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 03-10022**
	)	**(Nez Perce Tribe Instream Flow Claims)**
Case No. 39576	**)**	
	)	

ORDER ON MOTION TO STRIKE TESTIMONY OF DENNIS C. COLSON

ORDER ON UNITED STATES AND NEZ PERCE TRIBE S JOINT MOTION TO SUPPLEMENT THE RECORD IN RESPONSE TO THE OBJECTORS' MOTIONS FOR SUMMARY JUDGEMENT, I.R.C.P. 56(f)

ORDER ON MOTION TO STRIKE EXHIBIT TRANSCRIPTION OF LETTER FROM GENERAL PALMER TO GEORGE MANYPENNY, COMMISSIONER OF INDIAN AFFAIRS

ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE STATE OF IDAHO, IDAHO POWER, POTLATCH CORPORATION, IRRIGATION DISTRICTS, AND OTHER OBJECTORS[1] WHO HAVE JOINED AND/OR SUPPORTED THE VARIOUS MOTIONS

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1 There are a large number of Idaho cities (61), entities, and/or individuals who have joined and/or supported the various motions for summary judgment and/or motions to strike. Because their individual identities are not relevant to these orders, they are not separately listed here.

I.
APPEARANCES[2]

Mr. Albert Barker, Esq., Hawley Troxell Ennis & Hawley, Boise, Idaho, for the Boise Kuna Irrigation District, Federal Claims Coalition, et al.

Mr. Steven Strack, Esq., Boise, Idaho, Deputy Attorney General for the State of Idaho

Mr. Michael Mirande, Esq., Miller Bateman LLP, Seattle, Washington, for the Idaho Power Company

Mr. Peter Monson, Esq., Denver, Colorado, for the United States Department of Justice, Bureau of Indian Affairs

Mr. Steven Moore, Esq., Native American Rights Fund, Boulder, Colorado, for the Nez Perce Tribe

Mr. Douglas B.L. Endreson, Esq., Sonosky Chambers Sachse & Endreson, Washington, D.C., for the Shoshone-Bannock Tribe

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

These motions for summary judgment were argued in open court on October 13, 1999, in Boise, Idaho. On October 15, 1999, the Court, by letter, informed counsel that it had requested a transcript of the hearing to aid the Court in writing this decision. The Court informed the parties that it had given the Reporter until November 3, 1999, to prepare the transcript. Therefore, this matter is deemed fully submitted for decision on the next business day, or November 4, 1999.

III.
ORDER ON MOTION TO STRIKE TESTIMONY OF DENNIS C. COLSON

On September 7, 1999, a number of objectors filed a motion renewing their Motion to Strike the Testimony of Dennis C. Colson. The stated basis of the motion is:

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[2] There are multiple counsel of record representing the various parties in this consolidated subcase. Only those who actually argued the motions for summary judgment on October 13, 1999, are listed under the Appearances.

> Colson does not qualify as an expert witness, and because the conclusions drawn in his testimony are legal, not historical, they are inadmissible under Idaho Rules of Evidence 702.

The Court heard this motion on September 20, 1999. After the hearing, and by written order dated October 5, 1999, the Court announced that it was deferring its ruling on this motion until after the Court heard the oral arguments on summary judgment (which were then scheduled to be heard October 13, 1999). The basis of the Court's action in this regard was that the Court needed to hear the oral arguments on summary judgment before it could determine whether the testimony of Mr. Colson was even legally relevant to the issues on summary judgment. If Mr. Colson's testimony was legally relevant, depending upon the Court's determination of the substantive issues on summary judgment, the Court would then rule on the issues raised in the motion to strike.

Based upon the rulings which follow it is not necessary to rule on whether Professor. Colson's testimony and conclusions are admissible, and therefore, no further ruling under this motion is required. To be clear, this Court is not ruling one way or the other on whether Professor Colson qualifies as an expert or whether his conclusions are legal in nature and not historical.

IV.
ORDER ON UNITED STATES AND NEZ PERCE TRIBE S JOINT MOTION TO SUPPLEMENT THE RECORD IN RESPONSE TO THE OBJECTORS MOTIONS FOR SUMMARY JUDGEMENT I.R.C.P. 56(f)

On October 23, 1998, the United States and the Nez Perce Tribe filed a joint motion pursuant to I.R.C.P. 56(f) to supplement the record in response to the Objectors' motions for summary judgment. The motion was supported by a joint memorandum lodged October 23, 1998.

This motion was filed in response to Judge Hurlbutt's oral ruling on October 13, 1998 (order entered October 15, 1998) to the effect that the Court granted a motion to strike Professor Colson's “first" affidavit. The motion to supplement seeks to add affidavits and/or documents to the record because Professor Colson's “first" affidavit was stricken, i.e. in place of Professor Colson's stricken affidavit. However, the United States and the Nez Perce Tribe have now filed

Professor Colson's February 1999 expert report which is the subject of section III of this Order (Motion to Strike Testimony of Dennis C. Colson). The motion to supplement is in the alternative, in the event the Court strikes the "testimony" (February 1999 Report) of Professor Colson. See transcript of September 20, 1999, p. 88, ll. 14-24.

Because this Court has not stricken the testimony of Professor Colson (his February 1999 Report) as stated in paragraph III above, this alternative relief is **denied**.

V.
ORDER ON MOTION TO STRIKE EXHIBIT TRANSCRIPTION OF LETTER FROM GENERAL PALMER TO GEORGE MANYPENNY, COMMISSIONER OF INDIAN AFFAIRS

On August 31, 1999, Mr. Peter Monson, on behalf of the United States, filed with this Court a First Supplemental Declaration. Attached to this Declaration are three documents: (1) letter from James Doty to Isaac Stevens, dated March 26, 1855 (Exhibit 21); (2) a letter from General Joel Palmer, Superintendent of the Oregon Territory, to George Manypenny, Commissioner of Indian Affairs, dated April 13, 1855 (Exhibit 22); and (3) a transcript of letter from Palmer to Manypenny (also marked as Exhibit 22).

On September 10, 1999, Mr. Albert Barker, on behalf of the Objectors, comprising the Federal Claims Coalition and Idaho Power, filed a Motion to Strike the exhibit transcription (item 3 of the First Supplemental Declaration) of the letter from Palmer to Manypenny.

The stated basis of the motion is that the transcription of the letter is not properly authenticated under I.R.E. 901 and is not self-authenticating under I.R.E. 902 and, therefore, moves that it be stricken from the record.

Based upon this Court's ruling on the dispositive summary judgment motions as hereinafter stated, no ruling on this motion to strike is necessary.

VI.
THE ISSUES STATED IN THE MOTIONS FOR SUMMARY JUDGMENT AND THE RESPONSES THERETO

IDAHO POWER COMPANY (Hereinafter "IPCo")

IPCo states this motion presents six issues:

(1) Whether the geographic scope of the "exclusive" "on-reservation" fishing right reserved in the Treaty With The Nez Perce of 1855 was reduced commensurately with the reduction of the Tribe's reservation under the Treaty With The Nez Perce of 1863 and the Agreement With The Nez Perce of 1893, and if so, whether the "off-reservation "in common" fishing right contained in the Treaty of 1855 is therefore the sole basis upon which the Tribe can seek in-stream flows on the main stem of the Snake River?

(2) Whether the Tribe's right, set forth in the Treaty of 1855, to fish "in common" with non-treaty fishers at usual and accustomed fishing places off the reservation can serve successfully as the basis for the Tribe's claims for in-stream fisheries-flows in the Snake River?

(3) Whether, on the basis of the legal determinations and final judgment in Nez Perce Tribe v. Idaho Power Company, 847 F. Supp. 791 (D. Idaho 1994) ("Idaho Power"), the Tribe and the United States should be estopped from pursuing their fisheries flow claims predicated on the Tribe's off-reservation treaty fishing right?

(4) Alternatively, whether the Tribe's 1863 and 1893 land cessions resulted in the cession of all water rights -- including any flow rights -- appurtenant to the ceded lands?

(5) Whether recognition of the Tribe's in-stream fisheries-flows predicated on the off-reservation fishing right would violate the equal protection guarantee of the Fifth Amendment to the United States Constitution?

(6) Whether the course of the Nez Perce Tribe's legal interaction with IPCo, which includes the lengthy pursuit and settlement in 1980 of proceedings before the Federal Energy Regulatory Commission, as well as the ultimate resolution of Nez Perce Tribe v. Idaho Power Company, 847 F. Supp. 791 (D. Idaho 1994), forecloses in whole or in part the Tribe's in-stream flow claims as against IPCo?

> In perhaps an abundance of caution, IPCo and the objectors state at the outset that the foregoing issues do not embrace the question of the mutual intent of the parties to the 1855 Treaty regarding the Tribe's on-reservation fishing right. For purposes of this motion -- and solely for purposes of this motion -- we will assume for the sake of argument that the Tribe's original, exclusive, treaty right to fish on its reservation could have included a reserved fisheries flow right appurtenant to its reservation lands. The focus, rather, is upon the implications of subsequent actions for whatever rights the Tribe may have possessed under the Treaty of 1855.

IPCo Brief at 4 and 5.

POTLATCH CORPORATION (Hereinafter "Potlatch")

In Potlatch's Opening Brief in Support of Summary Judgment, it states:

> The pending motion raises essentially one question: Did the Nez Perce Tribe and the United States, in entering the 1855 Treaty [footnote 1 cited], the 1863 Treaty [footnote 2 cited], and the 1893 Agreement [footnote 3 cited] (collectively, the "Nez Perce Treaties"), intend that the express recognition of tribal fishing rights would, by implication, reserve to the Tribe preemptive federal water rights for virtually the entire flow of the Snake River?

Footnote 1 provides:

> Treaty with the Nez Perce, June 11, 1855, 12 Stat. 957 (ratified Mar. 8, 1859).

Footnote 2 provides:

> Treaty with the Nez Perce, June 9, 1863, 14 Stat. 647 (ratified Apr. 17, 1867).

Footnote 3 provides:

> Agreement with the Nez Perce, May 1, 1893, 28 Stat. 326 (ratified Aug. 15, 1894). This agreement is not labeled a "treaty," because in 1871 Congress forbade further treaties with Indian tribes. Act of Mar. 31, 1871, 16 Stat. 566, codified at 25 U.S.C. § 71. Thereafter, all dealings with tribes were in the form of agreements approved by Congress and the Executive in the form of statutes.

Potlatch Brief at 6 and 7.

