

# **NO WAY UP**

First Nations' legal options  
for loss of the Columbia River fisheries

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October 1993

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## **I. INTRODUCTION**

The Canadian Columbia River Inter-Tribal Fisheries Commission (CCRIFC) has convened a workshop to report on the options, strategies and opportunities to deal with the loss of fish and other resources in the Columbia River Basin. The CCRIFC is composed of the Ktunaxa-Kinbasket Tribal Council (KKTC), the Okanagan Tribal Council (OTC) and the Shuswap Nation Tribal Council (SNTC). Consistent with the workshop's purpose and objectives, a legal panel has been set up. This paper has been prepared as background for the legal panel.

## **II. PURPOSE**

This paper seeks to address the question: "What are the legal options available to First Nations for the loss of their fisheries as a result of the construction of dams on the Columbia River?"

The purposes of this paper are to:

- (1) summarize the historical background regarding First Nations, their fisheries and the building of the dams on the Columbia River;
- (2) review the Boundary Waters Treaty of 1909 and the Columbia River Treaty of 1961 which provided the legal framework for the construction of the dams on the Columbia River;
- (3) discuss some potential causes of action available to the First Nations;  
and
- (4) consider several legal strategies for dealing with the loss of the fisheries.

We do not intend to provide a definitive legal opinion in response to the question raised at the outset, but rather to discuss some of the relevant legal issues and lay out a series of legal strategies to address those issues.

In addressing the question raised above, it should be kept in mind that the issues faced by the First Nations go far beyond the loss of their fisheries. Hydro electric development in the Columbia River Basin has significantly altered the flow of water through First Nations' territories. It has also flooded burial grounds and other sacred sites, as well as hunting and gathering grounds. However, the loss of the fisheries is probably the greatest impact of industrial development on the CCRIFC Member nations.

It should also be kept in mind that other resource and industrial development, including mining and logging, have also contributed to the loss of the fisheries. Nevertheless, it is probably safe to say that the hydro-electric dams are the primary cause of this loss.

While acknowledging the importance of the loss of resources other than fish and the role played by developments other than hydro-electric, this paper will confine itself to the question of fish and dams.

This paper will not address American legal issues, including the important question: "Are First Nations in Canada entitled to remedies available in the US?" This question can only be answered with confidence by American lawyers.

### **III. HISTORICAL BACKGROUND<sup>1</sup>**

#### **1. First Nations and their fisheries**

Fishing has, since time immemorial, been an essential part of the lives of aboriginal people living in the Upper Columbia River Basin. At the time of contact between settlers and the ancestors of the Ktunaxa-Kinbasket, Okanagan and Shuswap nations, there was an abundance of fish in the region. As many as 600,000 anadromous<sup>2</sup> fish (including steelhead and 4 species of salmon) migrated annually to spawn in the Upper Columbia River Basin. There was also an abundant resident<sup>3</sup> fishery. There is evidence that the aboriginal people of the Upper Columbia River Basin harvested at least 10 different species of fish. The fisheries resource was and remains a critical social and economic component of the lives of the Ktunaxa-Kinbasket, Okanagan and Shuswap people.

#### **2. Construction of dams**

Even prior to the turn of the century, Canada and the United States recognized their interdependence in relation to shared waterways. In Eastern Canada, efforts were made to develop a cooperative regime to manage the Great Lakes and St. Lawrence River; while in Western Canada, management of the Columbia River was a key concern. In order to address this joint dependency on shared resources, Canada and the US entered into the Boundary Waters Treaty in 1909, which among other things

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<sup>1</sup> The facts set out in this section are based in large part on the work of Douglas Gordon and Wayne Choquette. Canadian Columbia River Co-operative Fisheries Management Project - Study Report FY 1991/92, April 1992.

<sup>2</sup> Anadromous fish hatch in freshwater, migrate to the ocean where they spend most of their lives and return to spawn in freshwater.

<sup>3</sup> Resident fish spend their entire lives in freshwater.

established the International Joint Commission. This treaty will be discussed in further detail below. It is worth noting that this treaty set out the respective rights and responsibilities of the two countries with respect to shared waterways. In so doing it established a legal framework that allowed hydro electric development to proceed on the Columbia River.

The first dam on the Columbia River at Lower Bonnington Falls was completed in 1898. Many others followed. Of all the dams, the Grand Coulee Dam, completed in 1942, probably had the most profound impact on the Upper Columbia River Basin. The Grand Coulee Dam, built without a fish passage, blocked access to more than 1700 kilometres of spawning grounds, mostly in Canada. It virtually eliminated the entire anadromous fish population of the Canadian Columbia River. Since 1898, a total of 28 major dams have been constructed on the main stem of the Columbia River, 16 in Canada and 12<sup>4</sup> in the US.

### **3. Impact of dams on First Nations' fisheries**

As a result of the construction of the dams on both sides of the Canada-US border, 4 species of salmon, steelhead trout and 2 local strains of rainbow trout were wiped out upstream<sup>5</sup> of the Grand Coulee Dam in the traditional territory of the KKTC. These stocks have also been severely depleted in the tributaries which join the Columbia River below the Grand Coulee Dam<sup>6</sup> in the traditional territory of the OTC and the SNTC. One of the serious problems faced by the fisheries downstream of the Grand Coulee Dam is that, even where spawning channels exist, juvenile fish returning to the

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<sup>4</sup>The 12 US dams include the Libby Dam built on the Kootenai River.

<sup>5</sup>The upper portion of the Columbia River and the Kootenay River lie upstream of the Grand Coulee Dam.

<sup>6</sup>The Okanagan River joins the Columbia downstream of the Grand Coulee dam.

ocean often get caught in the turbines of the dams. Many resident species remain in a precarious situation due to changes in water quality, temperature and flow, which in turn destroy habitat and food sources. For example, the Duncan and Revelstoke Dams in Canada have severely affected the Rainbow Trout, Dolly Varden and Kokanee by blocking runs and flooding spawning areas. As well, the Libby and Duncan Dams have altered streamflow to Kootenay Lake eliminating the lake's annual "turnover" thereby contributing to the demise of the white sturgeon.

The complete loss of certain fisheries and the reduction of others has had a devastating social and economic impact on Shuswap, Okanagan and Ktunaxa-Kinbasket people. While fishing remains an important part of their lives, today's fisheries can scarcely be compared with the fisheries which sustained them until half a century ago. To date, the CCRIFC member nations have received no compensation for the loss of their fisheries<sup>7</sup>.

To complete the background picture, we will now turn to the two Canada-US treaties which provided the legal basis for much of the hydro-electric development on the Columbia River.

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<sup>7</sup> Several of the elders of the KKTC recollect that an Indian agent handed out cans of salmon shortly after the fish vanished.

#### **IV. TREATIES**

##### **1. 1909 Boundary Waters Treaty**

The first of the two Canada-US treaties which have had an impact on the development of the Columbia River, the Boundary Waters Treaty, was signed in Washington, D.C. by the US and Great Britain in 1909. The Treaty provides principles and mechanisms to help prevent and resolve disputes concerning water quantity and quality along the boundary between Canada and the United States.

One of the primary dispute resolution mechanisms established by the Treaty is the International Joint Commission (IJC). The IJC is made up of three Canadian and three American members. The IJC has two primary responsibilities:

- (1) to issue Orders of Approval of "applications" for the use, obstruction or diversion of boundary waters; and
- (2) to investigate and make recommendations with respect to "references" from Canada and the US (each country can implement these recommendations at their discretion).

