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IDSC NIWRG Opening Brief

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: CSRBA CASE NO. 49576 SUBCASE NO. 91-7755 (353 Consolidated Subcases) NORTH IDAHO WATER RIGHTS ALLIANCE, MEMBERS OF THE NORTH WEST PROPERTY OWNERS ALLIANCE, MEMBERS OF THE COEUR D'ALENE LAKESHORE PROPERTY OWNERS ASSOCIATION, RATHDRUM POWER LLC, and HAGADONE HOSPITALITY CO., Appellants, v. UNITED STATES OF AMERICA and COEUR D'ALENE TRIBE, Respondents.	**SUPREME COURT DOCKET** **45384**

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

Members of the North Idaho Water Rights Alliance; Members of the North West Property Owners Alliance; Members of the Coeur d'Alene Lakeshore Property Owners Association; Rathdrum Power, LLC; and Hagadone Hospitality Co. (collectively, the "North Idaho Water Rights Group" or "NIWRG"), the above-named Appellants, by and through their counsel of record, Norman M. Semanko of Parsons Behle & Latimer, hereby submit their Opening Brief in this matter on appeal from the Fifth Judicial District, Coeur d'Alene Spokane River Basin Adjudication, Twin Falls County (Eric J. Wildman, Presiding).

I. STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") district court decision, granting in part and denying in part cross-motions for summary judgment, regarding claims by the United States for federal reserved water rights in connection with the Coeur d'Alene Indian Reservation.

2. Course of the Proceedings.

The United States filed a total of 353 federal reserved water right claims in the CSRBA for the Coeur d'Alene Reservation, on behalf of the Coeur d'Alene Tribe (the "Tribe"), as follows: (1) 17 domestic, commercial, municipal and industrial claims; (2) 72 instream flow claims for fish habitat; (3) 44 irrigated agriculture claims; (4) one lake level maintenance claim for Lake Coeur d'Alene; (5) 24 claims for springs and seeps; and (6) 195 claims for wetlands. R. at 5–7, 359–61.

The State of Idaho, the North Idaho Water Rights Group and other parties to the CSRBA filed objections and responses to the claims of the United States. Included in these objections was the State's concern that "the claimed water right is not necessary to accomplish the primary purpose for which the Reservation was set aside." R. at 369–70 (State's objection to claim no. 91-7755). This "necessity" objection was also made by members of the North Idaho Water Rights Group (R. at 385, 425 and 434), as well as by other objectors (R. at 399, 404, 410 and 431).

The district court consolidated the 353 subcases and determined that it would consider the case in two bifurcated stages, deciding first whether the United States was entitled to a reserved water right and, if so, the second phase of the case would quantify the right. The district court made clear: "Issues related to entitlement will be addressed in a single proceeding prior to litigation of quantification issues." R. at 462–63 (*Order Consolidating Subcases; Scheduling Order* (Feb. 17, 2015)). A summary judgment motion deadline was set, but the district court also scheduled an evidentiary trial in the entitlement proceeding. R. at 464. No quantification proceedings were scheduled.

Cross-motions for summary judgment were filed on the entitlement issues involving all 353 federal claims. A hearing was held in Coeur d'Alene, followed by the district court's *Order on Motions for Summary Judgment* (May 3, 2017) (R. at 4310–32), along with the district court's *Final Order Disallowing Purposes of Use* (May 3, 2017) (R. 4301–03)and its original *Final Order Disallowing Water Right Claims* (May 3, 2017) (R. 4305–08). The original Final Order disallowed 84 federal claims. Following consideration of a motion to set aside filed by the United States and the Tribe, the district court issued an *Amended Final Order Disallowing Water Right Claims*

(July 26, 2017) (R. at 4468–71), which reinstated 15 federal claims, thereby disallowing a total of 69 claims.

The North Idaho Water Rights Group timely filed its Notice of Appeal on September 6, 2017. Additional notices of appeal were filed by the State of Idaho, the United States and the Tribe. The transcript and record were consolidated for the four appeals.

3. Statement of the Facts.

The district court adopted the detailed summary of the circumstances surrounding the creation of the Coeur d'Alene Reservation that were provided in *Idaho v. U.S.*, 533 U.S. 262, 265–71 (2001). *Order on Motions for Summary Judgment* at 4–6. They are set out at length in the district court's opinion and will not be repeated verbatim here. An abbreviated summary of those facts is provided here instead, along with a short statement of other relevant facts.

President Johnson issued an Executive Order creating the Coeur d'Alene Indian Reservation in 1867. The Tribe found the 1867 boundaries unsatisfactory and negotiated an agreement in 1873 to enlarge the reservation boundaries to include certain waterways, including almost all of Lake Coeur d'Alene and portions of the St. Joe, Coeur d'Alene and Spokane Rivers. While the 1873 agreement was not approved by Congress, President Grant issued an additional Executive Order that same year establishing the enlarged reservation.

