

Willis D. and Betty G. DeVeny
dba Shingle Creek LLC

Dana L. Hofstetter, ISB No. 3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, ID 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774

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DEC 18 2006

DEPARTMENT OF
WATER RESOURCES

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

	)	Consolidated Subcase 03-10022
	)	(Nez Perce Instream Flow Claims);
In Re SRBA	)	
	)	Consolidated Subcase 67-13701
Case No. 39576	)	(Nez Perce Springs or Fountains Claims);
	)	
	)	Subcases 71-10886 <i>et. al</i>
	)	(State Minimum Stream Flow Claims);
	)	
	)	Consolidated Subcase 92-80
	)	(Nez Perce Multiple Use Claims).
	)	
	)	REPLY SUPPORTING
	)	OBJECTION TO PROPOSED
	)	CONSENT DECREE

In the opening paragraph of their Objection to Proposed Consent Decree and Memorandum in Support, the DeVenys explicitly and unequivocally establish that their objection is to the proposed springs and fountains Partial Decrees, not to the underlying Settlement Agreement: "The DeVenys object to the proposed 'springs or fountains' *Partial Decrees* which are Attachment 5 to the proposed Consent Decree on the basis that they are inconsistent with the underlying Settlement Agreement (Mediator's Term Sheet) as well as

applicable treaty law. Thus, **the DeVenys are not objecting to the Settlement Agreement itself, but, rather, to the proposed springs or fountains *Partial Decrees*** in the proposed Consent Decree which are not consistent with the Settlement Agreement terms or applicable treaty law.” *Objection to Proposed Consent Decree and Memorandum in Support* at 1-2 (emphasis added). Although the DeVenys stated their position unambiguously from the outset, the United States, Nez Perce Tribe and State of Idaho in their *Joint Response of United States, Nez Perce Tribe and State of Idaho to Objections to Settlement Agreement and Consent Decree* (“Joint Response”) repeatedly refer to the DeVenys’ objections to the Settlement Agreement. Indeed, the very title of their Joint Response asserts that the DeVenys object to the Settlement Agreement. One can only wonder how such a clear statement of the DeVenys’ fundamental position could be so misconstrued.

Further, there are other very unusual aspects to the Joint Response: the assertion (in footnote 17) that the factual and legal authorities cited in the Joint Response are not to “be construed as endorsement of the cited material by any of the signatory parties;” the assertion that the underlying law applicable to the proposed Partial Decrees essentially should be disregarded; the reference (and, indeed, wholesale attachment) of an Oregon Administrative Law Judge decision in the Klamath Basin Adjudication as a basis for the SRBA Court to overlook United States Supreme Court precedent (*Washington v. Washington State Commercial Fishing Vessel et al.*, 443 U.S. 658 (1979)) on a matter of federal reserved right law.

This Reply will serve to reiterate and confirm that the DeVenys do not challenge the underlying Settlement Agreement which has been approved by Congress, the Idaho Legislature and the Nez Perce Tribal Council. Rather, the DeVenys assert that the proposed springs or fountains Partial Decrees are not legally consistent with applicable law and the operative language in that approved Settlement Agreement: “The Tribe’s **treaty right** of access to and use of water from springs and fountains on Federal public lands within the 1863 Nez Perce Treaty ceded area shall be recognized and established under the agreement.” *Mediator’s Term Sheet, Section I.I* (emphasis added). As explained in the DeVenys opening Memorandum and further discussed below, the proposed springs or fountains Partial Decrees which have been submitted to the Court to effectuate this provision in the Settlement Agreement actually are not legally supported in numerous respects by the 1863 Treaty and other pertinent and controlling legal authorities.

1. Under the Pertinent Standard of Review, the Partial Decrees Should Conform to Applicable Law.

As noted in the Court’s *Scheduling Order on Joint Motion for Entry of Consent Decree*, the purpose of the current proceeding is to determine whether, “1. the proposed decree represents a reasonable factual and legal determination (*United States v. City of Miami*, 664 F.2d at 441 (5th Cir. 1981)); 2. whether it is a fundamentally fair, adequate and reasonable settlement of the entirety of the Tribe’s claims (*U.S. v. State of Or.*, 913 F.2d 576, 20 Env’tl. L. Rep. 21,232 (9th Cir.(Or.), Aug 27, 1990) (NO. 88-4311, 88-4316, 88-4347 and *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989); and (3) whether the terms of the agreement are contrary to law or public policy (*Big Lost Irr. Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706, 708-09 (1961)).”

A review of these referenced authorities explain the importance of the Court's role confirming the legality of a proposed consent decree, especially where, as here, not all affected parties consented to the proposed consent decree and where the proposed consent decree will reach into the future and have continuing effect on other water users. In *United States v. City of Miami*, the 5th Circuit was presented with a proposed consent decree agreed to by the City of Miami and the United States that resolved allegations about the City's discriminatory employment practices. The Fraternal Order of Police ("FOP"), an organization of police officers that was a party to the lawsuit, objected to certain aspects of the proposed consent decree. The 5th Circuit noted that even where a consent decree is agreed upon by all the parties, the court's role is more than a rubber stamp:

The court, however, must not merely sign on the line provided by the parties. Even though the decree is predicated on consent of the parties, the judge must not give it perfunctory approval. As Professors Moore and Currier state: "[T]he judgment is not an inter partes contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication." 1B Moore's Federal Practice P 0.409(5), at 1030 (2d ed. 1980).

