



U.S. Department of Justice  
Environment and Natural Resources Division

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DEPARTMENT OF  
WATER RESOURCES

VIA Federal Express

Gary Spackman, Director  
Idaho Department of Water Resources  
The Idaho Water Center  
322 East Front Street  
P.O. Box 83720  
Boise, Idaho 83720-0098

Re: *The United States' Claims as Trustee for the Nez Perce Tribe and Allottees*

In re: The General Adjudication of Rights to the Use of Water from the Palouse  
River Basin Water System (Northern Idaho Adjudication, Phase 2)

Dear Mr. Spackman:

Pursuant to the Commencement Notice, *In Re PRBA*, Case No. 59576 (D. Ct. 5<sup>th</sup> Jud. Dist. Idaho, April 10, 2019) setting December 31, 2019 as the filing deadline for all water rights based on federal law including claims by the United States, as Trustee, for the Nez Perce Tribe and Allottees, the United States hereby submits and files the enclosed Notices of Claims ("Tribal Claims"). These Tribal Claims are filed by the United States Department of the Interior, Bureau of Indian Affairs, in its role as Trustee for the Nez Perce Tribe and Allottees.

The Tribal Claims are filed pursuant to federal law, specifically the federal reserved water rights doctrine as established by *Winters v. United States*, 207 U.S. 564 (1908) and its progeny as well as aboriginal occupation and use of lands and waters as recognized in *United States v. Winans*, 198 U.S. 371 (1905) and its progeny. The United States claims water rights for waters from groundwater and surface water sources for the present and future needs of the Nez Perce Reservation in three categories to serve the overall purpose of establishing the Reservation as a permanent homeland for the Nez Perce people. *In re CSRBA*, Case No. 49576, Subcase No. 91-7755, slip op. (Idaho Sept. 5, 2019). While federal law provides the legal basis for these claims, the United States followed the state law guidance regarding format provided by the Idaho Water Code, where appropriate, in preparing these claims. *See* Idaho Code § 42-1409(1).

There are a total of 177 Tribal Claims enclosed in three categories: 1) Off-reservation in-stream flows for fish habitat; 2) Off reservation, non-exclusive use of springs and fountains; and 3) Domestic and stock water claims for two allotments. The following summary of the Claims is

provided for the convenience of the Court and Parties. Please note that Attachments I - V are attached to this summary for the reasons explained below. Accordingly, this entire package consists of three parts: 1) Letter summary of the Tribal Claims and Map of the Nez Perce Reservation (Attachment A); 2) Attachments I - V to the Letter Summary; and 3) 177 separate Notices of Claims.

#### **A. History of Nez Perce Tribe and Categories of Reserved Water Rights**

Prior to non-Indian settlement, the Nez Perce Tribe ("Nez Perce" or "Tribe") occupied approximately 13 million acres in central Idaho, southeastern Washington, and northeastern Oregon, including the Palouse River Basin. The Tribe entered into three treaties with the United States. Two of these treaties directly relate to these claims: one in 1855 and the other in 1863. The Treaty of June 11, 1855 ("1855 Treaty") established a reservation of 7.5 million acres and guaranteed the "right of taking fish at all usual and accustomed ("U&A") places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." 12 Stat. 957. The 1855 Treaty also reserved the "exclusive right of taking fish in all the streams where running through or bordering" the reservation.

Continued encroachment by non-Indian settlers led to the Treaty of June 9, 1863 ("1863 Treaty") which reduced the Nez Perce Reservation ("Reservation") to 784,996 acres. The Tribe ceded 6,932,270 acres. The ceded lands are known colloquially as "the donut area." See Attachment A. The Indian Claims Commission ruled that the northern boundary of the ceded land in the Palouse River Basin follows the Palouse River. *Nez Perce Tribe of Indians v. United States*, 8 Ind. Cl. Comm. 271, 272 (1959). The Preamble to the 1863 Treaty provides that its articles are "supplementary and amendatory to the treaty made between the United States and said tribe on the 11<sup>th</sup> day of June, 1855." 14 Stat. 647. The current Reservation boundaries are defined by the 1863 Treaty. However, a large portion of the Palouse River Basin includes ceded lands within the donut area, and, therefore, encompass streams needed to support the Nez Perce treaty rights to fishing reserved in the 1855 Treaty and the use of springs and fountains reserved in the 1863 Treaty.

Article VIII of the 1863 Treaty provides:

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

14 Stat. at 651. Article VIII is one of the unique provisions in the 1863 Treaty, to which the United States agreed in return for the Tribe's agreement to reduce the size of the Reservation from approximately 7.5 million acres to 784,996 acres. The Nez Perce have utilized springs for the following purposes: (1) personal drinking water; (2) watering livestock; (3) washing clothes; (4) medicinal drinking water; (5) gathering traditional foods and roots; (6) camping sites; (7) wildlife hunting; (8) spiritual uses, and, (9) with regard to hot springs, traditional sheep horn bow making and mud-bathing.