STATE OF IDAHO

In its Memorandum in Support of Motion for Summary Judgment, the State of Idaho states:

> The issue presented is whether, under the implied-reservation-of-water doctrine, the United States and Nez Perce Tribe are entitled to instream flow water rights, for the purposes stated on the face of their claims, when the claimed water rights are for streams that are not appurtenant to lands currently reserved by the United States for the exclusive use of the Nez Perce Tribe or its members. The larger issue incorporates the following sub-issues:
>
> 1. Whether, under the implied-reservation-of-water doctrine, federal reserved instream flows are implied by the provisions of the 1855 Nez Perce Treaty securing the right of tribal members to fish at usual and accustomed places outside the Nez Perce Reservation.
>
> 2. Whether the United States otherwise intended to reserve instream flows for the benefit of the Nez Perce Tribe on lands outside the Reservation established in the 1855 Treaty.
>
> 3. Whether the lands ceded in the 1863 Treaty and 1893 Agreement ceased to be part of the Nez Perce Reservation, and if so, whether the fishing rights applicable to the ceded lands are derived from the exclusive on-reservation right provided in Article 3 of the 1855 Treaty, or the non-exclusive, in-common right to fish at usual and accustomed fishing places provided in Article 3 of the 1855 Treaty.
>
> 4. Whether, under the implied-reservation-of-water doctrine, federal reserved instream flows are implied by the fishing rights secured to the Nez Perce Tribe for exercise on lands ceded in the 1863 Nez Perce Treaty and the 1893 Nez Perce Agreement.
>
> 5. Whether the United States otherwise intended to reserve instream flows for the benefit of the Nez Perce Tribe on lands ceded in the 1863 Nez Perce Treaty and the 1893 Nez Perce Agreement.
>
> 6. Whether under federal law and policy the United States may impliedly reserve water for instream flows when such water is not appurtenant to a reservation of land.

Memorandum of the State of Idaho at 7.

IRRIGATION DISTRICTS

A coalition of Irrigation Districts filed a Motion for Summary Judgment on June 2, 1998, in which they listed six (6) issues. Subsequently, on July 20, 1998, they filed a Notice of Partial Withdrawal of Motion and withdrew (without waiving their rights) issues 4 and 5. The Irrigation Districts then filed a Joint Brief in Support of their Motion for Summary Judgment with IPCo. Then on October 19, 1998, the Irrigation Districts filed their own Reply Brief in which they state:

> Idaho Power and Objectors' motion for summary judgment is directed only at the United States' and Tribe's claims for water rights outside the Tribe's present Reservation (off-reservation claims) [footnote 2 cited]. It is undisputed that these off-reservation claims are claims to an environmental condition which the Tribe's current experts assert is necessary to "guarantee" to restore a "sustainable" fish harvest population. As they have described their own claims, under oath:
>
> > The instream flow claims are ecosystem based and are focused on protecting and in some cases restoring habitats necessary for the long term propagation of fish populations. . . . These claims seek to guarantee available habitats of suitable quantity and quality to allow for the production and restoration of sustainable fish populations. . . . The amount of habitat that would be provided by the Tribe's instream flow claims is the amount necessary to provide the full range of natural variability and diversity of habitat conditions around which the subject species has evolved. A lesser amount of habitat would not provide that full range and would not fulfill the Treaty fishing rights.
>
> Tribe's Supplemental Responses to Idaho's Second Discovery Requests (Tucker Aff. Ex. 1).
>
> The inevitable conclusion of their position is that the United States and the Tribe have an ever-changing, implied water right to require the elimination of any dam, structure, condition or development of any kind (including agriculture and timber sales) off the reservation which would affect the "guarantee" of necessary habitat conditions and viability of every species of fish, bird, mammal, plant or insect which the Tribe deems important.
>
> The issue before this Court in this motion is whether such "ecosystem-based" or habitat-driven water rights were legally reserved to the Tribe over 140 years ago as part of an off-reservation fishing right which the Tribe held "in common" with the citizens of the Territories. The law is clear. The Tribe has no such off-reservation implied reserved water right [footnote 3 cited].

Footnote 2 provides:

> The State and Potlatch motions are broader than those filed by Idaho Power and these objectors. Much of the factual record relied on by the Tribe and United States admittedly is directed to those other motions. Whatever factual issues might exist in those motions cannot be allowed to distract this Court from dealing with the more narrowly drawn issues in this motion.

Footnote 3 provides:

> Objectors offer no opinion on whether on-reservation exclusive fishing rights are sufficient to impliedly reserve a water right. Merely for the purposes of this motion, Objectors will assume such a reservation is possible.

Irrigation District's Reply Brief at 2 and 3 (emphasis theirs).

UNITED STATES AND THE NEZ PERCE TRIBE

In their Joint Memorandum in Opposition to Objectors' Motions for Summary Judgment, lodged September 18, 1998, the United States and the Nez Perce Tribe state the following issues:

> 1. Does Article 3 of the Nez Perce Treaty of June 11, 1855, 12 Stat. 957, 2 Kappler 702, (hereinafter referred to as the "1855 Treaty") [footnote omitted]contain a reservation by the Tribe of "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation * * * as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory" and is fishing the purpose of that reservation?
>
> 2. Did the Tribe's reservation of the fishing right in the 1855 Treaty impliedly reserve a water right for instream flows? In other words, is it necessary that some quantity of water be left in the stream in order to fulfill the fishing purpose of the treaty reserved fishing right, such that without any water in the streams, the purpose of the fishing reservation would be "entirely defeated?"
>
> 3. Has the reservation of a fishing right in the 1855 Treaty been abrogated, in whole or in part, by any subsequent treaty, agreement, or statute?

Joint Memorandum at 6.

SHOSHONE-BANNOCK TRIBES

The Shoshone-Bannock Tribes lodged a Brief in Response to Summary Judgment on September 18, 1998. This brief does not specifically delineate the "issues" before the Court on summary judgment, at least not in the format set out in the briefs noted heretofore. The opening paragraph of the brief states:

> The present summary judgment motions involve only the rights of the United States and Nez Perce Tribe to instream flows for Nez Perce off-reservation treaty fishing rights. While they do not directly involve such rights for the Shoshone-Bannock Tribes of the Fort Hall Reservation (hereafter "Shoshone-Bannock"),[1] we set forth in this brief our response to these motions because their disposition may constitute precedent for resolution of similar Shoshone-Bannock rights.

Footnote 1 indicates:

> > The Shoshone-Bannock Tribes are involved in this subcase as objectors to a portion of the rights asserted by the Nez Perce Tribe but have not objected to the majority of the claims.

Shoshone-Bannock Tribe Brief at 1.

In their brief, the Shoshone-Bannock list and discuss the five (5) following assertions.

1. Every case to consider the question has concluded that treaty fishing rights do imply a reserved water right to instream flows to protect the fishery.

2. The cases relied upon by the State and other proponents of summary judgment do not justify denying the Nez Perce Tribe any right at all to instream flows.

3. The preservation of off-reservation fisheries is a "primary" purpose of treaties with Idaho tribes.

4. Tribes can have reserved water rights to instream flows for fishing sites outside reservations they do not "own."

5. The Tribes and the State share the water and fisheries as "quasi-cotenants" and state action to divert the instream flow would constitute enjoinable waste.

Shoshone-Bannock Brief, Table of Contents at v.

VII.
STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if 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 judgment as a matter of law. I.R.C.P. 56 (c); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson, A.I.A. v. Steer,* 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

Justice McDevitt in *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 847 P.2d 1156 (1993), stated the standard of review for summary judgment this way:

> Rule 56(c) of the Idaho rules of Civil Procedure states that summary judgment is to be "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.
>
> A strong line of cases weaves a tight web of authority that strictly defines and preserves the standards of summary judgment. The reviewing court must liberally construe disputed facts in favor of the non-moving party and make all reasonable inferences in favor of the party resisting the motion. If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. Nevertheless, when a party moves for summary judgement, the opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact.

> The burden of proving the absence of a material fact rests at all times upon the moving party. This burden is onerous because even "circumstantial" evidence can create a genuine issue of material fact. However, the Court will consider only that material contained in affidavits or depositions which is based upon personal knowledge and which would be admissible at trial. Summary judgment is properly issued when the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's cases.

Id. at 297-98, 847 P.2d at 1158-59 (citations omitted).

For water rights based on federal law, the Director of the Idaho Department of Water Resources abstracts the claim. The abstract does not constitute *prima facie* evidence of the water right. The claimant of a water right based on federal law has the ultimate burden of persuasion on each element of the water right. I.C. § 42-1411A(12).

VIII.
SCOPE OF THESE SUMMARY JUDGMENT PROCEEDINGS

The scope of this Court's ruling on these summary judgment proceedings is strictly limited to **off-reservation instream water right claims** for the Nez Perce Tribe or for the United States as trustee for the Tribe.

This Court's ruling on these summary judgment proceedings does not involve on-reservation water rights of any kind, nature, or description.

"Reservation" in this context means the present boundaries of the Nez Perce Reservation. In this regard, and as the Court clarified with the parties at the oral arguments on summary judgment on October 13, 1999, these water right claims come before this Court as "Consolidated Subcase No. 03-10022." *See* Second Amended Case Management Order, filed April 26, 1996. In that order, at page 3, the following appears:

All subcases arising under tribal instream flow claims are consolidated into the following categories:

1. Nez Perce Claims.

> All instream flow claims filed by the United States as trustee for the benefit of the Nez Perce Tribe and all claims filed by the Nez Perce Tribe on its own behalf. Lead subcase is 03-10022.

It is this Court's understanding that the parties are not in agreement as to the present boundaries of the Nez Perce Reservation. In fact, as a point of interest (and as will be discussed in greater detail later in this decision) the United States' (as trustee on behalf of the Nez Perce Tribe) Notice of Claim to A Water Right Reserved Under Federal Law, executed on March 23, 1993, and filed with the Court, sets forth, in paragraphs 8 and 11, the "Legal Description of the Nez Perce Indian Reservation" and "List of Documents Creating Reservation." Affidavit of Steven W Strack, Exhibit 1, pages 10 and 11. These two paragraphs in this original claim mention only the 1855 Treaty and the 1863 Treaty with the Nez Perce. Neither mention the Agreement with the Nez Perce of May 1, 1893, 28 Stat. 326 (ratified August 15, 1894).

Also, by this Court's reading of the Standard Form 4, "Motion to File: Amended Notice of Claim" of the United States and the Nez Perce Tribe, this document does not address the reservation boundaries, past or present. Affidavit of Steven W. Strack, Exhibit 2.

