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Hecla's Reply Brief

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

In Re CSRBA	Subcase No. 91-7755, *et al.*
Case No. 49576	**HECLA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Hecla Limited ("Hecla"), by and through its attorneys of record, Barker Rosholt and Simpson LLP, and submits this reply in support of its Motion for Summary Judgment. Hecla's summary judgment motion was directed at the off-reservation instream flow claims. This reply addresses those claims, without waiving the arguments raised in response to the United States' and Tribe's motions concerning the other types of water rights claimed by the United States on behalf of the Tribe. For the reasons explained herein, judgment should be granted in favor of the State and Hecla.

INTRODUCTION

These off-reservation instream flow claims asserted by the United States are unabashedly claims for instream habitat off the reservation, or as the United States describes it, a "biological" water right. If granted, the United States' and Tribe's off-reservation instream flow claims would impose an environmental servitude on all off-reservation waters and water users by controlling

the water supply. This is undisputed by the United States and Tribe. In fact, they essentially admit to this goal. The United States and Tribe try to downplay this reality – contending that they are not controlling the water, but that the water will simply be administered in priority like all other water rights. Make no mistake, these off-reservation federal reserved water rights impact all junior water right holders in the basin – upstream and downstream. The Tribe demands the most senior water rights in off-reservation waterways to protect their recently discovered "biological" right for the protection of fish habitat in these off-reservation streams. As a matter of law, these claims fail. The Agreements between the United States and Tribe reserving the land do not even purport to preserve any right or any claim outside of the Reservation and this Court cannot rewrite those Agreements in the manner demanded by the United States and Tribe. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties"); *Choctaw Nation of Indians*, *supra*; *see also United States v. Choctaw Nation*, 179 U.S. 494 (1900) ("the Court cannot employ any "notion of equity or general convenience, or substantial justice," to "incorporate into an Indian treaty something that was inconsistent with the clear import of its words").

The Court must carefully analyze these demands for federal reserved water rights under the *Winters* Doctrine, because to grant these claims will give the United States senior rights in the system and the unprecedented ability to control the water supplies. It is because of this reality that the *Winters* Doctrine has been exercised only within the narrowest boundaries and only when necessary to secure the "primary purpose" of the reservation of land. *Cappaert v. United States*, 426 U.S. 128, 139 (1976) ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and then available water. Intent is inferred if the previously

unappropriated waters ***are necessary to accomplish the purposes for which the reservation was created.***") (emphasis added). Indeed,

> Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, ***the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."*** Each 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.***

United States v. New Mexico, 438 U.S. 696, 701 (1978) (emphasis added); *see also Cappaert*, 426 U.S. at 143 ("the implied-reservation-of-water-rights doctrine is ***based on the necessity of water for the purpose of the federal reservation***") (emphasis added).

The United States and Tribe do not dispute that the Tribe ceded "all right, title and claim" outside the Reservation. Nevertheless, they argue that they have the right to control off-reservation instream flows based on a nebulous "homeland" theory. They assert that, since the Reservation was identified as the "home" for the Tribe, the Tribe is entitled to all water rights that they now think are necessary to support a "homeland." Neither *Winters* nor any other case supports such a right. Rather, a reserved water right can only be based on the "primary purpose" of the Reservation. Merely identifying the Reservation as a "homeland" does not give rise to a right to control habitat or the water supply outside that reservation. The Court may only find reserved water rights for those purposes that are consistent with the "primary purpose" of the Reservation.[1]

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[1] The United States and Tribe quote some cases that refer to a reservation as a "home" or "homeland." *U.S. Resp.* at Part II.A; *Tribe Resp.* at Part II. Yet, many of these cases still conducted a "primary purpose" analysis. *See, e.g., Coleville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) ("We apply the New Mexico test here," which states that water reserved must be "necessary to fulfill the very purposes for which a federal reservation was created"); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (an Indian reservation may have more than one

The United States and Tribe have not demonstrated that the primary purposes of this Reservation would be "entirely defeated" without a right to control off-reservation instream flows for biological purposes. *State v. United States (In Re SRBA Case No. 39576)*, 134 Idaho 940, 946 (2000) ("In order to meet the test of necessity required for a federal reserved water right, the need for water must be so great that, without water, the primary purpose of the reservation will be entirely defeated"). They have not, because no such evidence exists. Likewise, neither the Tribe nor the United States have shown that these off-reservation instream flow claims are appurtenant to the Reservation lands. *Agua Caliente Band of Cahuilla Indians v. United States*, ___ F.3d ___, 2017 WL 894471 (9th Cir., Mar. 7, 2017) at *4 (the *Winters* doctrine "only reserves water if it is appurtenant to the withdrawn land")[2]; *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (reserved water right doctrine "reserves appurtenant water then unappropriated").[3] Given the utter failing to show that these habitat claims are appurtenant to the Reservation, the United States' and Tribe's claims must be denied.