In 1887, the Tribe and the United States again negotiated, in response to the Tribe's 1885 petition to enter into an agreement. As a result, the Tribe agreed to cede all lands outside of the 1873 reservation boundaries. Congress did not immediately approve the 1887 agreement, expressing concern about the expanded size of the 1873 reservation boundaries. As a result,

additional negotiations were authorized in 1889. In the 1889 agreement, the Tribe agreed to cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene and the previously included portions of the Coeur d'Alene and Spokane Rivers.

In 1891, Congress approved both the 1887 and 1889 agreements with the Tribe. *Idaho*, 533 U.S. at 265–71; *Order on Motions for Summary Judgment* at 4–6.

The ceded lands were opened to homestead under the 1891 act. A further cession was made by agreement in 1894. A 1906 act made provision for surveying the diminished reservation, allotting lands to the Indians, and opening the unallotted lands to homestead entry. R. at 885–86, 994–97. In pursuance of the provisions of the 1906 act for opening the reservation lands, a proclamation was issued in 1909 for the opening of lands to settlement and entry, including a drawing in 1909 and general settlement beginning in 1910. R. at 888–89.

II. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in recognizing fishing and hunting as a primary purpose of the Coeur d'Alene Reservation.

2. Whether the district court erred by allowing claims to proceed to the quantification phase without first making determinations of necessity during the entitlement phase.

3. Whether the district court erred in not disallowing instream flow claims within the Coeur d'Alene Reservation.

4. Whether the district court erred in not disallowing irrigation claims within the Coeur d'Alene Reservation.

5. Whether the district court erred in not disallowing claim no. 95-16704 (Lake Coeur d'Alene) within the Coeur d'Alene Reservation.

6. Whether the district court erred in not disallowing ground water claims within the Coeur d'Alene Reservation.

III. ARGUMENT

A. Standard of Review

In an appeal from an order granting summary judgment, the Court applies the same standard of review as that used by the district court when originally ruling on the motion. *Mitchell v. Bingham Mem'l Hosp.*, 130 Idaho 420, 422, 942 P.2d 544, 546 (1997). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *First Security Bank v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). The determination is to be based on the pleadings, depositions, and admissions on file, together with affidavits, if any. *Id.*; *see* I.R.C.P. 56(c). However, the Court will liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell*, 130 Idaho at 422, 942 P.2d at 546. When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence before it and grant summary judgment despite the possibility of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The claimant of a water right based on federal law has the ultimate burden of persuasion on each element of the water right. I.C. Sec. 42-

1411A(12). As to issues of law, the Court exercises free review of the trial court's decision. *Hoffer v. Callister*, 137 Idaho 291, 294, 47 P.3d 1261, 1264 (2002).

B. The Law Regarding Federal Reserved Water Rights

The Court has ruled on several cases regarding the doctrine of federal reserved water rights. *See e.g., U.S. v. State of Idaho*, 135 Idaho 655, 23 P.3d 117 (2001) (regarding the Deer Flat National Wildlife Refuge claims); *State v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (regarding the Sawtooth National Recreation Area claims); *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000) (regarding the Wilderness Act and Hells Canyon Recreation Area claims); *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000) (regarding the Wild and Scenic River Act claims); and *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (regarding the Public Water Reserve 107 executive order claims).

The Court has made clear that the existence or absence of a reserved water right is a matter of federal law, relying in its prior decisions upon United States Supreme Court cases and relevant federal executive and legislative history. Reliance by the Court upon its prior decisions has been intended simply to incorporate reasoning based upon federal law, not to imply that there is applicable state law. *U.S. v. State of Idaho*, 135 Idaho at 122. The Court is "not bound by circuit court precedent even on matters of federal law." *State v. McNeely*, 162 Idaho 413, 416, 398 P.3d 146, 149 (2017). "Such decisions are authoritative only if the reasoning is persuasive." *Id*. Of course, if the United States Supreme Court has interpreted the federal law in question, the Idaho Supreme Court will be bound by the U.S. Supreme Court's interpretation of federal law. *James v.*

City of Boise, Idaho, 136 S.Ct. 685, 686 (2016). With regard to the federal reserved water rights doctrine, the U.S. Supreme Court has spoken definitively, as recognized by the Court.

