Docket No. 45381-2017

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)

STATE OF IDAHO,

Objector/Appellant,

vs.

UNITED STATES OF AMERICA and
COEUR D'ALENE TRIBE,

Claimants/Respondents.

OPENING BRIEF OF APPELLANT 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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I. STATEMENT OF THE CASE

A. Nature of the Case

When the United States reserves land for the exclusive use and occupation of an Indian tribe, it impliedly reserves the use of appurtenant waters if the reserved lands "would be valueless" otherwise. *Winters v. United States*, 207 U.S. 564, 576 (1908).

Below, the district court held that one of the primary purposes of the reservation set apart by Executive Order on November 8, 1873 (R. 2031) was to provide hunting and fishing for the Coeur d'Alene Tribe. Such purpose was implied by the drawing of reservation boundaries to include waterways that the Tribe insisted were needed for "a while yet" while the Tribe transitioned to a farming lifestyle. R. 4313 (quoting *Idaho v. United States*, 533 U.S. 262, 266 (2001)). The district court then assumed, without explanation or discussion, that the Reservation continues to be held for such a purpose despite an 1891 Act that excluded most of those same waterways from the Reservation while protecting the Tribe's agricultural lands, and a 1906 Act that placed tribal members on individual farms, eliminated almost all tribal communal land holdings, and opened the Reservation to non-Indian settlement. Over 75% of Reservation lands were eventually sold in fee simple to non-Indians, including the lands underlying and encompassing many of the streams for which the district court awarded the United States water rights to maintain fish habitat.

This appeal turns on the question of whether the United States can claim reserved water rights for fish and wildlife habitat when a reservation, established to meet a tribe's hunting and fishing needs "for a while yet," is later reconfigured by Congress for the primary purpose of

meeting the Tribe's agricultural needs, and is further reconfigured by allotting each member an individually-owned farm, and selling the remainder of the reservation to non-Indian homesteaders. The sale of the majority of reservation lands to non-Indians is particularly relevant because reserved water rights are appurtenant to reserved land. When land within an Indian reservation ceases to be held by the United States for a tribe's exclusive use, consumptive reserved water rights are either conveyed to the new land owner or are extinguished. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981) *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984). Whether conveyed or extinguished, the United States cannot claim reserved water rights for consumptive uses on lands conveyed to non-Indians. The State asserts that the same principle applies with equal force to non-consumptive water rights for fish and wildlife habitat. The district court, however, failed to squarely address this issue. This appeal requires this Court to determine: (1) the impact of superseding legislation on the Reservation's purposes; and (2) whether the United States can claim ownership of water rights implied by the reservation of land for the Tribe's exclusive use when the United States no longer holds title to the lands for the benefit of the Tribe.

B. Statement of the Facts

The district court adopted the findings of fact from *Idaho v. United States*, 533 U.S. 262 (2001), which addressed the Coeur d'Alene Tribe's ownership of submerged lands underlying the Reservation's navigable waterways, primarily the southern third of Coeur d'Alene Lake and the lower reach of the St. Joe River. The findings of fact, as adopted by the district court, start as follows:

> The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River. Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. *Id.*, at 1099-1102. 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.
>
> Under an 1846 treaty with Great Britain, the United States acquired title to the region of Lake Coeur d'Alene . . . . In 1867, in the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation . . . . 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. When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because "we are not as yet quite up to living on farming" and "for a while yet we need have some hunting and fishing."

R. 4313 (quoting *Idaho v. United States*, 533 U.S. at 265-66). The above-referenced petition from the Tribe was striking in its insistence that hunting and fishing was a necessary stopgap (i.e., needed "for a while yet") while the Tribe progressed in its adoption of agriculture:

> [W]e are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our aided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

United States v. Idaho, 95 F. Supp. 2d 1094, 1103 (D. Idaho 1998) (quoting petition). The petition helped spur negotiations with the Tribe:

> Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to "set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect ... from settlement or occupancy by other persons." The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and

> all of Lake Coeur d'Alene except a sliver cut off by the northern boundary.
>
> Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d'Alene, which, the District Court found, was contrary "to the usual practice of meandering a survey line along the mean high water mark."

R. 4313-14 (quoting *Idaho v. United States*, 533 U.S. at 266). The executive order was "seen as a temporary measure to fully protect the agreement until the necessary legislation could be passed [and] Congress confirmed the reservation." R. 1593 (affidavit of Tribe expert E. Richard Hart). The agreement, however, was not ratified, and the commission that negotiated it repudiated it and questioned whether they ever had authority to negotiate the Agreement. R. 2989-90 (affidavit of State expert Stephen Wee). Then:

> An 1883 Government survey fixed the reservation's total area at 598,499.85 acres, which the District Court found necessarily "included submerged lands within the reservation boundaries."
>
> As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to "make with us a proper treaty of peace and friendship ... by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." In response, Congress authorized new negotiations to obtain the Tribe's agreement to cede land outside the borders of the 1873 reservation. In 1887, the Tribe agreed to cede
>
> > "all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation."
>
> The Government, in return, promised to compensate the Tribe, and agreed that
>
> > "[i]n consideration of the foregoing cession and agreements ... the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the

> Coeur d'Alene Indians ... and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."
>
> As before, the agreement was not binding on either party until ratified by Congress.
>
> In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe's reservation and adopted a resolution directing the Secretary of the Interior to "inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho," and specifically, "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation," and that "[t]he St. Joseph River also flows through the reservation."

R. 4314 (quoting *Idaho v. United States*, 533 U.S. at 268).

In the 1888 resolution, Congress asked the Secretary of the Interior whether a portion of the reservation should be opened to settlement and "whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation." R. 2059 (Sen. Ex. Doc 76). In response, the Secretary forwarded a report from the Commissioner of Indian Affairs noting that the Tribe was "far advanced," "cultivate[d] the soil extensively" and advising "that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of great benefit to the public." R. 2061-62. The Secretary's report prompted Congress to seek additional cessions from the Tribe before acting to ratify the 1887 Agreement:

> Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. The House Committee on Indian Affairs later recalled that the 1887 agreement was not promptly ratified for

> "sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate[d] on the northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber.... It contains a magnificent sheet of water, the Coeur d'Alene Lake...."
>
> But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians," and, specifically, 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."

R. 4314-15 (quoting *Idaho v. United States*, 533 U.S. at 269). "[T]he main purpose of the new [1889] negotiations 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). The result, in subsequent negotiations, was the drawing of new Reservation boundaries that excluded from the Reservation two-thirds of Coeur d'Alene Lake.

> Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that "you still have the St. Joseph River and the lower part of the lake." And, again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress.
> ….
> On March 3, 1891, Congress "accepted, ratified, and confirmed" both the 1887 and 1889 agreements with the Tribe.

R. 4315 (quoting *Idaho v. United States*, 533 U.S. at 269-70).

The Supreme Court's findings of fact in *Idaho v. United States*, as adopted by the district

court, only address the purpose of the 1873 Executive Order, and do not address whether Congress, in establishing new Reservation boundaries in Act of March 3, 1891, 26 Stat. 989 ("1891 Act"), adopted the Executive Order's purpose or intended to encourage new purposes and uses of Reservation lands to meet the Tribe's future needs. The federal courts concluded that it was not necessary to determine "the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873)," because the issue before the court "did not require either that Congress itself apprehend the purpose [of the Executive Order] or that the purpose be extant at the time of congressional action." *United States v. Idaho*, 210 F.3d at 1075-76. Because ownership of submerged lands turned solely on "Congress's awareness that the 1873 reservation included submerged lands," the federal courts concluded that for purposes of determining such ownership "it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889." *Id.* at 1076.

