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USA Memo in Support of Mtn SJ

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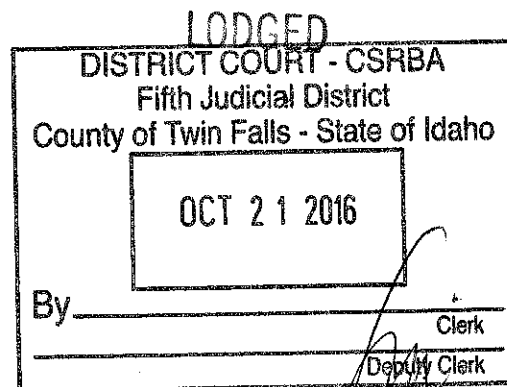
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**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS**

In Re the CSRBA

Case No. 49576

) Consolidated Subcase No. 91-7755
)
)
) **UNITED STATES' MEMORANDUM**
) **IN SUPPORT OF MOTION FOR**
) **SUMMARY JUDGMENT**
)

Pursuant to Idaho Rule of Civil Procedure 56(a) and the Court's Scheduling Orders in this Consolidated Subcase, the United States of America ("United States") hereby moves this Court for an order granting summary judgment that the United States as trustee and the Coeur d'Alene Tribe ("Tribe") as beneficiary are entitled to federal reserved water rights for the Coeur d'Alene Reservation. The United States' and Tribe's Joint Motion for Summary Judgment is

submitted herewith and is supported by this Memorandum and the United States' and Tribe's Joint Statement of Undisputed Facts, including supporting affidavits and attachments thereto ("Joint Statement of Facts").

HISTORY OF THE PROCEEDINGS

On November 12, 2008, the Court issued the *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication*. The United States is participating in this Adjudication based on the waiver of sovereign immunity found in the McCarran Amendment, 43 U.S.C. § 666, which provides for federal participation in state court adjudications as long as certain requirements are met. Based on its different interests in the Adjudication, the United States is acting in various capacities on behalf of different federal agencies. For purposes of this Memorandum, the United States appears both in its sovereign capacity and in its capacity as trustee for the Tribe of the Coeur d'Alene Indian Reservation ("Reservation") and is represented by the United States Department of Justice on behalf of the United States Department of the Interior, Bureau of Indian Affairs.

On January 30, 2014, the United States filed 353 claims to federal reserved water rights for the Coeur d'Alene Tribe to carry out the purpose of the Coeur d'Alene Indian Reservation. On February 17, 2015, the Court issued an *Order Consolidating Subcases, Order Bifurcating Proceedings, and Scheduling Order* ("Bifurcation Order"), wherein all federal claims for water on the Reservation were consolidated into this subcase and the litigation was bifurcated into issues of entitlement and quantification. Order at 2. The Bifurcation Order established a schedule for litigation of the entitlement issues that provided for completion of discovery and summary judgment motions on entitlement only. Any issues related to quantification of the claims to water for use by the Tribe on the Reservation were deferred to the quantification phase.

NATURE OF THE PROCEEDINGS

The entitlement phase of this subcase seeks to resolve the overarching question of whether the United States as trustee and the Coeur d'Alene Tribe as beneficiary are entitled to federal reserved water rights for use on the Coeur d'Alene Reservation. The Coeur d'Alene Reservation was set aside by Executive Order on November 8, 1873, within the aboriginal territory of the Tribe. Based on well-established legal precedent and the facts surrounding the establishment of the Reservation, which are set forth in the Joint Statement of Facts, the Court should affirm that such water rights were implicitly reserved to serve the purpose of the Reservation. In addition, the Tribe retained its aboriginal water uses that predate the Executive Order. The purpose of the Reservation was and is to establish and maintain a permanent homeland for the Coeur d'Alene Tribe. To achieve this homeland purpose, the necessary reserved water rights include the following: domestic, commercial, municipal and industrial; instream flows for fish habitat; irrigated agriculture; maintenance of lake levels in Coeur d'Alene Lake; and maintenance of wetlands, springs and seeps.

ISSUES PRESENTED

The issue presented is whether the United States as trustee and the Tribe as beneficiary are entitled to federal reserved water rights for the Tribe to use on the Reservation. To answer this question, the Court must consider the following:

1. Whether the purpose of the Reservation was, and continues to be, to provide a permanent homeland for the Coeur d'Alene Tribe and any other Indians who reside thereon?
2. Whether the priority date for the water uses necessary to fulfill the purpose of the Reservation is time immemorial for aboriginal uses and November 8, 1873 for other uses, or some other date?

3. Whether the permanent homeland purpose of the Reservation includes the following water uses: domestic, commercial, municipal and industrial; instream flows for fish habitat; irrigated agriculture; maintenance of lake levels in Coeur d'Alene Lake; and maintenance of wetlands, springs and seeps?

SUMMARY JUDGMENT STANDARD

Under Idaho Rule of Civil Procedure 56, summary judgment may properly be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(a).

In determining whether any issue of material fact exists, this Court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilsen, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (citation omitted).

However, in any case subject to a bench trial, rather than jury trial, the court is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 660-62 (1982). Accordingly, this Court can reach the most probable inferences from the undisputed material facts before it in ruling on the United States' and Tribe's Joint Motion for Summary Judgment.

LEGAL BACKGROUND

The doctrine of federal reserved water rights is governed by federal law and provides that water rights are reserved by implication to serve the purpose of a federal reservation.¹

A. Overview of the federal reserved water rights doctrine as applied on Indian reservations.

The federal reserved water rights doctrine was established in two primary cases: *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963) (“*Arizona I*”). The doctrine has been further developed in other federal and state court cases.

Winters arose when non-Indian irrigators located upstream from the Fort Belknap Reservation began diverting water from the Milk River, the primary water source for the reservation. The United States as trustee brought suit on behalf of the Gros Ventre and Assiniboiné Tribes because, as a result of the diversions, they were left with insufficient water. *Winters*, 207 U.S. at 565. The reservation was based on an agreement between the Tribes and the United States, ratified by Congress on May 1, 1888, that reserved a tract of land “as an Indian reservation as and for a permanent home and abiding place” for the Tribes. *Id.* The agreement did not mention water or water rights. *Id.*

The Supreme Court concluded that the 1888 Agreement impliedly reserved a water right sufficient to make the reservation “valuable or adequate” to support the Tribes’ lifestyle, despite the Act’s silence regarding water. *Id.* at 576-77.² The Court interpreted the Agreement in the

¹ *United States v. State of Idaho*, 135 Idaho 655, 660, 23 P.3d 117, 122 (Idaho 2001) (“The existence or absence of a reserved water right is a matter of federal law. In its prior decisions this Court has relied solely upon United States Supreme Court cases and relevant federal executive and legislative history. Reliance of this Court upon its prior decisions is intended simply to incorporate reasoning based upon federal law, not imply that there is applicable state law.”).

² Even though the Agreement referenced in *Winters* was ratified and confirmed by an Act of Congress on May 1, 1888, the Court repeatedly refers to the Agreement rather than the Act as evidence of the implied right. *See* 207 U.S. at 575-76 (“The case, as we view it, turns on the agreement of May 1888, resulting in the creation of Fort

context of the overall purpose of the reservation, noted the requirement for water on arid lands in the West, and applied the Indian canons of construction for treaty interpretation. *Id.* at 576.

The Court concluded that the Fort Belknap Reservation was established as “a permanent home and abiding place” for the Tribes living there. *Id.* at 565 (citing the 1888 Agreement). The Court continued by recognizing the necessity of water for irrigation purposes, the specific water use at issue in the case, and concluded that neither the Indians nor the federal government would have intended to establish a reservation absent sufficient water. *Id.* at 576. The Court applied the “rule of interpretation of agreements and treaties with the Indians, [which requires that] ambiguities occurring will be resolved from the standpoint of the Indians.” *Id.*

Winters established and applied the Indian canons of construction, requiring that Indian treaties, statutes and executive orders be construed liberally in the Indians’ favor.³ *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *County of Yakima v. Confederated Bands of the Yakima Indian Reservation*, 502 U.S. 251, 269 (1992); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) (cases summarizing and applying the canons of construction). The canons were summarized in *United States v. Adair*:

We therefore begin our analysis by turning to well-established principles of Indian treaty interpretation and Indian property rights for guidance. Foremost among these is the principle that ‘the treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.’ Further, Indian treaties should be construed as the tribes would have understood them. And any ambiguity in a treaty must be resolved in favor of the Indians. A corollary of these principles, also recognized by the Supreme Court, is that when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe’s sovereign dependent status.

Belknap Reservation. . . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.”) (emphasis added).

³ The Indian canons have analogues in the rules of construction found in both property and contract law. For example, in property law, a deed is construed against the grantor. *See, e.g., New York Indians v. United States*, 170 U.S. 1, 25-26 (1898); *United States v. Pappas*, 814 F.2d 1342 (9th Cir. 1987). A similar rule is found in contract law, where a contract is to be construed against the drafter of the contract. *See, e.g., Cole v. Burns Int’l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997); *Restatement (Second) of Contracts* § 206.

723 F.2d 1394, 1412-13 (9th Cir. 1983) (citations omitted) (emphasis added). Executive orders that create Indian reservations are subject to the same canons of construction that are applied to treaties and statutes. *See, e.g., Arizona I*, 373 U.S. at 598; *Parravano*, 70 F.3d at 544.

Consequently, executive orders must be construed as they were understood by the Indians and any ambiguities must be resolved in the Indians' favor. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *Winters*, 207 U.S. at 576.⁴

In *Arizona I*, when considering water rights for five Indian reservations in the Colorado River Basin, the Supreme Court relied on *Winters* to find that "water from the river would be essential to the life of the Indian people" and, therefore, concluded that the United States intended to "reserve waters necessary to make the reservation livable." 373 U.S. at 599.

