AT THE CONFLUENCE OF LAW AND HISTORY:

AN INVESTIGATION OF WATER RIGHTS IN NEZ PERCE COUNTRY

A Thesis

Presented in Partial Fulfillment of the Requirements for the

Degree of Master of Science

with a

Major in Water Resources

in the

College of Graduate Studies

University of Idaho

by

Megan E. Kernan

May 2014

Major Professor: Dr. Adam M. Sowards

AUTHORIZATION TO SUBMIT THESIS

This thesis of Megan E. Kernan is submitted for the degree of Master of Science with a major in Water Resources and titled "At the confluence of law and history: an investigation of water rights in Nez Perce Country," has been reviewed in final form. Permission, as indicated by the signatures and dates given below, is now granted to submit final copies to the College of Graduate Studies for approval.

Major Professor:	_____ Date _____	
	Adam M. Sowards, Ph.D.	
Committee Members:	_____ Date _____	
	Barbara Cosens, J.D., LL.M.	
	_____ Date _____	
	Dale Goble, J.D.	
Department Administrator:	_____ Date _____	
	Jan Boll, Ph.D.	
Discipline College's Acting Dean:	_____ Date _____	
	Katherine G. Aiken, Ph.D.	

Final Approval and Acceptance by the College of Graduate Studies

_____ Date _____

Jie Chen, Ph.D.

ABSTRACT

Central Idaho is the aboriginal homeland of the Nez Perce Tribe. Recently, the Tribe engaged in disputes over water resources and its treaty fishing rights with the Lewiston Orchards Irrigation District, the Bureau of Reclamation, and the Idaho Power Company. Competition over water resource use in Nez Perce Country can be better understood when viewed in a historical context. These conflicts originated from the creation of conflicting rights by the federal government without considering competing interests. These conflicts were exacerbated when the government supported economic water resource use without adequately protecting the Tribe's treaty rights or considering factors beyond economic development. However, after a period of increased self-government by the Tribe, in concert with the development of legal mechanisms aimed to protect both treaty rights and fish habitat, the Nez Perce Tribe has succeeded in exercising its treaty rights and protecting fish habitat.

ACKNOWLEDGEMENTS

I would like to thank my advisor, Dr. Adam Sowards, for all his support, patience, and vital input to this thesis. I would also like to thank my committee members Barbara Cosens and Dale Goble for their support and aid in reviewing this thesis. I also owe thanks to Emily Walhout of the Houghton Reading Room at Harvard University for her assistance with the Isabel Chapin Barrows Papers, and to Linda Vida and Jessica Greene of the University of California, Riverside's Water Resources Collections and Archives for their assistance with the James D. Schuyler Papers. I thank archivist Ken House at the Federal Archives in Seattle for his assistance in orienting me to the North Idaho Indian Agency Records.

This thesis benefited from the financial support of various institutions. I am grateful to the John Calhoun Smith Memorial Fund for their generous grant. I would like to thank the Waters of the West program at the University of Idaho for providing funding. In addition, I received grant funding through the Idaho Department of Environmental Quality's Section 319 program.

Lastly, I would like to thank my husband and my family who have supported and encouraged me throughout this entire process.

TABLE OF CONTENTS

LIST OF FIGURES

CHAPTER ONE: AN INTRODUCTION

Despite the harshness of their environments, the watersheds of Nez Perce Country have drawn humans to them for thousands of years. Sculpted first by geologic forces and then again by human ingenuity and hubris, these watersheds, with their water, fish, and power, are some of Northwest's most valuable resources.

The Nez Perce Tribe struggles to protect the anadromous fishery of their aboriginal homeland, referred to in this thesis as Nez Perce Country. Nez Perce Country includes much of central Idaho, and extends into Washington, Oregon, and Montana. For millennia, the Clearwater, Snake, and Salmon Rivers flowed through Nez Perce County, providing abundant habitat for anadromous fish. This fishery has a cultural importance to the Tribe, and it is relied on as an aboriginal food source.

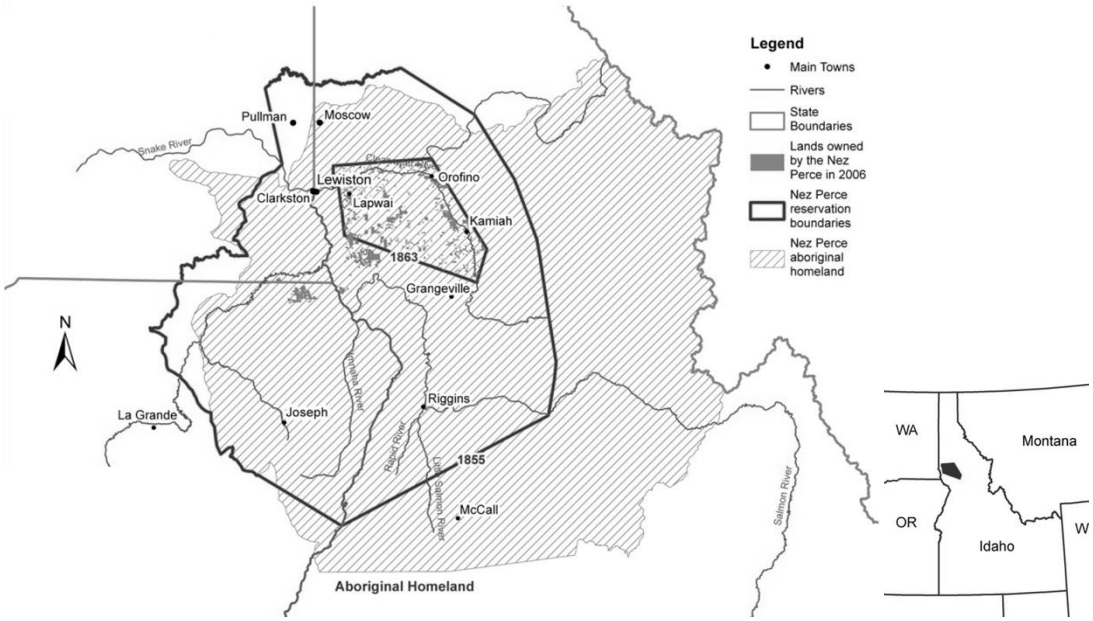

Figure 1: Map of Nez Perce Country[1]

So important is the fishery to the Nez Perce people that, even in the face of cultural and linguistic barriers, the Nez Perce Tribe managed to make the survival of their fishing rights imperative to their signing the 1855 Treaty with the federal government.

In the over 150 years since the Tribe first signed the Treaty at Walla Walla, significant and unforeseeable changes have occurred on the landscape. Native American sovereignty waxed and waned. Federal policies toward American Indians during this period can be described as mercurial at best. Ecologically, changes to the air, water, and earth abound. Forests cut, water diverted or impounded, and now climatic uncertainty further marginalizes the existence of many species. Anthropogenic impacts to Nez Perce Country's rivers and streams severely reduced the viability of the anadromous fishery. Water diversions and impoundments alike disconnect important spawning and rearing habitat, increase water temperatures, and lengthen the downstream travel time of juvenile fish.

This thesis focuses on two significant human alterations in Nez Perce Country that changed the ecology in a way that threatens the Nez Perce Tribe's ability to exercise its treaty fishing rights. These human alterations are the water diversions from the Lapwai Creek watershed by the Lewiston Orchards Irrigation District (LOID) and the construction and operation of the Hells Canyon Complex, a series of three privately operated dams on the Snake River. Both the Lapwai Creek watershed and the Hells Canyon reach of the Snake River fall within the original 1855 boundary of the Nez Perce Reservation, but subsequent agreements between the Tribe and the federal government eroded the Tribe's landholdings and increased the jurisdictional complexity in Nez Perce Country.[2]

The Lewiston Orchards is an area just south of Lewiston, Idaho. Presently, the area is made up of small scale farms and residential housing, but the area was initially developed

to produce high-value, intensely irrigated agriculture. Water diversion for irrigation in the Orchards began in the late nineteenth century.[3] Prior to the organization of a public irrigation district, various competing irrigation interests vied for control over the region's surface water resources. LOID was incorporated after the failure of the private irrigation company in 1922.[4] The mountainous region just south of the Orchards captures and stores water in the form of snow during the winter months, this snow historically melted gradually and provided stream flows in the lower watershed through the summer. The irrigation system impounds water high in the watershed at Lake Waha and Soldier Reservoir and diverts water through a series of diversion ditches and flumes to a storage reservoir closer to Lewiston.

Unlike the lands of the Lewiston Orchards area, the land appurtenant to the Snake River in the historic Nez Perce homeland is not suitable for irrigation. The area is a rugged canyonland, containing North America's deepest gorge. The lack of irrigation opportunities or human habitability in the Hells Canyon region, however, did not spare it from human alteration. The growing populations of the West were as hungry for electricity as they were thirsty for irrigation. Public and private power proponents alike sought to dam the river to harness the kinetic energy of water and gravity. In 1955, the federal government licensed a private hydropower project in Hells Canyon consisting of three dams. The construction and operation of those dams devastated the fish populations in the Middle Snake Valley.[5]

Currently, anadromous fish numbers are so low in Nez Perce Country that they warrant protection under the Endangered Species Act. Conflict exists between the Tribe and LOID over the irrigation district's withdrawal of water, due to the ecological impacts the withdrawals have on fish habitat. Likewise, conflict exists between the Tribe and the Idaho

Power Company, the operator of the three dams in Hells Canyon. The operation of these dams continues to impact water temperature and predation of migrant fish populations. The Tribe is currently working with both LOID and Idaho Power to reconcile these differences and improve fish habitat. The current situation exists as it does because it evolved over time in response to a variety of social, legal, and environmental forces that altered perspectives and changed priorities. This thesis seeks to inform the discussion about water rights in Nez Perce Country by investigating the actors and learning how relationships between those actors changed over time. By placing the legal analysis within its historical context, this investigation, through the exploration of pattern, irony, and change, reveals deeper meanings to the simple questions of who, what, where, when, and why.

This study also relies on insights realized through an analysis of legal authorities. Through the study of statutes, court decisions, and administrative rulings, a more complete picture of the broad forces of the federal government emerge, as does a better understanding of why actors chose to navigate conflict in a particular way. Laws set rules, create incentives, and provide recourse. The law also reflects social attitudes, which shift over time and cause corresponding changes in the law.[6] For example, the creation of new environmental laws in the 1960s and 1970s reflected increased ecological awareness within society. Thus, the law is both a response to society's needs and a pressure that acts upon society.

Using these two disciplines to study the water rights in Nez Perce Country best addresses the complexities fundamental to the present conflict that would otherwise be inadequately understood. The entrenchment of property rights in Nez Perce Country provides an example of an important component of the present conflict that is fully explored

only when put in the historic context and the lasting effects on the legal regime are considered. This study integrates insights from both disciplines to create new knowledge that comprehensively explains the current status of water rights in Nez Perce Country and will allow informed future decision-making. In integrating insights from both disciplines, this thesis examines both how the legal regime impacted actors and also how changes within the legal regime and the government's institutional structure were catalyzed by changes occurring within society. The historical context provides the lens with which to view those questions. An inquiry aimed at discovering historical patterns and a legal analysis that explores law, precedent, strategy, and anomaly addresses these questions comprehensively.

The current situation is better understood when approached in a three-part framework: 1. The federal government created competing rights that are now entrenched, making the status quo difficult to overcome; 2. Greater involvement by federal government in water resource development effectively sanctioned water use that altered the hydrology of Nez Perce Country in a way that impaired the ecological system and ultimately harmed tribal interests; and 3. In an attempt to reassert its treaty rights, the Nez Perce Tribe turned to various legal mechanisms, which have not always reaffirmed the Tribe's treaty rights, but resulted in a change of practices that benefit the anadromous fishery. In this thesis, each part of the framework is discussed at length in a corresponding chapter.[7]

The second chapter examines the creation of rights in Nez Perce Country. These rights include treaty rights, property rights, and water rights. Many of the rights discussed in the second chapter were allocated by the federal government. The exceptions are water rights administered by the state and treaty rights reserved by the Nez Perce Tribe. This chapter explores the competing interests in natural resources created by the federal

government when it simultaneously advanced a policy of turning the Nez Perce Tribe into agriculturalists while also promoting the settlement and development of adjacent land. Throughout the nineteenth century, the competition for resources escalated as non-native settlers were encouraged by the federal government to move deeper into the Tribe's aboriginal land. The competition over water resources eventually led to conflict and the Supreme Court added another layer of rights into the scramble for resources when it acknowledged the existence of the Nez Perce Tribe's reserved water rights. The federal government set the stage for conflict over water by encouraging its use and development by Nez Perce and settlers alike and providing incentives for mass settlement in an arid region, without considering the potential strain on resources and without recognizing the different, and conflicting, forms of water use, including ecological uses.

The third chapter explores the government's complicity in the destruction of riparian habitats by private actors in furtherance of economic development. After the bankruptcy and dissolution of the original creators of the Lewiston Orchards in the early twentieth century, land owners within the Orchards were left with debt and deteriorating infrastructure. The Bureau of Reclamation (BOR) agreed to, and Congress approved, a plan for the BOR to rehabilitate and expand the irrigation system. Shortly after beginning the project, LOID deeded major elements of the infrastructure over to the BOR. The federal government was also complicit in the construction and operation of the Hells Canyon Complex because it authorized the project via federal license. This complicity by the federal government would have important ramifications in the future, because it opened up both projects to the consultation process of the Endangered Species Act, which only public actions, or publicly licensed actions, are required to participate in.

The fourth chapter examines the Nez Perce Tribe's use of the law to assert their treaty rights. Recognizing the importance of sustaining anadromous fish runs to their culture, and thus the necessity of water, the Tribe has had little success asserting their treaty rights in Idaho federal and state courts, despite favorable precedents. The increased self-determination of the Tribe (such as the Tribe's administration of a fisheries program and the employment of tribal biologists, lawyers, and other technical expertise) and the creation of new environmental laws in the 1970s opened up new legal strategies allowing the Tribe to sue, though not under their treaty rights, but under statutes that seek to protect fish habitat and ultimately increase the amount of water left in the rivers and streams of Nez Perce Country.

The story of Nez Perce Country not only provides important context to the current localized discussion about managing resources in an environment of competing uses, diverse values, and changing circumstances, but it also contains lessons and insights that can be applied elsewhere. The study of historical and legal aspects of a watershed is an indispensable asset to that watershed's physical and biological exploration. Often, the scientific study and restoration of disturbed habitats seek a reference point of an ecological baseline, the landscape as it was before extreme anthropogenic disruption. This ecological baseline often helps scientists and managers identify conservation goals and could not be accurately attained without an understanding of the human-environment interactions occurring over time and their impacts on ecological systems.[8] Knowledge about the past helps understand the present and can be used to inform the ecological restoration plans and management objectives that shape the watersheds of the future.[9]

Conflict over water resources in the West is not a new phenomena; it is a quintessential part of the western landscape. Since the arrival of Euroamericans to the West, humans have sought to renegotiate the delicate ecological balance of the western landscape. At their worst, humans exploited resources with little regard for the lasting effects, seeking only to maximize gains. At their best, humans believed the impacts of their exploitation were justified and could be mitigated by technological solutions. Moreover, cycles of boom and bust, scarcity, and competing interests have made important contributions to the West we see today, and are themes that will likely persist and intensify as ecological pressures resulting from climate uncertainty and population growth continue to shape what lies ahead for Earth's inhabitants. The past cautions against absolute reliance on technology to mend ecological devastation waged in the name of economic gain. By exploring the complex relationships between actors and examining the difficult decisions made in the past, we might better understand the choices and their ramifications to the problems we face in the future.

CHAPTER ONE NOTES

[1] Julia White, "Lab 1 Maps," Tampico Tea Time, http://chewieii.blogspot.com/2010/03/lab-1-maps-qualitative-map-before-after.html (accessed December 1, 2013).

[2] See "Treaty with the Nez Perces," June 9, 1863, 14 Stat. 647 (1867) and "Agreement of May 1, 1893" 28 Stat. 326 (1894).

[3] *Lewiston Teller*, "Waha Ditch," in Betty Thiessen Meloy, *Past Days of the Tammany-Waha Area* (Lewiston: Lewiston Printing 1982), 290.

[4] Idaho Public Utilities Commission, *Ninth Annual Report of the Public Utilities Commission of the State of Idaho* (Caldwell: The Caxton Printers, Limited, 1922), 57.

[5] Nez Perce Tribe's Opening Brief, Nez Perce Tribe v. Idaho Power, on appeal from the U.S. District Court, District of Idaho, March 13, 1995, 4-5.

[6] Holly Doremus and A. Dan Tarlock, *Water War in the Klamath Basin: Macho Law, Combat Biology, and Dirty Politics* (Washington D.C., Island Press, 2008), 88-89.

[7] This framework was inspired by the themes explored in *Water War in the Klamath Basin*, see note 6 at pages 6-7.

[8] Torben C. Rick and Rowan Lockwood, "Integrating Paleobiology, Archaeology, and History to Inform Biological Conservation," *Conservation Biology* 27 (2012): 46-47.

[9] Peter S. Alagona, John Sandlos, and Yolanda F. Wiersma, "Past Imperfect: Ecology and Baseline Data for Conservation and Restoration Projects in North America," *Environmental Philosophy* 9 (2012): 65.

CHAPTER TWO: THE CREATION OF RIGHTS

> *The federal government created various expectations with the promise of homesteads to settlers and through treaty-making with tribes. The creation of these resource entitlements by the federal government ignored the competing interests of the two groups. The following chapter explores the federal creation of rights and their lasting impacts on the landscape.*

The Nez Perce people lived in sandy river bottoms where flashes of sunlight reflected off of the metallic skin of fish, betraying their location to those stalking from above. They lived in meadows where a sea of bright blue flowers barely hinted to the uninitiated at the wealth of nutritious tubers growing underfoot. They hunted game in conifer forests that marched up toward craggy peaks, peaks from which one might peer down into a labyrinth of rocky canyons extending like fingers from a great river below. The fate of these people, their culture, and their ecosystem would be forever changed by the arrival of Euroamericans to western North America.

Despite initial attempts to keep Euroamerican and Nez Perce communities separate, the attraction of natural resources "untapped" in the eyes of area's new arrivals made wholly separate communities impossible. The federal government saw the cohabitation of these two communities as temporary, something that would solve itself as Native Americans were culturally assimilated into Euroamerican society. However, the inertia of thousands of years of living in synch with the region's cycles of abundance and scarcity would not easily be broken by bibles and barbed wire. What did break easily were the promises made to the Nez Perce Tribe in exchange for their land. As the Tribe struggled to maintain its grasp on tradition and culture, the federal government continued to advocate that they give up a

seasonal lifestyle well suited to their region in exchange for an agrarian life that existed in defiance of climate and geography.

This chapter investigates the creation of competing rights in Nez Perce Country in an effort to better understand the subsequent resource conflicts in the region. Rights reserved by the American Indians through treaties were often infringed upon by American citizens. With respect to the Nez Perce Tribe, the United States government has a long history of falling short of its treaty obligations, especially in the presence of competing Euroamerican interests. The first territorial capital of Idaho was constructed illegally on Nez Perce land, but the United States government preferred moving the reservation boundary to ejecting Euroamerican settlers from prosperous mineral country, setting a precedent portending future reductions of the Nez Perce land base and infringements on treaty rights.

Property Rights and the Doctrine of Discovery

Not all rights are created equal. In fact, some rights are not created at all. Philosophers and legal theorists recognize a variety of rights, including moral rights, human rights, natural rights, and legal rights. Instead of being distinct, rigid categories, rights are often amorphous and overlapping.[1] This thesis discusses legal rights, which are a social construct and the product of a legal system. Legal rights are created, as opposed to natural rights, which are inherent. The types of rights discussed in this chapter are varied, and a non-exhaustive list includes property rights, reserved rights, the right of occupancy, treaty rights, and water rights.

An often used analogy in first-year Property Law courses is to liken property ownership to a "bundle of sticks," with each stick representing a right, and with the owner holding the entire bundle. It is not necessary in property ownership to posses all of the

sticks. An example of an owner giving away a property right is a lien on a house. The owner gives a property right away to secure a debt, but remains the owner of the house. The bundle of sticks analogy can similarly be applied to land on an Indian reservation. In "trust land" on a reservation, the absolute owner is the federal government. Many of the rights, however, are held by the tribe. The right to occupy the reservation, for example, is held by the tribe, and a tribe might also reserve, in the treaty or executive order establishing their reservation, the right to fish free from state regulations. Not all land within Indian reservations is trust land, however, and the creation of various classifications of reservation land ownership by the federal government has vastly complicated reservation administration. To understand the origins of this complexity, it is useful to understand the origins of property rights.

Defining and enforcing property rights is work. There would be no incentive for individuals to take on this work unless the property in question was a valuable resource.[2] In economics, value is a product of scarcity.[3] Scarcity, therefore, is assumed to be a prerequisite of property. Economist Harold Demsetz's classic work, "Toward a Theory of Property Rights," supports this view, arguing that property rights, "Develop to internalize externalities when the gains of internalization become larger than the cost of internalization."[4] Put another way, property rights provide the right holder a benefit at a cost that is less than what is gained through the ownership of the right. Demsetz applies his theory to a case study involving the indigenous people of the Labrador Peninsula. Demsetz points out the development of property rights among the indigenous Labradorians coincided with the fur trade.[5] The increased hunting for furs resulted in the creation of exclusive hunting grounds for particular tribal groups.[6] The arrival of a new market for furs by early

Europeans created scarcity by increasing the local demand for furs while the number of available furs declined, ultimately necessitating defined property rights. The fur trade in New England was similarly affected, William Cronon points out, "Reduction in beaver populations, as well as conflict over who should be permitted to trap where, led to major shifts in Indian notions of property."[7] The arrival of Europeans in North America greatly impacted indigenous society, economy, and ecology. Abundant resources rapidly became scarce. Europeans arrived on the continent at a time when many resources were plentiful, and they had little, if anything, to gain in recognizing indigenous property claims. Therefore, it is not surprising that the first explorers in the Americas did not recognize the existence of indigenous property. The belief that pre-contact Native Americans did not own property has persisted in mainstream American culture and continues to exist today.

The Nez Perce, however, had both individual and communal property. Personal property such as tools and crafts were owned by the person who created them; likewise livestock were owned by the person who bred them.[8] The Nez Perce could also hold personal property that was intangible, such as rights to a particular name.[9] Communal property, like the long-houses the Nez Perce people often slept in, was acquired through communal labor. Real property was also held communally, and could be owned by either the tribe as a whole, or by a village. Important fishing sites are one example of an area where real property was held by the Tribe.[10] The Nez Perce Tribe had mutual agreements with other tribes that permitted hunting in other tribal territories. These mutual agreements and other ownership relationships to both tangible and intangible items demonstrate that the pre-contact Nez Perce Tribe had a system of property rights in place at the time of Lewis and Clark's arrival to the Clearwater Valley in 1805.

The early European colonists also had a system of property rights. The British and other Europeans colonial powers relied on the Doctrine of Discovery to maximize the colonization of non-European lands.[11] The Doctrine gave a right to the first European power to discover previously "unknown" land, protecting it from competing European claims, and was solidified by the Catholic Church in the fifteenth century as a measure to keep Spain and Portugal from fighting over the Canary Islands.[12] Not aimed at taking away the rights of indigenous people, but rather at preempting European powers from competing claims to "uncivilized" lands, the Doctrine of Discovery did not strip all property rights from indigenous people, but instead eroded indigenous sovereignty. The English adopted the Doctrine, altering it slightly to include the elements of actual possession, present occupation, and incorporating the justification of terra nullius. Terra nullius, meaning vacant land, was a justification that allowed the English to claim land that was in possession of indigenous populations if those populations were "not using" the land in a way valued by Europeans; this justification was especially useful in the North American "wilderness," where large areas were used for hunting and subsistence gathering.[13] These added elements of the Doctrine required the colonial power do something more than merely stick a flag in the sand, these elements required actual occupancy of the new territory.

The application of the Doctrine of Discovery was imported to the American colonies from England, and was ultimately incorporated into the independent American government. The British government, at the close of the Revolutionary War, ceded its claims to the thirteen colonies to the American government under the 1783 Treaty of Paris. Much of the land that passed to the American government was occupied by Native Americans. The newly formed United States government, much like their English predecessors,

acknowledged the right of American Indians to occupy their aboriginal homelands. The burgeoning United States population, however, increased the demand by citizens for unoccupied land. The government, in response to this demand, sought to remove occupying tribes from areas close to the American population masses. In 1830, Congress passed the Indian Removal Act, legislation that authorized the United States government to negotiate the removal of American Indian tribes and their reestablishment on lands deeper into the frontier west.[14]

Native American tribes could, in some instances, broker a treaty with the United States government to make land available for Euroamerican settlement. These treaties generally reduced or extinguished the occupancy claims of a Native American tribe, and in exchange, the United States government would offer its protection, build schools, and provide other financial benefits to the tribe.[15] During a treaty negotiation, a tribe could emphasize rights that were particularly important, such as hunting and fishing rights, and designate that the tribe would keep those rights on the lands ceded under the treaty.

Pre-Contract and Early Explorations into Nez Perce Country

Historical accounts of the Nez Perce people often begin with the Tribe's first contact with Euroamerican civilization, the descent of the Clearwater River by the expedition of Lewis and Clark in the spring of 1805. Beginning at that point, however, inappropriately characterizes the history of the Nez Perce people, or Nimiipuu, as beginning in 1805.[16] Nez Perce people and culture persisted in the Inland Northwest since time immemorial. Prior to the arrival of Lewis and Clark, the Nez Perce had their own traditional relationship with the land, other tribes, and their environment.

The Nez Perce lived in small settlements of 30 to 200 people.[17] These settlements fluctuated in population throughout the year depending on the season.[18] The aboriginal homeland of these people is thought to have spanned roughly 14 million acres of land.[19] This homeland included part of Washington, Oregon, and much of central Idaho. Within the entire range of the Tribe, there were many small bands that comprised two larger groups; each group spoke a slightly different dialect of the same language.[20] The Nez Perce allocated and used their region's resources in a way commensurate with the availability and seasonality of those resources.[21] Tribal members collected various roots and berries, and also managed their landscape to increase yield. The Nez Perce would alter the landscape by setting fire to the prairie grassland to increase camas yields and preserve the prairie from the encroachment of trees and shrubs.[22]

The Nez Perce also relied on various game species, including deer and elk, for sustenance. In hunting, the Nez Perce used fire to drive game animals into traps or off cliffs.[23] Before horses were brought over into Nez Perce territory from the east, all of the Tribe's hunting was done on foot, sometimes requiring hunting parties to walk for several days. The Tribe relied heavily on traditional knowledge and skill to make their hunts successful.[24] The Nez Perce were also skilled fishermen, employing a wide variety of fishing techniques including hook and line, spear fishing, harpooning, dip-netting, trapping and the construction of fish weirs.[25]

Instead of seeing a tenacious people, living a life of abundant seasons punctuated by brief periods of scarcity, the members of the Corps of Discovery saw a struggling community. William Clark noted that the Nez Perce seemed to have few forms of amusement, and quickly concluded that the Tribe's subsistence required all of their available

time.[26] The perception that the Tribe struggled for survival was likely the product of the expedition's own cultural bias. Because Nez Perce lifeways did not resemble those of Euroamerican society, the Lewis and Clark expedition likely misread the subsistence life of the Nez Perce to be a life of poverty. Historian Elizabeth Vibert's study of early encounters between fur traders and Native Americans on the Columbia Plateau supports this explanation. Vibert found that the Plateau's early explorers did not value the fish-based subsistence of the region's indigenous cultures, but rather considered their diet of fish to be inferior to a diet of game and saw the tribes as existing in a state of starvation.[27] The Lewis and Clark expedition similarly preferred red meat over fish, and may have likewise viewed the fish and camas diet of the Nez Perce as inferior.[28] Whatever the reason for the misconception, early Euroamericans perceived the indigenous use of the region as a "waste" and thought that western techniques of agriculture and resource extraction was a "better" use of the landscape.

The Lewis and Clark expedition did not stumble across the Pacific Northwest by accident, the expedition was sent there by the American government to benefit the country in a variety of ways. Most importantly, Lewis and Clark were in search of the famed "Northwest Passage" that would provide an overland route to Asian fur markets and give the Americans a competitive edge over England in the fur trade.[29] The expedition also intended to (and did) increase scientific understanding of the newly acquired upper Missouri region of the Louisiana Purchase and beyond to the Pacific Ocean.[30] Another motive behind the expedition was to increase American claims to land in order to provide for the booming American population.[31] Finally, the expedition was to signal to the region's other colonial powers that America would have permanent settlements on the Pacific side of the

continent.[32] Thomas Jefferson, creator of the expedition, was a man with an unquenchable thirst for knowledge. His interests in philosophy and science are well documented, as was his remarkable collection of books. Jefferson's time corresponded with the "Age of Enlightenment," a period known for the use of reason to advance knowledge. This period also included many great explorations of unknown land, including the journeys of James Cook, George Vancouver, and Alexander Mackenzie.[33] Jefferson gave Lewis detailed instructions about the type of information the expedition should collect.[34] This included gathering information about geography, anthropology, and botany.[35]

Although Jefferson assured diplomats from Britain and France that the expedition was purely interested in the advancement of knowledge,[36] when advocating Congress for an appropriation, he couched the purpose of the expedition in a different light. Jefferson surreptitiously requested from Congress an appropriation to fund the expedition of the Upper Missouri and beyond. The rationale for the expedition, as Jefferson put it to Congress, was, "to provide an extension of territory which the rapid increase of our numbers will call for."[37] Jefferson sought to achieve this task by,

> encouraging [the Indians] to abandon hunting, to apply to the raising [of] stock, to agriculture and domestic manufacture, and thereby prove to themselves that less land and labour will maintain them in this, better than in their former mode of living. The extensive forests necessary in the hunting life, will then become useless.[38]

Jefferson wanted to increase the number of people living on the North American continent though more efficient use of its land, which would be achieved through agriculture. Congress responded by appropriating funds for the expedition, understanding that the Upper Missouri would likely be the first area outside of the union to be settled by citizens of the new republic.[39]

Land to fuel American agrarianism was not the only imperial interest had by the federal government in the expedition. The Lewis and Clark expedition was also a diplomatic tactic, a response to British explorations in the Pacific Northwest region.[40] After reading Alexander Mackenzie's *Voyages from Montreal*, Jefferson had to respond to Mackenzie's assertion that by colonizing the Pacific Northwest, the British would be able to control the entire fur trade of North America.[41] Jefferson was well aware that if the United States failed to claim the land of the west, another colonial power would. In his letter to Congress, Jefferson reasoned that if the British could maintain profitable trade in the northern latitudes, despite cold conditions and frozen water bodies, an American waterway leading from the Upper Missouri to the Pacific would render the more northern British waterway obsolete.[42]

Lewis and Clark set off on their journey in 1804. Their expedition was much more challenging than they had contemplated, and by the time they reached the lands of the Nez Perce in 1805, they were starving. It was fortuitous that the expedition made it down to the Clearwater River during a run of salmon. The Nez Perce, in an act of generous hospitality and kindness, fed the famished Corps of Discovery.

Although the interactions between the Nez Perce and the Lewis and Clark expedition were friendly, in sending the expedition westward, Jefferson had made the first offensive move toward the eventual American control of the Pacific Northwest and the Rocky Mountains. Jefferson well understood that the Louisiana Purchase in 1804, in concert with the expedition of Lewis and Clark, would provide the federal government with a legal claim to the frontier under the Doctrine of Discovery.[43] What Jefferson bought in the Louisiana Purchase was France's discovery claims to the region. However, many Native American

tribes inhabited the lands of the Purchase, and the federal government was still left with the task of obtaining the right of occupancy from those tribes.

In 1823, the United States Supreme Court officially adopted the European Doctrine of Discovery.[44] In *Johnson v. M'Intosh*, the Court was given the opportunity to decide a question that had vexed land speculators: whether Indian land could be purchased privately through direct negotiation with a tribe? The Court's pronouncement answered a bigger question, determining the extent of tribal property rights.

The lawsuit arose when two separate people ended up holding title to the same tract of land. The suit was initiated by Joshua Johnson and Thomas Graham, who traced their ownership of a property located in present-day Illinois back to the days before the American Revolution.[45] Their right to the property was a product of a sale by a consortium of the region's Native American tribes and two land speculation companies: the Illinois Land Company and the Wabash Land Company. The deeds in question were executed in 1773 and 1775, respectively, during a time when the direct sale of land between private citizens and tribes was prohibited.[46] After the Revolutionary War, the newly formed American government followed in the footsteps of the British and also prohibited the sale of land by Native American tribes directly to private citizens.[47]

Meanwhile, the United States government was busy buying land from tribes, and bought the same tracts of land purchased by the Illinois Land Company and the Wabash Land Company.[48] The government then sold the land to private citizens. William M'Intosh, a citizen who purchased land from the government, was subsequently sued by the land companies to find out who had the authentic title to the land.