The district court, like the federal courts, it did not address whether Congress established new purposes for the diminished Reservation by encouraging only the Tribe's agricultural efforts. The 1891 Act substantially reduced the Reservation by removing the northern two-thirds of Coeur d'Alene Lake, emphasizing the retention of agricultural lands (the authorizing legislation provided that any lands ceded should be "not agricultural"), Act of March 2, 1889, 25 Stat. 980, 1002, and repeatedly averring its intent to promote "the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." 1891 Act, 26 Stat. at 1028, 1031.

The Act's focus on "civilized" purposes reflected the Tribe's by-then renowned agricultural successes. The Tribe's statement in its 1872 petition that it would be "up to living on

farming" after a "while yet" had proven prophetic: by the time of the 1889 negotiations to alter the Reservation boundaries, the Tribe had thousands of acres under cultivation, R. 0719 (affidavit of U.S. expert Ian Smith), was harvesting tens of thousands of bushels of wheat and oats, R. 2087, 2095, and was hiring white workers to help work their farms. R. 3377. [1] The parties to the 1887 and 1889 negotiations emphasized the Tribe's agricultural pursuits by mentioning them at least 17 times. R. 2113-19; 2153-58 (negotiation transcripts). Tribal members (along with many non-Indians) continued to hunt and fish within the boundaries of the reduced Reservation. R. 2671-72; 3387-88. The sole mention of hunting or fishing during negotiations, however, was in the past tense: Commissioner Daniels stated that "[w]hen first I went among the Indians they had as food the wild meat of the buffalo; now I see you on good farms and in your happy homes." R. 2154. Notably, Chief Seltice, when describing what the Tribe wanted "preserved forever," listed "our homes . . . our houses [and] our farms", R., 2157, but made no mention of hunting or fishing. Seltice aptly demonstrated the Tribe's reliance on farming by pleading with the commissioners to wrap up the 1889 negotiations "because we are under expense and busy with our crops." R. 2116.

After the new Reservation boundaries were ratified in 1891, the Reservation remained intact for a number of years, with the exception of a minor cession of lands for the Harrison townsite, described by a tribal member as "the place where the Indians used to fish." R. 0741, 2202. *See* Act of Aug. 15, 1894, 28 Stat. 386, 322 (confirming cession).

[1] To put these figures into context, the 40,000 bushels of wheat harvested by the 500 member Tribe in 1887, R. 2095, would yield 3,600,000 one-pound loaves of bread. R. 2525.

The year 1906 saw major changes to the Reservation. Congress, over the objections of the Tribe, ordered that each member of the Tribe be given an "allotment" of 160 acres. Act of June 21, 1906, 34 Stat. 325, 335. Allotted lands ceased to be held for the benefit of the Tribe, but instead were held in trust by the United States "for the sole use and benefit" of the allottee. General Allotment Act, Feb. 8, 1887, 24 Stat. 388, 389 (codified at 25 U.S.C. § 348). The allotment policy implemented Congress' "view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). Of the approximately 345,000 acres within the Reservation, 104,076 acres were allotted to the members of the Coeur d'Alene Tribe and members of the Spokane Tribe. R. 2244-45. The Secretary of the Interior was "authorized and directed . . . to sell or dispose of unallotted lands" in the Reservation by opening such "surplus lands . . . to settlement and entry under the provisions of the homestead laws." 34 Stat. at 336. Surplus lands were sold to homesteaders "at not less than their appraised value," *id*., and the proceeds were deposited in the U.S. Treasury to the credit of the Tribe. *Id*. at 337.

Lands allotted to tribal members were concentrated in the agricultural lands in the western portion of the Reservation. R. 2214 (map). Almost all the lands in the stream basins draining into Coeur d'Alene Lake were made available for sale to non-Indian purchasers. *Id*. The conveyance of lands to homesteaders was complete and unqualified: the 1906 Act did not purport to reserve any property rights on behalf of tribal members allowing entry upon or use of the now-private lands.

The General Allotment Act allowed tribal allottees, after a holding period, to acquire fee

simple patents to their allotments. 25 U.S.C. § 348. Once a fee patent was issued, the allotment was no longer federal land: "the United States surrendered its trust by conveying the fee simple title to the Indian allottee or his heirs." *United States v. Reynolds*, 250 U.S. 104, 108 (1919). Fee title was alienable, and a substantial number of allotments were conveyed to non-Indians: by 1933 the total acreage of allotments held by Coeur d'Alene tribal members was reduced to 62,400 acres. R. 2250-51. In 1958 12,878 acres that were made available for purchase under the 1906 Act but never sold were restored to tribal ownership. Act of May 19, 1958, 72 Stat. 121. Since 1958, the Tribe has reacquired other lands within the Reservation—some of those lands have been taken into trust by the United States, and some remain held in fee by the Tribe. R. 3501-03; *see also* map accompanying *Protective Order,* R. 3692 (filed under seal) (showing re-acquired lands not taken into trust as "tribally owned fee" lands).

The result of the various conveyances of land within the Reservation was the creation of a classic "checkerboard" reservation, with federal and tribal land holdings representing only a fraction of lands within the reservation. This is reflected in the United States' water right claims for irrigation, domestic use, and wildlife habitat (springs, seeps, and wetlands), which are all limited to lands within the Reservation either held in trust for the Tribe, held in trust for tribal members, or owned in fee by the Tribe. R. 0009, 0011. The United States' claims for instream flows, however, claim the right to maintain stream levels in Reservation streams regardless of whether the United States or the Tribe holds title to the streambed and/or adjacent lands.

C. Course of Proceedings

On January 13, 2014, the United States Department of the Interior, Bureau of Indian Affairs, acting as trustee for the Coeur d'Alene Tribe, filed 353 claims for reserved water rights. Forty-four claims were made for irrigation of 5,573 acres. R. 0006, 0010. Seventeen claims were made for domestic, commercial, municipal and industrial (DCMI) uses. R. 0005, 0009-10. Twenty-four claims were made for springs and seeps, and 195 claims were made for maintenance of wetlands. R. 0006-07, 0011-12. Claims for springs, seeps, and wetlands were sought for purpose of providing game and waterfowl habitat, plant gathering, and traditional, cultural, spiritual, ceremonial, and/or religious uses. R. 0011. A single claim for maintenance of water levels in Coeur d'Alene Lake was made for purposes of providing food, fiber, transportation, recreation, religious, cultural and ceremonial uses, fish and wildlife habitat, wetland maintenance, water storage, power generation, and aesthetics. R. 0011. Seventy-two claims sought instream flows to provide fish habitat. R. 0010. Of the 72 instream flow claims, 57 were for stream reaches wholly outside the boundaries of the Coeur d'Alene Reservation; 8 additional claims straddle the boundary. R. 4481. All claims were adopted by the Coeur d'Alene Tribe. R. 0004.

The district court consolidated the 353 claims into subcase no. 91-7755, and bifurcated adjudication of the claims into entitlement and quantification phases. R. 0463. The entitlement phase proceeded to summary judgment, in which the court, citing only the purposes of the 1873 Executive Order, held that the primary purposes of the Reservation were "to promote an agrarian lifestyle for its inhabitants" and "to provide the Tribe with waterways for hunting and fishing."

R. 4320-21. Accordingly, the district court concluded that "claims for purposes of uses other than agriculture, fishing and hunting, and domestic use must be disallowed as a matter of law." R. 4324. The court thus disallowed the claim for lake level maintenance, since "[l]ake level maintenance was not a primary purpose of the reservation," R. 4328, but allowed the claim to proceed to quantification based "on its 'fish and wildlife' purpose of use." R. 4302. Likewise, the court allowed claims for springs, seeps, and wetlands to proceed to quantification, but limited the purpose of use to "wildlife and plant habitat for hunting." R. 4302.

