

# COMMENT

## THE NEZ PERCE WATER RIGHTS SETTLEMENT AND THE REVOLUTION IN INDIAN COUNTRY

BY

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*In March 2005, the Nez Perce Tribal Executive Committee agreed to waive instream reserved water rights claims for salmon throughout the Snake River Basin in a settlement with the federal government, State of Idaho, and Idaho water users. These claims arose from treaties signed by the Nez Perce and federal government in 1855 and 1863, which exterminated aboriginal title to millions of acres in Idaho, Oregon, and Washington but also explicitly reserved fishing rights for tribal members on and off the Nez Perce reservation in north central Idaho. In 1987, the State of Idaho initiated the Snake River Basin Adjudication (SRBA), a general adjudication of all water rights in the Snake River Basin. Six years later, the Nez Perce and federal government on behalf of the tribe filed over one thousand claims for instream reserved water rights in the SRBA. The SRBA Court ruled on the Nez Perce claims in 1999 and rejected tribal claims to reserved water rights in the Snake River Basin. In a decision assailed by some commentators, the court ruled that the Nez Perce impliedly reserved no water to protect Snake River salmon when it reserved fishing rights in the treaties. The Tribe appealed this decision to the Idaho Supreme Court while continuing efforts to reach a negotiated settlement with the federal government, State of Idaho, and Idaho water users. Negotiations culminated in 2005 when settlement parties reached accord. Under the settlement, the Nez Perce Tribe agreed to waive its reserved water rights claims in the SRBA, which avoided a significant*

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*reordering of priorities in the State of Idaho's priority-based water rights system. The Nez Perce secured an array of terms in exchange, including commitments from the federal government and State of Idaho to enhance salmon habitat in the Snake River Basin, a commitment from the federal government to transfer up to 11,000 acres of federal land within the Nez Perce reservation into trust for the Tribe, and creation of a tribal water right to 50,000 acre-feet from the Clearwater River with a priority date of 1855. This article traces the recent treatment of Nez Perce treaty fishing rights in the courts and discusses the effects of the SRBA court's decision as well as a 1994 decision by the federal District Court of Idaho on the water rights settlement. This article also suggests that the invigoration of Nez Perce sovereignty over the latter half of the twentieth century, a phenomenon described by Professor Charles F. Wilkinson as "the revolution in Indian country," provides a rational justification for the settlement which ultimately failed to fulfill the promise of comprehensive instream flows for Snake River salmon under the Nez Perce treaty fishing right.*

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## I. INTRODUCTION

On March 29, 2005, a six-member majority of the Nez Perce Tribal Executive Committee (Executive Committee) ratified a settlement for one of the West's largest and longest-running water rights disputes.<sup>1</sup> The agreement

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<sup>1</sup> Rocky Barker & Greg Hahn, *Nez Perce Council OKs Snake Water Agreement*, THE IDAHO STATESMAN (Boise), Mar. 30, 2005, at M1. Two members of the Executive Committee cast dissenting votes. *Id.* Anticipating tribal approval, Congress authorized appropriations and directed federal agencies to carry out the agreement on Dec. 8, 2004. Snake River Water Rights

recognizes and quantifies Nez Perce water rights in the Snake River Basin, whose rivers and streams supply water for most uses in Idaho.<sup>2</sup> A “major victory” for the Nez Perce, in the words of one observer, the agreement creates a tribal water right to 50,000 acre-feet from the Clearwater River with a priority date of 1855, transfers over 11,000 acres of federal land within the Nez Perce reservation from the Bureau of Land Management to the Bureau of Indian Affairs who will hold the land in trust for the Tribe, devolves management authority at two federal fish hatcheries to the Tribe, and sets instream flows on select stream reaches in the Clearwater and Salmon Basins to improve salmon habitat.<sup>3</sup>

The Tribe secured these terms by waiving water rights claims in the Snake River Basin Adjudication (SRBA), including substantial claims to off-reservation instream flows.<sup>4</sup> Originally filed in 1993,<sup>5</sup> the Tribe’s claims arose from treaties signed by the Nez Perce and United States in 1855 and 1863.<sup>6</sup> These treaties reserved for the Nez Perce both on and off-reservation fishing rights, which imply a variety of rights beyond the express right of taking fish at usual and accustomed places.<sup>7</sup> Courts have interpreted similarly worded provisions in other Indian treaties and have held that fishing rights necessarily include instream water rights sufficient to sustain the native fishery.<sup>8</sup> Thus, the waiver of treaty-based claims to water under the Nez Perce fishing right represented a major concession by the Tribe. These claims, if recognized, promised comprehensive, significant improvement to

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Act of 2004, Pub. L. No. 108-447, 118 Stat. 3431 (2004). On March 24, 2005, five days before the tribal vote, Governor Dirk Kempthorne signed three bills that approved the agreement on behalf of Idaho. Barker & Hahn, *supra*, at M1. On June 29, 2005, the parties filed a joint motion for approval of a consent decree for water rights under the settlement in the SRBA Court. *In re* SRBA, No. 39576, Subcase Nos. 03-10022, 67-13701, 71-10886, 92-80 (Idaho Dist. Ct. Aug. 3, 2005).

<sup>2</sup> “Idaho uses more water per capita than any other state in the nation,” most of which goes to irrigate cropland in southern Idaho. Rocky Barker, *Judge Orders end to Tribal Water Dispute; Nez Perce, Feds, Idaho Must Settle on Water Rights*, THE IDAHO STATESMAN (Boise), May 30, 2003, at M1. In southern Idaho alone, farmers irrigate 3.5 million acres of land, which generates \$2.9 billion of annual income. *Id.*

<sup>3</sup> Ray Ring, *Small Tribe in Idaho Weighs Big Water Deal*, HIGH COUNTRY NEWS, Mar. 7, 2005, at 5. Instream flows established under the agreement will be subordinated to existing uses and most future uses. *See infra* Part III.B.

<sup>4</sup> The SRBA, initiated in 1987, is a general stream adjudication of all surface and ground water rights in the Snake River Basin. Snake River Basin Adjudication, *Informational Brochure*, <http://www.srba.state.id.us/DOC/BROCH1.HTM#SEC1> (last visited July 16, 2006). The adjudication involves over 150,000 water rights claims. *Id.* The Nez Perce alone submitted over 1,133 claims for instream water rights. Idaho established a special court, the Snake River Basin Adjudication Court (SRBA Court), to resolve the claims at issue in the case. *In re* SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct. Nov. 10, 1999), *available at* <http://www.srba.state.id.us/FORMS/sumjudg.PDF>.

<sup>5</sup> *In re* SRBA, No. 39576, Subcase No. 03-10022 at 13 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>6</sup> Treaty between the United States of America and the Nez Perce Indians, June 11, 1855, 12 Stat. 957 (1859) [hereinafter Treaty of 1855]; Treaty between the United States of America and the Nez Perce Indians, June 9, 1863, 14 Stat. 647 (1867) [hereinafter Treaty of 1863].

<sup>7</sup> *See infra* Part III (describing the various rights Indian tribes enjoy under treaty fishing rights).

<sup>8</sup> *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983).

river conditions for Snake River salmon and represented an important component of the Tribe's on-going effort to effect wholesale change in the management of salmon by federal and state governments.<sup>9</sup> The waiver of these claims by the Executive Committee caused one former chairman to question the wisdom of the decision.<sup>10</sup> This sentiment has been echoed by other tribal members.<sup>11</sup>

The Nez Perce case is but the latest episode in the West's decades long struggle with Indian water rights.<sup>12</sup> Indian water rights prove problematic to many western states because state governments generally failed to account for unquantified water rights held by Indians under federal law when issuing water rights under the prior appropriation doctrine.<sup>13</sup> As a result, water users authorized by state law developed expectations under priority-based systems that failed to recognize Indian tribes as senior rights holders.<sup>14</sup> The seminal Indian water rights case is *Winters v. United States*,<sup>15</sup> and it proved these expectations to be unjustified and recognized that Indian treaties impliedly reserved water to fulfill their purposes.<sup>16</sup> These reserved water rights, or *Winters* rights, carry priority dates senior to the vast majority of water rights held under state law.<sup>17</sup>

Water allocation by western states in the post-*Winters* era continued without abatement.<sup>18</sup> As permitted water use resulted in over-appropriation of many western streams and rivers, the federal government exacerbated conflicts between prior appropriation systems and Indian water rights by failing to assert and protect tribal claims before appropriate tribunals.<sup>19</sup>

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<sup>9</sup> See generally Brief for Amicus Curiae Nez Perce Tribe, *Am. Rivers v. Nat'l Oceanic and Atmospheric Admin. Fisheries*, No. 04-0061, (D. Or. May 23, 2006) (discussing tribal effort to influence the management of dams located on the main stem of the Columbia and lower Snake Rivers as well as tribal participation in the relicensing of the Hells Canyon Complex on the middle Snake River).

<sup>10</sup> Ring, *supra* note 3, at 5.

<sup>11</sup> Megan Patrick, *Nez Perce Approve Snake River Water Deal*, LEWISTON MORNING TRIBUNE, Mar. 30, 2005, at 1A.

<sup>12</sup> See, e.g., A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 836-39 (5th ed. 2002) (discussing the history of reserved rights in the West).

<sup>13</sup> *Id.* at 837.

<sup>14</sup> See *United States v. New Mexico*, 438 U.S. 696, 705 (1978) (describing effect of federal reserved rights on overappropriated rivers as "gallon-for-gallon" reductions); Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 173-76 (2002) (describing the conflict between reserved water rights and water rights issued under state prior appropriation systems as "central" to determining the future of the West).

<sup>15</sup> 207 U.S. 546 (1908).

<sup>16</sup> *Id.* at 575-77.

<sup>17</sup> *Id.* at 577.

<sup>18</sup> See Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151, 157 (1992) (citing settlement of the West and creation of family-farms during the first half of the 1900s as among the interests that prevailed over tribal water rights).

<sup>19</sup> Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States—There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 598 (1995). See also TARLOCK, *supra* note 12, at 837 (discussing 1973 report by the National Water Commission that described the federal government's failure to protect Indian water rights as one of its "sorrier chapters").

Consequently, contemporary tribes claiming reserved water rights under nineteenth century treaties must do so in landscapes of diminished stream flows and entrenched water users.<sup>20</sup> And tribes asserting reserved water rights must also do so in state courts during comprehensive stream adjudications under the McCarran Amendment.<sup>21</sup> Because many states, including Idaho, elect state court judges by popular vote, political pressure bears on decision makers and accusations of partisanship often arise when state courts adjudicate Indian water rights claims.<sup>22</sup> The Snake River Basin Adjudication Court (SRBA Court) is unexceptional in this regard.<sup>23</sup>

Nez Perce instream flow claims threatened an irrigated agricultural economy in Idaho created and sustained by water diversions in the Snake River Basin.<sup>24</sup> That Nez Perce would dedicate these water rights to provide non-consumptive flows for Idaho's imperiled salmon runs whipped agricultural and municipal water users into a frenzy.<sup>25</sup> A 1999 SRBA Court decision pacified these interests, concluding that Nez Perce treaty rights to off-reservation fishing implied no instream flow rights to protect salmon.<sup>26</sup> Several commentators criticized this opinion for fundamental misapprehensions of federal Indian law and noted Judge Barry Wood's apparent conflict of interest as both adjudicator and party to SRBA proceedings.<sup>27</sup> The Tribe appealed the SRBA Court decision to the Idaho Supreme Court, a forum recently hostile to federal reserved water rights,<sup>28</sup> while simultaneously participating in formal mediation with Idaho, water

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<sup>20</sup> One author explained Indian claims to western water as a "massively destabilizing collection of unresolved claims . . . [which] will, when adjudicated, at least cloud and perhaps eventually preempt many water rights under which non-Indian users have invested untold millions of dollars and on which their lives and livelihoods depend." Paul Bloom, *Law of the River: Critique of an Extraordinary Legal System*, in *NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY* 139, 142 (Gary D. Weatherford & F. Lee Brown eds., 1986).

