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IDSC USA Response to NIWRGs Appeal

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No. 45384-2017

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: CSRBA, CASE NO. 49576, SUBCASE No. 91-7755

NORTH IDAHO WATER RIGHTS ALLIANCE, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

BRIEF OF RESPONDENT UNITED STATES OF AMERICA

Appeal from the CDA-Spokane River Basin Adjudication,
District Court of the Fifth Judicial District for the County of Twin Falls,
Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from consolidated subcases within the broader Coeur d'Alene-Spokane River basin general stream adjudication. The United States, as trustee for the Coeur d'Alene Tribe ("Tribe"), filed 353 claims to federal reserved water rights to fulfill the purposes of the Coeur d'Alene Reservation. The State of Idaho, several municipalities, companies, groups, and various private individuals objected.[1] The District Court of the Fifth Judicial District ("Water Court") consolidated the claims related to the Reservation (consolidated subcase No. 91-7755) and bifurcated the proceedings. In a May 3, 2017 decision, the Water Court addressed the nature of water rights held in trust for the Tribe. The court left the quantification of rights for a later phase of litigation.

The United States claimed water rights for the Tribe in two general categories: (1) rights to divert water for consumptive use in irrigation, domestic, commercial, and industrial applications; and (2) rights to maintain instream flows, lake levels, seeps, springs, and wetlands for the continuation of traditional tribal practices like hunting, fishing, plant gathering, recreation, and cultural activities. Both categories of water rights are essential to fulfilling the purpose of the Coeur d'Alene Reservation—to serve as a permanent homeland for members of the Coeur d'Alene Tribe.

These categories of claims individually accomplish necessary parts of the Reservation's general homeland purpose. Consumptive claims address the water necessary for lands owned by

[1] A consortium of those private objectors have organized themselves into the North Idaho Water Rights Group which includes the North Idaho Water Rights Alliance, members of the North West Property Owners Alliance, members of the Coeur d'Alene Lakeshore Property Owners Association, Rathdrum Power, LLC, and Hagadone Hospitality Co. The United States refers to this appellant group as "NIWRG" herein.

the United States in trust for the Tribe or for an allottee or owned in fee by the Tribe or tribal members, and such claims amount to less than one percent of the total outflow of the Coeur d'Alene-Spokane River Basin. Domestic usage claims address the water necessary for the population of the Reservation. Agricultural claims address the water necessary to achieve the well-established practicably-irrigable acreage standard. Claims for the maintenance of instream flows address water for the Tribe's fishery through maintaining biological requirements of certain fish species that migrate upstream from Lake Coeur d'Alene to spawn. Finally, the claim for the maintenance of the level of Lake Coeur d'Alene is measured by the Lake surface's natural average elevation at different months of the year.

In its May 3, 2017, decision, the Water Court held that the Coeur d'Alene Tribe is entitled to a water right for certain "primary purposes" of its Reservation, which was established via executive order in 1873 after the Tribe and the United States reached an agreement under which the Tribe would retain a key portion of its aboriginal territory.[2] While the Water Court rejected arguments of the United States and Tribe about the right to use water for certain other purposes—which are the subject of the United States' related appeal, *see* United States' Br. as Appellant at 10–26 in No. 45382—the court correctly determined that the Tribe holds a right to use water for hunting, fishing, domestic, and agricultural activities. Thus, while the Water Court opined that maintenance of the level of Lake Coeur d'Alene was not itself a purpose of the Reservation, it allowed the Lake level claim to proceed to the quantification phase of litigation to

[2] The Water Court's decision is now the subject of four appeals pending in this Court. In addition to the instant appeal, see No. 45381 (appeal by the State of Idaho); No. 45382 (appeal by the United States); No. 45383 (appeal by Coeur d'Alene Tribe). These appeals have a consolidated record on appeal, *see* R.1–2, but briefing of the appeals is proceeding separately. Citations to the Clerk's Record on Appeal prepared jointly for the related appeal are designated as "R.#."

the extent it is tied to the hunting and fishing purposes of the Reservation. And the Water Court, having found that domestic use was a purpose of the Reservation supporting an implied water right, permitted the United States' claims for diversion of groundwater for that purpose to proceed to the next phase of the adjudication.

NIWRG appeals the Water Court's decision, arguing that hunting and fishing were not a purpose of the Coeur d'Alene Reservation; that water is not necessary for hunting, fishing, and agriculture on the Reservation; that the Water Court should have rejected all claims for domestic water rights sourced from groundwater; and that the Water Court should have dismissed the claim for maintenance of the level of Lake Coeur d'Alene because it is unquantifiable.[3] NIWRG thus challenges *all* of the water rights claims for the Coeur d'Alene Tribe that the Water Court recognized, thereby asserting that the Tribe should have a permanent home with no right to water for hunting, fishing, agriculture, or even domestic uses. This Court should reject NIWRG's position.

B. Statement of Facts

The Coeur d'Alene Tribe's aboriginal territory included Lake Coeur d'Alene, the St. Joe River, and surrounding areas, within a vastly larger area of more than 3.5 million acres in what is now northern Idaho and northeastern Washington. *See Idaho v. United States,* 533 U.S. 262, 265 (2001) ("*Idaho II*") (detailing the history of the Tribe and establishment of its Reservation as background to determining that the United States holds submerged lands within the Reservation in trust for the benefit of the Tribe). The U.S. Supreme Court recognized that "Tribal members

[3] The State of Idaho has separately appealed, *see* No. 45381, and argues that the present Coeur d'Alene Reservation was created in 1891, that the Tribe holds no water right for subsistence activities because those activities had by that time been abandoned, and that the Water Court erred by approving instream flow claims within the Reservation where the Tribe does not currently own land underlying or abutting the relevant stream.

traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." *Id.* (citations and footnote omitted).

The United States acquired title to this area under an 1846 treaty with Great Britain. *Id.* As conflicts grew due to increasing settlement by non-Indians into the Tribe's territory, President Johnson in 1867 issued an executive order setting aside "a reservation of comparatively modest size." *Id.* Once the Coeur d'Alene became aware of this Order, the Tribe rejected it: "The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways." *Id.* at 266. Accordingly, when the Tribe petitioned the Commissioner of Indian Affairs for an adequate reservation, "it insisted on a reservation that included key river valleys because 'we are not as yet quite up to living on farming' " *Id.* This position aligned with what the United States government also believed: A 1873 Report of the Commissioner of Indian Affairs characterized the Tribe as still practicing "a roving way of life." R.3046 (Wee Report).

After further negotiations, the Tribe agreed in 1873 to relinquish all claims to its aboriginal lands outside the bounds of a larger reservation; in exchange, the United States would "set apart and secure" lands "for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons." *Idaho II*, 533 U.S. at 266. (quoting 1873 agreement). The reservation boundaries described in the agreement included part of the St. Joe River and nearly all of Lake Coeur d'Alene. *Id.*; *see also* R.1865–67; R.4201–03 (full text of the 1873 Agreement). The 1873 agreement was by its terms not binding without congressional approval, but later that year "President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for

the Coeur d'Alene Indians.'"*Idaho II*, 533 U.S. at 266 (quoting Exec. Order of Nov. 8, 1873, *reprinted in* 1 C. Kapler, *Indian Affairs: Laws and Treaties* 837 (1904)); *see also* R.1868.

As pressure from the new white settlers intensified and valuable minerals were discovered in this part of Idaho, Congress sought to make more land available to settlers and prospectors by altering the boundaries of the Coeur d'Alene Reservation. After further negotiations, the United States and Tribe in 1889 negotiated a new agreement under which the Tribe would cede the northern portion of its reservation in exchange for $500,000. *Idaho II*, 533 U.S. at 269–70; R.1882–84. Congress ratified this 1889 agreement in 1891, along with an 1887 agreement that had reaffirmed the establishment of the 1873 Reservation. *Idaho II*, 533 U.S. at 270.

The boundaries of the Coeur d'Alene Reservation have remained largely constant since that time, but control of Reservation lands has evolved, most substantially as a result of the 1906 Indian Appropriations Act, ch. 3504, 34 Stat. 325, 335–36 (1906), which authorized allotment of the Reservation. Under that law, and over vigorous and near-universal objection by the Tribe, *see* R.1750–51, each Indian on the Coeur d'Alene Reservation received an allotment of 160 acres, and the surplus lands—i.e., those lands not allotted or reserved for common tribal purposes—were open to settlement by non-Indians. 34 Stat. at 335–37. Application of this law soon caused non-Indian holdings of Reservation lands to exceed Indian holdings, due both to non-Indian homesteading and to the loss of Indian allotments resulting from sale, forfeiture, or loss in mortgage sale. *See* R.2244–50. The United States subsequently reversed course on that Indian allotment policy, through enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. As for the Coeur d'Alene Tribe, that significant policy change resulted in the eventual transfer back to the Tribe of remaining surplus lands (i.e., lands that had not yet been homesteaded following the 1906 allotment Act). R.3101, 3105; R.799–802. Over the last few

decades, the Tribe has endeavored to reacquire lands alienated from tribal control during allotment. *See* R.3108–10.