Under the terms of the Treaty, each country maintains exclusive jurisdiction and control over the use and diversion of waters on their side of the border. However, if any injury is caused in the other country as a result of the use or diversion of the water, the injured party is entitled to the same remedies as if the injury had occurred in the country causing the loss. This means that if the US limits the flow of water in a shared river and injures someone in Canada, the injured party is entitled to the same remedies as if the damage had been done to a American in the US. This provision does not apply where a special agreement has been entered into in relation to that waterway or development. (Article II)



Both countries agree not to build any dam which would raise the water level upriver from the dam in the other country without an Order of Approval from the IJC or in accordance with a special agreement. They also agree not to pollute boundary waters in such a way as to injure the health or property of people on the other side of the border (Article IV).

In cases where waters will be raised as a result of dams or other works, the IJC must require, as a condition of its approval, that suitable and adequate provision has been made to protect and indemnify all interests on the other side of the border which may be injured (Article VIII).

## **2. 1961 Columbia River Treaty**

In 1944, two years after the completion of the Grand Coulee Dam, Canada and the US asked the IJC to consider whether greater use of the Columbia River could be made through further development (i.e. whether building more dams would be a good idea). This was in the form of a "reference" pursuant to the Boundary Waters Treaty. The IJC was asked to keep in mind: domestic water supply and sanitation; navigation; efficient development of water power; the control of floods; the needs of irrigation; reclamation of wet lands; conservation of fish and wildlife; and other beneficial purposes. They were also requested to consider indemnification for damage to public and private property, the costs of the project and apportioning of any damages.

In March 1959, the International Columbia River Engineering Board, which had been established by the IJC, completed a report setting out alternative engineering proposals for further dam development. The Report strongly endorsed the construction of additional dams, emphasizing the benefits to "the three important fields of water power, flood control, and irrigation". In contrast, the Report stated that there was "no urgent need for cooperative development in the fields of domestic water

supply and sanitation, navigation, or conservation of fish and wildlife.” Finally, the Report concluded an international agreement would facilitate orderly development.

In December 1959, the IJC followed up with a report on principles for apportioning benefits from cooperative use of storage of waters and electrical interconnection within the Columbia River System. This report provided the basis for a common understanding which led to the signing of the Columbia River Treaty in 1961. The fundamental premise of the Treaty was that huge increases in power generating capacity at existing dams in the US could be achieved if additional dams were built in Canada. The Treaty called for the construction of 3 “treaty dams” in BC (the Duncan, Keenleyside and Mica Dams) and one in Montana (the Libby Dam). The treaty dams doubled the storage capacity of the Columbia River Basin and provided increased flood control. In exchange for providing additional water storage the US paid Canada US\$64.4 million (plus bonuses for early completion of the dams) and agreed to provide Canada with one-half of the additional power produced at the American hydro-electric plants. This latter benefit is referred to as the “Canadian entitlement” or the “downstream benefits”.

Canada, at the urging of BC, would not ratify the Treaty until its implementation was further defined through a protocol and arrangements were made to sell the first 30 years of Canada’s entitlement to “downstream benefits” to a group of electric utilities in the US for US\$254 million. Under a separate protocol, Canada agreed to assign the downstream benefits to BC. The Treaty was finally ratified in 1964 by President Johnson, Prime Minister Pearson and Premier Bennett.

The Treaty does not have an automatic expiry date. Instead, either country may terminate it, after 60 years with 10 years notice. This means the earliest the Treaty can be terminated is 2024 so long as notice is given by 2014. In the meantime, however, negotiations must take place on the downstream benefits. These benefits return to BC on the 30th anniversary of the scheduled completion of the Duncan, Keenleyside and

Mica Dams. Accordingly in 1998, BC will become entitled to 9% of the total downstream benefits; in 1999, an additional 46%; and in 2003, the final 45%. The Treaty calls for the downstream benefits to be delivered at Oliver, BC or as otherwise agreed. Since there are no transmission lines at Oliver at present, an interim agreement was reached in 1992 to deliver this power to existing transmission lines near Nelway, BC and Blaine, Washington. This agreement expires in 2003 giving the parties time to consider their options.

Under the terms of the Treaty, joint Assured Operating Plans are negotiated 6 years in advance. Closer to the operating year, Detailed Operating Plans are worked out. The Plans, however, allow some degree of flexibility to deal with unforeseen situations.

In 1984, BC Hydro and Bonneville Power Administration (BPA) entered a 10 year agreement, referred to as the "Non-Treaty Storage Agreement". The purpose of this Agreement is to coordinate the use of an additional portion of the water stored in the Mica Dam reservoir. In 1990, this agreement was extended until 2003. The 1990 agreement more than doubles the amount of water storage covered in the 1984 agreement. The additional power generating capacity will be shared equally by BC Hydro and BPA.

In October 1990, BPA signed a related agreement with the US Columbia Basin Fish and Wildlife Authority, which represents northwest fish and wildlife agencies and 13 Indian tribes. The purpose of the agreement is to ensure that the use of non-treaty storage water will pose no significant risks to fish.

### **3. Consideration of First Nations' interests in treaties**

Under the terms of the Boundary Waters Treaty, which was in force during the construction of the Grand Coulee Dam, the IJC was responsible for issuing orders of approval and was required to ensure that adequate provision was made for the

protection and indemnity of all interests on the other side of the line that might be injured (Articles IV and VIII). This means that to get an order of approval for the construction of the Grand Coulee Dam, the US had to show that any affected Canadian interests would be indemnified. In accordance with the terms of the Treaty, Canada would have been asked to identify the interests which would be affected and a plan for their indemnification would have been required.<sup>8</sup> It therefore seems likely that either Canada did not bring forward the issue of First Nations' rights to fish among the affected rights-holders or that the US and the IJC determined there was no need to indemnify them.

As there is no consideration whatsoever of First Nations' interests or concerns on the face of either the Boundary Waters Treaty or the Columbia River Treaty it is difficult to determine whether their interests were considered. If their interests were raised in the negotiations, nothing was ever included in the final text of the treaties. This omission occurred despite the fact that both treaties had a profound cultural and economic impact on the First Nations living in the Upper Columbia River Basin. This omission likely amounts to a breach of Canada's fiduciary obligation to the CCRIFC member nations.

Nothing in the material we have reviewed suggests that Canada consulted with or sought the consent of the Columbia River First Nations with respect to the ratification of the treaties by Canada or the construction of the dams. This assumption underlies some of the discussion which follows.

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<sup>8</sup> The evidence suggests that only the sports fishery was considered. To compensate for any loss in that regard, the IJC required the US to set up a hatcheries program to stock the reservoir. L.M. Bloomfield and Gerald F. Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)*, Carswell (1958), p. 158.

## **V. POTENTIAL CAUSES OF ACTION**

This section of the paper deals with potential causes of action available to First Nations in Canada which may provide remedies for the loss of their fisheries. In the first part, we consider the rights of First Nations as represented by Canada to seek compensation from the US under international law. In the second part, we consider the rights of First Nations to seek a remedy from the Crown (federal and provincial) for violation of their aboriginal rights. In the last part, we consider the rights of First Nations as ordinary residents of their region to seek remedies for violation of common law and statutory environmental rights.

### **1. Public international law (state vs. state)**

International law is generally divided into two categories: public international law and private international law. Public international law concerns the rights of states vis-a-vis each other. Private international law is generally focused on the rights of individuals to seek remedies in countries other than their own and concentrates on determining which laws should apply. In this paper we will only deal with potential causes of action under public international law.

As stated in the introduction, we will leave it to American lawyers to consider what rights First Nations in Canada might have to remedies in the US. This includes what rights they might have under Article II of the Boundary Waters Treaty which entitles injured parties (i.e. First Nations in Canada) to the same legal remedies as if the injury took place in the other country (i.e. the US) in relation to the construction of the Grand Coulee Dam in particular and the development of the river in general.

A discussion of public international law remedies must begin with a recognition of its limitations. As Professor Charles Bourne explains in relation to international environmental law:

At the international level, regulation and administration seem to offer the only chance of success in preserving the environment; by itself adjudication about legal rights and duties, even if feasible, is a step of last resort and unlikely to produce satisfactory results.<sup>9</sup>

This statement about international environmental law applies to international law in general. Although international law is essentially unenforceable, it has often proven to be persuasive and can offer a moral imperative.