The suit made its way up to the United States Supreme Court and Chief Justice Marshall authored the unanimous opinion. The Court relied on the Doctrine of Discovery to define the right to sell land to an individual as an exclusive right of the colonial power.[49] In holding that private entities could not purchase land directly from tribes, the Court stopped short of stating that the tribes had no rights at all to the land. Instead, the Court described the Native Americans' right as a "right of occupancy."[50] Therefore, indigenous people had the right to occupy or live on the land, but they did not have the right to sell the ownership of the land to others. The Court determined that what the tribes sold to the land speculators in 1773 and 1775 was merely the right of occupancy and nothing more.

The Court's holding affected North American tribes by greatly reducing the sovereignty of all tribes residing on "discovered" land. This result was based firmly in racism and was justified by the fact that indigenous Americans were not Christians.[51] When rationalizing the use of discovery by Europeans to gain ownership over tribal lands, Justice Marshall stated that the Europeans found a reason, "if not justification, in the *character and habits of the people* whose rights had been wrested from them."[52]

Marshall's opinion also provides insight into the assumptions made by the federal government with respect to their Indian policy. He described the relationship between the "conquerors" and the "conquered" being a distinction that would fade over time. Marshall envisioned Native Americans becoming assimilated into mainstream American society.[53] What was not envisioned by the Chief Justice was the strong resistance by many Native Americans to give up their culture.

The result of the case was not only that Native American tribes could not hold absolute title to their land, but the case also created a duty on the part of the federal

government to protect peaceful tribes.[54] The federal government was additionally instructed to purchase the right of occupancy from a tribe if the government wanted to remove tribes from a tract of land that they occupied.

Euroamerican Influences in the Nineteenth Century and the 1855 Treaty

In the fall of 1831, a small group of Nez Perce people took to the trail of Lewis and Clark and headed east.[55] They arrived in St. Louis with a request for religious instruction. Likely from two Native Americans who were taken by fur traders in 1825 to be baptized and schooled in the western tradition, the Nez Perce people had heard of, and were intrigued by, Christianity.[56] The response to the delegation was the dispatch of missionaries to Christianize the tribes of the Oregon Territory.[57]

The first missionaries to the Nez Perce were Henry Spalding and his wife, Eliza, who arrived in the region in 1836.[58] Spalding did more than bring the teachings of Christianity to the Nez Perce; he also brought with him the similarly sacrosanct teachings of agriculture. After the arrival of Christianity and agriculture to Nez Perce Country, the first United States governmental official arrived in 1842. Elijah White, U.S. subagent to the Northwest's Indian Tribes (never mind the fact that American ownership of the region at the time was contested by the British) traveled into Nez Perce Country and set forth eleven laws to govern relations between the Tribe and the region's Euroamericans.[59] White also asked the Tribe to appoint a single representative, a head chief. The Tribal structure of the Nez Perce did not include an overarching supreme chief, but White insisted one was necessary for future relations with the U.S. government. Eventually, the Nez Perce agreed to appoint someone, but the evidence surrounding the appointment suggests that the Tribe thought they were appointing a position closer to a tribal liaison than a head chief.[60] Although White's visit to

the Nez Perce had no immediate impact on the Tribe, the Tribe's willingness to appoint a single liaison between the governments would impact future dealings between the two governments, enabling the U.S. to negotiate with a "unified" Nez Perce Tribe, instead of the numerous Nez Perce bands.

After the departure of White, the Spaldings lived among the Nez Perce with limited interference from the U.S. government for the next few years. During this time, the Spalding's stay at Lapwai was appreciated by some Nez Perce members, but was not without tense moments. In a letter to Reverend David Greene in 1845, Spalding identified three sources of disquiet among the Tribe: suspicions arising from the death of a prominent Walla Walla member, blame for the rash of illness-related deaths in the Tribe, and the feelings of some Nez Perce that the Spalding should be paying them for the land and water used by the mission.[61] Of the anxiety over the mission's use of water and land, Spalding wrote, "They [the Nez Perce] are told by the enemies of the mission that people in the civilized world purchase their land and water privileges. This touches a chord that vibrates through every part of an Indian's soul--that insatiable desire for property."[62] This indicates that conflicts over resource use between the Nez Perce and Euroamericans began at the very genesis of cohabitation between the two groups.

The rising tensions between the missionaries and the indigenous population were not unique to the Nez Perce. Undoubtedly the region's most infamous and deadly conflict was the Whitman massacre of 1847. This involved members of the nearby Cayuse Tribe and the missionaries Dr. Marcus Whitman and his wife, Narcissa. The Spaldings' daughter, Eliza, was living at the Whitman mission to receive schooling, but her life was spared. Cayuse members killed 12 men at the Whitman mission, including Dr. Whitman; Narcissa Whitman

was the attack's sole female victim. Henry Spalding, having just been at the Whitman mission days prior to the attack, is thought to have narrowly escaped death in this incident.[63]

Despite the unfortunate violence and ever-present tensions between the missionaries and the Native Americans, the federal government sought to increase the numbers of American settlers in the Oregon Territory. The federal government utilized legal mechanisms to incentivize settlement; the Oregon Land Donation Act of 1850 provides an example.[64] This law rewarded settlement in the Oregon Territory by granting single male settlers with 320 acres of land for making the journey. For married couples, the amount of land that could be claimed was 640 acres. The provisions of the Oregon Land Donation Act expired by design in 1855. This law did increase the numbers of settlers heading west on the Oregon Trail and also served as the forerunner to the better known Homestead Act of 1862.

During the mid-nineteenth century, the federal government pursued two policies at odds with each other. On one hand, the government advanced a policy of removing Native American tribes east of the Mississippi. The removal policy was based on the underlying assumption that the federal government could rid itself of its "Indian problem" by evicting Native Americans from their homelands and placing them on reservations west of the Mississippi. Keeping Native Americans on the other side of a "permanent Indian frontier" would not solve any of the government's problems when it was simultaneously promoting settlement east of the Mississippi.[65] The other federal policy, as evidenced by the Oregon Land Donation Act, did just that. The Oregon Country was added to the United States's landholdings with Great Britain's acquiescence to the Oregon Treaty of 1846. Two years later Congress formally organized the Oregon Country into a territory. The Oregon Treaty

did not only add land to the United States, but it also added entire populations of Native American tribes, which the federal government was required to protect. To successfully induce settlers west, the federal government had to clarify the extent of Native American land occupancy in the region, especially in the wake of the high publicized Whitman massacre. The easiest way to minimize interactions between Euroamerican settlers and northwestern tribes was to negotiate with tribes and buy their right of occupancy, thereby concentrating tribes on relatively small reservations.

In 1853 Congress created yet another new territorial government. Carving land from the Oregon Territory, the Washington Territory was born. The Territorial Governor of Washington, Isaac Stevens, was set to the task of establishing treaties with the region's tribes. Treaty-making with Native American tribes had existed as an instrument of federal policy since the dawn of the American republic. The concept was simple: get tribal leaders to agree to cede as much land as reasonable, and place the tribe on a reservation far away from Euroamerican settlement.

For the Nez Perce people, their Treaty was negotiated at the Council at Walla Walla of 1855. This council was a multi-day event that included tribal representatives from the Cayuse, Walla Walla, and Nez Perce tribes. Along with Governor Stevens, negotiating on behalf of the federal government was Superintendent of Indian Affairs, Joel Palmer. Palmer had successfully negotiated Indian treaties in the Oregon Territory in 1853 and Governor Stevens had brokered treaties with tribes in the Puget Sound region during the same time.[66]

The Council began on May 29, but the tribes had been gathering for days beforehand. An observer to the Council described the impressive arrival of the 2,500 person Nez Perce delegation:

> We saw them approaching on horseback in one long line. They were almost entirely naked, gaudily painted and decorated with their wild trappings. Their plumes fluttered about them, while below, skins and trinkets of all kinds of fantastic embellishments flaunted in the sunshine. Trained from early childhood almost to live upon horseback, they sat upon their fine animals as if they were centaurs.[67]

The Nez Perce delegation was much larger than that of the other tribes, but was more amenable to the propositions of Stevens and Palmer. This was partially because the Nez Perce Chief known to be strong-willed and difficult, Chief Looking Glass, was not in attendance. This fact may have relieved Stevens, because he was left to negotiate with Chief Lawyer, a Nez Perce leader known to be more sympathetic.[68] Chief Lawyer took over as the Tribe's liaison with the U.S. government after the death of the man first appointed at the behest of Elijah White.[69] Chief Lawyer's position as lead negotiator for the Nez Perce is criticized by some scholars. As an early adopter of Christianity, Lawyer is viewed by some as "too anxious to please" and accused of being manipulated by Governor Stevens.[70] Other scholars, however, rebuke the idea that the Nez Perce Tribe could be easily fooled by the federal delegation and consider Lawyer a shrewd negotiator.[71] The size of the retained reservation and the successful lobby of Stevens to alter his plan to house multiple tribes on the reservation points to the conclusion that the Nez Perce leaders were well aware of what was at stake and the power they held against the government.

What Stevens and Palmer proposed during the treaty council was an exchange of land for material things, items that would turn the Native Americans into "civilized" people. Stevens spoke of schools, blacksmiths, and ploughs.[72] Perhaps because he knew that previous efforts made by the Spaldings and Whitmans to change the habits of the region's Native Americans were met with resistance, Stevens also offered the opportunity to maintain a traditional existence as well. Understanding the importance of traditional food sources to

the northwest tribes, Stevens told the delegations that they would still be permitted to gather roots and berries and hunt for game and fish as they wished, even outside of the boundaries of the proposed reservation.[73]

While Stevens painted a picture of what life could be like under the proposed treaty, Palmer told the story of what might happen if the treaty were rejected. Palmer spoke of a time when white settlers and Native Americans lived side by side. He told the Council that Euroamerican settlers and Native Americans could not live together in peace because their cultures were too different, and because of these differences, war was inevitable.[74] As Palmer continued his story, he spoke of the inevitable war, where Native American casualties would outnumber settler casualties, on account of the better weapons in the settler's possession. After the Euroamerican settlers won the war, they offered the Native Americans a treaty, a condition of which was confinement to a reservation. Palmer said that the Native Americans were warned, just as the delegation was being warned, that many more Euroamerican settlers were on their way to make homes in their region. Because the Native Americans did not want to leave their homeland and its abundant berries and game, the Native Americans in Palmer's story refused the terms of the treaty. The arrival of many Euroamerican settlers occurred, as promised, and the once abundant resources of the tribe's homeland were soon inadequate to meet the demands of the settlers and Native Americans alike. In reciting this parable to the Council, Palmer emphasized the "foolishness" of the tribe for not taking the reservation promised in treaty, and how the Native Americans ended up hungry and helpless, eventually capitulating and moving away from their homeland to a reservation.[75]

Palmer's story to the Council was a warning. He offered the delegation a choice: move to the reservation or be prepared to fight and have your resources strained. The coming of more settlers would bring clashes between them and the tribes. And Palmer guaranteed the settlers would be coming:

> If there were no other whites coming into the country we might get along in peace. You may ask: Why do they come? Can you stop the waters of the Columbia River from flowing on its course? Can you prevent the wind from blowing? Can you prevent the rain from falling? Can you prevent the whites from coming? You are answered: No! Like the grasshoppers on the plains, some years there will be more come than others; you cannot stop them.[76]

The first four days of the Council were filled with the oration of Stevens and Palmer; none of the tribal delegates spoke on the record until the fifth day.[77] On that day, several chiefs from various tribes spoke, but nothing was said that would instill any hope for the treaties in the minds of Stevens and Palmer. The chiefs were not convinced that reservations were a good idea for the tribes. One chief, Peo-peo-mox-mox, had traveled to California and seen reservation life first-hand. Unimpressed by the California reservations, Peo-peo-mox-mox accused Stevens and Palmer of speaking deceitfully in the negotiations.

In spite of the accusations from other tribal leaders, Chief Lawyer from the Nez Perce delegation agreed to sign a treaty. This Treaty was different from the one originally advanced by the United States delegation. Instead of housing multiple tribes on the Nez Perce Reservation, as initially proposed, the reservation would only contain Nez Perce people. Stevens and Palmer agreed to create more reservations for the other tribes in an effort garner more signatures. The other Nez Perce Chief, Looking Glass, arrived at the Council near the end of the meeting and was dissatisfied with the negotiations. Some scholars believe that Looking Glass was sent for by other members of the Nez Perce Tribe

as a way to disrupt the proceedings and use Looking Glass's opposition to the Treaty as a bargaining chip in the Tribe's favor.[78]

The 1855 Treaty with the Nez Perces ceded 7.5 million acres of land, but retained roughly 6.5 million acres. The Treaty likewise ceded Tribal sovereignty, but retained some as well. This "measured separatism" created a reservation where the Tribe is able to persist free from local and state government oversight, but this independence is attenuated by some degree of supervision and protection from the federal government.[79] The newly formed Nez Perce Reservation included the Wallowa Mountains, the Clearwater River, and much of the Salmon River. Article III of the Treaty contained language that retained the Nez Perce people's right to hunt and fish outside of the boundaries of the reservation, stating that,

> 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 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.[80]

This language would be interpreted many times in the years to come, as courts attempted to determine what rights native people have to the region's fishery. According to law professor Charles Wilkinson, the Nez Perce, "Insisted on keeping specified off-reservation rights for fishing, hunting, gathers, and other purposes."[81] And although the "usual and accustomed" language is repeated in many northwest treaties brokered by Stevens, it is hard to imagine that the Nez Perce Tribe would have signed anything that excluded such a provision. That the provision is included in so many treaties plainly shows that Stevens was well aware of the importance of those rights and understood that a treaty without them would be refused by tribes.

The language of Article XI of the Treaty foreshadowed a future chapter in the Nez Perce's struggle to hold on to their aboriginal homeland. It permitted the federal government to, at their discretion, carve out plots from within the reservation to be given out to tribal members. Nearly forty years later the federal government would survey and divide the reservation into plots for distribution and individual ownership. Not only would the federal government distribute these plots among the members of the Tribe, but the government would also permit non-Indian settlers to own homesteads within the reservation boundary, something not considered in the 1855 Treaty. The Treaty reaffirmed the federal government's position that tribes were dependent on the federal government. One of the provisions of the 1855 Treaty expressly required that the Nez Perce acknowledge this dependence and defer to the federal government in the event that another tribe acted with hostility to the Nez Perce.[82]

The 1855 Treaty with the Nez Perce was not immediately ratified by the Senate. Wars in the region with the Cayuse and Yakamas caused Congress to fear the area's instability, despite that fact that the Nez Perce had remained peaceful. That the Treaty had not been ratified did not stop Isaac Stevens from advocating the area for settlement. In 1858 Stevens sent his circular letter eastward to extol Nez Perce country and beyond as a fecund farmer's paradise, anxiously waiting to be broken by the plow.[83] Settlers heeded Stevens's call and arrived en masse. With the Treaty not ratified the Nez Perce's rights to the land had not yet been extinguished. Problems arose as settlers began building homesteads illegally on the reservation. Not all government officials supported the view that settlers should be able to move onto the reservation before the Treaty was ratified. An Army captain posted at Fort Vancouver objected to the government's permitting settlers to squat on native lands,

reasoning, "In my view of the matter, this region of country still belongs to the Indians who are living upon it; and, until their title to it is extinguished by ratified treaties, and the country thrown open for settlement (white men)[*sic*] have no right to locate thereon."[84]

That the Treaty had not been ratified caused uneasiness among the Tribe. Some tribal members who had been hopeful of the Treaty's promises were now disaffected after years without seeing the benefit of their agreement.[85] The Treaty was ratified in the Senate in 1859, nearly four years after it had been signed by the parties, but the damage to the federal government's reputation in the mind of the Tribe was done. Even with its ratification, the promises of the Treaty were not quickly fulfilled. In the spring of the following year, a party of miners came on to the reservation surreptitiously, under the guise of traders, to scout the region for mineral wealth.[86] By May a gold rush in the Nez Perce territory was rumored.[87] The thought of miners clamoring to the reservation seeking riches prompted the Superintendent of Indian Affairs to request military assistance to protect the reservation from miners.[88]

Although the request for military protection was approved, the soldiers arrived to Nez Perce country late in the year and were turned back by snow.[89] The encroachments on the reservation by miners greatly upset the Nez Perce, who were already dismayed by the government's inability to fulfill the Treaty provisions. An outbreak of war seemed to loom in the region's future. The possibility of conflict between the Tribe and the trespassing miners caused Indian Agent Andrew Cain to propose the gold bearing region of the reservation be purchased by the federal government from the Nez Perce in an effort to assuage tensions.[90] A memorial to President Buchanan was passed by the House of

Representatives of the Territory of Washington requesting that the reservation boundaries be changed in order to permit the economic exploitation of the region's mineral wealth.[91]

Meanwhile, as talk of shrinking the boundaries of the reservation was brewing, the payment provisions of the 1855 Treaty were just beginning to take effect. During the negotiations at Walla Walla, Stevens suggested that tribes would get a better deal for their land if instead of receiving money directly from the government, they receive payment in the form of goods.[92] Stevens reasoned that if the tribes were given cash, they would lose money by buying good from area traders with steep overhead costs.[93] Instead, Stevens suggested that the tribes cut out the middle man of the transactions and allow the government to buy to goods in bulk and distribute them straight to the Tribe.[94] The Tribe agreed to have most of the payment for the ceded land distributed in this fashion. Unfortunately for the Nez Perce, when the federal government used the money to purchase goods for the Tribe, instead of buying practical provisions for the Tribe, the government provided the Tribe with useless trinkets. Although the federal government advocated turning the Nez Perce into farmers, it seemed the government was unable to facilitate this change. That the government believed the Nez Perce Tribe would have ceded its land for beads and silk handkerchiefs showed a fundamental lack of understanding of Nez Perce people. In a letter from the Indian Agent Andrew Cain to the regional Indian Affairs Office in Portland, Cain wrote of the misguided purchases, "The Nez Perces are a partially civili[z]ed and intelligent people, and are not to be deceived or satisfied with gewgaws and trifles."[95] Cain also stated that by purchasing the items on the east coast and shipping them west, the government paid more money for them than they could have had they bought the items in Portland.[96] Cain estimated the $7,400 could have been saved if the goods were

purchased locally, and he additionally commented that the entire annuity payment to the Nez Perce Tribe should be spent on farming implements.[97]

An agreement between the Tribe and the government was brokered that permitted the mining by settlers to take place within the boundaries of the 1855 Treaty.[98] The area north of the Clearwater River and the area of the South Fork of the Clearwater River were both opened to settler mining. The land opened by this agreement remained within the domain of the reservation; the agreement merely permitted settler mining "in common" with the Tribe.[99] Although the Nez Perce did not cede any land in the agreement, a small town of permanent settlers began forming within the boundaries of the reservation. Lewiston originated illegally and, had the provisions of the new agreement between the Tribe and the government been enforced, the government troops promised under the agreement would have evicted the entire settlement. However, with the Civil War raging in the East, the government was less inclined to send its scant western troops out against its northern allies. The flood of settlers into the Nez Perce Reservation would not end despite reports that the Clearwater gold had "played out." [100] As gold claims north of the Clearwater began to thin, new and potentially more lucrative mines were being discovered elsewhere on the reservation, including in the Salmon River drainage.[101]

The 1863 Treaty with the Nez Perces

As illegal settler towns were set up throughout the reservation and a proposal to create an "Idaho Territory" was made, the federal government considered entering into a new treaty with the Nez Perce Tribe.[102] The government feared the character of the men drawn to work in the gold mines would have a negative impact on the reservation, and would likely bring trouble. The 1855 Nez Perce Reservation boundary, despite greatly

reducing the extent of the Tribe's homeland, still resulted in generally low population densities (by Euroamerican standards) across the reservation. The government continued to believe that the transition from a hunting and gathering tradition to that of agriculture would not only benefit Nez Perce society, but was inevitable. Once that transition was made, the expansive land reserved by the 1855 Treaty would not be necessary. In the federal government's view, the 1855 reservation boundary already resulted in land that was not used by the Tribe. In the proposed 1863 Treaty, the Nez Perce Tribe was asked again to cede land to the government, and permit the illegal encampments of the settlers at Lewiston and elsewhere on reservation land. These ceded areas would then be opened up for homesteading by settlers under the recently enacted Homestead Act of 1862 (a continuation and expansion of the Oregon Land Donation Act of 1850), and bring more settlers into central Idaho.[103]

A Treaty Council was set to be held in the spring of 1863. Rumors around the reservation that the government would seek to relocate the Tribe to another region made the Council very unpopular. On the day the Council was set to begin, May 10th, neither the Nez Perce nor the government were ready to discuss a new treaty. When the government's negotiators arrived at the treaty council grounds, they found that many of the Nez Perce people were inimical to treaty talks with the government. The Tribe was dissatisfied with the government's inability to fulfill the 1855 Treaty provisions and the feared that the government might again deceive them.[104] Additionally problematic for the government was the fact that the various bands of the Nez Perce Tribe had clashing views on future land cessations, and that such cessations were strongly disfavored, even by those tribal members generally sympathetic to U.S. government policy.

The government delegation persuaded some Nez Perce members to participate in the treaty negotiations with assurances that they would not be removed from their reservation. This was a strategy that government negotiators would later employ to garner support from various tribal factions. Henry Spalding, the Nez Perce Tribe's first missionary, was on site to interpret, but the Nez Perce requested that Perrin B. Whitman be brought from Salem. Whitman, the nephew of the slain Dr. Marcus Whitman, had grown up in the region and knew the language better than any other non-native. The Tribe's request for Whitman underscores the importance of both clear communication and accurate translation to the Tribe. The chief negotiators on the U.S. side were Commissioner Hale and Indian Agents Howe and Hutchins. They set their position out to the Tribe before Whitman's arrival so that the Tribe would have ample time to consider their proposition.

In Commissioner Hale's first speech to the Nez Perce present at the Council grounds on May 25th, the Commissioner struck a paternalistic tone, warning the Tribe that the U.S. government was unlikely able to effectively protect the Nez Perce people from the miners and others who might encroach on the reservation lands.[105] Notably, one of the first propositions put forth by Commission Hale was the idea that on the new reservation, each man or family would hold their property in severalty, in their own name, as opposed to communal landholdings.[106] On the second day of the council, again without the Nez Perce's requested translator and without the entire representation of the various tribal bands, the government representatives put forth more of their treaty propositions. This time, it was Hutchins presenting the government's offer. Hutchins clarified a point made the previous day by Hale, stating that the land on the proposed reservation "is to be for your own special use and occupation, on which no white man shall be permitted to live."[107] Hutchins also

explained the payments the Tribe would receive for giving up their land, as well as the money the government was prepared to pay for the creation of schools, mills, blacksmiths shops, and similar useful institutions.

The Nez Perce representatives did not express their position until the fourth day of the Council, still without their requested translator and also without much of the Tribe present. Chief Lawyer, who acted as the Tribe's primary negotiator during the 1855 Treaty Council, and who was also thought to side more favorably toward the government's position, spoke on behalf of the Tribe. Chief Lawyer expressed his fear that if the reservation was to be divided, that there would not be enough land for everyone.[108] The government and the Tribe had vastly different views on what amount of land was "enough," each informed by their own cultural understanding. Lawyer also stated that he was untroubled by the miners in his country, he proposed that the gold miners be allowed to mine on the reservation and that Congress enact laws to regulate mining on reservation lands.[109] Chief Lawyer concluded his speech, stating, "I will now give you the great answer, dig the gold, and look at the country, but we cannot give you the country you ask for."[110] Other tribal leaders spoke of the promises made by Governor Stevens, namely, that the reservation would be a sacred place for the Nez Perce people and that it would remain unadulterated by Euroamerican intrusions; for once, a unified voice from the Tribe could be heard, and that voice was telling the government that the reservation land could not be sold.

Unfortunately for the Tribe, the government interest in land cession would not be easily dissuaded. Just as members of the Tribe pointed out the unfulfilled promises of Governor Stevens, the government pointed to provisions in the 1855 Treaty that agreed to further land cession by the Tribe. Article XI of the 1855 Treaty, as Superintendant Hale

pointed out, provided that the government may assign lots for permanent homes and buy the excess reservation land.[111] The Treaty negotiations were at a standstill. A five-day recess from the treaty proceedings occurred. The recess from the formal proceedings, however, did not stop informal negotiations between tribal representatives and the government officials. Quite the opposite was true. The government negotiators used the recess to engage in a series of private meetings with Nez Perce leaders in an effort to ascertain their individual opinions and reservations.[112] Government officials attempted to attenuate the dissatisfaction of tribal bands by intentionally fixing the proposed boundaries of the new reservation to include as many of the disaffected bands as possible.[113]

When Perrin Whitman arrived at the end of the recess on June 3rd, he found the Tribe engaged in an acrimonious dispute over the new treaty. Chief Lawyer represented the larger portion of the Tribe who were willing to cede more land to the government, and Chief Big Thunder represented the faction of the Tribe that refused the government's offer. Chief Big Thunder's followers, numbered roughly a third of the entire Nez Perce population and, despite having signed on to the 1855 Treaty, refused to accept the annuity payments in protest of the cession of aboriginal land. Eventually some of the disaffected leaders in the Nez Perce Tribe were persuaded by the terms of the new agreement, but they refused to actually sign the Treaty, as the internal feud between the Nez Perce bands made their cooperation impossible.[114]

In the end, Lawyer and a few other Nez Perce elders were convinced to sign on to the new treaty. A large portion of the Tribe was not represented by the signatures, and the treaty's validity is questioned to this day. This Treaty reduced the Nez Perce Tribe's landholdings by over six million acres; the resulting reservation is contained entirely in

Idaho. The chiefs who rejected the 1863 Treaty were cast as "bad men" and "law breakers" by the government officials, and this faction of the Nez Perce Tribe were mostly those who had homes outside of the new reservation and would be forced to abandon those homes under the conditions of the 1863 Treaty. This faction, which included the Wallowa Band made famous by their resistance to the U.S. government, did not want to give up their homes. However, none of the provisions of the newly signed 1863 would take place until the Treaty was ratified by the Senate, so at the closure of the Treaty Council, all of the Nez Perce returned to their homes within the 1855 Treaty boundary and waited for the government to act.

The Senate was not quick to ratify the Treaty in Washington D.C. The Senators from Oregon demanded that Superintendent Hale be removed from office as a result of his mishandling the money appropriated for the 1863 Treaty negotiations.[115] Hutchins affirmed the Senator's fears by stating that he was aware of misappropriations by Superintendant Hale.[116] After Hale was removed from office, some members of the Senate refused to recommend the ratification of the Treaty, pushing the ratification off until the next session of Congress.[117]

That the Treaty had not been ratified did not seem to weigh heavily in the minds of the Euroamerican settlers, who arrived to the reservation to choose new homesteads on the lands that would be ceded by the 1863 Treaty. Before being removed from office, Superintendent Hale had stated to the Commander at Fort Lapwai that Article II of the 1863 Treaty (permitting Euroamerican settlers to take homes on the ceded lands) would take effect before ratification.[118] Two other government representatives present for the Treaty Council, Mr. Hutchins and Dr. Newell, however, stated Article II of the Treaty was never

understood, by either side, to take effect immediately.[119] Nonetheless, Euroamerican settlers were arriving on the reservation, causing problems alike for the United States government and the Nez Perce Tribe. Territorial Governor Caleb Lyon wrote a letter to the Secretary of the Interior describing the scene on the Camas Prairie as, "white settlers insisting on the terms of the new treaty, and the Indians still clinging to the old."[120]

The settlers on the reservation felt that regardless of the ratification status of the 1863 Treaty, that the Nez Perce had more land than they needed, and that they should be able to spare a quarter section for each family.[121] The settlers were either unaware that their presence on the reservation was illegal, or, because of the government's consistent ratification of their actions, felt that the government would once again permit the Euroamerican settlements to remain. One letter to the editor of a Lewiston newspaper reflects the sentiment that settlers believed they were acting in accordance with the law. The letter asks the editor, "Surely our Government will not allow law-abiding, loyal citizens to be driven from their homes?"[122] Historian Patricia Nelson Limerick points out that although the Euroamerican settlers of the West were antagonists in the story of Native American conquest, in the parallel story of frontier agrarianism, the settlers were the "innocent protagonists".[123] As innocent protagonists, settlers were victims of land speculation and embellished advertisements that brought them west with earnest desires to live off the land. Settlers traveled west with the understanding that hard work would allow them to provide for their families and that transforming the barren west into agrarian communities was a great service to the country. Survival on the frontier required a hard work and tenacity, something the government well understood and would reward with a land patent, assuming the land was open for settlement. While it is easy to vilify the settler for taking native land

as their own, the government was equally, if not more, responsible for that outcome as the architect of vague and poorly executed federal policies, such as allowing the repeated intrusions on the reservation by non-native settlers.

The ratification of the 1863 Treaty finally came in late 1866, but the Treaty was ratified with the addition of amendments by the Commission of Indian Affairs and the Senate.[124] The Nez Perce did not accept these changes, and believed that by rejecting them, the governing treaty would be that of 1855. The Idaho officials, recognizing the trouble that was inevitable if reservation boundaries remained as outlined in the Stevens Treaty, requested that the Senate re-ratify the 1863 Treaty, without any additional amendments. The following spring, the Senate followed the advice coming from Idaho and receded from the treaty amendments.[125]

In the meantime, the non-treaty bands of the Tribe had returned to their homes and were determined to maintain ownership over their lands. Upon returning to their home in the Wallowa Mountains, Chief Joseph's band found their land had yet to become settled by Euroamericans. However, by the early 1870's, as Chief Joseph lay on his deathbed, the first settlers moved into the Wallowa Canyon, as space in Grande Ronde Valley became increasingly limited.[126] The death of Chief Joseph and the ascension to chief by his son, also named Joseph, did not alter the band's position on their occupancy of the Wallowas. So tense was the situation that the Indian Agent stationed in Lapwai recommended that the federal government set aside the Wallowas for the Tribe.[127] In 1873, President Grant created, by executive order, a reservation for Joseph's band of Nez Perce in Oregon.[128] While well intended, the reservation was doomed from the start. Somehow, the Bureau of Indian Affairs mixed up the reservation boundaries, and Grant's executive order gave the

Tribe the lower Grande Ronde Valley, and, in effect, gave the Wallowas to the Euroamerican settlers (some of whom had surely just been uprooted from their homes in the Grande Ronde). The reservation lasted nearly two years, but in 1875 President Grant formally rescinded his previous executive order and abolished the Wallowa Reservation.[129]

The federal government's irresolute policy in the Wallowas succeeded in increasing the already elevated tensions between Joseph's band and the region's settlers. Eventually, Joseph agreed to give up the Wallowas and take a permanent home within the boundaries of the 1863 Nez Perce Reservation, but only after the government made clear that war was the only alternative. The federal government gave Joseph's band a mere 30 days to pack up their homes and stock and head for the reservation. Two days before the non-treaty bands were due on the reservation they had gathered at Tolo Lake, six miles west of Grangeville.[130] Animosity ran like a river through the camp, and the Tribe's young males seemed unable to break free from its current. The Nez Perce War of 1877 broke out on June 14th, the day before the non-treaty bands were required to move to the reservation. Lasting four months and resulting in the band's defeat, at the end of the war Joseph's band were marched to Kansas and eventually sent to Oklahoma.[131]

The Nez Perce War of 1877 did not greatly affect the lives of those tribal members who lived in accordance with the provisions of the 1863 Treaty, but it does shed light on what could have been. Had the entirety of the Nez Perce Tribe refused to cede land to the U.S. government, a full-scale war would likely have been the result. Chief Joseph remains a lasting symbol of American Indian resistance. To the U.S. government, Chief Joseph's band represented everything that was bad in Native American society. The band rejected Christianity and instead followed the indigenous "Dreamers" religious movement of the

Columbia Plateau. The Dreamers movement was based around a Nez Perce spiritual leader, Smohalla, who was thought by many to be a religious prophet.[132] Smohalla's teachings sharply opposed Euroamerican influence, and thus put his followers, such as the Wallowa band, at odds with the federal government. The band likewise rejected agriculture and preferred to live in the traditional way of the Nez Perce. The government had no use for Indians like that, and in the end gave them the choice of conceding or fighting. The Nez Perce War played out exactly as Joel Palmer had foretold during the 1855 Treaty negotiations; the message to the rest of the Tribe could not have been clearer.

Allotment in Severalty

Allotment of the Nez Perce Reservation land in severalty, with each man or family owning their land independently, had been a possibility for the Tribe since the 1855 Treaty brokered by Governor Stevens. The allotment provision in the 1855 Treaty was a bargaining chip in the 1863 Treaty Council, showing the Tribe that opening the reservation for settlement had always been on the table, and that, in fact, the Tribe had already consented to it. But at the same time, the government officials were quick to point out to the Tribe that reservation land would always be a place where non-tribal people would be prohibited.