"In deciding whether an implied reservation of water exists, the Court must determine whether it must be inferred that the executive body involved intended to reserve unappropriated waters. *Cappaert v. United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976)." *U.S. v. State of Idaho*, 135 Idaho at 123. "An intent to reserve water is inferred if water is necessary for the primary purposes of the reservation and if, without water, the purposes of the reservation will be entirely defeated." *State v. United States*, 134 Idaho at 943, 12 P.3d at 1287, *citing United States v. New Mexico*, 438 U.S. 696, 700, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978). "The necessity of water must be so great that without the water the reservation would be 'entirely defeated.' *New Mexico*, 438 U.S. at 702, 98 S.Ct. 3012." *U.S. v. State of Idaho*, 135 Idaho at 123. "Where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists." *United States v. State*, 131 Idaho at 470.

C. The Primary Purpose of the Reservation Does Not Include Fishing and Hunting

The district court concluded that fishing and hunting was a primary purpose for the federal government to set aside the Coeur d'Alene Indian Reservation. At the same time, the district court recognized agricultural and domestic uses as primary purposes. While the latter uses find generous

support in the text of the agreements and Congressional acts of the time, fishing and hunting does not. A detailed review of the agreements (1873, 1887 and 1889), Executive Orders (1867 and 1873) and Congressional actions (1886-1891 and 1906) involving the Coeur d'Alene Reservation reveal a purposeful and deliberate purpose: promoting an agrarian lifestyle on a diminishing reservation. This is remarkably similar to the series of events involving the Fort Belknap Reservation that was at issue in the first federal reserved water right case of *Winters v. United States*, 207 U.S. 564 (1908), in which the purpose of the diminished reservation was "to become a pastoral and civilized people," not for the "habits and wants of a nomadic and uncivilized people." *Winters*, 207 U.S. at 576.

The July 1873 agreement, which led to the enlarged Executive Order reservation that same year, sought to locate tribal members "on a reservation suitable to their wants as an agricultural people." R. at 713 (quoting Smith to the Secretary of the Interior (Nov. 1, 1873)). The 1873 agreement was to provide the tribal members with wagons, plows, horses, a grist mill, a saw mill, school buildings, a blacksmith and sundry other agricultural implements. R. at 710, 1866.

The need for assistance was understandable, given the statement by tribal leadership that "we are not as yet quite up to living on farming; with the word of God we took labor too; we began tilling the ground and we like it; though perhaps slowly we are continually progressing; but our unaided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones; for a while yet we need have some hunting and fishing." R. at 700. From the entirety of this statement, it seems clear that the overriding goal — the primary purpose — was agriculture (the future), with hunting and fishing as a fading vocation (the past).

The agricultural purpose of the reservation was certainly a promising one, given the favorable remarks on the Tribe's early agricultural practices, as provided by Governor Isaac Stevens and Captain John Mullan. R. at 646, 669, 670 and 686.

Accordingly, "the majority of Coeur d'Alene families began to relocate to the DeSmet area by the late 1870s and early 1880s." R. at 716. "A final factor in the removal of Coeur d'Alene families from their traditional villages to Hangman Creek Valley was the relocation of the Sacred Heart Mission from Cataldo to DeSmet. The Jesuits' move occurred in 1877. *Id*. There were many "well-improved farms[,]" and tribal members had a total of "160 farms" from which they found "a ready sale for their surplus produce at good prices." *Id*. (quoting John A. Simms, Indian Agent, to Commissioner of Indian Affairs in 1879 and 1880 reports).

By "1877 or 1878," the Coeur d'Alenes had reportedly "all commenced making small farms" in the DeSmet area and other lands within the reserve. R. at 725 (quoting James O'Neil, Resident Farmer, Coeur d'Alene, to Sidney D. Waters, Indian Agent (Mar. 26, 1885)).

At the time of the 1883 survey, tribal members were "far advanced over their white neighbors" in their agricultural endeavors. R. at 721 (quoting Waters to Price (Nov. 10, 1883)). In an 1884 letter, Indian Agent Waters called the Coeur d'Alenes "the peers of any farmers on the Pacific slope." R. at 723.

In its 1885 petition, the Tribe stressed the need for proper farming implements. R. at 1871. Congress appropriated funds to negotiate further with the Tribe in 1886. R. at 725. During the meetings in March 1887, the federal commission met with tribal leaders at the DeSmet mission, telling them that their farms were far "ahead of the whites." R. at 726.

In authorizing additional negotiations in 1889, Congress directed the new commission to seek the purchase of portions of the reservation "not agricultural." R. at 733 (quoting Act of March 2, 1889).

Comments made by tribal members during the 1889 Council meetings focused primarily on agricultural uses and "improvements." R. at 740 (Third Council, Aug. 31, 1889; Fourth Council, Sep. 8, 1889). To be sure, the waterways continued to be used by Indians and non-Indians alike afterwards. *See, e.g.*, R. at 741–42 (noting "a favorite camping and fishing place" for both tribal members and "the white people in this vicinity"). But it was not the focus of the reservation.

