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IDSC CDAT Response to Idaho's Appeal

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE CSRBA CASE NO. 49576 SUBCASE NO. 91-7755 (353 Consolidated Rights)	
STATE OF IDAHO, Appellant, v. COEUR D'ALENE TRIBE, *et al.* Respondent.	Supreme Court No. 45381-2017

RESPONDENT COEUR D'ALENE TRIBE'S RESPONSE BRIEF

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

This case is about the Coeur d'Alene Tribe's rights to water—rights "essential to the life of the Indian people," *Arizona v. California*, 373 U.S. 546, 599 (1963) ("*Arizona I*"), which "Tribal members traditionally [relied on] for food, fiber, transportation, recreation and cultural activities." *Idaho v. U.S.*, 533 U.S. 262, 265 (2001) ("*Idaho II*"). The importance of water to the Tribe—for both traditional and evolving modern purposes—was a foundational issue in the negotiations leading to the establishment of the Tribe's Reservation in 1873. The historical record demonstrates that the Reservation is located where it is precisely because the United States could achieve its objectives—obtaining certain lands from the Tribe and securing a lasting peace—only by agreeing to set aside this Reservation, which includes important waterways and water resources, as insisted upon by the Tribe. *Idaho II*, 533 U.S. at 275-276.

In its appeal here, the State seeks to undermine the Tribe's federally protected rights to water by evading or obscuring the governing legal principles. For example, as an adjudication of Tribal reserved water rights, this case is governed by federal law. This is so as a matter of constitutional law, as "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). As a feature of Tribal property rights, the Tribe's water rights are unquestionably governed by federal law. *Arizona I*, 373 U.S. at 597-98; *City of Pocatello v. Idaho*, 145 Idaho 497, 503, 180 P.3d 1048, 1054 (2008) ("*Pocatello*"). So, although the State begins its argument here by referring to the Tenth Amendment and general congressional deference to state water law, State Br. at 16-17 (quoting *California v. U.S.*, 438 U.S. 645, 653 (1978)), because federal law is controlling, state law cannot provide any basis for limiting the Tribe's reserved water rights.

Likewise, it is well established that agreements with Indian tribes—including those that define the purposes of an Indian reservation—must be construed as the Indians themselves would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). This principle has equal application to treaties, Executive Orders, and other agreements with tribes. *Winters v. U.S.*, 207 U.S. 564, 576-77 (1908) ("*Winters*"); *Pocatello*, 145 Idaho at 506. But in disregard of this principle, the State argues that through ratification of the 1887 and 1889 Agreements in 1891, the Tribe silently ceded all of its water rights for traditional purposes including hunting and fishing. Nothing in the text of the 1887 or 1889 Agreements or 1891 Act says that the Tribe no longer held water rights for hunting and fishing, and the snippets from the historical record cited by the State merely refer to farming—they say nothing about divesting the Tribe of water rights related to hunting and fishing. Under the State's formulation, the United States and Tribe agreed to a Reservation for the Tribe with water for broad purposes in 1873, and then silently whittled that down to a single purpose and took away water necessary for the Tribe's traditional and other pursuits. But there is simply no evidence to that effect—and no basis for asserting that the Indians would have understood the 1887 and 1889 Agreements to achieve such a devastating result. *See Idaho II*, 533 U.S. at 278 (finding no evidence that Congress "meant to pull a fast one" on the Tribe). Indeed, the record shows exactly the opposite—that traditional practices remained vitally important to the Tribe throughout this period and water for those purposes remained central to Tribal life.

A third, related principle holds that tribal reserved water rights are durable—that once established they remain intact and cannot be lost or abrogated, absent clear action by Congress. *U.S. v. Dion*, 476 U.S. 734, 739 (1986) (absent express language there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty");

Pocatello, 145 Idaho at 506 ("Congress will not abrogate Indian rights without clear intent and an express agreement from the Indians."). So, once the Tribe's water rights associated with the purposes of the Reservation vested in 1873, those rights continued intact and could only be lost if there was clear evidence Congress intended to abrogate them. Nothing in the 1891 Act, or any other statute, furnishes clear evidence that Congress intended to divest the Tribe of any part of its water rights.

This same principle defeats the State's argument regarding the transfer of certain Reservation lands to non-Indian settlers by a 1906 statute allotting Reservation lands to individual Indians and opening so-called surplus Reservation lands for sale to non-Indians. The State contends that fee land ownership on the Reservation by non-Indians divests Tribal claims to non-consumptive instream flows for fishing purposes. Here again, the State can point to no action by Congress clearly intending such a result. In the absence of such a congressional action divesting the pre-existing Tribal right to water, water associated with the Tribal right to fish within the Reservation was not lost by the sale of land to settlers. Indeed, the law is clear that tribal rights—such as the right to fish—survive not only the transfer of certain lands to settlers in an allotment act, but the total termination of a reservation. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 410-13 (1968).

With these basic principles in mind, we turn next to the specific arguments in the State's appeal.

ARGUMENT

I. The Purposes of an Indian Reservation Are Broad and Are Not Limited to a Single Purpose.

As this Court has emphasized in discussing tribal reserved water rights: "American law treats Indian tribes differently than it does other sovereign nations or private individuals."