In its *Order on Motions for Summary Judgment*, the district court held that the United States was not entitled to water rights for instream flows outside the boundaries of the Reservation. R. 4324-25. The court's *Final Order Disallowing Water Rights Claims*, however, disallowed all 72 instream flow claims, both inside and outside the Reservation, prompting the United States and the Tribe to file a motion to correct what they asserted to be a clerical error. R. 4346. The court ultimately agreed and reinstated 7 instream flow claims wholly within the Reservation and the on-Reservation portions of another 8 claims whose stream reaches straddle the Reservation boundaries. R. 4468, 4481. Another motion filed by the United States and Tribe that sought to reinstate "gathering" as a primary purpose of the Reservation was denied by the court. R. 4356, 4480.

In conjunction with its determination of the primary purposes of the Reservation, the district court determined the applicable priority date of the reserved water rights: "1873" for irrigation and domestic water rights; "time immemorial" for hunting and fishing water rights; and the "date of reacquisition" for "water rights associated with reservation lands homesteaded by non-

Indians and later reacquired by the Tribe," or, if applicable, "the date the homesteader perfected a water right on the homesteaded lands under state law." R. 4326-27. In response to a motion to reconsider filed by the State (R. 4343), the court clarified that the "date of reacquisition" priority date applied not only to homesteaded lands, but also to allotted lands that were conveyed to non-Indians and later reacquired by the Tribe. R. 4474. It also held that because non-Indian land owners could not "appropriate or exercise non-diversionary or instream rights, except for stock-water . . . [s]prings and wetlands as well as other rights lost to non-use would carry a date of re-acquisition priority date." R. 4474.

Following the district court's entry of its *Order Granting Motion to Reconsider and Order on Motion to Set Aside and Modify* (R. 4473, 4479), a notice of appeal was timely filed by the State. The State additionally filed a motion for permissive appeal of the summary judgment order, which was denied by this Court with the notation that "interlocutory orders may be addressed on appeal." *Order Denying State of Idaho's Motion Requesting Acceptance of Appeal by Permission*, Dkt. No. 45321-2017 (Sept. 27, 2017). Notices of appeal were also filed by the Coeur d'Alene Tribe, the United States, and the North Idaho Water Rights Group.

II. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in limiting its determination of the Reservation's purposes to the 1873 Executive Order, without considering whether the purposes of the congressional act establishing a diminished reservation in 1891, that encouraged only farming, superseded the purposes of the 1873 Executive Order Reservation?

2. Whether reserved instream flow water rights to preserve fish habitat survive in those

Reservation stream basins where the Tribe's title to the lands underlying and surrounding the subject stream has since been largely or entirely extinguished by conveyance of the lands in fee simple to non-Indians?

3. Did the district court err in reinstating all instream flow claims within the boundaries of the Reservation, given its concurrent holding that reserved water rights for "instream purposes" are lost through non-use when reservation lands are acquired by non-Indians?

III. ARGUMENT

A. Standard of Review

The standard of review for appeals from summary judgment orders is well established:

> This Court has explained that, when it reviews a summary judgment on appeal, "it does so under the same standards employed by the district court. 'The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits.' Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Idaho R. Civ. P. 56(c). Where the case will be tried without a jury, 'the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.' This Court freely reviews the entire record that was before the district court to determine whether either side was entitled to judgment as a matter of law and whether inferences drawn by the district court are reasonably supported by the record."

Black Canyon Irrig. Dist. v. State of Idaho, ___ Idaho ___, 408 P.3d 899, 904-05 (2018), quoting *Borley v. Smith*, 149 Idaho 171, 176–77, 233 P.3d 102, 107–08 (2010) (citations omitted in original).

"As to issues of law, this Court exercises free review of the trial court's decision." *Hoffer v. Callister*, 137 Idaho 291, 294, 47 P.3d 1261, 1264 (2002). Here, the primary question is one

of governmental intent: "[i]n determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 139 (1976).

Where rights are asserted to be implicit in a treaty's terms, "review of the history and the negotiations of the agreements is central to the interpretation of treaties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). "[A]ppropriate landmarks are, inter alia, the instructions to the treaty commissioners, their report to their superior, the treaty preamble, the President's message transmitting the treaty to Congress and the subsequent treatment given to the terms of the treaty by the United States and the Indians." *Citizens Band of Potawatomi Indians v. United States*, 391 F.2d 614, 619 (Ct. Cl. 1967). Examination of such records allows the court to consider "the context of the treaty negotiations to discern what the parties intended by their choice of words." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202. Examination of a treaty's negotiating history, however, does not render its interpretation a matter of fact. *Bonanno v. United States*, 12 Cl. Ct. 769, 772 (1987). Questions of intent are legal issues: where a government act incorporates or ratifies a treaty or agreement with an Indian tribe, "the interpretation of [the] treaty is a question of law and not a matter of fact." *Citizens Band of Potawatomi Indians*, 391 F.2d at 618.

In determining intent, ambiguities in agreements with Indian tribes are "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they

would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). This is so because of the unequal bargaining position of the parties and because tribal representatives, often working through interpreters, were likely "unfamiliar with all the forms of legal expression" employed in drafting the agreement. *Id.*

But such canons of construction are limited: "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). Nor can the Court employ any "notion of equity or general convenience, or substantial justice," to "incorporate into an Indian treaty something that was inconsistent with the clear import of its words." *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). In short, the court cannot:

> supply a *casus omissus* in a treaty, any more than in a law. We are to find the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops--whatever may be the imperfections or difficulties which it leaves behind . . . .

Id. at 533 (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat) 1, 71-72 (1821)).

B. Reserved Water Rights Are Implied for a Reservation Only Where the Primary Purposes of the Reservation Require the Use of Water and Such Purposes Are "Directly Associated" with the Reservation of Land.

One of the basic tenets of the United States Constitution is that police powers, including the power to regulate the use and exploitation of water resources, are reserved to the several States. U.S. Const. amend. 10. Although federal law can limit the States' sovereign authority, U.S. Const. Art. 6, cl. 2, stringent preemption standards apply to Congressional action when it legislates "in a field which States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*,

331 U.S. 218, 230 (1947). Nowhere is this truer than in the field of water law: the Supreme Court has often remarked upon "the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). Departures from Congress' policy of purposeful deference to state water law may be implied from the withdrawal of land from the public domain for "specific federal purposes," but only if "necessary to fulfill the very purposes" for which the land was withdrawn. *United States v. New Mexico*, 438 U.S. 696, 702 (1978). The limits of the doctrine have been recognized by this and other courts:

> Reserved water rights may be either express or implied. Where Congress does not expressly reserve water rights, an intent to reserve unappropriated water is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. The necessity of water must be so great that without the water the reservation would be entirely defeated. However, if water is only valuable for a secondary use of the reservation, the United States is left to "acquire water in the same manner as any other public or private appropriator."

United States v. City of Challis, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999) (internal citations omitted). The primary issue to be determined in a reserved water rights case is the purpose of the federal reservation. "Water is impliedly reserved for primary purposes. It is not, however, reserved for secondary purposes." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir. 2017) (citing *United States v. New Mexico*, 438 U.S. at 701). There are two parts to the primary purpose test: the court "must determine the primary purpose of the Tribe's reservation and whether that purpose contemplates water use." *Id.* at 1270.

The primary purposes of a reservation are those uses of reserved land actively encouraged, rather than merely permitted, by the agreement, act, or order establishing the reservation. *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 97 (Wyo. 1998); *see also Agua Caliente Band*, 849 F.3d at 1265 (basing primary purpose of reservation on government reports citing need "to encourage tribal members 'to build comfortable houses, improve their acres, and surround themselves with home comforts'") (quoting Comm'r of Indian Aff. Ann. Rep. 224 (1875)).

Water is reserved for primary purposes only if such purposes are "directly associated with the reservation of land." *Agua Caliente Band*, 849 F.3d at 1270. Reservations of land may occur by treaty, statute, or executive order. *Arizona v. California*, 373 U.S. 546, 598 (1963).

