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Norman M. Semanko
Attorney, Moffatt, Thomas, Barrett, Rock & Fields, Chartered

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EXHIBIT A

91 - 7755

RECEIVED
JAN 31 2014
Department of Water Resources
Adjudication Bureau

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

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE COEUR D'ALENE-SPOKANE RIVER BASIN WATER SYSTEM CASE NO. 49576	**NOTICE OF CLAIM** **Federal Reserved Water Right**

1. **Name and address of claimant:**
   UNITED STATES OF AMERICA, as trustee on behalf of the COEUR D'ALENE TRIBE of the COEUR D'ALENE INDIAN RESERVATION acting through the NORTHWEST REGIONAL DIRECTOR
   Department of the Interior
   Bureau of Indian Affairs
   911 N.E. 11th Ave.
   Portland, OR 97232

2. **Date of Priority:** Time Immemorial

3. **Source:** Saint Joe River (Fed ID #4001)

4. **Point of Diversion:** Not applicable; Instream flow

5. **Place of Use:**
   At all points along the stream reach located between the following boundaries:
   Upstream Boundary - Headwaters
   Township: 42N Range 11E Section: 4 QQ (__1/4 of __1/4): NENE
   B.M., County of Shoshone
   Downstream Boundary - Heller Creek
   Township: 43N Range 10E Section: 20 QQ (__1/4 of __1/4): NENE
   B.M., County of Shoshone
   Legal descriptions are based on current mapping but are subject to refinement to best reflect on-the-ground stream locations. See Attached Map.

6. **Purpose of Water Use:**

Fish habitat for fish species harvested within the Reservation – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation pursuant to the documents referenced in Section 9 and the provisions in Section 10, *infra*.

7. **Period of Use:** January 1 through December 31, as further detailed in Section 8 infra.

8. **Quantity Reserved (In cfs):**

January	Februrary	March	April	May	June
67	67	90	115	115	115
July	August	September	October	November	December
77	63	39	23	47	67

9. **Basis Of Claim:**

The legal basis for this water right claim stems from the doctrine of federal reserved water rights articulated by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, as well as the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation, including but not limited to, the Agreement dated July 28, 1873 between the United States and the Coeur d'Alene Tribe, the Executive Order signed by President Grant on November 8, 1873, 1 C. Kapler, Indian Affairs: Laws and Treaties 837 (1904), and the Agreement dated March 26, 1887 between the United States and the Coeur d'Alene Tribe, ratified by Act of Congress dated March 3, 1891, 26 Stat. 1027.

10. **Other Provisions:**

a. This claim is one in a series the United States is making for waters from groundwater and surface water sources within the North Idaho Adjudication in the State of Idaho to fulfill the permanent homeland purpose of the Coeur d'Alene Indian Reservation. Such present and future purposes include but are not limited to: DCMI (domestic, commercial, municipal, and industrial); irrigated agriculture; fish and wildlife habitat; fish propagation; lake level maintenance; water storage; power generation; religious, cultural, and ceremonial; transportation; stockwater and wildlife; aesthetics; and recreation.

b. The complex history of the establishment of the Coeur d'Alene Reservation, including the operative documents, surrounding circumstances, negotiations, agreements, executive orders and statutes, was analyzed by the United States Supreme Court in *Idaho v. United States*, 533 U.S. 262 (2001) (*Idaho II*), the Ninth Circuit in *United States and the Coeur d'Alene Tribe v. Idaho*, 210 F.3d 1067 (9th Cir. 2000), and the United States District Court for the District of Idaho in *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094 (D. Idaho 1998).

c. In *Idaho II*, the Supreme Court held that the United States reserved in trust for the benefit of the Tribe the submerged lands of southern third of Lake Coeur d'Alene and the St. Joe River within the current boundaries of the Reservation. 533 U.S. 262

(2001). In so holding, the Supreme Court affirmed the opinion of the district court, which had found that "a purpose of the 1873 Executive reservation was to retain the submerged lands for the benefit of the Tribe." 95 F.Supp.2d 1094, 1102 (D. Idaho 1998).

d. Prior to the creation of the Reservation in 1873, the Coeur d'Alene Tribe held aboriginal title to "more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River." *Idaho II*, 533 U.S. 262, 265 (2001). "Tribal members traditionally used the [L]ake and its related waterways for food, fiber, transportation, recreation and cultural activities." *Id.* at 265. "A right to control the lakebed and adjacent waters was traditionally important to the Tribe . . . ." *Id.* at 274.

e. This water right claim is for a traditional use of water that predates the creation of the Coeur d'Alene Reservation. This right was not created but was instead confirmed by the agreements and executive order outlined in section 9, *supra*. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1984). Therefore, pursuant to federal law, the priority date of this water right is time immemorial. *Id.*

f. In order to comply with Idaho Code § 42-1409(1), the United States has designated "places of use," "points of diversion," and "purposes of use" in submitting this water rights claim. This proposed water right claim form has been developed in conjunction with, and at the request of the Idaho Department of Water Resources ("IDWR"). The use of this format as required by Idaho Code, and as requested by IDWR, should not be construed to limit either the United States or the Coeur d'Alene Tribe's future use of water at other points of diversion, places of use or for other purposes within the boundaries of the Reservation. The statute's terminology has been employed to demonstrate that the amount claimed is necessary, justifiable, and available to achieve the purpose of the Reservation as a homeland for the Coeur d'Alene Tribe. The quantification standards used in no way constitute a limitation on the use of the water by the United States or the Coeur d'Alene Tribe.

11. Signatures:

(a) By signing below, I acknowledge that I have received, read, and understand the form entitled "How you will receive notices in the Coeur d'Alene-Spokane River Basin Adjudication."

(b) I do___ do not __X___ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

For Organizations:

I do solemnly swear and affirm that I am Stanley Speaks, Regional Director, U.S. Bureau of Indian Affairs, that I have signed the foregoing document in the space below as Regional Director, U.S. Bureau of Indian Affairs, and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent:

Northwest Regional Director
U.S. Bureau of Indian Affairs

Dated this 30th day of January, 2014.

Notice is hereby given that the United States Department of Justice will represent the United States of America, including, but not limited to the U.S. Department of the Interior, Bureau of Indian Affairs, in all matters pertaining to the Coeur d'Alene-Spokane River Basin Adjudication.

All notices, filings and correspondence concerning this matter should be mailed to the United States Department of Justice at the address set forth below:

Vanessa Boyd Willard
United States Department of Justice
Environment and Natural Resources Division
Indian Resources Section
550 W. Fort Street, MSC 033
Boise, Idaho 83724

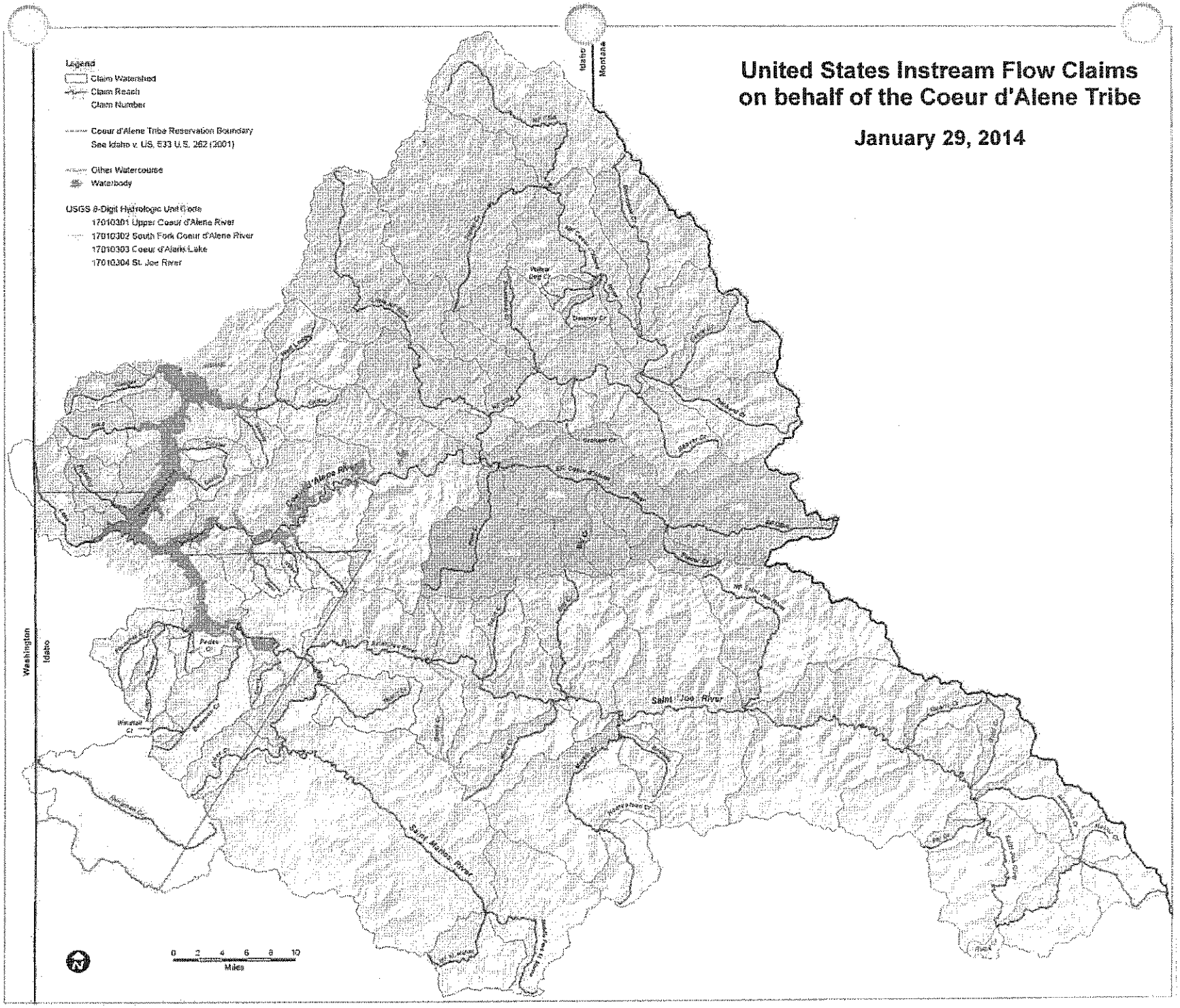
United States Instream Flow Claims
on behalf of the Coeur d'Alene Tribe
January 29, 2014
Legend
Claim Watershed
Claim Reach
Claim Number
Coeur d'Alene Tribe Reservation Boundary
See Idaho v. US, 533 U.S. 262 (2001)
Other Watercourse
Waterbody
USGS 8-Digit Hydrologic Unit Code
17010301 Upper Coeur d'Alene River
17010302 South Fork Coeur d'Alene River
17010303 Coeur d'Alene Lake
17010304 St. Joe River
Idaho
Montana
Washington
Idaho
Coeur d'Alene River
Saint Joe River
Saint Maries River
0 2 4 6 8 10
Miles

EXHIBIT B

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
SEP 17 2014
By _____ Clerk
_____ Deputy Clerk

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

In Re CSRBA) A. Subcase No. 91-7755
Case No. 49576)
) STANDARD FORM 1
) OBJECTION
)
)

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: North Idaho Water Rights Alliance on behalf of the objectors/claimants identified in Attachment A
Address: 391 Bella Rose Rd
St Maries, Idaho 83861
Phone: 208-245-0275

Attorney Name: Douglas P. Payne (ISB # 4789)
Attorney Address: 701 W. Collage St. Suite 201
St Maries, Idaho 83861
Attorney Phone No. 208-245-2564

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT
Name: United States of America, as trustee on behalf of the Coeur d' Alene Indian Reservation acting through the Northwest Regional Director
Department of the Interior
Bureau of Indian Affairs
911 N.E. 11th Ave.
Portland, OR 97232

ATTACHMENT A

The identified objectors & CSRBA water right claimants listed below are members of the North Idaho Water Rights Alliance

