited where Congress afforded similar relief: the Wichita tribe, the Sioux, the Cow Creek Band, the Three Affili-
ated Tribes, the Blackfeet, the Gros Ventre, the Assiniboine and the Tule River Tribe.

An equally compelling case exists here. The Columbia and Spokane Rivers were taken from the Spokane Indians over 50 years ago in a classic case of self-dealing by our legal guardian. The United States Government exploited the Grand Coulee site for the benefit of itself and others at the expense of the Spokane Tribe. Its conduct was neither fair nor honorable, as established by the courts and evidenced by the legislation before this body.

Unless the Congress waives this statute of limitations, there is no incentive whatsoever for Federal agencies to negotiate in good faith with my tribe. To compensate one of the two tribes devastated by Grand Coulee and not the other will only compound the injustice to our people and prolong this conflict.

We believe it would be unprecedented for Congress to only provide relief to one tribe and not the other when both tribes were similarly impacted.

Madam Chairperson and Honorable members of the committee, I ask you to listen to your hearts. We have no place to turn. We have no place to go. We ask for our day of justice. We have waited for this day for 50 years.

Thank you.

Ms. SHEPHERD. Thank you very much.

[Prepared statement of Mr. Seyler and briefing paper follow:]
TESTIMONY OF WARREN SEYLER
CHAIRMAN, SPOKANE TRIBE OF INDIANS

ON H.R. 4757
(GRAND COULEE DAM COMPENSATION)

BEFORE THE
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON NATURAL RESOURCES

August 2, 1994

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over $3 million for fishery losses. In 1992, the Appeals Court for the Federal Circuit ruled that the Colville's claim for power value, based on the same standard, was not barred. This resulted in the recent settlement that brings us here today.

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Tribes and $90.6 million for the Standing Rock Sioux Tribe.

In another example, Congress waived the statute of
limitations for the Zuni Tribe because (quote) "the Zuni Indian
tribal leadership failed to comprehend the absolute necessity of
filing a claim during the statutory five-year period ending in
1951." (P.L. 95-280). Numerous other examples are cited where
Congress afforded similar relief: the Wichita Tribe, the Sioux,
the Cow Creek Band, the Three Affiliated Tribes, the Blackfeet, the
Gros Ventre, the Assiniboine, and the Tule River Tribe.

An equally compelling case exists here. The Columbia and
Spokane Rivers were taken from the Spokane Indians over 50 years
ago in a classic case of self-dealing by our legal guardian. The
United States Government exploited the Grand Coulee site for the
benefit of itself and others at the expense of the Spokane Tribe.
Its conduct was neither fair nor honorable—as established by the
courts and evidenced by the legislation before this body.

Unless the Congress waives this statute of limitations, there
is no incentive whatsoever for federal agencies to negotiate in
good faith with our Tribe. To compensate one of the two Tribes
devastated by Grand Coulee, and not the other, will only compound
the injustice to our people and prolong this conflict.

Mr. Chairman, and honorable members of this Committee, I ask
you to listen with your hearts. We have no place to turn. We have
no place to go. We ask for our day of justice. We have waited for
this day for over fifty years.

Thank you.
A Message from the Spokane People:

We offer for your review and analysis the attached briefing paper. It summarizes past history and recent events surrounding the United States Government’s taking of the Spokane People’s land and waters for the construction and operation of the Grand Coulee Dam.

This taking of our land and waters and the destruction of our salmon runs was accomplished with complete disregard for the rights and welfare of the Spokane People. Grand Coulee flooded the western and southern boundaries of our Reservation—it’s heartland. Our social and cultural ways were changed forever. The very core of our subsistence was uprooted, forcing our dependence on the United States for our livelihood.

While we continue to suffer, others in the Pacific Northwest reap enormous benefits from irrigation and hydropower from Grand Coulee. It brought growth and prosperity to the Northwest. It brought poverty to our People.

In 1978, the Colville Tribe received $3.2 million in compensation for their destroyed fishery. Legislation has been introduced (S. 2250 and H.R. 4757) which will compensate the Colville People for past use ($53 million) and future use ($15 million annually) of Colville lands and waters. This compensation is based on the United States’ obligation to deal “fairly and honorably” with the Colville Tribe over these matters.

The Spokane People have never been compensated for our lost fishery. We have never been compensated for our Tribe’s contribution to Grand Coulee power production. The United States Government has turned a blind eye to the injustice inflicted on our People.

The Grand Coulee Settlement Act provides the opportunity for the United States Government to honorably and fairly correct this injustice. Justice must be afforded to both Tribes. Both are victims of the identical dishonorable conduct. Both have suffered equally. Correcting the injustice for one Tribe, and not the other, only compounds the injustice.

We are encouraged that the United States is willing to offer legislation on behalf of the Colville Tribes, but we can not stand idly by and allow the injustice to our Tribe go unanswered.

We, the Spokane People, request President Clinton and the United States Congress to address this injustice through a separate title to the Grand Coulee Settlement Act to provide just compensation to the Spokane Tribe of Indians.

We ask for your support.

Warren Sayler, Tribal Chairman
Summary

IMPACTS AND HISTORY OF GRAND COULEE DAM

- Largest concrete dam in world flooded western and southern boundaries of Reservation (10 miles total); ended upstream fish migration in 1939.

- Fishing—and Spokane River in particular—was center of Spokane People's economy, religion and lifestyle. Had lived and fished there since time immemorial. Destruction of fishery made Spokane dependent on U.S.

- 1881 Spokane Reservation boundaries expressly include entire adjacent riverbed of Columbia and Spokane Rivers (because of fishing reliance).

- In 1933, when construction on dam started, the BIA intended to pay annual rental to the Tribes. (U.S. knew of fishing reliance and knew it was flooding other tribal power sites.)

- Tribe received only $4,700 in compensation, yet:
  --Grand Coulee's gross electricity sales are about $400 million/year (does not include additional reservoir storage power value to downstream dams).
  --Largest electricity producer in the United States (6,500 megawatts).
  --Its pumps deliver 500,000 acre feet of water for off-Reservation irrigation.
  --Power subsidizes construction costs of irrigation projects.
  --Enormous benefits to Pacific Northwest and Nation continue to accrue while Spokane live in poverty.

- Colville and Spokane subject to identical dishonorable conduct by United States Government.

COLVILLE CLAIMS

- COMPENSATION FOR POWER PRODUCTION. In 1992, U.S. Claims Court ruled that United States was liable to the Colville for failing to deal “fairly and honorably” on Grand Coulee by expropriating power value of river for itself.

  --This resulted in 1994 Settlement of $53 million for past use of tribal lands and $15 million annually in perpetuity.

- COMPENSATION FOR LOST FISHERY. In 1978, Indian Claim Commission awarded Colville $3.25 million for fishery losses
for United States' dishonorable dealings at Grand Coulee. (This $3.2 million has a present value of over $7 million today.)

WHY SPOKANE DID NOT FILE CLAIM

Spokane Tribe missed 1951 ICCA filing deadline because:

--Did not have attorneys (until too late)
--Did not know it could file separate claim for Grand Coulee (It had received $4,700 in compensation under 1940 Act)
--Special lands claim legislation was vetoed by President Coolidge (This was only claim Tribe knew about.)
--BIA, 100 miles away at Colville, did not advise the Tribe that it could bring claim (though required to do so).
--Inexperience: Spokane Government/Constitution approved 6- 27-51 (2 months before filing deadline).

In 1993, Spokane Tribe was requested by Colville Tribe to defer pursuit of compensation from United States until Colville reached agreement with Justice Department. Spokane honored that request. The issue is now ripe.