Pocatello, 145 Idaho at 506. Ignoring this fundamental principle, the State assumes that aspects of the ruling in *U.S. v. New Mexico*, 438 U.S. 696 (1978), apply to limit Tribal water rights in this case. State Br. at 17-18. This flawed assumption is the basis for much of the State's argument. In particular, the State relies on *New Mexico* in seeking to limit the Tribe's reserved water rights under federal law only to what the State deems to be the "primary" purposes for which the Reservation was established. State Br. at 17. For any other, "secondary" purposes of the Reservation, the State argues that the Tribe has no reserved rights under federal law and must obtain water rights in compliance with state law.

But the approach used in *New Mexico* to determine the water rights of a national forest has no application to the Coeur d'Alene Reservation. As this Court has recognized, the purposes of an Indian reservation must be construed according to well-established principles that apply only to Indian tribes:

> First and foremost is the notion that agreements with Indians are to be interpreted to the benefit of the tribes. For example, the Supreme Court has stated,
>
> > [W]e will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules."
>
> *U.S. v. Winans*, 198 U.S. 371, 380-81, . . . (1905) (citing *Choctaw Nation v. U.S.*, 119 U.S. 1, 28, . . . (1886); *Jones v. Meehan*, 175 U.S. 1, . . . (1899)). Congress certainly has the power to abrogate Indian treaty rights, but its intent to do so must be clear. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, . . . (1999); *U.S. v. Dion*, 476 U.S. 734, 739-40, . . . (1986).

Pocatello, 145 Idaho at 506-07. It is these principles—not *New Mexico*'s approach regarding national forests—that control in this case.

Contrary to the State's contention, an Indian reservation is not limited to having a single purpose to the exclusion of all others. Unlike the national forest in *New Mexico*, an Indian

Reservation is created to provide for the ongoing life of a people on lands promised to them. As would be the case for the life for any people over time, this cannot be reduced to one formulaic purpose. Rather, as the Indians would have understood it at the time the Reservation was established, Tribal life on the Coeur d'Alene Reservation involved traditional activities like hunting, fishing, and gathering, more modern economic pursuits like farming, and industrial and commercial development, and everyday activities like drinking and washing—and water is needed for all of these purposes.[1] As *Winters* and its progeny hold, water for an Indian reservation is reserved broadly, consistent with the purposes of the reservation, which include providing a permanent home for Indians to live—to raise their families, to pursue their traditions, and to advance their economies. *See, e.g.*, *Winters*, 207 U.S. at 576; *Arizona I*, 373 U.S. at 598-601.

Along these lines, for the Coeur d'Alene Reservation the 1873 Agreement provided that the "Indians agree to locate and make their homes upon the reservation," R. at 4202 (Second Aff. of Vanessa Boyd Willard (Ex. 5, Agreement with the Coeur d'Alene of July 28, 1873 ("1873 Agreement"))), and the 1887 Agreement confirmed that the "Reservation shall be held forever as Indian lands and as homes for the Coeur d'Alene Indians." R. at 1391 (Aff. of Richard J. Hart, Ex. 4 (Agreement with the Coeur d'Alene of Mar. 26, 1887 ("1887 Agreement"))). Broad homeland purposes are clearly reflected in the negotiations leading to the creation of the Reservation in 1873—in which the Indians emphasized the importance of waters to the present and future lives of their people. *See* Section II.A *infra*. Certainly, the Indians would have understood that in agreeing to provide the United States with the lands it coveted and with the

[1] The Tribe has appealed the district court's dismissal of Tribal claims for traditional activities other than hunting and fishing, as well as for industrial, commercial, and mixed municipal uses, but those are the subject of a separate appeal pending before this Court. *See Coeur d'Alene Tribe v. State*, Case No. 45383-2017 (*In re CSRBA*, Case No. 49576, Subcase No. 91-7755).

peace it desired, they were retaining for their Reservation the waters necessary for a viable, long-term home, not one limited to a single activity.

In key respects, the purposes of Indian reservations, like the Coeur d'Alene Reservation, are the polar opposite from the purposes of national forests, like that at issue in *New Mexico*. The strong preemptive force of federal law protecting Indian present and future uses of water when Indian reservations are established is entirely absent in the case of national forests. As *New Mexico* states, "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid west." 438 U.S. at 713. In sharp contrast, Indian reservations were created to provide places for tribes to maintain and develop their homelands, with water for both present and future uses. Put simply, national forests were intended in considerable part to protect settlers in their uses of water under state law while Indian reservations were largely intended to protect tribes from the settlers' uses of water.

This dichotomy reflects a fundamentally different relationship with state law—with national forests there is a basic deference to state law, while with Indian reservations, federal law is strongly preemptive. *See, e.g.*, R. at 2231 (Special Master Report, *Arizona I*) (finding "[t]he suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law"); *U.S. v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939) (rejecting state law as a basis for acquiring water rights on the Flathead Indian Reservation reasoning that "the Montana statutes regarding water rights are not applicable because Congress at no time has made such statutes controlling in the reservation."); *Cohen's Handbook of Federal Indian Law* § 19.03[4], at 1218 (Nell Jessup Newton ed., 2012) ("States have considerable power over federal lands, and Congress has generally deferred to state water law relative to federal lands. By contrast, the establishment of an Indian reservation . . . preempt[s] state jurisdiction . . . . Congress has never deferred to state water law

relative to Indian reservations.") (footnotes omitted). These differences further underscore why the purposes for reserved rights for national forests are narrowly construed as in *New Mexico*, while purposes for reserved rights for Indian reservations are broadly construed.