"primary purpose" but still conducting a primary purposes analysis); *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*, Cons. Subcase No. 03-10022 (Nov. 10, 1999) (the "*Nez Perce Order*") (primary purposes analysis applies in Idaho). In *Walton*, while recognizing that the reservation was a "homeland for the Indians," the Court still conducted a "primary purpose" analysis to determine the intent of the reservation. 647 F.2d at 47-48. This analysis emphasizes that merely labeling a reservation as a "home" or "homeland" does not answer the question of the "primary purpose" of the reservation. Such "homeland" theory, as demanded by the United States and Tribe, is inconsistent with Ninth Circuit precedent. *United States v. Washington 375 F. Supp. 2d 1050, 1065 (W.D. Wash. 2005)* (rejecting a tribe's claim for water for a "homeland purpose" as "contrary to the "primary purpose" doctrine under federal law). The only case identified that includes a "homeland" analysis by the Arizona Supreme Court. *In re General Adjudication of all Rights to Us Water in the Gila River System & Source*, 35 P.3d 68 (Ariz. 2001). Given the vast case law in Idaho from the U.S. Supreme Court requiring a "primary purpose" analysis, this case is not persuasive authority.

[2] The *Agua Caliente* Court also determined as a matter of first impression that a tribe had a federal reserved water right to groundwater. 2017 WL 894471. That case arose in vastly different circumstances. The reservation was in the arid southern California desert. The surface water was insufficient for the needs of the reservation. None of those facts are duplicated here.

[3] The Tribe recognizes that the "reservation of water must be appurtenant to the reservation of land," but concludes that there is no requirement that the water be located within or adjacent to the reservation. *Tribe Resp.* at 34-36; *see also US Resp.* at 67 (accusing State of conflating the "term 'appurtenant' with adjacency or physically touching a water source"). The United States and Tribe confuse the nature of "appurtenant ***water***" with an "appurtenant ***water right***." *See U.S. Resp.* at 52 (ignoring the distinction and concluding "the United States is trust owner of allotments, as well as appurtenant reserved ***water rights***") (emphasis added). The State explains the distinction in its Reply Brief. *State Reply* at Part C.

LEGAL ARGUMENT

I. The *Nez Perce Order* Provides Guidance for this Court's Decision.

The *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*, Cons. Subcase No. 03-10022 (Nov. 10, 1999) (the "*Nez Perce Order*"), provides important guidance for this Court's decision. In light of the *Nez Perce Order*, a "careful examination"[4] of the record demonstrates that the Tribe did not retain the right to control off-reservation instream flows. Noticeably, but for a dismissive footnote in the Tribe's response brief, *Tribe Resp.* at 71, n.21, both the United States and Tribe continue to ignore this decision and its application to these claims. The decision is very important because it was issued by this Court, addresses the identical issue – off-reservation instream flows – and holds that a tribe that specifically *retained* off-reservation fishing rights (unlike the Coeur d'Alene Tribe) did not have a federal reserved water right.

A. The *Nez Perce Order* Rejects a Claim to Reserved Instream Flows for Fishing Rights.

In the *Nez Perce Order*, the Court concluded that a reservation of fishing rights at locations off the reservation "in common with" the citizens of the United States does not constitute a reservation of a water right or the right to control instream flows. *Nez Perce Order* at 31-33. Through the Nez Perce Treaty, the tribe agreed to cede all "right, title and interest" outside their reservation – except that they expressly retained the "right of taking fish at all usual and accustomed places in common with the citizens of the territory." *Id.* at 27. The United States

[4] *New Mexico, supra* at 701 ("Each 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**"). (Emphasis added).

and Nez Perce asserted that this language reserving fishing rights implied a right to control the instream flows of the river to "protect" their "in common" fishing right. *Id.* at 12-13. This Court rejected the United States and Nez Perce Tribe's contention – concluding that:

> Simply put, the Nez Perce do not have an absolute right to a predetermined or consistent level of fish. In times of shortages, the Supreme Court noted that it may be necessary to reallocate proportionate shares to meet the subsistence or ceremonial needs of the Tribe. Consequently an implied water right is not necessary for the maintenance of the fishing right as it has been defined by the Supreme Court.

