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

In Re SRBA	)	**Consolidated Subcase 67-13701**
	)	**(United States and Nez Perce Tribe**
Case No. 39576	)	**Springs or Fountains Claims)**
	)	
	)	**ORDERS ON MOTIONS FOR**
	)	**SUMMARY JUDGMENT AND**
	)	**MOTIONS TO STRIKE**
	)	**and**
	)	**ORDER SETTING SCHEDULING**
	)	**CONFERENCE**
	)	

SUMMARY

1. There are genuine issues of material fact as to the intent of the parties and meaning when the United States and the Nez Perce Tribe used the phrase: "all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished."

2. A party to the adjudication does *not* have to allege or prove injury to have standing to file an objection or response to a claim reported in a director's report or abstract of federal reserved water rights and become a party to a subcase.

BACKGROUND [1]

Order of Reference

On February 2, 2000, former-Presiding Judge Barry Wood entered an ***Order of Reference Appointing Terrence A. Dolan Special Master for the Nez Perce Tribe Federal Reserved Water Rights in Reporting Areas 19, 22 and 24, Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 and 86***.

[1] For a brief history of court proceedings involving the springs or fountains claims to date, see the Special Master's ***Order Denying Motion to Dismiss***, dated August 10, 2001.

Order of Consolidation

On May 8, 2000, the Special Master entered an ***Order Consolidating Subcases*** consolidating the "springs or fountains" claims [2] filed by the United States (as trustee for the Nez Perce Tribe) and the Nez Perce Tribe and designating 67-13701 as the lead subcase.[3]

Early Attempts to Identify Test Cases

On October 11, 2001, the Special Master required the United States and the Nez Perce Tribe ("claimants") and the objectors to identify as many as 5 springs or fountains claims on federal lands and 5 claims on private / non-federal public (state-owned) lands for purposes of establishing "test cases" for trial. ***Trial Schedule Order***, filed October 11, 2001.

► **Claimants**

The United States and the Nez Perce Tribe filed their *Notice of Claimants' Compliance with Trial Schedule Order* on November 30, 2001, listing 10 claims "located on public and private lands in that portion of the 1855 Nez Perce Reservation which was ceded in 1863 . . . located ¼ mile or more from a perennial stream, in order that they meet the treaty requirement that they be 'not adjacent to or directly connected with, the streams or rivers within the lands hereby relinquished'." *Notice*, at 5.

On July 11, 2002, the United States and the Nez Perce Tribe filed their *Notice of Compliance with the Court Order to Revise Test Cases* amending their list by switching one test case (78-11401) from the federal lands category to private or state-owned lands and deleting 2 test cases (79-12638 and 79-12726) from the private or state-owned lands category. The test cases identified by the United States and the Nez Perce Tribe were:

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[2] The phrase, "springs or fountains," is at the core of these proceedings and can be found in the last paragraph in Article 8 of the 1863 Treaty with the Nez Perce Tribe:

> The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.

Treaty with the Nez Perce of June 9, 1863, Article 8, 14 Stat. 647, 651.

[3] IDWR listed 1,886 springs or fountains claims in its *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps*, filed on March 9, 1999. Of that total, 1,243 claims are located on private or state-owned lands. Attachment to *United States' Notice of Compliance*, filed January 4, 2001, at 2-3. To provide some additional perspective during later arguments on motions for summary judgment, counsel for the United States said there are now 3,500 members of the Nez Perce Tribe. It was not clear if that included all enrolled members of the Tribe or only those members currently residing on the Nez Perce Indian Reservation.