C. The District Court Failed to Consider Whether the Congressional Act Approving the 1887 and 1889 Agreements Superseded the Purposes of the 1873 Executive Order.

1. The primary purposes of land withdrawn by executive order, and the rights implied therefrom, do not automatically carry over when a subsequent, congressionally-ratified agreement establishes new purposes for a reservation, particularly where the executive order set aside lands to meet a tribe's immediate subsistence needs and the subsequent congressional action addresses the tribe's permanent needs. This principle is demonstrated by the seminal reserved water rights case, *Winters v. United States*, 207 U.S. 564 (1908), which addressed water rights for the Fort Belknap Reservation. The Fort Belknap Reservation was created by a congressionally-ratified agreement with the occupant tribe in 1888. The agreement established a permanent reservation within the bounds of an earlier, and much larger, reservation that had been set aside by

executive orders and statutes to meet the subsistence needs of five tribes in Montana. In *Winters*, the Court recognized that the earlier reservation had been set apart for the purpose of meeting the tribe's then-existing "habits and wants of a nomadic and uncivilized people." *Id.* at 576. Accordingly, within that earlier reservation, the "Indians had command of the lands and the waters,--command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." *Id*. The Court did not suggest, however, that the Tribe's command of water for purposes of hunting within the earlier reservation continued to apply to the reduced reservation created by the 1888 cession agreement. Rather, the court looked solely to the purposes of the new agreement, which embodied "the desire of the tribe . . . to become a pastoral and civilized people." *Id*.

The foundational principle established by *Winters* is that the primary purposes of the reservation are established by looking forward, not backward, to what the parties anticipated would eventually be the Tribe's permanent means of livelihood, as reflected in the *Winters* Court's reliance on the tribe's "desire . . . <u>to become</u> a pastoral and civilized people." *Id*. (emphasis added). This same forward-looking analysis was employed in *Arizona v. California*, 373 U.S. 546 (1963). There, the Court recognized that, at the time the Indian reservations along the Colorado River were created, "water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.* at 599. While hunting provided subsistence at the time of reservation, the Court did not imply reserved water rights for such activity, because it was clear that the United States understood that irrigated agriculture, not hunting, was to be the foundation of the tribes' long-term livelihood. R. 2230 (*Arizona v. California* Special

Master's report concluding that the "United States intended to reserve mainstream water for the reasonable future needs of the … Indian Reservations . . . it was intended that the Indians would settle on the Reservation land and develop an agricultural economy").

Because reserved water rights are implied only by a tribe's permanent needs, the *Winters* Court did not consider the purposes of the earlier reservation, which had been established to address "the habits and wants of a nomadic and uncivilized people." 207 U.S. at 576. Instead, the Court held that the Tribe's need for water rights "as we view it, turns on the agreement of May, 1888, resulting in creation of the Fort Belknap Reservation." *Id.* at 575. The Tribe's uses of water on the earlier, larger, reservation, were irrelevant, because the carving out of a new, smaller reservation within the bounds of the old reservation was a "change in condition." *Id*. In a case addressing another of the reservations created by the agreement that created the Fort Belknap Reservation, the Court held that the rights held by the tribe rested "entirely on the agreements or conventions [establishing a new reservation] which were ratified and given effect by Congress" because the executive orders establishing the earlier reservation were "designed to be temporary" and were "superseded by congressional action and no longer are of any force." *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S. 159, 163 (1936).

Here, the district court based its holding solely on the purposes of the 1873 Executive Order, R., 4320-22, and failed to examine the "change in condition" that occurred as a result of the 1887 and 1889 Agreements. Such examination reveals that the primary purpose of the reduced reservation was to fulfill the Tribe's desire to establish a permanent livelihood based primarily on agriculture.

2. The Executive Order of November 8, 1873 (R. 2031) was intended to set apart lands for the use of the Tribe pending congressional action upon the 1873 Agreement, which would have ceded the Tribe's aboriginal lands and established a permanent reservation for the Tribe. The district court relied primarily on the 1873 Agreement to define the purposes of the Reservation, R. 4320-22, despite the fact that the Agreement, by its terms, was "null and void and of no effect" if not approved by Congress. R. 1349. Congress never ratified the 1873 Agreement. Instead, fourteen years later, Congress ordered new negotiations with the Tribe for the cession of their lands outside the limits of the 1873 reservation. Act of May 15, 1886, 24 Stat. 29, 44. Upon receiving the resulting agreement, which would have made the 1873 boundaries permanent,[2] Congress chose not to ratify the agreement, and instead directed the Department of the Interior "to negotiate with the Coeur d'Alene tribe of Indians 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. While not stated in the Act itself, the federal courts have determined that the intent of the 1889 Act "was to regain from the Tribe whatever submerged lands it was willing to sell." *United States v. Idaho*, 210 F.3d at 1077 n.14. The resulting 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,

[2] Absent congressional confirmation, a reservation established by executive order could be withdrawn by the President at any time without compensation to the occupant tribe. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 330 (1942) ("[i]t was a common practice during the period in which reservations were created by executive order for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it").

in exchange for $500,000." *Idaho v. United States*, 533 U.S. at 269-70.

Congress ratified the 1887 and 1889 Agreement together, in the 1891 Act, 26 Stat. at 1028. The plain language of the 1891 Act, when viewed in the context of the negotiations leading to the agreements approved therein, establishes that the primary purpose of the Act was to encourage the Tribe in its agricultural endeavors. During the 1887 negotiations, Chief Seltice, who led negotiations for the Tribe, stated:

> We are on only a small part of our country—I mean this reservation. Here we have made our homes; here we have built our houses; here we have our fences, our farms, our school-houses, our churches. Here are our wives and our children; here are the graves of our ancestors; here are our hearts; here we have lived, and here we wish to die and be buried. We want these preserved forever.

R. 2157. Seltice's statement echoes a letter that Tribal leaders had penned several years earlier in response to a rumored petition by white settlers to open arable reservation lands to settlement and remove the Tribe to lands east of the St Joe River:

> Are we squirrels or the like animals, thus to drive us into a wilderness, where nothing can be raised to support people? Or are we fishes, that we should be made to live in the water? We say that we are men, as well as any whites are. From the land they would take away, we get our food, our clothing & whatever we are in need of. For we till our land, raise crops, keep herds of cattle & thus provide for ourselves.

R. 3399-3400.

Given the Tribe's repeated emphasis on protecting its farm lands, it is no surprise that protecting tribal farms was the focus of the 1889 negotiations. Commissioner Benjamin Simpson opened negotiations by stating:

> The time is come when you, like the whites, should depend upon the cultivation of the soil. You have progressed astonishingly. When we look at your broad

> acres now in cultivation we are astonished and gratified. We know that the cultivation of the soil is the very foundation of civilization, prosperity, and wealth.

R. 2114. Later, Commissioner J. H. Shupe concluded negotiations by stating:

> When the conditions of these agreements are settled you will still have plenty of land left for farming and pasture, and the money that you will receive will enable you to improve your farms, and give you a community that will be far wealthier than your neighbors, the whites.

R. 2119 (emphasis added). Accordingly, the negotiations centered on protecting the core of the Tribe's farmlands. The Tribe's negotiators were hesitant to part with any land, but eventually expressed a willingness to relinquish lands on the northern part of the reservation that "have plenty of timber, plenty of mineral, and plenty of grass." R. 2115.

At no time during the negotiations did the Tribe express concern over loss of hunting or fishing grounds, nor did the parties discuss any need for protection of hunting and fishing rights. The parties did agree to tribal retention of the lower part of Coeur d'Alene Lake and the St. Joe River, but again the emphasis was on the area's usefulness for agricultural purposes—General Simpson stated: "Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joe River." R. 2115.