U.S. v. Miami, 664 F.2d at 441. Where a proposed consent decree reaches into the future and has continuing effect or where the decree would affect third parties, the 5th Circuit Court concluded that even more careful scrutiny of the proposed decree is appropriate to ensure that it will not have unreasonable effects that it is consistent with applicable law:

Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's

sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation. **If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.**

Id. (emphasis added).

The 5th Circuit then distinguished two different parts of the Consent Decree under review, one part which did not affect the non-consenting FOP and/or to which the FOP did not object and the other part to which did affect the non-consenting FOP:

Our analysis of the record, set forth more fully below, leads ineluctably to the conclusion that the consent decree between the United States and the City was a hybrid decree: in what was essentially a three-party suit, only two parties consented to the decree. Insofar as the decree does not affect the nonconsenting party and its members, or contains provisions to which they do not object, the trial court properly exercised its discretion in approving it. However, parts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree.

Id. at 442. Ultimately, the 5th Circuit Court remanded for judicial determination the contested aspect of the consent decree that would affect the FOP's members:

A party potentially prejudiced by a decree has a right to a judicial determination of the merits of his objection. The party is prejudiced if the decree would alter its contractual rights and depart from the governmental neutrality to racial and sexual differences that is the fundament of the fourteenth amendment in order to redress past discrimination. Those who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief.

Id. at 447.

In *U.S. v. State of Oregon*, 913 F.2d 576 (9th Cir. 1990) and in *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), the 9th Circuit confirmed that in reviewing any proposed consent decree a court should consider both whether it is “fundamentally fair adequate and reasonable” and also whether it complies with applicable statutory, constitutional and other legal standards:

Before approving a consent decree, a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable. [citation omitted] **In addition, because it is a form of judgment, a consent decree must conform to applicable laws.**

United States v. State of Oregon, 913 F.2d at 580 (emphasis added). See also *Big Lost Irrigation Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706, 708-09 (1961) (finding that the terms of a stipulation must not be “contrary to law or public policy” or “illegal.”).

The 9th Circuit has confirmed that an even heightened standard of review is appropriate where third parties who did not participate in the settlement negotiations are affected:

Idaho argues that a consent decree that affects the public interest or third parties imposes a heightened responsibility on the court to protect those interests. Although we have recognized that the court has such a duty [citations omitted]; we have also held that this requirement is intended to protect those who did *not* participate in negotiating the compromise, not those who negotiated it.

Id. at 581.¹

¹ It should be noted that the DeVenys were not invited or otherwise offered the opportunity to attend the Nez Perce mediation sessions, were not informed of the meeting times, and accordingly did not attend. In *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 508 (1981), the district court that required additional settlement negotiations, this time including a union which had been excluded from the original settlement discussions, was favorably commended:

In addition, the Union protested the fact that it had not been included in the negotiations. This latter objection particularly troubled the District judge. Indeed, although hearing evidence

Under these authorities, the SRBA court should review the proposed consent decree to determine both whether it is fundamentally fair, adequate and reasonable and also whether it comports with applicable laws. As in *U.S. v. Miami*, an even higher level of scrutiny should be afforded to those aspects of the proposed consent decree that prospectively affect the DeVenys and, possibly, others. As to these objected to portions of the proposed consent decree, the SRBA Court should confirm that the respective Partial Decrees are legally justified. Further these legal authorities confirm that the DeVenys' objections to the Partial Decrees in the proposed Consent Decree are timely and procedurally accurate. On the other hand, it appears that the United States, the Tribe and the State have missed the Settlement Agreement's March 31, 2005 deadline for obtaining SRBA Court entry of judgment and decree. *Mediator's Term Sheet* at 27.

It should be noted that the DeVenys' objection to the springs and fountains Partial Decrees of the proposed consent decree does not attack the underlying Settlement Agreement and would not unravel the settlement. The DeVenys do not object to the relevant Settlement Agreement language stating that "the Tribe's **treaty right** of access to and use of water from springs and fountains" is to be recognized; rather, the DeVenys' objections to the proposed springs or fountains Partial Decrees go to the very issue of what that treaty right legally constitutes. To the extent that the SRBA Court finds that certain proposed springs or fountains partial decrees need to be revised or dismissed to be consistent with the 1863 Treaty and/or

presented by the Vanguard and the City in support of the decree, the Judge stated that he was "appalled that these negotiations leading to this consent decree did not include the intervenors..." and refused to pass on the decree under the circumstances... Instead, he concluded: "I am going to at this time defer this proceeding until another day and I am mandating the City and the [Vanguard] to engage the Fire Fighters in discussions, in dialogue. Let them know what is going on, hear their particular problems."

other applicable law, it would be upholding the Settlement Agreement as approved by Congress, the Idaho Legislature and the Nez Perce Tribe. The Partial Decrees themselves were not approved by the governmental entities; rather, they were developed after the Settlement Agreement issued. The approved Settlement Agreement (Mediator's Term Sheet) constitutes the actual settlement. If this Court finds that the proposed springs or fountains Partial Decrees as currently written do not comport with the 1863 Treaty, other applicable law and, thus, the Settlement Agreement itself, the underlying settlement should still stand with the partial decrees corrected as necessary.

