IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

	)	**Subcases 29-11609 and 29-12877**
	)	
In Re SRBA	)	**ORDER GRANTING UNITED STATES', STATE**
	)	**OF IDAHO'S, AND SHOSHONE-BANNOCK**
	)	**TRIBES' MOTIONS FOR SUMMARY**
	)	**JUDGMENT; and ORDER DENYING CITY OF**
Case No. 39576	)	**POCATELLO'S MOTION FOR SUMMARY**
	)	**JUDGMENT**

I. PROCEDURAL HISTORY

The matters presented on summary judgment involve the legal issue of whether either the City of Pocatello or the Citizens of the Pocatello Townsite is entitled to a federal water right under an 1888 Act of Congress. The City of Pocatello (hereafter "Pocatello") filed claims for its water rights based on federal law under Subcase 29-11609. Pocatello also filed duplicate claims to the same water based on state-law theories.[1] The Citizens of the Pocatello Townsite (hereafter "the Citizens") essentially duplicated the federal claim by Pocatello, but asserted it owned the federal-based water right under subcase 29-12877. The Citizens did not file a claim under state-law theories.

The Idaho Department of Water Resources filed *Director's Reports* which recommended the state-law claims. IDWR did not file *Director's Reports* for 29-11609 or 29-12877, since those claims were based on federal law. IDWR filed abstracts for the federal-law based claims.

The State of Idaho, the United States, and the Shoshone-Bannock Tribes filed *Objections* to the federal claims of Pocatello and the Citizens. Pocatello filed an *Objection* to the claim of the Citizens.

[1] The state-based subcase numbers are: 29-271, 29-272, 29-273, 29-2274, 29-2338, 29-2354, 29-2382, 29-2401, 29-2499, 29-4221, 29-4222, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7502, 29-7770, 29-7782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13636, 29-13637, 29-13638, and 29-13639.

The parties filed cross-motions for summary judgment. Pocatello moved under I.R.C.P. 56 for a ruling that it is entitled to a federal water right. The State of Idaho, the United States, and the Shoshone-Bannock Tribes filed motions for summary judgment asserting that neither Pocatello nor the Citizens is entitled to a federal water right. The Citizens did not file a summary judgment motion, did not participate in the briefing, and did not attend the hearing. A hearing was held on these motions and cross-motions for summary judgment. The issue before the court is:

> **Whether, as a matter of law, either the City of Pocatello or the Citizens of the Pocatello Townsite is entitled to a federal water right based on Section 10 of the Act of 1888.**

II. FACTUAL BACKGROUND

A. Reservation and Treaty

United States President Andrew Johnson set apart lands for the reservation currently inhabited by the Shoshone and Bannock Indian Tribes with an executive order issued June 14, 1867. *Affidavit of Emily Greenwald* (hereafter "*Greenwald*") att. B. at 16; *Affidavit of Douglas R. Littlefield Dated January 14, 2005, In Support of Pocatello's Motion for Summary Judgment* (hereafter "*Littlefield*") at 5. The Second Treaty of Fort Bridger relating to the Fort Hall reservation was signed July 3, 1868. *Littlefield* at 5. The Second Treaty of Fort Bridger required written consent of a majority of adult male Indians for any cessions of land. (Executive Order of June 14, 1867, attached hereto as Exhibit 1; Second Treaty of Fort Bridger attached hereto as Exhibit 2.)

B. Traffic and Trespass

By 1870, there was considerable freight traffic in the vicinity of the Fort Hall Reservation. In 1878, the Utah Northern Railway Company (owned by Union Pacific Railway Company) built a north-south line across the Fort Hall Reservation without obtaining permission from either the Tribes or the Federal Government. *Greenwald* att. B. at 18. Railroad activity on the reservation resulted in trespass by railroad employees and other settlers. The right-of-way for the north-south route was not addressed for several years. *Greenwald* att. B. at 20. However, the Utah Northern Railway Company did negotiate with the Tribes for an east-west right-of-way on behalf of the Oregon Short Line. The terms of the agreement for the east-west route were signed in July 18, 1881, and approved by Congress on July 3, 1882. *Greenwald* att. B. at 20.

