



## AN ABSTRACT OF THE THESIS OF

Racquel Rancier for the degree of Master of Science in Water Resources Policy and Management presented on April 13, 2012.

Title: Assessing Tribal Water Rights Settlements as a Means for Resolving Disputes Over Instream Flow Claims: A Comparative Case Approach

Abstract approved: \_\_\_\_\_

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Tribal water rights and instream flows for species listed under the Endangered Species Act (ESA) have been a source of tensions in the western United States, particularly when tribes have undetermined water rights to support tribal fisheries listed under the ESA. Understanding the mechanics of past tribal settlements and their strengths and weaknesses in resolving disputes over instream flows for tribal trust fisheries listed under the ESA will allow parties involved in negotiations to evaluate whether similar provisions should be incorporated into future settlements. A review of the 27 congressionally approved tribal water settlements for instream flow and ESA provisions revealed that instream rights were either established as junior rights or reallocated from existing rights. The ESA was a factor in many of the settlements; however, only one actively incorporated ESA tools as part of the benefits of the settlement. After this preliminary evaluation, a comparative analysis framework with 28 criteria for evaluating environmental conflict resolution was applied to the Nez Perce Water Rights Settlement and Pyramid Lake Paiute Water Rights Settlement to identify strengths and weaknesses of using tribal water settlements as a means to resolve disputes involving instream flow claims. From my analysis, I conclude that tribal water settlements offer unique opportunities to shift the status quo and address historic inequities while minimizing harm to existing water users; however, settlement agreements may not result in an outcome that reduces conflict without a concerted effort to establish a fair process and minimize the impacts of the agreement on other parties. Furthermore, despite the many benefits of settlement agreements, since they have not delivered time-immemorial rights for fisheries, other options will likely be a continued consideration for tribes seeking to restore fisheries. However, while litigation presents a risky though lucrative

outcome, rights under state law are in line with what has been granted in settlements. Given the time, effort and cost associated with settlements, I suggest that since tribal water right settlements generally use state tools to establish instream flows, states and tribes may reduce future conflict by proactively working together to establish instream flows through existing state water reallocation mechanisms.

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Assessing Tribal Water Rights Settlements as a Means for Resolving Disputes Over Instream  
Flow Claims: A Comparative Case Approach

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Racquel Rancier

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I understand that my thesis will become part of the permanent collection of Oregon State University libraries. My signature below authorizes release of my thesis to any reader upon request.

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Racquel Rancier, Author

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## LIST OF ABBREVIATIONS

AF	acre-feet
BATNA	best alternative to negotiated agreement
BiOp	Biological Opinion
BLM	U.S. Bureau of Land Management
BOR	U.S. Bureau of Reclamation
BPA	Bonneville Power Administration
CAP	Central Arizona Project
CBC	Clearwater Basin Collaborative
DCMI	domestic, commercial, municipal, and industrial
DOJ	U.S. Department of Justice
ESA	Endangered Species Act
FCRPS	Federal Columbia River Power System
FERC	Federal Energy Regulatory Commission
IDWR	Idaho Department of Water Resources
IPCo	Idaho Power Company
KAF	thousand acre-feet
LOID	Lewiston Orchards Irrigation District
M&I	municipal and industrial
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NFH	National Fish Hatchery
NOAA	National Oceanic and Atmospheric Administration
NMFS	National Marine Fisheries Service
NPTEC	Nez Perce Tribal Executive Committee
SRBA	Snake River Basin Adjudication
TCID	Truckee Carson Irrigation District
TERO	Tribal Employment Rights Ordinance
Tribe	Nez Perce Tribe
TROA	Truckee River Operating Agreement
USFWS	U.S. Fish and Wildlife Service

ASSESSING TRIBAL WATER RIGHTS SETTLEMENTS AS A MEANS FOR RESOLVING  
DISPUTES OVER INSTREAM FLOW CLAIMS: A COMPARATIVE CASE APPROACH

## 1 INTRODUCTION, RESEARCH QUESTION AND OBJECTIVES

Water law in the western United States first developed during the push to settle the West at a time when indigenous rights and instream uses were less of a public concern or priority. The right to use water was acquired by putting it to a beneficial use and, during times of shortage, the first users received all of their right before those that had diverted later. Streams were often over-allocated and dewatered, leading to disputes amongst users and the decline of fish populations. Furthermore, although the U.S. Supreme Court in 1908 recognized that American Indians<sup>1</sup> had water rights arising under federal law (Reisner, 1993; Wilkinson, 1992), these rights – like instream uses – went largely ignored until the late 1980s. Since then, the West has reluctantly pushed forward to accommodate changing social priorities including tribal water rights and instream flows but not without some resistance from those interests that have come to benefit from the status quo. Almost one hundred years after the U.S. Supreme Court recognized tribal rights to water on reservation lands (*Winters v. United States*, 1908) and upheld the treaty right to fish (*United States v. Winans*, 1905),<sup>2</sup> the Klamath Basin broke out in conflict due to the curtailment of water deliveries to protect tribal fisheries listed under the Endangered Species Act (ESA): fish for which the tribes also had un-quantified senior water rights to support (Doremus & Tarlock, 2003, 2008).<sup>3</sup>

Similar to the Klamath, other basins in the American West have undergone repeated litigation to resolve tribal claims to water,<sup>4</sup> and many others have similar conditions of un-quantified rights and ESA listed species. While tribes can attempt to use methods available

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<sup>1</sup> Tribal, tribe and Indian in this paper refer to the indigenous tribes of the contiguous United States commonly referred to as American Indians. As the term “American Indian” is preferred to “Native American” by many tribal members, American Indian is used for this paper (McCool, 2002; Tucker, Kojetin, & Harrison, 1997).

<sup>2</sup> Certain property and resources, such as the treaty right to fish or a tribal water right, are held in trust by the federal government for the benefit of the tribe. The federal government has a fiduciary responsibility to protect trust resources for current and future generations of the tribe. For a summary of the tribal trust responsibility in the context of fisheries and water rights see “Memo of Regional Solicitor” (1995).

<sup>3</sup> The Klamath Tribes have a water right to preserve their fisheries but the quantity has yet to be determined. The water rights are senior to other users because they have a priority date of time immemorial (*United States v. Adair*, 1979, *United States v. Adair*, 1983).

<sup>4</sup>For example, the Eastern Shoshone and Northern Arapaho of the Wind River Reservation in Wyoming and the Pyramid Lake Paiute in Nevada have litigated their rights extensively.

under state law to establish instream flows, they may also have rights under federal law that are determined through litigation or a negotiated settlement. Recent attempts by tribes to obtain recognition of water rights through litigation and/or negotiated agreements have been slow, and one estimate shows that of the 565 federally recognized tribes, fewer than 75 have actually quantified their water rights (National Congress of American Indians, 2010). While research has reviewed the efficacy of litigation and negotiation to settle tribal water claims (Burton, 1991; Colby, Thorson, & Britton, 2005; McCool, 1993a, 1993b, 1997, 2002; Thorson, Britton, & Colby, 2006), a complete analysis on the role of tribal water settlements in settling instream flow claims is lacking. Given that many tribes in the Pacific Northwest have similar rights to fisheries, and that at least three tribes have expressed an interest in settling instream flow claims in the near future,<sup>5</sup> understanding the role of tribal water rights settlements in protecting instream flows will assist parties involved in future negotiations. Therefore, the primary question this research seeks to explore is:

Are tribal water rights settlements an effective institutional mechanism to resolve tribal claims to instream flows, where effective is defined as exhibiting the qualities of successful environmental conflict resolution as measured through 28 criteria outlined in *Braving the Currents: Evaluating Environmental Conflict Resolution in the River Basins of the American West*?

In order to understand the role of tribal water rights settlements as a tool for resolving tribal instream flow disputes, I first provide a background on water institutions in the West to understand other methods of instream flow protection and to demonstrate how water settlements have become important as a means to resolve tribal water claims. I then review the 27 congressionally approved tribal water rights settlements for instream flow mechanisms and identify two settlements for further analysis. Finally, I analyze and compare the two complex agreements using a framework of criteria for successful conflict resolution to identify the strengths and weaknesses of the two settlements in resolving conflict involving instream flow claims. It is important to note that this research does not purport to determine the success of water settlements in restoring instream flows, but rather seeks to evaluate the success of

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<sup>5</sup> The Confederated Salish and Kootenai Tribes of the Flathead Reservation (“Montana Compact Commission,” n.d.), The Confederated Tribes of the Umatilla (CUJ, 2009), and the Klamath Tribes (Upper Klamath Water Users Association, n.d.) are all in the process of negotiating instream rights.

settlements as a means of resolving instream flow disputes. In summary, the objectives of this research are to:

1. Understand the role of tribal water rights settlements as a method for instream flow protection.
2. Understand how tribal water settlements compare to litigation for instream flow protection.
3. Assess the strengths and weaknesses of tribal water rights settlements in resolving disputes over instream flow claims to support tribal fisheries using a framework of criteria for successful environmental conflict resolution.
4. Explore the role of the ESA in water settlements involving tribal fisheries.

### **1.1 Significance of this Research**

While the resolution of tribal water rights is not limited to negotiated settlements, tribes, states, and the federal government have generally preferred water settlements as a means for settling tribal water rights claims instead of litigation (Western Governors' Association, 2007; Western States Water Council, 2011). Evaluating the strengths and weaknesses of previous settlements using a standard framework will provide policymakers and interested parties with an understanding of the mechanisms utilized in previous agreements and the corresponding outcomes. In addition, settling tribal water claims while satisfying Endangered Species Act requirements have been co-objectives in recent settlements containing instream flows, and therefore a comparative analysis for both mechanisms and outcomes of success will provide a broader picture of the efficacy of such agreements.<sup>6</sup> Given that Oregon and Washington have completed two water settlements and there are 38 federally recognized tribes between the two states (Governor's Office of Indian Affairs, n.d.; Oregon State Archives, 2011), it is very likely that there will be future agreements involving tribal water rights for ESA listed tribal fisheries. For example, the Confederated Tribes of the Umatilla in Oregon, a tribe that has been active in fish restoration, have expressed their desire to negotiate a settlement (CUJ, 2009). Furthermore, this research could potentially provide interested policymakers with a frame of reference to make policy decisions on the Klamath Basin Restoration Agreement, which has yet to receive congressional approval ("Klamath Restoration Act," 2011).

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<sup>6</sup> The Nez Perce Agreement is the only congressionally approved example; however, the Klamath Basin Restoration Agreement is pending before Congress and includes provisions that incorporate the ESA and tribal water rights ("Klamath Basin Restoration Agreement," 2010).

In addition to its practical applied utility, this study will also contribute to advancing researchers' understanding of the research methodology and framework for evaluating environmental agreements through comparative analysis as developed in *Braving the Currents: Evaluating Environmental Conflict Resolution in the River Basins of the American West* (d' Estrée & Colby, 2004). A case analysis of the 2005 Snake River Water Rights Settlement was completed and compared to the 1990 Pyramid Lake Case Study included in *Braving the Currents*. This comparison of similar agreements by utilizing the same methodology and framework attempted to confirm information availability in relation to stage of the agreement and replicate the findings in *Braving the Currents*. Finally, implementing the same methodology to write and research these case studies will create additional capacity for future comparisons across case studies.

## 2 LITERATURE REVIEW AND BACKGROUND INFORMATION

### 2.1 Water Conflict and the West

Although there have been few instances of violence over water in the United States (Pacific Institute, 2009), the conflict between Owens Valley ranchers and Los Angeles that resulted in bombings of the Los Angeles Aqueduct has long served as a cautionary tale of the potential for future water conflicts in the West (Reisner, 1993). The 2001 Klamath Basin water crisis that caused social unrest has renewed the rhetoric of western water wars (Doremus & Tarlock, 2008), as basins across the West grapple with similar conditions of un-adjudicated and over-appropriated basins with endangered species and un-quantified tribal water rights (Doussard, 2007; U.S. Department of the Interior, 2003). While research suggests that cooperation over water occurs more often than conflict (Fesler, 2007; Giordano, Giordano, & Wolf, 2002), the intensity of water driven tensions increases as the geographic scale drops (Giordano, Giordano, & Wolf, 2002). Therefore, although conflicts in the West rarely escalate beyond litigation, the experiences in these two instances demonstrate the potential for more severe water disputes that disrupt the social fabric of communities.<sup>7</sup>

The tensions in the West are often blamed on the aridity of the region; however, a review of western water institutions reveals that the existing conflicts today over endangered species, instream flows, and tribal water rights are products of maintaining the status quo and failing to implement necessary institutional tools to address changing conditions and previously neglected interests (Doremus & Tarlock, 2003). Research on water conflicts supports this conclusion as water disputes generally occur when a sudden institutional or physical change exceeds the institutional capacity of a system to adapt and respond to that change (Wolf, Yoffe, & Giordano, 2003). The experience in the Klamath Basin supports these findings, as the Klamath in 2001 lacked the institutional capacity to address a sudden change in endangered species requirements (an institutional change) coupled with a dry year (a physical change), resulting in discord across the basin (Fesler, 2007). As such, understanding current institutions and increasing their resiliency is a marked goal of water management.

Institutions are the systems that have developed to organize and coordinate individuals within the structure and goals of the larger social system. Institutions include legal constructs, such as statutes and regulations, as well as informal institutions, such as “social norms, culture,

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<sup>7</sup> Research suggests that although there is the potential for more intense conflict at the local level, water related cooperation still far exceeds conflict (Fesler, 2007).

etiquette, ethics and moral rules” (Jaeger, 2005, p. 127). Improving the capacity to address perturbations through institutional mechanisms can help basins manage tensions to promote cooperative efforts instead of conflict. Research suggests that effective institutions that can absorb changes are more likely to generate cooperation in response to water problems instead of conflict and that basins should take steps to develop institutional capacity. For example, one study found that international basins with treaties had fewer conflictive water events and more events that were cooperative, suggesting that basins can improve institutional capacity through signing and implementing treaties (Wolf, Yoffe, & Giordano, 2003). Similarly, in the American West, tribal water rights settlements have emerged as one institutional tool aside from litigation to settle disputes between tribes and other water users. While research has focused on the efficacy of such agreements in obtaining water for tribal consumptive uses, there has not been a comprehensive analysis of how successful such agreements are in resolving disputes over water resources needed to support productive habitat for tribal fisheries, another tribal resource that has been a source of conflict.

## **2.2 Western Water Law and the Instream Flow Problem**

Understanding the historic approach to water allocation is fundamental to appreciating the complexity of tensions between tribal water rights, instream flows, and existing users in the western United States. Prior to the establishment of water laws in the West, the Riparian Doctrine was the primary water allocation method in the eastern United States, allowing landowners with property adjoining a waterway to make reasonable use of that water provided that it did not significantly impede the use of water by other riparians (Ferrey, 2007; Tarlock, 2001a). In addition, individual water users only received the right to share in the use of the water in relation to others; they did not have an exclusive right to use without regard for other riparians (Tarlock, 2000). The lack of riparian properties in the West combined with the inconsistent availability of water and a mining mindset led to a rejection in most western states of the Riparian Doctrine in favor of a more certain body of law: Prior Appropriation (Ferrey, 2007; Tarlock, 2001a; Wilkinson, 1992).<sup>8</sup>

Western water law developed during the 1800s as the federal government became concerned with settling the western United States and implemented a set of policies that resulted

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<sup>8</sup> Riparian law eventually changed to allow more exclusive use of water as industrial uses increased (Tarlock, 2000). Unlike most states in the West, California and Nebraska still recognize both riparian and appropriative rights (Getches, 1984).

in large-scale development of western lands by exploiting the region's seemingly abundant natural resources. At the time, population growth, climate change, indigenous rights and ecosystem conservation were not of concern to the national agenda; thus, the foundations of water policy today were laid by the states in a different era of seemingly inexhaustible resources driven by a desire for individual economic prosperity. The Prior Appropriation Doctrine was an effective allocation mechanism to promote land settlement by giving individual private rights to the use of water in perpetuity (Wilkinson, 1992). The common law doctrine required diversion of water from the stream without waste in order to constitute a beneficial use and failure to put the water to a beneficial use resulted in a loss of the right.<sup>9</sup> In addition, in times of shortage, the senior appropriator - the first to divert water and put it to a beneficial use - received his or her full allocation before those that began diverting later. These principles were effective in allocating scarce water without a permitting or administrative system while protecting the investments of early water users from those who came later.<sup>10</sup> Unfortunately, since a beneficial use of water required a diversion, the original allocation scheme did not incorporate instream flows resulting in widespread stream dewatering (Ferrey, 2007). The history of water allocation in the West reveals a consistent favoritism of consumptive uses over the preservation of instream flows and it was not until the second half of the 20th century that instream flows were recognized for their contributions to "local quality of life, cultural and historical assets, tourism dollars, real estate values, commercial ventures, water quality, species diversity and vitality, recreation, and religious values" (Crammond, 1996, p. 3).

In the zero-sum priority system based on allocating the risk of shortages by seniority of rights, new voluntary reallocation mechanisms are being developed to substitute "a new risk allocation regime for the one embedded in the law of prior appropriation" (Tarlock, 1999, p. 690) by creating incentives to redistribute water while accommodating status quo interests. Methods often require creativity and a willingness to experiment and adapt to changing conditions as necessary. There are numerous possible arrangements to resolve water disputes but their use may be limited depending upon the legal and social-political climate, the availability of funding, and the willingness of parties to collaborate (Crammond, 1996; Garrick,

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<sup>9</sup> Beneficial use without waste is the basis, measure, and limit of a water right under prior appropriation.

<sup>10</sup> Today most western states have a permitting system; however, water rights that pre-date that system are vested rights that are recorded into the system during a water rights adjudication.

Aylward, Siebentritt, & Purkey, 2008). Notably, creative solutions and negotiations are more likely to occur after a crisis than before (Colby et al., 2005; Garrick et al., 2008; Gunderson, 2000). By removing the zero-sum threat of enforcement under the priority system, these voluntary “risk based allocation regimes address the central barrier to progress, the fear of change without accommodation” (Tarlock, 1999, p. 691). These new risk allocation mechanisms have developed under state law generally in the form of markets and under federal law as negotiated agreements.

### ***2.2.1 Mechanisms under State Law: Voluntary Mechanisms, Creative Arrangements and Prior Appropriation***

The recent interest in satisfying tribal water rights and restoring instream flows for ecosystems in over-appropriated river systems has resulted in the development of additional tools in some states to work within the prior appropriation structure by recognizing instream flows as a beneficial use and reallocating senior water rights. Many states have some type of instream flow program that either establishes instream water rights or minimum instream flows, both of which are often junior to existing consumptive uses. To reallocate senior rights to instream purposes, some states also authorize water to be transferred, leased, or dedicated to instream uses while retaining the priority date of the consumptive right (Hollowed & Wasserman, 2001). In addition to state designation of instream flows, market transactions, incentives and negotiated agreements are common voluntary measures to reallocate water and resolve water conflicts including those relating to instream flows (Colby, 2000).

Market mechanisms under state law are probably the most common means of voluntary instream flow restoration. Economists, however, have recognized that current markets have been slow to reallocate water for instream purposes in part because of legal obstacles, but also because agricultural communities resist the change in fear that moving water to instream flows will undermine the viability of agriculture, creating local economic collapse. Therefore, tailoring individual transactions to address the goals of the various stakeholders can allay fears. Methods of reallocating water include split season leases, dry year options, priority date swaps, options for consumptive uses from an instream right, efficiency upgrade incentives that result in a portion of water placed instream (Jaeger & Doppelt, 2002) and forbearance agreements.<sup>11</sup>

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<sup>11</sup> Split season leases allow water users to irrigate for part of the season and dedicate water to instream flows during the critical low-flow periods. Similarly, under a dry year option, the water user agrees to forgo water use for instream flows during years of water shortages.

Crammond (1996) suggests that in the future “multiple party exchanges, in-kind payment, dry year options, and other deals will be more common,” such as payments in the form of “hay, power, and water” that can enable water users to sustain their current livelihood and ease community concerns about farm loss (p.38). While monetary compensation for water transferred to instream flows is the primary motivator for instream flow transactions through market reallocation, other incentives such as infrastructure upgrades, protection from forfeiture, ESA enforcement and concern for instream flows can also play a role (J. J. Ferguson, Hall, & Randall, 2006; M. A. King, 2004). Management modifications such as pulsing flows, point of diversion changes, altering storage operations, and water sharing offer additional flexibility to restore instream flows to support fisheries while maintaining consumptive uses.<sup>12</sup> Therefore, while tribal water rights and the Endangered Species Act can drive reallocations for instream flows, tools under state law are the common means to restore water to streams, as they are available to use independently or as part of negotiated agreements.

While most western states now recognize instream flows as a beneficial use and have laws to establish minimum instream flows or issue instream water rights, most changes in the law did not occur until the 1970s and 1980s with some states such as New Mexico and California waiting until as late as the 1990s to recognize instream flows. Even in states where programs developed rather early, progress has been slow since many basins in the West were already over-appropriated before instream flow programs began and new programs did not immediately result in instream flow protections (Charney, 2005; Hollowed & Wasserman, 2001; Neuman, Squier, & Achterman, 2006; Pilz, 2006). For example, Idaho, whose program was authorized in 1978, has water rights for minimum instream flows on less than two percent

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Forbearance agreements are usually private contracts that do not require approval from state agencies wherein a landowner agrees to allow water to bypass his or her diversion and forego use under a specified set of conditions (J. J. Ferguson, Hall, & Randall, 2006)

<sup>12</sup> Pulsing flows may involve releasing additional water from storage or temporarily stopping water diversions to increase flows and attract migrating fish (Siemann & Martin, 2007). Changing the place of diversion can even out flows and increase the amount of water instream (J. J. Ferguson et al., 2006). Alterations to storage may include shifts in operations or modifications to contracts and deliveries (MacDonnell & Rice, 1993). Water sharing or rotation is the coordination of withdrawals between users to reduce instantaneous flow reductions (Siemann & Martin, 2007).

of the total stream miles in the state as of 2010 (Idaho Water Resource Board, 2010).<sup>13</sup> Furthermore, since prior appropriation was developed to protect existing water users and allocate risk to junior appropriators (Tarlock, 2001b), new beneficial uses such as instream flows that have only recently been recognized are the last to receive water under the state priority system unless water is reallocated from a senior consumptive right (Blumm, 1992). It is unsurprising then, that a recent report regarding instream flows in the West found that states' instream flow programs did not adequately address instream flows or prevent stream dewatering. The report identified only four western states: Colorado, Montana, Washington and Oregon that have "sought to proactively manage instream flows" and "processed numerous rights, actively monitor and protect these flows, adequately staff programs, and are on the forefront of new management ideas" (Charney, 2005, p. 38). Even in states where tools for instream flow protection exist, recent reviews of implementation are critical of states' progress to provide instream flows and protect endangered species and tribal trust resources. For example, Washington, despite having one of the top instream flow programs, received a rather critical review on its failure to preserve instream flows for tribal fisheries:

Not only does the Department [of Ecology] ignore the prior federal and treaty reserved water rights of the tribes in dealing with existing water rights and their duty to ensure adequate instream flows for treaty reserved fishing rights, they also ignore tribal rights in future water right permit decision making...there is a serious conflict between instream fisheries needs and out of stream uses...Washington State must come to terms with impending collisions between state issued water rights and tribal treaty water rights, particularly off reservation rights to instream flows. (Hollowed & Wasserman, 2001, pp. 189–190).

Thus, while new policies have emerged in the West to reallocate water rights to restore instream flows (Bricker & Filippi, 2000; J. J. Ferguson et al., 2006; M. A. King, 2004); these new mechanisms embedded in state law have been slow to reallocate water to instream uses, leading to tribal dissatisfaction with state efforts and added pressures to pursue water rights under federal law (Northwest Indian Fisheries Commission, 2011): rights that are often a source of uncertainty and tension with state rights (Tarlock, 1988).

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<sup>13</sup> See also discussion and Table 15 in Hollowed & Wasserman (2001) regarding instream flow transactions.

## 2.3 Federal Water Rights

Aside from state mechanisms to reallocate water, some have suggested that federal water rights, including tribal water rights, may be a mechanism to obtain senior instream flows (Blumm, 1992; Blumm, Becker, & Smith, 2006; Singel & Fletcher, 2006). Federal water rights generally consist of regulatory water rights or federal reserved water rights (Blumm, 1992; Tarlock, 1988). Regulatory water rights arise out of the authority of federal regulations to preempt state water law when it conflicts with federal statutes (Bricker & Filippi, 2000). Federal reserved water rights are implied by the federal government's reservation of land and may include water for National Monuments, National Forests, National Parks, and other federal lands. Tribal reserved water rights are federal reserved rights that arise out of the federal government's treaties with tribes, reservations of land, or aboriginal practices (Burton, 1991; McCool, 2002). There is an inherent tension between federal and state water rights because federal water rights possess characteristics that conflict with prior appropriation and state water law.

### 2.3.1 *Federal Regulatory Water Rights and the Endangered Species Act*

The Endangered Species Act has recently been a driver in water disputes in the western United States (Doremus & Tarlock, 2008) as it can create federal regulatory water rights to protect listed species (Blumm, 1992; Tarlock, 1988). For example, the 2001 Klamath Basin conflict resulted from federal regulations on water under the Endangered Species Act. These rights, however, do not fit the traditional concept of a water right as they can be unplanned and sporadic (Tarlock, 2006). Thus, while most other water rights seek to create greater certainty, regulatory water rights are based on emerging conditions, science, and regulatory thresholds, which are less amenable to consistent quantification. The ESA prohibits certain actions by all persons as well as additional requirements for federal agencies in order to protect listed species and their habitat (*Endangered Species Act of 1973*, 2006). These provisions have different implications for how the ESA affects water rights.

Section 9(a)(1)(B) of the ESA prohibits any person, including individual landowners, from taking an endangered species where "taking" is defined to include "harm" (*Endangered Species Act of 1973*, 2006, sec. 1532(19)) making it the section of the Act with the potential for the most far-reaching implications. Harm includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" (*Endangered and Threatened*

*Wildlife and Plants Definitions*, 2011). While it is clear that water diversions can result in harm that constitutes a taking under the ESA, determining which individual water user is responsible for the taking is problematic and a significant barrier to enforcement (Benson, 2004; Estes, 1992; Spain, 2007). In the rare cases where agencies have pursued enforcement, it has typically been against senior water users because they utilize the water during low flows that results in the taking of the listed species. Problems with this approach occur, however, when senior users forbear flows to comply with the Act and junior irrigators then use the bypassed water (Estes, 1992). While there has been at least one case where an individual private landowner was held to take a species due to water diversions (Spain, 2007),<sup>14</sup> the fact remains that enforcement against small private irrigators has been relatively uncommon (Benson, 2004; Spain, 2007; Tarlock, 2007). Instead, irrigation ditches and districts are more often the focus of enforcement<sup>15</sup> because operations are concentrated and it is easier to pinpoint a single large diversion as taking a listed species.

Enforcement under the ESA has mostly centered on projects with a federal nexus, which are easier to regulate than are individual landowners. Under Section 7 of the Endangered Species Act, federal agencies must conserve listed species and habitat and federal actions must not jeopardize the continued existence of a listed species or degrade critical habitat. Therefore, the use of the ESA as a potent tool to force change, increase instream flows and protect riparian habitat has been evident in projects with a federal nexus as seen in the Klamath Basin and other federal irrigation projects across the West (Benson, 2004; Spain, 2007; Tarlock, 2007). As a result, Section 7 has generated lawsuits both from those seeking to enforce the Act and from those shouldering the burden of compliance. The impact on individual water users within these federal projects has been significant (Aiken, 1999; Benson, 2004; Spain, 2007; Tarlock, 2007) and Section 7 has led to new projects being stalled, changed or denied (Aiken, 1999). As a result, the ESA has generated substantial criticism among private property interests who have found their economic activities restricted to protect listed species and has resulted in states and individual irrigators pursuing protections from Endangered Species Act enforcement (Bricker & Filippi, 2000).

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<sup>14</sup> See *Idaho Watersheds Project v. Jones*, Civ. No. 00-0730-E-BLW (D. Idaho, Nov. 14, 2002) as cited in Spain (2007).

<sup>15</sup> For example, Washington Environmental Council threatened to sue several ditch companies, and an irrigation association (Manastash Steering Committee, 2007; “MOA between the Manastash,” 2007).

The ESA has also had mixed impacts on tribes seeking to quantify and use their water rights. For tribes that have suffered from a lack of water infrastructure, the ESA has created obstacles because their water rights, though senior, are often the last developed in over-appropriated basins where ecosystems have a number of listed species as a result of prior water development and land use. Since the construction of new water projects often results in harm to a species which would violate the ESA, providing basic water to reservations can become problematic (Colby, 2004; McCool, 2002).

Conversely, tribes interested in recovering a listed species have utilized the ESA to advance the restoration of habitat and instream flows. The ESA can be a strong incentive for groups to negotiate with tribes in order to allow local communities instead of the courts to determine how to meet the requirements of the Act. Therefore, while the Endangered Species Act can be a barrier to new projects, it is another tool for tribes that have struggled to preserve their tribal fisheries and associated instream water rights to drive parties towards settlements (Blumm et al., 2006). First, the citizen suit provision in section 11(g) of the Endangered Species Act allows tribes to pursue litigation and can be a vehicle to encourage conservation and recovery. Second, the fiduciary duty to protect fisheries for certain tribes creates a dual role for the federal government. For example, the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service noted that it:

Approaches the ESA 4(d)<sup>16</sup> rules as a vital component of conserving the species until the protections of the ESA are no longer needed. These protections will no longer be needed only if the abundance of fish is sufficient to satisfy treaty fishing rights and to fulfill the trust obligations of the United States.  
(*Endangered and Threatened Species; Final Rule 14 ESUs*, 2000, p. 42,440).

Furthermore, the threat of ESA enforcement along with the tribal trust status of listed fisheries has also encouraged water right settlements, particularly where the tribe has leveraged the ESA as a means to restore fisheries. Since tribes in the Pacific Northwest and other regions of the West have tribal fisheries water right claims, the potential for the Endangered Species Act to play a significant role in tribal water settlements in the future is imminent.

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<sup>16</sup> Under section 4(d) of the ESA, the Secretary defines prohibited acts through rule in order to protect species listed as threatened.

## 2.4 Federal Reserved Tribal Water Rights

### 2.4.1 *Overview and Tension with Prior Appropriation*

The law governing tribal water rights has developed slowly over time through litigation as Congress has failed to clarify tribes' rights to water. The 1908 Supreme Court ruling in *Winters v. United States* established the reserved water rights "Winters Doctrine" wherein the reservation of land by the federal government for a tribe impliedly reserved water to meet the purposes of the reservation with a priority date of when the lands were set aside (Myers, Smith, & Conference of Western Attorneys General, 2004; *Winters v. United States*, 1908).

Furthermore, unlike water rights under the state prior appropriation system which are based on actual use, *Winters* water rights must satisfy the purpose of the reservation for current and future uses and cannot be lost for nonuse (*Arizona v. California*, 1963). As the reserved rights doctrine was refined, state water right holders were suddenly junior to a potentially large amount of tribal water rights that were un-quantified until adjudication and often unused. Thus, the tension between state water right holders and tribes is unsurprising: The priority system's efficacy relies on establishing risk regimes based on when water was first diverted for use, a principle that the law governing tribal water rights directly contradicts. Since junior users have been allowed and encouraged to utilize the water while tribes' rights go un-quantified, today there is considerable resistance to quantification of tribal claims that have the capacity to significantly change the amount of water available to non-Indian users (Burton, 1991; Getches, Wilkinson, & Williams, 2005; McCool, 2002; Myers et al., 2004).<sup>17</sup>

### 2.4.2 *Quantifying Tribal Water Rights*<sup>18</sup>

After the *Winters* decision, further clarification of Indian water rights mostly stalled until Congress passed the McCarran amendment waiving federal sovereign immunity in state water adjudications, thereby allowing states to quantify federal water rights (*McCarran Amendment*, 2006). Thereafter, courts focused on developing the doctrine by defining how to quantify federal water rights. For reservations with an agricultural purpose, the practicably irrigable acreage (PIA) standard developed, awarding water based on the amount of land within

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<sup>17</sup> Based on the PIA standard one estimate suggests that tribes could have claims to up to 45 percent of the surface water used in the West (The Congress of the United States Congressional Budget Office, 1997).

<sup>18</sup> In addition to the cases cited, the following references were used in this section (Cosens, 2002; Myers, Smith, & Conference of Western Attorneys General, 2004; Newton, 2005).

the reservation suitable for agriculture (*Arizona v. California*, 1963). Later, after the reserved water rights doctrine was extended to all federal lands, the courts distinguished between primary and secondary purposes of the reservation of land, awarding water rights only for the minimum amount necessary to fulfill the primary purpose of the reservation (*United States v. New Mexico*, 1978). Although the decision set precedent for federal lands, it was unclear if it applied to federal lands held in trust for tribes, leading to further litigation to determine the purposes of Indian reservations (Myers et al., 2004). For example, two decisions found that in addition to agriculture, the dual primary purpose of the reservation was to preserve aboriginal uses such as fishing, hunting, and gathering (*Colville Confederated Tribes v. Walton*, 1981, *United States v. Adair*, 1979). Conversely, seven years later, the Big Horn court narrowly construed the purpose of the Wind River Reservation in Wyoming, ruling that it was only agricultural and refused to approve water for instream flows. This led to further uncertainty as to how courts in the future would quantify tribal water rights (*In re Gen. Adjudication of All Rights to Use Water in the Big Horn*, 1988). On appeal, after one justice who had written an opinion redefining the PIA quantification to include a sensitivity analysis to existing users recused herself (Cosens, 2002; Getches et al., 2005),<sup>19</sup> the U.S. Supreme Court affirmed the PIA as a viable quantification standard in an evenly-split decision (*Wyoming v. United States*, 1989). Thereafter, PIA was the generally accepted standard used to quantify tribal water rights until the Arizona Supreme Court rejected the narrow agricultural purpose of PIA, noting that the U.S. Supreme Court did not state that PIA was the only legitimate method. Instead, the Arizona Supreme Court determined that the primary purpose of Indian reservations was to provide the tribes with a permanent homeland. The court suggested that factors for consideration in quantifying Indian water rights should include: current and planned uses, history, culture, geography, natural resources, economic development, and historic water use (*In re Gen. Adjudication of All Rights to Use Water in the Gila River*, 2001). In reviewing this case history, it is apparent that the purposes, uses, and quantification methodologies of tribal water rights are subject to judicial interpretation and the disposition of the state court. Although state courts are supposed to apply federal law uniformly, the federal case law has not developed with enough detail to preclude inconsistent state decisions. The inherent uncertainty associated with pursuing the quantification of tribal water rights is an important factor that ultimately affects states' and tribes' actions, and thus, is

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<sup>19</sup> This case is often cited as an indication of the U.S. Supreme Court's increasing hostility towards tribal water rights, leading tribes to seek out negotiation over litigation (Cosens, 2002).

an important consideration in evaluating tribal water rights as a tool for resolving disputes involving instream flows. The case history surrounding tribal water rights for fisheries is even more complex and uncertain than quantification for consumptive uses.

## 2.5 Tribal Fisheries and Associated Water Rights

Given the focus of this research on water for instream flows, it is important to understand court decisions on the allocation and rights of tribes concerning tribal fisheries as these cases set the foundation for tribal water right claims, and thus influence the parties' best alternative to a negotiated agreement (BATNA). The preeminent cases dealing with tribal fisheries have occurred in the state of Washington<sup>20</sup> with Steven's treaty tribes who have reserved the exclusive right of taking fish within their reservations as well as the right to fish at usual and accustomed places outside of reservation lands.<sup>21</sup> While tribes typically have the right to exclusive on reservation fishing, hunting and gathering rights (Newton, 2005); most of the controversy has involved the off-reservation right to take fish as this creates direct competition between tribal fisherman and non-tribal fisherman and presents questions of sovereign jurisdiction. As such, decisions involving tribal fishing rights were often contentious and

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<sup>20</sup> Tribes in the Pacific Northwest have actively litigated to protect treaty fisheries and most case law references this litigation for precedent. Tribes in the Great Lakes region have also sought to protect rights to fish (Newton, 2005) and there has been some discussion of how these treaty rights might be leveraged to protect water in the Great Lakes. See generally Singel & Fletcher (2006). The focus of this research is on western states which follow some form of prior appropriation because, with the exception of the Seminole Lands Settlement, all water settlements have occurred west of the 100<sup>th</sup> meridian in mixed or pure prior appropriation states.

<sup>21</sup> The Steven's treaties contained similar language: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing" (*U.S. v. Washington*, 1974). Despite these potentially large claims, Washington State, where the majority of the Steven's treaty tribes live, has been slow to quantify these claims. A 2006 presentation by the Assistant Attorney General of Washington State noted that aside from the Yakama tribes, most other tribal water rights in the state were un-quantified (Reichman, 2006). It is unclear how many tribes may have instream flow claims outside of the Steven's treaty tribes because reservations were also established by executive order. In addition, at least six treaties contain language providing reservations "to be held as Indian lands are held," which the U.S. Supreme Court has affirmed includes rights to hunt and fish (*Menominee Tribe v. United States*, 1968).

preceded by violence as Indians were harassed in an attempt to shift management and allocations to the states and non-tribal fisherman.<sup>22</sup>

The seminal case on off-reservation fishing rights occurred three years before *Winters*, when the U.S. Supreme Court in *United States v. Winans* (1905) found that the treaty created an easement on the ceded lands where the tribe retained the right to fish at “usual and accustomed places”. Later, cases turned from access to allocation when fishing rights were shared in common with non-Indians: In *United States v. Washington*, commonly cited as the *Boldt Decision*, the court ruled that the tribe<sup>23</sup> received 50 percent allocation of the harvest excluding fish taken for ceremonial or subsistence purposes (*U.S. v. Washington*, 1974). On review, the U.S. Supreme Court set the current standard for allocating harvests, granting tribes the minimum amount of fish needed to provide the tribe with a moderate living but not to exceed 50 percent of the harvest and including ceremonial and subsistence in the total allocation (*Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 1979). These decisions would later become important in interpreting whether tribes have a right to habitat protection including instream flows to support fisheries.<sup>24</sup>

The controversy surrounding tribal water rights has involved claims to instream flows and determining not only if a right exists but how to quantify that right. The second phase of the Washington cases decided the question of whether the treaty right to fish also implied a treaty right to habitat protection. The court ruled that a reserved right to fish included the right to productive habitat but this decision was later vacated (*United States v. State of Washington*, 1980, *United States v. State of Washington*, 1982, *United States v. State of Washington*, 1985). Despite this, other courts’ actions, as discussed below, have mostly been consistent with the

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<sup>22</sup> In the 1960s, the tribes began fish-ins to protest the treatment of American Indian fisherman. In 1970, approximately sixty people were arrested and the police disbursed tear gas. Later that year, over sixty Indian nations gathered in Washington to support tribal efforts to protect treaty-fishing rights. In 1971, an Indian fishing activist was shot (Johnson, 1996). Despite the sometimes violent conflict, the tribes were eventually successful in obtaining recognition of treaty fishing rights, but the victory was short lived as fisheries precipitously declined, thereby setting the stage for water and habitat disputes to recover the species.

<sup>23</sup> The following tribes in Washington participated in the suit: Hoh; Makah, Muckleshoot; Nisqually; Puyallup; Quileute; Skokomish, Lummi; Quinault; Sauk-Suiattle; Squaxin Island; Stillaguamish; Upper Skagit River; and Yakama Nation.

<sup>24</sup> This is a limited review of litigation pertaining to tribal fisheries. For a more extensive overview, see Newton (2005).

vacated decision that the right to fish includes a corresponding right to habitat and that water is essential to the tribal fishing right. However, the case law is far from certain and, therefore, poses a potential risk to parties that seek to pursue litigation. The cases have mostly occurred in the Pacific Northwest, but the tribes of the Wind River Reservation and Pyramid Lake Reservation have also engaged in a series of lawsuits in pursuit of water for fisheries.

The Pyramid Lake Paiute were one of the first tribes to litigate their claims to water to support trust fisheries. Demonstrating the potentially powerful rights the tribes possess and the federal government's fiduciary duty to protect trust resources, the court affirmed that the federal government breached its trust responsibility by allocating excess waters to a Reclamation project instead of to the tribe for fisheries. The decision affirmed the preeminence of the federal trust relationship with the tribes, the federal government's duty to protect tribal resources and the potentially significant liability resulting from a failure to protect trust resources (*Pyramid Lake Paiute Tribe of Indians v. Morton*, 1973). Later rulings continued to extend the right to fish to include corresponding water needed to support the fishery. For example, one court required water sufficient to maintain a specific temperature and flow for an on-reservation fishery (*United States v. Anderson*, 1982), while another court awarded the tribe water to maintain a fishery to replace those destroyed by dams (*Colville Confederated Tribes v. Walton*, 1981). Similarly, the courts confirmed the Bureau of Reclamation's authority to operate dams for tribal ESA listed fisheries (*Klamath Water Users Protective Ass'n v. Patterson*, 1999, *Klamath Water Users Protective Ass'n v. Patterson*, 2000). *Adair I and II* affirmed that the Klamath tribe retained hunting and gathering water rights on former reservation lands with a time immemorial priority date. Furthermore, these aboriginal instream water rights did not create a right to withdraw water, but rather reserved a minimum amount of water to be left in the channel that could not be transferred to a different use. In addition, the court held that the tribe was entitled to the amount of water needed to support treaty rights as currently exercised (*United States v. Adair*, 1979, *United States v. Adair*, 1983). After the State of Oregon issued preliminary findings on the tribal water claims, the tribe and United States in *Adair III* sought clarification of the meaning of "as currently exercised." The court determined that the right was the amount necessary to support productive habitat for the resource, which was allocated at a harvest level necessary to provide the tribes with a moderate living as noted in *Washington Passenger Fishing Vessel* (*United States v. Adair*, 2002). However, like the Washington case explicitly acknowledging habitat, the Ninth Circuit vacated the *Adair III* decision as not ripe (*United States v. Braren*, 2003). Despite these vacated decisions, the trend indicates a tendency

to recognize water rights to support habitat for tribal fisheries within the boundaries or former boundaries of a reservation.

Not all tribes, however, have received favorable decisions when trying to obtain water rights for instream flows. The experience of the Pyramid Lake Paiute Tribe in Nevada has served as a lesson to tribes across the West involved in water adjudications to file claims on their own behalf and for any potential purpose. The Pyramid Lake Paiute's water rights were previously quantified in the Orr Ditch Decree; however, the federal government had failed to claim rights to support the lake and rivers for tribal aboriginal fisheries. Despite recognizing that the federal government represented conflicting interests in asserting water claims, the court refused to reopen the Orr Ditch Decree and held the decree to be final, valuing the certainty of an adjudication over the injustice to the tribe (*Nevada v. United States*, 1983). Meanwhile, proceedings were underway to adjudicate the rights of the tribes of the Wind River Reservation. The special master dismissed claims to support off-reservation fishing, but found that the reservation was a homeland and granted instream flow rights within the reservation. The court rejected the homeland purpose and only recognized the irrigation rights, leading to a series of lawsuits. The court distinguished the Shoshone and Arapaho claims from other cases awarding instream flows stating that the tribe did not have a specified treaty right. In addition, there was no indication that the tribe had a tradition of fishing or had been largely dependent on fishing to support claims for aboriginal water rights (*In re Gen. Adjudication of All Rights to Use Water in the Big Horn*, 1988). The Wind River tribes then attempted to transfer future irrigation water rights awarded under the PIA standard to current instream flow rights on the reservation, prompting additional litigation. The result was yet another unfavorable and puzzling decision<sup>25</sup> for the tribes which required future rights to first be put to their adjudicated use of irrigation before being changed to a different use. As these cases show, while the courts have generally been favorable to on-reservation instream water rights, each decision has been unique to the specific facts, and there is still uncertainty as to whether a tribe will be awarded instream flows.

The determination of off-reservation water rights for fisheries has involved inconsistent decisions resulting in significant uncertainty, particularly since the U.S. Supreme Court has yet to hear a case involving instream off-reservation tribal water rights (Myers et al., 2004). Similar to the aforementioned cases involving irrigation operations, a court affirmed Bureau of

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<sup>25</sup> Courts have generally held that the PIA is a means to quantify the amount of water reserved but that the tribes may then put it to any lawful purpose once quantified (*Colville Confederated Tribes v. Walton*, 1981, *United States v. Anderson*, 1984)

Reclamation's release of water to prevent dewatering of treaty fisheries' habitat off of the reservation to protect salmon redds but did not rule on the existence of a water right (*Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 1985). In a different case, the court found that the tribe held an off-reservation fisheries water right to tributaries of the Yakima River at treaty protected usual and accustomed to fishing places; however, the court determined that the water right had been diminished in conjunction with damage to the fishery (*In the Matter of the Determination of Rights to Yakima*, 1995). The tribe was entitled to a time-immemorial water right quantified as the "minimum instream flow necessary to maintain anadromous fish life in river, according to annual prevailing conditions" (*Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 1993). Interestingly, the court specifically acknowledged that conditions change and thereby required the tribal off-reservation instream right to be unquantified and managed based on annual conditions (Ottem, 2008). The previously discussed Adair case is sometimes referenced in support for off-reservation fisheries because the water rights survived the termination of the reservation (Goodman, 2000; *In re SRBA, Subcase 03-10022, Order on Motions for Sum. Judgment*, 1999); however, the instream flows awarded were only on lands within the former reservation boundaries and the termination act specifically preserved water rights. In contrast, the Snake River Basin Adjudication (SRBA) Court in Idaho rejected the Nez Perce's claims to off-reservation instream flows to support the tribe's treaty reserved right to fish at usual and accustomed places off-reservation. The court stated that the tribe's fishing right was subject to changing conditions and the Nez Perce merely had a right to a portion of the fish available to harvest (*In re SRBA, Subcase 03-10022, Order on Motions for Sum. Judgment*, 1999).<sup>26</sup> Whether this inconsistency in decisions only holds to the facts of the Nez Perce Tribe's case or could be applied in other situations is unclear.<sup>27</sup>

In summary, where there is a specific history of a tribe's reliance on fishing and depending on the language of the treaty or executive order, the tribe may have an aboriginal time immemorial water right within the boundaries of the reservation. In addition, where there

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<sup>26</sup> The tribes sought to have the judge removed when Judge Wood revealed that the outcome of the tribe's claims could affect his family's water rights. By the time the case was heard, it was dismissed as moot since Judge Wood was no longer part of the SRBA court (*United States v. State*, 2002).

<sup>27</sup> The facts, however, are sufficient for the Montana Compact Commission, who has acknowledged the Confederated Salish and Kootenai tribes' claims to on-reservation and off-reservation instream flows and is seeking to fulfill these claims while limiting impacts on existing consumptive uses (Reserved Water Rights Compact Commission, 2011).

is not a history of a fishing culture, the tribe may receive water under the PIA standard, which may or may not be transferred to an on-reservation instream right, or the tribe may receive water under the homeland standard, which could potentially quantify water for on-reservation instream use. In these cases, the priority date would be the date of the reservation. Finally, in the case for off-reservation instream uses, the law is unclear; a fact that is integral to understanding the importance of litigation in the context of settlements as principles from litigation continue to frame and define the starting points for negotiation. Table 2.1 summarizes each body of law as discussed above.<sup>28</sup>

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<sup>28</sup> The courts generally do not explicitly delineate between “Winters” and “Winans” water rights and often “view a treaty right to fish, for example, as evidence that one purpose of the reservation was to permit the tribes to continue their aboriginal fishing way of life, rather than as a distinct source of implied rights to water” (Newton, 2005, p. 1173). Since the literature and courts are inconsistent and imprecise in distinguishing between reserved rights arising under federal law, this table and associated terminology are based on Newton (2005) with Dep’t of *Ecology v. Acquavella* (1983), and *State v. Confederated Salish & Kootenai* (1985) used as supporting references. See also Blumm & Brunberg (2006), Strack (2006) and Wood (1999).

Table 2.1 Elements of Prior Appropriation and Indian Reserved Water Rights

Water Right	Prior Appropriation (State Law)	Indian Reserved Rights (Federal Law)	
		New Use	Aboriginal Use
Purpose/ Beneficial Use	Established in permit when use begins, considered measure, limit of right	Rarely express, generally implied. Undetermined until adjudication. Rights for primary purpose(s) of the reservation.	
		Reservation refers to set aside of land and new uses, usually agriculture or homeland.	Reservation refers to aboriginal practices. Affirms continued existence of a previous right/use. May have off-reservation rights.
Priority Date and Establishment	Date use begins, water right permit	Date of federal treaty, federal statute or executive order.	Time immemorial. Fishery rights implied or explicit depending on the treaty or executive order. Where implied, tribe must show a history of dependence on fishing.
Quantification	Amount actually used to meet beneficial use without waste	Minimum amount necessary to fulfill the primary purpose of the reservation. Undetermined until adjudication.	
		Minimum necessary for current and future uses. Agricultural – PIA standard. Homeland – various considerations.	Fishery – Enough to maintain fishery. Case law unclear.  Agricultural – Past use
Nonuse	Loss of right	No loss of right.	
Other Names	Not applicable	<i>Winters</i> rights	<i>Winans</i> or <i>Adair</i> rights

Sources: Myers et al. (2004), *Dep't of Ecology v. Acquavella* (1983), Newton (2005), and *State v. Confederated Salish & Kootenai* (1985).

## **2.6 Western Water Institutions: Considerations**

As social values shifted towards restoring instream flows and concerns over equity and indigenous rights grew, tensions erupted between these newly acknowledged uses and those interests that had legitimately prospered from past practices (Bingham, 1997; Colby, 2000; Gilless & Langridge, 2004). The intersection of tribal water interests with tribal species protected under the Endangered Species Act has created tensions that, in conjunction with local pressures to restore instream flows, challenge the institutional status quo. Some point out that the Endangered Species Act only comes into effect when the species are in crisis mode, which leads to reactive measures to recover the species, while increasing the potential for conflict. Similarly, the response to tribal water rights has been reactive. The result is that both have the potential to create rapid and drastic changes in basins with little capacity to address these changes (Curtis & Davison, 2003). Research on water conflicts points towards the importance of institutions in preventing tensions and suggests that conflict is more likely in areas of “rapid change that occurs either in the basin’s physical setting...or its political setting” coupled with a lack of institutions that have the capacity to cope with that change (Wolf, 2009, p. 69). Furthermore, the experiences in the international water sector suggest that longer-term tensions are likely to develop when one country independently takes actions to control a river “in the absence of a treaty or other protective international mechanism” (p. 69). Therefore, the need to create capacity to manage these strains becomes apparent in extrapolating these findings to management of water in the United States, wherein unilateral actions have been common in the history of non-Indian water development and, today, wherein water rights can suddenly be restricted to fulfill tribal water rights or ESA requirements. As parties have sought more voluntary measures, mechanisms under state law have emerged to address instream flows while negotiated agreements have emerged as a mechanism to quantify tribal water rights (Bingham, 1997; Colby, 2000; Gilless & Langridge, 2004) and improve basins’ institutional capacity to manage water resources and ecosystems.