In any event, the "Summary of Amended Instream Flow Water Right Claims" contains the following language:

> In March of 1993, the United States submitted 1133 and the Nez Perce Indian Tribe submitted 1134 water rights claims in the Snake River Basin Adjudication (SRBA) for stream reaches located within the Salmon, Clearwater, Weiser, Payette, and Snake River drainage. This submittal amends those claims. Through this amendment, the United States and the Nez Perce Tribe are withdrawing claims for 20 and 21 stream reaches, respectively and are modifying the original claims for the remaining 1113 stream reaches. These instream flows are claimed to provide fish habitat and the long-term maintenance of that habitat. The original flow claims that were submitted in 1993 included three components: fish habitat, channel maintenance, and riparian maintenance. These amended claims contain only the first two of these components with consideration for the riparian maintenance contained in the channel maintenance component.
>
> Monthly fish habitat flow claims are submitted for each of the 1113 stream reaches. These claims are for the instantaneous flows from the first day to the last day of each month. The channel maintenance claims are made for 38 stream reaches within the claim area. These claims are made only when the natural unimpaired streamflow is at or above the identified channel maintenance flow. These two types of claims are not additive. The total instream flow claim in a given reach at a specific time is the larger of the two types of claims.
>
> The attached table summarizes the amended claims and provides a comparison with the original flow claims submitted in 1993. Further explanation of the claims and definitions of terms in the attached table are provided below.

	Definition/Explanation
Stream Reach:	The name of the stream section as identified on USGS 7.5 or 15-minute quadrangle maps.
Tributary to:	The name of the stream to which the subject stream flows
Reach Number:	An identifying number used by the United States and the Nez Perce Tribe to refer to each stream reach. The numbers are identical to those presented in the location map submitted in 1993 with the original claims.
From:	Hydrologic node identifying the upstream extent of the stream reach.
To:	Hydrologic node identifying the downstream extent of the stream reach.
NPT #:	The Water Right Number (WRN) assigned by the Idaho Department of Water Resources (IDWR) to the corresponding 1993 flow claim made by the Nez Perce Tribe for this stream reach.
BIA #:	The WRN assigned by the IDWR to the corresponding 1993 flow claim made by the United States for this stream reach.
Upstream Location:	Legal Description of upstream point of stream reach for which instream flows are claimed.
Downstream Location:	Legal Description of downstream point of stream reach for which instream flows are claimed.
Fish Habitat:	These claims are made for instream flow to provide suitable fish habitat flows in the reach. The claims are monthly values representing the instantaneous flow in cubic feet per second claimed from the first day to the last day of each month.
New Claim:	These are the amended monthly flow claims for each reach and channel maintenance claim if included.

	For the 20 withdrawn claims, the table shows new claims of zero flow.
Old Claim	These are the original monthly flow claims submitted in 1993. These claims are superseded by the amended “new claims."
C.M.:	Channel maintenance claims are made for 38 stream reaches in the claim area. For a specific stream reach, a number in the C.M. column of the table indicates that a channel maintenance claim is made for that reach. The number in the column is the channel maintenance flow in cubic feet per second. The channel maintenance claim is for all of the natural flow in the stream when the natural flow is at or above the channel maintenance flow. When the natural flow is below the channel maintenance flow, no claim is made for channel maintenance.

Affidavit of Steven W. Strack, Exhibit 2, pages 24 and 25.

Because there is no agreement on the location of the present reservation boundaries, and because these water rights claims are based upon “stream reaches," this Court does not decide the issues presented herein on the basis of, or with reference to, individual water right claim numbers or the location of a particular stream reach or portions thereof. Rather, the issues presented herein are decided generically on the basis of whether the instream water is located off, or outside, the present reservation boundaries, whatever they may be. In other words, the legal concept of instream-flow water rights off-reservation is what is decided and not each individual amended claim.

Lastly, all parties to these proceedings agree that this is the so-called “entitlement phase" and no issues of “quantity" are presently before the Court, i.e., “entitlement" meaning the existence of, or non-existence of, off-reservation instream-flow water rights of the Nez Perce Tribe or for the United States as trustee for the Tribe.

IX
BRIEF CHRONOLOGY OF TREATIES, AGREEMENTS, LEGISLATION, AND LITIGATION AFFECTING THE WATER RIGHT CLAIMS AT ISSUE HEREIN

Where the existence and scope of claimed treaty rights are not clear from the face of the respective treaty, they are to be determined by examining the treaties, legislative history, surrounding circumstances, subsequent history, and subsequent interpretative litigation. *Solem v. Bartlett*, 465 U.S. 463, 471, 104 S. Ct. 1161, 1166, 79 L.Ed. 2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88, 97 S. Ct. 1361, 1363-64, 51 L.Ed. 2d 660 (1977).

The Court finds the following brief chronology of the above factors helpful in determining the existence or non-existence of the claimed off-reservation instream flow water right claims at issue in this case.

Pre-1855 Pre Treaty Era

In their Joint Memorandum in Opposition to Summary Judgment, lodged September 18, 1998, the United States and the Tribe state: "Since 'time immemorial,' the Nez Perce Indians occupied a large geographic area encompassing parts of what is today central Idaho, northeastern Oregon, and southeastern Washington." *Id*. at 10.

And, "fishing provided over half of the subsistence needs of the Nez Perce Tribe and it was unthinkable to either the tribe or the federal negotiators that fish -- much less water -- would become so scarce." *Id*. at. 7.

The Nez Perce aboriginal territory consisted of over 13 million acres. Ex. 12, *United States v. Scott, et al.*, Case No. CR 98-01-N-EJL, (D. Idaho) (Order Re: Jurisdiction, entered August 12, 1998, unsealed by Order dated August 17, 1998).

1855 Treaty of 1855 at the Walla Walla Council

On June 11, 1855, Isaac Stevens and other representatives of the United States entered into a treaty with representatives of the Nez Perce Tribe whereby the Tribe ceded approximately 6.5 million acres to the United States in return for, among other things, being secured in possession of a reservation of approximately 7.5 million acres. Treaty with the Nez Perce Indians, 12 Stat. 957, 2 Kappler 702 (June 11, 1855). This Treaty was ratified by the Senate of the United States on March 8, 1859, and proclaimed by the President on April 29, 1859.

Article 3 of the 1855 Nez Perce Treaty provides in pertinent part, as follows:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the Territory; * * *.

1863 Treaty of 1863 at the Lapwai Treaty Council

On June 9, 1863, representatives of the Unites States entered into a treaty whereby the Nez Perce ceded an additional 6 million acres of land to the United States. The 1863 Treaty reduced the Nez Perce Reservation to approximately 750,000 acres. Article 8 of the 1863 Treaty provided that "all the provisions of said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly, -- the same obligations resting upon the United States, the same privileges continued to the Indians outside of the reservation, and the same rights secured to citizens of the U.S. as to right of way upon the streams and over the roads which may run through said reservation, as are therein set forth." i.e., as is relevant here, the "fishing in common" right, off-reservation remained intact. In other words, the hunting and fishing rights retained on the lands ceded in the 1863 Treaty are identical to the hunting and fishing rights retained outside the 1855 Reservation. 14 Stat. 647 (ratified April 17, 1867).

1887 Indian General Allotment Act

In 1887 Congress passed the General Allotment Act, popularly known as the Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 *et seq*.) which authorized division of Indian reservations into separate parcels for individual Indians. The purpose of the act was to

encourage individual agricultural pursuits among the Indians with the surplus lands (non-allotted) to be sold to non-Indians.

By the terms of the General Allotment Act, each member of a tribe -- man, woman or child -- could be allotted one-eighth of a section of land (80 acres) for farming purposes, or one-forth of a section of land (160 acres) for grazing purposes. Act of February 8, 1887, 24 Stat. 388; *as amended by* Act of February 28, 1891, 1, 26 Stat. 794. Following allotment, the Secretary of Interior was authorized to negotiate for the "purchase and release" of all reservation lands not allotted to tribal members. Act of February 8, 1887, § 5, 24 Stat. 388.

Pursuant to the General Allotment Act, the Secretary of Interior ordered the allotment of the Nez Perce Reservation, and lands were allotted to individual Nez Perce during the years 1889 to 1892. Thereafter a Commission was appointed by the United States which was authorized to negotiate an agreement for the cession of the remaining surplus lands (all unallotted lands).

1893 Agreement with the Nez Perce

On May 1, 1893, the Nez Perce Tribe and the United States entered into an agreement wherein the Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest" to the unallotted portions of the then existing Reservation, save for some 32,020 acres of timberland to be set aside for the common use of tribal members. 1893 Agreement, Art. 1. For the cession of their lands the Tribe received consideration in the amount of $1,626,222. *Id.*, Art. 3.

The 1893 Agreement was ratified by Congress on August 15, 1894, 28 Stat. 326 and the unallotted lands of the former Reservation were opened to non-Indian settlement by Presidential Proclamation on November 8, 1895. *Id.*

The 1893 Agreement contained Article XI, a savings clause, which provides: "The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued in full force and effect."

1905 United States v. Winans

In 1905, the United States Supreme Court decided *United States v. Winans*, 198 U.S. 371, a case dealing with treaty language regarding "the right of taking fish at all usual and accustomed places in common with the citizens of the territory." In part, the case held "that a treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted." *Id.* at 379.

1908 United States v Winters

In 1908 the United States Supreme Court decided *United States v. Winters*, 207 U.S. 564. In this seminal case, the Court established the implied federal reserved water right commonly referred to as the "Winters" doctrine. It is arguable that this "doctrine" sets out no substantive rule of law, but is merely a special rule of construction used to divine original intent with respect to water rights on federal reservations where the organic document is silent on the subject. In any event, the doctrine is sensibly applied where century-old treaties, legislation, or executive orders left a gap which, if not filled through an implied right, would destroy an essential purpose of a reservation of federal land.

1987 SRBA General Adjudication is Commenced

In 1987, a petition was filed by the State of Idaho, *ex rel*. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, for the general adjudication of all water rights in the Snake River Basin pursuant to I.C. §§ 42-1406(A) and 42-1407. The water right claims at issue herein were thereafter filed in this case.

1994 Nez Perce Tribe v. Idaho Power Company

On March 21, 1994, *Nez Perce Tribe v. Idaho Power Company*, 847 F. Supp. 791 (D. Idaho 1994), was decided. The Nez Perce Tribe had brought an action against Idaho Power Company seeking monetary damages for reduction in numbers of fish in fish runs its members had treaty rights to fish.