CONGRESSIONAL PRECEDENT IN SIMILAR SITUATIONS

Missouri River Tribes (Fort Berthold & Standing Rock)

--Each received $12 million at the time of construction.
--In 1992, they received $240 million: Ft. Berthold ($150 million) and Standing Rock ($90 million)

Other examples of where Congress has waived statute of limitations deadline and/or U.S. defenses:

--Zuni (waived S/L because "tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951.")
--Wichita (waived S/L for land claims)
--Cow Creek (waived S/L for treaty violations)
--Sioux (waived U.S. defenses of res judicata and collateral estoppel for Black Hills claim)
--Three Affiliated Tribes (waived all U.S. defenses--including S/L, lapse of time, res judicata, collateral estoppel--for a land claims)
--Blackfeet (waived res judicata for land claims)
--Gros Ventre (waived res judicata for land claims)
--Assiniboine (waived res judicata for land claims)
--Tule River (restored lands without bringing claim)
SETTLEMENT IN INTEREST OF U.S. AND TRIBE

- To compensate Colville—and not the Spokane—for the identical misconduct by United States compounds the injustice.

- This is an on-going breach of the federal trust responsibility. In a historic meeting, President Clinton recently affirmed his commitment to honoring the trust relationship.

- Tribe would have no choice but to bring claims against the United States under existing laws for its unlawful and tortious conduct.

  --The federal government has breached its trust obligation. That breach is on-going.
  --Tribal land and resources continue to be utilized without compensation.
  --Tribe will assert federal navigational servitude is inapplicable because, among other reasons: (1) the Spokane River has been decreed as non-navigable, (2) special statutes applicable to Spokane and/or Grand Coulee. (Dams on the Flathead Reservation and Crow Reservation were held to be compensable under similar grounds).

- Litigation costs, the likelihood of substantial liability by the United States Government, and the patently inequitable and unjust nature of the status quo warrant Congressional settlement of the Spokane claims on Grand Coulee.
BRIEFING PAPER

THE SPOKANE TRIBE OF INDIANS’ RIGHT TO FAIR AND HONORABLE TREATMENT BY THE UNITED STATES GOVERNMENT FOR PAST AND FUTURE USE OF TRIBAL LANDS AND RESOURCES FOR THE CONSTRUCTION AND OPERATION OF GRAND COULEE DAM

PREPARED BY THE SPOKANE TRIBE OF INDIANS

JULY 20, 1994
To His Excellency Governor Stevens:

Sir,

You had desired our going to meet you at the treaty, but we can not go on account of the Salmon which is coming up now. We are laying in our winter supply as that is our only resource for living. We think we cannot do without it. As for us, we are for peace and it does not make any difference about our not going to meet you, for we all want to remain quiet and peaceful...

Respectfully yours,

Garry

September 12, 1856 - Spokane River

Letter from Chief Spokane Garry to Governor Isaac Stevens on why Spokane tribal leaders were not able to attend the treaty negotiating meeting.

Cover Picture:

Indian fisherman--and one of their assistants--catch downstream migrating "silvers" injured by their plunge over the Grand Coulee Dam spillway. April 14, 1949.
Since time immemorial the Spokane Tribe were a river people.\(^1\)

The Columbia and Spokane Rivers were central to their culture, economy, religion, and very existence. The ancestral river homelands of the Spokane and Colville Tribes were flooded by the largest concrete dam in the world.\(^2\) Some of the world's finest fishing grounds--Kettle Falls and the Lower Spokane River--were relegated to the bottom of Lake Roosevelt. When the turbines in Grand Coulee Dam began producing their first electricity in 1941, the western and southern boundaries of the Spokane Reservation, and the eastern and southern boundaries of the Colville Reservation, were rendered to the lake bottom.

President Franklin D. Roosevelt visits site of Grand Coulee Dam on August 4, 1934.

**Self Dealing Rather Than Fair Dealing**

The rivers that had sustained the Spokane for centuries were simply taken from them. They were taken by the very legal guardian, the United States Government, which had the moral and legal obligation to deal in good faith and to safeguard its "wards'" interests. In a classic case of self-dealing, the United States Government subordinated its moral and legal obligation to deal fairly with the tribes to its private interest in exploiting the Grand Coulee site for the benefit of itself and others. The

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2 See Guinness Book of World Records. Grand Coulee Dam eliminated 1140 miles of upriver streams that previously had been spawning and rearing habitat for salmon and steelhead.
history of the United States Government's expropriation of Indian lands to develop the Grand Coulee site stands as one of the most egregious breaches of guardianship in the annals of American Indian history. That breach is ongoing.

Benefits Accrue to Everyone But the Spokane
More than 50 years have passed since the waters of Lake Roosevelt inundated Kettle Falls, the Lower Spokane, and the ancestral river bottoms of the Spokane and Colville reservations. During this time the profits and benefits from Grand Coulee Dam—measured in billions of dollars—have accrued to nearly everyone except the tribes. Yet it was these tribes who paid the devastating price for the construction of Grand Coulee and who live with its aftermath day-to-day. These tribes await their day of justice.

The nation's largest electricity producer, Grand Coulee Dam's gross electricity sales are approximately $400 million annually and subsidize irrigation construction charges. Its pumps serve water for 500,000 acres. Benefits accrue to everyone but the Tribes—who sacrificed the most.

The largest producer of electricity in the United States, Grand Coulee Dam has produced an enormous revenue stream for the United States Government that accrues in perpetuity. In 1993, a low water year, gross electricity sales from Grand Coulee are estimated at $362 million. In 1992, electricity sales were $412 million. The massive federal irrigation projects which receive water from the project and whose construction debt is repaid by power revenues receive enormous benefits from the Grand Coulee project. Grand Coulee electricity sells at an average wholesale price of approximately 2.13 cents per kilowatt hour, providing some of the "cheapest" electricity in the nation.

Spokane Subsidize "Cheap" Electricity
In reality, the "cheap" electricity produced by Grand Coulee has been subsidized by the Spokane and Colville Tribes for 53 years. That subsidization continues every day: without compensation. The Tribes continue to subsidize Grand Coulee through the loss of cultural sites, religious sites, fishing

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3 Based on figures supplied by the Department of Interior. Grand Coulee Dam generates a maximum of 6,494 megawatts of electricity and produced 19.3 and 17 billion kilowatt hours of electricity in 1992 and 1993, respectively.

4 The electricity-driven pumps at Grand Coulee provide enough water for the 500,000 acres now under irrigation and sufficient water supply for the entire Columbia Basin. As the network of siphons and canals expand, over one million acres will receive water pumped from the Grand Coulee pumps.
sites, burial sites, power sites, irrigation sites, and the general usurpation of a lifestyle and economy that had nourished these tribes for centuries. The heartland of the Reservation and its people was excised. They receive no rental for the use of their lands and resources. While the region extracts billions of dollars in revenues and benefits from Grand Coulee, the Spokanes live in poverty.  

There is a moral and legal obligation to compensate the Spokane Tribe for the taking of its land and trust resources and the ongoing use of those resources. The cost of compensation is a small fraction of the revenues and benefits that accrue from Grand Coulee. Not to do so perpetuates the injustice and inequity that have endured for 53 years. The failure of the United States Government to own up to its misconduct and self-dealing at Grand Coulee makes a mockery of the federal-tribal trust relationship affirmed as recently as April 29, 1994, by President Clinton in a historic meeting with this nation's tribal leaders.