<sup>21</sup> *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 570 (1983). See also Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 442-43 (1994) (arguing for a reversal of the *San Carlos Apache* decision).

<sup>22</sup> See, e.g., Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 136-144 (2001) (discussing the failed re-election bid of Idaho Supreme Court Justice Cathy Silak in 2000 after she authored an opinion affirming federal reserved water rights for three Idaho wilderness areas); Feldman, *supra* note 21, at 449-50.

<sup>23</sup> See Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 451-52, 474-77 (2000) (showing Indian water rights have been improperly subjugated by state courts in derogation of their obligations under federal law).

<sup>24</sup> The Nez Perce sought water rights with priority dates of 1855 or "time immemorial," senior to existing water rights throughout the Snake River Basin either way. *Id.* at 451.

<sup>25</sup> Ring, *supra* note 3, at 5.

<sup>26</sup> *In re SRBA*, No. 39576, Subcase No. 03-10022 at 47 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>27</sup> Blumm, *supra* note 23, at 474-77.

<sup>28</sup> See *Potlatch Corp. v. United States*, 12 P.3d 1260, 1263-68 (Idaho 2000) (rejecting implied reservations of water for wilderness areas under the Wilderness Act of 1964); *State v. United States*, 12 P.3d 1284, 1287-91 (Idaho 2000) (rejecting implied reservation of water for non-wilderness areas of the Sawtooth National Recreation Area); *Fish & Wildlife Serv. v. State*, 23 P.3d 117, 125-26 (Idaho 2001) (rejecting implied reservation of water for wildlife refuge consisting of ninety-four islands in the Snake River); Blumm, *supra* note 14, at 189-94.

users, and the United States pursuant to a 1998 SRBA Court order.<sup>29</sup> Ultimately, the cost and legal risk of maintaining its appeal before the Idaho Supreme Court proved too substantial for the Tribe. The Nez Perce withdrew its appeal and agreed to the settlement, which the Executive Committee approved on behalf of the Tribe in March 2005.

Tribal sovereignty represented a separate but equally influential factor in the Executive Committee's decision to ratify the settlement. In a decades-long process that Professor Charles F. Wilkinson described as "the revolution in Indian Country,"<sup>30</sup> the Nez Perce system of governance evolved into a relatively sophisticated body with a mandate to provide for the general welfare of tribal members.<sup>31</sup> To carry out this responsibility, the Nez Perce people authorized the Executive Committee to manage tribal lands and resources and to represent the Tribe during inter-governmental negotiation.<sup>32</sup> The Executive Committee exercised this authority during the water rights settlement, which secured significant financial commitments from the federal government to improve infrastructure on the reservation.<sup>33</sup> Additional terms expanded tribal control over reservation land and natural resources.<sup>34</sup> These material benefits increase sovereign independence for the Nez Perce, an aspiration of apparent importance in the Executive Committee's decision to approve the settlement.

This Comment argues that the Nez Perce water rights settlement is a direct byproduct of two forces: the lingering effect of adverse judicial decisions in 1994 and 1999, and the tribal goal to achieve sovereign control over on-reservation natural resources. Part II provides historical context for the Nez Perce people, their relationship to water, and the Nez Perce treaties of 1855 and 1863. Part III analyzes the central holdings of the two recent court decisions adverse to Nez Perce treaty rights and explains their effect on the Executive Committee's decision to accept the agreement in exchange for waivers of water rights claims. Part IV discusses the several year long mediation process that led to the settlement agreement and the agreement's central terms. Part V argues that the "revolution in Indian Country" described by Professor Wilkinson played a compelling role in the decision of

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<sup>29</sup> *In re* SRBA, No. 39576, Subcase Nos. 03-10022, 67-13701, 71-10886, 92-80 at 2 (Idaho Dist. Ct. Aug. 3, 2005).

<sup>30</sup> Congress defines "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000).

<sup>31</sup> Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 446 (1998).

<sup>32</sup> DEWARD E. WALKER, JR., CONFLICT & SCHISM IN NEZ PERCE ACCULTURATION 169 (1985); Wilkinson, *supra* note 31, at 449-50.

<sup>33</sup> *See infra* Part IV.B.1 (describing settlement terms benefiting the reservation).

<sup>34</sup> *See id.* (describing settlement terms involving sovereign gains).

the Executive Committee to accept an agreement that waives Nez Perce claims to instream flows and fails to fulfill the off-reservation promise of the treaty fishing right. This Comment concludes by maintaining that the settlement, in part a product of narrow interpretations of Nez Perce treaty fishing rights by the courts, nevertheless furthers the tribal aim to achieve sovereign control over land and natural resources on the reservation.

## II. THE VALLEYS AND CANYONS OF THE WINDING WATERS

Water permeates the myths and history of the Nez Perce people.<sup>35</sup> According to tribal legend, the Monster whose girth filled the arid plateau between the Cascade Range and the Bitterroot Mountains before the time of Indians lay dead through the devices of Coyote.<sup>36</sup> His deed done, Coyote washed his hands and “with the wash-water (bloody) he sprinkled the land.”<sup>37</sup> The Nez Perce, a “powerful” and “manly” people, grew from the water and settled the Clearwater River country of Idaho, Washington, and Oregon.<sup>38</sup>

The Nez Perce originally lived in small fishing villages along the rivers and streams that form the valleys and canyons of the Snake, Salmon, and Clearwater rivers.<sup>39</sup> Abundant game, edible plants, and the temperate climate of places like the Wallowa Valley of northeastern Oregon and the Kamiah Valley of central Idaho fixed Nez Perce into sedentary lifestyles prior to introduction of the horse in the 1700s.<sup>40</sup> These locations also afforded the Tribe ready access to water, which played an important role in tribal steambath rituals<sup>41</sup> and permitted many villages to run Appaloosa herds numbering in the thousands.<sup>42</sup> And the waters, unadulterated and unappropriated, supported the salmon runs. The salmon runs, a “silver horde” that filled the streams, constituted the Tribe’s principal source of food<sup>43</sup> and an abiding source of cultural renewal.<sup>44</sup>

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<sup>35</sup> See *Nez Perce—Snake River Water Rights Act: Hearing on S. 2605 Before the S. Comm. on Indian Affairs*, 108th Cong. 28–31 (2004) (statement of Anthony D. Johnson, Chairman, Nez Perce Tribal Executive Committee) [hereinafter *Hearing on S. 2605*] (testifying that “[s]imply put, Nez Perce people defined, and define, themselves in terms of their association with, and relationship to, fish and water . . .”).

<sup>36</sup> FRANCES HAINES, *THE NEZ PERCES* 8 (1955).

<sup>37</sup> ARCHIE PHINNEY, *NEZ PERCE TEXTS* 26 (1934).

<sup>38</sup> *Id.*

<sup>39</sup> HAINES, *supra* note 36, at xv.

<sup>40</sup> ALVIN M. JOSEPHY, JR., *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* xv–xvii (1965).

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.* at 28–29.

<sup>43</sup> According to one estimate, the Nez Perce aboriginal fishery encompassed at least fifty different sites in the Snake River Basin, each with the potential to produce between 300 and 700 salmon per day. JOSEPH E. TAYLOR III, *MAKING SALMON: AN ENVIRONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS* 20 (1999).

<sup>44</sup> HAINES, *supra* note 36, at 12; see also TAYLOR, *supra* note 43, at 28 (describing spiritual and cultural significance of salmon to tribes of the Pacific Northwest).

*A. The Treaty of 1855*

An emigrant tide flooded the Pacific Northwest in the decades following the Lewis and Clark expedition.<sup>45</sup> The new arrivals fished out streams.<sup>46</sup> Settlers preempted traditional hunting and fishing sites.<sup>47</sup> And conflict between emigrants and Columbia Basin Indians, including the Nez Perce, grew increasingly common and bloody.<sup>48</sup> In response to native unrest in the Oregon and Washington Territories, the United States adopted a policy of removal and relocation towards aboriginals of the Columbia Basin.<sup>49</sup> Territorial representatives of the federal government implemented this policy in a series of treaties with the tribes in the 1850s.<sup>50</sup> These treaties extinguished aboriginal title to millions of acres in the Pacific Northwest and moved the tribes onto reservations with an aim to improve their “wretched and unhappy condition” through education, religious instruction, and farming.<sup>51</sup>

In late May, 1855, Washington Territorial Governor, Isaac I. Stevens, and Oregon Superintendent of Indian Affairs, Joel Palmer, convened a treaty council in the Walla Walla Valley to adjudicate the aboriginal rights of the Nez Perce.<sup>52</sup> The federal representatives appointed Lawyer, head of the Nez Perce village at Lapwai along the Clearwater River, as “head chief,” to speak on behalf of the entire Nez Perce people.<sup>53</sup> That any one Nez Perce could fairly represent the interests of all Nez Perce villages and bands clumsily labeled a cohesive tribe by the federal government is a fallacy now recognized by historians.<sup>54</sup> As a rule, the Nez Perce distrusted centralized authority.<sup>55</sup>

On June 11, 1855, the parties signed the first Nez Perce treaty.<sup>56</sup> Under the treaty, the Nez Perce ceded 5.5 million acres of aboriginal territory

<sup>45</sup> JOSEPHY, *supra* note 40, at 286–87.

<sup>46</sup> HAINES, *supra* note 36, at 92.

<sup>47</sup> JOSEPHY, *supra* note 40, at 286.

<sup>48</sup> *See id.* at 250–52 (describing conflicts between emigrants and Indian tribes in the late 1840s).

<sup>49</sup> STEPHEN DOW BECKHAM, ETHNOHISTORICAL CONTEXT OF RESERVED INDIAN FISHING RIGHTS: PACIFIC NORTHWEST TREATIES, 1851–1855 1 (1984).

<sup>50</sup> *Id.* at 20–21.

<sup>51</sup> BECKHAM, *supra* note 49, at 8, 16.

<sup>52</sup> JOSEPHY, *supra* note 40, at 314–15.

<sup>53</sup> *Id.* at 331.

<sup>54</sup> *Id.* at 334 n.3. The federal government reduced its misunderstanding of the Nez Perce political make-up into the Treaty of 1855, which provided funding to pay and house a Nez Perce “head chief” to be elected by tribal members. Treaty of 1855, *supra* note 6.

<sup>55</sup> JOSEPHY, *supra* note 40, at 231; *see also* WALKER, *supra* note 32, at 125 (discussing the rejection of historical attempts to create a central governing authority by tribal members). Vestiges of this distrust for central authority remain to this day. Some tribal members who opposed the settlement suggested the decision properly resided with the Nez Perce General Council—the Tribe’s entire voting membership—and not the nine person Executive Committee. Patrick, *supra* note 11, at 1A.

<sup>56</sup> Central tenets of Governor Stevens’ treaty policy included: 1) concentrating Indians upon reservations, 2) encouraging agricultural practices, 3) retaining tribal fishing, hunting, and gathering rights, “[a]s the change from savage to civilized habits must necessarily be gradual,” and 4) eventual allotment of reservation lands. BECKHAM, *supra* note 49, at 30–31.



bounded by the Palouse and Tucannon Rivers in modern-day southeastern Washington, as well as land between the Snake and Salmon Rivers in modern-day eastern Oregon and central Idaho.<sup>57</sup> Nez Perce bands and villages retained eight million acres of aboriginal territory encompassing the bulk of traditional habitation sites.<sup>58</sup> The Nez Perce also reserved an off-reservation right to fish and hunt at all usual and accustomed places “in common with citizens of the Territory,”<sup>59</sup> as well as an exclusive right to fish from streams running through or bordering the reservation.<sup>60</sup>

### *B. The Treaty of 1863*

Over the next eight years, homesteaders, miners, and grazers committed mass trespass on land “marked out for the exclusive use”<sup>61</sup> of the Nez Perce under the Treaty of 1855.<sup>62</sup> Newspapers encouraged “whites to settle, occupy, plow up, and cultivate the lands on the reservation.”<sup>63</sup> The federal government, which only eight years earlier pledged to defend the reservation, failed to follow through on this commitment.<sup>64</sup> In 1863, the United States convened a second treaty council at Lapwai to induce the Nez Perce to cede most of the territory reserved as tribal land under the Treaty of 1855.<sup>65</sup>

The federal government obtained the Treaty of 1863 without consent of several Nez Perce bands and villages.<sup>66</sup> Many of these bands and villages lost their ancestral homes, including the Wallowa Valley of Chief Joseph’s band, which had refused to attend the treaty negotiations.<sup>67</sup> All told, the second

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<sup>57</sup> JOSEPHY, *supra* note 40, at 335.