Among other things, the Court sustained the finding that:

> **[T]he tribes do not own the fish but only have a treaty right which provides an opportunity to catch fish if they are present at the accustomed fishing grounds**. In the Court's view, monetary damages for loss of property cannot be awarded for injury to **a fish run in which the plaintiff tribe owns only an opportunity to exploit**.

Id. at 795, 796 (emphasis added).

1998 South Dakota v. Yankton Sioux Tribe

On January 26, 1998, the United States Supreme Court issued its unanimous decision in *South Dakota v. Yankton Sioux Tribe, et al.*, 118 S. Ct. 789 (1998). This case interpreted the Act of August 15, 1894, 28 Stat. 286, the common statute in which Congress considered and ratified the Siletz, Nez Perce (1893 Agreement), and Yankton surplus land sale agreements. The Court expressly held that the unallotted, ceded lands were severed from the Yankton Reservation and the reservation was diminished (diminished meaning the boundaries of the reservation as delineated in the previous treaties were reduced to the lands retained in the 1894 Act).

X.

FINDINGS OF FACT FOR PURPOSES OF SUMMARY JUDGMENT

Although not mandatory, Findings of Fact and Conclusions of Law are encouraged in Summary Judgment cases. *Keesee v. Fetzck*, 111 Idaho 360, 361, 723 P.2d 904, 905 (Ct. App. 1986). Based on affidavits filed in this action, and taking into account the historical background surrounding the Treaties, as well as the Treaty negotiations, this Court finds the following facts for purposes of summary judgment. These facts are either uncontroverted, or if controverted, are found to exist. By this the Court means that the Nez Perce assert these are the facts, and for summary judgment purposes only, the Court accepts these as accurate to determine whether even under these set of facts the Court can render summary judgment, i.e., assuming the asserted facts to be true, is there a water right? While several of these were mentioned in the last section, they have been repeated here.

1. Since "time immemorial," the Nez Perce Indian Tribe historically occupied a geographic region consisting of between 13-14 million acres located in what today consists of central Idaho, northeastern Oregon and southeastern Washington.

2. Historically, Nez Perce sustenance consisted of fish, roots, berries, game, and other plant products. Fish comprised up to one-half of the Tribe's total food supply with each tribal member consuming between 300 to 600 lbs. of salmon per year. In addition to sustenance, fish and fishing were important to the spiritual well being, culture, and traditions of the Nez Perce. This importance remains to the present day.

3. In 1848 the Oregon Territorial Act was passed creating the Oregon Territory. The Washington Territory Act was passed in 1853.[3.] Both Acts expressly recognized Indian title to lands. In 1850, Congress enacted the Oregon Donation Act which gave non-Indian settlers title to land. As a result, a conflict arose between the Indian inhabitants and the non-Indian settlers.

4. In 1853, Isaac Stevens was appointed as the first governor of the Washington Territory. The position also carried with it the superintendancy of Indian affairs for the territory. In 1854, Stevens lobbied Congress for appropriations for the purpose of negotiating treaties with the various indigenous tribes. Stevens prepared a "model treaty" to be used at the various treaty councils.

5. In 1855, the Walla Walla Treaty Council was convened. The Council involved various Indian Tribes including the Nez Perce Tribe. Minutes were kept of the negotiation proceedings. *See Certified Copy of the Original Minutes of the Official Proceedings at the Council in Walla Walla Valley, Which Culminated in the Stevens Treaty of 1855*. The Treaty was subsequently ratified by the United States Senate in 1859. *See* Treaty of 1*855*, 12 Stat. 957 (June 11, 1855).

6. Pursuant to the 1855 Treaty, the Nez Perce Tribe agreed to cede approximately 6.5 million acres of aboriginal territory to the United States. In exchange, the Nez Perce Tribe reserved approximately 7.5 million acres for an Indian reservation. Various rights and privileges were also reserved to the Nez Perce Tribe. However, neither the Nez Perce Tribe or the United States government specifically intended to reserve an in-stream flow water right. Article III of the 1855 Treaty provided, among other things, as follows:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the Territory; * * *.

This treaty language was not unique to the Nez Perce Treaty. The identical or substantially similar language was contained in other Steven's treaties, as well as the

3 Between 1853 and 1863, the Washington Territory included portions of present day Idaho.

model treaty. Both the Treaty and the minutes from the Treaty negotiation were silent on the issue of water rights for fish preservation.

7. In 1863, the Nez Perce entered into the Treaty of Lapwai with the United States. This treaty came about as a result of the discovery of gold on lands under control of the Nez Perce Tribe. Because of tensions between trespassing prospectors and the Nez Perce people, treaty negotiations were reopened. Pursuant to the 1863 Treaty, the Nez Perce Tribe relinquished additional lands reserving approximately 750,000 acres of the former Reservation as the new Indian Reservation. *See* Treaty with Nez Perce, June 9, 1863, 14. Stat. 647 (ratified April 17, 1867). This Treaty was also silent as to the reservation of an in-stream flow water right. Article VIII of this Treaty also provided:

> [A]ll the provisions of the said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly, -- the same obligations resting upon the United States, the same privileges continued to the Indians outside the reservation.

8. On May 1, 1893, the Nez Perce Tribe and the United States entered into an agreement for the cession of the unallotted lands in accordance with the General Allotment Act. Pursuant to Article I of the 1893 Agreement, the Nez Perce agreed to:

> [C]ede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the Indians. . . .

The Nez Perce Tribe retained 32,020 acres of land to be held in common by the members of the Tribe. 1893 Agreement, Art. 1. For the cession of their former lands, the Tribe received consideration in the amount of $1,626,222.00. 1893 Agreement, Art. III. The agreement also provided that:

> The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued and in full force and effect.

1893 Agreement, Art. XI.

XI
BASIS OF THE NEZ PERCE CLAIMS: FEDERAL RESERVED WATER RIGHT V. INDIAN RESERVED WATER RIGHT

The Objectors (movants in these summary judgment proceedings) in this case have challenged or put at issue, among other things, the viability of the legal theory on which the Nez Perce claims are predicated. The Nez Perce Tribe and the United States (collectively "Nez Perce" or "Claimants"), as the non-moving parties, must provide evidence in the record in support of each element comprising the Nez Perce claims. See *Thomson v. Idaho Insurance Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994); *Snap on Tools, Inc. v. United States*, 26 Cl. Ct. 1045, 1052 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct 2548, 91 L.Ed. 2d 265 (1986)) (applying summary judgment standard to treaty interpretation) .

1. THE LEGAL ELEMENTS OF THE NEZ PERCE CLAIMS

The legal cause of action on which the Nez Perce claims are predicated is referred to as an Indian reserved water right. The Claimant's have made it clear and explicit to the Court through both briefing and at oral argument that they are not claiming an implied federal reserved water right, sometimes referred to as the "Winters Doctrine."[4] The Nez Perce and the United States state in their joint memorandum "here the reservation at issue is the Tribe's reservation of a fishing right from those lands ceded in 1855, not a 'reservation' of land from the public domain, as is the case with the non-Indian federally reserved water right." *United States' and Nez Perce Tribes' Joint Memorandum in Opposition to Objectors' Motions for Summary Judgment ("Joint Memorandum")* at 85. The Claimant's frame the elements as follows:

1) Did the Nez Perce Tribe reserve in the 1855 treaty the right of taking fish?
2) Has that right been exhausted?
3) Is some quantity of water necessary to fulfill that right?

In setting forth the elements that comprise an Indian reserved water right, a distinction between the two concepts (*Indian v. Federal*) is necessary because unfortunately the legal precedent upon which this Court must rely for guidance has a tendency to blur the distinction.

[4] Again, this Court is using the term "doctrine" as descriptive of the legal precedent but recognizing that there is a difference of opinion as to whether the "doctrine" is a rule of law or merely the application of a judicial cannon of interpretation.

A. The Federal Reserved Water Right.

The federal government has generally deferred to state law with respect to establishing water rights. Stated another way, a state generally has plenary control over water located within its boundaries. *See Kansas v. Colorado*, 206 U.S. 46, 86 (1907). An exception to that general rule is recognized when the federal government withdraws land from the public domain, either through legislation, executive order, treaty or other agreement. Reserved water rights may be either express or implied. *See United States v. New Mexico*, 438 U.S. 696, 699-700, 98 S.Ct. 3012, 3013-3014 (1978). Where the withdrawal of the public land is silent as to the issue of water rights, the law will imply that the government intended to reserve the necessary amount of appurtenant water so as to effectuate the purpose for which the land was withdrawn. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069 (1976). The purpose being effectuated must be determined to be a primary purpose of the withdrawal as opposed to a secondary purpose. *United States v. New Mexico* at 715-716, 98 S.Ct. at 3021-3022. A federal reserved water right, under the prior appropriation doctrine, takes a priority date corresponding to the date the land was withdrawn from the public domain. *Cappaert.* 426 U.S. at 138, 96 S.Ct. at 2069. Idaho has recognized and followed this legal precedent in acting on water rights. *United States v. State*, 131 Idaho 468, 469-70, 959 P.2d 449, 450-51 (1998).

B. The Indian Reserved Water Right.

In contrast to an implied federal reserved water right, an Indian reserved water right is the recognition by the federal government of an aboriginal right (i.e. hunting or fishing) either reserved by the Indians or not expressly ceded by the Indians through a respective treaty or other agreement. The existence of the right rests on the interpretation of the treaty so as to ascertain the intent of the parties. Interpretation of the treaty is governed by the application of various established canons or principles of Indian treaty interpretation. The foremost principle being the recognition that the Indian Tribe and the United States are independent sovereigns and that a treaty with an Indian Tribe constitutes a grant of rights to the United States from the Indians, not a grant of rights from the United States to the Indians. Thus any rights not expressly granted in the treaty by the Indians are reserved to the Indians. *United States v. Winans*, 198 U.S. 371, 373, 25 S.Ct. 662, 664 (1905); *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1984); *State v.*

McConville, 65 Idaho 46, 50 (1943). Any rights reserved to the Indians can only be terminated by acts of Congress. *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789, 798 (1998)(citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Another canon is that Indian treaties must be interpreted as the Indians themselves would have understood them. This canon results from the disparity between the parties with respect to understanding the English language. *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S. Ct. 3055, 3069, 61 L.Ed. 2d 823 (1979). Any ambiguities must be resolved in favor of the Indians. *Id.* at 675-76, 99 S. Ct. at 3069-70. Treaties are construed more liberally than private agreements and to ascertain their meaning courts may look beyond the writing itself to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *United States v. Washington*, 135 F.2d 618, 630 (9th Cir. 1998) (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991)). Indian rights have been "confirmed" through treaty interpretation based on the application of the foregoing canons. *See Winans, supra,* at 373, 25 S.Ct. at 664 (reserved right of access to fishing grounds); U*nited States v. Adair*, 723 F.2d 1394 (9th Cir. 1983)(reserved on-reservation water right for fishing); . *McConville, supra* at 50. (recognizing reserved right to fish); *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754 (Mont. 1985)(distinguishing between federal and Indian reserved water rights).

