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IDSC Idaho Response to CDAT Appeal

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Docket No. 45383-2017

In the Supreme Court of the State of Idaho

In Re: The General Adjudication of the Rights to the Use of Water from the Coeur d'Alene-Spokane River Basin Water System; Case No. 49576, Subcase No. 91-7755 (353 Consolidated Subcases)

COEUR D'ALENE TRIBE, et al.,

Plaintiffs-Appellants,

v.

STATE OF IDAHO, et al.,

Defendants-Respondents.

BRIEF OF RESPONDENT STATE OF IDAHO

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

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Given the near-identical arguments made by the United States and the Tribe, the State has prepared this single brief to be filed in response to the appeals of both the United States (Docket No. 45382) and the Coeur d'Alene Tribe (Docket No. 45383) from the district court's *Order on Motions for Summary Judgment* (R. 4310), *Final Order Disallowing Purposes of Use* (R. 4301) and *Final Order Disallowing Water Right Claims* (R. 4305), as modified in the *Amended Final Order Disallowing Water Right Claims* (R. 4468), *Order on Motion to Set Aside and Modify* (R. 4479), and *Order Granting Motion to Reconsider* (R. 4473).

The State, in its related appeal (Docket No. 45381), asserts that the district court should have disallowed all claims other than claims for irrigation, domestic, and municipal purposes. Consistent with that position, the State responds in these appeals that while the district court did not go far enough in disallowing claims, it did not err in disallowing the claims for off-reservation instream flows; the claims for commercial and industrial uses; the claim for maintenance of lake levels in Coeur d'Alene Lake; and the claims of non-consumptive water rights to wetlands, springs, and seeps for purposes of gathering, traditional, cultural, spiritual, ceremonial, and/or religious uses, all of which the United States and the Tribe assert as falling within the "homeland" purpose of the Coeur d'Alene Reservation.

B. ADDITIONAL STATEMENT OF THE FACTS

The briefs of the United States and the Tribe make repeated references to the "1873 Agreement" negotiated between federal representatives and the Tribe, often implying that its provisions are in place and enforceable. *See, e.g.*, Tribe's Brief at 9 ("[t]he 1873 Agreement . . . expressly protects the Tribe's water resources"). The 1873 Agreement, however, was never

ratified, in part because the federal representatives who negotiated the Agreement later repudiated it and questioned whether they had authority to negotiate with the Tribe. R. 2989.

In the litigation over ownership of submerged lands underlying Coeur d'Alene Lake, the federal district court found that the 1873 Agreement helped explain the rationale for the boundaries employed in the 1873 Executive Order, which, as the court found, "mirrored exactly the legal boundaries delineated in the 1873 agreement." *United States v. Idaho*, 95 F. Supp. 2d 1094, 1096 (D. Idaho 1998). While the court later stated that "an object of the Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 Agreement," *id*. at 1109, it meant nothing more than that the boundaries in the Agreement and the Executive Order are identical: no other terms from the Agreement are "mirrored" in the Order. Indeed, they could not be, for the President was barred from unilaterally implementing the Agreement through executive order. After Congress forbid treaty-making with Indian tribes in the Act of March 3, 1871, 16 Stat. 544, 566, "relations with Indians were governed by Acts of Congress . . . including legislating the ratification of contracts of the Executive Branch with Indian tribes . . . ." *Antoine v. Washington*, 420 U.S. 194, 203 (1975). Absent ratification, the 1873 Agreement was null and void, a fact recognized in the Agreement itself. R. 1866. *See also Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015) (treaty with tribe that was "never ratified by the Senate . . . carries no legal effect").

The State also disagrees with the assertion that the "full quantity of water claimed has a limited scope," U.S. Brief at 1, an assertion backed by reference to the fact that the United States' consumptive use claims amount to less than one percent of the total outflow of the Coeur d'Alene-Spokane River Basin. U.S. Brief at 1; Tribe's Brief at 16. Such assertions omit the impact of the instream flows claimed in 72 stream reaches and the claim to maintain the "natural monthly Lake elevations and outflows" of Coeur d'Alene Lake. R. 0011. The scope and impact

of the Lake claim cannot be understated; by necessity, a claim to maintain "natural Lake elevations and outflows" (R. 0011) leaves little to no water available for appropriation by other water users within the Basin. The latter fact is of critical importance: the Supreme Court has cited its reserved water rights decisions of *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963), as support for the proposition that neither Indians nor non-Indians can deprive the other of a "fair share" of a resource used by both. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684 (1979); see also *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 176 (1977) (tribe could not exercise fishing right so as to "interdict completely the migrating fish run" and frustrate the rights of non-Indian citizens to the resource).

II.
ARGUMENT

A. THE DISTRICT COURT PROPERLY REJECTED THE CLAIM THAT WATER WAS RESERVED FOR ALL PURPOSES ASSOCIATED WITH ESTABLISHMENT OF A "HOMELAND."

The United States and the Tribe (together, "Claimants") assert that water for the Coeur d'Alene Indian Reservation was reserved for every conceivable purpose, including irrigated agriculture; domestic, commercial, municipal, and industrial ("DCMI"); fish and wildlife habitat; fish propagation; lake level maintenance; water storage; power generation; religious, cultural, and ceremonial; transportation; stockwater and wildlife; aesthetics; and recreation. *See, e.g.*, R. 5576 (Claim No. 95-16672). Unsurprisingly, the district court concluded that in the Claimants' minds, this is a reservation with no secondary purposes. R. 4319. Indeed, the Claimants embrace this finding by arguing that, on Indian reservations, the distinction between primary and secondary purposes does not apply, and water is reserved for every conceivable purpose that falls under the rubric of "homeland."

1. The Claimants' assertion that Indian reservations are set aside as "homelands" simply states a tautology: the term "homeland" means "a state or area set aside to be a state for a people of a particular national cultural, or racial origin." *Merriam-Webster's Collegiate Dictionary* 554 (10th ed. 1996). The term "reservation" means "[a] tract of public land set aside for a special purpose; esp., a tract of land set aside for use by an Indian tribe." *Black's Law Dictionary* 1309 (7th ed. 1999). To argue that water is reserved for all "homeland" purposes is to argue that water is reserved for all "reservation" purposes, a position at odds with the very nature of the implied-reservation-of-water doctrine. "Because the doctrine is one of implication, the United States Supreme Court has traditionally applied it very narrowly." *Potlatch Corp. v. United States*, 134 Idaho 916, 926, 12 P.3d 1260, 1270 (2000) (Trout, J., concurring). It is no coincidence that the only purpose that the Supreme Court has confirmed for Indian reservations is irrigation—nor can such limitation be explained by asserting, as does the United States, that the Court's "decisions addressed water for irrigation because that was the question presented in those cases." U.S. Brief at 14. In *Arizona v. California*, 373 U.S. 546 (1963), the Court, employing a special master, was asked to determine "the *full extent* of the water rights created by the United States" for five Indian reservations. R. 2235 (special master's report) (emphasis added). Ultimately, the court held that the full extent of water rights was properly measured by reference to the amount of practicably irrigable acreage reserved for each tribe, despite recognizing that water was also "essential . . . to the animals they hunted." 373 U.S. at 599.

The Court's recognition of a singular, primary purpose for the five reservations in *Arizona v. California* reflects its view that the implied-reservation-of water doctrine is to be applied narrowly:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended

> to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. 696, 702 (1978).

While the United States labors to portray *New Mexico* as applying only to "later-defined" uses on national forest lands, the *New Mexico* decision itself belies such claim, for the Court was not crafting a new test for reserved water rights on national forests, but merely gleaning a principle from its earlier decisions. Citing its prior holdings addressing Indian reservations, *id*. at 700 n.4,[1] the Court held that "[*e*]*ach time* this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id*. at 700 (emphasis added).

Because the primary/secondary purposes doctrine was derived, in large part, from the Supreme Court's decisions addressing Indian reservations, there is no basis for concluding that the Court intended to limit its application to reservations of non-Indian lands. The lower federal courts have not done so—while generally prefacing their application of *New Mexico* with the caution that it does not apply "directly" to Indian reservations, *see, e.g.*, *United States v Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983), the lower federal courts have generally followed *New Mexico's* admonition to look solely to a reservation's primary purposes when implying water rights. *Adair*, citing *New Mexico*, held that "the scope of the implied right is circumscribed by the necessity that calls for its creation," and implied water rights only for primary purposes of the Klamath Reservation, not for secondary uses. *Id*. at 1408-09. In *Colville Confederated Tribes v.*

[1] *Discussing Winters v. United States*, 207 U.S. 564 (1908); 1908); *Arizona v. California*, 373 U.S. 546 (1963); and *Cappaert v. United States*, 426 U.S. 128 (1976).

