

IN THE COURT OF APPEALS IN THE STATE OF OREGON

COLUMBIA RIVERKEEPER, NATIVE FISH SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, OREGON WILD, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES, THE CONSERVATION ANGLER, NEZ PERCE TRIBE, a federally recognized Indian tribe, and CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION,
Petitioners,

v.

OREGON FISH AND WILDLIFE COMMISSION,
Respondent.

Court of Appeals No. A182213 (Control)
A182217

DECLARATION OF NEZ PERCE TRIBAL CHAIRMAN SHANNON F. WHEELER IN SUPPORT OF PETITIONERS' MOTION FOR STAY PENDING JUDICIAL REVIEW

The undersigned, Mr. Shannon F. Wheeler, states as follows:

1. I am the Chairman of the Nez Perce Tribal Executive Committee, the governing body of the Nez Perce Tribe under its Constitution. My name in the *nimipuutimt* language of my people is *Weowe'okt'pu*.

2. All of what is now Wallowa County, Oregon, is part of the homeland of the Nez Perce people, the *Nimiipuu*. In the Nez Perce Treaty of June 11, 1855 with the United States, we reserved rights exercised since time immemorial, including the right to take fish at all usual and accustomed places, and rights of

hunting, gathering, and pasturing animals on all open and unclaimed lands. Nez Perce Treaty-reserved rights are continually exercised by our members to this day, including throughout Northeast Oregon.

3. I address here the Nez Perce Tribe's extreme concern that the Oregon Department of Fish and Wildlife (ODFW) is pushing ahead with approval of a cost-cutting "trap and haul" fish passage plan at Wallowa Lake Dam, before this Court can rule on the legality of the in-the-dark fish passage rule revision challenged in this case, at a Treaty-reserved location of extraordinary importance to Nez Perce people.

4. The importance of Wallowa Lake within our homeland cannot be overstated. Wallowa Lake and its surroundings are simply a sacred place to our people. Its cultural, spiritual, and ecological significance is unique. The Nez Perce have stepped forward repeatedly over many decades in many forums to defend the lake and its surrounding lands from harm.

5. Attached as Exhibit A is a 2006 report by Alan G. Marshall, PhD, on the nature and significance of Wallowa Lake and its surroundings to Nez Perce people. For *Nimiipuu*, our traditional knowledge already tells us the sacred nature of Wallowa Lake. We don't need scientific analyses to tell us what we know through our traditional culture. This report, however, produced by a genuine academic expert and specialist on the *Nimiipuu*, was provided by the Tribe to the State of Oregon in the past to assist Oregon's understanding of the nature of the Wallowa Lake area, at a moment that resulted in joint tribal-state protection of an area now known as *Iwetemlaykin*, adjacent to the lake and the Wallowa Lake Dam.

The report is provided here to assist this Court in understanding the sacred nature of Wallowa Lake, and therefore the critical importance of how the lake and its habitat connectivity to the Wallowa River should be treated at a 100-year moment of opportunity. This is not a moment for cost and corner cutting.

6. Wallowa Lake was one of the great sockeye salmon lakes of North America. In 1916, a grave injustice was done when Wallowa Lake Dam was built with no fish passage. Earlier downstream dams, now gone, also blocked salmon migration, but what was done to Wallowa Lake remains a concrete barrier to this day. As the dam was used divert water to irrigate the upper Wallowa Valley, salmon were blocked from their lake and their own immemorial lifecycle, leaving a legendary Nez Perce fishing ground barren. This was a grave injury to the Tribe's 1855 Treaty-reserved fishing rights, at a unique Treaty-reserved location, that has never been resolved.

7. One hundred years later, the Wallowa Lake Dam is planned for reconstruction, but ODFW is pushing ahead with approval of a plan that would continue the same dam blockage, likely for another 100 years. And ODFW is using as justification exactly the no-notice, last-minute December 2022 fish passage rule rewrite challenged in this case. This would be used to approve the reconstruction of Wallowa Lake Dam without volitional upstream fish passage and instead with a permanent "trap and truck" facility at the dam.

8. Attached as Exhibit B is a June 2023 op-ed I wrote for publication in the local Wallowa County newspaper, the Wallowa County "Chieftain," with a message that echoes some of what I am saying here. The op-ed was a problem-

solving message – a Nez Perce offer – to the local community, the dam owner, and the State of Oregon. It is provided to the Court as a concise explanation of the vision of the Nez Perce Tribe at a 100-year moment in time for Wallowa Lake and its severed river and long-term restoration of sockeye salmon.

9. Attached as Exhibit C is a January 10, 2023, joint letter of the Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation. The Nez Perce and Umatilla Tribes wrote this letter to the Oregon Fish and Wildlife Commission after learning it adopted a fish passage rule revision radically different than August 2022 public comment draft – the product of a nearly two-year public process – the two Tribes had reviewed in September and then tracked to filing with the Oregon Secretary of State on October 21, 2022. The two Tribes learned that sometime prior to December 16, 2022, a last minute, no-notice rewrite was done to change the central definition of “fish passage” and to give ODFW an entirely new authority to use “trap and transport” instead of volitional passage for migratory fish throughout Oregon. Had anything like those changes been in the publicly noticed document the Nez Perce Tribe reviewed in September, or in the October filing with the Secretary of State, the Tribe would have commented in opposition.

10. Now, after the Tribe petitioned this Court to challenge the Commission’s adoption of no-notice, in-the-dark fish passage rule edits – critically important ones – that would affect ODFW migratory fish passage decisions throughout Oregon for decades to come, we see that ODFW is pushing ahead at Wallowa Lake with approval of a “trap and truck” upstream passage plan rather than volitional fish passage.

11. The Tribe knows that trap and transport of fish can be useful in certain circumstances, for example in an initial population restoration stage, and that initial restoration of sockeye salmon with an interim phase of trap and transport, will be part of sockeye restoration at Wallowa Lake. But “trap and haul” of fish is not a permanent, 100-year substitute for volitional fish passage. For the Commission to adopt a no-notice rule change then used to authorize trapping and trucking of fish to become a permanent substitute for upstream volitional passage at Wallowa Lake would be to add a new 100-year injury to Treaty-reserved fishing rights at Wallowa Lake – 100 years after Wallowa Lake Dam helped to destroy a unique Treaty-reserved fishing ground.

12. As I explained in my op-ed, true volitional passage at Wallowa Lake Dam should have been independently assessed, not merely by the dam owner. The Nez Perce Tribe recently hired a national-level fish passage engineering firm to assess that question and they have concluded that volitional fish passage at Wallowa Lake Dam was and is feasible: it can be engineered into a dam reconstruction. It is unclear why Oregon has avoided this opportunity and why it still does not take the opportunity to engage with the Tribe to pursue the genuine long-term habitat connectivity that the fish and Wallowa Lake deserve. If Oregon’s concern was cost, the Tribe has offered to facilitate the funding that would be needed.

13. We’ve reminded Oregon that the Nez Perce Tribe helped to secure the Oregon legislative funding and the congressional funding the Wallowa Lake Dam reconstruction has already been provided. The Tribe did not do that to bail out a

generic private dam with public money, and certainly not a dam that was the cause of historic injuries to Nez Perce Treaty rights. It did that for the 100-year opportunity to correct a wrong at a Treaty-reserved location the Nez Perce believe is sacred.

14. Attached as Exhibit D is the Nez Perce Tribe's January 26, 2024 letter comment to the U.S. Army Corps of Engineers on its notice of a Joint Permit Application (JPA) (with the state of Oregon) for Wallowa Lake Dam reconstruction.¹ The Nez Perce Tribe's comments include the requirement of (Presidential) Executive Order 13175 government-to-government consultation with the Corps as a federal agency trustee of the Tribe, prior to permitting; the literally sacred nature of the project location, Wallowa Lake and its surrounding land, to the Nez Perce Tribe and its people, and thus the extraordinary magnitude of all impacts; the pending Oregon Court of Appeals petition regarding precisely the in-the-dark, no-notice Fish Passage Rules "trap and haul" revisions being used to justify the lack of any upstream volitional fish passage in the JPA; and several significant inaccuracies in the JPA, including fundamental project elements such as water storage elevation/high water and water storage purposes, that should require application revision and resubmission.

15. ODFW's last-minute concealed rule revision is not what we expect of our otherwise strong, mutually-respectful relationship with the State of Oregon. If

¹ Several exhibits to the JPA comment letter have been omitted, including the Marshall Report and my June 2023 op-ed, to avoid duplication of those exhibits attached to this declaration.

ODFW now uses a no-notice rule revision to “lock in” trapping and trucking fish at Wallowa Lake for the next 100 years, a tragedy will have occurred.

16. People talk of looking into the future before taking action, but rarely exercise the imagination to do so. They rarely take the time to imagine a future generation’s perspective on actions pending today. The Nez Perce Tribe simply asks that all that is possible and feasible occur for the reestablishment of passage connectivity at Wallowa Lake Dam, after the Treaty right injuries of last 100 years. We know volitional passage can feasibly be engineered into a reconstruction. ODFW’s in-the-dark rewrite of the rules for volitional fish passage cuts corners, and circumvents existing rule processes for waiver or exemption of volitional passage if those can be publicly and transparently proved, across all of Oregon. That ODFW is now pushing ahead with approval of a cost-cutting “trap and truck” plan at Wallowa Lake, before this Court can rule on the legality of what was done to the rule, is insult on top of injury. The prospect of 100 years of additional harm to salmon and Wallowa Lake, and to the Nez Perce people and their Treaty rights, requires the stay the Nez Perce Tribe requests of the Oregon Court of Appeals.

I declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated February 16, 2024.

/s/ Shannon F. Wheeler
Shannon F. Wheeler

Exhibit A

**An Ethnohistoric Assessment of Nez Perce Relationships
with the
Marr Ranch Property, Wallowa Lake, and the Wallowa Country**

**Interim Report to
The Nez Perce Tribe
Office of Legal Counsel
P.O. Box 305
Lapwai, ID 83540**

**By
Alan G. Marshall, Ph.D.
818 6th Ave.
Lewiston, ID 83501**

15 September 2006

At the northern outlet of Wallowa Lake is a cemetery in which historically significant Nez Perces and others are buried. (See map) Land bordering the north side of the Wallowa River – the Chief Joseph Cemetery and adjacent land known as "the Marr Ranch" – are the focus of issues regarding commercial development. The current owner of the Marr Ranch property wishes to commercially develop the property. Others, including Nez Perce people, oppose such commercial development.

This interim report is concerned with the significance of Wallowa Lake and its environs to Nez Perce people. The commercial development of the Marr Ranch property reprises a 150-year-old problem for Nez Perce people. Development of the land bordering a significant cemetery and traditional, historical fishing ground in a commercial, market-driven manner degrades the natural, social, and spiritual dimensions of a sacred area and inhibits many other uses of the place. It further disconnects descendants of the Nez Perces native to the Wallowa Valley from their social and cultural roots.

In brief, the Chief Joseph cemetery and adjacent properties are highly significant to Nez Perce people generally, and to the descendants of the Nez Perce inhabitants of the area more than 100 years ago. The significance grows out of several dimensions:

1. Geographically, the Marr property was a fundamental part of wider historical/traditional Nez Perce subsistence, economic, family, political, and religious life. This ethnohistoric background is essential to understanding Nez Perce and, in particular, Wallowa Band descendants' concerns with the Marr property.

2. Prior to the expulsion of Nez Perces from northeastern Oregon, the outfall of Wallowa Lake, which includes the Marr property, was an important living space for the Wallowa Band of Nez Perces and their relatives. Most of the descendents of the Wallowa Band are enrolled members of one or another of three federally recognized tribal groups: the Confederated Tribes of the Colville Reservation (Joseph Band); the Confederated Tribes of the Umatilla Indian Reservation; and, the Nez Perce Tribe (Idaho). These political entities maintain a vital interest in the Wallowa country.
3. All Nez Perces agree with most legal authorities (including the Indian Claims Commission) and historians that the politically independent Nez Perce band occupying the area did not cede Wallowa Lake nor, indeed, the Wallowa Valley, Grande Ronde or Imnaha drainages, to the United States.
4. The Wallowa region remained significant to Nez Perces through the latter 19th and the 20th centuries despite their displacement following the war between several Nez Perce bands and the United States in 1877.
5. Wallowa Lake remains sacred to Nez Perces.

Before discussing these points I will very briefly identify who finds this area so significant to their present and future.

The Wallowa Band of Nez Perces

The Wallowa Band of Nez Perce Indians includes a number of families whose ancestors wintered in the canyons of streams originating in the Wallowa Mountains. Not all descendents are aware of the group and many, for various reasons, do not

take part in its activities. The Band has not been recognized as an independent group by the United States. Nevertheless, the band exists in fact, and is influential in a number of political arenas.