2. The Language of the 1863 Treaty Itself Indicates That Any Springs or Fountains Water Rights Would Be Prospectively Reserved by the United States and Would Not Be an Aboriginal Right with Priority of Time Immemorial.

The proposed springs or fountains Partial Decrees indicate a priority date of "time immemorial." A priority date of "time immemorial" is deemed to apply to aboriginal tribal rights that pre-dated the creation of a reservation. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). In *Adair*, the priority date of an implied water right associated with a treaty right recognizing exclusive tribal on-reservation fishing and gathering rights was at issue. The *Adair* court concluded that the associated implied reserved water right would appropriately have a priority date of time immemorial as these were rights related to aboriginal uses of water pre-dating the creation of the reservation and the relevant treaty:

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...Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home.... Accordingly, 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.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.... Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.

Adair at 1414 (emphasis added).

Unlike *Adair*, the operative “springs or fountains” clause in the 1863 Nez Perce Treaty envisions a prospective reservation of water by the United States for shared use on lands ceded from the Tribal reservation:

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

(Emphases added). This treaty language specifically provides that the United States would reserve the water rights for use in common by whites and Indians. In other words, the Treaty did not recognize any pre-existing aboriginal Tribal rights in this regard but only a prospective reservation by the United States government for shared use by whites and Indians.

The water rights already have been decreed to the Forest Service for springs or fountains satisfy the express language of the springs or fountains Treaty provision, as the United States, through its agency that manages the land, already has secured water rights in the SRBA to allow the use of the springs or fountains by whites and Indians in common. Since the Forest Service already has water right decrees for springs or fountains on the pertinent public lands, the express requirement of the springs or fountains treaty provision is satisfied and all

the springs or fountains claims of the Tribe should be dismissed, or at least modified to reflect the decreed priority date of the United States' reservation (May 10, 1906).

3. **The Treaty History, as Documented by Contemporaneous Transcripts, Confirms that the Intended Purpose of the Springs or Fountains Treaty Provision was to Provide Water for "Thirsty Men and Stock."**

In the Joint Response, the definition of "watering" from a 19th Century dictionary is referred to as the basis for the various proposed purposes of use, including, besides human consumption and livestock watering, wildlife watering and cultural and ceremonial purposes. However, the Treaty language itself, along with minutes of the Lapwai Council during which the representatives of the Nez Perce Tribe and the United States met to discuss the 1863 Treaty, establish that the springs or fountains provision is intended to have a different scope. The records of the Commissioners who represented the United States at the Council would reflect the intended import of the use of the word "watering" in the 1863 Treaty better than any arbitrary dictionary. In the June 4, 1863 minutes of the Council, Mr. Hutchins, addressing the Tribe, noted that in the ceded area, they would "be as free as the Whites to go where they pleased throughout the whole country, to hunt, to fish, to gather berries and dig camas. They could take their horses and cattle, to graze them on any lands outside, not in the occupancy of the whites." *Documents Relating to the Negotiation of the Treaty of June 9, 1863, with the Nez Perce Indians* (National Archives Microfilm Publication T494 Roll 6 Frame 654) at 37-38 (emphases added)² (excerpt reproduced in Exhibit A hereto). Thus, it was envisioned that the

² This document appears in the record as an attachment to the *Affidavit of Scott L. Campbell in Support of Pioneer, et al.'s Response to United States and Nez Perce Tribe's Motion to Compel* filed on June 25, 2002.

Tribe would be able to pass through the ceded area, along with their stock, but would not actually settle on lands outside the Reservation.

The Commissioners' report of the Lapwai Council explicitly explains that the intended purpose of the springs or fountains clause in the Treaty was to afford water for thirsty men and stock passing through the ceded area:

Article 9th [the springs or fountains clause]...was felt to be one of the great importance, in a country like that, where springs are not abundant. The few that do exist are, for the most part, situated in the midst of **a region valuable only for grazing purposes** and remote from any stream. Were these left to be taken by private individuals, they would give rise to the utmost extortion, in the sale of **water to thirsty men and cattle**, which would not regard the value of either life or property. The Indians had suffered, in this regard already, within the bounds of the Reservation, white men having selected some of these very spots, and enclosed them with substantial fence would neither allow Indians or others to use the water, to **allay their own thirst or that of their horses**, without paying for the same.

Id. at 69 (emphases added) and Exhibit A hereto.

The Treaty language itself mirrors and confirms this description of the purpose for the springs or fountains reservation. The Treaty explicitly states that the springs or fountains were to be protected from being enclosed and also that access rights were to be preserved. Also, the Treaty language, by indicating that the springs would be used "as watering places, for the use and common of both whites and Indians," establishes that both whites and Indians would share similar "watering" uses of the springs.

