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

In Re SRBA	)	Consolidated Subcase No. 03-10022
	)	Nez Perce Tribe Instream Flow Claims
Case No. 39576	)	
	)	**ORDER ON UNITED STATES' MOTION TO ALTER OR AMEND JUDGMENT OR ALTERNATIVELY FOR AN EVIDENTIARY HEARING**
______________________________	)	

I.
Brief Procedural Background

On November 24, 1999, the United States of America moved this Court to alter or amend its Judgment entered November 10, 1999, in this consolidated subcase to clarify the extent of its ruling as to the boundaries of the Nez Perce Indian Reservation diminished to the extent of all unallotted lands not expressly reserved in the 1893 Agreement. Specifically, the motion sought to amend the Judgment by revising the second paragraph on page 2 of the Judgment, to read as follows:

> In accordance therewith, and in accordance with I.R.C.P. 58(a), this judgment grants those motions for summary judgment, limited in scope to ~~the rulings contained in the Order of November 10, 1999: Specifically as~~ deciding that the Nez Perce Tribe, and/or the United States of America on behalf of the Tribe as Trustee, are not entitled to an off-reservation instream flow water right as claimed.

(i.e., sought to eliminate from the Judgment the lined-through material, which line is theirs).

The Motion was made pursuant to Rule 59(e) of the Idaho Rules of Civil Procedure. In the alternative, the United States moved that if the Court intended by its November 10, 1999, Judgment to rule upon the jurisdictional boundaries of the Nez Perce

Indian Reservation, the United States requested an opportunity to submit testimony, documentary evidence and legal authorities on that issue. The United States' Motion was supported by a Memorandum, lodged of equal date, but no oral argument was requested at the time of the filing of the Motion.

On December 7, 1999, the State of Idaho filed a written response to the *United States' Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing*. The State did not ask for oral argument.

On December 15, 1999, the United States lodged its *Reply Memorandum in Support of United States' Motion to Alter or Amend Judgement or Alternatively for an Evidentiary Hearing*. Also on December 15, 1999, the United States filed a written request that a hearing on its Motion be set for December 21, 1999. This request for a hearing was made pursuant to I.A.R. 13(b)(4) (which rule grants the District Court the power and authority to rule upon a motion to amend the judgment during the pendancy of an appeal). The Motion did not specifically request oral argument on the original Motion to Alter or Amend.

No other party responded to the Motion of the United States.

At this Court's regular monthly status conference (akin to a law and motion calendar) held on December 21, 1999, the following discussion took place:

> THE COURT: Mr. Campbell?
> MR. CAMPBELL: Thank you, Your Honor. I note for purposes of proceeding with the 54(b) appeal and also the pending 59(e) motion to alter or amend at the present time it's not my -- I don't have any understanding as to when that motion to alter or amend is going to be set for consideration by the court, if there's going to be a hearing or the court will just render a decision based upon the papers filed.
> And the reason that our clients are concerned, given the potential ramifications depending upon how the court decides the issue of jurisdiction, we don't want to be in a position of dragging things out too long. So from the standpoint of resolution of the 59(e) motion, it would be in our client's interests to have that set for hearing.
> THE COURT: Well, the reality is we're trying to get a number of other things done, come up for air, if you will, before we even get a chance to look at it, which hopefully will be in the next few days.
> MR. CAMPBELL: I understand, Your Honor. I'm not trying to pressure the court unduly, I just raise the issue from the standpoint of the context of the various matters.

THE COURT: Do I have a sense that all parties involved want it set for oral argument?

MR. MONSON: Your Honor, Peter Monson. As the court is aware, we did file with our reply brief a motion for a hearing. However, we don't have a strong preference that it be set for oral argument.

We would be willing to – given the court's calendar particularly in January, I know it's quite heavy. If the court prefers to decide it on the briefs, that would be amenable to us as well.

MR. STRACK: Your Honor, the State was the only party that filed an objection. And we would be glad to waive hearing if it would expedite the court's consideration of it.

THE COURT: Well, we'll take a look at it in the next few days and make a decision one way or the other.

MR. STRACK: Thank you, Your Honor.

MR. CAMPBELL: Thank you, Your Honor.

MR. MONSON: Thank you, Your Honor.

THE COURT: All right. Then we'll be in recess. Thank you.

(PROCEEDINGS ADJOURNED)

Reporter's Transcript of Regular Monthly Status Conference Re: Nez Perce Motions, December 21, 1999, p. 47, l. 5 – p. 48, l. 25.

II.

Matter Deemed Fully Submitted for Decision

The last filing in this matter occurred on December 15, 1999. The last hearing in this matter was December 21, 1999. Following that hearing, the Court was to initially determine whether it would grant/request oral argument on the *Motion to Alter or Amend* (Alternative Motions) of the United States filed November 24, 1999. I.R.C.P. 7(b)(3). Based upon the above colloquy that neither party insists on oral argument on the *Motion to Alter or Amend* and the Court having decided oral argument is not necessary to resolution of the Motion, the matter is determined to be fully submitted for decision the next business day, or December 22, 1999.

III.

Standard of Review

In *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030 (Ct. App. 1982), the Idaho Court of Appeals stated:

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. *Cohen v. Curtis Publishing Co.*, 333 F.2d 974 (8th Cir. 1964). An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. *Walker v. Bank of America National Trust and Savings Association*, 268 F.2d 16 (9th Cir. 1959), *cert. denied* 361 U.S. 903, 80 S.Ct. 211, 4 L.Ed.2d 158 (1959). Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977). Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.
>
> However, where – as in this case – the motion for "reconsideration" raises new issues, or presents new information, not addressed to the court prior to the decision which resulted in the judgment, the proper analogy is to a motion for relief from judgment under Rule 60(b). That rule requires a showing of good cause and specifies particular grounds upon which relief may be afforded. *Hendrickson v. Sun Valley Corporation, Inc.*, 98 Idaho 133, 559 P.2d 749 (1977). As with Rule 59(e) proceedings, the right to grant, or deny, relief under the provisions of Rule 60(b) is a discretionary one with the trial court. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

In essence, the motion of the United States' is in the alternative, the first being a Rule 59(e) motion to alter or amend the judgement entered on the summary judgment, or in the alternative a motion for relief from the judgment under Rule 60(b) to present information to the Court which the United States previously failed to present.

