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# Idaho's Memo in Support for Mtn SJ

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LODGED
DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 21 2016

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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**

| | |
|---|---|
| In Re CSRBA | ) Consolidated Subcase No. 91-7755 |
| | ) |
| Case No. 49576 | ) STATE OF IDAHO'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT |
| | ) |

## DESCRIPTIVE SUMMARY

The following Memorandum is submitted in support of the State of Idaho's Motion for Summary Judgment in Consolidated Subcase 91-7755, addressing the reserved water right claims made by the United States as trustee on behalf of the Coeur d'Alene Tribe.

## TABLE OF CONTENTS

**I. STATEMENT OF UNDISPUTED FACTS** .......... 1

**II. SUMMARY JUDGMENT STANDARD** .......... 8

**III. ARGUMENT** .......... 9

A. THE RESERVED WATER RIGHTS DOCTRINE IS A METHODOLOGY FOR DETERMINING INTENT; ABSENT EVIDENCE OF INTENT THERE CAN BE NO RESERVATION OF WATER RIGHTS .......... 9

1. The Reservation of Water Rights Cannot be Implied to Remedy an Omission in the Act Creating the Reservation .......... 9

2. Intent to Reserve Water Can Only Be Implied Where Necessary to Fulfill a Primary Purpose of a Reservation and Without Such Water the Purpose Would Be Entirely Defeated .......... 13

B. THERE CAN BE NO IMPLIED RESERVATION OF WATER RIGHTS OUTSIDE THE BOUNDARIES OF THE COEUR D'ALENE RESERVATION .......... 16

1. Water Rights Are Reserved by Implication Only Where the Subject Waters Are Within or Bordering a Reservation of Land .......... 17

2. Implying Off-Reservation Water Rights Would Be Inconsistent with the Purposes of the Reservation .......... 22

3. The President Lacked Authority to Reserve Instream Water Rights Outside the Boundaries of a Reservation of Land .......... 24

4. In the Agreements of 1887, 1889, and 1894, the Tribe Ceded Any Right to Maintain Instream Flows Outside the Diminished Reservation .......... 27

5. Congress' Acceptance of the Tribe's Cession of All Rights Outside the Reservation Was Intended to Implement Laws Requiring that Water on the Public Domain Be Available For Private Appropriation .......... 31

C. RESERVED WATER RIGHTS WITHIN THE RESERVATION ARE LIMITED TO THE PURPOSES ULTIMATELY SET BY CONGRESS WHEN IT ESTABLISHED THE CURRENT RESERVATION IN THE ACT OF MARCH 3, 1891 .......... 34

1. The 1873 Executive Order, By Itself, Did Not Permanently Reserve Water Rights Because It Was a Temporary Measure Intended to Remain in Effect Only Until Congress Could Make a Final Disposition of the Lands and Waters Within the Reservation .......... 34

2. The Stated Purpose of the Reservation, as Finally Approved by Congress in 1891, Was to "Promote the Progress, Comfort, Improvement, Education, and Civilization of Said Coeur d'Alene Indians" ....................39

3. While the Purpose of the Act of March 3, 1891 Was to Promote Agriculture, it Is Not Possible to Conclude on Summary Judgment that Water Was Impliedly Reserved: the United States Must Ultimately Prove Irrigation Is Necessary and Practicable Upon Such Lands ....................44

4. While the Parties to the 1887 and 1889 Agreements Likely Intended to Reserve Domestic Water Rights for Rural On-Reservation Households, Issues Remain Regarding the Quantity of Water Reserved ....................45

5. While One Purpose of the Reservation Was to Promote Commercial and Industrial Activities, Many of the United States' DCMI Claims Are for Activities Not Consistent with the Purposes of the Reservation ....................47

6. The United States Cannot Claim the Original Priority Date for Lands That Were Acquired by Nonmembers and Later Reacquired by the Tribe ....................51

7. The Alleged Reservation of the Right to Maintain the Elevation of Coeur d'Alene Lake at "Natural" Levels is Inconsistent with the Tribe's Cession of over 80% of the Lake and Specifically the Cession of Post Falls to Frederick Post ....................54

   i) The claim for lake level maintenance must also be denied because it is based on speculative future needs ....................59

8. Preservation of Springs, Seeps, and Wetlands Was not Essential to the Livelihood of the Tribe ....................65

   i) The decree of spring, seep, and wetlands claims upon allotments is not consistent with prior decisions holding that allotments are not held for the benefit of the Tribe ....................68

   ii) The United States cannot claim reserved water rights for both irrigation and wetland maintenance on the same land ....................70

9. Water for Fish Habitat on Streams Within the Reservation Was Not Reserved in the 1891 Act ....................71

   i) Even assuming, for purposes of argument that water rights for fish habitat were reserved, such water rights cannot apply to waterways running over or across lands not held for the benefit of the Tribe ....................76

**IV. CONCLUSION** ....................79

## TABLE OF AUTHORITIES

**Cases**

*Arizona v. California*,
373 U.S. 546 (1963) .......... 14, 45, 48, 65

*Arizona v. California*,
376 U.S. 340 (1964) .......... 19

*Blake v. Arnett*,
663 F.2d 906 (9th Cir. 1981) .......... passim

*Bonanno v. United States*,
12 Cl. Ct. 769 (1987) .......... 10, 11

*British-American Oil Producing Co. v. Bd. of Equalization*,
299 U.S. 159 (1936) .......... 37, 38, 75

*California Oregon Power Co. v. Beaver Portland Cement Co.*,
295 U.S. 142 (1935) .......... 32, 33

*California v. United States*,
438 U.S. 645 (1978) .......... 13

*Cappaert v. United States*,
426 U.S. 128 (1976) .......... 13, 18

*Catawba Indian Tribe v. South Carolina*,
865 F.2d 1444 (4th Cir. 1989) .......... 28

*Chamber of Commerce of the U.S. v. Reich*,
74 F.3d 1322 (D.C.Cir.1996) .......... 27

*Choctaw Nation v. United States*,
318 U.S. 423 (1943) .......... 11

*Citizens Band of Potawatomi Indians of Okl. v. United States*,
391 F.2d 614 (Ct. Cl. 1967) .......... 11, 39

*City of Tacoma, Washington v. F.E.R.C.*,
460 F.3d 53 (D.C. Cir. 2006) .......... 60, 61

*Colville Confederated Tribes v. Walton*,
647 F.2d 42 (9th Cir. 1981) .......... passim

*Confederated Bands of Ute Indians v. United States*,
330 U.S. 169 (1947) .......... 11, 27

*Confederated Tribes of Chehalis Indian Reservation v. State of Wash.*,
96 F.3d 334 (9th Cir. 1996) .......... 21

*Conrad Inv. Co. v. United States*,
161 F. 829 (9th Cir. 1908)....19, 46

*County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*,
502 U.S. 251 (1992)....5

*Donnelly v. United States*,
228 U.S. 243 (1913)....77

*Fort Berthold Reservation v. United States*,
390 F.2d 686 (Ct. Cl. 1968)....37

*Frost v. Wenie*,
157 U.S. 46 (1895)....33, 34

*Grisar v. McDowell*,
73 U.S. (6 Wall.) 363 (1867)....25

*Hagen v. Utah*,
510 U.S. 399 (1994)....4,6

*Holly v. Confederated Tribes & Bands of Yakima Indian Nation*,
655 F. Supp. 557 (E.D. Wash. 1985)....20

*Idaho v. United States*,
533 U.S. 262 (2001)....4, 17

*In re Crow Water Compact*,
364 P.3d 584 (Mont. 2016)....49

*In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*,
835 P.2d 273 (Wyo. 1992)....46

*In re General Adjudication of All Rights to Use Water in Big Horn River System*,
899 P.2d 848 (Wyo. 1995)....77

*In re General Adjudication of All Rights to Use Water in the Big Horn River System*,
753 P.2d 76 (Wyo. 1988)....16, 46, 75

*Jones v. Meehan*,
175 U.S. 1 (1899)....11, 12

*Lone Wolf v. Hitchcock*,
187 U.S. 553 (1903)....6

*Mattz v. Superior Court*,
758 P.2d 606 (Calif. 1988)....76

*Menominee Tribe of Indians v. United States*,
391 U.S. 404 (1968)....70

*Michigan v. Bay Mills Indian Cmty.*,
134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014)....37

*Montana v. United States*,
450 U.S. 544 (1981) .......... 76

*Morton v. Mancari*,
417 U.S. 535 (1974) .......... 34

*N. Paiute Nation v. United States*,
10 Cl. Ct. 401 (1986) .......... 52

*Nicodemus v. Washington Water Power Co.*,
264 F.2d 614 (9th Cir. 1959) .......... 69, 70

*Olsen v. J.A. Freeman Co.*,
117 Idaho 706, 791 P.2d 1285 (1990) .......... 8

*Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*,
473 U.S. 753 (1985) .......... passim

*Osage Tribe of Indians v. United States*,
66 Ct. Cl. 64 (1928) .......... 39

*Parravano v. Babbitt*,
861 F. Supp. 914 (N.D. Cal. 1994) .......... 76

*Petricevich v. Salmon River Canal Co.*,
92 Idaho 865, 452 P.2d 362 (1960) .......... 8

*Pollard v. Hagan*,
44 U.S. 212 (1845) .......... 61

*Potlatch Corp. v. United States*,
134 Idaho 912, 12 P.3d 1256 (2000) .......... 10

*R.G. Nelson, A.I.A. v. Steer*,
118 Idaho 409, 797 P.2d 117 ( 1990) .......... 8

*Red Rock v. Henry*,
106 U.S. 596 (1883) .......... 33

*Riverside Development Co. v. Ritchie*,
103 Idaho 515, 650 P.2d 657 (1982) .......... 9

*Sierra Club v. Block*,
622 F. Supp. 842, 854 (D. Colo. 1985) .......... 20

*Skokomish Indian Tribe v. United States*,
401 F.3d 979 (9th Cir. 2005) .......... 72

SRBA Consolidated Subcase 03-10022, *Order on Motion to Strike Testimony of Dennis C. Colson; Order on United States' and Nez Perce Tribe's Joint Motion to Supplement the Record in Response to the Objectors' Motions For Summary Judgement, I.R.C.P. 56(f); Order on Motion to Strike Exhibit Transcription of Letter From General Palmer to George Manypenny, Commissioner*

*Of Indian Affairs; Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions,* (SRBA Dist. Ct., Nov. 10, 1999)....24, 72

*State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation,*
712 P.2d 754 (Mont. 1985)....47

*State of Idaho v. Andrus,*
720 F.2d 1461 (9th Cir. 1983)....29

*State v. Manley,*
142 Idaho 338, 127 P.3d 954 (2005)....60, 62

*State, Dep't of Ecology v. Yakima Reservation Irrig. Dist.,*
850 P.2d 1306 (Wash. 1993)....48

*Tee-Hit-Ton Indians v. United States,*
348 U.S. 272 (1955)....21

*Texas v. United States,*
523 U.S. 296 (1998)....60

*The Amiable Isabella,*
19 U.S. (6 Wheat) 1 (1821)....12

*Thomas v. Union Carbide Agricultural Products Co.,*
473 U.S. 568 (1985)....60

*Tusch Enterprises v. Coffin,*
113 Idaho 37, 740 P.2d 1022 (1987)....8

*U.S. ex rel Lummi Indian Nation v. Washington,*
No. C01-0047Z, 2007 WL 3273545 (W.D. Wash. Nov. 2, 2007)....15

*U.S. ex rel Lummi Indian Nation v. Washington,*
No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007)....15

*U.S. ex rel. Ray v. Hibner,*
27 F.2d 909 (D. Idaho 1928)....46

*United States v Adair,*
723 F.2d 1394 (9th Cir. 1983)....passim

*United States v. Ahtanum Irrig. Dist.,*
236 F.2d 321 (9th Cir. 1956)....19, 20, 46

*United States v. Alaska,*
521 U.S. 1 (1997)....61

*United States v. Anderson,*
736 F.2d 42 (9th Cir. 1981)....passim

United States v. Anderson,
591 F. Supp. 1 (E.D. Wash. 1982) .......... 74

*United States v. Borden Co.*,
308 U.S. 188, (1939) .......... 33

*United States v. Cappaert*,
508 F.2d 313 (9th Cir. 1974) .......... 18

*United States v. Choctaw Nation*,
179 U.S. 494 (1900) .......... 12

*United States v. City of Challis*,
133 Idaho 525, 988 P.2d 1199 (1999) .......... 20, 65

*United States v. Idaho*,
210 F.3d 1067 (2000) .......... passim

*United States v. Idaho,*
95 F. Supp. 2d 1094 (D. Idaho 1998) .......... passim

*United States v. Midwest Oil Co.,*
236 U.S. 459 (1915) .......... 25

*United States v. New Mexico,*
438 U.S. 696 (1978) .......... 13

*United States v. Newmont USA Ltd.,*
504 F. Supp. 2d 1050 (E.D. Wash. 2007) .......... 69

*United States v. Reynolds*,
250 U.S. 104 (1919) .......... 6

*United States v. Rio Grande Dam & Irrig. Co.*,
174 U.S. 690 (1899) .......... 17, 18

*United States v. S. Pac Transp. Co.,*
543 F.2d 676 (9th Cir. 1976) .......... 68

*United States v. Washington*,
157 F.3d 630 (9th Cir. 1998) .......... 12

*United States v. Washington*,
18 F. Supp. 3d 1172 (W.D. Wash. 1991) .......... 30

*United States v. Washington*,
375 F. Supp. 2d 1050 (W. D. Wash. 2005) .......... 15, 16

*United States v. Winans,*
198 U.S. 371 (1905) .......... 78

*Washington v. Fishing Vessel Ass'n*,
443 U.S. 658 (1979) .......... 44, 45

*Western Shoshone Nat'l Council v. Molini*,
951 F.2d 200 .......... 22, 30

*Winters v. United States*,
143 F. 740 (9th Cir. 1906) .......... 10

*Winters v. United States*,
207 U.S. 564 (1908) .......... passim

**Statutes**

Act of July 26, 1866, 14 Stat. 253 .......... 26, 31

Act of July 9, 1870, 16 Stat. 218 .......... 27, 32

Act of March 3, 1877. 19 Stat. 377 .......... 32

Act of May 15, 1886, 24 Stat. 29 .......... 2

Act of May 1, 1888, 25 Stat. 113 .......... 38

Act of March 2, 1889, 25 Stat. 980 .......... 3, 39

Act of March 3, 1891, 26 Stat. 989 .......... passim

Act of August 15, 1894, 28 Stat. 286 .......... 5

Act of June 21, 1906, 34 Stat. 325 .......... passim

Act of May 19, 1958, 72 Stat. 121 .......... 6, 53

Act of Oct. 9, 1972, 86 Stat. 788 .......... 52

Agreement of March 26, 1887, 26 Stat. 989 .......... 28

Agreement of February 7, 1894, 28 Stat. 322 .......... 28

Treaty with the Kansa, June 8, 1825, 7 Stat. 244 .......... 75

Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707 .......... 4

Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 .......... 4

Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 .......... 75

16 U.S.C. § 799 (2015) .......... 60

16 U.S.C. § 807(2015) .......... 61

25 U.S.C. § 348 (2015) .......... 68

25 U.S.C. § 349 (2015) .......... 6

25 U.S.C. § 564m(a)(1976) .......... 78

43 U.S.C. § 661 (2015) .......... 26, 27, 32

43 U.S.C. § 321 (2015) .......... 32, 34
50 U.S.C. § 51 (2015) .......... 26, 31
50 U.S.C. § 52 (2015) .......... 26, 31

**Rules and Regulations**

I.R.C.P. 56 .......... 8
Executive Order of Sept. 27, 1917 .......... 19
Executive Order of Nov. 8, 1873 .......... 2, 35
18 C.F.R. § 6.2 (2016) .......... 60
127 F.E.R.C. ¶ 61,265 (June 18, 2009) .......... 59, 60

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*Waters and Water Rights* (Amy K. Kelly, ed., 2016) .......... 19

## I. STATEMENT OF UNDISPUTED FACTS

The Coeur d'Alene Reservation that exists today is the culmination of a series of federal actions. The first Coeur d'Alene reservation was set aside by President Andrew Johnson in 1867. The 1867 reservation was a small reservation centered on Hangman's Creek valley. *United States v. Idaho,* 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998).

The Tribe did not learn of the 1867 executive order until several years later. In 1872 the Tribe petitioned the United States to send a commission to negotiate for an expansion of the reservation. The Tribe asserted that they needed the Coeur d'Alene River and St. Joe River valleys because "we are not as yet quite up to living on farming . . . for a while yet we need have some hunting and fishing." *Id.* at 1103. Negotiations were held on July 26-28, 1873, resulting in an agreement to expand the reservation boundaries to include most of Coeur d'Alene Lake, the lower reaches of the St. Joe River, and the lower reaches of the Coeur d'Alene River. *Id.* at 1104-05. No transcript of the negotiations was kept, but one commissioner later reported 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.* at 1105.