## **2.7 Tribal Water Right Settlements**

### **2.7.1 *Litigation versus Negotiation***

In the early 1990s as more Indian water settlements were completed, researchers began questioning the efficacy of negotiated agreements and if settlements were more effective than

litigation.<sup>29</sup> Colby (2000) developed criteria to evaluate voluntary and compulsory tools to manage water resources but found that both are often used to create change in a basin. Without the threat of litigation or regulatory action, voluntary measures such as market transactions and negotiated agreements are difficult to implement. Therefore, change often occurs as a result of the interplay between the different tools utilized (Colby & D'Estree, 2000; Colby et al., 2005; Cosens, 2003; Nie, 2008). While litigation and regulation are at times necessary, voluntary methods are typically preferred (Colby, 2000).

Research mostly supports the resolution of water disputes through negotiation instead of litigation because of the capacity to adapt water management solutions to the specific situation in a manner that court allocations would fail to consider (Cosens, 2003). Litigation typically focuses on differences, potentially dividing parties further. Negotiation, however, directs groups to focus on what they have in common (Colby et al., 2005; Cosens, 2003) and allows parties to develop solutions that enable continued management in the future while also generating social capacity and more inclusive solutions (Cosens, 2003). In fact, the changing nature of available information, values, ecosystem conditions and weather conditions, means that tensions involving water resources are never completely resolved; therefore, developing the capacity of parties to solve problems in the future can be an important outcome of negotiation (Colby & D'Estree, 2000). However, other research has shown that tribal water settlements have not always lived up to the expectations of those that advocate settlements over litigation (Burton, 1991; McCool, 1993a, 1993b, 2002). The outcomes are specific to each situation; therefore, time savings, cost savings, reduced obstacles to implementation, resolution of all issues, increased water deliveries, successful implementation, and better relations are expected advantages of negotiation but do not occur in all cases. Despite this, negotiation remains the preferred method to resolve these disputes (McCool, 2002).

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<sup>29</sup> As noted previously, pitting litigation against negotiation may not be a pertinent question if both are necessary in order to create the change necessary to resolve ongoing disputes. As discussed in the analysis of the Pyramid Lake Case, negotiated agreements do not necessarily cause litigation to cease. However, if litigation and negotiation are necessary for effective water management and allocation, then success cannot be defined by a lack of one or the other.

### **2.7.2 Overview of Congressionally Approved Water Settlements**

In 1978, Congress passed the first tribal water rights settlement.<sup>30</sup> As of July 2011, Congress has approved 27 tribal water rights settlements which are listed below in Table 2.2 (Anderson, 2010; *Claims Resolution Act of 2010*, 2010).<sup>31</sup>

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<sup>30</sup> Settlement agreements did occur before 1978; however, the Ak-Chin water agreement is cited as the first settlement in the era of modern negotiated settlement agreements (Anderson, 2010; Colby, Thorson, & Britton, 2005; McCool, 1993a, 1993b, 2002; Thorson, Britton, & Colby, 2006).

<sup>31</sup> The full citations for settlement acts and agreements are included in the References section.

Table 2.2 Congressionally Approved Tribal Water Rights Settlement Acts, Settlement Agreements and Tribes.

<b>Federal Act</b>	<b>Associated Settlement Agreement</b>	<b>Tribes</b>
Aamodt Litigation Settlement Act (2010)	New Mexico ex rel. State Engineer v. Aamodt, Settlement Agreement (2006)	Nambé, Pojoaque, San Ildefonso, and Tesuque Pueblos
Act of July 28, 1978 - Ak-Chin Indian Community	Not Applicable	Ak-Chin Indian Community of Papago Indians of the Maricopa, Ak-Chin Reservation
Arizona Water Settlements Act - Gila River Indian Community Water Rights Settlement Act (2004)	Amended and Restated Gila River Indian Community Water Rights Settlement Agreement (2005)	Gila River Indian Community, Tohono Oodham Nation
Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act (1999)	Chippewa Cree Tribe-Montana Compact (1997)	Chippewa Cree Tribe of The Rocky Boy's Reservation
Colorado Ute Indian Water Rights Settlement Act of 1988	Colorado Ute Indian Water Rights Final Settlement Agreement (1986)	Southern Ute and Ute Mountain Ute Tribes, and Navajo Nation
Crow Tribe Water Rights Settlement Act of 2010	Crow Tribe-Montana Compact (1999)	Crow Tribe
Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act (1990)	Not Applicable	Fallon Paiute-Shoshone Tribe
Fort Hall Indian Water Rights Act of 1990	The 1990 Fort Hall Indian Water Rights Agreement	Shoshone-Bannock Tribes of the Fort Hall Indian Reservation
Fort McDowell Indian Community Water Rights Settlement Act of 1990	Fort McDowell Indian Community Water Right Settlement (1983)	Fort McDowell Indian Community
Jicarilla Apache Tribe Water Rights Settlement Act (1992)	Contract between the United States and the Jicarilla Apache Tribe (1992)	Jicarilla Apache Indian Tribe
Northern Cheyenne Indian Reserved Water Rights Settlement Act (1993)	Northern Cheyenne-Montana Compact (1991)	Northern Cheyenne Indian Tribe
Northwestern New Mexico Rural Water Projects Act - San Juan Water Rights (2009)	San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (2005)	San Juan Navajo Nation
Reclamation Projects Authorization and Adjustment Act (1992)	Ute Indian Water Compact (1980)	Utah Ute

Table 2.2 Congressionally Approved Tribal Water Rights Settlement Acts, Settlement Agreements and Tribes (Continued)

<b>Federal Act</b>	<b>Associated Settlement Agreement</b>	<b>Tribes</b>
Salt River Pima-Maricopa Indian Community Water Rights Settlement Act (1988)	Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement (1988)	Salt River Pima-Maricopa Indian Community
San Carlos Apache Tribe Water Rights Settlement Act (1992)	San Carlos Apache Tribe Water Rights Settlement Agreement (1999)	San Carlos Apache Indian Tribe
San Luis Rey Indian Water Rights Settlement Act (1988)	Not Applicable	La Jolla, Rincon, San Pasquale, Pauma, and Pala Bands of Mission Indians
Seminole Indian Land Claims Settlement Act (1987)	Water Rights Compact among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District (1987)	Seminole Tribe
Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act (2000)	Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Agreement (2001)	Shivwits Band of Paiute Indians
Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement (2009)	Agreement to Establish the Relative Water rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and the Upstream Water Users (2006)	Shoshone Tribe Paiute Tribe
Snake River Water Rights Act (2004)	Mediator's Term Sheet (2004)	Nez Perce Water Rights Settlement
Soboba Band of Luiseño Indians Settlement Act (2008)	Soboba Band of Luiseño Indians Settlement Agreement (2006)	Soboba Band of Luiseño Indians
Southern Arizona Water Rights Settlement Amendments Act (1982)	Tohono O'odham Settlement Agreement (2006)	San Xavier and Schuk Toak Districts, Tohono O'odham Nation
Taos Pueblo Indian Water Rights Settlement Act (2010)	Taos Pueblo Draft Settlement Agreement (2006)	Taos Pueblo
Truckee-Carson-Pyramid Lake Water Rights Settlement Act (1990)	Preliminary Settlement Agreement (1989)	Pyramid Lake Paiute Tribe
White Mountain Apache Tribe Water Rights Quantification Act (2010)	White Mountain Apache Tribe Water Rights Quantification Agreement (2009)	White Mountain Apache Tribe
Yavapai-Prescott Indian Tribe Water Rights Settlement Act (1994)	Yavapai-Prescott Indian Tribe Water Rights Settlement Agreement (1995)	Yavapai-Prescott Indian Tribe
Zuni Indian Tribe Water Rights Settlement Act of 2003	Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin (2002)	Zuni Pueblo

Table 2.3 shows that only one settlement has been completed in an eastern state where the riparian doctrine is the predominant body of law. The other 26 agreements affect tribes in the West, with Arizona accounting for one third of all settlements completed followed by New Mexico where four agreements have been approved. Montana has completed six water compacts through its unique approach to settling federal and tribal reserved water rights; however, Congress has only approved three of the six agreements. Notably lacking agreements are the states of Washington<sup>32</sup> and Oregon,<sup>33</sup> where salmon are both culturally significant to tribes and listed under the ESA.

Table 2.3 Number of settlements approved by Congress within each state. Notice the lack of settlements approved in Washington where most tribes have treaty-fishing rights.

State	Settlements
Arizona	9
New Mexico	4
Montana	3
Nevada	3
California	2
Idaho	2
Utah	2
Colorado	1
Florida	1

As shown in Table 2.4, the passage of congressionally approved water rights settlements has progressed slowly over the 33 years that modern agreements have been negotiated with an average of less than one approved per year, which means that most tribes are unlikely to receive a water settlement anytime soon.<sup>34</sup>

<sup>32</sup> Washington has completed a settlement with the Lummi Nation (Anderson, 2010), but it is not a congressionally approved settlement. The Yakama tribes' rights were adjudicated (*Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 1993).

<sup>33</sup> Oregon has completed a water settlement agreement with the Confederated Tribes of the Warm Springs Reservation, which has not been congressionally approved (Anderson, 2010).

<sup>34</sup> It is not clear how many of the 565 federally recognized tribes could have a claim to a water right.

Table 2.4 Number of settlement agreements passed by Congress by year. Amendments to settlements have been excluded. Approval of agreements is sporadic and there is no indication that settlements will be completed and passed more expeditiously in the future.

<b>1st Year Passed Congress</b>	<b># of Settlements</b>
1978	1
1982	1
1987	1
1988	2
1990	4
1992	4
1994	1
1999	1
2000	2
2003	1
2004	2
2008	1
2009	2
2010	4

### **2.7.3 Reallocation Mechanisms in Tribal Settlements**

While market mechanisms are a method of reallocating water, they do not address the fact that tribes have senior rights that have typically gone unused. As a result, water right settlement agreements use both market and non-market mechanisms to fulfill tribal water rights. Understanding the different mechanisms encompassed in a water agreement allows for comparison between agreements and the potential to understand what tools are useful. Tribal water rights settlements have included a number of different mechanisms to obtain water for tribes. Many water settlements have included provisions designating unused reclamation contracts (Burton, 1991); purchasing water rights; funding water efficiency measures (Burton, 1991; Colby et al., 2005; Thorson et al., 2006); developing or importing new water supplies; and providing economic development or monetary compensation instead of water (Colby et al., 2005). A review of Montana water compacts with tribes revealed additional tools including subordination, exchange, and mitigation. Tribes may agree to subordinate their rights to other existing uses when there is little risk of a call on the tribe's water, or when another mechanism is utilized that makes the subordination irrelevant in the total allocation. Exchange involves

changing the withdrawal source to a different surface water source or switching to groundwater. Mitigation includes creating new water through efficiency improvements, storage, or other means to offset new uses (Thorson et al., 2006, p. 164). Water agreements typically have provisions to address the concerns of existing users, which may include a variety of incentives to encourage settlement such as financial compensation, debt forgiveness, new water projects, upgrades to existing facilities, modification of contracts (McCool, 2002, pp. 59–60) and ESA protections (Strack, 2006). Without the option of building new dams and the focus on minimally impacting existing water users, tribal water rights settlements often involve a combination of money and innovative solutions to maximize the utility of existing infrastructure (McCool, 2002). The variety of tools utilized in prior settlements demonstrates the flexibility of negotiation to creatively satisfy parties and reach an agreement.

A preliminary analysis of all 27 congressionally approved water settlements reveals the multitude of mechanisms, tools and water sources that tribal settlements have incorporated to accommodate both tribal and non-tribal water uses and rights. As shown in Table 2.5, tribal settlements are not simply relying on one or two allocation methods, but rather are patching together complex settlements utilizing multiple mechanisms. The creativity and innovation behind these agreements goes far beyond the determination of priority and nonuse that form the basis of litigation and adjudication.

Table 2.5 Number and Percent of Agreements Incorporating Water Allocation Sources and Tools. These are preliminary results obtained by reading the main settlement agreement and corresponding settlement act once without further verification for accuracy. Attachments and supporting settlement documents were not reviewed.

<b>Allocation Mechanism</b>	<b>Agreements Using Mechanism N=27</b>	<b>Percentage of Agreements</b>
Storage, Project Water, Dam Reoperation	24	89%
Groundwater	22	81%
Tribe May Lease, Rent, Sell, Market Water	21	78%
Tribal Fund	19	70%
Natural flow	18	67%
Purchase / Retirement / Relinquishment	16	59%
New Infrastructure Pipeline, Canals etc.	15	56%
Exchange	14	52%
Joint/Partial Tribal Administration	11	41%
Water Conservation	11	41%
Shortage Sharing / Proration	11	41%
Priority Date Shift / Promise Not to Call	11	41%
Aquifer Storage and Recovery / Groundwater Replenishment	10	37%
Water Quality Provisions	10	37%
Wastewater / Reuse	9	33%
Basin Closure / Limits	9	33%
Land Acquisition	8	30%
Mitigation	7	26%
Administration Board	7	26%
Subordination	6	22%
Forbearance	4	15%
Future Rights	4	15%

While this discussion of mechanisms has primarily focused on technical tools of water augmentation and reallocation in order to fulfill water rights, it is important to recognize that negotiation and other voluntary measures offer the possibility to shift the discourse from win-lose rights-based arguments to a focus on needs and values of all parties. Negotiations based on needs and values can lead to addressing broader issues that allow the parties to come to agreement. Wolf (1999) suggests that “multi-resource linkages may offer more opportunities for creative solutions to be generated, allowing for greater economic efficiency through a

‘basket’ of benefits” (sec. 3). Creative solutions under the “basket of benefits” approach involve expanding the benefits from the use of water and may include financial incentives, power generation, information sharing, and even water quality transactions. For example, the United States paid Canada for the flood control benefits of dams on the Columbia, while India prevented erosion by having trees planted upstream in Nepal. In fact, the recent Klamath Basin Restoration Agreement takes a comprehensive benefits approach by incorporating elements of land, water, ESA protections, and power generation into the agreement (“Klamath Basin Restoration Agreement,” 2010). Similarly, the water negotiations in the Snake River Basin took the “basket of benefits” approach by addressing ESA protections and tribal water rights all at once, significantly reducing the uncertainty for existing water users (Strack, 2006). Therefore, in identifying the mechanics of settlement agreements, it is important to discern other drivers that may contribute to an agreement’s success.

## **2.8 The Status of Tribal Water Rights Today**

Although the United States Supreme Court first recognized Indian reserved water rights in 1908, progress has been slow in quantifying and developing these rights even as non-Indian water development has pressed forward (McCool, 2002; U. S. Department of Interior, 2010). A recent study of U.S. water management by the United Nations Human Rights program found that “thirteen percent of American Indian households do not have access to safe water and/or wastewater disposal” in comparison to 0.6 percent of non-Indian households (Albuquerque, 2011, sec. III.4). Similarly, one estimate suggests that fewer than 75 of the 565 federally recognized Indian tribes have quantified their water rights (National Congress of American Indians, 2010). According to a Bureau of Indian Affairs report in early 2010, at that time there were 24 water adjudications involving 60 tribes and over 40 pending lawsuits affecting tribal water rights (U. S. Department of Interior, 2010). Due to limited resources, however, only 18 negotiation teams are working to settle Indian water claims, which are insufficient to address the increasing number of tribes that have notified the Department of Interior of their interest in settling (U. S. Department of Interior, 2010, p. IA-RES-4). Fulfilling Indian water rights will continue to challenge all water users, particularly those in over-allocated basins, as the federal government moves to meet its trust obligations and as states seek to plan future water supplies.

While it is unclear if water right settlements will continue to be the primary mechanism for fulfilling tribal water rights, it is apparent from an instream flow perspective that tribes will continue to explore this option. In a study of six adjudications, researchers found that courts did

not require restoration of streamflows in sufficient amounts necessary to meet the purposes of the reservation. Instead, they concluded that tribes that have been successful in restoring some quantity (although diminished) of streamflows have done so through the use of settlement agreements and state water rights while leveraging whatever limited judicial recognition had been obtained (Blumm et al., 2006). As discussed previously, many tribes are concerned about setting precedent in litigation, and are relatively dissatisfied with state efforts to restore instream flows, which means that settlement agreements are likely to be the primary mechanism in the future. Three tribes with potentially significant instream claims have already signaled their interest in a settlement agreement. The Klamath Tribes in Oregon and the Confederated Salish Kootenai Tribes of the Flathead Reservation in Montana<sup>35</sup> are currently involved in negotiations to settle water rights (“Montana Compact Commission,” n.d.), while the Umatilla tribes are preparing for settlement negotiations (CUJ, 2009). Furthermore, given that the nine Steven’s treaties were signed with 23 tribes, bands and confederations, future quantification of water rights for instream flows could involve substantial fisheries water right claims (Mulier, 2006).<sup>36</sup> Despite the federal government’s preference for settling water claims through negotiated settlements and the apparent hostility of state courts in adjudicating these claims, there is no comprehensive analysis of tribal water rights settlements with a focus on instream flows. Given that tribal water rights settlements with significant instream flow provisions are likely to be negotiated in the future, understanding how instream flows have been incorporated into previous agreements will be a valuable resource for parties involved in future negotiations to resolve these disputes.

## 2.9 Defining Success

While the focus, thus far, has been on discussing mechanisms to manage water resources for multiple interests, it is important to recognize that the mechanism is not the ultimate objective. Rather, parties create mechanisms and institutions to achieve a successful

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<sup>35</sup> The Confederated Salish Kootenai Tribes are the only Steven’s treaty tribe in Montana (Osborn, 2009) and are the last Montana tribe to negotiate a water compact with the state. The Fort Peck, Blackfeet, and Fort Belknap Compacts with Montana have yet to be approved by Congress as of June 2011 (“Montana Compact Commission,” n.d.).

<sup>36</sup> Tribes in the Great Lakes region may also have significant water right claims to support tribal fisheries; however, a discussion of tribal water rights in the context of the riparian doctrine is beyond the scope of this research. See generally Singel and Fletcher (2006).

outcome. Surprisingly, a review of the literature reveals that it is difficult to define what constitutes successful resolution of these conflicts.

Generally, settlements have resulted in tribes agreeing to a reduction in their potential *Winters* water rights in return for funds and water supply development. In addition, agreements must also consider and ameliorate the impacts on existing water users, often by incorporating substantial benefits to non-Indian parties to garner support for the settlement conditions. In light of the fact that not all agreements have been implemented or resulted in the delivery of promised funds and water to tribes, these practices have led some to question whether negotiation is really better than litigation for tribes and has prompted research on criteria for determining success (Burton, 1991; Colby et al., 2005; McCool, 2002; Sly, 1988). Clearly, the presumption that negotiations are successful when an agreement has been reached cannot be the only measure: One only needs to look at the history of United States and American Indian relations during the treaty era to conclude that the signing of an agreement does not in itself constitute success.

There have been efforts to identify objectives embedded in water negotiations to create criteria to evaluate settlements. A common theme in water management is the need to prevent conflict and resolve tensions while recognizing that water systems are highly interconnected, complex, ever-changing, and uncertain (Gleick, 1998; Ison, Roling, & Watson, 2007). As such, flexibility and adaptive capacity are often cited as important qualities of a successful water management system (Carden, 2006; Colby, 2000; Cosens, 2003; Pahl-Wostl, 2002; Richter, Mathews, Harrison, & Wigington, 2003). Flexibility can be “defined as the potential of a system for structural change,” whereas “adaptability refers to the potential of a system to adapt to changes in external boundary conditions” (Pahl-Wostl, 2002, p. 396). In addition, Gleick (1998), citing the failure of past and current policies to consider environmental, cultural and social water needs, suggests that future policies must include a focus on sustainability and equity. Similarly, fairness and equity have been consistent standards (Burton, 1991; Colby, 2000; Cosens, 2003; Thorson et al., 2006) in discussions of tribal water right settlements precisely because of the inequities in past practices and the potential for future actions to place a disproportionate burden on certain water users. Furthermore, to reduce fear related to changes in allocation, the goal of some agreements may be to create safe conditions for those that must undergo the change (Colby et al., 2005). Similar to the western United States, Wolf (1999) notes that negotiations in international water allocation disputes often begin with claims based on the most extreme position of riparian rights or priority dates, making negotiation difficult

until parties shift towards thinking about needs or values. When this shift occurs, “‘reasonable and equitable use’ and the obligation not to cause ‘significant harm’” have emerged as the middle of the road allocation principles, but as Wolf explains, even defining and choosing between these principles has proved challenging in the international sector (sec. 2). At the very least, these objectives provide an indication of criteria to use for evaluating agreements and possible aspirations for parties involved in water transactions.

Based on these objectives, researchers have reviewed all stages of tribal water settlements from negotiation to implementation and identified criteria for success. Research on the negotiation process for tribal settlements has included: indicators of when a dispute may be suitable for negotiation; best practices to reach a settlement; how to determine who to invite to the table; and other rules to prevent implementation pitfalls (Folk-Williams, 1988; Thorson, 1992). Research suggests that “durability, marketability, enforceability, equity, and perpetuity” are factors to consider in evaluating settlements (Burton, 1991, p. 87). Colby (2000), however, proposes that an effective agreement has:

Reasonable process costs, includes realistic financial mechanisms to cover costs, is perceived as worthwhile in terms of benefits exceeding costs, is cost effectively implemented, and is one for which costs are fairly distributed. In addition, successful mechanisms to resolve water disputes must provide the flexibility to adapt to changing resource needs, stimulate paradigm shifts in addressing future conflicts, and improve the disputants' ability to resolve subsequent problems (p. 27).

The last three criteria in particular highlight the important social capacity that negotiations can generate. Similarly, Cosens (2003) defines a durable solution as “a comprehensive solution in both participation and issues and an equitable distribution of the benefits of use of the water resource, both among members of living generations and between living generations and future generations” that is simple, flexible, and has the capacity to address disputes as they arise (p. 983).

While the aforementioned criteria are helpful in determining standards of effective conflict resolution, d’Estrée and Colby (2004) have developed a more comprehensive framework for evaluating environmental conflict resolution that incorporates the above variables, as well as other criteria derived from alternative dispute resolution theories and interviews with practitioners. The case report framework provided in the *Appendix A: Guidebook for Analysis in Environmental Conflict Resolution* (“Guidebook”) outlines 28 criteria for defining successful conflict resolution and a methodology for data collection using

only publically accessible information (see Table 3.1). Section I of the framework includes four criteria to assess the extent to which the parties reached an agreement. Section II criteria assess how the parties reached the agreement including: the openness and extent that all interests were represented and provided equal and fair consideration; the distribution of information to the public and opportunity for public participation; and the distribution of costs accumulated in coming to agreement. Category III criteria seek to ascertain the quality of the outcome reached including: the distribution of implementation costs; the perception of whether the benefits outweighed the costs; the long-term capacity to meet financial obligations embedded in the agreement; the effect on communities including demographics, economics, and culture; the environmental and resource sustainability; the establishment of clearly defined performance criteria; the legal, political and technical viability by the public and stakeholders; and the value created by the agreement. Category IV criteria pertain to the parties' satisfaction with the agreement; the fulfillment of the agreed upon obligations and additional conflict resolution mechanisms utilized; adaptive capacity to deal with change and uncertainty; and finally the stability of the outcome overtime. Category V criteria measure the relations between the parties after the agreement including reduction in enmity in communication; improved relationships; a shift in the perception of the problem and conflict; the capacity to deal with new disputes; and increased understanding of other interests. The final category includes criteria that evaluate the extent that the agreement increases social capital including the capacity to draw on community resources; efficiently coordinate existing systems for effective responses to environmental problems; and improves the resilience of social systems. The Guidebook framework demonstrates the complexity of analyzing and defining successful environmental conflict resolution as process and outcomes matter just as much as the actual terms of the agreement in determining whether a settlement is successful. Despite this challenge, attempts to identify and define principles of a successful resolution are important to ensuring that agreements are worth pursuing in the future.

## **2.10 The Future of Tribal Water Settlements**

Today, policymakers are confronted with addressing the socioeconomic status of Indian communities, redressing inequities from previous policies, and restoring ecosystem function without creating new inequities within rural communities that have prospered from past practices. In order to accomplish these seemingly conflicting objectives, some basins have shifted away from litigation toward more collaborative solutions (Burton, 1991). Despite the

public discourse on impending western water conflicts, some basins in the West have embraced cooperation through the use of negotiated agreements and other voluntary mechanisms to address conflicts associated with interests that were historically ignored in western water policy: tribal water rights, instream flows and aquatic species (Bingham, 1997). As the United States pursues this policy of negotiation, it is worth exploring its efficacy to ensure that the U.S. avoids another era of broken promises as occurred under treaties. In that regard, understanding how current practices are addressing a specific tribal right – the right to water to support fisheries – is a pertinent question as tribes seek to quantify these rights.

### 3 METHODS

In order to understand the utility of tribal water rights settlements as a mechanism for protecting instream flows, an analysis of 27 agreements was performed to identify settlements with applicable provisions and determine the role of instream flows in tribal water settlements. Using the results from this general analysis, two agreements were selected based on the abundance of instream flow protection provisions to allow for more in-depth research into how effective the agreements were in resolving conflict. The process for each of these analyses is discussed below.

#### 3.1 Preliminary Analysis: Identifying Tribal Water Settlements with Instream Flows

This section describes the methods used to analyze the 27 agreements for instream flow, fisheries, and ESA related provisions.

*Population:* Tribal water settlements were divided between those that have been approved by Congress and those that have not. While an initial review revealed that there are water settlements which contain instream flow provisions that have been completed but not approved by Congress, the population was limited to the 27 congressionally approved agreements because it is likely that most settlements will need this consent. Therefore, settlements not approved by Congress were not included in the scope of this analysis, which also eliminated the challenge of attempting to determine how to identify, define and limit the scope of water settlements.

*Preliminary Analysis:* This stage of the analysis sought to identify tribal water settlements with instream flow and fisheries provisions and understand the outcomes in the context of the alternative: litigation. Depending on the document format, each settlement agreement and settlement act was either electronically searched or read for the terms “instream flow,” “fish,” “habitat,” “wetland” and “ecosystem.” Unless there was an indication that a supplemental agreement would incorporate these provisions, the sub-agreements and amendments were not included in the analysis. It was not always possible to distinguish between rights reserved to the tribes and those reserved to the state or federal government for instream flows to serve non-tribal purposes. Another difficulty in assessing whether an agreement provided instream flows was the fact that some simply authorized a volume of water and stated that it would be acceptable for any beneficial use. In addition, some of the agreements did not originally allocate water to an instream use but did allow the tribe to transfer

water from a consumptive use to an alternative purpose such as augmenting instream flows. Therefore, in addition to reviewing water settlements that specifically allotted water to instream uses, the authorized beneficial uses were also identified and recorded. Finally, since the beneficial uses differed for use on-reservation and off-reservation, the authorized uses were recorded separately. The results provided further context in interpreting the importance of the instream right in the agreement, as well as delineating which agreements were a result of tensions associated with instream flows, tribal water rights, and the Endangered Species Act. It should be noted that agreements were only reviewed once for this information and results were not verified for accuracy, introducing a potential source of error.

### **3.2 Comparative Case Analysis and Framework**

The objective of the comparative case analysis was to understand how tribal water rights settlements are not only addressing tribal consumptive water uses but also tribal concerns over fisheries restoration and instream flows in particular, while accommodating traditional water users. If the United States is to prevent another era of broken promises, it is imperative to periodically review the outcomes of settlements to determine if current U.S. policy is following the appropriate trajectory. After comparing the similarities and differences between the two settlements from a mechanisms standpoint, I analyzed the Nez Perce agreement using an evaluation framework consisting of 28 criteria for defining successful conflict resolution. The Pyramid Lake Case had already been analyzed using this framework and was published in *Braving the Currents*. I then compared each criterion of success for both the Nez Perce Case Study and the already completed Pyramid Lake Paiute Case Study to discuss the implications of patterns and inconsistencies between the two for future agreements.

#### **3.2.1 Case Study Selection**

The two case studies selected for analysis are drawn from a population of the twenty-seven water rights settlement acts and corresponding settlement agreements that have been passed by Congress through 2010. After reviewing all of the tribal water settlements for instream flow provisions as discussed in section 3.1, the Nez Perce Water Rights Settlement and the Truckee-Carson Pyramid Lake Water Rights Settlement were selected for comparison because they exhibit complex basins with creative solutions to address water rights for tribal fisheries that are also listed under the Endangered Species Act. Furthermore, in comparison to the other settlements, these had the most instream flow and habitat provisions aside from two agreements that were driven by restoration of wetlands for religious and cultural purposes.

Since I expect that the Endangered Species Act will be a secondary driver in tribal water settlements, particularly those in the Pacific Northwest, these ESA driven agreements are appropriate to understanding how instream flows and the Endangered Species Act are incorporated into settlement agreements for tribal water rights.

### **3.2.2 *Introduction to Framework for Evaluating Success***

Research was performed in accordance with the research methodology and research guidebook developed in *Braving the Currents: Evaluating Environmental Conflict Resolution in the River Basins of the American West* (d' Estrée & Colby, 2004) and outlined in "Appendix A: Guidebook for Analyzing Success in Environmental Conflict Resolution Cases" to generate one case study identifying the strengths and weaknesses of the Snake River Water Rights Settlement (Nez Perce Water Rights Settlement). The framework provides a standardized case study approach to analyze the 28 criteria (see Table 3.1) in order to facilitate comparative analysis between cases. It is important to note that these are criteria that define the characteristics of success and are not necessarily predictors of successful conflict resolution. In addition, it is unlikely that all water dispute solutions will have all of these qualities since fulfillment of some of the criteria may affect the ability to meet other criteria. For example, increasing flexibility may lead to poorly defined outcomes and greater uncertainty. Despite this, defining broad standards for conflict resolution mechanisms to achieve is important in helping negotiators and interested parties to understand the inevitable tradeoffs of a proposed agreement and its corresponding strengths and weaknesses. The benefit of this framework and the reason it was selected is that it provides a methodology for identifying strengths and weaknesses of a case's resolution through its multi-dimensional evaluation criteria.

### **3.2.3 *Development of a Framework for Evaluating Success***

According to d'Estrée and Colby (2004), while parties across the West struggle to resolve water conflicts, there has been little work or consensus on defining successful conflict resolution and an associated research methodology. While others have attempted to define criteria to evaluate settlements, the d'Estrée and Colby framework in *Braving the Currents* provides a comprehensive multi-disciplinary analysis of criteria for every aspect of the resolution of the conflict from the negotiation process to the outcomes associated with implementation. The framework includes 28 criteria as outlined in Table 3.1, which are broken into six categories: "outcome reached, process quality, outcome quality, relationship of parties to outcome, relationship between parties, and social capital" (d' Estrée & Colby, 2004, p. 303).

In addition to identifying and defining the 28 criteria, the framework outlines a methodology for systematically evaluating the resolution of conflicts.

Development of the framework resulted from reviewing literature; interviewing researchers, parties to conflict and conflict resolution professionals; and assembling information from past studies and other disciplines. The initial criteria were presented to researchers and practitioners to solicit additional feedback. The framework was then tested and evaluated using eight different water conflict cases across the Southwest to determine for each criterion: the accessibility of information; the best time during the process to evaluate the criterion; and the reliability, validity, and applicability to different types of conflict resolution processes. Based on their findings from applying the framework to eight case studies, the researchers then revised the methodology, refined the operationalization of criteria, and incorporated these revisions into the Guidebook provided for future researchers. The final framework, therefore, in addition to defining the scope of each criterion, identifies the possible range of information to be collected, the ideal time in the case to gather that information, and what sources are most likely to provide the desired data. Finally, it outlines research protocol to maximize reliability and validity (d' Estrée & Colby, 2004).

### **3.2.4 Sources of Information**

The framework was developed and tested using only publicly available information. The researchers recommended the following sources of data as “insider” sources:

Media interviews/quotes from the parties; internal documents from the parties, such as newsletters, memos, reports to members (environmental groups), stockholders (corporations, utilities), public relations documents, advertisements, videos, web sites; paid media spots commenting on issues; protests, picketing or other public activities; memos (or other documents) circulated among parties after the agreement was developed; and reports by any mediators/facilitators (d' Estrée & Colby, 2004, p. 63).

In addition, the researchers recommended the following “outsider” sources:

Newspaper articles (community, regional, High Country News); editorials or Op Eds; TV and radio coverage; paid media spots commenting on issues; and any protests, picketing, or other public activities (p. 63).

The range of sources was not limited to the aforementioned documents and additional sources of information were outlined for each criterion in the Guidebook.

Initial documents for analysis and incorporation into the Nez Perce Case Study were obtained by searching the internet using Google, as well as searching the Idaho Department of

Water Resources (IDWR) website, and LexisNexis Academic news for the term “Nez Perce water.” Additional keyword queries were performed as needed. Google omitted similar results returning approximately 176 entries. LexisNexis returned 158 results of which 145 were newspaper articles, newswires and press releases and included local Idaho newspapers. In addition, articles were retrieved from the website Bluefish.org, which archives news articles regarding the Columbia River basin. Documents were also obtained directly from the Farm Bureau, the Nez Perce Tribe, the IDWR website, the Idaho Legislature, the Snake River Basin Adjudication Court, the Idaho Law Review and Thomas Library of Congress as well as other sources. These documents formed the basis of the analysis for the Nez Perce Case Study. Agricultural data was reviewed for indications of the effects of the agreement, but use of this data would have proved problematic (U.S. Department of Agriculture, National Agricultural Statistics Service, 2011; U.S. Department of Agriculture, National Agricultural Statistics Service, Agricultural Statistics Board, 2001, 2004, 2005, 2007, 2009). The National Agricultural Statistics Service changed their sampling methodology in 2007, and the Census of Agriculture only occurs every five years with the last occurring in 2007 – the year the agreement was implemented fully. Other factors made the use of data questionable, as one would need to consider additional variables such as the purchase of rights as part of the Eastern Snake Plain Aquifer management, other actions associated with the SRBA adjudication, weather conditions, and crop prices, which are beyond the scope of this research.

In following the *Braving the Currents* methodology, the following types of sources were utilized in the Nez Perce Case Study: Media interviews and quotes from the parties, internal newsletters, public relations documents, television interviews, websites, newspaper articles, editorials, minutes from public meetings, minutes from state and federal legislative hearings, the agreement itself and associated documents, court documents, books, biological opinions, and journal articles. The law review articles written by the parties involved in the negotiations, as well as the minutes from the legislative sessions and newspapers, provided the most insight into the process.

### **3.2.5 Reliability and Validity**

The Guidebook presents a framework for identifying the strengths and weaknesses of environmental conflict resolution cases utilizing a data collection methodology that only uses publicly available information. Like all methods of data collection, there are drawbacks to only using publicly available information, as some parties are likely to be underrepresented in the

media and through other public documents, while others are likely overrepresented. In addition, some information is potentially withheld from the public or unpublished, which introduces additional sources of error. To maximize reliability and validity, d'Estrée and Colby recommend triangulation of data by consulting different sources of information to improve reliability and validity, although they note that for their cases sometimes information was inaccessible and only one source of information was used. Given the nature of this methodology and its reliance on publicly available information, this is a weakness of this approach. Therefore, in researching the Nez Perce Case Study, efforts were made to obtain information from multiple sources to the maximum extent possible, but ultimately not all information could be triangulated and this remains a significant concern in evaluating the Nez Perce Case Study, as well as the Pyramid Lake Case, which used the same approach.

Table 3.1 Framework Criterion for Successful Environmental Conflict Resolution

Category	Criteria
Outcome Reached	<ul style="list-style-type: none"> <li>• Unanimity or Consensus</li> <li>• Verifiable Terms</li> <li>• Public Acknowledgement of Outcome</li> <li>• Ratification</li> </ul>
Process Quality	<ul style="list-style-type: none"> <li>• Procedurally Just</li> <li>• Procedurally Accessible and Inclusive</li> <li>• Reasonable Process Costs</li> </ul>
Outcome Quality	<ul style="list-style-type: none"> <li>• Cost-Effective Implementation</li> <li>• Perceived Economic Efficiency</li> <li>• Financial Feasibility/Sustainability</li> <li>• Cultural Sustainability/Community Self-Determination</li> <li>• Environmental Sustainability</li> <li>• Clarity of Outcome</li> <li>• Feasibility/Realism</li> <li>• Public Acceptability</li> <li>• Efficient Problem-Solving</li> </ul>
Relationship of Parties to Outcome	<ul style="list-style-type: none"> <li>• Satisfaction/Fairness with Outcome</li> <li>• Compliance with Outcome over Time</li> <li>• Flexibility</li> <li>• Stability/Durability</li> </ul>
Relationship Between Parties	<ul style="list-style-type: none"> <li>• Reduction in Conflict and Hostility</li> <li>• Improved Relations</li> <li>• Cognitive and Affective Shift</li> <li>• Ability to Resolve Subsequent Disputes</li> <li>• Transformation</li> </ul>
Social Capital	<ul style="list-style-type: none"> <li>• Enhanced Citizen Capacity to Draw on Collective Potential Resources</li> <li>• Increased Community Capacity for Environmental/Policy Decision-Making</li> <li>• Social System Transformation</li> </ul>

Criteria to evaluate the success of environmental conflict resolution. Adapted from d'Estrée, Tamra Pearson, and Bonnie G Colby. 2004. *Braving the Currents: Evaluating Environmental Conflict Resolution in the River Basins of the American West*. Natural Resource Management and Policy 26, p. 301-302. Boston: Kluwer Academic Publishers.

## **4 RESULTS AND DISCUSSION: PRELIMINARY ANALYSIS OF TRIBAL WATER RIGHTS SETTLEMENTS FOR INSTREAM FLOW PROVISIONS**

### **4.1 On-Reservation Beneficial Use**

Excluding the Seminole Settlement<sup>37</sup> from the analysis, twenty-three of the twenty-six tribal water settlements authorize at least a portion of the tribe's right to be put to any use within the reservation (see Table 4.1). The only use specified in the Ak-Chin Settlement is irrigation, whereas the Aamodt Settlement recognized offset water for stream depletions as a beneficial use, but does not identify other instream purposes. The Gila Settlement only authorizes DCMI and agricultural uses. While certain portions of the rights allocated through settlements do have limited purposes, this does not detract from the conclusion that water settlements have mostly authorized tribal water rights for any beneficial use and therefore, are favorable to on-reservation instream flow purposes. Further supporting this conclusion is the diversity of uses specifically acknowledged in at least one or more of the settlements:

- agricultural, irrigation, stock watering
- aquaculture, hatchery, fish propagation
- carryover storage, underground storage
- community, public
- domestic, commercial, municipal, industrial (DCMI)
- residential, rural, urban
- cultural, religious, sustenance
- fish and wildlife
- flood control
- incidental drought relief
- instream flow, lake level maintenance
- mining
- offset water
- power production, hydropower
- recreation
- water quality
- wetland restoration, riparian habitat

The variety of authorized and acknowledged uses goes beyond the scope of what some courts or states would recognize by authorizing cultural, religious and instream uses and, thus, supports the conclusion that negotiated agreements can be tailored to meet the unique needs of the parties.

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<sup>37</sup> The Seminole Settlement is excluded since it is in a riparian doctrine state, which is reflected in the agreement. The settlement quantifies the water based on "reasonable beneficial use" which is terminology used under the riparian doctrine.

## **4.2 Off-Reservation Beneficial Use**

The authority to use tribal water off-reservation is important to tribes who wish to market water for economic development or to support tribal fisheries. Similar to litigation, settlements have been inconsistent in this aspect and, in most instances, off-reservation water use is more constrained in contrast to on-reservation uses. Settlements often limited the sources of water, as well as the type of use, the place of use and quantity of water eligible for off-reservation use. Most settlements subjected water used outside of tribal lands to state laws and did not authorize water marketing outside of the state where the reservation is located. In addition, the purpose of marketing the water in many of the settlements was to provide off-reservation consumptive uses with water, for example, to cities and not necessarily for instream flows. Based on the 27 settlements, it appears that the potential for tribes to use their own water for fisheries off-reservation is less probable than for on-reservation purposes and is likely to include limitations by both the state and the federal government.

Table 4.1 On-reservation and off-reservation beneficial uses authorized in tribal water right settlement acts and settlement agreements. Authorized uses in settlement acts and corresponding settlement agreements are combined but only the settlement act is listed for purposes of brevity. See Table 2.2 for associated agreements.

<b>Federal Act /Settlement Agreement</b>	<b>Beneficial uses - On Reservation</b>	<b>Beneficial Uses - Off Reservation</b>
Ak-Chin Water Rights Settlement Act	Irrigation	Not specified
Southern Arizona Water Rights Settlement Amendments Act (Tohono O'Odham)	Any use including agricultural, DCMI, mining, underground storage, instream flow, riparian habitat maintenance, or recreational use	Marketing, Central Arizona Project (CAP) service area
Seminole Indian Land Claims Settlement Act	Riparian Doctrine - Reasonable Beneficial Use	Riparian Doctrine
Colorado Ute Indian Water Rights Settlement Act of 1988	Municipal, industrial, agricultural, domestic, livestock, fish and wildlife development. May change to any beneficial use	Can transfer off reservation within water district
Salt River Pima-Maricopa Indian Community Water Rights Settlement Act	Depends on source - any use, municipal, industrial, agricultural	Depends on source - some use prohibited off reservation
San Luis Rey Indian Water Rights Settlement Act	Any use	May lease to local entities
Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act	Irrigation, fish and wildlife, municipal, industrial, recreation, water quality, or any other beneficial use under state law	
Fort Hall Indian Water Rights Act of 1990	DCMI, irrigation, hydropower, recreation, stock watering, fish propagation, and instream flow, other uses	May rent for any beneficial use
Fort McDowell Indian Community Water Rights Settlement Act	Irrigation, urban, DCMI, any beneficial use with some restrictions	
Truckee-Carson-Pyramid Lake Water Rights Settlement Act	Any use	
Jicarilla Apache Tribe Water Rights Settlement Act	Any use on reservation	May market water
Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992	Stock water, domestic, municipal, industrial, agricultural, livestock, any use	May use certain rights for any use off reservation – some restrictions
Reclamation Projects Authorization and Adjustment Act (Ute)	Any use, irrigation, domestic, municipal, industrial	

Table 4.1 On-reservation and off-reservation beneficial uses authorized in tribal water right settlement acts and settlement agreements (Continued).

<b>Federal Act /Settlement Agreement</b>	<b>Beneficial uses - On Reservation</b>	<b>Beneficial Uses - Off Reservation</b>
San Carlos Apache Tribe Water Rights Settlement Act	Any beneficial use	Any beneficial use for CAP water, other sources not authorized
Yavapai-Prescott Indian Tribe Water Rights Settlement Act	Any use	
Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999	Irrigation, recreation, DCMI, public, rural, livestock, fish and wildlife, incidental drought relief, agricultural, mining, or recreational uses. Some rights any use.	Some rights any use subject to certain restrictions
Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act	Any use	Any use but with some restrictions
Zuni Indian Tribe Water Rights Settlement Act of 2003	Any use on reservation, wetland restoration, religious, sustenance, stock water, wildlife or instream flow use, or for irrigation to establish or maintain wetland	State law applies on fee lands, no transfer to non-tribal lands
Gila River Indian Community Water Rights Settlement Act of 2004	DCMI, Irrigation, Residential - depends on source	May only use CAP water for community purposes
Snake River Water Rights Act of 2004	Irrigation, DCMI, hatchery and cultural uses on reservation; irrigation, cultural, or other uses	Springs and fountains for cultural and stockwater
Soboba Band of Luiseño Indians Settlement Act	Any use on tribal lands or within groundwater basin	Lease or exchange within basin
Northwestern New Mexico Rural Water Projects Act - San Juan Water Rights	Depends on source. Any use, irrigation, DCMI, aquaculture, limited hydroelectric. Navajo-Gallup Water - DCMI and stock. Groundwater - Municipal and domestic.	Navajo Irrigation Project - any use, subcontract for any beneficial use in state
Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement	Any use	In accordance with laws
Aamodt Litigation Settlement Act	Livestock, domestic, community, commercial, industrial, agricultural, offset water (stream depletion)	
Crow Tribe Water Rights Settlement Act of 2010	Any use including flood control, production of power, maintenance of instream flows or lake levels, carryover storage, cultural or religious	Ceded strip - Beneficial use under state law, lease
Taos Pueblo Indian Water Rights Settlement Act	Irrigation, stock watering, municipal, industrial, domestic, any use	Market
White Mountain Apache Tribe Water Rights Quantification Act	Any beneficial use including instream	CAP - Any use. Other use by exchange.

### **4.3 Characteristics of Specific Allocations to Instream Flows**

While the allowance for water rights to be put to any beneficial use is a favorable conclusion for tribes seeking to dedicate water instream, how water is specifically allocated to instream flows in settlements is more complicated. Federal reserved water rights as developed through litigation authorize water with a priority date at the time of the reservation, or, in aboriginal water rights cases, with a date of time immemorial. Tribal water rights are slotted into the prior appropriation water rights structure, thus, priority dates become an important factor in determining how successful an agreement is in satisfying tribal claims to instream flows. It is notable that none of the agreements authorize a time immemorial water right on-reservation or off-reservation specifically for instream flows, which is unsurprising because many of the settlement agreements include provisions to ameliorate the impacts of potential senior tribal water rights on existing users. In fact, most of the agreements that actually require instream flows, do so through the use of storage water and not by setting minimum streamflows.

The settlements are divided into four groups below: (1) settlements without water set aside for instream use; (2) settlements with instream flows that are obviously non-tribal; (3) settlements that have some instream flow components; and (4) settlements where the habitat restoration and instream flow provisions are central to the settlement agreement. This last category is further delineated between wetland restoration and fisheries restoration.

#### **4.3.1 *Settlements Lacking the Reservation of Water for Instream Purposes***

Twelve agreements (Table 4.2) do not allocate water specifically to instream flows, although this does not mean that water is not used for instream purposes, since almost all of the settlements authorize any use of the water on the reservation. Two of these agreements fail to acknowledge fish, instream flows, habitat, or ecosystems. The other ten agreements do not require water for instream flows, but contain provisions that require some action to protect fish or habitat, which may include coordinating with an existing recovery program or mitigating the impacts of water development. The White Mountain Apache and the Duck Valley Settlements both provide a settlement fund to the tribes that can be used for fish related projects. The settlement funds are unsurprising since both tribes have trust fisheries: the Duck Valley Reservation was cut off from historic salmon runs by the Columbia River Dams (*S. Hrg. 110-105*, 2007), while the White Mountain Apache Tribe has been working towards recovering Apache Trout since the 1950s (Arizona Game and Fish Department, 2009). Finally, the Fallon

Paiute Shoshone Water Settlement authorized the purchase of water rights for reservation wetlands.

Table 4.2 Settlements without Instream Flow Provisions

<b>Settlement</b>	<b>Description of Instream Flows and other Habitat Actions</b>
Ak-Chin Water Rights Settlement Act	Original settlement act only addresses permanent water supply and irrigation water for on the reservation.
Salt River Pima-Maricopa Indian Community Water Rights Settlement Act & Agreement	None
Seminole Indian Land Claims Settlement Act & Compact	Requires protection of wetlands
San Luis Rey Indian Water Rights Settlement Act	Requires mitigation for impacts on fish and wildlife. Requires report to Congress on conditions at Salton Sea Wildlife Refuge.
Jicarilla Apache Tribe Water Rights Settlement Act & Contract	Fishery developed as a result of Navajo Dam. Parties to cooperate with federal environmental laws and protect fisheries and endangered species.
Yavapai-Prescott Indian Tribe Water Rights Settlement Act & Agreement	Water development must be consistent with objectives of the Prescott Active Management Area. Parties must preserve the Verde River and its tributaries.
Soboba Band of Luiseño Indians Settlement Act & Agreement	Tribe and water district transferred land for habitat and environmental mitigation.
San Juan Water Rights Act & Navajo Nation Water Rights Agreement	Water may be used for aquaculture including rearing fish for San Juan Basin Recovery Program. Authorizes Secretary to use no more than 4 percent of the project costs for fish and wildlife projects.
Aamodt Litigation Settlement Act & Agreement	All parties must offset stream depletions from certain water diversions.
Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement & Agreement	Authorizes Development Fund that may be used for water and land acquisition, fish and wildlife production, fish and wildlife habitat, and other purposes. Development fund \$9 million for each fiscal year from 2010 to 2014.
White Mountain Apache Tribe Water Rights Quantification Act & Agreement	Establishes settlement fund, which may be used for fish propagation/hatchery, recreational lakes, water development and watershed health.
Fallon Paiute Shoshone Indian Tribes	Authorizes water purchases and restoration of Fallon wetlands. Allows Newlands Reclamation Project rights to be used for fish and wildlife, water quality, recreation, and other uses subject to state law.

### 4.3.2 *Instream Flows: Non-Tribal Provisions*

Four of the settlements preserve instream flows but not specific to tribal water rights and are associated with water development. Two of the settlements provide for state instream flows, while the other two simply call for the projects to provide water for fisheries. In addition, two of the settlements authorize water and habitat purchases. Three of the four agreements are tied to a specific program under the Endangered Species Act.

Table 4.3 Settlements with Non-Tribal Instream Flow Provisions

Settlement	Description of Instream Flows and other Habitat Actions
Fort McDowell Indian Community Water Rights Settlement	Salt River Project to maintain a minimum flow in the Verde River so as not to affect the flow or biota. Projects not to jeopardize ESA listed species such as spikedace.
Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act & Agreement	Authorizes \$3 million for the Secretary to acquire water rights and habitat for species under the ESA. Offset impacts of water development through Virgin River Resource Management and Recovery Program. Santa Clara Project to provide instream flow below reservoir for Virgin Spinedace. 3 cfs instream flow for Utah Division of Wildlife Resources. Division to receive storage for fish conservation and culture. Parties agree to reduce impact of water withdrawals during spawning to prevent the drying out of redds. Habitat mitigation credits.
Gila River Indian Community Water Rights Settlement Act & Agreement	Tribe agrees not to object to Arizona Fish and Game rights for wildlife and waives the right to call on rights. ESA Provision – Roosevelt Habitat Conservation Plan for Salt River Project. Authorizes mitigation measures. Creates a cooperative program to purchase properties containing riparian habitat and retire associated water rights.
Northern Cheyenne Indian Reserved Water Rights Settlement Act & Compact	Off-reservation transfers permitted if do not injure fish. Requires Tongue River Operation plan to include provisions for fish and wildlife if water is available. State and Federal government to develop cooperative agreement to conserve fish and wildlife. Tongue River Dam Project to include fish and wildlife enhancements funded by state and federal government.

### 4.3.3 *Instream Flows: Tribal Provisions*

The next set of agreements in Table 4.4 have specified instream flows that are tribal related, although they are not necessarily held by the tribe. Where storage rights are concerned, most of the agreements are vague about whether the rights are held by the tribe or are simply contracted space. In addition, only one is associated with the ESA through a Habitat Conservation Plan.