Id.; *see also id.* at 36, *citing Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791 (D. Idaho 1994) ("the Tribe does not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of the settlers and the resulting development of the land").[5]

The Agreements with the Coeur d'Alene Tribe do not reserve any fishing rights.[6] Much less one "in common" with the citizens. Here, rather than retain any off-reservation fishing rights (of any kind), the Tribe ceded "all right, title and claim" outside the Reservation. There is no limit to the scope of this cession – all was ceded. If the right to fish off-reservation, as expressly retained in the Nez Perce Treaty, does not create any right to an off-reservation

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[5] This is exactly what the United States is arguing in these claims – i.e. a right to preserve fish runs in their original condition. As a party to the proceedings resulting in the *Nez Perce Order*, the United States is estopped from disputing that decision. *See Western Industrial & Env. Services, Inc. v. Kaldveer Assoc., Inc.*, 126 Idaho 541, 544 (1994).

[6] The United States relies on the decisions in *Wash. Dep't. of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 1, 1994) ("*Acquavella I*"), and *Wash. Dep't. of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 1, 1994) ("*Acquavella II*"). However, these decisions do not support a claim for off-reservation instream flows. Both cases addressed a treaty that provided off-reservation fishing right "in common with" the settlers of the territory and the "usual and accustomed places." *Id.* Importantly, the court recognized that there were "two types of fishing rights" provided in the treaty – exclusive on-reservation fishing and "in common with" off-reservation fishing. *Acquavella I, supra* at 10. The discussion of instream flow rights recognized by the court were specifically in reference to the "in common with" off-reservation rights. *Id.* at 8-9. Speaking to the off-reservation fishing right retained by the tribe, the court held that there was a right to "an amount [of water] necessary to maintain fish life in the Yakima River." Since these cases and any similar cases involving off-reservation instream flow claims to support enumerated fishing rights are contrary to the *Nez Perce Order*, they should not be followed. As the Supreme Court has held, "decisions of lower federal courts are not binding on state courts, even on issues of federal law." *Dan Wiebold Ford Inc. v. Universal Computer Consulting Holding, Inc.*, 142 Idaho 235, 240, 127 P.3d 138, 143 (2005).

instream flow water right, then it defies logic to assert that any implied right to fish on-reservation would create such a water right off the reservation.

Tribal members undoubtedly fished in some of these off-reservation waterways. Some Tribal members likely fish in the Reservation's waterways today. Fishing was no doubt part of their pre-reservation lifestyle. However, these facts do not justify a finding that the United States and Tribe intended to impose an environmental servitude on all off-reservation waters and water users in order to sustain any fishing practices within the Reservation. The evidence is directly to the contrary.

The Tribe contends that it only ceded "land" and not the usufructuary rights associated with that land. *Tribe Resp.* at 52-55. They rely on the Supreme Court decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), for the premise that, since their 1887 and 1889 Agreements did not mention water rights, they did not relinquish any claim to off-reservation instream flows. *E.g. Tribe Resp.* at 54. *Mille Lacs* does not support the Tribe's argument.

In *Mille Lacs*, an 1837 treaty ceded all lands outside the Indian reservation, and expressly reserved the "privilege of hunting, fishing and gathering the wild rice" upon the ceded lands. 526 U.S. at 177. The Court held that a subsequent Executive Order and a treaty – which was silent about the off-reservation hunting and fishing guaranty – did not relinquish the right to hunt and fish off the Reservation. *Id.* at 198 ("It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment"). This is because "the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership." *Id.* at 201. Therefore, the cession of additional reservation land had no effect on the usufructuary right on ceded land because there was no language extinguishing that right.

In this case, the Coeur d'Alene Tribe ceded "all right, title and claim" outside the Reservation. They did not reserve any right to hunt or fish in the ceded area. In ceding land, the Tribe did not reserve, and the United States did not recognize, any hunting, fishing or water rights appurtenant to land outside of the Reservation. As this Court has held, even if a Tribe, like the Mille Lac Chippewa, had a usufructory right to hunt and fish off the Reservation (which the Coeur d'Alenes do not have) it would not give rise to a federal reserved water right. *Nez Perce Order, supra.*

Mille Lacs and the *Nez Perce Order* demonstrate that Congress knew exactly how to preserve rights of Tribes to use resources off the Reservation. It did so by expressly acknowledging those rights. Otherwise, the Agreement to cede "all right, title and interest" means exactly what it says. There is no exception for fish habitat or a "biological" water right in this Treaty with the Coeur d'Alenes.

