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Idaho's Memo in Opposition to the US-CDAT Mtn SJ

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

In Re CSRBA	) Consolidated Subcase No. 91-7755
	)
Case No. 49576	) STATE OF IDAHO'S
	) MEMORANDUM IN RESPONSE
	) TO UNITED STATES' AND
	) COEUR D'ALENE TRIBE'S JOINT
	) MOTION FOR SUMMARY
	) JUDGMENT
	)

DESCRIPTIVE SUMMARY

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

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I. INTRODUCTION

The United States and the Coeur d'Alene Tribe filed a joint separate motion for summary judgment in Consolidated Subcase 91-7755, which addresses 353 claims to federal reserved water rights on lands and waterways within the Coeur d'Alene Indian Reservation and on numerous waterways outside the Reservation. Concurrently, the State of Idaho filed its own motion for summary judgment. This memorandum, filed in response to the summary judgment motions of both the United States and the Tribe, incorporates by reference the points and authorities submitted in the State of Idaho's Memorandum in Support of Motion for Summary Judgment.

II. STATEMENT OF UNDISPUTED FACTS

The States has submitted separately the State of Idaho's Statement of Additional Facts. Except as explicitly pointed out therein and herein, the State, solely for purposes of these summary judgment motions, does not dispute the facts as set out in the United States' and Coeur d'Alene Tribe's Joint Statement of Facts.[1]

III. SUMMARY OF ARGUMENT

Claimants United States and Coeur d'Alene Tribe ("Tribe") base their water right claims exclusively on the 1873 Executive Order and its alleged "homeland" purposes. In doing so, they err, because Congress explicitly rejected the Reservation set forth in the Executive Order. Rather than ratify the reservation, Congress sought, and obtained, a substantial cession of the waterways, timberlands, and other natural resources that provided

[1] The State reserves the right to contest the facts asserted by the United States and the Tribe, and to impeach the statements and opinions offered by their expert witnesses, if this matter proceeds to trial.

the Tribe's traditional subsistence needs. *See* Smith 2015 Report at 2 (the Tribe's seasonal cycles of hunting, fishing, and gathering . . . relied heavily on the numerous rivers, lakes, springs, marshes, and other aquatic resources situated within the 1873 reservation boundaries").[2] *See also United States v. Idaho*, 210 F.3d 1067, 1071 (9th Cir. 2000) ("the Tribe agreed to cede the approximate northern third of its 1873 reservation to the United States; this area included roughly the northern two-thirds of the Lake").

When Congress approved the new and substantially reduced Reservation in 1891, its act superseded the earlier executive order so that such order was "no longer of any force." *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S. 162-63 (1936). Thus, any water rights implied by the reservation of land must, as a matter of law, be implied from the later congressional action, i.e., the Act of March 3, 1891, 26 Stat. 989, 1031. Indeed, in *Winters v. United States*, 207 U.S. 564 (1908), the Court implied water rights solely on the basis of a Congressional act that approved a substantially reduced reservation within the bounds of an earlier, larger reservation.

By the time Congress acted to establish the permanent Reservation, the Tribe was famously known for its agricultural successes. In the Tribe's own words, its farmlands provided "whatever we are in need of." Exhibit 25 to Third Affidavit of Steven W. Strack (hereinafter "3d Strack Aff."). The Reservation's focus on agriculture was stated explicitly in the 1891 Act, which directed federal efforts to securing the "progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." Act of March 3, 1891, 26 Stat. at 1028 and 1031. The focus on reserving the lands and resources necessary to support the Tribe's agricultural endeavors is further demonstrated by Congress' directive that the reduced Reservation should be drawn to include the Tribe's farmlands, by the

[2] The Smith 2015 Report was filed with the Court as Exhibit 1 to the Affidavit of Ian Smith.

Tribe's cession of over 80% of Coeur d'Alene Lake and all of the Coeur d'Alene River, by the lack of any reservation of hunting or fishing rights in the agreements with the Tribe, and by the lack of any mention of the need for traditional subsistence resources in the negotiations leading up to the agreements. A later session of Congress confirmed its understanding of the Reservation's agricultural focus when it ordered, in 1906, that the Tribe's land base be allotted and reduced to the farmlands that the Tribe continued to farm with great success, without any reservation of hunting or fishing rights on the Reservation lands that were opened to homesteading. Act of June 21, 1906, 34 Stat. 325, 335.

The only conclusion to be drawn from the plain terms of the agreements that were approved in the 1891 Act, and the legal and subsequent history of such agreements, is that support for traditional hunting, fishing and gathering was not a primary purpose of the Reservation, even though the Reservation retained the lower St. Joe River and a portion of Coeur d'Alene Lake. Thus, while the State does not contest that water may have been reserved where necessary for irrigation, domestic and municipal use, and some limited commercial or industrial uses, the State opposes the United States' claims for lake level, instream flows, wetlands, and springs water rights to support traditional subsistence practices. Tribal members continued to hunt and fish when not farming (as did their white neighbors, *see* State of Idaho's Statement of Additional Facts ¶ 46), but the right to continued reliance on traditional subsistence practices was not specifically or separately reserved. Indian reserved water rights for hunting and fishing have been decreed when the tribe and the United States agreed to reserve a separate and exclusive fishing right for the Tribe. *See, e.g.*, *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (treaty language reserving "exclusive" fishing right established that a primary purpose of the reservation "was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle"). Given the

complete lack of language expressly establishing that "continuation" of a hunting and fishing lifestyle was a purpose of the Reservation, the Court should deny the United States' claim of water rights to maintain wetlands, springs, lake level maintenance, and instream flows at levels existing before opening and development of lands in the Coeur d'Alene-Spokane River Basin..

IV. ARGUMENT

A. THE COURT SHOULD REJECT THE UNITED STATES' ASSERTION THAT WATER WAS RESERVED FOR ALL "HOMELAND" PURPOSES.

1. When Implying the Reservation of Water Rights, Canons of Construction Requiring that Ambiguities Be Resolved in Favor of Indian Tribes Do Not Override Precedent Requiring a Searching Examination of the Very Purposes of the Reservation.

When interpreting a treaty or agreement with an Indian tribe, the primary task before the Court is to determine not only what the Tribe intended, but what both parties intended, because a "treaty represents a meeting of the minds culminating with an agreement akin to a contract." *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296-BC, 2009 WL 1285846, at 6 (E.D. Mich. Apr. 29, 2009). As this Court has previously stated, interpretation of treaties or agreements is a question of law: "examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact, but merely serves as an aid to the legal interpretation which is at the heart of all treaty interpretation."[3] Thus, to imply the

[3] SRBA Consolidated Subcase 03-10022, *Order on Motion to Strike Testimony of Dennis C. Colson; Order on United States' and Nez Perce Tribe's Joint Motion to Supplement the Record in Response to the Objectors' Motions For Summary Judgement, I.R.C.P. 56(f); Order on Motion to Strike Exhibit Transcription of Letter From General Palmer to George Manypenny, Commissioner Of Indian Affairs; Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions*, at 29 (SRBA Dist. Ct., Nov. 10, 1999). Hereinafter cited as "SRBA 03-10022 Summary Judgment Order."

reservation of a water right, the Court must be satisfied, as a question of law, that the Tribe and the United States reached agreement regarding the purposes of the Reservation.

In determining whether a meeting of the minds occurred, the Court, as the United States suggests, must resolve ambiguities and "doubtful expressions" in favor of the Tribe. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). But there is a distinct difference between "doubtful expressions" and "doubts." In *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945), the Court specifically rejected the tribe's assertion that "[a]ll doubts . . . must be resolved in their (the Indians') favor." *Id.* at 353. The court stated that the canon of construction prohibiting the interpretation of treaties to the "prejudice" of Indians "meant no more than that the language should be construed in accordance with the tenor of the treaty." *Id.* "We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Id.* In other words, "generosity toward Indians is for Congress, not the courts." *State ex rel. Martinez v. Lewis*, 861 P.2d 235, 241 (N.M. 1993).

As applied to water right claims, the Court cannot award water rights that conflict with the plain and unambiguous language of an act or agreement: signatory Indians are "bound by the plain import of the language of the act and the agreement," even if they later assert "that they did not so understand the act." *United States v. Mille Lacs Band of Chippewa* Indians, 229 U.S. 498, 507-08 (1913). Put another way, a tribe's "understanding [cannot] be imputed to Congress in the face of plain language" establishing congressional intent. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

An additional counterbalance to the canons of construction favoring Indian tribes is the fact that the implied-reservation-of-water doctrine is a judicially-crafted exception to the "history of congressional intent in the field of federal-state jurisdiction with respect to

allocation of water." *United States v. New Mexico*, 438 U.S. 696, 701-02 (1978). "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *Id.* at 702. Exceptions to general rules establishing the respective boundaries of state and federal jurisdiction should be narrowly construed to avoid having the exception swallow the rule. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). "Because the reserved rights doctrine is an exception to Congress's explicit deference to state water law in other areas, the Supreme Court has emphasized the importance of the limitation of reserved water rights to only so much water as is essential to accomplish the purpose for which the land was reserved." *Adair*, 723 F.2d at 1419 (citations omitted).

a) Notions of equity or substantial justice are not relevant to determination of the water right claims before the Court.

In determining the primary purpose of the Coeur d'Alene Reservation, the Court cannot employ any "notion of equity or general convenience, or substantial justice." *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). Rather, the Court's role is to "find the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that . . . follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." *Id.* at 533 (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat) 1, 71-72 (1821)).

Because equitable concerns cannot be employed in determining the purpose of the Reservation, the Court cannot consider modern events in determining whether water rights were reserved in conjunction with the reservation of lands. Post-reservation actions are relevant only if they resulted in a loss of rights on particular lands or waterways, such as

occurred when the Reservation was opened to homesteading. *See* Act of June 21, 1906, 34 Stat. at 335 ("lands not allotted or reserved [are] opened to settlement and entry").

The Tribe violates these fundamental principles of interpretation by urging the Court to consider its assertions regarding modern-day management of the Lake—including the unsupported allegation that the State of Idaho "walked away" from dealing with contamination issues—an allegation that the State denies. The Tribe's recitation of changed conditions in the Lake, the Tribe's lake management and education efforts, and the Tribe's continuation or resumption of traditional gathering activities and canoe building all have no relevance to the issue before the Court, which is limited to determining the primary purposes of the Reservation as mutually understood by Congress and the Tribe at the time the Reservation was permanently set aside. Thus, the Court should reject as irrelevant the evidence proffered by the Tribe relating to modern-day lake management, and restrict its consideration to the terms of the orders, agreements, and statutes setting aside or altering the Reservation and the historical facts relating to the negotiation and enactment of such documents.

2. The Searching Examination Into the Reservation's Purpose Cannot Stop with the 1873 Executive Order.

The United States and the Tribe both insist that the sole federal action that reserved water rights was the 1873 Executive Order, which withdrew certain lands from sale and set them apart as a reservation for the Coeur d'Alene Tribe. Ex. Order of Nov. 8, 1873 (1st Strack Aff. Ex. 3).[4] Basing any implied-reservation-of-water claims exclusively on the 1873 Executive Order, however, ignores both history and case law.

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[4] First Affidavit of Steven W. Strack, filed Oct. 21, 2016, with exhibits 1-23.

