

WINTERS IN SALMON COUNTRY: THE NEZ PERCE TRIBE'S INSTREAM FLOW CLAIMS

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A State Court Rules

As the first snows of the 2000 water year started falling in the high country, Idaho Fifth District Judge Barry Wood issued his decision ruling against the Nez Perce Tribe's claims for instream water flows in Idaho's Snake River basin.¹ Judge Wood, presiding over the Snake River Basin Adjudication (SRBA), handed down his ruling in a state courtroom in Twin Falls, Idaho: 286 miles by air, 390 miles by road, 630 miles by river, and a world away from tribal headquarters in Lapwai on the Nez Perce Reservation. Tying together the Nez Perce Tribe and the farmers of the Snake River basin was the river and the common need for water to survive in the arid American West. Dividing them were the rugged mountains and steep canyons of central Idaho, one hundred fifty years of physical and legal conflict, and a cultural gulf with few, if any, bridges.

Judge Wood ruled that while the 1855 Nez Perce Treaty with the federal government guaranteed the Nez Perce the "right of taking fish at all usual and accustomed places in common with the citizens of the territory," it did not guarantee them there would ever again would be fish to be fished for at those places. Wood then raised the stakes for the tribe by ruling that the tribal reservation allotment program of the federal government in the late 1890s had diminished the extent of the Tribe's sovereignty over its own reservation, raising the possibility of tribal extinction.² He concluded "the Nez Perce do not have Indian reserved instream flow water rights extending beyond the boundaries of the present Reservation, where ever those boundaries may be."³

The court's order was immediately appealed by the tribe to the Idaho Supreme Court along with a companion suit seeking removal of Judge Wood from the SRBA court due to a previously undisclosed

apparent conflict of interest. Prior to hearing on appeal, the parties to the ruling agreed to settlement mediation and a stay of proceedings. The mediation was successfully completed in 2004. History and the river continue to flow.

The Nez Perce People and their Land

The Nimi'puu, the Nez Perce people, have lived in what we now call portions of Idaho, Oregon, and Washington since time immemorial.⁴ At the time of first contact with Anglo civilization in 1803, when Lewis and Clark descended half-starved from the Clearwater Mountains into the camas and salmon country of the Nez Perce, this people's aboriginal lands covered fourteen million acres stretching from the Wallowa country in the west to the Bitterroot Mountains in the east, from the headwaters of the Salmon River in the south to the Palouse River in the north. Never a single tribe as much as a collection of individual bands related by blood and custom occupying different areas within their territory, the a band followed the seasons from camp to camp, meeting with the other Nez Perce bands when the camas root was ready to dig and the salmon ran in the rivers.⁵

The Snake River and its major tributaries – the Salmon, Grande Ronde and Clearwater rivers – define the land of the Nez Perce. The Snake, flowing at an average rate of thirty-six million acre-feet per year at present-day Lewiston, Idaho,⁶ also defines the freshwater world of the salmon runs that once filled its creeks, rivers and lakes. Historically, salmon runs were estimated to have ranged from five million to eight million adult fish annually in the Snake and its tributaries.⁷

In the traditions of the Yakama, Umatilla, Warm Springs, and Nez Perce, the spirit of the salmon—

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Wy-kan-ush-mi Wa-kish-wit—is sacred life. The tribes believe that the salmon was created along with an ideal habitat in which to enjoy its existence and that for thousands of years the salmon unselfishly gave themselves for the physical and spiritual sustenance of human beings. The salmon's abundance shaped the culture, religion, society, and even languages of the four tribes. The majority of calories that the Columbia Basin tribes consumed came from salmon, elevating the reverence that the tribes placed on this incredible gift. Their religions always thanked the Creator for the bounteous blessing of salmon; they also thanked the salmon for offering themselves as food for humans. (Columbia River Inter-Tribal Fish Commission)⁸

Idaho's Snake River

The Snake's headwaters, rising from the high Teton Mountains along today's border between Wyoming and Idaho, lie far south, beyond the land of the Nez Perce and upriver of Hells Canyon, the deepest gorge in North America. Here the Snake River flows westward across a vast dry plain overlying deep basalt flows formed by a crustal hot spot now centered beneath Yellowstone National Park.⁹ Despite its aridity, the Snake River Plain's generally flat topography provided the quickest travel route for westbound settlers along what came to be known as the Oregon Trail.

