

2-24-2017

Idaho's Statement of Additional Facts

Steven W. Strack

Deputy Attorney General, State of Idaho

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/all>

Recommended Citation

Strack, Steven W., "Idaho's Statement of Additional Facts" (2017). *Hedden-Nicely Collection, All*. 49.
<https://digitalcommons.law.uidaho.edu/all/49>

This Brief is brought to you for free and open access by the Digital Commons @ UIIdaho Law at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Hedden-Nicely Collection, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

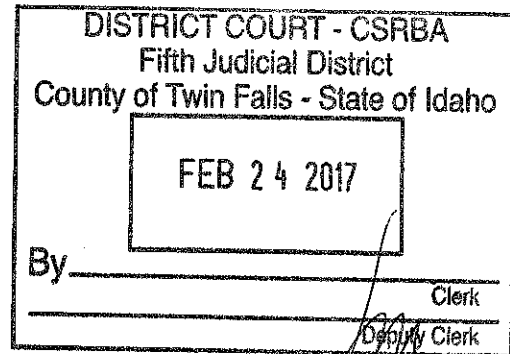
ORIGINAL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG, ISB No. 2207
Deputy Attorney General
Chief, Natural Resources Division

STEVEN W. STRACK, ISB. No. 3906
Deputy Attorney General
700 W. State Street – 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010
Phone: (208) 334-2400
Facsimile: (208) 854-8072
steve.strack@ag.idaho.gov

Attorneys for the State of Idaho



**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 STATEMENT
) OF ADDITIONAL FACTS
)
)

DESCRIPTIVE SUMMARY

The following Statement of Additional Facts is submitted to supplement the United States' and Coeur d'Alene Tribe's Joint Statement of Facts. Many of the Facts set forth herein were included in the State's opening brief in support of its summary judgment motion. This Statement sets forth such facts in more accessible form.

TABLE OF CONTENTS

I.	Corrections to United States and Coeur d'Alene Tribe's Joint Statement of Facts	3
II.	Additional Facts	5
A.	The Tribe's Farming Successes: 1873-1891	5
B.	The 1887 Agreement and its Aftermath	9
C.	The 1889 Agreement & Cession	12
D.	Act of March 3, 1891	15
E.	Traditional Subsistence Actions: 1887-1910	17
F.	The 1894 Agreement & Cession	19
G.	1906-1910: Allotment and Opening of the Reservation	19
H.	Post-Allotment Era	20

I. CORRECTIONS TO UNITED STATES AND COEUR D'ALENE TRIBE'S JOINT STATEMENT OF FACTS

For purposes of arguing the pending summary judgment motions only, and reserving the right to contest and impeach the expert testimony of the United States and the Tribe in the event of a trial of this action, the State does not dispute the facts asserted in the United States and Coeur d'Alene Tribe's Joint Statement of Facts, except as follows:

Joint Statement ¶¶ 3, 4, 12, 71, 107: The assertion that the intent of the United States and the Coeur d'Alene Tribe was to provide a "homeland" for the Tribe is a legal conclusion, not a historic fact. The term "homeland" is not used in any historic documents to describe the purpose of the Coeur d'Alene Reservation.

Joint Statement ¶ 11: The reference to an "imposed physical distance from Lake Coeur d'Alene" implies that the Tribe's relocation from traditional village sites along waterways to the Hangman's Creek valley was involuntary. It is undisputed, however, that the relocation was voluntary. Smith 2015 Report at 79; Hart 2015 Report at 158-59 (the Tribe was, by 1878, "beginning to accept the loss of resources upon which they had previously relied" and "finally agreed to make the big move" to the farming lands in the DeSmet area).¹

Joint Statement ¶¶ 26 & 27: The asserted facts relating to use of waterways for transportation fail to note the conclusion of the Tribe's expert witness that the Tribe "by 1760 probably had completely adapted their lifestyle to the use of the horse, and adequate herds of horses. After the acquisition of the horse, tribal members were able to travel over

¹ Herein, "Smith 2015 Report" refers to Ian Smith, *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation*; "Hart 2015 Report" refers to E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use 1780-1915*; "Smith Rebuttal Report" refers to Ian Smith, *A Response to the Expert Report of Stephen Wee Regarding the Establishment of and Purposes for the Coeur d'Alene Indian Reservation*; "Wee Report" refers to Stephen Wee, *Establishment of the Coeur D'Alene Indian Reservation and the Transformation of Coeur D'Alene Land and Water Use, From Contact Through Allotment* (submitted concurrently with this Statement as exhibit to Affidavit of Stephen R. Wee).

longer distances in shorter times making some water related resources more accessible.”
Hart 2015 Report at 44.