Unlike an implied federal reserved right, the priority date of an Indian reserved water right is predicated on the historical use by the respective Tribe and can relate back to "time immemorial." *Adair, supra* at 1414.

C. Distinguishing Between the Two Theories.

Although the implied federal reserved water right can apply where land is withdrawn from the public domain for the purpose of an Indian Reservation, the two types of rights are fundamentally different. The confusion results not only from the seminal case, *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908), which established the implied federal reserved water right, but also in the manner in which the courts have blurred the distinction between the two concepts. In *Winters, supra,* the federal government, by agreement with the Indians, created the Fort Belknap Indian Reservation in 1888. The purpose of the reservation was to convert the Indians to an agrarian culture. The agreement, however, was silent as to the water rights

necessary for irrigation. Thereafter, conflict over water arose between the Indians and non-Indian settlers.

The United States Supreme Court ruled that the Indian Tribe on the Fort Belknap Indian Reservation had a water right with a priority date coinciding with the date the reservation was created. *Id*. at 569, 28 S.Ct. at 212. The United States Supreme Court, however, was ambiguous as to how the water right was created. The *Winters* court first appeared to be asserting the reasoning set forth in an earlier 1905 decision of *United States v. Winans*, 198 U.S. 371 (1905). In *Winans*, the court acknowledged that a treaty was not a grant of right to the Indians, but rather a grant from them to the United States, thereby reserving any of those rights not expressly granted, which is the basis of the Indian reserved right. *Winans*, 198 U.S. at 373, 25 S.Ct. at 664.

The *Winters* court, however, shifted its discussion to the federal government's authority to reserve waters at the time of the establishment of the reservation. *Id*. at 569, 28 S.Ct. at 212. Ultimately, the basis for the Supreme Court's decision turned on the federal government's implied reservation of the water right. Although many commentators have argued that *Winters* was merely a canon of interpretation as to the federal government's intent and was limited to the facts, that concept was subsequently rejected by the United States Supreme Court. Fifty years later in *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 (1963), the Supreme Court held that the federal government had reserved water in the creation of five Indian reservations. The Court's analysis, however, focused solely on the federal government's power to reserve water for the Indians, rather than looking to ancient water rights that were never relinquished by the Tribes. As such, the tribal water rights took a priority date coinciding with the establishment of the respective Indian reservation.

In *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062 (1976), the United States Supreme Court applied the federal reserved rights doctrine beyond an Indian reservation. In finding a water right, the Court reviewed the basis of the implied federal reserved right:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.
>
> . . . .
>
> In determining whether there is a federally reserved water right implicit in the reservation of public land, the issue is whether the Government intended to reserve

> unappropriated and thus available water. Intent is implied if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id. at 139, 96 S.Ct. 2069-70.

In a subsequent case, *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct 3012 (1978), a case involving the reservation of water for a national forest, the United States. Supreme Court held that federal reserved water rights could only be established for primary rather than secondary purposes of the reservation of land.

In sum, the confusion arises because the reservation of water rights for Indian Reservations arose out of the implied federal reserved water right doctrine, rather than a reservation of rights by the Indians via treaty. Unfortunately, the trend in the courts is to merge the two concepts into the same category of implied reserved water rights despite the concepts being distinct from one another.

D. The Origination of the Nez Perce Reserved Water Right Claims.

The Nez Perce claims originate from the 1855 Treaty language together with reliance on the application of the principles of treaty interpretation to establish the Indian reserved water right claimed here. Again, both the Nez Perce and the federal government have stated in briefing and at oral argument that they are not contending the existence of an implied federal reserved water right in either party to the Treaty. In Article I of the 1855 Treaty, the Nez Perce ceded their "right, title and interest" in their aboriginal grounds subject to certain enumerated reservations. The reservation giving rise to the claimed water rights is contained in Article III of the Treaty, which states in relevant part as follows:

> The exclusive right of taking fish in all streams where running through or bordering said reservation is secured to the Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the territory. . . .

Treaty with Nez Perce, June 11, 1855, 12 Stat 957.

The foregoing treaty provision does not expressly reserve or otherwise create a water right in either party to the Treaty. Further, the Nez Perce, as well as the federal government, both concede that neither party intended to either reserve or create a water right to protect fish habitat

because the degradation of fish habitat was simply not contemplated back in 1855. Rather, the Nez Perce rely on the application of subsequently adopted principles of Indian treaty construction as applied to the treaty language. Such principles take into account the aboriginal importance of fishing to the Nez Perce culture, the history surrounding the 1855 treaty, the treaty negotiations, as well as the treaty language for purposes of establishing the claimed Indian reserved water right. The Nez Perce argue that an in-stream flow water right necessarily accompanies or is otherwise integral to the preservation of their reserved fishing right and without it that right becomes a "hollow promise."[5] The argument is predicated on the reasoning that since fish require water, in order to give meaningful effect to that fishing right, a water right must have also been necessarily implied, i.e. reserved to the Tribe. Further, because of the importance of fish and the act of engaging in fishing, to the Nez Perce culture, the Tribe would not have intentionally surrendered those water rights necessary to maintain its fishing right. The Nez Perce cite authority wherein it was held that an implied water right was reserved for maintaining a hunting or fishing right. *See Joint Board of Control of the Flathead Irrig. Dist. v. United States*, 832 F2d 1127 (9th Cir. 1987), *cert. denied* 486 U.S. 1007 (1988); *Kittitas Reclamation Dist. V. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985); *United States v. Adair*, 723 F.2d 1394 (9th Cir 1983) *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); *United States v. Anderson*, 591 F. Supp. 1 (1982).

The Nez Perce further argue that the distinction between "on-reservation" and "off-reservation" water rights is legally irrelevant, because the water right does not originate from a reservation or withdrawal of land, rather the right originates from the reservation of a fishing right pursuant to the 1855 Treaty. Lastly, the Nez Perce assert, that since intent is at issue and evidence is required for the purpose of construing intent under principles of treaty interpretation, that genuine issues of material fact exist and therefore the case cannot be decided on summary judgment.

2. IN APPLYING THE MOTION FOR SUMMARY JUDGMENT STANDARD, THE ISSUE OF INTENT CAN BE DECIDED AS A MATTER OF LAW.

5 The scope of this decision does not consider or otherwise take into account whether or not existing instream flow levels have threatened the Nez Perce's off reservation fishing rights.

A. Indian Treaty Interpretation is a Question of Law, if the Terms of the Treaty are Clear and Unambiguous, or have a Settled Legal Meaning, then Summary Judgment is Appropriate.

In opposition to the motions for summary judgment, the Nez Perce argue that this Court cannot rule on the issues presented on summary judgment because Treaty interpretation requires reliance on the consideration of the history surrounding the Treaty, an understanding of the importance of fishing to the Nez Perce culture, as well as examination of the Treaty negotiations in order to arrive at the intent of the parties. Specifically, the Nez Perce state: "[T]he Nez Perce's understanding of the reserved fishing right, and by extension, the right to water implied by that reservation, cannot be discerned without an understanding of the culture which the treaty negotiators represented, the history of the Tribe's reliance on its fishery, the historical context of the Treaty negotiations, and other purely factual issues." *See Nez Perce Tribe's Joint Memorandum* at 80. Thus the contention is that genuine issues of material fact exist. Further, the Nez Perce have filed affidavits in support of their opposition. The Nez Perce contend further that these affidavits remain uncontroverted by the Objectors, and therefore the case is not ripe for summary judgment. This Court disagrees.

Treaty interpretation is similar to contract interpretation. *Bonanno v. United States*, 12 Cl. Ct. 769, 771(1987). However, unlike contract interpretation, the interpretation of a treaty, including an Indian treaty, is a question of law for the Court to decide. *Cayuga Indian Nation of New York v. Cuomo,* 758 F. Supp. 107, 110 (N.D.N.Y. 1991)(citing *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). The examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact, but merely serves as an aid to the legal determination which is at the heart of all treaty interpretation. *Bonanno* at 772. *Stare decisis* applies to questions of law. *Id.* at 771. Further, in the realm of contract law, the initial determination whether a contract term is ambiguous is a question of law. *City of Pocatello v. City of Chubbuck*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995). If the terms of the contract are clear and unambiguous, or have a settled legal meaning, the interpretation of the meaning of the contract is a question of law. *Id.* In this case, since treaty interpretation is a question of law, much like statutory interpretation, the case can necessarily be decided on summary judgment. Additionally, however, the meaning of the subject "fishing in

common" treaty language has already been construed by the United States Supreme Court and is therefore unambiguous. Consequently, there are no genuine issues of material fact to be resolved by the Court.

Finally, in drawing inferences in favor of the Nez Perce (the non-moving party) there are still no genuine issues of material fact. This Court's analysis begins with the premise that neither the United States government nor the Nez Perce Tribe specifically intended to reserve a water right because the issue of water was never contemplated in 1855. Both parties have identified this in briefing and at oral argument. Thus, this Court is not being asked to construe actual intent. Accordingly, nothing in the record is submitted as being probative of actual intent. Rather, this Court is being asked to view the history of the Treaty, the Nez Perce culture, the Treaty negotiations, and then imply that the Nez Perce reserved a water right as a necessary component of their reserved fishing right or to otherwise give effect to that right. The affidavits submitted by the Nez Perce are probative of the importance of fish and fishing to the Nez Perce culture, as well as the importance of water to the fish habitat. However, whether the Court draws all favorable inferences from the facts in favor of the Nez Perce, or accepts the Nez Perce's facts as uncontroverted, because the subject Treaty language has a well settled legal meaning and is not ambiguous, resolution on summary judgment is appropriate. In sum, even if this Court assumes that all the Nez Perce's factual allegations are true as to the historical importance of the fish runs, the Court can still rule on this issue as a matter of law. *See Nez Perce Tribe v. Idaho Power Company*, 847 F. Supp. 79, 796 (D. Idaho 1994).

