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USA Reply Brief to State and Other Objectors

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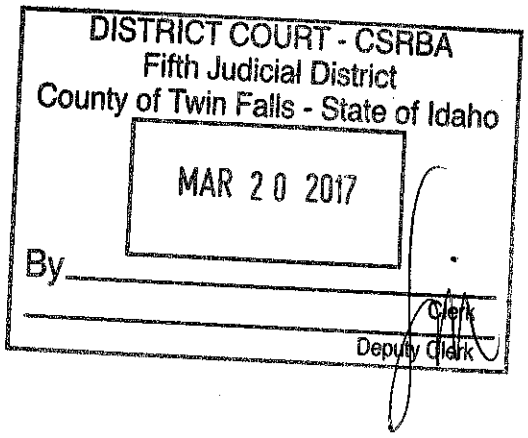

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

	)	Consolidated Subcase No. 91-7755
	)	
In Re the CSRBA	)	**UNITED STATES'**
	)	**MEMORANDUM IN REPLY TO**
Case No. 49576	)	**THE STATE OF IDAHO'S AND**
	)	**OBJECTORS' RESPONSES TO**
	)	**SUMMARY JUDGMENT MOTION**

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INTRODUCTION

The United States of America ("United States") hereby responds to the following memoranda related to motions for summary judgment: 1) *State of Idaho's Memorandum in Response to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, dated Feb. 22, 2017 ("State Response"); 2) *North Idaho Water Rights Group's Memorandum in Opposition to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, dated Feb. 23, 2017 ("NIWRG Response"); 3) *Hecla's Memorandum in Opposition to the United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, dated Feb. 23, 2017 ("Hecla Response"); 4) *Potlatch's Consolidated Response to Motions for Summary Judgment*, dated Feb. 23, 2017 ("Potlatch Response"); 5) *North Kootenai's Consolidated Response to Motions for Summary Judgment*, dated Feb. 23, 2017 ("North Kootenai Response"); and 6) *Alpine Meadows' Consolidated Response to Motions for Summary Judgment*, dated Feb. 23, 2017 ("Alpine Meadows Response") (collectively referred to as "State and Objectors Response Brfs."). For the reasons explained in this reply and previous briefs, the United States moves this Court to deny the State of Idaho's ("State") and other Objectors' Motions for Summary Judgment. The United States requests that this Court grant the United States' and Coeur d'Alene Tribe's ("Tribe") Joint Motion for Summary Judgment, dated October 20, 2016.

The United States' position in this case was outlined in two previous briefs in support of the Joint Motion for Summary Judgment: *United States Memorandum in Support of Motion for Summary Judgment*, dated Oct. 20, 2016 ("U.S. Opening Memo"); and *United States' Response to the State of Idaho's and Objectors' Motions for Summary Judgment*, dated Feb. 22, 2017 ("U.S. Response"). Those two briefs can generally be summarized in two overall themes. First, this case, and the Reservation purpose inquiry in particular, are framed by the United States Supreme Court's decision in *Idaho v. United States*, 533 U.S. 262 (2001) ("*Idaho II*"), which

rejected many of the arguments that the State and other parties assert in this case. Second, the federal reserved water rights doctrine—under which rights consistent with the homeland purpose of an Indian reservation are recognized with a priority date of on or before the date of the reservation—applies to the Coeur d'Alene Reservation, demonstrating that water rights were reserved for the claimed uses, including continuation of subsistence activities as well as agriculture and industry. These two themes are summarized below in Sections II and III respectively without repeating the arguments in previous briefs and only addressing the specific issues raised in the State and Objectors Response Briefs. Section IV addresses the three additional arguments that were raised in the State and Objectors Response Briefs.

Section I below addresses a March 7, 2017, Ninth Circuit opinion, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, ___ F. 3d __ (Slip Opinion), No. 15-55896, 2017 WL 894471 (9th Cir. March 7, 2017). In *Agua Caliente Band*, the Ninth Circuit analyzed the federal reserved water rights doctrine in the context of an Indian reservation and distilled some key principles of federal law applicable here.

I. THE *AGUA CALIENTE BAND* DECISION PROVIDES A ROADMAP FOR THIS CASE—THE BROAD PURPOSE OF AN INDIAN RESERVATION DICTATES THE WATER RIGHTS RESERVED.

Agua Caliente Band holds that federal reserved water rights extend to groundwater. *Id.* at *1. This holding is directly relevant in this case, in which the NIWRG asserts that federal law does not provide for federal reserved water rights to groundwater and that such claims should be disallowed. NIWRG Response at 3-4. *Agua Caliente Band* rejects this argument and, as a result, the NIWRG arguments should be denied. In addition to the groundwater analysis and importantly for this case, *Agua Caliente Band* establishes the proper federal law analysis to determine whether an Indian reservation is entitled to a federal reserved water right. That analysis should be followed by the Court in this case.

A. *Agua Caliente Band* confirms that federal reserved water rights extend to groundwater.

The NIWRG's argument that the federal reserved water rights doctrine does not extend to groundwater was at odds with the majority of courts that had addressed this issue prior to the ruling in *Agua Caliente Band;*[1] in the wake of that ruling, the NIWRG's argument must be rejected. As part of its argument, the NIWRG asserts that the Supreme Court in *Cappaert* treated the water rights at issue in that case as surface water and, thus, the Court did not reach the question of federal reserved water right to groundwater. NIWRG Response at 3, *citing United States v. Cappaert*, 426 U.S. 128, 138-39 (1976). NIWRG cites *Big Horn II,* 753 P.2d at 99-100 and previous SRBA settlements as support for its request that this Court reject any groundwater claims. NIWRG Response at 4.

The recent Ninth Circuit decision directly dispenses with these arguments. In acknowledging that *Cappaert* did not decide the issue, *Agua Caliente Band* states that "while we are unable to find controlling federal authority explicitly holding that the *Winters* doctrine applies to groundwater, we now expressly hold that it does." *Agua Caliente Band*, 2017 WL 894471 at *6. The court found that "[i]f the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself." *Id.* The NIWRG argument, therefore, conflicts with federal law and should be denied.

B. *Agua Caliente Band* explains how to analyze what purposes there are for federal reserved water rights on Indian reservations.

[1] In addition to a number of federal law cases addressing groundwater, state supreme courts have also recognized federal reserved water rights in groundwater. *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 747 (Ariz. 1999); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults,* 59 P.3d 1093, 1098-99 (Mont. 2002). The Wyoming Supreme Court recognized the logic of a federal right to groundwater but declined to find such a right because it incorrectly viewed the issue as one of first impression. *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 100 (Wyo. 1988), *aff'd by an equally divided Court sub nom., Wyoming v. United States*, 492 U.S. 406 (1989) ("*Big Horn II*").

In addition to recognizing reserved rights to groundwater, *Agua Caliente Band* provides guidance on interpreting the purposes of an Indian reservation when examining claims for federal reserved water rights. The Ninth Circuit reviewed the purposes of the Agua Caliente Reservation in a case similar in posture to this litigation and, thus, provides a roadmap for this Court to follow here.

There are several important similarities between the Agua Caliente and Coeur d'Alene Reservations. Both Tribes occupy a portion of their aboriginal territory on Reservations that were established by executive orders issued by President Grant in the 1870s. Both Tribes' Executive orders were "short in length, but broad in purpose," *id.* at *2, and both Reservations are "interspersed in a checkerboard pattern" based on lands opened up to non-Indians, *id.* at *1. In order to interpret the purpose of the Agua Caliente Reservation in light of the simple language in its executive orders, the Ninth Circuit relied on "detailed government reports from Indian agents" referencing the need for lands on which the Indians could "build comfortable houses, improve their acres, and surround themselves with home comforts," as well as to "secure the Mission Indians permanent homes, with land and water enough." *Id.* at *2, *citing* Comm'r of Indian Aff., Ann. Reports (1875 and 1877). *Agua Caliente Band* undertook the same sort of analysis that the Supreme Court undertook in *Idaho II*, reviewing the historical setting surrounding the establishment of the Coeur d'Alene Reservation. *Idaho II*, 533 U.S. at 265-71. Finally, *Agua Caliente Band* is currently in an entitlement phase, just like this case, with the quantification contemplated for a future phase. *Agua Caliente Band*, 2017 WL 894471 at *3.[2]

In order to answer the question of "whether the Tribe has a federal reserved right to the groundwater underlying its reservation," the Ninth Circuit followed a four-step analysis. *Id.* First,

[2] *Agua Caliente Band* also includes a second phase to consider ownership of the "pore space" in the groundwater basin at issue; the third phase will consider quantification. 2017 WL 894471, at *3.