Table 4.4 Tribal Water Settlements with Instream Flow Provisions, Excluding Settlements Where Instream Flows are Embedded Throughout the Settlement

Settlement	Description of Instream Flows and other Habitat Actions
Colorado Ute Indian Water Rights	1868 Project Reserved Water Right with 1963 subordination - 800 acre-feet per year for fish and wildlife development. During shortages stream fishery releases as stipulated in Dolores Project.
Fort Hall Indian Water Rights	Authorizes tribal water bank to rent water anywhere within the Idaho Snake River Basin including for instream flow. Mitigates rental water and exempts it from public welfare and public interest tests. Establishes Tribal Rental Pool Committee to operate the bank. Authorizes tribe to use storage water for instream flows on or adjacent to reservation and to use natural flows of waters wholly within the reservation for instream flows. May use up to 15,000 AFY from storage for instream flows in the Blackfoot River. Prevents tribe from obtaining water from Hells Canyon Dam to meet unsettled instream claims in the Salmon and Clearwater basins or in the Snake River basin below Hells Canyon Dam. Affirms instream flows under Michaud Act.
Ute Indian Water	\$10 million available to Secretary for stream improvements to 53 miles of certain creeks and rivers in Utah. Requires District to deliver 44,400 acre-feet (AF) of CUP water for minimum stream flows. Authorizes \$0.5 million to clean Bottle Hollow Reservoir, remove non-game fish, and obtain minimum flow for cold-water fishery. Secretary to release 29 cfs May through October and 23 cfs the rest of the year into Rock Creek. \$10 million to tribe for development of recreational game, fish and campgrounds in lieu of development of Lower Stillwater Dam.
San Carlos Apache Tribe Water Rights	Requires existing water users to relinquish 58,735 AF of surface water to the Tribe and provide storage behind Coolidge Dam for fish, recreation, and environmental purposes. Secretary to designate unused stored water to the tribe for fish, wildlife, recreation and other uses from Coolidge Dam. Tribe not to dispute Arizona Game and Fish Rights and will not subject such rights to a call.
Chippewa Cree Tribe of The Rocky Boy's Reservation Indian Reserved Water Rights	See agreement for specific allocations. Designates water and storage for Fish and Wildlife Enhancement, which includes water to enhance habitat by modifying impoundments. Fish and Wildlife water is a consumptive use as measured by evaporative loss and surface area. Tribes may not change use of fish and wildlife right. Restricts fish and wildlife enhancement impoundments to "existing wet riparian habitat" in zones delineated on map. Prohibits fish and wildlife or stock watering impoundments from stopping the flow. Tribe and Montana to develop a fishery and recreation management plan, which may posit modification of instream flows. Establishes set amount to be released from reservoir for non-tribal instream flows.
Crow Tribe Water Rights	Must develop a streamflow and lake level management program to protect a blue ribbon trout fishery below Yellowtail Dam. Requires no less than 150,000 AF be made available by the tribe from storage in Bighorn Lake for low flow periods to maintain streamflows. Sets aside unallocated water in Bighorn Reservoir for "flood control, production of power, maintenance of instream flows, maintenance of lake levels and carryover storage.
Tohono O'Odham	Allocates 35,000 AF for fulfillment of an agreement, groundwater storage, instream flows, and riparian habitat maintenance. Authorizes \$10 million for mitigation under Roosevelt Habitat Conservation Plan.

#### 4.3.4 *Water Settlements with Significant Provisions for Cultural Wetland Restoration*

While the agreements in Table 4.4 have instream flow provisions, the final four settlements discussed below are notable because they have numerous provisions that address instream flows, habitat, and restoration. The settlements can be further divided into two groups. As shown in Table 4.5, the first group has the goal of cultural wetland preservation and restoration, and thereby includes provisions addressing groundwater as well as surface water. The second category pursues fisheries restoration with the Endangered Species Act as a secondary driver.

Table 4.5 Tribal Water Rights Settlements with Significant Provisions for Wetland Restoration

Settlement	Description of Instream Flows and other Habitat Actions
Taos Pueblo Indian Water Rights Settlement Act & Agreement	Limits withdrawals or moves certain wells to decrease impacts of other water users on tribe's cultural and religious wetland. Implements a wetland recharge project and mitigation measures to offset depletions. Authorizes use of certain pueblo water rights for instream flows. New domestic needs met through construction of well fields away from wetland, retirement or reduction of pumping from existing wells, or surface water and groundwater mitigation. Allows Aquifer Storage and Recovery projects as long do not injure the wetland. Wetland recharge project includes 1,000 AFY for setup of program to offset quantity and timing depletions. Provides \$1 million for wetland, and provides grants for projects that reduce impacts of non-Indian pumping or resolve disputes over surface water.
Zuni Indian Tribe Water Rights Settlement Act of 2003 & Agreement	Restoration of cultural/religious wetland Kolhu/wala:wa and Sacred Lake, Hadin Kyaya. Authorizes 5,500 AFY of unappropriated flows to restore wetland with a 1984 priority date. May acquire 3,600 AFY from surface rights from voluntary sellers and 1500 AFY from underground water. Rights are state water rights with state priority dates that tribe may hold for Wetland Restoration Project. Creates Protection Area where tribe will not object to new non-exempt well owners that limit well capacity to 500 gallons per minute and sign a Pumping Protection Agreement. Tribe agrees not to file claims unless the static water level declines below 50 feet. Acknowledges pilgrimage route lands held by the State of Arizona and Apache County and requires consultation with the tribe before taking actions that may affect use for religious and sustenance purposes. State of Arizona to expand Stream Rehabilitation Program above the Reservation for wildlife and instream flow enhancement by purchasing land and appurtenant water rights. Arizona Game and Fish (AGAF) to spend \$5 million and transfer 1,000 AFY to the tribe for wetland restoration within 15 years and rights revert to AGAF if unused. Contains other provisions for the AGAF acquisition program. Salt River Project to contribute \$1 million to restore riparian vegetation and provide water to the Sacred Lake. Prohibits tribe from using funds to acquire land. Affirms that water for wildlife, instream flow, or wetland irrigation is an acceptable use and that rights may not be lost to forfeiture or abandonment.

### **4.3.5 Water Settlements with Significant ESA and Fisheries Provisions**

Two tribal water settlements acts and associated agreements have fisheries restoration as a significant driver throughout the agreement: The Truckee-Carson Pyramid Lake Water Rights Settlement Act for the Pyramid Lake Paiute in Nevada and the Snake River Water Rights Act for the Nez Perce in Idaho. While they both have been called model settlements (Bogert, 2006; Wilds, 2010), they accomplished their goals in distinctly different ways due in part to the differences in water availability and existing uses. The settlements are discussed in more depth below as they are the primary focus of this research.

#### **4.3.5.1 Truckee-Carson Pyramid Lake Water Rights Settlement Act and the Preliminary Settlement Agreement as Ratified By the Settlement Act**

The Truckee-Carson Pyramid Lake Water Rights Settlement Act and the Preliminary Settlement Agreement (collectively referred to as “The Pyramid Lake Settlement”) resulted from repeated actions and years of litigation by the Pyramid Lake Paiute to use any legal mechanism available to reallocate water to the Pyramid Lake fishery. The Pyramid Lake fishery consisting of cui-ui and Lahontan cutthroat trout declined in the early 1900s due to water withdrawals and dams with the original strain of Lahontan cutthroat trout going extinct by 1940 (Wilds, 2010). Today, the cui-ui is listed as endangered and an introduced strain of Lahontan cutthroat trout is listed as threatened in Pyramid Lake (U.S. Fish and Wildlife Service, 2010).

The Pyramid Lake Settlement has been called a model settlement because it was such a significant departure from the status quo and involved a number of provisions that signaled a realization that water had to be managed in accordance with the water scarce conditions of the West (Wilds, 2010). In addition, the Tribe’s consumptive reserved water rights had already been quantified and though the courts found a breach of trust for not asserting the Tribe’s fisheries water rights, it denied reopening the decree. The Tribe, however, won on several other theories; therefore, the context of this settlement is unique in that it had leveraged other legal arguments outside of reserved water rights including the ESA in order to obtain the settlement (Springmeyer, 2011). The tools used within the Pyramid Lake Settlement to restore streamflows included conservation, operations changes, water purchasing, state rights, mitigation and other provisions. In addition, the settlement included terms that increased tribal sovereignty. Some of the key components of the settlement are outlined below:

### *Conservation*

- Allocated water conserved from Naval Air Station to Pyramid Lake fishery or Lahontan Valley wetlands.
- Required wastewater effluent reuse study.
- Obligated Sierra Pacific to implement water metering and blocked pricing.
- Mandated a study to improve Newlands Project efficiency.

### *Operations*

- Required negotiation of an Operating Agreement to among other requirements, enhance spawning flows, meet ESA obligations and mitigate effects of settlement agreement on instream flows.
- Authorized reservoir storage for Pyramid Lake fishery.
- Directed Secretary to operate Newlands project for fish and wildlife in a manner consistent with project purposes.
- Converted Sierra Pacific's water rights for releases of water solely for hydroelectric power to Fishery Credit Water for the Pyramid Lake fishery. Fishery Credit Water to be used for spawning flows.
- Created storage priorities and rules for Sierra's Firm Municipal and Industrial (M&I) Credit Water, Non-Firm M&I Credit Water, and Fishery Credit water and allocations for non-drought, drought, and critical drought periods.

### *Water Purchasing and Funds*

- Created Lahontan Valley and Pyramid Lake Fish and Wildlife Fund.
- Directed Secretary to acquire and deliver water for wetlands and the Pyramid Lake fishery, and other fish and wildlife programs.
- Required report on social, economic and environmental impacts of water rights purchase program.
- Created \$25 million Pyramid Lake Paiute Fisheries Fund and authorized expenditure of interest by the Pyramid Lake Tribe for fishery facilities and conservation of the Pyramid Lake fishery provided the Tribe release all claims against the federal government for damages to the fishery.

### *Rights Under State Law and Mitigation*

- Dedicated all unappropriated flows to Pyramid Lake.
- Apportioned water between California and Nevada from Tahoe basin but exempted instream uses from being deducted from the total allocation.
- New wells required to minimize affect on surface water supplies.
- Reduction in return flows from change in method or place of water from sanitation agencies must be mitigated.
- All California commercial and agriculture water rights in the Truckee basin that are junior to the date of the settlement act were subordinated to Nevada water rights including those for the Pyramid Lake fishery.

### *Endangered Species Act*

- Required regular updates and implementation of recovery plans for Pyramid Lake fishery.
- Directed Army to study restoration of the lower Truckee River for the Pyramid Lake fishery to improve fish passage, riparian habitat, and habitat for spawning and migration.

#### *Tribal Sovereignty*

- Secretary to consult with Pyramid Lake Tribe on use of water for the benefit of the fishery.
- Transferred certain fishery facilities to the tribe.
- Prohibited Agreement, Act, or Operating Agreement from taking effect until Pyramid Lake Paiute's claims to all unappropriated water of the Truckee River were resolved.
- Confirmed reservation boundaries and tribes sole jurisdiction over water-based activities including fishing.
- Authorized exchange of federal lands for lands around reservation which may be added to the reservation.

#### *Other Provisions*

- Expanded Lahontan Valley Wetlands and Stillwater National Wildlife Refuge.
- Authorized Secretary to find solution to Newlands Project agricultural drain water.
- Required recoupment of water from Newlands Project that was diverted in excess of authorized amount ("Preliminary Settlement," n.d., *Pyramid Lake Settlement Act*, 1990).

#### 4.3.5.2 Snake River Water Rights Act and Mediator's Term Sheet<sup>38</sup>

In contrast to the Pyramid Lake Settlement, the Snake River Water Rights Act and Mediator's Term Sheet (collectively referred to as the "Nez Perce Agreement") largely preserved the status quo for fisheries with some incremental benefits, but offered the Tribe opportunities to increase its sovereignty over natural resources. The Nez Perce Agreement was not unique for its water management principles, but rather for its incorporation of ESA tools and other incentives in order to get parties to come to an agreement. In particular, one of the more innovative portions of this settlement was the creation of a 30-year Biological Opinion to protect local economies from the vagaries of shorter-term opinions while assuring the Tribe of a 30-year flow augmentation program. The Biological Opinion was especially innovative since it limited how much water Idaho could be required to use for salmon below the Hells Canyon

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<sup>38</sup> The settlement agreement has been called a variety of names. The actual agreement is the "Mediator's Term Sheet," however, it has also been called Snake River Water Rights Agreement (*Statement and Fiscal Note H. 152*, 2005, *Statement and Fiscal Note H. 153*, 2005, *Statement and Fiscal Note H. 154*, 2005), and Nez Perce Water Rights Settlement (Bogert, 2006; Gudgell, Moore, & Whiting, 2006; Klee & Mecham, 2006; Marshall, 2006; Strack, 2006; U.S. Department of the Interior, Office of the Secretary, 2004).

Complex, an impact on downstream states who were not involved in the agreement. The Nez Perce Agreement has been called a model settlement because it paves a way for industries such as agriculture and timber to proactively define how they will comply with the ESA while increasing tribal sovereignty over natural resources (Bogert, 2006; “Troubled Water,” 2005). For more information on the numerous provisions of the agreement, see Appendix A. The Nez Perce Agreement contained the following provisions related to fisheries:

- In accordance with the 30 year Upper Snake River Biological Opinion (BiOp), the State of Idaho authorized Bureau of Reclamation (BOR) to use up to 427,000 acre-feet of stored water and an additional 60,000 acre-feet of natural flow water rights for flow augmentation for listed salmon and steelhead.
- Dedicated \$50 million to water and fisheries trust fund for Tribe.
- Transferred management of one fish hatchery and established co-management for another hatchery with the Tribe.
- Required Idaho Water Resources Board to establish state instream flows on 205 selected streams, subordinated to future DCMI and limited development uses.<sup>39</sup>
- State of Idaho to establish irrigation and forestry ESA cooperative agreements to improve riparian habitat in the Salmon and Clearwater Basins.
- Created \$38 million habitat fund for the State of Idaho and Nez Perce.
- Authorized the use of 200,000 acre-feet of water from Dworshak Reservoir by the Tribe to augment flows and cool the lower Snake River during the months of August and September to help the migration of Chinook and steelhead.
- Developed work plans for habitat restoration projects on 24 degraded streams.
- Decreed minimum instream flows as provided in the Swan Falls agreement to be held by the Idaho Water Resources Board (Haller, 2004a; “Term Sheet,” 2004, *Snake River Act*, 2004).

#### **4.3.6 Discussion of Preliminary Analysis of Tribal Water Settlements**

As shown from the above categorization of tribal water settlements, the agreements range from no environmental or instream flow provisions to settlements wherein the environmental issues are the primary driver and incorporated throughout the agreement. Several of the settlements recognized breaches of the federal trust responsibility for the decline of fisheries and provided tribes with trust funds so that they may determine how to manage the resource themselves. In addition, restoration activities and water rights acquisitions were also authorized. However, not all of the settlements that integrated environmental provisions did so for the benefit of the tribe; rather, a few had instream flows to satisfy state interests, while most included provisions associated with reducing the settlements’ impacts on ESA-listed species.

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<sup>39</sup> Although not an instream water right, the agreement also recognized tribal reserved “springs or fountains” water rights claims on federal lands within the 1863 treaty ceded area.

The Nez Perce Agreement is the only settlement that actively leveraged and incorporated the Endangered Species Act and, therefore, is particularly unique in this respect.

The analysis of these agreements did not consider whether the tribes had requested water for instream flow purposes in their initial negotiating position. Therefore, while the results show the number of agreements that contain these provisions, it is unclear if tribes that desired water for instream flows were successful in obtaining them through the agreements. For example, it was observed that the White Mountain Apache Settlement had relatively few water provisions for instream flows and fisheries, and yet they have a long history working to recover the Apache Trout. While the settlement does authorize a fund, which can be used to improve watersheds and propagate fish, the role of the fish in the water agreement is limited. It appears that the tribe has pursued these two issues separately with great success: the Apache Trout is on its way to recovery and the Arizona Department of Fish and Game notes that it may be the first fish to be delisted under the ESA (Arizona Game and Fish Department, 2009). Therefore, addressing water rights or fisheries in the future does not necessarily mean that both will be implicated. It would be interesting to understand how many of the tribes that have water settlements also have corresponding trust fisheries and determine the role or lack of a role those played in the agreements. In addition, without looking further into the background of the negotiations, it is unclear in some of the settlements if they contain fisheries provisions to meet tribal demands, fulfill Endangered Species Act requirements, or both. Therefore, future research could determine what the initial negotiating positions included in comparison to the outcome.

Based on this analysis it is evident that tribal water rights are a common mechanism to obtain water to support fisheries and other instream beneficial uses but not necessarily with all of the benefits and characteristics of a reserved right. First, settlements often authorized the tribe's water right to be put to any use on the reservation including instream flows, regardless of state law. Secondly, many tribes were authorized to market the water off-reservation within the constraints of state and federal law, although this was mostly to fulfill state water users' needs. Decreed natural flow water rights specifically for fisheries were less common in settlements, although many allocated stored water for instream purposes. In most cases, the terms of the instream flow rights had been subordinated or given junior priority dates such that the rights could have been (or were) established under state law without the use of the Indian reserved water rights doctrine and did not generally carry the senior most right to protect water. None of the settlements provided for a time immemorial priority date for instream purposes. In addition,

several of the settlements authorized the purchase of state water rights to transfer to instream flow. In fact, the water rights offered in both the Nez Perce Case and the Pyramid Lake Case were state water rights acquired either through purchase, or through new water rights certificates with junior priority dates. The question for the tribes and states, then, is are these settlements better than simply proceeding with the state's tools for instream flows, if they are available?

## 5 RESULTS AND DISCUSSION: COMPARATIVE CASE ANALYSIS – PYRAMID LAKE PAIUTE AND NEZ PERCE

In the previous section, I reviewed the role of all 27 congressionally approved tribal water rights settlements in protecting instream flows and habitat. In this chapter, I compare and evaluate the two settlements that I identified as having significant instream flow and ESA provisions: the Nez Perce Water Rights Agreement<sup>40</sup> and the Truckee-Carson Pyramid Lake Water Rights Settlement Act. The agreements were analyzed using the Guidebook framework in *Braving the Currents*, which identifies 28 criteria for successful conflict resolution. The details of the Pyramid Lake Case Study can be found in Chapter 5 of *Braving the Currents* (d' Estrée & Colby, 2004), while the evaluation of the Nez Perce Case Study is found here in Appendix A.

The Pyramid Lake Case and the Nez Perce Case are both evaluations of congressionally approved settlements involving water rights to support tribal fisheries that are listed under the Endangered Species Act. Both tribes historically relied on these fisheries for subsistence purposes and have a strong fishing culture. Additional similarities between these cases include:

- Multi-party negotiations involving federal agencies, cities, and agricultural water interests, a power company, and two tribes
- A shared river system with at least one other state
- Parties engaged in litigation and negotiation before reaching a settlement
- The settlement resulted in requirements for additional agreements

The Pyramid Lake Case does differ from the Nez Perce Case in several important ways:

- The Pyramid Lake Settlement is not the result of a McCarran Amendment adjudication. The tribe's water rights had already been quantified but the federal government had failed to assert rights for the fishery. In contrast, the Nez Perce mediation was part of a comprehensive McCarran adjudication called the Snake River Basin Adjudication.
- Both fisheries spawn in streams but the Pyramid Lake fishery primarily resides in the terminal lake, whereas the anadromous salmon and steelhead of concern to the Nez Perce primarily reside in the ocean.

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<sup>40</sup> The analysis for the Snake River Water Rights Act and Mediator's Term Sheet which are collectively referred to as the "Nez Perce Agreement" is referred to as the Nez Perce Case Study. The Pyramid Lake Case Study focuses its analysis on The Truckee-Carson Pyramid Lake Water Rights Settlement Act and incorporates the Preliminary Settlement Agreement as necessary.

- The negotiations and final settlement in the Pyramid Lake Case addressed water allocation between the two states, California and Nevada. The Nez Perce agreement limited issues and parties to those in Idaho.
- Environmental groups were a part of the Pyramid Lake negotiations but were not a part of the Nez Perce mediation.
- The Pyramid Lake Reservation had not been allotted; therefore, the jurisdictional issues and associated tensions were a unique factor in the Nez Perce negotiations.

The following sections compare the two settlements using the framework criteria as a basis for understanding their strengths and weaknesses, as well as their similarities and differences. Each section includes a brief introduction to the criteria, a short discussion of the two settlements in the context of each criterion,<sup>41</sup> and where pertinent, a section on notable observations and an evaluation of the methods.

## **5.1 Criteria Category I – Outcome Reached**

The most basic standard for determining if a solution is successful is if the negotiations result in an agreement. Determining whether an outcome was reached requires the consideration of several elements including whether the parties: supported the outcome, could verify its terms, publicly acknowledged the agreement, and ratified it (d' Estrée & Colby, 2004).

### **5.1.1 *Verifiable Terms, Public Acknowledgement, and Ratification***

The two cases evaluated were written negotiated settlements that required legislation; therefore, both agreements were readily verifiable. Public acknowledgement of the outcomes were also high since the press, parties to the negotiations, and opposition provided summaries of the agreements' terms and educated the public. In addition, when considered for ratification, all parties that were required to ratify the agreements did so, although in both cases the federal settlement acts were held up in Congress and eventually passed as riders to other bills. Despite this, the three criteria of verifiable terms, public acknowledgement of outcome, and ratification were satisfied. The fourth criterion supporting the determination of whether an outcome was reached is consensus, a criterion that neither agreement was fully successful in achieving and merits further discussion.

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<sup>41</sup> See the original case studies for a more in-depth analysis of the settlements in the context of the framework criteria.

### 5.1.2 *Unanimity or Consensus*

In the Nez Perce and Pyramid Lake Cases, negotiations failed at first and it was not until they were reinitiated that parties came to an agreement; however, in both instances, there was opposition to the agreements and parties that withdrew from the negotiations.

In the Nez Perce Case, despite their best efforts, Idaho Power Co. (IPCo) withdrew from negotiations and opted to proceed with the regular Federal Energy Regulatory Commission (FERC) relicensing process, but did not oppose the agreement. The opposition came from cities in North Central Idaho near or within the Nez Perce Reservation who believed that the agreement benefitted southern Idaho at their expense. The status of these cities' involvement with the mediation was unclear, but they did not sign the consent decree. In addition, residents from the region were some of the more vocal opponents, mostly citing jurisdictional questions, private property rights, the potential removal of land from local tax revenues, and the belief that the State could win in court. The tensions over tribal jurisdiction of non-tribal members living within or near the reservation boundaries appeared to be the primary source of conflict, as some saw the water rights issue as an opportunity to also clarify the jurisdictional questions. The conflict over tribal authority subsided once the settlement agreement foreclosed further litigation.

In the Pyramid Lake Case, the negotiations with the tribe to benefit environmental purposes coupled with municipalities' demanding more water, led to a number of interests seeking to reduce the amount of water going to the Newlands Project area and the Truckee Carson Irrigation District (TCID), a proposition that led TCID to not sign the settlement. With all of the remaining parties unwilling to pursue a litigation track, talks eventually resulted in an agreement; however, since TCID was not at the table but an integral part of the solution, the settlement not only necessitated additional negotiation attempts, but also resulted in litigation (d' Estrée & Colby, 2004). Therefore, while both agreements were considered win-win solutions and model settlements, not all parties to the negotiations felt that way and were eventually a source of conflict.

### 5.1.3 *Observations*<sup>42</sup>

Congressionally approved tribal water rights settlements that seek to restore instream flows for ESA listed tribal fisheries are likely to meet three of the four criteria of success for Outcome Reached. The capacity for agreements to provide a solution that is supported by all; however, is challenging. Although negotiation is thought to be a more collaborative approach, parties must be prepared for opposition and hostility. When an agreement is perceived as threatening a core interest or value without providing benefits to that interest, reaching an agreement may not be possible. In addition, limiting the scope of who is involved in the negotiations may allow the parties to arrive at a settlement, but also generates distrust and dissension among those that are excluded. Parties must weigh the advantages of continuing without key parties involved and understand that moving forward with the agreement carries the risk of litigation and continued conflict.

The confidentiality of the negotiations made it difficult to determine who had been invited to the table, who willingly withdrew, and who disagreed. This became a point of public discussion and accusations in both case studies during the ratification process. Clear documentation of parties' participation would have possibly reduced some of the negative rhetoric during ratification.

### 5.1.4 *Methods*

Nez Perce Case Study: Consistent with the findings in *Braving the Currents*, the criteria for Outcome Reached were easily accessible with the exception of unanimity/consensus. While each criterion was well defined, there was some duplicity between public acknowledgement of outcome and verifiable terms. Verifiable terms was defined as corroborating “that consensus existed on the terms of the outcome and that reaching the outcome was publicly confirmed,” whereas public acknowledgement “verifies that reaching of the outcome was publicly confirmed” (d' Estrée & Colby, 2004, pp. 317–318). It may be that this overlap is only characteristic of negotiated agreements and not other forms of conflict resolution; however, future research would benefit from either refining the definitions to make them more distinct or combining the two.

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<sup>42</sup> The tradeoff of the case study format is that one cannot assume that results may be generalized to all cases. Therefore, it is important to recognize that the observations, discussion, and conclusions are set within the context of these two settlements and can only provide insight into potential outcomes but are not predictive.

## **5.2 Criteria Category II – Process Quality**

Process quality is the second criterion category for evaluating success and is based on the premise that a successful solution is reached only when done so in a just manner. Process quality evaluates whether the negotiation process had reasonable costs and was fair, accessible, and inclusive (d' Estrée & Colby, 2004). In both cases, information on costs were difficult to obtain and were not evaluated. As outlined below, there were indications that not all interests felt that the processes were procedurally just, accessible or inclusive, which was expressed in their opposition to the agreements.

### **5.2.1 Procedurally Just**

Procedural justice requires that: time for negotiation was sufficient; all interests and views were considered including the public's and minorities'; and that the process facilitated the perception that underlying concerns and emotional issues were given sufficient time (d' Estrée & Colby, 2004).

Although information was limited, the parties to the Nez Perce mediation had sufficient time to understand others' interests and concerns and generally seemed satisfied with the process, or did not indicate discontent. However, the process was subject to just as much criticism from opponents as the agreement itself; indicating procedural justice is an important factor in success. For many opponents to the agreement, there was a perception that their interests were ignored because negotiations were confidential and limited to water right holders. In addition, while the individuals in the mediation took sufficient time to negotiate the agreement and understand the concerns and emotional issues of the parties, the expedient ratification period was criticized for giving the public little time to understand the agreement and express concerns. Finally, the negotiation drew criticism that it favored southern Idaho interests at the expense of North Central Idaho by including decisions that affected tribal jurisdiction, grazing interests and other factions within the reservation without giving them proper consideration, since these interests were not necessarily a part of the water negotiations. The legislative hearings potentially played an integral role in folding in groups that felt like they had not been heard into the process. Despite the criticism, the opposition to the agreement was muted in the press after the public hearings and ratification of the agreement.

There was less information available about the Pyramid Lake process: parties that supported the agreement thought that Senator Harry Reid was fair and pushed for compromises from all parties, while the negotiations were criticized as unfair by irrigators and farmers. It

was noted that there was insufficient time taken for groups to begin to understand others' underlying concerns and emotions – the parties only had 90 days to negotiate with the farmers; although, others suggested that additional time would not have yielded results due to the intractable nature of the conflict. The case study did not identify what specifically the irrigators objected to in the process, other than stating it was unfair. Unfortunately, there is not enough information provided to evaluate the Pyramid Lake Settlement for comparison with the Nez Perce Case beyond this (d' Estrée & Colby, 2004).

### **5.2.2 *Procedurally Accessible and Inclusive***

Procedural accessibility and inclusiveness measures the extent that the public was incorporated in the process including through publicity, public participation, access to technical information and education. Procedural accessibility and inclusiveness are integrally tied to procedural justice as accessibility and inclusivity affected interpretations about whether interests, emotions, and concerns were considered in the process (d' Estrée & Colby, 2004).

In both cases, public access to information and inclusion did not begin until after the agreements were mostly finalized. Since the negotiations were confidential, details were not released to the public until the settlements were ready for ratification, which led to criticism from individuals not involved in the negotiations that their concerns were not addressed. In fact, opponents often cited the secrecy as a reason to oppose the agreement. The Nez Perce Case seemed to partially overcome this resistance by engaging in a public information campaign, and providing opportunities for public comment on the proposed legislation. Conversely, the controversy continued in the Pyramid Lake Case where public input and engagement were not requested until a draft environmental impact statement was prepared two years later for the Truckee River Operating Agreement (TROA). Due to the public dissension and TCID's opposition along with the need to address issues surrounding implementation, the "Second Generation" negotiations were undertaken. While the process for developing the agreement was not the only reason TCID was displeased with the settlement, it was a factor commonly cited within their rhetoric (d' Estrée & Colby, 2004).

### **5.2.3 *Observations***

These results suggest that although negotiation is thought to be more cooperative and fair in comparison to litigation, there will be parties that do not perceive the process as procedurally just and may even see it as unilateral action. Ultimately, in the two cases, individuals that thought the process was unfair also opposed the outcome; therefore, procedural

justice was correlated with short-term satisfaction with the agreement, although causality and directionality of the relationship could not be established. Furthermore, while the process of negotiation is collaborative, it is still emotionally straining and perhaps better described as a different way of engaging conflict since tensions still exist, difficult decisions must still be made, and not everyone gets what they want. However, unlike litigation, individuals can minimize harm to their interests by participating in the process. When individuals are not included or leave negotiations, the burden of the solution may be placed on them, and the outcome becomes similar to a court decision, wherein another party is making the decisions. Therefore, the role of participation in generating satisfaction should not be understated. However, as shown in the Pyramid Lake Case, when the goal is specifically to disrupt the status quo, the party whose resource is subject to reallocation is unlikely to be pleased regardless of whether the allocation is done via court, settlement, market incentives, or a combination. In such instances, negotiation does not necessarily result in collaboration and a lack of conflict between all parties.

The similar pitfalls encountered in the two cases suggests that these are weaknesses of negotiating water settlements, particularly because they often involve confidential negotiations in regions that already exhibit a lack of trust in the government. The fact that negotiation in tribal water settlements involves representatives of the larger body of constituents means that members of the groups engaged in negotiations do not experience the transformation and relationship building, and, thus, confidentiality only breeds further distrust. The Nez Perce Case seemed to overcome this slightly better than the Pyramid Lake Case by holding public information sessions and public hearings prior to ratification and shortly after the agreement was announced. Thus, parties should focus on engaging affected interests to ensure they at least feel heard.

#### **5.2.4 *Methods***

Nez Perce Case Study: Like the Pyramid Lake Case, the Nez Perce negotiations were confidential, making it difficult to assess the perceptions of participants about the process. Information accessibility was high to low depending on what aspect of the process was the focus. For example, information was readily available about ratification but there was little to no information on how members engaged in the negotiations felt about the mediation process itself. Furthermore, tribal members were under-represented in the study since the tribal council

meetings were closed to non-members, while minutes for the State and Federal public hearings were available online.

### **5.3 Criteria Category III – Outcome Quality**

The third category of criteria does not address process but rather seeks to identify the characteristics of a good solution. Outcome quality includes: the costs and cost-sharing associated with implementation; whether the parties perceived the agreement to provide net benefits; the environmental, cultural and financial sustainability of the provisions; and whether the agreement was clear, feasible, and acceptable to the public and an efficient way to solve the problem (d' Estrée & Colby, 2004).

#### **5.3.1 *Cost-Effective Implementation, Perceived Economic Efficiency and Financial Feasibility/Sustainability***

Cost-effective implementation involves the costs associated with implementing the agreement, whereas perceived economic efficiency asks generally whether the agreement was perceived to be worth its costs. A key difference between the two is that cost-effectiveness does not consider benefits, whereas perceived economic efficiency does. Finally, financial feasibility/sustainability assesses funding and other economic incentives or disincentives to ensure that the agreement will remain intact (d' Estrée & Colby, 2004).

The Nez Perce Agreement included benefits for all of the parties; however, the greatest benefit to all was removing the risk of litigating the tribal claims and having the winner take all to the detriment of the opposition. The Nez Perce agreement included almost \$200 million in federal benefits to the State of Idaho and the Nez Perce Tribe, with the tribe receiving about \$90 million in cash for fish restoration and economic development, habitat restoration, on-reservation water and sewer infrastructure, and for leasing stored water to the federal government. In addition, the tribe received greater control over natural resources including: ownership of 11,000 acres of land; on-reservation water rights of 50,000 acre-feet; management authority of one hatchery and co-management of another; a representative on an intergovernmental board to advise on state habitat conservation actions; management of 200 thousand acre-feet (KAF) of stored water for fisheries; recognition of springs and fountains claims on federal land; minimum instream flows set on 205 streams; and continuance of the flow augmentation program with an additional 60,000 acre-feet for a total of up to 487,000 acre-feet. The costs to the Tribe were opportunity costs associated with giving up time

immemorial instream water rights, giving up claims to a much larger quantity of on-reservation water, and relinquishing claims to springs and fountains on non-federal lands.

The settlement was a significant cost to the federal government, but it was deemed worthwhile since it settled both the tribe's water claim to which it had a fiduciary responsibility to protect and provided greater assurances that the federal government would meet its obligations under the ESA. The State of Idaho and water users received: assurances that more water would not be required under the ESA for flow augmentation; certainty surrounding the Nez Perce water rights; control of instream water rights; federal funding for instream flow and habitat projects; and programs to insulate timber harvests and water withdrawals from incidental take. The cost to the state was a 33 percent match to federal habitat trust funds. Local governments received \$2 million for impacts due to the changes in water use for flow augmentation and \$200,000 for lost taxes resulting from the transfer of land to the tribe. However, impacts resulting from the tribe's use of its \$60.1 million trust fund to purchase land or water would not be mitigated. Ranchers obtained greater certainty over springs on private lands, but at the cost of greater uncertainty over lease renewal and higher leasing costs for grazing allotments on the transferred lands. Aside from the constituents within the reservation who did not want the tribe's jurisdiction to increase and the grazing interests that were concerned about the potential loss of leases, the benefits for most parties outweighed the costs.

The costs incurred in the Pyramid Lake Paiute Case were less specific, in part, because the agreement was more of a framework that called for certain future actions and negotiations. The state was required to spend \$9 million on water acquisitions for the Lahontan Valley Wetlands to benefit the Fallon Shoshone Paiute and another \$4 million on water conservation. Similar to the Nez Perce case; however, the Pyramid Lake Paiute received \$25 million for fisheries and \$40 million for economic development from the federal government, further increasing the tribe's prosperity, power, and control over its resources. While the ESA in the Nez Perce Case was the strong secondary driver of the agreement, drought and the ESA were the primary drivers in the Pyramid Lake Case. The Sierra Pacific Power Company received greater security with its existing rights, while also tripling drought storage. In return, however, Sierra had costs associated with water conservation; water rights acquisitions; water metering; relinquishing unappropriated water claims; donating water in non-drought years for fish; and paying the federal government for storage. Although, the Sierra Pacific Power Company was required to fund a substantial portion of the settlement, the company said that the provisions provided in the agreement were the most cost-effective to obtain water needed to stabilize its

supply, as it had previously considered more costly solutions such as new storage. In addition, other benefits from the agreement included:

Certainty regarding interstate allocations of the Truckee and Carson Rivers; improved timing of river flows for threatened and endangered fish; water quality enhancement by flow augmentation; improved instream flows and reservoir levels in CA; wetlands recovery at Stillwater; reduced litigation region-wide; and more water reaching Pyramid Lake (d' Estrée & Colby, 2004, p. 127).

#### 5.3.1.1 Observations

In reviewing the benefits and costs of these two settlements it becomes apparent that negotiations in both cases leveraged different perceptions of benefits and costs than would be considered in litigation. The use of markets, Section 6 Cooperative agreements, water conservation, metering, operational improvements, land transfers and a greater role in natural resource management are all tools that are outside of the scope of a water rights adjudication. While it is difficult to comment on cost-effectiveness without knowing the costs of other options, it is clear that the choice to consider building new storage as a last resort to other options was the more cost-effective solution. The Nez Perce Agreement used water banking to reallocate water, while the strategy in Nevada was water conservation, fishery credit water, and water reallocation through purchase or other means.

Perceived economic efficiency was easier to measure: most parties expressed that the agreements' benefits outweighed the costs, particularly in light of the fact that litigation could continue for years, involved more risk, less decision control, and potentially more process costs. However, those opposing the agreements often expressed that for their particular interest, the benefits to them did not outweigh the costs mostly because of the perceived impacts on community or cultural sustainability. Finally, the financing for both of these agreements came primarily from the federal and state governments, with some costs allocated to private interests. Assuming that the political will of the federal and state governments to support the agreements remained, funding for most of the programs was imminent. Where private interests were required to provide funding, there was a specific and direct benefit to them. Therefore, agreements can leverage the financial resources of private companies where goals are compatible.

The benefits and costs associated with the two agreements reflect differences in the focus and conditions within the two basins: Reallocation and conservation was the focus of the Pyramid Lake Case, while the Nez Perce Case maintained the status quo to protect fish with

allowances for development and some reallocation of water for instream flows on over-appropriated streams. In general, overall the benefits and costs revealed a careful balancing of consumptive uses with a focus on fisheries restoration and tribal self-determination. However, the Pyramid Lake Case did not actively seek to mitigate the perceived impacts on the farming community and; therefore, it is unsurprising that the region has continued to experience conflict while evidence of continued opposition to the Nez Perce Agreement has dissipated. Perceived economic efficiency, therefore, is an invaluable tool for understanding the strengths and weaknesses of an agreement from the perspective of those affected, and therefore, begin to identify why opposition exists. In both cases, the interests that had little to gain from the agreement but perceived a significant cost, usually in the form of something intangible, were less interested in supporting the agreement.

#### 5.3.1.2 Methods

One difficulty encountered in the analysis of these criteria and a source of potential error, was that prior to adding perceived economic efficiency as a subcategory, the Pyramid Lake Case Study was completed with the benefits and costs incorporated into cost effectiveness. Since perceived economic efficiency requires a weighing of the benefits against costs, combining the two from the Nez Perce Case matched up with the Pyramid Lake Case analysis, while also reducing redundancy. Despite this, perceived economic efficiency was the most useful out of the three cost-related criteria because the perceived benefits and costs were well documented by supporters and opponents of the agreement. Cost effective implementation was less useful as cost reporting was incomplete and difficult to obtain and had low validity since the analysis only identified the costs, not whether the costs were the most efficient. It should be noted that this researcher acknowledges the importance of financial feasibility in ensuring that an agreement is implemented; however, since both agreements were feasible, this criterion did not reveal much in this study.

#### **5.3.2 Cultural Sustainability/Community Self-Determination**

Cultural sustainability assesses the potential demographic, economic, and cultural impacts of the solution on local communities. The second component, community self-determination, recognizes the importance of communities being able to control and make decisions about their own future (d' Estrée & Colby, 2004).

The Pyramid Lake Case lacked specific details about the potential effects on local communities and culture. The agricultural regions in the Pyramid Lake Case were concerned

that their way of life and livelihoods would be threatened by the reallocation of water from agriculture to environmental purposes under the agreement, a common fear in agricultural communities in the West that have traditionally used most of the water. In addition, the agreement included a requirement for recoument of water previously diverted in excess of what was authorized, which created more of a punishment than a reward structure. Conversely, the Pyramid Lake Paiute, similar to tribes in the Pacific Northwest, expressed that their cultural and economic well-being were harmed by the decline of the fishery, and that recovering the fish was integral to the health of their community. Unfortunately, in the Pyramid Lake Case, the solutions were not win-win for the irrigators and tribe, rather the scarcity and existing consumption required that the use of water by one necessitated a reduction in use by the other. While the agreement seeks to use other avenues such as conservation and dam reoperation to reduce these impacts, water is scarce in the region, which reduces flexibility and options (d' Estrée & Colby, 2004).

The Nez Perce Settlement, in comparison to the Pyramid Lake Agreement, contains numerous provisions that support the viability of the tribal community and culture as well as rural resource economies. In addition to the land transfer, trust funds, and various water and habitat provisions for fisheries (see Perceived Economic Efficiency and Environmental Sustainability), the agreement also increases tribal sovereignty and control over natural resources through the hatchery, land, and reservoir management provisions. The Nez Perce Settlement provides irrigators with compensation for water rights and, with the exception of the purchase of the natural flow rights, requires BOR to lease the water, allowing farmers to decide whether to fallow their land or transition out of agriculture entirely. In addition to the federal payments to local governments affected by the water purchase and land transfer, the agreement offers water users and loggers the potential to enroll in Section 6 cooperative agreements that would shield the landowner from incidental take liability. Furthermore, the minimum instream flows were set with preference in protection given to rivers adjacent to federal lands, with less protection and greater allowances for future development in state and private lands. Finally, the cap on the flow augmentation and corresponding 30-year biological opinion provides greater certainty allowing development and agricultural operations to continue and reducing the risk of water shutoffs. The multitude of provisions in the Nez Perce Water Settlement indicates that the parties attempted to mitigate against potentially destabilizing community impacts while improving environmental conditions.

There are, however, some impacts arising from the agreement. First, it does not address the effects of the flow augmentation program outside of the water purchase and it does not address potential tax reductions if the tribe uses trust funds for water or land acquisitions. In addition, the land transfer conveys the existing grazing leases to the Tribe who may increase grazing fees or discontinue grazing upon expiration of the existing lease. Despite this, there is no indication yet that the agreement has had negative impacts on the local communities. In addition, the tribe has expressed a willingness to work with the non-tribal communities to reduce the negative effects as much as possible, while also acting in the best interest of the tribe. Therefore, the benefits to local communities and rural cultures as well as the Nez Perce Tribe, indicates that the agreement has not had significant negative impacts.

#### 5.3.2.1 Observations

Both settlements supported tribal self-determination and culture; however, while the Nez Perce Agreement was fairly successful in ameliorating impacts on rural economies and livelihoods, the Pyramid Lake Settlement was described as choosing the tribal needs over the irrigators. Non-Indian members on the Nez Perce reservation were concerned about greater tribal jurisdiction, while TCID irrigators were suddenly forced to return excess diversions and feared the sustainability of their communities if water was transferred from the lands. Thus, threat of powerlessness to control the circumstances of one's future appeared to be a factor in resistance to the agreements. The differences in the two agreements are also indicative of the circumstances: the Nez Perce Agreement was proactive in its response to fisheries declines in comparison to the Pyramid Lake system, where the political power of TCID irrigators was giving way to the growing urban interests of the region. While both basins were experiencing problems with over-allocation, the Pyramid Lake region is operating under much greater constraints in terms of water availability. The different experiences in these two systems demonstrates why it is counterintuitive for states to delay adjudication of basins that still have flexibility and are relatively unappropriated. In addition, this suggests that the sooner that instream flows are set, the greater the capacity for the system to adapt. Unfortunately, the Pyramid Lake Case shows that agreements cannot always expand the basket of benefits to the point that there is no negative impact: however, as shown in the Nez Perce case, rural communities will have less of a burden if the states proactively manage water supplies.

### 5.3.2.2 Methods

In researching the Nez Perce Case, the strengths and weakness of this criterion were consistent with the findings in *Braving the Currents*. A more in-depth evaluation of this criterion in the Pyramid-Lake Case Study would have strengthened the comparative analysis.

### 5.3.3 *Environmental Sustainability*

Environmental sustainability requires that a process consider environmental issues and the associated solution incorporates environmental factors, natural conditions, and the impacts of resource use (d' Estrée & Colby, 2004).

Since the key objective in both of these negotiations was to obtain water for fisheries and preserve habitat, the agreements inherently incorporated environmental provisions. The Nez Perce Agreement decreed minimum instream flows, provided flow augmentation water, enrolled all state forestlands in a Section 6 cooperative program, developed work plans for habitat and flow improvements for selected degraded streams, and proposed other additional habitat and flow restoration programs. It did not promise senior reserved rights for fisheries as the Nez Perce Tribe had originally requested. While the Nez Perce agreement did provide fisheries benefits, many of the provisions were meant to preserve the status quo, which is why the state and water users were such strong supporters of the agreement.

In contrast, the Pyramid Lake Settlement was a shift in policy, incorporating a suite of new management measures including acquisition of water to sustain 25,000 acres of wetland; expansion of the Stillwater Wildlife Refuge for fish and wildlife; and restrictions on water use until installation of 90 percent of meters was completed. In addition, the settlement required further studies and reports pertaining to water acquisitions, water conservation and efficiency, the Stillwater Wildlife Refuge, and the Pyramid Lake fishery. The settlement also required the development of the Truckee River Operating Agreement to outline operations of the Truckee River Reservoirs for not only flood control and water supply, but also for the benefit of the fisheries (d' Estrée & Colby, 2004). Given the departure from the status quo in this agreement, it is unsurprising that the Pyramid Lake Agreement has taken longer to implement and has received more resistance. The agreement underscores that during intractable conflicts, a shift in the status quo is likely to involve conflict even when collaborative solutions are utilized.

#### 5.3.3.1 Observations

In the Pyramid Lake Case, the major environmental impact was saving water for fish through water conservation and water reallocation; whereas the Nez Perce Settlement decreed

minimum instream flows and agreed on the continuance of flow augmentation. Both agreements ultimately benefit fish, but reflect the different circumstances of the regions as well as the variety of mechanisms that can be utilized to protect or restore streamflows.

One noticeable similarity between the two cases was the use of agreements to outline goals with a direction for the future as a means to obtain commitment by the parties. The Pyramid Lake Settlement set out specific actions but also identified a number of studies to be completed that would help determine the course of future actions including studying how to improve the lower Truckee River for the fishery (d' Estrée & Colby, 2004). This likely allowed the parties to build rapport, while tackling a highly complex and technical problem. Similarly, the Nez Perce agreement outlined the settlement framework but required the parties to develop work plans and additional agreements before ratifying the settlement. These two approaches recognize that incremental gains can build momentum for parties to continue negotiating on more complex problems. In addition, it also recognizes the need for parties to jointly undergo technical studies.

#### **5.3.4 *Clarity of Outcome***

Environmental problems are complex and technical; therefore, developing a clearly worded agreement to minimize later disputes and encourage effective implementation can be challenging. Clarity of outcome assesses both the inclusion of specific baselines and performance standards within the agreement as well as perceptions of ambiguity or actual evidence of disputes over differences in interpretation (d' Estrée & Colby, 2004).

Overall, both agreements were clear and established baselines, specific outcomes, deadlines, responsibilities and procedures. The Nez Perce Agreement, however, was criticized for having provisions that were vague or ambiguous in regards to habitat and flow programs, but given the specificity of habitat work plans for the “B-List streams” and the requirement to further develop the Section 6 forestry program, this criticism is minor. The Nez Perce Agreement specifically capped the amount of water that could be transferred for flow augmentation, thus creating certainty, a stated goal of many of the parties in the Nez Perce negotiations and one of the prominent reasons a settlement was reached. The tribes were assured that water could be used for flow augmentation over the next 30 years; while the State and water users received the benefit of knowing that no more water could be used, thereby allowing businesses to determine how to invest their resources.

In contrast, the one criticism to the Pyramid Lake Settlement Act was much more significant; the parties failed to specify the quantity of water that the irrigators could use (or conversely how much water could be used for fish), thereby contributing to their sense of uncertainty and dissension. Some irrigators felt that there was no limit to the amount of water that could be reallocated and that given the goal of the Pyramid Lake Tribe in preventing all diversions out of the Truckee River Basin, the agreement did nothing to assuage their concerns except that acquisition had to be from willing sellers (d' Estrée & Colby, 2004).

#### 5.3.4.1 Observations

The designation of a cap on instream uses can reduce uncertainty for all parties. As shown in the Nez Perce case, this was a key motivator among the agricultural interests and the lack of one was a criticism in the Pyramid Lake Case. Therefore, the benefit of creating certainty is a key consideration for all interests and should not be underestimated as an incentive for cooperation. The capacity to understand the availability of water in the future – even if it is a reduced quantity – allows for proper planning and appropriate economic risks.

#### 5.3.4.2 Methods

The Pyramid Lake Case analysis provided limited information; there was no reference to the agreement itself. A review of the agreement in the context of baselines, timelines, and performance standards would have added to the analysis. A cursory review of the agreement did reveal that it included timelines for many of the actions.

### 5.3.5 *Feasibility/Realism*

A successful outcome must take into account the legal, political and technical feasibility of the solution. It is important that all three be evaluated, as a solution that is technically feasible, for example, may be too unpopular politically to actually be implemented. Therefore, feasibility requires all three dimensions (d' Estrée & Colby, 2004).

The implementations of the agreements have moved forward demonstrating feasibility, albeit some provisions have progressed slowly. There is little analysis on the Pyramid Lake Case of this criterion; however, it is notable that the two agreements were held up in committee before being ratified by Congress and were passed as riders to other bills. In both cases, there were concerns about the potential effects of the agreements on the ESA<sup>43</sup> and amendments were

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<sup>43</sup> While the Pyramid Lake Case study originally categorized this under Environmental Sustainability, this researcher felt that the information had more to do with ensuring that the Act

drafted to appease other members of Congress to ensure passage of the bills. For example, the following provision was added to the Pyramid Lake Water Settlement Act legislation:

Nothing in this title shall be construed as waiving or altering the requirements of any Federal environmental or wildlife conservation law, including, but not limited to, the Endangered Species Act, as amended, including the consultation and reinitiation of consultation responsibilities of the Secretary under section 7 of the Act, and the National Environmental Policy Act of 1969. (*Pyramid Lake Settlement Act*, 1990, sec. 210(b)(9)).

As seen in the case analysis of the Nez Perce Agreement, the parties went to great lengths to ensure that the agreement would be feasible legally, politically and technically. The method of setting instream flows with sensitivity to state water users (see Appendix A) contributed to the successful passage of the settlement, although it was also the source of internal discord for the Tribe. The one ongoing weakness in the agreement; however, has been the biological opinion because the parties are authorized to terminate the flow component if the service reinitiates consultation or issues a jeopardy opinion on the Upper Snake BiOp. Given the thirty-year term, circumstances are likely to change that will require consultation;<sup>44</sup> therefore, the thirty-year BiOp is the one provision that may not be feasible in the long-term. Connecting the agreement to the BiOp gave parties an incentive to support the Biological Opinion; however, it tied the fate of the agreement to another process to which they ultimately cannot control. From a species perspective, it could also discourage the listing agency from taking actions called for under the ESA that could disrupt the agreement. Therefore, this approach, though lauded as a model for future settlements, is uncertain.

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did not conflict with or change existing law; therefore, for the purposes of the analysis, this is discussed in legal and political feasibility.

<sup>44</sup> In addition to provisions within the agreement, the federal government is obligated to reinitiate consultation:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical habitat designated that may be affected by the identified action. (*Interagency Cooperation - Endangered Species Act of 1973, as amended*, 2008, pt. 402.16).

#### 5.3.5.1 Observations

The agreements generally met the three types of feasibility, despite opposition. It is notable for future settlements that in both instances the effects of the bills on the Endangered Species Act were express concerns that caused the federal settlement legislation to be held in committee and amended. Given the polarity between supporters and critics of the ESA, it is unsurprising that supporters are suspicious of passing legislation related to the Act. Settlements that incorporate ESA provisions and require federal legislation should include a provision that clearly states how the bill interfaces with the Endangered Species Act and other relevant federal laws to avoid delays and opposition.

#### 5.3.6 *Public Acceptability*

Public acceptability evaluates the extent of public support for the outcome including public opinion on fairness and feasibility (d' Estrée & Colby, 2004).