<sup>58</sup> *Id.* at 334.

<sup>59</sup> Treaty of 1855, *supra* note 6; *see also* BECKHAM, *supra* note 49, at 38, 40–41 (describing usual and accustomed fishing sites of Columbia Plateau Indians).

<sup>60</sup> Treaty of 1855, *supra* note 6; *see also* Wilkinson, *supra* note 31, at 440–41 (describing assurances from Stevens and Palmer that the United States would protect Nez Perce treaty rights).

<sup>61</sup> Treaty of 1855, *supra* note 6.

<sup>62</sup> HAINES, *supra* note 36, at 142–43; *see also* Wilkinson, *supra* note 31, at 439 (describing the nature of aboriginal property rights and trespass of white settlers). Article II of the Treaty of 1855 established the Nez Perce reservation for the “exclusive use and benefit” of the Tribe and expressly barred any “white man, excepting those in the employment of the Indian department [from residing upon the reservation] without permission of the tribe.” Treaty of 1855, *supra* note 6.

<sup>63</sup> HAINES, *supra* note 36, at 144.

<sup>64</sup> JOSEPHY, *supra* note 40, at 410.

<sup>65</sup> HAINES, *supra* note 36, at 144.

<sup>66</sup> *Id.* at 334 n.3.

<sup>67</sup> Wilkinson, *supra* note 31, at 442–43. Joseph would finally leave the Wallowa Valley in the spring of 1877 after interring his father, the elder Joseph, on the shores of Wallowa Lake. *Id.* His band journeyed towards the Lapwai Reservation in peace, crossing the Snake River swollen by spring rains. A series of revenge killings carried out against white settlers by young Nez Perce warriors unaffiliated with Joseph’s band forced Joseph and his people to flee, fearing retribution. The Nez Perce War of 1877 ensued. Joseph and his tribesmen, women, and children escaped across the Continental Divide, pursued by United States cavalry. After out-manoeuvring their pursuers for 1,300 miles, Joseph and his remnant band surrendered to federal troops in Montana’s Bear Paw Mountains, forty miles from the Canadian border. HAINES, *supra* note 36, at 215–81.

treaty reduced the tribal land base by over ninety percent and removed the Tribe to a 750,000-acre reservation east of Lewiston, Idaho.<sup>68</sup> The Nez Perce retained their right to fish from ceded land, however, as the Treaty of 1863 recognized both the on and off-reservation right reserved in the Treaty of 1855.<sup>69</sup>

### III. NEZ PERCE TREATY RIGHTS AND THE COURTS

During the 1990s, the Nez Perce sought to clarify the scope of its off-reservation treaty fishing right before the federal District Court of Idaho and the SRBA Court. Prior precedent favored the broad interpretations of the Indian fishing right posited by the Tribe during these proceedings. In 1905, the Supreme Court interpreted this same right, reserved in another Columbia Basin treaty, as creating a property right—a servitude across private lands to usual and accustomed fishing sites.<sup>70</sup> Three-quarters of a century later, the Supreme Court determined that the treaty fishing right also reserved a fair share—up to one-half—of harvestable salmon runs to treaty tribes.<sup>71</sup> In another recent case, the Ninth Circuit held that a treaty impliedly reserved water to protect fishing rights.<sup>72</sup> As Justice Stevens once noted, “broadly interpreting . . . treaties in the Indians’ favor” binds together these and other treaty cases.<sup>73</sup>

The District Court of Idaho and the SRBA Court broke sharply from established precedent and narrowly interpreted the Nez Perce treaty fishing right.<sup>74</sup> In these cases, the courts ruled: 1) the Nez Perce treaties imply no right to protect salmon habitat from damage caused by private parties;<sup>75</sup> 2) the Nez Perce enjoy no cause of action for damages against private parties whose actions diminish fish runs at usual and accustomed fishing grounds;<sup>76</sup> and 3) the Nez Perce treaties imply no instream water rights to provide habitat for Snake River salmon.<sup>77</sup> Both decisions rejected the “broad gloss”<sup>78</sup> on Indian treaties applied by the Supreme Court out of deference to treaty-time understandings of an “unlettered people.”<sup>79</sup> These decisions limiting the

<sup>68</sup> Wilkinson, *supra* note 31, at 442.

<sup>69</sup> The Treaty of 1863 provided that “the same privileges continue[ ] to the Indians outside of the reservation” as set forth under the Treaty of 1855. Treaty of 1863, 14 Stat. 647 (1867).

<sup>70</sup> United States v. Winans, 198 U.S. 371, 381 (1905).

<sup>71</sup> Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n (Passenger Fishing Vessel), 443 U.S. 658, 686–87 (1979).

<sup>72</sup> United States v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1983).

<sup>73</sup> *Passenger Fishing Vessel*, 443 U.S. at 676; see also *Adair*, 723 F.2d at 1409 n.13 (citing canon of treaty construction that “Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained” (internal quotations omitted)); *Winans*, 198 U.S. at 380.

<sup>74</sup> *In re SRBA*, No. 39576, Subcase No. 03-10022 at 38 (Idaho Dist. Ct. Nov. 10, 1999); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 808 (D. Idaho 1994).

<sup>75</sup> *Nez Perce Tribe*, 847 F. Supp. at 808.

<sup>76</sup> *Id.* at 811–12.

<sup>77</sup> *In re SRBA*, No. 39576, Subcase No. 03-10022, at 33 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>78</sup> *Passenger Fishing Vessel*, 443 U.S. 658, 679. *Cf.* United States v. New Mexico, 438 U.S. 696, 708–10 (1978) (construing the purpose of a federal land reservation narrowly).

<sup>79</sup> See, e.g., United States v. Winans, 198 U.S. 371, 380–81 (1905) (construing the treaty

scope of the Nez Perce fishing right largely nullified a critical advantage that tribes often maintain during negotiated water rights settlements—the threat of legal recognition for implied water rights by a court of law.<sup>80</sup> This Section analyzes the central holdings of the two recent cases interpreting the Nez Perce treaties and discusses their effect on the Tribe’s decision to forgo further litigation of its water rights claims in favor of settlement.

#### A. Nez Perce Tribe v. Idaho Power Co.

The Nez Perce sued the Idaho Power Company in 1994, asserting claims for monetary damages under the Federal Power Act (FPA)<sup>81</sup> and federal common law.<sup>82</sup> The Tribe sought compensation for declines in salmon runs occasioned by Idaho Power’s construction and operation of the Hells Canyon Complex on the middle Snake River.<sup>83</sup> According to the court, a cause of action for damages to salmon runs existed in this case only if the

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fishing right as an “unlettered people” understood it and as “justice and reason demand”); *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) (assuming a “responsibility” to interpret the treaty fishing right as Indians understood it and “in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people”); *Passenger Fishing Vessel*, 443 U.S. at 678 (giving “special meaning” to the “right of taking fish” in accordance with a tribe’s understanding of the treaty language); *United States v. Washington*, 759 F.2d 1353, 1358 (9th Cir. 1985) (applying major canons of treaty construction to promote Indian treaties’ central purposes).

<sup>80</sup> LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW* 126 (1991); John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63, 71 (1988).

<sup>81</sup> 16 U.S.C. §§ 792–825r (2000). Under the Federal Power Act, licensees are liable “for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license.” *Id.* § 803(c) (2000). The Hells Canyon dams block Snake River fall chinook from 80% of their historical range in Idaho and Oregon. In 1996, the National Marine Fisheries Service (NMFS) estimated Columbia River Basin anadromous fish stocks at ten million below historical levels. NMFS attributes roughly 80% of this decline to hydropower development on the Columbia and Snake Rivers. Hydroelectric generation at the Chief Joseph Dam on the Columbia River and at the Hells Canyon Complex alone account for half of the depredations to Columbia Basin salmon associated with hydropower development. NAT’L MARINE FISHERIES SERV., *FACTORS FOR DECLINE: A SUPPLEMENT TO THE NOTICE OF DETERMINATION FOR WEST COAST STEELHEAD UNDER THE ENDANGERED SPECIES ACT 6* (1996), available at [http://www.krisweb.com/biblio/gen\\_nmfs\\_nmfs\\_1996\\_stlhffd.pdf](http://www.krisweb.com/biblio/gen_nmfs_nmfs_1996_stlhffd.pdf). Over 1.5 million wild spring/summer chinook salmon returned to the Snake River in the late 1800s; by 1994, this figure declined by over 99 percent to 1,822. NAT’L MARINE FISHERIES SERV., *PROPOSED RECOVERY PLAN FOR SNAKE RIVER SALMON II-9*, 13 (1995). Federal biologists consider the Hells Canyon reach of the Snake River to be the most important production area for fall chinook salmon. In 1990, returning populations of wild Snake River chinook salmon plummeted to 78. *Id.* Snake River sockeye salmon, eliminated from nearly all areas of historical Snake River Basin habitat, have fared even worse. Only central Idaho’s Redfish Lake continues to support a remnant population of sockeye salmon, which received single-digit returns in the late 1980s and early 1990s. *Id.* at II-10, 13• 14.

<sup>82</sup> *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 794 (D. Idaho 1994).

<sup>83</sup> *Id.* at 795. Idaho Power built the Hells Canyon Complex, a series of three power dams, in the late 1950s and early 1960s. *Id.* at 794. Although the original federal license under which the utility constructed and operated the dams required Idaho Power to conserve the salmon runs, it failed in this effort. *In re Idaho Power Co.*, 14 F.P.C. 55 (1955).

Tribe possessed a property interest in the fish under the Nez Perce treaties.<sup>84</sup> The Nez Perce possessed compensable property rights in Snake River salmon runs based on precedent.<sup>85</sup> The treaty fishing right is a “right in the land” which burdens private property with an easement to access traditional fishing sites,<sup>86</sup> protects treaty tribes from state licensing fees<sup>87</sup> and discriminatory regulation,<sup>88</sup> and entitles treaty tribes to one-half of harvestable salmon runs.<sup>89</sup> These rights exist to protect a greater right held by the tribes and intended by treaty parties—the right to obtain a “moderate living” from salmon fishing.<sup>90</sup>

In an opinion by Magistrate Judge Larry M. Boyle adopted by the District Court of Idaho, the court rejected Nez Perce claims both under the FPA and at federal common law.<sup>91</sup> Because the Tribe “does not have a vested property interest in a certain fixed quantity of fish in the annual fish runs,” the court determined that Nez Perce could maintain no cause of action for damages against Idaho Power.<sup>92</sup> According to the court, the treaty parties intended to create a limited interest under the Nez Perce fishing right, which the Tribe possessed “only an opportunity to exploit” the salmon runs.<sup>93</sup> This narrowly-drawn interpretation of Nez Perce fishing rights is difficult to reconcile with Supreme Court precedent, which states that treaty fishing rights provide Indians with more than “merely the chance . . . occasionally to dip their nets into the territorial waters.”<sup>94</sup> Instead, Indian tribes with treaty fishing rights possess a right to obtain a “moderate living” from salmon fishing at usual and accustomed places.<sup>95</sup> The *Nez Perce Tribe v. Idaho Power Co.* Court correctly concluded that the fishing right is not absolute;<sup>96</sup> however, it erred in limiting this right to merely having the opportunity to fish.

The court also concluded that the Nez Perce treaties “must be interpreted in light of new, and often changing, circumstances.”<sup>97</sup> Applying this method of treaty construction, the court determined that no right exists under the treaties to prevent private action which threatens to “diminish

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<sup>84</sup> *Nez Perce Tribe*, 847 F. Supp. at 807.