Wallowa Band ancestors called themselves /w'al'wama/, and their dominant language was a dialect of the Nez Perce language -- /niimiipuutímt/. They were a politically independent of similar groups in the surrounding areas in present day Washington, Oregon, and Idaho.¹ Most of those groups were allied with /w'al'wama/ through intermarriage, trade, and occasional common use of resources. Those groups included other Nez Perce speaking groups such as the Asotin band; groups speaking related languages such as Walla Walla or Palus; and groups speaking very different languages, i.e., Cayuse. The southern border was occupied by Shoshonean language speaking peoples, against whom war was sometimes conducted. Few, if any, alliances were made with those groups.

Currently most /w'al'wama/ descendents are enrolled on the Colville, Umatilla, and Nez Perce Reservations. Descendents are also found on a number of other reservations, such as the Flathead-Salish Reservation in Montana and on reserves in Canada. At least some live in non-reservation areas. This situation results from the dispersal of the band consequent to the Nez Perce War of 1877 and later Federal policy and State actions; some of those are discussed later in this report.

¹ Ray, Verne F. "Native Villages and Groupings of the Columbia Basin." Pacific Northwest Quarterly 27.2 (1936): 99-152. Ray, Verne F., and and Others. "Tribal Distribution in Eastern Oregon and Adjacent Regions." American Anthropologist 40.3 (1938): 384-415. Ray, Verne F. "Ethnohistory of the Joseph Band of Nez Perce Indians: 1805-1905." Nez Perce Indians. Ed. David Agee Horr. The Garland American Indian Ethnohistory Series. New York: Garland Publishing Inc., 1974. 167-267. Chalfant, Stuart A. "Aboriginal Territory of the Nez Perce Indians." Nez Perce Indians. Ed. David Agee Horr. The Garland American Indian Ethnohistory Series. New York: Garland Publishing Inc., 1974. 25-163.

The Nez Perce War of 1877 captured the attention of the U.S. and has remained perennially interesting to non-Indian people. To non-Indians the war *was* a dramatic confrontation for many reasons. On the other hand, "the War" *is* an unhealed grievous injury that is often present to many Nez Perce people, especially those who are descended from the "combatants." There are many unique family histories of these events; the members of these families are the authorities for those histories.

The contrast between "was" and "is" constitutes a significant cultural difference between Nez Perce people and non-Indians. Non-Indians have difficulty realizing that Nez Perce history continues today.

Cultural-historical Background

"Nez Perces" have lived in the Wallowa country for as long as either written or oral histories record. "Nez Perce" is a term identifying those independent groups of native peoples who spoke dialects of /niimiipuutímt/ -- "the people's speech." Wallowa valley people spoke a distinct dialect, and were known as /w'al'wama/. This designation is significant because the word's ending -- /-ma/ -- identifies both the place and the people of that place or area. In other words, people and place were identical and inseparable.

The /w'al'wama/ were not a single political unit in the Euroamerican pattern. Rather it was a "coming together" of a number of smaller units, which had considerable autonomy in action. One way of interpreting this is through examining the "seasonal round" of Nez Perce people.

Understanding the Nez Perce "seasonal round" during the mid-1800s is basic to understanding the concerns of present-day Nez Perces for the Marr Ranch property and for present-day Wallowa County. This cultural pattern, modified by

historical events, has continued into the present day. "Seasonal round" refers to the pattern in which groups of people who derive all their economic, familial, political, and spiritual resources from local environments move their habitations from season to season in order to access those resources. The economy of such groups is often referred to as "hunting and gathering" or "foraging."

However, these terms are inadequate and misleading because the material, economic, social, and political life of Nez Perce people in the mid-nineteenth century was more complex than other groups categorized the same way. My view of the Nez Perce seasonal round is based on research conducted over the past 30 years.² Although I may disagree with the categorization of Nez Percés as "foragers," my description does not differ greatly from others'. The following is a brief sketch of that round.³

The year began in spring, sometime during March-May of the Gregorian calendar, and was a great ceremonial occasion. The ceremony was /ke'uyit/ -- the first foods ceremony. In this ceremony, the people recognized the fruits of "Mother Earth" and the bounty of the "Creator" with a feast composed of foods grown that spring and oratory. These feasts were held in so-called "winter villages" -- /tewyenikees/. These villages were found in the deep canyons, e.g., along the lower Imnaha and Joseph Creek. While each village had its own leadership and political

² Marshall, Alan G., "Nez Perce Social Groups: An Ecological Interpretation." Ph.D. Dissertation. Washington State University, 1977. Marshall, Alan G. "'Prairie Chickens Dancing...': Ecology's Myth." Idaho Folklife: Homesteads to Headstones. Ed. Louie W. Attebery. Salt Lake City: University of Utah Press, 1985. 101-07. Marshall, Alan G. "Unusual Gardens: The Nez Perce and Wild Horticulture on the Eastern Columbia Plateau." Northwest Lands, Northwest Peoples: Readings in Environmental History. Eds. Dale D. Goble and Paul W. Hirt. Seattle: University of Washington Press, 1999. Marshall, Alan G. "Niimípuunmhípt [Nez Perce Sustenance]." Author's Possession. Lewiston, ID, 2004. 5. Marshall, Alan G. "Fish, Water, and Nez Perce Life" Idaho Law Review. forthcoming

³ Marshall, "Nez Perce Social Groups," Chapter 2

identity, they usually formed combines with other villages nearby and on the same stream. Usually the ceremony involved all the villages in the combine.

The number of people living in these villages ranged from a single family to, perhaps, 30 or 40 families. In the larger villages many of those families had joined their lodges together into a "long house." This house (or houses) served as the social center for the villagers, such as being a structure for /ke'uyit/.

Shortly following /ke'uyit/ the people moved up the canyons and into the prairies as plant foods were ready to harvest in great enough amounts to process and store. As distances grew greater, families moved their homes to the work locations. Of course, during this time men continued to hunt and fish, sometimes at distant locations.

The people come together again at the great camas gathering grounds. These were usually the largest congregations of people, numbering in the many hundreds, if not thousands. Another gathering place was at a few fishing locations – such as at "Indian Village" and at the head of the Wallowa River.

By fall, many families had scattered into the mountains to traditional hunting places. As the snow fell and deepened, they returned to their "winter villages." Early winter saw people participating in "spirit dances." These dances were gatherings of people primarily from the same village combine; during the dances, some people demonstrated their closeness to the spirits that live in their region.

The identity of people and place has long been a question of interest among Nez Perce intellectuals. For the most part, these men and women have not published their work in written form. Like Socrates, they believe that reducing such work to writing robs it of life. Aspects of this intellectual tradition have been studied by several non-Nez Perce scholars.

Edward S. Curtis in his examination of the conflict between non-Indians settlers, the United States government, and the /w'al'wama/ wrote:

All the Shahaptian groups speak a great deal of the earth as mother, but the Nez Percés seem to have been the high-priest of the earth-mother religion...This prejudice against parting with land and tilling the soil was not mere whim, but was based on a deep-rooted religious doctrine. *Holahholah-tamáluit* (invisible law) is the name applied by the Nez Percés to the supreme law of nature. This law or power placed them on the earth, and it was this belief that made them so strongly oppose the Government's demand that they give up their native valleys and concentrate the bands on one reservation.⁴

This theology is clear in Chief Joseph's response to an 1876 Commission aimed at convincing the /w'al'wama/ to leave the Wallowa Valley.⁵

The reply to all such suggestions, seriously made and oft repeated both by Joseph and his brother, was to the effect that the "Creative Power," when he made the earth, made no marks, no lines of division or separation upon it, and that it should be allowed to remain as then made. The earth was his mother. He was made of the earth and grew up on its bosom. The earth, as his mother and nurse, was sacred to his affections, too sacred to be valued by or sold for silver and gold. He could not consent to sever his affections from the land that bore him. He was content to live upon such fruits as the "Creative Power" placed within and upon it, and unwilling to barter these and his free habits away for the new modes of life proposed by us. Moreover, the earth carried chieftainship, (which the interpreter explained to mean law, authority, or control,) and therefore to part with the earth would be to part with himself or with his self-control. He asked nothing of the President. He was able to take care of himself. He did not desire Wallowa Valley as a reservation, for that would subject him and his band to the will of and dependence on another, and to laws not of their own making. He was disposed to live peaceably. He and his band had suffered wrong rather than do wrong. One of their number was wickedly slain by a white man during the last summer, but he would not avenge his death. But unavenged by him, the voice of that brother's blood,

⁴ Curtis, Edward S. "The Nez Percés." The North American Indian, Being a Series of Volumes Picturing and Describing the Indians of the United States, the Dominion of Canada, and Alaska. Vol. 8. Norwood, MA: The Plimpton Press, 1911. 16.

⁵ This commission was led by D.H. Jerome. Other members were General O.O. Howard, Bt. Col. H. Clay Wood, Wm. Stickney, and A.C. Barstow. The council convened in a church near Lapwai on November 13, 1876. James Reuben likely was the interpreter.

sanctifying the ground, would call the dust of their fathers back to life, to people the land in protest of this great wrong.⁶

Clearly, Nez Perces felt that they must live in a way that their still active ancestors approved; otherwise they would suffer calamity; one of those laws was avenging the murder of one of their number. Even so, in order to honor their treaty, Joseph had not avenged the murder of one of his followers.

The belief that ancestors are still active in every day affairs is why Nez Perces are so concerned with cemeteries and gravesites. And, the continuing sense of this issue has especial relevance to understanding issues surrounding Tuekakas' ["Old Joseph"] graves and cemeteries. They are located in accordance with a historical tradition of placement.

Herbert Spinden noted:

Cemeteries are found near the traditional village sites, usually on the first bench above the river bottom, where the ground was easy to dig and where the graves could be seen from the village. ... Cemeteries are readily located by the heaps of rover-worn or rock-slide boulders [sic] piled over the graves. But so completely have most of the cemeteries been rifled by relic-hunters that it is now difficult to find any undisturbed graves except in the regions at present occupied by the Indians.⁷

Old Joseph, it is generally accepted, died during August, 1871, at the fork of the Lostine and Wallowa Rivers at a place now known as "Indian Camp."⁸ He was

⁶ Jerome, D. H., et al. "Report of Civil and Military Commission to the Nez Percé Indians, Washington Territory and the Northwest." Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, for the Year 1877. Washington, D.C.: Office of the Commissioner of Indian Affairs, 1877. 212.

⁷ Spinden, Herbert Joseph. "The Nez Percé Indians." Memoirs of the American Anthropological Association 2.3 (1908): 167-274.

⁸ The following account is based on: Bartlett, Grace. "Old Chief Joseph's Grave." From the Wallawas. Ed. Grace Bartlett. Enterprise, OR: Pika Press, 1992. 43-49. Bartlett, Grace. "Reburial of Old Joseph." From the Wallawas. Ed. Grace Bartlett. Enterprise, OR: Pika Press, 1992. 50-52. Josephy, Alvin M., Jr. The Nez Perce Indians and the Opening of the Northwest. New Haven: Yale University Press, 1965. 449-

buried in a cemetery on the slope south of the confluence. Old Joseph's grave was marked by a variety of means, such as a red-painted school bell, a boulder cairn, and so on. Later, the land was "settled" by A.V. McAlexander. The grave was desecrated almost immediately: the bell was stolen, the grave goods stolen, and so on. In 1886 a traveling dentist took Old Joseph's head, boiled it to remove dirt any remaining flesh, and later displayed the skull on his desk in Baker City, Oregon.

Growing tired of plowing around the gravesite, Mr. McAlexander wished to remove the grave elsewhere and spoke with J.H. Horner about it. In 1925 J.H. Horner proposed moving the grave to some Nez Perces, who for a number of years wanted a new cemetery in the county. Horner proposed the "Indian cemetery at Wallowa Lake" as the location. Some younger men were uninterested, but Frances McFarland, a Nez Perce who frequented the area, took the lead and convinced tribal members to do so. The move was effected on 26 September, 1926. Since then public interest in the site has waxed and waned.

A Brief History of the Loss of Wallowa Country and Wallowa Lake

The /w'al'wama/ have defended themselves and the land that made them against all others, except their relatives from other regions. They were willing to share their land so long as it was respected in the way that /w'al'wama/ had learned to do so successfully.

Wallowa Lake first appears in Euroamerican written history in 1839, when Henry Harmon Spalding visited there in the at the behest of one of his "converts," Tuekakas, or as Spalding preferred to call him, "Joseph."

Spalding wrote:

450. The published accounts of Old Joseph's death, burial, and the desecration of his grave are based on notes made by J.H. Horner, a long-time resident of Wallowa County, Oregon.