The two agreements had a broad base of supporters; however, they both experienced opposition. It is notable that the opposition was not only unhappy with the terms of the agreement, but also felt that the process was unfair and their interests were being sacrificed for everyone else's gain. In the case of Pyramid Lake, the opponents to the agreement protested the attempt to remove TCID from managing the Newlands Irrigation Project. The Fallon and Lahontan Valley region including the local governments and the Fallon and Shoshone Tribes opposed the agreement because they wanted to preserve or increase the amount of water to the region, and prevent the reduction of Truckee River water deliveries. In addition, there was public perception that irrigators were not treated fairly in the agreement, or that their failure to participate in negotiations resulted in a loss of their rights. Others suggested that since the irrigators were growing low value crops, the economic incentives provided by the interest in preserving Pyramid Lake to the northwest and the Stillwater National Wildlife Refuge to the east, left irrigators with decreasing political power and pressure to fallow lands (d' Estrée & Colby, 2004). The Idaho irrigators were in a similar situation except that they had retained political power within the state and support from their Congressional delegation. The State's and the irrigators' united front, resulted in a favorable settlement for water users even though Idaho took a different approach by participating in the flow augmentation program and taking measures to accommodate the needs of the fish. Thus, instead of marginalizing one group, both the Nez Perce Tribe and Idaho water users appeared to have gained politically. The main public dissension; however, came from North Central Idaho, where the water settlement was seen as a

barrier to litigating jurisdictional and boundary issues in State court and also taking private property rights. However, once the settlement passed, there was no evidence of tension found due to the settlement.

#### 5.3.6.1 Methods

Nez Perce Agreement: D'Estrée and Colby (2004) noted that the utility of this criterion was limited with low accessibility, reliability, and validity since it was difficult to find public as opposed to parties' reactions to the agreement. The results from this research are consistent with their findings. While in principal, public acceptability is likely to be an important aspect of whether an agreement that requires federal funding is passed, the delineation between public acceptability and the interested parties was almost impossible to distinguish in the Nez Perce Case. While this may reflect the fact that the agreement was so pervasive that most individuals of the public were also likely to be directly affected by the outcome, further refinement of this criterion is necessary. Future research should determine if public acceptability is more applicable when there are fewer parties and interests represented.

#### 5.3.7 *Efficient Problem-Solving*

Efficient problem-solving assesses whether the solution takes advantage of opportunities to expand the benefits through collaboration and creates win-win solutions (d'Estrée & Colby, 2004).

Supporters of the Nez Perce Settlement said the agreement was innovative because it was able to solve multiple issues at once through a more holistic approach to understanding the problem. For example, the modifications to the flow augmentation program satisfied the State's and water users' goal of certainty by assuring that no more water beyond the agreed upon amount would be requested for the duration of the 30 year agreement. The federal government and fisheries interests benefited because the changed provisions increased the likelihood that they would be able to obtain the flow augmentation water. The State reported that this was a win-win solution.

This criterion was not evaluated in the Pyramid Lake Case; however, it is evident that the Preliminary Settlement Agreement as Ratified by the Settlement Act expanded the benefits in the basin through the establishment of reservoir operations that traded risks and maximized the efficiency of the system. The agreement capitalized on the specific concern of Sierra Pacific Power Company being vulnerable to drought and the desire of the Tribe to restore the cui-ui. The cui-ui required water for spawning in the tributaries as well as to support lake levels. Since

the goal of the agreement was to increase lake levels over time, during drought years Sierra Pacific was authorized to use “fishery credit water,” while in non-drought years, this water was dedicated to Pyramid Lake and benefitted cui-ui spawning (Wilds, 2010).

#### 5.3.7.1 Observations

The Pyramid Lake and Nez Perce Settlements have often been cited as innovative agreements that incorporate win-win solutions; however, it cannot be ignored that this optimism and belief in the joint gains from the agreements was not across all parties. For example, it is not clear that the Nez Perce Tribe or grazing interests believed the agreement was a win-win; they gave up significantly more than the other parties did. Similarly, while those that were signatories to the Pyramid Lake Settlement thought it was win-win, the irrigators would have more likely described it as a win-lose agreement. Thus, efficient problem solving is relative.

#### 5.3.7.2 Methods

As noted above, the Pyramid Lake case was not originally evaluated on this criterion; therefore, it is likely that this study understates efficient problem solving for this agreement, as the information was based on this researcher’s knowledge and not a thorough analysis.

### 5.4 Criteria Category IV – Relationship of Parties to Outcome

#### 5.4.1 *Satisfaction/Fairness – As Assessed by Parties*

Satisfaction and fairness evaluates whether the parties involved in the process were content with the outcome (d’ Estrée & Colby, 2004).

Both cases had dissenters and opponents. In the Pyramid Lake case, the parties with the exception of TCID were generally satisfied with the agreement, although the Pyramid Lake Paiute Tribe thought the money provided was insufficient to restore the fishery. TCID opposed the agreement because it perceived that the settlement would result in a reduction of water for irrigated agriculture in the Newlands Irrigation Project (d’ Estrée & Colby, 2004). Similarly, not all parties were satisfied with the Nez Perce Agreement; the North Central Idaho region generally opposed the settlement perceiving it as a threat to the local tax base and an increase in tribal jurisdiction – a contentious issue between the Tribe and local interests. In addition, many tribal members opposed the agreement or were only partially satisfied, as it was ratified out of practicality and minimization of risk.

One noteworthy fact is that other tribes that also had environmental interests to water opposed the Nez Perce Settlement and the Pyramid Lake Settlement. The Fallon tribes in

Nevada contested the Pyramid Lake Agreement in hopes of obtaining more water for the Lahontan Valley wetlands, while the Shoshone Bannock in Idaho were concerned about instream flows being established under the Nez Perce Agreement when those streams were in their claimed territory. It is interesting, however, that these tribes in both instances had environmental goals and at some point had been involved in negotiations. In fact, in both cases agreements were made with these tribes that required a second round of negotiations. This suggests an area of future research as tribes are often pitted against each other. How can the federal government serve as a bridge to ensure these issues are resolved expediently in the original negotiations when multiple tribes are involved?

#### **5.4.2 *Compliance with Outcome Over Time***

Compliance with the outcome appraises whether the parties fulfilled their responsibilities and if litigation or other enforcement mechanisms were necessary (d' Estrée & Colby, 2004).

The Pyramid Lake Settlement is difficult to assess because it was a framework that set forth actions to create other agreements to solve identified problems. Therefore, implementation has been a long and slow process. Furthermore, the Act included unique provisions that targeted the Newlands Irrigation Project, restricting irrigators' options and limiting litigation. First, it extended the BOR operating plan for the Newlands Irrigation Project for an additional seven years, and authorized the Secretary to make changes as needed to comply with the ESA. In addition, the Act barred Newlands irrigators from challenging the actions in court during this seven-year period, leaving them with no means to address any grievances or concerns. While the purpose was to give all parties in the region a reprieve from litigation, the farmers interpreted it as an attack and concluded that the Secretary could then implement rules that would lead irrigators to become willing sellers as required by the agreement. TCID filed a lawsuit as soon as the seven-year term expired and the Department of Justice (DOJ) filed suit for all water diverted illegally from 1973 to 1987 to be returned to the Truckee River, equaling approximately 1 million acre-feet. The court agreed with DOJ saying that it was in the public interest and the federal government had a fiduciary responsibility to the tribe to recover the water. The Pyramid Lake Tribe and TCID also continued to litigate even after the Act passed. In addition, local governments filed three lawsuits seeking to prevent the transfer of water from agriculture to the wetlands and Pyramid Lake. The initial means by

which compliance was achieved was by prohibiting litigation , but this did little to prevent legal action thereafter (d' Estrée & Colby, 2004).

The Pyramid Lake Act was more like a plan that included actions to be completed within a timeline by incorporating incentives to drive additional agreements to resolve problems (d' Estrée & Colby, 2004). The Act set out a vision, and thus has required continuous effort by the parties. Similarly, the Nez Perce Agreement had originally started out as a framework, which laid out the general principles of what the parties agreed to with the intended goal of developing the details during implementation. However, the parties were reluctant to publicly agree to provisions without specification of the details. Therefore, the Term Sheet became the settlement agreement as more details were added. Under this approach, the Term Sheet was released and about 20 other documents had to be drafted and negotiated by the time the agreement was ratified. Essentially, most of the components for implementation were completed by the time parties decided to confirm the agreement. The piecemeal approach appears to have worked; both agreements have moved forward with compliance, although some actions were still in the implementation phase, such as the TROA (d' Estrée & Colby, 2004) and the Nez Perce Agreement Section 6 habitat and flow programs. These agreements are driving at complex issues that may take decades to negotiate and implement.

#### 5.4.2.1 Observations

The approach to implementation for the two settlements was quite different and was due in part to the structure of the agreements and goals of the parties. The Nez Perce Case used the momentum of the agreement and deadlines to achieve implementation. This was possible because many of the provisions were a continuation of the status quo and the parties did not address more politically challenging issues such as the dams on the lower Snake River or the relicensing of Hells Canyon Complex. In contrast, the Pyramid Lake Case was a turning point in making significant changes in the basin, and thus, operated on a longer time-scale for implementation. The agreement acted as a framework to outline desired changes and incentives to achieve specific goals, requiring additional studies and the negotiation of additional agreements (d' Estrée & Colby, 2004). In both cases, the agreements have for the most part been implemented as directed.

### **5.4.3 Flexibility**

Solutions that build institutional capacity require responsiveness to change. The outcome must be flexible to address changing conditions without undermining the integrity of the agreement (d' Estrée & Colby, 2004).

In the Pyramid Lake Case, the federal legislation ratified the preliminary settlement agreement but also contained various additional provisions that made it distinct. Amendments to the Settlement Act resulted in provisions being added that were perceived by TCID as a direct attack. The amendments required TCID to provide Interior with the quantity of water that it had diverted illegally; authorized the Newlands Project for additional uses including municipal; and authorized a new contractor to replace TCID. The amendments also reduced the appropriation to the tribe by \$35 million, for a total of \$40 million, although the reduction was later decreased. Many of the actions under the agreement still had to be negotiated so the flexibility was built in by piecemeal actions and requiring further studies (d' Estrée & Colby, 2004). The Nez Perce Agreement also built in flexibility for modification through the individual sub-agreements, which all specified how changes could be made. In addition, the forestry program incorporated an adaptive management component.

### **5.4.4 Stability/Durability**

The criterion stability/durability includes not only actual events demonstrating stability or instability but also indicators of provisions within the agreement that increase the likelihood that the outcome will be durable over time. These included deadlines, designation of responsibility, and provisions for resolving future conflicts (d' Estrée & Colby, 2004).

The Pyramid Lake Settlement had 31 actions which the federal team was in charge of managing (d' Estrée & Colby, 2004). The scope of the agreement and the continuous need to engage in new negotiations based on the proposed action demonstrates that more often than not, problems and solutions are complex and often need to be addressed in a piecemeal but coordinated fashion in order to make progress. While the agreement has held up; it did not put an end to litigation over the long-term, as TCID and others in the basin have continued to engage in lawsuits (Wilds, 2010).

The Nez Perce Agreement has proved to be stable and durable. Upon settling the objections in the SRBA court, there has not been a legal challenge to the agreement. In addition, the settlement and corresponding sub-agreements included provisions to ensure the relevant sovereigns were engaged in the decision-making process and identified mechanisms for

dispute resolution. The key weakness in the agreement is its ties with the Upper Snake BiOp, which has been the source of ongoing concerns about stability. Aside from the BiOp, however, the agreement has generated little post-ratification press, indicating that it has not generated much in the way of controversy.

#### 5.4.4.1 Observations

Despite the continued conflict, the Pyramid Lake Settlement has strong support from the parties involved in the agreement. However, it is incorrect to assume that negotiation will always lead to win-win solutions that do not involve hard decisions and tradeoffs. It was evident that despite the tension with TCID, the agreement continued to proceed because political leaders realized that it was time to shift the status quo (d' Estrée & Colby, 2004). The Pyramid Lake case is unique in this aspect, as the agricultural community has long held significant political power with Congress. It is possible that the municipal interests were the factor that weighed heavily in favor of reallocation when coupled with the ESA and tribal trust responsibilities.

## 5.5 Criteria Category V – Relationship between Parties

### 5.5.1 *Reduction in Conflict and Hostility*

Typically, the purpose and goal of an outcome is to reduce the conflict and hostility of actions and communication between the parties (d' Estrée & Colby, 2004).

When the Pyramid Lake Case research was performed in 1999, the conclusion was that it was too soon to tell if the Act would result in a reduction of conflict. While the Truckee-Carson Pyramid Lake Water Rights Act has often been hailed as a model agreement, it is not necessarily a model of cooperation, collaboration or peace. In fact, it was asserted by some that the Act was just part of the old water wars and that it:

was an effort to divide up Newlands Project irrigation water for the benefit of an organized coalition of opposing interests. Rather than initiating an era of water peace in the Sierras, this view considers the law as simply an occasion for the deployment of what they say might be described as an entirely new generation of water warfare weaponry, strategy and tactics. (d' Estrée & Colby, 2004, p. 142).

In contrast, because of the Nez Perce agreement, tensions temporarily increased with non-tribal members in the reservation over jurisdictional issues. It was difficult to assess whether conflict and hostility decreased in between the State of Idaho, water users and the tribe because the relationship had always appeared to be professional. The significant change was

that they were now on the same side of the litigation in regards to the Upper Snake River BiOp even as they remained opponents on the Federal Columbia River Power System (FCRPS) BiOp.

### **5.5.2 *Improved Relations***

This criterion seeks to understand how parties perceive and interact with one another including any changes in level of trust, attitudes, and the overall relationship (d' Estrée & Colby, 2004).

The researcher of the Pyramid Lake Case noted that it was difficult to determine if there was an improvement in relations at the larger community level beyond those individuals that were directly participating in the negotiations (d' Estrée & Colby, 2004). This is consistent with the findings of the Nez Perce Case wherein there were quotes from direct participants in the negotiations such as the lawyers and high-level leaders about the strengthening of relationships, even as there was dissension among members of the various groups.

### **5.5.3 *Cognitive and Affective Shift***

The cognitive shift assesses if there are changes in how parties describe and relate to the conflict and other parties (d' Estrée & Colby, 2004).

A comparison between the two cases shows differences in this criterion. There was a shift in the Pyramid Lake parties' understanding of the connection of quality of life to economics and the environment, as well as an increased willingness to engage in collaborative relationships to manage natural resources (d' Estrée & Colby, 2004). There was not, however, a noticeable shift in the Nez Perce Case, possibly because the only way for the parties to come to agreement was to write the agreement in such a way that the groups could maintain their firmly held values and positions, particularly for future legal arguments. In addition, the parties had always seemed to prefer negotiation to litigation, so their preference cannot be described as a shift.

### **5.5.4 *Ability to Resolve Subsequent Disputes***

Ideally, an outcome that resolves a conflict will also build the capacity for parties to work together in the future should new problems emerge that are related to the original conflict and solution. The indicators for this criterion include constructive resolution of new conflicts and proactive actions to prevent disputes. This criterion is distinguished from others by its exclusion of perceptions, only looking at concrete actions for evidence (d' Estrée & Colby, 2004).

The Pyramid Lake Settlement required a second round of negotiations four years after the Settlement Act indicating both an intractable problem and the new commitment of the parties to negotiate with TCID back at the table. The parties then developed the Truckee River Water Quality Agreement and implemented a new Operating and Management Contract with TCID while also continuing to negotiate the Truckee River Operating Agreement and engaging in a second round of negotiations with the Fallon Tribes (d' Estrée & Colby, 2004). While the problems remained with TCID, it is clear that the other parties have learned how to work together through negotiation. A cursory review of the situation today suggests that TCID and the farmers continue to be pitted against the rest of the region and that litigation continues as a means to resolve disputes (Wilds, 2010).<sup>45</sup> Conversely, with the exception of the Columbia River FCRPS, the parties in the Nez Perce agreement have demonstrated the capacity to work together. The tribes and IPCo. later came to a settlement on the relicensing of the Hells Canyon Complex, and after a brief stint of litigation, LOID and the tribe began working together on a solution to LOID's diversion impacts on fish.

### **5.5.5 Transformation**

Transformation occurs when individuals undergo personal growth as a result of dealing with conflict such as developing concerns over justice, fairness, and caring about other parties. Indicators of transformation include perceptions of capacity to work together to jointly resolve conflicts, major shifts in the perceptions of others and the conflict, changes in policies and empathy (d' Estrée & Colby, 2004).

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<sup>45</sup> For example, even after the 1990 Settlement Acts, litigation has continued to arise involving rights of the Fallon Paiute Shoshone and Pyramid Lake Paiute. As noted by the court,

Although Congress enacted the Settlement Act in an effort to resolve many of the conflicts over water rights in the Newlands Reclamation Project, the extensive and ongoing litigation over these rights clearly indicates that many individual competing concerns have yet to be satisfied (*United States v. Alpine Land & Reservoir Co.*, 2003).

Four years later, the court stated

We have, once again, been called upon to revisit water rights issues arising out of the Newlands Reclamation Project and the Orr Ditch Decree. We appreciate that the State Engineer and some of the applicants are becoming mighty tired of their trips to and from the federal court system...Alas, we cannot bring this process to a close, but must let parts of it continue on their torturous path (*United States v. Alpine Land & Reservoir Co.*, 2007).

Although there was not a discussion of transformation, the Pyramid Lake Settlement was applauded for “setting a precedent for indigenous peoples, the environment, and endangered species” since the tribe with little political power was able to leverage federal law and the fishery as a trust resource to change water allocation in the region (d’ Estrée & Colby, 2004, p. 146). In the Nez Perce Case, there was a slight transformation particularly in the realm of policy with the federal government integrating the Tribe further into natural resources management in the region. In addition, the State of Idaho came to appreciate and pursue the opportunity to develop voluntary actions for species protection to maximize the state’s control over recovery efforts while minimizing the federal government’s role. Leaders of the groups involved in negotiations also acknowledged the difficulty of the other’s position, but beyond the state there was little evidence of a transformation.

#### **5.5.6 Observations**

It is evident from reviewing this category of criteria that the assumption that negotiation leads to improved relationships is not entirely accurate. In both of these cases, there were individuals that spoke very poorly of other groups and the terms of the settlements. Furthermore, it was unclear if the relationships between supporters of the agreements had really advanced beyond the representatives and leaders involved in negotiations. In multi-party disputes, with a large number of constituents, it is possible that only the representatives of the groups develop a better relationship and not the local individuals of the parties. It would be interesting for future research to focus on differences between small local agreements and larger disputes both geographically and from the perspective of population or number of constituents. Furthermore, it is unclear how important the representative’s role is within each individual’s own group in determining whether internally the settlement is accepted.

#### **5.5.7 Methods**

The Nez Perce Case Study: The relationship between parties was one of the more difficult categories to assess due to accessibility of information and the operationalization of the criteria. The accessibility of information from 1998 for a baseline understanding of the relationship was limited. In addition, the multitude of parties in the case meant that characterization of the relationship is only in regards to parties that directly participated in the negotiations, mainly the lawyers and leaders. The various indicators were difficult to apply in practice and some were of questionable reliability and validity, which is consistent with the findings in *Braving the Currents*. Furthermore, the use of documents to assess these changes

drew its own challenges as there was no capacity to draw information from parties, but rather one could only rely on the indirect information. In addition, there were relatively few sources and information available after the agreement was passed that would lend insight to changes in the relationships. Therefore, the depth of analysis, reliability, and validity was inconsistent and findings should be interpreted critically. This category would greatly benefit from testing against other means of data collection to determine the strength of reliability and validity.

The second challenge with this category was the delineation between the sub-categories which incorporated similar definitions of data to be collected. For example, the transformation criterion called for looking at shifts in the “perception of the conflict and relationship,” while cognitive and affective relationship sought “evidence of shift in parties’ ‘framing’ of the conflict or the relationship,” and improved relations included “evidence of change in relationship quality” (d’ Estrée & Colby, 2004, pp. 359, 362, 365). Similarly, another indicator for transformation was “evidence of empathy for and acknowledgement of other parties’ circumstances” (pp.365) while improved relations sought evidence of a better understanding and sympathy of others’ positions. While there were indicators within each criterion that were different from other criteria, these slight nuances between different categories without a tool outside of document analysis made it difficult to differentiate the criteria and, thus, reduced the reliability of the analysis.

## **5.6 Criteria Category VI – Social Capital**

The Guidebook describes Social Capital as “criteria that address positive changes that occur in the larger system in which this conflict is embedded: Changes that go beyond the relationships between these particular stakeholders and/or beyond the particular issues in this conflict” (d’ Estrée & Colby, 2004, p. 367). Three criteria were used to evaluate Social Capital.

### **5.6.1 *Enhanced Citizen Capacity to Draw on Collective Potential Resources***

This category included the aggregate of resources within networks, the same parties working together on new projects, and evidence that groups from different backgrounds are assisting one another (d’ Estrée & Colby, 2004).

The results for this criterion were reviewed but it was determined that further operationalization of this criterion was needed and that information was too limited to be conclusive. For the Nez Perce Agreement, negotiations and resulting agreement did increase the capacity of the local water users to aggregate resources and assist one another. In the

Pyramid Lake Case, the Truckee River Partnership was a continuation of the relationships that had formed to implement and direct activities through the agreement (d' Estrée & Colby, 2004).

### **5.6.2 *Increased Community Capacity for Environmental/Policy Decision-Making***

Indicators for this criterion include increases in process efficiencies, the coordination of resources, information exchange, and the ability to cooperate and address new challenges (d' Estrée & Colby, 2004). In the Pyramid Lake Case, the parties that signed the agreement have increased capacity to resolve conflicts and the region is now better adapted to dealing with droughts. However, the region remains fractured as tensions with TCID and the farmers have not subsided (d' Estrée & Colby, 2004; Wilds, 2010). In the Nez Perce Case, the parties to the agreement were effective in supporting the Upper Snake River BiOp and the tribes appeared to have forged a professional relationship with the irrigators and the state. However, the relationships between the irrigators and environmentalists did not improve and hostile rhetoric continued, providing inconclusive results about whether the basin had actually improved capacity for cooperation.

### **5.6.3 *Social System Transformation***

The social system transformation subcategory identified eight potential indicators including support to the community, increased community dialogue, resilient economies and social systems, generation of learning systems, increased linkages and networks, cooperation and assistance, and greater trust (d' Estrée & Colby, 2004).

For the Pyramid Lake Case, the social system transformation has been limited primarily because TCID is integral to the solutions but has continued to resist participation. The fact that litigation continues has prevented improvements in the resiliency of the socio-political-economic system and general trust (d' Estrée & Colby, 2004). There was not sufficient information to make a determination on social system transformation in the Nez Perce Case.

### **5.6.4 *Observations***

The lack of evidence of increased Social Capital in the Nez Perce Case may be indicative of the level at which the conflict was resolved. Although it is clear that the parties directly involved in the negotiations, particularly the lawyers and higher-level decision makers such as the tribal NPTEC Chairman and the Governor's Office, likely developed better relationships, it is also evident in part because of the presence of the three sovereigns, that there were limitations to this relationship building within the community. As a researcher with

previous experience reviewing highly collaborative local level solutions to water shortages, I would propose for future research that the level at which the Nez Perce conflict was resolved was not necessarily conducive to developing extensive community social capital. Further research on the scale and type of conflict would help operationalize this criterion. For example, while social capital is often associated with local environmental conflict resolution, it is unclear if it is applicable in much broader scale conflicts where three sovereigns are involved. Are there different scales of social capacity? Is social capital likely under conditions where the negotiations primarily involve lawyers? Does social capital extend beyond the negotiators to constituents? A second factor that may have curbed increases in social capital is there was a multitude of issues that were left unresolved by the agreement, which left parties in a position of preserving their opposing legal positions for the future, thereby potentially limiting the capacity to engage in meaningful relationship building.

#### **5.6.5 Methods**

The Social Capital criteria were difficult to analyze due to challenges in obtaining relevant documents to analyze, particularly for a baseline, and because these criteria may not apply to this process. This highlights one of the challenges of using this methodology and drawing only from documents as conclusions cannot be made based on the absence of evidence for a certain criterion: It is possible that the indicators and criterion are not conducive to data collection from documents. The creators of the framework did note that not all criteria would be applicable to every solution but it is difficult to ascertain when this is the case or when there is simply a lack of information available.

The Social Capital indicators were also particularly susceptible to being falsely attributed as an outcome of the particular conflict resolution process. For example, a collaborative group between several of the settlement parties began right after completion of the Nez Perce Agreement; however, further research revealed that the group was the result of a different and unrelated collaborative process. This finding was consistent with d'Estrée & Colby (2004) who noted that "though it may be difficult to tie the development of social capital to a particular conflict resolution process, monitoring for change on these indicators may at least suggest changes in the larger system that are correlational" (p.367). Unfortunately, in the Nez Perce case, there were too many changes in the system for even a correlation to be drawn; therefore, without doing interviews, the Social Capital category was not useful in this analysis.

Further testing and operationalization of the three criteria would be beneficial for future research. The Social Capital category was added to the framework after the initial reliability and validity testing was completed; therefore, it did not go through the same development to refine the operationalization of the sub-categories. The value of the explanation and definition section within each sub-criterion was evident as it was difficult to assess the differences between the sub-categories in Social Capital while completing the Nez Perce Case analysis. In addition, based on a comparison between this researcher's reading of the three sub-criteria in the Guidebook and the analysis performed in the Pyramid Lake Case, there was some initial concerns about the reliability of these criteria. An explanation of the differentiation between the three sub-criteria could increase reliability, as there was overlap between the three that could compromise the validity of the criteria.

## **6 DISCUSSION OF METHODOLOGY**

NOTE: For ease of reading and organizing information, the results and discussion section above incorporates comments specific to a particular criterion. This section seeks to provide a higher-level discussion of the methods.

The analysis of the two agreements using the Guidebook framework reveals just how complex and difficult it is to evaluate if a solution to a water conflict is actually successful. The framework presented in the Guidebook is the most comprehensive framework this researcher has encountered. The inclusion of both evaluative criteria for the process, outcome, resulting relationships and community impacts connects the various dimensions of conflict resolution to understand how each criterion influences the success of the agreement. In order to understand the strengths and weaknesses of water rights settlements as a method for restoring instream flows, this research sought to evaluate one case study using the Guidebook and compare it to another case study with similar characteristics that had already been evaluated with the Guidebook. This approach not only allowed for an assessment of the cases themselves but also provided an opportunity to evaluate the framework and associated methodology including criteria that had not been previously tested by the original research group.

### **6.1.1 Data Source**

The Guidebook was developed to use documents and other public information as a means to collect data. Therefore, the Pyramid Lake Case was completed without interviews or focus groups and instead used only information that was publicly accessible. For consistency and comparison purposes, the Nez Perce Case Study was also completed using this approach. The amount of information available online and through library databases was initially overwhelming, with greater than 900 documents (including news articles and websites) reviewed from both academic and library databases as well as the Internet. The Nez Perce Case Study included in Appendix A uses almost 200 discrete sources. Even as the final write-up was being completed, additional articles and relevant documents were found that could not be incorporated into the analysis due to time and resource constraints. Despite the amount of information available, the capacity to triangulate data was often not possible. In addition, there were some analyses that the researcher determined were too speculative to tie the results to the agreement such as Social Capital or socioeconomic data for Community Sustainability. Furthermore, some items that required a baseline or the perception of parties were particularly difficult to address such as those requiring characterizations of the parties' relationships and

changes in social capital. It would be interesting for future research to evaluate the reliability of the publicly available information method versus more traditional interview, survey or focus group techniques.

As noted by d'Estree and Colby (2004), the Internet was a powerful source of information for some researchers during the initial test of the framework in the late 1990s, and this continued to be true in 2011 when collecting information for the Nez Perce Case. Although, the first attempt at negotiations for the Nez Perce Agreement started in 1993 when the Internet was not as ubiquitous, the negotiations that were the focus of this evaluation began in 1998 and ended in 2004, a period when the Internet had become embedded in daily life. The difference in accessibility to earlier information was noticeable and is one problem with using public information as the main data source. In addition, it underscores the need to rely on other databases such as LexisNexis. There were several other pitfalls in using the Internet. First, some of the groups that had maintained a website during the negotiations no longer had one, leaving a data gap that would have been helpful in understanding their positions. The Internet is dynamic and; therefore, attempts to search for pre-agreement and post-agreement positions often yielded only the most recent perspectives. Therefore, it is imperative that users of this data or framework are cognizant of what is available online. In addition, if publicly available information is the primary tool for analysis, researchers should be advised to learn advanced Internet search techniques and to review current research on the use of the Internet as a tool for scientific research.

### **6.1.2 *Framework Criteria***

The Guidebook was integral in understanding each criterion and relevant information to obtain for assessment. In researching the Nez Perce Case Study, the value of the Guidebook and tested criteria was apparent after attempting to evaluate social capital, which had not undergone the same testing for reliability, validity, and operationalization since it was added after the initial evaluation and would have benefitted from testing and further refinement (see Social Capital discussion above). In fact, several of the criteria were not included in the initial framework, which means that they are not necessarily as well defined in the Guidebook as the other criteria that have been tested and analyzed for accessibility, reliability and validity. The following criteria were not included in the initial evaluation: perceived economic efficiency, efficient problem solving, transformation, enhanced citizen capacity to draw on collective potential resources, increased community capacity for environmental/policy decision-making

and social system transformation. In addition, the framework did have instances where some of the criteria had crossover or the description was vague. The overlap, however, is partially due to the framework and partially due to the nature of the Nez Perce Agreement whose benefits (perceived economic efficiency), community/cultural sustainability, and environmental sustainability were often the same. Similarly, public acceptability, satisfaction and perceived economic efficiency also overlapped.

### **6.1.3 *Comparative Analysis***

The evaluative framework in the Guidebook is an excellent start at developing an accessible approach to assessing environmental conflict resolution processes and a means for comparative case analysis. However, in practice, I encountered several difficulties that made this framework and approach cumbersome. The quantity of information and depth of analysis on the Pyramid Lake Case Study was a limiting factor in the capacity to analyze the similarities and differences to the Nez Perce Case Study. In order to compare the case studies, more information was often needed than was provided in the original study. The limited information on some of the criteria in the Pyramid Lake Case was a consistent challenge and the comparative analysis would have been strengthened by more in-depth citation of the information used to derive certain conclusions. At times, it was difficult to determine why the conclusions in the Pyramid Lake Case were drawn, particularly when the sources of information used were not included but were just a general impression from the literature. In addition, there were notable differences between certain analyses and criteria that called into question the reliability and validity of the criteria as operationalized. Part of this disparity may arise from the Pyramid Lake Case study being completed before the Guidebook was revised; nevertheless, it is still a source of error. The Nez Perce Case benefitted from a more precise definition of each criterion based on the analysis of the researchers' original case studies, which included Pyramid Lake. Since my assessment of some of the criteria for the Pyramid Lake Case was different from the original researchers, inter-rater reliability was low and more research would be necessary to determine the extent of error for those particular criteria. Finally, as with all case studies, it is important to note that the results cannot be generalized to other agreements, but rather provide a basis for further research and a more in-depth understanding of these processes.

The goal of this framework was to provide a means to perform comparative case analysis; however, in practice it was unwieldy given the magnitude of various indicators and the

sheer volume of information possible. Thus, the strength of this framework also makes it difficult to apply in practice, which supports d'Estrée and Colby's assertion that researchers should choose only the relevant criteria for their objectives. Regardless, however, the framework only provides a means of recording the information, not necessarily a method of evaluating if the information found is sufficient to qualify as successful or unsuccessful. For example if there are ten indicators for flexibility and only one is reported, does this constitute success? The qualitative nature of the analysis makes it difficult as a tool for definitively stating whether an agreement has met each standard in a manner that has high inter-rater reliability. D'Estree and Colby graded the cases on an A-F scale within *Braving the Currents*, but since there was no standardized approach, it could not be replicated here.

Despite its drawbacks, the capacity for this framework to provide a roadmap for parties to understand the potential objectives in conflict resolution and analyze individual cases for strengths and pitfalls is invaluable. The depth of information requested led to the discovery of similarities and differences between the two agreements that would have otherwise likely gone unnoticed. For example, the cap on the amount of flow augmentation water in the Nez Perce Agreement was part of the reason for its success, whereas the lack of a cap on water to be transferred from TCID was one of the reasons the agreement continued to face resistance. The framework and its criteria provided a format in which it was possible to identify and observe these outcomes. Furthermore, while there were difficulties with using public information and documents, this research methodology shows that the use of the Internet and technology to obtain information is still an emerging but promising field for future research.

## **7 CONCLUSIONS – INSTREAM FLOWS AND TRIBAL WATER RIGHTS SETTLEMENTS**

As outlined in the introduction, this research sought to explore: (1) the role of tribal water rights settlements as a method for instream flow protection; (2) how tribal water settlements compare to litigation for instream flow protection; (3) the strengths and weaknesses of tribal water rights settlements in resolving disputes over instream flow claims using a framework of criteria to assess successful environmental conflict resolution; and (4) the role of the ESA in these settlements. These objectives were accomplished by first examining the 27 congressionally approved tribal water settlements for instream flow provisions and then selecting two agreements to compare their success in meeting the 28 criteria. The results from these analyses show that tribal water rights settlements provide creative opportunities to protect water instream to resolve tribal claims; however, settlements did not typically include favorable federal reserved rights terms that could be awarded through adjudication. Furthermore, like any method, negotiated settlements have strengths and weaknesses in resolving disputes arising over tribal claims and did not meet every criterion for successful conflict resolution. Therefore, the use of tribal water settlements as a mechanism for resolving tribal instream flow claims should be considered within the context of other tools, including adjudication of tribal water rights, other federal regulatory rights, and opportunities available under state law.

### **7.1 Tribal Water Rights Settlements as a Method for Instream Flow Protection**

The analysis of the 27 agreements confirmed that water rights settlements are a mechanism for instream flow protection and habitat restoration with some limitations, which can be specified based on whether the use is within or outside of the reservation. For instream flows within the reservation boundaries, almost all settlements authorized the tribal right for any use by the tribe, while about half-designated instream flows mostly as storage or state water rights. The significance of these findings for future negotiations is that while instream flows may be protected within reservation, the parties often must find a source of water to supply these rights if the basin is already over-appropriated: Settlements have generally been reluctant to change the status quo and instead use voluntary means such as reallocation through purchase, lease, or designation of federal contract space. In addition, priority dates were inconsistent, typically taking on the reservation date, or the state reallocated rights' priority dates; therefore, settlements did not necessarily result in senior rights. Off-reservation uses were either not authorized, had additional restrictions, or in at least one instance were designated in the state's name instead of the tribe's. Finally, some settlements utilized innovative methods to protect

instream flows such as conservation, offsets, reservoir reoperation, water banking, and groundwater protection, demonstrating the flexibility and uniqueness of agreements in fulfilling the needs of the parties.

While the initial tendency of existing consumptive water users is to object to tribal claims for instream flows, water settlements where instream flows have not been provided in sufficient quantity to meet the utility of that streamflow for the tribes are unlikely to have the intended certainty. It is evident that other legal mechanisms exist by which a tribe can continue to seek instream flows after a water settlement waiving all additional water claims in perpetuity. For example, even after completing a water settlement, the San Carlos Apache tribe sought to protect its recreational warm water sport fishery using nine different legal theories including the Endangered Species Act and breach of trust responsibility.<sup>46</sup> While all claims were ultimately defeated in this instance (*San Carlos Apache Tribe v. US*, 2003), the evidence points towards a water settlement that was insufficient to meet the current and future needs of the tribe such that the tribe sought other ways to protect their assets. Similarly, the Pyramid Lake Paiute Tribe continues to litigate water rights to protect the Pyramid Lake fishery and streamflows (*Pyramid Lake Paiute Tribe v. Ricci*, 2010, *United States v. Alpine Land & Reservoir Co.*, 2011). While the success of these legal tools will vary based on the facts, if the extinguishment of water lawsuits is an objective, parties should not resist these claims but rather focus on identifying ways to achieve an outcome that sustains fish and local livelihoods.

Based on these results, if the past is indicative of the future, it is unlikely that tribal water settlements will result in large-scale re-watering of streams; rather, they are more likely to designate unappropriated waters and rely on market transactions, particularly in cases where tribes have a strong legal case, such as a treaty fisheries right for a specie that is also ESA listed. It is important to note, however, that settlements have not occurred in Washington State where tribes are considered to have strong legal standing; therefore, it is possible that future negotiated agreements will be more favorable to instream flows than the current settlements suggest. Furthermore, since agreements have essentially used state law, there is the possibility that states and tribes will move to establish instream flows without settlements; although, this is unlikely in cases where it undermines parties' bargaining positions on other issues. Thus, while it is clear that tribal water rights settlements offer unique opportunities to protect instream flows and

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<sup>46</sup> The court noted that the tribe's non-native warm water fishery was the primary predator of razorback sucker for which the tribe had filed the ESA claim to protect.

may use a variety of tools in order to accomplish this goal, thus far, they have not carried the promise of senior instream rights.

## **7.2 Tribal Water Settlements and Litigation for Instream Flow Protection**

Although the case law for comparison is limited and unclear, settlements have recognized instream flows as a beneficial use and authorized tribes to change consumptive rights to instream uses, unlike the Big Horn cases involving the Wind River Reservation in Wyoming (*In re Gen. Adjudication of All Rights to Use Water in the Big Horn*, 1988, *In re Gen. Adjudication of All Rights to Use Water in the Big Horn*, 1992b). Conversely, in contrast to the Adair cases, settlements have not offered the promise of senior water rights for instream uses. The lack of recognition of senior time immemorial instream rights means that litigation will continue to be at least a consideration for tribes despite the significant risk and uncertainty associated with pursuing such rights in court. Furthermore, while tribal water rights settlements have been suggested as a possible method to establish and restore instream flows off-reservation; aside from offering the potential to market water off the reservation, settlements have not been a meaningful method to establish senior federal reserved instream flows. While the Nez Perce Agreement did include off-reservation minimum streamflows, the rights were not recognized as time immemorial reserved rights, but rather were issued as state water rights with a priority date of 2004 and subordinated to certain future uses. These water rights were not beyond the authorities of the state to issue; therefore, the state could have saved the resources of negotiating these instream flow claims simply by using its instream flow authorities under state law. Furthermore, the agreement did not restore streamflows, but rather authorized instream rights as well as the leasing of water on the 24 streams that needed flow restoration. Therefore, these settlements have generally not brought reserved instream water rights to fruition as promised in some, but not all court decisions, and it remains today that state law is the mode by which most instream flows in negotiated settlements are established. However, while the trend is state rights instead of time immemorial reserved rights, future negotiated settlements could yield more favorable terms depending on the unique facts, and therefore, negotiation is still likely the better choice since it offers some degree of control.

As shown in both the Nez Perce Case and Pyramid Lake Case, settlement agreements are set in the context of federal common law, which determines each party's BATNA; therefore, litigation is often a part of the process that gets parties to the point where they can agree to a settlement. In addition, while tribal rights are supposed to be based on federal law and;

therefore, consistent, the McCarran Amendment continues to subject tribes to state courts where some elected judges may have an incentive to decide in favor of the state (Blumm et al., 2006; Blumm, Goble, Royster, & Wood, 2000; McCool, 1997). Since, the U.S. Supreme Court sets the final precedent across the West, parties have been reluctant to press on, and instead have left the lower courts' decisions as the baseline for negotiation. Despite this, litigation outcomes have been inconsistent and this suggests that the advantage of negotiation comes from the capacity and control to minimize significant injury to each party while reducing uncertainty.

Other commonly cited advantages of negotiation over litigation such as time savings, better relations, and resolution of all issues (McCool, 2002) did not necessarily hold true. For example, in the Pyramid Lake Case, the settlement did not end conflict or litigation, while the negotiations from initial talks to the completion of the operating agreement required in the settlement took just as long as the adjudication of the entire Snake River Basin, and therefore, was quite time-consuming. Furthermore, the Nez Perce Case was successful precisely because it did not address all issues, although it did incorporate more problem areas than litigation would have. While, negotiated agreements are espoused as a more cooperative process that generates “win-win” solutions in comparison to litigation, it must be acknowledged that negotiation can also involve difficult choices and at times may include less than cordial debate. In addition, while parties representing the individual interests may come to an agreement and develop a mutual respect, the constituents that have not undergone the process will not necessarily be amenable to the outcome. As seen in the two cases, negotiation does not necessarily engender less conflict than litigation; rather it is simply another means of deciding a contentious issue with all parties seeking to minimize the damage to their own interests while maximizing benefits and avoiding winner take all situations. Furthermore, basins that have settlement agreements may continue to encounter litigation, in part due to uncertainty, the desire to protect rights, or due to continued political wrangling because settlements involve compromise.

Despite these pitfalls, the variety of mechanisms used in both agreements increased institutional capacity beyond what would have occurred through continued litigation. The Pyramid Lake region has new institutional tools that makes it better able to manage drought and conserve water, while the Snake River Basin in Idaho set out the relationship between key parties in relation to positions and actions under the ESA. If at least some of the parties learn to work together and develop solutions that increase institutional capacity, then the outcomes generated by negotiation are invaluable since more intense conflicts tend to occur when

institutional capacity has been exceeded (Fesler, 2007; Wolf et al., 2003). Due to the uncertainty and inconsistencies associated with litigation and the capacity for settlements to incorporate unique approaches to building the capacity to manage conflict, negotiated agreements offer some distinct advantages for obtaining recognition of water for fisheries in the context of tribal water rights.

### **7.3 Settlements and Standards for Successful Environmental Conflict Resolution**

The evaluation of the two case studies show that there are similarities in the strengths and weaknesses between the two agreements which may be indicative of a pattern of negotiated settlements in general.<sup>47</sup> The evaluation of success is shaped by the fact that negotiated agreements, though collaborative, do not always result in consensus, and there are likely to be detractors. Therefore, decision makers and others involved in settlement negotiations must recognize that not everyone will be satisfied with every provision of an agreement; however, this does not mean that opposition should be ignored or dismissed but rather utilized to shape the provisions to maximize gains and minimize harm. The Nez Perce Agreement was quite successful in doing this, which is likely one reason why there has been little mention of it in the press since its passage. In fact, there was a positive correlation between individuals that opposed agreements and those that expressed that the process to reach a settlement was unfair. Parties, therefore, should not underestimate the importance of process, and should engage a trained professional facilitator or mediator to ensure that procedurally the best practices are followed to maximize support for the agreement. Furthermore, determining who is allowed to engage in negotiations is equally important as non-participation was also correlated with dissatisfaction over the outcome. Parties should be cognizant of groups that are left out of the process and develop a strategy to engage them even if it is not directly allowing them to be involved in the negotiations. The difficulty with negotiated agreements, therefore, is weighing the balance of having an all-inclusive process while maintaining a safe and confidential environment as well as advancing the interests of the greater community against the potential need to exclude individuals intent on obstructing the process and change.

The results also suggest that the second challenge of negotiated agreements is obtaining within group cohesiveness and developing relationships beyond the core individuals involved in

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<sup>47</sup> The limitations of the case study approach is that it is not generalizable but rather is a tool for obtaining a greater depth.

the negotiations. While it is expected that negotiation is advantageous because it gives groups the opportunity to listen, develop relationships, and build the social and institutional capital to work through conflicts using less violent means, it is unclear without further research if this occurs with local issues spanning larger geographic areas that necessitate participation between higher levels of government and several sovereigns. For example, in the Pyramid Lake Case there was a strengthening of social and institutional capital between groups that had participated in the negotiations and settlement process, but not throughout the entire community.

Conversely, the Nez Perce Case, which spanned a larger geographic area, appeared to only generate cohesiveness within the irrigation community in Southern Idaho, while many of the other entities and interests including the tribe, were either fractured by within group opinions or appeared to acquiesce. Therefore, stakeholders should consider the different scales at which conflict occurs and be aware of not only the intergroup interactions but also the intragroup dynamics, particularly since the confidentiality of negotiations can generate distrust and resistance amongst constituents.

Despite the fact that both settlements were heavily influenced by the threat of ESA enforcement and the need to protect tribal trust resources, the agreements reflect different strategies, tactics and mechanisms to accomplish the parties' goals, and as a result have had different outcomes that affect the evaluation of success. The dichotomy can be classified as a comparison between a settlement that sought to preserve the status quo and proactively prevent further degradation versus a basin with degraded ecosystems whose priorities shifted and sought to change the management of the system. While the framework puts forth criteria that engender an ideal solution, it cannot imbue a context for that success. For example, the primary purpose of an agreement may not necessarily be to reduce conflict but rather to create change. In the Nez Perce Case, the settlement appeared to be highly successful but it did not require large-scale shifts in water allocation, and the setting of instream flows on undeveloped streams was a relatively proactive solution that did not generate significant conflict. In the Pyramid Lake Case, the status quo was no longer acceptable except to the few that benefitted from it. While the parties sought to increase institutional capacity to deal with future stressors and recover natural resources, this was a significant change in management that greatly affected the agricultural community. The best approach in such instances is unclear, as harm may be unavoidable, and therefore, the solution becomes a matter of minimizing injury, or as Priscolli and Wolf (2009) suggest, finding a way to create benefits that extend to the parties interests that do not necessarily require the use of water. Unfortunately, in cases where fisheries restoration

is a goal on over-appropriated systems, the interest-based benefits must be directed at consumptive users since fish cannot live without water, thus precluding certain options that do not include changing how water is used. This analysis of the past underscores the difficulties of changing the status quo and therefore, suggests that there are inherent advantages of proactively addressing problems, which is consistent with recommendations by Priscoffi and Wolf.

The comparative analysis of the two case studies revealed the realities of public policy in general and the associated difficulties with attempting to reach consensus on seemingly intractable water disputes. The spectrum and polarity of positions is common to many policy problems and solutions; therefore, parties should expect that any negotiated settlement will have its supporters and opponents. However, in contrasting the two cases, the Nez Perce Agreement was successful in minimizing harm to parties potentially impacted by the agreement. The Pyramid Lake Settlement did not attempt to address the broader impacts on the irrigation community. Similarly, while collaborative processes are often espoused as the best way to resolve natural resources conflicts, they are not without their own challenges, difficulties and tensions. Based on these two cases, I would suggest that the potential advantage of negotiation is not that it creates “win-win” solutions, but rather that it creates “shared-sacrifice”<sup>48</sup> solutions which benefit everyone because they are not “win-lose” outcomes. Priscoffi and Wolf (2009) affirm this conclusion noting that “there is growing realization that the price for having some control over agreements is sharing ownership and cooperating in both the process and outcome of those agreements” (pp. 3).

#### **7.4 The Endangered Species Act and Fisheries Provisions in Tribal Settlements**

The Nez Perce Water Rights Settlement and the Truckee-Carson Pyramid Lake Paiute Settlement were both the result of tribes’ desire to restore instream flows for fisheries that were also listed under the ESA. Although resolving tribal trust responsibilities in the context of water and fish was a factor, the ESA was also a key driving force for parties to come to the table, particularly in the Nez Perce Case. Like other tribal settlements, the Pyramid Lake Water Settlement did not take advantage of conservation incentives provided under the ESA, but rather referenced the existing recovery program. In contrast, the Nez Perce Agreement took a unique approach by incorporating tools provided under the ESA to recover species while also protecting resource users. The development of a 30-year biological opinion to protect Idaho’s

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<sup>48</sup> A group in the Dungeness basin coined the term “shared-sacrifice.” See generally Seiter, Newberry & Edens (2006, p. 1214).

water from additional curtailment for fishery flow augmentation was a creative approach, which encouraged many water users to support the settlement. In addition, the settlement also incorporated the establishment of a Section 6 cooperative agreement for timber and agricultural industries through a forestry program and flow program that incentivizes landowner participation by insulating them from incidental take. Thus, the Nez Perce Agreement encouraged as opposed to mandated landowners to support fish recovery. However, the ESA provisions of the Nez Perce Agreement were identified in the evaluation of success as the most problematic because the BiOp is still subject to changing conditions, which could result in re-initiation of consultation and thereby allow parties to back out of that section of the agreement. In addition, the cooperative agreements are one of the few elements of the settlement that have been slow to be implemented. Since the Nez Perce Agreement is the only settlement to have tried these approaches, the incorporation of the ESA into tribal water rights settlements is still an emerging field and the effectiveness of the ESA elements remains to be seen. Given the desire for parties to obtain certainty over water allocation in the West, it is likely that more settlements will include similar ESA provisions; therefore, parties involved in future settlements seeking to incorporate similar provisions should take a close look at their options and monitor the progress of the Nez Perce Agreement.

## **7.5 Concluding Thoughts**

The focus of this research has been on tribal water settlements as a mechanism to resolve tribal claims to instream flows; however, tribes interested in protecting instream flows potentially have options through other methods under federal and state law. The first section of this analysis framed settlements in the context of water law and adjudications, demonstrating that instream flows have been incorporated into some of the settlements but not necessarily with the favorable terms of a federal reserved water right. Essentially, the parameters of instream water rights established in settlements do not include provisions that are outside the normal scope of state water law. Despite the drawbacks associated with instream rights, settlements have offered unique opportunities for tribes to obtain other benefits and shift the traditional status quo favoring consumptive uses often while minimizing the impacts of change on existing users. The analysis of negotiated settlements revealed that settlement agreements, though often favored for their collaborative methods, are not without conflict and do not necessarily generate solutions favored by all interests. As with any conflict, the efficacy of each potential solution must be evaluated in comparison to the best alternative to a negotiated agreement. Therefore,

negotiated settlements will continue to be one mechanism by which tribes and other interests attempt to restore fisheries and instream flows; however, some may find it more beneficial and expedient to utilize other methods, particularly given the time and energy that go into negotiations and obtaining political will.

The current trajectory of water rights settlements and litigation suggest that tribal water right settlements will not result in large-scale re-watering of streams. If a tribe's goal is fisheries restoration, then working with the state rather than waiting for a tribal water settlement – which is likely to use existing state mechanisms anyway – may be a faster and less costly approach to obtain water and recover fisheries than litigation or negotiation. Furthermore, the difference in tensions associated with the resolution of the Nez Perce Case in comparison to the Pyramid Lake Case, coupled with the finding that settlements often use mechanisms available under state law to establish instream flows, suggests that states may have an opportunity to reduce and minimize the intensity of future conflicts over tribal instream claims by proactively establishing instream flows, and minimizing the over-appropriation of streams to consumptive uses. However, there is enough uncertainty and tension with determining what is embedded in a tribal right to fish, particularly when bolstered with the ESA, that settlements will likely continue to be the preferred avenue for establishing and protecting tribal instream rights in the future, while minimizing impacts on existing users

APPENDIX

## 8 APPENDIX A: NEZ PERCE CASE STUDY

### 8.1 Cover Sheet

*Period of case study evaluated:* This case study focuses on the Nez Perce Water Rights Settlement Agreement,<sup>49</sup> ratified in 2005, and the associated Snake River Water Rights Settlement Act, passed in 2004. The negotiations for the agreement and settlement act began when negotiations convened in 1998 and end with completion in 2007 of implementing actions to cause the agreement to go in effect. The evaluation of outcomes resulting from the agreement extends through October 2011. In addition, pre-1998 negotiations and litigation are discussed as necessary.

*Basic nature of dispute:* This is a complex case regarding the recovery of salmon and allocation of water for fisheries in the Snake River Basin to satisfy tribal instream water rights, ESA requirements and the Clean Water Act, while minimizing impacts on local economies, and preserving state and tribal sovereignty (McGovern, 2006).

*Issues in dispute:* Off-reservation instream water rights for Nez Perce Tribe. Conditions necessary for productive fish habitat and impacts of water withdrawals from mining, timber, industry, and municipalities (Stapilus, 2009). The effects of the Endangered Species Act on property interests and the ongoing Federal Columbia River Power System (FCRPS) Biological Opinion. Sovereignty of the state, tribes, and Federal government and the control of resources including land, water, and fish hatcheries. Allocation of recovery responsibilities between states. Control and management of resources.