Joint Statement ¶ 56: While Fort Hall Indian Agent Henry Reed was appointed as a member to the Shanks Commission, he did not participate in the 1873 council with the Coeur d’Alene Tribe. Hart 2015 Report at 129-30.

Joint Statement ¶ 60: The Joint Statement asserts that language in the 1873 Agreement declaring that “the waters running into said reservation shall not be turned from their natural channel where they enter said reservation” “reflect[s] the importance of these waterways.” The interpretation of the unratified agreement is a legal opinion, not a statement of undisputed fact.

Joint Statement ¶ 67: The Joint Statement suggests that the 1873 Executive Order “sought to mirror the 1873 Agreement, including its provision that “the waters running into said reservation shall not be turned from their natural channel where they enter said reservation” The Executive Order neither includes nor “mirrors” the quoted language.

Joint Statement ¶ 70: The Joint Statement asserts that the 1873 Agreement stipulates that the cession of tribal lands “would occur through the enactment of ‘the necessary legislation confirming this agreement.’” The language within the internal quotation marks, however, does not appear in the 1873 Agreement. USA-CDA000021487 to 21496.

Joint Statement ¶ 71: The assertion that the 1873 Executive Order expanded the Reservation “to include all the Lake” should be amended to “include almost all the Lake.” See Joint Statement ¶ 2 (“sliver [of Lake] cut off by northern boundary”).

Joint Statement ¶ 89: The Joint Statement implies that Coeur d’Alene reliance on hunting and fishing remained unchanged from 1840 to the early 1900s (“[i]ndeed, as they had done since the arrival of the Jesuits in the 1840s, the Coeur d’Alene Indians continued to

rely on a mix of agriculture, hunting, fishing, and gathering activities to provide for their subsistence in the decades both leading up to and following the negotiations of the 1887 and 1889 agreements”). Historical facts, however, show that while tribal members continued to fish and hunt along waterways (as did their white neighbors), there was an increasing reliance on agriculture over that period. See ¶¶ 1-12 under “Additional Facts” herein.

Joint Statement ¶¶ 94-98: This portion of the Joint Statement relates to modern use and management of the Lake in the 1970s to present. The State contests the relevance of this portion of the Joint Statement: the only issue before the Court is the purpose of the Reservation, which requires inquiry into the intent of the documents establishing the Reservation. The use and management of the Lake 80 years after the Reservation’s establishment has no relevance in establishing the purpose of the Reservation.

II. ADDITIONAL FACTS

The State submits the following facts, in addition to those set forth in the United States and Coeur d’Alene Tribe’s Joint Statement of Facts.

A. The Tribe’s Farming Successes: 1873-1891

1. “[T]he majority of Coeur d’Alene families began to relocate to the DeSmet [Hangman Creek] area by the late 1870s and early 1880s.” Smith 2015 Report at 80.
2. “By 1879 Coeur d’Alene tribal members had established over one hundred small gardens and farms, many of them with fenced fields, had built many houses, and were already selling oats at Fort Coeur d’Alene (using the lake to haul their goods by boat) and Palouse City. One agent complimented them for eating meals in restaurants in the cities and ‘paying without hesitation their 50 cents...the same as whites.’” Hart 2015 Report at 166.
3. In 1881, the Resident Farmer for the Coeur d’Alene Reservation reported that among the adult males of the Tribe, there were “111 farmers, 3 hunters or trappers,” with

nearly 4,500 acres under cultivation, and an expected harvest of nearly 20,500 bushels of wheat and 28,000 bushels of oats. (August 16, 1881 letter of Letter of James O'Neill, as published in the 1881 Annual Report of the Commission of Indian Affairs, p. 219) (USA-CDA00004278).

