United States Department of the Interior

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WASHINGTON, DC 20240

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M-37033

Memorandum

To: Assistant Secretary-Indian Affairs
Director, Bureau of Indian Affairs

From: Solicitor

Subject: Opinion Regarding the Status of the Bed of the Clearwater River within the 1863 Treaty Boundaries of the Nez Perce Reservation (Idaho)

This memorandum opinion responds to your request for an opinion on the question of ownership of the bed of the Clearwater River, as raised in the letter from the Nez Perce Tribe (Tribe) to Stanley Speaks, Regional Director for the Bureau of Indian Affairs (BIA), Northwest Region. This Opinion reaffirms a prior Solicitor's Office opinion that confirmed the Tribe's beneficial ownership of the bed of the Clearwater River within the boundaries of the Nez Perce Reservation (Reservation), as established by the 1863 treaty between the Tribe and the United States (1863 Treaty).[1]

As explained in more detail below, conflicts associated with gold mining activities led to the establishment of the present-day Reservation and promises to protect the Tribe and its resources. *See infra* Sections I.B, III.A.2. Those promises were not always well kept, and actions occurred both upstream and downstream of the Reservation that significantly diminished the number of fish that returned to the Reservation. *See infra* Section I.D. Now, the Tribe plays a leading role in the restoration of the basin's fishery resources. Ensuring the Tribe's ability to protect these interests has led to the request that I reassess and reconfirm the Tribe's beneficial title in the bed of the Clearwater River within the boundaries of the Reservation.[2] This memorandum derives from and expands upon a 1976 legal opinion issued by the Portland Regional Solicitor (1976 Memorandum).[3] The 1976 Memorandum concluded that:

1) "At the time of the admission of the State of Idaho to the Union [in 1890], the United States had reserved title to the bed of the Clearwater River within the [R]eservation for

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[1] Treaty between the United States of America and the Nez Perce Tribe of Indians, U.S.-Nez Perce Indians, June 9, 1863, 14 Stat. 647 (1863 Treaty).

[2] A thorough discussion of the Tribe's role in restoring fisheries follows in Section I.D.

[3] Memorandum from Robert E. Ratcliffe, Reg'l Solicitor, Portland Region, to the Portland Area Dir., BIA, *Ownership of the Bed of the Clearwater River of the Nez Perce Indian Reservation* (Dec. 6, 1976) (1976 Memorandum). The 1976 Memorandum, including its appendices, is included with this memorandum opinion as Attachment 1.

the benefit of the . . . Tribe. Therefore, the State of Idaho did not take title to the bed under the equal footing doctrine;" and,

2) "The . . . Tribe did not cede the title to the bed of the Clearwater River within the boundaries of the [R]eservation by the agreement of 1893."

For the reasons set forth below, I reaffirm these conclusions from the 1976 Memorandum.[4] The legal analysis herein incorporates, updates, and supplements the longstanding position and analysis of the Department contained in the 1976 Memorandum to reflect more recent precedent relevant to the question of riverbed title. In particular, the most recent U.S. Supreme Court decision on this issue, *Idaho v. United States*, provides strong support for my conclusion. The Court dealt with substantially the same issue, within the same state, and applied analysis to facts similar to those present here.[5]

I. BACKGROUND

The Tribe signed two treaties and one agreement with the United States related to the Reservation: (1) a treaty establishing the Reservation, signed on June 11, 1855 (1855 Treaty);[6] (2) the 1863 Treaty, ceding to the United States a significant portion of the original Reservation;[7] and (3) an 1893 agreement ceding to the United States certain unallotted Reservation lands (1893 Agreement).[8]

A. Pre-Treaty Traditional Ways of Life and the Necessity of Fishing

The Tribe's aboriginal territory encompassed up to 27,000 square miles[9] in what is now Washington, Oregon, and Idaho.[10] In 1800, it included more than seventy permanent villages.[11]

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[4] The Tribe previously asked the Department to initiate affirmative litigation against the State "to vindicate the Indians' ownership rights in the Clearwater riverbed" lying within the exterior boundaries of the Reservation established by the 1855 Treaty. Memorandum from Richard Schifter, Fried, Frank, Harris, Shriver & Kampelman, to Leo Krulitz, Solicitor, submitted on behalf of the Nez Perce (July 19, 1977). At the time, Solicitor Krulitz declined to refer the matter to the Department of Justice, stating without analysis that "case law does not support the theory of tribal ownership to that segment of the Clearwater Riverbed." Letter from Leo Krulitz, Solicitor, to Richard Schifter, Fried, Frank, Harris, Shriver & Kampelman (Aug. 8, 1978) (Krulitz Letter).

The Krulitz Letter has no effect on the conclusions here or in the 1976 Memorandum. A decision not to refer a matter to the Department of Justice for affirmative litigation turns on a complex set of considerations and cannot be construed as an opinion on the merits of any particular matter. Moreover, the Krulitz Letter neither provided any legal analysis explaining its conclusion nor referenced the 1976 Memorandum. Therefore, the Krulitz Letter did not affect the 1976 Memorandum, and the Bureau of Indian Affairs' subsequent assertion that the Krulitz Letter reversed the 1976 Memorandum was in error. *See* Memorandum from Doyce L. Waldrip, Assistant Area Dir., BIA, to Superintendent, N. Idaho Agency, BIA (Oct. 17, 1978).

[5] The conclusions in this Opinion are limited to the precise question of ownership, that is, title to the bed of the Clearwater River within the bounds of the Reservation.

[6] Treaty between the United States of America and the Nez Perce Indians, U.S.-Nez Perce Indians, June 11, 1855, 12 Stat. 957 (1855 Treaty).

[7] 1863 Treaty, *supra* note 1.

[8] Agreement with the Nez Perce Indians in Idaho, ch. 290, § 16, 28 Stat. 286, 326 (1894) (1893 Agreement).

[9] 1 DEWARD E. WALKER, JR., AMERICAN INDIANS OF IDAHO 53 (1973).

In general, "[t]he native peoples of the [Northwest] Plateau depended heavily on fishing for their livelihood."[12] In addition to the value of fish to the human diet through protein, fat, and vitamins, it was and remains valuable for "trace elements such as iodine likely to be lacking in the land-based wild foodstuffs on the Plateau interior."[13] The Tribe had an abundance of anadromous fish and streams for fishing, and "[w]ith their complex fishing technology, they took the chinook, coho, chum, and sockeye, varieties of salmon; dolly varden, cutthroat, lake, and steelhead varieties of trout; several kinds of suckers; whitefish; sturgeon, lampreys; and squawfish."[14] Although the Tribe's members also engaged in hunting, "it was of lesser importance during the salmon runs when all the able-bodied men turned to fishing."[15] During these heaviest periods of fishing, "many thousands of pounds were customarily caught and processed."[16] The Tribe's average per capita fish consumption likely exceeded 500 pounds per year.[17] The heaviest periods of fishing, August and September, saw tribal congregation in large fishing camps.[18]

Tribal members employed a variety of fishing methods in order to meet their needs, but of particular importance here was the common construction of traps and weirs built on streambeds.[19] "Large traps and weirs were usually constructed communally by villages and regulated by a fishing specialist who regulated the fishing and divided the catch."[20] Members of the Tribe constructed weirs and traps using willows and stones, with traps used more frequently in smaller streams.[21] Description of these methods illustrates usage of the streambed. For example, a more recent description of a weir used on the Clearwater River described a series of poles fastened crosswise placed into the river, across its entire length, with the legs of each cross-piece "anchored and wedged firmly with rocks."[22] Fishermen laid long poles between the crotches of adjoining cross-pieces, spanning the length of the river.[23] Then they wove panels of short poles together with willow bark and rested the panels on the long pole, using rocks to anchor the bottoms to the bed.[24] Finally, fishermen placed pairs of cross-pieces about six feet

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[10] DAN LANDEEN & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE 57 (1999).

[11] 12 SMITHSONIAN INSTITUTION, HANDBOOK OF NORTH AMERICAN INDIANS 420 (Deward E. Walker, Jr. vol. ed., 1986).

[12] *Id.* at 620.

[13] *Id.* at 621.

[14] *Id.* at 420.

[15] WALKER, JR., *supra* note 9, at 56.

[16] SMITHSONIAN INSTITUTION, *supra* note 11, at 420.

[17] *Id.*

[18] *Id.* at 632.

[19] *See id.* at 420, 627 fig.6, 632, 633 fig.12 (describing use of traps and weirs; figures illustrating placement of weirs and traps in streambed).

[20] *Id.* at 420.

[21] LANDEEN & PINKHAM, *supra* note 10, at 103.

[22] *Id.* at 104.

[23] *Id.*

[24] *Id.* at 104-05.

downstream, connected by a long pole, with additional long poles extended from the first to the top of the weavings, making a platform from which to fish.[25]

As to traps, William Clark, commissioned along with Meriwether Lewis to explore the new territory in the early 1800s, described a screen trap:

> A dam was formed with stones across a small stream so as to collect the water in a channel not exceeding three feet in width. The water was forced with great speed out across a mat or screen of willows closely tied with bark. This mat was about four feet wide by six feet long, and lay in a horizontal position with its extremities fastened. The water passed through, but fish running downstream were thrown out on the screen and lay there till removed.[26]

Explorer Paul Kane, writing in 1845, also described a trap on a tributary of the Columbia:

> The whole breadth of the stream is obstructed by stakes and open work of willow and other branches, with holes at intervals leading into wicker compartments, which the fish enter in. Once in they cannot get out, as the holes are formed with wicker work inside shaped something like a funnel or a wire mouse-trap.[27]

The Tribe's members also built platforms that extended into the river from which they could dip fish nets, as well as occasionally sank logs to create artificial eddies.[28]

Lewis and Clark also observed tribal members' use of a stone fish dam.[29] Other sources describe the Tribe's use of fish walls "made of stone and built in such a way as to form a diagonally positioned barricade between a particular margin of the river and its beach."[30] Members of the Tribe used the walls as fishing platforms as well as to anchor canoes for dip net fishing.[31]

B. The 1855 Treaty, the 1863 Treaty, and the Boundaries of the Reservation

The 1976 Memorandum and other secondary sources provide a detailed account of the Reservation's history; therefore, only key aspects are repeated here.[32] The 1855 Treaty reserved for "the exclusive use and benefit of [the] Tribe" 7.5 million acres out of the Tribe's aboriginal territory.[33] The Reservation spanned areas in present-day north-central Idaho, southeast Washington, and northeast Oregon, and included the stretch of the Clearwater riverbed at issue

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[25] *Id.* at 105.

[26] *Id.* at 103.

[27] *Id.* at 103-04.

[28] ALLEN P. SLICKPOO, SR., NOON NEE-ME-POO (WE, THE NEZ PERCES) 32 (1973).

[29] SMITHSONIAN INSTITUTION, *supra* note 11, at 632.

[30] LANDEEN & PINKHAM, *supra* note 10, at 102.

[31] *Id.*

[32] *See, e.g.*, 1976 Memorandum, *supra* note 3, at 2-5; *see also* THE NEZ PERCE NATION DIVIDED: FIRSTHAND ACCOUNTS OF THE EVENTS LEADING UP TO THE 1863 TREATY (Dennis Baird et al. eds., 2002).

[33] 1855 Treaty, *supra* note 6, 12 Stat. at 957-58 (Art. II); *see also* 1976 Memorandum, *supra* note 3.

here.[34] Importantly, the 1855 Treaty recognized the importance of fishing to the Tribe by securing to it the exclusive right to take fish in the streams running through or bordering the Reservation.[35]

A rapid influx of would-be miners following the discovery of gold within the Reservation, however, compromised the Federal Government's ability to meet its obligation to keep the Reservation for the exclusive use and benefit of the Tribe.[36] As the Superintendent of Indian Affairs (Superintendent) wrote to the Commissioner of Indian Affairs (Commissioner) in 1860:

> It is now reduced to a certainty that gold exists in paying quantities in extensive districts of the interior of Oregon and Washington, and there is little doubt that at no remote day, thousands of our citizens will be found rushing to these new fields of enterprise and wealth. It will therefore be a policy worthy of a great and magnanimous nation, to promptly make such provisions in [sic] behalf of the Indians, as will secure to them a desirable home on their Reservations, quiet their apprehensions, and secure their respect and goodwill.[37]

Beginning in 1860, gold prospectors entered Reservation lands in violation of the 1855 Treaty and in disregard of instructions to vacate issued by the Indian Agent and the Superintendent.[38] Military intervention became necessary, although it was ultimately unsuccessful in dealing with the first wave of miners,[39] and both the House of Representatives and the Superintendent advised that reducing the Reservation to make mining lands available to non-Indians would be necessary.[40] The House requested the appointment of a commission to negotiate a boundary change to "open such portions of that country as may be found rich in gold, to the enterprise of our miners."[41] In 1861, the Commissioner informed the Senate Committee on Indian Affairs that:

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[34] Attachment 2 features a map illustrating the extent and overlap of both the 1855 and 1863 Reservation boundaries.

[35] 1855 Treaty, *supra* note 6, 12 Stat. at 957-58.

[36] 1976 Memorandum, *supra* note 3, at 3.

[37] Baird et al., *supra* note 32, at 54 (citing Letter from Edward R. Geary, Superintendent of Indian Affairs, to A.B. Greenwood, Comm'r of Indian Affairs (Nov. 27, 1860)). For clarity, by 1860, Oregon had already become a state while the Idaho Territory had yet to be organized. The Oregon Territory included all of the eventual Washington Territory until 1853 when that area was split off to form the Washington Territory. In 1859, the State of Oregon was formed from a portion of the Oregon Territory, and the remaining area was added to the Washington Territory. In 1863, the Idaho Territory was formed from the eastern part of the Washington Territory and the western part of the Dakota Territory. *See* H.R. DOC. NO. 57-15, pt. 3, at 984 (1901).

[38] Baird et al., *supra* note 32, at 55 (citing Letter from Enoch Steen, Major, U.S. Army, to J.A. Hardie, Captain, U.S. Army (Dec. 5, 1860)).

[39] *Id.* (fifty Dragoons—light cavalry—dispatched to deal with forty-five miners located on the reservation); *id.* at 57 (citing Letter from Edward R. Geary, Superintendent of Indian Affairs, to A.B. Greenwood, Comm'r of Indian Affairs (Dec. 27, 1860)) (U.S. Dragoon party forced to turn back because of snow before reaching miners).

[40] *Id.* at 57-60 (citing Letter from Lyman Shaffer, Speaker of the House of Representatives, to James Buchanan, President of the U.S. (Dec. 18, 1860); Letter from Edward R. Geary, Superintendent of Indian Affairs, to A.B. Greenwood, Comm'r of Indian Affairs (Dec. 27, 1860)).

[41] *Id.* at 57 (citing Letter from Lyman Shaffer, Speaker of the House of Representatives, to James Buchanan, President of the U.S. (Dec. 18, 1860)).

> Recent discoveries of gold have been made on the Nez Perce reservation, on the small streams emptying into the Clearwater river from the spurs of the Bitter Root Mountains and a large immigration to that region of country is anticipated by the officers of the Indian Department and others, in consequence of which serious apprehensions exist in regard to the results that are likely to follow an invasion of the rights of the Nez Perce tribe guarantied [sic] by the [1855 Treaty].[42]

Further intrusions by miners and discovery of more gold, both on land as well as in the bed of Clearwater River tributaries found within the Reservation, continued into 1861.[43] Local Indian Department officers pleaded for additional military help during this period as the prospector and miner populations swelled.[44]

In 1862, however, more miners and even settlers came onto the Reservation. "Notwithstanding the injunctions of the Agent at the Nez Perces [sic] Reservation, some fifteen or twenty permanent houses have been erected at Lewiston."[45] Moreover, the Washington Territory's legislature "enacted measures utterly regardless of this country being solely under Federal jurisdiction," purporting to take actions such as dividing the Reservation into three counties, "establish[ing] and set[ting] a going the political machinery of the respective counties, and grant[ing] chartered priviledges [sic], such as turnpikes and ferries."[46] One Washington Territory newspaper proclaimed Lewiston to be the "future Sacramento" and described the situation as "[t]he sovereign 'peeps' have not only squatted upon the land . . . but have laid out a town and are actually disposing of the soil with all the form and 'pomp and circumstance' of law."[47]

In recognition of this worsening situation, Federal Government officials continued to advocate for negotiation of a new treaty with the Tribe:

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[42] *Id.* at 69 (citing Letter from A.B. Greenwood, Comm'r of Indian Affairs, to W.K. Sebastian, Chairman, Senate Comm. on Indian Affairs (Feb. 14, 1861)).

[43] *Id.* at 81 (citing Report of A.J. Thibodo, Physician at Nez Perce Reservation, to A.J. Cain, Indian Agent (Apr. 13, 1861) ("In ascending the Oro Fino we crossed a number of small streams having as good indications of gold as Oro Fino Flat itself. . . . None of these streams have as yet been prospected, owing to the season of the year & the anxiety of the miners to arrive at this fountain head as they call Oro Fino Flat. . . . The pay on Rhodes Creek is better than on any of the others. I saw the product of 5 pans from the bed rock of a claim which averages 40 cts to-the-pan & several of 20 cts.")).

[44] *Id.* at 85-89 (citing Letter from Edward R. Geary, Superintendent of Indian Affairs, to George Wright, Colonel, U.S. Army (Apr. 20, 1861) (requesting a squadron of Dragoons and noting "[h]undreds of white men are already in [the Nez Perce's] country, and daily accessions will soon swell the number to thousands"); Letter from Edward R. Geary, Superintendent of Indian Affairs, to A.S. Johnston, Brigadier General, U.S. Army (Apr. 22, 1861) (requesting troops); Letter from Edward R. Geary, Superintendent of Indian Affairs, to W.P. Dole, Comm'r of Indian Affairs (Apr. 23, 1861) ("Great excitement prevailed among the Indians on finding that instead of the miners being expelled on the opening of spring, as they had been promised, their number on the Reservation was daily augmented, and that thousands of white men were about to over run the country so recently garanteed [sic] them as an asylum and permanent home by our government.")).

[45] *Id.* at 156 (citing *Letters from the Mines, First Letter*, excerpt, WASHINGTON STATESMAN, Feb. 22, 1862).

[46] *Id.* at 161-62 (citing Letter from Charles Hutchins, Indian Agent, to W.P. Dole, Comm'r of Indian Affairs (Mar. 20, 1862)).

[47] *Id.* at 164 (citing *Jottings by the Way*, WASHINGTON STATESMAN, Mar. 24, 1862).

> [A]ll, or nearly so, of the country embraced in the Nez Perce Reservation is gold bearing, . . . the reservation will in a short time be so overrun and occupied by whites, as to render it practically useless for Indian purposes. . . . I have already solicited in my annual estimate with a view to the negotiation of a treaty with the Nez Perces whereby their consent may be had to the diminishing of the area of their present reservation . . . ."[48]

Senator Nesmith remarked: "I believe that it is not disputed, that [the Nez Perce] have faithfully observed the obligations of the treaty, but that its provisions have been violated by the Government in permitting our citizens to invade their reservation in search of gold."[49]

The United States turned its focus to negotiating a new treaty with the Tribe to reduce the size of the Reservation.[50] These negotiations culminated in the 1863 Treaty in which the Tribe ceded to the United States approximately ninety percent of the lands reserved in 1855, including all of the known mining lands.[51] The Reservation's current boundaries are those established by the 1863 Treaty. The Reservation is located in what is now north-central Idaho, near the Washington-Idaho border, and encompasses a 90.5 mile stretch of the Clearwater riverbed.[52]

The broad goals of the negotiations that led to the 1863 Treaty were two-fold: (1) providing the Tribe a homeland with sufficient resources,[53] and (2) addressing the tensions caused by the influx of miners and settlers following the discovery of gold in Clearwater River tributaries within the original Reservation.[54] Regarding the first goal, there was recognition that fish were a key resource to the Tribe. As noted, salmon and other fish served as one of the Tribe's principal food stocks.[55] Moreover, the Tribe's expertise as fishermen was widely acknowledged. At the time of treating, Governor Stevens of the Washington Territory wrote that the Nez Perce took large quantities of salmon from the Clearwater.[56] Equally well known were the Tribe's primary

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[48] *Id.* at 158 (citing Letter from Charles E. Mix, Acting Comm'r of Indian Affairs, to C.B. Smith, Sec'y of the Interior (Jan. 31, 1862)).

[49] CONG. GLOBE, 37th Cong., 2nd Sess. 2095 (1862); *see also* Baird et al., *supra* note 32, at 177 (citing same).

[50] 1976 Memorandum, *supra* note 3, at 3.

[51] 1863 Treaty, *supra* note 1, 14 Stat. at 647-48 (Arts. II, III); 1976 Memorandum, *supra* note 3, at 3; Baird et al., *supra* note 32, at 381 ("The amount of territory acquired by the Government by this treaty . . . include[s] all the mining district.").

[52] *See* Attachment 2.

[53] 1863 Treaty, *supra* note 1, 14 Stat. at 647-48 (Art. II) (area "reserve[d] for a home, and for the sole use and occupation of" the Tribe); *see also* CONG. GLOBE, 37th Cong., 2nd Sess. 2096 (1862) (Senator Nesmith describing available land to reserve as "where they can, at least in part, subsist themselves with the natural advantages of the country"); *see also* Baird et al., *supra* note 32, at 182 (citing same).

[54] 1976 Memorandum, *supra* note 3, at 3; *see also id.* at 11 (noting that riverbeds were one area of particular contention "since it was the discovery of gold in the beds of the Clearwater tributaries which led to the invasion of settlers in the first place and the necessity for making the Treaty of 1863"); ALVIN M. JOSEPHY, JR., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 386 (abridged ed., Univ. of Neb. Press 1979) (initial gold discoveries by Elias Pierce in Orofino Creek).

[55] 1976 Memorandum, *supra* note 3, at 12.

[56] Stuart A. Chalfant, *Aboriginal Territory of the Nez Perce Indians, in* NEZ PERCE INDIANS 25, 38-39 (David Agee Horr ed., 1974) (Chalfant report submitted in *Nez Perce Tribe v. United States*, Dkt. No. 175, before the Indian Claims Commission).

fishing techniques of using weirs, dams, dipping platforms, and fish walls, all of which required use of the riverbed.[57] Anthropological evidence shows that tribal fishermen passed on information about weirs, dams, rock walls, and "underwater trails" to their descendants through stories so that they could learn how to use the riverbed—*e.g.*, by learning where to place weirs and dams.[58] The 1855 Treaty recognized the importance of fishing to the Tribe, having specifically reserved to the Tribe the "exclusive right of taking fish" found in Reservation rivers.[59] The 1863 Treaty's savings provision continued this understanding, explicitly carrying forward that provision of the 1855 Treaty, as it was "not abrogated or specifically changed by any article herein contained."[60]

With respect to the second goal, contemporaneous reports surrounding the treaty negotiation show that a priority of the government negotiators was to establish Reservation boundaries such that the Tribe could "be placed with any prospect of not being again disturbed by gold-seekers, or speedily overwhelmed by the surging waves of civilization."[61] The communications between Department officials and Congress, as well as Senator Nesmith's statements, illustrate this priority.[62] The official proceedings of the 1863 council, at which the United States and Nez Perce negotiated the 1863 Treaty, reflect this priority as well; Superintendent Hale explained that upon learning of gold discovery on the Reservation, "the Government at once began to inquire as to the best way to preserve peace, and protect you from suffering wrong."[63]

The 1863 Treaty, with one exception, does not make explicit references to the Clearwater River, most likely because the 1863 Treaty establishes boundary lines that enclose the Clearwater River as depicted in Attachment 2.[64] The one exception occurs along the Reservation's western boundary, which generally runs north-south. In the northwest corner of the Reservation, the western boundary of the Reservation crosses the Clearwater River and then runs to the west for

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[57] 1976 Memorandum, *supra* note 3, at 13 (noting that the Tribe's fishing techniques were described by early missionaries and even the Lewis & Clark expedition).

[58] *See* 1976 Memorandum, *supra* note 3, at 13 (citing DEWARD E. WALKER, JR., MUTUAL CROSS-UTILIZATION OF ECONOMIC RESOURCES IN THE PLATEAU: AN EXAMPLE FROM ABORIGINAL NEZ PERCE FISHING PRACTICES 25 (Wash. State Univ. Laboratory of Anthropology, Reports of Investigations No. 41, 1967)); Baird et al., *supra* note 32, at 90-92 (citing Henry Miller, *Going up the Snake River*, WEEKLY OREGONIAN (Portland), June 15, 1861).

[59] 1855 Treaty, *supra* note 6, 12 Stat. at 958 (Art. III).

[60] 1863 Treaty, *supra* note 1, 14 Stat. at 651 (Art. VIII).

[61] REPORT OF THE SECRETARY OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. Exec. Doc. No. 37-1, at 541 (1862); *see also* Baird et al., *supra* note 32, at 291 (citing same).

[62] *See* discussion *supra* pages 5-7 & notes 37, 40, 41, 48, 49.

[63] Baird et al., *supra* note 32, at 352 (citing Official Proceedings of the 1863 Council, Source M, Reel 6, Frame 654+).

[64] 1863 Treaty, *supra* note 1, 14 Stat. at 647 (Art. II) (describing the Reservation as "[c]ommencing at the N.E. corner of Lake Wa-ha, and running thence, northerly, to a point on the north bank of the Clearwater river, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of the Hatwai creek; thence, due north, to a point seven miles distant; thence, eastwardly, to a point on the north fork of the Clearwater, seven miles distant from its mouth; thence to a point on Oro Fino Creek, five miles above its mouth; thence to a point on the north fork of the south fork of the Clearwater, five miles above its mouth; thence to a point on the south fork of the Clearwater, one mile above the bridge, on the road leading to Elk City, (so as to include all the Indian farms now within the forks;) thence in a straight line, westwardly, to the place of beginning").

approximately two miles before turning north again. Attachment 3 provides a magnified version of that general area of the Reservation. Along that short east-west portion of the Reservation's western boundary, the 1863 Treaty describes the boundary as being "on the north bank of the Clearwater";[65] thus this portion of the Clearwater is not within the Reservation today.

In addition to its underlying goals and established boundaries, there are two other provisions of the 1863 Treaty that are relevant to the present analysis. First, Article 8 of the 1863 Treaty "secured to citizens of the U.S. as to right of way upon the streams."[66] Second, the 1863 Treaty provided that ferries and bridges located within the Reservation were to be held and managed for the benefit of the Tribe and that any rents or profits from the same would inure to the benefit of the Tribe.[67] The official proceedings of the 1863 council also reflect that the Tribe already understood the existing 1855 Treaty to reserve to the Tribe the right to regulate passage over the streams found on the Reservation.[68] Specifically, Chief Aleiya (also known as Lawyer), a signatory to the Treaty of 1855,[69] at the 1863 Treaty council sought to use the Tribe's ownership of the riverbeds within the 1855 Reservation as leverage in the 1863 Treaty negotiations:

> There is a ferry kept by white men near the Alpowai. I am about to ask, what shall I receive for the privilege? There is another at the mouth of the Clearwater; another across the Snake River. Another question I put to you, what are we to receive for the town of Lewiston? What for the ferry at the North Fork of Clearwater. There is a mining town at Oro Fino; what are we to receive for it? What for Elk City? There is a Ferry also on this side, at another of the Forks of Clearwater, and another above the Forks, near Quil-quil-se-ne-na's camp. What shall we receive for these? What for the country thus taken? I have named these grievances, these violations of the treaty, of the Law . . . .[70]

Despite this existing understanding, the 1855 Treaty had no explicit provision regarding ferries and bridges, leading to the strong inference that the provision was added to the 1863 Treaty in order to ratify explicitly the Tribe's understanding as to its control over activities making use of the streambeds.

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[65] *Id.* The conclusions in this Opinion about the extent of the Tribe's ownership of the Clearwater riverbed do not affect any other treaty rights they may possess, which are governed by other legal principles and are beyond the scope of this Opinion. *See also* 1976 Memorandum, *supra* note 3, at 2 (explaining that its "review did not cover rights to water or possible claims to rivers outside the 1863 boundary of the [Reservation]").

[66] 1863 Treaty, *supra* note 1, 14 Stat. at 651 (Art. VIII). Article 3 of the 1855 Treaty similarly reserved the "use of the Clear Water . . . for rafting purposes, and as public highways." 1855 Treaty, *supra* note 6, 12 Stat. at 958. In fact, in the lead-up to the 1863 Treaty, a report to Congress noted that consent of the Tribe was first sought to build a steamboat landing, which ultimately became Lewiston. H.R. Exec. Doc. No. 37-1, at 539.

[67] 1863 Treaty, *supra* note 1, 14 Stat. at 651 (Art. VIII).

[68] Baird et al., *supra* note 32, at 360 (citing Official Proceedings of the 1863 Council, Source M, Reel 6, Frame 654+).