By 1884, the Utah Northern Railway Company had still not obtained a right-of-way for the north-south line that was constructed in 1878. There was a significant problem with trespassing on the reservation. *Greenwald* att. B at 22. In October 1885, United States Department of the Interior officials and Indian Agent Peter Gallagher ordered the removal of intruders. *Greenwald* att. B. at 23. In 1886, a group of citizens sent a petition asking Indian Agent Gallagher for leniency regarding the trespass. They explained that many of the trespassers were employees of the railroad and could not keep their jobs without trespassing on the reservation in some manner. The United States Secretary of the Interior S. J. Kirkwood wrote to the president of Union Pacific Railway Company in 1881 asking that the right-of-way issue be addressed. *Littlefield* at 10.

In May 1886, the railroad companies asked the United States Secretary of the Interior to assist in negotiations with the Tribes. *Greenwald* att. B. at 24. The United States Department of the Interior stated that "any agreement that may be entered into with the Indians for cession of the necessary quantity of land at the point named [Pocatello] should be in the nature of a cession to the United States-to be disposed of for the benefit of the Indians. . . ." *Greenwald* att. B. at 25.

C. Council of 1887

The trespass situation was so controversial that in 1886 Acting Commissioner of Indian Affairs A. B. Upshaw wrote to the United States Secretary of the Interior requesting a conference with the Indians. Commissioner Upshaw explained that previous orders to remove non-Indians from the reservation had been ignored. *Littlefield* at 14-15. Commissioner Upshaw stated that railroad employees had built dwellings on the reservation for shelter during the winter. *Littlefield* at 16. Commissioner Upshaw concluded that removing the trespassers might be impossible without military aid or, possibly, bloodshed. *Littlefield* at 16.

In May 1887, the United States Secretary of the Interior responded to the trespass problem and assigned Inspector Robert S. Gardner and Indian Agent Peter Gallagher to conduct negotiations with the Shoshone-Bannock Indian Tribes. *Greenwald* att. B. at 16. Inspector Gardner and Agent Gallagher met with the Tribes and held formal negotiations on May 27, 1887. The Union Pacific Railway Company was represented by Mr. E. Dickinson. Inspector Gardner and Agent Gallagher represented the United States, and a number of Shoshone and Bannock Indians represented the Tribes.

During the May 1887 council, Agent Gallagher opened the council by explaining that the meeting was to resolve the presence of the railroad and the community at Pocatello on the reservation. *Littlefield* at 18. Several Tribal representatives stated that they did not want to sell any land. *Greenwald* att. B. at 27. Agent Gallagher commented "Now Big Joe, over there, what does he say? He says he does not want to sell; that they have not water enough. There is water enough to attend to the work they do now. How is Big Joe or any other Joe on this reservation to get water. . . ? How are you going to make ditches; how are you going to irrigate land unless you have money?" *Greenwald* att. B. at 28.

D. Agreement Reached

The Shoshones and Bannocks were reluctant to cede land for the railroad and the townsite of Pocatello. Eventually, the lengthy discussions changed their minds, and they signed the Cession Agreement of May 27, 1887. *Greenwald* att. B. at. 28; *Littlefield* at 21. The Utah Northern Railway Company secured land for the right-of-way of the existing tracks, and land was ceded for the Pocatello townsite. The agreement also included "necessary grounds for station and water purposes. . . ." *Greenwald* att. B. at 28.

E. Congress Acts

Inspector Gardner and Agent Gallagher sent the Cession Agreement of May 27, 1887, to the United States Secretary of the Interior on May 30, 1887. The agreement was ratified by Congress in the Act of September 1, 1888. (Attached hereto as Exhibit 3.)

III. STANDARD OF REVIEW

The standard of review for summary judgment is well established. I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any. . ." to determine whether the moving party is entitled to judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *Strongman v. Idaho Potato Commission*, 129 Idaho 766, 771, 932 P.2d 889, 894 (1997) (*quoting* I.R.C.P. 56(c)).

If the record supports conflicting inferences or if reasonable minds might reach different conclusions, summary judgment should be denied. *Id*. The filing of cross-motions for summary

judgment by opposing parties does not, in itself, establish that there is no genuine issue of material fact. Where facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court, alone, will be responsible for resolving conflict between those inferences. *First Security Bank v. Murphy,* 131 Idaho 787, 964 P.2d 654 (1998). The issue on summary judgment presents no factual disputes. The resolution of this issue is purely a question of law.