A reservation's primary purposes are determined by identifying those uses of land that are actively encouraged by act, agreement, or order, rather than merely permitted. The Wyoming Supreme Court, determining whether water rights for hunting were reserved by the treaty that created the Wind River Reservation, found that the "treaty encouraged only agriculture, and that was its primary purpose." *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d at 97. The treaty's inclusion of an explicit hunting right was not

sufficient to deem hunting a primary purpose of the reservation, for hunting was permitted by the treaty's terms, rather than encouraged. *Id*. "The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion," nor did evidence of continued hunting and fishing for many years after the treaty. *Id*. at 97-98.

Here, the 1887 and 1889 Agreements actively encourage the Tribe's agricultural endeavors, but lack any provisions encouraging the use of Reservation lands for hunting or fishing. Hunting and fishing rights were never mentioned or reserved, only implied by the provision promising to hold the Reservation "forever as Indian land." 26 Stat. at 1028. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) ("the language 'to be held as Indian lands are held' includes the right to fish and to hunt"). But nothing in the Agreements or in the negotiations encourages hunting and fishing as a primary use of Reservation lands or as a permanent means of livelihood: the Tribe's own negotiators emphasized that their primary purpose was to protect their farms, *supra* p. 23 and R. 2157 (statement of Chief Seltice) and Congress expressly intended to support such purpose by providing funds and resources to "promote the progress, comfort, improvements, education, and civilization of said Coeur d'Alene Indians." 26 Stat. at 1028, 1031. Because the primary purpose of encouraging agriculture is explicit on the face of the Agreements, the Court need not, and should not, supply a *casus omissus* by implying a primary purpose that the parties themselves failed to express.

D. Instream Flows Cannot be Awarded on Waterways Within those Portions of the Reservation No Longer Reserved for the Tribe's Exclusive Use and Benefit.

Even if the district court were correct to conclude that the primary purposes of the 1891

Act did not supersede the purposes of the 1873 Executive Order, it still erred in finding the Tribe entitled to instream flows on all Reservation streams without addressing whether water rights for hunting and fishing survived the alienation in 1906 of over three quarters of the Reservation. The court's omission is especially puzzling in light of the court's later acknowledgment, in granting a motion to reconsider the proper priority date for springs and wetlands on lands reacquired by the Tribe, that "to the extent [reserved water] rights are non-diversionary or are for instream purposes, such rights would be lost through non-use" once reservation lands were conveyed to non-Indians, so that, upon reacquisition by the Tribe, the reserved water right would "carry a date of reacquisition priority date." R. 4474. The Court's holding is based, correctly, on the premise that non-diversionary rights do not survive on reservation lands sold in fee to non-Indians, and thus must acquire a new priority date when the lands are again taken into trust by the United States. The necessary corollary of such premise is that the United States cannot claim non-diversionary reserved water rights to protect fish and wildlife habitat on lands not currently held in trust for the Tribe. Indeed, the United States' claims embody this premise by decrying any intent to claim water rights for wildlife habitat on private lands. R. 0011 ("[t]his claim is for a sufficient amount of water to maintain wetlands, springs, and seeps <u>on Tribal lands</u> within the Reservation") (emphasis added). This same premise applies as equally to fish habitat as it does to wildlife habitat, and the district court erred by not disallowing instream flow claims to protect fish habitat on alienated Reservation lands.

1. The reservation of lands for a tribe's exclusive use and occupation may imply the res-

ervation of certain ancillary rights necessary to fulfill the Tribe's purposes and needs. Rights implied from the setting aside of lands for a tribe's exclusive use may include hunting and fishing rights, *Menominee Tribe of Indians*, 391 U.S. at 406, and, in certain circumstances, water rights necessary to support hunting and fishing. *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983). But, in such instances, the foundation upon which implied water rights are grounded is a reservation both of title and beneficial use in the land itself for the communal use of the tribe: "[a] reserved water right must be based on a reservation of land." *United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999).

The history of Indian reservations, and the Coeur d'Alene Reservation in particular, is that property rights initially reserved for a tribe's communal use did not always survive subsequent congressional actions that opened reservation lands to non-Indian settlement. For such reason, the determination of whether a tribe is entitled to reserved water rights cannot stop with the federal action initially setting aside the reservation.

Land within reservations was originally held as "Indian land," or communal property. "Tribal lands are communal property . . . ." *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 913 (Ct. Cl. 1963). "Such communal holding of property is in accord with normal Indian custom. Land is so held whether by Indian title or after creation of a reservation." *Whitefoot v. United States*, 293 F.2d 658, 661 (Ct. Cl. 1961). Communal property was often held for the purpose of preserving hunting and fishing opportunities. *See Montana Power v. Rochester*¸ 127 F.2d 189, 192 (9th Cir. 1942) ("[t]he Indian society is communal in character rather than in-

dividualistic; that is particularly true of the hunting and fishing grounds of the Indians"). Communal property rights ceased, however, when the reservation was allotted, with each tribal member being assigned a parcel of land for their individual use:

> In the latter half of the nineteenth century, large sections of the western States and Territories were set aside for Indian reservations. Towards the end of the century, however, Congress increasingly adhered to the view that the Indians tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West. As a result of these combined pressures, Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.

Solem v. Bartlett, 465 U.S. 463, 466–67 (1984); *see also Nebraska v. Parker*, 136 S. Ct. 1072, 1077, 194 L. Ed. 2d 152 (2016) (allotment was a "means of encouraging [tribal members] to depart from the communal lifestyle of the reservation"); *Hodel v. Irving*, 481 U.S. 704, 706 (1987) (allotment acts "divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement").

Congress ordered allotment of the Coeur d'Alene Reservation in the Act of June 21, 1906, with each tribal member receiving a trust patent to 160 acres. 34 Stat. at 335. By law, such patents were held in trust for the "sole use and benefit of the Indian to whom such allotment shall have been made . . . ." General Allotment Act, Feb. 8, 1887, 24 Stat. 388 (codified at 25 U.S.C. § 348). In other words, once allotted, lands are held for the individual benefit of the allottees, not the communal benefit of the Tribe. *Arenas v. United States*, 322 U.S. 419, 420–21 (1944) ("communal land holdings of the Indians were superseded by allotment to individuals").

Allotment also affects water rights: upon allotment, "'the right to use some portion of tribal waters essential to cultivation passed to the owners.'" *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981) (quoting *United States v. Powers*, 305 U.S. 527, 532 (1939)).

In conjunction with allotment of the Coeur d'Alene Reservation, Congress made all unallotted or "surplus" lands available for sale to non-Indians. Act of June 21, 1906, 34 Stat. at 336. Even more so than allotment, the sale of surplus lands had a profound impact on communal rights implied from the previous reservation of the lands for the tribe's exclusive use. It is generally acknowledged that the United States, in opening reservation lands to non-Indian purchasers, sought to extinguish tribal possessory rights "so that, as their trustee, it could make perfect title to purchasers." *Ash Sheep Co. v. United States*, 252 U.S. 159, 165-66 (1920). Thus, upon sale of reservation land to non-Indians, the tribe "loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Any rights implied from the setting aside of lands for the Tribe's communal use are likewise lost. This includes water rights: "a homesteader acquires no federal water rights incident to the transfer of public lands into private ownership [once land] is conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *United States v. Anderson*, 736 F.2d. 1358, 1362-63 (9th Cir. 1984).

2. Because reserved water rights are implied from the United States' reservation of land for a tribe's exclusive benefit, it is axiomatic that such rights are implied only so long as the United States retains the lands for the purpose that is the basis for implying the water right. That

being the case, implied water rights survive the sale of surplus lands only if the United States either: (1) acts to explicitly retain water rights on the alienated land; or (2) in rare cases, holds sufficient property back from the alienation to imply the reservation of the right to control uses of the alienated lands as necessary for the use and enjoyment of the retained property.