**COLVILLE OBTAIN SETTLEMENT FOR THEIR RIGHTS**

On April 21, 1994, the Confederated Tribes of the Colville Reservation and the United States Government entered into a Settlement Agreement to compensate the Colville Tribe for past and continued use of reservation lands for the Grand Coulee Dam. The Grand Coulee Project inundated the southern and eastern boundaries of the Colville Reservation (hereafter "Colville Settlement").

Under the Colville Settlement, the Colville Tribe receives a $53 million lump sum and $15 million annually in perpetuity. This is in addition to the $3.2 million received for fisheries losses and the $6 million received for Chief Joseph Dam compensation. In contrast, the Spokanes total compensation to date has been $4,700."

The Settlement Agreement provides for a $53 million lump sum payment to the Colville for past use and expropriation of tribal lands to be paid from funds appropriated for Indian claims settlements. For future use of Colville lands, the United States Government has agreed to provide the Colville approximately $15 million annually in perpetuity under a formula set forth in the Agreement. The Settlement Agreement is contingent upon enactment of enabling legislation (the "Settlement Act").

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5 Indian unemployment on the Spokane Reservation runs as high as 60% in the winter months.
The Settlement Agreement is premised on the United States Government's violation of the "Fair and Honorable Dealings" clause of the Indian Claims Commission Act of 1946 ("ICCA"). The Spokane Tribe, at the recent request of the Colville Tribe, agreed to not pursue its claim until the Colville Tribe and the U.S. Justice Department had reached a settlement. Now that the Colville Settlement is signed, and the Settlement Act has been introduced in Congress, it is time for the United States Government to address settlement for the Spokane Tribe.

**Settlement Act Should Include the Spokane Claim**

Like the Colville, the Spokane Tribe's lands and resources were--and continue to be--utilized by the United States Government. Grand Coulee inundates the entire western boundary of the Spokane Reservation (ten miles of the Columbia River) and nearly the entire southern boundary of the Spokane Reservation (31.5 miles of the Spokane River). Today Lake Roosevelt separates the Spokane and Colville Reservations. The Spokane River is now an arm of Lake Roosevelt.

A separate title should be added to the Settlement Act providing for the Spokane Tribe's past and future compensation for the taking and utilization of its resources. To honor and recognize this right to the Colville--but to deny it to the Spokane--would be a travesty of justice, a breach of fiduciary responsibility, and only ensure future conflict and protracted litigation over this matter.

Compensation will never restore the magnitude of the injuries suffered by the Spokane people. Much of what was lost is intangible in an economic sense. There were societal and psychological costs associated with the destruction of fishing, cultural, and religious sites and the decimation of the great fish runs. The lands and resources confiscated had provided the Spokane people with cultural continuity. The Spokane River was central to these people. For example, the Spokanes buried their people by placing bodies parallel to the Spokane River with their heads downriver.

**A Historically Peaceful and Prosperous People**

For millennium, the Spokane lived, boated, fished and relaxed on the lower Spokane River. Their name derives from their homeland on the lower Spokane River. The salmon migrating up the Spokane River were stopped by natural falls in what is now the City of Spokane. The Spokane River from that point down to its confluence with the Columbia River provided a salmon harvest rivaled only by the fish that were gathered at Kettle Falls on the Columbia River. These rivers were the main arteries of commerce

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6 The Colville claim was filed on July 31, 1951, pursuant to § 2 of the ICCA, Public L. No. 79-726, 60 Stat. 1049, 1050, formerly codified at 25 U.S.C. § 70a (1976).
for the Spokane. For centuries they lived a prosperous and contented lifestyle in their aboriginal lands--the center of which was the Spokane River.

The salmon came up the Columbia River to Kettle Falls to spawn so thick that the river appeared to be matted clear across the river below the falls. They appeared so thick it seemed also possible for one on foot to walk across the river on the backs of the salmon, massed below Kettle Falls."

Tribal elder Peter Paul, then 81 years old, remarked on January 28, 1930.

The Spokane opted to not take up arms against the United States and the settlers that swarmed on to their aboriginal lands. The Spokane sought peaceful coexistence. By the 1870's, however, it was clear that the Northern Pacific Railroad would be crossing Spokane lands. Pressure from white settlers increased. Hostilities broke out in 1877 between many Washington Tribes and the white settlers. The Spokane Tribe did not join in these hostilities and, instead, at the urging of the United States Government, parlayed with the official representatives of the United States Government for three days at a council held at Spokane Falls.
RESERVING A SPOKANE HOMELAND

The result of these negotiations was the Agreement of August 18, 1877, wherein the Spokane reserved the present Spokane Reservation. This agreement was duly transmitted to the United States Senate and the President. The final boundaries of the Spokane Reservation were defined and formally established in President Hayes’ Executive Order of January 18, 1881. In recognition that the Spokane were a river people, the boundaries of the Reservation were set at the far bank of the water ways that formed the boundaries of the Reservation on three sides. To the west, the Reservation boundary was set along the Columbia River’s “western bank.” To the south, the Reservation boundary was set at the Spokane River’s “southern bank.” To the east, the Reservation boundary was set at the “east bank” of Chamokane Creek.

“The Spokanes live on both sides of the Spokane River, from its mouth to the Idaho line.”

Reports of Agents in Washington Territory, September 1, 1875.

Thus by aboriginal title and by the plain terms of the 1881 Executive Order, the Spokanes retained reserved rights to the waters of the Spokane and Columbia Rivers and clear title to the beds and banks thereof. The reservation lands—mountainous and arid, with interspersed irrigable valleys—had little value except when viewed in combination with the waters that bounded and framed them on three sides.

In 1887, the Spokane Tribe agreed in the Articles of Agreement to cede their vast aboriginal homelands to the United States Government, except for the lands reserved for the Tribe in the 1881 Executive Order. That Agreement was ratified by the Congress on July 13, 1892 (27 Stat. 120, 139). As established before the Indian Claims Commission, the Tribe ceded title to about three million acres to the United States in return for its reserved Spokane Reservation homeland. Included in the vast lands

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7 In a quiet title action, the bed and banks of the Spokane River were decreed to the Spokane Tribe. Spokane Tribe of Indians v. State of Washington, et al., No. C 92-753 AM (E.D. Wash. September 14, 1992). The United States Government and the State of Washington signed written disclaimers of ownership in the original bed and banks of the Spokane River now inundated by Lake Roosevelt. The mile and a half of the Spokane River upstream from the confluence with the Columbia was excluded from the disclaimers and was not part of the quiet title decree.

ceded were fabulous fishing waters, but the Spokane retained all of the waterways within or bordering the Spokane Reservation and the prized fishing sites that lay within these waterways.

THE CONSTRUCTION OF GRAND COULEE

The federal government's original intention was to compensate the Spokane and Colville Tribes for the use of tribal resources by providing for annual rental or payments. For example, in a December 5, 1933, letter from the Commissioner of Indian Affairs to the Commissioner of Reclamation, the Indian Commissioner states that the project "could bear a reasonable annual rental in addition thereto for the Indians' land and water rights involved."

In 1933, the Commissioner of Indian Affairs recommended that the Spokane and Colville Tribes receive "a reasonable annual rental" for use of their lands and water rights by the Grand Coulee Dam.

Similarly, in a letter of the same date from the Indian Commissioner to the BIA Supervising Engineer, the Commissioner notes that revenue "should accrue annually to the Indians by reason of their interests which are involved in the development." The Commissioner notes that development of power was the "most valuable purpose" for the Indians' interest in the affected site. In an April 20, 1934, letter from the BIA Supervising Engineer to the Indian Commissioner, the Engineer discusses the damages the tribe will suffer and recommends that compensation include land, timber fisheries, and water power value.