4. By August 1882, the Coeur d'Alenes had a reported "5,000 acres under cultivation," with "many well-fenced farms." Smith 2015 Report at 83; Hart 2015 Report at 169.

5. An 1883 letter from Andrew Seltice and eleven other tribal leaders to U.S. Indian Agent John Simms expressed concern about a rumored petition to open the reservation to white settlement, and stated that tribal members "till our land, raise crops, keep herds of cattle & thus provide for ourselves," indicated that tribal members relied on the lands that the whites were threatening to "take away" for "our food, our clothing & whatever we are in need of," and asked Simms rhetorically: "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." Smith 2015 Report at 84-85; Petition, Andrew Seltis and Eleven Other Coeur d'Alene Chiefs to John J. Simms, U.S. Indian Agent, October 21, 1883, USA-CDA00005199, submitted concurrently as Exhibit 25 to Third Affidavit of Steven W. Strack.

6. In 1883, Colville Agent Sydney Walters visited the Coeur d'Alene Reservation and reported as follows:

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

Letter, Sidney Waters to Comm'r of Indian Affairs, Nov. 10, 1883 (reprinted in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 20 (1886) (Exhibit 4 to Affidavit of Steven W. Strack (hereinafter “1st Strack Aff.”)); Smith 2015 Report at 85.

7. In a letter to Commissioner Price dated November 29, 1884, Sidney Waters stated that the Coeur d’Alenes were “the peers of any farmers on the Pacific slope.” Smith 2015 Report at 87, citing Waters to Price, November 29, 1884, as reprinted in S. Ex. Doc. 122, 49th Cong., 1s Sess. (1886) 14-15 (1st Strack Aff. Ex. 4).

8. By 1884, the Resident Farmer reported that the Tribe’s farming efforts had progressed to a point where several tribal farmers were hiring whites to help work their farms. James O’Neill to Colville Indian Agency, July 26, 1884, reprinted in 1884 Annual Report of the Commissioner of Indian Affairs (USA-CDA00004302-03). In 1884, Chief Seltice wrote to Indian Agent Sydney Walters stating that “we have to take whites to plow and farm,” and asking advice on how to handle two white laborers “hired by an Indian to Work” who gave whiskey to two young members of the Tribe. 1st Strack Aff. Ex. 4, (Sen Ex. Doc. No. 122, 49th Cong., 1st Sess. 19 (1886) (reprinting letter from Andrew Seltice to Sydney Walters, dated April 20, 1884).

9. In an 1885 petition, Seltice and the other tribal leaders sought compensation for their aboriginal territory and demanded that a commission be sent:

[T]o provide for our present and future wants, and to make with us a proper treaty of peace and friendship, and enter into such proper business negotiations under and by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; that their present reserve may be confirmed to them, except such as may be confirmed to the missionary fathers and sisters, and that ample provision be made by the United States by which their compensation shall be annually made them partly in stock, tools, mills, and mechanical instruction by proper mechanics, for the permanent benefit of every member, young and old, male and female, of the Coeur d’Alene tribe of Indians.

Smith 2015 Report at 88.

10. In 1885, federal employees reported that the Tribe was successfully engaged in farming. The farmer assigned to the Coeur d'Alene Reservation described the Tribe as consisting almost entirely of farmers:

Nearly two hundred farms have been opened. . . . [A]ll of the males are good farmers, many of them (the older ones) having two or three hundred acres of land under a good substantial rail fence, and under cultivation. The younger men of the tribe, equally as good workers and fully as willing, but receiving no aid from the Government, except in their schools, have not the means to go ahead as they would wish. With the exception of one or two trappers (old men) all are farmers. . . . By their own labor and exertions . . . they have accumulated about 150 farm wagons, 8 or 10 spring wagons, 160 plows, harness, mowing and reaping machines, sulky-plows, &c.²

1st Strack Aff. Ex. 4: Letter, James O'Neil to Sidney Waters, March 26, 1885

(reprinted in Sen. Ex. Doc. No. 122, 49th Cong., 1st Sess. 12 (1886)).

