Northwest Power Planning Council
Response to ISRP
851 SW 6th Avenue, Suite 1100
Portland, OR 97204

Attn: Kendra Phillips

Subject: Proj. ID #29001 ISRP response

Dear Sirs:

The Colville Confederate Tribes (CCT) is pleased to present our responses to comments made by the ISRP regarding project #29001 – Evaluation of 1872 Water Rights to Supplement Flows Between Basins. The responses are in order as addressed on page 74 and 75 of the comment document.

The first comment presented requests information on the timeline of the project with respect to implementation and monitoring:

The project is proposed as an adaptive management plan through the life of the project. Timelines for the project generally are as follows:

FY03: This year will primarily consist of development of the database of the 1872 water rights. At this time, the CCT feels it has undocumented unquantified reserved water rights which can be identified and immediately transferred into the trust account. These rights may be available on reservation or within off-reservation allotments allotments. Areas of concern, which will be evaluated throughout the first year, include the western 1/3 of the Colville Reservation, and allotments in the Similkameen, Bonaparte, Antoine, Methow, Wanacutt, and Felix creek drainages. Implementation during this first year will primarily consist of the transfer of newly quantified undocumented water rights into the trust account, or transfer of suspended rights. Monitoring may be implemented if transfer of rights are immediately identified.

FY04: Database management will continue into FY04. The primary goals during this year will be to begin enforcement actions on abandoned or illegal water diversions to allow for the water to return to instream flow or groundwater within the basins. Permits that have been abandoned will also be returned to the trust account. Evaluation of the most beneficial use of the waters placed in trust will be initiated. This will include the evaluation of whether to leave the water in place (whether in groundwater recharging surface water, or eliminating diversions from creeks), or evaluate if it could be transferred to another adjoining basin via pumping/piping in order to assist with salmon recovery efforts which are on-going, or may be planned. During FY-04, evaluation of other implementations, such as purchase of water rights, or transfer of withdrawal will be conducted. Funds for identified implementation projects will then be sought in FY-04.

FY-05 through FY-07. Tasks and schedules will be similar to that identified in FY-04. It is the goal to have 50 to 75% of unallocated and/or abandoned water rights placed into the trust account by the end of FY-05. Similar goals will be placed on the trust account in subsequent years. Placement of water into trust account will be conducted by tribal resolution.

A second comment within the ISRP response asks for implementation objectives to be identified.

The project is proposed as an innovative idea to begin to structure a trust account for 1872 water rights that will be solely allocated to instream flows. In effect, this proposal will establish a water bank account from which withdrawals can be made to help identified projects and stream reaches. Therefore, immediately identifiable implementations are not known at this time. However, the proposal does address some potential implementation objectives within the first 2 years of the project. The implementation goals can be described in two main categories: 1) immediate; and 2) planned.

1) The immediate implementation approach would be to transfer immediate known allocated rights into the trust account. This would come from identified suspended diversions, or from identified unallocated 1872 rights. The goal would be to transfer up to 75% of these waters into the trust account. At first the identified water would be to leave the water in place, whether allowing immediate recharge to the streams, or left in the groundwater system. Another potential immediate approach would be the identification of illegal diversions. Enforcement of these illegal diversions will be handled through the CCT Environmental Trust Department and the Office of Reservation Attorney, if within their jurisdiction. If not, a cooperative effort with the State Department of Ecology will be initiated in order to rerun illegal diversions to the stream or groundwater.

2) Planning implementation will subsequently occur after the database of water rights is developed. This will include the evaluation of water available in each drainage. The planning phase will determine if existing identified water is more beneficial to be transferred to adjoining basins in order to assist with salmon recovery efforts, or left in place. In addition, evaluation of potential purchase of existing rights will be conducted. If an identified water right is identified for purchase, subsequent implementation funding will be sought to purchase and transfer this water.

In summary, the following implementation goals will be set for this project:

a) To identify 1872 water rights and immediately return up to 75% of unallocated waters to instream flows and/or groundwater in order to assist with steelhead, sockeye, spring Chinook, and bull trout recovery efforts.

b) Identify illegal use of waters, which will be immediately returned to surface and/or groundwater.
c) To catalog and obtain off-reservation water rights on allotments.
d) Setup the trust account for waters allocated to instream flows and fishery recovery efforts.

The next question once again addresses implementation issues and whether any implementation in the form of actual water acquisition or transfers are to be done under this project in the next three years.

As stated previously, there are two implementation goals, immediate and planning. Within the three year time period referenced in the comment, there should be some documentable transfer of water rights into the trust account. This proposed project is a new program, and thus, a known quantity of allocated water cannot yet be determined. However, the CCT has set a goal of transferring up to 75% of the available waters, identified through suspended rights, illegal rights, or identified 1872 rights, into the trust account within the first three years. Subsequent implementation would be evaluated once the database has been constructed and an understanding of known withdrawals are evaluated. The monitoring program is setup to evaluate whether the immediate transferred rights are more beneficial being left in place, or utilized to support other salmon recovery efforts within the basin or within adjacent basins. The implementation of these transfers would then occur under future requests for implementation funds. This program is primarily setup to identify and prioritize which implementation should occur in subsequent years.

