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In re CSRBA Case No. 49576 Subcase No. 91-7755 Respondent's Brief 2 Dckt. 45383

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: CSRBA CASE NO. 49576 SUBCASE NO. 91-7755 (353 Consolidated Subcases) COEUR D'ALENE TRIBE, et al., Appellant, v. THE STATE OF IDAHO, et al., Respondents.	**SUPREME COURT DOCKET** **45383-2017**

RESPONSE BRIEF OF
NORTH IDAHO WATER RIGHTS ALLIANCE, ET AL.

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

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") district court decision, granting in part and denying in part cross-motions for summary judgment, regarding claims by the United States for federal reserved water rights in connection with the Coeur d'Alene Indian Reservation. Separate appeals regarding other aspects of the district court's summary judgment determination have been filed by the State of Idaho (Docket No. 45381) and the North Idaho Water Rights Alliance, et al. (collectively referred to as "North Idaho Water Rights Group" or "NIWRG") (Docket No. 45384).

B. Additional Statement of the Facts.

The district court adopted the detailed summary of the circumstances surrounding the creation of the Coeur d'Alene Reservation that were provided in *Idaho v. U.S.*, 533 U.S. 262, 265–71 (2001). R. at 4313–15 (*Order on Motions for Summary Judgment* at 4–6). They are set out at length in the district court's opinion and will not be repeated verbatim here. An abbreviated summary of those facts is provided here instead, along with a short statement of other relevant facts. In addition, pursuant to I.A.R. 35(h), NIWRG adopts by reference the statement of additional facts set forth in the State of Idaho's response brief in this matter.

President Johnson issued an Executive Order creating the Coeur d'Alene Indian Reservation in 1867. The Tribe found the 1867 boundaries unsatisfactory and negotiated an agreement in 1873 to enlarge the reservation boundaries to include certain waterways, including almost all of Lake Coeur d'Alene and portions of the St. Joe, Coeur d'Alene and Spokane Rivers.

While the 1873 agreement was not approved by Congress, President Grant issued an additional Executive Order that same year establishing the enlarged reservation.

In 1887, the Tribe and the United States again negotiated, in response to the Tribe's 1885 petition to enter into an agreement. As a result, the Tribe agreed to cede all lands outside of the 1873 reservation boundaries. Congress did not immediately approve the 1887 agreement, expressing concern about the expanded size of the 1873 reservation boundaries. As a result, additional negotiations were authorized in 1889. In the 1889 agreement, the Tribe agreed to cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene and the previously included portions of the Coeur d'Alene and Spokane Rivers.

In 1891, Congress approved both the 1887 and 1889 agreements with the Tribe. *Idaho*, 533 U.S. at 265–71; R. at 4313–15 (*Order on Motions for Summary Judgment* at 4–6).

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

II. ARGUMENT

A. The Law Regarding Federal Reserved Water Rights.

The Court has ruled on several cases regarding the doctrine of federal reserved water rights. *See, e.g.*, *U.S. v. State of Idaho*, 135 Idaho 655, 23 P.3d 117 (2001) (regarding the Deer Flat National Wildlife Refuge claims); *State v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (regarding the Sawtooth National Recreation Area claims); *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000) (regarding the Wilderness Act and Hells Canyon Recreation Area claims); *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000) (regarding the Wild and Scenic River Act claims); *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999) (regarding the Multiple-Use Sustained-Yield Act claims); and *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (regarding the Public Water Reserve 107 executive order claims).

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

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

"In deciding whether an implied reservation of water exists, the Court must determine whether it must be inferred that the executive body involved intended to reserve unappropriated waters. *Cappaert v. United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976)." *U.S. v. State of Idaho*, 135 Idaho at 123. "An intent to reserve water is inferred if water is necessary for the primary purposes of the reservation and if, without water, the purposes of the reservation will be entirely defeated." *State v. United States*, 134 Idaho at 943, 12 P.3d at 1287, *citing United States v. New Mexico*, 438 U.S. 696, 700, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978). "The necessity of water must be so great that without the water the reservation would be 'entirely defeated.' *New Mexico*, 438 U.S. at 702, 98 S.Ct. 3012." *U.S. v. State of Idaho*, 135 Idaho at 123.

"Where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists." *United States v. State*, 131 Idaho at 470.

The doctrine of reserved water rights applies to Indian reservations and other lands reserved for a particular purpose, including parks, wildlife refuges and national forests. *Id.*

The claimant of a water right based on federal law has the ultimate burden of persuasion on each element of the water right. I.C. § 42-1411A(12).

B. The Primary Purposes of the Reservation Do Not Include the Broad Set of Purposes Claimed by the United States.

The district court concluded that fishing and hunting was a primary purpose for the federal government to set aside the Coeur d'Alene Indian Reservation. This determination has been separately appealed by the State of Idaho (Docket No. 45381) and NIWRG (Docket No. 45384). The district court also recognized agricultural and domestic uses as primary purposes.

