


*Presentation to the
Agriculture and Natural Resources
Interim Committee
of the North Dakota State Legislature
by
Clive J. Strong
Deputy Attorney General
Natural Resources Division
Office of the Idaho Attorney General*



An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.

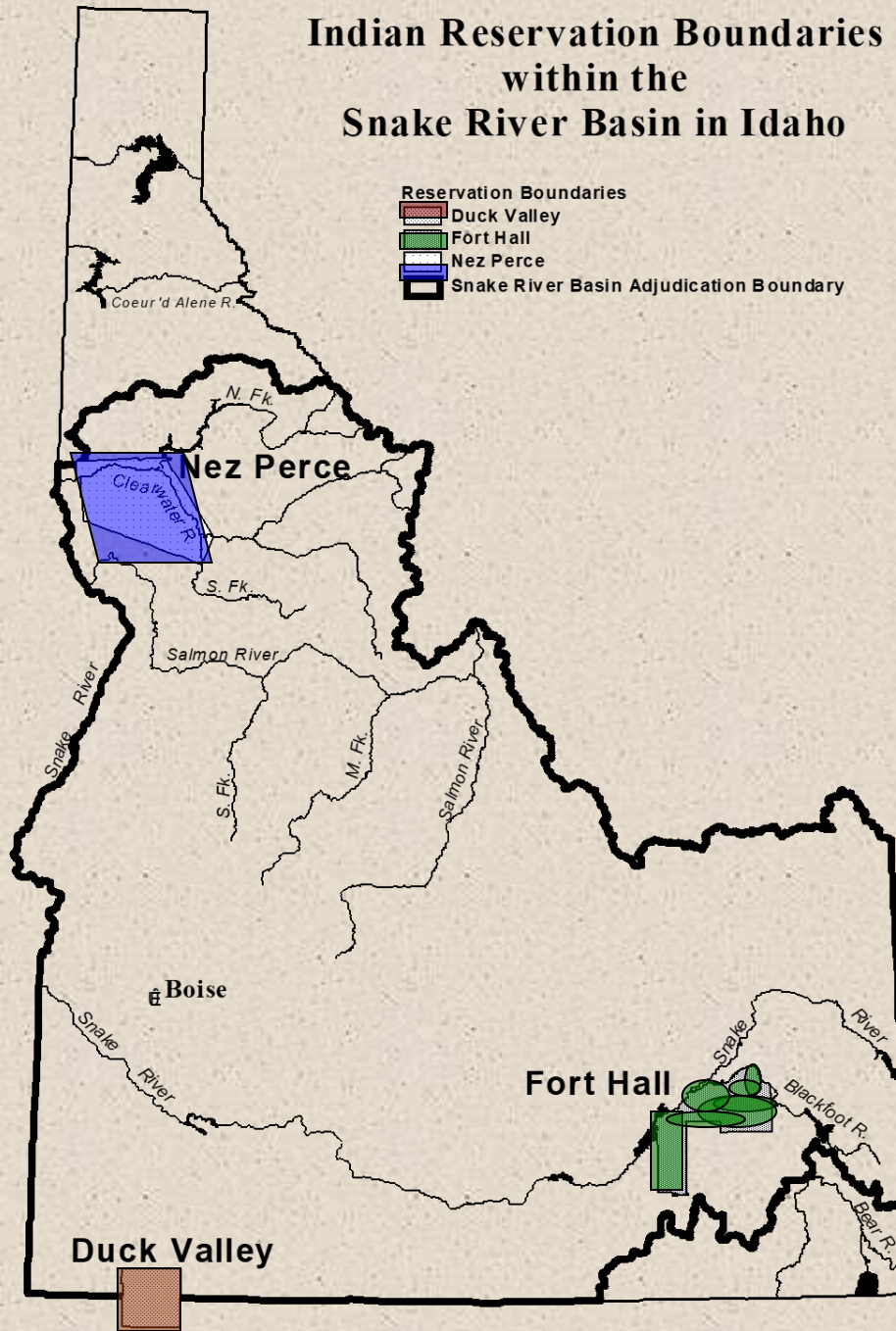
Snake River Basin Adjudication


- General Stream Adjudication of All Water Rights in the Snake River Basin within Idaho
- Purposes of Adjudication
 - Accurate List of All State Based Water Rights
 - Quantification of All Federal Reserved Water Rights
 - Determination of Hydraulically Connected Sources
- Second largest general stream adjudication in the United States

Indian Reservation Boundaries within the Snake River Basin in Idaho

Reservation Boundaries

- Duck Valley
- Fort Hall
- Nez Perce
- Snake River Basin Adjudication Boundary



An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.

Snake River Basin Adjudication

- 150,000 Water Right Claims
- 20,000 + Federal and Tribal Water Right Claims
- 120,000 + Claims Decreed
- Expected to be near completion within five-years

Summary of Tribal Water Right Claims

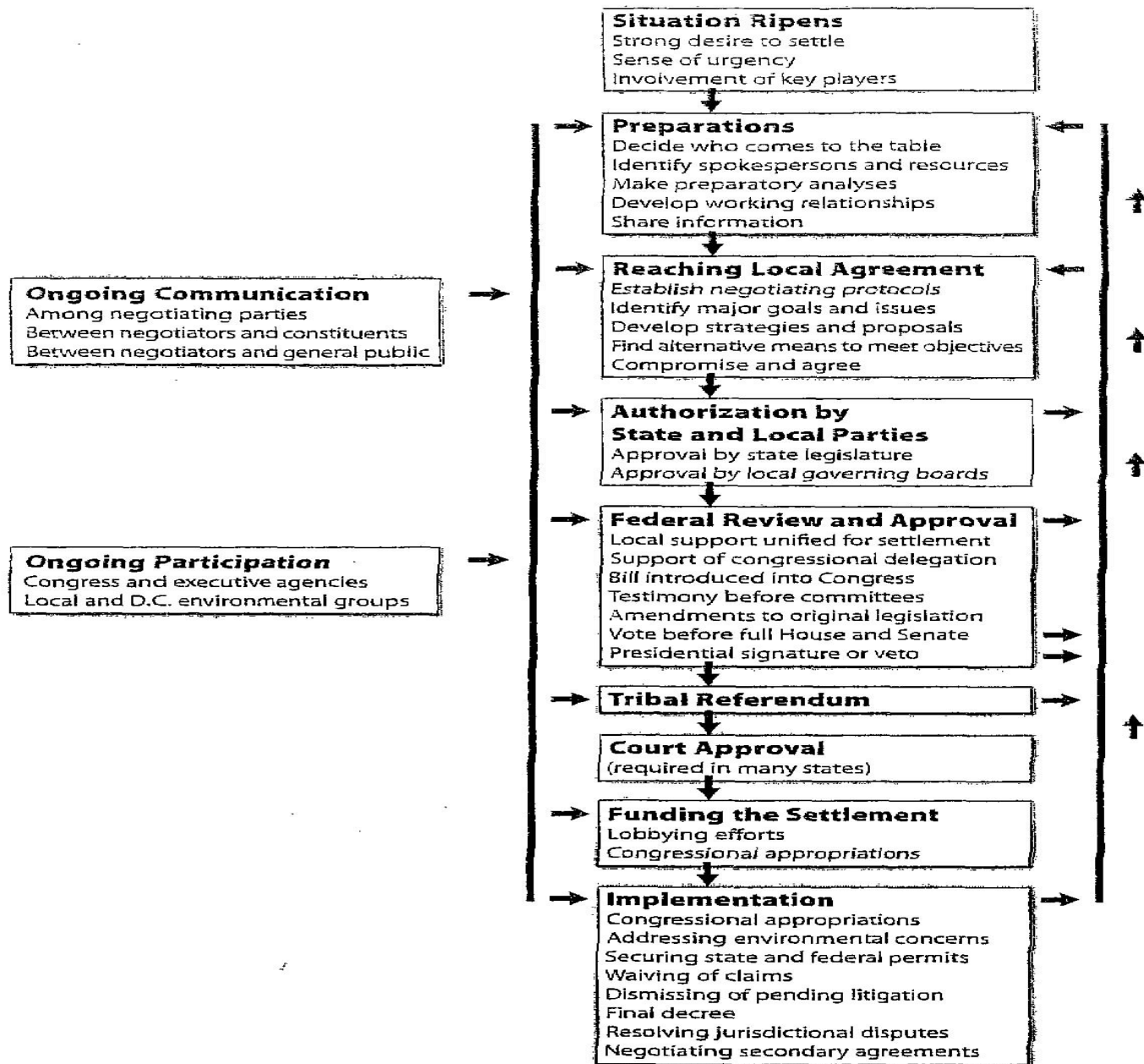
Agency/Tribe	Type of Claim	Amount Claimed	Amount Recognized	Status
Shoshone-Bannock Tribes	Irrigation	782,107 AFY	581,031 AFY	Final Decree
Nez Perce Tribe	DCMI	8,859 AFY	50,000 AFY	Settlement Pending
	Irrigation	290,580 AFY		
	Fish Facilities	214,124 AFY		
	Stockwater & Wildlife	6,545AFY		
	Wildlife Habitat	1,858 AFY		
	Hydropower	3,077 AFY		
	Springs & Fountains	88 cfs		
Shoshone-Paiute Tribes	DCMI	451 AFY & 0.02 claim	451 AFY & 0.02 claim	Settlement Pending
	Irrigation	83,648 AFY	83,648 AFY	
	Instream Flow	Variable	Disallowed	
	Stockwater & Wildlife	0.02 cfs/claim	0.02 cfs/claim For stockwater	
	Wildlife Habitat	11,475 AFY	Disallowed	
	Miscellaneous		Disallowed	
National Park Service	Craters of the Moon National Monument		54.5 AFY (consumptive) Disallowed (non-consumptive)	Final Decree
	City of Rocks National Monument		0.003 cfs & 1.21 AFY (consumptive) Disallowed (non-consumptive)	
	Yellowstone National Park		1AFY (Consumptive) As Claimed (non-consumptive)	

Summary of Federal Consumptive Use Reserved Water Right Claims


Agency	Type of Claim	Amount Claimed	Amount Recognized	Status
U.S. Department of Energy	Idaho National Laboratory		80 cfs & 35,00 AFY	Final Decree
	Buildings of Idaho Falls, Bonneville Power Administration		0.67 cfs, 0.06 cfs	Pending
Department of Defense	Mountain Home Air Force Base	42.14 cfs 7 30,726.6 AFY	Disallowed, State Law Claims Recognized	Final Decree
	Wilder Strategic Training Range	0.11 cfs & 52.7 AFY		Pending
	Army Reserve Center	092 cfs & 0.93 AFY		Pending
Department of Veteran's Affairs, General Services Administration, U.S. Geological Survey	Fort Boise	4.99 cfs, 4.39 cfs, 1.44cfs & 16.5 AFY		Pending
U.S. Fish and Wildlife Service	Deer Flat NWR Administrative Site and Fields	6.03 cfs		Pending
U.S. Army Corp of Engineers	Dworshak Dam & Reservoir	12, 266 cfs		Pending
	Lucky Peak Reservoir	3 cfs & 1062 AFY		
National Park Service	Craters of the Moon National Monument		54.5 AFY (consumptive) Disallowed (non-consumptive)	Final Decree
	City of Rocks National Monument		0.003 cfs & 1.21 AFY (consumptive) Disallowed (non-consumptive)	
	Yellowstone National Park		1AFY (Consumptive) As Claimed (non-consumptive)	

SUMMARY OF FEDERAL RESERVED INSTREAM FLOW CLAIMS

AGENCY/TRIBE	TYPE OF CLAIM	NO. OF ORIGINAL CLAIMS FILED	ALLOWED	DISALLOWED OR DISMISSED	STATUS
FOREST SERVICE	ORGANIC ACT	1,359	0	1,359	Final Settlement
	MUSYA	2,389	0	2,389	Final Decision
	WILDERNESS	7	0	7	Final Decision
	WILD & SCENIC	8	6	2	Final Decree
	SAWTOOTH NRA	5	0	5	Final Decision
	HELLS CANYON NRA	1	1	0	Final Settlement (comprehensive claim was reduced to claims on specific streams and lakes)
FISH & WILDLIFE SERVICE	DEER FLAT REFUGE	4	0	4	Final Decision
NEZ PERCE/BIA	TRIBAL INSTREAM FLOW	1,133	0	1,133	Final Settlement Pending before SRBA Court
NORTHWESTERN BAND OF SHOSHONI	TRIBAL INSTREAM FLOW	27	0	27	Final Decision
SHOSHONE BANNOCK TRIBES	TRIBAL INSTREAM FLOW	1,030	0	1,030	Dismissed with prejudice.
SHOSHONE-PAIUTE TRIBES	TRIBAL INSTREAM FLOW	7	0	7	Final Settlement pending
TOTAL INSTREAM FLOW CLAIMS		5,970	7	5,963	




Bonnie G. Colby et. al., Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West 58 (2005).

An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.


Alternatives for Quantification of Indian Reserved Water Rights

- Litigation (Wind River Adjudication in Wyoming)
- Negotiation (Warm Springs Settlement in Oregon)
- Litigation & Negotiation (Montana, Colorado, Arizona, New Mexico)



State Processes for Negotiation of Tribal Claims

- State Engineer (Oregon)
- Compact Commission (Montana)
- Executive Branch (Colorado, Washington, Idaho)
- Water User Lead (Arizona)

An aerial photograph of a river winding through a dense forest. The river is a light brown color, contrasting with the dark green of the trees. The river starts at the top left and curves downwards and to the right, then turns back to the left, creating a series of loops.


State Processes for Negotiation of Tribal Claims

- Regardless of approach, most states form a multimember negotiating team consisting of:
- Political Official for Policy Direction
- Senior Management Official for Continuity
- Technical Representative
- Legal Representative
- Lead Negotiator

An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.


Idaho Process

- Governor Lead Negotiator supported by the Attorney General
- Close coordination with the Idaho Legislature
- State Director of Water Resources provided technical support to all parties

An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the trees. The river starts at the top left and curves downwards and to the right, then turns back to the left, creating a series of loops. The forest is dense and covers the surrounding hills and valleys.

Idaho's Process for Negotiations

- Historical research of all federal claims
- Technical review of claims
- Evaluation of risks of litigation and chance for settlement
- Developed unified principles to govern negotiations
- Developed process for involvement of key constituents
- Provided periodic updates to Governor and Legislature
- Provided for public process for approval of settlements

An aerial photograph of a river winding through a dense forest. The river is a light brown color, contrasting with the dark green of the trees. The river starts at the top left and curves downwards and to the right, eventually exiting the frame at the bottom left.

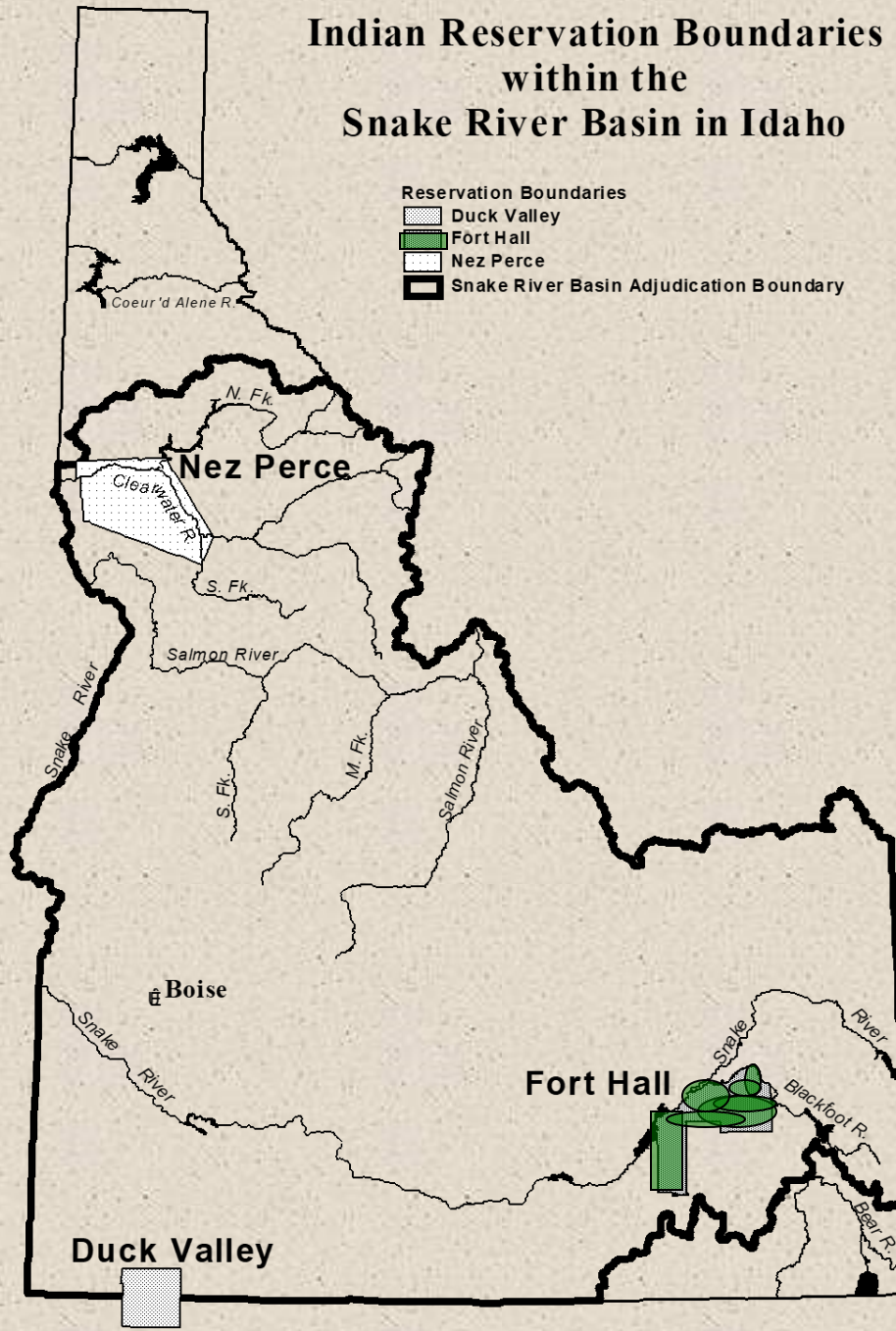
10 Factors Necessary For Successful Negotiations


1. Uncertainty of Outcome is Necessary
2. Realistic Expectations
3. Involvement & Continuity of Stakeholders
4. Sense of Urgency
5. Mutual Respect and Trust
6. Equal Access to Technical data and Facts
7. Avoidance of Sovereignty Issues
8. Funding
9. Forum for Conducting Sensitive Discussions
10. Clear Boundaries on Negotiations

Indian Reservation Boundaries within the Snake River Basin in Idaho

Reservation Boundaries


- Duck Valley
- Fort Hall
- Nez Perce
- Snake River Basin Adjudication Boundary



An aerial photograph of a river winding through a forested landscape. The river is light-colored, possibly due to sand or silt, and contrasts with the darker green of the surrounding trees. The river starts from the top left and curves downwards and to the right.

Shoshone-Bannock Negotiations

- Government-to-Government Negotiations Prior to Commencement of Litigation
- Tribal Claims consisted of on-reservation consumptive use claims and off-reservation instream flow claims
- 1990 Fort Hall Water Rights Agreement only dealt with on-reservation claims
- Instream flow claims were litigated
- Settlement resulted 581,031 acre-feet of decreed water rights and approximately \$22 million development fund



Shoshone-Bannock Negotiations

-Important Factors Favoring Negotiations

- Wyoming Experience with Wind River Adjudication
- Strong Tribal Commitment to Negotiations
- Strong Federal Negotiation Team

-State Sideboards on Negotiations

- State sovereignty
- No injury to existing state water rights
- No recognition of instream flow water rights

Indian Reservation Boundaries within the Snake River Basin in Idaho

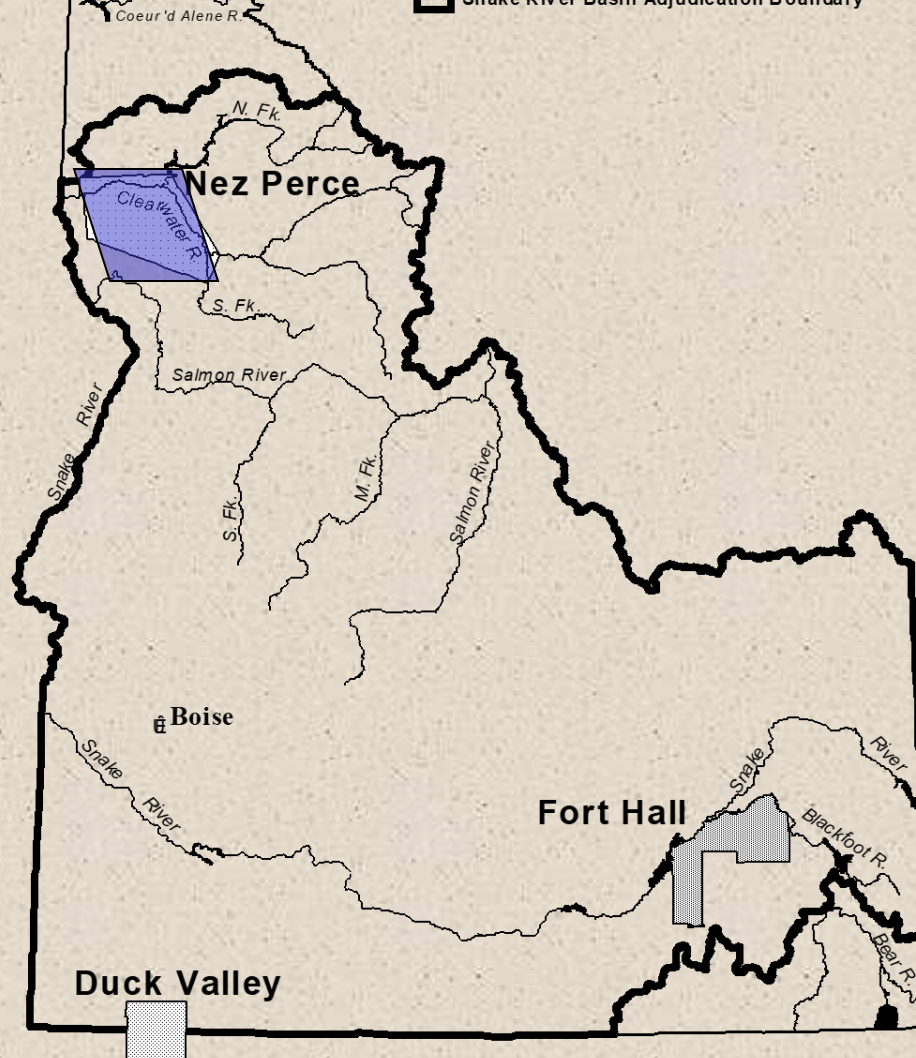
Reservation Boundaries

Duck Valley

Fort Hall

Nez Perce

Snake River Basin Adjudication Boundary



An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.

Nez Perce Negotiations

- Initial Efforts at Negotiation were not successful because of the magnitude of the tribal claims.

- Factors Creating Environment for Negotiations**

- Summary Judgment Decision Dismissing Instream Flow Claims and Finding the Reservation was Diminished

- Endangered Species Act Litigation

- Relicensing of Hells Canyon Dam

An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the river.

Process for Nez Perce Negotiations

- Idaho Side Boards for Negotiations
 - No Federal Instream Flows
 - Idaho Only Settlement
 - Protection of all existing water rights
 - Litigation must be allowed to proceed
- Mediator coordinated negotiations with lead negotiators
- Negotiations were conducted under a protective order
- Periodic Court Reports

An aerial photograph of a river winding through a dense forest. The river is a light brown color, contrasting with the dark green of the trees. The river starts at the top left and curves downwards and to the right, then turns back to the left, creating a series of loops.

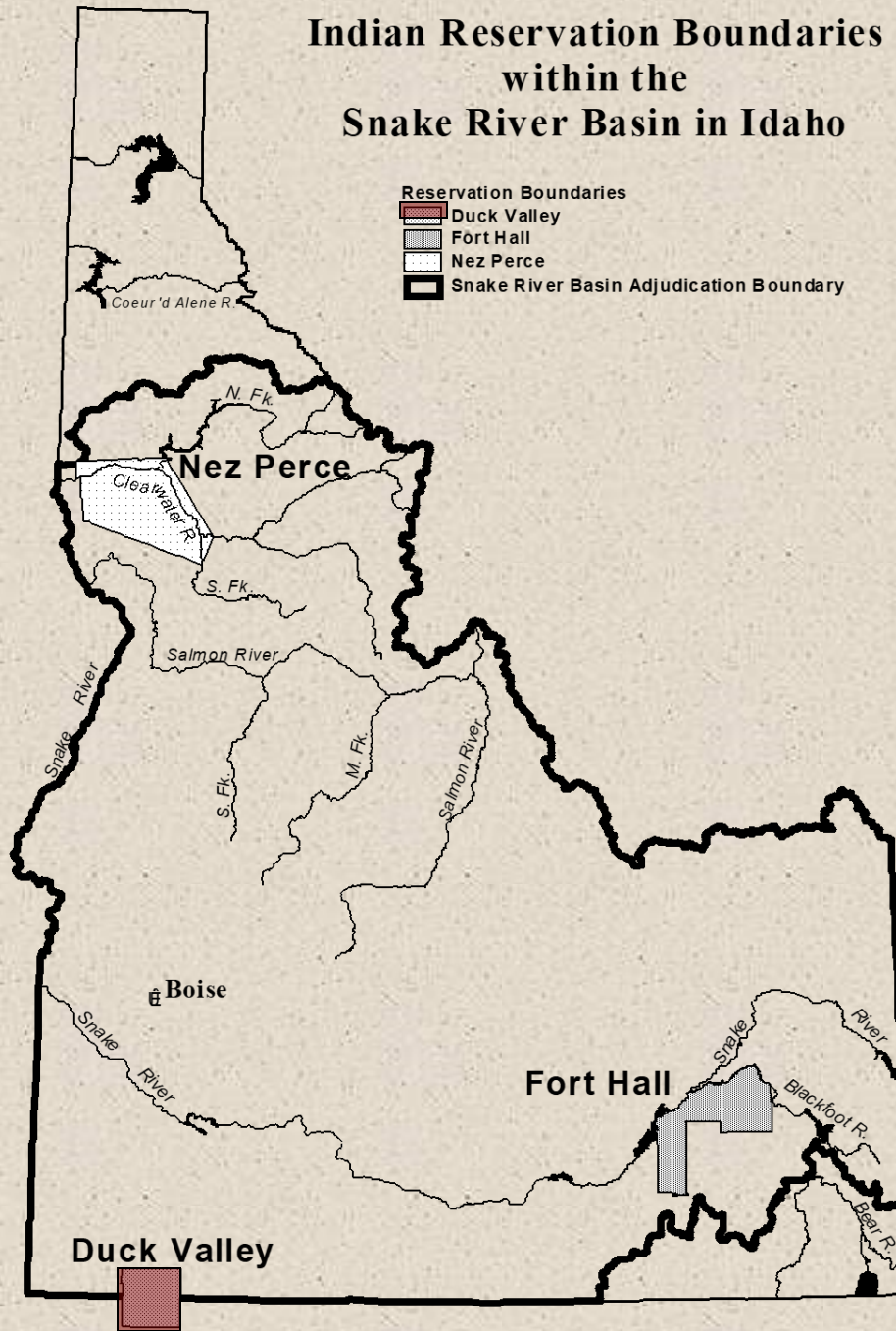
Northwestern Band of Shoshoni Negotiations


- Because the State did not view these claims as a risk, they were litigated.
- SRBA district court disallowed the claims.

Indian Reservation Boundaries within the Snake River Basin in Idaho

Reservation Boundaries


- Duck Valley
- Fort Hall
- Nez Perce
- Snake River Basin Adjudication Boundary



An aerial photograph of a river winding through a forested landscape. The river is a light brown color, contrasting with the dark green of the trees. The river starts at the top left and curves downwards and to the right, then turns back to the left, creating a series of loops. The surrounding land is covered in dense forest.

Shoshone-Paiute Negotiations

- Extensive settlement discussions lead to an agreement on the substantive water right claims; however, because of a change in Federal policy regarding funding of tribal settlements the agreement was never finalized.
- United States accepted Idaho's offer of judgment, which was submitted to the SRBA district court earlier this week in the form of a consent decree.
- Example of how a change in administration may affect the settlement process.

An aerial photograph of a river winding through a dense forest. The river is a light brown color, contrasting with the dark green of the trees. The river's path is highly irregular, with many sharp turns and loops, creating a complex, almost abstract pattern. The forest appears thick and continuous, with no significant gaps or clearings visible.

Conclusions

- Process should be tailored to the needs of the parties.
- Do your homework before starting negotiations.
- Insist on strong federal commitment to negotiation process.
- Ensure tribe is committed to negotiations.
- Know the limits of what you are willing to negotiate.

An aerial photograph of a river winding through a forested landscape. The river is a light blue-grey color, contrasting with the dark green of the surrounding trees. The river's path is highly irregular, with many sharp turns and loops. The forest appears dense and continuous on either side of the waterway.

Sources

-Peter Sly, **Reserved Water Rights Settlements** (1988)

-Colby, Thorson & Britton, **Negotiating Tribal Water Rights** (2005)