11. Farms were located primarily in the Hangman Creek Valley, with scattered farms documented near the Spokane River “near Crowley’s bridge,” Smith 2015 Report at 89, and some families living in the lake and river regions. Smith 2015 Report at 85; Sen Ex. Doc. No. 14, 51st Cong., 1st Sess. at 11-12 (statement of tribal leaders noting “five or six” families lived in the area ceded in the 1889 Agreement)(1st Strack Aff. Ex. 10).

12. In 1888, the Annual Report of the Commissioner of Indian Affairs reported that the Tribe harvested 40,000 bushels of wheat and 11,000 bushels of oats. 1st Strack Aff. Ex. 8 (Report). In 1889, a U.S. Indian Inspector reported that the 519 members of the Tribe had 6,000 acres under cultivation and had harvested 40,000 bushels of wheat and 70,000

² A “sulky-plow” is a wheeled riding plow.

bushels of oats. 1st Strack Aff. Ex. 9 (“Inspection report on Colville Agency, W.T.,” January 17, 1889).

B. The 1887 Agreement and its Aftermath

13. In the 1886 Indian Appropriations Act, Congress authorized negotiations with the Coeur d’Alene Tribe “for the cession of their lands outside the limits of the present Coeur d’Alene reservation.” Act of May 15, 1886, 24 Stat. at 44; Smith 2015 Report at 89.

14. When a commission was sent to the Coeur d’Alene Reservation in 1887 in response to the Tribe’s request for negotiations, the commissioners “expressed awe at the Indians’ ‘condition and the character of your reservation.’” Smith 2015 Report at 90. The Commissioners found that the Tribe had already purchased most of what they needed using proceeds from their farming efforts:

The reservation is one of the best we have visited. The Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest pattern, and indeed everything usually found on flourishing farms.

....

There may be a few exceptions, but so far as not to excite comment. Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the Mission, which together make quite a village.

....

These Indians had everything which they needed or wanted, or if not it was within their power to procure it, except a saw and grist mill.

1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 50, 53).

15. Commissioner John Wright opened the negotiations with the Tribe on March 23, 1887, by noting that “You have given up the pursuit of war and of the chase and are devoting all your energies to the arts of peace; you are striving manfully to take care of yourselves, your wives, and your children.” 1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 74).

16. In response to the Tribe's plea for a guarantee that they would have the reservation "forever," the commissioners inserted a provision stipulating that "their reservation shall be held forever as Indian land" and that it would not be opened to white settlement "without the consent of the Indians." Smith 2015 Report at 90; 26 State. 989, 1028.

17. In the Agreement of March 26, 1887, the Tribe agreed to: "cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." 26 Stat. 989, 1027.

18. The 1887 Agreement did not include any provision reserving the right to hunt, fish, or gather upon the ceded lands 26 Stat. 989, 1027. During the 1887 negotiations, the Tribe did not express any concern or need for access to ceded lands for traditional subsistence activities. There is no mention of hunting, fishing, or gathering in the negotiation minutes. Sen Ex. Doc. No. 14 at 42-54 (1st Strack Aff. Ex. 10).

19. In December 13, 1887 letter to the Secretary of the Interior, Commissioner of Indian Affairs J.D.C. Atkins urged the "speedy ratification" of the March 1887 agreement and remarked that "a better ordered or behaved community of Indians can nowhere be found." Smith 2015 Report at 92 (quoting J. D. C. Atkins, Commissioner of Indian Affairs, to the Secretary of the Interior, December 13, 1887, in House, Reduction of Indian Reservations, 50th Congress, 1st session, January 9, 1888, H. Ex. Doc. 63) (USA-CDA00003786).