The language in the Treaty itself, coupled with the contemporaneously prepared minutes and report of the Lapwai Council, lead to the inexorable conclusion that any Tribal springs or fountains rights were intended to be for human consumption and stock watering

only. Tribal use of the springs or fountains was to be for “thirsty men and cattle” as they passed through the area.

4. Under Applicable Legal Precedent, the Quantity of the Springs or Fountains Rights Should Not Exceed the Minimum Quantity, if Any, the Tribe Needs for a Livelihood.

Although *Washington State. v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), concerned similar “in common” treaty language that is at issue here, the Joint Response references a recent Oregon administrative law judge’s decision as a basis for the SRBA Court to overlook *Washington Fishing Vessel’s* interpretation of that language. The Joint Response reasons that the proposed Partial Decrees eschewing the *Washington Fishing Vessel* standards are reasonable as somehow a November 7, 2006 Oregon administrative law judge decision was part of the backdrop against which the springs or fountains settlement discussions had been undertaken. However, even the Oregon administrative law judge acknowledges that all parties in the proceeding before him had assumed that *Washington Fishing Vessel* applied. See Joint Response, Exhibit A at 10.

Of course, there can be little question of the legal weight that an administrative decision should be given over pertinent United States Supreme Court precedent. See *United States v. Braren*, 338 F.3d 971(9th Cir. 2003). But even putting that significant matter aside, the administrative law judge’s reasoning is not pertinent in the springs or fountains context. In the Klamath Adjudication decision, the administrative law judge found *Washington Fishing Vessel’s* standard inapplicable in determining the quantity of water appropriate for habitat: “The goal is to determine the appropriate level of water on the former reservation lands to allow productive habitat for the exercise of the Tribal rights to hunt, fish, gather, and trap.”

Joint Response, Exhibit A at 11. In the springs or fountains context, the habitat (and fishing and hunting) issues which governed the administrative law judge's reasoning do not pertain as springs or fountains specifically are deemed to be water bodies geographically removed from or unconnected to surface water streams.

The *Washington Fishing Vessel* standard should not be ignored in favor of an administrative law judge's determination in a wholly different context. Consistent with *Washington Fishing Vessel*, the SRBA Court should modify the quantification element in the proposed Partial Decrees.

5. Although the State Apparently Did Attempt to Include Certain Language in the Partial Decrees to Protect State-Based Water Right Users, the Language Ultimately Incorporated into the Proposed Partial Decrees is Not Fundamentally Fair, Adequate, or Reasonable.

Element No. 10: "Other Provisions Necessary for Definition or Administration" in the proposed Partial Decrees apparently does attempt to protect certain private parties' grazing rights and state-based water rights. However, the language, as currently proposed, actually does not accomplish this objective.

For example, in Other Provision (d), there is language which provides that the Tribal springs or fountains water right shall not be used to preclude the federal land management agency from managing federal land in the vicinity or from permitting use of any water right that the land management agency may have from the same source. If the provision ended there, it would appear to protect grazing rights and state-based water rights. However, the provision goes on essentially to negate the preceding statement: "Provided that no such management or water use shall preclude or interfere with the Tribe's exercise of this water

right.” On the one hand, the Tribal water right cannot be exercised in a way that would interfere with the management of the federal land or the use of the federal land management agency’s water right. However, the management of the federal land and the federal land management agency’s water use also cannot interfere with the Tribe’s exercise of the springs or fountains right. This is not reasonable in practice. If the Tribe exercises the springs or fountains right as currently proposed in the Partial Decrees, they are entitled to “up to one half the natural flow” under a time immemorial priority date. This use automatically would affect the amount of water available for diversion under the federal land management agency’s water right, and thus, the amount of stock that can be placed on the federal public land by the federal land management agency. This “Other Provision,” as currently written, is internally inconsistent and unadministerable.

Likewise, Other Provision (e) appears unworkable. On the one hand this provision states that the springs or fountains water right shall not prohibit the issuance or confirmation of state-based water rights from the same source. If the provision ended there, it would make sense. However, this provision goes on to say, “provided that no such water right shall preclude or interfere with the exercise of this water right.” This language casts a shadow on the status of state-based water rights like the DeVenys’, which in many instances authorize the diversion of more than half the flow of certain springs or fountains. It seems a state-based water right for the entire flow of a given spring under this provision could be deemed to interfere with the exercise of such a Tribal springs or fountains right of up to one half of the available quantity.

CONCLUSION

For the foregoing reasons, the proposed springs or fountains Partial Decrees, as currently written, are neither fair, adequate, reasonable, or in accordance with applicable law.