Construction on Grand Coulee dam commenced in 1933 under the purported authority of the National Industrial Recovery Act of 1933. When the legitimacy of this authority was clouded,9 Congress responded by reauthorizing Grand Coulee in the Rivers and Harbors Act of 1935. As construction escalated on Grand Coulee and the nation worked its way out of the Depression, the federal trustee's prior interest in compensating the Indians evaporated. No mention was made in either the 1933 or 1935 authorizations of the tribal land and resources to be flooded by the dam, or any consideration of compensation.

9 The authorization of a dam on the Colorado River under the same authority was invalidated by the U.S. Supreme Court in United States v. Arizona, 295 U.S. 174 (1935).
The Spokane River (on the left) flows into the Columbia River. March 27, 1940. In a few months, the water impounded by Grand Coulee Dam would inundate this confluence.

"Fish they say is their principal article of food, and this is so easily obtained from the river that they prefer to live on its banks, to removal any place else."


The confluence of the Spokane and Columbia Rivers today (Lake Roosevelt).
In a January 11, 1911, report to the Commissioner of Indian Affairs, Agent Webster identifies the “narrows” reach of the Spokane and a site 15 miles below Little Falls as two enormously valuable hydro-power sites. He recommends that when these two sites are developed that at least part of the proceeds revert to the Spokane Tribe as the river is entirely within the Spokane Reservation at these sites. Both sites are now submerged by Lake Roosevelt.

Tribal protests were ignored.\(^{10}\) Construction continued for seven years. It was not until the waters of Lake Roosevelt were actually flooding tribal lands that Congress made any attempt to address the use or taking of Indian lands.\(^{11}\)

In 1940, in aid of construction of Grand Coulee, the Congress “granted” to the United States “all right, title, and interest of the Indians in and to the tribal and allotted lands within the Spokane and Colville Reservations . . . . as may be designated therefor by the Secretary of the Interior from time to time.”\(^{12}\) The Secretary of the Interior was to determine the amount of “just and equitable” compensation for the tribal lands designated to be taken.\(^{13}\) Under this authority, the United States paid the Spokane Tribe approximately $4,700.00 for looking northeasterly at the Spokane River at the “narrows,” near its confluence with the Columbia. November 6, 1939.

\(^{10}\) See, e.g., Confederated Tribes of the Colville Reservation v. United States, 43 Ind. Cl. Comm. 505, 555-56 (1978).

\(^{11}\) See 59 I.D. 147, 155 (1945).


\(^{13}\) Id., codified as amended, 16 U.S.C. § 835e.
the taking of "fast" lands.14

While other property owners had the right, and exercised the right, to have their day in court and to challenge the condemnation and compensation offered them by the United States, the Indian land was simply taken under the 1940 Act "by designation." The federal trustee unilaterally determined what was "just and equitable." More important than what tribal lands were taken by designation was what tribal properties were not taken by designation. The compensation paid to the Spokane and Colville Tribes under the 1940 Act did not include the water power value of upstream lands taken by the Government, the water power value or the ordinary value of the bed and banks of the Columbia or Spokane River, nor did it include the value of fishery rights.15 These tribal property rights have been taken and continue to be utilized by the United States without compensation.

Spokane River at the "narrows." January 3, 1941. Water backing up from Grand Coulee Dam is evident.

**Colville Prevail on Claims Case**

In 1951 the Colville Tribe filed a petition under the ICCA seeking compensation for losses resulting from the construction of Grand Coulee Dam. On September 29, 1978, the Indian Claims Commission made an award to the Colvilles for the destruction of their fishery as a result of the construction and operation of Grand Coulee Dam in the amount of $3.257 million.16

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14 "Fast" lands are those above the high water mark which, when flooded, are considered a taking and subject to just compensation. See *Confederated Tribes of the Colville Reservation v. United States*, 964 F.2d 1102, 1105 n. 5 (Fed. Cir. 1992).

15 See *Confederated Tribes of the Colville Reservation v. United States*, 964 F. 2d at 1105; Solicitor's Opinion M-36887 (June 3, 1974) ("1974 Solicitor Opinion").

In Confederated Tribes of the Colville Reservation v. United States, 20 Cl.Ct. 31 (1990), the United States Claims Court (the successor to the Indian Claims Commission) held that the United States was not liable for water power values of tribal lands taken by Grand Coulee Dam. The Court held that in constructing the dam "Congress intended to create a multiple purpose project with navigational benefits" and that the "full and proper assertion" of the United States' navigational servitude was superior to all of the Tribes' legal, equitable, and moral claims. Id. at 34. The Tribe appealed.

The United States Court of Appeals in Confederated Tribes of The Colville Reservation v. United States, 964 F.2d 1102 (Fed Cir. 1992), partially reversed the Claims Court. The Federal Circuit affirmed the Claims Court's holding that construction of Grand Coulee Dam does not entitle the tribe to compensation under the Fifth Amendment for the water power value of land where the United States has invoked its sovereign right to exercise its navigational servitude. The Court found that (under the statutes applicable to the Colville Reservation) the Colville Tribe's takings claims were subordinate to the Federal Government's exercise of its navigational servitude.

The Federal Circuit reversed the Claims Court on its holding that the United States did not violate the "fair and honorable dealings" standard of the ICCA. The ICCA contains, as a separate basis for judicial relief, "claims based upon fair and honorable dealings that are not recognized by an existing rule of law or equity." (Clause 5 of § 2). The Claims Court had held that claims based on Clause 5 are also barred by the navigational servitude. The appellate court reversed on this point, holding that the navigational servitude is not a bar to the power value claim and allowed that claim to go forward.

The 1994 Colville Settlement establishes, as a matter of law and equity, that the United States violated its duty to deal fairly and honorably with the Colville Tribe. Because of the United States' culpability, it has now agreed to compensate the Tribe for its past use ($55 million) and future use ($15 million annually in perpetuity) of tribal lands and resources. That Settlement at last satisfies the Colville claim pending before the Claims Court on the 1992 remand from the Federal Circuit Court of Appeals.

**Fair and Honorable Treatment for Both Tribes**

In effect, the Colville Settlement establishes that the United States Government failed to deal honorably and fairly with both the Colville and Spokane Tribes. After initially making plans in 1933-34 to compensate both tribes, the United States
ignored these plans and pressed onward with construction of the dam and flooding of the lands and resources of both Tribes. Though it had a fiduciary duty to protect these lands and to deal in good faith, that duty was abandoned. Instead, the United States Government used its guardian position to exploit the very beneficiaries it had a legal and moral obligation to safeguard. The benefits from Grand Coulee were structured to accrue to the United States and private interests, while major costs and sacrifices were absorbed by the two Tribes. The Grand Coulee project continues to occupy both reservations without just and equitable compensation.

The benefits from Grand Coulee were structured to accrue to the United States and private interests, while major costs and sacrifices were absorbed by the two Tribes. The Grand Coulee project continues to occupy both reservations without just and equitable compensation.