First, the 1873 Executive order was intended to be a temporary withdrawal allowing time for Congress to act on a then-pending agreement with the Tribe. Hart Report at 136 (executive order "was seen as a temporary measure to fully protect the agreement until the necessary legislation could be passed"); 1st. Strack Aff. Ex 2 (Letter of Nov. 4, 1873, from Commissioner of Indian Affairs requesting that reservation be set apart by executive order "pending the action of Congress upon said agreement").

Second, while Congress "recognized the existence of the 1873 reservation," Joint Statement of Facts ¶ 64, it refused to ratify it without significant reductions to the amount of land and waterways included therein. An agreement negotiated with the Tribe in 1887 would have confirmed the 1873 Reservation, but:

> pressure to open up at least part of the reservation to the public (particularly the Lake), prompted the Senate to pass a resolution in 1888 inquiring of the Secretary of the Interior about the boundaries of the Tribe's reservation and "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers."

United States v. Idaho, 210 F.3d at 1071 (quoting S. Misc. Doc. No. 36, 50th Cong, 1st Sess. (1888)). Subsequently, Congress directed the executive branch to enter into negotiations "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell . . . ." Act of March 2, 1889, 25 Stat. 980, 1002. "The events surrounding the authorization clearly show that the main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell." 210 F.3d at 1077 n.14.

Congress' demand that the reservation be reduced prior to its permanent establishment, and its subsequent approval of the modified reservation, essentially superseded the earlier executive order and established the purposes for which the

Reservation would thereafter be managed, i.e., to "promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." Act of March 3, 1891, 26 Stat. 989, 1028 and 1031. Congress' directive to reduce the Reservation by acquiring only non-agricultural lands further establishes that the primary purpose of the new reservation was to provide a base for the Tribe's ongoing and successful agricultural activities.[5] The Tribe was reported as being not only the best Indian farmers in the northwest, but as the "peers of any farmers on the Pacific slope" and "far advanced over their white neighbors"). Idaho's Statement of Additional Facts ¶¶ 6-7. And, while the boundaries of the Reservation were "redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation," *United States v. Idaho*, 210 F.3d at 1075, the exclusion of the Coeur d'Alene River and over 80% of the Lake demonstrates that reserving resources to support fishing and other subsistence activities was no longer a "primary purpose" for setting aside the Reservation permanently.[6]

The primary purpose test requires a showing that the claimed use of water was "essential to the life of the Indian people." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981) (quoting *Arizona v. California*, 373 U.S. 546, 599 (1963)). By 1891, Congress had clearly concluded that the Tribe's essential needs were being provided through its agricultural endeavors, and thus Congress superseded the earlier executive order, which had been focused on providing resources for traditional subsistence, and established, in the 1891 Act, a Reservation centered on the Tribe's needs for arable farmland. The Tribe itself

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[5] *See* State of Idaho's Statement of Additional Facts ¶¶ 1-12 (describing Tribe's agricultural activities).

[6] See Affidavit of David B. Shaw, ¶ 12.

had emphasized its need for farmland several years earlier, when, in response to a rumored petition by white settlers to open arable reservation lands to settlement and remove the Tribe to lands east of the St Joe River, tribal leaders wrote:

> Are we squirrels or the like animals, thus to drive us into a wilderness, where nothing can be raised to support people? Or are we fishes, that we should be made to live in the water? We say that we are men, as well as any whites are. From the land they would take away, we get our food, our clothing & whatever we are in need of. For we till our land, raise crops, keep herds of cattle & thus provide for ourselves.

Andrew Seltis and Eleven Other Coeur d'Alene Chiefs to John J. Simms, U.S. Indian Agent, October 21, 1883 (3d Strack Aff. Ex. 25) (*see also* Smith 2015 Report at 84-85).

In the Tribe's own words, their farmlands provided "whatever we are in need of." Thus, the Reservation established in the 1891 Act included only a small portion of the waterways that had previously been the focus of the Tribe's traditional subsistence activities. Such subsistence activities, which the Tribe (along with many white settlers) still engaged in when not busy with farm activities, were secondary to Congress' stated goals of promoting the "progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." Act of March 3, 1891, 26 Stat. at 1028 and 1031.

Even ignoring such history, as a matter of law a congressional act establishing a permanent reservation within the bounds of an earlier, executive order reservation, supersedes the earlier executive order. In *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S. 159 (1936), the Supreme Court had to determine whether the reservation for the Blackfeet Indians was established by legislation or by executive order, because the mineral leasing laws for reservations established by congressional action were different and distinct from the mineral leasing laws applicable to executive order reservations. *Id.* at 161-62. The reservation occupied by the Blackfeet Indians was within

the boundaries of an earlier and larger Reservation that had been set aside by earlier statutes and executive orders for the use of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Tribes. Then, in a congressionally ratified agreement:

> [M]uch of the earlier reservation was ceded to the United States, and three separate reservations, all within the limits of the earlier reservation, were created, one of these being set apart for the Blackfeet and the other two for the other Indians. By another agreement or convention, ratified by Congress June 10, 1896, c. 398, 29 Stat. 321, 353, which disclosed various considerations moving from the Indians to the government and the reverse, part of the separate Blackfeet reservation was ceded to the United States, and the remainder was set apart as the tribe's future reservation. This last reservation is the one with which we now are concerned. It rests entirely on the agreements or conventions which were ratified and given effect by Congress. The Executive Orders before mentioned, evidently designed to be temporary, have been superseded by congressional action and no longer are of any force.

Id. at 162-63 (emphasis added). In other words, when Congress, by means of a cession agreement, establishes a permanent reservation within the bounds of an earlier executive order reservation, the reservation is thereafter founded solely and entirely on the congressionally-ratified agreement.

The presence of superseding congressional action renders the intent of earlier executive orders irrelevant. This principle is amply demonstrated by the decision in *Winters* v. *United States*, 207 U.S. 564 (1908), which, like *British-American Oil Producing Co. v. Bd. of Equalization*, addressed one of the three reservations carved out of the earlier Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservation by means of an 1888 cession agreement with the occupying tribes. *Winters*, 207 U.S. at 567-68 (discussing earlier reservation and 1888 agreement).

In *Winters*, the Court acknowledged that the earlier reservation occupied by the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Tribe was "a very much larger tract which

the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people." 207 U.S. at 576. But, the Court at no time suggested that the purposes of the earlier reservation were relevant to determining whether water rights had been impliedly reserved for the Fort Belknap Reservation. Rather, the Court found that the "case . . . turns on the [cession] agreement of May, 1888, resulting in creation of the Fort Belknap Reservation." *Id.* It was the new reservation, and the accompanying "turn[] to agriculture and the arts of civilization," that implied the need for water necessary to achieve such purposes. *Id.*

In short, the *Winters* Court saw no need to examine the purposes of the earlier, more extensive reservation that was set aside to provide for traditional subsistence activities, because the later agreement, with its new-found focus on agriculture, superseded the earlier reservation. There is no reason to do otherwise here, where Congress explicitly refused to ratify the 1873 Reservation without substantial changes that excluded the majority of waterways used for traditional subsistence and prioritized reliance on agriculture. Given such history, the United States and the Tribe err in urging the Court to discard *Winters* by limiting the examination of the Reservation's purposes to the superseded 1873 Executive Order.

The fact that the Supreme Court, in *United States v. Idaho*, examined the purposes of the 1873 Executive Order to determine whether submerged lands had been reserved does not alter the holding in *British-American Oil Producing Co.* that subsequent congressional action supersedes earlier orders. In *Idaho v. United States*, the critical issue was whether the submerged lands at issue had been reserved for the Tribe's use on or before the date of Idaho's statehood on July 3, 1890. Absent a pre-statehood reservation, the lands would have passed to the State under the equal footing doctrine. *Idaho v. United States*, 533 U.S. 262, 272-

73 (2001). Because Congress did not act to permanently set aside the Reservation until 1891, the only pre-statehood action reserving and setting aside lands was the 1873 Executive Order. Therefore, in order to determine the purposes of the Reservation as of July 3, 1890, the only relevant actions were the 1873 Executive Order, and the pre-statehood acts of Congress, which recognized the inclusion of navigable waterways in the 1873 Reservation by directing negotiations with the Tribe for the "negotiated consensual transfer" of lands and waterways., *Id.* at 281.

Because the Court was limited to determining intent to reserve submerged lands on or before July 3, 1890, the Court never fully examined the purposes of the Act of March 3, 1891, other than to note that the Act contained no cession by the Tribe of submerged lands within the boundaries of the diminished reservation established therein. *Id.* at 278.

In short, while the purposes of the 1873 Executive Order were relevant to determining intent to reserve submerged lands in the reservation as it existed prior to statehood, nothing in *Idaho v. United States* suggests that the purposes of the 1873 Executive Order were not superseded when Congress established, in the 1891 Act, a new Reservation within the bounds of the Old, and set forth in explicit language the purposes and objectives for which the lands within the new Reservation would be employed. Thus, in determining whether intent to reserve water rights is implied by the purposes of the Reservation, it is the purposes of the "last reservation" that are controlling.

3. There Is No Legal Basis for Implying the Reservation of Water for All Conceivable Uses Relating to Establishment of a "Homeland."

The United States and the Tribe err by limiting their analysis of the Reservation's purposes to the superseded 1873 Executive Order, and then compound their error by asserting that the Court need only determine whether the Tribe and the United States

intended to establish a "homeland" for the Tribe. The assertion that water is reserved for all purposes necessary to establishment of a "homeland" is at odds with the very nature of the implied-reservation-of-water doctrine. "Because the doctrine is one of implication, the United States Supreme Court has traditionally applied it very narrowly." *Potlatch Corp. v. United States*, 134 Idaho 916, 926, 12 P.3d 1260, 1270 (2000) (Trout, J., concurring).

The United States begins by asserting that the decision in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981) recognized water rights for "homeland" purposes. Such assertion is wrong. U.S. Brief at 10. The *Walton* court observed that a "general purpose for the creation of an Indian reservation [is] providing a homeland for the survival and growth of the Indians and their way of life." *Id.* at 47. The court never suggested, however, that the general purpose of establishing a "homeland" was sufficient to imply the reservation of water rights. Rather, the court found such general purpose relevant only to the ability of the Tribe to use water reserved for one purpose for another purpose. *Id.* at 48-49. Tellingly, in determining the purposes for which water was reserved, the *Walton* court explicitly applied the holding in *United States v. New Mexico*, 438 U.S. 696, 702 (1978), and implied the reservation of water only for the "very purposes" of the reservation and not for secondary uses. *Walton*, 647 F.2d at 47. Thus, the *Walton* court implied a reserved water right only to "maintain [the tribe's] agrarian society" and to develop a small-scale fishery in a tribal lake to replace fishing grounds lost due to dam construction on the Columbia River. *Id.* at 47-48.