A. Claims on Federal Lands

BIA Number [4]	NPT Number [5]	USFS Number [6]
78-11298	78-11659	78-04249
~~78-11401~~	~~78-11762~~	~~None Known~~
79-12609	79-13292	79-13639
79-13788	79-13916	79-04272
84-12077	84-12095	84-10854

B. Claims on Private / State Lands

BIA Number	NPT Number	Private Claim Number
78-11388	78-11749	None Known
78-11401	78-11762	None Known
~~79-12638~~	~~79-13321~~	~~None Known~~
~~79-12726~~	~~79-13409~~	~~None Known~~
82-11391	82-11637	82-10173
85-13514	85-14585	85-11118

Claimants' Notice, at 7, and *United States' and Nez Perce Tribe's Notice of Compliance with the Court Order to Revise Test Cases*, at 4.

In their *Notice*, the United States and the Nez Perce Tribe also explained how their test cases were investigated:

> As the Claimants were developing these claims, information about the existence of springs in the 1863 ceded area was obtained from a variety of sources including publicly available maps and claims submitted by other parties in the SRBA. On public lands where the Claimants have access to the springs, the existence and exact location of the springs were verified by site visits.
>
> For the claims on private land, however, the available information was much more limited. In many instances, Claimants' knowledge of the existence of the spring is based on a claim submitted by another party to the SRBA. Frequently, the location given in those claims is more generic, only identifying the quarter section (160 acres) or the quarter-quarter section (40 acres) within which the spring is located. From this limited information, it was impossible for the Claimants to conclusively determine the existence, nature, and exact location of springs on private land. In addition, almost all of the private landowners with an overlapping springs claim did not object to the Claimants' springs and fountains claims. Further, Claimants have not objected to reported springs claims located on private lands within the 1863 ceded area because the tribal claims are senior and because Article 8 of the 1863 Treaty anticipates shared use of the reserved springs and fountains. In addition, some of the private land claims located within the 1863 ceded area will not be reported to this Court until at least 2003 [footnote omitted].

Claimants' Notice, at 5-6.

[4] "BIA" means United States of America, Department of Interior, Bureau of Indian Affairs.
[5] "NPT" means Nez Perce Tribe.
[6] "USFS" means United States of America, Department of Agriculture, Forest Service.

► **Objectors**

On December 28, 2001, objector the State of Idaho filed its *Notice of Compliance with Trial Schedule Order* designating 5 claims on federal lands and 5 claims on private or state-owned lands as test cases. Its 10 test cases were:

A. Claims on Federal Lands

BIA Number	NPT Number	USFS or BLM[7] Number
69-11469	69-11481	69-11428
69-11471	69-11483	69-07069
77-13985	79-14078	7706581220 [?]
78-11491	78-11852	(none known)
79-12865	78-13548	(none known)

B. Claims on Private / State Lands

BIA Number	NPT Number	Private Claim Number
69-10884	69-11175	69-04011
69-10887	69-11178	(none known)
69-10895	69-11186	69-07005
69-10976	69-11267	(none known)
69-11474	69-11486	(none known)

State's *Notice*, at 3-4.

In its *Notice*, the State wrote: "[I]t must be noted that the State's designation of test cases is hampered by the fact that the United States has not yet disclosed the underlying data supporting claims to springs identified by Bureau of Land Management (BLM) personnel." State's *Notice*, at 2.

Objectors Pioneer Irrigation District, *et al.*,[8] filed their *Notice of Compliance / Notice of Joinder* on December 27, 2001, joining with the State's designation of test cases. Similarly, objectors the City of Lewiston and the Federal Claims Coalition [9] each filed a *Notice of Joinder in the State of Idaho's Identification of Claims* on December 28, 2001.

[7] "BLM" means United States of America, Department of Interior, Bureau of Land Management.

[8] Objectors who joined with Pioneer Irrigation District in filing its *Notice of Compliance / Notice of Joinder* were: Settlers Irrigation District, Payette River Water Users Association, Little Salmon Water Users Association, Thompson Creek Mining Company, Thousand Springs Ranch, Newfoundland Partners and Sinclair Oil Company dba Sun Valley Company.

[9] The Federal Claims Coalition includes the Wilder and Burley Irrigation Districts and the Twin Falls Canal Company. Idaho Power Company joined the Coalition in filing its *Notice of Joinder*.

