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IDSC CDAT 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 Rights)	
COEUR D'ALENE TRIBE, *et al.* Plaintiffs-Appellants, v. STATE OF IDAHO, *et al.* Defendants-Respondents.	Supreme Court No. 45383-2017

APPELLANT COEUR D'ALENE TRIBE'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL CIRCUIT FOR TWIN FALLS COUNTY
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STATEMENT OF THE CASE

A. Nature of the case.

This appeal concerns the Coeur d'Alene Tribe's ("Tribe") entitlement to reserved water to fulfill the purposes of the Coeur d'Alene Indian Reservation ("Reservation"). In 2008, pursuant to Idaho Code Ann. § 42-1406B, the Fifth Judicial District Court of Idaho initiated the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") to adjudicate all rights to use surface and groundwater in the Basin. The United States was joined pursuant to 43 U.S.C. § 666. The United States, as trustee on behalf of the Coeur d'Alene Tribe, filed 353 federal reserved water rights claims in the CSRBA pursuant to *Winters v. U.S.*, 207 U.S. 564 (1908). The Coeur d'Alene Tribe intervened in May of 2015, and adopted the claims filed by the United States on behalf of the Tribe.

B. Course of proceedings in the district court.

The parties agreed to consolidate the Tribe's and the United States' claims into one subcase and bifurcate the issues of entitlement and quantification. After initial discovery, the parties filed cross-motions for summary judgment on the issue of entitlement. After briefing and hearing, the district court granted each party's motions in part, and denied them in part, holding (1) water was reserved only for "primary purposes" of the Reservation, which it identified as domestic, agriculture, fishing and hunting purposes, and no water was reserved for other purposes; (2) the Tribe was not entitled to reserved water rights for instream flows outside the Reservation; (3) the priority dates for reserved water rights is November 8, 1873, for consumptive uses and time immemorial for nonconsumptive uses; and (4) on reacquired allotments, the priority date for consumptive water rights depends on intervening non-Indian ownership and a showing of beneficial use. On the State's motion for reconsideration, the district court amended its order to clarify that its ruling on the priority date for reacquired allotments extended to reacquired

homesteads and nonconsumptive water rights on reacquired lands. On a joint tribal-federal motion to set aside the judgment, the court corrected a clerical error dismissing on-Reservation instream flow fishing claims. All parties filed appeals pursuant to I.A.R. 11(a)(1) from the district court's final orders and interlocutory appeals under I.A.R. 12(c) from the district court's orders on motions for summary judgment and motions for reconsideration. On August 16, 2017, the district court granted the permissive appeals. By Order of this Court on September 27, 2017, the motions for appeals under I.A.R. 12(c) were denied, but this Court noted that "the interlocutory orders may be addressed on appeal." Order Denying Coeur d'Alene Tribe's Motion for Appeal by Permission (Sept. 27, 2017).

ISSUES PRESENTED ON APPEAL

A. What are the purposes of the Coeur d'Alene Indian Reservation?

B. Should the Tribe have the opportunity to prove during the quantification phase that reserved rights to instream flows outside the Reservation are necessary to fulfill the fishing purpose of the Reservation?

C. Do water rights for lands the Tribe has reacquired within the Reservation have priority dates no later than the date of Reservation establishment, except for nonconsumptive uses reflecting aboriginal water uses, which have priority dates of time immemorial?

ATTORNEY FEES

No attorney's fees are being sought in this appeal.

STATEMENT OF THE FACTS

The Coeur d'Alene Tribe or *Schitsu'umsh* ("those who are found here") once occupied and possessed over 3.5 million acres in northern Idaho and northeastern Washington. *Idaho v. U.S.,* 533 U.S. 262, 265 (2001) ("*Idaho II*"); *see also* Clerk's Corrected Record on Appeal ("R.") at 1423 (E. Richard Hart. *A History of Coeur d'Alene Tribal Water Use: 1780-1915* (Nov. 25, 2015)

("Hart Rep. 2015")). The Tribe's aboriginal territory included significant water resources including the area in and around Lake Coeur d'Alene—the "very heart" of Coeur d'Alene tribal settlement—its tributaries, a portion of the Spokane River, and drainage basins of the Coeur d'Alene River and the St. Joe River. *Idaho II*, 533 U.S. at 265; R. at 2635 (United States' and Coeur d'Alene Tribe's Joint Statement of Facts ("Jt. Stmt. Facts") ¶ 12).

Today the Tribe occupies a Reservation within its aboriginal territory including the southern end of Lake Coeur d'Alene. R. at 2629 (Jt. Stmt. Facts ¶ 1). In *Idaho II,* the Supreme Court held that the United States holds in trust, for the benefit of the Tribe, both the bed and banks of the southern third of Lake Coeur d'Alene and the St. Joe River—which alone contributes just over 2 million acre-feet of water[1] into the Lake. *Idaho II,* 533 U.S. at 265-81;[2] R. at 1429 (Hart Rep. 2015).

The Coeur d'Alene people traditionally lived in villages located around the Lake and along the rivers. *U.S. v. Idaho*, 95 F. Supp. 2d 1094, 1100 (D. Idaho 1998) (*Idaho II*); R. at 1431-52 (Hart Rep. 2015) (discussing village sites and locations). "Villages were situated near the lakes and rivers not only because of the ready and abundant supply of fish, but because travel through the dense undergrowth and thick forests was difficult, and much easier by canoe in the lakes and rivers." R. at 1451 (Hart Rep. 2015); *see also* R. at 2635 (Jt. Stmt. Facts ¶ 13). The historical record before the district court forcefully demonstrates the Tribe utilized the Lake and its related waterways to sustain virtually every aspect of tribal life, including "food, fiber, transportation,

[1] An acre-foot is approximately 325,900 gallons—enough water to cover one acre with one foot of water.
[2] In its decision, the Supreme Court in *Idaho II* noted that the State of Idaho "did not challenge the District Court's findings of facts on appeal." 533 U.S. at 265 n.1 (citing *U.S. v. Idaho*, 210 F.3d 1067, 1070 (9th Cir. 2000)).

recreation, and cultural activities." *Idaho II*, 533 U.S. at 265; R. at 2632-41 (Jt. Stmt. Facts ¶¶ 6-27).

In the *Idaho II* litigation, federal district court Judge Lodge ("Judge Lodge") found that "[b]y the 1840's, the Coeur d'Alenes had begun to cultivate small garden plots . . . [but these] endeavors augmented its traditional lifestyle, [and did] not supplant the Tribe's dependence on the waterways . . . ." *Idaho II*, 95 F. Supp. 2d at 1101; *see id.* at 1102 (describing the Tribe's farming practices). Catholic missionaries also began setting up missions within Coeur d'Alene territory in the early 1840's and reported on the widespread use of and reliance upon water resources by the Coeur d'Alene for their daily needs (e.g., hunting, fishing, gathering, transportation). R. at 1501, 1508-20 (Hart Rep. 2015) (describing tribal activities and reproducing pictures drawn by Father Point).

In 1853, the first Governor for the Washington Territory, Isaac I. Stevens, was appointed and tasked to negotiate treaties with the tribes under his jurisdiction. R. at 2643 (Jt. Stmt. Facts ¶ 32). Governor Stevens traveled to and met briefly with the Coeur d'Alene in June and December of 1855 and conveyed the federal government's intention to obtain land cessions and place the Tribe on a reservation where it would have "farms and schools and mills and shops of various kinds, and teachers and farmers and mechanics to instruct you in the arts of civilization[,]" but assured the Tribe that "nothing will be done without your full consent. *See* R. at 1525-30 (Hart Rep. 2015); *see also* R. at 2643-44 (Jt. Stmt. Facts ¶¶ 33-4). Coeur d'Alene leaders told Stevens they did not want soldiers coming onto their lands because "[w]e have not made friendship yet. When we see that the soldiers don't cross the Columbia, we shall believe you take us for your friends." R. at 1533 (Hart Rep. 2015); *see also* R. at 677 (Ian Smith, *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation* (Nov. 30, 2015) ("Smith Rep. 2015")).

Stevens never returned to negotiate a treaty with the Tribe and by 1858 encroaching hostilities between non-Indian settlers and Indians reached Coeur d'Alene territory. United States Troops stationed in Walla Walla, led by Lieutenant Colonel Edward J. Steptoe, were ordered to respond to conflicts with Colville. R. at 2645 (Jt. Stmt. Facts ¶ 35); R. at 1541 (Hart Rep. 2015). Steptoe left for Colville on May 6, 1858, but did not take a direct route, heading instead through Coeur d'Alene's territory. R. at 1541 (Hart Rep. 2015). When Steptoe reached Coeur d'Alene lands he was met by as many as 1,000 warriors, including 200 Coeur d'Alenes and more than 300 Spokane, Yakama, and Palouse Indians. R. at 2645 (Jt. Stmt. Facts ¶ 35). Coeur d'Alene leaders confronted Steptoe, asked why he was invading their territory and ordered him to leave. R. at 1543 (Hart Rep. 2015). After "a small group of Indians opened fire on the troops, all of the Indians joined in the battle . . . ." *Id.* Steptoe's forces sustained heavy casualties and retreated under the cover of darkness. *Id.*

Shortly thereafter, in September 1858, roughly 100 Coeur d'Alenes fought in two subsequent engagements against federal troops under the Command of Colonel George Wright. R. 2645 (Jt. Stmt. Facts ¶ 35). Hostilities between the United States and Coeur d'Alenes formally ended with the signing of a peace accord on September 17, 1858. *Id.*; R. at 1545-52 (Hart Rep. 2015). Because of the 1858 wars, the United States recognized the willingness and ability of Coeur d'Alenes to vigorously defend their territory, which impacted future federal relations with the Tribe, including the establishment and protection of their 1873 Reservation. *See Idaho II*, 533 U.S. at 275-77.

1867 Executive Order Reservation

In the 1858 peace accord, the Tribe promised to allow non-Indians to safely pass through Coeur d'Alene country. R. at 1547-48 (Hart Rep. 2015). Based upon this permission, between 1859 and 1862, Captain John Mullan built the Mullan Road through Coeur d'Alene territory for

the purpose of allowing transcontinental travel to new gold fields in the Northwest. R. at 1555-56 (Hart Rep. 2015). Captain Mullan reported to Congress that the Coeur d'Alene Indians "live by hunting, fishing, and cultivating the soil." R. at 2647-48 (Jt. Stmt. Facts ¶ 39). While Captain Mullan was impressed by Coeur d'Alene farming endeavors, he recognized that tribal members still relied primarily on traditional subsistence activities, including digging camas, picking berries, and traveling via canoes, and many continued to reside in traditional village sites "along the Coeur d'Alene and St. Joseph's rivers." *Id.*

The Mullen Road brought an influx of prospectors and miners through Coeur d'Alene territory. "[I]n the face of immigration into the Tribe's aboriginal territory, [on June 14, 1867] President Johnson issued an Executive Order setting aside a reservation of comparatively modest size" for the Coeur d'Alene Indians. *Idaho II*, 533 U.S. at 265 (citation omitted). The 1867 reservation formally approved boundaries set out in report by Idaho Territorial Governor Ballard to the Commissioner of Indian Affairs ("Commissioner") D.N. Cooley of roughly "20 miles square" that would include "agricultural & grazing lands, with hunting, fishing, berries & roots, & suitable locations for mills & c." R. at 2649 (Jt. Stmt. Facts ¶ 42). But the 1867 Reservation boundaries did not include the Lake or other key waterways vitally important to the life of the Tribe. *Compare* R. at 697 (Smith Rep. 2015, Map of Proposed 1867 reservation) *with id.* at 709 (Map of 1873 reservation).

The Tribe apparently was not consulted about and did not even become aware of the 1867 Executive Order reservation until at least 1871, when it "petitioned the Government to set aside a reservation." *Idaho II,* 533 U.S. at 266; *see also* 210 F.3d 1067, 1070 (9th Cir. 2000). Upon learning of the 1867 reservation boundaries, tribal leaders flatly rejected them "due in part to their failure to make adequate provision for fishing and other uses of important waterways." *Idaho II,* 533 U.S. at 266; *see also* 95 F. Supp. 2d at 1095 ("The precise boundaries of the 1867 reservation

never were established by survey, and the Tribe never formally accepted the reservation as its own."); R. at 2651 (Jt. Stmt. Facts ¶ 48). The Commissioner later recognized that "the Coeur d'Alenes . . . being dissatisfied with the location [of the 1867 Executive Order reservation] . . . never located thereon, and continued to roam over the tract of country claimed by them." R. at 1572 (Hart Rep. 2015). Throughout this time and into the 1870s government agents continued to report that Coeur d'Alenes "farm on a small scale, but subsist principally on hunting and fishing." R. at 2650 (Jt. Stmt. Facts ¶ 46); *see also Idaho II*, 95 F. Supp. 2d at 1103-04 (noting the importance of and quoting the same language in the 1871 Report by Agent W.P. Winas).

1873 Agreement and Executive Order Reservation

In 1872, the Tribe sent a second petition requesting the Commissioner to create a new and expanded reservation, one that included the Lake and other important waterways. *Idaho II*, 533 U.S. at 266. Given the importance of and reliance on their waterways to sustain their livelihood, the Tribe's petition explained that they assumed any reservation would as "a matter of course" include important waterways like the St. Joe and Coeur d'Alene Rivers. *Idaho II*, 95 F. Supp. 2d at 1103. Judge Lodge found that the Tribe's second petition

> makes three points . . . . First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home. Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs. . . . Several reports emphasize the Tribe's commitment to farming, while other accounts note the Tribe's continued reliance on fishing. Most important among the latter is a letter from [Deputy Surveyor] David P. Thompson to the Commissioner of the General Land Office, dated May 6, 1873, urging that the 1867 reservation be enlarged to include the waterways because '[s]hould the fisheries be excluded there will in my opinion be trouble with these indians [sic] but should they be included and also the mission which should also be in the Reservation there will be no trouble.'

Id. at 1103 (citations omitted) (emphasis added); *see also Idaho II*, 533 U.S. at 276-77.