Pass around this plain nearly to the E. end of the Snow Mt. & turn L. to the Lake (Spalding lake) the sight of which has paid me for my journey. It is a most beautiful body of water, I should judge 6m. long & 3 broad. S. end bound in by the snow topped Granite Mts., & the N. by a rolling hill of granite boulders, through which the outlet pass swiftly in a large stream 30 yards wide coming up to our horses sides. The water rushes over a bed of grate roaring & foaming as if eager to find a peaceful quiet, not conscience that it must be dashed against many rocks & rushes through many narrows not only after it units with its brother the G.R.R. but in the S. & C.R. before it finds a resting place in the bosom of the Pacific. The water of this Lake is clear as crystal & cool, a bed of white clay appears in the bottom.

The E. side is lined with G[ranite] which was doubtless brought in the time of the flood from the Mts. while the W. side displays much less. And here let me say, I discovered no granite till near the end of my journey, at first scattering, but here the boulders are piled up in hills, & to increase eastward. They might have been brought from the Mts. by a S.W. current. I saw no water fowl, but many white headed eagles. Joseph brought one from the top of a pine which afforded me a large pair of wings. Joseph tells me there are a great variety of trout & salmon in the lake. We arrived at 12, 5 hours from camp, 25 mis. Bathed in this beautiful water, took a few stones & some white clay from the bottom & started for camp 2 p.m.⁹ (271-271)

It is not so strange that Spalding missed the significance of this visit, although he was not unmoved by the place. A 25-mile detour to see a mere lake seems egregious, unless that lake had some special meaning to Tuekakas and the /w'al'wama/.

The 1855 Treaty, in the view of most Nez Perces including the /w'al'wama/, preserved the independence of the various independent, though closely allied, Nez Perce people.¹⁰ Fundamentally, it recognized them as the sovereigns of the land, and excluded all U.S. citizens from it.

⁹ Drury, Clifford Merrill, ed. The Diaries and Letters of Henry H. Spalding and Asa Bowen Smith Relating to the Nez Perce Mission, 1838-1842. Glendale: The Arthur H. Clark Company, 1958. Pp. 271-272.

¹⁰ "Treaty with the Nez Percés, 1855." Laws and Treaties. Ed. Charles J. Kappler. Vol. 2 (Treaties). Washington: Government Printing Office, 1904. 702-06.

The 1863 Treaty, however, was another matter. Tuekakas was not interested in signing this treaty, and did not.¹¹ The leaders of some other "bands" did sign the treaty and many members of the U.S. government and its citizens made the labored argument that those leaders represented all Nez Percés. Josephy described the Federal government's own doubts and acknowledgement that the Wallowa people were not signatories to the 1863 "supplemental" treaty. Superintendent of Indian Affairs (Oregon) T.B. Odeneal and Indian Agent (Nez Perce Agency) John Monteith met with Young Joseph and others of the /w'al'wama/. Odeneal's and Monteith's conclusion was that the Joseph Band's title to the Wallowa region had not been extinguished. They urged that all entry by settlers be stopped until the situation had been sorted out.¹²

The Federal government's concern was so great that President U.S. Grant attempted to redress the problem by establishing a reservation by Executive Order on June 16, 1873. The Executive Order Reservation divided the Wallowa Valley; the /w'al'wama/ were to get the upper valley, including the lake. But the description was somehow confused at the Bureau of Indian Affairs and assigned the lower valley, which had been settled by some pioneers, to the /w'al'wama/ and the upper area to the settlers. A withering political firestorm followed, led by the Governor of Oregon, and the Order was reversed June 10, 1875.¹³

¹¹ *supra*, Jerome, D.H., *Report of Civil and Military Commission*, at 5.

¹² Josephy, Alvin M., Jr. The Nez Perce Indians and the Opening of the Northwest. New Haven: Yale University Press, 1965. Pp. 455-456.

¹³ *Ibid.* Pp. 466

Nevertheless, title to the Wallowa country and Wallowa Lake was still in question. An examination of the situation by the Adjutant General's Office concluded that the band led by "Young Joseph" was not bound by the 1863 Treaty.¹⁴

Indeed, Tuekakas, slightly before his death, had said to Young Joseph: My son, my body is returning to my mother earth, and my spirit is going very soon to see the Great Spirit Chief. When I am gone, think of your country. You are the chief of these people. They look to you to guide them. Always remember that your father never sold his country. You must stop your ears whenever you are asked to sign a treaty selling your home. A few years more, and the white men will be all around you. They have their eyes on this land. My son, never forget my dying words. This country holds your father's body. Never sell the bones of your father and your mother."¹⁵

Nevertheless, the /w'al'wama/ were forced from the region consequent to the disputed Treaty of 1863 with the United States. In 1877 a belligerent U.S. government began a war with the /w'al'wama/ and other "bands" of Nez Perce, none of whom were signatories to the 1863 Treaty.¹⁶

The War

The war waged by the United States on some Nez Perce people has been the topic of over 95 books and many more articles in professional and other journals. It will not be detailed here. Alvin M. Josephy, Jr.'s work, "The Nez Perce Indians and the Opening of the Northwest" remains the best fundamental work on the subject.

Suffice it to say that, despite the U.S. Government's own doubts about the legality of the 1863 Treaty with the Nez Percés, bands of Nez Perce people living outside the borders of the 1863 Reservation were ordered to retreat to the

¹⁴ Wood, H. Clay. The Status of Young Chief Joseph and His Band of Nez-Perce Indians under the Treaties between the United States and the Nez-Perce Tribe of Indians and the Indian Title to Land. Portland: Assistant Adjutant General's Office, Department of the Columbia, 1876.

¹⁵ Chief Joseph. "An Indian's View of Indian Affairs," North American Review 128, April (1879): 419.

¹⁶ In fact, all the bands whose land was outside the 1863 reservation boundaries were either relocated on the reservation or traveling to it when the war began.

reservation, including the /w'al'wama/. At great capital loss, the /w'al'wama/ began to do so. In the process a few non-Indians were killed by a very few Nez Perce men.

Despite efforts by Nez Perces to avert military conflict, the U.S. Army and volunteers began the armed conflict 17 June 1877. Nez Perce bands, such as those led by Chief Lookingglass and Chief Red Heart, were swept up in the conflict. A storied attempt to escape the Army under General O. O. Howard's command occurred in the months that followed. In the end, the Nez Perces, much reduced by death and by the escape of some members under the leadership of Chief White Bird, "surrendered" to General Howard on 5 October 1877. These people, under the leadership of Chief Joseph, understood, among other things, that they would return to Idaho. The understandings concerning the disposition of the people were promptly violated, and the Nez Perces, many of whom were from the Wallowa country, were sent first to Ft. Leavenworth, then to Indian Territory in present-day Oklahoma.

Throughout this time the people, mostly the elderly, children, and babies, sickened and died due to the terrible conditions and the foreign nature of the land. In 1884 the Ponca Agent, John W. Scott wrote:

They are extremely anxious to return to their own country. They regard themselves as exiles. The climate does not seem to agree with them, many of them have died, and there is a tinge of melancholy in their bearing and conversation that is truly pathetic. I think they should be sent, back as it seems clear they will never take root and prosper in this locality.¹⁷

Clearly, exile did not quench the desire of /w'al'wama/ or others to return to their lands, however. When possible, over subsequent years those Nez Perces, including /w'al'wama/, who were scattered returned to either the Nez Perce or

¹⁷ Scott, John W. 1884. [Report of the Ponca Agent—Nez Perces of Joseph's Band]. *In* Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1884. Pp. 89-90. Washington, D.C.: Office of the Commissioner of Indian Affairs.

Umatilla reservations without official notice, at least. Those under the leadership of Chief Joseph continued a very public campaign to return to their country. In May, 1885, the 268 Nez Percés who were confined to the Ponca Reservation in Indian Territory began their return, substantially financed by themselves, to the Northwest. However, only 118 were allowed to go to the Nez Perce Reservation. The 150 remaining members of the Joseph Band were not allowed to go there; instead, they were sent to Nespelem area on the Colville Reservation. This federal decision displaced the Nespelem people who lived there.

The Joseph Band continued to campaign to return to the Wallowa country. But their immediate hopes for return were dashed after a visit to the Wallowa Valley by Chief Joseph and some others in 1899; the settlers there opposed their return. In 1900, Chief Joseph and Inspector General James McLaughlin visited the Wallowa Valley; again the citizens there opposed his return. And, the Agent at Colville also opposed the return, writing: "... that neither the welfare nor the happiness of the Indians nor the good of the service would be promoted by allowing Joseph and his band to remove from their present location to the Wallowa Valley...."¹⁸

Post-War Use of the Wallowa Country by /w'al'wama/

The people were scattered in the aftermath of the 1877 war. However, /w'al'wama/ people, as individuals and families, have continued to return to the region and the lake into the present. And there have been active efforts to return as a group to the Wallowa Valley.¹⁹ In recent years, /w'al'wama/ people have returned

¹⁸ Jones, W. A. 1900. Report of the Commissioner of Indian Affairs: Chief Joseph and His Band of Nez Percé. *In* Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900. Indian Affairs. Report of Commissioner and Appendixes. p. 180. Washington, D.C.: Office of the Commissioner of Indian Affairs.

¹⁹ Evans, Steven Ross. Voice of the Old Wolf: Lucullus Virgil Mcwhorter and the Nez Perce Indians. Pullman, WA: Washington State University Press, 1996.

as a group, calling themselves "Wallowa Band of Nez Perces," as well, holding an annual celebration at Wallowa, Oregon. This group has had significant impact on the area.²⁰ The legal status of the /w'al'wama/'s territory is also still debated by legal scholars. For example, a recent article asserts that the 1863 Treaty did not apply to the Wallowa Valley, and its "taking" is invalid.²¹

I visited the Wallowa Lake environs with Samuel M. Watters, whose family was part of the 1877 war, exiled to Oklahoma, and then sent to Colville. In the late 1800s his father and mother enrolled at Lapwai, ID, in the Nez Perce Tribe (of Idaho). Wallowa was very much a part of his and his family's life. Indeed, the first field trips that I took with him as an anthropologist-in-training was to /w'al'wama/. The lake was an important part of his teaching about /w'al'wama/; I was told the same facts about spirit-beings living in the lake.

Mr. Watters traveled whenever he could to /w'al'wama/. But he was, and is not, the only one. There has been a continued, though subdued presence of /w'al'wama/ and their relatives in the Wallowa country. Grace Bartlett notes, "...when they did agree to go to the reservation in Idaho, they stipulated that they be allowed to return each year to the Wallowa to fish and hunt."²²

The presence of Nez Perces in the Wallowa valley and at the headwaters of the Wallowa River is well known by local historians and in the oral history of non-Indians in the area. The use of the river at the lake occasioned some conflict.

²⁰ Waage, Sissel Annette. "(Re)Claiming the Watershed: Property Lines, Treaty Rights, and Collaborative Natural Resource Management Planning in Rural Oregon." Ph.D. Dissertation. University of California, 2000.

²¹ Flanagan, John K. "The Invalidity of the Nez Perce Treaty of 1863 and the Taking of the Wallowa Valley." American Indian Law Review 24.1 (1999-2000): 75-98.

²² Bartlett, Grace. From the Wallowas. Enterprise, OR: Pika Press, 1992. p. 138.

Immediately before the 1877 war, Nez Perces had physically stopped non-Indian commercial fishing at the lake's outlet.²³

Subsequently non-Indian commercial sockeye fishing proceeded virtually unfettered until the population collapsed and dams were built and replaced. During that time, Nez Perces traveled there to fish.²⁴ Landeen and Pinkham report Nez Perce elder Isabelle Saunders saying:

We used to go over to Lake Wallowa by horse to catch salmon. We called them "silversides." It was a beautiful time. The men would catch the salmon and the women would dry them. Sometimes the men would fish all night, and in the morning we would have a lot of salmon that we would have to dry or smoke.²⁵

This continued until a diversion dam was built in the river in 1890, which ended the sockeye runs.

Besides fishing, other activities occurred. In 1888, George W. Norris reported the following to the Commissioner of Indian Affairs:

The Indians quite generally leave the reservation in the latter part of August, as soon as harvesting is done, and spend two months hunting and fishing. The meat and fish thus secured are dried for winter use. They go in small parties, a portion of them to the Wallowa, or what is known as Chief Joseph's country, in Oregon; some to the valley and mountains of Salmon River and the Little Salmon, and others into the Bitter Root Mountains, where fish and game are abundant. A member of one part last year killed twenty-seven deer; another, in the same party, thirty; this was near the head of the Little Salmon.

