2-24-2017

Affidavit of CDAT Counsel

Kinzo H. Mihara
Attorney, Howard Funke & Associates

ORIGINAL

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

In re CSRBA	Subcase Nos.: 91-7755 (and 353 consolidated subcases)
Case No. 49576	AFFIDAVIT OF COUNSEL IN SUPPORT OF COEUR D'ALENE TRIBE'S RESPONSIVE BRIEFING

State of Idaho)
) ss.
County of Kootenai)

COMES NOW, Kinzo H. Mihara, after being duly sworn before an officer authorized to administer oaths, swears and declares as follows:

(1) My name is Kinzo H. Mihara. I am an attorney duly authorized to practice law in the State of Idaho. I am over the age of 18 and am competent to testify to matters herein.

(2) My office is the successor law firm to the firm which litigated the case cited as *Idaho I* and *Idaho II* in the Tribe's summary judgment briefings. As such, my firm has in its possession

and files the pleadings filed in that case. Keeping such files is part of the ordinary course of business for the firm.

(3) The litigation cited as *Idaho I* and *Idaho II* in the Tribe's briefings related to a quiet title action concerning the beds and banks of navigable waters within the Tribe's reservation. As such, the pleadings in *Idaho II* are records or documents and/or statements within records or documents affecting an interest in property. Further, it is my information and belief that true, accurate, and correct copies of the attached documents are reported in Westlaw, the Coeur d'Alene Tribe's Lake Management Department, the U.S. Department of the Interior Solicitor's Office, along with the Clerks' offices for the U.S. District Court for the District of Idaho, the U.S. District Court for the District of Eastern Washington, the U.S. Claims Commission, the U.S. Ninth Circuit Court of Appeals, and/or the Supreme Court of the United States. As such, the attached documents are public records and reports.

(4) Attached hereto as Exhibit "1" is a true, accurate, and correct copy of the cover page and pages 19-21 and 37-38 of the State of Idaho's brief to the Supreme Court of the United States filed in *Idaho II*.

(5) Attached hereto as Exhibit "2" is a true, accurate, and correct copy of the cover page and pages 2-3; 22; and 29 of the State of Idaho's Trial Brief to the District Court for the District of Idaho filed in *Idaho II*.

(6) Attached hereto as Exhibit "3" is a true, accurate, and correct copy of the Coeur d'Alene Tribal Water Storage/Use Permit, Permit No. 2008-01, issued to Avista Corporation.

(7) Attached hereto as Exhibit "4" is a true, accurate, and correct copy of the *Judgment and Decree* issued by the District Court for the District of Idaho in the *Idaho II* litigation.

(8) Attached hereto as Exhibit "5" is a true, accurate, and correct copy of the cover page and pages 8-10 of the *Memorandum Opinion and Order* in the case *United States and Spokane Tribe of Indians v. Anderson*, No. 3643 (E.D. Wash. 1979).

(9) Attached hereto as Exhibit "6" is a true, accurate, and correct copy of the cover page and pages 42-46 of the *Brief for Petitioners, State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 1998 WL 464932, downloaded from Westlaw.

(10) Attached hereto as Exhibit "7" is a true, accurate, and correct copy of the cover page and page 618 of the *Additional Findings of Fact, Coeur d'Alene Tribe v. United States, Indian Cl. Comm'n*, Docket No. 81 (Dec. 3, 1957).

(11) Attached hereto as Exhibit "8" is a true, accurate, and correct copy of the cover page and pages 1181-84 of F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (2012 ed.).

(12) Attached hereto as Exhibit "9" is a true, accurate, and correct copy of the cover page S. 2.02 (pages 113-123) of F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (2012 ed.).

(13) Attached hereto as Exhibit "10" is a true, accurate, and correct copy of the cover page and pages 9; 258 of the Rifkind Report (available for download at: http://hdl.handle.net/10974/312) filed in the case of *Arizona v. California* cited in the Tribal briefing.

(14) Attached hereto as Exhibit "11" is a true, accurate, and correct copy of the cover page and pages 553-43 of S. Clark and A. Joseph, CHANGES OF WATER RIGHTS AND THE ANTI-SPECULATION DOCTRINE: THE CONTINUING IMPORTANCE OF ACTUAL BENEFICIAL USE, 9 U. Denv. Water L. Rev. 553, 554 (2006).

(15) Attached hereto as Exhibit "12" is a true, accurate, and correct copy of the *Opinions of the Solicitor*, pgs. 1663-64, April 15, 1955 (available for download at http://thorpe.ou.edu/sol_opinions/p1651-1675.html).

(16) Attached hereto as Exhibit "13" is a true, accurate, and correct copy of the *Opinions of the Solicitor*, pg. 2051, December 21, 1972 (available for download at http://thorpe.ou.edu/sol_opinions/p2051-2075.htm).

Respectfully submitted this 21st day of February, 2017.

Kinzo H. Mihara

NOTARIAL ATTESTATION

That on the 21st day of February, 2017, and after being duly sworn, Kinzo H. Mihara, personally known to me, appeared before me, attested to and executed this document.

MARCELLA J HARRISON
(SEAL) NOTARY PUBLIC
STATE OF IDAHO

Marcella J. Harrison, Notary Public
Residing at: Coeur d'Alene

My commission expires: 4-14-20

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2017, a true and correct copy of the foregoing document was served upon the following individuals via email and/or by placing the document in the United States Mail, postage prepaid, addressed as follows:

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Marcella J. Harrison
MARCELLA J. HARRISON

EXHIBIT 1

No. 00-189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

It is a rare and extraordinary thing for a sovereign government to abrogate the public's ownership of lands underlying navigable waters. Submerged lands are tied in a unique way to sovereignty, precisely because their natural and primary uses are public in nature. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). Only sovereign ownership assures that submerged lands will be maintained for the benefit of the whole people. If such lands are to be removed from common public use, it must be done with deliberation, and only after full consideration of the consequences. An intent to defeat sovereign title to submerged lands must also be plainly stated, because such an important decision would not be left for inference from ambiguous language. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842).

For these reasons, the Court has carefully limited the circumstances under which it will infer an intent to sever submerged lands from sovereignty. While Congress, with its possession of national and municipal sovereignty over territories, may have the authority to sever submerged lands from sovereignty, and prevent their passage to future States, it has done so only in "the most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). Within Indian reservations, an intent to defeat state sovereign title to submerged lands has been found only where Congress conveyed the lands in fee to the occupant tribe, and promised the tribe the lands would never be included within any future state. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970). Where Congress has granted tribes rights other than full fee title, including rights of occupancy or exclusive use,

the Court has not inferred an intent to defeat state sovereign title to submerged lands within Indian reservations. *United States v. Holt State Bank*, 270 U.S. 49, 58-59 (1926); *Montana v. United States*, 450 U.S. 544, 554 (1981).

Within other types of federal reservations, an intent to defeat state title to submerged lands has been found only where Congress made the determination that state ownership would thwart the purposes for which the reservation had been established, and expressly prevented the state from assuming sovereignty and ownership over the submerged lands. *See generally United States v. Alaska*, 521 U.S. 1 (1997). Notably, in both *Choctaw Nation* and *Alaska*, the statutes in question addressed explicitly how the assumption of statehood would affect both sovereignty and title within the federal reservations at issue.

In the case of the Coeur d'Alene Indian Reservation, Congress never addressed the question of whether the future State of Idaho would be denied sovereign title to submerged lands within the Reservation. Prior to statehood, there were two congressional actions relating to submerged lands within the Reservation. The first was a Senate inquiry into allegations that steamboats on Coeur d'Alene Lake were "subject to the laws governing the Indian country and [that] all persons going on such lake or waters within the reservation lines are trespassers." App. 116-17. After being informed by the Department of Interior that it interpreted the Coeur d'Alene Indian Reservation to embrace the submerged lands of Coeur d'Alene Lake, Congress ordered negotiations to diminish the Reservation, through the purchase of lands from the Coeur d'Alene Tribe. In ordering the negotiations, however, Congress did not convey the submerged lands to the Tribe; it did not affirm the Reservation boundaries that

embraced the submerged lands; it did not direct that the public be denied access to the submerged lands or the overlying waters; and it did not address whether the submerged lands would later pass to the State as an incident of its sovereignty. Rather, Congress repudiated the Reservation as it then existed, directed its diminishment, and drafted its description of the lands to be purchased so as to avoid any implication that it was recognizing tribal title to the submerged lands. Act of March 2, 1889, 25 Stat. 980, 1002 (the "1889 Act").

In short, Congress did not "purport to defeat the entitlement of future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Utah Div. of State Lands*, 482 U.S. at 208. Further, neither the 1889 Act, nor its legislative history, suggest that Congress concluded that the future assumption of state sovereign title to submerged lands would thwart the purposes of the diminished Coeur d'Alene Indian Reservation. To the contrary, the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe, and the legislative history described the Tribe's members as successful farmers. Thus, exclusive tribal control of submerged lands, and exclusion of the public uses associated with state sovereign title, were not necessary to fulfill the purposes of the diminished Reservation.

ARGUMENT

Submerged lands, are, by their nature, "incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are

1887 agreement, it did not do so." Pet. App. 15. Instead, Congress authorized cession negotiations for the "purchase and release by said tribe of such portions of its reservation . . . as such tribe shall consent to sell." Act of March 2, 1889, 25 Stat. at 1002, App. 144. The court of appeals held:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.
>
> . . . .
>
> Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

Pet. App. 22-23 (emphasis in original).

1. The court of appeals, by holding that Congress did not "repudiate" the 1873 Executive Order Reservation, simply mischaracterized Congress' actions. Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations

was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement.

The court of appeals was correct in one respect: Congress had the authority to repeal the 1873 Executive Order if it chose to do so. Executive orders do not vest the occupant tribe with compensable title, but only a right of permissive occupancy akin to a tenancy at will. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947). It is not surprising, however, that Congress chose not to repeal the 1873 Executive Order. An outright repeal of the Order would have left the Tribe's farmlands unprotected. A repeal also would not have resolved outstanding claims of aboriginal title within the boundaries of the Reservation. As the Commissioner of Indian Affairs noted in his 1888 Report, it was the Indian Department's position that "these Indians have all the original Indian rights in the soil they occupy" and that such rights predated the 1873 Executive Order. App. 131.

Given the above concerns, Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands, by refusing to accept the existing Reservation boundaries, and directing further negotiations that would result in a radical diminishment of the Reservation. Congress' action can be characterized as an "acceptance" of the 1873 Reservation only through the most twisted application of logic.

2. The holding of the court of appeals cannot be reconciled with this Court's submerged lands decisions. As discussed above, this Court has inferred an intent to defeat state title to submerged lands only where Congress, by a definite declaration or plain statement of

EXHIBIT 2

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ATTORNEYS FOR STATE OF IDAHO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation	
	Case No. CIV 94-0328-N-EJL
UNITED STATES OF AMERICA, Plaintiff, Counterdefendant and COEUR D'ALENE TRIBE, Plaintiff in Intervention Counterdefendant in Intervention vs. STATE OF IDAHO, Defendant.	STATE OF IDAHO'S TRIAL BRIEF

I. GENERAL DISCUSSION

A. Introduction

This Trial Brief discusses the issues as framed by the Court's Order of October 31, 1997. It does not address certain factual issues, such as federal actions following the establishment of the Coeur d'Alene Reservation in 1873, since the Court indicated in its order that such factual issues were not relevant to the questions presented. Nor does this Brief address many of the legal issues raised by the plaintiffs regarding ratification, such as whether the General Allotment Act ratified the 1873 Executive Order, since the Court did not identify those as genuine issues of material fact in its Order. Additionally, those issues were fully briefed as part of the summary judgment proceedings and it would serve no purpose to repeat the arguments here. To the extent that such issues remain to be decided as part of the trial in this matter, the State herein incorporates by reference the arguments contained in the State's opening and reply briefs in support of the State's motion for summary judgment.