In addition, the specific statutes concerning creation of the national forest involved in *New Mexico* are not remotely analogous to the Agreements, Executive Order, or statute concerning the Coeur d'Alene Reservation. In *New Mexico* the Supreme Court was faced with two different statutes, each establishing different—and sometimes conflicting—purposes for national forests. 438 U.S. at 712-14 (discussing the Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 36 (codified at 16 U.S.C. § 481) and the Multiple Use Sustained-Yield Act (MUSYA) of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. § 528)). The Organic Act provided relatively narrow purposes for national forests—including protecting watersheds for western water users. *Id.* at 712-13. The MUSYA, on the other hand, provided for additional—sometimes conflicting—purposes, including recreation, range, and fish habitat. *Id.* at 713. Reviewing the legislative history of the MUSYA, the Court concluded that it was intended to "broaden the benefits accruing from all reserved national forests," by adding purposes "'to be supplemental to, but not in derogation of, the purposes for which the national forests were established' in the [Organic Act]." *Id.* at 714. The Court then found that the purposes in the subsequent MUSYA were secondary, and Congress did not intend to reserve water for them under federal law. *Id*. at 715.

In essence, the Court in *New Mexico* found that Congress did not, by enacting the later legislation, add to the original purposes of the forest for which water was reserved. In other words, *New Mexico* simply construed this statutory scheme to uphold the <u>original</u> purposes of the national forest. But significantly, neither *New Mexico*, nor any other case, has held that a later statute has <u>abrogated</u> the original purposes for which a reservation was established and for which water was reserved. Accordingly, the State's argument that Tribal rights to water that vested when the

Reservation was created in 1873 were later abrogated without any clear expression of intent by Congress, must likewise be rejected. *See infra* Section II.

New Mexico, as a case construing a particular statutory scheme, also does not stand for the proposition that where a reservation is established for broad or multiple uses, such as an Indian reservation, a court must find that some of the claimed uses are "secondary" uses and be pursued under state law. *See, e.g.*, *U.S. v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983) ("[n]either *Cappaert* [*v. U.S.*, 426 U.S. 128 (1976)] nor *New Mexico* requires us to choose between . . . activities or identify a single essential purpose").

This Court has recognized the differing goals for Indian reservations as contrasted with other federal reservations. In *Potlatch Corp. v. U.S.*, 134 Idaho 916, 12 P.3d 1260 (2000), this Court explained:

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

Id. at 920.[2] Both the Montana Supreme Court and Arizona Supreme Court have also recognized the significant differences between the creation of Indian reservations and other kinds of federal reservations, and both accordingly held that *New Mexico* does not apply in determining the reserved water rights on an Indian reservation.[3] *State ex rel. Greely v. Confederated Salish &*

[2] *See also Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 136 Idaho 53, 57, 28 P.3d 996, 1000 (2001) ("Indian reservations are different; distinct from every other type of reservation, i.e., national parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law.").

[3] The Ninth Circuit has indicated that *New Mexico* does not directly apply to *Winters* doctrine rights on Indian reservations, but nevertheless found it to provide useful guidelines. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 n.6 (9th Cir. 2017) ("we have previously noted that *New Mexico* is 'not directly applicable to *Winters* doctrine rights on Indian reservations'") (citations omitted). While the Ninth Circuit's approach fails to give

Kootenai Tribes of Flathead Reservation, 712 P.2d 754, 766-68 (Mont. 1985); *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 35 P.3d 68, 76-77 (Ariz. 2001) ("*Gila V*").

In sum, the State's argument that *New Mexico* mandates that the purposes of the Coeur d'Alene Reservation be narrowly construed must be rejected. The legal principles applicable to Indian tribes are unique, the record here demonstrates that the purposes of the Coeur d'Alene Reservation are broad, and accordingly the *New Mexico* case provides no basis for limiting the waters available to ensure a viable future for this Tribe on its Reservation, which was promised to it forever.

II. Congress Ratified the Broad Purposes of the Tribe's 1873 Reservation Within the Boundaries Confirmed by the 1891 Act.

The district court properly concluded that the Coeur d'Alene Reservation was established by Executive Order in 1873 and that federal reserved water rights were implied to fulfill not only the Reservation's domestic and agricultural purposes, but also traditional fishing, hunting, and wildlife habitat for hunting purposes. R. at 4320-23 (Order on Mots. S.J.).[4] The district court also correctly held that traditional fishing and hunting purposes carry a time immemorial priority date and agricultural purposes carry an 1873 Reservation establishment priority date. *Id.* at 4326.[5] The State does not dispute the district court's determination that the 1873 Executive Order Reservation

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adequate consideration to the federal Indian law principles that distinguish the situation regarding national forests from that involving Indian reservations, the holding in *Agua Caliente* does not support limiting tribal reserved water rights to a single, narrow purpose. Rather, the Ninth Circuit held in *Agua Caliente* that "[t]he general purpose, *to provide a home for the Indians*, is a broad one that must be liberally construed." *Id*. at 1270 (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) ("*Walton I*") (emphasis in original)); *see also id.* at 1265 ("The Executive Orders establishing the reservation are short in length, but broad in purpose.").