DATED this 15th day of December, 2006.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day December, 2006, I caused to be served copies of the foregoing Reply Supporting Objection to Proposed Consent Decree by U.S. Mail postage pre-paid to the following:

JOHN MARK NUTTMAN
411 EAST CONQUIST ROAD
ALLYN, WA 98524

JOSEPHINE P. BEEMAN
BEEMAN & ASSOCIATES, P.C.
409 WEST JEFFERSON STREET
BOISE, ID 83702

VANESSA BOYD WILLARD
U.S. DEPARTMENT OF JUSTICE
999 18TH ST., STE. 945 N. TOWER
DENVER, CO 80202

NEZ PERCE TRIBE
USA, TRUSTEE
911 N.E. 11TH AVENUE
PORTLAND, OR 97232

ALBERT BARKER&JOHN SIMPSON
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE, ID 83701-2139

STEVEN W. STRACK
210 STATEHOUSE
PO BOX 83720
BOISE, ID 83720-0010

IDWR DOCUMENT DEPOSITORY
P.O. BOX 83720
BOISE, ID 83720-0098

STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302

BRUCE M. SMITH
MOORE SMITH
BUXTON & TURCKE
950 W BANNOCK STE 520
BOISE, ID 83702

WILLIS D. & BETTY G. DEVENY
P.O. BOX 1160
RIGGINS, ID 83549

ROGER D LING
LING, ROBINSON & WALKER
PO BOX 396
RUPERT, ID 83350-0396

JOHN R. KORMANIK
NATURAL RESOURCES DIV.
IDAHO ATTORNEY GENERAL
PO BOX 44449
BOISE, ID 83711-4449

JAMES GIVENS
P.O. BOX 875
LEWISTON, ID 83501

TERRY T. UHLING
JR SIMPLOT COMPANY
PO BOX 27
BOISE, ID 83707

JOHN E. BURNS
PO BOX 264
CARMEN, ID 83462

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

JEFFREY FEREDAY
MICHAEL CREAMER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE, ID 83701-2720

CHARLES HONSINGER
DANIEL STEENSON
RINGERT, CLARK CHTD
PO BOX 2773
BOISE, ID 83701-2773

DAVID HENSLEY
OFFICE OF THE GOVERNOR
PO BOX 83720
BOISE, ID 83720-0034

JAMES C. TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

WILLIAM F. BACON
SHOSHONE-BANNOCK TRIBES
PO BOX 306
FORT HALL, ID 83203

TRAVIS L THOMPSON
BARKER, ROSHOLT & SIMPSON
113 MAIN AVE W, STE 303
TWIN FALLS, ID 83301-6167

Angela Schaer Kaufmann, Scott Campbell
Moffatt, Thomas, Barrett, Rock & Fields
PO Box 829
Boise, ID 83701-0829

LITTLE WEISER IRRIGATION
3453 HIGHWAY 95
CAMBRIDGE, ID 83610

CHIEF, NATURAL RESOURCES DIV.
IDAHO ATTORNEY GENERAL
PO BOX 44449
BOISE, ID 83711-4449

UNITED STATES DEPT OF JUSTICE
ENVIRONM'T & NAT'L RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

NORMAN SEMANKO
IDAHO WATER USERS ASSOC.
1010 W JEFFERSON ST, STE 101
BOISE, ID 83702

K. HEIDI GUDGELL
NEZ PERCE TRIBAL EXEC. COMM.
PO BOX 305
LAPWAI, ID 83540

MICHAEL MIRANDE
MILLER BATEMAN LLP
1426 ALASKAN WAY, STE 301
SEATTLE, WA 98101

LOST VALLEY RESERVOIR CO
C/O AMY SHUMWAY
2440 HIGHWAY 95
COUNCIL, ID 83612

CHARLES F MC DEVITT
MC DEVITT & MILLER
PO BOX 2564
BOISE, ID 83701

W. KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY, ID 83318

CLAYTON M. BADLEY
1220 EAST 10TH NORTH
MOUNTAIN HOME, ID 83647

MARK L. JACKSON
HC 11 BOX 32
KAMIAH, ID 83536

BRANDELLE WHITWORTH
SHOSHONE-BANNOCK TRIBES
TRIBAL COUNCIL OFFICE
PO BOX 306
FORT HALL, ID 83203

JERRY RIGBY, RAY RIGBY RIGBY
THATCHER, ANDRUS, RIGBY KAM
& MOELLER, CHTD.
PO BOX 250
REXBURG, ID 83440-0250

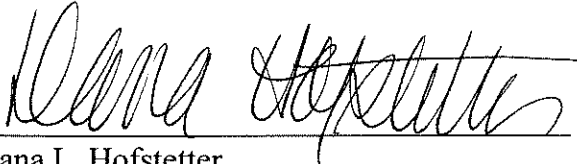
CLAUDE SIMMONS
HC 11 BOX 59B7
KAMIAH, ID 83536

DAVID & MELODIE BAKER
HC 68 BOX 304
CLAYTON, ID 83227

JERRY HOAGLAND
13528 UPPER REYNOLDS
CREEK RD
MELBA, ID 83641

MARDELL J. EDWARDS
239 GRANGEVILLE SALMON RD
GRANGEVILLE, ID 83530

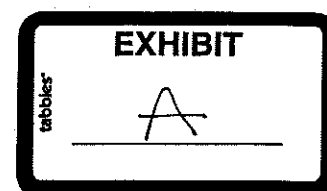
DON MILLER,
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302


Dana L. Hofstetter

E:\4049.1\7228

RATIFIED TREATY NO. 323

DOCUMENTS RELATING TO THE NEGOTIATION OF THE
TREATY OF JUNE 9, 1863, WITH THE NEZ PERCE INDIANS



RATIFIED TREATY NO. 323

DOCUMENTS RELATING TO THE NEGOTIATION OF THE TREATY
OF JUNE 9, 1863 WITH THE NEZ PERCE INDIANS

Synopsis of the Preliminary and Official Proceedings of a Council held in the valley of Lapwai, Washington Territory (now in territory of Idaho) by Calvin H. Hale Superintendent of Indian Affairs W. T. and Charles Hutchins and S. D. Howe U. S. Indian Agents, on the part of the United States, with the Nez Percés Indians, to negotiate a Treaty for the relinquishment of a portion, or all of their present reservation, or its exchange for other lands.