In a letter dated November 4, 1873, the Commissioner of Indian Affairs advised the Secretary of Interior of the 1873 agreement and recommended that "pending the action of Congress upon said agreement I have the honor to recommend that the President be requested to issue an Executive Order setting apart the same for the use of said Indians . . . [i]n order that the tract thus described may be protected from trespass by white persons pending the action of Congress upon said agreement." State Ex. 2[1]

[1] Throughout this brief, "State Ex." will be used to refer to the exhibits accompanying the Affidavit of Steven W. Strack, filed contemporaneously with this memorandum.

On November 8, 1873, President Ulysses S. Grant issued an Executive Order providing that the lands described in the 1874 Agreement be "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." The Executive Order did not incorporate any other provisions of the negotiated agreement. State Ex. 3.

The 1873 Agreement "required approval by Congress before it became binding on the parties." 95 F. Supp. 2d at 1096. But, for various sundry reasons, the agreement "never was ratified by Congress." *Id.* In fact, Congress took no further action with regard to the Reservation until 1886, when, in response to repeated requests from the Tribe, Congress authorized negotiations with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation," with the proviso that any agreement made would not "take effect until ratified by Congress." Act of May 15, 1886, 24 Stat. 29, 44. In the agreement reached on March 26, 1887, the Tribe, in return for a payment of $150,000 and other consideration, agreed to "cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation . . . ." Act of March 3, 1891, 26 Stat. at 1027. In return the agreement provided that all lands within the 1873 reservation would be "held forever as Indian lands and as homes for the Coeur d'Alene Indians." 26 Stat. at 1028.[2]

When the 1887 Agreement was forwarded to Congress for approval, the Senate, at the urging of Oregon Senator John Mitchell, passed a resolution expressing concern that the reservation provided "more than 1,000 acres" to each member of the 476 member Tribe, and especially expressing concern that "Lake Coeur d'Alene, all the navigable waters of the Coeur d'Alene River, and about 20 miles of the navigable part of Saint Joseph River," were

[2] A copy of the Act of March 3, 1891, is provided as State Exhibit 12.

"embraced within this reservation." State Ex. 5 (Sen. Misc. Doc. No. 36). Mitchell's Resolution directed the Secretary of the Interior to determine whether "it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." *Id.*

After the Senate received a report from the Commissioner of Indian Affairs confirming that the 1873 Reservation included extensive navigable waterways, State Ex. 6 (Sen. Ex. Doc. No. 76 at 3), Congress directed the formation of a new commission 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." Act of March 2, 1889, 25 Stat. 980, 1002. The new commission sent to negotiate with the Tribe was specifically directed to the Senate resolution calling for a release of the navigable waters. State Ex. 7 at 483. *See also United States v. Idaho*, 210 F.3d 1067, 1078 (2000) ("Congress . . . authoriz[ed] negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell").

The resulting negotiations with the Tribe resulted in an agreement to cede over 180,000 acres of land and most of the navigable waters that were included in the 1873 Reservation. In previous litigation involving ownership of submerged lands, the United States alleged in its complaint that "[i]n 1889, the Coeur d'Alene Tribe ceded to the United States the approximate northern one-third of the 1873 Reservation, including approximately the northern two-thirds of the Lake." State Ex. 20 (Complaint, *United States v. Idaho* at 4). In the resulting judgment and decree, the court found:

> The United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes

portions of Lake Coeur d'Alene and the St. Joe River, but exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation.

State Ex. 21 (Judgment and Decree, *United States v. Idaho*).

In the subsequent appeal, the Ninth Circuit Court of Appeals concluded that "the reservation boundaries were redrawn by the 1889 agreement to split the lake." *United States v. Idaho*, 210 F.3d 1067, 1075 (2000) (emphasis added). Likewise, the Supreme Court concluded that in 1889, " the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000." *Idaho v. United States*, 533 U.S. 262, 269-70 (2001) (emphasis added).

In 1891, Congress, having obtained the cession of lands and navigable water that it had demanded, approved both the 1887 Agreement and the 1889 Agreement, as part of the Indian Appropriations Act of 1891. Act of March 3, 1891, 26 Stat. 989, 1027. All lands that the Tribe ceded in the 1887 and 1889 Agreements were "restored to the public domain." 26 Stat. at 1031.[3] Unlike many other treaties and agreements in the Pacific Northwest, neither the 1887 Agreement nor the 1889 Agreement separately reserved fishing or hunting rights either inside or outside the Reservation.[4]

In 1894, the Tribe, in return for a payment of $15,000, agreed to "cede, grant, and relinquish to the United States all right, title, and claims which they now, have, or ever had,"

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[3] While the term "public domain" has no official definition, it is commonly used to refer to lands "opened to sale or settlement." *Hagen v. Utah*, 510 U.S. 399, 412 (1994).

[4] *Cf.* Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 ("[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians"); Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707 ("the exclusive right of taking fish in the streams and lakes, included in said reservation . . . is hereby secured to the Indians aforesaid").

to a one-mile wide strip on the northern boundary of the reservation. Act of Aug. 18, 1894, 28 Stat. 322. The ceded lands included the town of Harrison, which had been established illegally within the Reservation. State Ex.14 (H. Ex. Doc. No. 158 at 4). The agreement "explicitly included a portion of the lake bed in the cession." *United States v. Idaho*, 210 F.3d 1067, 1079 (2000). Notably, in stating the Tribe's agreement to sell the land after prolonged negotiations, tribal leader Pierre Wildshow stated:

> The white people settled not only at Harrison, but also on our land above Harrison, and we Indians all know that. We have known this for a long time, but we felt sure that Washington would soon see about it. Where Harrison now stands was the place where the Indians used to fish. But we will let it go. We have come to this conclusion: that we will let them have one mile across the boundary of the Reservation.

State Ex. 14 (H. Ex. Doc. No. 158 at 12). As with the 1887 and 1889 Agreements, there was no express reservation of fishing rights on the ceded lands, not surprising given Wildshow's statement that the Tribe "used to" fish there.

After congressional ratification of the 1887, 1889, and 1894 cessions, all lands within the Coeur d'Alene Reservation were held for the benefit of the Tribe. But:

> In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.

*County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). In accordance with this policy, Congress, fifteen years after the 1891 Act, directed the Secretary of the Interior to issue a trust patent for 160 acres of land to each "man, woman and child" of the Tribe. Act of June 21, 1906, 34 Stat. at 335. All lands within the Reservation "not allotted or reserved for Indian school, agency, or other

purposes" were opened to non-Indian ownership. 34 Stat. at 336. Three years earlier, the Supreme Court had confirmed that Congress had the power to open reservations to nonmember homesteading without the consent of the occupant tribe. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

Initially, allottees were issued trust patents, and the United States continued to hold the lands "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 25 U.S.C. § 348 (2015). After 25 years, fee title was to be conveyed to the allottee, unless the trust period was extended by the President. 25 U.S.C. § 348 (2015). Once the allottee had fee title, the allottee was free to sell the allotment. 25 U.S.C. § 349 (2015). Fee allotments are no longer federal land: "the United States surrendered its trust by conveying the absolute fee-simple title to the Indian allottee or his heirs." *United States v. Reynolds*, 250 U.S. 104, 108 (1919).

The opening of the reservation created several distinct categories of land ownership within the Reservation. Just over 104,076 acres were initially allotted to the 541 members of the Coeur d'Alene Tribe, and to 97 Spokane Indians living on the Reservation. Ross R. Cotroneo and Jack Dozier, "A Time of Disintegration: The Coeur d'Alene and the Dawes Act," *Western Historical Quarterly* 405 (1974). State Ex. 18 at 411-12. The lands remaining after allotment were opened to nonmember homesteading. Additional lands came into nonmember ownership as allottees received fee title to their allotments and either sold them or lost them to bank foreclosures. *Id.* at 416. By 1933, the total acreage of allotments held by tribal members or other Indians had dropped to 62,400.64 acres. *Id.* at 417.

In 1958, 12,877.65 acres of lands that were never homesteaded were returned to tribal ownership, to be held by the United States in trust for the Tribe. Act of May 19, 1958, 72 Stat. 121. The Tribe has since acquired additional lands within the Reservation, some of

which have been taken into trust by the United States. But, the vast majority of lands within the Reservation remain in nonmember ownership, as illustrated in the map included as Exhibit 1 to the Affidavit of David B. Shaw.

In sum, following the opening of the Reservation under the 1906 Act, and subsequent actions restoring some lands to tribal ownership, the Coeur d'Alene Reservation contains a variety of land ownership categories. The places of use for the United States' reserved water right claims include the following categories of land:

- Submerged lands, held in trust by the United States for the benefit of the Coeur d'Alene Tribe;
- Allotments continuously held in trust from 1906 to the present day by the United States for the benefit of tribal members or nonmember Indians;
- Lands opened to homesteading but never claimed, and subsequently restored to trust ownership for the benefit of the Tribe by the Act of May 19, 1958;
- Lands homesteaded by nonmembers, and later reacquired by the Tribe; and
- Allotted lands that were alienated to nonmembers, and later reacquired by the Tribe;[5]

The United States' reserved water right claims do not appear to apply to the following categories of land, with the exception of instream flow fish habitat claims:

- Lands homesteaded by nonmembers, and currently owned in fee by nonmembers;
- Former allotments now owned in fee by nonmembers; and
- Allotments held in fee by tribal members or nonmember Indians.

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[5] Reacquired homesteads and allotments may be held in fee ownership by the Tribe or by the United States in trust for the Tribe; the United States did not distinguish between trust and fee lands in making its claims: State Ex. 23 (U.S. Discovery Resp.).

As will become apparent in the course of the State's argument, the complex patchwork of land ownership within the Reservation to nonmember ownership bears on the issue of whether the United States is entitled to some of the reserved water rights that it claims, and is particularly relevant to the determination of the proper priority date of each claim.[6]

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is entered if the documents, affidavits, admissions, interrogatory answers, and other materials show that there are no genuine issues as to any material facts and the moving parry is entitled to judgment as a matter of law. I.R.C.P. 56; *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990). Controverted facts are to be construed in the light most favorable to the non-moving parry. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1025 (1987). The burden is on the moving party to prove the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1960). In turn, the non-moving party' s case must be based on more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 ( 1990). If cross motions for summary judgment are filed, and the Court will be the ultimate trier of fact, then summary judgment is appropriate even if "the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions"

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[6] It is not feasible possible at this time to provide the Court with information regarding which places of use are on tribal trust lands, trust allotments, or re-acquired trust or fee lands. The State requested such information by interrogatory, but the United States declined to provide the requested information because it viewed the request as burdensome, subject to a "joint litigation and common interest privilege," and because it asserted "that the legal issue of priority date should be fully briefed in the summary judgment context before the United States undertakes the time and expense to conduct title searches." State Ex. 23. (U.S. Discovery Resp.)

if the evidentiary facts themselves are not disputed, "because the court alone will be responsible. for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

## III. ARGUMENT

### A. THE RESERVED WATER RIGHTS DOCTRINE IS A METHODOLOGY FOR DETERMINING INTENT; ABSENT EVIDENCE OF INTENT THERE CAN BE NO RESERVATION OF WATER RIGHTS.

#### 1. The Reservation of Water Rights Cannot be Implied to Remedy an Omission in the Act Creating the Reservation.

In the seminal case of *Winters v. United States*, 207 U.S. 564 (1908), the United States asserted that in setting aside the Fort Belknap Indian Reservation, Congress intended to reserve water for irrigation, and sought to enjoin private water users from constructing dams on the Milk River upstream of the Reservation "or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation." *Id.* at 565.

The court began by noting the essential nature of the bargain struck between the Tribe and the United States: prior to the 1888 agreement establishing the Fort Belknap Reservation, the Tribe had occupied and used an extensive reservation set apart by act of congress and executive orders. *Id.* at 567. The earlier reservation had been "adequate for the habits and wants of a nomadic and uncivilized people." *Id.* at 576. The tribe eventually agreed to cede most of the earlier reservation and remove to a portion of it "to become a pastoral and civilized people." *Id.* The smaller reservation, however, was inadequate to meet the needs of a "pastoral and civilized" people "without a change of conditions [because] [t]he lands were arid, and, without irrigation, were practically valueless." *Id.*

The Court was thus required to choose "between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." *Id.* Under the first

inference, the Indians were "deceived by [the government's] negotiators" to "reduce the area of their occupation and give up the waters which made it valuable or adequate." *Id.* Under the second inference, the United States agreed to exercise its power "to reserve the waters and exempt them from appropriation under the state laws." *Id.* at 577. In the end, the second inference won out, because a reservation of arid lands without an accompanying reservation of water would have "destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." *Id.*

The *Winters* doctrine, however, was not intended to provide a court *carte blanch* authority to conclude water was reserved simply because water will enable the tribe's uses of reservation resources. In fact, the *Winters* "doctrine" does not establish any substantive rule of law, but merely establishes a methodology for implying intent to reserve appurtenant water rights as an incident of the reservation of land. Actual, original intent to reserve water has always been a requirement of the *Winters* doctrine, starting with the decision in *Winters* itself. The decision of the Ninth Circuit, as affirmed by the Supreme Court, stated: "We are of the opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the court below, 'to insure to the Indians the means wherewith to irrigate their farms,' and that <u>it was so understood by the respective parties</u> to the treaty at the time it was signed." *Winters v. United States*, 143 F. 740, 746 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908) (emphasis added). Idaho Court decisions confirm that "[w]hether there has been a federal reservation of water, and the quantity of water reserved, are questions of legislative intent." *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000).

Treaty interpretation is similar to contract interpretation in many respects. *Bonanno v. United States*, 12 Cl. Ct. 769, 771 (1987). A court's interpretation need not be supported by

substantial evidence "since the interpretation of a treaty is a question of law and not a matter of fact." *Citizens Band of Potawatomi Indians of Okl. v. United States*, 391 F.2d 614, 618 (Ct. Cl. 1967). The court's examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact, but merely serves as an aid to the legal determination which is at the heart of all treaty interpretation. *Bonanno*, 12 Cl. Ct. at 772. "[A]ppropriate landmarks are, *inter alia*, the instructions to the treaty commissioners, their report to their superior, the treaty preamble, the President's message transmitting the treaty to Congress and the subsequent treatment given to the terms of the treaty by the United States and the Indians." *Citizens Band of Potawatomi Indians*, 391 F.2d at 619.

As the United States will undoubtedly emphasize, in determining intent, ambiguities in agreements with Indian tribes are be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan,* 175 U.S. 1, 11 (1899). This is so because of the unequal bargaining position of the parties and because tribal representatives, often working through interpreters, were likely "unfamiliar with all the forms of legal expression" employed in drafting the agreement. *Id.*

But such canons of construction are limited: "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). Courts cannot, "under the guise of [liberal] interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean." *Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 179 (1947) (interpreting several treaties between the United States and the Ute Indian tribes). Nor can the Court employ any "notion of equity or general convenience, or substantial justice," to "incorporate into an

Indian treaty something that was inconsistent with the clear import of its words." *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900).

> In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops--whatever may be the imperfections or difficulties which it leaves behind . . . .

*Id.* at 533 (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat) 1, 71-72 (1821)). The prohibition on supplying a *casus omissus* is particularly relevant. Black's Law Dictionary defines *casus omissus* as:

> A case omitted; an event or contingency for which no provision is made; particularly a case not provided for by the statute on the general subject, and which is therefore left to be governed by the common law.

*Black's Law Dictionary* 219 (6th ed. 1990).

In particular, the Court cannot correct an omission in an agreement or act of Congress when determining whether the various agreements establishing and diminishing the Coeur d'Alene Reservation embodied intent to reserve water rights. *See United States v. Washington*, 157 F.3d 630, 651 (9th Cir. 1998) (district court abused its discretion by applying notions of equity to redefine terms in treaty); *Choctaw Nation*, 179 U.S. at 532 ("It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians").

Together, *Choctaw* and *Winters* establish that a reservation of water must be based on the intention of the parties. "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation omitted). The Court cannot correct an omission, nor can it ignore or alter a plain term in a treaty, agreement, or act of Congress that is inconsistent with an asserted water right.

### 2. Intent to Reserve Water Can Only Be Implied Where Necessary to Fulfill a Primary Purpose of a Reservation and Without Such Water the Purpose Would Be Entirely Defeated.

Federal reserved water rights, whether for Indian reservations or other federal enclaves, are a narrow exception to what the Supreme Court has described as "the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). Each time the Supreme Court has addressed the "implied-reservation-of-water doctrine, it has emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Reserved water rights can be implied only after the Court "has carefully examined both the asserted water right and the specific purposes for which the land was reserved. *United States v. New Mexico,* 438 U.S. 696, 700 (1978).