B. Issues Presented

The overall issue to be decided is whether the United States at any time prior to Idaho statehood affirmatively acted to defeat the future State of Idaho's title to the beds and banks of navigable waterways within the present Coeur d'Alene Indian Reservation. As the Court noted in its Order of October 31, 1997, the specific factual issues to be decided are: (1) whether, in the time-period immediately preceding the events giving rise to the 1873 Executive Order creating the Coeur d'Alene Reservation, the Coeur d'Alenes depended on the disputed waterways for subsistence fishing; (2) if so, then whether, in the time-period immediately preceding the events

giving rise to the 1873 Executive Order, the government officials responsible for issuance of the Executive Order knew or perceived the Tribe to be dependent on the disputed waterways for subsistence fishing; (3) if so, did government officials intend to reserve the beds and banks of navigable waterways within the Reservation for the purpose of protecting fisheries; and (4) if so, was Congress aware of the reservation of the beds and banks and did it take the necessary steps to ratify the reservation prior to or at the point of Idaho's admission to the Union. An additional issue raised by the Coeur d'Alene Tribe is whether the Tribe possessed aboriginal title to the Lake and its associated rivers and, if so, did such title prevent the disputed submerged lands from passing to the State upon its admission to the Union.

C. Standard of Proof

In *United States v. Alaska*, 117 S. Ct. 1888 (1997), the Supreme Court re-emphasized the heavy burden plaintiffs bear in asserting title to submerged lands: "Under our equal footing cases, '[a] court deciding a question of title to the bed of navigable water . . . must begin with a strong presumption' against defeat of a State's title." 117 S. Ct. at 1906, quoting *Montana v. United States*, at 450 U.S. 544, 552 (1981). "We will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'" *Id.*, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). "Under *Montana* and *Utah Div. of State Lands*, an intent to defeat state title to submerged lands must be clear." 117 S. Ct. at 1917.

When the United States alleges that it reserved submerged lands, intent to defeat state title to submerged lands cannot be inferred "from the mere act of reservation itself." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). Instead, the United States must

purpose of establishing for them a reservation suitable to their wants as an agricultural people." U.S. Ex. 662. In his Annual Report for 1873, the Commissioner of Indian Affairs stated that the purposes of the Agreement were to extinguish aboriginal title and to provide a reservation "suitable to their needs as an agricultural people." U.S. Ex. 233 at 392. In his annual report for 1874, the Commissioner of Indian Affairs stated that the Tribe agreed to remain upon the Reservation "provided that its boundaries should be changed so as to include the Coeur d'Alene mission and some farming-lands in the valley of the Lotoh or Hangman's Creek." State Ex. 3091 at 367-68.

Thus, there are a number of official documents expressly stating the reasons for the expanded boundaries and explaining the purposes and objectives of the expanded reservation. None of the documents mentions fisheries. The total lack of any mention of fisheries in any of the documents explaining the purposes of the Reservation is dispositive. The stated purposes of the expanded Reservation were to provide farmlands, fulfill the Tribe's agricultural needs, and provide access to the Mission. None of these purposes required federal ownership of submerged lands.

E. Even if it is assumed that the Tribe was dependent on fisheries, and that the United States perceived the Tribe to be so, there must still be additional evidence compelling the conclusion that the United States intended to reserve submerged lands.

Tribal dependence on navigable waterways, and the awareness of federal officials of that dependence, are important factors in resolving disputes over title to beds and banks within Indian reservations. Standing alone, however, they are insufficient to infer an intent to defeat state title. *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991).

built at the upper falls, thereby saving the expense of building a steam mill. State Exhibit 82. Under *Alaska*, a reservation of submerged lands is implied only where necessary to fulfill federal objectives. The purpose expressed in Monteith's report, i.e., providing a mill site, was fulfilled by reservation of the Spokane River. A reservation of Lake Coeur d'Alene and the St. Joe River is not implied, since they were not necessary to the express purpose of providing a mill site.

H. The President lacked both the intent and the authority to expressly convey submerged lands to the Coeur d'Alenes.

The 1873 Executive Order cannot be construed as an express conveyance of submerged lands, for one simple reason: it was issued with the intent and knowledge that it was only a temporary set-aside of lands to prevent white settlement pending congressional ratification of the 1873 Agreement. There would appear to be no dispute on this issue. For example, In U.S. Exhibit 1189, Richard Hart, expert witness for the United States, admits that the 1873 Reservation was considered to be temporary. U.S. Ex. 1189 at 90. Because the Executive Order was issued with the intent that it would only be temporary, the President clearly did not intend that it be a permanent disposition of lands. Thus, as a matter of law, it could not act as an express conveyance or grant of permanent property rights to the Tribe. *See also Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942)(regardless of intent, President not authorized to convey permanent title to Indian tribes through executive order).

1889 Coeur d'Alene agreements. Act of March 3, 1891, ____ Stat. at ___. A map of Crow Reservation showing this boundary may be found at United States v. Finch, 395 F. Supp. 205, 219 (D. Mont. 1975).

EXHIBIT 3

ATTACHMENT F TO EXHIBIT 2 MASTER AGREEMENT, CASE NO. CV-08-526

COEUR D'ALENE TRIBE
DEPARTMENT OF LAKE MANAGEMENT

WATER STORAGE/USE PERMIT

WATER PERMIT NO. 2008-01

THIS IS TO CERTIFY THAT:

Avista Corporation
P.O. Box 3727
Spokane, WA 99220

FILED AN APPLICATION FOR WATER STORAGE/USE PERMIT DATED DECEMBER 16, 2008, which is attached to and made part hereof as Appendix 1, and on that date paid to the Coeur d'Alene Tribe ("Tribe") the $500.00 filing and processing fee required by Tribal law.

This application requests permission from the Tribe to store water upstream of the Avista Corporation's ("Avista") hydroelectric dams located on the Spokane River at Post Falls, Idaho, upon the submerged lands of Coeur d'Alene Lake, Hepton Lake, the St. Joe River, and the Coeur d'Alene River, as well as affected tributaries ("Submerged Lands"), located within the current boundaries of the Coeur d'Alene Indian Reservation ("Reservation") for use in the generation of hydroelectric power for the term of any new license issued pursuant to Part I of the Federal Power Act ("FPA"), 16 U.S.C. §§ 791 *et seq.*, by the Federal Energy Regulatory Commission ("FERC") to Avista in pending relicensing proceedings involving Avista's use, occupancy, and enjoyment for water storage and other purposes of the Submerged Lands within the current boundaries of the Reservation and any subsequent annual licenses.

Upon consideration of the application, A WATER STORAGE/USE PERMIT ("PERMIT") IS ISSUED AS FOLLOWS:

BENEFICIAL USE: Storage of water for use in hydropower generation at the Post Falls HED located on the Spokane River in Idaho and at each of Avista's four downstream HEDs (Upper Falls, Monroe Street, Nine Mile, and Long Lake) located on the Spokane River in Washington. These five HEDs are now licensed by FERC as the Spokane River Project, FERC No. 2545.

ANNUAL PERIOD OF USE AND RATE OF DIVERSION OR STORAGE:
Consistent with Avista's Current Operations between 1/01 and 12/31, Storage Up to 2,128 Feet Above Mean Sea Level ("MSL"), Drawdown commencing between the Tuesday after Labor Day and 9/15 of each year.

WATER STORAGE/USE PERMIT

WATER PERMIT NO. 2008-01

The above provisions are subject to, and Avista shall be entitled to store water consistent with, the lawful requirements of the new license referenced above and any lawful requirements imposed by FERC by order or otherwise in relation to the operation of the hydroelectric dams under such new license; *provided, however*, that the provisions of this Permit do not authorize any material alteration in Avista's Current Operations or Storage on the Submerged Lands in excess of 2,128 Feet above MSL ordered or required by FERC if such material alteration in Current Operations or excess Storage results from requests made to FERC by Avista, and nothing in this Permit is intended or shall be construed to impair or limit in any way the right of the Tribe to challenge the legality of any requirement imposed by FERC that increases the Storage authorized by this Permit in excess of 2,128 Feet above MSL, or that materially alters Avista's Current Operations with respect to such stored water, or that authorizes the use of such stored water for purposes other than hydropower generation, or in a manner or to the extent inconsistent with this Permit or rights reserved or held by the Tribe pursuant to federal and Tribal law. The description of current and proposed operations set forth in Avista's Application for Tribal Water Storage/Use Permit submitted on December 16, 2008, is offered as and hereby deemed to be a reference point only and shall not be construed or interpreted to establish or determine any facts in any proceeding or forum regarding Avista's current or proposed operations of the five hydroelectric developments (Post Falls, Upper Falls, Monroe Street, Nine Mile, and Long Lake) now comprising the Spokane River Project, FERC No. 2545.

LOCATION OF POINT(S) OF DIVERSION/STORAGE: Submerged Lands within the Reservation

PLACE OF USE: Submerged Lands within the Reservation

PRIORITY: August 1907 for storage up to 2,126.5 feet above MSL
June 1941 for storage up to 2,128 feet above MSL

CONDITIONS OF APPROVAL AND REMARKS

1. The Tribe and Avista are entering into a Master Settlement Agreement, contemporaneously with the Tribe's issuance of this Permit, comprehensively resolving a number of issues, including the storage of water on Submerged Lands within the Reservation. This Permit is issued pursuant to the provisions of Section 44-25.01 of the Coeur d'Alene Tribal Code and the Tribe's retained sovereignty, as well as its reserved rights of dominion and control, over the Submerged Lands and Waters covered by this Permit, including its authority to regulate the use of such lands and waters, as well as activities and resources thereon, to protect the public health, safety or welfare. This Permit shall be construed in a manner that is consistent with that Master Settlement Agreement and with applicable federal and Tribal law.

2. This water use shall be appurtenant to the described place of use (storage).

WATER STORAGE/USE PERMIT

WATER PERMIT NO. 2008-01

3. This Permit is subordinate and junior to the Tribe's proprietary right of exclusive use and occupancy of all surface and groundwaters (collectively "Waters") within the Reservation with a priority date of time immemorial.

4. The right to the use of water under this Permit shall be non-consumptive.

5. As of 2005, the Tribe estimates that Avista's storage of water above the dams at its Post Falls HED at 2,128 feet above MSL creates a total storage capacity upon submerged lands within the Reservation and upon submerged lands of Coeur d'Alene Lake outside the Reservation ("Total Submerged Lands") of approximately 284,471 acre feet of water. As of 2006, Avista estimates that its storage of water above its Post Falls HED at 2,128 feet above MSL creates a total storage capacity upon such Total Submerged Lands of approximately 266,692 acre feet of water. Pursuant to the Tribe's retained sovereignty over submerged lands and waters within the Reservation and consistent with Section 4 of Avista's Application for this Water Storage/Use Permit, dated December 16, 2008: (a) Avista and the Tribe shall work cooperatively during the term of this Permit to apply best scientific approaches mutually agreed upon by Avista and the Tribe to make reasonable calculations of the total volume of water stored above Avista's Post Falls dams at 2,126.5 and 2,128 feet above MSL, respectively, as well as the total volume of water stored on submerged lands within the current Reservation boundaries at those elevations; (b) Avista and the Tribe shall each pay their respective costs of these cooperative efforts; (c) pending further cooperative measurement efforts, Avista and the Tribe shall use the mean between their respective existing estimates, or 275,581.5 acre feet, as the best available measurement of storage volume above Avista's Post Falls dams upon the Total Submerged Lands at 2,128 feet above MSL; and (d) these cooperative efforts shall include the preparation of a map or maps clearly identifying, by section, township, and range, the location of water being stored on submerged lands within the Reservation.

6. This Permit is issued for the term of any new FPA license issued by FERC to Avista in pending relicensing proceedings involving Avista's use, occupancy, and enjoyment for water storage and other purpose of the Submerged Lands within the current boundaries of the Reservation and any subsequent annual licenses.

7. Upon issuance of this Permit, Avista is deemed to be in full compliance with Tribal Code Section 44-25.01. The payment of a processing or filing fee in the amount of $500.00 at the time of Avista's filing of the Application for this Permit shall satisfy any and all payment obligations by Avista over the term of the Permit.