"The government, as the owner of land, may attach any condition it sees fit upon parting with its title; or it may grant a qualified and limited estate and reserve the right to control the property . . . ." *State v. Lott*, 21 Idaho 646, 123 P. 491, 496 (1912). There is nothing in the 1906 Act, however, that indicates congressional intent to retain hunting and fishing rights, or any tribal property rights whatsoever, in homesteaded lands. The Secretary of the Interior was directed to "sell or dispose of unallotted lands" without qualification. Act of June 21, 1906, 34 Stat. at 335. Lands were classified as agricultural, grazing, or timber lands, then sold to homesteaders "at not less than their appraised value." *Id*. at 336. The "net proceeds arising from the sale and disposition of the land" were to be expended for the Tribe's benefit or "paid to the Indians in cash per capita." *Id*. at 337. In short, Congress directed that the Tribe's property rights in opened lands would be conveyed in return for payment to the Tribe of the full appraised value of the lands. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (court may not question validity of conveyance of tribal property where Congress "purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit"). No property rights were held back from the conveyance. "When the patent issued, the full legal title passed to the patentee. He could do with the land that which he saw fit, sell, or give it away." *Hartman v. Butterfield Lumber Co*., 199 U.S. 335, 336 (1905); *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir.

1981) ("[w]e have also held that a patent pursuant to the homestead laws conveys all incidents of title free from any implied easement"); *Fort Berthold Reservation v. United States*, 390 F.2d 686, 698 (Ct. Cl. 1968) (Tribe's "permanent possession and use of the surplus, unallotted, and unreserved reservation lands terminated when the homesteader actually entered and settled upon the tract chosen by him").

Moreover, Congress did not merely open lands within the Reservation to non-Indian ownership: it required that the new owners settle the lands "under the provisions of the homestead laws." 1906 Act, 34 Stat. at 336. This is particularly relevant because the homestead laws required settlers to cultivate the land and provide proof of such cultivation. Homestead Act of May 20, 1862, 12 Stat. 392, 393. The Tribe's claims that Congress intended to preserve fish habitat on opened lands for the Tribe's benefit cannot be reconciled with Congress' imposition of an affirmative duty upon buyers to settle and cultivate the land.

3. The 1906 Act's lack of explicit intent to hold back communal water rights for fish habitat from alienation is fatal to the Tribe's claims, for property rights on alienated lands do not exist by implication except in the rarest of circumstances. The Supreme Court has held repeatedly that if lands reserved for a tribe's exclusive use are alienated to nonmembers, all rights implied from the previous setting aside of land for the tribe's use are either conveyed to the nonmember purchasers or cease to apply. The benchmark decision is *Montana v. United States*, 450 U.S. 544 (1981), which addressed the authority of the Crow Tribe to protect fish and wildlife resources on its reservation. Such authority over fish and wildlife was implied from the setting

aside of lands for the Tribe's "absolute and undisturbed use and occupation." *Id*. at 558-59. After allotment of its reservation, and sale of a substantial number of allotments to nonmembers, the Tribe asserted that it retained the right to prevent hunting by nonmembers on the alienated allotments. While the Court acknowledged that the nonmember lands remained part of the reservation, the Court held that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Id*. at 561.

A consequence of alienation was that the Tribe lost the property owner's right to exclude others, and the lesser-included right to protect wildlife resources by prohibiting hunting, because such right "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" *Id*. at 559 (quoting Fort Laramie Treaty, 15 Stat. 649 (1868)); *see also Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (holding that *Montana* "rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude'").

In short, *Montana* stands for the common-sense proposition that the United States' unqualified alienation of Reservation lands includes all property rights the Tribe formerly held as the landowner, whether express or implied, unless such rights were reserved explicitly in the act authorizing such alienation, or, in rarer cases, the reservation of right can be implied unambiguously from the circumstances surrounding alienation.

Montana does not stand alone. Its core principle that rights implied by the reservation of lands are lost when land is alienated has been repeatedly applied by the Supreme Court. One case especially on point is *Puyallup Tribe, Inc. v. Department of Game of State of Wash*., 433

U.S. 165 (1977) (*Puyallup III*), which was cited in *Montana*. There, the Court was asked to determine whether a fishing right implied from the reservation of riverside lands for a tribe's exclusive use continued to apply despite the alienation of all but 22 acres within the original 18,000 acre reservation. The Tribe asserted that the treaty setting aside the lands for the tribe's exclusive use "amount[ed] to a reservation of the right to fish free of state interference." *Id*. at 174. The Court concluded, however, that "such an interpretation clashes with the subsequent history of the reservation." *Id*.[3] Thus, the Tribe's fishing on alienated lands was "subject to reasonable regulation by the state pursuant to its power to conserve an important natural resource." *Id*. at 175. The Court's conclusion that preservation of fish and game on alienated reservation lands is a matter subject to state, not tribal, authority, is as applicable to instream flows for fish habitat as it is to the fish themselves.

Another case addressing tribal authority to preserve natural resources on nonmember fee lands is *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The Yakima Reservation consisted of two distinct areas: a "closed" area wherein approximately 97 percent of the lands were retained by the Tribe, and an "open" area wherein approximately half the lands were owned by nonmembers. *Id*. at 415-16. The Tribe sought to regulate use of lands by nonmembers to preserve natural resources and wildlife habitat in the closed area, and agricultural lands in the open area. *Id*. at 438. The Tribe asserted the right to control

[3] The Tribe lost the exclusive right to fish implied from the since-abrogated setting aside of lands for the Tribe's sole use, but retained the non-exclusive right to enter the alienated lands and fish under a treaty provision allowing the tribe to fish at usual and accustomed place in common with non-Indians, *Puyallup III*, 433 U.S. at 174. The agreements with the Coeur d'Alene Tribe lack any such provision.

use of all reservation lands based on a treaty provision setting aside the reservation "for the exclusive use and benefit" of the Tribe. Justice White, writing for a plurality, stated: "We disagree. The Yakima Nation no longer retains the 'exclusive use and benefit' of all the land within the reservation boundaries established by the Treaty with the Yakimas." *Id*. at 422 (citing *Puyallup III* and *Montana*).

Justice White's plurality opinion in *Brendale* would have flatly rejected any tribal control over uses of nonmember lands to preserve resources of interest to the tribe. *Id*. at 425. Justice Stevens, in a concurring opinion which controlled the outcome of the case, likewise concluded that it was "improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy." *Id*. at 437. Stevens thus joined the plurality in rejecting tribal control of land use on the "open" portion of the reservation, where about half the lands were owned by nonmembers. Stevens, however, held that in the "closed" part of the reservation, where 97 percent of the lands were held for the Tribe's use, it was "inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community." *Id*. at 437. In such extraordinary circumstances Steven's concurring opinion recognized tribal authority to require preservation of natural resources on nonmember fee lands.

In subsequent cases, the Court has characterized the *Brendale* holdings as "turn[ing] on the extent to which the Tribes maintained ownership and control over the areas in which the parcels were located." *Nevada v. Hicks*, 533 U.S. at 390 (citing *Brendale*, 492 U.S. at 438-44 (opinion of Stevens, J.)). Likewise, the Court has emphasized that the lack of tribal rights to restrict

the use of nonmember lands is the norm, given that the *Brendale* decision merely authorized tribal zoning "on nonmember fee land isolated in 'the heart of a closed portion of the reservation'. . . ." *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 333-34 (2008) (quoting *Brendale*, 492 U.S. at 440 (opinion of Stevens, J.) (internal alteration omitted)).