Given Congress' almost invariable deference to state water law, reserved water rights are implied only if "necessary to fulfill the very purposes for which a federal reservation was created." *Id.* at 702. If 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.*

The Ninth Circuit Court of Appeals has repeatedly affirmed that the distinction between primary and secondary purposes is applicable to Indian reservations. In *United States v Adair*, 723 F.2d 1394 (9th Cir. 1983), the court held that the *New Mexico* primary/secondary distinction clarifies that "the scope of the implied right is circumscribed by the necessity that calls for its creation," and held that water rights were implied only for primary purposes of the Klamath Reservation, not for secondary uses. *Id.* at 1408-09. In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the court again applied the "*New Mexico* test," and found that the primary purpose test is met if the reservation would be "valueless without water" (*id.* at 46, citing *Winters*, 207 U.S. at 576), or if water was "essential to the life of the Indian people." *Id.* at 46, quoting *Arizona v. California*, 373 U.S. 546, 599 (1963).

Here, the United States, throughout its claims, asserts that the primary purpose of the Coeur d'Alene Reservation was to create "a homeland for the Coeur d'Alene Tribe." Such an assertion, however, simply begs the question, for the terms "homeland" and "reservation" are synonymous. The term "homeland" means "native land" or "a state or area set aside to be a state for a people of a particular national cultural, or racial origin." *Merriam-Webster's Collegiate Dictionary* 554 (10th ed. 1996). The term "reservation" means "[a] tract of public land set aside for a special purpose; esp., a tract of land set aside for use by an Indian tribe." *Black's Law Dictionary* 1309 (7th ed. 1999).

In short, the term "homeland" is simply too generic to identify a reservation's primary purpose. Thus, while the Ninth Circuit, in *Walton*, noted that "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed," 647 F.2d at 47, it went on to apply the *New Mexico* test to examine the specific purposes for which the Colville Reservation was established. *Id.* at 47-48. The court concluded that while

the purpose of the executive order setting aside the Colville Reservation was "to provide a homeland," it was a homeland set aside with the specific purpose of providing "for the Indians to maintain their agrarian society." *Id.* at 47. Then, again applying the primary purpose doctrine, the court concluded that another primary purpose was to preserve "the tribe's access to fishing grounds." *Id.* at 48.

In *United States v. Washington*, 375 F. Supp. 2d 1050 (W. D. Wash. 2005), the district court addressed whether merely establishing a "homeland" was a sufficient purpose to imply reserved water rights.[7] The court concluded that the assertion of a "homeland" purpose was "contrary to the 'primary purpose' doctrine under federal law" because it was "simply a formulation that does away with determining the purpose and begs the question of what water was reserved to make the 'homeland' livable." 375 F. Supp. 2d at 1065 (quoting Washington's brief). The court concluded that "[t]he Court cannot find a 'homeland' primary purpose and end its inquiry . . . [t]he appropriate inquiry under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established. These implied *Winters* rights are necessarily limited in nature." *Id.*

Likewise, in the Big Horn River Adjudication, the district court rejected the special master's determination that the purpose of the Wind River Reservation was to "provide the Indians a homeland where they could establish a permanent place to live and to develop

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[7] The court's decision was subsequently vacated pursuant to a settlement agreement so that it had "no preclusive effect as to any party, any person or entity bound by this Order and Judgment." (*U.S. ex rel Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007)). The court did not repudiate its earlier decision, but merely vacated it in deference to the parties' concern that its determination of priorities would be "at odds" with the settlement agreement, which "abandon[ed] the federal and state priority systems for allocation of water rights. *U.S. ex rel Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 3273545 at *9 (W.D. Wash. Nov. 2, 2007).

their civilization." *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 94 (Wyo. 1988). The Wyoming court, asked to review the district court's rejection of the homeland purpose, concluded that the district court had correctly ruled that the treaty's reference to "'permanent homeland' does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation." 753 P.3d at 97.[8]

The requirement that water be reserved only for the primary purposes of a reservation is particularly relevant to the United States' claim that it reserved water rights outside the boundaries of the Coeur d'Alene Reservation. Such a claim begs the question: if the primary purpose of the reservation required tribal control of water rights in streams outside the reservation, why were such streams not included in the reservation in the first instance?

## B. THERE CAN BE NO IMPLIED RESERVATION OF WATER RIGHTS OUTSIDE THE BOUNDARIES OF THE COEUR D'ALENE RESERVATION.

The story of the Coeur d'Alene Reservation is one of reduction: the United States sought, and the Tribe agreed, in a series of actions, to reduce the area used and occupied by the Tribe in order to free up land for Euro-American settlement, while identifying and setting apart sufficient resources to meet the Tribe's needs at the time. As the Tribe's needs changed, the area set apart for their use was reduced. In 1873, an area of approximately 600,000 acres was set aside for their use, with the understanding that the Tribe would vacate the remainder of their aboriginal territory and make it available for settlement. *United States v. Idaho*. 95 F. Supp. 2d at 1095. In 1887 that agreement was formalized, and the Tribe

[8] The court's statement that Article IV of the treaty referred to a "permanent homeland" was a paraphrasing of the treaty. Earlier in the opinion, the court quoted article IV, in which the Indians agreed to "make said reservations their permanent home . . . ." 753 P.2d at 95 (quoting Treaty with the Shoshones and Bannocks).

agreed explicitly to "cede, grant, relinquish, and quitclaim to the United States all rights, title, and claim" to all lands outside the then-Reservation boundaries. Act of March 3, 1891, 26 Stat. at 1027. In 1889 the Tribe then agreed to "cede, grant, relinquish, and quitclaim" the northern portion of the 1873 Reservation, *id.*, "including approximately two-thirds of Lake Coeur d'Alene." *Idaho v. United States*, 533 U.S. at 269-70.

The intent of the parties in making the initial Reservation, and each subsequent cession, was to eliminate the Tribe's property interest in off-reservation property and resources. The elimination of all off-reservation property interests cannot be reconciled with the United States' claim that it reserved off-reservation fish habitat for the Tribe's exclusive benefit. For the reasons described below, the claims for off-reservation fish habitat instream flows must be denied.

### 1. Water Rights Are Reserved by Implication Only Where the Subject Waters Are Within or Bordering a Reservation of Land.

The United States claims it reserved instream flow water rights on 72 stream reaches: six of the stream reaches are wholly within the Reservation, eight are partially within the Reservation, and the remainder are wholly outside the Reservation. The stated purpose of the claims is to provide fish habitat for fish species harvested within the Reservation. This section of the State's Memorandum is limited to those stream reaches fully or partially outside the current Reservation boundaries. The State asserts that instream flow claims for stream reaches outside the boundaries of the Reservation must be denied as a matter of law.

The implied-reservation-of-water-doctrine has from its beginning been limited to waters within or adjacent to federal land reservations. The seeds for the doctrine were sown in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899), wherein the United States sought to enjoin the construction of a private dam on the basis that it violated federal laws

prohibiting the obstruction of navigable streams. *Id.* at 692. The defendants claimed the right to construct the dam under territorial laws allowing the appropriation of the stream for irrigation and other purposes. *Id.* at 692-93.

The Court began its analysis by holding that under the common law, "[e]very proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands . . . ." *Id.* at 702 (quoting Kent's Commentaries on the Common Law). Although the Court recognized the rights of states to "change this common-law rule, and permit the appropriation of the flowing waters," *id.*, it went on to hold as follows:

> Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations 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 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; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

*Id.* at 703.

The above quote has been identified as the first declaration of the principle of "reserved" water rights. *United States v. Cappaert*, 508 F.2d 313, 322 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976) ("[i]t was established before *Winters* 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").

Nine years after the *Rio Grande* decision, the Supreme Court, in *Winters v. United States*, was asked to determine whether Congress, in establishing the Fort Belknap Indian Reservation, had reserved the right to divert water from the Milk River. 207 U.S. at 565-66.

As the Court took care to note, the Reservation boundary went to the middle of the River. *Id.* at 565. The United States sought to prevent upriver appropriators from interfering with "the riparian and other rights" of the United States and the Tribe "to the uninterrupted flow of the waters of the river, which had been employed by the Tribe for irrigation many years before the upriver diversions. *Id.* at 567. The Court citing *Rio Grande*, held that the "power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Id.* at 577.

From *Rio Grande* and *Winters* to the modern day, courts have applied the federal reserved water rights doctrine only to waters within or bordering a reservation, as noted by numerous commentators.[9] In *Conrad Inv. Co. v. United States,* 161 F. 829, 831 (9th Cir. 1908), the court found *Winters* to be applicable because the reservation boundary, as in *Winters*, went to the middle of the river that was the source of the claimed reserved water right. Then in *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956), the court was presented with a claim of a reserved right to use the water of Ahtanum Creek, which forms one boundary of the Yakima Reservation. The court was confronted with the fact that "the Yakima treaty described the Ahtanum as the north boundary of the reservation, whereas the boundary of the Fort Belknap reservation in the *Winters* case was described as beginning at a

[9] *Waters and Water Rights* (Amy K. Kelly, ed., 2016), reports that "[t]he Cocopah Reservation, which does not border the Colorado River, was nevertheless awarded reserved water from the Colorado River in *Arizona v. California*, 376 U.S. 340, 344 (1964)." *Id.*, § 37.01(b)(3) n.78. The report does not appear to be correct, however. The executive order establishing the Cocopah Reservation describes the inclusion of lands contiguous with the Colorado River:

> It is hereby ordered that the west half of the south-east quarter of section twelve and the west half of the north-east quarter of section thirteen, township ten south, lots two, four, five and six, together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northwest quarter of Section thirty, township nine south of range twenty-four west of the Gila and Salt River Meridian, Arizona, be, and the same are hereby withdrawn and set apart for the use and occupancy of the Cocopah Indians . . . .

Executive Order of Sept. 27, 1917, IV Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1001 (1929).

point in the middle of the main channel of Milk River." *Id.* at 325. The court resolved the difference by applying the common law rule that "a tract of land bounded by a nonnavigable stream is deemed to extend to the middle of the stream." *Id.*

The fact that the court felt the need to demonstrate that the river was within the boundaries of the reservation establishes that Indian reserved water rights are limited to waters within or bordering the reservation, a principle recognized by many commentators. *See, e.g.,* A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States,* 50 Nat. Resources J. 471, 473 (2010) ("*Winters v. United States* held that Indian tribes could claim a hybrid riparian and appropriative right to irrigate their reservations" and describing the right as "a share of the available water flowing through or under the reservation"); Harry B. Sondheim & John R. Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 S. Cal. L. Rev. 1, 2 (1960) (comparing Indian implied-reserved water rights to riparian rights because "they attach to waters which are contiguous to designated tracts of land"); David E. Getches et al., *Federal Indian Law* 131 (4th ed. 1998) (noting that historically, *Winters* rights have been recognized only "from streams on and bordering reservations"). Courts have likewise noted such limitation: "Indian *Winters* rights reserve a paramount right to the use of as much water which is in contact with the reservation as is needed to fulfill the primary purposes for which the land was reserved." *Holly v. Confederated Tribes & Bands of Yakima Indian Nation,* 655 F. Supp. 557, 558 (E.D. Wash. 1985).

Thus, the Idaho Supreme Court has correctly decided that "[a] reserved water right must be based on a reservation of land." *United States v. City of Challis,* 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999). In determining whether there is an implied reserved water right,. "the threshold question is whether the government has in fact withdrawn and reserved the lands." *Sierra Club v. Block,* 622 F. Supp. 842, 854 (D. Colo. 1985). "[T]his issue

must be answered affirmatively before it can be determined whether reserved water rights may be implied." *Id.*

As a methodology grounded in implication, the reserved water rights doctrine is properly limited to the determination of whether a reservation of land includes appurtenant water rights within the boundaries of, or at least bordering on, the reserved land. This limitation is affirmed by the nature of appurtenant rights. Black's Law Dictionary defines "appurtenant" to describe a thing "[a]nnexed to a more important thing." *Black's Law Dictionary* 111 (8th ed. 2004). "Appurtenance" is similarly defined to mean "[s]omething that belongs to or is attached to something else." *Id.* In short, the reservation of the "more important thing," land, can include rights annexed to such lands, but where land is not reserved, the reservation of a water right may not be implied: it would have to be segregated from land ownership and reserved expressly.

This is particularly true of rights reserved by, or for the benefit of, an Indian tribe. Tribes occupied vast territories to the exclusion of others. Such rights of occupation have been termed "aboriginal title" by the federal courts: "Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory." *Confederated Tribes of Chehalis Indian Reservation v. State of Wash.,* 96 F.3d 334, 341 (9th Cir. 1996). Aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Such occupation included not only a right to occupy the land, but rights incidental to occupation of the land, such as hunting, fishing, and gathering rights. *United States v. Adair*, 723 F.2d at 1413. And, as recognized in *Winter* , another right incidental to occupation of land was "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 acts of civilization." 207 U.S. at 576; *see also Adair*, 723 F.2d at 1413 (aboriginal title included "an aboriginal right to the water used by the Tribe as it flowed through its homeland").

In short, when the United States, whether by treaty, agreement, or executive order, withdraws and reserves land within a Tribe's aboriginal territory for the use of the Tribe, the incidents of aboriginal title that, together, formed the right of occupation, may, by implication, accompany the reservation of land. But, outside the boundaries of the reservation, no land is reserved, and likewise no incidents of title are preserved. Even those incidents of title that are more easily segregated from land ownership, such as hunting and fishing rights, have been found to exist outside reservation boundaries only if expressly reserved. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985) ("[i]n the absence of any language reserving any specific rights in the ceded lands, the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing"); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) (reviewing case law and concluding "a general transfer of title" extinguishes all implied aboriginal rights).

### 2. Implying Off-Reservation Water Rights Would Be Inconsistent with the Purposes of Reservation.

Even if the Court were to conclude that water rights could be reserved by implication outside the boundaries of a reservation, summary judgment would nonetheless be justified because the purpose of the 1873 Executive Order, establishing a temporary reservation, and later congressional acts establishing the permanent Reservation, was to extinguish, not reserve, rights outside the boundaries of the Reservation.

The 1873 Reservation was a response to the 1867 executive order that established a reservation for the Tribe centered in the Hangman Valley. *U.S. v. Idaho*, 95 F. Supp. 2d at 1103. Upon learning of the Reservation several years later, the Tribe wrote a petition asking that the Reservation be enlarged to include the St. Joseph and Coeur d'Alene River valleys, stating "for a while yet we need have some hunting and fishing." *Id.* at 1103. A three member commission was sent to visit the Coeur d'Alenes and other tribes, for the purpose of inducing the tribes "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." *Id.* at 1104. The commissioners and the Tribe agreed to enlarge the Reservation to include the two river valleys and most of Coeur d'Alene Lake, and "[i]n exchange for this enlarged reservation, and other compensation, the Tribe agreed to relinquish all claims to the remainder of its aboriginal lands." *Id.* at 1105. While the agreement was never ratified, the President set the lands aside by executive order.

As the federal court concluded:

> The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands."

*Id.* at 1107.

Moreover, the federal court went on to find that:

> In contrast to the intended purpose of the reservation created for the Indians in *Skokomish Indian Tribe* [320 F.2d at 207][denying tribal claims to submerged lands because the Skokomish Indians were free to roam and fish at their usual

> off reservation locations], here a reason for expanding the reservation to include the Tribe's fishery was precisely so that tribal members could be confined within its boundaries.

*Id.* at 1109 n.16.

In short, the undisputed facts demonstrate that the Tribe, rather than seeking off-reservation rights, sought to obtain a Reservation that included all waterways it considered necessary to its survival. The Government's intent was to confine the Tribe to the lands within the Reservation and to obtain a release or relinquishment of lands outside those boundaries so that the lands would be available for settlement. In previous litigation asserting off-reservation fish habitat water right claims for the benefit of the Nez Perce Tribe (which, unlike the Coeur d'Alene Tribe, retained off-reservation fishing rights), this Court concluded 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."[10] Here, the lack of any intent to reserve rights outside the Reservation, is, if anything, even more compelling, and the claims must be denied.

### 3. The President Lacked Authority to Reserve Instream Water Rights Outside the Boundaries of a Reservation of Land.

As discussed *supra*, the 1873 Executive Order was a temporary measure intended to last only until congress acted to establish a permanent reservation,, and was superseded by later agreements with the Tribe. But, assuming or purposes of argument only that the

[10] SRBA Consolidated Subcase 03-10022, *Order on Motion to Strike Testimony of Dennis C. Colson; Order on United States' and Nez Perce Tribe's Joint Motion to Supplement the Record in Response to the Objectors' Motions For Summary Judgement, I.R.C.P. 56(f); Order on Motion to Strike Exhibit Transcription of Letter From General Palmer to George Manypenny, Commissioner Of Indian Affairs; Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions*, at p. 38, SRBA Dist. Ct., Nov. 10, 1999. Hereinafter cited as "SRBA 03-10022 Summary Judgment Order."

Executive Order retains any relevance to the United States' claims, the Court must conclude that any rights reserved by the Executive Order apply only to the lands specifically reserved in the order.