For the time being, First Nations in Canada are not recognized as fully sovereign independent states by the international community. Consequently, the main avenue available to First Nations in international law is to persuade the Canadian government to seek redress on their behalf from the United States government.<sup>10</sup> If the Canadian government refuses to do so, the First Nations can sue for breach of fiduciary duty, a cause of action discussed in further detail below. This latter action would be unlikely to succeed unless First Nations can prove that there was a likelihood of Canada succeeding in an international law claim against the US government.

Canada may have a claim in international law against the US if Canada can prove that the US is in breach of the Boundary Waters Treaty or the Columbia River Treaty. Canada may also be entitled to make a claim under other principles of international law not covered by either of the treaties. This would include the right of states to invoke the principle of state responsibility. As Professor Castel writes:

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<sup>9</sup>Charles B. Bourne, "International Environmental Law International Water Resources: Canada - United States of America" in the Canadian Bar Association Committee Report *Sustainable Development in Canada: Options for Law Reform*, CBA (1990), p. 206.

<sup>10</sup>An action against the IJC was dismissed on the grounds that it did not have the capacity to be sued nor did the court have jurisdiction to hear the case. *Burnell v. International Joint Commission* (1976), 71 DLR (3rd) 725 (F.C.T.D.).

State responsibility is closely connected with the rights and duties of states, the permanent sovereignty of states over their natural resources and the principles of international law applicable to friendly relations and cooperation among states.<sup>11</sup>

The international responsibilities of a state can include the obligation to make reparation for damages caused to other states. Cases such as the Trail Smelter Arbitration<sup>12</sup> and the Cosmos 954 Claim<sup>13</sup> provide examples of these types of claims. Canada may claim that the US had no right to destroy the anadromous fishery and that the US has the responsibility to make reparations to Canada. The First Nations would then make their claim for any damages paid to the Government of Canada. However, if the US can prove it made reasonable attempts to consult with Canada on the issues related to the building of the dams and their impact on the fishery, Canada's case would be weak. We do not have sufficient facts at this time to know whether such a claim would have any chance of success.

Canada might also advance the view that the US, which has belatedly extended its recognition of the rights of American tribes to the Columbia River fishery, should extend comparable recognition to First Nations in Canada who were similarly affected by the construction of the dams. Canada could raise Article II of the Boundary Waters Treaty in support of this argument. More information is required on the nature of the rights of American tribes recognized by the US government and under American law to develop this argument further.

If Canada were successful in any of the above causes of action, the outcome would likely be a negotiated settlement whereby the First Nations would receive some form of

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<sup>11</sup> Castel in Kindred et al., *International Law: Chiefly as applied in Canada* (4th), Emond Montgomery Publications, p. 540.

<sup>12</sup> *United States v. Canada* (1931-1941).

<sup>13</sup> *Canada v. U.S.S.R.* (1979).

compensation. An alternative outcome could be a negotiated recognition, set out in US legislation, an agreement or a treaty, that First Nations in Canada are entitled to the same remedies as the American tribes.

## 2. Aboriginal rights

This next section will consider the right of First Nations to sue the federal and provincial governments for violation of their aboriginal right to fish. To avoid lengthy speculation, we will assume for the sake of this discussion that the BC Court of Appeal decision in *Delgamuukw*<sup>14</sup> will be upheld by the Supreme Court of Canada. As we are limiting this discussion to the impact of the dams on the fishery, we will leave aside any discussion of the violations of First Nations' land-based rights as a result of the construction of the dams.

### a) Extinguishment

The first question to consider in determining whether there has been a violation of aboriginal rights is whether those rights have been extinguished or are "existing" rights protected under section 35 of the *Constitution Act*, 1982. In this case, the specific issue is whether the right to fish of the CCRIFC Member nations was extinguished before 1982. From 1982 onwards, extinguishment of First Nations' rights can only be accomplished by constitutional amendment or with the consent of the aboriginal people who hold those rights<sup>15</sup>.

Prior to 1982 aboriginal rights could also be extinguished by legislation, but only if the legislation showed a clear and plain intention to extinguish. However, from 1871, the year BC joined Confederation, only the federal Crown had the legal authority to

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<sup>14</sup>*Delgamuukw v. The Queen* (1993), Vancouver Registry CA 013770 (BCCA).

<sup>15</sup>Peter W. Hogg, *Constitutional Law of Canada* (3rd), Volume I, Carswell (1992), pp. 27-30.



extinguish aboriginal rights by legislation in BC. The BC Court of Appeal recently decided in *Delgamuukw* that there was no blanket extinguishment of aboriginal rights in BC by the colonial government prior to 1871. The Supreme Court of Canada decided in *Sparrow* that the regulation of the aboriginal right to fish under the *Fisheries Act* and regulations did not extinguish the aboriginal right to fish in BC. The remaining question is whether any other federal legislation extinguished the Columbia River First Nations' aboriginal right to fish.

The Canada-US treaties themselves could not extinguish aboriginal rights as they have no effect on the internal law of Canada. However, federal legislation implementing a treaty could potentially extinguish aboriginal rights. A review of the *International Boundary Waters Treaty Act* and the *Canada Water Act* does not reveal any clear and plain intention to extinguish the aboriginal right to fish. It does not appear that any federal legislation was passed to implement the Columbia River Treaty.

Some cases have also held that it is possible to extinguish by "necessary implication".<sup>16</sup> Whether by necessary implication or in the case of a clear and plain intention, a high standard must be met. Our legal review to date has not uncovered any federal legislation which shows a clear and plain intention to extinguish the aboriginal right to fish of the CCRIFC Member nations. The federal government could argue that such rights were extinguished by necessary implication, but it is difficult to determine what legislation they would rely on.

In the event that a court finds that the federal government extinguished the aboriginal right to fish of the CCRIFC member nations, an argument could nevertheless be advanced that any such extinguishment was in breach of the Crown's fiduciary duty.

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<sup>16</sup>Delgamuukw as per MacFarlane.

## b) Breach of fiduciary duty

The next issue we will examine is breach of fiduciary duty. This cause of action exists whether or not a court finds that the aboriginal right to fish in this case has been extinguished. If the aboriginal right has not been extinguished, the actions of the federal and provincial governments in constructing the dams in Canada and consenting to the construction of the dams in the US, which devastated the First Nations' fishery, would likely amount to a breach of fiduciary duty. Likewise, if the aboriginal right has been extinguished by federal legislation, an argument can be advanced that it was a breach of the government's fiduciary duty to do so.

In *Guerin v. R.*<sup>17</sup>, a case regarding the Musqueam Band and the surrender of reserve lands to the Crown for lease to a golf club, the court clearly stated that the federal government owes a fiduciary duty to First Nations. In *R. v. Sparrow*,<sup>18</sup> the Supreme Court of Canada explained the origin of this fiduciary duty as follows:

The *sui generis* nature of Indian title and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor*, ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

It is likely that a court would apply *Guerin* in this case and find that the federal

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<sup>17</sup> *Guerin v. R.*, [1984] 2 SCR 335.

<sup>18</sup> *R. v. Sparrow*, [1990] 4 WWR 410 (SCC), p. 434.

government owed the CCRIFC member nations a fiduciary duty<sup>19</sup>. As a consequence of the breach of that duty a court would probably award damages as they did in *Guerin*.

c) Unjust enrichment

Causes of action based on unjust enrichment are not a frequently discussed in aboriginal rights cases. Nevertheless, such causes of action may be worth considering in this case.

To make out a cause of action in unjust enrichment a First Nation would have to demonstrate three elements:

- (1) that one party (in this case, the federal and provincial governments) were enriched;
- (2) that the other party suffered a corresponding deprivation (in this case, that First Nations lost their fisheries); and
- (3) that there was no lawful basis for the unjust enrichment (in this case, that the federal or provincial government did not have the authority to violate the First Nations' aboriginal right to fish).

