

# Tribal Rights in the Pacific Northwest

## Recent Developments Affecting Water and Fishery Resources

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# Introduction

- Oregon home to several Indian tribes and Reservations
- Exercise of tribal treaty and reserved rights within Columbia Basin can affect Oregon interests
- Survey of recent court and other decisions demonstrates broad reach of tribal rights and interests well beyond borders of tribal reservations
- Views expressed in this presentation are those of the author and are not intended to represent the views or positions of the U.S. Department of the Interior or the Office of the Solicitor

# Overview

- Important developments have occurred in the following areas
  - Tribal reserved water and fishing rights litigation
    - Implied Indian reserved water rights to groundwater;
    - Instream Flow Rights for Fisheries
    - Treaty Fishing Rights includes off-reservation habitat protections
  - Tribal water right negotiations
    - New Administration's statements in support of negotiations
    - Oregon has active settlements

# Overview

- Columbia River Developments
  - Federal Columbia River Power System – ESA Litigation
  - U.S. v. Oregon – Development of new 10 year harvest plan
  - Columbia River Treaty
  - Tribes and Hydropower licensing



# Tribal Reserved Rights Litigation

## Water Rights

Basis of Indian water rights is the Federal reserved water rights doctrine established in *United States v. Winters* in 1908

- Establishment of a reservation impliedly reserves the amount of water necessary to accomplish the purposes of the reservation (homeland purpose)
- Very senior priority: date of creation of reservation or, in some cases, time immemorial
- Past, present, and future uses included
- rights are not lost by non-use
- Governed by Federal and not state law
- held in trust by the Federal Government

# Tribal Reserved Rights Litigation

## Water Rights

- Groundwater and the *Winters* Doctrine: In the Agua Caliente Band case the Ninth Circuit held that:
  - The *Winters* doctrine does not distinguish between surface water and groundwater
  - When establishing the Agua Caliente Reservation as a homeland, the U.S. impliedly reserved the right to use the water from the Coachella Valley aquifer

*Agua Caliente Band of Cahuilla Indians et al. v. Coachella Valley Water District et al.*, 849 F.3d 1262 (2017 9<sup>th</sup> Cir)

The Water Districts and others filed a petition seeking the U.S. Supreme Court review. Petitioners argue that *Winters* doctrine does not apply to groundwater.

# Tribal Reserved Rights Litigation

## Water Rights

- Several Indian water rights settlements have addressed and resolved Tribal water right claims to groundwater and granted Tribes the rights to use groundwater, including:
  - - Pechanga (California)
    - Warm Springs (Oregon)
    - Nez Perce & Ft Hall (Idaho)
    - Bryce Canyon National Park (Utah)

# Tribal Reserved Rights Litigation

## Water Rights

### On-Reservation Rights to Water for Fish and other Purposes:

The Idaho state trial court adjudicating water rights of the Coeur d'Alene ruled on the Tribe's entitlement to water rights. The court:

- Upheld Tribal agriculture, domestic, and fishing/hunting water rights on the Reservation
- Upheld Tribal water rights for fishing in Lake Coeur d'Alene
- Denied Tribal water rights for commercial, industrial, cultural purposes, and off-Reservation in-stream flows for fish

*In re CSRBA*, Order on Motion to Set Aside, Subcase No. 91-77755 (July 26, 2017)

# Tribal Reserved Rights Litigation

## Water Rights

- Klamath Basin
- September 2017 Court of Federal Claims Decision
  - Several water user interests served by Bureau of Reclamation Klamath Project asserted claims that Reclamation's decision not to deliver Project water in 2001 was a physical taking of their entitlement to the water
  - The water rights held by the Klamath, Yurok and Hoopa Valley Tribes are reserved federal rights. (Slip Op at 61)
  - The Tribes' reserved rights are senior to those of any of the plaintiff users of the Klamath Project water. (Id. at 62)

