

DISTRICT COURT - PRBA  
Fifth Judicial District  
County of Twin Falls - State of Idaho

FEB - 7 2023

By \_\_\_\_\_  
Clerk  
\_\_\_\_\_  
Deputy Clerk

**TODD KIM**  
Assistant Attorney General  
Environmental and Natural Resources Division  
United States Department of Justice

**DANIEL F. MCCARL**  
**VANESSA BOYD WILLARD**  
Indian Resources Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street  
South Terrace – Suite 370  
Denver, Colorado 80202  
Phone: (202) 353-5331  
(303) 844-1353  
Fax: (303) 844-1350  
Email: [Daniel.McCarl@usdoj.gov](mailto:Daniel.McCarl@usdoj.gov)  
[Vanessa.Willard@usdoj.gov](mailto:Vanessa.Willard@usdoj.gov)

Counsel for the United States of America

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

**IN RE: PRBA**

**CASE NO: 59576**

)  
) **UNITED STATES MOTION TO**  
) **FILE LATE OBJECTION IN**  
) **SUBCASE NO. 87-12297**  
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Pursuant to Idaho Code § 42-1412(9), and in conformance with the procedures  
outlined in Standard Form 7, the United States, in its trust capacity on behalf of the Nez  
Perce Tribe ("Tribe"), hereby files this Motion to File Late Objection in Subcase No. 87-

12297. This Motion, and the accompanying Standard Form 1 Objection, are filed by the United States Department of Justice, on behalf of the United States Department of Interior, Bureau of Indian Affairs, in its role as Trustee for the Tribe.

### **I. The United States' Tribal Water Rights Claims and Objections**

At present, the United States maintains approximately 185 active claims in this adjudication on behalf of the Tribe ("Tribal Claims"), consisting of: (1) 23 off-Reservation instream flow claims to sustain fish and support hunting, gathering and pasturing; (2) 160 off-Reservation claims to springs and/or fountains; and (3) 2 domestic and stock water claims for allotments.

The United States also maintains approximately 80 objections in this adjudication on behalf of the Tribe. Each of these objections has been made as to the quantity of water claimed by a non-federal party (or recommended by IDWR, in a Director's Report) in a spring and/or fountain that is also (or is anticipated to be) the subject of a federal claim.

By this Motion, the United States seeks to file the attached late objection in Subcase No. 87-12297, and in particular to the August 2, 2021 Director's Report's recommendation for this claim. Like the United States' other objections brought on behalf of the Tribe in this adjudication, this objection concerns the quantity of water claimed in a spring that is also subject to a federal claim (namely, the federal claim presented in Subcase No. 87-12037).

### **II. Background for Tribal Springs and Fountains Claims**

Prior to non-Indian settlement, the Tribe occupied approximately 13 million acres in central Idaho, southeastern Washington, and northeastern Oregon, including the Palouse River Basin. The Tribe entered into three treaties with the United States. Two of these

treaties directly relate to all categories of Tribal Claims: one in 1855 and the other in 1863.<sup>1</sup> In addition, an 1893 settlement agreement between the United States and Tribe established that the provisions of these two treaties remain in effect. The Treaty of June 11, 1855, 12 Stat. 957 (“1855 Treaty”) established a reservation of 7.5 million acres.

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

Article VIII of the 1863 Treaty provides in relevant part:

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

14 Stat. at 651.

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<sup>1</sup> In 1868 the United States and Tribe negotiated a third treaty which amended portions of the 1863 Treaty. Treaty of August 13, 1868, 15 Stat. 693.

Article VIII was one of the unique provisions in the 1863 Treaty that induced the Tribe to agree to the huge reduction of their reservation from approximately 7.5 million acres to 784,996 acres. The Nez Perce have utilized springs for the following purposes: (1) personal drinking water; (2) watering horses and livestock; (3) washing clothes; (4) medicinal drinking water; (5) gathering traditional foods and roots; (6) camping sites; (7) wildlife hunting; (8) spiritual and ceremonial uses; and (9) with regard to hot springs, traditional sheep horn bow making and mud-bathing.<sup>2</sup> Accordingly, the United States has filed approximately 160 claims for off reservation, non-exclusive use of springs and fountains pursuant to Article VIII of the 1863 Treaty. Based on the “in common” language, the United States claimed up to half the natural spring flow. The priority date of these springs and fountains claims is time immemorial based on the Tribe’s aboriginal use of springs.

