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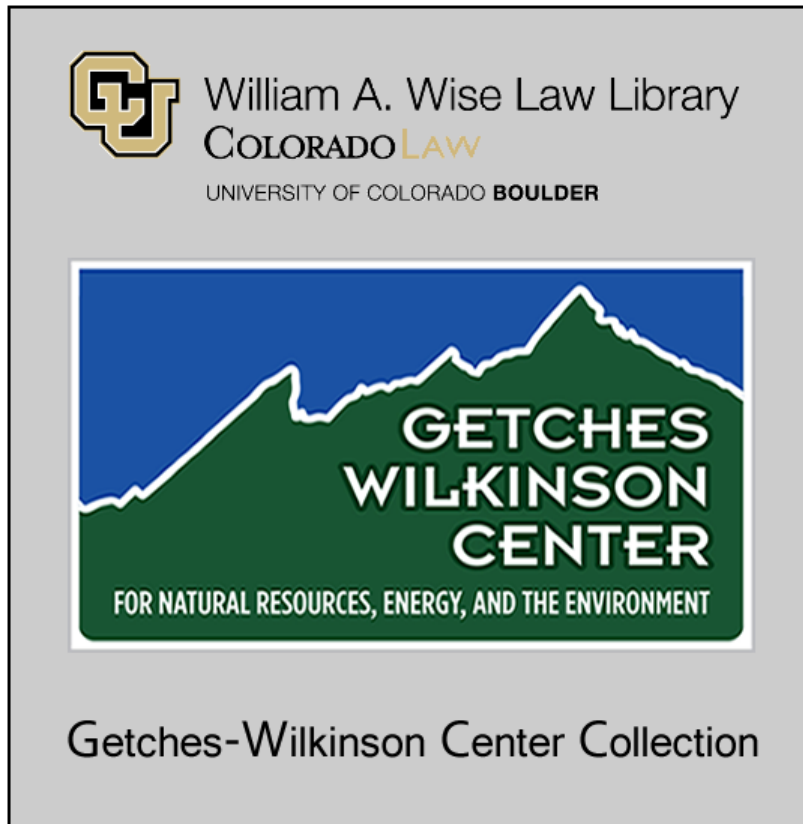


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**INDIAN WATER RIGHTS AND THE SNAKE
RIVER BASIN ADJUDICATION**

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INDIAN WATER RIGHTS AND THE SNAKE RIVER BASIN ADJUDICATION

by Peter C. Monson¹

Summary

Scarcity breeds litigation. But scarcity can be defined differently depending on where you are from. For those in the audience from the desert southwest, the quantities of water at issue in the Snake River Basin will surely boggle the mind. According to the Idaho Department of Water Resources (IDWR), the average annual flow from the Snake River into the Columbia River is about 37 million acre feet per year (afy). Stated another way, spring run-off in May and June in the Snake River near Lewiston where it leaves the state in pre-development conditions has been estimated to average about 150,000 cubic feet per second (cfs), with peak year flows approaching 200,000 cfs. Groundwater is also abundant; the IDWR estimates that the top 100 feet of the Snake Plain Aquifer in southern Idaho stores about 100 million acre feet. Active reservoir storage in the state is about 12 million acre feet. Against this backdrop, there are about 4 million acres of land in irrigated agriculture.

So where's the scarcity? While the quantity of water at issue in the Snake River Basin Adjudication (SRBA) is several orders of magnitude larger than the quantities at stake in general stream adjudications in the Southwestern United States, water managers and water users in Idaho are facing an increasingly limited and, in many places, over-appropriated water resource, at least during certain times of the year. Conflicts between surface water users are common, and conflicts between surface water users and groundwater users are becoming more so. But it is no longer just a fight for water among irrigators. For nearly a century, Idaho water users have grown accustomed to the prior appropriation system common to all western states, which is based

¹The views expressed herein, and in any presentation made during this conference, are solely those of the author and do not necessarily reflect or embody the views of the Justice Department or its client, the United States of America, or any subordinate agency thereof.