Motion to Withdraw

On January 9, 2002, the United States and the Nez Perce Tribe filed a *Motion to Withdraw Without Prejudice the Claims Listed on Attachment A* seeking to withdraw 54 of their springs or fountains claims. That number was later reduced to 38 claims. Even though the 38 claims were not among the test cases set for trial, the *Motion* was denied by the Special Master, in part because determination of the test cases will likely resolve the threshold issue of entitlement for all similar claims and a recommendation now that the 38 claims be dismissed by the Presiding Judge would invite motions to alter or amend and challenges. Each of those steps would only prolong a final determination of the claims. See ***Order on Pending Motions***, filed April 2, 2002, at 4-6.

Expert Reports

The ***Trial Schedule Order***, dated October 11, 2001, set deadlines for the parties to file expert reports. The parties filed the following reports:

► **United States** -- *Notice of Compliance with Trial Schedule* Order, filed February 1, 2002:

> Carla Homstad, "The Reservation of Springs and Fountains in Article 8 of the Nez Perce Treaty of 1863," dated February 1, 2002.
>
> Stephen G. Leonard, "Ecology and Economics of Springs and 'Fountains' for Livestock Use and Production -- with emphasis on near stream habitats," dated January 24, 2002.
>
> Lora McKusick, "Training, Data Collection and Mapping of Springs in the Nez Perce Ceded Area," undated.
>
> Robert Delk, "Expert Witness Report," undated.

► **Nez Perce Tribe** -- *Notice of Claimants' Compliance with Trial Schedule Order*, filed February 1, 2002, and *Notice of Compliance with Amended Trial Schedule Order*, filed February 22, 2002:

> Dennis C. Colson *Affidavit* and "The Origin of the Springs or Fountains Clause in the 1863 Nez Perce Treaty," dated January 31, 2002.
>
> Alan G. Marshall, Ph.D., *Affidavit*, dated February 21, 2002.

► **State of Idaho** -- *Second Preliminary Notice of Compliance*, filed March 21, 2002, and *Notice of Compliance*, filed March 29, 2002:

> Dr. Jeff Mosley, "Grazing Distribution of Nez Perce Horses and Cattle in North-Central Idaho, circa 1863," dated March 21, 2002.
>
> David B. Shaw, "Evaluation of Claims to Water Rights for Nez Perce Springs and Fountains Test Cases," dated March 22, 2002.
>
> Robert E. Fricken, Ph.D., "The 1863 Treaty and the Issue of Spring Enclosure," dated March, 2002.

► **Objectors Pioneer Irrigation District, *et al.*** -- *Notice of Compliance*, filed March 29, 2002:

> Dr. Chad C. Gibson, "Utilization of Springs and 'Fountains' as Livestock Watering Sources on Rangeland," dated March 17, 2002.
>
> Dr. Charles E. Brockway and Terry M. Scanlon, "Springs and Fountains Hydraulic Evaluation Expert Report," dated March 27, 2002.

Final List of Test Cases

At the State's urging, on July 25, 2002, the Special Master entered an ***Order*** requiring the United States and the Nez Perce Tribe to amend their lists of test cases by deleting those claims they did not intend to support at trial. On July 26, 2002, the United States and the Nez Perce Tribe filed their *Amended Notice of Compliance* listing 7 claims they would not "defend" because "field work conducted last month which has provided new and previously unavailable information demonstrating that these springs are not likely to fall within the definition of springs and fountains as defined in the 1863 Treaty." Two of those claims were originally designated as test cases by the United States and the Nez Perce Tribe. The other 5 were designated by the State and other objectors. That left 13 test cases.