In order to succeed in such an action First Nations would have to prove that the federal and provincial governments were enriched through this process. In the case of the Columbia River Treaty this is relatively easy to prove as Canada and BC received payment for flood control as well as a further payment on account of downstream benefits. The dams built on the Canadian side for Canadian purposes would likely

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<sup>19</sup>In *Guerin*, Mr. Justice Dickson made it clear that, in his opinion, it did not matter whether the case concerned an interest in reserve land or traditional territories.

qualify as "enriching" Canada. More information would be required to determine whether Canada was enriched by the construction of the earlier dams on the US side. First Nations would have to prove that the dams built pursuant to the Treaty resulted in a further depletion of their fisheries. Finally, First Nations would have to show that their aboriginal rights were not lawfully extinguished by federal legislation.

d) Expropriation

The CCRIFC Member nations may have a claim against the Governments of British Columbia and Canada for compensation for the "expropriation" or "taking" of their fisheries. Their claim would be based on the expropriation of their *sui generis* proprietary right in the fisheries as a result of the Columbia River development.

Unlike property rights in the US, which are recognized by the 5th Amendment, property rights in Canada are not recognized in the Constitution. Consequently, there is no constitutional impediment to the taking of private property for public purposes, and there is no mandatory requirement for the government to provide compensation for such takings. There are, however, numerous statutes, such as the *Expropriation Act* in British Columbia, that specifically require compensation for takings and a common law presumption that a person should be compensated if his property has been expropriated.

The issue of whether compensation for takings should be paid when a statute makes no mention of compensation has arisen in a number of mining cases. The Supreme Court of Canada in *The Queen v. Tener*<sup>20</sup> relied on a common law principle that statutes should not be construed so as to take away someone's property without compensation. That is, there is a common law presumption of compensation for takings in the absence of specific statutory language to the contrary. This

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<sup>20</sup> *Guerin v. R.*, [1985] 3 WWR 673 (SCC).

presumption, however, is rebuttable and does not amount to an absolute common law right to compensation.

The result in a claim by the CCRIFC member nations for expropriation of their fisheries would depend to a large degree on whether the aboriginal right to fish is a "private proprietary right". Earlier this year, the BC Court of Appeal in *Delgamuukw* confirmed that aboriginal rights are unique (*sui generis*). The Court did not discuss whether aboriginal rights amount to "private rights" and left open the question of whether the aboriginal rights are "proprietary" in nature. Furthermore, the court refused to deal with the issue of compensation in the absence of specific facts. In so doing, the Court left the door open for such claims.<sup>21</sup> In our opinion, it is likely that a court would hold that the communal aboriginal right to fish, an integral part of the cultures of the CCRIFC Member nations, should be characterized as a private right for the purposes of a consideration of compensation.

In an attempt to deal with current conflicts in resource use, the BC Government recently commissioned Richard Schwindt to inquire into the issue of compensation for the taking of resource interests. Unfortunately, the Schwindt Commission Report<sup>22</sup>, submitted in August 1992, is limited to forest tenures and mineral titles. Furthermore, the terms of reference prevented the Commission from dealing with many of the broader related issues surrounding the takings question.<sup>23</sup> However, the Report does provide an interesting discussion of policies, principles and processes for determining compensation.

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<sup>21</sup> The Supreme Court of Canada in *Sparrow* also left this question open.

<sup>22</sup> Richard Schwindt, Commissioner, *Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests* (August 21, 1992).

<sup>23</sup> See comments on Schwindt Report in *WCELRF Newsletter* Vol 16:6, March 21, 1993, p. 3.

Schwindt relies heavily on utilitarian principles and classical economics, suggesting a taking should only occur where it increases social welfare. Schwindt develops the theory that the decision to award compensation should be based on considerations of both fairness and economics. Certainly it could be argued that the development of the Columbia River Basin was aimed at social welfare maximization. However, this social welfare maximization should not come at the expense of the CCRIFC member nations. An argument may be made that the CCRIFC member nations can be compensated for the taking of their fisheries if a proprietary right in the fisheries can be established.

e) Remedies

We understand that some of the goals of the CCRIFC member nations in relation to compensation for the loss of their fisheries will include the following<sup>24</sup>:

- (1) implementation of a major resident and anadromous fisheries restoration program which would bring back all or some of the fisheries;
- (2) compensation for loss of the fisheries which cannot be brought back;
- (3) strict mitigation measures in relation to the operation of existing dams in Canada and the US to protect the remaining fisheries; and
- (4) direct participation in the Columbia Basin fisheries management.

While the issue of future damage to the fishery is not the subject of this paper, consideration should be given to causes of action and remedies in relation to

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<sup>24</sup> This assumption is based on documentation provided to us by the CCRIFC including the Report from the November 21-22, 1991 workshop.

continued expansion<sup>25</sup> of existing facilities and the construction of new projects.

While a great deal has been written about the nature of aboriginal rights, there are very few cases and there is very little academic literature on the issue of remedies for violations of aboriginal rights<sup>26</sup>. Part of the reason for this has been that many of the aboriginal rights cases have arisen out of prosecutions under statutes such as the *Fisheries Act* (eg. *Sparrow*). Other cases have primarily sought declarations from the courts (eg. *Calder*, *Delgamuukw*). In these cases, it is assumed that the actual remedy will be worked out through negotiation.

From a legal perspective, the remedies which correspond to the causes of action described in the previous section are as follows:

- (1) a wide range of equitable remedies for violation of aboriginal rights and breach of fiduciary duty (from monetary compensation to diversion of resource revenues to First Nations);
- (2) restitution for unjust enrichment; and
- (3) monetary compensation for expropriation.

In general, the above remedies are flexible enough to encompass all the stated goals of the First Nations. All of the goals stated above can be reduced to monetary compensation (i.e. a sum of money). Calculations could be made to determine the cost of major restoration projects, the value of the fisheries that cannot be recovered

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<sup>25</sup>For example, according to a *Vancouver Sun* article dated September 23, 1993, B.C. Hydro intends to add two more turbines each at its Mica and Revelstoke Dams.

<sup>26</sup> "Remedies for Violations of Aboriginal Rights" by Kent Roach is in *Manitoba Law Journal* (1992) 498 an important exception to this statement.

(although this can never adequately make up for the loss of a way of life) and the cost of mitigation measures. However, the implementation of an enhancement project or mitigation measures might require injunctive or declaratory relief if government agencies refused to cooperate. Consequently, if First Nations were successful under any of the above causes of action, their stated goals could potentially be achieved.

This paper will leave aside the very technical discussion regarding calculation of compensation.

### 3. Common law environmental causes of action

In the environmental context, there are six main common law causes of action available to First Nations: private nuisance, public nuisance, trespass, riparian rights, the *Rylands v. Fletcher* doctrine of strict liability, and negligence. The principal difficulty with advancing several of these causes of action is the issue of standing (i.e. whether the First Nation has the right to sue). In a 1985 BC Supreme Court case, *Bolton v. Forest Pest Management Institute*<sup>27</sup>, the Court held that an Indian Band's right to fish and hunt on certain lands was not sufficient to entitle it to sue in nuisance. It should be kept in mind that this case pre-dates the *Sparrow* and *Delgamuukw* decisions and a decision of the Supreme Court of Canada<sup>28</sup> to broaden standing in environmental cases. A court might arrive at a different conclusion today.

An important defence which could be raised by the government in relation to a number of the causes of action listed above is the defence of statutory authority. The government would argue that it had the statutory authority under, for example, the BC *Water Act* to affect the rights of the First Nations. Consequently, they would argue the plaintiff is not entitled to bring forward a common law cause of action to stop it. The

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<sup>27</sup> *Bolton v. Forest Pest Management Institute* (1985), 34 CCLT 119.