IV. FEDERAL RESERVED WATER RIGHTS

Pocatello conceded in its briefing and during oral argument that it does not now claim a federal reserved water right. However, since Pocatello's claim asserted a "federal reserved" basis, this decision addresses that theory briefly.

Federal law on reserved water rights is well established. A state has plenary control of water located within its territory. *Kansas v. Colorado,* 206 U.S. 46 (1907). Federal courts have described claims to federal reserved water rights as exceptions to the state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.,* 174 U.S. 690 (1899). A reserved water right must be based on a reservation of land. *Arizona v. California,* 373 U.S. 546 (1963). Reserved water rights may be express or implied. *United States v. New Mexico,* 438 U.S. 696 (1978).

Federal reserved water rights on Indian reservations were first defined by the United States Supreme Court in *Winters v. United States,* 207 U.S. 564 (1908). The *Winters* Court held that lands set aside for an Indian reservation included an implied reservation for the amount of water necessary to meet the purposes of the reservation.

An express reservation of water is created by the explicit language in the act creating the land reservation. *United States v. New Mexico*, 438 U.S. 696. If there is not an express reservation of water included in the land reservation, an implied reserved water right may be granted if the following criteria are satisfied:

1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *Id.* at 702;

2) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation, *Id.* at 700; and

3) Without the minimum amount of water claimed, the purposes of the reservation must be entirely defeated, *Id.*

Central to a finding of a federal reserved water right is a federal reservation of land. It is undisputed that no land was reserved for Pocatello or the Citizens. Thus the crucial element of a federal reserved water right is absent.

Neither Pocatello nor the Citizens presented "genuine issues" of "material fact" on which a federal reserved water right could be based. The required elements of a federal reserved water right have not been established. As a matter of law, neither subcase 29-11609 nor 29-12877 can establish a federal reserved water right.[2]

V. ALLOTMENT-BASED RIGHTS

Courts have recognized water rights on former reservation lands that are no longer in tribal control where they relate to Indian allotments. This category of water rights relates to the General Allotment Act passed by Congress in 1887. 25 U.S.C. § 334, *et seq.* The General Allotment Act provided for individual Indians to receive an allotment of land for agricultural purposes.

The United States Supreme Court held in *United States v. Powers,* 305 U.S. 527 (1939), that the goal of allotments was to encourage individual tribal members to farm and reasoned that allotted lands were of no agricultural value without irrigation. *Id.* at 533. In *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981), *cert. denied,* 454 U.S. 1092 (1981), the Court of Appeals for the Ninth Circuit ruled that a non-Indian successor to an allotment obtains a right to water that quantity actually appropriated by the Indian allottee at the time title to the allotment passes. The Court reasoned that an Indian allottee has the right to sell his land along with his share of the reserved water right. However, the non-Indian successor loses his

[2] This Special Master has also considered whether Pocatello's claim could be supported under a new theory of federal non-reserved water right. Research found no federal case law on federal non-reserved water rights. The term "non-reserved federal right" arose in a Department of the Interior Solicitor's Opinion in 1979. In *86 Interior Decision*, 553, 1979 WL 34241, Solicitor Leo Krulitz opined that the federal government could appropriate a water right without a reservation of land and while complying with the processes of state law. The Krulitz Opinion stated such federal non-reserved water rights were valid even if they did not follow substantive state law. Two subsequent solicitor's opinions rejected or at least narrowed the Krulitz Opinion. *See 88 Interior Decision*, 253 (1981) and *88 Interior Decision 1055 (1981)*. The concept of federal non-reserved water rights is not what Pocatello claimed and does not appear to have been sanctioned by any court.

right to the full measure of the allottee's water right if he does not maintain that right by continuous use. *Id.* at 50.

Water users in Wyoming argued for expansion of the *Walton* doctrine in the Big Horn River Adjudication. They argued for the extension of water rights to lands that were originally part of the Wind River Indian Reservation, but which were never owned by Indian allottees. *Big Horn IV,* 899 P.2d 848, 850 (1995). These parties argued that federal water rights should be recognized as appurtenant to land that was ceded from the reservation. They argued that a priority date as of the date of the reservation should attach to the water rights. The Wyoming court described these claims as "super-*Walton* rights" because such rights would have expanded on the traditional *Walton* right by deleting the requirement that land title trace to an Indian allotment.

The Wyoming Supreme Court rejected these "super-*Walton*" rights, holding that only the tribes, Indian allottees, and successors in title of Indian allottees should receive appurtenant reserved water rights with an 1868 priority date.