WATER STORAGE/USE PERMIT

WATER PERMIT NO. 2008-01

8. The Tribe expressly reserves its rights of dominion and control over the Submerged Lands and Waters covered by this Permit, including its sovereign authority to regulate the use of such lands and waters, as well as activities and resources thereon, to protect the public health, safety or welfare.

Nothing in this Permit is intended, or shall be interpreted, to limit or impair in any way the Tribe's sovereign power or authority over Reservation Submerged Lands or Waters, including the Tribe's legislative, regulatory, and adjudicative power and authority over such lands and waters. All of the Tribe's property and sovereign interests therein of any kind, including its rights to use and regulate such lands and waters in any manner, are retained subject to the nonexclusive use of such lands and waters by Avista for water storage for hydropower purposes pursuant to this Permit.

9. Avista will be deemed to be in compliance with this Permit if, during the term of this Permit, Avista's storage of water is consistent with its current operations, subject to the requirements of any new license refereneed above and any requirements imposed by FERC by order or otherwise in relation to the operation of the hydroelectric dams under any new license, as limited by the proviso set forth in the introductory portion of this Permit entitled "ANNUAL PERIOD OF USE AND RATE OF DIVERSION OR STORAGE."

10. If a dispute arises concerning this Permit, Avista and the Tribe agree to exhaust Tribal judicial and administrative remedies, if available and adequate, consistent with Section H.2d of the Master Settlement Agreement between Avista and the Tribe before seeking relief in the United States District Court for the District of Idaho.

This Permit is issued pursuant to the provisions of Section 44-25.01 of the Coeur d'Alene Tribal Code. Witness the seal and signature of the Director, affixed at the Coeur d'Alene Indian Reservation, this 16th day of December, 2008.

Phillip Cernera, Lake Manager
Coeur d'Alene Tribe
Department of Lake Management

EXHIBIT 4

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation	Case No. CIV-94-0328-N-EJL
UNITED STATES OF AMERICA, Plaintiff, Counterdefendant and COEUR D'ALENE TRIBE, Plaintiff in Intervention Counterdefendant in Intervention vs. STATE OF IDAHO, Defendant, Counterclaimant.	JUDGMENT & DECREE

This action came on for trial before the Court, Honorable Edward J. Lodge, United States District Judge, presiding, from December 1 through December 12, 1997, and the issues having been duly heard and a July 28, 1998, MEMORANDUM DECISION AND ORDER having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation;

2. The United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation;

3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of all the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and

submerged lands were not at issue in this litigation;

4. The State of Idaho's counterclaim is denied;

5. For such other and further relief in accordance with the aforementioned July 28, 1998, MEMORANDUM DECISION AND ORDER, which by this reference is incorporated herein as if set forth verbatim; and

6. Costs are awarded to the Coeur d'Alene Tribe. By agreement the United States and the State of Idaho shall bear their own costs.

DATED this 14th day of August, 1998.

EDWARD J. LODGE
United States District Judge

EXHIBIT 5

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff-in-Intervention,

-vs-

BARBARA J. ANDERSON, et al,

Defendants.

No. 3643

MEMORANDUM OPINION AND ORDER

The United States brought this action on its own behalf and as trustee for the Spokane Tribe of Indians to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries. The Court permitted the Spokane Tribe to intervene as a plaintiff. Defendants include the State of Washington in its governmental and proprietary capacities and all other persons and corporations that claim an interest in the waters of Chamokane Creek, its tributaries, or its groundwater basin.[1/] Jurisdiction lies in this Court under 28 U.S.C. §1345.

All parties to the litigation claim water in the

1/ In this opinion, the term "Chamokane basin" is used below to refer to the entire system, including the creek, its tributaries, and its ground water basin.

the original creation of the reservation is not the priority date because the original purposes of the reservation, and therefore the implied reserved water rights for those purposes ceased to exist when the land passed out of Indian ownership. See Colville Confederated Tribes v. Walton, 460 F. Supp. at 1326-1329. The date of the enactment of the statute authorizing return of the land to trust status also is not the priority date because the statute merely "gave formal sanction to an accomplished fact." United States v. Walter River Irr. Dist., 104 F.2d 334, 338 (9th Cir. 1939). Once the Tribe reacquired original reservation land, the Tribe and the Department of Interior treated this land as any reservation land in trust status. This de facto status as part of the trust land on the reservation was simply confirmed by the 1968 Act (25 U.S.C. §487).

The Court finds that the priority date for reserved water for irrigation of the 562 reacquired acres, based upon the date of reacquisition, is as follows:

TRIBAL LANDS REACQUIRED
FROM NON-INDIANS

Section Twsp. & Range	Description, Tract No.	Date of Reacquisition	Irrigable Acreage
Sec. 35, T29N, R39E	E 1/2 S 1/4, T1000	3/24/42	15
Sec. 36, T29N R39E	SW 1/4, T1000 T1001	3/24/42 2/2/42	130
Sec. 2, T28N, R39E	Lots 1 & 2, S 1/2 NE 1/4, T1010	3/25/42	130
Sec. 23, T28N, R39E	Lot 2, S 1/2 SE 1/4 NE 1/4, NE 1/4, SE 1/4 T1007	2/7/42	30
Sec. 24, T28N R39E	Lots 7 & 8, T 1006	2/7/42	49
Sec. 27, T28N, R39E	E 1/2 SE 1/4, T 1012	7/16/45	15

Sec. 34, T28N, R39E	NE 1/4, E 1/2 SE 1/4 T1012	7/16/45	15
Sec. 21, T29N, R40E	Lots 5 & 7, E 1/2 SW 1/4, E 1/2 SE 1/4 T 1001	2/2/42	20
Sec. 31, T29N, R40E	NW 1/4, W 1/2 NE 1/4 T1001	2/2/42	110
Sec. 2, T27N, R39E	Lots 6 & 9, NE 1/4 NW 1/4, S 1/2 NW 1/4, NW 1/4 SW 1/4, T 1001	2/2/42	48

In conclusion, this Court recognizes reserved water rights for irrigation of lands within the Chamokane basin on the Spokane Indian Reservation in the following amounts. The Tribe has a reserved right to a maximum of 23,694 acre-feet of ground or surface water from the basin each year for irrigation of the 7,898 irrigable acres with a priority date of August 18, 1877, the date of the creation of the reservation. For the 562 reacquired irrigable acres within the basin, the Tribe has a reserved right to a maximum of 1,686 acre-feet of water each year with a priority date of the date of reacquisition.

2. Reserved Water Rights for Fishing

Plaintiffs also assert a reserved right to sufficient water to preserve fish in the Creek. They therefore claim that one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food. See, e.g., United States v. Winans, 198 U.S. 371 (1905).

The Court finds that maintenance of the creek for fishing was a purpose for creating the reservation. The United States acknowledged the importance of Chamokane Creek to the Spokane Indians by setting the eastern boundary of the reservation at the eastern bank of the creek, thus in-

cluding the breadth of the waterway within the reservation. Fish remain a staple food in the diet of the Spokane Indians. The Spokanes have reserved the exclusive right to take fish from the part of Chamokane Creek contained within the reservation, and many Indians catch and use the native trout as a food source.

The Court therefore holds that the Tribe has the reserved right to sufficient water to preserve fishing in Chamokane Creek.

The Court finds that the quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than simply to minimum flow. The native trout cannot survive at a water temperature in excess of 68°F. The minimum flow from the falls into Lower Chamokane Creek which will maintain the water at 68°F varies, but is at least 20 cfs. The Court therefore holds that the plaintiffs have a reserved right to sufficient water to maintain the water temperature below the falls at 68°F or less, provided that at no time shall the flow past the falls be less than 20 cfs.

Although the usual priority date for reserved water rights is the date of the creation of the reservation, the priority date for the water reserved for fishing uses arguably is even earlier. The Spokane Indians have used this creek for fishing purposes since "time immemorial," and therefore they claim a reserved water right with a priority date of "time immemorial."

The priority date for reserved water for fishing at the latest is the date of the creation of the reservation, and the Court need not rule on whether the priority date is "time immemorial." Under either priority date, the Tribe's reserved water rights for fishing uses are superior to any

EXHIBIT 6

1998 WL 464932 (U.S.) (Appellate Brief)
United States Supreme Court Petitioner's Brief.

STATE of Minnesota; Minnesota Department of Natural Resources; Rodney Sando, Commissioner of Natural Resources; Arne Carlson, Governor of Minnesota; Raymond B. Hitchcock, Assistant Commissioner of Operations, Minnesota Department of Natural Resources, Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al., Respondents.

No. 97-1337.
October Term, 1997.
Aug. 6, 1998.

On Writ of Certiorari To The United States Court of Appeals For The Eight Circuit

BRIEF FOR THE PETITIONERS

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*i QUESTIONS PRESENTED

On July 29, 1837, the United States and thirteen bands of Chippewa Indians executed the Treaty with the Chippewa of 1837, 7 Stat. 536. Article 5 of the 1837 Treaty guarantees the bands the privilege of hunting and fishing on the lands ceded by them to the United States "during the pleasure of the President of the United States."

1. Was an 1850 Presidential Order revoking the Indians' special hunting, fishing and gathering privilege effective, where the 1837 Treaty reserved that privilege to the Indians only "during the pleasure of the President"?

2. Was a hunting, fishing and gathering privilege, reserved only "during the pleasure of the President," "temporary and precarious" and therefore extinguished under *Ward v. Race Horse,* 163 U.S. 504 (1896) when Minnesota was admitted to the Union on an equal footing with the original thirteen states?

18 Contrary to the lower court decisions here, the Minnesota Supreme Court, in *State v. Keezer,* 292 N.W.2d 714, 721 (Minn.1980), held that the 1855 Treaty extinguished the hunting, fishing and gathering privilege reserved under the 1837 Treaty.

***42 A. This Court Previously Has Found Essentially The Same Treaty Language To Extinguish Hunting And Fishing Rights Reserved In An Earlier Treaty.**

This Court has previously held that treaty language containing such an all-encompassing relinquishment of rights is effective to extinguish previously reserved hunting and fishing rights. In *Oregon Dep't of Fish & Wildlife v. Klamath,* 473 U.S. 753 (1985), the Klamath Indians had executed an 1864 Treaty ceding "all their right, title and claim to all the country claimed by them," and received a 1.9 million-acre reservation and the exclusive right of fishing and gathering within the reservation. *Id.* at 755. Then, in a 1901 agreement, the Klamaths agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title and:interest in and to" approximately a third of the 1864 reservation in exchange for monetary compensation. *Id.* at 760. The 1901 Agreement contained no language expressly referring to hunting and fishing rights, and further provided in a savings clause that "nothing in this agreement shall be construed to deprive [the Tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement." *Id.* at 760-61. In 1982, the Klamaths sued the State of Oregon, claiming a continued right to hunt and fish on the land ceded in the 1901 Agreement and arguing that the 1901 Agreement did not extinguish those rights.

Reversing the lower courts, this Court held that language ceding "all claim, right, title, and interest in and to" land also extinguished any special hunting and fishing rights reserved on those lands, and should not be ignored in the face of purported ambiguity surrounding the Indians' understanding of the cession. 473 U.S. at 765-66. Rejecting the tribe's argument that express reference to hunting and fishing is necessary to extinguish such rights, this Court said that silence with regard to the ***43** preservation of off-reservation hunting and fishing rights does not show an intent to preserve the previously reserved rights. Rather, the silence "is consistent only with an intent to end any special rights of the Tribe outside the reservation." *Id.* at 773 n. 23. This conclusion is particularly noteworthy given the presence of the "savings clause" in the 1901 Agreement, which provided a basis for the Tribe's argument that it had intended to preserve hunting and fishing rights separate from the land cession. There is no similar "savings clause" in the 1855 Treaty here.