The Tribe's claim that only land was ceded by the Treaty with the United States, and that there is an unlimited usufructory right off the Reservation that gives right to a water right runs head long into both the reserved water rights doctrine and the diminishment case law. A federal reserved water right is implied when there is a reservation of *land, Winters, supra*; *Avondale Irrigation Dist. v. North Idaho Properties*, 99 Idaho 30, 34, 577 P.2d 9, 13 (1978) (when the federal government reserved *land* it reserves right to *appurtenant* water necessary to accomplish the purpose of the reservation of land); *Cappaert v. United States*, 426 U.S. 128, 136 (1976). Since the water right must be appurtenant to land, when the land was ceded, so too was any claim to a water right. Second, ceding "all right, title and interest in the lands" is "precisely suited" to diminishment of the reservation and termination of tribal rights outside that boundary. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998); *Wyoming v. EPA*, 2017 WL

694481, ___ F.3d ___ (10th Cir. Feb. 22, 2017). Hence, the Coeur d'Alene Tribe have ceded all right, title and interest to land and appurtenant water rights in the off-reservation lands.

The United States cites *Mille Lac* only to support its claim that the Supreme Court "sharply limited" its decision in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). In *ODFW v. Klamath*, that Tribe had no off-reservation rights and only retained on-reservation usufructory hunting and fishing rights. *Id.* When the Reservation was diminished again in 1901, the on-reservation rights were extinguished as well because there was no reservation left to exercise those rights in. *Id. Mille Lacs* did not "sharply limit" or overturn *Klamath*.[7] The Court in *Mille Lacs* merely held that when there was an express recognition of off-reservation hunting and fishing rights, in one treaty, those expressly recognized off-reservation rights would not be defeated by silence in a later treaty. Here, there are no off-reservation rights of any kind recognized in any Agreement or Treaty for the Couer d'Alene Tribe.

The United States and Tribe point only to a sentence in the 1873 Agreement to support their claims. *U.S. Resp.* at 39; *Tribe Resp.* at 92 ("the waters running into said reservation shall not be turned from their natural channel where they enter said reservation"). The Tribe asserts that off-reservation instream flow rights were "locked in" in 1873 by this phrase, and concludes that, since they did not subsequently cede the right to control off-reservation flows in either the 1887 or 1889 Agreements, the right to control instream flows persists today. *Tribe Resp.* at Part III.C.3.

[7] In fact, *ODFW v. Klamath* has been cited with approval by the Supreme Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), another case affirming diminishment of a tribe's reservation by express language of cession like that in the Coeur d'Alene Treaty, and again just last month in *Wyoming v. EPA*, 2017 WL 694481, ___ F.3d ___ (10th Cir. Feb.2017).

Hecla discussed this language, in detail, in its prior briefing. *See Hecla Resp.* at Part III.A.[8] This language does not contemplate or imply any intent to control off-reservation instream flows. Nothing in the (unratified) 1873 Agreement reserves any fishing rights or biological needs of fish.

Even the most liberal reading of this language cannot support a conclusion that the United States and Tribe intended to "lock in" off-reservation instream flows at 1873 levels forever. This language is found in Article 1 of the 1873 Agreement – an Article exclusively addressing the rights retained by the Tribe within the Reservation. 1873 Agreement at USA-CDA00021490. It is in this context, in this Article, that the Agreement states that "waters running into said reservation shall not be turned from their natural channel **where they enter said reservation.**" *Id.* (emphasis added). There is no attempt here to identify or imply any right to control off-reservation waterways. Indeed, where the waters "enter said reservation" is different from all the off-reservation, instream flow locations claimed by the United States. It is not until Article 2 that the United States and Tribe address the off-reservation lands – confirming that the Tribe "agrees to relinquish to the Government ... all of their rights and title in and to all the lands heretofore claimed by them." *Id.* Had there been any intent by either the United States or the Tribe to retain any rights outside of the Reservation, it would have been discussed in Article 2. However, there was no such reservation and the Tribe agreed to cede "all right, title and interest" outside of the Reservation.

The United States and Tribe contend that their claims are different from the Nez Perce' claims because they are based on a "biological necessity rather than any assertion of fishing rights on off-reservation lands" and are "necessary to sustain the biological life cycles of the

[8] That argument is incorporated herein as further discussion of the error in the United States' and Tribe's reliance on this language.

adfluvial fishery." *U.S. Resp.* at 66 & 76. Not true. The United States claimed that a water was necessary because "fish need water" support the treaty right to fish off the Reservation. The *Nez Perce Order* rejected these claims to a water right when it recognized "the importance of the anadromous fish runs to the Nez Perce,"[9] but concluded that "there is no legitimate basis from which to infer that a water right is necessary to the preservation of the limited right." *Nez Perce Order* at 37.