In 1873, Indian Commissioner Smith established the three-member Shanks Commission, to negotiate with the Coeur d'Alenes for an agreement under which a permanent reservation would

be created and the Tribe's non-reserved aboriginal territory would be conveyed to the United States. R. at 2655 (Jt. Stmt. Facts ¶ 56). Two Members of the Shanks Commission and Indian Agent Monteith "rode over" the 1867 reservation and "took notes of the boundaries." R. at 707 (Smith Rep. 2015). The Commission then held a council with the Tribe on July 25-27, 1873, where they agreed to new, enlarged boundaries. *Id.*; R. at 2655-56 (Jt. Stmt. Facts ¶ 57) (providing the legal description for the 1873 Reservation). The expanded Coeur d'Alene Reservation (approximately 598,000 acres) encompassed nearly all of Lake Coeur d'Alene and many of the Tribe's principal fisheries and village sites along the Coeur d'Alene, St. Joe, and Spokane Rivers. *Idaho II*, 95 F. Supp. 2d at 1102, 1106, 1108; R. at 2656 (Jt. Stmt. Facts ¶ 58).

In the 1873 Agreement, the United States agreed to "set apart and secure [the expanded Reservation] for the exclusive use of the Coeur d'Alene Indians" in exchange for the Tribe agreeing "to relinquish (for compensation) all claims to its aboriginal lands outside the bounds" of the expanded reservation. *Idaho II,* 533 U.S. at 266 (internal quotation marks omitted); *see also* R. at 4202 (Second Aff. of Vanessa Boyd Willard, Ex. 5, Agreement with the Coeur d'Alene of July 28, 1873 ("1873 Agreement")). The Agreement expressly stated that the Tribe agreed to "locate and make their homes upon the reservation." R. at 4202 (1873 Agreement, art. 2). The United States also agreed to furnish and construct "for use of said Indians 1 grist and saw mill combined; 1 School House with apartments . . . 1 smith shop[,]" and provide a saw miller and blacksmith who were required to teach the Indians their skills. R. at 4202 (1873 Agreement, art. 3). *See also Idaho II*, 95 F. Supp. 2d at 1105 (discussing that the expanded reservation would include Indian farms and allow the Tribe to put a mill at the upper falls). Any funds remaining under the Agreement were to be used for "such articles of comfort for the civilization of said Indians . . . ." R. at 4202 (1873 Agreement, art. 3).

The 1873 Agreement "preserv[ed] the water resource[s]" for the Tribe because it "added the rivers, lake and waters with which they demanded remain under their control." R. at 1589-90 (Hart Rep. 2015); *see also Idaho II*, 533 U.S. at 274 ("A right to control the lakebed and adjacent waters was traditionally important to the Tribe. . . ."). The 1873 Agreement also contains a provision unique to Coeur d'Alene that expressly protects the Tribe's water resources by stating that "the waters running into said reservation shall not be turned from their natural channel where they enter said Reservation." R. at 4202 (1873 Agreement). The importance of this provision is buttressed by Judge Lodge's finding in *Idaho II* that "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource." 95 F. Supp. 2d at 1109 (emphasis added). Judge Lodge explained that:

> at the time of the Executive reservation in 1873 the Tribe continued to be dependent on the Lake and rivers . . . [.] In no uncertain terms, the Coeur d'Alenes made it be known that their continued reliance on the waterways was necessary to ensure their survival . . . . [I]n 1873 the Lake and rivers were an essential part of the 'basket of resources' necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived.

95 F. Supp. 2d at 1104 (citations omitted). Judge Lodge found that "the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands." *Id.* at 1107.

Although the 1873 Agreement was subject to congressional ratification, R. at 2657 (Jt. Stmt. Facts ¶ 61), the Supreme Court in *Idaho II* explained that:

> [I]n 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians.'

533 U.S. at 266 (citations omitted). Judge Lodge specifically found that the Executive Order was intended to "create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement." 95 F. Supp. 2d at 1109.[3]

1887 Agreement

Increasing encroachments by non-Indians led the Tribe to once again petition the United States to "make with us a proper treaty of peace and friendship . . . [so] that their present reserve may be confirmed to them." *Idaho II*, 533 U.S. at 267. In response, Congress authorized negotiations with Coeur d'Alene in the Indian Appropriation Act of May 15, 1886, "for the cession of their lands outside the limits of the *present* Coeur d'Alene reservation to the United States." R. at 1366 (Aff. of Richard Hart, Ex. 4, Report of Comm'r, Dep't of the Interior, Office of Indian Affairs, at 18 (Dec. 13, 1887) ("Dec. 13, 1887 Rep.")) (emphasis added). The federal negotiating commission reported that the "reservation is one of the best we have visited" and that "[t]he Indians are industrious, thrifty, provident, and good traders." R. at 1382 (Aff. of Richard Hart, Ex. 4, Report of Northwest Indian Comm'n, at 50 (June 29, 1887) ("NW Comm'n Rep.")). Coeur d'Alene Chief Andrew Seltice insisted that the commission "preserve for us and our children forever this reservation, where are our schools, our churches, our homes, our graves, our hearts . . . [because] neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all the Indians living on it shall have it forever." R. at 1396 (Aff. of Richard Hart, Ex. 4, Council with Coeur d'Alenes, at 78 (Mar. 25, 1887). The commission, in turn, promised that the United States "will do so if it takes its whole power." *Id.*

[3] In 1883, the federal government surveyed the boundaries of the 1873 Reservation and "fixed the reservation's total area at 598,499.85 acres, a calculation that included submerged lands under the Lake and rivers within the boundaries of the reservation." *Idaho II*, 95 F. Supp. 2d at 1106; *see also* 533 U.S. at 267.

On March 26, 1887, the United States and the Tribe signed an agreement that confirmed the "present Coeur d'Alene Reservation," and provided for the 1873 reservation to be "held forever as Indian land and as homes for the Coeur d'Alene Indians . . . ." R. at 1391 (Aff. of Richard Hart, Ex. 4, Agreement with Coeur d'Alene, arts. 1, 5 (Mar. 26, 1887) ("1887 Agreement")). The 1887 agreement further promised that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." R. at 1391 (1887 Agreement, art. 5). Like the 1873 Agreement, the Coeur d'Alene agreed to "cede, grant, relinquish, and quitclaim to the United States" all lands outside "their present reservation" for compensation. R. at 1391 (1887 Agreement, art. 1). Consistent with the 1873 Agreement, the 1887 Agreement also provided that the United States would expend funds to "erect[] on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller . . . [and to] best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians. . . ." R. at 1391 (1887 Agreement, art. 6).[4] The 1887 Agreement was also subject to ratification by Congress. R. at 1391 (1887 Agreement at 69, art. 14).

1889 Agreement & Congressional Ratification

"Congress was not prepared to ratify the 1887 Agreement . . . owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself." *Idaho II,* 533 U.S. at 269. However, "Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled

[4] The commission also agreed to a provision requiring Indians to be trained because "[w]e were assured that in a short time Indians on the reservation would be fully qualified to do all these things, and we considered this an important provision tending to their rapid self-support." R. at 1384 (NW Comm'n Rep., at 54). The 1873 Agreement has a similar provision. *See* R. at 4202 (1873 Agreement) (providing for "1 grist and 1 saw miller and 1 blacksmith . . . until such time as said Indians shall determine to dispense with the services of such employees, said employees to teach the Indians to perform such labor.").

beneficially to the reservation as then defined . . . [and] the 1889 Indian Appropriations Act . . . direct[ed] the Secretary of the Interior . . . to negotiate 'for the purchase and release by [the Coeur d'Alene] tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such the tribe shall consent to sell.'" *Id.* The Secretary of the Interior formed a new three-member commission (Simpson, Shupe and Humphrey) to negotiate with the Tribe for the cession of additional lands. R. at 1357 (Aff. of Richard Hart, Ex. 4, Report of the Comm'r, Dep't of the Interior, Office of Indian Affairs, at 2 (Dec. 7, 1889) ("Dec. 7, 1889 Rep.")).

Throughout the 1889 negotiations, the Coeur d'Alene leaders insisted upon ratification of the 1887 Agreement which confirmed the 1873 Reservation. *See, e.g.,* R. at 1357 (Dec. 7, 1889 Rep. at 3) ("[T]he Indians . . . absolutely refused to entertain any proposition [to relinquish some of their Reservation] until the old agreement was ratified."); R. at 1360 (Aff. of Richard Hart, Ex.4, Report of Coeur d'Alene Indian Comm'n, Third Council, at 9 (Aug. 31, 1889)) (Chief Seltice told the commission "President Grant, the head of the nation, ratified all the others had done in giving us this land.").[5] During negotiations the Tribe also expressed fears of losing their homes and the importance of their lands and waters. *See, e.g.*, *Idaho II,* 533 U.S at 270 (Commissioner Simpson "reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake'"); R. at 1357 (Dec. 7, 1889 Rep. at 5) ("The one thing that has given [the Indians] trouble has been the fear of losing their homes.").[6] The Tribe and government negotiators reached an additional

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[5] *See also* R. at 1359 (Aff. of Richard Hart, Ex. 4, Report of Coeur d'Alene Indian Comm'n, at 6 (Sept. 1889) ("The Indians . . . were reluctant . . . from the fact that other business transactions with them had been neglected, and the failure of Congress to ratify the last treaty . . . . They displayed surprising business sagacity, coupled with an exalted idea of the fulfillment of promises. . . . They finally consented to dispose of a portion of the land that is included in this treaty, they insisting upon making the lines.").

[6] *See also* R. at 1361 (Aff. of Richard Hart, Ex. 4, Report of Coeur d'Alene Indian Comm'n, Third Council, at 10 (Aug. 27, 1889)) (In response to commissioner Simpson's assertion that "the more

agreement on September 9, 1889, in which the Tribe agreed to relinquish a specified portion of the 1873 Reservation to the federal government. R. at 2668 (Jt. Stmt. Facts ¶ 81).

The 1889 Agreement required that both it and the 1887 Agreement be ratified by Congress. 533 U.S. at 270.[7] "On March 3, 1891, Congress 'accepted, ratified, and confirmed' both the 1887 and 1889 agreements with the Tribe." *Idaho II*, 533 U.S. at 270-71.

Allotment of the Coeur d'Alene Reservation

Despite prior promises to the Tribe that its lands would not be taken without its consent, the federal government unilaterally determined to make allotments to individual Indians and open "surplus" lands to non-Indians within the Coeur d'Alene Reservation. R. at 1750 (Hart Rep. 2015). In 1904, Congress appropriated funds for a survey of the Reservation for these purposes over the Tribe's strong opposition . R. at 1750 (Hart Rep. 2015). In 1906, after completion of the survey, Congress authorized allotment of the Reservation. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 335-36; R. at 1750, 1753 (Hart Rep. 2015), 2672 (Jt. Stmt. Facts ¶ 91).[8] Lands remaining after allotment would be classified, appraised, and "opened to settlement and entry" by non-Indian

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land you let us have the more money you will get." Coeur d'Alene Chief Seltice responded, "[m]y dear friends, if our object was money you would be correct, but money is no object; our land we wish to keep."); R. at 1362 (Aff. of Richard Hart, Ex. 4, Report of Coeur d'Alene Indian Comm'n, Fourth Council, at 12 (Sept. 8, 1889) (Seltice stated that the negotiations for more land was like "cutting my left arm off.").

[7] *See also* R. at 1359 (Aff. of Richard Hart, Ex. 4, Report of Coeur d'Alene Indian Comm'n, First Council, at 7 (Aug. 14, 1889)) (General Simpson explained to the Tribe that "[t]o make this treaty in all its force and vitality, we will insert a clause to the effect that unless the other treaty (of 1887) is ratified, this shall become null and void."); R. at 1360 (Aff. of Richard Hart, Ex 4, Report of Coeur d'Alene Indian Comm'n, Second Council, at 8 (Aug. 27, 1889)) ("If we make a treaty with you now, we will make it entirely dependent on the ratification of the former treaty; the head chief can have a copy of the agreement and treaty, and go to Washington to see that all is fulfilled and the treaty is ratified as agreed upon.").

[8] Allotments were made in accordance with the Dawes Act, ch. 119, 24 Stat. 388 (Feb. 8, 1887), *codified at* 25 U.S.C. § 331 *et seq.*, which generally provided each Indian on the Reservation would receive an allotment of one hundred and sixty acres that would be held in trust by the government for twenty-five years. *Id.* at 389.

homesteaders. 34 Stat. at 336. Importantly, the Act reserved from allotment "any . . . lands necessary for agency . . . purposes, including . . . the site of any sawmill, gristmill, or other mill property" then in use for the Tribe. *Id.* at 337.

The Tribe continued to strongly oppose allotment on grounds that the United States had promised that the Reservation would never be surveyed or sold without tribal consent. R. at 1751 (Hart Rep. 2015). In 1908, before allotment was completed, Chief Peter Moctelme unsuccessfully led a delegation to Washington, D.C. to protest allotment on that basis. R. at 1752 (Hart Rep. 2015), 2243 (Ross R. Cotroneo & Jack Dozier, *A Time of Disintegration: The Coeur d'Alene and the Dawes Act*, W. Historical Quarterly (1974) ("Cotroneo & Dozier 1974")), 2673 (Jt. Stmt. Facts ¶ 92). In the end, Coeur d'Alene and Spokane Indians were allotted 104,076 acres, R. at 2244-45 (Cotroneo & Dozier 1974), but by 1933 almost half of that had gone out of Indian ownership. *Id.* at 2250. Lands not allotted were opened to non-Indian settlement and by 1910, non-Indian homesteaders obtained 219,767 acres of Reservation land. *Id.* at 2245-46. Lands not homesteaded remained in trust for the benefit of the Tribe. R. at 798 (Smith Rep. 2016); 2673 (Jt. Stmt. Facts ¶ 93).