In this case, the Eighth Circuit distinguished *Klamath's* strong extinguishment mandate almost entirely on the single assertion that the rights in *Klamath* were exclusive and on-reservation rights, whereas the privilege at issue in this case was a non-exclusive and off-reservation privilege. PA 39. Contrary to the Eighth Circuit's conclusion, however, this Court in *Klamath* directly addressed the impact of the "all right, title and interest" language to *off-reservation* hunting and fishing rights. The Court explained that, because the land ceded by the Klamath Tribe was no longer part of the reservation, the off-reservation rights claimed by the Tribe were somewhat comparable to the off-reservation rights reserved in the Treaty construed in *Puyallup Tribe v. Department of Game of Washington,* 391 U.S. 392 (1968), and *United States v. Winans,* 198 U.S. 371 (1905). *See Klamath,* 473 U.S. at 764-65 n. 15. This Court then added, "Our inquiry, therefore, is whether a special right, nonexclusive but free of state regulation, was intended to survive in the face of language of the 1901 Agreement ceding 'all ... right ... in and to' the ceded lands." *Id.* at 764-65 (omission in original). The Court concluded that no such special right survived such language. The Court later reiterated that its decision applied to off-reservation rights: "The present ***44** case, however, involves the necessarily precedent question whether any off-reservation rights were intended to be preserved at all." *Klamath,* 473 U.S. at 769 n. 20. [19]

19 In *Klamath,* the land ceded under the 1901 Agreement was no longer reservation land. Therefore, any exercise of hunting and fishing rights on that land in the modern era would have changed from exclusive, on-reservation harvest, to shared, off-reservation harvest. The Court started its analysis with the cession language in the 1864 Treaty, where the Tribe ceded "all their right, title, and claim" to a described 22 million acre area. As the Court put it, "that general conveyance unquestionably

carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres *outside* the reservation." *Id.* at 766 (emphasis added).

The Court's analysis and conclusion in *Klamath* is extremely compelling for the analysis of the 1855 Treaty language here. Both agreements have similar phrases conveying "all right, title and interest" of the Indians. Both agreements surrender the Indians' rights "in and to" the land. But the 1855 Treaty at issue here contains several phrases, beyond those in the *Klamath* agreement, demonstrating the sweeping nature of the relinquishment of rights. The treaty includes the words (1) "fully and entirely," (2) "relinquish and convey," (3) "any and all" right, title or interest, (4) "any other lands," and (5) "in the Territory of Minnesota or elsewhere." PA 503. If the language in *Klamath* was sufficient to extinguish previously reserved hunting and fishing rights (even in the face of a savings clause), then even more clearly the words of the 1855 Treaty (and the lack of a savings clause) are sufficient to extinguish such rights here.

B. Available "Historical Context" Is Insufficient To Overcome The 1855 Treaty's Plain Language.

The Eighth Circuit primarily based its conclusion that the 1855 Treaty did not extinguish the Chippewas' privilege in the 1837 Ceded Territory on limited historical ***45** evidence that suggested the Indians understood the 1855 Treaty as only involving a sale of land to the government and did not intend to surrender the special hunting, fishing and gathering privilege. The court noted that "Chippewa representatives also indicated during negotiations that they would continue to hunt, fish, and gather after the Treaty was negotiated," and that the "Chippewa complained to federal officials that state enforcement of game regulations violated their rights under the 1837 Treaty." PA 36. The district court also concluded that the key provision of the 1855 Treaty quoted above was intended only to convey any rights the Bands may have had in other lands, not described in the treaty, to the north and west of the ceded lands. PA 285-88.

This abbreviated discussion of the evidence regarding the signatories' intent in 1855 is an insufficient basis to disregard the clear, all-encompassing treaty language. While some evidence might be interpreted to support the Bands' views, there is abundant evidence that the Treaty's actual language fit the historical context of the time. The Treaty's negotiation was part of an overall shift in federal policy from removing the Indians from eastern lands to consolidating Indians on reservations. The reservations were defined geographic areas where the Indians were expected to establish, and would be guaranteed, permanent homes. The objective of these treaties, which the Indians understood, was to permit faster white settlement but, at the same time, to preserve for the Indians a traditional homeland where they could permanently reside and presumably acquire the habits and skills of farmers.

The context of extinguishment was reflected in the goals of the Chippewa leaders. During the 1855 Treaty negotiations, Chippewa Chief Hole-in-the-Day, one of the main treaty negotiators, stated that the Indians' survival lay in trying to accommodate the Euro-American civilization that had engulfed them. He advocated for the money ***46** and tools to allow the Indians a chance to stay on their land by adopting the agricultural ways of the whites, rather than continuing the Indians' past subsistence existence. During the treaty negotiations, Hole-in-the-Day made numerous statements about abandoning the old ways and moving forward as white citizens. [20]

20 Hole-in-the-Day told Commissioner of Indian Affairs Manypenny, "We do not know we will be alive tomorrow; but my great wish and desire is to improve the conditions of the Chippewa nation, and make them live like the whites." JA 302. Later in the negotiations, Hole-in-the-Day complained that the proposed payments by the United States were insufficient "to give us a start, and enable us to support ourselves while preparing to live like the whites." JA 335. He explained that the Chippewa "do not live outside, but within your nation. We are your friends.... We want to give ourselves up to your government. We want to cease to be Indians, and become Americans. We want to be citizens, and to have the right to vote. All we desire is to imitate the whites, and to follow their example." JA 338-39. The chief stated that "the Country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try, a new one." JA 348. Additionally, he stated that he had studied the Treaty's provisions and concluded that "the Indians have given away all, and leave themselves no alternative but to work." JA 349.

EXHIBIT 7

BEFORE THE INDIAN CLAIMS COMMISSION

THE COEUR D'ALENE TRIBE OF INDIANS, Petitioner,	)	
v.	)	Docket No. 81
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 3, 1957

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact:

12. By the Agreement of March 26, 1887, 26 Stat. 989, 1027, petitioner agreed to "cede, grant, relinquish and quit claim to the United States" all its lands except the portion thereof within the boundaries of the reservation set apart as such by Executive Order of November 8, 1873.

13. The lands thus ceded, relinquished and quit claimed by petitioner comprise 2,389,924 acres in the present States of Idaho and Washington, 2,055,596 acres of which are in the State of Idaho, and 334,328 acres in the State of Washington. The reservation referred to in Finding 1 contained 598,500 acres, all within the State of Idaho.

14. Description of the Coeur d'Alene Tract: the Coeur d'Alene Tract occupies the central portion of the Panhandle section of the State of Idaho and extends westward into the State of Washington from ten to twelve miles. The northernmost extension of the north boundary of the Tract reaches the southern tip of Lake Pend Oreille and extends

lands would have been considered inaccessible and a prospective purchaser would have been aware of the necessity of watershed protection both to the needs of the lumbering industry and to the mining region. A well-informed hypothetical buyer would also have been aware that the timber lands were of good commercial quality, that with the rivers and the lake on the Tract there was accessible timber in large quantities, and that the timber lands of the area would be in demand by the lumbering industry in the foreseeable future. The hypothetical purchaser would also take into consideration the size of the area of the Tract classified as timber lands; the necessity of paying taxes and fire insurance on the timber lands; the administrative costs in holding and disposing of the lands; the necessity of probably a number of years to exploit or dispose of his holdings when the timber became marketable; and finally the need of providing for risk and the return of his investment with profit. In considering all the facts of record the Commission finds that the timber lands within the Tract as of March 3, 1891, had a value in the sum of $1,848,606.00, or at the rate of $1.00 per acre for 1,848,606 acres.

Value of Water Rights

30. The streams and waters of the Coeur d'Alene Tract are not and cannot be separately evaluated. The value placed upon the agricultural and timber lands and upon the mineral lands of the area comprehend the availability of water and the continuance of an adequate water supply to meet the needs of the farms, mines and forests of the area. Water and its use and need is necessarily included in the valuation of the lands of the Tract.

EXHIBIT 8

COHEN'S HANDBOOK OF

FEDERAL INDIAN LAW

2012 EDITION

The Supreme Court subsequently applied the reserved rights doctrine to federal lands other than Indian reservations,[94] and transferred the purposes-of-the-reservation doctrine from *Winters* to federal enclaves.[95] In *United States v. New Mexico*,[96] involving water rights for a national forest, the Court distinguished between the primary and secondary purposes for which federal lands were reserved. The *New Mexico* Court held that water is impliedly reserved only for the primary purposes of federal reservations. If the government needs water for the secondary purposes, those water rights must be acquired under state law.[97]

The Supreme Court has not ruled on whether the *New Mexico* distinction between primary and secondary purposes applies to Indian water rights. The significant differences between Indian reservations and federal reserved lands indicate that the distinction should not apply.[98] One of those fundamental differences is that Indian reservations were set aside as homelands for the Indian tribes, to provide for an economically self-sufficient place of residence, whereas federal enclaves, such as national parks and national forests, were reserved for the benefit of the federal government and dedicated to the protection of the natural resources.[99] In the latter situation, the federal government is acting as proprietor and sovereign; in the former, it is acting as trustee for the Indian tribes.[100] As trustee, Congress is presumed to have "deal[t] fairly" with the Indian tribes,[101] and the documents establishing the reservations are construed liberally in the tribes' favor.[102] By contrast, the purposes of federal enclaves are strictly construed.[103]

In addition, the role of state law in Indian country and on federal lands differs substantially. States have considerable power over federal lands,[104] and Congress

[94] Arizona v. California, 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340 (1964) (national recreation area, national wildlife refuges, and national forest).

[95] Cappaert v. United States, 426 U.S. 128, 141 (1976).

[96] United States v. New Mexico, 438 U.S. 696 (1978).

[97] United States v. New Mexico, 438 U.S. 696, 702 (1978).

[98] *See* In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 35 P.3d 68, 73–74 (Ariz. 2001).

[99] *Compare* Arizona v. California, 373 U.S. 546, 600–601 (1963), *decree entered*, 376 U.S. 340 (1964) (Indian reservations), *with* United States v. New Mexico, 438 U.S. 696 (1978) (national forest).

[100] Frank Trelease, Federal-State Relations in Water Law 160 (1971) (National Water Comm'n Legal Study No. 5).

[101] Arizona v. California, 373 U.S. 546, 600 (1963), *decree entered*, 376 U.S. 340 (1964).

[102] *See* Winters v. United States, 207 U.S. 564 (1908). These rules of interpretation apply as well to water contracts or consent decrees. *See, e.g.*, United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1438 (9th Cir. 1994).

[103] In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 35 P.3d 68, 73–74 (Ariz. 2001); *see also* United States v. New Mexico, 438 U.S. 696, 702 (1978).

[104] Kleppe v. New Mexico, 426 U.S. 529, 543 (1976).

has generally deferred to state water law relative to federal lands.[105] By contrast, the establishment of an Indian reservation in and of itself has the effect of preempting state jurisdiction within the reservation over Indians, Indian tribes, and Indian property.[106] State water laws do not govern the use of water by Indians and Indian tribes on Indian lands with respect to any of the purposes of a reservation.[107] Indian reserved water rights are defined by reference to federal law, and Congress has thus never deferred to state water law relative to Indian reservations.[108]

Based on the substantial differences between federal enclaves and Indian lands, the Arizona Supreme Court has rejected the application of *New Mexico*'s primary-versus-secondary purposes approach to Indian water rights, holding that the purpose of Indian reservations is to provide tribes with a homeland.[109] Other courts have found that the *New Mexico* analysis provides "useful guidelines" in determining the purposes of Indian reservations.[110] How those courts employ the *New Mexico* approach, however, depends on whether the courts interpret tribal and federal intentions broadly or narrowly. Most of the courts have taken a broad approach to the purposes of Indian reservations. For example, the Ninth Circuit ruled that the "general purpose" of the Colville Reservation was to provide the tribes with a homeland, and that subsumed within that general purpose were two primary purposes: The creation of an agrarian society and the preservation of the tribes' historic access to their fishing grounds.[111]

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[105] *See* United States v. New Mexico, 438 U.S. 696, 702 (1978); California v. United States, 438 U.S. 645 (1978).

[106] Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 474 n.13 (1976).

[107] *See* United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939). *See also* § 19.03[1].

[108] *See* Western Water Policy Review Act of 1992, Pub. L. 102-575, title XXX, § 3002(8), 106 Stat. 4693, *reprinted at* 43 U.S.C. § 371 notes.