upon the notion that water left in the stream is water wasted. In the past decade or two, however, that traditional arrangement has been under attack. Environmentalists contend that some water should be left in the stream for the inherent benefits to fish and other aquatic life; recreationists concur in order that they can pursue their preferred activities, including fishing, boating, and the like. State and federal water quality statutes and regulations have placed additional restrictions upon water use in an effort to control pollution and temperature problems in order to achieve the Clean Water Act goal of fishable and swimmable streams. And limitations on appropriative, out of stream, water uses are being imposed for the benefit of fisheries, especially the Idaho salmon and steelhead fisheries, all of which have now been listed under the Endangered Species Act and which are of critical importance to the people of the Pacific Northwest in general and Idaho in particular, both Native Americans and more recently arrived Euro-Americans, alike.

Although the quantities of water at stake may be orders of magnitude larger than those at issue in general stream adjudications in the southwestern states such as New Mexico, Arizona, and Colorado, the Snake River Basin Adjudication embodies many of the same issues and controversies over Indian water rights. The claims filed in the SRBA by the United States for the benefit of Indian tribes, and by the Tribes themselves, reflect both the timeless needs for water of Indian people (and the fish and wildlife upon which they depend) and the modern demands over the use of water resources which have so dramatically altered water allocation in the West. These claims, based upon well-settled legal principles and the logical extension of those principles, embody the concept of Indian reservations as homelands for their people while trying also to honor the promises, made in treaties, statutes, and executive orders, which the government of the United States has made to these tribes.

Resolution of these tribal claims exemplify the theme of this conference: Courts, Coercion, and Collaboration. The Snake River Basin Adjudication is one of the largest lawsuits pending in any court in the nation. It seeks to adjudicate over 150,000 separate water rights, to both surface and groundwater, diverted within the Snake River Basin in Idaho, which encompasses over 85% of

the State. The United States, together with all of its water rights including its rights asserted for the benefit of Indian Tribes, is joined in this massive adjudication by virtue of the McCarran Amendment, 43 U.S.C. 666. Among the largest such unquantified federal Indian reserved water rights were those of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. Also of great significance to Snake River water users are the rights of the Nez Perce Indian Tribe to water both on and off-reservation, especially those rights to instream flows necessary to support the once abundant - but today endangered - salmon and steelhead (anadromous) fisheries in the Snake River and its tributaries. This dispute is being played out on the backdrop of what some have referred to as the “New West”, a term which is reflective of the dramatic shift in the economies of western states from rural and resource extractive to urban and recreation oriented. It is also informed as a legal matter by the principles of federal Indian law and policy, which can only be understood against the backdrop of history.

Resolution of these complex Indian water rights claims will occur through both coercion and collaboration. In Idaho, the claims of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, were accomplished through collaboration resulting in a settlement of their rights which was largely achieved even before the claims had been filed. However, the settlement was not achieved in a vacuum; indeed, that it was achieved at all may be reflective of the fact that the Shoshone-Bannock claims were due to be filed in the SRBA litigation which presented a deadline and a degree of coercion. Resolution of the claims for the Nez Perce have not been so collaborative, and indeed a degree of coercion from the very active, on-going litigation process, from the court and court appointed mediator, is necessary to bring the parties to the bargaining table. Whether that collaborative effort will achieve fruition before the litigation foists a solution upon the parties remains to be seen. An intermediate example may be found in the claims for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, which sits astride the Idaho-Nevada border. This set of claims presents interesting jurisdictional questions since the Duck Valley claims are pending both in Idaho state court and before the Nevada State Engineer. These jurisdictional issues have not yet been addressed by the courts and may be avoided altogether if a negotiated resolution can be achieved in both states.

This paper has three modest objectives. First, it will provide the audience with a brief overview of the law of Indian water rights for consumptive and non-consumptive purposes. Second, it will discuss the Fort Hall Indian Water Rights Settlement, which was agreed to and enacted in 1990 and decreed in 1995. Third, it will discuss the other pending claims for Indian Tribes, including those made for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and those made for the benefit of the Nez Perce Tribe.