IV.

Issues Presented

In its *Memorandum in Support of United States' Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing*, the following issues/points are identified.

> 1. The Judgment, When Read In Conjunction With the Orders On Summary Judgment, Is Ambiguous.
>
> 2. The Question Whether the 1893 Agreement Diminished the Nez Perce Reservation is a Disputed Fact and Cannot Be Decided on Motions for Summary Judgment.
>
> 3. In the Alternative, The United States Moves the Court for An Evidentiary Hearing to Present Testimony, Documentary Evidence, and Legal Argument on the Diminishment Issue.
>
> > A. Only a Clear Expression of Congressional Intent Will Diminish an Indian Reservation.
> >
> > B. The 1893 Nez Perce Agreement and its Legislative History Evidence a Clear Intent to Recognize and Continue the 1863 Reservation Boundaries.
> >
> > C. Subsequent Jurisdictional History Also Supports a Finding of No Diminishment.

V.

[Whether] The Judgment, When Read In Conjunction With the Orders On Summary Judgment, Is Ambiguous.

The United States of America first argues that this Court's Judgment, when read in conjunction with the ***Order on Summary Judgment,*** is ambiguous. The first assertion is that it is unclear whether this Court intended to incorporate into the Judgment the statement:

> In this Court's view, pursuant to the holding in *Yankton Sioux*, the boundaries of the Nez Perce Reservation was diminished to the extent of all unallotted lands not expressly reserved in the 1893 Agreement.

Order on Motions for Summary Judgment, Etc. ("***Order***"), at 46 (November 10, 1999).

This Court does not find the Judgment to be ambiguous, but if there is any doubt by anyone, this Court intends the above quoted language to be a part of the Judgment.

The United States next asserts that it interprets the above quoted statement regarding diminishment not to be this Court's holding, but instead to be *obiter dicta*; i.e., not necessary for the decision as to whether the off-reservation right of taking fish carries with it a water right to instream flows as claimed off-reservation. The finding of diminishment by this Court is not *obiter dicta*, but for reasons different than the one cited by the United States' immediately above.

The United States is technically correct in one very narrow sense in that a finding of diminishment is not absolutely necessary to make the decision as to whether the off-reservation right of taking fish carries with it a water right to instream flows off-reservation (and, as will be discussed in more detail later, whether this Court is correct or incorrect as to diminishment, the issue of whether there is an off-reservation instream flow water right is not affected, i.e., there is no off-reservation water right as claimed, diminishment or not).

However, by asserting it is *obiter dicta*, the United States apparently misinterprets this Court's November 10, 1999, ruling regarding diminishment in several major respects. First, one of the direct issues variously presented by some of the different motions for summary judgment was whether the geographic scope of the "exclusive" "on-reservation" fishing right reserved in the 1855 Treaty was reduced commensurately with the Tribe's Treaty of 1863 and the 1893 Agreement and/or whether the Tribe's 1863 and 1893 land cessions resulted in the cession of water rights. *See* issues 1 and 4 raised by Idaho Power Company; issue addressed in Potlatch Corporation's Brief at pages 6 and 7; issues 3 and 5 raised by the State of Idaho; issue addressed in Reply Brief of Irrigation Districts at pages 2 and 3; and issue 3 stated in the *Joint Memorandum in Opposition to Objector's Motions for Summary Judgment*, lodged by the United States and the Nez Perce Tribe on September 18, 1998. Thus, there is no legitimate question of whether the legal effect (relating to reservation boundaries) of both the Treaty of 1863 and the Agreement of 1893 as so enacted by Congress in 1894 were raised as material issues in this case. Hence, the United States' assertion that it did not understand that the question of diminishment was an issue pending before the Court on the Motions for Summary

Judgment does not pass muster. *See also* pages 6 and 60-65 of the *United States' and Nez Perce Tribe's Joint Memorandum*, lodged September 18, 1998.

Secondly, because this Court's holding expressly distinguishes between on-reservation and off-reservation water rights, it was necessary to address the effects of the subsequent Treaty of 1863 and the Agreement of 1893.

Lastly, and as noted above, while a finding of diminishment is not necessary to the legal conclusion that there is no off-reservation instream flow water right, the holding in *South Dakota v. Yankton Sioux*, 188 S.Ct. 789 (1998), and a finding of diminishment, clearly bolsters this Court's determination of the non-existence of the claimed off-reservation water rights; i.e., it is inconceivable that the government would buy the ceded land for the primary purpose of opening it up to settlement but intended to allow the Tribe to reserve what would essentially be most of the water.

The United States also asserts that a ruling of diminishment would have profound jurisdictional implications – both civil and criminal – within the affected area and is in conflict with two recent decisions of the United States District Court, which held to the contrary. *See United States v. Webb*, Case No. CR 98-80-N-EJL (D. Idaho) (January 12, 1999) on appeal, No. 99-30155 (9th Cir.); *United States v. Scott and Crowe*, Case No. CR 98-01-N-EJL (D. Idaho) (Order Re: Jurisdiction entered August 12, 1998).

With respect to the profound implications a finding of diminishment may have is a factor beyond the realm of this Court's control. It would necessarily be presumed that Congress took this into account when the Agreement of 1893 was ratified in 1894. Many Congressional Acts carry profound implications – both criminal and civil; but such a fact cannot defeat what Congress intended.