Arizona I established additional foundational principles of federal reserved water rights regarding Indian reservations. First, the Court noted that reservations established by Executive Order must be treated the same as reservations created by treaty or congressionally ratified

⁴ Like its federal counterparts, the Idaho Supreme Court has consistently applied these same canons of construction. As recently as 2008, it reaffirmed that "it [is] crucial to consider both parties' intentions in signing the treaty." *City of Pocatello v. State of Idaho*, 145 Idaho 497, 506, 180 P.3d 1048, 1057 (2008). Further, the Court found that "the language must be interpreted as the Indians themselves interpreted it" and that statutes should be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to [the Tribe's] benefit." *Id.* (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992)). The Court noted that the policy behind this rule of interpretation was that "[a] treaty with an Indian Tribe constitutes a grant of rights *from* them, not a grant of rights from the United States *to* the Indians." *Id.* (emphasis in original). As a result, "the critical determination . . . was what the Indians felt they were giving up when signing the treaty." *Id.* Likewise, "Congress will not abrogate Indian rights without clear intent and an express agreement from the Indians." *Id.*; *State v. Timmo*, 94 Idaho 759, 497 P.2d 1386 (1972) (finding the 1868 Treaty of Fort Bridger reserved off-reservation fishing rights, despite only mentioning hunting rights, because the Tribes understood the term "hunt" to include hunting and fishing); *State v. McConville*, 65 Idaho 46, 48, 139 P.2d 485, 487 (1943) (rejecting the State's argument that the Allotment Act abrogated the Nez Perce Tribe's fishing rights within the 1855 Reservation and finding "[c]ertainly there is nothing in any of the statutes or treaties subsequent to 1855 indicating in the slightest degree that the Indians ever intended to or understood that by selling land to the United States they were giving up the right to fish as they had immemorially done . . .").

agreement. *Id.* at 598. Second, the Court noted that reserved water rights are “present perfected rights” that vest as of the date that the reservation is established. *Id.* at 600, *see also United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (“tribal reserved *Winters* rights vest on the date of the creation of the Indian Reservation.”). Finally, the Court concluded that quantification of water for an Indian reservation must satisfy future as well as present needs. *Arizona I*, 373 U.S. at 600. Accordingly, the Court established a method for quantifying agricultural water rights—the practicably irrigable acreage (“PIA”) standard—which was applied to quantify the water rights for the tribes located in the lower Colorado River Basin.

Moreover, implied tribal reserved rights predate *Winters*. In *United States v. Winans*, the Supreme Court held that an access right was impliedly reserved by the Yakima Indians to give effect to express treaty language reserving a right to off-reservation fishing. 198 U.S. at 381. The Court observed that treaties are “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.” *Id.* In other words, tribes retain aboriginal rights which they did not expressly give up in treaties or agreements with the United States. The federal courts generally have not distinguished between *Winans* and *Winters* rights, however, but rather have found an overall set of water rights for a reservation recognizing that aboriginal ways of life continue on an Indian reservation in addition to the new purposes associated with the establishment of the reservation. *See, e.g., Adair*, 723 F.2d at 1414; *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (“*Walton*”); *see also* Nell Jessup Newton, et al., COHENS HANDBOOK OF FEDERAL INDIAN LAW ¶ 19.03, at 1210 (ed. 2012).

Federal reserved water rights on Indian reservations extend both to surface water and groundwater. *United States v. Cappaert*, 503 F.2d 313, 317 (9th Cir. 1974), *aff’d on other grounds*, 426 U.S. 128, 138-39 (1976); *see also In re Gen. Adjudication of All Rights to Use*

Water in the Gila River Sys. and Source, 989 P.2d 739, 745, 747-48 (Ariz. 1999); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002).

B. Federal and state courts analyze the circumstances surrounding the creation of the reservation to determine its purpose and consistently find that Indian reservations were created for broad, homeland purposes.

Beginning with *Winters* and continuing through the most recent cases regarding Indian water rights, courts have consistently recognized that the purpose of an Indian reservation is to provide a homeland for tribes. Such a homeland purpose makes sense because reservations were established by the federal government to provide tribes with a place to live during a period when the western United States was subject to increasing populations and non-Indian settlement. The reservations were typically smaller portions of land carved out of a tribe's overall aboriginal homeland and, thus, provided places for the Indians to continue certain traditional subsistence activities, such as hunting, fishing, and gathering, as well as to begin new practices, such as agricultural or industrial activities.⁵

As outlined above, the Supreme Court has found that the purpose of an Indian reservation is to provide a homeland. *See, e.g., Winters*, 207 U.S. at 565 (citing the 1888 Agreement to find that the purpose of the Fort Belknap Reservation was “as an Indian reservation as and for a permanent home and abiding place” for the tribes living there) (emphasis added); *Arizona I*, 373 U.S. at 599 (concluding that reserved water rights were “necessary to make the reservation livable”) (emphasis added); *see also Arizona v. California*, 460 U.S. 605, 616 (1983) (“*Arizona II*”) (stating that “the creation of the Reservations by the federal government implied an

⁵ For certain tribes in the American Southwest, agriculture was part of their traditional activities. In contrast, agriculture was not part of the traditional lifestyle of many tribes in the Pacific Northwest, including the Coeur d'Alene Tribe.

allotment of water necessary to ‘make the reservation livable.’”) (quoting *Arizona I*; *Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968) (Menominee Tribe’s treaty language establishing the Wolf River Reservation “for a home, to be held as Indian lands are held” interpreted to authorize the Tribe to “maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.”) (emphasis added). The need for a reservation to be a “home” and “livable” indicates an overall homeland purpose.

The United States Court of Appeals for the Ninth Circuit recognized that the general purpose of an Indian reservation is to provide a permanent homeland in two water rights cases, *Walton*, 647 F.2d at 47, and *Adair*, 723 F.2d at 1410.

Walton considered the quantification of a federal reserved water right for the Colville Indian Reservation. The Ninth Circuit summarized the process necessary to determine the reservation purpose: “[t]o identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.” 647 F.2d at 47 (citing *Winans*, 198 U.S. at 381). Importantly, like the Coeur d’Alene Reservation, the Colville Reservation was set aside by an 1872 Executive Order providing that “[i]t is hereby ordered that the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.” *Id.* at 47 n. 8 (quoting Executive Order of July 2, 1872, reprinted in 1 Kappler 916).⁶

⁶ There are a number of similarities between the history of the Colville Reservation and the Coeur d’Alene Reservation. Like the Coeur d’Alene, a major impetus for setting aside a reservation was to avoid hostilities as non-Indians encroached on each Tribes’ territory. *Walton*, 647 F.2d at 44. Similar to the Coeur d’Alene, the northern half of the reservation was opened to homesteading. *Id.* Also, the Colville Reservation was allotted in 1906

Although the Executive Order set aside a certain territory, it was entirely silent regarding the purpose of the reservation or the particular activities that would use water thereon. Despite this silence, the Ninth Circuit analyzed the “circumstances surrounding its creation, and the history of the Indians for whom it was created” to discern the purposes of reservation. *Id.* at 47. In other words, the court’s analysis was not solely from the document creating the reservation. Based on its analysis of the circumstances surrounding the creation of the reservation, the *Walton* court concluded that “the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.” *Id.* at 47. The court noted that “[w]e also consider their need to maintain themselves under changed circumstances.” *Id.*

The *Walton* court analyzed the specific circumstances related to the establishment of the Colville Reservation to determine that the implied water rights included water for both agriculture and fishing, two uses consistent with the general homeland purpose. *Id.* at 47-48. With respect to agriculture, the court noted that prior to the 1872 Executive Order, the Tribes were described as “good farmers, (who) raise extensive crops, make good improvements and own stocks of cattle and horses.” *Id.* at 44. However, the court also found that “[p]roviding for a land-based agrarian society . . . was not the only purpose for creating the reservation.” *Id.* at 48. The court examined historical evidence—in particular an 1871 report from the Commissioner of Indian Affairs—to conclude that the “Colvilles traditionally fished for both salmon and trout” and such fishing activities were of “economic and religious importance to them.” *Id.* Based

pursuant to the General Allotment Act. *Id.* Finally, at the time that their reservation was set aside, the Confederated Colville Tribes were “described as ‘good farmers.’” *Id.*

upon this evidence, the Ninth Circuit found that “preservation of the Tribe’s access to fishing grounds was one purpose for the creation of the Colville Reservation.” *Id.*⁷

After *Walton*, the Ninth Circuit again examined Indian reserved rights in *Adair*, which concerned the implied water rights for the Klamath Indian Reservation established by an 1864 treaty. There, “[t]he State and individual appellants [were] argu[ing] that the intent of the 1864 Treaty was [solely] to convert the Indians to an agricultural way of life. The Government and the Tribe argue[d] that an equally important purpose of the Treaty was to guarantee continuity of the Indians’ hunting and gathering lifestyle.” *Adair*, 723 F.2d at 1409. The *Adair* court concluded that the Klamath Reservation reserved water for both agricultural purposes and traditional purposes such as hunting, fishing, and gathering. *Id.* at 1410.

The Ninth Circuit relied on “an analysis of the intent of the parties to the 1864 Klamath Treaty as reflected in its text and the surrounding circumstances.” *Id.* at 1409 (emphasis added) (citing *Washington v. Fishing Vessel Ass’n*, 443 U.S. at 675-76 (1979), *Winters*, 207 U.S. at 575-76.).⁸ The Klamath Tribes had a traditional livelihood of hunting, fishing and gathering. *Adair*, 723 F.2d at 1397-98. As such, the court had previously found it “unlikely that [the tribes] would have knowingly relinquished these rights at the time they entered into the treaty. *Id.* at 1409

⁷ In fact, the Court went even further, noting that since “the Tribe’s principle historic fishing grounds on the Columbia River have been destroyed by dams . . . we find an implied reservation of water from No Name Creek for the development and maintenance of *replacement* fishing grounds.” *Walton*, 647 F.2d at 48 (emphasis added). This is consistent with the Ninth Circuit’s rule that one factor to consider when determining the purpose of the Reservation is the Tribe’s “need to maintain themselves under changed circumstances.” *Id.* at 47. In so ruling, the Ninth Circuit made clear that “[w]hen the Tribe has a vested property right in reserved water . . . subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.” *Id.* at 48.

⁸ It is important to highlight that, like *Walton*, the *Adair* Court reiterated that the intent of both the Tribe(s) and the United States, not just that of the federal government, is relevant to the determination of the purposes of the creation of an Indian reservation.