Neither Pocatello nor the Citizens asserted they obtained an Indian allotment. The land ceded from the Fort Hall Reservation that became the Pocatello townsite was not allotted. Neither Pocatello nor the Citizens presented "genuine issues" of "material fact" showing the required elements of a water right under the *Walton* line of cases.

VI. THE CONGRESSIONAL ACT OF 1888

Pocatello argues that a federal water right was granted by the Act of September 1, 1888, in conjunction with land ceded for the townsite. Pocatello argues that the language of Section 10 of the Act of September 1, 1888, granted a water right:

> Sec. 10. That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

Act of September 1, 1888, ch. 936, 25 Stat. 452, (hereafter "Act of 1888").

The United States, the Shoshone-Bannock Indian Tribes, and the State of Idaho assert that this language only conveyed access to water sources. The critical question is whether

Section 10 granted a federal water right or whether that language granted mere access to reservation water sources.

A. Treaty Law

Pocatello argues that Congress granted it federal water rights in hand with the grant of the townsite. As this court sees it, that assertion of a federal water right would be a diminution of reservation or tribal rights. If Pocatello's assertion of a federal water right would diminish tribal rights, Indian treaty law must be considered. The law in that area is clear. Only Congress can alter the terms of an Indian treaty by diminishing a reservation. *United States v. Celestie,* 215 U.S. 278, 285, (1909). The touchstone in determining whether a given statute diminished or retained reservation boundaries is congressional purpose. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). Congressional intent to diminish a reservation must be clear and plain. *United States v. Dion,* 476 U.S. 734, 738-739 (1986).

B. Statutory Language

Where the language of a statute is clear and unambiguous, a court gives effect to the statute as written and should not engage in statutory construction or resort to legislative history. *Idaho v. Pauls,* 101 P.3d 235, 238 (Ct. App. 2004). If, on the other hand, a statute is ambiguous, a court reviews the legislative history and applies the rules of statutory construction to ascertain the intent of the legislation. *Id*.

The purpose of the Act of 1888 was to address historical right-of-way and trespass issues on the reservation. The north-south railroad route was built without obtaining a right-of-way and without consent of the Shoshone-Bannock Indian Tribes. In addition to the tracks, railroad stations and buildings were constructed on the reservation in trespass. Railroad employees and settlers unloading freight and conducting business were trespassers on the reservation. The trespass and unauthorized activity caused social unrest on the reservation. Congress was urged to act to prevent violence. The Council of 1887 was, therefore, convened and the Act of 1888 was passed.

Article I of the Act of 1888 describes the cession by the Tribes of the land on which the Utah Northern and Oregon Short Line Railways had their tracks. Article II sets forth terms for ceding the railroad right-of-way. Article III sets forth the details of the cession. Sections 2 through 9 of Article III describe procedures for the survey, appraisal, and sale of the lands within the Pocatello townsite. Section 11 grants a right-of-way for the previously

unauthorized tracks. Section 12 allows necessary employees of the railroad to live on the right-of-way. Section 13 requires the railroad to fence portions of its road. Section 14 provides for a bond to secure against railroad damages. Section 15 contains conditions of acceptance by the railroad. Section 16 provides that Congress may amend, alter, or appeal the act.

The key phrases contained in Section 10 demonstrate that the thrust of the Act of 1888 was to solve trespass issues.

1. "**Free and Undisturbed Use . . . of the Waters"**

Section 10 states that the citizens of the town shall have the "free and undisturbed use in common with the said Indians." Pocatello argues that this language conveys a water right. However, the term "free and undisturbed use" is more properly understood as describing a right of access.

Section 10 did not use the phrase "water right" in describing what was granted. The inclusion of the term "use" does not clearly and plainly show congressional intent to grant a federal water right. Without Section 10, the citizens of the town were trespassers on the reservation at any time that they diverted water from any of the water sources. When Congress allowed for "free and undisturbed use . . . of the waters," the citizens of the town were granted a right to access points of diversion and to remove the water from sources on the reservation. Without this "free and undisturbed" right of access or use, the citizens of the town would have been trespassing. Congress acted to resolve trespass issues, and this phrase did that by conveying the ability to access water.