The President, in setting aside the 1873 Reservation, would not have understood himself to have the authority to reserve water outside the lands he set aside. Unlike some executive orders, the 1873 Executive Order was not explicitly authorized by statute. But, as the Supreme Court recognized in *Grisar v. McDowell,* 73 U.S. (6 Wall.) 363 (1867):

> [F]rom an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

*Id.* at 381. The Court confirmed the President's power to make withdrawals of land in *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915):

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

*Id.* at 475.

The *Midwest Oil* decision also confirmed the President's power to make withdrawals of land in aid of future legislation, *id.* at 475-76, as was the case with the 1873 Coeur d'Alene Reservation. In doing so, the President was not intruding on Congress' legislative power over the public domain, but rather was exercising proprietary rights by means of implied congressional consent. *Id.* at 474-75.

While the Supreme Court has recognized the President's implied proprietary authority to withdraw lands and appurtenant waters from the public domain, the power to withdraw both lands and waters does not imply authority to reserve water rights for streams and rivers on public domain lands outside federal reservations. In fact, the creation of such a water right, which "consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411, was barred on public domain lands. Several years before the issuance of the 1873 Executive Order Congress, by a series of Acts, had required that all waters on public domain lands be available for private appropriation without restriction.

The first of these acts, the Mining Act of 1866, opened public domain lands to exploration and development by miners. Act of July 26, 1866, 14 Stat. 253 (codified at 50 U.S.C. §§ 51, 52 and 43 U.S.C. § 661). Recognizing that mining often required extensive diversion of water, the Act included a provision that specifically disclaimed congressional intent to interfere with water rights and systems that had developed under state and local law:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

Act of July 26, 1866, 14 Stat. 253 (codified at 43 U.S.C. § 661).

Four years later Congress amended the Mining Act of 1866 to include placer mines, and reaffirmed that water rights obtained under applicable state or local laws were not to be affected by grants made under the Act:

> "[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or right to ditches and reservoirs used

> in connection with such water rights, as may have been acquired under or recognized by the [1866 Act]."

Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661).

While courts have recognized that the President can reserve both lands and appurtenant waters from the public domain, the President, under the terms of the Mining Act, had no authority to preserved flows in waterways on the public domain by prohibiting diversions therefrom. The President cannot accomplish by executive order that which Congress has specifically prohibited. *See Chamber of Commerce of the U.S. v. Reich,* 74 F.3d 1322, 1332–39 (D.C.Cir.1996) (concluding that Executive Order that directly conflicted with the National Labor Relations Act was preempted). Nor can the Court "create Presidential authority where there was none," or hold, "under any acceptable rule of interpretation," that the Tribe was granted certain rights "merely because they thought so." *Confederated Bands of Ute* Indians, 330 U.S. at 179-80.

**4. In the Agreements of 1887, 1889, and 1894, the Tribe Ceded Any Right to Maintain Instream Flows Outside the Diminished Reservation.**

Even if the Court were able to ignore the President's lack of intent or authority to reserve instream flows outside the boundaries of the lands he set aside, the Court must still dismiss the claims, because in subsequent agreements establishing a permanent, diminished reservation, the Tribe and the United States mutually agreed to extinguish all right, title and claim the Tribe may have had to lands outside its current reservation. These subsequent agreements, once approved by Congress, superseded any rights that the Tribe may have retained in off-reservation streams in the years following issuance of the 1873 Executive Order. It is not possible to rationally conclude that the relevant agreements and congressional actions silently reserved instream flow water rights despite the explicit extinguishment of all right title and claim outside the diminished Reservation.

"The Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington." *U.S. v. Idaho*, 95 F. Supp. 2d at 1095. The Tribe held "Indian title" or "aboriginal title" to the lands it occupied.

> "Indian title is a creation of federal law. It is the title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign [and] includes a right to possession [and the] right to exclude all others . . . . Indian title cannot be alienated except by Act of Congress.

*Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989).

The Coeur d'Alene Tribe has, by agreement, thrice ceded portions of its original lands and waters to the United States. Each agreement contains explicit language of cession, with no reservation of fish habitat, or water rights for fish habitat, on ceded lands. For example, in the Agreement of March 26, 1887, the Tribe agreed to:

> cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

26 Stat. 989, 1027.

Three years later, the Tribe agreed to "cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had" to the northern third of the 1873 Reservation and the northern two-thirds of Coeur d'Alene Lake. 26 Stat. at 1030. Five years after that, the Tribe agreed to "cede, grant, and relinquish to the United States, all the right, title, and claim which they now have, or ever had" to a one mile wide strip along the northeastern boundary of the 1889 Reservation. Agreement of February 7, 1894, 28 Stat. 322.

The three cession agreements are striking in their scope: unlike other tribes, the Coeur d'Alene Tribe did not reserve any hunting, fishing, gathering or other usufructuary rights allowing it to use, occupy, or access natural resources in the territories it ceded. Courts have remarked that "[t]he Act of 1891 . . . constitutes congressional action by which the Tribe gave up all rights they may have held to their tribal aboriginal land." *State of Idaho v. Andrus*, 720 F.2d 1461, 1463 (9th Cir. 1983).

One 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. An explicit extinguishment of rights can be countermanded only by an equally explicit exception. For example, in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), the Supreme Court examined a treaty in which the Klamath Tribe ceded "all their right, title, and claim" to lands outside their reservation. *Id.* at 766. The Court concluded that such a "general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation." *Id.* The Court went on to specifically reject the Tribe's assertion that "silence itself, viewed in historical context, demonstrates an intent to preserve tribal hunting and fishing rights in the ceded land." *Id.* at 770-71. The Court concluded that if a Tribe "ceded all its rights in and to the land" then "silence concerning specific rights in [a cession] Agreement is consistent only with an intent to end any special rights of the Tribe outside the reservation." *Id.* at 773 n.23.

There can be no question that the Coeur d'Alene Tribe's cession of "all right, title and claim" included a cession of all incidents and rights that accompanied the Tribe's aboriginal title:

A general conveyance of title to lands carries with it any implicit hunting or fishing rights that the Indians possessed in the lands, absent an express reservation of those rights. Hunting and fishing rights need not be separately ceded or abrogated unless explicitly reserved by a prior agreement between the Tribe and the United States. *Molini*, 951 F.2d at 202-03.

As with hunting and fishing rights, there is no requirement that water rights in aboriginal territories be ceded separately from the cession of "lands." Any right that the Tribe possessed to preserve instream flows in its aboriginal territory was an incident of aboriginal title, not a right separate from the Tribe's title to the lands. The Ninth Circuit has found as much, when it concluded, in *United States v Adair*, that the Klamath Tribe's aboriginal title included a right to use water to support fishing:

> [The Tribe's] ancestral homeland encompassed some 12 million acres. Within its domain, the Tribe used the water that flowed over its land for domestic purposes and to support its hunting, fishing and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or 'Indian title' to all of its vast holdings. . . . The Tribe's title also included aboriginal hunting and fishing rights, and, by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland.

*United States v. Adair*, 723 F.2d at 1413 (citations omitted).

If the use of flowing water is an component or incident of aboriginal title, then the cession of aboriginal title necessarily carries with it any right to the use of water in the ceded territory. "The extinguishment of aboriginal title extinguishes all incidents of aboriginal title and any use rights such as fishing in the aboriginal lands, unless expressly reserved by treaty or federal law." *United States v. Washington*, 18 F. Supp. 3d 1172, 1201 (W.D. Wash. 1991).

In its claims, the United States attempts to circumvent the express cession of all rights to water outside the current Reservation by asserting that the off-reservation instream

flow claims are not asserted to support any off-reservation fishing rights, but rather to provide "fish habitat for fish species harvested within the Reservation." This is a distinction without a difference. Regardless of where the fishing takes place, the claims seek to preserve fish habitat outside the reservation. Fish habitat consists of both the river beds and the overlying water. The river beds, and the right to waters flowing over such beds, were expressly ceded, and the claimed water rights must be denied.

### 5. Congress' Acceptance of the Tribe's Cession of All Rights Outside the Reservation Was Intended to Implement Laws Requiring that Water on the Public Domain Be Available For Private Appropriation.

In the Act of March 3, 1891, Congress ratified the Tribe's cession of all "right, title and claim" to lands outside the diminished Reservation, and went on to provide as follows:

> That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply,[11] and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States.

26 Stat. at 1031. Congress' directive returning the ceded lands to the public domain is significant, because Congress, by a series of Acts, had earlier required that all waters on public domain lands be available for private appropriation without restriction.

As discussed above in relation to the 1873 Executive Order, the first of these acts, the Mining Act of 1866, specifically disclaimed any intent to interfere with water rights on public domain lands that had developed under state and local law for "mining, agricultural, manufacturing or other purposes." Act of July 26, 1866, 14 Stat. 253 (codified at 50 U.S.C.

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[11] Section 2301 of the Revised Statutes allowed homesteaders to acquire property immediately by paying the minimum price at any time before the expiration of the mandatory five year occupation.

§§ 51, 52 and 43 U.S.C. § 661). The policy of protecting state law water rights on the public domain was affirmed four years later in the Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661 (2015)).

In 1877, Congress passed a third statute, the Desert lands Act, to permit persons in most western states to enter and claim irrigable lands "by conducting water upon the same" in an amount not to "exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation." Act of March 3, 1877 (codified at 43 U.S.C. § 321). Congress then went on to provide that:

> [A]ll surplus water over and above such actual appropriation and use, together with the water from all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

Act of March 3, 1877, (codified at 43 U.S.C. § 321).

The Supreme Court has interpreted the three acts as recognizing and affirming not only those water rights vested at the times of the acts' passage, but also all future water rights appropriated under state law:

> [The Acts of 1866 and 1870 were] not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.

*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). Indeed, the Court went on to conclude that Congress intended to abrogate any claim that waterways on public domain lands could be protected from diversion under common law principles ensuring that flows remained in the stream for the benefit of all land owners:

> [Congress] thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers.

*Id.* at 157. In effect, the Desert Lands Act reserved all waters on the public domain for private appropriation:

> Congress intended . . . that all nonnavigable waters [on the public domain] should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction.

*Id.* at 162.

Thus, prior to the Act of 1891, which returned all lands ceded by the Coeur d'Alene Tribe to the public domain, Congress had provided that all nonnavigable waters on the public domain were reserved for appropriation under state laws. Congress' restoration of the lands ceded by the Tribe to the public domain must be read in a manner consistent with Congress' prior directives in the Mining Acts of 1866 and 1870, and the 1877 Desert Lands Act:

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest."

*United States v. Borden Co.*, 308 U.S. 188, 198, (1939)(quoting *Red Rock v. Henry,* 106 U.S. 596, 601 (1883) (other citations omitted).

A clear and manifest intent to repeal prior legislation exists only where "the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute." *Frost v.*

*Wenie*, 157 U.S. 46, 58 (1895). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Here, it is impossible to reconcile the assertion that Congress, in the 1891 Act, intended, by its silence, to preserve instream flows for the use of the Tribe on the public domain despite then-existing laws providing that all nonnavigable water ways on the public domain would "remain and be held free for the appropriation and use of the public." 43 U.S.C. § 321 (2015). A federal reserved instream flow "entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411. Because then-existing laws reserved non-navigable waters on the public domain for appropriation under state law, Congress could not take action to prevent public appropriation of those same waters unless it did so explicitly.

## C. RESERVED WATER RIGHTS WITHIN THE RESERVATION ARE LIMITED TO THE PURPOSES ULTIMATELY SET BY CONGRESS WHEN IT ESTABLISHED THE CURRENT RESERVATION IN THE ACT OF MARCH 3, 1891.

### 1. The 1873 Executive Order Was A Temporary Measure that Did Not Permanently Reserve Water Rights.

The history and purpose of the 1873 Executive Order has been previously determined in litigation between the United States, the Tribe, and the State, which addressed title to submerged lands underlying navigable waterways within the Reservation. There, the primary issue was the purpose of the 1873 Reservation, because the question of what was originally reserved was critical to the issue of whether or not the Reservation was intended to include the submerged lands.

The 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.

95 F. Supp. 2d at 1109.

The court reached its conclusions regarding the intent of the 1873 Executive Order after a two week trial involving thousands of historical documents and the testimony of multiple expert witnesses.

The United States appears to base its consumptive use claims on the 1873 Executive Order, since it claims a priority date of November 8, 1873, for such claims. As discussed above, however, the federal district court concluded only that the purpose of the 1873 Executive Order was to preserve the Tribe's access to water resources that were, at the time, necessary for the Tribe's survival. While it is undisputed that some members of the Tribe had taken up farming by 1873, and many others did shortly thereafter, the decision in *United States v. Idaho* is not consistent with the assertion that setting aside lands for agriculture was a primary purpose of the Executive Order. As the court noted, "the majority of the expanded reservation was not suitable for farming." *United States v. Idaho*, 95 F. Supp. 2d at 1105.

Indeed, the history of the 1873 Reservation stands in stark contrast to the circumstances that generally compel the conclusion that agriculture is the primary purpose of a reservation. A reservation of water rights for irrigation and industry is usually implied when a Tribe agrees to reduce its land holdings to a point where they are no longer sufficient

to provide its subsistence needs, and the "smaller tract would be inadequate without a change in conditions." *Winters*, 207 U.S. at 576. In other words, the reservation of water for irrigation is implied when the tribe's land holdings are reduced to a point where reliance on irrigated agriculture is fundamental to the tribe's survival.

Here, the Tribe "refused to settle within the confines of the 1867 reservation, which would have required the Tribe to subsist by agriculture, and demanded a reservation large enough to provide for its survival by means of traditional subsistence activities. 95 F. Supp. 2d at 1109. The Tribe's stated reason for expansion of the Reservation was that "for a while yet we need have some hunting and fishing." 95 F. Supp. 2d at 1105 (quoting Tribe's petition of November 18, 1872). In effect, the tract reserved in 1873 was intended primarily to provide for the Tribe's needs without any need for systematic agriculture.

In this case, however, the analysis of whether water rights were ultimately reserved for the purposes claimed by the United States and the Tribe does not rest with the Executive Order. As the Tribe's own expert has stated, it is undisputed that the Executive Order:

> was seen as a temporary measure to fully protect the agreement until the necessary legislation could be passed. The executive order was intended to mirror the agreement signed between the United States and the Coeur d'Alene Tribe and protect the lands, rights, and resources set aside in the 1873 Agreement until such time as Congress confirmed the reservation.

E Richard Hart: A History of Coeur d'Alene Tribal Water Use (excerpt provided as State Ex. 22).

Given Hart's statement, it is undisputed that the President intended to act in a manner that preserved for Congress the final decision regarding the lands and waters that would be permanently reserved for the Tribe's use. It 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 required substantial reductions to both lands and waters that effectively altered the purposes for which it was set aside. Because the Constitution vests Congress with plenary authority over both federal property and Indian affairs,[12] any action that Congress took with regard to Reservation property rights supersedes the prior action taken by the President, except to the extent the prior action was ratified and incorporated into the 1891 Act.

Court decisions confirm that the purposes of executive order reservations do not survive subsequent agreements between the Tribe and the United States to establish a permanent reservation within the bounds of an earlier and larger executive order reservation, especially if the executive order reservation was "evidently designed to be temporary." *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S. 159, 163 (1936) (addressing reservation for Blackfeet Indians). If a portion of the executive order reservation was ceded to the United States, and the remainder was set apart as a permanent reservation by congressionally-approved agreement, then in such an instance, the "last reservation is the one with which we now are concerned. It rests entirely on the agreements or conventions which were ratified and given effect by Congress" and any earlier executive orders are "superseded by congressional action and no longer are of any force." *Id.*

The "last reservation" doctrine is particularly applicable to water rights. The same executive orders and agreements at issue in *British-American Oil Producing Co.* were the basis for the creation of the reserved water rights doctrine in *Winters*. As in *British-American Oil Producing Co.*, the lands of the Fort Belknap Reservation had originally been part of the large

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[12] "[T]ribes are subject to plenary control by Congress." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014); *see also Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968) (recognizing Congress' "plenary powers over the Indians and their property").

reservation in Montana reserved by congressional act and executive orders for various Indian tribes—in 1888 portions of those lands were ceded by the tribes and three new reservations, including the Blackfeet Reservation and the Fort Belknap Reservation, were established within the old reservation. Act of May 1, 1888, 25 Stat. 113. The act ratifying creation of the Fort Belknap reservation was the same act discussed in *British-American Oil Producing Co.* *See Winters*, 207 U.S. at 568 (discussing Act of May 1, 1888); *British-American Oil Producing Co.*, 299 U.S. at 162 (finding that Act of May 1, 1888, superseded earlier executive orders).