While these were the primary issues in dispute, the mediator indicated that the scope of issues ranged from questions of facts relating to “historical, cultural, anthropological, and economic” particularly in the context of fishing, as well as factual questions surrounding the biological and hydrological effects of certain activities, and consideration of storage, power generation and recreation (McGovern, 2006, p. 554). In addition, there were issues surrounding the interpretation of laws, treaties, and court decisions.

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<sup>49</sup> The settlement agreement has been called a variety of names. The actual agreement is the “Mediator’s Term Sheet,” however, it has also been called Snake River Water Rights Agreement, (*Statement and Fiscal Note H. 152, 2005, Statement and Fiscal Note H. 153, 2005, Statement and Fiscal Note H. 154, 2005*), and Nez Perce Water Rights Settlement (Bogert, 2006; Gudgell et al., 2006; Klee & Mecham, 2006; Marshall, 2006; Strack, 2006; U.S. Department of the Interior, Office of the Secretary, 2004).

*Actors and Associated Interests of Each:*<sup>50</sup> The dispute over tribal water rights was a subset of the overarching Snake River Basin Water Rights Adjudication (SRBA), which involved over 150,000 water right claims to the use of surface and groundwater in the Snake River Basin in Idaho. The basin spans most of the state and the adjudication affected 38 of Idaho's 44 counties. Parties to the adjudication included individual citizens, businesses and corporations, the State of Idaho, cities, counties, federal agencies, tribes in Idaho ("SRBA - Informational Brochure," n.d.), as well as irrigation districts and water, reservoir and canal companies. Parties not a part of the adjudication but interested in the outcome included environmental groups, other Indian tribes and the other Columbia River Basin states: Montana, Washington, and Oregon. The adjudication and mediation for the settlement only included parties and issues within Idaho and the mediation was limited to parties of the Snake River Basin Adjudication (McGovern, 2006).<sup>51</sup>

*American Indian Tribes*

Nez Perce: Tribe's primary goal was to obtain water rights for on-reservation use, water rights for treaty springs and fountains, and water rights for treaty fisheries (Gudgell, Moore, & Whiting, 2006). In addition, the tribe sought to protect their homeland and treaty rights including treaty fishing, hunting, pasturing and gathering rights (*S. Hrg. 108-636*, 2004) and have a greater role in natural resources management (Gudgell et al., 2006). The tribe also wanted to restore salmon runs (McGovern, 2006) to the point that the tribe could fish for commercial as well as subsistence and ceremonial purposes (Native American Rights Fund,

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<sup>50</sup> According to the mediator:

The list of parties includes virtually every city in Idaho, every irrigation district, reservoir company, canal company, and water company. Most major Idaho companies were parties as well as Idaho Power Company, the State of Idaho, and a number of farms and ranches...[and] federal entities. (McGovern, 2006).

<sup>51</sup> Parties to the adjudication were defined as:

persons 1) who assert ownership of water rights in Idaho, or 2) on whose behalf ownership of rights to the use of water is asserted or 3) who are served or joined, are claimants (hence, parties to the adjudication) and may become parties to a subcase merely by filing an objection or response to a claim. There is no requirement that objectors must first show injury to their own water right claims to file an objection. (*In re SRBA, Subcase 67-13701, Orders on Motions for Sum. Judgment*, 2003).

2004), which was to be accomplished by removing the dams and restoring ecosystem function (McGovern, 2006).<sup>52</sup>

Shoshone Bannock including the Lemhi Tribe: The tribe sought to obtain federal reserved rights for instream flows off-reservation within its aboriginal territory and resolve the long disputed boundaries of the Shoshone-Bannock and the Nez Perce Tribe's historical off-reservation hunting and fishing grounds in the Salmon River Basin (*Minutes S. State Mar. 4*, 2005).

Federal Government:<sup>53</sup> The Federal government needed to fulfill its legal responsibilities to the tribe, as well as protect endangered species, water quality, and federal water rights as required by law (McGovern, 2006). The federal government had a stake in ensuring that it asserted all water rights claims as failure to do so could result in liability for unlawful takings (Klee & Mecham, 2006). The following federal agencies<sup>54</sup> had an interest in the agreement:

- Army Corps of Engineers
- Bonneville Power Administration (BPA)
- Bureau of Indian Affairs – Interested in asserting and defending Nez Perce's water rights to fulfill its fiduciary responsibility. (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001a)
- Bureau of Land Management (BLM)
- Bureau of Reclamation (BOR)

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<sup>52</sup> The value of salmon to the tribe is particularly important to understand in the context of what was at stake and why the agreement was difficult for some tribal members:

That fish and water are essential material and symbolic elements in contemporary Nez Perce society and culture is very clear. Fish and water provide the means by which people can express their individuality and pride; their commitment to their families and community; and their connection with the spiritual world. They are, in other words, the means by which Nez Perce people express basic social values and give them a sense of who they are. The reduction in availability of fish and water reduces their ability to be Nez Perce people in a community of Nez Perce people. (Marshall, 2006).

<sup>53</sup> The federal negotiation team included: Office of the Solicitor of Department of Interior, Office of Indian Water Rights, Bureau of Indian Affairs, Bureau of Reclamation, Fish and Wildlife Service, National Oceanic and Atmospheric Administration, Bureau of Land Management, Forest Service, Environmental Protection Agency, and Department of Justice (Klee & Mecham, 2006).

<sup>54</sup> This list of federal agencies from Army Corps to NOAA was compiled from two sources: Klee & Mecham (2006) and McGovern (2006).

- Upper Snake River Irrigation Dams: Required to operate dams in accordance with ESA and contracts.
- Lewiston Orchards Irrigation District: The district sought to limit the impacts of the tribal instream water claims (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001e), improve reliability of water quantity available for delivery and to resolve the dispute with the tribe regarding its operation's impacts on ESA listed fisheries (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001e; "Overview Lower Clearwater," 2011)
- Department of Commerce
- Department of Interior – Interest in fulfilling trust responsibility to tribe by protecting water rights while also balancing its responsibility to fulfill water contracts, and protect fish and wildlife (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001a).
- Fish and Wildlife Service (USFWS)
- National Oceanic and Atmospheric Administration (NOAA) – Responsible for recovery of listed anadromous fisheries, which require sufficient instream, flows. (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001a)
- Council on Environmental Quality
- Department of Agriculture
- Department of Energy
- Federal Energy Regulatory Commission (FERC)
- United States Forest Service
- Office of Management and Budget
- Secretary's Indian Water Rights Office
- Environmental Protection Agency
- Justice Department
- Office of the Solicitor of Department of Interior

*State of Idaho*: Idaho wanted to retain its authority over water and minimize impacts on existing and future water users (McGovern, 2006). According to Dirk Kempthorne, "Any resolution had to maintain our state sovereignty. It had to protect our State water rights, and it had to protect state water law by resisting any federally-reserved water rights" (*S. Hrg. 108-636*, 2004, p. 34). Similarly, it was noted that

the State of Idaho agreed to participate in the mediation subject to the following conditions: 1) no federal instream flow water rights would be recognized; 2) no injury to existing water rights; 3) the settlement would be statewide; and 4) litigation would continue on a parallel track. (*Minutes S. State Jan. 14, 2005*, p. 2).

*Agriculture, Federal Claims Coalition*: According to Roger Ling, the Federal Claims Coalition sought to achieve certainty over water rights by limiting impacts of tribal and federal claims on existing water rights and limiting the potential for water to be reallocated under federal regulatory water rights. The coalition consisted of SRBA claimants including

“irrigation districts, canal companies, water districts and advisory committees of water districts” (*S. Hrg. 108-636*, 2004, p. 36).

*Idaho Power Co. (IPCo.)*: Produces hydroelectric power in the region and wanted to complete FERC relicensing under the Federal Power Act for its dams.

*Cities, Counties, Industry and Other Businesses*: Concerned with minimizing impacts of tribal water rights on existing water rights and preserving the opportunity for future water development for growth and economic development (McGovern, 2006).

*Ranchers*: Interested in preserving grazing rights on allotment lands and water rights on federal lands, including springs.

*Landowners*: Sought to protect their private property rights and water rights. The Nez Perce springs and fountains claims, if decreed, could have potentially required access to springs on private land.

*Forestry*: According to Jim Riley of the Intermountain Forestry Association, the goal was to uphold the Forest Practices Act, and ensure that any ESA provisions would be voluntary, based on science, and utilize incentives to encourage action (*Minutes House Res. Feb. 22*, 2005).

*Conservation Groups*: Primarily interested in fish recovery. Attempted to intervene in adjudication on several occasions using theories of the public trust doctrine and local public interest test but ultimately failed in court. Groups expressing interest included Land and Water Fund of the Rockies, Idaho Conservation League, Idaho Rivers United, Idaho Wildlife Federation, and Northwest Resource Info. Center. Conservation groups were only allowed to intervene where the local public interest was a precondition to decreeing the water right (Stapilus, 1999).

*Attempted Conflict Resolution Processes*: The parties attempted informal negotiations, pursued litigation, and eventually agreed to try formal mediation (Stapilus, 1999). The Snake River Basin Court, the district court of the Fifth Judicial District of the State of Idaho, ordered the formal mediation and appointed Professor Francis McGovern as the mediator. Idaho Power Co. had paid for the initial costs of the mediator until December of 1999, when Judge Hurlbutt in ordering the formal mediation, required half of the costs to be paid by the claimants and the other half to be paid by the objectors (*In re SRBA, Order of Mediation and Appt.*, 1998; Stapilus, 1999). The resulting settlement agreement required state and federal legislation. This case study focuses on the formal mediation and resulting settlement agreement as well as the implementing legislation.

## 8.2 Case History Overview - Background

### 8.2.1 *The Nez Perce treaties, Idaho development and the Snake River Basin Adjudication*

The Snake River Basin in Idaho encompasses most of the state's rivers, which flow into the Snake River entering Idaho from Wyoming and continuing west into Washington where it meets with the Columbia River. In addition to being an important surface water source, the Snake River is hydrologically connected to the Snake River Plain Aquifer, a significant source of water in southern Idaho (Stapilus, 2009). Since time immemorial, various bands of the Nez Perce Tribe lived in an area spanning approximately 14 million acres starting at the continental divide near the border of Idaho and Montana and moving west across Idaho to parts of Washington and Oregon, thereby including portions of the Snake River Basin. Almost half of the Nez Perce diet consisted of fish, which was abundant in the area and included Sockeye and Chinook salmon, as well as steelhead. In a 1855 treaty with the United States, the tribe ceded half of their territory to the United States for a reservation of 7.5 million acres (*S. Hrg. 108-636*, 2004, pp. 54–63) but reserved fishing rights both on and off the reservation (Gudgell et al., 2006; Haller, 2004a, 2004f). Specifically, Article 3 of the 1855 Treaty with the Nez Perce's states:

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. (Kappler, 1904).

In 1863, the tribe ceded most of the remaining land to the United States, but retained approximately 750,000 acres (*S. Hrg. 108-636*, 2004, p. 61) and reserved the use of springs and fountains on ceded lands within the 1855 reservation boundary (Haller, 2004a, 2004f).

According to Article 8 of the 1863 Treaty with the Nez Perce:

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. (Kappler, 1904).

The final act reducing the tribe's lands occurred in 1893 under the Nez Perce Dawes Agreement as part of the Dawes allotment era, which fragmented tribal lands within the reservation and opened them up to settlement (Gudgell et al., 2006).

As more settlers moved westward, the United States engaged in a dam building era, culminating in the completion of several dams in the late 1950s through 1970s including the four Lower Snake River dams, the Hells Canyon Complex and Dworshak Dam. The Hells Canyon Complex included three dams, licensed by the Federal Energy Regulatory Commission to Idaho Power Co, which blocked fish passage. Dworshak Dam was built on the Nez Perce Reservation and blocked fish passage on the Clearwater River cutting off 1,667 miles of spawning grounds (*S. Hrg. 108-636*, 2004, pp. 61–63).

By the early 1900s, Idaho Power Co. had become the primary electricity provider in Idaho through its use of hydropower, a reality that led ratepayers to sue the company for failing to protect its water rights when a drought in 1977 reduced the Swan Falls Hydropower Plant's capacity by a third. In response, IPCo prevented new electric irrigation hookups and filed a lawsuit, stating that it had never subordinated its water rights to irrigation. In 1982, the Idaho Supreme Court overturned the lower court's decision, uprooting the assumed water rights structure, by determining that IPCo had not subordinated its water rights. The ruling led to the realization that both power users and irrigators had legitimate economic interests in the water, leading to the signing of the 1984 Swan Falls Agreement that reduced IPCo's water right but guaranteed they would receive 3,900 cfs in the summer and 5,600 cfs the rest of the year (Stapilus, 2009). The agreement also required the adjudication of the Snake River Basin.

In 1987, the State of Idaho initiated the Snake River Basin adjudication encompassing 87 percent of Idaho ("SRBA - Informational Brochure," n.d.; Stapilus, 2009). As a comprehensive McCarran Amendment adjudication, the Nez Perce Tribe was required to participate or lose its claim to water within the basin. A technical advisory team for the Nez Perce and United States worked with tribal staff and attorneys from the federal government, the Office of Legal Counsel, and the Native American Rights Fund to identify the tribe's water right claims. In 1993, the United States and tribe filed approximately 1,100 claims for instream flows to support fisheries; 2,700 claims for on-reservation uses; and 1,900 springs and fountains claims within the 1963 ceded area. The magnitude of the claims generated concerns from the state and water users as the rights could have affected most of the existing water rights in the basin (Haller, 2004f).

### 8.2.2 *The ESA as a Secondary Driver of Settlement Negotiations*

*ESA Listings:* In 1991, Snake River Sockeye was listed under the Endangered Species Act: the first of 14 populations of salmon and steelhead in the Columbia River Basin to be listed. By 1999, other stocks had not improved but rather nine additional populations/ESU's of salmon and steelhead were added for a total of 12 listed populations in the Columbia Basin, just as the negotiations and litigation over the Nez Perce's water rights began moving forward (U.S. Bureau of Reclamation, 2007, p. 51; U.S. Fish and Wildlife Service, 2011b).<sup>55</sup>

*Upper Snake River BiOp:* Although Hells Canyon Dam blocks fish passage into the region where BOR's projects operate, the diversion of water from the upper Snake River basin ultimately has impacts below the dam where ESA listed fish still reside. The primary ESA concern for Idaho irrigators has been the operation of the 12 BOR irrigation projects in the upper Snake River basin above Brownlee Reservoir and the dedication of flows for listed salmon and steelhead. Since 1993, the Biological Opinions (see FCRPS BiOp) have called for BOR to provide 427 KAF per year of water to augment flows for migrating juvenile salmon and steelhead as they pass through dams on the lower Snake and Columbia Rivers (U.S. Fish and Wildlife Service, 2005). In 1997, the National Marine Fisheries Service (NMFS) requested consultation on 10 of the Bureau of Reclamation's upper Snake River Projects and in 2001, the first separate Upper Snake River BiOp from the FCRPS was issued due to expectations that the Nez Perce negotiations would propose actions requiring consultation. When the negotiations did not end, another BiOp was issued in 2002 for three years (Crampton & Espenson, 2009). In reviewing the amount of flow augmentation provided from 1991 through 2004, the variability in the flow augmentation program is apparent: BOR provided approximately 90,000 acre-feet for two of the years, between 200 KAF and 300 KAF for three of the years, 341KAF for one of the years, and between 422 KAF to 437 KAF for eight of the years. Thus, six of the 14 years, BOR was greater than 80 KAF short of reaching its desired 427 KAF of flow augmentation (U.S. Fish and Wildlife Service, 2005).

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<sup>55</sup> In 2005 and 2011, Coho runs were added. As of 2011, the Columbia River Basin including the Snake River Basin has a total of 14 listed Salmon or Steelhead populations/ESU's including: 5 ESU's of Chinook, 1 population of Chum, 2 ESU's of Coho, 1 population of Sockeye, and 5 populations of Steelhead (U.S. Fish and Wildlife Service, 2011b).

*FCRPS BiOp*:<sup>56</sup> Biological Opinions for the Federal Columbia River Power System (FCRPS) were issued in 1992, 1993, 1994, and 1995 with Supplemental BiOps issued in 1998, 1999, and 2000. The 1994 BiOp was challenged in court and remanded, resulting in the 1995 BiOp (U.S. Army Corps of Engineers, Bonneville Power Administration, & U.S. Bureau of Reclamation, 2007). By 2000, the FCRPS BiOp included various measures to reduce the impacts on fish including flow augmentation, reservoir spills, barging juvenile fish, restoring habitat, reducing the negative impacts of hatcheries, and reducing incidental take during harvest. In addition, breaching the lower Snake River dams was proposed as a last resort option. In 2001, environmental and fishing groups challenged the BiOp and in 2003, Judge Redden remanded the BiOp because it relied heavily on habitat mitigation activities that were not reasonably certain to occur. The revised BiOp was issued in September 2004, this time treating the dams as part of the environmental baseline, removing breaching as an option, and putting more burden on habitat, hatcheries and harvest to reduce impacts (“ESA and Columbia River,” 2011).

*The Lemhi Watershed*: In 1992, the Model Watershed Project was launched in the Lemhi Basin as part of a Northwest Power Planning Council initiative to develop collaborative programs that work with landowners to improve habitat and flows for salmon recovery. While the program was considered successful, in 2000, the Northwest had dry conditions resulting in low flows. Dead salmon smolts were found on a diversion screen and NMFS initiated enforcement action. At the request of Governor Kempthorne, the State and NMFS agreed to develop a collaborative solution to address the problem. As a result, an agreement was reached that set a minimum instream flow along with occasional flushing flows of 35cfs. An MOU was developed that committed the parties – including the Lemhi Irrigation District, the Model Watershed Project, Water District 74, IDFG and IDWR – to these and other provisions (Rudolph, 2000). The Lemhi Watershed served as both an example of potential future enforcement actions against individual irrigators as well as an illustration of how to develop programs to restore habitat and instream flows for the Salmon/Clearwater Component of the Nez Perce Agreement (*Minutes S. State Jan. 14, 2005*).

*The Klamath Basin Water Shutoff*: In 2001, the Bureau of Reclamation announced that it would not deliver water to 180,000 acres of farmland in the Klamath Basin of Oregon and

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<sup>56</sup> The biological opinions for the Upper Snake River and Federal Columbia River Power System could easily warrant their own case studies; therefore, details and analysis are only provided in the context of understanding the Nez Perce Water Rights Settlement.

California because the water was needed for ESA listed tribal fisheries. The Klamath Basin water shutoff served as a warning to Idaho irrigators and influenced their desire to include ESA protections in the settlement. For example, Norm Semanko of the Idaho Water Users Association stated, “The economic devastation in Southern Idaho would be five to 10 times greater than what happened in the Klamath Basin in 2001” (Wilkins, 2004, para. 9). Later he framed the settlement as beneficial in comparison to the 2001 Klamath Basin shutoff (*Minutes House Res. Feb. 22, 2005*).

*Lewiston Orchards Irrigation District:* In 1906, the Lewiston Orchards Irrigation District began building the Lewiston Orchards Project (LOP) consisting of storage reservoirs, diversion structures and canals. In 1946, BOR was authorized to repair and construct LOP facilities, some of which are located within the Nez Perce Reservation and affect the hydrology of Webb, Sweetwater and Lapwai Creeks, which contain treaty fisheries. The BOR initiated consultation with NMFS in 1998 and submitted a supplemental Biological Assessment in 2001. The consultation was postponed pending the Nez Perce Water Rights negotiations in hopes that the parties could resolve the issue (U.S. Bureau of Reclamation, 2010).

### **8.2.3 *Secondary Tension: Nez Perce Jurisdiction within the Reservation***

The question of on-reservation and off-reservation water right claims resurrected historical tensions over reservation boundaries and tribal jurisdiction. The tensions stem back to the treaty era when the federal government first reduced the Nez Perce’s reservation and then sold it for allotments. The allotment policy resulted in the transfer of ownership of over 90 percent of the land within the reservation boundaries to non-Indians leading to fragmentation of lands held in trust for the tribe. Further complicating governmental relations was that the reservation resided within five counties and included several cities. The result of this fragmentation was uncertainty over the role of the state, local government, and the tribe in governing non-Indians within the reservation boundaries. While there were periods of collaboration and conflict, in the 1990s, relations between the tribe and the local non-Indian residents disintegrated when the tribe required construction of a new school to comply with the Tribal Employment Rights Ordinance (TERO). TERO required preferential hiring of Indians and payment of a fee for all construction projects within the reservation boundaries. The assessment of the TERO fee on the school led three counties, twenty towns, and school and highway districts to form the North Central Idaho Jurisdictional Alliance to oppose any attempt by the tribe to exercise control over local governments and residents. In 1998, local leaders

feared that tensions would erupt in violence and by 2000, the parties entered mediation which led to the formation of an Intergovernmental Working group (Allred, 2004) followed by the signing of a MOU in 2002. The MOU committed the parties to working through disputes without litigation (Allred, 2004; “In the Spirit,” 2002).

#### **8.2.4 Attempts at Resolving Tribal Claims**

In 1993, the Tribe received a federal water rights negotiating team (Gudgell et al., 2006) and attempted negotiations with the State of Idaho over the Tribe’s water claims (Stapilus, 1999). The process was open to the public (Stapilus, 1999) although there were some private meetings. It was at this time that the parties engaged experts and began exchanging information (Klee & Mecham, 2006; McGovern, 2006). While the parties began to understand each other, political and representative changes made continuity difficult and the negotiations ultimately failed (McGovern, 2006). The parties attempted negotiations starting in 1996 to resolve the instream flow claims (*Joint Status Report Mediation*, 1998; Strack, 2006) but negotiations broke down in 1997 and the parties moved towards a litigation track (Gudgell et al., 2006; Stapilus, 1999; Strack, 2006). An attorney for some of the parties, including some irrigation interests, noted that his clients came to believe that the claims could not be resolved through negotiation or dispute resolution even though all parties had participated in good faith (Stapilus, 1999). However, these initial negotiations allowed parties to understand the role of salmon in the Nez Perce’s lives, as well as the frustrations by water users of increasing demands and emerging constraints on their water rights (Klee & Mecham, 2006).

In 1997, parties began preparing for the litigation of the off-reservation instream flow claims (Gudgell et al., 2006), although, the Court ordered the parties to generate a list of potential mediators to attempt to settle at least some of the issues through negotiation (*In re SRBA, Scheduling Order*, 1997; Stapilus, 1999). According to one source, tensions were high as parties attempted to determine how to move forward with litigation. In order to decide how to organize participation, the DOJ suggested that the State act as the lead on the case to represent all parties in opposition to the Nez Perce claims, but some groups said this would be problematic. Instead, the court sent out a survey to all objectors to the claims to determine how many people wanted to withdraw their objection, or participate in the litigation as active or passive objectors: It was also stated that a failure to respond would result in the objection being dismissed. In July of 1997, Judge Hurlbutt dismissed 2,376 objections, which affected who could participate in the formal mediation. Later, in August of 1997, it was apparent that the

technical nature of the instream flow rights was complicating the discovery process and the parties complained about the lack of cooperation on information discovery, stating that deadlines were missed and information was incomplete (Stapilus, 1999).

In June of 1998, Idaho Power and the Federal Claims Coalition expressed their interest in attempting a formal mediation that incorporated other fisheries issues outside of the Tribe's water rights (Klee & Mecham, 2006). By August of 1998, the parties had decided to bring a mediator in from the start, unlike past negotiations, and named Professor Francis McGovern. The parties took ninety days to work with the mediator to define the issues, determine the mediation process and timeline, and decide whether to proceed (*Joint Status Report Mediation*, 1998). While all parties affirmed their commitment to the mediation, several also suggested that both a mediation and litigation schedule should be set because some issues seemed intractable (Stapilus, 1999; *Status Conference Re Transcript*, 1998, p. 30). Judge Hurlbutt attempted to create some urgency, stating:

I'm going to see that the momentum continues for parties to resolve this with some form of satisfactory mutual accord, or the matter will be tried...an end is required to this matter and I will provide the end. If you would like to avoid it, the power is in your hands. (*Status Conference Re Transcript*, 1998, p. 30).

On December 22, Judge Hurlbutt ordered the parties into formal mediation with Mediator Francis McGovern but required litigation to continue as a parallel process (Gudgell et al., 2006; *In re SRBA, Order of Mediation and Appt.*, 1998).

The parties did not reach agreement and litigation proceeded alongside negotiations in 1999. Judge Wood heard the summary judgment motion and ruled that the tribe's treaty did not reserve water rights for off-reservation fisheries and concluded that the reservation had been diminished (Gudgell et al., 2006; *In re SRBA, Subcase 03-10022, Order on Motions for Sum. Judgment*, 1999). The Tribe later learned of Judge Wood and his families' water claims and sought to have him disqualified and the judgment set aside. By the time the Idaho Supreme Court heard the case to remove Judge Wood, he had already moved on and the court ruled that the issue was moot (Gudgell et al., 2006; *United States v. State*, 2002). The decision was appealed to the Idaho Supreme Court but stayed pending completion of the mediation (Klee & Mecham, 2006) and the appeal on the actual water issues was never heard.

In the meantime, the mediation had expanded from the instream flow claims to include all of the tribe's water rights as well as other issues (Gudgell et al., 2006). One participant noted that the litigation was essential to the parties reaching an agreement, as prior negotiations

had failed due to the uncertainty over the Tribe's claims. The assertion of water rights beyond the reservation and beyond usual and accustomed to locations resulted in novel legal theories that made negotiation difficult. While the parties did not meet the court-ordered mediation deadline in 2002, they voluntarily continued negotiations (Strack, 2006), and in May of 2004, the parties released the Mediator's Term Sheet, the settlement agreement that resulted from the confidential negotiations (Gudgell et al., 2006). The court stayed all litigation on the Nez Perce water rights claims until March 31, 2005, giving the parties less than a year to complete a number of steps necessary for the settlement to proceed (Native American Rights Fund, 2004). Over the course of the next eleven months, the parties negotiated several sub-agreements, obtained Congressional approval of federal legislation, and held meetings to inform the public about the provisions of the settlement, culminating in the ratification of the agreement by the State of Idaho and the Nez Perce. By 2007, the parties had met all implementation requirements for the waivers and certain other provisions in the agreement to go into effect ("Statement of Findings," 2007).

### **8.2.5 *Timeline of Major Events***

- 1805 Lewis and Clark Expedition first encounter Nez Perce tribal members.
- 1855 First treaty with the Nez Perce ceded 6.5 million of approximately 14 million acres of the Nez Perce aboriginal lands to the United States but retained right to fish on ceded lands.
- 1863 The Nez Perce retain 750,000 acres of the 7.5 million acre reservation. Tribe retains off-reservation fishing right to fish and use of springs in the newly ceded area (*S. Hrg. 108-636*, 2004, pp. 54–61).
- 1893 Nez Perce Tribe cedes 542,000 fragmented acres within the reservation.
- 1916 Idaho Power Co. becomes primary electric power company due to its use of hydroelectric dams.
- 1976 Idaho Power Co. denied permission to build a coal power plant to meet increased demand.
- 1977 Drought causes water levels to fall to 2/3 of power plant's generating capacity. Ratepayers sue Idaho Power for failing to protect its water rights (Stapilus, 2009).
- 1978 IPCo. succeeds in stopping new irrigation electric hookups.

- 1982 *Idaho Power Company v. Idaho* determines that Idaho Power Company's water rights were not subordinated in a previous agreement; therefore, the Snake River is over-allocated and no new rights can be issued (Shaw, 1988; Stapilus, 2009).
- 1983 IPCo seeks to enforce the court's ruling by suing individual water holders to protect their instream rights (Stapilus, 2009).
- 1984-85 Idaho Power and the State sign the Swan Falls Agreement to resolve the over-allocation problem. Agreement requires adjudication of the Snake River Basin.
- 1987 The Director of the Department of Water Resources petitions the court and the judge agrees to initiate the adjudication of the Snake River Basin, which is to include federal and tribal claims (Shaw, 1988).
- 1991 Snake River Sockeye is listed under the ESA (NOAA Fisheries, 2008).
- 1992 Snake River fall, spring and summer Chinook salmon listed under the ESA (U.S. Fish and Wildlife Service, 2011b).
- 1993 State and Tribe begin negotiations of Nez Perce claims.
- 1997 Nez Perce Negotiations break down and litigation begins. Court sends Notice of Active Participation offering objectors to the tribe's water rights the opportunity be an active participant, passive participant, or withdraw the objection.
- 1998 Parties agree to work with Mediator Francis McGovern and Judge Hurlbutt orders formal mediation (Stapilus, 2009).
- 1999 Judge Barry Wood replaces the original judge in the SRBA. Judge Wood rules that Nez Perce do not have an off-reservation instream flow water right (*In re SRBA, Subcase 03-10022, Order on Motions for Sum. Judgment*, 1999; Stapilus, 2009). Twelve populations/ESU's of Salmon and Steelhead in the Columbia River Basin are now ESA listed (U.S. Fish and Wildlife Service, 2011b).
- 2000 Nez Perce Tribe seeks to have Judge Wood removed for conflict of interest. Judge Wood is removed for unrelated reasons.
- 2003 Judge Burdick states intention of ending the mediation and resuming litigation.
- 2004 May - Parties release final settlement to the public, which required parties to ratify and negotiate other documents by April 2005.  
December - Snake River Water Rights Act passes Congress and is signed by the President.
- 2005 Settlement ratified by State and Tribe. Shoshone-Bannock filed 56 objections to the agreement. Judge affirms protective order surrounding the negotiations is still in effect.

Shoshone-Bannock dismiss their objections to the Nez Perce settlement (Stapilus, 2009).

2006 U.S. District Court Judge Redden strikes down BiOp, threatening the Nez Perce Agreement.

2007 Secretary issues statement that all requirements have been met for waivers (“Statement of Findings,” 2007).

*Focus of Case Study:* The focus of this analysis is the Nez Perce Water Rights Settlement, a negotiated agreement released in 2004 and ratified in 2005. Since the settlement required federal and state implementing legislation and a court decree, these associated actions are incorporated into the analysis, as an evaluation of the settlement without them would be incomplete. Therefore, the analysis will also refer to the associated federal Snake River Water Rights Settlement Act passed in 2004; the three bills passed by the Idaho Legislature in 2005; the Nez Perce resolution approving the agreement; and the consent decree for judicial approval of the settlement. The timeframe of analysis begins with negotiations for the agreement, which convened in 1998. In addition, to the extent practicable, the evaluation of outcomes resulting from the agreement extends through October 2011.

### **8.3 Criteria Category I – Outcome Reached**

*Nature of the Outcome Analyzed:* The 2005 Nez Perce Water Rights Settlement Agreement, known as the Term Sheet, associated actions to execute and implement the agreement, and the mediation process by which the agreement was developed.

#### **8.3.1 Unanimity or Consensus<sup>57</sup>**

*When agreement was reached, it was not unanimous; there were significant parties not at the table at all.* According to Clive Strong, the agreement did not have unanimous support (*Minutes S. State Jan. 14, 2005*); however, all three entities that were required to ratify the final settlement - the Tribe, the Idaho Legislature and Congress – did pass the needed legislation or resolutions to ratify the agreement. Since the mediation was confidential, there was no clear record of what parties were involved in the negotiations; therefore, it is difficult to determine

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<sup>57</sup> It is unclear from the Guidebook if this would include the ratification process, or just the agreement to proceed with the Term Sheet as the final agreement. This distinction may be unique to this case; however, I have briefly included information on the ratification for reference, to be discussed further in the ratification section.

the extent of consensus. There were 98 parties that signed the consent decree<sup>58</sup> and five objectors remaining when it was approved by the court in 2007. Four of the objectors were individuals who objected to the springs and fountains claims on private land: these claims were dismissed as part of the agreement. The fifth party was Idaho Power Co., who the court reported did not oppose the consent decree (*In re SRBA, Consent Decree*, 2007). There were reports of specific major parties that did not sign on to the settlement. See also Public Acceptability.

*Major parties that did not sign agreement:*

Idaho Power Co.: Idaho Power Co., who originally initiated the mediation (Klee & Mecham, 2006), withdrew from negotiations in 2000 and re-entered in 2001 (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001b). Although, Idaho Power was part of the negotiations, the company did not sign on to the settlement agreement and instead agreed to continue working with the parties in the future (Native American Rights Fund, 2004). The Tribe continued to assert its concerns with IPCo through the dam relicensing process (Haller, 2004b).

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<sup>58</sup> United States, State of Idaho, Nez Perce Tribe, A & B Irrigation District, Aberdeen-Springfield Canal Company, Agland, Inc., Agwild, Inc., Bar-U-Inc., Basic American Foods, Inc., Big Bend Irrigation District, Boise-Kuna Irrigation District, Buck Creek Ra.11Ch, Inc., Burgess Canal & Irrigation Company, Burley Irrigation District, City of Ashton, City of Bliss, City of Buhl, City of Burley, City of Cascade, City of Challis, City of Chubbuck, City of Council, City of Declo, City of Donnelly, City of Eden, City of Emmett, City of Fairfield, City of Fruitland, City of Garden City, City of Glenns Ferry, City of Grand View, City of Heyburn, City of Inkom, City of Ketchum, City of Kuna, City of Lewiston, City of Mackay, City of Meridian, City of Middleton, City of Minidoka, City of Mountain Home, City of Mud Lake, City of Nampa, City of New Plymouth, City of Oakley, City of Parma, City of Paul, City of Payette, City of Pocatello, City of Rigby, City of Ririe, City of Roberts, City of Rupert, City of Salmon, City of St. Anthony, City of Sugar City, City of Ucon, City of Weiser, ConAgra/Lamb-Weston, Inc., Egin Bench Canal, Inc. Enterprise Irrigation District, Falls Irrigation District, Glen Dale Farms, Inc., Harrison Canal & Irrigation Company, Idaho Irrigation District, J.R. Simplot Company, Lewiston Orchards Irrigation District, Little Salmon River Water Users, Association, M.L. Investment Company, Milner Irrigation District, Minidoka Irrigation District, New York Irrigation District, Newfoundland Partners, North Freemont Canal Systems, North Side Canal Company, Payette River Water Users Association, Inc., Peoples Canal & Irrigation District, Pioneer Irrigation District, Port of Lewiston, Potato Storage, Inc., Potlatch Corporation, Progressive Irrigation District, Settlers Irrigation District, Simplot Cattle Company, Simplot Dairy Products, Inc., Simplot Livestock Company, Simplot Meat Products, Inc., Sinclair Oil Corporation d/b/a Sun, Valley Company, Snake River Valley Irrigation District, SSI Food Services, Inc., SSI Foods, Inc., Sunnyslope Orchards Partnership, Thompson Creek Mining Company, Thousand Springs Ranch, TM Ranch Company, Twin Falls Canal Company, Wilder Irrigation District (*In re SRBA, Consent Decree*, 2007).

Lewiston Orchards Irrigation District (LOID): LOID was initially involved in the negotiations but the portion of the settlement that would have addressed their operations was dropped from the settlement (Haller, 2004b). Part of LOID's diversion facilities are located on tribal lands and operations have affected tribal treaty fisheries as well as tribal resources. In addition, the Tribe's instream flow claims would have reduced the amount of water available to LOID (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001e). It was unclear why LOID dropped out but some suggested that the plan to reduce the impacts of LOID operations on the tribe and fisheries was too expensive (E. Barker, 2007).

The Shoshone Bannock Tribe: The extent of the participation of the Shoshone Bannock tribe in the negotiations is unclear. Apparently, the Shoshone Bannock and the Nez Perce had an ongoing dispute over the boundaries of the aboriginal fishing and hunting territory, primarily in the Salmon River Basin. The Lemhi Tribe, now part of the Shoshone Bannock, and the Nez Perce both claimed rights to an overlapping area but the Department of Interior failed to resolve the dispute, leaving the fishing rights undetermined. The Shoshone Bannock tribe had unsuccessfully attempted to force the United States to file claims on their behalf for federal reserved rights to instream flows in the Salmon River Basin, but the courts upheld the United State's position that it was not required to assert the claims (*Minutes S. State Mar. 4, 2005*). According to the mediator, however, the Shoshone-Bannock tribes had representatives that continued to participate in the mediation (McGovern, 2006). Nancy Murillo, Chair of the Fort Hall Business Council of the Shoshone-Bannock Fort Hall Reservation, testified at a hearing for the Nez Perce Water Settlement state legislation that, the "Shoshone-Bannock Tribes have never participated, and were not invited to participate in the Nez Perce negotiations" (*Minutes House Res. Feb. 23, 2005, p. 5*).

While the Shoshone-Bannock denied being a part of the negotiations, the Governor's office and Nez Perce Tribe claimed that they withdrew their claims and, therefore, were no longer able to participate in the negotiations. The Shoshone-Bannock explained that the Governor had proposed a separate settlement of their claims but later reneged on the agreement. The Shoshone-Bannock said that they dropped their claims on April 22, 2002 even though the Governor had backed out of the deal on April 15 because they wanted to hold the Governor to the deal. The Governor denied that the deal was ever finalized and claimed that this was all a part of the ongoing dispute over fishing grounds between the Nez Perce and the Shoshone-Bannock (D. Ferguson, 2005). The attorney for the Shoshone-Bannock stated that they intended to file a lawsuit if the Nez Perce settlement was ratified because 32 streams included in

the agreement for minimum flows were in the boundaries of the sole Shoshone-Bannock fishing area, and another 25 streams were in the disputed area (Taule, 2005). As a result of these flows being in their claimed aboriginal area, the Shoshone-Bannock believed they should have been included in the negotiations (Oxley, 2005). Based on the collective sources of information, it appears that the Shoshone-Bannock were involved in the negotiations at the beginning, but at some point withdrew their claims and were no longer able to participate in the mediation.

*North Central Idaho:* The consent decree was not signed by cities in North Central Idaho, with the exception of Lewiston. The mediation was confidential; therefore, it is unclear if North Central Idaho interests participated; however, they did have the opportunity to do so since they were objectors to the instream water right claims. At least several of these cities eventually opposed the agreement including the cities of Kooskia, Nezperce, and Grangeville, and the Clearwater, Idaho, Lewis and Valley counties (McGann, 2004a). However, another source noted that in addition to Grangeville and Kooskia, Kamiah, Stites, Orofino and Peck opposed the agreement, while Lewiston, Lapwai, Kendrick and Julietta supported it (*Minutes House Res. Feb. 23, 2005*).

*Parties Not at the Table:*

*Conservation Groups:* Several groups had attempted to become parties to the adjudication, but the court allowed their participation only where the public interest was required as a precondition to decreeing a right; therefore, they were not involved in the negotiations. Groups expressing interest included Land and Water Fund of the Rockies, Idaho Conservation League, Idaho Rivers United, Idaho Wildlife Federation, and Northwest Resource Info. Center (Stapilus, 1999).

### **8.3.2 Verifiable terms**

*The outcome was written and formally signed; terms accessible to interested parties and the public; and terms published in the media or posted in public forum.* The progress of the mediation and terms of the settlement were not disclosed to the public until the settlement was completed because the court had ordered a confidential mediation (Gudgell et al., 2006). The Term Sheet itself was and remains posted online, along with an official summary of the agreement, and a fact sheet (Idaho Water Resource Board, n.d.; U.S. Department of the Interior, Office of the Secretary, 2004). A search of Idaho Libraries in World Cat (November 2011) reveals that only the Idaho Commission for Libraries continues to have an agreement available, but since it is an electronic format, the agreement would be accessible at other public libraries in

Idaho. The agreement and its terms were widely publicized in newspapers, with most articles providing an overview very similar to the official summary or fact sheet. In addition, Idaho Public Television aired a special on the agreement, and newsletters from various groups described the provisions in the Term Sheet to constituents (see Public Acknowledgement). While the Mediator's Term Sheet was well publicized, it became apparent in researching this agreement that a list of parties to the negotiations and parties to the settlement were not published or easily found. Court documents, which were and continue to be available on the Snake River Basin Adjudication website (as of November 2011), list the parties to the final consent decree. Given the assertions that a party was excluded from the mediation, a list of parties to the mediation, dates that a party dropped out, and a list of signatories to the agreement would have been helpful and possibly reduced some of this rhetoric. Finally, the documents that were completed between the time the settlement was announced in 2004 and ratified in 2005, such as the Memorandum of Agreements and Habitat Work Plans, were not discussed in the media and were not found online.

### **8.3.3 Public Acknowledgement of Outcome**

Once the settlement was announced via press release by the parties (U.S. Department of the Interior, Office of the Secretary, 2004), information was released to the public at each critical point thereafter in the settlement ratification and implementation process. Most sources described the current juncture in the process, what would come next, and included a summary of the settlement.

*Newspapers, Newsletters, and the Internet:* The agreement was not mentioned in national newspapers such as The New York Times or Los Angeles Times, but was regularly covered in local newspapers. Instead of citing each individual article, a review of search results on November 20, 2011 for "Nez Perce water rights" from each newspaper's website or from googlenews revealed a consistent pattern of coverage. The following newspapers included over 20 articles about the agreement: *Idaho Statesman* ([www.idahostatesman.com](http://www.idahostatesman.com)), *The Spokesman-Review* ([www.spokesman.org](http://www.spokesman.org)), and *The Lewiston Tribune* (GoogleNews). In addition, *Moscow-Pullman Daily News* and *Lewiston Morning Tribune* had greater than five articles discussing the agreement. Finally, the *Nez Perce Currents*, Native American Rights Fund, Aginfo.net, and Watchman on the Wall had posted information on the settlement online. *Nez Perce Currents* was targeted at tribal members, provided monthly updates and information on the settlement, and attempted to address common misconceptions and technical questions.

*Television and Internet:* In February 2005, Idaho Public Television aired an episode of “Dialogues” that interviewed the Nez Perce Chairman and two Idaho legislators (“Tapped Out,” 2004). In addition, as shown on their website, Idaho Public Television has a page dedicated to Idaho’s water issues, which includes several links to segments that previously aired about the Nez Perce agreement (Idaho Public Television, 2004).

*Professional Journals:* Several professional and academic journals published material about the Nez Perce agreement including *The Water Report* (Rigby, 2005), *Environmental Law* (Hays V. (Ti), 2006), and the *Idaho Law Review* (Cosens, 2006; Gudgell et al., 2006; Klee & Mecham, 2006; Marshall, 2006; McGovern, 2006; Strack, 2006), which dedicated an entire issue to the agreement including articles from the tribe, the State of Idaho, the federal government, and the mediator. Overall, once the agreement was authorized for release to the public, the dialogue within the public sphere appears to have generated a wealth of publicity that informed members of the public that an agreement had been reached.

### **8.3.4 Ratification**

The agreement required the U.S. Congress, the State of Idaho Legislature, and the Nez Perce Tribe to ratify the agreement.

The federal negotiation team stated that the Congressional approval was the “wildcard” particularly with such a short timeframe and the restrictions on federal agencies to lobbying Congress, thereby leaving the Tribe and State to do most of the advocacy (Klee & Mecham, 2006, note 25). The state noted that it was “a Herculean effort by the parties” (Strack, 2006, p. 656). One advantage was that the Idaho congressional delegation was politically powerful at the time with members on committees that were integral in passage of the Act: Senator Larry Craig sat on the Senate Appropriations Committee; Senator Crapo was Chairman of the House Subcommittee on Water, Parks, and Wildlife; and Representative Mike Simpson was on the House Appropriations Committee (Bogert, 2006). Congress approved the legislation expeditiously: The bill was introduced in June of 2004 with a hearing held in July, followed by a business meeting held in September where the amendment was reported favorably out of committee, and discussed on the Senate floor in November (*S. Rep. No. 108-389*, 2004). The legislation passed later as a rider to the Consolidated Appropriations Act of 2005.

*Summary of Governing Body’s Activities:*

<u>Constituency</u>	<u>Ratification Date/Forum/Type of Action</u>
U.S. Congress	Consolidated Appropriations Act of 2005

	11/20/2004 Conference Reports
	House (344-51 Passed), Senate (65-30 Passed)
	Signed by President 12/8/2004 (“Bill Summary,” n.d.)
Idaho State Legislature	House Bill 152 <sup>59</sup>
	03/16/2005 Senate (27-7 Passed)
	03/02/2005 House (55-14-1 Passed)
	(“Idaho Water Users,” n.d.)
Nez Perce Tribal	Resolution No. 05-210
Executive Council	03/29/05 (6-2 Adopted)
	(Associated Press, 2005b; “Statement of Findings,” 2007)

*Judicial Approval:* The parties had originally pursued mediation and litigation in parallel; therefore, Judge Wood’s instream flow decision was pending at the Supreme Court when the agreement was announced. The parties had to file a motion for remand to the SRBA Court for the agreement to receive approval and be incorporated into the adjudication. The Shoshone Bannock Tribes objected to the remand, but the case was sent back to the SRBA court (Haller, 2005b), which approved the consent decree on January 30, 2007 with a 42-day appeal period (National Indian Law Library, 2007a).

## **8.4 Criteria Category II – Process Quality**

### **8.4.1 Procedurally Just**

Given that the mediation was court ordered and had a ratification component that required legislation, several processes influenced the perception of procedural justice.

*Confidential Negotiations and Perceptions of Procedural Justice:* Due to the role that the confidentiality played in individual’s perceptions of procedural justice, a discussion of the process of implementing the confidential mediation is in order. During the discovery process in April of 1998, the parties had requested a protective order (*Joint Motion for Protective Order*, 1998) which was granted for documents containing information on archaeological resources and certain Nez Perce materials containing sensitive religious and cultural information. Those authorized to review the material deemed confidential included the court, attorneys, representatives of the parties, consultants, experts, and witnesses (*In re SRBA, Protective Order*,

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<sup>59</sup> Two other bills were passed along with HB 152 to ensure legislation aligned with programs in the agreement. HB 152 is included here because it is the bill that ratified the agreement.

1998). Later the Special Master for the subcase required the mediation materials to remain confidential if it contained trade secrets, proprietary information, or sensitive information, and the party indicated that it was confidential. The order also provided that “statements made or positions taken in the mediation shall not be disclosed to any person or entity not a party to the mediation and shall not be admissible in any trial or other proceeding” (*In re SRBA, Protective Order for Mediation*, 1999, p. 4 sec. 11).

The negotiations lasted for six years and included thousands of indirect participants and more than one hundred direct participants. Recognizing that there was a conflict between the need to keep the settlement terms confidential while also ensuring that all parties felt included, the mediator chose to have a core group of individuals that would reach an agreement on a particular issue and then expand participation by including the next level of participants. The mediator acknowledged that this approach had the potential to alienate some groups before it was time for their involvement, particularly because of the confidentiality requirement, but that the parties appeared to have kept their constituents informed enough to prevent resistance. The mediator chose to have about 15 of the lawyers to represent the various SRBA parties and serve as the primary negotiators with another 10 lawyers representing the tribe and United States. The lawyers for the State, Tribe and U.S. served as the liaison with their respective agencies. Through the lawyers, all parties were coordinated and interests represented by a somewhat centralized group. Although the issues were expanded to include additional issues outside of allocation of water to the tribe, the scope of the negotiation was limited to parties and issues in Idaho. The mediation involved multiple separate meetings with parties and their lawyers, all elected federal officials from Idaho, the relevant state legislators, the governor, the relevant federal agency and department officials, experts, and other interested parties. The meetings were held in Boise, Twin Falls, Lapwai, Lewiston, Portland, Seattle, San Francisco, and Washington, D.C. Altogether there were more than twenty-five general meetings and hundreds of smaller meetings. Telephone discussions were used for both private and conference call status meetings. The bulk of the mediation involved interaction by committees or subcommittees to produce the draft agreement (McGovern, 2006).

*Perception that Underlying Concerns were Unearthed:* Although individuals not a part of the mediation were suspicious and critical of the court’s requirement that the mediation remain confidential, it was noted that the confidentiality allowed the parties to fully explore options without being concerned that it would be used against them in future litigation (*Minutes S. State Jan. 14, 2005*).

*Procedure Used was Fair:* There was little information available about the perception of the negotiation process, although some parties made comments about dealing in good faith (U.S. Department of the Interior, Office of the Secretary, 2004, p. 48) or as one party stated “the blood, sweat and tears that have gone into the negotiations of this settlement have been sincere” (Oxley, 2005, para. 13). The mediator told the court,

one would have to say that all of the parties are really trying quite, quite hard to see if they can work something out...I would like to commend everyone publicly and on the record for the effort that they have expended, and I feel confident that all the people who have participated thus far will continue to with the same willingness, with the same level of thoughtfulness. (*Status Conference May Transcript*, 2002, pp. 19–20)

Similarly, Michael Bogert, representing the state, wrote of the process, “Each of the parties to the Nez Perce Agreement took the critical time necessary to understand each other's respective interests, and accounted for it in positions taken during the mediated discussions” (Bogert, 2006, p. 700).

There were several legislators that actively lobbied against the agreement and some expressed concerned with how it was negotiated. State Senator Skip Brandt led the opposition, “My biggest concern is the details haven't been in the light of day,” (R. Barker, 2004b, para. 13). Similarly, U.S. Representative Chenoweth-Hage was reported to have criticized the process including the confidential negotiations and expressed concerns that the agreement would negatively impact the state (Stapilus, 2009).

*Time:* The parties were given six years, probably more than adequate time to negotiate and make a decision on the agreement. According to the federal representatives, by 2000, a draft of the term sheet had been created, but negotiations continued because the parties wanted to release a more comprehensive document (Klee & Mecham, 2006). In 2002, the mediator told the court that they had a document that outlined the issues that the settlement would include, but that there were at least 20 issues that the parties did not agree on which could prevent them from reaching an agreement. The mediator, along with the parties, noted that it was time for parties to make decisions and stated that six weeks should be sufficient to do so. The judge at this time also urged a settlement:

It's time for the business and corporate organizations of this state to show some leadership...They all know that another five to ten years of litigation does not get them anything. It doesn't get them clear planning. It doesn't get them forecasts...It's time for political entities and subdivisions to put aside silly pre-election jingles...and show statesmanship and get this problem solved. We

don't need fear. We need vision, and we need courage from these individuals.  
(*Status Conference May Transcript*, 2002, pp. 36–37).

Despite the seemingly slow progress of the negotiations, there was very little critique from the parties over the time it took to come to an agreement. As one representative from the state noted “Each of the parties to the Nez Perce Agreement took the critical time necessary to understand each other's respective interests” (Bogert, 2006, p. 700). However, the mediator noted that the negotiations suffered from not having an end date, and it was not until there was the potential for personnel changes within the federal negotiation team, that parties reached agreement (McGovern, 2006).

Although the negotiations appeared to have provided sufficient time to resolve the dispute, non-participants in the process were critical of the amount of time allotted to ratify the agreement. For example, Angie Lee Morrow of Harrison said “It startles me that the governor and even our federal senators and congressmen are ramming this through, when even our legislators do not know all the details” (Russell, 2005b, para. 17). The federal negotiation team also noted the short timeframe for implementation and ratification actions and it was not clear if everything could be completed in time. The deadline was self-imposed and set to correspond with the expiration of the Upper Snake River Biological Opinion on March 31, 2005. According to the federal negotiation team, the timeline was a key consideration in determining whether they could in good faith sign on to the agreement (Klee & Mecham, 2006).

*All Interests were Taken into Account:* Due to the negotiations being limited to parties with a water right claim in the SRBA, it is unsurprising that there was a perception that some views and interests were given more consideration, which was only compounded by the confidentiality of the negotiations. One source stated that “Ranchers, loggers, salmon advocates and conservation groups are worried about how the deal affects their interests because details of the agreement are not widely known — it was negotiated in secret for five years” (R. Barker, 2004b, para. 4).