Doug & Kristi Payne
P. O. Box 315
St. Maries, ID 83861

Pam Secord for
Oceanwoods Oasis Trust
391 Bella Rose Road
St. Maries, ID 83861

Robin & Leslee Stanley
P. O. Box 268
Silverton, ID 83867

Thomas G. & Mary M. Carve
2301 Cromwell Drive
St. Maries, ID 83861

Gary & Patricia Mitchell
30808 S. Hwy 3
Medimont, ID 83842

Mullan School #392
345 Park St
Mullan, ID 83846

Jack & Eleanor Buell
402 Shepherd Road
St. Maries, ID 83861

Edward & Candace Anderso
P. O. Box 327
Kingston, ID 83839

Norman McCall
P. O. Box 160
Fernwood, ID 83830

Dick & Carole Harwood
81527 Hwy 3 So.
St. Maries, ID 83861

Robert & Dianna Bostrom
P. O. Box 241
Potlatch, ID 83855

Robert & Patty Anderson
P. O. Box 2674
Everett, WA 98213

Crows Nest Water
Association
P.O. Box 311
Harrison, ID 83833

Nona Bruns
P.O.Box 105
St. Maries, ID 83861

Bernard & Dawn Weber
60553 Hwy 3 So.
Fernwood, ID 83830

Ralph & Martha Banderob
8831 Hells Gulch Road
St. Maries, ID 83861

Weber Farms
60553 Hwy 3 So.
Fernwood, ID 83830

Carol Clark
1513 E. 56th Lane
Spokane, WA 99223

Ken & Yvonne Devries
333 Lost Trail
St. Maries, ID 83861

Roderick & Beth Halvorson
P.O. Box 44
Santa, ID 83866

Rick & Holly Day
59494 S. Hwy 97
St. Maries, ID 83861

Dohrman, Jean
59510 S. Hwy 97
St. Maries, ID 83861

Tom & Eileen DuHamel
4300 E. Sunset Drive
Harrison, ID 83833

Ronald & Sherlene Mendive
3732 S. Dusty Lane
Coeur d' Alene, ID 83814

John & Shirley Ferris
7569 Windfall
St. Maries, ID 83861

Roy & Linda Michael
400 Michael Road
St. Maries, ID 83861

Furth, James & Victoria
16603 Hwy 5
St. Maries, ID 83861

William & Gretchen Harrison
12777 W. Cougar Gulch Roa
Coeur d' Alene, ID 83814

Patrice Hartel
2213 Hawthorn Lane
St. Maries, ID 83861

Dean & Glenda Gentry
P. O. Box 321
St. Maries, ID 83861

J. Rachael Johnson
689 Nuthatch Lane
St. Maries, ID 83861

William & Nancy McAninch
205 Santa Marie Woods Dr
St. Maries, ID 83861

Terry & Wilma Murray
P. O. Box 263
Santa, ID 83866

Martha Green
1090 Ellis Lane
Plummer, ID 83551

John & Michelle McMahon
P. O. Box 872
Victorville, CA 92393

John & Agnes McFaddin
20189 S. Eagle Peak Road
Cataldo, ID 83810

Joel & Cindy Newson
260 S. River Hideaway
St. Maries, ID 83861

Richard L. Powell
396 Powell Road
St. Maries, ID 83861

Patrick & Annette Petrie
349 Kathy Drive
St. Maries, ID 83861

Paul & Colleen Smith
88 Garden Tracts Road
St. Maries, ID 83861

Jeff & Dede Shippy
95 Ferguson Street
St. Maries, ID 83861

Lois Tuel
756 Shepherd Road
St. Maries, ID 83861

Robert & Gail Short
31054 Hwy 6
St. Maries, ID 83861

Elizabeth Roberts
10015 W. Royal Oak #327
Sun City, AZ 85351

ATTACHMENT A

The identified objectors & CSRBA water right claimants listed below are members of the North Idaho Water Rights Alliance

Sotin, Larry & Susan
82803 Hwy 3 South
St. Maries, ID 83861

Don & Martha Vail
1530 Cottonwood Drive
St. Maries, ID 83861

Harry Grubham
345 So. 15th St
St. Maries, ID 83861

Marvin & MaryAnne Wheeler
33716 S. Benewah Road
Harrison, ID 83833

Leland & Danielle Boldt
4924 Honey Hill Road
Oak Hills, CA 92344

Vic & Rita Brodie
P. O. Box 82
Santa, ID 83866

Edmond & Janet Ferrel
P.O. Box 125
Santa, ID 83866

Lance & J. Michele McDaniel
P.O. Box 606
St. Maries, ID 83861

D. I object to the following elements or general provision as recommended in the Director's Report. (Please check the appropriate box(es)).

1 ☒ **Name and Address**
Should be: _____

2 ☒ **Source**
Should be: _____

3 ☒ **Quantity**
Should be: _____

4 ☒ **Priority Date**
Should be: _____

5 ☒ **Point of Diversion**
Should be: _____

6. ☒ **Instream Flow Beginning and Ending Point**
Should be: _____

7. ☒ **Purpose(s) of Use**
Should be: _____

8. ☒ **Period of Year**
Should be: _____

9. ☒ **Place of Use**
Should be: _____

10. □ General Provision
□ Individual Water Right

□ All Water Rights
□ Should not be recommended.

□ This general provision was not recommended but should be recommended as described below.
Should be: _____

□ General provision was recommended but should be modified as described below.
Should be: _____

11. ☐ I object because the recommendation contains an accomplished transfer under Idaho Code § 42-1425 resulting in injury to my water right(s) and/or enlargement of the original right.

12. ☒ **I Object because:**

13.

☒ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described below

E: REASONS SUPPORTING OBJECTION(S):

Box 12, and Boxes 1-9:

The named objectors/claimants collectively known as the North Idaho Water Rights Alliance ("NIWRA"), objects to the claimed water right on the basis that some or all of the claimed water right was either not reserved at the time the Coeur d Alene Reservation was withdrawn from the public domain or was extinguished by subsequent agreements, Acts of Congress, cessions, relinquishments, orders decrees, or judgments. Moreover, the claim fails to establish that the United States at the time of Reservation, intended to reserve the water in order to accomplish the primary purpose for which the United States withdrew the Reservation from the public domain.

In the event the claimed water right is found to have been reserved and not fully extinguished, NIWRA submits the following additional reasons for its objections:

Box 2, 6, and 9: NIWRA objects on the basis that: (1) the United State never reserved in stream flows or other water rights in stream reaches outside the boundaries of the 1873 Executive Order withdrawing lands; furthermore any reservations of in stream flows in stream reaches outside the boundaries of the current Reservation were extinguished by subsequent agreements, Acts of Congress, cessions, relinquishments, and alienations reducing said Reservations to its current boundaries; and (3) except for those limited stream reaches running through, over, or immediately adjacent to lands constantly and currently owned by the Coeur d'Alene Tribe, or held in trust for, the use and benefit of the Coeur d'Alene Tribe. Any reservation of in stream flows inside the current boundaries of the Reservation to nonmember ownership and conveying the underlying stream bed or immediately adjacent to third parties, even if title was late reacquired by the United States or the Coeur d' Alene Tribe.

Box 3: NIWRA objects to the claimed quantity. The claimed quantity exceeds the amount reasonably necessary to accomplish the primary purpose for which the Reservation was created or to accomplish the specific purpose of the claim.

Box 4: NIWRA objects to the claimed priority date to the extent it asserts that the claimed priority dates continues to apply the use of water on lands that were conveyed to third parties and later reacquired by the United States in trust for the Tribe or reacquired by the Tribe in fee simple ownership.

Box 5: NIWRA objects to the claimed point of diversion to the extent it claims the right to divert water from any groundwater aquifer or from any surface waters that do no run through, over, or are otherwise appurtenant to lands owned by the Coeur d'Alene Tribe or is held by the United States in trust, for the use and benefit of the Coeur d' Alene tribe.

Box 7: NIWRA objects to the claimed purpose of use is overbroad and inconsistent with the primary purpose for which the Reservation was created; moreover, the claimed water is not necessary to accomplish the primary purpose for which the Reservation was set aside, or is not necessary to accomplish the stated purpose of the specific claim.

Box 9: NIWRA objects to the claimed place of use to the extent such place of use includes lands, water bodies, or waterways not constantly and currently owned by the Coeur d' Alene Tribe or by the United States in trust for, the use and benefit of the Coeur d' Alene Tribe. These claims should be documented with reliable evidence on a monthly basis that the claimed flows are necessary for the claimed use and not to exceed the actual stream flows. In the absence of such credible evidence the claimed quantity numbers are arbitrary and injurious to all other valid water users, possibly preventing all other water users current and future from making reasonable use of the stream. To be credible, the claimant must identify and document exactly what habitat and which species are to be protected by ensuring claimed stream flows are necessary for the habitat protection and provide documented evidence that such protection is essential for the purposes of the Federal reserved definition of a reserved water right for a Reservation

INSTRUCTIONS FOR MAILING
You must mail the Objection, to the Clerk of the court.
FAX filings will not be accepted. You must also send a copy to all the parties listed below in the Certificate of Mailing.

F. CERTIFICATE OF MAILING
I certify that on September 12, 2014, I mailed the original and copies of this objection, including all attachments, to the following persons

:

1. Original to: Clerk of the District Court
Coeur d'Alene-Spokane River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:
Name: Department of the Interior
Address: Bureau of Indian Affairs
911 N.E. 11th Ave.
Portland, OR 97232

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Signature of Objector or attorney
mailing on Objector's behalf

EXHIBIT C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Consolidated Subcase 03-10022**
	)	**(Nez Perce Tribe Instream Flow Claims)**
Case No. 39576	)	
	)	

ORDER ON MOTION TO STRIKE TESTIMONY OF DENNIS C. COLSON

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

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

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

---

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

I.
APPEARANCES[2]

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

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

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

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

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

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

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IDAHO POWER COMPANY (Hereinafter "IPCo")

IPCo states this motion presents six issues:

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

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

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

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

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

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

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

IPCo Brief at 4 and 5.

POTLATCH CORPORATION (Hereinafter "Potlatch")

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

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

Footnote 1 provides:

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

Footnote 2 provides:

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

Footnote 3 provides:

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

Potlatch Brief at 6 and 7.

STATE OF IDAHO

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

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

Memorandum of the State of Idaho at 7.

IRRIGATION DISTRICTS

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

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

Footnote 2 provides:

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

Footnote 3 provides:

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

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

UNITED STATES AND THE NEZ PERCE TRIBE

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

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

Joint Memorandum at 6.

SHOSHONE-BANNOCK TRIBES

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

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

Footnote 1 indicates:

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

Shoshone-Bannock Tribe Brief at 1.

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

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

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

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

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

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

Shoshone-Bannock Brief, Table of Contents at v.

VII.
STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56 (c); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson, A.I.A. v. Steer,* 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

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

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

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

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

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

VIII.
SCOPE OF THESE SUMMARY JUDGMENT PROCEEDINGS

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

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

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

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

1. Nez Perce Claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

Pre-1855 Pre Treaty Era

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

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

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

1855 Treaty of 1855 at the Walla Walla Council

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

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

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

1863 Treaty of 1863 at the Lapwai Treaty Council

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

1887 Indian General Allotment Act

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

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

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

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

1893 Agreement with the Nez Perce

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

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

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

1905 United States v. Winans

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

1908 United States v Winters

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

1987 SRBA General Adjudication is Commenced

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

1994 Nez Perce Tribe v. Idaho Power Company

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

Among other things, the Court sustained the finding that:

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

Id. at 795, 796 (emphasis added).

1998 South Dakota v. Yankton Sioux Tribe

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

X.

FINDINGS OF FACT FOR PURPOSES OF SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1893 Agreement, Art. XI.

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

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

1. THE LEGAL ELEMENTS OF THE NEZ PERCE CLAIMS

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

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

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

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

A. The Federal Reserved Water Right.

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

B. The Indian Reserved Water Right.

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

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

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

C. Distinguishing Between the Two Theories.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1414 (emphasis added).

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

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

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

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

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

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

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

Treaty of 1863, 14 Stat. 647.

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

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

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

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

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

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

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

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

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

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

Id. at 793 (emphasis added).

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

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

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

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

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

Id. at 797, 798 (emphasis added).

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

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

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

Article XI of the 1893 Nez Perce Agreement provides:

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

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

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

Id. at 799 (emphasis added).

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

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

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

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

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

XII
Conclusion

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

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

IT IS SO ORDERED

DATED November 10, 1999.

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

CERTIFICATE OF MAILING

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

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Court Certificate of Mailing for Consolidated Subcase 03-10022

_____
Deputy Clerk

EXHIBIT D

CONTRIBUTIONS TO THE HYDROLOGY OF THE UNITED STATES, 1921.

NATHAN C. GROVER, *Chief Hydraulic Engineer.*

COEUR D'ALENE LAKE, IDAHO, AND THE OVERFLOW LANDS.

By R. W. DAVENPORT.

INTRODUCTION.

A controversy regarding the use of Coeur d'Alene Lake, Idaho, as a storage reservoir has existed for several years between the Washington Water Power Co. and owners of overflow lands near the lake and its tributaries. The purpose of using Coeur d'Alene Lake for storage is to equalize the flow of low-water periods and to increase the mean flow during such periods by the release of flood water stored in the spring, thereby assuring a greater output of power from the Washington Water Power Co.'s hydroelectric plants on Spokane River. The use of the lake for storage, although it has not increased the maximum water level or the maximum area of lands that may occasionally be flooded, involves the maintenance of a higher water level during low-water periods than would naturally exist, and the consequent retarding of drainage is detrimental to the interests of the landowners. Although the Washington Water Power Co. has settled with the landowners, the natural conflict of interests in the process of settling as well as in the management of the storage reservoir has fostered a great deal of ill feeling.

Because of the functions of the Department of the Interior in the administration of public lands the controversy has been placed several times before the department for consideration. A recent request made of the Geological Survey for certain technical advice has necessitated a field investigation. The writer was detailed to make this investigation and thus had a favorable opportunity to become familiar with the existing physical conditions and with the main features of the controversy.

Because the situation is very complex and involves many factors, concerning which information is lacking or meager, it has seemed advisable to publish a brief report on the conditions and the conclusions reached in order to contribute to a better understanding of

OBJ 0003

the situation and to a proper solution of the many problems involved. It is the purpose of this report, therefore, to present such conclusions as are consistent with a proper understanding of these conditions and to make constructive suggestions as to further activities.

The field investigation was made during the period from May 19 to June 3, 1920, inclusive. About six days was spent with the settlers and their representatives in seeing and considering the features that they believed deserved special attention, and about the same length of time was spent in a similar way with representatives of the Washington Water Power Co. The remainder of the period was spent in independent investigation.