Agua Caliente Band reiterated the federal reserved water rights doctrine as established by the Supreme Court and applicable to Indian reservations. *Id.* at *3-4. Next, it restated the doctrine's legal test: "it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land." *Id.* at *4. Third, the court cited the "primary-secondary use"[3] distinction from *United States v. New Mexico*, 438 U.S. 696, 702 (1978), as providing useful guidelines for determining Indian reservation water rights, even if not "directly applicable." *Id.* at *4, n. 6, *citing United States v. Adair*, 723 F.3d 1394, 1408 (9th Cir. 1983) (noting that while the *New Mexico* test is "not directly applicable to *Winters* doctrine rights on Indian reservations," it "establishes several useful guidelines.").

The water agencies in *Agua Caliente Band* asserted the same argument the State makes in this case—that the *New Mexico* primary-secondary use distinction narrowed the federal reserved water rights doctrine sufficiently that "Congress intended to defer to state water law" if a federal water rights was not absolutely required. *Id.* at *4. The Ninth Circuit squarely rejected this argument:

> *New Mexico*, however, is not so narrow. Congress does not defer to state water law with respect to reserved rights. Instead, Congress retains 'its authority to reserve unappropriated water . . . for use on appurtenant lands withdrawn from the public domain for specific federal purposes.'

Id. at *5 (citations omitted). The court continued by reiterating that "[t]he federal purpose for which land was reserved is the driving force behind the reserved rights doctrine." *Id.* Moreover, "the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the

[3] *New Mexico* referred to primary, or specific, *purposes* of the reservation that give rise to a federal reserved water right, as compared to secondary *uses* of the reservation that do not result in a reservation of water. These terms have different meanings, particularly in the context of the federal reserved waters doctrine. That said, for ease of reference, this brief adopts the *Agua Caliente Band* court's use of the term "primary-secondary use" distinction to refer to the *New Mexico* standard.

reservation envisions water use." *Id. Agua Caliente Band* summed up the *New Mexico* distinction as "not alter[ing] the test envisioned by *Winters*," but only "add[ing] an important inquiry related to the question of *how much* water is reserved." *Id.* (emphasis in original).

Fourth, following its analysis of *New Mexico*, *Agua Caliente Band* conducted its final step of the analysis, to "determine the primary purpose" of the Agua Caliente Reservation and "whether that purpose contemplates water use." *Id.* The court examined the executive orders and government reports surrounding the establishment of the Reservation. *Id.* at *6 (*citing* the executive orders that set land aside for "the permanent use and occupancy of the Mission Indians" as well as the reports noting the need to secure the Tribe "permanent homes, with land and water enough."). Notably, the Ninth Circuit relied on its precedent in *Walton* that recognizes that "the specific purposes of an Indian reservation . . . [are] often unarticulated. The general purpose, *to provide a home for the Indians*, is a broad one and must be liberally construed." *Id.*, *citing Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) (emphasis in the original). In conclusion, *Agua Caliente Band* found that "the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose." *Agua Caliente Band* at *6.[4] In other words, *Agua Caliente Band* recognized the overall homeland purpose which establishes a need for water, but noted that a homeland includes multiple purposes which remain for consideration in the final quantification phase of that case. *Id.* at *8 ("We also understand that a full analysis specifying the scope of the

[4] The State and Hecla both rely on *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005) ("*Lummi*") for their arguments in opposition to the homeland purpose. Hecla Response at 3; State Response at 21. Any negative treatment of the homeland purpose of an Indian reservation is overruled by the Ninth Circuit in *Agua Caliente Band*, as well as its previous decisions in *Walton* and *Adair*. Moreover, *Lummi* was vacated precisely because the United States and Tribe reached a favorable settlement recognizing federal reserved rights in groundwater underlying the Lummi Indian Reservation.

water reserved under *New Mexico* will be considered in the subsequent phases of this litigation.").[5]

Application of *Agua Caliente Band* to the question of whether the Coeur d'Alene Reservation is entitled to water rights addresses a number of issues in this case. First, Congress does not defer to state law regarding federal reservations of water, and the *New Mexico* primary-secondary use distinction does not mandate a narrowing of the federal reserved water rights doctrine. *Compare Agua Caliente Band,* 2017 WL 894471 at *5, *with* State Response at 14 (arguing for a narrow application of the federal reserved water rights doctrine). Second, the primary purpose of an Indian reservation is broad and must be liberally construed to recognize that a home for Indians is contemplated. *Agua Caliente Band,* 2017 WL 894471 at *6. Such a broad construction does not relieve a court from a more in-depth analysis of the facts for each reservation to ascertain the specific primary purposes; however, the narrow construction advocated by the State in this case is contrary to federal law.

The purpose of Coeur d'Alene Reservation must be construed in this homeland framework—though recognition of a homeland does not end the inquiry. Instead, as detailed in preceding United States' briefs, a thorough review of the historic record relating to the establishment of the Reservation demonstrates that the Reservation had two broad, primary purposes—1) to sustain traditional tribal practices of hunting, fishing, and gathering; and 2) to promote the modern practices of agriculture, municipal uses for larger communities, and industry to fulfill the federal goal of economic self-sufficiency. *See* U.S. Opening Memo at 17-33; U.S. Response at 27-34. The United States Supreme Court in *Idaho II* conducted that thorough review

[5] It is the United States' understanding that Phase I in this present case intends to examine both the broad homeland purpose as well as any specific purposes necessary for the reservation under the *New Mexico* primary-secondary use standard. Therefore, unlike *Agua Caliente Band,* the specific primary purposes of the Coeur d'Alene Reservation will be determined in this Phase I considering entitlement rather than deferring that finding to the Phase II quantification.

of the historic record, concluded that the Reservation was established in 1873 for purposes including subsistence, and its conclusions must be followed here.

II. THE SUPREME COURT'S ANALYSIS OF THE HISTORY OF THE COEUR D'ALENE RESERVATION IN *IDAHO II* CONTROLS THE DETERMINATION OF THE TRIBE'S ENTITLEMENT TO WATER RIGHTS.

The State and Objectors' challenges to federal reserved water rights to support subsistence uses on the Reservation turn on one issue: whether the 1873 Executive Order established the Coeur d'Alene Reservation. The State asserts that it did not, alleging that "Congress explicitly rejected" the 1873 Reservation and did not establish a "permanent Reservation" until the 1891 Act.[6] State Response at 1-2. The purpose of the 1891 Reservation, according to the State, is limited to "securing the 'progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians.'" *Id.* at 2, *citing* the 1891 Act.[7] The State's arguments fail because they contradict the *Idaho II* Court's analysis, which controls this case.

A. ***Idaho II* considered events through the 1891 Act and expressly rejected the State's argument that the Reservation was not established until 1891 or that it was established solely for agricultural purposes.**

The State seeks to avoid *Idaho II*'s holding that Reservation purposes include subsistence uses by arguing that *Idaho II* "was limited to determining intent to reserve submerged lands on or before July 3, 1890," when Idaho became a State and, further claims that the Court "never fully examined the purposes of the Act of March 3, 1891." State Response at 13. The State clings to the failed argument that Congress created a "new and substantially reduced Reservation in

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[6] The *United States' and Coeur d'Alene Tribe's Joint Statement of Facts*, dated Oct. 20, 2016 ("JSF"), as summarized in the U.S. Response at 2-4, provides a full description of the 1873 Executive Order, the subsequent 1887 and 1889 Agreements, and the 1891 Act.

[7] The State and Objectors assert that the priority date for water rights based on establishment of the Reservation should be 1891. *See e.g.*, Hecla Response at 20-21. The United States disagrees because the Reservation was established in 1873, rather than 1891, resulting in an 1873 priority date for agricultural and industrial uses. *See* U.S. Opening Memo at 39-41. The priority date for subsistence practices, including domestic use, is time immemorial. *Id.* at 34-39.

1891." *Id.* at 2. In effect, the State argues that *Idaho II* only considered history up to Idaho statehood on July 3, 1890, in order to conclude that the Tribe's subsistence use of the waterways was sufficiently important to demonstrate reservation of submerged lands.