<sup>28</sup> *Minister of Finance v. Finlay*, [1986] 2 SCR 607.



root of the determination becomes one of legislative intent - did the Legislature intend to override particular common law rights? The most recent pronouncement on the defence of statutory authority came from the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board* <sup>29</sup>. The outcome in this case suggests that this defence will be applied restrictively.

In our view, the strongest of the common law environmental actions for the CCRIFC member nations would be an action based on the *sui generis* equivalent of riparian rights. Riparian rights are the rights held by the owner of land bordering river, lake or stream. Such rights include the right to water quality and flows. While the BC *Water Act* has replaced riparian rights in BC an argument can be made that it does not apply to waters running through or alongside reserves<sup>30</sup>, and possibly through traditional territories.

In the *Pasco* <sup>31</sup> case, the court recognized the possibility that Indian bands had riparian rights arising from the location of a reserve alongside a river and accordingly granted an injunction in favour of the band.

The remedies in the common law environmental actions are generally damages and/or injunctive relief. A mandatory injunction might be useful to ensure the release of a certain volume of water to protect fish habitat. However, absent a specific request a court would be most likely to award damages to First Nations. The remedy for a violation of riparian rights is generally a mandatory injunction to remove the structure causing the diversion or alteration in water quality.

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<sup>29</sup> *Tock v. St. John's Metropolitan Area Board* (1990) 1 C.C.L.T. (2d) 113 (SCC).

<sup>30</sup> Richard H. Bartlett, *Aboriginal Water Rights in Canada*, Canadian Institute of Resources Law (1988).

<sup>31</sup> *Pasco v. CNR*, [1986] 1 CNLR 3 (BCCA), affirming [1986] 1 CNLR 35 (BCSC), leave to appeal to SCC denied.

#### 4. The BC *Water Act*

In order to determine whether there is a statutory right of action in relation to the loss of the fisheries, information is required on the approvals for the construction and operation of the Canadian dams. In particular, copies of any certificate under the *Utilities Commission Act* and any licence or approval under the BC *Water Act* would be required. In the event that one or more of the dams is operating under a section 7 *Water Act* approval, the CCRIFC member nations might be able to rely on a compensation provision in that act<sup>32</sup>. In addition, the certificate and approval or licence might provide additional requirements with respect to compensation.

In order to succeed under this cause of action, the CCRIFC member nations would have to prove, as in the case of an expropriation, that their right amounts to a proprietary right.

#### 5. *Limitation Act* defence

Under the current BC *Limitation Act*, there is a 30 year ultimate limitation period. The Federal Court of Appeal relied on this provision in the very recent *Apsassin*<sup>33</sup> case. In that case, the majority of the Court held that the action was barred by the 30 year ultimate limitation period. That case concerned the surrender of reserve land and its subsequent transfer to the Director of Veteran Lands Affairs and then to individual veterans.

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<sup>32</sup>Subsection 18(1) of the current BC *Water Act* provides as follows: "Every licensee and person who has obtained approval under section 7 shall exercise reasonable care to avoid damaging land, works, trees or other property, and shall make full compensation to the owners for damage or loss resulting from the construction, maintenance, use or operation of the licensee's works."

<sup>33</sup>*Apsassin v. The Queen*, Federal Court of Appeal, A-1240-87 (February 9, 1993).

One argument that could be raised to try and defeat the 30 year ultimate limitation period is that the cause of action in this instance is continuing. To the extent that the federal and provincial governments continue to violate aboriginal rights and continue to breach their fiduciary duty by the continuing operation of the dams without taking mitigation and enhancement measures, it is possible to argue that the limitation period has not yet begun. It can further be argued that the surrender in *Apsassin* extinguished aboriginal rights while no such extinguishment has occurred in the Upper Columbia River Basin.

In support of this argument is the view that the fiduciary duty of the Crown requires that existing aboriginal rights be afforded special protections. In particular, it could be argued that the *Limitation Act* cannot be relied upon by governments to defeat a claim against themselves.

## VI. LEGAL STRATEGIES

### 1. Treaty Commission process

The Treaty Commission process, once up and running, will provide an avenue for the discussion of compensation for loss of the fisheries. The BC Claims Task Force Report states that:

Negotiations will likely include consideration of a financial component to recognize past use of land and resources and First Nations' ongoing interests... Although recognition of past and current uses is important, detailed calculations would be technically difficult, costly and time-consuming. The task force encourages the parties to reach a negotiated solution by bargaining with good will and good faith in the determination of compensation.<sup>34</sup>

Clearly, therefore it is envisioned that this process will provide an opportunity to consider the issue of compensation. Participation by governments in the treaty process, however, does not guarantee that they will be willing to provide the resources necessary to rebuild the fishery. The treaty process may also require that goals in relation to the fishery be weighed against other First Nation goals.

Access to this Treaty Commission process should be relatively straightforward for any First Nation that can prove that it meets the definition of "First Nation". A First Nation which wants to participate in the process is simply required to file a Statement of Intent identifying:

- (1) the First Nation and aboriginal people it represents;

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<sup>34</sup> *The Report of the British Columbia Claims Task Force* (June 28, 1991), pp. 26-27.

- (2) the general geographic area of the First Nation's traditional territory; and
- (3) a name to be contacted for future discussions.

Funding for these negotiations will be available to First Nations from the Treaty Commission.

CCRIFC members should consider whether they are prepared to negotiate fisheries on a watershed rather than tribal council basis. If it is agreed to go forward together, strategies will have to be developed to take into account differences in the Tribal Councils' priorities, approaches to these issues and in their degree of readiness to negotiate.

One of the principal advantages of this process is that it will provide an opportunity to negotiate compensation not only for the loss of fisheries but for other resources as well. The Treaty process potentially allows all relevant federal and provincial jurisdictions to be on the table at once rather than dealing with one agency at a time. The only difficulty may be in addressing international issues at the negotiation table. That can be addressed by dealing with these issues at a separate table with the goal of incorporating them into the treaty at a later stage.

There are precedents in the northern land claims settlements for special compensation provisions. For example, the Sahtu Dene and Metis Comprehensive Land Claim agreement has special provisions for the sharing of royalties between the First Nation and the federal government from Esso Resources' Norman Wells oilfields.

## **2. Specific Claims process**

The specific claims process is designed to deal with claims which relate to the administration of Indian reserve lands and other band assets.

If there was any expropriation or flooding of reserve lands in connection with the building of dams this could be addressed under the Specific Claims process. It does not appear to us that this process is suitable for discussing the loss of fisheries. This is because the Specific Claims process is not to deal with unextinguished aboriginal rights issues. The issue in question here is clearly that.

Moreover, even if fishing rights could be discussed, would it be appropriate to limit the damages sought to the fishery exercised within the reserve boundaries? The factual issue is whether all the major fishing was carried out within reserve lands. If a great deal of fishing was carried out within the First Nations' traditional territories then it makes little sense to lock into a process which is limited to considerations of reserve based rights. We do not have the facts necessary to determine this issue.

If on the other hand, the major fishing places were within reserve boundaries the Specific Claims process offers another option. One of the principal advantages of this process over litigation is that acceptance of claims is not affected by the statutes of limitation or other such defences.

### **3. Court action (litigation)**

If First Nations choose to advance their rights by litigation, we believe that the strongest potential cause of action for the Columbia River First Nations is breach of fiduciary duty. The advantage of this process over the treaty and specific claims processes is that there is a possibility of a court awarding First Nations compensation which reflects the actual loss in monetary terms of the fishery. It is unlikely that any negotiation process would lead to such an outcome. However, litigation is always a risky process. Moreover, even successful litigation can lead back to negotiation. In such a case, however, the outcome is likely to be an agreement that is more favourable to First Nations.