A final case addressing the loss of rights on alienated reservation lands is *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), which addressed the fishing rights of the Yurok Indians on the Klamath Indian Reservation, which was established by an executive order that specifically encompassed the Yurok's fishing grounds along a 20 mile stretch of the Klamath River. *Id*. at 911. Several decades after its establishment, the Reservation was allotted, and surplus lands were opened to homesteading. *Id*. at 908. A timber company that had purchased a number of former allotments challenged the right of the Yurok Indians to enter its lands to hunt and fish. The court acknowledged that "when the Reservation was first created," hunting and fishing were "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id*. at 909 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

Despite such fact, the court held that "any interest in the land that might be implied from the mere creation of the reservation," including implied fishing rights, did not survive alienation of the lands to non-Indians. *Id*. at 911. The United States' grant of fee title to allotments granted the allottee and any non-Indian successors title "in fee . . . and free of all charge and incumbrance whatsoever." *Id*. at 910 (quoting General Allotment Act, § 5, 24 Stat. 388, 389). In light of such language, the court concluded that no tribal property rights, including an "equitable servitude that benefits the tribe and burdens the land," could encumber allotted lands. *Id*. The court

held that the same was true for lands opened to homesteading: "a patent pursuant to the homestead laws conveys all incidents of title free from any implied easement." *Id*. at 911.

Importantly, the *Blake* decision distinguished the holding in *United States v. Winans*, which held that a treaty provision guaranteeing the signatory tribes the right to fish at "usual and accustomed places" imposed a servitude upon such fishing places that continued to apply after the property was patented to non-Indian settlers. 198 U.S. at 381. The *Blake* court held that even though the Klamath Reservation was undoubtedly created to provide access to the Yurok Tribe's traditional fishing places, it could not imply a servitude similar to that in *Winans* because "we find no such express reservation or creation of fishing or hunting right" in the documents that created the reservation. 663 F.2d at 911.

The rationales of *Puyallup III*, *Montana*, *Brendale* and *Blake* are particularly applicable to instream flow claims, which "entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983). Such a water right, whether deemed a property right, a servitude, or a regulatory right to restrict water use and maintain natural conditions, does not survive the unqualified alienation of reservation lands, particularly where (as here) non-Indian fee land holdings are substantial. *See Bourland*, 508 U.S. at 689 (when a tribe's lands are conveyed in fee "to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands," including the right to prevent taking of fish and game). If a tribe lacks the right to hunt and fish on alienated land, and lacks the right to prevent the direct taking of fish and game by the non-Indian owners, it is axiomatic that it likewise lacks the right to prevent those same

owners from taking fish or game through depletion of instream fish habitat.

The application of these principles is particularly apt on the Coeur d'Alene Reservation. According to the Tribe's map of *Tribal Lands at Claim Locations and Adjacent to Reservation Streams* (filed under seal), the overwhelming majority of land within the twelve on-reservation stream basins that drain into Coeur d'Alene Lake and the St. Joe River are privately-held fee lands.[4] The fee owners possess absolute, unqualified title to such lands—Congress did not explicitly reserve a servitude or other property right allowing the Tribe to assert ownership and control over streams flowing over or through private lands, and there is insufficient tribal ownership of the streambeds and surrounding lands to imply intent to retain tribal control of stream flows.

3. There are three decisions by the Ninth Circuit Court of Appeals that recognize reserved water rights for instream flows within Indian reservations despite non-Indian fee ownership of some lands along the claimed streams. The three Ninth Circuit cases are *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); and *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). As discussed below,

[4] The twelve claims dominated by private fee lands are: 92-10906 (Cherry Creek), 92-10907 (Alder Creek), 94-9244 (Black Creek), 94-9425 (Willow Creek), 94-9246 (Evans Creek), 95-16678 (Fighting Creek), 95-16679 (Lake Creek), 95-16680 (Plummer Creek), 95-16681 (Little Plummer Creek), 95-16682 (Pedee Creek), 95-16683 (Benewah Creek), and 95-16684 (Windfall Creek). *Compare* R. 4479 (*Order on Motion to Set Aside and Modify)* with R. 3692 (*Protective Order* & map filed under seal). Because the tribe owns the beds and banks of the St. Joe River, the State does not contend that alienation of reservation lands affected instream flow rights in the St. Joe River (91-7777), if the Court concludes preservation of fish and game habitat was a purpose of the Reservation. Two other claims for Hangman Creek (93-7469 and 93-7470) may require additional fact-finding to determine if such claims meet the high threshold established in *Brendale* for implying intent to reserve control over uses of land (and, presumably, instream fish habitat) by non-Indian landowners.

the result in each instance is consistent with the holdings in *Puyallup III*, *Montana*, *Brendale* and *Blake*, and factually distinguished from the situation presented on the opened Coeur d'Alene Reservation.

Adair: In *Adair*, the court addressed the unique situation of the Klamath Indian Reservation, which was "terminated" in accordance with a since-abandoned policy adopted by Congress in the 1950s that sought to end the trust relationship between the United States and Indians. The Klamath Reservation had been allotted in the early 20th century, but at the time of termination 75% of the original reservation remained held in trust for the Tribe and its members. 723 F.2d at 1398. As part of termination, the United States purchased or condemned the remaining trust lands, and retained most of them for use as a national forest and wildlife refuge. As a result, 70% of the former reservation remained in federal ownership after termination. *Id.*

The Klamath Reservation had originally been reserved in 1864, and one of the "'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Id.* at 1409. Thus, the court implied intent to "reserve a quantity of the water flowing through the reservation . . . for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands." *Id.* at 1410. The water right was non-consumptive, so that it "consist[ed] of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *Id.* at 1411.

The non-Indian owners within the Reservation argued, much as the State does here, that

"the Tribe can no longer hold a water right to support its treaty hunting and fishing rights because the Tribe no longer owns land to which this water right is appurtenant." *Id*. at 1415 n. 24. Such argument failed, however, in light of two statutory provisions unique to the Klamath Termination Act and its related legislation.

The first provision, 25 U.S.C. § 564m(b), expressly retained within the terminated reservation those fishing rights reserved to the Tribe by treaty. The court relied on an earlier decision, *Kimball v. Callahan*, in which the court had held that the treaty provision reserving the "exclusive right" to fish within the Reservation, in combination with the "Klamath Termination Act [which] expressly provided that nothing in the Act would abrogate the fishing rights secured by the Treaty," were sufficient to "protect the exercise of those treaty rights on the lands constituting the ancestral Klamath Indian Reservation." *Kimball v. Callahan*, 590 F.2d 768, 774 (9th Cir. 1979). The court in *Kimball* distinguished the Klamath Tribe's expressly-reserved fishing rights from the implied fishing rights lost upon alienation of allotted lands in *Puyallup III*, with the caveat that the "transfer of reservation lands . . . may affect treaty rights by converting the exercise of those rights from exclusive to non-exclusive." *Id*.

The second provision cited by the *Adair* court was Section 564m(a) of the Termination Act, which provided "[n]othing in sections 564–564w of this title shall abrogate any water rights of the tribe and its members." *Id*. at 1412 (citing 25 U.S.C. § 564m(a)). As the court noted "[t]his provision admits no exception." *Id*. This led the court to conclude that "[b]ecause Congress in section 564m of the Termination Act explicitly protected tribal water rights and nowhere in the Act explicitly denied them, we can only conclude that such rights survived termination."

Id. at 1412.

In short, *Adair* establishes only the unremarkable proposition that where the United States retains ownership of 70% of former reservation lands, and Congress explicitly reserves the Tribe's fishing rights and water rights on former reservation lands, whether or not in private ownership, instream flows implied from the original setting aside of the lands for the Tribe's exclusive use continue to apply to streams and rivers within the former reservation. *Adair* finds no application to the Coeur d'Alene Reservation, which, unlike the former Klamath Reservation, is mostly owned in fee simple by non-Indians, with little or no retained federal lands within its boundaries. More importantly, unlike the Klamath Termination Act, Congress did not act to preserve fishing and water rights in the 1906 Act that opened the Reservation to homesteading. 34 Stat. at 335-38.