(quoting *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974)). This led the court to conclude:

[I]n view of the historical importance of hunting and fishing, and 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 the Tribe a continuation of its traditional hunting and fishing lifestyle. This was at the forefront of the Tribe’s concerns in negotiating the treaty and was recognized as important by the United States as well.

Adair, 723 F.2d at 1409. Like *Walton*, the Ninth Circuit relied upon a Report of the Commissioner of Indian Affairs as evidence that the United States was aware of the Tribes’ reliance upon hunting and fishing. *Id.* at 1409, n. 15.

In addition to this traditional lifestyle, the treaty provisions outlined a federal goal of converting the Klamath Indians to “an agricultural way of life.” *Id.* at 1410. The court highlighted that the Supreme Court has never “require[d] us to choose between these activities or to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve.” *Id.* (citations omitted). *Adair* supports the overarching homeland purpose by recognizing multiple purposes—the purpose of an Indian reservation must be interpreted broadly enough to encompass both new activities as of the date of the reservation (agriculture) as well as traditional activities (hunting, fishing and gathering). *Id.* at 1410; *see also United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1252-53 (D. Nev. 2004) (finding that irrigated agriculture and maintenance of a fishery were both primary purposes of the Pyramid Lake Paiute Reservation).

In reaching this conclusion, the Ninth Circuit specifically referenced the *Walton* court’s recognition that the Colville Reservation provides a “‘homeland for the Indians to maintain their agrarian society,’ as well as ‘preservation of the tribe’s access to fishing grounds.’” *Adair*, 723

F.2d at 1410 (citing to *Walton*) (internal citations omitted).⁹ Overall, the *Adair* court concluded that, in determining reserved water rights, the purpose of an Indian reservation must be broad in scope, as it must be interpreted to further the “goal of Indian self-sufficiency.” *Id.* at 1408, n. 13. Such a broad scope is consistent with a general homeland purpose for an Indian reservation.

Courts in other Western states, specifically Montana, Arizona, Washington, and New Mexico, have followed federal caselaw in recognizing the broad homeland purposes of Indian reservations when determining federal Indian reserved water rights. The Montana Supreme Court examined the issue of quantifying reserved water rights to serve the purpose of an Indian reservation in *Montana ex rel Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 762 (Mont. 1985) (“*Greely*”). Like federal courts, *Greely* concluded that the purpose of an Indian reservation must be given broad interpretation, particularly as compared to a non-Indian federal reservation. *Id.* at 768. In order to quantify water for these broad purposes, *Greely* noted the following possible water uses on an Indian reservation that should be analyzed:

- 1) agricultural water measured by the PIA standard;
- 2) water necessary to preserve tribal hunting and fishing rights;
- 3) water necessary to “develop, preserve, produce or sustain food and other resources of the reservation, to make it liveable;” and
- 4) water needed for “acts of civilization,” including industrial purposes.

Id. at 764-765. Like *Adair*, *Greely* supports a general homeland purpose by recognizing that the overall purpose of a reservation must be broad enough to encompass many different kinds of water uses ranging from agriculture to fishing and hunting. *Id.* In order to decide which water uses to include, *Greely* reiterated the “principles of construction developed by the federal judiciary” that include resolving ambiguities in favor of the Indians, noting that tribes reserved

⁹ Explicit treaty language is not required because *Adair* acknowledged that the *Walton* Court “discovered the purposes of the reservation and implied water rights” from a one paragraph Executive Order, “a much less explicit text than that provided by the 1864 Klamath Treaty.” *Id.* at 1410.

any rights they did not give up, and “[a]n Indian reservation will be defined to protect any pre-existing possessory rights of the Indians unless a contrary intent clearly appears in the document or statute that created the reservation.” *Id.* at 762-63.

In *In re the Gen. Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68 (Ariz. 2001) (“*Gila V*”), the Arizona Supreme Court considered the general purpose of an Indian reservation and relied on *Winters* and *Arizona I* to conclude “[w]e agree with the Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a ‘permanent home and abiding place,’ that is a ‘liveable’ environment.” *Id.* at 74 (citing *Winters*, 207 U.S. at 565 and *Arizona I*, 373 U.S. at 599). The *Gila V* court expressly rejected the contention that the only purpose of an Indian reservation was to encourage an agricultural way of life: “[a]s observed by Special Master Tuttle in his *Arizona II* report, ‘the [Supreme] [C]ourt did not necessarily adopt [the PIA] standard as the universal measure of Indian reserved water rights’” *Id.* at 78 (quoting *Arizona II* Master Report at 90). *Gila V* also cited to *Greely* in confirming that “[t]he purposes of Indian reserved rights . . . are given broader interpretation in order to further the federal goal of Indian self-sufficiency.” *Id.* at 74, (citing *Greely*, 712 P.2d at 768). *Gila V* emphasized the well-recognized principle that executive orders, like treaties and statutes, must be construed liberally in favor of the Indians and as the tribes would have understood them. *Id.* at 74-75.

Gila V analyzed the different activities that could be considered on a case by case basis to quantify water rights to “satisfy both present and future needs of the reservation as a liveable homeland.” *Id.* at 77-81. *Gila V* acknowledged that the PIA standard is the applicable methodology to quantify an agricultural claim. *Id.* at 77-79. In addition, the court recognized that “[a] permanent homeland requires water for multiple uses, which may or may not include

agriculture.” *Id.* at 78. *Gila V* concluded that the actual and proposed water uses should be analyzed using the following factors: tribal history, tribal culture, reservation geography, topography and natural resources, tribal economic base, past water use on the reservation and population considerations. *Id.* at 80. The court provided these factors as an initial, but not exhaustive, list. *Id.* at 81.

Courts in Washington and New Mexico have also recognized the broad homeland purposes of Indian reservations. *See State Dep’t. of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (“*Aquavella II*”) (finding that the purpose of the reservation was for the “permanent settlement of the Yakima Indians.”); *State of New Mexico ex rel. Reynolds v. Lewis*, Nos. 20294 and 22600, Final Judgment (5th Judicial District, Chavez County, New Mexico) (July 11, 1989) at 9, *aff’d*, 861 P.2d 235 (N.M. App. 1993) (“a permanent homeland for the Mescalero Tribe requires water for recreation, agriculture, domestic, stock, commercial, industrial, and other uses for the ‘arts of civilization.’”); *but see In re: The Gen. Adjudication of All Rights to Use Water In the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (“*Big Horn I*”), *aff’d* by an equally divided Court sub nom., *Wyoming v. United States*, 492 U.S. 406 (1989) (Wyoming Supreme Court limited the purpose of the Wind River Reservation to agriculture, however, it allowed a reserved right for municipal, domestic, and commercial use as part of the agricultural water right).¹⁰

¹⁰ It is important to point out that even the Wyoming Supreme Court found that determination of Indian reserved water rights turns upon the intent of both the Tribes and the United States, as evidenced by the text of the treaty and circumstances surrounding the creation of that treaty. *See generally, Big Horn I*, 753 P.2d at 97-98. However, that court went on to find that the text and circumstances surrounding the creation of the 1868 Treaty of Fort Bridger suggested that the sole purpose of the Wind River Reservation was to encourage agriculture. The court specifically found that the Tribes of the Wind River Reservation had “neither a dependency upon fishing for a livelihood nor a traditional lifestyle involving fishing.” *Id.* at 98. It went on to hold that “[t]he evidence is not sufficient to imply a fishery flow right absent a treaty provision.” *Id.* Thus, even *Big Horn I* rejects the notion that, as a matter of law, the sole purpose of Indian reservations is irrigated agriculture. Instead, *Big Horn I* supports reserved water rights for hunting, fishing, and gathering where a Tribe was traditionally reliant upon those activities. For the reasons discussed below, the Coeur d’Alene Tribe was traditionally reliant on hunting, fishing and gathering.

ARGUMENT

Federal court precedent, supplemented by the historical facts as developed in this case, demonstrates that the purpose of the Coeur d'Alene Reservation was to provide a permanent homeland for the Tribe. The water rights necessary to fulfill that homeland purpose have a time immemorial priority date for aboriginal activities and a date-of-reservation priority date for all other uses.

I. THE PURPOSE OF THE RESERVATION WAS TO PROVIDE A PERMANENT HOMELAND AND THAT OVERALL HOMELAND PURPOSE INCLUDES THE TRIBE'S TRADITIONAL ACTIVITIES AS WELL AS AGRICULTURAL AND OTHER MODERN ACTIVITIES.

The United States as trustee and Coeur d'Alene Tribe as beneficiary are entitled to federal reserved water rights to serve the purpose of the Reservation. In addition, the Tribe retained any aboriginal rights, often referred to as *Winans* rights,¹¹ that it did not expressly give up in its negotiations with the United States and associated water rights are included in the claims of the United States as trustee in this case. The federal reserved water rights must be sufficient to serve the overall purpose of the reservation, which in the case of an Indian tribe, must be interpreted broadly to provide a permanent homeland. The overall homeland purpose includes water to sustain multiple activities ranging from traditional uses, such as hunting, fishing, and gathering, to uses that began around the time that the reservation was established, such as agricultural and industrial uses. To determine which uses must be included in the federal reserved water rights that serve the homeland purpose of an Indian reservation, courts examine the specific documents, unique histories, and circumstances surrounding the creation of a particular reservation. All documents examined must be subject to the federal Indian law canons

¹¹ *United States v. Winans*, 198 U.S. 371 (1905) (holding that tribes retain aboriginal rights not expressly given up to the United States) is discussed further below.

of construction—documents shall be construed as the Indians would have understood them and any ambiguities must be interpreted in their favor.

The federal courts determined the purpose of the Coeur d’Alene Reservation in *Idaho v. United States*, 533 U.S. 262 (2001) (“*Idaho II*”).¹² That precedent, together with the testimony of expert historians in this case, demonstrates that the Coeur d’Alene Reservation was established to provide for both continuation of traditional activities as well as initiation of modern activities—in other words, a permanent homeland.