C. Course of Proceedings

In 2006, the Idaho Legislature approved initiation of the Northern Idaho Adjudication, a general stream adjudication for the judicial determination of surface and ground water rights in the Coeur d'Alene-Spokane River basin. Idaho Code § 42-1406B. The United States is a party to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666. The first basin to be adjudicated by the Water Court is the Coeur d'Alene-Spokane River drainage, which includes the Coeur d'Alene Indian Reservation. In 2008, the Water Court issued a *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* setting forth a process for filing water right claims. In 2014, the United States filed 353 claims to federal reserved water rights for the Tribe to fulfill the purpose of the Reservation. *See* R.8 (United States' Cover Letter for Tribal Claims). The Tribe entered an appearance on its own behalf and joined in the claims. *See* R.4. In 2015, the court issued an order consolidating all federal claims for water on the Reservation into one subcase and bifurcating litigation of that subcase into issues of entitlement and quantification. R.461–62. The Water Court has thus far considered—and this appeal involves—only issues of entitlement and of the priority date to be assigned to different categories of water claims.

The water rights claimed by the United States for the Tribe fall into several categories, all of which are intended to accomplish the Reservation's purpose as a permanent homeland for the Coeur d'Alene Tribe. The United States claimed non-consumptive water rights to support the Tribe's hunting, fishing, gathering, cultural practices, transportation, recreation, and related uses. These claims are for the maintenance of certain flows or levels in Lake Coeur d'Alene and its associated waterways and for seeps, springs, and wetlands on Reservation lands. These in-situ

water rights allow for the Tribe's continued traditional activities on Reservation waters, which require protecting the upstream habitat upon which the Tribe's fishery depends. The claimed consumptive water rights would entitle the Tribe to divert water for domestic, agricultural, municipal, commercial, and industrial uses, which serve the Reservation's homeland purpose by supporting basic domestic needs and by aiding in the Tribe's continued economic development and self-sufficiency.

Because a tribe's water rights vest no later than a reservation's creation, the historical context of the Coeur d'Alene Reservation's creation is critical to understanding the nature and extent of these implied rights. The United States and Tribe retained historians who prepared reports on the history of the Coeur d'Alene Tribe, particularly with respect to the circumstances surrounding the creation of the Reservation. *See* R.2627–28 (United States and Coeur d'Alene Tribe's Joint Statement of Facts, summarizing expert reports submitted in this case). These expert reports thoroughly document the Tribe's historical reliance on waterways for fishing, hunting, gathering, trade, culture, and general survival from time immemorial through (and beyond) Reservation creation; the Tribe's initiation of agriculture on the Reservation; the negotiations between the Tribe and various federal representatives and entities leading to the 1873 Agreement, including the Tribe's firm demand for a reservation with waterways; and the negotiations that continued after Reservation establishment. *See generally* R.2632–72. Historical experts also documented tribal resistance to federal allotment policy and the Tribe's continued commitment to fighting for its water resources. R.2671–76. An expert explained the biological attributes of the fish species that are the focus of the claims for instream flows to protect fish habitat, as well as why maintenance of fish habitat both within and outside the Reservation's boundaries is critical to effectuating the fishing purpose of the Reservation. R.2676–78.

On motions for summary judgment, the United States argued that the Coeur d'Alene Reservation was established in 1873 to create and maintain a permanent homeland for the Coeur d'Alene Tribe. The United States relied heavily on the U.S. Supreme Court's decision in *Idaho II*, which explained the history of the Coeur d'Alene people and the establishment of the Reservation in holding that the submerged lands beneath navigable waters in the Reservation had been reserved for the Tribe in the establishment of the Reservation. The United States urged that the Water Court's inquiry should center—as did the Supreme Court's in *Idaho II*—on the purposes underlying the establishment of the Reservation via executive order in 1873 and the Tribe's uses of the Reservation lands and waters at that time. The United States demonstrated that the very creation of the Reservation acknowledged the centrality of the Reservation waterways to the Tribe for its hunting and fishing activities and urged the Water Court to defer consideration of arguments regarding the amount of water reserved for various uses to the later quantification phase of the adjudication.

The Water Court (Judge Eric J. Wildman) issued its ruling on entitlement on May 3, 2017. R.4310–33. The court rejected the United States' contention that the establishment of the Reservation also impliedly reserved all water rights necessary to provide a homeland for the Tribe. R.4318–20. But the court held that the Tribe holds reserved water rights to facilitate certain specific uses of the Reservation, namely, agriculture, domestic use, hunting, and fishing. R.4320–23. Those hunting and fishing-related water rights included maintenance of instream flows within the Reservation, maintenance of a particular level of Lake Coeur d'Alene, and maintenance of springs, seeps, and wetlands on Indian lands within the Reservation. *See* R.4302.

In this appeal, NIWRG argues that the Water Court was wrong to recognize reserved water rights for hunting, fishing, agriculture, and domestic uses on the Coeur d'Alene Reservation. As demonstrated below the Water Court's determinations as to each use should be

affirmed. In determining the United States' entitlement to reserved water rights for the Tribe, the Water Court properly held that purposes of the Reservation's establishment in 1873 included facilitating the Tribe's continued hunting and fishing activities, developing agriculture on the Reservation, and meeting the Tribe's domestic needs. The court correctly allowed claims for rights in waters within the Reservation that address these uses to proceed to the quantification phase of this water rights adjudication.

ISSUES PRESENTED

The issues presented in this appeal by NIWRG are:

1. Whether the Water Court properly determined that the Coeur d'Alene Tribe is the beneficiary of a reserved water right to support hunting and fishing on the Reservation.

2. Whether the Water Court should have undertaken a "test of necessity" and rejected claims for hunting, fishing, and agricultural water rights as unnecessary to support those Reservation uses.

3. Whether the Water Court should have dismissed all groundwater claims.

4. Whether the claim for maintenance of Lake Coeur d'Alene must be rejected because it is unquantifiable.

STANDARD OF REVIEW

In an appeal from an order granting summary judgment, this Court "employs the same standard of review as the district court." *Pocatello v. State*, 180 P.3d 1048, 1051 (Idaho 2008). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Id.* (quoting Idaho R. Civ. P. 56(c)). This Court exercises "free review" over issues of law. *Id.*

ARGUMENT

I. The Water Court correctly determined that the Coeur d'Alene Reservation was established in part to allow continuation of the Tribe's hunting and fishing activities.

The Coeur d'Alene Reservation was established by executive order in 1873 as a permanent homeland for the Coeur d'Alene Tribe. The 1873 executive order created a reservation equally valid as a reservation that might have been created by an Act of Congress. *See, e.g.*, *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty *or executive order*, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." (emphasis added)); *Arizona v. California*, 373 U.S. 546, 598 (1963) ("*Arizona I*"). With the establishment of this Reservation of land, water was also impliedly reserved to make the Reservation livable as a permanent homeland. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona I*, 373 U.S. at 599 (*Winters* doctrine of implied water rights applies to reservations established by executive order).[4] Based on this history of the Coeur d'Alene Tribe and the negotiations leading to the establishment of its Reservation, this reserved water right includes water to permit the Tribe's continued traditional activities—including hunting and fishing—alongside "modern" pursuits like agriculture.

The principles underlying federal reserved rights to water for tribes are well established. Because *Winters* rights are impliedly reserved by the creation of a tribe's reservation, they need not be made explicit at any time during negotiations between the Tribe and the United States, nor need they be expressly indicated in any document formalizing the reservation. *See Winters*, 207

[4] Although the adjudication of the federal water right claims is conducted in state court pursuant to the McCarran Amendment, 43 U.S.C. § 666, federal law governs the determination the federal reserved water rights claims by the United States. *See Arizona I*, 373 U.S. at 597–98.

U.S. at 576–77; *United States v. Adair*, 723 F.2d 1397, 1409 (9th Cir. 1983); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 75 (Ariz. 2001) ("*Gila V*"); *Mont. ex rel. Greely v. Confed. Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985) ("*Greely*"). Instead, these rights are determined through consideration of several important factors, including the history of the tribe and the reservation at issue, including the tribe's traditional practices and its need to maintain itself under changed circumstances; the language of the treaty, order, or agreement that created the Indian reservation; and the canon of interpretation requiring agreements between the federal government and Indians to be construed in a light favorable to the Indians. *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *see also Adair*, 723 F.2d at 1409, 1412; *Washington v. Wash. State Comm'l Fishing Vessel Ass'n*, 443 U.S. 658, 676, 680 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 206 (1999). Also important to recognize in determining a tribe's reserved water rights is that an agreement to confine a tribe to a reservation "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also Pocatello*, 180 P.3d at 1057; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353–54 (1941) (creation of Indian reservation protects any pre-existing possessory rights of the Indians in absence of clear contrary intent). A tribe's water right vests no later than the date its reservation was established and is quantified based on the tribe's present and future needs, securing the right to use water in the future, even if the water has not already been put to use. *Arizona I*, 373 U.S. at 600; *Adair*, 723 F.2d at 1414.