The time proposed by the principal chiefs, and which had been agreed to on the part of the Commissioners, for the opening of the Council, was the tenth of May 1863. Owing to various causes which will be explained in the report, the Council was not properly opened until the 25th of May, and was concluded on the 9th day of June.

On Monday the 11th day of May, there were present at Lapwai, the following Officers of the Indian Department, to wit,

C. H. Hale Superintendent Commissioner

L. D. Howe U. S. Ind. Agent Commissioner

Geo. F. Whitworth Secretary

H. C. Hale Clerk

R. Senel Interpreter

H. H. Spaulding Interpreter

The Head chief Lawyer, who resides at the Agency, was the only Chief on the ground, and but very few of his people had yet arrived.

Wednesday May 13th

Lawyer having expressed a desire for a conference with the Commissioners, a meeting for that purpose was held at the Agency at 10 O Clock A. M. at which there were present of the Indian Department, the same parties as named on the 11th inst.

On the part of the Nez Perces, were Lawyer, the Head Chief, Ute-si-mi-la-kin, Tepu-lana-tima-ni, or Spotted Eagle, and Capt. John.

The object of the conference was, in relation to the employment for an Interpreter, desiring that the Commissioners would send for Perrin B. Whitman who they considered more thoroughly aquatinted with their language than either Dr. Senel, Mr. Craig or Mr. Spaulding. They stated that it was possible they might have some plain, some hard things to say and the Commissioners on the other hand might have the same to reply. Whatever might thus be spoken by either party, they wished to be just as plainly or sharply interpreted. They expressed full confidence in all the Interpreters mentioned, with this exception, that they might very naturally be led to soften some of the harsh expressions which might be used, from motives of the best character, in order to avoid disagreement or difficulty. Especially they desired that the labor should not devolve upon Mr. Spaulding, as he was their Teacher, and they did not wish to put harsh words into his lips. Besides, the disaffected bands of the tribe might make it a ground of objection, if the Interpreter should be taken solely

from those living in their midst, being considered liable to the charge of favoring the view of one party more than the other. So Mr. Whitman had been away for some time that objection could not be urged against him, and they believed the disaffected or disloyal party (as they termed them) would be better satisfied.

Supt. Hale replied, that he had endeavored to procure Mr. Whitman, he had not seen him,- but had sent word to him, that he wished him to come. The answer sent back was that he could not come. But as it was the wish of the Chiefs present, and for the reasons they had given, the Commissioners would immediately send for him.

The Chiefs then made further request that Mr. Anderson, their Agent, should be despatched as a Messenger to the Wellamette Valley, to procure Mr. Whitman, as they had full confidence in him, that he would proceed without unnecessary delay, and use every influence in his power to bring Mr. Whitman with him; that Mr. Anderson had a good heart towards the Nez Perces, and would not do anything to turn the heart of Mr. Whitman against them.

To this the Commissioners agreed and directed Mr. Anderson to proceed at once to Salem in Oregon, that being the place of Mr. Whitman's residence and secure his services if possible, and to have him start for Lapwai without delay.

The following is a copy of the Letter sent by Mr. Anderson to P. B.. Whitman.

Nez Perce Ind. Agency

Lapwai W.T. May 13, 1863

Sir

It is our desire, and is also the request of the Indians, that you should act as Interpreter in the Council now pending with the Nez Perces.

We will fix the amount of compensation for your services at the close of the Council, but you may rest assured that it will be such as will amply remunerate you for any disadvantage which may arise to you from leaving home at the present time.

Yours respectfully

C. H. Hale Commissioner

S. D. Howe Commissioner

P. B. Whitman Esq.

Salem

Oregon

The following is the letter of Instructions to Agent Anderson.

Nez Perce Indian Agency

Lapwai W. T. May 13th 1863

Sir

You are hereby instructed to proceed as rapidly as possible to Salem Oregon for the purpose of procuring the services of Perrin B. Whitman to act as Interpreter at the Council proposed to be held with the Nez Perce Indians so soon as they are assembled.

You will state to Mr. Whitman that it is the wish of the Indians themselves, and is also the desire of the Commissioners who are now present that he should thus act.

His traveling expenses both in coming and returning will be met by the Commissioners, besides amply remunerating him for the time he may necessarily be called from home and the services he may perform.

Yours respectfully

C. H. Hale Commissioner

S. D. Howe Commissioner

J. W. Anderson Esq.

Supt. Ind. Agent

Lapwai W.T.

The Chiefs were then requested to send messengers to the different bands of their tribe, and give information of the arrival of the Commissioners;- that Mr. Whitman had been sent for as Interpreter,- and urge them to come in without further delay; to which they agreed.