# Tribal Reserved Rights Litigation

## Water Rights

- Klamath Basin
- September 2017 Court of Federal Claims Decision:
  - The water rights held by the Klamath, Yurok and Hoopa Valley Tribes are reserved federal rights. (Slip Op at 61)
  - The Tribes' reserved rights are senior to those of any of the plaintiff users of the Klamath Project water. (Id. at 62)
  - Because the Tribes held water rights to Klamath Project water that were senior to those held by all remaining plaintiff class members, and because the Tribes water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the Endangered Species Act ..., plaintiffs had no entitlement to receive any water before the government had satisfied what it determined to be its obligations under the Endangered Species Act and its Tribal Trust responsibilities (Id. at 74)
- Baley et al. v. U.S. Nos. 1-591L, etc. (CFC, September 29, 2017)

# Tribal Reserved Rights Litigation

## Stevens Treaty Fishing Rights

- BACKGROUND
- In 1854 and 1855, a series of similar Indian treaties were entered into between the United States, represented by Washington Territory Governor Isaac Stevens, and numerous tribes in the Pacific Northwest.
- In most of these treaties, tribes reserved to themselves:
  - “exclusive right of taking fish in all streams running through and bordering” the Reservation;
  - the right to fish at usual and accustomed fishing sites off the Reservation “in common” with non-Indian settlers.

# Tribal Reserved Rights Litigation

## Stevens Treaty Fishing Rights

- BACKGROUND
- In 1905, the US Supreme Court confirmed the off-reservation fishing right:
  - Members of the Yakama Nation had been blocked from a traditional fishing site on the Columbia River by landowners who had obtained a patent for the land from the United States.
  - Reversing the Ninth Circuit, held that “the treaty was not a grant of rights to the Indians, but a grant of rights from them, *a reservation of those [rights] not granted.*”
  - The reserved tribal fishing right “imposed a servitude upon every upon every piece of land as if described therein....”
- *United States v. Winans*, 198 U.S. 371 (1905).

# Tribal Reserved Rights Litigation

## Fishing Rights

- Off-Reservation Reserved Rights for Fish Protection
  - U.S. v. Washington – Washington
    - Ninth Circuit found that the State of Washington violated the off-Reservation treaty fishing rights of several tribes in NW Washington by allowing construction of culverts that block fish passage
    - [federal...]
    - Raises questions whether water that impact instream flows are also violations of tribal reserved fishing rights

# Tribal Reserved Water Right Negotiations

## Secretary Zinke:

“As Interior Secretary, I believe water is a vital resource for Indian Tribes. The Federal Government has a responsibility to uphold our trust responsibilities, which includes Tribal water rights. We are continuing to work on Indian Water Settlements with Tribes, States, and all water users to ensure there is certainty for all and an opportunity for economic development in local communities.”

**Ryan Zinke, U.S. Department of the Interior Secretary, August, 2017**

# Tribal Reserved Water Right Negotiations

- INTERIOR VIEWS:

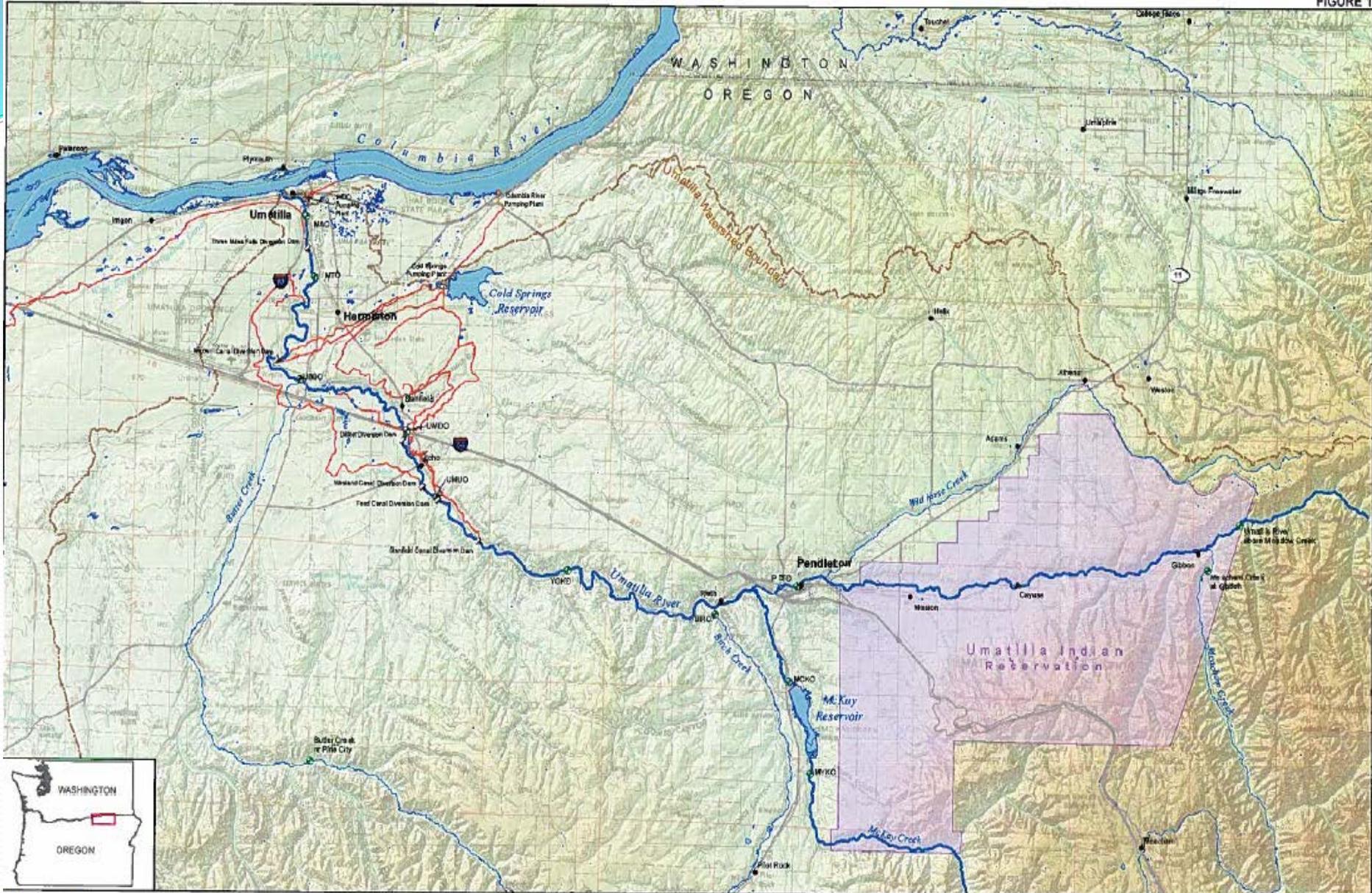
## Indian water settlements:

- Are a critical part of the United States Government's trust responsibilities and we have a duty to collaborate on a government-to-government basis with Tribes.
- We know that water is a key resource for the Tribes and the surrounding communities and settlement of claims brings certainty to all water users.
- There is a critical need for a sustainable and reliable water supply for the West.