[69] 1855 Treaty, *supra* note 6, 12 Stat. at 960 (Signature of "ALEIYA, or Lawyer, *Head-chief of the Nez Perces*").

[70] Baird et al., *supra* note 32, at 360 (citing Official Proceedings of the 1863 Council, Source M, Reel 6, Frame 654+).

Congress ratified the 1863 Treaty on April 20, 1867, twenty-three years before the State of Idaho was admitted to Union.[71] The 1890 Constitution of the State of Idaho forever disclaimed all right and title to all lands within the boundaries of Indian Reservations.[72]

C. The Dawes Act and the 1893 Agreement

In 1887, Congress passed the General Allotment Act, commonly referred to as the Dawes Act.[73] The Dawes Act authorized the Secretary to allot reservation lands to individual Indians and to negotiate with tribes for the sale of unallotted portions of their reservations ("surplus lands").[74] The Secretary could then make surplus lands available for non-Indian settlement.[75]

The Secretary allotted reservation lands to individual Indians on the Nez Perce Reservation from 1889 to 1892.[76] Although allotment officials encouraged tribal members to select prairie land, which was more suitable for farming, the tribal members overwhelmingly preferred to select canyon bottom lands near the river.[77] Canyon land was important to the seasonal subsistence cycle. Traditionally, the Tribe had established villages at the mouths of streams.[78] Although

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[71] An act to provide for the admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890) (enacted July 3, 1890). The Territory of Idaho was created from Washington Territory in 1863 prior to the signing and ratification of the 1863 Treaty. 1976 Memorandum, *supra* note 3, at 3-4. For purposes of analyzing riverbed title, the law (as discussed further in Section II) is concerned only with congressional reservation prior to the date of statehood; the date of reservation in relation to formation of a territory is irrelevant. *Id.* at 6 (citing U.S. CONST. art. IV, § 3, cl. 2) (explaining that "[p]rior to the admission of a territory as a state, the United States is the sovereign power which has sole authority to dispose of these lands"). Even if territorial status were relevant, the Organic Act of the Territory of Idaho contained a general disclaimer stating that "nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory," 1976 Memorandum, *supra* note 3, at 3 (citing An Act to provide a temporary Government for the Territory of Idaho, ch. 117, § 1, 12 Stat. 808, 809 (1863)), which lends support to the conclusion that none of the land within the Reservation's boundaries, including the riverbed, passed to the state in 1890.

[72] IDAHO CONST. art. 21, § 19 (approved July 3, 1890) (declaring that "the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, . . . and said Indian lands shall remain under the absolute jurisdiction and control of the [C]ongress of the United States."); *see also* 1976 Memorandum, *supra* note 3, at 4.

[73] General Allotment Act, ch. 119, 24 Stat. 388 (1887).

[74] General Allotment Act §§ 1, 5. Section 5 of the Dawes Act directed the Secretary to hold in trust, for the benefit of individual allottees, patents to the allotments for a period of twenty-five years before transferring fee title to the allottees. But that section of the Act also allowed the President discretion to extend this trust period. Following an Attorney General opinion narrowly construing that discretion, 25 Op. Att'y Gen. 483 (1905), Congress enacted a statute explicitly authorizing broad discretion in extending trust periods. 25 U.S.C. § 391. In 1934, congressional enactment of the Indian Reorganization Act ended the practice of patenting allotted lands in fee, providing that trust patents would remain in trust until Congress directed otherwise. *Id.* § 462. Allotted land that had passed out of trust, however, was often ultimately transferred to non-Indians. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03(2)(b), at 1074 & n.29 (Nell Jessup Newton ed., 2012) (citing Wilcomb Washburn, Red Man's Land/White Man's Law 145 (Univ. Okla. Press 2d ed. 1995) and U.S. Dep't of Interior, 10 Rep. on Land Planning 6 (1935)).

[75] Emily Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act* 25 (2002); *see also* General Allotment Act § 5.

[76] *Greenwald, supra* note 75, at 39.

[77] *Id.* at 74-75, 81-83, 89.

[78] *Id.* at 41.

tribal members typically left the village in the summer to harvest root crops and hunt, they returned to the canyon bottoms for the winter.[79] The weather was milder there, and spawning fish provided a critical food source in the spring.[80]

After the Secretary made these allotments, the United States negotiated and entered into an agreement in 1893 with the Tribe for the sale of surplus lands.[81] Pursuant to the 1893 Agreement, the Tribe agreed to sell all unallotted Reservation land to the United States for $1.6 million.[82] Article I of the 1893 Agreement provided, "the said Nez Perce Indians hereby 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 [their] reservation, saving and excepting [certain tracts]."[83] The 1893 Agreement specifically reserved and retained certain parcels from disposal, totaling over 32,020 acres, including an area referred to as the "the boom" adjacent to the Clearwater River.[84] The 1893 Agreement made no other mention of the river or riverbed, although a number of both trust patents and patents issued for surplus lands bordered, but did not include, the river.[85] The 1893 Agreement concluded with a savings clause that stated that "[t]he 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."[86]

D. The Tribe's Role in Modern Fishery Restoration

The modern history of fisheries on the Columbia River and its tributaries, including the Clearwater River, is one of great decline followed by present-day restorative action. Construction of a series of dams ultimately contributed to blocking fish passage.[87] In addition to hydro-electric dam development, environmental change, and unsustainable fishing practices have contributed to major decreases in fish populations.[88] As a general illustration, Pacific salmon caught in the Columbia River dropped from roughly 1.2 million to 24,000 by 1978.[89]

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[79] *Id.* at 42, 77.

[80] *Id.* at 41.

[81] *Id.* at 79. The efforts were initially met with resistance. *Id.* at 80-81.

[82] 1893 Agreement, *supra* note 8. Congress ratified the 1893 Agreement by the Act of August 15, 1894. *Id.*, 28 Stat. 286.

[83] *Id.*, 28 Stat. at 327. *See United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (noting the timber lands reserved to the Tribe).

[84] 1893 Agreement, *supra* note 8, 28 Stat. at 327-29 (Arts. I and II).

[85] The 1893 Agreement made one reference to a tract of land for which the United States agreed to pay a private party to release and relinquish all title and claim in favor of the United States, the land description of which used "the margin of said Clearwater River at low-water mark" to describe one of the boundary lines. 1893 Agreement, *supra* note 8, 28 Stat. at 328 (Art. II). Consistent with the discussion in Section III.B, however, the use of the Clearwater River low-water mark to describe a single property line, when considered in combination with the 1893 Agreement's savings clause, is insufficient to establish any intention to divest the Tribe of title to the riverbed.

[86] 1893 Agreement, *supra* note 8, 28 Stat. at 331 (Art. XI).

[87] *See* SMITHSONIAN INSTITUTION, *supra* note 11, at 640.

[88] NATIONAL PARK SERVICE, COHO SALMON RESTORATION IN LAPWAI CREEK, IDAHO, http://www.nps.gov/nepe/planyourvisit/upload/NEPE_Coho_Project.pdf.

[89] SMITHSONIAN INSTITUTION, *supra* note 11, at 640.

In the face of this decline, the Tribe has engaged in important and extensive fish production activities requiring use of the bed of the Clearwater River within the Reservation.[90] The Tribe and United States have cooperated in managing a number of hatcheries to help renew these runs.[91] Fish runs continue to be of significant cultural, religious, and practical importance to the Tribe.[92] Moreover, the hatcheries and restoration activities serve an important legal and historical purpose in contributing to protection of the Tribe's treaty-reserved fishing rights.[93]

As a result of the Tribe's co-management authority with the United States over fishery resources,[94] the Tribe's Department of Fisheries Resource Management (DFRM) runs one of the largest fisheries programs in the United States, tribal or non-tribal. With nearly 200 employees and an annual budget surpassing $20 million, the DFRM owns, manages, or operates three hatcheries on the Clearwater River within the Reservation—the Nez Perce Tribal Hatchery (co-owned by the Tribe and the U.S. Department of Energy's Bonneville Power Administration (BPA)), the Kooskia National Fish Hatchery (owned by the United States but managed and operated by the Tribe), and the Dworshak National Fish Hatchery Complex (owned by the United States and co-managed by the Tribe and the U.S. Fish and Wildlife Service)—as well as related acclimation and monitoring facilities. Fish production at the hatcheries includes four anadromous salmonid species: Snake River fall-run chinook, Snake River spring-run chinook, Snake River steelhead, and coho salmon.[95] The Tribe also releases anadromous Pacific lamprey from the Nez Perce Tribal Hatchery into tributaries of the Clearwater River.[96]

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[90] With regard to fish production facts and figures, where not otherwise cited, information was gathered through personal communication with and documents provided by the Tribe's Department of Fisheries Resources Management.

[91] *See, e.g.*, Snake River Water Rights Act of 2004, Pub. L. No. 108-447, Div. J, Tit. X, 118 Stat. 2809, 3431; Agreement Between the United States of America and the Nez Perce Tribe Regarding Management of the Kooskia National Fish Hatchery and Joint Management of the Dworshak National Fish Hatchery (signed Mar. 31, 2005) (recitals recognizing importance of fish to Tribe and goals of, *inter alia*, agreement to assist in sustaining, preserving, and enhancing fisheries).

[92] *See, e.g.*, LANDEEN & PINKHAM, *supra* note 10, at 91.

[93] The Tribe holds reserved fishing rights confirmed by the 1855 Treaty. 1855 Treaty, *supra* note 6, 12 Stat. at 958 (Art. III). Enforcement of these fishing rights is overseen by federal court. *See United States v. Oregon*, 699 F. Supp. 1456, 1458-60 (D. Or. 1988) (describing background of the court's retained jurisdiction over treaty fishing rights).

[94] *See supra* note 91.

[95] Fall-run chinook, spring-run chinook, and steelhead are each listed under the Endangered Species Act, 50 C.F.R. § 17.11(h), and coho were declared extirpated in the Clearwater River as of 1986, NATIONAL PARK SERVICE, COHO SALMON RESTORATION IN LAPWAI CREEK, IDAHO, http://www.nps.gov/nepe/planyourvisit/upload/NEPE_Coho_Project.pdf.

[96] Providing further example of the importance of submerged land to the Tribe's hatchery activities, Pacific lamprey require four to six years in a larval stage burrowed in fine riverbed silt. DFMR collects adult lamprey at dams on the Snake and Columbia Rivers, overwinters the adults in a special building at the Nez Perce Tribal Hatchery, and then releases the adults into the Clearwater River and tributaries. Larvae produced by these released adults make use of the bed of the Clearwater River.

To illustrate the importance of the Tribe's fish production activities, Snake River fall-run chinook have seen an increase in returning fish from 575 in 1990 to about 80,000 in 2014.[97] This significant increase results largely from the Tribe's production: annual on-Reservation production of juvenile fall-run chinook totals just over two million fish. Use of submerged land, *i.e.*, the riverbed, plays an important role in these activities. In 2014, the Clearwater River on the Reservation was home to over 3,000 salmon spawning beds. Known as redds, these spawning beds are built by salmon in the gravel of a stream.[98] Cold-water releases from Dworshak Dam also cause fall-run chinook eggs and young juveniles to spend a prolonged period in the gravel of the riverbed.

Mining or other submerged land disturbance, through either extraction or insertion of materials from or into the riverbed, could seriously harm the Tribe's fish production activities. Riverbed disturbance could directly harm or destroy redds as well as affect the spawning beds through changes to water quality.[99] Submerged land activities may also directly disturb juveniles and their habitat, as well as hinder juvenile and adult migration and passage. Riverbed disturbances could also lead to adverse impacts to the water quality of sources used by the hatcheries for purposes beyond simple maintenance of in-stream flows. The Tribe's related activities could also be adversely affected through direct or indirect disturbance of juvenile migration traps and passive integrated transponder tag arrays, electronic monitoring devices located in-river.

The discussion above demonstrates the importance of the Tribe's fish production activities in the Clearwater River. This discussion establishes the need for consideration of whether these activities could in any way be threatened by competing claims to ownership of the bed of the Clearwater River. The analysis that follows reaffirms the Tribe's ownership of the riverbed underlying these activities.

II. LEGAL BACKGROUND

There are two sets of operative legal principles regarding these historical facts, which must be reconciled with care. First, interpretation of Indian treaties requires application of a set of canons of construction specific to that area of law, which generally calls for their liberal interpretation in favor of tribes. Second, in the context of the Equal Footing Doctrine, courts begin with a presumption that title to the beds of navigable waters passes to the state upon admission to the Union.

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[97] Similarly, the Tribe's production returned coho from being previously extirpated in the basin to a return of at least 15,000 fish in 2014. Roger Phillips, *Coho salmon in Idaho: Back from the dead*, IDAHO STATESMAN, Oct. 20, 2014, http://www.idahostatesman.com/2014/10/20/3437617/back-from-the-dead.html. The Tribe has also been outplanting (transplanting from a nursery location) Pacific lamprey in the Clearwater River basin since 2007, with 183 outplanted in 2015. On-Reservation production of juvenile fish totals roughly 3.05 million spring-run chinook, 300,000 steelhead, and 900,000 coho.

[98] *E.g.*, Washington Department of Fish & Wildlife, Recreational Activities May Harm Salmon & Steelhead Spawning Beds: What is a redd?, http://wdfw.wa.gov/conservation/habitat/spawningbed_protection/redd.html (last visited Oct. 7, 2015). A female salmon will dig depressions in the gravel to form pockets to hold her eggs. *Id.*

[99] Besides actual crushing of eggs given their close location to the surface of the bed, even siltation of a redd's gravel cover can prevent the normal flow of water through the gravel, which brings oxygen to eggs and moves waste product away. *Id.*

A. Indian Law Canons of Construction

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law."[100] The Supreme Court has developed three primary rules of construction applicable to Indian treaties.[101] First, "treaties with the Indians must be interpreted as they would have understood them."[102] Second, ambiguities or "any doubtful expressions in them should be resolved in the Indians' favor."[103] Third, treaties must be liberally construed in favor of the Indians.[104] Intent in the Indian treaty context is typically a question of fact and may be evidenced by "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[105] Attention must also be paid to traditional lifestyles at the time of a treaty, as evidenced by oral history and archaeology.[106] Additionally, treaty rights can be abrogated only by a subsequent act when Congress clearly expresses intent to abrogate after a careful consideration of the conflict with extant rights.[107]

B. The Equal Footing Doctrine

Under the Equal Footing Doctrine, courts begin with a presumption that "title to land under navigable waters passes from the United States to a newly admitted State" at statehood.[108] This

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[100] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

[101] These canons of construction also apply when interpreting statutes, executive orders, regulations, and agreements intended for the benefit of Indians. *E.g.*, *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'"); *see also* COHEN'S HANDBOOK, *supra* note 74, § 2.02(1), at 113-15.

[102] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (noting among other things that treaties are not a grant of rights *to* the Indians, but *from* them).

[103] 397 U.S. at 631.

[104] *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians").

[105] *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Mille Lacs Band*, 526 U.S. at 196 ("we look beyond the written words to the larger context that frames the Treaty").

[106] *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (examining the pre-treaty role of fishing), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[107] *Mille Lacs Band*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (requiring "clear evidence" Congress considered the conflict and chose to resolve it by abrogating the treaty); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate tribal property rights must be "plain and unambiguous"); *see also Cobell v. Norton*, 240 F.3d 1081, 1102-03 (D.C. Cir. 2001) (holding Indian canons trump deference to agency interpretation); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (same).

[108] *See, e.g., Idaho v. United States*, 533 U.S. 262, 272 (2001) (internal citations omitted). Determination of navigability in the United States uses the "navigability in fact" test. *E.g.*, *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012). Unlike the definition of navigability used in English common law that relied on distinguishing between tidal and non-tidal waters, the test here requires evidence that waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 1226-27, 1228 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)). Navigability for title also should not be confused with navigability for purposes of the Clean

presumption emerged from the recognition that newly admitted states entered the "Union on an 'equal footing' with the original States."[109] Nevertheless, Congress has authority to "convey land beneath navigable waters, and to reserve such land . . . for a particular national purpose such as a[n] . . . Indian reservation," prior to statehood, thereby defeating state title to those submerged lands.[110]

Since issuance of the 1976 Memorandum,[111] the Supreme Court has decided two cases pertaining to ownership of lands under navigable waterways within the boundaries of Indian reservations.[112]

Water Act. *See generally* 33 U.S.C. § 1251 et seq. (Clean Water Act). For equal footing cases, navigability is to be determined as of the time of statehood and "on a segment by-segment basis." 132 S. Ct. at 1227-28, 1229. This Opinion focuses on the test for determining title to lands underlying navigable rivers because, as explained in the 1976 Memorandum, the available evidence indicates that the stretches of the Clearwater River at issue are navigable. *See* 1976 Memorandum, *supra* note 3, at 6-8; *see also Village of Peck v. Denison*, 450 P.2d 310, 313 (Idaho 1969) (describing creek on reservation as flowing into "navigable Clearwater River"). I am aware of no new or more recent evidence that contradicts the evidence offered as to navigability in 1976. Thus, I adopt the 1976 Memorandum's conclusion that the Clearwater River is navigable for purposes of the analysis here.

[109] *Idaho*, 533 U.S. at 272; *see also Alaska v. United States*, 545 U.S. 75, 79 (2005); COHEN'S HANDBOOK, *supra* note 74, § 15.05(3)(a), at 1019. *See also* Thomas H. Pacheco, *Indian Bedlands Claims: A Need to Clear the Waters*, 15 HARV. ENVTL. L. REV. 1, 11 n.56 (1991) ("The equal footing precept has been embodied in a federal statute. The [Submerged Lands] Act specifies that title to land under navigable water lies in the state in which the land is located, except for land lawfully conveyed by the United States to any person, or held by the Federal Government for the benefit of Indians. 43 USC 1311, 1301(f), 1313(b).").

[110] *Idaho*, 533 U.S. at 272-73. The Equal Footing Doctrine is not explicit in the Constitution. In contrast, the property clause explicitly confers on Congress the authority to reserve or dispose of federally held land. *Compare* U.S. CONST., art. IV, § 3, cl. 1 (permitting admission of new states into the Union) *with* U.S. CONST., art. IV, § 3, cl. 2 (granting Congress exclusive authority to reserve or dispose of federal property). *See also* Pacheco, *supra* note 109, at 14.

[111] The 1976 Memorandum contains a thorough discussion of the key Equal Footing Doctrine cases that preceded it. This Opinion incorporates that discussion by reference.

[112] Several Ninth Circuit decisions also have resolved issues regarding the ownership of submerged lands on Indian reservations. In cases where the record demonstrated tribal reliance on the waterways at issue, the Ninth Circuit found in favor of the tribes and the United States. *See United States v. Milner*, 583 F.3d 1174, 1186 (9th Cir. 2009) (United States owns tidelands in trust for the benefit of the Lummi Tribe where the Tribe depended on use of the tidelands, earlier decisions quieted title in the United States, and the facts satisfied the *Idaho* two-step inquiry, discussed below); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983) (Puyallup Tribe is beneficial owner of former riverbed where Puyallup Reservation was enlarged to include a segment on the River), *cert. denied*, 465 U.S. 1049 (1984); *Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (Muckleshoot Tribe is beneficial owner of former riverbed where Muckleshoot Reservation was enlarged to include Tribe's traditional fisheries), *cert. denied*, 465 U.S. 1049 (1984); *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982) (Quinault Indian Nation owns the bed of the Quinault River), *cert denied*, 463 U.S. 1207 (1983); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (bed of south portion of lake owned by United States in trust for Confederated Salish & Kootenai Tribes where application of *Montana* analysis does not support overturning earlier Ninth Circuit cases recognizing Tribes' beneficial title), *cert. denied*, 459 U.S. 977 (1982). *But see United States v. Aam*, 887 F.2d 190, 196-98 (9th Cir. 1989) (tidelands not held in trust for Suquamish Tribe where the disputed tidelands did not supply "a significant amount" of the Tribe's fishery needs and, thus, no public exigency existed); *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir. 1983) (riverbed not held in trust for the Colorado River Indian Tribes where congressional intent to depart from the Equal Footing Doctrine could not be inferred because record did not show history of tribal dependence on river). Both *Puyallup* and *Muckleshoot* are particularly instructive because the Ninth Circuit paid close attention to the fact that the tribes in each case relied on the riverbeds for their methods of fishing. *Puyallup*,

In *Montana v. United States*,[113] the Court concluded that the bed and banks of the Bighorn River within the Crow Indian Reservation passed to the State of Montana upon statehood because they were not reserved for the Crow Tribe. Conversely, in *Idaho v. United States*,[114] the Court found that the United States held in trust for the benefit of the Coeur d'Alene Indian Tribe the bed and banks of Lake Coeur d'Alene and the St. Joe River within the boundaries of the Coeur d'Alene Reservation and that title did not pass to the State of Idaho upon its entry into the Union. In both cases, the importance of fishing and use of the waterways to the tribes' diets and ways of life figured prominently in the Court's analysis.

1. Montana v. United States

In 1975, the United States filed suit to quiet title to the bed and banks of the Bighorn River in the United States as trustee for the Crow Tribe.[115] The Supreme Court began "with a strong presumption against conveyance by the United States" to the Tribe, and then applied principles established in *United States v. Holt State Bank*[116] and *Shively v. Bowlby*[117] to determine whether the establishment of the Crow Reservation constituted a "public exigency" such that title to the riverbed did not pass to the State upon statehood.[118] The Court first looked to the treaties with the Crow Tribe. Although the Crow Reservation was established before Montana statehood, the Court concluded that the treaties alone, which made no specific mention of the riverbed, were insufficient to overcome the Equal Footing Doctrine's presumption.[119] The Court then briefly

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717 F.2d at 1261; *Muckleshoot*, 713 F.2d at 458. Both cases involved tribes utilizing their respective riverbeds to construct fish traps and weirs. 717 F.2d at 1261; 713 F.2d at 458. As the court noted in *Puyallup*, quoting the district court's finding below, the "Puyallup harvested fish with wiers [sic] and traps, 'substantial structures which spanned the width of the river [and] were firmly implanted in the bed of the river.'" 717 F.2d at 1261 (quoting *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65, 71 (W.D. Wash. 1981)).

Furthermore, with respect to the *Namen* case, the State and Mr. Namen unsuccessfully sought *certiorari* and explicitly argued that the circuit court had relied on a prior decision involving Flathead Lake, *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), that was irreconcilable with *Montana*. Petition for Writ of Certiorari at 16-19, *Namen v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (No. 82-22). The petitioners further argued that *Namen*'s result "would virtually eviscerate the Equal Footing Doctrine in most of our Western states." *Id.* at 19. The Court denied *certiorari*. *Polson v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (1982). Similarly, in both the *Puyallup* and *Muckleshoot* cases, the Supreme Court denied *certiorari* despite the petitioners raising alleged inconsistencies with *Montana*. *See* Petition for Writ of Certiorari, *Port of Tacoma v. Puyallup Indian Tribe*, 465 U.S. 1049 (No. 83-958); Petition for Writ of Certiorari, *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 465 U.S. 1049 (No. 83-833).

[113] *Montana v. United States*, 450 U.S. 544 (1981). This suit by the United States followed a dispute between the Crow Tribe and the State of Montana regarding the regulation of hunting and fishing on fee land owned by non-Indians on the Crow Reservation.

[114] 533 U.S. 262.

[115] *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978).

[116] 270 U.S. 49 (1926).

[117] 152 U.S. 1 (1894).

[118] *Montana*, 450 U.S. at 552.

[119] *Id.* at 554-55. Although the Court analogized to *Holt State Bank*, stating that the Crow treaty merely "reserve[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory," *id.* at 554, some commentators suggest that the Court seriously misread *Holt State Bank*. *See* John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW

analyzed whether the situation of the Crow Tribe at the time of treating constituted a public exigency such that congressional intent to depart from the Equal Footing Doctrine could be inferred.[120] It found that the Crow Tribe was nomadic and depended primarily on buffalo; "fishing was not important to their diet or way of life."[121] Thus, the Court concluded that "the situation of the Crow Indians . . . presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States."[122] Accordingly, title passed to the State upon its entry into the Union.[123]

2. Idaho v. United States

Twenty years after *Montana*, the Supreme Court resolved a dispute over the Coeur d'Alene

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STORIES 535, 572-74 (2011); Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 677-78, 681-82 (1981); *see also* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 118 n.126 (2002); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte *Young, Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 Ariz. St. L.J. 787, 816 n.111 (1999); Pacheco, *supra* note 109, at 23-24 & nn. 117, 122.

[120] 450 U.S. at 556.

[121] *Id.* The *Montana* Court's analysis regarding Crow fishing habits is not as comprehensive as it could have been. In a prior, related proceeding, Justice Anthony Kennedy, then sitting as Judge on the Ninth Circuit, wrote the majority opinion in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), reversing the federal district court's conclusion that the Crow Tribe had not shown sufficient evidence of historical fishing. In reversing and vacating the decision of the Ninth Circuit, the Supreme Court made no mention of the circuit court's opinion with respect to fishing, merely concluding that the criminal defendant had indeed been subject to double jeopardy. 433 U.S. 676. Afterward, in the near-parallel proceeding of *United States v. Montana*, the district court again ruled that the Crow Tribe had not shown any meaningful historical evidence of fishing, stating that the Ninth Circuit's opinion in *Finch* had been vacated and that the district judge disagreed with then-Judge Kennedy's reasoning. 457 F. Supp. 599, 600 n.1 (D. Mont. 1978). The Ninth Circuit reversed again, essentially adopting its prior conclusion. 604 F.2d 1162, 1166 (9th Cir. 1979). This time, however, the Supreme Court simply incorporated the district court's characterization of the record without actual analysis, leaving it to a single sentence. 450 U.S. at 556. The dissent rightly pointed out that there was in fact "evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in times of scarcity." *Id.* at 570 (Blackmun, J., dissenting in part).

[122] 450 U.S. at 556. After a careful consideration of *Montana*, the Ninth Circuit subsequently noted:

> [W]hen faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river.

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257 (9th Cir. 1983). The Ninth Circuit accordingly developed the following framework for resolving the question of whether the United States holds title to submerged lands in trust for Indian tribes such that the Equal Footing Doctrine's presumption is rebutted:

> [W]here a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

Id. at 1258. *See also Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983). *Puyallup*'s analytical framework corresponds with the first step in *Idaho*'s two-step inquiry, discussed below.

[123] *Montana*, 450 U.S. at 556-57.

Tribe's ownership of submerged lands within its Indian reservation.[124] This time, the Court found in favor of tribal ownership.

The Coeur d'Alene Tribe:

> traditionally used [Lake Coeur d'Alene] and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.[125]

The United States acquired through a treaty with Great Britain an area including the aboriginal territory of the Coeur d'Alene Tribe.[126] Thereafter, the Tribe agreed to cede to the United States most of its aboriginal territory, reserving for its exclusive use an area including "part of the St. Joe River . . . and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary."[127] An 1873 executive order established the Coeur d'Alene Reservation within the boundaries described in the agreement between the Tribe and the United States.[128] Through later agreements, the Tribe ceded portions of its reservation, including the northern portion of Lake Coeur d'Alene.[129] Congress ratified these later agreements in 1891, less than one year after passing the Idaho Statehood Act.[130]

The Court in *Idaho* formulated the following "two-step enquiry" for determining whether the establishment of an Indian reservation defeats the Equal Footing Doctrine's presumption: (1) did "Congress intend[] to include land under navigable waters within the federal reservation"?; and, (2) did "Congress intend[] to defeat the future State's title to the submerged lands"?[131] If both are answered affirmatively, then the presumption is rebutted. Where a "reservation clearly includes submerged lands," congressional intent is met if "Congress was on notice" of such inclusion and "the purpose of the reservation would have been compromised if the submerged lands had passed to the State[.]"[132]

Applying step one, the Court found that Congress was on notice that the reservation included submerged lands. The State of Idaho conceded, and contemporaneous congressional and executive documents demonstrated, that Congress likely knew that "[a] right to control the

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[124] *Idaho v. United States*, 533 U.S. 262 (2001).

[125] *Id.* at 265 (internal citations omitted).

[126] *Id.* The United States received from Great Britain title "subject to the aboriginal right of possession held by resident tribes." *Id.*

[127] *Id.* at 266.

[128] *Id.*

[129] *Id.* at 269-70.

[130] *Id.* at 270-71.

[131] *Id.* at 273.