Two years later, the Ninth Circuit reiterated that the "purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights." *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir.1983). In *Adair*, the court, again applying the primary purposes/secondary uses test from *New Mexico*, *id.* at 1409, and without any mention of the "homeland" discussion in *Walton*, determined the primary purposes of the Klamath

Reservation by looking to the text of the treaty that set aside the lands: the treaty provided money "to promote the well-being of the Indians, advance them in civilization, and especially agriculture," but also expressly reserved all fisheries within the reservation for the exclusive use of the Tribe. *Id.* at 1409-10 (quoting 1864 Klamath Treaty, 16 Stat. at 708). From those treaty provisions, the court inferred that "both objectives [agriculture and "continuity of the Tribe's hunting and gathering lifestyle"] qualify as primary purposes of the 1864 Treaty and accompanying reservation of land." *Id.* at 1409.

The *Adair* decision establishes that if plain language in an agreement sets forth the primary purposes of an Indian reservation, the Court's inquiry is at an end. The United States, however, ignores *Adair*, and instead cites a number of lower court decisions in support of its assertion that water is, as a matter of law, broadly reserved for all "homeland" purposes. But, with one exception, the cases cited by the United States in support of its homeland theory do not, upon further examination, stand for the proposition that water is reserved for all uses associated with establishment of a "homeland." For example, the United States asserts that the Final Judgment in *State ex rel. Reynolds v. Lewis*, Nos. 20294 and 22600, (5th Judicial District, Chavez County, New Mexico, July 11, 1989), as affirmed by the New Mexico court of appeals, *State ex rel. Martinez v. Lewis,* 861 P.2d 235 (N.M. App. 1993), recognized reserved water rights "for recreation, agriculture, domestic, stock, commercial, industrial, and other uses for the 'arts of civilization'"). U.S. Brief. at 16. The United States fails to disclose, however, that at least some of the water uses recognized in the trial court's final judgment were the result of a stipulation among the parties, which expressly stated that "the plaintiffs do not agree to the legal basis of these claims." 3d Strack Aff. Ex. 26 (Stipulation, *State of New Mexico v. Lewis*). As a result of the stipulation, the only reserved water right claims actually litigated were claims for irrigation. 861 P.2d at 238.

Because the lower court's recognition of reserved water rights for recreation and other purposes was the result of an agreement among the parties, it cannot be cited as precedent. *See United States v. Walton (In re Baker)*, 693 F.2d 925, 925-26 (9th Cir.1982) (prior case did not establish controlling precedent since the question at issue was "simply assumed" by the parties and neither contested nor ruled upon); *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1373 n. 16 (Fed. Cir. 2003) (prior decision that merely accepted parties' agreement did not establish controlling precedent).

Another case that the United States misrepresents as support for its "homeland" theory is *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (Mont. 1985). The United States asserts that "*Greely* supports a general homeland purpose by recognizing that the overall purpose of a reservation must be broad enough to encompass many different kinds of water uses ranging from agriculture to fishing and hunting." U.S. Brief at 14. The *Greely* court, however, did not have any reserved water right claims before it: the only issue it considered was whether "the Montana Water Use Act [is] adequate to adjudicate reserved water rights?" 712 P.2d at 762. In conjunction with such question, the court was merely surveying existing case law that described the potential scope of reserved water claims that could be presented in a future case. *Id.* at 762-65. Such dicta establishes no precedent. *Montana Human Rights Div. v. City of Billings*, 649 P.2d 1283, 1287 (Mont. 1982) ("[t]his Court is not bound to give precedential value to dicta"). And in fact, the court's dicta did not recognize reserved water for a broad range of uses: the court found authority only for a reserved water right to support agriculture and for fishing and hunting. 712 P.2d at 764. The court found no federal case law support for implying water rights to support industrial purposes or uses "classed as 'acts of civilization.'" *Id.* at 765.

Likewise, the United States errs in citing the decision in *State Dept. of Ecology v. Yakima Reservation Irrig. Dist.*, 850 P.2d 1306 (Wash. 1993) ("*Acquavella II*") as support for "homeland" water rights. The United States' argument rests solely on a statement in the court's decision noting that the purpose of the reservation was to establish a "permanent settlement of the Yakima Indians." 850 P.2d at 1317. But in the *Acquavella* adjudication, the district court applied the *New Mexico* primary/secondary purpose test, and ultimately concluded that the primary purposes of the Yakima Reservation were limited to agriculture and fishing, and thus claims "for commercial, industrial and other purposes are not and would not be in fulfillment of the primary purposes of the Treaty with the Yakimas." *In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin; Dept. of Ecology v. Acquavella,* No. 77- 2- 01484- 5, Amended Partial Summary Judgment Entered as Final Judgment Pursuant to Civil Rule 54(b) at 7(Wash. Superior Ct., Nov. 29, 1990) (3d Strack Aff. Ex. 27). On appeal, the Washington Supreme Court noted the lower court's holding that the Tribe would have to apply under state law to obtain water for "commercial, industrial, and other nonagricultural purposes," 850 P.2d at 1310, and only affirmed reserved water rights for the reservation's primary purposes of agriculture and fishing. *Id.* at 1316. Thus, if anything, the holdings in the *Acquavella* adjudication expressly reject "homeland" water rights.

Given that neither *Greely, Acquavella,* nor *State of New Mexico ex rel. Reynolds* support the United States' claim of "homeland" water rights, the United States' claim rests solely on the decision in *In re the General Adjudication of All Right to the Use of Water in the Gila River System*, 35 P.3d 68 (Ariz. 2001) (*Gila River V*). In *Gila River V*, the Arizona Supreme Court rejected the parties' proffered historical analyses of the reservation's purposes, instead holding, as a matter of law, "that the purpose of a federal Indian reservation is to serve as a 'permanent

home and abiding place' to the Native American people living there." *Id.* at 76 (quoting *Winters*, 207 U.S. at 565). In doing so, the Court rejected dicta from a prior decision stating that determination of purpose required "fact-intensive inquiries that must be made on a case-by-case basis," and replaced it with the court's legal finding "that Indian reservations were created as permanent homelands." *Id.* at 76 n.5 (citing *In re the General Adjudication of All Right to the Use of Water in the Gila River System*, 989 P.2d 739, 748 (Ariz. 1999)).

The holding in *Gila River V*, however, rests on a series of false premises. First, the court concluded that because intent to reserve water rights is "merely imputed," rather than expressed, "its historical reality is irrelevant for purposes of establishing reserved rights." *Id.* at 75 (quoting Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights,* 31 Nat. Res. J. 549, 563 (1991)). Ignoring historical evidence of intent, however, is completely at odds with the very foundations of the reserved water rights doctrine. As the Idaho Supreme Court has concluded, "[w]hether there has been a federal reservation of water, and the quantity of water reserved, are questions of legislative intent." *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000). While intent to reserve water is rarely expressed explicitly, it can be inferred from the very purposes for which the reservation was established. Examination of the historical purposes of a reservation, therefore, is a critical element in applying the implied-reservation-of-water doctrine and in ensuring "the limitation of such rights to only so much water as is essential to accomplish the purpose for which the land was reserved." *Adair*, 723 F.2d at 1419. The Arizona court simply erred in discarding precedents calling for a historical examination into the purposes of each reservation. *Cf. Adair*, 723 F.2d at 1409-10 (engaging in historical analysis of treaty, negotiations, and related documents to determine the purposes "which the parties to the 1864 Treaty intended the Klamath Reservation to serve").

The second false premise adopted by the Arizona court was its conclusion that the Supreme Court's admonition that reserved water rights must be "narrowly quantified to meet the original, primary purpose of the reservation" applies only to "non-Indian reservations." *Gila River V*, 35 P.3d at 73. To reach such a conclusion, the court had to distinguish the Supreme Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), in which the Court held that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id.* at 700 (emphasis added). The Supreme Court's reference to "each time" included its decisions addressing water rights for Indian reservations in *Winters* and *Arizona v. California,* 373 U.S. 456 (1963). *New Mexico*, 438 U.S. at 700 n.4.

Thus, the *New Mexico* Court clearly viewed the required "careful examination" of specific purposes as applying to all federal reservations, including Indian reservations. Such "careful examination" of an Indian reservation's purposes requires the court to determine the "very purposes for which a federal reservation was created," because while it is reasonable to imply the reservation of water rights for such primary purposes, "there arises the contrary inference" that Congress intended to acquire water under state laws "[w]here water is only valuable for a secondary use of the reservation." *Id.* at 702.

The Supreme Court's limitation of reserved water rights to those necessary to fulfill the "specific purposes" of a reservation cannot be simply cast aside, as did the Arizona court. The term "specific" means "[e]xplicitly set forth, definite" and "[s]pecial, distinctive and unique." *The American Heritage Dictionary of the English Language* 1669 (4th ed. 2000). Thus, in determining the purposes of a reservation, this Court must delve beyond the

simplistic assumption that all Indian reservations have a broad, general purpose of providing a home for the Indians, *Gila River V*, 835 P.3d at 76, and instead examine the terms of the agreements and acts of Congress that establish the definite and distinct purposes which the parties intended the reserved lands to serve.

Third, and finally, the *Gila River V* court erred in crafting a "permanent homeland concept [that] allows for . . . flexibility and practicality." 35 P.3d at 76. The court believed that flexibility in quantifying water rights was important because "an across-the-board application of PIA [had] potential for inequitable treatments of tribes based solely on geographical location." *Id.* at 78 (emphasis added). The court believed that such "inequity is unacceptable and inconsistent with the idea of a permanent homeland." *Id.* In interpreting treaties, however, a court cannot employ equitable considerations. *United States v. Washington*, 157 F.3d 630, 650 (9th Cir. 1998). Thus, by interpreting the treaty establishing the reservation flexibly in order to avoid inequitable results, the Arizona court violated the Supreme Court's admonishment that courts are not "at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice." *United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900).

In sum, the "homeland" theory propounded by the Arizona Supreme Court in *Gila V* is not well-founded, and should not be adopted by this Court. Intent to reserve water should be determined by engaging in an analysis of the purposes which the parties to the agreement establishing the current reservation "intended the . . . Reservation] to serve"). *Adair*, 723 F.2d at 1410. Tellingly, the "homeland" theory has been soundly rejected by other courts. In Wyoming's Big Horn River Adjudication, the appellate court held that the "district court correctly found that the reference in Article 4 to "permanent homeland" does

nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation." *In re the Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 97 (Wyo. 1988).

Likewise, in *United States v. Washington*, 375 F. Supp. 2d 1050 (W. D. Wash. 2005), the United States claimed water rights for "homeland" purposes on the Lummi Indian Reservation "based on *Gila River V*." *Id.* at 1062. The United States claimed water rights "for all domestic, agricultural, community, commercial and industrial purposes," and contended that anything less "would unfairly limit the Lummi's water rights." *Id.* "The district court concluded that "[t]he effect of Plaintiff's position would be the quantification of a water right for a broad and almost unlimited range of activities." *Id.* Ultimately, the court concluded that the United States' assertion of a "homeland" purpose was "contrary to the 'primary purpose' doctrine under federal law" because it was "simply a formulation that does away with determining the purpose and begs the question of what water was reserved to make the 'homeland' livable." *Id.* at 1065 (quoting Washington's brief). The court concluded that "[t]he Court cannot find a 'homeland' primary purpose and end its inquiry . . . [t]he appropriate inquiry under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established. These implied *Winters* rights are necessarily limited in nature." *Id.*[7]

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

a) **Regardless of whether the Tribe's lands are labeled as a "reservation" or a "homeland," the primary purpose was to establish a home on which the Tribe could pursue its agricultural endeavors.**

The terms "homeland" and "reservation," as they relate to Indian tribes, are practically synonymous: the fact that a reservation was to serve as a tribe's "homeland" does not alleviate the Court's responsibility of determining the primary purposes for which the reservation or homeland was established. Here, as the State submitted in its Memorandum in Support of Summary Judgment, pages 44-45, a primary purpose of the Reservation was to establish a home on which the Tribe could pursue its agricultural endeavors, with an implied water right for irrigation if there are places of use on which the Tribe cannot earn a "moderate living" by raising basic grain or other crops without irrigation. The existence and extent of such lands, however, is an issue left to the quantification phase of this litigation.