Walton, 647 F.2d 42 (9th Cir. 1981), the court, stating "[w]e apply the *New Mexico* test here," found that the primary purpose test is met if the reservation would be "valueless without water" (*id*. at 46, citing *Winters*, 207 U.S. at 576), or if water was "essential to the life of the Indian people." *Id*., quoting *Arizona v. California*, 373 U.S. at 599.

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017), the court again found that the *New Mexico* primary/secondary distinction provides "guidelines" for determining tribal water rights, *id*. at 1269 n.6, and stated that "[b]ecause *New Mexico* holds that water is reserved if the primary purpose of the reservation envisions water use, we now determine the primary purpose of the Tribe's reservation and whether that purpose contemplates water use." *See id*. at 1270 (describing purpose as "to establish a home and support an agrarian society"). Likewise, the Wyoming Supreme Court, in determining reserved water rights for the Wind River Indian Reservation, applied the "rigorous analysis called for by *United States v. New Mexico*." *In re the General Adjudication of All Rights to Use Water in the Big Horn River System,* 753 P.2d 76, 90 (Wyo. 1988).[2] The Wyoming court found that the primary purposes of the Reservation were defined by those on-reservation activities that were actively encouraged by treaty, rather than merely contemplated or permitted:

> Although the treaty did not force the Indians to become farmers and although it clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9), the treaty encouraged only agriculture, and that was its primary purpose.

Id.

[2] In *Vaughn v. State*, 963 P.2d 149 (Wyo. 1998), the court abrogated that portion of the *Big Horn* decision employing an abuse of discretion standard to determine whether the district court properly admitted engineering feasibility testimony used to determine practicably irrigable acreage, but otherwise left the decision intact.

Given the wealth of precedent applying *New Mexico* to Indian reservations, the district court did not err in distinguishing between primary and secondary purposes in determining the Tribe's entitlement to reserved water rights. Likewise, this Court must reject the assertion that the *New Mexico* Court, by finding that later-added purposes for federal reservation are not primary purposes, necessarily concluded that *any* original purpose, whether express or implied, is a primary purpose. U.S. Brief at 17-18. If anything, the *New Mexico* decision establishes that only purposes clearly expressed by Congress at the creation of the reservation are primary purposes. In determining the primary purposes of a national forest reservation, the Court stopped at the plain language of the act creating the national forests, 438 U.S. at 707-08, and rejected the United States' assertion that an additional, generalized purpose to "improve and protect" national forests could be implied from the wording of the act. *Id*. at 707 n.14.

2. Not only do the Claimants seek to limit application of *New Mexico's* primary/secondary purposes test: they seek to avoid *any* further inquiry into the Reservation's purposes once it is established that the Reservation was to serve as a "homeland" for the Tribe. The only court to actually apply the Claimant's "homeland" theory of water rights is the Arizona Supreme Court in *In re the General Adjudication of All Rights to Use Water in the Gila River System*, 35 P.3d 68 (Ariz. 2001) (*Gila River V*).[3] In *Gila River V*, the Arizona Supreme Court

[3] The Claimants' citation of *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (Mont. 1985), as a case implying "homeland" water rights is misplaced. While the *Greely* Court appeared to distinguish *New Mexico*, it was not adjudicating reserved water right claims: the only issue it considered was whether "the Montana Water Use Act [is] adequate to adjudicate reserved water rights." 712 P.2d at 762. In conjunction with such question, the court surveyed the case law that described the potential scope of reserved water right claims that could *potentially* be presented in a future case. *Id.* at 762-65. Such dicta establishes no precedent. *Montana Human Rights Div. v. City of Billings*, 649 P.2d 1283, 1287 (Mont. 1982) ("[t]his Court is not bound to give precedential value to dicta"). And in fact, the *Greely* court did not recognize reserved water rights for a broad range of uses, but found authority only for reserved water rights to support agriculture and for fishing and hunting. 712

rejected the parties' proffered historical analyses of the reservation's purposes, instead holding, as a matter of law, "that the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there." *Id*. at 76 (quoting *Winters*, 207 U.S. at 565). In doing so, the Court rejected a prior decision stating that determination of purpose required "fact-intensive inquiries that must be made on a case-by-case basis," and replaced it with the court's legal finding "that Indian reservations were created as permanent homelands." *Id*. at 76 n.5 (citing *In re the General Adjudication of All Rights to Use Water in the Gila River System*, 989 P.2d 739, 748 (Ariz. 1999)).

The *Gila River V* holding, however, stands on infirm foundations, and is inconsistent with this Court's precedents and that of most jurisdictions. First, the court concluded that "historical reality is irrelevant for purposes of establishing reserved rights," because intent to reserve water rights is "merely imputed" rather than expressed. *Id*. at 75 (quoting Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 Nat. Res. J. 549, 563 (1991)). Ignoring historical evidence of intent, however, is at odds with this Court's determination that "[w]hether there has been a federal reservation of water, and the quantity of water reserved, are questions of legislative intent." *Potlatch Corp.*, 134 Idaho at 914, 12 P.3d at 1258. In practice, historical examination into the specific purposes of a reservation often yields valuable information regarding the parties' intent. *Cf. Adair*, 723 F.2d at 1409-10 (examining treaty, negotiations, and related documents to determine the purposes "which the parties to the 1864 Treaty intended the Klamath Reservation to serve"); *Big Horn*, 753 P.2d at 97-98 (employing historical examination to determine what activities the treaty encouraged,

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P.2d at 764. The court found no "decisive federal cases" implying water rights to support industrial purposes, *id*. at 765, and concluded only that "[i]t may be that such 'acts of civilization' will include consumptive uses for industrial purposes." *Id*.

rather than merely permitted); *Winters*, 207 U.S. at 575 (intent to reserve water "turns on the agreement" creating reservation).

Secondly, the *Gila River V* court erred in determining that *New Mexico's* admonition that reserved water rights must be "narrowly quantified to meet the original, primary purpose of the reservation," applies only to "non-Indian reservations." *Gila River V*, 35 P.3d at 73. As discussed *supra*, the Supreme Court's limitation of reserved water rights to those necessary to fulfill the "specific purposes" of a reservation was constructed on the foundation of the Court's prior decisions addressing water rights for Indian reservations; the Arizona court erred in simply casting it aside.

Third, the *Gila River V* court erred in citing a need for "flexibility" in implying the scope of reserved water rights, given its belief that "an across-the-board application of PIA [has the] potential for inequitable treatment of tribes based solely on geographical location." *Id*. at 78. The court's concern about the perceived inflexibility of the PIA standard is at odds with the Supreme Court's reasons for adopting the practicably irrigable acreage standard, which the Court has described as "in part attributable to the Court's interest in a *fixed* calculation of future water needs." *Arizona v. California*, 460 U.S. 605, 617 (1983) (emphasis in original).

The Supreme Court's use of PIA as the measure of reserved water rights is grounded in the principle that the quantity of water reserved is dependent on the uses of land contemplated in the document creating the reservation, not on future uses of water not tied specifically to the productivity of reserved land. *See id*. ("[t]he practicably irrigable acreage standard was preferable because how many Indians there will be and what their future needs will be could 'only be guessed'") (quoting *Arizona v. California*, 373 U.S. at 601). Limiting the reservation of water rights to the primary purposes of reserved land, however, does not limit the *use* of such water for other purposes as a tribe's economy develops—such flexibility was incorporated into

the PIA standard by the Special Master in *Arizona v. California*, who held that while "reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy" that does not mean that "water reserved for Indian Reservations cannot be used for purposes other than agricultural and related uses." R. 2235 (Special Master's Report at 265). In a follow-up *per curiam* opinion, the Court held that the "quantity of water necessary to supply consumptive use required for irrigation . . . shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application." *Arizona v. California*, 439 U.S. 419, 422 (1979). In *Walton*, the court held that allowing flexibility in the usage of water initially reserved for irrigation met the general purpose of "providing a homeland for the survival and growth of the Indians and their way of life." 647 F.2d at 49. In other words, concerns about flexibility are addressed by recognizing that uses of reserved water rights may change over time, not by implying the reservation of additional water for such uses.

Finally, the *Gila River V* court erred in its belief that treaties must be interpreted to avoid inequitable outcomes. 35 P.3d at 78. By interpreting a treaty flexibly in order to avoid results the court viewed as inequitable, the Arizona court violated the Supreme Court's admonishment that courts are not "at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice." *United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900); *see also United States v. Washington*, 157 F.3d 630, 650 (9th Cir. 1998) (a court may not employ "equitable considerations in *interpreting* Indian treaties") (emphasis in original).