Secondly, this Court is well aware of other Courts' holdings regarding a finding of no diminishment under the Agreement of 1893 ratified by Congress in 1894. With all due respect (and as will be explained in greater detail later in this ***Order***) to these courts, it seems to this Court that the Supreme Court of the United States of America has the final say on the issue of diminishment and the affect of the Act as ratified by Congress in 1894. The 1998 *Yankton Sioux* decision would supercede all previous court decisions on the topic, including (if there were one) previous United States Supreme Court decisions. (And as pointed out by this Court in its November 10, 1999 ***Order on Summary***

Judgment, *Yankton Sioux* was a unanimous decision by the United States Supreme Court in January of 1998, and it interpreted this very piece of legislation passed by Congress in 1894 which not only dealt with the 1892 Agreement with the Yankton Sioux Tribe but also the 1893 Agreement with the Nez PerceTribe).

VI.

The Question Whether the 1893 Agreement Diminished the Nez Perce Reservation is a Disputed Fact and Cannot Be Decided on Motions for Summary Judgment.

The question of whether the 1893 Agreement diminished the Nez Perce Reservation boundaries is a question of Congressional intent, which in turn is a question of law if either the terms of the Agreement are clear and unambiguous, or if it has a settled legal meaning; and can be properly decided on summary judgment.

First, as noted both above and in this Court's Order of November 10, 1999, the question of what Congress intended regarding the purchase of these lands and whether there was a diminishment of the reservation has been recently answered by a unanimous United States Supreme Court. *South Dakota v. Yankton Sioux*, 188 S.Ct. 789 (1998). To the contrary and to be very explicit, this determination is not some new or previously unanswered issue which this Court decided as a case of first impression. More precisely, Justice O'Connor wrote in this first paragraph of the *Yankton Sioux* decision:

> **This case presents the question whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota**. The reservation was established pursuant to an 1858 treaty between the United States and the Yankton Sioux Tribe. Subsequently, under the General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (the Dawes Act), individual members of the Tribe received allotments of reservation land, and the Government then negotiated with the Tribe for the cession of the remaining, unallotted lands. The issue we confront illustrates the jurisdictional quandaries wrought by the allotment policy: We must decide whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject to federal environmental regulations. **If the divestiture of Indian property in 1894 effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. s 1151(a), and the**

> **State now has primary jurisdiction over them**. In light of the operative language of the 1894 Act, and the circumstances surrounding its passage, we hold that Congress intended to diminish the Yankton Reservation and consequently that the waste site is not in Indian country.

Id. at 793. (emphasis added).

Secondly, in *Yankton Sioux*, the United States Supreme Court held in part:

> By March 1893, the Commissioners had collected signatures from 255 of the 458 male members of the Tribe eligible to vote, and thus obtained the requisite majority endorsement. The Yankton Indian Commission filed its report in May 1893, but congressional consideration was delayed by an investigation into allegations of fraud in the procurement of signatures. **On August 15, 1894, Congress finally ratified the 1892 agreement, together with similar surplus land sale agreements between the United States and the Siletz and Nez Perce Tribes.** Act of Aug. 15, 1894, 28 Stat. 286. The 1894 Act incorporated the 1892 agreement in its entirety and appropriated the necessary funds to compensate the Tribe for the ceded lands, to satisfy the claims for scout pay, and to award the commemorative 20-dollar gold pieces. Congress also prescribed the punishment for violating a liquor prohibition included in the agreement and reserved certain sections in each township for common-school purposes. *Ibid.*
>
> President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895, and non-Indians rapidly acquired them. By the turn of the century, 90 percent of the unallotted tracts had been settled. *See Yankton Sioux Tribe v. United States*, 224 Ct.Cl. 62, 623 F.2d 159, 171 (1980). A majority of the individual allotments granted to members of the Tribe also were subsequently conveyed in fee by the members to non-Indians. **Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land**. **Indian Reservations: A State and Federal Handbook 260 (1986).**

Id. at 796 (emphasis mine).

This same text, cited as persuasive authority by the United States Supreme Court as noted immediately above, states with respect to the current Nez Perce Reservation (current meaning following the 1893 Agreement as ratified by Congress in 1894):

> NEZ PERCE RESERVATION Federal Reservation
> Nez Perce, Lewis, Clearwater, and Idaho Counties
> Nez Perce Tribe
> Tribal Headquarters: Lapwai, Idaho

> **Land Status**. Tribally-owned land: 33,642 acres. Allotted land: 54,237 acres. Total area: 87,879 acres.

Indian Reservations, A State and Federal Handbook 88, *Compiled by* The Confederation of American Indians (1986).

The United States also asserts that the record is clear that there is a disputed issue of fact as to whether the 1893 Agreement diminished the exterior boundaries of the Nez Perce Reservation, citing as support for this assertion the following colloquy between this Court and Mr. Strack during oral argument on summary judgment, October 13, 1999, *Tr.* at 44:

> THE COURT: * * * So do the parties agree or disagree as to what the current reservation boundaries are, number one? And if that's true, is there an agreement that all of these claim numbers are on the ground or relate to land or water off the reservation? Do you understand?
>
> MR. STRACK: Yeah, I do, your honor. As I believe I've suggested in the briefing, is that this would probably have to be a two-step proceeding; that this court rule – if it does rule that off-reservation claims are denied as a matter of law, then we would have to probably proceed either by agreement or litigation, if necessary, to decide what claims are on the reservation and what claims are off the current reservation. As you noted, there is disagreement ---

Transcript of Hearing of October 13, 1999, p. 44, ll. 2-15.

As correctly pointed out by the State, however, this was not all of the discussion. The remainder of the discussion was:

> THE COURT: So the answer to the question, then, simply is, as to the ruling legal principle, we're not deciding each of these individual claims because they may or may not be on or off the reservation.
>
> MR. STRACK: That's entirely correct. I think we have to have a separate proceeding in order to go through claim number by claim number and decide which are on-reservation claims and which were ceded.