[132] *Id.* at 273-74 (citing *United States v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997)).

lakebed and adjacent waters was traditionally important to the Tribe."[133] Accordingly, the Court concluded that Congress intended to include the submerged lands as part of the reservation.[134]

Next, the Court noted that Congress's dealings with the Coeur d'Alene Tribe "show[ed] clearly that preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation."[135] Finding no such agreement by the Tribe to relinquish beneficial ownership of the submerged lands, the Court determined Congress "underst[ood] that the . . . reservation's submerged lands had not passed to the State."[136] Accordingly, the Court held: "Congress recognized the full extent of the . . . reservation . . . it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands" within that reservation.[137]

C. Interplay of the Indian Law Canons of Construction and the Equal Footing Doctrine

The Equal Footing Doctrine's presumption was developed outside the context of Indian law.[138] In cases in which other legal presumptions might apply, the Court has set them aside or given them a different weight when arising in the context of and in conflict with Indian law.[139] When the Court has faced the interplay of the Equal Footing Doctrine and title to lands beneath navigable waters in the Indian law context, however, the Court has applied the presumption while sometimes explicitly invoking the canons and at other times making no mention of them whatsoever.[140]

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[133] *Id.* at 274.

[134] *Id.*

[135] *Id.* at 276.

[136] *Id.* at 279. Also important to the Court's analysis was the course of dealing between the United States and the Coeur d'Alene Tribe. *Id.* at 274-81.

[137] *Id.* at 281.

[138] *See Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894) (discussing origin of doctrine in English common law); *see also Pollard v. Hagan*, 44 U.S. 212, 228-30 (1845) (title to non-coastal tidelands pass to state upon admission to Union; non-Indian-law case).

[139] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999) (presumed legality of executive orders not given same weight in face of required resolution of treaty ambiguities in favor of Indians); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985) (dealing with presumption against repeals by implication); *see also Equal Emp't Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001) (setting aside normal presumption that omission from Age Discrimination in Employment Act of a Title VII provision indicates deliberate choice by Congress); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (typical *Chevron* deference not applied); Pacheco, *supra* note 109.

[140] *Compare Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (applying rule that treaties be interpreted as tribe would have understood and resolving doubtful expressions in favor of Indians, while still acknowledging presumption found in Equal Footing Doctrine), *and Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (appealing to liberal construction in favor of Indians in face of question as to whether United States reserved submerged lands adjacent to islands), *with Idaho*, 533 U.S. 262 (applying the "default" rule presuming passage of navigable streambed title to states), *and Montana v. United States*, 450 U.S. 544 (1981) (applying presumption without mention of canons by majority).

As noted above, *Montana* and *Idaho* each applied the Equal Footing Doctrine's presumption without analysis of the Indian canons.[141] But neither case overturned those that had previously made explicit use of the canons, such as *Choctaw Nation v. Oklahoma.*[142] In *Choctaw Nation*, the Court wrote that "nothing in the *Holt State Bank* case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor."[143]

Based on a synthesis of the Court's precedent, then, the analysis in circumstances like these begins with the presumption that title to lands beneath navigable waters passes to the state. In determining whether that presumption is overcome, the inquiry should apply the Indian law canons of construction where appropriate to the facts.[144] The presence of an intent to include lands beneath navigable waters in a reservation and the presence of an accompanying intent to defeat future state title to such lands are necessarily factual inquiries that turn on interpretation of both the controlling documents—here, treaties and agreements—as well as the historical circumstances surrounding entry into those agreements. Interpretation of treaties and agreements are at the heart of the canons, and nothing in recent Supreme Court precedent has stated that the canons should not be used in such an interpretation.[145] Thus, I will proceed within the framework of *Idaho*'s equal footing analysis with an eye toward applying the canons where interpretation of the treaties and agreement are necessary.

III. ANALYSIS

A. The 1855 and 1863 Treaties Reserved the Bed of the Clearwater River within the Boundaries of the Reservation such that Title to the Riverbed Did Not Pass to the State of Idaho under the Equal Footing Doctrine.

For the reasons set forth below, I reaffirm the 1976 Memorandum's conclusion that, at the time of Idaho's entry into the Union, the United States held in trust for the benefit of the Tribe the stretch of the Clearwater riverbed at issue here such that title did not pass to Idaho. I also adopt

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[141] *See* 450 U.S. 544; 533 U.S. 262.

[142] *See* 450 U.S. at 567-68 (Stevens, J., concurring); 533 U.S. 262.

[143] *Choctaw Nation v. Oklahoma*, 397 U.S. at 634.

[144] *See United States v. Idaho*, 210 F.3d 1067, 1073 (9th Cir. 2000), *aff'd Idaho*, 533 U.S. 272 ("Juxtaposed in this case are two principles, both of which must be accorded due weight: the canon of construction favoring Indians and the presumption under the Equal Footing Doctrine that a State gains title to submerged lands within its borders upon admission to the Union.").

[145] The canons are rooted in otherwise standard common-law presumptions regarding treaties: "treaties are construed more liberally than private agreements, and to ascertain their meaning [courts] look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *see also Mille Lacs Band*, 526 U.S. at 198. Analogues to these rules exist in contract law and property law, which also favor a construction benefitting the Tribe. For example, contracts are to be construed against the drafter. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d, 1465, 1486 (D.C. Cir. 1997); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). Here the drafter would be the United States. In property law, a deed is construed against the grantor. *See, e.g., New York Indians v. United States*, 170 U.S. 1, 25-26 (1898). Applying these rules, the United States was the entity recognizing title in the Tribe.

the 1976 Memorandum's analysis of the cases that preceded it. As a result, the discussion below focuses on more recent precedent, although some of the older cases are still discussed to the extent relevant to the instant analysis.

The Supreme Court in *Idaho* began with the recognition that the United States acquired title to the lands of the Oregon Territory, including those at issue here, through treaty with Great Britain[146] and subject to the aboriginal right of possession enjoyed by peoples already residing on that land.[147] The Court established a two-part inquiry to determine whether a federal reservation includes riverbed title and overcomes the presumption in favor of title passing to the State under the Equal Footing Doctrine: whether Congress intended to include submerged lands within a reservation and, if so, whether Congress intended to defeat state title (*e.g.*, by looking to whether the purpose of the reservation would be compromised if title passed to the state).[148] I find that the situation here meets this two-part test. Accordingly, I conclude that the Clearwater riverbed within the Reservation did not pass to Idaho upon statehood.

1. Intent to Include Streambeds in the Reservation

As the 1976 Memorandum explains, the texts of the 1855 and 1863 Treaties evince intent to include the riverbed in the Reservation. First, as in *Idaho* where the reservation boundaries "covered part of the St. Joe River . . . and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary,"[149] the Reservation boundary established by the 1855 Treaty completely enclosed the Clearwater River stretch at issue here.[150] Likewise, the 1863 Treaty continued to enclose completely the same stretch.[151] In reducing the 1855 reservation boundaries, the 1863 Treaty clearly excludes an approximately two-mile portion of the riverbed from the Reservation, describing the southern boundary as running along "the north bank of the Clearwater."[152] Similarly, the Court in *Idaho* adopted the finding that the government survey which drew the northern reservation boundary line directly across Lake Coeur d'Alene "was contrary 'to the usual practice of meandering a survey line along the mean high water mark.'"[153] The specificity with which the 1863 Treaty drafters described the boundary in the northwest corner is significant because it illustrates that the drafters and thus "Congress quite well knew how to exclude the riverbed when it so desired,"[154] and could have done so elsewhere on the Reservation if that were the intention.

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[146] Treaty With Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

[147] *See* 533 U.S. at 265.

[148] *Id.* at 272-73.

[149] *Id.* at 266.

[150] 1855 Treaty, *supra* note 6, 12 Stat. at 957-58 (Arts. I, II); *see also* Attachment 2.

[151] 1863 Treaty, *supra* note 1, 14 Stat. at 647-48 (Arts. I, II); 1976 Memorandum, *supra* note 3, at 12; *see also id.* at 9 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970)).

[152] 1863 Treaty, *supra* note 1, 14 Stat. at 647 (Art. II); *see* Attachment 2.

[153] 533 U.S. at 266.

[154] 1976 Memorandum, *supra* note 3, at 9.

Second, Article 3 of the 1855 Treaty secured the "use of the Clear Water and other streams flowing through the reservation . . . to citizens of the United States for rafting purposes, and as public highways."[155] Article 8 of the 1863 Treaty continued to "secure[] to citizens of the U.S. as to right of way upon the streams . . . which may run through said reservation."[156] The language of both treaties show Congress directly contemplated inclusion of the Clearwater River within the Reservation. The right-of-way was arguably necessary because the 1855 and 1863 Treaties reserved the riverbed for the exclusive use and occupancy of the Tribe and Congress recognized the need to provide express permission for such uses by non-tribal members of the portion of the Clearwater River that ran through the Reservation.[157]

Third, Chief Aleiya's statement at the 1863 council shows that the Tribe understood the 1855 Treaty to have included the right to regulate and control access to movement over and use of streambeds located on the Reservation. Chief Aleiya complained of the United States' failure to control or compensate the Tribe for the proliferation of ferries on the navigable waterways on the Reservation, calling that failure a violation of the 1855 Treaty. Following the council, the parties included in the 1863 Treaty an explicit provision requiring ferries and bridges located within the Reservation be held and managed for the benefit of the Tribe and that any rents should inure to the Tribe's benefit.[158] The reasonable inference is that the United States confirmed the Tribe's understanding that the 1855 Treaty had given it control over activities requiring use of the streambed and that the United States had allowed miners and settlers to continually violate the Treaty. As recompense to the Tribe, the United States made that understanding clear. No historical evidence has been identified that the Tribe receded from that understanding with respect to the 1863 Treaty, particularly given the goals of the Treaty, as discussed below in Section III.A.2.[159]

Moreover, ferries and bridges require use of the riverbed to varying degrees for placement of docks and bridge supports. Specifying that the rent from such activities should inure to the benefit of the Tribe makes no sense unless the riverbed was included in the reservation and beneficial ownership rested with the Tribe.[160] The Court in *Idaho* found it notable that, after entering the agreement to establish the Coeur d'Alene Reservation, Congress passed legislation granting a right-of-way over the Reservation but directing the company to obtain the Coeur d'Alene Indian Tribe's consent, "and that the Tribe alone (no one else being mentioned) be compensated for the right-of-way, a part of which crossed over navigable waters within the reservation."[161] Like the treaties at issue in *Choctaw Nation* and *Idaho*, the "natural inference"

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[155] 1855 Treaty, *supra* note 6, 12 Stat. at 958.

[156] 1863 Treaty, *supra* note 1, 14 Stat. at 651.

[157] This conclusion, however, should not suggest that the United States divests itself of the navigational servitude when reserving land for Indian tribes. *Cf. United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 706-07 (1987) (concluding navigational servitude applied to Cherokee Nation even though the Cherokee Nation held fee simple title to riverbeds and the United States did not expressly reserve a navigational servitude or easement).

[158] 1863 Treaty, *supra* note 1, 14 Stat. at 651 (Art. VIII).

[159] Given the goal of addressing the tensions with miners and settlers invading the Reservation, it is unlikely the Tribe would have reversed its understanding.

[160] *See* 1863 Treaty, *supra* note 1, 14 Stat. at 651 (Art. VIII); *cf.* 1976 Memorandum, *supra* note 3, at 10.

[161] *Idaho v. United States*, 533 U.S. 262, 268-69 (2001).

from these provisions of the 1863 Treaty is that Congress intended to reserve everything within the Reservation's boundary, including the riverbed, for the benefit of the Tribe.[162]

Finally, fulfilling the key purposes of the 1863 Treaty's boundary reduction necessarily required reserving the riverbed. Further discussion follows, but the necessity of reserving the riverbed in order to accomplish those goals—providing a tribal homeland with the necessary resources for the Tribe, dependent as it was on use of the riverbed for fishing and other purposes, and addressing tensions caused by the influx of miners and settlers—makes even clearer the congressional intent to reserve the riverbed for the Tribe. In *Idaho*, the Supreme Court found that the Coeur d'Alene Tribe's well-established reliance on fishing clearly satisfied the first part of the test.[163] The Court noted that the Coeur d'Alene Tribe "depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks."[164] The Coeur d'Alene Tribe also expressed the importance of fishing in its petition to the Federal Government for a reservation, and the Court found the state's concession on that point "a sound one" because "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[165] As detailed below, the Tribe here can make the same arguments that prevailed for the Coeur D'Alene Tribe. Accordingly, the Tribe's reliance on the Clearwater riverbed supports the conclusion that Congress intended to include the bed within the Reservation.

2. *Intent to Defeat State Title*

The next question is whether Congress demonstrated intent to defeat Idaho's title to those submerged lands reserved for the Tribe. To begin, the Idaho Statehood Act "'accepted, ratified, and confirmed' the Idaho Constitution," which, in pertinent part, "forever disclaimed all right and title to . . . all lands lying within [Idaho] owned or held by any Indians or Indian tribes."[166] The *Idaho* opinion likewise noted this fact.[167] Because the 1863 Treaty was negotiated and

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[162] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970) (explaining that "petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers.").

[163] 533 U.S. at 274.

[164] *Id.* at 265.

[165] *Id.* at 266, 274.

[166] *Id.* at 270 (citing Idaho Const. art. XXI, § 19); *see also United States v. Milner*, 583 F.3d 1174, 1185-86 (9th Cir. 2009) (holding that general disclaimers of title to Indian lands, like the one made in connection with Idaho's admission, were sufficient to evidence congressional intent to defeat a state claim to the bed of a navigable river); *Alaska v. United States*, 545 U.S. 75, 110 (2005) (holding proviso in Alaska Statehood Act sufficient to show congressional intent needed to overcome Equal Footing Doctrine presumption); Pacheco, *supra* note 109, at 21 & nn. 108-09. In *Milner*, the court found that the Lummi Tribe had title to certain tidelands based on a reservation created by a treaty and subsequent Executive Order. 583 F.3d 1174. The Ninth Circuit based this finding on the fact that the Executive Order finalizing the reservation boundary expressly extended it to the low-water mark. *Id.* at 1185. It found that the congressional intent prong of the *Idaho* two-step test was satisfied by the fact that the Executive Order put Congress on notice as to the extent of the reservation prior to Washington's admission to the union, which admission was accompanied by a general disclaimer of all Indian lands. *Id.* at 1185-86.

[167] 533 U.S. at 270. Although the Court in *Montana* made no mention of nearly identical language in the Montana enabling act and state constitution, Act of Feb. 22, 1889, 25 Stat. 676, 677; Mont. Const. art. I, that omission is not surprising because the Court there found that Congress had not intended to reserve the bed for the tribe. 450 U.S. at

concluded nearly 27 years prior to Idaho's statehood,[168] there is strong support for concluding that the riverbed at issue was held in trust by the United States for the Tribe and thus included in the lands disclaimed by Idaho in 1890.

Perhaps more important, the Court in *Idaho* placed great emphasis on "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State."[169] As the Court explained, "[w]here the purpose [of a treaty] would have been undermined . . . 'it is simply not plausible that the United States sought to reserve only the upland portions [of a river].'"[170] Here, similar to the way in which the Ninth Circuit analyzed the issue post-*Montana*, Congress's plain awareness of "the vital importance of the submerged lands and the water resource to the tribe at the time of the grant" leads to the conclusion that Congress intended to defeat state title.[171] Overwhelming support for this conclusion is found in the fact that the riverbed title was a component critical to achieving two key goals in creating the 1863 Reservation: providing a tribal homeland with the necessary resources for the Tribe's livelihood and addressing tensions caused by the influx of miners and settlers. Without tribal ownership of the riverbed, both goals would have been undermined.

With respect to the first goal, the evidence shows that tribal representatives and government negotiators understood that fish were a key resource to the Tribe and that the Tribe relied on a highly-developed form of fishing that used weirs, dams and dipping platforms, and other methods that require use and control of the riverbed in order to place those structures.[172] In proceedings before the Indian Claims Commission, Dr. Verne F. Ray, Professor of Anthropology at the University of Washington, presented testimony establishing that the Tribe engaged in "an annual cycle of subsistence activities," including salmon fishing that took place ten months out of each year.[173] Not only did the Tribe regularly fish, but "salmon fishing was one of the major sources of subsistence."[174] Based on this and other evidence, the Commission found that "[t]he principal fish was the salmon. This was a very important food item," and went on to describe a range of other species for which the Tribe fished and noted the locations, including the Clearwater River.[175] Appendix VI to the 1976 Memorandum contains a historical map used before the Indian Claims Commission of the principal fishing sites on the Reservation, and Appendix VII to that memorandum consists of a drawing from a Washington State University

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554. Without a reservation of land prior to statehood (per the *Idaho* first step), there was no Indian-held land to disclaim. In other words, the disclaimer is relevant to *Idaho*'s second step, and the *Montana* Court had no reason to reach that inquiry.

[168] Moreover, the 1863 Treaty was ratified just over 23 years prior to statehood. 1863 Treaty, *supra* note 1, 14 Stat. at 647.

[169] 533 U.S. at 274.

[170] *Id.* (citing *United States v. Alaska*, 521 U.S. 1, 39-40 (1997)).

[171] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983). *See also Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983) (citing and explaining same).

[172] 1976 Memorandum, *supra* note 3, at 12-13.

[173] *Nez Perce Tribe of Indians v. United States*, 18 Ind. Cl. Comm. 1, 20 (1967) (Dkt. No. 175, Findings of Fact).

[174] *Id.* at 21.

[175] *Id.* at 96.

Laboratory of Anthropology report showing historical types of weirs installed in streambeds on the Reservation.[176] The Tribe was also known to build fish walls below the high water mark (*i.e.*, on the bed of the stream),[177] and such walls were in fact documented by Lewis and Clark.[178] Also instructive is that the reduced 1863 Treaty boundaries still included principal aboriginal fishing sites,[179] and almost all of the Tribal members already residing on lands encompassed within the 1863 boundaries continued to fish.[180] Add to these facts the extensive evidence discussed above in Section I.A, and there can be no doubt as to the importance to the Tribe and its members of fishing and methods employed that relied upon using the riverbed.

Facts such as these, showing the importance of riverbed use, have consistently been used to support finding congressional intent to defeat later state title. The Supreme Court in *Idaho* linked Congress's "complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation" with an additional congressional desire to do so only by agreement and consent of the Coeur d'Alene Tribe.[181] There, Congress was well aware that such consent and objectives could only be achieved through preservation of the Tribe's title to submerged lands.[182]

As explained in the 1976 Memorandum, the Court reached a similar conclusion in *Alaska Pacific Fisheries v. United States*.[183] In *Alaska Fisheries*, the Supreme Court held that an island reservation established for the Metlakahtla Indians included adjacent fishing grounds despite not being explicitly identified in the Congressional actions authorizing the settlement.[184] The following facts supported the Court's decision: (1) the area reserved described the entire island, (2) the fishing was understood to be important to the tribe, and (3) the Indians could not sustain themselves on the island uplands alone.[185] The Court also looked to contemporaneous understanding of the statute at issue in recognition of the general rule "that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed."[186] Similar factors that led to the decisions in favor of riverbed ownership resting with the tribes in *Idaho*, *Alaska Fisheries*, and *Choctaw Nation* support the Tribe's claim to the Clearwater riverbed here: (1) the river stretch at issue is entirely within the Reservation, (2) at the time of the Reservation's establishment the importance of fishing to the Tribe was well known, and (3) the Tribe would not have agreed to the 1863 Treaty had it failed to maintain the Tribe's beneficial ownership of the riverbed. Simply put, as in *Idaho*, it would be implausible that Congress intended to ensure

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[176] 1976 Memorandum, *supra* note 3, at apps. VI, VII.

[177] *Id.* at app. VIII.

[178] *Id.* at 13 (citing WALKER, JR., *supra* note 58, at 25).

[179] 1976 Memorandum, *supra* note 3, app. VI.

[180] JOSEPHY, JR., *supra* note 54, at 422.

[181] *Idaho v. United States*, 533 U.S. 262, 276-77 (2001).

[182] *Id.* at 278-79.

[183] *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918).

[184] *Id.*

[185] *Id.* at 89-90.

[186] *Id.* at 89.

continued fishing in the Tribe's traditional manner while simultaneously intending to pass title to the riverbed to the state.[187]

With respect to the second goal of the 1863 Treaty, the available evidence also strongly weighs in favor of congressional intent to defeat later state title to the riverbed. As explained above, the influx of land-seeking settlers and miners seeking gold, some of which was found in riverbeds, and a desire to protect and maintain peaceful relations with the Tribe were the primary United States motives for negotiating and executing the 1863 Treaty, which excluded the mining lands. In the 1863 Treaty, the government negotiated a drastic reduction of the 1855 reservation in order to find a location for the Tribe "where they can be placed with any prospect of not being again disturbed by gold-seekers, or speedily overwhelmed by the surging waves of civilization."[188] Because the gold discoveries that created the need to negotiate the 1863 Treaty were located in the beds of Clearwater River tributaries, it would not have been possible to protect the Tribe from future mining activities within the reduced Reservation boundaries if the title to the riverbeds within the Reservation had not also been reserved for the benefit of the Tribe. These circumstances are similar to those leading up to the creation of the Coeur d'Alene Reservation at issue in *Idaho*. The Court in *Idaho* specifically noted that one of the purposes of negotiating with the Coeur d'Alene Tribe was to respond to an "influx of non-Indians into the Tribe's aboriginal territory."[189] The *Idaho* Court found, given the Coeur d'Alene Tribe's expressed interest in the bed and refusal to reach an agreement that did not include certain lakes and rivers, that "the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title [to an area covered by a prior agreement] by agreeing to a reservation that included the submerged lands."[190] Similarly, the Tribe here had already expressed the position that the operation of ferries on the navigable waters found on the Reservation violated the 1855 Treaty. Moreover, it would again be implausible to conclude that Congress intended the 1863 Treaty to exclude non-Indians from potential on-Reservation mining activities in the bed of the Clearwater River while also intending that title to the riverbed would pass to a future state.

The *Idaho* Court gave particular weight to Congress's intent to avoid hostilities with the Coeur d'Alene Tribe.[191] As the Court put it, "although the goal of extinguishing aboriginal title could have been achieved by congressional fiat, and Congress was free to define the reservation boundaries however it saw fit, the goal of avoiding hostility seemingly could not have been attained without the agreement of the Tribe."[192] The United States was similarly concerned here with hostilities between the Tribe and gold miners. For example, upon news that a large party of

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[187] *Idaho*, 533 U.S. at 278-79 (state's argument implausible where passage of submerged lands "would have amounted to an act of bad faith accomplished by unspoken operation of law"). Of course, the Supreme Court has held that states may regulate Indian fishing to some degree for appropriate conservation purposes. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977).

[188] H.R. EXEC. DOC. NO. 37-1 at 541.

[189] 533 U.S. at 275.

[190] *Id.* at 275-76 & n.6; *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970) (considering circumstances of the grant).

[191] 533 U.S. at 275-77.

[192] *Id.* at 277.

miners were to set out for the 1855 Reservation, the Superintendent wrote to an Indian Agent, that "[y]ou will perceive the determination of the Government to interpose its authority, and, employ the most vigorous measures to suppress all such violent and lawless proceedings, and preserve the country from the disaster of another Indian war."[193] The possibility of hostilities was likewise recognized by Congress, as exemplified by the statement of Senator Nesmith in debating the $50,000 appropriation to enable the President to negotiate the 1863 Treaty: "[gold miners] have overspread and occupied the reservation in violation of the treaty, and to the great detriment of the Indians, who constantly threaten that if the Government longer refuses or delays to protect them in their rights they will protect themselves."[194] The evidence that Congress and the Executive were aware of potential hostilities and sought to negotiate a treaty in response gives even greater support to a finding that Congress could not have meant to pass title to the State.

In sum, and consistent with the 1976 Memorandum, I find that Congress intended to include within the Reservation the land under navigable waters and intended to defeat later state title. Any other conclusion would contradict the purposes of the 1855 and 1863 Treaties. As such, the Tribe held beneficial ownership of the Clearwater riverbed within the Reservation before and after the entry of Idaho to the Union.

B. The 1893 Agreement did not Change the Ownership of the Riverbed

Having settled that the 1863 Treaty reserved the riverbed for the Tribe and maintained its beneficial ownership upon Idaho statehood, the next inquiry is whether the Tribe ceded the riverbed in the 1893 Agreement. Although the equal footing analysis begins with the presumption, overcome here, that title to navigable beds passes to the state, the doctrine loses any applicability after the date of statehood.[195] Instead, where the United States has continued to hold land in trust after statehood, the possible cession of such land is examined with particular attention paid to the Indian law canons. Of particular force in the post-statehood context is a presumption that applies in favor of tribes: abrogation of tribal property must be clearly

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[193] Baird et al., *supra* note 32, at 44 (citing Letter from Edward R. Geary, Superintendent of Indian Affairs, to A.J. Cain, Indian Agent (Aug. 25, 1860)); *see also, e.g., id.* at 83 (citing Letter from Enoch Steen, Major, U.S. Army, to W.W. Mackall, Major, U.S. Army (Apr. 16, 1861)) ("The Nez Perces have always been, and are now, disposed to yield a great deal and remain friendly, provided the government shows a disposition to uphold them in their rights; but if this is not done I fear there will be trouble."); *id.* at 87 (citing Letter from Edward R. Geary, Superintendent of Indian Affairs, to W.P. Dole, Comm'r of Indian Affairs (Apr. 23, 1861)) ("it is no longer possible to resist the tide of adventurers setting towards this new attraction [of gold], and barely so, to control and direct it as to prevent the calamity of a frontier war"); *id.* at 124 (citing Letter from Enoch Steen, Major, U.S. Army, to A.C. Wildrick, Lieutenant, U.S. Army (Aug. 19, 1861)) ("It is feared by the agent, and in fact by all who are competent to judge, that there will be an outbreak [of hostilities] probably on Salmon River and the South Branch of Clearwater."); *id.* at 139 (citing *Threatened Hostilities of the Snake Indians*, WEEKLY OREGONIAN (Portland), Nov. 2, 1861) ("Eagle of the Light" and his party of sixty Indians including twenty Nez Perce "positively forbid [a party of miners] to cross his country, and threatened death if he persisted; and declared that he was going to drive all of the whites out of his country.").

[194] CONG. GLOBE, 37th Cong., 2nd Sess. 2095 (1862); *see also* Baird et al., *supra* note 32, at 177 (citing same).

[195] *See Alaska v. United States*, 213 F.3d 1092, 1097 (9th Cir. 2000) ("The key moment for the determination of title is the instant when statehood is created.").

expressed.[196] "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'"[197] The Supreme Court does "not construe statutes as abrogating treaty rights in 'a backhanded way.' . . . Indian treaty rights are too fundamental to be easily cast aside."[198] And as previously noted, agreements with Indian tribes must be interpreted in favor of tribes when resolving doubts.

In light of the Indian canons, I find that the available evidence supports the conclusion that neither the Tribe nor the United States understood the 1893 Agreement as terminating or otherwise modifying the Tribe's interest in the Clearwater riverbed reserved by the 1863 Treaty.[199] Instead, the 1893 Agreement ceded only "surplus" and "unallotted" lands, which did not include the riverbed.[200]

The 1893 Agreement identifies three categories of land: (1) allotted lands; (2) retained lands; and (3) surplus or unallotted lands.[201] Pursuant to the 1893 Agreement, the Tribe ceded only surplus and unallotted lands.[202] Thus, the Agreement could have only passed title to the riverbed if the riverbed was considered "surplus" or "unallotted" land. Because the Agreement itself is

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[196] *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate tribal property rights must be "plain and unambiguous"); *see also Cobell v. Norton*, 240 F.3d 1081, 1102-03 (D.C. Cir. 2001) (holding Indian canons trump agency deference); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (same).

[197] *Mille Lacs Band*, 526 U.S. at 202-03.

[198] *United States v. Dion*, 476 U.S. 734, 739 (1986).

[199] This Opinion, dealing only with the question of submerged land ownership, does not address separate questions as to jurisdiction. With respect to the distinct jurisdictional status of the Nez Perce Reservation as Indian country under 18 U.S.C. § 1151, the Ninth Circuit has previously held that the 1893 Agreement did not diminish the Reservation, relying on similar facts as those recited here. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000) (affirming that there was no congressional intent to diminish the Reservation and concluding, "The historical information independently confirms that there was no intent to diminish or disestablish the Nez Perce Reservation."), *cert. denied*, 531 U.S. 1200 (2001). The United States' longstanding position—in judicial proceedings and in administrative, civil, and criminal contexts—is that the exterior boundary of the Reservation that exists today is described in the 1863 Treaty and that the Reservation as so described is Indian country. *See* Approval and Promulgation of Implementation Plans; Idaho, 68 Fed. Reg. 2,217, 2,220 & n.4 (Jan. 16, 2003) (U.S. EPA's statement of the U.S.'s position with respect to the Nez Perce Reservation in approving Idaho's State Implementation Plan under the Clean Air Act, excluding the Reservation as Indian country, and responding to Idaho's contention that the 1893 Agreement diminished the Reservation).

[200] Even if the 1893 Agreement were interpreted to divest the Tribe of its title to the riverbed of the Clearwater River, the Agreement would have only conveyed the bed to the United States. To date, there have been no subsequent conveyances to Idaho. Neither would federal patents, discussed in Section III.B.3, reflect federal transfer of the riverbed to any patentee.