Continued importance of Reservation water resources to the Tribe

The Supreme Court in *Idaho II* noted that Judge Lodge "explained how the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation . . . ." 533 U.S. at 275. *See also* R. at 2669-71 (Jt. Stmt. Facts (¶¶ 85, 89) (explaining importance of Tribe's water resources up to and after ratification in 1891). "[T]he Coeur d'Alene people . . . continue to be inextricably linked to the inland aquatic world centered on Lake Coeur d'Alene." R. at 2633-34 (Jt. Stmt. Facts ¶ 9). Department of the Interior ("Interior") hearings held in 1910 revealed ongoing tribal uses of Lake Coeur d'Alene, Benewah Lake and the St. Joe and Coeur d'Alene Rivers for fishing, hunting,

camping and transportation. R. at 2670-71 (Jt. Stmt. Facts ¶¶ 86, 87). In more recent times, the Tribe has continued its commitment to protecting, controlling and managing its sovereign ownership of the "the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation." *Idaho II*, 95 F. Supp. 2d at 1117.

The Tribe has led efforts to remediate and restore the water quality in the Coeur d'Alene-Spokane River Basin, including initiating and prevailing in a suit against nine mining companies and the Union Pacific Railroad, for releasing approximately 64,390,000 tons of contaminated tailings into the Coeur d'Alene River, much of which was ultimately deposited into the Lake. R. at 2674 (Jt. Stmt. Facts ¶ 95) (citing *Coeur d'Alene Tribe v. Asarco, Inc.,* 280 F. Supp. 2d 1094, 1105 (D. Idaho 2003)). The Tribe also actively manages the Lake with a goal of protecting and restoring aquatic and cultural resources for the benefit of tribal members and the public.[9]

The Tribe hosts an annual water potato day to celebrate the water potato harvest and an annual water awareness week on the Reservation to teach elementary children from the region about the interrelationship between human activity, water quality and aquatic health. R. at 2675 (Jt. Smt. Facts ¶ 98). The Tribe also hosts an inter-tribal canoe journey and builds traditional sturgeon nose and dugout canoes. R. at 2675 (Jt. Stmt. Facts ¶ 98). These activities—educating, hunting, fishing, gathering, traveling, and other traditional uses of the Lake and waterways—are as critical to the identity of the Coeur d'Alene people today as they were in 1873. As tribal member Vincent Peone noted at a recent water potato celebration "[b]y doing this, our ancestors are still alive . . . [w]ithout an identity, you are a lost people." R. at 513 (Aff. of Cajetan Matheson, Ex. 5, Brian Walker, *The Last Harvest* (Oct. 21, 2014)).

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[9] R. at 2390-91 (Coeur d'Alene Tribe's Mem. in Supp. of Mot. S.J.) (quoting and citing Coeur d'Alene Tribe, *Lake Management*, *available at* http://www.cdatribe-nsn.gov/LakeMngmt/Mission.aspx.)

Tribal Water Rights Claims

The Tribe is seeking to protect its federally reserved rights to both surface water and groundwater in this case. In total, the Tribe's reserved rights claims for consumptive uses (i.e., water that is permanently withdrawn) amount to less than one percent of the total outflow of the Basin. R. at 2675-76 (Jt. Stmt. Facts ¶ 99). The United States and the Tribe claim 17,815 acre-feet per year ("AFY") of reserved water for irrigation of 5,573 acres held by the Tribe within its Reservation. R. at 2675 (Jt. Stmt. Facts ¶ 99); R. at 10 (Tribal Claims Cover Letter from Vanessa Boyd Willard, U.S. Dep't of Justice, to Gary Spackman, Dir., Idaho Dep't of Water Res. (Jan. 30, 2014) ("Tribal Claims Letter")). The United States and Tribe claim reserved water rights for 979 domestic use wells (up to 13,000 gallons per day) and 7,453 AFY of water to support domestic, commercial, municipal, and industrial uses (collectively "DCMI"). R. at 2675 (Jt. Stmt. Facts ¶ 99); R. at 10, 12 (Tribal Claims Letter). The irrigation and DCMI claims constitute the extent of the past, present and future reserved rights to water that the Tribe is seeking for consumptive uses in this case.

The United States and Tribe also filed non-consumptive claims (i.e., water that remains *in situ*) to wetlands (7,102 AFY), seeps and springs (21.6 AFY) to support traditional activities, as well as instream water rights based on monthly flows needed to support an on-Reservation tribal fishery. R. at 11-12 (Tribal Claims Letter). Lastly, the United States and the Tribe filed claims to reserved rights to Lake Coeur d'Alene to have sufficient water in the Lake to protect its natural elevation and allow for water inflows and outflows necessary to protect the Lake's ecosystem in order to allow the Tribe to use the Lake for traditional, commercial, municipal and industrial activities. *Id.*

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." *Potlach Corp. v. U.S.*, 134 Idaho 916, 919, 12 P.3d 1260, 1263 (2000). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

ARGUMENT

I. Legal Principles Applicable to Tribal Reserved Water Rights

For over a century, the Supreme Court has held that when the United States withdraws land from the public domain and reserves it for a federal purpose, by implication unappropriated water is reserved to the extent needed to accomplish the purpose of the reservation. *E.g., Winters v. U.S.,* 207 U.S. 564 (1908); *City of Pocatello v. State,* 145 Idaho 497, 507, 180 P.3d 1048, 1058 (2008) ("*Pocatello*"). *See also Cappaert v. U.S.,* 426 U.S. 128, 138 (1976). Reserved water rights arise under federal law and are not subject to regulation by states. *See, e.g., Cappaert*, 426 U.S. at 145; *Pocatello*, 145 Idaho at 503 ("the [Supreme] Court recognized only two restrictions on the States' exclusive control of water: reserved rights on federal government property and navigation servitude"). Rather they are federal rights that preempt conflicting state law and are not subject to any balancing of equities with states. *Arizona v. California,* 373 U.S. 546, 597-98 (1963) ("*Arizona I*") (rejecting application of equitable apportionment and holding that "[w]e have no doubt about the power of the United States under [the Commerce and Property Clauses of the U.S. Constitution] to reserve water rights for its reservations and its property").

In *Winters,* the United States brought suit on behalf of the Tribes of the Fort Belknap Reservation in Montana to enjoin non-Indians from diverting water for irrigation upstream from the Tribes' Reservation, because insufficient water was reaching lands on the Reservation which the Tribes and Bureau of Indian Affairs wanted to develop for farming, cultivation and the pursuit of agriculture by irrigation. 207 U.S. at 565-66. The reservation was created on May 1, 1888 by an agreement between the Tribes and the United States that reserved a tract of land "as an Indian reservation as and for a permanent home and abiding place" for the Tribes. *Id.* at 565. The agreement did not mention water rights and the United States argued in *Winters* that the purposes of the reservation were to "'train, encourage and accustom . . . Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement'" and that "all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created." *Id.* at 566-67.

Despite the fact that the non-Indian irrigators had used the water first and would hold senior rights under the state law prior appropriation doctrine, *id.* at 569-70, the Supreme Court held that the Tribes had superior rights to water under federal law. The Court found that the case turned on the 1888 Agreement and applied well established canons of construction to interpret it ("[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"). *Id.* at 575-76. *Accord Pocatello*, 145 Idaho at 506. The Court in *Winters* concluded that when the reservation was established, it impliedly reserved the water and exempted them from state laws "for a use which would be necessarily continued through the years." 207 U.S. at 577.

Arizona I is the only major United States Supreme Court decision other than *Winters* explaining the nature and extent of Indian reserved water rights.[10] *Arizona I* determined, among other things, the federal reserved water rights for five Indian reservations established by statute or Executive Order in the Colorado River Basin. *Id.* at 595-601. The Court made clear that Indian reservations established by Executive Order must be treated the same as reservations created by treaty or congressionally ratified agreements. *Id.* at 598. The Court held "that the United States . . . reserve[d] the water rights for the Indians effective as of the time the Indian Reservations were created." *Id.* at 600. In deciding the quantity of reserved water the tribes were entitled to, the Court agreed with the Report of the Special Master that the United States reserved "the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands." *Id.* at 596.[11] The Master calculated the tribes' total quantity of reserved water based on practicably irrigated acreage (totaling about 900,000 acre-feet for all five reservations), *id.,* which the Court found reasonable because it was "intended to satisfy the future as well as the present needs of the Indian Reservations . . . ." *Id.* at 600. The Court rejected the argument that "the Master has awarded too much water," because it found that "[i]f the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries" and that the United States intended to "reserve waters necessary to make the reservation[s] livable." *Id.* at 598-99.

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[10] There were only a handful of reported cases concerning Indian water rights between *Winters* and *Arizona I*. The federal court decisions in this period generally adhered to *Winters* in holding that tribes held water rights that were senior to non-Indian uses initiated after a reservation was established, and the Indian uses could be increased in the future to meet "the ultimate needs of the Indians as those needs and requirements should grow." *U.S. v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956); *accord Conrad Inv. Co. v. U.S.*, 161 F. 829, 832, 835 (9th Cir. 1908); *but see U.S. v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939) (limiting tribal reserved rights to past irrigation uses).

[11] The Master in *Arizona I* determined that the intended purposes of the five Indian reservations were to "settle [the Indians] on the Reservation land and develop an agricultural economy." R. at 2230 (Aff. of Steven W. Strack, Ex. 17, Simon H. Rifkind, Special Master: Report, Dec. 5, 1960, *Arizona I* ("Special Master Report, *Arizona I*")).

Both *Winters* and *Arizona I* establish that preemptive federal law—embodied in the treaties, Executive Orders and agreements establishing Indian reservations—exempts tribes from principles of state water law, including the principles of prior appropriation, which would otherwise limit tribal water uses and thereby thwart the future use of water by tribes necessary to fulfill the purposes for which the reservation was created. *See Winters*, 207 U.S. at 576-77; *Arizona I*, 373 U.S. at 597-601; *see also In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 71-2 (Ariz. 2001) ("*Gila V*"). Instead, federal law secures for Indian tribes a right to use water in the future, even though the water has not been put to use, to enable tribes' future uses of water to fulfill the purposes for which their Indian reservations were created.[12]

In determining the purposes of an Indian reservation, a court considers the document and circumstances surrounding the reservation's creation, and the history of the Indians for whom it was created. *See, e.g.*, *Winters,* 207 U.S. at 575-76 (interpreting the agreement creating Indian reservation and surrounding circumstances to determine purposes of the reservation); *Colville Confederated Tribes v. Walton* 647 F.2d 42, 47 (9th Cir. 1981) ("*Walton I*") (purposes of Indian reservation determined by "the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created"). In addition, courts must look at and consider the tribe's need to maintain themselves under changed circumstances. *Id.* at 47 (citing *U.S. v. Winans,* 198 U.S. 371, 381 (1905)). Where a tribe claims water rights for traditional uses, courts also look at whether the circumstances surrounding the creation of the reservation demonstrate the traditional uses were "of historical importance" to the Tribe. *U.S. v. Adair*, 723

[12] *See State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 762 (Mont. 1985) ("*Greely*"), and *Gila V*, 35 P.3d at 71-72, for descriptions of the difference between federally reserved water rights and rights under the state law prior appropriation doctrine.

F.2d 1394, 1409 (9th Cir. 1983). Ultimately, the interpretation of an Indian treaty, agreement or executive order is a question of law and "[t]he examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact but merely serves as an aid to the legal determination." *Pocatello,* 145 Idaho at 505.

Although the priority dates for the reserved water rights in *Winters* and *Arizona I* were the dates those reservations were created, courts have held that where a tribe historically used water for certain traditional purposes (such as hunting, fishing and gathering) before the reservation was created, such implied tribal rights, including reserved water rights, predate the establishment of the reservation and thus carry a time immemorial water right. *See U.S. v. Winans*, 198 U.S. 371, 381 (1905) (stating that treaties were "not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted");[13] *see also Adair*, 723 F.2d at 1414; *Cohen's Handbook of Federal Indian Law* § 19.03[3] at 1215-16 (Nell Jessup Newton, ed., 2012) ("*Cohen's Handbook*").

II. The Coeur d'Alene Reservation was established as a home to allow the Tribe to continue its traditional ways of life, and to promote agriculture, future industry, and civilization.

This case requires a comprehensive inquiry into the purposes for which the Coeur d'Alene Reservation was established to determine the Tribe's entitlements to reserved water rights. Water resources were a central feature in the creation of the Reservation. The unique and long history leading up to creation of the Reservation in 1873 and up to final ratification by Congress in 1891 establishes that the Tribe agreed to be confined to a Reservation with carefully delineated boundaries that would allow it to both engage in a wide range of traditional activities and adapt to

[13] *Cf. Winters,* 207 U.S. at 576 ("The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?").

modern civilization by expanding its agricultural, commercial and industrial enterprises so that the Reservation would be a permanent home. At the same time, the United States had two basic objectives—to acquire land from the Tribe and to establish conditions that would promote permanent peace in the face of ongoing hostilities resulting from non-Indian encroachment into Coeur d'Alene territory.

The United States recognized that it could not achieve these objectives without negotiating terms of an agreement with the Tribe—and it did exactly that. For its part, the Tribe insisted on a Reservation that protected its physical, governmental, economic, and spiritual connection with the waters of the Lake and other waterways. At the same time, the Tribe understood and expressed that protecting water uses for the future was critical to its long-term survival and agreed that it would necessarily be adapting to the modern world. Obtaining the Tribe's approval was critical to the United States, so it acceded to the Tribe's insistence on protecting the Tribe's traditional activities, while also promoting the "arts of civilization" to ensure that peace, which was a cornerstone of the agreement, could be maintained. In sum, the purposes of the Reservation are reflected in this history—the United States secured land and peace in exchange for guaranteeing the Tribe a Reservation that ensured its rights to water to serve its traditional activities and future water needs.