Transcript of Hearing of October 13, 1999, p. 44, ll. 16-24.

This Court readily recognized that the parties had no agreement on the location of the present reservation boundaries, and that is, in part, why the issue regarding diminishment was decided. However, as noted earlier, this is a legal determination. The factual determination yet to be made is specifically where on planet earth are the respective water right claims located. In other words, because the claims which are at

issue are based upon 1,113 different "stream reaches," the factual question is whether a particular stream reach (or portion thereof) is in or out of the present reservation boundaries.

VII.
In the Alternative, The United States Moves the Court for An Evidentiary Hearing to Present Testimony, Documentary Evidence, and Legal Argument on the Diminishment Issue.

A. Only a Clear Expression of Congressional Intent Will Diminish an Indian Reservation.

B. The 1893 Nez Perce Agreement and its Legislative History Evidence a Clear Intent to Recognize and Continue the 1863 Reservation Boundaries.

C. Subsequent Jurisdictional History Also Supports a Finding of No Diminishment.

Because the remainder of the assertions raised by the United States essentially relate to this Court's interpretation of *South Dakota v. Yankton Sioux*, they will be addressed without trying to separate them by topic category.

One legal principle the United States is absolutely correct about is that only a clear expression of congressional intent will diminish an Indian Reservation. Id. at 798.

The United States Supreme Court found such a clear expression of Congressional intent with respect to the Yankton Sioux Agreement of 1892. Thus, in reality, a comparison between the 1892 Agreement with the Yankton Sioux and the 1893 Agreement with the Nez Perce is helpful.

This Court having already compared the two Agreements in its November 10, 1999, Orders on Summary Judgment, that discussion is incorporated herein by reference. However, some additional comments may be helpful in clarifying this Court's reasoning on the determination of diminishment of the reservation boundaries.

The United States asserts at page 6 of its *Memorandum in Support of United States' Motion to Alter or Amend*, lodged November 24, 1999, that in this case there has been no review of the history and of the negotiations of the 1893 Agreement with the Nez Perce. That statement simply is not true, as this Court has read and reviewed a significant amount of historical documents included in the affidavits submitted by the various counsel.

In *Yankton Sioux*, the United States Supreme Court interpreted the meaning of the 1892 agreement with the Yankton Sioux Tribe and focused its attention on different provisions of the Agreement. The Supreme Court also noted that the Act of Congress of August 19, 1894, which ratified the Yankton Sioux Agreement of 1892 also ratified "similar surplus land sale agreements between the Siletz and Nez Perce Tribes." Id. at 796. One must keep in mind, there was but <u>one</u> Act of Congress that ratified and approved these respective land purchases.

The Annual Report of the Commissioner of Indian Affairs for 1894 (to the two houses of Congress), contained in Exhibit 16 of the Affidavit of Steven W. Strack, page 320 (citing volume 3306 of the Congressional Serial Set, published by the United States Government Printing Office) states in relevant part:

> AGREEMENTS WITH INDIANS.
>
> **Siletz, Yankton, and Nez Perces. –** The agreement concluded with the Siletz Indians in Oregon, October 1, 1892, that with the Yankton Sioux in South Dakota, concluded December 31, 1892, and that with the Nez Perces in Idaho, concluded May 1, 1893, referred to in my last annual report, were ratified by the act of Congress approved August 15, 1894 – the Indian appropriation act. **Under these agreements some 880,000 acres of land will be restored to the public domain for disposition as provided in said act.**

(Emphasis on last sentence is added).

As such, it is difficult to perceive that "under these agreements" that "some 880,000 acres of land will be restored to the public domain for disposition," and yet assert that Congress intended to keep those lands (and waters) as part of the respective reservations. How could the land (and water) be both "restored to the public domain" of the United States, yet still be part of the Reservation; two totally different sovereigns?

By restoring the land to the public domain of the United States, one must fairly conclude that this evidences a present and total surrender of any tribal interest therein.

In any event, a comparison between the respective Agreements with the Yankton Sioux of 1892 and the Nez Perce of 1893 is again helpful. It should also be noted that the Congressional Act of 1894 which ratified these two very similar agreements (Yankton Sioux and Nez Perce) incorporated the two agreements in their entirety and appropriated the necessary funds to compensate the respective tribes for the ceded lands.

How similar are the two Agreements (Yankton Sioux and Nez Perce) and related documents?

Compare the following:

1. **Purpose of the Agreement.** One must fairly keep in mind the underlying purpose of the respective Agreements, which in each case was the same: for the United States to acquire the surplus non-allotted lands, restore them to the public domain and open them to settlement by non-Indians. These respective Agreements were ratified by Congress in one common statute, not separate statutes.

2. **The respective cession language.** Article I of the 1892 Yankton Sioux Agreement provides:

> The Yankton tribe of Dakota or Sioux Indians **hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation** set apart to said Indians as aforesaid.

(emphasis added for illustration).

Article I of the 1893 Nez Perce Agreement provides in relevant part:

> **The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation**, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: (legal descriptions omitted).

(emphasis added for illustration).

Thus, the cession language is not just similar, it is identical in the two agreements.

3. **Sum certain language.** Article II of the 1892 Agreement with the Yankton Sioux provides:

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

Article III of the 1893 Agreement with the Nez Perce provides in relevant part:

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars.

Again, this sum certain language of the two agreements is essentially identical.

Keeping in mind that each of these respective agreements were for the sale of land, the Supreme Court stated:

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

reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See 510 U.S., at 412, 114 S.Ct., at 966.

Id. at 798 (emphasis added).

Thus, the Nez Perce Agreement of 1893 contains identical "cession" language, nearly identical "sum certain" language, and evidences the present and total surrender of all tribal interest in the ceded lands.