In sum, the "homeland" theory propounded by the Arizona Supreme Court in *Gila River V* was not well-founded because it failed to recognize that fulfillment of the general "homeland" purpose of providing means for future economic development does not require that consumptive

water rights be quantified for every conceivable future use whether or not such use was a primary purpose at the time of reservation. Rather, establishment of agriculture as the primary purpose of a reservation recognizes that as a tribe's economy evolves, farms may be converted to commercial or industrial uses, and water earlier used for irrigation may be turned to such uses. *See Walton*, 647 F.2d at 47 n.9 ("Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process"). Here, the district court correctly determined that intent to reserve water should be determined by engaging in an analysis of the purposes which the United States and the Tribe "intended the . . . Reservation] to serve"). *Adair*, 723 F.2d at 1410. While the State asserts, in its appeal, that not all purposes of the 1873 Executive Order survived subsequent, superseding legislation, the district court nonetheless correctly determined that any purpose other than agriculture, hunting, and fishing was not a primary purpose of the 1873 Executive Order. The district court's holding does not foreclose the *use* of reserved water for the myriad of purposes sought by the Tribe, with the caveat that non-consumptive water rights may only be used for other, non-consumptive purposes. *See Adair*, 723 at 1411 (holder of non-consumptive reserved instream flow water right "is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses").

B. THE DISTRICT COURT CORRECTLY DISALLOWED CLAIMS FOR COMMERCIAL AND INDUSTRIAL PURPOSES.

The district court denied all claims of water rights for commercial and industrial purposes, other than a claim for a fish hatchery—presumably the latter claim was allowed as consistent with court's determination that a primary purpose of the Reservation was hunting and

fishing.[4] The district court's denial of water rights for commercial and industrial purposes is well-supported.

In *Winters*, the United States claimed that water was necessary to achieve the purposes of "furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them." 207 U.S. at 567. The Supreme Court agreed that water could be "turned to agriculture and the arts of civilization," but did not suggest that "arts of civilization" would be the basis for a separate water right entitlement. *Id*. Since *Winters*, courts have noted the lack of "decisive federal cases on the extent of Indian water rights for uses classed as 'acts [sic] of civilization.'" *Montana ex rel. Greely*, 712 P.2d at 765 (but noting possibility that acts of civilization may include water for industrial purposes).

Any assertion that water was reserved by the 1873 Executive Order to encourage "arts of civilization" must be construed in the context of the times. In the nineteenth century, federal agents believed that "civilization" of tribes was to be achieved not through commercial or industrial activities, but through farming. In 1889 General Benjamin Simpson opened negotiations with the Tribe by stating that "[t]he time is come when you, like the whites, should depend upon the cultivation of the soil . . . . We know that cultivation of the soil is the very foundation of civilization, prosperity, and wealth." R. 2114. When the Commission of Indian

[4] Below, the State did not contest claims for power generation and fire suppression because the State asserted that the current reservation was created by the Act of March 3, 1891, which anticipated tribal reliance primarily on farming and agriculturally-related industries, thus superseding the Executive Order of November 8, 1873. If, however, the Reservation was created by the 1873 Executive Order, then the United States is correct in asserting that purposes added by later acts are, by their very nature, secondary. *See* U.S. Brief at 15-16 ("[*New Mexico*] requires only that the federal reservation of water rights be tied to the original purposes of the Coeur d'Alene Reservation; any later-defined purposes of the reservation would have to be assessed to determine whether they were merely "secondary" uses that are not entitled to federally-reserved water rights").

Affairs reported in 1889 that the Tribe was "far advanced in civilization," he cited their extensive cultivation of the soil as support for such statement. R. 2110.

In *Arizona v. California*, the Court applied the Special Master's Report that specifically rejected a separate claim of reserved water rights for industrial purposes, instead recognizing that water initially reserved for irrigation could be later converted to such use:

> The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations cannot be used for purposes other than agricultural and related uses.

R. 2235 (Special Master's Report at 265).

Likewise, in *Dep't of Ecology v. Yakima Reservation Irrig. Dist*., 850 P.2d 1306 (Wash. 1993), the appellate court upheld the trial court's holding that the:

> The Yakima Indian Nation's diversions of water (over and above the amount listed [for irrigation purposes]) for commercial, industrial and other nonagricultural purposes are not in fulfillment of the primary purposes of the treaty and therefore are limited to those quantities of water that may be established pursuant to state law.

Id. at 1310.

To the State's knowledge, the only case affirming a reserved water right for an "industrial" purpose is *In re Crow Water Compact*, 364 P.3d 584 (Mont. 2016), in which the court was considering objections that a water rights compact allocating water to the Crow Tribe to support coal mining was "for an improper purpose." *Id*. at 589. The court determined:

> [U]nder *Winters* and its progeny the tribe has a right to water for development of industrial interests. The Tribe's interests in the Ceded Strip are primarily mineral

> deposits (coal) that may be developed for industrial purposes. The allocation of water in the Ceded Strip reflects the opportunity to do that for the Tribe.

Id. (citations omitted). The court concluded that the compact was negotiated at arm's length and in good faith and therefore "presumptively valid" absent a showing that "the Compact is unreasonable and that [the objectors'] interests are materially injured." *Id*. at 587-88. With regard to the water right for industrial purposes, the court found such standards met, in part because of a provision that the "Tribal Water Right cannot be exercised ahead of pre-1999 state-law rights." *Id*. at 588. Because the court was approving a water rights compact, the decision has limited precedential value.

Here, the sole historical evidence offered by the Claimants in support of the assertion that industrial uses were a primary purpose of the 1873 Reservation is the fact that the unratified 1873 Agreement would have furnished the Tribe with a "grist and saw mill combined" to be located at the "Upper Falls" (i.e., Post Falls). Tribe's Brief at 37 (citing R. 1866). The district court concluded that such a mill did not establish an independent, "industrial" purpose, but rather was one of "various implements [that] would be conveyed from the United States to the Tribe to promote [an] agricultural lifestyle." R. 4320. The court's conclusion is well supported not only by the terms of the unratified agreement, but by the fact that in other adjudications, similar provisions for mills have not led courts to imply the reservation of water for industrial and commercial purposes. In the *Big Horn Adjudication*, the court noted that the treaty creating the Wind River Reservation provided for a saw mill with attached grist mill, 753 P.2d at 95, but concluded that the "district court did not err in denying a reserved water right for mineral and industrial uses." *Id*. at 98. In *Adair*, the Treaty with the Klamath Indians, 16 Stat. 707, called for the erection of a saw mill and flouring mill, but the court found that the primary purposes of the Reservation were limited to agriculture, hunting, fishing, and gathering. 723 F.2d at 1410.

Likewise, in *Dep't of Ecology v. Yakima Reservation Irrig. Dist*. (discussed *supra*), the court upheld the denial of water rights for "commercial, industrial and other nonagricultural purposes," 850 P.2d at 1310, yet the Treaty with the Yakimas, 12 Stat. 951, called for the construction of "one saw-mill and one flouring-mill" and the erection of an "agricultural and industrial school."

C. THE DISTRICT COURT PROPERLY HELD THAT GATHERING AND OTHER TRADITIONAL USES OF WATERWAYS WERE NOT PRIMARY PURPOSES OF THE COEUR D'ALENE RESERVATION.

Gathering of water-dependent plants was part of the Tribe's traditional subsistence practices, and the Tribe used waterways for travel and for religious and cultural purposes. But the fact that a use of water was of "historical importance" does not mean such use is automatically deemed a primary purpose of the Reservation—if such were the test, the primary purposes doctrine would be of limited utility. The Wyoming Supreme Court, in adjudicating water rights for the Wind River Reservation, found that uses of historical importance, such as hunting, were not primary purposes of the reservation if merely permitted by treaty terms, rather than encouraged. *Big Horn*, 753 P.2d at 97. Likewise, in *Adair*, the only case to recognize a reserved water right for gathering, the court based its decision on the "historical importance" of traditional subsistence activities "*and* the language of Article I of the 1864 Treaty," which specifically reserved gathering rights within the reservation. 723 F.2d at 1409 (emphasis added). Here, there is no treaty or agreement expressly reserving gathering rights, or indeed, any subsistence rights at all, and the contemporary historical evidence relating to establishment of the 1873 Reservation that addresses reliance on traditional subsistence activities mentions only hunting and fishing. *See* R. 4322 (discussing 1872 tribal petition and letter from government surveyor). On appeal, the Claimants do not identify any contemporaneous evidence that preservation of gathering opportunities was a primary purpose of the 1873 Executive Order: they

rely instead on modern day expert analysis of the Tribe's subsistence practices.[5] Given the lack of contemporaneous evidence encouraging or expressly preserving gathering, transportation, cultural, and religious rights, the district court correctly concluded that such traditional uses, while admittedly permitted, were not primary purposes of the Reservation.

D. MAINTENANCE OF COEUR D'ALENE LAKE AT SPECIFIC ELEVATIONS IS NOT NECESSARY TO FULFILL THE PRIMARY PURPOSES OF THE RESERVATION.