Fundamental Principles of Indian Water Law

The *Winters* Doctrine and its Progeny

The jurisprudential foundation of Indian and federal reserved water rights is the seminal reserved water rights case, *United States v. Winters*, 207 U.S. 564 (1907). The case involved a dispute over water in the Milk River in Montana, between the Indians of the Fort Belknap Indian Reservation and an upstream water user who began diverting water from the Milk River after the creation of the reservation and to the detriment of the tribal irrigation system. In ruling in favor of the United States, acting as trustee for the Indians, the Court applied the canons of construction which are unique to Indian treaties, statutes and agreements, to find that water was impliedly reserved with the reservation of the Fort Belknap Indian Reservation:

The Indians had command of the lands and the waters, “command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. * * * By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purposes of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the “double sense” which might some time be urged against them.

Winters, 207 U.S. at 576-77. The Supreme Court held that even though the treaty creating the Fort Belknap Indian Reservation was silent as to water, the parties impliedly reserved a sufficient quantity of water to irrigate the arid reservation land. Without that water, the purpose of creating the Reservation to enable the tribe to give up its nomadic existence and sustain itself on a relatively small tract of land would be incapable of fulfillment. *Winters*, 207 U.S. at 576. Thus, the construction of dams or reservoirs or the undertaking of any other activities that would prevent water from flowing to the Reservation was enjoined.

This ruling was followed to varying degrees by subsequent lower court rulings, and was reaffirmed by the U.S. Supreme Court in *Arizona v. California*, 373 U.S. (1963). That case extended the *Winters* doctrine to Indian reservations which are created by Executive Order and to non-Indian federal reservations such as national parks and monuments, wildlife refuges, and other federal reservations such as national forests. See also, *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).

Arizona v. California is also significant in that it defined the measure of the Indian water right, at least that part of the right reserved for agricultural purposes. It established that the measure of the Indian agricultural right is based upon the water necessary to irrigate all of the “practicably irrigable acres” (PIA) within an Indian Reservation. Since the water right is to be adjudicated into perpetuity, it must be sufficient to irrigate not only the lands being irrigated historically or at the time of the litigation (“presently irrigated”) but also those lands which would be susceptible to irrigation in the future, based on the quality of the soils, engineering feasibility, and economics. Although there is considerable debate in particular cases about the elements that comprise the PIA standard, courts have generally followed it. See e.g., *In re Rights to Use Water in the Big Horn River*, 753 P.2d 76 (Wyo. 1988), *aff’d* by an equally divided court sub nom. *Wyoming v. United States*, 492 U.S. 406 (1989).

Typically, the United States and affected Indian tribes, should they choose to join water adjudication suits, file claims not only for agricultural purposes but also for domestic, stock

watering, municipal, commercial and industrial uses, as well as for instream flows on-reservation for the protection of fish and wildlife habitat. These “other” claims, which tend to be much smaller in quantity than the agricultural claims, are based on the overarching purpose of nearly all Indian reservations to provide the Indians with a permanent homeland.

Winans and the Indian Right to Instream Flows

For many Indian tribes in the Pacific Northwest, hunting, gathering and especially fishing were and to some extent remain, the primary source of subsistence, and had ceremonial, religious, and commercial value. While resident fish and shellfish were important sources of food and commerce depending upon the needs and environment of the particular tribe, perhaps the most important types of fish were the anadromous salmon and steelhead, which were spawned in fresh water, migrated as juveniles to the ocean where they spent several years maturing, and then returned to their natal streams to complete the cycle of life. Salmon were historically and remain today vitally important to these tribes for subsistence, religious, ceremonial, and commercial reasons. The relatively recent demise of the salmon has caused adverse impacts to the tribes and their members.

The recent scarcity of salmon is not a late 20th Century development. Indeed, in the late 1800's, non-Indian canning technology had improved and demanded ever-increasing quantities of fish. A deadly efficient device known as a “fish wheel” was developed, and around the turn of the century a dispute developed at Celilo Falls on the Columbia River between Yakama Indians who had always fished at this particular location and the property owners who had installed a fish wheel and were taking all of the fish to the exclusion of the Indians. As in *Winters*, the United States again brought suit for the benefit of the Indians, basing its claim upon the Yakama Tribe’s rights under the Yakama Treaty which provides, *inter alia*, that,

“[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory, * * *.”