Applying these principles to the history of the Coeur d'Alene Tribe and the negotiations leading to the establishment of its Reservation in 1873 makes clear that hunting and fishing were two important traditional tribal activities and that the Tribe retained lands and waters to facilitate them in the establishment of the Reservation. Indeed, the United States may have promoted

agriculture in discussing the establishment of a reservation, but the government's larger and more immediate goal was securing the Tribe's agreement to cede vast quantities of its aboriginal lands and be confined on a reservation. And to accomplish this goal, the United States accepted the Tribe's demand that it retain waterways that were essential to the Tribe's traditional way of life. *See Idaho II*, 533 U.S. at 266; R.708 (2015 Smith Report); R.1571, 1577–78 (2015 Hart Report). *See generally* R.699–713 (2015 Smith Report, describing Tribal opposition to the 1867 boundaries, the negotiation of the 1873 Agreement, and the executive order establishing the Reservation). Accordingly, under *Winters* and its progeny, water was impliedly reserved to accomplish these traditional uses—along with agriculture and other then-modern uses of land—and these rights vested at the time of the Reservation's establishment.

An Act of Congress was not necessary for the establishment of the Coeur d'Alene Reservation. Once established, however, the Reservation and associated rights could be altered only by explicit action of Congress. Indeed, unlike *recognition* of a tribe's water rights, which occurs by implication upon establishment of a reservation, *abrogation* of tribal rights must be explicit and may not be accomplished through implication or silence. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). Although Congress later reduced the size of the Coeur d'Alene Reservation and allowed for fee ownership of lands within the Reservation (including by non-Indians), Congress never abrogated the Tribe's reserved right to use water for hunting and fishing. Accordingly, these reserved rights, which relate to the Tribe's aboriginal uses, *see Winans*, 198 U.S. at 381, vested when the Reservation was established in 1873, *see Arizona I*, 373 U.S. at 600, and continue to be held today.

The Water Court correctly recognized that "the Tribe's need to access the waterways to facilitate its traditional fishing and hunting practices" was at "the forefront of" the negotiations between the Tribe and the federal government for the establishment of a reservation. R.4321.

Crediting the United States' expert's findings and the Supreme Court's decision in *Idaho II*, 533 U.S. at 266, the court explained that the Tribe was moving toward incorporating agriculture into its way of life, but at the same time continued to rely on hunting and fishing for its survival. The court acknowledged that the United States fully understood that the Tribe intended to negotiate a reservation that included waterways for hunting and fishing, and that it was in the United States' interest to provide those waters to the Tribe to avoid "trouble" while extinguishing tribal claims to lands within much of the Tribe's aboriginal territory. R.4322. The court agreed with the United States that the "history and circumstances surrounding the 1873 agreement and resulting Executive Order thus establish that" the "very locale and construct of the reservation was tailored to serve" the purpose of facilitating "traditional fishing and hunting practices." R.4322. The court thus correctly recognized that the Coeur d'Alene Tribe holds a right to water for hunting and fishing with a time immemorial priority date. R.4322, 4326.

NIWRG argues that the Water Court erred when it concluded that the Coeur d'Alene Tribe's hunting and fishing were within the primary purposes of the establishment of the Coeur d'Alene Reservation. NIWRG Br. 7–11. This argument fails for several reasons. First, while NIWRG urges the Court to determine the Reservation's purposes based on several decades of events post-dating the Reservation's creation, the U.S. Supreme Court has already rejected that argument in *Idaho II* and has determined that the Reservation's purposes included hunting and fishing. Second, NIWRG is incorrect as a matter of fact that the Tribe had abandoned its traditional hunting and fishing by the time of Reservation establishment or soon thereafter. Third, the *Winters* reserved water rights doctrine does not support NIWRG's argument that the Water Court should have rejected all water rights to support hunting and fishing.

A. *Idaho II* confirmed that the Coeur d'Alene Reservation was established in 1873; reserved water rights for hunting and fishing vested at that time.

NIWRG urges this Court to rely on events occurring as long as three decades after the establishment of the Coeur d'Alene Reservation to determine the purposes for which water was impliedly reserved for the Reservation.[5] NIWRG Br. 8. In so arguing, NIWRG fails to acknowledge that the U.S. Supreme Court has considered and opined on the purposes of the 1873 creation of the Coeur d'Alene reservation and has foreclosed the argument that later actions—through and beyond Congress's 1891 Act altering the Reservation's boundaries—altered those purposes. The U.S. Supreme Court squarely rejected the theory that the State of Idaho presented to it and that NIWRG now presents to this Court.[6]

In *Idaho II*, the U.S. Supreme Court addressed ownership of title to submerged lands underlying navigable waters on the Coeur d'Alene Reservation. In deciding that the United States holds title to these lands in trust for the Coeur d'Alene Tribe, the Court reviewed the various agreements and acts that led to the establishment and reshaping of the Reservation in the late 19th Century. The Court recognized that the Reservation was established in 1873 by an executive order and that Congress understood the lands reserved to include submerged lands

[5]NIWRG improperly utilizes the term "diminished" when it asserts that these later actions led to changed purpose of a "diminished" or "diminishing reservation." NIWRG Br. 8. "Diminishment" is a legal term of art in Indian law, and refers to a situation where more than just an Indian reservation's boundaries change. Diminishment removes certain lands from Indian Country jurisdiction. *Solem v Bartlett*, 465 U.S. 463, 470 (1984). No court has ruled that the Coeur d'Alene Reservation has been "diminished," and at no point in this adjudication has NIWRG even argued that the Reservation has been "diminished." Instead, NIWRG misuses this term of art as simply an adjective to refer to the change of the Reservation's borders. For this reason, the United States respectfully urges the Court to not use the term "diminished," as the implications of that term are broader than NIWRG's casual usage suggests.

[6] This argument is similar to that made by the State in its related appeal and the United States' response herein is likewise similar to its response in that appeal. *See* United States' Br. as Respondent at 13–17 in No. 45381.

within the Reservation boundaries. 533 U.S. at 269. Nevertheless, Idaho argued that Congress had not demonstrated any intention to reject the default rule that title to land beneath navigable waters passes from the United States to a newly-admitted state. The State argued that whatever the original intent of the creation of the 1873 Reservation, congressional statutes authorizing further negotiations and ultimately ratifying agreements with the Tribe were focused on maintaining only the Tribe's agricultural pursuits and made no reference to reservation of submerged lands. Under that theory, Congress's silence regarding submerged lands had the effect of allowing them to pass to the State of Idaho upon its admission to the United States in 1890, rather than remain reserved for the Tribe. *See id.* at 279.

While the ultimate issue in *Idaho II*—quieting title to land—differs formally from the water rights issues presented here, both cases require determining the original purpose of the Reservation and the extent to which Congress altered the Reservation's scope through subsequent actions. The Supreme Court's answers to those questions control here. First, the Supreme Court noted that the State's concession that the executive branch had intended (or later interpreted) the 1873 executive order to reserve submerged lands for the Coeur d'Alene Tribe was "sound" given that a "right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing." *Idaho II*, 533 U.S. at 274. Indeed, the Supreme Court noted that the Tribe had rejected an earlier reservation because it had failed "to make adequate provision for fishing and other uses of important waterways," *id.* at 266, and the Tribe had made clear that it would be reliant on hunting and fishing "for a while yet," *id.* (internal quotation marks omitted). The Court explained that "submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation and granting Idaho statehood," so much so that the " 'Federal Government could only achieve its goals of

promoting settlement, avoiding hostilities and extinguishing aboriginal title' " by meeting the Tribe's " 'demand[]' " for " 'an enlarged reservation that included the Lake and rivers.' " *Id.* at 275 (quoting *United States v. Idaho*, 95 F. Supp. 2d 1094, 1107 (D. Idaho 1998)). A mere ancillary use of the Reservation waters—as NIWRG argues hunting and fishing were by the time the Reservation was created, Br. 8—could not override the "strong presumption" that submerged lands would instead pass to the State. *Id.* at 273 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997)). Indeed, the Supreme Court recognized that "the purpose of the reservation would have been compromised" if these submerged lands passed to the state, so essential were they to the Tribe. *Id.* at 274; *see also United States v. Idaho*, 210 F.3d 1067, 1075 (9th Cir. 2000) ("the purpose of the reservation would have been defeated had it not included submerged lands," so total was the Tribe's dependence on its waterways).

