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USA-CDAT Joint Statement of Facts

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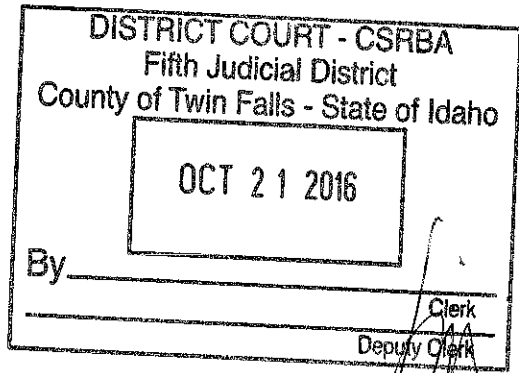
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**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS**

In Re the CSRBA

Case No. 49576

) Consolidated Subcase No. 91-7755
)
)
) **UNITED STATES' AND COEUR D'ALENE**
) **TRIBE'S JOINT STATEMENT OF FACTS**
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The United States and Coeur d'Alene Tribe ("Tribe") hereby submit the following Joint Statement of Undisputed Facts ("Statement") in support of the United States' and Tribe's Joint Motion for Summary Judgment. This Statement provides an overview of the history of the Coeur d'Alene Tribe, including the circumstances surrounding the establishment of the Coeur d'Alene Indian Reservation. Three expert witnesses provide testimony in support of this Statement: 1) Ian Smith, M.A. (historian contracted to the United States); 2) E. Richard Hart (historian contracted to the Coeur d'Alene Tribe); and 3) Dudley W. Reiser, Ph.D. (fish biologist contracted to the United States). The qualifications of these witnesses to provide expert testimony is provided in their respective resumes.

The following five reports authored by these witnesses support this Statement and are provided herewith as attachments to their affidavits:

1. Smith, Ian. *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation*, submitted to the U.S. Department of Justice by Historical Research Associates, Inc., November 30, 2015. ("Smith 2015 Report").

2. Hart, E. Richard. *A History of Coeur d'Alene Tribal Water Use: 1780-1915*, submitted to the Coeur d'Alene Tribe, November 25, 2015. ("Hart 2015 Report").

3. Smith, Ian. *A Response to the Expert Report of Stephen Wee Regarding the Establishment of and Purposes for the Coeur d'Alene Indian Reservation*, submitted to the U.S. Department of Justice. Submitted by Historical Research Associates, Inc., May 26, 2016 ("Smith 2016 Report").

4. Hart, E. Richard. *A Reply to the Report of Dr. Stephen Wee*, submitted to the Coeur d'Alene Tribe; May 20, 2016 ("Hart 2016 Report").

5. Dudley W. Reiser, *Rebuttal Report on the Importance and Biological Attributes of the Fisheries of the Coeur d'Alene Reservation*, submitted to the U.S. Department of Justice by R2 Resource Consultants, Inc., May 26, 2016 ("Reiser Report").

The State of Idaho submitted a report that is also cited in this Statement, however, the United States and Tribe primarily rely on the five reports listed above. See Wee, Stephen, "*Establishment of the Coeur D'Alene Indian Reservation and the Transformation of Coeur D'Alene Land and Water Use, from Contact through Allotment*," submitted to the Office of Attorney General of the State of Idaho by JRP Historical Consulting, LLC, February 2016 ("Wee Report").

Two additional affidavits are submitted herewith. The Affidavit of Vanessa Boyd Willard provides copies of two unpublished legal opinions. The Affidavit of Cajetan Matheson provides additional information from the Coeur d'Alene Tribe.

The historic record outlined in this Statement is complex and detailed. To aid the Court in reading the Statement, the United States and Tribe provide the following summary of significant historic figures in chronological order as they appear:

- 1) Isaac Stevens - Governor of Washington Territory, established in 1853, and ex officio superintendent of Indian Affairs for that region.
- 2) Lieutenant Colonel Edward Steptoe – Officer in the United States Army that fought a battle with Coeur d'Alenes and other tribes in May, 1858.
- 3) Father De Smet – Jesuit priest who served as a United States Army chaplain in Coeur d'Alene territory and filed an 1859 report about the Tribe to the U.S. military.
- 4) Chief Andrew Seltice – Head Chief of the Coeur d'Alene Tribe when it signed the 1873 Agreement.

4) Agent Monteith – The Department of Interior Indian Agent for the Coeur d’Alene

Tribe during the Shanks Commission review of the 1867 Reservation boundaries.

I. OVERVIEW OF NEGOTIATIONS, AGREEMENTS, EXECUTIVE ORDERS, AND CONGRESSIONAL ACTIONS

1. The Coeur d’Alene Indian Reservation (“Reservation”) is located adjacent to, and on, the southern end of Lake Coeur d’Alene. The Reservation includes the bed and banks of the southern third of the lake. *Idaho v. United States*, 533 U.S. 262, 265-72 (2001) (“*Idaho IP*”).¹

¹ *Idaho v. United States* arose from an action by the United States, acting in its own capacity and as trustee for the Coeur d’Alene Indian Tribe, against the State of Idaho in the United States District Court for the District of Idaho to quiet title—in the United States, to be held for the use and benefit of the tribe—to submerged lands in Idaho within the exterior boundaries of the Tribe’s reservation, which encompassed the lower third of Lake Coeur d’Alene and part of the St. Joe River. Following a 9-day trial, 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 “The 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.” 95 F. Supp. 2d at 1117. The Court of Appeals for the Ninth Circuit affirmed. 210 F.3d 1067 (2000). The Supreme Court granted certiorari, 531 U.S. 1050 (2000), and affirmed. 533 U.S. 262 (2001). In deciding ownership of submerged lands, the Supreme Court and lower courts made detailed findings concerning the “purpose of the reservation” because a relevant factor in determining submerged land ownership is whether “the tribe depended on the watercourse for a significant portion of the tribe’s needs.” 95 F. Supp. 2d at 1098.

The district court decision incorporates extensive factual findings based upon historical evidence presented by expert witnesses for the United States and the Tribe. 95 F. Supp. 2d at 1101. The Court explained:

The Court’s findings are based in part on the expert testimony of Mr. Richard Hart, Dr. Roderick Sprague, Dr. Thomas Power and Dr. Thomas R. Cox. The opinions of these witnesses were well within their respective areas of expertise, supported by the documentary evidence and were not diminished on cross-examination. In addition, the Court’s findings are supported by the various scientific studies and oral histories submitted by the parties. Archaeological, ethnographic, and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d’Alene located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.

95 F. Supp. 2d at 1101. The district court noted that the “State introduced the expert testimony and report (Ex. 3235) of Dr. Kent D. Richards to show that the Tribe was not dependent on the Lake and rivers. However, Dr. Richards’ opinions on this issue were significantly undermined on cross-examination and, in any event, the great weight of the evidence is to the contrary.” 95 F. Supp. 2d at 1101 n.8. The State of Idaho did not challenge the District Court’s factual findings on appeal. 533 U.S. at 265 n.1.

This litigation followed an independent attempt by the Tribe to quiet title, inter alia, to the same lands. See *Coeur d’Alene Tribe v. Idaho*, 521 U.S. 261 (1998) (“*Idaho P*”).

2. The United States Supreme Court outlined the history of the establishment of the Reservation in *Idaho II*. This history involved several rounds of negotiations, agreements, executive orders, and Congressional actions. While the facts are detailed in subsequent sections below, a summary of the history, as recounted by the United States Supreme Court, provides overall context:

The 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.

... In 1867, in the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation. The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways....

Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to 'set apart and secure' 'for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons.' The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary.

Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians.' The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d'Alene, which, the District Court found, was contrary 'to the usual practice of meandering a survey line along the mean high water mark....'

As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to 'make with us a proper treaty of peace and friendship . . . by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them.' In response,

Congress authorized new negotiations to obtain the Tribe's agreement to cede land outside the borders of the 1873 reservation. In 1887, the Tribe agreed to cede

all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

The Government, in return, promised to compensate the Tribe, and agreed that

in consideration of the foregoing cession and agreements . . . the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

As before, the agreement was not binding on either party until ratified by Congress....

Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself....

But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior 'to negotiate with the Coeur d'Alene tribe of Indians,' and, specifically, to negotiate 'for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.' Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for \$500,000. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake.' And, again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress.

...On March 3, 1891, Congress 'accepted, ratified, and confirmed' both the 1887 and 1889 agreements with the Tribe.

Idaho II, 533 U.S. at 265-271 (citations omitted).

3. The intent of the federal government and the Tribe in creating the Coeur d'Alene Indian Reservation was to provide a permanent homeland for tribal members within a portion of their

aboriginal territory. The homeland established by the 1873 executive order not only anticipated agricultural uses of reservation lands, but also allowed for tribal members to continue their seasonal cycles of hunting, fishing, and gathering—activities that relied heavily on the numerous rivers, lakes, springs, marshes, and other aquatic resources situated within the 1873 reservation boundaries. Smith 2015 Report at 2.

4. The district court in *Idaho II* noted several resources that were important for serving this homeland purpose:

[T]he Court concludes that in 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.

95 F. Supp. 2d at 1104.

5. Coeur d’Alene tribal leaders explicitly indicated the importance of these waterways and the Tribe’s traditional subsistence activities during the period leading up to the issuance of the 1873 executive order. Smith 2015 Report at 2; Hart 2015 Report at 30. This is because activities such as fishing, hunting, gathering, berry picking, and water-based travel played a vital role in the subsistence patterns of the Coeur d’Alene Indians. *Id.*

II. HISTORICAL USES OF WATER BY THE COEUR D’ALENE TRIBE

6. Water has been essential to both the physical and cultural existence of the Tribe for millennia, with Lake Coeur d’Alene forming the heart of tribal territory since time immemorial. Smith 2015 Report at 2; Hart 2015 Report at 5-44; Wee Report at 5 (“the Coeur d’Alene Indians utilized their aboriginal lands, centered on the Spokane River drainage system and Lake Coeur

d’Alene, to hunt, fish, and gather a subsistence diet comprised largely of fish, deer, waterfowl, camas root, bitterroot, water potatoes, and berries.”).

7. In *Idaho II*, the Supreme Court found:

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.

533 U.S. at 265. The district court also found:

The 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...the Lake and associated waterways were essential to the Tribe’s traditional lifestyle.

95 F. Supp. 2d at 1099-1100. The district court further found:

[T]he majority of the Tribe’s population lived in villages located next to the Lake and rivers. The 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.

8. These waterways offered tribal members an array of materials essential to their sustenance, ranging from fish and big game to water potatoes, berries, and camas roots.

Moreover, water played a significant role in Coeur d’Alene mythology, language, and cultural practices. Smith 2015 Report at 2-3; Hart 2015 Report at 5-44; Wee Report at 5-15.

9. Lake Coeur d’Alene and the waters that flowed into it provided the Coeur d’Alene people with an axis for understanding their environment, culture, and history. “[T]he Coeur d’Alene people, in the pre-literate past and today, have been and continue to be inextricably linked to the

inland aquatic world centered on Lake Coeur d'Alene." Smith 2015 Report at 30²; *see also* Hart 2015 Report at 43.