In 1891, the year Congress ratified the 1887 and 1889 agreements, the local Indian Agent commended the tribal members' agricultural efforts, stating that nearly all of them were farmers. By the mid-1890s, they continued to hold "the finest farms" among all area tribes that boasted "clean fields, well supplied with stock, modern machinery, good houses and barns." At the decade's end, tribal members reportedly had "a greater acreage in cultivation than ever before" and were "better farmers than any other tribe connected with this agency." R. at 741–42 (quoting Indian Agency reports from Cole (1891), Bubb (1894) and Anderson (1899)).

The fact that "not all tribal members relocated from their traditional village sites along tribal waterways" with "some families continu[ing] to reside in the lake and river regions well into the twentieth century" (R. at 716) and that some tribal members "did not abandon their traditional subsistence practices" into the late 1800s (R. at 743), is not sufficient to find that fishing and hunting were a primary purpose of the reservation. Agriculture, however, clearly was, just as in *Winters*.

As a result, the federal claims on the reservation that rely upon a fishing and hunting purpose should be dismissed. This includes the remaining 15 instream flow claims, the lake claim, and the claims for springs, seeps and wetlands.

D. The Test of Necessity Defeats the Federal Government's Reserved Right Claims

The inquiry regarding entitlement to a federal reserved water right does not end with a determination of the primary purpose of the reservation. The *New Mexico* "test of necessity" must be applied. This is critically important because the federal reserved water rights doctrine is a narrowly tailored exception to the "purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). If allowed, the federal claims threaten future curtailment of vested, state law water rights. As admitted by the United States: "The water rights claimed for various consumptive and non-consumptive uses may exceed the natural flow in a given stream in a particular year. The United States and Coeur d'Alene Tribe reserve the right to determine in any particular year which use(s), if any, to limit." R. at 13. Given Idaho's system of priority administration, and the senior priorities claimed by the United States, it is safe to assume that the uses to be limited during times of shortage will not just be those of the Tribe. The more junior state law water right holders on the system will be adversely impacted. That is why the stringency of the necessity test is so important. *See also, U.S. v. State of Idaho*, 135 Idaho at 666 (observing that federal reserved water right for Wildlife Refuge would make state law irrigation water rights inferior and subject to interruption).

The district court correctly identified this critical task, citing *New Mexico* for the proposition that a federal reserved water right may be implied only after the court "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." R. at 4316 (*Order on Motions for Summary Judgment* at 7 (*quoting New Mexico*, 438 U.S. at 700)) (emphasis added); R. at 4318 (*Order on Motions for Summary Judgment* at 9, n.4 ("a primary purpose may only carry a federal reserved water right if 'without the water the purposes of the reservation would be entirely defeated.' *New Mexico*, 438 U.S. at 700.")).

However, the district court stopped short of actually applying the necessity test, seeming to settle instead on identifying the primary purposes of the reservation and implying a federal reserved water right from that finding alone. R. at 4322 (*Order on Motions for Summary Judgment* at 13 ("one primary purpose of the Coeur d'Alene Reservation was to provide the Tribe with the important waterways needed to facilitate its traditional fishing and hunting practices. . . . The Court therefore concludes that when the United States reserved land for use as the Coeur d'Alene Indian Reservation, it impliedly reserved water rights necessary to fulfill the fishing and hunting purpose of the reservation")). Applying the test below, it is clear that certain federal reserved water right claims are not necessary to fulfill the primary purposes of the reservation and should be disallowed.

1. Fishing and Hunting Purposes Are Not Entirely Defeated Without a Federal Reserved Water Right.

Application of the *New Mexico* "test of necessity" here indicates that no federal reserved water right exists for fish and hunting purposes. In conducting this analysis, it is helpful to first review the Court's previous decisions applying the test.

For example, the Court previously found no basis for a federal reserved water right in the Sawtooth National Recreation Area ("SNRA"), despite the existence of a fish and wildlife purpose of use. *State v. United States*, 134 Idaho 940, 945–47, 12 P.3d 1284, 1289–91 (2000). The primary purpose of the reservation was to regulate development and mining in the SNRA "in order to preserve and protect the natural, scenic, historic, pastoral, and fish and wildlife values of the area, as well as to enhance the recreational values associated with the area." *Id.* at 944. The district court took judicial notice of the fact that fish require water to live, and because the primary purpose of the reservation included the protection of fish and wildlife values, ruled that water was necessary to fulfill the primary purpose. The Court disagreed. *Id*. at 944–45.