In determining the purposes of the Reservation, the district court failed to fully evaluate the comprehensive historical record regarding creation of the Reservation in 1873 or to fully recognize the applicability of *Idaho II*. The district court did properly confirm the Tribe's consumptive reserved water rights claims for agriculture and domestic uses (including some municipal uses) and the Tribe's non-consumptive reserved water rights claims based on wildlife and plant habitat for hunting, hunting and fishing uses. R. at 4320-23 (Order on Mots. of Summ. J. ("Order Mot. S.J.")); R. at 4301-02 (Final Order Disallowing Purposes of Use), *as amended by*

R. at 4468 (Am. Final Order). The Tribe is not appealing those portions of the court's order in this appeal. However, the district court did not examine the Tribe's other reserved rights claims (e.g., gathering, recreation, transportation, cultural, municipal, commercial, industrial and lake level uses) in relation to the record or the detailed factual and legal findings in the *Idaho II* litigation.

In *Idaho II,* the Supreme Court and lower federal courts reviewed the 1873 Executive Order and its surrounding circumstances to answer the question of whether the federal government intended to convey submerged lands to the Tribe. The *Idaho II* litigation made clear that at the time the Reservation was created in 1873 and up until final ratification by Congress in 1891, the federal government understood that the only way it could avoid hostilities with the Tribe and obtain land cessions was to agree to a Reservation that allowed the Tribe to continue its traditional activities and, at the same time, adapt to new "civilized" agricultural and industrial pursuits.[14] It is true that the courts in *Idaho II* principally focused on the Tribe's water uses and activities at the time the reservation was created prior to Idaho statehood—because the issue in the case was title to submerged lands at that time. Even though the title issue did not require findings regarding future water needs (as is the case here), the *Idaho II* litigation nevertheless demonstrates the intent of the United States and Tribe to adjust to changing conditions in the development of industry, commerce and promoting other arts of civilization to address the future needs of the reservation—a critical issue in a case involving Indian reserved water rights—which *Winters* and *Arizona I*

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[14] These findings in *Idaho II* are informative here in determining the broad purposes of the Reservation. *See, e.g.*, *In re Gen. Adjudication of all Rights to Use Water in Big Horn River Sys.*, 753 P.2d 76, 97-98 (1988) ("*Big Horn I*") (relying on a prior Supreme Court decision in a takings case interpreting the "purpose" of the tribe's treaty to determine the tribe's reserved water rights); *Adair,* 723 F.2d at 1408 (relying on the interpretation of a specific treaty provision in a different case to aid in determining the purpose of the tribe's reservation in its reserved water rights case). As discussed below, the record conclusively shows that creation of the Tribe's Reservation as a home is inextricably linked to the Tribe's ability to protect and preserve Lake Coeur d'Alene, associated waterways, and water resources.

establish is a necessary inquiry in determining the purposes for which water was reserved for an Indian reservation.

A. The Reservation was established to provide a permanent home for the Tribe.

A specific purpose of the Coeur d'Alene Reservation was to create a permanent home for the Tribe. In the 1873 Agreement the "United States agreed to 'set apart and secure' [as a reservation] '*for the exclusive use of the Coeur d'Alene Indians*, and to protect [same] from settlement or occupancy by other persons.'" *Idaho II*, 533 U.S. at 266 (emphasis added). The 1873 Agreement also provided that the "*said Indians agree to locate and make their homes upon the reservation* . . . ." R. at 4202 (1873 Agreement) (emphasis added). Judge Lodge found that the language in the 1873 Agreement was the basis for President Grant's 1873 Executive Order "withdraw[ing] from sale and set[ting] apart as a reservation for the Coeur d'Alene Indians[,]" which was intended, "in part, to create a reservation that *mirrored the terms of the 1873 Agreement* . . . ." 95 F. Supp. 2d at 1108-09 (emphasis added). And based on the "exclusive use" language in the Executive Order, Judge Lodge concluded that the 1873 Executive Order "*had a much broader purpose*" than merely withdrawing lands from sale and was intended "to create a reservation for the exclusive use of the Tribe 'pending the action of Congress upon [the 1873] agreement.'" *Id.* at 1099 (emphasis added) (alteration in original).

Judge Lodge's determination is consistent with other controlling rulings, which hold that similar language establishes that an Indian reservation was created as a permanent home for an Indian tribe, which necessarily implies broad purposes. *See, e.g.*, *Winters*, 207 U.S. at 565 (citing the 1888 Agreement to find the purposes of the Ft. Belknap Reservation were "as an Indian reservation and for a permanent home and abiding place"); *Arizona v. California*, 460 U.S. 605, 616 (1983) ("*Arizona II*") (stating "the creation of the Reservations by the federal government

implied an allotment of water necessary to 'make the reservation livable'") (quoting *Arizona I*, 373 U.S. at 599-600). *See also, e.g., Walton I*, 647 F.2d at 47 ("The general purpose, *to provide a home for the Indians*, is a broad one and must be liberally construed.") (emphasis added).

The intent to create a permanent home for the Coeur d'Alene Tribe was not altered but was reinforced by later events. In negotiating the 1887 Agreement, for example, Chief Seltice underscored the importance of preserving the Tribe's 1873 Reservation because it was their permanent home "where our school, our churches, our homes, our graves, our hearts" reside which we "shall have . . . forever." R. at 1396 (Aff. of Richard Hart, Ex. 4, Council with the Coeur d'Alenes, at 78 (Mar. 25, 1887). To address this concern a provision was included, similar to the 1873 Agreement, in which the federal government agreed that "the Coeur d'Alene Reservation s*hall be held forever as Indian lands and as homes for the Coeur d'Alene Indians* . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indian residing on said reservation." *Idaho II*, 533 U.S. at 267-68 (emphasis added) (ellipsis in original).

The district court acknowledged that "[t]here is no doubt that the United States intended to move the Coeur d'Alene people on to the lands reserved to be the reservation *with the aim that those lands be their homeland*." R. at 4319 (Order Mot. S.J.) (emphasis added); *see id.* ("this is true of all Indian reservations—their aim is to provide a homeland to those who inhabit them"). Despite this, the district court rejected the homeland theory because "it is difficult to conceive a beneficial use of water that would not serve the expansive concept of 'the homeland.'" *Id.* [15] But

[15] The district court based its homeland ruling, in part, on its view "that the U.S. Supreme Court has not applied the homeland theory advanced here." R. at 4319 (Order Mot. S.J.). To the contrary, the purpose of establishing a livable home for tribes *was* integral to the holdings in *Winters* and *Arizona I* – which are the only two Supreme Court decisions that have determined Indian reserved rights claims. *Winters*, 207 U.S. at 565, 576; *Arizona I*, 373 U.S. at 598-99, 600-01.

the district court's view that the homeland purposes in this case would be expansive or open-ended ignores the nature and specificity of the Tribe's claims here. All the Tribe's claims in this case have been filed and, as the district court recognized, "the time for filing such claims has passed." *Id.* In any event, the inquiry with respect to the Tribe's entitlements to reserved water does not end in a finding that a purpose of the Reservation is a permanent home. What constitutes a permanent home for the Coeur d'Alene Tribe—and what that means in terms of the quantity of water reserved—depends on the circumstances surrounding the creation of the Reservation.

Therefore, as discussed below, the district court should have proceeded to examine the Tribe's reserved rights claims in relation to the comprehensive historical record and the *Idaho II* litigation, which clearly demonstrate that creation of the Tribe's Reservation forever as a home was inextricably linked to the Tribe's desire to protect and preserve Lake Coeur d'Alene, associated waterways, and water resources for traditional and future activities. And the federal government understood that the only way it could reach an agreement with the Tribe was to agree to a Reservation that allowed the Tribe to continue its traditional activities and, at the same time, adapt to new "arts of civilization." It is the historical record and *Idaho II* that inform and define the Tribe's entitlements to reserved water rights and as shown in Sections II.B-D, *infra*, every tribal claim is tied to a purpose for which the Reservation was created.

B. The Reservation was established to protect the Tribe's ability to rely on its water resources to support its traditional ways of life.

In *Idaho II*, Judge Lodge determined that "in 1873 the Lake and rivers were an essential part of the 'basket of resources' necessary to sustain the Tribe's livelihood. . . . [T]he waterways provided a reliable, year-round source of food, fibre, and transportation without which the Tribe could not have survived." *Id.* at 1104. Based on the Tribe's history and circumstances surrounding establishment of the Tribe's Reservation, Judge Lodge specifically found that "a purpose of the

1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource." *Id.* at 1109. In fact, *Idaho II* confirmed that "the Federal Government could only achieve its goals—to extinguish aboriginal title and free tribal lands for settlement—by agreeing to an expanded reservation" that met the Tribe's demands by including the Lake and rivers. *Id.*; *see also* 533 U.S. at 275-76 (discussing same). These findings were central to the Supreme Court's decision in *Idaho II.* As the Supreme Court stated, "[t]he District Court . . . explained how the submerged lands *and related water rights* had been continuously important to the Tribe *throughout the period prior to congressional action confirming the reservation* and granting Idaho statehood." 533 U.S. at 275 (emphasis added).

The Supreme Court in *Idaho II* affirmatively found that the Lake Coeur d'Alene and its related waterways, were historically important to the Tribe for "food, fiber, transportation, recreation, and cultural activities." 533 U.S. at 265 (citing 95 F. Supp. 2d at 1099-1102 (findings of fact and conclusions of law)). The Supreme Court cited to Judge Lodge's decision which summarized the importance of the Tribe's waterways and water resources:

> [t]he Tribe consumed resident trout and whitefish year-found. The resident fishery was the main staple of the Tribe's diet. . . . The Lake and associated rivers were commonly used to facilitate hunting activities. During communal hunts, deer were driven into a waterway and large numbers, sometimes hundreds were, were killed by tribal members . . . . The Coeur d'Alenes also depended on waterways to hunt small game . . . . The Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato . . . [and the Tribe] collected rushes and tule from along the waterways for use in construction of baskets, mats and the Tribe's lodges. The watercourses provided the primary highways for travel, trade and communication. The Lake and rivers played an integral part in the Tribe's cultural activities. The waterways were tied to the Tribe's recreational pursuits, religious ceremonies and burial practices. In this respect, the Lake and rivers served not only as the means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe's spiritual and cultural identity.

Idaho II, 95 F. Supp. 2d at 1100 (footnote, citations, and indentations omitted); *see also* 533 U.S at 265 (citing 95 F. Supp. 2d at 1100).[16] Judge Lodge further found that the Tribe's historic proximity to watercourses was "no coincidence" given their dependence on important water resources in every aspect of their daily lives. 95 F. Supp. 2d at 1101.

These factual findings were foundational to Judge Lodge's conclusion in *Idaho II* that, as a matter of law, the federal government was aware of the Tribe's dependence on the Lake and associated waterways and intended to include submerged lands within the Tribe's 1873 Reservation. *Id.* at 1099-1104.[17] Affirming Judge Lodge's decision, the Supreme Court explained that the Tribe rejected the 1867 Reservation "due in part to [the 1867 Reservation's] failure to make adequate provisions for fishing *and other uses of important waterways*." 533 U.S. at 266 (emphasis added); *id.* at 281 ("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."); *see also* 95 F. Supp. 2d at 1109 ("a purpose of the [1873] Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe."). The Supreme Court in *Idaho II* thus recognized that the Tribe contemplated water uses for traditional activities other than just fishing and hunting when it demanded an enlarged reservation that included the Lake and other waterways.

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[16] The record before the district court also firmly establishes that traditional tribal activities were predicated upon the watercourses and their associated riparian areas being included within the Reservation. *See, e.g.,* R. at 1476-78 (Hart Rep. 2016), R. at 659-63 (Smith Rep. 2016), R. at 522-23 (Aff. of Cajetan Matheson, Ex. 8) (importance of plants for gathering – food and fiber – purposes); R. at 663-64 (Smith Rep. 2016), R. at 1470-75 (Hart Rep. 2016) (importance of waterways to Tribe for transportation and recreation); R. at 1479, 1481-83 (Hart Rep. 2016), R. at 665-66 (Smith Rep. 2016) (describing Lake and waterways interconnectedness to Tribal culture and spiritual beliefs).

[17] *See supra* n.2 (noting that the State did not appeal Judge Lodge's findings of fact before the Supreme Court).

In determining the purposes of the Reservation in this case, the district court failed to recognize and give effect to the factual findings and legal conclusions reached in the *Idaho II* litigation.[18] As discussed above, the *Idaho II* litigation and the historical record establish that the Tribe's traditional activities were not limited, as the district court found, to fishing and hunting, but included "fiber" (e.g., gathering) and "transportation, recreation [including aesthetics] and cultural activities," and that these activities played a significant role in the Tribe's daily life at the time it negotiated the 1873 Agreement continuing up to and after final ratification of the Tribe's Reservation in 1891. For example, the Supreme Court in *Idaho II* recognized that during negotiations of the 1889 Agreement, retaining the Lake and associated waterways remained a central concern to the Tribe. In explaining the new boundary line under the 1889 Agreement, "General Simpson, a negotiator for the United States, reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake." 533 U.S. at 270; *see also id.* at 257 (noting that "submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation"). The determinations made in

[18] In fact, the district court erred in failing to find that the issues of fact and law determined in *Idaho II* are conclusive in this case under the doctrine of issue preclusion. "The preclusive effect of a federal-court judgment is determined by federal common law." *Stillwyn, Inc. v. Rokan Corp.*, 158 Idaho 833, 839, 353 P.3d 1067, 1073 (2015) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008)). Under the doctrine of issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 153 (1979). There is no question that *Idaho II* conclusively resolved multiple issues that the State seeks to relitigate here, including the State's contentions that: (1) the Tribe gave up fishing, hunting, and gathering between 1873 and 1891; (2) the Reservation was created in 1891 and not 1873; and (3) the intent for establishing the Reservation was limited to promoting agriculture. *See* R. at 2491-2501 (State of Idaho's Mem. in Supp. of Mot. for Summ. J. ("State Mot. S.J.")). Because the State advances the same arguments that were conclusively rejected in *Idaho II*, preclusion "is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered . . . ." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

Idaho II mandate a finding here that all of the Tribe's traditional activities are entitled to reserved water rights.