10. Water was an essential component of life and culture for the Coeur d'Alene Indians both before and after contact with Europeans and Americans. The center of the Tribe's aboriginal territory was Lake Coeur d'Alene, where they established dozens of permanent winter villages along its shores and tributary waterways. Tribal members utilized lakes, rivers, and aquatic resources for subsistence, lodging, transportation, and tools, continuing to rely extensively on these resources even after the adoption of horses and buffalo hunting during the eighteenth century. Smith 2015 Report at 9; *see also* Hart 2015 Report at 20; Wee Report at 5 ("on the Coeur d'Alene homeland water resources played an important role in providing a varied base of sustenance."). Coeur d'Alene villages were clustered around the major waterbodies and waterways of their territory: principally, Lake Coeur d'Alene and the Spokane, St. Maries, St. Joe, and Coeur d'Alene Rivers. Smith 2015 Report at 10-11; Hart 2015 Report at 19.

11. Dr. Robert McCarl observed "the Coeur d'Alene people have been defined and continue to define themselves as dependent upon aquatic environments. That this dependency has diminished as a result of imposed physical distance from Lake Coeur d'Alene and its tributaries, in no way has diminished its cultural and ethical importance in Coeur d'Alene culture." Hart 2015 Report at 43.

12. The Tribe's aboriginal area covered most of the present Idaho Panhandle and extended into Washington, along the Spokane River from its headwaters at Lake Coeur d'Alene to a point just above Spokane Falls. Smith 2015 Report at 12; *see also* Wee Report at 4-5; Hart 2015

² Citing McCarl, "A Spatial Analysis of Coeur d'Alene Traditional Literature," 109, USA-CDA00002038.

Report at 1-2 (map 1). Within this expansive terrain, the Tribe's principal homeland centered on Lake Coeur d'Alene—the “very heart” of Coeur d'Alene settlement—together with its tributaries; Hayden and Liberty Lakes; a portion of the Spokane River; and the drainage basins of the Coeur d'Alene and St. Joe Rivers. Smith 2015 Report at 12-13; Wee Report at 1-8.

13. Their permanent winter villages, established on lakes or waterways, were occupied periodically throughout the year, even during non-winter months. Smith 2015 Report at 13. These settlements were always situated near lakes and rivers. Smith 2015 Report at 14; Hart 2015 Report at 19; Wee Report at 7 (“All but one of these villages... were located along waterways or other water bodies...”). From these villages, the Coeur d'Alene people engaged in an annual subsistence cycle that relied on fishing, hunting, and gathering throughout the year. Smith 2015 Report at 16; Wee Report at 5 (“Coeur d'Alene Indians utilized their aboriginal lands, centered on the Spokane River drainage system and Lake Coeur d'Alene, to hunt, fish, and gather a subsistence diet comprised largely of fish, deer, waterfowl, camas root, bitterroot, water potatoes, and berries.”); Hart 2015 Report at 62.

14. Portraits of daily village life among the Coeur d'Alene Indians were captured by Nicholas Point, a Jesuit missionary who lived among the Tribe in the 1840s. After accompanying tribal members on hunting and fishing expeditions in the winter of 1842–1843, Point wrote:

The Coeur d'Alenes also have their great hunt, but their country, dotted with lakes and interlaced with rivers, abounds in fish no less than in game animals, so they also have their great fishing expeditions. Fishing, like hunting, is done almost the year round. But the great fishing expedition takes place in fall, and the great hunting expedition occurs in the winter.

Smith 2015 Report at 16³; *see also* Hart 2015 Report at 62-63; Hart 2016 Report at 19; Wee Report at 10 (“Accompanying tribal members on a fishing expedition to Spokane River near where the river left Lake Coeur d’Alene, [Father Nicholas] Point reported that this particular area ‘teems with a prodigious number of fish.’”).

15. In *Idaho II*, the District Court noted:

With the advent of the horse, some tribal member[s] traveled to the Plains during the late fall to participate in an annual buffalo hunt. In this regard, the acquisition of the horse reduced somewhat the Tribe’s reliance on fishing and small game hunting. However, the majority of Coeur d’Alenes continued to live along the waterways and engage in a traditional subsistence lifestyle. The pastoral influence arising from the introduction of the horse and buffalo hunt most significantly affected the villages located near the Spokane (Rathdrum) Prairie, but even at these sites tribal members continued to depend on the water resource.

95 F. Supp. 2d at 1101. The District Court found:

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.

Id. at 1101 n.7

A. Fishing

16. “Historically, 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.” *Idaho II*, 95 F. Supp. 2d at 1100.

17. Villages were “always in close proximity to a good fishing place.” Smith 2015 Report at 19.⁴ In 1859, Jesuit missionary Pierre-Jean De Smet noted fish in abundance: “All the rivers and

³ Citing Point, *Wilderness Kingdom*, 174–175, USA-CDA00002715.

⁴ Citing Liljelblad, “Indian Peoples in Idaho,” 26, USA-CDA00001938.

rivulets in the Coeur-d'Alene country abound wonderfully in mountain trout and other fish.” Smith 2015 Report at 19⁵; *see also* Hart 2015 Report at 101. The Coeur d’Alene people feasted on, among other things, runs of west slope cutthroat trout, whitefish, steelhead trout, and Chinook salmon. Smith 2015 Report at 19; *see also* Wee Report at 9 (lake and rivers “served as a source of fish, including salmon in the lower Spokane River and trout from Coeur d’Alene River. Large numbers of Coeur d’Alene and Spokane Indians from northerly villages fished for salmon at favored locations...”); Hart 2015 Report at 21-28 (description of Tribe’s fishing techniques).

18. Fishing endured as an essential subsistence activity among the Coeur d’Alenes long after the Tribe’s acquisition of horses. Smith 2015 Report at 21; Hart 2015 Report at 5-6. By the 1800s, families had begun to leave traditional fishing sites for part of the year in favor of buffalo hunting and trade on the plains. Smith 2015 Report at 21; Hart 2015 Report at 5-6; Wee Report at 100 (“The Coeur d’Alene travelled down to the upper reaches of Clark Fork of the Columbia River and the Clearwater River for fish and into the Northern Plains in Montana to hunt bison along with the Flathead.”). But fishing “persisted in its old form at old locations.” Smith 2015 Report at 21.⁶ Even after the adoption of horses and buffalo hunting by the Coeur d’Alenes, “[m]uch of the traditional subsistence pattern, the yearly rounds, the hunting areas and fishing sites, the camas grounds, remained unchanged.” Smith 2015 Report at 21-22⁷; Hart 2015 Report at 20; Wee Report at 5 (even with adoption of the horse, “on the Coeur d’Alene homeland water resources played an important role in providing a varied base of sustenance.”)

⁵ Citing De Smet, *New Indian Sketches*, 130, USA-CDA00001327.

⁶ Citing Chalfant, “Historical Material Relative to Coeur D’Alene Indian Aboriginal Distribution,” 145–146, USA-CDA00001045.

⁷Citing Chalfant, “Historical Material Relative to Coeur D’Alene Indian Aboriginal Distribution,” 145–146, USA-CDA00001045.

B. Hunting and Trapping

19. Beyond fishing, a second pillar of the traditional Coeur d'Alene subsistence pattern was hunting, supplemented by trapping. Smith 2015 Report at 22; Hart 2015 Report at 29-30; Wee Report at 9. In these pursuits, the Coeur d'Alene people used the water resources of their aboriginal lands. Hart 2015 Report at 29-30; Smith 2015 Report at 22; Wee Report at 167 (discussing "their traditional subsistence use of the lake, rivers, and streams for hunting, fishing, and gathering").

20. In *Idaho II*, the district court noted: "The Lake and associated rivers were commonly used to facilitate hunting activities... The Coeur d'Alenes also depended on the waterways to hunt small game, such as beaver, as well as migratory waterfowl." 95 F. Supp. 2d at 1100.

21. Even after their adoption of horses and buffalo hunting, the Coeur d'Alene people continued to hunt their traditional prey within their aboriginal territory, including deer and elk. Smith 2015 Report at 22. In addition to deer, the Coeur d'Alene people utilized lakes and waterways to hunt other animals such as waterfowl, including grouse, ducks, and geese. Smith 2015 Report at 23; *see also* Hart 2015 Report at 28-30 (describing hunting techniques and noting "Traditional hunting activities indicate a high level of reliance by the Coeur d'Alenes on their lakes and rivers").

C. Plant Gathering

22. Besides fishing and hunting, the Coeur d'Alene people relied on a number of other aquatic resources for their survival. Smith 2015 Report at 23; Hart 2015 Report at 35; Wee Report at 9 (noting "consumption of camas root, water potatoes, and berries."). Roots and berries, typically collected along waterways, were a pillar of the Coeur d'Alene subsistence

cycle, and tribal members also collected fibers and stones for a variety of purposes. Smith 2015 Report at 23; Hart 2015 Report at 35; Wee Report at 16 (“Another root, water potato, was dug from the mud and shallow waters along the rivers and Lake Coeur d’Alene. Other edible roots, tubers, and bulbs also supplemented their diet. In the spring, summer, and fall the Coeur d’Alene hunted water fowl and game and collected berries in the nearby mountains.”).

23. Berries were an important component of the traditional Coeur d’Alene diet; families often gathered berries along rivers near their main villages. Smith 2015 Report at 24. Water potatoes were another component of the traditional Coeur d’Alene diet, harvested in late fall. Smith 2015 Report at 25; *see also* Hart 2015 Report at 35 (“Foods were also collected from plants that grew along the shoreline of the lakes and rivers, often from a canoe. One of the most important of these was the water potato.”); Wee Report at 16. These roots grew in the marshy areas along the shores of both Coeur d’Alene and Hayden lakes, often where creeks and streams entered the lakes. Hart 2015 Report at 35; Smith 2015 Report at 25; Wee Report at 2 (“For sustenance, members of the tribe also obtained camas root from the low meadowlands and wetlands lying south of Lake Coeur d’Alene ... and gathered water potatoes that grew along area lakes and streams.”). The Coeur d’Alenes’ traditional use of water potatoes has continued to the present-day and the Tribe continues to celebrate this staple with a “Water Potato” holiday. The water potatoes are a favorite of Coeur d’Alene people and are spiritually regarded and treated with reverence. Hart 2015 Report at 36.

24. In addition to food items, the Coeur d’Alene people utilized aquatic resources within their aboriginal territory for fiber to make a wide range of necessary items. Smith 2015 Report at 25; Hart 2015 Report at 35; Wee Report at 9 (“Being a semi-sedentary people and living in a country where wood, bark and vegetal materials of many kinds abounded, the Coeur d’Alene developed

the arts of fishing, canoe making, and textile work in weaving of nets, bags, and baskets, probably to a greater degree than any of the neighboring tribes”). Among the most important raw materials were rushes, tule reeds, and other aquatic grasses, harvested from marshy areas to construct mats—all-purpose items that served a number of applications including building lodges, baskets, rafts, and fishing equipment. Smith 2015 Report at 25-26; Hart 2015 Report at 43; Wee Report at 9.

