

SCANNED

JAN 16 2025



U.S. Department of Justice

Tribal Resources Section
Environment and Natural Resources Division

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Denver, CO 80202*

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Via Federal Express

January 15, 2025

RECEIVED
JAN 16 2025
DEPARTMENT OF
WATER RESOURCES

Matthew Weaver, Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

Re: *The United States' Claims on behalf of the Kalispel Tribe of Indians*

In re: The General Adjudication of Rights to the Use of Water from the
Clark Fork – Pend Oreille River Basin Adjudication. Case No. 69576

Dear Mr. Weaver,

Pursuant to the *Order Granting Motion for Alternative Filing Schedule for Federal Claims*, dated August 21, 2024, granting the United States until January 17, 2025 to file claims on behalf of the Kalispel Tribe of Indians (“Kalispel” or “Tribe”), the United States hereby submits and files the enclosed Notices of Claims (“Tribal Claims”). These Tribal Claims are filed by the United States Department of Justice for the Department of the Interior, Bureau of Indian Affairs, in its role as trustee on behalf of Kalispel.

The Tribal Claims are filed pursuant to federal law, specifically, the federal reserved water rights doctrine as established by *Winters v. United States*, 207 U.S. 564 (1908) and its progeny. While federal law provides the legal basis for these claims, the United States followed the state law guidance regarding format provided by the Idaho Water Code, where appropriate, in preparing these claims. See Idaho Code § 42-1409(1).

There are a total of 45 Tribal Claims enclosed. The following summary of the Claims is provided for the convenience of the Court and Parties. This entire package consists of three parts: 1) Letter summary of the Tribal Claims; 2) Attachments I-II to the Letter Summary; and 3) the 45 separate Notices of Claims.

A. Kalispel Tribe and Reservation

Prior to the creation of the Kalispel Reservation (“Reservation”), the Tribe’s aboriginal territory included over 2.4 million acres in what is today Montana, Idaho, and Washington. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1508 (9th Cir. 1991). The Kalispel Tribe’s historical lifeways centered on hunting, fishing, and gathering in this territory. As confirmed by the testimony of the Tribe’s primary ethnographer, Dr. Allan Smith, before the Indian Claims Commission (“ICC”), “[f]ish played an exceedingly important part in the diet of both the Upper and the Lower Kalispel” and fishing occurred throughout the entire year, particularly the summer, and for bull trout, westslope cutthroat trout, suckers, and white fish, among other species. Petitioner’s Proposed Findings of Fact and Brief (“ICC Pet. FF”) at 25, *The Lower Pend D’Oreille or Kalispel Tribe of Indians v. United States* (No. 94) (1957).

In contrast to other tribes in the region during late 1800s, the Kalispel steadfastly refused to remove to a reservation that did not include their homeland in the Clark Fork – Pend Oreille River Basin. Findings of Fact, *The Lower Pend D’Oreille or Kalispel Tribe of Indians v. United States* (No. 94), 6 Ind. Cl. Comm. 353, 356-58 (1958). A primary reason for that refusal was the Tribe’s insistence that it be able to continue its traditional lifeways in its aboriginal territory, including fishing in the Clark Fork - Pend Oreille River Basin. *Id.* In 1856 and again in 1887, federal officials attempted to negotiate with the Kalispel to cede their aboriginal territory and remove to the Flathead Reservation in Montana, but the Kalispel refused. ICC Pet. FF at 42-43, 47-48. After encroachment on Kalispel lands by white settlers, and after significant efforts on the part of federal officials to protect Kalispel lands, on March 23, 1914, President Woodrow Wilson signed Executive Order 1904, formally establishing the 4,629.27-acre Kalispel Reservation along the Pend Oreille River in the state of Washington. *Id.* at 49-55. The Tribe never agreed to cede right, title or interest outside the Reservation. *C.f.*, *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 548-49, 448 P.3d 322 (2019).

B. Instream Flow Claims for Fish Habitat

The United States, on behalf of Kalispel, claims off-reservation instream flow water rights for fish habitat. These water rights serve the on-reservation fishing rights of the Tribe to support the Reservation as a permanent homeland for the Kalispel people. *Arizona v. California*, 373 U.S. 546, 599-600 (1963). These claims are essential to support the habitat of fish species that spend important parts of their lifecycles in the Clark Fork – Pend Oreille River Basin in Idaho before migrating downstream to the Reservation where the Tribe exercises its on-reservation fishing rights. Monthly fish habitat flow claims are submitted for a total of 45 stream reaches.

Bull trout, westslope cutthroat trout, and mountain whitefish, among other species, were central to the Tribe's diet and culture since time immemorial and at the time the Reservation was created. The Tribe therefore depended on a year-round supply of water to support habitat to exercise its reserved fishing rights throughout the year. ICC Pet. FF at 22-25. Historical records surrounding the 1914 Executive Order formally establishing the Reservation demonstrate that the United States was plainly aware of the Tribe's historic dependence on the fishery. And the Tribe continues to rely on the fishery resource to this day. Based on the Tribe's fishing culture dating back to aboriginal times, the United States thus claims a priority date of time immemorial for its instream flow claims. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Idaho v. United States*, 533 U.S. 262, 265 (2001).

Attached to this letter is a table providing an overall summary of the monthly instream flow claims for each named stream reach (Attachment I). Attachment II provides a map of the claimed stream reaches (note that this same map is attached to each instream flow claim form).

C. Reservation of Rights

Pursuant to the McCarran Amendment, 43 U.S.C. § 666, the United States' claims filed herein are limited to those instream flow water rights held in trust for the benefit of the Tribe in the Clark Fork – Pend Oreille River Basin in Idaho. The Kalispel Tribe is entitled to water rights other than instream flows for fish to meet the homeland purpose of its Reservation, however, the United States as trustee does not seek to adjudicate any of those other tribal federal reserved water rights in this adjudication. By submitting these claims, the United States does not waive any immunities, privileges, or rights except as clearly and unambiguously required by Act of Congress nor does the United States waive any immunities, privileges, or rights on behalf of the Tribe. These claims, and other documents provided herein, do not waive the sovereign immunity of the United States or the Tribe respecting the title to any lands on or off the Kalispel Reservation.

The claim forms comply with Idaho Code § 42-1409(1) where possible, but the use of this format should not be construed to limit either the United States or Kalispel's future use of water outside of the State of Idaho or within the boundaries of the Reservation. The United States reserves the right to supplement and/or amend the water rights claims filed herein. Should the Department have any questions regarding these claims, please do not hesitate to call me at (303) 844-1353.

Sincerely,

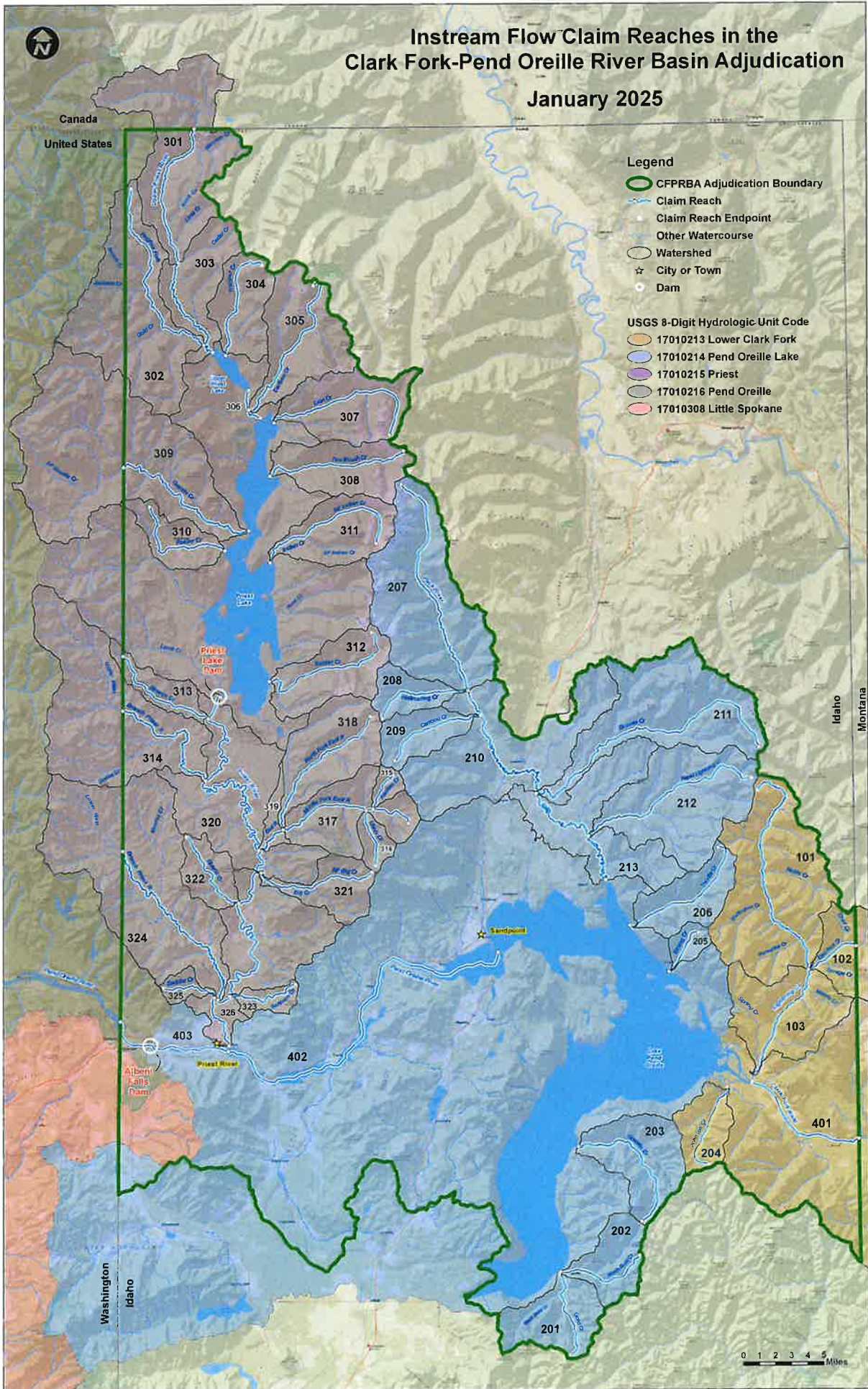


Vanessa Boyd Willard
Marisa J. Hazell
Trial Attorneys
United States Department of Justice
Environment and Natural Resources
Division Tribal Resources Section

Federal Instream Flow Claims on behalf of Kalispel Tribe (01/15/2025)

Claim Number	Basin Name (USGS HUC8)	Stream Name	Clark Fork-Pend Oreille River Basin Adjudication - Federal Instream Flow Claims											
			Upstream Boundary						Downstream Boundary					
			Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
101	Lower Clark Fork	Lightning Creek	138	130	188	444	855	765	189	67.2	70.8	114	211	215
102	Lower Clark Fork	East Fork Creek	41.8	47.5	54.2	136	271	249	80.6	27.8	28	29.1	61.3	68.1
103	Lower Clark Fork	Lightning Creek	265	227	373	893	1590	1270	265	36.3	29.5	127	323	263
201	Pend Oreille Lake	Gold Creek	38	49.5	69.8	119	143	143	18.4	8.62	6.99	8.2	20.5	30.9
202	Pend Oreille Lake	North Gold Creek	32.6	40.6	54.5	99.9	120	75	21.6	7.48	5.42	6.03	18.5	24.9
203	Pend Oreille Lake	Granite Creek	40.6	62.4	77.9	142	148	81.4	22.9	9.88	8.4	8.71	19	36.1
204	Lower Clark Fork	Johnson Creek	22.4	32.7	43.4	76.8	77.5	44.9	11.6	4.99	3.8	4.15	9.67	21.3
205	Pend Oreille Lake	Strong Creek	10.5	12.5	15.4	25.3	42.7	15.5	6.63	3.27	2.32	2.96	6.43	7.93
206	Pend Oreille Lake	Trestle Creek	47.7	53.5	64	145	208	132	32.1	13	12.4	15	38.2	44.3
207	Pend Oreille Lake	Pack River	67.5	72.2	113	282	525	399	107	34	31	37.6	69.7	79.4
208	Pend Oreille Lake	Hellroaring Creek	11.4	15.8	23.7	62.9	108	79.4	16.3	5.21	4.47	5.23	11.2	12.5
209	Pend Oreille Lake	Caribou Creek	16.3	23.8	31.7	60.9	147	92.7	21.5	6.71	5.73	7.24	15.3	17.1
210	Pend Oreille Lake	Pack River	171	223	315	776	1390	822	196	65.8	58.2	88.9	163	183
211	Pend Oreille Lake	Grouse Creek	84.9	103	140	332	526	194	61.1	22.4	18.9	28.3	75.3	93.6
212	Pend Oreille Lake	Rapid Lightning Creek	83.2	97.2	134	285	458	157	40.5	18.8	31	42.8	80.5	77.4
213	Pend Oreille Lake	Pack River	348	452	655	1600	2410	1120	287	114	100	164	314	414
301	Priest	Upper Priest River	78	72.3	105	274	504	406	127	41.4	45.8	49.6	78	81.5
302	Priest	Hughes Fork	77.9	69.2	104	262	477	446	150	46.3	46.6	51.3	74.2	79.8
303	Priest	Upper Priest River	190	176	257	669	1230	991	311	101	112	121	190	199
304	Priest	Trapper Creek	27	25.9	36.9	98.8	182	128	36.7	12.7	15.6	16.6	28.1	28.7
305	Priest	Caribou Creek	48.2	43.9	49.8	150	344	328	107	31	34.2	40	63.6	56.3
306	Priest	Priest River	286	264	355	966	1920	1650	527	163	180	202	319	311
307	Priest	Lion Creek	30.4	30.6	35.9	117	307	315	130	28.8	27.6	31.1	47.2	38.6
308	Priest	Two Mouth Creek	28	28.3	31.8	99.7	257	254	76.7	23.1	24.7	27.7	43.4	37.6
309	Priest	Granite Creek	107	100	175	401	656	549	160	55.4	43	46	84.4	86
310	Priest	Reeder Creek	8.94	11.9	27.2	48	52.3	25.3	6.7	2.61	2.34	3.84	5.51	6.72
311	Priest	Indian Creek	26.2	30.2	33.2	106	253	258	75.8	22.4	26.6	28.7	46.5	36
312	Priest	Soldier Creek	26.7	28.7	47.6	131	243	170	46.3	13.9	12	14.5	26.5	28
313	Priest	Binarch Creek	10.7	13.7	26.3	42.3	49.3	21.7	5.32	3.76	3.38	4.1	5.73	7.83
314	Priest	Upper West Branch Priest River	65.6	65.2	145	275	323	182	40.9	26	24.3	32.8	53.6	60.9
315	Priest	Keokee Creek	4.24	4.07	6.9	19.7	36.6	33.6	10.2	3.03	2.48	2.6	5.27	5.07
316	Priest	Uledda Creek	5.91	6.09	11.8	32.1	53.1	39.1	10.6	3.57	3.06	3.32	5.8	6.74
317	Priest	Middle Fork East River	44.9	48	83.4	205	307	245	61.3	20	15.8	17.9	37.2	42.3
318	Priest	North Fork East River	29.6	33.4	65.4	158	218	177	45.3	15.3	12.5	13.9	28.5	28.3
319	Priest	East River	81.4	87.1	156	399	573	447	110	36.3	29.3	32	67.3	71.7
320	Priest	Priest River	1000	1020	1420	3580	6300	4800	1470	598	533	819	1160	1140
321	Priest	Big Creek	15.5	20.8	39.4	86.7	106	69.8	17.8	6.56	5.63	6.21	14	14.4
322	Priest	Quartz Creek	8.57	13.5	25.2	38.8	44.5	16.8	4.75	2.99	2.93	3.6	5.88	8.74
323	Priest	Sanborn Creek	4.01	6.46	13.7	20.2	23.8	6.98	1.87	1.51	1.8	2.82	3.22	3.98
324	Priest	Lower West Branch Priest River	66	84.4	207	319	349	173	41.7	27.7	28	40.6	47.1	66.8
325	Priest	Saddler Creek	2.91	4.62	9.42	14.3	15.3	4.78	1.59	1.58	1.57	2.02	2.28	3.12
326	Priest	Priest River	1110	1130	1580	3970	6990	5320	1630	663	591	908	1290	1270
401	Lower Clark Fork	Clark Fork River	6590	7280	9070	13200	13200	13200	13200	13200	13200	13200	13200	6940
402	Pend Oreille Lake	Pend Oreille River	8870	9250	11200	14700	14700	14700	14700	14700	14700	11800	8670	9170
403	Pend Oreille Lake / Pend Oreille	Priest River	9600	9990	12100	15600	15600	15600	15600	15600	12200	9190	8470	9960

Instream Flow Claim Reaches in the Clark Fork-Pend Oreille River Basin Adjudication January 2025



RECEIVED

JAN 16 2025

DEPARTMENT OF WATER RESOURCES

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

IN RE THE GENERAL ADJUDICATION)
OF RIGHTS TO THE USE OF WATER)
FROM THE CLARK FORK-PEND)
OREILLE RIVER BASINS WATER)
SYSTEM)
CASE NO. 69576)

NOTICE OF CLAIM

Federal Reserved Water Right

Subcase No. 96-17090

SCANNED

JAN 16 2025

1. Name and address of claimant:

UNITED STATES OF AMERICA, as trustee on behalf of the KALISPEL TRIBE OF INDIANS of the KALISPEL INDIAN RESERVATION acting through the NORTHWEST REGIONAL DIRECTOR
Department of the Interior
Bureau of Indian Affairs
911 N.E. 11th Ave
Portland, OR 97232

2. Date of Priority: Time Immemorial

3. Source: Lightning Creek (Water Right # 96-17090) (Fed. ID # 101)

4. Point of Diversion: Not applicable; Instream Flow

5. Place of Use:

At all points along the stream reach located between the following boundaries:

Upstream Boundary – Headwaters

Table with 8 columns: Water Right, Federal I.D., Township, Range, Section, Q in the Q, Meridian, County. Row 1: 96-17090, 101, 58N, 2E, 3, SESE, BM, Bonner

Downstream Boundary – Above East Fork Creek

Table with 8 columns: Water Right, Federal I.D., Township, Range, Section, Q in the Q, Meridian, County. Row 1: 96-17090, 101, 57N, 3E, 32, SWSW, BM, Bonner

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

6. Purpose of Water Use:

Fish habitat for fish species harvested within the Kalispel Reservation - as a component of water rights necessary to fulfill the homeland purpose of the Kalispel Reservation pursuant to the documents referenced in Section 9 and the provisions in Section 10, *infra*.

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

8. Quantity Reserved (In cfs):

January	February	March	April	May	June
138	130	188	444	855	765
July	August	September	October	November	December
189	67.2	70.8	114	211	215

9. Basis of Claim:

The legal basis for this water right claim stems from the doctrine of federal reserved water rights articulated by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, as well as the operative documents and circumstances surrounding the creation of the Kalispel Reservation, including but not limited to, the Executive Order signed by President Wilson on March 23, 1914, C. Kapler, Indian Affairs: Laws and Treaties 1051 (Vol. 4, 1927).

10. Other Provisions:

a. This claim is one in a series the United States is making for waters from surface water sources within the Clark Fork-Pend Oreille River Basin Adjudication in the State of Idaho to fulfill the permanent homeland purpose of the Kalispel Indian Reservation, including the present and future fishing purpose.

b. Prior to the creation of the Reservation in 1914, the Kalispel Tribe held aboriginal title to certain lands “within the United States in what are now the States of Washington, Idaho and Montana.” *The Lower Pend D 'Oreille or Kalispel Tribe of Indians v. United States of America*, Docket No. 94, 12 Ind. Cl. Comm. 141 (1963). The Kalispel Reservation is located on the mainstem Pend Oreille River because fishing is central to the Tribe’s history, culture and use of resources. The Tribe never agreed to cede right, title or interest outside the Reservation. *C.f., In re CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 548–49, 448 P.3d 322 (2019).

c. This water right claim is for a traditional use of water that predates the creation of the Kalispel Reservation. This right was not created but was instead confirmed

by the executive order outlined in section 9, *supra. United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1984). Therefore, pursuant to federal law, the priority date of this water right is time immemorial. *Id.*

d. In order to comply with Idaho Code § 42-1409(1), the United States has designated “places of use,” “points of diversion,” and “purposes of use” in submitting this water rights claim. This proposed water right claim form has been developed in conjunction with, and at the request of, the Idaho Department of Water Resources (“IDWR”). The use of this format as required by Idaho Code, and as requested by IDWR, should not be construed to limit either the United States or the Kalispel Tribe’s future use of water at other points of diversion, places of use or for other purposes within the boundaries of the Reservation. The statute's terminology has been employed to demonstrate that the amount claimed is necessary, justifiable, and available to achieve the purpose of the Reservation as a homeland for the Kalispel Tribe.

11. Signatures:

(a) By signing below, I acknowledge that I have received, read, and understand the form entitled “How you will received notices in the Clark Fork-Pend Oreille River Basin Adjudication.”

(b) I do ___ do not X wish to received and pay a small annual fee for monthly copies of the docket sheet.

For Organizations:

I do solemnly swear and affirm that I am Rudy Peone, Acting Northwest Regional Director, U.S. Bureau of Indian Affairs, that I have signed the foregoing document in the space below as Regional Director, U.S. Bureau of Indian Affairs, and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent:



Acting Northwest Regional Director
U.S. Bureau of Indian Affairs

Dated this 15 day of January 2025.

Notice is hereby given that the United States Department of Justice will represent the United States of America, including, but not limited to the U.S. Department of the Interior, Bureau of Indian Affairs, in all matters pertaining to the Clark Fork-Pend Oreille River Basin Adjudication.

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



Vanessa Boyd Willard
Marisa J. Hazell
United States Department of Justice
Environment and Natural Resources Division
Tribal Resources Section
999 18th Street, Suite 370
Denver, CO 80202

Attorneys for the United States of America

Dates this 15 day of January 2025.

Instream Flow Claim Reaches in the Clark Fork-Pend Oreille River Basin Adjudication

January 2025