20. When the 1887 Agreement was forwarded to Congress for approval, the Senate, at the urging of Oregon Senator John Mitchell, passed a resolution expressing concern that the reservation provided "more than 1,000 acres" to each member of the 476 member Tribe,

and especially expressing concern that “Lake Coeur d’Alene, all the navigable waters of the Coeur d’Alene River, and about 20 miles of the navigable part of Saint Joseph River,” were “embraced within this reservation.” Mitchell’s Resolution directed the Secretary of the Interior to determine whether “it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.” 1st Strack Aff. Ex. 5 (Sen. Misc. Doc. No. 36); Smith 2015 Report at 92-93.

21. In response to the Resolution, the Secretary of the Interior submitted to the Senate a letter from the Commissioner of Indian Affairs addressing the questions in the Resolution. It stated, in part:

[M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

....

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

1st Strack. Aff. Ex. 6 (Sen. Ex. Doc. No. 76 at 6-7 (1888)) (emphasis added).

22. The Secretary of Interior also forwarded to Congress information regarding the “mountainous country, known as ‘Wolf Lodge District’” in the north-east portion of the Reservation, and stated “[t]he Indians do not use this, and only occasionally go there hunting for elk and deer.” 1st Strack Aff. Ex. 11 (House Rep. No. 1109 at 23).

23. Congress directed the formation of a new commission to negotiate “for the purchase and release by said tribe of such portions of its reservation not agricultural and

valuable chiefly for minerals and timber as such tribe shall consent to sell.” Act of March 2, 1889, 25 Stat. 980, 1002.

24. Benjamin Simpson, John Shupe, and Napoleon Humphrey were appointed as commissioners to negotiate a new cession agreement with the Coeur d’Alene Tribe. Smith 2015 Report at 97. The commissioners’ instructions referred them to the Senate resolution asking “whether it was advisable to release any of the navigable waters therein,” and they were provided a copy of the response from the Commissioner of Indian Affairs and were specifically pointed to the provisions regarding “the location and extent of its navigable waters [and] the steamboat route through Lake Coeur d’Alene and the Coeur d’Alene River.” 1st Strack Aff. Ex. 7 at 483 (Acting Comm’r Indian Affairs to Simpson, Shupe, & Humphrey, June 18, 1889).

C. The 1889 Agreement and Cession

25. The commissioners arrived at the Coeur d’Alene Reservation in August, 1889. The commissioners later reported:

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

1st Strack Aff. Ex. 10 (Report of the Coeur d’Alene Indian Commission, appointed March 2, 1889, reprinted in Sen Ex. Doc. No. 14, 51st Cong., 1st Sess. at 5-6 (1889)).

26. Negotiations with the Tribe were held on August 14, 1889, August 27-31, 1889, and on September 8-9, 1889. 1st Strack Aff. Ex. 10 (Sen Ex. Doc. No. 14, 51st Cong., 1st Sess. 7-14 (1889)). The Tribe initially asserted that they would not agree to any cession of Reservation land until the 1887 Agreement was ratified. Smith 2015 Report at 98. The Tribe's reluctance to negotiate was eventually resolved when the commission "reassured tribal leaders that Congress would ratify the 1887 agreement and that no subsequent agreement would be effective without its prior approval." Smith 2015 Report at 98.

27. During the negotiations with the Tribe, federal negotiators proposed to split the Lake by drawing a boundary line across the Lake just south of the Coeur d'Alene River, as was initially explained to the Tribe by General Simpson, the lead negotiator:

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

Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural lands along the St. Joseph River.

1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 9 (1889)) (emphasis added).

28. After further negotiations the federal negotiators and the Tribe settled on the following boundaries for the lands to be ceded:

Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes

west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

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

29. In the Agreement, the Tribe agreed to “cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had” to the northern third of the 1873 Reservation. 26 Stat. at 1030.

30. “[T]he 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.” *United States v. Idaho*, 95 F. Supp. 2d 1094, 1113 (D. Idaho 1998).

31. “[T]he main purpose of the new [1889] negotiations was to regain from the Tribe whatever submerged lands it was willing to sell,” *United States v. Idaho*, 210 F.3d 1067, 1077 n.14 (9th Cir. 2000), and the subsequent agreement “split the lake—a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe, and the maps submitted to Congress.” *Id.* at 1075.