B. The "Fishing in Common" Treaty Language Has Settled Legal Meaning.

The heart of the issue in this case is interpretation of the 1853 Treaty language "the right of taking fish at all usual and accustomed places in common with the citizens of the territory. . . ." This is the only language in the Treaty which secures to the Nez Perce an off-reservation fishing right. However, since the meaning and scope of this language has already been interpreted by the United States Supreme Court, the language has a settled legal meaning. In *Washington v. Passenger Vessel Fishing Ass'n*, 443 U.S. 658, 99 S. Ct. 3055, 61 L.Ed 2d 823 (1979), at issue was the scope of the fishing right reserved to various Indian Tribes created by operation of the following similar treaty term: "[T]he right of taking fish and all usual and accustomed grounds and

stations . . . in common with the citizens of the territory." The subject treaty language was contained in a series of six Steven's treaties negotiated between various Indian Tribes located west of the Cascades and Isaac Stevens on behalf of the United States. Specifically, at issue in *Fishing Vessel* was whether the "fishing in common" language reserved to the Indians merely a right of guaranteed access across private ground to exercise their off-reservation fishing rights or whether the language conferred on the Indians the broader right to harvest a share of the anadromous fish runs. Because of the conflicting interpretations regarding the meaning of the "fishing in common" language as between the state and federal courts, the United States Supreme Court granted *certiorari* "to interpret this important treaty provision." *Id.* at 674.

In interpreting the Treaty language, the Supreme Court took into account the vital importance which fish had to the Indians. *Id*. at 667, 99 S. Ct. at 3065. The Court also concluded that because of the abundance of fish at the time the treaty was executed, neither party to the treaty contemplated a need for future regulation or allocation. *Id*. at 668-69, 99 S. Ct. at 3066. In defining the Treaty language, the Supreme Court held:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal areas. . . .
>
> The purport of our cases is clear. Non-treaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." **Both sides have a right, secured by treaty to take a fair share of the available fish. That, we think is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.**

Id. at 679, 684-85, 99 S.Ct. 3071, 3074 (emphasis added).

The Supreme Court, however, also makes it clear the fishing right is a limited, rather than an absolute guarantee or entitlement. In setting up the percentage allocations for the fish run harvest, the Court set maximums, but not minimums. The Court also noted that the maximum could also be modified in response to changing circumstances. *Id* at 687, 99 S. Ct. at 3075. The Court stated:

> We need not now decide whether priority for [ceremonial and subsistence needs] would be required in a period of short supply in order to carry out the purposes of the treaty.

Id. at 688, 99 S. Ct. at 3076.

Although the Nez Perce were not parties to treaties at issue in *Fishing Vessel*, because of the similarities between the Steven's treaties, and the use of almost identical language, when interpreting Steven's treaties, the Untied States Supreme Court has looked to cases construing other Steven's treaties for guidance. The Ninth Circuit also follows this approach. *See Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994) (citing *United States v. Oregon*, 718 F.2d 299, 301-02 & n.2 (9th Cir. 1983); *Sohappy v. Smith*, 529 F.2d 570, 573-74 (9th Cir. 1974). *Fishing Vessel* is analogous to the instant case in several important respects. First, the importance of fish and engaging in fishing was vitally important to the Indians in *Fishing Vessel*. The Supreme Court began its analysis with that premise in construing the parties' intent, noting that the religious rites of the Indians were intended to insure the return of the salmon and that fish constituted a major part of the Indian diet. In fact, the Indians west of the Cascades were known as the "fish eaters." *Id*. at 665, n. 6. The importance of anadromous fish runs could not have been of any less significance than the fish runs were to the Nez Perce. Stated another way, the importance of the anadromous fish runs to the Nez Perce could not have been of greater significance than it was to the "fish eaters" west of the Cascades.[6]

Next, the "right to fish in common" provision contained in the 1855 Nez Perce Treaty is essentially the same as the treaty language contained in the series of treaties at issue in *Fishing Vessel*. This language is also essentially the same language that is contained in the model treaty which Stevens prepared for negotiations with the various Indian Tribes in the Washington Territory, including the Nez Perce. Lastly, the parties to the treaties in *Fishing Vessel* did not contemplate that their fishing right would be impeded by subsequent technology (fishing wheels), property law concepts (right of access), or regulation (conservation laws) at the time the treaty was being negotiated. Likewise, the parties to the 1855 Nez Perce Treaty did not intend to

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6 Again, this Court recognizes that the extent of the fish's importance to the Nez Perce is disputed by the Objectors.

reserve an instream flow water right because neither party to the Treaty contemplated a problem would arise in the future pertaining to fish habitat.

In this regard, the *Fishing Vessel* decision is decisive in several respects. First, the Supreme Court holds that the meaning of the "fishing in common language" is unambiguous. As such, this Court is required to follow the Supreme Court's interpretation under principles of *stare decisis*. The Supreme Court interprets the subject language as granting (reserving) an off-reservation fishing right. The scope of that right includes the larger right to a proportionate share of the fish run. The contention in *Fishing V*essel was that the language merely conferred a right of access to exercise tribal fishing rights. The Supreme Court held the right is broader and actually means a proportionate right to the share of the harvest. Now the Nez Perce asks this Court to take the additional leap and by judicial fiat declare a water right for that purpose. The Supreme Court's interpretation does not support that contention. 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. In fact, the entire decision is a remedy predicated on the assumption that the fluctuations in the fish population is completely out of the control of the parties.

Second, the Supreme Court's interpretation is inconsistent with the creation of a water right. The off-reservation fishing right does not guarantee a predetermined amount of fish, establish a minimum amount of fish, or otherwise require maintenance of the status quo. Rather, the right extends to a proportionate share of the available fish run, whatever that run may be. Implicit in the ruling is the recognition the fish runs will vary or even be subject to shortages. This recognition is therefore inconsistent with the assertion that a water right is necessary for maintenance of fish habitat or fish propagation. Simply put, the Nez Perce do not have an absolute right to a predetermined or consistent level of fish. In times of shortages, the Supreme Court noted that it may be necessary to reallocate proportionate shares to meet the subsistence or ceremonial needs of the Tribe. Consequently an implied water right is not necessary for the maintenance of the fishing right as it has been defined by the Supreme Court.

The *Fishing Vessel* decision also embraces earlier rulings of the United States Supreme Court which hold that off-reservation treaty fisherman are subject to state regulation imposed for purposes of species conservation. This regulation places further limitations on the scope of the

off-reservation fishing right. In *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 88 S. Ct. 1725 (1968), (Puyallup I), the Supreme Court addressed the issue regarding the ability of the State of Washington to regulate the off-reservation fishing right of the Indians. The fishing rights at issue were derived from the "right of taking fish at all usual and accustomed places in common with the citizens of the territory" language contained in the Treaty of Medicine Creek, which was also one of the treaties at issue in *Fishing Vessel*. The Treaty fishermen were using nets for the commercial fishing of salmon, which was prohibited by state law. In determining the scope of the fishing right, the Supreme Court began its analysis with the assumption that fishing with nets by the Indians was customary at the time of the Treaty. Also, that traditionally there were commercial aspects to the fishing at that same time. However, the Supreme Court reasoned that because the right was a nonexclusive right, and because the Treaty was silent as to whether the Indians could exercise the right in their "usual and accustomed manner," the State could regulate the manner and purpose of fishing. The Supreme Court held that although the "right" to fish could not be qualified by the State, "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated in the interest of conservation by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* at 398, 88 S. Ct. at 1728.

In *Puyallup Tribe v. Dept. of Game of Washington*, 433 U.S. 173, 97 S. Ct. 2616 (1977)(Puyallup III), the Supreme Court stated that the power of the State was adequate for protection of the fish. Referring to an earlier case, the Supreme Court stated:

> Speaking for the Court, Mr. Justice Douglas plainly stated that the power of the State is adequate to assure the survival of the steelhead:
>
> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. **The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.**

Id. at 176, 97 S. Ct. at 2623 (citing *Wash. Dept. of Game v. Puyallup Tribe*, 414 U.S. 44, 49, 94 S. Ct. 330, 333 (1973)(Puyallup II))(emphasis added).

Consequently, the scope of the subject fishing rights is further limited in that the State can regulate the right for conservation purposes. In fact, the State is essentially charged with imposing regulations for conserving the fish. The converse is not true in that the Indians cannot impose regulations on the non-treaty off reservation fisherman for purposes of conservation. *See, e.g., Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (holding Crow Tribe could not regulate non-tribal hunters and fishermen on land owned in fee by non-tribal members).

Further support can be found in *Nez Perce Tribe v. Idaho Power Company*, 847 F. Supp 791 (D. Idaho 1994), in which the Federal District Court of Idaho construed the scope of the fishing right reserved to the Nez Perce both on and off-reservation. However, unlike the treaties at issue in *Fishing Vessel, Nez Perce Tribe* involved construction of the Article III of the exact treaty which is the subject of this case. At issue was whether the Nez Perce Tribe's fishing rights were being violated by Idaho Power as a result of three dams being operated by Idaho Power which allegedly reduced the number of fish on the annual runs. The Nez Perce Tribe sought monetary damages. In holding that the Tribe was not entitled to monetary damages, the Court's interpretation of the scope of the fishing right is dispositive of the issues in this case. The Court acknowledged that the fishing rights were aboriginal in origin and confirmed by the 1855 Treaty. *Id*. at 800.

In *Nez Perce*, the Nez Perce Tribe contended that without monetary damages, their treaty fishing rights would be meaningless.[7] In concluding that the Nez Perce were not entitled to monetary compensation, the District Court concluded:

> [T]he primary reason that Indian tribes have not been awarded damages for their treaty fishing rights in the past is because the tribes **do not own the fish, but only have a treaty right which provides an opportunity to catch fish <u>if</u> they are present at the accustomed fishing grounds.**

[7] Similarly, in this case, the Nez Perce contend that without water rights, their Treaty rights would be meaningless.

Id. at 795(emphasis added). Further, the Court held that neither the Nez Perce Tribe nor any of its enrolled members have a property interest in any particular number of fish in the runs unless the fish are actually present in the river and can be caught . *Id.* at 811-12. The Court also held that the Tribe's fishing rights would not be meaningless or nullified because of "hatchery facilities and other mitigation and protection programs." *Id.* at 796.