According to individuals from the federal negotiation team, the mediator created a structure for parties to explore the range of potential issues and determine which issues would be pursued in the mediation. Similarly, the federal team was able to create a structure in which the diversity of federal interests could be taken into account. The federal government realized that the issues in the mediation all had a federal nexus that potentially included many different departments; therefore, they decided to appoint one legal counsel to oversee the negotiations for the federal government and include representatives from other agencies whenever that

department would be affected by a decision. This approach ensured that all agencies supported the completed agreement (Klee & Mecham, 2006).

Although recreational interests were not at the table (*Minutes House Res. Jan. 17, 2005*), there were parties to the mediation that must have been at least partially representing and considering their interests since the Memorandum of Agreement (MOA) for Dworshak reservoir required consideration of the flow augmentation's impact on reservoir recreation ("MOA Between the Nez Perce Tribe, The United States Army," 2005). In addition, some BLM lands adjacent to the Clearwater River and Lolo Creek were excluded from the land transfer to protect recreational uses (*S. Hrg. 108-636, 2004, p. 66*).

*The Ratification Process:* There was less information available on how the Nez Perce tribal members felt about the process. At least some of the members were unhappy with the confidentiality of the negotiations and the fact that the Nez Perce Tribal Executive Council (NPTEC) did not allow the entire voting membership to determine whether to ratify the agreement. For example, tribal member Julian Matthews stated that "I'm not saying all of the negotiations should have been public, but there should have been some communication about what they're thinking" (Associated Press, 2005a, para. 5). Owen C. Slickpoo was more accusatory and suspicious, telling one newspaper that the process "has been underhanded and secretive since the beginning" ... [Expressing further distrust, Slickpoo asserted that] 'surrounding tribes are excelling, while the executive committee is nothing but a federally funded 'Mafia' intent on politically oppressing its people and denying them due process'" (McGann, 2004b, para. 3,13). Similarly, Justin Gold stated, "The people have been removed from this decision and the government here is partially funded by the federal government, which makes me ask where their interests lie" (Associated Press, 2005a, para. 11). From these comments, it is clear that at least some of the tribal members felt the process was unjust.

The State of Idaho's ratification process also generated a response from opponents of the agreement: The Water Rights Coalition complained that the House Resources and Conservation Committee public hearing did not allow equal time for opponents during the panel presentations. However, the Coalition later reported that the process for the Senate hearing was fair (E. Barker, 2005b). Similarly, the Farm Bureau, who was a primary leader of the opposition, commented that the state ratification hearing was fair and, "all sides were given equal time to address the joint committees of State Affairs and Resources. Committee members were allowed to ask questions of all who testified" (Idaho Farm Bureau Public Affairs, 2005, p. 2).

*Participation in the Negotiations:* Only water right holders that were a part of the Snake River Basin Adjudication had the opportunity to join in the mediation (*Minutes S. State Jan. 14, 2005*). Many opponents to the agreement cited their exclusion from the negotiations as a source of dissension. For example, Judy Bartlett from the Farm Bureau, who actively opposed the agreement, stated that the Farm Bureau was not invited to negotiations and that her water board was not invited either (*Minutes S. State Feb. 9, 2005*). The CEO of the Idaho Farm Bureau expressed his dissatisfaction the stating that the agreement “needs openness and transparency” as “some affected by its outcome were never consulted nor gave their consent” (Keller, 2005, p. 2). In addition, Keller’s tone was accusatory, critical and suspicious:

The trend in governments is becoming more and more secretive, willing to make agreements during the midnight hours, with select, hand-picked groups, purposely avoiding Congressional and legislative committee review and discussion. They abandon open and fair hearings if they fear their pet cause cannot stand the scrutiny of public disclosure. We must condemn this process, even if it can be used to our advantage. Open debate and full disclosure are what we expect and deserve. (Keller, 2005, p. 6).

Similarly, the Shoshone-Bannock claimed that they were not a part of the negotiations, although others claimed that they were: regardless it was apparent from reviewing the hearings and news articles (D. Ferguson, 2005; *Minutes House Res. Feb. 23, 2005, Minutes S. State Mar. 4, 2005*; Oxley, 2005) that they believed their interests had not been represented. However, it is also possible that with an unfavorable court opinion, a federal government unwilling to pursue their claims, and a separate failed negotiated agreement with the governor, that the opposition to the settlement and reports of not being included in the process was their last resort option to protect their perceived interests.

*Perception that Specific Interests were Given More Weight:* The expansion of the issues from water rights to include other issues allowed parties to come to an agreement, but it also introduced the risk that all parties affected by the agreement were not at the table. Similarly, by including provisions that increased the tribe’s jurisdiction, the parties introduced an additional layer of interests, creating a north Idaho versus south Idaho element, particularly in North Central Idaho, which had a more tense history with the tribe. It is unclear if the parties considered these current and historical tensions concerning tribal jurisdiction but it was apparent that these interests did not feel represented. Pat Holmberg of the Idaho Independent Miners told the committee, ““We believe that anything decided in secret is not good for the people...Those of us in north-central Idaho kind of feel like the stepchild at the family reunion”” (Russell,

2005b, para. 19). Similarly, Angie Lee Morrow of Harrison said the agreement is ““allowing a small party of people to have what they want at the expense of all of our citizens””(para. 19). In addition, Senator McKenzie expressed concern that ranchers and local governments’ rights were being traded to the benefit of the rest of the state (Idaho Farm Bureau Public Affairs, 2005; *Minutes S. State Mar. 9, 2005*). The Idaho Farm Bureau emphasized that rights of those that were unrepresented were being given away to the benefit of the irrigators. “All parts of the state are not being treated equally and this will cause deep and long-lasting divisions” (Idaho Farm Bureau Public Affairs, 2005, p. 1).

Several articles noted that the tribe had a distinct disadvantage due to the loss in court denying their off-reservation instream flow claims and that the State significantly leveraged this ruling to obtain difficult concessions from the tribe (Anderson, 2006; Hays V. (Ti), 2006; Osborn, 2009). It is unclear if this was the tribe’s perception during mediation.

#### **8.4.2 Procedurally Accessible and Inclusive**

*Public Notice and Public Participation in the Mediation Process:* The negotiations were confidential and held in private; therefore, public notice and participation were expressly prohibited (Associated Press, 2002; *In re SRBA, Order Modifying Protective Order*, 2004, *In re SRBA, Protective Order*, 1998, *In re SRBA, Protective Order for Mediation*, 1999). The court authorized verbal briefings to persons not subject to the mediation, but required that all parties approve the meetings and information used, and that any person briefed follow the protective order (*In re SRBA, Order Modifying Protective Order*, 2004). The public, including tribal members, did not learn about the provisions of the agreement until the Term Sheet was released in May of 2004 and could no longer be changed (*Minutes S. State Feb. 9, 2005, S. Hrg. 108-636*, 2004).

The tribe did include brief updates on the mediation in its Nez Perce Currents newsletter but did not mention any of the terms of the agreement. The newsletter instead focused on items such as: the role of consultants in determining the tribe’s claims (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001b); the transition to a new federal administration; and the re-entry of Idaho Power Company to the negotiations (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001b, 2001c). In addition, the updates disclosed general mediation topics such as flow protection in the Salmon and Clearwater basins (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001f, 2001g).

*Public Notice and Public Participation Prior to Ratification:* The Tribe and the State held public hearings to determine whether they should ratify the agreement: The meetings were not a forum to change the agreement. The Term Sheet, as released, could not be changed (Haller, 2004g; *Minutes S. State Feb. 9, 2005*).

*Nez Perce:* The tribe engaged in an extensive education campaign (see Public Education section below). As one source noted, the Nez Perce “spent ten months engaged in its own tribal public debate” (Gudgell et al., 2006, p. 588). The Nez Perce Currents newsletter was dedicated to providing tribal members information on the adjudication, mediation, and settlement agreement, as well as notice about upcoming public meetings (Haller, 2004b, 2004c, 2004e, 2004f, 2004g). Tribal members were told that “it is extremely important that all members of the Nez Perce Tribe carefully review the settlement proposal, ask questions, and convey your thoughts” (Haller, 2004b). By November, the rhetoric in the Nez Perce Currents public meeting announcement had changed from a focus on understanding the settlement to providing a venue for members to ask questions and “give input to the NPTEC and SRBA Team regarding the decision making process” (Haller, 2004g). Demonstrating the commitment to public input, the tribe’s November 20 meeting was held for several hours from 10:00 am until 2:00 pm (Haller, 2004g). In addition, before voting on the agreement on March 31, NPTEC heard from tribal members for approximately five hours (McCoy, 2005b), many of whom opposed the agreement. Approximately 60 members attended this particular meeting in the Richard Halfmoon Chambers (Boone, 2005b; Haller, 2005b). Although there was some discussion within the tribal council to let all eligible tribal members vote on the agreement, NPTEC decided that it would only vote on ratifying the agreement, much to the dismay of some tribal members (Associated Press, 2005a).

*State of Idaho:* When it came time for the legislature to hold public hearings, there was some discussion of holding public hearings around the state (*Minutes House Res. Jan. 17, 2005*), but ultimately, the legislature decided to only hold the hearings in Boise, Idaho (*Minutes House Res. Feb. 22, 2005*). Despite this, the State of Idaho legislative public hearings on the settlement were well publicized and attended (Chmelik, 2005). The Senate State Affairs Committee allowed the Farm Bureau to testify on the agreement during a committee meeting on February 9, 2005 (*Minutes S. State Feb. 9, 2005*), and later held a joint public hearing with the members of the Senate Resources and Environment Committee on March 9, 2005 at the Boise City Hall (*Minutes S. State Mar. 9, 2005*). The public hearing had approximately 100 people testify (Boone, 2005a). In addition, the House Resources and Conservation Committee held a

public hearing on the ratification of the agreement for two days on February 22 and 23 (*Minutes House Res. Feb. 22, 2005, Minutes House Res. Feb. 23, 2005*). The House Resources Committee, composed of 18 representatives, listened to almost 300 testimonies over the course of several hours (Russell, 2005b). The meetings were held at Boise State University to accommodate the large number of participants over the two day hearing (Bogert, 2006). Several of the interest groups issued press releases or notified their members of the scheduled hearings. The Water Rights Coalition issued a press release about the hearings and even offered to obtain a bus and lodging if enough people were interested in attending (Chmelik, 2005).

*Court Processes:* On January 9, 2007, the SRBA Court heard the Joint Motion for Entry of Consent Decree filed by the Tribe, the United States, and the State of Idaho, and on January 30, 2007 the presiding judge entered a written order approving the Consent Decree. No appeals were filed with the Idaho Supreme Court challenging the final consent decree (National Indian Law Library, 2007b).

*Access to Technical and Substantive Information on Issues*

*Direct Participants:* Given the highly complex and technical nature of instream flows, habitat restoration, and forestry management in the interest of salmon, the parties developed a process wherein technical teams composed of representatives of each party obtained and vetted information. Since some information was limited or uncertain, the technical team and negotiators met periodically to ensure that the technical team had direction to move forward and to incorporate negotiators with their understanding of political reality (Cosens, 2006).

*General Public:* The process was confidential (*Joint Motion for Protective Order, 1998, In re SRBA, Protective Order, 1998, In re SRBA, Protective Order for Mediation, 1999*); there was not any evidence to suggest that the public was provided access to technical reports.

*Public Education:* Once the parties issued the press release stating that an agreement had been reached, the State of Idaho and the Tribe engaged in an extensive public information campaign (Gudgell et al., 2006).

*Nez Perce:* The Nez Perce Chairman Anthony Johnson said that since the mediation was confidential, the “public information process is particularly important” and would take “several months” to “ensure that tribal members are fully informed and have their questions answered before the final decision is made” (*S. Hrg. 108-636, 2004, p. 31*). The *Nez Perce Currents* newsletter served as a venue to provide public notice of upcoming meetings, encourage participants to attend, and also publish questions and answers from previous meetings. In June of 2004, NPTEC held meetings in Lapwai, Kamiah, and Orofino to explain

the settlement and answer questions (Haller, 2004b). Later, in the July *Nez Perce Currents*, the tribe announced three more meetings: Orofino, August 10<sup>th</sup>; Kamiah, August 11<sup>th</sup>; and Lapwai, August 12<sup>th</sup> (Haller, 2004c). The General Council meeting discussed the agreement on September 25, 2004 (Haller, 2004e).

In addition to the public meetings that were held across the state and for tribal members, as discussed above, the *Nez Perce Currents* was a source of information both prior to and after the settlement was announced. Prior to the release of the Term Sheet, the newsletter included information about dams, the Northwest Power Planning Council, the Upper Snake River BiOp (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001d), the Chinook Salmon lifecycle, flow augmentation (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001c), groundwater (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001b), federal reserved rights, treaties (Nez Perce Tribe Water Resources Division and Office of Legal Counsel, 2001a), and other topics. Once the Term Sheet was released, the newsletter focused on answering questions about water rights, the Term Sheet, the ratification process, and the Tribe's options (Haller, 2004a, 2004b, 2004c, 2004d, 2004e, 2004f, 2004g, 2005a, 2005b).

*State of Idaho:* Two sources noted that meetings were held throughout the state (Gudgell et al., 2006; Haller, 2004c), and that state, tribal, and federal representatives had been present (Haller, 2004c). It is unclear how many meetings were held but there was at least one in each of the following cities: Lewiston, Orofino, Coeur d'Alene, Sandpoint, and Idaho Falls (E. Barker, 2004). The sessions held in Lewiston and Orofino, which are near the tribal reservation, were noted as having good attendance by "local elected officials, timber interests, and ordinary citizens" (Haller, 2004c). In addition, the Senate State Affairs Committee was briefed about the settlement during its public committee meeting on January 14 and March 4 (*Minutes S. State Jan. 14, 2005, Minutes S. State Mar. 4, 2005*) while the House Resources and Conservation Committee held a similar briefing on January 17, 2005 (*Minutes House Res. Jan. 17, 2005*).

### **8.4.3 Reasonable Process Costs**

There was little information available on the costs incurred during the negotiation process. One article stated that the "Tribe, United States, and Indian rights advocacy groups invested approximately \$20 million to litigate and mediate the tribe's water claims" (Hays V. (Ti), 2006, p. 885). Prior to 1999, Idaho Power Co. and the Federal Claims Coalition paid for

mediation costs (*Status Conference Re Transcript*, 1998). Once the court ordered formal mediation, the judge ordered costs and fees to be split equally between claimants and objectors with each paying 50 percent (*In re SRBA, Order of Mediation and Appt.*, 1998). One driving factor in reaching the settlement was the cost of continuing to not resolve the issue, particularly as both tribal and federal funding became more strained (*Hays V. (Ti)*, 2006). In addition, the federal team commented that although water rights negotiations “can be as difficult, expensive, and time-consuming as litigation” the federal government chose to engage in mediation efforts because it offered the potential to resolve issues that litigation could not address (Klee & Mecham, 2006, p. 602).

### **8.5 III. Criteria Category III – Outcome Quality**

#### **8.5.1 *Cost-Effective Implementation*<sup>60</sup>**

*Cost Sharing Principles:* Although the federal government supposedly follows federal guidelines for water settlements which are based on the government’s potential legal liability as outlined in the frequently criticized *Criteria and Procedures*, it is unclear to what extent the standards are applied. Some have commented that the *Criteria and Procedures* are only there in principle (Anderson, 2006). The federal government funded this settlement almost wholly with a cost-sharing requirement for the payment made to the state for its ESA Section 6 programs (*Statement and Fiscal Note H. 152*, 2005). The Tribe and State also incurred some personnel costs as part of the various ongoing programs, but were not otherwise required to fund the settlement.

#### *Costs to Parties at the Table*

*Nez Perce Tribe:* The Tribe and U.S. originally filed claims for on-reservation uses totaling 223,698 acre-feet per year from surface water and 14,629 acre-feet per year from groundwater. The multiple uses included domestic, commercial, municipal, industrial, irrigation, lake level maintenance, fish propagation, hydropower, and livestock and wildlife watering (*Joint Motion for Approval of Consent Decree*, 2005). In the final agreement, they received 50,000 acre-feet. The case law for on-reservation water rights is more favorable to tribes; therefore, the Tribe incurred the opportunity cost of forgoing potentially more on-reservation water rights. In addition, although they had lost in district court, they forwent the opportunity to possibly win minimum instream water rights with a time immemorial priority

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<sup>60</sup> Indirect costs, such as loss of tax revenues, that are a byproduct of the agreement and affect local communities are noted under Cultural Sustainability/Community Self-Determination.

date along with control over administration and enforcement. Similarly, the resolution of the 1,263 springs and fountains claims “was extremely beneficial to private water users” but a cost to the tribe as they relinquished their claims on all private lands, leaving them with the 548 claims on federal lands (Strack, 2006, p. 660).

State of Idaho: The costs of the agreement included a 25 percent match for habitat projects or approximately \$8 million (equivalent to one-third of the federal governments contribution), which may include in-kind services for the Section 6 cooperative program (*Statement and Fiscal Note H. 152, 2005*). While the Office of Species Conservation and Idaho Department of Water Resources did not expect to require any additional funds for the agreement, the Idaho Department of Fish and Game expected increased personnel costs due to the Section 6 program. The Forestry Program was not expected to increase staffing requirements and the Idaho Department of State Lands projected that enrollment of endowment lands into the program would not appreciably reduce revenues (*Statement and Fiscal Note H. 152, 2005*), since the state forest endowment lands already performed most of the actions described in the forestry program of the Term Sheet (*Minutes House Res. Jan. 17, 2005*). In addition, the Idaho Department of State Lands estimated that it would spend \$2 million to prepare the documents associated with the Section 6 Idaho Forestry Program, although it could use the funds from the federal government for this cost (*Statement and Fiscal Note H. 152, 2005*).

Water Acquisition: The Idaho Water Resources Board purchased natural flow water rights to meet the 60,000 acre-feet of natural flow water rights authorized by the agreement for lease by BOR for instream flows. The state acquired 74,000 acre-feet of natural flow water rights from the Bell Rapids Mutual Irrigation Company and leased 60,000 to BOR through 2035 (*Minutes on Meeting 10-10, 2010*). For comparison, the Lemhi Rental Pool, which only rents natural flow rights, rents water for \$146 per acre foot annually (Clifford, Landry, & Larsen-Hayden, 2004). The purchase of natural flow water rights of 74,000 acre-feet, therefore, by the state with all financing costs included, was \$24,375,000, which is cost effective in comparison (*Minutes on Meeting 10-10, 2010*), as the cost of these rights for one year is equivalent to \$329 per acre-foot. One source noted that the federal government would reimburse the state up to \$13 million for the natural flow water rights acquisition, although this could not be confirmed by other sources (*Statement and Fiscal Note H. 152, 2005*).

Opportunity Cost: The State also incurred an opportunity cost in not pursuing litigation as it missed the chance to obtain clarity over the reservation boundaries without going to the

Ninth Circuit Court, which Idaho perceived as favoring tribes. Water rights are unique in that they are one of the few instances where state courts have jurisdiction over a federal issue; therefore, the case would have gone to the Idaho Supreme Court and then directly to the U.S. Supreme Court, a venue that has been less favorable to tribes in recent years than the Ninth Circuit (Strack, 2006).

*Federal Government:* In accordance with the Mediator’s Term Sheet, the federal legislation approved the following costs to the federal government:

- \$2 million for mitigating the impacts of water acquisitions on local governments
- Up to \$7 million worth of BLM lands<sup>61</sup>
- \$200,000 for local governments to mitigate for the transfer of BLM lands
- \$60.1 million Water and Fisheries Fund for cost of “acquiring land and water rights, restoring or improving fish habitat, or for fish production, agricultural development, cultural preservation, water resource development, or fisheries-related projects” (*Snake River Act*, 2004, sec. 6(b)(1)).<sup>62</sup>
- \$23 million Domestic Water Supply Fund for cost of upgrades to water system, sewer system and a water quality lab.<sup>63</sup>
- \$38 million Salmon and Clearwater River Basins Habitat Fund divided as follows:
  - \$12.7 million Nez Perce Tribe Salmon and Clearwater River Basins Habitat Account.<sup>64</sup>
  - \$25.3 million Idaho Salmon and Clearwater River Basins Habitat Account (*Snake River Act*, 2004).<sup>65</sup>

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<sup>61</sup> Although the agreement authorized up to \$7 million in BLM lands, the total value of the 11,297 acres of BLM land transferred to the tribe was appraised at \$5,220,650 (Honse, 2004).

<sup>62</sup> The funds were to be paid for each fiscal year as follows: 2007, \$7,830,000; 2008, \$4,730,000; 2009, \$7,380,000; 2010, \$10,080,000; 2011, \$11,630,000; 2012, \$9,450,000; and 2013, \$9,000,000 (*Snake River Act*, 2004). The agreement had called for \$50 million for the Water and Fisheries Fund and \$10.1 million in lieu of storage in the Payette Reservoir (“Term Sheet,” 2004). The \$10.1 million for 45,000 acre feet of storage space in Payette River Reservoir was determined by the “net present value of the cost of rental payments for that storage space over the course of a 30-year period” (*S. Rep. No. 108-389*, 2004, p. 5).

<sup>63</sup> The funds were to be paid for each fiscal year as follows: 2007, \$5,100,000; 2008, \$8,200,000; 2009, \$5,550,000; 2010, \$2,850,000; and 2011, \$1,300,000.

<sup>64</sup> To be paid as \$2,533,334 for each fiscal year from 2007 through 2011.

The analysis of the bill in the Senate Committee Report confirmed these allocations. In addition, it was estimated that the reduction in revenue was minimal from the land transfer as its appurtenant 43 grazing allotment receipts were worth less than \$1,000 (*S. Rep. No. 108-389*, 2004). Although the agreement authorized the transfer of up to \$7 million of available BLM land (Staff, 2005), the final appraisal determined that it was worth \$5.5 million resulting in a transfer of all 11,297 acres available (Haller, 2005a; Honse, 2004). Finally, the fiscal note stated that the federal government would pay up to \$13 million for the natural flow water rights acquisition and \$57 million in rental fees over the 30-year flow augmentation program,<sup>66</sup> although, this could not be confirmed in the committee report or by the language of the bill (*Statement and Fiscal Note H. 152*, 2005).<sup>67</sup> While the cost efficacy of renting versus purchasing storage rights for the 30-year flow augmentation program is unclear, Idaho does have a well-developed and sophisticated water banking system. Some economists have suggested that Idaho's historic use of water banks and rental pools has resulted in reduced transaction costs to maximize market mechanisms instead of resorting to political means, as occurred in the Klamath (Slaughter & Wiener, 2007). See Financial Feasibility for more information on the Water Banking Program.

As of May 2011, the Nez Perce Tribe reported that Congress has thus far appropriated the settlement funds as agreed. The settlement requires the United States to pay \$95.8 million to the tribe from fiscal years 2007 to 2014. According to the Tribe, Congress had appropriated \$61,853,336 for the settlement funds for fiscal years 2007 through 2010 (*Nez Perce Tribe Spring General Council Meeting Minutes*, 2011). A review of current budget justifications also shows that the federal government has continued to meet the funding requirements to the State

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<sup>65</sup> To be paid as \$5,066,666 for each fiscal year from 2007 through 2011.

<sup>66</sup> The federal government would likely have paid some cost to purchase or lease water for flow augmentation regardless of whether the agreement was signed due to the ESA and the inability of the FCRPS BiOp to meet ESA obligations without the upper Snake River water.

<sup>67</sup> However, these costs are in line with estimates suggesting that the agreement provided approximately \$95 million in federal funds to the state and local government (*Statement and Fiscal Note H. 152*, 2005) and federal benefits to the Tribe worth \$102 million (Anderson, 2006). Similarly, the federal negotiation team estimated that over the 30-year period of the agreement, it will cost the federal government about \$200 million, which includes funding needed to rent the 487,000 acre-feet of water for flow augmentation (Klee & Mecham, 2006). In addition, BOR has been requesting money for flow augmentation annually (U.S. Bureau of Reclamation, U.S. Department of Interior, 2011).

of Idaho. According to the Fiscal Year 2012 USFWS Budget Justification, a total of \$25,333,330 was appropriated to the State from 2007-2011 for water supply and habitat restoration projects, requiring no further payments for this particular account (U.S. Fish and Wildlife Service, 2011a). In addition, for fiscal year 2012, the Bureau of Indian Affairs requested the sixth of seven installments for their part of the settlement (Indian Affairs, U.S. Department of Interior, 2011) and BOR requested \$5.75 million for the flow augmentation program (U.S. Bureau of Reclamation, U.S. Department of Interior, 2011).

*Costs to State Water Users and Forestry:* The water users and loggers will experience opportunity costs in not being able to fully exploit the resources for profit, and in the case of water, development may be constrained (Simpson, 2002). In addition, logging businesses and state water users that voluntarily sign up for the Section 6 cooperative program will incur costs associated with enrolling the property to the extent that costs are not covered by the State or grants.

*Potential Costs to Other Parties and Perceptions*

*Increased Costs:* There were concerns that the agreement would result in increased costs to loggers and ranchers in North Central Idaho (R. Barker, 2004b). In addition, the grazing leases on the transferred BLM land were of particular concern for some ranchers, although the Tribe did agree to honor leases until they expired (Haller, 2004d) this did not alleviate cost concerns. For example, Wally Butlers testified that the tribal leases have a base rate of nine to 18 dollars per animal unit month, or the equivalent of a ten-fold fee increase (Scott, 2005b), although the Tribe reported that they were hoping to lease the lands for nine dollars (*Minutes S. State Mar. 9, 2005*). See Cultural and Community Feasibility for more information on grazing leases.

*Too Costly:* One source did report that the City of Kooskia opposed the deal citing a number of concerns including that it was too costly (Haller, 2004e). Overall, there was minimal reference to the cost of the agreement, most likely due to the fact that the federal government was paying for most of it.

*Other Costs:* As far as the impacts of the 200 KAF of water to be released from Dworshak, the MOA stipulates that the operating plan will be considered revenue neutral if the flow is released in August or September and flows go through the powerhouse at full capacity. After 2020, the flow releases can be changed to other times and still be considered revenue neutral (“MOA Between the Nez Perce Tribe, The United States Army,” 2005). The

management of these flows for fish, instead of power production; however, are an opportunity cost.

### **8.5.2 *Perceived Economic Efficiency***<sup>68</sup>

#### *Perceptions of Parties Participating in Process*

*Benefits to All*: The settlement allowed for avoidance of costly and potentially prolonged litigation that would have left the region in a cloud of uncertainty and culminated in an outcome with devastating effects for one of the parties while setting precedent for other tribes and states.

*Benefits to the State and State Residents*: Sovereignty over Waters of the State - Limiting Tribal Water and Control: The tribal component to the settlement quantified the Nez Perce's on-reservation right at 50,000 acre-feet with the water coming from the Clearwater River and tributaries where it was available for appropriation and would not affect existing rights. The State recognized that this was a significant compromise by the Tribe and a major benefit to Idaho, as the Nez Perce had a strong case through litigation to claim more water with an 1855 priority date from tributary streams. According to the state, "The allocation assures the availability of water for future development by both the Tribe and the nonmember populace" (Strack, 2006, p. 659). Similarly, although the agreement required the state to establish minimum instream flows, it contained conditions that limited the impacts on water users. First, minimum flow water rights were established primarily on relatively unappropriated federal lands with only 24 instream rights on heavily appropriated streams bordering private lands. In order to balance the interests of the Tribe and fish with those of the irrigators and State, the parties agreed to subordinate the instream water rights to existing water rights, future domestic, commercial, municipal and industrial (DCMI) uses; and allowed for some limited non-DCMI use. The instream rights were held by the state who had the ultimate authority to change the rights after consulting with the Tribe. Essentially, the Tribe succeeded in protecting some water for fisheries, but according to the Deputy Attorney General, the "consultation results only in an exchange of views and information and does not affect the state's ultimate authority over the water," thus retaining the state's sovereignty (Strack, 2006, p. 662). Finally, the resolution of the 1,263 springs and fountains claims "was extremely beneficial to private water users" as the Tribe relinquished their claims on all private lands, leaving the tribe with its 548 claims federal

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<sup>68</sup> I included the benefits that there was a consensus on. Perceived benefits that were not listed by all parties, were then included separately.

lands (p.660). The tribe received up to one-half of the water in all claimed springs on federal lands, which protected grazing allottees that also potentially used the water (Strack, 2006). Finally, the determination of the tribe's rights allowed the state to move on with the SRBA adjudication (R. Barker, 2004c, 2005a).

Sovereignty Over Waters of the State - Reducing ESA Risk: According to Michael Bogert, the State of Idaho saw the ESA Section 6 cooperative agreements as an opportunity for the State to obtain more authority over implementation of federal environmental laws (O'Loughlin & Lazar, 2005). In addition, the Idaho forest endowment lands were already managed as described in the forestry program, and, therefore, would not reduce revenues. Enrolling the state lands in the program had a benefit: it was noted that the state had already prevented at least one ESA lawsuit by implementing these measures (*Minutes House Res. Jan. 17, 2005*). The agreement also provided certainty by authorizing ESA protections for 30 years, which capped the demands on Idaho's water for flow augmentation purposes (Bogert, 2006).

State Perceptions: The state understood that while it had to make some concessions, overall the agreement was beneficial. According to Dirk Kempthorne the agreement was worthwhile because it "achieved: Sovereignty; Certainty; and Opportunity for Idaho and her stakeholders to chart their own destiny under the Endangered Species Act" (*S. Hrg. 108-636, 2004, p. 48*) which "gives us the tools we need to protect Idaho's sovereignty over its water" (Oxley, 2005, line 3). The legislators were well aware that there were tradeoffs including disparities in how the agreement would affect Idaho residents; however, the strengths outweighed these concerns (Russell, 2005b; Wilson, 2004). Similarly, the state Attorney General's office mostly saw the benefits of the agreement:

By resolving such claims through negotiation, the State was able to gain concessions that protected existing water rights. Such protections could not have been gained through litigation. Perhaps more importantly, resolving the Tribe's claims by means of the settlement agreement allowed the State to address other threats to water rights, primarily threats posed by the Endangered Species Act...Finally, the agreement provides the most critical element of a water rights adjudication: certainty...In short, the agreement benefits all Idaho citizens by disposing of any possibility of future treaty-based challenges to Idaho's system of water appropriation and distribution. (Strack, 2006, p. 671).

Water User Perceptions: The State of Idaho and water users generally saw the agreement as favorable and presented the same arguments. Water users, particularly from Southern Idaho, thought the agreement's benefits were worth the costs as it preserved existing uses and infrastructure, protected water users from ESA enforcement, and ensured water would

be obtained voluntarily by paying farmers for flow augmentation (R. Barker, 2004c, 2005a). Norman Semanko, representing the Idaho Water Users Association said that the agreement settled the tribe's water claims while retaining the status quo of water use, allowing for future water development, and providing an opportunity to obtain incidental take protection and assurances under the Clean Water Act (O'Loughlin & Lazar, 2005). Similarly, Roger Ling from the Federal Claims Coalition said it was a good agreement that protected the state's sovereignty and settled the tribe's water rights (Boone, 2005a).

North Central Idaho: The state was divided on whether or not the agreement was beneficial, with supporters stating that despite its flaws, it was in the best interest for the state, while the opposition argued that it impedes on north Idaho property rights (Boone, 2005a, 2005b). The primary opponents were in North Central Idaho in the region close to or within the reservation, who had historic tensions with the tribe and perceived that the agreement created burdens without any benefits for them. In addition, they believed that the state would continue to defeat the Tribe's claims in court and, therefore, the settlement and corresponding concessions were not necessary (*Minutes House Res. Feb. 22, 2005, Minutes House Res. Feb. 23, 2005, Minutes S. State Mar. 9, 2005*). Idaho State Senator Skip Brandt, one of the primary opponents to the agreement, noted that the issues were complex, but that the tribe and southern Idaho businesses were the ones that benefitted from the agreement. He further pointed out "The swap protects southern Idaho irrigators, whereas the Salmon River, Clearwater users are not treated at all...It's going to give the tribe a lot more power and influence with money" (Wilson, 2004, para. 12). Conversely, the Idaho Grain Producers supported the agreement because of the ESA protections offered to water users which they considered to be "very important to us in the north" (Russell, 2005b, para. 18).

Although people in North Central Idaho did not think that the burden placed on them outweighed the benefits, many across the state felt otherwise. The state noted that the tribe would not be able to assert jurisdiction over non-tribal members or their land in the context of water rights administration: The parties felt they addressed this concern by identifying the place of use in the water right. Allocations of water for non-tribal members was retained by the state. Similarly, the State pointed out in the context of Judge Wood's decision that:

the only advantage potentially lost with regard to jurisdictional issues is the foregone opportunity of obtaining an affirmation of the summary judgment decision from the Idaho Supreme Court, and the possibility that the United States Supreme Court would have taken up the jurisdictional issues on a petition for certiorari. (Strack, 2006, p. 670).

Nez Perce Benefits: The Tribe received 50,000 acre-feet of water for on-reservation use as well as treaty springs and fountains rights on federal lands within the 1863 Treaty ceded area. The tribe obtained a \$50 million trust fund for natural resources and economic development, \$23 million for improvements to reservation sewer and water supply systems, \$10.1 million for lease of reservoir storage space and control of a \$12.6 million habitat trust fund (R. Barker, 2004c, 2005a). The Nez Perce also received ownership of over 11,297 fragmented acres of land worth \$5.2 million (Honse, 2004).<sup>69</sup> The agreement also included provisions increasing the Tribe's sovereignty such as tribal administration of the on-reservation right, management of 200KAF from Dworshak, management authority at hatcheries, and control of a habitat trust fund for fish (Gudgell et al., 2006; *S. Hrg. 108-636*, 2004). Finally, the tribe benefitted from portions of the agreement that would improve conditions for salmon, which included the following:

- Designation of 200 KAF for flow augmentation from Dworshak Reservoir.
- Authorization of a \$38 million habitat trust fund (R. Barker, 2004c, 2005a).<sup>70</sup>
- Minimum flows on 205 streams selected by the tribe to provide water for fisheries.
- Enrollment of all State forest lands in the Section 6 cooperative agreement, which includes practices to protect fish habitat (Strack, 2006).
- Change in state water rules to increase likelihood of 427 KAF being available for flow augmentation.
- Purchase of 60 KAF of natural flow rights for flow augmentation.
- Establishment of minimum instream flows within the Salmon and Clearwater Basins.
- Creation of a cooperative program for forestry and water withdrawals in the Salmon and Clearwater basins to reduce impacts on fish. The tribe noted that the ESA related provisions "improved marginally or maintained the status quo" for fisheries and; thus,

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<sup>69</sup> The land appraisal found that parcels ranged from 3.79 to 1,060.96 acres in size with parcels dispersed throughout an area of 1,200 square miles containing private, tribal, state, and federal land. Many of the land parcels though suitable for grazing, timber harvest, residential or recreational uses, lacked access and were in steep terrain. Approximately 4,000 acres had harvestable timber which was included as part of the appraisal. The total value of the land was \$5,220,650 (Honse, 2004).

<sup>70</sup> This is also listed under benefits to the state and benefits to the tribe: The tribe received control of \$12.6 million and consultation authority on Idaho's \$26.3 million.

were acceptable but the Nez Perce did not view it as a benefit (Gudgell et al., 2006, p. 592).

According to the Tribe's Attorneys, the agreement was viewed in the context of the other options available to the Nez Perce and, thus, it was determined that the benefits outweighed the costs:

The SRBA Court's limited jurisdiction could have produced at best nothing other than water rights. The funding to make those rights benefit the Tribe and its members, the transfer of land within the reservation, and the creation of many beneficial inter-governmental relationships through subsidiary settlement agreements, were all beyond the power of the water court. (Gudgell et al., 2006, pp. 593–594).

Similarly, according to Chairman Johnson, the agreement was worth it because ““unlike the uncertainty involved in litigating such water right claims, the Nez Perce Tribe, by agreeing to the terms of the proposed settlement, was able to have a voice in the decision making involved in the final determination of our water right claims”” (Boone, 2005b, para. 17). However, as discussed below in Public Acceptability, while many tribal leaders thought that the agreement's benefits outweighed the cost of forgoing the rights that could have been won in court, not all tribal members agreed.

*Perceptions of Observers:* There was extensive coverage of the agreement; therefore, perceived benefits are quantified by type of source. These benefits did not differ from those listed by the participants .

*Perception of Observers – Mediator:* The mediator for the dispute noted that the agreement allowed parties to obtain approximately \$200 million in federal funding and improve management of water quality and instream flows, while avoiding the intractable issues of sovereignty and historic conditions by focusing on the future to achieve greater certainty and cooperation (McGovern, 2006).

*Perceptions of Observers – Newspapers:* In general, most newspapers reported favorably on the agreement, citing the reduction of the risk of litigation on BOR projects (R. Barker, 2004c, 2005a), additional habitat and water benefits for salmon, incidental take insulation for water users, and the money, land, and water the tribe would receive (R. Barker, 2004c; Staff, 2005). In addition, all parties benefitted from avoiding the costs, uncertainty, and risk associated with litigation of the tribal water claims (Russell, 2005b; Staff, 2005; Wilson, 2004).

One article noted that the state benefited from the agreement because Idaho has an interest in recovering its fisheries and the provisions were beneficial to fish. In addition, the agreement protected the state's use and control of water in Idaho, eliminating the risk of losing the water to the tribe in court, which protected the economic viability of farms and other businesses in the state. While the agreement was costly, the writer stated that it was worth it because the potential losses under litigation were unacceptable (Staff, 2005). However, one newspaper observed that the issues in northern Idaho were not about water, but were about the money the tribe would receive that could be used to increase their control over land in the area. In this sense, one cost to northern Idaho was relinquishing some of its jurisdiction over natural resources (Wilson, 2004). Another article, however, looked at the increase in tribal control as a positive for the local region. The article stated that "the tribe gets an eye-popping list of benefits" primarily in the form of money, land and on-reservation water rights but any economic development on-reservation would also benefit Idaho residents living near or within the reservation (Staff, 2005, para. 10).

*Perceptions of Observers - Academic Journals:* Hays V (2006) wrote an extensive analysis on the agreement. He surmised that the benefits to the state and state water users was a 30-year biological opinion as well as Section 6 habitat agreements that included federal funding and incidental take protection. In addition, the state protected existing water users and allowed for future diversions in the basin. He concluded, "for this reason, and to the extent these settlements produce immediate and discernible winners and losers, Idaho emerged victorious" (p.888).

Hays V (2006) was more reluctant to pronounce that the agreement was a good deal for the tribe, particularly in the short-term saying that "whether settlement also benefited the Tribe is less certain" (p. 888). The Nez Perce dismissed their time immemorial instream flow claims for most of the water in the Snake River Basin in return for the state setting minimum streamflows with 2004 priority dates and subordinations to future DCMI uses on approximately 200 streams.

The Nez Perce filed water rights claims in the SRBA Court to put water back into rivers and streams for salmon. Viewed through this lens, the settlement embodies disappointment...Idaho and the water users sought and exacted painful compromises from the Tribe during settlement negotiations. (p. 898).

Hays V, however, as well as two other articles, generally concluded that the tribe negotiated the best it could given the adverse legal decision. The authors all pointed out that

despite waiving their potential reserved off-reservation water rights, the tribe did obtain significant benefits that would not have been available through litigation including land; greater management authority over resources; funding for fish habitat and water and sewer infrastructure improvements; and avoidance of litigation cost and risk (Anderson, 2006; Hays V. (Ti), 2006; Osborn, 2009). In addition, the Tribe increased its sovereignty and jurisdiction through the transfer of some BLM lands to tribal ownership, received a greater management role over certain BLM owned lands, and had more input on salmon recovery efforts (Hays V. (Ti), 2006). As Anderson (2006) concluded:

The creative Snake River approach...provides substantial benefits to the Nez Perce Tribe, protects the interests of state water right holders, and promotes salmon habitat protection. Future administrations should hold its creativity forth as a model for other settlements. (p.35).

Overall, it appears that most observers thought that the agreement's benefits outweighed its costs.

*Perceptions of Groups Not Party to Negotiations:* Jon Marvel, Executive Director of the Western Watershed Project wrote an article regarding the purchase of the Bell Rapids Mutual Irrigation Co. land criticizing it as a poor deal for Idaho taxpayers (Marvel, 2005). However, another criticized Marvel's analysis as incorrect (R. Barker, 2005b). The Farm Bureau stated that the agreement's benefits did not outweigh the costs it would place on rural interests in the state. They expressed concern over the loss of income on land if purchased by the tribe with settlement funds. In addition, the Farm Bureau felt the agreement placed ESA enforcement on the state agencies, which would lead to greater state budgets. They also asserted that grazing endowments could be lost, while landowners would have increased costs, as they would be forced to participate in the voluntary Section 6 component (*Minutes S. State Feb. 9, 2005*).

### **8.5.3 Financial Feasibility/Sustainability**

The federal government bore most of the costs of the agreement with the state required to match 33 percent of the federal government's contribution to the habitat fund Account ("Term Sheet," 2004, *Snake River Act of 2004, Cong. Record, 2004, Snake River Act, 2004*). All other costs of the agreement were less apparent and mostly subsumed within agency budgets and personnel costs. It appears that the financial obligations were feasible for all parties to meet.

*Federal Government:* The financial feasibility of this agreement is high, since it relies mostly on federal funding. The only potential pitfall with congressional funding is that Congress could decide not to appropriate the funds; therefore, the parties instituted two methods to ensure that the funds would be allocated. First, the funding was spread out over three federal agencies within the Department of Interior, obligating Interior to pay the Nez Perce and State of Idaho \$170.0 million over a 7 year period (Indian Affairs, U.S. Department of Interior, 2011).<sup>71</sup> Secondly, the Tribe sought to protect its interests by adding a provision in the federal legislation that certain waivers of liability against the United States would only become effective upon the appropriation of the final payments to the Nez Perce Water and Fisheries Fund, the Nez Domestic Water Supply Fund, and the Nez Perce Tribe Salmon and Clearwater River Basins Habitat Account (*S. Hrg. 108-636, 2004, Snake River Act of 2004, Cong. Record, 2004, Snake River Act, 2004*). In addition, in regards to the transfer of hatcheries, it was explicitly assumed by the tribe (Haller, 2004d) and the U.S. Senators that the two hatchery facilities would continue to receive funding from the federal government. The Senators, however, insisted that provisions should be incorporated into the management agreements to protect the tribe, should funds fail to be appropriated (*S. Rep. No. 108-389, 2004*). The resulting MOA provides that the funding for the hatcheries will rely on continued federal appropriations; however, if Kooskia is not funded for three consecutive years, ownership of the hatchery will transfer to the Tribe (“Agreement for National Fish Hatcheries,” 2005). It was apparent from the committee reports and the resulting documents that the Senators and Tribe had in good faith worked together to insure that the Tribe was protected from the vulnerability of federal funding to politics by incorporating provisions that would deter non-compliance.

Although not included in the Act, the Bureau of Reclamation will receive funds annually for the 30-year term of the flow augmentation in order to lease up to 487,000 acre-feet of water (U.S. Bureau of Reclamation, U.S. Department of Interior, 2011). Since this funding is also tied to fulfilling the highly litigated FCRPS BiOp, there is a reasonably high likelihood that the federal government will continue to appropriate the needed funds over the life of the agreement.

*The State of Idaho:* The State of Idaho’s plan for meeting its funding obligations was not specified. The State’s major contribution was included in the cost-sharing provision of the

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<sup>71</sup> The agencies with budget responsibilities under the Act included Indian Affairs, Bureau of Reclamation and USFWS. See cost-effective implementation for the schedule of appropriations.

agreement requiring a 25 percent match for habitat projects in the Section 6 cooperative program (equivalent to one-third of the federal government's contribution), which could include in-kind services. While the Idaho Department of State Lands, Office of Species Conservation, and Idaho Department of Water Resources did not expect to require any additional funds or staff to implement the agreement, the Idaho Department of Fish and Game expected increased personnel costs due to the Section 6 program, which presumably could count towards the State's contribution (*Statement and Fiscal Note H. 152*, 2005). The other significant cost of the agreement was the natural flow water rights purchase: The State of Idaho chose to purchase the rights so that the State and not the federal government would have control of the rights. Therefore, Idaho incurred this cost by choice. The purchase of the water rights from Bell Rapids required the legislature to approve \$21.3 million from the State's general fund, which was to be repaid with interest by July 1, 2006. The Idaho Water Resource Board issued \$7,831,698 in Water Development Revenue Bonds to repay the General Fund, as BOR was unable to arrange for payment by the deadline. The bonds are to be retired with lease payments received from BOR (Patton, 2006). The State reported that both the Bell Rapids Mutual Irrigation Company and U.S. Bank had been paid in full as of October 2010 (*Minutes on Meeting 10-10*, 2010).

*Consistent Incentives:* The agreement authorized an increase in the amount that BOR can pay to rent water. The previous rental price was capped so low that there was little incentive for farmers to lease their water. In previous years and depending on the rental pool, the rental rates for out of basin use were between \$5.65 and \$10.50, while for in basin, the rates were between \$2.95 and \$6.50. BOR rentals are generally out-of-basin for instream use, while in-basin transfers are typically for agriculture. In addition, the rental pools had a last to fill provision on water used for flow-augmentation, creating a disincentive for farmers considering leasing (Clifford et al., 2004). To reduce barriers to participation, the price caps were authorized to increase gradually, starting at \$14 per acre-foot and increasing by an additional \$3 per acre-foot at specified years until 2023, when the price will reach \$23 per acre foot for the remainder of the agreement through 2034 ("Term Sheet," 2004). The increase in the rates for flow augmentation allows BOR to garner more interest in leasing and compensates farmers for the risk associated with the last to fill provision during periods of drought.

#### **8.5.4 Cultural Sustainability/Community Self-Determination**

*Affected Communities:* Given the extensive nature of this agreement within the State of Idaho, communities across the Snake River Basin were affected. However, many of the impacts occur within and near the reservation boundaries in the Nez Perce, Lewis, Idaho, and Clearwater Counties; within the Salmon and Clearwater Basins; and within communities in Southern Idaho.

*Potential Effects:*<sup>72</sup> While the purpose of the mediation was to resolve water rights claims, the agreement also greatly expanded to resolve sovereignty issues for both the tribe and the state. The state focused on maintaining control over water resources, while the tribe with its poor legal position, relinquished its off-reservation water rights and focused on increasing tribal control over natural resources within the boundaries of the reservation (Hays V. (Ti), 2006). The agreement and opposition were driven mostly by a desire to maintain culture and control over natural resources; therefore, cultural sustainability and community self-determination are particularly important in this case.

*Resource Changes, Local Economic Impacts and Self Determination:* The main provisions of the agreement resulted in various community impacts as outlined below.

Flow Augmentation: The rental program was renewed for a 30-year period for up to 487,000 acre-feet and authorized BOR to pay higher rates; however, this was not a significant change in the status quo but rather increased the likelihood that water would be obtained for flow augmentation (Strack, 2006). The agreement added an incentive for farmers to fallow their fields or convert to dry land farming due to the higher rates, but since the flow augmentation quantity is capped and the price is fixed, this is unlikely to change the agricultural community beyond what is needed to meet the authorized 427,000 acre-feet. Parties did not assert that the augmentation program would result in economic impacts to local communities due to the fallowing of land.

Some recreational interests opposed the agreement due to the authorization of flow augmentation, because it draws down reservoirs and potentially reduces income to local

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<sup>72</sup> I did not attempt to determine the demographic and economic effects of the agreement on local communities unless information or statements specifically tied the data to the agreement. Given the confounding factors such as the economic recession, the multitude of other recent settlements in conjunction with the SRBA, and the massive adjudication of most of the state's water rights all within the same timeframe, it would not be feasible or responsible to extrapolate from economic or demographic statistics and associate changes with this particular agreement without performing advanced economic analysis.

economies that rely on reservoir recreation such as boating (McCoy, 2005a). The primary concern was Dworshak Reservoir, which the agreement attempted to address. First, the agreement concerning the Tribe's management of 200 KAF of water drawn from Dworshak Reservoir required the governing board to consider the impacts on summer recreation ("MOA Between the Nez Perce Tribe, The United States Army," 2005). Secondly, the parties stated that the agreement would actually benefit recreation since the 200 KAF would be saved for salmon that migrate later in the year; thereby, leaving more water in the reservoir during the summer for (*Minutes House Res. Jan. 17, 2005*).

State Representative Eskridge had expressed concerns that the agreement, in authorizing water to be used instream, could put pressure on water supplies in the south and lead these downstream interests to look to draw water from the Panhandle region. In response to these concerns, Governor Kempthorne provided a signed letter stating that his office would not be supportive of such reallocation and made it clear that this was not the intent of the negotiators (Russell, 2005b).

Natural Flow Water Acquisition: The 60,000 acre-feet of natural flow rights were acquired from farmers that had used high-lift water pumps to irrigate: a venture that was less profitable due to the associated high power costs (Strack, 2006). The farmers involved with the Bell Rapids water acquisition agreed unanimously to sell the water to the state, even though it was a difficult decision for some farmers (Wilkins, 2005). The federal government had authorized \$2 million to mitigate impacts of changes in water use on local governments. Twin Falls County received \$1.56 million of the \$2 million due to the Bell Rapids Water Rights Acquisition, which resulted in a loss of production on 19,118 acres. The Board of County Commissioners estimated that the loss of tax revenue would be \$161,598 per year in perpetuity from this removal of irrigated agriculture. In addition, the County noted that it would expend part of the funds to deal with the increase of invasive and noxious weeds on these lands that were no longer under irrigation (*Minutes on the Regular January Meeting, 2008*).

Land: The land transfer was expected to reduce PILT payments to Lewis and Nez Perce Counties by \$11,000 annually but the federal government agreed to mitigate the impact with a \$200,000 payment that was equivalent to \$13,000 annually over the 30-year period of the agreement (*Statement and Fiscal Note H. 152, 2005*).<sup>73</sup> However, there were no provisions to mitigate impacts on tax rolls should the tribe use its \$60.1 million trust fund to purchase land

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<sup>73</sup> Calculated at a rate of 5 percent.

(*Minutes S. State Feb. 9, 2005*). In addition to the economic impacts of the land transfer and purchase program, opponents of the agreement were concerned the tribe would have greater authority and control over land and referenced previous conflicts over tribal jurisdiction within the 1863 reservation boundary. Grazing allotments on the BLM lands that were transferred under the agreement were also a point of dissension. Under BLM management, grazing leases were issued every ten years, were renewable, and often inherited. The Farm Bureau stated that these elements essentially made the grazing rights property, and therefore, would result in a private property taking if terminated (*Minutes S. State Feb. 9, 2005*). The BLM lands were leased to 43 permittees and included 500 AUMs. While the tribe intended to continue leasing the lands to maximize revenue (*Minutes House Res. Feb. 22, 2005*), there was concern that these grazing rights would be lost if the tribe chose to discontinue grazing on the acquired lands (*Minutes S. State Feb. 9, 2005*). Although the Farm Bureau opposed the agreement, Mike Webster of the Idaho Cattle Association supported it with some reservations, saying that conversations with the Tribe had eased their concerns (*Minutes House Res. Feb. 23, 2005*).