On September 24, 2002, at the hearing on motions for summary judgment, the United States and the Nez Perce Tribe announced they would no longer support test case BIA No. 77-13985 because the source of the water is an adit -- a horizontal passage to a mine which probably did not exist in 1863. The final list of 12 test cases, then, included the following claims (only BIA and private / State claim numbers will be used hereafter to avoid confusion):

A. Claims on Federal Lands

BIA Number	Name of Spring
69-11469	spring (USFS)
78-11298	Rodger Spring (USFS)
78-11491	spring (BLM)
79-12609	Dairy Mountain Lookout Spring (USFS)
79-12865	spring (USFS)
79-13788	Free Use Road Spring (USFS)
84-12077	spring (USFS)

B. Claims on Private / State Lands

BIA Number	Name of Spring	Private Claim Number & Claimant
69-10884	spring	69-04011 (Deborah Davis & Dennis Edwards)
78-11388	spring	unknown
78-11401	Tepee Springs	unknown (State)
82-11391	spring	82-10173 (Richard M. Connor, Jr.)
85-13514	spring	85-11118 (Eugene & Mark Burch)

Motions for Summary Judgment [10]

► **United States and Nez Perce Tribe**

The United States and the Nez Perce Tribe filed their *Joint Motion for Partial Summary Judgment* on August 9, 2002. Attached to the *Joint Motion* were: 1) *Joint Statement of Undisputed Facts*, 2) *Memorandum in Support* and 3) affidavits by Alan G. Marshall, Dennis C. Colson, K. Heidi Gudgell, Carla Homstad, David A. Jarvis and David R. Tuthill, Jr..

► **State of Idaho**

The State of Idaho filed its *Motion for Summary Judgment* on August 9, 2002, along with a *Memorandum in Support* and affidavits by David B. Shaw and Steven W. Strack.

► **Pioneer Irrigation District, *et al.***

The Pioneer Irrigation District, *et al.*, filed their *Motion for Summary Judgment* on August 9, 2002, along with a *Memorandum in Support* and affidavits by Charles E. Brockway, Terry M. Scanlon and Chad C. Gibson.[11]

[10] Objector John W. Brewer filed a *Motion for Summary Judgment*, along with a *Memorandum in Support* and an affidavit by Mr. Brewer, on August 1, 2002. Objectors Dr. Scott and Connie Harris filed their *Motion for Summary Judgment*, *Memorandum in Support* and affidavits by Dr. Harris and Jeffrey C. Fereday on August 12, 2002. None of these objectors' claims are among the 12 test cases, so their *Motions* will be addressed separately from these ***Orders*** at a later date.

Preliminary Motions

► **Pioneer Irrigation District, *et al***

On August 28, 2002, the Pioneer Irrigation District, *et al.*, filed a *Motion to Strike* asking that the Special Master strike certain paragraphs and exhibits in the affidavit by David A. Jarvis attached to the United States and Nez Perce Tribe *Joint Motion for Partial Summary Judgment*. Pioneer also sought to strike certain statements in the United States and Nez Perce Tribe *Memorandum* and *Joint Statement of Undisputed Facts*. Pioneer sought to strike statements and arguments concerning the standing of certain SRBA party-claimants to file objections in consolidated subcase 67-13701 -- "the affidavit and arguments on that point are now immaterial, redundant, and in disregard of the Special Master's order and the District Court's recent decision." *Motion to Strike*, at 4.

► **Federal Claims Coalition**

On August 30, 2002, the Federal Claims Coalition filed its *Motion to Strike*, essentially asking for the same relief requested by Pioneer Irrigation District, *et al.*, in their *Motion to Strike*. Like Pioneer, the Coalition cited I.R.C.P. Rule 12(f) which states: "[T]he court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Hearing on Preliminary Motions and Motions for Summary Judgment

A hearing on the preliminary motions and then the motions for summary judgment was held over 2 days at the Ada County Courthouse in Boise, Idaho, on September 24 and 25, 2002. Peter C. Monson, Vanessa Boyd Willard and Frank Wilson appeared for the United States; K. Heidi Gudgell and Steven C. Moore appeared for the Nez Perce Tribe; Steve W. Strack and John R. Kormanik appeared for the State of Idaho; Angela D. Schaer and Scott L. Campbell appeared for the Pioneer Irrigation District, *et al.*; John K. Simpson appeared for the Federal Claims Coalition and Idaho Power Company; and James W. Givens appeared for John W. Brewer.[12]