"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. *New Mexico*, 438 U.S. at 700, 98 S.Ct. at 3014, 57 L.Ed.2d at 1057." *Id.* at 945. While agreeing that "fish require water," the Court found that the test of necessity was not met because the primary purpose of the reservation, including protection of fish and wildlife values, was being accomplished through the promulgation of land use regulations for the recreation area. *Id.* (*citing, e.g.,* 36 C.F.R. Secs. 292.14–292.18 (1999)). Because the purpose of the SNRA was now being addressed by government regulations, the Court found that the fish and wildlife purpose would not be entirely defeated without water and held that there was no federal reserved water right. *Id.* This was true, even though the government regulations were adopted well after the SNRA was established.

The *New Mexico* "test of necessity" was also applied by the Court in the context of a federal reserved water right claim for the Deer Flat National Wildlife Refuge. *U.S. v. State of Idaho*, 135 Idaho 655, 23 P.3d 117 (2001). The federal government claimed that the reservation of islands in the Snake River, for the purpose of providing a refuge and breeding ground for migratory birds and other wildlife, created a federal reserved water right. However, the Court found: "The United States has not shown that the principal objects of the reservations will be defeated without a reserved water right." *Id.* at 664. "One can assume that there was an expectation that the 'islands' would remain surrounded by water, but that does not equate to an intent to reserve a federal water right to accomplish that purpose. *Id.* The Court observed that the reclamation projects assured that there would be sufficient water to maintain the islands without a federal reserved water right. *Id.* at 666. "Local residents say that the principal factor in preventing water level fluctuations are the numerous dams and reservoirs upstream." *Id.*

Despite the fact that fish and islands both need water, it turns out that neither required a federal reserved water right under the Court's previous opinions, applying "the test of necessity" from *New Mexico*. The same is true for fishing and hunting on the Coeur d'Alene Reservation. The asserted fishing and hunting purpose would not be "entirely defeated" without a federal reserved water right.

In *Puyallup Tribe v. Dept. of Game of Washington*, 433 U.S. 173 (1977), the U.S. Supreme Court concluded that the power of the state was adequate for protection of the fish, and a federal reserved water right was not necessary to fulfill that purpose. This rationale is equally applicable to the State of Idaho, rendering a federal water right unnecessary to meet the fish and wildlife

purpose of the Coeur d'Alene Reservation. Just as federal regulation in the SNRA negated any need for a federal water right for fish and wildlife, state regulation of fish and wildlife negates such a need here.

In addition, the State of Idaho has provided vested water right protections for important waterways within the Reservation boundaries, making a federal water right unnecessary.

In 1927, the Idaho State Legislature authorized and directed the Governor of the State of Idaho to appropriate in trust for the people of the State of Idaho all of the unappropriated water of Lake Coeur d'Alene, to preserve the lake for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the residents of Idaho. I.C. Sec. 67-6304. The Governor applied for and was granted water right no. 95-2067 for the preservation of Lake Coeur d'Alene, which right was licensed and became vested pursuant to the laws of the State of Idaho. I.C. Sec. 42-220. By its terms, this water right protects the entire lake, including the portion that lies within the Coeur d'Alene Reservation. The purpose of the United States' claim for the lake, including maintaining its historic levels for fish and wildlife purposes, is met by the State.

The same holds true for the United States' claim for a reserved water right for the St. Joe River. The purpose of use in the claim is listed as: "Fish habitat for fish species harvested within the Reservation." R. at 363. However, these values are already preserved through licensed water right no. 91-7122, held by the Idaho Water Resource Board and decreed by the Adjudication Court in the CSRBA on November 13, 2015, for the protection of fish and wildlife habitat, aquatic life and recreational values in the St. Joe River.

Also of importance is the fact that, just as in the Deer Flat National Wildlife Refuge case, an upstream dam prevents water level fluctuations in the lake and river. The United States acknowledges that Post Falls Dam keeps the water at or above natural levels. R. at 11. It is perhaps not surprising then that "the target fish that are in the lake can and do move freely throughout different portions of the lake to fulfill their biological requirements." R. at 588. This is true for movement by the fish species to and from the rivers and streams, as well. R. at 568, 594.

With this purpose satisfied, the federal claims fail the *New Mexico* "test of necessity." Again, this is critical because every federal reserved water right is an exception to the state law system of water rights and thereby threatens the availability of water for vested water rights. To exist, a federal reserved water right must truly be necessary. Here, it is clear they are not.

In total, there are 15 instream flow claims, one claim for the portion of Lake Coeur d'Alene, 24 claims to seeps and springs, and 195 wetland claims within the reservation, all claiming fishing and/or hunting purposes. As discussed above, these claims fail to meet the *New Mexico* "test of necessity." These federal claims must therefore be disallowed, just as those in the SNRA and the Deer Flat National Wildlife Refuge were.