Monday May 25th 1863

In accordance with the arrangements made with the principal Nez Perce Chiefs, the Council was opened at 11 O Clock A. M. at which were present the chiefs of the friendly portion of the Nez Perce tribe, and the most of their people.

There were present the following officers of the Indian Department, to wit,

C. H. Hale. Superintendent. Commissioner

Char. H. Hutchins. U. S. Ind Agent. Commissioner

S. D. Howe " " " Commissioner

Geo. F. Whitworth. Secretary

H. C. Hale. Clerk

H. H. Spaulding. Interpreter.

Robert Senel. Special Ind. Agent

-by Appointment of Supt. Rector.

Superintendent Hale opened the Council, by addressing the Indians as follows:

My Friends;- You see us here as your friends, sent by the President of the U. S. to talk with you. We have thought is best to

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speaking to you now, rather than to wait until Mr. Whitman arrives, and to tell you what we have to propose, that you may have time to think about it, and consider it well. You may use your own pleasure in regard to answering or talking to us, until Mr. Whitman arrives. We do not wish you to answer us, or to think that we expect it, before he comes to interpret for you, unless you wish to do so.

We know that different persons have talked to you, and that some of them have told you, that we were coming here to do things which we do not intend, and for which we are not sent. We are here to propose for your consideration, matters which will be for your good in all time to come. We come as your friends to advise with you, and to arrange for the preserving your rights. So your friends we propose to you to relinquish to the United States a part of your present Reservation and to take a new Reservation, smaller than the one you now hold. We also propose that on this new Reservation, each man or family shall have a piece of land in their own right, in their own name, just as the Americans do.

This talk is for the whole Nez Perce nation, not for a part, but for every man who has an interest here. We recognize you as one of the contracting parties and shall therefore open our hearts fully to you. From you we shall expect to hear afterwards, and that you will open your hearts to us.

We have been sorry that there has been so much sickness amongst you, since you came here, and that there have been some deaths;- we are glad now, that your sick people have recovered, and that we meet so many of you this morning, as well as you are.

arrangement would be satisfactory to the Govt., and were well satisfied that it would be an injury, instead of a benefit to the Indians themselves.

After the adjournment of the Council, separate conversations were had with the leading chiefs of the friendly bands.

Thursday June 4th.

The Council met at 11 O Clock A.M. when Mr. Hutchins addressed the Indians, with arguments similar to those already employed, and urged upon them the importance of considering the propositions now made, for if they rejected them, they would not be likely to have such favorable proposals made to them again. He assured them, that no power could prevent men from digging Gold wherever they could find it, and as long as the Mountains should stand, and the rivers continue to run, so long would the whites continue to dig gold.

The land proposed to them for their new reservation, was well adapted to their wants, retaining for them one of the finest and richest bodies of land within their whole country. It might seem small to them, as compared with what they had been accustomed to hold, but the Commissioners were satisfied, from the examination they had made, and from the information they had gathered, that, it was amply sufficient for all their wants. He reminded them that it was not intended to fence them in. Their homes, and the land they cultivated, were to be within the Reservation, but they were to be as free as the Whites to go where they pleased throughout the whole country, to hunt, to fish, to gather berries and dig camas. They could

take their horses and cattle, to graze them on any lands outside, not in the occupancy of the whites. Their homes would be secured by the paper they would receive, and by other Laws, besides the Treaty. "The Land on which you live will be your own, and when you die it is your children's". In concluding his remark he urged them to accept the propositions made, for the sake of their children, who were to be the most benefited, and assured them, that if they did not, they were in danger of being utterly ruined and destroyed as a people, for the whites will come in as thick as grasshoppers and crickets. It was the desire of the Commissioners, and that of the Govt., to protect and preserve them, hence the reason, that they were urged to accept the propositions made.

No replies of any importance were made. Two or three of the disaffected chiefs said a few words, but in such a haughty and incoherent manner, as to be unable to understand the half of what was said.

Big Thunder inquired, what they intended to do with him, where he was to go.

Eagle of the Light said You have been asking questions for three or four years. Now come to a point. I do not know what these chiefs may have thought of me. I have not been wanted. You could talk without me, you have talked without me. Go on, fix the matter as you like. When it is fixed, then we will talk.

Supt. Hale replied in few words- that the Commiss. had waited for several days. They had all been notified to be on the Ground by the 10th of May. The Commiss. arrived on the 11th, and had not

Commissioner Hale- I understand you accept our propositions. I am satisfied you will never regret it. We have now to draw up the paper and make the final agreement. In order to come to a full understanding, we want to talk to a few of the head Chiefs, because we cannot draw up the paper whilst we are talking to all of you. Some twelve of your Chiefs can understand it, and then we will submit After all is fixed and you all it, we will then sign it. give out our goods fast as possible, so that home. I am thankful to yo[u for your] patience. If ten of you will with us, we will fix it all u... will be as liberal as possible to.... and do all we can for you.

...[The Cou]ncil then adjourned till day the 9th inst.

Office Superintendent Indian Affairs

Olympia, W.T., November 10, 1863

Sir

I have herewith forwarded by Mail the Report of the Council held with the Nez Perces in May and June last, together with a Synopsis of the Preliminary and Official Proceedings thereof and Map and accompanying Papers.