4. **Payment.** Again referring to the Annual Report of the Commissioner of Indian Affairs for 1894, referenced in the record before this Court as Exhibit 16 of the Affidavit of Steven W. Strack, page 319, appears the following relevant language by the Commissioner to the Two Houses of Congress:

For the fiscal year 1895 the total amount appropriated is $10,750,486.03. This includes the following items:

Item	Amount
Payment of damages to settlers on Crow Creek and Winnebago reservations…………………………	$119,119.19
Payment to Yankton tribe for lands…………….	621,475.00
Payment to Yakama tribe for lands………………..	20,000.00
Payment to Coeur d'Alenes for lands……………..	15,000.00
Payment to Siletz Indians for lands…………….	142,600.00
Payment to Nez Perces for lands………………..	1,668,622.00
Capitalization of Shawnee funds…………………..	100,000.00
Face value of certain State bonds assumed by United States…………………………………………….	1,330,666.66
	4,017,482.85

(emphasis mine).

5. **Liquor Prohibition**. Article XVII of the 1892 Agreement with the Yankton Sioux provides:

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the

> violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

Article IX of the 1893 Agreement with the Nez Perce provides:

> It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

In regards to the liquor prohibition language in the Yankton Sioux Agreement of 1892, the United States Supreme Court stated:

> The State's position is more persuasively supported by the liquor prohibition included in Article XVII of the agreement. The provision prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty," 28 Stat. 318, thus signaling a jurisdictional distinction between reservation and ceded land. The commissioners' report recommends that Congress "fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants within the limits of the reservation," Report, at 21, which could be read to suggest that ceded lands remained part of the reservation. **We conclude, however, that "[t]he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country.'"** *Rosebud, supra*, at 613, 97 S.Ct., at 1376. **By 1892, Congress already had enacted laws prohibiting alcohol on Indian reservations**, see Cohen 306-307, **and "[w]e assume that Congress is aware of existing law when it passes legislation,"** *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990).

Id. at 801 (emphasis added).

Thus, the same reasoning applies to the liquor prohibition in the 1893 Agreement with the Nez Perce.

6. **Other similarities**. Each agreement also provided for money to satisfy disputed claims for scout pay, to award commemorative 20-dollar gold pieces, and reserved certain sections in each township for common-school purposes.

7. **Savings Clause**. Article XVIII of the 1892 Agreement with the Yankton Sioux provides:

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

Article XI of the 1893 Agreement with the Nez Perce provides:

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

With respect to the savings clause language in the 1892 Yankton Sioux Agreement, the United States Supreme Court stated in part:

> The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. **The United States urges** a similarly "holistic" construction of the agreement, which would presume **that the parties intended to modify the 1858 Treaty only** insofar as necessary **to open the surplus lands for settlement, without fundamentally altering the Treaty's terms.**
>
> Such a literal construction of the saving clause, as the South Dakota Supreme Court noted in *State v. Greger*, 559 N.W.2d 854, 863 (S.D.1997) would "impugn the entire sale." **The unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders can by no means be reconciled with the central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's "permanent" home and prohibited white settlement there.** See *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 770, 105 S.Ct. 3420, 3430, 87 L.Ed.2d 542 (1985) (discounting a saving clause on the basis of a "glaring inconsistency" between the original treaty and the subsequent agreement). Moreover, the Government's contention that the Tribe

intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. See *Solem, supra*, at 468, 104 S.Ct., at 1164-1165. We "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's late claims." *Klamath, supra*, at 774, 105 S.Ct., at 3432 (internal quotation marks and citation omitted).

Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." See *United States v. Ganderson*, 511 U.S. 39, 56, 114 S.Ct. 1259, 1268-1269, 127 L.Ed.2d 611 (1994) (internal quotation marks omitted). The most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the Tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 Treaty. Along with the proposed sale price, these annuities and other unrealized Yankton claims dominated the 1892 negotiations between the Commissioners and the Tribe. The tribal historian testified, before the District Court, that the loss of their rations would have been "disastrous" to the Tribe, App. 589, and members of the Tribe clearly perceived a threat to the annuities. At a particularly tense point in the negotiations, when the tide seemed to turn in favor of forces opposing the sale, Commissioner John J. Cole warned:

> "I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. … Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe." Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74.

Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, **we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.**

The language in Article XVIII specifically ensuring that the "Yankton Indians shall continue to receive their annuities under the [1858 Treaty]" underscores the limited purpose and scope of the saving clause. It is true that the Court avoids interpreting statutes in a way that "renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574,

> 115 S.Ct 1061, 1069, 131 L.Ed.2d 1 (1995). **But in light of the fact that the record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries but many references to the Government's failure to fulfill earlier promises**, see, *e.g.*, Council of the Yankton Indians (Dec. 3, 1892), transcribed in S. Exec. Doc. No. 27, at 54-55, it seems most likely that the parties inserted and understood Article XVIII, including both the general statement regarding the force of the 1858 Treaty and the particular provision that payments would continue as specified therein, to assuage the Tribes' concerns about their past claims and future entitlements.

Id. at 799 and 800 (emphasis added); *See also* Article II of the 1855 Treaty with the Nez Perce (containing a similar provision that the reservation was for the exclusive use and benefit of the tribe and white settlers were prohibited).

The two respective savings clauses set out in full above are obviously somewhat different. However, several observations are easily made. First, the Supreme Court found that the Government's negotiations with the Yankton Sioux in the 1892 Agreement were dominated by the Government's failure to fulfill earlier promises, primarily annuity payments which were part of the 1858 Treaty. However, by Article IV of the 1855 Treaty with the Nez Perce, and Article IV of the 1863 Treaty with the Nez Perce, all annuity payments were due and payable long before the negotiations of 1893, and, therefore, clearly would not be expected to be any part of the negotiations in 1893.

