

Tribal Water Nuts and Bolts

Chuck Brushwood, Fish & Wildlife Policy Advisor

Confederated Tribes of the Colville Reservation

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CAVEAT:

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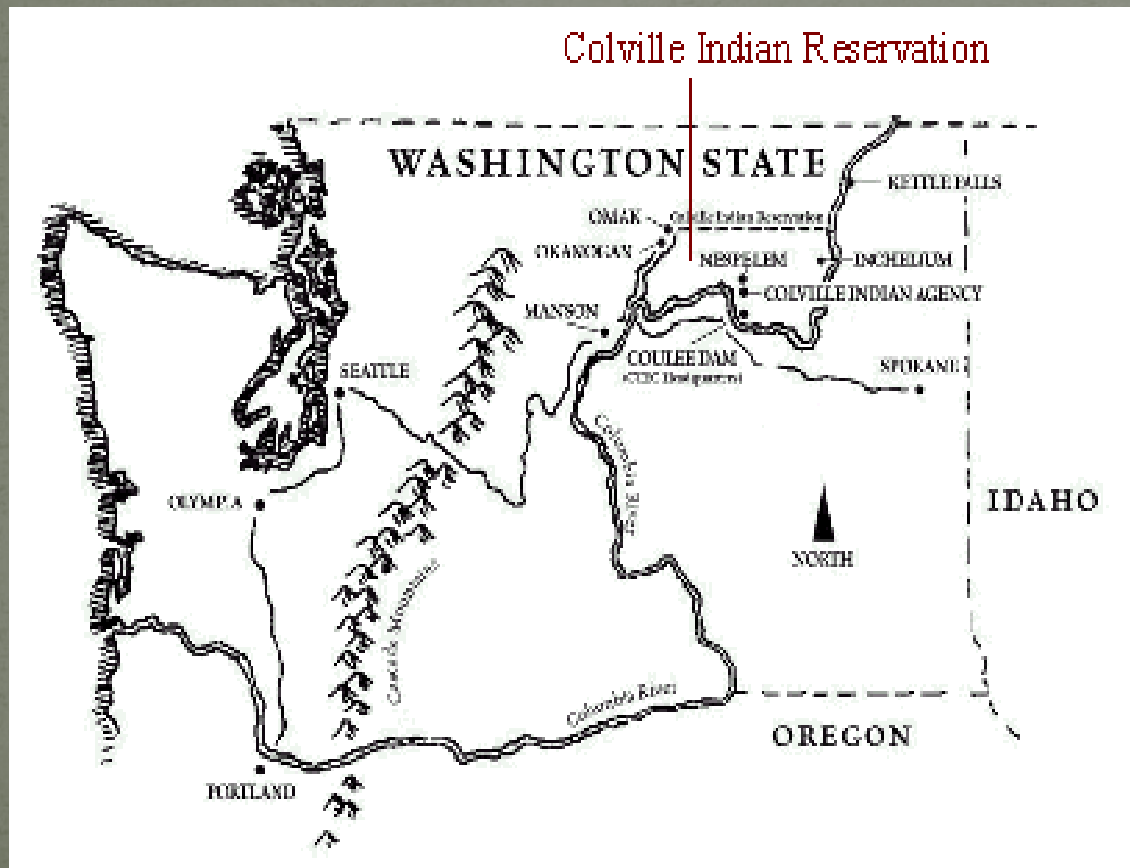
About the Colville Confederated Tribes

- Sovereign Nation and federally-recognized Indian Tribe
- Confederation of 12 Tribes commonly known by English and French names: the Colville, Nespelem, San Poil, Sinixt (Lakes), Palus, Wenatchi, Chelan, Entiat, Methow, southern Okanogan, Moses Columbia and Nez Perce of Chief Joseph's Bands.
- Approximately 9,500 enrolled members, roughly half of whom reside on the Colville Indian Reservation
- Membership relies on harvest of first foods, including salmon, for ceremonial and subsistence purposes