In determining the purpose of the Fort Belknap reservation in *Winters*, the Court, as it did in *British-American Oil Producing Co.* looked solely to the purposes of the agreement ratified by the Act of May 1, 1888: it did not look to the purposes of the earlier, larger, reservation established by statute and executive order: "The case, as we view it, turns on the agreement of May, 1888, resulting in creation of the Fort Belknap Reservation." 207 U.S. at 575. The purposes of the earlier executive order reservation, which, due to its large size had been "adequate for the habits and wants of a nomadic and uncivilized people," *id.* at 576, were not relevant to determining the purposes of the new reservation, because the carving out of a new, smaller reservation within the bounds of the old reservation was a "change in condition." *Id.*

Likewise, the 1889 Agreement with the Coeur d'Alene Tribe was a "change in condition." As in *Winters*, the purposes of the earlier, larger reservation were superseded by the 1889 Agreement, which set apart a new, smaller reservation within the bounds of the old. Thus, in order to fully understand the purpose for which the Coeur d'Alene Reservation was permanently established, the critical question is what purposes did Congress and the Tribe have in mind when they finally reached agreement on a permanent reservation within the bounds of the earlier, superseded executive order reservation?

In answering such question, the starting point is the plain language of the agreements establishing the Reservation: "courts cannot ignore plain language [contained in an agreement] that . . . clearly runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774. If the Court deems any provision in the agreements to be ambiguous, the relevant material facts include the legislative history, as published in the congressional record, reports of commissions sent to negotiate with the Tribe, the transcripts of such negotiations, and "the subsequent treatment given to the terms of the treaty by the United States and the Indians." *Citizens Band of Potawatomi Indians*, 391 F.2d at 619; *see also Osage Tribe of Indians v. United States*, 66 Ct. Cl. 64, 80 (1928) (if a "treaty is unambiguous [and its] meaning is clear without the aid of extraneous facts" the court cannot "reform" it to say something its does not).

### .2. The Stated Purpose of the Reservation, as Finally Approved by Congress in 1891, Was to "Promote the Progress, Comfort, Improvement, Education, and Civilization of Said Coeur d'Alene Indians."

The agreement to cede aboriginal lands and confirm the 1873 Reservation boundaries was signed on March 26, 1887. 26 Stat. at 1029. Congress refused to approve the Reservation as described in the 1887 agreement, and ordered additional negotiations with the Tribe. Act of March 2, 1889, 25 Stat. at 1002. An agreement to diminish the Reservation was signed on September 9, 1889. 26 Stat. at 1030. Congress approved both the Tribe's 1887 cession of its aboriginal lands and its 1889 agreement to diminish the Reservation in the Act of March 3, 1891, 26 Stat. at 1027. The 1891 Act is reminiscent of the act that led the Supreme Court to find an implied reservation of water rights in *Winters*, where the reduction of the Tribe's original reservation to a smaller reservation which required reliance on agriculture for survival was a "change of conditions" that implied intent to reserve water to fulfill the purposes of the new Reservation. *Winters*, 207 U.S. at 576; *see also Walton*, 647

F.2d at 47 ("[w]e also consider [the Indians'] need to maintain themselves under changed circumstances").

The purposes of both the Tribe and Congress are plain on the face of the 1891 Act. In the 1887 Agreement, the Tribe and the federal negotiators, in describing the purposes for which expenditures would be made, agreed, in addition to constructing a saw and grist mill, to purchase articles "as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." 1887 Agreement, art. 6, 26 Stat. at 1028. Such directions to expend money in a certain manner are reliable evidence of the purposes for which lands were reserved. In *United States v. Adair*, the Ninth Circuit relied on a similar treaty provision stating that monies paid to the Tribe in consideration for the land ceded by the treaty "shall be expended . . . to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education" as establishing that an "essential purpose" of the reservation was the promotion of agriculture. 723 F.2d at 1410.

After securing a reduction in the Coeur d'Alene Reservation, Congress confirmed, in its approval of the 1887 and 1889 Agreements, that the money to be paid to the Tribe would be spent "as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." 26 Stat. at 1031. Congress then took the highly unusual step of directing that the $500,000 to be paid the Tribe for the cession of reservation lands in the 1889 Agreement would be appropriated as a lump sum and paid to the tribe pro rata. 26 Stat. at 1031.

The pro rata payment was approved only because Congress was informed, in a letter from the Commissioner of Indian Affairs, that "[i]t has not been the practice to pay such large sums of money to Indians cash in hand as it proposed in this case, but the Coeur

d'Alene Indians are far advanced in civilization . . . ." State Ex. 10 (Sen. Ex. Doc. No. 14 at 4). The Tribe was by then well-known for its reliance on, and success at, farming. When a commission was sent to the Coeur d'Alene Reservation in 1887 in response to the Tribe's request for negotiations, they found that the Tribe had already purchased most of what they needed using proceeds from their farming efforts:

> The reservation is one of the best we have visited. The Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest pattern, and indeed everything usually found on flourishing farms.
>
> . . . .
>
> There may be a few exceptions, but so far as not to excite comment. Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the Mission, which together make quite a village.
>
> . . . .
>
> These Indians had everything which they needed or wanted, or if not it was within their power to procure it, except a saw and grist mill.

State Ex. 10 (Sen. Ex. Doc. No. 14 at 50, 53).

Because the commissioners "ascertained that these Indians really needed and desired nothing in the way of clothing, food, agricultural implements, or school facilities" they took the unusual step of recommending that the Tribe be paid in cash for its ceded lands. State Ex. 10 (Sen. Ex. Doc. No. 14 at 53-54).

Two years later, the commissioners sent to negotiate the 1889 cession agreement reported:

> The Commission proceeded August 16 overland from the southern boundary of the reservation northward to the confluence of the St. Joseph River with Lake Coeur d'Alene, passing in their journey over the rich agricultural land and the many well-cultivated farms of the Indians lying in that portion of their territory. It was with much surprise and pleasure that the Commission noted the great progress made by these Indians in the ways of civilization and the arts of peace. Farms surrounded by better fences than their neighbors, the whites, burdened with golden grain that gave promise of a rich harvest; horses

and cattle in large numbers peacefully grazing upon hills covered with bunch-grass, made a picture truly pleasant to contemplate.[13]

The farmer assigned to the Coeur d'Alene Reservation described the Tribe as consisting almost entirely of farmers:

> Nearly two hundred farms have been opened. . . . [A]ll of the males are good farmers, many of them (the older ones) having two or three hundred acres of land under a good substantial rail fence, and under cultivation. The younger men of the tribe, equally as good workers and fully as willing, but receiving no aid from the Government, except in their schools, have not the means to go ahead as they would wish. With the exception of one or two trappers (old men) all are farmers. . . . By their own labor and exertions . . . they have accumulated about 150 farm wagons, 8 or 10 spring wagons, 160 plows, harness, mowing and reaping machines, sulky-plows, &c.[14]

Congress also had a copy of Seltice's letter to Colville Agent Sidney Waters reporting that some of the Tribe's farmers were hiring "whites" to help work their farms,[15] and a copy of agent Waters' report on his visit to the Coeur d'Alene Reservation:

> I found on examination that their farms were cultivated quite extensively, and that by their own exertions they were very well supplied with farming implements, and will say that I think these Indians far advanced over their white neighbors. They all have excellent fences and very comfortable frame or log houses, with the exception of four or five families who live in lodges."[16]

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[13] State Ex. 10: Report of the Coeur d'Alene Indian Commission, appointed March 2, 1889, reprinted in Sen Ex. Doc. No. 14, 51st Cong., 1st Sess. at 5-6 (1889).

[14] State Ex. 4: Letter, James O'Neil to Sidney Waters, March 26, 1885 (reprinted in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 12 (1886)).

[15] State Ex. 4: Letter, A. Seltice to Sidney D. Waters, April 20, 1884, reprinted in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 19 (1886)).

[16] State Ex. 4: Letter, Sidney Waters to Comm'r of Indian Affairs, Nov. 10, 1883 (reprinted in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 20 (1886)): Some may suggest that Waters was exaggerating the success of the Tribes under his jurisdiction. But Waters was apparently not prone to such exaggeration. In describing the living conditions of the Calispel Tribe, he stated: "They are the wildest of the Indians attached to this agency ... They have a considerable number of horses, cultivate the soil only in a small way, and subsist in a great measure on the results of their hunting, fishing, and trapping." Letter, Sidney Waters to Comm'r of Indian Affairs, June 26, 1884 (reprinted

The 1889 negotiations with the Tribe also indicate the parties anticipated the reduced Reservation would be useful primarily for cultivated agriculture. General Benjamin Simpson started the negotiations by telling the Tribe that "[t]he time is come when you, like the whites, should depend upon the cultivation of the soil . . . We know that cultivation of the soil is the very foundation of civilization, prosperity, and wealth." State Ex. 10 (Sen. Ex. Doc. No. 14 at 8). Accordingly, the parties limited the cession negotiations to "timber and mineral lands" or what tribal leaders called "the two big mountains." State Ex. 10 (Sen. Ex. Doc. No. 14 at 8, 11). Not once during the 1887 or 1889 negotiations did the Tribe express concern about loss of subsistence hunting and fishing on the ceded lands and waters. But the Tribe did express concern for six tribal members who lived in the area to be ceded and had developed what Seltice and Pierre Wildshow described as "farms," "fenced" lands, a "hay farm," and "improved places." State Ex. 10 (Sen. Ex. Doc. No. 14 at 11-12). The Tribe's reliance on agriculture was also demonstrated by Seltice's desire to conclude negotiations because "we are under expense and busy with our crops," and his request that that the federal negotiators "go and see the ones who are out harvesting" after getting the signatures of the tribal members who attended the negotiations. State Ex. 10 (Sen. Ex. Doc. No. 14 at 10, 12).

Given the plain language of the 1887 and 1889 agreements, the focus on preservation of agricultural lands, and the lack of even a single mention of subsistence needs during negotiations, the material facts in this historical record compel the conclusion that the primary purposes of the 1891 permanent Reservation were to provide a reservation suitable

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in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 16 (1886). Likewise, the commissioners who, in 1887, described the Coeur d'Alene Tribe as having "flourishing farms" described the Spokane Indians, in the same report, as being "very poor and ignorant" and afflicted with "idleness, poverty, and misery." State Ex. __ (Sen. Ex. Doc. No. 14 at 45).

for the Tribe's ongoing and future agricultural endeavors, and to promote the "progress, comfort, improvement, education, and civilization" of the Tribe.

### 3. While the Purpose of the Act of March 3, 1891 was to Promote Agriculture, it Is Not Possible to Conclude on Summary Judgment that Water Was Impliedly Reserved: the United States Must Ultimately Prove Irrigation Is Necessary and Practicable Upon Such Lands.

Given the foregoing discussion, the State does not dispute that a primary purpose of the Reservation, as permanently set aside in the 1891 Act, was to promote the Tribe's agricultural endeavors.

History is devoid of any reference, however, to the construction of irrigation projects on the Reservation. A 1911 Map of the Reservation's allotted lands includes the notation that "no irrigation ditches" had been constructed on the Reservation. State Ex. 16. A 1908 report indicated that reservation lands "do not require irrigation, as the rain fall is sufficient to grow a good crop." State Ex. 15. In *Winters*, the Court implied the reservation of irrigation water rights because the reservation "lands were arid, and without irrigation, were practically valueless." 207 U.S. at 576. Because the lands were arid, the implication was that the Tribe would not have ceded its aboriginal territory without the water needed to make agriculture possible on the reservation. *Id.* But, where sustainable agriculture is possible without irrigation, and irrigation would simply enable the growing of higher value crops, the reasoning of *Winters* does not necessarily apply.

In light of these principles, the Ninth Circuit, in *Adair*, 723 F.2d at 1415, held that reserved water rights are limited by the "moderate living standard" enunciated in *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979). The moderate living standard establishes "that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than,

is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Fishing Vessel Ass'n*, 443 U.S. at 686. While the moderate living standard was developed in the context of Indian fishing rights, the Court traced its origins to its decision in *Winters* and the irrigation water right decision in *Arizona v. California*, 373 U.S. 546, 600 (1963). *Fishing Vessel Ass'n*, 443 U.S. at 686.

Therefore, reserved water right claims for irrigation should be denied if the Tribe can earn a "moderate living" by raising basic grain or other crops on the claimed places of use on a long-term sustainable basis without irrigation. Such a determination will involve contested issues of fact not suitable for summary judgment, and may best be incorporated into the quantification phase of this litigation, at which the United States will bear the heavy burden of proving that irrigation is necessary and practicable to fulfill the 1891 Act's agricultural purposes.

#### 4. While the Parties to the 1887 and 1889 Agreements Likely Intended to Reserve Domestic Water Rights for Rural On-Reservation Households, Issues Remain Regarding the Quantity of Water Reserved.

The United States claims water rights for 979 present and future domestic wells to serve "self-supplied rural residential households." CSRBA, Notice of Claim 95-16672. The reservation of water for domestic needs on trust and tribal lands within the Reservation is consistent with the stated purpose of the 1891 permanent Reservation, which was to provide "homes for the Coeur d'Alene Indians." 26 Stat. at 1028. As noted in the facts described above, federal agents reported that most of the tribal members lived on farms with comfortable houses. It is therefore likely that all parties to the 1887 and 1889 Agreements intended to reserve water for domestic consumption.

Federal court decisions recognize reserved water rights may include water for domestic consumption, though some such decisions treat domestic water rights as a

component of irrigation water rights. *See Conrad Inv. Co.*, 161 F. at 832 (finding implied water right for "agricultural, stock raising, and domestic purposes"); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d at 327 (implying water right for "development of Indian agriculture upon the reservation" with no mention of domestic needs); *Adair*, 723 F.2d at 1415-16 (quoting *Arizona v. Calif.*, 373 U.S. 546, 600 (1963) (finding water right for "irrigation and domestic purposes" but describing it only as "sufficient water to 'irrigate all the practicably irrigable acreage on the reservation'"); *U.S. ex rel. Ray v. Hibner*, 27 F.2d 909, 910–11 (D. Idaho 1928) (holding that "Indian lands are entitled to a continuous flow through the entire year of a sufficient amount of water from Toponce creek for domestic and irrigation purposes for such portion of their lands as are susceptible to irrigation). *See also Walton*, 647 F.2d 42 (no mention of reserved water rights for domestic purposes); *Anderson*, 736 F.2d 1358 (no mention of reserved water rights for domestic purposes).

In the Big Horn River System Adjudication, the Wyoming Supreme Court found that:

> A reserved water right for municipal, domestic and commercial uses was included within the agricultural reserved water award. Domestic and related use has traditionally been subsumed in agricultural reserved rights . . . The court properly allowed a reserved water right for municipal, domestic, and commercial use.

*In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99 (Wyo. 1988); *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 275 (Wyo. 1992) (recognizing that water for "municipal, domestic, and commercial uses" was subsumed within tribe's "right to divert water from the Big Horn River System for agricultural purposes").

Whether domestic water rights should be quantified as a component of irrigation water rights or separately quantified is a matter for determination in the quantification phase

of this litigation, as is the number of wells and the individual volumetric limits for such wells. The court's order on entitlement, however, should clarify that the place of use for domestic water rights is limited to federal trust and tribal fee lands within the current Reservation. The claimed place of use for domestic water rights is described as "undetermined location[s] in Kootenai and Benewah counties." *See* CSRBA Claim No. 95-16672 (domestic wells for rural residential households). Any claim to use reserved water rights outside the boundaries of the Reservation must be denied, for it is not consistent with the stated purpose of the Act of March 3, 1891, which was to establish homes for the members of the Coeur d'Alene Tribe within the boundaries established in the 1889 Agreement.

### 5. While One Purpose of the Reservation was to Promote Commercial and Industrial Activities, Many of the United States' DCMI Claims Are for Activities Not Consistent with the Purposes of the Reservation.

The Act of March 3, 1891, provided unequivocally that a primary purpose of the Reservation was to "promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." 26 Stat. at 1028. The Act called for the erection of a steam-operated "saw and grist mill" on the Reservation, and provided for tribal members to be trained and employed as "millers, engineers, and mechanics." 26 Stat. at 1028.

In *Winters*, the United States alleged that water was necessary to achieve the purposes of "furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them." 207 U.S. at 567. The Supreme Court agreed that water could be reserved for both "agriculture and the arts of civilization," but provided little guidance otherwise. 207 U.S. at 576. Courts have noted the lack of "decisive federal cases on the extent of Indian water rights for uses classed as 'acts of civilization.'" *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754,

765 (Mont. 1985) (but noting possibility that "acts of civilization" may include water for industrial purposes).

In *Arizona v. California*, the Court approved the Special Master's determination that water was reserved for five Indian reservations along the Colorado River. The Special Master's Report specifically rejected a claim of reserved water rights for industrial purposes:

> The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations cannot be used for purposes other than agricultural and related uses.

State Ex. 17 (Special Master's Report at 265).

Likewise, in *State, Dep't of Ecology v. Yakima Reservation Irrig. Dist.*, 850 P.2d 1306 (Wash. 1993), the appellate court upheld the trial court's holding that the:

> The Yakima Indian Nation's diversions of water (over and above the amount listed [for irrigation purposes]) for commercial, industrial and other nonagricultural purposes are not in fulfillment of the primary purposes of the treaty and therefore are limited to those quantities of water that may be established pursuant to state law.

*Id.* at 1310.