The United States has a legal and moral obligation to deal fairly and equitably with both Tribes on this matter. The total compensation the Spokane have obtained for the destruction of their lifestyle and the taking of their Reservation heartland is $4,700.00. Yet Grand Coulee yields billions of dollars of revenues and benefits to the United States Government, federal irrigation projects, and other recipients. The Colville Tribe is poised to receive $55 million in past compensation and $15 million annually, in perpetuity, for future compensation. (This is in addition to the $3.257 million the Colville received in 1978 as

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17 See, e.g., Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (its conduct should be "judged by the most exacting fiduciary standard"); Lane v. Pueblo of Santa Fe, 249 U.S. 110, 113 (1919) (treat[ing Indian lands as public lands "would not be an exercise of guardianship, but an act of confiscation."]); United States v. Creek Nation, 295 U.S. 103, 110 (1935) (federal authority over Indians "is subject to limitations inhering in such a guardianship").
compensation for past fishery losses and in addition to the $6 million received as separate compensation for Chief Joseph Dam, which utilizes Lake Roosevelt storage.)

The United States Government used its guardian position to exploit the very beneficiaries it had a moral and legal obligation to safeguard.

To compensate the Colville for the United States’ misconduct and use of tribal trust resources—and deny the Spokane the right to compensation for the same purpose—would be an egregious miscarriage of justice.

**TIME FOR RESOLUTION**

At the request of the Colville Tribe, the Spokane Tribe delayed their active pursuit of remedies with the federal agencies and the Congress while the Colville settlement negotiations were underway. The Colville Tribe suggested that inclusion of the Spokane claim could be addressed when a settlement was reached on the Colville claim. That time has arrived.

Congress should address the Spokane Tribe’s claims at Grand Coulee in a separate title of the Settlement Legislation. To not address the Spokane claim would perpetuate the ongoing injustice and guarantee costly and unnecessary litigation for all parties concerned. The Colville Settlement establishes that the United States Government has not treated either tribe in a fair and honorable manner. Fundamental notions of fairness and morality require the United States Government to own up to its trust responsibility to deal with both Tribes’ claims in a fair and equitable manner.

Through no fault of the Tribe, the Spokane Tribe missed the 1951 filing deadline for a ICCA-based action for claims arising out of the construction of Grand Coulee Dam. At the time, five years after the completion of Grand Coulee Dam, the Tribe was unaware (until it was too late) that they could bring a claim under the ICCA for Grand Coulee damages. By 1951, the Spokane Tribe had been paid the $4,700 compensation for the “fast” lands designated under the 1940 Act and were unaware a further claim could be brought. The Tribe had no attorneys at that time to advise them of the ICCA and its deadlines, and no federal agency advised them of the filing deadline.¹⁸

¹⁸ The Spokane Tribe did not have an official tribal government or approved constitution until June 27, 1951. The deadline for filing ICCA claims was August 13, 1951. The Spokane Tribe had its government in place for less than 60 days before that date. It had no tribal attorney or claims attorney. Calvin Coolidge had vetoed special legislation to allow the Spokane Tribe to file claims for loss of aboriginal lands. That potential claim for its
With the filing deadline approaching, the Tribe barely found legal counsel in time to represent the Tribe before the Indian Claims Commission on its aboriginal lands claim. It was also unclear whether a claim could be brought under the ICCA for post-1946 damages given the ICCA's provision that "No claim accruing after the date of approval of this Act [August 13, 1946] shall be considered by the [Indian Claims] Commission."19

Irrigated farm lands in the Spokane Valley flooded by Lake Roosevelt. Circa 1939.

The fact the Spokane Tribe did not file an ICCA-based claim prior to 1951 does not negate the merits of the Spokane claim. Nor does it insulate the United States Government from liability.20

aboriginal lands was the only claim that the Tribe had knowledge it had. Upon learning that the Kalispels and Coeur d'Alene were filing claims under the ICCA for their aboriginal lands, the Spokane, belatedly, sought to employ the same claims attorneys. These claims attorneys had no time to investigate other claims and filed only the aboriginal lands claim for the Spokane. Given the various Acts relating to the construction of Grand Coulee, and especially the Act of June 29, 1940, it was unclear whether the Tribe's claims were governed by the ICCA. It is still unclear today.

19 60 Stat. 1050; formerly codified at 25 U.S.C § 70a. The authority to include post-1946 damages in an ICCA-based claim was not clearly established until 1978. See Navajo Tribe v. United States, 586 F.2d 192 (Cl.Ct. 1978).

20 The Spokane Tribe does not concede that the navigational servitude is a bar to the Tribe's claim for the power value of inundated lands. Though the 1992 Federal Circuit Court affirmed this holding based on the statutes applicable to Colville, the Courts have not addressed that question with regard to the statutes applicable to the Spokane Tribe and its reservation lands. The 1992 holding is further distinguished because the entire length of the Spokane River is non-navigable and therefore not subject to the navigational servitude. Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985), cert. denied, 113 S. Ct. 493 (1992) (The entire length of the Spokane River is non-navigable and the construction
The Spokane Tribe would have no alternative but to seek judicial relief if the Congress does not accommodate the Spokane's just claim for compensation. That would result in substantial legal costs for everyone and further polarization. The Tribe patiently sought to avoid protracted litigation as it awaited the resolution of the Colville settlement.21

It is unclear whose tribal resources are being compensated in the Colville Settlement. This becomes a difficult issue because the Columbia River (Lake Roosevelt) is the boundary between the Colville and Spokane Reservations; this boundary has never been judicially determined.22 This raises the thorny question of how the United States Government can carry out its trust obligation to the Colville in the Settlement Agreement without compromising the Spokane Tribe's property rights. Are the Colville being compensated on their eastern Reservation boundary for rights belonging to the Spokane? This question alone is justification for legislatively resolving the Spokane claim in a separate title to the Settlement Legislation.

CONSISTENT WITH LEGISLATIVE PRECEDENT

There is ample legislative precedent for Congressional resolution of tribal claims against the United States notwithstanding technical defenses that the United States could raise. The most recent example of this involved Indian lands flooded by Missouri River dams built by the United States Government. In 1992, Missouri River Tribes received $240 million in additional compensation from Congress for inundated lands.

In 1992, Congress enacted the “Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Program Act,” which provided compensation to both tribes for the taking of

of Grand Coulee Dam does not legally convert it into a navigable river.) Moreover, notwithstanding the navigational servitude, the Colville received compensation for the past and future use of their tribal resources.

21 From 1976-1980, the Spokane and Colville Tribes participated in a Task Force with Department of Interior and Department of Defense officials to explore ways in which these Tribes might benefit from power production from Grand Coulee. Unfortunately, the Task Force was unable to reach a consensus on how these Tribes might participate in the power production benefits. Given the lack of consensus, the Colville Tribe resumed its litigation before the Claims Court which ultimately resulted in the April 21, 1994, Settlement Agreement.

22 On its western boundary, the Spokane Reservation includes the bed and banks of the Columbia River to the "western bank." The Colville Tribe asserts that the eastern boundary of their Reservation extends to the middle of the original channel of the Columbia River. No court has resolved this conflict. In the 1990 Lake Roosevelt Cooperative Management Agreement, the two tribes agreed to "determine as between themselves the allocation management responsibility" along this disputed border.
reservation lands for the construction of Garrison Dam and Reservoir and the Oahe Dam and Reservoir. Like the Grand Coulee Project, these Missouri River dams were built without consultation and equitable compensation to the two impacted tribes, yet enormous benefits accrued to the United States and its designated beneficiaries.

The $12 million in compensation each tribe had received for the taking of its lands at the time was found to be totally inadequate in light of the devastating and inordinate share of the impact borne by these two tribes. Congress appropriated an additional $149.2 million for the Three Affiliated Tribes and $90.6 million to the Standing Rock Sioux Tribe. (See Title 35 of Public Law 102-575 and Senate Report No. 102-267.)