2. Water Is Not Necessary to Fulfill the Agricultural Purpose of the Reservation.

The district court appropriately concluded that "one primary purpose of the reservation was to establish an agrarian lifestyle for its inhabitants." R. at 4320 (*Order on Motions for Summary Judgment* at 11). But, then, much like with the fishing and hunting purpose of use, the district court concluded that a reserved water right was implied, without first applying the *New Mexico* "test of necessity." *Id.* ("It follows [from the primary purpose conclusion] that when the United

States reserved land for use as the Coeur d'Alene Indian Reservation it impliedly reserved the water rights necessary to fulfill that purpose."). The district court did acknowledge the question as to whether "agriculture can be sustained to various degrees on the reservation without irrigation," but characterized the issue as "one of quantification," to be reached during the quantification stage. R. at 4320–21.

However, the question of whether a water right is necessary to fulfill the agricultural purpose of use — whether that purpose would be entirely defeated without water — is a threshold entitlement question under the *New Mexico* "test of necessity," not a quantification issue. As discussed below, the record is adequate to make that determination on summary judgment. If, however, the Court decides that the determination cannot be made on summary judgment, it should remand the matter to the district court with instructions to conduct an evidentiary hearing during the entitlement phase. The quantification phase would follow only if it is determined that the agricultural use of the Coeur d'Alene Reservation would be entirely defeated without a federal reserved water right, as set forth in the district court's *Order Consolidating Subcases; Scheduling Order*. R. at 462, 463.

When the necessity test is applied, it is apparent that the agricultural purpose of the reservation does not require a federal reserved water right.

"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. *New Mexico*, 438 U.S. at 700, 98 S.Ct. at 3014, 57 L.Ed.2d at 1057." *State v. United States*, 134 Idaho at 945. Here, there is ample evidence in the record that irrigation is not

required on the Coeur d'Alene Reservation — at all. There is no evidence in the record that irrigation is required, or that the agricultural purpose of the reservation would be "entirely defeated" without water. This is highly problematic for the United States, given that the ultimate burden of persuasion for a federal reserved water right claim is on the claimant. I.C. Sec. 42-1411A(12); R. at 837. Given the dearth of evidence, there is no basis to sustain a finding that water is necessary to satisfy the agricultural purpose of the reservation.

The State's historical expert (Wee) reported that the reservation "area was well watered." R. at 2948. He found no discussion in the historical record of irrigation systems being constructed and used by the Coeur d'Alene Indians; it was dry farming. R. at 2965. He found no historical documentary evidence that indicates irrigation was practiced. R. at 2970–71. As time went on, he concluded, the practice continued to be dry farming, with no evidence that the Tribe or its members developed irrigation works. R. at 3114–15. In their rebuttal reports, the experts for the United States (Smith) and the Tribe (Hart) provided no evidence of actual irrigation or the need for irrigation on the Coeur d'Alene Reservation. R. at 796–97, 1975–2010. The closest they got to the mark was when Hart noted that agriculture was impossible without irrigation — in Utah. R. at 1979. Tellingly, Smith claimed that "these topics do not directly relate to the purposes for which the reservation was created." R. at 796. Hart ultimately acknowledged that dry farming was used on the reservation. R. at 1980, 1986.

In the 1906 Act opening the reservation to allotment and disposal, the funds from the sale of lands were to be expended for the benefit of the Coeur d'Alene Indians, including "the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horse-rakes, thrashing machines,

and other agricultural implements for issue to said Indians." R. at 996. There was no provision included for water facilities (e.g., irrigation) for the Coeur d'Alene Reservation, unlike the water facilities provided for the Flathead Reservation in Montana as part of the 1906 Indian Appropriations Bill. R. 1008. This, despite the fact that the tribal leadership was advised of the bill in council by Acting Superintendent Worley and told that they could suggest changes. They asked for nothing else. R. at 1024–35, 1087–88.

A federal government report in 1921 observed that lands in and around the reservation had "been diked, drained, and put under cultivation" and were "very productive." R. at 883. The report also discussed the need for the formation of drainage districts, so lands could be productively farmed. R. at 884. The government surveys included lands down to an elevation of about 2,121 feet. Their agricultural value, unless they were drained, was questionable. R. at 888–89. The only mention of irrigation was the potential use of Lake Coeur d'Alene as a storage reservoir for irrigation of desert lands along the Columbia River, in Washington State. R. at 907. If irrigation was needed on the Coeur d'Alene Reservation, it would make little sense to consider storing it for use downstream in Washington State instead.