Under the State's argument, whether the 1873 Reservation retained a subsistence purpose, turns on a different analysis. That analysis purportedly requires review of the 1891 Act, which the State claims vacated the 1873 Reservation. According to the State, the eight months—from Idaho statehood leading up to Congress' March 3, 1891 Act ratifying the 1887 and 1889 Agreements—led to a sea-change in federal and tribal intent, including a wholesale abandonment of the fishing, hunting, and gathering practices that had been central to Tribal existence for millennia. Moreover, according to the State, *Idaho II* ignored this change. To the contrary, *Idaho II* specifically considered events through and beyond 1891, but the Court rejected the idea that Congress pulled "a fast one" by reversing course in 1891 and repudiating mutual agreements with the Tribe that secured a Reservation that provided for continuation of Tribal subsistence practices.[8]

In *Idaho II*, the State squarely raised the argument that the 1873 Executive Order was superseded by the 1891 Act; the Supreme Court rejected this, explaining that after 1873:

> Congress undertook to negotiate with the Coeur d'Alene Tribe for reduction in the territory *of an Executive Order reservation* that Idaho concedes included the submerged lands at issue here. Congress was aware that the submerged lands were included and clearly intended to redefine the area of the reservation that covered them only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder. There is no indication that Congress *ever* modified its objective of negotiated consensual transfer... *Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed*, and intended to bar passage to Idaho of title to the submerged lands at issue here.

[8] The State and United States agree that the canons of construction apply regarding the interpretation of documents related to Indian tribes; however, the State asserts that the only document for this Court to interpret is the 1891 Act. State Response at 5-6. The State is wrong because the 1873 Executive Order established the Reservation for the hunting, fishing and gathering purposes confirmed in *Idaho II*. U.S. Response at 4-9.

Idaho II, 533 U.S. at 280-81 (emphasis added). The Court found that "Congress recognized the full extent" of the Executive Order reservation in the Act of March 3, 1891. 533 U.S. at 271 ("On March 3, 1891, Congress 'accepted, ratified, and confirmed' both the 1887 and 1889 agreements with the Tribe."); *see also* JSF at ¶¶ 80-81. Thus, *Idaho II* clearly considered Congress' intent through the 1891 Act and rejected the State's argument that Congress repudiated the 1873 Reservation.[9]

The State's argument also ignores Tribal intent for its Reservation by 1891. Tribal intent continued to be particularly relevant because the United States would not unilaterally make changes to the 1873 Reservation. *Idaho II* emphasizes that the federal "goal of avoiding hostility seemingly could not have been attained without the agreement of the Tribe" and that this policy of proceeding by agreement remained unchanged through 1891. 533 U.S. at 277-78. Tribal intent to continue subsistence practices on the Reservation was a lynchpin of the *Idaho II* decision, and an argument that the Tribe changed its mind by 1891 flies in the face of the *Idaho II* ruling. *See* 533 U.S. at 265-66.

The Supreme Court expressly rejected the State's argument that the United States changed its intent to preserve subsistence practices as a specific purpose of the Reservation through the 1891 Act:

> The explicit statutory provisions requiring agreement of the Tribe were unchanged right through to the point of Congress's final 1891 ratification of the reservation, in an Act that of course contained no cession by the Tribe of submerged lands within the reservation's outer boundaries. Nor, it should be added, is there any hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho under a legal presumption, by virtue of the Statehood Act approved eight months before Congress took final action on the reservation. There is no evidence that the Act confirming the reservation was delayed for any reason but

[9] *Idaho II*'s rejection of the State's argument that Congress repudiated the 1873 Reservation is exhaustively addressed in the U.S. Response at 4-9, 11-13.

> comparison of the respective House and Senate bills, to assure that they were identical prior to the House's passage of the Senate version.

533 U.S. at 278. While the State makes much of the eight months between Idaho statehood and the 1891 Act, Idaho Response at 2, *Idaho II* specifically addressed that timeframe and this passage of time reflected merely the grind of the legislative process and not any change in tribal or federal intent. 533 U.S. at 270-71.[10] The Supreme Court specifically considered the effects of the 1891 Act and found that it indeed affirmed the 1873 Reservation, which would include the subsistence purposes of that Reservation that led to the federal reservation of submerged lands for the Tribe:

> Eight months after passing the Statehood Act, Congress ratified the 1887 and 1889 agreements in their entireties (including language in the 1887 agreement that "*the Coeur d'Alene Reservation shall be held forever as Indian land*"), with no signal that some of the land over which the parties to those agreements had negotiated had passed in the interim to Idaho.

533 U.S. at 279 (emphasis added). In fact, *Idaho II* considered events through 1894 in confirming the Tribe's submerged land ownership. Moreover, the basis for the Court's ruling on ownership of submerged lands is the same as for a subsistence water right—evidence of subsistence use of the Lake and Tribal dependence on traditional resources. And evidence of a purported abandonment of these uses, would be relevant to both determinations. The Court, however, made no mention of the alleged Tribal abandonment of subsistence water uses after Idaho statehood. *See* 533 U.S. at 279-80; *relying on* 95 F. Supp. 2d at 1117.

[10] The Supreme Court tracked the legislation in detail and explained that, on June 7, 1890, the Senate passed a bill ratifying both the 1887 and 1889 agreements and, on June 10, the Senate bill was referred to the House, where a parallel bill had already been reported by the House Committee on Indian Affairs. On July 3, 1890, while the Senate bill was under consideration by the House Committee on Indian Affairs, Congress passed the Idaho Statehood Act. On August 19, 1890, the House Committee on Indian Affairs reported that the Senate bill ratifying the 1887 and 1889 agreements was identical to the House bill that it had already recommended. On March 3, 1891, Congress accepted, ratified, and confirmed both the 1887 and 1889 agreements with the Tribe. 533 U.S. at 270-71.

Importantly, *Idaho II* emphasized the 1891 ratification of the 1887 provision that "the Coeur d'Alene Reservation shall be held forever as Indian land." This language meant to Interior Department officials that "these Indians have all the original Indian rights in the soil they occupy." *See* US Response Brief at 26, *citing* Smith 2015 Report at 93; *see also Menominee Tribe v. United States*, 391 U.S. 404, 406-407 (1968) (holding that "the language 'to be held as Indian lands are held' includes the right to fish and to hunt"). Even after the Tribe's 1889 cession of some northern lands, the 1873 Reservation, as ratified by Congress in 1891, included access to waterways supporting hunting, gathering, and fisheries valued by the Tribe. JSF ¶¶ 101, 102. Congress' 1891 confirmation of the 1873 Reservation, including the Tribe's continued subsistence purposes for the Reservation, completely contradicts the State's theory that Congress pulled a "fast one" after 1890 by creating a new agricultural Reservation.[11]

B. ***Idaho II* supports the reservation of water for Tribal cultural uses as incidental to the subsistence practices of fishing, hunting, and gathering.**

The State asserts that cultural and religious practices were only secondary uses for the Reservation and, therefore, water was not reserved. State Response at 37-39. The State's argument is also defeated by *Idaho II*, which found that cultural use of water was part of the overall subsistence practices of the Tribe. 533 U.S. at 265 ("Tribal members traditionally used the lake and its related water ways for food, fiber, transportation, recreation, and *cultural activities*.") (emphasis added); *see also* JSF ¶ 7. Moreover, such uses do not provide a separate quantification basis for a water right, but are encompassed by the subsistence uses for hunting,

[11] The United States does not rely on its trust ownership of the beds and banks in the Lake as the basis for its reserved water right as the State suggests. State Response at 43-46. On the contrary, the United States relies on the *Idaho II* examination of historic events to determine Reservation purposes as a basis for the conclusion that continued subsistence practices was one of the intended purposes of the Reservation. Accordingly, the water right in the Lake is based on the need for water to sustain such traditional uses to serve the purpose of the Reservation, not the underlying ownership of land itself.

fishing, and gathering. As long as sufficient water is provided for fish, game and plant habitat, then religious and cultural water resources will be protected. For this entitlement phase of the case, however, cultural and religious use of water are included in the subsistence purpose of the Reservation.

C. Evidence of the Tribe's use of the Lake and other water resources within the Reservation from aboriginal times through to the present defeats the State's argument that the Tribe intended to abandon subsistence practices.