[109] In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 35 P.3d 68, 76–77 (Ariz. 2001); *see also* United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245, 1253 (D. Nev. 2004) (expressly not addressing whether tribes are limited to applying reserved water for primary purposes only).

[110] United States v. Adair, 723 F.2d 1394, 1408–1409 (9th Cir. 1983); *see also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981) (*Walton I*); In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, 850 P.2d 1306, 1316–1317 (Wash. 1993); In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 96 (Wyo. 1988) *(Big Horn I), aff'd sub nom. by an equally divided Court,* Wyoming v. United States, 492 U.S. 406 (1989).

[111] Colville Confederated Tribes v. Walton, 647 F.2d 42, 47–49 (9th Cir. 1981) (*Walton I*); *see also* United States v. Adair, 723 F.2d 1394, 1408–1409 (9th Cir. 1983) (Klamath Tribes); United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245, 1252–1253 (D. Nev. 2004) (irrigated agriculture and fishery were both primary purposes of Pyramid Lake Paiute Reservation); In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, 850 P.2d 1306, 1317 (Wash. 1993) (Yakima Nation). The courts generally use "fishing" as a shorthand designation for hunting, fishing, trapping, and gathering; water is reserved for all those activities. United States v. Adair, 187 F. Supp. 2d 1273, 1275 (D. Or. 2002), *vacated as not ripe,* United States v. Braren, 338 F.3d 971 (9th Cir. 2003).

The Wyoming Supreme Court, by contrast, has taken a narrow approach to interpreting the purposes of the reservation, rejecting the homeland concept for the Wind River Tribes.[112] Despite recognizing that the treaty "clearly contemplates" activities other than agriculture, the court held that the primary purpose of the reservation was agriculture only.[113] The court thus found that the tribes were entitled to water to fulfill the agricultural purpose of the Wind River Reservation, including not only irrigation rights, but also such "subsumed" uses as livestock watering, and municipal, domestic, and commercial uses.[114] The court expressly rejected a number of other purposes for the reservation, including mineral development, industrial development, wildlife preservation, aesthetics, and fisheries.[115] In its rejection of a fisheries purpose, the court apparently drew a distinction between tribes historically dependent on fishing, such as the Colville Tribes, and tribes historically dependent upon hunting, such as the Wind River Tribes. In the case of the Wind River Tribes, the Wyoming court concluded that there was insufficient evidence of a "tradition" of wildlife preservation.[116]

The approach of the majority of courts is more consistent with the Indian law canons of construction that call for the documents establishing reservations to be construed liberally in favor of the Indians.[117] Certainly the general federal policy of confining tribes on reservations included the creation of agrarian societies.[118] But the Indians certainly contemplated that the reservations would serve as their homelands; most tribes ceded vast tracts of aboriginal territory in exchange for federal promises of protection and permanency on the reservations. Reservations were thus created, and waters were reserved, "to make the reservation livable,"[119] to enable the Indians "to maintain . . . their way of life,"[120] and to permit the tribes "to change to new [ways of life]."[121] When

[112] In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 94-95 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

[113] In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 97 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

[114] In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 99 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

[115] In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 98-99 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

[116] In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 99 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

[117] *See* Ch. 2, § 2.02.

[118] *See* Ch. 1, § 1.03[6].

[119] Arizona v. California, 373 U.S. 546, 599 (1963), *decree entered*, 376 U.S. 340 (1964).

[120] Menominee Tribe v. United States, 391 U.S. 404, 406 (1968).

[121] Winters v. United States, 207 U.S. 564, 577 (1908).

the documents creating reservations are construed in accordance with the Indian law canons,[122] more is encompassed within the homeland purpose than merely transforming the tribes into agrarian societies.

[5]—Measure of the Right

[a]—Quantification

The Supreme Court first addressed the quantification of tribal water rights in *Arizona v. California I*,[123] rejecting a variable standard of quantification of irrigation rights according to the tribes' "reasonably foreseeable needs."[124] The Court noted that this standard depended on tribal population, but that population numbers and future needs "can only be guessed."[125] In addition, the Court rejected use of equitable apportionment to determine tribal water rights, because equitable apportionment is a means of allocating water between states. Tribal water rights, however, depend on analysis of the treaties, statutes, or executive orders giving rise to the water rights.[126]

Nonetheless, the quantification of tribal-reserved water rights is necessary to integrate those rights and state appropriation rights into a workable system. Unlike appropriation rights, however, Indian water rights are not quantified by the amount actually and continuously diverted to a beneficial use.[127] Instead, Indian water rights are quantified according to the purposes that those water rights are intended to fulfill. In general, water rights to support an agricultural purpose for reservations are quantified according to irrigable acres, while water rights for other purposes are quantified by other measures. These standards, however, are judicially developed, and judicial determinations of reserved rights are increasingly being replaced with settlement agreements[128] that quantify the tribal right to water. In settlements, tribes generally agree to a negotiated amount of water, usually accompanied by promises of assistance in delivering the water to the reservation, in exchange for relinquishing their claims to potentially larger, but undetermined amounts of water.[129]

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[122] *See* Ch. 2, § 2.02.

[123] Arizona v. California, 373 U.S. 546 (1963).

[124] Arizona v. California, 373 U.S. 546, 600 (1963). The standard was proposed by the state of Arizona.

[125] Arizona v. California, 373 U.S. 546, 600–601 (1963).

[126] Arizona v. California, 373 U.S. 546, 597 (1963).

[127] *See* § 19.01[1].

[128] *See* § 19.05[2].

[129] Lloyd Burton, American Indian Water Rights and the Limits of Law 80-81 (Univ. Kan. Press 1991).

EXHIBIT 9

COHEN'S HANDBOOK OF

FEDERAL INDIAN LAW

2012 EDITION

[3] Federal Power Over Tribes

The Supreme Court has held that Congress has the power to impose federal law on tribes without their consent subject to specific constitutional limitations, such as the due process and takings clauses.[22] The sources, scope, and limits of congressional authority in Indian affairs are discussed in Chapter 5, *Tribal/Federal Relationship*.

§ 2.02 Canons of Construction

[1] Overview of the Principles

The theory and practice of interpretation in federal Indian law differs from that of other fields of law. The Supreme Court has stated: "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law."[1] The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians[2] and that all ambiguities are to be resolved in their favor.[3] In addition,

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a dormant Indian commerce clause analysis and stating that existing preemption analysis is sufficiently sensitive to protect tribal and federal interests). *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 Tax Lawyer 897, 998–1004 (2010).

[22] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 413 (1980) (takings clause); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1976) (equal protection component of due process clause).

[1] Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). For scholarly commentary, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 Calif. L. Rev. 601 (1975).

[2] *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit"); Ramah Navajo School Board v. Bur. of Revenue, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence."); Choctaw Nation v. United States, 318 U.S. 423, 431–432 (1943) (quoting Tulee v. Washington, 315 U.S. 681, 684–685 (1942)) ("treaties are construed more liberally than private agreements . . . Especially is this true in interpreting treaties and agreements with the Indians [which are to be construed] 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians].' "); Choate v. Trapp, 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians [the] construction [of treaties] is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor" of the Indians); Worcester v. Georgia, 31 U.S. 515, 551–557 (1832) (interpreting Treaty of Hopewell in light of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate").

[3] *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("doubtful expressions are to be resolved in

treaties and agreements are to be construed as the Indians would have understood them,[4] and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[5]

These canons were first developed in the context of treaty interpretation, but the courts have consistently extended them to non-treaty sources of positive law such

favor of [the Indians]"); Winters v. United States, 207 U.S. 564, 576–77 (1908) ("[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"); Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (statutes are "to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

[4] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("this Court has often held that treaties with the Indians must be interpreted as they would have understood them"); Choctaw Nation v. United States, 318 U.S. 423, 432 (1943) (treaties "are to be construed, so far as possible, in the sense in which the Indians understood them"); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them"); United States v. Winans, 198 U.S. 371, 380–81 (1905) ("we have said we will construe a treaty as [the Indians] understood it"); Worcester v. Georgia, 31 U.S. 515, 551–554 (1832) (interpreting Treaty of Hopewell as Cherokees would have understood its meaning); United States v. Smiskin, 487 F.3d 1260, 1264–1268 (9th Cir. 2007) ("The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor").

[5] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); United States v. Dion, 476 U.S. 734, 739–40 (1986) ("[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ("[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978) (federal statutes will not be interpreted to "interfere[] with tribal autonomy and self-government . . . in the absence of clear indications of legislative intent"); Fisher v. Dist. Ct., 424 U.S. 382, 387–388 (1976) (tribes have right to regulate tribal affairs free from state interference in absence of express federal legislation to the contrary); Menominee Tribe v. United States, 391 U.S. 404, 412 (1968) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress") (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934)); United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 346, 353 (1941) (congressional intent to abrogate aboriginal property rights must be "plain and unambiguous" or "clear and plain"); Rincon Band of Luiseno Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010) (canons of construction obligate courts to "to construe a statute abrogating tribal rights narrowly"); San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1312 (D.C. Cir. 2007) ("[A] clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."); NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1195–96 (10th Cir. 2002) ("We . . . do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so"); Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 525 (6th Cir. 2006) (ambiguous treaty language will be read to preserve tribal right to be free from state property taxation).

as agreements,[6] statutes,[7] executive orders,[8] and federal regulations.[9] When a statute is clear on its face, however, the canons of construction will not come into play.[10]

In 1999, the Supreme Court applied the canons to a treaty, an executive order, and a statute in a single case. *Minnesota v. Mille Lacs Band of Chippewa Indians*,[11] concerned the modern consequences of an 1837 treaty in which the tribe had ceded lands to the United States but retained the right to hunt, fish, and gather in those areas. The Supreme Court relied on the established canons of treaty interpretation[12] to conclude that the tribe's rights were not extinguished when, in a later treaty, the tribe agreed to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere."[13] Although this broad language might seem to cede all rights, the Court declared that in interpreting treaties, "we look beyond the written words to the larger context that frames the Treaty," including "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[14] This was particularly necessary for Indian treaties, which are inter-

[6] *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908); *see also* Choate v. Trapp, 224 U.S. 665 (1912) (agreement and statute).

[7] County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' ") (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 767–68 (1985)); Rincon Band of Luiseno Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010) (statutes must be construed "most favorably toward tribal interests"); Citizens Exposing the Truth About Casinos v. Kempthorne, 492 F.3d 460, 471 (D.C. Cir. 2007) ("[A]s IGRA is designed to promote the economic viability of Indian Tribes, the Indian canon of statutory construction requires the court to resolve any doubt in favor of the Band."); *see also* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 176 (1973).

[8] Antoine v. Washington, 420 U.S. 194 (1975); Arizona v. California, 373 U.S. 546 (1963);Parravano v. Masten, 70 F.3d 539 (9th Cir. 1995) ("Executive orders, no less than treaties, must be interpreted as the Indians would have understood them 'and any doubtful expressions in them should be resolved in the Indians' favor.' ").

[9] HRI Inc., v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000).

[10] *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (when statutory language is "plain and unambiguous," it should be applied "according to its terms"); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.").

[11] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[12] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200 (1999).

[13] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 (1999) (citing Treaty with the Chippewas, 1855, art. I, 10 Stat. 1166).

[14] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (quoting

preted "to give effect to the terms as the Indians themselves would have understood them."[15] Given the "plausible ambiguity" of this history, the later treaty could not be construed to abrogate Chippewa usufructuary rights.[16]

Mille Lacs also rejected an argument that an 1850 Executive Order revoked the treaty rights. The order declared that the hunting, fishing and gathering rights were revoked and that all Indians remaining in the ceded lands were required to remove to the unceded lands. The Court found that the President lacked authority to issue the removal portion of the Executive Order, and although the 1837 treaty specifically provided that the rights were guaranteed "during the pleasure of the President," the portion of the order terminating the treaty rights could not stand alone.[17] The strong presumption of legality normally attaching to executive orders could not trump the presumption in favor of protecting treaty rights embedded in the Indian law canon.[18]

Finally, the *Mille Lacs* decision applied the canons in the context of statutory interpretation. The state contended that Congress had abrogated the treaty rights when it enacted legislation admitting Minnesota to the Union. The Court responded: "In making this argument, the State faces an uphill battle. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.[19] There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' "[20] Finding no such clear evidence, the Court concluded that the treaty rights survived Minnesota statehood.[21]

[2] The Sources and Justifications for the Canons

In discussions of the canons, courts often conclude that they are "rooted in the unique trust relationship between the United States and the Indians."[22] This formulation conveys the idea that courts should presume a benevolent intent on the part of Congress and other federal actors when they exercise their trust

Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970)).