Few stayed in this high desert country until the expansion of settlement in the Salt Lake basin by adherents of Joseph Smith's Church of Jesus Christ of Latter Day Saints (Mormons).¹⁰ In this desert country, diverting water out of the streams and rivers to irrigate agricultural land was the only way to grow enough food to survive. Over the next one hundred fifty years, seventeen dams were built on the upper Snake River and its tributaries to support agriculture and Idaho's growing population centers. Beginning in 1905 when the gates were closed at Milner Dam, the entire summer flow of the Snake River was diverted just above Shoshone Falls (the upstream end of salmon habitat more than eleven hundred miles from the ocean) sending the river into a network of a thousand miles of irrigation canals.¹¹

Judge Wood's courtroom was in Twin Falls, a few miles from Milner Dam, centered in the geographic and political hub of modern Idaho's irrigated agriculture economy. Vast geographic, economic, political, and cultural differences separated the Nez Perce people from Judge Wood and most of the other residents of Twin Falls and its surrounding irrigated agricultural landscape.

The Nez Perce Treaties

In 1855, the Nez Perce bands gathered in Walla Walla at the request of Territorial Governor Isaac I.



Stevens to negotiate a treaty with the United States. As recounted by the Nez Perce and recorded by Nez Perce historian Alvin Josephy,¹² many of the bands, including some of the most powerful leaders such as Looking Glass, were away hunting buffalo on the other side of the Bitterroot Mountains hundreds of miles distant and were not present when the talks began. For convenience, Stevens recognized a minor leader, Lawyer, who had been converted to Christianity by missionaries and learned some English, as the bands' spokesman even though the other leaders present had not awarded him that responsibility. To cement his leadership position with Stevens, Lawyer agreed to cede the Nez Perces' rights to 7.5 million acres of their aboriginal lands. Looking Glass, having heard of the meeting, quickly journeyed back across the mountains to Walla Walla, arriving before the signing ceremony saying, "My people, what have you done? While I was gone you have sold my country... Go home to your lodges. I will talk to you."¹³ Looking Glass was unable, however, to overcome Lawyer's argument to the leaders that they could not now go back on the agreement he made with the white men. In the end fifty-six Nez Perce leaders signed the treaty in which the United States agreed the bands would have sole control over the 6.5 million acres of their reservation as well as the right to hunt and fish at all their usual and accustomed places outside the reservation boundary.¹⁴

With the cession of their land, the division of the Nez Perce people along religious and band affiliation lines began. In 1860, gold was discovered by prospectors trespassing on Nez Perce land north of the Clearwater River and in the lower Salmon River country. A second treaty gathering was convened by the order of the territorial governor at Lapwai in 1863 to address the white encroachment. With some 1855 Treaty signers selling supplies to miners at gold-

fever prices, a growing restiveness among other tribal members unhappy with the outcome of the 1855 Treaty, and the recent suppression of an armed uprising of the Yakama, Spokane, Cayuse, and Palouse tribes as a backdrop, tension among the treaty negotiators was high. Again, as in 1855, Lawyer was chosen by the white negotiators to represent the Nez Perce. He was persuaded to reduce the reservation to ten percent of its 1855 Treaty size. The lands of Lawyer and his followers' bands were included in the proposed new reservation while those of Joseph, leader of the Wallowa band, and several others who had the stature to challenge Lawyer, were not. Thunder-Eyes, speaking for the anti-Lawyer, anti-treaty faction said, "the Nez Perce nation [is] dissolved", and that from then on they would be "friends, but a distinct people."¹⁵ The subsequent 1863 treaty signed by Lawyer and his faction established a reservation of approximately 750,000 acres and reserved the same hunting and fishing rights established in the 1855 Treaty.¹⁶

The Nez Perce were increasingly a divided people, weakened in their ability to resist further violations of their sovereignty and their treaty rights.

In 1877, Joseph and his non-treaty band from the Wallowa Valley were forced from their lands and pursued by the United States Army in a thousand mile flight across Idaho, Wyoming, and Montana in search of their freedom in Canada. Captured just south of the Canadian border, the non-treaty Nez Perce were sent to the Oklahoma Indian Territory and eventually re-settled in permanent exile on the Colville and other reservations in eastern Washington State.