Complaints through your office were made of Indian depredations in the last-named locality. They have also been made to me by citizens living in the Wallowa, but I have been unable to discover any just cause of complaint. The right of the Indians to hunt and fish in the country adjacent to their reservation seems the real question at issue. This right was reserved and is secured to them by their treaty. If the people of

²³ Ibid. p. 139

²⁴ Ibid.

²⁵ Landeen, Dan, and Allen Pinkham. Salmon and His People: Fish and Fishing in Nez Perce Culture. A Nez Perce Nature Guide. Lewiston, ID: Confluence Press, 1999. p. 138.

Oregon or elsewhere wish to enjoy the exclusive right of hunting and taking fish in the localities named it is a proper subject for negotiation, purchase, and sale. It is certainly not their privilege to exclude the Indians from the enjoyment of their treaty rights, nor to abridge them.²⁶ (86)

Hunting, fishing, and camping in the Wallowa country continued. Alan Marshall has gathered accounts of all three activities from the 1930s from two different families, and participated in those activities at various times from 1970 through the 1990s. Ancillary activities such as mushrooming also were part of the activities. Due to enforcement of fish and game laws, especially since the 1950s, a number of cases involving Nez Perces have come before the Circuit Court in Enterprise; many have been dismissed. It is clear that Nez Perces have continued to use the region.

Nez Perce activities of these kinds are often seen as secular by non-Indians. Hunting, fishing, and camping are practical activities, but they also have a sacred or spiritual dimension. The animals, in particular, continue to be viewed as sentient beings who "sacrifice" themselves so that humans, who are at a loss to live in their own, can survive.²⁷ Sharing the food with others, then, is a kind of communion with "the Earth" and one's fellows. Thus, there is great sacred significance in maintaining a continuing "exchange" with "the Earth."

Research into these matters is on-going.

The Lake and Environs as a Sacred "Place"

Walker indicates that the problem faced by Natives in protecting religious practice and ceremony in the courts is the "centrality standard." This is because the

²⁶ Norris, George W. 1888. Report of Nez Perce Agency. *In* Fifty-Seventh Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. Pp. 85-89. Washington, D.C.: Office of the Commissioner of Indian Affairs. p. 86.

²⁷ Alan G. Marshall, unpublished ms.

religious tradition is very different, and does not include, for example, central pilgrimage centers,. He states:

Clearly, sacred geography is a universal and essential feature of the practice of American Indian religions. Without continuing access to many sacred sites which maintain their physical integrity, most practitioners of traditional American Indian religions will be denied the opportunity to practice many vital ceremonies.²⁸

In the "court of public opinion," just as clearly, Native people's religions and their significant spiritual locations are not understood. Indeed, some locations and activities are literally not seen by outsiders even when the ceremony is going on in full view.

Wallowa Lake fits several criteria that Walker identifies as characteristic of Native sacred places. Among the nine types of sacred sites identified by Walker²⁹ are

1. "monumental geological features that have sacred (usually mythic) meaning-mountains, waterfalls, or unusual geological formations ...";
2. "burial areas and cemeteries"; and,
3. "sites of historical significance...".

Wallowa Lake obviously fits these criteria and Walker lists it among some 30 sites out of 300 that he has recorded:

27. *Wallowa Lake*. This northeastern Oregon, Nez Perce vision quest and ceremonial ground was the home of Chief Joseph, whose descendants gather here to memorialize his life, death, and historical significance to the Tribe.³⁰

Of course, all the earth is sacred to Nez Perces and many other Native people. But places such as Wallowa Lake are *portals*, *access points*, or *passageways* for

²⁸ Walker, Deward E., Jr. "Protecting American Indian Sacred Geography." Northwest Anthropological Research Notes 22.2 (1988): 253-66.

²⁹ Ibid., p. 259

³⁰ Ibid., pp. 261-262.

communication between the sacred world and the everyday world. Indeed, the lake and its environs are an intersection of the worlds; not only can humans enter the sacred world there, but sacred beings can enter the ordinary world as well.

What Indians do claim about Wallowa Lake is that a multitude of buffalo, blue and white elk, deer without horns and many strange animals to them unknown, lived in the depths of that beautiful body of water. By creeping up to the lake over the high lateral moraine, especially of a morning, you could see great droves of queer animals grazing on the shore. With the slightest noise, the herd would stampede for the lake in an eerie mixture of whinnies, bellowing, and baas. In their quick dive to the unknown depths the animals would churn the lake surface into froth, but soon all would be quiet and serene once more.³¹

Research into this subject is continuing.

/w'al'wama/ presence on the Marr property and environs

Written and oral traditions indicate that at least two settlements existed at various times on Wallowa Lake, and one at the location of present day Joseph, OR. These settlements were part of a more inclusive settlement pattern. In short, /w'al'wama/ congregated during the summer at locations where significant amounts of resources occurred, such as salmon or root grounds. In winter, the people dispersed into "winter villages" in the deep canyons. In the ethnographic and archaeological literature the summer settlements are referred to as "camps" and the winter settlements as "villages."

Madge Schwede surveyed a number of written and oral sources in order to document Nez Perce settlements. She obtained the following locations on Wallowa Lake:

228. -- ? --: Located in the area of Joseph, Oregon, NE1/4 SEC. 31 AND SW1/4 SEC. 29, T.2S R.45E., F: camp; R, Ch.

³¹ Bartlett, Grace. From the Wallowas. Enterprise, OR: Pika Press, 1992. p. 16.

229. -- ? --: Located on northwest side of Wallowa Lake, just below Joseph, Oregon, NW1/4 SEC. 5, T.3S., R.45E., 5: camp; Ch.

230. -- ? --: Located on southeast corner of Wallowa Lake, ¼ mile square area at intersection of Secs. 21, 20,29,28, T.3S. R. 45E., 5; camp; Ch.³²

Schwede's settlement number 229 seems to be at least partially located on the Marr property. Schwede identified all three settlements from of Stuart A. Chalfant's work for the Indian Claims Commission.

Physical evidence in the form of archaeological materials of the presence of /w'al'wama/ on the Marr property is sparse. Several surveys were done as part of the development of the Joseph City water system.³³ No village, habitation, tools, or graves were found. A "lithic scatter" – scattered flakes of rock resulting from making tools – was found.

"What we are dealing with is a very low density lithic scatter distributed randomly throughout a weakly developed soil profile which has been thoroughly mixed by rodent activity, frost heave and finally by historic agricultural activities. The site yielded no formed tool or datable materials and no living surfaces or cultural features were encountered."³⁴

The absence of materials is unsurprising. First, the main area of the camp was probably located off the property; this area was likely used for other purposes, perhaps horse grazing and/or drying fish. Second, the most intensive use of the Wallowa River – dipnetting, gaffing, and/or trapping salmon – would leave few long-lasting remains and those would be subject to dispersal by high water.

³² Schwede, Madge L. "An Ecological Study of Nez Perce Settlement Patterns." M.A. Washington State University, 1966. p. 44-45.

³³ Jaehnig, Manfred E. W. Archaeological Investigation of the Marr Property, Joseph, Oregon. Report to Regional Services Institute, Eastern Oregon State College. n.p., 1986. Womak, Bruce R. Cultural Resource Survey for Joseph Water Filtration. Report to City of Joseph. 1990. Womak, Bruce R. and Dale L. Potter. Water Filtration Project, City of Joseph, Oregon. Report to City of Joseph. 1990.

³⁴ *supra* Womack and Potter, Cultural Resource Survey.

The Marr property was clearly an integral part of /w'al'wama/ life at the north end of Wallowa Lake. It seems that a cemetery existed in the "northwestern slope" of the lake. Womack reports that a government surveyor observed one in 1869; J. H. Horner recorded an oral account of Young Chief Joseph burying a child near, if not on, the Marr property; and, Mr. Verne Russell, a life-long Wallowa County resident and surveyor, related to Womack his observations of graves on Wahluna Terrace.³⁵ However, no graves were found in a survey of the moraine above the terrace, and none were officially reported in the development of a housing project built on the Terrace.

Physical evidence of /w'al'wama/ in the environs of the Marr property also includes the current cemetery site. It was chosen some 80 years ago in order to protect Tuekakas' remains from continued desecration, and the location of other graves ensures a company of people. Tuekakas, also known as "Old Joseph" or "Old Chief Joseph," was the leader of the /w'al'wama/ in the mid-1800s. He began the diplomatic defense of /w'al'wama/. So, the choice of the foot of Wallowa Lake for memorial had cultural significance for Nez Perce people and their supporters in the Wallowa valley.

Wallowa Lake and its basin are, and were, a sacred place to Nez Perce people. In recent years Chief Joseph's gravesite, cemetery, and environs are significant cultural sites for the Nez Perce people. The reburial of "Old Chief Joseph" there simply compounds the sacral nature of the feature. The development of the lake basin has impinged upon the sacred character of the place, and has increasingly limited Nez Perce presence there. It is for this reason that the cemetery and the Marr

³⁵ Russell, Verne H. Letter to Marilyn Goebel. 20 October 1992. Nez Perce National Historical Park, Joseph, Oregon.

Ranch are of such importance to Nez Perces, wherever they live, and have become the focal sites of Nez Perce concerns.

Conclusion

The Marr Ranch property has great significance to Nez Perce people, especially the /w'al'wama/, who are descendents of the people living in that area prior to 1877. Although the property includes few archaeological materials, houses existed nearby, as did fishing sites. Perhaps it was a pasture; perhaps it was important open space separating portions of a settlement. In any case, a strong historical connection with this portion of the valley clearly exists. It was a significant part of the fundamental pattern of /w'al'wama/ settlement, economy, politics, and religion.

And even after being expelled from their homeland in 1877, /w'al'wama/ continued to return to their old haunts. Some for extended periods. With increasing settlement, of course, the remaining open lands became even more precious.

This connection is on-going. Nez Perces continue to hunt, fish, and gather in the valley; /w'al'wama/ return to the "Joseph Cemetery" and its environs. There and at Wallowa Lake many find a special place at which they can make spiritual connections with their past, present, and future.

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Exhibit B

https://www.wallowa.com/opinion/columnists/shannon-wheeler-addressing-a-100-year-injustice-at-wallowa-lake/article_3134a9c8-0727-11ee-97ec-2bc6d6cecb64.html

Shannon Wheeler: Addressing a 100-year injustice at Wallowa Lake

By SHANNON WHEELER

Jun 14, 2023



Shannon Wheeler

The Nez Perce Tribe noted the article on U.S. Sen. Jeff Merkley's tour of the proposed reconstruction of Wallowa Lake Dam. We were pleased that fish passage was on the senator's mind as a required part of reconstruction. It is certainly on ours.

Most of Northeast Oregon, and all of Wallowa County, is the homeland of the Nez Perce Tribe and our people, Nimiipuu. In our Treaty of June 11, 1855 with the United States, we reserved rights exercised since time immemorial, including the right to take fish at all usual and accustomed places, and rights of hunting, gathering, and pasturing animals on all open and unclaimed lands. The tribe's reserved rights are continually exercised by members to this day.

The importance of Wallowa Lake within our homeland cannot be overstated. Wallowa Lake simply is a sacred place to our people. Its cultural, spiritual, and biological significance is unique. Our Tribal Nation has stepped forward repeatedly over many decades to defend the lake and its

environs from harm.

Biologically, Wallowa Lake was one of the great sockeye salmon lakes of North America. In 1916, a grave injustice was done when Wallowa Lake Dam was built without fish passage. Earlier downstream dams, now gone, also blocked sockeye migration, but what was done to Wallowa Lake remains a concrete barrier to this day. As the dam was used to store and divert water to irrigate the valley, salmon were blocked from their lake and their own immemorial lifecycle, leaving once abundant fishing grounds barren.

Fast-forward 100 years. Today the Nez Perce Tribe and salmon are facing a proposal to merely continue the same injustice: a proposal to rebuild the dam without a fish ladder, in the service of time and cost savings. Have we learned nothing over the past century?

But under today's laws, dam reconstruction requires fish passage that allows salmon to pass "volitionally" (of their own power). The irrigation district dam owner is proposing a "trap and haul" program where salmon would be captured below the dam, loaded into a truck, and released above the dam. It makes no sense that for the next 100 years salmon would swim 600 miles upstream from the ocean to within yards of the lake, all to be captured for a truck ride through Joseph and around the dam.

Trap and haul can be biologically useful in an initial restorative stage, and the production of fish, with trap and haul, will be an interim component of fish restoration at Wallowa Lake. But it is not a permanent substitute for volitional passage. That is unacceptable for our tribal nation, the fish, and Wallowa Lake. The irrigation district may think trap and haul is the cheapest option, but that is myopic. Who would pay for trap and haul (hundreds of thousand dollars per year) for the next 100 years? The district? The Oregon Department of Fish and Wildlife?