About the Colville Indian Reservation

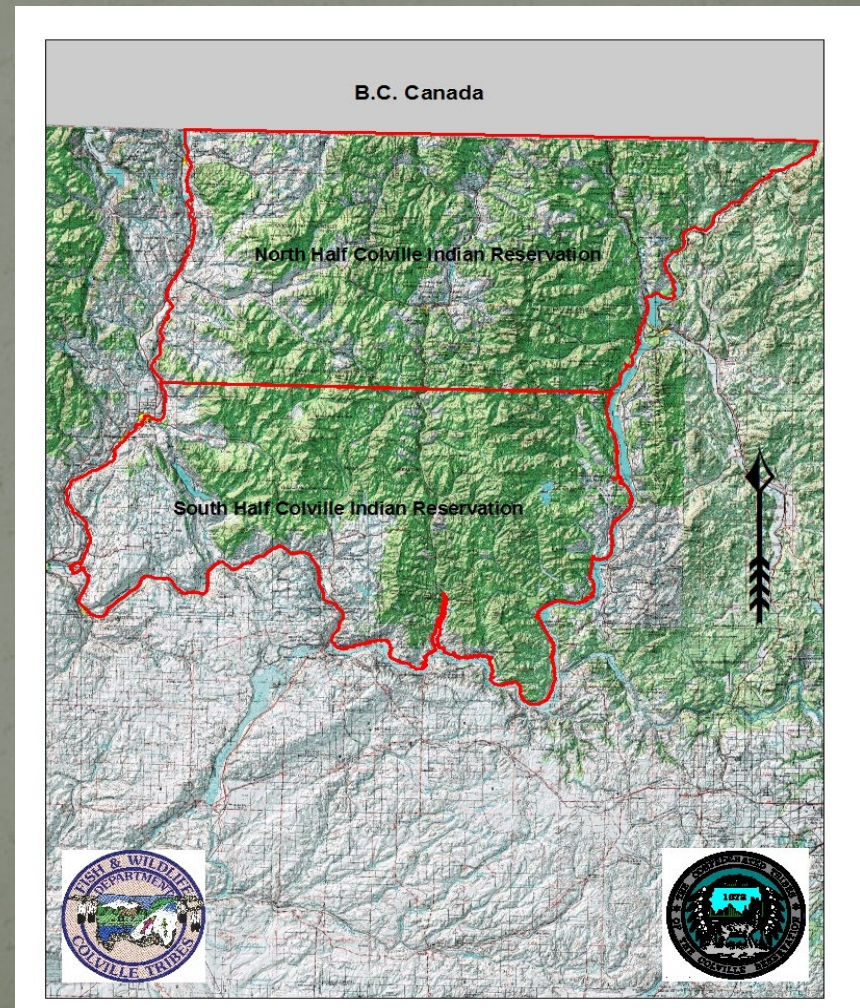
- The Colville Indian Reservation was established by Executive Order in 1872 and was originally twice as large as it is today.



- Current Reservation is approximately 1.4 million acres in size
- Located in north central Washington in the southeastern portion of Okanogan County and the southern half of Ferry County

Reserved Hunting and Fishing Rights on the North Half and Fishing Rights at Wenatshapam

- Colville Tribes' current off-Reservation reserved hunting and fishing rights include the North Half of the original Colville Reservation as affirmed by the U.S. Supreme Court (*Antoine v. Washington*, 420 U.S. 194 (1975))
- Colville also exercises fishing rights at Icicle Creek in the Wenatchee (*United States v. Confederated Tribes of the Colville Reservation*, 606 F.3d 698 (9th Cir. 2010))



Transboundary Rights:

R. v. Desautel, 2021 SCC 17

- Sinixt (Lakes Tribe) member of the CTCR — shot an elk near Castlegar, BC (2010); charged under BC's Wildlife Act
- Defended on the basis of an Aboriginal right to hunt in Sinixt ancestral territory under s. 35(1) of Canada's Constitution Act, 1982
- SCC (7–2): “Aboriginal peoples of Canada” = modern successors of Aboriginal societies occupying Canadian territory at European contact; non-citizen CTCR members may assert Aboriginal hunting rights in traditional Sinixt territory in BC
- Triggers Crown duty to consult with U.S.-resident Sinixt on asserted Aboriginal rights in traditional Canadian territory

Why Collaborate on Streamflow Restoration Efforts?

- Alternatives (e.g. litigation) may yield uncertain outcomes or (e.g. general streamwide adjudication) can be time and resource intensive
- Partners (Ecology, BPA, Mid-C PUDs, RCO, etc.) can bring funding; expertise (WWT, WWP/TU, etc.); and wet water (irrigators, irrigation districts) to the table
- Because in a successful collaboration, no one party may *get everything it is seeking*, but ideally collaborative participants *get everything they need*



Why Focus on Off-Reservation Water Rights and Instream flows?