[15] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

[16] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999)

[17] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 189–195 (1999).

[18] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 n.5 (1999).

[19] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) (citing United States v. Dion, 476 U.S. 734, 738–740 (1986)); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

[20] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999) (quoting United States v. Dion, 476 U.S. 734 (1986)).

[21] For application of the canons in the context of reservation diminishment, see Ch. 3, § 3.04[3].

[22] County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Yankton Sioux v. Kempthorne, 442 F. Supp. 2d 774, 783 (D.S.D. 2006).

responsibilities in dealing with Indians. This conception is useful, but is subject to misunderstanding.

One problem is that this formulation can easily be confused with the outmoded notion that Indians are powerless wards subject to complete domination by the federal government.[23] Similarly, especially for those unfamiliar with federal Indian law, this language might suggest that judicial solicitude for Indians should turn on considerations similar to those that might motivate judicial solicitude for other politically powerless "discrete and insular" minorities.[24] A better understanding of the trust relationship is that it is based on internal structures of sovereignty in the American system, not on the particular characteristics of Indians as racial or political minorities. The trust relationship is rooted in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*,[25] in which the Court declared the tribe to be a "domestic dependent nation," a term demonstrating that tribes are not simply minority ethnic groups, but are sovereigns possessing a government-to-government relationship with the United States. Moreover, in the second *Cherokee* case, *Worcester v. Georgia*,[26] Chief Justice Marshall grounded the Indian law canons in the values of structural sovereignty, not judicial solicitude for powerless minorities. Seen in this light, the canons mediate the problems presented by the nonconsensual inclusion of Indian nations into the United States.[27] In a more recent case, *City of Roseville v. Norton*,[28] the District of Columbia Circuit relied on the canon requiring courts to resolve any doubt in favor of the tribes and rejected an argument that the canons were predicated on the weakness of tribes, and therefore no longer viable when tribes have " 'increasing political clout and sophistication.' "[29] To the contrary, the court noted that the canons' "applicability to ambiguous statutes purporting to benefit Indians is settled."[30]

[23] *See* Carpenter v. Shaw, 280 U.S. 363, 366 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").

[24] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 148 n.4 (1938); *cf.* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard Univ. Press 1980) (contending that judicial review is designed in part to protect discrete and insular minorities from being disadvantaged by intentional discrimination).

[25] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[26] Worcester v. Georgia, 31 U.S. 515 (1832).

[27] For a detailed discussion of the roots of the canons, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 393–417 (1993).

[28] City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

[29] City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (quoting Appellants' Brief at 29–30); *see also* Dark-Eyes v. Comm'r Revenue Serv., 887 A.2d 848, 857 n.12 (Conn. 2006) (affirming that tribal wealth does not render Indian law canon inapplicable to settlement act with tribe).

[30] City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

Under Chief Justice Marshall, the Supreme Court conceptualized an Indian treaty as a grant of rights from the tribe to the United States, with the tribe reserving for itself all interests not clearly ceded, rather than a complete capitulation by the tribe, with the United States allotting back certain concessions.[31] This important understanding provides the basis for later cases squarely recognizing the "reserved rights doctrine."[32] Far from being based on the helplessness of tribal people, the reserved rights doctrine is based on the status of tribes as preexisting sovereigns entering into a government-to-government relationship with the United States.[33] Treaties were not regarded as private contracts entered into by self-motivated parties seeking to get all they could from the deal, but as public documents of governance.

The consequences of understanding the Indian law canons as fostering structural and constitutive purposes are quite significant. The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our system of governance.[34] Accordingly, statutes and treaties are broadly construed in favor of protecting tribal property and sovereignty.[35] In this respect, the Indian law canons can be seen as analogous to the Supreme Court's canons of interpretation protecting the states against federal statutory regulation unless Congress has spoken quite clearly,[36] and immunizing the federal executive branch against all but crystal-clear congressional intrusions.[37] The canons have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all

[31] Worcester v. Georgia, 31 U.S. 515, 552–553 (1832).

[32] *See* United States v. Winans, 198 U.S. 371, 380–81 (1905).

[33] *See* Connecticut *ex rel.* Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 92-93 (2d Cir. 2000) (rejecting notion that Indian law canons apply only when tribes are at legal or economic disadvantage).

[34] *See* Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 Wash. L. Rev. 627, 654 (1981) ("[t]he doctrine of liberal construction was, in practical effect, the tribes' tenth amendment").

[35] *See, e.g.*, State v. Ambro, 123 P.3d 710, 716 (Idaho Ct. App. 2005) (holding that state statute assuming Public Law 280 jurisdiction over "operation and management" of vehicles on state highways must be construed to "minimize erosion of tribal sovereignty" and so could not be construed to permit jurisdiction over possession of drugs while driving, especially because tribe criminalized such conduct).

[36] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

[37] *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986). On the various procedural roles canons can play, as promoting narrow or broad construction, or as tiebreakers, presumptions, and clear statement rules, see William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 331–342 (Found. Press 2000).

but explicit congressional derogation.[38]

[3] Competing Canons and Policies

In some instances, the Indian law canons clash with competing canons based on other values.[39] The Indian law canons may point to a result different from that reached by courts applying ordinary canons of statutory interpretation. In those cases, the Indian law canons, which are rooted in structural, normative values, usually should displace other competing canons.

In *Montana v. Blackfeet Tribe*,[40] for example, the Supreme Court held that despite the "strong presumption against repeals by implication," provisions authorizing state taxation of tribal oil and gas leases did not survive a later act that was silent as to taxation. Although the state argued that "sound principles of statutory construction" would suggest that its taxing authority remained intact, the Court found the state "fail[ed] to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law."[41] Similarly, in *Choctaw Nation v. Oklahoma*,[42] the Court employed the Indian law canons to defeat state title to the Arkansas Riverbed despite the conflicting presumption, based on the equal footing doctrine, of state ownership of submerged lands under navigable waterways.[43] More recently, in *Idaho v. United States*,[44] the Court held that, despite this "strong presumption" of state title to land beneath navigable waters,[45] the Coeur D'Alene Tribe held title to the bed of Lake Coeur d'Alene. While the Court did not mention the role of the Indian law

[38] *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 416 (1993).

[39] Often, both sides of a dispute will be able to identify canons of interpretation that arguably support their position. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation, Chs. 7, 9 (Found. Press 2000).

[40] Montana v. Blackfeet Tribe, 471 U.S. 759 (1985); *see* Ch. 8, § 8.03.

[41] Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 n.5 (1999) (declining to apply normal presumption of legality of executive orders where it conflicted with Indian law canon); Bryan v. Itasca County, 426 U.S. 373, 378–79 (1976) (rejecting *expressio unius* canon); EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001) (although normal rules of statutory construction would dictate that tribe was employer under Age Discrimination in Employment Act, rules did not apply in Indian law cases); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997) ("normal rules of construction do not apply when Indian rights, or even non-treaty matters involving Indians, are at issue").

[42] Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

[43] Choctaw Nation v. Oklahoma, 397 U.S. 620, 634 (1970) (rejecting presumption owing to "the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor").

[44] Idaho v. United States, 533 U.S. 262 (2001).

[45] Idaho v. United States, 533 U.S. 262, 272–73 (2001).

canons, it emphasized the evidence that Congress intended to deal in good faith with the tribe as a basis for finding the necessary intent to defeat the state's title.[46]

In other cases, however, courts have simply ignored the Indian law canons. In *Montana v. United States*,[47] for example, the Supreme Court concluded that title to the bed of a river passing through an Indian reservation established by treaty belonged to the state, not the tribe. The navigable waters doctrine was the touchstone of its analysis, and the Indian law treaty interpretation canons were not discussed by the majority.[48]

The Supreme Court also has considered the interplay between the Indian law canons and the canon that federal statutes should not be construed to provide an exemption from taxation unless that exemption is clearly expressed.[49] The Court has repeatedly held that when these canons conflict, the Indian law canon controls. Thus in *Choate v. Trapp*,[50] the Court held that Indian allotments remained exempt from taxation even after restrictions on alienation had been removed, stating that while in the ordinary case "tax exemptions are strictly construed, . . . in the government's dealings with the Indians the rule is exactly the contrary."[51] Similarly, in *Squire v. Capoeman*,[52] the Court held that a provision that Indians should receive their allotments "free of all charge and encumbrance whatsoever" not only prohibited federal taxation of the land, but also taxation of income from the sale of timber on the land. Although the Court acknowledged that "in general, exemptions from taxation should be clearly expressed," the statute had to be interpreted according to the rule that "[d]oubtful expressions are to be resolved in favor of the [Indians]."[53] In *McClanahan v. Arizona State Tax Commission*,[54] the Court inferred intent to prohibit taxation from admittedly ambiguous language despite its acknowledgment of the rule outside the Indian law context.[55]

In *Chickasaw Nation v. United States*,[56] the Supreme Court declined to apply

[46] Idaho v. United States, 533 U.S. 262, 280–81 (2001).

[47] Montana v. United States, 450 U.S. 544 (1981).

[48] *But see* Montana v. United States, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting) (discussing Indian law canons).

[49] *See* Squire v. Capoeman, 351 U.S. 1, 6 (1956). This inquiry into whether federal laws *create* a tax exemption should not be confused with the rule in state taxation cases that states have no jurisdiction to tax Indians on Indian land unless Congress clearly expresses its intent to *authorize* taxation. *See* Ch. 8, *Taxation*.

[50] Choate v. Trapp, 224 U.S. 665 (1912).

[51] Choate v. Trapp, 224 U.S. 665, 675 (1912).

[52] Squire v. Capoeman, 351 U.S. 1 (1956).

[53] Squire v. Capoeman, 351 U.S. 1, 6–7 (1956).

[54] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973).

[55] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 176 (1973). *But cf.* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (applying tax canon to find that state is authorized to tax tribal income from off-reservation land, without mentioning countervailing Indian law canon).

[56] Chickasaw Nation v. United States, 534 U.S. 84 (2001).

the Indian law canons in deciding that tribes must pay federal wagering and occupational excise taxes applicable to pull-tab games. Although the Court suggested in dicta that the Indian law canon might be offset by the tax canon,[57] it held that the statute was not "fairly capable" of two interpretations.[58] Because the Court found there was no ambiguity for the Indian law canons to resolve, the canons could play no role in the outcome.[59] *Chickasaw*, therefore, does not undermine the weight of precedent holding that the Indian law canon predominates. Nor should it, given the normative rule that it is "not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."[60]

Courts also have considered the relationship between the Indian law canons and the normal deference granted to agency interpretations of law. Federal agencies necessarily construe ambiguous statutory terms in the course of administering the many programs that affect Indian tribes. In *Chevron v. Natural Resources Defense Council, Inc.*,[61] the Court ruled that once a court determines that a statute is ambiguous, courts should defer to "permissible" agency interpretations of the laws they must implement.[62]

When the agency interpretation is consistent with the rule that ambiguities in laws affecting Indians should be resolved in their favor, these canons may work together.[63] But federal agencies have sometimes argued that their interpretations of statutes are entitled to deference even when they conflict with the Indian law canons. Before the Supreme Court decided *Chevron*, the Court held that a Bureau of Indian Affairs interpretation of a statute was not entitled to deference, relying in part on the "distinctive obligation of trust" incumbent on the federal government in dealing with Indian peoples.[64] Since *Chevron*, the D.C. and Tenth

[57] Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001).

[58] Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001). In dissent, Justice O'Connor argued the statute was ambiguous. *See id.* at 96–99 (O'Connor, J., dissenting); Ch. 8, § 8.02.

[59] Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001).

[60] Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418, 420-21 (1935).