More importantly, however, is the actual language of the two respective savings clauses. In this Court's view, the language in the Nez Perce Agreement of 1893 is much stronger in support of diminishment than is the *Yankton Sioux* savings clause. The reason being the plain, simple and explicit language of the clause. More specifically, and as pointed out throughout this decision, a continuation or preservation of the then-existing reservation boundaries (pre-1893 Agreement) would be wholly inconsistent with the purpose of the Agreement, "would eviscerate the agreement in which it appears," and would lead to an "absurd conclusion."

Lastly, according to the record of negotiations with the Nez Perce (*see* Proceedings relating to the 1893 Treaty negotiations, entitled: *Organization of the council of the Nez Perce tribe of Indians in the State of Idaho and on Nez Perce Reservation, Lapwai Agency, Idaho, December 2, 1892,* transcribed in S. Exec. Doc. No.

31, pp. 26-61; in this Court's record as Exhibit 4 to the *Affidavit of James C. Tucker Dated – July 17, 1998*, filed July 20, 1998), the dominant theme, as read and interpreted by this Court, was whether members of the Tribe would sell the surplus land or not in the first instance.

8. **Record of negotiations on discussions of preservation of reservation boundaries**. As noted earlier, the Supreme Court in *Yankton Sioux* held that the record of the negotiations between the Commissioners and the Yankton tribe contains no discussion of the preservation of the 1858 boundaries. Id. at 800.

A reading of the record of negotiations with the Nez Perce in 1893, however, does reveal at least a minimal discussion of changing reservation boundaries (the following quotes taken from: Proceedings relating to the 1893 Treaty negotiations, entitled: *Organization of the council of the Nez Perce tribe of Indians in the State of Idaho and on Nez Perce Reservation, Lapwai Agency, Idaho, December 2, 1892,* transcribed in S. Exec. Doc. No. 31, pp. 26-61; in this Court's record as Exhibit 4 to the *Affidavit of James C. Tucker Dated – July 17, 1998*, filed July 20, 1998).

First, it was clearly understood by all at the negotiations that the Government's sole purpose was to purchase the surplus (unalloted) lands with the exception of certain timber lands. For instance, the following excerpts are from the First Day of Council at Lapwai, Idaho, December 5, 1892:

> Commissioner ROBERT SCHLEICHER. You have known for several years, since the special agent was sent to allot your lands, that a commission would be sent to buy your lands. Your allotments were completed several months ago, and commissioners have now come to treat for your surplus lands, you reserving enough timber land for yourselves and children.

p. 26, and

> JAMES LAWYER. **Is the sale of unallotted lands the only object?**
>
> Commissioner JAMES F. ALLEN. **Yes**; the **land you do not require after your allotments are made and what timber and wood land you need.** The commission has your interest at heart. I was selected by the Secretary of the Interior as your special friend. **We are authorized to treat, arrange terms, and no other business.** The Government believes

> that if you cede these lands at a fair and reasonable price you will receive a payment for them, the balance to be invested, drawing 5 per cent interest, which will be paid to you every year or expended for your benefit as agreed upon. These lands can be of small benefit to you. **The Government tries too** [sic] **keep trespassers off and cattle off, but is not always able.** If you have the money from this sale you will be sure of receiving it.

p. 27 (emphasis added).

Second, and as alluded to immediately above with respect to trespassers, there were discussions on the Sixth Day of Council about the difficulties in keeping trespassers off the then-existing (pre-1893 Agreement) Reservations.

> JAMES LAWYER. That provision of the treaty only had reference to the time being and did not expect them to keep the land altogether. It was a small piece of land and the land was to be used as a stage station. Whether it is there, in the treaty, or not, it should have been that the agent should have authority, if he overstepped the privilege of remaining there, to remove his cattle and horses. He can get them as far up as to the canyon – and they go that far – and bring them back. Not only that, in going there he is not particular, but gets some of ours too. Last year I had a cow and a calf and a yearling, and this man took them from us, and only with considerable trouble I was enabled to get them back again.
>
> Commissioner JAMES F. ALLEN. My friend Lawyer has given a far better argument than I can give why you should sell the land. **As I have said before, the Department has ordered Caldwell off the reservation. It was supposed he was off. If he is back again with his cattle and horses it only shows the great difficulty the Department labors under 3,000 miles from here in keeping such men off the reservation** and keeping it clear of cattle and horses so that it would be of some use to you. **If you will sell the surplus lands and have the money for it, it won't then make any difference if white men's cattle roam over it.** But they will not, for settlers will come and take up land and fence their farms, and that will keep cattle not only off their lands but it will help to keep them off your lands, for before the cattle can get on your farms they will have to come over white men's farms. The white men will be interested in keeping them off their lands and so help to keep them off your lands. **I said the other day that when the land is settled up with farms and settlers all round inside and outside and mixed among you there will be no difficulty in keeping cattle off your land.** Now, this is a strong argument why you should dispose of this land, and is one of the reasons why the Secretary and the President are anxious you should do so.

p. 45 (emphasis added).

A fair reading of the above discussion also reasonably leads to the conclusion that if sold, the land would no longer be a part of the reservation, i.e., "If you will sell the surplus lands … it won't then make any difference if white men's cattle roam over it." In other words, white men's cattle on land was only a trespass problem if it was on-reservation.

Next, on the Seventh Day of Council, held on December 13, 1892, the following breakdown of the subject lands was stated.

> Commissioner ROBERT SCHLEICHER. My friends, we have spoken a great deal, and you have spoken a great deal else, and you and we think now the time has come not to make such long speeches, but devote ourselves to business.
>
> We were requested yesterday by some speakers to bring you this morning a list of the number of acres in the whole reservation, and the number of acres that was allotted and the number of acres that is left for you to dispose of. This we are prepared to do. And we will now read it out and ask that the interpreter shall translate it slowly, so that every one can understand it, as follows:

	Acres
The reservation contains	**756,968**
The allotments comprise	182,234
Leaving a surplus of lands	574,734
Reserved for wood and timber	64,820
	509,914
If the amount of timber land is reduced to 34,820 acres it will add to surplus	30,000
And the surplus to be sold will amount to	**539,914**

p. 47 (emphasis added).