By the 1870s, momentum had gained behind the idea that reservations throughout the United States should be allotted.[133] The basic proposition was that reservations should no longer be held communally; that individual tribal members should own their property outright, in quarter sections; and that the remaining balance of the reservation's land base should then be opened for settlement by Euroamericans. Some thought that by exposing Native Americans more closely to Western traditions and culture, that they would become

better farmers and citizens, assimilating into mainstream American society. Another widely held view of the time was that both agriculture and the ownership of private property were essential to civilized humanity. Speaking of the lack of individual property ownership as a hindrance to the civilization of Indians, Commission of Indian Affairs Edward Smith wrote in his annual report for 1873:

> All barborus customs tend to destroy individuality. Where everything is held in common, thrift and enterprise have no stimulus of reward, and thus individual progress is rendered very improbable, if not impossible. The starting point of individualism for an Indian is the personal possession of his portion of the reservation… In order to [take] this first step, the survey and allotment in severalty of the lands belonging to the Indians must be provided for by congressional legislation.[134]

Mr. Smith's sentiment resonated clearly a few years later in the Report for the Yankton Agency of the Dakota Territory:

> As long as the Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, community in food, heathen ceremonies and dances, constant visiting- these will continue as long as the people live together in close neighbornoods and villages. Many of the Yanktons are now moving out from the neighborhood villages on claims or lands of their own, and I trust that before another year is ended they will generally be located upon individual lands of farms. From that date will begin their real and permanent progress.[135]

Calls by Indian Affairs officials for civilizing Native Americans through private property were echoed by humanitarian reformers who felt that the deplorable living conditions present on many reservations could be alleviated if the reservation system were abolished and individual tribal members sought self-sufficiency.[136]

Important changes were afoot in the federal government. The Civil War had ended, which had greatly reduced the amount of energy the government could expend in Indian Country during the preceding years. In 1869 President Ulysses S. Grant commenced a new policy toward the government's handling of Indian affairs. This "Peace Policy" was an

attempt to move Indian affairs outside of the military bureaucracy and under civilian control. Removing the U.S. Army from reservation life and replacing it with religious organizations provided greater accessibility for humanitarian groups such as the "Friends of the Indian" to become involved in shaping Indian policy. Another fundamental change in the way the federal government interacted with Native American tribes occurred in 1871, when Congress ended the practice of making treaties with tribes.[137] The House of Representatives had grown tired of the responsibility of funding treaty obligations that they had no say in the making of, and both chambers of Congress voted to abolish treaty-making with tribes. This, in effect, eroded some of the tribe's legal status, as treaties were reserved as a diplomatic tool for building and maintaining relationships with foreign sovereigns, something Congress thought no longer necessary for their interactions with tribes.

As the government relationship with Native American tribes was changing, so too was the notion that tribes could just be "removed" from the path of American development to points further on the westward horizon. The end of the western frontier was rapidly approaching and there was no longer anywhere to remove tribes to. Even a tribe like the Nez Perce, once thought to be in such a remote location, had two treaties signed in eight years on account of the rapid settlement of the western frontier. To government officials and politicians, a policy shift away from removal toward the assimilation of Native Americans into Euroamerican culture not only made economic sense; it seemed a necessity.

The opening salvo in the battle to persuade tribal members into independent land ownership was the extension of the Homestead Act to Indians.[138] A major detraction to this legislation was that any Indian seeking the 160 acres permitted under the law would have to renounce their tribal affiliation, but not gain American citizenship, leaving the Indian

homesteader "stateless."[139] The first general allotment bill was drafted by the Commissioner of Indian Affairs, Ezra Hayt in 1879.[140] This bill was sponsored in Congress the following year by Senator Richard Coke of Texas, and became known as the "Coke bill."

The basic components of the Coke bill were that the President could have an Indian reservation surveyed and allotted if the reservation was suitable for agriculture, provided that two-thirds of all male tribal members over the age of 21 consented to the allotment.[141] The allotments were 160 acres for heads of families and single people over 18.[142] Orphans were to receive 80 acres and children under 18 would receive 40 acres.[143] Although the allotments would eventually be owned outright by the allotee, a 25 year prohibition on the alienation of allotments was written into the bill.[144] After a reservation was allotted, surplus land would be opened up for settlement under the Homestead Act.

The allotment bill was not signed into law until 1887, but prior to the passage of the law, some Indian tribes successfully took the allotment of their reservations into their own hands. The Omahas are an example of this. The Omaha Tribe used allotment to secure title to their lands in as a preventative measure against removal, not because the Tribe sought to assimilate into American society.[145] Chief of the Omaha Tribe, Joseph La Flesche, sent various letters to Congress in hope of achieving allotment legislation, but it was not until he enlisted the help ethnographer Alice Fletcher that his plans for allotment began gaining traction in Washington.[146] The bill providing for the allotment of the Omaha Reservation was passed in August of 1882, opening the door for other tribes to lobby Congress for allotment legislation, as the Umatilla successfully did in 1885.[147]

That some Native American tribes were reaching out to Congress to be allotted provided the policy's proponents more momentum, even if the underlying concern of the

tribes was land protection rather than assimilation. In 1881, echoing tribal concern over losing land, Secretary of the Interior Carl Schurz wrote, "There is nothing more dangerous to an Indian reservation than a rich mine…[but] the attraction of good agricultural land is apt to have the same effect,"[148] and although tribes like the Omahas had found, in their particularized allotment acts, some measure of protection against displacement from their lands, they also inadvertently put the balance of their reservations in the cross hairs of land speculators and non-native settlement.

Meanwhile in Congress the Coke bill was being transformed in the Dawes bill, as Senator Henry Dawes of Massachusetts became heavily involved in passing the legislation out of Congress. In 1884, the Coke-Dawes bill permitted a tribal patent to those who refused to accept an individual allotment.[149] The following year, Senator Dawes appointed Fletcher, an ethnographer-turned-allotment proponent, to lobby the House of Representatives to pass the bill. Fletcher took issue with the bill's tribal patent provision and consent requirement.[150] Fletcher persuaded Senator Dawes to take the tribal patent provision out of the proposed bill. The final version of the bill was passed in February of 1887, just as Fletcher envisioned, without the tribal patent or consent provisions.[151] The Dawes Act was a monumental pronouncement of federal government policy towards Indians, one of only three major acts of Congress since the beginning of the Nation's history (the other two being the Trade and Intercourse Acts and the end of treaty making with tribes.)

The Dawes Act arrived on the Nez Perce Reservation in 1889 when the federal government sent Fletcher allot the reservation. The Nez Perce were designated by President Grover Cleveland as one of the first tribes to go through allotment under the Act, likely

because of their acceptance of Christianity (bringing them one step closer to the sedentary agrarianism at the heart of the law) and their history of friendliness toward the U.S. government. Fletcher's arrival was hailed in the Lewiston newspaper as a sign that the allotment of the Nez Perce Reservation was eminent.[152] The *Lewiston Teller* lauded Fletcher as a successful allotter of Indian reservations, one with a proven ability to come up with land divisions that were agreeable to both Indian and settler alike.[153]

Unfortunately for Fletcher, the Nez Perce Reservation in 1889 was embroiled in a dispute over the reservation's appointed Indian Agent John B. Monteith. As Fletcher's companion and photographer, Jane Gay, recollected in a letter, "we are told that there is confusion at the Agency…that internecine war is raging among officials. Three of them are on trial here in the county court for assault with intent to kill and for false imprisonment of each other."[154] The Nez Perce people rejected Monteith's appointment as their agent and sent tribal member James Reuben to Washington, D.C. to seek his removal.[155] Fletcher recognized that the government's appointing Monteith and sending her to the reservation at roughly the same time was bound to become correlated in the minds of many Nez Perce.[156]

Fletcher told the *Lewiston Teller* that she estimated the reservation's allotment to take 15 months.[157] Unfortunately for Fletcher, her original estimate relied on the cooperation of the Tribe, which was not forthcoming. Most of the Nez Perce refused to be allotted until James Reubens returned from Washington confident that Fletcher was legitimately carrying out the will of the government. In Lapwai, nearly a month after their arrival, the allotting officials held a meeting where the Dawes Act was explained to the Tribe.[158] The Tribe was not enthusiastic about the new law, and, as it was the first major act of the federal government affecting the Tribe after the era of treaty making, the Nez Perce

were put off that a decision about their land could be made without their consultation.[159] Hoping to have better luck with the Tribe further away from Lapwai, which was not only entangled in the imbroglio over Montieth, but also, as the reservation's political nexus, stood with more to lose in the opening of the reservation, Fletcher and her associates traveled to Kamiah.

Kamiah, however, was not quite the bastion of progressive Indians Fletcher had hoped for. Similar to what was done in Lapwai, Fletcher held a meeting in Kamiah to explain the law. After the law had been read, and Nez Perce man named Kip-ka-pal-i-kan, former judge of the Indian Court of Offenses, responded, "We do not want our land cut up in little pieces; we have not told you to do it."[160] With the entire Tribe skeptical of the allotment law, Fletcher was off to a rough start, and it was not just the Nez Perce who were making her task difficult.

Views on allotment from outside the reservation were mixed. Many settlers living outside of the reservation had an agreement with the Tribe that allowed them to graze cattle within the reservation boundaries. A notice posted in the *Lewiston Teller* eight days before announcing the arrival of Alice Fletcher declared the cattlemen's free reign over reservation grass over. The announcement, authorized directly by President Cleveland, threatened to employ military force, not only to remove any rogue stock, but also to hold those responsible for the animals accountable "to the utmost extent."[161] The cattlemen who grazed on the reservation disliked allotment because it extinguished their right to graze, potentially rendering their cattle outfits unprofitable. These ranchers, with an estimated ten thousand head of cattle on the reservation, wasted no time in introducing themselves to

Fletcher.[162] It was the whites living outside of the reservation, according to the paper, that delayed the allotment.[163]

There was also significant interest in opening the balance of the reservation to settlement. The Nez Perce Reservation was thought to contain Idaho's largest tract of "unspoken for" agricultural land. The fecundity of the land was touted in the papers as "the most fruitful soil on the continent."[164] Gay satirically juxtaposed the promises of riches borne from the land with the present condition of the earth, correctly foretold the necessity of water:

> The photographer, who has been picking up scraps of information from the people, says we have indeed reached a Land of Goshen. "Everything from wheat to peanuts will grow here…Idaho is the garden spot of the Earth!" While we were listening, entranced, to this recital, a dust storm broke upon the town and for an hour we gasped and struggled to breathe the clouds of alkaline dust which surged up against our hotel and penetrated our room.[165]

Gay's observation would not discourage the settlers. Even before Fletcher commenced the allotment of the reservation, those interested in homesteading on the reservation began arriving in central Idaho.[166] On June 20, 1889, the *Lewiston Teller* reported that more than a hundred such settlers had made their way to the off-reservation slopes of Craig Mountain where they made temporary homes and waited for the reservation to open.[167]

One goal of allotment was to turn the Native Americans into self-sufficient agriculturalists. To effectuate this goal, Fletcher was tasked with allotting prime farmland for the tribal members. However, like the Omahas before them, the Nez Perce were not chiefly interested in the assimilationist goals of the law. The Nez Perce were being asked to choose one small piece of their homeland to keep, and the arability of the land was but one consideration. Many Nez Perce sought to choose allotments which had other significance, such as being near the place of their birth. The allotting officials often had to dissuade tribal

members from selecting allotments that would be unable to sustain a family farm, but they were not always successful.[168] Another problem with the allotment of the reservation was the unfamiliarity by Nez Perce to the Euroamerican system of measurement. The amount of land that 160 acres contained was difficult to image without being able to reference it to something known. This was especially true to the Nez Perce who were generally not engaged in agriculture and unlikely to have a sense of how much land would be needed to prosper via the plow.[169]

Even if tribal members selected allotments better suited to homesteading, Fletcher had her own misgivings about the Act's successful application to the Nez Perce Reservation. Confiding to a close friend, Fletcher wrote, "This is my first experience allotting mixed land, grazing & agricultural, & I see plainly that the amt. given an Indian for grazing land is too small for him to make a living off of…[T]he outlook of the Nez Perce tribe is not as favorable as I might wish."[170] Gay noted that reservation lands had been defrauded of its natural resources by greedy settlers prior to the allotment of the lands, pointing out that grass, timber, and water had all be taken from the reservation illegally by settlers.[171]

In spite of the fact that the allotments were unlikely to sustain the Nez Perce people in the Euroamerican agrarian tradition, once James Reuben returned to Lapwai from Washington, D.C. upon successfully recalling Indian Agent Montieth from duty, Reuben went to Fletcher and asked for his allotment.[172] That Reuben now accepted the allotment policy signaled to the Tribe's more progressive members Fletcher's legitimacy, and soon much of the Tribe living in Kamiah followed suit, seeking allotments. To get allotment holdouts in Lapwai to take their tracts of land, Fletcher obtained a hunting ban that prohibited unallotted Nez Perce from leaving the reservation to hunt.[173] This seems to have

been effective, and the reservation's allotment was finished in the fall of 1892, taking much longer than the 15 months Fletcher had first anticipated. In 1893, the federal government made an agreement with the Tribe to buy the surplus reservation lands so that they could be opened for homesteading.[174] It is worth noting that the 1893 Agreement expressly preserved the Tribe's treaty rights, including the off-reservation fishing and hunting rights under the previous treaties, abrogating only those portions of the earlier treaties that directly conflicted with administering the Dawes Act.[175]

The obvious and lasting effects of the allotment policy were the reduction of the Tribe's control over the reservation land base and the increased pressure on reservation resources. Allotment also inadvertently created (though not initially) a mechanism of land leasing to non-native farmers. That a Nez Perce member would be given an allotment to assimilate into Euroamerican culture and then turn around and lease the land to Euroamericans is just one of countless ironies in the tribal-federal relationship. A more disagreeable result of allotment is the loss of land by Nez Perce members, either from being pressured into selling their land by settlers, or by foreclosures from failure to pay taxes of their land.[176] The problems of administrating a reservation made of a patchwork of jurisdictions resulting from the various types of landownership, and the unsettled legal effects of allotment, continue to plague the Tribe.

Creating the Land of Goshen

As Alice Fletcher and her crew were allotting the reservation, Lewiston entrepreneurs were planning for the growth of Lewiston. As early as 1880, large tracts of land lying just south of the city were being bought up for the construction of an irrigation system.[177] These entrepreneurs had their sights on Lake Waha, a natural reservoir high in

the Sweetwater watershed, hoping that water from the lake could be brought down toward Lewiston and used for irrigation.[178] The construction of the irrigation ditch led by Lewiston banker John Vollmer was reported to have begun in 1890 and was slated to include 17 miles of ditch and two reservoirs.[179]

By the turn of the century, the land rush brought on by the opening of the reservation to settlement had turned into a fierce competition over the development of the region's water resources. This competition included some of Idaho's political elite. Fred Dubois had served as Idaho's senator in the United States Senate. He briefly retired in 1897, when Henry Heitfield succeeded him in office. Dubois did not stay retired long, and returned to the U.S. Senate in 1901. In 1903, both senators were shareholders in the newly incorporated Lewiston-Waha Land, Water and Power Company.[180] Lewiston-Waha hired Los Angeles hydraulic engineer, James Schuyler, to provide a professional opinion about the feasibility and profitability of a large scale irrigation network before Lewiston-Waha made arrangements with additional investors.[181] Not only did Schuyler determine that an irrigation network would be profitable, but he also concluded that it would be possible to deliver water to the City of Lewiston at a higher pressure for less money than was currently being spent.[182] Upon the positive report from the engineer, Lewiston-Waha negotiated with Vollmer for the sale of the irrigation canal he had begun building 13 years earlier.[183] Although the Vollmer Ditch itself would have to be rebuilt, Lewiston-Waha was likely more interested in obtaining ownership of the right-of-way and water rights associated with the ditch than the actual canal itself.

In addition to the purchase of the Vollmer Ditch, Lewiston-Waha Land also acquired the Shissler Ranch (also known as the "21 Ranch").[184] The purchase of this property also

included water rights valuable to the irrigation project, as they were a prerequisite to the impoundment and flooding of Lake Waha. Lewiston-Waha did not only need title to land in the upper watershed to make its planned irrigation project profitable, the company also needed access to large tracts of land that would be irrigated by the project so the prophecy of Lewiston becoming a modern-day "Land of Goshen" could be realized. Lewiston-Waha secured options on 25,000 acres at prices ranging from $10 to $30 per acre. Mortgages on the land within the project could be secured by Lewiston's newly established Commercial Trust Company, having an authorized capital of five million dollars at its inception in 1903.[185]

With the bank, the land, the water rights, and the engineering in place, it seemed like the Lewiston-Waha project had nothing preventing it from turning wheat fields into orchards while making money hand over fist in the process. However, six months after the announcement of the incorporation of the Commercial Trust Company and the favorable report of the engineer, little, if any, work had been completed on the Waha project.[186] Competing irrigation developers spread rumors that the Lewiston-Waha project had been abandoned, hoping that the period available for the project would lapse, providing new development opportunities for other entrepreneurs.[187] In May of 1905, the *Lewiston Morning Tribune* anxiously reported on the Waha Canal, uncertain as to the project's status, but the paper was willing to deduce from the recent purchase by the Commerical Trust Company of the Goddard Ranch and some additional properties closer to Lewiston, that the project was active and water would be brought close to Lewiston.[188]

Not only was the Goddard Ranch purchased, but an important water filing of Mary Goddard was also acquired by Lewiston-Waha. Water rights in Idaho are a property right

and are administered by the State. During the early 1900s, a new water right could be acquired by filing an application with the Idaho State Engineer. The water right application of Goddard was approved by the Idaho State Engineer on August 6, 1904. A subsequent application for a water right was filed in October of the same year to Colorado congressman Lafe Pence, Permit No. 877, which was thereafter transferred to a competing irrigation developer, the Lewiston-Sweetwater Irrigation Company, of Portland Oregon.[189] Competing water rights on the same stream are administered in Idaho with priority going to the holder of the oldest right, meaning that in times when not enough water ran through the stream to satisfy both water rights, the Goddard water right would be satisfied before the Pence water right. The irrigation works contemplated by the developers were some of the first in Idaho under the new irrigation laws of 1903, and the law's provisions were considered "novel" at the time.[190] The 1903 laws constituted the first comprehensive water code enacted by the State of Idaho.[191] The water code created the administrative body that allocated water rights, the Office of State Engineer, and required that the water under a water right be put to beneficial use. The laws specifically required that the construction of any required diversion systems be completed within five years of the application's approval and that one-fifth of the work required be finished in one-half of the time specified by the State Engineer.[192] The Oregon irrigating interests, knowing that the water right they purchased from Lafe Pence (for one dollar) was junior to the right filed by Mary Goddard and transferred to their competitors, requested that the State Engineer cancel the water right of Lewiston-Waha for failure to complete one-fifth of the construction in half of the time prescribed by the State Engineer.[193]

Upon receiving the request by Lewiston-Sweetwater to cancel the permit held by Lewiston-Waha (known as Waha-Lewiston in the official court proceedings that followed) the State Engineer conducted an investigation on the completion of the irrigation project and determined that not enough work had been completed to warrant the continuation of the provisional water right. The Idaho State Engineer cancelled the water right on March 12, 1907.[194] The cancellation of the Lewiston-Waha permit did not end the feud between the two irrigation companies, and a mere three months after Lewiston-Sweetwater had successfully had the Lewiston-Waha permit cancelled, Lewiston-Waha (now organized under "Waha-Lewiston"[195]) turned around a petitioned the Idaho State Engineer to cancel the permit of Lewiston-Sweetwater, Permit No. 877.[196] Waha-Lewiston alleged that no work had been completed under Permit No. 877.[197] Waha-Lewiston also pointed out that another water rights application had been provisionally approved by the Idaho State Engineer in 1905, Permit No. 1547, appropriating a portion of the same water as Permit No. 877. Permit No. 877, argued Waha-Lewiston, was using water that legally should be used to fulfill Permit No. 1547, a permit filled by none other than the Commercial Trust Company and conveyed to the Waha-Lewiston Land and Water Company.[198] Ultimately, the request by Waha-Lewiston to cancel Permit No. 877 was denied by the Idaho State Engineer.[199] The failed cancellation request, however, did not end the legal drama for the Lewiston-Sweetwater Irrigation Company.

The owners of another water right, the Siegrist Mill Company, initiated a lawsuit in federal court which resulted in the general stream adjudication of Lapwai Creek and its tributaries, including the rights assigned in Permit No. 877, held by the Lewiston-Sweetwater Irrigation Company. The Siegrist Mill Company had a water right, dated to

September of 1901, which permitted them to use up to nine cubic feet per second of water from Lapwai Creek and its tributaries.[200] Upstream water use had impacted the mill's ability to produce power and the mill's partners, William Siegrist, John Bramlett, and Charles Bramlett, sued to have the upstream water use curtailed. The Nez Perce Tribe and the United States government, on behalf of the Tribe, both intervened in the lawsuit.[201] The lawsuit implicated all of the irrigation interests in the watershed, naming as defendants four separate (but some interrelated) irrigation companies. The Lewiston-Sweetwater Irrigation Company had reorganized under the name "Lewiston-Sweetwater Irrigat*ing* Company" and had Permit No. 877 transferred to the new corporation.[202]

Meanwhile as the adjudication of Lapwai Creek was playing out in federal court, the Waha-Lewiston Land and Water Company was slowly slipping away. With no water rights and lots of debt, the company was forced to dissolve, leaving the door open for the Lewiston-Sweetwater people, if they could manage to hold on to their water rights. Years prior, the Commercial Trust Company (having connections in Philadelphia) borrowed money from the Philadelphia Warehouse Company and used the property owned by Waha-Lewiston as security on the debt. The Philadelphia Warehouse Company eventually foreclosed on the debt and the company's president, Franklin Potts, became the owner of all of Waha-Lewiston's assets, including the Shissler and Goddard Ranches.[203]

With Waha-Lewiston out of the picture, the only question remaining for Lewiston-Sweetwater was what effect would the Lapwai Creek adjudication have on its water rights. The Siegrist Mill's water right, although senior and to a significant flow of the stream, was not as potentially destructive to the irrigation interests as the unquantified water rights of the

Nez Perce Tribe. A Supreme Court ruling had recently come out that promised to change forever water rights in Indian Country.

Winters v. United States and the Reserved Rights Doctrine

In a letter written to the then commissioner of Indian Affairs, Francis Leupp, the reservation superintendent at the Fort Belknap Reservation wrote,

> We have had no water in our ditch whatever. Our meadows are now rapidly parching up. The Indians have planted large crops and a great deal of grain. All this will be lost unless some radical action is taken at once to make the settlers above the Reservation respect our rights. To the Indians it either means good crops this fall, or starvation this winter.[204]

This plea for help was written in the spring of 1905, yet it had been in the making nearly 15 years. Irrigators upstream of the Fort Belknap Reservation boundary had been diverting water from the Milk River in an effort to support crops and livestock on otherwise arid lands. As was true in Idaho, the federal government widely encouraged the settlement and cultivation of Montana's desert plains. With legislation such as the Homestead Act of 1862 and the Desert Lands Act of 1877, settlers were given tracts of land at little to no cost as an incentive to make the initial investments needed to cultivate those lands. Also a necessary assurance was a way to protect the availability of one's water, without which much of the land would be worthless. The Doctrine of Prior Appropriation provided homesteaders, miners, and ranchers alike with the protection needed to securely invest in one's water delivery system. However, when diverters upstream of the reservation began to negatively impact the reservation's inhabitants an injunction was issued by federal district court Judge William Hunt to cease the upstream diversion of water.

The attorney assigned to intervene on behalf of the Native Americans was Carl Rasch, who employed a three-pronged strategy in the legal fight for the right to the Milk River's silty waters. Rasch argued that the Indians had been the first diverters of the river (which was later proven untrue), that the reservation had a Riparian Right due to the river's appurtenance to the reserved land, and that the reservation was created for specific intended purposes, for which water would be needed to satisfy.[205] The judge issued an order which prohibited non-Indian irrigators from diverting water, but later modified the order to allow diversion which did not negatively impact tribal irrigators.

Eventually, the case was brought to the United States Supreme Court. In a previous decision, *United States v. Winans*, Justice Joseph McKenna delivered the opinion of the Court in regards to another kind of reserved right for Native Americans, a reserved fishing right. Justice McKenna stated, in his 1905 opinion,

> The treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted…. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the territory.[206]

In the *Winans* case, it is necessary to underscore that Justice McKenna had come to his decision by carefully looking to the construction of the treaty in an effort to compensate for the disadvantaged position of the Indian tribe. In his *Winters* opinion, Justice McKenna likewise stated, "By a rule of interpretation of agreement and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[207] Treaty interpretation was an important component to United States' argument in *Winters*, as the government was able to effectively argue that the Indians would not have ceded such a large tract of land without water to accompany their newly formed reservation. The Court's ultimate holding in *Winters* was that when the federal government established an Indian

reservation, the government was also reserving with it the amount of water necessary to fulfill the reservation's purpose.

The implications of the Court's holding were immense. Tribal water rights were recognized as existing before the creation of the reservation and regardless of the state's other appropriations. Because a tribe's water rights were reserved from the cession of other rights during treaty-making, they were senior to other water rights on a river or stream. Therefore the Court's pronouncement in *Winters* affected every moving water body downstream from a reservation. Settlers brought out the west under promises that work would bring wealth suddenly were at risk of losing an essential element of western life: water. The *Siegrist* lawsuit adjudicating Lapwai Creek and its tributaries would be one of the first applications of the new doctrine.

Following the precedent set in *Winters*, the district court in *Siegrist* held that the Nez Perce Tribe and the tribal allotees had a right to irrigation water senior to the other rights on Lapwai Creek, receiving a priority date of June 11, 1855, the date of the signing of the Stevens Treaty. This could have dealt a devastating blow to the non-Indian interests in the Lapwai watershed, however, Judge Frank S. Dietrich determined that neither the Tribe nor its allottees had constructed a water conveyance system or had demonstrated a need for the water (other than the 300 acres surrounding the school reserve), and that they were not entitled to use more water than there was presently a need for.[208] The lack of present infrastructure or need did not mean that the Nez Perce Tribe would be unable to use water in the future, if the situation changed on the reservation and the water was needed. The Siegrist Decree could be reopened by the court and the water rights could be altered in the face of changed circumstances on the reservation, such as an increase of irrigated agriculture

by the Tribe.[209] The court affirmed the Siegrist Mill water right with a 1901 priority date. Permit No. 877 of the Lewiston-Sweetwater Irrigating Company was likewise confirmed by the court, with a priority date of July 14, 1904.[210] The irrigation company had secured its water rights, and the court allowed them to divert up to 100 cubic feet per second if such water was available.

With water rights secured by the court's decree, the Lewiston-Sweetwater Irrigating Company had been given a green light to sell the subdivided farm tracts to settlers arriving in Idaho with dreams as big as the Land of Goshen. While irrigators and land companies sold improved land with irrigation water to those who could afford it, the federal government incentivized agriculture on the Nez Perce Reservation by continuing to provide free land under the Homestead Act. In addition to making efficient use of the land, the federal government hoped that Euroamerican settlement inside of the reservation would catalyze the assimilation of the Nez Perce into mainstream American culture. In opening the reservation for settlement, just as in the acquisition of reservation lands in 1863 and 1855, the government reduced, but did not eliminate, the rights of the Nez Perce in favor of the incoming settlers. The settlers flocking to the reservation to avail themselves of the "new" land altered the physical landscape with the addition of cows, fences, and farms.

In the first 200 years after the arrival of Lewis and Clark in the Bitterroot Mountains, the Nez Perce bore witness to dramatic changes. The creation of a legal relationship with the United States altered the Tribe's political landscape by creating a measured separatism. The federal government continually went back on the promises it made to the Nez Perce Tribe. By giving rights to Euroamerican settlers that would directly conflict with the rights of the Tribe, the government had failed to keep up its side of the trust relationship. Despite

the Tribe's reluctance to relinquish its rights to its aboriginal territory, the Nez Perce did agree to reduce its land base, possibly because of the added assurance of hunting and fishing rights to the ceded land. The Tribe likely suspected that the alternative to not signing the government's treaties was violence, and those suspicions were realized in the Nez Perce War of 1877. The government had essentially held the Tribe at gunpoint, but yet it was the government, ironically, who sought to civilize the Nez Perce.

CHAPTER TWO NOTES

[1] For a discussion on the various type of rights, and the components of property rights in particular, see Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), 16-19.

[2] Terry L. Anderson and Peter J. Hill, *The Not So Wild West: Property Rights and the Frontier* (Stanford: Stanford University Press, 2004), 37.

[3] For a discussion about scarcity, more than utility, controlling an object's value, see Adam Smith, *The Wealth of Nations* (New York: Cosimo Classics, 2011), 42.

[4] Harold Demsetz, "Toward a Theory of Property Rights," *Americans Economic Review 57* (Papers and Proceedings, 1967): 350.

[5] Ibid., 352.

[6] Ibid.

[7] William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New Engand* (New York: Hill & Wang, 1983), 105.

[8] Herbert J. Spinden, *The Nez Perces* (Lancaster: New Era Print Company, 1908), 245.

[9] James Arneson, "Property Concepts of 19th Century Indians," *Oregon Historical Quarterly* 81, no. 4 (Winter 1980): 394.

[10] Spinden, *The Nez Perces*, 245.

[11] Robert Miller, "The Doctrine of Discovery in American Indian Law," *Idaho Law Review* 42, no. 1,(2005): 2.

[12] Ibid., 10.

[13] Ibid., 18-19.

[14] "Indian Removal Act of 1830," May 28, 1830, 4 U.S. Statutes at Large 411-412.

[15] Although not a treaty reestablishing an Indian tribe, the 1855 Treaty with the Nez Perces provides an example of the government exchanging protection and financial benefits with tribe for land. "1855 Treaty with the Nez Perces," June 11, 1855, 12 U.S. Statutes at Large 957-962.

[16] Nimiipuu (also spelled Ne-mee-poo) is the title the people known commonly as the Nez Perce give themselves. The title means the "real people" or "we the people."

[17] Allen P. Slickpoo, Sr. and Deward E. Walker, Jr., *Noon Nee-Me-Poo (We, The Nez Perces)* (Idaho: Nez Perce Tribe of Idaho, 1972) 29.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Alan G. Marshall, "Unusual Gardens: The Nez Perce and Wild Horticulture on the Eastern Columbia Plateau," in *Northwest Lands, Northwest Peoples: Readings in Environmental History*, eds. Dale D. Goble and Paul W. Hirt (Seattle: University of Washington Press, 1999), 178-80; Allen P. Slickpoo, Sr. and Deward E. Walker, Jr., *Noon Nee-Me-Poo (We, The Nez Perces)* (Idaho: Nez Perce Tribe of Idaho, 1972), 30.

[22] Alan G. Marshall, "Unusual Gardens," 179.

[23] Allen Slickpoo and Deward, *Noon Nee-Me-Poo (We, The Nez Perces)*, 42.

[24] Ibid.

[25] Ibid., 32.

[26] *The Lewis and Clark Journals*, ed. Gary E. Moulton (Lincoln: University of Nebraska Press, 2003), 217.

[27] Elizabeth Vibert, *Trader's Tales: Narratives of Cultural Encounters on the Columbia Plateau 1807-1846* (Norman: University of Oklahoma Press, 1996), 164 & 179.

[28] *The Lewis and Clark Journals,* 214.

[29] Robert Miller, "The Doctrine of Discovery in American Indian Law," 90.

[30] Thomas Jefferson to Congress, January 18, 1803, in *Letters of the Lewis and Clark Expedition*, ed. Donald Jackson (Urbana: University of Illinois Press, 1962), 10.

[31] Ibid., 11.

[32] James P. Ronda, "Knowledge of Distant Parts: The Shaping of the Lewis and Clark Expedition," *Montana The Magazine of Western History* 41, no. 4 (1991): 13.

[33] Ibid., 8.

[34] Thomas Jefferson to Meriwether Lewis, June 20, 1803, in *Letters of the Lewis and Clark Expedition*, 61-63.

[35] Ibid.

[36] Lewis's British and French Passports, in *Letters of the Lewis and Clark* Expedition, 19-20.

[37] Thomas Jefferson to Congress, January 18, 1803, in *Letters of the Lewis and Clark Expedition*, 10.

[38] Ibid.

[39] Albert Gallatin to Thomas Jefferson, April 13, 1803, in *Letters of the Lewis and Clark* Expedition, 33.

[40] James P. Ronda, "Knowledge of Distant Parts: The Shaping of the Lewis and Clark Expedition ," 13.

[41] Ibid.

[42] Thomas Jefferson to Congress, in *Letters of the Lewis and Clark* Expedition , 12.

[43] Robert J. Miller, "The Doctrine of Discovery in American Indian Law," 77.

[44] Johnson v. M'Intosh, 574.

[45] Ibid.

[46] Eric Kades, "The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands," *University of Pennsylvannia Law Review*, 148 (Spring:2000): 1081.

[47] Ibid., 1086

[48] Ibid., 1088-1089.

[49] Johnson v. M'Intosh, 573.

[50] Ibid., 574.

[51] Ibid., 589-590.

[52] Ibid., 589, emphasis added.

[53] Ibid.

[54] Ibid., 591.

[55] The first official publication of this account in occurred in 1834 and described the delegation as Flathead, but since that publication many historians believe that the delegation was actually comprised of Nez Perce people.

[56] Cliford Merrill Drury, "The Nez Perce 'Delegation' of 1831" *Oregon Historical Quarterly* 40, no. 3 (1939): 285.

[57] Francis Haines, "The Nez Perce Delegation to St. Louis in 1831" *Pacific Historical Review* 6, no. 1 (1937): 78.

[58] Clifford Merrill Drury, *Henry Harmon Spalding* (Caldwell: The Caxton Printers, Ltd., 1936), 158.