As for the United States' claims of water rights for domestic, commercial, municipal and industrial (DCMI) purposes, the State does not contest the reservation of water for domestic purposes and municipal uses within the current Reservation boundaries, but reserves the right, in the quantification phase of this litigation, to contest the number of wells and the amount to be diverted from each well that is necessary to meet the minimum domestic and municipal needs of the Tribe.

For the reasons stated in the State's Memorandum in Support of Summary Judgment, pages 47-51, the State acknowledges that water was reserved for commercial and industrial purposes that have a nexus to the general agricultural purposes of the Reservation, but asserts that the following claims should be denied for the reason that the claimed purposes have no nexus to the primary purpose for which the Reservation was set aside; additionally, many of the claims are intended to primarily serve the needs of non-Indian visitors, not the Tribe.

CSRBA Claim No. 93-7462, Casino and Hotel Complex Well;
CSRBA Claim No. 93-7463, Circling Raven Golf Course;
CSRBA Claim No. 93-7464, Casino and Hotel Complex expansion;
CSRBA Claim No. 93-7465, RV Park (future);
CSRBA Claim No. 93-7466, Water Park (future);
CSRBA Claim No. 95-16671, Golf Course (future);
CSRBA Claim No. 95-16675, Golf Course Pond Maintenance (future); and
CSRBA Claim No. 95-16669 (fish hatchery).

The requirement that DCMI water rights have, at a minimum, a close nexus to the primary purpose of the Reservation is confirmed in the numerous court decisions either questioning whether DCMI water rights should ever be implied to exist or denying such claims outright. *See Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 712 P.2d 754, 765 (Mont. 1985) (noting lack of "decisive federal cases on the extent of Indian water rights for uses classed as 'acts of civilization'"); Special Master' Report, *Arizona v. California* (Dec. 5, 1960) (1st. Strack Aff., Ex. 17 at 265) (denying water right claim for industrial purposes because the "reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy"); *State Dep't of Ecology v. Yakima Reservation Irrig. Dist.*, 850 P.2d 1306. 1310 (Wash. 1993)(water right claims for "commercial, industrial and other nonagricultural purposes are not in fulfillment of the primary purposes of the [Yakima] treaty"). [8] Given such authorities, any decree of reserved water rights for DCMI uses should be limited to those claims that have an identifiable nexus to the primary purpose of promoting agricultural development, which clearly excludes the claims listed above.

[8] The State reserves the right to contest the quantification of the remaining DCMI claims, and further asserts that the place of use for such claims must be specifically limited to locations within the current boundaries of the Reservation.

4. The Alleged "Homeland" Purpose Does Not Support, and in Fact Is Counter to, the United States' Claims for Off-Reservation Instream Flows.

The United States relies on the alleged "homeland" purpose of the 1873 Executive Order as justification for its off-reservation instream flow claims. As noted previously, the 1873 Executive Order was superseded by later legislation, but such issue aside, the assertion that the Executive Order reserved off-reservation water right is inconsistent with the assertion that the President intended to establish a "homeland" sufficient for all the Tribe's subsistence needs. If in fact the Reservation was intended to provide all the Tribe's needs, then there can be no implied reservation of rights outside the Reservation. The Court cannot rewrite history by implying an intent to reserve additional waterways outside the Reservation boundaries simply because modern science has determined that such waterways provide spawning areas for fish caught on the Lake. Such an assertion essentially argues that the Court should make an equitable adjustment of the Executive Order's terms to rectify the short-sightedness of the parties who established the 1873 boundaries. The Court, however, lacks such authority: courts cannot employ any "notion of equity or general convenience, or substantial justice" when interpreting documents setting aside Indian reservations. *United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900).

The United States then compounds its error by failing to explain how the alleged off-reservation water rights could survive the subsequent cession, relinquishment, and quitclaim of all "right, title and claim" to all rights outside the current Reservation. Act of March 3, 1891, 26 Stat. at 1027, 1030. By its own terms, the plain language of the cession includes not only the bare land, but all incidents of title and all appurtenant rights, including water rights.

In reviewing an analogous assertion that hunting and fishing rights survived a tribe's cession of all "right, title and interest" to a portion of its reservation, the Supreme Court

emphasized that "even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (internal quotation marks and citations omitted); *see also Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179-80 (1947) ("[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean"); *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 445 (1975) (tribe's agreement to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest" in certain lands was "precisely suited" to convey "all of their interest" in such lands); *id.* at 447 ("[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent"); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[t]he 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").

In short, there is no ambiguity in the cession language employed in the 1887 and 1889 Agreements that would allow the Court to conclude that the Tribe retained any off-reservation property rights—any right the Tribe may have originally had to restrict appropriation of streams and rivers in its aboriginal territory did not survive the Tribe's absolute and unconditional surrender of all off-reservation rights in the two agreements approved by Congress in the 1891 Act. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 462 (7th Cir. 1998) ("the creation and acceptance of an Indian reservation by

treaty constitutes a relinquishment of aboriginal rights to lands outside the reservation . . . including aboriginal rights in land or water not specifically mentioned in any treaty . . . [i]t is irrelevant whether members of the Tribe continued to use these off-reservation resources"); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 357-58 (1941) (creation of reservation at tribe's request "and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation"). Rather than face such issues, the United States offers only the erroneous assertion that "[r]eserved water rights may extend beyond the boundary of an Indian reservation if such water is necessary to fulfill the purpose of the reservation." U.S. Brief at 46. Yet, not a single case cited by the United States supports its assertion.

First, the United States asserts that the decree in *Arizona v. California*, 376 U.S. 340, 344-45 (1964) awards irrigation water for the "irrigation of [Cocopah] Reservation lands from the Colorado River, which is located approximately two miles from the Reservation boundary." U.S. Brief at 46-47. The only authority cited by the United States is the *U.S. v. Arizona* decree, which does not identify the location of the Reservation relative to the Colorado River. And, as pointed out in the State's opening brief, the 1917 executive order establishing the Cocopah Reservation (Exec. Order of Sept. 27, 1917), in addition to reserving several tracts of land away from the Colorado River, also included "all vacant, unsurveyed and unappropriated public lands adjacent to [the withdrawn sections] and between the same and the waters of the Colorado River . . . ." Accordingly, the applicable Master Title Plat and Index Sheet (3d Strack Aff. Exs. 29 & 30) indicate that lands adjacent to the Colorado River were withdrawn by the executive order and became part of the

Cocopah Reservation, so that at least portions of the original executive order Reservation awarded water rights in *Arizona v. California* were adjacent to the River.[9]

The United States' citation of *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), for recognition of off-reservation reserved water rights is especially inapposite. The *Kittitas* decision did not adjudicate any water rights. It simply upheld the authority of the district court under a 40 year-old consent decree to temporarily modify releases of water in order to protect 60 salmon redds that would have been exposed and destroyed if flows were lowered. The salmon had spawned on the upper portion of the river's beds due to "artificially high irrigation releases in the fall of 1980." *Id.* at 1033. The only issue before the Ninth Circuit was whether the district court had exceeded the scope of its jurisdiction under the consent decree in ordering the release of water and the transplantation of endangered redds to another location. *Id.* at 1035.

In other words, the *Kittitas* decision addresses the equitable authority of the court to modify federal irrigation project operations to preserve fish, and associated treaty fishing rights, from irreparable injury—the Court specifically proclaimed that the underlying consent decree did not adjudicate the water rights of the Yakama Nation[10] and additionally clarified that "[w]e need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty." *Id.* at 1034, 1035 n.5. Given those pronouncements, it is improper to cite the case as precedent for recognition of off-reservation reserved water rights. *See Sethy v.*

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[9] As indicated on 3d Strack Aff. Ex. 29, additional lands were added to the Cocopah Reservation by Public Law 99-23, 99 Stat. 47 (1985), but the 1963 *Arizona v. California* decree only addressed water rights for the original Reservation as withdrawn by the 1917 executive order.

[10] In the mid 1990's the Yakima Nation renamed itself "Yakama" to reflect the pronunciation in the Nation's native tongue. Some of the decisions cited herein predate the change.

Alameda Cty. Water Dist., 545 F.2d 1157, 1159 (9th Cir. 1976) (en banc) (prior decision does not constitute "controlling precedent" if the "court did not reach the merits" of the issue).

The United States especially errs by citing the unreported Washington district court decision in *In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin; Dept. of Ecology v. Acquavella*, No. 77- 2- 01484-5 (hereinafter "*Acquavella*"), as precedent for off-reservation instream flows. While the district court did award the United States off-reservation reserved water rights to support the fishing rights of the Yakama Nation, the issue of whether such rights could be reserved was never litigated. The parties simply assumed such rights were reserved.

The issue of off-reservation water rights arose upon motion of certain irrigation districts. The irrigation districts did not contest the authority or intent of the United States to reserve water rights outside the boundaries of the Yakama Reservation. Rather, their summary judgment motion was limited to arguing that whatever off-reservation water rights the Nation possessed had been extinguished or diminished by a series of later federal actions. *Acquavella, Memorandum Opinion re: Motions for Partial Summary Judgment* at 46 (Wash. Superior Ct., May 29, 1990) (3d Strack Aff. Ex. 28). In other words, the only issue before the court was "the maximum quantity of water which may be claimed by the U.S. on behalf of the [Yakama Nation]." *Id.* at 3. The court ultimately decided that off-reservation water rights had been diminished but not extinguished. *Id.* at 60.

When the summary judgment decision was appealed the Washington Supreme Court noted that:

> The question in this appeal is not *whether* the Indians have treaty rights to water from the Yakima River and its tributaries, but rather the quantity of water the Indians are entitled to and the priority date attaching to such quantity.

State Dept. of Ecology v. Yakima Reservation Irrig. Dist., 850 P.2d 1306, 1309 (Wash. 1993). Later in the opinion, the court again noted that:

> All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes, and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.

Id. at 1317.

The Washington Supreme Court went on to confirm that the Nation's fishing rights, and the assumed water rights, had been "diminished" by later federal actions. *Id.* at 1331-32. On remand to the trial court, therefore, the issue was not whether the Nation had water rights for "usual and accustomed" fishing rights; the only issue decided was "which tributaries are diminished pursuant to the Partial Summary Judgment." *Acquavella, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places* at 5 (Exhibit 1 to Affidavit of Vanessa Boyd Willard)(emphasis in original). Likewise, the court's memorandum opinion addressing "flushing flows" did not determine the Yakama Nation's entitlement to off-reservation flows to aid migrating fish; rather, it implemented the partial summary judgment opinion in which the parties had assumed such entitlement. *Acquavella, Memorandum Opinion: Flushing Flows* at 2 (Exhibit 2 to Affidavit of Vanessa Boyd Willard).