According to the State's false historical narrative, the Tribe somehow abandoned reliance on fishing, hunting, and gathering between 1873 and 1891 and such subsistence practices were relegated to only secondary uses of the Reservation. *See* State Response at 6 (asserting that "post-reservation actions are relevant only if they resulted in a loss of rights on particular lands or waterways"); *see also* State Response at 10 (arguing that Tribal subsistence activities were just like those of the many white settlers and were secondary goals for the Reservation). Yet *Idaho II* expressly rejected the argument that the Tribe intended to give up its "basket of resources" necessary to sustain subsistence activities. *See* U.S. Response at 6, *citing Idaho II*, 95 F. Supp. 2d at 1104. Evidence of the Tribe's continued use of the Lake and other water resources through present day debunks the State's allegations that the Tribe at any time, whether in 1873, 1891, or now, intended to give up its subsistence use of the Lake. *See* U.S. Response at 19-21 (outlining the historic record demonstrating that the Tribe continued to rely on the waterways for subsistence through 1891and beyond). In any case, the water rights for subsistence uses were reserved through creation of the Reservation in 1873, with a priority date of time immemorial, and could not be lost through subsequent actions. *See e.g., Agua Caliente Band,* 2017 WL 894471 at *7 (noting that reserved water rights vest at time of Reservation creation and are not lost through non-use).

III. THE COEUR D'ALENE RESERVATION IS ENTITLED TO THE CLAIMED WATER RIGHTS UNDER THE FEDERAL RESERVED WATER RIGHTS DOCTRINE SPECIFIC TO INDIAN RESERVATIONS.

The specific, primary purposes of the Coeur d'Alene Reservation are framed by the general homeland purpose applied to all Indian reservations. The general homeland purpose is analyzed further to determine the primary purposes of an Indian reservation; such analysis is broadly construed consistent with the homeland intent. In the case of Coeur d'Alene, the broad, primary purposes of the Reservation are: 1) preserving the Tribe's subsistence lifestyle; while at the same time, 2) providing the resources necessary for agriculture and economic development to achieve the federal goal of tribal self-sufficiency.

On-reservation instream flow water rights are necessary to serve the subsistence purpose of the Reservation regardless of the existence of private lands within the Reservation boundary. The 1891 Act, confirming the 1873 Reservation, also documents that water rights were reserved for domestic, commercial, municipal, and industrial ("DCMI") uses. DCMI uses include current uses for the Tribal casino as well as future economic development uses based on the requirement that federal water right claims provide for future, as well as present, needs. *See Arizona v. California*, 373 U.S. 546, 599-600 (1963). Finally, off-reservation rights do not rest on any reservation of rights in land or fishing rights outside the boundaries of the Reservation; rather those water right claims are based on the on-Reservation fishery needs.

A. The primary purposes analysis does not conflict with the general homeland framework; but the homeland requires broad application of the primary purposes / secondary uses distinction.

The State's overall argument assumes that the federal reserved water rights doctrine is a narrow exception to State-based rights. The State's assumption fails to account for the broad nature of Indian reservations. *Agua Caliente Band* demonstrates that the *New Mexico* primary purposes-secondary uses distinction, as applied in the context of Indian reservations, must be

broadly construed to account for the general purpose of Indian reservations, as providing a homeland. In other words, the primary purposes inquiry is not in conflict with the general homeland purpose of an Indian reservation—rather the analysis of primary purposes of the Coeur d'Alene Reservation must be conducted with the overall homeland intent.

i. The State's legal arguments to narrow the application of the federal reserved water rights doctrine fail to account for the unique context of Indian reservations.

In an effort to narrow the application of federal reserved water rights, the State alleges that a "counterbalance to the [Indian law] canons of construction" is congressional deference to state water law which establishes the federal reserved water rights doctrine as an exception to the general rule. State Response at 5-6. The Ninth Circuit's recent analysis in *Agua Caliente Band* refutes the State's argument by expressly stating that "Congress does not defer to state water law with respect to reserved rights." *Agua Caliente Band* at *5. In other words, when it comes to federal reservations, the federal reserved water rights doctrine is not an exception at all but provides the general rule—a rule that in many instances predates statehood and state-based uses. The federal reserved water rights doctrine cannot be narrowed in the manner that the State suggests because federal law preempts state law in the context of federal Indian reservations and other federal reservations. *Id.* Moreover, where reserved water rights pre-date statehood, those rights limit the universe of water available for appropriation under state law, in the same manner that federal reservations of the beds of navigable waterways limit lands available to the state.

The State alleges further support for its argument to narrow federal rights in deference to state rights by citing to *Adair* for the premise that reserved water rights are limited to those essential to accomplish the reservation purpose. State Response at 6, *citing United States v. Adair*, 723 F.3d 1394, 1419 (9th Cir. 1983). Again, the State's arguments fail to distinguish

Indian reservations from other federal reservations or enclaves. For example, the State cites a portion of *Adair* confirming water rights to the Klamath National Wildlife Refuge and Winema National Forest, both non-Indian federal reservations. *Id.* But in the part of the *Adair* decision addressing *tribal rights*, the Ninth Circuit relied on *Walton* to find that "[n]either *Cappaert* nor *New Mexico* requires us to choose between these activities to identify a single essential purpose" for the Klamath Indian Reservation. *Adair*, 723 F.2d at 1410. *Adair* observed that the *Walton* court "found that the provision of a 'homeland for the Indians to maintain their agrarian society,' as well as 'preservation of the tribe's access to fishing grounds,' were dual purposes behind establishment of the Colville Reservation." *Id.*

The State also argues that a homeland purpose for an Indian reservation is "at odds with the very nature of the implied-reservation-of water doctrine" because such rights are applied narrowly. State Response at 14, *citing Potlatch Corp. v. United States*, 134 Idaho 916, 926 (2000). Yet again the State relies on examples of non-Indian federal reservations, however, because *Potlatch* concerned three federally designated Wilderness Areas and the Hells Canyon National Recreation Area, not Indian reservations. 134 Idaho at 917; *see also State v. United States (In Re SRBA Case No. 39576)*, 134 Idaho 940, 946 (2000) (case concerning a non-Indian federal reservation cited in Hecla Response at 2). The State then proceeds to tick through several cases asserting that the homeland purpose lacks support in caselaw. State Response at 14-21. The State's attempt to narrow these cases to remove the general homeland purpose for Indian reservations is incorrect for the reasons outlined in the U.S. Opening Memo at 9-16 and recently strongly reiterated by the Ninth Circuit in *Agua Caliente Band.*

Agua Caliente Band demonstrates that the Court must consider the general homeland purpose of an Indian reservation as the context in which to conduct a broad analysis of primary purposes of the Coeur d'Alene Reservation. *Agua Caliente Band* relied on *Walton's* application

of the primary purposes test in the Indian context to confirm that "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Agua Caliente Band* at *6, *citing Walton*, 647 F. 2d at 47. The cited portion of *Walton* includes a footnote that is instructive: "The rule of liberal construction should apply to reservations created by Executive Order. Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process. This vision of progress implies a *flexibility of purpose*." 647 F.2d at 47, n. 9 (citiations omitted) (emphasis added). The *Walton* court proceeded to apply this "broad" purposes analysis, even within the *New Mexico* primary-secondary uses distinction, to find both agricultural and fishing purposes for the Colville Reservation. *Id.* at 47-48. The same "flexibility of purpose" must be applied to the Coeur d'Alene Reservation and supports the multiple purposes necessary to serve subsistence practices of fishing, hunting, and gathering as well as agriculture and DCMI. *Walton*, 647 F.2d at 47, n. 9.

ii. *The State's arguments specific to the Coeur d'Alene Reservation—that subsistence uses are secondary—fail as a matter of law and fact.*

With respect to the Coeur d'Alene Reservation, the State argues that Tribal subsistence practices are "secondary uses" of the Reservation rather than primary purposes. State Response at 10, *citing* 1891 Act (State asserting that subsistence activities "were secondary to Congress' stated goals of promoting the 'progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians.'").[12] The State's argument suffers from both legal and factual errors.

[12] Even though the State and other Objectors appear to concede the agricultural purpose of the Reservation because they view it as the primary purpose, NIWRG and Hecla argue that this Court should deny the *irrigated* agriculture claims because they allege that irrigation is not necessary on the Reservation if dry land farming works. NIWRG Response at 5; Hecla Response at 22-23. This argument should be dismissed as contrary to federal law establishing the practicably irrigable acreage ("PIA") standard and the federal goal of promoting economic self-sufficiency on Indian reservations. *See* U.S. Response at 49. Moreover, whether the lands are subject to PIA is a quantification issue that will be addressed in the next phase of this litigation.