In 1887, Congress enacted the General Allotment Act of 1887 as amended (“General Allotment Act” or “Act”), through which the United States allotted lands to individual tribal members. Act of February 8, 1887, 24 Stat. 388, *amended*, Act of February 28, 1891, 26 Stat. 794. The General Allotment Act set up a process “‘to allot lands in severalty’ to any Indian located upon reservations established ‘either by treaty stipulation or by virtue of an act of Congress or Executive Order setting apart the same for their use.’” *Allotment Selections on the Fort Belknap Indian Reservation*, 55 I.D. 295, 297 (1935), 1935 DOINA LEXIS 309, *quoting*, the General Allotment Act. On April 13, 1889, President Benjamin Harrison granted authority for making allotments to the Nez Perce Indians and on April 17, 1889, the Secretary of the Interior appointed Alice Cunningham Fletcher as the allotting agent “to make allotments, in conjunction with the Agent of the Nez Perce Agency.” *See*, Letter dated May 4, 1889, from R. V. Belt, Acting Commissioner of Indian Affairs, to Alice Fletcher, *reprinted in*, Nicole Tonkovich, *Dividing the Reservation, Alice C. Fletcher’s Nez Perce Allotment Diaries and Letters, 1889-1892*, 52-55 (2016). Allotment of the Reservation was largely completed by 1892.

**1) The first category of water right claims includes instream flows to support fishing at the Tribe’s U&As.** The priority date of these instream flow claims is time immemorial based on the Tribe’s aboriginal fishing activities. Monthly fish habitat flow claims are submitted for a total of 23 stream reaches for the purposes of providing fish habitat and long-term maintenance of that habitat. Attachment I is a table that provides a summary of the monthly instream flow claims for each stream reach. Attachment II provides a map of the instream flow claims.

**2) The second category of water right claims includes springs and fountains pursuant to Article VIII of the 1863 Treaty.** Based on the “in common” language, the United States claims up to half the natural spring flow. The priority date of these springs and fountains claims is time immemorial based on the Tribe’s aboriginal use of springs. Attachment III is a table that provides a summary of the springs and fountains claims. Attachment IV provides maps of the locations of the claims. Claims 1021, 1026, 1037, 1071, and 1076 list multiple aliquot parts for the location of the spring or fountain. These Tribal Claims are based on notices of a claim to a water right acquired under state law that were filed with the Idaho Department of Water Resources (“IDWR”) and in which the point of diversion is listed as the entire parcel. The aliquot parts listed in these Tribal Claims describe the entirety of the parcel listed in the claim filed with IDWR.

**3) The third category of water right claims is for domestic and stockwater uses on two allotments located in the portion of the current Reservation within Basin 87.** The United States holds legal title to these allotments in trust, while individual tribal members and the Tribe hold undivided beneficial ownership interests in these allotments. Attachment V is a map of the locations of the claims.

**B. Summary of Claims and Reservation of Rights**

The following table provides an overall summary of the claims:

Type of Claim	Number of Notices of Claim
Instream Flows	23
Springs	152
Allotments	2

Pursuant to the McCarran Amendment, 43 U.S.C. §666, the United States' claims filed herein are limited to those water rights held in trust for the benefit of the Tribe and Allottees. By submitting these claims, the United States does not waive any immunities, privileges, or rights except as clearly and unambiguously required by Act of Congress nor does the United States waive any immunities, privileges, or rights on behalf of the Nez Perce Tribe. These claims, and other documents provided herein, do not waive the sovereign immunity of the United States or the Nez Perce Tribe respecting any title to lands on or off the Nez Perce Reservation. Additionally, the Tribe and the United States expressly reserve their rights to assert their sovereign regulatory authorities to allocate and manage water rights within the exterior boundaries of the Nez Perce Reservation.

In order to comply with Idaho Code § 42-1409(1), the United States has designated "places of use," "points of diversion," and "purposes of use" in submitting these water rights claims. The enclosed notices of claim were developed consistent with the forms filed and accepted by the State of Idaho in the Coeur d'Alene Spokane River Basin Adjudication. The use of this format should not be construed to limit either the United States or the Nez Perce Tribe's future use of water at other points of diversion, places of use or for other purposes within the boundaries of the Reservation. The statute's terminology has been employed to demonstrate that the claim is necessary, justifiable, and available to achieve the purpose of the Reservation as a homeland for the Nez Perce Tribe. The quantification standards used in no way constitute a limitation on the use of the water by the United States or the Nez Perce Tribe.

The water rights claimed for the various consumptive and non-consumptive uses may exceed the natural flow in a given stream in any particular year. The United States and the Nez Perce Tribe reserve the right to determine in any particular year which uses(s), if any, to limit.

The United States and the Tribe reserve the right to supplement and/or amend the water rights claims filed herein.

Should the Department have any questions regarding these claims, please do not hesitate to call me at (303) 844-1378.

Sincerely,



Katherine M. Kane  
Trial Attorney  
Indian Resources Section  
Environment and Natural Resources Division  
United States Department of Justice