Also of importance in the *Nez Perce Order* was the lack of any evidence that either the United States or the Nez Perce considered that instream flows would be necessary. *Id.* at 32-33 ("The parties to the 1855 Nez Perce Treaty did not intend to reserve an instream flow water right because neither party to the Treaty contemplated a problem would arise in the future pertaining to fish habitat"). There is no evidence here that the United States and Tribe ever considered a need to protect off-reservation instream flows for fish habitat or "biological" needs. Neither the United States nor the Tribe point to any such evidence – because none exists. Merely asserting that fishing had been important does not equate to a right to control the water resources to protect fish habitat. *Id.* at 32 (recognizing that "the importance of the anadromous fish runs to the Nez Perce could not have been of greater significance than it was to the 'fish eaters' west of the Cascades" and determining that, notwithstanding this importance, there was no reservation of an instream flow right to protect fish habitat).

The Agreements did not reserve flows for fish habitat. There is no discussion of fish habitat. The Agreements do not establish any standards or identify any locations for fish habitat. The mere claim that fishing may have been important to the Tribe does not mandate an implication that they intended to control the rivers. In light of the Tribe's agreement to give up

[9] Similar to the adfluvial fish runs referenced by the United States, *U.S. Resp.* at 66, n.23, an anadromous fish run consists of fish migrating up and down rivers from the ocean to spawn.

all "right, title and claim" to those off-reservation lands, the Tribe has no reserved right to instream flows. *See Nez Perce Order* at 37 ("Based on the scope of the Nez Perce fishing right, there is no legitimate basis from which to infer that a water right is necessary to the preservation of that limited right. The Nez Perce do not have anything akin to a fish propagation right.").

The Tribe asserts that Hecla "limits" the Tribe's instream flow rights to locales where the Tribe has fishing rights. *Tribe Resp.*, p. 71, n. 21. The Tribe misunderstands Hecla's brief and this Court's *Nez Perce Order*. First, Hecla does not agree that the Tribe has any water rights for fish habitat, on or off the Reservation. Hecla's motion was addressed to the off-reservation claims because that is where Hecla's rights are located. But Hecla has never agreed that the Tribe has an on-reservation habitat/biological water right. The Treaty reserves no such right to the Tribe and a claim to such a right does not withstand scrutiny under the *Nez Perce Order*. Second, the Tribe misunderstands the Nez Perce proceedings. The United States and Nez Perce Tribe did make *Winters* claims. This Court held that off-reservation water right claims for fish based on the treaty right to fish and for fish habitat should be analyzed as an express treaty right rather than an implied reserved water right. *Order*, p. 25. Neither approach works to give the Coeur d'Alene Tribe an off-reservation water right here, because there is no express treaty language reserving off-reservation fishing rights and the primary purpose of this reservation does not require water for off-reservation fish habitat.

B. A Primary Purpose of the Reservation was to Provide Additional Lands for Settlement and Development, as Promoted by Federal Laws Which Also Protected the Rights of Settlers to the Water Resources Necessary for that Development.

The *Nez Perce Order* also confirmed that the intention of both the United States and Tribe – relative to lands outside of the Reservation – is just as important as the intention in establishing the Reservation. In rejecting the Nez Perce's instream flow claims, the SRBA Court

also found it "inconceivable" that the United States and Nez Perce would have intended to reserve instream flows – when viewed in light of the actions of the United States outside of the Nez Perce Reservation.

> The purpose of the Stevens Treaties [including the Nez Perce Treaty] was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers. It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. ... it defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty."

Nez Perce Order at 38.

The history of opening the ceded lands in North Idaho is basically the same here. In 1866 – before any agreement was reached with the Tribe – the United States opened public lands to mineral development, protecting necessary water rights associated therewith. Act of July 26, 1866, 14 Stat. 253 (codified at 50 U.S.C. §§ 51, 52 and 43 U.S.C. § 661). An 1870 amendment to the Mining Act confirmed the recognition and protection of water rights associated with mineral development. Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661). In 1877, Congress passed the Desert Lands Act, authorizing persons to enter and claim irrigable lands "by conducting water upon the same." Act of March 3, 1877 (codified at 43, U.S.C. § 321).

Examples of the important role that water played in the Coeur d'Alene Mining District can be found in the earliest decisions of the Idaho courts. *See Hawkins v. Spokane Hydraulic Mine Co.*, 2 Idaho 970, 28 P. 433 (1891) (placer claim in the Coeur d'Alene mining district worked with "a large stream of water"...pipes, flumes and other hydraulic machinery); Idaho Constitution, Art. XV § 3 (recognizing priority of use of water in organized water districts).