The Supreme Court rendered its decision in 1905, finding in favor of the Indians. Rejecting claims based on private property rights created under state law, the Court noted that the fishing right also is itself a property right “a profit á prendre” which “imposed a servitude upon every piece of land as though described therein [in the Stevens’ treaties],” and it “was intended to be continuing against the United States and its grantees as well as against the State and its grantees.” *United States v. Winans*, 198 U.S. 371, 381-82 (1905). Patents issued by the United States “are subject to the treaty as to the other laws of the land,” whether or not they mention the treaty. *Id.* Particularly important from the water rights perspective here is the notion first enunciated in *Winans* and echoed in *Winters*, that “the treaty was not a grant of rights to the Indians, but a grant of rights from them- a reservation of those not granted.” *Winans*, 198 U.S. at 379. This principle has been reaffirmed in numerous cases to this day. See e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 676 (1979).

So what does this mean for water rights? The import of *Winans* and *Winters* is that the Indians reserved all rights, whether expressly stated or implied from necessity, to water and other resources except what was expressly ceded to the United States in a particular treaty. While the U.S. Supreme Court has not yet accepted certiorari on a case involving claims for instream flow water rights for fisheries, the lower courts, and in particular the Ninth Circuit, have decided a number of cases the vast majority of which recognize a reserved water right for instream flows for fishery purposes, both on-reservation and even where a reservation has been diminished or extinguished but where the associated fishing and hunting rights have survived. The following are representative and leading cases which have recognized Indian and federal reserved water rights for fishery purposes:

1. *Joint Board of Control of the Flathead Irrig. Dist. v. United States*, 832 F.2d 1127 (9th Cir. 1987), cert. denied 486 U.S. 1007 (1988) (upholding federal recognition and enforcement of tribal water right to instream flows to preserve the tribal fisheries with a priority date of time immemorial);
2. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985) (requiring water to be released from irrigation storage reservoirs to protect salmon redds subject to Yakama treaty fishing rights both on- and off-reservation);
3. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied sub nom *Oregon v. United States*, 467 U.S. 1252 (1984) (“Accordingly, we agree with the district court that within the 1864 Treaty is a recognition of the Tribe’s aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the [former] Klamath Reservation. Such water rights necessarily carry a priority date of time immemorial.”);
4. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (“The right to water to establish and maintain the Omak Lake replacement fishery includes the right to sufficient water to permit natural spawning of the trout.”);
5. *United States v. Anderson*, 591 F.Supp. 1, 5 (E.D. Wash. 1982) (“Therefore, under the Winters doctrine, the [Spokane] Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek.”);
6. *In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin; Dept. of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Wash. Supr. Ct., September 1, 1994) (extending prior decision re: treaty fishing water right Ato include all Yakima

River tributaries affecting fish availability at the [Yakama Indian Nation's] "usual and accustomed" fishing stations. Such rights carry a priority date of time immemorial.).

Legal scholars have also examined the issues of instream flows to support fishing rights. See e.g., *Waters and Water Rights*, ch. 37, (Robert E. Beck, ed., 1996 & Supp. 1997 at 250-251); Michael C. Blumm & Bret A. Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach", 69 U.Colo.L.Rev. 407 (1998).

Indian Water Rights, the McCarran Amendment and Forum Shopping

As sovereigns, the United States and Indian tribes are normally immune from suits by states or private entities, absent an express waiver of sovereign immunity. So why are the Indian water rights being adjudicated in state court? The McCarran Amendment, 43 U.S.C. 666, waives the United States immunity from suit in any "suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, * * *."