As to its legal errors, the State's assertion that subsistence practices were contemplated only as secondary uses of the Reservation not only conflicts with *Idaho II* (*see* Sec. II above), but also fails to recognize that the Ninth Circuit has applied the primary-secondary use distinction three times and never found any such secondary uses on an Indian reservation. The *New Mexico* primary-secondary uses distinction was established in the context of analyzing the water rights for the Gila National Forest, a non-Indian federal reservation administered by the United States Forest Service. 438 U.S. at 698. After an extensive review of statutory history, the *New Mexico* Court concluded that aesthetic and recreational uses of the Gila National Forest were secondary to the primary timber purposes established under the Organic Administration Act of 1897. *Id.* at 715. The Ninth Circuit, however, has never found such secondary uses on an Indian reservation.[13] For example, the Ninth Circuit has now applied the *New Mexico* primary-secondary uses distinction to Indian reservations in a trilogy of cases, but never found any secondary uses because the general homeland purpose of an Indian reservation requires broad construction of the primary purposes reserved to provide the tribal home. *See Walton*, 647 F. 2d at 47; *Adair*, 723 F.2d at 1410; and *Agua Caliente Band*, 2017 WL 894471 at *6.

As to factual errors, the State misquotes Chief Seltis in an effort to provide a factual basis for its allegation that the Tribe gave up its subsistence practices. The State quotes Chief Seltis as saying "[f]rom the land they would take away, we get our food, our clothing & whatever we are in need of." State Response at 10, *citing* Andrew Seltis and Eleven Other Coeur d'Alene Chiefs to John J. Simms, U.S. Indian Agent, Oct. 21, 1883. In the next line, the State claims that "[i]n the Tribe's own words, their farmlands provided 'whatever we are in need of.'" But the State misquotes the Tribe's own words, which did not include "farmland." *Compare* "land," *with*

[13] *But see Bighorn II*, 753 P.2d at 94-99 (without employing primary purpose / secondary use test, court concluded that certain types of water claims for fisheries, mining, and industrial uses were not reserved in the relevant treaty).

"farmland." This is a distinction that makes a difference. Chief Seltis refers to the *land* as providing "whatever we are in need of," which would have included subsistence hunting, fishing and gathering, as well as agricultural uses. *See* Smith 2015 Report at 84-85.

The State also asserts that the word "homeland" is not used in any historic documents to describe the purpose of the Reservation. State Statement of Additional Facts at 3. In fact, the 1887 Agreement acknowledges that the 1873 Reservation is to serve as a homeland as it provides for the 1873 Reservation to be "held forever as Indian land and as homes for the Coeur d'Alene Indians." JSF ¶74. The 1873 Reservation was created in response to the Tribe's November 1872 petition which refers to the Tribe's need to be "certain of a home." *See* Smith 2015 Report at 64, *citing* Coeur d'Alene Petition, November 18, 1872, USA-CDA00021418.

B. On-reservation instream flow water rights were reserved to fulfill the Reservation purpose to support hunting, fishing, and gathering rights.

Even if, for argument sake, this Court did not find an *off-reservation* instream flow right, it should recognize *on-reservation* instream flow water rights that were reserved to provide for the subsistence purpose of the Reservation. In addition to the *Idaho II* analysis, federal common law firmly supports the Coeur d'Alene Tribe's rights to hunting, fishing, and gathering within its Reservation boundaries.

First, aboriginal title to land includes the right to engage in traditional subsistence activities on those lands. *United States v. Santa Fe P. R. Co.*, 314 U.S. 339, 347 (1941). Within the boundaries of its Reservation, the Coeur d'Alene has never ceded aboriginal title to the lands it has formally retained since 1873 and, therefore, holds exclusive hunting, fishing, and gathering rights thereon.

Second, exclusive on-reservation hunting, fishing, and gathering rights are *implied* from the establishment of a reservation. *Menominee Tribe*, 391 U.S. at 406 (holding that language "to

be held as Indian lands are held" implicitly includes hunting, fishing, and gathering rights). The State argues that such rights were not reserved because "nothing in the 1873 Executive Order, the 1887 Agreement, or the 1889 Agreement" provides express language preserving hunting, fishing, and gathering rights. State Response at 34. But the *implicit* federal reserved water rights doctrine does not require *explicit* language. *New Mexico*, 438 U.S. at 701 ("the reservation is implied, rather than express. . ."); *see also Menominee Tribe*, 391 U.S. at 406 (finding hunting and fishing rights retained by Tribe even when treaty was silent as to such rights).

In *Walton*, the court recognized a fishing purpose for the reservation created by an executive order that was silent as to subsistence uses but based on the fact that "[t]he Colvilles traditionally fished for both salmon and trout" and that "fishing was of economic and religious importance to them." 647 F.2d at 48. The State's attempt to downplay *Walton* as a "small-scale replacement fishing ground" should be rejected because the fishing purpose was steeped in the Tribe's historical fishing practices. State Response at 33, note 11. Contrary to the State's argument, the inquiry revolves around determination of the purposes of the reservation and whether water is necessary to fulfill those purposes, not a requirement of express language.

Third, subsistence rights for hunting, fishing, and gathering are reserved by executive order as well as by treaty or statute. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326, 343-44 (1983) (finding exclusive tribal jurisdiction to regulate hunting rights on a reservation established by executive order). Indeed, the entirety of *Winters* doctrine cases, including the recent *Agua Caliente Band* case, demonstrates that executive order reservations are treated the same as treaty reservations, thus, explicit language preserving subsistence purposes on an Indian reservation is not required. *See* U.S. Response at 13-19. The language from the treaties referencing hunting, fishing, and gathering in the cases cited in the State Response at 33 was not

repeated in the executive orders establishing reservations once the treaty-making era was over. *Id.* Yet the law is clear that those reservations must be treated the same. *Id.*

Finally, when lands within an Indian reservation are alienated and sold to non-Indians, a Tribe may no longer have exclusive hunting, fishing, and gathering rights on those non-Indian lands, but it retains such rights on the tribal trust lands remaining within the Reservation. *Compare Montana v. United States*, 450 U.S. 544, 560 (1981) (limiting tribal regulatory authority over non-Indian fee lands within a reservation), *with* 18 U.S.C. § 1165 (restricting non-Indian hunting on Indian lands). The State cites to four cases that it alleges support the argument that express language reserving the subsistence uses is necessary, "particularly on reservations later opened up for homesteading and non-Indian occupation." *Id.* at 33. *Walton* defeats that argument because that court had no problem finding a fishing purpose for the reservation even though it was open to homesteading. 647 F.2d at 45; *see also Anderson*, 591 F. Supp. at 13 (finding a water right in an on-reservation stream to serve fishing purpose of the reservation despite lands with state water rights within the reservation boundary).

The State and Objectors are simply wrong in alleging that the Tribe's on-reservation subsistence rights were somehow defeated by the non-Indian acquisition of lands within the Reservation. State Response at 38-43; NIWRG Response at 7-10. While it is true that Tribal members may not hunt on private lands within the Reservation boundary, the subsistence purpose of the Reservation survived the alienation of those lands, harvest rights continue on Tribal and trust lands within the Reservation boundary, and the non-consumptive federal reserved water rights were reserved to serve this subsistence purpose regardless of land ownership. *See* U.S. Response at 35-43; *see also Agua Caliente Band,* 2017 WL 894471 at *7 (noting that reserved water rights vest at time of Reservation creation and are not lost through non-use.)

C. The multiple purposes of the Reservation include DCMI water rights to achieve the goal of Indian economic self-sufficiency—a concept included in the 1891 Act language that the State urges the Court to rely on.

The State concedes that water rights for DCMI purposes were reserved, but argues to limit the commercial and industrial uses to those "that have a nexus to the general agricultural purposes of the Reservation." State Response at 22. The State then lists the commercial and industrial claims which it asserts should be denied due to lack of sufficient nexus to agriculture, including any water for the Tribe's existing casino or future development projects such as the fish hatchery or RV Park. *Id.* at 23. The State's view is too narrow, particularly in light of its heavy reliance on the 1891 Act's language stating one Reservation goal as the "progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." *See* State Response at 10, *citing* 1891 Act. The State's argument is also contrary to federal law which requires that reserved water rights satisfy future, as well as present, needs. *See Arizona*, 373 U.S. at 599.