Second, the U.S. Supreme Court's decision made clear that the purposes of the Reservation were not reduced or reconceived through any later agreement or Act of Congress. In *Idaho II*, the State in essence argued that, whatever the United States initially intended regarding the ownership of submerged lands within the Reservation, later congressional action made clear that submerged lands would not be retained for the Tribe: "the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe" and thus tribal control of these lands was "not necessary to fulfill the purposes of the diminished Reservation." R.3612 (State's Brief before Supreme Court in *Idaho II*). The State argued to the Supreme Court that the Ninth Circuit had "mischaracterized Congress' actions" "by holding that Congress did not 'repudiate' the 1873 Executive Order Reservation," R.3618, and that "the court of appeals' failure to explore the purposes of the Reservation, as understood by Congress, is indefensible," R.3621.

The Court squarely rejected that argument. It explained that Congress was aware of the scope of the 1873 Reservation and "clearly intended to redefine the area of the reservation . . . only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder" of the lands not ceded. *Idaho II*, 533 U.S. at 280–81. "There is no indication that Congress ever modified its objective of negotiated consensual transfer." *Id.* Congress's posture is critical: because it understood the 1873 Order as establishing a Reservation and that it would need the Tribe's agreement for any change to of that Reservation, any alteration of the Reservation would need to be express, indicating the agreement by the Tribe. *Id.* at 277–78*; see also Menominee Tribe*, 391 U.S. 404 (federal government's termination of Indians' recognized rights must be explicit, not by implication). Put succinctly, the Court held that in renegotiating the extent of the Tribe's Reservation, the "intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." 533 U.S. at 278. The Court found no basis for determining that the Tribe had agreed to cede its submerged lands, *id.* at 280–81, as the State argued was a result of the federal government's mention of the Tribe's agricultural pursuits, *see* R.3621–22.

This Court need look no further than the *Idaho II* decision to answer the question whether a "primary" purpose of the creation of the Coeur d'Alene Reservation was to facilitate the Tribe's continued hunting and fishing: the U.S. Supreme Court has decided that it was. Recognizing this purpose of the Coeur d'Alene Reservation is an important step toward determining the Tribe's entitlement to water, because under *Winters*, the federal government impliedly reserved water to fulfill the Reservation's purpose when the Coeur d'Alene Reservation was created. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976). That water right "vests on the date of the reservation and is superior to the rights of future appropriators." *Id.* Just as the Supreme Court rejected the idea that Congress took a backhanded approach to "pull a

fast one" on the Tribe by unilaterally redefining the Reservation to exclude submerged lands, *Idaho II*, 533 U.S. at 278, this Court should reject NIWRG's effort to argue that Congress later replaced the 1873 Reservation's purposes with a new, more limited, set of purposes never explicitly contained in any agreement with the Tribe or any Act of Congress. *Idaho II* leaves no room for such a conclusion.

B. To the extent *Idaho II* did not rule on the question whether hunting and fishing were a primary purpose of the Coeur d'Alene Reservation's creation, the historical record establishes that they were.

Even if this Court needed to conduct its own review as to whether hunting and fishing were a "primary" purpose of the Coeur d'Alene Reservation, the historical record amply establishes the centrality of hunting and fishing to the Tribe at the time of the Reservation's creation and beyond.

The Water Court correctly recognized that "the Tribe's need to access the waterways to facilitate its traditional fishing and hunting practices" was at the forefront of the Tribe's negotiations for its Reservation. R.4321. *Cf. Pocatello*, 180 P.3d at 1056 (opining that although the interpretation of an Indian treaty or agreement is a question of law, "examination of a treaty's negotiating history and purpose . . . serves as an aid to the legal determination"). Indeed, the Tribe's rejection of the 1867 Reservation was based on the failure of that reservation to adequately provide for these practices. *Idaho II*, 533 U.S. at 265–66; *see also* R.2651–52; R.700 (2015 Smith Report); R.1578 (2015 Hart Report); R.2981 (Wee Report). As the Water Court explained, moreover, the United States understood that there would be "trouble" with the Tribe if its fishing activities were not protected; in negotiation for establishment of the Reservation, the government intended "to avoid such trouble" while clearing the way for non-Indian settlement of the Tribe's aboriginal territory. R.4322; *see also* R.2654–55.

The Tribe "depended on submerged lands" and used the Lake and its related waterways for "food, fiber, transportation, recreation, and cultural activities," *Idaho II*, 533 U.S. at 265, and the Tribe demanded an enlarged reservation that included lands and waterways to ensure continuation of its traditional way of life. The lands that the Tribe requested, according to a government surveyor, were "almost worthless as an agricultural country but will include the fisheries on the lake and on the St. Josephs River." R.2655. The resulting agreement between the Tribe and United States led to creation of a Reservation that included portions of Lake Coeur d'Alene, the Coeur d'Alene River, and the St. Joe River. R.2656. The Water Court correctly recognized that the very location of the Reservation was tailored to serve the important hunting and fishing purposes of the Reservation and that in creating the Reservation, the United States impliedly reserved water rights necessary to fulfill those purposes. R.4322.

To the extent that NIWRG claims that over years following the Reservation's establishment, the Tribe adopted a wholly agricultural lifestyle and subsistence activities like hunting and fishing were no longer important, NIWRG's focus is improper as a matter of law; under *Winters*, water is impliedly reserved at the time of a reservation's creation (if not before) to serve that reservation's purposes. *See Cappaert*, 426 U.S. at 138 (water rights vest at time of reservation). The argument is also incorrect as a matter of fact. When the federal government sought to purchase parts of the Reservation from the Tribe in the late-1880s, the Tribe expressed great resistance to ceding parts of its Reservation and did so only in exchange for a guarantee that its remaining Reservation lands would be "held forever *as Indian land* and as homes for the Coeur d'Alene Indians." R.2665 (emphasis added); *see also* R.1874. "Indian land" has been understood to indicate the implied right to fish and hunt. *See Menominee Tribe*, 391 U.S. at 406–07. Tribal leaders informed the 1887 commission that "we wanted the land of our present reservation, provided we were to hold it forever; as had been promised." *Id*. Interior Department

officials reported, in February, 1888, that "these Indians have all the original Indian rights in the soil they occupy." R.729. During later negotiations, in 1889, Chief Seltice expressed that money was not the Tribe's object; instead, "our land we wish to keep." R.2667–68; R.736. He compared the sale of lands through this agreement to "cutting my left arm off." R.2668; R.726. Indeed, the Commissioner of Indian Affairs reported that it had required "much argument and entreaty" to secure the Tribe's willingness to enter the 1889 Agreement, and that the Tribe, "absolutely refused to entertain any proposition" for the sale of lands, without the "express condition that the [March 1887] agreement should be ratified and carried into effect." R.737.

The Tribe insisted on these protections in part because their traditional subsistence activities remained an important part of their way of life. *See generally* R.2669–71 ⁋⁋ 85–88 (United States' and Tribe's Joint Statement of Facts);[7] R.787 (2016 Smith Report describing findings that "even successful tribal farmers did not rely entirely on agriculture for their subsistence"). Indeed, fishing, hunting, and gathering remained important to the Tribe thorough the years leading to congressional ratification of the Reservation in 1891, and in fact also remain important today. Some families continued to reside at traditional village sites through this period and continued to rely on hunting and fishing. *See* R.2670 (R.3025 (Wee Report), R.643 (2015 Smith Report), R.1859 (2015 Hart Report); R.788 (2016 Smith Report). A Department of the Interior report in 1891 explained the difficulty of obtaining an accurate census of the Coeur d'Alene Tribe because many tribal members had "gone in to the mountains hunting and fishing which made it impossible to see them all." R.788 (2016 Smith Report); R.3029 (Wee Report). As the State's historian for this litigation acknowledged, even the "Coeur d'Alene Indians who

[7] NIWRG did not lodge any of its own objections to the United States' and Tribe's proposed findings of fact, but the group joined the State's objections. R.2848. The State did not object to any of these proposed findings of fact. *See* R.3374.

seemingly embraced Euro-American style agriculture did not completely abandon their traditional hunting, fishing, and gathering economy" in the decades after the 1891 Agreement ratification. R.3049 (Wee Report). Indeed, testimony about ongoing Tribal use of Reservation waterways for fishing, hunting, camping, and transportation was entered into 1910 hearings at Interior. R.2670 (citing R.643, 740–41 (2015 Smith Report); R.789–90 (2016 Smith report); R.1786–1803, 1859 (2015 Hart Report)). A white farmer reported seeing "Indians camped every place" on the bank of the St. Joe River "[p]ractically every year" from his settlement at St. Maries, Idaho, in 1884 to the date of his testimony in 1910, and that he had seen Indians fishing year round for trout. R.2670 (citing R.789 (2016 Smith Report); R.1791 (2015 Hart Report)). Witnesses reported seeing fish traps in the rivers, and the Coeur d'Alene hunted for deer and ducks along rivers, ponds, and marshes. *See* R.789–90 (2016 Smith Report).