The Court went on to note that consistent with the holding in *Fishing Vessel*, "[I]n interpreting the several Steven's treaties, the courts have consistently held that the reserved fishing rights grant the Indians 'an opportunity to take, by reasonable means, a fair and equitable share of all fish from **any given run**.'" *Id* at 806 (citing *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985)(emphasis added). The Court also noted that the right is limited by the need to protect fish runs from over harvest through state and federal regulation. *Id*. (citing *Sohappy v. Smith*, 302 F. Supp. at 908; *United States v. Oregon*, 769 F.2d at 1416; *United States v. Oregon*, 657 F.2d 1009, 1016-17 (1981); *Puyallup Tribe, Inc. v. Dept. of Game v. U.S.*, 433 U.S. 165, 176-177, 97 S. Ct. 2616, 2623 53 L. Ed.2d 667 (1977)).

Lastly, and most importantly, the Court answered the "ultimate issue" as to whether the 1855 Treaty provided the Tribe with an absolute right to preservation of the fish runs in the condition then existing in 1855, free from environmental damage caused by a changing and developing society. The Court held that the Tribe does not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of the settlers and the resulting development of the land. *Id.* at 808.

Further, that established treaty rights to catch and harvest fish are subject to outside changing circumstances. The Court stated:

> Having concluded that Indian treaties must be interpreted in light of new, and often changing, circumstances including conditions which limit the available quantity of fish, it is not surprising that the courts have not awarded monetary damages to Indian tribes for the depletion or destruction of fish and game caused by development.
>
> This Court is not able to agree with the Tribe's contention that if Indian treaties are subject to changing circumstances, the treaties are therefore 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'[citations omitted]
>
> . . . .

> In the scope of this action, the Tribe's right to fish pursuant to the 1855 Stevens treaty only guarantees access to certain off-reservation fishing grounds and the right to attempt to catch available fish. The treaty does, however, require assurance that the Tribe will have a 'fair share' of the available fish. The law requires the various states, and private parties in certain circumstances such as those presented here, to take remedial actions should their development of the rivers or the surrounding land injure the fish runs. The Stevens treaties require that any development authorized by the states which injures the fish runs be non-discriminatory in nature**,** *see Fishing Vessel* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 **but does not however, guarantee that subsequent development will not diminish or eventually, and unfortunately, destroy the fish runs.**

Id. at 814 (emphasis added). This decision was never appealed.

In taking into account the established authority defining the scope of the off-reservation fishing right, this Court's ruling can be summarized as follows. The Nez Perce contend that a water right must necessarily be implied to give effect to the Tribe's off-reservation fishing right. The Nez Perce admit that the Tribe did not intend to reserve a water right in 1855 because fish habitat was not contemplated. As such, the scope of the treaty fishing right must be ascertained to determine whether the application of canons of treaty interpretation imply a water right necessary to give effect to that treaty right. Established precedent has defined the scope of the right. The fishing right is non-exclusive and shared with non-Indians. The right is essentially a right to a share of the fish harvest. The right is not to an absolute entitlement. Nor does it guarantee a set amount of fish. The right is subject to State regulation for purposes of conserving the species. In fact, the State, not the Nez Perce, has the authority to regulate off-reservation fishing for purposes of conservation. The Nez Perce do not have a property interest in the fish. Further, fishing rights are subject to changing circumstances incurred by settlement and development, which is what has occurred in this case. Lastly, there are other measures in place, such as regulation, to protect the fish run.

Based on the scope of the Nez Perce fishing right, there is no legitimate basis from which to infer that a water right is necessary to the preservation of that limited right. The Nez Perce do not have anything akin to a fish propagation right. Accordingly, this Court cannot conclude, as a matter of law, that the Nez Perce or the federal government reserved an instream water right for fish.

C. The Nez Perce's (and the United States') Admission as to Intent as Well as the Purpose of the 1855 Treaty Is Inconsistent with an Indian Reserved Water Right.

The Nez Perce and the United States agree that neither intended to reserve an instream flow water right in connection with its fishing right at the time the 1855 treaty was executed. This aspect also has independent legal significance as to whether the 1855 Treaty impliedly reserved a water right. Unlike the situation in *Fishing Vessel*, it would be repugnant to the purpose of the treaty negotiations to imply that the Indians reserved an off-reservation instream flow water right. The purpose of the Stevens Treaties was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers. It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. Although, the construction of a treaty focuses on what the Indians would have understood at the time the treaty was negotiated, the Nez Perce and the United States both admit that neither contemplated reserving an off-reservation water right at the time the treaty was being negotiated and executed. At most, the Nez Perce intended that the off-reservation fishing rights (as opposed to a water right) secured by the Treaty would be absolute and free from impediment. However, it defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty. The Nez Perce submit that the issue pertaining to the quantity of water reserved is beyond the scope of these proceedings. However, for illustrative purposes it is helpful to point out that the Nez Perce's amended instream claim for the lowermost point on the Snake River is for 105% of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined. It was also asserted by the State in oral argument on October 13, 1999, and as illustrated on demonstrative exhibits used therein, that many of the Nez Perce's claims are for waters outside their aboriginal territory. Tr. p. 26, L. 22, Tr. p. 27, L. 2.. Because one of the admitted purposes of the Treaty was to extinguish aboriginal title to make the lands available for settlement, it is inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water.

Essentially, what the Nez Perce Tribe is seeking by way of a water right is a remedy for an unforeseen consequence which it now believes stands to threaten its fishing right. Historically, the right of access threatened the fishing right, then the over-allocation of fish by non-treaty fishermen interfered with the right, at present it is the scarcity of water (among other things), and in the future there will unquestionably emerge other unforeseen factors which may also pose a threat to fish habitat. However, at some point only so many interpretations can be exacted from the Treaty language. It is also a canon of treaty interpretation that Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678 (1943).

D. *Adair* and Related Authority Does Not Support an "Off-Reservation" Reserved Indian Water Right.

This Court recognizes, and the Nez Perce have cited authority wherein, some courts have implied a reserved water right for purposes of maintaining an Indian Tribe's reserved fishing right. However, these cases differ in either of two respects. Either the genesis of the water right was a federal reserved water right and, thus, was appurtenant to the Indian Reservation -- the right was limited to the on-reservation, or the right was not derived from the "fishing in common" language which is the claimed origin of the Nez Perce's off-reservation fishing rights. *See, e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1282, 104 S. Ct. 3536, 82 L.Ed 2d 841 (1984)(reserving water for protection of on-reservation fishing right); *Kittitas Reclamation District v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (1985) *cert. denied*, 474 U.S. 1032 (1985) (court does not decide issue of scope of fishing right); *Coleville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L. Ed.2d 630 (1981) (federal reserved water right for maintaining on-reservation fishing right.); *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982) (federal reserved water right to preserve fishing); *Joint Board of Control of Flathead Irrigation Dist. v. United States*, 832 F.2d 1127 (9th Cir. 1987) (right created by "exclusive right of taking fish in all streams running through and bordering reservation."); *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1408 (1963) (federal reserved water right).

The distinction is important because this Court's ruling is limited to claimed water rights appurtenant to off-reservation lands, as the boundaries exist at present. The front runner case which appears to create an off-reservation water right for fishing is *United States v. Adair*, 723 F.2d 1394 (1983). In *Adair*, at issue was whether hunting and fishing rights reserved by the Klamath Tribe in an 1864 treaty also implied the reservation of a water right.[8] Although the Court held that the Tribe had reserved a water right to maintain the tribe's hunting and fishing rights, the water rights at issue were clearly limited to on-reservation lands and, therefore, the decision is not applicable to this case. The language reserving the water right reserved to the Tribe "exclusive use and occupancy of the lands." The Court held:

> There is no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest **in those lands it reserved for itself**. [citations omitted]
> . . . .
> [We] agree with the district court that within the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle **on the Klamath Reservation.**

Id. at 1414 (emphasis added).

The Court's reasoning was based on the finding that the Klamath Tribe reserved exclusive use and occupation on the reserved lands and that there was no express or implied indication that the tribe intended to cede any interest in those reserved lands. *Id* at 1414.

As such, the most *Adair* can stand for in this case is that the Nez Perce reserved water rights on the reserved lands, however that issue is not before this Court and is not decided. *Adair* does not extend to off-reservation water rights. In the instant case, the Nez Perce's claim for off-reservation water rights is predicated on the "fishing in common" language, the meaning and scope of which have been defined and limited to less than a water right.

2. The Subsequent Effect of the 1863 Treaty of Lapwai.

In 1863, the Nez Perce entered into a subsequent treaty with the United States. Pursuant to the 1863 Treaty of Lapwai, the Nez Perce agreed to relinquish additional lands to the United States. In exchange, the Tribe reserved certain defined lands for a new reservation. The 1863 Treaty reduced the boundaries of the former reservation from approximately 7 million acres to

[8] Also at issue was the effect of the Klamath Termination Act on the water right.

approximately 750,000 acres. The ceded land was opened up to non-Indian settlement. Article VIII of the 1863 Treaty provided, *inter alia*, as follows:

> [A]nd further, that all the provisions of said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly, -- the same obligations resting upon the United States, the same privileges continued to the Indians outside of the reservation. . . .

Treaty of 1863, 14 Stat. 647.

As a result, the issue is raised regarding the effect of the subsequent diminishment of the reservation on the Tribe's fishing rights. Stated another way, did the "exclusive" on-reservation fishing rights continue to apply within the 1855 reservation boundaries or did the "exclusive" rights extend only to the 1863 boundary of the new reservation?[9] This issue, however, does not need to be decided because the subsequent 1893 Agreement made by the Nez Perce, and the subsequent legislation ratifying the Agreement, essentially subsumes the issue.

3. *South Dakota v. Yankton Sioux* – The Subsequent Effect of the 1893 Agreement.

In 1998, a unanimous United States Supreme Court decided *South Dakota v. Yankton Sioux Tribe, et al.*, 118 S. Ct. 789 (1998), a suit over who had regulatory jurisdiction over a proposed waste site (landfill), the Tribe and the United States, or the State of South Dakota. Of major significance to the issues before this Court on summary judgment is the fact that the United States Supreme Court interpreted the very same statute in which Congress approved the 1893 Agreement between the United States and the Nez Perce Tribe relating to the cession and sale of surplus tribal lands. Act of Aug. 15, 1894, 28 Stat. 286.