Numerous other examples can be cited:

P.L. 95-280. The Zuni Act directed the Secretary of the Interior to purchase and hold certain lands in trust for the Zuni Indian Tribe of New Mexico. Notwithstanding statutes of limitations, the Act also conferred jurisdiction upon the Court of Claims to hear and determine the Zuni's aboriginal lands claim. Congress recognized that "[u]nfortunately, the Zuni Indian tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951." Congress took note of the fact that the Zuni lacked sufficient legal representation and that the federal government had failed to meet its obligation to provide notice and explanation to the Zuni of their right to file a claim against the United States.


P.L. 95-243. This Act authorized the U.S. Court of Claims to review, without regard to the technical defenses of res judicata or collateral estoppel, the Sioux Tribe's claims for compensation for the taking of the Black Hills. Thus Congress overrode the Court of Claims dismissal of the Sioux's claim, which had been dismissed on the grounds of res judicata.

P.L. 96-251. Waived the statute of limitations of the ICCA to permit the Cow Creek Band of Umpqua Indians to file a claim against the United States for treaty violations. Congress stated that its enactment of this legislation "will assure the Cow Creek Band their right to due process and a fair day in court." Senate Report No. 96-397, at 2.

P.L. 96-404. Allowed a land claim suit by the Three Affiliated Tribes to proceed in the U.S. Court of Claims
notwithstanding statutes of limitations, lapse of time, res judicata, collateral estoppel, or any other provisions of law.

P.L. 96-405. Authorized the U.S. Court of Claims to hear claims by the Blackfeet and Gros Ventre Tribes for land takings notwithstanding the Court of Claims' earlier dismissal of these tribes suit on the grounds of res judicata.

P.L. 96-434. Same relief as in P.L. 96-405 afforded to the Assiniboine Tribe.

P.L. 96-338. Restored lands to the Tule River Indian Tribe despite the fact that the Tribe did not bring a claim for these lands under the TCCA.

P.L. 96-401. Authorized the Secretary of the Interior to cancel and renegotiate coal leases involving Northern Cheyenne lands in light of an apparent violation of the Federal Government's fiduciary duty to the tribe, and because the present "impasse can only lead to expensive and lengthy litigation." House Report No. 96-1370, at 3.

CONCLUSION

By agreeing to the 1994 Settlement Agreement with the Colville Tribe, the United States Government has made amends and compensation to one of the two Indian tribes whose lands were inundated by the Grand Coulee Dam project. What about the other tribe? The record is indisputable that the United States Government equally trampled on the Spokane Tribe's rights. Its conduct was anything but "fair and honorable." Given the reliance placed on fishing the Spokane and Columbia Rivers, the Spokanes were impacted perhaps more than any Indian tribe in U.S. history by hydroelectric development of a large river.

Billions of dollars in revenue have accrued—and continue to accrue—to the United States Government and its selected beneficiaries of the Grand Coulee project. These benefits come in the form of subsidized irrigation, "cheap" electricity, and water pumped to the Columbia Basin. At the same time, the economy of the Spokane Reservation lays prostrate. Every day, the Spokane Tribe and its people subsidize the economic bonanza flowing from Grand Coulee. The injustice is palpable and unconscionable.

As discussed above, there is substantial precedent for Congress to address this injustice. A separate title must be added to the Grand Coulee Settlement Legislation to compensate the Spokane Tribe for its injuries and the ongoing utilization of tribal property and rights on the Columbia and Spokane Rivers. A failure to do so is a miscarriage of justice and will only lead to protracted litigation against the United States Government—adding insult to injury.
Ms. SHEPHERD. Mr. Smith, Questions?
Mr. SMITH. Thank you, Madam Chairperson.

This is kind of an interesting situation with respect to how this bill should proceed. Obviously, the litigants in this case are delighted that they have reached a compromise, and they are worried that any addition of language which might waive the statute of limitations for the Spokanes might endanger the passage of a bill which is going to pass.

On the other hand, the question is—from my point of view, at least—obviously you have an excellent position to at least go forward with a lawsuit, with the exception that the statute of limitations stands in your way; and in order to relieve that, you have to have Congress state that they will suspend the statute of limitations on this bill or some other bill.

So it is kind of an interesting situation, since your position is enhanced by the must-pass bill. However, the question is what endangerment we might place on the bill should we add your waiver of the statute of limitations, and that is for you to make a judgment.

However, I wanted to ask you, have you talked to your Member of Congress?

Mr. SEYLER. We have met with, I believe, all of the Washington delegation, yes.

Mr. SMITH. Are they supportive of your position?

Mr. SEYLER. In speaking with the delegations and their staff, they didn't say yes and they didn't say no.

Mr. SMITH. That is typical.

Mr. SEYLER. Yes. They didn't want to hold up this legislation also.

Mr. SMITH. Well, okay. I wanted to ask you, do they support your position that a stand-alone bill separated from this, or attachment to another bill merely suspending the statute of limitations would be one that they could support?

Mr. SEYLER. They would support it if they knew it would not just endanger this, yes.

Mr. SMITH. Okay. So you have talked to the "big chief." That is, you know, the number one legislator here—Mr. Foley, who is your Member of Congress.

Mr. SEYLER. I have spoken with his staff and I have a 3 o'clock appointment today.

Mr. SMITH. And he supports a stand-alone position?

Mr. SEYLER. Like I said, I have a 3 o'clock appointment today that will confirm.

Mr. SMITH. Well, I think you understand that, you know, if you get his support, it is a giant step—and, of course, that of the Washington delegation. I see no possible reason they could not support your position. I think it is totally sustainable.

Mr. SEYLER. Basically, when I met with his staff, they did not even want to speak to this issue. They had direction to do so.

Mr. SMITH. Until after this hearing.

Mr. SEYLER. Until after this hearing, yes.

Mr. SMITH. All right. I think I understand, and in that respect, I would tend to agree. I don't think amending this bill is the proper way to go.
But I would certainly support your position to waive the statute of limitations which would allow you, at least, to go to court and allow Mr. Smith a contingency fee. I mean, we have to look out for everyone here.

Thank you.

Ms. SHEPHERD. Thank you.

Mr. Barrett.

Mr. BARRETT. No questions.

Ms. SHEPHERD. Mr. Seyler, since it appears that we have finally ended a 40-year negotiation for the Colville Tribe's bill, and although we hope we are not looking at an additional 40-year negotiation for the Spokane Tribe of Indians, do you think that your best alternative is to seek a stand-alone bill. Are you comfortable with that?

Mr. SEYLER. Madam Chairperson, I believe what I seek today is an indication that we would have support. For me to go back to my tribe and tell them that we would not receive compensation or be considered for that, even though for centuries we stood alongside and fished the same waters, we lived the same and shared the same river, to bring back to them that we would not be considered for just compensation would be tough.

If there was evidence that we would be considered and that we would have support, yes, I could do that.

Ms. SHEPHERD. I believe that the record of this hearing will show that the Department of Interior is interested in working with you and with this committee on trying to solve the problems and make the outcome be more fair to your tribe. So perhaps that is at least the first hopeful sign that you can go home with.

If those are all the questions, we will just thank you very much for your attendance today. Thanks to all of the panel members, and thanks to all of you who attended this hearing; and this hearing is adjourned.

Mr. SEYLER. Thank you.