Ninth Circuit cases addressing reserved water rights for Indian reservations are silent regarding water rights for commercial, industrial and municipal purposes. Rather, the federal courts in the Ninth Circuit have based reserved consumptive water rights on irrigation needs, coupled with acknowledgment of the Tribe's ability to use such water for other purposes as the Tribe's needs evolve. In *Walton,* the court found that "permitting the

Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life." *Walton,* 647 F.2d at 49.

The only case the State could locate explicitly recognizing reserved water rights for an "industrial" purpose is *In re Crow Water Compact*, 364 P.3d 584 (Mont. 2016), in which the Court was considering objections that a water rights compact allocating water to the Crow Tribe to support coal mining was "for an improper purpose." *Id.* at 589. The Court determined:

> [U]nder *Winters* and its progeny the tribe has a right to water for development of industrial interests. The Tribe's interests in the Ceded Strip are primarily mineral deposits (coal) that may be developed for industrial purposes. The allocation of water in the Ceded Strip reflects the opportunity to do that for the Tribe.

*Id.* (citations omitted). Because the court was approving a water rights compact, the decision has limited precedential value.

Given the dearth of authority for implying the separate reservation of water rights for commercial, industrial, and municipal purposes, the Court should, if it recognizes such rights at all, limit them to the type of industrial activities specifically anticipated and provided for in the 1891 Act. The Act provided for construction of a steam powered saw mill and a grist mill—the common thread being that these are the types of industries intended to support the agrarian purposes of the Reservation. There is no support, however, for implying water rights for recreation and tourist-based attractions, including the claims of reserved water rights for a casino, hotel, golf courses, and water park.[17] Commercial attractions geared to

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[17] Claim No. 93-7462 is for a "Casino and Hotel Complex Well." Claim No. 93-7463 is for the "Circling Raven Golf Course." Claim No. 93-7464 is for "Casino and Hotel Complex expansion (future)." Claim No. 93-7465 is for "RV Park adjacent to Circling Raven Golf Course (future),."

non-Indian customers were not a purpose of the 1887 or 1889 Agreements, which set apart lands for the exclusive use of the Tribe. While recreational visitation to the Reservation, particularly its navigable waterways, was occurring even before 1891, federal policy at the time was to discourage recreational visitation to Indian reservations. Indeed, the Act of June 30, 1834, 4 Stat. 729, "provided that a citizen of the United States should not go into the Indian country without a passport, and that he might be removed therefrom as an intruder." *Red Bird v. United States*, 203 U.S. 76, 81-82 (1906). Given such federal policies, it is not possible to conclude that Congress, in ratifying the 1887 and 1889 Agreements, intended to reserve water for tourism-based commercial activities.

The Tribe's claimed water right for a commercial fish hatchery likewise has no precedent in any reserved water rights case. If a reservation is set aside to preserve fishing access to anadromous fish populations, and such access is lost due to the construction of dams on rivers below the Reservation, then courts have implied a reservation of water rights to construct a replacement fishery. *See, e.g., Walton*, 647 F.2d at 48. No such circumstances are present here, however. There have been no subsequent off-reservation obstructions denying the Tribe access to historic fishing grounds within the Reservation. Any loss of access that the Tribe has had to traditional fishing grounds has been the result of the voluntary cessions of waterways in the 1887 and 1889 Agreements. No court has implied a water right for replacement of fishing areas lost by voluntary cessions.

Finally, if the Court determines that the Tribe is entitled to one or more of the DCMI water right claims, its decision on summary judgment should clarify that the place of use for any such DCMI water rights is limited to federal trust and tribal fee lands within the current

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Claim No. 93-7466 is for "Water Park (future)." Claim No. 95-16671 is for "Golf Course (future)." Claim No. 95-16675 is for "Golf Course Pond Maintenance (future)."

Reservation. The claimed place of use for several of the DCMI claims is described as "undetermined location[s] in Kootenai and Benewah counties." *See* CSRBA Claim No. 95-16669 (future fish hatchery); 95-16671 (future golf course); 95-16673 (biofuel plant); 95-16674 (future combined cycle combustion turbine plant); 95-16675 (future golf course pond); 95-16676 (5 ponds for fire suppression and fishing); 95-16677 (future municipal wells). Any claim to use reserved water rights outside the boundaries of the Reservation must be denied, for it is not consistent with the stated purpose of the Act of March 3, 1891, which was to establish homes for the members of the Coeur d'Alene Tribe within the boundaries established in the 1889 Agreement.

### 6. The United States Cannot Claim the Original Priority Date for Lands That Were Acquired by Nonmembers and Later Reacquired by the Tribe.

The United States claims a priority date of November 8, 1873, for its irrigation and DCMI claims, and a priority date of "time immemorial" for all other claims. As discussed above, the State asserts that the earliest priority date for irrigation and DCMI claims is March 3, 1891. But, regardless of which date the Court ultimately applies, the original date of reservation does not apply to many of the United States' claims because the places of use have not been in continuous federal ownership since 1891. As discussed *supra* pages 5-8 , the Coeur d'Alene Reservation was allotted and opened to homesteading in 1906. Most of the lands opened to homesteading were conveyed to non-Indians. Then, in the following decades, many allottees were granted fee title, and the allotments were sold to non-Indians. Eventually, lands that were opened but never homesteaded were restored to the Tribe, and the Tribe has since reacquired some homesteaded lands and some allotments that were sold to nonmembers.

In the case of *United States v. Anderson*, the Ninth Circuit was asked to determine whether reserved water rights remained attached to certain lands in the Spokane Reservation that had been opened to non-Indian ownership and alienated, and if so, which priority date applies. 736 F.2d at 1360. Much like the Coeur d'Alene Reservation, the lands in the Spokane Reservation had been allotted to tribal members, and the remainder opened to homesteading. *Id.* at 1361. As tribal members were issued fee title to allotments, some were sold to nonmembers. *Id.* As with the Coeur d'Alene Reservation, the Tribe had also reacquired various lands within the reservation, resulting in a patchwork of various categories of land ownership. *Id.* The court's analysis of the priority dates that apply to the various categories of lands is directly applicable here.

**Allotted Lands**. The United States retains many allotments in trust for the heirs of the original allottee, and the Tribe has purchased some allotments from such heirs. *See, e.g.*, Act of Oct. 9, 1972, 86 Stat. 788 (authorizing the Secretary of the Interior to sell allotments held in multiple ownership to the Coeur d'Alene Tribe). If irrigation is necessary and practicable, resulting in a reserved water right for irrigation, such water right may also be applied to allotments held in trust for individual Indians. "It is settled that Indian allottees have a right to use reserved water." *Walton*, 647 F.2d at 50. "It does not diminish the allottees' water rights to hold that the water and irrigation system belong to the tribe with a concomitant right to delivery of water in the allottees." *N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 409 (1986). The priority date for allotments held in trust by the United States is the date the permanent reservation for agricultural purposes was established, March 3, 1891. The priority date of March 3, 1891, would apply to allotments continually held in trust or tribal ownership from the date of allotment.

**Reacquired Allotments**. If an allotment was conveyed to a non-Indian purchaser, the reserved water right was likewise conveyed, and retains its original priority date so long as the non-Indian successor "puts [it] to beneficial use with reasonable diligence following the transfer of title" and maintains the priority date through continued use. *Anderson*, 736 F.2d at 1362. In such instance the Tribe, upon reacquiring the allotment, is "entitled to an original priority date." *Id.* If 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. *Id.* at 1361-62 .

**Act of 1958 Restored Trust Lands.** If irrigation is necessary and practicable, resulting in a reserved water right for irrigation, such water right may be claimed for lands held in trust for the Tribe. In 1906, the unallotted lands on the Coeur d'Alene Reservation were opened to homesteading. But, in 1958, 12,877.65 acres of opened lands that were never homesteaded were restored to trust status. Act of May 19, 1958, 72 Stat. 121. The priority date for such water rights would be the date of reservation, March 3, 1891. *See Anderson*, 736 F.2d at 1361 (lands opened to homesteading but never claimed carry priority date as of date of reservation's creation if restored to trust status).

**Reacquired Homestead Lands**. The Tribe has reacquired some homesteaded lands by purchasing the lands from the nonmember owners. If irrigation water rights are claimed for lands that were homesteaded, and later reacquired by the Tribe, the Ninth Circuit has determined that the opening of reservation lands to homesteading, and the subsequent conveyance of title to nonmembers, "terminate[s] the availability of *Winters* rights" on the conveyed lands. *Anderson*, 736 F.2d at 1363. If such lands are reacquired by the Tribe, the Court must "treat these lands in a manner analogous to that of a newly created reservation and find that the purposes for which *Winters* rights are implied arise at the time

of reacquisition by the Tribe." *Id.* at 1363. Thus, reserved water rights decreed for reacquired lands will carry the earlier priority date of either: (1) the date the homesteader or his successors perfected a water right on the homesteaded lands under state law, or (2) if no water right was perfected by the homesteader or his successors, than the reserved water right "will have a priority date as of the date of reacquisition, rather than an original, date-of-the-reservation priority." *Anderson*, 636 F.2d at 1361.

### 7. The Alleged Reservation of the Right to Maintain the Elevation of Coeur d'Alene Lake at "Natural" Levels is Inconsistent with the Tribe's Cession of over 80% of the Lake and Specifically the Cession of Post Falls to Frederick Post.

The United States claims "sufficient water to reflect the natural Lake process [of Coeur d'Alene Lake and related waters] prior to Post Falls Dam—consistent with the federal and tribal intent as it was understood in 1873." CSRBA, Claim No. 95-16704. The claimed water right (which is stated as a lake elevation, not as a storage volume) acknowledges that lake levels are currently regulated by Avista Corporation pursuant to a license issued by the Federal Energy Regulatory Commission (FERC) to operate Post Falls Dam. *Id.* Hence, the claim "does not seek to affect present licensed operation at Post Falls," but is submitted to "address the possibility that the dam will be removed or altered." *Id.*

After the Lake was split by the Act of March 3, 1891, the United States retained approximately 15.5% of the Lake, as it was commonly mapped before construction of the Post Falls Dam.[18] Today, under the terms of the FERC License for Post Falls Dam, the lake is maintained at a level of 2,128 feet above mean sea level throughout the summer. At that level, approximately 18% of Lake is within the Reservation boundary.[19] By its terms, Claim

[18] Affidavit of David B. Shaw. *See also* State Ex. 10 (Sen. Ex. Doc. No. 14). The map between pages 14 and 15 shows the extent of the Lake then understood to be within the diminished Reservation.

[19] *Id.*

No. 95-16704 only seeks to maintain water elevations in "[t]hat portion of Lake Coeur d'Alene and its related waters that are located within the boundary of the Coeur d'Alene Reservation." The Court can take judicial notice, however, that limiting a lake level water right to the Reservation boundaries is not only impractical, it is impossible. Given that fact, the United States seeks to control the lake elevation for all of Coeur d'Alene Lake, despite claiming that is seeks only to control the elevation within the small portion of the Lake held in trust for the Tribe.

The United States' claim of the right to control the lake elevation is not consistent with the purposes of the 1891 Act. Both undisputed historical documents and court decisions establish that (1) that the Lake was split due to congressional concerns that tribal control of the entire Lake was not in the public interest and (2) that the Tribe explicitly bargained for, and in fact insisted on, private control of Post Falls, the outlet that controls the Lake's elevation.

In 1988, Oregon Senator John Mitchell secured the passage of a Senate Resolution alleging that the Reservation then embraced "Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River." State Ex. 5 (Sen. Misc. Doc. No. 36, 50th Cong., 1st Sess.). The Resolution alleged that those waters were "the most important highways of commerce in the Territory of Idaho," and expressed concern that "all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the Reservation line are trespassers." *Id.* The Resolution directed the Secretary of the Interior to report:

> [W]hether, in the opinion of the Secretary, 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; and also whether it is

> advisable to release any of the navigable waters aforesaid from the limits of such reservation.

*Id.*

The resolution was prompted by "pressure to open up at least part of the reservation to the public (particularly the Lake)." *United States v. Idaho,* 210 F.3d 1067, 1071 (9th Cir. 2000). In response to the Resolution, the Secretary of the Interior submitted to the Senate a letter from the Commissioner of Indian Affairs addressing the questions in the Resolution. It stated, in part:

> [M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which <u>would be of very great benefit to the public</u>; but this 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 so taken.
>
> . . . .
>
> I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of <u>such portions of their reservation as they do not need, including all or a portion of the navigable waters</u>, upon fair and very reasonable terms.

State Ex. 6 (Sen. Ex. Doc. No. 76 at 6-7 (1888)) (emphasis added).

In the resulting negotiations with the Tribe, which led to the 1889 Agreement, the Lake was split by drawing a boundary line across the Lake just south of the Coeur d'Alene River, as was initially explained to the Tribe by General Simpson, the lead negotiator:

> I will explain the boundaries. Commencing at the northeast corner of the Coeur d'Alene Reservation, thence along the northern boundary line of the reservation to the north west corner; thence south along the division line between Washington and Idaho Territories to a point 12 miles south of the said northwest corner; thence due east to the west margin of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the point at the mouth of the Coeur d'Alene River; <u>then due east across said Lake to said point</u>; thence southerly along the east shore of said lake to a point 1 mile north of the St. Joseph River; thence on a parallel line

> with the north bank of said St. Joseph River, 1 mile distant from said bank, to the east line of the said reservation; thence northerly along the east line of said reservation to the place of beginning.
>
> Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural lands along the St. Joseph River.

State Ex. 10 (Sen. Ex. Doc. No. 14 at 9 (1889)) (emphasis added). After further negotiations the federal negotiators and the Tribe settled on the following boundaries for the lands to be ceded:

> Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

Act of March 3, 1891, 26 Stat. at 1030.

In short, the 1889 agreement "split the lake—a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe, and the maps submitted to Congress." *United States v. Idaho*, 210 F.3d 1067, 1075 (2000).

Because "the natural reading of all available documentation points to a purposeful division of the Lake," *id.*, the Tribe could not have understood itself to be reserving the sole right to determine the water levels that would be maintained throughout the entire Lake. This is particularly true given the Tribe's insistence that a provision be added to the 1891 Act approving the Tribe's prior conveyance of Post Falls to Frederick Post. The last section of

the 1891 Act quotes verbatim a statement by Coeur d'Alene chief Andrew Seltice, stating in part:

> Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alene Indians, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels . . . .

Act of March 3, 1891, 26 Stat. at 1031-32. Congress directed that Post Falls be surveyed and patented to Frederick Post. 26 Stat. at 1031. The survey conducted in 1891 and 1893 showed the three dams that Post had constructed across the three channels of the Spokane River. State Ex. 13.

Given the purposeful division of the Lake, the Tribe's retention of only a small portion thereof, and particularly the Tribe's insistence on conveying the outlet of the Lake to Frederick Post, it is not possible to imply an intent to reserve a "water right" that allows the Tribe to dictate water levels throughout the Lake. By ceding Post Falls without any reservation or restriction of the building of dams, the Tribe well understood that control of the lake level would be in the hands of Fredrick Post and his successors. Moreover, the United States' "lake level maintenance" claim is not a typical water right, since it is partially expressed in part as a lake elevation, and seeks to protect the United States' sovereign interest in submerged lands by ensuring such lands remain submerged. The respective

authorities of the State, the United States, and the Tribe to protect their interests in submerged lands through control of the overlying water, however, is not within the scope of this adjudication. For such reasons, the United States "lake level maintenance" claim must be denied.

Another reason for denying the "lake level" claim is that it purports to assert a right to specified outflows "[a]s measured by the United States Geological Survey gage located on the Spokane River near Post Falls, ID." CSRBA, Claim No. 95-16704. Yet, as noted above, the Tribe specifically ceded all property rights in Post Falls, and to the entirety of the Spokane River, in the 1889 Agreement. Act of March 3, 1891, 26 Stat. at 1031-32. As discussed *supra* in relation to the Tribe's off-reservation fish habitat claims, there is no precedent for the decree of implied federal reserved water rights on streams which are outside the Reservation. The explicit cession of all right title and claim of the Spokane River prohibits any implied right to maintain flows in the River. If the Tribe had intended to reserve the right to maintain certain flows in the Spokane River it would have had to do so expressly: rights in ceded properties cannot be reserved by silence. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. at 773. N.23 ("silence concerning specific rights in [a cession] Agreement is consistent only with an intent to end any special rights of the Tribe outside the reservation").

#### i) The claim for lake level maintenance must also be denied because it is based on speculative future needs.

The United States' claim of water for lake level maintenance is not based on any past or current needs of the Coeur d'Alene Tribe. At present, the elevation of Coeur d'Alene Lake is controlled by the Post Falls Dam, which is operated by the Avista Corporation pursuant to the terms of a FERC license that does not expire until 2059. 127 FERC

¶ 61,265 (June 18, 2009). By its own admission, the United States' lake level claims would have no present effect because it "does not seek to affect present licensed operations at Post Falls." CSRBA, Claim No. 95-16704. In fact, the claim is only asserted to "address the possibility that the dam will be removed or altered" at some future date. *Id.*

The claimed water right is simply too speculative to adjudicate. In general, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985)). "Under the ripeness test in Idaho, a party must show (1) the case presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication." *State v. Manley*, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005).