<sup>85</sup> See *United States v. Winans*, 198 U.S. 371, 381 (1905) (determining that treaty fishing rights burden private property with servitudes of access to usual and accustomed fishing sites); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (suggesting a taking of a treaty hunting or fishing right by the United States would give rise to a claim for compensation).

<sup>86</sup> *Winans*, 198 U.S. at 381.

<sup>87</sup> *Tulee v. Washington*, 315 U.S. 681, 685 (1943).

<sup>88</sup> *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 48–49 (1973).

<sup>89</sup> *Passenger Fishing Vessel*, 443 U.S. 658, 685–87 (1979).

<sup>90</sup> *Id.* at 686.

<sup>91</sup> *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 795–96 (D. Idaho 1994).

<sup>92</sup> *Id.* at 811.

<sup>93</sup> *Id.* at 795–96. *But see* Charles A. Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504, 519 (1963–64) (arguing the treaty fishing right “includes certain rights to have the continued flow of game and fish.”).

<sup>94</sup> *Passenger Fishing Vessel*, 443 U.S. at 678–79.

<sup>95</sup> *Id.* at 686.

<sup>96</sup> *Nez Perce Tribe*, 847 F. Supp. at 808.

<sup>97</sup> *Id.* at 814.

or . . . destroy the fish runs.”<sup>98</sup> This result, as argued by the Tribe, suggests “an impotent outcome to [treaty] negotiations . . . , which seemed to promise more and give the word of the Nation for more.”<sup>99</sup> Equitable arguments aside, Supreme Court precedent did not dictate this result. It is the *intent* of treaty parties which “must control any attempt to interpret the [Indian] treaties.”<sup>100</sup> The Nez Perce and United States intended to reserve a fishing right that endures and compels settlement, development, and other drivers of change to accommodate the tribal right of taking fish at usual and accustomed fishing places.<sup>101</sup> The *Nez Perce Tribe* Court reversed this concept when it ruled the Nez Perce could not prevent Idaho Power from operating the Hells Canyon Complex so as to damage or destroy the salmon runs.<sup>102</sup>

This decision denied compensation to the Nez Perce for the damage caused to Snake River salmon runs by Idaho Power’s hydroelectric facility. It also ruled out future causes of action by the Tribe against private parties whose actions may damage or destroy salmon runs. A post-decision settlement between the Tribe and Idaho Power lessened the bitterness of this result.<sup>103</sup> The Tribe agreed to withdraw its appeal before the Ninth Circuit in exchange for some \$11 million<sup>104</sup> but rejected an additional \$5 million to fully support Idaho Power’s effort to relicense the Hells Canyon Complex.<sup>105</sup> The *Nez Perce Tribe* decision would also prove instrumental in the SRBA proceedings. The analysis set forth by the District Court of Idaho provided the SRBA Court with a roadmap to further limit the scope of the Nez Perce fishing right and to interpret the treaties in light of new and changed circumstances.

#### B. In re SRBA, No. 39576

Following the *Nez Perce Tribe* decision, the tribal effort to gain recognition of treaty rights to protect salmon habitat took the form of water rights claims before the SRBA Court. If recognized, these claims would establish instream flows at usual and accustomed fishing places in order “to maintain the livelihood of Tribe members.”<sup>106</sup> Nez Perce water rights would enjoy priority dates of 1855 or “time immemorial”<sup>107</sup> but would not, as feared by many Idahoans, impose a “wilderness servitude” upon the waterways of

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (quoting *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392, 397 (1968)).

<sup>100</sup> *Passenger Fishing Vessel*, 443 U.S. at 675; *see also* WATERS AND WATER RIGHTS § 37.02(a) (Robert Beck ed., 2004) (discussing treaty interpretation).

<sup>101</sup> *See, e.g.*, *United States v. Winans*, 198 U.S. 371, 384 (1905) (enjoining private parties from erecting physical barriers that prevent tribes from accessing usual and accustomed fishing grounds); *Passenger Fishing Vessel*, 443 U.S. at 687 (preventing non-Indian fishermen from harvesting more than 50% of salmon runs).

<sup>102</sup> *Nez Perce Tribe*, 847 F. Supp. at 814.

<sup>103</sup> Blumm, *supra* note 23, at 466 n.120.

<sup>104</sup> *Id.*

<sup>105</sup> Rachel Odell, *The Snake River, Unplugged*, HIGH COUNTRY NEWS, Sept. 2, 2005, at 5.

<sup>106</sup> *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

<sup>107</sup> *Id.*

the Snake River Basin.<sup>108</sup> Quantification of the Tribe's water rights would only "prevent other appropriators from depleting the stream waters below a protected level,"<sup>109</sup> a level necessary to afford the Tribe with a moderate living from salmon fishing.<sup>110</sup>

The Tribe based its water rights claims on the off-reservation treaty fishing right.<sup>111</sup> Tribal members at the treaty council in 1855 recognized the fishing right as necessary to preserve their traditional way of life and bargained for its provision.<sup>112</sup> Justice Stevens shed light on this tribal purpose when he wrote:

It is perfectly clear . . . that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.<sup>113</sup>

Similarly, the Ninth Circuit determined in *United States v. Adair*<sup>114</sup> that the Klamath Tribe intended to preserve a traditional fishing lifestyle in an 1864 treaty with the federal government and that this purpose necessarily implied instream water rights.<sup>115</sup> "[A]t the forefront of the Tribe's concerns in negotiating the treaty," the *Adair* Court wrote, was "a continuation of its traditional hunting and fishing lifestyle."<sup>116</sup> The *Adair* decision recognizes that the traditional lifestyle treaty parties sought to maintain will become an historical anecdote and the fishing right a nullity without water.<sup>117</sup> Under a "solemn obligation" to uphold federal law in Indian water rights case,<sup>118</sup> the SRBA Court nevertheless ruled as a matter of law that the Nez Perce reserved off-reservation fishing rights without water for fish.

The SRBA Court rejected Nez Perce claims because the court ruled that to hold otherwise "would be repugnant to the purpose of the treaty negotiations . . ."<sup>119</sup> Judge Wood defined this treaty purpose as: "to resolve the conflict which arose between the Indians and non-Indian settlers . . ."<sup>120</sup> True enough, federal parties sought and obtained the 1855 treaty primarily to

<sup>108</sup> *Id.* at 1414–15.

<sup>109</sup> *Id.* at 1411.

<sup>110</sup> See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 470–478 (1998) (arguing the treaty fishing right creates a negative servitude "limiting activities that jeopardize the supply of fish necessary to furnish tribes with a moderate living").

<sup>111</sup> *In re* SRBA, No. 39576, Subcase No. 03-10022, at 9 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>112</sup> Wilkinson, *supra* note 31, at 440–41.

<sup>113</sup> *Passenger Fishing Vessel*, 443 U.S. 658, 667 (1979).

<sup>114</sup> 723 F.2d 1394 (9th Cir. 1984).

<sup>115</sup> *Id.* at 1414–15.

<sup>116</sup> *Id.* at 1409.

<sup>117</sup> *United States v. Winans*, 198 U.S. 371, 380 (1905).

<sup>118</sup> *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983).

<sup>119</sup> *In re* SRBA, No. 39576, Subcase No. 03-10022, at 38 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>120</sup> *Id.* Judge Wood stated that "[e]ssentially, what the Nez Perce Tribe is seeking by way of a water right is a remedy for an unforeseen consequence which it now believes to threaten its fishing right." *Id.* at 39. However, this unforeseen consequence—encroachment upon traditional hunting and fishing grounds by settlement—is precisely what treaty parties intended the reserved fishing rights to protect against. See *Winans*, 198 U.S. at 381.

palliate growing conflict between the Nez Perce and emigrants by extinguishing aboriginal title and removing the Tribe to a reservation out of the path of settlement.<sup>121</sup> But a court interpreting an Indian treaty must give effect to federal and tribal purposes of the treaty because both carry legal significance.<sup>122</sup> The SRBA Court failed to give meaningful consideration to the tribal purpose of the Nez Perce treaties: to preserve a traditional fishing lifestyle through reservations of fishing rights “not much less necessary to [their] existence . . . than the atmosphere they breathed.”<sup>123</sup> Had the SRBA Court recognized and evaluated this tribal purpose, the Supreme Court’s example in *Cappaert v. United States*<sup>124</sup> may have illuminated its analysis. In *Cappaert*, the Court recognized protecting a species of desert fish as a purpose of the presidential proclamation that established the Devil’s Hole National Monument.<sup>125</sup> Because federal land withdrawals imply water rights to fulfill their primary purposes,<sup>126</sup> the *Cappaert* Court recognized an implied federal reserved water right in an amount necessary to provide habitat for the fish.<sup>127</sup>

The SRBA Court distinguished cases that recognized implied water rights to protect treaty fishing rights on two grounds: either the case involved 1) an on-reservation fishing right, or 2) an exclusive right to fish, not one held “in common” with other citizens.<sup>128</sup> First, the SRBA Court distinguished several cases that recognized implied water rights because the treaties at issue involved on-reservation fishing rights.<sup>129</sup> In so doing, the SRBA Court discounted the broad interpretation of Indian fishing rights applied by courts in these decisions. For example, in the *Adair* decision, the Ninth Circuit recognized implied water rights to fulfill the fishing purpose of a treaty between the United States and Klamath Tribe, whose reservation the federal government terminated in 1954.<sup>130</sup> The Ninth Circuit also construed Indian fishing rights broadly in *Colville Confederated Tribes v. Walton*,<sup>131</sup> holding that the executive order creating the Colville Reservation in 1872 implied water rights to fulfill the reservation’s purposes.<sup>132</sup> Although this executive order failed to articulate fishing as a purpose of the reservation and neither reserved nor created express fishing rights for the Colville Tribe,

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<sup>121</sup> See BECKHAM, *supra* note 49, at 15–22 (describing the philosophy and practice of Joel Palmer, Superintendent of Indian Affairs in Oregon, who viewed removal and relocation as the “one path” to peaceful co-existence between Oregon emigrants and aboriginals).

<sup>122</sup> *United States v. Adair*, 723 F.2d 1394, 1498 n.13 (9th Cir. 1983); see also *Passenger Fishing Vessel*, 443 U.S. 658, 675–76 (1979) (“[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties.”).

<sup>123</sup> *Passenger Fishing Vessel*, 443 U.S. at 680 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

<sup>124</sup> 426 U.S. 128 (1975).

<sup>125</sup> *Id.* at 141.

<sup>126</sup> *Arizona v. California*, 373 U.S. 546, 596 (1963).

<sup>127</sup> *Cappaert*, 426 U.S. at 141.

<sup>128</sup> *In re SRBA*, No. 39576, Subcase No. 03-10022, at 39 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>129</sup> See Blumm, *supra* note 23, at 468–71 (discussing cases cited by SRBA Court in support of its denial of Nez Perce water rights claims).

<sup>130</sup> *United States v. Adair*, 723 F.2d 1394, 1398 (9th Cir. 1983).

<sup>131</sup> 647 F.2d 42 (9th Cir. 1981).

<sup>132</sup> *Id.* at 47.

the court still implied a water right to protect a native fishery because the tribe “traditionally fished for both salmon and trout” and “fishing was of economic and religious importance to them.”<sup>133</sup> Thus, at least in the Ninth Circuit, preserving a tribe’s traditional reliance on fishing warrants more weight in an implied water rights analysis than the on or off-reservation appurtenance of the fishing right or whether this fishing right is implied or express.<sup>134</sup>

Second, the SRBA Court determined that “an implied water right is not necessary” because the Nez Perce enjoy no “absolute right to a predetermined or consistent level of fish,” echoing the ruling in *Nez Perce Tribe*.<sup>135</sup> This finding by the SRBA Court required a narrow reading of the Supreme Court’s central holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Passenger Fishing Vessel)*.<sup>136</sup> The *Passenger Fishing Vessel* Court allocated up to one-half of salmon harvests to Indians with treaty fishing rights held in common with non-Indians.<sup>137</sup> The SRBA Court erred when it concluded that the Court did not also establish a minimum entitlement for tribes with treaty fishing rights. This minimum entitlement is an amount of harvestable salmon “necessary to provide the Indians with a livelihood—that is to say, a moderate living.”<sup>138</sup> A moderate living from salmon fishing requires sufficient water to support the fishery, as recognized by the Ninth Circuit.<sup>139</sup> Because the SRBA Court failed to determine whether the Nez Perce could obtain a moderate living from salmon fishing without off-reservation instream flows, it failed to uphold this purpose of the Nez Perce treaties.