25. In *Idaho II*, the court 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.

95 F. Supp. 2d at 1100. “[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.

D. Transportation and Trade

26. Lakes and waterways were a principal means of transportation within aboriginal Coeur d’Alene territory. Smith 2015 Report at 27; Hart 2015 Report at 30-39; Wee Report at 9 (“The area’s river-lake system provided the tribe with a means of transportation by canoe...”). The Coeur d’Alene people used a variety of canoes, dugouts, and rafts to navigate the numerous waterways of their territory. Smith 2015 Report at 28; Hart 2015 Report at 30 (“Coeur d’Alenes traditionally traveled over Coeur d’Alene Lake, the St. Joe and the Coeur d’Alene River by canoe, for purposes of trade, communication, hunting, and to reach gathering locations. Every family had at least one canoe.”). Because much of their aboriginal territory was rugged,

mountainous, and heavily forested, the principal routes of travel followed watercourses. Smith 2015 Report at 28; Hart 2015 Report at 30.

27. In *Idaho II*, the court noted:

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.

95 F. Supp. 2d at 1100.

E. Agriculture

28. In *Idaho II*, the court noted:

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.

95 F. Supp. 2d 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).

29. In his 1870 report, Idaho Superintendent of Indian Affairs De L. Floyd Jones noted that the Jesuits at the Cataldo Mission were "instructing them [the Coeur d'Alenes] in agriculture," while also stating that "[n]o attempt has been made to collect them on reservations." Smith 2016

Report at 29.⁸ The following year, the “farmer in charge” of the Colville Agency reported that Coeur d’Alene tribal members “farm on a small scale, but subsist principally by hunting and fishing.” Smith 2016 Report at 29.⁹

30. 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. USA-CDA00021487. The United States promised in the 1887 Agreement to provide a grist mill and Congress’ 1891 ratification authorized funding for the grist mill. Act of Mar. 3, 1891, 26 Stat. 989 at 1028 (1887 Agreement), 26 Stat. 989 at 1031 (1891 appropriation), USA-CDA00021602, 605.

31. 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. Potatoes, grains and produce could then be shipped from the storage houses on the shore, “by flat-boats, made by lashing two or three canoes together with platform, and enabling them to take a load of three tons down the lake to camp Coeur d’Alene.” Hart 2015 Report at 168¹⁰; *see also* Wee Report at 50 (“In 1880, the tribe built a wagon road from the farming region to a large granary and root house on a landing on the banks of Lake Coeur d’Alene”).

⁸ Citing Col. De L. Floyd Jones, Superintendent of Indian Affairs, Idaho Territory, to E. S. Parker, Commissioner of Indian Affairs, September 10, 1870, in ARCIA 1870, 182, USA-CDA00004124.

⁹ Citing Wm. P. Winans, Farmer in Charge, Fort Colville, to T. J. McKenny, Superintendent of Indian Affairs, Washington Territory, September 1, 1871, in ARCIA 1871, 710–711, USA-CDA00004131.

¹⁰ Citing United States. Department of the Interior. Annual Report of the Commissioner of Indian Affairs, 1880. Washington, D. C.: Government Printing Office, pp. 275-276.

III. ISAAC STEVENS' INITIATION OF TREATY DISCUSSIONS, THE NORTHERN PLATEAU WAR, AND THE MULLAN ROAD, 1853-1865

A. *Isaac Stevens's Abandoned Treaty with the Coeur d'Alenes, 1853-1855*

32. The Washington Territory's creation in 1853, along with the appointment of its first governor, Isaac Stevens, "heralded unprecedented changes" for the Tribe's future. Smith 2015 Report at 33; Hart 2015 Report at 71; Wee Report at 25-26 ("Nineteenth century Coeur d'Alene tribal members lived in an era of changing political, social, and cultural landscapes ... President Polk appointed Isaac Ingalls Stevens (1818-1862), a West Point graduate who had served in the Mexican War, as territorial governor and ex officio superintendent of Indian Affairs for the sprawling new territory."). Serving a dual role as governor and superintendent of Indian affairs for the territory, Stevens had several goals in 1853. Smith 2015 Report at 33; Hart 2015 Report at 71; Wee Report at 26. Primary among these was his desire to locate a transcontinental railroad route that would bring white settlers into the Pacific Northwest. Smith 2015 Report at 33; Hart 2015 Report at 71; Wee Report at 26. Bringing this vision to fruition, however, required the extinguishment of Indian title to broad swaths of land throughout the region. Smith 2015 Report at 33; Hart 2015 Report at 71; Wee Report at 27.

33. Stevens began advocating for the negotiation of agreements to achieve such ends in 1853. Smith 2015 Report at 36; Hart 2015 Report at 72; Wee Report at 27. Stevens met with the Coeur d'Alene Indians briefly on June 26, 1855 and he told tribal leaders that he did not have time to negotiate with them at that time, but he intended to return in the autumn to discuss a proposed "agreement by which you will sell your lands and live upon a Reservation." Smith 2015 Report at 38¹¹; *see also* Hart 2015 Report at 72; Wee Report at 27.

¹¹ Citing Doty, *Journal of Operations of Governor Isaac Ingalls Stevens*, 37, USA-CDA00021163.

34. In a December 1855, Spokane Council with the Coeur d'Alene, Spokane, and Colville tribes, Stevens opened the talks by attempting to dispel the "false stories" then circulating that he had "come to steal" Indian lands through treaty negotiations. Smith 2015 Report at 39; *see also* Hart 2015 Report at 79; Wee Report at 27. Instead, he claimed that he wanted to "protect" the tribes, assuring them that "nothing will be done without your full consent." Smith 2015 Report at 39; *see also* Hart 2015 Report at 79; Wee Report at 27 ("If he does not wish to sell it, he will say so. We shall never drive him from his lands.'). The governor, though, remained "doubtful" that "this was a time to make arrangements" for reservations and land cessions with the Coeur d'Alene, Spokane, and Colville tribes. Smith 2015 Report at 41. Recognizing that Stevens was "in a hurry," tribal leaders believed, too, that it would be better to enter treaty negotiations when the governor could "find time and see us" after establishing peaceful relations with the Yakamas and other tribes. Smith 2015 Report at 41; Hart 2015 Report at 81. Despite their willingness to postpone treaty talks, the Coeur d'Alene, Spokane, and Colville leaders made it clear to Stevens that they would not approve of U.S. military forces entering their territory. Smith 2015 Report at 41; Hart 2015 Report at 82. Ultimately, Stevens was unable to keep the military out of Coeur d'Alene territory, and he failed to deliver on his promise to negotiate a treaty with the Tribe. Smith 2015 Report at 42; Hart 2015 Report at 85. The latter resulted in the Coeur d'Alenes being increasingly vulnerable to the encroachments of non-Indian settlers, emigrants, and miners during the ensuing decades. Smith 2015 Report at 42; Hart 2015 Report at 85. The former, meanwhile, became a precursor to the only war in which the Tribe engaged against the United States. Smith 2015 Report at 42; Hart 2015 Report at 86.

B. The 1858 War and the Continued Importance of Traditional Subsistence Activities Among the Coeur d'Alene Indians

35. Lieutenant Colonel Edward Steptoe, on May 6, 1858, led soldiers directly toward Coeur d'Alene territory while responding to conflicts in Walla Walla. Smith 2015 Report at 43; Hart 2015 Report at 88. Once the troops crossed the Palouse River, “where part of the Coeurs d'Alene [w]ere digging roots,” Father Joset reported that tribal members became increasingly upset about the soldiers’ incursion into their lands. Smith 2015 Report at 43; *see also* Hart 2015 Report at 87. In accordance with the sentiments expressed during the December 1855 Spokane Council, as many as 1,000 Native warriors—including 200 Coeur d’Alenes and more than 300 Spokane, Yakama, and Palouse Indians—engaged Steptoe in a battle in mid-May 1858 to defend tribal territory. Smith 2015 Report at 43; Hart 2015 Report at 89-90; Wee Report at 27 (The Tribe was “finally drawn into the battle in 1858 and defeated a large military force under Lt. Colonel Steptoe”). In early September, roughly 100 Coeur d’Alenes fought in two subsequent engagements with U.S. troops under the command of Colonel George Wright at what became known as the Battle of Four Lakes and the Battle of Spokane Plains. Smith 2015 Report at 43; Hart 2015 Report at 93; Wee Report at 27. Hostilities between the United States and the Coeur d’Alene Indians formally ended with the signing of a peace accord at the Cataldo Mission on September 17, 1858. Smith 2015 Report at 43; Hart 2015 Report at 94-95; Wee Report at 27-28.

36. The battles during the 1858 Northern Plateau War showed the willingness and ability of the Coeur d’Alenes to vigorously defend their traditional territory. Smith 2015 Report at 43; Hart 2015 Report at 97-99; Wee Report at 27-28. The United States’ recognition that the Tribe would forcefully and effectively defend its aboriginal territory not only impacted the 1858 peace accord, but also future federal relations with the Tribe with respect to their traditional lands and, ultimately, their 1873 reservation. Smith 2015 Report at 43-44; Hart 2015 Report at 147-149

(“With the horror of the Civil War in the immediate past, politicians were also well aware that at a more banal level, negotiating a peace and establishing a reservation was much less costly than carrying out a war.”).

37. Information reported by observers and participants in the war provided insight into the ongoing importance of the Coeur d’Alenes’ traditional subsistence activities. Smith 2015 Report at 44. As noted by Joset in his 1870s remembrance of the 1858 war, Steptoe’s troops first encountered the Coeur d’Alenes at their camas digging grounds, where “almost all” of the Tribe was “off in the plains after roots.” Smith 2015 Report at 44¹²; Hart 2015 Report at 89. A Jesuit priest reported that it took him “over three weeks” to locate the “scattered” Coeur d’Alene bands in the summer of 1858, noting that they were living “at great distances from each other, some fishing, others digging roots or gathering fruits, and making provision for winter.” Smith 2015 Report at 44¹³; Hart 2015 Report at 98. River basins throughout the Coeur d’Alene region were “well stocked with elk, deer and fish” and tribal families continued their seasonal rounds of huckleberry picking, camas digging, hunting, and fishing throughout the 1850s and 1860s. Smith 2015 Report at 4, 45. At the conclusion of their “big fall hunts,” Chief Andrew Seltice reported that “[e]ach family” would load “seven or eight pack horses” with a supply of “dried elk, mule deer, and salmon” to sustain their families through the upcoming winter. Smith 2015 Report at 45.¹⁴

38. In an 1859 report to U.S. military officials (written while he was serving as an army chaplain), Father De Smet commented on the plentiful fish, game, roots, and berries that

¹² Citing Burns, “Pere Joset’s Account of the Indian War of 1858,” 292, 294, USA-CDA00001013.

¹³ Citing Father Congiato to General Clarke, August 3, 1858, in Senate, *Report of the Secretary of War*, 35th Congress, 2d session, 1859, S. Ex. Doc. 1, pt. 2, Serial 975, 372, USA-CDA00003865.

¹⁴ Citing Kowrach and Connolly, eds., *Saga of the Coeur D’Alene Indians*, 9–10, 82–83, USA-CDA00001740.

flourished throughout the Coeur d’Alenes’ aboriginal territory and noted that this area “abounds in nutritious roots, (bitter-root, camash, & c.,) on which the Indians principally subsist for a great portion of the year.” Smith 2015 Report at 45¹⁵; *see also* Hart 2015 Report at 100-101; Wee Report at 24 (“The Coeur d’Alene ‘have to live as yet for a great part of the year by fishing, hunting, and digging the edible roots which the kind providence of God has so liberally bestowed in the lands of the... Indians.’”). De Smet identified Lake Coeur d’Alene as the “central point” of the Tribe’s territory, noting that it also extended “fifty miles to every point of the compass” from the lake’s shores. Smith 2015 Report at 45; *see also* Hart 2015 Report at 100-101; Wee Report at 29.