The next question addresses the lack of clarity of how the planned physical transfer of water is to occur (e.g. left in place or moved by piping). And if there is an assumption that there is still unclaimed water in the drainages.

As stated previously, the transfer of water will be first to return the documented water to the streams or groundwater, i.e. left in place. Subsequent evaluations will then occur to determine if this is the most beneficial use of the water. The initial transfer of water into the trust account will be done by Tribal Resolution, thus protecting the allocated water for instream use and salmon recovery. With regards to subsequent transfer of water to potential salmon recovery efforts, the project does not specifically address which water will be piped to adjacent basins, due to the fact that it is unclear at this point how much, and to what extent the most beneficial use of the water should be allocated. The comment references several drainages, which he asks if the transfers will just be on paper to allow more instream flow. The target areas of this project will be the western extent of the reservation, and allotments throughout the Okanogan basin. Potential creeks to benefit from this project include: Similkameen, Omak, Bonaparte, Antoine, Methow, Wanacutt, and Felix creek basins, as well as the mainstem Okanogan. There are CCT tribal lands and allotments throughout these drainages in which the 1872 water rights will be cataloged and evaluated for potential transfer into the trust account. The comment also references to an assumption that it is unlikely that there is unclaimed water rights. The CCT disagrees with this assumption. The CCT wishes to identify and catalog all

reserved water rights, and if feels there will be unidentified 1872 reserved water rights which would have senior status in the drainage. The goal would be to enter these currently unquantified rights into the trust account for beneficial use of instream flows and salmon recovery efforts. There may be significant amounts of tribal water that can placed into this trust account, which otherwise may be claimed for consumptive uses. This project would focus on locking this water into the trust account. In summary, the CCT feels it has not identified all of the available water and this proposed project would address these issues in order to identify these waters.

The final comment addresses the need for a more detailed M&E plan to monitor and evaluate the biological benefits, in addition to flow and temperature. The comment asks to address the monitoring relevant to on-going project related monitoring, and to address the software used in monitoring.

Current monitoring within the reservation boundaries is a program for resident ambient monitoring. Data collected from this program is shared between the Environmental Trust Department (for water quality) and the Fish and Wildlife Department (for habitat and biological evaluations). The program consists of monitoring most surface water for flow, temperature and various other water quality parameters throughout the reservation. General information on the existing monitoring program is as follows:

A. Most physical and chemical water quality parameters are detected with standard portable water quality field instruments. (1) We use the Horiba Ltd. U-10 Water Quality Checker according to operator manual protocol (follow specific use or measurement, calibration and maintenance procedures) and collect data once a month at each site. (2) We collect continuous data at several sites using Hydrolab DataSonde Multiprobe, Surveyor 3 Logger and SVR3 system software version V1.31; copyright 1995 Hydrolab Corporation, Austin TX. The SVR3 is a multiparameter LCD display and an internal data logger. Communication software programs include Datastorm Technologies, Incorporated's ProComm Plus for DOS and Hydrolab's ProFiler. This software provides necessary features to set up communications between the Hydrolab instruments (e.g.multiprobe) and computer.
Another communications program we use is HyperTerminal for computers with Windows 95.

B. Some physical, chemical and biological parameters are determined on a quarterly basis at each site by water sampling and lab analysis. We use the services of a certified water quality laboratory, AAA Superior Laboratory in Cheney WA, for analysis purposes.

C. We use the midsection method developed by the U.S. Geological Survey as a standard procedure to determine cross-section area for streamflow (discharge) measurements [Buchanan, T.J. and W.P. Somers, Discharge Measurements at Gaging Stations (Chapter A8) in Techniques of Water-Resources Investigations of the United States Geological Survey, Applications of Hydraulics (Book 3)]. Stream current velocity detected with standard meter; we use Swoffer Instruments Inc. Model 2100.

D. The database software we use for storing this information on PCs is Excel and Access.

The monitoring proposed for this project will expand on the existing ambient monitoring program. The program will be initiated to assure monitoring is being conducted for flows and temperatures in the immediate area and down-gradient of the transfer. Monitoring will be evaluated by environmental trust and Fish and Wildlife staff in order to assure the most beneficial use of the transfer is occurring.

The comments also requested that a review of project #25074 recommendations be conducted.

We reviewed the seven comments made on Project #25074 – Deschutes water transfer. The questions raised for this proposal address issues through a private water brokerage and issues arising from the mechanisms to permanently transfer the water. Within the 1872 Water Rights proposal, it provides a unique situation. Water rights can be transferred to the trust account through tribal resolution. The CCT also has enforcement power over illegal diversions and abandoned rights within the reservation boundaries and allotments. Therefore, this proposal provides an innovative way to quickly return waters to instream flows for the benefit of salmon.