And finally, on the Tenth Day's Council, held on December 15, 1892, the following was stated in regards to the understanding that at least some members of the Tribe possessed; that is by selling the land the reservation boundaries would change.

> SALMON RIVER BILLY. You see me, and you see, too, I am left of the number who helped to make the first treaty with Governor Stevens in '55, as also the treaty of 1863, made by Mr. Hale. I learned then, and know what I learned then was true. **And I was one of the speakers at both treaties**, all of which that was spoken of. I remember well Mr. Hale told us that the former treaty made by Governor Stevens was, as it were, fenced in and all right, **and I was also told by him at same time that the country had been inclosed** [sic] **according to the treaty and prevented the entrance on the reservation of any white man and any who should try to set aside or break down the boundaries of that reservation.** Should it be done by us Indians, we should take the matter in hand, but if by the white men the Government should be appealed to. In case your agent would not take cognizance of the matter, it would be for you to push that agent out of office and refer the matter to the Government. **Perhaps it may be on account of having another President, who is a Democrat; perhaps it is he who has made the edict for breaking down the lines of the reservation.**

p. 56 (emphasis added).

9. **Preamble language in the Congressional Act of 1894**. The Act of August 15, 1894, 28 Stat. 286, contains preamble language to the Articles of Agreement for both the agreements with the Yankton Sioux and the Nez Perce. The preamble Yankton language is as follows:

> Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or **Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of** April (19th) nineteenth, eighteen hundred and fifty-eight **(1858)**, between said tribe and the United States, and situated in the state of South Dakota.
>
> Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S. D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth: (emphasis mine).

Act of August 15, 1894, ch. 290 (53d Cong. 2d Sess. 1893), p. 314.

The preamble Nez Perce language is as follows:

> Whereas the said **Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home**

> **for their use and occupation by the second article of the treaty between said Indians and the United States, concluded** June ninth, **eighteen hundred and sixty-three**:
> Now, therefore, this agreement made and entered into in pursuance of the provisions of said Act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and male adults of the Nez Perce tribe of Indians located on **said Nez Perce Reservation, witnesseth**: (emphasis mine).

Act of August 15, 1894, ch. 290 (53d Cong. 2d Sess. 1893), p. 327.

An examination of the above language reveals some important matters. First, Congress expressly found and stated in the statute that the respective Tribes were willing to dispose of a portion of the lands previously reserved to the respective tribes; i.e., a clear expression of congressional intent. Second, as it relates to the Nez Perce, note that the language (bolded by this Court for emphasis) provides that the Tribe is willing to dispose of part of the lands reserved to the Tribe by the Treaty of 1863 (not the Treaty of 1855). Thus it is clear that at least Congress thought that the Reservation of 1855 had been diminished by the Treaty of 1863 and that Congress intended to further diminish it by the ratification in 1894 of the Agreement of 1893.

With the above in mind, this Court then considers the respective cession language in each of the Treaties/Agreement with the Nez Perce. Article I of the Treaty of 1855 provides in relevant part:

> ARTICLE I. **The said Nez Perce tribe of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest** in and to the country occupied or claimed by them, bounded and described as follows, to wit:

(emphasis mine).

Articles I and II of the Treaty of 1863 provide in relevant part:

> ARTICLE I. **The said Nez Perce tribe agree to relinquish, and do hereby relinquish, to the United States the lands heretofore reserved for the use and occupation of the said tribe, saving and excepting so much thereof as is described in article II. for a new reservation.**
> ARTICLE II. **The United States agree to reserve for a home, and for the sole use and occupation of said tribe, the tract of land included within the following boundaries,** to wit:

(emphasis mine).

And again the cession language of Article I of the 1893 Agreement with the Nez Perce provides:

> The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: (legal descriptions omitted).

Therefore, an examination of the above quoted language of the three agreements with the Tribe reveals the following logic. No one contends that by the 1855 Treaty that the Tribe did not cede, sell, and relinquish to the United States approximately 7 million acres and reserved an approximate 7 million acres. Or, therefore, if the cession language in the 1855 Treaty has any legal effect, then the near identical language in the Agreement of 1893 must be consistently interpreted in a like fashion. Furthermore, no one seriously contends that the Treaty of 1863 had not diminished the Reservation created in the 1855 Treaty from about 7 million acres to about 750,000 acres (at least as noted above in the Nez Perce Preamble, Congress speaks of the Tribe disposing of lands reserved in Article II of the 1863 Treaty, p. 327).

10. **Presidential Proclamations Following the Congressional Act of 1894.**

As further clear evidence of "contemporary interpretation" by the federal government regarding the interpretation that the 1893 Agreement (specifically the "cession" and the "sum certain" language) had the effect of diminishing the Nez Perce Reservation, an examination of the respective Presidential Proclamations opening the Reservations for settlement is useful.

President Grover Cleveland's Proclamation of May 16, 1895, opening for settlement the ceded lands of the previous Yankton Sioux Reservation, provides in relevant part:

> Whereas, all the terms, conditions and considerations required by said agreement made with said tribes of Indians and by the laws relating

> thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:
>
> **Now, therefore, I, Grover Cleveland, President of the United States,** by virtue of the power in me vested by the Statutes hereinbefore mentioned, do hereby **declare** and make known **that all of the lands acquired from the Yankton tribe** of Sioux or Dacotah Indians **by the said agreement**, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same, will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty first day of May, 1895 and not before, **be open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement**, the statutes hereinbefore specified **and the laws of the United States applicable thereto.**
>
> The lands to be so opened to settlement are for greater convenience, particularly described in the accompanying schedule, entitled "Schedule of lands within the Yankton Reservation, South Dakota, to be opened to settlement by Proclamation of the President", and which schedule is made a part hereof. (emphasis added).