The 1894 Act incorporated (among other things) both the 1892 Agreement with the Yankton Sioux in its entirety and the 1893 Agreement with the Nez Perce in its entirety and, in accordance with both Agreements, Congress expressly appropriated the necessary funds to compensate the Tribes for the ceded lands, to satisfy the claims for scout pay, and to award the commemorative 20-dollar gold pieces. Congress also prescribed the punishment for violating a

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[9] This distinction is important for two reasons. First, this opinion is limited to off-reservation water rights. Second, because the opinion is limited to off-reservation water rights, this opinion does not interpret whether or not the "exclusive" fishing right confers a water right on the reservation.

liquor prohibition included in the agreement and reserved certain sections in each township for common-school purposes. Finally, each Agreement contained a saving clause. *Id.*

In *Yankton Sioux*, both the Federal District Court and the Eighth Circuit Court of Appeals held that the 1894 Act (1892 Agreement with the Yankton Sioux) did not diminish the boundaries of the reservation as delineated in the 1858 Treaty between the United States and the Yankton Sioux Tribe and, consequently, that the subject waste site lies within an Indian Reservation where federal government regulations would apply, i.e., that the Yankton Sioux had sold their surplus lands to the government, but not their governmental authority over it.

The United States Supreme Court granted *certiorar*i to resolve the conflict between the Court of Appeals and a number of decisions of the South Dakota Supreme Court which had declared that the Reservation had been diminished.

The first paragraph of the Supreme Court's opinion reads:

> **This case presents the question whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota.** The reservation was established pursuant to an 1858 treaty between the United States and the Yankton Sioux Tribe. Subsequently, under the General allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (the Dawes Act), individual members of the Tribe received allotments of reservation land, and the Government then negotiated with the Tribe for the cession of the remaining, unallotted lands. The issue we confront illustrates the jurisdictional quandaries wrought by the allotment policy: We must decide whether a landfill constructed on non-Indian fee land that falls with the boundaries of the original Yankton Reservation remains subject to federal environmental regulations. **If the divestiture of Indian property in 1894 effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them.** In light of the operative language of the 1894 Act, and the circumstances surrounding its passage, **we hold that Congress intended to diminish the Yankton Reservation and consequently that the waste site is not in Indian country.**

Id. at 793 (emphasis added).

The Supreme Court found that the land in question was deeded to a non-Indian under the Homestead Act of 1904, i.e., consisted of unallotted land ceded in the 1894 Act. Here, it was no longer on the reservation.

The Supreme Court also stated that the Act of Aug. 15, 1894, which ratified the 1892 Agreement between the United States and the Yankton Sioux, contained "similar surplus land sale agreements between the United States and the Siletz and Nez Perce Tribe." *Id*. at 796.

In setting the stage for its analysis, the Supreme Court stated the rules of interpretation as follows:

> States acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem*, 465 U.S., at 467, 104 S. Ct., at 1164. In contrast, if a surplus land Act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries," *Id*., at 470 104 S. Ct., at 1166, then the entire opened area remained Indian country. **Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose**. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615, 97 S. Ct. 1361, 1377, 51 L.Ed.2d 660 (1977). **Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.** See, *e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). **Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation**, *United States v. Celestine*, 215 U.S. 278, 285, 30 S. Ct. 93, 94-95, 54 L.Ed. 195 (1909), **and its intent to do so must be clear and plain,"** *United States v. Dion*, 476 U.S. 734, 738-739, 106 S. Ct. 2216, 2219-2220, 90 L.Ed.2d 767 (1986).
>
> Here we must determine whether Congress intended by the 1894 Act to modify the reservation set aside for the Yankton Tribe in the 1858 Treaty. Our inquiry is informed by the understanding that, at the turn of the century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian Territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," *Solem*, 465 U.S. at 468, 104 S. Ct., at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid*.; see also *Hagen*, 510 U.S., at 426, 114 S. Ct., at 973 (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen"). **Thus, although "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands,"** we have held that we will also consider "the historical context surrounding the passage of the surplus land Acts," and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Id.*, at 411, 114 S. Ct., at 965. **Throughout this inquiry, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment."** *Ibid.*

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. **This "cession" and "sum certain" language is "precisely suited" to terminating reservation status.** See *DeCoteau*, 420 U.S. at 445, 95 S. Ct., at 1093. Indeed, we have held that **when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises.** *Solem, supra,* at 470, 104 S.Ct., at 1166; see also *Hagen, supra,* at 411, 114 S.Ct., at 965.
>
> The terms of the 1894 Act parallel the language that this court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra*, at 445, 95 S.Ct., at 1093, and as in *DeCoteau,* the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See 510 U.S., at 412, 114 S.Ct., at 966.

Id. at 797, 798 (emphasis added).

Like the 1892 Yankton Agreement, the 1893 Nez Perce Agreement contains nearly identical explicit language of cession, evidencing the "present and total surrender of all tribal interests" (except specifically enumerated and legally described tracts), and a fixed sum payment, representing "an unconditional commitment from Congress to compensate the [Nez Perce] tribe for its opened land." *See* Articles I, II, and III of the 1893 Nez Perce Agreement.

Turning to the savings clause in each of the two respective agreements, Article XVIII of the Yankton Sioux Agreement states (with emphasis):

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, **and the said Yankton Indians shall continue to receive their annuities under said treaty of April 19th, 1858.**
>
> 28 Stat.326 (August 15, 1894).

Article XI of the 1893 Nez Perce Agreement provides:

> The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued in full force and effect.

In *Yankton Sioux*, the United States Supreme Court, in addressing the savings clause, stated:

> The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. **The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained**. The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the Treaty's terms.
>
> **Such a literal construction of the saving clause** as the South Dakota Supreme Court noted in *State v. Greger*, 559 N.W.2d 854, 863 (S.D. 1997) **would "impugn the entire sale." The unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders can by no means be reconciled with the central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's "permanent" home and prohibited white settlement there.** See *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 770, 105 S.Ct. 3420, 3430, 87 L.Ed.2d 542 (1985) (discounting a saving clause on the basis of a "glaring inconsistency" between the original treaty and the subsequent agreement). **Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status.** See *Solem, supra*, at 468, 104 S.Ct., at 1164-1165. We "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's late claims." *Klamath, supra*, at 774, 105 S.Ct., at 3432 (internal quotation marks and citation omitted).
>
> **Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion."** See *United States v. Granderson*, 511 U.S. 39, 56, 114 S.Ct. 1259, 1268-1269, 127 L.Ed.2d 611 (1994) (internal quotation marks omitted). The most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the Tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 Treaty. Along with the proposed sale price, these annuities and other unrealized Yankton claims dominated the 1892 negotiations between the Commissioners and the Tribe.

Id. at 799 (emphasis added).

In this case, the conclusion that the Nez Perce Tribe ceded all its interest in all unallotted land not expressly reserved by the 1893 Agreement and its subsequent ratification by Congress is equally compelling. The savings clause contained in Article XI of the 1893 Agreement, would be in direct contravention of Articles I and II of the Agreement if the Reservation boundaries were not diminished by operation of the savings clause. To conclude otherwise would not only eviscerate the purpose of the 1893 Agreement and its subsequent congressional ratification, but would also be inconsistent with the plain meaning of the 1855 Treaty wherein the Nez Perce Tribe also agreed to "cede, relinquish and convey" to the United States all of its "right, title, and interest" in its aboriginal lands. Stated another way, if the cession language contained in the 1893 Agreement is not to be given literal effect, then the sanctity of the of the 1855 Treaty language can also be called into question. However, by strongly urging the operation of the Indian reserved rights doctrine, the Tribe necessarily admits those aboriginal lands not reserved were ceded pursuant to the 1855 Treaty.

In this Court's view, pursuant to the holding in *Yankton Sioux*, the boundaries of the Nez Perce Reservation was diminished to the extent of all unallotted lands not expressly reserved in the 1893 Agreement.[10] The boundaries of the reservation are important because this ruling is limited to claimed in-stream flow water rights outside of the current boundaries of the Reservation. Consistent with the savings clause of the 1893 Agreement and the 1863 and 1855 Treaties, the Tribe did reserve its off-reservation "right to fish in common." The scope of this right, however, does not include an instream flow water right.

This Court recognizes the holding in *United States v. Webb*, District of Idaho Case No. 98-80-N-EJL (January 12, 1999), which is currently on appeal. *Webb* raised the issue of criminal jurisdiction on previously allotted lands of the Nez Perce Reservation. The District Court ruled that pursuant to the 1893 Agreement the unallotted lands continued to be within the boundaries of the Reservation by operation of the savings clause. This Court declines to follow the ruling for several reasons. First, the matter is currently on appeal and therefore not final. Next, both the government and the defense stipulated in the case that the offense took place on previously allotted land. Therefore, since the status of the unallotted land was not at issue, the decision pertaining to the status of the same is dicta and in all likelihood may not be revisited by the Court of Appeals on that basis.

10 *Yankton Sioux* specifically did not answer whether allotted lands, now in non-Indian ownership were part of the Reservation.

Further, this Court disagrees substantively with the opinion. The Court's analysis erroneously focuses on the intent of the Nez Perce, rather than Congressional intent. Next, the conclusion that Congress did not intend the cession of unallotted lands not specifically reserved to the Tribe in common, not only ignores the plain meaning of the statutory language but also the historical circumstances following the Treaty of 1855. Namely, the influx of settlers on Reservation land and the related policies of alleviating conflict between the Indians and the settlers, settling the west, and extinguishing Indian title.

XII
Conclusion

For the foregoing reasons, this Court rules as follows: 1) That pursuant to the 1855 Treaty, the Nez Perce Tribe reserved among other things, the "right of taking fish at all usual and accustomed places in common with the citizens of the territory;" 2) that the Nez Perce Tribe or the United States did not specifically intend to reserve an off-reservation instream flow water right for purposes of maintaining said fishing right; 3) that the scope of the "right of taking fish in common" does not also confer an off-reservation instream flow water right, and; 4) that pursuant to the 1893 Agreement and its subsequent congressional ratification, the Nez Perce Tribe ceded all interest in unallotted lands not expressly reserved to the Tribe, 5) that by the savings clause the Tribe again reserved its off-reservation in common fishing rights. Therefore, the Nez Perce do not have Indian reserved instream flow water rights extending beyond the boundaries of the present Reservation, where ever those boundaries may be. This Court makes no ruling on the extent of on-reservation water rights of any kind. Summary judgment is therefore granted.

Additionally, based upon the ruling herein, the Court determines that it is unnecessary to address other/additional issues raised in some of the Objectors' Motions for Summary Judgment.

IT IS SO ORDERED

DATED November 10, 1999.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that true and correct copies of the ***ORDER*** were mailed on November 10, 1999, by first-class mail to the following:

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_____
Deputy Clerk