Since there is no specific mention of agriculture in this language, the State incorrectly assumes that concepts of "progress," "improvement," and "civilization" in 1891 included only agriculture. The United States agrees that agriculture was surely contemplated as one of the purposes; but the words are not limited to agriculture. Indeed, this phrase contemplates economic development that would provide opportunities for education and "civilization." Even in 1891, such "improvement" would not be limited to agriculture but would include opportunities for industry and modern development. The water rights that provide for a modern economy on the Reservation, such as the casino, fall well within the intensions of the operative language from the 1891 Act, as well as meet the overarching federal goal of Indian self-sufficiency. *See* U.S. Response at 53-56.

Related to its arguments to limit industry to agricultural-related activities, the State asserts that any evidence of the Tribe's use of water after the establishment of the Reservation is irrelevant. State Response at 6-7. That assertion fails in the face of well-settled federal law requiring that federal reserved water claims must account for both present and future uses. *Arizona*, 373 U.S. 599-600. Indeed, the Supreme Court has made clear that Congress intended to reserve sufficient water to make Indian reservations "liveable" and that the amount of water reserved "was intended to satisfy the future as well as the present needs of the Indian Reservations." *Id.* The future needs requirement demonstrates that Congress did not envision that Tribes would be frozen in time to 19th Century activities but that sufficient water was reserved to provide for the Tribe to progress to economic self-sufficiency. The water claims to support an existing casino and other commercial and industrial development by the Tribe achieve the goal to provide sufficient water for "future needs." *Id.*, *see also Agua Caliente Band,* 2017 WL 894471 at *7 (noting that reserved water rights are "flexible.")

As to the State's contention that there is a lack of precedent supporting DCMI water rights, State Response at 23, this is largely a result of the fact that almost all tribal water rights adjudications have been resolved through congressional settlements, rather than litigated results. Accordingly, the water rights acknowledged in those settlements are instructive. The settlement of the Nez Perce Tribe's water rights, provided an on-reservation, consumptive use amount of 50,000 acre feet per year that could be used for "irrigation, DCMI, hatchery and cultural uses." Mediator's Term Sheet, Sec. I.A, Snake River Water Rights Act of 2004, Public Law 108-447, 118 Stat. 3431. *See also Blackfeet Tribe-Montana-United States Compact*, Mont. Code Ann. Sec. 85-20-1501, Article III. B. (providing water rights for "[a]ll Existing Uses by the Tribe, its members and Allottees" including but are not limited to "irrigation, Stock Water, domestic, municipal, storage and those uses identified in Article III.A. [i.e., "traditional religious or

cultural uses of water"]."); *Partial Final Judgment and Decree on the Water Rights of Taos Pueblo, New Mexico ex rel. State Engineer v. Abeyta*, Nos. CV 69-7896 & CV 69-7939 consolidated (D.N.M. Feb. 11, 2016) at 4, Subparagraph 3.B (providing water rights for "municipal, domestic, and industrial use, the Pueblo has the right to divert and consume annually Three Hundred (300.00) acre-feet of groundwater.").

D. The federal reserved water rights doctrine recognizes off-reservation water rights where necessary to serve the purpose of the reservation. Such rights are necessary here to serve the subsistence purpose of the Reservation, specifically the biological needs of the adfluvial fishery.

The State and Objectors argue that off-reservation instream flow water rights did not survive the Tribe's cession of all "right, title and claim" to lands outside the Reservation. Hecla Response at 5-8; State Response at 24-30. Such an argument misconstrues the basis of the off-reservation claims. These claims are based on the biological needs of the on-reservation, adfluvial fishery. *See* U.S. Response at 72-76. The fishery is necessary to fulfill the subsistence purpose of the Reservation and cannot survive without sufficient water in streams and the Lake necessary for fish, whether located within and outside Reservation boundaries. JSF ¶¶ 102, 104.[14] The instream flow claims are not based on any reservation of rights (fishing, lands or otherwise) outside the Reservation boundary, but rather are based on the water necessary to fulfill the subsistence purpose of the Reservation.

The *Agua Caliente Band* decision notes that reserved water rights are appurtenant to a reservation. 2017 WL 894471 at *4 ("[T]he *Winters* doctrine only applies in certain situations: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land."). As explained earlier,

[14] The claims do not equate to an "environmental servitude" as Hecla suggests because they do not seek stream flows dating to the 19th Century, but rather seek basic flows for fish habitat. Hecla Response at 4. The quantity of water claimed for habitat will be proven in the Quantification Phase and is not before the Court in this Entitlement Phase of the case.

"appurtenance" is a legal term—waters are considered appurtenant to a federal reservation if necessary to serve the purposes of a reservation. U.S. Response at 37. The *Agua Caliente Band* court observed that "[a]ppurtenance, however, simply limits the reserved right to those waters which are attached to the reservation" when it confirmed that the federal reserved rights doctrine applies to groundwater. 2017 WL 894471 at *6.

The instream flows and Lake level claims here are necessary for the "survival" of the adfluvial fishery on the Coeur d'Alene Reservation. Such claims apply to streams that are "attached" to the Reservation in that they are connected to the flows of the on-reservation streams that provide for fish passage. As such, those flows are "appurtenant" to the Reservation because they are necessary to fulfill the fishing purpose.

According to the State, federal law is insufficient to support these off-reservation water rights. State Response at 26-30. In support of its argument, the State analyzed the following three cases: *Arizona v. California*, 376 U.S. 340 (1964) (Cocopah Reservation); *Kittitas Reclamation Dist. V. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985); and *Depart. of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Sup. Ct. Sept 1, 1994). *Id.* The State gets the facts wrong in *Arizona*, while missing the point for which *Kittitas* and *Acquavella* are cited—that courts review the biological needs of fish to determine federal reserved water rights to fulfill the fishing purpose of an Indian reservation.

Regarding the Cocopah Reservation at issue in *Arizona v. California*, the State submitted maps that it allege demonstrate that the Cocopah Reservation was "adjacent to the Colorado River" in 1917 when the Reservation was created. State Response at 26. This is an incorrect interpretation of the 1917 Executive Order, including the maps submitted, because the Department of the Interior's 1955 Solicitor's Opinion confirmed that the Cocopah Reservation was not adjacent to the River in 1917. U.S. Response at 68-70 (*citing* Solicitor's Opinion M-

36275, *Title to Accretion Lands Adjacent to Cocopah Indian Reservation*, II Op. Sol. Indian Affairs 1663, 1955 Doina Lexis 186 (1955)). The 1955 Solicitor's Opinion was public and Special Master Rifkind was aware that the Cocopah Reservation was "near" the River, not adjacent to it. *See* U.S. Response at 70 (*citing* Special Master Rifkind's Report, dated Dec. 5, 1960, p. 83). Despite this fact, the Supreme Court recognized a water right for the Cocopah Reservation and, therefore, provided legal precedent for off-reservation water rights as a general matter. *Id.*

Kittitas and *Acquavella* provide the legal basis for a different principle—biological needs of fish can provide the basis for a federal water right if necessary to serve the fishing purpose of a reservation. The State asserts that *Kittitas* "did not adjudicate any water right" and only addressed judicial authority "to preserve fish, and associated treaty fishing rights, from irreparable injury." State Response at 27. The United States agrees; but that is the point for which the case is cited—the preservation of a Tribe's fishery may require off-reservation water based on the lifecycle of the fish. The *Kittitas* court examined the biological needs of the salmon redds that were located off the Yakama Reservation and concluded that water was necessary to sustain the redds, and thus produce juvenile and later adult salmon, to fulfill the fishing right for the Yakama Reservation. 763 F. 2d at 1033-35, *see* U.S. Response at 74.