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[11] On August 16, 2002, the Federal Claims Coalition filed its *Notice of Joinder in the State of Idaho's and Pioneer Irrigation District, et al.'s Motions for Summary Judgment*. On August 22, 2002, John W. Brewer filed his *Notice of Joinder in the State of Idaho's and Pioneer Irrigation District, et al.'s Motions for Summary Judgment.*

[12] Technical problems with the Court's recording system continue to delay transcription of more than ½ of the September 24 / 25, 2002 hearing on motions for summary judgment. There is no indication when, or if, the remainder of the recording can be transcribed.

DISCUSSION

Standard of Review for Entry of Summary Judgment

Idaho Rules of Civil Procedure, Rule 56(c), states that summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The standard of review is whether there are genuine issues of material fact and, if not, whether the prevailing party is entitled to judgment as a matter of law. *Wells v. U.S. Life Ins. Co*., 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991). Motions for summary judgment should be granted with caution; if the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991). However, if the court will be the ultimate fact finder and both parties move for summary judgment, basing their motions on the same evidentiary facts, theories and issues, then summary judgment is appropriate even though conflicting inferences are possible. *Aid Ins. Co. (Mut.) v. Armstrong*, 119 Idaho 897, 811 P.2d 507 (Ct. App. 1991).

Canons of Treaty Construction

Over the years, courts have developed unique rules or canons of construction for interpreting treaties between the United States and Indian tribes and federal statutes touching on Indian affairs: [13]

> [G]enerally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. These canons play an essential role in implementing the trust relationship between the United States and Indian tribes and are involved in most of the subject matter of Indian law.

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 225.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have

[13] In 1871, further treaties with Indian tribes were prohibited by statute. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. §71). Thereafter, the usual method of dealing with Indian tribes and establishing reservations was either by statute, executive order or agreement later approved by statute.

> understood them and any doubtful expressions in them should be resolved in the Indians' favor [citation omitted].

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970); also see *United States v. Adair*, 723 F.2d 1394, 1413 (1983) (treaty construed as Indians would have understood it given practices and customs of tribe at time treaty was negotiated.).

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. State of Washington, 315 U.S. 681, 684-685, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942); also see *Cree v. Flores,* 157 F.3d 762, 769 (9th Cir.1998).

> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. . . . "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Washington v. Washington State, Etc., 443 U.S. 658, 675-676, 99 S. Ct. 3055, 3069, 61 L.Ed.2d 823 (1979), quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899).

> The treaty is to be construed as the Indians would have understood it, as disclosed by the practices and customs of the Indians at the time the treaty was negotiated, and by the history of the treaty, the negotiations that preceded it, and the practical construction given the treaty by the parties. In sum, the treaty is to be interpreted to attain the reasonable expectations of the Indians [citations omitted].

United States v. Top Sky, 547 F.2d 486, 487 (9th Cir.1976).

> [I]n the context of treaty-reserved usufructuary rights, courts will not readily imply a congressional intent to repeal such rights. "[A]brogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must be clear from the circumstances and legislative history surrounding a Congressional act." [citation omitted].

Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 457 (7th Cir.1998), quoting *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 352 (7th Cir.1983); also see *Yukon Flats School Dist. v. Venetie Tribal Gov't*, 101 F.3d 1286, 1294 (9th Cir.1996), quoting Cohen, *Handbook of Federal Indian Law*, at 224 ("Congress's intent to abrogate Indian rights must be indicated by a 'clear and plain statement'.") and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.").