As part of the federal government's policy of opening western lands to white settlement, the General Allotment Act of 1874 opened the Nez Perce reservation to white settlement in 1893 after allocation of one hundred sixty acres to each tribal member. Non-treaty bands and non-treaty tribal members were not included in the allotment.

Through all these times of crisis for the tribe, the salmon were a constant for the Nez Perce, held apart from the world of chaos created by increasing contact with the encroaching whites, returning year after year to offer themselves to the Nimi'puu. That too would soon change.

Building an Irrigated Landscape

With the beginning of the twentieth century a new use of the region's rivers came to the fore: construction of dams for electrical generation. While the irrigation dams in the Upper Snake River had reduced the river's flow in its uppermost reaches, they had not noticeably affected salmon runs due to their location upstream of Shoshone Falls, the river's natural barrier to the salmon. Downstream, spring flows rejuvenated the river current in the Thousand Springs reach of the river. Beginning in 1901, the construction of private hydroelectric

dams increasingly blocked entire watersheds and river systems to salmon access. Salmon were now restricted to the lower and middle reaches of the Salmon River, the forks of the Salmon, and the mainstem of the Snake River.

With the entrance of the federal government into dam building on the mainstem of the Columbia with Bonneville Dam in 1937, and with the erection of twenty more dams on the Columbia and lower/middle Snake over the ensuing thirty-five years, the salmon that had provided the life of the Nez Perce began to disappear. By 1991, five runs of Snake River salmon and steelhead were listed as threatened or endangered under the Endangered Species Act.¹⁷

Meanwhile groundwater pumping was taking its place alongside surface water irrigation as a driving force in southern Idaho's agricultural economy. Farmers were pumping more than 4.5 million acre feet of surface water onto approximately one million acres of land to produce the crops, livestock, and processed food products.¹⁸ The 2002 value of irrigated agricultural products in the Magic Valley surrounding Judge Wood's courtroom was \$1.56 billion.¹⁹ An additional \$1.9 billion in value was added to those products in the Magic Valley by food processors.²⁰

Claiming the Water

In 1993, the Nez Perce Tribe filed suit against Idaho Power Company claiming damages to their treaty fishing rights by the construction of Idaho Power's Hells Canyon Dam Complex. Federal Judge Larry Boyle for the District of Idaho shocked the Tribe with his ruling that their treaty rights did not allow for damages because the "tribes do not own the fish, but only have a treaty right which provides an opportunity to catch fish if they are present at the accustomed fishing grounds."²¹ Although settled out of court while pending appeal before the Ninth Circuit Court of Appeals, Boyle's decision in *Nez Perce v. Idaho Power* served notice to the tribe that they faced a hostile judiciary in Idaho.²²

The Nez Perce Tribe is not alone in its relation to the courts. Because of Native American status as dependent sovereigns of the federal government, all legal actions involving tribes and tribal members are heard in federal court, not at the state level. However, in 1952, Congress carved an exception to that rule when it passed the McCarran Amendment waiving federal immunity in state water adjudications.²³

United States Senator Pat McCarran (D-NV) had been asked to help resolve a private water rights dispute in Nevada's Quinn River basin that included federal ownership. Attempts to resolve the dispute in state court had been stymied by the federal government's refusal to waive its immunity and appear in state court. McCarran applied a broad brush to the matter ending federal immunity for all water right claims whenever

a state proceeded with a basin-wide adjudication. The Department of Interior voiced their objections to the over-reaching consequences of the proposed amendment in testimony before the Senate Judiciary Committee specifically as it applied to the “*Winters* rights” of the nation’s tribes.²⁴

In 1908, the U.S. Supreme Court ruled in *Winters v. U.S.* that when the federal government reserves land for purposes such as Indian reservations, forest reserves, military bases, parks, wildlife refuges, and other federal uses, the water necessary for the purpose of the land reservation is also retained by the federal government. Importantly in the generally arid western states where “first in time, first in right” is the basis of state water law, the priority date for the federally reserved water is established as the date of the land reservation. As most Indian reservations were established before statehood, Indian *Winters* rights are generally the most senior water rights in a state.²⁵

The McCarran Amendment passed, unchanged, as a rider on the appropriation bill for the Department of Justice. Tribes would now have to argue before state judges for the water rights promised them in their treaties with the federal government. Only a final decision by a state supreme court could be appealed by a tribe to the United States Supreme Court as an issue of federal law.