Because all parties in the *Acquavella* litigation agreed that the Yakama Nation was entitled to water rights to support usual and accustomed fishing rights, the United States errs in citing the decision as precedent for recognizing off-reservation reserved water rights. *See Webster v. Fall*, 266 U.S. 507, 510 (1925) ("[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."); *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 991 (Wash. 1994) ("[i]n cases where a legal theory is not discussed in the

opinion, that case is not controlling on a future case where the legal theory is properly raised"); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985)("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions").

In sum, the United States has offered no justification, either in the plain language of the 1887 and 1889 Agreements, or in existing case law, for the reservation of instream flow fish habitat water rights outside the boundaries of the current Coeur d'Alene Reservation. Moreover, it is well established that when a tribe explicitly cedes all right, title and interest to lands, the tribe cannot claim that certain rights survived such cession by implication: any right the tribe retains must be reserved by language as explicit as that used to describe the cession. *See Adair*, 723 F.2d at 1418 n.31 ("[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right"). That being the case, the Court must deny the Tribe's claims for off-reservation fish habitat flows.

5. The Alleged "Homeland" Purpose of the Reservation Does Not Imply the Reservation of Water for On-Reservation Subsistence, Cultural, and Religious Practices.

The United States and the Tribe assert the alleged "homeland" purpose of the 1873 Reservation implied the reservation of water to support on-reservation fish habitat. Instream flows for fish habitat are claimed for Hangman Creek, the St. Joe River, and all Reservation rivers and streams that drain into Coeur d'Alene Lake. *See, e.g.,* CSRBA Claim No. 91-7777 (instream flow for fish habitat). Such claims would require that water use on large portions of the Reservation be restricted to ensure maintenance of the claimed flows. With the exception of Hangman Creek, most of the lands in the affected stream basins are lands opened to homesteading by the Act of June 21, 1906, 34 Stat. 325. *Compare* Hart 2015

Report at 334 (map illustrating tribal lands remaining after allotment) to Figure 3 of Dudley Reiser Report (showing stream basins) (maps attached as Addendums 3 & 4 hereto).

Other claims to support traditional subsistence activities include claims to water rights at 24 springs in part to provide "wildlife and plant habitat for hunting and gathering rights" (*e.g.*, CSRBA Claim No. 91-7779) and water rights for 195 wetlands for "wildlife and plant habitat" (*e.g.*, CSRBA Claim No. 91-7782). The claim for lake level maintenance, CSRBA Claim No. 95-16704, is also based in part for fish and wildlife habitat. Hereafter, these categories of claims are described as "subsistence water rights."

The United States and the Tribe purport to base their implied subsistence water rights on the 1873 Executive Order, which other courts have concluded expanded the original reservation "to include the Tribe's traditional fishing grounds." *United States v. Idaho,* 95 F. Supp. 2d at 1106. Such argument, however, ignores the fact that: (1) unlike treaties interpreted to broadly reserve instream flows for fisheries, the 1873 Executive Order did not reserve an independent, "exclusive" fishing right; (2) the subsequent reduction of the Reservation in 1891 was paired with a provision dedicating the reduced Reservation to the promotion of "the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians" (Act of March 3, 1891, 26 Stat. at 1027, 1031), without any provision preserving hunting and fishing against diminution due to surrounding white settlement; and (3) Congress later opened the majority of the Reservation to homesteading by non-Indians, and did not specifically reserve hunting, fishing, or gathering rights on homesteaded lands or on allotments later sold in fee simple to non-Indians. *See Adair*, 723 F.2d at 1418 n.31 ("[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right"). The above-listed actions, both individually and in the aggregate, demonstrate that the exercise of

traditional subsistence practices was, at most, a secondary use, and not a primary purpose, of the Reservation.

a) **The claim that expansion of the Reservation in 1873 implies reservation of water to support subsistence activities ignores the fact that neither the Executive Order not any subsequent congressional act reserves the right to rely permanently on traditional subsistence activities.**

Neither the 1873 Executive Order nor the Act of March 3, 1891, reserve the right to hunt or fish as an independent property right to be thereafter held by the Tribe. Rather, the Tribe's ability to hunt and fish was limited to lands and waters that the Tribe owned and controlled—so long as the Tribe retained beneficial title to such lands and waters, it could use them for hunting, fishing, and gathering. But, as title was ceded or abrogated, so was the right to hunt, fish, and gather on the alienated lands. *See, e.g., Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985) (absent explicit reservation, no right to hunt or fish on ceded lands); *Blake v. Arnett*, 663 F.2d 906, (9th Cir. 1981) (absent explicit reservation of fishing right, no right to fish on alienated lands within reservation).

As this Court has previously acknowledged, water rights for such traditional subsistence purposes, sometimes referred to as Indian reserved water rights, are in some respects fundamentally different than the typical *Winters* water rights, which are often implied by a change in circumstances that accompanies the establishment of an Indian reservation. SRBA 03-10022 Summary Judgment Order at 24-25. The existence of an Indian reserved water right "rests on the interpretation of the treaty so as to ascertain the intent of the parties," with the "foremost principle" being that rights originally held by tribes are retained unless ceded or extinguished. *Id.* at 24. "Extinguishment of Indian title based on aboriginal possession . . . [can] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, [and] its

justness is not open to inquiry in the courts." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941).

Notably, Indian reserved water rights, particularly on reservations later opened to homesteading and non-Indian occupation, have been affirmed only where the treaty creating the reservation explicitly reserved hunting, fishing or gathering rights and contained language that "confirmed the continued existence of these rights" despite subsequent changes in reservation land ownership. *Adair*, 723 F.2d at 1414. For example, in *Adair*, the treaty provided the tribe "the exclusive right to hunt, fish, and gather on its reservation," *id.* at 1409, and such right survived the tribe's later loss of title, because congress explicitly provided that the sale of lands did not abrogate hunting, fishing, and water rights on the lands. *Id.* at 1409-12. Likewise, other cases recognizing Indian reserved water rights for subsistence purposes have based such rights on treaty provisions explicitly guaranteeing "exclusive" on-reservation fishing rights. *See Joint Bd. of Control of Flathead, Mission & Jocko Irrig. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (suggesting that Flathead Tribe had a "colorable claim" to an Indian reserved water right based on treaty language reserving "exclusive right of taking fish" on reservation streams); *State Dep't of Ecology v. Yakima Reservation Irrig. Dist.*, 850 P.2d 1306, 1315 (1993) (recognizing, pursuant to assumption of all parties, a continuing but diminished Indian reserved water right where treaty provided for exclusive right of taking fish within reservation); *cf. In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 98 (Wyo. 1988) (citing lack of treaty fishing right as supporting denial of tribe's claim of on-reservation instream flow water right for fish habitat).[11] Here, the two agreements creating the Coeur

[11] While the Ninth Circuit recognized reserved water rights for establishment of small-scale replacement fishing grounds in *Walton*, 647 F.2d at 48 and in *Anderson*, 736 F.2d at 1365, the court grounded such rights in *Winters*. The court specifically cited the changed circumstances caused by

d'Alene Reservation lack any reference to hunting, fishing, or gathering rights, exclusive or otherwise. In such instance, recognition of Indian reserved water rights for hunting, fishing and gathering would represent a significant and unwarranted expansion of the Indian reserved water rights doctrine. [12]

In short, nothing in the 1873 Executive Order, the 1887 Agreement, or the 1889 Agreement allows the Court to conclude that the United States intended to "guarantee a predetermined amount of fish, establish a minimum amount of fish, or otherwise require maintenance of the status quo." SRBA 03-10022 Summary Judgment Order at 33 (discussing off-reservation claims). Absent language establishing "an absolute right to a predetermined or consistent level of fish . . . an implied water right is not necessary for the maintenance of the fishing right." *Id.* Here, nothing in the documents creating the Reservation guarantees the Tribe a given or even a sustainable harvest of fish, game, or plant material. Given the lack of such assurances, there is no basis for implying the reservation of a water right to support traditional subsistence practices.

b) The claim of water rights for instream flows, springs, and wetlands for subsistence purposes is inconsistent with the primary purposes of the Reservation as established in 1891.

Because the Tribe never bargained for an independent hunting or fishing right, it is limited to asserting that the expansion of the Reservation in 1873 to include lands and waters necessary to traditional subsistence activities implied the reservation of water to sustain those

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construction of dams blocking migration of fish to the Tribes' traditional fishing grounds that necessitated development of the "replacement" fisheries. The court did not suggest any right to water to maintain fishing rights as exercised by the Tribe prior to the dams' construction.

[12] *See Arizona v. California*, 373 U.S. 546 (1963), wherein the Court did not imply the reservation of water rights to sustain traditional hunting and fishing, despite acknowledging that water from the Colorado River was "essential to the life of the Indian people and the animals they hunted and the crops they raised," *Id.* at 599.

activities. Any implication that may have arisen from the Reservation's expansion in 1873, however, is negated by the subsequent cession of many of those same lands and waters in the agreement of September 9, 1889 (26 Stat. at 1029-32), the Agreement of February 7, 1894 (approved in the Act of Aug. 15, 1894, 28 Stat. 286, 322), and especially the act opening the majority of the reservation to non-Indian homesteading (Act of June 21, 1906, 34 Stat. at 335). "[T]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. 544, 561 (1981). It would make little sense to imply the reservation of water rights for a subsistence-based economy that relied on large tracts of lands and water when subsequent cessions of those same lands and waters made a subsistence-based economy impossible. *See* Hart 2015 Report at 288 ("[a]s a result of the [allotment] process Coeur d'Alene ownership of reservation lands was reduced from 345,000 acres to 58,000 acres [and] the Tribe lost all lakefront and riverfront property"). See Addendum, Map 2 (1911 map of allottments).

It would make little sense to harken back to the 1873 Executive Order to imply intent to reserve water for subsistence purposes regardless of subsequent cessions when the parties, in establishing a permanent Reservation, did not themselves do so, but rather agreed that the purpose of the permanent Reservation was to engage in development that would "promote the progress . . . improvement . . . and civilization" of the Tribe. Act of March 3, 1891, 26 Stat. at 1028, 1031.[13] At the time the Reservation was permanently established, the terms "progress . . . improvement . . . and civilization" were widely used, by government officials and by the Tribe itself, to refer to the adoption of agricultural practices. When the Commission of Indian Affairs reported that the Tribe was "advanced in civilization," he

[13] *Cf. Adair*, 723 F.2d at 1410 (basing purpose of reservation on similar provision to spend money paid to tribe to "promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education").

cited their extensive "cultivat[ion of] the soil" as support for such statement. Sen. Ex. Doc. 14, *A letter of the Secretary of the Interior relative to the purchase of a part of the Coeur d'Alene Reservation*, 51st Cong., 1st Sess. 4 (Dec. 18, 1889) (1st Strack Aff. Ex. 10)(emphasis added). The commissioners sent to negotiate the 1889 cession agreement with the Tribe described the Tribe's farms as evidence of the "great progress made by these Indians in the way of civilization." *Id.* at 6 (emphasis added). During the 1889 negotiations, Commissioner Simpson, noting "your broad acres now in cultivation," told the Tribe "[y]ou have progressed astonishingly." *Id.* at 8 (emphasis added).