[4] *See supra* n.1.

[5] The Tribe has appealed the district court's ruling with respect to the priority date for reserved water rights on reacquired lands. *See supra* n.1.

included fishing and hunting purposes, but appeals the district court's decision on the premise that the 1891 congressional act ratifying the 1887 and 1889 Agreements fundamentally changed the purposes of the 1873 Reservation, leaving agriculture as the sole purpose.[6]

As noted above, such an abrogation of the Tribe's rights to water for the purposes of the 1873 Reservation would require a clear statement from Congress. The 1891 Act passed by Congress simply states that the 1887 and 1889 Agreements are "hereby, accepted, and confirmed" and then sets out the provisions of each agreement. Act of Mar. 3, 1891, Ch. 543, 26 Stat. 989, 1027-29 (1887 Agreement), 1029-32 (1889 Agreement) (1891). This bare bones statutory language provides no textual support for abrogation of the purposes of the Tribe's 1873 Reservation.

The same is true regarding the text of the 1887 and 1889 Agreements—which solely addressed land cessions from the Tribe in exchange for continued recognition of the Tribe's 1873 Reservation. There is nothing in the text of the Agreements that could have been understood by the Tribe to mean that those Agreements were abrogating the purposes of the Reservation or taking away the water needed to make the Tribe's homeland viable.

In short, there is simply no evidence that Congress repudiated the 1873 Executive Order Reservation or narrowed the purposes for which it was established. In fact, just the opposite is true—the Supreme Court in *Idaho II* squarely held that in 1891 "Congress recognized the full extent of the Executive Order reservation lying with the stated boundaries it ultimately

[6] The State makes a passing reference to the "diminished Reservation" in connection with the 1891 Act. State Br. at 7. But "diminished" is a term of art in this context, which connotes a change in Reservation boundaries as a result of a statute that opened the Reservation to non-Indian settlement—which occurs only where Congress clearly and plainly intends such a result. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). The Coeur d'Alene Reservation has never been held to be diminished, the State did not raise any diminishment issue below, and the issue is not presented here.

confirmed . . . ." 533 U.S. at 281.[7] *Idaho II* and the historical record demonstrate continuity, not change, in later actions taken by both the Executive branch and Congress that recognized the Tribe's 1873 Reservation and the purposes for which it was established.

A. The Tribe's 1873 Reservation Was Established for Broad Purposes Including Hunting and Fishing.

1. The Tribe's 1873 Reservation was established by Executive Order and must be treated the same as any other Indian reservation for determining its purposes.

As correctly recounted by the district court, in *Idaho II* the Supreme Court found that Lake Coeur d'Alene and its related waterways were historically important to the Tribe for "food, fiber, transportation, recreation, and cultural activities." 533 U.S. at 265; R. at 4313 (Order on Mots. S.J.). These broad purposes, each tied to the Tribe's use of water, formed the backdrop to the creation of the 1873 Reservation. When the Tribe and United States reached an agreement in 1873, the deal provided for the Tribe to relinquish claims to its aboriginal lands in exchange for an expanded reservation that accommodated the Tribe's insistence on inclusion of key water bodies within the retained Reservation. *Idaho II*, 533 U.S. at 266. Under the 1873 Agreement the Tribe agreed to "locate and make their homes upon the reservation." R. at 4202 (1873 Agreement). The 1873 Agreement also "preserv[ed] the water resource[s]" to sustain the Tribe's traditional activities, including hunting and fishing, because it "added the rivers, lake and waters . . . which they demanded remain under their control." R. at 1589-90 (E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use* (Nov. 25, 2015) ("Hart Rep. 2015")); *see also Idaho II*, 533 U.S. at 274 ("[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe"); *id.*

[7] *Idaho II* principally focused on the Tribe's traditional water uses and activities at the time the reservation was created in 1873, through congressional ratification in 1891, because the issue in the case was title to submerged lands at the time of Idaho statehood. *Idaho II* did not look more comprehensively at the additional purposes for which the Coeur d'Alene Reservation was created but nonetheless strongly supports the intent of the United States and the Tribe in reserving water for other present and future purposes, including agriculture, commerce, and industry.

at 275 ("the submerged lands and related water rights had been continuously important to the Tribe"). In fact, the 1873 Agreement contains a provision unique to Coeur d'Alene that expressly protects the Tribe's water resources by stating that "the waters running into said reservation shall not be turned from their natural channel where they enter said Reservation." R. at 4202 (1873 Agreement). At the same time, the Tribe was beginning to advance in the arts of civilization, including agriculture and industry, and the 1873 Agreement reflects an equally important focus on ensuring that the Tribe's Reservation would sustain these more modern pursuits. *See U.S. v. Idaho*, 95 F. Supp. 2d 1094, 1105 (D. Idaho 1998) ("*Idaho II*") (1873 Reservation would include Indian farms and allow for a mill at the upper falls); R. at 4202 (1873 Agreement) (providing for school, training in commercial and industrial pursuits); R. at 1588 (Hart Rep. 2015) (Indians demanded extension of 1867 reservation to include Catholic mission and mill privileges).