Pocatello cites *Byers v. Wa-Wa-Ne,* 86 Or. 617, 169 P.121 (1917), as an example of congressional action showing that Congress knew how to grant federal water rights. Byers succeeded to the rights of permittees who had an 1870 revocable permit from the Department of the Interior for construction of a ditch on the Umatilla Reservation in Oregon. The rights under the permit were used for water power for the operation of a flour mill.

In 1882, the Pendleton Townsite Act was passed, conveying 640 acres of the Umatilla Reservation to the Town of Pendleton. In 1885, Byers' license was converted into a water right with the Allotment Act of 1885. The Oregon Supreme Court held that the language of the Allotment Act created a water right. *Byers* at 169 P.121. However, that case seems inapposite to Pocatello's position. The statutory language from the 1885 Allotment Act used the phrase "water right," not use. The 1885 Allotment Act stated:

> Provided further, that the water right across a portion of said reservation from the town of Pendleton granted by the Interior Department July seventh, eighteen hundred and seventy on the application of George LaDow, Lot Livermore and other citizens of Pendleton for manufacturing, irrigating and other purposes be confirmed and continued to W.S. Byers and Company their successors: Provided, That this act shall in no way impair or affect any existing right to a reasonable use of the water of said stream for agricultural purposes, nor shall confirm or grant any right to use the water thereof in any manner nor to any extent beyond or different from that to which it has been heretofore appropriated.

1885 Allotment Act, Ch. 319, 23 Stat. 343, § 2.

The *Byers* court held that the language in the statute confirmed a preexisting license and created a permanent water right, or an irrevocable water right. The court's ruling in *Byers* hinged on the view that Congress would not have acted to grant a right that already existed, but must have acted to change what was in effect prior to the enactment. In *Byers*, the court held that the phrase "water right" in conjunction with the phrase "confirmed and continued" conveyed a water right. So Congress was familiar with the phrase "water right" as early as 1885, but chose not to use it in the Act of 1888.

2. "In Common With the Said Indians"

Pocatello argues that the "in common with the said Indians" language granted a proportional share of the Tribes' federal reserved water right. Pocatello cites the United States Supreme Court case *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979) (hereafter *Fishing Vessel*), for the proposition that the "in common with" language in treaties has been interpreted to require sharing of the resource in question. Pocatello correctly notes that the *Fishing Vessel* case held that the "take" of fish was to be shared proportionally. Pocatello argues that it was the interpretation of the "in common" language that was pivotal in *Fishing Vessel*. Therefore, Pocatello argues that the "in common" language in Section 10 entitles Pocatello to share in common with the Shoshone-Bannock Tribes' "exclusive right to waters on the reservation." The "in common" language in Section 10 may create a sharing of what was granted; however, the "in common" language does not bootstrap a grant of access into a water right.

Critically, *Fishing Vessel* had two important components. First, the case applied the "in common" language to the right conveyed – a fishing right. Second, the case

interpreted the "in common" language to quantify the right to take fish. "In common" meant a sharing of what it modified. In *Fishing Vessel,* "in common" modified the fishing right. Thus the tribe in *Fishing Vessel* had a shared fishing right.

In contrast, the Act of 1888 uses the "in common" language to modify "use . . . of the waters." The "in common" language does not, by itself, convey a water right any more than the "in common" language conveyed a fishing right in *Fishing Vessel.* The United States Supreme Court in *Fishing Vessel* looked to the "in common" language to determine the characteristics or quantification of the fishing right. Without the critical treaty language "right of taking fish," however, the "in common" language would have had a different application. The *Fishing Vessel* analysis may indicate that whatever was granted to Pocatello is to be shared, but that case does not elucidate whether the grant was a water right or a right of access.

The phrase "in common with the said Indians" is also similar to a phrase that was recently analyzed by the SRBA District Court. In ***Order on Motions to Strike, Motion to Supplement the Record, and Motions for Summary Judgment*** (Nez Perce Consolidated Subcase 03-10022) (November 10, 1999) at 30-37, the SRBA District Court held that the "in common" language in the Nez Perce Treaty did not create a water right. The SRBA District Court held that the treaty language reserved a right to fish, but did not create a water right. "Nowhere in the Supreme Court's interpretation of the language is a water or other property right greater than an access or allocation right mentioned for purposes of giving effect to the fishing right, or as being within that scope of the fishing right." ***Nez Perce Order*** at 33.