In addition, the canons governing construction of treaties, statutes and Executive Orders establishing Indian reservations firmly support a legal determination that the Tribe's traditional hunting, fishing, gathering, transportation, recreational, and cultural, spiritual, and religious water uses fall squarely within the purposes for which the Reservation was established. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *State v. Tinno*, 94 Idaho 759, 763, 497 P.2d 1386 (1972) ("[W]e must attempt to give effect to the terms of the treaty as those terms were understood by the Indian representatives."). The district court's conclusion, R. at 4321-22 (Order Mot. S.J.), that the Tribe's references to hunting and fishing during negotiations was somehow intended or understood by the Tribe to limit its traditional activities to only hunting and fishing is simply not supported by the canons or the historical record. *See, e.g.*, *Tinno*, 94 Idaho at 762-63 (1868 Treaty of Fort Bridger reserved off-reservation fishing rights, despite only mentioning hunting rights, because the Tribes understood the term "hunt" to include hunting and fishing); *Adair*, 723 F.2d at 1409 (finding that non-consumptive water rights for fishing, hunting, gathering, and trapping from a treaty provision that only mentions fishing and gathering because the "historical importance" of hunting and trapping to the Klamath Tribe showed that continuation of the those traditional activities was one of the "very purposes" the reservation was established). To the contrary, during the negotiations resulting in the 1873 Agreement, the Tribe made specific references to its need to continue to rely on hunting and fishing but also expressly conveyed to the United States' representatives that it did not understand that it was required to specifically itemize and request every activity that it needed on its reservation. *See, e.g.*, *Idaho II*, 95 F. Supp. 2d at 1103. Protecting all of its traditional activities, not just hunting

and fishing, which were centered on and around the Tribe's water resources, was central to the Tribe's demands that their Reservation include important waterways and water resources.

The district court relied on *U.S. v. New Mexico*, 438 U.S. 696 (1978), to support its dismissal of reserved rights claims for traditional activities other than hunting and fishing, as well as other uses discussed in Sections II.C-D *infra*, R. at 4318-19, 4323-24 (Order Mot. S.J.). In *New Mexico*, the Supreme Court held that in reserving lands for a national forest, the United States reserved only the amount of water "necessary to fulfill the very purposes for which" the forest was established, but that where water is "only valuable for a secondary use of the reservation," the United States must acquire that water under state law "in the same manner as any other public or private appropriator." 438 U.S. at 702. *New Mexico* developed what is referred to as the primary/secondary purposes test for determining reserved water rights on non-Indian federal reservations. The district court determined that the claimed water rights for traditional gathering, recreation, transportation and cultural uses, as well as certain municipal, industrial, commercial and maintenance of Lake Coeur d'Alene lands were "secondary purposes" of the reservation and thus not entitled to reserved water rights under federal law.

New Mexico, however, does not apply here, where a federal reservation was created for an Indian tribe. In *Potlatch Corp. v. U.S.*, 134 Idaho 916, this Court recognized and pointed out the differences between the implied reservation of water for Indian reservations and other federal reservations:

> [Whereas] *Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities[, a federal law creating other reservations, like] the Wilderness Act [which established the National Wilderness Preservation System], is not an exchange; it is an act of Congress that sets aside land, immunizing it from future development. There is no principle of construction requiring the Court to interpret [it] to create an implied water right.

Id. at 920.[19] Like this Court in *Potlatch*, both the Montana Supreme Court and Arizona Supreme Court have recognized the significant differences between the creation of Indian reservations and federal reservations for other purposes such as national forests. Both these court have accordingly held that *New Mexico* does not apply in determining the reserved water rights on an Indian reservation.

In *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 766 (Mont. 1985), the Montana Supreme Court observed that "[f]ederal reserved water rights differ from Indian reserved water rights in origin, ownership, determination of priority date, the manner in which the purpose of the reservation is determined, and quantification standards." It explained that non-Indian federal reserved water rights are created not by treaties, but by statutes, executive orders, or agreements establishing the non-Indian federal reservation. *Id.* at 767. In addition, "[t]he United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. . . . [Whereas it] owns federal reserved water rights [on other federal reservations and] can lease, sell, quitclaim, release . . . or convey its own federal reserved water rights." *Id.* The court also found it important that "there are no special canons of construction for interpreting the documents that create federal reserved water rights. The purposes for which the federal government reserves [non-Indian] land are strictly construed." *Id.* at 767-68 (citing *Cappaert*, 426 U.S. at 141-42; *New Mexico*, 438 U.S. at 705). But, "[t]he purposes of Indian

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[19] Moreover, *New Mexico* itself does not stand for the proposition that where a reservation is established for broad or multiple uses, such as an Indian reservation, a court must find that some of the claimed uses are secondary uses. To the contrary, the Supreme Court in *New Mexico* recognized that federal reservations can have broad purposes by comparing the narrow purpose of national forests to the broader purposes of national parks. *New Mexico*, 438 U.S. at 709-10; *see also id.* at 714 n.22 (expressing no view but recognizing subsequent federal statutes might apply "*a broader doctrine of reserved rights*" than the Organic Act establishing national forests) (emphasis added); *Adair*, 723 F.2d at 1410 ("[n]either *Cappaert* nor *New Mexico* requires us to choose between . . . activities or identify a single essential purpose").

reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self-sufficiency." *Id.* at 768. And the court explained that "[u]nlike Indian reserved rights, which include water for future needs and changes in use" the "quantification standard for [non-Indian] federal reserved water rights is a 'minimal need' standard, [which] . . . reserves only that amount of water necessary to fulfill the primary purpose of the reservation, no more." *Id.* at 767 (quoting and citing *Cappaert*, 426 U.S. at 141-42 and *New Mexico*, 438 U.S. at 700).

The Arizona Supreme Court, in *Gila V*, also held that the primary/secondary purpose test developed in *New Mexico* does not apply to determining the reserved water rights of Indian reservations. *Id.* at 76-77. The Arizona Supreme Court concluded that "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Id.* at 77 (alteration in original). Following *Greely,* the Arizona Supreme Court also distinguished Indian and non-Indian federally reserved rights on the basis that Indian rights are given broader interpretation in order to further to federal goal of Indian self-sufficiency. *See Id.* at 74 (quoting *Greely,* 712 P.2d at 768).

The district court erred in applying the primary/secondary distinction to determine the reserved rights of the Coeur d'Alene Reservation because the facts concerning creation of the Coeur d'Alene Reservation are not remotely analogous to those in *New Mexico*. The differences between the national forest system in *New Mexico* and those of the Coeur d'Alene Reservation are striking and unmistakable. First, the purposes established by statute for reserving lands for national forests are much narrower than the purposes of establishing Indian reservations under *Winters* and *Arizona I*. In *New Mexico*, the Supreme Court interpreted the Organic Administration Act of 1897 ("Organic Act") finding "that Congress intended national forests to be reserved for only two purposes—'[t]o conserve the water flows and to furnish a continuous supply of timber

for the people.'" 438 U.S. at 707 (alteration in original). Indeed, the Court found that the "very purpose for which Congress did create the national forest system" was to conserve the flow of rivers in mountainous watersheds to serve "principally as a means of enhancing the quantity of water that would be available to settlers of the arid West." *Id.* at 711-13. The strong preemptive force of federal law protecting Indian past and future uses of water when Indian reservations are set aside is entirely absent in the case of national forests, which were created in part to augment waters available to be allocated and administered under state law.

By contrast, state law is generally inapplicable to tribes on Indian reservations unless Congress provides otherwise,[20] and deference to state law is not applicable to Indian reservations in the way it applies to other federal reservations. *See, e.g.*, R. at 2231 (Special Master Report, *Arizona I*) ("The suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law."); *Cohen's Handbook*, § 19.03[4], at 1218 ("States have considerable power over federal lands, and Congress has generally deferred to state water law relative to federal lands. By contrast, the establishment of an Indian reservation . . . preempt[s] state jurisdiction . . . Congress has [thus] never deferred to state water law relative to Indian reservations.") (footnotes omitted).

The historical record is clear that the protection of tribal water uses, both to protect the Tribe's traditional way of life and to provide for the more modern "arts of civilization" necessary for the tribal future, *see infra* Section II.C, were central features of the negotiations leading to the

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[20] The Supreme Court has established that "the Constitution vests the Federal government with exclusive authority over relations with Indian tribes," *Montana v. Blackfeet Tribe of Indians,* 481 U.S. 759, 764 (1985); *accord Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62, 72 (1996), and that "in the absence of federal authorization . . . all aspects of tribal sovereignty [are] privileged from diminution by the states," *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986). Congress, of course, has never provided that Indian tribes lack federal reserved rights and must look to state law for fulfilling "secondary" purposes of Indian reservations.

establishment of the Coeur d'Alene Reservation and were foundational purposes of the Reservation. The United States determined that in obtaining tribal lands and securing the peace, the consent of the Tribe was essential and that tribal consent could not be obtained without protecting tribal water uses – for all of these purposes. This was a package deal, and there is no basis to now disaggregate the elements of the package and treat some elements as "secondary." In the same way that the United States sought both land and peace, the Tribe sought water for both traditional and future needs. That was the bargain between the Tribe and the United States, all the elements had equal dignity, and the district court's effort to deny the Tribe central features of its agreement by deeming certain purposes as secondary is inconsistent with the historical record and *Winters* and subsequent cases determining the water rights of Indian reservations.

C. The Reservation was also equally established to promote agriculture and future needs for commerce, industry and arts of civilization.

In establishing the Tribe's Reservation in 1873, the federal government acknowledged that the Tribe intended to rely on its water resources not only to sustain its traditional ways of life, but to meet future needs as the Tribe learned new arts of civilization. *See, e.g.*, R. at 2650 (Jt. Stmt. Facts ¶ 46) (noting that by 1871 the Tribe was beginning to farm on a small scale); R. at 1525-27 (Hart Rep. 2015) (When visiting Coeur d'Alene, Governor Stevens stated "[w]e want you to have farms and schools and mills and shops of various kinds, and teachers and farmers and mechanics to instruct you in the arts of civilization."). The district court however, dismissed some of the Tribe's claims based on municipal uses and all the Tribe's claims based on mixed commercial and industrial uses. R. at 4323 (Order Mot. S.J.).[21] Most of these claims relate to water needs for

[21] The State conceded in the district court that a purpose of Reservation was "unequivocally" to promote commercial and industrial activities. R. at 2504 (State Mot. S.J.). Although the State cites to the 1891 Act, the 1891 Act merely confirmed the purposes of the Reservation established in

existing tribal businesses (e.g., golf course, hotel), tribal community needs (e.g., celebration ground, future fire suppression, future education center) and future commercial and industrial uses (e.g., golf course expansion, water park, and biofuel and gas-fire combustion plants). Additionally, a component of the Lake Claim discussed in Section II.D, *infra*, is for commercial/industrial uses for storage and power generation. R. at 6278 (Notice of Claim 95-16704) ("Lake Claim")).

In dismissing these claims the district court stated that "[l]imited support for . . . these uses may be found in the circumstances surrounding the creation of the reservation." R. at 4323 (Order. Mot. S.J.). The court acknowledged that "Tribal requests for mills during the negotiations leading to the 1873 Agreement *may* indicate the Tribe arguably had some concern with future commercial and/or industrial development. But [it determined that] these concerns were certainly secondary to the primary purposes of the reservation . . . ." *Id.* at 4323-24 (emphasis added). The district court's reasoning is not supported by the record and is directly at odds with both *Idaho II* and *Winters*. *See also* Section II.B *supra* (discussing that *New Mexico* is not applicable here).

The Tribe's 1872 petition illustrates the tensions the Tribe was experiencing as it was becoming increasingly exposed to non-Indian culture. In that petition, the Tribe explained:

> What we are unanimous in asking, besides the 20 square miles already spoken of, are the two valleys, the S. Josephs, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much, and it would be so if all or most of it were fit for farming but the far greatest part of it is either rocky or too dry, too cold or swampy; besides we are not as yet quite up to living on farming: with the work 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

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1873. *See* Act of Mar. 3, 1891, ch. 543, art. 6, 26 Stat. 989, 1028. Under the 1873 Agreement, the United States agreed to pay the salaries of millers and blacksmiths, who would train the Indians, and with any funds remaining pay for school and "such articles of comfort and for the civilization of said Indians . . . ." R. at 4202 (1873 Agreement). This language plainly contemplates municipal, commercial, and industrial activities. *Cf.* R. at 2504 (State Mot. S.J.) (citing 26 Stat. at 1028, providing for purchase of articles to "promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians").

> think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Idaho II, 95 F. Supp. 2d at 1103 (quoting petition); 533 U.S. at 266. The 1873 Agreement expressly reflects this dual concern showing that future development in the arts of civilization was an equally important goal in establishing the Reservation as protecting traditional uses. *See also supra* Section II.B. Under the 1873 Agreement, the United States agreed to furnish and construct "for the use of said Indians 1 grist and saw mill combined; 1 School House with apartments . . . 1 smith shop[,]" and provide a saw miller and blacksmith who were required to teach the Indians to perform their labor services. R. at 1866 (Hart Rep. 2015). Nez Perce Agent John Monteith, who participated in the 1873 Agreement negotiations, explained to the Commissioner that federal negotiators understood the expanded boundaries would "include all Indian farms in Idaho" and allow "Indian officials [to] 'put the Mills at the upper falls,' which would entail 'much less expense than building a steam mill.'" R. at 707-08 (Smith Rep. 2016).[22]

Additionally, the historical record is replete with instances showing that leading up to and after the establishment of the 1873 Reservation, the Tribe continued to rely on traditional pursuits but desired land and water resources necessary to sustain a Reservation economy that included not only agricultural, but also domestic, commercial, municipal, and industrial uses. *See, e.g.*, *Idaho II*, 95 F. Supp. 2d at 1105 (1873 Reservation would include Indian farms and allow for a mill at the upper falls); R. at 1588 (Hart Rep. 2015) (Indians demanded extension of 1867 reservation to

[22] Like the 1873 Agreement, the 1887 Agreement also provided for a saw and grist mill, this time to be operated by steam and not hydropower, an engineer, a miller, a blacksmith and required those laborers to teach the Indians their trades and vocations. *Compare* R. at 1391 (1887 Agreement arts. 6, 10-11) *with* R. at 1866 (Aff. of Richard Hart, Ex. 6, 1873 Agreement). These provisions show that it was important to the Tribe that the federal government fulfill the promises made in the 1873 Agreement and provide the tools necessary for the Tribe to realize the commercial and industrial purposes of its Reservation.

include Catholic mission and fishing and mill privileges); R. at 1866 (Aff. of Richard Hart, Ex. 6, 1873 Agreement) (providing for school, training in commercial and industrial pursuits).