At the time of the visit the stage of water in the lake was at its highest for the season. Although this afforded a good opportunity to see the extent of lands flooded by the lake at that stage, it was not so favorable for observing the character of the soil of the low lands and other conditions that would appear at a lower stage. Two trips by boat were made—one up Coeur d'Alene River as far as Lane and the other up St. Joe River as far as St. Maries. From St. Maries automobile trips were made up St. Maries River for 5 or 6 miles and up St. Joe River as far as Falls Creek, a distance of about 20 miles. The drainage projects near St. Maries were examined, and numerous interviews were had with citizens representing not only the agricultural but various other interests of the region. The officers and representatives of the Washington Water Power Co. made full statements respecting the attitude of the company, and the city engineer of Spokane was interviewed regarding the effect of floods in Spokane.

All persons concerned showed a most helpful disposition in furnishing all information in their possession and in aiding the investigation in every way. The engineering staff of the Washington Water Power Co. has collected a large amount of data regarding the physical conditions and has made studies and investigations of the different features. The settlers have done much less work of this kind but have obtained considerable information concerning the cultivation and productivity of the lands.

The writer is most grateful to all who facilitated the examination. Special acknowledgment is due to Mr. Fred Herrick, Capt. John A. Nye, and Mr. M. S. Parker, among the settlers, and to the officials and employees of the Washington Water Power Co. Valuable information was obtained from a report on the situation entitled "Preliminary report on proposed drainage district No. 4, Benewah County, and drainage district No. 6, Kootenai County," prepared by L. T. Jessup, drainage engineer, under the direction of Samuel Fortier, chief of irrigation investigations, Bureau of Public Roads, United States Department of Agriculture.

OBJ 0004

GENERAL FEATURES.

TOPOGRAPHY.

Coeur d'Alene Lake is in northern Idaho, in the "panhandle." This lake, which lies a few miles from the west boundary of the State, in the same latitude as the city of Spokane, Wash., is 24 miles long and in most places from 1 to 2 miles wide. The chief tributaries are Coeur d'Alene and St. Joe rivers, which drain a wide mountainous area that extends eastward to the crest of the Bitterroot Mountains, part of the eastern boundary of Idaho. The outlet of the lake is Spokane River, which flows westward through Spokane and joins Columbia River. Plate I is a map of the Spokane River basin.

Coeur d'Alene Lake was formed by the drowning of a narrow, steep-sided valley by a dam of gravel that was deposited by a glacial stream at a time when a great glacier extended down from the north.[1] The lake originally extended several miles up the valleys of Coeur d'Alene and St. Joe rivers, but these valleys have been gradually filled with soil washed down from the mountains and deposited by the streams where the current slackens as the water joins the lake. This material has been deposited not only where the main current slackens but also along the margins of the main current where the water has spread outward and the current is not so strong. Because of this lateral deposition, the immediate river banks are the highest land between the river and the steep slopes of the hills that bound the valleys. Decayed vegetation has also contributed to the enrichment of the lands and in some measure to their formation. The lands slope gradually toward the lake, thus illustrating the different stages of the process by which they are being built up. As a further incident of the building process small lakes and swamps have been entirely or partly cut off from the lake at its lower levels.

The natural low-water elevation of the lake is 2,120 feet above the sea. The highest level that the lake has been known to reach was 2,137.6 feet, in the spring flood of 1894. Between these two levels lies about 30,000 acres, including the alluvial bottom lands and the lakes and swamps that at low-water elevation are not a part of the lake proper. This area includes about all the lands that owe their origin to the process described. Considerably more than two-thirds of this area is below an elevation of 2,130 feet and subject to overflow by high water in spring in more than half the years. The area of the lake at a level of 2,120 feet is about 27,000 acres. Its depths are generally great, and navigation is practicable for

[1] Calkins, F. C., A geological reconnaissance in northern Idaho and northwestern Montana: U. S. Geol. Survey Bull. 384, p. 32, 1909.

OBJ 0005

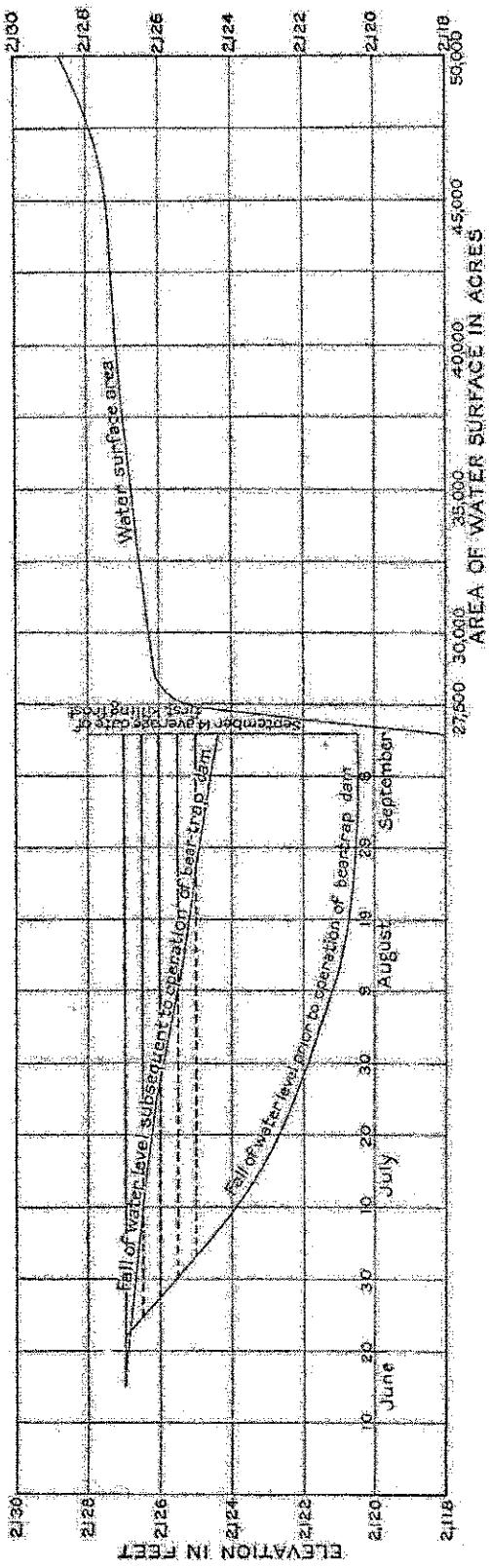


FIGURE 1.—Diagram showing fall of water level of Coeur d'Alene Lake, Idaho, during summer before and after operation of bear-trap dam, in relation to water-surface area.

several miles up its chief tributaries. Figure 1 represents the area of the lake at different levels and indicates also the elevation of the overflow lands.

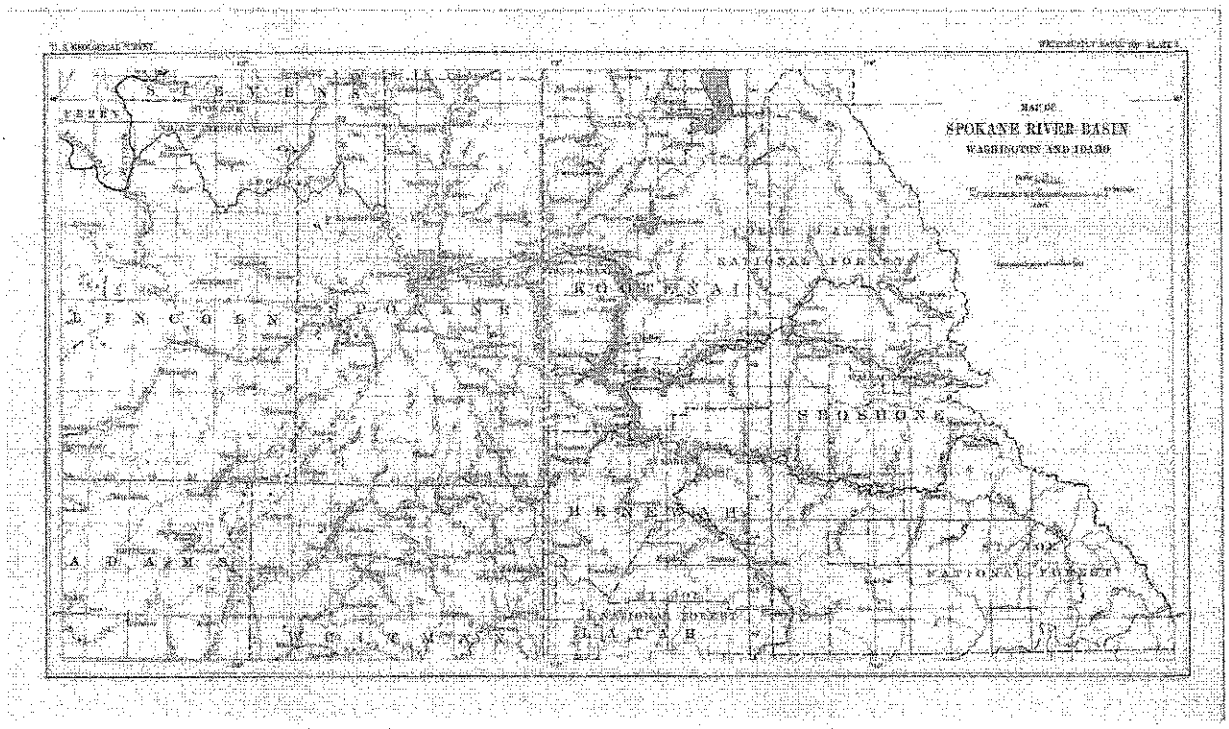
Coeur d'Alene Lake and its tributaries, Coeur d'Alene and St. Joe rivers, are far famed for their beauty. Although many have described them, the description by Capt. John Mullan is perhaps the most interesting, because he saw the region before it had been scarred by the operations of lumbermen and by navigation. Capt. Mullan was on the Coeur d'Alene in 1854 to 1862, superintending the construction of the military road called by his name, extending from Fort Walla Walla to Fort Benton. In July, 1859, he first saw the lake in the vicinity of the mouth of St. Joe River, near the present log-sorting gap. The following extract[2] from his report of 1863 is of historical as well as descriptive interest:

> The valley of the St. Joseph's is a beautiful gem, embedded in a noble range of mountains. Viewed from an elevation on a summer's day the scenery and effect is grand and picturesque—the river winding from side to side in graceful curves, while copses of willow, cottonwood, and alder fringe its banks, and silvery lakes dot here

[2] Mullan, John, Report on the construction of a military road from Fort Walla Walla to Fort Benton, p. 16, Washington, Government Printing Office, 1863.

OBJ 0006

Pg 4.1


SPOKANE RIVER BASIN
WASHINGTON AND IDAHO
STEVENS
PEND OREILLE
LINCOLN
SPOKANE
ADAMS
BENEWAH
KOOTENAI
SHOSHONE
NATIONAL FOREST

and there the green sward in which it is clothed. The spurs that form its either boundary, gently rising to an elevation of a thousand feet, are densely clad with one of the finest growths of fir and pine to be found in the mountains; and, enlivened, as it is, with here a camp of hunters and there the light bark canoe of the Indian, forms one of the most beautiful scenes it was our fortune to meet with in the Rocky Mountains. It was in this valley that, as early as 1842, the Jesuit fathers chose a site for the first of their Rocky Mountain missions. A small plateau, projecting into the valley from the north, where fine springs gushed from the slopes, on which the forest lay as yet untouched by the woodman and a rich virgin soil smiled in a beauty of profusion, cultured by the hand of nature alone, offered them a choice garden that, with slight attention, should yield abundant fruits. Here they maintained themselves for many years until, finding the overflow of the lower portion of the valley entered as an impediment both to pleasant travel and to the extension of their fields, they removed to their present location on the Coeur d'Alene Lake.

Spokane River is a little over 100 miles in length and has a fall of about 1,050 feet. For 9 miles below the outlet of the lake the river has a very flat slope. It then drops 40 feet at Post Falls, and it has a concentrated fall of over 140 feet within the city limits of Spokane. The Geological Survey has made a profile survey of Spokane River from its mouth to Chamokane Creek, a distance of 35 miles.[3]

CLIMATE.

The nearness of the Pacific Ocean, the prevailing winds, and the topography have given northern Idaho a milder climate than its latitude indicates. The following table, taken from the reports of the United States Weather Bureau, shows a summary of temperature records at St. Maries, Idaho, which is representative of the region considered.

Summary of temperature records, in degrees Fahrenheit, at St. Maries, Idaho, for 12 years.

[Altitude, 2,263 feet.]

	Jan.	Feb.	Mar.	Apr.	May.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	Annual.
Highest	52	67	72	88	92	92	102	102	96	86	73	51	102
Lowest	−16	−26	0	20	28	29	37	32	25	15	−8	−2	−26
Average	30.1	32.5	39.0	47.4	54.2	60.0	66.0	64.8	57.2	48.9	39.1	32.6	47.6

As shown by the following table the part of the year that is free from frosts is so short that for the best results crops of quick growth must be selected and must be planted as soon as the danger of frosts is over in order to insure as long a growing season as possible:

Frost data at St. Maries, Idaho.

Length of record	12 years.
Average date of last killing frost in spring	May 8.
Average date of first killing frost in autumn	September 14.
Earliest date of killing frost in autumn	August 19.
Latest date of killing frost in spring	June 8.

[3] Marshall, R. B., Profile surveys in Spokane River basin, Wash., and John Day River basin, Oreg.: U. S. Geol. Survey Water-Supply Paper 377, pls. 1-3, 1915.