Genuine Issues of Material Fact

The pleadings, depositions and affidavits suggest there are few genuine issues of material fact in consolidated subcase 67-13701. There were no major disagreements over such terms as

"springs or fountains"(an issue of water from the earth[14]), "streams or rivers" (perennial streams[15]) and "use in common" (shared use[16]). None of the parties disputed that the claims designated as test cases are within the portion of the 1855 Nez Perce Reservation ceded in 1863.[17] And arguments about whether the United States should have kept back from settlement the land surrounding the springs or preserved perpetual rights of way raised issues of *relinquishment* of treaty rights rather than *establishment* of such rights, *viz*, post-treaty considerations. While post-treaty events may shed light on the parties' intent at the time the 1863 Treaty was signed, at this point (pre-trial proceedings) the court is more focused on the specific language of the Treaty.

However, there are genuine issues of material fact concerning the meaning of the phrase "all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished. . . " and the intent of the parties. The United States and the Nez Perce Tribe suggested a standard of ¼ mile for nearly all claims -- if a spring is located ¼ mile or more from a perennial stream, the spring meets the treaty requirement of "not adjacent to, or directly connected with. . . ." The State, on the other hand, suggested a ½ mile standard in steep terrain -- only those springs ½ mile or more from a perennial stream would meet the requirement. Where the terrain is flat, the State suggested a 2 mile standard.

Both sets of standards derive from the grazing distribution of horses and cattle, yet the claimed uses for these treaty-reserved "watering places" include: "drinking, livestock watering, cooking, hunting game, gathering food and medicines, bathing, making horn bows and certain religious and ceremonial uses." *United States' and Nez Perce Tribe's Memorandum in Support of Joint Motion for Partial Summary Judgment*, at 48. Those additional purposes suggest that any distance standard based solely on range management considerations (or *any* arbitrary distance, for that matter) may not be adequate to identify which springs or fountains the parties to 1863 Treaty intended to reserve.[18]

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[14] However, there was some discussion of whether "springs or fountains" includes seeps.

[15] The State suggested "streams or rivers" *may* include intermittent streams, too, in certain circumstances.

[16] Some parties noted in passing that where the spring is now located on privately-owned land, "use in common of both whites and Indians" may include the general public and not just the landowner and members of the Nez Perce Tribe.

[17] Counsel for Pioneer Irrigation District, *et al.*, suggested there may be hearsay problems using maps to prove where certain springs are located or whether they even exist.

[18] During closing arguments on the motions for summary judgment, the State was willing to concede the existence of reserved rights for springs or fountains on federal public land, but not on state or private land. None of the other objectors were willing to make such a concession.

Comparable Reserved Rights

Counsel for the parties were unable to cite any other case where an Indian tribe explicitly reserved by treaty a usufructuary right to springs ("watering places") "for the use in common of both whites and Indians" within a ceded portion of their reservation. In other words, this is a case of first impression. However, the 1855 treaty (12 Stat. 951, proclaimed on April 18, 1859) between the United States and the Yakima Indians, *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), may provide some guidance.

In that early case, the treaty secured to the Yakima Indians the right of taking fish "at all usual and accustomed places in common with the citizens of the territory" of Washington. The United States Supreme Court first reminded the parties that the treaty was not a grant of rights *to* the Indians, but a grant of right *from* them, -- a reservation of those rights not granted.[19] The Court then held:

> Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land, -- the right of crossing it to the river, -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.
>
> . . .
>
> The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state

[19] In the 1863 Treaty, the Nez Perce Tribe ceded 6,932,270 acres to the United States and retained 784,996 acres. *Affidavit of Carla Homstad*, lodged August 9, 2002, at 11, fn 24. That meant "a relinquishment of about 9/10 of the former Reservation estimated at about 90,000 square miles, leaving about 10,000 in the new Reservation." Robert E. Fricken, *The 1863 Treaty and the Issue of Spring Enclosure: A Historical Report*, lodged March 29, 2002, at 2, quoting Washington Superintendent of Indian Affairs Calvin Hale's letter dated June 29, 1863.

> unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

Winans, 198 U.S at 381-382 and 384, 25 S.Ct. at 664-665; also see *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 352 (7th Cir.1983) ("[T]reaty-recognized rights of use depend neither on title nor right of permanent occupancy; rather, they are similar to a *profit a prendre*.").

After stating those broad principles, the Supreme Court in *Winans* remanded the case to the lower court for further proceedings: "What rights the Indians had were not determined or limited[; t]his was a matter for judicial determination regarding the rights of the Indians and rights of the respondents." *Winans*, 198 U.S. at 384, 25 S.Ct. at 665. In such "usual and accustomed places" fishing rights cases, courts have assumed what was customary at the time of the treaty is controlling, *Puyallup Tribe v. Washington*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968), and courts rely on anthropological and historical evidence to establish such facts. Cohen, *Handbook of Federal Indian Law*, at 455.

Necessity for Trial on Merits

Cases such as *Winans* and *Puyallup Tribe* may be helpful in establishing canons of treaty construction, but it remains for this court to develop a sufficient factual record to support any decision concerning the United States' and the Nez Perce Tribe's claims to reserved water rights for springs or fountains. In this case, it is incumbent on the Special Master to examine further into genuine issues of material fact. What is the meaning of, or what did the parties intend, when they used the phrase: "all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished. . . ?" Again, this is a case of first impression; there are no existing judicial interpretations of this treaty language. To help the court answer those questions, a trial is necessary. Although both sides moved for summary judgment on the same issue, under the applicable canons of treaty interpretation, there are not sufficient facts in the record from which the Special Master can render an interpretation of the treaty language.

Motions to Strike - Standing

The Pioneer Irrigation District, *et al.*, and the Federal Claims Coalition moved to strike arguments made by the United States and the Nez Perce Tribe concerning the standing of certain

objectors in consolidated subcase 67-13701. In their *Joint Motion for Partial Summary Judgment*, filed August 9, 2002, the United States and the Nez Perce Tribe wrote:

> Two Private Objectors, the Little Salmon Water Users Association and the Payette River Water Users Association, lack statutory standing as well as constitutional standing to object, and their objections must be dismissed. Other Private Objectors lack constitutional standing to object to these claims because they cannot show any potential injury in fact to their water rights claims should this Court decree the rights as claimed.

Joint Motion, at 3-4.

The law of the SRBA case is clear -- all parties to the adjudication have standing to file an objection or response to any claim for a water right in the SRBA:

> In the SRBA, any *party to the adjudication* can file an objection or response to a claim reported in a director's report or abstract of federal reserved water rights and become a *party to a subcase*. I.C. §§ 42-1412 and 42-1411(5). ***AO1*** defines "party to the adjudication" as "any claimant as defined in I.C. § 42-1401A(1) and (6)." ***AO1* § 2(q)**. Idaho Code section 42-1401A defines "claimant" as "any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted. I.C. § 42-1401A(1). Idaho Code section 42-1401A(6) defines "party" as "any person who is a claimant or who is served or joined." I.C. § 42-1401A(6). . . . In *Fort Hall Water User's Association v. United States*, 129 Idaho 39, 921 P.2d 739 (1996), the Idaho Supreme Court affirmed the ruling of the SRBA district court wherein the court denied standing to a water users association to file an objection in the SRBA where the water users association was not claiming ownership of a water right and therefore did not fit within the definition of "claimant" under Idaho Code section 42-1401(A) [emphasis in original].

Presiding Judge Roger S. Burdick's ***Order on Motion to Participate/Intervene***, Consolidated Subcase No. 75-13316 ("Wild & Scenic Rivers Claims"), dated July 29, 2002, at 5-7.