32. In the 1889 Agreement, the Tribe agreed to “cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d’Alene, in exchange for \$500,000.” *Idaho v. United States*, 533 U.S. 262, 269-70 (2001).

33. During negotiations, tribal leaders Andrew Seltice and Pierre Wildshow expressed concern for “five or six” six tribal members who lived in the area to be ceded and had developed what Seltice and Wildshow described as “farms,” “fenced” lands, a “hay farm,”

and “improved places.” 1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 11-12); Smith 2015 Report at 99 (citing “the fact that several tribal members continued to reside in the area that the commissioners hoped to purchase”).

34. Seltice expressed his desire to conclude negotiations because “we are under expense and busy with our crops,” and requested that the federal negotiators “go and see the ones who are out harvesting” after getting the signatures of the tribal members who attended the negotiations. 1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 10, 12).

35. The 1889 cession did not include any of the Tribe’s agricultural lands in the Hangman Valley. Act of March 3, 1891, 26 Stat. 989, 1027.

36. The 1889 Agreement did not include any provision reserving the right to hunt, fish, or gather upon the ceded lands. During the 1889 negotiations, the Tribe did not express any concern or need for access to ceded lands or waters for traditional subsistence activities. There is no mention of hunting, fishing, or gathering in the negotiation transcripts. 1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 7-13).

37. The 1889 Agreement did not include any provision reserving to the Tribe the exclusive right to hunt, fish, or gather within the Reservation. Act of March 3, 1891, 26 Stat. 989, 1027.

D. Act of March 3, 1891

38. In 1891, Congress approved both the 1887 Agreement and the 1889 Agreement, as part of the Indian Appropriations Act of 1891. Act of March 3, 1891, 26 Stat. 989, 1027.

39. All lands that the Tribe ceded in the 1887 and 1889 Agreements were “restored to the public domain.” 26 Stat. at 1031.

40. Congress directed that the money to be paid to the Tribe for the 1887 cession would be spent “as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d’Alene Indians.” Act of March 3, 1891, 26 Stat. 989, 1031.

41. Congress directed that the \$500,000 to be paid to the Tribe for the 1889 cession be paid to tribal members as a *per capita* lump sum. Act of March 3, 1891, 26 Stat. 989, 1030. Congress acted in accordance with the recommendation of the Commissioner of Indian Affairs, who noted that “[i]t has not been the practice to pay such large sums of money to Indians cash in hand as it proposed in this case, but the Coeur d’Alene Indians are far advanced in civilization” 1st Strack Aff. Ex. 10 (Sen. Ex. Doc. No. 14 at 4).

42. The last section of the 1891 Act quotes verbatim a statement by Coeur d’Alene chief Andrew Seltice, apparently prepared by Seltice a week after the conclusion of the cession negotiations. Smith 2015 Report at 102. The Seltice statement averred, in part, as follows:

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

Act of March 3, 1891, 26 Stat. at 1031-32.

43. Congress directed that Post Falls be surveyed and patented to Frederick Post. 26 Stat. at 1031. The survey conducted in 1891 and 1893 showed three dams that Post had constructed across the three channels of the Spokane River. 1st Strack Aff. Ex. 13.

E. Traditional Subsistence Activities: 1887-1910

44. In addition to their successful farming activities (see ¶¶ 1-12), tribal members continued to hunt and fish within and near the Reservation, and were often observed camping, hunting, and fishing along the St. Joe River and in Chatcolet and Benewah Lakes during the 1890s and the first decade of the 20th Century. Smith 2015 Report at 104-06. “[I]n testimony given on January 4, 1910, St. Maries, Idaho, in proceedings relating to the inundation of reservation dams by the dam at Post Falls, farmer A. J. L. Brewald reported seeing ‘Indians camped every place on that bank, I guess, up and down that [St. Joe] river, from the lake to the [reservation] line.’ Brewald further asserted that Coeur d’Alene tribal members had camped ‘on these high banks next [to] the river’ during the summers ‘[p]ractically every year’ since his settlement at St. Maries in 1884.” Smith Rebuttal Report at 32. Brewald also reported seeing tribal members fishing along the St. Joe in spring, summer and fall, as well as “through the ice” at the mouth of the St. Joe in winter. *Id.*; *see also* USA_CDA00008045 (testimony of former Indian agent George F. Steele that “lots” of tribal members came to the St. Joe River in summer to camp and fish during his years on the Reservation, 1893-1901).