In 1984, Idaho initiated the Snake River Basin Adjudication (SRBA) to settle all water rights claims in the area of the state drained by the Snake River.²⁶ Stretching from its headwaters in Wyoming to its exit from the state at Lewiston, the Snake River Basin includes not only the Nez Perce Reservation, but also all of the Nez Perce aboriginal lands ceded by treaty. Those treaties specifically included the tribe’s retention of the right to fish at their “usual and accustomed places,” even when off the reservation. To defend their treaty rights the Nez Perce would claim their reserved *Winters* rights.

As a basin-wide adjudication, the Nez Perce tribe was compelled by the McCarran Amendment to assert and defend their *Winters* claims for instream water in state court.²⁷ In 1994, the tribe filed claims for 1,134 water rights to support “fish habitat and channel maintenance”²⁸ in accordance with the 1855 Nez Perce treaty:

The 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 the citizens of the Territory.²⁹

The Nez Perce claims, if approved, would account for “105 percent of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined.”³⁰ Idaho Power Company, the State of Idaho, the Potlatch Corporation (a forest products company and Idaho’s largest private landowner), and a coalition of irrigation

districts filed as interveners. Overnight, the political distance between the tribe’s northern Idaho reservation and the irrigated agriculture center of southern Idaho’s economic power structure shrank to zero.

The SRBA Judge

As the Snake River Basin Adjudication entered its fifteenth year evaluating water rights claims, its long-serving and well-respected presiding judge, Daniel Hurlbutt, announced his retirement. In February 1999, the Nez Perce tribe submitted a letter to the Idaho Judicial Council putting the state on notice as to the tribe’s expectation that the next SRBA judge must have judicial experience and extensive a knowledge of water law, as well as no actual or perceived conflicts of interest.³¹ In March 1999, interim SRBA Presiding Judge Barry Wood was appointed by the Idaho Supreme Court as permanent SRBA Presiding Judge. Eight months later, Wood handed down his decision ruling strongly against the Nez Perce’ claims. In doing so, he went a significant step further than the previous *Nez Perce v. Idaho Power* court, finding that the 1893 opening of the Nez Perce Reservation to white settlement had diminished the reservation by the extent of all lands not currently owned by tribal members, or held in trust for the tribe by the federal government, within the 1863 Treaty boundaries. Wood arrived at this conclusion even while acknowledging existing case law did not support his decision.³²

Judge Wood broke the fragile peace between the tribe and the people who had occupied their lands and used their water. His order found the various Nez Perce treaties and agreements did not imply the right to enough water for fish to live in, but only the right to fish, and that the sovereignty of the tribe over their homeland was reduced to the 17 percent of the reservation still in tribal hands after the allotment and termination policies of the early 1900s. Both findings were highly emotionally charged and even more highly questionable in their legal basis in the federal common law.³³

The tribe appealed the decision and in a separate filing and sought the removal of Wood as SRBA judge on the grounds his own and his family members’ ownership of several rights subject to SRBA jurisdiction constituted conflicts of interest. Judge Wood was removed by the Idaho Supreme Court from his SRBA position. The court found the election of Wood’s brother-in-law, Daniel Eismann, to the Supreme Court created an ethical conflict for the Supreme Court itself. Eismann was elected to the court in a campaign against Justice Cathy Silak shortly after Silak had authored the court’s opinion upholding the federal government’s water rights in Idaho wilderness areas under the *Winters* doctrine.³⁴ During his election campaign, Justice Eismann had publicly stated he would not recuse himself from ruling on water right

claims appealed from his brother-in-law's court. As the court could not unseat their new colleague, Justice Eismann, they unseated Wood to preserve the ethical standing of the court.