C. Mullan Road Construction in the 1860s and the Continued Importance of Traditional Subsistence Activities Among the Coeur d’Alene Indians

39. The importance of traditional, water-based subsistence activities was also a common theme in the reports submitted by the government officials who participated in the construction of the Mullan Road in the early 1860s. This wagon route—which connected the Missouri and Columbia Rivers by land from Fort Benton, Montana, to Walla Walla, Washington—passed directly through Coeur d’Alene territory. Like Stevens a decade earlier, Captain John Mullan (after whom the road was named) was impressed by the Coeur d’Alenes’ farming endeavors. However, he also reported that, in the mid-1860s, tribal members still relied heavily on hunting, fishing, and gathering, and many continued to reside in traditional village sites “along the Coeur d’Alene and St. Joseph’s rivers.” Smith 2015 Report at 4; Hart 2015 Report at 105, 107. Mullan reported to Congress that the Coeur d’Alene Indians “live by hunting, fishing, and cultivating the

¹⁵ Citing P. J. De Smet, S.J., Chaplain, & c., United States Army, to Captain A. Pleasonton, Acting Assistant Adjutant General, May 28, 1859, in House, *Affairs in Oregon*, 36th Congress, 1st session, April 12, 1860, H. Ex. Doc. 65, Serial 1051, 147–148, USA-CDA00021277.

soil.” Moreover, he indicated that, while some tribal members had begun residing “at the mission,” many others remained in their traditional village sites “along the Coeur d’Alene and St. Joseph’s rivers.” Smith 2015 Report at 50¹⁶; *see also* Hart 2015 Report at 107. Mullan’s report to Congress also reflected the ongoing importance of other traditional subsistence activities among the Coeur d’Alenes, such as digging camas, picking berries, and traveling via canoes. Smith 2015 Report at 51; Hart 2015 Report at 107.

IV. ESTABLISHING THE COEUR D’ALENE INDIAN RESERVATION, 1867-1873

A. The Executive Order of June 14, 1867

40. Stevens’ failure to negotiate with the Coeur d’Alenes meant that they had not relinquished aboriginal title to the lands, rivers, and waterways they had used and occupied for millennia. Recognizing this, in the mid-1860s, federal officials renewed their efforts to negotiate an agreement with tribal leaders that would provide for the establishment of a reservation and the relinquishment of a portion of the Tribe’s traditional territory. Smith 2015 Report at 58; Hart 2015 Report at 107-108.

41. In his annual report for 1865, Idaho Superintendent of Indian Affairs Caleb Lyon—who also served as governor of the recently created territory—urged the establishment of both an agency and a reservation in Coeur d’Alene country. Smith 2015 Report at 58; Hart 2015 Report at 107-108. David Ballard, who succeeded Lyon as Idaho’s territorial governor, was charged with addressing the Tribe’s unsettled land status. Smith 2015 Report at 59; Hart 2015 Report at 112-113. Ballard knew little about the Coeur d’Alene Indians, having never met with tribal members and having gained information about them solely through “correspondence with parties

¹⁶ Citing Mullan, *Report on the Construction of a Military Road*, 49, USA-CDA00021293.

who have travelled among them.” Despite his dearth of personal knowledge about the Coeur d’Alenes, Ballard included in his September 1866 report to Cooley a proposal to create a reservation for them and other northern Idaho tribes. Smith 2015 Report at 59; Hart 2015 Report at 113; *see also* Wee Report at 30 (noting Ballard’s recommendation for reservation).

42. Ballard’s proposed reservation was located in the southern tier of the Coeur d’Alene Indians’ traditional territory, near their camas grounds in Hangman Creek valley. Smith 2015 Report at 60; Hart 2015 Report at 113; Wee Report at 30. Government reports described a reservation roughly “20 miles square” that would include “agricultural & grazing lands, with hunting, fishing, berries & roots, & suitable locations for mills & c.,” Smith 2015 Report at 60; Hart 2015 Report at 113; Wee Report at 30. On June 14, 1867, President Johnson formally approved these boundaries, setting the lands apart “for the Indians” as the Coeur d’Alene Indian Reservation. Smith 2015 Report at 60-61 (Figure 6)¹⁷; *see also* Hart 2015 Report at 114-115; Wee Report at 30-32 (describing executive order).

43. In *Idaho II*, the Supreme Court noted: “In 1867, in the face of immigration into the Tribe’s aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation.” 533 U.S. at 265-66 (citations omitted).

44. Despite the reservation’s initial establishment in 1867, tribal members were not informed of its creation for several years and continued to reside in their long-held village sites, subsisting

¹⁷ Citing Executive Order of June 14, 1867; N. G. Taylor, Commissioner of Indian Affairs, to O. H. Browning, Secretary of the Interior, May 23, 1867; Jos. S. Wilson, General Land Office Commissioner, to W. T. Otto, Acting Secretary of the Interior, June 6, 1867; Otto to the President, June 13, 1867; all in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, vol. 1 (Washington, D.C.: GPO, 1904), 835-837, USA-CDA00001713.

largely according to their traditional lifeways, irrespective of the newly established reservation boundaries. Smith 2015 Report at 62; Hart 2015 Report at 115; Wee Report at 32 (“the 1867 executive-order reservation was created unbeknownst to the Coeur d’Alene.”).

45. In *Idaho II*, the district court noted: “The precise boundaries of the 1867 reservation never were established by survey, and the Tribe never formally accepted the reservation as its own.” 95 F. Supp. 2d at 1095.

46. Idaho’s superintendent of Indian affairs reported in September 1869 that the Coeur d’Alene and Spokane Indians claimed the entire region lying “north of the Nez Perces” and had never “been collected on reservations.” Smith 2015 Report at 62.¹⁸ Likewise, in their 1870 and 1871 annual reports, the agents whose jurisdiction included the northern Idaho and eastern Washington Indians reported to the commissioner that Coeur d’Alene tribal members “farm on a small scale, but subsist principally by hunting and fishing.” Smith 2015 Report at 62.¹⁹ Moreover, Indian officials had not yet attempted “to collect them on reservations,” claiming that “so long as their country remains unoccupied, or is not demanded by the whites, this is perhaps unnecessary.” Smith 2015 Report at 62.²⁰

B. Tribal Opposition to the 1867 Reservation Boundaries

47. In *Idaho II*, the Supreme Court noted: “The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways.” 533 U.S. at 265-66 (citations omitted). “When the Tribe petitioned

¹⁸ Citing De L. Floyd Jones, Superintendent of Indian Affairs, Idaho Territory, to E. S. Parker, Commissioner of Indian Affairs, September 28, 1869, in ARCIA 1869, 720, USA-CDA00004112.

¹⁹ Citing Wm. P. Winans, Farmer in Charge, Fort Colville, to T. J. McKenny, Superintendent of Indian Affairs, Washington Territory, September 1, 1871, in ARCIA 1871, 710-711, USA-CDA00004131.

²⁰ Citing De L. Floyd Jones, Superintendent of Indian Affairs, Idaho Territory, to E. S. Parker, Commissioner of Indian Affairs, September 10, 1870, in ARCIA 1870, 646, USA-CDA00004124.

the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because ‘we are not as yet quite up to living on farming’ and ‘for a while yet we need have some hunting and fishing.’” 533 U.S. at 266.

48. The reservation initially created for the Coeur d’Alene Tribe in 1867 encompassed only a small portion of their aboriginal territory, situated mainly along Hangman Creek near present-day DeSmet, Idaho. The boundaries excluded the vast majority of the Tribe’s traditional village sites and use areas along Lake Coeur d’Alene and the Coeur d’Alene, Spokane, St. Joe, and St. Maries Rivers. Coeur d’Alene leaders expressed vehement opposition to the 1867 reservation boundaries upon learning of the reservation’s creation in the winter of 1871–1872. Smith 2015 Report at 63; Hart 2015 Report at 116.

49. Upon learning of the reservation’s limited size, tribal leaders promptly petitioned federal officials in 1872 to request the inclusion of “the two valleys of S. Joseph and Coeur D’Alene rivers” and to secure “some kind of title” to an expanded reservation. Smith 2015 Report at 5; Hart 2015 Report at 121-122; *see also* Wee Report at 34 (“the tribe and the Jesuits began an appeal campaign to protect the tribe’s aboriginal lands surrounding Lake Coeur d’Alene.”).

50. Tribal leaders requested an expansion of the 1867 reservation boundaries to include lands along the Coeur d’Alene and St. Joe Rivers, noting the continued importance of “hunting and fishing” to tribal members. Smith 2015 Report at 64; *see also* Hart 2015 Report at 122; Wee Report at 35 (quoting from 1872 tribal petition). The Coeur d’Alenes’ November 1872 petition clearly reflected these issues, indicating that the Tribe was “unanimous” in asking for the inclusion of “the two valleys of S. Joseph and Coeurs d’Alene rivers” in their reservation. Smith

2016 Report at 13. In fact, waterways such as these were so important that tribal leaders thought it “a matter of course” that they would be included in their reservation. *Id.*²¹

51. Coeur d’Alene leaders stated that the additional lands they sought along these waterways were not well-adapted to farming. *Id.* They indicated that “no white man could ever settle there,” since the valleys along the Coeur d’Alene and St. Joseph Rivers were “under water” each spring and since whites had yet to settle there. Smith 2016 Report at 13; Hart 2015 Report at 122; Wee Report at 35 (“...we thought no white man could ever settle there...”). The Tribe had already “fenced in and cultivated” those “few spots which usually escape being inundated.” Smith 2016 Report at 13; *see also* Hart 2015 Report at 122; Wee Report at 35. Tribal leaders further indicated that their request for this expanded acreage along Coeur d’Alene waterways—which were “from old the habitual residence of most of us”—would be “too much” if these lands “were fit for farming.” Smith 2016 Report at 13; *see also* Hart 2015 Report at 122; Wee Report at 35. However, the Tribe argued that “the far greatest part of it is either rocky, or too dry, too cold, or swampy.” Smith 2016 Report at 13²²; Wee Report at 35.

52. In *Idaho II*, the district court found:

In late 1871 or early 1872, the Coeur d’Alenes became aware of the 1867 reservation and expressed their dissatisfaction with its boundaries. On November 18, 1872, tribal leaders sent a second petition to the Commissioner of Indian Affairs...

The second petition makes three points ... 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...

²¹ Citing Petition of the “Chiefs and People of the Coeurs D’Alene,” November 18, 1872, C-417, Roll 912, National Archives Microfilm Publication M234: *Letters Received by the Office of Indian Affairs, 1824–1881* [hereinafter cited as M234], frames 868–872, USA-CDA00021418.

²² Citing Petition of the “Chiefs and People of the Coeurs D’Alene,” November 18, 1872, C-417, Roll 912, M234, frames 868–872, USA-CDA00021418.

While the second petition makes clear the Tribe's continuous reliance on the Lake and rivers, other sources reporting on the Tribe's economic status during the late 1860's and early 1870's offer conflicting assessments. Several reports emphasize the Tribe's commitment to farming, while other accounts note the Tribe's continued reliance on fishing. Most important among the latter is a letter from David P. Thompson to the Commissioner of the General Land Office, dated May 6, 1873, urging that the 1867 reservation be enlarged to include the waterways because 'should the fisheries be excluded there will in my opinion be trouble with these indians but should they be included and also the mission which should also be in the Reservation there will be no trouble.' Also significant is the 1871 Agent report by W. P. Winas, observing that: 'The Coeur d'Alenes reside on Spokane Prairie, and their number living in this Territory is about one hundred and fifty. They farm on a small scale, but subsist principally by hunting and fishing.'