The State argues that the district court should not have relied on the 1873 Agreement to define the purposes of the Tribe's Reservation because "by its terms, [it] was 'null and void and of no effect" if not approved by Congress." State Br. at 21. But there is more than one way to create an Indian reservation, and the President soon acted to formalize the Reservation as set forth in the 1873 Agreement. As the Supreme Court explained in *Idaho II*:

> [On November 8,] 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians.'

533 U.S. at 266 (citations omitted); R. at 1354 (Aff. of Richard J. Hart, Ex. 3 (Exec. Order of Nov. 8, 1873)).[8]

[8] The State's own expert report also recognizes that officials within the Department of the Interior were already taking formal action on the 1873 Agreement prior to the commission's recommendation. *See* R. at 2990 n.118 (Stephen Wee, *Establishment of the Coeur d'Alene Indian Reservation and the Transformation of Coeur d'Alene Land and Water Use, from Contact through Allotment*, (Feb. 25, 2016) ("Wee Rep. 2016")) (citing Letter from Edward P. Smith, Comm'r of Indian Affairs, to E.C. Kemble, U.S. Inspector, Olympia, Wash. Terr. (Nov. 14, 1873)). That letter explains that the Executive Order withdrew and set aside a reservation "described by natural

The State also questions the relevance of the 1873 Agreement because, after the Executive Order was issued, the commission that negotiated the agreement on behalf of the United States belatedly sent a report to the Commissioner of Indian Affairs recommending that the agreement they entered with the Tribe not be confirmed. State Br. at 4 (citing R. at 2989-90 (Wee Rep. 2016)). The commission's report, however, was only a recommendation, and it is the formal action of the President in issuing the Executive Order—and not this ignored recommendation by the commission—that is controlling.

And an Executive Order reservation has the full measure of legal dignity, just like any other—as federal law requires that an Indian reservation established by Executive Order must be treated the same as reservations created by treaty or other congressionally ratified agreements. *Arizona I*, 373 U.S. at 598 ("We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) ("We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise"); *U.S. v. S. Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976) ("executive order reservations do not differ from treaty or statutory reservations"). Thus, issuance of the Executive Order unequivocally reserved the 1873 Reservation for the Tribe's benefit. *See Idaho II*, 95 F.

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boundaries, as stipulated in the agreement concluded with said Indians July 28, 1873" and goes on to note that the General Land Office was also furnished a copy and was "requested to notify the proper offices . . . of the setting apart of such reservation. You will cause said Indians to be advised of the setting apart of this reservation and that it is the desire of this Department that they locate thereon without unnecessary delay." *See* Letter from Edward P. Smith, Comm'r of Indian Affairs, to E.C. Kemble, U.S. Inspector, Olympia, Wash. Terr. at 1-2 (Nov. 14, 1873) (This historical document was lodged with this Court rather than included in the Clerk's Corrected Record on Appeal. *See* R. at 4500 (Notice of Lodging Historical Documents)).

Supp. 2d at 1114.[9] As such, the Tribe's reserved water rights vested no later than the date that the Reservation was established. *Arizona I*, 373 U.S. at 600; *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (implied tribal rights predating reservation are retained and exist from immemorial).

And Judge Lodge in *Idaho II* specifically found that the Executive Order was intended to "create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement . . . . " 95 F. Supp. 2d at 1109. Judge Lodge explained that:

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

Id. at 1104. *Idaho II* and the historical record thus show that a purpose of establishing the 1873 Reservation was to ensure the Tribe would be able to continue its traditional activities, in addition to allow the Tribe to progress in agricultural, commercial and other industrial pursuits.

2. The 1887 Agreement confirmed the purposes of the Tribe's 1873 Reservation.

Increasing encroachments from non-Indians caused the Tribe to be concerned that their 1873 Reservation could be jeopardized or altered. To guard against this, the Tribe sought additional negotiations with the federal government in 1885 seeking Congressional ratification of its 1873 Reservation. The Tribe's petition described its aboriginal territory and noted that "all the

[9] The State cites to a statement by the Tribe's expert that 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.'" State Br. at 4 (citing R. at 1593 (Hart Rep. 2015)). The "temporary nature" of the Executive Order only meant that "[u]ntil Congress approved the Executive reservation . . . the Tribe's property right was 'subject to termination at the will of either the executive or Congress.'" *Idaho II*, 95 F. Supp. 2d at 1110. As discussed in this Section, Congress ultimately ratified and confirmed the 1873 Executive Order Reservation when it ratified the 1887 Agreement. *See also* R. at 1809 (Hart Rep. 2015) (explaining that the 1887 Agreement, which Congress did ratify in the 1891 Act, confirmed the Coeur d'Alene Reservation set aside in the 1873 Agreement and Executive Order).

lands of your petitioners, so by them owned and herein described, have been taken possession of by the whites without remuneration or indemnity, except that portion now by them occupied as the present Coeur d'Alene Reservation." R. at 2041 (Aff. of Steven W. Strack, Ex. 4 (S. Exec. Doc. No. 122 (1886)) (reprinting Petition from Coeur d'Alene Tribe to President of United States (Mar. 23, 1885)).[10] In response, Congress authorized a new commission to engage in negotiations with the Tribe in 1886, and this enactment expressly recognized establishment of the Tribe's 1873 Reservation. R. at 1366 (Aff. of Richard J. Hart, Ex. 4 (Report of Comm'r of Indian Affairs, to Sec'y of Interior at 18 (Dec. 13, 1887)) (an act "to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States") (emphasis added). As the Supreme Court in *Idaho II* explained:

> Congress was free to define the reservation boundaries however it saw fit . . . [but] Congress in any event made it expressly plain that its object was to obtain tribal interests only by tribal consent. When in 1886 Congress took steps toward extinguishing aboriginal title to all lands outside the 1873 boundaries, it did so by authorizing negotiation of agreements ceding title for compensation.