In accordance with its "homeland" theory of water rights, the United States claimed the right to maintain Coeur d'Alene Lake at specified lake levels throughout the year for a "myriad of tribal uses," including "food; fiber; transportation; recreation; religious, cultural and ceremonial; fish and wildlife habitat; lake level and wetland maintenance; water storage; power generation; and aesthetics." R. 0011. "[T]the intent [was] to claim sufficient water to reflect the natural Lake processes prior to Post Falls dam." R. 0011. The district court disallowed the claim because "[l]ake level maintenance is not a primary purpose of the reservation," referring back to its dismissal of "homeland" purposes as providing the reason for such conclusion. R. 4328. Additionally, the court held that the "outflow component of the claim," which would have established minimum stream flows below Post Falls Dam, "seeks to develop a place of use outside the boundaries of the reservation." R. 4328. In its *Final Order Disallowing Purposes of Use*, the district court ordered that the claim "proceed to the quantification phase of this litigation on its 'fish and wildlife' purpose of use." R. 4302.

As discussed in the section of this brief addressing "homeland" claims, the district court acted in accordance with the law in rejecting the "myriad" of claimed purposes of the Lake, and

[5] The United States points to one instance in the record of a historical document relating to the Tribe that mentions "berries and roots," U.S. Brief at 24, but the letter (R. 696) was discussing resources on the small reservation set apart by the Executive Order of June 14, 1867, which was superseded by the 1873 Executive Order.

in limiting the claim to what the court concluded were the primary purposes of the Reservation. In its appeal (Docket No. 45381), the State asserts that, in light of the Reservation's history subsequent to 1873, "fish and wildlife" is a secondary purpose of the Reservation. Here, solely for purposes of argument, the State will assume the district court correctly determined that "fish and wildlife" is a primary purpose of the Reservation. Even in the light of such assumption, the district court's denial of a claim for "lake level maintenance" must be upheld because the actions of the United States and the Tribe decry any assertion that maintenance of Coeur d'Alene Lake at "natural levels" is necessary to achieve the primary purposes of the Reservation. *See United States v. New Mexico*, 438 U.S. at 699 ("the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more'") (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).

First, a series of actions subsequent to the 1873 Executive Order demonstrate conclusively that the parties did not understand the Reservation's purposes to require maintenance of lake levels. In 1888, Congress initiated an inquiry into whether the Reservation boundaries should be redrawn to exclude the Lake, or substantial portions thereof, from the Reservation. An 1886 resolution crafted by Oregon Senator John Mitchell stated, in part, that "Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River . . . [are alleged to be] the most important highways of commerce in the Territory of Idaho," and expressed concern that "all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the Reservation line are trespassers." R. 2055. The Resolution directed the Secretary of the Interior to report "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." *Id*. In response to the Resolution, the Secretary of the Interior submitted to the Senate a letter from the Commissioner of Indian Affairs concluding

that "the release of some or all of the navigable waters therefrom . . . would be of very great benefit to the public." R. 2057, 2058 (Sen. Ex. Doc. No. 76 (1888)).

Congress subsequently authorized negotiations, whose "main purpose . . . was to regain from the Tribe whatever submerged lands it was willing to sell." *United States v. Idaho*, 210 F.3d 1067, 1077 n.14 (9th Cir. 2000). In the new agreement, concluded September 9, 1889, the parties agreed to "split the lake—a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe, and the maps submitted to Congress." *Id*. at 1075. The 1889 agreement, in the words of the Supreme Court, "cede[d] the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000." *Idaho v. United States*, 533 U.S. 262, 269-70 (2001). While two-thirds is a rough estimate of the cession measured by length, the cession, when measured by area, excluded more than 80 percent of the Lake from the Reservation.[6]

The "purposeful division of the Lake," 210 F.3d at 1075, with less then 1/5 of the Lake remaining within the Reservation, belies the Claimants' assertions of a lake level maintenance right. If the primary purposes of the Reservation required maintenance of lake levels, then the subsequent exclusion of most of the Lake from the Reservation was at odds with such purpose, for implicit in such cession is loss of control over lake elevations. When a water body has split ownership, one party cannot claim the unilateral right to maintain a specific lake elevation, because such right, if recognized, necessarily imposes a lake elevation upon all owners of the water body.[7] This is especially true given the Tribe's assertion that "[a] right to lake level and

[6] R. 548 (Affidavit of David Shaw, ¶ 8, determining that "about 15.5% of the Lake is within the Reservation and about 84.5% is outside of the Reservation"); *see also* R., p. 2810 (denying motion to strike the above-cited portion of Mr. Shaw's Affidavit).

[7] The Tribe (unsupported by the United States) claims ownership of the entirety of Coeur d'Alene Lake, but under the law, this Court must presume state ownership of those portions of

wetland maintenance . . . is part and parcel of the Tribe's sovereign ownership and control of submerged lands." Tribe's Brief at 43. The Supreme Court has held that when there are competing sovereign interests on a single waterbody, the solution is not to award one sovereign the right to impose its will on the other: the solution is a "just and equitable" apportionment of water rights made after a "delicate adjustment of [all] interests." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 684 (citing *Winters* and *Arizona v. California* to support holding that neither Indians nor non-Indians can deprive the other of a "fair share" of a shared resource).

While the State does not suggest that the CSRBA district court has jurisdiction to conduct an equitable apportionment of the Lake between the State and Tribe, the principles that underlie such doctrine caution against implying, in the face of the cession of over 80% of the Lake, retention of the right to dictate lake elevations throughout the Lake. The district court correctly denied the claim for lake level maintenance, and limited any claim to the Lake to the purposes of hunting and fishing, which presumably would be measured by the volume of water in the Tribe's portion of the Lake necessary to fulfill such purposes. *See* Idaho Code § 42-1409(1)(c)(ii) (non-consumptive federal reserved water rights to be described by "the rate of flow in cubic feet per second or annual volume of present and future diversion in acre feet per year").

Likewise, the district court recognized that the United States could not claim the right to maintain a specified outflow from the Lake, as measured below Post Falls Dam, which the United States claims is "necessary to keep the lake from becoming a stagnant pool." U.S. Brief at 19 n.9. As the district court correctly noted, the claimed outflow is well outside the

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the Lake not decreed to the Tribe. *Alaska v. United States*, 545 U.S. 75, 78 (2006) ("States enjoy a presumption of title to submerged lands beneath inland navigable waters within their boundaries").

boundaries of the Reservation, and the place of use was explicitly ceded by the Tribe, an action at odds with the assertion that the purposes of the Reservation required maintenance of the outflow. Indeed, the Tribe not only ceded the Spokane River and Post Falls by means of general and comprehensive cession language, it insisted that the United States confirm its earlier cession of Post Falls to Frederick Post for water power purposes by including the following statement by Coeur d'Alene chief Andrew Seltice in the Act of March 3, 1891:

> Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements . . . .

Act of March 3, 1891, 26 Stat. at 1031-32. Congress directed that Post Falls be surveyed and patented to Frederick Post. *Id*. at 1031.

Given the purposeful division of the Lake, the Tribe's retention of only a small portion thereof, and the Tribe's insistence on conveying the outlet of the Lake to Frederick Post for "water-power and improvements," it is not possible to imply intent to reserve a "natural lake processes" water right either in the Lake itself or at Post Falls.

Actions subsequent to the 1891 cession confirm that the parties did not understand maintenance of the Lake's "natural processes" to be necessary to the primary purposes of the Reservation. The first such action is the Department of the Interior's issuance, in 1909, of a permit to Washington Water Power Company allowing the Company to overflow Reservation lands as a consequence of the construction of dams at Post Falls. *See* R. 1767-82 (report of Tribe expert E. Richard Hart discussing permit); R. 3038 (report of State expert Stephen Wee discussing permit). The dams at Post Falls retard drainage of the Lake so that it remains at

higher elevations for longer periods of the year. R. 0876 (1921 hydrologic report). The Tribe received $1.25 per acre for water storage on its portion of the lakebed and adjacent lands. R. 3038.

The Government's 1909 issuance of a permit on behalf of the Tribe allowing alternation of the Lake's natural flow regime is difficult to reconcile with its current assertion that the parties understood a natural flow regime to be essential to fulfill the primary purposes of the Reservation. Even more difficult to reconcile is the United States' acknowledgment that current operations at Post Falls Dam, which significantly alter the natural hydrologic regime, are consistent with the purposes of the Reservation. Such acknowledgment appears on the face of the lake level maintenance claim, in which the United States admits that the claim is not currently necessary to achieve the purposes of the Reservation because it "does not seek to affect present licensed operations at Post Falls." R. 6279 (Notice of Claim No. 95-16704). The current license does not expire until 2059. *Order Issuing New License and Approving Annual Charges for the Use of Reservation Lands*, 127 FERC ¶ 61,265, 62,187 (June 18, 2009).