These statutes and this history forms the backdrop of the negotiations with the Tribe.[10] As settlers began to move into the Tribe's aboriginal lands for mineral and other development – encouraged, no doubt, by the statutes authorizing mineral development and settlement on public lands – the Tribe became concerned and "pushed" for a reservation. *United States v. Idaho*, 533 U.S. 262, 267 (2001) ("*Idaho III*") ("In the 1880's, the Tribe became concerned with the mineral development interfering with its lands and pushed for negotiations to establish a reservation"). Following the original Agreements, Congress authorized further negotiations with the Tribe after receiving more pressure to open additional land for mineral development. *United States v. Idaho*, 210 F.3d 1070 (9th Cir. 2000) ("*Idaho II*"). It is "inconceivable" that the United States and Tribe would recognize this development, negotiate a reservation so that this development could continue and, at the same time, retain instream flow rights that would prevent the use of the water resources that would have been necessary for that very development.

The United States and Tribe dismiss this history and this legislation – contending that it does not impact their ability to impose an environmental servitude on off-reservation waters and water users. *U.S. Resp.* at 76-79; *Tribe Resp.* at 89-90. The United States accuses the State of interpreting this legislation as setting "aside the entirety of waterbodies on public lands for only private appropriation." *U.S. Resp.* at 77. The Tribe accuses Hecla of arguing that these statutes "intended water on the public domain to be available solely for private appropriation" and that "in order to effectuate these statutes, settlers and miners must have the unquestioned and

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[10] Equally important is what was happening on the ground. As one prominent western historian, Herbert Howe Bancroft, famously observed:

> "The miners of Idaho were like quicksilver. A mass of them dropped in on any locality, broke up into individual globules, and ran off after any atom of gold in their vicinity."

Bancroft, Works XXXI, p. 427. Quoted in R. Paul, Mining Frontiers of the Far West, 1848-1880, p. 139 (1963).

absolute right to remove every drop of water from any stream on the public domain." *Tribe Resp.* at 89-90.[11]

The United States and Tribe muddle the issue. It is the United States and Tribe who want the water for fish habitat. They do not even attempt to explain how the United States intended to reserve this water for fish habitat on ceded lands and at the same time encourage mineral development on the same ceded lands. A principal purpose of this Reservation was to separate the Tribe from the settlers developing the aboriginal lands as promoted by federal laws and policies. Particularly given the silence on fishing and water rights, there is simply no evidence that in establishing this Reservation the United States and Tribe intended to impose an environmental servitude on off-reservation waters and water users to protect fish habitat. Such a contention is "inconceivable."

It "defies logic" to conclude that the United States would (i) pass legislation promoting mineral and agricultural development – including in areas ceded by the Tribe; (ii) negotiate with the Tribe for a reservation that specifically opened up lands for mineral development; and (iii) mandate further negotiations in response to pressure to open even more lands for mineral development, while, at the same time, threatening that very development through the imposition of instream flows, such as those demanded by the Tribe.[12]

Congress "had the sophistication and experience to use express language" to accomplish its intended purposes. *Mille Lacs*, 526 U.S. at 185. In this case, the Agreements specifically and

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[11] Arguments such as these are breathless hyperbole. There is no basis in fact for this claim. Hecla's water rights do not even come close to commanding "an absolute right to remove every drop of water from the stream." *See, e.g.*, Water Right Nos.94-2022, 94-2030, 94-2073, 94-2122.

[12] The Tribe contends that Hecla has not provided evidence "that mineral ... development could not be maintained along with a federal reserved water right that would ensure a minimum amount of water remains in the stream for fish habitat." *Tribe Resp.* at 91. This is the United States' claim for the Tribe and it bears the burden of proof, not Hecla. Yet, neither the United States nor the Tribe have provided any evidence that an off-reservation instream flow right is necessary for the primary purpose of the reservation. Nor have they provided any evidence that the existing instream flow rights held by the Idaho Water Resource Board are insufficient to protect fish habitat. *See, for example,* Water Right Nos. 91-7122 (St. Joe River) & 94-7341 (Coeur d'Alene River).

clearly evidenced an intent by the Tribe and by the United States to cede all "right, title and claim" outside the Reservation. When viewed in light of the relevant history of settlement and mineral development in this region, this language can only mean one thing – that the Tribe had relinquished any "claim" it may have had outside the Reservation (including these claims for instream flows). *See Nez Perce Order* at 38 ("it is inconceivable that the United States would have intended or otherwise agreed to allow the [Tribe] to reserve instream flow off-reservation water rights"); *see United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) ("It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians").

II. Protection of Fish Habitat Was Not a Primary Purpose of the Reservation.

Winters, and its progeny, hold that a water right can only be reserved for the primary purpose of the reservation at issue. The *Winters* Doctrine has been exercised only within the narrowest boundaries and only when necessary to secure the "primary purpose" of the reservation of land. *Cappaert*, 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters ***are necessary to accomplish the purposes for which the reservation was created.***") (Emphasis added). Such claims must be "carefully examined" to ensure that "only that amount of water necessary to fulfill the purpose of the reservation" is recognized, "no more." *New Mexico*, 438 U.S. at 701. Water rights are reserved only for those primary purposes of a reservation – any "secondary uses" may only be acquired "in the same manner as any other public or private appropriator." *Id.* at 699.