A. The Idaho II Litigation.

The *Idaho II* litigation concerned the question of ownership of submerged lands within the boundaries of the Coeur d’Alene Reservation. While that specific issue is different than the issue in the present case, there is significant overlap because a major part of the legal test applied in *Idaho II* required determination of the purpose of the Coeur d’Alene Reservation. *Idaho II* focused primarily on the traditional activities of the Coeur d’Alene Tribe within its ancestral homeland, such as hunting, fishing and gathering, and survival in general, and concluded that the Tribe and United States intended for those activities to continue on the Reservation. Moreover, *Idaho II* also recognized that the Tribe had begun modern activities, such as agriculture and industry, and that the Reservation purpose must provide for those activities as well.

Idaho II arose from an action by the United States, acting in its own capacity and as trustee for the Coeur d’Alene Tribe, against the State of Idaho in the United States District Court for the District of Idaho to quiet title to submerged lands within the exterior boundaries of the Tribe’s Reservation. The Tribe intervened as a plaintiff and Idaho counterclaimed, seeking to

¹² This litigation is referred to as *Idaho II* because it followed an independent attempt by the Tribe to quiet title, *inter alia*, to the same lands. See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997).

quiet title in favor of the State. Following a nine-day trial and detailed factual findings, the district court quieted title “in favor of the United States, as trustee, and the Coeur d’Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation.” *United States v. Idaho*, 95 F. Supp. 2d 1094, 1117 (D. Idaho 1998). The court ordered that “[t]he State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation.” *Id.* The Court of Appeals for the Ninth Circuit affirmed. *United States v. Idaho*, 210 F.3d 1067 (2000). The Supreme Court granted certiorari, *Idaho v. United States*, 531 U.S. 1050 (2000), and affirmed, 533 U.S. 262 (2001).¹³

The Ninth Circuit expressly noted the thorough district court factual findings: “[a]fter a nine-day trial involving multiple expert and lay witnesses, extensive written reports, scientific studies, and historical documents, the district court issued a lengthy and meticulous decision. . . .” *Idaho II*, 210 F.3d at 1069. Idaho did not challenge the district court’s factual findings on appeal to the Ninth Circuit or Supreme Court. *Id.* at 1073 (“the State does not appear to have challenged any of the [district] court’s underlying factual findings, we accept the facts as given and note they are amply supported by the record.”); *Idaho II*, 533 U.S. at 265, n.1 (“Petitioner, the State of Idaho, did not challenge the District Court’s factual findings on appeal.”).

In addressing the competing claims to the sovereign ownership of the submerged lands underlying navigable waters on the Coeur d’Alene Reservation, the United States Supreme Court carefully examined whether the purpose of the reservation includes continuation of the Coeur

¹³ For ease of reference, this brief refers to *Idaho II* as short form for the district court, Ninth Circuit and Supreme Court decisions in that case.

d’Alene Tribe’s use of those submerged lands and related waterways for “food, fiber, transportation, recreation, and cultural activities.” *Idaho II*, 533 U.S. at 265-72. The Court answered this question affirmatively and found that the United States, on behalf of the Coeur d’Alene Tribe, retained ownership of the bed and banks of Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the reservation. *Id.* The Supreme Court also adopted the district court’s finding that “submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to Congressional action confirming the reservation and granting Idaho statehood.” *Id.* at 275.

The *Idaho II* courts exhaustively reviewed the history of the establishment of the reservation, which involved several rounds of negotiations, agreements, executive orders, and Congressional actions. *See* 533 U.S. at 265-271 and Joint Statement of Facts at ¶ 1-2 (short summary). Similarly, expert historians provided an extensive analysis. *See* Joint Statement of Facts at ¶ 2-84. In examining the evidence, the *Idaho II* courts applied the Indian canons of construction, though the application of the canons was done in the context of a strong presumption in favor of state title to submerged lands under navigable waterways. *Idaho II*, 95 F. Supp. 2d at 1098.¹⁴ The Supreme Court noted that “[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption against defeat of a State’s title.” *Idaho II*, 533 U.S. at 272-73 (citations omitted). Even in the face of such a strong presumption in favor of the state, the historical record was so overwhelming in *Idaho II* that the

¹⁴ This presumption has its roots in the fact that ownership of submerged lands underlying navigable waters “carries with it the power to control navigation, fishing, and other public uses of water . . .” *United States v. Alaska*, 521 U.S. 1, 5 (1997) (citations omitted). As a result, ownership of submerged lands “is an essential attribute of sovereignty.” *Id.* The sovereign character of submerged lands gives rise to the equal footing doctrine, in which “a state is presumed upon admission to the Union to ‘succeed to the United States’ title to the beds of navigable waters within [its] boundaries.” 95 F. Supp. 2d at 1097 (quoting *Alaska*, 521 U.S. at 5). No such strong presumption of state or private retention of water rights on federal reservations exists in this case.

United States and the Tribe nonetheless were able to conclusively overcome the strong presumption. Importantly, no presumption in favor of the State exists in this case, making this evidence all-the-more forceful here.

B. Testimony of expert historians in this case.

In addition to *Idaho II*, historians in this case have testified via expert reports regarding the historical record of the Coeur d'Alene Tribe, particularly with respect to the circumstances surrounding the creation of the Reservation. The United States contracted with Ian Smith and the Tribe contracted with E. Richard Hart. *See* Joint Statement of Facts at 1. Both witnesses are expert historians, as demonstrated in their resumes, and provided reports based on research of historic documents. *Id.* Their testimony is summarized in the Joint Statement of Facts and provides additional detail which complements the historical findings of *Idaho II*.

C. In *Idaho II*, the Supreme Court found that the Coeur d'Alene Reservation was created to enable the Tribe to continue its traditional lifestyle which depended on waterways for hunting, fishing, and gathering in addition to cultural and spiritual identity. Expert reports further support this finding.

The test applied by *Idaho II* to determine title to submerged lands underlying navigable waters overlaps with the legal standard to determine entitlement to a federal reserved water right, because both require analysis of the purpose of the reservation. In examining federal government intent regarding submerged lands in an Executive Order reservation implementing an agreement between the United States and a tribe, courts consider whether “the tribe depended on the watercourse for a significant portion of the tribe’s needs” and whether the “Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe.” 95 F. Supp. 2d at 1098. The Supreme Court emphasized that courts consider “whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State” and that, where the purpose would have been undermined, “[i]t is simply not plausible

that the United States sought to reserve only the upland portions of the area.” 533 U.S. at 273–74 (citations omitted).

In considering the purpose for the creation of the Coeur d’Alene Reservation, *Idaho II* settles a number of these issues. First, *Idaho II* conclusively demonstrates that the Tribe was traditionally dependent upon the water resources within its territory for its subsistence fishing, hunting, and gathering needs as well as general survival. Moreover, it concludes that although the Tribe, with the encouragement of the United States, was beginning to engage in agriculture and other modern industries, it continued to be reliant upon the water resource for its subsistence up to and beyond the period when its reservation was created in 1873. Second, it establishes that the United States was aware of that dependence and could only achieve its goals of promoting settlement, avoiding hostilities with the Tribe, and extinguishing aboriginal title by agreeing to a reservation consistent with the tribal demand that it include waterways for traditional subsistence activities.

Taken together, these factors led the *Idaho II* Court to conclude that it was the mutual intent of both the United States and the Tribe to preserve the existence of the vital waterways as part of the reservation and to ensure the Tribe’s continued right to use those waterways for “food, fiber, transportation, recreation, and cultural activities”—in other words, to preserve all of the essential activities the Tribe had relied upon to provide for its survival and protect its way of life in its ancestral homeland. *Idaho II*, 533 U.S. at 265-72.

- i. *Idaho II* conclusively settles that the Coeur d’Alene Tribe depended on the Lake and associated waterways for traditional activities in its homeland from time immemorial through creation of the Reservation. Expert reports further support this finding.**

In considering the history of the Coeur d’Alene Tribe, the Supreme Court recognized that:

[t]he Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River. Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.

Idaho II, 533 U.S. at 265. The heart of the Tribe's territory has always been the Lake and its related waterways. The district court found "[t]he Coeur d'Alene Indians have occupied the area adjacent to the Lake and the Coeur d'Alene, St. Joe and Spokane Rivers since time immemorial. The Tribe traditionally survived by fishing, hunting and gathering." 95 F. Supp. 2d at 1099-1100. For this reason, "[h]istorically, the Coeur d'Alene Indians lived in a number of villages located around the Lake and along the rivers. The Tribe consumed resident trout and whitefish year-round. The resident fishery was a main staple of the Tribe's diet." *Id.* at 1100. The court explained:

[t]he Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual, religious and social life centered around the Lake and rivers.

Id. at 1101.

In addition to fishing, the Tribe utilized waterways "to facilitate hunting activities and depended on the waterways to hunt small game, such as beaver, as well as migratory waterfowl."

Id. at 1100.

The waterways also "serve[d] as a means of efficient transportation" for purposes including trade. *Id.* at 1101. As the district court found:

The watercourses provided the primary highways for travel, trade and communication. Canoes were prevalent and constructed in several distinct styles.

Travel was measured in the days it took a canoe to get from point to point. Canoes also facilitated the Tribe's fishing and hunting activities.

Id. at 1100.

The Lake, related rivers, smaller streams, as well as seeps, springs, and wetlands were also utilized for plant gathering purposes. "[T]he Coeur d'Alenes harvested camas, a plant yielding a fleshy bulb . . . Tribal members also harvested berries throughout the summer as they ripened at successive elevations." *Id.* at 1100-01. The court also noted:

The Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato, a plant that was gathered annually by tribal members from the shallow waters of the Lake and rivers. The Coeur d'Alenes also collected rushes and tule from alongside the waterways for use in the construction of baskets, mats and the Tribe's lodges.

Id. at 1100.

The Lake and its related waterways were more than a means of subsistence to the Tribe: it was the heart of their aboriginal homeland and integral to who they are as a people. "The Lake and rivers played an integral part in the Tribe's cultural activities. The waterways were tied to the Tribe's recreational pursuits, religious ceremonies, and burial practices." *Id.* at 1100. As a result, the "Tribe's spiritual, religious, and social life centered around the Lake and rivers." *Id.* at 1101. Based upon these findings, the court concluded:

the Tribe depended on the Lake and associated rivers for a significant portion of its needs. The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. Furthermore, the Coeur d'Alenes 'depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices.'