Likewise, the President's Proclamation of November 8, 1895, opening for settlement the ceded lands of the previous Nez Perce Reservation provides in relevant part:

> Whereas all the terms, conditions, and considerations required by said agreement made with said tribe of Indians hereinbefore mentioned, and the laws relating thereto, precedent to opening said lands to settlement have been, as I hereby declare, provided for, paid and complied with:
>
> **Now, therefore, I Grover Cleveland, President of the United States**, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by said agreement, do hereby **declare** and make known **that all of the unallotted and unreserved lands acquired from the Nez Perce Indians**, by said agreement, will, at and after the hour of 12 o'clock, noon, (Pacific Standard time) on the 18th day of November 1895 and not before, **be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement**, the statutes above specified **and the laws of the United States applicable thereto.**
>
> The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Nez Perce Indian Reservation, Idaho, to be opened to settlement by Proclamation of the President", and which schedule is made a part hereof. (emphasis added).

In *Yankton Sioux*, the United States Supreme Court stated in this respect:

> Finally, the Presidential Proclamation opening the lands to settlement declared that the Tribe had "ceded, sold, relinquished, and conveyed to the United States, all [its] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article [of the 1858 Treaty]." Presidential Proclamation (May 16, 1895), reprinted in App. 453. This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment." (citation omitted).

Id. at 803.

The operative language in the respective Presidential Proclamations cited above is nearly identical and is legally indistinguishable. As such, and consistent with the holding in *Yankton Sioux*, the language in the Presidential Proclamation regarding the ceded lands of the former Nez Perce Reservation must likewise be construed as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment."

More fundamentally, the purchased land was "opened to settlement under …the laws of the United States applicable thereto." Therefore, the land was clearly contemplated to be a part of the United States and not the Reservation.

VIII.

Court's Declaration For Clarification Of Ruling Regarding Diminishment And The Claimed Instream Flow Water Rights On Appeal, i.e., Even If This Court Is Wrong Regarding Diminishment Of The Reservation, There Is Still No Off-Reservation Instream Flow Water Right.

In light of the present motion to alter or amend the judgment and the pending/imminent appeals, the Court desires to clarify its prior ruling regarding the asserted reservation of any off-reservation in-stream flow water rights. As previously discussed, this Court ruled that the 1893 Agreement and its subsequent Congressional ratification diminished the boundaries of the Reservation and that such diminishment also would have necessarily included any then existing off-reservation in-stream flow water rights. However, it needs be clarified that irrespective of the effect of the 1893

Agreement on the boundaries of the Reservation, the Nez Perce did not impliedly reserve in-stream flow water rights extending outside the current boundaries of the Reservation, wherever those boundaries are ultimately determined to exist. Simply put, based on the Court's interpretation of the 1855 Treaty, the Nez Perce did not reserve any in-stream flow water rights outside the boundaries of the Reservation.

Contrary to the assertion made by the United States, this does not make the Court's ruling on the effect of the 1893 Agreement on the boundaries of the Reservation "*orbiter dicta*." The basis for the Nez Perce Tribe's reserved water right claims originated in conjunction with the fishing rights reserved in pursuant to Article III of the 1855 Treaty. Article III of the 1855 Treaty distinguished between the nature of the fishing rights reserved by the Nez Perce Tribe both on and off the Reservation. Specifically, the Nez Perce reserved "exclusive" fishing rights on the Reservation and "in common" fishing rights extending outside of the Reservation. The "in-common" language contained in Article III is the only express language contained in the Treaty that arguably supports the claim for a reserved in-stream flow water right outside the boundaries of the Reservation. Therefore, it belies the plain language of the Treaty to fail to distinguish between the nature of the fishing right reserved by the Nez Perce Tribe both on and off the Reservation.[1] As this Court previously discussed in its *Memorandum Decision and Order*, the nature and extent of the off-Reservation fishing right reserved pursuant to "in-common" fishing language, as that language has been previously interpreted in both the subject treaty and in other Steven's Treaties, does not give rise to the implication that a reserved water right necessarily accompanied the fishing right. The Court did not rule on the whether the "exclusive" fishing rights reserved by the Nez Perce Tribe also implied an in-stream flow water right on the Reservation because the scope of the motion was limited to claims outside the boundaries of the Reservation. Since, based on this Court's analysis, there is a difference between the on and off reservation fishing rights which in turn ultimately form the basis for the claimed water rights, and since this Court ultimately must adjudicate the in-stream flow claims, the present boundaries of the

[1] Although the Nez Perce Tribe argues that the distinction between claimed water rights on and off the Reservation is irrelevant, this Court disagrees. Again, the claimed basis for the water rights is the fishing rights reserved in Article III of the 1855 Treaty. Article III clearly does not reserve the same fishing rights both on and off the Reservation.

Reservation are clearly at issue. Accordingly, the effect of the 1893 Agreement is both integral to the determination of the boundaries of the Reservation and also the alternative conclusion that even if the Nez Perce Tribe has previously reserved in stream flow rights outside the boundaries of the Reservation, those rights were ceded. Although the physical boundaries of the Reservation have not yet been determined, if it is later resolved that the Nez Perce Tribe, or the Federal Government on behalf of the Tribe, reserved in-stream flows on the Reservation, the boundaries will ultimately have to be particularly described so that the water rights can also be properly described.

IV.
Conclusion

This Court reaffirms its rulings made in the November 10, 1999 Orders on Summary Judgment and also adopts as additional grounds the matters stated herein.

For all of these reasons, the United States' *Motion to Alter or Amend the Judgment* is **denied**. Likewise, the alternative motion for an evidentiary hearing is **denied**.

IT IS SO ORDERED:

DATED: JANUARY 21, 2000.

____

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