[201] The terms "surplus" and "unallotted" are used synonymously in the 1893 Agreement. *Compare* 1893 Agreement, *supra* note 8, 28 Stat. at 326-27 ("Whereas the President, under date of October thirty-first, eighteen hundred and ninety-two . . . authorized negotiations with the Nez Perce Indians in Idaho for the cession of their *surplus lands* . . . ." (emphasis added)), *with id.* at 327 ("The said Nez Perce Indians hereby 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 said reservation. . . ." (emphasis added)).

[202] 1893 Agreement, *supra* note 8, 28 Stat. at 326-27.

silent on the specific issue of whether submerged lands qualify as surplus land, I begin by looking at both the Tribe's and Congress' understanding of the Agreement, with the former being particularly important given that any ambiguity in an agreement between a tribe and the United States must be resolved in favor of the tribe. Moreover, Congress's intent to abrogate those rights must be clearly expressed and supported by clear evidence.

1. The Tribe Understood the 1893 Agreement as Protecting Their Previously Negotiated Treaty Rights

As explained above, the historical record shows that the Tribe understood the 1863 Treaty as reserving and protecting the right to hunt, fish, and practice their traditional subsistence lifestyle,[203] including fishing methods that utilized the riverbed.[204] This understanding was not changed by the 1893 Agreement, as evidenced by the fact that, as allotment began, a majority of tribal members chose allotments adjacent to the river, the land they valued most, even though the farmland was better elsewhere within the Reservation.[205] Similarly, reports of tribal members[206] present at the signing of the 1893 Agreement demonstrate that the Tribe believed it had retained its treaty rights to hunt and fish in all of the lands it had once owned pursuant to the 1855 and 1863 Treaties, consistent with the 1893 Agreement's savings clause.[207]

Events during the decade following execution of the 1893 Agreement illustrate the Tribe's understanding of the document. The Tribe became increasingly dissatisfied with what it saw as the Federal Government's failure to adequately protect its hunting and fishing rights.[208] Although the Tribe's concerns applied most forcefully to off-reservation fishing, these sentiments indirectly support the continued understanding that traditional subsistence methods could be practiced on lands still within the 1863 Treaty boundaries as well. The Tribe interpreted the 1863 Treaty to permit continued hunting and fishing on all territory previously

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[203] Greenwald, *supra* note 75, at 86.

[204] *See supra* Section I.A.

[205] Historical accounts show that, to the great excitement of non-Indian settlers, it was widely reported that the best farming land on the reservation was still available because the Tribe had passed it up. Greenwald, *supra* note 75, at 81-83.

[206] *See* Memorial of the Nez Perce Indians Residing in the State of Idaho to the Congress of the United States (Nez Perce Memorial), S. DOC. NO. 62-97, at 58 (1911) (Harrison Red Wolf, an attendee at the signing of the 1893 Agreement, stated that the Tribe did not understand the Agreement to affect fishing rights because the Tribe was "selling *only* the surplus land and that it was estimated at 542,275 acres" (emphasis added)); *id.* at 88 (Jim Matt, an attendee at the signing of the 1893 Agreement, affirmed that the agreement preserved all of the rights that the Nez Perce had acquired in their former treaties).

[207] Nez Perce Memorial, S. DOC. NO.62-97, at 3 ("Your memorialists represent: That the Nez Perce Indians were a strong and powerful tribe of Indians occupying a large tract of territory amounting to many million acres in the States of Oregon, Washington, Idaho, Montana, and Wyoming; that in 1855 they ceded over 12,000,000 acres of their territory to the Government, but retained the rights to the game and fish thereon. That again in 1863 a further cession of land was made, but our rights to the game, fish, etc., were still retained; finally in 1893, when we made the last cession of land, we were guaranteed all the treaty rights theretofore promised."). The savings clause appeared in Article XI of the 1893 Agreement and provided that "[t]he 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." 1893 Agreement, *supra* note 8, 28 Stat. at 331.

[208] Greenwald, *supra* note 75, at 86.

ceded and the 1893 Agreement as not disturbing that conclusion.[209] In 1911, the Tribe expressed those concerns to Congress. The Tribe explained that the preservation of its right to hunt, fish, and use the river was part of the bargain in the 1893 Agreement. Specifically, the Tribe viewed this right as more valuable "than the money promised to us for the cession of the land."[210] As Philip McFarland, a 67-year-old Nez Perce member, explained at the time, "[o]ur people always contend[ed] and everyone understood that we had reserved the fish and game in the treaty of 1855, the treaty of 1863, and even in the agreement of 1893."[211]

In sum, historical accounts and the Tribe's own settlement patterns following allotment demonstrate a continued belief by the Tribe that the various agreements with the United States preserved its traditional fishing rights, rights that were well understood to be exercised using methods that required use of the bed.[212] Because the Tribe understood the 1893 Agreement to preserve these fishing practices, it would not have made sense for the Tribe to cede title to the riverbed within the very same agreement; such title was a component of exercising a right they viewed as having been preserved. As a result, it would be inconsistent with applicable canons of construction to interpret the terms "surplus" and "unallotted" lands in the 1893 Agreement as including the bed of the Clearwater River.

2. *The Text and Legislative History of the 1893 Agreement Fail to Clearly Express Congressional Intent to Abrogate Tribal Title to the Riverbed By Considering it "Surplus" or "Unallotted" Lands*

Further supporting the Tribe's understanding of what lands it ceded in the 1893 Agreement, the text of the Agreement, consistent Supreme Court holdings with respect to the intent of general land laws, and the legislative history show a lack of any clear intent to abrogate riverbed title. The Agreement itself shows the lack of any clear intent to abrogate title, stating:

> That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States *shall be opened to settlement* by proclamation of the President, and shall be *subject to disposal only under the homestead, town-site, stone and timber, and mining laws of the United States.*[213]

This passage describes the 1893 Agreement's intent to open the ceded areas to settlement and other disposition. Congress's objectives to allow for settlement and other disposition pursuant to the 1893 Agreement, however, cannot be read as divesting the Tribe of beneficial ownership of the riverbed within its Reservation.[214] As explained above, the ceded areas did not include the

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[209] *Id.*

[210] Nez Perce Memorial, S. DOC. NO. 62-97, at 3.

[211] *Id.* at 47.

[212] *See supra* Section I.A.

[213] 1893 Agreement, *supra* note 8, 28 Stat. at 332 (emphasis added).

[214] Undoubtedly, lands adjacent to the Clearwater River and within the boundaries of the Reservation were deemed surplus lands or were otherwise subsequently transferred out of trust and passed to various individuals or entities in

riverbeds, so this provision could not be viewed as opening the riverbeds to disposal under the homestead, town-site, stone and timber, or mining laws of the United States. To read this language as divesting the Tribe of beneficial ownership of the riverbed within the Reservation would be a prime example of "backhand[ed]" abrogation, as the Court in *Dion* has declared to be unacceptable.

The lack of clearly expressed intent to abrogate the Tribe's riverbed title in the Agreement is further supported by the Supreme Court's recognition of a "long-held and unyielding policy of never permitting the sale or settlement of land under navigable waters under the general land laws."[215]

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them . . . in short, shall not be disposed of piecemeal to individuals as private property.[216]

Such general land laws included the homestead, town-site, stone and timber, and mining laws cited in the 1893 Agreement.[217] Because the Supreme Court has stated that opening lands to entry and settlement by operation of the general land laws is never sufficient to display congressional intent to open submerged land under navigable water to settlement, it is implausible to conclude that the 1893 Agreement's purpose—to obtain land for entry and settlement under those same general land laws—evinces any intent to obtain the Clearwater riverbed.

The legislative history of the bill ratifying the 1893 Agreement also shows that Congress understood the Agreement to cede only dry lands, which could then be entered and sold for settlement and other purposes. Both proponents and opponents of the Agreement in Congress displayed this understanding. Congress's focus on obtaining land that could be disposed of to non-Indians is reflected in the report accompanying H.R. 7387, the bill proposing to ratify the Agreement, in which the House Committee on Indian Affairs stated:

> [In the] agreement the said Indians released to the United States about 556,207 acres of land, to be opened to settlement under the provisions of the homestead, town site, timber, and stone and mineral laws of the United States. The bill reported by the committee

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fee. As noted previously, this Opinion only addresses title to the riverbed and makes no conclusion regarding any appurtenant rights that adjacent landowners may now hold.

[215] *Utah Div. of State Lands v. United States*, 482 U.S. 193, 204 (1987).

[216] *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894).

[217] *See Utah Div. of State Lands*, 482 U.S. at 204; *cf. Udall v. Tallman*, 380 U.S. 1, 19-20 (1965) ("the term 'public-land laws' is ordinarily used to refer to statutes governing the alienation of public land"); 43 U.S.C. § 1702(j) (Federal Land Policy and Management Act provision defining "withdrawal" as withholding Federal land "from settlement, sale, location, or entry, under some or all of the general land laws").

> provides that persons entering these lands shall pay $3.75 per acre for agricultural lands, and $5 per acre for timber and stone and mineral lands.[218]

This language from the House ratifying the Agreement was eventually included in H.R. 6913, the Indian Department appropriation bill for fiscal year 1895.[219] That bill was reported out of a conference committee and referred to the full House for final passage. The 1893 Agreement was one of several land cession agreements included in H.R. 6913. During debate on the bill, opponents objected to these agreements because they believed it would be more fiscally responsible for the Federal Government to hold the lands in trust, sell them to the highest bidder, and then pay the proceeds to the tribes rather than paying the tribes for the lands up front, as proponents suggested and as the agreements ultimately provided.[220] This debate is informative because it reflects the consistent understanding of both proponents and opponents of the bill that the government was acquiring only lands that could be entered and disposed of under the specified general land laws. Nowhere in these discussions did Congress signal any intent to acquire any riverbed as part of the 1893 Agreement or abrogate rights held by the Tribe under the 1863 Treaty. The absence of such discussion is significant given the Tribe's understanding of the Agreement and what it did and did not include and given the general rule that Congress may not abrogate tribal rights without clearly expressing its intent to do so.[221]

Similarly, the lack of congressional intent to acquire riverbed land or abrogate the Tribe's right to the bed is evidenced by the pricing for disposition of the land. Congressional pricing of mineral lands at $5 per acre suggests that Congress contemplated only a cession of dry land. Deposits of gold in a streambed would typically constitute a placer claim.[222] But the Mining Law of 1872 set a price of only $2.50 per acre to patent placer claims.[223] Lode claims, on the other hand, would be located on dry land,[224] and the Mining Law set the price of patenting at $5 per acre.[225] Thus, setting a price for mineral lands consistent with that charged for a type of claim that is usually located on dry land, and inconsistent with the type of claims located in riverbeds, supports an inference that Congress sought only to acquire dry lands and certainly illustrates a lack of any clearly expressed intent to acquire the riverbed.

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[218] H.R. REP. NO. 53-1050, at 1 (1894) (emphasis added).

[219] *See* 26 CONG. REC. 8,251 (1894) (calling up H.R. 6913 for consideration in the House of Representatives); *id.* at 8,255-56 (discussing language in H.R. 6913 related to 1893 Agreement with the Nez Perce).

[220] *See* 26 CONG. REC. 8,255-58, 8,263-71 (1894); *id.* at 8,265-66 (statement of Congressman Lynch of Wisconsin) ("And yet we are asked here to pay $3 an acre for every acre of that land! That is the injustice of the proposition. . . . And we are asked to sell the agricultural land for $3.75 an acre, and the mineral and timber lands at an estimate of $5 . . . leaving us, of course, all of the bad lands on our hands for all time, because we will never be able to get rid of them."). *Compare id.* at 8,256 (Statement of Congressman Wilson of Washington describing the land covered by the Agreement as "exceedingly valuable and fertile land, [that] will give an opportunity to build up a great agricultural community there").

[221] *See supra* Section II.

[222] *See* 1 American Law of Mining § 32.02 (2nd ed. 2015).

[223] 30 U.S.C. § 37.

[224] *See* 1 American Law of Mining § 32.02.

[225] 30 U.S.C. § 29.

Additionally, one of the stated goals in setting prices for particular acreage was "to reimburse the Treasury by means of the payments by the settlers for the money to be paid the Indians."[226] As the letter accompanying the Agreement notes, "The price proposed to be required of the settlers for the land, $3 per acre, is the same price stipulated in the agreement to be paid the Indians for the cession of the land."[227] The letter contains further reference to the report of the Commissioner of Indian Affairs who remarked regarding the negotiations: "Much of the land, however, is fine agricultural land, worth perhaps $8 or $10 per acre, while from one-third to one-half is of little value. We therefore think that this price, while liberal, is fair and equitable, both to the Indians and the Government."[228] As previously discussed, Congress was well aware of these pricing considerations, given that the sums to be charged and paid amounted to the greatest concern during debates.[229] These report statements suggest Congress did not believe it was acquiring riverbed for sale to settlers. Had Congress intended to acquire and then dispose of the riverbed, the legislative history would have likely revealed discussion concerning what constituted a fair price for submerged land—whether or not the same as for the uplands—given the overriding principle that the United States should charge prices sufficient to cover the compensation paid to the Tribe.

Assurances made by the commissioners sent to negotiate with the Tribe also show that Congress did not intend to acquire the bed of the Clearwater River. At the opening of negotiations, one of the commissioners stated that "the Government at Washington does not expect us to make any treaty with you that would not be satisfactory to you. The Secretary of the Interior would not consent to any treaty unfavorable to you."[230] If we assume that the Tribe had ceded the riverbed, it would have potentially opened the bed to operation of the Mining Law, paving the way for the very conflict with gold miners that Congress was trying to avoid when it negotiated and set the reservation boundaries in the 1863 Treaty. Given the history of the 1863 Treaty and the necessity of avoiding conflict with gold miners and settlers, Congress should not be understood to have expected that cession of the riverbed previously secured would be acceptable or favorable to the Tribe.[231]

In the absence of clearly expressed intent to do so, the 1893 Agreement cannot be construed as affecting the Tribe's interest in the riverbed as reserved by the 1863 Treaty.[232] The circumstances here are similar to those in *Choctaw Nation* in which the Supreme Court affirmed tribal ownership of the riverbed. There, as in the history of the Reservation here, agreements were negotiated with the tribes for specific areas of land.[233] Subsequently, Congress entered into

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[226] S. EX. DOC. NO. 53-31, at 2 (1894).

[227] *Id.*

[228] *Id.*

[229] *See supra* note 220.

[230] S. EX. DOC. NO. 53-31, at 28.

[231] *See also* 43 C.F.R. § 3811.2-3 (providing all lands within boundaries of an Indian Reservation are withdrawn from entry, location, appropriation under the Mining Law).

[232] *See* 26 CONG. REC. 8,268 (1894) (Statement of Congressman Pickler of South Dakota in debating the ratification bill emphasizing that "[t]he Indians understood that the commissioners were empowered to deal with them," and encouraging his colleagues to "[l]et us, then, stand by our agents and by the agreement our agents made.").

[233] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625-27 (1970).

negotiations with those same tribes to have their unallotted lands ceded to the United States.[234] And just as is the case here, the allotment agreements specifically preserved those rights that were unaffected by the subsequent negotiations.[235] Ultimately, the Supreme Court in *Choctaw Nation* concluded that the tribe there retained title to the beds in fee.[236] A similar conclusion is warranted here, although because of differences in the history of the Reservation, the Clearwater riverbed remains held by the United States in trust for the Tribe, whereas in *Choctaw Nation* the tribe was determined to be the fee owner.[237]

3. *The Patents Issued Following the 1893 Agreement Are Consistent With the Conclusion That the Agreement Did Not Include the Bed*

The land patents issued by the United States following the 1893 Agreement also support the conclusion that the Tribe continued to own the riverbed. The Supreme Court clarified in the 1913 case of *Scott v. Lattig* that a patent to federal land abutting navigable waters, made *after* statehood, passes no title to the streambed, "save as the law of [the State] may have attached such a right to private riparian ownership."[238] This rule assumes that the abutting river has *already passed* to the state under operation of the Equal Footing Doctrine. Here, the bed of the Clearwater River never passed to Idaho in the first instance.

Additionally, the Ninth Circuit has otherwise recognized that "[t]he general rule . . . is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark."[239] In that case, the court determined that the bed of a lake having not passed to the state, but rather remaining in trust for the tribe, also did not pass to a private owner by way of federal patent.[240] Here, land patents issued to riparian parcels following the 1893 Agreement included specific language about the location of the boundary, such as "along the edge of the river" and "to the left bank of the Clearwater River."[241] Other

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[234] *Id.* at 627.

[235] *Id.* at 627, 634-36.

[236] *Id.* at 634-36.

[237] The same conclusion can be drawn by analogizing *Menominee Tribe of Indians v. United States*, which held that a termination act extinguished only federal supervision over the tribe and not hunting and fishing rights granted by treaty. 391 U.S. 404, 412-13 (1968). The Court reasoned that the termination act stated only that "statutes" affecting Indians would no longer apply to tribe members, and was "potent evidence that no *treaty* was in mind." *Id.* at 412 (emphasis in original). The Court "decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." *Id.* In the same manner, the 1893 Agreement should not be read as a backhanded abrogation of the Tribe's interest in the riverbed.

[238] *Scott v. Lattig*, 227 U.S. 229, 243 (1913). This conclusion makes sense because any federal title to the streambed passed to the state at statehood, leaving no title to pass by patent. *Id.*

[239] *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942); *see also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983) (citing *Rochester* for proposition that "grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river" in context of allotment patents made by the United States where court first determined the riverbed had been conveyed to tribe).

[240] *Rochester*, 127 F.2d at 192-93. The Ninth Circuit later relied on *Rochester* once more, post-*Montana*, in *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*, and the Supreme Court denied *certiorari*. 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

[241] Examples of the post-1893 Agreement patents are attached hereto as Attachment 4.

land patents referred to "the meander line"[242] of the river, and the rest referred to Government Lots, all of which were drawn to the edge of the river.[243] That patents issued following the Agreement included specific references to the boundary of such riparian parcels provides further confirmation that the Tribe did not cede its interest in the bed to the United States as part of the 1893 Agreement.[244]

C. Third Parties Have Recognized the Tribe's Title Interests in the Riverbed

According to information provided by the Tribe,[245] the conclusions above regarding riverbed title have also been acknowledged by third parties endeavoring to undertake activities within the beds at issue. For example, in 1979 the Tribe granted the Idaho Department of Fish and Game a Revocable Permit to "enter, construct, inspect, maintain and repair a boat ramp" in the bed of the River at Mile 15.[246] Similarly, in 2000 the Bonneville Power Administration (BPA) asserted that it was not required to get a permit from the Idaho Department of Lands for the Nez Perce Tribal Hatchery facility located within the exterior boundaries of the Reservation because the 1863 Treaty reserved "ownership of the bed and banks of the Clearwater River . . . to the Nez Perce Tribe."[247] Finally, in 2013, the City of Orofino requested a permit in connection with its replacement of an existing water intake structure and raw water intake pump station on the

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[242] A "meander line" is a survey line that usually follows the course of a river or stream. BLACK'S LAW DICTIONARY 1001 (8th ed. 2004); *see also* WALTER G. ROBILLARD, CLARK ON SURVEYING AND BOUNDARIES § 13.01 (8th ed. LexisNexis Matthew Bender 2014) ("The traverse of the margin of a permanent natural body of water is termed a meander line. All navigable bodies of water and other important rivers and lakes are segregated from the public lands at mean high-water elevation. In original surveys, meander lines are run for the purpose of ascertaining the quantity of land remaining after segregation of the water area.") (citing The Manual of Surveying Instructions for the Survey of the Public Land of the United States).

[243] *See supra* note 241.

[244] Similarly, as noted in the 1976 Memorandum, the Submerged Lands Act has no application here, explicitly excluding lands acquired by the United States in a proprietary capacity and all submerged lands held for the benefit of Indians. 43 U.S.C. § 1313(a), (b); 1976 Memorandum, *supra* note 3, at 16 n.58. Additionally this Office has reviewed Bureau of Land Management records and determined that there are no active claims in the riverbed. Even so, the existence of active claims would not be legally controlling.

[245] The materials discussed in Section III.C of this Opinion are presented in Attachment 5.

[246] *See, e.g.*, Revocable Permit No. 3719 (granted to the State of Idaho by the Tribe, dated May 8, 1979); *see also* Revocable Permit No. 3720 (granted to the State of Idaho by the Tribe, dated May 8, 1979).

[247] Letter from Marian Wolcott, Realty Specialist, Dep't of Energy, BPA, to Donald F. McNaris, Idaho Dep't of Lands (July 5, 2000); *cf.* Letter from Will Runnoe, Field Manager, Bureau of Land Mgmt., Cottonwood Field Office, to Silas C. Whitman, Chairman, Nez Perce Tribe (Aug. 7, 2012) (acknowledging tribal title to the bed related to a different activity proposed for the bed). During construction of the Nez Perce Tribal Hatchery, the Idaho Department of Lands sent a letter to the BPA stating that the hatchery required a permanent easement from the State of Idaho because the State owned the riverbed. BPA, consistent with the longstanding position reaffirmed in this Opinion, responded that the Tribe held title to the bed of the Clearwater River within the Reservation, that the Tribe had authority to grant any necessary easement to BPA, and that Idaho had no authority to require an easement or permit. Letter from Marian Wolcott, Realty Specialist, Dep't of Energy, BPA, to Donald F. McNaris, Idaho Dep't of Lands (July 5, 2000). Neither BPA nor the Tribe obtained a permit from the State.

Clearwater River within the Reservation.[248] All of these actions are consistent with the conclusion that title to the riverbed is with the Tribe.

IV. CONCLUSION

Based on the foregoing analysis, I reaffirm the conclusion in the 1976 Memorandum that the bed of the Clearwater River within the boundaries of the Reservation, as established by the 1863 Treaty, was reserved for the benefit of the Tribe and did not pass to the State of Idaho at statehood. I also reaffirm the conclusion that the Tribe's beneficial ownership of the riverbed was not affected or otherwise altered by the 1893 Agreement. Thus, this decision reaffirms the Department's nearly forty-year-old position that the bed of the Clearwater River within the Reservation is held in trust by the United States for the benefit of the Tribe.[249] The Tribe's position as a leader in restoring the basin's fishery resources, through hatchery and related activities requiring use of the riverbed within the Reservation, could be undermined without a modern-day reaffirmation of the status of title to the bed underlying many of those important activities. This conclusion will contribute to the Tribe's ongoing ability to serve in this important leadership role.

Hilary C. Tompkins

Attachments

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[248] Letter from Silas C. Whitman, Chairman, Nez Perce Tribe, to Rick Lamm, City Adm'r, City of Orofino (May 15, 2013) (asserting tribal ownership of the bed as a basis for requiring the City to seek a permit for any structures located in the bed); *see also* Letter from Ryan Smathers, Mayor, City of Orofino, to Silas C. Whitman, Chairman, Nez Perce Tribe (May 31, 2013) (transmitting a copy of the executed revocable permit issued by the Tribe to the city for its intake project).

[249] This Opinion would not have been possible without the stellar legal research and drafting of Attorney-Advisors Andrew Engel and Sarah Foley, and Assistant Solicitor - Branch of Water and Power, Division Indian Affairs, Scott Bergstrom, and several peer reviewers, including Attorney-Advisor Bella Wolitz, Counselor to the Solicitor Vanessa Ray-Hodge, Associate Solicitor for Land and Water Laura Brown, Assistant Solicitor - Branch of Public Lands, Division of Land and Water, Aaron Moody, Attorney-Advisor Elizabeth Carls, Associate Solicitor for Mineral Resources Karen Hawbecker, Attorney-Advisors Kendra Nitta and Anne Briggs, and Advisor to the Director, Bureau of Land Management, Dylan Fuge. Special Recognition goes to Deputy Solicitor for Water Resources Ramsey Kropf and Associate Solicitor for Indian Affairs Eric Shepard for coordinating the efforts of this multi-disciplinary team of attorneys within the Solicitor's Office.

Attachment 1

United States Department of the Interior

OFFICE OF THE SOLICITOR
PORTLAND REGION, 1002 N. E. HOLLADAY ST.
P. O. Box 3621, Portland, Oregon 97208

December 6, 1976

In reply refer to:

Memorandum

To: Portland Area Director, Bureau of Indian Affairs

From: Regional Solicitor, Portland

Subject: Ownership of the Bed of the Clearwater River of the Nez Perce Indian Reservation

We were asked to review the applicable law and facts to determine the right of the Nez Perce Tribe to the bed of the Clearwater River within the boundaries of the Nez Perce Reservation. We have completed our review, and the following is a summary of the applicable law and facts and our opinion concerning this right.

INTRODUCTION

The ownership of the bed of the Clearwater River within the Nez Perce Indian Reservation has generally been assumed to be held by the State of Idaho. The State has been issuing permits for stream channel alterations and mineral leases for the removal of sand and gravel from this bed. 1/ On several occasions where gravel was being removed from the Clearwater River, the Nez Perce Tribe has considered objecting on the basis of their asserted ownership of the bed. 2/ The plans by the City of Lewiston to place pumps in the bed of the Clearwater River within the reservation boundaries will bring this issue to a head. The tribe is vigorously opposed to the project and will use the riverbed issue if necessary in order to block the project. 3/

With the exception of about 2 miles on the western boundary where the border runs along the north bank of the Clearwater, the riverbed is clearly within the exterior boundaries of the Nez Perce Indian Reservation. 4/ The river runs fairly parallel to the eastern and northern boundaries of the reservation and about 3 or 4 miles inside the borders.

1/ See Appendix I.

2/ See Appendix II.

3/ See Appendix III.

4/ See Appendix IV.

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

There are three major forks of the Clearwater River which converge within the reservation. The North Fork comes within the boundaries of the reservation at a point 7 miles from its juncture with the main branch about 4 miles downstream from Orofino. The water level of this fork has been raised a great deal by the construction of Dworshak Dam near its mouth. The Middle Fork enters the reservation at a point directly east from Kooskia, about 5 miles upstream from its confluence with the South Fork. The Middle Fork was designated a Scenic River in the Wild and Scenic Rivers Act (16 U.S.C. § 1274). The South Fork enters the reservation about 11 miles south of Kooskia, or as the Treaty of 1863 described it, 1 mile above the bridge on the road to Elk City. Unlike the rest of the river, the banks of the South Fork are not lotted in the surveys.

Our review concerned only the rights and title to the lands underlying the Clearwater River within the boundaries of the Nez Perce Indian Reservation. The primary value of these lands is the right to gravel and other minerals and the right to build structures on the bed. Our review did not cover rights to water or possible claims to rivers outside the 1863 boundary of the Nez Perce Reservation.

The parties involved in this issue are the State of Idaho, the Nez Perce Tribe, the United States, and any riparian owners or their successors who may have acquired a title including lands below the mean high water mark of the Clearwater River prior to the State of Idaho's admission to the Union or thereafter. The resolution of the interests of these parties will depend primarily upon interpretation of the treaties which created the Nez Perce Indian Reservation.

HISTORY OF THE RESERVATION

On June 11, 1855, the first treaty with the Nez Perce was signed by representatives of the United States and the Nez Perce Tribe and others. It was later ratified by the United States Senate on March 8, 1859, and proclaimed by the President on April 29, 1859 (12 Stat. 957). In this treaty, the Nez Perce Tribe agreed to relinquish and cede to the United States all right, title and interest to its described aboriginal territory except for the reservation by the United States of a described tract of land set aside for the "use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians of Washington Territory ... ." Under this treaty the use of the Clearwater River flowing to the reservation was secured to the citizens of the United States for rafting purposes, and as public highways. However, the Indians secured in this treaty the exclusive right of taking fish in streams running through or bordering on the reservation.

The minutes of the treaty negotiations reveal that much of the talk focused on the problem of protecting the Indians from the encroachment by white settlers. One of the major points persuasively used by Governor Stevens and General Palmer to obtain agreement to the treaty was that the United States Government could better protect the Indians if they resided on a reservation. 5/ Pertinent excerpts of these minutes appear in Appendix V.

In the spring of 1860, gold was discovered on the Nez Perce Reservation. Shortly thereafter white men began to overrun the reserved territory. The towns were laid out and settled on the reservation by the gold seekers and their followers without regard to the treaty provisions. One of these towns, Lewiston, was named the first capitol of the Territory of Idaho in the spring of 1863. 6/ The pressures resulting from the gold discovery and the consequent influx of settlers resulted in the negotiation of a second treaty in June of 1863. 7/ This treaty also reserved a tract of land, though much reduced from the 1855 treaty, for their exclusive use. No white man, except those employed by the Indian Department, could reside on the reservation without permission of the tribe and superintendent.