Judge Lodge specifically determined that in 1873, the federal government could not meet "the Tribe's demand for its fishing grounds *and a mill site* . . . without an agreement that included within the reservation the land under the Lake and rivers." 95 F. Supp. 2d at 1109 (emphasis added). Put simply, the federal government could not achieve its goals of obtaining a cession of the Tribe's aboriginal lands without acceding to the Tribe's demands to establish a Reservation that satisfied both its traditional activities and advancement in civilization and industrial pursuits, which included learning commercial trades and creating a home in which the Tribe could have a livable and sustainable economy. *See, e.g.*, *Greely*, 712 P.2d at 747 (holding the reserved rights doctrine entitles tribes "to sufficient water 'to develop, preserve, produce or sustain food and other resources of the reservation, to make it livable'" and for "acts of civilization[,]" including industrial purposes) (quoting *Arizona I*, 373 U.S. at 599-600 and *Winters*, 207 U.S. at 576). Reserved water to fulfill these purposes is therefore necessarily implied.

Moreover, *Winters* and *Arizona I* conclusively establish reserved rights properly include uses to meet future as well as present tribal needs. R. at 2232 (Special Master Report, *Arizona I*) (tribes are entitled to water rights for use in the "indefinite future to satisfy the needs of the tribes . . . as those needs might develop"). The Special Master in *Arizona I* noted that *Winters* establishes "that the United States may, when it creates an Indian Reservation, reserve water for the *future needs* of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water *for its expanding needs*." *Id.* at 2228 (emphasis added). The Master also found that a "[f]ailure to foresee expanding requirements would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations." *Id.* at 2234. The Supreme Court

upheld the Master's findings in *Arizona I*, including his finding that reserved rights for the tribes must include future needs. 373 U.S. at 599-601; *see also Ahtanum Irrigation Dist*., 236 F.2d at 327 ("the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation"); *Greely*, 712 P.2d at 767 (noting Indian reserved rights "include water for future needs and changes in use"); *Gila V*, 35 P.3d at 77 (reserved water rights are intended to "satisfy both present and future need of the reservation as a livable homeland").

By entirely denying any reserved water rights for commercial and industrial purposes, the district court decision here would forever confine the Tribe to the uses of the late 19th century and preclude any flexibility in adapting to subsequent conditions in the intervening 125 years since the Reservation was established. It is accordingly irrelevant that many of the Tribe's municipal, commercial, and industrial uses are premised upon present and future projects or community needs not in existence or foreseen at the time the Reservation was established. The only applicable question is whether the uses relate to the purposes for which the Reservation was established. Here, the Tribe's claims for municipal, commercial, and industrial uses are critical to the current Reservation economy, which allows the Tribe to pursue self-sufficiency, and are consistent with the original intent and purposes underlying the Reservation's establishment.

D. Water was reserved for Lake Coeur d'Alene, including lake level and wetland maintenance

The Tribe filed a reserved water rights claim to waters within Lake Coeur d'Alene. R. at 6278 (Lake Claim). The Lake claim is based on the following purposes of use: food, fiber, transportation, recreation, religious, cultural, ceremonial, fish and wildlife habitat, lake level and wetland maintenance, water storage, power generation, and aesthetics. *Id.* The district court

dismissed all claimed purposes associated with the Tribe's Lake claim with the exception of a "fish and wildlife habitat" purpose of use. R. at 4302 (Final Order Disallowing Purposes of Use). Notwithstanding *Idaho II*, the district court found that "claimed uses, such a maintenance of Lake Coeur d'Alene lake levels" had "no support." R. at 4324 (Order Mot. S.J.).

The district court was wrong because the Tribe's use of the Lake for food, fiber, transportation, recreation, fish and wildlife habitat, and religious, cultural, and ceremonial purposes relate specifically to its exercise of traditional activities, which Section II.B *supra* demonstrated are purposes of the Reservation for which reserved rights are implied. Similarly, as shown in Section II.C *supra,* the Tribe's use of the Lake for commercial and industrial purposes, which includes water storage and power generation, are within the purposes for which the Reservation was created. Both of these sets of purposes require the Lake to function as it historically has, including allowing sufficient inflows and outflows to ensure a healthy ecosystem to protect the uses associated with these purposes.

As shown above, in *Idaho II*, the Supreme Court squarely held that in establishing the Coeur d'Alene Reservation, Congress intended to defeat State of Idaho's title to lands submerged by the Lake Coeur d'Alene and related navigable waters, including the St. Joe River, because of the centrality of the Lake and its tributaries to the Tribe's livelihood. *Idaho II*, 533 U.S. at 265. In reaching its decision, the Supreme Court emphasized that courts consider "whether *the purpose of the reservation* would have been compromised if the submerged lands had passed to the State" and that, where the purpose would have been undermined, "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area." *Id.* at 273-74 (alterations in original) (emphasis added).

Examining the history surrounding creation of the 1873 Reservation, the Supreme Court expressly found that "[a] right to control the lakebed and adjacent waters was traditionally

important to the Tribe . . . ." *Id.* Indeed, "the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation . . . ." *Id.* at 275 (emphasis added). The Court in *Idaho II* also concluded that neither the 1887 Agreement nor the 1889 Agreement, in which the Tribe ceded the northern portion of its Reservation, evidenced any cession of rights relative to the submerged lands within the remaining portion of the Tribe's 1873 Reservation. Rather, the intent "was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit . . . ." *Id.* at 278; *see Winans*, 198 U.S. at 381 (treaties are "not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."); *Pocatello*, 145 Idaho at 506 (noting same).

The Tribe's Lake Claim is based on the need for sufficient flows into Lake Coeur d'Alene "to maintain the natural monthly Lake elevations and outflows." R. at 11 (Tribal Claims Letter). This is a non-consumptive water right to ensure an *in situ* water elevation based on the Lake's natural hydrograph. The monthly Lake levels also protect the wetland areas in and around the Lake. The Tribe's Lake Claim is supported by the 1873 Agreement, which ensures that there is enough water in the Lake and the St. Joe River to fulfill the purposes of the Reservation by providing that "the *water* running into said reservation shall not be turned from their natural channel where they enter said reservation." *Idaho II*, 95 F. Supp. 2d at 1105 (emphasis added); R. at 4202 (1873 Agreement). This language expressly protects the natural flows of waters coming into the Reservation, ensuring that they remain unimpaired and ultimately reach the Lake through, for example, the St. Joe River.

Satisfaction of this claim does not call for a higher lake elevation than presently occurs on the Lake. Current management of the Lake's elevation is subject to a FERC license and the Tribe's claim does not "seek to affect present licensed operations at Post Falls." R. at 6279 (Lake Claim). While the Tribe's Lake Claim therefore does not require any greater flows into or out of the Lake

than occur presently, it protects against the future possibility of expiration of the FERC license and the cessation of operations at Post Falls Dam – a circumstance that could imperil the viability of the Lake and its resources.

Preservation of the natural Lake elevation with inflows and outflows is a vital sovereign right of the Tribe as owner of the Lake and its submerged lands. Prior to *Idaho II*, the Tribe attempted to litigate the ownership of these submerged lands by suing Idaho state officials. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) ("*Idaho I*"). The Supreme Court rejected the Tribe's attempt to overcome state sovereign immunity via the *Ex Parte Young* exception. The Court noted that the general presumption is that "[a]ll the waters of the state, when flowing in their natural channels . . . are declared to be the property of the state. Title to these public waters is held by the State of Idaho in its sovereign capacity for the purpose of ensuring that it is used for the public benefit." *Idaho I*, 521 U.S. at 286-87 (citations and quotation marks omitted). Thus, the Court concluded in *Idaho I* that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and water would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id*. at 287. As the concurrence in *Idaho I* noted, the state's sovereign interest in the case was significant, as "[c]ontrol of [submerged] lands is critical to a state's ability to regulate use of its navigable waters." *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 195 (1987)).

The same rights to submerged lands and waters at issue in *Idaho I*, which include regulatory authority, were resolved *in favor of the Tribe* in *Idaho II*. The Tribe's Lake Claim emanates from *Idaho II*. A tribe's right, where it owns submerged lands, is no different from a state's. The only distinctive fact here is that "[t]he Coeur d'Alene Indians have occupied the area adjacent to the Lake . . . since time immemorial." *Idaho II*, 95 F. Supp. 2d at 1099-1100. The Tribe reserved its

aboriginal rights to the Lake and waterways in 1873 (prior to Idaho statehood) and Congress confirmed that reservation in 1891, as to the portion of submerged lands and waters within the Reservation. *Id.* at 1116-17; *see also Winans*, 198 U.S. at 381 (aboriginal rights can predate creation of reservation). A right to lake level and wetland maintenance to ensure the natural hydrograph of the Lake is not depleted and preserve water in the lake for aesthetics, among other uses discussed in this Section, is part and parcel of the Tribe's sovereign ownership and control of submerged lands and ensures that the Lake continues as a viable organic source of water to fulfill the purposes of the Reservation.

The Supreme Court has acknowledged that "[o]wnership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty." *U.S. v. Alaska*, 521 U.S. 1, 5 (1997); *accord Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 624-25, 632-33, 671 P.2d 1085, 1087-88, 1095-96 (1983) (states have authority to control waters over submerged lands for fish and wildlife habitat, recreation, aesthetic beauty, and water quality). In *Idaho II*, the Supreme Court emphasized that "[d]ue to the public importance of navigable waterways, ownership of the land underlying such water is 'strongly identified with the sovereign power of government.'" 533 U.S. at 272 (quoting *Montana v. U.S.*, 450 U.S. 544, 552 (1981)). These sovereign rights are "just as necessary, perhaps even more so, to [the Tribe's] own dignity and ancient right" as they are to a state's dignity and right. *Idaho I*, 521 U.S. at 287.

The foregoing demonstrates that the Tribe has significant interests that compel acceptance of its Lake Claim by this Court. First, the Tribe possess the rights and privileges associated with owning submerged lands and waters within the Reservation. Second, the Tribe, like a state when it owns submerged lands, has governmental authority to control transportation, recreation, aesthetics and other uses on submerged lands it owns. For these reasons, the United States

impliedly reserved water rights in the Lake and St. Joe River under federal law for the benefit of the Tribe to protect the Lake's natural operation and ensure that it remains a viable resource.

III. This Court should allow the Tribe's claims to *Winters* rights outside the Reservation to proceed to quantification to determine if they are necessary to fulfill the purposes of the Reservation

The Tribe and the United States claim non-consumptive reserved water rights to maintain instream flows in off-Reservation waterways in order to protect and support habitat that is necessary for the fish species within the Reservation which the Tribe historically relied on and currently harvests. R. at 10, 15-18 (Tribal Claims Letter). The district court correctly determined that the United States "impliedly reserved water rights necessary to fulfill the fishing . . . purpose of the reservation." R. at 4322 (Order Mot. S.J.). There is no dispute that the Tribe's on-Reservation fisheries are biologically dependent on waterways and portions of Lake Coeur d'Alene that are outside the boundaries of the Reservation to sustain the lifecycle of the fish. *See* R. at 2677 (Jt. Stmt. Facts ¶ 102).

The district court nevertheless rejected the Tribe's claims to *Winters* rights in off-Reservation waterways because "[i]t was not a primary purpose of the reservation to protect off-reservation fish habitat." *Id.* at 4324. The district court also found that "the Tribe gave up all its off-reservation rights and interests[,]" *Id.* at 4325 (footnote omitted), and concluded that the Tribe's claims "are not supported by case law." *Id.* at 4326; *see also id.* at 4325 (finding "no support for the proposition that the United States can impliedly reserve water rights . . . many miles outside the boundaries of the lands reserved."). As discussed below, the district court was wrong on all these points.

Since time immemorial, the Tribe and its members have relied on their fisheries. R at 10 (Tribal Claims Letter); R. at 2676 (Jt. Stmt. Facts ¶ 100). The principal fish species on the Reservation that the Tribe historically relied on and is currently reliant upon include Westslope

Cutthroat Trout and Bull Trout. *Id.* These fish are adfluvial in nature. R. at 2676 (Jt. Stmt. Facts ¶ 101). As adfluvial fish, Westslope Cutthroat Trout and Bull Trout spend a substantial period of time within Lake Coeur d'Alene feeding, growing, and maturing. *Id.* The fish then migrate upstream into the rivers and streams seeking areas that are suitable for spawning. *Id.* These spawning areas are widely distributed within the Coeur d'Alene Basin and can require fish to travel anywhere from a few miles to more than 100 miles upstream. R. at 588 (Dudley W. Reiser, *Rebuttal Report on the Importance & Biological Attributes of the Fisheries of the Coeur d'Alene Reservation* (May 26, 2016) ("Reiser Rep.")). After spawning, the adult fish migrates downstream and re-enter the Lake and the adfluvial life cycle is repeated. R. at 2676 (Jt. Stmt. Facts ¶ 101). Westslope Cutthroat Trout and Bulltrout spend critical portions of their lifecycle, such as spawning and rearing, in streams and portions of Lake Coeur d'Alene off the Reservation. R. at 2677 (Jt. Stmt. Facts ¶¶ 102, 104).