The Nez Perce appealed the SRBA Court instream flows ruling to the Idaho Supreme Court.<sup>140</sup> This appeal faced long odds. In 2000, the Idaho

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<sup>133</sup> *Id.* at 48.

<sup>134</sup> *See Adair*, 723 F.2d at 1409 (deciding the question of whether a treaty implied water rights by looking to “whether securing to the Indians the right to hunt, fish, and gather was a primary purpose”).

<sup>135</sup> *In re SRBA*, No. 39576, Subcase No. 03-10022 at 33 (Idaho Dist. Ct. Nov. 10, 1999).

<sup>136</sup> 443 U.S. 658 (1979).

<sup>137</sup> *Id.* at 685–86.

<sup>138</sup> *Id.* at 686; *see also* MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 275–76 (2002) (arguing the moderate living standard should guide federal and state agencies in planning and approving projects that will affect salmon habitat).

<sup>139</sup> *Adair*, 723 F.2d at 1411; *see also* Blumm & Swift, *supra* note 110, at 470 (arguing the treaty fishing right creates a “negative servitude limiting activities that jeopardize the supply of fish necessary to furnish tribes with a moderate living”).

<sup>140</sup> The Nez Perce also appealed Judge Wood’s decision not to recuse himself. In December 1999, several months after the SRBA Court issued its decision, the Nez Perce discovered that Judge Wood and his family had claims for water rights in the SRBA. The Nez Perce filed a disqualification motion in February 2000, which Judge Wood rejected in July 2000. The Idaho Supreme Court, despite acknowledging “considerable issues in dispute over the question of whether Judge Wood should have disqualified himself” and without citation to legal authority, upheld Judge Wood’s ruling on mootness grounds. The court reached this decision because, due to the election of his brother-in-law to the Idaho Supreme Court, Judge Wood no longer presided over the SRBA Court. *United States v. State*, 51 P.3d 1110, 1111–12 (Idaho 2002). *See also* Blumm, *supra* note 14, at 182 (describing Judge Wood’s failure to recuse himself and subsequent removal by the Idaho Supreme Court).



Supreme Court issued two decisions which declined to recognize federal claims to implied reserved water rights for three Idaho wilderness areas<sup>141</sup> and the Sawtooth National Recreation Area.<sup>142</sup> In both decisions, the court narrowly construed the primary purposes of federal land reservations.<sup>143</sup> The Tribe had little basis to believe the court would construe the Nez Perce treaties any differently and overturn the SRBA Court decision.

The Tribe's appeal faced a problematic future. Considering the legal risks associated with further litigation—the sweeping SRBA Court decision and a perceived bias against federal reserved water rights in the Idaho Supreme Court—the Nez Perce withdrew its appeal as part of the water rights settlement.<sup>144</sup> Legal risk alone cannot explain the Tribe's decision; practical considerations of cost and time also influenced the Nez Perce. First, the Tribe, United States, and Indian rights advocacy groups invested approximately \$20 million to litigate and mediate the tribe's water rights claims.<sup>145</sup> Bankrolling appeals to the Idaho Supreme Court and beyond would have required an additional \$5 million or more of these parties.<sup>146</sup> With federal funding drying up and the Tribe's resources stretched thin by protracted proceedings, settlement made economic sense for the Tribe.<sup>147</sup> Second, settlement afforded the Tribe with certainty and finality as to its water rights under the treaties. Litigation may not have produced this result

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<sup>141</sup> *Potlatch Corp. v. United States*, 12 P.3d 1260, 1263–68 (Idaho 2000).

<sup>142</sup> *State v. United States*, 12 P.3d 1284, 1287–91 (Idaho 2000).

<sup>143</sup> *Id.* at 1288–91; *Potlatch Corp.*, 12 P.3d at 1264–67. The Idaho Supreme Court did recognize federal reserved water rights for the Hells Canyon National Recreation Area (HCNRA). The court did so only because Congress made an express reservation of water in the HCNRA Act. *Id.* at 1270.

<sup>144</sup> The principal decisions upholding implied reserved water rights to protect fishing purposes of Indian reservations and treaties or fish-related purposes of federal land reservations were all decided nearly one-quarter century ago. *See, e.g., Cappaert*, 426 U.S. 128, 141 (1975) (recognizing an implied reservation of water in the presidential proclamation establishing the Devil's Hole National Monument to protect a species of desert fish); *Colville Confederated Tribes*, 647 F.2d at 48 (recognizing an implied reservation of water in the executive order establishing a reservation for the Colville Confederated Tribes to develop and maintain a tribal fishery); *Adair*, 723 F.2d at 1409–10 (recognizing an implied reservation of water in a treaty between the Klamath Tribe and federal government sufficient to protect the Tribe's traditional, on-reservation fishing and hunting lifestyle). Federal courts have been less receptive to treaty rights in the time since, as best exemplified by the Ninth Circuit's *en banc* decision in *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005). The *Skokomish* Court rejected the Tribe's contention that its treaty with the federal government implied a right of action for damages to its reservation and fisheries caused by construction and operation of a hydroelectric project. At least one observer has criticized the decision for being “malignant in tone and dismissive in posture.” William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 ENVTL. L. 397, 407 (2005) (arguing against court's interpretation of Indian treaties and court's treatment of continuing nuisance doctrine).

<sup>145</sup> E-mail from Steve Moore, Attorney, Native American Rights Fund, to author (Nov. 29, 2005) (on file with author).

<sup>146</sup> *Id.* Assuming the Idaho Supreme Court reversed the SRBA Court and the United States Supreme Court affirmed, the Tribe would incur further expenses, possibly \$10 million, litigating the scope of its water rights. *Id.*

<sup>147</sup> *Id.* *But see* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 55 (2002) (quoting a justice department attorney and official with the Office of Management and Budget who both claim that litigation is a cheaper alternative for the federal government than negotiation, due to federal outlays under settlements).

until 2015 after parties exhausted appeals and upon conclusion of court proceedings to determine the scope of the Tribe's water rights.<sup>148</sup>

#### IV. THE NEZ PERCE WATER RIGHTS SETTLEMENT

The Nez Perce water rights settlement culminates an oft-contentious, twelve year process triggered by the filing of tribal water rights claims in 1993. Since that time, two Idaho-based courts have addressed the scope of Nez Perce treaty fishing rights: both courts ruled against the Tribe, both construed the treaty fishing right narrowly.<sup>149</sup> The Tribe, disappointed by the treatment its treaty rights received in these decisions and weighing practical concerns of cost and time, turned to settlement negotiations with the federal government, the state of Idaho, and Idaho water users in hopes of receiving some measure of recognition for its water rights claims. The negotiations culminated in 2004, when the parties agreed to settlement terms.<sup>150</sup> This section discusses the settlement process and the central terms of the agreement.

##### *A. The Settlement Process*

In the past, the Nez Perce and other Columbia Basin Indians used litigation as the vehicle to assert treaty rights.<sup>151</sup> And, generally speaking, federal courts were sympathetic to tribal claims.<sup>152</sup> The rules of the game began to change in 1952, at least concerning water rights, when Congress passed the McCarran Amendment<sup>153</sup> and authorized states to assume primary jurisdiction over federal reserved water rights during comprehensive suits.<sup>154</sup> The McCarran Amendment raised more questions than it answered, however, and its intended scope remained unresolved in the years following its passage.<sup>155</sup> In 1983, the Supreme Court clarified the amendment's scope when it determined that states could adjudicate water rights claims brought by tribes during comprehensive adjudications.<sup>156</sup> The ruling placed tribes in a disadvantageous position, forcing them to seek politically unpopular relief from state court judges often elected by popular vote. Federal law binding on the state courts required decision makers to faithfully follow federal law in Indian water rights cases;<sup>157</sup> however, state

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<sup>148</sup> E-mail from Steve Moore, *supra* note 145.

<sup>149</sup> See *supra* Parts III.A, III.B (discussing the Nez Perce treaty rights and the courts).

<sup>150</sup> See *supra* note 1 and accompanying text discussing settlement authorization.

<sup>151</sup> Wilkinson, *supra* note 31, at 448–49.

<sup>152</sup> *Id.*

<sup>153</sup> 43 U.S.C. § 666(a) (2000).

<sup>154</sup> See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976) (applying the McCarran Amendment to reserved water rights claims brought by the federal government on behalf of both the United States and Indian tribes); *United States v. Oregon*, 44 F.3d 758, 765–67 (9th Cir. 1994) (holding that a comprehensive administrative proceeding constituted a suit under the McCarran Amendment).

<sup>155</sup> Feldman, *supra* note 21, at 440.

<sup>156</sup> *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569–70 (1983).

<sup>157</sup> *Id.* at 573.

courts often failed this charge—the political pressure proved too great, the omnipotence of vested development interests too profound.<sup>158</sup>

Justice Stevens dissented in *Arizona v. San Carlos Apache Tribe of Arizona*<sup>159</sup> because he doubted the ability of state courts to treat Indian water rights claims fairly and orderly during water adjudications.<sup>160</sup> The Nez Perce case gives credence to his skepticism. An adverse decision on its water rights claims in state court factored heavily in the Tribe's decision to waive these claims during negotiated settlement.<sup>161</sup> This decision—to bargain away treaty rights—came with considerable pain to the Nez Perce and opened old wounds.<sup>162</sup> Nez Perce treaty rights, in the words of Executive Committee chairman Anthony D. Johnson, remain “materially and symbolically essential to the Nez Perce people . . .”<sup>163</sup> Essential is quite right. Over the last century and as a result of federal allotment policies, Nez Perce on-reservation holdings diminished by nearly ninety percent.<sup>164</sup> Six hundred and sixty-four thousand acres of land passed out of tribal hands in the decades following an 1893 allotment agreement between the Tribe and the federal government.<sup>165</sup> Their land base diminished and fragmented,<sup>166</sup> the treaty fishing rights became important sources of continuity between past and present for the Nez Perce people.<sup>167</sup>

Mediation that began in 1998 pursuant to an order of the SRBA Court proceeded confidentially for six years. Realistically, the Nez Perce stood little chance of earning recognition for off-reservation instream reserved water rights under the Nez Perce treaties. Of the twenty or so Indian water rights settlements since the early 1980s, none have recognized off-reservation reserved water rights for tribes.<sup>168</sup> Moreover, the *Nez Perce Tribe*

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<sup>158</sup> See *supra* notes 22–23 and accompanying text.

<sup>159</sup> 463 U.S. 545 (1983).

<sup>160</sup> *Id.* at 579 (Stevens, J., dissenting).

<sup>161</sup> The substance of the settlement process that would illuminate the give-and-take of settlement parties remains subject to a confidentiality order. E-mail from Geoff Whiting, Attorney, Nez Perce Tribe, to author (Nov. 18, 2005) (on file with author). See also John Folk-Williams, *Parties and Permanence: Alternative Dispute Resolution Principles*, in *INDIAN WATER IN THE NEW WEST* 147, 155 (1993) (noting water rights waivers as a “bedrock” of negotiated settlements).

<sup>162</sup> See Folk-Williams, *supra* note 80, at 63–64 (citing a perception in Indian communities that tribal leaders may bargain away water rights as an inherent problem of water rights negotiations).

<sup>163</sup> *Hearing on S. 2605, supra* note 35.

<sup>164</sup> Wilkinson, *supra* note 31 at 443–45. Beginning in the 1880s, the federal government adopted a policy towards Indian tribes of assimilation into a way of life American, agricultural, and Christian. The government implemented this policy through private ownership. Individual Indians received fee patents to reservation land formerly held in trust for the tribe by the United States. Reservation land not allotted to individual Indians became “surplus” lands open for entry and settlement by non-Indians at the President's discretion. Twenty-seven million acres of reservation land allotted to Indians eventually passed into non-Indian ownership during the allotment era, while tribes lost an additional sixty million acres under the surplus lands program. Judith V. Royster, *The Legacy of Allotment*, 27 *ARIZ. ST. L.J.* 1, 7–13 (1995).