533 U.S. at 277 (emphasis added). In other words, the clear understanding of Congress in 1886 was that the Tribe then held a Reservation that was established in 1873 and that any "Tribal interests" to be obtained would require the consent of the Tribe.

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[10] The petition also described the vast resources included in the Tribe's territory and discussed various items that the Tribe needed, like "grist and saw mills, proper farming implements, and mechanics to help to teach us . . . industrial pursuits" R. at 2042 (1885 Petition). These items were not in derogation of the Tribe's traditional pursuits—rather they were listed in the context of compensation to settle the Tribe's claims to lands outside its current reservation—as the petition explained it specifically sought to enter

> proper business negotiations under and by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; that their present reserve may be confirmed . . . and that ample provision be made by the United States by which their compensation shall be annually made them partly in stock, tools, mills, and mechanical instruction by proper mechanics, for the permanent benefit of every member, young and old, male and female, of the Coeur d'Alene tribe of Indians.

Id.

Under the 1887 Agreement arising out of those negotiations, the Tribe once again agreed to cede lands outside the "Coeur d'Alene Reservation"[11] and the Agreement confirmed that the Reservation "shall be held forever as Indian lands and as homes for the Coeur d'Alene Indians." R. at 1391 (1887 Agreement, art. 5). The 1887 Agreement unequivocally confirms the Tribe's 1873 Reservation and shows that the cession of lands was the only "Tribal interest" that the Tribe consented to relinquish.

The State refers to statements made by Coeur d'Alene Chief Andrew Seltice regarding agricultural endeavors prior to and during negotiations of the 1887 Agreement. State Br. at 22. But statements about agriculture are far short of the clear statement from Congress that is required to abrogate Tribal rights within the 1873 Reservation. *Pocatello*, 145 Idaho at 506-07. Further, these statements must be understood in context. In the 1887 Agreement, the United States sought a cession of land—there was no effort to strip from the Tribe the ability to use water for the broad purposes for which the Reservation was established in 1873, which include traditional activities. At most, the statements cited by the State support the continued recognition of the Tribe's efforts to engage in the agricultural and more modern pursuits within its 1873 Reservation, while at the same time maintaining its traditional activities.

[11] In fact, much of the 1887 negotiating history is limited to obtaining a cession of lands outside the Tribe's Reservation and the terms of compensation for that cession. In this respect the 1887 Agreement is substantially similar to the 1873 Agreement, which the federal negotiators used as a reference. R. at 1383 (Aff. of Richard J. Hart, Ex. 4 (Report of Nw. Indian Comm'n, to Comm'r of Indian Affairs at 53 (1887))). For example, like the 1873 Agreement, the 1887 Agreement provided that the federal government would expend federal funds to "erect[] on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller . . . [and to] best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians . . ." R. at 1391 (1887 Agreement, art. 6). These provisions show that it was important to the Tribe that the federal government fulfill the promises made in the 1873 Agreement and provide the resources necessary for the Tribe to realize the agricultural, commercial and industrial advancements it previously sought for its Reservation economy; thereby reflecting continuity, not change, between the two Agreements.

In fact, the Tribe continued to engage in traditional activities throughout this time period,[12] and the historical record makes clear that during negotiations, Chief Seltice insisted on the continued protection of its 1873 Reservation and implored the commission to "preserve for us and our children forever this reservation . . . [because] neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all the Indians living on it shall have it forever." R. at 2157 (Aff. of Steven Strack, Ex. 10 (Council with Coeur d'Alenes at 78 (Mar. 25, 1887))). As discussed above, the 1887 Agreement must be construed as it would have been understood by the Indians. *Pocatello*, 145 Idaho at 506. The Tribe simply could not have understood an agreement that was fortifying its 1873 Reservation and ceding lands outside the Reservation as somehow—and without saying so—limiting all Tribal life on the Reservation to pursuing agricultural endeavors to the exclusion of all else.

Idaho II reinforces that the purposes of the Reservation remained unchanged. Given the Tribe's traditional reliance on its waters, the Supreme Court in *Idaho II* found that "Idaho [correctly] also conceded . . . that after Secretary of the Interior's 1888 report that the [1873] reservation embraced nearly 'all the navigable waters of Lake Coeur D'Alene' . . . Congress was on notice that the Executive Order reservation included submerged lands." *Id.* at 275. Importantly,