[59] Elliot West, *The Last Indian War: The Nez Perce Story* (Oxford: Oxford University Press, 2009), 30-31.

[60] Ibid., 32-33.

[61] Henry Spalding to Rev. David Greene, October 17, 1845, Henry Harmon Spalding Papers, Washington State University Library, Pullman, WA.

[62] Ibid.

[63] Drury, *Henry Harmon Spalding*, 337.

[64] *Oregon Land Donation Act of 1850*, Public Law 31-76, *Statutes at Large of the United States of America* 9 (1862): 396.

[65] Francis P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994), 235.

[66] Ibid., 253.

[67] Lawrence Kip, *The Indian Council at Walla Walla, May and June, 1855, A Journal* (Eugene: Star Job Office, 1897), 10.

[68] Joseph C. Dupris, Kathleen S. Hill, William H. Rodgers, Jr., *The Si'lailo Way: Indians, Salmon and Law on the Columbia River* (Durham: Carolina Academic Press, 2006), 26.

[69] Elliot West, *The Last Indian War*, 64-65.

[70] Charles Wilkinson, "Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe," *Idaho Law Review* (1998), 440.

[71] Joseph C. Dupris, Kathleen S. Hill, William H. Rodgers, Jr., *The Si'lailo Way*, 27-29.

[72] Isaac I. Stevens, *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, 1855* (Fairfield: Ye Galleon Press, 1985), 41-42.

[73] Ibid., 44.

[74] Ibid., 47.

[75] Ibid., 49.

[76] Ibid., 51-52.

[77] Dupis et. at., *The Si'lailo Way, Salmon and the Law on the Columbia River*, 29.

[78] Ibid.

[79] Charles F. Wilkinson, *American Indians, Time, and the Law (*New Haven: Yale University Press, 1987), 14.

[80] "1855 Treaty with the Nez Perces"

[81] Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W.W. Norton & Co., 2005), 39.

[82] "1855 Treaty with the Nez Perces"

[83] Isaac Ingalls Stevens, *A Circular Letter to Emigrants Desirous of Locating in Washington Territory* (Washington: G.S. Gideon, 1858), 8-9.

[84] Captian William N. Grier to J.W. Nesmith, Oregon Territory Superintendent of Indian Affairs, October 28, 1858, in *The Nez Perce Nation Divided: Firsthand Accounts of Events Leading to the 1863 Treaty,* eds. Dennis Baird, Diane Mallickan, and W.R. Swagerty (Moscow: University of Idaho Press, 2002), 11.

[85] William Craig to U.S. Commissioner C. H. Mott, October 26, 1858, in *Nez Perce Nation Divided*, 9.

[86] The Pierce Chronicle, First Signs of Gold, in *Nez Perce Nation Divided*, 34.

[87] Indian Agent A.J. Cain to Superintendent of Indian Affairs E. R. Geary, May 8 1860, in Nez *Perce Nation Divided*, 38.

[88] Superintendent of Indian Affairs E. R. Geary to Brigadier General W.L. Harney, May 14 1860, in *Nez Perce Nation Divided*, 39.

[89] E.R. Geary to Commissioner of Indian Affairs A.B. Greenwood, December 27, 1860, in *Nez Perce Nation Divided*, 57-58.

[90] Indian Agent A.J. Cain to Superintendent of Indian Affairs E. R. Geary, November 27, 1860, in *Nez Perce Nation Divided*, 51-52.

[91] Speaker of the House Lyman Shaffer to President Buchanan, December 18, 1860, in *Nez Perce Nation Divided*, 57.

[92]Isaac I. Stevens, *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, 1855*, 67-68.

[93] Ibid., 68.

[94] Ibid.

[95] Indian Agent A.J. Cain to Superintendant E.R. Geary, December 29, 1860, in *Nez Perce Nation Divided*, 60-61.

[96] Ibid.

[97] Ibid.

[98] Articles of Agreement with Nez Perce Nation, April 10 1861, in *Nez Perce Nation Divided*, 75-77.

[99] Ibid.

[100]*Weekly Oregonian*, "Disappointed Miners and the Mines," August 24, 1861, in *Nez Perce Nation Divided*, 112.

[101] Superintendent William H. Rector to Commissioner of Indian Affairs W.P. Dole, March 16, 1862, in *Nez Perce Nation Divided,* 159.

[102] *Oregon Statesmen*, "Proposed State of Idaho," August 23 1862, in *Nez Perce Nation Divided*, 222.

[103] *Homestead Act of 1862*,Public Law 37-64, U.S. Statutes at Large 12 (1862):392.

[104] Calvin Hale's Final Report of the 1863 Council, June 30, 1863, in *Nez Perce Nation Divided,* 394.

[105] Ibid.

[106] Official Proceedings of the 1863 Council, in *Nez Perce Nation Divided*, 348.

[107] Ibid., 350.

[108] Ibid., 360.

[109] Ibid., 361.

[110] Ibid.

[111] "1855 Treaty with the Nez Perces"

[112] Calvin Hale, in *Nez Perce Nation Divided*, 394.

[113] Ibid., 390.

[114] Ibid., 394.

[115] Ibid., 404.

[116] Ibid.

[117] Ibid.

[118] C.H. Hale to Benjamin Alvord, June 29, 1863 in *War of the Rebellion: A Compilation of the Official Reocrds of the Union and Confederate Armies, Volume II*, eds. George W. David, Leslie J. Perry, and Joseph W. Kirkley (Washington D.C.: Government Printing Office, 1897), 503.

[119] Benjamin Alvord to W.H. Wallace, July 22, 1863, in *Reports on the Aftermath of the 1863 Nez Perce Treaty by Chief Lawyer, Governor Caleb Lyon, General Benjamin Alvord and Indian Agent James O'Neil*, ed.Dennis W. Baird (Moscow: University of Idaho Press, 1999), 5.

[120] Caleb Lyon to James Harlan, October 20, 1865, in *Reports on the Aftermath of the 1863 Nez Perce Treaty by Chief Lawyer, Governor Caleb Lyon, General Benjamin Alvord and Indian Agent James O'Neil* , 15.

[121] *Lewiston Radiator,* February 25, 1865, in *Reports on the Aftermath of the 1863 Nez Perce Treaty by Chief Lawyer, Governor Caleb Lyon, General Benjamin Alvord and Indian Agent James O'Neil* , 13.

[122] Ibid.

[123] Patricia Nelson Limerick , The *Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1987), 36-39.

[124] Nathaniel G. Taylor to Secretary of the Interior O.H. Browning, April 5, 1867, in *The Treaty of 1855 Has Not Been Lived Up To, and We Have No Faith That This Will Be Lived Up To*, ed. Donna K Smith (Moscow: University of Idaho Press), 57-58.

[125] Andrew Johnson, April 17, 1867, in *The Treaty of 1855 Has Not Been Lived Up To, and We Have No Faith That This Will Be Lived Up To*, 58.

[126] Alvin Josephy, *The Nez Perce Indians and the Opening of the Northwest (*New Haven: Yale University Press, 1965), 450.

[127] Ibid., 456.

[128] Center for Columbia River History, "Executive Order Establishing Wallowa Reservation, 1873," http://www.ccrh.org/comm/river/treaties/wallowa.htm (accessed September 15, 2013).

[129] U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877* (Washington: Government Printing Office, 1877), 245.

[130] Alvin Josephy, *The Nez Perce and the Opening of the Northwest*, 512.

[131] Ibid., 638-639.

[132] Elliot West, *The Last Indian War*, 81-82.

[133]D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman: University of Oklahoma Press, 1973), 3.

[134] U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs, 1873* (Washington, D.C.: Government Printing Office, 1874), 4.

[135] U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs, 1877*(Washington, D.C.: Government Printing Office, 1878), 75-76.

[136] Emily Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act* (Albuqueque: University of New Mexico Press, 2002), pg.24.

[137] Act of March 3, 1871, 16 Stat. 544, 566.
[138] Francis Paul Purcha, *American Indian Policy in Crisis: Christian Reformers and the Indian 1865-1900* (Norman: University of Oklahoma Press, 1976), 233-234.
[139] Daniel M. Greene, ed. *Decisions of the Department of the Interior in Cases Related to Public Lands* (Washington D.C., Government Printing Office, 1922),48: 44-45.
[140] Emily Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act*, 26.
[141] Cong. Rec., 46th Cong 3d sess., 1881, 11 pt. 1: 778-9.
[142] Ibid.
[143] Ibid.
[144]Ibid.
[145] Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act*, 27.
[146] Joan Mark, *A Stranger in Her Native Land: Alice Fletcher and the American Indian* (Lincoln: University of Nebraska Press, 1988), 71-79.
[147] Greenwald, *Reconfiguring the Reservation*, 28.
[148] Carl Schurz, essay, July 1881, in *The Speeches, Correspondence and Political Papers of Carl Schurz*, ed. Fredric Bancroft (New York: G.P. Putnam's Sons, 1913), 4:143.
[149] Joan Mark, *A Stranger in Her Native Land: Alice Fletcher and the American Indian*, 106.
[150] Ibid.
[151] The General Allotment Act, February 8, 1887, U.S. Statutes at Large 24 (1887):388.
[152] *Lewiston Teller*, "Nez Perce Reservation to be Allotted at Once," May 28, 1889.
[153] Ibid.
[154] E. Jane Gay, *With the Nez Perces*, (Lincoln: University of Nebraska Press, 1981), 7.
[155] Ibid., 25-26.
[156] Nicole Tonkovich, *The Allotment Plot: Alice C. Fletcher, E. Jane Gay, and Nez Perce Survivance* (Lincoln: University of Nebraska Press, 2012), 61.
[157] *Lewiston Teller*, May 28, 1889.
[158] Gay, *With the Nez Perces*, 22-24.
[159] Ibid.
[160] Ibid., 49.
[161] *Lewiston Teller*, May 20, 1889.
[162] Gay, *With the Nez Perces*, 10-11.
[163] *Lewiston Teller*, "The Work of Allotment," July 11, 1889.
[164] *Lewiston Teller*, "Opening of the Nez Perce Reservation in the Near Future," June 20, 1889.
[165] Gay, *With the Nez Perces*, 8.
[166] Ibid., 15.
[167] *Lewiston Teller*, June 20, 1889.
[168] Gay, *With the Nez Perces*, 69.
[169] Emily Greenwald, *Reconfiguring the Reservation*, 66-67.
[170] Alice Fletcher to Isabel Barrows, September 10, 1889, Samuel J. and Isabel Barrows Papers, Houghton Library, Harvard University, Cambridge, MA.
[171] Gay, *With the Nez Perces*,134-135.
[172] Ibid., 58.
[173] Ibid., 152.
[174] "1893 Nez Perce Agreement," 28 Stat. 326 (1894).
[175] Ibid.
[176] Charles Wilkinson, *Blood Struggle*, 49.
[177] *Lewiston Teller*, "Waha Ditch," February 27, 1880, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*. (Lewiston: Lewiston Printing, 1982), 290.
[178] Ibid.
[179] *Lewiston Teller*, Sweetwater Irrigation Company, June 19, 1890, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area* (Lewiston: Lewiston Printing, 1982), 290.

[180] Jas. Schuyler, *Report on the Irrigation Project of the Lewiston-Waha Land, Water and Power Company of Lewiston, Idaho*, December 31, 1903, Orbach Science Library, University of California Riverside, Riverside, CA.

[181] Lewiston-Waha Land, Water, and Power Company Articles of Incorporation, August 1, 1903 in *Report on the Irrigation Project of the Lewiston-Waha Land, Water and Power Company of Lewiston, Idaho*, December 31, 1903.

[182] Jaas. Schuyler, *Report on the Irrigation Project of the Lewiston-Waha Land, Water and Power Company of Lewiston, Idaho*, December 31, 1903, 16.

[183] Ibid., 25.

[184] *Lewiston Tribune*, May 5, 1903, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 291.

[185] *Lewiston Tribune*, "$5,000,000 Trust Company with Headquarters Here," December 27, 1903, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 292.

[186] *Lewiston Tribune*, "The Waha Project is Alive," June 27, 1904, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 293.

[187] Ibid.

[188] *Lewiston Morning Tribune*, "Has the Work Started on the Waha Canal?" May 23, 1905, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 296.

[189] Letter to Idaho State Engineer?, IDWR Archives, Boise, ID.

[190] Idaho State Engineer Application for Extension of Time for Beneficial Use Proof, Permit No. 877, H. L. Powers, October 25, 1913, IDWR Archives, Boise, ID.

[191] Wells A. Hutchins, *Water Rights Law in the Nineteen Western States*, 3rd ed (Clark: The Lawbook Exchange, Limited, 2009), 3:263.

[192] Idaho Session Laws, 7th Sess., 1903, 223.

[193] *Lewiston Morning Tribune*, "Water Rights at Lake Waha," October 17, 1905, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 296.

[194] Waha v. Sweetwater, 158 F. 137 (C.C. Idaho 1907).

[195] *Lewiston Tribune*, "Capital is $2,000,000, Articles of Waha-Lewiston Land Company Are Filed," November 1, 1905, in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 297.

[196] Letter from Idaho State Engineer, James Stevenson to Waha-Lewiston Land and Water Company, dated May 16, 1907, IDWR Archives, Boise, ID.

[197] Letter from E.D. Thomas, Secretary of Waha-Lewiston Land and Water Company to the Idaho State Engineer dated April 30, 1907, IDWR Archives, Boise, ID.

[198] Ibid.

[199] Letter from James Stephenson, Idaho State Engineer to Waha-Lewiston Land and Water Company dated October 25, 1907, IDWR Archives, Boise, ID.

[200] Siegrist v. Lewiston Sweetwater/Sweetwater Irrigation and Power, unpublished (D.C. Idaho 1916), 1.

[201] Ibid., 2.

[202] Ibid. , 15, emphasis added.

[203] *Lewiston Tribune*, Potts Secures 7000 Acres, November 23, 1912, reprinted in Betty Thiessen Meloy, *Past days of the Tammany-Waha Area*, 298.

[204] William R. Logan to Francis E. Leupp, June 3, 1905, quoted in Norris Hundley, "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined," *The Western Historical Quarterly* 13 no. 1 (1982) 20.

[205] John Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context 1880s - 1930s* (Norman: University of Oklahoma Press, 2000), 17-18.

[206] United States v. Winans, 198 U.S. 371 (1905), 378.

[207] Winters v. United States, 207 U.S. 564, 576 (1908).

[208] Siegrist v. Lewiston Sweetwater/Sweetwater Irrigation and Power, 3.

[209] Conrad Investment Company v. U.S., 161 F. 829 (9th Cir. 1908).

[210] Ibid., 9.

CHAPTER THREE: WATER USERS WITH FEDERAL BLESSINGS

> *The focus of this chapter is the shift from the utilization of private enterprise to the use of government programs, government funding, or the requirement of government oversight, in the continued development of central Idaho. The federal government permitted certain resource uses without having a complete understanding of either the competing claims on the resource, or the scientific complexity of the impacts resulting from their decisions.*

By the dawn of the twentieth century, sweeping changes made their way across the aboriginal homeland of the Nez Perce people. The Nez Perce Tribe had gone from a self-reliant and autonomous tribe to a "domestic dependent nation," and witnessed the drastic reduction of their tribal land holdings. The allotment of the Nez Perce Reservation greatly decreased the amount of land held communally by the Tribe and enabled Euroamerican settlement of land that was formerly off-limits. The allotment and settlement of land previously part of the reservation under the 1863 Treaty, in addition to the opening to settlement in 1863 of land previously protected by the 1855 Treaty, resulted in more intensive cultivation of the land and thereby necessitated the development of irrigation infrastructure.

Low wheat prices in the early twentieth century and a national interest in the reclamation of arid lands increased the desirability of irrigated crops,[1] but the development of irrigation networks required technical knowledge and deep pockets.[2] Eastern financiers often made fickle partners, and land speculators were only interested in making a quick buck. Speculators sold unrealistic expectations and left behind poorly designed irrigation systems.

The first experiment in using federal legislation to incentivize the transformation of arid lands into irrigated croplands was the Carey Act of 1894. The basic premise of the Act was that states would acquire land within that state's boundaries from the federal domain, if the state could develop the land with irrigation.[3] The state would partner with private development firms to engineer and construct the projects.[4] The Carey Act was used to irrigate land in southern Idaho, but, after an initial boom, the irrigation bond market sank and private capital evaporated.[5] The federal government, still eager to increase the nation's wealth through expanding arable cropland, passed the Newlands Reclamation Act in 1902. The Act was premised on the idea that water was being wasted in western rivers by allowing it to run to the sea without first using it to "reclaim" arid lands by converting them, through irrigation, into agricultural fields.[6] Nevada Senator, Francis Newlands, the sponsor of the Reclamation Act, defended the bill to Easterners who felt the federal government had no business spending money to create irrigation projects for Westerners, reasoning that:

> The Government is the owner of almost all of the arid land in that region … We claim that it is the Government's duty to open this land to settlement, and to do what is necessary to promote settlement, namely, to conserve the snow and flood waters, and to construct such high-line ditches and canals as are necessary to bring the waters of that region within reach of settlers; in other words, to make them available for settlement. The settlers will do the rest.[7]

Senator Newlands went on to explain that the reclamation projects would be financed through the sale of land from the public domain, and therefore would not result in additional taxes to Easterners.[8] In the first 25 years after the passage of the Reclamation Act, the Reclamation Service (the administrative body created by the Act) went from being an office in the U.S. Geological Survey, to becoming a stand-alone agency within the Department of the Interior in 1907, to constructing, what was in 1928, the largest dam in history.[9]

Human ingenuity and water were harnessed to bring irrigation to the arid lands of central Idaho, and they were harnessed again to electrify the Pacific Northwest and catalyze industrial development. The West, no stranger to cycles of boom and bust, saw massive increases in the production of electricity in the early twentieth century. Just as land speculators hurt local farmers, holding companies, pyramid business structures, and unstable growth threatened development and rattled the American economy in the late 1920s. The Great Depression, and the New Deal policies created to end it, resulted in increased government involvement in large infrastructure projects. In the Pacific Northwest, that meant the construction and operation of large dams, unlike the dams previously created for localized irrigation projects, these large dams were used primarily to create electricity and impound water for large-scale irrigation.

This chapter examines the conflict between federal activities to develop water resources and federal promises made to the Nez Perce Tribe. The two specific examples investigated in this chapter are the Bureau of Reclamation's (BOR) rehabilitation and operation of the Lewiston Orchards Project and the Federal Power Commission's licensing of three hydroelectric dams in Hells Canyon. Each example results in the destruction of fish habitat that is imperative to the Tribe's treaty fishing right, and thus harms the Tribe's rights. In both instances, the government chose the economic value of developing the water resources over its responsibility to the Tribe.

Trouble in the Orchards

The Lewiston Orchards were a promised land. An advertisement for the orchards read, "Wealth comes from the earth here, much like the water gushed from the rock at the tap of Moses' staff."[10] But, who was really getting rich? Historian Patricia Nelson Limerick

notes that the land speculator is as much a part of the western tradition as the cowboy but hardly as celebrated.[11] Central Idaho was not immune. After much time, effort, and money, the Lewiston-Sweetwater Irrigating Company was ready to finally make a return on its investment, and that required customers. Through the sale of the uniformly laid out five-acre orchard tracts Lewiston-Sweetwater and its partner, the Lewiston Land and Water Company, hoped to realize its much anticipated profit.

The irrigation and land companies were not just selling orchards; they were selling an idealized way of life. *The Sunday Oregonian* noted that the Lewiston Orchards, more so than any other fruit district in the Pacific Northwest, promoted community organizations, both social and those related to agricultural pursuits.[12] The promoter of these organizations was the Lewiston Land and Water Company, who sought to make community life in the Lewiston Orchards a success.[13]

The Lewiston Orchards also promoted their community by producing a monthly newsletter, with the help of Lewiston Land and Water's horticultural specialist, W. S. Thornber. The newsletter, *Lewiston Orchards Life*, covered community events and society in addition to providing useful agricultural information. The agricultural information and tips were likely extremely important to the orchard residents, who generally made their primary income outside of the orchard tracts, but used fruit growing to augment their income. The timbre of the newsletter was positive, to say the least, as the newsletter almost exclusively sang the community's praises, but it also occasionally dispelled rumors. One issue of *Lewiston Orchards Life* set out to debunk "unjust reports" about irrigation projects. Blaming the rumors on "[u]nprincipled promoters of other development schemes [who] spread abroad, through public press and otherwise, the most false and malicious reports,

reflecting, without discrimination, upon bogus and legitimate irrigation projects alike."[14] The result of these false and malicious reports, according to the newsletter, was distrust among investors, who then suspend payments.[15]

In addition to the printing of a community paper that extolled the virtues of the Orchards, paid advertisements were placed in the region's newspapers. In March 1907, a full-page advertisement ran in the *Morning Oregonian*.[16] The advertisement guaranteed crop failure was impossible in the orchards and spoke of an inexhaustible supply of water.[17] In addition to the frequent advertisements, stories were occasionally written in the regional papers telling of notable citizens purchasing an orchard plot. The publicity attracted significant attention to the area, but not all of it was good. University of Idaho horticultural student, George Downing wrote:

> The attention of the entire horticultural world was attracted to the orchards … not only on account of the very high class fruit raised, but also on account of the fabulous stories told, the fabulous prices paid for orchards and orchard lands, and the stories told of men who had made very poor investments by purchasing these orchards. The fact that the orchards… have been more of a wind fall to real estate men and speculators, than to the men who make profits by the fruit which they grow and sell, cannot be denied.[18]

Downing went on to criticize the practices of the Lewiston Land and Water Company, stating that the company charged enormous amounts for the tracts, misrepresented the amount of fruit that the tracts could yield, and used the deceptive practice of showing potential buyers pictures of tracts other than those that were actually for sale.[19]

Although the development companies behind the Orchards sought to distinguish themselves from the dishonest irrigation promoters and speculators that were prevalent in the West, the Lewiston Land and Water Company was willing to stretch the truth to attract buyers and make sales. In reality, the speculative endeavors of the early twentieth century

West were not so black and white as *Lewiston Orchards Life* would have one believe. In *The Legacy of Conquest: The Unbroken Past of the American West*, Patricia Nelson Limerick remarks on this point stating that, "Like so many activities in the American West, speculation could shift meaning when viewed from different angles."[20] So it was true with the developers of the Lewiston Orchards, they had organized and executed a plan for the Orchards and subjected themselves to considerable risk, something worthy of compensation, but at the same time, as their debts came due they were willing to stretch the truth at the expense of farmers and orchardists, counting on prosperous crops to keep residents happy.

For the first commercial years of the Orchards, fruit production was not the problem; it was the lack of processing infrastructure that troubled fruit growers. In 1912, Lewiston and Clarkston fruit growers lost approximately $150,000 due to an inability to handle the sheer volume of fruit grown in the area.[21] The Lewiston Orchards reportedly had 4000 tons of peaches that rotted on the ground for want of agricultural infrastructure.[22] The area lacked fruit dryers and other preservation facilities that could prevent ripe fruit from spoiling before making it to the market in addition to adequate transportation to get the quantities of fruit grown to downriver markets in a reasonable amount of time.[23]

Despite the effort put into promoting the Lewiston Orchards, the Lewiston-Sweetwater Irrigating Company and the Lewiston Land and Water Company did not make the money they intended.[24] They had, however, amassed a large amount of debt in various forms, including tax delinquencies, liens, and bonds.[25] Unable to pay their debt or to take on any additional credit, the Lewiston Land and Water Company was likewise unable to pay for the maintenance of their properties. Although the company had sold 3,300 acres of the Lewiston Orchards, it still owned 4,000 acres.[26] The unsold acreage was at risk of

significant depreciation if Lewiston Land and Water failed to maintain the property. To protect their interests in the property, in 1915 the stockholders of the company filed a suit that commenced the company's bankruptcy proceedings. The land company's debt was more than $1.5 million, and debt owed to the land company was difficult to collect, as the stockholders' attorney acknowledged:

> By reason in great part of financial depressions which is now prevalent in the country and is of peculiar force and intensity in the northwest states the Land Company has for some time been unable to collect more than a very small part of the money due it.[27]

Despite strong fruit prices tethered to the outbreak of war in Europe, the Orchards struggled. In the last years of the Orchards' existence, the land and water company had been playing a shell game with its debt– taking out bonds to pay off debt, and then issuing new refunding bonds to satisfy the debt on older bonds. The debt moved around but was never paid off. Receivers were appointed by the court and the Lewiston Land and Water Company's assets, including 3290 acres, were slated to be liquidated by public auction.[28]

In the foreclosure sale, more than 2,000 acres were purchased by some of the Lewiston Land and Water Company's bondholders.[29] The bondholders, seeking to dispose of the property as quickly as possible, vested title in the Security Savings and Trust Company. The Trust Company then employed Harry L. Powers to sell the remaining properties. Harry Powers, of course, being the president of both the Lewiston-Sweetwater Irrigating Company and the Lewiston Land and Water Company, was quite familiar with the properties and their improvements. Even as his companies dissolved in bankruptcy, Powers would make money from the Orchards, charging a 20 percent commission on the sale of the foreclosed tracts.[30]

Eventually, the tracts were disposed of and the administration of the irrigation water was taken over in 1922, by a newly created public entity: the Lewiston Orchards Irrigation District (LOID). The purchase agreement for the sale of the irrigation system stipulated that the irrigation district would take measures to increase the water storage and irrigation ditch capacities.[31]

Unfortunately for the fledgling irrigation district, it inherited serious infrastructure problems from its predecessors. The entire Lewiston Orchards irrigation system was built out of wood pipe. And while at the turn of the century the use of pipe at all, wood or otherwise, was considered a major technological advancement, by the mid-1920s and into the 1930s the wood was cracking and rotting, leading to major system failures. Water availability for Lewiston Orchards customers was steadily decreasing annually as water seeped from the pipes at various points along the conveyance. The leaks in the pipes were so severe as to flood basements and cause sink holes in nearby roads from the excess water.[32]

An additional concern was water quality. From the irrigation project's conception, drinking water had always been a component of the system. Lake Waha provided very pure drinking water for Lewiston customers, but by the 1930s, water contamination and pipe failure plagued the district. The payment of defaulted debt in a 1938 settlement with the Nez Perce Holding Company required that private Lewiston Orchards landowners raise a large sum of money in only three years to cover the cost of the settlement.[33] While raising the funds to pay this bonded indebtedness, many orchards residents lost their homes.[34] Those who were able to make the required payments were left short on cash and with a bad

taste for debt and fund raising by bonds. Unable to raise the funds required to reconstruct the pipes out of metal, the irrigation district sought federal assistance

The Lewiston-Sweetwater Irrigating Company and its partner, the Lewiston Land and Water Company, struggled and eventually failed to make their irrigation and land developing project a financial success. After defaulting on their debts and losing assets in foreclosure, the residents of the Lewiston Orchards themselves had little choice but to pick up the pieces of the failed project themselves and try to save the Orchards. By establishing a public irrigation district, the Lewiston Orchards began a self-governing institution with the power to levy taxes on its residents. But, the ability to tax orchard residents was only a useful power if the residents could afford to pay, and many could not. The Lewiston Orchards Irrigation District was left scrambling for federal assistance to pay for the badly deteriorating infrastructure for both the irrigation and domestic water systems. Although Lewiston Orchards residents were left with the difficult task of managing and funding irrigation operations, they were neither wholly innocent nor entirely sympathetic actors in Nez Perce Country. In their efforts to acquire enough water to satisfy their customers in the face of extensively rotting wooden pipes, the irrigation district diverted more water than their legal allocation, which negatively impacted their neighbors and senior water rights holders, the Nez Perce Tribe.

Formal complaints of the Lewiston Orchards diversions from the Tribe came in the early 1930s, but it was impossible to substantiate the Tribe's claims because there were no measurement devices and no records of diversion.[35] The Tribe asked the Bureau of Indian Affairs (BIA) to send an engineer to make an official record of the water situation, but the BIA engineers were working on other reservations and could not be spared. Eventually, the

supervising BIA engineer sent the commissioner a letter discussing the violation of the Siegrist Decree by the LOID. The sanatorium at Lapwai posted a notice to all Nez Perce water users asking them to refrain from diverting water so that accurate measurements could be taken. [36]

After conducting some preliminary measurements and bringing government field counsel, Geraint Humpherys, into the water dispute, it seemed certain that the Orchards were illegally diverting the Tribe's water. After going back and reading the Siegrist Decree, Humpherys remarked:

> Before the diversion by the Lewiston Orchard Company there was once ample water along these streams to supply two ditches, one to our own institution, and one passing below the city of Lapwai, which operated a feed mill. This mill was operated by Mr. C. Grist [*sic*] who went into litigation with the Orchard track people and I understand won that decision. In view of these facts it would appear that this same Orchard concern is again at fault.[37]

Humpherys reasoned that, considering the existence of the prior Siegrist Mill water right (that also was not receiving water), the Orchards had to be diverting more than its apportioned share.

Others in the BIA were not so sure if the Lewiston Orchards had violated the Decree. Supervising engineer L. M. Holt called the Decree "inconsistent" and stated that the Decree, as written, did not provide the Tribe with a sufficient amount of water for "proper irrigation" of reservation lands.[38] Indian Affairs needed another opinion on the Siegrist Decree. They contacted Moscow judge, Gillies D. Hodge, and asked for his interpretation.[39]

Judge Hodge was an excellent choice to examine the Decree, as he assisted the federal court during the original Siegrist lawsuit and was quite familiar with the water situation at Lapwai Creek.[40] In Judge Hodge's opinion, the upstream appropriators (including the Lewiston Orchards) were interfering with the Tribe's decreed rights.[41] Of the

water troubles in the Lapwai watershed, the judge prophesized a second adjudication, stating, "This will eventually lead to further litigation between all the parties interested."[42] The judge also determined that the water right of the Orchards was only a right to the excess spring run-off, which they could then store in their reservoirs for use later in the year. The BIA agreed with the judge that the Nez Perce Tribe's water rights were impacted by upstream diversions, but cited the lack of hydrologic data as a major obstacle to challenging the Orchards' water use, stating that they would not take the Orchards to court without a prior investigation of water availability.[43] The BIA also stated that the required hydrological data could not be obtained because of a lack of funds.[44] The solution proposed to the Tribe by the BIA:

> Place as much water upon the land during the early part of the season as can be properly absorbed by it, so when the flow reaches such a point that it is inadequate to meet the decreed rights, the crops will have had the necessary irrigation therefore.[45]

To put it another way, the BIA was telling the Tribe to make do as best they can and pray for rain. Without the money or the water measurement devices in place, the BIA declined to provide the Tribe with assistance in enforcing their decreed water rights. The Lewiston Orchards' diversions left the Tribe with little water, and the BIA would do nothing to enforce the Tribe's rights, in spite of the government's earlier goal to turn the Nez Perce people into successful agriculturalists.

As the federal government cited a lack of funds to aid the Tribe in asserting its rights, the irrigation district began formulating a strategy to convince the government to pay for the improvement of their water infrastructure. The economic fallout from the stock market crash and depression in the late 1920s caused the federal government to advance policies and programs that would put Americans back to work. These policies and programs are

collectively referred to as the New Deal. The Lewiston Orchards Irrigation District took advantage of New Deal programs in Idaho. The Works Progress Administration (WPA), a New Deal program, began replacing the wood flumes on Sweetwater Creek with concrete bench flumes in 1939.[46] The WPA continued working to replace the flumes in 1940 and 1941, but could not complete the project because of shortages of both labor and supplies brought on by war in Europe.[47] Even before the war prematurely halted the WPA project, the irrigation district communicated its interest in increasing its water supply to the BOR.[48]

Four members of Idaho's congressional delegation lobbied the Department of the Interior and the BOR to investigate the possibility for rehabilitation of the LOID system; the politicians involved were Representatives Henry Dworshak and Compton White and Senators D. Worth Clark and John Thomas. The BOR was receptive to the idea of conducting a storage study in the basin, but the uncertainty of war tightened the federal purse-strings and made the undertaking of a new project before the end of the war quite unlikely. The lawmakers and the irrigation district persevered, underscoring the urgent necessity of rehabilitation and increased storage in the watershed, and soon the BOR was searching for funding. The offer of a loan to the district, even a no-interest loan, could not work because the residents of the Orchards, finding indebtedness much to their distaste given their previous experiences, refused to vote in favor of a BOR loan.[49] The irrigation district's manager, Walter Hereth, emphasized the necessity of a government-funded project, "The orchards are getting back on their feet as far as reputation is concerned, and people like to live here. But I would not tell them how rotten this pipe is. They trust us to keep the water running."[50] To Hereth, for the water system to falter in the Orchards at that moment would be a disaster for crops and residents alike.

One method of funding sought out by the Lewiston Orchards was the War Food Program. This program was aimed at increasing domestic food production and preservation. But the Orchards more closely resembled suburban hobby farms than serious attempts at food production, with only three farms more than 20 acres, and with 90 percent of Orchards residents engaged in something other than farming as their primary source of income.[51] The Lewiston Orchards Project was never formally proposed as a project for the War Food Program, because the Commissioner of Reclamation felt that the War Production Board would immediately dismiss the project due to an "adverse ratio of food production to materials and labor requirements."[52] The Orchards would have to seek another method of funding to get their pipes repaired.