In conclusion, the CCT feels this is an innovative approach to return water to salmon bearing streams, or to groundwater hydraulically connected to surface waters, for the benefit of multiple species. The program will be a part of the overall Okanogan Basin Water Strategy team, and data collected through this project will be shared with the these technical teams through the CCT Environmental Trust Department and the Office of Reservation Attorney. This proposal uses an opportunity to develop an allocated water base from 1872 priority water rights, which can be set aside for instream flows. Its goal is to protect the water from out of stream uses and assure it is dedicated to instream flows. The project is being proposed as a new innovative idea, thus exact known quantities of water will not be know until the second or third year of the project.

The CCT Office of Reservation Attorney also would like to present the following summary of reserved fishing and instream water rights, relevant to the 1872 water rights proposed for placement in the trust account under this solicitation:

Reserved Fishing and Instream Water Rights of the Colville Tribes
and the Federal Trust Responsibility
To Protect Those Rights

It is critically important to bear in mind that federal funding decisions affecting anadromous fish restoration on and near the Colville Reservation also implicate the federal government's trust responsibility to protect the federal reserved fishing and water rights of the Colville Tribes. The historical and legal background to this is as follows:

The Colville Reservation was established by Executive Order in 1872. At that time the Reservation consisted of all the lands within the United States bounded by the Columbia and Okanogan Rivers, roughly 3.0 million acres. The U.S. Court of Appeals for the 9th Circuit has unequivocally ruled that under the 1872 Executive Order one of the primary purposes of the Colville Reservation was to preserve tribal fisheries and access to traditional tribal fishing areas. *Confederated Tribes of the Colville Reservation v. Walton*, 647 F.2d 42 ("*Walton*"). The 9th Circuit also ruled that the Colville Tribes possesses federal reserved water rights to instream flows sufficient to preserve or restore the tribal fisheries reserved in the 1872 Executive Order. *Walton*, 647 F.2d 42.

In 1891, the Colville Tribes entered into an Agreement with United States in which the Tribes ceded the North Half of the 1872 Reservation. The ceded area consists of roughly 1.5 million acres between the Canadian border and the current northern boundary of the Reservation. In the 1891 Agreement the Tribes expressly reserved the right to hunt and fish, which was "not to be abridged in any way." The U.S. Supreme Court has ruled that the 1891 Agreement was lawfully ratified by Congress and that the hunting and fishing rights reserved by the Tribes in that Agreement are in full force and effect today. *Antoine v. Washington*, 420 U.S. 194 (1975). The hunting and fishing rights for the North Half also include gathering rights and, most importantly for present

purposes, the reserved water rights recognized in the *Walton* case to support fish restoration and preservation and to support wildlife and plant habitat.

In sum, under the above legal history, the Colville Tribes possesses reserved fishing rights and instream water rights, arising under well-settled principles of federal law, throughout the current Colville Reservation and ceded North Half, which coincides with the extent of the original 1872 Reservation. The territory encompassed by these rights includes the entire length of the Okanogan River within the United States (some 75 river miles) and the Columbia River within the United States above the Okanogan confluence (some 160 river miles), as well as all tributaries within that area. The 9th Circuit has also clearly established that the priority date for these instream flow water rights, in relation to the State of Washington's priority system, is "time immemorial" for any stream associated with an aboriginal fishery, *Klamath Water Users Protection Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000) *and United States v. Adair*, 723 F.2d 1394 (9th Cir 1984), and 1872 for any stream in which the Tribes is attempting to establish an introduced fishery, *Walton*, 647 F.2d 42. In most cases, the fishery in question is likely to be an aboriginal fishery, which triggers the ancient time immemorial priority date for the associated instream water right.

Finally, the Tribes' fishing and water rights are federally protected tribal assets or property rights, which all agencies of the United States have a trust responsibility to protect. *Menominee Tribes of Indians v. United States*, 391 U.S. 404 (1968). *Klamath Water Users Protection Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000).

The Salmon Creek project implicates the Colville Tribes' fishing and water rights in the Okanogan River, which lies within the Colville Reservation and ceded North Half

and is subject to the fishing and "time immemorial" water rights described above. Rather than assert these rights in a confrontational or litigative fashion with respect to Salmon Creek, the Colville Tribes has pursued a proactive approach emphasizing cooperation with the Okanogan Irrigation District, to demonstrate that it is eminently possible to achieve tribal goals while also protecting the water supply and economic interests of the District. We have made significant progress toward a genuine "win-win" outcome, and as noted in other sections of this paper have gained broad recognition for a model approach to resolving this difficult problem. This is precisely the type of project that any federal agency should be eager to fund, because it furthers the purpose of the federal trust responsibility to protect the Tribes' rights, and does so without obliging the United States to attempt to restrict the junior State law rights of another user group. This is the case even if the funding agency in question takes the position that it has no particular trust responsibility to take specific action to protect the interests of the Colville Tribes; the point is that even without reaching the question of a specific agency's precise responsibility, support for the Salmon Creek project is obviously consistent with the overall federal trust responsibility and furthers the purposes and goals of that responsibility.