

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

87-12004

IN RE: THE GENERAL)
ADJUDICATION OF RIGHTS)
TO THE USE OF WATER FROM)
THE PALOUSE RIVER BASIN)
WATER SYSTEM)
)
)
)
)
)
)

Case No.: 59576

NOTICE OF CLAIM

Federal Reserved Water Right

RECEIVED
DEC 30 2019
DEPARTMENT OF
WATER RESOURCES

1. Name and address of claimant:

UNITED STATES OF AMERICA, as trustee on behalf of the NEZ PERCE TRIBE and ALLOTTEES of the NEZ PERCE INDIAN RESERVATION acting through the REGIONAL DIRECTOR, NORTHWEST REGION

Department of the Interior
Bureau of Indian Affairs
911 N.E. 11th Ave.
Portland, OR 97232

- 2. Date of Priority:** Time Immemorial
- 3. Source:** Union Flat Creek (Federal I.D. # 302)
- 4. Point of Diversion:** Not applicable: Instream flow

Upstream Boundary – Headwaters

Township:	Range:	Section:	Q in the Q:	Meridian:	County:
38N	5W	4	NENW	Boise	Latah

Downstream Boundary - WA/ID State Line

Township:	Range:	Section:	Q in the Q:	Meridian:	County:
37N	6W	24	SWSW	Boise	Nez Perce

Legal descriptions are based on current mapping but are subject to refinement to best reflect on-the-ground stream locations. *See Attached Map.*

5. Place of Use:

At all points along the stream reach located between the boundaries listed above.

6. Purpose of Water Use:

To provide instream flows to sustain fish within the described Place of Use and to support hunting, gathering, and pasturing upon open and unclaimed lands.

7. Period of Use: January 1 through December 31, as further detailed in paragraph 8, *infra*.

8. Quantity Reserved (In cfs):

January	February	March	April	May	June
30	83	67	29	10	3.7

July	August	September	October	November	December
0.8	0.12	0.49	0.91	2.5	6.7

9. Basis of Claim:

The legal basis for this water right includes the following: the reservation of aboriginal rights recognized in *United States v. Winans*, 198 U.S. 371 (1907), and its progeny; the Treaty of 1855 between the United States of America and the Nez Perce Indians, U.S.-Nez Perce Indians, June 11, 1855, 12 Stat. 957 (“1855 Treaty”); the Treaty of 1863 between the United States of America and the Nez Perce Indians, U.S.-Nez Perce Indians, June 9, 1863, 14 Stat. 647 (“1863 Treaty”); the circumstances surrounding the establishment of the Nez Perce Reservation; the doctrine of federal reserved water rights articulated in *Winters v. United States*, 207 U.S. 564 (1908), and its progeny; and the interpretation of treaties in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979), and its progeny.

10. Other Provisions:

- a. The United States has asserted other claims in the Palouse River Basin Adjudication. Paragraphs 10(a) – (g) express assertions applicable to all claims filed by the Bureau of Indian Affairs in its capacity as trustee for the Nez Perce Tribe in the Palouse River Basin Adjudication. The United States claims waters from groundwater and surface water sources within the Palouse River Basin in the state of Idaho to satisfy the rights reserved to the Nez Perce Tribe by the 1855 Treaty and the 1863 Treaty and to fulfill the permanent homeland purpose of the Nez Perce Reservation. Such present and future purposes include: instream flows for fish habitat; hunting, gathering, and pasturing; spring and fountains flows pursuant to Article VIII of the 1863 Treaty between the United States of America and the Nez Perce Tribe; and consumptive use claims on two allotments held in trust by the United States.
- b. The Nez Perce Tribe has occupied a territory in what is now central Idaho, southeastern Washington, and northeastern Oregon since time immemorial. *United States v. Webb*, 219 F.3d 1127, 1129 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). The Palouse River Basin is within the Tribe’s traditional lands.
- c. There is a complex history of the United States’ establishment of the Nez Perce Reservation, including negotiations of treaties and agreements. Regarding fishing

rights, Article III of the 1855 Treaty reserves to the Nez Perce Tribe the “exclusive right to fish in all streams running through or bordering” the Reservation created by the 1855 Treaty. Article III of the 1855 Treaty also guaranteed the “right of taking fish at all usual and accustomed places in common with the citizens of the Territory” to the Nez Perce. For purposes of the priority date of the instream flow claims, the United States claims Time Immemorial, but in the alternative, claims a priority date of June 11, 1855 pursuant to the 1855 Treaty.

- d. Article III of the 1855 Treaty further reserves to the Tribe “the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.”
- e. Article VIII of the Nez Perce Treaty of 1863 includes a unique provision reserving to the Nez Perce Tribe the use of “springs and fountains” within the area ceded under Article I of the 1863 Treaty. For purposes of the priority date of the springs and fountains claims, the United States claims Time Immemorial, but in the alternative, claims a priority date of June 11, 1855 pursuant to the 1855 Treaty.
- f. Pursuant to the General Allotment Act of 1887, Act of February 8, 1887, 24 Stat. 388, *amended*, Act of February 28, 1891, 26 Stat. 794, there are two allotments (Allotments 182-43 and 182-45) held in trust by the United States located within the boundaries of the Palouse River Basin and the northwestern corner of the Nez Perce Reservation. For purposes of the priority date of the domestic and stock watering claims for these two allotments, the United States claims June 11, 1855 pursuant to the 1855 Treaty.
- g. In order to comply with Idaho Code § 42-1409(1), the United States has designated “places of use,” “points of diversion,” and “purposes of use” in submitting this water rights claim. The use of this format, as required by Idaho Code, should not be construed to limit either the United States or the Nez Perce Tribe’s future use of water at other points of diversion, places of use, or for other purposes within the boundaries of the Reservation. The statute’s terminology has been employed to demonstrate that the amount claimed is necessary, justifiable, and available to fulfill the treaty rights of the Nez Perce Tribe and achieve the purpose of the Reservation as a homeland for the Nez Perce Tribe. The quantification standards used in no way constitute a limitation on the use of the water by the United States or the Nez Perce Tribe.

11. Signatures:

- (a) By signing below, I acknowledge that I have received, read, and understand the form entitled “How you will receive notices in the Palouse River Basin Adjudication.”
- (b) I do do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

For Organizations:

I do solemnly swear and affirm that I am Bryan Mercier, and that I have signed the foregoing document in the space below as Regional Director, Northwest Region, Bureau of Indian Affairs, and that the statements contained in the foregoing document are true and correct.



Signature of Authorized Agent:

Title and Organization:

Northwest Regional Director
U.S. Bureau of Indian Affairs

Dated this 26th day of December, 2019.

Notice is hereby given that the United States Department of Justice will represent the United States of America, including the U.S. Department of the Interior, Bureau of Indian Affairs, in all matters pertaining to the Palouse River Basin Adjudication.

All notices, filings and correspondence concerning this matter should be mailed to the United States Department of Justice at the address set forth below:



Katherine M. Kane
United States Department of Justice
Indian Resources Division
Natural Resources Section
999 18th Street
Denver, CO 80202

Attorney for the United States of America

Dated this 26th day of December, 2019.

Instream Flow Claim Reaches in the Palouse River Basin Adjudication