Id. at 1102 (quoting *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983)) (internal citations omitted).

Idaho II further establishes that the Coeur d'Alene Tribe continued to rely upon the Lake and related rivers for the above purposes at the time of Reservation establishment in 1873. To find this continued reliance, the district court emphasized the Tribe's rejection of the 1867 Reservation, the boundaries of which were unilaterally proposed by the United States without Tribal consultation. *Id.*; see Statement of Facts ¶ 40-64. This finding was expressly affirmed by the Supreme Court when it noted that "[t]he Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways." *Idaho II*, 533 U.S. at 266. As a result, the Tribe petitioned the United States in 1872, asking for an enlargement of their reservation boundary to include the Lake and rivers. 95 F. Supp. 2d at 1103. The district court highlighted the significance of the Tribe's action:

[t]he . . . petition makes three points relevant to the Court's present inquiry. First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home. Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs.

Id. The court also found that the "petition provides the Tribe's own assessment of its ability to live without the resources provided by the Lake and rivers. In no uncertain terms, the Coeur d'Alenes made it be known that their continued reliance on the waterways was necessary to ensure their survival." *Id.* at 1104. Based upon these factors, the court concluded:

[I]n 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering, and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived.

Id. at 1104 (citations omitted).

Expert testimony summarized in the Joint Statement of Facts provides additional detail and support which complements the historical findings of *Idaho II*. Expert reports thoroughly

document the Tribe's reliance from time immemorial through and beyond reservation creation on the waterways for fishing, hunting, gathering, trade, culture, and general survival. *See* Joint Statement of Facts ¶ 5, 6, 8, 10, 11, 12, 13, 14, 37-39, 69, 71 (Tribe's overall reliance on waterways for multiple activities); 6, 8, 10, 13, 14, 16-18, 37-39, 46 (fishing); 6, 8, 10, 13, 14, 19-21, 37-39, 46 (hunting); 6, 8, 10, 13, 22-24, 37-39 (gathering); 10, 26 (trade); 85-89 (continuation of traditional activities after reservation creation); 94-96 (modern day efforts to protect and restore water resources); 97-98 (continued Tribal connection to water resource). Expert reports further document the Tribe's rejection of the 1867 reservation boundaries and demand for a reservation including waterways. *See* Joint Statement of Facts ¶ 40-46 (federal government's unilateral establishment of 1867 reservation); 47-51 (Tribe's rejection of 1867 boundaries due to inadequate waterways); 53, 55-58 (federal government intent to negotiate for reservation satisfactory to Tribe); 58-61 (description of 1873 agreement providing for enlarged reservation).

- ii. Idaho II conclusively resolves that at the time of the 1873 Reservation, the federal government was plainly aware of the vital importance of water resources to the Tribe and could only achieve its goals by agreeing to a reservation that included the waterways. Expert reports further support this finding.***

The district court found that the United States' receipt of the Tribe's petition for an enlarged reservation, as well as its reaction thereto, demonstrated federal awareness of the Tribe's continued dependence on the water resource for subsistence fishing, hunting, and gathering, as well as cultural identity, in 1873. The district court specifically found:

[a]ny uncertainty concerning the extent of the Tribe's dependence on the Lake and rivers in 1873 was dispelled by the Tribe's request in the . . . petition for inclusion of the waterways in an expanded reservation. Most important, during the 1873 negotiations the Coeur d'Alenes reiterated their demand that the 1867 reservation be enlarged to include the Tribe's traditional fishing grounds.

Id. at 1106.

The Supreme Court summarized that the “right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing.” *Idaho II*, 533 U.S. at 274. The Court cited, for example, government correspondence emphasizing the importance of fishing to the Tribe at the time of the reservation’s creation: “[t]he concern with hostility arose again in 1873 before the reservation boundaries were established, when a surveyor on the scene had warned the Surveyor General that ‘should the fisheries be excluded there will in my opinion be trouble with these Indians.’” *Id.* at 276-77. Indeed, “the Secretary of Interior advised the Senate against fiddling with the scope of the reservation without the Tribe’s agreement” and Congress’ objective was to “obtain tribal interests only by tribal consent.” *Id.* at 277.

Rather than force the Tribe onto the 1867 Reservation, the United States engaged in negotiations with the Tribe, which resulted in an “agreement [that] called for setting aside a significantly larger portion of the Tribe’s aboriginal territory” 95 F. Supp. 2d at 1105. Further, the new boundary “enclosed all but a small portion of the Lake, the Coeur d’Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to the present-day site of St. Maries, and a tract of land lying to the south of the Spokane River.” *Id.* Importantly, the district court concluded that the majority of the expanded reservation was not suitable for farming, but was instead expanded because “the Coeur d’Alenes demanded an enlarged reservation that included the Tribe’s fishing grounds, a mill site and the Mission. The Tribe’s demand for its fishing grounds and a mill site could not be satisfied without an agreement that included within the reservation the land under the Lake and rivers.” *Id.* at 1109.

The court also expressly noted the importance of retaining water flows through the reservation: “the 1873 agreement guarantees ‘that the water running into said reservation shall not be turned from their natural channel where they enter said reservation.’” *Id.* at 1108. Thus, the district court summarized the situation:

Based on the foregoing, the Court concludes that in 1873 the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers. As recounted above, from first contact with the Coeur d'Alenes, government officials noted the Tribe's reliance on the water resource. . . . According to Governor Bennett, the expanded boundaries fixed by the 1873 agreement reflected the United States' realization that the Coeur d'Alenes required a reservation that included the Tribe's fishery. Thus, at the time of the 1873 reservation the “Government’s Indian agents understood that ‘the capture of fish was an essential source of the Indians’ food supply.’”

Id. at 1106 (quoting *Muckleshoot*, 713 F.2d at 458). The court further concluded:

The great weight of the evidence demonstrates that in 1873 the Tribe depended on the water resource for a significant portion of its needs. Finally, the evidence shows that the Federal Government was plainly aware of the Tribe’s dependence at the time of the Executive reservation.

Id. at 1106 (citations omitted).

Although the United States likely could have forced the Tribe onto the 1867 Reservation, the district court recognized that a number of “public exigencies” existed in 1873 that impacted federal intent, causing the United States to instead negotiate and acquiesce to tribal demands. *Id.* at 1107. The Supreme Court summarized those exigencies as: “promoting settlement, avoiding hostilities, and extinguishing aboriginal title.” 533 U.S. at 275-276. The Court likewise found that “the Federal Government could only achieve [these] goals,” by agreeing to the Tribe’s demands for an enlarged reservation that included the Lakes and rivers as well as water rights to support its budding agricultural and industrial uses. *Id.*

The Ninth Circuit affirmed, finding that the purpose of the Reservation would have been “defeated” had it not included the waterways. 210 F.3d at 1075.

Based upon these facts, the district court, affirmed by the Ninth Circuit and the Supreme Court of the United States, ultimately found that:

[A] purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. 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 (citations omitted).

Expert reports further document that the federal government was aware of the vital importance of the water resource to the Tribe and could only achieve its goals by agreeing to a reservation that included the waterways supporting fishing, hunting, and gathering and other traditional activities. *See* Joint Statement of Facts ¶¶ 32-36, 39, 53, 55-58, 68, 71 (federal government intent to negotiate for reservation that included waterways important to Tribe); 58-61 (description of 1873 agreement); 62-64 (effect of Executive Order of 1873).

D. *Idaho II* demonstrates that the Coeur d'Alene Reservation was also created to enable the Tribe to pursue agriculture and other modern activities necessary to achieve economic self-sufficiency. Expert reports further support this finding.

The focus in *Idaho II* was on the question of whether traditional uses were a purpose of the reservation because the State of Idaho conceded that pastoral and agricultural uses were included as reservation purposes. The district court rejected the State's argument that the Tribe solely adopted pastoralism and abandoned its traditional subsistence lifestyle:

The State contends that following the acquisition of the horse many tribal members relocated from stream side villages to open, grassy areas, adopted pastoralism, and abandoned the Tribe's traditional subsistence lifestyle. The weight of the evidence demonstrates, however, that the majority of Coeur d'Alenes continued to live along the waterways and depend on the water resource for food, fibre and transportation.

95 F. Supp. 2d at 1101, n.7. Even though *Idaho II* did not focus on agriculture and other modern uses, the Court noted that such uses had begun at the time that the reservation was established, and the Court's findings support the conclusion that the parties intended both to preserve traditional activities as well as promote modern activities.

By the 1840s tribal members began to augment their traditional lifestyle with some garden plots, although that effort did not displace traditional hunting, fishing, or gathering. The district court explained:

By the 1840's, the Coeur d'Alenes had begun to cultivate small garden plots, rarely exceeding an acre or two. The primary crops were potatoes and wheat. While the Tribe's agricultural endeavors augmented its traditional lifestyle, it did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl and plants. The limited quantities and seasonal availability of garden produce served at most as a supplement to the continuous and stable source of food and fibre provided by the water resource.

Id. at 1101. The court further found:

In 1846, the Jesuits established the Mission of the Sacred Heart on the Coeur d'Alene River and with the help of tribal members began farming. Eventually, the Mission's farm totaled 200 acres. The agricultural production from the Mission farm, however, did not play a significant role in the Coeur d'Alenes' diet. While many of the federal officials that interacted with the Coeur d'Alenes during the 1850's and early 1860's commented on the Tribe's agricultural efforts, they also noted the Tribe's use of the Lake and rivers.

Id. at 1102 (citations omitted).

While the court rejected Idaho's argument that the reservation was limited to pastoral and agricultural purposes, it found that those purposes had begun and would be continued on the reservation, along with traditional activities, into the future.

[A]t the time of the Executive reservation in 1873 the Tribe continued to be dependent on the Lake and rivers. Reports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias. Depictions of agricultural activity most likely are based on the Tribe's maintenance of garden plots, horses and, in some cases, cattle. Estimates of

farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d'Alenes were not engaged in systematic farming practices.

Id. at 1104 (citations omitted).