# Tribal Reserved Water Right Negotiations – Umatilla Tribes

## Umatilla Indian Reservation:

- Located in NE Oregon in the Umatilla River Basin
- Home to the Confederated Tribes of the Umatilla Indian Reservation (CTUIR)



-  City / Town
-  River / Stream
-  Watershed Boundary
-  Pumping Plant
-  Canal
-  Lake / Reservoir
-  Diversion Dam
-  Pipeline
-  State Boundary
-  Stream Gage
-  Interstate Highway

**LOWER UMATILLA RIVER  
OVERVIEW MAP**

**DRAFT**



# Tribal Reserved Water Right Negotiations – Umatilla Tribes

Federal Government: Umatilla Tribes have unresolved Indian reserved water right claims. Based on their 1855 “Stevens” treaty, the tribes have claims for:

- On-reservation: surface water consumptive and instream flows; groundwater
- Off-reservation: instream flows
- Oregon asserts that the Umatilla Tribes’ water right claims were resolved in an early 1900s adjudication, but neither the U.S. nor the Umatilla Tribes agree with Oregon’s position

# Tribal Reserved Water Right Negotiations – Umatilla Tribes

## BACKGROUND

Since the late 1800s, significant irrigation development in the Umatilla Basin:

- Includes the Bureau of Reclamation's Umatilla Project commenced in the early 1900s.