Not satisfied with this broad set of primary purposes, the United States and the Tribe argue on appeal that an even broader set of purposes, including commercial, municipal, industrial, gathering, lake level maintenance, maintenance of wetlands, springs and seeps, off-reservation fish habitat, and the all-encompassing "homeland" purpose should be recognized, as well. The agreements and Congressional acts of the time do not support this expansive inference.

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

The July 1873 agreement, which led to the enlarged Executive Order reservation that same year, sought to locate tribal members "on a reservation suitable to their wants as an agricultural

people." R. at 713 (quoting Smith to the Secretary of the Interior (Nov. 1, 1873)). The 1873 agreement was to provide the tribal members with wagons, plows, horses, a grist mill, a saw mill, school buildings, a blacksmith and sundry other agricultural implements. R. at 710, 1866 (emphasis added).

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

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

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

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

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

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

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

Comments made by tribal members during the 1889 Council meetings focused primarily on agricultural uses and "improvements." R. at 740 (Third Council, Aug. 31, 1889; Fourth Council, Sep. 8, 1889).

In 1891, the year Congress ratified the 1887 and 1889 agreements, the local Indian Agent commended the tribal members' agricultural efforts, stating that nearly all of them were farmers. By the mid-1890s, they continued to hold "the finest farms" among all area tribes that boasted "clean fields, well supplied with stock, modern machinery, good houses and barns." At the

decade's end, tribal members reportedly had "a greater acreage in cultivation than ever before" and were "better farmers than any other tribe connected with this agency." R. at 741–42 (quoting Indian Agency reports from Cole (1891), Bubb (1894) and Anderson (1899)).

Agriculture was clearly the primary purpose of the reservation, just as in *Winters*. The additional uses of the reservation advocated by the United States and the Tribe on appeal were therefore properly regarded as secondary purposes by the district court.

C. The Test of Necessity Further Defeats the Federal Government's Broad Set of Reserved Right Claims.

The inquiry regarding entitlement to a federal reserved water right does not end with a determination of the primary purposes of the reservation. The *New Mexico* "test of necessity" must be applied. This is critically important because the federal reserved water rights doctrine is a narrowly tailored exception to the "purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978).

If allowed, the federal claims threaten future curtailment of vested, state law water rights. As admitted by the United States: "The water rights claimed for various consumptive and non-consumptive uses may exceed the natural flow in a given stream in a particular year. The United States and Coeur d'Alene Tribe reserve the right to determine in any particular year which use(s), if any, to limit." R. at 13. Given Idaho's system of priority administration, and the senior priorities claimed by the United States, it is safe to assume that the uses to be limited during times of shortage will not just be those of the Tribe. The more junior state law water right holders on the system will be adversely impacted. That is why the stringency of the necessity test is so important. *See*,

New Mexico, 438 U.S. at 699, 705 (concluding that "federal reservations inescapably vie with other public and private claims for the limited quantities of water to be found in the rivers and streams" and that "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators"); *see also*, *U.S. v. State of Idaho*, 135 Idaho at 666 (observing that federal reserved water right for Wildlife Refuge would make state law irrigation water rights inferior and subject to interruption) and *City of Challis*, 133 Idaho at 527 (recognizing that "water rights could potentially be curtailed if the claims were granted").

Applying the test below, it is clear that certain of the additional federal reserved water right claims asserted by the United States and the Tribe on appeal are not necessary to fulfill the primary purposes of the reservation and should be disallowed.

In conducting this analysis, it is helpful to first review some of the Court's previous decisions applying the test.

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

of the reservation included the protection of fish and wildlife values, ruled that water was necessary to fulfill the primary purpose. The Court disagreed. *Id.* at 944–45.

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

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

right to accomplish that purpose." *Id.* The Court observed that the reclamation projects assured that there would be sufficient water to maintain the islands without a federal reserved water right. *Id.* at 666. "Local residents say that the principal factor in preventing water level fluctuations are the numerous dams and reservoirs upstream." *Id.*

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

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

In 1927, the Idaho State Legislature authorized and directed the Governor of the State of Idaho to appropriate in trust for the people of the State of Idaho all of the unappropriated water of Lake Coeur d'Alene, to preserve the lake for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the residents of Idaho. I.C. § 67-4304. The Governor applied for and was granted water right no. 95-2067 for the preservation of Lake Coeur d'Alene, which right was licensed and became vested pursuant to the laws of the State of Idaho. I.C. § 42-220. By its terms, this water right protects the entire lake, including the portion that lies within the Coeur d'Alene Reservation. The purpose of the United States' claim for the lake, including inflow, and associated claims for maintenance of wetlands, springs and seeps, gathering and other traditional uses of waterways, is met by the State. Where the power of the State is

adequate to fulfill the purpose of the reservation, a federal reserved water right is not necessary. *See, e.g.*, *Puyallup Tribe v. Dept. of Game of Washington*, 433 U.S. 173 (1977) (concluding that the power of the state was adequate for protection of fish and a federal reserved water right was not necessary to fulfill that purpose); *see also*, *State v. United States*, 134 Idaho 940, 12 P.3d 1284 (federal regulation negated need for federal water right).