The Supreme Court has interpreted the McCarran Amendment broadly in prior cases and has rejected "technical" challenges to state court jurisdiction over the United States and tribal claims, holding that while the statute does not waive tribal sovereign immunity to general stream adjudications, it does permit the joinder of the tribes' trustee, the United States, and thus gives state courts the authority to adjudicate tribal rights through the United States. This is true even in states which have disclaimed authority over Indian tribes in their constitutions and enabling acts. See, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Conservancy District v. United States*, 424 U.S. 800 (1976).

Because of the controversial nature of Indian water rights claims, and the often complex law and evidence supporting them, the choice of forum is thought to be a critical factor in their success.

States asserted their state courts' "expertise" in water adjudications while tribal and federal claimants feared that they could only get a fair hearing in federal court. The substantive law for federal and Indian claims is federal law, and state and federal courts alike are bound to apply federal law. *Cappaert v. United States*, 426 U.S. 128, 145-146 (1976). As a practical matter, general stream adjudications under the McCarran Amendment have proceeded in both federal and state courts, and neither forum has evidenced a particular knack for resolving these cases quickly, nor has either forum proven to favor consistently one side or the other. State courts have an unflagging obligation to apply the substantive federal law governing federal and Indian reserved water rights and many have tried in good faith to do so.

The 1990 Fort Hall Indian Water Rights Settlement

The Fort Hall Indian Reservation is located in southeastern Idaho, and is bordered by the Snake River and the Blackfoot River, among other sources. See attached map. It is home to the Shoshone and Bannock Indians, as well as members of the Lemhi Tribe, and operates with one governing Business Council. It is a fairly large reservation, and a majority of the land is in trust status for the Indians, either tribal trust or allotted.

In 1985, negotiations between the State of Idaho, the Shoshone-Bannock Tribes, representatives of large irrigation districts in the upper Snake River system (aka "the Committee of Nine"), and the United States began informal, and later more formalized, discussions toward a negotiated settlement of the Shoshone-Bannock Tribes's water rights. Although the SRBA had not yet been instituted, it was imminent, an outgrowth of the Swan Falls settlement between Idaho and the Idaho Power Company. The Shoshone-Bannock Tribes also possessed the single largest, potential claim in southern Idaho. The Reservation is quite large, comprising an area of approximately 544,000 acres, and had a large potential for irrigation, both present and future, measured by the "practicably irrigable acreage" (PIA) standard discussed above. Moreover, the Tribe traced its water right to the Fort Bridger Treaty of 1868 and an executive order in 1867.

The same Fort Bridger Treaty was at issue in the Big Horn Adjudication in Wyoming, and the state court there awarded the Shoshone-Arapahoe Tribes of the Wind River Indian Reservation a sizeable quantity of water based on PIA, so it was apparent to state interests that the Fort Hall Reservation claims posed a serious threat to existing water users. The Tribe was similarly fearful of litigating its water rights in an Idaho state court, and saw negotiations as way to control the adjudication of their water rights.

The United States, which was involved both as trustee for the Tribes and for the Bureau of Indian Affairs which administered the Fort Hall Irrigation Project serving both Indian and non-Indian lands, appointed a water rights negotiating team. The negotiations proceeded over the course of the next several years. The parties were initially far apart on the quantity of water to be decreed to the tribes, and the water sources from which it would come. Once the gap was closed on those issues, other issues came to the forefront, including “governmental” questions such as who (state, tribal, federal) would administer the various water rights.

Finally, in 1990, an agreement was reached and signed by the political leaders of the three governments and the Committee of Nine, and submitted to each government’s legislative body. The Tribal membership passed a referendum approving the Agreement, the Idaho legislature approved it, and the U.S. Congress enacted the Fort Hall Indian Water Rights Act of 1990, Pub. L. 101-602, (Nov. 16, 1990). The legislative history of the act contains a fairly comprehensive discussion of the elements of the settlement and the background. See, H.R. Rep. No. 101-831, 101st Cong., 2d Sess. (Oct. 10, 1990). Among other things, the settlement provided the following:

1. A tribal water right, based on the *Winters* doctrine, to divert up to 581,031 acre feet per year, divided among various water sources including both surface and groundwater;
2. Confirmed certain storage rights to the Tribe in two Bureau of Reclamation reservoirs;