C. *Winters* does not support NIWRG's argument.

NIWRG erroneously relies on *Winters* to support its argument that the Coeur d'Alene Reservation's purposes were purely agricultural. NIWRG Br. 8. But *Winters* was not a general stream adjudication, and the U.S. Supreme Court had no occasion in that case to determine the full extent of water rights that accompany that reservation. *Winters* presented only the more limited question whether to enjoin upstream users from damming up water that would have otherwise flowed down the Milk River to the Fort Belknap Reservation. To determine whether the Reservation's creation had an associated water right that would limit upstream use, the Supreme Court reviewed the circumstances surrounding "the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation." 207 U.S. at 575. The Court concluded that the 1888 agreement had impliedly reserved water to support the move toward agricultural purposes, *see id.*, but the Court had no reason to consider—and did not consider—questions about reserved water rights for hunting and fishing or water rights in any waterway other than the Milk River. In

fact, the full suite of federal reserved water rights for the Fort Belknap Reservation are the subject of a current state court adjudication in Montana in which the United States as trustee has asserted water rights—including from the Milk River—on behalf of that reservation. *See* R.4221 (an example of Statement of Claim Form filed by the United States on behalf of the Fort Belknap Reservation). Finally, even if *Winters* had been a general stream adjudication and had recognized only water rights for agriculture, that conclusion would necessarily be tied to the purposes and the circumstances tied to *that reservation*, and not necessarily applicable to any other reservation.

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The Coeur d'Alene Reservation was intended, in part, to allow the Tribe to continue its traditional hunting and fishing practices. NIWRG's argument to the contrary was considered and rejected in *Idaho II* and finds no support in the historical record.

II. NIWRG's "necessity" arguments misapply *New Mexico* and misunderstand the purposes of the Coeur d'Alene Reservation.

NIWRG characterizes the federal reserved water rights doctrine as but a narrow exception to preeminent state water law, and it contends that the Water Court should have applied a strict "test of necessity" that NIWRG believes is mandated by *United States v. New Mexico*, 438 U.S. 696 (1978). NIWRG Br. 11. In so contending, NIWRG misrepresents *New Mexico*'s holding.[8]

[8] NIWRG also impermissibly raises the issue of "advers[e] impact[s]" to "more junior state law water right holders" if water rights for the Coeur d'Alene Tribe are recognized. NIRWG Br. 11. That question is not a proper consideration in addressing a Tribe's entitlement to water rights. In *Winters* itself, the Supreme Court recognized a senior federally-protected right with priority over junior state-law rights, one that would deprive the non-Indian irrigators of water they had been using and on which they had been relying. *Winters*, 207 U.S. at 568–69; *see also Cohen's Handbook of Federal Indian Law* § 19.03[1] at 1211–12 (2012) ("From its inception, then, the *Winters* doctrine contemplated that junior non-Indian users could forfeit their water when tribes asserted their reserved rights. . . . [but] the impact on state water users is not a

New Mexico did not alter the U.S. Supreme Court's central holding in *Winters* that federal reservations of land for Indians impliedly reserve water to accomplish the purposes of the reservation. *New Mexico* addressed federal reserved water rights claims for the Gila National Forest, which was reserved under the authority of the Organic Administration Act of 1897. That statute provided that the purpose of such reservations was to conserve water flows and preserve timber. *See* 438 U.S. at 707 (citing 16 U.S.C. § 473 et seq.). Subsequently, the Multiple-Use Sustained Yield Act of 1960 ("MUSYA") broadened the uses for which national forests would henceforth be administered to include aesthetic, recreational, wildlife-preservation, and stockwatering. *See id.* at 713 (citing 16 U.S.C. § 528 et seq.). *New Mexico* considered whether the uses specified in MUSYA supported claims to federal reserved water rights in addition to the reserved water rights that would accomplish the original purposes of that forest under the 1897 Organic Administration Act. The Court held that MUSYA broadened the use of national forests but did not also broaden the implied reservation of water for those forests, which was instead limited to the original purposes of the forest reservation. *Id.* at 708, 714–15. Thus, while new reservations of land after enactment of the 1960 MUSYA might include implied reservations of

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factor in the determination or scope of the federal law right to an implied reservation of water."). And numerous courts have since upheld this principle. *See, e.g.*, *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 94 (Wyo. 1988) (holding that the question of effects on other users "does not apply to the question of intent to reserve water"); *Wash. Dep't of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) ("a court is not to balance the competing interests of Indian and non-Indian users to reach an 'equitable apportionment' "); *Colville Confed. Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) ("Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users."); *Cappaert*, 426 U.S. at 139 & n.4 (holding that there is no "balancing test" in determining an implied reservation of water). Even if it is true, there is no legal significance in NIWRG's assertion that recognition of Tribal water rights on the Coeur d'Alene Reservation would adversely affect junior water users.

water for this broader set of purposes, *see id.* at 715 n.22, reservations under the Organic Act only had implied water rights tied to the original set of specific purposes, *id.* at 718.

NIWRG focuses on the part of *New Mexico* that explains that the federal government impliedly reserves water that is "necessary" to fulfill the "very purposes" of the federal reservation. *Id.* at 700. Although *New Mexico* identified specific, individual purposes of Congress's creation of the Gila National Forest, that approach does not apply to the reservation of land broadly intended to serve as a permanent home for people.[9] The "very purpose" of the Coeur d'Alene Reservation is clear, as the Water Court reognized: "There is no doubt that the United States intended to move the Coeur d'Alene people onto the lands reserved to be the reservation *with the aim that those lands be their homeland*." R.4319 (emphasis added). Thus, the appropriate question in determining whether establishment of the Reservation impliedly reserved water for the Tribe is not whether the United States specifically intended the Coeur d'Alene Reservation to include water merely for one particular activity or another, but rather whether water is necessary to accomplish the purpose of the Reservation to provide a permanent home for the Tribe. The Water Court correctly held that water was reserved for the Tribe,

[9] The fundamental difference between reservations of land for homelands for Indian tribes and reservations of land for national forests has properly caused some courts to reject the application of *New Mexico*'s primary-secondary distinction in the Indian water rights context. In *Gila V*, for instance, the Arizona Supreme Court reasoned that while "the primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination," reservations of land for Indians "are construed liberally in the Indians' favor" and their purposes " 'are given broader interpretation in order to further the federal goal of Indian self sufficiency.' " 35 P.3d 68, 74 (quoting *Greely*, 712 P.2d at 768); *see also* William C. Canby, *American Indian Law* 435 (2004) ("Although the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."); *Cohen's Handbook of Federal Indian Law* § 19.03[4], at 1217 (2012) ("The significant differences between Indian reservations and federal reserved lands indicate that the [primary-secondary] distinction should not apply.").

recognizing the simple reason that water is "essential to the life of the Indian people." *Arizona I*, 373 U.S. at 599.

Moreover, the proper question in determining the scope of this reserved right is not whether as a practical matter a tribe's water-related needs may be met without a federal reserved water right. In *Walton*, for instance, the Ninth Circuit recognized rights for maintenance of flows to provide fish spawning habitat even though natural spawning was not strictly "necessary" because the United States was providing the tribes with fingerling fish from a federal hatchery. 647 F.2d. at 48. Just last year, moreover, the Ninth Circuit rejected the argument that the availability of water under state law obviates the need for a federal reserved right, because the "purpose for which land was reserved is the driving force behind the reserved rights doctrine . . . not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir.), *cert. denied* 138 S. Ct. 468, 469 (2017).

Even taking a more fine-grained look at the Coeur d'Alene Reservation, water clearly was essential to the Coeur d'Alene Tribe's way of life, as the United States was well aware. *See, e.g.*, *supra* Section I.B (discussing the importance of water for hunting and fishing). Viewed under the strict "necessity" lens that NIWRG advocates, the federal reservation of water for these purposes was necessary because Idaho's water laws do not recognize private non-appropriative rights to water. Only by establishing these water rights with a senior priority could the United States ensure that the hunting and fishing aspect of the Coeur d'Alene Reservation's purpose are met.

Promoting agricultural activities by the Tribe was another of the United States' goals in moving the Tribe onto a reservation. *See, e.g.*, R.1866 (1873 agreement that the government provide farming tools and a grist mill). The Tribe had begun to incorporate agriculture into its

lifestyle, but it was "not as yet quite up to living on farming" at the time the Reservation was created in 1873. *Idaho II*, 533 U.S. at 266. *Winters* makes clear, however, that a reservation of water for agriculture does not require a tribe to have been a beneficial user of water at that time. Indeed, the *Winters* doctrine of implied federal reservation of water to accomplish the purposes of a reservation of land for a tribe has an important forward-looking component. Federal reservation of water looks not just to a tribe's current uses, but also to future uses of its reservation and impliedly reserves all water "to make the reservation liveable," *Arizona I*, 373 U.S. at 599, as well as to enable a tribe "to change to new" ways of life, *Winters*, 207 U.S. at 577.

A. A federal reserved right for hunting and fishing vested at the time of the Reservation's creation and is held in perpetuity.