The Organic Act of the Territory of Idaho, which Congress passed just a few months before the treaty was negotiated, seemingly upheld the principle of the exclusive use by Indian tribes of their reserved territory. In establishing the Territory of Idaho, section 1 of this act stated:

> "Nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits

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5/ 1 Allan P. Slickpoo, Sr., and Deward E. Walker, Jr., Noon Nee-Me-Poo (We the Nez Perces) (1973 ed.); transcripts of the minutes can be found at the Nez Perce Tribal Center or in the records of the Indian Claims Commission, Nez Perce Tribe v. United States, Dkt. No. 175, Petitioner's Exh. No. 75.

6/ 2 H. H. Bancroft, History of Washington, Idaho and Montana 1845-1889 233-40, 481-96 (1890).

7/ Treaty with the Nez Perce of June 9, 1863 (14 Stat. 647; ratified April 17, 1867; proclaimed April 20, 1867).

> or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said territory ... ." 8/

The United States Supreme Court ruled that this provision in the 1863 Organic Act had no operative effect since no treaty at the time of passage of the act had a clause requiring tribal consent for inclusion within state or territorial boundaries. 9/ It should be noted, however, that the portion of the 1863 Organic Act dealing with personal and property rights of Indians unextinguished by treaty was not made conditional on the existence of any particular Indian treaty provisions.

The State of Idaho was admitted to the Union on July 3, 1890. 10/ The 1890 Constitution of the State of Idaho forever disclaimed all right and title to all lands within boundaries of Indian reservations:

> "The people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; ..." 11/

While the beds of navigable streams are not "unappropriated public lands" to be included within the disclaimer of title 12/, the Clearwater riverbed would be included in the term "all lands within boundaries of Indian reservations." 13/

8/ Act of March 3, 1863 (12 Stat. 808).

9/ Utah and Northern Railway Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542 (1889); Frankfurt v. Monteith, 102 U.S. 145, 26 L.Ed. 53 (1880) (specifically applied to Nez Perce Reservation).

10/ Act of July 3, 1890 (26 Stat. 215).

11/ Idaho Const. art. 21, § 19 (approved July 3, 1890).

12/ State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945).

13/ Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942); Hynes v. Grimes Packing Co., 165 F.2d 323 (9th Cir. 1947).

In 1893 an agreement was made between the Nez Perce Tribe and the United States whereby the tribe would "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 said [Nez Perce] reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz. ..." In consideration for this cession, the United States agreed to pay a sum of $1,626,222.00, among other things. 14/ After the allotting of the land to individual members of the Nez Perce Tribe was completed, President Cleveland proclaimed the unallotted and unreserved lands acquired from the Nez Perce open to settlement beginning at 12 noon, November 18, 1895. 15/

Within the first 13 days after opening to entry, 507 homestead filings were made on the ceded lands. Prior to the 1893 agreement, the Nez Perce Reservation consisted of 762,236.05 acres, exclusive of surface areas of lakes and nonfordable streams. The lands ceded in that agreement totaled 549,559 acres. 16/

WHAT IS THE BASIS FOR OWNERSHIP OF SUBMERGED LANDS?

Under firmly established legal doctrine in the United States, the title to the soil under navigable waters is in the sovereign, except as far as private rights in it have been acquired by express grant or prescription or usage. 17/ This land is held by the sovereign so that it may benefit the whole people within its territory. Under our constitutional system, the only sovereign bodies capable of holding such ownership are the states or the Federal Government.

From the beginning of our republic, the soils under the tidewaters and navigable bodies of water within the original states were reserved to them respectively. 18/ Since new states are admitted to the Union

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14/ Act of Aug. 15, 1894 (28 Stat. 326).

15/ Proclamation of Nov. 8, 1895.

16/ Nez Perce Tribe v. United States, 13 Indian Claims Commission 192, 197-98.

17/ 65 C.J.S. Navigable Waters § 89 (1966).

18/ Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 80 L.Ed. 9 (1935). (Suit by the City of Los Angeles to quiet title to tidelands of island situated in the Bay of San Pedro. City asserted title under a legislative grant by the state, and the other party claimed under a preemption patent issued by the United States.)

on an equal footing with the original states 19/, they succeed to the same sovereignty and jurisdiction over submerged lands within their borders as the original states possessed. 20/ Prior to the admission of a territory as a state, the United States is the sovereign power which has sole authority to dispose of these lands. 21/ However, the United States established early in its history the policy of regarding lands ~~under~~ navigable waters as held in trust for the ultimate benefit of the future states and so refrained from making disposal of such lands save in exceptional instances when impelled to particular disposals by some international duty or public exigency. 22/

The Nez Perce Tribe claims its ownership to the riverbeds on the basis that the treaties made prior to the statehood of Idaho so reserved or disposed of the riverbeds that the State of Idaho did not acquire ownership of them upon its admission. However, the effect of certain subsequent acts of Congress, such as the Agreement of 1893 and the Submerged Lands Act of 1953, must also be examined. The set of legal principles which will be applied to determine the question of title will largely depend on whether the Clearwater River fits the definition of a navigable body of water.

IS THE CLEARWATER RIVER NAVIGABLE?

The English common law doctrine on navigability was that only water in which the tide ebbs and flows is considered navigable. In the United States, this test is generally inapplicable, and the prevailing view is "waters are navigable which are navigable in fact." The circumstances of each individual case must therefore be examined. 23/ The United States Supreme Court has held that circumstances to be considered include not only the natural condition of the stream, but also the effect of "reasonable improvements" which may be made:

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. ... A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aides

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19/ Pollard v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845).

20/ Borax Consolidated, supra.

21/ U.S. Const. art. IV, § 3, cl. 2.

22/ United States v. Holt State Bank, 270 U.S. 49 (1925).

23/ 65 C.J.S. Navigable Waters §§ 3-9 (1966).

> must make the highway suitable for use before commercial navigation may be undertaken. ... The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. ... There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." 24/

Using this criteria, the United States District Court in Idaho found that the Moyie River in Idaho was a navigable stream. 25/ The Moyie River is considerably smaller than the portion of the Clearwater River which lies within the Nez Perce Reservation. 26/

The first recorded use of the Clearwater for navigation was that by Lewis and Clark. It was near the confluence of the North Fork and the main channel of the Clearwater River that the expedition built its canoes for the final leg of their journey to the Pacific Ocean. 27/ Later, in the 1860's, we have further reports of the navigability of this stream. Edward R. Geary, Superintendent of Indian Affairs for Oregon and Washington in the 1860's, reported that the Clearwater River was navigable for small steamers for 50 miles above its mouth on the Snake River. 28/ Indeed, in 1861, a small steamer by the name of Colonel Wright traveled to within 12 miles of the mouth of the North Fork where it landed and established the town of Slaterville. Another steamer by the name of Tenino made several trips to this town but soon found it impracticable to make a landing due to the rapids in the river and made its final return trip in June of 1861. 29/ Also, in 1861 several permits were issued for the operation of ferries across the

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24/ United States v. Appalachian Electric Power Co., 311 U.S. 377, 85 L.Ed. 243 (1940).

25/ United States v. Wallace, 157 F. Supp. 931 (D. Idaho 1957).

26/ Federal Writer's Project, The Idaho Encyclopedia (1938) [Caxton Publishing Co., Caldwell, Idaho].

27/ Alvin M. Josephy, Jr., The Nez Perce Indians and the Opening of the Northwest 8 (1965).

28/ Verne F. Ray, "Analysis of Historical Materials Bearing Upon the Value of Nez Perce Lands Ceded by The Treaty of 1855," Nez Perce Tribe v. United States, Dkt. No. 175, Indian Claims Commission, Petitioner's Appraisal Report, Vol. II at 101 (1970).

29/ Bancroft, supra at 237.

Clearwater. One was issued to Lyman Shaffer and W. F. Bassett "across the south branch of Clearwater on main wagon road from Lewiston to Orofino." Another was issued to Orrington Cushman across the Clearwater "at or near camp of Lawyer." 30/ Lawyer's Village was in the vicinity of Kamiah. 31/

In 1950, the United States Corps of Engineers reported that construction of a dam near Kooskia was economically feasible. They reported this would improve the navigability of the river far up the Middle and South Forks. 32/

Based upon the foregoing evidence, it is quite certain that the federal courts would find that the Clearwater River within the Nez Perce Indian Reservation was a navigable stream.

WHAT EFFECT DO THE TREATIES WITH THE NEZ PERCE HAVE ON THE OWNERSHIP OF THE CLEARWATER RIVERBED?

Although the United States may grant away rights and title to the submerged lands within its territory prior to a state's admission, such disposals are not to be lightly inferred. Such intention by the United States must be definitely declared or otherwise made very plain. 33/ Federal courts have found that Congress has the power to include ownership of beds of navigable waters as a part of an Indian reservation, but whether or not Congress has done so is a matter of congressional intent. 34/ The question then becomes, what evidence is sufficient for a finding of such an intent by Congress?

In Holt State Bank, the Court found the evidence insufficient to show congressional intent to dispose of the beds of Mud Lake for the use of the Chippewa Indians. The reservation in that case was not created by any formal setting apart or declaration of the rights of the Indians therein or attendant exclusion of others from the use of the navigable waters. Instead, the reservation had been created more or less by implication from a series of cessions by the tribe of other lands which it had occupied. Although the tribe had never conveyed away its rights and title to the lands which they occupied as a reservation, there was

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30/ Id. at 251.

31/ Josephy, supra at 78.

32/ H.R. Doc. No. 531, 81st Cong., 2d Sess. 219 (1950).

33/ United States v. Holt State Bank, supra.

34/ United States v. Pollmann, 364 F. Supp. 995 (D. Mont. 1973).

no congressional expression of intent to reserve these lands to the Indians. Without such an affirmative act by the Congress, therefore, the submerged lands will become the property of the state upon its admission to the Union.

Most Indian reservations, however, have been created expressly by treaty or Executive order, and thus can easily be distinguished from Holt State Bank. The courts do, however, look at the particular circumstances surrounding the treaties and the creation of the reservations. Several factors appear particularly important to the courts in making their determination.

One very convincing factor in Choctaw Nation v. Oklahoma 35/ was that the United States had granted a fee patent to the tribe for the described territory. Also, the treaty promised that no state would be created in this territory. This indicated clearly that Congress did not intend to hold the riverbeds in trust for a future state. Although the circumstance of having a fee patent to the reservation is pretty much limited to the Oklahoma tribes, the case does indicate the importance and relevance of the provisions in the Organic Act of the Territory of Idaho 36/ which disclaimed right and title to the Indian lands. If the Indian lands in the territory may never be included in the future state, it certainly opens the possibility that Congress was not holding the riverbeds in trust for the future state.

In Donnelly v. United States 37/, the Court found that an Executive order describing the reservation as including "tract of country one mile in width on each side of the Klamath River" clearly included the riverbed within the reservation. The fact that the Arkansas River was surrounded on both sides by land granted to the Cherokees with no express exclusion of the bed of the river by the United States was a point considered by the Court as significant evidence that the United States intended to convey title to the riverbed in Choctaw Nation v. Oklahoma. The Clearwater River quite clearly is surrounded on both sides by lands reserved to the Nez Perce Tribe in the Treaty of 1863. Congress quite well knew how to exclude the riverbed when it so desired; e.g., the description of a portion of the western boundary of the Nez Perce Reservation as "to a point on the north bank of the

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35/ 397 U.S. 620 (1969).

36/ Quotations appearing supra at pp. 3-4.

37/ 328 U.S. 243, 57 L.Ed. 820 (1913) (issue was jurisdiction over a murder).

Clearwater River 3 miles below mouth of the Lapwai Creek, thence down north bank of Clearwater River to the mouth of Hatwai Creek." 38/ No other exclusion of the riverbed appears in the Treaty of 1863.

The fact that the lands have been reserved for the exclusive use and occupancy of the Indians has also been a significant factor in the decisions finding ownership of the riverbeds in the United States in trust for the tribes. In Montana Power Co. v. Rochester 39/, where the Ninth Circuit Court of Appeals found the treaty with the Flatheads to include the submerged lands of the lake, Justice Healy stated:

> "It is inadmissible to suppose that the United States, having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state, the policy of which was necessarily unknown at the time of the treaty, ... for adoption of a proprietary policy the state might substantially interfere with, if not foreclose, use of the shores by the Indians in the conduct of their fishing operations." 40/

In both treaties with the Nez Perce 41/, the United States agreed "to reserve [the described territory] for a home, and for the sole use and occupation of said tribe." All of the described tract was to be set apart and the described boundaries "surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation." No white man (except those employed by the Indian Department) could reside on the reservation without the permission of the tribe and superintendent. A navigational easement on the Clearwater River was secured in the 1855 treaty to the citizens of the United States for "rafting purposes and as public highways." This navigational easement would not have been necessary if Congress had not made the river and its bed subject to the exclusive use and occupancy of the Indians.

The circumstances surrounding the 1863 treaty were that the United States had been unable to secure the borders of the 1855 reservation from gold-seeking miners and land-hungry settlers. The reservation was literally being overrun with these white men. Entire towns were

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38/ Treaty with Nez Perce, June 9, 1863 (14 Stat. 647), art. II.

39/ 127 F.2d 189 (9th Cir. 1942).

40/ Id. at 192.

41/ June 11, 1855 (12 Stat. 957); June 9, 1863 (14 Stat. 647).

being established within the reservation boundaries in complete disregard of the treaty. The efforts of the Indian agent and federal troops to turn back the influx of settlers had proved futile. The 1863 treaty, which considerably reduced the size of the reservation, was an attempt to appease the appetite of the surrounding white populace and create a smaller tract in which the Federal Government could better "protect" the Indians. 42/ This protection should certainly include the riverbeds, since it was the discovery of gold in the beds of the Clearwater tributaries which led to the invasion of settlers in the first place and the necessity for making the Treaty of 1863.

Courts have also placed much importance on a showing of a particular need for the submerged lands. Some of the cases which held that the United States had reserved the submerged lands for the use of the Indians were distinguished by the Arizona Supreme Court in Morgan v. Colorado River Indian Tribe 43/ on the basis that there was no peculiar need shown in the case which would infer intent that the submerged lands and navigable waters be included in the grant; i.e., the tribe did not show use of the Colorado River for fishing. The cases referred to by the Arizona court were Moore v. United States 44/ and Alaska Pacific Fisheries v. United States 45/. Both of these cases involved lands beneath the ocean waters. In these cases, as well as the Arizona case, the issue was whether the description of the boundaries of the reserved lands extended to the submerged lands.

Alaska Pacific Fisheries was a suit by the United States to enjoin fisheries from maintaining a fish trap in navigable waters surrounding certain islands reserved for Indians. The Court took note that the Indians, who were largely fishermen, looked upon these islands as a suitable location for their colony because the adjacent fishery would provide subsistence and a promising opportunity for industrial and

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42/ Josephy, supra at 389-430; Francis Haines, The Nez Perces 154-164 (1955); Roy P. Foll, "An Appraisal of the Mineral Resources in the Lands of the Nez Perce Tribe Acquired by the United States in the Treaty of June 11, 1855," Nez Perce Tribe v. United States, Dkt. No. 175, Indian Claims Commission, Vol. I at 36-38 (1970); Bancroft, supra at 237-251.

43/ 103 Ariz. 425, 443 P.2d 421 (1968) (Wrongful death action against tribe for the death of girl who went swimming in tribe's marina. One of the issues in the case was whether the area was within the boundaries of the Indian reservation or not.).

44/ 157 F.2d 760 (9th Cir. 1946).

45/ 248 U.S. 78, 63 L.Ed. 138 (1918).

commercial development. Without the surrounding submerged lands, the Indians could not sustain themselves on the use of the uplands alone. Thus, the Court interpreted "islands" as including intervening and surrounding waters.

In determining the meaning of the words describing boundaries of the Quileute Reservation, the court in Moore v. United States looked at the means by which the Indian tribe had earned its living. They found from the evidence a showing that the Quileutes had a highly developed fishing enterprise and sealskin industry at the time of the creation of the reservation. Evidence of clam shell mounds demonstrated aboriginal use of the beach for clamming.

In United States v. Stotts 46/, it was stated that each treaty must rest on its own provisions. In that case, the Executive order creating the Lummi Reservation very clearly stated that the boundary ran to the low water line. The court held that the United States had the right to grant this land for appropriate purposes, and here the state could not complain since this use by the Indians of their shoreline had been made since time immemorial.

The situation on the Nez Perce Reservation is more closely analogous to the Stotts case, since there can be no dispute that the Clearwater River was included within the described boundaries of the reservation. Thus, the evidence of the aboriginal use of the submerged lands will not be necessary to prove what was intended to be included within the reservation boundaries, but, rather, to show that the grant by the United States of such land was for an appropriate purpose.

Fish was an important part of the Nez Perce diet. Since the most populous villages of the Nez Perce were located in the Clearwater River valley, some of the more important fishing sites were located there. 47/ Ethnologist Stuart A. Chalfant states that for basic subsistence the Nez Perce were largely dependent on salmon and certain edible roots. Salmon was one of the principal food stocks for winter use and was as much a staple as meat. The Clearwater drainage system was used considerably for salmon fishing, principally by the Kamiah, Ahsahka and other Clearwater River bands. Governor Stevens himself wrote in 1855 that the Nez Perce took great quantities of salmon from the Clearwater River. 48/

46/ 49 F.2d 619 (W.D. Wash. 1930).

47/ Ray, supra at 74; see Appendix VI.

48/ Stuart A. Chalfant, "Aboriginal Territory of the Nez Perce Indians," report submitted in Nez Perce Tribe v. United States, Dkt. No. 175, Indian Claims Commission, 38-41, 79-80 (1970).

The Nez Perce fishing techniques made use of the streambeds by the construction of weirs, dams, dipping platforms and fish walls. Some of the early Christian missionaries described the Nez Perce use of weirs. 49/ An artist's drawing of such a weir appears in Appendix VII.

Fish walls were first described by Lewis and Clark. They said:

> "We proceeded on passed a great number of fishing camps where the Natives fish in the spring. The stone piled up in roes so that in high water the sammon lay along the side of the line of rocks while they would gig them." [Sic] 50/

Fish walls were built at different elevations on the bank in order to adjust to variations in water heights. A diagram of these structures appears in Appendix VIII.

Besides these aboriginal uses of the riverbed, the Treaty with the Nez Perce of 1863 itself provides that all ferries and bridges within the reservation shall be held and managed for the benefit of the said tribe. Thus, even modern structures built by white men within the reserved boundaries appear to be intended for the benefit of the Indians. 51/

Therefore, it is evident that the Nez Perce depended on the use of the Clearwater River prior to 1863 and that the United States intended to reserve the bed thereof for the use of the Nez Perce Indians by the Treaty of 1863. Consequently, the title to the bed did not pass to the new State of Idaho when it was admitted to the Union in 1890.

WHAT EFFECT DID THE 1893 AGREEMENT HAVE ON THE OWNERSHIP OF THE RIVERBED?

The Nez Perce Tribe, in the 1893 agreement 52/, ceded all its rights, title and interest to the unallotted lands within the reservation

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49/ Deward E. Walker, Jr., Mutual Cross-Utilization of Economic Resources in the Plateau: An Example from Aboriginal Nez Perce Fishing Practices 25 (Wash. State Univ. Laboratory of Anthropology Report of Investigations No. 41, 1967).

50/ Id. at 26.

51/ 14 Stat. 647, art. VIII.

52/ Act of Aug. 15, 1894 (28 Stat. 326).

except for certain described tracts. The tribe received payment for these lands. Article XI of the 1893 agreement provided:

> "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."

The act which ratified the agreement provided:

> "[T]he lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and mining laws of the United States ... ." 53/

The question, then, is whether the bed of the Clearwater River within the reservation was ceded by the tribe by the 1893 agreement. A review of the agreement, the ratification by Congress and the Presidential proclamation clearly shows that it was never intended that the tribe should cede the bed of the Clearwater River within the reservation. As the section of the act which is quoted above indicates, the purpose for which the lands were ceded by the tribe was to open the lands for settlement and disposal under the laws of the United States. As a result thereof, the President proclaimed that all of the "unallotted and unreserved lands acquired from the Nez Perce Indians" were open for settlement.

That the bed of the Clearwater River within the reservation was not ceded by the tribe is clearly evident from the fact that the patents later issued by the United States did not include the bed of the river. Descriptions in these patents included language such as the following: "along the edge of the river," or "to the left bank of the Clearwater River." 54/ Under Idaho law, the United States could have included the bed in the patents issued. 55/ The fact that it did not do so is further evidence that there was no intent that the tribe should cede its interest in the bed of the river to the United States.

53/ 28 Stat. 332.

54/ See Appendix VIII.

55/ The law of the State of Idaho, until 1915, was that title to the bed of a stream, whether navigable or not, was in the riparian owner to the center of the thread of the stream subject to public easement over or along the stream. The Idaho courts would so construe Government grants of land unless the Government in some manner clearly

However, this conclusion is not reached solely by inference as to the intent of the parties. The agreement provided that the existing provisions of former treaties not inconsistent with the provisions of the agreement would continue in full force and effect. The retention of the bed of the river by the tribe was entirely consistent with the purposes for which the lands were ceded.

The intent to modify, dissolve or diminish a reservation or rights reserved by treaty must be clear and is not to be lightly imputed. 56/ Also, under rules of statutory construction, every effort must be made to give effect to the intent of the parties, and any doubts must be resolved in favor of the Indians. The Supreme Court in a recent case stated:

> "[W]e must be guided by that 'eminently sound and vital canon' ... that 'statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" 57/

One alternative conclusion would be to hold that the bed of the river within the reserved area was ceded to the United States and has been so retained, although unused, by the United States for over 80 years. Such a holding would be contrary to the manifest purpose of the agreement. The other alternative, equally untenable, would be that the State of Idaho acquired the title to the bed of the river within the reservation. The State would have had to acquire such right from the United States since, as pointed out above, the State acquired no title when it joined the Union in 1890. There has been no conveyance from

---

indicated intention to stop at the margin or edge of the river. Johnson v. Johnson, 14 Idaho 561, 95 P. 499 (1908). The Idaho Supreme Court reversed its position in 1915 in Callahan v. Price, 26 Idaho 745, 146 P. 732 (1915), but where patents were issued prior to the decision in 1915, the riparian rights of ownership to the thread of the stream could have been conveyed.

56/ Menominee v. United States, 391 U.S. 404, 20 L.Ed.2d 697 (1968); Mattz v. Arnett, 412 U.S. 481, 37 L.Ed.2d (1973).

57/ Bryan v. Itasca County, ___ U.S. ___, 48 L.Ed.2d 710, 723 (1976); see also McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 36 L.Ed.2d 129 (1973), and Antoine v. Washington, 420 U.S. 194, 43 L.Ed.2d 129 (1975).

the United States to the State of Idaho of any lands beneath the beds of navigable waters in Idaho. 58/

CONCLUSION

At the time of the admission of the State of Idaho to the Union, the United States had reserved title to the bed of the Clearwater River within the reservation for the benefit of the Nez Perce Tribe. Therefore, the State of Idaho did not take title to the bed under the equal footing doctrine, nor has title been conveyed to the State by any subsequent act of Congress.

The Nez Perce Tribe did not cede the title to the bed of the Clearwater River within the boundaries of the reservation by the agreement of 1893. All provisions of the treaties with the Nez Perce remained in full force and effect except those provisions of the agreement inconsistent therewith. Since the need for the United States to acquire lands for settlement and disposal was not inconsistent with the treaty right of the tribe to the bed of the Clearwater River within the reservation, the title remains with the tribe in trust status.

Robert E. Ratcliffe
Regional Solicitor

58/ The Submerged Lands Act of 1953, 43 U.S.C. § 1311, did release to the states all lands beneath navigable waters, however, it is clear from legislative history that this act was to promote exploration and development of petroleum deposits in coastal waters. 1953 U.S. Code Cong. & Ad. News 1385. Also, the act specifically excluded all lands acquired by the United States by "purchase, cession, gift or otherwise in a proprietary capacity" and all lands held for Indians. 43 U.S.C. § 1311(a),(b).

Copies of permits themselves are found in files accompanying this report. Although the State of Idaho has been requested to furnish us a list of gravel permits issued for the Clearwater Riverbeds, they have not yet responded.

STREAM CHANNEL ALTERATIONS

No.	Applicant	Located On Middle Fork Clearwater River	Final Action
81-S-2	Joseph & Lorena Schwartz	Sec 5, T32N, R6E	App 10-20-71
81-S-7	Crane Service, Inc.	Sec 2, T32N, R5E	App 5-7-73
81-S-11	Jack Albert	Sec 3, 10; T32N; R4E (Court action in Idaho Co. also resulted)	Order 3-74
81-S-20	Idaho Transportation Dept.	Sec 4, T32N, R4E	App 4-27-76
81-S-22	Ralph Yerkey	Sec 11, T32N, R5E	App 5-25-76
81-S-25	Linwood Laughy	Sec 6, T32N, R5E	App 8-25-76
		South Fork Clearwater River	
82-S-9 82-S-10	Shearer Lumber Products, Inc.	Sec 33, T29N, R8E	App 10-3-72
82-S-17	City of Stites	Sec 20, 29; T32N; R4E	App 5-16-74
82-S-18	R. Redding Construction Co.	Sec 8,9,16,17;T32N;R4E	App 6-11-74
82-S-23	Gay Richardson	Sec 26, T29N, R4E	App 10-10-75
82-S-24	Grover Hunter	Sec 16, T31N, R4E	App 11-5-75
82-S-25 82-S-26	Dept. of Transportation - Federal Highway Administration	Sec 29, T29N, R8E Sec 29, T29N, R7E	App 4-30-76 App 4-30-76
82-S-28	Clearwater Forest Industries	Sec 8, T32N, R4E	App 8-17-76
85-S-23	George E. Wilson	Sec 33, T32N, R4E	App 6-4-73
85-S-34	Division of Highways	T29N & 30N; R3E & 4E	App 9-10-74
		North Fork Clearwater River	
83-S-41	Potlatch Forests Inc.	Sec 14,15,22,27;T40N;R4E	App 8-16-72
83-S-88	Clearwater County Waterways Committee	Sec 34, T37N, R1E	Perm. Not Pe 1-14-75

No.	Applicant	Located On Clearwater River	Final Action
85-S-28	City of Orofino	Sec 1, T36N, R1E	App 4-10-74
85-S-31	Clearwater County Waterways	Sec 23, T35N, R2E	App 5-17-74
85-S-35	Committee	Sec 33, T36N, R2E	App 10-17-74
85-S-36	Nez Perce County	Sec 5, T36N, R3W	App 10-17-74
85-S-43	Id. Transportation Dept.	Sec 33, T37N, R3W	App 11-20-75

September 28, 1976

William A. Scribner
Chief, Bureau of Navigable Waters
Division of Earth Resources
Department of Lands
Statehouse
Boise, Idaho 83720

Re: State leases, Clearwater River

Dear Mr. Scribner:

For the present, information regarding only current activity in state leases in the Clearwater River within the Nez Perce Indian Reservation will be sufficient for our purposes.

The Nez Perce Tribe requested us to investigate the ownership of the riverbeds of the Clearwater River. We desire the information about state leases so that we will have some idea of the use which is now being made of these riverbeds.

Sincerely yours,

For the Regional Solicitor

Roger W. Nesbit
Attorney

RWN:mp

STATE OF IDAHO

DEPARTMENT OF LANDS

STATEHOUSE, BOISE, IDAHO 83720

STATE BOARD OF LAND COMMISSIONERS

CECIL D. ANDRUS
GOVERNOR AND PRESIDENT
PETE T. CENARRUSA
SECRETARY OF STATE
WAYNE L. KIDWELL
ATTORNEY GENERAL
JOE R. WILLIAMS
STATE AUDITOR
ROY TRUBY
SUP'T OF PUBLIC INSTRUCTION

21 September 1976

Mr. Roger Nesbit
Regional Solicitor's Office
U.S. Department of the Interior
Bonneville Power Administration Bldg.
1002 NE Holladay
Portland, OR 97232

RE: State Leases
Clearwater River

Dear Mr. Nesbit:

Today Ms. Patti Harris conveyed to me your request for information regarding state leases in the Clearwater River system. This request will take a substantial amount of research, unless you are interested in only the current activity.

To justify commitment of time to your request we ask that you specify in writing what information you wish, what time period is to be included, and what the purpose the information will serve.

Very truly yours,

DIVISION OF EARTH RESOURCES

WILLIAM A. SCRIBNER, Chief
Bureau of Navigable Waters

WAS:ph

cc: Director

Real Property
Management
320
EP

Northern Idaho Agency
Lapwai, Idaho 83540

January 19, 1973

Mr. Richard A. Halfmoon
Chairman, Nez Perce Tribal
Executive Committee
Lapwai, Idaho 83540

Dear Mr. Halfmoon:

Attached is the letter of January 15, 1973 from William G. Cummings which he sent to the Nez Perce Tribal Executive Committee, and which you had delivered to us for review before the Committee takes any action.