Moreover, before issuing the license for Post Falls Dam, the Federal Energy Regulatory Commission (FERC) was required to find that the licensed operations are not "inconsistent with the purpose for which such reservation was created." 16 U.S.C. § 797(e). The FERC so found, stating that the Tribe "raised no objection to the fact that the project reservoir, Coeur d'Alene Lake, occupies part of the reservation," and citing the lack of "any evidence that relicensing the Post Falls development as part of the Spokane River Project would adversely affect the reservation." *Order*, 127 FERC at ¶ 62,169. The fact that the United States and the Tribe request that any lake level water right be deferred for the term of the current 50-year FERC license demonstrates their continuing agreement with FERC's determination that fulfillment of the Reservation's purposes does not require that the natural hydrograph be maintained.

E. THE DISTRICT COURT CORRECTLY DISALLOWED ALL INSTREAM FLOW CLAIMS OUTSIDE THE CURRENT RESERVATION BOUNDARIES.

The Claimants invite the Court to craft an entirely new category of reserved water rights, namely a water right to protect fish habitat many miles distant from the Reservation if fish in such stream eventually reach the Tribe's portion of Coeur d'Alene Lake, where the Tribe retains an implied fishing right. R. 0010. The extraordinary nature of the claim cannot be understated, for *implied* rights outside reservation boundaries are generally precluded. This is so because both tribes and tribal members "going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). An exception to this general rule exists only when "there is *express* federal law to the contrary." *Id*. (emphasis added). Here, all parties admit there is no express reservation of water rights outside the reservation, indeed, in the various agreements with the Tribe, there is no reservation of *any* off-reservation rights. For such reason, the Claimants attempt to portray their claimed water right as necessary to the exercise of on-reservation fishing rights. The assertion that an instream flow water right applies wherever fish subject to an on-reservation fishing right may travel has no precedent in the law. Reserved water rights are appurtenant to land, not to fish. Moreover, the Claimants' attempt to relate the off-reservation claims to the exercise of on-reservation fishing rights fails, because the place of use for the claimed rights is outside the reservation—the claims seek water to protect fish habitat *in situ*.

The district court's disallowal of all instream flow claims outside the current Reservation must be upheld for the following reasons: (1) water rights are reserved by implication only when the subject waterway is within or bordering the reservation; (2) the Tribe's cession of all right, title, and interest to lands outside the current Reservation included all right, title, and interest in

waterways; and (3) Congress, by returning ceded lands to the public domain, expressed its intent that uses of water thereon would be appropriated only in accordance with state law.

1. The Claimants assert, correctly, that the term "appurtenant," as applied to water rights generally, does not require that the water source be physically located on or adjacent to the appropriator's land. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 12-13, 156 P.2d 502, 513-14 (2007). But, rights incidental to the setting aside of lands for a tribe's exclusive use are different: "it is manifest" that rights implied from the reservation of land for a tribe's use do "not exist independently of the reservation itself." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765-68 (1985) (discussing "appurtenant" hunting and fishing rights). The 1873 Executive Order "set apart" a specific tract of land "as a reservation for the Coeur d'Alene Indians." R. 2031. Any incidental rights created by the Executive Order are confined to such tract of land and do not exist independently of such land.

The restriction of reserved water rights to water sources that have a physical connection with a reservation of land is a constant thread in reserved rights decisions. The first case to confirm the federal government's authority to reserve waters was *United States v. The Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). There, the Court held that a state, through adoption of the prior appropriation doctrine, could not "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters." *Id*. at 703. Next, in *Winters*, the Court, citing *Rio Grande*, concluded that the United States reserved the right to use water from the Milk River only after noting that the Reservation's boundary went to the middle of the River. 207 U.S. at 565. Other courts followed suit: in *Conrad Inv. Co. v. United States*, 161 F. 829, 831 (9th Cir. 1908), the court found *Winters* to be applicable only because the reservation boundary, as in *Winters*, went to the middle of the river; in *United States v. Ahtanum Irng. Dist*., 236 F.2d 321 (9th Cir. 1956), the court found a reserved water right to divert water

from Ahtanum Creek, which formed a boundary of the Yakima Reservation, only after applying the common law rule that "a tract of land bounded by a nonnavigable stream is deemed to extend to the middle of the stream." *Id*. at 325; *see also City of Pocatello v. State*, 145 Idaho 497, 503, 180 P.3d. 1048, 1054 (2008) (only restrictions on state control of water are "reserved rights on federal government property and navigation servitude").

In *Cappaert v. United States*, 426 U.S. 128 (1976), the Supreme Court upheld the district court's holding that "the President, in setting aside a national monument, had "reserved appurtenant, unappropriated water necessary to the purpose of the reservation." *Id*. at 136. The Court's use of the term "appurtenant," however, was not meant to affirm federal authority to reserve waters not physically attached to the reservation: the district court had held that the President had withdrawn from private appropriation only those unappropriated waters "in, on, under and appurtenant to Devil's Hole [National Monument]." *United States v. Cappaert*, 375 F. Supp. 456, 460 (D. Nev. 1974). The use of the conjunctive "and" indicates the court's understanding that "appurtenance" is an additional requirement for implied reservation of water, not a substitute for physical attachment.

The *Cappaert* court's enjoining of a water use over two miles distant from the reservation does not suggest that the reserved water right extended off the reservation: the Court did nothing more than apply conjunctive management principles in holding that a junior-priority off-reservation groundwater user could be restricted when necessary to fulfill an on-reservation, senior priority water right. *Id*. Moreover, the Claimant's citation of *Cappaert* as analogous to the present off-reservation claims is severely misplaced because, as discussed *supra*, the Claimants do not seek to enjoin off-reservation water users "to serve on-reservation uses of water." U.S. Brief at 37. Rather, the express purpose of the claims is to preserve off-reservation instream habitat. A necessary prerequisite to such off-reservation use is proof of either tribal

ownership of such habitat, or reservation of the right to use, control and protect off-reservation habitat. The Claimants have shown proof of neither. *Cf. Joyce*, 144 Idaho at 512-13 (recognizing right to use water source not located on rancher's property when rancher had legal right, in form of grazing permit, to use federal property on which water source was located).

The limitation of implied reserved water rights to waters in, on, under, *and* appurtenant to a reservation of land was also recognized in *Agua Caliente Band*, 849 F.3d at 1270, which held that "the *Winters* doctrine . . . only reserves water if it is appurtenant to the withdrawn land," and then found that "[a]ppurtenance . . . simply limits the reserved right to those waters which are attached to the reservation." *Id*. at 1268, 1271. The court found such attachment to exist because the aquifer "clearly underlies the Tribe's reservation. *Id*. at 1271 n.10.[8]

The Claimants err in asserting that the holdings in *Arizona v. California, Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist*., 763 F.2d 1032 (9th Cir. 1985), and *Dep't. of Ecology v. Yakima Reservation Irrig. Dist*. (also known as the *Acquavella Adjudication*) all recognized off-reservation water rights. The assertion that the *Arizona v. California* decree awarded water rights to the Cocopah Reservation for lands two miles from the Colorado River ignores the history of the Cocopah Reservation. The Cocopah Reservation was created by

[8] In an earlier case, *John v. United States*, 720 F.3d 1214, 1229-30, (9th Cir. 2013), the court held that the term "appurtenant," as used in reserved water right cases, "refer[s] 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." *John* did not involve water rights: the plaintiffs in *John* challenged the validity of a federal regulation that defined the scope of "public lands" in Alaska to include appurtenant reserved water rights. While the Court did not interpret appurtenancy to mean physical attachment, as it later did in *Agua Caliente*, it approved the agencies' determination that under the reserved water rights doctrine "appurtenant" waters "included waters within and 'immediately adjacent to' federal reservations, but not . . . waters upstream and downstream from those reservations." *Id*. at 1241. The *Agua Caliente* court apparently did not view *John* as providing any meaningful guidance as to the meaning of "appurtenant," since it failed to cite it.

executive order in 1917, and the lots reserved in the executive order were "bordered on the west by the meander line of the Colorado River as shown by a public land survey made in 1874." R. 2938 (Solicitor Opinion); R. 3495 (plat showing Reservation bordering Colorado River meander line). Between the time of the 1874 survey and the 1917 executive order, accretion had shifted the Colorado River to the West, "leaving a considerable amount of accreted land between the river and [the Reservation boundary]." R. 2938. A dispute later arose regarding whether such accretion became part of the Reservation. R. 2938-2941 (the Solicitor eventually concluded that it was). Regardless of the status of the accretion, the Reservation was bounded by the Colorado River *as surveyed* so that the reservation of implied water rights from the River is consistent with the principle that reserved water rights are limited to waterways physically attached to the Reservation.