NIWRG's argument that a federal reservation of water is not necessary to facilitate the hunting and fishing purposes of the Coeur d'Alene Reservation is based largely on its view of the current practical realities, such as the State's regulation of hunting and fishing, the State's water right for maintenance of Lake Coeur d'Alene, an Idaho Water Resources Board right for water in the St. Joe River, and the current federal license for the operation of the Post Falls Dam. NIWRG Br. 15–16. But even if the Tribe's needs for water to support hunting and fishing are or could be temporarily met through rights and licenses held by others *today*, that is not a proper basis for rejection of a federal reserved water right that vested when the reservation was created in 1873.

Federal reserved water rights are determined according to the purposes of the reservation when created, not by later events. *See Arizona I*, 373 U.S. at 600. For this reason, NIWRG's focus on events post-dating the creation of the Coeur d'Alene Reservation are not relevant to the question of what water was impliedly reserved for the Tribe upon establishment of the Reservation. NIWRG's argument may be rejected for this reason alone.

NIWRG's practical arguments fail in any event, because none of the claimed current "protections" actually protect the Tribe's rights in a meaningful, permanent way. The defects in NIWRG's argument as it relates to Post Falls Dam are instructive. It is correct as a practical matter that the Lake levels claimed by the United States on behalf of the Tribe are below the levels currently maintained under a Federal Energy Regulatory Commission ("FERC") license for the operation of a hydroelectric facility at Post Falls. But that current practical reality has no bearing on the Tribe's entitlement to a federal water right. It simply means that the Tribe's senior right is currently satisfied. Although it is difficult to imagine a Lake Coeur d'Alene without the dam, the FERC license is of limited duration and there is no guarantee that it will be renewed. *See Avista Corp.*, 127 FERC 61265, 62187 (2009) (describing terms of license).

This water adjudication, on the other hand, is meant to establish *permanent* rights. And this adjudication is the Tribe's one opportunity to have its rights recognized and quantified under this water rights adjudication. *See* Idaho Code § 42-1420. It is thus critical that the adjudication establish minimum Lake levels based on a natural hydrograph that will control if and when operations at Post Falls cease. The Tribe plainly cannot be made to rely for its permanent right to the use of water on a license held by another entity that may cease to benefit the Tribe at some unknown point in the future. *See Walton*, 647 F.2d at 48 (recognizing a reserved water right to provide fish spawning habitat even though the United States was currently providing fingerling fish from a hatchery, and natural spawning was not strictly necessary). And of course, the current level maintained by the dam has no bearing on the question of whether a right to maintain the Lake's level was necessary when the Reservation was established.[10]

[10] NIWRG's arguments about water rights held by the State, which the State does not itself advance, fail for the same reason. The State does hold a junior water right "to maintain the level of Coeur d'Alene Lake," *see* State Water Right 95-2067, available at

NIWRG's legal arguments are no more persuasive than its practical arguments. NIWRG contends that *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977), held that "a federal reserved water right was not necessary" to protect fish on a reservation because the state's regulations provided adequate protection. NIWRG Br. 14. That characterization of *Puyallup Tribe* is wrong. The case did not consider federal reserved water rights *at all*. Rather, it addressed a tribe's argument that it continued to hold exclusive *fishing* rights on parts of its reservation. The U.S. Supreme Court held that the tribe held only rights to fish in common with non-Indians as a result of alienation of those fishing grounds, and that the fishery was therefore subject to the state's reasonable regulation. *Puyallup Tribe*, 433 U.S. at 175–76. *Puyallup Tribe* has no application here.

NIWRG's reliance on two other cases—neither of which involved implied water reservation for tribes—fares no better. NIWRG characterizes *State v. United States*, 12 P.3d 1284, 1289–91 (Idaho 2000), as rejecting a reserved water right even in the face of an acknowledged reservation purpose that included "protection of fish and wildlife values." NIWRG Br. 13. The comparison to this case in inapt. This Court's decision in *State v. United States* was based on its determination that the purposes of the Sawtooth National Recreation Area ("NRA") were "to protect the wilderness portion of the Sawtooth NRA from mining operations, and to protect the non-wilderness portion of the Sawtooth NRA from the dangers of unregulated development and mining in order to preserve and protect the natural, scenic, historic, pastoral, and other values associated with those areas." *State*, 12 P.3d at 1289. This Court noted that the purpose was "not simply to protect fish habitat, but rather to protect that habitat . . . from the dangers associated with unregulated mining operations." *Id.* Given the extent of federal land

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https://go.usa.gov/xnF78, but there is no guarantee that the State will never change or abandon that right, or that the State will enforce it.

use regulations for the area that "control the rate and manner of development of the area, as well as limiting mining operations," and thereby addressed the dangers specifically identified by the Act establishing the NRA, this Court concluded that there was insufficient necessity from which to imply congressional intent to reserve water. *Id.* at 1289, 1291.

State v. United States is thus unlike the present case, as the Court there determined that the Sawtooth NRA was aimed at protecting against specific threats, but the purpose of the Coeur d'Alene Reservation is to provide a permanent homeland for people. And here, there is no other federal regulation or law that can directly and permanently protect the Coeur d'Alene Tribe's use of water; only reserved water rights recognized through this water rights adjudication can achieve that result of providing the water necessary to accomplish the purposes of the Reservation, as required as a matter of federal law.

NIWRG's reliance on *United States v. State of Idaho*, 23 P.3d 117 (Idaho 2001), NIWRG Br. 14, addressing reservations made to effectuate the purposes of the Migratory Bird Conservation Act, is similarly misplaced. That case concerned the federal government's reservation of islands in the Snake River to create sanctuaries for migrating birds to protect them from hunting. *United States*, 23 P.3d at 125. This Court held that because these sanctuaries—as defined by the Migratory Bird Conservation Act—would continue to exist even if there were no longer enough water in the Snake River to maintain these areas as islands, the United States' purpose in creating the reservations did not include a reservation of water as well. *Id.* at 126. This non-Indian case involves a narrowly-defined reservation of land for a use that the Court determined does not require water; it has no bearing on the question of whether a reservation that will be "held forever as Indian land," R.2665, R.1874, includes an implied water right for a Tribe's continued ability to fish—an activity that unquestionably *does* require water.

B. The United States reserved water for agriculture, as it would have understood water to be necessary for that use.

NIWRG presents the remarkable argument that, although the Water Court "appropriately concluded that 'one primary purpose of the reservation was to establish an agrarian lifestyle for its inhabitants,'" water is not necessary for agricultural activities on the Reservation and thus the Coeur d'Alene Reservation "does not require a federal reserved right." NIWRG Br. 16–17 (quoting R.4320).[11]

As a threshold matter, NIWRG now asserts that "the record is adequate to make" a determination about whether water is in fact needed to irrigate the Reservation's agricultural lands. NIWRG Br. 17. But NIWRG waived this argument before the Water Court by joining the State's Motion for Summary Judgment, which stated that determining whether "irrigation is necessary" to fulfill the reservation's agricultural purpose—as the State insisted is required—"will involve contested issues of fact not suitable for summary judgment, and may best be incorporated into the quantification phase of this litigation." R.2502; *see also* R.2606–07 (NIWRG "hereby join[s] in the *State of Idaho's Motion for Summary Judgment* . . . and join[s] in the arguments of the *State of Idaho's Memorandum in Support of Motion for Summary Judgment*" (emphasis in original)); R.4321 (Water Court decision noting the State's concession and NIWRG's joinder). Appellate review is not appropriate for issues waived in the lower court. *See State v. Wharton*, 402 P.3d 1119, 1124–25 (Idaho 2017).

[11]NIWRG also notes that the United States has sought reserved rights for "both irrigation and wetland purposes in the same locations," which the group says indicates that the Reservation does not in fact require water for agriculture. NIWRG Br. 20. NIWRG is wrong to imply that the United States has double-claimed water; the United States' claims expressly assert separate justifications for the same water. R.2297. There is no connection between the fact that the United States has provided alternative justifications and the question whether the Tribe is entitled to water for an agricultural purpose.

NIWRG is also incorrect that the *Winters* presumption of a reservation of water for a tribe's future agricultural pursuits does not apply here because the Coeur d'Alene had not undertaken extensive irrigation projects before the Reservation's creation. It is undisputed that one purpose of the Coeur d'Alene Reservation was to encourage the Tribe to incorporate agriculture into its way of life. An agricultural purpose plainly implies the use of water, and that alone is sufficient to establish a tribal right to water for present *and* future needs. *See, e.g.*, *Arizona I*, 373 U.S. at 600 (recognizing a tribal right to water under the practically irrigable acreage standard to meet present and future needs); *Walton*, 647 F.2d at 47–48 (recognizing a right to irrigate all practicably irrigable acreage simply because "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society"). The U.S. Supreme Court's decision in *Arizona I* precludes NIWRG's argument that recognition of reserved water rights for agricultural purposes depends exclusively on a tribe's *past* use of water in this way.