The next avenue the district traveled in its search for funding to rehabilitate the irrigation works was the use of Lanham Act funds.[53] The Lanhan Act of 1940 was enacted by Congress to provide for the construction of infrastructure to communities heavily involved in the defense industry during the war. The rationale was that because Lewiston was a lumber town, and because lumber was a critical wartime material, the reconstruction of the water conveyance system in the Lewiston Orchards might qualify for Lanham Act funding. The Federal Works Administration investigated the possibility of using Lanham Act money at the Orchards, but determined that there was "Not sufficient war-connected need to justify the use of Lanhan Act funds for the reconstruction."[54]

With the Lanhan Act funding inaccessible to the Orchards, the BOR continued working on their rehabilitation report for the Lewiston Orchards Project, but the actual construction of the project would not be considered until after the war.[55] The BOR completed their report on Lewiston Orchards in 1945, fortuitously for the irrigation district,

the same year the war ended. The negotiations between the irrigation district and the BOR began well ahead of the project's official approval from Washington, the Secretary of the Interior approved the plan and the project was formally proposed to Congress in 1946.[56]

The project proposed to Congress consisted of two parts. The first part was the rehabilitation of the Lewiston Orchards irrigation system as it existed in 1946, serving water to 3,430 acres.[57] The second part would expand the irrigation system, enabling it to irrigate another 348 acres.[58] Another feature of the plan separated domestic and irrigation water, which had been combined up to that point. The proposed expanded service area was selected, not for its suitability toward agriculture, but because of its adjacent location to the Lewiston city limits, demonstrating a shifting rationale that would become ever more critical. The BOR determined that it was more important to include high demand and high value suburban land into its plan for the Orchards over lands with a "higher agricultural utility."[59] The plan, as assessed in 1940, would cost taxpayers $997,000.[60]

In proposing the Lewiston Orchards project to Congress, the BOR emphasized that plenty of water was available to make the project operational and that the project would not interfere with existing water rights in the Lapwai basin. The report concluded, "Conflicting [water] rights can have no significant impact on project development."[61] The report also stated that the prior insufficient deliveries of water were entirely the fault of the decomposing pipes, and that there would be plenty of water in the Craig Mountain watershed for the continual diversion from the basin's creeks.[62] Supporting the views expressed in the written report, Idaho governor, Arnold Williams, assured the Secretary of the Interior Julius Krug and Congress that, "This project fits well into the general basin development. The water supply is small and independent and no conflicts exist with other

water users."[63] In the Lewiston Orchard Project report's appendices, an additional, yet unclaimed, water right of the Nez Perce Tribe was mentioned, noting that 1.39 second-feet from Sweetwater Creek could still be diverted.[64] The report was also quick to point out, however, that all of the prior rights on Sweetwater Creek could be satisfied by water coming into the creek downstream from the Lewiston Orchards diversion. Therefore, in the eyes of the BOR, the Lewiston Orchard Project had carte blanche to divert the entire flow of Sweetwater Creek as it saw fit.

Despite the assurances made to Congress about the improbability of conflicts with other water right holders, possibilities for conflict did exist in the watershed. The water rights of the Nez Perce Tribe had been negatively affected by Lewiston Orchards irrigation diversions. It is unclear whether the BOR was aware of the Tribe's previous claims that the irrigation district's diversions had impacted tribal rights. Given LOID's desperation to obtain federal assistance, it is easy to imagine the irrigation district concealing any facts that would make a partnership seem like a liability to the federal government. It also seems likely that the irrigation districted expected that the rehabilitation of its pipes would allow it to divert less water (because seepage from the pipe would be eliminated) and therefore stop conflicts with other water users in the basin. Regardless of whether the BOR was aware of the Tribe's downstream water rights or not, Congress was assured that there was enough water in the Lapwai Creek watershed to irrigate the Orchards.

Congress approved the rehabilitation and augmentation of the Lewiston Orchards Irrigation District on July 31, 1946 and enacted Public Law 79-569. Construction on the project began in the fall of 1947 and was completed 42 months later. After the first year of the rehabilitation project, LOID deeded the collection, reservoir, distribution systems, and

all water rights, to the BOR, but the irrigation district remained responsible for the operation and maintenance of the Lewiston Orchards Project facilities.[65]

The partnership between the BOR and LOID enabled the district to recover from years of financial instability at the hands of the Orchards' creators. Before the involvement of the BOR, private Orchards residents had taken on the irrigation district's debt, which was a burden to many residents, so much so that some resident lost their homes.[66] Because of these prior financial hardships, it was not possible for the irrigation district to raise the capital needed to repair the irrigation system, which was in dire need of restoration. For its part, the BOR was able to use its technical expertise in the development and construction of irrigation to help American taxpayers that were in serious need. The Orchards were a place with a proven ability to produce fruit, an arid place once reclaimed, but at risk of falling back into desert. Not even suburbia could flourish without water, let alone an orchard. Without the rehabilitation of the irrigation system, crops and households alike would go without water. Reclamation found that the project benefits clearly outweighed the costs, but were not fully informed about possible conflicts with Nez Perce water users downstream.

The BIA failed to protect the Nez Perce Tribe's decreed water rights. By not collecting the required hydrological data to substantiate the Tribe's claim, the BIA missed an opportunity to stop the Lewiston Orchards from diverting more than its share of water. Instead, the BIA preferred to counsel the Nez Perce to "make do," setting a precedent to those outside the reservation that the decreed water rights of the Nez Perce were not to be taken seriously. Although the first time that the federal government blatantly ignored the Tribe's *water* rights, the failure of the government to protect Nez Perce rights fits squarely in the pattern that began when the first Euroamerican settlers entered the Nez Perce

Reservation searching for mineral wealth after the signing of the original 1855 Treaty. Because these water issues were not just going to "go away," the BIA was just pushing the inevitable conflict between the Tribe and the irrigation district further into the future, to a point in time when the Lewiston Orchards diversions would be entrenched in a history of overuse and when the orchards would have a strong "partner in crime" in the BOR.

The completion by the BOR of the Lewiston Orchards Project reinvigorated the Orchards. The Orchards were quickly changing from their agricultural roots into a more suburban community. The growth of both the Lewiston Orchards and the nearby city of Lewiston started talk among residents about the possibility of annexing the Orchards into the City of Lewiston. In 1955, the Orchards had roughly 6,500 residents, making it one of Idaho's largest unincorporated communities.[67] The sheer size of the Orchards made annexation an attractive option to residents concerned that essential services such as a the fire department and community sanitation could be more effectively implemented by a city government rather than the orchards' current ad hoc system of governance.[68]

Not all Orchards residents wanted annexation. Some residents were opposed to the idea, preferring to remain an unincorporated community. Another idea proposed that the Lewiston Orchards become a entirely new city called "West Lapwai," but an Idaho law prohibiting the creation of a new city within three miles of another city of an equal or greater size quickly ended the possibility of a West Lapwai.[69] One question that arose in the discussion about annexation was whether the orchards would end up on a municipal water system if they were joined with Lewiston. Lewiston's City Commission Chair, Paul Wise, assured orchard residents that their irrigation district could remain intact, if residents preferred it.[70]

In 1968, the City of Lewiston sought to annex the Lewiston Orchards. By then, the population in the Orchards was larger than the city's by 3,000 people (12,000 living in Lewiston to 15,000 in Lewiston Orchards).[71] The sudden influx of residents would double Lewiston's tax base and make it the fourth largest city in Idaho. The Lewiston City Charter prohibited the annexation of new areas into the city if 50 percent of the property owners in the community to be annexed objected in writing. Included in the definition of "property owners" was any person owning an unoccupied gravesite.[72] Because many city residents owned Lewiston Orchards gravesites, this rule was thought to unfairly advantage the city. A group of anti-annexation Orchards residents challenged the annexation in court. The case made its way up to the Idaho Supreme Court, which upheld the annexation, but not the right of owners of unoccupied gravesites to be counted as Orchards residents.[73] The city abandoned its charter and the municipal council passed an ordinance annexing the Lewiston Orchards into the City of Lewiston on December 15, 1969.[74] So, in spite of Orchards' opposition and without an election, annexation succeeded.

The Orchards further tied itself to the city of Lewiston in 1976 when a pipeline, dubbed the "Lewiston Connection," linked LOID to Lewiston's municipal water system. The Lewiston Connection permitted water sharing between the two entities in times of drought and was capable of moving a million gallons of water a day uphill from downtown Lewiston to the Orchards.[75] Not everyone was happy to see the pipeline installed, and vandals, in an apparent dynamite blast, damaged the Lewiston Connection's meter box shortly after it was installed.[76] Two years later, the irrigation district again added new water to its system, this time hooking a well into the LOID system.[77] Like the Lewiston Connection, the addition of the well faced resistance, this time in the form of large boulders

thrown down the well shaft on weekends, delaying drilling when work resumed on Mondays.[78]

A third augmentation to the Lewiston Orchards' system was proposed shortly after the construction of the well. The augmentation plan was posed to voters as a $6.9 million loan from the federal government that would pay to pump the Clearwater River up to the Orchards, reline and pipe the Sweetwater Canal, and additionally pay for the construction of a new two-million-gallon reservoir to treat domestic water.[79] If the proposed plan passed, it would have cemented the Orchards as a suburban community, greatly increasing LOID's focus on treating and delivering domestic water rather than its historical charge for irrigation. Some Orchards residents felt that the proposed Clearwater Plan was aimed toward increasing the LOID water supply so the irrigation district could expand service into new undeveloped subdivisions in the Tammany area. Those residents generally opposed the measure, as they felt that they had already paid for their water supply and thought it unfair that they should be asked to foot the bill for the addition of new residences to the district.[80] In a letter to the editor of the *Lewiston Morning Tribune*, one resident pointed out that in the two and a half years since the Lewiston Connection was made at the cost of $100,000, it had only been used twice.[81] The letter went on to say that the LOID well, which had been under construction for nearly two years with a total of $450,000 spent, had yet to produce water.[82]

The proposed Clearwater River Plan catalyzed the Nez Perce Tribe into an attempt to quiet title to the beds and banks of the Clearwater River and its tributaries existing inside the reservation boundary. A quiet title suit determines who owns a specific piece of land, therefore settling competing claims. If the Nez Perce Tribe were able to succeed in a quiet title suit against the State of Idaho, the ramifications would surely impact LOID and its

attempt to tap into the Clearwater River to expand its water supply. The Solicitor's Office within the Department of the Interior determined that tribal ownership of the beds and banks of the rivers was not supported by case law and decided not to pursue the matter on behalf of the Tribe.[83] The Solicitor's Office welcomed the Tribe to use their own resources if they wished to pursue the matter further, but the issue became less pressing when voters rejected the Clearwater River Project in the fall of 1979 by a margin of 767 to 1,273.[84]

The Lewiston Orchards had changed from a rural district of fruit growers to a suburban neighborhood within the boundaries of the City of Lewiston. The transition from rural to suburban resulted in the decrease of the average property size and the increase of the population. This increased population density brought on an analogous increase in the demand for water. To meet this growing demand, the irrigation district connected its system with the City of Lewiston's system to provide for the Orchards in times of drought. The irrigation system also drilled a well to alleviate strain on the surface water resources of the irrigation project. Despite these new sources of water, the system still struggled to make its deliveries to customers. The irrigation district put forth to voters a plan to tap the Clearwater River as a water supply, but voters rejected the plan.[85] That left the BOR and the irrigation district to continue to use Sweetwater Creek and the Lapwai Creek watershed as water sources for the burgeoning suburban population. Although the federal government had a fiduciary duty to the Nez Perce Tribe, the BOR continued to harm the Tribe's interests by withdrawing water from the Lapwai Creek watershed.

Electricity Comes West

Just as irrigation techniques at the end of the nineteenth century began to alter the possibilities of agriculture, new technologies in other sectors began increasing economic

outputs. The second case study examined in this chapter is the development of hydropower resources in Hells Canyon despite known negative impacts such development would have on fish and consequently, the Nez Perce Tribe's treaty fishing rights. This case study details the hydropower industry's development in the Northwest, the federal government's relationship with the industry as both competitor and regulator, and the government licensing of three hydroelectric dams in the Hells Canyon reach of the Snake River that would alter forever the anadromous fishery relied on by the Nez Perce Tribe. That hydropower provided the Northwest an important economic driver cannot be understated, but it must also be acknowledged that it was done so at the expense of the region's anadromous fisheries and in spite of promises made to the region's Tribes.

The Pacific Northwest was an ideal landscape for hydroelectric power. Impressive vertical relief, high altitude water storage in the form of snow and ice, massive water volumes, and regularity of flow all create excellent conditions for harnessing energy from water. The northwest stored energy in every forest and every cascading stream. The "Electric Revolution" was also an "Economic Revolution" as electricity would enable mines to run longer hours and allow energy intensive industries like aluminum smelting to move to the northwest.

The economic benefits of hydroelectric development, however, were not without their ecological and social costs. Dams impacted natural systems by altering hydrology and inundating habitat. Dams built without fish ladders cut off upstream habitat for migrating fish, vastly reducing available habitat. Downstream migrating fish were often sucked into dam turbines and killed. Dams also flooded important cultural landmarks such as "usual and

accustomed" fishing sites. Although access to these sites were protected by treaty, the government permitted them to be inundated, sacrificed at the altar of economic prosperity.

The burgeoning hydropower industry would be at odds with another boom and bust industry of the turn of the century: commercial fisheries. It was well understood that the damming of rivers containing a profitable commercial fishery would negatively impact that fishery; as historian Paul Hirt puts it, "The Northwest embarked on its twentieth-century dam-building binge with eyes wide shut."[86] Conservationists, on the other hand, supported the development of water resources, and believed that the adverse effects on fish could be mitigated through proper planning, science, and technology.[87] The sentiment is reflected in a statement made by President Theodore Roosevelt as he transmitted a report of the Inland Waterways Commission to Congress:

> Every stream should be used to its utmost. No stream can be so used unless such use is planned in advance. When such plans are made, we shall find that, instead of interfering, one use can often be made to assist another. Each river system from its headwaters in the forest to its mouth on the coast, is a single unit and should be treated as such.[88]

Roosevelt felt that the government was in the best position to allocate the various resources in a way that maximized their use, and therefore their efficiency. This optimism that organization and planning could solve the problems of conflicting resource use led to an over-simplification of the problems inherent in water resource development. This made the choice of power production over fish easier, because the fish destroyed by dams could be "replaced" through technological advancements in fish propagation science.[89]

Electrical consumption was on the rise in America throughout most of the first three decades of the twentieth century, and Idaho was no exception. The already rapid expansion of electrical output was further catalyzed with the onset of World War I, with electrical

production increasing by 40 percent from 1916 to 1917 alone.[90] War not only increased the demand for electricity in the U.S., but it also increased the need for government oversight in the industry, as national security required the government be able to efficiently direct the power supply to the war effort. In passing the National Defense Act of 1916, Congress authorized the President Woodrow Wilson to select a site and construct a hydropower dam to aid in the war effort. President Wilson selected a site at Muscle Shoals in Alabama construction began in 1918 on the first of what would be many federal hydropower dams.[91]

After the war, the federal government sought to further streamline the coordination of the nation's energy and hydropower resources and began drafting plans for the creation of a new administrative agency to oversee hydropower projects on navigable rivers or federal land. In 1920, Congress passed the Federal Water-Power Act, which created just such an administrative agency, the Federal Power Commission. The Federal Power Commission, as created by the Act of 1920, was comprised of the War, Agriculture, and Interior Secretaries and could also include, at the discretion of the Commission, a representative from the Army Corps of Engineers to serve the Commission as engineer officer.[92] One of the Commission's primary functions was to grant licenses for the construction and operation of hydropower projects on navigable waterways, a discretionary power turned mandatory when Congress amended the Act in 1935. The Commission was quickly inundated with applications for hydropower development. In its Second Annual Report, the Commission reported nearly 300 hydropower applications, with 171 of those applications occurring in the western states.[93]

By 1922, kilowatt-hours generated in Idaho increased 100-fold over the preceding twenty years.[94] From 1922 to 1927, kilowatt-hours generated had already increased by 34

percent.[95] The increased electrical production necessitated consumers; utilities incentivized electrical consumption by structuring rates to include low prices for bulk customers.[96] Throughout the 1920s private utilities dominated over their publicly-owned counterparts. In Idaho, private utilities controlled roughly 90 percent of the market throughout the decade.[97] Most private utility companies in the Pacific Northwest were controlled by eastern holding companies and were therefore under absentee ownership.[98] These holding companies controlled massive amounts of electrical production capacity, raising serious concerns about monopolizing the market. By 1932, the eight largest holding companies in America controlled over 73 percent of the country's private electrical utilities, amounting to half of the total electricity produced in the country.[99] The stock market crash and subsequent economic depression was thought to be the result of an unrestrained laissez-faire business environment, Congress responded to this lack of government regulation and monopolization of private power by eastern firms by enacting the Public Utility Holding Act of 1935. The law was one piece of New Deal legislation that wrested some control from private utilities and subjected them to government regulatory authority.

As the Hoover Dam was being constructed at breakneck speed in the in the blistering Mohave Desert, the federal government was already looking at other sites to construct more monumental dams. Dam sites at Grand Coulee and Bonneville on the Columbia River brought big federal dam building to the Pacific Northwest. Given the green light to begin construction in 1933 by President Roosevelt, but not authorized by Congress until 1935, the two dams on the Columbia increased power production in the Pacific Northwest to the tune of 2.5 million kilowatt hours.[100] To operate hydropower projects on the Columbia and sell electricity in the Pacific Northwest, Congress created the Bonneville Power Administration

(BPA) in 1937. In creating the BPA, the federal government more closely aligned the northwest with public power interests, but the BPA and its underlying New Deal policies were not without their detractors. Conservatives favored private power and felt that the electricity produced by Bonneville and Grand Coulee was unnecessary and would be difficult to market.[101] The BPA, however, had already begun attracting aluminum manufacturing plants to the Pacific Northwest to purchase the power,[102] and when World War II broke out, the need for aircraft, and therefore aluminum, increased dramatically.

The BPA succeeded in marketing Columbia River power, and not only was the region's industries reliant on cheap electricity, so was its citizens. After the end of World War II, residential and industrial customers of the BPA consumed electricity at a rate 300 percent higher than the national per capita average.[103] Plans to build a hydroelectric project on the Snake River in Idaho had floated around throughout the New Deal Era of the 1930s, but it was not until after the war that serious consideration was made. The idea of damming the Snake River for power production reignited the debate over public versus private power, and ultimately dealt a serious blow to the proponents of public power.

The Idaho Power Company began in 1916 when it was incorporated under the laws of Maine.[104] The company resulted from the merger of five private utilities operating primarily in Idaho, which, once consolidated, provided electrical power for nearly every city and town in the Snake River valley.[105] Idaho Power was, from the beginning, controlled by the General Electric subsidiary, the Electric Bond and Share Company. As the only private power utility in southern Idaho, Idaho Power's main competition came from municipal and federal power projects.[106] During the late 1920s, growing skepticism of private utilities had reached Idaho. Idaho Power, and therefore private power, were first challenged in Buhl,

Idaho, when a syndicate of public power proponents organized and passed a municipal bond to build a public power plant.[107] The bond initiative raising money for the public Buhl power plant passed, but Idaho Power had already bought out the site for the public plant out from underneath the public power proponents. That the private utility would go behind the back of the public to stop it from getting its own power plant followed Idaho Power's reputation for years. Public power reorganized and a new bond election was scheduled in Buhl. Idaho Power campaigned heavily against the bond. The second public power bond in Buhl was favored 185 to 99, a majority, but not the two-thirds majority required to pass a bond measure.[108] Idaho Power had effectively won its first fight with public power in the Snake River basin and had sharpened its political tools for the battles that lay ahead.

Public power proponents squared off for a second time against Idaho Power in the Snake River basin in 1947 over the development of hydropower in Hells Canyon. The New Deal years had not been kind to private power, and Idaho Power was no exception. The passage of the Public Utilities Holding Company Act in 1935 stripped Idaho Power of its East Coast financial and technical backing, separating it from the Electric Bond and Share Company in 1943. The creation of the BPA and the public support of multiple-use resource planning had changed the playing field of the private/public power debate. Idaho Power applied to the FPC for a preliminary license to develop a hydropower facility at the Oxbow site in Hells Canyon in 1947.[109]

Both the Army Corps of Engineers and the BOR were interested in federal projects in Hells Canyon, and the license application of Idaho Power was delayed so that the federal interests would have time to organize their position. As the agencies began investigating potential development plans in the canyon, Idaho Power also continued the leg-work for

their development plans and submitted another application to the FPC in 1950, this time for a formal license. The BOR sought to construct a 742-foot dam in the canyon, taller than either Grand Coulee or Hoover dams. The BOR claimed that not only would the entire cost of the project be paid back through the sale of electricity, but that the electrical profits would also help fund upstream irrigation projects.[110] Secretary of the Interior Oscar L. Chapman formally announced his opposition to the Idaho Power plan in 1951.[111] The Department of the Interior was permitted to intervene in the FPC proceeding a year later, allowing Interior to present the case for public power.[112]

By the 1952 presidential election, Democrats had held the White House for 20 years under Roosevelt and Truman, and Republicans were eager to gain control of the executive branch with their nominee, Dwight Eisenhower. The Cold War and anti-Communist sentiment made government-controlled electricity projects easy targets for conservative politicians, and American culture was less liberal than it was before the war. The 1952 election resulted not only in a Republican president, but also the Republican control over both chambers of Congress.

President Eisenhower appointed Douglas McKay to be the new Secretary of the Interior, and McKay quickly endorsed Idaho Power's Oxbow Dam plan, withdrawing the opposition of the previous administration.[113] The only administrative agency standing in the way of Oxbow Dam was now the FPC, which had yet to grant the utility a license. The FPC hearings on Idaho Power's plans to develop Hells Canyon began on July 7, 1953, and continued through 1955, making them, at that point, the longest power hearings in the Commission's history.[114] A group of public power supporters organized as the National

Hells Canyon Association (NHCA) and were allowed to intervene in the Hells Canyon matter before the FPC.[115]

The NHCA argued that only a federal project would ensure the best use of the Snake River and take into consideration multiple uses. NHCA supporters also pointed to the larger capacity for electrical production that the federal dam would have, and the correspondingly large reservoir that could be used to regulate the flow to the four proposed downstream dams on the Snake River. Idaho Power and the supporters of private power stated that the extravagant price of the federal dam was not justified by the increased electrical outputs, and further questioned the need for that much electrical production.[116] Idaho Power also claimed that they could get their project built in just a fraction of the time that a federal project would take and without costing taxpayers a dime. Idaho Power's claim that they would not cost taxpayers, however, was greatly undermined when the company applied for tax concessions from the Office of Defense Mobilization that might have benefited Idaho Power up to $60 million more than the total cost of the dams (Idaho Power was proposing a three dam development in Hells Canyon).[117]

The 1954 midterm elections brought Republican defeats in both the House and Senate, resulting in a democratic takeover of both chambers. The following year, well before the FPC ruling on the Idaho Power license, Oregon senator Wayne Morse, alongside 29 co-sponsors, brought legislation to the Senate calling for a single, public Hells Canyon dam. During the hearings in Congress over the proposed bill, S. 1333, testimony was given on both sides of the public power debate. Five residents from the Lewiston Orchards, all in favor of the public development of hydropower in Hells Canyon, provided testimony in support of the bill. One of the residents, E.G. Stewart, recalled being sent to the dam site in

Hells Canyon as part of a delegation of the Lewiston Orchards' local Farmers Union.[118] Another Orchards resident, Howard Adams, spoke of a lesson well learned in the Lewiston Orchards, favoring the federal plan because, "To me, conserving water is life as we know it today, agricultural life, industrial life and employment life."[119] That water could make or break a family farm out on the Orchards was a not-too-distant memory from the years before the BOR bailed the irrigation district out, and the Orchards residents had had not forgotten the federal government's favor.

Most of the testimony received by Congress took a stand as either for the Idaho Power project or for the high dam previously proposed by the federal government. Nez Perce tribal member, Joseph Blackeagle, however, offered testimony of a different sort.[120] Calling to the committee's attention to the looming 100-year anniversary of the Nez Perce's 1855 Treaty, Blackeagle reminded them of the:

> solemn agreement [that] was reached that the Indians would always have the undisturbed use of streams running through or bordering on the reservation and the right to return to their usual and accustomed fishing grounds and stations located outside the boundaries of their reservation for the purpose of obtain a major portion of their annual food supply from the annual salmon runs in the Columbia River and its tributaries.[121]

Blackeagle pointed out the harm caused to salmon runs by the dams at Grand Coulee, Bonneville, and McNary, and prophesized a similar fate at Celilo in the upcoming years as The Dalles Dam and reservoir were completed.[122] Blackeagle, in closing his testimony, spoke of a day when the salmon runs of the Nez Perce would be destroyed by dams, and warned members of Congress not to forget to add compensation for the Tribe's loss into the construction costs of its dams.[123] Clearly, Blackeagle was aware of the federal government's willingness to trade tribal fishery resources in for a power resource,[124] relying on hatcheries to fill the gap while Native Americans withdrew from their dependency on

fish. The BIA took the position that any dam on the Columbia or its tributaries that inundated "usual and accustomed" fishing places was a violation of treaty rights, belatedly entering—albeit haltingly—into the debate.[125] At the same time, the BIA and the Department of Justice refused to get involved on behalf of the Nez Perce Tribe to stop the construction of dams, and, in fact, represented the dam building contractor *against* the Tribe (who had hired their own attorney) in a 1948 action to halt construction at McNary Dam on the Columbia.[126]

Four months after the committee hearings on S. 1333, the FPC issued its ruling granting a license to Idaho Power to construct three dams in Hells Canyon.[127] Within days of the FPC ruling, the NHCA appealed the decision to the federal courts. The Court of Appeals in the D.C. Circuit affirmed the decision of the FPC.[128] Because the Supreme Court declined to review the case, the Circuit Court decision upholding FPC's 50-year hydropower license to Idaho Power was final. The last line of defense for proponents of public power in Hells Canyon was the bill in the Senate authored by Senator Morse. Despite the fact that putting a federal high dam in Hells Canyon would surely submerge the licensed Idaho Power dam, Senate Democrats passed a bill authorizing a federal project 45 to 38.[129] The Eisenhower administration lobbied the Interior Committee of the House of Representatives to kill the bill, which it did on July 24, 1957, ending one chapter in the ongoing national debate over hydroelectricity development in Hells Canyon.[130]

The battle between public and private power development is worth understanding because it provides evidence of society's changing values about another debate that will likely outlast the power debate, the debate between economic gain and environmental loss. What is interesting about the public/private showdown over the Hells Canyon Complex is

the lack of outcry over the obvious environmental consequences of building three dams in the Snake River (this would not be the case during the next conflict over dams in Hells Canyon). Blind faith in science and technology did much to quiet would-be detractors and a lack of institutional support kept the Tribe away from the Hells Canyon conflict and focused on the inundation of other important historical fishing site at Celilo, where a coalition of Tribes could make a stronger opposition force.[131]

Acknowledging that the three dam Hells Canyon Complex would negatively impact runs of anadromous fish, the FPC, when issuing the license to Idaho Power, placed certain conditions on company with respect to fish conservation. Article 34 of the license required Idaho Power to pay the U.S. Fish and Wildlife Service (USFW) up to $250,000 so that USFW could study the impacts of the complex and devise mitigation procedures.[132] Article 35 required that Idaho Power maintain and operate fish ladders, traps, and other devices that could be used to protect fish from the dams.[133] This article also required Idaho Power to construct fish hatcheries, thought of at the time as the panacea of the West's fish problems. The implementation of Article 35 stirred up additional controversy, as the fish and game departments of Oregon, Washington, and Idaho favored an implementation plan more expensive than the plan proposed, and ultimately carried out, by Idaho Power.[134]

Unfortunately for Idaho Power, the Snake River's anadromous fish, and the Nez Perce Tribe, the methods used by Idaho Power did not result in the adequate protection of Snake River fish. Net barriers installed to prevent juvenile fish from entering the turbines often failed.[135] Fish traps killed fish, as the traps were not always removed frequently enough to sustain the trapped fish. In 1958, a fish trap downstream of the Oxbow dam site cracked. Idaho Power responded by shutting the water off in order to fix the cracked trap.

A distance of 60 miles between the Oxbow site and the Imnaha River was left completely dry, killing hundreds of salmon during an essential time for the fall Chinook run. A similar event happened again in 1961 when Idaho Power stopped the flow of the river in an effort to make repairs to the Oxbow Dam spillway. For a period of four days the river ran completely dry under the dam. As a result, several thousand fish died. In 1963, Idaho Power proposed to the FPC that they utility be permitted to abandon the effort to save the Snake River's anadromous fish runs.[136] The Attorney General of Oregon requested the FPC to assess damages for Idaho Power's "negligent" destruction of the fishery.[137] The 3.4 million dollar fish net was scrapped in 1963, recognized universally as a complete failure.[138] Numbers of downstream migrating fish in the Snake River went from 300,000 Chinook in 1959 to less than 14,000 by 1962.[139]

This decline in fish numbers impaired the Nez Perce Tribe's ability to exercise its treaty fishing rights on the Snake River and its tributaries. In addition, the inundation of $92^{1}/_{2}$ miles of natural river put many of the Tribe's "usual and accustomed" fishing sites under water.[140] That access to these sites is protected by the 1855 Treaty, did not keep them from being flooding in the name of electricity production. The dams impacted traditional fishing of Nez Perce people at Rapid River, a tributary to the Salmon (and then the Snake) where Idaho Power built a mitigation hatchery in an effort to alleviate population declines that resulted from the Hells Canyon Complex. Declines in fish on Rapid River and the impact of those declines on treaty fishing rights would turn into a public controversy in the late 1970s and early 1980s, and is explored in more detail in the following chapter.[141]

Declining numbers of fish in Hells Canyon were but one result of the Northwest's reliance on hydropower. Electricity had changed the face of the Northwest, but the industry

itself had also changed over time. What began as a firmly entrenched private sector industry was all but taken over by the federal government in the wake of the depression, as big dams meant big labor requirements, and when the simultaneous planning and development of multiple uses was hailed as the most efficient use of water resources. The private hydroelectric dams that were built after the depression, such as those of the Hells Canyon Complex, were looked at with a greater scrutiny. The federal government exercised greater oversight over privately operated dams through FPC licensing. At Hells Canyon, the FPC made certain requirements of Idaho Power with respect to fish passage at the dam sites. Much faith was placed in technology saving anadromous fish in the Columbia River basin. Technology had turned desert into farms, and electrified cities and factories throughout America, and surely technology would solve the Northwest's fish problem.

The Nez Perce Tribe was not convinced. But, as was true when the Tribe sought BIA assistance with the LOID diversions, the BIA again failed to defend the Tribe's rights against development. Without the help of the BIA, the Tribe had few resources and limited access to technical support. The dams went up, and fish populations went down. Meanwhile, Americans began to reevaluate their relationship with the natural world, which would eventually be reflected in court decisions, executive orders, and legislation. But, for the time being, without the BIA, independent Tribal expertise, or a sympathetic legal and political regime, the Hells Canyon dams would remain a concrete tombstone for upstream habitat and the fish runs that one flourished in the middle Snake River.

CHAPTER THREE NOTES

[1] Barlett Sinclair,"Idaho," *New York Times*, January 1, 1900.

[2] For a discussion on the importance of investors and financial backers in the development of irrigation projects, see Donald Worster, *Rivers of Empire: Water, Aridity, and Growth of the American West*, (Oxford: Oxford University Press, 1985), 130-131; for a discussion of the importance and power of technical knowledge with respect to irrigation development, see Donald Worster, *Rivers of Empire: Water, Aridity, and Growth of the American West*, 192.

[3] Hugh T. Lovin, "The Carey Act in Idaho, 1895-1925: An Experiment in Free Enterprise Reclamation," *Pacific Norwest Quarterly* 78 (October 1987): 122.

[4] Ibid.

[5] Donald J. Pisani, *Water and American Government: The Reclamation Bureau, National Water Policy, and the West*, 1902-1935 (Berkeley and Los Angeles: University of California Press, 2002), 66-67.

[6] *New York Times*, "The Message Praised: Every Objection to Irrigation Answered Says G. H. Maxwell of Chicago," December 4, 1901.

[7] Francis G. Newlands, "Irrigation in the West," *New York Times*, March 2, 1902.

[8] Ibid.

[9] Phillip Dunn, "Frank Crowe: General Superintendent of the Six Companies, Inc. Hoover Dam Project" in *Hoover Dam 75th Anniversary History Symposium*, Richard L. Wiltshire, David R. Gilbert, Jerry R. Rodgers, eds. (Reston: American Society of Civil Engineers, 2010), 307.

[10] *Morning Oregonian*, March 4, 1907.

[11] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1987), 55.

[12] *Sunday Oregonian*, "Boys and Girls Clubs to be a Factor in Idaho Agriculture," August 25, 1912.

[13] Ibid.

[14] *Lewiston Orchards Life*, "Some Unjust Reports," December 1913, 3.

[15] Ibid.

[16] *Morning Oregonian*, March 4, 1907.

[17] Ibid.

[18] George J. Downing, "The Lewiston Orchards: With Special Reference to their Economic Phase," (bachelor's thesis, University of Idaho, 1914), 1.

[19] Ibid., 6-7.