Forestry Program: Nez Perce County Commissioner Doug Zenner was opposed to the voluntary forestry riparian protective provisions, stating that this could result in a reduction in timber harvest resulting in millions of dollars in lost taxes (Scott, 2005a). While the voluntary forest measures would reduce income, it is unclear to what extent and how significant that reduction would be in the context of tax revenues. Although several timber groups supported the agreement, some timber interests were concerned that they would be pressured to participate in the heightened voluntary forestry measures or they would become a target of citizen suits under the ESA (*Minutes S. State Feb. 9, 2005*). Given that the program is voluntary; however, it is likely that only companies with potentially significant ESA exposure would partake in the program to obtain incidental take coverage.

State Resident Cultural Considerations: Some ranchers and loggers expressed concerns that the agreement would impact their livelihood (R. Barker, 2004b). The primary opponents to the agreement were individuals that believed the agreement would encroach on their private property rights and interfere with their way of life. With the exception of the potential loss of grazing rights, there is little evidence to support this conclusion. The timber program and habitat programs are voluntary; therefore, it is unlikely that these provisions will result in a loss of livelihoods. The agreement actually supports water rights holders due to the carefully written provisions that provided water rights to the tribe in a manner that would not affect existing water uses. Furthermore, it preserved private landowners' use of springs and fountains without

encumbrance by the tribe on private lands, and retained fifty-percent of the quantity of springs on public lands for non-tribal users such as ranchers (“Term Sheet,” 2004). The grazing leases if discontinued upon expiration appear to be the only provision that significantly departs from that status quo that could potentially threaten the livelihoods of ranchers.

While, the objectors expressed concerns over local control of natural resources, rural livelihoods and the economic viability of communities, the supporters held these same values but conversely saw the agreement as a way to protect Idaho communities. According to Governor Dirk Kempthorne, the agreement ““provides Idaho's water users the assurance, security and flexibility they need to address the water challenges facing their businesses and communities”” (Pegg, 2004, para. 22). Similarly, Michael Bogert stated that the agreement supports both timber and water users potentially affected by the ESA, and the local economies that rely on those resources (*S. Hrg. 108-636*, 2004).

State Sovereignty: Senator Skip Brandt expressed concern that the agreement did not protect state sovereignty (Oxley, 2005), although there was no evidence to support this assertion and most parties thought the agreement bolstered the State’s sovereignty. In contrast, Michael Bogert testified to members of the U.S. Senate that the agreement augmented the state’s sovereignty by requiring the instream flows to be issued under state water law, protecting existing state water users, and creating more certainty around future ESA actions (*S. Hrg. 108-636*, 2004).

Nez Perce Tribe: According to the tribal newsletter, the settlement was “designed to promote Native economies and culture and control of resources” (Haller, 2004b). Although, the Tribe was unable to obtain reserved off-reservation instream rights, it did secure other benefits that ultimately increased its sovereignty and jurisdiction over natural resources near or within the reservation. Through the agreement, the tribe gained access to water rights, obtained a role for greater input on the management of natural resources, and acquired additional land (Gudgell et al., 2006).

Tribal self-determination and control over natural resources:<sup>74</sup> The sub-agreements for the management of the hatcheries provided the tribe with opportunities to not only determine how to enhance the fish populations but also offered a path for tribal members to receive training, education and job placement within the hatchery system to ensure that the Nez Perce

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<sup>74</sup> See Hays V. (2006) for a more in depth argument about how the agreement increases tribal sovereignty and control of its natural resources.

have a role in determining how to manage hatchery fish (“Agreement for National Fish Hatcheries,” 2005, “MOA between the USFWS for Dworshak,” 2005, “MOA between USFWS for Kooskia,” 2005, “MOA between USFWS for Training,” 2005). The MOA that outlines the parameters of the training program also set goals for the minimum number of tribal members working at facilities, thus exhibiting a commitment to ensure greater tribal involvement (“MOA between USFWS for Training,” 2005). The Dworshak portion of the agreement also establishes an intergovernmental board of representatives appointed by each party to create the 200 KAF operational plan to augment flows with the Nez Perce representative serving as Chair (“MOA Between the Nez Perce Tribe, The United States Army,” 2005). Together, these actions bolstered the Tribe’s role in managing its natural resources (Haller, 2004a, 2004b; Hays V. (Ti), 2006). Additional actions increasing tribal control over natural resources included:

- The transfer of ownership of 11,297 acres of BLM land within the reservation to be held in trust. The land transfer was equal to 11% of the tribal land held in trust or fee on the reservation, resulting in a significant increase in land controlled by the Tribe within the reservation boundaries (Haller, 2005a).
- The agreement not only recognized the quantity of water that the tribe could use for on-reservation purposes but also recognized the right of the tribe to control that water and determine how it would be administered (Haller, 2004b).
- The habitat as well as fisheries and economic development funds will enable the tribe to exercise their discretion to recover salmon and/or increase the tribe’s economic and jurisdictional base, depending on how it chooses to spend the money. At least \$50 million can be used for land or water purchases, habitat restoration, “fish production, agricultural development, cultural preservation, and water resource development” which could increase tribal control while improving reservation economies (“Term Sheet,” 2004, sec. 1B).
- The water and sewer systems will greatly improve conditions within the reservation, ease housing shortages and encourage economic development (Haller, 2004a, 2004b; Hays V. (Ti), 2006).
- The agreement to manage the remaining un-transferred BLM lands within the reservation also expands tribal authority (Hays V. (Ti), 2006).

These various provisions in the agreement increase Nez Perce self-determination and sovereignty over natural resources, while providing opportunities for economic development within the reservation.

Nez Perce Cultural Considerations: The agreement provides cultural benefits and protections for the Tribe. First, the transfer of aboriginal land and provisions to recover salmon, protects the Nez Perce's cultural identity, which is still strongly tied to both (Hays V. (Ti), 2006). Similarly, the recognition of the Tribe's springs and fountains claims on federal lands, despite waiving those on private lands, preserves the 1863 treaty right to access springs and fountains for cultural and stock-watering purposes (Haller, 2004a, 2004d). Secondly, the hatchery MOAs establish public outreach and employee training programs about the Nez Perce culture and the fisheries as a tribal resource ("Agreement for National Fish Hatcheries," 2005, "MOA between USFWS for Training," 2005). Thirdly, cultural resources are included as a consideration for flow operations in the MOA for the 200 KAF of flow augmentation for Dworshak Reservoir ("MOA Between the Nez Perce Tribe, The United States Army," 2005).

As shown from this discussion, overall this agreement carefully balances the diversity of interests in an attempt to support the livelihoods and culture of both the Tribe and local communities. Although there were tradeoffs, ultimately the agreement bundled together various benefits to attempt to create a solution that all parties could live with while minimizing harm.

### **8.5.5 Environmental Sustainability**

Environmental Impacts: There is no indication that the agreement creates any new environmental problems; rather, it seeks to address existing issues associated with fish recovery including habitat. However, in order to come to an agreement, there were many significant issues relating to the fish that were not addressed including: the operations of the Hells Canyon Complex (owned by IPCo) and Lewiston Orchards Irrigation District (BOR) to minimize impacts on fisheries, and the larger ongoing dispute over fish passage on dams on the lower Snake River (Haller, 2004a). The agreement did begin to address water quantity, water quality, and habitat to support fish on the upper main stem of the Snake River and in the Salmon and Clearwater Basins (Strack, 2006). Therefore, while the agreement did not deal with all of the major environmental concerns it did address some of the issues as outlined below.

Flow Augmentation: The State of Idaho reauthorized its program allowing BOR to use up to 427,000 acre-feet of stored water for flow augmentation for listed salmon and steelhead for a period of 30 years and authorized BOR to acquire an additional 60,000 acre-feet of natural

flow water rights for 30 years. The authorization for this extended period of time reduced the uncertainty that the program would be discontinued under state law and the water left unprotected, and thereby increased the likelihood of BOR being able to obtain the water to meet ESA requirements (Strack, 2006; U.S. Army Corps of Engineers, U.S. Bureau of Reclamation & Bonneville Power Administration, 2007). However, it should be noted that the water for flow augmentation is subject to water availability from year to year and the ability for BOR to find willing lessors (Haller, 2004g). The agreement also authorizes the use of 200,000 acre-feet of water from Dworshak Reservoir to augment flows and cool the lower Snake River during the months of August and September to help the migration of Chinook and steelhead (“Term Sheet,” 2004; U.S. Army Corps of Engineers, U.S. Bureau of Reclamation & Bonneville Power Administration, 2007). However, there is not a consensus on whether flow augmentation actually benefits the fish and the program has been criticized as not being scientifically sound (Independent Scientific Advisory Board, 2003; Rudolph, 2003). See Feasibility/Realism and Satisfaction/Fairness for further assessment of the flow augmentation program.

*Minimum Instream Flows:* The agreement required the Idaho Water Resources Board to establish instream flows in the Salmon and Clearwater River Basins for both habitat and stream channel maintenance. Prior to the agreement, minimum flow water rights had been established for approximately eighty stream reaches statewide; thus, the addition of 205 instream flow water rights was a significant accomplishment for instream flow protection in Idaho. However, most of the instream rights were established on federal lands where pressures on streams were minimal: Twenty-four of the rights were on over-appropriated streams within primarily privately owned stretches (Strack, 2006). These rights, however, are subordinated to all future DCMI uses as well as some future non-DCMI development and all existing uses (“Term Sheet,” 2004; Strack, 2006). Biology was not the only or necessarily the primary factor in quantifying these rights as cultural and economic components were also considerations. Flows were established in areas significant to the tribe within the Salmon and Clearwater River Basins and the level of protection was based on the potential impacts to existing water users. For example, flows on federal lands in wilderness areas had the best instream flows and allowed for limited future development, while streams on private and state lands had lower instream flows and allowed for greater future development (Haller, 2004a, 2004b; “Term Sheet,” 2004). However, on the 24 “B-List” streams that were already over-allocated and degraded, the parties agreed to set instream flows and additional actions to improve habitat with the input of local landowners (Haller, 2004a; “Term Sheet,” 2004), and any water needed for instream flows would have to be

obtained through voluntary means by the state (“Term Sheet,” 2004; Strack, 2006). In addition to these activities, which are focused primarily in the Salmon and Clearwater basins, the agreement also decreed the minimum instream flows as provided in the Swan Falls agreement to be held by the Idaho Water Resources Board (Haller, 2004a; “Term Sheet,” 2004).

*Habitat Protection and Restoration:* The agreement creates a Section 6 cooperative program through the State of Idaho that allows landowners to voluntarily perform certain actions in order to obtain protection from incidental take liability (U.S. Army Corps of Engineers, U.S. Bureau of Reclamation & Bonneville Power Administration, 2007). The program specifically targets timber activities to improve riparian habitat in the Salmon and Clearwater basins as well as habitat and flows on B-list developed streams (Haller, 2004a; “Term Sheet,” 2004). The timber provision creates a cooperative agreement that insulates landowners from incidental take if they undertake certain silviculture management practices (“Term Sheet,” 2004; Strack, 2006). The 30-year program uses an adaptive management approach that targets management of forests near riparian areas and activities related to roads with a focus on recovery and not just take avoidance. For the programs on B-List streams, the State agreed to develop work plans in conjunction with the local communities to restore habitat and improve fish passage, with the goal that some of these work plans will turn into Section 6 cooperative conservation agreements that will insulate participating parties from incidental take (Strack, 2006). In addition, the agreement creates a habitat fund that can be used to fund associated habitat improvement projects (Haller, 2004a; “Term Sheet,” 2004). Whether the provisions incorporated into the agreement actually make substantial improvements for fisheries is difficult to assess – particularly from the different viewpoints provided by the parties. The ESA provisions that reduce the uncertainty for the next 30 years while beneficial to the state and resource users, from the tribe’s perspective, they either “improved marginally or maintained the status quo in their respective geographic areas in ways that made them an acceptable part of the overall settlement” (Gudgell et al., 2006, p. 592). See Feasibility/Realism and Satisfaction/Fairness.

The parties did take actions to ensure that the environmental problem would not be shifted. Northern Idaho expressed concerns that the State was protecting southern Idaho irrigation interests at the expense of northern Idaho, and that the burden of providing water for ESA listed fish would be shifted. The Governor quelled the concerns of north Idaho by publically stating and providing written documentation that the agreement would not require more water from north Idaho to protect downstream fisheries (Russell, 2005b).

#### 8.5.5.1 Natural Contingencies

The parties did take some natural contingencies into account. First, the agreement does not require that 487,000 acre-feet of water be released for flow augmentation, rather it authorizes up to a maximum 487,000 acre-feet of water for flow augmentation. Therefore, BOR is not in violation of the agreement if they cannot provide the water. In addition, if the flow augmentation program is not working, then the U.S. is allowed to renegotiate parts of the agreement under certain conditions (Haller, 2004g). Various other provisions of the agreement, particularly, the sub-agreements also incorporated provisions for natural fluctuations.

*Dworshak Management Agreement:* The Memorandum of Understanding (MOU) for the management of the 200KAF for the Tribe provides several options in the event that the 1,535 feet elevation of reservoir storage is not met including that the Tribe can use water from available storage should the reservoir fail to reach 1,535 feet by June 30<sup>th</sup>. The MOU includes other contingencies such as reserving water for the Tribe's use should the operating elevations change or if the ESA flow augmentation program is eliminated. It also recognizes that the Corps may have to operate the project differently to respond to emergencies or take actions to preserve life or property. However, the right to use the 200 KAF is for the life of the project, so the MOU contains provisions that assure the Tribe that the Corps will provide the water ("Agreement for Water Use in the Dworshak Reservoir," 2005).

#### 8.5.5.2 Projected Resource Use

The resource use changes are positive environmental developments. The 60,000 acre-feet of natural flow rights were acquired from farmers that had used high-lift water pumps to irrigate, a venture that was unprofitable due to the associated high power costs (Strack, 2006). In addition, land was transferred from the BLM to the Tribe; however, there was no indication that the use of the land would change as the tribe indicated they would honor the existing grazing leases (*Minutes S. State Feb. 9, 2005*).

#### 8.5.5.3 Consideration of Environmental Concerns

In addition to the Tribe's claims for consumptive water rights, the Nez Perce were also concerned with obtaining instream flows to support fisheries and corresponding habitat. The Tribe was the primary group involved in the mediation that was interested in curbing the decline of fish as most environmental groups did not have water rights and, therefore, first saw the agreement when it was released to the public (R. Barker, 2004b). While environmental groups were not involved in the negotiations, they did play a role once the Term Sheet was released,

although this role was muted. Idaho Rivers was supportive of the Nez Perce Tribe and noted that while there were some provisions for fisheries, it was not an agreement that would lead to salmon recovery because it did not address the lower Snake River dams (Boone, 2004). Similarly, Save Our Wild Salmon – which advocates on behalf of fisherman and other environmental groups – noted that the group would have to consult with the Nez Perce before taking a position on the agreement (R. Barker, 2004b). Later, Pat Ford of Save Our Wild Salmon, said that the agreement was insufficient to improve conditions for salmon and steelhead, but rather was more of the status quo since it did not appreciably increase the amount of flow augmentation water or remove the lower Snake River dams (O’Bryant, 2004). Ford was critical of the 427,000 acre-feet flow augmentation, stating that science suggested that recovery would require 1.5 million acre feet. In addition to criticizing the science and maintenance of the status quo, Ford also expressed concerns about Idaho’s greater role in managing ESA-listed species, stating that it had a poor history of working to restore salmon and fishing economies (Pegg, 2004). Therefore, while the conservation groups were not active in opposing the agreement due to their respect for the Tribe, they did make it known that the settlement would not substantially improve conditions for fish.

The federal government was also an environmental advocate due to its responsibility under the Endangered Species Act to conserve species and protect tribal fisheries. In addition, it was in the best interest for agencies such as the Bureau of Reclamation and NOAA to come to an agreement that would protect fish while also reducing the need to curb irrigation water withdrawals. Therefore, the federal government was active in obtaining the right to lease up to 487,000 acre feet annually of water for flow augmentation for 30 years, in addition to the habitat restoration and protection measures, and the designation of minimum instream flows (Klee & Mecham, 2006). Environmental interests, therefore, were well represented; however, they were not represented by parties with a narrow interest in environmental protection, which ultimately led to environmental concessions as other parties had more “needs” to negotiate.

Although, the conservation groups had a limited role in the actual settlement and were not active opponents during ratification, the groups took an active role in litigating the 2005 Upper Snake River Biological Opinion from NMFS. The BiOp was an essential element of the agreement since a jeopardy opinion could have resulted in termination of a section of the agreement (Haller, 2007).

## 8.6 Clarity of Outcome

The parties gave themselves a specific deadline of March 31, 2005 to ratify the Term Sheet, develop management agreements, determine the value of the BLM lands to be conveyed, and pass the needed state and federal legislation (Haller, 2004b). The tasks went as planned with little indication that there were significant implementation difficulties aside from the BiOp. Furthermore, after ratification, the final steps for implementation needed to trigger the waivers were completed within two years, although there were not specific deadlines as these steps required certain actions by the court which were beyond the parties' control (Klee & Mecham, 2006; "Statement of Findings," 2007).

Many of the performance standards and baseline conditions were specified in the documents that were developed between the time that the Term Sheet was released and before it was ratified. As part of the process for the Section 6 Habitat program in the Upper Salmon, Little Salmon, and Clearwater River Basins, the parties developed work plans outlining "limiting factors, aquatic goals, and implementation strategies for habitat actions" ("MOA between the State of Idaho for Section 6," 2005, p. 4). The work plans included baseline information and suggested concrete objectives within stated timeframes for each implementation strategy to address the identified limiting factors.

Similarly, the MOA that defined the tribe's management role with the National Fish Hatcheries (NFH) created clear objectives for staffing. "The goal for the combined Dworshak NFH and Kooskia NFH workforce after 10 years is 30%, consisting of Tribal Members and the eight Tribal Employees, and after 15 years is 50%, consisting of Tribal Members and the eight Tribal Employees" ("MOA between USFWS for Training," 2005, p. 3). The details of the operations for Dworshak Reservoir for flow augmentation were also specific, identifying the parameters of the operations as well as what must be determined annually. For example, "the schedule, rate and temperature of water releases shall be determined in accordance with the operation plans" and the releases will be measured at the powerhouse, spillway, or regulating outlet, depending on where the water is released ("Agreement for Water Use in the Dworshak Reservoir," 2005, p. 4). Furthermore, the agreement specified that the Tribe is entitled to the water stored between elevations 1,535 feet and 1,520 feet above the National Geodetic Vertical Datum.

### *Discrepant versions of outcome*

There were no indications that there were differences in interpretation of the settlement by the parties. The parties that were part of the negotiation conveyed a consistent public

message and it was clear from the numerous news articles about the agreement that the parties were well aware of what needed to be accomplished.

#### *Perceptions of Ambiguity*

Opponents to the agreement thought it was ambiguous: notably, most had not been involved with the negotiations and seemed to be receiving their information from the Pacific Legal Foundation or the Farm Bureau. The Pacific Legal Foundation's Russell Brooks stated that provisions of the agreement were "open-ended and ambiguous" (Associated Press, 2004, line 9). Judy Bartlett of the Farm Bureau expressed concern that the agreement would lead to further litigation because it was "so open and vague" (*Minutes S. State Feb. 9, 2005*, p. 7). The Water Rights Coalition said the agreement contained "Ambiguous Riparian Management Measures [that] could drastically reduce timber harvests" (Simmons, 2004, para. 14).

In addition to the parties that opposed the agreement, one law review article pointed out "The state must also identify other flow-limited streams, take measures to augment instream flows, and undertake other habitat improvement projects, although these commitments are quite vague" (Blumm et al., 2006, p. 1201). In reviewing the referenced part of the agreement, the article is correct that these actions are vague; however, the specificity of the work plans for the B-list streams is impressive and likely to take a number of years to complete. In light of the other provisions in the agreement, this may imbue some needed flexibility.

### **8.6.1 Feasibility/Realism**

#### *Legal feasibility*

The Term Sheet was consistent with court rulings and existing legislation; however, as discussed under political feasibility, the agreement did require State Legislation in order to reauthorize and change certain provisions of the state flow augmentation program. In addition, the BiOp associated with the agreement was challenged in court on legal grounds, an outcome that was not unexpected by the parties.

While the agreement had to be written within existing laws including complying with the Endangered Species Act, the parties had some flexibility in that all three sovereigns were active in the negotiations. For example, since BOR must follow state law in water allocation (U.S. Bureau of Reclamation, 2007), the flow augmentation program had to be legal under state law. The parties were able to address this issue by drafting state legislation reauthorizing the flow augmentation program for 30 years (*Statement and Fiscal Note H. 153, 2005*). At the federal level, there were concerns that the agreement and legislation would modify the

Endangered Species Act; therefore, the Senate Committee on Indian Affairs drafted an amendment to the bill to address their concerns. When the agreement reached the floor, however, Senator Cantwell expressed concern that the agreement may modify consultation requirements under ESA section 7 and requirements of the parties under the Clean Water Act. Senator Cantwell's remarks were specifically in concern to the impact of the agreement on downstream states, whose interests had not been represented in the negotiations. Senator Campbell responded that the Act and agreement do not modify any of the federal environmental laws or remedies available to any person under those laws (*Snake River Act of 2004, Cong. Record*, 2004). The clarification of the interaction between the agreement and federal law likely stymied some potential avenues for legal challenges.

The Upper Snake River BiOp was a challenge for the parties as there was no way to prevent individuals that had not been a part of the settlement from litigating the BiOp in court. In addition, since regulations allow for a biological opinion to be revised if conditions change, the parties addressed this problem by allowing parties to terminate the applicable section of the agreement (Klee & Mecham, 2006).

The Shoshone-Bannock Tribe threatened to sue if the Nez Perce Water Rights Settlement was ratified by the legislature, claiming that the deal intruded on the water rights of the Lemhi-Shoshone within their aboriginal territory (D. Ferguson, 2005). The Shoshone-Bannock tribe later filed objections to the Nez Perce claims associated with the agreement, but eventually dropped them when the State agreed to consult with the Shoshone-Bannock on changes to minimum instream flows and habitat projects that are within their aboriginal and disputed aboriginal fishing grounds (Associated Press, 2005d; D. Ferguson, 2005).

#### *Political Feasibility*

The settlement has thus far withstood political scrutiny. Supporting this assertion is the fact that in 2007, the Secretary of Interior published findings in the Federal Registrar that all of the requirements necessary for the waivers to go into effect were complete. Specifically, the agreement required that: the court issue a final decree, the U.S. and tribe find that the implementation was consistent with the terms of the agreement, Congress approve the agreement and necessary funds, the tribe and State ratify the agreement, and issuance of the Upper Snake BiOp and all other documents required by the agreement had occurred ("Statement of Findings," 2007). While the settlement was difficult politically during ratification, with the exception of the BiOp, there was no indication that the other implementation actions would be politically difficult.

Passage of Legislation: The federal and state legislatures passed the needed legislation to implement the agreement. For more information on the ratifying legislation see the Ratification section. In addition to the legislation passed to ratify the agreement, the state legislature passed HB 153 authorizing the flow augmentation program (“Idaho Water Users,” n.d., *Statement and Fiscal Note H. 153*, 2005)<sup>75</sup> and HB 154 approving state minimum instream water rights (*Statement and Fiscal Note H. 154*, 2005).<sup>76</sup> As mentioned previously, the agreement did not have full political support. In addition, all parties had to make concessions that made certain parts of the agreement difficult to justify to constituents. Not all residents of the State or members of the tribe were happy with the agreement; however, political leaders realized that it was a better deal than the risks posed by litigation. One academic observer noted that prior to the Judge Wood ruling, negotiation was not possible because the uncertainty surrounding the legal theories made it so that any solution would have been difficult to justify to constituents, and therefore, risky politically. After the court ruling, the parties had a benchmark to negotiate and the uncertainty and risks were more clear (Cosens, 2006).

The State of Idaho: Michael Bogert, who participated on behalf of the state, noted that the parties “were able to preserve their legal positions on future issues while at the same time settling their differences,” which allowed the parties to justify the settlement to constituents (Bogert, 2006, p. 696). The parties were able to come to a consensus without conceding certain positions that would be integral to other future efforts outside of the agreement.

All of the parties to the Agreement were able to remain true to their fundamental beliefs and value systems while compromising on legal issues that would usually require drawing a line in the sand...Governor Kempthorne (and future Idaho Governors), and the water user community, can forever remain dubious of flow augmentation from the Upper Snake River Basin as a requirement of the Endangered Species Act. The Nez Perce Tribe can protect its long-held position on salmon restoration-including the breaching of the four lower Snake River dams-and yet partner on habitat restoration projects with new constituencies who hold opposite views on how fish are to be protected. And Idaho's timber industry can fiercely defend the State's Forest Practices Act while voluntarily doing more to achieve ESA protection. (Bogert, 2006, pp. 699–700).

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<sup>75</sup> Senate 3/16/2005, 29-5-0; House 03/02/2005, 55-12-3 (“Idaho Water Users,” n.d.).

<sup>76</sup> Senate 3/16/2005 29-5-0; House 3/2/2005, 54-14-2 (“Idaho Water Users,” n.d.).

The State of Idaho did have more difficulty justifying the agreement to members in North Central Idaho, however, who were resistant to increased tribal control over resources, and concerned about the affects of the ESA provisions. Senator Skip Brandt of Kooskia (R. Barker, 2004b; Wilson, 2004), the City of Kooskia, the Farm Bureau (Haller, 2004e; Keller, 2005; Priestley, 2005; Staff, 2005; “The Nez Perce Agreement: A Legacy,” 2005), and ranchers (Scott, 2005b) were some of the opponents.

The Nez Perce: The agreement was politically difficult for the tribe. The waiver of claims to water for instream flows took away the hope of significant improvements in instream flows to restore tribal fisheries (Hays V. (Ti), 2006). According to one member of NPTEC, Rebecca Miles, “the agreement will face opposition from some tribal members... It will definitely be a challenge,” (“Our analysis of the Nez Perce,” 2006, para. 8). For example, tribal member, Owen C. Slickpoo told a newspaper that the agreement “is an outright assault on the Nez Perce. We’ve already given away too much” (McGann, 2004b, para. 6).

Instream Flows: See scientific feasibility below for discussion of how political feasibility and science were balanced to determine instream flow levels.

#### *Scientific and Technical Assumptions*

Habitat Program: Whether the habitat program is successful remains to be seen. Experience from habitat restoration programs in the Lemhi River, which the habitat program is based on, shows that pre-2001 the Lemhi Model Watershed Plan and the Upper Salmon River Basin Watershed Project had successfully completed projects. Between 2001 and 2004, the region had difficulty completing projects due to new federal requirements, the associated time required to complete technically difficult projects, and landowners that pulled out of projects (R. Barker, 2004a). Since the Lemhi was used as an example for the other habitat work plans (*Minutes S. State Jan. 14, 2005*), the habitat programs’ effectiveness will rely on the extent that landowners are dedicated to participating in the program and have the patience to complete complex projects.

The parties did put forth significant efforts to ensure that the habitat program was based on science. The MOA for the Section 6 Habitat Program requires monitoring reports for each project and that all funding requests include success criteria and define how the project achieves the goals of the respective program. As part of the process for the Upper Salmon, Little Salmon, and Clearwater River Basins, the parties consulted with “local technical teams, advisory groups and other stakeholders” to develop work plans outlining “limiting factors, aquatic goals, and implementation strategies for habitat actions” (“MOA between the State of

Idaho for Section 6,” 2005, p. 4). In addition, the MOA outlines criteria for the Committee to consider in making their recommendations and suggests that certain projects would be precluded based on legal or institutional feasibility, prohibitive costs or the geographic area. If projects meet these initial criteria, then they are to be ranked based on the expected benefits to the fishery, as well as the “success and cost variables, likelihood of successful implementation, total cost (capital, operations, maintenance, and monitoring), and land and water requirements” (p. 6).

*Scientific and Technical Feasibility of Instream Flows:* The selection of the 205 streams and corresponding minimum streamflows were partially, but not strictly, informed by science; rather, the science was balanced with political feasibility. The 205 streams were selected by the past, present, and future capacity for a stream to provide habitat for salmon, as well as tribal oral histories of areas important to the tribes. The Tribe, Idaho Department of Fish and Game, USFWS and NOAA Fisheries all participated in the identification of the stream segments and a combination of resources were utilized to piece together information. In some instances data was insufficient and professional opinions of scientists were utilized. Political acceptability played a major role in the final determinations and quantifications with the parties basing the level of streamflow protection less on science and more on land ownership, with less stream protection where political opposition would be greatest. The land statuses were divided as follows:

(1) drainages with predominantly state and private land status; (2) drainages with predominantly federal, non-wilderness land status; (3) drainages with predominantly federal wilderness or wild and scenic river status; (4) special area streams with high value for fish habitat or cultural/spiritual value for the Nez Perce. (Cosens, 2006, p. 742).

In addition, streams were divided into A list and B list streams: on the 24 B List streams where conflict potential was greater due to private property ownership, over-allocation, and degraded habitat, an additional step was taken to consult with the local communities. On A list streams, the quantity was set by determining or modeling the natural flow and corresponding exceedance values using a methodology developed by U.S. Geological Survey. Not all streams had gauging instruments, so models were often used. On streams where data was unavailable and flow was highly uncertain, the parties agreed that if data became available in the future, the instream flows could be changed accordingly. A consultant was hired to determine the extent of consumptive use based on estimates of diversions and return flows using claims and reports

from the still un-adjudicated basins. After the consultant generated a list of projected water rights, he then determined the amount of stream depletion by estimating crop use using alfalfa and pasture water requirements to estimate efficiency. While this estimated overall return flow, and therefore, depletion, it did not account for potential stream dewatering below diversion points. Therefore, the stream impact was estimated by doubling the consumptive use, or the diversions minus return flow estimates. The parties then had to determine how much water was needed to support fish habitat for salmon. Biologists used the computer model, Physical Habitat Simulation, to determine habitat based on various discharges. The parties set the flows to correspond with less habitat as conflict potential increased. The following exceedence levels of the estimated unimpaired flows were set: 50 percent for state and private lands; 40 percent for federal non-wilderness; 30 percent for federal wilderness or wild and scenic rivers; and case by case for streams with high-value habitat or special significance to the Tribe. However, exceedence levels did not take into account the state's desire to protect existing water users and future development. Therefore, in order to ensure political acceptability, the instream flows were subordinated to existing uses, future DCMI use; and a limited amount of non-DCMI development, which varied based on land type (Cosens, 2006).

Forestry: Due to the uncertainty associated with predicting how various restoration and management measures affect habitat, the parties agreed to an adaptive management approach for the Section 6 forestry cooperative agreements (Cosens, 2006).

Flow Augmentation: In the years preceding and following the agreement, there was much public debate in the scientific community over the efficacy of instream flows versus dam removal. Since dam removal was not under consideration, the only discussion was about the efficacy of flow augmentation. In 2003, scientists serving in a science advisory role for management of the Columbia River system stated that the correlations between flow and survival needed further study as there was too much potential for other explanations and the data was inconclusive (Independent Scientific Advisory Board, 2003). While other scientists commented on the data, it was clear that the efficacy of flow augmentation was worth reevaluating (Rudolph, 2003). To accommodate concerns, the agreement allows that if flow augmentation is no longer supported by science, the parties can terminate this portion of the agreement (*Minutes S. State Jan. 14, 2005*).

Tribal Consumptive Uses: From a technical standpoint, the parties realized that most of the tributaries were already fully appropriated and would not be available to fulfill the 50,000 acre-feet for the reservation. The parties looked at groundwater but most aquifers were

declining. After exploration of these alternatives, the parties, along with hydrologists, identified both surface and groundwater sources, primarily from the Clearwater River and aquifers hydrologically connected to the Clearwater to ensure that water was available to meet the tribal consumptive use needs (Strack, 2006).

*Biological Opinion:* The approval of the Upper Snake River Biological Opinion for ESA listed Spring Chinook, Fall Chinook, Steelhead, and Sockeye was the greatest obstacle to ensuring that the agreement remained intact. The parties were well aware of the potential difficulties with the BiOp and incorporated two provisions to prevent the BiOp from folding the entire agreement. First, they required the consultation to occur separate from the Columbia River Power System (lower Columbia) Biological Opinion. In addition, they authorized the parties to terminate the flow augmentation component (but not other components) should a jeopardy opinion be issued. The parties had worked with the Service and a no jeopardy biological opinion was issued on March 31, 2005. Several environmental groups, who had not been a part of the settlement negotiations, filed suit challenging the separation of the Upper Snake River from the Columbia River Power System. Judge Redden struck down the BiOp and allowed it to proceed separately but required an analysis of the cumulative impacts of all actions throughout the entire system on the listed species. The State did not want a collaborative process for the remand of the BiOp because the lower river tribes and states would then have had the opportunity to provide input. Interestingly, the BiOp required parties to have a continuing relationship: The State Attorney General's Office noted that the federal government, the Nez Perce Tribe, and water users had been supportive of the BiOp and cooperative with the State. The State was hopeful that they would be able to obtain a no jeopardy opinion, but noted that they could attempt to appeal to the U.S. Supreme Court, or obtain an exception through Congress (*Minutes on the Upper Snake*, 2006). By 2007, Idaho's congressional delegation attempted to pass a rider to an appropriations bill that required federal agencies to implement the 2005 biological opinion, previously struck down by Judge Redden. The lawmakers asserted that the purpose of their actions was to protect the Nez Perce Water Rights Settlement Agreement, which relied on obtaining a no jeopardy opinion (R. Barker, 2007a).

### **8.6.2 Public Acceptability**

The position of supporters is well covered in both the Perceived Economic Efficiency section and the Satisfaction section. Therefore, the dissent is primarily discussed here.

There was not a single public opinion on the agreement; but rather as with all policies, there were supporters and opponents (Russell, 2005b). Support for the agreement was split mostly based on geography: North Central Idaho generally opposed the agreement while southern Idaho tended to support it (Associated Press, 2004; Chmelik, 2005; Patrick, 2005; Russell, 2005a, 2005b). Southern Idaho mostly thought that it was fair, as well as feasible legally, politically, and technically. Conversely, those in North Central Idaho that had interests near the reservation, tended to have concerns about the agreement (Associated Press, 2004; Chmelik, 2005; Patrick, 2005; Russell, 2005a, 2005b) and criticized its feasibility on all three aspects.

The agreement had a substantial number of supporters in addition to the Southern Idaho irrigation, municipal, and industrial interests that were signatories to the decree (*In re SRBA, Consent Decree*, 2007, p. Attachment 1; McGovern, 2006). The Idaho Water Users compiled a list of a number of organizations that supported the agreement, many of which were trade associations not part of the consent decree (Idaho Water Users Association, 2010).<sup>77</sup> While it cannot be determined if the cities in the north all opposed the agreement, or even were part of the mediation, it is clear that southern Idaho was the stronghold of support (Patrick, 2005; Scott, 2005a, 2005b). Out of the parties that were participants in the SRBA, only one of the 18 North

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<sup>77</sup> According to the Idaho Water Users Association, the following organizations supported the agreement:

Committee of Nine, the Idaho Water Resource Board, the Port of Lewiston, the City of Lewiston, the Ada, Bingham, Bonneville, Canyon, Elmore, Fremont, Madison, and Twin Falls county Farm Bureaus, the Idaho Association of Commerce and Industry, the Idaho Grain Producers Association, the Idaho State Grange, the J.R. Simplot Company, the Intermountain Forest Association, the Potato Growers of Idaho, the Milk Producers of Idaho, the Idaho Eastern-Oregon Seed Association, the Payette River Water Users Association, the Boise Project Board of Control, the Lewiston Chamber of Commerce, the Lewiston Orchards Irrigation District, the Twin Falls Canal Company, the North Side Canal Company, the Idaho Dairymen's Association, the Idaho Hay and Forage Association, the Idaho Mint Growers Association, the Potlatch Corporation, the Idaho Cattle Association, the Idaho Ground Water Appropriators, the Idaho Weed Control Association, the Idaho Sugarbeet Growers Association, the Idaho Cooperative Council, the Far West Agribusiness Association, the Wilder Farm Labor Committee, the Greater Idaho Falls Chamber of Commerce, the Food Producers of Idaho, the Wilder Irrigation District, the Idaho Wool Growers Association, and the Nez Perce County Commissioners. (Idaho Water Users Association, 2010).

Central Idaho cities signed the consent decree,<sup>78</sup> whereas almost all of the cities that were parties in the SRBA from southern Idaho signed the consent decree: 44 total (*In re SRBA, Consent Decree*, 2007, p. Attachment 1; McGovern, 2006). The accusations that the agreement primarily benefitted Southern Idaho; therefore, are unsurprising given the lack of support in the North Central region. See also Unanimity and Consensus.

The public that testified from North Central Idaho mostly support this assessment of the region's feelings towards the agreement. Several claimed that they had not been a part of the negotiations, and it appeared that the perception that the process was not fair, spilled over to their judgment about the merits of the settlement. For example, Pat Holmberg of the Idaho Independent Miners had said, "We believe that anything decided in secret is not good for the people... Those of us in North Central Idaho kind of feel like the stepchild at the family reunion" (Russell, 2005b, para. 19). Angie Lee Morrow of the North Idaho Citizens Alliance, criticized the agreement stating that it allows "a small party of people to have what they want at the expense of all of our citizens" (para. 19). According to one newspaper, Idaho State Representative George Saylor received "pretty volatile" e-mails from opponents of the agreement, some of whom see it as a threat to property rights or an expansion of the Nez Perce Tribe's influence. "They're talking about people getting shot" (Russell, 2005a, para. 17). The newspaper attributed most of the opposition to the historical tensions between the Tribe and state residents near or within the reservation about non-related issues.

The public in North Central Idaho objected to a number of provisions related to the tax implications of the land transfer, private property rights, the boundaries of the reservation, and the potential purchase of additional land by the Tribe. Some of the groups that opposed the agreement included the Idaho Farm Bureau, Idaho County Property Owners Association; Idaho County, Valley County, and Bannock County Commissioners; Riggins City Council; City of Kooskia; and the Water Rights Coalition (Edwards, 2005). In addition, although the North Central Idaho Jurisdictional Alliance decided not to take a position on the agreement, many of its members opposed the settlement, in part due to the lobbying efforts of the group's Chairman (Walker, 2004). The Farm Bureau also opposed the agreement stating that it conflicted with the

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<sup>78</sup> At least several of cities eventually opposed the agreement including the cities of Kooskia, Nezperce, and Grangeville, and the Clearwater, Idaho, Lewis and Valley counties (McGann, 2004a). Another source noted that in addition to Grangeville and Kooskia, Kamiah, Stites, Orofino and Peck opposed the agreement, while Lewiston, Lapwai, Kendrick and Julietta supported it (*Minutes House Res. Feb. 23, 2005*).

Farm Bureau's policy of opposing: flow augmentation, the administration of the ESA in Idaho by NOAA, recognition of instream flows, limiting forest practices, and authorizing greater minimum instream flows without new storage (Haller, 2004e).

The Farm Bureau as one of the more politically powerful organizations opposing the agreement brought forth many of the arguments that parties cited; therefore, the Farm Bureau's dissension is summarized in depth here, which demonstrates that the group did not think it was legally or politically feasible or fair.

The Farm Bureau had 6 months to review the agreement before it held a meeting in December of 2004 where about 75% of the delegates from local Farm Bureau organizations voted to oppose the agreement. The Farm Bureau asserted that it was problematic for private property rights, agricultural economies, and democratic principles. Referring to the land transfer and instream water rights, The Farm Bureau stated that the "Tribe was granted sweeping concessions" and proceeded to list 12 benefits to the tribe which include land, money, and water. As far as benefits of the agreement to the State, the Farm Bureau lists only that it allows the State to retain sovereignty over water and eliminates the need for parties to engage in expensive litigation. However, from the Farm Bureau's perspective, these advantages were outweighed by the agreement's taking of private property rights, which in turn impacted rural communities, landowners, ranchers, farmers, and taxpayers.

The Farm Bureau's January 2005 news magazine had three articles dedicated to discussing the Farm Bureau's opposition to the agreement with a cover page headline "Water Agreement Threatens Private Property Rights" (Keller, 2005; Priestley, 2005; "The Nez Perce Agreement: A Legacy," 2005). One article was critical of the agreement's legal language and stated that the Farm Bureau hired two attorneys to interpret the agreement, which brought forth "several questionable compromises" (Priestley, 2005, p. 33). The article written by the President of the Farm Bureau expressed concern over private property rights, and opposed the agreement for a variety of other reasons including that the agreement: 1. authorized instream flows without authorizing new storage; 2. appeared to require more stringent regulations than the Idaho Forest Practices Act (IFPA); 3. required reauthorization of flow augmentation; 4. "takes grazing rights from 43 Idaho ranchers and places new regulations on timber harvesting"; 5. takes private property by requiring one acre of land for every 300 feet of stream requiring a buffer (p.33). Some of the Farm Bureau's arguments are explained in more detail below:

*Forest Practices:* The Farm Bureau first challenged the assertions that the forest practices program will be voluntary and protect landowners from take liability, noting that it would not insulate them from third-party citizen suits.

*Ranchers:* The Farm Bureau stated that allotment fees would increase from \$1.43 per animal unit month to \$18 per animal unit month and the settlement of disputes over grazing allotments would occur in tribal court. In addition, the Tribe could elect not to renew the grazing leases, leading to a loss of the allotment and the associated value to the base property, since base properties are often sold with the allotment (See Community/Cultural Feasibility).

*Irrigators:* Farmers were said to be affected in instances where they leased water since rental charges set to increase from \$9 per acre-foot in 2005, to \$14 in 2012, and \$23 per acre foot from 2023 to 2030. Furthermore, water users would be competing with the federal government for water, and the increased cost of water may make it difficult for groundwater users to mitigate for impacts on surface water users.

*Communities:* The Farm Bureau also asserted that the agreement would affect schools, infrastructure, and communities because of reductions in timber harvests, modifications to infrastructure for fish, and the transfer of land to the tribe all of which result in less money for local government. Finally, although the federal government contributed \$193 million to the agreement, Idaho taxpayers are likely to bear the costs of compliance monitoring, and research associated with the Section 6 cooperative agreement. The Farm Bureau concluded that the costs and uncertainty associated with many of the agreement's provisions, were not worth the benefits ("The Nez Perce Agreement: A Legacy," 2005).

### **8.6.3 *Efficient Problem-Solving***

Several of the parties expressed that the collaboration resulted in new options and win-win solutions.

*Forestry:* According to Jim Riley, the collaboration between parties was unique and resulted in a new approach to managing resources by "refocus[ing] our energies and our investments on what could be possible, rather than in endless debates through the courts as to what is minimally required" (*S. Hrg. 108-636*, 2004, p. 39).

*State of Idaho:* Michael Bogert explained to the U.S. Senate that this agreement not only contained the provisions of typical tribal water rights settlements, but also

provides opportunity by setting forth a new way of going about protecting endangered species, while preserving access to state and private timberlands for our resource-based industries and the rural communities that depend on Idaho's

forests...this is an innovation in a State like Idaho 5 years ago, if we could have predicted that this would have been a possible outcome, would have boggled our minds. In this instance, there is a real possibility of a win-win for our agriculture community as well as ESA-listed fish. (*S. Hrg. 108-636*, 2004, p. 34).

Michael Bogert, later wrote of the agreement:

“the Agreement contained a level of innovation that addressed and will solve important issues. The Section 6 Endangered Species Act agreements, when implemented, will provide Idaho a program of cooperative federalism never before seen under this particular federal law...The innovations created during the negotiations to resolve these legal issues proved exceedingly difficult to abandon and left for the historical dust bin labeled ‘What Could Have Been’” (Bogert, 2006, p. 699).

Bogert emphasized that the agreement was a success because it took a more comprehensive look at the problem outside the scope of simply water rights to include the compensation in the form of land and greater natural resource control while purposefully addressing federal environmental laws. Furthermore, the use of federal funding to address the ESA disputes was also seen as a positive development to address private property and ESA tensions (Anderson, 2006).

*Federal Government:* The federal team stated that the agreement was “ambitious” because it incorporated a suite of water, land, and ESA issues to reach “unique and unprecedented solutions that proved instrumental in achieving such a comprehensive settlement” (Klee & Mecham, 2006, p. 597) and it was the “comprehensive approach [which] allowed resolution where piecemeal efforts may not have been successful” (p.629). In addition to the land transfer and funds for additional land purchases, by incorporating the ESA provisions into the agreement, the federal government was able to obtain more water and a thirty-year guarantee that it could lease the water under state law. This same component benefitted project water users who received greater certainty over the operation of the federal projects for the thirty-year period. In addition, the fish, and therefore, tribe were posited to benefit from the greater likelihood that the flow augmentation program would be implemented.

One academic observer noted that when tribal water rights target both fish and water resources, that the Endangered Species Act can play a greater role in settlement, since unlike in litigation, multiple issues can be addressed to reduce uncertainty across artificial policy lines. Therefore, the decision to pursue settlement, allowed multiple issues to be addressed in a comprehensive instead of piecemeal and potentially conflicting fashion (Cosens, 2006).

## 8.7 IV. Criteria Category IV – Relationship of Parties to Outcome

### 8.7.1 *Satisfaction/Fairness – As Assessed by Parties*<sup>79</sup>

Parties were not able to reach agreement on all issues, so some interests remained unsatisfied. The State, the Tribe, and Idaho Power Co. had wanted to come to an agreement on the operation of the Hells Canyon Complex while L.O.I.D., BOR, the State and the Tribe were unable to reach a solution for the impacts of L.O.I.D. on fisheries. These two issues were eventually addressed in different venues. Finally, the agreement does not address the damages potentially owed to the Tribe for placing Dworshak dam on the reservation. (Haller, 2004b).

*The Nez Perce*: The tribe was split on its support for the agreement and the comments of several of the representatives reveal that the Nez Perce was only partially satisfied with the outcome, seeing it as the least detrimental and most practical of the two options. According to Heidi Gudgell, the attorney for the tribe, “I’m not sure that anybody, including the tribe, thinks it’s the best deal,’... ‘It’s a reasonable alternative to many, many years of litigation” (Russell, 2005a, para. 6). Similarly, tribal leader Rebecca Miles in describing her experience in trying to determine whether to ratify the settlement said, ““Our people were really in an uproar about the settlement. I led the public meetings with our people and got chewed out quite a bit, got some nasty phone calls. I didn’t sleep well. I even had tears over it. It was such a hard time”” (Sudermann, 2006, para. 7). Nez Perce Chairman, Anthony Johnson made a similar statement to Congress, saying that the settlement “involves difficult compromises for us. Other parties have made compromises and it is the collective offerings made by all parties to which the tribe looks in examining the overall merit of the proposed agreement” (*S. Hrg. 108-636*, 2004, p. 30). Similarly, Greg Haller, who was responsible for writing the *Nez Perce Currents*, conveyed his sentiment towards the agreement. ““This settlement isn’t a celebration...Settlements rarely are”” (Ring, 2005, para. 15). While the tribe was disappointed that it was unsuccessful in obtaining time immemorial instream water rights, it was successful in securing a greater role in managing natural resources, particularly within the reservation. The tribal leadership weighed the risks and ultimately found that the benefits through the agreement were much greater than those that could be obtained through pursuing an uncertain outcome in litigation. Therefore, the settlement at least partially satisfied the tribe and was the better choice even though it did involve significant concessions (Gudgell et al., 2006).

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<sup>79</sup> There were less than 48 objections filed to the court decrees for the agreement and water rights (Strack, 2006).

State of Idaho: The state appeared to be pleased with the outcome of the settlement, and many who supported the agreement recognized that it was the best choice for the state even if it contained some provisions that were not ideal (Boone, 2005a; Oxley, 2005). As David Hensley, attorney for Governor Dirk Kempthorne, said, “In order to understand the benefits of the agreement, look at the downsides of not having an agreement. The uncertainty and the costs associated with future litigation over this issue are tremendous” (Russell, 2005a). State representatives involved in the negotiations were satisfied and felt they had been successful in protecting Idaho’s interests (Bogert, 2006; *Minutes Expanded Nat. Res. Oct 14, 2004, Oversight Hearing*, 2008, *S. Hrg. 109-507*, 2006; Strack, 2006). According to Kempthorne, the state achieved all of the objectives that it had set out to when beginning negotiations including: certainty and protection of state water rights in the context of federal laws and reserved rights; state control over water resources; and ESA protections for timber and agricultural interests. Michael Bogert, representing the Governor’s office, stated “In this instance there is a real possibility of a win-win for our agriculture community as well as ESA-listed fish” (*S. Hrg. 108-636*, 2004, p. 34). Representative Saylor stated that, while some people could be negatively affected by the agreement, overall it was beneficial for the state and the negative impacts are likely overstated (Russell, 2005b). While the state was mostly satisfied with the agreement, there were individuals and sectors that were not.

Forestry: The forestry sector was mostly pleased with the agreement since they succeeded in protecting their current forestry practices while obtaining a voluntary program that would shield them from take liability. Jim Riley of the Intermountain Forest Association commented that the program was not perfect but that it was better than nothing (*Minutes House Res. Feb. 22, 2005*), suggesting at least partial satisfaction.

State Water Users (Primarily Southern Idaho): Roger Ling who had represented the Federal Claims Coalition which was comprised of water users, said of the settlement, “I really do think we got a great deal” (Boone, 2005a). They were successful in reducing risks to existing water uses and future development from tribal water rights and the ESA (Strack, 2006). Similarly, Norm Semanko, pledged the benefits of the agreement, noting that it was a good deal, particularly in light of the 2001 Klamath Basin shutoff (*Minutes House Res. Feb. 22, 2005*).

North Central Idaho: It is unclear to what extent North Central Idaho interests participated in the mediation; although, there were several cities that were party to the adjudication and could have participated. North Central Idaho interests were mostly dissatisfied with the outcome and process. They felt that the Nez Perce and southern Idaho were getting too

much, at the expense of their private property rights (Boone, 2005a). Some Orofino businesses opposed the Nez Perce Agreement because the federal government was untrustworthy and had a history of making promises that it did not keep. They stated that residents were promised that Dworshak Dam would increase tourism and recreational benefits to the community even though the dam would destroy a valuable steelhead run. After the dam was built, the reservoir was operated for flow augmentation for salmon, drawing down the reservoir and ruining the recreational viability of the reservoir. The chamber also cited the cuts to federal timber harvest on federal lands, and expressed concern that the Nez Perce agreement would have similar effects and negatively impact local economies (E. Barker, 2005a).

*Shoshone Bannock*: The Shoshone-Bannock Tribe, whose status in the negotiations was unclear, threatened a lawsuit because, as one newspaper stated, they felt “the agreement steps on their aboriginal turf and that they should have been included in negotiations” (Oxley, 2005). The Shoshone Bannock and the Nez Perce had an ongoing dispute over the boundaries of the aboriginal fishing and hunting territory. The Salmon River Basin is the primary area in dispute. The Lemhi Tribe, now part of the Shoshone Bannock, and the Nez Perce both claim rights to an area that overlaps, but the Department of Interior has failed to resolve the dispute leaving the fishing rights undetermined. The Shoshone Bannock Tribe filed claims for federal reserved rights to instream flows in the Salmon River Basin, but the United States refused to assert the claims, and a court affirmed the federal government’s actions (*Minutes S. State Mar. 4*, 2005). The attorney for the Shoshone-Bannock stated that the tribe intended to file two lawsuits if the agreement was ratified because 32 streams included in the agreement for minimum flows were in the boundaries of the sole Shoshone fishing area, and another 25 streams were in the joint disputed area. The second lawsuit was in regards to a separate water rights settlement for the Shoshone Bannock’s off-reservation claims that the Governor verbally agreed to but then withdrew. As a result of this, the Shoshone-Bannock gave up their off-reservation claims in the Snake River Basin (Taule, 2005). Overall the Shoshone-Bannock was unsatisfied with the various processes they had undergone to obtain fishing water rights.