OBJ 0008

The table below shows the mean monthly precipitation at St. Maries for a period of 12 years. During this period the annual precipitation varied between approximate limits of 24 and 34 inches, with a mean annual amount of 28.82 inches. The mean precipitation for June, July, and August is 3.94 inches, but in many years the amount will undoubtedly be less than this. Although the precipitation for the year is fairly plentiful, the comparatively low rainfall during the growing season makes an auxiliary supply of water advantageous, if not necessary, for the production of many varieties of crops on lands that have no other supply than rainfall. In winter the precipitation in the mountains is in the form of snow, which except for melting caused by occasional chinooks tends to accumulate until spring.

Mean monthly precipitation, in inches, at St. Maries, Idaho, for a period of 12 years.

January	3.38	August	1.03
February	2.53	September	1.46
March	2.84	October	2.32
April	1.76	November	4.41
May	2.62	December	3.56
June	1.87		
July	1.04	Annual	28.82

STREAM FLOW.

Records of stream flow have been maintained for many years on Spokane River at different points and for shorter periods on some of the tributaries of Coeur d'Alene Lake. The records of water levels of the lake have been maintained since 1903. These records are published in the water-supply papers of the United States Geological Survey and are readily available. Inasmuch as these records are voluminous, they are not inserted in this report, but some of the more important facts obtained from them are shown below:

Flow, in second-feet, of Spokane River at Spokane, Wash.

Maximum flow:	
May 31, 1894	48,000
May 17, 1917	41,700
Minimum flow:	
Prior to storage operation (Sept. 30, 1905)	1,240
Subsequent to storage operation	[1] 1,700
Mean annual flow	7,400
Estimated average inflow between Post Falls and Spokane	400

Water level, in feet, of Coeur d'Alene Lake.

Maximum elevation:	
May 31, 1894	2,137.6
May 17, 1917 (second highest)	2,135.9
Mean of annual maximum elevations, 1903–1920	2,130.9
Minimum elevation:	
Prior to storage operation	2,119.9
Subsequent to storage operation	2,120.52

[1] Varies below this, but this is a reasonable estimate of the flow that can be maintained.

OBJ 0009

The chief source of run-off is the melting snow in the mountains, and consequently the highest stages of water occur in spring. Chinook thaws cause occasional rises in winter. A good example of such a rise is that of January, 1918, when the lake reached a level of 2,135.9 feet, the same as in May, 1917, the second highest level on record. The records indicate that rises of such magnitude in winter are rare.

RESOURCES AND INDUSTRIES.

The economic importance of the streams and lakes of the country is well illustrated by Coeur d'Alene Lake. This lake has taken a prominent part in the development of the region in which it lies and is likely to take a more prominent part in the future. Its first important service was in furnishing a means of economical transportation prior to the construction of railroads. It continues to be of service in this respect, although railroads are now easily accessible from most of the region. At the present time a fleet of steamers is operated on the lake, maintaining a daily service from Coeur d'Alene to St. Maries throughout the year. In 1917 the traffic was reported to consist of 150,000 passengers and 60,000 tons of freight annually.[5] Coeur d'Alene Lake and its connections that are now navigable lie wholly within the State of Idaho, and consequently the United States Government may not in the near future exercise the authority over the lake that it has over waterways utilized in interstate navigation. A large quantity of timber near Coeur d'Alene Lake makes lumbering an important industry of the region, and the lake and its tributaries are used extensively for floating logs to the sawmills. The summer cottages about the border of the lake are a noteworthy feature of development in the region, and the natural beauty of the lake and its environs may be counted as a valuable asset.

Although the resources and industries just mentioned are more or less directly involved in the present discussion, the resources with which this report is primarily concerned are those of agriculture and of storage for the development of power. More than 20,000 acres of overflow land, the origin of which has been explained, lies along St. Joe and Coeur d'Alene rivers. Near St. Maries about 2,000 acres has been diked, drained, and put under cultivation. As would be expected of lands formed as these have been, they are very productive. A county farm bureau has been organized, and under the supervision of a county agricultural agent assigned by the State scientific tests are being made to determine the varieties of crops best adapted to the lands. These tests show that the lands are well suited to truck gardening, a type of development that would make them very valuable. Other factors that make the lands valuable are the relative

[5] Acher, A. H., Report on preliminary examination of St. Marys and St. Joe rivers, Idaho: 65th Cong., 2d sess., H. Doc. 1216, 1917.

OBJ 0010

scarcity of agricultural lands in northern Idaho; the nearness to Spokane and to the mining towns and other good markets of the mountain region; and the excellent transportation facilities, both by rail and by water.

The landowners are interested in the establishment of two drainage districts—No. 4, Benewah County, and No. 6, Kootenai County. These districts include lands below an elevation of 2,138 feet; and their areas are given by M. S. Parker, consulting engineer for the districts, as 10,056 and 15,729 acres, respectively. Additional areas of lands at higher elevations would be adapted to combination as farm units with overflow lands and probably could not be farmed so advantageously unless they were combined.

Data are not available to answer conclusively the question how the productivity of the undiked overflow lands would compare with the productivity of the diked lands. Considerable areas on Coeur d'Alene River have been covered with deposits of lead compounds washed down from the tailing dumps of the mining districts. These deposits have killed the vegetation and have left the lands in an unproductive state. The mining companies have settled the resulting damage claims privately or through condemnation proceedings or have bought the damaged lands outright. Those who are familiar with this condition believe that the lands could be restored to productivity if the deposits could be kept off the lands for two or three years.

The character of the soil of the lands nearest the mouths of the rivers apparently should receive further investigation. The process by which the lands have been built up would favor the sorting of the material deposited to a certain extent, so that for this and other reasons incident to the different conditions to which it has been subjected the soil of the lower lands is not necessarily equivalent to that of the lands farther up the rivers. Answering questions of this kind would be an essential part of such an investigation as should be made before any extensive scheme of reclamation is undertaken.

The value of the lake as a storage reservoir in connection with the development of water power arises from the fact that a dam of relatively low height will store a great amount of water and from the further fact of its strategic location at the head of a stream with great fall. Water power that can be developed from stored water as it is needed has a much greater value than water power that is limited by the fluctuations in the flow of a stream. Water power from storage enables a power company to contract to supply a larger amount of power throughout the year than it could contract to supply without storage, and the measure of the increase is not the kilowatt-hours derived from the stored water alone, but the kilowatt-hours derived from the stored water and that part of the natural flow of the stream that it supplements and that would run to waste except for the

OBJ 0011

storage. With the storage now developed by the dam at Post Falls it is probably practicable to develop more than 80,000,000 kilowatt-hours a year that would not be developed without the storage. This is nearly two-thirds of the electric power used by the Chicago, Milwaukee & St. Paul Railway in the operation of its lines over the entire Rocky Mountain and Missoula divisions, a distance of 440 miles. On the assumption that 3 pounds of coal would produce 1 kilowatt-hour, it would take 120,000 tons of coal a year to produce the power made possible by the storage now developed.

In the above calculations consideration is given not only to the water power that is now developed on Spokane River, but to the water power that it is estimated will ultimately be developed.

Obviously the extension of agricultural development conflicts with the extension of storage development. Both have merits that deserve careful consideration, and in considering them proper attention must be given to the other resources and industries that are concerned.

HISTORICAL STATEMENT.

The first white settlers in the Coeur d'Alene region were Jesuit missionaries, who established a mission a short distance above the mouth of St. Joe River. Capt. Mullan [6] gives the date of the establishment as 1842; Bancroft [7] gives it as 1841.

In 1846 the mission was moved to its present site on Coeur d'Alene River because the overflow in the lower portion of the valley near the old site was objectionable. In 1858–1862 the Mullan military road was constructed. Spokane was settled in 1872.[8] Frederick Post probably first developed water power on Spokane River some time prior to 1876, for Bancroft [9] states that in that year Post was induced by the settlers at Spokane to remove his mill from Trent to Spokane Falls by a gift of 40 acres of land and water-power privileges.

In 1879 Fort Coeur d'Alene, afterward Fort Sherman, now abandoned, was established at the outlet of the lake at the present site of Coeur d'Alene. In or about 1880 the railroad reached the region. During the eighties settlement proceeded very rapidly because of the greater accessibility of the region afforded by the railroad and because of mining discoveries and developments on the branches of Coeur d'Alene River.

Coeur d'Alene Lake and the lands surrounding it were included within the limits of the Coeur d'Alene Indian Reservation by Executive order November 8, 1873. The northern part of the reservation, including a large part of the lake, was ceded to the United States by agreement of September 7, 1889; and the lands were opened to

[6] Op. cit., p. 16.
[7] Bancroft, H. H., History of Washington, Idaho, and Montana, 1845-1889, p. 562, 1890.
[8] Idem, p. 390.
[9] Idem, p. 391.

OBJ 0012

homestead entry in accordance with the provisions of section 22 of the act of March 3, 1891 (26 Stat., 989). A further cession was made by agreement of February 7, 1894, and the lands were opened in accordance with the provisions of section 14 of the act of August 15, 1894 (28 Stat., 286). The act of June 21, 1906 (34 Stat., 325), made provision for surveying the diminished reservation, allotting lands to Indians, and opening the unallotted lands to homestead entry.

The land at Post Falls on which the present power plant is situated is owned by the Washington Water Power Co., successor to Frederick Post, who obtained it from the Indians in 1871, the Indian grant being confirmed by the act of March 3, 1891, and patent issued in 1894. Prior to 1891 dams in the three channels at Post Falls were constructed by Post, but they affected the level of the lake very little and probably not at all. New dams were completed by the Washington Water Power Co. in June or July, 1906. (See Pl. II.) The new dams (hereinafter referred to as a single dam) have a greater discharge capacity than the old dams but are constructed with control gates that allow the water to be held up to an elevation of 2,126.5 feet and gradually released as the low-water season advances. The water was first held in the summer of 1907. From July 1 to October 1 of that year the water level of the lake averaged about 3 feet higher than in the same period in 1906, owing mainly to the new control operations. The effect of the operation of the new works on the water level is discussed on page 14.

In holding the water to a higher level the Washington Water Power Co. at first relied upon its legal right to overflow lands because of its successorship to the grant of water-power privileges acquired by Post, by and with the consent of the United States, and because of the alleged inferior character of the lands. The company maintained that it had the right to overflow the lands and that the owners had no legal rights to recover damages. In Gaskill *v.* Washington Water Power Co. (17 Idaho, 128), the Supreme Court of Idaho held, on October 29, 1909, that the power company had waived the above-mentioned right as a defense and that it had invoked condemnation procedure as a means of securing the right to overflow. On March 28, 1911, the Supreme Court of Idaho held, in Washington Water Power Co. *v.* Waters (19 Idaho, 595), that the construction of a dam in Spokane River at Post Falls and the increase in storage thereby for use in the low-water season for power purposes constitute a public use within the contemplation of the State laws granting the right of eminent domain.

Soon after the lake was first used as a reservoir the company undertook surveys of the lands below an elevation of 2,128 feet. Although the company was maintaining that it had a legal right to overflow, in 1907 and 1908 it acquired many easements from settlers by

OBJ 0013

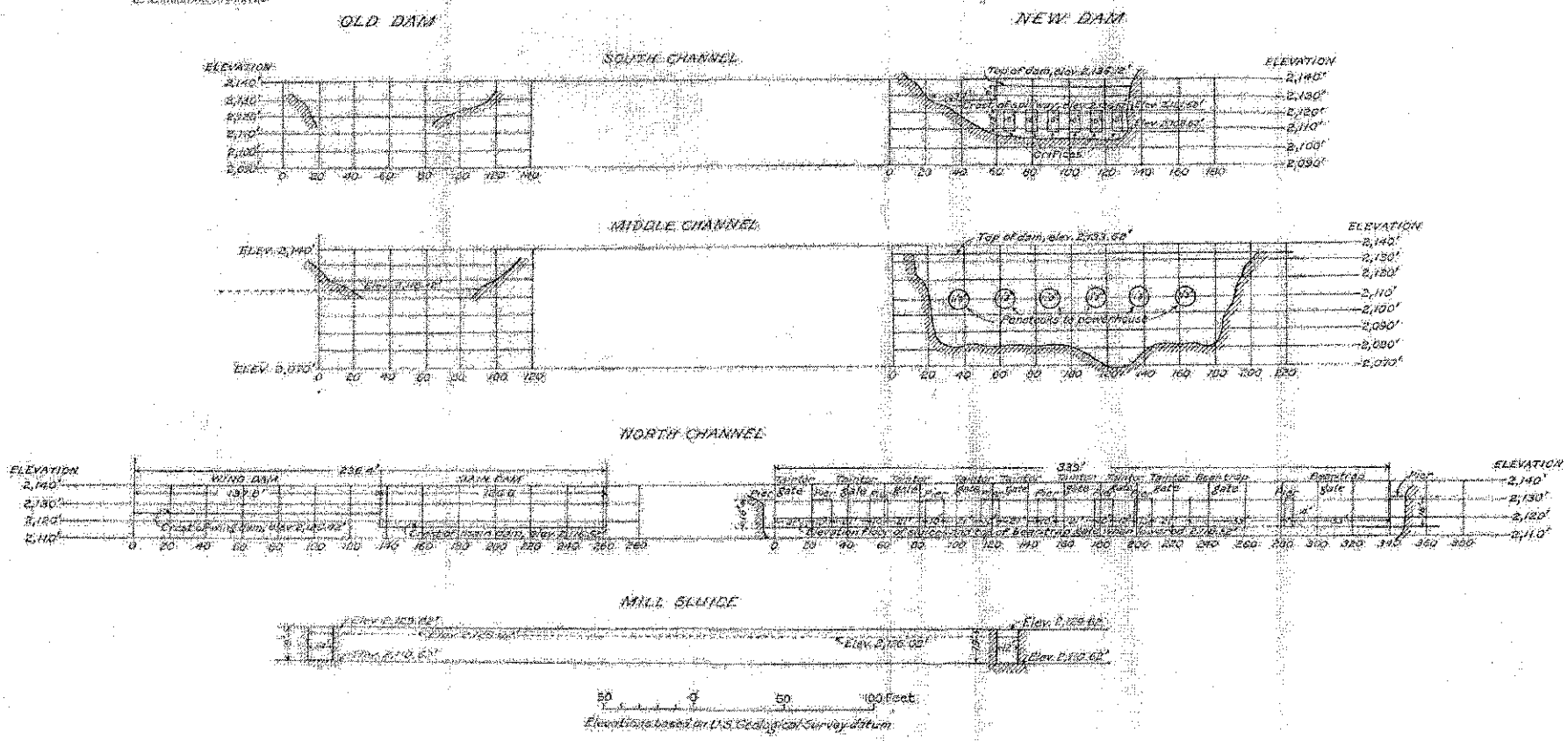


DIAGRAM SHOWING DEPTHS OF RESERVOIRS BEHIND OLD AND NEW DAMS ON SPOKANE RIVER AT POST FALLS, IDAHO.