<sup>165</sup> Wilkinson, *supra* note 31, at 445.

<sup>166</sup> *Id.* at 446.

<sup>167</sup> *Id.* at 446–47; see also *Passenger Fishing Vessel*, 443 U.S.658, 686–87 (1979) (describing Indian fishing as an exercise in “cultural cohesion”).

<sup>168</sup> E-mail from Steve Moore, *supra* note 145.

decision and the SRBA Court ruling provided Idaho and the water users with leverage unusual for non-Indian parties to negotiated water rights settlements.<sup>169</sup> These parties capitalized on their superior position during mediation because the settlement preserves existing water rights under state law and will not substantially inhibit future diversions in the Snake River Basin.<sup>170</sup> For this reason, and to the extent these settlements produce immediate and discernible winners and losers, Idaho emerged victorious. Whether settlement also benefited the Tribe is less certain, at least in the short-term. The Tribe secured a variety of benefits not available to it through litigation;<sup>171</sup> however, these beneficial terms required the Tribe to waive substantial treaty-based claims to water earmarked for salmon. The settlement will play out on the ground at Lapwai and in the Salmon and Clearwater Basins over the coming years. If at all, the merits of settlement for the Nez Perce will reveal themselves during this time and will depend in large part on faithful compliance with settlement terms by governmental parties.

### *B. Terms of the Settlement*

The settlement resolves tribal water rights claims in the Snake River Basin through a “creative hybrid of Indian water rights resolutions and related Endangered Species Act<sup>[172]</sup> agreements.”<sup>173</sup> Organized into three components—1) the Nez Perce Tribal Component, 2) the Salmon/Clearwater Component, and 3) the Snake River Flow Component,<sup>174</sup> the scope of the settlement is broad and encompasses matters beyond the existence or non-existence of tribal water rights. Each component fundamentally relates to water or salmon and the Nez Perce desire to protect these resources, centrally important to tribal culture and the livelihood of tribal members. This section discusses the major terms of each of three components that comprise the settlement.

#### *1. Nez Perce Tribal Component*

The Nez Perce Tribal Component consists of several measures intended to restore Snake River salmon habitat and aid in development of the reservation. First, the federal government will hold in trust a tribal water right of 50,000 acre-feet from the Clearwater River with a priority date of 1855.<sup>175</sup> The Tribe will administer this water right for multiple-uses pursuant

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<sup>169</sup> See Folk-Williams, *supra* note 80, at 154 (noting that favorable judicial precedent normally works in tribes’ favor in settlement negotiations).

<sup>170</sup> See *infra* Part IV.B.2 (discussing the Salmon/Clearwater Component of the settlement agreement).

<sup>171</sup> See *infra* Part IV.B.1 (discussing the Nez Perce Tribal Component of the settlement agreement).

<sup>172</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

<sup>173</sup> See *Hearing on S. 2605, supra* note 35.

<sup>174</sup> MEDIATOR’S TERM SHEET 1, 3, 18 (2004), <http://www.srba.state.id.us/FORMS/Mediator%20term%20sheet.pdf> (last visited July 12, 2006) [hereinafter TERM SHEET].

<sup>175</sup> *Id.* at 1.

to a Nez Perce tribal water code.<sup>176</sup> The federal government will also place \$60.1 million into a water and fisheries trust fund.<sup>177</sup> The Tribe may use funds from this trust for the purposes of “acquiring lands and water rights, restoring/improving fish habitat, fish production, agricultural development, cultural preservation, and water resource development or fisheries-related projects.”<sup>178</sup> The federal government also agreed to provide \$23 million to develop domestic water supply and sewer systems on the reservation.<sup>179</sup>

Second, the Tribe will lead an intergovernmental panel that will draft annual operating plans for the release of 200,000 acre-feet of water from Dworshak Reservoir on the Clearwater River.<sup>180</sup> Prior to the settlement, the federal government released 1.2 million acre-feet from the reservoir beginning July 1 of each year to cool the lower Snake River and augment river flows for juvenile fall chinook salmon migrating downstream.<sup>181</sup> The annual operating plans will govern release of the last 200,000 acre-feet from behind the reservoir, which the Tribe hopes to delay until late summer or early fall in order to provide river flows for late departing juvenile salmon and early returning adults.<sup>182</sup>

Third, the federal government will transfer varying levels of management authority at two federal fish hatcheries located within the Nez Perce reservation to the Tribe.<sup>183</sup> The Tribe will assume total control over hatchery operations at the Kooskia National Fish Hatchery,<sup>184</sup> while the Tribe and the federal government will jointly manage the Dworshak National Fish Hatchery.<sup>185</sup> The federal government constructed these hatcheries to mitigate for depredations caused to salmon runs by Columbia Basin dams.<sup>186</sup>

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<sup>176</sup> *Id.* The Tribe, subject to the approval of the Secretary of the Interior, will enact a tribal water code by December 2007. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, § 7(b)(1), 118 Stat. 3431, 3434 (2004).

<sup>177</sup> TERM SHEET, *supra* note 174, at 1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; Eric Barker, *Tribe-Jed Board Will Write Dworshak Plan; Tribe Has Argued for a Slower Water Release Through the Summer*, LEWISTON MORNING TRIBUNE, April 24, 2005, at 7A. In 1972, the United States Army Corps of Engineers completed the Dworshak Dam on the North Fork of the Clearwater River within the boundaries of the Nez Perce Reservation against strenuous objections from the Tribe. The dam prevented spring/summer chinook salmon and steelhead from spawning in 1,667 stream-miles of the river and its tributaries. *Hearing on S. 2605*, *supra* note 35, at 66.

<sup>181</sup> Barker, *supra* note 180, at 7A.

<sup>182</sup> *Id.*

<sup>183</sup> TERM SHEET, *supra* note 174, at 1.

<sup>184</sup> The federal government built the Kooskia National Fish Hatchery on Clear Creek, a tributary of the Clearwater River, in 1969 “to mitigate spring chinook salmon losses resulting from federal dams and other water development projects in the Columbia River Basin.” U.S. Fish & Wildlife Serv., *Kooskia National Fish Hatchery: FAQ*, <http://www.fws.gov/kooskia/faq/> (last visited July 16, 2006). The Fish & Wildlife Service manages the Kooskia hatchery exclusively for production of spring chinook salmon. *Id.*

<sup>185</sup> The Dworshak Dam, built without a fish ladder, blocked access to natural spawning grounds for spring chinook salmon and steelhead. The federal government raises both spring chinook and steelhead at the hatchery, which is located at the confluence of the North Fork and the main stem of the Clearwater River. U.S. Fish & Wildlife Serv., *Dworshak National Fish Hatchery: FAQ*, <http://www.fws.gov/dworshak/faq/> (last visited July 16, 2006).

<sup>186</sup> Eric Barker, *Hatchery Change Has Already Begun; During Management Transition, Tribal*

Fourth, the federal government will transfer isolated parcels of federal land within the reservation to the Bureau of Indian Affairs who will hold the land in trust for the Tribe.<sup>187</sup> These parcels will help the Tribe consolidate a reservation land base fractured by dispositions to non-Indians during the allotment era.<sup>188</sup> The Tribe may select inholdings valued at \$7 million from among the 11,000 acres of land managed by the Bureau of Land Management within the reservation.<sup>189</sup>

Finally, the settlement recognizes a tribal right to access and use water from springs and fountains located on land the Tribe ceded to the United States under the Treaty of 1863.<sup>190</sup> The agreement limits this access and use right to land presently held by the federal government. Reservation land ceded to the federal government in 1863, but presently owned by private parties, is not burdened by the Tribe's right.<sup>191</sup>

## 2. *Salmon/Clearwater Component*

The Salmon/Clearwater Component consists of two major sub-components: 1) Nez Perce instream flow claims, and 2) the Salmon/Clearwater Habitat Management and Restoration Initiative. Under the first sub-component, the SRBA Court will decree instream flows at nearly 200 locations within the Salmon and Clearwater Basins.<sup>192</sup> The Tribe selected these stream reaches for instream flow protection due to their importance for salmon habitat. The state may change these instream flows only after consulting with the Tribe and, in issuing any new water right that may affect instream flows established under the agreement, the state must consider the protection of fish and wildlife habitat.<sup>193</sup> The Idaho Water Resources Board, and not the Nez Perce, will hold these rights, which the settlement subordinates to existing water rights and "to future domestic, commercial, industrial and municipal water rights."<sup>194</sup> The agreement also creates a limited subordination to future water rights for agricultural use.<sup>195</sup>

Second, subject to federal authorization under the National Environmental Policy Act<sup>196</sup> and ESA, Idaho will implement and administer the Salmon/Clearwater Habitat Management and Restoration Initiative (Initiative) as a multi-faceted cooperative agreement under section 6 of the ESA.<sup>197</sup> The Initiative focuses conservation and restoration efforts under the

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*Employees Will be Trained to Operate the Kooskia Hatchery*, LEWISTON MORNING TRIBUNE, Apr. 24, 2005, at 6A.

<sup>187</sup> TERM SHEET, *supra* note 174, at 1–2. Any licensed or permitted uses of these lands, including grazing, may continue until expiration of that lease or permit. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, § 6(b)(1), 118 Stat. 3431, 3434 (2004).

<sup>188</sup> See Royster, *supra* note 164, at 7–13; *infra* Part V.A.

<sup>189</sup> TERM SHEET, *supra* note 174, at 1.

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.*

<sup>192</sup> *Hearing on S. 2605*, *supra* note 35.

<sup>193</sup> TERM SHEET, *supra* note 174, at 2.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 4.

<sup>196</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2000).

<sup>197</sup> Under section 6, the Secretary of the Interior may authorize programs established and

settlement agreement on the Salmon and Clearwater Basins. These efforts will proceed pursuant to three programs: 1) the Instream Flow Program, 2) the Idaho Forestry Program, and 3) the Habitat Improvement Program.<sup>198</sup>

Under the Instream Flow Program, Idaho will establish instream flows on stream reaches identified by settlement parties as flow limited.<sup>199</sup> The SRBA Court will not decree these instream flows, however, and the Tribe enjoys no right of notice and consultation prior to changes or diversions that may affect these flows.<sup>200</sup> Additionally, the agreement subordinates flows under this program to the same subordinations specified for the Nez Perce instream flows.<sup>201</sup>

The Idaho Forestry Program (Forestry Program) invites owners and operators on state and private land to voluntarily comply with detailed forest practice standards set forth in the agreement.<sup>202</sup> The settlement parties crafted these standards, which establish no harvest zones within twenty-five feet of fish-bearing streams, harvest limitations in riparian buffer zones, and road management measures, to protect water quality and salmon habitat.<sup>203</sup> As incentive to enroll in the Forestry Program, the federal government will extend incidental take coverage to enrolled parties that employ timber management practices in compliance with standards set forth in the agreement.<sup>204</sup> The Idaho Department of Lands will monitor enrolled parties for compliance with the Forestry Program and will prepare annual audits for National Oceanic and Atmospheric Administration (NOAA) Fisheries and the United States Fish and Wildlife Service that summarizes all program activities and details enrollee performance.<sup>205</sup>

The Habitat Improvement Program is the third and final program that settlement parties agreed to implement under the Initiative. Idaho will develop this program primarily to provide private landowners with

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maintained by any state “for the conservation of endangered species and threatened species.” 16 U.S.C. § 1535(c) (2000). In order to receive authorization from the Secretary, a state must: 1) authorize state wildlife agencies to conserve endangered or threatened species, 2) develop a program to conserve endangered or threatened species, 3) authorize state wildlife agencies to monitor endangered or threatened species, 4) authorize state wildlife agencies to establish conservation programs, and 5) provide for public participation in subsequent listing decisions. *Id.* § 1535(c)(1)(A)–(E) (2000). The Secretary will review cooperative agreements for compliance with these factors on an annual basis. *Id.* § 1535(c)(1) (2000). Section 6 does not waive section 9 liability for state agencies or other parties acting pursuant to an authorized cooperative agreement. *Id.* § 1535(f) (2000).