[12] During the years prior to the 1887 Agreement, the Tribe continued to engage in traditional activities. For example, due to increasing conflicts in the late 1870s between non-Indians and other Indian tribes, like the Nez Perce, the Coeur d'Alenes engaged in traditional gathering, sometimes under the protection of tribal soldiers. R. at 1615 (Hart Rep. 2015) ("At the time of the outbreak of the Nez Perce War, the Coeur d'Alenes were digging camas near St. Maries. . . ."). Around 1878, in order to protect their land and water resources within their Reservation boundaries, the Tribe decided to move many, but not all, of their villages and homes closer to the De Smet area near their traditional camas grounds. *Id*. at 1615, 1621-23. *See also* R. at 653 (Ian Smith, *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation* (2015)) ("Most Coeur d'Alene villages [on lakes and rivers] remained in use until at least the 1870s, with some retaining 'a permanent population as late as 1900.'"); R. at 2669-72 (Jt. Stmt. Facts) (summarizing continuance of traditional activities after 1873). Into the 1880s, "the Tribe . . . continued to use their traditional fishing spots and to remain true to tribal culture." R. at 1626 (Hart Rep. 2015).

the Supreme Court found that "the Tribe was understood [by Congress] to be entitled beneficially to the reservation as then defined." *Id.* at 267 (emphasis added). The Court would not have ruled that the Tribe owned the submerged lands in *Idaho II* if by the time of Idaho statehood in 1890, the Tribe no longer needed these submerged lands for hunting, fishing, and other traditional activities.

3. The 1889 Agreement and 1891 Act ratified the purposes of the 1873 Reservation within the boundaries confirmed by Congress.

This same pattern was repeated two years later. The 1889 Agreement—like the 1887 Agreement—only involved a cession of land, not an abrogation of rights on the portion of the 1873 Reservation that the Tribe retained. Indeed, the Supreme Court concluded in *Idaho II* that in authorizing additional negotiations with the Tribe in the 1889 Appropriation Act, Congress "did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood [by Congress] to be entitled beneficially to the reservation as then defined" and Congress only sought an additional land cession within the Tribe's 1873 Reservation that the Tribe "shall consent to sell." *Idaho II*, 533 U.S. at 277.[13] Accordingly, rather than suggesting any congressional intent to defeat or limit the purposes of the Tribe's 1873 Reservation, Congress's instructions confirm that negotiations were limited and sought only a voluntary cession of land within the Tribe's Reservation—not any effort to abrogate Tribal rights within the boundaries it ratified. *Idaho II*, 533 U.S. at 280-81 ("[t]here is no indication that Congress ever modified its objective of negotiated consensual transfer" and "[a]ny imputation to Congress either of bad faith or of secrecy in dropping its express objective . . . is at odds with the evidence.").

[13] The Ninth Circuit similarly found in *Idaho II* that Congress's "1889 Authorization of negotiations with the Tribe for a cession of tribal property constituted recognition and validation of the executive reservation." *U.S. v. Idaho*, 210 F.3d 1067, 1074 (9th Cir. 2000) ("*Idaho II*").

Here again, the State incorrectly suggests that statements made during the 1889 negotiations relating to the Tribe's agricultural endeavors somehow implicitly abrogated the Tribe's traditional reliance on its waterways and water resources within its 1873 Reservation. State Br. at 22-23. But the law does not allow such a backhanded loss of Tribal rights. While the statements cited by the State may reflect an awareness that the Tribe was advancing in agriculture (which the district court properly found was another purpose of establishing the 1873 Reservation), none of the statements indicates that the Tribe or the federal government understood the 1889 Agreement as abrogating or relinquishing any of the purposes for which the 1873 Reservation was created. *See Pocatello*, 145 Idaho at 506-07.

Moreover, while the State's recitations from the record are limited to agriculture, that is only one part of a much fuller history. The record also shows that retaining the 1873 Reservation, including the Lake and associated waterways, remained a central concern to the Tribe. Throughout the 1889 negotiations, Coeur d'Alene leaders insisted upon ratification of the 1887 Agreement, which confirmed their 1873 Reservation. *See, e.g.*, R. at 1357 (Aff. of Richard J. Hart, Ex. 4 (Report of Comm'r of Indian Affairs, to Sec'y of Interior at 3 (Dec. 7, 1889))) ("[T]he Indians . . . absolutely refused to entertain any proposition [to relinquish some of their Reservation] until the old agreement was ratified."). The Tribe also expressed fears of losing their homes and the importance of their lands and waters. *See, e.g.*, *Idaho II*, 533 U.S at 270; R. at 2115 (Third Council with Coeur d'Alene Indians (Aug. 31, 1889) (Chief Seltice stating that "I, as an Indian, like my land; am very anxious to have land; I do not care about money"). In response to the Tribe's concerns, when explaining the new boundary line under the 1889 Agreement, "General Simpson, a negotiator for the United States, reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake[,]'" 533 U.S. at 270, "and all the meadow and agricultural land

along the St. Joseph River." 210 F.3d at 1071 n.6.[14] And during this time the Tribe was continuing to engage in traditional activities, notwithstanding its continued agricultural and other pursuits.[15]

This history shows that the Tribe remained concerned about protecting its land and water resources and that the federal government recognized it could not obtain an additional cession of land without ensuring that the Tribe's 1873 Reservation was ratified—albeit with a boundary adjustment in the northern portion. *See Pocatello*, 145 Idaho at 506. ("'[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties.'") (alteration in original). As Judge Lodge found in *Idaho II*, "the placement of the boundary line [under the 1889 Agreement] was for the purpose of establishing the Tribe's rights to the Lake and rivers." 95 F. Supp. 2d at 1115. The record demonstrates that water remained a central feature of the negotiations throughout this period, and that while certain lands were ceded, all of the Tribe's rights within the boundaries of the 1873 Reservation ratified by Congress were retained by the Tribe. Certainly, there was no clear expression, or agreement of the Indians, to any loss of water rights. *See Pocatello*, 145 Idaho at 506-07.