[61] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

[62] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-843 (1984). *See generally* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 28 Admin. L. Rev. 363, 372–73 (1986). This deference is limited to situations in which an agency interpretation has been announced as part of a notice-and-comment rulemaking process or an adjudication. Christensen v. Harris County, 529 U.S. 576, 587 (2000); *see also* Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1989) (no deference afforded to state interpretation of federal statute administered under delegation from federal government).

[63] *See* Williams v. Babbitt, 115 F.3d 657, 660 (9th Cir.1997); Reindeer Herders Ass'n v. Juneau Area Office, 23 I.B.I.A. 28, 66–67 (1992). The court in *Williams* nevertheless declined to uphold the agency's interpretation on the ground that the statute as construed by the agency might result in a violation of the Constitution's equal protection clause. 115 F.2d at 661–666. *See* Ch. 14, § 14.03[2][b][i].

[64] Morton v. Ruiz, 415 U.S. 199, 205–06 (1974). While the Court also relied on the fact that the policy had not been promulgated through rule making, ordinary principles of administrative law

Circuits have decisively held that the Indian law canons trump the deference due agency interpretations in other areas.[65] As the D.C. Circuit explained in *Cobell v. Norton*:[66]

> This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people.[67]

Although the Ninth Circuit has held that the Indian canons of construction do not trump *Chevron* deference,[68] a more recent Ninth Circuit en banc decision gave some indication that the issue may be an open one.[69]

One commentator has suggested that the issue can be resolved by applying the Indian law canons in the course of evaluating whether a given agency interpretation is in fact a "permissible" reading as required by *Chevron*.[70] Because Congress legislates against the backdrop of the canons and its trust responsibility, he argues that courts should not discard the Indian law canons in the face of contrary agency interpretations of ambiguous statutes. Rather, agencies should

would not have required publication of such eligibility requirements. *See* Kenneth Culp Davis, *Administrative Law Surprises in the* Ruiz *Case*, 75 Colum. L. Rev. 823 (1975).

[65] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461–62 (10th Cir. 1997); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988); *cf.* Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (stating that although Indian law canon trumped *Chevron* deference, it did not apply where secretarial interpretation did not run against tribe, but only against one contestant in a tribal leadership dispute); Governor of Kansas v. Kempthorne, 516 F.3d 833 (10th Cir. 2008) (stating that although the Indian law canon trumps *Chevron* deference, the canon is not applicable to a case involving competing tribal interests).

[66] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

[67] Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

[68] *See* Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1342 (9th Cir. 1990).

[69] Navajo Nation v. Dep't Health & Human Servs., 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (en banc) ("we leave for another day consideration of the interplay between the *Chevron* and *Blackfeet Tribe* presumptions"). Earlier Ninth Circuit cases had limited agency discretion in interpreting congressional actions. *See* Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983); Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 572 (9th Cir. 1980).

[70] Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes As States" Section of the Clean Water Act?* 11 St. Thomas L. Rev 15, 30–31 (1998). The Ninth Circuit seems to have followed just such an approach in *Washington v. EPA*, 752 F.2d 1465, 1469–70 (9th Cir. 1985); *see also* Massachusetts v. U.S. Dep't of Transportation, 93 F.3d 890, 893 (D.C. Cir. 1996) ("[T]raditional presumptions about the parties or the topic in dispute may limit the breadth of ambiguity and thus affect both the first and second steps of *Chevron*. . . . [W]e have rejected agency interpretations of statutes which may have been reasonable in other contexts because the agency interpretation would not favor Indians.").

apply the canons in their interpretations of ambiguous statutes to ensure that their actions comport with the federal trust responsibility.

§ 2.03 Federal Laws of General Applicability

Many general federal statutes apply to all persons, property, or groups throughout the United States with no reference in text or legislative history to Indian tribes or activities in Indian country. The extent to which these statutes can be applied to Indian tribes, or to activities in Indian country involving tribes or tribal members, is the subject of this section. Although the Indian law canons of construction discussed in § 2.02 apply to statutes of general applicability, the distinctive way in which they are applied in this context warrants separate treatment. To a certain extent, the resolution of the question is specific to the area of law involved, and the sections of this treatise dealing with specific areas should be consulted.[1]

The Supreme Court has long applied the Indian law canons to statutes of general applicability.[2] The leading modern case taking this approach is *United States v. Dion*, in which the Court analyzed whether the Eagle Protection Act abrogated treaty rights to hunt eagles on Indian reservations.[3] The Court declared that to find abrogation, "clear evidence" of congressional intent to diminish the rights through the Act was "essential."[4] In 1999, *Minnesota v. Mille Lacs Band of Chippewa Indians* reiterated this test in holding that the Minnesota Enabling Act failed to abrogate treaty rights.[5] The Court also has long applied the canons to preserve rights guaranteed by statute or common law.[6] In *Iowa Mutual v. LaPlante*, for example, the Court interpreted the general grant of diversity jurisdiction to federal courts, finding that as the statute and its legislative history "makes no reference to Indians," it could not be interpreted to undermine "the established federal policy promoting tribal self-government" and thus did not permit jurisdiction absent tribal exhaustion.[7]

The canons will not apply when the interpretive question is one that might be

[1] *See, e.g.*, Ch. 8, *Taxation*; Ch. 9, *Criminal Jurisdiction*; ; Ch. 10, § 10.01[2][a] (environmental laws); Ch. 14, *Civil Rights*; Ch. 21, § 21.02[5][c][i] (labor and employment laws); and Ch. 22, *Government Services for Indians*.

[2] *See* Bryan H. Wildenthal, *Federal Labor Law, Tribal Sovereignty, and the Indian Canons of Construction*, 86 Or. L. Rev. 413, 489–502 (2007) (discussing examples).

[3] United States v. Dion, 476 U.S. 734 (1986).

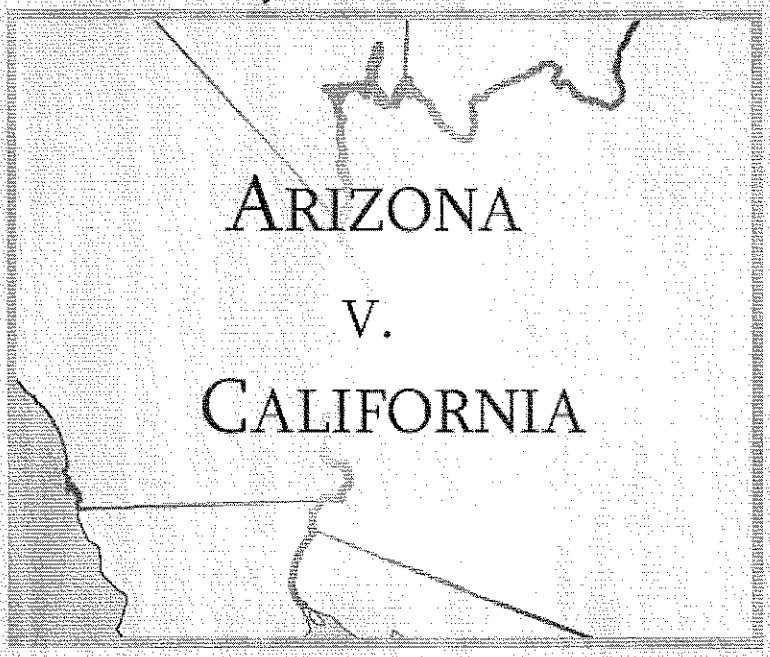
[4] United States v. Dion, 476 U.S. 734, 739–40 (1986).

[5] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999) (quoting United States v. Dion, 476 U.S. 734 (1986)).

[6] *See, e.g.*, United States v. Winters, 207 U.S. 564, 576–77 (1908) (finding that Montana's Enabling Act did not abrogate the water rights reserved by implication in the 1888 statute creating the Fort Belknap Reservation); *see also* Elk v. Wilkins, 112 U.S. 94 (1884) ("General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.").

[7] Iowa Mutual v. LaPlante, 480 U.S. 9, 17 (1987).

EXHIBIT 10



Simon H. Rifkind, Special Master[:] Report[,] December 5, 1960, Arizona v. California, 1960 Term (U.S.).

Landmark decision:
Arizona v. California, 373 U.S. 546 (1963).

III. Geography of the Colorado River Basin

The Colorado River is a stream of continental proportions. From its headwaters in the high peaks of north central Colorado to its mouth in the Gulf of California it runs a course of approximately 1,300 miles. During its journey to the sea it travels within or on the boundaries of five states and one foreign nation, as follows: through western Colorado, 245 miles; across Utah, 285 miles; through Arizona, 295 miles; on the Arizona-Nevada boundary, 145 miles; on the Arizona-California boundary, 235 miles; on the Arizona-Mexico boundary, 16-20 miles; and within Mexico, 75 miles.[20]

Within the United States the River System drains an area of 242,000 square miles or one-twelfth of the continental United States exclusive of Alaska. This drainage basin is approximately 900 miles long and varies in width from about 300 miles in the northerly section to about 500 miles in the southerly section. It is bounded on the north and east by the Continental Divide, on the west by the Wasatch Range and other divides, and by minor divides on the south and southwest. Within this drainage basin are portions of Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada and California.[21]

The following table shows the relationship of each of these states to the Basin.[22]

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[20]Ariz. Ex. 1000, p. 9.
[21]Ariz. Ex. 1000, p. 7.
[22]Ariz. Ex. 1000, p. 8.

had vested. The United States successfully sued to enjoin the upstream farmers from interfering with the flow of water to the Fort Belknap Reservation.

The Supreme Court affirmed the trial court's holdings that "there was reserved to said Indians the right to use the water of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty . . .," and that the defendants would be enjoined from interfering with the flow of 5,000 miners' inches of Milk River water to the Reservation. 143 Fed., at 743. The Supreme Court thus held that the reservation of water was effective as of the date that the Fort Belknap Reservation was created, 207 U. S., at 577, and that the appropriative rights obtained by the defendants subsequent to the time that the water was reserved but prior to the time that it was put to use on the Reservation were subordinate to the Reservation's rights.

The Supreme Court supported this result with the following reasoning, at p. 577:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs. *United States* v. *Powers,* 305 U. S. 527 (1939); *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U. S. 988 (1957); *United States*

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University of Denver Water Law Review
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Commentary

CHANGES OF WATER RIGHTS AND THE ANTI-SPECULATION DOCTRINE: THE CONTINUING IMPORTANCE OF ACTUAL BENEFICIAL USE

Scott A. Clark, Alix L. Joseph[a1]

Colorado water law developed in response to populist efforts of miners and farmers concerned that wealthy easterners would corner limited water resources to the exclusion of actual water users settling in Colorado. Colorado thus established property rights based on a water allocation and administration system called the "Colorado Doctrine," which encourages "multiple use of a finite resource for beneficial purposes."[1] The Colorado Doctrine states that:

> (1) water is a public resource, dedicated to beneficial use by public agencies and private persons as prescribed by law; (2) the right to use water includes the right to cross the lands of others so that water can be placed into or withdrawn from natural water-bearing formations or to convey water across others' property; and (3) the natural water-bearing formations may be used for the transport and retention of appropriated water.[2]

***554** The anti-speculation doctrine provides that an appropriator cannot obtain a water right decree without a demonstrated ability to actually use the water at a specified place. This doctrine developed from the seeds of the Colorado Doctrine to prevent wealthy speculators from monopolizing the development of Colorado's water resources.[3] Although the demands on this scarce resource have changed since the earliest settlement of Colorado, the anti-speculation doctrine continues to assure that water rights holders put the state's resources to actual use. More and more, municipal users, rather than farmers and miners, drive the continued development of Colorado water law. Notably, this rapidly increasing municipal water demand is occurring at a time when many of Colorado's rivers, the South Platte and Arkansas in particular, are over-appropriated. Securing reliable year-round supplies for municipal customers under these conditions presents unique and unprecedented challenges for municipal water suppliers.