45. The area along the St. Joe River and Chatcolet and Benewah Lakes was also used by whites for hunting and fishing. USA_CDA00008063 (testimony of Boyd Hamilton, discussing duck hunting); USA_CDA00008083 (testimony of A.J.L. Bredwald discussing hunting and trout fishing); USA_CDA00008156-62 (testimony of E.A. Green describing camping and fishing for pleasure in Lake Chatcolet along with 400 to 800 other campers);

USA_CDA0008205-08 (testimony of Sol Walters describing fishing and hunting trips along lower St. Joe River over a period of 18-20 years and seeing up to 500-600 people camping at Lake Chatcolet); USA_CDA00008230-32 (testimony of Charles Breeding describing summer fishing trips to Lake Chatcolet “when we got through with our spring crop,” during which he observed 50-400 other campers along the St. Joe River); USA_CDA00008268 (testimony of Grant Vess describing camping and fishing trips along St. Joe River “after we would get our crop in along in June or July”); USA_CDA00008500-02 (testimony of A.P. Powell describing commercial hunting and fishing along St. Joe River in 1896 and 1897 for “[t]he Coeur d’Alene market”)..

46. The Tribe had constructed fish traps along the St. Joe River. Historian Pat Allen Pentlands reported that the traps were “still used by the Indian sat the turn of the century.” Smith Rebuttal Report at 33. Henry Collins testified that he camped with the Indians at the fish trap sometime between 1888 and 1908. USA_CDA00008476. Ralph Howard testified that he visited the area in 1891 and that “[t]here is a lot of stakes setting up there, what they call a fish trap” USA_CDA00008567-69. But a witness reported that by 1893 the fish traps “had been there for a good many years,” and were “all broken and tore” and no longer in use. USA_CDA00008092-93)(testimony of R.B. Dickerson). Thomas Dunson, traveling in 1907 through the area referred to as the fish traps, reported, when asked what the fish traps looked like, that there were some stakes stuck in the ground but the traps “were obliterated; perhaps it showed a couple or three rods.”³ USA_CDA00008098-8107.

³ From the context of his earlier testimony, Duson was using “rod” as a unit of measurement. A rod is equivalent to 16 ½ feet.

F. The 1894 Agreement & Cession

47. In 1891, shortly after congressional ratification of the 1887 and 1889 Agreements, several white men established a temporary fishing camp on land within the Reservation near the mouth of the Coeur d'Alene River. It quickly grew into a town of 125 residents and became known as Harrison. Hart 2015 Report at 266-67.

48. The Commission of Indian Affairs authorized negotiations with the Tribe to cede the lands occupied by Harrison. Hart 2015 Report at 273-74.

49. The Tribe, in return for a payment of \$15,000, agreed to "cede, grant, and relinquish to the United States all right, title, and claims which they now, have, or ever had," to a one-mile wide strip on the northern boundary of the reservation. Act of Aug. 18, 1894, 28 Stat. 322.

50. The agreement "explicitly included a portion of the lake bed in the cession." *United States v. Idaho*, 210 F.3d 1067, 1079 (2000).

51. The 1894 Agreement did not reserve any right to hunt, fish, or gather upon the ceded lands. Act of Aug. 18, 1894, 28 Stat. 322.

52. In agreeing to the cession, tribal leader Pierre Wildshow stated that the ceded land near the mouth of the Coeur d'Alene River "was the place where the Indians "used to fish." Smith 2015 Report at 105; 1st Strack Aff. Ex. 14 (House Ex. Doc. 158, 53d Cong., 2d Sess. 12 (1894)).

G. 1906-1910: Allotment and Opening of the Reservation

53. In 1906, Congress, over the objections of the Tribe, directed the Secretary of the Interior to "allot" Reservation lands among tribal members by issuing a trusting patent for 160 acres of land to each "man, woman and child" of the Tribe. Act of June 21, 1906, 34 Stat. at 335.