<sup>198</sup> TERM SHEET, *supra* note 174, at 3.

<sup>199</sup> *Id.* at 3–4.

<sup>200</sup> *Id.* at 4.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Eric Barker, *Water Settlement Would Affect Logging; State Would Implement Protective Rules Under Proposed Snake River Basin Agreement*, LEWISTON MORNING TRIB., June 11, 2004, at 1A.

<sup>204</sup> TERM SHEET, *supra* note 174, at 17. Federal fish and wildlife agencies may authorize private individuals to take listed species in incidental take permits for the purpose of “enhanc[ing]the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1)(A) (2000).

<sup>205</sup> TERM SHEET, *supra* note 174, at 14–15.

incentives to improve salmon habitat.<sup>206</sup> Using two-thirds of a \$38 million trust fund established by the federal government under the settlement, Idaho will encourage private parties to correct existing man-made barriers to fish passage, protect habitat through land acquisitions and conservation easements, and take other measures for the purpose of protecting and restoring salmon in the Salmon and Clearwater Basins.<sup>207</sup> Idaho will select and implement habitat improvement projects in consultation with the Tribe, who will control the remaining one-third of the federal trust fund for additional habitat restoration.<sup>208</sup>

### 3. Snake River Flow Component

The Snake River Flow Component (Flow Component) is an upper Snake River Basin flow augmentation program “designed to assist fish survival downstream of Hells Canyon Dam.”<sup>209</sup> Under the Flow Component, the United States agreed to lease 427,000 acre-feet of water from eleven water development projects managed by the Bureau of Reclamation in the upper Snake River through the thirty year term of the agreement.<sup>210</sup> The upper Snake River projects exist primarily to provide irrigation flows to agricultural interests in southern Idaho.<sup>211</sup> The settlement also authorizes the United States to acquire an additional 60,000 acre feet from the Snake River mainstem, bringing total flow augmentation under the Flow Component to 487,000 acre-feet per year.<sup>212</sup>

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<sup>206</sup> *Id.* at 16.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 20; *see infra* notes 210–11 and accompanying text.

<sup>210</sup> TERM SHEET, *supra* note 174, at 20. In the wake of Snake River salmon ESA listings in the early 1990s, the Northwest Power Planning Council, a regional agency created by Congress in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839–839h (2000), in part to protect, mitigate, and enhance fish and wildlife, developed a program to recover salmon. JOHN M. VOLKMAN, A RIVER IN COMMON: THE COLUMBIA RIVER, THE SALMON ECOSYSTEM, AND WATER POLICY 87 (1997). The program called for the Bureau of Reclamation (BOR) to acquire 427,000 acre-feet in the Snake River Basin to aid salmon migration in the summer months. *Id.* at 93–94. In 1993, the National Marine Fisheries Service (NMFS), issued a biological opinion to determine whether operation of the Federal Columbia River Power System would jeopardize salmon listed under the ESA. *Id.* at 89–94; *see also* 16 U.S.C. § 1536(b)(3)(A) (2000) (requiring fish and wildlife agencies to prepare biological opinions on whether federal actions adversely affecting a listed species will jeopardize the continued existence of those species). NMFS incorporated the Northwest Power Planning Council’s recommendation for Snake River Basin water leasing into its 1993 biological opinion. VOLKMAN, *supra* note 210, at 89–90. Between 2000 and 2004, BOR failed to provide 427,000 acre-feet from upper Snake River reservoirs as envisioned by the program due to drought and the lack of willing sellers. Natalie M. Henry, *Landmark Snake River Pact Clears Final Hurdle*, LAND LETTER, Mar. 31, 2005, <http://www.eenews.net/Landletter/2005/03/31/> (last visited July 16, 2006). A wet spring allowed BOR to lease enough water from Idaho farmers to meet the 427,000 acre-foot goal in 2005. Rocky Barker, *Water Release is Show of Good Faith at Right Time*, THE IDAHO STATESMAN (Boise), June 24, 2005.

<sup>211</sup> *Am. Rivers v. Nat’l Oceanic and Atmospheric Admin. Fisheries*, No. 04-0061, slip op. at 2 (D. Or. May 23, 2006).

<sup>212</sup> TERM SHEET, *supra* note 174, at 20.



Flow augmentation from upper Snake River reservoirs is not a novel measure.<sup>213</sup> Since the listing of Snake River salmon under the ESA in the early 1990s, the Northwest Power Planning Council's fish and wildlife program and a series of biological opinions issued by NOAA Fisheries directed BOR to release 427,000 acre-feet from Snake River reservoirs during the summer migration season to avoid jeopardizing threatened and endangered species of salmon.<sup>214</sup> NOAA Fisheries intended flow augmentation from the BOR projects to offset partially the effects of upper Snake River water diversions, which deplete annual flows below the Hells Canyon dams by approximately six million acre-feet.<sup>215</sup> On May 23, 2006, the federal District Court of Oregon invalidated the most recent biological opinion addressing the effects of upper Snake River water development projects on listed species of salmon.<sup>216</sup> The court held that NOAA Fisheries' jeopardy analysis violated the ESA because the biological opinion, which recommended flow augmentation of 487,000 acre-feet—the precise amount agreed to under the settlement—failed to “consider the combined effects of the proposed action and the existing environmental baseline.”<sup>217</sup> The ruling requires NOAA Fisheries to prepare a new biological opinion for upper Snake River projects and casts doubt on the validity of the Flow Component. Settlement parties premised this component on BOR's commitment to regulate upper Snake River projects pursuant to terms set forth in the agreement and on a finding by NOAA Fisheries that BOR's action under the agreement would not jeopardize listed species of salmon.<sup>218</sup>

#### V. THE REVOLUTION IN INDIAN COUNTRY

Professor Wilkinson described the recent invigoration of tribal sovereignty on the Nez Perce reservation as “the revolution in Indian Country.”<sup>219</sup> The settlement is the latest episode in this social movement, during which the Tribe moved from the brink of termination to achieve self-sufficiency and independence in the modern era.<sup>220</sup> The Executive Committee accomplished these reforms through a concerted effort to reconnect tribal people with the land and natural resources integral to native identity.<sup>221</sup> Today, the Tribe is a major player in the field of natural resources

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<sup>213</sup> Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 ENVTL. L. 997, 1036–37 (1998).

<sup>214</sup> *Id.*

<sup>215</sup> *Am. Rivers*, No. 04-0061 at 2.

<sup>216</sup> *Id.* at 5–6.

<sup>217</sup> *Id.* at 6.

<sup>218</sup> TERM SHEET, *supra* note 174, at 23.

<sup>219</sup> Wilkinson, *supra* note 31, at 446.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 447–49.

management.<sup>222</sup> The settlement solidifies this role and broadens tribal influence over land and natural resources both on and off the reservation.<sup>223</sup>

Nez Perce sovereignty reached a nadir during the mid-twentieth century when the threat of termination loomed over the reservation.<sup>224</sup> Termination would extinguish the reservation; the federal government would sell off tribal property and disperse receipts in per capita payments to enrolled tribal members.<sup>225</sup> Many Nez Perce living off the reservation favored this course of action.<sup>226</sup> The Executive Committee, a creature of the original Nez Perce constitution ratified by tribal members in the late 1940s, resisted this faction.<sup>227</sup> After shepherding Nez Perce claims through the Celilo fishing settlement of 1956, the Executive Committee suppressed the movement for termination.<sup>228</sup> The committee displayed an early commitment to perpetuating and strengthening the reservation following the settlement and elected to invest the Tribe's \$2.8 million settlement share in reservation development rather than per capita payouts to tribal members.<sup>229</sup> The water rights settlement shows that the intervening five decades have not dimmed this commitment. Tribal control of land and natural resources as a means to achieve sovereign independence remains prominent in Executive Committee considerations.<sup>230</sup>

Not all tribal members endorsed the settlement.<sup>231</sup> These dissenting views may arise from perceived similarities between the settlement and the Nez Perce treaties,<sup>232</sup> whose territorial cessions invoke strong feelings in

<sup>222</sup> See David Johnson, *The Tribe Spends Its Salmon Dollars to Region's Benefit*, LEWISTON MORNING TRIB., Mar. 27, 2005, at 4F (stating that the Nez Perce possess the largest tribal natural resources program in the country).

<sup>223</sup> See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Land and Resources*, 1995 UTAH L. REV. 109, 133–34 (1995) (citing the tribal land base as an essential attribute of native sovereignty).

<sup>224</sup> WALKER, *supra* note 32, at 128.

<sup>225</sup> *Id.* at 124–32.

<sup>226</sup> *Id.*

<sup>227</sup> The Nez Perce created the Executive Committee primarily to assert claims for treaty violations before the Indian Claims Commission. WALKER, *supra* note 32, at 128. To carry out this responsibility, the Nez Perce delegated the following powers to the Executive Committee in the 1948 constitution:

(1)(a) To represent the Tribe in negotiations with Federal, State, and local governments and with private corporations, associations, and individuals and to advise and consult with government officials concerning governmental activities affecting the Tribe . . . .

. . . .

(2)(b) To manage the property of the Nez Perce Tribe, including Tribal lands, restricted funds, timber and other resources, and to purchase or otherwise acquire lands or interest in lands within or without the Reservation . . . .

NEZ PERCE CONST. of 1948 art. VIII, *in* WALKER, *supra* note 32, at 169.

<sup>228</sup> WALKER, *supra* note 32, at 126.

<sup>229</sup> *Id.* at 128.

<sup>230</sup> See Wood, *supra* note 223, at 133–34 (suggesting that tribes will achieve native sovereignty in the contemporary era through a distinct, tribal land base).

<sup>231</sup> See *supra* Part I (describing dissenting opinions of tribal members, including one former Executive Committee chairman).

<sup>232</sup> See BURTON, *supra* note 80, at 85–86 (arguing Indian water rights settlements in the 1980s resemble 19th century treaties because, in both circumstances, tribes waived significant rights

tribal members to this day.<sup>233</sup> As the Nez Perce waived aboriginal claims to land in 1855 and treaty rights in 1863, the Executive Committee waived substantial treaty-based claims to water during settlement negotiations.<sup>234</sup> The Tribe must again entrust the benefit of its bargain largely to the federal government, whose broken promises define the sad history of its Indian relations.<sup>235</sup> Finally, the Tribe once more reached agreement with parties who wielded superior bargaining power during negotiations, this time derived from the narrow interpretation of Nez Perce treaty rights in the SRBA Court ruling.<sup>236</sup> Federal Indian law and policies have changed substantially since the nineteenth century. However, the largely unfulfilled promises made by the federal government during the treaty experience in exchange for land cessions caused some tribal members to voice opposition to treaty rights waivers in the settlement.<sup>237</sup>

This intra-tribal tension provides context for a preliminary assessment of the settlement. This section argues that the Executive Committee in ratifying the settlement successfully advanced sovereign interests through gains in land and self-determination, but provided less certain benefits to Snake River salmon due to waivers of instream flow claims.

#### A. Land and Self-Determination

Nez Perce sovereignty and national identity derive from the land, the water flowing through the land, and the living things upon it.<sup>238</sup> Before the arrival of white settlers, the Tribe claimed a vast aboriginal territory of thirteen million acres, now within Idaho, Oregon, and Washington.<sup>239</sup> Salmon returned to the Snake River Basin in abundance and in rhythm with the seasons, the camas fields flourished, and the Tribe moved freely, fishing and gathering the fruit of an unsurveyed territory.<sup>240</sup> Events of the nineteenth and twentieth centuries forever changed the native landscape. Lines were fixed

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in natural resources in exchange for benefits the federal government often failed to procure).

<sup>233</sup> Wilkinson, *supra* note 31, at 440.

<sup>234</sup> See *supra* Part II (discussing the history of Nez Perce treaty claims).