Likewise, during those same negotiations, tribal leaders requested additional compensation for tribal members who had "improved places" or "improvements" in the area to be ceded, and described such improvements as a "hay farm" near Fort Sherman, "that that is fenced," and as "farms" *Id.* at 11-12 (emphasis added). And 17 years earlier, in a petition to the United States, tribal leaders noted that while they were, at the time, still dependent on hunting and fishing, they had "begun tilling the soil" and "though perhaps slowly we are continually progressing." *United States v. Idaho,* 95 F. Supp. 2d at 1103 (quoting petition of Nov. 18, 1872) (emphasis added).

In sum, the historical record demonstrates that at the time Congress acted to create a permanent and reduced reservation, the terms used to describe the purposes of the Reservation, *i.e,* "progress . . . improvement . . . and civilization," would have been understood by the Tribe to refer to cultivated agriculture, and not to continued reliance on fishing and other traditional subsistence practices. Such plain language setting forth the primary purposes of the Reservation cannot be simply ignored by the Court, as would be required to imply the reservation of instream flows for fish habitat. Given the plain language in the 1891 Act establishing the purposes for which the lands were set aside, there is no legal

basis for concluding that the parties believed that preservation of fish habitat was essential to the Tribe's continued livelihood. *Cf. Arizona v. California*, 373 U.S. 546, 599 (1963) (water right created by implication only if such use of the water was "essential to the life of the Indian people"); *see also United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999) (the "necessity of water must be so great that without the water the reservation would be entirely defeated").

i. There is no precedent for the decree of reserved water rights for cultural, spiritual, ceremonial, or religious uses.

In addition to water rights claimed for traditional subsistence, the United States and the Tribe claim that water was reserved at springs and wetlands for "traditional, cultural, spiritual, ceremonial, and/or religious uses." See, e.g., CSRBA Claim No. 91-7779 (spring); CSRBA Claim No. 91-7782 (wetland).

As discussed immediately above, the Reservation established in the 1891 Act was intended to promote the Tribe's agricultural endeavors, described in terms such as "progress . . . improvement . . . and civilization." Act of March 3, 1891, 26 Stat. at 1028, 1031. Continuation of cultural, spiritual, ceremonial, and/or religious practices was neither identified as a primary purpose of the Reservation, nor specifically reserved by the Tribe. Use of water for such practices was, given the Act's plain language, secondary to the purposes for which the reduced Reservation was permanently established.

Indeed, the claims of water rights for cultural, spiritual, ceremonial, and/or religious practices lacks legal support, as amply demonstrated in the United States' brief, which cites no court decisions in support of its claims of water from springs and wetlands for traditional, cultural, spiritual, ceremonial, and/or religious uses. *See* U.S. Brief at 44-45. The Tribe, in its brief, offers no authority for, and does not even discuss, such purposes.

The sole court decision that appears to even address the reservation of water for such traditional uses is dicta from *Gila River V*, which states that "[w]ater uses that have particular cultural significance should be respected, where possible." 35 P.3d at 80. There is no indication that the court's dicta ever resulted in the award of water rights for cultural or religious purposes outside the context of a settlement agreement. Likewise, so far as the State has been able to determine, no other court has, absent agreement of the parties, recognized the reservation of water for the broad array of traditional or cultural uses claimed here.

c) The fact that water uses for subsistence, cultural, and religious practices are non-consumptive is not a valid basis for decreeing such water rights for places of use on non-tribal lands.

The United States asserts that its claims for consumptive use are limited to: (1) lands owned by the United States and held in trust for the Coeur d'Alene Tribe or an allottee; and (2) lands owned in fee by the Coeur d'Alene Tribe at the time that the claims were filed. U.S. Brief at 41. But, as the United States admits, its non-consumptive claims "include waters that cross private lands within the Reservation boundary." *Id.* The United States offers no authority for decreeing nonconsumptive or *in situ* reserved water rights on private land, other than to assert that it is "typical" for the State to hold such nonconsumptive water rights over private lands for the benefit of fisheries important to all persons. *Id.* The United States' assertion compares apples to oranges. The State may impose minimum stream flow requirements on waterways flowing over private lands as an exercise of the State's police power to regulate the diversion or withdrawal of water. *See DeRousse v. Higginson*, 95 Idaho 173, 182, 505 P.2d 321, 330 (1973) ("[t]he supervision by the state of withdrawal and use of water by and among the various claimants to its waters is an activity which is comprehended by the police power"). An Indian reserved water right, however, is not founded in federal or

tribal powers to regulate the use of natural resources on private lands, which powers, with limited exceptions, are generally lacking. *See, e.g., Montana v. United States*, 450 U.S. 544, 564-65 (1981) (tribe had no power to regulate taking of wildlife on nonmember lands within reservation). Rather, a tribal non-consumptive water right is a form of property right—a fact demonstrated by repeated judicial holdings that reserved water rights must be appurtenant to reservations of federal land. *See. e.g., United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999) ("[a] reserved water right must be based on a reservation of land").

Because tribal reserved water rights are property rights, they cannot be retained by the Tribe on reservation lands opened to homesteading unless the Tribe expressly retained such property rights at the time the lands were transferred to non-Indian ownership. This facts is amply demonstrated by the series of Ninth Circuit cases addressing non-consumptive reserved water rights.

In the first case, *Colville Confederated Tribes v. Walton*, the court addressed a unique factual situation: the tribe, cut off from its traditional fisheries on the Columbia River by the construction of federal dams, had developed a replacement fishery in a small, self-contained water basin on the reservation. The adult fish lived in a lake without outlet, and spawned in the single creek that fed the lake. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 2d 1320, 1324-25 (E.D. Wash. 1978). All of the lands in the basin had been allotted, and the tribe had acquired most of the allotments by acquisition or long-term lease. *Id.* at 1324. Three other allotments on the creek were owned by a non-Indian, Walton, who had purchased them from the original allottee. *Id.* The tribe had developed spawning grounds by re-routing the lower reach of the creek, which flowed through the allotments owned or controlled by the Tribe. *Id.* at 1325; 647 F.2d at 45 ("[t]he Indians cultivated No Name Creek's lower reach to establish spawning grounds").

The court implied the reservation of instream flows to protect the fish habitat on the tribally-controlled allotments in the lower reach of the creek. 647 F.2d at 48. Nothing in the opinion indicates that the Tribe had any right to protect fish habitat in that portion of the creek flowing through Walton's allotment. Thus, the decision establishes nothing other than the unremarkable proposition that a Tribe may have a water right to protect fish habitat on lands that continue to be held in trust for the Tribe, a fact demonstrated by the court's note that "[w]e need not consider what effect the opening of reservation lands for entry and settlement had on the control of water on or appurtenant to such lands. All of the lands here involved were allotted." 647 F.2d at 53 n.16.

In the second Ninth Circuit case, *United States v. Adair*, the court had the opportunity to address the circumstances under which water rights reserved for fish habitat could continue to exist on private lands which had formerly been reserved for a tribe. *Adair* addressed water rights on the "terminated" Klamath Reservation. Pursuant to since-discarded policies, Congress terminated the Klamath Reservation in 1954 by acquiring the vast majority of property within the Reservation and taking steps to terminate federal supervision over tribal property and tribal members. *See* 68 Stat. 718 (Klamath Termination Act).

In conjunction with the termination provisions, Congress provided that the termination of the reservation and sale of former reservation lands would not affect Article I of the Klamath Tribe's 1864 Treaty, which provided the tribe "the exclusive right to hunt, fish and gather on their reservation." *Adair*, 723 F.2d at 1398; *see also* 68 Stat. at 722, § 14(b) ("[n]othing in this Act shall abrogate any fishing rights or privileges of the tribe or the

members thereof enjoyed under Federal treaty").[14] And, the termination act included a provision stating that "[n]othing in this Act shall abrogate any water rights of the tribe and its members." 68 Stat. at 722, § 14(a).

Given the express reservation in the termination act of the treaty's "exclusive" hunting and fishing rights on private lands, and the express reservation of all water rights, the court concluded that non-consumptive instream flow water rights reserved in the 1864 Treaty were not affected by the termination of the reservation. 723 F.2d at 1412. The court cautioned, however, that it would reach a different conclusion where land was opened to non-Indian ownership without an express reservation of hunting or fishing rights: it held that "[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right." 723 F.2d at 1418 n. 31. Thus, *Adair* offers no support for the United States' claim that water rights to protect fish habitat continue to apply to waterways on reservation lands opened to non-Indian ownership with no express reservation of hunting and fishing rights.

The final Ninth Circuit decision to address reserved water rights for fish habitat was *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd in part*, 736 F.2d 1358 (9th Cir. 1984), issued a year after the *Adair* decision. *Anderson* addressed water rights on a reservation opened to homesteading, and the court determined that reserved water rights were extinguished when opened lands were homesteaded:

> *Winters* rights were only intended to assist in accomplishing the needs of the reservation; where the land has been removed from the Tribe's possession and

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[14] Article I of the 1864 Klamath Treaty provided that the Tribe would have "exclusive" fishing privileges within the reservation. Prior to *Adair*, the federal courts had interpreted Article I to include exclusive hunting and gathering privileges as well, *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974), and concluded that such rights likewise survived termination of the reservation. *Kimball v. Callahan*, 590 F.2d 768, 775 (9th Cir. 1979).

> conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated.

Anderson, 736 F.2d at 1363. The clear implication of the court's holding was that all implied water rights, including water right to support hunting and fishing, are extinguished when lands are homesteaded, a result in line with the holding in *Adair* that there would be no basis for a hunting and fishing water right on homesteaded lands without an express reservation of the underlying hunting and fishing rights.

At the same time, the court recognized a reserved water right for fish habitat on the lower mile and one-half of Chamokane Creek, a non-navigable stream that bordered the reservation. 591 F. Supp. at 4. The court did not address ownership of the land over which the Creek flowed, but the boundary of the reservation, which lay west of the Creek, was drawn down the east bank of the Creek, so as to purposefully enclose the entirety of the Creek in the Reservation. Ex. Order of Jan. 18, 1881, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 925 (1904). Presumably, the bed of the creek remained under tribal ownership at the time of the *Anderson* decision, but regardless, no party appears to have asserted that the tribe's fishing rights or the claimed instream flow had been extinguished due to the opening of the reservation.

In sum, the decisions in *Walton* and *Anderson* are consistent with the holding in *Adair* that the transfer of land to private interests without an explicit reservation of hunting, fishing, or gathering rights extinguishes any basis for a reserved water right to support those traditional subsistence activities. 723 F.2d at 1418 n. 31. Here, when Congress opened the Coeur d'Alene Reservation to allotment and homesteading, there was no express reservation of hunting, fishing or gathering rights on private lands. When lands within a reservation are conveyed to non-members without an "express reservation or creation of fishing or hunting

rights" for the benefit of the tribe, the conveyance "grant[s] an unencumbered title" to the purchaser, "which would not be subject to any interest in the land that might be implied from the mere creation of the reservation." *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981).[15] Given that the Tribe has no right to hunt, fish, or gather on private lands within the Reservation, it likewise lacks any right to preserve and protect habitat for fish, game, and native flora on private lands—therefore, the United States' claims for fish habitat flows, springs, and wetlands, if not denied as inconsistent with the primary purposes of the Reservation, must be denied to the extent the place of use is on private lands.