In reviewing the lease proposal, we would like you to consider these factors. The offer of 20¢ per ton for gravel is reasonable, as is the 1¢ per yard for crossing rights. The annual ground rent of $150 for sanitary fill use appears low. It is also recalled that this lease was the subject of considerable attention by the Committee in the past. The Tribe has to date elected not to take action to have adjudicated the ownership of stream beds within the reservation boundaries. It is gravel from such a stream bed that the would-be lessee proposes to move over tribal land. It is also suggested that if the Committee does grant a lease to this applicant, the lessee should be prevented from removing additional gravel from the slopes in order to prevent an erosion problem.

We will await the pleasure of the Committee before taking any action. Please call if we can be of further assistance.

Sincerely yours,

Charles P. Mathes
Realty Officer

Attachment

cc:RPM Subj.
Land Ops.
EPLeasingEnt.

→ 66.1

Real Property
Management
308
TU 46

Northern Idaho Agency
Lapwai, Idaho 83540

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

March 26, 1969

Mr. James H. Hunter
Ace Concrete Company
Box 27, N. 302 Park Road
Spokane, Washington 99206

Dear Mr. Hunter:

The Nez Perce Tribal Executive Committee has today formally charged that your equipment is crossing and using a portion of tribal trust land designated as Unit No. 46 situated on the right bank of the Clearwater River in Section 18, Township 36 North, Range 2 East, Boise Meridian, Idaho, in a trespass status.

You are hereby put on notice that you must immediately cease and desist from any further trespass on or across the aforesaid lands.

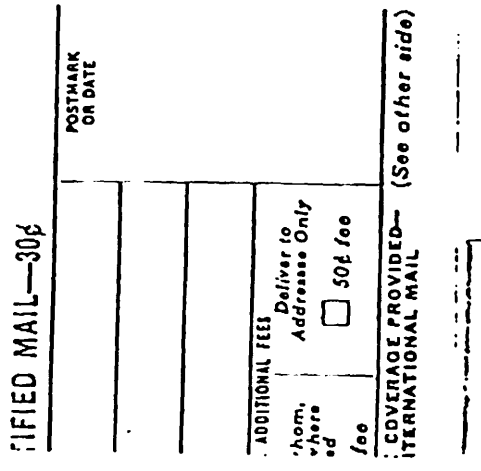
You are also warned not to attempt to remove any stockpiled material from the aforesaid lands, until title to such material is determined, and permission for removal is granted. You may, however, remove all machinery owned by you from such land.

Further, you are warned that title to lands lying below the line of mean high water mark on rivers within the reservation boundary has not been determined. The issuance of a permit by the State of Idaho for the removal of sand and gravel from riverbeds within the reservation boundary is a grant by the State limited to whatever title the State may legally posess.

We trust that this notice will suffice to prevent any continuation of the acts outlined above. Your immediate cooperation will be appreciated.

Sincerely yours,

Superintendent



INSTRUCTIONS TO DELIVERING EMPLOYEE

Show to whom and date delivered ☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

Real Property
Management
NP 1584

Northern Idaho Agency
Lapwai, Idaho 83540

October 21, 1969

MEMORANDUM

To: Superintendent

From: Realty Officer

Subject: Trespass - DeAtley Corp. - Ivan Davis property at Kamiah

This pertains to the unauthorized crossing of NP allot. No. 1584 by the DeAtley Corporation during a six week period ending September 3rd. During this time DeAtley Corporation removed sand and gravel from the river bed in accordance with State of Idaho Mineral Lease No. 4251.

Mr. Ivan Davis, who holds an undivided 1/5 interest in the land being crossed to reach the river, made his complaint known to the Superintendent, Realty Officer, and members of the NPTEC. All appropriate action has been taken by the Agency up to the point of the present impasse between Ivan Davis and the DeAtley Corporation. A recent request for information by members of NPTEC prompted the sending of a photo copy of the complete case file to Chairman Moffett on October 16th.

A telephone call was received from Mr. Neil DeAtley yesterday. The main point pertaining to this case as made by Mr. DeAtley are as follows:

1. That Ivan Davis made an appointment to meet DeAtley in my office on a certain date but failed to show up, although DeAtley was here.
2. That DeAtley's offer was a total of $25.00 for the 6 week crossing permit; not the amount indicated by Mr. Davis. DeAtley indicated that he would be willing to increase this amount, but that Mr. Davis' demands were so far out of reason that he felt it hopeless to attempt to negotiate.
3. That his permit with the State was for five (5) years.
4. That he would like to clear this up in order to get an approved permit to cross NP 1584 for the life of his State Mineral Lease #4251.
5. That he would make another attempt to speak to Mr. Ivan Davis at Kamiah in the near future.

I warned Mr. DeAtley not to cross NP 1584 again without an approved crossing permit AND that the Nez Perce Tribe claimed title to the river bed. A copy of this memorandum is being forwarded to Rev. Moffett for attachment to his copy of the case file.

cc:Rev.Moffett

Realty Officer

December 16, 1975

U. S. Dept. of the Interior
Bureau of Indian Affairs
Northern Idaho Agency
Lapwai, ID 83540

RE: Lewiston Orchards Irrigation District
Environmental Impact

Gentlemen:

Transmitted herewith are a new map and a new description for this project. The location of the Clearwater River pipe line is shifted to the East because of problems with the pipe line location, all the rest of the project remains the same.

You were very kind to furnish data regarding environment impact previously so we would appreciate your comments regarding the change of the pipe line: Generally the first 3500 feet of the pipe line crosses more rigorous terrain and the remaining 23,500 feet crosses much more favorable terrain as it is higher on the small drainages and as a result does not cross any small rocky draws. The new location also crosses friendly land owners which was not true previously.

Please send return to me at the Boise office.

Very truly yours,

HOFFMANN, FISKE & WYATT

Charles C. Fiske

em

Enc.

PROJECT DESCRIPTION

The major features of the project consist of the pumps and intake on the left bank of the Clearwater River, and the underground aqueduct from the river to Mann Lake, a distance of 5 miles; the lining and piping of the existing Sweetwater Canal, a distance of approximately 9 miles with a 3000 foot siphon replacing 11,000 feet of the canal; construction of a 2,000,000 gallon reservoir at the existing filter plant; and a new supply line from Mann Lake to the water treatment plant.

No new agricultural lands will be added to the District area. There is some new urban development which is anticipated so the purpose of the project is to provide a better water system to the Lewiston Orchards.

a. Clearwater River Pumping

Total pump capacity will be 30 cubic feet per second with four pumps. The river pumping station will be located on the left bank of the Clearwater River near Spalding, Idaho and just south of the Clearwater River Bridge. The structure will be reinforced concrete with the pumps located well above flood level. The pumps will be vertical turbine pumps. The intake will be designed so that the velocity of the water entering the intake will be less than 0.5 feet per second. The intake screen will be either a moving screen or a Johnson Intake screen. The Johnson screen is a cylindrical screen with bars at 2.5 mm which is a minimum requirement for fish.

The pumps will be 1250 horsepower each with a total of 5000 horsepower for all pumps.

The aqueduct location from the river pumping station to the surge tank at the top of the mesa traverses some rigorous construction up the steep Clearwater River breaks. The construction is simila to locations along the Snake River in Owyhee and Elmore Counties except it is higher. The length of this section of the aqueduct is 3500 feet. The aqueduct will be located underground in this section as much as possible. The aqueduct crosses the Camas Prairie Railroad along the Clearwater River. The part of the aqueduct that willbe exposed will be painted with paint that will blend with the brown hills. This section of the aqueduct is quite visible from U. S. Highway 12, which is also U. S. Highway 95. This section of the aqueduct will probably be steel pipe, 30 inches inside diameter.

The surge tank at the end of the first section of pipe line and the beginning of the second section of pipeline will be a concrete and earth structure partly excavation and part embankment. It will be about 8 feet above the natural ground surface 3 to 1 side slopes.

The pipe line from the surge tank to Mann Lake is 23,500 feet long. It will cross rolling farm land with no problem in burying the pipe so that farming operations may be carried out over the top. Trenches will be backfilled so that the top soil is returned to the

top of the trench. Part of the pipe will have to be steel but much of the pipe could be reinforced plastic mortar pipe or asbestos cement pipe of 30" diameter. Corrugated metal pipe is not acceptable. The pipe line will connect with the outlet from Mann Lake between the lake and the filter plant.

A meter will be located near the end of the pipe and will transmit to a recorder at Lewiston Orchards Filter Plant. The controls for the system will be at the Lewiston Orchards District Filter Plant.

The Lewiston Orchards Irrigation District has an applicatic for a water right from the Clearwater River for 30 cubic feet per second. They will not use this amount for many years. Initially the pumping will probably be with just one or two of the four pumps.

The aqueduct does not cross any streams, ravines or rocky draws.

b. Sweetwater Canal

The Sweetwater Canal conveys the flow of Sweetwater Creek (which also includes all of the Lewiston Orchards Irrigation District supply from other sources) from a dam on Sweetwater Creek to Mann Lake. The first 9,366 feet of the canal consists of concrete flume which is in good repair and does not need replacement. The remaining 8.8 miles of the canal traverses a rough rocky hillside. The canal is quite crooked and rocky. It is subject to leaking in the rocky sections. The proposed construction is to line the existing channel with concrete a total distance of 34,600 feet and to construct a pipe siphon at one section to save 11,000 feet of canal. The pipe siphon will be 2,550 feet long and covered. The siphon will cross Webb Creek at a place where it is not visible from a very large area.

c. 2,000,000 Gallon Reservoir

A 2,000,000 gallon concrete or steel reservoir will be constructed at the filter plant to provide storage for the domestic water supply. The reservoir will not be elevated but will be a tank sitting on the ground, of either steel or reinforced concrete construction. The reservoir will be partly buried and partly above the ground projecting about 16 feet above the average ground. The reservoir will be 102 feet in diameter. The reservoir will be painted an earth color

d. New Supply Line From Mann Lake to Water Treatment Plant

This water main is a 14 inch diameter pipe, 6000 feet long which will be connected to outlet from Mann Lake and to proposed Clear water River pipe line. This will permit use of water from the Clear-water River without going through Mann Lake. This pipe line will provide another water supply line for the domestic water supply from Mann Lake to the water treatment plant. The construction will be on an existing easement and right-of-way so no new land will be required. T pipe line will be buried, covered and re-seeded where it crosses open land. The pipe line does not cross any streams.

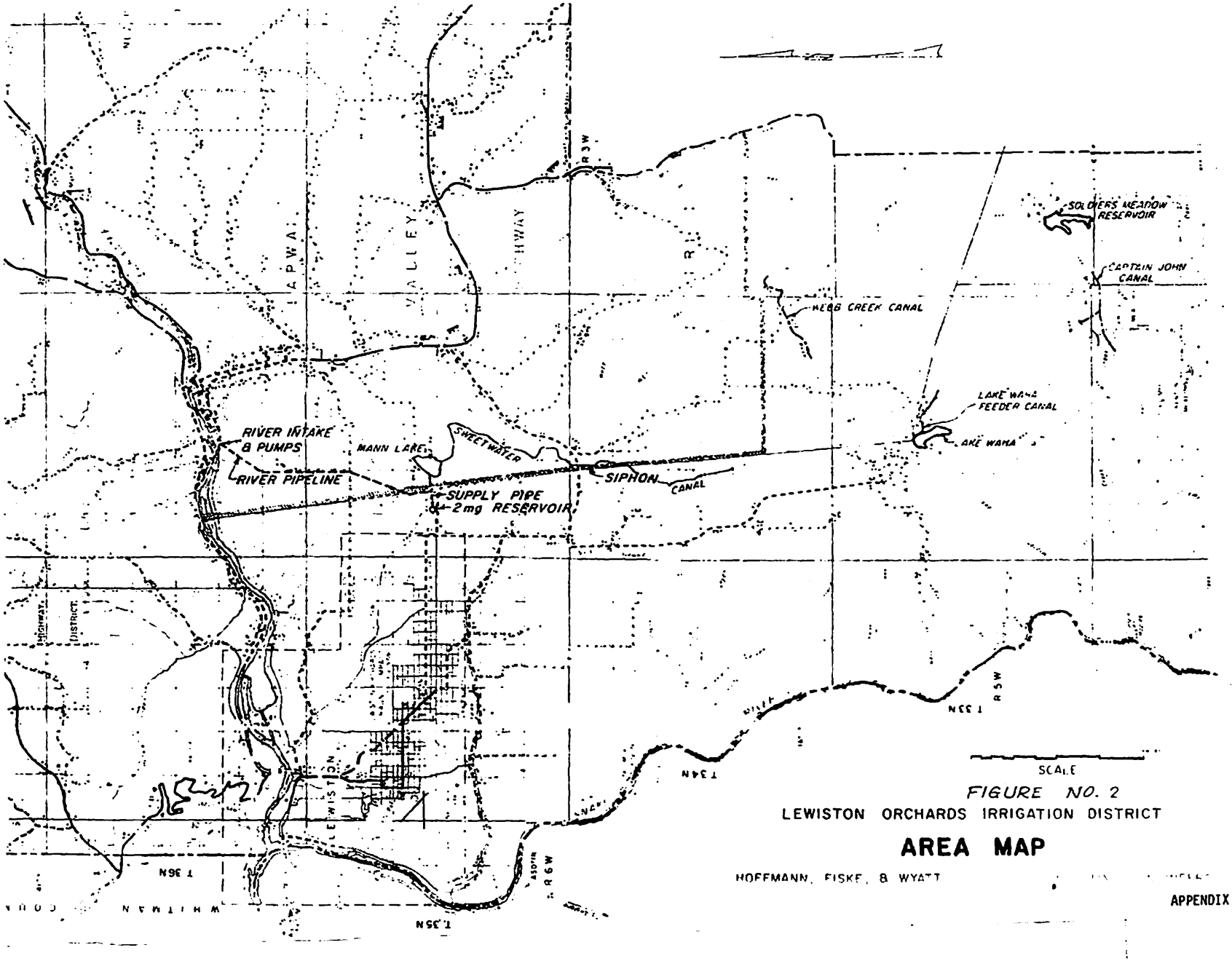


FIGURE NO. 2

LEWISTON ORCHARDS IRRIGATION DISTRICT

AREA MAP

HOFFMANN, FISKE, & WYATT

Consulting Engineers

JOHN L. HOFFMANN
CHARLES C. FISKE
D. RICHARD WYATT

2368 KOOTENAI STREET
TELEPHONE (208) 344-8535
BOISE, IDAHO 83705

101 MAIN ROAD
TELEPHONE (208) 743-2582
LEWISTON, IDAHO 83501

July 29, 1976

U. S. Department of Interior
Bureau of Indian Affairs
Northern Idaho Agency

RE: Lewiston Orchards Irrigation District - Environmental Impact

Gentlemen:

Transmitted herewith is a copy of our letter to you of December 16, 1975. This project is ready to go to the U. S. Bureau of Reclamation for funding so would appreciate a reply.

Very truly yours,

HOFFMANN, FISKE & WYATT

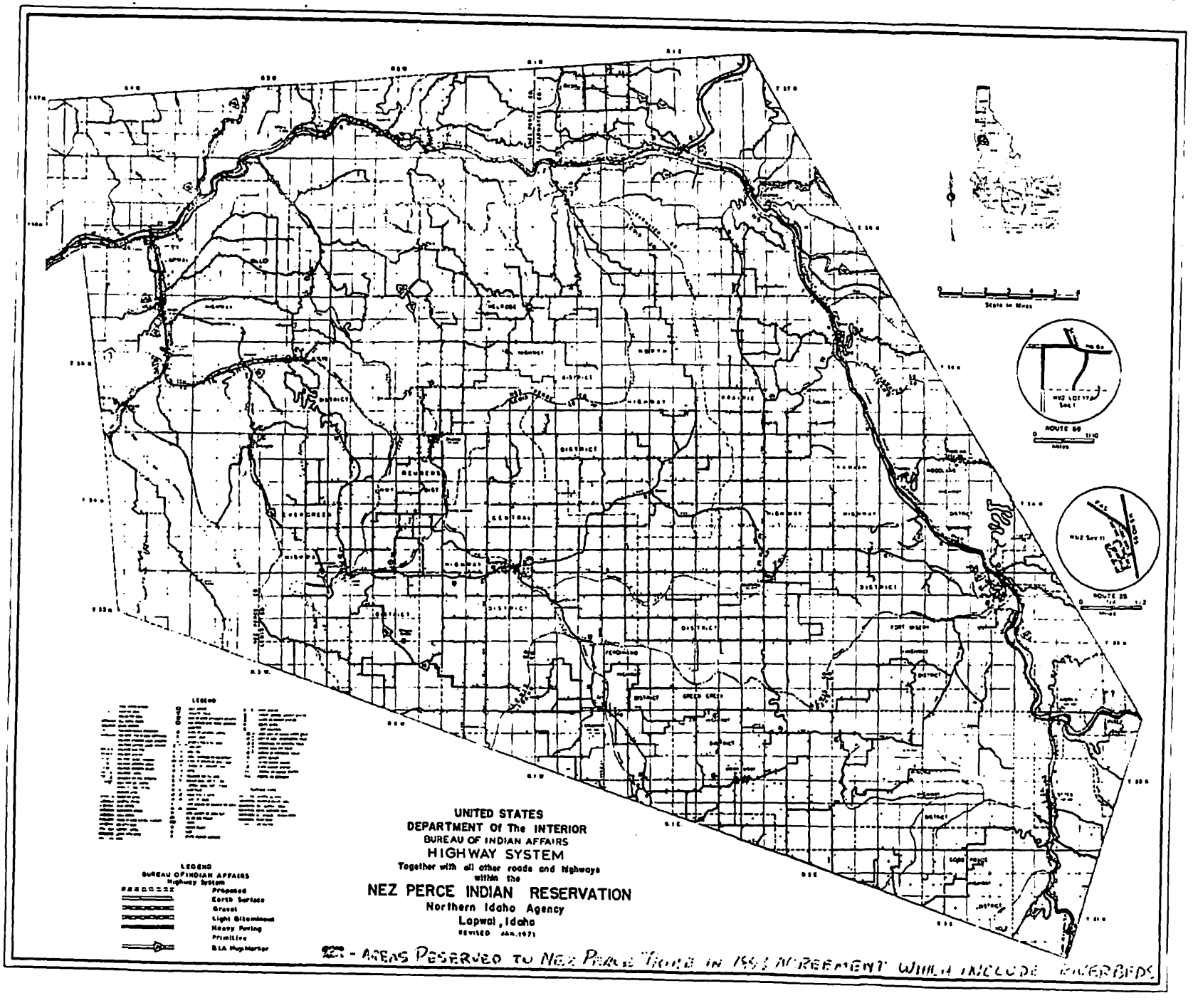
Charles C. Fiske

Charles C. Fiske

em

Enc.

APPENDIX IV


UNITED STATES
DEPARTMENT Of The INTERIOR
BUREAU OF INDIAN AFFAIRS
HIGHWAY SYSTEM
Together with all other roads and Highways
within the
NEZ PERCE INDIAN RESERVATION
Northern Idaho Agency
Lapwai, Idaho
REVISED JAN. 1971
LEGEND
BUREAU OF INDIAN AFFAIRS
Highway System
Proposed
Earth Surface
Gravel
Light Bituminous
Heavy Paving
Primitive
BIA Maintainer
- AREAS RESERVED TO NEZ PERCE TRIBE IN 1863 AGREEMENT WHICH INCLUDE RIVERBEDS

UNITED STATES
DOCKET NO. 175
PETITIONER'S EXH. NO. 75
RECEIVED TR.

A true copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, held jointly by

Isaac I. Stevens, Gov. Supt. W. T.

and

Joel Palmer, Supt. Ind. Affairs, O.T.

on the part of the United States

with the

Tribes of Indians named in the Treaties made at that Council

June 9th and 11th, 1855.

Excerpts from the Record of the Official Proceedings at the Council in the Walla Walla Valley held jointly by Isaac I. Stevens, Governor and Superintendent, Washington Territory, and Joe Palmer, Superintendent, Indian Affairs, Oregon Territory, on the part of the United States, with the tribes of Indians named in the treaties made at that council on June 9 and 11, 1855. 1/

Governor Stevens said, "... the Great Father has been for many years caring for his red children across the mountains; there (point east) many treaties have been made. Many councils have been held; and there it had been found that with farms and with schools and with shops and with laws the red man could be protected.

"Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? No! They came from the Great Father; did I and mine make trouble? No! But the trouble had been made generally by bad white man and the Great Father knows it, hence laws.

"The Great Father therefore desires to make arrangements so you can be protected from these bad white man, and so they can be punished for their misdeeds; and the Great Father expects you will treat his white children as he will make a law they shall treat you. We are now in council to see if we can arrange the terms which will carry this into effect." 2/

1/ These excerpts are taken from the book Noon-Nee-Me-Poo by Allen P. Slickpoo, Sr., and Deward E. Walker, Jr., p. 83 et seq., which quotes from the handwritten document on file at the Nez Perce Tribal Headquarters. A full transcript of the official proceedings can also be found in Indian Claims Commission, Nez Perce Tribe v. United States, Dkt. No. 175, Petitioner's Exhibit No. 75.

2/ Slickpoo and Walker, supra, at 90-91; Indian Cl. Comm., supra, at 10.

General Palmer said [after speaking of the early history of relations between Indians and white men]: "... They finally made war, a council was held, speeches and harangues were made and they declared war, a few white men were killed and many Indians were killed; there were more Indians killed than white men because we had better arms and know-how to make them. This war continued some time but finally they had peace; the whites brought with them and made after they arrived here whiskey; this the Indians were very fond of and like all other persons after drinking it were foolish; they quarreled among themselves and killed each other and some whites in their drunken frolics; our chief saw this condition and desired to do them good; he saw that the Indians and the white man could not live peaceable together: he called the Indians together in council; he proposed as we propose in this council, to purchase their country and select a place for them to live; he proposed to have a district of country set aside for the Indians to live in that no white man should live there; but the Indians said no: why should we leave the bones of our fathers and go to strange land: we have plenty of elk, deer, bear, berries and roots; we like you let us live together, we don't want to cultivate the soil you are welcome to occupy it; we are told that the wild game, the roots and the berries would not last always; they said they were great and numerous people, they knew what was best for them and not want our council; they quit talking, the whites went to their houses and Indians to their lodges; our people continued coming; every year vessels came until our people got as numerous as the leaves on the trees."

[Speaks for awhile about how white man killed off these Indians.]

"...These Indians then began to see that they had acted very foolish, and that when they supposed they knew enough for them and did not want any of our council, they knew nothing, they were as blind men; they have since been learning and continued to learn and prosper, and are now a great and happy and good people; there were a few tribes who refused to go into that council who refused to treat. What was the condition of that people? Those who thought themselves very wise and refused to take the advice of the white people those who continued to make war upon our people? Their game was all killed, they had nothing to eat. They fled to the mountains then they continued to live but a few years of miserable existence, until they were finally overtaken by more powerful tribes and all killed. There were other tribes in other districts of country who heeded the advice of the chief and were set aside in districts of country belonging to themselves.

"In all cases where they have entered into a treaty and agreed to reside upon tracts set apart for them our chief has aided them. All who have settled upon these tracts have not done well, for they are lazy and have foolishly thrown away what has been done for them.

"But you as a people know how to appreciate these advantages do not throw them away; all experience we have had with Indians these 360 years shows us that the white man and the red man cannot live happily together; although we may live near together there should be a line of distinction drawn so that the Indian may know where his land is and the white man where his land is; you are all able to judge for yourselves by

the constant difficulties that are occurring here among you, between the whites and the Indians." 3/

Pee-O-Mox-A-Mox said, "I do not know what they (the interpreters) have said. My heart was heavy, my heart has to separate so, that was my heart. I do not know for what lands they (the interpreters) have spoken. If they had mentioned the lands that had spoken of them, I should have understood them. Let it be as you proposed so the Indians have a place to live, a line as though it was fenced in, where no white man can go.

"If you say it shall be so, then all of these Indians will say yes. Although that you have said the whites are like the wind: you cannot stop them, you make good what you have promised." 4/

General Palmer said, "We buy your country and pay you for it and give the most of it back to you again." 5/

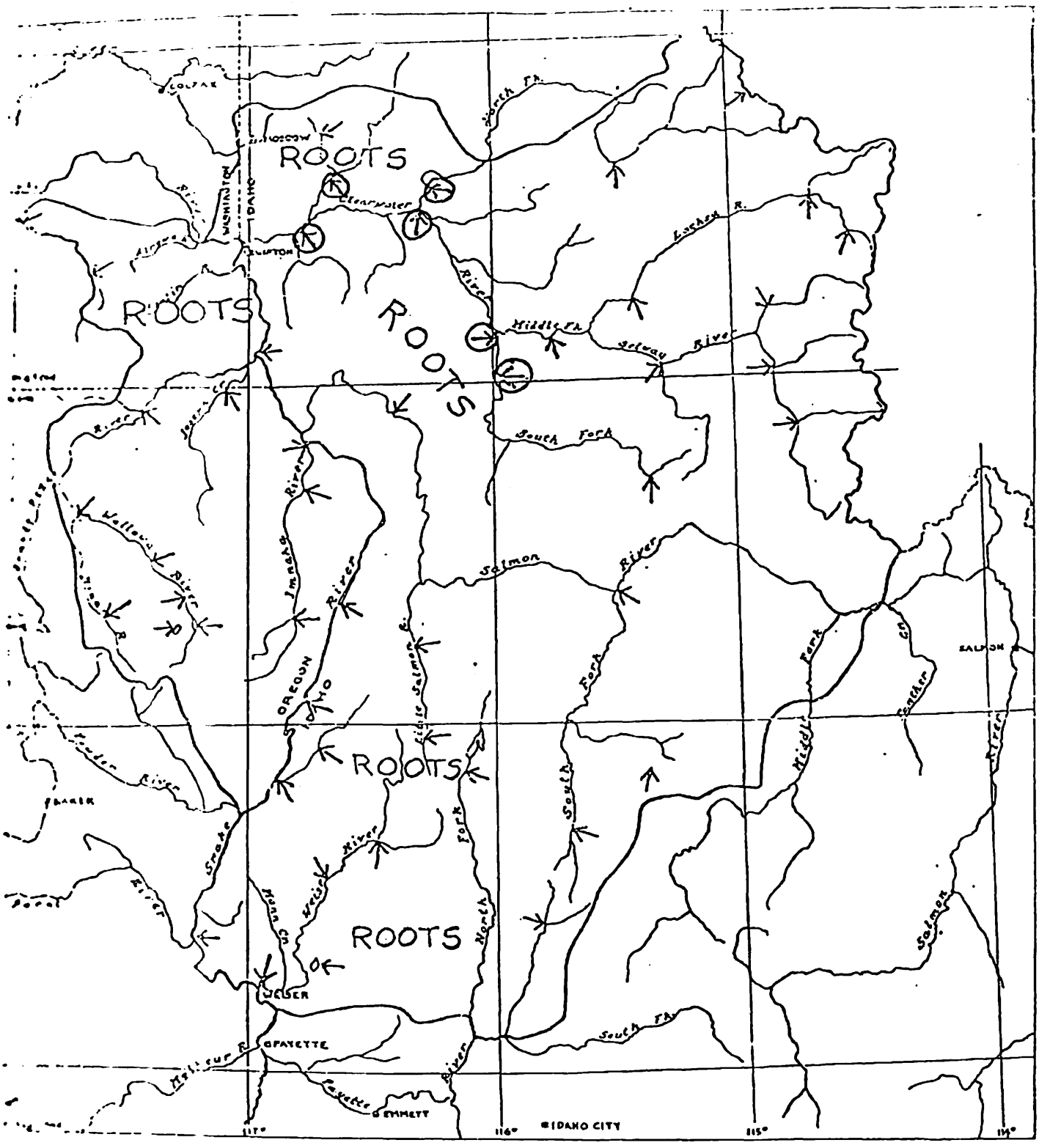
Looking Glass said, "He has said to me that the whites shall not go over that line; none should go into that country and this you said and it is said. And you will show to the President what we have said." 6/

3/ Slickpoo and Walker, supra, at 99-101; Indian Cl. Comm., supra, at 16-17.

4/ Ibid. at 107 and 23, respectively.

5/ Ibid. at 134 and 46, respectively.

6/ Ibid.