The analysis of the "in common" language by the United States Supreme Court in *Fishing Vessel* and by the SRBA District Court in the ***Nez Perce Order*** are helpful in understanding whether the grant was exclusive or shared, but sheds little light on what the grant was.

3. "Right of Access at All Times"

The final phrase, "with right of access at all times thereto," shows a clear and plain congressional intent to grant a right of <u>access</u>. This language shows that the congressional intent of Section 10 was to grant a right of access, rather than a federal water right. In analyzing the critical phrases used in Section 10, it is apparent that the language is consistent with the overall scheme of the Act of 1888 which was to resolve trespass issues. Section 10 resolved a trespass problem. In order to hold that Congress conveyed a shared portion of the Tribes' federal

water right, this court would have to determine that the language of Section 10 clearly and plainly conveyed a water right. It does not appear that the language meets that requirement by allowing access to water. Section 10 did not grant a water right, rather it granted a right of access.

B. **Historical Context.**

A review of the historical context in which Section 10 was written bolsters the conclusion that Congress intended to grant a right of access. Courts look at historical documents in order to understand the words of old congressional acts and to determine the weight and meaning the words once carried in order to properly construe them. *See Ute Indian Tribe, v. State,* 521 F.Supp. 1072, 1079 (U.S.D.C. Utah) (1981), *affirmed in part*, *Ute Indian Tribe v. State*, 716 F.2d 1298 (10th Cir.) (1983), *on rehearing*, 773 F.2d 1087 (10th Cir.) (1985), *cert. denied*, 479 U.S. 994 (1986).

The Act of 1888, including the critical Section 10, was passed by the United States Congress to "ratify an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes." Message from the President of the United States, 25 Stat. 455; H.R. Exec. Doc. No. 140, 50th Cong. 1st Sess. (1888).

Several historical documents relating to the Act of 1888 support the notion that the language conveyed a right of access, not a water right. First is a transmittal letter dated February 4, 1888, from Secretary of the Interior Wm. F. Vilas to the President of the United States providing a summary of the events that resulted in enactment of the Act of 1888. (Attached hereto as Exhibit 4.) His summary states that:

1) The Utah and Northern and Oregon Short Line railroads cross each other within the Fort Hall Indian Reservation at a location known as Pocatello Station, where railroad employees established a settlement.

2) Trespass occurring in the area caused the Department of the Interior to instruct the United States Indian Inspector and the Indian Agent to confer with the Indians and prepare for settlement of the trespass questions.

3) The Department of the Interior wanted to determine the compensation that should be paid to the Indians for the land occupied by the railroads.

4) The Utah and Northern Railway Company also sought land for workshops, stockyards, a water reservation and pipeline, and stipulated to pay $8 per acre.

Secretary Vilas explained Section 10 as follows:

> The draught of bill provides that the land ceded for the town-site (except portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town-site

The outline by Secretary Vilas emphasizes the resolution of the trespass issues, and the explanation of the draft bill focuses on a right of access.

A second document that is instructive is a February 1888 letter from Commissioner of Indian Affairs J. D. C. Atkins to the Secretary of the Interior explaining the reason for including Section 10 in the Act. (Attached hereto as Exhibit 5.)

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the waters of any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town with the right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as may be necessary to provide with proper water and sewerage facilities.

This language seems to infer that Section 10 was put into the Act as a "precaution," consistent with the granting of a right of access to get to the water without trespassing.

The third document is an 1891 letter from Assistant Attorney General George H. Shields providing a legal opinion of the effect of Section 10. (Attached hereto as Exhibit 6.) Mr. Shields wrote:

> In view of the fact that the provision of said section of the statute is in derogation of the rights of the Indians as secured by treaty, I am of the opinion the grant should be strictly construed . . .
>
> . . . In other words, the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct operate, and maintain a canal. This right is in the nature of a mere license – authority to do an act, which without such authority would be illegal. . . . I conclude that the right so granted to said citizens is a personal one, and not assignable under present law.

The opinion by Assistant Attorney General George H. Shields is a contemporaneous interpretation of the Act of 1888 by an official charged with its administration. Such contemporaneous interpretations are entitled to great weight. *Aluminum Company of America v. Central Lincoln Peoples' Utility District,* 467 U.S. 380, 389 (1984) Shields concluded that the congressional grant in Section 10 was a mere license to go on the lands of the Indians for the purpose of bringing water to the town.