3. Permitted the marketing of tribal water rights within the Fort Hall Indian Reservation and the marketing of water accruing to the Tribes' Reclamation storage space with certain restrictions;'
4. Created an inter-governmental board to address disputes;
5. Recognized that each government has certain administrative authority over the water use by its citizens and created an information sharing agreement among those governments;
6. Protected certain existing uses through subordination in certain areas and the contribution by the United States of uncontracted storage space to water users impacted by the Agreement; and
7. Provided for federal and state contributions of money and in-kind services toward tribal economic development and the improvement of the tribal irrigation system and enhanced tribal water management.

The settlement called for the water rights to be decreed in the SRBA. That process took longer than the negotiations, due in part to a challenge by several disgruntled non-Indian water users in the Fort Hall Irrigation Project who alleged that their entitlements to water, based on contracts with the United States and not individual water rights, would be diminished as a result of the implementation of the settlement. The district court and the Idaho Supreme Court ultimately rejected their challenges on standing grounds, since these water users did not claim any water rights in the SRBA. *Fort Hall Water Users Assn. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996). The water rights were decreed, and the 1990 Fort Hall Agreement became effective, in 1996.

The Nez Perce Claims

The Nez Perce Indian Reservation is located in Northern Idaho. See attached map. It was originally reserved in 1855 - out of a much larger aboriginal territory - and extended into portions of what is now Oregon and Washington as well as further into Idaho. The reserving document was the Treaty with the Nez Perce, 12 Stat. 957 (June 11, 1855), which was negotiated by then-territorial Governor Isaac Stevens, who negotiated several other treaties with tribes in the Pacific Northwest. It set apart for the exclusive use and occupancy of the Nez Perce a land reservation, and contained other reservations and provisions, including a reservation of off-reservation fishing rights and hunting and gathering privileges.

A few years later, gold was discovered on the Nez Perce Reservation and it was promptly overrun by gold-seekers in contravention of the “exclusive” nature of the reservation. Unable to contain the onslaught, the United States sought to negotiate a diminishment of the Reservation land base, which ultimately resulted in the Treaty with the Nez Perce, 14 Stat. 647 (June 9, 1863). That treaty specifically preserved the provisions of the prior 1855 Treaty except where abrogated or specifically changed by the 1863 Treaty. It also expressly reserved “all springs or fountains” not directly connected with rivers or streams located in the area ceded in 1863. Later, the Nez Perce Reservation was opened to settlement, pursuant to an agreement entered into in 1893 and approved by Congress in 1894. That agreement likewise preserved “in full force and effect” the provisions of prior treaties to the extent they were not inconsistent with the provisions of the Agreement.

None of the claims asserted by and on behalf of the Nez Perce Tribe have been resolved, and all are in active litigation. Thus, this outline will necessarily be brief and will only discuss the claims as filed.

On-Reservation Consumptive Uses: The Homeland

The United States has filed several claims for consumptive uses in connection with tribal fee and trust land within the reservation, which total about 224,000 acre feet per year from surface and 14,000 acre feet per year from groundwater. The purposes include agriculture on trust and tribal fee land (PIA), as well as livestock watering, domestic, commercial and industrial uses, etc. These claims have not yet been reported to the Court by IDWR and are not yet at issue.

Non-consumptive Claims, Both On- and Off-reservation, for Fish

A common feature of the Stevens' treaties was the reservation of fishing rights to the tribes, which was reflective of the importance the tribes placed on fishing, and the incredible abundance of fish at treaty time. The Nez Perce Treaty was no exception and contained Article 3 which provided in part that “[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory.” Based upon this treaty language, and the body of law applicable to instream flow claims associated with treaty reserved fishing rights (see discussion above), 1113 claims have been asserted by the United States and the Nez Perce Tribe to instream flows both within the Nez Perce Reservation as depicted on the map, and in connection with the treaty fishing rights reserved at “usual and accustomed” places outside of the reservation. The claims are quantified not just at usual and accustomed fishing places identified by our archaeologists, anthropologists, historians and tribal elders, but also at biologically necessary streams within the basin which provide important habitat for fish which pass through the “usual and accustomed places.”