The history of this Reservation fails to reveal that protection of off-reservation fish habitat or off-reservation flows was a primary purpose of the Reservation. The undisputed factual record clearly shows that the creation of the Reservation was spurred, in large part, due to the discovery of valuable mineral deposits within the aboriginal lands of the Tribe. *Arrington Aff.* Ex. B at 104 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve"); *see also Idaho v. United States*, 533 U.S. 262, 265 (2001) ("*Idaho III*") (the 1867 Reservation was set aside "in the face of immigration into the Tribe's aboriginal territory").

Congress authorized negotiations with the Tribe to induce "the tribes 'to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy.'" *United States v. Idaho*, 95 F.Supp.2d 1094, 1095 (D. Idaho 1998) ("*Idaho I*"). In 1867, President Johnson issued an Executive Order establishing a reservation. *Idaho III* at 265. When the Tribe discovered the 1867 Reservation, the Tribe demanded a new Reservation boundary that "included key river valleys" because "'we are not as yet quite up to living on farming' and '**for a while yet** we need have some hunting and fishing.'" *Id.* at 266 (emphasis added). Following negotiations, the United States and Tribe agreed, in 1873, on a Reservation that was comprised of approximately 590,000 acres. *United States v. Idaho*, 210 F.3d 1067 (9th Cir 2000) ("*Idaho II*"); *Idaho III*, 533 U.S. at 266 ("Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to set apart and secure" "for the exclusive use of the Coeur d'Alene Indians,

and to protect ... from settlement or occupancy by other persons"). Outside the Reservation, the Tribe agreed to cede all "right, title and claim." *Id.* Nothing in the Executive Order identified fishing or fish habitat (whether on or off-reservation) as a purpose of the Reservation. *See Supra* Part I.

The 1873 Agreement required approval from Congress "before it became binding on the parties," but it was never ratified. *Idaho III* at 266-67. In 1885, recognizing that no formal agreement was in place, the Tribe, due to their concerns about white settlement pressure, petitioned the Government and requested further treaty negotiations. *Idaho III, supra* at 267 ("make with us a proper treaty"); *see also Arrington Dec.* Ex. A (Non-Indian interest in forest lands of northern Idaho predated the 1880s, but accelerated with the emergence of mining towns along the South Fork of the Coeur d'Alene River). Seeking to "extinguish the Tribe's aboriginal title to lands outside of the reservation," Congress authorized additional negotiations in 1887. *Idaho III*, 533 U.S. at 267.

The Reservation identified in the 1873 and 1887 agreements included "the vast majority of the Lake" and valuable mineral deposits in the area. *Idaho II* at 1070; *Idaho III*, 533 U.S. at 268 ("the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment"). While the 1887 agreement was pending before Congress, the United States received "pressure to open up at least part of the reservation to the public (particularly the Lake)" to develop its timber and mineral deposits. *Idaho II* at 1070; *Arrington Aff.* Ex. B at 106 ("There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve ... and we found mining claims numerously staked off ... and in some cases notices posted"); *id.* at 106-07 ("These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off"). These mineral deposits had little value to the Tribe. *See Id.* at 106; *but see Idaho III*, 533 U.S. at 269 (The "northern end of said

reservation, is valuable and necessary to the citizens of the United States for sundry reasons" including that "It contains numerous, extensive, and valuable mineral ledges"). In fact, Congress authorized the Commissioners to acquire new lands "with few limitations aside from an instruction to acquire non-agricultural lands". *Idaho II* at 1077.

In 1889, following further negotiations, the Tribe agreed to "cede the approximate northern third of its 1873 reservation to the United States" – including the land containing the valuable mineral deposits desired by the white settlers. *Idaho II, supra*; *see also Arrington Aff.* Ex. C ("The commissioners report that they held frequent councils with the Indians, explored the mineral portions of the reservation lying in the northern part thereof, and finally on September 9, 1889, concluded an agreement with the Indians whereby they cede and relinquish to the United States a very considerable portion of their reservation, valuable chiefly for mineral and timber upon terms advantageous as they believe to the Indians and the Government"). Clearly, a primary purpose of the Reservation was to open mineral deposits on the ceded land to development, which federal law recognized requires water. 1866 Mining Act, *supra*.