In *Kittitas Reclamation Dist.*, the court made no determination of reserved water rights—indeed, it made no mention of *Winters* or other reserved water right cases. Rather, the only issue before the court was whether a federal district court had exceeded the scope of its retained jurisdiction under a prior consent decree when it ordered the temporary release of water from a federal irrigation project to protect 60 salmon redds that would have otherwise been exposed and destroyed. 763 F.2d at 1033-34. The release was upheld as a "reasonable emergency measure[]." *Id*. at 1035. No off-reservation water rights were awarded or recognized.

In *Dep't of Ecology*, the issue of entitlement to off-reservation instream flows was never in dispute: on appeal, the Washington Supreme Court noted that:

> The question in this appeal is not whether the Indians have treaty rights to water from the Yakima River and its tributaries, but rather the quantity of water the Indians are entitled to and the priority date attaching to such quantity.

Dep't. of Ecology, 850 P.2d at 1309. Later in the opinion, the court again noted that:

> All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes, and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.

Id. at 317. Because the Washington courts simply incorporated the parties' agreement regarding entitlement to off-reservation water rights, the *Dep't of Ecology* decision has no value as precedent. *See Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 991 (Wash. 1994) ("[i]n cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised").

2. Even if this Court were to ignore precedent limiting the implied-reservation-of-water doctrine to waters physically attached to a reservation of land, it still could not imply an intent by the President to reserve, in the 1873 Executive Order, all off-reservation waters in the Coeur d'Alene and Spokane River basins. First, such a reservation would be inconsistent with the express language of the Order, which, by its terms, delimited a "tract of country" to be "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." R. 2031. By withdrawing a specific tract of land, the natural implication is that no rights are reserved except within such tract. *See United States v. Santa Fe Pac. R. Co*., 314 U.S. 339, 357-58 (1941) (creation of executive order reservation at tribe's request "and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation").

The holding in *Santa Fe* is, if anything, bolstered in the case of the Coeur d'Alene Reservation by the terms of the unratified 1873 Agreement, which, while unenforceable, does demonstrate the Tribe's acceptance of the 1873 Reservation and the Tribe's accompanying intent to relinquish all rights outside such Reservation. In such Agreement the Tribe agreed to "relinquish to the government of the United States all their right and title in and to all the lands

heretofore claimed by them, and lying and being outside of said described reservation." R. 3674. An intent to reserve water rights on lands outside the Reservation can hardly be ascribed to a cession of all "right and title" to those same lands. Nor can the Tribe assert that it did not understand waterways to be included in its cession of "lands," because its Reservation was described as consisting of "all and singular the lands and privileges lying and being within" the described limits of the reservation. R. 3673. If the Tribe understood the *reservation* of "lands" to include waterways, it necessarily understood its *cession* of lands to likewise include waterways.[9] As the district court concluded, this interpretation is bolstered by the fact that the unratified agreement would have included a provision "that the waters running into said reservation shall not be turned from their natural channel where they enter such reservation." R. 3673. Such a provision, by its terms, reflects the parties' understanding that, if the Agreement was ratified, any limitation on diversion of waters would be limited to waters "where they enter such reservation."

3. Another reason to deny the off-reservation claims is the general principle that the Tribe's property interest in fish present in the Tribe's portion of Coeur d'Alene Lake ceases once those fish leave tribal property. The Tribe's ownership of lands includes the power to protect and regulate the taking of wildlife while present on tribal land. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (addressing reservation never opened to non-Indian ownership). Likewise, "[o]wnership of submerged lands [includes] the power to control navigation, fishing, and other public uses of water." *United States v. Alaska*, 521 U.S. 1, 5 (1997). But ownership of submerged lands does not provide the Tribe a property right or other

[9] The Tribe's understanding that the cession included waterways is also demonstrated by the fact that the ceded "lands" were described, in part, as going to the "foot of Pen de'Oreille Lake; thence up said lake to the summit of the Bitter Root mountains." R. 3674.

legal interest that follows the fish once they leave the Lake to spawn in tributary streams. The Tribe's right to protect the fish from exploitation or harm ceases once those fish are no longer on tribal property. This principle is embodied in cases addressing tribal authority to prevent the taking of wildlife on non-Indian lands—the Supreme Court has repeatedly held that wildlife on non-Indian lands, even within reservations, is beyond tribal protection. *Montana v. United States*, 450 U.S. 544, 557 (1981) (tribe has power to regulate hunting and fishing only on land belonging to the tribe); *South Dakota v. Bourland*, 508 U.S. 679, 689-90 (1993) (conveyance of reservation lands to non-Indians implies the loss of right to prevent hunting and fishing). If a tribe cannot protect fish and game on fee lands within reservation boundaries, it necessarily follows that a tribe cannot claim the right to protect fish or fish habitat outside the reservation absent an express act of Congress providing otherwise.[10]

In short, as a matter of law, the Tribe has no property right in fish once they leave waterways owned by the Tribe; the Tribe has no right to prevent the taking of fish once they leave waters owned by the Tribe; and the Tribe has reserved no property rights in fish habitat outside Reservation boundaries. Because fish outside the Reservation are outside the ownership and control of the Tribe, no purposes exist for which instream *Winters* rights may be implied—the situation is no different than that which exists when lands suitable for irrigation are conveyed to a non-Indian: once "land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984). Outside the Reservation, neither the land, the

[10] *See Adair*, 723 F.2d at 1412 (holding that instream flows implied from setting aside of lands for primary purpose of fishing survived termination of tribal ownership because congressional act, in addition to preserving right to hunt and fish on former reservation lands, provided that termination would not "abrogate any water rights of the tribe and its members").

waterways, nor the fish are in tribal possession—absent possession of at least one of the three, no reserved water rights for fish habitat can be implied.

4. Even if legal precedent existed for recognition of off-reservation water rights, such rights could not be implied in light of the Tribe's express cession of all right, title, interest and claim to lands outside the current Reservation. In 1886, Congress authorized negotiations with the Tribe "for the cession of their lands outside the limits of the present [i.e., 1873] Coeur d'Alene reservation." Act of May 15, 1886, 24 Stat. 29, 44. In the agreement reached on March 26, 1887, the Tribe, in return for a set payment of $150,000 and other consideration, agreed to "cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation . . . ." Act of March 3, 1891, 26 Stat. 989, 1027.

When the 1887 Agreement was presented to Congress for ratification, Congress declined to do so, and instead directed the formation of a new commission to negotiate "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Act of March 2, 1889, 25 Stat. 980, 1002. The new commission sent to negotiate with the Tribe was specifically directed to a Senate resolution calling for the release of navigable waters from the Reservation. State Ex. 7 at 483. *See also United States v. Idaho*, 210 F.3d at 1078 ("Congress . . . authoriz[ed] negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell").

In negotiations occurring in 1889, the Tribe agreed to "cede, grant, relinquish, and quitclaim to the United States all the right, title, and claim which they now have, or ever had," to "the northern portion of the [1873] reservation, including approximately two-thirds of Lake

Coeur d'Alene, in exchange for $500,000." *Idaho v. United States*, 533 U.S. at 269-70. The 1887 and 1889 Agreements were ratified together in the Act of March 3, 1891, 26 Stat. 1027.

It is well-established that a tribe's cession of all right, title and interest to "lands," especially when coupled with monetary payment, includes not only bare title to the land, but all incidents of title as well. In *Oregon Dep't of Fish & Wildlife*, the Court concluded that a tribe's "general conveyance" of all "right, title and claim" to lands in a described area "unquestionably carried with it whatever special hunting and fishing right the Indians previously possessed." 473 U.S. at 766. In *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), the Ninth Circuit concluded that an "unqualified transfer of title includes a transfer of hunting and fishing rights." *See also United States v. Washington*, 18 F. Supp. 3d 1172, 1201 (W.D. Wash. 1991) ("[t]he extinguishment of aboriginal title extinguishes all incidents of aboriginal title . . . unless expressly reserved by treaty or federal law"); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 462 (7th Cir. 1998) ("the creation and acceptance of an Indian reservation by treaty constitutes a relinquishment of aboriginal rights to lands outside the reservation . . . including aboriginal rights in land or water not specifically mentioned in any treaty . . . .").

In short, case law establishes overwhelmingly that a cession of "land" includes all incidental property rights and all right to use natural resources in the ceded area, unless the cession agreement, or a related treaty, agreement, or statute, segregated such rights from land ownership and reserved them explicitly. *See. e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-02 (1999) (Tribe's cession of "all right, title and interest . . . to any other lands in the Territory of Minnesota or elsewhere" did not cede hunting rights reserved in an earlier treaty because "the Chippewa's usufructuary rights," having been explicitly reserved on earlier-ceded lands, "existed independently of land ownership" and would not have been

understood to be included in a cession of "land"); *Adair*, 723 F.2d at 1412 (congressional termination of Tribe's title to lands within former reservation did not extinguish fishing rights and water rights implied to protect fish habitat given statutory language providing that termination would not "abrogate any water rights of the tribe").