Settlement

In the year prior to Wood's ruling against the instream flow claims, the State of Idaho and the Nez Perce tribe agreed to enter mediation in an attempt to settle the tribe's *Winters* claims. Six years later, with appeal of Wood's ruling stayed at the Idaho Supreme Court, the tribe, state, and the federal government (acting in its capacity as trustee for the tribe), agreed to settle the tribe's instream flow claims out-of-court for a mixture of instream flow rights, regulatory protections for endangered species, monetary awards, and other measures.³⁵ The State of Idaho, acting on behalf of its water rights holders, agreed to send water downstream to support the salmon so vital to the survival of the Nez Perce people. The federal government agreed to provide funding for the settlement and to enter into joint operating agreements for federal fish hatcheries in the tribe's Clearwater River basin homeland.

In 1994, the dispersed non-treaty bands of the Nez Perce partnered with the National Park Service to honor their Wallowa homeland with the creation of an interpretive center at Wallowa Lake.³⁶ In 1997, the on-reservation descendants of the treaty bands, utilizing funds granted to the tribe to offset the damage done to the reservation and their treaty fishing rights by the construction of Dworshak Dam on the north fork of the Clearwater River, purchased 10,300 acres of Chief Joseph band's ancestral homeland in the Wallowa country. (Another five thousand acres were subsequently added to the tribe's holdings in Joseph Canyon.) While the land sales contain covenants restricting the use of the lands to fishing and wildlife purposes,³⁷ for the first time in 130 years, the Nez Perce people, "treaty" and "non-treaty", were to some extent, home in the heart of their ancestral lands.

Could There Have Been a Different Outcome?

If the Pacific Northwest is defined as "wherever the salmon can get to," as Tim Egan writes in his 1990 book, *The Good Rain*, then Twin Falls and Lapwai are worlds apart. Shoshone Falls, one of two natural salmon-blocking cataracts on the Snake River that gives the city of Twin Falls its name, historically marked that regional boundary until man-made dams started moving the boundary further and further downstream to its present location at the base of Idaho Power Company's Hells Canyon Dam. Shoshone Falls no longer flows at its thundering pace, the waters of the Snake River dammed and diverted above the falls into a thousand miles of canals delivering water to desert soil for farming. The people who settled here, who turned the water onto their fields to build an irrigated

agricultural empire, have never had salmon as the center of their lives. They and those who followed them across southern Idaho's Snake River plain—taking the salmon's water so they could live—did not then and do not now live in the Pacific Northwest Egan describes.

The Nez Perce people do, and have done so since time immemorial. Salmon are for them both a physical and a sacred being, offering themselves for the good of the Nez Perce people, to sustain them in body and soul. Most of the salmon's range in what we now call Idaho is Nez Perce aboriginal land. As recognized in the treaties the Nez Perce negotiated with the United States government, they could somehow accept and live on a fraction of their former lands, but they could not and would not live without the salmon. The treaties specifically retained to the Nez Perce the right to fish at all their usual and accustomed places. But today, the salmon are killed by passage through and around the eight mainstem dams on the lower Snake and Columbia rivers that stand between Idaho and the Pacific Ocean. Those that survive the passage are confronted by headwater streams often dewatered or degraded by agriculture, grazing, mining, logging, and urban use. The salmon are struggling to continue to offer themselves to the Nez Perce, and the Nez Perce people are struggling to rebuild the salmon's Idaho home.

Whether the Nez Perce could have prevented their conquest by EuroAmericans will never be known. Their choices were constrained by the pressure of white settlement on their lands and the body blow to their strength as a people delivered by an epidemic of deadly diseases to which the Indians had no resistance. The divisions that grew within the Nez Perce people as they tried to adapt to these overwhelming forces made their task even more difficult as different bands were forced in separate directions by their acceptance or rejection of treaties, culture and religion. Federal policies of tribal assimilation and termination that threatened the tribe's very existence persisted until the 1970s.

A new era for the Nez Perce and the other Columbia River tribes began with the 1974 *Boldt* decision affirming the Columbia River tribes right to half the salmon fishery.³⁸ Shortly thereafter, the gates were closed at the Army Corps of Engineers 700-foot high Dworshak Dam across the north fork of the Clearwater River on the Nez Perce reservation. To compensate the tribe for the harm Dworshak Dam caused to the tribe's fishing and hunting rights, the federal government agreed to a mitigation plan. The provision of funding to implement the plan had an intentional objective—to provide resources for the tribe to help struggling salmon populations through habitat restoration and hatchery programs—and an unintentional (for the Corps) byproduct: enabling the Nez Perce to more actively advocate for their treaty rights and by connection, the salmon.