Expert reports further document the initiation of agriculture on the reservation as well as federal government intent to promote that agriculture. Joint Statement of Facts ¶¶29-31, 46. For example, the 1873 Agreement provided for the government to provide the Tribe with, among other things, wagons, plows, mares, mowers, harrows, grain cradles and a grist mill. The United States promised in the 1887 Agreement to provide a grist mill and Congress' 1891 ratification authorized funding for the grist mill. Joint Statement of Facts ¶30. By 1881, the Coeur d'Alenes had constructed a granary and a root house on the shores of Coeur d'Alene Lake and reportedly had at least 160 small farms and gardens in operation. Joint Statement of Facts ¶31.

E. **Idaho II and the expert reports in this case demonstrate that the Coeur d'Alene Reservation was established for the broad purpose of providing a permanent homeland.**

Idaho II is binding precedent that one purpose of the reservation was continuance of traditional activities while providing strong legal support for the conclusion that the reservation was also established to promote modern activities such as agriculture. When the *Idaho II* legal framework is applied to the facts in this case, the evidence demonstrates that the purpose of the Coeur d'Alene Reservation is to provide a permanent homeland for tribal members and other Indians who moved to the reservation. The homeland established by the 1873 Executive Order and associated agreements not only anticipated agricultural uses of reservation lands, but also provided for tribal members to continue hunting, fishing, and gathering—activities that relied heavily on the rivers, lakes, springs, marshes, and other aquatic resources which the 1873 reservation boundaries very purposefully included. The homeland purpose includes use of water for longstanding needs such as food, fiber, transportation, recreation, and cultural activities as

well as sustaining the Tribe's livelihood in the future. *Idaho II*, standing alone, sets out the uncontroverted findings demonstrating the above purpose and is controlling precedent here. Moreover, to the extent any additional facts are considered, the undisputed facts established in this case by historic reports demonstrate the Coeur d'Alene Reservation's homeland purpose.

In *Winters*, the Supreme Court noted that the Fort Belknap Reservation was established “as an Indian reservation as and for a permanent home and abiding place” for the tribes living there. 207 U.S. at 565. Similarly, the March 26, 1887 Agreement provided for the 1873 Coeur d'Alene Reservation to be “held forever as Indian land and as homes for the Coeur d'Alene Indians” and any other tribes that relocated to the Coeur d'Alene Reservation. Joint Statement of Facts ¶74; *see also Idaho II*, 533 U.S. at 267, 271. In *Winters*, the Court observed that the “Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization” and held that the Tribe did not “give up the waters which made it valuable or adequate.” 207 U.S. at 576. Nor did the Coeur d'Alene Tribe give up the “basket of resources” provided by the reservation's waterways. *See, e.g.*, 95 F. Supp. 2d at 1104. The Coeur d'Alene Reservation's homeland purpose is entirely consistent with *Winters* and *Idaho II*.

As in *Arizona I*, water for the Coeur d'Alene Reservation “was intended to satisfy the future as well as the present needs of the Indian Reservations.” 373 U.S. at 600. *Arizona I* relied on *Winters* to conclude that reserved water rights were “necessary to make the reservation livable.” *Arizona I*, 373 U.S. at 599 (emphasis added). This is consistent with judicial analysis of Coeur d'Alene Reservation purposes in *Idaho II*—which recounted in great detail the need for the reservation to be livable. *See, e.g.*, 95 F. Supp. 2d at 1104 (discussing waterways “necessary to sustain the Tribe's livelihood”). Further, as in *Arizona I*, the Coeur d'Alene

reserved water rights are “present perfected rights” as of the date that the reservation is established—even where established by executive order. 373 U.S. at 600. In *Arizona I*, the Court held: “[w]e can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive,” 373 U.S. at 598, and that “the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created,” which are “present perfected rights.” *Id.* at 600.

In summary, the United States Supreme Court found that the United States and Coeur d’Alene Tribe purposely retained submerged lands and related waters within the Coeur d’Alene reservation for food, fiber, transportation, recreation, and cultural activities. *Idaho II*, 533 U.S. at 274-76. The Court reached this conclusion despite the State of Idaho’s efforts to portray the Tribe as having abandoned traditional activities in favor of pastoralism. While the courts acknowledged the Tribe’s addition of agriculture, the courts squarely rejected the State’s theory of abandonment of traditional subsistence activities. For these reasons, *Idaho II*, standing alone, sets out the findings necessary to reach the conclusion that the purpose of the Coeur d’Alene Reservation is to provide for both continuation of traditional activities as well as initiation of modern activities—in other words a permanent homeland. Even if *Idaho II*, standing alone, did not provide sufficient evidence, the detailed expert reports provide any additional support that is necessary.

II. THE PRIORITY DATE FOR WATER RIGHTS NECESSARY FOR TRADITIONAL USES IS TIME IMMEMORIAL. THE PRIORITY DATE FOR WATER RIGHTS NECESSARY TO SUPPORT ACTIVITIES THAT BEGAN AROUND THE TIME THAT THE RESERVATION WAS ESTABLISHED IS NOVEMBER 8, 1873.

The priority date is a critical component of a water right administered in the prior appropriation system, such as that followed in Idaho, because senior users receive the full

measure of their water rights before a junior user in times of shortage. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976); *see also Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890). Under Idaho state law, the priority date of a water right is determined by the date upon which water is applied to beneficial use. *Conant v. Jones*, 3 Idaho 606, 32 P. 250 (1893).¹⁵ Federal reserved water rights on Indian reservations are different, however, because priority date is based upon federal law and depends on whether the tribal activity requiring water was engaged in prior to creation of the reservation or developed after the reservation was established. Water rights for activities that predate the creation of the reservation receive a time immemorial priority date as compared to a date-of-reservation priority date for those activities that began at or near the time the reservation was established.

A. Water rights to support the continuation of aboriginal activities, including water rights necessary for domestic, hunting, fishing and gathering rights on the Coeur d'Alene Reservation, receive a time immemorial priority date.

Winans offers early judicial recognitions of aboriginal rights and how those rights may be preserved and recognized by the United States. 198 U.S. at 381. While *Winans* was not a water rights case, it established principles that apply in the water rights context, primarily with regard to the preservation of aboriginal rights. When interpreting the treaty provisions related to the Yakama Nation's fishing rights, the *Winans* Court found:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians but a grant of right from them—a reservation of those not granted.

¹⁵ Today, under the permit system, Idaho law dictates that an appropriator's priority date relates back to the date they applied for a water permit rather than the date water was first applied to beneficial use. I.C. § 42-219(4).

Id. at 381 (emphasis added). In other words, tribes with reservations within their ancestral homelands retain the aboriginal rights which they did not give up to the United States.

A few years later, in *Winters*, the Supreme Court's analysis began once again by recognizing tribes' aboriginal control over resources:

The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all of this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

207 U.S. at 576 (emphasis added). Consistent with the *Winans* findings, the *Winters*' Court recognized the pre-existence of aboriginal rights and, moreover, that such rights endure. *Winters* ultimately recognized a date-of-reservation priority date because the water use at issue in that case (which was not a general stream adjudication) was for irrigation, which was not a traditional exercise of rights by the Gros Ventre and Assiniboine Bands on the Fort Belknap Reservation. 207 U.S. at 576-77.

While *Winans* and *Winters* set the stage, *Adair* completed the development of federal common law regarding a time immemorial priority date. 723 F.2d at 1410. As explained above, the *Adair* court first analyzed the purpose of the Klamath Reservation and determined that it was established for two purposes: 1) to support agriculture; and 2) to maintain the Klamath Tribes' treaty right to hunt and fish. *Id.* at 1410. Next, the court turned to the analysis of priority date and concluded that the water rights for the Klamath Tribes' former reservation gave rise to two priority dates: 1) date-of-reservation for agriculture; and 2) time immemorial for hunting, fishing and domestic uses. *Id.* at 1414-15.

The *Adair* court implemented a three-step process to analyze whether a time immemorial priority date applies. First, the court reiterated bedrock principles of federal Indian law that must

frame the analysis. *Id.* at 1413. Chief among these was a citation to *Winans* relying on the principle that tribes retain whatever rights they did not relinquish to the United States. *Id.* (citing *Winans*, 198 U.S. at 381) (other citations omitted). The court continued by restating the Indian canons of construction that any treaties must be construed as tribes would understand them and any ambiguities must be interpreted in their favor. *Id.* This step concluded by noting again that “the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe’s sovereign dependent status.” *Id.* (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956)).

Second, the *Adair* court analyzed the historic facts of the Klamath Tribes as related to water use. 723 F.2d at 1413. The court noted that the Tribe had lived for centuries in its ancestral homeland which “encompassed some 12 million acres.” *Id.*

Within its domain, the Tribe used the waters 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.

Id. (citation omitted).

“With this background in mind,” the third and final step in the analysis conducted by the *Adair* court was to “examine the priority date attaching to the Klamath Tribe’s reservation of water to support its hunting and fishing rights.” *Id.* In confirming the time immemorial priority date, the court found:

There is no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself. Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home. Further, we find no language in the treaty to

indicate that the United States intended or understood the agreement to diminish the Tribe's rights in that part of its aboriginal holding reserved for its permanent occupancy and use.

Id. at 1414 (citations omitted). The time immemorial priority date attached because the "rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of those rights." *Id.* (citations omitted); *see also Joint Board of Control v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) ("Moreover, when the Tribe exercised aboriginal title and rights to fish on the lands and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial.").