C. Implied Federal Water Rights

In addition to considering the historical context of the Act of 1888, it is helpful to understand the background of Indian reserved rights. The United States did not expressly convey water rights when it created reservations. Instead, it reserved the land, but was silent about conveying water rights in executive orders setting apart reservation lands and in treaties.

Federal reserved water rights on Indian reservations were not created by express treaty language or congressional language, but were recognized by judicial decision. Indian reserved rights are, therefore, "implied" federal reserve water rights. Interestingly, these implied Indian water rights were first recognized by the United States Supreme Court in 1908, several years after the Act of 1888 was passed. In *Winters v. United States*, 207 U.S. 564 1908, the court explained:

> That the government did reserve them (the waters) we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant. . . ."

Winters at 577.

1. Purpose of Reservation

The *Winters* case was the first to recognize an implied reservation of water rights, and subsequent cases clarified the policy. Implied reserved water rights may be granted where necessary to fulfill the primary purposes for which the reservation of land was created. *United States v. New Mexico*, 438 U.S. at 700-702. The 1868 Treaty of Fort Bridger established the reservation still held by the Shoshone-Bannock Indian Tribes. The purpose of the Treaty of Fort Bridger was:

> [T]o induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.

Skeem v. United States, 273 F. 93, 95 (9th Cir. 1921); *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

2. Tribes' Rights

To determine whether Pocatello or the Citizens were granted a portion of the reserved right from the Tribes, it is imperative to analyze the rights of the Tribes. The basis of Pocatello's argument is that Congress granted a portion of the Tribes' water right in conjunction with the ceding of land for a townsite. There is little support in law for the argument that Congress intended Indian water rights to be received by those who succeeded to title of land from sources other than Indian allottees. Where land is ceded, there is an inference that the Tribes determined they did not need that land. Therefore, the ceded land does not relate any longer to the primary purpose of the reservation – to benefit the Tribes.

Ceded lands were the focus of the claim to "super-*Walton*" rights asserted in Wyoming's *Big Horn* adjudication. *See Big Horn IV*, 899 P.2d 848, 850 1995. The cession of lands to the federal government indicated to the *Big Horn* court that the Tribes no longer needed the ceded land. Since the Tribes no longer needed the lands for their reservation, the lands no longer needed water rights. Thus, the court reasoned that any federal water rights on ceded land ceased to exist. *Big Horn* at 853-854. The *Big Horn* analysis is applicable here.

The *Big Horn* Court correctly identified the policy underlying Indian reserved water rights as requiring benefits to the Indians. That judicial policy cuts against a finding that Congress conveyed a portion of the Tribes' water rights with the Act of 1888. The underlying

question a court must ask is: **Would a finding of reserved water rights benefit the tribe or individual Indians?** The answer for *Walton* rights is "yes" because water rights appurtenant to allotment lands clearly make those lands more valuable to the Indians and would enhance the financial benefits to allottees, whether they held the land or sold it. The answer for land ceded to a townsite is "no."

Neither the Tribes nor individual Indians would realize any economic benefit from a water right on land ceded to a townsite because the lands passed from tribal control. Awarding a water right to ceded land would harm, rather than benefit, the Tribes. Such an action would lessen the reserved water right of the Tribes.

Therefore, allowing federal water rights related to the land cession for the Pocatello townsite is inconsistent with federal policy. Water rights on ceded land are not necessary for the primary purpose of the reservation and, thus, are not part of an implied federal reserve water right. A finding of a water right on ceded land would not benefit the Indians and would likely not be recognized by federal courts.

E. Pocatello's Compliance with State Law

It is interesting to note that Pocatello has complied with state licensing and transfer requirements for much of the state-based claims it asserts claim the same water as the federal claim. Pocatello has obtained state licenses for some of the water now claimed under a federal theory and has sought state permission to transfer other rights or to change elements such as points of diversion. Pocatello's compliance with state licensing and transfer proceedings is consistent with the view that it did not have a federal water right in 1888, but received a right of access. (A summary of Pocatello's state-based claims is attached hereto as Exhibit 7.)