[20] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West*, 67.

[21] *Morning Oregonian*, "Fruitgrowers Will Act," October 28, 1912.

[22] *East Oregonian*, "Outlook Favorable to Acquiring Line," January 22, 1913.

[23] Ibid.

[24] Stephen J. Matlock, "Gateway to the Lewiston Orchards," *Lewiston Morning Tribune*, June 25, 1967.

[25] King et. al. v. Barr et. al., 262 F. 56, 57 (9th Cir. 1920).

[26] Ibid.

[27] Transcript of Record, King et. al. v. Barr et. al., 4.

[28] *Morning Oregonian*, "Foreclosure Sale Lewiston Land and Water Company, Ltd., Properties, Lewiston Idaho," February 20, 1918.

[29] Powers v. Security Savings and Trust Co., 38 Idaho 289 (1923).

[30] Ibid.

[31] Bureau of Reclamation, "Project Planning Report Appendices: Lewiston Orchards Project, Lewiston Idaho," December, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, Record Group (RG) 115, Federal Archives, Denver, CO [hereafter FADC].

[32] Walter Hereth to Boyd Austin, February 4, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[33] Walter Hereth to Representative Compton L. White, August 13, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[34] Ibid.

[35] "Problem at Fort Lapwai, Idaho" Bureau of Indian Affairs Paper, undated, in Irrigation and Irrigation Projects folder, box 23, RG 75, Federal Archives, Seattle, Washington [hereafter FASW].

[36] Dr. C. H. Koentz to "all water users on Sweetwater, Webb, and Lapwai Creeks," August 27, 1935, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[37] Dr. C. H. Koentz to Geraint Humphreys, August 7, 1935, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[38] L. H. Holt to the Commissioner of Indian Affairs, August 2, 1935, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[39] Gilles D. Hodge to Dr. C. H. Koentz, September 5, 1936, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[40] Gilles D. Hodge to Dr. C. H. Koentz, September 16, 1936, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[41] Ibid.

[42] Ibid.

[43] William Zimmerman, Jr. to Arthur G. Wilson, received August 12, 1937, in Irrigation and Irrigation Projects folder, box 23, RG 75, FASW.

[44] Ibid.

[45] Ibid.

[46] Bureau of Reclamation, "Project Planning Report Appendices: Lewiston Orchards Project, Lewiston Idaho," December, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[47] Ibid.

[48] Representative Compton L. White to Commissioner John C. Page, March 15, 1940, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC .

[49] Walter Hereth to Representative Compton L. White, August 13, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[50] Walter Hereth to Boyd Austin, February 4, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[51] Commissioner H.W. Bashore to Representative White, received June 10, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[52] Ibid.

[53] Commissioner H.W. Bashore to Representative White, received September 29, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[54] Ibid.

[55] Ibid.

[56] *Lewiston Orchards Project, Idaho*, 79th Cong., 2d sess., 1946, S. Rep 247, in box 477, RG 115, FADC.

[57] Ibid., 5.

[58] Ibid.

[59] Ibid., 6.

[60] Ibid., 8.

[61] Ibid.

[62] Ibid.

[63] Arnold Williams to Julius Krug, March 18, 1946, reprinted in *Lewiston Orchards Project, Idaho*, see note 55.

[64] Bureau of Reclamation, Project Planning Report, Lewiston Orchards Project, Idaho, December 1944, in box 477, RG 115, FADC.

[65] U.S. Bureau of Reclamation, *Lewiston Orchards Project Biological Opinion and Essential Fish Habitat Consoltation*, April 15, 2010, 1.

[66] Walter Hereth to Representative Compton L. White, August 13, 1944, in Surveys and Investigations. Lewiston Orchards Irrigation District 302.12-Idaho folder, box 562, RG 115, FADC.

[67] *Lewiston Morning Tribune*, "Booming Lewiston Orchards Faces an Undefined Suburban Future," October 6, 1955.

[68] *Lewiston Morning Tribune*, "Wise Says Both Lewiston, Orchards Would Gain By Becoming One City," January 11, 1968.
[69] Ibid.
[70] Ibid.
[71] *Spokane Daily Chronicle*, "Annexation Battle Looms Over Lewiston Orchards," January 1, 1970.
[72] Ibid.
[73] Willows v. City of Lewiston, 93 Idaho 337 (1969).
[74] *Spokane Daily Chronicle*, January 1, 1970.
[75] Johnny Johnson, "Orchards Voters Decide Tuesday Whether to Make History," *Lewiston Morning Tribune*, October 22, 1979.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] *Lewiston Morning Tribune*, "Water Decision Faces Orchards Today," October 23, 1979.
[80] Johnny Johnson, "Orchards Voters Decide Tuesday Whether to Make History," *Lewiston Morning Tribune*, October 22, 1979.
[81] George Preston, Letter to the Editor, *Lewiston Morning Tribune*, October 20, 1979.
[82] Ibid.
[83] Leo M. Krulitz to Richard Schifter, received August 3, 1978, in 832 Lewiston Orchards Irrigation District 1957-1977, box 182, Record Group 115, National Archives, Denver, Colorado.
[84] Johnny Johnson, "Orchards Voters Say River Water Plan All Wet," *Lewiston Morning Tribune*, October 25, 1979.
[85] Ibid.
[86] Paul W. Hirt, *The Wired Northwest: The History of Electric Power, 1870s-1970s* (Lawrence: University Press of Kansas, 2012), 154.
[87] Ibid., 152.
[88] President Theodore Roosevelt transmitting the preliminary report of the Inland Waterways Commission to Congress, February 26, 1908, 60th Cong., 1st sess., S. Doc. No. 325, iv.
[89]Paul W. Hirt and Adam M. Sowards, "The Past and Future of the Columbia River," in *Transboundary River Governance in the Face of Uncertainty: The Columbia River Treaty Revisited*, ed. Barbara Cosens (Corvallis: Oregon State University Press, 2012),117.
[90] Paul W. Hirt, *The Wired Northwest*, 171.
[91] Donald J. Pisani, *Water and American Government*, 222.
[92] *Water Power Act of 1920*, U.S. Statutes at Large 41 (1920): 1063-1077.
[93] Federal Power Commission, *Second Annual Report of the Federal Power Commission*, June 30, 1922 (Washington: Government Printing Office, 1922), 12-13.
[94] U.S. Bureau of the Census, *Central Electric Light and Power Stations and Street and Electrical Railways with Summary of Electrical Industries 1912* (Washington D.C.: Government Printing Office, 1915), 50; U.S. Bureau of the Census, *Central Electric Light and Power Stations 1927 (*Washington D.C.: Government Printing Office, 1930), 44.
[95] U.S. Bureau of the Census, *Central Electric Light and Power Stations 1927*, 44.
[96] Paul W. Hirt, *The Wired Northwest*, 69.
[97] Ibid., 191.
[98] Gus Norwood, *Columbia River Power for the People: A History of the Bonneville Power Administration* (Portland: Bonneville Power Administration, 1950), 24.
[99] Richard R. Nelson ed., *The Limits of Market Organization* (New York: Russell Sage Foundation, 2005), 30.
[100]Gus Norwood, *Columbia River Power for the People*, 41.
[101] Paul W. Hirt, *The Wired Northwest*, 278.
[102] Ibid., 303.
[103] Karl Boyd Brooks, *Public Power, Private Dams: The Hells Canyon High Dam Controversy* (Seattle: University of Washington Press, 2006), 32-33.
[104] "Boise City, Idaho" *The Commercial and Financial Chronicle*, September 1916, 11.
[105] Ibid.

[106] Susan M. Stacy, *Legacy of Light: A History of Idaho Power Company* (Boise: Idaho Power Company, 1991), 61.
[107] Ibid., 68.
[108] Ibid., 70.
[109] Idaho Power Company v. Federal Power Commission, 189 F.2d 665, 666 (D.C. Cir. 1951).
[110] Raymond G. Leonard, "Investigating Hells Canyon," *Reclamation Era*, December 1950, 232.
[111] *New York Times*, "Oxbow Project Opposed," May 24, 1951.
[112] *New York Times*, "Voice on Power Granted," July 9, 1952.
[113] *The Deseret News*, "Idaho Power to Develop Dam," May 6 1953.
[114] Karl Brooks, *Public Power, Private Dams*, 211.
[115] Ibid., 196.
[116] Ibid., 204.
[117] *New York Times*, "Dam Tax Plea Attacked," November 8, 1953.
[118] U.S. Congress. Senate. Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, *Hells Canyon Project, Idaho-Oregon*, 84th Cong., 1st sess., 1955, 1241.
[119] Ibid., 117.
[120] Ibid., 1153-1154.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] The idea that the construction of dams in the Columbia River basin was a reallocation of resources from Native Americans to non-Indian people is attributed to and discussed in depth in Katrine Barber's *Death of Celilo Falls* (Seattle: University of Washington Press, 2005).
[125] U.S. Department of the Interior Pacific Northwest Coordinating Committee, Memorandum of the Temporary Subcommittee on Effect of Columbia and Snake River Dams on Fisheries, January 9, 1947, in North Idaho Agency folder, box 727, RG 75, FASW.
[126] Karl Brooks, *Public Power, Private Dames*, 220.
[127] In re Idaho Power Company, 14 F.P.C. 55 (1955).
[128] National Hells Canyon Association v. Federal Power Commission, 237 F.2d 777 (D.C. Cir. 1956).
[129] *New York Times*, "Senate Approves Public-Build Dam at Hells Canyon," June 22, 1957.
[130] William M. Blair, "House Unit Kills Hells Canyon Bid" *New York Times*, July 25, 1957.
[131] Katrine Barber, *Death of Celilo Falls*, 156-157.
[132] Susan M. Stacy, *Legacy of Light*, 208.
[133] Nez Perce Tribe's Opening Brief, Nez Perce Tribe v. Idaho Power, on appeal from the U.S. District Court, District of Idaho, March 13, 1995, 4.
[134] *Spokesman-Review*, " Idaho Power Fish Plan Stirs Up Controversy," December 12, 1959.
[135] Nez Perce Tribe's Opening Brief, 5.
[136] *New York Times*, "End of Salmon Runs Proposed in Oregon," June 10, 1963.
[137] *Spokesman-Review*, "Idaho Power Fish Probe Scheduled," March 23, 1963.
[138] New York Times, "3 Million Fish Net Proves Ineffective," September 8, 1963.
[139] Nez Perce Tribe's Opening Brief, 5.
[140] Ibid., 8.
[141] Dan Landeen and Allen Pinkham, Salmon *and His People: Fish and Fishing in Nez Perce Culture* (Lewiston: Confluence Press, 1999), 117-120.

CHAPTER FOUR: LEGAL MECHANISMS IN THE HISTORICAL CONTEXT

> *The decline of anadromous fish in Nez Perce Country is well documented. The Nez Perce Tribe bargained for its treaty fishing rights during the 1855 treaty negotiations at Walla Walla and has sought to use those rights as the legal basis for the fishery's protection. The following chapter explores the Tribe's efforts to enforce their treaty rights and protect anadromous fish in the face of entrenched competing water uses and unsympathetic Idaho courts.*

It was well understood that private dams in Hells Canyon had destroyed anadromous fish, yet both private and public power proponents continued to fight over new dam sites in Hells Canyon. A three-way fight between private, public, and federal (also public, but on a federal, rather than local, level) dam projects led to a U.S. Supreme Court decision in 1967 that was groundbreaking in its consideration of the natural world with respect to the public interest. The impacts of the Hells Canyon dams also stirred up controversy at Rapid River, where the Nez Perce Tribe became vocal advocates of their treaty fishing rights. The Nez Perce Tribe's treaty fishing rights were reaffirmed in 1981 when an Idaho state court dismissed the citations of 33 Nez Perce members for fishing at Rapid River during a state imposed closure of the fishery. Although this judicial reaffirmation of the Tribe's treaty fishing right, in concert with a long line of federal judicial decisions supporting treaty fishing, seemed to portend good things for the Nez Perce Tribe in their future court battles over treaty fishing rights, the Tribe was greatly disappointed in their future interactions with both federal and state courts in Idaho.

The Nez Perce Tribe, the Lewiston Orchards Irrigation District (LOID), and Idaho Power all became parties to the Snake River Basin Adjudication (SRBA) during the 1990s. The SRBA was a state court proceeding that determined all water rights in the Snake River Basin in relation to one another, including the rights of the federal government and the

Indian tribes with rights in the basin. During the SRBA, federal, state, and private parties entered negotiations with the Tribe to achieve a comprehensive settlement of the Tribe's claims to Snake River basin surface water. LOID eventually dropped out of the negotiations, and after the Tribe settled its water rights in the basin-wide adjudication of the Snake, it took on the Lewiston Orchard Project using a new legal strategy.

The Endangered Species Act (ESA) provided the Tribe with the legal mechanism to challenge the Orchard's water withdrawals. The Tribe successfully challenged the BOR's operational plans for the Lewiston Orchards and forced them to increase habitat protection measures in their operation of the Lewiston Orchards Project. Likewise, ESA requirements that did not exist during the 1955 licensing of the Hells Canyon Complex demand greater consideration of fish habitat protection as Idaho Power now seeks the federal relicensing of its facilities. Stronger environmental laws and the willingness of the courts to protect treaty fishing rights outside of Idaho, especially in the U.S. Supreme Court, empowered the Tribe to attempt to enforce their treaty rights and protect fish habitats in a manner that would have been unthinkable to earlier generations.

This chapter follows the increased momentum that treaty fishing rights received in the courts during a simultaneous period of increased social awareness of ecological concerns and tribal self-determination. The legal outcomes realized through litigation and settlement are a product of these social and historical contexts. Likewise, the legal course charted by the Tribe can be explained though an examination of legal precedent. The Tribe's increased technical capacity through the establishment of the Columbia River Inter-Tribal Fish Commission (CRITFC) and through the creation of tribal fisheries management bodies

strengthened the ability of the Tribe to assert its treaty fishing rights though the reassertion of tribal sovereignty over its resources.

Another Controversy in Hells Canyon

The construction of Idaho Power's Hells Canyon Complex did not end the fight over dams on the middle Snake. Applications for two more dams on the river were submitted to the Federal Power Commission (FPC) in 1958 and 1960.[1] The two mutually exclusive projects were proposed by consortiums of power utilities--one private, the Pacific Northwest Power Company (PNPC), and one public, the Washington Public Power Supply System (WPPSS). PNPC sought a license for their High Mountain Sheep project, a 670 foot dam to be located just upstream from the Snake River's confluence with the Salmon River.[2] WPPSS proposed the construction of the Nez Perce dam, larger than the High Mountain Sheep dam, to be built just downstream from the confluence of the Snake and Salmon Rivers.[3] Secretary of the Interior, Stewart Udall, voiced opposition to both private and the proposed public projects and instead favored a public project undertaken by the federal government.[4] Udall felt that a project under federal control would best balance the various uses of the river's resources,[5] echoing past arguments for public power, but using them to advance a federal project over a public one. Udall also voiced concern over the status of the river's anadromous fishery, and requested the FPC to postpone a decision on the application until adequate means of fish protection could be studied.[6]

In spite of Udall's request, the FPC granted a license to the High Mountain Sheep project and rejected the application for the Nez Perce dam. The FPC's decision was appealed to the Court of Appeals for the D.C. Circuit, the same court that upheld Idaho Power's Hells Canyon license in 1956. The Court of Appeals rejected the challenge posed

by WPPS in addition to Secretary Udall's plea to allow the federal government to develop the High Mountain Sheep site.[7] The case was appealed to the U.S. Supreme Court, which heard arguments on April 11th and 12th of 1967.

The Court, in holding that the FPC failed to comply with the Federal Power Act by not becoming adequately informed of the potential advantages of a federal project, reversed the Court of Appeals decision and remanded the case.[8] In writing for the majority, Justice William O. Douglas directed the FPC to consider the impacts on recreational fishing the dam would have, noting that the requirement of considering effects on recreation (section 10a of the Federal Power Act) went beyond a determination of what project creates the best reservoir.[9] Justice Douglas also considered the statutory language and legislative intent of the Fish and Wildlife Coordination Act (1958) and the Anadromous Fish Act (1965), finding that the statutes supported the view that further investigations into ecological impacts was warranted.[10] Most notably, Justice Douglas emphasized the importance of a broad consideration of the public interest, one that not only considers the need for new energy, but that also considers the public interest in wild rivers and the preservation of anadromous fish.[11]

Although the Court remanded the case back to the FPC, the decision effectively ended the consideration of the High Mountain Sheep dam site and marked a turning point in the judicial review of administrative actions.[12] That the Court would no longer give blind deference to the decisions of administrative agencies was an important step in ending the era of dam building, and the opinion itself seemed the opening salvo for the coming environmental revolution of the 1970s, it did not, however, stop the building of more dams

on the Snake River. Three more dams on the lower Snake would go up in spite of Justice Douglas's skepticism over the necessity of more hydropower in the region.

The Court's decision to no longer accept that an agency's assertion was always in the public's best interest came at a time when American society was reevaluating many past government policies with respect to the natural world. Another area that witnessed significant change beginning in the 1960s was federal Indian policy and social attitudes about the status of Native Americans and tribal self-governance. In the late- 1960s, the Nez Perce Tribe (as a tribal government, not the BIA) only employed a handful of staff.[13] The creation of federal programs and funding by President Johnson's "War on Poverty" began to slowly increase the amount of money spent by the government on Indian reservations. Opportunities in Indian Country created through War on Poverty programs were administered directly through the tribal-run organizations and the federal grant program was overseen by the newly created National Indian Opportunity Council.[14] The Council was created specifically to encourage the use of federal funds available to Indian populations. The effect of the increased funding and the creation of an advocacy organization to ensure that the available funding would be used brought on a renaissance of reinvigorated tribal sovereignty, self-determination, and treaty rights to reservations.[15]

The late 1960s and early 1970s also saw a rise in Native American activism. The Occupation of Alcatraz in 1969, the takeover of the BIA offices in 1972, and the siege at Wounded Knee in 1973 are all examples of the rising voices of Native Americans seeking to draw attention to native issues such as the political oppression of Native Americans and poverty on reservations.[16] Tribal activists demanded more control in tribal governance and sought to wrest power over the reservations from the BIA. Partially in response to the

increased public discourse taking place about the status of Native Americans, Congress enacted the Indian Self-Determination and Education Assistance Act of 1975 to provide opportunities to increase tribal control over governance. This Act enabled tribes to take over the administration of federal programs.

Meanwhile, in the Columbia River basin, tribes were beginning to gain more authority in the management of fishery resources. As ordered by the court in *U.S. v. Oregon*, northwest tribes began co-managing fishery resources in a 1977 plan approved by federal court.[17] This plan, entitled, "A Plan for Managing Fisheries on Stocks Originating from the Columbia Rivers and its Tributaries above Bonneville Dam," was a 5-year plan that created a sharing agreement for the Columbia River and addressed conservation issues.[18] Shortly after this plan was adopted, CRITFC was formed by the four Columbia River treaty tribes: the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation. The purpose of CRITFC was to coordinate fisheries management and technical expertise between the Tribes.[19] CRITFC was a recipient of funds from the Indian Self-Determination and Educational Assistance Act and used those funds to hire fish biologists, policy analysts, and legal staff. This independence from the BIA was a critical first step in the development in the Nez Perce fishery program.

Another significant boost to the tribal administration of fishery management was the passage of the Pacific Northwest Power Planning and Conservation Act of 1980, this act mandated that Columbia River power production be weighed equally with fishery resources.[20] This Act was important to tribal-run fisheries program because it ensured that any smolts propagated in an upstream tribal hatchery would have a better chance of being

flushed downstream, as hydropower operators were required to give consideration to fish survival. This law helped catalyze the creation of a tribal hatchery program.[21] Funded through the Bonneville Power Administration, the tribal hatchery program was created to provide steelhead for tribal consumption.

As a member of CRITFC, the Nez Perce Tribe negotiated with Columbia River states for a decade over the management of the fishery before the 1988 Columbia River Fisheries Management Plan was released. This plan improved the efficiency of co-management between the states and tribes and also increased the technical capacity of the stakeholders.[22] The availability of federal funding for tribal governance programs, federal policies aimed at achieving the self-determination of tribes, co-management of common-pool resources, and collaboration among tribes has all help bring technical capacity, professional experience, and funding to tribal fishery management. This availability of scientific information, policy analysis, and legal expertise to tribes helped level the playing field in the ongoing litigation with states over fishery resources. This expanded capacity and experience combined with legal precedent supporting treaty fishing rights and new environmental laws would be used to help the Nez Perce Tribe protect fish habitat both on and off the reservation.

One major success of the Nez Perce Tribe in asserting its treaty fishing rights occurred on Rapid River. The anadromous fishery at Rapid River, an eventual tributary to the Snake River, was impacted by the construction and operation of the Hells Canyon Complex. The spring Chinook fishery at Riggins (near the confluence of Rapid River and the Salmon River) was closed to sportfishers for three years beginning in 1974.[23] The fish hatchery on Rapid River was created to mitigate the Idaho Power dams on Hells Canyon.

During the late 1970s, there was concern that not enough Chinook would make their way to the hatchery to be used to artificially produce more fish.[24] Rapid River was also a usual and accustomed fishing site for the Nez Perce Tribe.[25] Although the overall decline of the fish was due to the development of hydropower on the Snake and Columbia Rivers, at Rapid River, the sentiment among some non-native sportfishers was that the Nez Perce were to blame for preventing Chinooks from reaching the hatchery. Local vigilante groups harassed native fishers to the point where native fishers were shot at, ran off the road in their vehicles, and otherwise threatened with violence.[26] The vigilantes blamed the Tribe for the reduction of fish at Rapid River, as the Nez Perce's exercise of their treaty fishing rights resulted in the fishing of the few Chinooks left in the river. Tensions ran high on Rapid River, fueled by persistent racism and a lack of understanding of the relationship between Nez Perce culture and salmon. Idaho Power was accused by the Director of Idaho Fish and Game (IFG), Joseph Greenley, as trying to "replace the real anadromous fish issue with a red herring about Indians taking too many fish at Rapid River."[27] Greeley was speaking specifically to an Idaho Power press release that accused members of the Nez Perce Tribe of taking too many fish on Rapid River. The reality was that Idaho Power had not met the expectations of the State Idaho with respect to fish mitigation measures. IFG asked Idaho Power to build two additional raceways at the Rapid River Hatchery and build a fish trap below the Hells Canyon Complex, which IFG believed was necessary for Idaho Power to replace the fish killed during the construction of the dams.[28]

The declining number of returning salmon led the State of Idaho to close the Rapid River salmon fishery.[29] Tribal fishers continued to fish, despite the state's closure and organized into a resistance group, "The Fishermen's Committee."[30] The group organized

demonstrations on Rapid River and had over 300 participating members.[31] Eventually, tribal fishers were cited for violating the fishery's closure order, and the State of Idaho arrested more than eighty fishermen.[32] Thirty-three pending court cases against Nez Perce fishers were consolidated into one action that was heard in Grangeville, Idaho.[33] The Magistrate Judge who heard the case, Judge George Reinhardt, issued a memorandum order dismissing all charges.[34] Basing his decision on the recent treaty fishing cases *United States v. Oregon* and *United States v. Washington*, Judge Reinhardt found that the Idaho did not meet its obligation to give the Tribe a meaningful part in the decision to close fishing.[35] Former Nez Perce legal counsel Doug Nash called the case "an important part of the Nez Perce's Tribe's legal history," stating:

> In dismissing those cases, Judge Reinhardt made two critical points. The first was that the state had made an attempt to prohibit Nez Perce treaty fishing rights without consulting with the tribe. The second major point was that the decision reaffirmed the Tribe's fishing rights at its 'usual and accustomed places' off the reservation in accordance with the Treaty of 1855.[36]

That Judge Reinhardt dismissed the charges in the Rapid River resistance was a win for the Nez Perce Tribe, but it did not address the larger problem for the Tribe and the anadromous fishery: the destruction of habitat through the development of water resources.[37]

As tensions flared on Rapid River, the fish and game agencies of Idaho, Oregon, and Washington filed a Federal Energy Regulatory Commission (formerly the FPC) proceeding against Idaho Power. The states sought a declaratory judgment requiring Idaho Power to renovate three of its hatcheries, including the hatchery at Rapid River.[38] The Nez Perce Tribe intervened in that action in August 1977. The states eventually agreed to settle their complaint in 1980. As a condition of the settlement, the states agreed that the settlement would resolve all issues relating to the actual salmon destroyed by the construction of the

Hells Canyon Complex and would constitute complete mitigation for the numerical loses of steelhead and salmon caused by Idaho Power.[39] The Tribe dropped out of the settlement and therefore retained the right to sue Idaho Power for the destruction of fish, which it did in the early 1990s.

An Exploration of Legal Precedent

The suit filed by the Nez Perce Tribe was not the first court case in the West to test the durability of the treaty fishing right. And although a state court in Idaho reaffirmed the right at Rapid River, the suit against Idaho Power was the first time the Nez Perce Tribe attempted to sue directly for damages to its fishing right. The legal precedent set in the following cases provide the backbone of the judicially recognized treaty fishing right and are important to the overall understanding of the Nez Perce Tribe's attempt to have their treaty fishing right recognized in court as a property right.

The first important case which addressed treaty fishing rights was *United States v. Winans*. *Winans* is discussed in chapter I of this thesis, but greater detail is merited here. Decided 8-1 in favor of the government (arguing on behalf of the tribal interests), *Winans* is the starting point of the treaty fishing analysis.[40] In 1887, on the east side of Hood River, Oregon, Audobon and Linnaens Winans erected a fishwheel to harvest some of the Columbia River's anadromous fish.[41] Furthermore, the Winans brothers employed a guard to block access to the river from other Tribal peoples.[42] In 1895, a complaint was filed on behalf of the tribal interests by U.S. Attorney William Brinker. The complaint claimed that by restricting Native Americans from accessing the fishing sites, the Winans brothers interfered with the fishing rights guaranteed by the Yakama Nation's Treaty.[43] After the

district court issued an injunction prohibiting the Winans brothers from blocking tribal access to fishing sites along the river, the court refused to enforce it.[44]

On appeal at the Supreme Court, Justice Joseph McKenna delivered an opinion focusing on the usual and accustomed fishing places treaty language, nearly identical to the language of the Nez Perce 1855 Treaty. Underscoring the importance of how this language would have been understood by Native Americans during the drafting of the Treaty, Justice McKenna rejected the Winans's argument that Yakama Indians had acquired no rights via their Treaty outside of the common rights shared by Indian and non-Indian men alike.[45] Justice McKenna considered this possibility an "impotent outcome to negotiations and a convention which seemed to promise more."[46] Famously, Justice McKenna recognized that the treaty was "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[47] The Court further underscored the importance of construing the terms of the treaty as the Native Americans would have understood it.

Another case that attempted to clarify the extent of the treaty fishing right was *Tulee v. Washington*.[48] Sampson Tulee was convicted by the Washington trial court for salmon fishing without the required state license.[49] Tulee's conviction was affirmed by the Washington Supreme Court, after which Tulee appealed to the U.S. Supreme Court on the basis that the Washington law requiring a fishing license was repugnant to the treaty between his tribe and the United States.[50] In a unanimous decision authored by Justice Hugo Black, the Court found that the State of Washington did not have the power to charge the tribal members a fee for a fishing right guaranteed to them by treaty, even if the fee was charged nondiscriminatory to both Indians and non-Indians.[51] The Court qualified its holding stating that it would not preclude the State from fulfilling its regulatory duties. The

Court stated that the State would be permitted to enact legislation affecting Indian treaty rights if the laws were aimed at conservation of the resources and were not regulating on-reservation fishing.[52] Providing that states had the ability to regulate its entire (Indian and non-Indian) fishery, as long as those regulations were means toward a conservation end, would prove to be problematic in future cases.

Puyallup Tribe v. Department of Game became one of those problematic cases. In fact, the case was so problematic as to warrant three separate Supreme Court opinions. In this case, the Court held that a ban on net fishing was appropriate as long as the state regulation was reasonable and necessary to the preservation of the fishery.[53] In the first of the three Supreme Court decisions on the case, the Court took the absence of treaty language regarding the manner of fishing to mean that it was up to the state to determine which manners of fishing would be permissible.[54] Looking to *Tulee*, the Court found the Washington regulation against the use of net fishing at the mouths of rivers entering the Puget Sound was an appropriate use of the State's police power because the regulation affected both Indians and non-Indians equally, was aimed at the conservation of fish, and imposed no fee.[55]

Five years later, the case returned to the Court. The question presented in *Puyallup II* was whether a ban on net fishing would be discriminatory against Indian fishers because it essentially grants the entire run of fish to sports fishers.[56] The Court answered that question affirmatively, stating, "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed."[57] The case was then remanded for a second time to the lower court.

The case appeared for one final time before the Supreme Court, this time the question was one of actual apportionment.[58] Here, the Supreme Court agreed with the lower court, allocating 45 percent of the harvestable wild fish to native net fishers.[59] Essentially, the *Puyallup Cases* stand for the state's ability to exercise its police power in regulating, for conservation purposes, the fishing of anadromous fish, so long as the state does not act discriminatorily.

In *Sohappy v. Smith*, a state regulation was overturned by the courts, the regulation aimed at achieving conservation purposes, and was facially nondiscriminatory.[60] Referred to as the Belloni decision, *Sohappy* stands for the "fair share" doctrine.[61] Once again the court was called upon to define what the "usual and accustomed places" language really meant. The state argued that it meant to give the Indians only the same right as other citizens would have.[62] The regulation at issue in this case, like the *Puyallup* cases, prohibited traditional Indian net fishing from the Columbia River by allowing only hook and line fishing in the river.[63] Although the regulation did not expressly discriminate against Indian fishers, it excluded an entire mode of fishing that was a traditional Native American means of catching fish and allowed instead a predominantly non-native mode of fishing. Looking back to the decision in *Tulee*, Judge Robert Belloni determined that the language "necessary for the conservation of fish" found in *Tulee* did not extend to regulations that were partially based on modes of taking fish, particular user groups, or harvest areas.[64] With regards to the Tribe's treaty fishing right, Judge Belloni stated, "If Oregon intends to maintain a separate status of commercial and sports fisheries, it is obvious a third must be added, the Indian fishery. The treaty Indians, having an absolute right to that fishery, are entitled to a fair share of the fish produced by the Columbia River system."[65] This loose

apportionment of a "fair share" of the available fish was an affirmative right to the fishery and consequently is the core of the fair share doctrine.

Despite the fact that the Belloni decision was not appealed, tribal members kept getting arrested for net fishing in the rivers, this time rivers on the Olympic Peninsula.[66] Eventually, the United States government filed a suit on behalf of the tribes arguing that the fair share doctrine enunciated by Belloni gave the tribe's a 50 percent apportionment of the catch.[67] Judge George Boldt determined that in addition to whatever was caught on-reservation (as both parties had agreed that the state had no business in regulating the on-reservation fishery), that the tribes would be entitled to a 50 percent allotment of the catch.[68] Judge Boldt found that the language "at all usual and accustomed grounds and stations" and agreed that all citizens of the territory might fish at the same places in common with tribal members," contained the treaty right to half the catch because of the phrase "in common."[69] Judge Boldt's decision was affirmed by the circuit court and not reviewed by the Supreme Court. However, much like the response to the Belloni decision, the Boldt decision was not followed peaceably by the State of Washington nor its citizens.[70] The widespread non-compliance in Washington led Boldt to enter a series of orders, all upheld by the circuit court, which ultimately put the court in control of managing Washington's entire fishery.[71]

Not surprisingly, the battles in the courtroom were far from over. The next case to make its way up to the United States Supreme Court was *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.[72] This case, argued in the late 1970s, concerned treaty fishing rights negatively affected by the increased pressure on the resource.[73] The end result of the case affirmed the Boldt decision and its 50 percent apportionment.[74] The Court reasoned that the various tribes were owed this because the

treaties guaranteed and recognized the importance of the fish to tribes. Justice John Stevens further qualified the right by likening it to a reserved water right where only what is needed is allocated, and nothing more.[75] This "moderate living" standard gives the tribes a right to a ceiling of 50 percent if that is what is needed to maintain a moderate living, however, if something less would suffice then it was possible for the tribes to have a "less-than-fifty percent" right to the resource.[76]

With the U.S. Supreme Court endorsing the Boldt decision, it would seem that the 50 percent proportional share of the fishery resources had solidified into law. Unfortunately, splitting the available fish runs in half was not as simple as it sounded. By 1980, the parties had returned to the courthouse and this time Boldt was not around to judicially manage the Washington State fishery (at this point, he had retired).[77] Important in this matter was the effect which hatchery fish might have on the 50 percent apportionment and whether the right included some environmental protections to the fish habitat.[78] Because the treaty language was silent as to hatchery fish and environmental protections, two things which could not have been contemplated at the time of treaty negotiation, the court placed an extra emphasis on proper treaty construction.[79] The court disposed of the hatchery fish issue easily stating, "all hatchery fish must be included in the computation of the tribes' treaty share in order to effectuate the parties' intent and the purposes of the fishing clause."[80] Whether the tribes were entitled to protection against environmental degradation was also clearly answered by Judge William Orrick's opinion:

> The Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation. Virtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes.[81]

Judge Orrick added later in the opinion, "The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present."[82] The opinion written by Judge Orrick was largely upheld by a three-judge panel, but two years later the environmental protections segment of the decision was vacated by the entire bench of the court of appeals because the court took issue with Judge Orrick's pronouncement of a legal standard with an unclear application.[83]

Taken together, the precedents outlined here support the Tribe's claim for monetary damages arising from the loss of fish. *Winans* provided the geographical basis for the Snake River fishery to be protected by the Nez Perce's treaty rights, as an off-reservation usual and accustomed fishing site. *Tulee* and *Puyallup* strengthened and defined the treaty fishing right, protecting it from state licensing fees and discriminatory regulations. The decisions of Belloni and Boldt, and the *Fishing Vessel* case provided the Tribe with an affirmative right to a fair share of fish, up to 50 percent of the run, solidifying the treaty fishing right into something concrete, or, as the court said in *Fishing Vessel*, "[a] right to 'take'—rather than merely the 'opportunity' to try to catch."[84] What was not yet answered by the court was whether the treaty fishing right might also include habitat protection as a means to protect the existence of the right.