6. The Alleged "Homeland" Purpose does not Require that a "Natural Hydrograph" Be Maintained for Coeur d'Alene Lake.

The United States claims it reserved water to maintain Coeur d'Alene Lake for purposes of "food; fiber; transportation; recreation; religious, cultural and ceremonial; fish and wildlife habitat; lake level and wetland maintenance; water storage; power generation; and aesthetics." CSRBA Claim No. 95-16704. Likewise, the United States claims a water right to the lower St. Joe River for fish habitat. CSRBA Claim No. 95-7777. In both instances the United States seeks a water right resembling the "natural" hydrograph of such water bodies as they existed prior to construction of Post Falls Dam.

The State asserts that such claims should be denied for the reason that the claimed purposes are not, as discussed above, primary purposes of the Reservation. All of the purposes listed in Claim Nos. 95-16704 and 95-7777 were understood, at the time of the Reservation's permanent establishment in 1891, to be secondary to the primary purpose of ensuring a land base for the Tribe's then ongoing and highly successful agricultural

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[15] For a more detailed discussion of how the holding in *Blake v. Arnett* applies to the Coeur d'Alene Reservation, see the State of Idaho's Memorandum in Support of Summary Judgment, pages 69-70 and 76-77.

endeavors. In addition, however, there are circumstances unique to the Lake and the lower St. Joe River that require the Court to deny the United States' claims of a right to maintain the natural hydrograph of those water bodies.

The United States bases its claim, in part, on the fact that within the current boundaries of the Coeur d'Alene Reservation, the United States holds the beds and banks of Coeur d'Alene Lake and the lower St. Joe River in trust for the Tribe. The United States suggests that ownership of the beds and banks of a navigable waterway implies a property interest in the overlying waters. There is no support for such a proposition. If there were, then the State would automatically have a water right to all waters in navigable waterways. It does not. When the State determines it is in the public interest to maintain a certain lake level or stream flow in a navigable lake or stream, it, like every other water user, must apply for such water right and describe specifically the purpose of use and the amount of water that can be beneficially used for such purpose.

Analogous principles apply to lake beds and river beds held by the United States for the Tribe's benefit. There is no automatic reservation of water rights simply because the bed of a water body is included in a federal reservation. For example, in *United States v. New Mexico*, 438 U.S. 696 (1978), the Court addressed whether the United States had reserved water rights in the Rio Mimbres, which "originates in the upper reaches of the Gila National Forest" before disappearing in a desert sink. *Id.* at 697. While the river was apparently non-navigable and part of the forest reservation, the Court did not suggest that reservation of the land underlying the river in any way implied reservation of a water right in the river itself. Rather, water rights to the river were not reserved because such water rights were not necessary to achieve the primary purposes of the forest reservation. *Id.* at 708-12.

Likewise, in *Cappaert v. United States*, 426 U.S. 128 (1976), the United States reserved a national monument which included the bed of an underground pool that served as habitat for an isolated fish population. The Court never suggested, however, that reservation of the bed of the water body implied reservation of all overlying waters as they existed at the date of reservation. Rather the Court examined the specific purposes of the overall reservation, and concluded that water was reserved only to the extent necessary to fulfill the purpose of the reservation. Even then, the Court did not imply the reservation of water to cover all beds and banks of the pool. Rather, the Court allowed water in the pool to be appropriated for off-reservation development so long as a ledge that served as spawning habitat was protected. *Id.* at 141.

And finally, in *Adair*, the court, addressing Indian reserved water rights, again made no suggestion that the mere inclusion of the Williamson River in the Reservation implied the reservation of the overlying waters—rather, its decision rested entirely on the fact that the Tribe had explicitly reserved to itself "exclusive" fishing rights on the River. 723 F.2d at 1409.

In short, *New Mexico, Cappaert, and Adair* demonstrate that inclusion of the beds of a water body in a reservation does not, by itself, imply reservation of all overlying waters. Regardless of whether title to beds and banks in a reservation resides in the United States or the State, the court must engage in a searching inquiry to determine the purposes of the reservation, and whether such purposes would be entirely defeated without water rights. Such inquiry is particularly relevant when addressing a claim founded in traditional or aboriginal subsistence practices—in such an event there must be language in the agreement or act establishing that "one of the 'very purposes of establishing the . . . Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Adair*, 723

F.2d at 1409. Here, the acts creating the reservation are plainly lacking any reference to hunting or fishing rights, and the claims for lake level and instream flow water rights to sustain such practices must be denied.

a) **The Federal Energy Regulatory Commission has already determined that maintenance of a natural lake level is not a primary purpose of the reservation.**

Water elevations on Coeur d'Alene Lake and the lower St Joe River are controlled by Post Falls Dam. Hart 2015 Report at 287. Washington Water Power Company (now Avista Corporation) acquired the site from Frederick Post in 1906 and constructed a hydroelectric facility. *Id.* Following hearings, the Department of Interior granted a permit to WWP in 1912 allowing the company to overflow Reservation lands. *Id.* at 299-300. Today, use of Reservation lands for water storage by Avista Corporation is controlled by the terms of a license issued by the Federal Energy Regulatory Commission (FERC). Avista pays annual charges to the Tribe for storage of water over beds and banks held in trust for the Tribe. *Order Issuing New License and Approving Annual Charges for the Use of Reservation Lands,* 127 FERC ¶ 61,265, ¶ 62,163 (June 18, 2009). The Post Falls Dam "controls water levels in the Spokane River and Coeur d'Alene Lake approximately six months a year starting in late June or July, after the spring runoff flows have peaked and largely subsided." 127 FERC at ¶ 62,160. Water levels are held at or near 2128 feet above sea level "[t]hroughout the summer recreation season," then gradually released after Labor Day. *Id.*

Here, the United States claims the right "to maintain the natural monthly Lake elevations and outflows" of Coeur d'Alene Lake,[16] and insists that the Tribe, being

[16] United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p. 4 ("Cover Letter").

"dependent on the Lake for subsistence, including hunting, fishing, and gathering . . . in effect, bargained for the natural hydrograph of the Lake." U.S. Brief at 42-43. The water right claim, if implemented, would effectively prohibit development at Post Falls, because the claim requires a minimum outflow that is inconsistent with use of Coeur d'Alene Lake for water storage. CSRBA Claim No. 95-16704. The claim recognizes such fact by acknowledging that "the outflows will not be required during the effective period" of the "present licensed operations at Post Falls." CSRBA Claim No. 95-16704. *Id.*[17]

The purported purpose of the lake level claim is to prevent development of Coeur d'Alene Lake upon expiration of the current FERC license by restoring "the natural Lake processes [that existed] prior to Post Falls Dam." Claim No. 95-16704, § 10. Such purpose is inconsistent with subsequently-enacted general federal laws promoting hydropower development on Indian reservations.

The Federal Power Act (FPA) was enacted "to provide for the . . . development of water power [and] the use of the public lands in relation thereto." *Fed. Power Comm'n v. Union Elec. Co.*, 381 U.S. 90, 100 (1965) (quoting preamble to FPA, 41 Stat. 1063 (1920)). If the FERC determines that a water power development proposal is "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development,[and] for the adequate protection, mitigation, and enhancement of fish

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[17] The outflows claimed in Claim No. 95-16704 range from a low of 974 cfs in September to a high of 23,000 cfs in May. The claimed flows conflict with the FERC license, which establishes summer outflows of 600 cfs, but if the elevation of the Lake decreases below 2,127.75 feet at any time between June 7 and the Tuesday following Labor Day, then outflows must be reduced to 500 cfs "in order to maintain lake elevations for summer recreation . . . ." *Project No. 2545-115: Order Modifying and Approving Discharge Flow Monitoring Plan for the Post Falls Development*, 131 FERC ¶ 62246, 64644 (June 18, 2010).

and wildlife," then FERC may grant a license for such an operation, and authorize the use of "any part of the public lands and reservations of the United States." 16 U.S.C. §§ 797(e), 803. The term "reservation" includes "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2). If the water power development requires use of tribal lands, then FERC may issue the license "only after a finding by the Commission that the license will not interfere with or be inconsistent with the purpose for which such reservation was created . . . ." 16 U.S.C. § 797(e).

Here, FERC has issued a license allowing modification of the natural hydrograph and storage of water in Coeur d'Alene Lake and the lower part of the St. Joe River. *Order Issuing New License and Approving Annual Charges for the Use of Reservation Lands,* 127 FERC ¶ 61,265 (June 18, 2009). In order to issue the license, the FERC was required to find that the licensed operations are not "inconsistent with the purpose for which such reservation was created." 16 U.S.C. § 797(e). The FERC made such a finding for the Post Falls Dam, stating that the Tribe "raised no objection to the fact that the project reservoir, Coeur d'Alene Lake, occupies part of the reservation," and citing the lack of "any evidence that relicensing the Post Falls development as part of the Spokane River Project would adversely affect the reservation." *Id.* at ¶ 62,169.

FERC's finding that water storage on the Lake is not inconsistent with the purposes of the Reservation, and the Tribe's concession to that effect, undermine the claim that one of the very purposes of the Reservation was maintenance of "the natural Lake processes prior to Post Falls dam." CSRBA Claim No. 95-16704 § 10. If a primary purpose of the Reservation was maintenance of natural lake processes, the FERC would have been required to deny the license.

The United States and the Tribe were both parties to the FERC proceedings, and did not contest the determination that use of the Lake for water storage "will not interfere with or be inconsistent with the purpose for which such reservation was created . . . ." 127 FERC at ¶ 62,169. Indeed, the fact that the United States and the Tribe request that any lake level water right be deferred for the term of the current 50-year FERC license demonstrates their continuing agreement with FERC's determination that fulfillment of the Reservation's purposes does not require that the natural hydrograph be maintained. That being the case, Claim No. 95-16704 must be denied.

Likewise, the Court must deny Claim No. 91-7777, which seeks to establish a natural stream flow regime for that portion of the St. Joe River within the Reservation. The portion of the St. Joe River that lies within the Reservation is part of the project area inundated under the terms of FERC License No. 2545-091. 127 FERC at ¶ 62,158. The FERC's finding that inundation of the lower St. Joe River for hydropower storage is consistent with the purposes of the Reservation precludes the United States' claim that the purpose of the Reservation requires maintenance of the instream flows that existed prior to construction of Post Falls Dam.

b). The United States' claim for lake level maintenance ignores the critical fact that Congress purposefully split the lake, retained only a small portion within the Reservation, and released the remainder from tribal control.

The United States' lake level maintenance claim, which is based exclusively on "federal and tribal intent as it was understood in 1873" (CSRBA Claim No. 95-16704, § 10), ignores the subsequent exclusion of over 80% of the Lake from the Reservation in the 1889 cession agreement, which re-drew the Reservation boundaries to purposefully bisect the

Lake.[18] The United States' deliberate avoidance of the consequences of the exclusion of most of the Lake from the Reservation violates the Supreme Court's admonishment that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. 544, 561 (1981). The United States cannot simply claim that a purpose of the 1873 Executive Order was to maintain the Lake's natural hydrograph without addressing the consequences of the subsequent bisection of the Lake.