Similarly, the United States relies on the *Acquavella* decisions to demonstrate that federal reserved water rights are based on the biological needs of fish. U.S. Response at 74-75. The State argues that the *Acquavella* litigation does not support that legal principle because "[t]he parties simply assumed such rights were reserved" in that case and the irrigation districts failed to sufficiently challenge the existence of the off-reservation rights. State Response at 28. The State presumes too much from one opinion within the complex litigation history of an adjudication that spanned several decades. Indeed, the State's representation that the parties "simply assumed

such rights" is unsupported by citation and fails to take into account the interplay of the *Acquavella* adjudication with other cases, such as *Kittitas*, and numerous other decisions issued in such a long adjudication where the parties may in fact have disputed the existence of such rights. Regardless, even if the *Acquavella* parties accepted the existence of an off-reservation water right as a matter of law, such acceptance directly illustrates the settled and reasonable legal basis for such rights when necessary to serve the biological needs of the fish. Those water rights were expressly based on the anadromous fish life cycle, e.g., biological needs, and the need for water for the different salmon life stages from egg to adult. *See* 1994 *Acquavella* Memorandum Opinions cited and explained at U.S. Response at 74-75. The Washington court's confirmation of off-reservation federal reserved water rights was not an issue that "merely lurk[ed] in the record" as the State asserts, but was the direct holding in both its 1994 Opinions. *Compare* U.S. Response at 74-75 (discussing the biological bases of the 1994 *Acquavella* Opinions), *with* State Response at 29 (alleging that the *Acquavella* Opinions do not provide precedent for off-reservation water rights because the parties agreed the rights existed).

IV. THE ADDITIONAL ARGUMENTS IN THE STATE AND OBJECTORS' RESPONSE BRIEFS ALSO FAIL.

The State and Objectors Response Briefs raise three new arguments in support of theories advanced in their opening briefs which are addressed below.

A. *Winters v. United States*, 207 U.S. 564 (1908), does not support the State's purported "last reservation" theory.

The State's flawed reliance on a tax case, *British-American Oil Producing Co. v. Bd. of Equalization,* 299 U.S. 159, 163 (1936), for its assertion that a "last reservation" doctrine exists in federal Indian Law was addressed in the U.S. Response at 17-19. In its Response, the State alleges for the first time that *Winters* also lends support to its theory. State Response at 11-12. On the contrary, *Winters* does not support the "principle" that the "presence of superseding

congressional action renders the intent of earlier executive orders irrelevant." State Response at 11. The State's argument rests on a misunderstanding of the history and legal context of *Winters*.

The 1888 Agreement establishing the Fort Belknap Reservation considered in *Winters* is analogous to the 1873 Executive Order establishing the Coeur d'Alene Reservation for several reasons. First, the 1888 Agreement was the first federal action establishing Fort Belknap as a reservation separate from the Blackfeet, Rocky Boys, and Fort Peck Reservations which were also eventually carved out of the same overall lands set aside by Congress in 1874 for numerous tribes.[15] *Winters*, 207 U.S. at 575 ("The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation) (emphasis added). The 1888 Agreement was preceded by the 1855 Treaty with the Blackfoot and other Tribes of Indians, 11 Stat. 657, as well as a number of executive orders, none of which purported to establish the Fort Belknap Reservation but rather set aside territory for many tribes. The reason that the *Winters* Court did not return to the earlier documents establishing the "larger tract" is that the overall parcel was not a reservation specifically for the Gros Ventre and Assiniboine bands—their Fort Belknap Reservation was first established in 1888. *Winters*, 207 U.S. at 576. Second, in 1895, the boundaries of the Fort Belknap Reservation were reduced by an agreement between the United States and the Fort Belknap Tribes, known as the Grinnell Agreement, 29 Stat. 350. INDIAN AFFAIRS: LAWS AND TREATIES, vol. 1, Charles J. Kappler ed., at 601-04 (1904). The *Winters* Court returned to the original 1888 Agreement in examining the agricultural purpose of the Fort Belknap Reservation, not the 1895 Grinnell Agreement, which was the last Agreement to establish the boundaries of the Reservation. *Winters*, 207 U.S. at 575.

[15] Incidentally, this is yet another reason that *British-American Oil* does not stand for any "last reservation" concept because the history of the establishment of the Blackfeet Reservation at issue in that case arose from the same overall tract of land set aside for multiple tribes which was eventually carved up to provide for a number of specific Indian reservations. *See* State's Response at 10-11.

If the "last reservation" doctrine existed, the 1895 Grinnell Agreement would have controlled in *Winters*; but it did not. Just like the 1873 Executive Order for Coeur d'Alene, the 1888 Agreement was the first federal action establishing the specific Fort Belknap Reservation and informs the purposes for that Reservation despite subsequent boundary changes.

The State also misconstrues the legal context of the *Winters* case by insinuating that the Court conducted a full, historic review of all the purposes of the Fort Belknap Reservation. But no such global review was conducted in *Winters* because it was not a general stream adjudication. Instead, *Winters* was an injunctive relief action that sought to enjoin upstream diverters from damming up irrigation water in one of the four basins intersecting the Reservation. 207 U.S. at 565 ("This suit was brought by the United States to restrain appellants and others from constructing and maintaining dams or reservoirs on the Milk River. . . ."). The case resulted in an injunction against those water users. The full suite of federal reserved water rights for the Fort Belknap Reservation are the subject of a current state court adjudication in Montana in which the United States as trustee has asserted water rights on behalf of the Reservation. *See* example of Statement of Claim Form filed by the United States on behalf of the Fort Belknap Reservation, Second Willard Affidavit, Ex. 10. These claims are the subject of a negotiated settlement Compact, approved by the Montana legislature in 2001, Mont. Code Ann. § 85-20-1002,[16] which, if approved by the United States Congress and the Montana Water Court, will recognize federal reserved water rights in all four basins on the Reservation, including the Milk River which was the subject of *Winters*.

[16] The Compact recognizes water rights to serve various purposes, including fish and wildlife purposes, as well as stock watering and irrigation. Mont. Code Ann. § 85-20-1002, Art. III.A.6. Regarding the irrigation water right in the Milk River, the Compact provides an overall right of 645 cfs but notes that 125 cfs of that right is "to preserve the historic water use protected in *Winters*." *Id.* at Art. III.A.1.a.

In short, the State's following assertion is incorrect: "[T]he *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." State Response at 12. There was not an earlier Fort Belknap Reservation; nor did the *Winters* Court examine all water uses. Rather, *Winters* concluded that irrigation water was required to serve the Tribes' agriculture on the portion of the Reservation served by the Milk River and, thus, the upstream diversions were enjoined. Whether the Fort Belknap Reservation has additional purposes for which water rights were reserved will be decided in the Montana adjudication.

B. The Federal Energy Regulatory Commission license authorizing Avista to operate Post Falls Dam in a manner that controls Coeur d'Alene Lake and related water levels for part of the year does not defeat the Tribe's *in situ* water right to maintain Lake levels. The license includes conditions to protect the Lake's natural resources and does not contradict a Tribal water right to protect Lake processes in the event the dam is removed or altered because both seek to ensure protection of the Lake's resources.

The State argues that Federal Energy Regulatory Commission (FERC) hydropower license for Post Falls Dam, which "controls water levels in the Spokane River and Coeur d'Alene Lake approximately six months a year,"[17] has rendered ineffective any tribal claim to an *in situ* water right in Lake Coeur d'Alene. State Response at 46 citing *Order Issuing New License and Approving Annual Charges for the Use of Reservation Lands,* 127 FERC ¶61,265, 62,163 (June 18, 2009).[18] The State argues that, because FERC found that "water storage on the Lake is not

[17] The State acknowledges that Post Falls Dam operation only influences Lake levels for part of the year. This confirms the error in the North Idaho Water Rights Group ("NIWRG") argument that Post Falls Dam construction in 1907 raised lake levels and submerged more lands which were not reserved to the Tribe in 1873. *See* United States' Response Brief at 64-66. Even if, for arguments sake, the NIWRG assertion that certain submerged lands were not included in *Idaho II*, this Court's jurisdiction under the McCarran Amendment, 43 USC § 666, does not extend to quieting title to lands. NIWRG Response at 12.

[18] Also available at 2009 FERC LEXIS 1241.

inconsistent with the purposes of the Reservation," then this must mean that a purpose of the Reservation cannot be maintenance of "the natural Lake processes prior to Post Falls dam." State Response at 48.

To the contrary, the FERC license: a) emphasizes the importance of the Lake to the Tribe's Reservation homeland; and b) specifies numerous conditions, including mandated Lake levels and outflows, to protect the natural resources on the Lake and related waters. The FERC license is consistent with a Tribal water right to protect Lake processes in the event the dam is removed or altered because both seek to ensure protection of the Lake's resources. Even if, for argument's sake, the license were inconsistent with protecting Lake resources, a FERC license issued after Reservation creation cannot restrict Reservation purposes or defeat water rights reserved at the time of the Reservation. *See e.g. Agua Caliente Band,* 2017 WL 894471 at *7-8 (noting that reserved water rights vest at time of Reservation creation are not lost through non-use, and are determined by asking "whether water was envisioned as necessary for the reservation's purpose at the time the reservation was created."). FERC may not determine tribal water rights. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 782 (1984) (Indian tribes "cannot be deprived of any water to which they have a legal right" as FERC "is expressly forbidden to adjudicate water rights.").