In *Nez Perce v. Idaho Power Co.*,[85] the Tribe argued that it was entitled to compensation under section 803(c) of the Federal Power Act and under common law. Section 803(c) created a liability for the power company to "all damages… to the property of others" caused by the construction, maintenance, or operation of their project works.[86] The district court, agreeing with the magistrate judge's findings, determined that there was

no legally cognizable property interest in the treaty fishing right, and therefore the Tribe could not recover money damages from an impairment of that right.[87] The treaty right in this case was essentially the same right as in the line of cases previously discussed. Northwest tribal treaties were generally negotiated by Governor Isaac Stevens and include similar language. It is therefore no surprise, that the language at issue was the clause in the 1855 Treaty with the Nez Perces which states, "the right of taking fish at all usual and accustomed places in common with citizens of the Territory."[88]

The main issue before the district court was whether a cause of action (a legal basis for a lawsuit) existed for the Tribe. The Tribe asserted that a cause of action existed at common law and additionally that it was not preempted by the Federal Power Act.[89] The court rejected any cause of action that the Tribe might have as a result of the court's determination that the Tribe did not have a property interest in fish.[90] The court stated that a right to catch up to 50 percent of the catch did not mean that the Tribe had a right to anything more than 50 percent of the available fish in the river. That is to say, if there remains only two fish left in the entire Snake River, the District Court of Idaho was ready and willing to assume that one fish is what the Nez Perce Tribe ceded their land for.

The *Idaho Power* decision also relied heavily on the idea that the Tribe's treaty right was not protected from changing circumstances or new conditions. Despite the fact that the Tribe never asserted that they were somehow to be immune to changing circumstances in the environment, the court felt compelled to answer for its decision, "After careful analysis, the Court concludes that while treaty fishing rights are subject to changes in *circumstances***,** the treaty fishing rights that the tribes reserved to themselves have not been rendered meaningless because of the hatchery facilities and other mitigation and protection

programs."[91] Basically, the court announced that changing circumstances, such as the creation of a fish-run blocking dam on ceded lands, would not be considered a detriment to the Tribe's treaty rights because of mitigation projects, regardless of their effectiveness—or lack thereof.

In their most simple sense, the line of cases leading up to *Idaho Power* were cases concerning treaty interpretation. A basic tenet of treaty interpretation with respect to tribes is that the language of the treaty is to be construed in the light most favorable to the Tribes and as the Tribes would have understood it at the time of treaty-making.[92] When Stevens negotiated with the Nez Perce to cede vast tracks of land to the U.S. government, was the Tribe expected to understand that this meant their fishery right, the core of Nez Perce culture, would not be protected against harm, it is hard to image that this is so.

Although the Nez Perce Tribe lost at the district court, they appealed the case to the 9th Circuit Court of Appeals. Before the circuit court heard the case, Idaho Power settled with the Tribe for over $11 million.[93] The large amount of money offered in the settlement shows that despite the Tribe's loss in court, they made enough of a case to make Idaho Power think twice about the possibility of an appeal. Moreover, it may have comforted the Tribe to know that the Hells Canyon Complex's license was set to expire in 2005, at which point a new round of negotiations regarding the status of the Snake River anadromous fishery would begin. Happening simultaneously to the Idaho Power case, but occurring in Idaho state court, was the adjudication of the Snake River and its tributaries under the Snake River Basin Adjudication (SRBA). While these court proceedings concerned water quantity, rather than fishing rights, the proceedings certainly affected fish habitat and involved the Nez Perce Tribe, Idaho Power, and LOID.

The Snake River Basin Adjudication

In 1987, the SRBA proceedings began in Idaho state court whose purpose was to untangle the web of conflicting claims to the Snake River basin water and clarify rights. [94] The SRBA was necessitated when the Idaho Supreme Court determined that Idaho Power's federal operating license (issued in 1955 and discussed at length in chapter II) for the Hells Canyon Complex did not subordinate Idaho Power's Swan Falls water rights to upstream development.[95] What this meant for junior water right holders upstream of Swan Falls dam (including much of Idaho's famous potato farms) was that they could have their water use curtailed if Idaho Power needed the water to create electricity for its customers. Such a result would have certainly destabilized southern Idaho's agricultural sector and damaged that State's agriculture-dependent economy. Following the Idaho Supreme Court's decision, an agreement was made between the State of Idaho and Idaho Power, known as the Swan Falls Agreement, which agreed to commence general stream adjudication of the Snake River.[96] Thus, the SRBA was born.

The water rights of the Nez Perce had not been adjudicated since the 1916 Siegrist Decree. In the SRBA court, the Nez Perce Tribe maintained three different types of water rights claims: on-reservation multiple-use water rights, rights to springs or fountains, and instream flows based on treaty fishing rights (both on and off-reservation).[97] The first (and only) claims to be litigated were the off-reservation instream flow claims. In the SRBA subcase of consolidated instream flow claims, the Tribe sought to gain legal recognition of an instream flow water right to protect their treaty fishing right. The basic idea behind the suit was that the off-reservation treaty fishing right's purpose was to allow the Nez Perce people to preserve their traditional way of life, and that instream flow rights were a

necessary part of that preservation. If the Nez Perce had succeeded in the instream flow subcase, the water rights of many water users, including LOID and Idaho Power, would have been impacted.

Like the *Idaho Power* case before it, the Nez Perce Tribe's argument rested on significant legal precedent. Also like *Idaho Power*, the Tribe's claims were denied. In the litigation of the Nez Perce Tribe's instream flow claims, Judge Barry Wood of the Idaho Water Court granted a Motion for Summary Judgment against the Tribe.[98] In his Summary Judgment Order, Judge Wood determined that the reserved treaty fishing right carried with it no implied water right and that the Nez Perce Tribe had been diminished (by the allotment of the reservation) and therefore could not hold an instream flow claim to any of the basin's water.

The legal theory advanced by the Nez Perce Tribe in the instream flow subcase was that the treaty fishing right carried with it an implied water right to protect fish habitat. The treaty fishing right that provided the basis of the Tribe's *Idaho Power* lawsuit and the Rapid River cases is an express treaty right, meaning that the fishing right was written into the original treaty. An implied right, like the one discussed in the subcase, (and was also discussed in *Winters* and *Siegrist* in chapter I), is not written on the face of treaty, but is implicated by the purpose of the treaty itself. Despite the differences between the *Idaho Power* case and the instream flow case, and despite *Idaho Power* not being controlling law in the Idaho state courts (*Idaho Power* was decided in a federal court), Judge Wood gave heavy weight to the decision in *Idaho Power*. Judge Wood took the notion from the *Idaho Power* decision that the Nez Perce did not have a right to prevent the destruction of their

fishery and extended it to preventing the Nez Perce from having a water right for fish habitat protection.[99]

The Nez Perce Tribe's case rested upon legal the precedent created by *U.S. v. Adair*. The court in *Adair* had not only considered the right a property right but had gone further and permitted an instream flow to protect a treaty fishing right.[100] In Adair, the Klamath Indians argued that they were entitled to enough water to maintain a marsh they had historically used for fishing and hunting.[101] The opposing argument furthered by the State of Oregon was essentially the same as the arguments of the Nez Perce's adversaries: an entity cannot have a water right without a possessory interest in land.[102] In *Adair*, the Klamath Tribe no longer had a reservation because of the federal termination policy of the 1950s. Although the reservation had been terminated and the tribe no longer had any landholdings, the Tribe's hunting and fishing rights survived termination.[103] The court in *Adair* expressly stated, "The termination of the Reservation and the disposition of all Tribal land did not dispossess the Tribe of water right essential to protect hunting and fishing rights."[104] Here, the court underscored the fact that just because the Tribe did not have any land did not preclude it from having a water right to protect their fishery right.

The instream flow right in *Adair* protects fish habitat in essentially the same way an instream flow right for the Nez Perce would. The SRBA court, however, distinguished the two cases. Judge Barry Wood made the curious distinction that the *Adair* case is about on-reservation water rights.[105] Yet the Klamath Reservation had ceased to exist since the Klamath Termination Act was passed in 1954.[106] Furthermore, because Congress expressly retained the hunting and fishing rights during the termination of the Reservation, Congress intended for those rights to extend beyond the ownership of appurtenant land.[107]

Adair is not the sole case that has determined treaty fishing rights as containing an implied instream water right.[108] The Yakama Nation requested their court-appointed watermaster to allow water to flow to protect Chinook redds (the salmon's underwater nests), which cannot survive absent a cold water flow.[109] The district court directed the watermaster to allow water to flow from the dam despite protests from upstream irrigators. The court decided that the instream flow rights to protect the Nation's fishing rights were preempted by a 1945 decree of water rights (the Yakama Nation's rights were not considered in the 1945 decree).[110] With respect to the SRBA instream flow subcase, it is important to note that the redds in Kittitas were not within the reservation boundaries, but were in fact off-reservation.[111]

Ultimately, the Nez Perce instream flow subcase was decided against the Tribe. Judge Wood determined that not only did treaty fishing rights not include instream flows, but also concluded that the allotment of the Nez Perce Reservation, and the subsequent 1893 Agreement that ceded unalloted lands to the federal government, "diminished" the Nez Perce Reservation, thereby eliminating reserved water rights.[112] This determination was in spite of a "savings clause" in the 1893 Agreement that specifically continued the off-reservation fishing rights of the Tribe.[113]

The subcase rejected the Nez Perce Tribe's claims to instream flows to improve fish habitat. The case was not appealed by the Tribe, as the Nez Perce Tribe was seeking to have Judge Wood disqualified and the decision vacated due to an undisclosed conflict of interest.[114] Judge Wood and his family were both parties to an SRBA proceeding, Judge Wood himself irrigating 13 acres in the Snake River basin, and his family tied to many more irrigated acres.[115] Mediation of the dispute over the Tribe's water rights began before Judge

Wood's summary judgment decision had come out, per a court order.[116] The mediation continued in confidentiality for six years, and the settlement "Term Sheet" outlining the details of the agreement was finally released to the public in 2004.[117] The end of the negotiations did not mean that the settlement was complete, as the agreement had to be ratified by Congress, the Idaho Legislature, and the Nez Perce Tribal Executive Committee. The public engaged in discussion over the proposed settlement; the Tribe spent ten months publicly debating the terms of the agreement, while public meetings were held off-reservation elsewhere in Idaho.[118] Eventually all three governmental bodies ratified the settlement agreement.

The actual terms of the settlement are numerous, but some of the main features of the tribal component of the agreement include: 50,000 acre-feet of on-reservation reserved consumptive water; $50.1 million from the United States deposited into a multiple-use fisheries/water trust fund for the Tribe's use; 200,000 acre-feet of water from Dworshak Reservoir to benefit fish habitat; $23 million for the construction of domestic water and sewer infrastructure for tribal communities; the transfer of the management of the federal fish hatchery at Kooskia over to the Tribe; joint management of the federal fish hatchery at Dworshak; the funding and co-management of a section 6 plan under the Endangered Species Act; and the transfer of 11,000 acres of Bureau of Land Management land to the Bureau of Indian Affairs to be held in trust for the Nez Perce Tribe.[119] Another feature of the settlement that was considered a major concession for the Tribe was that the instream water rights included in the settlement are held in trust by the State, instead of being held by the Tribe. These instream flow rights are established at over 200 sites and were established

with a priority date of April 20, 2004.[120] The Lewiston Orchards were not included in the settlement agreement, having dropped out of settlement negotiations.

From the Tribe's perspective, the settlement was a positive outcome in part because it was able to provide things that the SRBA Court could not. The SRBA Court only had jurisdiction to adjudicate water rights, and could not provide the Tribe with control over tribal natural resources, co-operative management arrangements, or the funding that the settlement achieved. Nez Perce Tribal Chair, Anthony Johnson, stated his opinion on the success of the settlement to the Senate Committee on Indian Affairs in 2004, stating

> This proposed settlement offers a superior model of future conduct, in our relationship with the State of Idaho in particular, when compared with the expensive, time-consuming and uncertain path of litigation. A mutual respect between the State and the Tribe as sovereign governments underlies this proposed agreement in ways that contrast strikingly with the hostility of litigation.[121]

This quote not only reveals the perspective of the Tribe on the settlement, but sheds light on the Tribes general feelings about litigation, and provides insight into future decisions by the Tribe to favor collaboration over litigation.

In both the *Idaho Power* case and the instream flow case the Tribe lost their court battles. The Tribe in both of those cases, however, also settled with its opponents and received compensation and other benefits. These favorable settlements were likely influenced by the body of case law that supports treaty rights as property rights and tribal instream flow rights to protect fish habitat. The Tribe also benefited from significant tribal technical support and governance that did not exist in the 1950s and 1960s when dam building was destroying the fishery.

The Endangered Species Act as an Effective Legal Mechanism

For the Nez Perce, time spent in the courtroom litigating treaty rights has done little to save the Snake River fishery. Although the Nez Perce Indian Water Rights Settlement resulted in some benefits in the form of increased funds and water rights, the anadromous fishery of the Snake River still faces many adverse environmental conditions. Yet, hope remains for the fish, as the Tribe has become deft navigators of the Endangered Species Act's (ESA) contours, using the law to support fish habitat where the courts have failed to effectuate treaty rights. The ESA is presently being used as a catalyst in the Snake River basin to prevent the dewatering of Sweetwater Creek, a tributary to Lapwai Creek, and to reduce the catastrophic fish mortalities caused by the Hells Canyon Complex.

The ESA passed in 1973 as a mechanism to protect and recover biodiversity.[122] The ESA came on the heels of an international effort to protect global biodiversity during a period of an increased willingness to pass environmental laws in the United States. Under the ESA, species of plants and animals may be listed as either "endangered" or "threatened." The degree of protection a species receives under the ESA depends on the category the species is listed under. Species listed as endangered receive the greatest degree of protection under the law.

The ESA is administered by the Fish and Wildlife Service and the National Marine Fisheries Service (NMFS). Anadromous fish, such as salmon and steelhead, are managed with respect to the ESA by NFMS. NMFS lists species under the ESA as required by section 4 of the law. The five factors considered by NMFS before a species is listed include: the present or threatened destruction, modification, or curtailment of the species habitat or range; the overutilization of the species for commercial, recreational, scientific, or

educational purposes; the extent of disease or predation affecting the species' populations; the inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting its continued existence. The listing of a species under the ESA must be based on the best available science and may not take into consideration the potential economic impacts of the listing.[123]

In addition to the listing of species under the ESA, NMFS is also responsible for the designation of critical habitat (for anadromous species) under the law. Critical habitat can be specific areas within the geographical range occupied by the species at the time of listing, if those areas contain certain physical or biological features essential to conservation.[124] Critical habitat can also be other areas lying outside of the geographical area occupied by the species that NMFS determines are essential for the conservation of the species.

The Lewiston Orchards Project (LOP), heavily impacts the hydrology of the region. As discussed in chapters I and II, the Lewiston Orchards began as a private enterprise, became the public Lewiston Orchards Irrigation District in 1922, and the federal government became involved in the mid-1940s. At the time, the irrigation project was failing due to the fact that the irrigation pipes were made of wood and had begun rotting out, causing leakages throughout the system. The cost to repair the irrigation system was too great for LOID to shoulder on its own, and the irrigation district approached the BOR for assistance.

Initially, the BOR was only going to provide financial assistance to the project, but within two years of beginning the project, LOID deeded the Project over to the Bureau.[125] LOID is still active in the delivery of the Project's water, but the Project is administered by the Bureau. The involvement of the Bureau in the administration of the Project water

changed the relationship between the project and the government, and likewise changed the way federal laws apply to the Project.

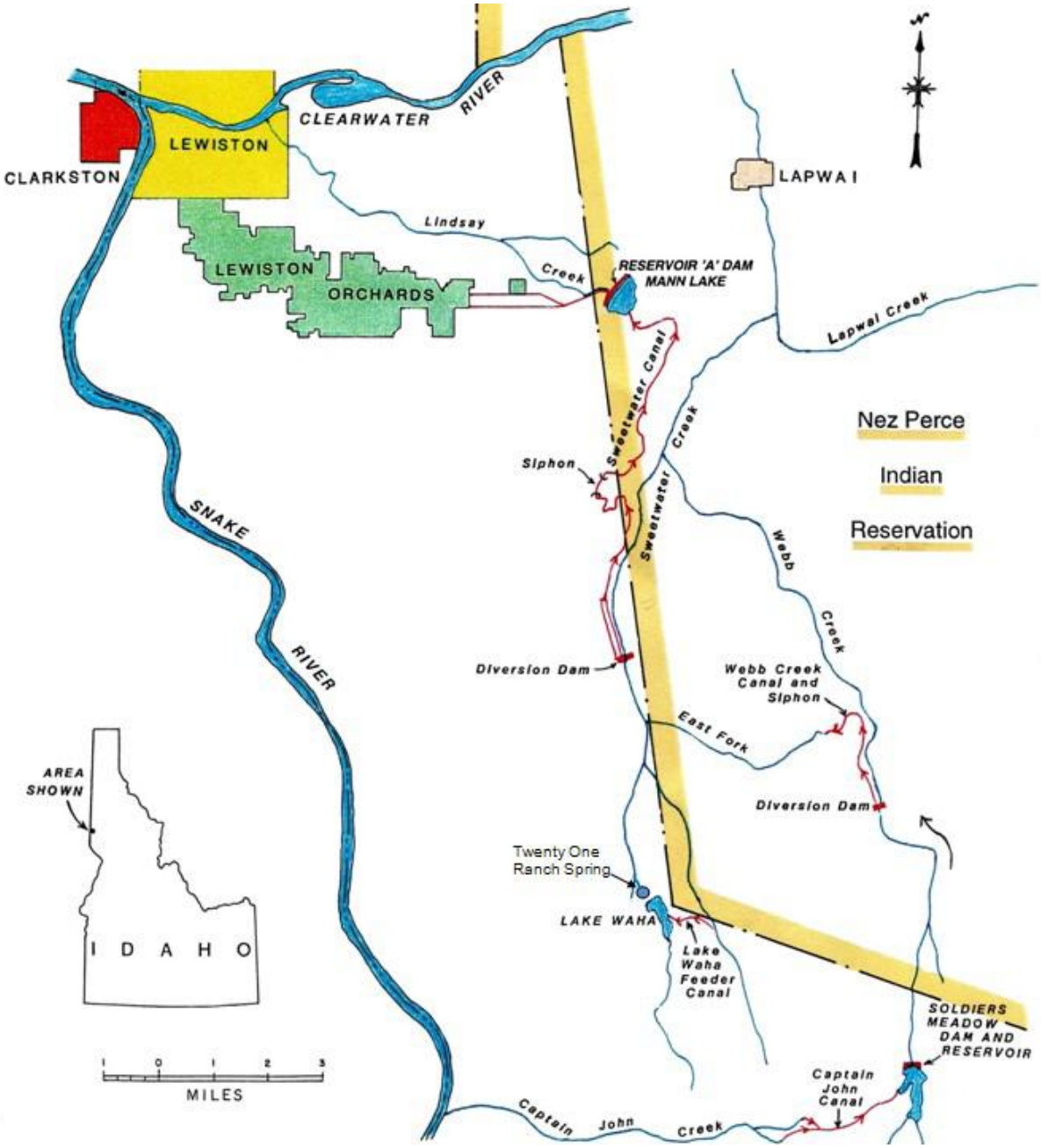

Figure 2: Lewiston Orchards Project Map[126]

In 1992, the NMFS listed the population of Snake River Chinook salmon as threatened. In 1997, Snake River steelhead were also listed.[127] The Chinook and Steelhead populations and habitat in the Lapwai Creek watershed were protected under the listing, implicating the operations of the LOP. After the listing of anadromous Snake River fish in the 1990s, the Bureau consulted with NMFS (with respect to its operations impacting the Snake River watershed, above the Lower Granite Dam) as required under the ESA. This consultation, however, was suspended due to ongoing SRBA negotiations between regional water resource stakeholders. In the meantime, NMFS listed the Sweetwater Creek drainage as critical habitat for steelhead. Eventually, the LOID dropped out of the SRBA negotiations and the consultation between NMFS and the Bureau was subsequently resumed.[128]

During consultation, if an agency believes that its action might affect a listed species, the ESA requires that agency to prepare a Biological Assessment (BA). The BA is supposed to evaluate the potential effects of the agency's action on listed species and designated critical habitat. In spring of 2001, the Bureau delivered to NMFS a BA detailing its operations at the Project and the potential impacts of those operations on steelhead. This BA was supplemental to the larger Snake River BA, and contained information that had been withheld or not available during the adjudication of the Snake River. Instead of focusing the majority of the BA on the impacts of Project water withdrawals on the basin's hydrology, the Bureau instead focused on the effects of curtailing operations of the Project on the irrigation district and area water users. The BA concluded that the operations of Project would not likely adversely affect steelhead, stating that "Since there has been no recent documentation of adult returns of steelhead to Sweetwater Creek, LOID operations

are not likely to adversely affect existing populations of listed anadromous fish in the Lapwai Creek basin."[129]

Essentially, the Bureau relied on the proposition that because they had observed very few steelhead in Sweetwater Creek, they could not impact fish, because there were none there in the first place. Very little biological information was considered during the creation of the 2001 BA to support the finding that steelhead were not present in the creek. After the submission of the supplemental BA to NMFS in 2001, the Nez Perce Tribe conducted fish surveys in Sweetwater Creek and reported the presence of juvenile steelhead in both Sweetwater and Webb Creeks. That the Tribe could dispatch its own scientists to fact check the federal government's science is something that could not be accomplished without the Tribe's significant investment into creating and sustaining its own fish management program. In addition, the fish surveys also reported spawning steelhead in Lapwai Creek near the mouth of Sweetwater Creek.[130]

This new evidence that steelhead were in fact present in Sweetwater Creek prompted a request from NMFS that the Bureau reconsider its findings in the 2001 BA, namely the proposed water withdrawals from Sweetwater Creek. The Bureau, however, declined to reassess the potential effects of the LOP operation, reasoning that a change to the proposed action was not warranted.[131]

Continuing in the consultation process as outlined by the ESA, NMFS issued a draft Biological Opinion (BiOp) to the Bureau. The BiOp is another requirement of the ESA. The purpose of a BiOp is to state NMFS's opinion on whether the agency's action is likely to jeopardize the continued existence of listed species or adversely affect critical habitat. The NMFS's BiOp for the operation of the Project differed from the Bureau's BA in that it

determined the proposed Project operation *would likely* jeopardize fish survival and advised an alternative method of operation. The alternative put forth by NMFS called for a seasonal reduction of water withdrawals. Based on the draft opinion by NMFS, the Bureau agreed to alter its proposed action. Eventually, NMFS and the Bureau came to an agreement as to what action was appropriate given the existence of ESA protected steelhead in Sweetwater Creek.[132]

Outlined in a 2006 BiOp, the LOP operation agreed upon by NMFS and the BOR was a tiered approach that was planned to run for 15 years. The 15-year period was spilt into an initial 10-year period of operation and a later or "long-term" five-year period of operation. During the 10-year period, the operation of the LOP would include a delivery of 1 cfs down Sweetwater Creek during from June through October. This water "delivery" would be subject to exceptions, such as during drought conditions. Under a drought exemption, the minimum flow put forth by the BiOp could be waived one out of three years as long as there was at least two years between drought waivers. Drought conditions were triggered under the BiOp when the storage volume at Soldiers Meadow Reservoir fell below 1800 acre-feet before June.[133] During the later 5-year period of proposed operation, the BOR would ensure a minimum instream flow of 1.5 cfs, to be measured at the toe of the Sweetwater diversion dam. The rationale behind having a graduated schedule of guaranteed instream flows was to provide the irrigation district and the BOR with adequate time to develop new water resources and increase the system's efficiency. Half of the water gained through increased efficiency measures would be returned to Sweetwater Creek. [134]

Having been involved in the agency consultation between NMFS and the BOR, the Nez Perce Tribe disagreed with the final BiOp. The Tribe sued both NMFS and the BOR in

a federal court in Idaho to have the BiOp set aside. In *Nez Perce Tribe v. NOAA Fisheries*, the district court sided with the Tribe and determined that the BiOp was not the product of reasoned scientific analysis. Despite the fact that the court deferred to the agency's decision, the court found that the instream flow schedule proposed by the agencies provided no assurance that steelhead habitat would improve. As a result, the court set aside the BiOp and the BOR and NMFS went back to the drawing board to come up with a new plan for the operation of LOP. [135]

In the meantime, area water resource stakeholders, recognizing the precarious balancing act the federal agencies were in, with domestic water users and irrigators pitted against the Tribe and protected fish, and weighed in on the controversy. The Nez Perce Tribe, LOID, the City of Lewiston, Nez Perce County, and the Lewiston Chamber of Commerce signed a Memorandum of Understanding (MOU) that put forth common goals among the stakeholders.[136] Although not legally binding, the MOU advanced three steps that could be taken to alleviate water conflict in the area. The first step would be to pursue a new water intake system from the Clearwater River to replace the existing system's reliance on Lapwai basin water. The newly envisioned system would be capable of providing 8500 acre-feet to the LOID service area without diverting water from Sweetwater Creek. The next step would be the securing of funding to pay for the proposed Clearwater River intake system and for the disposition of the current LOP system. The final step would be to transfer the current LOP system to the Nez Perce Tribe so that the Tribe may address the habitat impacts that had been created by the operation of the LOP.[137]

The MOU signaled a change from the adversarial past between the parties, where the Tribe sued the agencies under the ESA to get results, to a more collaborative effort. Likely a

recognition by the parties that the status quo was no longer an available option (because of the requirements of the ESA) and that continued litigation would be time consuming and costly. The Nez Perce Tribe, after the SRBA settlement, indicated its preference for collaboration over litigation, and the MOU likewise supports that sentiment.

In 2010, NMFS released its new BiOp outlining the operations of the LOP.[138] Although the action proposed in the BiOp still diverts water from Sweetwater Creek, it provides more habitat protection for the watershed's steelhead populations. In the 2010 BiOp NMFS unsurprisingly removed the short-term (10 year) flow period from the LOP operations altogether. Also removed from the previous BiOp was the drought exemption. The new minimum stream flow became 2.5 cfs at Sweetwater Creek (this was the higher, long-term value under the old BiOp) and 1.0 cfs at Webb Creek. These minimum stream flows became immediately effective when the new BiOp was signed.[139] Currently, the 2010 BiOp still controls the operations at LOP. The BiOp will likely remain effective until a pump-exchange program such as the one envisioned in the MOU becomes operational.

The ESA similarly impacts the operation of long-standing water resource infrastructure in Hells Canyon. The FPC license granted to Idaho Power in 1955 has expired and the utility company must not comply with environmental laws, such as the ESA, that were not in existence at the time of issue of the original license. As discussed in chapter II, in 1920 Congress sought to increase the regulation of hydropower projects and passed the Federal Power Act. The Act created the Federal Power Commission (FPC), which was charged with the coordination of dams under the control of the federal government.[140] The Federal Power Act has been amended many times since it was first enacted, and many of the amendments increased the regulatory oversight of the FPC. The energy crises of the 1970s

prompted Congress to pass the Department of Energy Organization Act in 1977. This Act, among other things, abolished the FPC and replaced it with the Federal Regulatory Energy Commission (FERC).[141]

Today FERC remains an independent federal regulatory agency within the Department of Energy. FERC's decisions are not reviewable by either the President or Congress, but may be challenged in court. The five FERC commissioners are appointed by the President and then must be confirmed by the Senate; the commissioners serve five-year terms. FERC is charged with numerous energy-related responsibilities, from the regulation of energy rates to overseeing and approving mergers within energy corporations. One of the most visible things that FERC does in the view of a westerner's eye is license and relicense hydropower projects. To apply for a hydropower license, a potential licensee must follow a lengthy application process. The application includes scoping documents, preliminary studies, draft licenses, and other documentation required by federal law.[142]

The ESA also can place certain requirements on the FERC licensing/relicensing process. In addition to the agency consultation requirements of section 7 of the act, section 10 provides a permit requirement when an activity results in an "incidental take" of a species. An incidental take happens when an ESA protected species is harmed by an otherwise lawful activity when the take results from an agency action whose purpose was not to harm or take a protected species.[143]

The applicability of the ESA to federal dams has been affirmed by the Supreme Court.[144] In *Tennessee Valley Authority v. Hill* (*TVA*) the Court determined that the ESA prevented the operation of a nearly completed federal dam project because of the potential negative effects on ESA protected species.[145] In the *TVA* case, the Tellico Dam was nearing

completion on the Little Tennessee River amidst a sonorous outcry by a variety of environmental groups. As the controversy ensued, a discovery was made in the waters of the Little Tennessee: a new species of snail darter endemic to the river. The snail darter was quickly added to the endangered species list, and the Little Tennessee River was designated as the snail's critical habitat. Despite the listing, Congress sought to hasten the completion of Tellico Dam and appropriated money to meet that goal. In response, the *TVA* suit was filed to enjoin the completion and operation of the dam. The Court found the language prohibiting action that might jeopardize a species to be unambiguous stating, "One would be very hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act."[146] Recognizing that to enjoin the operation of Tellico Dam indefinitely would result in the appearance of a wasted dam, the Court looked to Congress's intent when it passed the ESA, and determine that Congress had meant to afford endangered species the highest of priorities.[147]

As discussed in chapter III, the operation of the three dams in the Hells Canyon Complex produced disastrous effects on the Snake River fishery. In 1955, when the initial federal license for the operation of the dams was issued the National Environmental Policy Act, the Clean Water Act, and the ESA did not exist yet. After the listing of several Snake River fish, but before the 1955 license expired, groups called on FERC to enter into section 7 consultation due to the ongoing operation impacts the Complex had on ESA listed fish.[148] In fact, NMFS twice requested that FERC initiate formal consultation concerning the ongoing operations of the Hells Canyon Complex in 1997.[149] Letters sent from NMFS to FERC claimed that the operations at the Complex were likely going to adversely affect listed fish species and their designated critical habitat. NMFS further directed FERC to

begin preparing a BA evaluating the potential impacts on protected fish caused by the operation of the Hells Canyon Complex.

Instead of preparing a BA on the interim operation of the Complex, FERC directed Idaho Power to prepare a BA.[150] In 1998, Idaho Power filed a BA first with FERC, and then with NMFS. Another draft of the BA was completed the following year. NMFS soon began working on a BiOp, which was finished in June of 2000. According to some reports, FERC was so displeased with NMFS's BiOp that they ended the consultation.[151] In other reports, NFMS was furious over the FERC comments to the BiOp and ended the consultation.[152] Either way, the BiOp was shelved.

Increasing the sensitivity of the matter was the fact that the SRBA negotiations were going on simultaneously in Idaho state court. The SRBA negotiations between the Nez Perce Tribe, Idaho Power, and various other governmental and private entities, were sure to, and did, affect the ESA matters. Moreover, parties to the settlement negotiations were bound by a protection order prohibiting them from disclosing information about the settlement to third parties. This meant that Idaho Power and NMFS would both become privy to information that they would be unable to disclose to FERC.[153]

Despite the previous tensions between FERC and NMFS, the two parties restarted their consultation effort. FERC requested formal consultation in 2003, and in 2004, FERC additionally granted a request dating back to 1997 for FERC to begin consultation regarding the operations of Hells Canyon.[154] During 2003, Idaho Power submitted to FERC its application for a renewed operating license. Idaho Power's license to operate the Hells Canyon Complex was set to last 50 years and would be expiring in 2005.

Unfortunately for Idaho Power, the two years "head start" it gave itself to renew its hydropower license was woefully inadequate. Every year after 2005, Idaho Power has had to request an annual license from FERC to operate the Complex in the meantime as the renewal process drags on. The ESA is not the only new law that Idaho Power must satisfy to be relicensed, as the Clean Water Act 401 certification also poses a new challenge for the utility. Additionally, advocates for fish habitat, such as the Nez Perce Tribe have more resources, expertise, and experience than they did during the initial 1955 licensing proceedings. The Nez Perce Tribe has consistently proved their commitment to the exercising of the treaty fishing rights, and will likely continue to do so, as the obstacles to sustaining populations of anadromous fish are ever increasing in their complexity.