The parties are in the midst of litigation on the “entitlement” issue, which is whether the United States and the Nez Perce Tribe can claim the instream flow rights at all. Summary judgment motions were filed by the state of Idaho and other objectors in June of 1998, and briefing was

completed in October of 1998. Argument on the motions was postponed to September, 1999, apparently to allow mediation of the claims to proceed. Discovery is on-going. Tens of thousands of pages of documents have been produced by the United States and Nez Perce Tribe and the other parties, and depositions of “entitlement” expert witnesses for both sides will continue through this summer. Experts have been proffered in the entitlement phase in the fields of archaeology, anthropology, history, legal history, and fish biology. Quantification of the claims will likely prove to be even more complex and may be tried separately, sometime in the year 2000 or beyond.

Mediation of the Nez Perce instream flow claims is on-going simultaneously with extremely intensive discovery. It is still in an early stage and it is hard to know what the shape of any mediated settlement might look like. Suffice it to say, however, that the range of potential issues is as far reaching as the range of habitat needed by the salmon. The Pacific Northwest is involved in a fundamental debate over the Endangered Species Act and its implications for the future of four lower Snake River dams. The Idaho Power Company’s Hells Canyon Project, which totally blocks formerly productive salmon habitat in southern Idaho, all present stark questions of dams versus fish. Moreover, at stake is the future of southern Idaho’s agricultural economy and way of life. The issues involved are very significant to the future of Idaho and the future of the Nez Perce Tribe.

“Springs and Fountains”

Based on the express reservation of “springs and fountains” in the 1863 Nez Perce Treaty, 1,886 claims have been made to discrete springs within the area ceded in the 1863 Treaty. Some, but not all, of those springs claims have been reported by IDWR, but otherwise no litigation has yet begun. It is possible that a global settlement, involving all Nez Perce claims, consumptive and non-consumptive and on-reservation and off-reservation, could resolve these claims.

The Duck Valley Claims

As depicted on the attached map, the Duck Valley Indian Reservation is home to the Shoshone and Paiute Tribes of that reservation, and it sits astride the Idaho-Nevada border along the Owyhee River which crosses the reservation in both states and ultimately joins the Snake River. The reservation was created by three executive orders. Claims for reserved water rights were filed for this reservation by the United States for homeland purposes, including agriculture based upon the PIA analysis. The adjudication of these claims presents some interesting jurisdictional issues. Compounding this process is the fact that the Nevada adjudication process is primarily an administrative process run by the Nevada State Engineer, while Idaho's SRBA is primarily a judicial process. Simplifying this case, however, is that there are relatively few water users in Nevada and Idaho who are affected by the claims, so a settlement might be possible here. Litigation in both Nevada and Idaho is proceeding ahead, however.

Concluding Observations

The title of this conference is apt: Courts, Coercion, and Collaboration. Resolution of the Indian water rights in the SRBA and elsewhere really requires all three. Settlements are unlikely to be achieved without the coercive effects of the litigation process and its court-imposed time deadlines. Similarly, coercion founded upon statutory and regulatory requirements such as the Endangered Species Act and the Clean Water Act can be helpful in getting people's attention. Yet, at the same time, litigation and "command and control" regulation by themselves are unlikely to meet the needs of the tribes and provide them with the "wet water" necessary to have productive tribal farms and healthy tribal fisheries. Courts handling McCarran Amendment general stream adjudications are courts of very limited jurisdiction as to federal and Indian claims, and the decrees they can impose can necessarily provide only a part of the solution, that being a decree of a water right. While that may be enough in some cases, in most instances it is not. In addition, by its adversarial nature, litigation is divisive, and can foment longstanding ill will

between Indian and non-Indian neighbors. Collaboration through negotiation can minimize that ill will by attempting to craft a solution which benefits all parties. Clearly, a balanced use of all three tools is necessary.

*Indian
Water Right Claims
in the
Snake River Basin
Adjudication*