Many municipalities address these challenges by purchasing and changing agricultural water rights to satisfy municipal demand. The adjudication of these often complicated changes has forced the application of existing tenets of Colorado water law to new circumstances, forcing the evolution of Colorado water law. The anti-speculation doctrine is one of these well-established tenants. The doctrine requires demonstration of an actual plan and intent to place water to beneficial, and not speculative, use as a condition for adjudication of a water right. Yet, until *High Plains*, the obligation of a holder of an absolute water right to demonstrate, as part of an application to change the use of the water right, a present intent to put the changed water right to a specific beneficial use remained unanswered. In its *High Plains* decision, the Colorado Supreme Court confirmed that the anti-speculation doctrine is a fundamental principle of Colorado water law that must apply to changes of absolute water rights.[4]

In examining the *High Plains* decision, this article first discusses the history of the anti-speculation doctrine. Part II analyzes the *High Plains* decision in the context of the Arkansas River Basin. Part III considers the tenets of Colorado water law that support applying the anti-speculation doctrine to change cases. The article concludes with a discussion of the impacts of the *High Plains* decision on future applications for changes of water rights.

*555 I. THE ANTI-SPECULATION DOCTRINE: A FUNDAMENTAL PRINCIPLE OF COLORADO WATER LAW

The anti-speculation doctrine has its origins in Section 5, Article XVI of the Colorado Constitution, which declares that all unappropriated water within Colorado is "the property of the public," and reserves the use of such water for "the people of the state, subject to appropriation as hereinafter provided."[5] As interpreted by the Colorado Supreme Court, Section 5 reserves the waters of the state for the public, and it protects the public interest by requiring actual use of the water by appropriators.[6] The anti-speculation doctrine developed to ensure that new appropriations of water are not speculative. The concept is so essential to Colorado water law that courts and lawmakers have applied it to a variety of circumstances.

A. The Anti-Speculation Doctrine Developed From the Requirement to Beneficially Use Water

Colorado water law has long recognized water rights based primarily on the diversion and beneficial *use* of water.[7] This simple requirement of *use* has far-reaching effects. For instance, actual use of water must precede adjudication of an absolute water right.[8] Similarly, a conditional water right can exist only if the applicant demonstrates that it can and will use the water.[9] Moreover, an owner of a conditional water right must periodically return to water court to demonstrate diligent pursuit of the appropriation and show it still can and will use the water.[10] More than simple administrative red tape, these requirements protect against speculative hoarding of water rights.[11]

***556** The requirement of actual beneficial use prevents hoarding of water rights for financial gain.[12] For instance, *City and County of Denver v. Northern Colorado Water Conservancy District*, presented a situation in which several engineers platted various transmountain diversions and attempted to sell the project to municipalities along the Front Range.[13] Ultimately, Colorado Springs purchased the project, and sought adjudication of water rights for the project. Colorado Springs claimed the engineering work of the entrepreneurs from which it purchased the project constituted diligent efforts to appropriate a water right and justified adjudication of an appropriation date relating back to the beginning of that work.[14] The court rejected the idea that:

> mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution.[15]

The court determined that one who has no intent to apply the water to beneficial use cannot claim rights against one who subsequently makes a good faith appropriation.[16] Because Colorado Springs' predecessors were "promoters and speculators," their efforts fell short of the diligence toward an appropriation required to establish a conditional water right.[17] As the court later stated in a subsequent ruling, "[s]peculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right."[18]

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tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Substantially the same prohibitions were contained in the First Intercourse Act of July 22, 1790 (1 Stat. 137) and the Second Intercourse Act of March 1, 1793 (1 Stat. 329), the latter of which was

reenacted from time to time with various minor modifications. There has never existed at any time any convention, treaty or other act of Congress which authorized the sale of any lands then owned or which might be acquired in the future by the tribe. Those statutes enacted subsequent thereto which authorize the leasing of tribal lands for mining purposes would not, in my opinion, authorize the issuance of a lease for mining purposes of lands or mineral interests which the tribe may acquire in the future, but which it does not own at this time. See *United States* v. *Noble,* 237 U.S. 74 (1915).

J. REUEL ARMSTRONG,
Acting Solicitor.

TITLE TO ACCRETION LANDS ADJACENT TO COCOPAH INDIAN RESERVATION, ARIZONA

M-36275 *April 15, 1955.*

Indian Tribes: Reservations

Where an Executive Order establishing an Indian reservation of public lands of the United States, including an unsurveyed area of accreted lands, provides that a sector of the reservation boundary shall follow what will be a section line of the public survey when extended, the Indians have no right as riparian owners to the accreted lands found to lie between such projected section line, when established, and the waters of an adjacent river.

Memorandum

To: Commissioner of Indian Affairs
From: Solicitor
Subject: Title to accretion lands adjacent to the Cocopah Indian Reservation, Arizona

The Director of your Area Office at Phoenix has presented the question of the ownership of an area of accreted land lying between the Cocopah Indian Reservation, Arizona and the waters of the Colorado River. The reservation was created by an Executive Order on September 27, 1917 which reads:

> "It is hereby ordered that the west half of the southeast quarter of section twelve and the west half of the northeast quarter of section thirteen, township ten south, lots two, four, five, and six, together with such vacant, unsurveyed, and unappropriated public lands adjacent to the foregoing-described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northeast quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona, be, and the same are hereby, withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States."

At that time, lots 2, 4, 5 and 6 were bordered on the west by the meander line of the Colorado River as shown by a public land survey made in 1874. Prior to the date of the order establishing the reservation, it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended.

Part of the land covered by the Executive Order was within what was known as the Farmers Banco No. 501 claimed by General Higinio Alvarez, a Mexican citizen. His claim later came before the International Boundary Commission of the United States and Mexico in 1926 and it was determined that dominion and sovereign jurisdiction over the area had passed to the United States (IO File 8717-26). When creating the Cocopah Indian Reservation on a part of this unsurveyed area the United States could limit the reservation boundary to include all or any part of the area. (56 Am. Jur. Sec. 481). See also *Jones* v. *Johnston,* 18 How. 150. *Producers Oil Co.* v. *Hanzen,* 238 U.S. 325.

Had it been intended that the rights of the Cocopah Indians should extend all the way from the western boundary of surveyed lots 2, 4, 5 and 6 to the waters of the Colorado River there would have been no occasion for including in the Executive Order the restrictive language defining the western boundary of the reservation to include such land "* * * as would, upon extension of the lines of existing surveys, constitute fractional portions of the northeast quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona". It being known that there was already a sizeable area of accreted land between the river and unsurveyed section 30, this language operated to exclude the accreted land found to be west of section 30 when the survey lines were protracted. To include in the reservation all of the accreted land between the 1874 meander line and the water of the river as it flowed when the reservation was

created would be to hold as superfluous and without meaning the above-quoted part of the Executive Order. It must be concluded, therefore, that the Indians have no rights to accreted lands west of the boundary fixed by the Executive Order. See also *Houston Brothers* v. *Grant,* 73 So. 284; *Saulet* v. *Shepherd,* 71 U.S. 502.

J. REUEL ARMSTRONG,
Acting Solicitor.

TEMPORARY WITHDRAWAL IS IN AID OF LEGISLATION

M-36277 *April 19, 1955.*

Withdrawals and Reservations: Authority to make

There is no authority for Executive action which would temporarily withdraw lands within the Papago Indian Reservation from the operation of the mining laws in aid of legislation for the benefit of the Indians, in view of the statutory provision rescinding an earlier withdrawal made for the same purpose, and restoring the lands to exploration and location under the mining laws.

Memorandum

To: Assistant Secretary--Public Land Management
From: Solicitor
Subject: Withdrawal of lands within Papago Indian Reservation from operation of mining laws

You have asked me to express an opinion on the question whether there is authority for Executive action which would temporarily withdraw the lands within the Papago Indian Reservation from the operation of the mining laws, pending action on a bill now before the Congress, that would expressly withdraw the lands from the operation of those laws and make the minerals underlying the lands a part of the reservation, to be held in trust by the United States for the Papago Indian Tribe. I am of the opinion that there is no authority for such Executive action in connection with these particular lands.

Executive Order No. 2524, dated February 1, 1917, withdrew and set apart certain lands, described in the order, as a reservation for the Papago Indians. The Executive order specifically provided that:

> "The foregoing reservation is hereby created with the understanding that all mineral lands within the reservation which have been or which may be shown to be such and subject to exploration, location and entry under the existing mining laws of the United States and the rules and regulations of the Secretary of the Interior applying thereto, shall continue to be subject to such exploration, location and entry notwithstanding the creation of this reservation; and town-sites, necessary in connection with the development of the mineral resources of the reservation, may be located within the reservation under such rules and regulations as the Secretary of the Interior may prescribe, and patented under the provisions of the town site laws of the United States: *Provided,* That nothing herein contained shall affect any existing legal right of any person to any of the lands herein described."

The act of February 21, 1931 (46 Stat. 1202) added certain lands to that reservation with the express provision that "all such lands shall be subject to disposition under the mining laws as provided in the Executive order of February 1, 1917, creating the Papago Indian Reservation."

In a letter dated October 26, 1932, to the Secretary of the Interior, the Commissioner of Indian Affairs described the creation and enlargement of the reservation, stated that 180 placer mining claims on the reservation had been surveyed and approved, and then said:

EXHIBIT 13

Memorandum

To: Assistant Secretary for Public Land Management
From: Solicitor
Subject: Title to accretion lands adjacent to the Cocopah Indian Reservation, Arizona

This office has been requested to review an opinion of a former Solicitor, Solicitor's Opinion of April 15, 1955, M-36275, regarding title to accretion lands adjacent to the Cocopah Indian Reservation, Arizona.

The Cocopah Indian Reservation was created by an Executive Order on September 27, 1917, which reads:

> It is hereby ordered that the west half of the south-east quarter of section twelve and the west half of the north-east quarter of section thirteen, township ten south, *lots two, four, five and six, together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northwest quarter of Section thirty, township nine south of range twenty-four west of the Gila and Salt River Meridian, Arizona,* be, and the same are hereby withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States. (Emphasis added)

Over the years there have been considerable differences of opinion regarding interpretation of the Executive Order. One interpretation to which the Executive Order is susceptible is that the Executive Order gave everything to the Cocopah Indians between the Colorado River and the subdivisions mentioned. The second interpretation is that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 are words not merely of description but of limitation, and that therefore the Indians could not claim any land west of section 30. In the Solicitor's Opinion of April 15, 1955, the interpretation that was followed was that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 were not merely words of description, but words of limitation.

In the process of reviewing this matter I have been provided copies of numerous documents bearing on the intent of the original Executive Order, some of which documents the former Solicitor may not have had available to him at the time the 1955 opinion was rendered. One of these documents is a letter dated July 26, 1917, from the Commissioner of the General Land Office of this Department to the Commissioner of Indian Affairs. The significance of that letter arises from the fact that it contained the proposed wording of an Executive Order which in fact was used in the Executive Order of September 27, 1917. Thus the precise phraseology of the Executive Order that has resulted in differing interpretations over the years stems directly frown the General Land Office letter.

The former Solicitor in his 1955 opinion indicates that prior to the date of the Executive Order establishing the reservation it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended, and he therefore concluded that the reference to section 30 in the Executive Order operated to exclude the accreted land found to the west of section 30 from the reservation. My examination of the various documents and particularly the aforesaid letter of July 26, 1917, from the General Land Office, leads me to the opposite conclusion. While it seems clear that as a matter of fact prior to the date of the Executive Order the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended, and it is also clear that the existence of accreted lands was known, it is not clear that the General Land Office in suggesting the wording of the Executive Order was aware that the river had shifted so far to the west that there were accreted lands between the river and what would have been the western line of section 30. As a matter of fact, there is some indication in the letter from the General Land Office that it was thought that the river was still at least partially within what would have been section 30. Even more significant, however, is the fact that the Commissioner of the General Land Office after discussing the existence of lands east of the river which were unsurveyed and contiguous to unapproved public lands of the United States which would in fact be the property of the United States if the lands were formed by accretion, then suggested:

> If you should be of opinion that withdrawal should be ordered now to preserve public possession and right to possession of such public lands as may exist in the locality mentioned, then I recommend that the language of the proposed order be altered by striking out all following the word "six" in line four and inserted in the place thereof the