[Whereupon, at 11:05 a.m., the subcommittee was adjourned.]
Honorable George Miller, Chairman
House Natural Resources Committee
Subcommittee on Oversight
and Investigations
U.S. House of Representatives
Washington, D.C. 20510-6450

Dear Chairman Miller:

At this week's hearing of the Subcommittee on Oversight and Investigations, we were asked about the Department of the Interior's position on the Spokane Tribe's request to waive the statute of limitations that bars certain tribal claims for compensation relating to the construction of the Grand Coulee Dam. I wish to reiterate on behalf of the Department that we do not support an amendment relating to the Spokane Tribe as part of the Colville Grand Coulee Dam Settlement bill (H.R. 4757). It is our understanding that any amendments to the Colville bill will jeopardize its timely passage and we cannot support that delay.

We will, however, commit to examining, in consultation with the Tribe and along with other federal agencies, the Spokane Tribe's request independently of H.R. 4757. The Bureau of Indian Affairs and Solicitor's Office representatives met recently with the Spokane Tribal Chairman and their attorneys, and we are now reviewing the Tribe's submission supporting their waiver request. The Solicitor's Office has requested more information from the Tribe. We will complete this examination expeditiously and will report our findings to Congress.

We hope this information is useful to you in the Subcommittee's examination of H.R. 4757. We urge you to swiftly approve the bill in its current form.

Sincerely,

John Leshy
Solicitor
Suggested revision to last sentence in Colville report:

Nevertheless, the Committee agrees that the Spokane may have a moral claim and requests that the Department of the Interior and other federal agencies examine the claim, in consultation with the Spokane Tribe, and make appropriate recommendations to Congress.
SETTLEMENT AGREEMENT

Between the Confederated Tribes of the Colville Reservation
and
The United States of America

The Confederated Tribes of the Colville Reservation, consisting of the Tribes of the Colville, Lake, Sanpoil, Nespelem, Okanogan, Methow, Columbia, Wenatchee, Chelan, Entiat, Palus, and Joseph's Band of the Nez Perce Indians, are the plaintiffs in Docket 181-D of the Indian Claims Commission, which has been transferred by various acts of Congress to the United States Court of Federal Claims. The United States has recognized the Confederated Tribes of the Colville Reservation as the governing body of the plaintiff tribes. The Confederated Tribes of the Colville Reservation are hereafter referred to as the Tribe.

The Defendant in this action is the United States.

The claim asserts the entitlement of the Tribe under the "Fair and Honorable Dealings" clause and other clauses of the Indian Claims Commission Act to payment for use of reservation lands for the production of power by the Grand Coulee Dam.

1. It is hereby agreed between the Tribe and the United States through the Department of Justice and the Bonneville Power Administration (BPA) and with the support of the Department of the Interior, to settle Docket 181-D upon the terms stated herein, contingent upon enactment of enabling legislation (The Settlement Act) approving and ratifying this Settlement Agreement. The parties agree to work together and to use their best efforts to see that each step is accomplished as quickly as possible so as to meet the time schedule set forth in this agreement.

-DEFINITIONS-

a. The term "BPA power sales revenue" means all BPA revenue for the fiscal year from the sale of electric power and transmission of such power. BPA Power Sales Revenue does not include revenue from wheeling (i.e., the transmission of electric power not marketed by BPA) or from miscellaneous services not associated with the sale or delivery of power.
b. The term "BPA power sales price" means the ratio of BPA power sales revenue for a fiscal year divided by BPA power sales for such fiscal year measured in megawatt-hours.

c. The term "BPA price escalator" means the ratio of the BPA power sales price for a fiscal year divided by the BPA power sales price for FY95, taken to six decimal places.

d. The term "CPI escalator" means the ratio of the Consumer Price Index (for all urban consumers as published by the Bureau of Labor Statistics) for the September ending the fiscal year to the Consumer Price Index for September 1995, taken to six decimal places.

e. The term "combined escalator" means the average of the BPA price escalator for the fiscal year and CPI escalator for the fiscal year.

f. The term "Grand Coulee generation" means Grand Coulee total generation less generation reserved for use at Grand Coulee Dam.

-PROSPECTIVE PAYMENTS-

2. The Bonneville Power Administration, or any successor thereto that markets Grand Coulee generation, shall be authorized and required by the Act of Congress (Settlement Act) to make annual payments to the Tribe as set forth below.

a. The first annual payment, covering BPA fiscal year 1995, shall be in the amount of $15.25 million paid by BPA to the Tribe no later than March 1, 1996.

b. Not later than March 1 of each succeeding year, BPA shall pay to the Tribe for the preceding BPA fiscal year a sum computed as follows:
(1) The FY95 annual payment of $15.25 million and Grand Coulee Dam’s 50 water-year computer simulated average annual generation of 20,410,800 MWh establishes a "base price" of 0.747153 mills/kWh calculated as $15.25 million divided by 20,410,800. For each fiscal year subsequent to FY95, a "base annual charge" shall be calculated equal to the base price multiplied by the BPA price escalator for the fiscal year multiplied by Grand Coulee generation for the fiscal year.

(2) There are hereby established a "floor price" of 0.661414 mills/kWh and a "ceiling price" of 0.832892 mills/kWh. For each fiscal year subsequent to FY95, a "floor annual charge" shall be calculated as the floor price multiplied by the combined escalator for the fiscal year multiplied by Grand Coulee generation for the fiscal year. Also for each fiscal year subsequent to FY95, a "ceiling annual charge" shall be calculated as the ceiling price multiplied by the combined escalator for the fiscal year multiplied by Grand Coulee generation for the fiscal year.

(3) The annual payment for a fiscal year shall be the base annual charge, except that if the base annual charge is less than the floor annual charge then the annual payment will be the floor annual charge, and if the base annual charge is greater than the ceiling annual charge then the annual payment will be the ceiling annual charge.

c. BPA shall make available to the Tribe at the time of payment its computation of the amount paid, and at the Tribe’s request will make available to the Tribe such other information as may reasonably be requested by the Tribe to verify the computation.

d. In the event that the computed annual payment for any fiscal year is less than $15.25 million, the Tribe shall have the option to take a payment of $15.25 million in lieu of the computed amount. Should the Tribe exercise this option, the difference between $15.25 million and the computed amount shall constitute a loan from BPA to the Tribe. The amount of the loan shall be debited to an account held by BPA and, for the time period during which the loan is outstanding, shall accrue interest at a rate equal to the average of each month’s weighted average cost of debt for all of BPA’s borrowing with a term of more than one
year or, if there are no such borrowings, then at the rate paid by the United States on 1-year notes for the period in question. Repayment of the loan with accrued interest may be made at any time at the Tribe’s option. However, if in any subsequent fiscal year the computed annual payment exceeds $15.25 million, the loan balance, including accrued interest, shall be deducted from the annual payment and credited against the account established herein. If, after this deduction, the recomputed annual payment is less than $15.25 million, the Tribe shall have the option to take a payment of $15.25 million. Should the Tribe exercise this option, the difference between the recomputed annual payment and $15.25 million shall remain as a debit to the account established herein and shall continue to accrue interest at the rate stated herein. The Tribe shall have no obligation to repay any loan allowed under this section except from the proceeds of future annual payments that in any year exceed $15.25 million.

-PAST PAYMENT-

3. Within 15 days after (and contingent upon) enactment of the Settlement Act, the Tribe and the United States will file with the United States Court of Federal Claims a copy of this Agreement, the Settlement Act, and such papers as are necessary for entry of a compromise judgment in the amount of $53 million to settle the past payment element of this claim. Enactment of the Settlement Act and payment of that judgment will be a full and final resolution of all claims that were or could have been brought in Docket No. 181-D, excluding post judgment interest. The referenced judgment shall be paid from the funds appropriated pursuant to 31 U.S.C. 1304 and shall not be reimbursable by BPA.