In Idaho, state water rights follow the prior appropriation doctrine and are defined by the state constitution and state statutes. To obtain a state water right, a user must have put the water to beneficial use prior to the mandatory permit and licensing statutes, or must have applied to the Idaho Department of Water Resources for a permit or license. If IDWR approves the permit application, the user generally has five years to "perfect" the water right by putting the water to beneficial use and submitting proof of the appropriation to IDWR. It is difficult to understand why Pocatello applied for state licenses and transfers if it held the federal "trump" card. In addition to the water rights which Pocatello licensed or transferred in compliance with state law, at least three rights were previously decreed.

Pocatello has consented to the adjudication of its rights, has gone through state licensing, or has applied to the state administrative agency for transfer of elements for most of the water now claimed under its federal theory. Those licenses and decrees may act as a legal impediment to now claiming the water under a federal theory.

The SRBA District Court has cited prior state licenses in a decision denying the federal basis of dual-based claims for the United States Mountain Home Air force Base. ***Order Disallowing Uncontested Federal Reserved Water Right Claims (Mountain Home Air Force Base)*** (Subcase 61-11783, 61-11784 and 61-11785) (April 6, 2001). As in that case, Pocatello's longstanding compliance with state licensing and transfer statutes may preclude Pocatello from asserting a federal basis for these claims. Three state-based water rights of Pocatello were previously decreed. The prior decrees are not yet part of the record, but the *Director's Reports* indicate they were previously decreed. All three have very old priority dates, but the dates are after the date of the reservation. The prior decrees may preclude Pocatello from relitigating and claiming a different priority and a different theory. The doctrine of *res judicata* precludes parties and their privies in a final litigation from relitigating in a second suit against the same parties, not only the same claim or demand, but also all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group,* 119 Idaho 146, 804 P.2d 319 (1990).

The doctrine of collateral estoppel or issue preclusion may also apply. A final judgment such as a decree is conclusive on the parties to the judgment and their privies as to the issues determined, and precludes the parties from later relitigating the same issues. Unlike the doctrine of *res judicata,* collateral estoppel binds the parties in later litigation with outsiders as well as with parties to the first suit. *See Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1987).

Much of the water claimed here under a federal theory and also asserted under state law includes previously licensed water rights. The preclusive effect of previously issued licenses has previously been litigated in the SRBA.

Even if Pocatello's consent to licenses and administrative proceedings and transfer statutes is not dispositive of a federal-based claim, it is consistent with the Act of 1888 conveying a right of access rather than a federal water right.

VII. CONCLUSION

The question presented here is whether either Pocatello or the Citizens is entitled to a federal water right based on Section 10 of the Act of 1888.

Neither Pocatello nor the Citizens presented genuine issues of material fact that support a federal reserved water right. The Act of 1888 did not reserve land; it ceded land. Similarly, neither Pocatello nor the Citizens has alleged genuine issues of material fact that support a *Walton*-based water right. The Act of 1888 did not create any allotments. The question of whether Section 10 of the Act of 1888 granted a new type of federal water right is a case of first impression. After careful analysis of the language of Section 10, the facts, and the case law, this Special Master finds that the language of Section 10 was not "clear and plain" enough to express an intent to grant a portion of the Tribes' water right. Instead, the language appears to have granted a right of access to water sources in order to resolve trespass issues. Implied federal reserved water rights are limited to the minimum quantity necessary for the primary purposes of the reservation. Here, the primary purpose of the reservation was to benefit the Indians and to create a homeland. Water relating to land ceded from the reservation seems to be outside the primary purpose requirement and is, thus, without a federal water right. Furthermore, the policy and purpose for which federal courts recognized federal reserved water rights is to provide a benefit to the Indian tribes and their members. It is difficult to attach any tribal benefit to diminishment or sharing of a reserved right. Although Pocatello makes an intriguing argument for extending it a federal water right, this Special Master holds that such a right was not granted to Pocatello or the Citizens.

IT IS THEREFORE ORDERED THAT:

1) The City of Pocatello's *Motion for Summary Judgment* is **denied**.

2) The *Motions for Summary Judgment* by the United States, the State of Idaho, and the Shoshone-Bannock Tribes are **granted**.

DATED July 28, 2005.

/s/ Brigette Bilyeu
BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

Exhibit 1 – Executive Order of June 14, 1867

Exhibit 2 – Second Treaty of Fort Bridger

Exhibit 3 – Act of September 1, 1888

Exhibit 4 – Transmittal letter

Exhibit 5 – Atkins letter

Exhibit 6 – Shields letter

Exhibit 7 – Summary of state-based rights