OBJ 0014

purchase at about $20 an acre, such easements generally giving overflow rights to an elevation of 2,128 feet.

On April 27, 1908, in pursuance of representations made by the Interior Department and representatives of the Washington Water Power Co., a bill was introduced in Congress by Hon. Burton L. French authorizing the Secretary of the Interior to grant overflow easements on the affected lands in Coeur d'Alene Indian Reservation. Later, however, because a strong local sentiment was found against the passage of the bill, Congressman French took steps to have it withdrawn from further consideration, and this was done about December 20, 1908.

On January 25, 1909, the company applied to the Department of the Interior for permit to overflow the Indian lands under the act of February 15, 1901 (31 Stat., 790). The permit was granted on February 22, 1909, on condition that the company would pay $1.25 an acre for the Indian lands flooded, and such payment, amounting to $7,801.25, was duly made.

In pursuance of protests made by settlers to the Secretary of the Interior against the continuance of the permit, proceedings were initiated in April, 1909, that culminated in a hearing before the register and receiver of the United States land office at Coeur d'Alene extending from December, 1909, to April, 1910. As a result of the hearing an order of revocation was issued on July 29, 1910, but the company immediately filed a motion for review of the decision, and on April 21, 1912, the department issued an order in which the revoking order was "vacated and set aside."

As above noted, the Supreme Court of Idaho held, March 28, 1911, that the right of eminent domain might be invoked for lands on Coeur d'Alene Lake flooded by the storage operations. Exclusive of lands in the former reservation covered by the Interior Department permit (including Heyburn Park), the right to overflow to an elevation of 2,128 feet has been acquired for approximately 9,000 acres of private lands, of which about 1,000 acres was condemned. It is to be noted that the department's decision setting aside the order of revocation was not inharmonious with that of the State court in confirming the public purpose of the company's operations and its right to condemn private lands.

In pursuance of the provisions of the act of June 21, 1906, for opening the reservation lands, the proclamation of May 22, 1909 (36 Stat., 2494), was issued. This proclamation provided specifically for the opening of lands to settlement and entry, including a drawing beginning August 9, 1909, receipt of application for entry beginning April 1, 1910, and general settlement and entry beginning September 1, 1910. The Government surveys included lands down to an elevation of about 2,121 feet. Most of the lands covered by the permit were

OBJ 0015

immediately applied for, although their agricultural value, unless they were effectively drained, was questionable. The homesteading of these lands, which by governmental notice was subject to the rights of the Washington Water Power Co. under the overflow permit, was thus actually in progress during the period between the issuance and vacating of the order revoking the permit when the order was under review and when it still might have become effective from the date of issuance. Some settlers perhaps were led to believe that the rights of the power company were dead; and relying on this belief, which later proved to be mistaken, they have suffered injury and loss.

PHYSICAL CONDITIONS.

Coeur d'Alene Lake is a part of the watercourse system through which the water of Spokane River passes on its way to Columbia River and the sea. Like any watercourse its level rises and falls in general relation with increases or decreases in the flow of water to be carried. Records of the Geological Survey show that in 1904, 1905, and 1906, prior to the operation of the present Post Falls dam, the average range of stage between the high and low water season was 9.1 feet on Coeur d'Alene Lake and 7.6 feet on Spokane River at Spokane. Doubtless the range of stage is greater at some places on Spokane River than on the lake.

The lake is unlike an ordinary river channel, however, in its large amount of surface area, which introduces the factor of storage to a marked degree. If it were not for the effect of storage the outflow from the lake would always equal the inflow. The general controlling influence of a lake upon a watercourse is too well understood to require an extended explanation, and therefore this phase of the subject will be treated only briefly.

When unaffected by storage manipulations the amount of flow out of Coeur d'Alene Lake depends primarily on the stage of the lake. Other conditions being unchanged, the same amount of water will pass out at a certain stage of the lake, say 2,130 feet, in one year as in another. If the inflow to the lake becomes greater than the outflow the stage of the lake and the outflow will increase, and the outflow will maintain a definite relation to the stage. If the inflow continues constant in amount the outflow will in time become equal to the inflow, a condition that would be much more promptly attained in an ordinary river channel. A part of the inflow has been used to raise the level of the lake, so that up to this point the total volume of inflow is greater than the total volume of outflow by the amount of such storage. If the inflow decreases the order of adjustment will be reversed.

It may be considered that as the inflow increases or decreases the outflow is continually striving to become equal to it, which merely

OBJ 0016

means that the watercourse is trying to operate as much as possible like an ordinary river channel. Because of the intervention of the storage influence, however, the sudden fluctuations of the inflow are reflected in the outflow only in a greatly reduced degree. As above indicated, if the inflow remains at approximately the same amount for several days the outflow may have time to become adjusted to it. If the inflow is large for a considerable length of time the stage of the lake will tend to increase until the lake can discharge from the outlet the quantity of water that it is receiving. The direct relation between the inflow to Coeur d'Alene Lake on the one hand and the stage of the lake and the outflow on the other is a fundamental fact that it is very important to understand in the consideration of problems involving any changes in the regimen of the lake.

The general details of both the new and the old works at Post Falls are shown on Plate II. The river has three channels at this place, and originally the restrictions to the flow caused a lakelike expansion immediately above the falls at low-water stages. Capt. Mullan's report states[16] that the high-water mark at the falls was 18 feet above the level at the time of the examination made the last of August, 1859. At the time of the construction of the present works a bear-trap dam and a system of Taintor gates were installed, and the main north channel was considerably enlarged by the excavation of rock at the side, as indicated in the diagrams. As would be expected from a comparison of the details of the new and old works, the flood discharge capacity is now considerably greater than it was with the old dam.

The method of operating the dam at Post Falls as reported by representatives of the Washington Water Power Co. is as follows: When the spring rise commences all the gates at the dam are opened wide to give the maximum discharge capacity. As soon as the lake falls to an elevation of 2,126 feet or thereabout the bear-trap dam is raised and the Taintor gates are manipulated so as to maintain the water level as near 2,126.5 feet as possible. As the low-water season advances the stored water is gradually released as need requires. When the autumn rains commence a small amount of stored water is accumulated for use in the periods of low water that occasionally occur in winter.

The records of the flow of Spokane River at Spokane and of the stage of Coeur d'Alene Lake, published in the water-supply papers of the United States Geological Survey, furnish a basis for investigating the manner in which the gates at Post Falls dam have actually been operated. The outflow from Coeur d'Alene Lake under natural conditions depends primarily on the stage of the lake. Except at the lower stages the flow at Spokane may be considered as essentially the

[16] Mullan, John, op. cit., p. 110.

OBJ 0017

same as the outflow from the lake. Sufficient records have been obtained at times when it was known that manipulations of the dam were not influencing the level of the lake to indicate the normal relation between the stage of the lake and the outflow. If at any time this relation does not exist and other adequate explanation does not appear, it may be assumed that the outflow is being affected by the dam. The time at which the bear-trap dam was lowered may be satisfactorily checked merely from analyzing this relation and comparing the flow at Spokane with the level of the lake. Normally a sudden decrease in discharge at Spokane should reflect a corresponding decrease in the level of the lake, but when such a decrease is accompanied by a rise in the level of the lake or when the lake maintains a stage that is not in normal relation with the decreased flow it is generally convincing evidence that the control of the outflow from the lake by the Post Falls dam has begun. Of course the control of the flow from the lake necessarily interferes with the normal relation between the stage of the lake and the outflow.

A study of these data, which are available to anyone because they are published Government records, shows that the Washington Water Power Co. has operated the dam, except possibly in one year, in accordance with the procedure above set forth. The records indicate that in the spring of 1909, the third year of the operation of the dam, the control of the lake by the dam was begun when the lake level was about 2,128 feet. In all other years the control was apparently begun when the lake level was approximately 2,126 feet or below.

The highest discharge of Spokane River at Spokane prior to the construction of the present dam and since regular records of the level of the lake have been maintained occurred in 1904, when the lake reached a height of 2,132.8 feet. The discharge of 1904 and the actual discharges measured at Spokane when the lake reached a height of 2,132.8 feet at times since the construction of the present dam are listed in the following table:

Discharge, in second-feet, of Spokane River at Spokane at times when the level of Coeur d'Alene Lake was 2,132.8 feet.

Prior to construction of present dam:	
1904	27,900
Subsequent to construction of present dam:	
1910	26,800
1913	27,000
1916	28,200
1917 (spring)	28,800
1917–18 (winter)	28,600
Average	27,900

The differences in discharge in the different years are so small as to be insignificant. Similar comparisons made for lake levels down

OBJ 0018

to 2,128 feet show only differences that are also insignificant or that are plainly due to other factors than the effect of the new dam. The results are consistent with the conclusion that the outflow from the lake at levels above 2,128 feet has not been appreciably changed by the present Post Falls dam.

At first thought it would seem that if some stored water were being held in the lake by the dam at the beginning of a flood the lake would have less capacity for accumulation of more stored water and therefore would rise to a higher level than it would if the stored water were not being held. This is true theoretically, but considerable study of the conditions of flow that have existed shows that any increase in flood stage from this cause has been and probably will be inappreciable, even though storage should be maintained to a higher level than at present.

For example, let two cases be considered in each of which the inflow to the lake is the same from day to day, but in (1) there is no storage in the lake at the beginning of a flood and in (2) say 3 feet of stored water is being held. In (2) when there are signs that a considerable rise has begun the bear-trap dam and Taintor gates under proper methods of operation will at once be opened, and the outflow will be determined primarily by the height of the lake. Because the level of the lake in (2) is higher than in (1) the outflow will be correspondingly greater. If the outflow is greater in (2), but the assumed inflow is the same, the excess of storage of (2) over (1) will be reduced. As the excess of storage is reduced the difference in lake level between (2) and (1) will be reduced, and the excess of outflow in (2) over that in (1) will decrease correspondingly. As a result the excess of storage of (2) over (1) will be steadily reduced as time goes on, but by amounts that will be successively smaller for equal intervals of time. Reduction in the excess of storage means that the lake level in (2) will gradually approach the same height as in (1). Computations indicate that in a few days a difference in level of 3 feet at the beginning of a rise will be reduced to an amount that is practically inappreciable.

The situation may also be considered in the light of the principle previously stated that under natural conditions the outflow is always striving to adjust itself to the inflow. In any rise the outflow in trying to keep pace with the inflow would practically overcome the handicap incident to any probable amount of storage and would be practically in the same position at the peak of the rise that it would have been in if there had been no storage at the beginning.

A sudden high rise such as that in January, 1918, would be most likely to show the effect of initial storage because the outflow might have insufficient time to "catch up" with its normal position. How-

OBJ 0019

ever, just before the flood of January, 1918, the level of the lake was considerably lower than normal for the season of the year, even prior to the construction of the present dam, and therefore the maximum height of that flood was not increased because of storage.