95 F. Supp. 2d at 1103-04 (citations omitted).

53. In light of the on-going Indian wars with other tribes, the United States chose to engage in negotiations to reach an agreement satisfactory to both it and the Coeur d'Alenes. Hart 2015 Report at 148-149. For example, the Indian War with the Modoc in California was occurring during the same general time. Hart 2015 Report at 126. The Surveyor General noted that "there was a great deal of excitement among the Indians as a result of the Modoc hostilities they had heard about in California." Hart 2015 Report at 126. However, during the 1877 Nez Perce War, the Coeur d'Alenes not only sided with the United States and refused to join the hostilities but also protected non-Indian lives and property around its reservation from the Nez Perce. Hart 2015 Report at 157; *see also* Wee Report at 29 n.84, 48 n. 127 ("Throughout the summer of 1877, Coeur d'Alene warriors protected the lands and property of local non-Indian settlers from Nez Perce raids. In July 1877, Seltice returned a horse stolen from settlers by Nez Perce warriors, and during an August conference between the US Army and the nontreaty tribes, he declared that if necessary, he would join the fight on the US side.").

C. Continued Tribal Dependence on the Lake and Rivers in 1873

54. In *Idaho II*, the district court noted the Tribe's continued dependence on waterways in 1873:

[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.

In this regard the Court rejects the State's contention that the 'Big Move' to the Hangman Valley area occurred in the late 1860's and early 1870's, and that by 1873 the Tribe had converted to an agrarian based society, no longer dependent on 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...

[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.

95 F. Supp. 2d at 1104 (citations omitted).

D. The Shanks Commission and the Coeur d'Alene Agreement of July 28, 1873

55. Government officials echoed Coeur d'Alene leaders' calls for the inclusion of tribal waterways within the Coeur d'Alene Reservation. Writing in May 1873, General Land Office Deputy Surveyor David Thompson urged an enlargement of the 1867 reservation, noting that it excluded tribal members' principal fisheries on Lake Coeur d'Alene and the St. Joe and Coeur d'Alene Rivers. Thompson wrote, "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians." Smith 2015 Report at 5, 68²³; *see also* Hart 2015 Report at 127;

²³ Citing D. P. Thompson, Deputy Surveyor, to L. F. Cartee, Surveyor General, May 6, 1873, L-111, Roll 341, M234, frames 290-294, USA-CDA00021443.

Wee Report at 37 (same Thompson quote). The Indian Office's Commissioner, Charles Ewing, agreed. He told the Secretary of the Interior in June 1873 that, upon learning of the 1867 reservation, the Coeur d'Alenes "at once said it is not large enough." Smith 2015 Report at 5; *see also* Hart 2015 Report at 128. According to Thompson, "[t]he section of country to be included is almost worthless as an agricultural country but will include the fisheries on the lake and on the St. Josephs River." Smith 2015 Report at 14²⁴; *see also* Hart 2015 Report at 126.

56. These reports and petitions from both tribal leaders and government officials ultimately led to the appointment of a commission to negotiate with the Coeur d'Alene Indians for an agreement under which a permanent reservation would be created and the Tribe's non-reserved aboriginal territory would be conveyed to the United States. Smith 2015 Report at 5; Hart 2015 Report at 129; Wee Report at 39-40 (describing origin of Shanks Commission). This led to the three-member Shanks Commission—named after its chairman, John Shanks—which also included Idaho Governor Thomas Bennett and Fort Hall Indian Agent Henry Reed. Smith 2015 Report at 70; Hart 2015 Report at 129.

57. After the Commission members "rode over" the 1867 reservation and "took notes of the boundaries," the Shanks Commission and Indian Agent Monteith held a council with tribal members at Hangman Creek on July 25–27, 1873, where they agreed to enlarge the boundaries of the Coeur d'Alene Reservation. Smith 2015 Report at 71; *see also* Hart 2015 Report at 130. The newly drawn lines would incorporate a far greater extent of the Tribe's traditional lands in

²⁴ Citing Thompson to Cartee, May 6, 1873, L-111, Roll 341, M234, frames 290–294, USA-CDA00021443. For the boundaries of the 1867 reservation, see Executive Order, June 14, 1867, in Kappler, *Indian Affairs: Laws and Treaties*, vol. 1, 836–837, USA-CDA00001713.

northern Idaho. Outlining the Tribe's aboriginal territory, Monteith reported that the Coeur d'Alenes claimed the following area:

We start at the head of the Palouse and run across to Steptoes Butte, from that point to Antoine Plants ferry, on the Spokane River then to the foot of 'Pend D'Oreille' lake, thence up lake to the sum[m]it of Bitter-root Mountains then along sum[m]it of Mountains to place of beginning.

Smith 2015 Report at 71²⁵; *see also* Wee Report at 40 (same description).

58. In July 1873, the Shanks Commission and Tribe negotiated an agreement providing for the expansion of the 1867 reservation to encompass nearly all of Lake Coeur d'Alene, as well as many of the Tribe's principal fisheries and village sites along the Coeur d'Alene, St. Joe, and Spokane Rivers. Smith 2015 Report at 5; Hart 2015 Report at 132; Wee Report at 40 ("These boundaries took in the rivers, lakes, and valleys surrounding Lake Coeur d'Alene and the agricultural land in Hangman Creek Valley.").

59. In *Idaho II*, the Supreme Court noted:

Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to 'set apart and secure' 'for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons.'

533 U.S. at 266. The district court explained:

The reservation boundaries established by the 1873 agreement embraced the Hangman Valley, the Coeur d'Alene River (from its mouth to the Coeur d'Alene Mission of the Sacred Heart), the St. Joe River (from its mouth to the present site of St. Maries), and all but a small portion of the Lake. As such, the 1873 reservation included within its boundaries not only the area set aside by the 1867 Executive Order but also the Lake and other waterways as well as additional tracts of land.

²⁵ Citing Monteith to Smith, August 6, 1873, M-407, Roll 341, M234, frames 547-552, pp. 1-3, USA-CDA00021501.

95 F. Supp. 2d at 1095-96.

60. The agreement itself was signed on July 28, 1873, by Shanks, Monteith, Bennett, and eight Coeur d'Alene leaders, including Head Chief Andrew Seltice. It provided for the United States to "set apart and secure as a Reservation, for the exclusive use of the Coeur de Alene Indians," lands within significantly expanded boundaries that encompassed the entirety of Lake Coeur d'Alene, as well as many of the Tribe's traditional villages and principal fisheries along the Coeur d'Alene, Spokane, and St. Joe Rivers. Reflecting the importance of these waterways, the agreement stipulated that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation." Smith 2015 Report at 72; Hart 2015 Report at 132, 144, 335; Wee Report at 41 (same quote). Shanks discussed the vital importance of fishing to the tribes in the Interior Northwest and noted that moving tribes away from fisheries would amount to "literally robbing the Indians of their country and their food." Smith 2015 Report at 76.²⁶

61. The agreement provided that the consideration to be paid to tribal members for relinquishing these aboriginal lands was conditioned on Congress's consent. Article four stipulated that the July 1873 agreement would be "submitted to the Congress of the United States, for its approval." Smith 2015 Report at 74; Hart 2015 Report at 392. Upon receiving congressional sanction, it would "thereafter be binding and of full force and effect." Smith 2015 Report at 74. But if Congress failed to ratify the agreement, it would become "null and void and

²⁶ Citing John P. C. Shanks, Special Commissioner, to Hon. T. W. Bennett and H. W. Reed, August 14, 1873, in House, *Proposed Indian Reservations in Idaho and Washington Territories*, 43d Congress, 1st session, January 23, 1874, H. Ex. Doc. 102, serial 1607, 5, USA-CDA00003773.

of no effect.” Smith 2015 Report at 74²⁷; Hart 2015 Report at 392. This requirement reflected, in part, the end of treaty making with Indian tribes in the United States, which formally concluded with the passage of the 1871 Indian Appropriations Act. “After 1871, reservations resulted from presidential executive orders or agreements. Unlike treaties, agreements required approval by both the House and the Senate.” Smith 2015 Report at 74²⁸; *see also* Hart 2015 Report at 356.

E. The Executive Order of November 8, 1873

62. In *Idaho II*, the Supreme Court explained:

Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be ‘withdrawn from sale and set apart as a reservation for the Cur d’Alene Indians.’ Exec. Order of Nov. 8, 1873, reprinted in 1 C. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d’Alene, which, the District Court found, was contrary ‘to the usual practice of meandering a survey line along the mean high water mark.’

533 U.S. at 266 (citations omitted). The district court found:

In a letter dated November 4, 1873, the Commissioner of Indian Affairs advised the Secretary of Interior of the 1873 agreement and recommended that ‘pending the action of Congress upon said agreement . . . the President . . . issue an Executive Order setting apart the same for the use of said Indians.’ On November 8, 1873, President Ulysses S. Grant established by Executive Order a reservation for the Tribe that mirrored exactly the legal boundaries delineated in the 1873 agreement...

95 F. Supp. 2d at 1096 (citations omitted); *see also* Wee Report at 44 (“President Ulysses S. Grant, in an effort to forestall trespassing and possible clashes between non-Indians and the Coeur d’Alene that could possibly interfere with plans for a transcontinental railroad line through northern Idaho, acted swiftly to set aside the lands specified in that agreement.”). The 1873

²⁷ Citing Coeur d’Alene Agreement, July 28, 1873, M-407, Roll 341, M234, frames 553–562, p. 10, USA-CDA00021487.

²⁸ Citing Woodworth-Ney, *Mapping Identity*, 95, USA-CDA00021719.

Executive Order was intended to mirror the terms of the 1873 Agreement. 95 F.Supp.2d at 1109; *see also* Hart 2015 Report at 136.

63. The executive order “set apart as a reservation for the Coeur d’Alene Indians” the lands described in the July 28, 1873, agreement. Smith 2015 Report at 77²⁹; Hart 2015 Report at 394; *see also* Wee Report at 45 (“the 1873 executive-order reservation included all or nearly all of Lake Coeur d’Alene. To the east, it embraced the lower Coeur d’Alene River and the river valley and the lower St. Joseph River and its river valley...”).

64. Congress recognized the existence of the 1873 reservation in subsequent legislation that authorized the March 1887 negotiations with the Tribe. Smith 2016 Report at 7; Hart 2015 Report at 203-204; Wee Report at 63. In that law, Congress appropriated money to pay the costs of negotiating with Coeur d’Alene leaders “for the cession of their lands outside the limits of the present Coeur d’Alene reservation.” Smith 2016 Report at 7³⁰; Hart 2015 Report at 203-204. Similarly, the Commissioner of Indian Affairs specifically referenced the “executive order of 1873” as having “defined” the reservation’s boundaries. Smith 2016 Report at 7³¹; *see also* Hart 2015 Report at 237; Wee Report at 69 (“The Coeur d’Alene, in [Atkins’] view, ‘have all the original Indian rights to the soil they occupy,’ and further, ‘[t]hey claimed the country long before the lines of the reservation were defined by the Executive Order of 1873 . . .”). In February 1888, the Senate published three maps produced by federal officials during the

²⁹ Citing Executive Order, November 8, 1873, in Kappler, *Indian Affairs: Laws and Treaties*, vol. 1, 837, USA-CDA00001713. Two weeks later, President Grant would set aside other lands in Arizona for the Colorado River Reservation by similar order. *See Arizona v. California*, 373 U.S. 546, 596 n.99 (citing, inter alia, Executive Order dated November 22, 1873), 598 (“...water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”).