The cost of litigation becomes an important factor if funding is not available through one of the federal government funding agencies. However, the cost of negotiation which is sometimes subtracted from a final compensation figure should not be underestimated.

#### **4. Legislative action**

The United States has used a legislative approach to deal with the fisheries issue in the Columbia River Basin.<sup>35</sup> This approach could be used in Canada as well. For example, legislation was used in Ontario to give effect to the 1986 Indian Lands Agreement<sup>36</sup>. This agreement authorized Ontario Indian Bands, the Province of Ontario and Canada to enter into agreements related to lands and natural resources.

From a First Nations' perspective the one caution we offer is that governments will not allow First Nations to have a veto over amendments to legislation as it violates the principle of Parliamentary sovereignty. This means that legislation cannot offer the same degree of long term protection as a treaty protected under section 35 of the *Constitution Act, 1982*. If First Nations expect the settlement of treaties to take a long time, legislation may work well as an intermediate term solution. Again, any agreement arrived at and reflected in legislation can always be rolled into a treaty at a later date.

Legislation can provide an overall structure for a mitigation program. It would have the advantage of being binding on all residents of Canada or BC.

#### **5. Direct compensation negotiations with Canada, BC, US agencies**

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<sup>35</sup>*Pacific Northwest Electric Power Planning and Conservation Act*, 16 USCS 839.

<sup>36</sup>*Indian Lands Agreement (1986) Act*, S.C. 1988, c. 39.

Direct compensation negotiations with Canada, BC and US agencies need not exclude other processes. However, if several processes are ongoing simultaneously, the parties should try and agree how they will link up once they are concluded.

An important factor favouring this approach is the possibility of accessing funding or compensation through participation in the negotiations between Canada/BC (represented by BC Hydro) and the US on downstream benefits arising out of the Columbia River Treaty, which are returned to BC in 1998 ( 9%), 1999 ( 46%) and 2003 (45%). As well, there appears to be a possibility of accessing funding for mitigation under the US Northwest Power Planning Council Fish and Wildlife Program.



## VII. SUMMARY

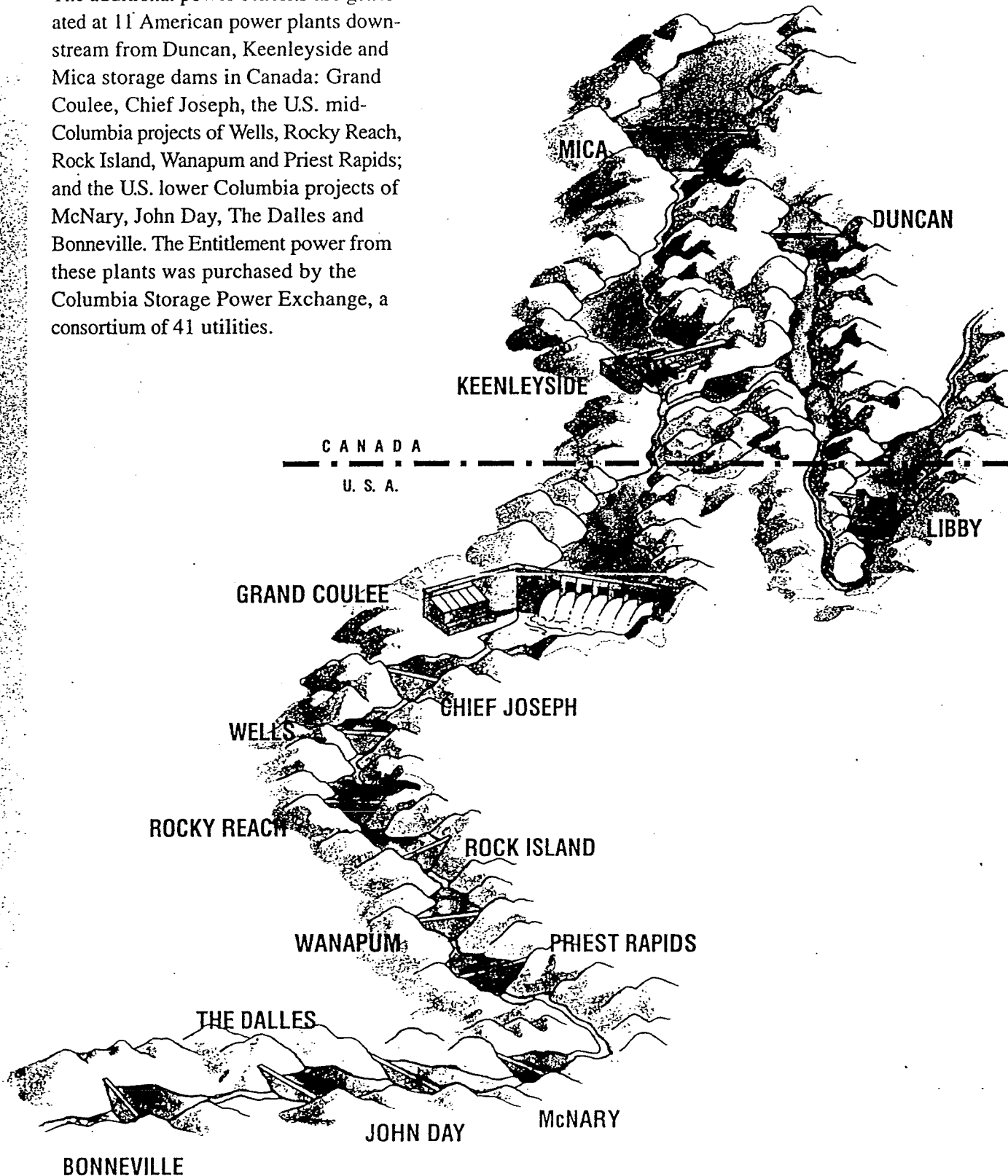
In choosing a legal strategy to address the loss of their fisheries, the CCRIFC Member nations must take into account the positions of the parties with whom they will have to deal. If the parties are willing to work towards the accomplishment of the same goals as the First Nations have set for themselves, then negotiation may be a useful process. Negotiation offers the advantage of being able to develop an integrated approach to resource management that respects the ecosystem as a whole. A negotiation process could begin outside the treaty process with a view to incorporating the agreed upon structure, if it stands the test of time, into a treaty later on. Alternatively, an agreement could be given some permanence through legislation, although legislation can be unilaterally amended by government while a treaty cannot.

If there is wide divergence between the goals of First Nations and the other parties, litigation may be necessary. In our view, an action in breach of fiduciary duty against both the federal and provincial governments has the greatest chance of succeeding. The advantage of this cause of action is that it could be maintained even if a court held that the CCRIFC member nations' aboriginal rights have been extinguished. Before commencing a law suit a great deal more work would have to be done in evaluating the possible causes of action.

While there may be "no way up" the Columbia River in 1993, this paper suggests that legal strategies are available for obtaining funding for the restoration of the fisheries and to compensate CCRIFC member nations for their loss.