A study of the stream-flow data indicates that in any year storage to a level of 2,124 feet on December 14, the approximate date of beginning of the flood of January, 1918, would provide sufficient

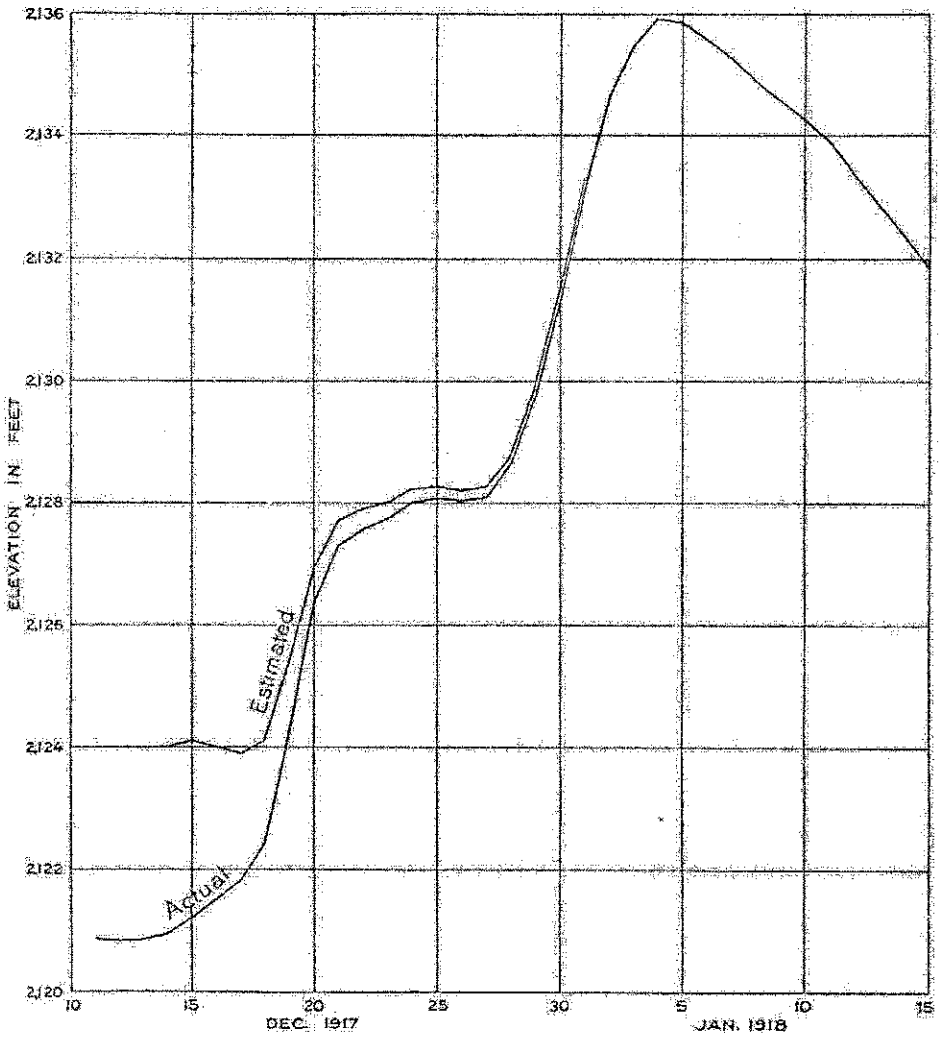


FIGURE 2.—Comparison of actual hydrograph for heights of Coeur d'Alene Lake in flood of January, 1918, and estimated hydrograph assuming storage in lake to level of 2,124 feet at beginning of flood.

storage regulation thereafter until the spring rise, even if storage were increased so as to assure a greater flow than it is now attempted to maintain. It is hardly conceivable that a greater amount of stored water need ever be held at that season under any condition. Figure 2 shows the actual hydrograph of the lake for the flood of January, 1918, and the estimated hydrograph on the assumption that the lake level at the beginning was 2,124 feet. A certain amount

OBJ 0020

of assumption was necessary in the computations on which the estimated hydrograph was based, but it was of such a nature that the result may be considered substantially accurate in showing the general tendency of adjustment. It indicates that by December 31 the difference between the estimated lake level and the actual level would be less than one-tenth of a foot.

Similarly, figure 3 shows the actual hydrograph of the flood of May, 1917, and the estimated hydrograph on the assumption that the level

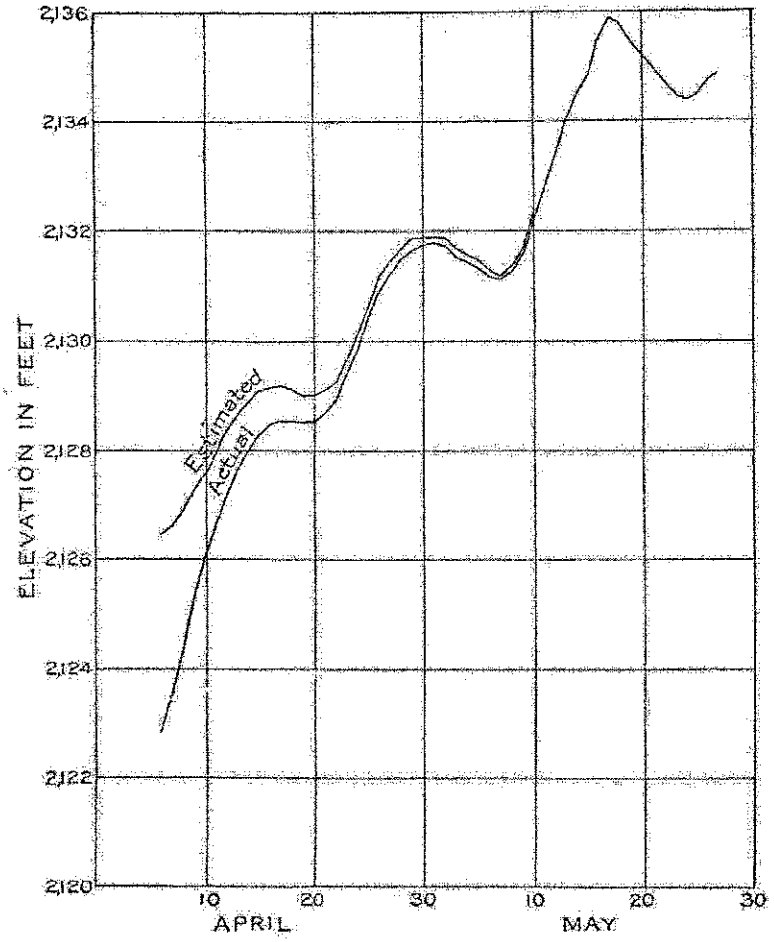


FIGURE 3.—Comparison of actual hydrograph for heights of Coeur d'Alene Lake in flood of May, 1917, and estimated hydrograph assuming storage in lake to level of 2,126.5 feet on April 6.

of the lake stood at an elevation of 2,126.5 feet on April 6. By May 10 the difference between the estimated lake level and the actual level would have been less than one-tenth of a foot. Of course, no condition is conceivable that would necessitate that amount of storage at that season, and the only purpose of the assumption is to test the principles that are being discussed.

Because of the reasons and facts above presented the conclusion is reached that the operation of the Post Falls dam has not appreciably

OBJ 0021

affected the natural level of Coeur d'Alene Lake above an elevation of 2,128 feet. For all practical purposes it may be considered that any rise of the lake above that elevation would have occurred even if there had been no control works at Post Falls.

The effect of the present dam on lake levels below 2,128 feet during the summer is graphically represented on figure 1 (p. 4), which shows the average dates on which the lake reached certain levels before and after the construction of the present dam. Records of the stage of the lake began in 1903. Of the four years for which records are available prior to the operation of the present dam—1903, 1904, 1905, and 1906—the last two were abnormal in the low stages that were reached. The years 1903 and 1904 were fairly representative in the amount of flow during the summer, and consequently the curve illustrating conditions prior to the construction of the present dam is based on the records for those two years. The conditions after the construction of the dam are based upon averages for the years 1907 to 1916, inclusive. These are all published records of the United States Geological Survey.

The average date of the first killing frost at St. Maries for a period of 12 years was September 14. (See p. 5.) This is a fair index of the end of the growing season for crops in the region that is being considered. Figure 1 (p. 4) is designed to show the length of time, prior to September 14, that lands at a certain elevation and under average conditions have been above the water level of the lake, before and after the construction of the present dam.

For convenience of comparison the lake areas at different elevations are also represented on figure 1. These areas were determined by J. C. Stevens, consulting engineer for the Washington Water Power Co., from all surveys and data in the possession of the company. The figures have been checked sufficiently by the writer to show that they are in reasonably close agreement with available information. Although more detailed knowledge may change these figures, such changes probably would not modify the general conclusions reached.

Unless conditions are favorable during July for crop growth the season will be too short to mature a crop of any kind. On figure 4 is a comparison of the elevations of the water surface of Coeur d'Alene Lake on July 1, 15, and 31, before and after the construction of the bear-trap dam, and the land areas overflowed at different elevations above 2,120 feet, the extreme lower-water level of the lake prior to the construction of the present dam. The areas shown include an undetermined area of water surface, such as lakes and swamps that are cut off from the main body of the lake as the level falls. (See p. 3.) The proportion of such undetermined area is so small that in the absence of more accurate data these areas may be considered

OBJ 0022

reasonably indicative of the relative distribution of land areas at the different elevations.

The effect of holding the water of the lake at a certain level is not confined to the lands below that level. As the lake falls the lands that are exposed are left saturated with water. In order to drain off from the soil, the water must overcome a certain amount of resistance from the soil particles and therefore must have some fall to create a flow. Consequently, the water table or the surface of the saturated soil will slope upward from the water surface of the lake. It may be observed from the diagrams on figure 4 that throughout July under average conditions the water surface of the lake is within 1 to 2 feet of most of the bottom lands near the lake. Although evaporation helps to dry the soil, conditions are very favorable for keeping the main part of the bottom lands well saturated with water throughout July. As these are average conditions the main part of the overflow land is not well suited to the production of wild hay or any other crops unless it is adequately drained.

Before the lake was used for storage the water surface during July under average conditions ranged from about 2 to 5 feet below the main part of the lands. This would make considerable difference in the facility with which the lands could be drained. Comparisons similar to those on

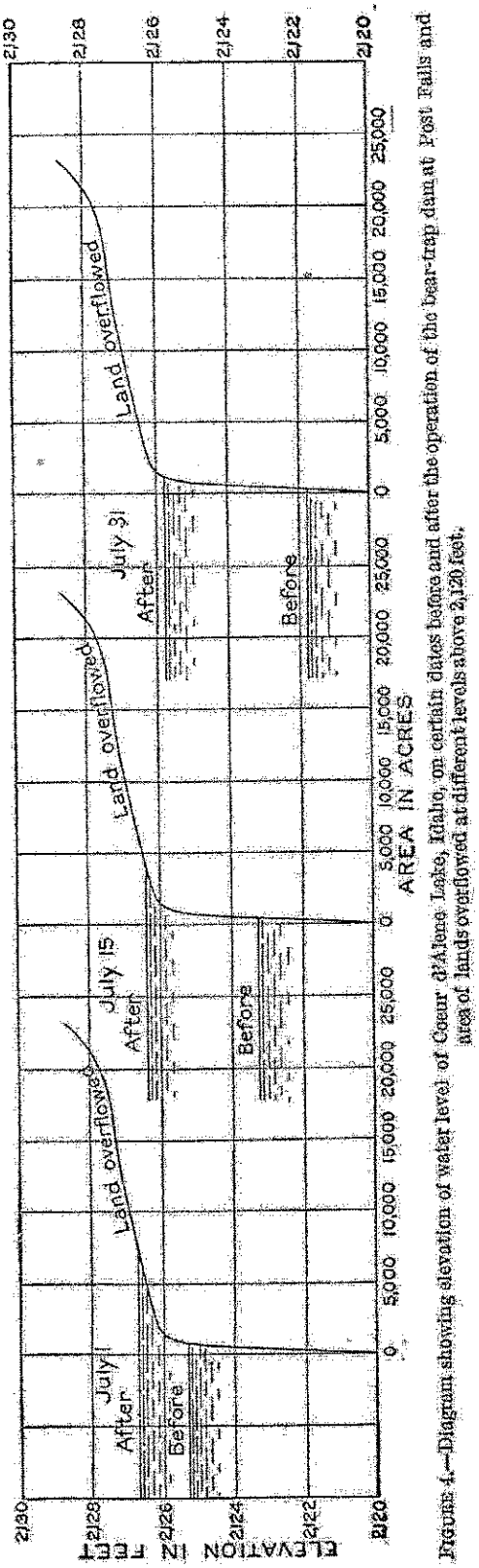


FIGURE 4.—Diagram showing elevation of water level of Coeur d'Alene Lake, Idaho, on certain dates before and after the operation of the bear-trap dam at Post Falls and area of lands overflowed at different levels above 2,120 feet.

OBJ 0023

figure 4 can readily be made for later dates in the season by reference to the data on figure 1.

The foregoing deductions point to the conclusion that the use of the lake for storage has introduced factors that would cause a serious water-logging of the overflow lands. The Washington Water Power Co. maintains that this effect does not extend above an elevation of 2,128 feet, to which it has flowage rights under the permit. The writer does not undertake to say whether the effect extends above that elevation. However, unless the water-logged lands were drained and diked to protect them against the spring overflow, they would not be valuable for agriculture because they could not be worked before the later part of June in average years. Although their condition would be favorable to the production of wild hay, and in seasons when the lake level fell early enough crops such as oats or potatoes might be raised, the value of the lands for agriculture of this type was very materially reduced by the use of the lake for storage. The truth of this conclusion was supported very strongly by the statements of the settlers.

IMPROVEMENT MEASURES.

FUNDAMENTAL PRINCIPLES.

Various proposals have been made for the modification of the natural conditions of Coeur d'Alene Lake and the overflow lands in order to secure a more extensive utilization of the resources. Storage has already been employed to a considerable extent for the development of water power, and a number of diking projects have been undertaken. It is a natural tendency for the different parties to consider their own interests most important and to desire to change conditions to suit themselves, perhaps with inadequate regard to the other resources involved and to the interest of the public. It is in the public interest that the resources of Coeur d'Alene Lake should be so developed as to afford the maximum possible benefit to all. In so far as there is conflict between the different uses, the use affording less benefit should give way to the use affording greater benefit. The resources involved are of great value, and the situation demands that any plan of improvement undertaken should be approved by a proper governmental agency as in accord with best public policy.

The United States is intimately concerned in any changes on the lake because it is a riparian owner upon it and because of the interstate aspects involved in the utilization of storage for the development of water power. The State of Idaho is interested because it claims title to the bed of the lake below the natural high-water mark [11]

[11] Calhoun v. Price (26 Idaho, 745).