³⁰ Citing Act of May 15, 1886, 24 Stat. 29 at 44, USA-CDA00021560.

³¹ Citing Senate, *Letter from the Secretary of the Interior, Transmitting, in Response to Senate Resolution of January 25, 1888, Information About the Coeur d’Alene Indian Reservation, in Idaho*, 50th Congress, 1st session, February 13, 1888, S. Ex. Doc. 76, serial 2510, 2-3, 7, USA-CDA00021564.

previous five years, all of which depicted the reservation's boundaries as established by executive order in November 1873. Smith 2016 Report at 8-11.

F. Recognition of Tribal Lake and River Dependence for Traditional Uses in 1873 Agreement and Executive Order

65. In *Idaho II*, the Supreme Court found:

A 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....

[T]he Tribe demanded an enlarged reservation that included the Lakes and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities, and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands.

533 U.S. at 274-276.

66. The *Idaho II* district court found that “in 1873 the Federal Government was plainly aware of the Tribe’s dependence on the Lake and rivers” and that “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.’” 95 F. Supp. 2d at 1106 (citations omitted). The court continued: “the Tribe’s survival was dependent on the retention of the disputed submerged lands” and “the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands.” 95 F. Supp. 2d at 1107.

67. The district court noted the importance of retaining water flows through the Reservation: “[T]he 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. The court

noted that the 1873 Executive Order sought to mirror the 1873 Agreement. *Id.* at 1109. The court further found:

At the time of the 1873 Executive reservation, the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers...the evidence shows that in 1873 the majority of tribal members continued to rely on the water resource for a significant portion of their needs. Moreover, events immediately preceding and following the 1873 agreement demonstrate that government officials were made aware of the Tribe's reliance on the waterways. The fact that the boundaries of the reservation, as determined by the 1873 agreement and endorsed by the Executive Order, were drawn to include the Lake and rivers leads the Court to conclude that a purpose of the 1873 Executive reservation was to retain the submerged lands for the benefit of the Tribe.

Id. at 1102. The district court further determined,

In 1873 the Federal Government sought an agreement with the Coeur d'Alenes in order to confine the Tribe to a reservation and extinguish the Tribe's aboriginal title. The Tribe had refused to settle within the confines of the 1867 reservation. Thus, the Federal Government could only achieve its goals--to extinguish aboriginal title and free tribal lands for settlement--by agreeing to an expanded reservation. In this regard, 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.

95 F. Supp. 2d at 1109.

68. The district court explained: "[A] member of the Commission, Governor Bennet, acknowledged that the expansion of the reservation was for the purpose of meeting the Tribe's demand for its fishing grounds and a mill site." *Id.* Writing about the negotiation of the 1873 agreement in a September 18, 1873, letter published in the *Idaho Signal*, Governor Bennett informed the newspaper's readers that "the Indians *demand*ed an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River."

Smith 2015 Report at 72³²; *see also* 95 F. Supp. 2d at 1105 (quoting Bennett). The district court observed:

Agent Monteith listed four reasons for enlarging the boundaries of the 1867 reservation: first, an adjustment in the southwest boundary would include ‘several Indian farms’ and exclude ‘four places belonging to white settlers;’ second, running the eastern boundary north to the Mission ‘will leave some good farming land in the Upper Latah and will take in several farms around the new Mission on the Coeur d’Alene river;’ third, ‘by running down the Spokane [the Tribe] can put the mills at the upper falls at much less expense than building a steam mill;’ and fourth, ‘by following the Washington and Idaho line to the dividing ridge between the Latah and Pine Creek it will include all Indian farms in Idaho and leave out all white settlements.’ Although three of the four reasons for expanding the reservation focus on the location of agricultural lands, other than the specific areas identified by Monteith, the majority of the expanded reservation was not suitable for farming.

95 F. Supp. 2d at 1105 (citations omitted).

69. At the time of President Grant’s 1873 executive order, most tribal members still resided in their traditional village sites along the numerous rivers, lakes, and waterways located throughout the Coeur d’Alenes’ aboriginal territory, continuing their seasonal rounds of hunting, fishing, and gathering, which were supplemented by their farming endeavors. Smith 2015 Report at 79; Hart 2015 Report at 138; Wee Report at 46 (“the Coeur d’Alene refused to abdicate their traditional lands, and reportedly continued to use those traditional grounds.”).

70. Absent congressional approval, the aboriginal areas proposed to be relinquished by the Tribe under the terms of the July 1873 agreement remained within tribal control, since the agreement stipulated that the cession of these lands would only occur through the enactment of “the necessary legislation confirming this negotiation.” USA-CDA00021487. By contrast, the 1873 reservation expansion became fully effective upon the issuance of President Grant’s

³² Citing “Governor Bennett’s Letter,” September 18, 1873, in *Idaho Signal*, October 4, 1873, USA-CDA00006617. Emphasis in original.

executive order. The formal relinquishment of the Coeur d'Alenes' traditional lands lying outside the 1873 reservation boundaries would not occur for another eighteen years, with the passage of the Act of March 3, 1891. Smith 2015 Report at 79³³; Wee Report at 82.

71. The correspondence leading up to the creation of the 1873 reservation, along with the comments made by the commissioners who negotiated the July 1873 agreement, reveal that the purposes for enlarging the Coeur d'Alene Reservation centered on the need to provide a sufficient, permanent homeland for the Tribe. As tribal leaders and federal officials pointed out, the 1867 reservation was not large enough for the Coeur d'Alenes. Because it excluded their principal fisheries, village sites, and waterways, as well as some of their agricultural lands, the 1867 reservation threatened to undermine tribal members' existence and lifeways. For most tribal members in the early 1870s, these lifeways included both small-scale agriculture and a continued reliance on fishing, hunting, gathering, and other traditional subsistence activities. Recognizing the need to create a permanent homeland for the Coeur d'Alenes that would enable the continuance of these diverse subsistence patterns, the Shanks Commission—and, later, President Grant—agreed to expand the Coeur d'Alene Reservation in 1873 to include all of Lake Coeur d'Alene, as well as significant stretches of the Coeur d'Alene, St. Joe, and Spokane Rivers. Smith 2015 Report at 81-82; Hart 2015 Report at 139-140. The expanded boundaries reflected tribal members' desire to incorporate within the reservation many of the fisheries, waterways, and hunting and gathering grounds upon which they had relied for centuries. Smith 2016 Report at 17; Hart 2015 Report at 141. As such, the purposes for which the federal government established the reservation in 1873 were not limited to agriculture, but instead

³³ Citing Edw. P. Smith, Commissioner of Indian Affairs, to the Secretary of the Interior, November 1, 1874, in ARCIA 1874, 367-368, USA-CDA00004173.

reflected the Coeur d'Alene Indians' ongoing reliance on their centuries-old traditional subsistence activities, including fishing, hunting, berry picking, and root gathering. Smith 2016 Report at 17-18; Hart 2015 Report at 149.

V. CONFIRMING AND ALTERING COEUR D'ALENE RESERVATION BOUNDARIES, 1870s-1890s

A. Mining Activity, Timber Trespass, and the 1887 Agreement

72. Despite more than doubling the size of the Coeur d'Alene Reservation from roughly 250,000 acres to nearly 600,000 acres, the 1873 order still set aside less than a quarter of the Coeur d'Alene Indians' traditional aboriginal territory, which encompassed lands mainly in northern Idaho and northeastern Washington that stretched from the Palouse country in the south to the southern end of Lake Pend Oreille in the north. Moreover, since Congress did not ratify the July 1873 agreement, the Tribe's aboriginal title to these traditionally occupied lands remained intact. Smith 2015 Report at 6; Hart 2015 Report at 153; *see also* Wee Report at 45 ("The Coeur d'Alene thus secured federal recognition of the reservation boundaries they sought but Grant's executive order could not authorize compensation, funding, or materials for the reservation; only Congress could provide such monies.").

73. Despite the promulgation of the 1873 executive order creating the Coeur d'Alene Reservation, the reservation's boundaries remained unsurveyed into the 1880s, leaving the lands susceptible to trespass and non-Indian encroachment. Smith 2015 Report at 83; Hart 2015 Report at 169. Although the completion of the Mullan Road in 1863 had led to increased travel through Coeur d'Alene territory and although gold strikes in the late 1860s along the North Fork of the Clearwater River had encouraged mining activity in the region, the traditional lands occupied by the Coeur d'Alene Indians remained only minimally impacted by non-Indians

through the 1870s. This changed in the early 1880s, with gold discoveries along the North Fork of the Coeur d'Alene River, the construction of the Northern Pacific Railroad, and increased timber harvesting along the heavily forested slopes east of Lake Coeur d'Alene. Smith 2015 Report at 83; Hart 2015 Report at 167-171; *see also* Wee Report at 52 (“By the 1880s, construction of the Northern Pacific Railroad through the Idaho Panhandle and discovery of gold, silver, and lead deposits along first the North Fork and then later the South Fork of the Coeur d'Alene River spurred a land rush by Euro-Americans....”).

74. Due to the increasing impacts of non-Indian encroachment on Coeur d'Alene lands during the 1880s, federal officials directed a second commission to negotiate with the Coeur d'Alene Tribe in 1887. The subsequent negotiations resulted in an agreement signed on March 26, 1887, that provided for the 1873 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. Agreement with Coeur d'Alene, March 26, 1887, Art. 5. USA-CDA00021602; Smith 2015 Report at 6-7, 91; Hart 2015 Report at 205-214; Wee Report at 65. The March 1887 agreement with the Coeur d'Alenes required ratification by Congress before it was “binding on either party.” Smith 2015 Report at 91.³⁴ Tribal leaders emphasized the significance of the negotiations, stating that tribal leaders had informed the 1887 commission that “we wanted the land of our present reservation, provided we were to hold it forever; as had been promised.” Smith 2015 Report at 98.

³⁴ Citing Agreement with Coeur d'Alene, March 26, 1887; Report of Northwest Indian Commission, June 29, 1887; both in House, *Reduction of Indian Reservations*, 50th Congress, 1st session, January 9, 1888, H. Ex. Doc. 63, serial 2557, 39, 54-55, USA-CDA00003786. The commissioners also indicated that the boundaries of the Coeur d'Alenes' aboriginal territory, as outlined in the March 1885 petition, “substantially agree” with the area described in the July 1873 agreement.

B. Ratification Efforts Regarding the 1887 Agreement

75. The 1887 agreement was not ratified in 1888 due to the “desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873.” Smith 2015 Report at 96; Hart 2015 Report at 232. Congress authorized a \$2,000 appropriation to pay the expenses of a new commission to negotiate “for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.” Smith 2015 Report at 97; Hart 2015 Report at 239; Wee Report at 73 (same quote). Under the terms of the Act of March 2, 1889, any such agreement negotiated with the Coeur d’Alenes had to be “ratified by Congress” to become effective, and the terms had to be “just and equitable” to both parties. Smith 2015 Report at 97³⁵; Hart 2015 Report at 239; Wee Report at 72.