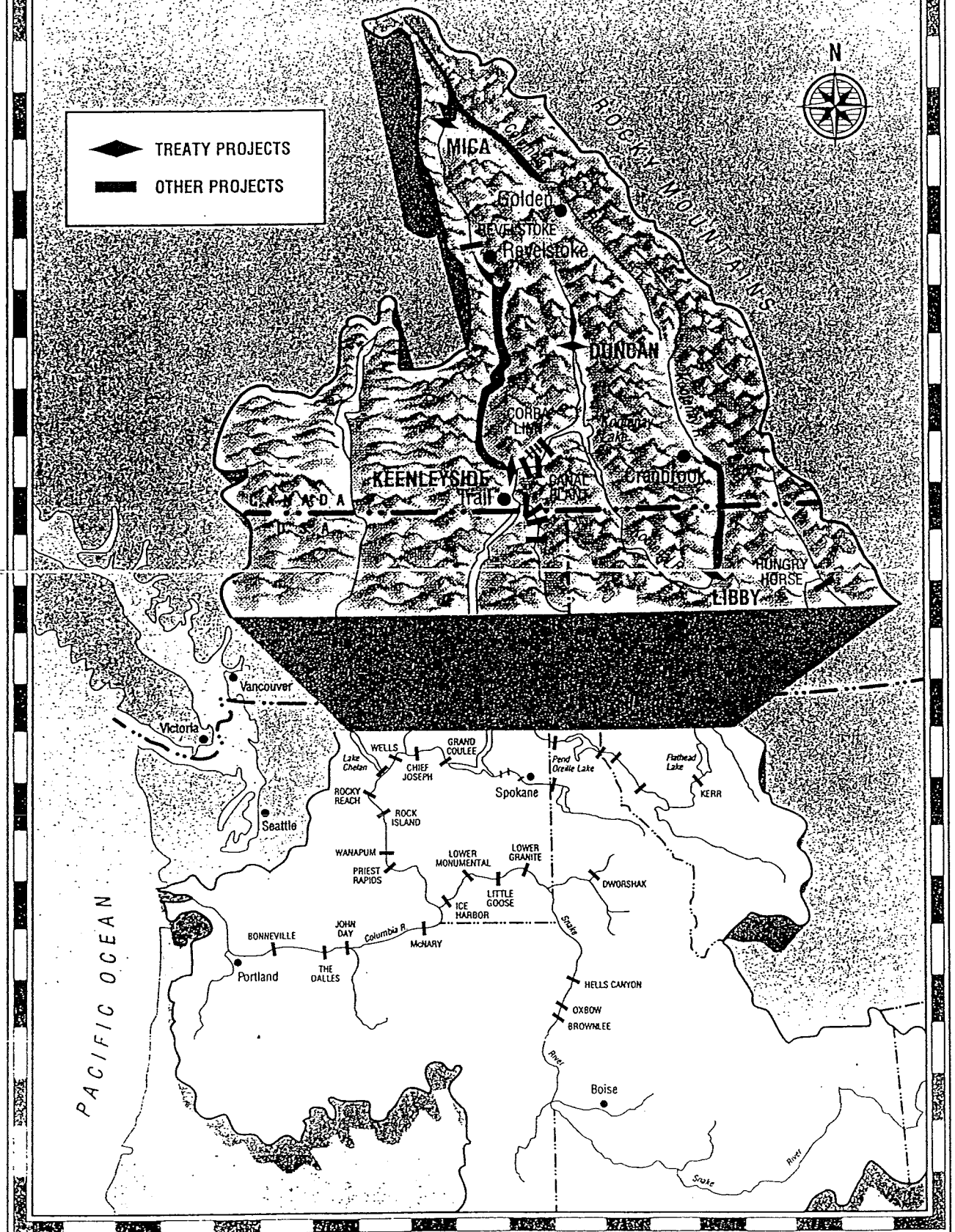
## WHERE IS THE ENTITLEMENT POWER PRODUCED?

The additional power benefits are generated at 11 American power plants downstream from Duncan, Keenleyside and Mica storage dams in Canada: Grand Coulee, Chief Joseph, the U.S. mid-Columbia projects of Wells, Rocky Reach, Rock Island, Wanapum and Priest Rapids; and the U.S. lower Columbia projects of McNary, John Day, The Dalles and Bonneville. The Entitlement power from these plants was purchased by the Columbia Storage Power Exchange, a consortium of 41 utilities.



Source: the Columbia Report, number 2, published by the Downstream Benefits Steering Committee (Ministry of Energy, Mines & Petroleum Resources; Crown Corporations Secretariat; B.C. Hydro)

# COLUMBIA RIVER BASIN



Source: the Columbia Report, number 1, published by the Downstream Benefits Steering Committee (Ministry of Energy, Mines & Petroleum Resources; Crown Corporations Secretariat; B.C. Hydro)

FIGURE 1, LOCATION MAP

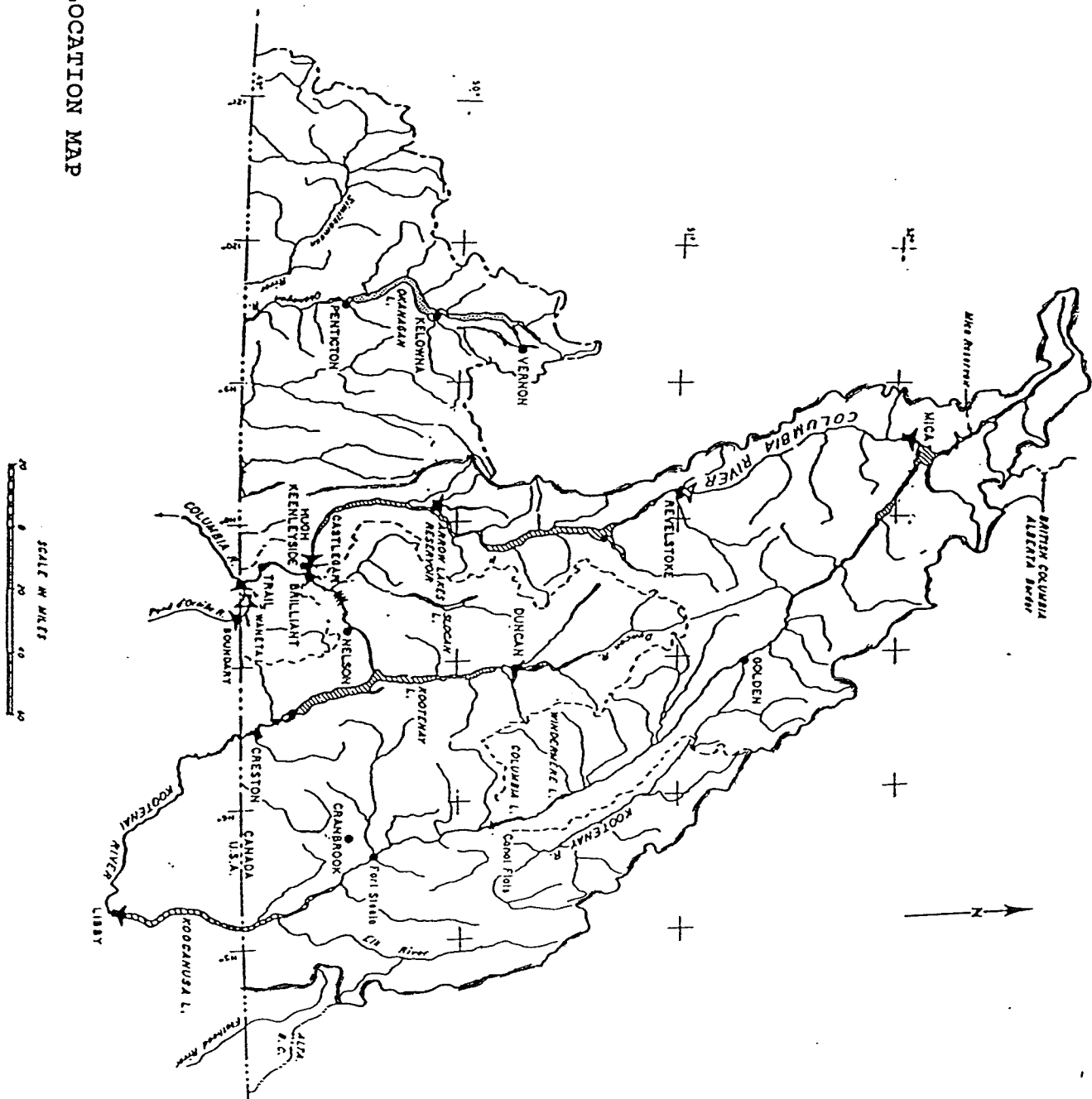
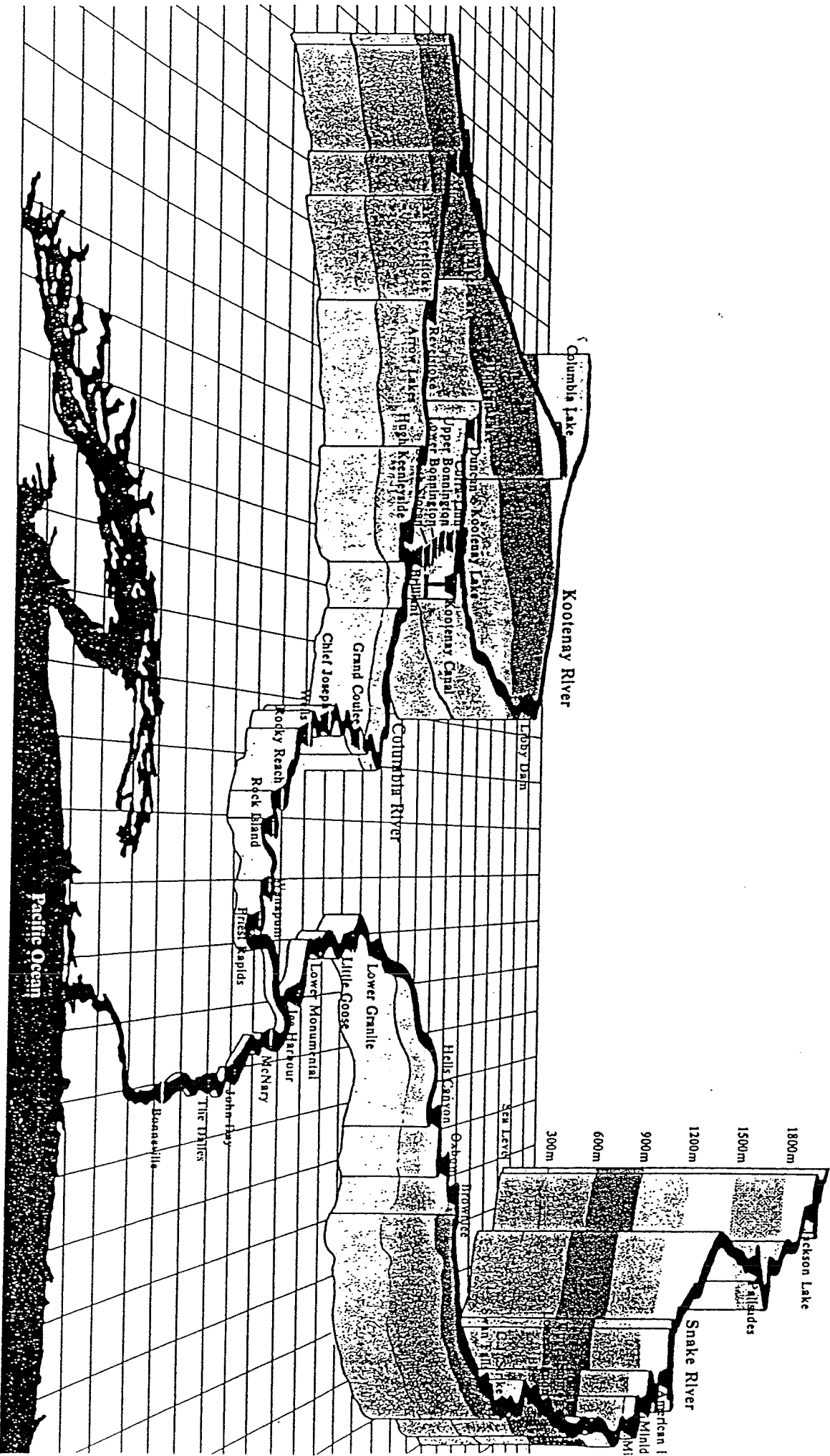


FIGURE 2 - DAMS ON THE COLUMBIA RIVER



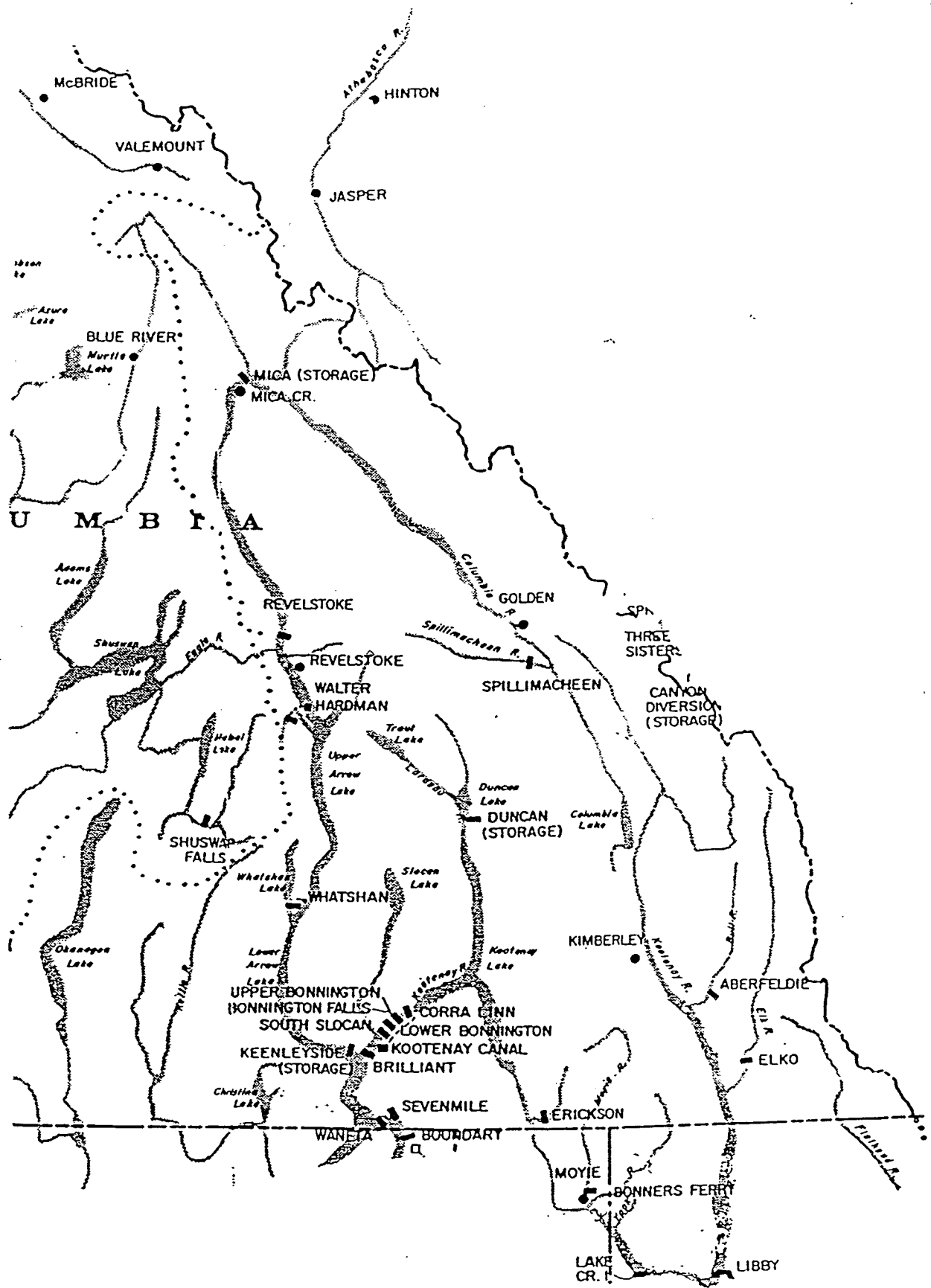


FIGURE 3 - DAMS IN THE UPPER COLUMBIA RIVER BASIN