The question to be answered, then, is whether certain objectors named by the United States and the Nez Perce Tribe in their *Joint Motion for Partial Summary Judgment* are "parties to the adjudication." The rule is that persons [20] 1) who assert ownership of water rights in Idaho, or 2) on whose behalf ownership of rights to the use of water is asserted or 3) who are served or joined, are claimants (hence, parties to the adjudication) and may become parties to a subcase merely by filing an objection or response to a claim. There is no requirement that objectors must

[20] A "person" means "an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state of Idaho or any political subdivision, the United States, an Indian tribe, or any other public or private entity, except that 'person' does not include the director of the department [Idaho Department of Water Resources] or the department." I.C. § 42-1401A(7).

first show injury to their own water right claims to file an objection. If the Court were to inquire into whether each party must prove injury before filing an objection or response, the entire SRBA process would grind to a halt and expert reports on hydrology and geomorphology would swamp the Court.[21]

So, injury, whether direct, remote or potential, is not relevant in determining who may file an objection in the SRBA. Any party to the adjudication can object or respond to another's water right claim. What is relevant, though, is whether the Little Salmon Water Users Association and the Payette River Water Users Association are parties to the adjudication. In other words, have they asserted ownership of Idaho water rights or has someone asserted such ownership on their behalf, or were they served or joined as parties to the SRBA? If so, they are proper parties and valid objectors.

The two names -- Little Salmon Water Users Association and Payette River Water Users Association -- do not appear on IDWR's nor the SRBA Court's records as water right claimants in the SRBA. However, the record in this matter will require further examination before the Special Master can rule on their status as objectors in consolidated subcase 67-13701. For instance, has someone asserted ownership of a water right on their behalf or were they served or joined as parties to the SRBA?

For these reasons, the *Motions to Strike* filed by the Pioneer Irrigation District, *et al.*, and the Federal Claims Coalition should be granted on the issue of standing to file an objection -- parties to the adjudication do *not* have to allege or prove injury to have standing to file an objection or response. But those portions of the *Motions* concerning whether the Little Salmon Water Users Association and the Payette River Water Users Association have standing to object to the United States' and Nez Perce Tribe's springs or fountains claims will be held in abeyance until the record is developed further.

CONCLUSIONS OF LAW

1. The *Joint Motion for Partial Summary Judgment* and the *Motions for Summary Judgment* filed by the United States and the Nez Perce Tribe, the State of Idaho and the Pioneer Irrigation

[21] From the language in the United States and Nez Perce Tribe *Joint Motion for Partial Summary Judgment*, they seemed to agree that at least those "private objectors" listed in their footnote 2 (Twin Falls Canal Company, *et al.*) are water right claimants in the SRBA.

District, *et al.*, must be denied because the pleadings and depositions on file, together with the affidavits, show there are genuine issues of material fact and the moving parties are not entitled to judgment as a matter of law.

2. The *Motions to Strike* filed by the Pioneer Irrigation District, *et al.*, and the Federal Claims Coalition should be granted, in part, on the issue of standing to file objections to the United States and Nez Perce Tribe claims -- parties to the adjudication do *not* have to allege or prove injury to have standing to file an objection or response to a claim reported in a director's report or abstract of federal reserved water rights and become a parties to a subcase. The matter of attorney fees and costs will be addressed later.

ORDERS

THEREFORE, IT IS ORDERED that:

1. The United States and Nez Perce Tribe *Joint Motion for Partial Summary Judgment*, the State of Idaho *Motion for Summary Judgment* and the Pioneer Irrigation District, *et al.*, *Motion for Summary Judgment* (the latter two *Motions* having been joined in by the Federal Claims Coalition and John W. Brewer) are **denied**;

2. The Pioneer Irrigation District, *et al.*, *Motion to Strike* and the Federal Claims Coalition *Motion to Strike* are **granted, in part**, on the issue of whether certain parties to the adjudication have standing to file objections to the United States and Nez Perce Tribe claims; and

3. A scheduling conference shall be held by telephone on **Thursday, March 27, 2003, 1:30 p.m.** The parties should expect a trial setting at the SRBA Courthouse in Twin Falls, Idaho, and a beginning date within 90 days of the scheduling conference.

DATED February 18, 2003.

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TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication