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

	) Consolidated Subcase No. 91-7755
	)
In re CSRBA	) COEUR D'ALENE TRIBE'S RESPONSE
	) TO THE STATE OF IDAHO, HECLA,
Case No. 49576	) AND THE NORTH IDAHO WATER
	) RIGHTS GROUP
_____	)

COMES NOW, the Coeur d'Alene Tribe (hereinafter referred to as "Tribe"), and hereby offers the Court this response memorandum in support of its joint motion for summary judgment. The previously filed joint statement of facts, and accompanying affidavits, filed contemporaneously herewith, are expressly incorporated therein.

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INTRODUCTION

This memorandum responds to the arguments made by the State of Idaho, Hecla, and the North Idaho Water Rights Group ("NIWRG") in support of their motions for summary judgment. The overarching argument of this memorandum can be broken down into five elements. First, the historic record, as laid out in *Idaho II*, conclusively demonstrates the Coeur d'Alene Reservation was set aside on November 8, 1873 and objectors are precluded from arguing otherwise. Second, all of the Coeur d'Alene Tribe's federal reserved water rights vested on that date. Third, "a purpose of the 1873 Agreement was to provide the Tribe with a reservation that granted tribal members

exclusive use of the water resource," to the extent necessary to fulfill the purposes of the Reservation and "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement . . . ." *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094, 1109 (D. Idaho 1998) ("*Idaho II*"). Fourth, once vested any cession, abrogation, or diminishment of water rights cannot be completed through silence but must be unequivocally expressed because agreements are "not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). And fifth, the canons of construction, controlling case law, and historic record in this case conclusively demonstrates that no subsequent agreements between the Tribe and the United States or other Congressional acts operated to cede, abrogate, or otherwise diminish any of those water rights reserved in 1873. Accordingly, the United States continues to hold for the benefit of the Coeur d'Alene Tribe all water rights reserved in 1873.

FACTUAL BACKGROUND

The *United States' and Coeur d'Alene Tribe's Joint Statement of Facts* filed on October 20, 2016 is incorporated herein. *See United States' and Coeur d'Alene Tribe's Joint Statement of Facts*, In re In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Oct. 20, 2016) (hereinafter "Joint Statement of Facts").

STANDARD OF REVIEW

The Tribe hereby adopts and incorporates herein the statement of the standard of review contained in the Memorandum of the United States in Support of Motion for Summary Judgment. *See United States' Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case

No. 49576, Consolidated Subcase No. 91-7755 at 4 (Oct. 20, 2016) (hereinafter "United States' Opening Brief").

ARGUMENT

I. THE COEUR D'ALENE RESERVATION WAS CREATED ON NOVEMBER 8, 1873 AND OBJECTORS ARE PRECLUDED FROM ARGUING OTHERWISE

In its opening brief, the State of Idaho acknowledges that "[t]he history and purpose of the 1873 Executive Order has been previously determined in litigation between the United States, the Tribe, and the State . . . ." *State of Idaho's Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 34 (Oct. 20, 2016) (hereinafter "Idaho Opening Brief"). The State admits that "[t]he [federal district] court, after reviewing the history that led to the 1873 Executive Order, concluded as follows:

> Th[e] evidence leads the Court to conclude that a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe."

Id. at 35 (quoting *Idaho II*, 95 F.Supp.2d at 1109).

In other words, Idaho concedes the purposes of the creation of the 1873 Reservation consistent with the arguments made by the Tribe and the United States in their opening briefs. Rather than argue the purposes of the 1873 Reservation, Idaho sidesteps the issue and instead argues that "the 1873 Executive Order was a temporary measure that did not permanently reserve water rights." *Id*. at 34. The State goes on to create a so-called "last reservation doctrine," that has

no root in federal law,[1] to conclude that "[i]t is also indisputable that the Coeur d'Alene Reservation, as established by executive order, was ultimately rejected by Congress." *Id*. at 36-37. Given Idaho's concession regarding the purposes of the 1873 Reservation, **determination of the Tribe's entitlement turns on whether the Coeur d'Alene Reservation was created in 1873 or 1891**.

The State has already fought and lost this battle in federal district court, before the Ninth Circuit, and before the Supreme Court of the United States. Despite the State's characterization to the contrary, a central issue in *Idaho II* was whether Congress ratified or rejected the 1873 Executive Order when it passed the 1887 and 1889 Agreements into law. Arguing this very question before the Supreme Court of the United States, Idaho contended that "Congress repudiated

[1] The State derives its so-called "last reservation doctrine" from *British-American Oil Producing Co. v. Bd. Of Equalization*, 299 U.S. 159 (1936). The State attempts to convince this Court that *British-American Oil* sets out a rule of general applicability, arguing that the Supreme Court held as a general matter that any time "a portion of the executive order reservation was ceded . . . 'the last reservation is the one with which we are concerned.'" Idaho Opening Brief at 37. The State takes the Supreme Court's language out of context. Instead, the Supreme Court in that case was analyzing the specific facts and circumstances *in that case* regarding the Blackfeet Reservation, stating that "*[t]his* last reservation is the one with which we are now concerned. 299 U.S. at 163. The Court's decision turned on the fact that Blackfeet Tribe's original reservation, which was set aside by executive order, was "evidently designed to be temporary . . . ." *Id*.

As the State points out, this executive order was also analyzed in *Winters*, wherein the Supreme Court specifically found "that the lands . . . <u>were part of a much larger tract</u> . . . [that] was set apart and reserved [through the executive order] <u>for the occupation of [several tribes</u>, including] the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians, but that the right of the Indians therein 'was the <u>bare right of use</u> and occupation thereof at the will and sufferance of the government of the United States." *Winters v. United States*, 207 U.S. at 567 (emphasis added). In other words, the original reservation served as a temporary placeholder until such time as individual agreements and reservations could be reached with each individual tribe. Far from holding that "the purposes of [all] executive order reservations do not survive subsequent agreements between the Tribe and the United States," *British-American Oil* actually demonstrates that analysis of <u>reservation's history must be completed on a case-by-case basis</u> and that the executive order at issue *in that case* stated that the reservation included no rights outside of a bare right of occupation. To the contrary, the reservation history of the Coeur d'Alene Reservation demonstrates that Congress confirmed the 1873 executive reservation. *See* section I(B)-(C), *infra*.

the Reservation as it then existed [in 1873], [and] directed its diminishment. Aff. Counsel, Ex. 1, p. 21 (Idaho's Supreme Court Brief *Idaho II*). Idaho went on to argue

> Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement.

Id. at 37-38. Indeed, the State's *primary theory* of the case was that Congress rejected the 1873 Reservation and created a new reservation in 1891, one year after Idaho became a state on equal-footing with the other states in the union. *Id*. at 20-21. As such, according to the State, the submerged lands had already passed to the State before the Coeur d'Alene Reservation was set aside. *Id.* If this were the case; if the Coeur d'Alene Reservation had not been created until 1891, then title would have been quieted in the State's favor rather than in favor of the United States and the Tribe.

As this Court well knows, that was not the outcome in *Idaho* II. Instead, the Supreme Court, like the Ninth Circuit and district court before it, entirely rejected the State's arguments and found that

> the negotiating history, not to mention subsequent events, "ma[k]e [it] very plain," that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . .

Idaho v. United States, 533 U.S. 262, 281 (2001) ("*Idaho II*") (quoting *Holt State Bank*, 270 U.S. at 55) (changes in original).

A. The Doctrine of Collateral Estoppel—Also Known as Issue Preclusion—Bars Objectors from Arguing the Reservation Was Not Created on November 8, 1873

The Idaho Supreme Court has found that the doctrine of collateral estoppel, or issue preclusion, "applies to protect litigants from the burden of relitigating an identical issue with the same party or its privy." *D.A.R., Inc. v. Sheffer*, 134 Idaho 141, 144 (2000). Under Idaho law five factors must be present for collateral estoppel to apply:

> 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the litigation

Id.[2]

The State's argument that Congress repudiated the 1873 executive order reservation is barred by the doctrine of collateral estoppel in this case because, as more fully described in section

[2] The federal rule on collateral estoppel is similar to the Idaho rule. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). The rationale for collateral estoppel is to "prevent[] litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Id*. (quoting *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979)). The rule, as articulated by the Ninth Circuit

> prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. "In both the offensive and defensive use situations the party against whom estoppel [issue preclusion] is asserted has litigated and lost in an earlier action." The issue must have been "actually decided" after a "full and fair opportunity" for litigation.

Id. Like Idaho law, the Ninth Circuit requires that "[t]he issue in the prior action must be identical to the issue for which preclusion is sought." *Id.* at 326.

I(B), *infra*, the state made the identical argument before the federal district court, Ninth Circuit, and United States Supreme Court in *Idaho II*.

As to the factors laid out in *D.A.R.*, first, the State has acknowledged that "the [district] court reached its conclusions . . . after a two week trial involving thousands of historical documents and the testimony of multiple expert witnesses." Idaho Opening Brief at 35. Second, As more fully outlined in section I(B), *infra*, one issue that was determined in *Idaho II*, as outlined by the State of Idaho, was whether Congress took "the necessary steps to ratify the [1873] reservation prior to or at the point of Idaho's admission to the Union." Aff. Counsel, Ex. 2, pg. 2-3 (Idaho's Trial Brief *Idaho II*). Third and fourth, the federal district court in *Idaho II* issued a final decision on the merits, which was subsequently affirmed by the Ninth Circuit and Supreme Court. Further, as more fully outlined in section I(B), *infra*, that issue was actually decided by the district court and affirmed by the Ninth Circuit and the Supreme Court.

Fifth and finally, the State of Idaho was a party to *Idaho II*. Further, as citizens of the State, the remaining objectors are in privity with the State of Idaho under the doctrine of *parens patriae*. *Alaska Sport Fishing Assoc. v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994). "The '*parens patriae*' doctrine… is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). The Supreme Court pointed out that doctrine is rooted in two principles. First, it is "a necessary recognition of sovereign dignity . . . ." *Id*. However, the Court also highlighted that it amounts to "a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id*.

In *New Jersey v. New York* the Supreme Court recognized "the wisdom of the rule," applies in any "suit involving a matter of sovereign interest . . . ." *Id*. Unquestionably, *Idaho II* fits this description given that "[o]wnership of submerged lands-which carries with it the power to control navigation, fishing, and other public uses of water-is an *essential attribute of sovereignty*." *United State v. Alaska*, 521 U.S. 1, 5 (1997) (emphasis added). Put another way, "ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.'" *Idaho II*, 533 U.S. at 272 (quoting *Montana v. United States*, 450 U.S. 544, 552 (1981)). In its brief before the Supreme Court the State argued this very point, highlighting that "[s]ubmerged lands are tied in a unique way to sovereignty, precisely because their natural and primary uses are public in nature." Aff. Counsel, Ex. 2, pg. 19 (Idaho's Supreme Court Brief *Idaho II*). Accordingly, there is no question that quiet title actions for submerged lands underlying navigable waters fits into the suite of lawsuits contemplated by the Supreme Court that "involve[e] a matter of sovereign interest . . . ." *New Jersey*, 345 U.S. at 372.

The Ninth Circuit has likewise applied the doctrine of *parens patriae* to determine that state citizens are in privity with their state for the purposes of determining the application of claim preclusion. *Alaska Sport Fishing*, 34 F.3d at 773. There, a group of sport fishers had brought a lawsuit against the Exxon Corporation for their actions resulting in the Exxon Valdez oil spill. *Id*. at 770. The district court dismissed the case on preclusion grounds because the state of Alaska had already "settled all such public claims." *Id*.

The plaintiffs in *Alaska Sport Fishing* asserted that preclusion did not apply because they were not party to the original suit nor were they in privity with the state of Alaska. *Id*. at 773. The district court concluded "that the plaintiffs were privies of the governments under the parens patriae doctrine," and the Ninth Circuit found that "[t]his ruling was not in error." *Id*. The Ninth Circuit

found that "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interest of all its citizens.'" *Id*. (quoting *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C.Cir. 1979)). In such a situation, "[t]here is a presumption that the state will adequately represent the position of its citizens." *Id*. As a result, the Ninth Circuit concluded that the sport fishers in *Alaska Sport Fishing* "were 'parties' of the federal suit within the meaning of res judicata." *Id.*

The same rationale applies in this case. Given the important sovereign nature of the submerged lands at issue in *Idaho II*, the State of Idaho litigated that case in its sovereign capacity in the interest of all of its citizens. Recognition of this principle is necessary to maintain the sovereign dignity of the State, the United States, and the Tribe. *New Jersey*, 345 U.S. at 372. Furthermore, as a matter of "good judicial administration," the Tribe should not have to face the prospect of relitigating the issues from *Idaho II* against "no practical limitation on the number of citizens," of the State of Idaho. *Id*. The doctrine of *parens patriae* clearly applies in this case and each of the objectors were either a party in *Idaho II* or a privie to the State.

As a result, the objectors are collaterally estopped from asserting that Congress rejected rather than confirmed the 1873 executive reservation because the federal district court, the Ninth Circuit, and United States Supreme Court each in turn found "the negotiating history, not to mention subsequent events, 'ma[k]e [it] very plain,' that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." *Idaho II*, 533 U.S. at 281.

B. *Idaho II* Conclusively Determined That the 1873 Executive Reservation was Confirmed by Congress

The United States Supreme Court laid out a two-prong test for determining whether a state's presumptive equal footing title to submerged lands within its borders has been defeated. That test is "whether the United States intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands." *Idaho II*, 533 U.S. at 273. "[N]otably, the Supreme Court has not required that the requisite intent be established in any specific, formulaic way, focusing instead on whether the congressional action at issue showed an affirmative intent to defeat state title . . . ." *United States v. Idaho*, 210 F.3d 1067, 1073 9th Cir. 2000) ("*Idaho II*"). In the case of the Coeur d'Alene Reservation, the two prong test became (1) whether the 1873 executive reservation included submerged lands; and (2) whether "Congress's actions prior to statehood clearly indicate its acknowledgment, express recognition, and acceptance of the executive reservation . . . ." *Id*.

Before the trial court, the State of Idaho articulated the issues to be decided as:

> (1) Whether, in the time-period immediately preceding the events giving rise to the 1873 Executive Order creating the Coeur d'Alene Reservation, the Coeur d'Alene depended on the disputed waterways for subsistence fishing; (2) if so, then whether, in the time-period immediately preceding the events giving rise to the 1873 Executive Order, the government officials responsible for issuance of the Executive Order knew or perceived the Tribe to be dependent on the disputed waterways for subsistence fishing; (3) if so, did government officials intend to reserve the bed and banks of navigable waterways within the Reservation for the purpose of protecting fisheries; and (4) if so was Congress aware of the reservation of the bed and banks and ***did it take the necessary steps to ratify the reservation prior to or at the point of Idaho's admission to the Union.***

Aff. Counsel, Ex. 2, pg. 2-3 (Idaho's Trial Brief *Idaho II*) (emphasis added). Just as it has argued before this Court, Idaho's primary argument in *Idaho II* was that

> [t]he 1873 Executive Order cannot be construed as an express conveyance of submerged lands, for one simple reason: it was issued with the intent and knowledge that it was only a temporary set-aside of lands to prevent white settlement pending congressional ratification of the 1873 Agreement.

Id. at 29.[3]

Idaho's arguments were summarily rejected by the federal district court, which found that "Congress ratified the 1873 Executive reservation of submerged lands . . . ." *Idaho II*, 95 F.Supp.2d at 1109. Further, the district court found that Congress was made aware of the extent of the Coeur d'Alene Reservation and rather than unilaterally altering the boundaries of the Reservation, directed government officials to negotiate for a voluntary cession of lands from the Tribe. *Id*. at 1114. The court found this dispositive evidence that "Congress acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes." *Id*. at 1110. Taken together, the court found that Congress "explicitly recognize[ed], prior to Idaho's statehood, an Executive reservation that included submerged lands . . . ." *Id*. at 1115.

On appeal to the Ninth Circuit the State "challenged neither [the] factual findings nor the court's legal conclusion on executive intent." *Idaho II*, 210 F.3d at 1072. As to the facts, the Ninth Circuit found they were "amply supported by the record." *Id*. The Court went on to highlight the issue on appeal:

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[3] The State based its argument in *Idaho II* on the same out-of-context statement made by Richard Hart that it relies upon in this case. In its opening brief in this case, Idaho argues "[a]s the Tribe's own expert has stated, it is undisputed that the Executive order 'was seen as a temporary measure . . . until such time as Congress confirmed the reservation." In its trial brief in *Idaho II*, the State argued that "[t]here would appear to be no dispute on this issue . . . Richard Hart, expert witness for the United States, admits that the 1873 Reservation was considered to be temporary." Aff. Counsel, Ex. 2, pg. 29 (Idaho's Trial Court Brief *Idaho II*). As demonstrated in section I(C), *infra*, Richard Hart's actual expert opinion, when taken in proper context, thoroughly demonstrates that the State's argument is without merit.

> Given the State's concession, for purposes of this appeal, that the 1873 executive order was intended to convey or reserve title to submerged lands, we focus on the second prong-whether Congress demonstrated an intent to defeat the States title to the submerged lands.

Id. at 1073. Determination of this issue turned on ***whether Congress ratified the 1873 executive reservation.*** *Id*. To this question, the Ninth Circuit found "that Congress's actions prior to statehood clearly indicate its acknowledgement, express recognition, and acceptance of the executive reservation . . . ." *Id*.

The Ninth Circuit based this conclusion on its finding that "the actions Congress took with respect to the reservation in the late 1880s . . . demonstrates acknowledgement, recognition, and acceptance of the boundaries of the 1873 reservation . . . ." *Id*. at 1076. Specifically, the Ninth Circuit found

> Congress's course of conduct in ascertaining in 1888 that the Executive construed the reservation to include submerged lands and then authorizing negotiations in 1889 ***to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgement that beneficial ownership of those lands had passed to the Tribe.***

Id. at 1077 (emphasis added).

The Circuit Court also acknowledged that the 1887 Agreement expressly referenced the 1873 executive reservation: "Congress also had the unratified 1887 agreement before it, an agreement that referenced the Tribe's 'present [1873] reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation . . . .'" *Id*. (changes in original).

Contrary to the position the State now takes, the Ninth Circuit found that "[a]lthough Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize

negotiations . . . 'for the purchase *and release* by such tribe of such portions of *its reservation* … and that such tribe *shall consent to sell*." *Id*. (quoting Act of March 2, 1889, 25 Stat. 980, 1002) (emphasis in original). The Circuit Court went on:

> [t]he express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation-boundaries . . . the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands-including submerged lands-within the 1873 reservation . . . .

Id. (emphasis in original).

The Ninth Circuit specifically rejected the State's assertion that Congress repudiated the 1873 executive reservation, instead finding "Congress, fully aware of the boundaries of the 1873 reservation . . . sought to modify the boundaries . . . via purchase rather than the simpler expedient of rejecting the executive reservation." *Id*. at 1078. This, for the Ninth Circuit, demonstrated "that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe." *Id*.

The State appealed the decision of the Ninth Circuit to the United States Supreme Court. In its brief, the State made a strikingly similar argument to the one made here:

> The Court of appeals, by holding that Congress did not "repudiate" the 1873 Executive Order Reservation, simply mischaracterized Congress' actions. Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement. . . .
>
> Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands, by refusing to accept the existing Reservation boundaries, and directing further negotiations that would result in a radical diminishment of the Reservation. Congress' action can be

> characterized as an "acceptance" of the 1873 Reservation only through the most twisted application of logic.

Aff. Counsel, Ex. 1, pg. 37-38 (Idaho's Supreme Court Brief in *Idaho II*).

The Supreme Court did not agree. Instead, the Supreme Court found "[t]he manner in which Congress then proceeded to deal with the Tribe shows clearly that preservation of the lands within the [1873] reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation." *Idaho II*, 533 U.S. at 276. The Court went on to highlight that "although the goal of extinguishing aboriginal title could have been achieved by congressional fiat, and Congress was free to define the reservation boundaries however it saw fit . . . Congress . . . made it expressly plain that its object was to obtain tribal interests only by tribal consent." *Id*. at 277.

The Court also clarified that the 1887 Agreement was not a re-reservation of the land within the 1873 reservation but instead a *confirmation* of the executive reservation along with an agreement to cede aboriginal title outside the 1873 reservation. *Id*. "When in 1886 Congress took steps toward *extinguishing aboriginal title to all lands outside the 1873 boundaries*, it did so by authorizing negotiations of agreements ceding title for compensation." *Id*. (emphasis added).

Also dispositive, according to the Supreme Court, was that "when Congress decided to seek a reduction in the size of the 1873 reservation itself, the Secretary of the Interior advised the Senate against fiddling with the scope of the reservation without the Tribe's agreement. . . . Accordingly, after receiving the Secretary's report, Congress undertook in the 1889 Act to authorize negotiation with the Tribe for the *consensual, compensated cession* of such portion of the Tribe's reservation 'as the Tribe shall consent to sell.'" *Id*. (emphasis added). Given these factors, the Supreme Court

concluded that Congress "authorized the reservation's modification solely by agreement. The intent, in other words, was that anything not consensually ceded by the Tribe *would remain for the Tribe's benefit*." *Id*. at 278.[4]

In sum, the Supreme Court rejected the State's argument—the same argument the State now presents to this Court—that "Congress chose to repudiate the 1873 Reservation." Instead, the Supreme Court affirmed the district court and Ninth Circuit and held "the negotiating history, not to mention subsequent events, 'ma[k]e [it] very plain,' that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." *Id*. at 281 (changes in original). The decision of the Supreme Court is binding upon the CSRBA Court and the State of Idaho and its citizens are precluded from relitigating this question in the CSRBA.

C. The Historic Record Demonstrates that the Coeur d'Alene Reservation was Created on November 8, 1873 and that Congress Confirmed the 1873 Executive Reservation

The State of Idaho argues that "[i]t is also indisputable that the Coeur d'Alene Reservation, as established by the executive order, was ultimately rejected by Congress. In rejecting the Reservation, Congress . . . effectively altered the purposes for which it was set aside." Idaho Opening Brief at 36-37. Even assuming *arguendo* that Objectors are not precluded from making this argument, Idaho's assertion is not consistent with the historic record, which conclusively demonstrates that Congress confirmed rather than rejected the 1873 executive reservation.

As tribal historic expert Richard Hart points out, "[t]he United States and the Congress of the United States immediately recognized and confirmed the president's 1873 executive order

[4] The Supreme Court also found instructive that in 1888, before it had ratified the 1887 or 1889 Agreements, Congress required the Tribe be compensated for a railroad right-of-way that was to run through the reservation. *Idaho II*, 533 U.S. at 277. This fact obviously cuts against the State's assertion that the Tribe lacked beneficial title pursuant to the 1873 executive reservation because, if that were the case, then no compensation would have been necessary in 1888.

creating the Coeur d'Alene Reservation." 2d.Aff. R. Hart, Ex. 1, p. 56 (Hart Rebuttal Report). In support of this assertion, Mr. Hart cites "numerous reports, actions and Acts of Congress that both confirmed and ratified the 1873 executive order and made its 1873 date efficacious." *Id*. at 55, n. 150-52. Further evidence includes the fact that "Congress appropriated funds to support the reservation, appointed agents to oversee government operations there, reported on the reservation's establishment, provided annual reports on activities on the reservation, and passed laws recognizing, confirming and ratifying the reservation and its effective date of 1873." *Id*. at 55-56. *See also Arizona v. California*, 373 U.S. 546, 598 (1963) (opinion of the Supreme Court recognizing the efficacy of executive order reservations, particularly where "they have been uniformly and universally treated as reservations by map makers, surveyors, and the public.").

Recognition of the 1873 executive order reservation is built directly into the 1887 Agreement. Article 1 of that agreement states "[w]hereas the Coeur d'Alene Indians formerly possessed a large and valuable tract of land . . . but the same, *with the exception of the present Coeur d'Alene Reservation*, is held by the United States and settlers and owners deriving title from the United States . . . ." Aff. R. Hart, Ex. 4, pg. 67-70 (1887 Agreement) (emphasis added). Likewise, Article 2 states "[f]or the consideration . . . the said Coeur d'Alene Indians hereby cede . . . all lands . . . *except the portion of land within the boundaries of their present reservation* . . . known as the Coeur d'Alene Reservation." *Id*. (emphasis added).

The negotiation transcript for the 1887 Agreement also clarifies that both the United States and the Tribe recognized the efficacy of the 1873 executive reservation. At one point Chief Seltice said to government negotiators

> [o]ne thing you have spoken to us about is our land, which the whites have taken away from us and which they now occupy . . . This land was

> very dear to us . . . [but] we are only on a small part of our country – I mean *this reservation*. Here we have made our homes; here we have built our houses; here are our fences; our farms; our school-houses; our churches. Here are our wives and our children; here are the graves of our ancestors; here are our hearts; here we have lived; and here we wish to die and be buried. We want these preserved forever . . . . Neither money nor land outside do we value compared with *this reservation*. Make the paper strong; make it so strong that we Indians living on it shall have it forever.

Aff. R. Hart, Ex. 4, pg. 74-79 (1887 Agreement Negotiation Transcript) (emphasis added). To this Judge Wright responded "The Government will protect you and *your* lands. It will do so if it takes its whole power." *Id*. (emphasis added).

Further evidence of Congress' recognition of the 1873 executive order reservation came in 1888 when the Senate passed a resolution acknowledging that "the present area of the Coeur d'Alene Indian reservation . . . embraces 480,000 acres of land . . . ." *Idaho II*, 95 F.Supp.2d at 1111. The resolution went on to ask the Secretary of the Interior to determine "whether . . . it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion . . . ." *Id*. at 1112.

Speaking for the Secretary, the Commissioner of Indian affairs submitted to the Senate a map of the 1873 executive reservation and reported that the reservation embraced an area of 598,500 acres. *Id*. The Commissioner believed that "changes could be made in the boundaries" of the 1873 executive reservation, but he "advised the Senate against fiddling with the scope of the reservation without the Tribe's agreement. *Idaho II*, 533 U.S. at 277. Instead, the Commissioner advised that any changes "should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land taken." *Id*.

"Although the goal of extinguishing aboriginal title could have been achieved by Congressional fiat," *id*. at 276, Congress instead directed the Secretary of the Interior "to negotiate with the Coeur d'Alene Tribe of Indians . . . for the purchase and *release* by said tribe of such portions of its reservation, not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id*. at 270 (quoting Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002) (emphasis added). In the interim, Congress further recognized the 1873 reservation by requiring—before the 1887 Agreement or the 1889 Agreement had been ratified—the Tribe be compensated for a right-of-way that went through the Reservation. *Id*. at 277 (citing Act of May, 30, 1888, ch. 336, § 1, 25 Stat. 160).

The plain language of the 1889 Agreement confirmed the 1873 executive reservation. Although only a few paragraphs in length, the Agreement refers to the "Coeur d'Alene Reservation" on at least three separate occasions. Aff. R. Hart, Ex. 4, pgs. 13-14. Since the 1887 Agreement had not been ratified in 1889, these references must refer to the 1873 executive reservation. The 1889 Agreement was also contingent upon passage of the 1887 Agreement, which, as already demonstrated *supra*, expressly recognized the 1873 Executive Reservation. The Agreement notes that it was conducted between "duly appointed commissioners . . . and the Coeur d'Alene tribe of Indians, *now residing on the Coeur d'Alene Reservation* . . . ." Aff. R. Hart, Ex. 4, pgs. 13-14. Article 1 states that "for consideration . . . said Coeur d'Alene Indians cede . . . the following-described *portion of their reservation* . . . ." *Id*. (emphasis added). Ultimately, the Agreement memorializes that it was "Done at De Smet Mission, on the Coeur d'Alene Reservation . . . ." Aff. R. Hart, Ex. 4, pgs. 13-14. Both the 1887 and 1889 Agreements were ultimately ratified by Congress in 1891.

Taken together, these facts conclusively demonstrate that "although the goal of extinguishing aboriginal title could have been achieved by congressional fiat," the historical record demonstrates that "Congress undertook to negotiate with the Coeur d'Alene Tribe for a reduction in the territory of an Executive Order reservation." *Idaho II*, 533 U.S. at 280. Further, Congress "authorized the reservation's modification solely by agreement. The intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Id*. at 278. In sum, the record leads to the inescapable conclusion that "Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." *Id*. at 281.

D. The *Winters* Doctrine Does Not Require Congress Ratify an Executive Order for Water Rights to Vest

Even if Congress had not confirmed the 1873 executive Reservation, water rights would have nonetheless vested for the benefit of the Coeur d'Alene Tribe. The Supreme Court has specifically rejected the argument that "water rights cannot be reserved by Executive Order." *Arizona v. California*, 373 U.S. at 598. At issue in *Arizona* were five Indian reservations. *Id*. at 595-96. The Colorado River Reservation had been created by Act of Congress but later expanded by Executive Order. *Id*. The other four reservations at issue in *Arizona v. California* had been created solely by Executive Order. *Id*. None of the executive orders had been ratified by Congress. Like Idaho, the State of Arizona argued that, given the temporary nature of executive reservations, water rights could not have been implied. *Id*. at 598. The Court, in rejecting this argument, found that "[i]n our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well." *Id*. Just as the 1873 executive order reservation was summarily recognized by the United States government, the Court highlighted in *Arizona* "Congress and the Executive have ever since recognized these as Indian Reservations." *Id*. The Court also noted that

the Arizona executive order reservations "have been uniformly and universally treated as reservations by map makers, surveyors, and the public." *Id*. As a result, the Supreme Court found "[w]e can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive." *Arizona v. California*, 373 U.S. at 598. Finally, the Court found that the priority date for the water rights at issue in *Arizona* were "effective as of the time the Indian Reservations were created" by Executive Order. *Id*. at 600.

The Ninth Circuit has likewise found that federal reserved water rights vest upon the creation of an executive reservation. *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939). There, the Ninth Circuit reversed the decision of the trial court when it "thought Winters v. United States distinguishable, as being based on an agreement or treaty with the Indians. Here there was no treaty." *Id*. at 336. In reversing, the Ninth Circuit found that "[i]n the Winters case, as in this, the *basic question for determination was one of intent*— whether the waters of the stream were intended to be reserved for the use of the Indians, or whether only lands were reserved." *Id*. The Court went to hold that "[w]e see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent . . . . The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved." *Id*.

The Supreme Court makes clear in *Arizona* that the 1873 Executive Order Reservation included an implied reservation of water pursuant to the *Winters* doctrine. The question therefore becomes whether the United States impliedly abrogated those rights by negotiating and ratifying the 1887 and 1889 Agreements. The historic record, as interpreted by the United States Supreme Court, conclusively demonstrates that, far from repudiating the 1873 Executive reservation

"Congress recognized the full extent of the Executive Order reservation lying within the state boundaries it ultimately confirmed . . . ." *Idaho II*, 533 U.S. at 281.

II. THE PRIMARY-SECONDARY PURPOSES TEST FROM *UNITED STATES V. NEW MEXICO* IS NOT APPLICABLE TO THE COEUR D'ALENE RESERVATION

Despite admitting the purposes of the 1873 Reservation, the State and Hecla make much of the so-called primary-secondary purposes test as outlined by the Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978). As this Court knows, that test outlines that

> [w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude . . . that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

Id. at 702. However, the federal reservation at issue in *New Mexico* was a national forest—a federal non-Indian reservation. The *New Mexico* rule has not been applied to an Indian reservation by the United States Supreme Court.

The Ninth Circuit has narrowly interpreted the applicability of the *New Mexico* test. Although, the Court in *Walton* found the *New Mexico* test applicable to the Colville Reservation it went on to declare "[t]he general [primary] purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). In other words, the Ninth Circuit has found the homeland purpose *is the primary purpose* for creation of Indian reservations. *Id*. The specific component water uses necessary to fulfill this general primary homeland purpose are discerned from "the document and

circumstances surrounding [the reservation's] creation, and the history for whom it was created. We also consider their need to maintain themselves under changed circumstances." *Id*.

Later, in *Adair*, the Ninth Circuit rejected the applicability of the *New Mexico* test to Indian reservations, finding that "*New Mexico* . . . , [is] not directly applicable to *Winters* doctrine rights on Indian reservations, *see* F. Cohen, *Handbook of Federal Indian Law* 581-85 (1982 ed.), [but it] established several useful guidelines." *United States and Klamath Tribes v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983). It went on to find that "[n]either *Cappaert* nor *New Mexico* requires us to choose between activities or to identify a single essential purpose [for the creation of the reservation]." *Id*. at 1410.

The Idaho Supreme Court has also recognized the critical differences between Indian reservations and other non-Indian federal reservations for the purposes of the *New Mexico* test. *Potlatch Corp. v. United States*, 134 Idaho 916, 920 (2000). There, the Court found that "*Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities." *Id*. The Court found that "[t]o the contrary, the Wilderness Act is not an exchange; it is an act of Congress that sets aside land . . . . There is no principle of construction requiring the Court interpret the Wilderness Act to create an implied right." *Id*. The Court found that "[t]he Supreme Court has held that *in cases such as this* [i.e. the case of federal reservations instead of Indian reservations], where water is not necessary to fulfill the specific purposes of a reservation, there arises a contrary inference that the 'United States would acquire water in the same manner as any other public or private appropriator.'" *Id*. (quoting *New Mexico*, 438 U.S. at 702).

Similar to Idaho, an overwhelming majority of state supreme courts have found the *New Mexico* test inapplicable to Indian reservations. *See*, *e.g.*, *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 77 (Ariz. 2001) ("…the significant differences between Indian and non-Indian reservations preclude application of the test to the

former.") ("*Gila V*"); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 767-68 (Mont. 1985) (distinguishing Indian and non-Indian federally reserved rights for the purposes of the *New Mexico* test, stating that Indian rights "are given broader interpretation in order to further the federal goal of Indian self-sufficiency"); *Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation District*, 850 P.2d 1306, 1316 (Wash. 1993) ("*Acquavella*") (following the test but finding a dual purpose of the creation of the Yakama Reservation for both agriculture and fishing). *But see*, *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys*tem, 835 P.2d 273, 283 (Wyo. 1992) (following the test).

Cohen, cited approvingly regarding the *New Mexico* test by the Ninth Circuit in *Adair*, 723 F.2d at 1408, argues that

> The significant differences between Indian reservations and federal reserved lands indicate that [*New Mexico*] should not apply [on Indian reservations]. One of those fundamental differences is that Indian reservations were set aside as homelands for the Indian tribes, to provide for an economically self-sufficient place of residence, whereas federal enclaves, such as national parks and national forests, were reserved for the benefit of the federal government and dedicated to the protection of the natural resources. In the latter situation, the federal government is acting as proprietor and sovereign; in the former, it is acting as trustee for the Indian tribes. As trustee, Congress is presumed to have "deal[t] fairly" with the Indian tribes, and the documents establishing the reservations are construed liberally in the tribes' favor. By contrast, the purposes of federal enclaves are strictly construed.
>
> In addition, the role of state law in Indian country and on federal lands differs substantially. States have considerable power on federal lands, and Congress has generally deferred to state water law relative to federal lands. By contrast, the establishment of an Indian reservation in and of itself has the effect of preempting state jurisdiction within the reservation over Indians, Indian tribes, and Indian property. State water laws do not govern the use of water by Indians and Indian tribes on Indian lands . . . Indian reserved water rights are defined by reference to federal law, and Congress has thus never deferred to state water law relative to Indian reservations.

. . .

> The approach of the majority of courts is . . . consistent with the Indian law canons of construction that call for the documents establishing reservations to be construed liberally in favor of the Indians. Certainly the general federal policy of confining tribes on reservations included the creation of agrarian societies. But the Indians certainly contemplated that the reservations would serve as their homelands; most tribes ceded vast tracts of aboriginal territory in exchange for federal promises of protection and permanency on the reservations. Reservations were thus created, and waters were reserved, "to make the reservation livable," to enable the Indians "to maintain . . . their way of life," and to permit the tribes "to change to new [ways of life]."

Aff. Counsel, Ex. 8, p. 1181-84 (F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (2012 ed.)).

Given this overwhelming precedent and policy, it is clear that the *New Mexico* test does not apply to the Coeur d'Alene Reservation.

III. THE TRIBE'S WATER RIGHTS VESTED IN 1873 AND THE TRIBE HAS NEVER EXPRESSLY CEDED ANY WATER RIGHTS NOR HAS CONGRESS ABROGATED ANY WATER RIGHTS HELD BY THE TRIBE

In light of the State's admission that "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource," as well as its admission that "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement," little need be said regarding the purpose of the creation of the Coeur d'Alene Reservation in this brief. *See* Idaho Opening Brief at 35 (quoting *Idaho II*, 95 F.Supp.2d at 1109). Indeed, the Tribe thoroughly demonstrated in its opening brief that an essential purpose of the Coeur d'Alene Reservation was to set aside the submerged lands underlying navigable waters within the Reservation for the benefit of the Tribe. *See generally Coeur d'Alene Tribe's Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated subcase no. 91-07755 (Oct. 21, 2016) (hereinafter

"Tribe's Opening Brief"). Likewise, the United States demonstrated in its opening brief that "the purpose of the reservation was to provide a permanent homeland and that overall homeland purpose includes the Tribe's traditional activities as well as agricultural and other modern activities." United States' Opening Brief at 17. Accordingly, the question becomes whether any water rights reserved in 1873 for those purposes have been either ceded by the Tribe or abrogated by Congress.

The State argues that through the 1887, 1889, and 1894 agreements, as well as the Coeur d'Alene Allotment Act, either the Tribe impliedly agreed to cede or Congress impliedly abrogated essentially all of the Tribes water rights. On the Reservation, the State argues "[t]he conveyance of lands to nonmembers impliedly extinguishes not only the Tribe's beneficial interest in the conveyed lands, but also all incidents of title that the Tribe exercised while the lands were held in trust for its benefit, unless such rights were expressly reserved." Idaho Opening Brief at 76. As to off-reservation instream flow rights, the State argues that through the 1887, 1889, and 1894 Agreements, all land cession agreements, the Tribe impliedly ceded all of its water rights because it did not "expressly reserve" them. *Id*. at 22. Finally, The State argues the Tribe impliedly ceded *all* of its water rights in Coeur d'Alene Lake because, to date, it has not quieted title to 100% the submerged lands underlying the Lake.

The State's arguments are a failed attempt to rewrite the canons of construction applied to Indian tribes and their property rights. Notwithstanding Idaho's bare assertion to the contrary, the Supreme Court has carved out *no exceptions* to its "eminently sound and vital canon" of interpretation that statutes affecting Indian tribes are "to be liberally construed [with] doubtful expressions being resolved in favor of the Indians."[5] Further, the Supreme Court has repeatedly

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5 *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976) (quoting *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) and *Alaska Pac. Fisheries v. United States*, 248 U.S.

found, contrary to Idaho's position, that tribal treaty rights will not be ceded or abrogated by implication or silence but instead the intent of the tribe and/or Congress must be "plain," "clear," and "unambiguous."[6] This requires the abrogation "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Bryan v. Itasca County*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05). *See also*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2012 ed.)

78, 89 (1918)); *see also County of Yakima v. Confederated Tribes Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (second alteration in original) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian Jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))); *N. Cheyenne Tribe*, 425 U.S. at 656 (reaffirming the "judicially fashioned canon of construction that these statutes are to be read to reserve Congress's powers [to abrogate tribal rights] in the absence of a clear expression by Congress to the contrary"); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170–71, 174–75 (1973) (determining that unless expressly provided by Congress, state laws are generally not applicable to Indians on a reservation, and any ambiguity should be interpreted in favor of the Indians); *Squire v. Capoeman*, 351 U.S. 1, 6–7 (1956) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (quoting *Worcester v. Georgia*, 31 U.S. 515, 582 (1832))); *Carpenter v. Shaw*, 280 U.S. 363, 366–67 (1930) ("[I]n general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed . . . the contrary is the rule to be applied to tax exemptions secured to the Indians . . . . Such provisions are to be liberally construed"); *Alaska Pac. Fisheries*, 248 U.S. at 89 (stating as a "general rule[,] that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (holding that statutory "construction . . . is liberal; doubtful expressions . . . are to be resolved in favor [of the Indians]").

6 *United States v. Santa Fe Pac. R.R. Co*., 314 U.S. 339, 346, 353 (1941). *See also*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *United States v. Dion*, 476 U.S. 734, 739–40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.").

The Idaho Supreme Court has recognized, adopted, and followed the canons of construction. In *City of Pocatello v. State*, the City of Pocatello argued that "the 'in common with' language in Section 10 [of the 1888 Agreement] grant[ed] the City a portion of the [Shoshone-Bannock] Tribes' water right." 145 Idaho 497, 505 (2008). Section 10 of the Agreement provided that "the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation . . . ." *Id*. at 501.

In analyzing the validity of the City's claim that the Tribes agreed to cede to the City a portion of its water rights, the Idaho Supreme Court highlighted that "in *Winters* . . . the Supreme Court recognized . . . that, when the federal government withdraws land from the public domain for a federal purpose, it impliedly withdraws reserves enough water to fulfill that purpose. Thus, the Tribes in this case impliedly received the water rights necessary to sustain the purposes of their reservation . . . ." *Id*. at 507. Turning to Section 10 of the 1888 Agreement, the Court found that "[t]he *question is whether the Cession Agreement . . . abrogated any of the Tribes' rights*." *Id*. at 507. The Court concluded "[t]he answer must be no." *Id*.

The Court's analysis was rooted in the canons of construction, finding that "the [U.S. Supreme] Court held that it was crucial to interpret the right in the sense the Indians themselves would have interpreted it." *Id*. at 506. It also recognized that "the Court stressed it was crucial to consider both parties' intentions in signing the treaty . . . . Thus, the critical determination in that case . . . [is] what the Indians felt they were giving up in signing the treaty." *Id*. The reason for this is that "[a] treaty with an Indian Tribe constitutes a grant of rights *from* them, not a grant of rights from the United States *to* the Indians." *Id*. (emphasis in original). Thus, the Idaho Supreme Court concluded, "the language must be interpreted as the Indians themselves interpreted it." *Id*.

The Idaho Supreme Court likewise recognized that "Congress will not abrogate Indian rights without clear intent and express agreement from the Indians." *Id*. Those statutes that purport to take tribal rights "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id*. Although the Court also found that "Congress certainly has the power to abrogate Indian treaty rights, . . . its intent must be clear." *Id*. (citing *Minnesota v. Mille lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *United States v. Dion*, 476 U.S. 734, 773-75 (1986)). In rejecting the City's claim, Idaho Supreme Court found the silence regarding water rights in the negotiating history dispositive, holding that "[c]onsidering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised." *Id*.

Application of *City of Pocatello* demonstrates that "the Tribe[] in this case impliedly received the water rights necessary to sustain the purposes of their reservation," when it was created in 1873. *Id*. at 507. "[t]he question is whether the [1887 or 1889] Cession Agreement . . . abrogated any of the Tribes' rights." *Id*. at 507. Despite the State's and Hecla's best attempts to undermine the Indian law canons of construction and convince this Court that rights are ceded unless expressly reserved, the fact of the matter is that both the United States Supreme Court and the Idaho Supreme Court have been unwavering in their consistent affirmation that important tribal treaty rights will not be abrogated through silence or implication. Instead, as the Idaho Supreme Court has affirmed "Congress will not abrogate Indian rights without clear intent and express agreement from the Indians." *City of Pocatello*, 145 Idaho at 506. Turning to the case at hand, when viewed through this lens, the history is clear that the Coeur d'Alene Tribe has ceded absolutely no water rights and Congress has not acted to unilaterally abrogate those rights.

A. The Alienation of Tribal Reservation Land Subsequent to the Creation of the Reservation Did Not Abrogate Tribal Non-Consumptive Water Rights

In defense of its objections to tribal on-reservation non-consumptive water right claims for seeps, springs, and wetlands Idaho argues "the incidents of title that accompany the reservation of lands for the benefit of a tribe cease to apply once lands are allotted." Idaho Opening Brief at 70. Likewise, in support of its objection to tribal non-consumptive instream flow rights the State argues "[t]he conveyance of lands to nonmembers impliedly extinguishes not only the Tribe's beneficial interest in the conveyed lands, but also all incidents of title that the Tribe exercised while the lands were held in trust for its benefit, unless such rights were expressly reserved." *Id*. at 76.

In this case, the alienation of Coeur d'Alene reservation land from the Tribe can be entirely traced to the Coeur d'Alene Allotment Act. That act broke up the reservation and provided for the disbursement of 160 acre allotments to each Coeur d'Alene tribal member. 34 Stat. 325, 335-36 (reported at Kappler, Charles Joseph. *Indian Affairs, Laws and Treaties*, Vol. 3, Washington, D. C.: Government Printing Office, 1913, p. 203). Once each tribal member was allotted his or her 160 acres the remaining "surplus" lands were opened to settlement and entry pursuant to the homestead laws. *Id*. From the beginning, the Tribe was unanimously against allotment of the Reservation, which they viewed as "nothing short of open thievery." Aff. R. Hart, Ex. 6, p. 284 (Hart 2015 Report). Nonetheless, and despite its promise in the 1887 Agreement that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians…" and that, "no part of the reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation," Aff. R. Hart, Ex. 4 (1887 Agreement), Congress moved to allot the Reservation starting in 1906. The question therefore becomes whether the Coeur d'Alene Allotment Act—which is entirely silent regarding its

effect on the reserved water rights of the Tribe—impliedly alienated the Tribe's water rights when the lands were allotted and/or sold to non-Indians.

Idaho cites *Blake v. Arnett* to support its arguments. 663 F.2d 906 (9th Cir. 1981).[7] However, *Arnett* was addressing the very specific question of whether tribal members retained the right to "enter and cross lands of [a non-Indian fee land owner] to exercise . . . hunting and fishing rights." *Id*. at 908. The Ninth Circuit noted that the California Court of Appeal had already "held that the state has no authority to regulate hunting and fishing by the Yuroks within the Reservation." *Id*. (citing *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454 (1975). Accordingly, hunting and fishing rights were not at issue in *Arnett* but instead the issue concerned the right to access non-Indian property in order to exercise those hunting and fishing rights.

[7] The State also cites *Nicodemus v. Wash. Water Power Co.* for the proposition that "once land was allotted and a trust patent issued, the allotment 'is not part of the reservation, nor is it tribal land." Idaho Opening Brief at 69 (quoting 264 F.2d 614, 617 (9th Cir. 1959)). This termination era holding of the Ninth Circuit has been wholly repudiated by the United States Supreme Court. In *Mattz v. Arnett*, a predecessor case to *Blake v. Arnett*, the United States Supreme Court was asked to decide whether an 1892 Act that opened the Klamath River Reservation to allotment and non-Indian settlement had "effected the termination of the Klamath River Reservation." *Mattz v. Arnett*, 412 U.S. 481, 495 (1973). The Court found that "[t]he Act did no more (in this respect) than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.'" *Id.* at 497 (quoting *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) (finding that the Colville Reservation continued to wholly exist after the Colville Allotment Act, which is very similar to the Coeur d'Alene Allotment Act). The Court likewise found that "when Congress has once established a reservation *all tracts* included within it remain a part of the reservation until separated therefrom by Congress." *Id*. at 504-05 (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)). In *Celestine*, the Court was asked to determine whether the United States federal courts had jurisdiction over a murder that occurred on an allotment by another allottee. *Id*. The Defendant, a Tulalip tribal member contended that since the murder occurred on an allotment the land in question was not part of the Tulalip Reservation and therefore the defendant was subject to state court jurisdiction. *Id*. at 94. The Supreme Court did not agree, finding that despite the allotment of the Tulalip Reservation, "all tracts included within remain a part of the reservation," and that no Congressional Act had operated to separate those allotments from the Reservation. *Id*. at 285-86. Accordingly, Idaho's argument that the allotments on the Coeur d'Alene Reservation are not part of the Reservation is without any legal merit.

The Idaho Supreme Court has made clear the difference between treaty fishing rights and the right to *access* at any particular place on the reservation in order to exercise those rights. *State v. McConville*, 65 Idaho 46, 139 P.2d 485, 487 (1943). There, a Nez Perce tribal member was arrested for fishing without a state fishing license on a stream located within the Nez Perce Reservation but where all the land adjacent to the stream had been sold to white settlers. *Id*. at 486. The "territory immediately adjoining said stream, . . . was opened and allotments made in 1887 [but] was never transferred to any Indian but sold to white settlers." *Id*. The State of Idaho argued that since "the land surrounding this stream [is] now . . . owned by white men, the Indian had no right to fish therein." *Id*. at 487. The Idaho Supreme Court rejected this argument, finding "[t]here is . . . no question of trespass in this case, the sole question being the right to fish without a fish and game license." *Id*.

As to the question of the Tribe's fishing rights in this stream, the State argued, as it does in the CSRBA,[8] "that when the reservation was thrown open to settlement if the Indians had desired to retain the right to fish, as now contended for, there should have been a provision to that affect in the law or treaty." *Id*. The Idaho Supreme Court rejected this argument, holding that "[s]uch [provision] was not necessary . . . because the Indians *were granting* [rights], consequently, anything not specifically granted was retained." *Id*. The Court then rejected the argument that silence in the Allotment Act acts to abrogate tribal treaty rights, finding that "[c]ertainly there is nothing in any of the statutes or treaties subsequent to [the creation of the reservation] indicating in the slightest

[8] *See* Idaho Opening Brief at 76 ("[t]he conveyance of lands to nonmembers impliedly extinguishes . . . all incidents of title that the Tribe exercised while the lands were held in trust for its benefit, unless such rights were expressly reserved.").

degree that the Indians ever intended to or understood that by selling land to the United States they were giving up the right to fish as they had immemorially done . . . . ." *Id*.[9]

The non-consumptive water rights at issue here are fundamentally different than the right to enter on to non-Indian fee lands to hunt and fish that was at issue in *Arnett*. The Tribe does not claim in this adjudication the right to enter on to non-Indian fee lands for any purpose related to these non-consumptive instream flow water rights. Further, both *Arnett* and *McConville* demonstrate that underlying treaty rights are not abolished just because tribal members lose access to particular parcels of property within the reservation. In fact, as more fully described in section III(C)(3), *infra*, the purpose of the non-consumptive water rights claimed here are to ensure sufficient water remains to provide for traditional subsistence fishing, hunting, and gathering *on tribal property*.

The State's failure to cite any applicable case law regarding *water rights* demonstrates the precariousness of their position. Ultimately, *Arnett* is inapplicable to this case because it has *nothing to do with water rights*. The Supreme Court has been clear that the test under the *Winters* doctrine "is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 139 (1976). Likewise, the test under the *Winters* doctrine for non-consumptive water rights for fishing, hunting, and gathering is whether the Tribe traditionally engaged in those activities. *Walton*, 647 F.2d at 48. Federal courts have found that "[i]n view of the historical importance of hunting and fishing . . . we

[9] Although the Idaho Supreme Court also made note of the fact that "the treaties subsequent to [the original 1855 Treaty] specifically reserved all rights not given," *Id*., those savings clauses simply codified the canon of construction dealing with Indian Tribes that "the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Winans*, 198 U.S. at 381.

find that one of the 'very purposes' of establishing the . . . Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Adair*, 723 F.2d at 1409.

The State's arguments fail because ownership of a particular parcel of land is simply not a part of the test for the Tribe to be entitled to a reserved water right. As the State correctly points out, a reservation of water must be appurtenant to a reservation of land. *Cappaert*, 426 U.S. at 138. *See also*, *United States v. City of Challis*, 133 Idaho 525, 529 (1999) ("A reserved water right must be based on a reservation of land."). However, no court has required a parcel-by-parcel analysis in the manner suggested by the State. Instead, the Supreme Court "has long held that when the Federal Government withdraws land from the *public domain* . . . the government, by implication, reserves appurtenant water then unappropriated . . . ." 426 U.S. at 138 (emphasis added). *See also*, *City of Pocatello*, 145 Idaho at 507 ("in *Winters* . . . the Supreme Court recognized . . . that, when the federal government withdraws land *from the public domain* for a federal purpose, it impliedly reserves enough water to fulfill that purpose."). In this case, the Reservation of land was the Coeur d'Alene Reservation, which occurred in 1873. The question therefore becomes whether any water rights have subsequently been alienated from tribal ownership. Such alienation can only be done by Congress through legislation, and must "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Bryan*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05).

The Ninth Circuit has thrice addressed Indian reserved water rights on checkerboarded Indian reservations. The first was *Walton*, which was an adjudication of water rights in the No Name Creek Hydrologic System involving the Colville Tribes, tribal allottees, and Boyd Walton, a non-Indian who owned a former allotment that was directly adjacent to No Name Creek. 647 F.2d at 45. Like the Coeur d'Alene Reservation, the Colville Reservation was created by executive order

that contained no mention of water rights. *Id*. at 44. Also like Coeur d'Alene, the Colville Reservation was allotted with surplus land being made available to homesteaders. *Id*. The Tribe claimed reserved water rights for both irrigation and instream flows to protect the reservation fishery. *Id*. at 46. Despite the mixed land ownership in the No Name Creek Basin, the test, according to the Ninth Circuit, was not whether the Tribe's instream water rights had been abrogated once a particular parcel of land had been alienated from the Tribe. Instead, the Court found that "[a]n implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation." *Id*. It found instream flow water rights for fish were necessary because "[t]he Colvilles traditionally fished for both salmon and trout." *Id*.

According to the State's legal theory, the Tribe would not have been entitled to instream flow water rights in the portions of No Name Creek that ran through either Walton's or the individual allottees' property. *See* Idaho Opening Brief at 68; 76. However, the Ninth Circuit found "an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds." *Walton*, 647 F.2d at 48. The Trial Court later found that the fishery required 350 acre-feet. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 404 (1985) (*Walton III*). This amount was not reduced according to the land ownership pattern in the No Name Creek Basin nor was the right limited to tribal lands; the full 350 acre-feet was awarded to the Colville Tribe. *Id*.

The Ninth Circuit next addressed the interrelationship between non-consumptive reserved water rights and land ownership in *Adair*, 723 F.2d at 1394. *Adair* was an adjudication of the reserved water rights held by the Klamath Tribes in California. Like the Colville Reservation, the Klamath Reservation had been allotted. *Id*. at 1398. The Reservation was later terminated entirely by Congress pursuant to the Klamath Termination Act. *Id*. The Termination contained a savings

clause, stating "nothing in sections . . . of this title shall abrogate any water rights of the tribe and its members." *Id*. at 1412.

Like the Colvilles, the Klamaths were found to be entitled to water rights for both irrigated agriculture as well as instream flows for fish. *Id*. at 1408-11. Idaho argues, based upon the savings clause in the Klamath Termination Act, that "*Adair* actually demonstrates that water rights must be explicitly reserved in order to survive alienation of reservation lands to nonmembers." Idaho Opening Brief at 78. However, the presence of a saving clause *in that case* does not dictate that such an express reservation of water rights is necessary *in all cases*. Indeed, Idaho can point to no specific language in *Adair* that would so indicate. More importantly, however, is that by asking this Court to compare the Klamath Termination Act with the Coeur d'Alene Allotment Act, the State asks this Court to compare apples with oranges. As already mentioned, the Klamath Reservation was allotted pursuant to the General Allotment Act, which, unlike the Termination Act, contains no express reservation of water rights. *See* 24 Stat. 388 (1887). If the State's logic were correct then the Termination Act's savings clause would not have applied to any lands that had been previously alienated from the Tribe through the Allotment Act because those water rights would have already been alienated along with the land. However, the Ninth Circuit placed no such limitation on the Tribe's instream flow water rights. *Id*. Instead, the scope of the Tribe's entitlement was limited only by whether "water is necessary to fulfill the very purposes for which [the] reservation was created . . . ." *Id*. at 1408-09 (citing *New Mexico*, 438 U.S. at 702).

In *United States v. Anderson*, an adjudication of the Chamokane Creek watershed, the Ninth Circuit affirmed the order of the federal district court that the Spokane Tribe was entitled to water rights for both irrigation as well as instream flows for fish purposes. 736 F.2d at 1365 ("The district court recognized the importance of the tribal fishery and has awarded non-consumptive water rights

to preserve it."). The Spokane Reservation was also set aside by executive order that contained no mention of water rights and was subsequently allotted. Aff. Counsel, Ex. 5, p. 6-7 (*United States and Spokane Tribe of Indians v. Anderson*, No. 3643, Memorandum Opinion and Order (E.D. Wash. 1979)) (hereinafter "*Anderson* First Trial Ct. Op."). Like *Walton* and the case here, some allotments were eventually sold to non-Indians. However, just as the Ninth Circuit had found in *Walton* and *Adair*, the Court did not find that land ownership of a particular parcel of land was relevant to the inquiry of whether the Tribe held instream flow water rights. Instead, the court applied the rule that "[w]hen the United States sets aside a reservation of land, it impliedly reserves water then unappropriated in sufficient quantity to fulfill the purposes for which the reservation was created." *Id*. at 4 (citing *Winters*, 207 U.S. at 564).

The court then found that "maintenance of the creek for fishing was a purpose for creating the reservation." *Id*. at 9. This award was not abridged in any way to account for the non-Indian fee land adjacent to the creek. Instead, the court ordered that "the quantity of water needed to carry out the reserved fishing purpose is related to water temperature," and "[t]he native trout cannot survive at a water temperature in excess of 68^0 F." *Id*. Accordingly, the court ordered that the Tribe was entitled to "[t]he minimum flow from the falls into Lower Chamokane Creek which will maintain the water at 68^0 F or less, provided that at no time shall the flow past the falls be less than 20 cfs." *Id*.

Walton, *Anderson*, and *Adair* lay bare that non-consumptive water rights are to remain communally owned by the Tribe with only irrigation water rights passing on as the land it allotted and, if applicable, sold to non-Indians. The *Walton* Court found "[i]t is settled that Indian allottees have a right to use reserved water." *Walton*, 647 F.2d at 50 (citing *United States v. Powers*, 305 U.S. 527 (1939)). However, the Ninth Circuits finding was based upon the Supreme Court's

decision in *United States v. Powers*, which found that "when allotments were made for the exclusive use and thereafter conveyed in fee, the right to use some portion of the tribal waters *essential for cultivation* passed to the owners." *Powers*, 305 U.S. at 532. Therefore, the Ninth Circuit reasoned, the water right passed on to allottees is "based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water *reserved for irrigation*." *Id*. at 51 (emphasis added). The Court went on to find that "[a] non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns." *Id*. *See also*, *Adair*, 723 F.2d at 1415 ("the non-Indian successor's right to water is 'limited by the number of irrigable acres [of former reservation lands that] he owns.'"). No portion of the Tribe's instream flow water right went to allottees or non-Indian *Walton* right holders. Those rights were retained exclusively by the Tribe for the communal benefit of all its members.

The *Anderson* Court affirmed this principle and then extended it to homesteaded properties. 736 F.2d at 1363. As a general rule, the Homestead Act should be construed very narrowly as applied to tribal property rights and any alleged abrogation must "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Bryan*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05). As to reserved irrigation water rights appurtenant to homesteaded properties, the Ninth Circuit in *Anderson* found that "where the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which Winters rights were implied are eliminated." *Id*. Clearly, the Ninth Circuits ruling only applied to irrigation water rights because it did not eliminate or reduce the Tribe's instream flow rights proportionate to the amount of non-Indian property lying along Chamokane Creek. Further, the Court's basis for its ruling was that "Winters rights were only intended to assist in accomplishing

the needs of the reservation . . . ." *Anderson*, 736 F.2d at 1363. Clearly, if the Tribe no longer owns the place of use for an irrigation water right then the purpose of that particular water right would no longer be needed. However, since fish, wildlife, and aquatic plants do not recognize property boundaries, a continuous and uninterrupted stream reach is necessary to ensure their survival. Accordingly, unlike irrigation water rights, instream flows continue to be necessary to "accomplishing the needs of the reservation," even after lands have been alienated from the Tribe.

Together, the established federal precedent of *Walton*, *Adair*, and *Anderson* is clear that the alienation of tribal lands caused by the Coeur d'Alene Allotment Act did not act to sever any tribal non-consumptive reserved water rights because those rights continued to be necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation.

B. The United States and Coeur D'Alene Tribe Are Entitled to Sufficient Water to Maintain Coeur D'Alene Lake In Its Natural Condition

The State of Idaho asserts the Tribe should not be entitled to a water right for Coeur d'Alene Lake because, according to the State, the United States only owns a portion of the submerged lands for the benefit of the Tribe. Idaho Opening Brief at 54. This argument fails for a number of reasons. First, it is based upon the false premise that the State owns the remaining portion of the Lake. In actuality, no court has quieted title in favor of the State for the portion of Coeur d'Alene Lake located outside the current boundary of the Coeur d'Alene Reservation. In fact, the Tribe sought to have the question of title *of the whole Lake* determined in federal district court but the State stridently objected, claiming sovereign immunity pursuant to the Eleventh Amendment of the United States Constitution, thereby precluding a decision on the merits. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). As a result, title to the submerged lands of the portion of Coeur d'Alene Lake and its related waters within the 1873 reservation boundary but outside the current

reservation boundaries has never been adjudicated and remains a matter in dispute. Now, the State seeks to have this Court salt in its alleged ownership of these submerged lands through a back-door argument that has no relevance to the Tribe's water right claim.

The State acknowledges that it required a *two-week trial* to conclusively determine ownership of the southern portion of the Lake. Idaho Opening Brief at 35. Nonetheless, the State asks this Court to make a determination of critical sovereign interest based upon an untimely affidavit by a former state employee in support of its alleged ownership of Coeur d'Alene Lake, trotting out an unclear and un-vetted methodology that has not been subjected to investigation by tribal or federal experts nor subject to cross-examination by tribal or federal attorneys. Beyond the sheer inadequacy of the State's argument, it is not within the jurisdiction of this Court to quiet title to *any* submerged lands.[10] Accordingly, the only thing that can be known conclusively as a matter

[10] By statute the CSRBA Court is one of limited jurisdiction as "the legislature has only conferred jurisdiction on the court to review claims and recommendations for the purpose of entering decrees with respect to the statutory elements set forth in I.C. § 42-1411." *Order Granting, In Limited Part, Motion to Reconsider Order Denying Motion for Leave to Intervene*, In re In Re SRBA Case No. 39576 (Jan. 1, 1995). Although the Court has jurisdiction over the determination of federal reserved water rights pursuant to I.C. § 42-1411A, that jurisdiction remains limited to "decree the elements of water rights . . . ." *Id*. at 7. The State of Idaho has made this very point as recently as July 22, 2016 when it argued

> The SRBA Court is a court of limited subject matter jurisdiction. . . . Ancillary issues that are "not related to an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants" cannot be considered by the Court.

State of Idaho's Memorandum in Support of Motion for Summary Judgment, In Re CSRBA Case No. 49576, Subcase Nos. 91-7102; 91-7173 at 6 (July 22, 2016).

This is consistent with the limited waiver of sovereign immunity by both the United States and the Tribe. For its part, the United States has only waived its sovereign immunity for "(1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights . . . ." 43 U.S.C. § 666. As this Court has acknowledged

of law is that "title is quieted . . . to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation . . . ." Aff. of Counsel, Ex. 4 (Judgment & Decree from *Idaho II*, 95 F.Supp.2d 1094 (D. Idaho 1998).

The second reason the State's argument fails is that, by its very terms, the place of use for the claim made by the United States on behalf of the Tribe is limited to ""to those submerged lands where title is quieted in favor of the United States for the benefit of the Coeur d'Alene Tribe." *See Notice of Claim: Federal Reserved Water Right*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Jan. 30, 2014). The State nonetheless accuses the United States and the Tribe of "seek[ing] to control the lake elevation for all of Coeur d'Alene Lake." Idaho Brief at 55. The State apparently believes that any federal reserved water right that has an impact on off-reservation water rights is an impermissible attempt by the United States and the Tribe to "control" the water in the Basin. Accordingly, the State seemingly contends that the only time the Court can

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> [i]n deciding whether the United States was required to pay filing fees in the SRBA, the United States Supreme Court held that waivers of federal sovereign immunity must be unequivocally expressed, strictly construed in favor of the United States *and not enlarged beyond that which the statute requires*.

Memorandum Decision and Order on Basin-Wide Issue No. 3, In Re SRBA Case No. 39576 at 6 (Aug. 25, 1994) (citing *U.S. v. Idaho, ex rel. Director, Idaho Dept. of Water Resources*, 580 U.S. 1, 7 (1993)). This Court went on to acknowledge, consistent with the plain language of the McCarran Amendment that it "only waives federal sovereign immunity in a suit for the adjudication of right to the use of water in a river system . . . ." *Id*. Furthermore, the United States has expressly reserved its sovereign immunity from quiet title actions that may involve lands held in trust for Indian tribes. 28 U.S.C. § 2409a. The Tribe has likewise "refuse[d] to waive its sovereign immunity to suit . . . for any other matters beyond the determination of the nature, extent, and priority of water rights before the above mentioned court." *Notice of Appearance*, In re In Re CSRBA Case No. 49576 (May 20, 2015). Accordingly, the Tribe respectfully submits that the Court should decline the State's invitation to render a decision that (1) has implications that reach far beyond the determination of water rights in the CSRBA; (2) is beyond the jurisdiction of this Court; and (3) is not relevant to the determination of whether the United States and the Tribe are entitled to a water right in Lake Coeur d'Alene.

recognize a federal reserved water right is if the entire waterbody is located within a reservation.[11] The State provides no legal support for this conclusion.

In actuality, the State uses the inflammatory term "control" as a red herring in an attempt to demonize the federal claim and make it out to be something greater than it actually is. The State likewise accuses the Tribe of attempting to claim "the right to prevent storage of water in Coeur d'Alene Lake." *Id*. at 62. The State's argument conveniently ignores the plain language of the Tribe's and United States' claim, which states the purpose of the claim is not to dictate the Lake be at any particular level at any particular time but instead "the intent is to claim sufficient water to reflect the natural Lake processes prior to Post Falls Dam – consistent with the federal and tribal intent as it was understood in 1873." Lake Claim Form 95-16704. It likewise ignores the fact that

[11] The State's theory is nothing more than a retread of the so-called "sensitivity doctrine" that has been thoroughly debunked by both state and federal courts. Like the "last reservation doctrine," the "sensitivity doctrine" is another theory made of whole cloth by state-law proponents looking to further erode the *Winters* Doctrine. Although the theory has been posited in various ways, the essence of the argument is that reserved water rights should be quantified with "sensitivity to the impact on state and private appropriators . . . ." *Big Horn I*, 753 P.2d at 112. This line of argument has been summarily rejected by both state and federal courts. The Wyoming Supreme Court has stated unequivocally "[t]he sensitivity doctrine does not apply to the question of intent to reserve water." *Id*. at 94. *See also*, *Acquavella*, 850 P.2d at 1306 ("a court is not to balance the competing interests of Indian and non-Indian users to reach an 'equitable apportionment.'"). The Ninth Circuit in *Walton III* found that "[t]he district court feared that the Tribe, by utilizing its *Winters* rights for the Omak Fishery, would dilute the water rights of the Indian allottees and their successors (*e.g.,* Walton). . . . Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users." 752 F.2d 397, 405 (9th Cir. 1985). In another Ninth Circuit case, the "State [of New Mexico] makes much of the economic effect on the non-Indians who were awarded lands by the 1933 Act if the Pueblos have a right prior to them." *New Mexico v. Aamodt*, 537 F.2d 1102, 1113 (9th Cir. 1976). The Court rejected this argument, reaffirming that the Supreme Court "[i]n Cappaert . . . rejected the argument that equity calls for a 'balancing of competing interest.' We reach the same result." *Id*. *See also Cappaert*, *infra*. Importantly, Idaho's theory actually goes beyond the "sensitivity doctrine" in that Idaho is not arguing that this Court merely be sensitive to the impact on other appropriators but instead that the Court should entirely reject the Tribe's lake claim because of its alleged impact on other appropriators. Given the complete repudiation of the less onerous "sensitivity doctrine" there is simply no legal basis or acceptable rationale for instituting a rule that would actually lead to a total rejection of the Tribe's entitlement to water rights simply because it may impact the water supply available for junior users.

the Tribe has actually *authorized* rather than prevented storage of water on the portion of Coeur d'Alene Lake that is located within current reservation boundaries. Aff. Counsel, Ex. 3 (Coeur d'Alene Tribe Water Storage/Use Permit to Avista). The fact is that the lake claim filed by the United States and the Tribe does not seek to "control" lake elevation but instead to reserve "the right to prevent other appropriators from depleting the [Lake] waters below a protected level in any area where the non-consumptive level applies." *Adair*, 723 F.2d at 1409. This right has been repeatedly recognized on other Indian reservations and is an essential attribute of the reservation the Coeur d'Alene Tribe bargained for in 1873; it is a primary purpose for the creation of the Coeur d'Alene Reservation.[12]

As the United States made clear in its claim form, the minimum levels claimed are unlikely to occur so long as the Lake continues to be operated consistent with the FERC license. Further, should there be sufficient water in the Lake such that the elevation is above the minimum levels claimed then the surplus water would be available to other appropriators. As such, although this claim would give the Tribe the right to ensure a minimum amount of water remains in the Lake—and in that sense, it could have an impact on other water users both on and off the Reservation—it does not authorize the Tribe to "control" lake level in the manner alleged by the State. Instead, as more fully explained below, the right claimed is consistent with the reserved

[12] The State's argument is also falsely premised upon the theory that a tribe must own submerged lands underlying a navigable water body in order to have a federal reserved water right in the overlying water. This is simply not the case and many Indians tribes have been awarded water rights from navigable waters despite there being no finding they *own* the underlying lands. *See e.g. Big Horn I*, 753 P.2d at 273 (Big Horn River); *Arizona v. California*, 373 U.S. at 596 (Colorado River). The Tribe's claim is not based solely upon its ownership of the submerged lands but upon the fact that—pursuant to *Winters*—intent to reserve water rights is conclusively demonstrated from the fact that "a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe." *Idaho II*, 95 F.Supp.2d at 1109.

water rights that have been awarded to Indian Tribes since the *Winters* doctrine was first announced by the Supreme Court.

1. The Tribe and the United States are Entitled to a Water Right Regardless of Whether the Entire Lake is Located Within the Coeur d'Alene Reservation and Regardless of Off-Reservation Impacts

The State argues that "it is not possible to imply an intent to reserve a 'water right'[13] that allows the Tribe to dictate water levels throughout the Lake." Idaho Opening Brief at 58. As outlined above, the State's argument is based upon the false premise that it is the owner of the portion of the Lake located outside the current reservation boundaries. However, it is also based upon the false premise that an on-reservation water right may not "control" water supplies located off-reservation. Again, the State conflates "control" with having an impact off-reservation. The State's assertion is contrary to every major federal court case that has addressed the scope of the *Winters* Doctrine.

In *Cappaert v. United States*, the United States filed suit in federal district court seeking a declaration of its federal reserved water right appurtenant to a pool containing an endangered pupfish in Devil's Hole National Monument and to enjoin the use of groundwater by the Cappaerts

[13] The State's use of quotations marks appears to derive from its belief that there cannot be a federal reserved water right for a lake level. Idaho Opening Brief at 58. It goes on to argue that "the United States' 'lake level maintenance; claim is not a typical water right, since it is partially expressed in part as a lake elevation . . . ." However, the United States Supreme Court has recognized that federal reserved water rights may be for a level rather than in acre-feet or c.f.s. *See*, *Cappaert*, 455 F.Supp.81 (D. Nev. 1978). *Aff'd Cappaert*, 426 U.S. at 128. This Court has also recognized water rights to "maintain the lake at its natural level." *See e.g. Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 21-11966*, In Re SRBA Case No. 39576 (2012); *Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 21-11967*, In Re SRBA Case No. 39576 (2012); *Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 21-11967*, In Re SRBA Case No. 39578 (2012). These rights were decreed for various lakes in Yellow Stone National Park pursuant to agreement between the United States and the State of Idaho. The State's argument that this water right is not "typical" is hard to understand in light of its express recognition of other water rights for natural lake levels in Idaho.

to the degree necessary to protect the level in the pool. 426 U.S. at 135. Notably, the Cappaerts groundwater wells were located *two and a half miles* outside the federal reservation. *Id*. at 133. The Court also noted that "[t]he District Court found that the water from certain of the wells [owned by the Cappaerts] was hydrologically connected to Devil's Hole, that the Cappaerts were pumping heavily from those wells, and that that pumping had lowered the water level in Devil's Hole." *Id*. at 136. The district court also found "that the pumping could be regulated to stabilize the water level at Devil's Hole . . . ." *Id*. Accordingly, the district court decreed that "except for domestic purposes, the defendants are forthwith permanently enjoined as follows: To limit the pumping from underground waters from wells . . . to the extent required to achieve and to maintain at Devil's Hole . . . a daily mean water level of 2.7 feet below the copper washer . . . ." *Cappaert*, 455 F.Supp.81 (D. Nev. 1978).

Put another way, the Court found that the aquifer in *Cappaert*—like Coeur d'Alene Lake here—was a unitary water body that occurred both on and off the Devil's Hole National Monument. Further, the United States was granted a water right appurtenant to the Monument for a *water level* in the pool that allowed it to "regulat[e] the pumping" off-reservation thereby effectively granting the United States total "control" of the level of the *entire* aquifer (to the extent the aquifer is hydrologically connected to the Monument) in order to maintain the level of the pool in the Monument.

The Supreme Court awarded the United States this right despite the fact that the Monument is just forty acres in surface area and, as found by the Ninth Circuit, the aquifer at issue is approximately 4,500 square miles in surface area. *Cappaert*, 508 F.2d 313, 315-16 (9th Cir. 1974). In other words, a maximum of 0.0014% of the total surface area of the aquifer was located within the Monument's boundary.

Despite the miniscule amount of the aquifer that was within the Monument's boundaries, the Court did not find—as Idaho argues here—that it was impossible "to imply an intent to reserve a 'water right' that allows the [United States] to dictate water levels throughout the [aquifer]." Idaho Opening Brief at 58. Instead, the fact that the Cappaert's "wells draw water from the same underlying sources supplying Devil's Hole," was a dispositive factor in the Supreme Court's decision in favor of the United States. The Court cited back to *Winters*, noting that

> In Winters v. United States, . . . , the Court did not mention the use made of water by upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication, it reserves water rights sufficient to accomplish the purposes of the reservation.

Cappaert, 426 U.S. at 138-39. Just the opposite of Idaho's position, the Supreme Court found that the connectivity between federal reserved water rights and state-law water rights is a basis for curtailing the *junior state law rights* rather than disallowing the federal reserved right. Ultimately, the Court confirmed that the existence of a reserved water right has nothing to do with whether the right may control or even entirely curtail off-reservation state law water use. Instead, the "issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id*. 139.

From the inception of the *Winters* Doctrine, the United States Supreme Court has recognized that federal reserved water rights have impacts off-reservation. In *Winters v. United States*, the Supreme Court noted that the Milk River originated off the Fort Belknap Reservation before flowing on to the Reservation. 207 U.S. at 569-70. The Court noted that the defendants had

acquired their lands under the "desert and homestead land laws of the United States," and those lands were adjacent to "the Milk river and its tributaries," upstream from the Reservation (i.e. off the reservation). *Id*. at 568.

The defendants argued strenuously that the water right claimed by the United States for "all of the waters of the river," *id.* at 567, effectively allowed it to control the River's flow and that "[i]f defendants are deprived of the waters their lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained." *Id*. at 569. The defendants argued more broadly

> [t]hat there are other lands within the watershed of the Milk river and its tributaries, and dependent upon its waters for irrigation, upon which large numbers of persons have settled under the land laws of the United States . . . and, if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up . . . .

Id. at 569-70. The Court repeated the defendants' allegation *a third time*, stating

> [a]nd it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than $100,000 to them, and that if they are deprived of the waters 'their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but will greatly exceed $100,000,' and that they will be wholly without remedy if the claim of the United States and the Indians be sustained.

Id. Just as objectors have argued here, the off-reservation defendants in *Winters* claimed that if the claims of the United States were sustained "the purpose and object of the government in opening said lands [under the land laws] for settlement will be wholly defeated."

The Court was not persuaded. Instead, the Court found that "[t]he case, as we view it, turns," not upon whether the federal claim interferes with state law water rights, but upon "the agreement of May 1888, resulting in the creation of the Fort Belknap Reservation," and "the

declared purpose of [the Tribes] and the government." *Id*. at 576-77. Ultimately, the Court upheld the district court's award to the United States for 5,000 inches of water notwithstanding the fact that that such a water right would effectively allow the United States to "control" the use of the Milk River well off the reservation and to the extreme detriment of the off-reservation water users.

Likewise, in *Arizona v. California*, the Tribes were awarded a water right from the Colorado River for 1,000,000 acre-feet. 373 U.S. at 596. The total available flow for the lower basin was found to be 7,500,000 acre-feet. *Id*. at 562. The Special Master in *Arizona v. California* found that the Colorado River "runs a course of approximately 1,300 miles . . . [and] drains an area of 242,000 square miles or one-twelfth of the continental United States exclusive of Alaska." Aff. Counsel, Ex. 10, p. 9 (*Simon H. Rifkind, Special Master: Report, December 5, 1960, Arizona v. California*, 373 U.S. 546 (1963) (hereinafter "*Arizona v. California* Rifkind Report")). The reservations awarded the water rights for 1,000,000 acre-feet had a total surface area of 335,500 acres (approximately 524 square miles). *Id*. at 85-88. Although it is unclear how much of the River actually touched these reservations, it goes without saying that a *vast majority* of the Colorado River is located outside of these reservation.[14] Ultimately, however, the United States Supreme Court awarded five reservations that made up a little over 0.2% of the total surface area of the Colorado River Basin "control" of almost a seventh of the Colorado River's total annual flow for the lower basin. In so doing, it rejected Arizona's arguments that "there is a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them . . . [and] that even if water was meant to be reserved the Master has awarded too much water." *Arizona v. California*, 373 U.S. at 598. Ultimately, the Supreme Court reaffirmed that the *Winters* Doctrine does not turn on how

[14] Indeed, as more fully discussed in section III(C)(1) *infra*, the record demonstrates that *none* of the Colorado River ran through or adjacent to the Cocopah Reservation in 1963.

much of a water body is within a reservation but instead turns on whether the United States and the Tribe intended to reserve water. *Id*.

The Ninth Circuit has likewise recognized that the *Winters* Doctrine is not predicated upon how much of a waterbody is located within reservation boundaries or whether the claimed water right will result in *de facto* control of water levels off-reservation. For example, *United States v. Anderson*, recognized instream flow water rights to protect fish habitat in the Chamokane Creek Basin, a "hydrological system including Chamokane Creek, its tributaries and its ground water basin." 736 F.2d at 1361. The Court expressly noted that "[t]he waters of the Chamokane Basin are not wholly within the Spokane Indian Reservation." *Id*. Nonetheless, the Court affirmed the district court's finding of a non-consumptive instream flow water right to protect fish habitat. *Id*. at 1365. In fact, the district court had found a water right "related to water temperature rather than to simply minimum flow." *Anderson*, 591 F.Supp at 5. Specifically, the water right required sufficient water to maintain the water of Chamokane Creek at a temperature of sixty-eight degrees Fahrenheit or lower and, in any event at least twenty cubic feet per second. *Id*. Given the geography of the Basin, this minimum temperature and/or flow transcended the Reservation's boundaries; the water temperature off-reservation had to be at most sixty-eight degrees as it entered the reservation. However, rather than strike it down because it "allows the Tribe to dictate water levels," outside the reservation, *See* Idaho Opening Brief at 58, the Ninth Circuit expressly recognized its validity. *Id*. at 1365.

Similarly, in *United States v. Adair*, the Ninth Circuit found that the Klamath Tribes were entitled to non-consumptive water rights to support traditional hunting, fishing, and gathering in the Williamson River watershed. 723 F.2d at 1409. However, the Klamath Reservation had been terminated in 1954. *Id*. at 1398. As a result, almost all of the Williamson River and its tributaries

were "off-reservation" by the time of the adjudication in 1984. Nonetheless, the Ninth Circuit found that the Tribes' water rights "survived the Klamath Termination Act." *Id*. at 1408. Further, the Court did not find land ownership relevant to the inquiry of whether the Tribes had reserved water rights but instead turned upon whether the water was necessary to accomplish the purposes of the Reservation. *Id*. Finally, the Court highlighted that "the entitlement consists of the right to prevent other appropriators from depleting the stream's waters below a protected level in any area where the non-consumptive right applies." *Id*. at 1411. In other words, the Ninth Circuit recognized exactly what Idaho argues is beyond the scope of a *Winters* right: a non-consumptive water right that allows the Tribe to protect a minimum level below which other appropriators cannot deplete the waters of the Lake.

Federal reserved water rights that impact off-reservation water rights have consistently been recognized in Idaho as well. For example, the Idaho Supreme Court has recognized federal reserved water rights pursuant to the Wild and Scenic Rivers Act for the Main and Middle Fork of the Salmon River, the Middle Fork of the Clearwater River, the Selway River, the Lochsa River, and Rapid River. *Potlatch*, 134 Idaho at 912.[15] With the exception of the Selway and Lochsa Rivers, each of these streams extends beyond federal land.[16] Further, the portion of the Snake and Main Salmon River that is designated as wild and scenic are located in the middle of those stream basins. As such, these federal reserved water rights impact—or in the parlance of the State, "control"—the amount of water that must be in the stream off the federal reservation. Despite their apparent ability to "control" off-reservation stream flows, the Court found federal reserved water

[15] The water right numbers associated with these water rights are 75-13316 and 77-11941 (Main Salmon); 77-13844 (Middle Salmon); 78-11961 (Rapid River); 81-10472 (Selway); 81-10513 (Lochsa); 81-10625 (Middle Fork Clearwater).

[16] *See National Wild and Scenic Rivers System*, *available at*: https://www.rivers.gov/idaho.php (last visited November 29, 2016).

rights for these rivers because "[the provisions of the Wild and Scenic Rivers Act] makes little sense unless the legislation reserved water to fulfill the purposes of the Act." *Id*. at 914.

2. The 1889 Agreement Demonstrates the Mutual Intent of the United States and the Coeur d'Alene Tribe to Retain Water Rights in the Lake

Idaho argues "[t]he United States' claim of the right to control the lake elevation is not consistent with the purposes of the 1891 Act." Idaho Opening Brief at 55. The basis of its argument once again stems from its allegation that the 1889 Agreement split the ownership of the submerged lands underlying Coeur d'Alene Lake. *Id*. Idaho's argument fails, however, because it once again falsely equates ownership of submerged lands with the ownership of reserved water rights. Despite Idaho's best attempt to convince this Court to the contrary, a court of competent jurisdiction has never found the State owns *any* portion of Coeur d'Alene Lake. However, the question before this Court is not who owns the submerged lands underlying the northern portion of the Reservation but instead whether the Tribe has a water right in Coeur d'Alene Lake. As the Tribe's opening brief clearly demonstrates, the United States and the Tribe did reserve such a water right because, as the State has pointed out "[t]he [federal district] court, after reviewing the history that led to the 1873 Executive Order, concluded as follows:

> Th[e] evidence leads the Court to conclude that a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe."

Id. at 35 (quoting *Idaho II*, 95 F.Supp.2d at 1109). Accordingly, the issue is whether the Tribe ever ceded the water rights it reserved for the Lake in 1873.

The State argues that cession came in the 1889 Agreement. The Supreme Court requires the 1889 Agreement "to be liberally construed [with] doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 392-93. *See also* note 5-6, *supra*. Through such a lens it cannot be said that the Tribe agreed to cede any water rights in the 1889 Agreement.

The State cites to the 1888 Senate Resolution inquiring into the extent of the Coeur d'Alene Reservation and "whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open . . . ." Idaho Opening Brief at 55. It also quotes the response from the Commissioner of Indian Affairs stating that any cession of tribal lands "should be done, if done at all, with the full and free consent of the Indians . . . ." *Id*. at 56.

However, the State fails to cite the actual Congressional Authorization to begin negotiations with the Tribe for the 1889 cession. That authorization directed the Interior Department to "negotiate with the Coeur d'Alene Tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Idaho II*, 95 F.Supp.2d at 1113. *See also Idaho II*, 533 U.S. at 269. In other words, Congress only authorized the purchase of land and did not authorize the negotiators to purchase water rights. *c.f.*, *Minnesota v. Mille lacs Band of Chippewa Indians*, 526 U.S. 172, 197 (1999) (noting that the legislation authorizing treaty negotiations mentioned only land and was "silent with respect to authorizing agreements to terminate Indian usufructuary privileges."). Further, this language was critical to the Supreme Court in *Idaho II*, where it found that "Congress understood its objective as *turning on the Tribe's agreement* to the abrogation of any land claim it might have on the reduction of the 1873 reservation's boundaries . . . . The intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit . . . ." 533 U.S. at 278 (emphasis added).

No mention of the purchase of water rights was made during the 1889 negotiations. Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript). Although the boundaries as they related to navigable waters within the boundaries of the 1873 Reservation were discussed, no meeting of the minds on the cession of these waters took place. At one point Seltice asked General Simpson "[w]here will you make the lines?" *Id*. General Simpson replied "[w]e fixed a line, as was shown you on the map . . . . You understand that the lake belongs to you as well as to the whites – to all, everyone who wants to travel on it." *Id*. Seltice did not agree, stating "[t]hat is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." *Id*. General Simpson replied [y]ou know where the St. Joseph River is. We do not want any of that." *Id*. The General then proposed the boundaries quoted by the State in its opening brief: "I will explain the boundaries. Commencing at the northeast corner . . . then due east across said Lake . . . if we buy this land you still have the St. Joseph River and the lower part of the lake . . . ." *Id*. However, the State fails to mention that Seltice rejected this proposal outright, stating "I do not like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk." To this, General Simpson acquiesced, telling Seltice, "[t]hat is right and appropriate." *Id*.

The above exchange is the single place in the negotiation transcript where water was discussed in any detail. *See Mille Lacs*, 526 U.S. at 198 ("this silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights . . . . It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about relinquishment."); *City of Pocatello*, 145 Idaho at 507 ("Considering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised."). Instead,

negotiations focused on the purchase of *land* not water. General Simpson clearly states "[o]ur object was to select the land that is of no benefit to you," and "we were instructed to purchase from the Indians lands for their timber and mineral." Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript). When the negotiators finally agreed on the land to be ceded, General Simpson stated "[*f*]*or this land* we will give you $500,000 . . . ." *Id*. (emphasis added); *see also Mille Lacs*, 526 U.S. at 195 (the agreement "contains no language providing money for the abrogation of previously held [water] rights," other than the bare value of the land itself.).

This Court need not decide, however, whether the Tribe retained ownership of the land or water of the *entire* lake. Indeed, there can be no question that the Tribe owns *at least* the portion that lies within the current exterior boundaries of the Reservation. *Idaho II*, 533 U.S. at 262. General Simpson reaffirmed that "if we buy this land you still have the St. Joseph and the lower part of the lake . . . ." Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript). Unquestionably, at the very least the Tribe retained water rights sufficient to ensure the continued viability of the portion of the Lake that lies within reservation boundaries.

The State next argues that the Tribe impliedly relinquished *all* of its water rights in Coeur d'Alene Lake through its "insistence" that the Post Falls dam site be conveyed to Frederick Post. Idaho Opening Brief at 57. Idaho concludes that "[b]y ceding Post Falls without any reservation or restriction on the building of dams, the Tribe well understood that control of the lake level would be in the hands of Frederick Post and his successors." *Id*. at 58. The State's argument fails for a number of reasons.

First, it supposes, without citing any precedent, that the Tribe impliedly relinquished critical reserved water rights to a third party that is not the United States without so much as a passing

mention of water rights.[17] The Supreme Court has repeatedly refused to imply the cession of tribal treaty rights, *see* section III, *supra*. The State itself cites *Pollard v. Hagen*, which held that "to give to the United States the right to transfer to a *citizen* the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly . . . ." 44 U.S. at 230. Second, the State's argument is based upon a purported transaction the validity of which is dubious at best. *See* 2d.aff.Richard Hart, Ex. 3. In fact, as late as 1889, eighteen years after the Tribe allegedly sold Post Falls to Frederic Post, the Tribe was complaining that Post was *trespassing* at Post Falls. *Id*. at 4. Indeed, Idaho, in its own brief, highlights that "the State never conceded the validity of the patent to Frederick Post." Idaho Opening Brief at 61. The Idaho Supreme Court recognizes that "[j]udicial estoppel 'precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'" *Heinze v. Bauer*, 145 Idaho 232, 235 (2008) (quoting *McKay v. Owens*, 130 Idaho 148, 152 (1997)). Third, it is falsely premised, once again without any precedent, on the incorrect notion that the right to control a water body is necessary to have a reserved water right.[18]

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[17] Selling of tribal property rights to *anyone other than the United States* is expressly forbidden under the Indian Nonintercourse Act. *See* Act of June 30, 1834 (Trade and Intercourse Act of 1834), ch. 161, § 12, 4 Stat. 729, 730–31 (codified at 25 U.S.C. § 177(2012)). Although the 1891 legislation ratifying the 1887 and 1889 Agreements contained authorization for the sale of the land at Post Falls, it contains no mention of water rights. *See Bryan*, 426 U.S. at 393 (requiring cessions of rights to "be expressed on the face of the Act or be clear from the surrounding circumstances . . . .").

[18] In fact, many reserved water rights have been awarded in stream systems that are controlled by dams not tribally owned. For example, the Colorado River, the subject of *Arizona v. California*, currently contains several dams. Bureau of Reclamation, *Dams Along the Lower Colorado*, https://www.usbr.gov/lc/yuma/facilities/dams/yao_dams_map.html (last visited Feb. 18, 2017). The Fresno Dam is located on the Milk River, the subject of *Winters v. United States*. Bureau of Reclamation, *Fresno Dam*, https://www.usbr.gov/projects/index.php?id=128 (last visited Feb. 18, 2017). The Yellowtail dam is located on the Big Horn River, subject of the *Big Horn* Adjudication in Wyoming. National Parks Service, *Yellowtail Dam*, https://www.nps.gov/bica/learn/historyculture/yellowtail-dam.htm (last visited Feb. 18, 2017). The

Fourth, and most importantly, the State's argument assumes that *anyone*, particularly the Tribe, understood in 1871 that a water power development would include the ability to impound any serious amount of water. As Mr. Hart explains more fully in his second affidavit, "[a]t the time of [the] purported transaction in 1871, no one could have envisioned damming Coeur d'Alene Lake and controlling the level of that lake for the purpose of hydropower." 2d.aff.Richard Hart, ex. 2, p. 10. Instead, Mr. Hart concludes, "[t]he only dam envisioned in the area was a log crib dam designed to run a water wheel for a grist mill." *Id*. Mr. Hart came to this conclusion because, among other reasons, the construction of the first hydroelectric facility in the United States didn't begin until 1889 and even it originally envisioned the use of run of the river waterwheels. *Id*. at 7-8. Eventually that dam was constructed using turbines in 1895 but the dam failed in 1900, killing dozens of people, and was never rebuilt. *Id*. at 8. In other words, it was not technically or economically feasible to impound large quantities of water for hydroelectric power production until almost *thirty years* after the Tribe is purported to have sold the Post Falls site to Frederick Post. As a result, Idaho's argument that the Tribe silently and impliedly *intended* to give up its water rights in Coeur d'Alene Lake through a purported sale of the Post Falls site entirely fails under the weight of the actual historic record in this case.

Yakima River, subject of the *Aquavella* adjudication in Washington State, contains the Roza Dam and the Easton Diversion Dam. Bureau of Reclamation, *Roza Diversion Dam*, https://www.usbr.gov/projects/index.php?id=323 (last visited Feb. 18, 2017); Bureau of Reclamation, *Easton Diversion Dam*, https://www.usbr.gov/projects/index.php?id=103 (last visited Feb. 18, 2017). The Gila River, subject of the Gila River Adjudication in Arizona, contains Coolidge Dam. Bureau of Indian Affairs, *Division of Water and Power Background and History*, https://www.bia.gov/WhoWeAre/BIA/OTS/IPSOD/History/index.htm (last visited Feb. 18, 2017). Further, the Salt River, a major tributary of the Gila River, contains several dams. Salt River Project, https://www.srpnet.com/water/dams/ (last visited Feb. 18, 2017). Finally, there seven hydroelectric developments within the Klamath River Hydroelectric Project. Pacificorp, *Klamath River*, https://www.pacificorp.com/es/hydro/hl/kr.html (last visited Feb. 18, 2017). In none of these cases did the court find it relevant, let alone dispositive, that the tribes did not own and/or have control of the dams when analyzing their entitlement to water rights.

3. The Lake Claim is Not for Speculative Future Needs But Even if it Were, Under Federal Law, a Federal Reserved Water Right May be Set Aside for Future Uses of Water

The State's final argument against the Tribal lake claim is that it must "be denied because it is based on speculative future needs." *Id*. at 59. This is an audacious argument given that it is the State that forced the Tribe and United States to file these claims in the CSRBA through the auspices of the McCarran Amendment with the knowledge that "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ." I.C. § 42-1420. The State makes this argument knowing full well that it would vehemently object to the Tribe making claim to *any* additional federal reserved water rights after the completion of this adjudication.

In actuality, the State's apparent purpose for including this argument seems to be to create an invitation for this Court to make a finding regarding its claimed ownership of the submerged lands at the Post Falls dam site. In furtherance of its argument, the State cites this Court to a settlement agreement neither the Tribe nor the United States were a party to in an effort to convince the Court that "in the event Avista ever surrenders its license, the State would assume control of the property . . . ." Idaho Opening Brief at 62. In making such a claim, it becomes clear that it is the State, not the Tribe that is speculating in this case. Notwithstanding the fact that ownership of the Post Falls dam site is completely irrelevant to whether the Tribe is entitled to a water right in Coeur d'Alene Lake, title to that property has never been quieted in favor of the State. Further, as more fully outlined in section III(B), n. 10, *supra*, it is beyond the jurisdiction of this court to make determinations related to title of submerged lands. Accordingly, the Tribe respectfully submits that this Court should not take the State up on its invitation to presume its ownership of the Post Falls dam site.

Idaho also greatly misconstrues the nature of the tribal lake claim. It argues that "[g]iven the many contingencies involved . . . the Court cannot predict whether the Tribe will ever acquire the right to prevent storage of water in Coeur d'Alene Lake . . . ." Idaho Opening Brief at 62. However, the purpose of the claimed water right is "the right to prevent other appropriators from *depleting* the [Lake] waters below a protected level in any area where the non-consumptive level applies." *Adair*, 723 F.2d at 1409 (emphasis added). In other words, the Tribe could not "prevent storage" in the Lake, or demand the Lake be held exactly at the level decreed, but only prevent the lake level from being dropped below the minimum monthly elevation. So long as lake elevation were above the claimed levels the water right would be satisfied.

Importantly, the minimum levels claimed are <u>not contingent on dam removal or any other occurrence</u> but would be effective as soon as decreed. *Compare Notice of Claim to Federal Reserved Water Right No. 95-16704*, In Re CSRBA Case No. 49576 (Jan. 31, 2014) (hereinafter "Lake Claim Form 95-16704") *with Conditional Notice of Claim to Federal Reserved Water Right No. 93-7470*, In Re CSRBA Case No. 49576 (Jan. 31, 2014) (an instream flow claim in Hangman Creek conditioned upon the reintroduction of anadromous salmon). Because present dam operations cause lake elevation to be *higher* during the water short summer months than would naturally occur, the water right would likely never come into effect unless the dam were removed, operations changed significantly, or the climatic and/or hydrological situation in the Basin were to radically change. The claim form acknowledges this reality by stating "[s]ince the water rights claim must address the possibility that the dam will be removed or altered, the intent is to claim sufficient water to reflect the natural Lake processes prior to Post Falls Dam – consistent with the federal and tribal intent as it was understood in 1873." Lake Claim Form 95-16704. However, this language is not meant to imply that the water right is somehow contingent upon removal of the dam

or a change in operations. Instead, section 10(a) of the claim form was meant to clarify that the water right would not affect operations so long as the minimum levels are reached. Accordingly, this right is not speculative at all but for a current use necessary to fulfill the purpose of the Coeur d'Alene Reservation.

Even assuming for arguments sake that the water right was for a future use of water, it is well settled under federal law, as well as Idaho state law, that federal reserved water rights may be reserved for both current and future needs, regardless of whether the future claims require speculation. The term "speculation" is a term of art in water law. "A speculator is someone who seeks to appropriate water without having an immediate need for it in the hope of selling it later to someone who can put the water to work." Fereday, Meyer, and Creamer, WATER LAW HANDBOOK: THE ACQUISITION, USE, TRANSFER, ADMINISTRATION, AND MANAGEMENT OF WATER RIGHTS IN IDAHO 201 (2017), *available at*: http://www.givenspursley.com/uploads/pdf/handbook-waterlaw.pdf (last visited Feb. 8, 2017). To prevent this behavior, states have adopted the anti-speculation doctrine, which is a state law construct that provides that "an appropriator cannot obtain a water right decree without a demonstrated ability to actually use the water at a specified place." Aff. Counsel, Ex. 11, p. 554 (Clark and Joseph, *Changes of Water Rights and the Anti-Speculation Doctrine: The Continuing Importance of Actual Beneficial Use* 9 U. Denv. Water L. Rev. 553, 554 (2006)). In other words, the anti-speculation doctrine prohibits the appropriation of water rights for future uses of water rather than putting the water immediately to beneficial use. However, one of the fundamental principles of the reserved rights doctrine is that water rights may be reserved for both current and future needs.

Winters itself dictates this result. At the time the Fort Belknap Reservation was created, the Tribe was not using water from the Milk River. *Winters*, 207 U.S. at 568. Then, after the creation

of the Reservation but before "any . . . use of the waters of the river . . . was made by the United States or the Indians . . . except a pumping plant of the capacity of about 250 miners' inches," non-Indian appropriators began appropriating water upstream from the Milk River. *Id*. at 568. Nonetheless, the Supreme Court affirmed the district court's award of 5,000 miner's inches, finding it had been reserved at the time the Reservation was created. *Id*. at 575. In other words, the Supreme Court found that the United States had earlier reserved water that had not actually been put to use until well after the creation of the Fort Belknap Reservation.

Almost immediately after *Winters* was decided, the Ninth Circuit found "the policy of the government to reserve whatever water . . . may be necessary, not only for present purposes, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case. *Conrad Inv. Co. v. United States*, 161 F. 829, 832 (9th Cir. 1908). The Ninth Circuit's finding was confirmed by the United States Supreme Court in *Arizona v. California*, which expressly adopted the findings of its special master that "the water [reserved] was intended to satisfy the future as well as the present needs of the Indian Reservations . . . ." 373 U.S. at 600. The special master decision adopted by the Supreme Court put it this way: "[t]he *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs." *Arizona v. California* Rifkind Report at 258 (citing *United States* v. *Powers,* 305 U. S. 527 (1939); *United States* v. *Ahtanum Irr. Dist.,* 236 F.2d 321 (9th·Cir. 1956); *Walker River,* 104 F.2d at 334*; Conrad Investing Co. v. United States,* 161 F. 829 (9th Cir. 1908)).

The Ninth Circuit in *Ahtanum* addressed the argument that the Yakama's water rights should be limited and thereby "measured by the use being made at the time the treaty reservation was made." 236 F.2d at 326. The Ninth Circuit dismissed this outright, stating "The reservation was not merely for present but for future use." *Id*. As such, "the Treaty operated to reserve sufficient waters of Ahtanum Creek for the Indians' needs, both present and future." *Id*. at 323. The Court even refused to limit the scope of the Tribe's right to "the amount . . . actually used beneficially by the Indians within some . . . reasonable time." *Id*. Instead, the Court went on to find "that the paramount right of the Indians to waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the *ultimate needs* of the Indians . . . ." *Id*. at 327. The Ninth Circuit went so far as to hold that "the Indians were awarded the paramount right regardless of the quantity remaining for white settlers." *Id*.

Federal Courts have repeatedly affirmed that reserved rights may be for both current and future uses. *See e.g. Walton*, 647 F.2d at 47 ("the Supreme Court agreed with a Master's finding that water was reserved to meet future as we as present needs . . . ."); *Adair*, 723 F.2d at 1416 ("the full measure of this right need not be exercised immediately. As with rights reserved to the Tribe, water may be used by Indian allottees for present and future irrigation needs."); *Anderson*, 591 F.Supp. at 8 (citing *Arizona v. California* for the conclusion that "the law is clear the Tribe has a right to reserved water for present as well as future needs.").

The Idaho Supreme Court has also recognized that unlike state law rights federal reserved water rights may be for both present and future needs. In *Avondale Irr. Dist. v. North Idaho Property*, the Idaho Supreme Court recognized

> that reserved rights, unlike state created appropriative rights, do not depend upon diversion from the stream and application to beneficial use.

> Likewise, since the doctrine is based upon the supremacy clause, it supersedes Idaho law on speculative water rights, since some speculation is necessarily required in a present quantification of reserved water rights.

96 Idaho 1, 5, n. 10 (1974). The Idaho Supreme Court quoted this exact language four years later in *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 40 (1978). Other state Supreme Courts have universally adopted this principle. *See Acquavella*, 850 P.2d at 1315 ("The *Winters* doctrine was interpreted by lower courts as giving the Indians the right to that amount of water needed to satisfy the present and future needs of the reservation."); *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 105 (Wyo. 1988) (*Big Horn I*) ("We therefore affirm the district court's award of a reserved water right for future projects . . . ."); *Gila V*, 35 P.3d at 72-73 ("the [Supreme] Court found that the United States reserved water rights 'to make the reservation[s] livable.' This allocation was intended to 'satisfy the future as well as the present needs of the Indian Reservations.'").

4. The North Idaho Water Rights Group's Arguments Are Irrelevant to The Determination of The Tribe's Reserved Water Rights and Mischaracterize the Precedent Regarding the Ordinary High Water Mark of Coeur d'Alene Lake

The North Idaho Water Rights Group ("NIWRG") argues that "(1) the United States may only claim federal reserved water rights for those specific lands actually reserved for the Tribe, and (2) the extent of the federal lands held by the United States on behalf of the Tribe is limited to those lands that were reserved at the time the Reservation was set aside (e.g., the submerged lands underlying Coeur d'Alene Lake and the St. Joe River as they existed at the time of the reservation of lands)." *Memorandum in Support of the North Idaho Water Rights Group's Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 3 (Oct. 21, 2016) (hereinafter "NIWRG Opening Brief"). It is telling that no other objector, particularly the State of

Idaho, has joined in NIWRG's argument. Perhaps this is because as you read NIWRG's brief it becomes increasingly clear that their arguments are less about water rights and more about relitigating the scope of the submerged lands decided in *Idaho II* and trying to persuade this Court to issue a new ruling regarding the ordinary high water mark of Coeur d'Alene Lake.[19]

The boundary between submerged lands owned by an Indian Tribe and the adjacent uplands is determined under federal law to be the ordinary high water mark. *Montana Power Co. v. Rochester*, 127 F.2d 189, 191 (9th Cir. 1942). NIWRG asserts, however, that:

> the presumed ordinary high water mark ("OHWM") is currently 2128 feet and has been at that level since 1907 (*Erickson*, 132 Idaho at 211, 970 P.2d at 4), this higher level is the result of "the dam [that] raised the water level . . . in both in the lake and in the Coeur d'Alene and St. Joe rivers that feed into the Lake." The dam has been recognized as "raising the elevation of the water . . . approximately 6 1/2 feet . . . . This increased height in the dam naturally resulted in the lands adjacent to Coeur d'Alene Lake and the streams flowing into the lake to an elevation of at least 2,126.5 feet." *In re Sanders Beach*, 143 Idaho [at] 443.

[19] The Tribe notes that this is the *sixth* forum wherein attorneys for the NIWRG has made this *exact* argument. *See Memorandum in Support of Claimants Steve and Dianne Hawks' Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Subcase No. 91-7102; 91-7173 at 7-8 (July 27, 2016); *Memorandum in Opposition to Plaintiff's Motion for Order of Recognition of Foreign Judgment*, *Coeur d'Alene Tribe v. Johnson*, Case No. CV-2016-0025 at 10 (May 10, 2016); *Appellant's Brief*, *Coeur d'Alene Tribe v. Johnson*, Supreme Court No. 44478-2016 at 2; 6-7 (Jan. 31, 2017); *Memorandum in Support of Motion to Contest Jurisdiction*, *Coeur d'Alene Tribe v. Hawks*, Coeur d'Alene Tribal Court Case No. CV-DE-2016-0116 at 5 (Sept. 30, 2016); *Memorandum in Support of Motion to Dismiss or Stay*, *Coeur d'Alene Tribe v. Hawks*, Case No. 2:16-cv-00366-CWD at 8 (Sept. 13, 2016). To date, no court has accepted NIWRG's invitation to relitigate *Idaho II* or make a determination regarding the ordinary high water mark that is contrary to standing Idaho Supreme Court precedent. On summary judgment in subcase nos. 91-7102; 91-7173 Special Master Bilyeu found that "[t]his Court is not the ordinary venue for revisiting those issues [raised in *Idaho II*]." *Order on Summary Judgment*, In Re CSRBA Case No. 49576, Subcase Nos. 91-7102; 91-7173 at 6 (Oct. 11, 2016). Nonetheless, she recognized Judge Lodge's Final Judgment and Decree from *Idaho II* that "[t]itle is quieted in favor of the United States . . . and the Coeur d'Alene Tribe . . . to the bed and banks of *all* of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation [excluding those submerged lands in Heyburn State Park, which were not litigated]." *Id*. Master Bilyeu pointed out that Judge Lodge's decree was affirmed by both the Ninth Circuit and the United States Supreme Court. *Id*.

Id. at 9-10.

At the outset, regardless of the web NIWRG tries to spin around the facts in this case, Judge Lodge expressly found that the Tribe owns "the bed and banks of *all of the navigable waters* lying within the current boundaries of the Coeur d'Alene Indian Reservation . . . ." Aff. of Counsel, Ex. 4 (Judgment & Decree from *Idaho II*, 95 F.Supp.2d 1094 (D. Idaho 1998) (emphasis added).[20]

However, this Court need not get into the scope of the Tribe's ownership of submerged lands because NIWRG's argument is not relevant to this Court's inquiry regarding whether the Tribe is entitled to a water right in Coeur d'Alene Lake to protect the Lake's natural hydrograph. As the Tribe has already demonstrated, ownership of a particular parcel of land is not necessary to reserve a water right pursuant to the *Winters* Doctrine. *See* sections III(A); III(B)(1)-(3), *supra*. Instead, the inquiry is "whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139.

NIWRG's argument is also not relevant because the Tribe's claim is not linked in any way to the ordinary high water mark. The claim sets the *natural* level of the Lake as the minimum level; the level that would exist *but for* the dam regulating lake elevation. *See* Lake Claim Form 95-16704. Put another way, the claim is designed to generally mimic, on a monthly basis, lake levels that existed *at the time of the creation of the Reservation and before the installation of Post Falls Dam*. *Id*. ("the intent is to claim sufficient water to reflect the natural Lake processes prior to Post Falls

[20] Pursuant to I.R.E. 201(d), the Tribe asks the Court to take judicial notice of the fact, content, and substance of the *Judgment & Decree* in the federal case CIV-94-0328-N-EJL, entered in the United States District Court for the District of Idaho, signed by Hon. Edward J. Lodge on August 14, 1998. A true accurate, and correct copy of that *Judgment & Decree* is attached to the supporting affidavit of Counsel as Exhibit X thereto.

Dam – consistent with the federal and tribal intent as it was understood in 1873."). Accordingly, the claim is expressly limited to water that would be overlying "those specific lands actually reserved for the Tribe . . . ." NIWRG Opening Brief at 3.

Even assuming NIWRG's allegation that the Post Falls Dam raised the ordinary high water mark of Coeur d'Alene Lake in 1907, which it did not, *see infra*, those lands flooded were owned by the Tribe. The United States held in trust for the Coeur d'Alene Tribe *all land*—submerged lands and uplands—within the Coeur d'Alene Reservation until May 2, 1910 when the Reservation was opened to non-Indian homesteading by proclamation. 36 Stat. 2494. *See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 953 (9th Cir. 1982) (discussing 36 Stat. 2494, which also applied to the Flathead Reservation). Accordingly, even assuming NIWRG's argument that "additional lands within the reservation boundary . . . became submerged only after the construction of [the Post Falls dam] in 1907," any lands flooded would have been owned by the United States in trust for the Tribe because the Reservation continued to be 100% tribally owned in 1907.

As NIWRG points out, "land that later becomes submerged does not change ownership simply because it becomes submerged." NIWRG Opening Brief at 10 (citing *Jefferis v. East Omaha Land Co*., 134 U.S. 178 (1890)). Accordingly, since any uplands adjacent to the Lake were owned in trust for the Tribe in 1907, ownership would have remained in the Tribe. *Jefferis* also clarifies that when a patent is issued by the United States, "the water-course, and not the meander line, as actually run on the land, is the boundary." 134 U.S. at 196. *See also Erickson v. State*, 132 Idaho 208, 212 (1998) ("[i]t is well established that 'meander lines established by surveys of public lands bordering on navigable rivers are not boundary lines, rather the river or stream forms the boundary line.'"). More importantly, the boundary is the water-course *as of the date of the patent*. *Jefferis*,

134 U.S. at 196 ("the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, *but as it ran at the date of the patent in 1855*."). Accordingly, once homestead patents were finally issued in 1910, those patents would only go to the edge of "the water-course . . . as actually run on the land" as it was situated in 1910—three years after installation of Post Falls Dam. *Id*.

In addition to asking this Court to follow it down a rabbit-hole, NIWRG mischaracterizes the applicable law and historical facts surrounding the ordinary high water mark of Coeur d'Alene Lake. First, NIWRG mischaracterizes the holding of both *Erickson* and *Sanders Beach*. NIWRG alleges that *Erickson* held that the "presumed ordinary high water mark . . . has been [2128 feet] since 1907." NIWRG Opening brief at 9. However, the holding of *Erickson* was that the presumed ordinary high water mark *at statehood* was 2128 feet. *Erickson*, 132 Idaho at 210-13. The Idaho Supreme Court further noted with approval expert evidence provided by the state of Idaho that the ordinary high water mark was 2128 feet as early as 1800. *Id*. at 212. The Court in *Sanders Beach* reaffirmed that "[w]e had previously [in *Erickson*] ruled that the OHWM of Coeur d'Alene Lake *at the time of statehood* was presumed to be 2128 feet above sea level." *Sanders Beach*, 143 Idaho 443, 446 (2006) (emphasis added).

NIWRG also selectively omits dispositive text of the decision quoted from *Sanders Beach*. Recall that NIWRG argues:

> the presumed ordinary high water mark ("OHWM") is currently 2128 feet and has been at that level since 1907 (*Erickson*, 132 Idaho at 211, 970 P.2d at 4), this higher level is the result of "the dam [that] raised the water level . . . in both in the lake and in the Coeur d'Alene and St. Joe rivers that feed into the Lake." The dam has been recognized as "raising the elevation of the water . . . approximately 6 1/2 feet . . . . This increased height in the dam naturally resulted in the lands adjacent to

> Coeur d'Alene Lake and the streams flowing into the lake to an elevation of at least 2,126.5 feet." *In re Sanders Beach*, 143 Idaho [at] 443.

NIWRG Opening Brief at 9-10. In actuality the Idaho Supreme Court found "the dam raised the water level, ***at least during parts of the year***, in both in the lake and in the Coeur d'Alene and St. Joe rivers that feed into the Lake." *In re Sanders Beach*, 143 Idaho at 449. It likewise found "[b]y means of thus raising the dam at Post Falls and accordingly raising the elevation of the water in the Coeur d'Alene Lake approximately 6 1/2 feet, ***the appellant is enabled in seasons of low water*** to increase the capacity of its two plants . . . ." *Id*. at 449-50.

The portions NIWRG omits are critical to understanding that—contrary to NIWRG's assertions—the Post Falls dam did not affect the *ordinary high water mark* of Coeur d'Alene Lake but instead only changed the *seasonal low water mark*. The other cases cited by NIWRG—*Deffenbaugh v. Wash. Water Power Co.*, 24 Idaho 514 (1913); *Petajaniemi v. Wash. Water Power Co.*, 22 Idaho 20 (1912); *Wash. Water Power Co. v. Waters*, 19 Idaho 595 (1911)—further support this conclusion. None of these cases purport to determine the ordinary high water mark of Coeur d'Alene Lake. NIWRG alleges that "[i]t has been well-established by our own Idaho Supreme Court that additional lands became submerged only after the construction of one or more dams, culminating with the construction of Post Falls Dam in 1907." NIWRG Opening Brief at 9. These cases did not so hold.

The Court in *Washington Water Power Co. v. Waters* explained the actual situation:

> The Coeur d'Alene Lake . . . is supplied and fed by the waters of the Coeur d'Alene and St. Joe rivers. . . . Along these rivers and the small lakes and bodies of water tributary thereto . . . there are large areas of low meadow lands *which drain into these rivers* ***at times of low water***. . . . ***Late in the summer and early autumn*** the waters recede, and the Coeur d'Alene Lake itself is ***several feet lower than it is during what is commonly known as the high-water period***. The

> appellant company, by closing its headgates at Post Falls and raising the bear trap, is enabled to raise and ***hold the level*** of the waters of Coeur d'Alene Lake and the Coeur d'Alene and St. Joe Rivers about 6 1/2 feet higher than their natural level, and the waters when so held overflow and cover . . . the low meadow and grass lands along and contiguous to these streams . . . . By means of thus raising the dam at Post Falls and accordingly raising the elevation of the water in the Coeur d'Alene Lake approximately 6 1/2 feet, the appellant is enabled ***in seasons of low water*** to increase the capacity in its two plants.

19 Idaho 595, 683 (1911) (emphasis added).

The Idaho Supreme Court provided more detail in *Petajaniemi v. Washington Water Power Co.*:

> Prior to the improvement and reconstruction of the dams at Post Falls, ***the low-water elevation in Coeur d'Alene Lake was 2,120 feet*** above mean sea level. The Appellant so improved and constructed the dams as to enable it to raise what are called "bear traps" at the top of the dam, whereby the water could be raised and held at an elevation of **2,126.5 feet** above sea level. The chief purpose of these devices is to convert the Coeur d'Alene Lake into a storage reservoir, and ***hold the water during the low-water season at a higher elevation than the ordinary and natural condition of the lake*** . . . and thereby give a greater power capacity at Post Falls than could otherwise be obtained during the low-water season.

22 Idaho 20, 124 P. 783, 784 (1912) (emphasis added). The dam had the effect of temporarily "submerging a great portion of the lowlands along the stream." *Id*.

The lands at issue in *Deffenbaugh v. Washington Water Power Co*. were actually a bathing beach. This beach would be submerged each spring but would reemerge in the summer as water receded, which "offered an excellent bathing beach during the months of June, July and August of each year." 24 Idaho 514, 135 P. 247, 249 (1913). The Court further explained the effect of the Post Falls dam:

> The dam . . . has been used in operation for the purposes of impounding and holding the water in Coeur d'Alene Lake ***each***

> ***season*** since 1907. The effect of this dam is stated by appellant in its brief as follows: "The dam ***does not raise the water in Coeur d'Alene Lake, but simply retards its waters in their run-off.*** In the spring during the high-water season the water is much higher. *It simply tends to* ***prevent the water from falling as rapidly as it did prior to the construction of the present dam.***" The water collects in Lake Coeur d'Alene from various streams emptying into it during the winter and spring until the elevation is raised six or eight feet above the ordinary elevation of the water *in the summer and fall*. The purpose of this dam is *to* ***hold the water back from running off in the spring and summer so rapidly***, and to hold the level thereof at an elevation of 2,128 feet, whereas, if the flow was not so retarded by this dam and bear trap, it would runoff much more rapidly, and ***by the middle of the summer would be reduced to an elevation of 2,121.5***.

24 Idaho at 514 (emphasis added).

In sum, every case cited by NIWRG to support its position actually comes to the opposite conclusion. The Post Falls Dam never changed the ordinary high water mark of Coeur d'Alene Lake but instead caused water to be stored at a higher elevation than its **ordinary low elevation**.

Given the absolute irrelevant nature of NIWRG's arguments to this case, its obvious ulterior motivations, as well as its demonstrated mischaracterization of the law and facts surrounding the ordinary high water mark of Coeur d'Alene Lake, the Tribe respectfully suggests that this Court do as other courts have done when presented with this exact same argument—refuse to entertain it.

C. The Coeur d'Alene Tribe is Entitled to *Winters* Rights Off-Reservation if Necessary to Accomplish the Purpose of the Reservation

Idaho argues at great length that "there can be no implied reservation of water rights outside the boundaries of the Coeur d'Alene Reservation." Idaho Opening Brief at 16. In support of its argument Idaho suggests that reserved water rights may only be reserved where the water source is within or bordering the reservation. *Id*. at 17. Idaho and Hecla likewise argue that "[i]n the

Agreements of 1887, 1889, and 1894, the Tribe ceded any right to maintain instream flows outside the . . . Reservation." *Id*. at 27; Hecla Opening Brief at 16 ("[t]he plain language of the Agreements evidence the Tribe's intent to cede 'all right, title and claim' to lands outside of the Reservation."). Finally, they argue that such a reservation of water would be inconsistent with the purpose of the Coeur d'Alene Reservation. Idaho Opening Brief at 22; Hecla Opening Brief at 13.

These arguments fail because, as demonstrated below, neither the State nor Hecla offer any definitive precedent to support its arguments. No Court has expressly stated that federal reserved water rights may not have sources off the reservation.[21] In fact, federal courts have expressly found

[21] Hecla and to a lesser extent the State rely upon this Court's decision regarding Nez Perce Tribe Instream Flow Claims. *Order on Motions for Summary Judgment*, In Re SRBA Case No. 39576, Consolidated Subcase No. 03-10022 (1999). Essentially both parties argue that this decision forecloses the possibility that off-reservation instream flow claims may be recognized in Idaho. Idaho Opening Brief at 24; Hecla Opening Brief at 11. However, Hecla and the State's analogy to this case misses the mark. As Judge Wood points out in his decision "[a]lthough the implied federal reserved water right can apply where land is withdrawn from the public domain for the purposes of an Indian Reservation, the two types of rights [federal reserved water rights] and [Indian reserved rights] are fundamentally different." *Id*. at 25. According to Judge Wood, "[i]n contrast to an implied federal reserved water right, an Indian reserved water right is the recognition by the federal government of an aboriginal right (i.e. hunting or fishing) . . . ." *Id*. at 24. In that case, "[t]he Nez Perce admit that the Tribe did not intend to reserve a water right in 1855 because fish habitat had not been contemplated. As such, the scope *of the treaty fishing right* must be ascertained to determine whether the application of the canons of treaty interpretation imply a water right necessary to give effect to that treaty right. *Established Precedent* has defined the scope of the right. . . . ." *Id*. at 37 (emphasis added). The scope of the Nez Perce Tribe's off-reservation fishing rights had been thoroughly examined by the United States Supreme Court: "[t]he right is essentially a right to a share of the fish harvest [and] is not an absolute entitlement. Nor does it guarantee a set amount of fish. . . . The Nez Perce do not have a property interest in the fish [and the] fishing rights are subject to changing circumstances incurred by settlement and development . . . ." *Id*. Based upon these conclusions, this Court ultimately found "[b]ased on the scope of the Nez Perce *fishing right*, there is no legitimate basis from which to inter that a water right is necessary to the preservation of that limited right." *Id*. (emphasis added).

The Court's analysis demonstrates the fallacy of Hecla's and the State's argument. Both repeatedly attempt to limit the Tribe's instream flow rights to only those locales where the Tribe unquestionably has fishing rights. However, unlike the Nez Perce Tribe, which was claiming a water right pursuant to its express treaty fishing rights, the Coeur d'Alene Tribe is claiming federal reserved water rights pursuant to the *Winters* Doctrine. As this Court has correctly pointed out, the

off-reservation federal reserved water rights. Ultimately, the courts have made clear that the test for whether a water right was reserved under federal law is not whether the water source is on or off the reservation. Instead, the operative test continues to be "whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. 139.

1. No Court has Limited Federal Reserved Water Rights to Water Sources Located On-Reservation

The State cites a series of cases to support its position that "[t]he implied-reservation-of-waters-doctrine has from its beginning been limited to waters within or adjacent to federal land reservations." Idaho Opening Brief at 17. None of these cases can support the weight Idaho places upon them. First, Idaho cites *United States v. Rio Grande Dam & Irr. Co*., which as the State points out, held that

> Two limitations [to the State's ability to change the common law with respect to water rights] must be recognized: First, that, in the absence of specific authority from congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on

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legal theories for these two types of water rights are "fundamentally different." *Id*. at 25. Further, the Supreme Court precedent from *Passenger Vessel* and other cases interpreting Steven's treaty provisions are inapplicable to the Coeur d'Alene case. Unlike the Nez Perce, the Coeur d'Alene Tribe *does* assert that it was the mutual intent of the Tribe and the United States to reserve off-reservation water rights in 1873. *See* section III(C)(3), *infra*. This Court found in the Nez Perce case that "[b]ecause one of the admitted *purposes* of the Treaty was to *extinguish* aboriginal title to make the lands available for settlement, it is inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water." *Id*. at 38 (emphasis added). In contrast, as more fully explained in section III(C)(3), *infra*, reservation of off-reservation flows was necessary to *fulfill* the fishing *purpose* of the creation of the Coeur d'Alene Reservation and ensure tribal members would stay on the Reservation and off lands ceded to the United States. Accordingly, the Tribe respectfully asserts that this Court's analysis in the Nez Perce case directs a different result in the Coeur d'Alene case.

> a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.

174 U.S. 960,703 (1899). As the State has also pointed out, this language was later cited by the Ninth Circuit for the conclusion that "the federal government has the power to reserve waters which are needed for federal lands and to exempt those waters from appropriation under states [sic] laws." *Cappaert*, 508 F.2d 131, 322, n. 3 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976). Both of these citations support the Tribe's, not the State's, position in this case. The Tribe's instream flow water right claims are to ensure sufficient "continued flow" comes into the Coeur d'Alene Reservation to support one of the primary beneficial uses—purposes—of the Reservation; the Tribe's on-reservation right to hunt, fish, and gather. In interpreting the scope of *Rio Grande*, The Ninth Circuit places no geographic limitation upon the water that can be reserved. Regardless of where the water may originate, *Cappaert* clearly holds that if the water is needed for federal lands then the United States has the power to reserve it to fulfill the purposes of the reservation.

Next, the State cites three cases where the stream at issue made up a border of the reservation to support its proposition that "Indian reserved water rights are limited to waters within or bordering the reservation . . . ." Idaho Opening Brief at 20. The first case is *Winters* itself, where the Supreme Court noted that Fort Belknap Reservation boundary extended to the middle of the Milk River. 207 U.S. at 565. Next, the State cites *Conrad Inv. Co. v. United States*, which found that "[t]he present case is in many respects similar to the Winters case. The act of Congress of May 1, 1888, which ratified an agreement with certain Indians and established the Ft. Belknap Indian reservation . . . established also the Blackfeet Indian reservation, with the middle of the channel of Birch creek for its southern and southeastern boundary . . . ." 161 F. 829, 831 (9th Cir. 1908). Finally, the Ninth Circuit in *United States v. Ahtanum Irr. Dist.*, found that the Tribe owned to the

middle of Ahtanum Creek even though the Creek was supposed to be the boundary of the Yakama Reservation because "a tract of land bounded by a nonnavigable stream is deemed to extend to the middle of the stream." 236 F.2d at 325.

None of the cases cited by the State requires reserved water right be limited to waters within or bordering the reservation. Although these cases do mention that the streams at issue happen to border the reservation, none found that factor to be dispositive. Instead, the Supreme Court in *Winters* found "[t]he case, as we view it, turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation. *Winters*, 207 U.S. at 575. The Court went on to find that "in the construction of this agreement there are certain elements to be considered that are prominent and significant." *Id*. at 575-76. The fact that the Milk River was within or bordering the Reservation was not listed by the Court as one of those prominent and significant factors. Instead, the Court focused on the federal purposes for the creation of the Reservation, finding that without water the reservation would be "practically valueless." *Id*. at 575. Also important to the Court was that

> The Indians had command of the lands and the waters,-command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible.

Id. at 576. Ultimately, the Court reaffirmed "[b]y rule of interpretation of agreements or treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id*. In other words, *Winters* dictates that the test is not whether a particular stream is located within the reservation but instead "whether the Government intended to reserve unappropriated and thus

available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139.

The Ninth Circuit in *Ahtanum* was even more explicit, finding that "[t]he suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance." 236 F.2d at 325. The Court went on to expressly support off-reservation water rights, finding

> it would be a novel rule of water law to limit either the riparian proprietor or the appropriator or waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the land to which their waters ultimately become appurtenant.

Id. The Ninth Circuit in *Ahtanum* went on to highlight that the reason it mentioned that Ahtanum Creek bordered the reservation was not to demonstrate that the rivers were within the reservation and thus available for tribal use but instead to point out that part of the river was *outside* the reservation and thus non-Indian appropriators could access the stream to appropriate surplus water. *Id*. at 335. The Court found

> [w]e have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers. The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians. But they were not nonexistent. Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by the White settlers. And after the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use of any surplus available within the stream.

Id.

Next, the State turns to Black's Law Dictionary in an effort to argue that by using the term "appurtenant," the courts actually mean "physically adjacent." Idaho Opening Brief at 21. The

State ignores the fact that the definition of the term "appurtenant" as it applies to reserved water rights has already been defined by the Ninth Circuit in *John v. United States,* 720 F.3d 1214, 1229 (9th Cir. 2013). There, the Ninth Circuit found that "[t]he federal reserved water rights doctrine allows the United States to reserve waters 'appurtenant' to federally reserved lands in order to fulfill the purposes of that reservation. While the cases do not define 'appurtenancy,' there is an apparent consensus that it *does not mean physical attachment*." *Id*. (emphasis added). Instead, the Ninth Circuit found "[j]udicial references to such rights being 'appurtenant' to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes." *Id*. at 1229-30.[22]

The Ninth Circuit went on to find that "no court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation." *Id*. at 1230. It then clarified that "the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away." *Id*. at 1229. Instead, it found that "the Supreme Court has recognized that federal water rights may reach sources of water that are separated from, but 'physically interrelated as integral parts of the hydraulic cycle' with, the bodies of water physically located on reserved land." *Id*. at 1230 (quoting *Cappaert*, 426 U.S. at 133). Accordingly, the Ninth Circuit concluded "the federal reserved water rights doctrine does not typically assign a geographic location to implied federal

[22] The Ninth Circuit cites Professor David Getches for this proposition. *Id*., n. 94. In its opening brief, Idaho cites Professor Getches to argue "that historically, *Winters* rights have been recognized only 'from streams on and bordering reservations.'" *Id*. (quoting David E. Getches et al., *Federal Indian Law* 131 (4th ed. 1998)). Professor Getches' actual statement in *Federal Indian Law* is not clear, however, since the State only quoted half the sentence. Nonetheless, the Ninth Circuit cites Professor Getches to support the opposite conclusion from the one advanced by the State; that a water source need not be physically attached to a reservation of land for the purposes of the *Winters* Doctrine. In the same footnote, the Ninth Circuit also cites *4 Waters and Water Rights* § 37.01(b)(3) (Robert E. Beck ed., 1991 ed., repl. vol. 2004) ("[R]eserved rights may be drawn from water sources that do not traverse or border on reservations.").

water rights. The rights are created when the United States reserves land from the public domain for a particular purpose, and they exist to the extent the waters are necessary to fulfill the primary purpose of the reservation." *Id*. at 1231 (citing *Cappaert*, 426 U.S. at 139).

The Supreme Court in *Arizona v. California* likewise found a reserved water right in the Colorado River for the Cocopah Reservation, which at the time was not adjacent to the Colorado River. 373 U.S. at 595. As the State has pointed out, the Cocopah Reservation was created in 1917 by executive order, which set aside specific parcels of land located off of the Colorado River plus any "unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River . . . ." Executive Order of Sept. 17, IV Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1001 (1929). However, the official boundary of the Cocopah Reservation did not extend to the Colorado River in 1960 when Special Master Rifkind issued his report and in 1963 when the Supreme Court issued its decree. In a 1955 Solicitor's Opinion, the Department of Interior found that there were no "unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and . . . the waters of the Colorado River" because they had been claimed by General Higinio Alverez, a Mexican citizen. Aff. Counsel, Ex. 12 (Opinions of the Solicitor, pg. 1663, April 15, 1955)[23] Thus, the boundary at

[23] Also *available at*: http://thorpe.ou.edu/sol_opinions/p1651-1675.html (Last visited Jan. 31, 2017). The Solicitor later reversed its opinion in 1972. *See,* Aff. Counsel, Ex. 13 (Opinions of the Solicitor, pg. 2051, December 21, 1972, also *available at*: http://thorpe.ou.edu/sol_opinions/p2051-2075.htm (Last visited Jan. 31, 2017). In that opinion, the Solicitor noted that "

> Over the years there have been considerable differences of opinion regarding interpretation of the [1917] Executive Order. One interpretation to which the Executive Order is susceptible is that the Executive Order gave everything to the Cocopah Indians between the Colorado River and the subdivisions mentioned. The second interpretation is that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 are words not merely of description but of limitation, and that therefore the Indians could not

the time of *Arizona v. California* was set far away from the Colorado River. Nonetheless, the Supreme Court found the Cocopahs were entitled to an off-reservation water right from the Colorado River. *Arizona v. California*, 373 U.S. at 595.

Since its inception, the *Winters* doctrine has operated to prevent the use of off-reservation water supplies if such use would interfere with the purposes of a downstream federal reservation. The defendants in *Winters* were located upon lands acquired through the homestead lands laws located on the Milk River upstream from the Fort Belknap Reservation. *Winters*, 207 U.S. at 568. These users were enjoined from preventing "the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation" should less than 5,000 inches of water be available. *Id*. at 565. In other words, *Winters* operated to preclude off-reservation water use that interfered with "the purposes for which the reservation was created." *Id*. at 567.

Likewise, in *Cappaert*, the *Winters* doctrine operated to enjoin the pumping of groundwater a full 2 1/2 miles from Devil's Hole National Monument because that pumping was "causing the water level in Devil's Hole to drop . . . ." 426 U.S. at 133; 142. There, the Cappaerts argued that "the effect of applying the implied reservation doctrine to diversions of groundwater is to prohibit pumping from the entire 4,500 square miles above the aquifer that supplies water to Devil's Hole." *Id*. at n. 7. However, the Supreme Court clarified that "the injunction limits but does not prohibit pumping." *Id*. Instead, the injunction only precluded pumping to the extent necessary to prevent the

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> claim any land west of section 30. In the Solicitor's Opinion of April 15, 1955, the interpretation that was followed was that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 were not merely words of description, but words of limitation.

Id. Ultimately, the Solicitor in 1972 found that the full body of documents he reviewed "leads me to the opposite conclusion." *Id.* Regardless, the fact remains that, as of 1963, the understanding was that the Colorado River did not flow through or border the Cocopah Reservation.

lowering of the water level in Devil's Hole. *Id*. In so doing, the Court made clear that the reserved water rights may "reach sources of water that are separated from, but 'physically interrelated as integral parts of the hydraulic cycle' with, the bodies of water physically located on the reserved land." *John*, 720 F.3d at 1230 (quoting *Cappaert*, 426 U.S. at 142).

Both *Winters* and *Cappaert* demonstrate that the *Winters* doctrine operates to prevent off-reservation diversion of water that is necessary to serve on-reservation purposes. Although the State will undoubtedly argue that the water in *Winters* and *Cappaert* was "used" on the reservation, this is a distinction without a difference. Where the water is "used" does not change that the ultimate effect is the preclusion of off-reservation diversion of water. Further, the requirement that the water be "used" at all is a state law construct that is not required under federal law for the *Winters* doctrine to be effective. Neither *Winters* nor *Cappaert* placed any emphasis on the nature of the federal use of water but instead focused on whether other water use was interfering with the purpose of the federal reservation. Ultimately, the question is not where the water is from but whether the water is "necessary to accomplish the purposes for which the [Coeur d'Alene] reservation was created." *Cappaert*, 426 U.S. at 139.

2. According to the United States Supreme Court, the State's Argument that "the right to use off-reservation resources does not survive a cession . . . of tribal title except where expressly reserved," "reveals a fundamental misunderstanding of the basic principles of treaty construction."

The State, along with Hecla,[24] argues that the Tribe and the United States in 1887 and again in 1889 "mutually agreed to extinguish all right, title and claim the Tribe may have had to lands

[24] Specifically, Hecla argues that the language from the 1887 and 1889 agreements is "absolute" with no "limitation or exception to its scope." Hecla Opening Brief at 16. Essentially, both the State and Hecla argue that absolutely *no right* can survive such a land cession. As the Tribe will

outside its current reservation." Idaho Opening Brief at 27. Based upon this language, the State argues that "[o]ne fundamental principle that courts have applied in interpreting similar cessions is that the right to use off-reservation resources does not survive the cession or extinguishment of tribal title except where expressly reserved." Idaho Opening Brief at 29 (citing *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 753 (1985)). Far from a "fundamental principle," this argument has in fact been entirely repudiated by the United States Supreme Court, which found the argument "reveals a fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. The Court went on to clarify that "[o]ur holding in *Klamath* was not based *solely* on the bare language of the 1901 agreement. Rather, to reach our conclusion about the meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id*.

The Klamath Tribe's aboriginal territory comprised approximately 22 million acres. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985). In 1864, the United States and Klamath Tribe agreed to a treaty that set aside 1.9 million acres within the Tribe's aboriginal territory. *Id*. The Tribe agreed to cede "all their right, title, and claim to all the country claimed by them," outside this reservation. *Id*. The Reservation was then erroneously surveyed in 1871, excluding a large area from the boundaries of the Reservation. *Id* at 756. Rather than resurvey the reservation to fix the error, the United States entered into a second agreement with the Tribe in 1901 where the Tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" the erroneously excluded reservation land. *Id*. at 760.

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demonstrate, however, it is this argument that is not consistent with the precedent of the United States Supreme Court.

The question in the case was whether the Tribe retained the right to hunt and fish in the portion of the reservation that was ceded in 1901.

Although the Supreme Court stated that "[i]n the absence of any language reserving any specific rights in the ceded lands, the normal construction of the words used . . . . would encompass any special rights to use the ceded lands for hunting and fishing," *Klamath*, 473 U.S. at 768, the Court also highlighted that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land . . . [and] doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the Tribe." *Id*. at 765-66. Therefore, far from ending its analysis at the language of the cession agreement, the Court "consider[ed] not only the terms of the . . . Cession Agreements but also the predecessor . . . Treaty that established the Tribe's original reservation and certain other events in the history of the Tribe." *Klamath*, 473 U.S. at 755.

The Supreme Court found that "[t]he language of the 1901 Agreement must be read with the terms of the 1864 Treaty in mind." *Klamath*, 473 U.S. at 768. It reasoned that the Tribe could not have impliedly reserved any rights in the area ceded in 1901 that it did not reserve in the 1864 Treaty and "the language of the 1864 Treaty plainly describes rights intended to be exercised within the limits of the reservation . . . . The fishing right thus reserved is described as a right to take [fish] 'within its limits. . . . '" *Id*. at 766. Furthermore, the fact that "the rights were characterized as 'exclusive' forecloses the possibility that they were intended to have existence outside of the reservation; no exclusivity would be possible on lands open to non-Indians." *Id*.

The original 1864 Treaty also required tribal members to "remain [on the Reservation], unless temporary leave of absence be granted . . . ." *Klamath*, 473 U.S. at 767-68. The Supreme Court found that "a glaring inconsistency in the overall Treaty structure would have been present if

the Tribe simultaneously could have exercised an independent right to hunt and fish on the ceded lands outside the boundaries of the diminished reservation while remaining bound to honor its 1864 Treaty commitment to stay within the reservation absent permission." *Id*. at 770.

The Tribe also pointed out that it had never been specifically compensated for cession of hunting and fishing rights in 1901 cession area, which the Tribe argued was evidence that those rights were never ceded. However, in 1969 the Indian Claims Commission awarded the Tribe $4,162,992.80 in additional compensation for lands ceded in 1901. *Id*. at 762. The Court found that "the Tribe apparently agreed that the 'highest and best uses' for the ceded lands were commercial lumbering and livestock grazing again without mention of any hunting or fishing rights." *Id*. at 774. Because the lesser uses were subsumed into the final calculation for compensation for the Tribe, the Court concluded that the Tribe was in fact compensated for its right to hunt and fish in the area ceded in 1901.

Finally, the Court's decision was driven by the history surrounding the cession agreement, finding that "[b]y 1896, non-Indian settlers had moved on to the disputed reservation lands, the State of Oregon had completed a military road across the reservation, and conflicts between members of the Tribe and non-Indians perceived as interlopers were sufficient to require congressional attention." *Klamath*, 473 U.S. at 771.

In contrast, the Court, in *Mille Lacs Band of Chippewa Indians*, examined the language of an 1855 treaty wherein certain bands of Chippewa Indians agreed to "sell and convey to the United States all their right title and interest in, and to, the lands now claimed by them, in the Territory of Minnesota." 526 U.S. at 185. The Court noted the "Treaty . . . makes no mention of hunting and fishing rights," *Id*., but nonetheless concluded that "the historical record refutes the State's assertion

that the . . . Treaty 'unambiguously' abrogated the [Tribe's] hunting, fishing, and gathering privileges." *Id*. at 200.

Like *Klamath*, the basis of the case was a previously ratified treaty that had been negotiated between the United States and various bands of Chippewa in 1837. *Id*. at 176. In that treaty, the bands agreed to sell lands in present-day Wisconsin and Minnesota but insisted on preserving their right to hunt, fish, and gather on the ceded lands. *Id*. However, they ultimately agreed to the following language:

> The *privilege* of hunting, fishing, and gathering wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, *during the pleasure of the President of the United States*.

Id. at 177 (quoting 1837 Treaty with the Chippewa, 7 State. 537) (emphasis added).

In 1850 President Taylor "revoked" the "privileges granted temporarily to the Chippewa Indians . . . by the . . . Treaty made with them on the 29th of July 1837, 'of hunting, fishing, and gathering the wild rice . . . .'" *Id*. at 179. However, the President's order was later suspended by the Secretary of the Interior, presumably with the permission of the President. *Id*. at 181.

This formed the backdrop leading up to treaty negotiations in 1855. In that treaty the bands agreed to "cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota . . . . And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." *Id*. at 184 (quoting 10 Stat. 1165-66). The Supreme Court also highlighted that "[t]he treaty. . . makes no mention of hunting and fishing rights, whether

to reserve new usufructuary rights or to abolish rights guaranteed by previous treaties." *Id*. at 184-85.

Like the State of Idaho, the State of Minnesota argued that "the Band unambiguously relinquished its usufructuary rights by agreeing to 'fully and entirely relinquish and convey to the United States, any and all right, title and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere.'" *Id*. at 195. However, the Supreme Court found that despite the broad sweep of this language, the "sentence . . . does not mention the 1837 Treaty, and it does not mention hunting, fishing, and gathering rights. The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights." *Id*. The Supreme Court also noted that "the Treaty contains no language providing money for the abrogation of previously held rights." *Id.* To the Supreme Court, "[t]hese omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights." *Id*.

Like the State of Idaho, Minnesota nonetheless argued that "despite any explicit reference . . . to usufructuary rights . . . [the Treaty of 1855] nevertheless abrogates those rights." *Id*. at 196. Minnesota's argument, like Idaho and Hecla here, was based upon the bare words used in the Treaty of 1855. However, the Supreme Court concluded "to determine whether this language abrogates . . . Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id*.

Based upon a full understanding of the context within which the 1855 Treaty was negotiated, the Supreme Court concluded that the "1855 Treaty was designed primarily to transfer

Chippewa land to the United States, not to terminate Chippewa usufructuary rights." *Id*. It noted that the legislation authorizing the treaty negotiations mentioned only the acquisition of land and was "silent with respect to authorizing agreements to terminate Indian usufructuary privileges." *Id*. at 197. The Court also highlighted that the federal treaty negotiators told the Chippewa they were there to negotiate a cession of land. *Id*. In response, the Chief of the Pillager Band stated "It appears to me that I understand what you want . . . . You want land." *Id*. Federal negotiators confirmed the Chief's understanding. *Id*.

The Court also pointed to the Treaty Journal, which recorded the course of the negotiations. It found that this Journal "is silent with respect to usufructuary rights. The journal records no discussion of the 1837 Treaty, of hunting, fishing, and gathering rights, or of the abrogation of those rights." *Id*. at 198. The Court concluded that "this silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights . . . . It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about relinquishment." *Id*.

In a last ditch effort to save its case, the State of Minnesota made the same argument the State of Idaho makes here; namely, it argued, citing *Klamath*, that "[t]his Court has previously held that treaty language containing such an all-encompassing relinquishment of rights is effective to extinguish previously reserved hunting and fishing rights." Aff. Counsel, Ex. 6, p. 42 (*Brief for Petitioners*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) at 42). The State went on "this Court in *Klamath* directly addressed the impact of the 'all right, title and interest' language to *off-reservation* hunting and fishing rights." *Id* at 43 (emphasis in original). According to Minnesota, "[t]he Court concluded that no such special right survived such language." *Id*. The State then compared the language of the 1855 Chippewa Treaty with the 1901 Klamath

Agreement, highlighting that they both have "similar phrases 'all right, title and interest," but also pointing out that "the 1855 Treaty at issue here contains several phrases, beyond those in the *Klamath* agreement, demonstrating the sweeping nature of the relinquishment of rights." *Id*. at 44. The State concluded by arguing "[i]f the language in *Klamath* was sufficient to extinguish previously reserved hunting and fishing rights . . . then even more clearly the words of the 1855 Treaty . . . are sufficient to extinguish such rights here." *Id*.

The Supreme Court found that "the State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. The Court reiterated that its holding in *Klamath* resulted not *solely* from the language of the 1901 Agreement but also that "the 1864 Treaty restricted [the Klamath's usufructuary rights] to the lands within the reservation." *Id*. at 201. The Court went on by quoting *Klamath* directly, "'because the right to hunt and fish reserved in the 1864 Treaty was an exclusive right to be exercised *within the reservation*, that right could not consistently survive off the reservation' on lands the Tribe had sold." *Id*. (quoting *Klamath*, 437 U.S. at 769-70). Ultimately, the Court dismissed the State of Minnesota's argument—the same argument made by Idaho and Hecla here—by pointing out that "[o]ur holding in *Klamath* was not based solely on the bare language of the 1901 agreement." *Id*. at 202.

Accordingly, The Supreme Court has made clear that the language found in the 1887 and 1889 Agreements is far from "absolute." Instead, to determine the meaning of the language in the 1887 and 1889 Agreement, "we [must] examine[] the historical record and consider[] the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id*.

3. *Off-Reservation Instream Flow Rights were Necessary to Fulfill the Purposes of the 1873 Coeur d'Alene Reservation and No Water Rights were Ceded by the Coeur d'Alene Tribe in the 1887, 1889, or 1894 Agreements*

The Supreme Court is clear; the language of the 1887, 1889, and 1894 Agreements must be examined in light of the "historical record and considered in the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id*. Just as the "language of the 1901 [Klamath] Agreement must be read with the terms of the 1864 Treaty in Mind," *Klamath*, 473 U.S. at 768, and as the 1855 Chippewa Treaty was read in the context of the 1837 Treaty, *Mille Lacs*, 526 U.S. at 172, the subsequent agreements in the Coeur d'Alene case must be read in context of the circumstances surrounding the creation of the 1873 Reservation.

Those circumstances have been thoroughly documented by Judge Lodge of the federal district court for the district of Idaho, as well as the United States Supreme Court. *See Idaho II*, 95 F.Supp.2d at 1094, *aff'd*, 533 U.S. at 262. They have also been thoroughly analyzed by the Tribe and the United States in their opening briefs in this case. *See United States' Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Oct. 21, 2016); *Coeur d'Alene Tribe's Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Oct. 21, 2016). As such, only the highlights need be repeated here.[25]

[25] In contrast to the State, Hecla, in its opening brief, suggest that by the time of the creation of the reservation in 1873, "fishing was not a 'primary purpose' of the reservation," Hecla's Opening Brief at 16, because "the Tribe was shifting to a more agrarian lifestyle." Hecla's Opening Brief at 14. This argument was thoroughly rebuffed by Judge Lodge in *Idaho II*. As discussed in section IV, *infra*, the State in *Idaho II* argued, as Hecla does here, that the *sole* purposes of the 1873 Reservation was to "provide farmlands, fulfill the Tribe's agricultural needs, and provide access to the Mission." Aff. Counsel, Ex. 2, pg. 22 (Idaho's Trial Brief *Idaho II*). Judge Lodge disagreed, finding that "[h]aving considered all the evidence, the Court finds that at the time of the Executive reservation in 1873 the Tribe continued to be dependent upon the Lake and rivers." 95 F.Supp.2d at

The Coeur d'Alenes are, and always have been, a fishing people. *See* Joint Statement of Facts at 8-14; 21. The Tribe expressly rejected the original 1867 reservation that unilaterally set aside a tract of land to the south of the Lake for them without their knowledge or consent because it failed "to make adequate provision for fishing and other uses of important waterways." *Idaho II*, 533 U.S. at 265-66. In their petition for a larger reservation, the Tribe specifically noted the "need [to] have some hunting and fishing." *Id*. at 266. Rather than force the Tribe on to this reservation, the United States entered into negotiations for an expanded reservation.

Upon entering into negotiations, the federal negotiators found that "the Coeur d'Alenes demanded an enlarged reservation that included the Tribe's fishing grounds . . . ." *Idaho II*, 95 F.Supp.2d at 1109. As the State points out, "the Tribe . . . sought to obtain a Reservation that included all waterways it considered necessary to its survival." Idaho Opening Brief at 24. Notably, the principle species of fish upon which the Tribe relies are native cutthroat trout and bull trout. Joint Statement of Facts at 52. These fish are principally adfluvial in nature, meaning they live in the Lake but migrate into headwater streams to spawn. *Id*. If there is not sufficient water for their upstream migration or at their spawning grounds to spawn and rear their young, the fish population will eventually be extirpated. *Id*. at 54. In other words, unless water is reserved in these streams

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1104. Although it was the mutual intent of the both the United States and the Tribe that land be set aside for agricultural purposes in 1873, "[e]stimates of farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d'Alene were not engaged in systematic farming practices," and "the Tribe's sole reliance on systematic agricultural practices did not become a reality until much later." *Id*. In contrast, Judge Lodge concluded "the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived." *Id*.

Hecla also argues that "the reservation was prompted by a desire of the Tribe to set aside land that would be protected from white settlement." Hecla Opening Brief at 14. Although this is unquestionably true, is simply begs the question of what rights and resources the Tribe intended to reserve and "protect from white settlement," to fulfill the purposes of the Reservation.

located on and off-reservation, the Tribe's on-reservation fishing right, a primary purpose of the Coeur d'Alene Reservation, will be entirely defeated.

The most straightforward method to comply with the Tribe's demand for its fishing rights would have been to create a reservation that included both the Lake and all its tributaries in order to ensure fish would continue to have access to the spawning ground and rearing habitat necessary for their survival. Such a reservation would have essentially required the Tribe's entire aboriginal territory. Such a large reservation was inconsistent with the principle objectives, or purposes, in setting aside the Coeur d'Alene Reservation, which were to "promot[e] settlement, avoid[] hostilities, and extinguish[] aboriginal title . . . ." *Idaho II*, 533 U.S. at 275-76.

The 1873 Agreement represents a middle ground. It set aside the Lake, the mouths of the Lake's principle tributaries—the St. Joe River and Coeur d'Alene River—as well as the outlet of the Spokane River. Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1); Joint Statement of Facts at 39. Then, rather than reserving the land encapsulating the headwater streams necessary to ensure the continued survival of the native fishery, the parties agreed that "water running into said reservations shall not be turned from their natural channel where they enter said reservation." Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1).

The agreement represents a compromise given the objectives and purposes of the parties. The United States could acquire the Tribe's aboriginal title and promote settlement in a majority of the Tribe's territory in exchange for reserving to the Tribe a land base to protect its homeland, the Lake, and the water rights necessary to ensure the survival of the Tribe's adfluvial fishery.

Both the State and Hecla suggest that these objectives are mutually exclusive; that by passing the various land grant statutes such as the Mining Act, the Homestead Act, and the Desert

Land Act, Congress intended water on the public domain be available solely for private appropriation. Idaho Opening Brief at 31; Hecla Opening Brief at 19 ("the United States codified its intent to recognize and protect mineral development and its associated water rights.").[26] In other words, Hecla and the State argue that in order to effectuate these statutes, settlers and miners must have the unquestioned and absolute right to remove every drop of water from any stream on the public domain. However, as the Wyoming Supreme Court has found:

> Congress, by passing the settlement acts, intended non-Indian settlers to obtain water rights. . . . The settlement acts do not, however, simply by recognizing that water is important to settlers, indicate that water was not important to the Indians as well. Nor do the acts indicate that Congress did not intend to reserve necessary water for the Indians.

Big Horn I, 753 P.2d at 91. The Ninth Circuit, for its part, has found that

> Appellees point to the heavy expense of reclaiming their lands and to the conduct of the Government in permitting an encouraging settlement, particularly the acquisition of title under the Desert Land Act of 1877. . . . The settlers who took up lands in the valleys of the stream were not

[26] The State also argues that "the president lacked authority to reserve instream water rights outside the boundaries of a reservation of land." Idaho Opening Brief at 24. The United States thoroughly briefed this issue and the Tribe adopts those arguments. *See United States' Response to the State of Idaho's and Objectors' Motions for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at § VI (Feb. 23, 2017). Additionally, the Tribe points out that this argument has been summarily rejected by the Ninth Circuit, which, in analyzing another executive reservation, has held that

> [i]t is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. The act of July 26, 1866 . . . was no more than a formal confirmation of local law and usage which had theretofore met with silent acquiescence on the part of the national government. *But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes.*

Walker River, 104 F.2d at 336-37 (emphasis added).

> justified [however] in closing their eyes to the obvious necessities of the Indians already occupying the reservation below.

Walker River, 104 F.2d at 339. Notwithstanding this precedent, as well the fact that the United States Supreme Court has repeatedly and expressly found these Acts inapplicable to federal reservations and federal reserved water rights,[27] neither Hecla nor the State have provided any evidence that (1) mineral, agricultural, and timber development could not be maintained along with a federal reserved water right that would ensure a minimum amount of water remains in the stream for fish habitat; or (2) that it was the intent of Congress to make this water available *only* to non-Indians under state law

Ultimately, Judge Lodge found that "a purpose of the 1873 Agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource." *Idaho II*, 95 F.Supp.2d at 1109 (emphasis added). Judge Lodge recognized that the 1873 Agreement was not ratified. *Id*. at 1096. However, he went on to find that "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement . . . ." *Id*. at 1109. By using the word "terms" rather than "lands," Judge Lodge clearly interpreted the 1873 Executive Order to adopt *all the terms* of the 1873 Agreement (other than compensation for cession of aboriginal title, which required a Congressional appropriation).

Having established that the Tribe's 1873 reservation included sufficient off-reservation water rights to support the on-reservation fishery, the question becomes whether those water rights were subsequently ceded by the Tribe or unilaterally extinguished by Congress. Any such cession or extinguishment must "be expressed on the face of the Act or be clear from the surrounding

[27] *Rio Grande*, 174 U.S. at 703; *FPC v. Oregon*, 349 U.S. 435, 448 (1955); *Cappaert*, 426 U.S. at 143.

circumstances . . . .” *Bryan*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05); *See also* Section III, n. 5-6, *supra*.

None of the dispositive factors present in *Klamath* are applicable to the Coeur d’Alene agreements. As the Court in *Mille Lacs* pointed out, “‘because the right to hunt and fish [at Klamath] was an exclusive right to be exercised *within the reservation*, that right could not consistently survive off the reservation . . . .’” *Mille Lacs*, 526 U.S. at 201 (quoting *Klamath*, 437 U.S. at 769-70). However, the relevant water rights reserved pursuant to the 1873 Executive Order—which mirrored the terms of the 1873 Agreement—were expressly reserved to ensure the “water running into said reservations shall not be turned from their natural channel where they enter said reservation.” Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1). Unlike the Klamath’s hunting and fishing right, which was expressly an *on-reservation* right, the water rights reserved by the Coeur d’Alene Tribe are expressly *off*-reservation rights. Further, neither the Tribe nor the United States alleges the water rights at issue here are exclusive but instead are for the amount necessary to provide a healthy habitat for the tribal fishery. Any surplus water in the streams over this amount would remain for non-Indian appropriators.

The Coeur d’Alene Tribe’s award in its Claims Commission case further demonstrates its continued ownership of off-reservation instream flow water rights for fishing purposes. The Coeur d’Alenes were specifically compensated for *only* the loss of off-reservation water rights for agriculture, timber, and mining purposes. Aff. Counsel, Ex. 7, p. 618 (*Additional Findings of Fact*, *Coeur d’Alene Tribe v. United States,* Indian Cl. Comm’n Docket No. 81 at 618 (Dec. 3, 1957)). By iterating out the specific purposes of water use for which the Commission was compensating the Tribe, the Commission made clear that it was not compensating the Tribe for any other purpose of water use—such as instream flows for fish—to which the Tribe may have a claim. Further, unlike

Klamath, the Commission made no finding that it was compensating the Tribe for the "highest and best" uses of either the land or water at issue. *c.f. Klamath* 473 U.S. at 774. Accordingly, unlike the Klamath Tribes, there can be no allegation that the Tribe's instream flow water rights were subsumed into its compensation for other uses of the water.

Finally, the Supreme Court in *Klamath* found that "a glaring inconsistency in the overall Treaty structure would have been present if the Tribe simultaneously could have exercised an independent right to hunt and fish on the ceded lands outside the boundaries of the diminished reservation while remaining bound to honor its 1864 Treaty commitment to stay within the reservation absent permission." *Klamath*, 473 U.S. at 770. This became particularly acute by the Court's finding that "[b]y 1896, non-Indian settlers had moved on to the disputed reservation lands . . . ." *Id*. at 771. In contrast, far from an "inconsistency in the overall Treaty structure," an off-reservation instream flow water right is necessary to make the "overall treaty structure" consistent in the Coeur d'Alene case. Like the situation at Klamath, leading up to 1887 non-Indians were rapidly moving on to Coeur d'Alene aboriginal territory and encroaching upon the Reservation itself. *Idaho II*, 95 F.Supp.2d at 1110. However, unlike the off-reservation hunting and fishing right at issue in *Klamath*, which would have caused tribal members to enter onto lands that were then owned by non-Indians to hunt and fish, thereby creating conflict, an off-reservation instream flow right at Coeur d'Alene would actually help to cause tribal members to *remain on the reservation*. Indeed, the only way to ensure tribal members would remain on the Reservation was to ensure the Reservation provided the Tribe the resources necessary for its survival. A primary component of that basket of resources was the reservation fishery, which is dependent upon off-reservation water supplies for its survival. Accordingly, unlike Klamath, the water rights at issue here are not in conflict with the overall treaty structure but actually "central to Congress's complementary

objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation." *Idaho II*, 533 U.S. at 276. In other words, the off-reservation instream flows are necessary to fulfill the purpose for the creation of the Coeur d'Alene Reservation.

Application of *Mille Lacs* demonstrates that the Coeur d'Alene Tribe never ceded any off-reservation instream flow water rights. *See*, 526 U.S. at 185; Section III(C)(2). The cession agreement that implicates the great majority of the streams claimed by the Tribe in the CSRBA is the 1887 Agreement. Similar to the 1855 Chippewa Treaty, wherein the Chippewa Indians agreed to "sell and convey to the United States all their right title and interest in, and to, the *lands* now claimed by them, in the Territory of Minnesota" 526 U.S. at 185 (emphasis added), the 1887 Coeur d'Alene Agreement included an agreement to "cede, grant, relinquish, and quitclaim to the United States all right, title, and claim . . . to all *lands* in said Territories . . . ." Aff. R. Hart, Ex. 4 (1887 Agreement) (emphasis added). Just as the 1855 Chippewa Treaty "makes no mention of hunting and fishing rights," 526 U.S. at 185, the 1887 Agreement is "devoid of any language expressly mentioning—much less abrogating—[water] rights." *Id*. *See also* Aff. R. Hart, Ex. 4 (1887 Agreement).[28] Just like the 1855 treaty drafters, the federal negotiators to the 1887 Agreement "had the sophistication and experience to use express language for the abrogation of treaty rights." 526 U.S. at 185.

The Supreme Court's analysis in *Mille Lacs* exposes the fatal flaw in the State's argument. Based upon its interpretation of *Klamath*, Idaho argues silence is dispositive that any off-reservation rights were ceded because "the right to use off-reservation resources does not survive the cession or

[28] Hecla argues that "Perhaps most telling is that neither the 1873, 1887 nor 1889 agreements makes any reference to tribal fishing activities . . . ." Hecla Opening Brief at 14. Contrary to Hecla's argument, the Supreme Court has concluded time and again that silence indicates rights were reserved, not impliedly ceded. *See*, *Mille Lacs*, 526 U.S. at 185; section III, *supra*.

extinguishment of tribal title except where expressly reserved." Idaho Opening Brief at 29. If this were a correct statement of the law then silence in the 1855 Chippewa Treaty regarding Chippewa usufructuary rights would have conclusively demonstrated the Tribe had sold those rights. Instead, the Supreme Court applied the same canon of construction to an alleged cession of off-reservation rights as it does to on-reservation rights, requiring the cession "be expressed on the face of the Act or be clear from the surrounding circumstances . . . ." *Bryan*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05); *See also* Section III, n. 5-6, *supra*. Ultimately, the Court found "this silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights . . . . It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about relinquishment." *Mille Lacs*, 526 U.S. at 198.

Like the 1855 Chippewa Treaty interpreted in *Mille Lacs*, the 1887 cession "was designed primarily to transfer [Coeur d'Alene] land to the United States," not to terminate Coeur d'Alene reserved off-reservation water rights. *Mille Lacs*, 526 U.S. at 196. The 1887 Agreement was initiated by the Tribe, which had petitioned the United States to "make with us a proper treaty . . . by which your petitioners may be properly and fully compensated for such portion of *their lands* not now reserved to them . . . ." *Idaho II*, 533 U.S. at 267. As was the case in 1855, the legislation authorizing negotiations with the Coeur d'Alenes was "silent with respect to authorizing agreements to terminate Indian [water] privileges." *Mille Lacs*, 526 U.S. at 197. Instead, the authorization mentioned only land, authorizing Interior to negotiate with the Coeur d'Alenes "for the cession of their *lands* outside the limits of the present Coeur d'Alene reservation." *Idaho II*, 95. F.Supp.2d at 1096; 2d.Aff. R. Hart, Ex. 4 (1886 Authorization).

Importantly, that same 1886 authorization authorized Interior to "negotiate with the . . . Chippewa . . . for such modification of existing treaties . . . [for] such change of their reservation as may be deemed desirable . . . and as to what sum shall be a just and equitable *liquidation of all claims* which any of said [Chippewa] tribes now have upon the Government." 2d.Aff. R. Hart, Ex. 4 (1886 Authorization) (emphasis added). Congress's use of the phrase "liquidation of all claims" when referring to one tribe while simultaneously authorizing negotiations "for the cession of . . . lands" from another tribe is a stark reminder that Congress "had the sophistication and experience to use express language for the abrogation of treaty rights." *Mille Lacs*, 526 U.S. at 185.

As was the case during the 1855 Chippewa treaty negotiations, negotiations regarding the 1887 Coeur d'Alene cession focused exclusively on lands. *See* Aff. R. Hart, Ex. 4 (1887 Agreement Negotiation Transcript). For the federal negotiators, the basis of the negotiations was the Tribe's petition for compensation for lands outside the 1873 Reservation. *Id*. Chief Seltice, who was the principle negotiator for the Coeur d'Alenes, stated "[o]ne thing you have spoken to us about is our land, which the whites have taken away from us and which they now occupy. It is lost to us . . . . You say we may receive for our lost land $150,000—for our land outside the reservation." *Id*. In other words, just as in the 1855 Chippewa Treaty, the 1887 Agreement "contains no language providing money for the abrogation of previously held rights," other than the bare value of the land itself. *Mille Lacs*, 526 U.S. at 195.

In fact, the entire 1887 Agreement negotiation transcript is "silent with respect to [water] rights . . . or of the abrogation of those rights." *Id*. at 198. In contrast to the 1855 treaty negotiations, which apparently did not discuss the 1837 Treaty, the parties to the 1887 Agreement discussed the *confirmation* of the 1873 Reservation at length. At one point Chief Seltice told negotiators

> I plead with you, I implore you, I call on the Great Father, who will hear me, preserve for us and our children forever this reservation, where are our schools, our churches, our homes, our graves, our hearts. The Government has now thought of our claims for our lost *land* and they have sent you to us. Of this we are glad, but neither money nor *land* outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all Indians living on it shall have it forever.

Aff. R. Hart, Ex. 4 (1887 Agreement Negotiation Transcript) (emphasis added). And so, although water rights were not specifically discussed, protection of the Tribe's entire "reservation" was clearly contemplated. At the very least, the Supreme Court has been clear that "this silence suggests that the [Coeur d'Alenes] did not understand the proposed Treaty to abrogate their [water] rights . . . It is difficult to believe that in [1887], the [Coeur d'Alene] would have agreed to relinquish the [water] rights they had fought to preserve in the [1873 Reservation] without at least a passing word about relinquishment." *Mille Lacs*, 526 U.S. at 198. *See Also*, *City of Pocatello*, 145 Idaho at 507 ("Considering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised.").

Rather than immediately ratify the 1887 Agreement, Congress authorized a second round of negotiations in 1888 "owing to a growing desire to obtain for the public . . . certain portions of the [1873] reservation itself." *Idaho II*, 533 U.S. at 269. However, the Supreme Court found that "Congress did not simply alter the 1873 boundaries unilaterally." *Id*. Instead, Congress directed "the Secretary of the Interior 'to negotiate with the Coeur d'Alene tribe of Indians,' and, specifically, to negotiate 'for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id*.

Like the 1887 negotiations, the 1889 negotiations focused on the sale of land. *See generally* Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript).[29] In his opening remarks, General Simpson, chief negotiator for the United States made clear that "it is not our intention to do anything but what is satisfactory to you . . . . You are not compelled to sell." *Id*. The General also clarified "we were instructed to purchase from the Indians lands for their timber and mineral." *Id*. After opening remarks, General Simpson then stated, "we will go and examine the land and locate it, then make a paper and agree together." *Id*. To this, Seltice responded "[a]fter you go and look over the land and come back we will talk about trading . . . . [G]o and see the land and put a price on it . . . ." *Id*. After inspection, General Simpson described land to Seltice:

> We inspected the land we expected to buy of you, and we found a portion of it mountainous and broken, with very poor timber: some parts of the country contain fairly good timber. We found some prospects of gold and silver, but are not prepared to say what their value is until developed.

Id. Ultimately, the parties agreed to the cession of the block of land described in the 1889 Agreement. The federal negotiators told the Tribe "[f]or this land we will give $500,000." *Id*. As negotiations drew to a close, Commissioner Shupe told the Tribe "[w]e knew that you as Indians loved your lands, and know that you are sorry to part with them, but we feel that the best has been done for you . . . than if you had kept your land. When the conditions of these agreements are settled you will still have plenty of land left . . . ." *Id*.

Just like the 1887 and 1889 Agreements, the 1894 Harrison cession included absolutely no water rights. This cession was for a one-mile strip of land, running due east from the mouth of the

[29] Navigable waters within the boundaries of the 1873 Reservation were discussed as well. However, the negotiation was limited exclusively to on-reservation waters. Further, as describe more fully in section III(B)(2), *supra*, no meeting of the minds on any cession of these reservation waters took place.

Coeur d'Alene River to the eastern boundary of the Reservation. 28 Stat. 322.[30] The cession became necessary because the Tribe had granted its permission for a single non-Indian to establish a temporary fishing camp at the location. Aff. R. Hart, Ex. 6, p. 266 (Hart 2015 Report). Nearly overnight, an entire town of squatters sprung up. *Id*. *c.f.*, *City of Pocatello*, 145 Idaho at 498 ("A settlement of non-Indian residents sprang up at the intersection. The settlers were trespassers, being on the Reservation without permission."). These squatters petitioned Congress, which authorized the 1894 negotiations of the Harrison Strip. Aff. R. Hart, Ex. 6, p. 267-68 (Hart 2015 Report). The authorization specifically enumerated the land that negotiators were to purchase. *Id*. at 268.

When negotiators arrived they found the Tribe was extremely reticent to sell *any* land. *Id*. at 270. Federal negotiators made matters worse by acting in a condescending manner to the Tribe, refusing to show the Tribe their negotiation instructions, and demanding the Tribe give up the land for nothing. As the session went on,"[t]he Indians were obviously perturbed and indignant and losing their patience . . . ." *Id*. at 271. The Tribe demanded $25 per acre at the townsite and $5 per acre for the rest of the strip. *Id*. at 272. The federal negotiators balked, to which Seltice responded "if you don't want to make papers according to our plan, we will not give that strip." *Id.* Incensed, negotiators left without coming to a deal. *Id.*

The Tribe then wrote directly to the Commissioner of Indian Affairs, complaining of the behavior of the federal negotiators but mainly objecting that "[a]ccording to the last treaty with us, there was to be a stone wall around our Reservation." *Id*. at 273. They reiterated their price for the cession of land and, in response, the United States sent new negotiators. *Id*. at 274. Despite the

[30] The only water rights claimed by the United States and the Tribe in this area appear to be for Willow Creek (94-9245), Evans Creek (94-9246), and a very small portion of the Coeur d'Alene River (94-9270).

federal negotiators renewed attempts to get the Tribe to give away the land for nothing, the parties eventually settled to sell the land for $15,000. *Id*. at 277.

Without rehashing the entire *Mille Lacs* analysis, it is clear, that just like the 1887 and 1889 Agreements, the 1894 cession only contemplated a cession of land. The Agreement itself was for the cession "to all the *land* embraced within the following described tract . . . ." 28 Stat. 322. Just like the 1855 Chippewa Treaty, which "makes no mention of hunting and fishing rights," 526 U.S. at 185, the 1894 Agreement is "devoid of any language expressly mentioning—much less abrogating—[water] rights." Nor does the record establish that water rights were discussed during negotiations. Just as in *City of Pocatello*, "[c]onsidering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised. The record does not reveal a single instance where the Indians were apprised of the possibility that they were to lose some water rights. Serious discussions between the federal officials and the Indians would certainly have ensued if that were the case." 145 Idaho at 507. *See also*, *Mille Lacs*, 526 U.S. at 198 ("silence suggests that the [Tribe] did not understand the proposed Treaty to abrogate their . . . rights . . . . It is difficult to believe that in [1984], the [Tribe] would have agreed to relinquish the . . . rights they had fought to preserve in [1873] without at least a passing word about relinquishment."

The historic record in this case is uncontroverted that (1) an essential purpose of the 1873 Reservation was to reserve instream flow water rights off-reservation sufficient to maintain the on-reservation fishery; (2) that those water rights vested on November 8, 1873; and (3) that in no subsequent agreement did the Tribe expressly agree to sell or Congress unilaterally and expressly abrogate those off-reservation instream flow water rights.

IV. A COMPONENT PART OF THE OVERALL HOMELAND PURPOSE OF THE 1873 COEUR D'ALENE RESERVATION WAS TO PROVIDE THE TRIBE WITH SUFFICIENT WATER FOR AGRICULTURAL USES

The only argument made by the State that focuses on water rights that were created as part of the *1873 Reservation* (contrary to the fabled "1891 Reservation") is that "the tract reserved in 1873 was intended primarily to provide for the Tribe's needs without any need for systematic agriculture." Idaho Opening Brief at 36.[31] The State cites to no evidence or precedent to support this contention. This argument by the State is the polar opposite of its position in *Idaho II* where it argued that "[t]he stated purposes of the expanded [1873] Reservation were to provide farmlands, fulfill the Tribe's agricultural needs, and provide access to the Mission." Aff. Counsel, Ex. 2, pg. 22 (Idaho's Trial Brief *Idaho II*). *See also*, *Heinze*, 145 Idaho at 235 ("[j]udicial estoppel 'precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'").

The historic record clearly demonstrates that although agriculture was not the sole purpose of the creation of the Coeur d'Alene Reservation it was nonetheless a critical component of the Tribe's homeland reservation. From the Tribe's perspective, agriculture long represented an opportunity to supplement its traditional subsistence practices. As Judge Lodge found, "[b]y the 1840's, the Coeur d'Alene had begun to cultivate small garden plots . . . . The primary crops were

[31] The State also argues that "the United States must ultimately prove irrigation is necessary and practical upon such lands," and "issues remain regarding the quantity of water reserved for domestic purposes." Idaho Opening Brief at 44-47. This Court bifurcated consolidated subcase no. 91-7755 into two phases: entitlement and quantification. *Order . . . Bifurcating Proceedings*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 4 (Feb. 17, 2015). Accordingly, Idaho's arguments regarding the quantification of consumptive water rights are not ripe for review, analysis, or decision by this Court. Based upon the Court's bifurcation order, neither the Tribe nor the United States have argued quantification in this phase of the adjudication. As such, the Tribe respectfully requests this Court not accept the State's invitation to make findings regarding the quantification standards to be applied until that issue is actually ripe for review.

potatoes and wheat." *Idaho II*, 95 F.Supp.2d at 1101. Although he found "it did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl, and plants," it did serve to "supplement the continuous and stable source of food and fibre provided by the water resource." *Id*. By 1846, the Mission's farm had approximately 200 acres under cultivation. *Id*. at 1102. Although farming prior to the creation of the Reservation "did not play a significant role in the Coeur d'Alenes diet . . . many of the federal officials that interacted with the Coeur d'Alenes during the 1850s and early 1860s commented on the Tribe's agricultural efforts, they also noted the Tribe's use of the Lakes and rivers." *Id*.

Leading into the 1873 agreement negotiations the Tribe, "Agent report by W.P. Winans, observ[ed] that: 'The Coeur d'Alenes . . . farm on a small scale, but subsist principally by hunting and fishing." *Id*. at 1104. Nonetheless the Tribe made clear that it wanted a reservation that included its key waterways so that it could continue its traditional subsistence practices but also included sufficient land to allow the Tribe to continue to develop its agriculture. In its petition wherein the Tribe asked for an extension of its reservation to include "the two valleys of the S. Joseph, and Coeur d'Alene rivers," the Tribe also made clear "with the work of God we took to labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing . . . ." 2d.Aff.Richard Hart, Ex. 5 (Cd'A Petition to the United States).

For its part, the United States long intended that a purpose of the Coeur d'Alene Reservation was to encourage agriculture while at the same time recognizing the Tribe's dependence on the water ways for subsistence. As the Commissioner of Indian Affairs stated in 1869, the general policy of the United States at the time was the "concentration of the Indians upon suitable reservations, and . . . supplying them with means for engaging in agricultural and mechanical

pursuits . . . ." E.S. Parker, *Report of the Commissioner of Indians Affairs* (1869).[32] The United States also recognized, however, that Indian tribes, particularly in the northwest, continued to rely upon traditional subsistence practices for their survival. Recognizing this reality, the Commissioner in 1872 stated that reservations should encourage farming but also provide sufficient land to allow for continued subsistence practices, which "implies the occupation of a territory far exceeding what could be cultivated." 2d.Aff. R. Hart, Ex. 1, p. 53 (Hart Rebuttal Report).[33]

Federal officials on the ground at Coeur d'Alene further demonstrated this dual federal policy. "[M]any of the federal officials that interacted with the Coeur d'Alenes during the 1850's and early 1860's commented on the Tribe's agricultural efforts, they also noted the Tribe's use of the Lakes and rivers." *Idaho II*, 95 F.Supp.2d at 1102. Although Judge Lodge found that "[r]eports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based upon personal knowledge, and may be tainted by cultural and personal bias," there is little question that federal officials were enthusiastically encouraging the Tribe to take up agriculture from the 1840s into the 1870s. *Id*.

Perhaps the most probative evidence of the mutual intent of the United States and the Tribe to create a homeland that included the Lake and related waters, traditional subsistence, as well as agriculture, is the 1873 Agreement itself. That document provided the Tribe with agricultural implements including wagons, plows, mowers, harrows, grain cradles and a grist mill. Joint Statement of Facts at 17. At the same time, the Agreement promised that "water running into said

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[32] *Available at*: http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep69/reference/history.annrep69.i0002.pdf (last visited Feb. 10, 2017).

[33] Quoting Francis A. Walker, *Report of the Commissioner of Indian Affairs, November 1, 1872 in Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1872* at 13 (1872).

reservations shall not be turned from their natural channel where they enter said reservation." Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1).

The expanded boundaries of the 1873 Reservation—as compared to the 1867 Reservation—also demonstrates the multiple purposes for creating the Reservation. The original 1867 reservation "consisted for the most part of the area known as Hangman Valley and included only a small sliver of the Lake." *Idaho II*, 95 F.Supp.2d at 1102. The Hangman Valley is the area where the Tribe engaged in a majority of its agriculture. *Id*. at 1104 (stating that the Tribe's "big move" to the Hangman Valley to engage in systematic agriculture "started sometime after 1873"). In rejecting the 1867 Reservation, the Tribe did not reject the reservation of the Hangman Valley but instead insisted upon an *extension* of the Reservation so that it would *also* include the Tribe's important waterways. *Id*. at 1103-04. In other words, the Tribe required a reservation of its homeland that included the ability to farm and engage in traditional subsistence activities.

Historical evidence contemporaneous to the 1873 Agreement confirms this fact. Federal Negotiator Monteith listed four reasons for enlarging the boundaries of the 1867 reservation:

> First, an adjustment in the southwest boundary would include "several Indian farms" and exclude "four places belonging to white settlers;" second, running the eastern boundary north to the Mission "will leave some good farming land in the Upper Latah and will take in several [Indian] farms around the new Mission on the Coeur d'Alene river; third, "by running down the Spokane [the Tribe] can put in mills at the upper falls at much less expense than building a steam mill;" and fourth, "[b]y following the Washington and Idaho line to the dividing ridge between the Latah and Pine Cree it will include all Indian farms in Idaho and leave out all white settlements."

Id. at 1105. Governor Bennet, another federal negotiator, pointed out that the reason the boundaries were changed was due to the fact "[w]e found that the Indians *demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane

River." *Id*. (emphasis in original). Indeed, "the majority of the expanded reservation was not suitable for farming." *Id*. The extension of the Reservation boundaries clearly demonstrates the Party's multiple purposes, including agriculture, for the creation of the Coeur d'Alene Reservation.

Notwithstanding the State's bald assertion to the contrary, the historic record clearly demonstrates that the mutual intent of the United States and the Tribe was to set aside a permanent homeland for the Coeur d'Alene Tribe that included sufficient land to ensure the Tribe could continue to develop its fledgling agricultural pursuits.

V. THE STATE MISAPPLIES THE RULES FROM *UNITED STATES V. ANDERSON* REGARDING WATER RIGHTS APPURTENANT TO REACQUIRED LANDS

The State of Idaho uses *United States v. Anderson* to argue that "[i]f the original priority date of a water right appurtenant to an allotment conveyed to a non-Indian was lost to nonuse then the priority date is the date of reacquisition." Idaho Opening Brief at 53. Essentially, the State asks this court to engage in a parcel-by-parcel analysis of every piece of land on the Reservation where claims have been filed to determine (1) whether the land is trust or fee land; (2) whether the land has *ever* gone out of tribal ownership; (3) whether the land is a former allotment; (4) whether the land is a former homestead; (5) whether the lands are 1958 restored trust lands; (6) the date each parcel was reacquired, if applicable; (7) how much water the allottees were using on their property at the time of sale to non-Indians; (8) whether the non-Indian purchasers, none of whom are known, put any additional water to use within a reasonable time after the sale; and (9) whether the purchaser or intervening non-Indian land owners, none of whom are known, put water to a continuous beneficial use while the land was not in tribal ownership. In short, the State proposes this court

engage in what can only be described as a judicial nightmare in an effort to force the Tribe and the United States to undertake what it knows to be an impossible task.[34]

The immensity of this effort becomes even more acute when you consider that the Tribe's total PIA claim is just 17,815 acre-feet. According to the State of Idaho, "[t]he total annual discharge of the Coeur d'Alene-Spokane River Basin is approximately 4,400,000 acre-feet. *Affidavit of Carter Fritschle*, In Re CSRBA Case No. 49576, Subcase No. 00-40001 at 2 (Dec. 21, 2015). The Tribe's PIA water rights, in other words, amount to approximately 0.4% of the total annual discharge of the Basin. During argument of CSRBA Basin-Wide Issue No. 1 the State argued "the uncontroverted facts . . . demonstrate conclusively that domestic and stockwater rights have a *de minimis* impact on the water supply," because the total consumptive use for domestic and stockwater rights amounted to between 0.44 and 3% of the total annual discharge in the Basin. *State of Idaho's Reply Brief*, In Re CSRBA Case No. 49576, Subcase No. 00-40001 at 5-6 (Jan. 25, 2016). The State strenuously argued that state-law domestic and stockwater rights need not be investigated to the same degree as other water rights because "the impact of domestic and stockwater rights is less than one-half percent of the total water supply in the Coeur d'Alene-Spokane River Basin, and . . . investigating domestic and stockwater rights would require between 24,000 and 48,000 person-hours of work." *Id*. at 6. The State has not explained why it should be exempt from fully investigating its *de minimis* uses while the Tribe and the United States must

[34] In contrast to the incredible effort this would require at Coeur d'Alene, the task in *Walton* and *Anderson* was much more manageable. Those adjudications were not general stream adjudications but instead simply adjudications of a single stream. In *Walton*, the Court had to determine the water rights from No Name Creek for just three sets of parties: The Tribes, Boyd Walton, and the Indian allottees. *Walton III*, 752 F.2d at 404. The Court in *Anderson* found there were just ten reacquired parcels owned by the Spokane Tribe in the Chamokane Creek Basin. Aff. Counsel, Ex. 5, p. 8-9 ("*Anderson* First Trial Ct. Op.").

intricately document the full chain of title and continuous water use of every single one of its PIA water rights that account for a similar amount of the total available water supply.

Other courts have recognized the futility of engaging in such a herculean and ultimately unnecessary task. The Wyoming Supreme Court found "[b]ecause all the reacquired lands on the ceded portion of the [Wind River] [R]eservation are reservation lands, the same as lands on the diminished portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date." *Big Horn I*, 753 P.2d at 114.

Notwithstanding the practical problems with the approach suggested by the State, it also greatly overstates the reach of *Anderson*. First, it asserts, without the benefit of any precedent, that *Anderson* applies to all water rights claimed by the United States and the Tribe, regardless of purpose of use. Idaho Opening Brief at 51. Second, it implies that the burden would be on the United States and the Tribe to establish that water has been put to a continuous beneficial use while the lands were in non-Indian ownership. However, by its very terms *Anderson* and its rationale only apply to irrigation water rights and the burden is clearly on objectors to establish any reacquired water rights had been lost due to nonuse while in non-Indian ownership.

A. *United States v. Anderson* Only Applies to Irrigated Agricultural Water Rights

Without the benefit of precedent, Idaho attempts to bootstrap the rule in *Anderson* to all tribal claims, whether those claims are for irrigated agriculture, DCMI, or its non-consumptive claims. However, the applicability of *Anderson* does not extend beyond water rights for irrigated agriculture. *Anderson* was based upon the Ninth Circuit's previous decision in *Walton*, 647 F.2d at 51. As the Court pointed out, "[t]he Court's rationale in Walton was that, in order for the Indian allottee to enjoy the full benefit of his allotment, he must be able to sell his land together with the

right to share in the reserved waters." *Anderson*, 736 F.2d at 1362. Accordingly, the applicability of *Anderson* turns upon what water rights are held by the allottee.

At the outset, it bears reminding that the Indian canons of construction dictate that allotment acts, like all Congressional acts, be construed liberally with ambiguities being resolved in favor of the Tribe. *County of Yakima v. Confederated Tribes Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Further, all property rights not expressly abrogated by Congress are reserved. *Mille Lacs*, 526 U.S. at 196 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."). Unquestionably, the non-consumptive water rights claimed were reserved in 1873 because, as the State has pointed out, a purpose of the 1873 Agreement was "to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource," Idaho Opening Brief at 35, for "food, fiber, transportation, recreation, and cultural activities." *Idaho II*, 533 U.S. at 265. Further, as established in section III(A), *supra*, unlike water rights for irrigated agriculture, tribal non-consumptive rights are held for the communal benefit of the Tribe as a whole. Nowhere in the Coeur d'Alene Allotment Act does Congress either abrogate these water rights or expressly pass them on to allottees.

The root of the Ninth Circuit's holdings in *Anderson* and *Walton* is the United States Supreme Court Case *United States v. Powers*, which limits its holding to irrigation water rights. 305 U.S. 527 (1939). There, Crow tribal members had received allotments that were subsequently patented to them in fee. *Id*. at 344. They asserted that "waters within the Reservation were reserved for the equal benefit of tribal members and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters *essential for cultivation* passed to the owners." *Id*. at 532 (emphasis added). The Supreme Court agreed, stating "[m]anifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians

upon designated tracts where they could make homes with exclusive right *to cultivation* . . . [and] [w]ithout water productive *cultivation* has always been impossible." *Id*. at 533 (emphasis added). Nothing in *Powers* indicated that individual allottees would acquire any other water rights than those necessary to irrigate their allotments.

The Ninth Circuit, in *Walton*, has likewise affirmed that allottees only acquire irrigation water rights. 647 F.2d at 51. There, the Ninth Circuit found that the Colville Tribes had reserved water rights for both irrigation and instream flows to support fish habitat. *Id*. at 47-48. Boyd Walton, a non-Indian purchaser of a former allotment, claimed a federal reserved water right for his property. No Name Creek—the stream at issue in *Walton*—ran through Mr. Walton's property. *Id*. at 45. Again, the *Walton* Court expressly found that "the fee [held by the allottee] included the appurtenant right to share in reserved waters, and [we] see no basis for limiting the transferability of that right." *Id*. at 50. Accordingly, had the allottee been entitled to a share of the Tribe's non-consumptive instream flow water right, it would have passed to Boyd Walton. However, instead of awarding Mr. Walton a share of the Tribe's instream flow water right as well as its irrigation water right, The Ninth Circuit found "the extent of an Indian allottee's right is based on the number of irrigable acres he owns." Accordingly, since "[a] non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller . . . the [non-Indian] purchaser's right is similarly limited by the number of irrigable acres he owns." *Id*.

On remand, the district court in *Walton* found that the No Name hydrological system contained 1,000 acre-feet of available water per year. *Walton III*, 752 F.2d at 404. It found that Boyd Walton was entitled to 384 acre-feet per year, based upon the number of irrigable acres he had put to beneficial use. *Id*. It also found that tribal allottees were entitled to 428.8 acre-feet per year, based upon the same metric. *Id*. The court then turned to the Tribe's water right for its fishery. It

found that the Tribe's fishery required 350 acre-feet per year. *Id*. However, it only awarded the Tribe 187.2 acre-feet, the amount left after the irrigation water rights were satisfied in full (1000 acre-feet minus 384 acre-feet minus 428.8 acre-feet equals 187.2 acre-feet). *Id*. The Ninth Circuit reversed on appeal, finding "*Walton II* is clear. *The Tribe* has a reserved right 'to sufficient water to permit natural spawning of the trout,' and *the Indian allottees* have a right to share in the reserved water, based upon the irrigable acreage owned, without any reduction for non-use." *Id*. (quoting *Walton*, 647 F.2d at 48, 51) (emphasis added). Accordingly, the Court found *the Tribe*, not the allottees, "is entitled to its full allocation, 350 acre feet per year . . . ." *Id*. at 405.

Coming full circle, the Ninth Circuit in *Anderson* found that "on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse [by the intervening non-Indian owner]." *Anderson*, 736 F.2d at 1362.[35] The Spokanes, like the Colvilles were found to have reserved water rights for both irrigation and instream flows for fish. *Anderson*, 591 F.Supp. 1, 5 (E.D. Wash. 1982). However, the district court's opinion regarding reacquired lands fell within the "Reserved Water Rights for Irrigation" section. Aff. Counsel, Ex. 5, p. 8-9 ("*Anderson* First Trial Ct. Op."). In contrast, the court *did not* find its holding regarding reacquired lands applied to the

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[35] The fact that nonuse of the water right is the lynchpin of the rationale in *Anderson* exposes yet another flaw in the State's argument. As the Ninth Circuit pointed out, a restriction placed upon *Walton* rights while in non-Indian ownership is "use it or lose it." *Anderson*, 736 F.2d at 1362. The Court went on to state that "on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse." *Id*. Such a rationale simply cannot be applied to non-consumptive water rights because, by definition, "[t]he holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses." *Adair*, 723 F.2d at 1411. Instead, as this court well knows, a non-consumptive right is the right to "prevent other appropriators from depleting the streams waters below a protected level . . . ." *Id*. In other words, you cannot lose a non-consumptive water right for nonuse because it is illegal to consumptively "use" it in the first instance.

Tribe's instream flow water rights. *Id.* at 10. Instead, the Spokane's instream water rights were awarded a priority date of "at the latest . . . the date of the creation of the reservation." *Id*.

The only part of the trial court's decision that was appealed to the Ninth Circuit was the question of whether reacquired *irrigation* water rights should have a later priority date if the intervening non-Indian owner had lost those rights by nonuse. As such, the Ninth Circuit did not determine instream flow water rights adjacent to reacquired lands were subject to loss for nonuse. instead, it found that "'the non-Indian successor's right to water is 'limited by the number of irrigable acres [of former reservation land that] he owns,'" and "[t]he second restriction may be simply expressed as: use it or lose it." *Anderson*, 736 F.2d at 1362. The Court concluded that "where 'the full measure of the Indian's reserved water right is not acquired by this means and maintained through continuous use, it is lost to the non-Indian successor." However, the Court did not apply this rule to the Tribe's instream flow water rights. Instead, the Spokanes enjoy a priority date for its instream flow water rights of "at the latest . . . the date of the creation of the reservation." Aff. Counsel, Ex. 5, p. 8-9 ("*Anderson* First Trial Ct. Op.").

In sum, *Anderson*, *Walton*, and *Powers* clearly demonstrate that the only water rights that may have a later priority date than the creation of the Coeur d'Alene Reservation are water rights reserved for irrigated agriculture.

B. The Burden is on the Objectors to Establish that Any Reacquired Irrigation Water Rights Were Lost to Non-use

The State argues that "[i]f the original priority date of a water right appurtenant to an allotment conveyed to a non-Indian was lost to nonuse then the priority date is the date of reacquisition." Idaho Opening Brief at 53. However, the State does not elaborate on *who* would

have to establish whether the water right was lost to nonuse. Despite the state's inference to the contrary, federal and state law clearly provide that the burden of establishing nonuse is on the objectors.

The Supreme Court has laid out the elements necessary to establish a federal reserved water right. The Court in *Cappaert* found that "[t]his Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." 426 U.S. at 138. It further found that the *Winters* doctrine, reserves . . . that amount of water necessary to fulfill the purpose of the reservation, no more." *Id*. at 141.

Application of these elements to this phase of the subcase requires the United States and the Tribe establish that (1) the Reservation was withdrawn on November 8, 1873; (2) that the water claimed is necessary to fulfill the purposes of the creation of the Coeur d'Alene Reservation; and (3) that purposes for the creation of the Reservation would be defeated if water were not also reserved. *Id*.[36] Upon establishment of these elements, federal law dictates that "the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created. This means . . . that these water rights . . . are 'present perfected rights' and as such are entitled to

[36] Each of these elements have been established for each category of claimed filed by the United States and adopted by the Coeur d'Alene Tribe in this case. *See generally*, Tribe's Opening Brief; United States' Opening Brief. Indeed, even the State has admitted that "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource," as well that "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement." Idaho Opening Brief at 35 (quoting *Idaho II*, 95 F.Supp.2d at 1109).

priority . . . .” *Arizona v. California*, 373 U.S. at 600. In other words, federal law recognizes the Tribe’s irrigation water rights in this case vested on November 8, 1873.

From this starting point *Anderson* requires determination of whether the priority date for reacquired irrigation water rights should actually be later because an intervening non-Indian owner failed to use the water. *Anderson*, 736 F.2d at 1362. The root of the Ninth Circuit’s holding in *Anderson* on this point is *Walton*, which in turn derived its rules from *United States v. Adair*, 478 F.Supp. 336, 348-49 (D. Oregon 1977) and *United States v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928)). *Anderson*, 736 F.2d at 1362 (citing *Walton*, 647 F.2d at 51). The Court in *Adair* found that these rights are subject to loss for non-use while in non-Indian ownership because “non-Indian purchasers are subject to the doctrine of prior appropriation. 478 F.Supp. at 342. In *Hibner*, the Federal District Court for the District of Idaho further clarified that “the white man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state . . . .” 27 F.2d at 912. Accordingly, the water rights reacquired by the Coeur d’Alene Tribe were, while owned by non-Indians, subject to loss for non-use pursuant to Idaho state law.

Under Idaho law it is clear that “abandonments and forfeitures are not favored.” *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 842 (2003) (citing *Zezi v. Lightfoot*, 57 Idaho 707 (1937)). As such, “[t]he party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by clear and convincing evidence.” *Id*. at 842. Likewise one who asserts that a water right has been abandoned has the burden of establishing the elements of abandonment by clear and convincing evidence. *Gilbert v. Smith*, 97 Idaho 735, 738 (1976). The Idaho Supreme Court has recognized several defenses to an assertion of forfeiture, including

> [e]xtension of the five-year period pursuant to Idaho Code § 42-222; wrongful interference with the water right by others; failure to use the water because of circumstances over which the water right holder has no control; resumption of use after the five-year period of nonuse if it is before a claim of right by a third party; and *where Indian reserved rights are involved*.

Sagewillow, 138 Idaho at 842, n. 4 (internal citations omitted).[37] The Idaho Supreme Court has also made clear that another defense to forfeiture is that the water user "had used the . . . water the entire time." *Jenkins v. I.D.W.R.*, 103 Idaho 384, 389 (1982). This Court has likewise recognized in the SRBA that under Idaho state law the burden is on the objector to establish clear and convincing evidence that a water right claim has been lost for nonuse. *See e.g.*, *Memorandum Decision and Order on Challenge*, In Re SRBA Case No. 39576, Subcase No. 65-05663B at 20-21 (2002).

Accordingly, the burden is on the objector to establish by clear and convincing evidence that part of the Tribe's irrigation water right should have a later date due to an intervening non-Indian owner's nonuse.

CONCLUSION

The uncontroverted historical facts in this case conclusively demonstrate that the Coeur d'Alene Reservation was created on November 8, 1873. *See* section I(A)-(D), *supra*. Further, objectors are precluded from asserting that the Reservation was not created until 1891. *Id*. Pursuant

[37] The Idaho Supreme Court's declaration that a defense to forfeiture is "where Indian reserved rights are involved" was based upon *Hibner*. There, the federal district court for the district of Idaho found that "failure of the Indians to use their water will not cause either an abandonment or a forfeiture of their rights thereto." 27 F.2d at 912. In *Anderson*, although some water rights had passed out of Indian and ownership and were subsequently reacquired, the Ninth Circuit nonetheless found that "[i]f the tribe chooses to use water reserved for irrigation in a non-consumptive manner, it does not thereby relinquish any of its water rights . . . . The State may regulate only the use, by non-Indian fee owners, of excess water." 736 F.2d at 1365. Accordingly, once back in tribal ownership, the reacquired water rights are once again protected from abandonment and/or forfeiture.

to the creation of the 1873 Reservation, the Coeur d'Alene Tribe impliedly reserved "exclusive use of the water resource," to the extent necessary to ensure it had sufficient water to maintain the overall homeland purpose of the Reservation. That homeland purpose had three essential components: (1) the reservation of Coeur d'Alene Lake in its natural condition; (2) the right of the Tribe to continue to engage in its traditional substance fishing, hunting, and gathering practices; and (3) to provide the Tribe with the land and resources necessary for it to engage in agricultural, domestic, commercial, and industrial pursuits. These essential components to the Tribe's homeland reservation necessitate a non-consumptive water right to maintain Coeur d'Alene Lake in its natural condition, as well as water rights for seeps, springs, wetlands, and instream flows. The Tribe's homeland also requires consumptive water rights for domestic, commercial, municipal, and industrial uses, as well as irrigated agriculture.

The Tribe's water rights vested on November 8, 1873. *See* section I(A)-(D), *supra*. Objectors have demonstrated no historical facts that would indicate any water rights have been silently ceded by the Tribe or impliedly abrogated by Congress. Contrary to arguments by Objectors, these critical tribal treaty rights cannot be lost through silence; the 1887, 1889, and 1894 Agreements were "not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371; section III (B)-(C), *supra*. Accordingly any water rights not expressly ceded were reserved for the Tribe's benefit. Further, any water rights not expressly and unambiguously taken by Congress pursuant to the Coeur d'Alene Allotment Act are retained by the Tribe. *See*, section III, n. 5-6; section III(A), *supra*. The canons of construction, controlling case law, and historic record in this case conclusively demonstrates that no subsequent agreements between the Tribe and the United States or other Congressional acts operated to cede, abrogate, or otherwise diminish any of those water rights reserved in 1873.

Accordingly, the Coeur d'Alene Tribe respectfully requests this Court grant the joint motion for summary judgment filed by the United States and the Tribe and deny the motions filed by objectors.

Respectfully submitted this 23rd day of February, 2017.

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