NIWRG's argument misrepresents the historical evidence of the Tribe's agricultural practices in any event. By the time the Reservation was established, the Coeur d'Alene had begun to engage in agriculture, including small gardens near rivers where water could be diverted for irrigation. R.1975 (2016 Hart Report); R.797 (2016 Smith Report). The United States wanted to further encourage agricultural activity, which (consistent with the practice then in the American West) meant the use of irrigation to grow crops. Water was thus impliedly reserved in the reservation of the lands for the Tribe, just as water was generally used by those engaging in agricultural activities. The water reserved, as already noted, was water adequate for both present and future needs, as properly will be determined subsequently under the practically irrigable acreage standard.

NIWRG insists that dry-farming is perfectly adequate for the Coeur d'Alene Reservation to fulfill its agricultural purpose (a debatable proposition), but that assumption does not account either for general irrigation practices even at that time or, significantly, for what the United States and the Tribe would have understood as to agricultural practices at the time of the Reservation's creation.[12] There is no record basis for holding that either party understood an agricultural purpose for the Reservation to have meant only dry-farming in perpetuity, and the record shows to the contrary: "there is no evidence of dry-farming on or adjacent to the Coeur d'Alene Reservation prior to the establishment of the 1873 Reservation." R.1979 (2016 Hart Report); *see also* R.2002 (same); R.797 (2016 Smith Report, noting the absence of evidence that tribal members practiced dry farming prior to 1873). Indeed, white settlers attempting the practice in nearby eastern Washington had only mixed results in the decade before the Reservation's establishment. R.1980 (2016 Hart Report).

As to the more specific questions about *how much* water was reserved for that purpose, the Water Court—and the State—were correct that the measure of water reserved for this purpose is "one of quantification," R.4321, and is properly considered in the second phase of this adjudication proceeding, *see* R.462 (bifurcation order). Upon consideration of that question during that phase of the adjudication, the Water Court's task will be straightforward, because the U.S. Supreme Court has established a standard measure of quantifying water rights for agricultural purposes—practicably irrigable acreage ("PIA"). That standard, established in *Arizona I*, is measured as "enough water . . . to irrigate all the practicably irrigable acreage on" a reservation. 373 U.S. at 600. The Supreme Court explained that the PIA standard, in contrast to a

[12] NIWRG's reliance on events post-dating the Reservation's establishment, *see* NIWRG Br. 18–20, is inappropriate because the water rights for agriculture vested when the Reservation was created, and not later.

standard like "reasonably foreseeable needs," is "the only feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 601.

The extent of water rights recognized through application of the PIA standard does involve practical considerations like whether crops may be grown on the land and the economic feasibility of irrigation. *See Gila V*, 35 P.3d at 77–78. But the absence of pre-existing irrigation projects has not been held to demonstrate that a Tribe is not entitled to a PIA-based water right. And NIWRG's insistence that the Tribe be permanently locked into dryland farming is inconsistent with the U.S. Supreme Court's recognition in *Arizona I* that the PIA standard is applied to "satisfy the *future* as well as the present needs" of a Tribe. 373 U.S. at 600 (emphasis added); *see also United States v. Ahtanum Irr. Dist*, 236 F.2d 321, 327 (9th Cir. 1956) (implied reservation of water "looked to the needs of the Indians in the future"); *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1977) (rights reserved to Tribes need not be tied to traditional uses); *Greely*, 712 P.2d at 767, 768 (reservation includes "water for future needs and changes in use" and serves "the federal goal of Indian self sufficiency").

Indeed, the very idea of creating "a 'permanent home and abiding place' for the Indian people," is a "broad" purpose that must be "liberally construed" to allow "tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency." *Gila V*, 35 P.3d at 76 (quoting *Walton*, 647 F.2d at 47). As such, "nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so," and a court should determine the quantity of water reserved for a tribe with an eye to "the optimal manner of creating jobs and income for the tribes [and] the most efficient use of the water." *Id.* at 76, 80 (internal quotation

marks omitted).[13] NIWRG's attempt to limit the Tribe to growing only those crops susceptible to dry-farming finds no support in the applicable caselaw.

* * *

The Court should reject NIWRG's incorrect interpretation of *New Mexico* as requiring a strict showing that the Tribe could only fulfill the Reservation's purpose with a federal reserved water right. The Reservation was intended to be the Tribe's permanent home. That is a purpose requiring water, and water was impliedly reserved for that use.

III. The United States may hold reserved water rights to groundwater.

NIWRG argues that the Water Court should have dismissed all claims to fulfill the Reservation's domestic purpose because those claims are for the diversion of groundwater, rather than surface water. But this Court should decline to depart from the many state and federal court decisions that have recognized the application of *Winters* rights to groundwater.

NIWRG characterizes *Cappaert* as "declin[ing] to apply the federal reserved water rights doctrine to groundwater," NIWRG Br. 23. But neither *Cappaert* nor any other decision of the U.S. Supreme Court has directly addressed the application of the reserved rights doctrine to groundwater. The Court in *Cappaert* recognized that the case presented only a question of

[13] That a tribe may develop its agricultural resources in different ways over time (such as by irrigating lands previously dry-farmed to grow higher value crops) flows from the established understanding that tribes need not be confined to their traditional methods of hunting or agricultural production or to antiquated industrial technologies. *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Nat. Res.*, 141 F.3d 635, 639 (6th Cir. 1998) ("treaties did not in any way . . . restrict the treaty fishers to using technology that was in existence at the time of the treaty."). Tribes' use of water cannot be required to remain frozen in the past, just as "[o]ther right holders are not constrained . . . to use water in the same manner as their ancestors in the 1800s." *Gila V*, 35 P.3d at 76. And "permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life." *Walton*, 647 F.2d at 49.

reserved rights to surface water, and so it had no occasion to address federal reserved water rights for groundwater. *Cappaert*, 426 U.S. at 142; *see also Agua Caliente*, 849 F.3d at 1270 n.8.[14] Significantly, however, *Cappaert* did recognize that surface and groundwater are hydrologically connected, and held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143. This holding led the Ninth Circuit to the reasoned conclusion in *Agua Caliente* that the *Winters* doctrine applies to groundwater: "If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself." *Agua Caliente*, 849 F.3d at 1271. This holding was not conditioned on a showing that groundwater had historically been used as a water source on the reservation at issue (indeed the opinion noted that the tribe does not pump its own groundwater), and broadly recognized that there is "no reason to cabin the *Winters* doctrine to appurtenant surface water." *Id.*

Agua Caliente is but the latest in a series of decisions that have nearly unanimously held that federal reservations of water may include groundwater. *See, e.g.*, *Colville Confed. Tribes v. Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) ("[*Winters* rights] extend to ground water as well as surface water"), *aff'd in part on other grounds, rev'd in part on other grounds*, 647 F.2d 42 (9th Cir. 1981); *State of New Mexico ex. rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (Pueblo water rights extend to groundwater as an integral part of the hydrologic cycle); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 9 Cl. Ct. 660, 699 (1986) (Winters doctrine "includes an obligation to preserve all water sources within the reservation, including ground water"); *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm.

[14] The Ninth Circuit recognized the pool at Devil's Hole—the subject of *Cappaert*—as groundwater, and held that "the reservation of water doctrine is not" limited to "only surface water rights" and that "the United States may reserve not only surface water, but also underground water." *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974).

326, 341 (1976) ("the Winters Doctrine applies to all waters appurtenant to the reservations, including wells, springs, streams, and percolating and channelized ground waters"). NIWRG has provided no reasoned basis for treating the Coeur d'Alene Reservation differently.

With a single exception, state supreme courts that have addressed the question also have concluded that the *Winters* doctrine applies to groundwater. The exception is a Wyoming Supreme Court decision, *In re All Rights to Use Water in the Big Horn River System*, which acknowledged the "logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d 76, 99 (Wyo. 1988). The Wyoming court nonetheless declined to reverse a lower court decision that groundwater was not reserved, on the ground that "not a single case applying the reserved water doctrine to groundwater is cited to us." *Id.*

In the three decades since that single court's ruling, the state supreme courts that have addressed the question have, like the federal courts, consistently held that rights in groundwater may be federally reserved. The Arizona Supreme Court expressly declined to follow the Wyoming Supreme Court's equivocal decision in *Big Horn*, holding instead that groundwater may be reserved for the benefit of Indian reservations under *Winters*. *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739 (Ariz. 1999). In that case, the court observed that "[w]e can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive." *Id.* at 745. The Arizona court held that when the United States establishes Indian reservations on arid land, it likewise intends a "reservation of water to come from whatever particular sources each reservation had at hand." *Id.* at 747. Using *Winters* and *Cappaert* as "guideposts," the Arizona court concluded that the "significant question for the purpose of the reserved rights doctrine is not whether the water runs

above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.* at 747.

Similarly, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093 (Mont. 2002), the Montana Supreme Court relied on the reasoning of the Arizona Supreme Court and *Cappaert* in finding "no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation." 59 P.3d at 1098. It concluded that there was "no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights." *Id.* at 1099.