In *Greely*, 712 P.2d 754 (Mont. 1985), the Montana Supreme Court followed the precedent established in *Adair* and applied federal law regarding priority date. The *Greely* court, like the *Adair* court, began its analysis of priority dates by restating principles of federal Indian law, such as the canons of construction, and reiterating that "[a]n Indian reservation will be defined to protect any pre-existing possessory rights of the Indians unless a contrary intent clearly appears in the document or statute that created the reservation." *Greely*, 712 P.2d at 763 (citations omitted). In reaching the conclusion that multiple priority dates may apply to an Indian reservation, the Court found that "[t]he date of priority of an Indian reserved water right depends upon the nature and purpose of the right." *Id.* at 764. Thus, tribal uses that "existed before creation of the reservation" receive a priority date of time immemorial whereas a date-of-reservation applies "[i]f the use for which the water was reserved is a use that did not exist prior to creation of the Indian reservation." *Id.*

The *Adair* three-step analysis regarding priority date can be readily applied to the Coeur d'Alene Reservation. *See Adair*, 723 F.2d at 1413. First, the analysis is framed by the principles of federal Indian law, including the principles that the Tribe retained any rights that it did not

cede to the United States and that any documents must be interpreted as the Tribe would have understood them. *Id.* Second, the court must review the historic facts related to the Tribe's water use in its ancestral homeland. *Id.* *Idaho II* conducted an in-depth examination of the history of Coeur d'Alene people and their use of water resources for "food, fiber, transportation, recreation, and cultural activities." 533 U.S. at 265, 275-76. In particular, that case found that the "Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington" and that the Reservation was carved out of this ancestral homeland. 95 F.Supp.2d at 1095. The Tribe traditionally survived by fishing, hunting and gathering. The *Idaho II* Court found that the Lake and associated waterways were essential to the Tribe's traditional lifestyle. *Id.* at 1100. This factual analysis was adopted by the Supreme Court and applies here to support the conclusion that the Tribe's traditional water uses—for domestic use and to support hunting, fishing and gathering activities—must receive a time immemorial priority date.

In addition to the controlling precedent provided by the *Idaho II* factual analysis, the undisputed historic facts provided by expert historians in this case also support a time immemorial priority date for these water rights. Expert reports thoroughly document the Tribe's reliance from time immemorial through and beyond reservation creation on the waterways for fishing, hunting, gathering, trade, culture, and general survival. *See* Joint Statement of Facts ¶ 5, 6, 8, 10, 11, 12, 13, 14, 37-39, 69, 71 (Tribe's overall reliance on waterways for multiple activities); 6, 8, 10, 13, 14, 16-18, 37-39, 46 (fishing); 6, 8, 10, 13, 14, 19-21, 37-39, 46 (hunting); 6, 8, 10, 13, 22-24, 37-39 (gathering); 10, 26 (trade). Expert reports further document the Tribe's rejection of the 1867 Reservation boundaries and demand for a reservation including waterways. *See* Joint Statement of Facts ¶ 40-46 (federal government's unilateral establishment

of 1867 reservation); 47-51 (Tribe's rejection of 1867 boundaries due to inadequate waterways); 53, 55-58 (federal government intent to negotiate for reservation satisfactory to Tribe); 58-61 (description of 1873 agreement providing for enlarged reservation).

Based on these historic facts, the *Adair* analysis demonstrates that water rights for domestic, fishing, hunting and gathering activities on the Coeur d'Alene Reservation have a time immemorial priority date. See *Adair*, 723 F.2d at 1413. Similar to the Klamath Tribes in *Adair*, the historic record supports the Coeur d'Alene Tribe's exercise of traditional water uses and does not support any indication, "express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself." *Id.* at 1414. On the contrary, the Tribe bargained expressly for access to water resources so that it could continue fishing, hunting and gathering within its Reservation and there is no indication that the United States "intended or understood the agreement to diminish the Tribe's rights in that part of its aboriginal holding reserved for its permanent occupancy and use." *Id.* Altogether, the time immemorial priority date for these traditional uses is confirmed by the direct precedent of *Idaho II* and the great weight of the evidence.

B. November 8, 1873 is the priority date for water rights related to irrigated agriculture, commercial and industrial uses because such activities began around the time the Coeur d'Alene Reservation was established.

Winters and *Arizona I*, when establishing the basic principles of federal reserved water rights, provided the explanation for a date-of-reservation priority date. In *Winters*, the Court noted the "power of the government to reserve the waters and exempt them from appropriation under the state laws" before concluding that such reservation was accomplished in that case on May 1, 1888—the date that the United States reached agreement with the tribes of the Fort Belknap Reservation. 207 U.S. at 577. In addition, *Winters* noted the Tribe's authority to

reserve its own rights. *Id.* at 566-67. In *Arizona I*, the Court followed *Winters* and noted that the “United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.” *Arizona I*, 373 U.S. at 600. In both instances, the Court concluded that it was the action of the federal government as of the date that the reservation was established which provided the priority date for the water uses at issue.

A component part of the homeland purpose of the Coeur d’Alene Reservation was to reserve water rights necessary to support irrigated agriculture and commercial and industrial activities. Although it was the mutual intent of both the United States and the Tribe that the Tribe would eventually engage in these activities, they were not traditional activities of the Tribe. Accordingly, they are entitled to the date-of-reservation priority date of November 8, 1873. Once again *Idaho II* is applicable and controlling. There, the district court noted that tribal members, as of the 1840s, added agriculture as a supplement to their traditional lifestyle. 95 F. Supp. 2d at 1101. Although agriculture did not supplant tribal subsistence fishing, hunting, and gathering, there is no question that the federal government—through its agents operating in Coeur d’Alene country as well as a matter of federal policy—supported the Coeur d’Alene Tribe’s agricultural efforts leading up to the creation of the Coeur d’Alene Reservation in 1873. *See, Id.* at 1104. Expert reports further document the initiation of agriculture on the reservation as well as federal government intent to promote that agriculture. Joint Statement of Facts ¶ 29-31, 46. Commercial and industrial uses were also encouraged as a matter of federal policy to achieve the “goal of Indian self-sufficiency.” *Adair*, 723 F.2d at 1408, n. 13. For example, Congress’ 1891 ratification authorized funding for various industrial projects, included a grist mill and a smith shop, as well as employment of engineers, millers, mechanics and laborers. Act of Mar. 3, 1891, 26 Stat. 989 at 1028 (1887 Agreement), 26 Stat. 989 at 1030-32 (1891

appropriation). In sum, the record is replete with evidence supporting the date-of-reservation priority date for agricultural, commercial and industrial water rights.

III. THE HOMELAND PURPOSE OF THE COEUR D'ALENE RESERVATION INCLUDES THE WATER RIGHTS CLAIMED BY THE UNITED STATES AS TRUSTEE AND THE TRIBE AS BENEFICIARY.

The United States' and Tribe's claims in this case within the broad homeland purpose can be grouped into two categories: 1) traditional uses of water including hunting, fishing, gathering, cultural, spiritual and domestic uses; and 2) modern uses including agriculture, commercial and industrial uses. The federal reserved water rights doctrine and the precedent provided by *Idaho II*, as well as expert reports, demonstrate that the Reservation is legally entitled to water rights in both categories. This Section provides a brief summary of the relevant facts for each category of water rights claimed.

As a general matter, the claims include consumptive and non-consumptive uses. The place-of-use for consumptive use claims is limited to two categories of lands: 1) Trust Lands—lands owned by the United States and held in trust for the Coeur d'Alene Tribe or an allottee; and 2) Tribal Fee Lands—lands owned in fee by the Coeur d'Alene Tribe that were not in trust at the time that the claims were filed. Because land within the reservation was allotted and conveyed to non-Indians subsequent to reservation establishment, Joint Statement of Facts ¶¶90-93, it is worth noting that the consumptive claims are confined to remaining tribal lands. In the case of irrigation, the claims are further limited by practicably irrigable acreage and, in the case of domestic use, the claims are tied to Indian populations on the reservation. The consumptive claims amount to less than one percent of the total outflow of the Coeur d'Alene-Spokane River Basin. Joint Statement of Facts ¶¶99. Non-consumptive claims, such as instream flow claims for fish, include waters that cross private lands within the Reservation boundary, as well as waters

outside the Reservation. Such claims are necessary to serve the purpose of the Reservation based on the adfluvial lifecycle of the Tribe's fishery (discussed below). While these claims extend off of tribal trust lands, they are nonconsumptive and focus on instream flows and *in situ* water which are typical water rights for the state to hold over private lands for the benefit of fisheries important to all citizens.

A. Traditional Uses.

i. Maintenance of Coeur d'Alene Lake Levels

The United States and Tribe claim sufficient flows into Lake Coeur d'Alene "to maintain the natural monthly Lake elevations and outflows." United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p. 4 ("Cover Letter"). The Lake claim seeks a non-consumptive water right to ensure an "*in situ*" water elevation based on the natural hydrograph, but does not "seek to affect present [FERC] licensed operations at Post Falls" United States' Notice of Claim # 95-16704, p. 1-2. "Since the water rights claim must address the possibility that the dam will be removed or altered, the intent is to claim sufficient water to reflect the natural Lake processes prior to the Post Falls dam—consistent with the federal and tribal intent as it was understood in 1873." *Id.* at 2.

As explained in *Idaho II*, the Lake provides the very heart of the Coeur d'Alene Reservation. The Tribe has been and continues to be dependent on the Lake for subsistence, including hunting, fishing and gathering purposes. In addition to supporting different fish species and other aquatic biota on a year-round basis, Coeur d'Alene Lake provides critical habitats that are used seasonally by Westslope Cutthroat Trout and Bull Trout for feeding, holding, overwintering, and staging (prior to spawning). The Lake also provides wetlands

habitat for harvesting plants and hunting animals. In addition, the Lake continues to be central to the cultural identity of the Tribe, including its spiritual and religious practices. Indeed, the Tribe's insistence and success in securing a Reservation that included submerged lands under the Lake and associated waterways would be meaningless if these submerged lands were deprived of water. The Tribe, in effect, bargained for the natural hydrograph of the Lake. The United States' and Tribe's claim to the natural hydrograph in the Lake includes all of these uses.

The fish species to which the Tribe has historically been and is currently reliant upon include, but are not limited to, the Westslope Cutthroat Trout, Bull Trout, and in one drainage, Hangman Creek, Chinook Salmon. Joint Statement of Facts ¶100. The trout species exhibit an adfluvial life history strategy that depends on a combination of lake and riverine habitats within and external to the 1891 boundaries of the Reservation. *Id.* at ¶101. An "adfluvial" life history strategy means that the fish spend a substantial period of time within the lake feeding and growing and maturing, but then they migrate upstream into (ad-) the rivers and streams (fluvial) seeking areas that are suitable for spawning. These areas are widely distributed within the Coeur d'Alene Basin and can be spatially quite distant from the lake proper requiring upstream excursions of fish that may range from a few to more than 100 miles. After spawning, the adults then move back downstream and re-enter the lake and the cycle is repeated. *Id.*

Adfluvial Westslope Cutthroat Trout and Bull Trout move freely within the lake environment, with movement patterns largely governed by a complex of behavioral responses largely associated with changing water quality conditions, food availability, predator avoidance, and reproductive instincts. *Id.* at ¶ 104. Fish that spend a portion of their life cycle in the lake and that at a given time are within the 1891 boundaries of the Reservation, freely move to other areas in response to their biological needs. *Id.* at ¶ 104. The adfluvial life history strategy

requires both lake and riverine habitats, and importantly, that those habitats are available, accessible and properly functioning. *Id.* at ¶ 106.