Here, there is no assurance that Post Falls Dam will ever be removed. Surrender of the current FERC license and removal of Post Falls Dam would have to be approved by FERC. 16 U.S.C. § 799 (2015). "Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe, and, if the project works authorized under the license have been constructed in whole or in part, upon such conditions with respect to the disposition of such works as may be determined by the Commission." 18 C.F.R. § 6.2 (2016). And, if the current licensee does not re-apply at the expiration of the current 50 year license, any number of options may occur:

> Under the [Federal Power Act], any of several things can happen when a license to operate a hydroelectric facility expires: (1) the federal government can take over the project, 16 U.S.C. § 807; (2) FERC can issue a new license to the same licensee "upon reasonable terms," *id.* § 808(a)(1); (3) FERC can issue a license to a different licensee "upon reasonable terms," *id.*; (4) FERC can

license all or part of the project for nonpower use, *id.* § 808(f); and (5) FERC can decline to issue a new license.

*City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 71 (D.C. Cir. 2006).

Even if the current operator surrenders its license, such surrender does not provide the Tribe the right to remove the dam and restore the Lake to "natural" levels. Post Falls was patented to Fredrick Post pursuant to the Act of March 3, 1891, 26 Stat. at 1031-32. The patent included all three river channels and the surrounding uplands. Given the Tribe's insistence that Post Falls be patented to Frederick Post, the Tribe could not have foreseen a day when Post Falls, and control of the Lake's outlet, would be retroceded to the Tribe in order to return the Lake to pre-patent water flow conditions.

Moreover, the possibility of any such retrocession to the Tribe is rendered even more remote by the fact that any retrocession would have to be approved by the State. By law, all submerged lands passed to the State upon its admission to the Union on July 3, 1890. *Pollard v. Hagan*, 44 U.S. 212, 228-29 (1845). The only exception is for submerged lands conveyed or reserved prior to statehood. *United States v. Alaska*, 521 U.S. 1, 41 (1997). But, the 1873 Reservation only went to "the center of the channel of said Spokane River." Ex. Order of Nov. 8, 1873. After the State's admission, Congress had no authority to convey submerged lands outside the boundaries of the Reservation. *Pollard*, 44 U.S. at 230 ("to give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty"). For such reasons the State never conceded the validity of the patent to Frederick Post.

Eventually, the State and Washington Water Power Company ("WWP," since renamed "Avista Corporation"), entered into a settlement agreement by which WWP

disclaimed "any and all right, title or interest in the bed of the Spokane River lying within the areas described in the Post Patent lying below the natural or ordinary high water mark." State Ex. 19 (Settlement Agreement § 7). In turn, the State granted WWP a perpetual easement to occupy the beds and banks of the Spokane River for the purpose of operating and maintaining hydropower facilities "so long as WWP has a valid federal license or right to operate the Post Falls Development." State Ex. 19 (Settlement Agreement § 8).

Thus, in the event Avista ever surrenders its license, the State would assume control of the property, and could either apply for a new FERC license or authorize another to do so. Given the State's ownership of Post Falls, the Tribe could ensure permanent removal of Post Falls Dam, and restoration of the natural hydrograph which is the premise of Claim No. 95-16704, only by acquiring the property from the State. Absent tribal ownership of Post Falls, the Tribe can provide the Court no assurance that the claimed water right will ever be implemented.

Given the many contingencies involved with the surrender of a FERC license, the removal of the dam at Post Falls, and the State's control of Post Falls in the event the license is ever surrendered, the Court cannot predict whether the Tribe will ever acquire the right to prevent the storage of water in Coeur d'Alene Lake, nor can the Court predict the conditions in the Lake that may exist if such an event were to ever occur: climatic or other conditions may be such that a water right to maintain a "natural" hydrograph may have little or no practical application. Given the future uncertainties, the claimed water right is only an abstract concept, with no concrete application. "The purpose of the ripeness requirement is to prevent courts from entangling themselves in purely abstract disagreements." *Manley*, 142 Idaho at 342, 127 P.3d at 958.

Even if the Court were to conclude that the Tribe is entitled to some type of lake level maintenance claim in the event of the dam's removal, such claim is currently incapable of quantification. In *Adair*, the Ninth Circuit held that a Tribe's reserved water right for fish habitat must be based on "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe." *Adair*, 723 F.2d at 1414-15. The court went on to clarify that a water right for fish habitat must be measured by the amount of fish necessary to provide the tribe a moderate living, as determined by the Tribe's use of the resource at the time the water right is decreed:

> Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living.

*Id.* at 1415.

The contingent water right sought by the United States may have no application for a century or more, if ever. The Court cannot speculate as to what amount of fish harvest will provide the Tribe a moderate living 100 years from now, nor can it speculate as to the amount of water necessary to provide sufficient habitat for such theoretical harvest levels under climatic, water supply, and economic conditions that may exit at such time.

In sum, even if the Court were to conclude that the parties to the 1887 and 1889 Agreements intended to reserve a water right to maintain the level of Coeur d'Alene Lake, such determination has no current application, and could not be embodied in a water right decree, particularly given that neither the entitlement element nor the quantity element is incapable of determination without conjecture. For such reasons, the claim must be denied.

### ii) Any water right for future lake level maintenance would have a priority date concurrent with the date of dam removal.

In the event the Court concludes that the United States is entitled to a water right for lake level maintenance in the event of dam removal, such a water right should be decreed with a priority date concurrent with the date of dam removal. As discussed *supra*, when a Tribe reacquires reservation lands that were alienated to nonmembers, the water right associated with such lands does not relate back to the date of reservation, since there is an intervening private ownership of the land. *Anderson*, 736 F.2d at 1363. Here, there is an analogous situation, because the Tribe and the United States effectively alienated control of the lake level. As discussed above, the Tribe specifically and purposefully purported to alienate Post Falls to Frederick Post, and Congress approved the Tribe's conveyance in the Act of March 3, 1891. And, as discussed above, any future attempt to restore Coeur d'Alene Lake to a "natural" hydrograph by removing Post Falls Dam would require the Tribe to acquire either title to Post Falls Dam or the right to control construction at Post Falls.

If at some point the United States and the Tribe were to acquire the right to control operations at Post Falls Dam, such acquisition is akin to the reacquisition of alienated land. As the Ninth Circuit held in *Anderson*, "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." 736 F.2d at 1363. If alienated land is subsequently reacquired, it is "analogous to that of a newly created reservation," and the Tribe obtains a "priority date for these rights as of the date of reacquisition, rather than an original, date-of-the-reservation priority." *Id.* at 1361. Likewise, when the United States and the Tribe voluntarily ceded Post Falls and authorized water storage on the submerged lands of the Reservation, they ceded the right to maintain the lake in its "natural" state. Currently, the Tribe has no authority to prevent storage of water in Coeur d'Alene Lake because it neither owns nor controls the

submerged lands under Post Falls Dam. If at some future date the Tribe, through an unlikely sequence of circumstances, secures the right to maintain the Lake in a natural state by acquiring Post Falls Dam, such a right would be akin to a newly-created right, and the priority date should be the date of reacquisition.

### 8. Preservation of Springs, Seeps, and Wetlands Was not Essential to the Livelihood of the Tribe.

The United States claims water rights for springs, seeps, and wetlands on federal trust and tribal fee lands within the Reservation to provide "[w]ildlife and plant habitat for hunting and gathering rights as well as other tribal traditional, cultural, spiritual, ceremonial, and/or religious uses." *E.g.*, CSRBA, Claims 91-7779 & 91-7782. These claims must be denied because, as a matter of law, such uses are secondary purposes of the Reservation.

In *Winters*, the Court found that the parties intended to reserve water for irrigation because the arid land of the Fort Belknap reservation would have been "valueless" without irrigation. *Winters*, 207 U.S. at 576. Decades later, the Court likewise concluded that a reservation of water was intended where water was "essential to the life of the Indian people." *Arizona v. California*, 373 U.S. at 599. The Ninth Circuit bases reserved water rights on the premise that "Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless." *Walton*, 647 F.2d at 47.

In short, in order for a water right to be reserved by implication, the purported use of the water must be so essential to the Tribe's livelihood that their lands would be useless or valueless if water was not reserved for such use. *See United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999) (the "necessity of water must be so great that without the water the reservation would be entirely defeated"). This requirement is also inherent in the distinction between primary and secondary purposes. "Primary" means "first or highest

in rank, quality, or importance." *The American Heritage Dictionary* 1393 (4th ed. 2000). While the definition suggests there can only be one use of land that is "primary," courts have recognized there can be two primary uses of a reservation if both uses are equally important. *See, e.g., Adair,* 723 F.2d at 1410.

Here, a stated purpose of the 1891 Act was to promote the "progress, comfort, improvement, education and civilization" of the Coeur d'Alene Tribe, words that clearly defined the continued development of agriculture as the primary purpose of the Reservation. While there is no question that hunting, gathering, and traditional, cultural, spiritual, ceremonial, and/or religious uses were also important to the Tribe, mere importance is not enough: the Court, in order to imply the reservation of water rights, would have to conclude that such uses were as equally essential as agriculture to the continued livelihood of the Tribe.

The documents establishing the Reservation do not allow for such a conclusion. While the parties to the 1891 Agreement thought that promoting the "progress, comfort, improvement, education and civilization" of the Tribe was a purpose worthy of express statement, the parties did not feel the need to make any provision for hunting, gathering, or for cultural, spiritual or ceremonial needs.

Notably, only one case, *United States v. Adair,* has concluded that the parties to a treaty intended to reserve water for hunting and gathering, and did so only because such purposes were mentioned explicitly on the face of the treaty, thus allowing the court to conclude they were a "primary" purpose co-equal with the treaty's express goal of promoting agriculture. In *Adair,* the court reviewed Article I of the Klamath Treaty, in which the Tribe reserved "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." 16 Stat. 708. In earlier

litigation, the Court had held that the provision was also understood by the Indians to include exclusive hunting and trapping rights. *Adair*, 723. F.2d at 1409. The court queried whether an intent to reserve water for hunting and gathering was "reflected in [the treaty's] text <u>and</u> its surrounding circumstances. *Id.* (emphasis added). The Court held that "[i]n view of the historical importance of hunting and fishing, <u>and</u> the language of Article I of the 1864 Treaty, we find that one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Id.* (emphasis added). Only the express textual inclusion of an "exclusive" hunting and gathering right, coupled with evidence of the importance of hunting and fishing, allowed the court to conclude that "a continuation of its traditional hunting and fishing lifestyle . . . was at the forefront of the Tribe's concerns in negotiating the Treaty and was recognized as important by the United States as well." *Id.*

The *Adair* court also noted that "the Government was probably aware that hunting and fishing held the greatest promise for sustaining the Klamath on their reservation" because the Commissioner of Indians Affairs, in the same year as the Treaty, had reported that the land later included in the reservation "is a high, cold plain, nearly on a level with the summit of the Sierra Nevada mountains, too frosty to raise cereal or roots with success, and fit only for grass." 723 F.2d at 1409 n.15.

The present claims are distinguished from *Adair* by several factors. First, there is no reservation of hunting or gathering rights in either the 1887 or the 1889 Agreements. Second, there is no indication that continuation of its traditional hunting and fishing lifestyle was at the forefront of the Tribe's concerns when negotiating the 1887 and 1889 Agreements. The transcripts of the 1887 and 1889 negotiations reveal that the Tribe did not make a single mention of hunting or fishing needs during the negotiations—likewise, the

petitions that the Tribe sent in the 1880s requesting negotiations made no mention of hunting or fishing.[20] Third, unlike the Klamath Reservation, the Coeur d'Alene Reservation was well-suited for growing grain and other crops, and by the time the 1887 and 1889 agreements were negotiated, the Tribe was already farming successfully. In 1888, the Annual Report of the Commissioner of Indian Affairs reported that the Tribe harvested 40,000 bushels of wheat and 11,000 bushels of oats. State Ex. 8 (Report). In 1889, a U.S. Indian Inspector reported that the 519 members of the Tribe had 6,000 acres under cultivation and had harvested 40,000 bushels of wheat and 70,000 bushels of oats. State Ex. 9 ("Inspection report on Colville Agency, W.T.," January 17, 1889).[21]

Given the undisputed omission of any hunting or gathering rights in the 1887 and 1889 Agreements, the lack of any evidence in negotiation transcripts that hunting and gathering were at the "forefront" of the Tribe's concerns while negotiating the agreements, and given the Tribe's successful farming endeavors, there is no basis for concluding that preserving springs and wetlands for hunting, gathering, spiritual and ceremonial purposes was a purpose co-equal with that of promoting the Tribe's agricultural lifestyle. Given the undisputed facts, the claims for springs, seeps and wetlands must be denied.

**i) The decree of spring, seep, and wetlands claims upon allotments is not consistent with prior decisions holding that allotments are not held for the benefit of the Tribe.**

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[20] *See, e.g.,* Sen Ex. Doc 122 (1886) [State Ex. 4] at 19 (April 20, 1884 petition of Seltice); Sen Ex. Doc No. 14 (1889) [State Ex. 10] at 7-13 (transcript of 1889 negotiations); *id.* at 49-54 (report of 1887 commission); *id.* at 74-79 (transcript of 1887 negotiations); H. Rep. No. 1109 [State Ex. 11] at 39 (Oct. 30, 1885 petition of Seltice); *id.* at 40-42 (March 23, 1885 petition of Seltice).

[21] While man cannot live by bread alone, 40,000 bushels of wheat would make a good start for a 500 member tribe. According to the National Association of Wheat Growers, a bushel of wheat yields 90 one pound loaves of whole-wheat bread. http://www.wheatworld.org/wheat-info/fast-facts/ (last visited Oct. 13, 2016). 40,000 bushels of wheat would yield 3,600,000 loaves of bread.

Assuming, for purposes of argument, that the Court concludes that the purposes of the Reservation imply the reservation of springs, seeps, and wetlands for the benefit of the Tribe, such water rights could not be decreed for places of use that fall within allotted lands. "The primary purpose of the allotment policy was to break up tribal life and encourage Indians to live independently on their own individual lands." *United States v. S. Pac Transp. Co.*, 543 F.2d 676, 683 (9th Cir. 1976). Once land is allotted to a tribal member, federal law requires that the United States must "hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotments shall have been made." 25 U.S.C. § 348 (2015).

In *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959), the court addressed an allottee's challenge to an action to condemn a portion of his allotment for a power line. The allottee asserted that condemnation would be inconsistent with Article 5 of the 1887 agreement (which the court referred to as "the treaty") that provided that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of, without the consent of the Indians residing on said reservation." *Id.* at 616.

The court concluded that once land was allotted and a trust patent issued, the allotment "is not part of the reservation, nor is it tribal land." *Id.* at 617. Because the allotment was neither part of the reservation nor tribal land, the court held it was "not land subject to the treaty." *Id.*; *see also United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1065-66 (E.D. Wash. 2007) (quoting *Nicodemus* for premise "[o]nce allotted in severalty, the [allotted] land was 'no longer a part of the reservation, nor [was] it tribal land'").

Likewise, in *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981), the court was asked to address whether the Yurok Tribe's fishing rights continued to apply to allotted and homesteaded lands. Like the Coeur d'Alene Tribe, the Yuroks did not have express fishing

rights on their reservation: rather, such rights existed as an incident of the executive order setting aside a portion of the Tribe's aboriginal land for their exclusive use. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968)(treaty providing that reservation lands were "to be held as Indian lands are held" implicitly reserved the right to hunt and fish within the reservation). The Ninth Circuit concluded that in the absence of an express reservation of rights, "Congress intended that the allotments and patents, granted under the Act of 1887, would grant an unencumbered title to the Indian allottees and their successors in interest, which would not be subject to any interest in the land that might be implied from the mere creation of the reservation." *Blake v. Arnett*, 663 F.2d at 911.

Together, *Nicodemus* and *Blake* establish that the incidents of title that accompany the reservation of lands for the benefit of a tribe cease to apply once lands are allotted: the lands are no longer reserved for the Tribe's use, but rather for the sole use and benefit of the allottee. The Tribe has no hunting or gathering right on allotments, and it likewise has no implied property right in the springs, seeps and wetlands on such allotments. Put another way, the Tribe cannot claim entitlement to water rights intended to support hunting and gathering rights that no longer exist on allotted lands. That being the case, the claimed water rights for springs, seeps, and wetlands must be denied for any claims that include an allotment as the place of use.[22]

**ii) The United States cannot claim reserved water rights for both irrigation and wetland maintenance on the same land.**

The United States, in at least two instances, claims reserved water rights for both irrigated agriculture and for wetlands maintenance for the same place of use. *See* State Ex.

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[22] Identifying specific claims that include allotments as the place of use will require further proceedings: to date, the United States has refused to provide the information necessary to identify which places of use are upon allotments. State Ex. 23 at 18-19.