- Irrigation diversions significantly reduced Umatilla Basin flows, especially in the lower Basin
- Prior to irrigation development, Umatilla Basin very productive for salmon and steelhead
- Due to these reduced flows, native salmon and steelhead runs were significantly reduced or extirpated

# Tribal Reserved Water Right Negotiations – Umatilla Tribes

Beginning in the 1980s, interests in the basin have focused on improving fish conditions in the Umatilla. As part of this effort, Congress approved the 1988 Umatilla Basin Project Act

- Act authorized a water supply exchange
  - Three irrigation districts served by Reclamation's Umatilla Project agreed to receive their irrigation water pumped from the Columbia
  - In exchange, the districts agreed to reduce or eliminate diversions of Umatilla water
- Project significantly enhanced Umatilla flows and this allowed successful reintroduction of anadromous fish runs and improvements for lamprey.
- Umatilla Basin Project Project Act did not resolve or expressly address CTUIR's Umatilla Basin reserved water right claims

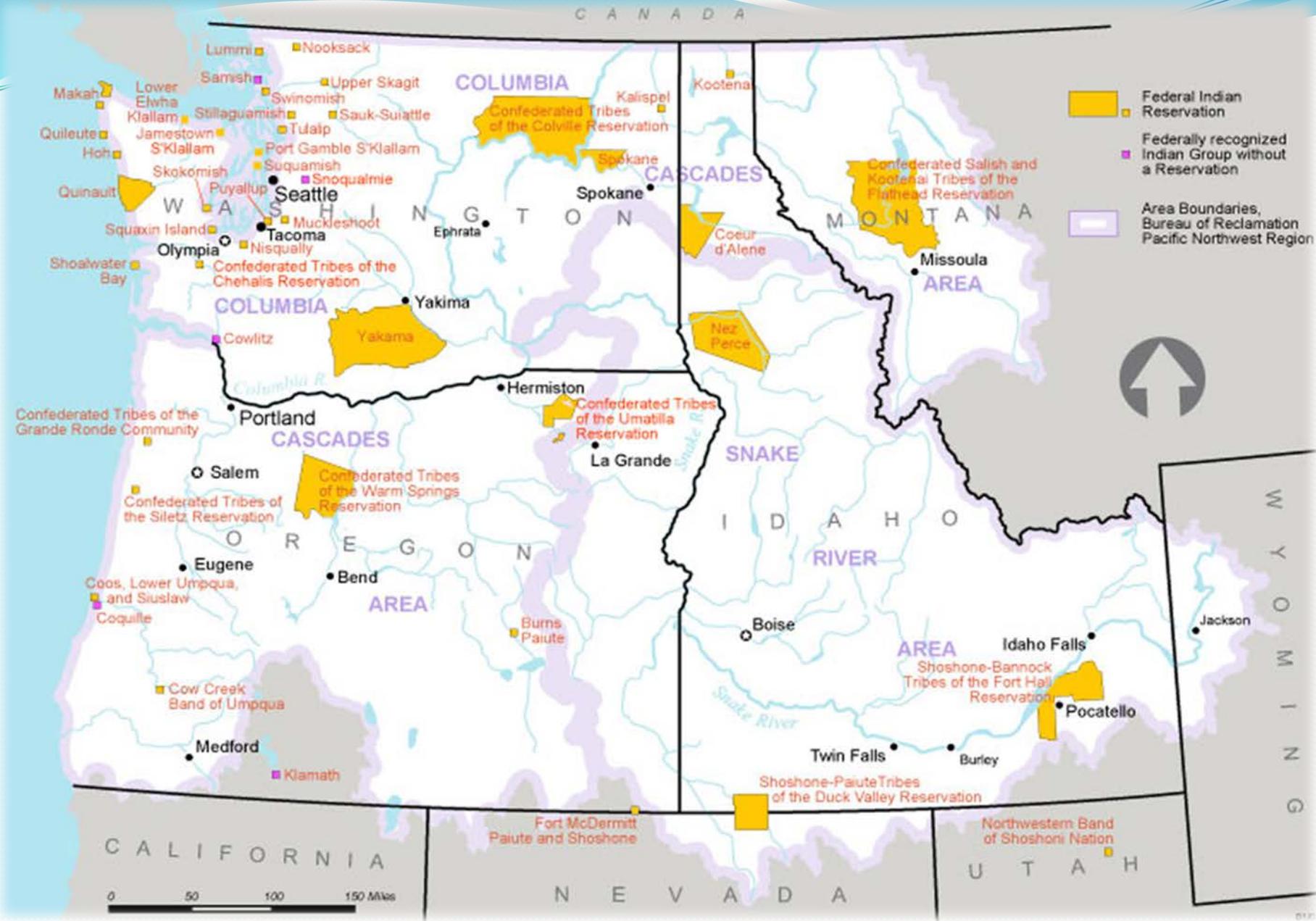
# Tribal Reserved Water Right Negotiations – Umatilla Tribes