54. All lands within the Reservation “not allotted or reserved for Indian school, agency, or other purposes” were to be “opened to settlement and entry under the provisions of the homestead laws.” 34 Stat. at 336. Section 16 and 36 of each township were “excepted from the foregoing provisions and . . . granted to the State of Idaho for school purposes.” 34 Stat. at 336.

55. Allotment of the Reservation took place between 1908 and 1909. Wee Report at 116. Just over 104,076 acres were initially allotted to the 541 members of the Coeur d’Alene Tribe, and to 97 Spokane Indians living on the Reservation. Wee Report at 125; Ross R. Cotroneo and Jack Dozier, “A Time of Disintegration: The Coeur d’Alene and the Dawes Act,” *Western Historical Quarterly* 405 (1974) (1st Strack Aff. Ex. 18).

56. In 1908 Congress withdrew certain lands within the Reservation “from allotment and settlement” and authorized the Secretary of the Interior to convey them to the State of Idaho “to be maintained by said State as a public park.” Act of August 20, 1908, 35 Stat. 78. Those lands have since been designated as Heyburn State Park. Idaho Code § 67-4202.

57. On May 22, 1909, President Taft issued a proclamation opening all unallotted lands on the Reservation, other than the lands withdrawn for the future state park and the State school lands, to homesteading entry. Hart 2015 Report at 289. A total of 104,416 people registered for the lottery that would distribute 1,350 homesteads within the Reservation. Wee Report at 129.

H. Post-Allotment Era

58. As allottees were issued fee patents, many sold their lands or lost them to bank foreclosures. Wee Report at 147. By 1933, the total acreage of allotments held by tribal members or other Indians had dropped to 62,400.64 acres. Cotroneo & Dozier at 417.

“Within fifty years nearly 50% of the allotments had passed out of tribal ownership.” Hart 2015 Report at 290.

59. In 1958, 12,877.65 acres of lands that were never homesteaded were “restored to tribal ownership,” to “held by the United States in trust” for the Tribe. Act of May 19, 1958, 72 Stat. 121.


60. Discovery responses from the United States and the Tribe indicate that the Tribe has re-acquired some lands within the Reservation and holds those lands in fee simple.

Third Affidavit of Steven W. Strack, Exhibits 31 and 32.

Respectfully submitted this 22^d day of February, 2017.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



STEVEN W. STRACK
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing STATE OF IDAHO'S STATEMENT OF ADDITIONAL FACTS 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::

ALBERT P BARKER
BARKER RSHOLT & SIMPSON LLP
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

CHRISTOPHER H MEYER
JEFFREY C FEREDAY
JEFFREY W BOWER
MICHAEL P LAWRENCE
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720

DIRECTOR OF IDWR
PO BOX 83720
BOISE ID 83720-0098

RATLIFF FAMILY LLC #1
13621 S HWY 95
COEUR D'ALENE, ID 83814

HOWARD A. FUNKE
424 SHERMAN AVE STE 308
PO BOX 969
COEUR D'ALENE, ID 83816-0969

CANDICE M MCHUGH
MCHUGH BROMLEY PLLC
380 S 4TH STREET STE 103
BOISE, ID 83702

NORMAN M SEMANKO
MOFFATT THOMAS
101 S CAPITOL BLVD 10TH FL
PO BOX 829
BOISE, ID 83701-0829

MARIAH R DUNHAM
NANCY A WOLFF
MORRIS & WOLFF PA
722 MAIN AVE
ST MARIES, ID 83861

WILLIAM J SCHROEDER
PAINE HAMBLIN LLP
717 W SPRAGUE AVE, STE 1200
SPOKANE, WA 99201-3505

JOHN T MCFADDIN
20189 S EAGLE PEAK RD
CATALDO, ID 83810

WILLIAM M GREEN
2803 N STH ST
COEUR D'ALENE, ID 83815

RONALD D HEYN
828 WESTFORK EAGLE CREEK
WALLACE, ID 83873



Steven W. Strack