76. In *Idaho II*, the Supreme Court found:

In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe’s reservation and adopted a resolution directing the Secretary of the Interior to ‘inform the Senate as to the extent of the present area and boundaries of the Coeur d’Alene Indian Reservation in the Territory of Idaho,’ and specifically, ‘whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d’Alene, and of Coeur d’Alene and St. Joseph Rivers.’ S. Misc. Doc. No. 36, 50th Cong., 1st Sess., 1 (1888). The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that ‘the reservation appears to embrace all the navigable waters of Lake Coeur d’Alene, except a very small fragment cut off by the north boundary of the reservation,’ and that ‘the St. Joseph River also flows through the reservation.’ S. Exec. Doc. No. 76, 50th Cong., 1st Sess., 3 (1888). Based largely, it appears, on this report, Idaho conceded in the Court of Appeals (as it does here) that the 1873 Executive Order reservation included submerged lands. See Opening Brief for Appellant in No. 98-35831 (CA9), p. 17 (‘Certainly, the State concedes that by 1888, the executive branch had construed the 1873 Coeur d’Alene Reservation as including submerged lands’).

³⁵Citing Act of March 2, 1889, 25 Stat. 980 at 1002, USA-CDA00021574.

533 U.S. at 268.

77. The Court observed that “Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself.” 533 U.S. at 269.

The Court found:

But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior ‘to negotiate with the Coeur d’Alene tribe of Indians,’ and, specifically, to negotiate ‘for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.’ Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002.

533 U.S. at 269.

78. On June 18, 1889, after the foregoing legislation was passed but prior to negotiating the 1889 Coeur d’Alene Agreement, the commissioners appointed (Simpson, Shupe, and Humphrey) were directed to consult the agreement made with the Indians in Montana the previous year. Hart 2015 Report at 243 n. 415. Eventually, in 1908, the Supreme Court proclaimed the *Winters* doctrine on the basis of that agreement with the Indians in Montana. *Id.*³⁶

79. In addition to demanding the ratification of the 1887 agreement, Coeur d’Alene leaders also continually made reference to the importance of the 1873 reservation throughout subsequent August–September 1889 negotiations. For example, during an August 27, 1889 council, Chief Seltice responded to Simpson’s assertion that “the more land you let us have the more money you will get,” by stating, “My dear friends, if our object was money you would be correct, but

³⁶ *Winters v. United States*, 207 U.S. 564, 575-76 (“The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Ft. Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant.”).

money is no object; our land we wish to keep.” Later that day, he told the commissioners, “You know it is against our wishes to sell any land, but you wanted to buy.” Smith 2015 Report at 100; *see also* Hart 2015 Report at 249; Wee Report at 77 (noting Seltice’s remarks). At the final council, Seltice indicated how difficult it was for tribal leaders to consent to the land sale, comparing it to “cutting my left arm off.” Smith 2015 Report at 100.³⁷

C. The 1889 Agreement and Congress’s 1891 Ratification of Coeur d’Alene Agreements

80. The Tribe and Government negotiators reached a new agreement in 1889. 533 U.S. at 269-70.

81. In the agreement signed on September 9, 1889, the Tribe agreed to relinquish a specified portion of the reservation to the federal government. Smith 2015 Report at 100. Congress ratified the 1887 and 1889 agreements in the Act of March 3, 1891. Smith 2015 Report at 103³⁸; Hart 2015 Report at 377.³⁹ “On March 3, 1891, Congress ‘accepted, ratified, and confirmed’ both the 1887 and 1889 agreements with the Tribe. Act of Mar. 3, 1891, ch. 543, §§ 19, 20, 26 Stat. 1027, 1029.” 533 U.S. at 271.

82. In *Idaho II*, the district court noted: “[P]rior to Idaho’s statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d’Alene Reservation.” 95 F. Supp. 2d at 1114. “It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the

³⁷ Citing Third Council, August 31, 1889; and Fourth Council, September 8, 1889; both in Senate, *Message from the President . . . Relative to the Purchase of a Part of the Coeur d’Alene Reservation*, 51st Congress, 1st session, December 18, 1889, S. Ex. Doc. 14, serial 2679, 10–12, USA-CDA00003948.

³⁸ Citing *Congressional Record*, 51st Congress, 2d session, March 3, 1891, 22: 3878, USA-CDA00021608; Act of March 3, 1891, 26 Stat. 989 at 1026–1032, USA-CDA00021598.

³⁹ Citing United States. Congress. *The Statutes at Large of the United States of America from December 1889, to March, 1891*, Washington, D. C.: Government Printing Office, 1891, pp. 989-991, 1027-1032. [221]

fact that the 1873 reservation included the land beneath the Lake and rivers.” 95 F. Supp. 2d at 1114. “[T]he Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d’Alenes.” 95 F. Supp. 2d at 1114.

83. The Supreme Court further recounted that:

The manner in which Congress then proceeded to deal with the Tribe shows clearly that preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress’s complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation. The Tribe had shown its readiness to fight to preserve its land rights when in 1858 it defeated a force of the United States military, which it misunderstood as intending to take aboriginal lands.

533 U.S. at 276.

84. The district court noted:

With two exceptions, the boundaries of the Coeur d’Alene Reservation remain the same today as established by the congressional ratification of the 1887 and 1889 agreements. In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation, running from the mouth of the Coeur d’Alene River to the reservation’s eastern boundary (the ‘Harrison cession’). And in 1908, Congress authorized the conveyance to the State of Idaho of land surrounding three small lakes, adjacent to the southern extreme of the Lake. Following its transfer by patent to the State of Idaho in 1911, this area became a public park (‘Heyburn State Park’).

95 F. Supp. 2d at 1097.

VI. ONGOING TRIBAL USES OF COEUR D’ALENE WATERWAYS, 1880s–1900s

85. While many tribal members had relocated from their traditional village sites to the DeSmet area during the decade leading up to the negotiation of the 1887 agreement, the Coeur d’Alene Indians continued to engage in traditional subsistence activities along the lakes, rivers, and other water bodies that remained the center of their aboriginal territory. Hart 2015 Report at 385. As historian Laura Woodworth-Ney found, “some families continued to reside in the lake and river regions well into the twentieth century,” and Coeur d’Alene waterways “continued to

form the soul of the tribal landscape.” Smith 2015 Report at 7⁴⁰; *see also* Wee Report at 79 (noting that at time of 1889 agreement, “[a]long Coeur d’Alene River there were also tribal members (a number unspecified by Wildshow) who maintained traditional village sites, did not rely entirely upon farming, and occupied the river and lake area seasonally.”); Wee Report at 83 (during 1891, census reports indicated “many of the Indians had gone in to the mountains hunting and fishing”); Wee Report at 103 (arguing that in decades after 1891 agreement, “Coeur d’Alene Indians who seemingly embraced Euro-American style agriculture did not completely abandon their traditional hunting, fishing, and gathering economy, but these did decline in importance as more and more Coeur d’Alene took up agricultural activities.”).

86. Interior Department hearings held in 1910 revealed ongoing tribal uses of Lake Coeur d’Alene, Chatcolet Lake, Benewah Lake, and the St. Joe and Coeur d’Alene Rivers for fishing, hunting, camping, and transportation through the first decade of the twentieth century. Smith 2015 Report at 7, 104-105⁴¹; Smith 2016 Report at 32-33; Hart 2015 Report at 314-331, 385.

87. For example, in testimony given on January 4, 1910, St. Maries, Idaho, farmer A. J. L. Brewald reported seeing “Indians camped every place on that bank, I guess, up and down that [St. Joe] river, from the lake to the [reservation] line.” Brewald further asserted that Coeur d’Alene tribal members had camped “on these high banks next [to] the river” during the summers “[p]ractically every year” since his settlement at St. Maries in 1884. Brewald also testified to the quality of the “trout fishing on the St. Joe River,” noting that he had seen Indians

⁴⁰ Citing Laura Woodworth-Ney, *Mapping Identity: The Creation of the Coeur d’Alene Indian Reservation, 1805–1902* (Boulder: University Press of Colorado, 2004), 90, USA-CDA00021719.

⁴¹ Citing Testimony of A. J. L. Brewald, January 4, 1910, vol. 2, Entry 1028: Records Relating to Legal Action Taken by the Department of the Interior Against the Washington Water Power Company, 1909–10, Record Group 49: Records of the Bureau of Land Management [RG 49], National Archives and Records Administration, Washington, D.C. [NARA I], pp. 814, 819–821, USA-CDA00008049.

fishing that stream in the spring, summer, and fall, as well as “through the ice” near the mouth of the St. Joe River “at the upper end of the lake.” Smith 2016 Report at 32⁴²; Hart 2015 Report at 318-319.

88. The continued use of the fish traps along the lower St. Joseph River during the early 1900s was also confirmed by historian Pat Allen Pentland, whose grandparents “settled the St. Joe valley in 1905 and built a saw mill at the mouth of Benewah Creek, only one mile from Mission Point.” Smith 2016 Report at 33; Hart 2015 Report at 62. Pentland provided a detailed description of both the historic and ongoing uses of these fish traps near the site of the original Jesuit mission along the St. Joe River (often referred to as Mission Point). Pentland wrote:

There also existed at Mission Point a fairly extensive construction of Indian fish traps, built between the end of the plateau and the river, across the outlets of present day Goose Haven Lake and Peterson Creek. These traps were apparently used to annually harvest the fish imprisoned in the flooded meadow lands each spring, which were attempting to pass back into the river as the high water receded. Being constructed from willows, this fishery obviously predated the mission itself, and was still used by the Indians at the turn of the century.

Smith 2016 Report at 33⁴³; Hart 2015 Report at 62.

89. Coeur d’Alenes continued to rely on the waterways within their traditional territory during the 1880s, 1890s, and into the early 1900s. While many tribal members expanded their agricultural activities during these decades, they did not abandon their traditional subsistence practices. Instead, as they had done since the arrival of the Jesuits in the 1840s, the Coeur d’Alene Indians continued to rely on a mix of agriculture, hunting, fishing, and gathering

⁴² Citing Testimony of A. J. L. Brewald, January 4, 1910, vol. 2, Entry 1028, RG 49, NARA I, pp. 814, 819–821, USA-CDA00008049. For the location of the traditional Coeur d’Alene village site near St. Maries, Idaho, see Palmer, “Coeur d’Alene,” in *Handbook*, vol. 12, 314, USA-CDA00021626.

⁴³ Citing Pat Allen Pentland, “The Illfated Mission: The Sacred Heart Mission on the St. Joe River, 1842–1846,” M.A. thesis, May 1973, Gonzaga University, p. 42, copy from Sacred Heart Collection, Box 10, Special Collections, Gonzaga University, Hart Exhibit No. 699.

activities to provide for their subsistence in the decades both leading up to and following the negotiation of the 1887 and 1889 agreements. Smith 2015 Report at 107; Hart 2015 Report at 314-331, 385.

VII. 1906-1910: ALLOTMENT AND COEUR D'ALENE OPPOSITION

90. The Coeur d'Alene reservation was described at the turn of the 20th century as being prosperous and thriving, with large productive tribal farms, nice houses, and good tribal schools. Hart 2015 Report at 281.