The Treaty itself was forwarded some weeks ago with the Annual Report. The delay in forwarding this Report and accompanying papers has been unavoidable partly on account of my

own necessary absence on Official business during a considerable part of the Summer and Fall and partly from the amount of business in the Office, which could not be delayed under the present stringent regulations of the Treasury Department.

Yours respectfully

Com. Wm. P. Dole

C. H. Hale

Commiss. Ind. Affairs

Supt. Ind. Affairs W.T

Washington

Office Supt Ind. Affairs W.T.

Olympia June 30th 1863

Sir

Accompanying this, you will receive the Treaty made during the present month with the Nez Perce Indians, for the relinquishment of a part of their Reservation to the United States; together with a Synopsis of the Preliminary and Official Proceedings of the Council, held in connection therewith.

Having received no information from your Office, whether a third Commissioner had been appointed in the place of W. H. Rector Esq, former Superintendent of Oregon, and it being doubtful whether Agent Hutchins would be able to arrive in time from the Flathead Agency, I had upon the strength of your telegram of Oct. 25th 1862, invited Agent Howe to accompany me, and act as one of the Commissioners in case of a vacancy. I may also add, that I had

previously deemed it advisable to confer with him, in reference to some of the preliminary arrangements, in the absence of Agent Hutchins.

On the first of May, we accordingly left Olympia, so as to be in Portland on the arrival of the San Francisco Steamer, due on the 2nd inst., on which Gov. Wallace was expected to arrive, either with authority to act as one of the Commissioners, or bringing official information of the person appointed. As he failed to come, there was no other alternative, than to proceed as we were. We accordingly pushed onward to Lapwai, whither the goods, for presents and subsistence, had already preceded us.

Being unavoidably delayed at the Dalles, nearly two days waiting for connection of Steamers on the Upper Columbia, we did not reach Lapwai, until the morning of Monday the 11th of May. We found but very few of the Indians had arrived, and the reason assigned for their tardiness, was, in part, the unusual backwardness of the season, which had prevented their putting in their crops as early as usual. We also ascertained, that evil disposed persons had been busy on the circulation of false reports amongst the Indians, for the very purpose of delaying or preventing their coming in; such as these, that the Commissioners would not come and that the soldiers, then stationed at Fort Lapwai, were there for the purpose of driving them away from their lands by force. These with other reports of a similar character operated upon their minds very unfavorably, so that they knew not who to believe, or what to do. Many of them had heavy hearts in looking forward to the Council, knowing that its object was to induce them to consent to relinquishing a part of their

these certificates as marks of honor, and had carried them so long, that they had been worn nearly out. To preserve them, he had secured copies of the same to be made, and certified to, by A.P. Dennison, formerly Indian Agent in Oregon. These copies, well worn, were presented to us, and we were well satisfied that his claims are correct and just.

Article 9th provides for the United States to reserve all springs or fountains, not adjacent to, or directly connected with the streams or rivers within the lands relinquished, as watering places, for the use in common of both whites and Indians. This provision was felt to be one of the great importance, in a country like that, where springs are not abundant. The few that do exist are, for the most part, situated in the midst of a region, valuable only for grazing purposes and remote from any stream. Were these left to be taken by private individuals, they would give rise to the utmost extortion, in the sale of water to thirsty men and cattle, which would not regard the value of either life or property. The Indians had suffered, in this regard already, within the bounds of the Reservation, white men having selected some of these very spots, and enclosed them with substantial fence would neither allow Indians or others to use the water, to allay their own thirst or that of their horses, without paying for the same. To make it still worse, and for the purpose of securing other gains for an illicit traffic, they had connected therewith, in some instances, a grocery for the sale of liquors.

By introducing these various provisions, which met their views, and accorded with their ideas of justice, the Nez Perces were brought to consent to the relinquishment of so large a portion of their former

Reservation, and that relinquishment is cheaply purchased by the U.S. for the consideration named in the Treaty. If this negotiation had failed, a collision between the whites and Indians was inevitable, the results of which, in the expenditure of lives and money, cannot be estimated.

From the accompanying map will be seen, at a glance, the relative difference in size between the new and the old Reservation, the latter having covered an area of ten thousand square miles, or six million four hundred thousand acres, while the former is reduced to a little over twelve hundred square miles, or about eight hundred thousand acres. The amount thus relinquished is very nearly six millions of acres, and is obtained at a cost, not exceeding eight cents per acre, when all the expenses, present and prospective on the ratification of the treaty, shall have been met. In the tract of country relinquished is much that is exceedingly valuable, by reason of its gold and silver mines, whilst many of its valleys, and much of its uplands, will be found desirable and necessary for agricultural and grazing purposes.

For the purpose of presenting the items of expense actually incurred in the negotiation of this Treaty, a Statement of the same is herewith forwarded, from which it will be seen, that the sum total falls short of the amount appropriated. The expense would have been much less, but for the unfortunate condition of financial affairs, and the great difference between the value of Gold, and the Government drafts and currency. Many of the purchases and expenses, all of which were, under the circumstances, unavoidable, were incurred at the usual coin rates, but being paid either in U. S.