Rather than confront this weight of legal authority, NIWRG places reliance on a practical argument: that because Idaho law "provides an exemption from the permitting requirement" for groundwater pumping for domestic uses, the Coeur d'Alene Tribe has no need for a federal water right to protect this use. NIWRG Br. 24. Once again, NIWRG's focus on events that post-date the vesting of a reserved water right is inapt. A permit scheme (or exceptions to it) created after 1873 is irrelevant to the question of what was reserved for the Tribe at that time. And, of course, *Winters* rights are "federal water rights," "governed by federal law," and they "are not dependent upon state law or state procedures." *Cappaert*, 426 U.S. at 145; *Colville Confed. Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985).

The practical argument fails in any event. Under Idaho Code § 42-227, there is an exception from the normal permitting requirements (under Idaho Code§ 42-229) for the excavation and opening of wells and withdrawal of water for domestic purposes, as defined by Idaho Code § 42-111. But qualifying for an exemption from a permitting process is not the same as holding a water right, particularly one with an early priority date, as the Water Court has applied to water for domestic uses on the Coeur d'Alene Reservation, R.4327 (priority date for

domestic use is November 8, 1873). The Coeur d'Alene-Spokane River Basin Adjudication "Order Establishing Procedures for the Adjudication of *de Minimis* Domestic and Stockwater Claims" makes clear that claimants may indeed rely on their *de minimis* status to defer the adjudication of their groundwater claim, but doing that leaves these claims essentially unenforceable unless and until they are adjudicated, as a "claimant who has elected to defer adjudication of a *de minimis* domestic or stock water claim will be required to see a final adjudication of the claim prior to requesting distribution." Order at 3, *available at* https://idwr.idaho.gov/files/adjudication/20081112-CSRBA-Order.pdf. And using the deferral process still requires exempt-well claimants to hold "the burdens of proof and persuasion in establishing each and every element of his or her claim" under state water law. *Id.* at 5. Accordingly NIWRG's reliance on the state-law exemption for domestic-use wells is misplaced, because that exemption provides none of the benefits and protections of the date-of-reservation federal *Winters* right that the Water Court correctly endorsed in this case.

NIWRG offers no compelling reason to depart from the long line of federal and state decisions recognizing that *Winters* rights may extend to groundwater, and its argument that the Coeur d'Alene Tribe should be satisfied with a process to defer the adjudication of its domestic claims lacks merit.

IV. The United States' claim to maintain the level of Lake Coeur d'Alene is not, as NIWRG insists, "unquantifiable," and the Water Court did not need to make a determination about the extent of submerged lands.

NIWRG contends that the Water Court improperly allowed the United States' claim to maintain the level of Lake Coeur d'Alene to proceed to the quantification phase of the adjudication to the extent that the claim supports fish and wildlife habitat in furtherance of the recognized hunting and fishing purpose of the Coeur d'Alene Reservation. NIWRG Br. 20–22. NIWRG curiously insists that the Water Court rejected the United States' claim for Lake-level

maintenance with reference to specific elevations at different times of the year, and that the claim must be dismissed in its entirety because "there is no other standard" for assessing the amount of water necessary for the lake. NIWRG Br. 21. NIWRG also argues that the Water Court should have determined (or must determine in further proceedings) the extent of the submerged lands beneath Lake Coeur d'Alene that the United States holds in trust for the Tribe. NIWRG Br. 22.

NIWRG is incorrect that the Water Court rejected the claimed Lake levels and the United States' method of quantifying the level necessary to meet accepted purposes of the Reservation. To the contrary, the Water Court allowed the Lake-level claim to proceed to quantification to extent that the claim is tied to hunting and fishing, and it recognized the centrality of Lake Coeur d'Alene to these uses: "Naturally Tribal fishing practices were reliant upon important waterways such as Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers." R.4321. The Water Court did reject some aspects of the United States' claim for maintenance of Lake Coeur d'Alene, such as a right to maintenance of Lake level for certain asserted purposes of the Reservation (which the United States has appealed in related case No. 45382). *See* R.4328; R.4302. That decision was based, in part, on the Water Court's determination that maintenance of the Lake's level was not, in its view a "primary purpose" of the Reservation.[15] R.4328. But contrary to NIWRG's assertions, the Water Court did not determine that the particular Lake levels claimed were impermissible or that a right related to Lake level was impractical or unquantifiable. The Water Court did not consider the amount of water reserved for the acknowledged Reservation purposes at all, as that question is plainly one of quantification, not

[15] The United States' opening brief in its related appeal, No. 45382, explains why the Water Court was mistaken in this approach to the Lake level issue. *See* United States' Br. as Appellant at 18–22.

entitlement. As such, NIWRG's argument that the Water Court is left without any standard to apply—and thus that the Lake level claim must be dismissed in its entirety—is without basis.[16]

NIWRG is also wrong that the Water Court was required to determine the extent of reserved submerged lands or that the Water Court must do so during further proceedings. The claim for the maintenance of Lake Coeur d'Alene—similar to the claims for instream flow—is not based on ownership of submerged lands. Instead, the quantity of water reserved at Lake Coeur d'Alene is based on the Tribe's use of that water resource and the amount of water necessary to fulfill the Reservation's purpose. Indeed, under *Winters* it is *use* of water, not title to land, that supports a claim to reserved water rights.[17] Once the Water Court correctly recognized that hunting and fishing were key tribal uses of the Reservation, it properly determined that water was impliedly reserved to serve those uses. R.4322.[18]

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[16] Although tribal reserved water rights are determined under federal law, the concept that an entity may hold a right to maintain a particular level of a body of water is also recognized by Idaho law. *See* Idaho Code §§ 42-1501, 42-1503(d) (including preservation of "lake level").

[17] This concept is not unique to federal reserved water rights. *Use*, not *title*, is likewise the basis for obtaining a private water right under a state law prior appropriation system. *See*, *e.g.* Idaho Code § 42-101 (providing for water rights to be established through "beneficial use"). This Court has expressly rejected the doctrine of riparian rights, which rests on ownership of lands along a waterway, as in conflict with this state's prior appropriation regime, which is based on use. *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1062 (Idaho 1909) ("A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use.").

[18] For this reason, *Coeur d'Alene Tribe v. Johnson*, 405 P.3d 13 (Idaho 2017), is inapposite. That case considered a regulatory authority question—whether a tribe can regulate the activities of non-members on land the tribe no longer owns—not a reserved water rights question. *Id*. at 20. It did not involve any question about water rights or whether a water right must be based on underlying ownership. The United States has responded to the State's argument along similar lines in appeal No. 45381. United States' Br. as Respondent at 24–37.

NIWRG's insistence that water rights must be "appurtenant" to land betrays a misunderstanding of this legal concept, which is a *conceptual*, not a *physical*, requirement. The Ninth Circuit recently explained this distinction in *Katie John v. United States,* 720 F.3d 1214 (9th Cir. 2013), which held that off-reservation waters may be tied to reserved lands. In so determining, the court found "an apparent consensus that [appurtenancy] does not mean physical attachment" of water to land. 720 F.3d at 1229–30. Instead, "appurtenancy" has to do with the "*relationship* between reserved federal land and the use of the water, not the *location* of the water." *Id.* at 1230 (emphasis added). This understanding of the appurtenance requirement accords with the Supreme Court's recognition of water rights for irrigation of reservation lands from a water source two miles from the reservation boundary. *Arizona v. California,* 376 U.S. 340, 344–45 (1964) ("*Arizona II*"); *see also Cappaert*, 426 U.S. at 141, 147 (holding that the federal government's implied reservation of water for Devil's Hole National Monument included "appurtenant water sufficient to maintain the level" of an underground pool, and affirming an injunction that limited the pumping of groundwater by private citizens *2.5 miles away* from the pool). It also accords with the law applying to non-Indian private users in Idaho, which does not require ownership or control over a stream in order to find those waters "appurtenant" to land not touching the stream. *See Joyce Livestock Co. v. United States*, 156 P.3d 502, 513–14 (Idaho 2006).

In any event, state courts do not have jurisdiction over questions of title to land involving the United States, and it is thus at best uncertain that the Water Court has authority to determine the extent of federal title in submerged lands. *See H.F.L.P., LLC v. City of Twin Falls*, 339 P.3d 557, 564 (Idaho 2014). The United States' joinder in this adjudication is pursuant to the limited waiver of federal sovereign immunity in the McCarran Amendment, which as relevant here authorizes joinder of the United States in "the adjudication of rights to the use of water of a river

system or other source." 43 U.S.C. § 666. The United States has waived its immunity from suit over title to land in which it claims an interest in the Quiet Title Act, 28 U.S.C. § 2409a. That Act, however authorizes suit only in federal court and expressly excepts water rights claims from that waiver of immunity. *Id.* § 2409a(a). The water rights claimed here by the United States do not depend on a determination of federal ownership of submerged lands, and the waiver of federal sovereign immunity in the McCarran Amendment would not apply to any such determination.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Water Court insofar as it accepted the United States' water claims tied to hunting and fishing uses, agriculture, and groundwater.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2018, I caused a true and correct copy of the foregoing brief to be served as follows:

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