OBJ 0024

and for various other reasons incident to the fact that the lake is within its jurisdiction.

The possibilities for improvement on Coeur d'Alene Lake should be studied in a comprehensive way, and a plan should be outlined that will assure the ultimate realization of the maximum possible benefit and enjoyment. Thereafter all improvements made should conform to this plan. Such a plan to be most successful would require the cooperation of all interests, including governmental agencies as well as the individuals and the organizations concerned. Considerable study and thought have been given to available information dealing with the subject, and it is the attempt here to give a composite picture of this information in so far as it bears upon the determination of a proper plan and policy of development.

IMPROVEMENT OF THE OUTLET OF COEUR D'ALENE LAKE.

For many years it has been recognized that the alluvial bottoms of St. Joe and Coeur d'Alene rivers would be benefited for agriculture if the outlet of Coeur d'Alene Lake could be improved in such manner as to relieve the lands from the damage of overflow. Capt. John Mullan was the first person known to consider this problem. In his report on the construction of the military road through this region [12] he states:

> The overflow of the Coeur d'Alene and St. Joseph rivers and the means of preventing it is a subject to which I have given much attention; and having made surveys, both in high and low water, I have been enabled to collect many facts and data, which I will treat of at greater length at a future point of my report.

Elsewhere in his report [13] in discussing the agricultural lands along the line of the military road he states:

> One of the largest bodies of good land is in the valleys of the St. Joseph and Coeur d'Alene, and if these valleys are once drained, a body of 40,000 acres of the finest soil in the world will be reclaimed—soil 6 and 8 feet deep and as black as coal. This overflow can be prevented by widening the natural outlet and making an artificial one alongside of it; an appropriation of $5,000 will meet this difficulty, and the ends to which it looks are well worthy the experiment. Rock blasting is the only method of accomplishing it and should be done during a low stage of water. The overflow is alone occasioned in the highest stages of water, when the mouth of the outlet of the lake is not capacious enough to discharge the volume of water sent into it by its feeders.

Capt. Mullan's estimate of the cost of improvement was apparently based on erroneous knowledge of the conditions at the outlet. Theodore Kolecki, a topographer of his party, who was sent (Aug. 27 and 28, 1859) to reconnoiter Post Falls, then called Little Falls of Spokane River, reported that he estimated "the average fall from the lake to the falls, a distance of 8 miles, to be 20 feet per mile." [14] As a

[12] Mullan, John, op. cit., p. 16.
[13] Idem, p. 42.
[14] Idem, p. 110.

OBJ 0025

matter of fact the fall at low water under natural conditions is little more than 1 foot to the mile. The assumption that the improvement work would consist mainly of rock blasting was also erroneous, for present information indicates that the material below the outlet is gravel for several miles. Nevertheless Capt. Mullan's proposal possesses historical interest.

The scheme of lowering the outlet has been considered at different times by groups of settlers and others. In 1905 T. A. Noble, engineer of the United States Reclamation Service, proposed a scheme that involved, among other things, the enlargement of the channel of Spokane River from the lake to Post Falls so as to make it possible to lower the low-water level of the lake 16 feet. The cost of deepening and widening the channel was estimated at $3,000,000, but the writer has been unable to find data that would warrant placing much reliance on the accuracy of this estimate.

It has been in the interest of the Washington Water Power Co. to make studies of the feasibility of lowering the outlet as a means of developing storage capacity, and since about 1912, when such studies were started, a considerable amount of information has been collected by the company. It is understood that the conclusions reached from these investigations induced officials of the company to express themselves in 1915 as favorable to undertaking the dredging of the channel of Spokane River so as to reduce the low-water level of the lake about 4 feet, provided that the owners of property on the lake would secure without cost to the power company the rights necessary to complete the project. The proposal was not agreeable to the settlers.

Drainage districts for the reclamation of the flooded lands have been in process of organization within the last three or four years. In 1918 a project was planned for enlarging the channel of Spokane River for about 12,000 feet below the outlet by widening in places and by the removal of snags and other obstructions so as to increase the flow at flood stages. At the time of writing this report it is understood to be the intention of the drainage districts to carry out this work.

The outlet of Coeur d'Alene Lake can be modified for two purposes—(1) to relieve the damage to lands and property located thereon caused by high water and overflow, and (2) to develop storage for use in connection with the development of water power. The settlers are interested primarily in the first purpose and the water-power interests in the second. To a large extent an improvement for the first purpose would require certain excavation that would be necessary for the second purpose, and as each party would be benefited it does not seem equitable that the work should be paid for solely by one party. Any improvement should be made with a view to attaining both purposes as far as possible. The circumstances of the situation

OBJ 0026

appear to point definitely to the desirability of joint participation in a scheme of improvement which will obtain the greatest practicable benefit to each party and toward the cost of which each party should contribute in proportion to its benefit. Such a procedure would secure to each party the maximum benefit to itself for a minimum expenditure.

Although the Washington Water Power Co. has collected a considerable amount of information regarding the conditions in Spokane River below the outlet, this information is insufficient for a comprehensive consideration of a dredging project. Thoroughly realizing this fact, the writer has studied the available data with a view to determining what they indicate as to the general feasibility of such a project. It has been assumed that any improvement would be made with a purpose both to obtain relief from overflow and to increase storage.

The problem assumed the improvement of the channel so as to carry the maximum outflow of the spring flood of 1917 at an elevation of the lake 2 feet lower than that which the lake then reached. Then the channel carried approximately 41,500 second-feet at an elevation of 2,135.9 feet, and under the assumed condition it was to carry the same flow at an elevation of 2,133.9 feet. The cross sections of the river used in the studies and the places at which they were obtained are shown on Plate III. Although the individual cross sections are no doubt reasonably accurate, the places at which they were made are so far apart that considerable inaccuracy is involved in assuming that they properly represent the character of the channel between the cross sections.

The slope of the stream between the lake and the Post Falls dam for the spring flood of 1917 is also shown on Plate III. It was determined chiefly from the maximum heights of this flood as obtained by employees of the Washington Water Power Co. Some use was made of known heights of the flood of the spring of 1910 and of a general knowledge of conditions. The result probably has some inaccuracies, but it is perhaps sufficiently reliable to warrant certain general conclusions.

No borings have been made, but from more or less casual observation the channel of Spokane River for about 5 miles below the outlet of the lake appears to be in gravel of various grades, which would offer no special difficulty to dredging. The stream bed, however, contains sunken logs that might add appreciably to the cost of dredging. Below this point there is a stretch where the excavation of the channel would be more difficult and consequently more expensive because of boulders, steeper banks, and the possibility that rock might be encountered. These conditions constitute an important factor in determining how far downstream dredging of the channel

OBJ 0027

would be carried under any project of improvement. The farther downstream that dredging could be carried in order to lower the water level of the lake 2 feet the greater would be the slope secured, and consequently the smaller the size of the channel that it would be necessary to dredge out.[15] Nevertheless, if the excavation were carried through the section of more difficult excavation it might cost more than a larger channel in the less difficult material.

To estimate the volume of excavation it is necessary to assume how far down the river the improvement will extend. The elevation of the water surface for the flood of 1917 at this limiting point subtracted from 2,133.9 feet, the assumed elevation at the lake, will give the amount of fall available in the improved channel. This fall and the distance from the outlet of the lake to the assumed point determine the slope of the channel. At each determined cross section may be calculated by means of engineering formulas a new cross section of the channel that would carry the 41,500 second-feet with the water surface at an elevation established by the slope thus determined. The new sections should be so planned as to require a minimum amount of excavation but at the same time should be fairly uniform. The enlargement found necessary at the different cross sections and the distance between them constitute the factors for the determination in a very rough way of the volumes of excavation that would be necessary. It was concluded that the assumed improvement could be made with the excavation of 2,500,000 to 3,000,000 cubic yards of material that would probably be very largely gravel. On the assumption that the cost of dredging would be 50 cents a cubic yard, it is estimated that the cost of excavation would be approximately $1,500,000. To obtain the total cost of the project, including damages and many other items, this amount would have to be increased considerably.

The proposed improvement would lower the heights of flood approximately 2 feet and would probably increase the maximum flood flow of Spokane River, and the ability to draw the lake to a lower level would afford additional storage capacity. The reduction of flood heights would lower the height to which dikes would have to be built and would therefore be a benefit to the landowners of the diking districts. This would amount to a saving in dike construction equivalent to 2 feet on the bottom of all dikes. Whether the length of the dikes that will ultimately be built is 50 miles or 100 miles, it is evident that this saving would be large. The increase in storage capacity would of course be a great benefit to the development of water power on Spokane River.

[15] For example, if the slope of a channel is twice as great as the slope of another channel, its cross-sectional area needs to be only about one-fourth as great to carry the same amount of water.

OBJ 0028

Pg 24.1

OBJ 0029

An increase in the maximum flood flow would cause some additional damage at Spokane, although this would hardly be appreciable for the relatively small increase in flood flow that would be involved in the example that is being considered. This possible additional damage, however, is a factor that should be thoroughly investigated prior to undertaking any improvement. Considerable damage is done by the flooding of buildings and basements in Spokane at times of the highest floods. It is understood, however, that the most critical features are the Olive Street concrete-arch bridge and the city's dam and pump works. Although the high water in 1917 was lower than that in 1894, which occurred prior to the construction of the dam at Post Falls, it was seriously questioned by officials of the city engineer's office whether a higher flood than that in 1917 would not be disastrous. The cost of proper protection would be determinable and should be duly considered in connection with any improvement project. The city would be a beneficiary from the increase in storage, because the increased stream flow in low-water season would be available for the operation of the pumps of its water-supply system.

There might also be possible damage to riparian owners and navigation interests on the lake. The writer believes that a lowering of 2 or 3 feet, such as would probably be involved in the scheme suggested, would interfere with navigation by necessitating the extention of docks and perhaps some dredging at a few critical places. The damage to riparian owners would apparently not be very serious, but substantial payment for it would probably have to be made to them.

The assumed improvement may be feasible. It is to be emphasized, however, that the limitation to a lowering of 2 feet has no special significance except as a concrete basis for considering the problem. The most definite conclusion that can properly be drawn is that a project for lowering the outlet of Coeur d'Alene Lake, if participated in jointly by landowners and storage interests, promises sufficient benefits to warrant a detailed investigation. Apparently the cost of even a 2-foot lowering would be large, and the increase in cost as the channel was deepened more would be relatively greater than the corresponding increase in benefits. Therefore, a deepening of more than a very few feet would probably not be feasible.

Less extensive schemes of improvement of the outlet may be practicable. It might be very beneficial if the three bridges immediately below the outlet were so reconstructed as to present less obstruction to the current. These bridges have comparatively short clear spans, the rest consisting of piles so closely spaced that they tend to catch driftwood and snags. It is reported that a fall of as much as 1 foot has been observed at one of these bridges. An obstruction of the current

OBJ 0030

to this extent probably would not continue very long, but the aggregate effect of the three bridges may amount to nearly half a foot, and this with the possibility of an increase by snags damming up from time to time presents a very undesirable condition. A modification of some of the log booms a short distance below the outlet of the channel and the removal of some snags and sunken logs, all with the purpose of decreasing the obstruction to flow immediately below the outlet, are improvement measures that might reduce the heights of maximum floods sufficiently to warrant their cost. More extensive improvements, and perhaps even these, would best await comprehensive study of the entire problem.

DIKING AND DRAINAGE.

Diking is the only effective means of preventing the flooding of the overflow lands during periods of high water. The height of floods may be reduced by enlargement of the outlet, but not sufficiently to prevent the floods from being an obstacle to the highest agricultural development of the lands. Relief from water-logging of the lands can be obtained only by proper drainage, and the lands must be diked before they can be drained successfully. Making the fullest practicable use of the lake as a reservoir need not increase the flood heights of the lake (see p. 16) and therefore would not make it necessary to construct higher dikes. It might increase the necessity for draining the diked lands, for if the water in the lake were held at a higher level in summer the water table of the diked lands would tend to maintain a correspondingly higher level. This would mean that more water would have to be pumped from the diked areas.

The rainfall during the growing season is rather low, so that for best results intensive agricultural operations, such as truck farming, require some other source of water supply.

The ability to control the elevation of the water table by a diking and drainage system might furnish a practicable means of subirrigation. If the level of the lake were lowered so much as to make it impossible to control the water table the growth of intensive crops might suffer for lack of water. This phase of the matter should at least be given consideration in the study of any scheme that involves lowering the level of the lake during the growing season, for the ability to maintain a relatively high water table may be an advantage rather than a disadvantage to the diked lands.

The determination of the height to which dikes should be built requires consideration of the probable maximum flood height. This flood height is not that which has occurred in the past but that which will occur in the future. The possibility of a reduction in flood heights by dredging out the outlet has already been considered. However, even if flood heights had been reduced in this manner, thereafter, as areas along Coeur d'Alene and St. Joe rivers that are

OBJ 0031

normally subject to overflow were diked, there would be a tendency for lake heights to increase and for backwater to develop on the rivers owing to restrictions of their overflow channels.