Here, nothing in the ratified agreements with the Tribe explicitly segregated and reserved fish habitat and associated water rights in the territories ceded by the Tribe. As was true for the 1873 unratified cession agreement discussed *supra*, the Tribe agreed in the 1887 Agreement to cede "all lands in said Territories and elsewhere except the portion of land within the boundaries of their present reservation." 26 Stat. at 1027. Tribal negotiators consistently referred to the Reservation as consisting of "lands."[11] If the parties understood the reservation of "land" to include water rights, then the cession of land in the same document must likewise include water rights. Indeed, the Supreme Court reached this exact conclusion in *Idaho v. United States*, which found that the Tribe's 1889 cession of all right, title and interest to a specified portion of its reservation "include[ed] approximately two-thirds of Lake Coeur d'Alene." 533 U.S. at 269-70. Clearly, the Court understood the Tribe's cession to include not only land, but waters. This fact is reflected in the United States' claims, which do not claim water rights for the ceded portion of the Lake. R. 6278 (Notice of Claim No. 95-16704). If, as is admitted by the United States, it cannot claim water on the ceded portion of the Lake, then its claims for water rights on other ceded waterways must likewise be disallowed.

[11] R. 2115 ("Saltice. . . . I, as an Indian, like my land; am very anxious to have land; I do not care about money. You three gentlemen came today to have an understanding about part of our land. My heart has been troubled, for three or four days, but now it is all right, because I know this land is my property."); R. 2116 ("Saltise. You say we have a great deal of land. If we wanted to let it go for money we would say, take more, but we do not care for money; it is land we want. When the other treaty [the 1887 Agreement] is ratified we will have land to sell").

5. Even if the Court were to conclude that the Tribe did not intend its cession of lands in the 1887 and 1889 to include water rights, it must still uphold the disallowal of all claims on ceded lands, because regardless of tribal intent, Congress, in ratifying the 1887 and 1889 agreements, took the additional and conclusive step of directing that "all lands so sold and released to the United States . . . shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law." 26 Stat. at 1031. Congress' restoration of the lands to the public domain is dispositive: once the ceded lands were returned to the public domain, they became subject to a series of congressional acts requiring that waters on public domain lands be available for private appropriation without restriction. While such statutes do not apply to water rights whose place of use is within an Indian reservation, they do apply where, as here, the place of use is outside the reservation, unless Congress took action to reserve water rights for the Tribe on public domain lands in language equally explicit to the language reserving such waters for private appropriations. It did not.

The first of these acts, the Mining Act of 1866, opened public domain lands to exploration and development by miners. Act of July 26, 1866, 14 Stat. 253. Recognizing that local laws and customs had arisen to allocate the use of waters for mining, Congress declared that uses developed under local laws were to be maintained and protected:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

Act of July 26, 1866, 14 Stat. 253 (codified at 43 U.S.C. § 661).

Four years later Congress amended the Mining Act of 1866 to include placer mines, and reaffirmed that water rights obtained under applicable state or local laws were not to be affected by grant of federal patents:

> [A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or right to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by [the 1866 Act].

Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661).

In 1877, Congress passed a third statute, the Desert Lands Act, to permit persons in most western states to enter and claim irrigable lands "by conducting water upon the same" in an amount not to "exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation." Act of March 3, 1877, 19 Stat. 377 (codified at 43 U.S.C. § 321). Congress went on to provide that:

> [A]ll surplus water over and above such actual appropriation and use, together with the water from all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. The Supreme Court has held that the three acts recognized and affirmed not only those water rights vested at the times of the acts' passage, but also all future water rights appropriated under state law:

> [The Acts of 1866 and 1870 were] not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935). The Court went on to conclude that the Desert Lands Act reserved all waters on the public domain for private appropriation:

> Congress intended . . . that all nonnavigable waters [on the public domain] should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction.

Id. at 162.

Thus, when Congress, in the 1891 Act, returned all lands ceded by the Coeur d'Alene Tribe to the public domain, those lands became subject to the directive in the 1877 Desert Lands Act that all sources of waters in the ceded territory were to be "held free for the appropriation and use of the public." 43 U.S.C. § 321. The Tribe's suggestion that the Tribe believed it had reserved off-reservation water rights (despite its explicit cession of all "right, title and claim") is not sufficient to overcome the explicit language of the 1891 Act: rights are not reserved to a tribe "merely because they thought so." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947). Signatory Indians are "bound by the plain import of the language of the act and the agreement," even if they later assert "that they did not so understand the act." *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 507-08 (1913). Put another way, a tribe's "understanding [cannot] be imputed to Congress in the face of plain language" establishing congressional intent. *Confederated Bands of Ute Indians*, 330 U.S. at 179.

F. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE PRIORITY DATE OF RESERVED WATER RIGHTS APPURTENANT TO RESERVATION LANDS ALIENATED BY THE UNITED STATES, THEN LATER REACQUIRED AND RESTORED TO TRUST STATUS, SHOULD BE THE DATE OF REACQUISITION OR THE DATE WATER RIGHTS WERE ESTABLISHED UNDER STATE LAW.

1. Purposes Implied by the Setting Aside of Lands for a Tribe's Exclusive Use Cease to Apply When Reservation Lands are Conveyed to Non-Indians.

The United States claims a priority date of November 8, 1873, for its irrigation and DCMI claims, and a priority date of "time immemorial" for its non-consumptive claims

(instream flows, springs, seeps, wetlands, and lake level maintenance). The claimed priority dates ignore the fact that many of the claimed water rights are for places of use that have not been in continuous federal ownership since the creation of the Reservation. The Government, in 1906, allotted to each tribal member 160 acres of land to be held for the sole use and benefit of the individual tribal member. Act of June 21, 1906, 34 Stat. 325, 335. The remaining lands, which formed the majority of the Reservation, were opened to non-Indian homesteading. 34 Stat. at 326. In the following decades, another 40,000 acres were conveyed to non-Indians as allottees sold their allotments or lost them due to mortgage foreclosures. R. 2244-50. By the early part of the 20th Century, non-Indian lands within the Reservation, "*far* exceeded Indian holdings." U.S. Brief at 7 (emphasis in original)

As time went on, a small portion of the lands within the Reservation were reacquired by the Tribe—once those lands are taken into trust by the United States they are once again "reserved" for the Tribe's exclusive use. Reacquired property consists of either: (1) allotments that were sold to non-Indians, or (2) former homesteads. [12]

If a non-Indian purchases a former allotment, he or she may acquire the allottee's share of the Tribe's reserved irrigation water right, if such water is put to use "with reasonable diligence after the passage of title." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). Such rights are typically referred to as "*Walton* rights." [13] *Walton* rights have a date of

[12] In 1958, 12,877.65 acres of land that were made available for sale, but never sold, were "restored to tribal ownership." Act of May 19, 1958, 72 Stat. 121. Those lands never left federal ownership and thus retain their original date-of-reservation priority date. *Anderson*, 736 F.2d at 1361.

[13] "*Walton*" rights are measured by the amount of water the allottee was using, along with water to irrigate any additional acreage the non-Indian purchaser established with reasonable diligence after acquisition. 647 F.2d at 51.

reservation priority date, which applies upon re-acquisition by the Tribe. *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984).

Different rules apply to homesteaded lands. Once reservation land is "conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *Anderson*, 736 F.2d at 1363. Thus, the homesteader does not acquire a share of the Tribe's reserved water rights; any water rights for homesteaded land must be acquired, and retained, under state law. *Id*. Upon reacquisition by the Tribe, the priority date is the date a water right (if any) was perfected under state law, unless lost to non-use:

> It is a basic tenent [sic] of western water law that water rights perfected through appropriation and not subsequently lost to nonuse or abandonment will generally pass with transfer of title to real property and will carry a priority date as of their original application to beneficial use. We see no reason to depart from this rule as to the perfected water rights of homesteaders on reacquisition of the property by the Tribe. As to lands in this category, state law determines the priority date.
>
> Where the homesteader has no perfected water rights or has lost rights which were perfected, there are no rights to be regained by the Indians on reacquisition of the property.

Anderson, 736 F.2d at 1363.

The principle underlying the Ninth Circuit's holding regarding consumptive water rights on reacquired lands is that the Tribe acquires only those water rights that the non-Indian seller is able to convey. If additional water rights are necessary to achieve the purposes for which the land was reacquired, the reacquired lands is treated "in a manner analogous to that of a newly created federal reservation and . . . the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe." *Id*.

The district court correctly applied these principles in holding that a non-Indian seller could not convey non-consumptive water rights to the Tribe because:

> [N]on-Indian successors cannot hold, appropriate or exercise non-diversionary or instream rights, except for stockwater. As a result, to the extent such rights are non-diversionary or are for instream purposes, such rights would be lost through non-use. Springs and wetlands as well as other rights lost to non-use would carry a date of reacquisition priority date.