Increasing urbanization, failed and non-existent fish mitigation, and blatant disregard for the needs of other life forms has greatly impaired anadromous fish, the aboriginal food source of great cultural significance to the Nez Perce Tribe. So important were the fish to the Tribe that the inclusion of the right to fish in their aboriginal homeland was retained by the Tribe, despite giving up the land itself. Treaty rights represent a direct, bargained for exchange with the federal government. The canons of Indian treaty construction recognize this and seek to place Native American tribes on equal footing with the government, despite obvious disadvantages in bargaining power. Since the signing of the original treaty, the government has repeatedly failed to protect the Tribe's rights and fulfill its fiduciary duty. It is no coincidence that the Tribe's fortune began to change shortly after the Indian self-determination movement began changing the tribal-federal relationship.

Despite the doctrinal attempt to rectify the Tribe's disadvantaged position and effectuate the treaties as the Indians would have understood them, tribes are still fighting

unsuccessfully for rights they have had for over 150 years. One reason behind this is that the challenges facing society today could have never been dreamt of during the era of treaty-making. Massive dams block thousands of miles of fish habitat; irrigation projects dewater entire reaches of streams. Today's environmental realities could not have been contemplated by the parties at Walla Walla, who themselves were only beginning to marvel at the telegraph and the singing plow. Here, a problem and a lesson present themselves. The problem is the interpretation of treaties in light of the significant changed and unforeseeable circumstances, and the lesson is that resource decisions intending to be long-lasting must be capable of adapting to change.

Thankfully, with respect to the problem of interpretation, a body of law exists to guide us. Starting with *Winans*, which stands for the proclamation that the federal government did not "give" the Native Americans their rights, and that instead the rights had always existed and the tribes merely retained what they did not expressly relinquish. Other cases exist that clarify the extent of treaty rights, whether they arise out of express provisions within the treaty, or if they emerge out of the government's larger purpose behind creating a reservation of land. Unfortunately, despite a relatively cogent body of law with respect to treaty rights, the Nez Perce Tribe has been unable to adequately protect is precious fishery resources.

Instead, the Tribe has increasingly looked to environmental law and collaboration between governments to protect and restore the Snake River fishery. The ESA is one environmental law that the courts have applied stringently.[155] The Tribe can continue to use the ESA to add pressure to federal agencies whose actions may impact the Snake River fishery or can sue agencies when they fail to meet their legal requirements under the statute.

The empowerment of the Tribe to administer its own tribal programs and share technical expertise with other Columbia River Treaty tribes is a product of a social change that shifted the institutional structure of tribal government. As a result, the Tribe was able to increase its sophistication and began actively participating in the management of fishery resources and challenging the actions of both government and private entities in court. The willingness of the federal government to better protect fish habit, as evidenced by the current revised operations of the Lewiston Orchards Project, are a direct result of the Tribe's success in the courtroom. But legal action by the Tribe has not always been successful, and this uncertainly provides an incentive for water resource stakeholders to resolve their issues outside of court. The current collaboration and recognition by the government and private actors of the Tribe's powerful position in these disputes is reason to feel optimistic about the future of Nez Perce Country.

CHAPTER FOUR NOTES

[1] Washington Public Power Supply System v. Federal Power Commission, 358 F.2d 840 (D.C. Cir 1966).

[2] *New York Times,* "Utilities Assail Udall for Views on Power Plan," July 8, 1962.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Udall v. Federal Power Commission, 386 U.S. 428, 432 (1967).

[7] Washington Public Power Supply System v. Federal Power Commission.

[8] Udall v. Federal Power Commission, 434.

[9] Ibid., 437.

[10] Ibid., 438-440 and 443-444.

[11] Ibid., 450.

[12] Adam M. Sowards, *The Environmental Justice: William O. Douglas and American Conservation* (Corvallis: University of Oregon Press, 2009), 122; Karl Boyd Brooks, *Public Power, Private Dams: The Hells Canyon High Dam Controversy (*Seattle: University of Washington Press, 2006), 221.

[13] Charles Wilkinson, "Indian Tribal Rights and the National Forests: the Case of the Aboriginal Lands of the Nez Perce Tribe," *Idaho Law Review* (1998), 446.

[14] Executive Order No. 11399, Code of Federal Regulations, Title 3 p. 105 (1968).

[15] Charles Wilkinson, "Indian Tribal Rights and the National Forests," 446.

[16] Jeff R. Keohane, "The Rise of Tribal Self-Determination and Economic Development," *Human Rights* (Spring, 2006): 9.

[17] Dan Landeen and Allen Pinkham, *Salmon and His People: Fish and Fishing in Nez Perce Culture* (Lewiston: Confluence Press, 1999), xv.

[18] Sibyl Diver, "Columbia River Tribal Fisheries: Life History Stages of a Co-Management Solution," in *Keystone Nations: Indigenous Peoples and Salmon Across the North Pacific*, Benedict J. Columbi and James H. Brooks eds. (Santa Fe: School For Advanced Research Press, 2012), 214.

[19] Ibid., 215.

[20] Dan Landeen and Allen Pinkham, *Salmon and his People*, xvi.

[21] Johnny Johnson, "Nez Perce Tribe Planning to Start Own Fish Program," *Lewiston Morning Tribune*, June 22 1983.

[22] Sibyl Diver, "Columbia River Tribal Fisheries: Life History Stages of a Co-Management Solution," 216-217.

[23] *New York Times*, "Idaho Fears Clash on Indian Fishing Rights," May 21, 1977.

[24] Ibid.

[25] Dan Landeen and Allen Pinkham, *Salmon and His People*, 117.

[26] Ibid., 118.

[27] *Lewiston Morning Tribune*, "Greenley Says Idaho Power Shrinking Fish Mitigation Duties," May 31, 1977.

[28] Ibid.

[29] Dan Landeen and Allen Pinkham, *Salmon and His People*, 117.

[30] Ibid., 118.

[31] Angelique EagleWoman, "Tribal Hunting and Fishing Lifeways and Tribal and State Relations in Idaho," *Idaho Law Review* (2009): 111.

[32] Dan Landeen and Allen Pinkham, *Salmon and His People*, 119.

[33] Ibid., 120.

[34] *Spokane Daily Chronicle*, "Judge Dismisses Indian Fishing Counts," March 3, 1981.

[35] Angelique EagleWoman, "Tribal Hunting and Fishing Lifeways and Tribal and State Relations in Idaho," 114.

[36] Doug Nash in Dan Landeen and Allen Pinkham, *Salmon and His People*, 119.

[37] Fish habitat in Nez Percy Country is impacted by a variety human activities, including deforestation, mining, agriculture, and urban growth. This thesis focuses on but one form of human impact: the development of water resources.

[38] Nez Perce Tribe v. Idaho Power, 847 F.Supp 791, 794 (D. Idaho 1994).
[39] Ibid.
[40] United States v. Winans, 198 U.S. 371, 381 (1905).
[41] Michael Blumm and James Brunberg, "Not Much Less Necessary… Than the Atmosphere They Breathed": Salmon, Indian Treaties, and the Supreme Court- A Centennial Remembrance of United States v. Winans and its Enduring Significance, *Natural Resources Journal* 46 (2006): 522.
[42] Ibid., 524.
[43] Ibid.
[44] Ibid.
[45] Ibid., 380.
[46] Ibid.
[47] Ibid., 378-79.
[48] Tulee v. Washington, 315 US 681 (1942).
[49] Ibid.,681.
[50] Ibid., 682.
[51] Ibid., 685.
[52] Ibid., 684.
[53] Puyallup Tribe v. Department of Game of the State of Washington, 391U.S. 392, 401 (1968).
[54] Ibid. at 398.
[55] Ibid. at 399.
[56] Department of Game of the State of Washington v. Puyallup Tribe, 414 U.S. 44, 46-47 (1973).
[57] Ibid. at 48.
[58] Puyallup Tribe, Inc. v. Department of Game of State of Washington, 433 U.S. 165, 177 (1977).
[59] Ibid.
[60] Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).
[61] Brian Perron, "When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty: The Case for Money Damages when Treaty-Reserved Fish Habitat is Degraded," *William and Mary Environmental Law and Policy Review* 25 (2001:) 783, 793.
[62] Sohappy v. Smith, 904-905.
[63] Brian Perron, "When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty," 793.
[64] Sohappy v. Smith. 908.
[65] Ibid. at 911.
[66] Michael Blumm and Brett Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest, a Property Rights Approach," 69 *University of Colorado Law Review* (1998): 455.
[67] Ibid.
[68] U.S. v. State of Washington, 384 F.Supp. 312, 341-343 (W. D. Wash. 1974).
[69] Ibid.
[70] Brian Perron, "When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty," 795.
[71] Michael Blumm and Brett Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest, a Property Rights Approach," 456.
[72] Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).
[73] Ibid.
[74] Ibid. at 685.
[75] Ibid.
[76] Ibid.
[77] U.S. v. State of Washington, 506 F.Supp. 187 (W. D. Wash. 1980).
[78] Ibid.
[79] Ibid. at 194.
[80] Ibid. at 197.
[81] Ibid. at 203.
[82] Ibid.

[83] Brian Perron, "When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty," 798.

[84] Washington v. Washington State Commercial Passenger Fishing Vessel Association, 678.

[85] 847 F. Supp 791 (D. Idaho 1994).

[86] 16 U.S.C. §803(c) (1994).

[87] Nez Perce Tribe v. Idaho Power Company, 847 F. Supp. 791, 816-817 (D. Idaho 1994).

[88] Ibid. at 794.

[89] Plaintiff's Brief, supra note 10.

[90] Nez Perce Tribe v. Idaho Power Company, 795-796.

[91] Ibid., 796.

[92] United States v. Winans, 380.

[93] Michael Blumm et.al., "Judicial Termination of Treaty Water Rights: the Snake River Case," *Idaho Law Review,* (2000): note 120.

[94] David Shaw, "Snake River Basin Water Right Adjudication," Idaho Department of Water Resources, http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/SRBA_Court/PDFs/history.pdf (accessed on October 3, 2013).

[95] Steven W. Strack, "Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty over Idaho Water and Promote Intergovernmental Cooperation," *Idaho Law Review* (2006): 635.

[96] Ibid., 635-636.

[97] K. Heidi Gudgell et. al., "The Nez Perce Tribe's Perspective on the Settlement of its Water Right Claims in the Snake River Adjudication," *Idaho Law Review* (2006): 572-573.

[98] In re SRBA, Case No. 39576 Consolidated Subcase 03-10022 (Idaho 5th Dist.Ct, 1999).

[99] Ibid., 36-37.

[100] U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1983).

[101] U.S. v. Adair, 478 F. Supp. 336 (1976).

[102] Ibid. at 343.

[103] Ibid. at 342.

[104] Ibid. at 345.

[105] In re SRBA, Case No. 39576 Consolidated Subcase 03-10022, 39.

[106] 25 U.S.C. 564 et seq.

[107] Michael Blumm et.al., "Judicial Termination of Treaty Water Rights: the Snake River Case," 469.

[108] Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F. 2d 1032 (9th Cir. 1985).

[109] Ibid. at 1033-34.

[110] Ibid. at 1035.

[111] Michael Blumm et.al., "Judicial Termination of Treaty Water Rights: the Snake River Case," 469.

[112] In re SRBA, Case No. 39576 Consolidated Subcase 03-10022, 46

[113] "1893 Nez Perce Agreement," 28 Stat. 326 (1894).

[114] Steven W. Strack, "Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty over Idaho Water and Promote Intergovernmental Cooperation," 654.

[115] Michael Blumm et.al., "Judicial Termination of Treaty Water Rights: the Snake River Case," 474-475.

[116] Alexander Hayes V, "The Nez Perce Water Rights Settlement and the Revolution in Indian Country," *Environmental Law*, (Summer 2006): 887.

[117] Steven W. Strack, "Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty over Idaho Water and Promote Intergovernmental Cooperation," 655.

[118] K. Heidi Gudgell et. al., "The Nez Perce Tribe's Perspective on the Settlement of its Water Right Claims in the Snake River Adjudication," Idaho Law Review (2006): 588-589.

[119] Term Sheet of the Snake River Water Rights Settlement.

[120] K. Heidi Gudgell et. al., "The Nez Perce Tribe's Perspective on the Settlement of its Water Right Claims in the Snake River Adjudication," 589-590.

[121] Ibid., 593.
[122] Endangered Species Act, 16 U.S.C. §1531-1544 (2011).
[123] Ibid.
[124] 16 U.S.C. §1532. (2011).
[125] National Marine Fisheries Service, "Endangered Species Act – Section 7 Formal Consultation Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Operation and Maintenance of the Lewiston Orchards Project Snake River Basin Steelhead, Snake River spring/summer Chinook Salmon, Snake River Fall Chinook Salmon, and Snake River sockeye Salmon Lewiston Orchards Project," April 15, 2010, 1. Referred to hereafter as "NFMS, 2010 Biological Opinion."
[126] Ibid., 2.
[127] National Oceanic and Atmospheric Administration, "Five Year Review: Summary and Evaluation of Snake River Sockeye, Snake River Spring-Summer Chinook, Snake River Fall-Run Chinook, Snake River Basin Steelhead," July 26, 2011, 4.
[128] NMFS, 2010 Biological Opinion, 3.
[129] Bureau of Reclamation, "Supplemental Biological Assessment on Lewiston Orchards Irrigation District," April 2001, 15.
[130] NMFS, 2010 Biological Opinion, 3.
[131] Ibid.
[132] Ibid., 3-4.
[133] Nez Perce Tribe v. NOAA Fisheries, not reported (D. Idaho 2008), 10.
[134] NMFS, 2010 Biological Opinion, 6-7.
[135] Nez Perce Tribe v. NOAA Fisheries, 29.
[136] "Memorandum of Understanding between the Lewiston Orchards Irrigation District, the Nez Perce Tribe, the City of Lewiston, Nez Perce County, and the Lewiston Chamber of Commerce," July 10, 2009, http://www.loid.net/uploads/20090710093634327%20(2).pdf (accessed November 21, 2013).
[137] Ibid.
[138] NMFS, 2010 Biological Opinion, 6-10.
[139] Ibid.
[140] *Federal Power Act*, 16 U.S.C. 791-828c (2011).
[141] *Department of Energy Organization Act of 1977*, Pub. L. 95-91, 91 Stat. 565.
[142] Federal Energy Regulatory Commission "Licensing," FERC http://www.ferc.gov/industries/hydropower/gen-info/licensing.asp (accessed on November 29, 2013).
[143] Code of Federal Regulations, Wildlife and Fisheries, Title 50, sec. 402.02.
[144] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
[145] Ibid.
[146] Ibid., 173.
[147] Ibid., 174.
[148] James M. Lynch, "Effect of ESA Listing on the Operation of FERC-Licensed Projects: the Hells Canyon example and beyond," *Fordham Environmental Law Journal* 10 (1999): 271.
[149] Ibid., 279.
[150] Ibid.
[151] Karen Mockler, "Agencies tangle over Hells Canyon Dams," *High Country News*, November 5, 2001.
[152] Federal Energy Regulatory Commission, "FERC Order of August 6, 2004," http://www.ferc.gov/whats-new/comm-meet/072804/H-8.pdf (accessed on October 21, 2013).
[153] Ibid.
[154] Ibid.
[155] Tennessee Valley Authority v. Hill provides an example of this.

CHAPTER FIVE: CONCLUSION

Steelhead and Chinook remain threatened under the Endangered Species Act. In an effort to reduce the impacts of water withdrawals from the Lewiston Orchards Project, a study is ongoing that investigates the possibility of constructing a pump-exchange on the Clearwater River that would bring water from the river up into the Orchards, thus making withdrawals from the Lapwai Creek watershed unnecessary.[1] The undertaking of this study is the result of a collaborative effort among water resource stakeholders to find a lasting solution to the water allocation issues that have plagued the watershed for nearly 100 years.

Although a similar pump-exchange plan was put to voters and rejected in the 1970s, different circumstances in the current social and ecological landscape make the pump-exchange a more attractive option presently compared to when it was the idea was first considered. One reason for this is because there exists a real threat of a lawsuit by the Nez Perce Tribe either under the Endangered Species Act or under a treaty rights theory. The uncertainty and the expense of a lawsuit have brought the regional water resource stakeholders to the table in an effort to procure more favorable and dynamic outcomes. An important lesson of Nez Perce Country is the importance of having that ability to be able to adapt to changing and unforeseen circumstances.

The Idaho Power Company is in its 13th year of operation under a temporary extension of its federal license. The added requirements of the Endangered Species Act, and other environmental laws have drastically changed the future course of business in Hells Canyon. Unlike the Federal Power Commission proceedings in the early 1950s as Idaho Power was an applicant for a hydropower license in Hells Canyon, the Tribe now has a place at the bargaining table and has the expertise to be a powerful stakeholder.

These conflicting interests have existed on the landscape for years. Created largely by the federal government, when it simultaneously incentivized the development of Nez Perce Country while under the responsibility to protect the Tribe's interests, the implications of these competing interests still persist. The entrenchment of rights and the inertia of the status quo are powerful forces to reconcile. However, changing values such as the environmental and social values that the 1960s and 1970s are known for can be an equally powerful force. When changing social values influence the creation of laws and are reflected in court decisions, funding opportunities, and policy, they can overcome the status quo and produce lasting impacts.

While the story of water rights in Nez Perce Country is unique because it contains unique people, places, and events, it also falls within a pattern of resource use in the West. Many western watersheds are ecologically impacted by resource development primarily interested in economic gain. These economic uses are often pitted against the more intangible benefits of the ecological uses. Fish versus farmers is a well known tale in the West and a story like that of Nez Perce Country, one that results in an equitable and functional decision-making process with a focus on collaboration, could be instructive in other basins.

This study of Nez Perce Country is unable to predict the outcome of resource conflicts on the landscape, let alone future clashes over resources elsewhere, but lessons such as the danger of absolute faith in a technological fix, the trouble inherent in ignoring competing interests in resources, and the problem of blind continuation of the status quo might well inform current resource use in the hydraulic fracturing of North Dakota, where environmental degradation is overlooked because of the newest boom industry west of the

Mississippi.[2] That the decline in the anadromous fishery was the result of choosing an economic gain over ecological stability may prove to be yet another irony, as millions of dollars each year go into mitigation and fish propagation, and perhaps soon even greater sums of money will be spent on studies appraising the wisdom of tearing the dams down and allowing a new list of unknowns to alter Nez Perce Country.

CHAPTER FIVE NOTES

[1] Information regarding the proposed pump-exchange project in the following study: JUB Engineers, "Lower Clearwater Exchange Project Appraisal Study," September 2011, http://www.loid.net/uploads/PDFs/LCEP-Appraisal-Study.pdf (accessed November 24, 2013).

[2] Clifford Krauss, "In North Dakota, Wasted Natural Gas Flickers Against the Sky," *New York Times*, September 26, 2011.

BIBLIOGRAPHY

Archival and Manuscript Sources

Houghton Library, Harvard University, Cambridge, MA.
Samuel J. and Isabel Barrows Papers

National Archives, Bureau of Indian Affairs Collection, Seattle, WA

National Archives, Bureau of Reclamation Collection, Denver, CO

University of California Riverside, Orbach Science Library, Riverside, CA.
James D. Schuyler Papers

Washington State University Library Special Collections, Pullman, WA
Henry Harmon Spalding Papers

Newspapers and Newsmagazines

Commercial and Financial Chronicle

Deseret News

Lewiston Morning Tribune

Lewiston Orchards Life

Lewiston Teller

Eastern Oregonian

High Country News

Morning Oregonian

New York Times

Reclamation Era

Spokane Daily Chronicle

Spokesman-Review

Sunday Oregonian

Weekly Oregonian

Court Cases

Conrad Investment Company v. United States, 161 F. 829 (9th Cir. 1908).

Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44 (1973).

Idaho Power Company v. Federal Power Commission, 189 F.2d 665 (D.C. Cir. 1951).

In re Idaho Power Company, 14 F.P.C. 55 (1955).

Johnson v. M'Intosh, 21 U.S. 543 (1823).

King et. al. v. Barr et. al., 262 F. 56 (9th Cir. 1920).

Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F. 2d 1032 (9th Cir. 1985).

National Hells Canyon Association v. Federal Power Commission, 237 F.2d 777 (D.C. Cir. 1956).

Nez Perce Tribe v. Idaho Power Company, 847 F. Supp. 791 (D. Idaho 1994).

Nez Perce Tribe v. NOAA Fisheries, (D. Idaho 2008).

Powers v. Security Savings and Trust Co., 38 Idaho 289 (1923).

Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968).

Puyallup Tribe v. Department of Game of Washington, 433 U.S. 165 (1977).

Siegrist v. Lewiston Sweetwater/Sweetwater Irrigation and Power (D.C. Idaho 1916).

Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

Tulee v. Washington, 315 US 681 (1942).

Udall v. Federal Power Commission, 386 U.S. 428 (1967).

United States v. Adair, 478 F. Supp. 336 (D. Or. 1976).

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

United States. v. State of Washington, 384 F.Supp. 312 (W. D. Wash. 1974).

United States v. State of Washington, 506 F.Supp. 187 (W. D. Wash. 1980).

United States v. Winans, 198 U.S. 371 (1905).

Waha v. Sweetwater, 158 F. 137 (C.C. Idaho 1907).

Washington Public Power Supply System v. Federal Power Commission, 358 F.2d 840 (D.C. Cir 1966).

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

Winters v. United States, 207 U.S. 564 (1908).

Government Documents

David, George W., Leslie J. Perry, and Joseph W. Kirkley, eds. *War of the Rebellion: A Compilation of the Official Reocrds of the Union and Confederate Armies, Volume II*. Washington D.C.: Government Printing Office, 1897.

Federal Power Commission. *Second Annual Report of the Federal Power Commission*, June 30, 1922. Washington: Government Printing Office, 1922.

Idaho Public Utilities Commission. *Ninth Annual Report of the Public Utilities Commission of the State of Idaho.* Caldwell: The Caxton Printers, Limited, 1922.

U.S. Bureau of the Census. *Central Electric Light and Power Stations and Street and Electrical Railways with Summary of Electrical Industries 1912.* Washington D.C.: Government Printing Office, 1915.

U.S. Bureau of the Census. *Central Electric Light and Power Stations 1927.* Washington D.C.: Government Printing Office, 1930.

U.S. Office of Indian Affairs. *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877*. Washington: Government Printing Office, 1877.

U.S. Department of the Interior. *Annual Report of the Commissioner of Indian Affairs, 1873.* Washington, D.C.: Government Printing Office.

Greene, Daniel M., ed. *Decisions of the Department of the Interior in Cases Related to Public Lands.* Washington D.C., Government Printing Office, 1922.

Books and Articles

Alagona, Peter S., John Sandlos, and Yolanda F. Wiersma. "Past Imperfect: Ecology and Baseline Data for Conservation and Restoration Projects in North America." *Environmental Philosophy* 9 (2012): 49-70.

Anderson, Terry L., and Peter J. Hill. *The Not So Wild West: Property Rights and the Frontier*. Stanford: Stanford University Press, 2004.

Arneson, James. "Property Concepts of 19th Century Indians." *Oregon Historical Quarterly* 81, no. 4 (Winter 1980): 391-422.

Baird, Dennis, Diane Mallickan, and W.R. Swagerty, eds. *The Nez Perce Nation Divided: Firsthand Accounts of Events Leading to the 1863 Treaty.* Moscow: University of Idaho Press, 2002.

Baird, Dennis, ed. *Reports on the Aftermath of the 1863 Nez Perce Treaty by Chief Lawyer, Governor Caleb Lyon, General Benjamin Alvord and Indian Agent James O'Neil*. Moscow: University of Idaho Press, 1999.

Bancroft, Fredric, ed. *The Speeches, Correspondence and Political Papers of Carl Schurz.* New York: G.P. Putnam's Sons, 1913.

Barber, Katrine. *Death of Celilo Falls*. Seattle: University of Washington Press, 2005.

Becker, Lawrence C. *Property Rights: Philosophic Foundations.* London: Routledge & Kegan Paul, 1977.

Blumm, Michael, and James Brunberg, "'Not Much Less Necessary… Than the Atmosphere They Breathed': Salmon, Indian Treaties, and the Supreme Court- A Centennial Remembrance of United States v. Winans and its Enduring Significance." *Natural Resources Journal* 46 (2006): 489-546.

———, and Brett Swift, "The Indian treaty piscary profit and habitat protection in the Pacific Northwest, a property rights approach." *University of Colorado Law Review* 69 (1998): 407-502.

———, Dale D. Goble, Judith V. Royster, and Mary Christina Wood. "Judicial Termination of Treaty Water Rights: The Snake River Case." *Idaho Law Review* 36 (2000): 449-477.

Brooks, Karl Boyd. *Public Power, Private Dams: The Hells Canyon High Dam Controversy*. Seattle: University of Washington Press, 2006.

Columbi, Benedict J., and James H. Brooks eds. *Keystone Nations: Indigenous Peoples and Salmon Across the North Pacific*. Santa Fe: School For Advanced Research Press, 2012.

Cosens, Barbara, ed. *Transboundary River Governance in the Face of Uncertainty: The Columbia River Treaty Revisited.* Corvallis: Oregon State University Press, 2012.

Cronon, William. *Changes in the Land: Indians, Colonists, and the Ecology of New England.* New York: Hill & Wang, 1983.

Demsetz, Harrold. "Toward a Theory of Property Rights." *Americans Economic Review 57* (1967): 347-359.

Doremus, Holly, and A. Dan Tarlock. *Water War in the Klamath Basin: Macho Law, Combat Biology, and Dirty Politics.* Washington D.C., Island Press, 2008.

Drury, Cliford Merrill. *Henry Harmon Spalding.* Caldwell: The Caxton Printers, Ltd., 1936.

———. "The Nez Perce 'Delegation' of 1831." *Oregon Historical Quarterly* 40, no. 3 (1939): 283-287.

Dupris, Joseph C., Kathleen S. Hill, William H. Rodgers, Jr. *The Si'lailo Way: Indians, Salmon and Law on the Columbia River.* Durham: Carolina Academic Press, 2006.

EagleWoman, Angelique. "Tribal Hunting and Fishing Lifeways and Tribal and State Relations in Idaho." *Idaho Law Review* 46 (2009): 81-117.

Gay, Jane E. *With the Nez Perces*. Lincoln: University of Nebraska Press, 1981.

Goble, Dale D., and Paul W. Hirt. *Northwest Lands, Northwest Peoples: Readings in Environmental History.* Seattle: University of Washington Press, 1999.

Greenwald, Emily. *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act.* Albuqueque: University of New Mexico Press, 2002.

Gudgell, Heidi K., Steven C. Moore, and Geoffery Whiting. "The Nez Perce Tribe's Perspective on the Settlement of Its Water Right Claims in the Snake River Basin Adjudication." *Idaho Law Review* 42 (2006): 563-593.

Haines, Francis. "The Nez Perce Delegation to St. Louis in 1831." *Pacific Historical Review* 6, no. 1 (1937): 71-78.

Hays, Alexander V. "The Nez Perce Water Rights Settlement and the Revolution in Indian Country." 36 *Environmental Law* (Summer 2006): 869-902.

Hirt, Paul W. *The Wired Northwest: The History of Electric Power, 1870s-1970s.* Lawrence: University Press of Kansas, 2012.

——— and Adam M. Sowards. "The Past and Future of the Columbia River." In *Transboundary River Governance in the Face of Uncertainty: The Columbia River Treaty Revisited,* edited by Barbara Cosens, 115-136. Corvallis: Oregon State University Press, 2012.

Hundley, Norris. "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined." *The Western Historical Quarterly* 13, no. 1 (1982): 17-42.

Hutchins, Wells A. *Water Rights Law in the Nineteen Western States*. 3rd ed Clark: The Lawbook Exchange, Limited, 2009.

Jackson, Donald, ed. *Letters of the Lewis and Clark Expedition*. Urbana: University of Illinois Press, 1962.

Josephy, Alvin. *The Nez Perce Indians and the Opening of the Northwest.* New Haven: Yale University Press, 1965.

Kades, Eric. "The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands." *University of Pennsylvannia Law Review* 148 (Spring 2000): 1065-1190.

Keohane, Jeff R. "The Rise of Tribal Self-Determination and Economic Development." *Human Rights* (Spring, 2006): 9-12.

Kip, Lawrence. *The Indian Council at Walla Walla, May and June, 1855, A Journal.* Eugene: Star Job Office, 1897.

Landeen, Dan, and Allen Pinkham. Salmon *and His People: Fish and Fishing in Nez Perce Culture.* Lewiston: Confluence Press, 1999.

Limerick , Patricia Nelson. The *Legacy of Conquest: The Unbroken Past of the American West.* New York: W.W. Norton & Company, 1987.

Lovin, Hugh T. "The Carey Act in Idaho, 1895-1925: An Experiment in Free Enterprise Reclamation." *Pacific Norwest Quarterly* 78, (October 1987): 122-133.

Lynch, James M., "Effect of ESA Listing on the Operation of FERC-Licensed Projects: the Hells Canyon example and beyond," *Fordham Environmental Law Journal* 10 (1999): 271-303.

Mark, Joan T. *A Stranger in Her Native Land: Alice Fletcher and the American Indian.* Lincoln: University of Nebraska Press, 1988.

Meloy , Betty Thiessen. *Past days of the Tammany-Waha Area*. Lewiston: Lewiston Printing, 1982.

Miller, Robert. "The Doctrine of Discovery in American Indian Law." *Idaho Law Review* 42, no. 1,(2005): 1-122.

Moulton, Gary E., ed. *The Lewis and Clark Journals*. ed. Lincoln: University of Nebraska Press, 2003.

Nelson, Richard R., ed. *The Limits of Market Organization*. New York: Russell Sage Foundation, 2005.

Norwood, Gus. *Columbia River Power for the People: A History of the Bonneville Power Administration.* Portland: Bonneville Power Administration, 1950.

Otis, D.S. *The Dawes Act and the Allotment of Indian Lands.* Norman: University of Oklahoma Press, 1973.

Perron, Brian. "When tribal treaty fishing rights become a mere opportunity to dip one's net into the water and pull it out empty: the case for money damages when treaty-reserved fish habitat is degraded." *William and Mary Environmental Law and Policy Review* 25 (Spring 2001): 783-835.

Pisani, Donald J. *Water and American Government: The Reclamation Bureau, National Water Policy, and the West, 1902-1935.* Berkeley and Los Angeles: University of California Press, 2002.

Prucha, Francis P. *American Indian Treaties: The History of a Political Anomaly.* Berkeley: University of California Press, 1994.

———. *American Indian Policy in Crisis: Christian Reformers and the Indian 1865-1900.* Norman: University of Oklahoma Press, 1976.

Rick, Torben C., and Rowan Lockwood. "Integrating Paleobiology, Archaeology, and History to Inform Biological Conservation." *Conservation Biology* 27 (2012): 45-54.

Ronda, James P. "Knowlegde of Distant Parts: The Shaping of the Lewis and Clark Expedition," *Montana The Magazine of Western History* 41, no. 4 (1991): 4-19.

Shurts, John. *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context 1880s - 1930s.* Norman: University of Oklahoma Press, 2000.

Slickpoo, Allen P., Sr., and Deward E. Walker, Jr. *Noon Nee-Me-Poo (We, The Nez Perces).* Lapwai: Nez Perce Tribe of Idaho, 1972.

Smith, Donna K., ed. *The Treaty of 1855 Has Not Been Lived Up To, and We Have No Faith That This Will Be Lived Up To*. Moscow: University of Idaho Press.

Sowards, Adam M. *The Environmental Justice: William O. Douglas and American Conservation.* Corvallis: University of Oregon Press, 2009.

Stacy, Susan M. *Legacy of Light: A History of Idaho Power Company.* Boise: Idaho Power Company, 1991.

Stevens, Isaac I. *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, 1855.* Fairfield: Ye Galleon Press, 1985.

———. *A Circular Letter to Emigrants Desirous of Locating in Washington Territory.* Washington: G.S. Gideon, 1858.

Smith, Adam. *The Wealth of Nations.* New York: Cosimo Classics, 2011.

Spinden, Herbert J. *The Nez Perces.* Lancaster: New Era Print Company, 1908.

Strack, Steven W. "Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty over Idaho Water and Promote Intergovernmental Cooperation." Idaho Law Review 42 (2006): 633-672.

Tonkovich, Nicole. *The Allotment Plot: Alice C. Fletcher, E. Jane Gay, and Nez Perce Survivance.* Lincoln: University of Nebraska Press, 2012.

Vibert, Elizabeth. *Trader's Tales: Narratives of Cultural Encounters on the Columbia Plateau 1807-1846.* Norman: University of Oklahoma Press, 1996.

West, Elliot. *The Last Indian War: The Nez Perce Story*. New York: Oxford University Press, 2009.

Charles Wilkinson. "Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe," *Idaho Law Review* (1998): 435-463.

———. *American Indians, Time, and the Law*. New Haven: Yale University Press, 1987.

———. *Blood Struggle: The Rise of Modern Indian Nations.* New York: W.W. Norton & Co., 2005.

Wiltshire, Richard L., David R. Gilbert, Jerry R. Rodgers, eds. *Hoover Dam 75th Anniversary History Symposium.* Reston: American Society of Civil Engineers, 2010.

Worster, Donald. *Rivers of Empire: Water, Aridity, and Growth of the American West*. Oxford: Oxford University Press, 1985.