True volitional passage can be developed through independent engineering that questions all assumptions to date. And in the long run, volitional passage will be much less expensive than hauling salmon around the dam for the next 100 years. (Though cost is no excuse under the fish-passage law.)

No one expects the irrigation district to pay for a fish ladder. Our tribal nation will work with national conservation groups and state and federal agencies to secure funding to engineer and build volitional passage into reconstruction, at no cost to the district.

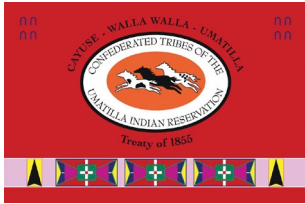
We remind them that the Nez Perce Tribe helped them to secure the Oregon funding and congressional funding they have already been given. We did that not to rebuild a private dam with public funding, but to address the 100-year injustice caused by blockage of Wallowa Lake, and the historic opportunity to provide true fish passage.

The article quotes the irrigators saying that fish ladders “are not part of the conversation anymore.” We put them and Oregon elected leaders on notice that a fish ladder will be a key part of the effort going forward. The 100-year moment to ensure long-term volitional passage is now — there will be no “just do it later” opportunity.

Further discussion of trap and haul alone as “good enough” will only serve to delay the start of reconstruction. A grave mistake was made 100 years ago. We will not repeat it, or cut corners, or kick it down the road. We will do what is right — completely and diligently right — at a moment that deserves nothing less for our descendants, the fish, and Wallowa Lake itself.

Shannon F. Wheeler is the chairman of the Nez Perce Tribal Executive Committee.

Exhibit C



10 January 2023

Ms. Mary Wahl
Chair of the Oregon Fish and Wildlife Commission
4034 Fairview Industrial Drive SE
Salem, OR 97302
ODFW.Commission@odfw.oregon.gov

Re: Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation Statement on Unlawful Fish Passage Rule Revisions

Dear Ms. Wahl and Commission Members:

The Nez Perce Tribe (NPT) and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) write to you with serious concerns about concealed, late-hour, no-public-notice revisions to core principles, definitions, and procedures of the Oregon Fish Passage Rule.

We write to you on a government-to-government basis. We write in advance of your January 13 public meeting and request that you acknowledge this letter and the issue it presents at that meeting. Our government-to-government request is straightforward: that the State of Oregon timely correct this situation. We will not be attending your meeting beyond this letter.

First, regarding process:

In 2021, the Oregon Department of Fish and Wildlife (ODFW) began a process to revise Oregon's Fish Passage Rule at OAR 635-412. "Aligning the state's passage rules with the ODFW Climate and Ocean Change Policy is a driving force behind this initiative."¹ During 2021 and 2022 there were 20 rules subcommittee meetings and additional Fish Passage Task Force Meetings where rule changes were discussed. These were all public meetings. There were two public comment periods on draft rule revisions, one to kick off the process in 2021, and then another in 2022. The 2022 public comment period ran from August 31 through September 29 and focused on the draft rule revisions that were noticed to the public on August 30 as the result of this 18-month-long rule revision process.

¹ See, [ODFW Fish Passage Requirements \(state.or.us\)](https://state.or.us/odfw-fish-passage-requirements) (Last visited January 10, 2023.)

ODFW received 175 comments on the publicly noticed August 30 draft rule revisions. These comments were considered and a final draft rule was prepared for the Fish Passage Task Force to consider at its October 7, 2022 meeting. The Task Force adopted the rule revisions at that meeting, and on October 21 ODFW filed with the Secretary of State the formal “Notice of Proposed Rulemaking” for the fish passage rule revisions, Chapter 635.²

The NPT and CTUIR reviewed the August 30 rule revisions. Of particular importance to our Tribes were any revisions having to do with the definitions of “fish passage” and “volitional” movement of fish. There was a minor revision which only strengthened the existing rule in our Tribes view. The definition to “Fish passage” in OAR 635-412-0005 was revised (prior to the October 21 draft) to include the words “minimal delay”:

"Fish passage" means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, minimal delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.

The definition of “Volitionally” was unchanged and continued to specifically exclude trapping of fish:

"Volitionally" means with minimal delay and without being trapped, transferred, or handled by any person, unless specifically allowed under OAR 635-412-0035(6).

The reference in “Volitionally” to “. . . unless specifically allowed under OAR 635-412-0035(6)” was a reference to a subsection with special allowances at traps as a *specific category of obstruction*. Under -0035(6), traps (defined as devices that "prevent [fish] from passing volitionally") were a unique type of obstruction where fish could be “trapped, transferred, or handled,” actions otherwise prohibited by the definition of "volitionally" at any other type of obstruction. The reference was plainly not – given the language and purpose of -0035(6) itself (see below) – a reference to a subsection providing authority for traps to be used as a form of fish passage *at dams or other obstructions*.

Because these revisions as of October 21 continued the long-standing Oregon approach to favoring true volitional fish passage our Tribes were not concerned with the rule revisions.

However, after this long 18-month public process, at the last hour new language was inserted by Oregon staff to change the definitions of “Fish passage” and “Volitionally” and, critically, to alter the purpose and authority of subsection -0035(6), in the packet of materials submitted to the Fish and Wildlife Commission. These changes were not a “tweak,” but a substantial change that did not undergo public notice and comment and fundamentally altered the core concept of volitional fish passage.

² See Exhibit G, Attachment 2 to the December 16, 2022 Oregon Fish and Wildlife Commission Meeting Materials. This Attachment bears the “Filed” stamp from the Secretary of State’s Office.

Letter to Mary Wahl, Oregon Fish and Wildlife Commission, January 10, 2023; page 3 of 5

These last-hour no-public-notice revisions, made on or after November 30, 2022, changed the central definition of "Fish passage" to add "trap collection and transport" as an alternative to volitional passage:

([18]20) "Fish passage" means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move **either** volitionally **or by trap collection and transport if consistent with requirements of OAR 635-412-0035(6)**, with minimal stress, **minimal delay**, and without physical or physiological injury upstream and downstream of an artificial obstruction.

Subsection 635-411-0035(6) was also altered at the last minute. Its defining header was edited to change the *purpose* of the section from non-volitional allowances at traps as a type of obstruction, to the use of trap and transport as a type of fish passage at other obstructions. "(6) Requirements for fish **passage by trap** collection and transport [~~at traps are~~] **include:**" And an entirely new section (g) was added to authorize and implement this entirely new section purpose:

(g)Traps shall be utilized where the feasibility of other fish passage structures or other site-specific considerations warrant use of trap collection and transport, or otherwise, the Department determines, using its professional judgment, trap collection and transport will result in an effective means of ensuring access to habitat above or below the artificial obstruction by native migratory species.

These -0035(6) changes are critical. Hidden from public view, they altered the very purpose of a subsection for traps (-0035(6)) as a type of fish *obstruction* – like dams -0035(2) and culverts -0035(3) – with unique non-volitional passage allowances, into a new authority for traps to be used *as a form of passage* at dams and other obstructions. The prior reference in the definition of "Volitionally", stated above, to the prior version of -0035(6), had functioned to allow fish to be "trapped, transferred, or handled" at traps as a special type of obstruction regulated under -0035(6). It did not authorize traps to be used as a form of fish passage *at other obstructions by trap and transport*.

These critical rule alterations were nowhere in the August 30, 2022 revision released for public and Tribal comment. They were nowhere in the October 11 draft posted to ODFW's website. They were nowhere in the October 21 final draft filed with the Secretary of State as a proposed rulemaking and posted to ODFW's website. They were nowhere in the October 21 "Notice of Proposed Rulemaking" submitted to your Commission as Exhibit G, Attachment 2, for your December 16 meeting. They were nowhere in the detailed "Agenda Item Summary" submitted to your Commission as Exhibit G, Attachment 1, for your December 16 meeting. And nowhere in the Exhibit G "Presentation" document submitted to your Commission for your December 16 meeting.

The PDF document adding these alterations, from internal data, appears to have been created November 30, 2022, after Division Director, Director, and Attorney General signatures had been made below "Reviewed and Approved" on the packet Cover for Exhibit G for your December 16 meeting. The public had no lawful notice that the publicly filed rule revision had been replaced with a document that

included alterations of the central definition of "Fish passage" and of the purpose of a subsection that allowed non-volitional passage *at traps* (-0035(6)) *as a specific type of obstruction* – to create a new ODFW authority to use traps as a form of fish passage *at dams and other artificial obstructions*.

Bluntly, this concealed alteration is a disgrace as a matter of required Oregon public notice-and-comment.

Second, regarding significance:

Nowhere in the rule revised in this way did ODFW have prior authority to treat "trap and transport" as a form of fish passage at other obstructions such as dams, or anywhere other than *at a trap*. There is no possible sense in which this was a "tweak" or "rearrangement" of existing authority. It was a rewrite of core rule concepts, definitions, and procedures. The existing definitional reference in "Volitionally" to "...*unless specifically allowed under OAR 635-412-0035(6)*" was *not* a reference to a subsection providing authority for traps to be used as a form of *fish passage at dams* or other obstructions. It was a reference to a subsection with special non-volitional criteria allowed at *traps as a specific category of obstruction*. Under -0035(6), traps (defined as devices that "prevent [fish] from passing volitionally") were a *specific category of obstruction* where fish could be "trapped, transferred, or handled," actions otherwise prohibited by the definition of "volitionally." Thus the inclusion of "unless", with reference to -0035(6), in the prior definition of "volitionally." This is emphasized in the section -0020(3)(a) reference to "Obtain[ing] from the Department an approval determination of a fish passage plan that meets the requirements of OAR 635-412-0035 *for the specific artificial obstruction*." Traps were a specific artificial obstruction with unique criteria under -0035(6), as dams are under -0035(2), and culverts under -0035(3). Subsection -0035(6) was *not* a special allowance for traps to be used as a form of *fish passage at other obstructions*. This is emphasized by the prior -0035(6) criteria themselves: they addressed unique allowances for non-volitional passage *at traps as obstructions*. Subsection -0035(6) was in no respect existing authority for traps to serve as a form of fish passage *at dams or other artificial obstructions*.

This alteration of the very purpose of -0035(6) is spotlighted by the late-hour, no-public-notice editing of the subsection header, from criteria for "passage at traps" into "fish passage by trap collection and transport." This alteration and the insertion of an entirely new -0035(6)(g) authority to implement the new subsection purpose at ODFW's "professional judgment," is a nearly perfect example of a rule alteration that requires public notice and comment, not concealed late-hour alteration.

These no-notice revisions are serious and consequential for all of Oregon's watersheds and dams, and for the large areas of Eastern Oregon where the NPT and CTUIR hold reserved treaty fishing rights. Our focus here is the failure to provide lawful public notice of these alterations. But it should go without saying that no Tribal consultation occurred either, and that Tribal consultation requires formal government-to-government policy-level engagement, not informal tribal staff contacts if such occurred.

Letter to Mary Wahl, Oregon Fish and Wildlife Commission, January 10, 2023; page 5 of 5

As the NPT and CTUIR conveyed to ODFW staff on December 28 and again on January 3, through our tribal legal counsel, our Tribes expect Oregon policy leaders to take timely steps to correct this unlawful rule alteration. Should such timely action fail to occur, our Tribes reserve the right to seek all appropriate legal remedies.

Please direct communication on this matter to legal counsel for the NPT, David J. Cummings at djc@nezperce.org, and CTUIR, Brent H. Hall at Brent@Bhhall.com.

Thank you for your timely attention to this important matter.

Sincerely,



Samuel N. Penney, Chairman
Nez Perce Tribe Executive Committee



N. Kathryn Brigham, Chairwoman
Confederated Tribes of the Umatilla Indian
Reservation Board of Trustees

cc: The Honorable Tina Kotek, Governor of Oregon
Burns Paiute Tribe
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indian
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians
Confederated Tribes of the Warm Springs Reservation of Oregon
Coquille Indian Tribe
Cow Creek Band of Umpqua Tribe of Indians
The Klamath Tribes

Exhibit D



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

26 January 2024

Via Electronic Mail Only

U.S. Army Corps of Engineers
Regulatory Branch
Ms. Danielle Erb
P.O. Box 2946
Portland, OR 97208-2946
danielle.h.erb@usace.army.mil

***Re: Nez Perce Tribe Response to Public Notice Of Wallowa Lake Dam Application,
USACE No. NWP-2022-494***

Dear Ms. Erb:

The Nez Perce Tribe ("Tribe") writes in response to the above-referenced notice from the U.S. Army Corps of Engineers ("USACE") dated December 27, 2023. This letter supplements the Tribe's concerns stated in our November 22, 2023 letter to USACE. (This letter also recognizes the letter of Colonel Caswell received by the Tribe on January 24, 2024, and Colonel Caswell is copied below.)

1. Nez Perce Treaty Right and Treaty Area Impacts; Requirement of Executive Order 13175 Tribal Consultation

The Tribe requests formal government-to-government consultation with USACE pursuant to Presidential Executive Order 13175. This must occur before any USACE permitting decision is made, and before finalization of any related biological consultations, cultural surveys, or other decisions under any applicable environmental or cultural resource laws, including but not limited to the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, and the National Environmental Policy Act.

The proposed reconstruction is of a dam that when constructed from 1916–1919 ensured the destruction of Nez Perce Treaty-reserved fishing grounds of extraordinary importance, at a place, Wallowa Lake, of unique religious and cultural importance to the Tribe. USACE was not the cause of that destruction 100 years ago. But it is now involved in a reconstruction application that proposes to continue dam blockage of upstream fish passage at Wallowa Lake for likely 100

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years more. USACE's trust relationship with the Tribe, pursuant to the treaty and trust relationship of the Tribe and the United States, requires a thorough and meaningful consultation and consideration of decisions USACE will make in the present day, particularly given the extraordinary time duration at stake here.

2. A Unique Treaty-Reserved Location

Most of Northeast Oregon and all of Wallowa County is part of the homeland of the Nez Perce people, the *Nimiipuu*. In the Nez Perce Treaty of June 11, 1855, the Tribe reserved all rights not expressly ceded to the United States and specifically reserved rights it had exercised since time immemorial, including the right to take fish at all usual and accustomed places, and the rights of hunting, gathering, and pasturing animals on all open and unclaimed lands. The Tribe's reserved rights in Northeast Oregon are continually exercised by its members, and are critical to the present-day culture, religion, and economy of the Tribe.

Wallowa Lake and its dam-severed Wallowa River lie within the Nez Perce homeland at an extraordinary location. To the Nez Perce, Wallowa Lake simply is a sacred place. Attached as Exhibit A is a 2006 report by Alan G. Marshall, PhD, on the nature and significance of Wallowa Lake and its surroundings to Nez Perce people. For the Nez Perce, our traditional knowledge already tells us the sacred nature of Wallowa Lake. We don't need scientific analyses to tell us what we know through our traditional culture. This report, however, produced by a genuine academic expert and specialist on the *Nimiipuu*, was provided by the Tribe to the state of Oregon in the past to assist Oregon's understanding of the nature of the Wallowa Lake area, at a moment that resulted in joint tribal-state protection of an area now known as *Iwetemlaykin*, adjacent to the Lake and the Wallowa Lake Dam. The report is provided to USACE to assist its understanding of the sacred nature of Wallowa Lake, and therefore the critical importance of how the Lake and its passage connectivity to the Wallowa River should be treated at a 100-year moment in time.

Wallowa Lake was one of the great sockeye salmon lakes of North America. A grave injustice was done when Wallowa Lake Dam was built without fish passage. Earlier downstream dams, now gone, also blocked salmon migration, but what was done to Wallowa Lake has remained a concrete barrier for over 100 years. The application before USACE proposes to continue that upstream barrier for likely 100 more years. As the Dam diverted water to irrigate the upper Wallowa Valley, sockeye salmon were blocked from their lake and their own immemorial lifecycle was destroyed. This was a grave violation of the Tribe's 1855 Treaty, at a unique Treaty-reserved location, that has never been resolved.

3. Pending Litigation

This is a particularly critical issue. The Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation are now in litigation before the Oregon Court of Appeals regarding a December 2022 last-minute, in-the-dark rewrite of the Oregon Fish Passage Rules, by

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unknown state staff, that changed the very definition of “fish passage” and created an entirely new authority for Oregon Department of Fish and Wildlife to authorize trap and haul in place of volitional fish passage. (*Columbia Riverkeeper et al., Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation v. Oregon Fish and Wildlife Commission* (A182213, Oregon Court of Appeals, 2023)). Done without public notice, and after a two-year public input process had produced a draft rule amendment without those changes, this in-the-dark rewrite was obviously unlawful. The application before you now proposes a trap and truck facility at Wallowa Lake Dam rather than upstream volitional fish passage. The trap and truck proposal before USACE is plainly premised on the unlawful rule rewrite, and the legality of that element of this proposed project therefore depends on the outcome of the pending litigation. If the Nez Perce and Umatilla tribes are successful, the trap facility proposed in the application will be unlawful and volitional upstream fish passage at the Wallowa Lake Dam will be required, absent a rule “waiver” or “exemption” pursuant to rule procedures that include public notice and comment. The USACE should hold its permit decision given the unique litigation situation involved, and the high probability that a core element of the application before it is unlawful.

Attached as Exhibit B is my June 2023 op-ed as Chairman of the Nez Perce Tribe that will provide USACE with a concise explanation of our vision at this 100-year moment in time, for the Lake, its river, and for long-term volitional passage for salmon. As the op-ed notes, the permanent omission of volitional upstream passage at Wallowa Lake for another 100 years would be tragic. The op-ed is also a problem-solving message in the context of what is now litigation — a Nez Perce vision of a cooperative path forward if the law is followed, and importantly, is allowed to be followed.

4. Presidential Memorandum of September 27, 2023: “Memorandum on Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin”

In tribal consultation and otherwise, USACE should consider the directives of the Presidential Memorandum of September 27, 2023: “Memorandum on Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin.”

That memorandum states, among other things, that, “[i]n recognition of these priorities, it is the policy of my Administration to work with the Congress and with Tribal Nations, States, local governments, and stakeholders to pursue effective, creative, and durable solutions, informed by Indigenous Knowledge, to restore healthy and abundant salmon, steelhead, and other native fish populations in the Basin”

The extraordinary and particular significance of fish passage restoration at Wallowa Lake is highlighted by the reference in the “Fact Sheet” accompanying the Presidential Memorandum, which expressly called out Wallowa Lake and the opportunity “for restoring sockeye salmon habitat connectivity at the Wallowa Dam” (See FACT SHEET: President Biden Takes

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Action to Restore Healthy and Abundant Wild Salmon and Steelhead in the Columbia River Basin, (Sept. 27, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/27/fact-sheet-president-biden-takes-action-to-restore-healthy-and-abundant-wild-salmon-and-steelhead-in-the-columbia-river-basin/>.)

5. Inaccurate Application Information

- In the Application and its attachments, the maximum elevation storage level of Wallowa Lake is asserted to be 4,385 feet above sea level. This is a substantial inaccuracy. The maximum storage elevation at Wallowa Lake was the subject of extensive Oregon litigation resulting in the Oregon Supreme Court decision in Milton Box Co. v. Silver Lake Ditch Co. (Or. 1961) (attached as Exhibit C). The maximum storage elevation was found to be 4,384.06 feet above sea level. See attached Exhibit C. The assertion of 4,385 feet rather than 4,384 is a substantial inaccuracy given the effect on surrounding Lake basin properties, including the Tribe's conservation easement at the Wallowa Lake Lodge.
- In the Application and its attachments, the vertical water storage right in Wallowa Lake is asserted to be 28.4 feet. This is a substantial inaccuracy. The vertical storage was found to be 25 feet in the Oregon Supreme Court's Milton Box Co. decision. Because that was a measure from a low water mark 3.4 feet above the sill of the Dam, the measurement on the face of the Dam itself has been registered since that time as 28.4 feet. But the actual vertical water storage right is 25 feet above lower water. See attached Exhibit C. This is a substantial inaccuracy given the effect on Lake basin surrounding properties.
- In the Application and its attachments, the total water storage right quantity in Wallowa Lake is asserted to be 50,000 acre feet. This is a substantial inaccuracy. The water storage right perfected by the ditch company predecessors to the applicant in 1931 was and remains 44,000 acre feet. See attached Exhibit D. A subsequent Oregon water permit issued in 1967 (attached Exhibit E) and perfected through a water certificate in 2013 (attached Exhibit F), for 5,257 acre feet, was expressly issued for what had been "dead" storage space within the storage quantity of the 1931 water right, and was expressly limited in the 1967 permit and 2013 certificate as contained within the original quantity of the 1931 certificate, thus 44,000 acre feet. See Exhibits E and F. This is a substantial inaccuracy given the effect on Lake basin surrounding properties, and on water resources and water rights in Wallowa Lake and in the Wallowa River and Grande Ronde River downstream.
- The Application and its attachments assert that the Dam's purposes include flood control. This is a substantial inaccuracy. The 1931 Oregon water certificate was issued "for purposes of irrigation, domestic, and supplemental irrigation." See attached Exhibit D. No storage right for "flood control" was ever added or amended later. See Exhibits E and F. The Dam itself may pose a flood risk because of its storage for primarily irrigation purposes, but the

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Dam was not constructed or permitted for natural flood control or natural flood risk. This is a substantial inaccuracy in public portrayal and misapprehension of the purposes underlying the Dam's reconstruction.

6. Cultural Resources and Surrounding Lands

The Tribe is a major landowner in Northeast Oregon, including many lands adjacent to the proposed project. The Tribe is a co-trust owner, with the Umatilla Tribes, of the Old Chief Joseph Gravesite at Wallowa Lake, a National Historic Landmark and part of the Nez Perce National Historical Park, directly adjacent to the proposed project. The Tribe owns the *Am'sáaxpa* land adjacent to the Wallowa River downstream. The Tribe is a co-manager of the *Iwetemlaykin* State Heritage Site adjacent to the Old Chief Joseph Gravesite. And the Tribe is the owner of riparian land on the upper Wallowa River above Wallowa Lake, of nearly 100 acres of the West Moraine of Wallowa Lake, and of a conservation easement adjacent to the shore of Wallowa Lake at the Wallowa Lake Lodge.

The proposed project construction area adjacent to the Old Chief Joseph Gravesite will cause direct adverse impacts to a site that is sacred to the Nez Perce Tribe and is listed on the National Register of Historic Places. (The application mapped staging area in fact shows a crossing of the boundary into property held in trust for the Nez Perce and Umatilla tribes.) Direct impacts to the sense of place and feeling for the Nez Perce will be caused by greatly increased noise, dust, and lights, as well as a concrete facility proposed between the cemetery and Wallowa Lake. Any proposal to reconstruct Wallowa Lake Dam must avoid or minimize impacts to the Old Chief Joseph Gravesite, above and beyond protection of all other archaeological or cultural resources.

Qe'ciyéw'yew' (thank you) for your careful consideration of the Nez Perce Tribe's comments and requests.

Sincerely,



Mr. Shannon F. Wheeler
Chairman

cc: Beth Coffey, Director of Programs, Northwest Division, USACE
Colonel Larry D. Caswell, Jr., U.S. Army, Portland District Commander, USACE

MILTON BOX COMPANY, a corporation,
Appellant,

v.

SILVER LAKE DITCH COMPANY, The
Dobbins Ditch Company, Big Bend Water
Ditch Company, Farmers Water Ditch
Company, Craig Ditch Company, and
Wrenn & Dobbin Ditch Company, corpora-
tions, dba Associated Ditch Companies,
Respondents.

Supreme Court of Oregon.

Argued and Submitted at Pendleton,
May 1, 1961.

Decided June 28, 1961.

Action to have several ditch companies enjoined from submerging a part of plaintiff's land through operation of their dam, and to recover damages for past injuries resulting from such submergence. The Circuit Court, Wallowa County, W. F. Brown-ton, J., entered a judgment unsatisfactory to plaintiff and it appealed. The Supreme Court, O'Connell, J., held that evidence sustained finding that low-water mark referred to in deed granting one of the defendants a right to overflow plaintiff's land through elevation of waters of a lake 25 feet above low-water mark was a point 3.4 feet above sill of outlet gates of defendants' dam, and not at the same level as sill of the outlet gates.

Decree and judgment affirmed.

1. Waters and Water Courses ⇨179(4)

Evidence, in suit to enjoin ditch companies from submerging a part of plaintiff's land through operation of their dam, and to recover damages for past injury resulting from such submergence, sustained finding that low-water mark referred to in deed granting one of the defendants a right to overflow plaintiff's land through elevation of waters of a lake 25 feet above low-water mark, was a point 3.4 feet above sill of outlet gates of defendants' dam, and not at same level as sill of outlet gates.

2. Evidence ⇨265(8)

Verified answers of ditch companies in certain prior litigation, as to location of low-water mark of a lake, were evidentiary admissions, but they were not conclusive as to location of the mark, but were to be weighed with other evidence in a subsequent case, and in view of fact location of low-water mark was not a material issue in previous cases, only limited weight could be assigned such allegations.

3. Waters and Water Courses ⇨165

Deed providing that land shall be used by grantee for purpose of overflowing the same with the privileges of the grantee, its successors and all persons acting under, by or through its authority to enter on such right of way, was intended to create in grantee an easement broad enough to permit assignment of all or part of grantee's interest.

4. Waters and Water Courses ⇨178(2)

Award of \$1,000 damages to landowner, against ditch companies, for unauthorized raising of level of a lake by 1.5 feet, above level specified in a deed, was proper, but an award of punitive damages was not warranted.

George H. Corey, Pendleton, argued the cause for appellant. On the briefs were Corey & Byler, Pendleton, and George E. Richards, Enterprise.

Robert V. Chrisman, Enterprise, argued the cause for respondents. On the brief were Wilson & Wilson, Joseph, and Chrisman & Ricker, Enterprise.

Before McALLISTER, C. J., and ROSS-MAN, WARNER, SLOAN, O'CONNELL and GOODWIN, JJ.

O'CONNELL, Justice.

Plaintiff, which is the owner of several lots adjoining Wallowa lake, brings this suit to enjoin defendants, several ditch companies which are collectively known as the Associated Ditch Companies, from submerging a part of plaintiff's land through the operation of defendants' dam, and to

MILTON BOX COMPANY v. SILVER LAKE DITCH COMPANY Or. 203

Cite as 363 P.2d 202

recover damages for past injury resulting from such submergence. The trial court enjoined the defendants from submerging plaintiff's land above a certain authorized level (which will be described below) and gave judgment in the amount of \$1,000 for past damage. Plaintiff appeals from the decree and judgment.

By deed dated February 8, 1919, Mary E. Stanley granted to The Dobbins Ditch Company, one of the defendants, a right to overflow plaintiff's lands through the elevation of the waters of Wallowa lake "25 feet in a perpendicular line above low water mark." The deed further granted "the right to lower the said water four feet below said low water mark."

Plaintiff contends that the damage to its land resulted from raising the level of the water more than 25 feet above the low water mark. The principal issue in this case is the location of the low water mark to which the Stanley deed referred. There is no direct evidence establishing the low water mark of Wallowa lake. The lower court found the low water mark to be at 3.4 feet above the sill of the outlet gates of the dam. It found the elevation of the sill to be 4,355.66 feet above sea level. Plaintiff contends that the low water mark is at the same level as the sill of the outlet gates. The sill of the outlet gates is shown as zero datum on a gauge which measures the height of the water at the upstream face of the dam. The water in the reservoir reached a level of 29.85 feet on the gauge on June 5, 1957, a date within the period during which plaintiff alleges its land was submerged in excess of the maximum permissible height specified in the Stanley deed of easement. Since defendants claim only the right to store water to a height of 28.47 feet on the existing gauge it is apparent that they raised the level of the lake 1.38 feet above the level asserted by them as being within the terms of the grant. The trial court determined that defendants have the right to store water to a height of 28.4 feet on the present gauge. In giving judgment for the amount of \$1,000 it regarded the unauthorized raising of the level by

1.45 feet (29.85 feet actual high water minus 28.4 feet found to be the authorized level) as the cause of plaintiff's damage.

The central issue on appeal is whether defendants introduced sufficient evidence to establish the low water mark at a point 3.4 feet above the sill of the outlet gate. It is conceded that the conclusion reached by the trial court was based upon circumstantial evidence since, as we have already mentioned, there was no direct evidence establishing the location of the low water mark at the time the Stanley deed was executed.

The dam was first constructed in 1916—approximately three years prior to the execution of the Stanley deed. Subsequently, additions were made to the dam raising its height but the sill of the outlet gate at all times remained at the same level as when it was constructed in 1916. There is no direct evidence which aids in explaining why the outlet gates were constructed at the particular level at which they are located. As the trial judge pointed out in his memorandum opinion, "[i]t would seem reasonable to conclude that the gates were constructed at the low water mark. If the gates had been established at an elevation above low water mark, then certain natural flow of the stream would be impounded as dead storage. If the outlet gates were constructed at a level below low water mark, there would be no advantage gained over their construction at low water mark, unless it were intended to lower the level of the lake." However, defendants produced evidence which would tend to show that the low water mark was above the outlet gate sill. This evidence is ably analyzed in the following excerpts from the memorandum opinion of Judge Brown-ton:

"* * * The only substantial and satisfactory evidence in this case upon which a determination can be made as to the low water mark is the river channel extending between the lake and the dam. The elevation of the lake at low water mark in 1919 would have

been identical to the elevation of the highest point in the bottom of the river channel. The highest point in the bottom of the river channel would have been the true elevation of low water.¹ The defendants contend that the bottom of the channel has not changed since that time, whereas the plaintiff contends that it has been raised by the sloughing off of the channel sides and the depositing of rock and debris in the bottom of the channel. The court has reviewed very carefully the evidence in respect to any change that may have occurred in the channel which bears upon the question of the low water mark. The evidence is undisputed that the current is rather swift through the channel and that dirt and debris and rocks have been carried from the channel through the gate openings. The evidence indicates a very rapid drop in the channel as it reaches the gates and this would indicate that debris and dirt which might otherwise have remained on the channel bottom would more probably flow through the gates. There is further evidence that an attempt was made to dredge the channel bottom but without success. The only evidence presented as to a change in the bottom of the channel is the testimony that there has been a sloughing off of the sides of the channel consisting of dirt and rocks. There is no evidence that this material actually remained upon the bottom of the channel. The physical facts in respect to the flow of the stream and the deposit of rocks through the gates as well as the condition of the channel as found when

an attempted dredge was made indicate that the sloughing off materials were not deposited upon the bottom of the channel in such a manner as to increase its height. According to the testimony of Mr. Wilson, recent readings were made as to the depth of the water at a high point in the channel and that these readings varied from eight feet to nine feet 10 inches. At the time the readings were made the gauge reading showed 12 feet three inches. This would indicate that the low water mark was four feet three inches above zero datum. In 1929, however, the figure of 3.4 feet was considered as the differential and this figure is the one which is claimed by the defendants as the elevation above the gate sills. It is true that there is no explanation as to the manner in which 3.4 feet was established. It is clear, however, that the low water mark is higher than the sill gates and that the claim of the defendants that the low water mark is 3.4 feet above the sill gates has the greatest probability of being the accurate low water mark. It is the opinion of the court that the bottom of the river channel at its highest point is substantially the same as it was in 1919. It is, therefore, the finding of the court that the true low water level of the lake in 1919 was at a point 3.4 feet above the sill of the outlet gates and that the true zero datum should be established at such 3.4 feet above the sill gates."

It will be recalled that the Stanley deed, in addition to granting the right to raise the waters of Wallowa lake 25 feet above low water mark, also granted "the right

1. To be precise, the low water mark would be slightly higher than the high point in the channel. This would be so because even at times of lowest water some water flows through the channel and the low water mark would be at the surface. However, the testimony indicates that the depth of the water flowing over the high point in the channel at times of lowest water is only approximately .6 to .7 of a foot. In view of the fact that de-

fendants contended for a finding no more favorable to them than that the low water mark was at 3.47 feet on the gauge at the dam, for purposes of this case we shall disregard this minor element of the depth of the stream flowing over the high point in the channel at times of lowest water in finding the low water mark at 3.4 feet on the existing gauge. (Footnote ours.)

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to lower the said water four feet below said low water mark." The outlet gates of the dam were in existence at the time that deed was executed. If the gate sill was at low water mark the right to lower the lake an additional four feet below low water mark would be of no value because obviously the water could not, through the ordinary methods of releasing impounded waters, be lowered below the low water mark through an outlet located at the low water mark level. We believe that this provision in the deed creates a strong inference that the gate sill was approximately four feet below the low water mark.

[1] As the trial court pointed out, the highest point in the channel leading from the lake to the dam would be the low water mark (subject to the minor qualification expressed in footnote 1, *supra*). Measurements made by defendants showed that when the gauge was at 12 feet the height of the water at the highest point in the channel was approximately 8 feet, a differential of 4 feet. The removal of this obstruction in the channel would permit the lowering of the lake an additional four feet, which suggests that the provision in the Stanley deed permitting the lowering of the level of the lake four feet below low water mark was inserted in light of this condition of the channel. We are of the opinion that the evidence is sufficient to support the trial court's conclusion as to the location of the low water mark of Wallowa lake.

[2] Plaintiff contends that defendants are bound by admissions made in certain pleadings filed by defendants in three previous actions brought against defendants by persons whose lands were flooded as a result of a release of water from the dam. In those actions, each of which involved essentially the same facts as the others, defendants' verified answers in effect alleged that the low water mark was at the same level as the gate sill of the dam. These allegations were evidentiary admissions. Annotation: Admissibility of pleading as evidence against pleader, on behalf of

stranger to proceedings in which pleading was filed, 63 A.L.R.2d 412 (1959); McCormick, Evidence, pp. 512-513 (1954); 4 Wigmore, Evidence (3d Ed.1940), §§ 1057-1059, 1065-1066. However, they are not conclusive; rather they are to be weighed with the other evidence in the case. Since the location of the low water mark was not a material issue in those previous cases, we agree with the trial court in assigning limited weight to the allegations.

[3] Plaintiff urges that since the Stanley deed granted an easement only to the Dobbins Ditch Company the other defendants had no privilege to flood plaintiff's land and that, therefore, the defendants other than the Dobbins Ditch Company should have been enjoined. The Stanley deed contained the following provision:

"The said strip of land shall be used by the said grantee for the purpose of overflowing the same with the privileges of said grantee, its successors, assigns and all persons acting under, by, or through its authority to enter on said right of way, or easement, for the purpose of building, repairing or using the said land for all lawful purposes connected therewith."

From this provision it is apparent that it was the intention of the grantor to create in the grantee an easement broad enough to permit the assignment of all or a part of the grantee's interest. Considering the character of the easement we believe that it is reasonable to construe the grant as embracing the right of the grantee to permit others to participate in the use of the dam for the purpose of impounding waters up to the elevation specified in the deed. Since in any event the maximum permissible level is as specified in the deed of easement, it does not appear that the association of the grantee with other ditch companies in storing and using the water will effect a greater burden upon the servient lands.

[4] In calculating the damage to plaintiff's land the trial court proceeded on the theory that defendants were not liable for any wave damage, if the level of the water

in the lake as measured by the gauge at the dam did not exceed 25 feet above the low water mark. Plaintiff argues that the grantor of the easement did not intend to fix the 25-foot level in terms of water at rest but rather intended to set the maximum level in terms of the water in motion. We think that since the parties must have intended that the measurement would be made at the dam face where the water would be relatively still, the lower court's interpretation is the more reasonable. We are unable to improve upon the trial court's estimate of the damages resulting from the unprivileged conduct of defendants in raising the water level above the 25-foot level specified in the deed. Further, we agree with the trial court's determination that punitive damages are not warranted.

The decree and judgment of the lower court is affirmed.



**In re Complaint as to the Conduct of
Herbert D. BLACK.**

Supreme Court of Oregon,
In Banc.

Argued and submitted July 6, 1961.

Decided July 19, 1961.

Petition for review of recommendation of Board of Governors of State Bar that attorney be disbarred. The Supreme Court, Sloan, J., held that misconduct including solicitation of business and retention of runners warrants disbarment.

Attorney disbarred.

1. Attorney and Client ⇐49

Disciplinary proceeding against attorney is neither civil nor criminal; it is not an adversary proceeding but is designed to test right of lawyer to continue to be member of profession.

2. Attorney and Client ⇐38

Misconduct including solicitation of business and retention of runners warrants disbarment. ORS 9.470, 9.510.

Leo Levenson, Portland, for petitioner.

Robert H. Hollister and Thomas J. Moore, Portland, for Oregon State Bar.

Before McALLISTER, C. J., and ROSSMAN, PERRY, SLOAN, O'CONNELL, GOODWIN and LUSK, JJ.

SLOAN, Justice.

The Board of Governors of the Oregon State Bar recommended to the court that accused, Black, be permanently disbarred. Black petitioned the court for review. The complaint against Black contained twenty-seven charges of misconduct. Most of them, either directly or indirectly, accused him of soliciting damage cases by paid runners. The charges were heard in an extensive hearing by a trial committee of three able lawyers. The trial committee found Black guilty of twenty-two of the twenty-seven charges. The trial committee also recommended disbarment. The Board of Governors substantially affirmed the trial committee's findings.

A meaningful statement of the facts would require a narration of unreasonable length to understandably identify the persons who appear in the transcript of evidence and to describe the events they participated in. It is not necessary to do that. The record has been examined with care. Since all of the witnesses could not testify at the same time the task of review has required piecing together the testimony of the many witnesses to see if the total evidence forms a completed picture. Unfortunately for the accused, the pieces do fit together.

The testimony of the witnesses who had been solicited was believable. The identity of the soliciting runners was convincingly established. The existence of a relationship between the alleged runners and Black was proved and, in some instances, admitted. The evidence of payment to the runners was

STATE OF OREGON

COUNTY OF WALLOWA

CERTIFICATE OF WATER RIGHT

THIS IS TO CERTIFY, That the Dobbin Ditch Company and assignees -- Silver Lake Ditch Company, Big Bend Water Ditch Company, McCubbin-Craig Ditch Company, Wrehn and Dobbin Ditch Company, Farmers Ditch Company and Creighton Ditch Company, of Joseph, State of Oregon, have made proof to the satisfaction of the STATE ENGINEER of Oregon, of a right to store the waters of Wallowa River for the purposes of irrigation, domestic and supplemental irrigation, to be appropriated under Permit No. 2896, under Reservoir Permit No. 347 of the State Engineer, and that said right to store said waters has been perfected in accordance with the laws of Oregon; that the priority of the right hereby confirmed dates from January 3, 1915; that the amount of water entitled to be stored each year under such right, for the purposes aforesaid, shall not exceed 44,000 acre-feet, and to be apportioned as follows:

Dobbin Ditch Company	8,018	acre-feet
Creighton Ditch Company	1,503	acre-feet
Silver Lake Ditch Company	10,023	acre-feet
Big Bend Water Ditch Company	8,018	acre-feet
McCubbin-Craig Ditch Company	401	acre-feet
Wrenn & Dobbin Ditch Company	6,014	acre-feet
Farmers Ditch Company	10,023	acre-feet

The reservoir is located in Sections 4, 5, 8, 9, 18, 17, 20 and 21, Township 3 South, Range 45 East, W. M.

After the expiration of fifty years from the date of this certificate or on the expiration of any federal power license issued in connection with this right, and after not less than two years notice in writing to the holder hereof, the State of Oregon, or any municipality thereof, shall have the right to take over the dams, plants and other structures and all appurtenances thereto which have been constructed for the purpose of devoting to beneficial use the water rights specified herein, upon condition that before taking possession the State or municipality shall pay not to exceed the fair value of the property so taken, plus such reasonable damages, if any, to valuable, serviceable and dependable property of the holder of this certificate, not taken over, as may be caused by the severance therefrom of the property taken in accordance with the provisions of Section 47-508, Oregon Code 1930.

WITNESS the signature of the State Engineer,

affixed this 28th day of October, 1931.

State Engineer.

Recorded in State Record of Water Right Certificates, Volume 9, page 2310.

* Reservoir Permit No. **R 5018**

Application for a Permit to Construct a Reservoir and to Store for Beneficial Use the Unappropriated Waters of the State of Oregon

of Wrenn & Dobbin Ditch Company; Creighton Ditch Company, Silver Lake Ditch Company, Big Bend Water Ditch Company, McCubbin-Craig Ditch Company, Wrenn & Dobbin Ditch Company and Farmers Ditch Company
Enterprise and Joseph, Oregon.
(Name of Applicant)
(Mailing Address)

State of Oregon, do hereby make application for a permit to construct the following described reservoir and to store the unappropriated waters of the State of Oregon, subject to existing rights.

All in Oregon; Farmers Water Ditch Company, July 2, 1900,

If the applicant is a corporation, give date and place of incorporation/Dobbin Ditch Company August 10, 1900; Creighton Ditch Company, 1928; Silver Lake Ditch Company, June 4, 1902; Big Bend Water Ditch Company, June 23, 1902; McCubbin-Craig Ditch Company, November 11, 1916; Wrenn & Dobbin Ditch Co, July 17, 1901.

1. The name of the proposed reservoir is Wallowa Lake Reservoir

2. The name of the stream from which the reservoir is to be filled and the appropriation made is Wallowa River

tributary of Grande Ronde River

3. The amount of water to be stored is ~~5227.7~~ 5257 1/2 12-11-67 acre feet.

4. The use to be made of the impounded water is irrigation
(Irrigation, power, domestic supply, etc.)

5. The location of the proposed reservoir will be in Sec. 4, 5, 8, 9, 15, 17, 20, 21
(Give sections or townships to be submerged)

Tp. 3 S., R. 45 E., W.M., in the county of Wallowa

(a) State whether situated in channel of running stream and give character of material at outlet
in present Wallowa Lake Reservoir.

(b) If not in channel of running stream, state how it is to be filled. If through a feed canal, give name and dimensions

6. The dam will be located in Wallowa, Sec. 5
(Smallest legal subdivision)

Tp. 3 S., R. 45 E., W.M. The maximum height will be feet above stream bed or ground surface on center line of dam. The length on top will be feet; length on bottom feet; width on top feet; slope on front or water side; slope on back; height of dam above water line when full feet. Dam is as described in prior permit
(Feet horizontal to 1 vertical) (Feet horizontal to 1 vertical)

* A different form of application should be used for the appropriation of stored water to beneficial use. Such forms can be secured without charge, together with instructions, by addressing the State Engineer, Salem, Oregon 97310.

Exhibit E

R 5018

7. The construction of dam, the material of which it is to be built, and method of protection from waves are as follows: Cement construction.

8. The location of wasteway with dimensions are as follows: as described in prior permit.
(State whether over or around the dam)

9. The location of outlet from the proposed reservoir, with character of construction and dimensions, are as follows: as described in prior permit.
(All dams across natural stream channels must be provided with an outlet conduit, of such capacity and location to pass the normal flow of the stream at any time)

10. The area submerged by the proposed reservoir, when full, will be as described in prior permit. acres,
with a maximum depth of water of _____ feet; and approximate mean depth of water _____ feet.

11. The estimated cost of the proposed work is \$ none

12. Construction work will begin on or before completed

13. Construction work will be completed on or before _____

(Signature of applicant)

STATE OF OREGON, }
County of Marion, } ss.

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return the same for Completion

In order to retain its priority, this application must be returned to the State Engineer, with corrections on or before October 30th, 1967

WITNESS my hand this 28th day of August, 1967.

CHRIS L. WHEELER

By [Signature] STATE ENGINEER
ASSISTANT

APPLICANTS:

DCBBIN DITCH COMPANY

By Malcolm W Dawson
President

By D. J. Jennis
Secretary

Creighton Ditch Company

By May L. Johnson
President

By Harold L. Johnson
Secretary

Silver Lake Ditch Company

By Harold L. Holmes
President

By M. Kent Nelson
Secretary

Big Bend Water Ditch Company

By Wayne M. Fetzinger
President

By Albert R. Pratt
Secretary

McCubbin-Craig Ditch Company

By Wesley P. Craig
President

By E. Snyder
Secretary

Wrenn & Dobbin Ditch Company

By Malcolm W Dawson
President

By C. Raymond Johnson
Secretary

Farmer Ditch Company

By W. B. Freudenberg
President

By M. Kent Nelson
Secretary

Remarks: Apportionment as follows:

Silver Lake Ditch Company	1267.34 ¹¹⁹⁸ acre feet
Farmers Water Ditch Company	1267.34 ¹¹⁹⁸ acre feet
Big Bend Water Ditch Company	954.60 ⁹⁵⁷ acre feet
Dobbin Ditch Company	724.51 ⁷¹⁹ acre feet
Creighton Ditch Company	180 acre feet
McCubbin-Craig Ditch Company	48 acre feet
Wrenn & Dobbin Ditch Company	954.51 ⁹⁵⁷ acre feet
	5257

17r. 12-11-67

This application is to cover storage of water which heretofore was "dead" storage in the Wallowa Lake Reservoir, and which was covered by certificate of water right 9310. This dead storage is now available by reason of dredging operations on the outlet channel. This application is not intended to cover additional storage.

STATE OF OREGON, }
County of Marion, } ss.

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions: The right herein granted is limited to the construction of Wallowa Lake Reservoir and storage of water from Wallowa River to be appropriated under application No. 44050, permit No. 32669 for supplemental irrigation

The right hereunder shall be limited to the storage of 5257.0 acre feet.

The priority date of this permit is June 5, 1967

Actual construction work shall begin on or before January 18, 1969 and shall thereafter be prosecuted with reasonable diligence and be completed on or before October 1, 19⁶⁹

WITNESS my hand this 18th day of January, 19⁶⁸



STATE ENGINEER

pc

Application No. R-43692

Reservoir Permit No. R 5018

PERMIT

To construct a reservoir and store for beneficial use the unappropriated waters of the State of Oregon.

This instrument was first received in the office of the State Engineer at Salem, Oregon, on the 5th day of June, 1967, at 8:00 o'clock A. M.

Returned to applicant:

Approved:

January 18, 1968

Recorded in Book No. _____ of _____

Reservoirs, on Page R 5018

CHRIS L. WHEELER

State Engineer

Drainage Basin No. 8 page 30A

Fees \$57.28

Refund 6.21

STATE OF OREGON
COUNTY OF WALLOWA
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

ASSOCIATED DITCH COMPANY
85393 BICENTENNIAL LANE
JOSEPH OR 97846

confirms the right to use the waters of WALLOWA RIVER, tributary to GRANDE RONDE RIVER, in WALLOWA LAKE RESERVOIR for MULTI-USE, including but not limited to Agricultural and Municipal uses.

This right was perfected under permit R-5018. The date of priority is JUNE 5, 1967. The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 5257.0 ACRE FEET measured at the point of diversion.

The point of diversion is located as follows:

Twp	Rng	Mer	Sec	GLot	Measured Distances
3 S	45 E	WM	5	4	940 FEET SOUTH AND 1500 FEET EAST FROM THE NW CORNER OF SECTION 5.

A description of the place of use is as follows:

MULTI-USE					
Twp	Rng	Mer	Sec	Q-Q	GLot
3 S	45 E	WM	4	SW NW	4
3 S	45 E	WM	4	NW SW	4
3 S	45 E	WM	4	SW SW	4
3 S	45 E	WM	5	NE 1/4	
3 S	45 E	WM	5	NE NW	
3 S	45 E	WM	5	SW NW	
3 S	45 E	WM	5	SE NW	
3 S	45 E	WM	5	NE SW	
3 S	45 E	WM	5	NW SW	
3 S	45 E	WM	5	SE SW	
3 S	45 E	WM	5	SE 1/4	
3 S	45 E	WM	8	NE 1/4	
3 S	45 E	WM	8	NE NW	
3 S	45 E	WM	8	SE 1/4	
3 S	45 E	WM	9	NW 1/4	
3 S	45 E	WM	9	SW 1/4	

NOTICE OF RIGHT TO RECONSIDERATION OR JUDICIAL REVIEW

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482. Pursuant to ORS 183.482, ORS 536.075 and OAR 137-003-0675, you may petition for judicial review and petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

MULTI-USE					
Twp	Rng	Mer	Sec	Q-Q	GLot
3 S	45 E	WM	16	NW 1/4	
3 S	45 E	WM	16	SW 1/4	
3 S	45 E	WM	17	NE 1/4	
3 S	45 E	WM	17	SE 1/4	
3 S	45 E	WM	20	NE 1/4	
3 S	45 E	WM	20	NE SE	
3 S	45 E	WM	20	NW SE	
3 S	45 E	WM	21	NW 1/4	
3 S	45 E	WM	21	NW SW	

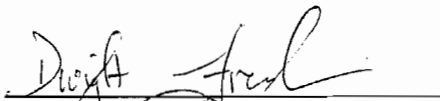
The quantity of water stored for the new uses shall not exceed the quantity of water stored under the original use.

When required by the Department, the water user shall install and maintain a suitable device for measuring and recording the quantity of water stored. The type and plans of the measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.

When requested by the Department, the water user or irrigation district shall report on the use of stored water when requested by the Watermaster. The Watermaster may monitor accuracy of the measuring device, as needed.

This certificate is issued to confirm a change in TYPE OF USE approved by an order of the Water Resources Director entered October 12 1998, at Special Order Volume 52, Page 895, approving Transfer Application 7634.

Issued FEB 04 2013



Dwight W. French
Water Right Services Administrator, for
Phillip C. Ward, Director

CERTIFICATE OF FILING AND SERVICE

I certify that on February 20, 2024, I filed the original copy of this
**DECLARATION OF NEZ PERCE TRIBAL CHAIRMAN SHANNON F.
WHEELER** with the Appellate Court Administrator, Appellate Court Records
Section, using the Appellate Court Electronic Filing System.

I further certify that on February 20, 2024, I served a copy of the same using
the Appellate Court Electronic Filing System on:

Dustin Buehler
Oregon Department of Justice
Attorney for Respondent

CRAG LAW CENTER

s/ Maura Fahey

Maura Fahey, OSB # 133549

*Attorney for Petitioners
Columbia Riverkeeper, et al.*