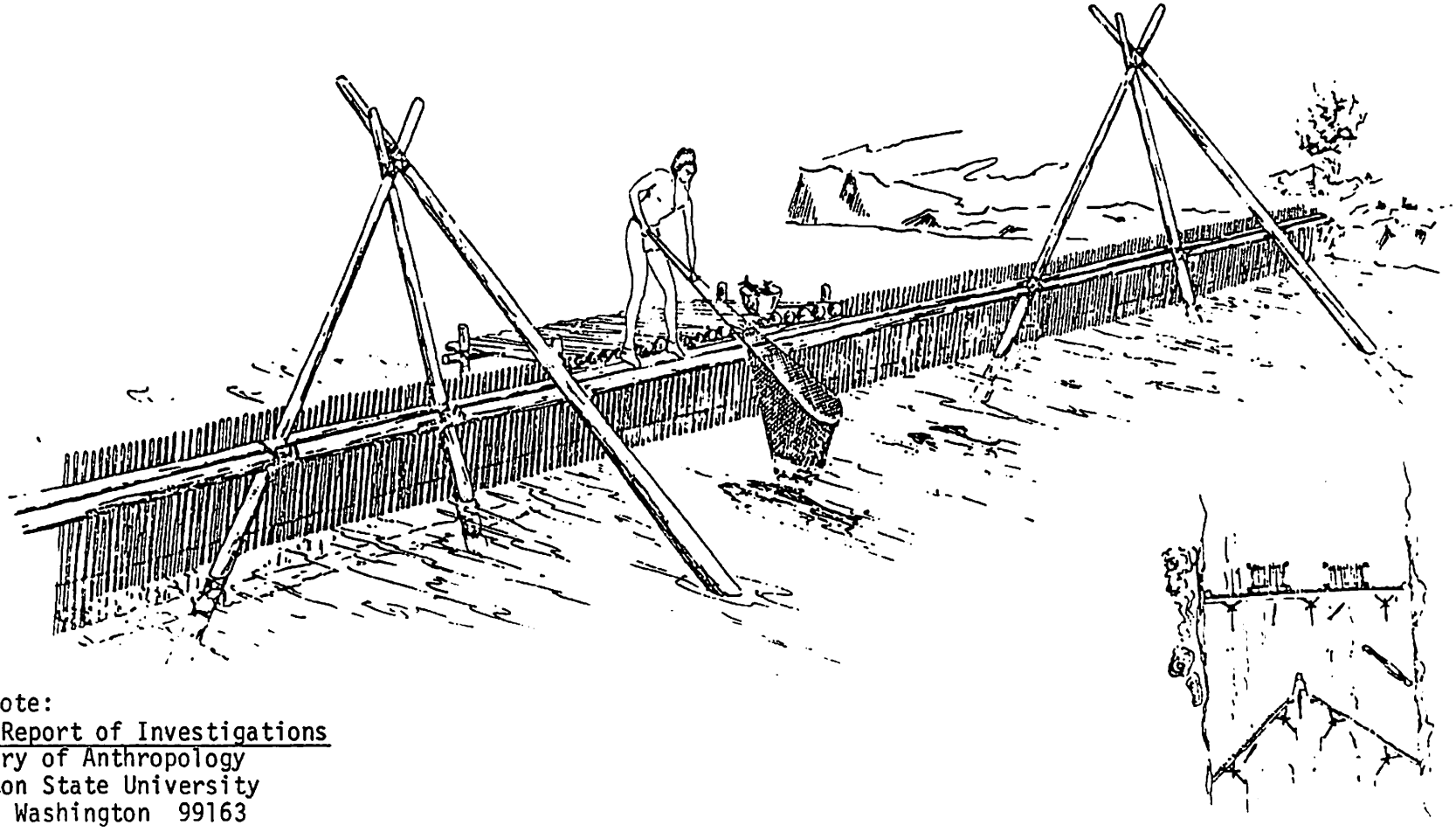
Principal Aboriginal Fishing Sites and Root-digging Grounds of Nez Perce Indians, by Verne F. Ray.

Arrows indicate principal fishing sites. The word "roots" designates the centers of major root-digging areas.

(A)- SITES WITHIN BOUNDARIES OF TREATY OF 1863

APPENDIX VI

Indian Claims Commission, Nez Perce Tribe v. United States, Dkt. No. 175, Petitioner's Exh. 2-L



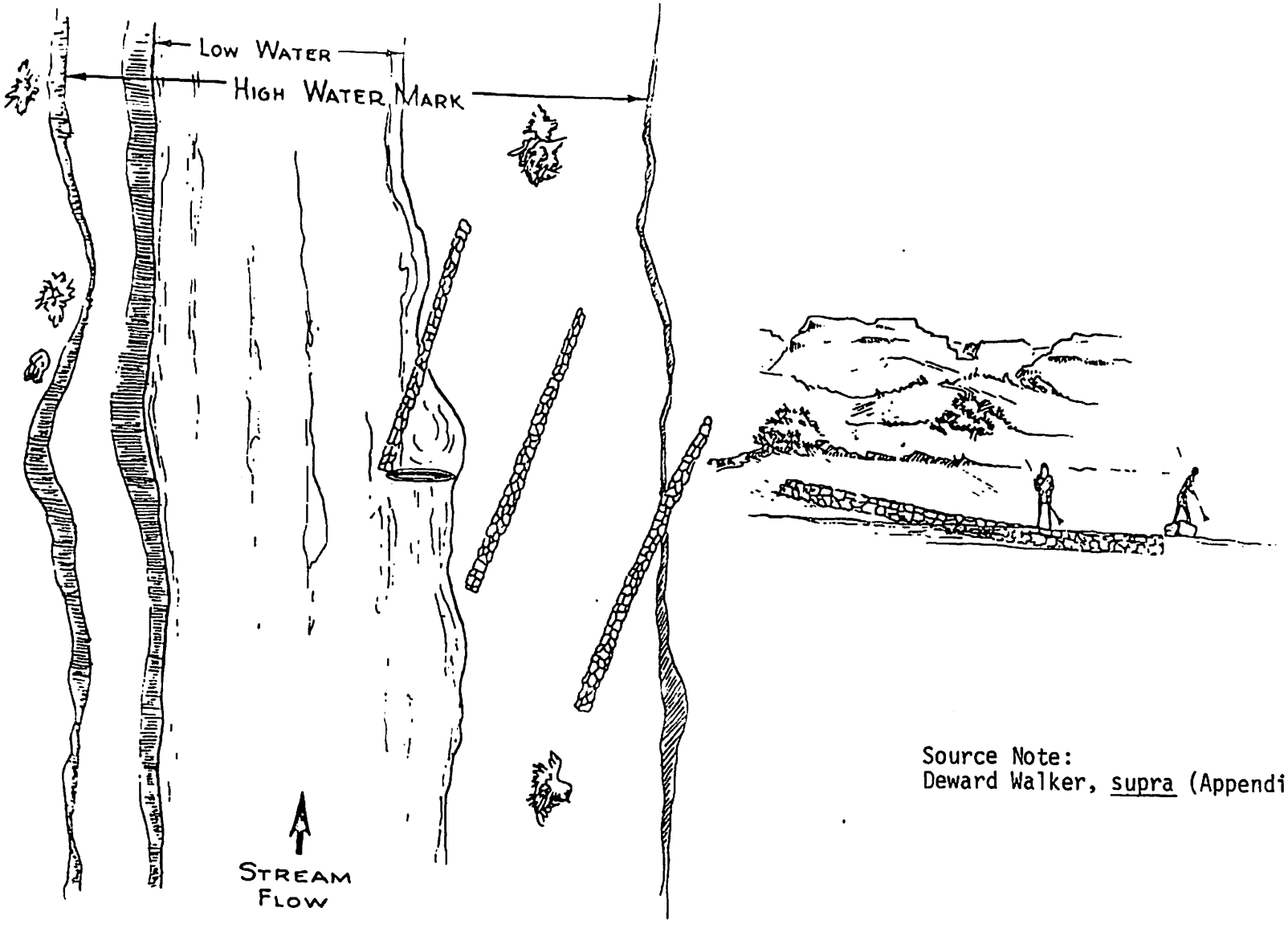
Source Note:
Editor, Report of Investigations
Laboratory of Anthropology
Washington State University
Pullman, Washington 99163

Mutual Cross-Utilization of Economic Resources in the Plateau: An Example from Aboriginal Nez Perce Fishing Practices
By: Deward E. Walker, Jr.

Washington State University
Laboratory of Anthropology
Report of Investigations No. 41

Fig. 4. Nez Perce Double Weir

ADDENDUM VII



Source Note:
Deward Walker, supra (Appendix VII)

Fig. 7. Nez Perce Fish Walls

INDIAN DEED INHERITED L[illegible]DS.

182 [illegible]

THIS INDENTURE, Made and entered into the Third day of January [illegible] Martha Yellow Bear and [illegible]teen, by and between

[illegible], Idaho

Yellow Bear

[illegible] Nez Perce Indian party of the first part, and J. [illegible] George [illegible] Pottlatch Lumber Company

of Kooskia, Idaho party of the second part

WITNESSETH, That said party of the first part, for and in consideration of the sum of Eight hundred fifty and no/100 --- ($850 00) dollars,

in hand paid, the receipt of which is hereby acknowledged, do[illegible] hereby grant, bargain, sell and convey unto said part[illegible] of the second part the following described real estate and premises situated in Idaho County, State of Idaho, to wit:

-- Beginning at a point 1084 feet west of Sec. corner of Sections [illegible] of [illegible] East B. M. Idaho thence South 3° 30' West 396 ft; thence S 28° 00' W. [illegible] ft; thence S 1° 30' W. [illegible] ft; thence N 89° 57' W. 165 ft; thence [illegible] along the edge of the river on East line of land now owned by party of the second part 1320 ft. to a point 325 ft. W. of the place of beginning; thence S. 89° 57' E 328 ft. to the place of beginning [illegible] [illegible] beginning at a point [illegible] ft W. of Sec. Corner of Sec. [illegible] Tp 32 N. R [illegible] E B M Idaho; thence [illegible] ft; thence S 23° 00' W. [illegible] ft, thence [illegible] 225 ft thence S. 89° 57' E. 130 ft to place of beginning [illegible] acres [illegible] [illegible] Idaho that [illegible] [illegible] granted a right of way [illegible] canals constructed by authority of the United States

together with all the improvements thereon and the appurtenances thereunto belonging. And the said party of the first part for herself and her heirs, executors and administrators does hereby covenant, promise and agree to and with the said parties of the second part their heirs and assigns, that She will forever warrant and defend the said premises against the claim of all persons claiming or to claim by, through or under her only.

To have and to hold said described premises unto the said parties of the second part their heirs, executors, administrators, and assigns, forever.

IN WITNESS WHEREOF, The said party of the first part has hereunto set her hand and seal the day and year first above written.

Martha Yellow Bear [illegible] mark

Witnesses

F. E. Quist

James Stuart

[SEAL]

[SEAL]

[SEAL]

[SEAL]

[SEAL]

[SEAL]

[SEAL]

STATE OF Idaho
COUNTY OF Idaho } ss:

BE IT REMEMBERED, That on this Third day of January, A. D. 191[illegible], before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Martha Yellow Bear, a widow

to me personally known to be the identical person who executed the within instrument of writing and such person duly acknowledged the execution of the same to be [illegible] free and voluntary act and deed for the uses and purposes therein set forth.

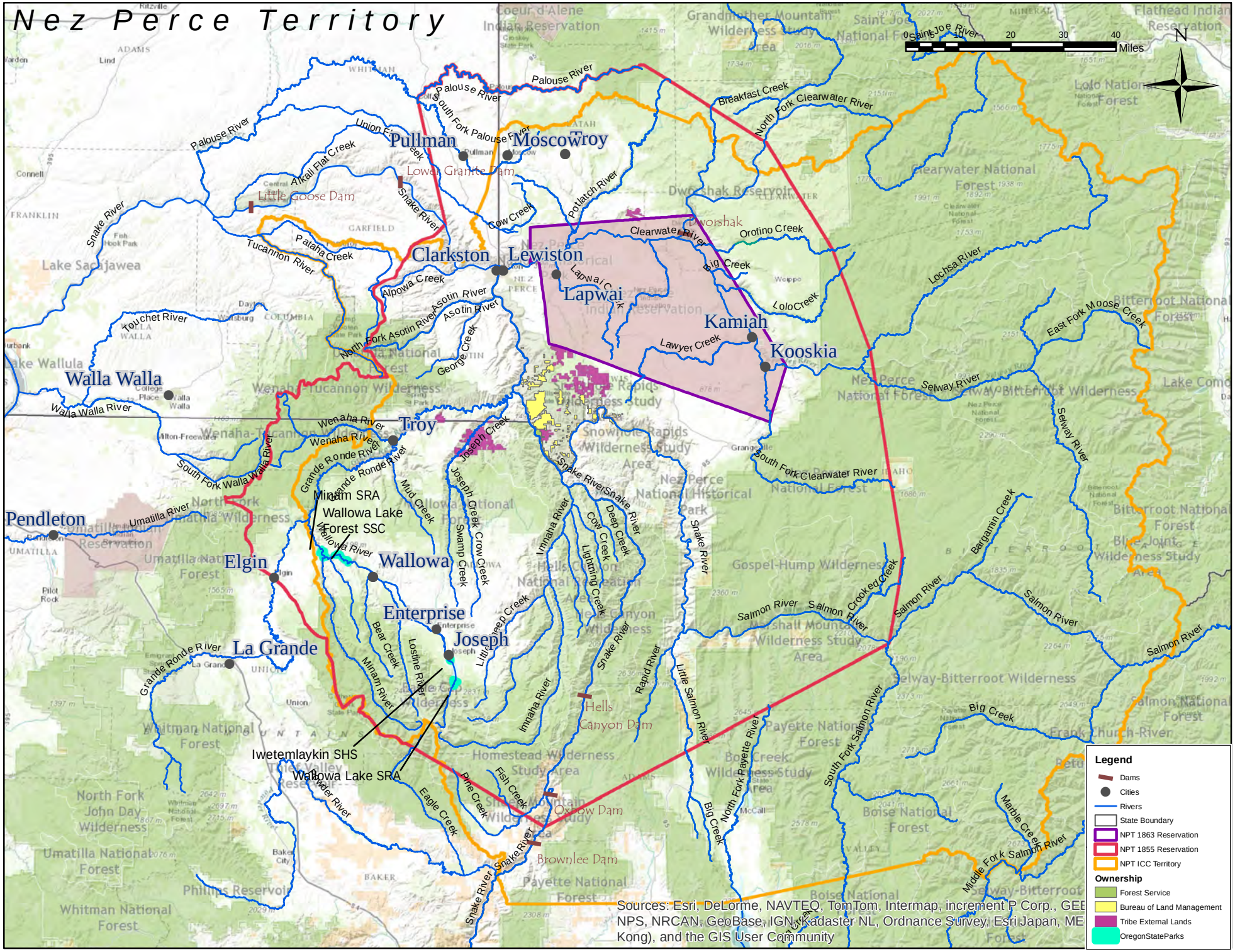
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

F. E. Quist
Notary Public
[illegible]

My commission expires Jan. 12, 1918

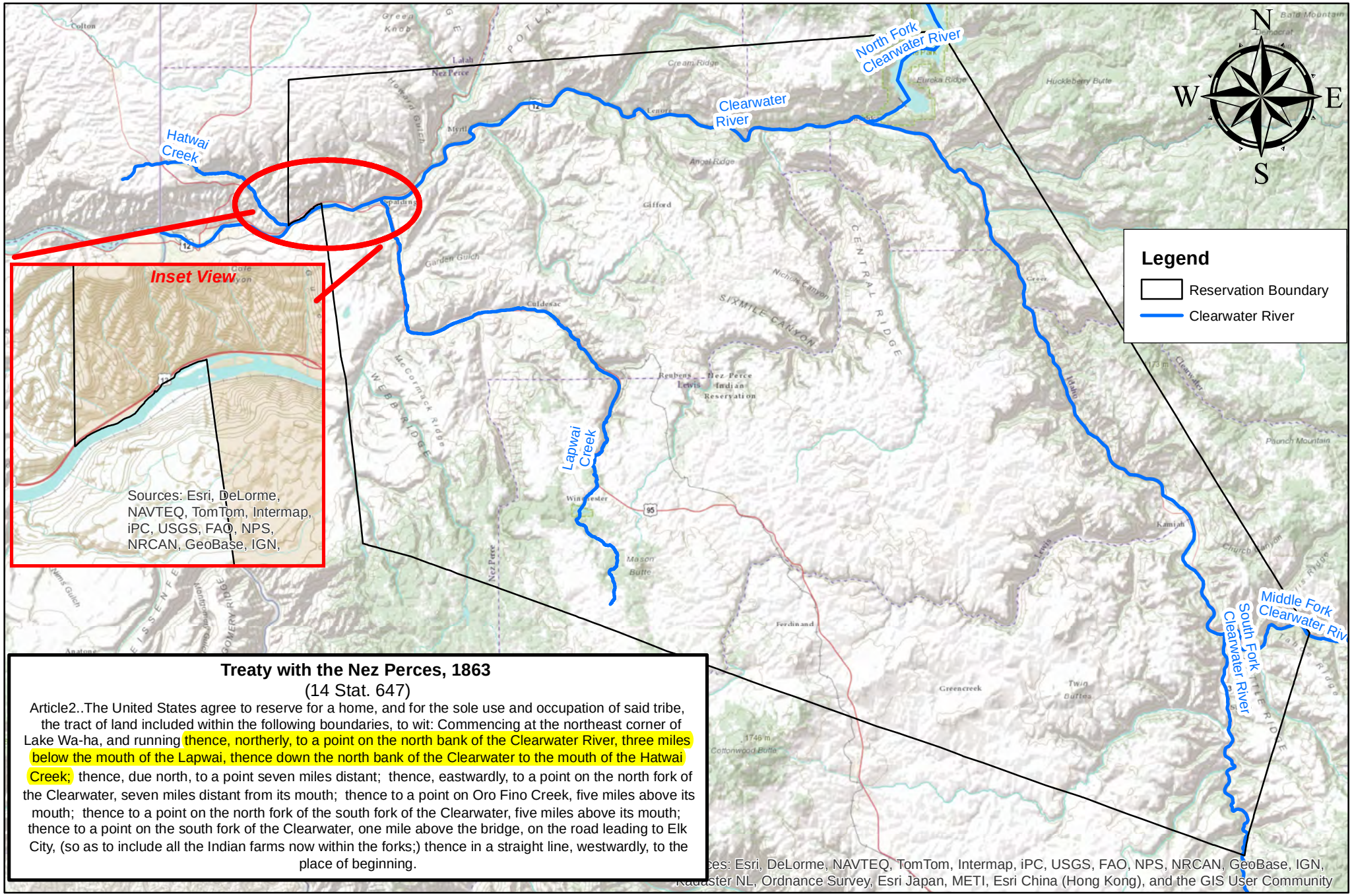
APPENDIX I
Page 2 of

Attachment 2


Nez Perce Territory
0 5 10 20 30 40 Miles
N
Pullman
Moscow
Lewiston
Clarkston
Lapwai
Kamiah
Kooskia
Troy
Walla Walla
Pendleton
Elgin
Wallowa
Enterprise
Joseph
La Grande
Minam SRA
Wallowa Lake Forest SSC
Iwetemlaykin SHS
Wallowa Lake SRA
Lower Granite Dam
Little Goose Dam
Hells Canyon Dam
Oxbow Dam
Brownlee Dam
Dworshak Reservoir
Palouse River
South Fork Palouse River
Union Flat Creek
Alkali Flat Creek
Snake River
Tucannon River
Pataha Creek
Alpowa Creek
Asotin River
North Fork Asotin River
George Creek
Touchet River
Walla Walla River
Wenaha River
Grande Ronde River
South Fork Walla Walla River
Umatilla River
Mud Creek
Joseph Creek
Swamp Creek
Crow Creek
Lostine River
Bear Creek
Minam River
Wallowa River
Eagle Creek
Pine Creek
Fish Creek
Imnaha River
Lightning Creek
Cow Creek
Deep Creek
Little Sheep Creek
Rapid River
Little Salmon River
North Fork Payette River
South Fork Salmon River
Big Creek
Breakfast Creek
North Fork Clearwater River
Potlatch River
Cow Creek
Clearwater River
Orofino Creek
Big Creek
Lapwai Creek
Lawyer Creek
LoloCreek
Lochsa River
East Fork Moose Creek
Selway River
South Fork Clearwater River
Bargamin Creek
Crooked Creek
Salmon River
Marble Creek
Middle Fork Salmon River
Saint Joe River
Flathead Indian Reservation
Coeur d'Alene Indian Reservation
Nez Perce National Historical Park
Hells Canyon National Recreation Area
Snowhole Rapids Wilderness Study Area
Gospel-Hump Wilderness
Selway-Bitterroot Wilderness
Frank Church-River
Legend
Dams
Cities
Rivers
State Boundary
NPT 1863 Reservation
NPT 1855 Reservation
NPT ICC Territory
Ownership
Forest Service
Bureau of Land Management
Tribe External Lands
OregonStateParks
Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEE
NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, ME
Kong), and the GIS User Community

Attachment 3

1863 Nez Perce Reservation



Treaty with the Nez Perces, 1863

(14 Stat. 647)

Article2..The United States agree to reserve for a home, and for the sole use and occupation of said tribe, the tract of land included within the following boundaries, to wit: Commencing at the northeast corner of Lake Wa-ha, and running thence, northerly, to a point on the north bank of the Clearwater River, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of the Hatwai Creek; thence, due north, to a point seven miles distant; thence, eastwardly, to a point on the north fork of the Clearwater, seven miles distant from its mouth; thence to a point on Oro Fino Creek, five miles above its mouth; thence to a point on the north fork of the south fork of the Clearwater, five miles above its mouth; thence to a point on the south fork of the Clearwater, one mile above the bridge, on the road leading to Elk City, (so as to include all the Indian farms now within the forks;) thence in a straight line, westwardly, to the place of beginning.

Attachment 4

C4.

303
135

The United States of America,

To all to whom these Presents shall come, GREETING:

Whereas, *There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated* March 18 1895 *from the Commissioner of Indian Affairs, approved by the Secretary of the Interior* March 19 1895 *whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 Stats., 388,) as amended by the Act ~~of Congress of~~ approved* February 28 1891 (26 Stats 794) Yo. yes-tah-likt or George *an Indian ~~of the~~ residing on the Nez Perce ~~Tribe or band,~~ Reservation has been allotted the following-described land, viz:*

The West half and the West half of the East half of the Lot numbered two and the Lots numbered three and four of Section five and the Lot numbered two of Section twenty one, also Beginning at a point 50 chs due South and 5 chs East of the North West corner of Section twenty one in Township thirty six North of Range four West of Boise Meridian; thence due East 5 chs; thence due South 2.50 chs; thence due West 5 chs; thence due North 2.50 chs to the place of beginning Containing 125 acres, being a part of Lot Four of Section twenty one in Township thirty six North of Range four West of Boise Meridian in Idaho, Containing in the aggregate one hundred and eighteen acres and sixty two Hundredths of an acre

Now, Know Ye, *That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887,* HEREBY DECLARES *that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said* Yo yes-tah-likt or George *or, in case of* his *decease, for the sole use of* his *heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or* his *heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.*

In Testimony Whereof, *I,* Grover Cleveland *, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.*

Given under my hand, at the City of Washington, this thirteenth *day of* June *, in the year of our Lord one thousand eight hundred and* ninety five *, and of the Independence of the United States the one hundred and* Nineteenth.

L.S.

By the President: Grover Cleveland

By J. M. Sloan *, Secretary.*

L. C. Lamar

Recorder of the General Land Office.

8—417

64.

337

167

The United States of America,

To all to whom these Presents shall come, GREETING:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated March 8 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior March 19 1895 whereby it appears that, under the provisions of the Act of Congress, approved February 8, 1887, (24 Stats., 388,) as amended by the Act of ~~Congress of~~ approved February 28, 1891, (26 Stats. 794) Etsan ya ya ye yah Pitz or Coyote, an Indian ~~of the~~ residing on the Nez Perce ~~Indian~~ Reservation ~~tribe or band~~, has been allotted the following-described land, viz:

The North West quarter of the South West quarter of Section ten; also - Beginning at the center of Sec 21, T 36 North of Range 4 West B M, thence due W 8 chs; thence due S 10 chs; thence due E 5 chs; thence due S to the right bank of the Clear-Water River; thence Easterly along the meanders of said river to a point due S of the point of beginning thence due North to the place of beginning Containing fifty seven acres and fifty four hundredths of an acre, and being lot three and lot four of Section numbered one in Township thirty six North of Range four West of Boise Meridian in Idaho, containing fifty seven acres and fifty four hundredths of an acre

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, HEREBY DECLARES that it does and will hold the land thus allotted, (subject to all the restrictions and conditions contained in said fifth section,) for the period of twenty-five years, in trust for the sole use and benefit of the said Etsan ya ya ye yah Pitz or Coyte, or, in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: **Provided,** That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this fourteenth day of June, in the year of our Lord one thousand eight hundred and ninety five, and of the Independence of the United States the one hundred and nineteenth

L. S.

By the President: Grover Cleveland

By W. McKean, Secretary.

L. C. Lamar

Recorder of the General Land Office.

8-417

370

205

Ex.

The United States of America,

To all to whom these Presents shall come, GREETING:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated March 18. 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior March 19. 1895, whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 Stats., 388,) as amended by the Act ~~of Congress of~~ approved February 28. 1891 (26 Stats 794), Kar ye Wats, or Daniel Nesbit, an Indian ~~of the~~ residing on the Nez Perce ~~tribe or bands~~ Indian Reservation, has been allotted the following-described land, viz:

The East half of the South East quarter of the South East quarter of Section twenty eight, the West half of the Lot numbered eight of Section twenty seven and the Lots numbered six and eleven of Section thirty three Also Beginning at a point 5 chains East of the South West corner of Sec 22 T36 N. R 4W B.M. thence due W 15 chains, thence due N to the left bank of the Clear Water river, thence Northeasterly along the meanders of said river to a point due North of the point of beginning, thence due South to the place of beginning containing thirty two acres and twenty five hundredths of an acre more or less, being parts of Lots eight and twenty in Section twenty two and part of Lot seven in Section twenty one in Township thirty six North of Range four West of Boise Meridian in Idaho - containing in the aggregate one hundred and two acres and twenty five hundredths of an acre

Partitioned under the Act of May 10, 1916. See Sec. Letter 91/802-310 BLIST 643

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, HEREBY DECLARES that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Kar ye Wats or Daniel Nesbit or, in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: **Provided,** That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety five, and of the Independence of the United States the one hundred and nineteenth

L.S.

By the President: Grover Cleveland

By W. M. Kean, Secretary.

L. Q. C. Lamar

Recorder of the General Land Office.

8—617

209

Pat. Issued 27806-09
55626

The United States of America,

To all to whom these Presents shall come, GREETING:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated March 18 1895 from the Commissioner of Indian Affairs, approved by the Secretary of the Interior March 19 1895 whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 Stats., 388,) as amended by the Act ~~of Congress of~~ approved February 28 1891 (26 Stats 794) Captain Kane, an Indian ~~of the~~ residing on the Nez Perce Indian Reservation ~~tribe or band~~, has been allotted the following-described land, viz: The Lot numbered six of Section twenty one and the North West quarter of the North East quarter of the North East quarter; the North half of the North West quarter of the North East quarter and the South West quarter of the North West quarter of Section twenty eight. Also Beginning at a Point 10 chs West of the SE corner of Sec 21 T 36 N R 4 W B.M. thence due West 10 chs thence due North to the left bank of the Clearwater river, thence Northeasterly along the meanders of said river to a point due N of the point of beginning thence due South to the place of beginning containing fourteen acres and fifty hundredths of an acre more or less and being a part of Lot seven of Section twenty one in Township thirty six North of Range four West of Boisé Meridian in Idaho containing in the aggregate ninety eight acres and fifty hundredths of an acre. SW NW 28-36 N-4 W

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, **HEREBY DECLARES** that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Captain Kane or, in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: **Provided,** That the President of the United States may, in his discretion, extend the said period.

Fee Patent Issued for all except SW NW Sec 28 - 58.50 a.
Patent 1021150 CAW 1/25/29
Letter 1316530

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this thirteenth day of June, in the year of our Lord one thousand eight hundred and Ninety five, and of the Independence of the United States the one hundred and nineteenth.

[L.S.]

By the President: Grover Cleveland

By M. McKean, Secretary.

L. Q. C. Lamar
Recorder of the General Land Office.

6-117

Form 1860–8
(July 1975)

I-16451

The United States of America,

To all to whom these presents shall come, Greeting:

Nez Perce
Allotment No. 135

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that, in accordance with 25 Code of Federal Regulations 121.6, a fee simple patent issue to Pauline Ann Marker Redheart, for a undivided 1/6 interest, in the following described lands:

Boise Meridian, Idaho

T. 36 N., R. 4 W.,
Sec. 21, lot 2.

The area described contains 34.35 acres, according to the official plat of survey of the land, on file in the Bureau of Land Management:

NOW KNOW YE, that the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Pauline Ann Marker Redheart and to her heirs, the said undivided 1/6 interest in the above described lands; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Pauline Ann Marker Redheart, and to her heirs and assigns forever.

SUBJECT TO:

1. Right-of-way easements in favor of the Nez Perce County Commissions for an access outlet on Coyote Grade Road.

2. Those rights for highway purposes as have been granted to the State Highway Department, its successors or assigns by right-of-way I-620, under the Act of March 3, 1901 (31 Stat. 1058, 1084).