The bisection of the Lake was conclusively established by the federal litigation over lake ownership, including the district court decision (*United States v. Idaho*, 95 F. Supp. 2d 1094 (D. Idaho 1998)), the Ninth Circuit Court of Appeals' decision (*United States v. Idaho*, 210 F.3d 1067 (2000)), and the Supreme Court's decision (*Idaho v. United States*, 533 U.S. 262 (2001)). As both the United States and the Tribe assert, the parties to such litigation are "collaterally estopped and barred from challenging the findings of facts and conclusions of law" therein. Tribe's Brief at 4 n.2; U.S. Brief at 19 (arguing State is bound by factual findings not challenged on appeal). Indeed, the United States and the Tribe collectively cite over 120 factual findings and conclusions of law from the *United States v. Idaho* litigation that they assert must be adopted by this Court.

In *United States v. Idaho*, all three courts found that the 1889 agreement purposefully bisected the Lake to exclude the northern portion of the Lake from the Reservation, and such findings were integral to the courts' decisions. After an exhaustive review of the historical facts, the district court found that Congress, "authoriz[ed] the Federal

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[18] In the federal cases addressing ownership, the district court found that the "northern two-thirds" of the Lake was excluded from the Reservation and the "southern one-third" was reserved for the Tribe. *United States v. Idaho*, 95 F. Supp. 2d at 1096. If one goes by length, approximately one-third of the Lake is within the current Reservation. By area, 15.5% to 18% of the Lake is within the current Reservation. Affidavit of David B. Shaw ¶¶ 8 &12 (filed Oct. 21, 2015).

Government to negotiate with the Tribe for a release of the submerged lands," 95 F. Supp. 2d at 1114, and concluded that:

> The resulting negotiations lead [sic] to an agreement in 1889, in which the Tribe ceded the approximate northern third of the 1873 reservation to the United States. The portion of the reservation subject to the 1889 cession included within its boundaries the approximate northern two-thirds of the Lake.
>
> . . . .
>
> Thus, the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one-third of the Lake included within the new reservation boundaries.

95 F. Supp. 2d at 1096, 1113. The Ninth Circuit also concluded that "the main purpose of the new [1889] negotiations was to regain from the Tribe whatever submerged lands it was willing to sell," 210 F.3d at 1077 n.14, and affirmed the district's court's findings regarding the subsequent bisection of the Lake:

> Following negotiations, the Tribe agreed to cede the approximate northern third of its 1873 reservation to the United States; this area included roughly the northern two-thirds of the Lake (the "1889 agreement").
>
> . . . .
>
> The map submitted to Congress along with the written terms of the agreement showed the boundary of the reservation as bisecting the Lake from west to east at its southern third.
>
> . . . .
>
> As noted, the reservation's boundaries were redrawn by the 1889 agreement to split the lake—a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe and the maps submitted to Congress . . . the natural reading of all available documents points to a purposeful division of the Lake.

210 F.3d at 1071, 1075. The Supreme Court likewise concluded that in 1889, "the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur

d'Alene, in exchange for $500,000 . . . [t]he new boundary line, like the old one, ran across the lake." 533 U.S. at 269-70.

The courts' holdings regarding the bisection of the lake cannot be dismissed as mere dicta, for the courts relied on the Lake's bisection as significant evidence of federal intent to affirm tribal title to the Lake south of the bisection line. In the words of the district court, the bisection of the Lake was "'compelling evidence' that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake." 95 F. Supp. 2d at 1115. Likewise, the Ninth Circuit held that the "manner in which the boundaries of the reservation were determined" was relevant evidence of intent, and noted that:

> [S]ignificantly, when the 1873 boundaries were renegotiated in 1889, the "northern boundary line of the diminished reservation was drawn so as to bisect the Lake" specifically "for the purpose of establishing the Tribe's right to the Lake and rivers."
>
> . . . .
>
> As we recognized in another case in which we upheld tribal claims to submerged lands under the half of a lake within the borders of a reservation, "[i]t would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir.1982).
>
> . . . This observation is equally pertinent here, where the natural reading of all available documentation points to a purposeful division of the Lake.

210 F.3d at 1075.

In short, the "purposeful division" of the Lake was a critical factual finding that the federal courts relied upon in determining intent to reserve the southern portion of the Lake's submerged lands for the Tribe. This factual finding was not challenged by either the Tribe or the United States on appeal. As the Tribe concedes, collateral estoppel applies to all

findings of fact made in the lake ownership litigation. Tribe's Brief at 4 n.2. For purposes of these summary judgment motions, the relevant fact is the federal court's finding that "the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of [the] Lake excluded from the reservation." 95 F. Supp. 2d at 1113. This Court need not, and has no jurisdiction to, quiet title to submerged lands in the northern part of the Lake. But such a determination is not necessary here. Regardless of title to the underlying submerged lands, the Lake, north of the bisection line, was excluded from the Reservation.

The United States ignores the fact that Congress sought "release of the submerged lands" from tribal control, 95 F. Supp. 2d at 1114, and asserts that the Tribe, nonetheless reserved to itself the right to determine water levels in the Lake based on its retention of less than one-fifth of its submerged lands. Moreover, the United States, by claiming the right to maintain outflows in the Spokane River below Post Falls, ignores the fact that the Tribe insisted that such section of the River be conveyed into the ownership and control of Frederick Post for the express purpose of allowing Post to use it "for water power and improvements." Act of March 3, 1891, 26 Stat. at 1031-32.[19]

It surpasses reason to conclude that Congress intended to simultaneously release the vast majority of the Lake from tribal control while reserving tribal control over the Lake's water level. The irrationality of such a conclusion is further exacerbated by Congress' conveyance of Post Falls into private hands for the express purpose of erecting water power improvements. The plain language of the 1889 Agreement is unambiguous: 80% of the Lake was excluded from the Reservation, and control of the Lake's outlet, and the corresponding control over lake levels, was conveyed to Frederick Post, subject to applicable

[19] The fact that the Tribe expressly deeded Post Falls to Frederick Post to allow him to develop it for "water power" effectively disposes of the United States' claim of the right to maintain lake levels for water storage and power generation.

state and federal regulations—a fact confirmed by FERC's issuance of a license allowing use of the Lake for water storage, and its finding that such use is not inconsistent with the purposes of the Reservation. Given the bisection of the Lake, the express conveyance to Post, and the finding by an administrative agency of competent jurisdiction that water storage does not violate the purposes of the Reservation, this Court must deny the claimed right to maintenance of a "natural" flow regime on both the Lake and the lower St. Joe River.

c). Assuming, for purposes of argument only, that the United States Is entitled to maintenance of lake elevations, there is no requirement that such elevations be maintained by "natural" inflows and outflows.

Claim No. 95-16704 asserts the right to maintain the elevation of Coeur d'Alene Lake at a specific level each month, ranging from a high of 2,129.6 feet elevation in May to a low of 2,120.4 feet in September. Such elevations, however, are combined with required outflows immediately below Post Falls dam, ranging from a high of 23,000 CFS in May to a low of 974 CFS in September. As a result, the specific water levels can be maintained only "so long as there is a sufficient flow into the Lake." CSRBA Claim No. 95-16704 § 10.a. In other words, the specified outflows require correspondingly high inflows to maintain the lake levels requested in the claim.

As the United States concedes, however, its claim for maintenance of lake level elevations is limited to the following place of use: "[t]hat portion of Lake Coeur d'Alene and its related waters that are located within the boundary of the Coeur d'Alene Reservation." CSRBA Claim No. 95-16704, § 5. Thus, by its terms, the rights asserted in CSRBA Claim

No. 95-16704 would be fulfilled so long as the lake elevations within the specified place of use remain at or above the levels specified in § 8 of the Claim (Quantity Reserved).[20]

The implied-reservation-of-water doctrine has always been described as the right to that minimum quantity of water necessary to fulfill the purposes of a reservation. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976) ("[t]he implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more"). No court has suggested that the doctrine includes a corresponding right to dictate how such a quantity is delivered to the place of use.

Courts have rejected, moreover, any interpretation of the implied-reservation-of-water doctrine that would require restoration of a waterway to a "natural," pre-dam condition. In *Adair*, the Ninth Circuit held that the Tribe's entitlement to an instream flow did not imply a right to "restoration of an 1864 level of water flow" or what the objectors called a "wilderness servitude." 723 F.2d at 1414. Rather the tribe was entitled only to a specific quantity of water necessary to support "its hunting and fishing rights as currently exercised." *Id.* And, in both *United States v. Anderson* and *Colville Confederated Tribes v. Walton*, the federal courts, addressing water rights for reservations where historic fishing grounds were destroyed by the construction of dams on the Columbia River, did not imply a right of restoration of natural stream processes. Rather, the courts implied the reservation of a quantity of water sufficient for development of small-scale "replacement fishing grounds." *Anderson*, 591 F. Supp. at 8, *aff'd*, 736 F.2d 42 (9th Cir. 1981); *Walton*, 47 F.2d at 48.

In short, if the purpose of the Coeur d'Alene Reservation implies the need for a non-consumptive water right, such purpose is fulfilled by providing a quantity of water at the

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[20] The States reserves the right to challenge the claimed lake levels during the quantification phase of this litigation, if such is necessary.

place of use sufficient to meet the Tribe's needs as currently exercised, but does not require restoration of waterways to the condition existing at the time of reservation. Here, so long as the minimum quantify of water, expressed as a lake elevation, is present at the claimed place of use, the alleged purpose of the Reservation is fulfilled, regardless of the means used to deliver such quantity of water to the Tribe, and regardless of outflows in the Spokane River, more than twenty miles downstream from the claimed place of use on the Reservation. Whether the water level results from a combination of inflows and outflows, or whether the water level results from water backing up behind a dam constructed at Post Falls, the end quantity present at the place of use is the same. Therefore, in the unlikely event the Court determines that the Tribe is entitled to the maintenance of certain lake levels, the Court should deny the associated claim for instream outflows as measured in the Spokane River. By denying the claimed outflows, a water right for the Lake would, in the unlikely event of cessation of FERC licensed operations at Post Falls, leave open the possibility of fulfilling the claimed water right through other means that fulfill the claimed purpose of the water right, such as construction of a replacement dam that maintains water levels in the Lake at or above whatever levels may be established if the claim proceeds to quantification.

Similar reasoning applies to Claim No. 91-7777, for instream flows on the lower St. Joe River. If water storage by the Post Falls project results in the physical presence of water in the St. Joe River, then the Tribe's interest in having water present at the place of use is fulfilled, regardless of whether such quantity of water is flowing through the place of use at the current rate or at the rate that existed before construction of Post Falls Dam.

V. CONCLUSION

For the reasons stated here, the State of Idaho respectfully submits that the Court should deny the summary judgment motions of the United States and the Coeur d'Alene Tribe, and grant the summary judgment motion submitted by the State.

Respectfully submitted this 22d day of February, 2017.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT MOTION FOR SUMMARY JUDGMENT was sent on February 22, 2017, by overnight delivery to the SRBA Court, 253 3rd Avenue North, Twin Falls, Idaho, 83303-2702, and mailed on February 22, 2017, with sufficient first-class postage to the following:

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