The decision in Judge Wood's court in Twin Falls was never seriously in question. The tribe had filed instream flow claims totaling the entire flow of the Snake River at Lewiston, its furthest downstream location in Idaho. Finding in favor of the tribe would have dried up irrigated agriculture in southern Idaho, by far the largest economic sector of the entire state. No state judge would issue such a ruling and Judge Wood proved no exception. The appeals of the SRBA court's ruling were where the Tribe and the salmon's rights would be fought for and possibly won—probably not at the Idaho Supreme Court where the same forces present in the District Court were at play—but at the next stop in federal court. It was at this point, with appeals pending, that settlement negotiations became the focal point for deciding the tribe's and the salmon's rights to water.

It took another five years to bring the negotiations to fruition, but in the end the salmon that managed to get past the eight mainstem dams were guaranteed enough water to survive within their current range downstream of southern Idaho's irrigation and power dams. At a minimum, the state agreed the Snake River flows established by the Swan Falls Agreement would be provided for downstream instream flow. The state also agreed to provide up to 427,000 acre feet in flow augmentation for salmon from water stored behind southern Idaho dams. The tribe is to receive \$95.8 million and up to 11,000 acres of land to support fishery and wildlife habitat acquisition, restoration, and protection. Among other provisions, the tribe is to assume sole management of the federal fish hatchery at Kooskia and joint management of the Ahsahka federal fish hatchery just below Dworshak Dam. It will also receive support for other tribal hatchery programs.

The settlement is not without its detractors within the tribe. There are tribal members who wanted the tribe to pursue its case to its full extent within the court system or, alternatively, argued that the settlement compensation agreed to was inadequate. Whether the \$95.8 million compensation was adequate was highlighted on April 7, 2008, when four downstream Columbia River tribes and the federal government signed an agreement giving those tribes just under one billion dollars for salmon restoration. In return for ten times the money given in compensation to the Nez Perce for settling actual treaty rights, all the downstream tribes need to do for their money is remain silent for ten years whenever talk of breaching four lower Snake River dams to restore salmon runs surfaces. The Nez Perce Tribe, while party to the negotiations on the status of the lower Snake River dams, refused the proposed terms and did not sign the final agreement.³⁹

With the finalization of the settlement of the Nez Perce tribe's instream flow claims, the last major hurdle to resolution of the 1984 Swan Falls Agreement—the settlement of the dispute between Idaho Power Company and southern Idaho upstream irrigators that

gave birth to the Snake River Basin Adjudication—was passed. The originally stipulated water conflicts of the Magic Valley irrigators and Idaho Power had been settled.

Six hundred and thirty river miles downstream and a world away, the Nez Perce people and the salmon continue their physical and spiritual partnership, dependent more than ever on each other for survival. The settlement assures there is enough water in the rivers for the salmon to find the way to their natal streams, and enough resources for the tribe to restore and protect the river and stream habitat to support spawning conditions. But the salmon must still somehow survive their passage through and around the lower Snake and Columbia rivers' eight fish-killing mainstem dams and reservoirs and the Nez Perce people must still survive challenges to their culture, traditions, and sovereignty.

The winter snows are melting once again, filling rivers, and carrying young salmon downstream to the sea. When they return to Idaho as adults a few years from now, the Nez Perce will be there as they have been since time immemorial to bless them and to receive the salmon's offering of themselves for the good of the people, the Nimi'puu. The cycle continues.

The research described in this paper has been funded in part by the United States Environmental Protection Agency (EPA) under the Greater Research Opportunities (GRO) Graduate Program. EPA has not officially endorsed this publication and the views expressed herein may not reflect the views of the EPA.