The United States' Notice of Claim for that portion of Lake Coeur d'Alene and its related waters within the boundary of the Reservation is for purposes including: food; fiber; transportation; recreation; religious; cultural; ceremonial; fish and wildlife habitat; lake level and wetland maintenance; water storage; power generation; and aesthetics. The Claim further notes that "[s]ince the water rights claim must address the possibility that the dam will be removed or altered, the intent is to claim sufficient water to reflect the natural Lake processes prior to the Post Falls dam—consistent with the federal and tribal intent as it was understood in 1873."

The license specifically observes that the Coeur d'Alene Reservation purpose is to serve as a homeland: "the general purpose of providing a homeland for the Indians is a broad one that must be liberally construed. Thus, in establishing an Indian reservation, the United States is presumed to intend to provide a suitable homeland for the Indians and to allow them to continue their traditional way of life." 127 FERC at ¶ 62,169 (paragraph 102). The license notes the importance of the Lake to the Tribe. 127 FERC at ¶ 62,169 (paragraph 103).

During the licensing process, Avista, the Coeur d'Alene Tribe, and the Department of the Interior ("Interior") reached a settlement agreement with proposed license conditions "protecting and enhancing the Tribe's natural and cultural resources." 127 FERC at ¶62,162-63 (paragraphs 52, 54). Because the new license included Interior and the Tribe's "conditions for the protection and utilization of the reservation, consistent with the settlement agreement," FERC found that the new license "as conditioned" would not be inconsistent with Reservation purposes. 127 FERC at ¶62,169 (paragraph 104). FERC explained that "this license requires numerous measures to protect and enhance fish, wildlife, water quality, recreation, cultural, and aesthetic resources at the project." 127 FERC at ¶62,163 (paragraph 56).[19] The fisheries provisions include measures to protect and enhance Westslope Cutthroat Trout and Bull Trout, which are important to the Tribe. 127 FERC at ¶62,164 (paragraph 75); JSF ¶ 100. The license prescribes specific Lake elevations and discharge rates. 127 FERC at ¶62,167 (paragraph 92). The license requires that Avista carry out a number of implementation plans to achieve the above conditions in collaboration with the Tribe. 127 FERC at ¶62,170 (paragraph 108).

[19] Conditions include minimum discharge flows for aquatic habitat, 127 FERC at ¶62,163 (paragraph 56), a water quality management plant, 127 FERC at ¶62,164 (paragraph 66), aquatic weed, erosion, and sediment control, 127 FERC at ¶62,164 (paragraphs 69-70), fisheries and recreation protection, 127 FERC at ¶62,164-65 (paragraphs 73-75, 78), wildlife protection, 127 FERC at ¶62,165 (paragraphs 79-80), wetland and riparian habitat mitigation, *id.* at para. 81, scenic protection, *id.* at para. 82, and cultural resource protection, *id.* at para. 83.

The license also contains recommendations from the Idaho Department of Fish and Game to protect fish and wildlife and their habitat, including prescribed flow releases from Post Falls Dam. 127 FERC at ¶62,174-75 (paragraphs 141, 144). The State argues that the federal claim encompassing a minimum outflow from the Lake as part of claim quantification is inconsistent with any development at Post Falls. State Resp. at 47, 56. Yet the State's own Department of Fish and Game prescribed releases from the dam and, as discussed above, the license mandates certain release rates so that, even with the presence of the dam, the Lake functions as habitat rather than a pool of stagnant water.

The State again inserts a red herring in arguing that the Tribe seeks to prevent all development on the Lake. State Response at 47. To the contrary, as demonstrated by the FERC license, certain Lake elevations and outflow are necessary to protect natural resources, but this does not preclude development. Nowhere does the federal claim, which encompasses water levels lower than present Lake elevations under the FERC license, assert a right to prevent development. To the extent the State quibbles with the claims' quantification of Lake levels or flows, this is not a basis for finding no entitlement to the right, but is an issue for subsequent quantification proceedings. For all these reasons, the FERC license does not contradict a Tribal water right to protect Lake processes in the event the dam is removed or altered because both seek to ensure protection of the Lake's resources, including through protecting Lake levels.

C. The 1999 SRBA Decision regarding Nez Perce off-reservation instream flow water rights is not controlling precedent, is inherently flawed, and has limited applicability because of the subsequent Nez Perce settlement.

In the SRBA, the United States, as trustee for the Nez Perce Tribe, asserted off-reservation instream flow water right claims to support fish habitat based on Article 3 of the Nez Perce Treaty of June 11, 1855, 12 Stat. 957, 2 Kappler 702, which reserves to the Tribe "the right of taking fish at all usual and accustomed places in common with citizens of the Territory." This

"usual and accustomed" language was utilized in a number of treaties negotiated by Governor Issac Stevens in the mid-19th Century and has been the subject of extensive litigation, primarily in the ongoing case of *United States v. Washington.*

In 1999, the SRBA Court denied the United States and Nez Perce Tribe's motion for summary judgment regarding the off-reservation claims. *Order on Motions to Strike, Motion to Supplement the Record, and Motions for Summary Judgement*, Consolidated subcase 03-10022 (Idaho 5th Jud. Dist. Ct., Twin Falls County, November 10, 1999) ("1999 SRBA Decision"). The reasoning of the 1999 SRBA Decision relies primarily on *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979), which is a case arising in the *United States v. Washington* framework analyzing "usual and accustomed" fishing grounds as reserved in the Stevens Treaties. *See* 1999 SRBA Decision at 30-39. The 1999 SRBA Decision's narrow interpretation of *Passenger Fishing Vessel* is contrary to federal law and should not be considered controlling even for "usual and accustomed" fishing grounds. *See e.g., United States v. Washington*, 827 F.3d 836 (9th Cir. 2016).[20] Moreover, the 1999 SRBA Decision was appealed to the Idaho Supreme Court but was remanded before consideration pursuant to the Mediator's Term Sheet, Sec. IV.K, that provided the basis for the Snake River Water Rights Act of 2004, Public Law 108-447, 108 Congress Session 1, Consolidated Appropriations Act, 2005, 118 Stat. 3431. Accordingly, the legal reasoning of the 1999 SRBA Decision has not been subject to appellate review.

Most importantly for this case, however, the 1999 SRBA Decision focused on a claim to water rights based on usual and accustomed fishing grounds, which is not the basis for the claims

[20] The 1999 SRBA Decision has been the subject of legal critique that has found significant flaws in its reasoning. *See e.g.*, Michael Blumm, Dale Goble, Judith Royster & Mary Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 Idaho L. Rev. 449 (2000).

in this case. The claims in this case are based on the biological needs of the adfluvial fish population subject to harvest within the Reservation boundary. *See* U.S. Response at 71-72. These claims are not based on any asserted rights to exercise off-reservation fishing rights at usual and accustomed fishing grounds like the Nez Perce claims. Accordingly, the analysis in the 1999 SRBA Decision is not directly applicable to this Court's consideration of the claims here based on biological necessity. Moreover, even if this Court were to consider the 1999 SRBA Decision, the rationale utilized in that opinion was flawed and should not be extended to apply to this case.

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CONCLUSION

For all of the reasons above, as well as the arguments in the United States' previous briefs, the United States moves the Court for an order granting the *United States' and Coeur d'Alene Tribe's ("Tribe") Joint Motion for Summary Judgment*, dated October 20, 2016.

DATED this 17th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' MEMORANDUM IN REPLY TO THE STATE OF IDAHO'S AND OBJECTORS' RESPONSES TO SUMMARY JUDGMENT MOTION was sent via fax this 17th day of March, 2017 to:

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I certify that true and correct copies of the documents listed above were sent via U.S. Post to the parties below on this 17th day of March, 2017.

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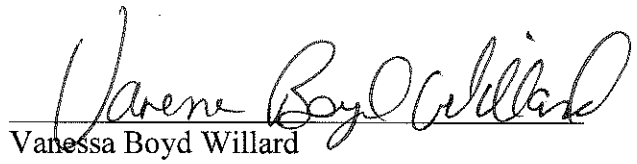

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