Walton: In *Walton*, the court addressed another unique situation involving a tribal instream flow claim to a small, on-reservation waterway named, appropriately, No Name Creek. The creek ran through a row of seven allotments. Four allotments were owned by the Tribe or leased by the Tribe from the allottees. 647 F.2d at 45. The court assumed that "none of the Tribe's allotments ever passed from Indian ownership." *Id*. at 45 n.5. The middle three allotments were held by Walton, a non-Indian. *Id*. at 45. The creek emptied into Omak Lake, in which the Tribe had established a non-native fishery to replace fish lost due to the damming of the Columbia River, which bordered the Colville Reservation. *Id*. at 48. The non-native fish "thrive[d] in the lake's saline water, but need[ed] fresh water to spawn." *Id*. at 45. "The Indians cultivated No Name Creek's lower reach [that ran through three tribal allotments] to establish

spawning grounds but irrigation use depleted the water flow during spawning season." *Id*.

The court held that the Tribes "have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery [including] the right to sufficient water to permit natural spawning of the trout." *Id*. Because the trout spawned only in the lower reach of the creek, which ran through three tribal allotments, the *Walton* decision establishes only that when tribal allotments form the majority of lands in an isolated stream basin, the Tribe may be entitled to an instream flow water right to support fish spawning on those portions of the creek running through tribal lands. In short, because the spawning grounds remained under federal ownership in trust for the Tribes and had never been alienated, reserved water rights for those lands continued to apply.

Walton has no application to the present claims for instream flows on streams running entirely, or nearly so, through private fee lands. Unlike the Omak Lake fishery at issue in *Walton*, the Tribe has not shown that it owns or controls the majority of the stream beds, with the exception of the St. Joe River (decreed to the Tribe in *U.S. v. Idaho*), and possibly portions of Hangman Creek. Absent such a showing, the Court must decline any invitation to employ *Walton* as precedent for the Tribe's claims.

Anderson: In *Anderson*, the Ninth Circuit addressed another unique set of circumstances that led it to conclude that the tribe had an instream water right to support a tribal fishery. The fishery was in Chamokane Creek, which formed the eastern boundary of the Spokane Indian Reservation. 736 F.2d at 1366. The reservation boundary did not go down the middle of the Creek. Rather, the boundary was drawn along the east bank of the Creek in order to reserve the

breadth of the creek for the Tribe's use. Ex. Order of Jan. 18, 1881, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 925 (1904). Given these unique circumstances, the district court concluded that "maintenance of the creek for fishing was a purpose for creating the Reservation." *United States v. Anderson*, 591 F. Supp. 1, 7 (E.D. Wash. 1982).

The Spokane reservation was later allotted and opened to homesteading. *Anderson*, 736 F.2d at 1361. None of the parties in the case, however, asserted that the allotment and opening of the Reservation had affected the Tribe's right to enter or fish on Chamokane Creek. Rather, the district court recognized that the Tribe had a continuing right of "access to fishing areas" along the Creek and thus a "reserved right to sufficient water to preserve fishing in the Chamokane Creek." *Anderson*, 591 F. Supp. at 5. The court's holding must be understood in the context of its unstated assumption that the Tribe retained either the bed of Chamokane Creek or sufficient uplands along the Creek such that opening of the reservation did not affect the Tribe's fishing rights in the Creek; indeed, the court noted that the Spokane Tribe had reacquired "much" of the former allotments and homesteaded lands in the Chamokane Creek basin. 736 F.2d at 1361. Tribal ownership is also demonstrated by the district court's award of water to the Tribe for irrigation purposes for lands in the Chamokane Creek basin. *Anderson*, 591 F. Supp. at 7.

In short, *Anderson* is based on the assumption, unchallenged by any party, that the Tribe held sufficient property so in and along Chamokane Creek so as to provide it control over the fishery in the Creek. Thus, the court did not address the issue presented here, i.e., whether hunting and fishing rights, and associated water rights, survive on non-navigable waterways in stream basins that are owned entirely, or nearly so, by non-Indians due to the opening of the Reservation

to homesteading.

A decision does not establish controlling precedent if the court did not "consider[] the question" because the issue was uncontested by the parties. *State v. Cutler*, 109 Idaho 448, 451, 708 P.2d 853, 856 (1985); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"). Thus, *Anderson* does not establish, as a general proposition, that water rights for hunting and fishing survive the alienation of the streams that such rights are supposed to preserve. Even if *Anderson* were viewed as precedent for establishing instream flow water rights on streams with a mix of private and tribal lands, it still could not be reliably applied to the present claims, because there are insufficient facts to establish a mix of private and tribal lands comparable to the situation presented in *Anderson*.

Indeed, the only fact that can be gleaned from *Anderson* is that the Tribe had a sufficient property interest in Chamokane Creek to allow it fishing access. Here, the Tribe and the United States have not asserted a right of fishing access on all the claimed streams; rather, they have simply argued that it does not matter whether the Tribe has fishing access or not. R. 3553 (U.S. Response Brief) ("[t]he instream flow water right claims on behalf of the Coeur d'Alene Tribe do not rely on rights to fish on private lands"); R. 3149 (Tribe Response Brief) ("[t]he Tribe does not claim in this adjudication the right to enter on to non-Indian fee lands for any purpose related to these non-consumptive instream flow water rights"). *Anderson* simply does not support the assertion that a tribe is entitled to a reservation of instream flow water rights regardless of

whether the tribe has to right to access the stream to conduct a fishery.

d. In sum, in allotting the Coeur d'Alene Reservation and selling its surplus lands, Congress did not specifically reserve hunting, fishing, and water rights, as it did when terminating the Klamath Reservation. Nor did the Tribe retain sufficient lands in and along the streams on the opened portion of the Reservation to preserve fishing rights and provide it control of spawning and rearing habitat, as was the case in *Walton*, and presumably, *Anderson*. If anything, the opened portions of the Coeur d'Alene Reservation are most akin to *Puyallup III* and *Blake*, where the courts held that rights implied from the setting aside of lands for a tribe's exclusive use did not survive the alienation of those same lands. If implied fishing rights fundamental to a tribe's survival do not survive alienation of lands, the same must necessarily hold true for implied water rights. Once Congress has determined that land no longer need be held to provide for a tribe's hunting and fishing needs, the same determination applies to water rights to preserve fish and wildlife habitat on those same lands.

IV. CONCLUSION

The State respectfully requests that this case be remanded to the district court with an order to disallow all claims for reserved water rights for hunting and fishing purposes, including reserved water rights to maintain instream flows, water rights to maintain springs and seeps, water rights to maintain wetlands, and a water right for a portion of Coeur d'Alene Lake for hunting and fishing purposes. In the event this Court denies such relief, the State requests, alternatively, that this case be remanded to the district court with an order to disallow all instream flows on those non-navigable streams within the Reservation that flow entirely, or primarily, through non-

Indian fee lands,[5] and with an order to engage in fact-finding to determine whether the United States holds sufficient land along Hangman Creek in trust for the Tribe to imply intent to retain control of the two claimed minimum stream flows on Hangman Creek.[6]

RESPECTFULLY SUBMITTED this 23rd day of February, 2018.

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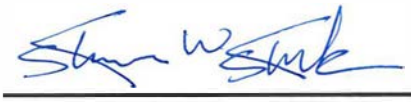
CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2018, I caused to be filed with the Supreme Court by hand-delivery and email the foregoing document, and caused copies of the same to be served by U.S. Mail and email to the persons listed on the cover page(s).



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[5] Claim Nos. 92-10906 (Cherry Creek), 92-10907 (Alder Creek), 94-9244 (Black Creek), 94-9425 (Willow Creek), 94-9246 (Evans Creek), 95-16678 (Fighting Creek), 95-16679 (Lake Creek), 95-16680 (Plummer Creek), 95-16681 (Little Plummer Creek), 95-16682 (Pedee Creek), 95-16683 (Benewah Creek), and 95-16684 (Windfall Creek

[6] Claim Nos. 93-7469 and 93-7470.