On May 1, 1893, the Federal Government and Tribe entered into an agreement (“1893 Agreement”) that provided for the United States to purchase from the Tribe certain unreserved and unallotted lands within the reservation boundaries and the eventual opening of these ceded lands to settlement by non-Indians. Agreement with the Nez Perce Indians in Idaho, 28 Stat. 286, 326-331. Article XI of the 1893 agreement provides: “The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the

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<sup>2</sup> During its review of the documents IDWR issued July 29, 2021, the United States noted that IDWR in the document titled “List of Federal Reserved Claim Numbers” improperly characterized its claims to springs and fountains as only “for Wildlife.” As explained above, the Tribe reserved its use of these springs for many uses in addition to wildlife. The United States and Tribe will present evidence during the course of this proceeding demonstrating the Tribe’s additional uses for the springs and fountains water right. The purpose of this footnote is to provide notice to the Court and parties of these additional uses that the United States will seek to include in any final decree.

provisions of this agreement are hereby continued in full force and effect.” 28 Stat. at 331. *See United States v. Webb*, 219 F.3d 1127, 1130 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (United States commissioners added Article XI as a “savings clause designed to preserve all of the tribe’s treaty rights not inconsistent with the sale of surplus lands.”).

### **III. Reasons for Late Objection in 87-12297**

By this Motion, the United States seeks to file a late objection as to quantity in Subcase No. 87-12297. In Subcase No. 87-12297, the claimant, Kyle N. Hawley, seeks a water right in the amount of 0.04 cubic feet/second (“CFS”) for domestic use in a single home. In a related subcase, Subcase No. 87-10617, Mr. Hawley filed a claim to a spring located in the same quarter-quarter section in the amount of 0.06 CFS, also for domestic use in a single home.

On September 22, 2022, at the initial status conference for Subcase Nos. 87-12297 and 87-10617, the United States sought clarification from claimant’s counsel as to the relationship between the two claims. Claimant’s counsel explained that both claims seek water from the same spring, but that separate claims were filed because the homes served and the priority dates are distinct.

To date, the United States has filed an objection in Subcase No. 87-10617 but not in 87-12297. The reason for the United States’ objection in 87-10617 was because, similar to all of its other objections made on behalf of the Tribe in this adjudication, the claim and the Director’s Report’s recommendation for the claim failed to account for the United States’ competing claim to the same spring for half of the natural flow.

The same rationale applies to Subcase No. 87-12297. Where multiple state law-based claims are made to the same spring, and that spring is also the subject of a federal

claim, each state law-based claim should recognize a limitation on the quantity of water attributable to the competing federal claim. The reason the objection is late in Subcase No. 87-12297 is because the United States required further clarification from claimant as to the relationship between the two subcases (i.e., Subcase Nos. 87-12297 and 87-10617), which claimant's counsel provided at the September 22, 2022 initial hearings.

With that clarification, the United States has determined that an objection is necessary to account for the United States' competing claim to the same spring in Subcase No. 87-12037, and to protect the Tribe's rights under Article VIII of the 1863 Treaty.

DATED this 6th day of February, 2023.

Respectfully submitted,

TODD KIM  
Assistant Attorney General



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Daniel F. McCarl  
Vanessa Boyd Willard  
Trial Attorneys, Indian Resources Section  
Environment & Natural Resources Division  
United States Department of Justice

*Attorneys for the United States*

**CERTIFICATE OF SERVICE**

I certify that on February 6, 2023, I caused a true and correct copy of the foregoing to be served on parties listed as follows:

**Original to:**

Clerk of the District Court  
Palouse River Basin Adjudication  
253 Third Avenue North  
Twin Falls, ID 83303-2707

**Copies to:**

IDWR Document Depository  
P.O. Box 83720  
Boise, ID 83720-0098

U.S. Department of Justice  
Environment & Natural Resources Division  
550 W. Fort St., MSC 033  
Boise, ID 83724

Chief, Natural Resources Division  
Office of the Attorney General  
State of Idaho  
P.O. Box 83720  
Boise, ID 83720-0010



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Daniel F. McCarl