23 at p. 28 (copy of relevant U.S. admissions). Such overlapping claims must be denied. While the United States asserts that it did not intend to "double a claim to the same surface water," but intended merely to assert "separate justifications for the use of the same water," *id.*, such an assertion is not a sufficient reason to decree two separate and overlapping rights for the same place of use. Rather, the United States must be required to state a single, primary purpose for each place of use. If such purpose is sufficient to imply a reserved water right, the United States, upon decree of that right, can use it for other purposes on the same place of use so long as such change in use does not result in injury to other water users. *See Walton*, 647 F.2d at 48 ("[w]hen the Tribe has a vested property right in reserved water, it may use it in any lawful manner").

### 9. Water for Fish Habitat on Streams Within the Reservation Was Not Reserved in the 1891 Act.

The United States claims reserved water rights to provide "fish habitat for fish species harvested within the Reservation." *See, e.g.*, Claim No. 91-7755. The United States' fish habitat claims are essentially non-consumptive instream flow claims, which seek to prevent diversion from identified streams to the extent necessary to maintain flows stated in cubic feet per second. With the exceptions of the St. Joe River and portions of Hangman Creek, the vast majority of the on-reservation fish habitat claims are for streams running over or through lands owned by nonmembers.

The United States' claims to instream flow water rights must be denied. While the United States may present the opinion of its experts that fishing and other traditional subsistence activities remained important to the Tribe in 1891, mere evidence of the importance of fishing is not enough to demonstrate it was a primary purpose of the Reservation. In the SRBA, this Court concluded that expert affidavits offered by the Nez

Perce Tribe regarding the cultural importance of fishing rights, while "probative of the importance of fish and fishing to the Nez Perce culture, as well as the importance of water to the fish habitat," did not prevent entry of summary judgment denying the water right claims as a matter of law. SRBA 03-10022 Summary Judgment Order at 30.[23]

Here, no one disputes that in 1889 most members of the Tribe continued to hunt and fish when not farming. But, the cession, not retention, of fishing grounds was the primary focus of the 1889 Agreement. The undisputed facts demonstrate that "Congress . . . authoriz[ed] negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell." *United States v. Idaho*, 210 F.3d at 1078. The directions to the commission sent to negotiate the cession agreement reiterated that the commission was to seek the cession of lands "not agricultural" and specifically referenced the congressional documents asking "whether it was advisable to release any of the navigable waters" from the Reservation. State Ex. 7 at 483. During the negotiations, the parties focused on retention of

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[23] Likewise, the Ninth Circuit has concluded that a mere showing that fishing was important to a tribe is not sufficient to establish intent to reserve water rights. In *Skokomish Indian Tribe v. United States,* 401 F.3d 979 (9th Cir. 2005), the Ninth Circuit, sitting *en banc,* was asked to determine whether a dam on the Skokomish River had "violated water rights that were impliedly reserved to the Skokomish Tribe by treaty. *Id.* at 989. The Tribe asserted water rights had been reserved to support its on-reservation fishing. The court held:

> The Tribe directs us to submitted declarations from a historian and a cultural anthropologist, but these declarations only suggest that fishing was important to the Tribe, and that the United States intended to ensure the Tribe was not excluded from its fisheries. Demonstrating that the United States intended for the Tribe to continue fishing on the reservation is not the same as showing that fishing was a primary purpose of the reservation.

*Id.* at 989. The court went on to distinguish the Skokomish Tribe 's claim from the instream flow right approved in *Adair,* which the court characterized as being based primarily on the express reservation of an exclusive on-reservation fishing right. *Id.*

While the Skokomish decision is of historical and persuasive value, the State does not cite it as precedent because, when denying the motion for rehearing, the court superseded the decision by issuing an amended decision that omitted, without explanation, the discussion of reserved water rights. 410 F.3d 506 (9th Cir. 2005).

agricultural lands, and did not address, or even mention, the preservation of resources needed for traditional subsistence. And, any assertion that preservation of traditional subsistence resources was a primary purpose of the 1889 Agreement is difficult to reconcile with the fact that the Tribe ceded 80% of Coeur d'Alene Lake, and the entirety of the Coeur d'Alene River drainage, a result in stark contrast to its 1872 petition, in which it insisted on inclusion of the Coeur d'Alene River drainage because "for a while yet we need have some hunting and fishing." *United States v. Idaho*, 95 F. Supp. 2d at 1103.

The lack of any explicit on-reservation fishing right, combined with the lack of any discussion of fishing needs in the 1889 negotiations, distinguishes the United States' fish habitat water rights claims from those affirmed in *Adair*, which recognized an implied reservation of instream flows to support fishing, because (1) fishing rights were expressly reserved by the Klamath Tribe and (2) fishing rights were at the "forefront" of the Tribe's concerns during negotiation of the Klamath Treaty. *Adair*, 723 F.2d at 1409. Where, as here, fishing rights are not expressly reserved, and fishing rights were never mentioned during negotiations, it cannot be concluded that fishing rights were foremost in the Tribe's minds while negotiating the agreements, regardless of any ancillary evidence the United States may provide regarding the important of fishing. And, given the Tribe's successful farming endeavors, there is no basis for concluding that preserving fishing rights was a purpose co-equal with that of promoting the Tribe's agricultural lifestyle. Indeed, several years after the 1889 negotiations, the Tribe ceded the Harrison townsite and an additional portion of Coeur d'Alene Lake around the mouth of the Coeur d'Alene River with the statement that "where Harrison now stands was the place where the Indians used to fish." State Ex. 14 (H. Ex. Doc. No. 158 at 12).

The present claims are distinguished from *Walton,* in which the court found an implied instream flow water right for the Colville Reservation. In *Walton,* the fishing rights of the resident tribes were implied by land ownership, rather than expressly reserved. But, the court implied the reservation of water rights to support on-reservation fishing due to the fact that the Reservation, which bordered the Columbia River for many miles, had been set apart primarily to provide the tribes access to traditional fishing locations on the River. *Walton,* 647 F.2d at 48. When the tribes' "principal historic fishing grounds on the Columbia River [were] destroyed by dams," a need for replacement fishing grounds arose. Thus, the court found "an implied reservation of water . . . for the development and maintenance of replacement fishing grounds," and noted that such water right was a substitute, for, and not an addition to, any "right to water for a fishery in the watershed where the fishery historically existed." *Id.*

Likewise, in *Anderson,* the district court concluded that a instream water right to preserve water for fishing was implied because a purpose for the executive order creating the Spokane Reservation was "to preserve access to fishing areas and to fish for food." 591 F. Supp. 1 (E.D. Wash. 1982).

Here, it was established in previous litigation that the 1873 Executive Order, like the Colville executive order, was intended to provide access to the Coeur d'Alene Tribe's fishing grounds in Coeur d'Alene Lake, the St. Joe River, and the Coeur d'Alene River.[24] Here,

[24] In finding that the parties intended to preserve tribal access to fisheries by reserving submerged lands, the court cited a provision in the unratified 1873 Agreement stating "that the water running into said reservation shall not be turned from their natural channel where they enter said reservation." 95 F. Supp. 2d at 1108. Because the Agreement was never ratified, it has no bearing on the issue of whether the Executive Order reserved instream flows either on or off the Reservation. Moreover, it would be error to conclude that it necessarily refers to instream flows to protect fish habitat. The provision appears as a proviso or exception to the rights reserved to the tribe, as follows:

however, there was a subsequent and superseding agreement ceding a portion of the earlier reservation and setting the remainder apart as a permanent reservation. In such instances the "last reservation is the one with which we now are concerned" because the earlier executive orders are "superseded by congressional action and no longer are of any force." *British-Am. Oil Producing Co. v. Bd. of Equalization of State of Montana*, 299 U.S. 159, 163 (1936). As discussed above, the primary purpose of the 1889 Agreement was to remove waterways from the reservation and make them available to the public. While a portion of the navigable waterways in the earlier reservation were retained in trust for the Tribe, the 1889 Agreement, and the ancillary documents, do not indicate that fishing was, at the time of the Agreement, a primary purpose of the reduced Reservation; rather, they confirm that at the time of the Agreement, the Tribe's livelihood depended primarily on agriculture. These factors distinguish the present claims from the situations presented in *Walton* and *Anderson.* and are more analogous to the *Big Horn* litigation where no water right for fishing was implied because the tribe was not dependent on fishing for its livelihood or for its traditional lifestyle. *In re Big Horn River System,* 753 P.2d at 98.

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> Provided that the said government reserves the right to establish in and across said reservation mail routes, military roads, and public highways for the benefit of the citizens of the United States, and provided further that the waters running into said reservation shall not be turned from their natural channel where they enter said reservation.

State Ex. 1. Because the running water provision is coupled with the highways proviso, the most probable interpretation of the provision is that the federal negotiators inserted it to preserve public rights of navigation on waters included in the Reservation. Such provisos were common for reservations that included navigable waterways. *See, e.g.*, Treaty with the Kansa, June 8, 1825, 7 Stat 244 ("the United States shall forever enjoy the right to navigate freely all water courses or navigable streams within the limits of the tract of country herein reserved to the Kanzas Nation"); Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 ("that the navigation of all lakes and streams shall be forever free to citizens of the United States").

**i) Even assuming, for purposes of argument, that water rights for fish habitat were reserved, such water rights cannot apply to waterways running over or across lands not held for the benefit of the Tribe.**

Even if the Court were to conclude that water rights for fish habitat were reserved in the 1891 Act, claims to fish habitat on non-navigable waterways encompassed by nonmember fee lands would have to be denied. It is a fundamental principle of Indian law that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. 544, 561 (1981). The 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. Here, there was no express reservation of the right to preserve fish habitat on homesteaded lands.

In the case of *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), the Ninth Circuit Court of Appeals addressed whether the fishing rights of the Yurok Tribe within the Hoopa Valley Reservation could be exercised on homesteaded lands and on allotments sold to nonmembers. Like the Coeur d'Alene Tribe, the Yurok Indians had never entered into a treaty or agreement explicitly providing them fishing rights on reservation lands. But a "specific, primary purpose for establishing the Hoopa Valley reservations was to secure to the Indians the access and right to fish without interference from others." *Parravano v. Babbitt*, 861 F. Supp. 914, 920 (N.D. Cal. 1994), *aff'd*, 70 F.3d 539 (9th Cir. 1995); *see also Mattz v. Superior Court*, 758 P.2d 606, 618 (Calif. 1988) ("the reason the extension of the Hoopa Valley Reservation took the form that it did was in recognition of the Yurok Indians' historic reliance on the fish resources of the Klamath River"). The reservation consisted of a strip of land on both sides of the Klamath River that "afford[ed]complete access for fishing by the reservation Indians," so that it "probably did not occur to anyone to mention

fishing rights" when the reservation was set aside. *Id.* at 911. And, like the Coeur d'Alene Reservation, the Hoopa Valley Reservation included submerged lands underlying navigable waters. *Donnelly v. United States*, 228 U.S. 243, 264 (1913).

But even though fishing was of vital importance to the Yurok Indians, the court, in the absence of express fishing rights, was compelled to conclude that Congress, by declaring the reservation "to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights," intended to convey "all incidents of title free from any implied easements." *Id.* at 911. Likewise, the court concluded that patents to allotments issued "to the Indian allottees and their successors in interest . . . would not be subject to any interest in the lands that might be implied from the mere creation of the reservation." *Id.* at 911. Thus, once lands were sold to nonmembers, any implied right to use the lands ceased. *Id.*

As is the case with fishing and hunting rights, implied water rights are incidents of title: if title to reservation lands is conveyed to nonmembers without an express reservation of the water right, then the water right is either conveyed with the lands or abrogated.

> Our first decision in this case held that the Treaty of Ft. Bridger impliedly reserved water for the Wind River Indian Reservation and for the Tribes and the Indian allottees to pursue agriculture. *Big Horn I.* When the Tribes ceded their land to the United States for sale, the reserved water right disappeared because the purpose for which it was recognized no longer pertained. That purpose no longer existed for lands acquired by others after they had been ceded to the United States for disposition. The effect is that the reserved water rights were eliminated as to those tracts

*In re General Adjudication of All Rights to Use Water in Big Horn River System*, 899 P.2d 848, 854-55 (Wyo. 1995); *see also Anderson*, 736 F.2d at 1363 (reserved water rights terminate on reservation lands opened to homesteading and "subsequently conveyed into private ownership").

The United States may cite the decision in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), as proof that instream flow water rights may survive the alienation of reservation lands and their conveyance to nonmembers. But *Adair* actually demonstrates that water rights must be explicitly reserved in order to survive the alienation of reservation lands to nonmembers. In *Adair,* when the reservation was terminated and all lands conveyed to either the United States, individual Indians or private owners, Congress explicitly reserved the Tribe's exclusive, on-reservation hunting and fishing rights, and also provided that "[n]othing in . . . this title shall abrogate any water rights of the tribe and its members." *Adair,* 723 F.2d at 1411-12 (quoting 25 U.S.C. § 564m(a)(1976)). The explicit reservation of fishing, hunting, and water rights created a servitude that continued to apply even after lands were sold to non-Indians. *Cf. United States v. Winans,* 198 U.S. 371, 381 (1905) (explicit reservation of fishing right in treaty "imposed a servitude upon every piece of land as though described therein"). Such servitudes, however, cannot be created by implication. *See Mattz,* 663 F.2d at 911 (rejecting claim of implied fishing rights on homesteaded lands that, if recognized, would be a "form of equitable servitude that benefits the tribe and burdens the land, whoever owns it").

Here, nothing in the 1887 or 1889 Agreements created a servitude that would survive either allotment or the alienation of tribal lands to nonmembers through homesteading. There was no reservation of fishing rights, and, on nonnavigable streams running over and across allotted and homesteaded lands, no reservation of fish habitat, which requires both the beds and banks of the stream and the overlying waters. Absent such reservation, the

Tribe has no right to require the maintenance of instream flows or fish habitat on those waterways where the underlying beds and banks are no longer held in trust for the Tribe.[25]

## IV. CONCLUSION

For the reasons stated above, the State requests that the Court enter summary judgment to:

1) Deny all claims for instream flows for fish habitat outside the current boundaries of the Coeur d'Alene Reservation;

2) Allow claims for irrigation to proceed to the quantification phase subject to the requirement that the United States and the Tribe prove, for each place of use, that irrigation water rights are necessary to fulfill the purpose of the Reservation by showing that basic crops cannot be profitably grown at the place of use without irrigation, and further require that all irrigation claims are subject to further hearing regarding the practicability of irrigation and the applicable priority date for each claimed place of use;

3) Deny the following DCMI claims as not implied by the primary purposes of the Reservation: Claim No. 93-7462 (Casino and Hotel Complex Well); Claim No. 93-7463 (Circling Raven Golf Course); Claim No. 93-7464 (Casino and Hotel Complex expansion); Claim No. 93-7465 (RV Park adjacent to Circling Raven Golf Course); Claim No. 93-7466

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[25] The United States has not disclosed the information necessary to determine ownership of lands under the waterways for which it claims fish habitat instream flows. If the Court determines that preservation of fishing was a primary purpose of the Reservation, and allows fish habitat claims to proceed to the quantification phase, it will be necessary to examine each claim and establish a threshold amount of federal or tribal ownership necessary to provide any tangible benefit to the Tribe. A fish habitat water right claim would not be implied where the United States or the tribe owned insufficient habitat along a stream for such a claim to provide any benefit.

(Water Park); Claim No. 95-16671 (Golf Course); Claim No. 95-16675 (Golf Course Pond Maintenance); Claim No. 95-16669 (fish hatchery);

4) Allow the remaining DCMI claims to proceed to the quantification phase subject to quantity objections; and further requiring that all remaining DCMI claims are (1) limited to places of use within the Reservation boundaries, and (2) subject to further hearing regarding the applicable priority date for each claimed place of use;

5) Allow Claim No. 96-166772, for wells to serve "self-supplied rural residential households," to proceed to the quantification phase for wells within the current boundaries of the Coeur d'Alene Reservation, subject to objections regarding the number of wells and annual volumetric limits;

6) Deny all claims for "springs and/or seeps," and claims for "wetlands and/or riparian areas *in situ*," provided, that to the extent the Court recognizes such claims they be subject to further hearing regarding quantification and the applicable priority dates for the claimed places of use;

7) Deny all claims for on-reservation instream flows for fish habitat, provided, that in the event the Court does not deny all such fish habitat claims as not consistent with the primary purpose of the Reservation, then the Court should deny all such fish habitat claims where the beds and banks of the subject waterways are owned by persons who are not members of the Tribe, and schedule any remaining claims for hearing of quantification objections;

8) Deny Claim No. 95-16704 for *in situ* maintenance of the natural elevation of Coeur d'Alene Lake.

Respectfully submitted this 20th day of October, 2015.

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing State of Idaho's Memorandum in Support of Motion for Summary Judgment was mailed on October 20, 2016, with sufficient first-class postage to the following:

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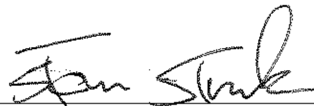

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