The Tribe pins its claim to a water right because it disagreed with the 1867 Reservation due, at least in part, to the lack of waterways within the Reservation boundaries of that Executive Order. The United States and Tribe advance this argument as "evidence" that the "primary purpose" of the Reservation must have been to protect fish habitat. Yet, getting waterways within the boundary of the Reservation would not have been important, if as the United States and Tribe now claim, their rights to flow and fish habitat were fully protected off the Reservation. Their arguments cannot withstand scrutiny.

The historical record demonstrates:

1. The formation of the Reservation was spurred, in large part, by the encroachment of settlers on the Tribe's aboriginal grounds; *Idaho III*, 533 U.S. at 265 (the 1867

Reservation was set aside "in the face of immigration into the Tribe's aboriginal territory"); *see also Idaho III*, 533 U.S. at 269 (The "northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons" including that "It contains numerous, extensive, and valuable mineral ledges"); *Idaho II* at 1077 (Congress authorized new negotiations in 1889 "with few limitations aside from an instruction to acquire non-agricultural lands").

2. When the Tribe learned of the 1867 Reservation, it requested negotiations for a larger Reservation. The Tribe recognized that "primary purpose" of that Reservation was to allow the Tribe to transition to a more agrarian lifestyle and would only need fishing and hunting "for a while." *Idaho III*, at 266 ("'we are not as yet quite up to living on farming' and 'for a while yet we need have some hunting and fishing'").
3. The 1873 Agreement does not provide any express reservation of off-reservation instream flows or off-reservation hunting or fishing rights. There is no discussion of fishing, fish habitat or fish levels. Indeed, the 1873 Agreement is wholly silent on fishing, fishing rights and guaranteed water supplies. 1873 Agreement at USA-CDA00021490. To the contrary, the 1873 Agreement recognizes the agrarian lifestyle purpose of the Agreement by providing wagons, cross cut saws and other similar items to the Tribe. *Id.* Further, through the 1873 Agreement, the Tribe agreed to cede "all right, title and claim" outside the Reservation.
4. The 1887 Agreement does not reserve any water rights, fishing or fish habitat. Act of March 3, 1891. In the 1887 Agreement, the Tribe agreed to cede "all right, title and claim" outside the Reservation. *Id.*

5. In 1888, Congress authorized further negotiations with the Tribe to acquire new lands "with few limitations aside from an instruction to acquire non-agricultural lands." *Idaho II, supra* at 1077
6. The 1889 Agreement does not reserve any water rights, fishing or fish habitat. Act of March 3, 1891. In the 1889 Agreement, the Tribe agreed to cede "all right, title and claim" outside the Reservation. *Id.*
7. The 1891 Congressional ratification of the Reservation Agreements does not reserve any water rights, fishing or fish habitat. *Id.* The 1891 authorization recognized the Tribe's agreement to cede "all right, title and claim" outside the Reservation. *Id.*

A water right is reserved only if the primary and specific purposes of the Reservation would be entirely defeated. *United States v. New Mexico*, 438 U.S. 696, 701 (1975). These facts present a clear picture of the purpose of the Reservation. The Tribe would not have stated that "'we are ***not as yet*** quite up to living on farming' and '***for a while*** yet we need have ***some*** hunting and fishing,'" *Idaho III* at 266, if the purpose of the Reservation was the protection of fish habitat forever, particularly the off-reservation rights at issue in Hecla's motion. The use of phrases such as "not as yet," "for a while" and "some hunting and fishing" evidence a clear picture of Tribe's understanding of the intent of the Reservation. While hunting and fishing may have been a part of the Tribe's aboriginal lifestyle, the purpose of the Reservation was to transition the Tribal members to a more agrarian lifestyle. This purpose does not "envision access to water" for off-reservation instream flows.

When the Tribe ceded all "right, title and claim" outside the boundaries, the Reservation was legally diminished and no off-reservation rights remained. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Wyoming v. EPA*, 2017 WL 694481 (10th Cir. Feb. 22, 2017). Their

claim to have silently reserved these rights is inconsistent with the diminishment law from the Supreme Court.

CONCLUSION

The Reservation was not established to protect off-reservation fish habitat. The specific and stated purposes of the Reservation were to (1) allow for the development of aboriginal ceded lands by settlers, and (2) allow the Tribe to transition to an agrarian lifestyle on the Reservation. Outside the Reservation, the Tribe ceded all "right, title and claim" – retaining no rights on the ceded lands. Recognizing off-reservation instream flow claims puts at risk the rights of thousands of people who relied on the United States' actions in opening these lands to settlement and mineral development. Hecla's summary judgment motion should be granted.

DATED this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

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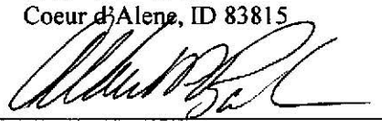

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