The Tribe's off-Reservation instream flow claims are necessary to prevent water withdrawals from dewatering streams on which adfluvial fish depend during their lifecycle to the detriment of the Tribe's fishery located on the Reservation. *See* R. at 2677-78 (Jt. Stmt. Facts ¶¶ 102, 106). The preservation of on and off-Reservation fish habitat "promotes the continuance of the Tribal fishery" on the Reservation and failing to maintain these habitats "will most certainly, over time, compromise the overall population sustainability and the sustainability of the Tribal fishery" on the Reservation. R. at 2678 (Jt. Stmt. Facts ¶ 106).

Courts have held that the *Winters* doctrine implies reserved rights to permit spawning necessary to sustain tribal fisheries on a reservation. In *Walton I*, the Ninth Circuit found a *Winters* right "to sufficient water to permit natural spawning of the trout," because "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." *Walton I*, 647 F.2d at 48. In order to determine the water necessary to maintain the tribe's fishery,

Walton I recognized that trout "needs fresh water to spawn." *Id.* at 45. The *Walton I* court held that "[t]he right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout." *Id.* at 48.

Similarly, the federal district court in *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *rev'd in part on other grounds* 736 F.2d 1358 (9th Cir. 1984), implied a *Winters* right in sufficient quantities to maintain a certain water temperature to meet the biological needs of fish. The basis for *Anderson*'s ruling was that "one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food." *Id.* at 5. The district court in *Anderson* further held that the quantity of water could be adjusted, depending on the amount of flow needed to maintain the requisite temperature, if "a higher flow is necessary at any time to accomplish the purpose." *Id.*

In both *Walton I* and *Anderson*, the courts found that the tribes were entitled to a *Winters* right in sufficient quantities to protect fish habitat because preserving the tribal fisheries was a purpose of each reservation. These courts did not need to separately find that protecting fish habitat was a purpose of the reservation, because supporting the biological needs of the fish was a means of fulfilling the reservations' fishing purpose. *Walton I* and *Anderson* teach that *Winters* rights are inferred to support and protect the biological needs of fish that are necessary to sustain tribal fisheries on the reservation. *Walton I*, 647 F.2d at 48; *Anderson*, 591 F. Supp. at 5.

It makes no difference whether the spawning of the Reservation fishery occurs outside the Reservation. The district court based its geographical limitation on *Winters* rights on the Supreme Court's statement in *Cappaert* that the United States "reserves *appurtenant* water."[23] R. at 4325

[23] The district court's final order disallowed all claims made by the Tribe to *Winters* rights for instream flows to protect fish habitat, including some claims made on water sources within the

(Order Mot. S.J.) (quoting 426 U.S. at 138) (emphasis in original). *Cappaert*, in fact, supports the Tribe's position in this case and is contrary to the district court's ruling. In *Cappaert*, the Supreme Court held that the United States could enjoin the use of groundwater on private land two and one-half miles from Devil's Hole, a part of the Death Valley National Monument, because the *Winters* doctrine "is based on the necessity of water for the purpose of the federal reservation," rather than the location of the water. 426 U.S. at 133, 143. *See also John v. U.S.*, 720 F.3d 1214, 1229-30 (9th Cir. 2013) (noting that "[j]udicial references to such rights being 'appurtenant' to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes.") (quoting David H. Getches, *Water Law* 349-50 (4th ed. 2009)) (citations omitted). [24]

The district court's geographical limitation on *Winters* rights is also inconsistent with how this Court treats appurtenant water rights under Idaho law. In *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007), this Court rejected the argument that land must have a "physical

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Reservation. R. at 4305-4307 (Final Order Disallowing Water Right Claims). The district court later amended its final order disallowing claims to remove the claims to waters within the Reservation because the on-Reservation "claims were included on the list of rights disallowed by the Court's *Final Order* as a result of clerical error." R. at 4481 (Order on Mot. To Set Aside and Modify (Jul. 26, 2017) ("Order to Modify")). In its Order to Modify, the district court stated, "it was not the intent of the Court to disallow these claims[],[]" as "the claims are for on-reservation water rights." *Id.* at 4481. Thus, the district court erroneously decided which claims to disallow based on a geographical distinction between waters on or off the Reservation, as opposed to determining whether a claim to water was necessary to fulfill the fishing purpose of the Reservation.

[24] The district court also relied on the Ninth Circuit's recent decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017), which stated that "[a]ppurtenance . . . simply limits the reserved right to those waters which are attached to the reservation." *Agua Caliente* is not inconsistent with the Tribe's claim here. In *Agua Caliente*, the Ninth Circuit did not need to consider whether an off-reservation water source was necessary to fulfill the purpose of the Agua Caliente Reservation and therefore attached to the Tribe's reservation. As the court in *Agua Caliente* noted, neither party "dispute[d] appurtenance" because "[t]he Coachella Valley Groundwater Basin clearly underlies the Tribe's reservation." *Id.* at 1271 n.10.

relationship" to a water right in order for the water right to become appurtenant to that land. *Id.* at 12. In *Joyce*, a livestock company claimed instream water rights for stock watering in a portion of Jordan Creek on federal land near its ranch properties. *Id.* at 4. Although the relevant portion of Jordan Creek was neither within nor physically touching Joyce Livestock's properties, this Court noted that "[l]ivestock must have adequate forage and water." *Id.* at 11. This Court found that the water rights in Jordan Creek benefitted the ranch properties because the properties "alone [were] not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country." *Id.* at 13. Thus, this Court held that the water rights in Jordan Creek on federal lands were appurtenant to Joyce Livestock's ranch properties. *Id.*

In so holding, this Court recognized that the water rights in Jordan Creek obtained by Joyce Livestock's predecessors "were beneficial and useful adjuncts to their cattle ranches and would be of little use apart from the operations of their ranches." *Id.* This Court determined that Joyce Livestock need not be the exclusive user of the water, *id.* at 7, nor make any diversion to establish a beneficial use. *Id.* In finding Joyce Livestock's water rights were appurtenant to the ranch properties, this Court further held that such rights did not give Joyce Livestock any possessory or other interest in the federal land itself. *Id.* at 20. This Court reasoned that a water right "is simply a right to use the water to apply it to a beneficial use" and "[o]wnership of a water right does not include the right to trespass upon the land of another in order to access the water." *Id.* at 19 (citations omitted).

The Supreme Court has also held that a Tribe's reserved water rights can extend beyond its reservation boundaries. In the decree issued in *Arizona I*, the Court awarded the Cocopah Reservation a water right in the Colorado River, which was located approximately two miles from the reservation boundary. *Arizona v. California,* 376 U.S. 340, 344-45 (1964) ("*Arizona I*

Decree"); *Cohen's Handbook*, § 19.03[2][A] at n.23.[25] The Master, whose findings the Supreme Court upheld in *Arizona I*, concluded the Tribe was entitled to reserved rights to the River because the Cocopah Reservation was "near" the Colorado River. *See* R. at 4216 (describing Indian reservations "on or near" the Colorado River) (Special Master Report, *Arizona I*). In finding that the water was "necessary to sustain life" on the Cocopah Reservation, the U.S. Supreme Court drew no distinction between whether the water was located on or off the reservation. *See Arizona I,* 373 U.S. at 598-99.

Finally, the district court here erred by holding that the Tribe's relinquishment of rights to land outside the Reservation barred the Tribe's claims to *Winters* rights in off-Reservation waters which are necessary to preserve fisheries on the Reservation. *See* R. at 4325 (Order Mot. S.J.) Cessions of land outside the Tribe's current Reservation are irrelevant to resolution of the question presented in this case. Like the ranch in *Joyce Livestock*, the Tribe does not claim an interest in land outside the boundaries of the Reservation in this case. Instead, the Tribe claims off-Reservation water rights to support the biological needs of the fish species on the Reservation, which must leave and then return to the Reservation to be harvested by tribal members.[26] Off-

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[25] In the district court, the State argued it was "irrelevant" that, at the time *Arizona I* was decided, the United States had determined in a published Department of Interior Solicitor's Opinion that the Cocopah Reservation was not adjacent to the Colorado River. *See* R. at 4022 (State of Idaho's Mem. In Reply to Responses of United States and Coeur d'Alene Tribe). It is hardly "irrelevant" that *Arizona I* was adjudicated on the assumption that the Cocopah Reservation was "near" the Colorado River. *See* R. at 4216 (Special Master Report, *Arizona I*). The Colorado River was neither within nor adjacent to the Cocopah Reservation at the time *Arizona I* was decided in 1963. It was not until 1972 that the United States reversed its position and published a Solicitor's Opinion finding that the Cocopah Reservation "extended to the Colorado River." R. at 3683-84 (Solicitor's Op. M-36867 (Dec. 21, 1972)).

[26] The district court also relied on a prior decision in the Snake River Basin Adjudication ("SRBA") as authority which "previously rejected similar claims for off-reservation water rights." R. at 4325 (citing *Order on Motions for Summary Judgment*, In Re SRBA Case No. 39576, Consol. Subcase No. 03-1002 (Nov. 10, 1999) ("*Nez Perce Tribe*")). But *Nez Perce Tribe* did not limit that tribe's

Reservation minimum instream flows are therefore properly claimed under *Winters* as necessary to ensure that fish can return to the Reservation to fulfill the fishing purpose of the Reservation. R. at 4322 (finding that a purpose of the Reservation was to "facilitate [the Tribe's] traditional fishing . . . practices") (Order Mot. S.J.). As such, the Tribe's right to off-Reservation flows were attached and became appurtenant to the Reservation when it was established in 1873 by operation of the *Winters* doctrine.[27]

The district court's dismissal of the Tribe's claims to instream flows outside the Reservation deprives the Tribe of the opportunity to prove, in the quantification phase of this case, that instream flows are necessary to preserve fish stocks on the Reservation. This Court should reverse the district court's decision and allow the Tribe to adjudicate these claims in the quantification phase.

IV. The priority dates for the Tribe's water rights were unaffected by allotment and intervening non-Indian ownership.

The Tribe has reacquired some land on the Reservation ("reacquired lands") that went out of tribal ownership as a result of the Coeur d'Alene Allotment Act. This Court should follow the approach described by the Wyoming Supreme Court in *Big Horn I*,[28] under which the Tribe's

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Winters rights to water sources on the reservation. The issue in *Nez Perce Tribe* was whether a right to fish outside the Nez Perce Tribe's reservation carried a reserved water right. *See* R. at 848. The issue here is quite different: whether instream flows off the Reservation are necessary to fulfill the fishing purpose on the Reservation.

[27] This conclusion is buttressed by the 1873 Agreement's provision guaranteeing "that the waters running into said reservation shall not be turned from their natural channel where they enter said reservation." R. at 4201-02 (1873 Agreement, art. 1). The 1873 Agreement's provision for waters to "not be turned" from entering the Reservation is a clear recognition of the interrelationship between waters on and off the Reservation to sustain tribal waters uses on the Reservation.

[28] In *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998), the Wyoming Supreme Court overruled the standard of review that the *Big Horn I* court applied to the lower court's opinion but did not rule on the principles of reserved Indian water rights. *See id.* at 151-52.

reserved water rights on reacquired lands retain their original priority date. Non-consumptive uses, which support the Tribe's exercise of its traditional activities and preceded the creation of the Reservation, should receive a time immemorial priority date. Similarly, domestic water uses should also receive a time immemorial priority, while other consumptive uses that did not exist at the time the Reservation was created should have a priority date of 1873.[29] *Arizona I*, 373 U.S. at 600; *Greely*, 712 P.2d at 764.

The district court erroneously found that the Tribe's priority date for the uses of water on reacquired lands[30] was affected by their intervening non-Indian ownership. The district court decided that nonconsumptive uses on reacquired lands "would carry a date of reacquisition priority date," because intervening non-Indian owners could not "hold, appropriate or exercise" those rights and therefore, during the period of non-Indian ownership "such rights would be lost through non-use." R. at 4474 (Order Granting Mot. to Reconsider).

Relying on *U.S. v. Anderson*, 736 F.2d 1358, the district court also decided that the priority dates for consumptive uses were affected by the manner in which reacquired land had been lost under the Allotment Act. The district court held that land that was homesteaded by a non-Indian and reacquired by the Tribe would carry a state law priority date for all consumptive water uses

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[29] The Tribe asserted a time immemorial priority date for domestic uses and in the alternative, a Reservation priority date of 1873. The district court awarded a Reservation priority date for domestic uses because the water now used for that purpose is pumped groundwater, and the Tribe did not use wells when the Reservation was established. R. at 4327. However, the priority date is not determined by *how* the Tribe obtained the water when the Reservation was created, but by whether the particular *use of water existed* at that time. Since tribal domestic use of water predates the creation of the Reservation, the Tribe is entitled to a time immemorial priority date. *See Adair*, 723 F.2d at 1414.

[30] The State, which was the only party below to contest the Tribe's priority date on reacquired lands, did not assert that the date of priority for "allotments continually held in trust or tribal ownership" was affected by allotment, *see* R. at 2509 (State Memo. in Supp. of Mot. for S.J.), and the court below did not include those allotments in its discussion of the Tribe's priority date on reacquired lands, R. at 4326-28 (Order on Mot. S.J.), 4474 (Order Granting Mot. to Reconsider). Accordingly, the priority date for such reacquired allotments are not at issue here.

perfected by the prior non-Indian owners under state law. R. at 4474 (Order Granting Mot. to Reconsider); *see also* R. at 4327-28 (Order on Mot. S.J.). The district court also held that land that was allotted but subsequently passed to a non-Indian before it was reacquired by the Tribe would carry a Reservation priority date only for consumptive uses perfected at the time of sale or later established by the non-Indian "with reasonable diligence." R. at 4474 (citing *Anderson*, 736 F.2d at 1362). The district court also held that any water rights lost to non-use or otherwise unperfected by the non-Indian on reacquired lands (homesteads or allotments) would receive a date of reacquisition priority date. *Id.*

The district court and *Anderson* are both wrong because they are contrary to the continued existence of the Reservation after allotment and congressional policy. The Tribe's reacquired lands have always been within the Reservation and upon reacquisition were restored to the Reservation. These lands are once again being used for the purposes of the Reservation. As discussed below, intervening non-Indian ownership should have no effect on the priority dates of water rights for these lands.