If it could be conceived that Coeur d'Alene Lake were limited to the size of an ordinary river channel in the flood of May, 1917, thereby greatly reducing the effect of storage, then it would follow that the outflow would nearly have equaled the inflow, and the stage of water level at the outlet would probably have been 3 or 4 feet higher than it was. Any reduction in the storage on the overflow lands would similarly increase the water-stage level at the outlet, though in a less degree. If 15,000 acres had been diked in that flood, the lake level would have been increased about 1 foot. If there had been 15,000 acres diked in the flood of January, 1918, the lake level would have been increased about 1½ feet. The increase in the height in the flood of January, 1918, would be greater than that in the flood of May, 1917, because the inflow was greater, causing a more rapid rise and making storage of relatively greater importance.

If the flood flow were restricted to narrower channels by dikes, the current would require a greater velocity in order to carry the water through. This would mean that the streams would have a greater fall and that backwater would be caused at points upstream. If there were extensive diking of lands along the river below St. Maries, for example, the flood heights at St. Maries would be increased not only because of the higher lake level due to decrease in storage capacity but because of backwater caused by the restricted channel. The combined increase in flood heights at St. Maries from these two factors might be as much as 4 or 5 feet. If the flood heights were increased 4 feet owing to the construction of dikes and reduced 2 feet by improvements of the channel at the outlet, there would be a net increase in flood heights at St. Maries of 2 feet. Obviously this is a very important matter. It emphasizes the desirability of an exhaustive study of the problem in order that dikes may be constructed to safe heights and that the dike systems may be so designed as to leave adequate capacity for flood flow. Construction of dikes without such study invites disaster. Many dikes in the region have failed already and have caused serious loss, chiefly because of inadequate engineering.

If flood levels of the lake are increased by diking, the flood discharge at Spokane will also be increased, and the consequent damage should be considered thoroughly.

DEVELOPMENT OF STORAGE.

The use of Coeur d'Alene Lake as a storage basin in connection with the development of water power has been decided by the courts to be a public use for which necessary private lands may be con-

OBJ 0032

demned. The Washington Water Power Co. has apparently settled practically all claims arising from the overflow of lands below an elevation of 2,128 feet that are not covered by the permit. Such lands constitute about 65 per cent and the lands under permit constitute about 35 per cent of the lands below that elevation for which overflow rights have been obtained. The use of storage as practiced by the company has been detrimental to a large part of the overflow lands, because it has raised the water table so high as to interfere seriously with the production of crops unless the lands are diked and drained. If the lands are diked and drained the raising of the water table can cause little injury and, as previously suggested, may even be of some advantage in dry seasons. Inasmuch as the highest development of the lands for agriculture requires that they be diked and drained, the present storage operations can not be very detrimental to lands that are of sufficient value to warrant reclamation in that manner. Neither would lands that are diked and drained be seriously damaged if storage were maintained to a higher level than at present, provided that flood heights were not increased, and the flood heights would not be increased appreciably if the control gates were properly operated. The importance of storage to development of water power is discussed on pages 8–9. It seems feasible to increase storage on Coeur d'Alene Lake to a considerable extent. At least prospects are sufficiently promising to warrant a careful investigation.

The possibilities of increasing the storage capacity by lowering the outlet and thereby making it possible to lower the level of the lake are set forth on pages 21–26.

COMBINED STORAGE AND AGRICULTURAL DEVELOPMENT.

In the preceding discussion it has been shown that holding the water of the lake at a higher level for purposes of storage will not cause serious injury to lands that are diked and drained. Consequently, further development of storage is not incompatible with the agricultural development of diked lands, but the undiked lands will be practically ruined for agricultural use if storage is materially increased by holding the water at a higher level. For such lands as it was feasible to dike there would be the alternative of diking so that they could be used agriculturally. Before diking the individual owner would be inclined to inquire how much it would cost to dike the lands, how much they would be worth when diked, and how much they would bring if sold to be used as a part of the storage reservoir. If the difference between the cost of diking and the value when diked was no greater than the price that the lands would bring for storage without diking the owner would have no incentive to dike them but would probably sell them.

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The general public has a broader interest in the matter than the individual owner, and therefore consideration should be given to the problem from its point of view.

In the West, as a whole, agricultural possibilities are limited by other factors than the quantity or quality of available land. Because of the general aridity of the climate the primary limiting factor is the water supply that may be used at a reasonable cost for irrigation. Because of the economic principle that the agricultural industry is the foundation of all other industries, there is a disposition in many Western States to consider the use of water for irrigation as higher than its use for the development of power.

By somewhat similar reasoning it might appear that the agricultural use of the overflow lands should take precedence over their use as a reservoir in connection with the development of water power. Such a principle has some merit, but it should not be followed without regard to the circumstances of the case. For example, assume an acre of land on which 3 feet of water may be held for storage. This amount of water in its fall of more than 1,000 feet from the lake to Columbia River during the summer could generate enough power to raise water by pumping at some other place sufficient to irrigate and reclaim 3 or 4 acres of land that otherwise would not be reclaimed. In which is the public the more interested, the reclamation of 1 acre of overflow lands or that of 3 or 4 acres of desert lands? Of course, the identical power generated from this water might not be utilized for irrigation pumping, but it would add to the power supply of the region, and in so far as a favorable power supply is beneficial to the development of irrigation pumping it would be beneficial to the development of agriculture. It is evident that it is not necessarily in the public interest that agricultural use of the overflow lands should take precedence over their use for storage.

The writer believes that the public and the individual owner would follow the same line of inquiry for determining the lands that should be used for agriculture and the lands that should be used for a reservoir. The determination should rest, first, on the feasibility of diking and, second, if it is feasible, on the cost of diking, the value of the lands when diked, and the value of the lands for storage. If these factors can be reliably determined by impartial investigation, no good reason appears why all parties concerned should not consent to abide by the results.

Assume merely for illustration that no lands are diked; that storage is carried to a considerably higher level than at present, perhaps to 2,132 feet; and furthermore that available storage is developed to the economic limit by lowering the outlet of the lake. The low-water period for the summer and fall of 1919 and the winter of 1920 is probably the most critical with reference to power devel-

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opment on Spokane River that has occurred since records of flow have been kept. In this period storage of the extent assumed would have been used for regulation of flow about 250 days. Now if an area having an average elevation of 2,130 feet were diked off from the reservoir, it is evident that the reduction in the amount of storage would be about 2 acre-feet per acre of the area. Such a reduction would not appreciably shorten the period through which storage regulation could be maintained. With allowance for loss by evaporation incident to storage, the reduction in the regulated flow over 250 days would be about 1 second-foot for each 300 acres of the assumed area. Although data are insufficient for a close determination it is estimated that such a supply, even if only 1 second-foot, would be worth several thousand dollars in the power development that it would make possible at the water-power sites, developed and undeveloped, on Spokane River. This suggests a line of reasoning by which the value of lands for storage may be determined for comparison with their value for agriculture.

Investigation would probably show that a considerable part of the lands could be more profitably diked than made a part of the reservoir site, because of a fortunate combination of high value when diked and a comparatively low cost of diking, although their value as a part of the site might be rather high. Although more land might be acquired for storage by proceedings under the right of eminent domain, the merits of a proper adjustment between agriculture and storage might not be adequately considered in such proceedings. The public interest will best be served by developing both agriculture and storage to the greatest possible extent and by deciding conflicts between the two uses on their respective merits.

FUTURE PROGRAM.

Most of the bad feeling and dispute between the owners of overflow lands on Coeur d'Alene Lake and the Washington Water Power Co. has been a natural outgrowth of the conflicting interests. The landowners have not obtained a broad knowledge of all the circumstances of the situation, but the power company has collected a considerable amount of data and has had means to present effectively the features favorable to its side of the case. Many of the company's data have become a matter of public record in the various suits and hearings that have been held and have become available to the settlers in other ways. The circumstances, however, have been essentially such that the landowners have lacked the organization and other facilities for dealing advantageously with the company. The best hope for future progress in the development of the resources of Coeur d'Alene Lake and the overflowed lands lies in founding operations on the grounds that the different interests have in common. It may be

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assumed that both the agricultural and power interests recognize that the resources should be so developed as to realize the maximum amount of benefit from them all, and that individual rights may need to be subordinated to this principle—although, of course, not without due compensation for any resulting damage. It may also be assumed that all parties, including the State and National governments, are interested in the solution of the problem upon this principle. So far insufficient studies have been made, and, as has been emphasized in this report, what is needed most is a comprehensive investigation in order that the problem of development may be correctly solved. There are important questions of economics and engineering that should be thoroughly considered. No reason appears why the cost should be very large, and the advantages gained would many times repay the cost.

It would be very appropriate to the circumstances if the investigation were undertaken by Government agencies under a cooperative agreement, perhaps especially sanctioned by an act of Congress, and when a plan of development had been decided upon, all interested parties might very fittingly cooperate to carry it out. In any work that is undertaken the principle that the different parties should contribute to the cost in proportion to their benefits should be followed as nearly as practicable.

The interest of the public in the operation of the Taintor gates and the bear-trap dam at Post Falls might desirably be recognized in a more direct way in the future than in the past. The United States has a right to require that these works shall interfere as little as possible, consistently with effective operation, with the use and development of the lands by the settlers. The power company should hold the water level of the lake no higher than is necessary to insure adequate storage for proper regulation. The water supply can be predicted to a certain extent, and it may be that when conditions were favorable for a good supply the power company could safely draw the lake to a lower level than when a poor supply was expected, thereby benefiting the lands. Even though it is assumed that the power company has done all to this end that might be reasonably expected, which it has, in the writer's opinion, and that this fact might have been ascertained at any time by properly authorized agencies, the settlers who are most intimately concerned have had no easy means of assurance that such was the case, and the situation has encouraged misunderstanding. It seems appropriate for the Government to interest itself in cooperating with the power company in measures toward holding the level of the lake as low as possible with proper regard to storage, in order that the settlers may have ample assurance that the water is not being held unnecessarily high and that their interests are being properly guarded.

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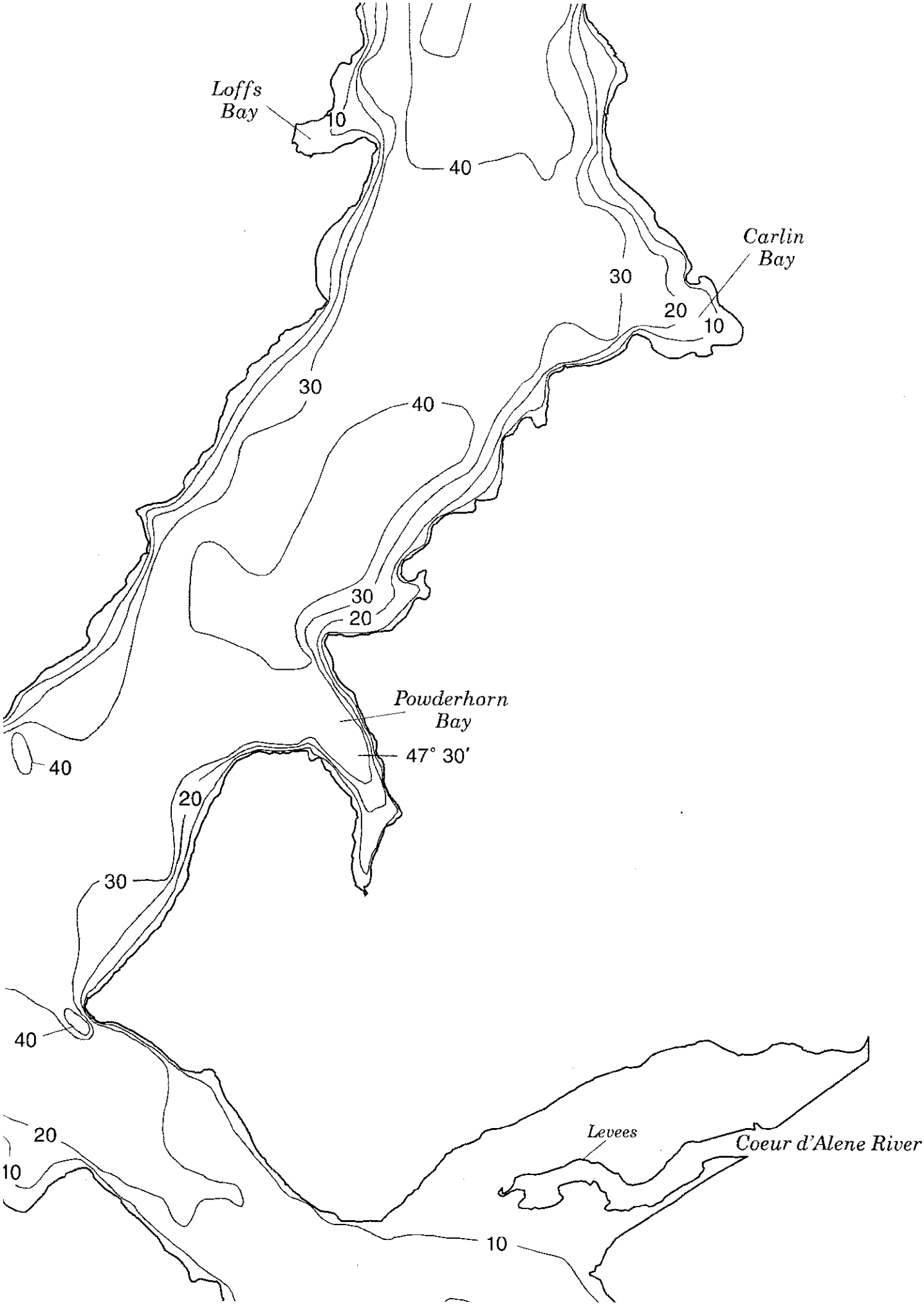
EXHIBIT E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Levees
Coeur d'Alene River
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