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Boise, Idaho
the EIGHTEENTH day of JUNE in the year
of our Lord one thousand nine hundred and EIGHTY
and of the Independence of the United States the two hundred
and FOURTH.

[SEAL]

By S/Rex D. Colton
Acting State Director

Patent Number 11-80-0052

GPO 858 - 816

Homestead Certificate No. 4566 4-773 A. Application 7732

THE UNITED STATES OF AMERICA

To all to whom these Presents shall come, GREETING:

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Lewiston Idaho, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Adelbert W. Fleming has been established and duly consummated, in conformity to law, for the Lot numbered five of Section twenty-one the Lots numbered seven, and eight of Section twenty the North West quarter of the North West quarter of Section twenty-eight and the North East quarter of the North East quarter of Section twenty-Nine in Township thirty-six North of Range four West of Boise Meridian in Idaho containing one hundred and forty-four acres and seventy hundredths of an acres.

according to the official plat of the survey of said land, returned to the General Land Office by the Surveyor General.

Now Know ye that there is, therefore, granted by the United States unto the said Adelbert W. Fleming the tract of land above described: To have and to hold the said tract of land, with the appurtenances thereof, unto the said Adelbert W. Fleming and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law, and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

SEAL

Given under my hand at the city of Washington, the thirtieth day of December, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth

By the President:

T. Roosevelt

By J. M. McLean, *Secretary.*

C. H. Bush, *Recorder of the General Land Office.*

6-30

Township Nº 36 North Range Nº 4 West of the Boise Meridian

Total number of Acres 13766.72

Surveys Designated	By Whom Surveyed	Date of Contract	Amount of Surveys M.	Chs.	Lks.	When Surveyed	Mean Declination
Township lines Resurvey	E. D. Briggs		5.	79	78	Nov. 17th - 29th 1890	
Subdivisions	" " "		40.	49	83	" " " "	20° 30' E
~~Meanders~~	" " "		10.	24	82	" " " "	

Meanders of								
Posts	Courses	Chs. Lks.	Posts	Courses	Chs. Lks.	Posts	Courses	Chs. Lks.

The above Map of Township Nº 36 North of Range Nº 4 West of the Boise Meridian, Idaho, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

Surveyor General's Office,
Boise City, Idaho
Dec. 31st 1891.

Willis H. Pettit
Sur. Gen. for Idaho

REVOCABLE PERMIT

PERMIT NO.: 3720

Permission is hereby granted to the STATE OF IDAHO THROUGH ITS DEPARTMENT OF FISH AND GAME of 600 South Walnut Street, Post Office Box 25, Boise, Idaho 83707, hereinafter called the Permittee, to enter, construct, inspect, maintain and repair a boat ramp, together with the right of ingress and agress when necessary for the above-mentioned purposes over and across the following described land located within the Nez Perce Indian Reservation, County of Nez Perce, State of Idaho.

A tract of land in the bed of the Clearwater River, situated in Lenore Site, portions of Lots 2 and 3, Section 35, Township 37 North, Range 2 West, Boise Meridian, lying South of the main tract of the Camas Prairie Railroad, beginning at the East abutment of the concrete bridge and extending eastward 850 feet.

This permit will begin on date of approval by the Superintendent or Acting Superintendent of the Northern Idaho Agency. The permittee will deposit with the Superintendent of the Northern Idaho Agency the one-time payment of FIFTY AND NO/100 DOLLARS ($50.00) as the consideration for this permit.

It is understood that this permit will be automatically revoked when the boat ramp for which this permit is issued is no longer in use or if the area occupied by the boat ramp is used for any other purpose by the permittee.

In the event of termination of this permit, whether for breach of provisions or revocation by the approving officer, the permittee shall have the right to remove the boat ramp and any other property, equipment, belonging to the permittee within thirty (30) days from the date of termination notice.

It is further understood and agreed that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest or right in or to the land described herein, but is merely a temporary permit, terminable and revocable at the discretion of the Superintendent or Acting Superintendent.

PERMITTEE:
STATE OF IDAHO
DEPARTMENT OF FISH AND GAME

BY: Joseph Greenley

TITLE: Director

DATE: April 30, 1979

PERMITTOR:
NEZ PERCE TRIBE OF IDAHO

BY: Wilfred A. Scott
Chairman

BY: Clarence J. Hastings
Secretary

DATE: 5/18/79

PER NEZ PERCE RESOLUTION NO. NP 79-231

APPROVED:

Roy P. Petterborg
ACTING Superintendent
Northern Idaho Agency

DATE: 5/17/79

Attachment 5

REVOCABLE PERMIT

PERMIT NO. 3719

Permission is hereby granted to the STATE OF IDAHO, THROUGH ITS DEPARTMENT OF FISH AND GAME of 600 South Walnut Street, Post Office Box 25, Boise, ID 83707, hereinafter called the Permittee, to enter, construct, inspect, maintain and repair a boat ramp, together with the right of ingress and egress when necessary for the above-mentioned purposes over and across the following described land located within the Nez Perce Indian Reservation, County of Nez Perce, State of Idaho.

A tract of land in the bed of the Clearwater River, situated in Gibbs Eddy (Myrtle Beach) adjacent to Lot 8, Section 7, Township 36 North, Range 3 West, Boise Meridian (River Mile 15.0)

This permit will begin on date of approval by the Superintendent or Acting Superintendent of the Northern Idaho Agency. The permittee will deposit with the Superintendent of the Northern Idaho Agency the one-time payment of FIFTY DOLLARS AND NO/100 ($50.00) as the consideration for this permit.

It is understood that this permit will be automatically revoked when the boat ramp for which this permit is issued is no longer in use or if the area occupied by the boat ramp is used for any other purpose by the permittee.

In the event of termination of this permit, whether for breach of provisions or revocation by the approving officer, the permittee shall have the right to remove the boat ramp and any other property, equipment, belonging to the permittee within thirty (30) days from the date of the termination notice.

It is further understood and agreed that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest or right in or to the land described herein, but is merely a temporary permit, terminable and revocable at the discretion of the Superintendent or Acting Superintendent.

PERMITTEE:
STATE OF IDAHO
DEPARTMENT OF FISH AND GAME

BY: [signature]
TITLE: Director
DATE: April 30, 1979

PERMITTOR: NEZ PERCE TRIBE OF IDAHO

BY: [signature]
Chairman

BY: [signature]
Secretary

DATE: 5/8/79

PER NEZ PERCE RESOLUTION NO. NP 79-231A

APPROVED:

[signature]
ACTING Superintendent
Northern Idaho Agency

DATE: 5/17/79

Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

ENVIRONMENT, FISH AND WILDLIFE

July 5, 2000

In reply refer to: KECN-4

Mr. Donald F. McNaris
Idaho Department of Lands
954 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0050

Dear Mr. McNaris:

RE: Riverbed Easement for Tribal Allotment 1705

I have received your letter to Kenneth Kirkman dated April 13, 2000, requesting Bonneville Power Administration (BPA) to obtain a riverbed easement from the Idaho Department of Lands for the development of a fish rearing facility on a tribal allotment within the exterior boundaries of the Nez Perce Reservation.

It appears that pursuant to the Treaty with the Nez Perce of June 11, 1855, and the Treaty with the Nez Perce of June 9, 1863, ownership of the bed and banks of the Clearwater River within the exterior boundaries of the Nez Perce Reservation belongs to the Nez Perce Tribe. BPA, consistent with the position of the Bureau of Indian Affairs, acknowledges the Tribe's claim of ownership of the riverbed and its right to the control and benefit therefrom. BPA believes the Nez Perce Tribe has the authority to grant BPA an easement to utilize the banks of the river for use by the Nez Perce Tribal Hatchery. As a Federal agency working in partnership with the Nez Perce Tribe on the Nez Perce Reservation, the state of Idaho's authority to require a permit is not apparent.

If after reconsideration of your agency's authority to require a permit in this situation you still consider this an outstanding issue, please inform us of the basis for your position.

Sincerely,

Marian Wolcott

Marian Wolcott
Realty Specialist

cc:
Richard Eichstaedt, Office of General Counsel, Nez Perce Tribe

bcc:
R. Austin – KEW-4
G. Meuleman - KEWN/Boise
K. Kirkman - KEWN-4
R. Swedo – KR/Spokane
P. Key - LC-7
J. Trottier – LC-7
J. Cowger – TR-3
Official File – TR-3 (LA-19-10)

MWolcott:jd:3273:7/5/00 (W:\TSR\NEZPERCESTATEOFIDAHO.DOC)

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Cottonwood Field Office
1 Butte Drive
Cottonwood, Idaho 83522

In Reply Refer To:
1232 (IDC020)

AUG - 7 2012

Silas C. Whitman
Chairman, Nez Perce Tribe
P.O. Box 305
Lapwai, Idaho 83540

Mr. Chairman:

The Bureau of Land Management (BLM) was contacted by the Paparazo-Lozar wedding party on July 26, 2012, requesting the reservation of both pavilions at Pink House Recreation Area on September 1, 2012. During a follow-up conversation with the bride, the BLM identified that the location of the actual wedding ceremony would take place on the Pink House Beach below the high water mark, which is identified as a parcel of tribal land.

The non-tribal member ceremony would involve the placement of a temporary deck, 50 chairs, flowers, portable music for the walk down the aisle and dancing to celebrate the ceremony. The wedding would be held from 1:00 p.m. to sunset with the wedding party moving up to the pavilions for a potluck. The bride would prefer that the wedding party be permitted to set-up the beach for the ceremony on August 31, 2012.

The BLM is requesting guidance from the tribe on this matter.

If you have further questions about the ceremony, or would like to review the BLM Letter of Agreement to be signed by the wedding party, please contact Judy Culver, Outdoor Recreation Planner, at 208-962-3796, or jculver@blm.gov about potential dates for the meeting.

Sincerely,

Will Runnoe
Field Manager

Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

May 15, 2013

Rick Lamm, City Administrator
City of Orofino
217 First Street
Orofino, ID 83544

Re: Replacement of existing water intake structure and raw water intake pump station on the Clearwater River within the Nez Perce Reservation

Dear Mr. Lamm:

The Nez Perce Tribe (Tribe) is contacting you regarding the City of Orofino's proposal to replace an existing water intake structure and raw water intake pump station on the Clearwater River within the Nez Perce Reservation. For coordination purposes, the Tribe is copying the Bureau of Indian Affairs below.

The attached Project Description and Proposed Work describes the proposed activity as: (1) removing the existing wire-basket rock gabion wall, which is approximately 4 feet wide and extends 200 feet across the river from the bank; (2) installing a new ecology block eight feet wide at the base, four feet wide at the top, and extending 150 feet across the river; and constructing a new fish intake/fish screen structure. This work is to be done in the dry behind a coffer dam constructed in the Clearwater River. The Project Description describes a significant amount work that would be located below the ordinary high water mark of the Clearwater River within the Nez Perce Reservation.

The Tribe is aware that EPA recently issued the City of Orofino certification under Section 401 of the Clean Water Act for work associated with the Corps of Engineers' proposal to authorize the Project under Nationwide Permit 12 (Utility Line Activities) and 33 (Temporary Construction Access, and Dewatering). Given the Project's location, the Tribe's Water Quality Program Coordinator, Ken Clark, coordinated with EPA to ensure that the Project will comply with applicable Tribal environmental regulations in addition to Section 401 of the Clean Water Act.

The Tribe appreciates and supports the City of Orofino's initiative, through this Project, to ensure Tribal and non-Tribal residents continue to have reliable access to safe drinking water. The Tribe appreciates

as well your coordination with the Tribe on this Project. Title to land below the ordinary high water mark of the Clearwater River within the Nez Perce Reservation is held in trust for the Tribe by the United States. Project work that would occur below the ordinary high water mark will require the permission of the Tribe and the Department of Interior's Bureau of Indian Affairs.

That said, the Tribe supports the purposes of this Project and will be contacting the Bureau to advise the granting of permission for the purpose of implementing this Project. Please keep the Tribe informed of any additional information or developments in the meantime.

Sincerely,

Silas C. Whitman
Chairman, Nez Perce Tribal Executive Committee

cc: BIA
OLC file

217 First Street
P.O. BOX 312
OROFINO, ID 83544

Phone (208) 476-4725
Fax (208) 476-3634
Email:citycouncil@orofino-id.com

City of Orofino

May 31, 2013

Silas C. Whitman, Chairman
Nez Perce Tribal Executive Committee
P.O. Box 305
Lapwai, Idaho 82540

RE: Revocable Permit to Access Clearwater River

Dear Chairman Whitman:

Please find enclosed the Revocable Permit issued by the Nez Perce Tribe to the City of Orofino for access to the Clearwater River for the construction of a new Raw Water Pump Station and Water Intake System. All work will be completed within the environmental window period identified in our certification under Section 401 of the Clean Water Act issued by EPA.

On behalf of the City Council and the Community of Orofino, I wish to thank the Nez Perce Tribe for their support of our water project and your willingness to work with the city to accomplish our much needed project.

If I can be of any assistance or answer any questions whatsoever, please do not hesitate to contact me.

Sincerely,

Ryan Smathers
Mayor

RECEIVED

Received
JUN 0 5 2013
NPTEC
RACHEL

REVOCABLE PERMIT

PERMIT NO. _____

Permission is hereby granted to the City of Orofino, 217 First Street, Orofino, ID 83544 (Permittee) to enter, construct or replace, inspect, maintain, and repair a water intake structure and raw water intake pump station on the Clearwater River within the Nez Perce Reservation at the following described location:

> A tract of land in the bed of and below the ordinary high water mark of the Clearwater River, identified in the City of Orofino's Water Treatment Plant Design Details maps (copy attached).

This Permit begins on the date of execution below by the Chairman and Secretary of the Nez Perce Tribal Executive Committee of the Nez Perce Tribe (Permittor). The water intake structure and raw water intake pump station are part of a Project that will ensure Tribal and non-Tribal residents have reliable access to safe drinking water.

It is understood that this Permit will be revoked if the water intake structures which are the purpose of this Permit are no longer used by Permittee, or if the land on which the water intake structures which are the purpose of this Permit are located is used for any other purpose by Permittee.

In the event of revocation of this Permit, Permittee shall have the right to remove all water intake structures belonging to Permittee within 30 days from the date of notice by Permittor.

This Permit is not a lease and does not grant any leasehold interest or right in or to the land described above. It is a Permit revocable at the discretion of Permittor. As this is not a lease and does not grant any leasehold interest or right in or to the land described above, Bureau of Indian Affairs' approval pursuant to 25 Code of Federal Regulations 162 is not required.

Permittee:
City of Orofino

By: _____

Title: Major

Date: 5/31/2013

Permittor:
Nez Perce Tribe

By: _____
Chairman

By: _____
Secretary

Date: 06-06-13

Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

9 September 2014

Ray Hennekey
Idaho Department of Fish and Game
3316 16th Street
Lewiston, ID 83501

Re: Amendment of Permit #3720 (Lenore Boat Ramp)

Dear Mr. Hennekey:

The Nez Perce Tribe appreciates that the Lenore Boat Ramp serves both Nez Perce tribal members and non-Indians.

The expansion of the Lenore Boat Ramp requires an amendment of Permit # 3720 granted to Idaho Fish and Game for Lenore Boat Ramp in 1979.

An amended permit is attached for your signature. Upon the receipt of a signed copy of this permit, the Tribe will execute its signatures promptly and in advance of IDF&G's September 20, 2014 identified date for initiating work.

Please contact David B. Johnson, Department of Fisheries Resource Management, if you have any questions, at (208) 843-7320, ext. 3736.

Sincerely,

Silas C. Whitman
Chairman

REVOCABLE PERMIT

PERMIT NO.: 3720

Permission is hereby granted to the STATE OF IDAHO THROUGH ITS DEPARTMENT OF FISH AND GAME of 600 South Walnut Street, Post Office Box 25, Boise, Idaho 83707, hereinafter called the Permittee, to enter, construct, inspect, maintain and repair a boat ramp, together with the right of ingress and agress when necessary for the above-mentioned purposes over and across the following described land located within the Nez Perce Indian Reservation, County of Nez Perce, State of Idaho.

A tract of land in the bed of the Clearwater River, situated in Lenore Site, portions of Lots 2 and 3, Section 35, Township 37 North, Range 2 West, Boise Meridian, lying South of the main tract of the Camas Prairie Railroad, beginning at the East abutment of the concrete bridge and extending eastward 850 feet.

This permit will begin on date of approval by the Superintendent or Acting Superintendent of the Northern Idaho Agency. The permittee will deposit with the Superintendent of the Northern Idaho Agency the one-time payment of FIFTY AND NO/100 DOLLARS ($50.00) as the consideration for this permit.

It is understood that this permit will be automatically revoked when the boat ramp for which this permit is issued is no longer in use or if the area occupied by the boat ramp is used for any other purpose by the permittee.

In the event of termination of this permit, whether for breach of provisions or revocation by the approving officer, the permittee shall have the right to remove the boat ramp and any other property, equipment, belonging to the permittee within thirty (30) days from the date of termination notice.

It is further understood and agreed that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest or right in or to the land described herein, but is merely a temporary permit, terminable and revocable at the discretion of the Superintendent or Acting Superintendent.

PERMITTEE:
STATE OF IDAHO
DEPARTMENT OF FISH AND GAME

BY: Joseph Greenley

TITLE: Director

DATE: April 30, 1979

PERMITTOR:
NEZ PERCE TRIBE OF IDAHO

BY: Wilfred A. Scott
Chairman

BY: Johnna Rose J. Redbird
Secretary

DATE: 5/8/79

PER NEZ PERCE RESOLUTION NO. NP 79-231

APPROVED:

Ray S. Petterborg
ACTING Superintendent
Northern Idaho Agency

DATE: 5/17/79

PERMIT NUMBER: 3720-AMENDED

AMENDED REVOCABLE PERMIT

In May, 1979, the Nez Perce Tribe granted to the STATE OF IDAHO, THROUGH ITS DEPARTMENT OF FISH AND GAME , permission to enter, construct, inspect, maintain and repair a boat ramp, together with the right of ingress and egress when necessary for the above-mentioned purposes over and across the following described land located within the Nez Perce Indian Reservation, County of Nez Perce, State of Idaho:

> A tract of land in the bed of the Clearwater River, situated in Lenore Site, portions of Lots 2 and 3, Section 35, Township 37 North, Range 2 West, Boise Meridian, lying South of the main tract of the Camas Prairie Railroad, beginning at the East abutment of the concrete bridge and extending eastward 850 feet.

A copy of this Permit, Permit # 3720, is attached as Exhibit A to this permit, and is incorporated herein by reference.

The Tribe, through this amendment to Permit # 3720, grants to the STATE OF IDAHO, THROUGH ITS DEPARTMENT OF FISH AND GAME, permission to enter, construct, maintain and repair an expanded boat ramp (as depicted in Exhibit B to this permit), together with the rights of ingress and egress when necessary for the above-mentioned purposes over and across the following described land located within the Nez Perce Indian Reservation, County of Nez Perce, State of Idaho:

> A tract of land in the bed of the Clearwater River, identified as the "Lenore Access Boat Ramp" and set forth in the Site Drawing and Boat Ramp Detail drawings attached hereto.

This Permit begins on the date of execution below by the Chairman and Secretary of the Nez Perce Tribal Executive Committee of the Nez Perce Tribe (Permittor).

It is understood that this permit will be revoked when the boat ramp for which this permit is issued is no longer in use or if the area occupied by the boat ramp is used for any other purpose by the permittee.

In the event of revocation of this Permit, Permittee shall have the right to remove the boat ramp and any other property or equipment belonging to Permittee within 30 days from the date of notice by Permittor.

This permit is not a lease and does not grant any leasehold interest or right in or to the land described above. It is a Permit revocable at the discretion of the Permittor. As this is not a lease and does not grant any leasehold interest or to the land described above, the Bureau of Indian Affairs' approval pursuant to 25 Code of Federal Regulations 162 is not required.

##

Permittee:

State of Idaho

Department of Fish and Game

By: Sharon W. Kiefer

Title: Deputy Director

Date: 9/10/14

Permittor:

Nez Perce Tribe

By _____

Chairman

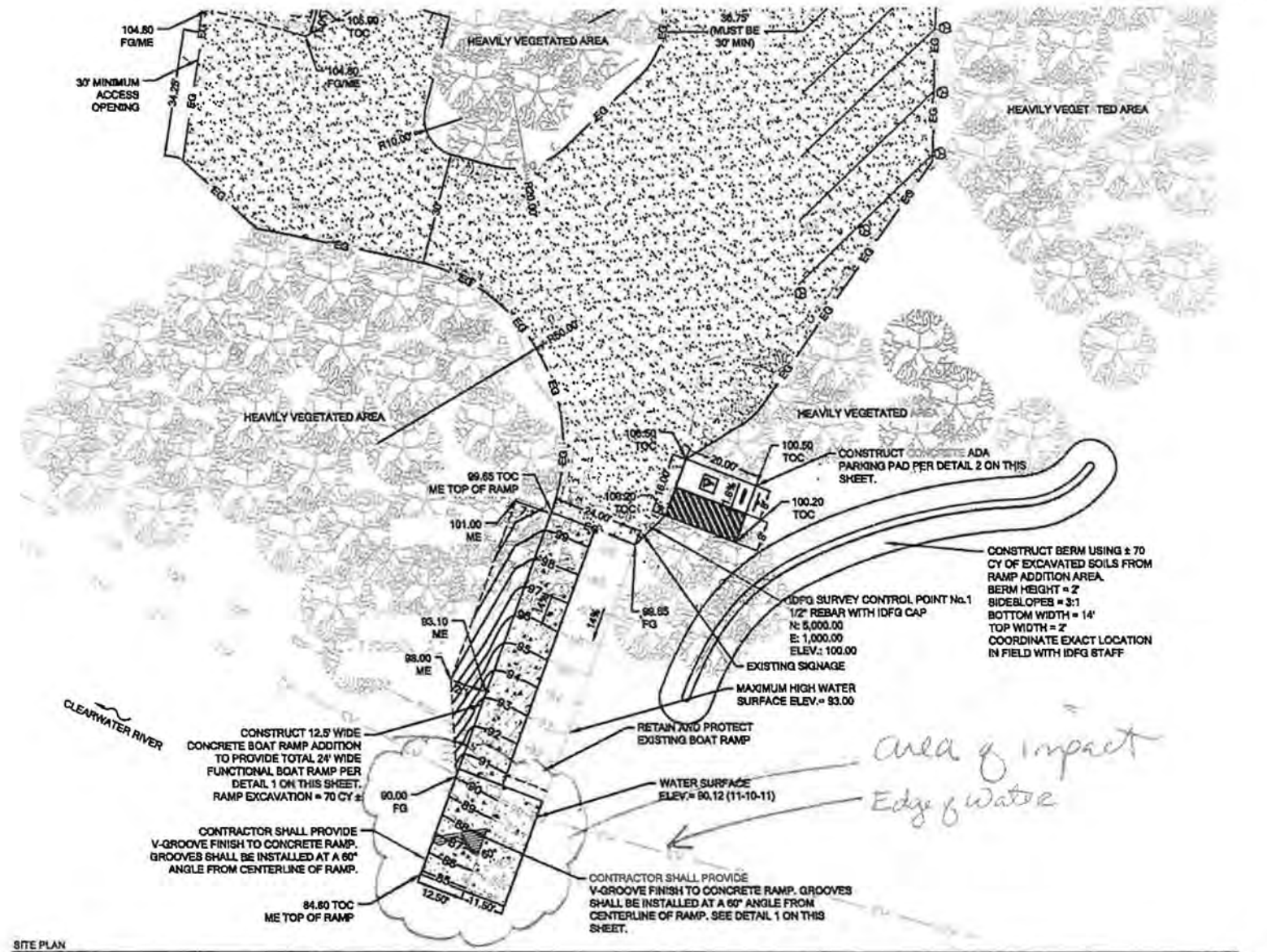
By: Daniel Kane

Secretary

Date: 09-10-14

Attachment A

March 29, 2013

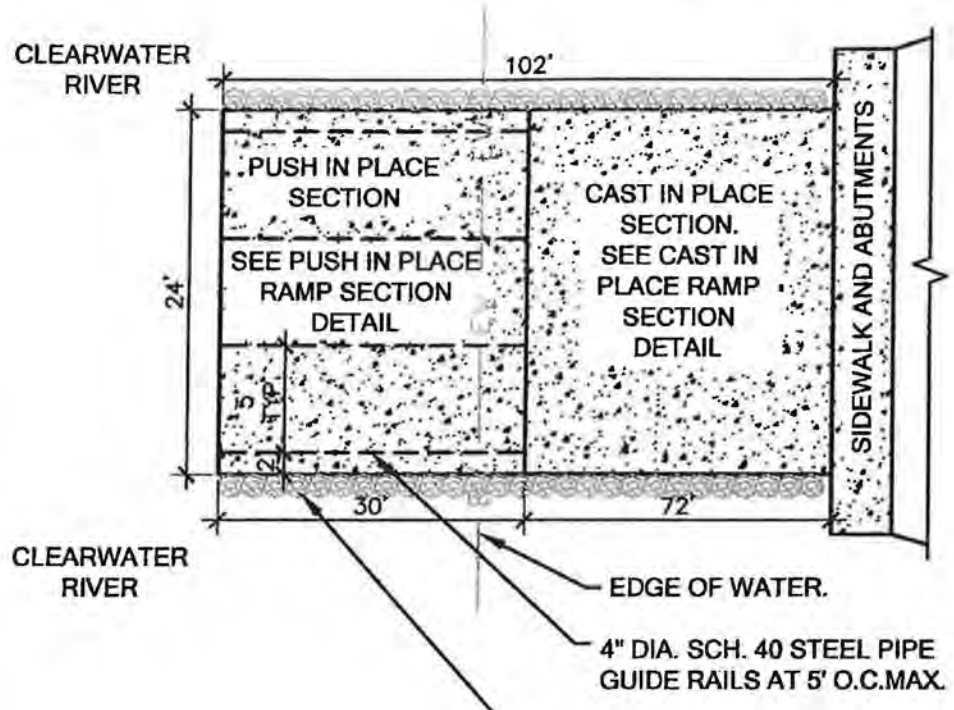


SITE PLAN

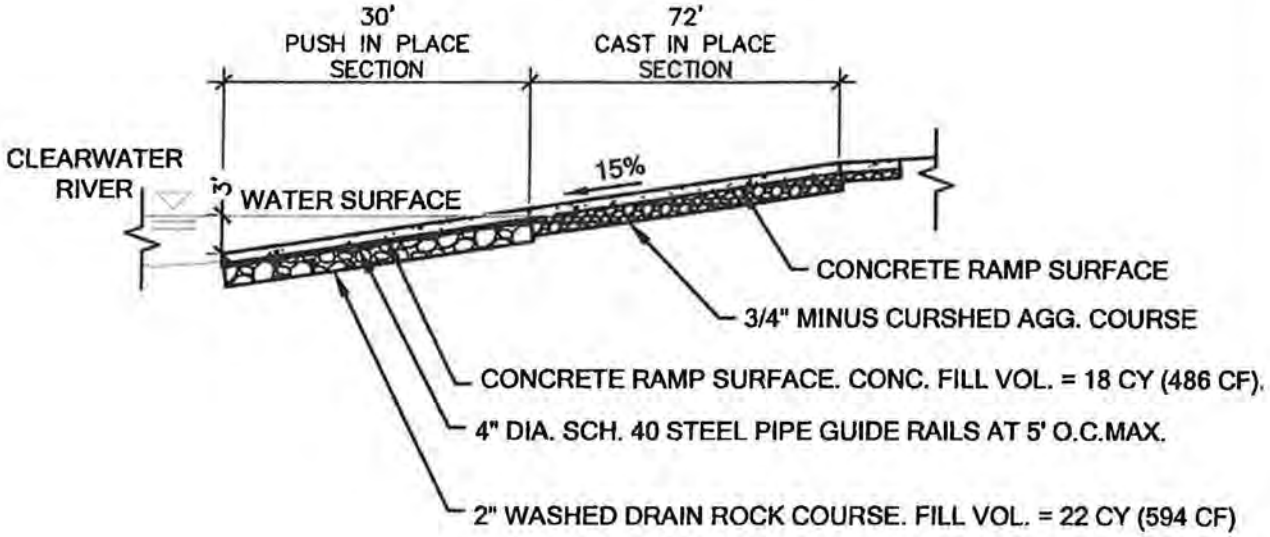
SCALE: 1"=40'

Attachment B

LENORE ACCESS BOAT RAMP
NEZ PERCE COUNTY, IDAHO



PLAN



SECTION

1 CONCRETE BOAT RAMP DETAIL

S:\PROJECTS\2011\2011-135 LENORE BOAT RAMP\CAD\SITE PLAN 2.DWG