- Fish and wildlife are migratory and move on and off-Reservation
- Colville Tribal members have adjudicated off-Reservation hunting and fishing (North Half and Wenatshapam) rights



- Off-Reservation streams are often fully or over-appropriated
- Water in many off-Reservation streams in the West is completely diverted during the late summer, leaving no water for fish and wildlife

Tribal/Federal Reserved Water Rights

Nuts and Bolts

- Tribal/Federal Reserved Rights Doctrine
 - Quantification/measure of the right
(*Arizona I, Gila River Adjud.*)
- Determination of Tribal reserved water rights
- Water rights of allottees and subsequent owners
(*Walton I*)
- Doctrinal developments/recent key cases

Tribal Reserved Water Rights

Winters v. United States (1908)

- Water right was reserved (implied) to fulfill the purpose of creating the Reservation
- Purpose = permanent homeland with an agricultural economy (not a “barren waste”)
- Tribal water rights are paramount even though/where non-Indian use preceded Tribal water use
- Water right not quantified (open-ended decree)

Unique nature of “*Winters*” *rights*

- Priority date – creation of the Reservation
- Implied right – not lost through non-use
- Generally limited to use on Reservation

Tribal reserved water rights – instream flows

Legal theories (many); cases (few):

- *United States v. Winans (1905)* (certain rights were necessarily reserved by Tribes to give effect to Treaty-reserved fishing rights)
- *United States v. Adair (1983)* (right to maintain steamflows, with a time-immemorial priority date, sufficient to support Treaty-reserved hunting and fishing rights)
- *Ecology v. Yakima Res. Irr. Dist. (1993)* (Yakama off-Reservation instream flow rights)
- *United States v. Washington (2007)* (“culverts case”)

Quantification of “*Winters*” rights

Arizona v. California (1963) (“*Arizona I*”)

- **Practically irrigable acreage (PIA)** - Critiques: both over-inclusive (“paper rights” beyond foreseeable use) and under-inclusive (fails to account for DCMI, cultural and ecological needs)
- **Must satisfy present and future needs**
- **Example: Wind River Reservation (*Big Horn I adjud.* – *Wyo. 1988*)**
 - Ranching is primary agricultural activity; alfalfa water duty
 - Domestic, commercial, municipal uses subsumed
 - Tribe barred (3-2 vote) from dedicating unused agricultural award to instream flow to protect fisheries

Quantification – alternatives to PIA

- *Gila River* adjud. (Ariz. 2001) – broad homeland purpose
 - Reservation as a permanent homeland (with multiple uses), broader view of *Winters* rights
 - Recognized the limitation of PIA methodology; could include DCM, fisheries, and agricultural uses
 - Quantification only enough to meet “minimal need”
- *United States v. New Mexico* (1978) – “primary purpose”
 - Non-Indian federal reservation (Nat’l Forest)

Determination of Tribal reserved water rights

- **Federal courts have jurisdiction to adjudicate Indian claims to water rights**
- **McCarran Amendment – 43 U.S.C. § 666**
 - Waives United States' sovereign immunity in lawsuits regarding ownership and management of water rights
 - U.S. may be joined in state general stream adjudications to determine tribal reserved water rights (*Colo. River Water Cons. Dist. V. United States* – 1976)
 - McCarran Amendment did not waive or abrogate tribal sovereign immunity (*Arizona v. San Carlos Apache Tribe* – 1983)
- **Renewed importance of negotiated settlements of Indian water rights**

Colville Confederated Tribes v. Walton (*Walton I* – 9th Cir. 1981)

- Colville and the U.S. sued non-Indian owner of former allotment
- Defined water rights held by non-Indian successors-in-interest to Tribal allotments
- Confirmed dual purposes of the Colville Reservation
 - Maintain an agrarian society
 - Preserve access to fishing grounds
- Recognized reserved water rights in No Name Creek for “replacement fishing grounds”

Walton continued...

- **Successor to Tribal allotment obtained allotment reserved rights subject to additional limits:**
 - Quantification – rights in use at time of transfer of ownership plus any additional water put to beneficial use with reasonable diligence
 - Can lose through non-use
 - Priority date of the creation of the Reservation (1872)
- **Tribe, not state, has regulatory authority over the use of water in No Name Creek**

Key Case: *Arizona v. Navajo Nation* 599 U.S. 555 (2023)

- Court recognized and reaffirmed *Winters*
- Majority: U.S. has no enforceable duty to take “affirmative steps” to secure reserved water absent express treaty/statutory language
- Dissent (Gorsuch): federal promise of a 'permanent home' necessarily entailed ensuring an adequate water supply

Key Case: *Agua Caliente*

849 F.3d 1262 (9th 2017)

- *Winters* rights extend to groundwater where necessary to accomplish a reservation's purposes
- Nonuse does not forfeit the right
- Subsequent proceedings - standing limits: must show imminent impairment for injunctive relief

**Key Case: *GRIC v. Schoubroek*
No. 23-2743 (9th Cir. Jul. 24, 2025)**

- Federal courts retain non-exclusive jurisdiction under 28 U.S.C. § 1362
- Declined to defer to state adjudication exclusively
- Vacated injunction and remanded: factual disputes over subflow wells

Questions?



Contact: charles.brushwood@colvilletribes.com