## CURRENT STATUS

- Tribes have been working with other stakeholders in the Basin since the early 2000s
- In 2017, Tribes proposed a comprehensive settlement of their Umatilla Basin water right claims, including:
  - Surface water rights in Umatilla River obtained via exchanges by shifting irrigation diversions to Columbia
  - Right to groundwater on the Umatilla Reservation
  - Right to unappropriated springtime flows as allowed under state law

# Tribal Reserved Water Right Negotiations

- On the Horizon:
  - Off-Reservation Instream Flow Claims
    - Nez Perce Tribe, Umatilla Tribes, Yakama Nation and Warm Springs Tribes have Off-Reservation Fishing Rights throughout Columbia River Basin
    - Query: do these reserved fishing rights include right to instream flow protections?



# Columbia River Basin

## Federal Columbia River Power System – *NWF v. NMFS*

- 2016 - Judge Simon merits ruling
- 2017 - Judge Simon rulings on injunctions
- Legislation

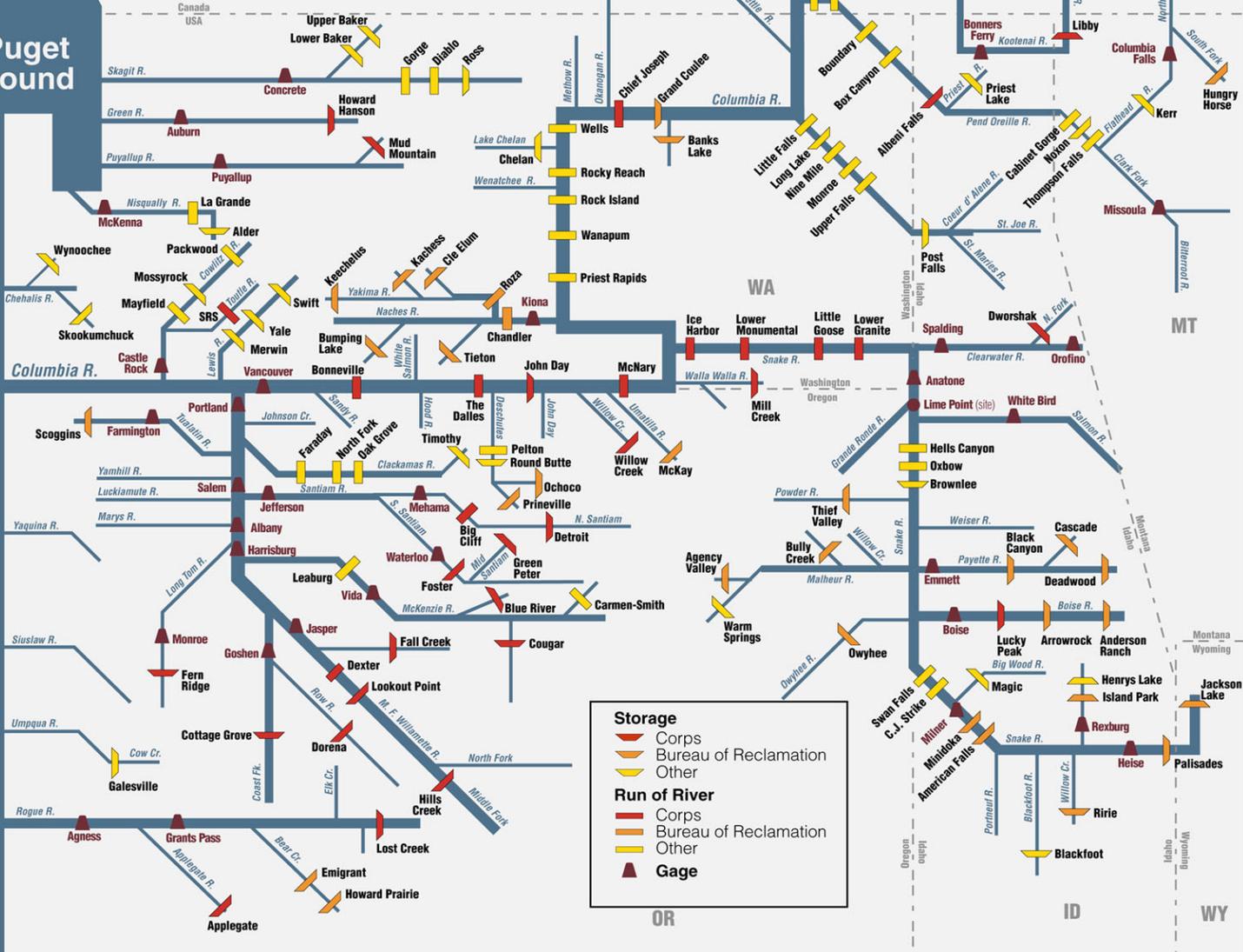


● Corps of Engineers Dams  
● Dams owned by Others

# Pacific Northwest Reservoir System

Puget Sound

Pacific Ocean



Storage	
	Corps
	Bureau of Reclamation
	Other
Run of River	
	Corps
	Bureau of Reclamation
	Other
	Gage

# Columbia River Basin

## Federal Columbia River Power System – *NWF v. NMFS*

- Tribal Participation
  - Federal District Court confirmed in 1990s that Tribes are co-managers of the Fisheries
  - Several tribes participate in litigation
  - Some tribes reached agreements with federal agencies in 2008 to implement basin-wide habitat improvements

# Columbia River Basin

## U.S. v. Oregon – Columbia In-River Fishery Harvest Management

- 2008 – 10 year State/Tribal plan
- 2018 – Parties projecting to complete new 10-year plan

# Columbia River Basin

- Columbia River Treaty
  - 2013 Regional Recommendation
  - 2016 – Department of State – Basis of Negotiation
  - Tribal Participation and Roles