And in 1934, a Congressional summary involving the Coeur d'Alene Reservation reported: "No irrigation projects on this jurisdiction and none needed." R. at 935. The report, prepared by the Coeur d'Alene Indian Superintendent, stated that the crops grown by the tribal members included wheat, sweet corn, oats, hay, potatoes and garden vegetables. R. at 934. At the October 23, 1933 hearing held in DeSmet, Idaho, a transcript of which is included in the same report, the Senate Indian Affairs Subcommittee Chairman opened the hearing by stating: "As we

came through your reservation we find that you have the finest farming land of any Indian reservation, I think, in the United States. I do not think there is another Indian reservation in all the United States that has as fine farming land as the Indians here upon this reservation." R. at 926. And this was accomplished with "[n]o irrigation projects . . . and none needed." R. at 935.

The fact that irrigation claims are not supportable on the reservation is also indicated by the United States' own claims, which seek reserved water rights for both irrigation and wetland purposes in the same locations. R. at 2297.

Based on the evidence in the record, it is apparent that the agricultural purpose of the reservation would not be "entirely defeated" without water. *New Mexico,* 438 U.S. at 700. As a result, the federal reserved water right claims filed by the United States for irrigation purposes should be denied.

In the alternative, if the Court determines that the necessity issue cannot be resolved on summary judgment, the matter should be remanded to the district court for an evidentiary hearing in the entitlement proceedings to make the necessity determination required under *New Mexico*.

E. Without a Lake Level, the Lake Claim Is Unquantifiable and Should Be Dismissed

The district court disallowed the United States' claim for lake level maintenance of Lake Coeur d'Alene, based upon a finding that lake level maintenance was not a primary purpose of the reservation. R. at 4328 (*Order on Motions for Summary Judgment* at 19). This seemed to dispose of the lake level claim (no. 95-16704). However, because the claim lists "fish and wildlife habitat" under its claimed purpose of use, the district court allowed the claim to proceed to the

quantification phase. R. at 4302 (*Final Order Disallowing Purposes of Use* at 2). The claim should nonetheless be dismissed.

If, as argued above, the Court finds that the primary purpose of the reservation does not include hunting and fishing, that would dispose of the lake level claim. Alternatively, if, as also argued above, the Court finds that a federal reserved water right is not necessary to fulfill the fishing and hunting purpose as it relates to the lake level claim, this would also dispose of the claim. If neither of these arguments prevails, the lake level claim should be dismissed for the additional reason that there exists no method for quantifying the claim.

The United States' "Summary of Federal Lake Elevation Maintenance Claims on Behalf of the Coeur d'Alene Tribe" indicates that the quantity of the right would be "maintenance of natural Lake Elevation." R. at 12. This lake maintenance level is claimed between 2120.4 feet and 2129.6 feet in elevation. R. at 20 (Attachment V to U.S. Cover Letter (Jan. 30, 2014) ("Summary of Federal Lake Elevation Maintenance Claims on behalf of Coeur d'Alene Tribe")).

The district court appropriately held that lake level maintenance is not a purpose of the Coeur d'Alene Reservation. Absent the lake levels set forth in the claim — which the district court disallowed — there is no other standard for the amount of water necessary for the lake. The Court has held that "[a]bsence of any standard for quantification is indicative of the fact that quantification was not meant to be determined." *Potlatch Corp.*, 134 Idaho at 922, 12 P.3d at 1266. As a result, the lake level maintenance claim no. 95-16704 should be dismissed.

If the Court does not dismiss the lake level claim, the district court should be instructed to take up the North Idaho Water Rights Group's issue on remand regarding the extent of the

submerged lands reserved for the Tribe by the United States. As the district court recognized, this issue relates to the United States' lake level maintenance claim. R. at 4328 (*Order on Motions for Summary Judgment* at 19); *see also*, Tr. at p. 140, L. 17–25, p. 142, L. 13–20, p. 143, L. 15–19 (discussing need to limit lake level claim to lands submerged at time of reservation). The district court said it did not reach the issue because it determined that the United States is not entitled to a federal reserved water right for lake level maintenance as a matter of law. R. at 4328 (*Order on Motions for Summary Judgment* at 19). Yet, the district court allowed the lake level claim to go forward to the quantification stage. R. at 4302 (*Final Order Disallowing Purposes of Use* at 2). If this is allowed to stand, the issue of the extent of the submerged lands held for the Tribe by the United States must be heard and decided by the district court.