4. The Tribe shall pay out of the funds described in paragraphs two and three above such attorneys fees and expenses as it has agreed to pay under contracts approved by the Secretary of the Interior or his duly authorized agent.

-AGREEMENT EFFECTIVE-

5. This Settlement Agreement shall become effective upon signature by the United States and Tribes as follows:

a. For the United States by a duly authorized representative of the


Department of Justice of the United States, by the Administrator of the Bonneville Power Administration, and with the concurrence of a duly authorized representative of the Department of the Interior.

b. For the Tribe by the Chairman of the Confederated Tribes of the Colville Reservation, authorized by a resolution of the Colville Business Council and a majority vote of a General Meeting of the membership of the Confederated Tribes of the Colville Reservation held for that purpose or by referendum, as determined by the Tribes. The general meeting of the membership, or referendum, shall be held after receipt of a letter of commitment to the proposed terms of this agreement from the Department of Justice on behalf of the federal signatories shown below.

IN WITNESS WHEREOF, the undersigned have executed this Proposed Settlement Agreement on the dates and at the places shown below.

UNITED STATES BY:

[Signature]
Lois J. Schiffer
Acting Assistant Attorney General
Environment & Natural Resources Div.

BONNEVILLE POWER ADMINISTRATION

[Signature]
Randall W. Hardy
Administrator
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION BY:

Eddie Palmanteer, Jr.
Chairman
Colville Business Council
WHEREAS, the United States has offered to settle Docket 181-D now pending in the United States Court of Federal Claims for a lump sum payment of $53 million and annual payments commencing at $15.25 million as set forth in the attached Settlement Agreement; and,

WHEREAS, the Colville Business Council fully considered the proposed offer to settle and unanimously agreed to recommend to the general Tribal membership that the Tribal membership accept the offer to settle; and,

WHEREAS, the Colville Business Council on March 22, 1994, mailed to each Tribal member eligible to vote: (1) an explanation of the offer to settle, a summary of the negotiations and a summary of the 181-D case; (2) notice of the general Tribal membership meeting to be held on April 16, 1994 at which the Tribal membership would vote on the offer to settle; and (3) notice of six informational meetings to be held at Omak on April 4, 1994, Nespelem on April 5, 1994, Keller on April 6, 1994, Inchelium on April 7, 1994, Spokane on April 8, 1994, and Seattle on April 9, 1994; and,

WHEREAS, notice of the general membership meeting scheduled for April 16, 1994 and the informational meetings was also published in the March issue of the Colville Tribal Tribune which is sent to all Tribal members; and

WHEREAS, the informational meetings were held as set out in the March 22, 1994 notice; staff from the Tribal enrollment office and Tribal police monitored each informational meeting to insure that only Tribal members were allowed to attend; total attendance at the informational meetings exceeded 1100 members; Tribal attorneys and members of the Tribal Business Council attended each informational meeting and explained the offer to settle in detail and answered questions from Tribal members concerning the offer to settle and the process by which the Tribal membership would vote on the offer to settle; and

WHEREAS, an additional informational meeting was held on the Yakima Reservation on April 12, 1994, conducted in the same manner as all scheduled informational meetings; and

WHEREAS, the general Tribal membership meeting was held on April 16, 1994, at Nespelem, Washington on the Colville Indian Reservation, as scheduled and was conducted in the following manner:

Resolution - P.1
a. The doors to the Nespelem Community Center, where the general Tribal membership meeting to consider the offer to settle was held, were opened at 8:30 A.M. Only Tribal members were allowed to enter. Membership status was checked by staff from the Tribal enrollment office and monitored by a representative of the Bureau of Indian Affairs and the Colville Tribal police.

b. At approximately 10:00 A.M. the lead Tribal claims attorney, Harry Sachse, and an attorney from the Reservation Attorneys Office, Alan C. Stay, made a formal presentation to those Tribal members present explaining the details of the offer to settle and answering any questions raised by the membership. Members of the Tribal Business Council participated in the presentation.

c. Throughout the day the Tribal attorneys and members of the Colville Business Council were available to answer any question that a Tribal member had concerning the offer to settle; and displays highlighting aspects of the offer to settle and its value to the Tribes and Tribal members were present in the Community Center.

d. Tribal members were able to vote on the offer to settle by secret ballot from 8:30 A.M. until 3:00 P.M. Each member was required to register immediately before voting; was given a ballot and after marking the ballot the Tribal member immediately placed the ballot in a locked ballot box. The actual balloting was conducted by representatives from the Tribal Election Board, and was monitored by a representative from the Bureau of Indian Affairs.

e. When voting closed at 3:00 P.M. the votes were counted. The Tribal Executive Director read aloud each ballot and the votes were tallied on a public board by a representative from the Bureau of Indian Affairs. Three members from the Colville Business Council Election Committee independently tallied the votes cast. The Superintendent for the Colville Agency of the Bureau of Indian Affairs and the Tribal Election Coordinator observed the vote count. The Tribal Business Council also observed the counting of the ballots.

WHEREAS, at that general membership meeting, those members present and voting voted 219 in favor of the settlement and 184 opposed, with 8 ballots being rejected;

THEREFORE, BE IT RESOLVED, that the Colville Business Council, meeting in SPECIAL Session, this 16th day of April, 1994, at the Colville Indian Agency, Nespelem, Washington, does certify that the offer to settle the 181-D Grand Coulee claims case was

Resolution - P.2
approved by a majority vote of those Tribal members voting at the
general membership meeting of the members of the Confederated Tribes of the Colville Reservation held for that purpose on April 16, 1994.

AND BE IT FURTHER RESOLVED, that the Colville Business Council does hereby approve the settlement and authorizes the Chairman of the Colville Business Council to sign the Settlement Agreement, and any other necessary document needed to implement the settlement, on behalf of the Confederated Tribes of the Colville Reservation.

The foregoing was duly enacted by the Colville Business Council by a vote of 11 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

Eddie Palmanteer, Jr.
Chairman
Colville Business Council

Attest:

Frances Charette
Secretary
Colville Business Council

Resolution - P.3
OFFICIAL COUNT OF THE VOTE OF THE
TRIBAL MEMBERS VOTING AT THE GENERAL MEMBERSHIP MEETING
TO CONSIDER THE GRAND COULEE 181-D SETTLEMENT
HELD APRIL 16, 1994 AT THE COLVILLE INDIAN AGENCY
NESPELEM, WASHINGTON

To accept the Settlement: 2191
To reject the Settlement: 154
Ballots rejected: 8
Total votes cast: 2353

4/16/94
Date

Colville Business Council Chairman

4/16/94
Date

Superintendent
Colville Indian Agency

SUPERINTENDENT'S CERTIFICATION

This is to certify that: (1) I attended, and along with my staff, monitored the vote to consider the Grand Coulee Settlement (181-D) held and conducted at a general membership meeting on April 16, 1994 at Nespelem, Washington on the Colville Indian Reservation; and (2) that the vote at that meeting was conducted in the manner and following the procedures set out in Resolution No. 1994-14 of the Colville Business Council in a proper and regular fashion after sufficient notification to the Tribal membership. A total of 2353 ballots were cast. I observed the canvassing of the ballots cast and further certify that a majority of those voting at the general membership meeting voted in favor of the settlement as set-out in the above tabulation. All ballots are being kept at the Colville Indian Agency of the Bureau of Indian Affairs in the custody of the Superintendent.

Dated this 16th day of April 1994.

84-173 (104)