<sup>235</sup> The Tribe's waivers will go into effect once Congress appropriates money for the Tribal Fisheries Fund and Habitat Trust Fund. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 3431 (2004); see also BURTON, *supra* note 80, at 86 (noting that congressional appropriations for money authorized under Indian water rights settlements in the 1980s are generally on track). The same author later pointed out, however, that "[i]f . . . continuing and significant financial obligations are not fully honored legislatively, the Indians will be considerably worse off than if they had never negotiated in the first place." *Id.* at 129. Another author noted that Congress normally diverts money from Bureau of Indian Affairs's housing and education programs to fulfill federal commitments under water rights settlements, thus resulting in "zero-sum" benefit to Indian country. MCCOOL, *supra* note 147, at 61-63.

<sup>236</sup> See *supra* Part III.

<sup>237</sup> See Ring, *supra* note 3, at 5 (quoting Allen Pinkham, Sr., former chairman of the Executive Committee, as saying the "[settlement] is not the correct thing to do").

<sup>238</sup> Wilkinson, *supra* note 31, at 462-63; see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1473-74 (1994) (noting a secure land-base as one of four attributes of tribal sovereignty).

<sup>239</sup> Wilkinson, *supra* note 31, at 436.

<sup>240</sup> *Id.*

on maps at statehood and under treaties with the federal government;<sup>241</sup> by 1863, territorial cessions had reduced the Nez Perce interest in land to 750,000 acres along Idaho's Clearwater River. The Nez Perce land base dwindled to less than 100,000 acres during the twentieth century as thousands of acres passed out of tribal ownership during the allotment era.<sup>242</sup> Meanwhile, salmon, the vigorous and seemingly inexhaustible resource central to all facets of Nez Perce life, began to disappear from the Snake River and its tributaries.<sup>243</sup> These injuries to the traditional lifestyle of the Nez Perce led to pervasive despair and hopelessness on the reservation in the first half of the twentieth century.<sup>244</sup>

The settlement presented the Executive Committee with a rare opportunity to reclaim aboriginal land for the Nez Perce people.<sup>245</sup> Federal land transfers<sup>246</sup> and interests in real property purchased at later dates with settlement funds<sup>247</sup> will further expand sovereign control over land within reservation borders.<sup>248</sup> The Tribe will also oversee management of reservation land remaining under federal control through a cooperative agreement with the Bureau of Land Management.<sup>249</sup> Finally, the reservation will benefit from sewage and water delivery systems constructed with funds

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<sup>241</sup> BECKHAM, *supra* note 49, at 1. Writing of western Oregon tribes in 1853, Superintendent of Indian Affairs Joel Palmer portended the fate of the Nez Perce reservation under the Treaty of 1855:

That these Indians . . . cannot long remain on the reserves in the heart of the settlements granted them by treaty, even should Congress confirm those treaties, is too clear to admit of argument. Vice and disease, the baleful gifts of civilization, are hurrying them away, and ere long the bones of the last of many a band may whiten on the graves of his ancestors. If the benevolent designs of the government to preserve and elevate these remnants of the aborigines are to be carried forward to a successful issue, there appears but one path open. A home remote from the settlements must be selected for them.

*Id.* at 15–16 (quoting S. EXEC. DOC. NO. 1, at 449 (1st Sess. 1853)).

<sup>242</sup> See Royster, *supra* note 164, at 7–13.

<sup>243</sup> BLUMM, *supra* note 138, at 5–14.

<sup>244</sup> Wilkinson, *supra* note 31, at 446.

<sup>245</sup> Other opportunities to regain control over aboriginal territory have recently presented themselves to the Tribe. In 1997, the Tribe purchased a 10,300 acre wildlife preserve in the Hells Canyon region of eastern Oregon. The Tribe made this purchase with money from the Bonneville Power Administration (BPA), which makes funds available to implement the Northwest Power Planning Council's fish and wildlife program. Elizabeth Manning, *After 120 Years, the Nez Perce Come Home*, HIGH COUNTRY NEWS, July 7, 1997, at 7; see also COLUMBIA BASIN FISH & WILDLIFE AUTH., NE. OREGON WILDLIFE MITIGATION PROJECT—"PRECIOUS LANDS," available at <http://www.cbfwa.org/FWProgram/ReviewCycle/fy2002bm/projects/199608000n.doc> (describing the preserve's acquisition and management). In 2005, the Tribe purchased a 1,000 acre parcel from Oregon contiguous to the wildlife preserve, also with money from the BPA. Jeff Barnard, *BPA Grant Helps Nez Perce Buy Ancestral Land*, THE COLUMBIAN (Vancouver, Wash.), Aug. 5, 2005, at C2.

<sup>246</sup> See *supra* Part IV.B.1.

<sup>247</sup> *Id.*

<sup>248</sup> See *Hearing on S. 2605*, *supra* note 35 (testifying that land transfers "support the Tribe's goal of cohesive management of fish and wildlife resources on its Reservation"); CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 14 (1987) (noting that treaty parties originally intended to establish reservations as separate homelands for tribes, free from interference by non-Indians and state governments).

<sup>249</sup> TERM SHEET, *supra* note 174, at 1–2.

authorized for these purposes by the federal government.<sup>250</sup> When in place, these systems will help alleviate acute housing shortages on the reservation.<sup>251</sup>

Self-determination, an attribute prized by modern Indian tribes to shed long-held perceptions as “sovereign dependents,”<sup>252</sup> in large part means tribal control over on-reservation natural resources for the Nez Perce.<sup>253</sup> This desire for tribal control is keen on the reservation, given the historic failure of federal and state governments to administer natural resources, water and salmon in particular, with sensitivity to tribal interests.<sup>254</sup> The terms accepted by the Executive Committee aim to disperse federal control over salmon recovery efforts on the reservation and to create an environment where tribal biologists and policy makers will stand on equal footing with their federal counterparts.<sup>255</sup> Tribal members will coordinate efforts to draft annual operating plans for water releases from the Dworshak Reservoir and will work control and assist hatchery operations at Kooskia and Dworshak respectively.<sup>256</sup>

These terms provide the Tribe with a significant part in determining the fate of salmon restoration within the reservation. One day, the Tribe hopes to create a sanctuary for salmon in the Clearwater and Salmon Basins, a goal that ultimately may require removal of the lower Snake River dams.<sup>257</sup> Fisheries and habitat restoration trust funds provided by the federal government for the Tribe will serve this long-term goal.<sup>258</sup> At its discretion, the Tribe may use these funds to restore salmon habitat through water rights and land deals and implementation of habitat restoration projects.<sup>259</sup> Thus, while salmon populations declined drastically over the past century under federal and state supervision, the settlement will afford the Nez Perce with an influential voice in determining the method and pace of future recovery efforts.

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<sup>250</sup> *Id.* at 1.

<sup>251</sup> *Cf. Hearing on S. 2605, supra* note 35.

<sup>252</sup> *See* Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management As a Reserved Right*, 30 ENVTL. L. 279, 357 (2000) (citing tribal self-determination over natural resource and rights in natural resources as a crucial element of tribal sovereignty).

<sup>253</sup> Wilkinson, *supra* note 31, at 446. As evidence, the Nez Perce Natural Resources Subcommittee pursues the following goal: “Expand and protect our precious natural resources, which are fundamental to who we are as a people, including an expanded land base, access to traditional resources, and the protection of the vast family of fish, birds, vegetation and wildlife which depend on the health of an environment.” Nez Perce Tribe, *Natural Resources Subcommittee*, <http://www.nezperce.org/NPTEC/NaturalResourcesSubcmt.htm> (last visited July 16, 2006).

<sup>254</sup> Goodman, *supra* note 252, at 281–82.

<sup>255</sup> *See supra* Part IV.B.

<sup>256</sup> TERM SHEET, *supra* note 174, at 1.

<sup>257</sup> E-mail from Geoff Whiting, *supra* note 161. *See also* Winston Ross, *Advocates Float Radical Ideas to Save Salmon*, EUGENE REGISTER-GUARD, Jan. 26, 2006, at A1 (recommending salmon sanctuaries as one possible method to keep salmon at sustainable levels through the year 2100).

<sup>258</sup> TERM SHEET, *supra* note 174, at 1.

<sup>259</sup> *Id.*

*B. Salmon*

The Nez Perce asserted treaty claims to water in the SRBA hoping to provide salmon throughout the Snake River Basin with instream flows protected by law.<sup>260</sup> The SRBA Court ruling snuffed out this hope and, in settlement, the Executive Committee waived the claims.<sup>261</sup> In return, the Tribe agreed to instream flows for salmon of uncertain effect because the settlement emphasizes two factors not often aligned in protection of Snake River salmon: state control and the status quo.<sup>262</sup> Idaho, not the Tribe, will hold instream flows decreed by the SRBA Court.<sup>263</sup> Thus, the state maintains authority to amend these flows or permit future diversions that affect these flows without violating terms of the agreement.<sup>264</sup> This scenario is plausible because water users in Idaho maintain close political ties with the state legislature and generate billions of dollars for the state economy.<sup>265</sup> The Tribe enjoys a right of notice and consultation under the settlement prior to actions by the Idaho Water Resources Board to change or affect instream flows on tribal priority stream reaches; however, it remains to be seen how vigorously the state will pursue consultation, and what weight the state will accord tribal recommendations assuming consultation occurs. Even if Idaho administers the instream flows in keeping with the spirit of the agreement, the settlement does not appreciably affect the status quo on Snake River Basin rivers and streams because the settlement established the flows with priority dates of April 20, 2004, and subordinates these instream uses to existing and most future water rights.<sup>266</sup> The status quo of diminished river flows and imperiled salmon runs in the Snake River Basin is why the Nez Perce filed instream flow claims at all.<sup>267</sup>

## VI. CONCLUSION

The Nez Perce filed water rights claims in the SRBA Court to put water back into rivers and streams for salmon. Viewed through this lens, the settlement embodies disappointment. The hope and promise of instream flows with time immemorial priority dates for Snake River salmon fell before a harsh judgment by the SRBA Court. Equipped with this decision, Idaho and the water users sought and exacted painful compromises from the Tribe during settlement negotiations. These waivers ensured Nez Perce water rights would not interfere with existing water diversions in the Snake River

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<sup>260</sup> See *supra* Part I (detailing the Tribe's claims).

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* Part IV.B.2 (discussing the nature of the settlement).

<sup>263</sup> TERM SHEET, *supra* note 174, at 2. A common criticism of Indian water rights settlements is that non-Indian parties often look to settlement negotiations as an opportunity to subject tribes to state control. WATERS AND WATER RIGHTS, *supra* note 100, § 37.04(c)(1).

<sup>264</sup> TERM SHEET, *supra* note 174, at 3. Were the state to change any water right decreed by the SRBA Court pursuant to the settlement, it would first have to provide six months advance notice to all parties and consult with the Nez Perce on a government-to-government basis. *Id.*

<sup>265</sup> Barker, *supra* note 1, at M1.

<sup>266</sup> See *supra* Part IV.B.2 (describing instream flows established by the settlement).

<sup>267</sup> See *supra* Part I (describing purpose of Nez Perce instream flow claims).

Basin. What instream flows the Nez Perce did guarantee for salmon earned priority dates of April 20, 2004 with subordinations to most future diversions. The waivers also invoked painful memories of the treaty experience for the Tribe, where the Nez Perce lost so much land in return for a reservation methodically diminished by federal Indian policies and fishing rights to salmon, a species on the verge of extinction.

Viewed through the lens of tribal sovereignty, however, the settlement represents a bold step in the Tribe's continuing effort to control and manage land and natural resources. The settlement extends tribal influence over federal land within the reservation and places thousands of additional acres under direct control of the Nez Perce. The Tribe will influence hatchery operations and water releases to aid salmon in the Clearwater Basin and manage multi-million dollar trust funds which will improve salmon habitat and quality of life on the reservation. These terms will provide the Nez Perce people with voice and opportunity to restore the land and natural resources so intertwined with cultural identity and with fodder to maintain the revolution which has returned sovereign identity to the reservation at Lapwai.