A. Reacquired lands carry a date of time immemorial for nonconsumptive uses.

The Coeur d'Alene Reservation was established by a grant of rights *from* the Tribe, which reserved the Tribe's pre-existing rights within the Reservation, including the right to continue its traditional activities. *Winans*, 198 U.S. at 381; *U.S. v. Dion*, 476 U.S. 734, 737-38 (1986); *see also Pocatello*, 145 Idaho at 506; *State v. Coffee*, 97 Idaho 905, 908, 556 P.2d 1185 (1976) ("treaties provide for the retention by the Indian of hunting and fishing rights" on the reservation). These rights therefore carry a time immemorial priority date. *See Winans,* 198 U.S at 381; *Adair*, 723 F.2d at 1414. The Tribe's nonconsumptive reserved water rights to support traditional activities are fundamental to the Tribe's existence, *see* R. at 2632-41 (Jt. Stmt. Facts ¶¶6-27), and the record

establishes that the Tribe sought to protect the exercise of those rights during negotiations establishing the Reservation. *See supra* Section II. These rights continue unless abrogated by Congress. *See e.g., Menominee Tribe of Indians v. U.S.,* 391 U.S. 404, 412-13 (1968); *Dion*, 476 U.S. at 738-39, which has not occurred.

The district court is the *only* court to hold that nonconsumptive water rights within a Reservation are impacted by the loss and later reacquisition of lands by a tribe. To the contrary, Federal law establishes that the Tribe's nonconsumptive reserved water rights are not affected by allotment and held regardless of the ownership of lands over which the waters flow. *See Adair*, 723 F.2d at 1398, 1412; *Anderson*, 591 F. Supp. at 5-6.[31] In *Walton I*, lands within the reservation established for the Colville Confederated Tribes were lost under the General Allotment Act and some of those lands were acquired by non-Indians. *Walton I*, 647 F.2d at 44-45. Notwithstanding allotment, the court held that the Tribe continued to hold reserved water rights within the Reservation to support the Tribe's traditional fishing activities, including where water passes through non-Indian lands. *Id*. at 48, 52. In *Adair,* the Ninth Circuit found that the Klamath Tribe's 1864 Treaty recognized the Tribe's aboriginal water rights and confirmed a continued water right to support the Tribe's hunting and fishing lifestyle on its reservation even after the Tribe's reservation was allotted and subsequently terminated by Congress. *Adair,* 723 F.2d at 1398, 1412. The Termination Act included a provision that nothing was intended to abrogate the water rights of the Tribe. However, the court's holding however, was not premised solely on this provision, but also on the fact that nowhere in the Act had Congress explicitly abrogated the Tribe's reserved water rights. *Id.* at 1412, 1414 (tribe held nonconsumptive water right with time immemorial

[31] Although the district court's decision in *Anderson* was reversed in part, *see* 736 F.2d at 1367, this portion of the district court's ruling was not considered on appeal, *id.* at 1360.

priority date on terminated reservation mostly owned in fee by non-Indians and federal government, to support hunting, fishing, and gathering treaty rights).[32] The Tribe's nonconsumptive reserved water rights here similarly continue to exist within the Reservation despite intervening non-Indian land ownership issues and carry a time immemorial priority date. *See e.g., Adair*, 723 F.2d at 1417 n.28 (tribal nonconsumptive water rights are superior to allottees' rights); *Walton I*, 647 F.2d at 48, 50-51 (allotment only transferred a consumptive, agricultural water right and not tribal nonconsumptive right that supported fishery); *State v. McConville*, 65 Idaho 46, 139 P.2d 485, 487 (1943) ("[p]rivate ownership of some lands is not inconsistent" with exercise of treaty fishing rights).

State law also adheres to the principle that nonconsumptive rights do not follow land ownership. In *Joyce Livestock*, 144 Idaho at 7, 18 (citing *Ickes v. Fox*, 300 U.S. 82, 95 (1937)), this Court recognized that land ownership is independent of nonconsumptive water rights. *See also Sanderson v. Salmon River Canal Co., Ltd.*, 34 Idaho 145, 199 P. 999, 1003 (1921)) (landowner can hold nonconsumptive water rights that benefit his land in waters outside that land).

The district court's additional conclusion that nonconsumptive rights are lost on reacquired lands because non-Indians cannot acquire these nonconsumptive rights is simply misplaced. Rec at 4474 (Order Granting Mot. to Reconsider). Nonconsumptive water rights preserve water in a hydrological system to sustain traditional activities like hunting, fishing, gathering and wildlife and plant habitat. *Adair*, 723 F.2d at 1411 (citing *Cappaert*, 426 U.S. at 143). These rights belong to the Tribe and cannot be transferred to a third party or lost simply because another party did not consume water. *Adair,* 723 F.2d at 1418. To hold otherwise would impose the framework of the state law prior appropriation doctrine—under which a water right only exists if it is put to

[32] Similarly, here there is nothing in the Coeur d'Alene Allotment Act that expressly abrogates or limits the Tribe's reserved water rights to support traditional activities.

beneficial use, and is lost if it is not used—onto a Tribe's nonconsumptive reserved water rights arising under and protected by federal law. Nonconsumptive federal reserved water rights, have "no corollary in the common law of prior appropriations," *Adair*, 723 F.2d at 1411, and are not subject to forfeiture by nonuse since by their nature they require that water not be used, but remain *in situ*. The Tribe's nonconsumptive reserved water rights therefore continue to exist on reacquired lands and are entitled to a time immemorial priority date.

B. Reacquired lands carry a priority date of no later than the creation of the Reservation for consumptive uses.

This Court should also reject the district court's decision that priority dates of Tribal water rights on reacquired lands are affected by non-Indian ownership under the *Anderson* framework and follow the Wyoming Supreme Court's decision in *Big Horn I*, 753 P.2d at 114, under which the priority date for consumptive water rights on reacquired lands is not affected by intervening non-Indian ownership. [33]

The Tribe's reacquisition of lands within its Reservation fulfills important goals established by Congress in the Indian Reorganization Act of 1934 ("IRA"), Pub. L. No. 73-383, 48 Stat. 984 (1934). Recognizing that allotment was a failure nationwide, Congress repudiated it and passed the IRA, which authorized the Secretary to restore surplus lands not yet homesteaded within an allotted reservation to tribal ownership, 48 Stat. at 984, § 3, and extended indefinitely the trust period for all remaining Indian trust allotments. *Id.* at § 2.[34] The IRA authorized the Secretary of

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[33] Even if *Anderson* were correct, the case only dealt with agricultural water rights, and would only apply to them here. *See* R. at 2906-07 (Mem. Decision & Order at 8-9, *U.S. v. Anderson*, No. 3643 (E.D. Wash. July 23, 1979)) (finding priority date for "water for irrigation" on reacquired lands); *U.S. v. Powers*, 305 U.S. 527, 532-33 (1939); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402 (9th Cir. 1985) ("*Walton III*").

[34] In 1934, the year the IRA was enacted, the Secretary withdrew from public entry all remaining surplus lands on the Coeur d'Alene Reservation until the Tribe could determine whether to

the Interior to acquire land in trust within an existing Indian reservation for the benefit of a Tribe, 25 U.S.C. § 5108, and add the land to the existing reservation, 25 U.S.C. § 5110; *see* 25 C.F.R. § 151.3(a)(1) (authorizing Secretary to take land into trust for a tribe when "located within the exterior boundaries of the tribe's reservation,"), *id.* § 151.10 (describing on-reservation land-into-trust acquisition process).

Before the IRA, it was federal policy to assimilate Indians and break up tribal land bases. As a result, tribes, including Coeur d'Alene, suffered devastating land losses nationwide. *See Cohen's Handbook*, § 1.04 at 72-74. The decimation of the tribal land base was ruinous for tribal economies, institutions, culture, and communities. *See* Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,576 (1999) (citing Charles F. Wilkinson, *American Indians, Time and the Law* 19-21 (1987)); *see also* Legislative History of the IRA, H.R., 73d Cong. 2d Sess., 78 Cong. Rec. 11,427, 11,727 (June 14-18, 1934) ("allotment was a costly tragedy both to the Indians and to the Government") (Statement of Rep. Howard). Allotment of the Coeur d'Alene Reservation had the same effects. *See* R. at 2252 (Cotroneo & Dozier 1974).[35]

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reorganize under the IRA. R. at 3101 (Stephen Wee, *Establishment of the Coeur d'Alene Indian Reservation and the Transformation of Coeur d'Alene Land and Water Use, from Contact Through Allotment, submitted to the State of Idaho* (Feb. 25, 2016) ("Wee Rep. 2016")). In 1947, the Tribe organized a government and adopted a constitution, R. at 799 (Smith. Rep. 2016); R. at 3105 (Wee Rep. 2016), and in 1958, Congress fully restored nearly 13,000 acres of surplus lands to the Tribe that had not passed to non-Indian homesteads. Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121; *see* R. at 799-802 (Smith Rep. 2016). The Tribe has since developed a "land acquisition, consolidation, and development" program to reacquire lands lost during allotment. R. at 3108-10 (Wee Rep. 2016) (discussing the use of Indian Claims Commission award). For example, in 1971, the Tribe purchased lands to establish an 1,800-acre commercial farm enterprise, which has expanded to 6,000 acres of grain and lentil farmland. *Id.* at 3110.

[35] By the early 1930s, the local agent reported to the Commissioner that the allotment and homesteading of the Coeur d'Alene Reservation had undermined the Tribe's welfare. R. at 2252 (Cotroneo & Dozier 1974).

The Secretary has exercised his authority under the IRA on the Coeur d'Alene Reservation on numerous occasions to restore allotted and homesteaded lands within the Reservation to tribal ownership. Reacquisition of lands within the Reservation to tribal ownership fulfills the IRA's goals of rebuilding the Tribe's homeland. Because the reacquired lands at issue here were only temporarily lost to the Tribe due to the failed allotment policy repudiated by Congress, but are now being used to fulfill the purposes of the Reservation, the priority date of consumptive water rights on these lands should not be affected by intervening non-Indian ownership. *See Big Horn I*, 753 P.2d at 114. As the Wyoming Supreme Court held, the fact that reacquired lands were owned by non-Indians does not affect the priority date of consumptive uses of water on those lands when they are reacquired by the Tribe. *See Big Horn I*, 753 P.2d at 114. Under *Big Horn I*, all the Tribe's reacquired lands, regardless of non-Indian ownership, carry reserved rights with priority dates of either the date of creation of the Reservation, or time immemorial. *See In re Gen. Adjudication of all Rights to Use Water in Big Horn River Sys.*, 899 P.2d 848, 853, 855 (Wyo. 1995) ("*Big Horn IV*") (*Big Horn I* covers allotments and homesteads). This conclusion is also mandated by the goals of Congress in enacting the IRA and the Secretary in implementing the Act.

Lands reacquired by the Tribe always remained part of the Reservation despite intervening non-Indian ownership. *U.S. v. Celestine*, 215 U.S. 278, 285 (1909) (all tracts included in a reservation "remain a part of the reservation until separated therefrom by Congress"); *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (allotments and homesteads retain reservation status); *Idaho II*, 95 F. Supp. 2d at 1097 (boundaries of the Coeur d'Alene Reservation are essentially the same as set by the 1887 and 1889 agreements). The loss of land from tribal ownership is distinct from whether the land is still within the Reservation, and has no bearing on "the question of how and when treaty rights of Indians in those lands are extinguished." *Idaho v. Andrus*, 720 F.2d 1461, 1464-65 (9th Cir. 1983) (quoting *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983)) (discussing

Coeur d'Alene Reservation). Upon reacquisition by the Tribe, the original priority dates for water rights on these lands are restored. *Big Horn I*, 753 P.2d at 114. It would be antithetical to the underlying principles of *Winters* and to the intent of Congress when it enacted the IRA to subject the Tribe's reserved water rights to rules governing non-Indian water use on specific parcels during the time they were lost from tribal ownership through a forced allotment policy that the Tribe adamantly opposed.[36] Consequently, when an allotment or homestead on the Reservation returns to tribal ownership, the Tribe's full *Winters* rights, including priority rights properly attach. *See Big Horn I*, 753 P.2d at 114.

CONCLUSION

1. This Court should affirm the district court's determinations that the Tribe holds reserved water rights for agricultural uses on the Reservation with a priority date of November 8, 1873; hunting and fishing uses and related wildlife and plant habitat on the Reservation with a priority date of time immemorial; and for domestic uses (including some municipal uses) but hold that these rights have a time immemorial, not November 8, 1873, priority date.

2. This Court should reverse the district court's dismissal of the Tribe's claims for reserved water rights for:

a. gathering, recreation, transportation, and cultural uses; and aesthetics

b. industrial and commercial uses; and all other municipal uses

c. maintaining the natural monthly inflows, Lake elevations and outflows of Lake Coeur d'Alene.

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[36] As this Court has recognized, a background of tribal opposition to abrogation of its rights and the absence of any express action by Congress, supports the conclusion that Congress did not intend to abrogate Indian reserved water rights on the Reservation. *See Pocatello*, 145 Idaho at 506.

3. This Court should reverse the district court's dismissal of the Tribe's claims for reserved water rights to maintain instream flows off the Reservation and allow these claims to proceed to quantification to determine where off-Reservation flows are necessary to support the on-Reservation fishing purposes of the Reservation.

4. This Court should reverse the district court's denial of the Tribe's claims of reserved water rights on allotments and homestead lands reacquired from non-Indians with a priority date of no later than November 8, 1873 for consumptive uses and a priority date of time immemorial for non-consumptive uses.

Respectfully submitted, this ~~26th~~ 28 VRH day of February, 2018.

Counsel for Coeur d'Alene Tribe

By: _____

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Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by First-Class Mail, Postage Pre-Paid on this ~~26th~~ 28 VRH day of February, 2018, upon the following:

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