R. 4474.

The Claimants seek to avoid *Anderson's* holding that the tribe only acquires those water rights held by the non-Indian seller by crafting an entirely new, and henceforth unrecognized, category of reserved water rights, namely water rights that "have remained dormant during the period of non-tribal ownership." U.S. Brief at 40. Because the water rights are asserted to be dormant, rather than extinguished, the United States asserts that "once back in tribal hands" non-consumptive water rights "maintain their original priority date." *Id*.

The Claimants' theory of "dormant" reserved rights is not grounded in *Anderson*, which held that the only water rights "regained" upon reacquisition are those held by the non-Indian seller. 736 F.2d at 1363. Nor does the United States' theory of water rights that remain dormant, rather than lost, upon sale of land to non-Indians, have any basis in general Indian law principles. Courts typically describe rights incidental to ownership of tribal property as being "lost," "excluded," or "eliminated" upon conveyance of reservation lands in fee to non-Indians. *See e.g*., *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (surveying earlier cases, and finding that Crow Tribe, as confirmed in *Montana*, 450 U.S. at 559, had "*lost* the right of absolute use and occupation of lands so conveyed [and] the incidental power to regulate the use of the lands by non-Indians") (emphasis added); *Blake v. Arnett*, 663 F.2d 906, 910 (9th Cir. 1981) (plaintiff tribe's fishing rights could not be exercised on non-Indian lands because the United States, in giving non-Indians fee title, "*excluded* the interests asserted by the plaintiffs") (emphasis added); *Anderson*, 736 F.2d at 1363 (where the land has been removed from the Tribe's possession and

conveyed to a homesteader, the purposes for which *Winters* rights were implied are *eliminated*") (emphasis added).

Moreover, the assertion that non-consumptive water rights should spring back into being with their original, "time immemorial" priority date misrepresents the nature and origin of the "time immemorial" principle. In *Adair*, the court concluded that a hunting and fishing water right had a "time immemorial" priority date because "*uninterrupted use and occupation* of land and water created in the Tribe aboriginal or 'Indian title' to all of its vast holdings." 723 F.2d at 1413 (emphasis added). The court concluded that an "important purpose of the [1864 Klamath] treaty was to *guarantee continuity* of the Indians' hunting and gathering lifestyle." *Id*. at 1409 (emphasis added). Thus, the 1864 Treaty was a "recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a *continued water right* to support its hunting and fishing lifestyle on the Klamath Reservation." *Id*. at 1414 (emphasis added). In short, the time immemorial water right was based on continuous and uninterrupted use that predated the reservation and was confirmed by, rather than created by, the federal action reserving the lands. *Id*. (time immemorial water rights "were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights").

But when a tribe reacquires lands, its use of the land and the water, whether consumptive or non-consumptive, is no longer continuous due to the intervening non-Indian ownership. Upon reacquisition, any water rights necessary for use of the reacquired property, unless regained from the non-Indian seller, must be treated as "new" rights, because such rights would not exist absent reacquisition. As explained in *Anderson*, "[t]his principle protects the intervening rights, if any, that may have been acquired in good faith by third party water users . . . prior to reacquisition by the Tribe." 736 F.2d at 1363. Such concern for vested water rights applies whether the claim is for consumptive or non-consumptive uses. In both cases, the district court properly applied

Anderson's admonishment to "treat these lands in a manner analogous to that of a newly created federal reservation and find that the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe." *Id.*

In addition to their theory of "dormant" reserved rights, the Claimants attempt to circumvent the *Anderson* holdings by asserting that non-consumptive reserved water rights are not affected by, and can be claimed on, allotments and homesteads sold to non-Indians. Tribe's Brief at 53; U.S. Brief at 41 This assertion cannot be reconciled with the claims themselves, which limit claims for non-consumptive water rights for springs, seeps, and wetlands to "Tribal lands within the Reservation." R. 0011. This limitation in the claims demonstrates the United States' own determination that non-consumptive water rights cannot be claimed when the place of use is on non-Indian lands.

Ignoring the conflict with their own claims, the United States and the Tribe rely on a statement in the *Walton* litigation addressing a reserved water right to support natural spawning of fish in No Name Creek on the Colville Reservation. U.S. Brief at 41; Tribe's Brief at 53. *Walton* did not establish a minimum stream flow over and across both tribal and non-tribal property; rather, the court awarded the Tribe a water right of 350 acre feet per year to support fish spawning on tribal property. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985); *see also Walton*, 647 F.2d at 45 ("[t]he Indians cultivated No Name Creek's lower reach to establish spawning grounds"). Under such circumstances, the court held that the "*quantity* of water" awarded to the Tribe to support fish spawning on tribal lands was "not affected by the allotment of reservation lands and passage of title out of the Indians' hands." 752 F.2d at 400 (emphasis added). The court therefore rejected the district court's reduction of the fish spawning water right to 187.2 acre feet per year, a figure the district court arrived at by subtracting irrigation water rights for tribal and non-tribal lands from the 1,000 acre feet per year

estimated to be available in the No Name water system. *Id*. at 404. Instead, the Ninth Circuit ordered that the court award "120 acre feet per year to Walton; 666.4 to the Indian allottees; and 350 to the Tribe's fishery." *Id*. at 405. Since this exceeded the 1,000 acre feet of water available, and "all parties have a priority date as of the creation of the Reservation, each should bear a proportionate share of any adjustment required by shortages of water." *Id*.

In short, *Walton's* statement that the *quantity* of a non-consumptive water right awarded to the Tribe for use on its lands was not affected by the passage of several allotments to a non-Indian does not recognize a tribal right to retain and hold non-consumptive water rights on non-Indian lands. Thus, *Walton* provides no support for Claimant's assertion that non-consumptive water rights on reacquired lands retain their original priority date upon reacquisition of title.

2. The *Big Horn* Approach to Water Rights on Reacquired Lands is Consistent with *Anderson*.

The Claimants suggest that the district court erred in relying on the *Anderson* decision regarding priority dates on reacquired lands, citing the holding in the *Big Horn Adjudication*. Tribe Brief at 50, U.S. Brief at 40 n.17. The *Big Horn* court only addressed water rights on reacquired lands originally held by "an Indian allottee," 753 P.2d at 114, and had no occasion to apply, or even discuss, *Anderson's* holding that once reservation lands are homesteaded, the "purposes for which *Winters* rights were implied are eliminated." *Anderson*, 736 F.2d at 1363. Thus, *Big Horn* leaves intact *Anderson's* holding that on reacquired homestead lands, the priority date is the date of reacquisition, unless the non-Indian predecessor had perfected a water right under state law, in which case the tribe acquires the state law priority date. *Id*. Indeed, the *Big Horn* court cited with approval the *Anderson* district court holding that "[i]mplied water rights on Indian reservations . . . are extinguished by acts of Congress inconsistent with recognition of

their existence." 753 P.2d at 133 (quoting *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982).

Moreover, in addressing the priority date for reacquired allotments, the *Big Horn* court did not distinguish *Anderson*, but simply assumed that the non-Indian purchasers had acquired a date-of-reservation priority water right from the Indian allottee. *See* 753 P.2d at 114 (holding that reacquired lands have a date of reservation priority date because "[w]e have already held that a non-Indian purchaser from an Indian allottee obtains a reserved water right with a treaty priority date, and that his non-Indian successor would likewise succeed to the treaty priority date" and there is "no reason then to deny the same priority to an Indian or tribal purchaser"); *cf. Anderson*, 736 F.2d at 1362 (upon reacquisition of allotment, Tribe acquires allottee's original, date-of-reservation priority date, unless lost through nonuse by subsequent owners). Thus, the *Big Horn* court did not craft a rule different than that applied by the Ninth Circuit; indeed, it explicitly applied the holding in *Walton*, *id*. at 112-13, and simply left unaddressed reacquisitions of land where non-Indian purchasers failed to acquire and hold water rights from allottees. *See Walton*, 647 F.2d. at 51 (once acquired by a non-Indian, allotment water right is subject to state laws providing for forfeiture of water rights for non-use).

III.
CONCLUSION

The State requests that the Court uphold the disallowal of claims as provided in the *Order on Motions for Summary Judgmen*t (R. 4310), *Final Order Disallowing Purposes of Use* (R. 4301) and *Final Order Disallowing Water Right Claims* (R. 4305), as modified in the *Amended Final Order Disallowing Water Right Claims* (R. 4468), *Order on Motion to Set Aside and Modify* (R. 4479), and *Order Granting Motion to Reconsider* (R. 4473).

RESPECTFULLY SUBMITTED this 13th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2018, I caused to be filed with the Supreme Court by hand-delivery and email the foregoing documents, and caused copies of the same to be served by U.S. Mail and email to the persons listed on the cover page(s).

STEVEN W. STRACK
Deputy Attorney General