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

With these purposes satisfied, the additional federal claims fail the *New Mexico* "test of necessity." Again, this is critical because every federal reserved water right is an exception to the state law system of water rights and thereby threatens the availability of water for vested water rights. To exist, a federal reserved water right must truly be necessary. Here, it is clear they are not. As a result, these claims fail to meet the *New Mexico* "test of necessity," just as those in the SNRA and the Deer Flat National Wildlife Refuge cases did.

D. The Off-Reservation Claims of the United States Were Properly Disallowed.

The United States and the Tribe argue that the district court erred in denying certain off-reservation claims. This stands in stark contrast to the United States' concession that other of its claims filed on behalf of the Tribe do not extend beyond the reservation boundaries. R. at 4323.

Because the lands outside of the Reservation are not reserved by the United States, there can be no federal reserved water right associated with these lands.

The power of establishing water rights within its dominion undoubtedly belongs to the State. *Kansas v. Colorado*, 206 U.S. 46, 86 (1907). However, when the federal government withdraws land from the public domain, it may claim a "reserved" water right needed for the "reserved" federal land. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2063 (1976). While the United States has claimed certain water rights off the Reservation, it is clear that "[a] reserved water right must be based on a reservation of land." *City of Challis*, 133 Idaho at 529, 988 P.2d at 1203. "[T]he threshold question is whether the government has in fact withdrawn and reserved lands" for which those water rights are claimed. *Sierra Club v. Block*, 622 F. Supp. 842, 854 (D. Colo. 1985). In other words, implied federal reserved water rights can only be claimed for federal reserved lands. When the land is not reserved, there can be no reservation of a federal water right.

The Snake River Basin Adjudication ("SRBA") Court dealt with a similar issue regarding off-reservation claims made by the Nez Perce Tribe and the extent of the federal lands reserved by the United States. R. at 826–74 (*Nez Perce Tribe Instream Flow Claims, Order on Motions for Summary Judgment*).

In the SRBA, the Nez Perce Tribe claimed implied federal reserved water rights for fishing on lands ceded by the Tribe. R. at 848. Judge Barry Wood ruled that the Tribe was not entitled to reserved instream flow water rights extending beyond the boundaries of the present Reservation because the Nez Perce Tribe or the United States did not intend to reserve an off-reservation instream flow water right for purposes of maintaining a fishing right and, pursuant to certain agreements, the Nez Perce Tribe ceded all interest in unallotted lands not expressly reserved to the Tribe. R. at 872. Similarly, the United States and the Coeur d'Alene Tribe are not entitled to federal reserved water rights beyond the present boundaries of the Reservation or for any lands within the boundaries of the present Reservation that were not reserved by the United States, that have been ceded by the Tribe, or that have been conveyed to others by the United States. *See, Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (confirming plenary power of Congress over Indian reservation lands).

The original Coeur d'Alene Indian Reservation was established by Executive Order in 1867. *United States v. Idaho*, 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998). The boundaries of the Reservation were significantly enlarged by an 1873 Executive Order. The Tribe agreed to cede the lands outside of the 1873 boundary in the Agreement of 1887. The Tribe subsequently agreed to cede significant portions of the lands reserved in 1873 in the Agreement of 1889. Both the 1887 and 1889 Agreements were approved by Congress in 1891. *Id.* at 1096–97. This resulted in a significant diminishment of the Reservation and the loss of all right, title and interest in the ceded lands, including any water rights.

Federal reserved water rights cannot exist without reserved lands. Accordingly, the district court was correct to disallow the off-reservation claims filed by the United States.

E. The Correct Priority Date for Reacquired Lands Is the Date of Reacquisition.

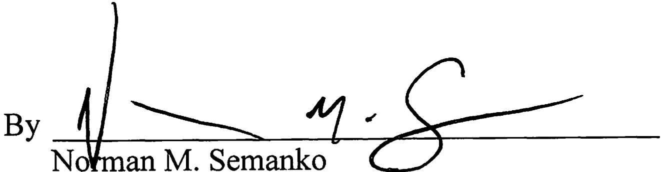
Pursuant to I.A.R. 35(h), the North Idaho Water Rights Group adopts by reference the portion of the State of Idaho's response brief in this matter regarding the appropriate priority date for reacquired lands. For the reasons hereby incorporated by this reference, the district court's decision on this issue should be affirmed by the Court.

III. CONCLUSION

For the above-stated reasons, the North Idaho Water Rights Group respectfully requests that the Court deny the instant appeal.

DATED this 13th day of April, 2018.

PARSONS BEHLE & LATIMER



By ______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2018, I served a true and correct copy of the foregoing document on the parties listed below by first class mail, postage prepaid, and electronically as reflected on the contemporaneously filed Certificate of Compliance:

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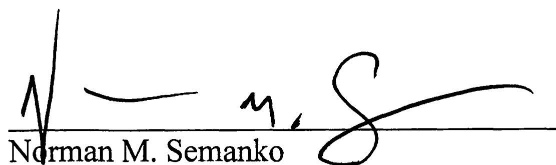

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