*Grazing*: The agreement potentially impacts grazing interests in two distinct ways. First, there were concerns that on federal lands, the decree of the tribe’s right to one-half of the springs and fountains would potentially inhibit the use of such water sources on federal lands used for grazing. However, the springs claim was explicit and it is likely that the courts would have ruled in favor of the tribe. Grazing interests expressed a mixture of opinions about the springs and foundations claims; however, the more commonly cited concern was the transfer of

BLM lands to the tribe. Judy Bartlett of the Farm Bureau said that grazing rights were typically issued for up to ten years, were renewable, like property rights and were often inherited (*Minutes S. State Feb. 9, 2005*). One rancher stated that it is unthinkable that “through a process of secret negotiations those rights would be summarily stripped from the permittees that own those rights” (Scott, 2005b). Wally Butler, a range consultant, stated that the tribe’s typical rate of nine to 18 dollars per animal unit month was ten times the amount ranchers typically paid (Scott, 2005b). Through the agreement, the ranchers did not have much to gain in regards to grazing leases, so their dissatisfaction with the agreement is unsurprising.

*Federal Government:* The instream flow claims on the Snake River were particularly contentious because the time immemorial priority date would require water to be left instream instead of being used for irrigation. According to the federal government, other parties were seeking and received in the settlement: a long –term solution to the ESA issues, a program for instream flows that obtained water only from willing users and followed state law, and assurances that the section 7 consultation would not be reopened. Ultimately, the Tribe and U.S. waived the instream claims, in part due to the thirty-year flow augmentation program. The federal government wanted assurance that the flow augmentation would occur annually so that it could meet its obligations under section 7 of the ESA. According to the federal team, all parties were able to come to terms with the flow augmentation provisions; however, parties not a part of the negotiation were critical of the provision. Some parties suggested that the federal agencies could simply shift the water in their dams from consumptive uses to flow augmentation, while conservationists challenged the BiOp in court. The federal government, however, was satisfied with the provisions as it provided a solution to the ESA challenges faced by Reclamation using a collaborative approach that reduced the uncertainty surrounding BOR’s operations (Klee & Mecham, 2006).

For the tribal component, the federal government sought to obtain sufficient water for the Nez Perce, determine compensation for breach of trust and damages, and increase tribal authority over its natural resources. Unlike many basins in the West, the Clearwater River had sufficient water available for the tribe without requiring reallocation, and affording the parties the latitude to establish it as a reserved water right with an 1855 priority date. The state, however, insisted that the right be subordinated to existing water users and the parties were able to reach a compromise subordinating the tribe’s right from tributaries, but keeping the priority date for water withdrawn from the Clearwater. According to the federal team’s analysis, the on-reservation and Clearwater sources were sufficient so the effect on the tribe was minimal. In

addition, the tribe compromised on the springs and fountains claims on land ceded in 1863 by waiving the rights to those on private and state lands. While this was a significant compromise by the tribe, it avoided the conflict that would have likely ensued over access to springs on private lands (Klee & Mecham, 2006).

The federal representative stated that tribe and federal government actively discussed the negotiations over compensation for damages and noted that while the parties began with different perspectives, they were ultimately able to come to agreement. As a result, the tribe received a Water and Fisheries Fund, a Domestic Water Supply Fund, and a Salmon and Clearwater River Basins Habitat Account. These funds allowed the tribe to accomplish its goals of protecting resources essential to its culture, and address on-reservation water systems in serious disrepair. In return for funding, the United States benefitted from the release of claims for breach of trust for failure to protect the tribe's water, injury to tribal fisheries resulting from insufficient water, failure to protect reserved springs and fountains, and any breach of trust due to the settlement. According to the federal team, the overall goal of the mediation for the tribe and state was "to increase and better define the level of the Tribe's management authority and sovereignty over its water and other resources" (Klee & Mecham, 2006, p. 622). The difficulty in achieving this, however, was that transfers of certain authorities to the tribes had to be approved by Congress, and other actions that increased tribal control had to be balanced with the potential to interfere with local and state government's jurisdiction and authority. This was accomplished by allowing the tribe to administer on-reservation water rights through a tribal water code, authorizing rental of water off-reservation, determining the release of 200,000 acre-feet of water from Dworshak, increased management of two hatcheries, and transferring land to the tribe. The federal team generally was pleased with the outcome of the agreement.

#### *Fairness of Cost Sharing*

The agreement placed almost the entire burden of costs on the federal government; therefore, there was little room for critique of the cost sharing arrangements. The federal team appeared to agree with the cost of the settlement to the federal government, noting that it not only settled the Nez Perce Tribe's concerns but also addressed key ESA issues for the federal government (Klee & Mecham, 2006). Michael Bogert from the State expressed the same opinion noting that the settlement "is an example of creativity in resolving contentious water rights disputes in the West. We believe that the Federal participation and contribution contemplated in the legislation is appropriate to resolve the tribe's claims and the related issues" (*S. Hrg. 108-636*, 2004, p. 26). The Nez Perce, aside from the costs associated with personnel

at the fish hatcheries, did not have a cost sharing burden, and therefore, it is unlikely that they would consider the cost sharing arrangement unfair.

#### *Perceptions of Scientific/Technical Credibility*

While parties were supportive of the agreement, they also held widely different views about certain provisions and what was necessary to recover salmon. For example, the parties did not agree on whether flow augmentation was beneficial. The Nez Perce was careful to state in its newsletter that the scientific and conservation community assert that the 487,000 acre-feet is insufficient to pass juvenile salmon through the lower four Snake River dams, implying that more water was needed (Haller, 2004b). Later, the Nez Perce Currents said that the managers mostly agreed that flow augmentation benefits juvenile fall Chinook by flushing the fish out of reservoirs, where they encounter warm temperatures and predators (Haller, 2007). While the Nez Perce were proponents of the flow augmentation program, the State was not. The Deputy Attorney General said the State, despite questions about its efficacy, only consented to inclusion of flow augmentation in the agreement in order to take away the uncertainty and threat that more water would be required for fish. From the State's perspective, they preserved their legal argument that the flow augmentation program does not benefit fish (Strack, 2006). The water users were even more adamant that the program had no scientific credibility. The positioning can be seen in the Congressional Hearing as evidenced by Roger Ling's statement representing the Federal Claims Coalition:

It is not conceded by the State of Idaho nor the private parties to the Snake River Flow component of the agreement that, by entering into the agreement, the flows identified will benefit the listed species; that BOR operations in the Upper Snake require ESA consultations, or that BOR operations in the Upper Snake are subject to modifications to meet ESA requirements or concerns, or that diversions, storage or use of water in the State of Idaho are subject to modification to meet ESA requirements or concerns. (*S. Hrg. 108-636*, 2004, p. 38).

#### **8.7.2 Compliance with Outcome Over Time**

The court ordered in the consent decree that the state and Tribe share information in a database that includes water right information including the place of use, point of diversion, type of use, and quantity of water to ensure compliance and facilitate cooperation in the administration of water rights (*In re SRBA, Consent Decree*, 2007). In addition, the habitat MOA requires monitoring reports for each project and requires all funding requests to include

success criteria and define how the project achieves the goals of the program (“MOA between the State of Idaho for Section 6,” 2005).

There are indications that the settlement has resulted in more consistent flow augmentation. The settlement includes up to 487,000 acre-feet of water for flow augmentation between June and August. In 2006, flow augmentation reached 477,000 acre-feet and, in 2007, 427,000 acre-feet was provided. In comparison, between 1991 and 2004, Reclamation only provided 427,000 acre-feet in seven of the fourteen years. (Haller, 2007).

Overall, monitoring records were not accessible and, therefore, it is inconclusive if they are keeping appropriate records. There was no indication that any litigation, mediation, or negotiating sessions were threatened or held to bring parties into compliance.

### **8.7.3 Flexibility**

There are several options to modify certain aspects of the agreement and its provisions. The agreement allows the State to change the minimum instream flow rights as long as it consults with the Tribe. The State, however, does not have to obtain agreement from the tribe, and thus, could unilaterally act to change the flows in the future as long as it consults (Strack, 2006). In addition, as noted previously, on streams where data was unavailable and flow was highly uncertain, the parties agreed that if data became available in the future, the minimum flows could be changed accordingly. Due to the uncertainty associated with predicting how various restoration and management measures affect habitat, the parties also agreed to an adaptive management approach for the Section 6 Forestry cooperative agreements (Cosens, 2006). Finally, the MOA for Dworshak flow releases authorizes modification of the MOA by unanimous consent (“MOA Between the Nez Perce Tribe, The United States Army,” 2005). While there is no guarantee that 427,000 acre-feet will be provided every year, the Term Sheet allows the U.S. to reopen the agreement under certain conditions, which includes new information that the flow augmentation operation is not meeting expectations (Haller, 2004g). In addition, the upper Snake terms can be modified within five years if a Temperature Control Structure is not installed at the Hells Canyon Complex. Therefore, the parties did create a structured approach to incorporating flexibility into the agreement (Haller, 2004b).

#### *Subsequent Actions Related to Modification of Outcome*

In October of 2007, a dispute arose between the federal government and the forestry industry in attempting to develop the forestry component of the Nez Perce Agreement. The agreement originally required 88 trees per acre near streams, but NOAA Fisheries wanted to

increase that number in two of the drainages, and cited the provision in the agreement that allowed the specifications to change for large woody debris (R. Barker, 2007b). It is unclear how this disagreement was resolved.

#### **8.7.4 Stability/Durability**

##### *Provisions/Mechanisms in Outcome*

Implementation Pre-Ratification: The agreement was somewhat unique in that it called for major steps towards implementation to be completed before the agreement was ratified. As is typical with all federal water settlements, the federal government had an implementation team. Duane Mecham, who had been involved in the mediation is the implementation leader for the federal team (“Statement of Findings,” 2007). According to members from the federal negotiation team, the announcement of the Term Sheet by high-level officials, served to inform agencies that the United States was committed to implementing the agreement, thereby allowing agency personnel to move forward with actions for implementation. Essentially, due to the federal government’s clear directive to support the agreement, agencies were able to mobilize resources more effectively. The federal negotiation team also recognized the challenge of negotiating twenty documents before the March deadline, and engaged Ed Sheets to facilitate the activities of the parties and assist in ratification and implementation of the agreement. In order to effectuate implementation, the parties created working groups and work plans, and participated in weekly conference calls for the governmental staffs and team to discuss issues, coordination, and information. Sheets created an agenda for the weekly conference call and noted follow-up actions. In addition, he had the implementation personnel from the three governments meet in order to strengthen the relationships between the parties, as they were reliant on one another to accomplish the tasks. In order to ensure completion of the tasks, the federal negotiation team developed a matrix of deliverables and received confirmation from the state and tribal staff that it was accurate. Workgroups of state, federal and tribal staff were then formed to resolve issues and develop processes and work plans. Sheets created a work plan for each deliverable starting from analysis to execution, which required each work group to meet several deadlines that brought them closer to the final product. Sheets then developed an overarching work plan that allowed the parties to determine priorities to focus resources. In addition, the comprehensive work plan served as a roadmap for the parties during each meeting to determine which projects were not on schedule, thereby allowing actions to remedy the problem (Klee & Mecham, 2006).

*Implementation, Post-Ratification:* The sub-agreements designated responsibilities between the various sovereigns and there was no indication that implementation had not proceeded as planned.

*Federal Appropriations:* As discussed by Senator Inouye, Michael Bogert and Nez Perce Chairman, Anthony Johnson at the federal hearing, neither the agreement nor the original draft federal legislation specified a payment schedule. While Michael Bogert explained that it was assumed that the timing would be determined in the appropriations process and likely occur over a ten-year period, Senator Inouye noted that the Nez Perce wanted the funds sooner. In the prepared statement by the Nez Perce Chairman, he noted the lack of a payment schedule for the funds in the draft bill, and stated “We hope to see maximum schedules of five years, beginning in year one after enactment...we intend to seek a cause-of-action provision included in the bill” (*S. Hrg. 108-636*, 2004, p. 68). The final federal legislation included a payment schedule over 7 years from 2007 to 2014 and withheld waivers against the federal government until the final payment was received (*Snake River Act*, 2004).

*Mechanisms for Dealing with Conflict and Ensuring Relevant Parties are Involved:*

Overall, the agreement and associated documents were structured to balance power, create means for the State of Idaho, federal entities, and the Tribe to constructively work together, and provide a forum in which parties could resolve disputes. The various sub-agreements often provided the specific directives for parties as well as processes for dispute resolution.

*Dworshak Flow Augmentation:* The Dworshak water use agreement between the Tribe and the Corps of Engineers required them to cooperate to the extent possible to avoid litigation. In the event of a dispute, a representative from each party would meet and attempt to resolve the problem but may seek out “any available dispute resolution process, including mediation” (“Agreement for Water Use in the Dworshak Reservoir,” 2005). Management of the Dworshak Reservoir required the parties to continue to work together to determine how to manage the 200 KAF to augment instream flows. The agreement was intended to allow the State and Tribe to have greater input and control over species protection efforts (U.S. Army Corps of Engineers, U.S. Bureau of Reclamation & Bonneville Power Administration, 2007). For the flow releases from Dworshak, the MOA established an intergovernmental board with representatives from the Nez Perce Tribe, The Army Corps of Engineers, NOAA NMFS, BPA, and the State of Idaho. The MOA requires the board to submit an operational plan but if the Board cannot reach a consensus, the Tribe is to develop and submit the plan (“MOA Between the Nez Perce Tribe,

The United States Army,” 2005). While this does not appear to be an inclusive process, as the Tribe can essentially act unilaterally if a consensus is not reached, this provision does balance the power between the Tribe and the State of Idaho. In addition, as discussed below for other provisions such as the instream flow program and the habitat trust fund, Idaho has decision-making authority (“MOA between the State of Idaho for Section 6,” 2005; Strack, 2006).

*Water Rights Administration:* Although the Tribe was authorized to administer its on-reservation multiple-use water rights, each water right stipulated that an intergovernmental board consisting of one representative each from the State and the Tribe, as well as a third representative that is appointed by both would review all changes in the point of diversion for injury to other water rights. The board would provide public notice and hold public hearings to determine if injury to other rights would occur from the change and identify how injury could be avoided (*Negotiated Agreement for Federal Reserved*, n.d.). The Consent Decree also requires the parties to share water use information through databases that includes the water right number, use, point of diversion, place of use, quantity of water diverted, and source of water (*In re SRBA, Consent Decree*, 2007).

*Hatchery Operations:* The Tribe and USFWS agreed to work together to jointly operate the Dworshak National Fish Hatchery and to transition operations of Kooskia National Fish Hatchery to the tribe (“Agreement for National Fish Hatcheries,” 2005, “MOA between the USFWS for Dworshak,” 2005, “MOA between USFWS for Kooskia,” 2005, “MOA between USFWS for Training,” 2005). The Agreement includes a dispute resolution methodology to address personnel disputes, fish production disputes, or policy disputes in a manner that incorporate both Tribal and USFWS interests (“Agreement for National Fish Hatcheries,” 2005). In addition, the training MOA specifically outlines the expectations for the interactions between the two entities by proactively establishing a program “to foster mutual respect and cultural awareness among Tribal Members and non-Tribal Members and to foster teamwork and camaraderie among all employees at the Dworshak Complex” (“MOA between USFWS for Training,” 2005, p. 3).

*Section 6 Habitat Fund:* The MOA for the State Section 6 Habitat Trust Fund governs the funding process for habitat programs for the B-list streams, Lemhi River Basin, Habitat Improvement Program, and the Forestry Program. The MOA requires the State to establish a Collaborative Committee to make recommendations on projects and priorities as well as monitor implementation of actions funded under the Section 6 program. The Collaborative Committee is comprised of two State representatives, two Nez Perce representatives, one

USFWS representative and one NOAA representative. One of the representatives for the state serves as chair. The Committee is to hold annual meetings and provide opportunity for public involvement. It should be clear that the role of the Committee is to make recommendations to the State and operates on a consensus basis; however, if a consensus cannot be reached, then the state considers each individual representative's recommendation. The role of the Committee is in an advisory capacity and the State makes all decisions. The Committee reviews potential projects; receives monitoring reports; and receives stakeholder, advisory team, and technical recommendations. In addition, they make recommendations on funding, objectives, strategies, and habitat projects ("MOA between the State of Idaho for Section 6," 2005).

*Instream Water Rights:* While the State already requests input from parties potentially affected by a change in water rights, the agreement specifically requires Idaho to consult with the tribe should it desire to change the minimum instream rights. However, it does not require consent and the State can move forward with changing the instream flows as long as it gives the Tribe the opportunity to provide input. Thus, the agreement requires a continued, but limited relationship on the minimum streamflow issue (Strack, 2006).

*Subsequent Actions Related to Stability/Durability*

The agreement and corresponding documents were specific in terms of which entity was responsible for executing certain portions of the agreement and provisions. The sub-agreements that were negotiated included further details of responsibilities for each party where more specific direction was needed.

*Indicators of Instability over Time*

Overall, the agreement appears to be stable. There is no indication that the parties have not been complying with the details of the agreement, although some portions have not been executed in their entirety. More specifically, Section II. A. 8 of the agreement provided that Section 6 Cooperative Agreements would be developed for the Lemhi and Pahsimeroi River Basins("Term Sheet," 2004); however, the MOA stated that the parties needed to collect more information and decided that in the interim, the B-list work plan for the Pashimeroi River would be implemented. The parties set a goal of creating the Pahsimeroi Section 6 Cooperative Agreement by March 2010 ("MOA between the State of Idaho for Section 6," 2005); however, as of 2011, there is no indication that such an agreement has been completed. Similarly, a Lemhi Section 6 Cooperative Agreement was not found, and a June 30, 2011 memorandum on Lemhi River conservation projects stated that Idaho was developing a Lemhi Conservation Plan and working with USFWS and NOAA on a Section 6 Agreement (Edmondson, 2011).

Therefore, it appears that certain provisions of the Salmon and Clearwater Basin component are still in development.

While there was extensive rhetoric before the agreement was ratified by both the State of Idaho and the Tribe, there was very little mention of the agreement in the press once it passed. In fact, the only discussion of the agreement in the press was in regards to the ongoing battles over the upper Snake Biological Opinion and FCRPS Biological Opinions. The State of Idaho, water users, and the Idaho Congressional Delegation expressed concerns that Judge Redden would issue a decision that would lead to the collapse of the Nez Perce Water Rights Settlement. Despite these concerns, all parties, including the Tribe continued to support the upper Snake BiOp and actions that would keep it in place to ensure that the conditions of the settlement agreement were met (Associated Press, 2006; R. Barker, 2005d; Barnard, 2005; Rudolph, 2006). Had either party, the State of Idaho, the Idaho Water Users or the United States failed to see the benefit of ensuring the successful implementation of the agreement, the outcome could have been much different. But the supporters of the agreement were coordinated enough to present a consistent argument to the public and lawmakers that apparently carried over, despite other disagreements with the lower Snake and Columbia River (Poppino, 2009b).

In fact, the State of Idaho was willing to take all measures necessary to ensure the stability of the agreement. In 2006, U.S. District Court Judge Redden criticized the federal agencies for failing to write the salmon recovery documents objectively, noting that the documents were heavily influenced by the Nez Perce Agreement and that the ESA takes precedence over other water matters. Idaho's Congressmen, perceiving this as a threat to Idaho's water, warned that curbing water could lead to another Klamath Basin, and stated that they would take actions necessary to remove this threat. The delegation went forward with a federal rider attempting to require BOR to implement the 2005 BiOp, but in December of 2007, Senator Dianne Feinstein removed the provision from an appropriations bill (Stapilus, 2009).

Even the parties that had previously objected to the agreement stopped opposing it possibly because they had lost political power. The Farm Bureau was criticized for its opposition (Popkey, 2005; Russell, 2005c) and relented once the agreement was ratified, stating that it would support the Idaho's decision (Putnam, 2005). Without the Farm Bureau's political clout and resources that had been driving the opposition, North Idaho was left on its own. Eventually, the North Central Idaho Jurisdictional Alliance lost its inertia as its members were no longer seeing the benefit of remaining in the organization (Fisher, 2005; Hedberg, 2011a; Walker, 2005). The tribe, for its part, had not attempted to control or tax non-Indians and, thus,

the role of the Alliance slowly became less important, although it did revitalize in 2011 over matters unrelated to water (Hedberg, 2011a, 2011b). Finally, the coalition that had passed the settlement was adamant about defending the agreement, which helped in completing the BiOp, particularly because the Idaho Water Users Association, another powerful organization, and the Nez Perce Tribe were on the same side (R. Barker, 2007a; *Minutes on the Upper Snake*, 2006).

The Shoshone-Bannock filed 56 objections to the Nez Perce water agreement in the SRBA, but eventually dropped the objections in October 2005. In April 2006, an objection to the tribes springs claims was filed, which Judge Melanson responded to with concern, noting the historic nature of the agreement and the desire to resolve the matter without drawn out litigation. It is unclear what happened with this objection; however, since the decree was approved, it ultimately must have been resolved (Stapilus, 2009).

## **8.8 Criteria Category V – Relationship between Parties**

### **8.8.1 *Reduction in Conflict and Hostility***

The agreement dissipated the conflict between the tribe, the state, and water users over flow augmentation because in return for reauthorizing the program and other provisions, the Tribe has honored its commitment to support the Upper Snake BiOp and flow augmentation limit, even as it challenges the FCRPS BiOp that the State and water users support. The agreement eliminated the need for debate over flow augmentation between parties in Idaho (except conservation groups who were not a part of the mediation), shifting the conflict to a focus on dam breaching. There appears to be some underlying respect and acceptance of this, as the State and Idaho Water Users cite the Nez Perce Tribe's support of one and not the other as an example that the two BiOps need not exist together (R. Barker, 2007a). In addition, while some proponents of the Idaho water user community continued to be publicly hostile towards the environmentalists for opposing the BiOps, the tribe did not receive the same treatment for opposing the lower FCRPS BiOp (Associated Press, 2005c; Jones, 2011; Rudolph, 2006; Semanko, 2005; Wilkins, 2006). Whether or not this is a change, however, is less clear. A review of newspaper articles does not show any significant differences in the interactions. In the media, it appears that there has generally been a professional relationship between the parties in the debate on flow augmentation and dam breaching (Associated Press, 1997).

In addition to reviewing the articles overall, two particular situations demonstrate that the basin has been in a consistent flux between cooperation and litigation as the parties attempt to determine how to resolve the salmon issue. For example, Governor Batt had encourage the

Nez Perce to continue to work with the state on solutions for salmon (Associated Press, 1997), while also encouraging the Tribe and North Idaho Jurisdictional Alliance to mediate and not litigate, when tensions had risen in this basin (Tuchscherer, 1998). Similarly, the tribe has consistently affirmed its commitment to helping economies that would be impacted if the dams were breached (T. King, 1999; Wickline, 1998). Therefore, it does not appear that there was a significant change between the water users, the tribe, and the State, beyond the issues that were addressed in the agreement, at least from what can be gleaned in the media. As discussed by Nez Perce Tribal Chairman, Anthony Johnson:

In important respects, this proposed settlement offers a new model for future conduct in our relationship with the State of Idaho in particular, when compared to the expensive, time consuming and uncertain path of litigation. A mutual respect between the state and tribe as sovereign governments underlies this proposed agreement in ways that contrasts with the hostility of litigation. It has taken a certain amount of courage and commonsense on the part of all parties to make it to this point, and I respect that and hope you do as well. The path of continued fighting in court begun 17 years ago could well continue for another decade if this effort were to fail. (*S. Hrg. 108-636*, 2004, p. 30).

*Northern Idaho:* The agreement did temporarily escalate conflict particularly within and nearby the reservation boundaries where there was a history of conflict between non-tribal residents and the tribe. According to Idaho State Representative George Saylor, he received “‘pretty volatile’ e-mails from opponents of the agreement, some of whom see it as a threat to property rights or an expansion of the Nez Perce’ Tribe’s influence. ‘They’re talking about people getting shot’” (Russell, 2005a, para. 17). The language included character assassinations, public putdowns, and varying degrees of hostile rhetoric. For example, the Mayor of Kooskia and Chairman of the North Central Idaho Jurisdiction Alliance wrote about the agreement “‘This sounds like extortion to me. Let’s settle this in court’” (Schurbon, 2004, para. 6). Similarly, an Orofino resident stated that “‘Clearwater, Idaho, Lewis, and Nez Perce counties are on the verge of being sold out by Idaho’s U.S. congressional delegation, Gov. Kempthorne and his cronies, and the Idaho State Legislature for the benefit of the big water users in southern Idaho’” (Bruce, 2005, para. 1). While the conflict between the parties was palpable, some citizens felt criticized for their opposition to the agreement. For example, Keith Hanson, a business owner in Orofino, addressed the accusations that the Chamber of Commerce’s opposition was targeting the Tribe stating that, “‘We are not a wild-eyed bunch of Indian-hating radicals... We are just trying to look out for the best interest of this community.’ [Hanson clearly felt unfairly criticized for not supporting the agreement saying,] ‘Walk in our

shoes, live in our community and listen to our concerns and don't be so upset with us for opposing this thing” (E. Barker, 2005a, para. 22, 24).

### **8.8.2 *Improved Relations***

Given the large number of parties, the multiple processes and ongoing disputes, it was difficult to determine if relations had improved using documents. It was not possible to determine if there was improved understanding or communication between the different interests outside of what is discussed in the Transformation Section. Based on statements from the leaders of the State and Nez Perce Tribe, the two appeared to have strengthened the relationship as two sovereigns and developed a respect for the other's positions. The Nez Perce Tribal Chairman, said “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” (*S. Hrg. 108-636*, 2004, p. 69), while Governor Dirk Kempthorne's said of the negotiations:

In Idaho, when you can have the intensity of the negotiations we have had involving water over the last few years and leave the table with a deep, and abiding respect for each other, that is a great accomplishment. We certainly have a great respect for the Nez Perce Tribe as our partners in this process, and this agreement represents a remarkable success story. (p. 47).

Michael Bogert also emphasized the new relationship with the tribe stating that they had formed “stronger bonds with each other and between our respective governments” and that both parties put forth the effort to understand each other's interests and priorities (p.33). The strengthening of the relationship; however, only extended to the Nez Perce and Idaho, not the Shoshone Bannock. Both tribes were asked to comment on their relationship with Governor Dirk Kempthorne during his nomination for Secretary of Interior. The Shoshone Bannock expressed great distrust and disappointment in Kempthorne saying he backed out of an agreement to settle their instream flow claims. Conversely, the Nez Perce appreciated his role in the settlement negotiations and offered to assist Kempthorne in reaching out to other tribes (Holmes, 2006).

Despite the greater respect expressed by some of the parties, the Nez Perce did take precautions to protect itself from others; this is unsurprising given the history of over 150 years of broken promises. While there was no indication from other parties' statements during the congressional hearing (*S. Hrg. 108-636*, 2004), the prepared statement of the Tribal Chairman indicated that the Nez Perce did not fully trust the government or other parties. For example, in discussing the minimum stream flows, the Chairman expressed the important role of federal

ownership in reassuring the tribe that streams would be afforded protection and, thus, played a factor in the Tribe's acquiescence on the minimum streamflow claims. "I will tell you that continued federal ownership and care for these lands and riparian areas is critical, and we expect the United States to honor its commitment to maintain these lands and the important habitat they provide in perpetuity" (p.66). In addition, Chairman Johnson expressed concern that the agreed upon funds would not be appropriated by Congress in a timely manner, and stated "we intend to seek a cause-of-action provision included in the bill like the provision included in the Fort Hall Settlement" (p.68). Further supporting the conclusion that the tribe was weary, the Chairman ensured that it was on the Congressional record that the Tribe was not giving up anything related to its treaty rights.

The Nez Perce also demonstrated that they were not completely trusting of the state to consult with the tribe and consistently referred to the desire to develop a memorandum of understanding for each process. For example, the Chairman stated in regards to changes in the minimum instream flow rights, "The Tribe intends to enter into a memorandum of understanding with the State prior to final agreement that would provide for a meaningful process of consultation between the two sovereigns" (*S. Hrg. 108-636*, 2004, p. 67). Similarly, in regards to the provision requiring the State to work with the Tribe to determine how to spend the habitat funds, the Chairman stated, "The Tribe has high expectations of its ability to lend its fisheries expertise to this process and intends to enter into a memorandum of understanding with the State and the United States as to the nature of this collaborative process" (p.68). It is clear that the Tribe was cautious in its approach and, although accusations were never made of a lack of good faith, these statements demonstrate that the Tribe felt the need to protect its interests and ensure that parties outlined their relationship in writing.

While the Tribe's actions implied distrust, the opponents to the agreement were explicit in expressing their distrust. The Mayor of Kooskia and Chairman of the North Central Idaho Jurisdiction Alliance wrote "This sounds like extortion to me" demonstrating a lack of trust in the tribe (Schurbon, 2004, para. 6). Some Orofino businesses said the federal government was untrustworthy and had a history of making promises that it did not keep (E. Barker, 2005a). One Orofino resident distrusted the government in general claiming that they were "being sold out" by government including "Governor Kempthorne and his cronies" (Bruce, 2005, para. 1). Similarly, tribal member Owen C. Slickpoo expressed distrust of NPTEC and the federal government, asserting that "surrounding tribes are excelling, while the executive committee is nothing but a federally funded 'Mafia' intent on politically oppressing its people and denying

them due process” (McGann, 2004b, para. 13). Therefore, while it is evident that the relationships improved between the sovereigns, it is less clear if this reached beyond the individuals involved in the negotiations.

### **8.8.3 *Cognitive and Affective Shift***

This was a difficult variable to assess using media sources. The sovereigns appeared to change their perspective that salmon recovery was important to all parties involved, even if it was for different reasons. This framing of the conflict allowed the parties to focus on efforts that would recover the fisheries without impairing local economies. According to a representative of the State of Idaho:

The United States, the Tribe, and the State share a common goal of restoring salmonid populations to the point where they can be de-listed. Land-owners, likewise, have a significant interest in the restoration of listed species, for the listing of the species brings with it the constant threat of lawsuits alleging that water diversions and timber harvest harm listed salmon, steelhead, and bull trout by degrading essential fish habitat. (Strack, 2006, p. 661).

Beyond this, however, it did not appear that parties had a cognitive or affective shift. As mentioned previously the key to success in reaching an agreement was that parties did not have to negotiate on their strongly held values and positions. In addition, many of the provisions in the agreement maintain and simply codify the status quo to prevent further change.

### **8.8.4 *Ability to Resolve Subsequent Disputes***

After the 2005 ratification, there was relatively little information available in the press about the progress of the agreement. Given that the media tends to report conflict, it is likely that few if any new problems arose, or that the parties were able to effectively handle disputes without calling attention from the media. Either way, this indicates that the parties have been able to implement the provisions of the agreement without resorting to more hostile forums. In addition, the agreement included several provisions that required various parties to work together and often incorporated conflict resolution provisions in order to address disputes (see Stability/Durability).

Obtaining a Biological Opinion that pleased the court was the greatest obstacle to ensuring the agreement remained intact. To that end, parties including the Tribe, worked together to support the upper Snake River BiOp even as the Tribe opposed the Columbia River BiOp (R. Barker, 2007a; *Minutes on the Upper Snake*, 2006). There is evidence that the parties have considered turning toward more collaborative efforts in the lower Snake River, however, it

would be presumptuous to assume that the water settlement was the precursor as there are many other confounding factors. For example in 2005, Representative Butch Otter said while inside at a meeting on the Lower Snake River system:

‘They had rallies out there where both sides got to vent, and got to state their case, but in here, I found a totally different demeanor and that demeanor was one of caring and understanding of the value of the other persons position, while certainly championing their own cause.’ (Martin, 2005, para. 2).

The parties also appeared to stress the value of collaboration and engaging others in discussion about problems. First, the Shoshone-Bannock dropped their 56 objections to the Nez Perce Settlement because the Shoshone-Bannock came to an agreement with the state in which they would be consulted on habitat projects and on any proposed changes to minimum instream flows (Associated Press, 2005d). In addition, Tribal Chairman, Anthony Johnson noted that the agreement did not resolve certain waivers of claims by the Tribe against the federal government, particularly those involving the building of Dworshak Dam, and suggested that the parties meet to come to a resolution. “The history of the Dworshak Dam on the Nez Perce Reservation is one of the most offensive, and yet unresolved, issues to our tribal members, and I hope you will meet with us in good faith to discuss this matter at the appropriate time” (*S. Hrg. 108-636*, 2004, p. 66). Despite the fact the Dworshak issue continued to be a point of strife between the U.S. and Tribe, there was no mention of litigation, just a call for good-faith negotiations.

### **8.8.5 Transformation**

*Empowerment:* In the years after the Nez Perce Agreement was announced, there was heightened discussion in newspapers about the role of collaboration and holding talks to find a way to recover salmon throughout the Columbia Basin while sustaining local communities. The Nez Perce Agreement was consistently held up by water users, the State and the federal government as what could happen if parties in the Columbia had meaningful discussions. However, parties still retained their entrenched values just as they did during the Nez Perce mediation. The water users would not consider talks if increased flow augmentation was a possibility, while the Nez Perce would not engage, if breaching the dams was not on the table for discussion (R. Barker, 2005c, 2008b, 2011b; Editors, 2005a, 2005b). Despite this, parties and the media still emphasized the role of cooperation instead of litigation. For example, Norm

Semanko with the Coalition for Idaho Water<sup>80</sup> in response to an upcoming court ruling that ordered parties to collaborate stated:

It was a similar process that was used to arrive at the historic Nez Perce Water Rights Settlement between the federal government, the State of Idaho, Nez Perce Tribe and water users. That agreement...can in fact serve as a cornerstone for the regional collaboration now underway. The State, the feds and the Tribe are all at the table in the collaboration and are well-positioned to make sure this happens. (Semanko, 2007, para. 5).

Similarly, the Nez Perce Tribal Chairman described the agreement as “a superior model of future conduct” (*S. Hrg. 108-636*, 2004, p. 69).

*Transformation of perception of the conflict and relationship:* Information on this criteria was limited and expressions of transformation of the relationship came from the Governor’s Office. In a prepared statement by Governor Kempthorne supporting the federal legislation, he wrote:

In Idaho, when you can have the intensity of the negotiations we have had involving water over the last few years and leave the table with a deep, and abiding respect for each other, that is a great accomplishment...When we announced the agreement on May 15 in Boise, I paused and observed the parties who joined us on that day. I saw them enjoying the moment and each other in celebration of what was achieved through this agreement. These were parties who were once adversaries. I thought then as I do now that the alternative—several more years of litigation with the prospect that the ultimate outcome could be resolved by the U.S. Supreme Court—was no alternative at all. (*S. Hrg. 108-636*, 2004, pp. 48–49).

One year after the agreement had been ratified, Governor Kempthorne again expressed how the relationship had changed, that “discussions transformed adversaries into allies” and as a result they were able to avoid a solution that created “winners and losers” (*S. Hrg. 109-507*, 2006, p. 21). Three years after the settlement had been ratified, Michael Bogert, who had been integral to the negotiations for Kempthorne continued to express satisfaction and support of the process and agreement:

Indian water rights can serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future. I saw

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<sup>80</sup> Many of the groups in the Coalition for Idaho Water are a part of the Idaho Water Users Association and/or were a part of the Federal Claims Coalition during the mediation – both supported the agreement.

this happen with the Nez Perce settlement agreement. (*Oversight Hearing*, 2008, p. 8).

Beyond this, however, there was little evidence of transformation between the parties.

*Transformation of policies/procedures:* The agreement and sub-agreements called for multiple policy and procedural changes. These are discussed in other sections of this case study, but primarily involved the federal government incorporating a greater role for the tribe in management of resources including BLM lands, Dworshak Reservoir, and the two hatcheries as well as increased collaboration between the State and Tribes. In addition, the decision to write a 30-year biological opinion was a substantial departure from the policy of one-to-ten year biological opinions previously issued on the Columbia River System.

*State Water Policy Changes:* The State already had a policy of negotiating federal and tribal water rights and had done so successfully in the past (Strack, 2006); however, a comparison of the previous 1996 State Water Plan and the proposed 2010 Draft State Water Plan, reveals several changes in the phrasing of policies relating to Indian water rights and the Endangered Species Act. While Section 1A of the plan does not change, making it clear that the state seeks to retain sovereignty over the control and use of waters within the state, the discussion section in the 2010 policies adds: “The state should pursue cooperative agreements and partnerships with other states, Indian tribes, and the federal government to address water resource and management issues in a manner that benefits the citizens of Idaho” (“Idaho State Water Plan Draft,” 2010, p. 7). This statement is in alignment with the State’s approach during the Nez Perce negotiations, seeking to strengthen or maintain state control, while also seeking to reduce conflict by working with the tribe.

The State Water Plan policies on conserving species changed significantly, again in alignment with the approach taken in the Nez Perce Agreement, demonstrating a more advanced understanding of the complexities of water use and species conservation. The 1996 plan stated that Idaho would “cooperate” in accordance with state law to “conserve and restore” ESA listed species (“Idaho State Water Plan,” 1996, p. 8), whereas the 2010 draft emphasized a much more active and local method to species recovery:

Voluntary community-based conservation programs that benefit species listed under the Endangered Species Act...and resolve water resources issues should be the primary strategy for achieving species protection and recovery...In enacting the ESA, Congress contemplated a state federal alliance to advance the recovery of listed species and provided for the development of state-led recovery efforts...Cooperative community-based conservation programs are

more effective in providing on-the-ground habitat benefits than enforcement actions...targeted and effective conservation strategies can be developed and implemented that protect private property rights and assure state primacy over water resources while, at the same time, providing natural resource protection...It is in the interest of the public for the Idaho Water Resource Board to take a leadership role in the development of local and regional conservation strategies that contribute to the recovery of ESA-listed species (“Idaho State Water Plan Draft,” 2010, pp. 21–22).

The shift entails a preference for the use of voluntary local actions to address species problems and a more active role by the state. The plan also discusses the Nez Perce Agreement as an example of this approach, and states that one implementation strategy is to:

Collaborate with Office of Species Conservation, state and federal agencies, affected Indian tribes, and local stakeholders to develop and implement habitat conservation programs that preclude the need for listing of species and contribute to listed species' recovery. (“Idaho State Water Plan Draft,” 2010, pp. 21–22).

Although prior policies stated a preference for state control over water resources, negotiation over litigation for tribal water rights, and local and state participation in ESA actions to reduce impacts on private property; the presence of these themes in the documents have increased, indicating that the state’s resolve towards these goals was strengthened with the Nez Perce Settlement Agreement. Furthermore, the Draft State Water Plan spends significantly more time discussing the need to proactively address ecosystems problems through voluntary means at the local level. The state appears to have recognized that the risk of inaction is too great, and that the state must make concerted efforts to improve habitat conditions so that it can control and minimize the impacts on existing water users instead of reacting to problems. Essentially, in the context of the ESA and water, the state appears to have shifted toward a risk management strategy of maximizing state control and reducing the federal presence.

*Recognition of the other:* Within the parties, there were several instances wherein negotiators directly involved in the mediation expressed that they understood the other group’s situation. In a 2002 interview, John Simpson who represented irrigators, explained his understanding of the importance of the fishery to the tribe by comparing the similar circumstances of farmers:

I believe it's not that much different than if you were to talk to a number of Idaho farmers that have been farming for 100 years, what the land has meant to them and what the water means. It's their livelihood. Probably just like some

tribal members would feel the fishery is their livelihood. (Simpson, 2002, para. 30).

Similarly, prior to the completion of the mediation, Clive Strong from the State of Idaho stated:

Certainly in negotiations when you sit and talk across the table with people of different points of view you begin to understand their interests better... we can certainly understand and appreciate the tribe's tie to the resources and their desire for a certain outcome. (Strong, 2002, para. 36).

The federal negotiation team, responsible for coordinating the various divergent interests of the government, also expressed an understanding of the other parties' positions:

The Tribe's water rights claims sought to protect a way of life and opportunities for economic growth. Equally important for a long-term resolution was for the negotiators to acknowledge and protect the other legitimate interests ...the settlement would have to recognize not only the water rights of the agricultural community and municipalities, but also the importance of preserving a way of life throughout Idaho for the fishing, farming, ranching and timber industries, as well as opportunities for economic development. (Klee & Mecham, 2006, pp. 629–630).

Similarly, the Tribe acknowledged the impact of the tribal claims on others, explaining in the Snake River Currents that “Hundreds of legal objections to the Tribe’s claims were filed, particularly the instream flow claims, because those claims could affect the rights of agricultural interests in southern Idaho to divert water to grow crops” (Haller, 2004a, sec. 5). However, at least one tribal member that opposed the agreement, did not empathize with the irrigators. When prompted in a 2002 interview (prior to completion of negotiations) about the capacity for the Nez Perce claims to hurt other water users such as irrigation and power, the tribal member responded:

So be it. You know, we as Indian people have been hurt many times over because of the encroachment of so-called civilization. So when do we quit feeling pain? I think now is the time for us to quit making sacrifices for progress. Why doesn't somebody else suffer some economic pain, like we have for the last 200 years? (Pinkham, 2002, para. 12).

These few quotes demonstrate that there was an acknowledgement by some parties involved in the negotiations of the difficulties associated with the agreement. However, it is not clear that this understanding extended much beyond those directly involved in the mediation. In reviewing comments in other sections such as Public Acceptability and Improved Relations, there were some members of the population that expressed little empathy or understanding of

other interests. This underscores the difficulty in achieving transformation within all members of a group, particularly when they are not directly involved in the negotiations.

## **8.9 Criteria Category VI – Social Capital**

### **8.9.1 *Enhanced Citizen Capacity to Draw on Collective Potential Resources***

*Aggregate of resources/Potential Assistance Relationships/Generalized Reciprocity:*

There was little information available for these criteria. The Idaho water users benefitted greatly from the experience in negotiating the Nez Perce Water Settlement and developing relationships with each other and through two organizations, The Coalition for Idaho Water and the Idaho Water Users Association. The water users showed an increased capacity to leverage their collective resources to respond to threats (Semanko, 2007). For example, just after the completion of the settlement and during the lawsuit over the Upper Snake BiOp, the Coalition for Idaho Water included about 70 organizations. These interests along with the Tribe, State and federal government supported the Upper Snake BiOp (Wilkins, 2006).

### **8.9.2 *Increased Community Capacity for Environmental/Policy Decision-Making***

*Aggregate of Resources:* At the local level, the Clearwater Basin Collaborative (CBC)

is one example of a cooperative effort that incorporates a cross section of various groups. The CBC, however, did not arise from the Nez Perce Agreement and mediation; rather, Senator Crapo who initiated the CBC, stated that it was inspired by the Owyhee Initiative (Wheeler, 2010). It is unclear, if the Nez Perce water negotiations had any role in the founding of the CBC. Although the CBC was formally established in 2008, they had been meeting since 2004. The Collaborative has 23 members that represent citizen, governmental, business and conservation groups within the Clearwater Basin of North Central Idaho and includes a member from the Nez Perce tribe. In addition, to the 23 individual members, the Collaborative also has persons serving as liaisons to the federal agencies, and Idaho's Congressmen. The CBC was founded on the common understanding that natural resources are both "priceless and necessary to economic, social and ecological well-being" and the recognition that management of natural resources in the basin had been plagued by conflict ("Clearwater Basin Collaborative," n.d.).

*Increased System Efficiency:* There are numerous provisions in the agreement that require information sharing and consultation between the sovereigns. It is clear, however, that information sharing to the public, particularly via the Internet, has not increased: There is little information on the progress of programs included in the Salmon and Clearwater Component, particularly related to habitat actions and the cooperative agreements. For example, information

was not available online about the intergovernmental board that monitors the habitat fund and projects, nor was there accessible information about the progress of the Section 6 flow agreement. Therefore, there was no way to verify changes in system efficiency.

*Increased Capacity for Cooperation:* Although collaboration was encouraged to resolve conflicts, some of the direct participants had not changed their tactics after the process. For example, despite the preferences of scientists, tribes and environmentalists in 2005, Governor Kempthorne, much like at the outset of the Nez Perce negotiations, created preconditions to negotiation, stating that dam breaching would not be a part of any discussions attempting to address the issues on the Columbia (Editors, 2005b). Similarly, Norm Semanko, who had played a significant role in passing the Nez Perce Water Rights Settlement on behalf of Idaho water users (McCoy, 2005b) continued criticizing environmentalists (Scott, 2005c), and wrote a rather aggressive letter putting “strident radicals in the environmental movement,” and “federal bureaucrats and activist environmentalists on notice” asserting that:

these are extremists who want you to believe they alone know what’s best for Idaho water. With one voice, they tell you they have Idaho’s best interest at heart while, out the other side of their mouth, they argue in court in Portland that state control should be stripped away...It’s now time to renew our efforts to protect Idaho from those who seek to impose partisan and scientifically flawed policies on its citizens. (Semanko, 2005).

Therefore, it appears that participants did not implement different approaches to conflict resolution with groups that had not been involved in the mediation. Interestingly, most of the collaborative efforts following the Nez Perce Agreement came from Senator Mike Crapo, who had just finished negotiating wilderness bills, and had a lesser role in the Nez Perce negotiations. Senator Crapo espoused conflict resolution principles, ““Most people will support negotiations when they know they have had a real opportunity to be heard and they can see that the interests they feel most strongly about have been fairly treated”” (Editors, 2005b, para. 13).

See discussion in *Stability/Durability* for more on the shift in power. After the agreement was in place, there was a shift in alliances and power, but it was a shift towards those parties that had signed on to the agreement and away from those that had opposed it, such as the Farm Bureau and North Central Idaho interests. For example, one newspaper article noted that:

Kempthorne was asked by reporters about the credibility of the Farm Bureau... its opposition to the water agreement prompted some of its local affiliates to dissent. ‘I think it would be a time for them to evaluate their strategy and their positions,’ Kempthorne said. (Russell, 2005c, para. 7).

*North Central Idaho:* Prior to the water settlement and for an unrelated matter, a mediator had been called out to resolve conflicts between the non-Indian community and tribe over jurisdictional issues, which culminated in a formal Memorandum of Understanding (MOU) in 2002. However, relations fell apart again when the tribal water claims came up for review by the Idaho Supreme Court. The Alliance chose to file an amicus brief stating that the reservation was diminished and asking to intervene (Allred, 2004; U.S. Water News Online, 2004). The move eventually led the tribe to terminate the MOU (Allred, 2004), just two years after it had been signed (U.S. Water News Online, 2004). The water rights settlement also escalated the jurisdictional tensions between the tribe and local residents within and near the reservation due to the decision to expand the issues addressed in the agreement to include land ownership, which was perceived to increase the tribe's jurisdiction. The tensions with the Alliance remained highly divisive as the water settlement was announced (Allred, 2004). After the agreement was ratified, however, the Alliance lost momentum and some members stopped paying dues. In 2005 one major supporter, Idaho County, failed to renew its support for the Alliance (Walker, 2005). In addition, around this same period, the tribe had obtained funding for schools in the area (Fisher, 2005), and upon being criticized in one of the local newspapers, the Alliance responded with an editorial stating that the tribe did many good things, and that the Alliance did not support or oppose the water settlement, although some of its members had formally opposed it (Schurbon, 2005). While it appeared that tensions had subsided after the Nez Perce Water Rights agreement was ratified, the Alliance continued to have regular meetings until 2007. Some of the Alliance's members filed amicus curiae briefs supporting disestablishment of other reservations that are similar to the Nez Perce's ("Brief for Idaho County," 2008, "Brief of Lewis County," 2011).

In 2011, however, an employee of the tribe contacted several of the counties stating that TERO would be enforced. The Alliance reorganized and Idaho County rejoined, although some members noted that they had been contacted by other members of the Tribe that did not agree with the tribal employee. The Alliance decided to wait for the Tribe's next action and did not set another meeting (Hedberg, 2011a). The Tribal Chairman attempted to meet with the City Council to clarify the issue and the Nez Perce said they were:

'disappointed to see regional officials believe it is necessary to reform the alliance...In the past, much progress was made with outside mediators...The tribe does not want to see that progress lost.' (Hedberg, 2011b, para. 2).

The tribe also held two public information meetings to reach out to local residents and stated in their news release that:

The tribe will continue to reach out to local governments to discuss areas of concern...The tribe is open to direct dialog with any governmental officials of issues and encourages them to contact the tribe with any questions or concerns they may have. (Hedberg, 2011b, para. 11).

In reviewing these relations between the tribe and local governments, it is not possible to assess the impact the Nez Perce Water Agreement had on relations because the group had been working with a mediator specifically to address the jurisdictional issues. In fact, the water rights adjudication and settlement, temporarily sidetracked the progress these parties had made, escalating the conflict instead of serving to continue building capacity. However, it is apparent that the Nez Perce Tribe has found value in formal conflict resolution processes and seeks to collaborate with other local governments.

*Increased System Capacity for Responding to External Challenges*

The effects of the Nez Perce Agreement are difficult to determine since the Columbia River Basin has become a focal point for collaborative efforts due to: the significance of salmon to the region; the number of tribes with treaty fishing rights; the federal government's role in the decline of salmon; and their corresponding duty to recover salmon under the ESA. There is no shortage of examples of groups working together and certainly the networks across the basin are extensive; however, there is also no shortage of examples of litigation (E. Barker, 2009; R. Barker, 2008a, 2008b, 2011a, 2011b, 2011c). At least one individual involved in the negotiations indicated that the Nez Perce Agreement could serve as a foundation for future collaborative efforts on the lower Columbia (Semanko, 2007).

### **8.9.3 Social System Transformation**

*Assistance and Support Provided to General Community:* Information not gathered. Could not establish a reliable baseline.

*More Resilient Social/Political/Economic System:* No evidence to suggest a change.

*Increased Civic Discourse:* No evidence of increased civic discourse.

*Creating a Learning System/"Double Loop Learning":* Limited evidence. See Enhanced System Capacity to Draw on Collective Resources.

*Enhanced Networks:* No information found for this criterion.

*Perceived Mutual Reciprocity/Assistance Relationships:* The Nez Perce appreciated Governor Kempthorne's role in the settlement negotiations and offered to assist him in reaching out to other tribes when he became Secretary of the Department of Interior (Holmes, 2006).

*Perceived Interdependence:* In 2009, the Lieutenant Governor of Idaho, Brad Little, when discussing potential solutions for salmon recovery, pointed out Idaho's commitment of 2 million acre-feet of water from Dworshak and 487,000 acre-feet feet through the Nez Perce Agreement for flow augmentation. According to Little, the flow augmentation has costs to Idaho's economy, but "supporting (the latest federal salmon plan) comes with a price tag we are willing to pay because all of the region's sovereigns must sacrifice if we are to recover salmon and steelhead" (Poppino, 2009a).

*General Trust:* In 2008, political changes offered the possibility of new talks to recover salmon on the Columbia, including consideration of breaching the lower Snake River dams. Norman Semanko noted that he was not concerned because he had confidence that Idaho's Congressional Delegation would not bargain away Idaho's interests (Poppino, 2009a).

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