ENDNOTES

1. *In re* SRBA Case No. 38576, Consolidated Subcase 03-10022 (Idaho Dist. Ct. Nov. 10, 1999).
2. *Ibid.*, 46.
3. *Ibid.*, 47.
4. National Park Service, "Nez Perce National Historical Park," <http://www.nps.gov/nepe/> (accessed March 23, 2008).
5. Alvin M. Josephy Jr., *Nez Perce Country* (Lincoln: University of Nebraska Press, 2007), 8.
6. Steve Steubner, "No more ignoring the obvious: Idaho sucks itself dry" in *Water in the West: A High Country News Reader*, ed. Char Miller, Corvallis: Oregon State University Press, 2000.
7. Save Our Wild Salmon, "Interactive Map," <http://www.wildsalmon.org/library/map2.cfm> (accessed March 18, 2008).
8. Columbia River Inter-Tribal Fish Commission, "Why Salmon Are Important," http://www.critfc.org/sots/salmon_import.html (accessed March 18, 2008).
9. Volcano World, "The Snake River Plain and the Yellowstone Hot Spot," http://volcano.und.edu/vwdocs/volc_images/north_america/yellowstone.html (accessed on March 19, 2008).
10. Idaho State Historical Society, "The Oregon Trail in Idaho," Reference Series #50.
11. Twin Falls Canal Company, "Milner Dam," <http://www.tfcanal.com/milner.htm> (accessed on March 18, 2008).
12. Josephy, 71.

13. *Ibid.*, 72.
14. "Treaty with the Nez Perces," June 11, 1855, 12 Stat. 957 (1863).
15. Josephy, 90.
16. "Treaty with the Nez Perces," June 9, 1863. 14 Stat. 647 (1867).
17. National Marine Fisheries Service. "FINAL RULE: Endangered and Threatened Species; Endangered Status for Snake River Sockeye Salmon," *Federal Register* 56, no. 124 (November 20, 1991): 58619.
18. William Hazen and Robert Ohlensehlen, "Economic Implications of Curtailing Groundwater Pumping," University of Idaho Extension, Moscow, Idaho (2004).
19. U.S. Department of Agriculture. National Agricultural Statistics Service. *2002 Census of Agriculture: Idaho State and County Data*. June 2004, 6.
20. U.S. Department of Agriculture, 202.
21. *Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791 (1994).
22. Michael Blumm, David Becker, and Joshua Smith, "The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled," *Lewis and Clark Environmental Law Review* 36, no. 4 (2006).
23. *McCarran Amendment*, U.S. Code 43 (1994), § 666(a).
24. U.S. Congress. Senate. Committee on the Judiciary. *Authorizing Suits Against the United States to Adjudicate and Administer Water Rights*. 82nd Cong., 1st sess., September 17, 1951, Report No. 755.
25. *United States v. Winters*, 207 U.S. 564, 28 S.Ct. 207 (1908).
26. *Snake River Basin Adjudication Authorization*, Idaho Code §§ 42-203B, 203C, 203D (1990).
27. McCarran Amendment
28. *Summary of Amended Instream Water Right Flow Claims*, *In re* SRBA Consolidated Case # 38576 (1993).
29. "Treaty with the Nez Perces, art. III," June 11, 1855, 12 Stat. 957 (1863).
30. *In re* SRBA, 38.
31. Samuel Penney to Robert G. Hamlin, February 11, 1999. Affidavit of Heidi Gudgell, *In re* SRBA Case No. 39576, February 4, 2000, Exhibit A (Idaho Dist. Ct.).
32. *In re* SRBA Case No. 38576, 46.
33. *United States v. Adair*, 723 F.2d 1394, 49.
34. John Echeverria, "Changing the rules by changing the players: the environmental issue in state judicial elections," *N.Y.U. Environmental Law Journal* 9, no. 31 (2001): 217.
35. Nez Perce Settlement, *Mediator's Term Sheet with Appendices*, <http://www.idwr.idaho.gov/nezperce/pdf/files/complete-agreement.pdf> (accessed March 18, 2008).
36. Wallowa Band Nez Perce Trail Interpretive Center, "Remembering the Past," <http://www.wallowanezperce.org/> (accessed on March 19, 2008).
37. Nez Perce Tribe Wildlife Program, *Precious Lands Wildlife Area Draft Management Plan, November 2002*, http://www.nezperce.org/content/Wolf/precious_land_wildlife_area_dra.htm (accessed on March 19, 2008).
38. *United States v. Washington*, 384 F.Supp 312.
39. 3 Treaty Tribes-Action Agency Agreement, "Memorandum of Agreement among the Umatilla, Warm Springs and Yakama Tribes, Bonneville Power Administration, U.S. Army Corps of Engineers, and U.S. Bureau of Reclamation," April 4, 2008