The non-consumptive water right to ensure an “*in situ*” water elevation based on the natural hydrograph does not call for a higher lake elevation than presently occurs on Lake Coeur d’Alene and, in fact, would be satisfied with lower summer lake elevations. Typically, from the end of December through late spring, the Post Falls Project does not control upstream water levels, but the Project does hold the Lake to maintain the summer pool at or near elevation 2,128 feet. More specifically, the Federal Energy Regulatory Commission (FERC) stated in its Final Environmental Impact Statement concerning licensing the Post Falls Project that:

Once the lake has been drawn down to the degree that inflow, precipitation, and the natural lake outlet channel restriction will allow (typically by the end of December), the Post Falls Project no longer controls upstream water levels, and nearly all flows reaching the dam are allowed to pass. At that time and extending through the spring runoff period, the facility does not significantly influence either lake levels or river flows downstream of the Post Falls Project. Usually by June, high spring runoff has filled the lake up to or above summer recreation levels and, as the spring runoff abates and the lake levels drop, Post Falls Project closes its control gates to hold the lake and maintain the summer pool at or near elevation 2,128 feet.

See July 20, 2007 Final Environmental Impact Statement for Hydropower Relicensing, Spokane River and Post Falls Hydroelectric Projects, States of Washington and Idaho, FERC Project Nos. 2545 and 12606, Section 3 at page 3-63 (available at <http://www.ferc.gov/industries/hydropower/enviro/eis/2007/07-20-07.asp>).

ii. Maintenance of Wetlands, Springs and Seeps

The United States and Tribe claim sufficient water “to maintain wetlands, springs, and seeps on Tribal lands within the Reservation to provide for Tribally-harvested game and waterfowl habitat, Tribal plant gathering, and other Tribal traditional, cultural, spiritual, ceremonial, and/or religious uses.” Cover Letter at 4. These claims seek non-consumptive water

rights to ensure sufficient surface and/or groundwater to maintain habitat at wetlands, springs and seeps. *See, e.g.,* United States' Notice of Claim # 91-7779.

iii. *Instream Flows for Fish Habitat*

The United States and Tribe claim non-consumptive water rights “to maintain instream flows for fish species the Tribe harvests within the Reservation.” Cover Letter at 3. The instream flow claims include 71 stream reaches within three primary watersheds, the Coeur d’Alene River, the Saint Joe River and its primary tributary the Saint Maries River, as well as a number of streams that are directly confluent to Coeur d’Alene Lake. *See* Joint Statement of Facts ¶ 102. The purpose of the instream flow claims is to provide necessary habitat for the fish species which the Tribe historically relied on and currently harvests within its Reservation.¹⁶

As discussed above, Westslope Cutthroat Trout and Bull Trout are “adfluvial” fish, which means that they spend a substantial period of time within the Lake feeding and growing and maturing, but then they migrate upstream into the rivers and streams seeking areas that are suitable for spawning. *Id.* at ¶ 101. These areas are widely distributed within the Coeur d’Alene Basin and can be spatially quite distant from the Lake proper requiring upstream excursions of fish that may range from a few to more than 100 miles. *Id.* After spawning, the adults then move back downstream and re-enter the Lake and the cycle is repeated. *Id.*

Based on the adfluvial lifecycle of these fish species, the Tribal fisheries within the Reservation are biologically dependent on waterways and portions of Coeur d’Alene Lake that are beyond the boundaries of the Reservation. *Id.* at ¶ 101-106. Accordingly, the United States and Tribe claim flows in streams located both on and off the Reservation because they are

¹⁶ Current Tribal harvest of Bull Trout is limited due to conservation concerns regarding the species.

necessary to provide sufficient habitat for the fishery to be subject to Tribal harvest within the Reservation boundary.

iv. Domestic and Municipal

The United States and Tribe claim consumptive water rights “to satisfy present and future” domestic and municipal needs on the Reservation. Cover Letter at 2. Domestic water uses include water for drinking, bathing, cleaning and general household uses. In modern times, these water uses are often served through municipal systems.

B. Modern Uses

i. Irrigated Agriculture

The United States and Tribe claim consumptive water rights “to irrigate the Tribe’s practicably irrigable acreage (“PIA”) within the Reservation.” Cover Letter at 3. The draft projects outlined in the claims are limited to Tribal lands that meet the PIA standard. *See, e.g.*, map of irrigation project attached to Notice of Claim # 91-7778.

ii. Commercial and Industrial

The United States and Tribe claim consumptive water rights to support “present and future” commercial and industrial activities on the Reservation. Cover Letter at 2. These claims include current uses for projects such as a casino, hotel, and golf course along with future uses, such as a fish hatchery. *Id.* at 3.

C. The federal reserved water rights include off-reservation water sources because they are necessary to fulfill the purpose of the reservation, including the Tribe’s access to its adfluvial fishery.

Reserved water rights extend beyond the boundary of an Indian reservation if such water is necessary to fulfill the purpose of the reservation. In *Arizona v. California*, the United States Supreme Court recognized off-reservation water rights for the Cocopah Reservation. 376 U.S.

340, 344-45 (1964) (1964 decree entered after the 1963 legal opinion). The Cocopah Tribe was awarded a water right, based on the PIA standard, for irrigation of Reservation lands from the Colorado River, which is located approximately two miles from the Reservation boundary. *Id.*; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[2][a] ("In *Arizona v. California*, for example, the Supreme Court affirmed reserved water rights in the Colorado River for the Cocopah Reservation, which is not riparian to the river.") (citations omitted).

In cases where tribal fisheries are at issue, courts have found water outside the reservation necessary to support all life stages of fish that are ultimately subject to tribal harvest. In the context of addressing the rights of the Yakama Indian Nation ("Yakama Nation"), both federal and states courts have recognized off-reservation water rights to support fish.

In *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985), the Yakama Nation sought protection for certain stream flows in the Upper Yakima Basin, approximately 50-miles from the Yakama Reservation, to protect salmon spawning habitat. In rejecting the Yakima Irrigation Project objections to the use of water to support the tribe's fishing rights, the Ninth Circuit confirmed that the district court had authority to order water released to support the Yakama Nation's fishing right based on the needs of the fish for sufficient flows to support the spawning portion of their lifecycle. *Id.*

Subsequently, in the adjudication of the Yakima River Basin, the state court confirmed that water rights extend beyond the boundary of the Yakama Reservation to support the migratory lifecycles of fish. *Wash. Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 9 (Wash. Super. Ct. Sept 1, 1994) (memorandum opinion entitled Treaty Reserved Water Rights at Usual and Accustomed Fishing Places) (Aff. of V. Willard, Ex. 1). The court observed that "[f]ish life cannot be maintained without a place for fish to spawn." *Id.* The geographic scope of

the reserved water rights to support the Yakama Nation's fishing rights, therefore, "includes all Yakima River tributaries affecting fish availability [at locations where the Nation can harvest fish]." *Id.* at 15 (emphasis in original). Accordingly, the Yakama Nation's adjudicated water rights extend throughout the Yakima River Basin based on the migratory lifecycle of the relevant fish species, even though the Reservation only occupies the southwestern portion of Basin.

In another opinion in the Yakima Basin Adjudication, the court recognized that various life stages of anadromous fish require water and did not limit flows "to rescuing only adult fish." *Wash. Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 6 (Wash. Dec. 22, 1994) (memorandum opinion entitled Flushing Flows) (Aff. of V. Willard, Ex. 2). The court held that water was necessary to allow juvenile salmon to migrate to the Pacific Ocean as part of the overall anadromous lifecycle necessary to support the fishery. *Id.* Overall, the federal and state courts in Washington have held that the Yakama Nation's water rights include off-reservation waters where flows are biologically necessary to support each stage in the lifecycle of the fish that is subject to harvest within the Yakama Reservation boundary or at certain fishing places located outside the Reservation.

Like the Yakama Nation, the Coeur d'Alene Tribe has rights to harvest fish within the boundaries of its Reservation. *See Idaho II*, 533 U.S. at 265-72. The fish subject to Coeur d'Alene Tribal harvest are adfluvial and, as a result, are biologically dependent on waterways and portions of Coeur d'Alene Lake that are beyond the boundaries of the Reservation. Joint Statement of Facts at ¶ 101-106. Like anadromous fish examined in the Yakima Basin Adjudication, the adfluvial fish in the Coeur d'Alene Basin "cannot be maintained without a place for fish to spawn." *See Acquavella*, No. 77-2-01484-5, slip op. at 9. In sum, sufficient flows are biologically necessary outside the boundary of the Coeur d'Alene Reservation to

support the various lifecycles of the adfluvial fishery that is subject to Tribal harvest within the Reservation boundary.

CONCLUSION

The federal reserved water rights doctrine provides that the United States and the Coeur d'Alene Tribe are entitled to water rights sufficient to fulfill the homeland purpose of the Coeur d'Alene Indian Reservation, which includes the water rights claimed in this case

DATED this 20th day of October, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that original copies of the *UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT MOTION FOR SUMMARY JUDGMENT*, *UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT*, and *UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT STATEMENT OF FACTS* with attachments were sent via Federal Express this 20th day of October, 2016 to:

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Coeur d'Alene-Spokane River Basin Adjudication
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I certify that true and correct copies of the documents listed above were provided to the parties below on a DVD mailed on this 20th day of October, 2016.

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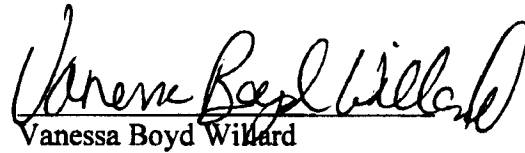
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