91. In 1906, Congress passed an act which provided for allotment of the Coeur d'Alene Reservation. 34 Stat. 325, 335. The provision read:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and sixty acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior as agricultural lands, grazing lands, or timber lands, and shall be appraised under their appropriate classes by legal subdivisions, and, upon completion of the classification and appraisal, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws ...

34 Stat. 325, 335-36 (reported at Kappler, Charles Joseph. *Indian Affairs, Laws and Treaties*, Vol. 3, Washington, D. C.: Government Printing Office, 1913, p. 203).

92. The Tribe was strongly opposed and the Tribe's leadership voted unanimously in opposition to allotment.⁴⁴ Hart 2015 Report at 284. The Tribe sent a delegation to Washington, D.C. to demand the United States reverse its decision. Hart 2015 Report at 285.

93. Despite continued resistance, allotment of the Coeur d'Alene Reservation was carried out between 1907 and 1908. Hart 2015 Report at 288. Eventually, 638 Indian allotment patents were issued: 97 to Spokane Tribal members and 541 to Coeur d'Alene Tribal members. Hart 2015 Report at 288. Tribal ownership of reservation lands was reduced from 345,000 acres to approximately 58,000 acres. Hart 2015 Report at 288. In some instances, tribal members were unable to keep the farms they had established or were forced to move away from the waterways. Hart 2015 Report at 288. The Tribe retained a beneficial interest in the reservation's unsold surplus lands throughout the period leading up to the 1958 Tribal Restoration Act. Smith 2016 Report at 47.

VIII. COEUR D'ALENE TRIBE CONTINUED COMMITMENT TO WATER RESOURCES

94. The Coeur d'Alene Tribe has continued its commitment to its water resources and its sovereign ownership of "the bed and banks of Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation." *See Idaho II*, 95 F. Supp. 2d at 1117. In the 1970s, the Tribe intervened in licensing proceedings for Washington Water Power Company's operations at Post Falls. *See Washington Water Power Company*, 13 FERC ¶ 63, 051 (1980). That litigation culminated in a 1988 decision by the Federal Energy

⁴⁴ The Commissioner of Indian Affairs previously noted, in the 1880s, that the Tribe was against allotment, having much more land under cultivation already than tribal members would have been allowed to select under the Dawes Act. Hart 2015 Report at 237, 284. The Tribe had unanimously voted against taking lands in severalty at that time as well. Hart 2015 Report at 237, 284.

Regulatory Commission that it lacked jurisdiction to determine ownership of submerged lands underlying navigable waters. *Washington Water Power Company*, 43 FERC ¶ 61,254 (1988). Three years later the Tribe file suit against the State of Idaho seeking to quiet title to the navigable waterways of its reservation. *Coeur d'Alene Tribe v. Idaho*, 798 F.Supp. 1443, 1445 (D. Idaho 1992) (“*Idaho P*”) (discussed above).

95. To restore natural resources, the Tribe filed suit against nine mining companies and the Union Pacific Railroad, for releasing approximately 64,390,000 tons of contaminated tailings into the Coeur d’Alene River, much of which was ultimately deposited in the Lake. *Coeur d’Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1105 (D. Idaho 2003). The district court found that the Tribe and the United States, as trustees, had established liability for defendants’ damages to natural resources. *Asarco*, 280 F.Supp.2d at 1117.

96. Although the remediation and restoration effort is now underway, the fishery remains contaminated and hazardous to human health. As a result the Coeur d’Alene Tribe has issued a resolution issuing a fish consumption advisory warning tribal members against consuming fish from the Lake and Coeur d’Alene River. Aff. of C. Matheson, Ex. 2 (Tribal Resolution 42 2001)).

97. The Lake and its related waters continue to be at the heart of the Tribe’s cultural identity. The Tribe is committed to the Lake Coeur d’Alene Lake Management Plan (“LMP”), a multipart plan developed in cooperation with the State of Idaho. *See Our Gem Coeur d’Alene Lake Collaborative*, www.ourgem.org (last visited Oct. 11, 2016).⁴⁵ As part of that collaboration, the

⁴⁵ The goal of the LMP is “to protect and improve lake water quality by limited basin-wide nutrient inputs that impair water quality conditions, which in turn influence the solubility of mining-related metals contamination in lake sediments. *See* Dept. of Env’t. Quality and Coeur d’Alene Tribe, *Coeur d’Alene Lake Management Plan* at 12 (2009), *available at*: <http://www.cdatribe-nsn.gov/tribaldepts/notice/lake/LMP09.pdf> (last visited Oct. 11, 2016).

Tribe hosts the “Our Gem Symposium” each year, an event to provide outreach to the community regarding implementation of the LMP. Aff. of C. Matheson, Ex. 6.

98. In addition, many of the Tribe’s current cultural events are dedicated to the Tribe’s connection to the Lake. For example, the Tribe hosts an annual water potato day where tribal members come together to celebrate the water potato harvest. Aff. of C. Matheson, Ex. 8. The Tribe also hosts an annual water awareness week where it invites elementary schools from around the region to come to the Reservation to learn about the interrelationship between human activity, water quality, and aquatic health. Aff. of C. Matheson, Ex. 10. Most recently, the Tribe has built traditional sturgeon nose and dugout canoes and hosts an inter-tribal canoe journey where the Tribe invites regional tribes to the Reservation to paddle the length of the Lake from the Reservation to the City Beach at downtown Coeur d’Alene. Aff. of C. Matheson, Ex. 11. As tribal member Lovina Louie recently put it, “[b]ecause we were put on reservations, were taken away from the water. A lot of us are coming back When that canoe touched our water, I could feel our ancestors welcoming us home.” Aff. of C. Matheson, Ex. 11.

99. Today, the United States and Tribe claim 17,815 acre-feet per year (“AFY”) for irrigation of 5,573 acres still held by the Tribe and contained within its reservation. The United States and Tribe also claim 7,453 AFY to support domestic, commercial, municipal, and industrial uses as well as 979 domestic wells. Combined, the Tribe’s consumptive claims amount to less than one

The LMP likewise has five objectives: (1) Improve scientific understanding of lake conditions through monitoring, modeling, and special studies; (2) establish and strengthen partnerships to maximize benefits of actions under existing regulatory frameworks; (3) develop and implement a nutrient reduction plan; (4) increase public awareness of lake conditions and influences on water quality; and (5) establish funding mechanisms to support the LMP goal, objectives, and strategies. *See Id.*

percent of the total outflow of the Coeur d'Alene-Spokane River Basin. *See* aff. Fritchle, *In Re CSRBA*, No. 49576, Subcase No. 00-40001 at 2 ¶¶ 4-5 (Dec. 18, 2015).⁴⁶

IX. BIOLOGICAL ATTRIBUTES OF THE FISHERIES OF THE COEUR D'ALENE RESERVATION

100. 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 (*Oncorhynchus clarkii*), Bull Trout which is a native char species (*Salvelinus confluentus*), and in one drainage, Hangman Creek, Chinook Salmon (*O. tshawytscha*). Reiser Report at 1, 12.

101. Westslope Cutthroat Trout and Bull Trout are the focus of the Instream Flow Claims. Both of these 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 35. 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.* at 29.

⁴⁶ *See also*, State of Idaho's Opening Brief at 10, *In Re CSRBA*, No. 49576, Subcase No. 00-40001 (Dec. 18, 2015) (domestic and stockwater claims in the CSRBA, which could use between 18,870 and 136,808 acre-feet per year are *de minimis* because the use amounts to between 0.43 percent and 3.11 percent of the average annual outflow of the Coeur d'Alene-Spokane River Basin.”); *Memorandum Decision* at 10 *In Re CSRBA*, No. 49576, Subcase No. 00-40001 (Mar. 7, 2016) (“[t]he record establishes that the cumulative impact of *de minimis* water use in the Coeur d'Alene-Spokane River system as a whole is insignificant when compared against the total available water supply.”).

102. The 71 stream reaches that are represented by the Instream Flow Claims consist of streams and water courses 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. *Id.* at 1. The lands defined by the 1891 boundaries of the Reservation include access to fisheries valued by the Tribe. The Tribal fisheries that exist today within the Reservation are biologically dependent on waterways and portions of Coeur d'Alene Lake that are beyond the boundaries of the Reservation; these waterways include the two main river systems entering Coeur d'Alene Lake – Coeur d'Alene River and its tributaries, and the St. Joe River and its tributaries, as well as a number of streams that are directly confluent to Coeur d'Alene Lake, including Wolf Lodge Creek, Beauty Creek, Turner Creek and Carlin Creek. *Id.* at 35.

103. Fish do not recognize realty borders or boundaries unless those boundaries happen to be of a physical nature such as a natural waterfall, a steep and extremely fast and turbulent set of rapids, a section of river or stream that becomes dewatered (naturally or anthropogenically), or a dam or other man-made structure that results in a barrier to fish movements. *Id.* at 3.

104. Adfluvial Westslope Cutthroat Trout and Bull Trout move freely within a 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 25. Coeur d'Alene Lake has no borders and the target fish that are in the lake can and do move and migrate freely throughout different portions of the lake to fulfill their biological requirements. 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 29-30.


105. Westslope Cutthroat Trout are widely distributed throughout the Coeur d'Alene basin and may utilize every stream that contains appropriate habitat conditions. *Id.* at 26.

106. The adfluvial life history strategy requires both lake and riverine habitats, and importantly, that those habitats are available, accessible and properly functioning. This means that both habitat types must be maintained and protected so they can continue to provide the mix of biophysical parameters (e.g., flow, water quality (temperature, dissolved oxygen, etc.), sedimentation, nutrient levels, physical structure, biological components) to which these sub-populations have evolved around. Failure to do so will most certainly, over time, compromise the overall population sustainability and the sustainability of the Tribal fishery. Even the streams and rivers that are on the fringes of the aboriginal lands used by the Tribal and that are well beyond the 1891 boundaries of the Reservation contribute to the viability and future sustainability of the Tribal fishery. These streams and their associated sub-populations of target fish are part of the overall population portfolio that serves to temper interannual variability in abundance, provides further insurance of population persistence, and promotes the continuance of the Tribal fishery. *Id.* at 34.


X. SUMMARY

107. Taken together, the historical evidence leading up to the establishment of the Coeur d'Alene Reservation in 1873 demonstrates that its creation resulted from an effort on the part of both tribal leaders and government officials to secure a permanent homeland for the Tribe. At the time of the reservation's creation, tribal members continued to rely on fishing, hunting, and gathering, while also incorporating Euroamerican agriculture and Catholic religious observances into their seasonal migrations and traditional subsistence patterns. Recognizing this, federal officials agreed with Coeur d'Alene leaders who petitioned them about the need to expand the 1867 reservation to include essential tribal waterways and to enable the continuance of the Tribe's diverse subsistence strategies and lifeways. In so doing, United States officials reflected the government's intent to create a reservation that would meet the broad homeland needs of the Coeur d'Alene Tribe. Smith 2015 Report at 7; Hart 2015 Report at 336.

DATED this 20th day of October, 2016.

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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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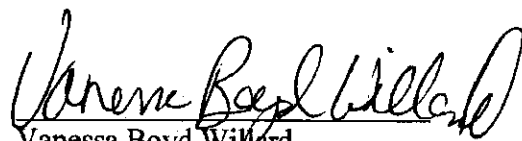
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