The federal government only "reserves appurtenant water." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2063 (1976). Determining the extent of the submerged lands that were reserved by the United States is a prerequisite for finding what water is appurtenant to such lands. It cannot simply be presumed that all of the currently submerged land is owned by the United States. *See e.g.*, *Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754, 405 P.3d 13 (2017) (sufficient proof of alienation of submerged lands would serve to defeat Tribe's claim of jurisdiction over such lands). As a result, if the United States' lake level maintenance claim is not dismissed here, the submerged lands issue raised by the North Idaho Water Rights Group must be considered by the district court in further proceedings, and the district court should be so instructed.

F. Federal Ground Water Claims Should Be Dismissed for Lack of Binding Authority and Because They Are Not Necessary to Fulfill the Domestic Purpose

The district court found that water rights for domestic use are necessary "to make the reservation livable." R. at 4322 (*Order on Motions for Summary Judgment* at 13 (*quoting Arizona v. California*, 460 U.S. 605, 616 (1983))). However, the district court erred in not addressing the legal question as to whether such federal rights can be sourced from ground water. There is no binding authority to recognize such a right. In addition, a federal reserved water right is not necessary.

In the process of determining a priority date for the domestic claims, the district court observed: "While the use of surface water for domestic purposes was surely an aboriginal practice of the Tribe, the diversion and use of groundwater via wells was not." R. at 4327 (*Order on Motions for Summary Judgment* at 18). The United States did not claim surface water for domestic purposes, only groundwater.

The United States Supreme Court has declined to apply the federal reserved water rights doctrine to groundwater. *Cappaert*, 426 U.S. at 142. While the Ninth Circuit Court of Appeals has on at least two occasions concluded that such a right exists, the U.S. Supreme Court has not.

In *Cappaert*, the U.S. Supreme Court based its holding on a conclusion that the water in the underground pool at issue was surface water, not groundwater. *Id*. The Ninth Circuit had, it turns out incorrectly, reached the opposite conclusion. *United States v. Cappaert*, 503 F.3d 313, 317 (9th Cir. 1974), *aff'd on other grounds*, 426 U.S. 128, 138–39 (1976).

More recently, the Ninth Circuit found that a federal reserved water right may be sourced from groundwater. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017). However, that interlocutory decision was not reviewed by the U.S. Supreme Court, as the petitions for certiorari were denied. Order List: 583 U.S. (Nov. 27, 2017). As a result, any binding authority on this question will need to wait.

Recognizing that there was no binding authority establishing that the federal reserved water rights doctrine extends to groundwater, the Wyoming Supreme Court refused to recognize such a right. *In re Gen. Adjudication All Rights to Use Water in the Big Horn River Sys.* ("*Big Horn II*"), 753 P.2d 76, 99–100 (Wyo. 1988), *aff'd without opinion sub nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989).

Under the *New Mexico* test, it is difficult to conceive the necessity of a federal ground water right for domestic purposes in Idaho, given that Idaho law provides an exemption from the permitting requirement for such uses. I.C. Sec. 42-111. Under this exemption, anyone in the State of Idaho — including a tribal member — may divert and use up to 13,000 gallons per day for domestic purposes. *Id.* This is the same amount being claimed by the federal government. R. at 14. Under these circumstances, the domestic purpose of the reservation would not be "entirely defeated" without a federal reserved water right. *New Mexico*, 438 U.S. at 700. As a result, and given the lack of any binding authority to support a federal reserved water right sourced from groundwater, the domestic claims should be denied.

IV. CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the district court by holding that fishing and hunting are not a primary purpose of the Coeur d'Alene Reservation or, alternatively, that there is no necessity for a federal reserved water right for these purposes.

Appellants also request that the United States' irrigation claims be disallowed as they are not necessary to fulfill the agricultural purpose of the reservation or, alternatively, that an evidentiary hearing regarding the entitlement to such claims be ordered on remand.

Appellants further request that the lake level maintenance claim be dismissed for the additional reason that there exists no means by which to quantify the claim or, alternatively, that the Court order additional proceedings for the district court to determine the extent of the submerged lands which have appurtenant water.

Finally, Appellants respectfully request that the domestic groundwater claims be dismissed due to a lack of binding authority recognizing such federal rights and because such federal rights are not necessary.

DATED February 26, 2018.

PARSONS BEHLE & LATIMER

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February, 2018, I served a true and correct copy of the foregoing document on the parties listed below by first class mail, postage prepaid, and electronically as reflected on the contemporaneously filed Certificate of Compliance:

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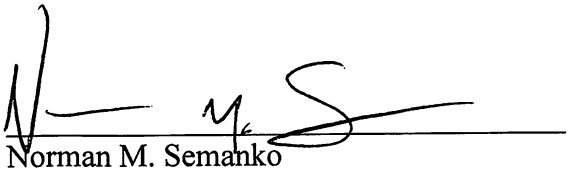

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