Idaho II underscores this conclusion—that apart from ceding certain lands, the Tribe retained all other rights on the Reservation that remained. The Supreme Court found that the 1891

[14] The State seizes on "the meadow and agricultural land" references as nullifying the continued importance of the Tribe's traditional activities within the 1873 Reservation. State Br. at 23. This ignores the broader context of the statement in which General Simpson also referenced that the Tribe would retain the Lake and other important waterways that were traditionally important to the Tribe. The Ninth Circuit in *Idaho II* for example, found that "[t]he Tribe's chief insisted on carefully defining the new proposed boundaries, rejecting the suggestion that the 'lake belongs to [the Tribe] as well as to the whites.'" 210 F.3d at 1071 n.6 (alteration in original).

[15] *See, e.g.*, R. at 788 (Ian Smith, *A Response to the Expert Report of Stephen Wee Regarding the Establishment of and Purposes for the Coeur d'Alene Indian Reservation* (May 26, 2016) ("Smith Rep. 2016")) (federal officials reported that during the 1880s and 1890s the Tribe "continued to rely on hunting, fishing, and gathering activities on their traditionally occupied lands" and in 1888 Commissioner J.D.C. Atkins reported that Coeur d'Alene Tribal members "occasionally go [to the Wolf Lodge district within the 1873 Reservation] hunting for elk and deer").

Act ratifying the Tribe's Reservation "contained no cession by the Tribe of submerged lands within the reservation's outer boundaries" and noted that "the intent [of the 1889 Appropriations Act] . . . was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit . . . ." 533 U.S. at 278 (emphasis added).[16] So despite agreeing to an additional cession in the 1889 Agreement, the Tribe did not relinquish any of its rights within the boundaries of its remaining 1873 Reservation.[17] *See also Idaho II*, 210 F.3d at 1073 ("[w]e conclude that Congress's actions [show] . . . express recognition, and acceptance of the [1873] executive reservation");[18] *id.* at 1076 (given the Tribe's dependence on traditional activities "[i]n 1889, the borders of the reservation were contracted and redrawn—but redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation").[19]

[16] *See also* 210 F.3d at 1077 (in the 1889 act authorizing additional negotiations, the "express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's . . . all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation") (emphasis in original).

[17] After ratification and despite the pressures faced by the Tribe and its adaptation to civilized and industrial pursuits, the Tribe continued to rely on traditional pursuits as part of their regular lives. In July of 1891, for example, when the resident farmer at Coeur d'Alene attempted to get a census of the Indians on the Reservation he "complained about the difficulty of obtaining an 'accurate' census of the Coeur d'Alene Tribe because many tribal members had 'gone to the mountains hunting and fishing which made it impossible to see them all.'" R. at 788 (Smith Rep. 2016).

[18] The Ninth Circuit noted that "[t]he State has not challenged the district court's factual findings, nor has it challenged the court's conclusion that executive actions reflect a clear intent to include submerged lands within the 1873 reservation." *Idaho II*, 210 F.3d at 1070. As such, the Ninth Circuit "accept[ed] the facts as given" but also found that the facts "are amply supported by the record." *Id.* at 1073.

[19] The absence of express statements "in the Agreements or in the negotiations [regarding] hunting and fishing" is not indicative of an express intent to change to a purely agrarian society nor does finding a hunting and fishing purpose result in a *casus omissus* as the State argues, because as discussed, both Agreements were premised on the original purposes of the 1873 Reservation being confirmed. *See* State Br. at 16 (citing *Choctaw Nation v. U.S.*, 318 U.S. 423, 432 (1943)), 24 ("the Court need not, and should not, supply a casus omissus by implying a primary purpose the parties themselves failed to express").

In sum, the Tribe's efforts to establish a Reservation in 1873 that would, in part, protect its broad traditional uses of Lake Coeur d'Alene and related waterways, combined with the federal government's recognition that it could only achieve its goals in securing peace and land cessions from the Tribe by agreeing to the Tribe's demands, are the foundations upon which the Supreme Court concluded in *Idaho II* that the Tribe owned submerged lands within the Reservation boundaries confirmed by Congress in 1891. 533 U.S. at 275-76. The 1887 and 1889 Agreements evidence a continued recognition by both the Executive and Congress of the Tribe's dependence on its water resources for traditional purposes, which served as the cornerstone of the Supreme Court's decision in *Idaho II*.

B. The State Is Precluded from Relitigating Issues the Supreme Court Previously Rejected in *Idaho II*.

This is not the first time that the State has argued that the purposes of the Reservation are limited to agriculture by virtue of the 1887 and 1889 Agreements and the 1891 Act. The State made that very same argument in *Idaho II*—and the Supreme Court firmly rejected it. Accordingly, the State is precluded from asserting that the Tribe's Reservation as ratified by Congress in 1891 is limited to an agricultural purpose.[20] "The preclusive effect of a federal-court judgment is determined by federal common law." *Stilwyn, Inc. v. Rokan Corp.*, 158 Idaho 833, 839, 353 P.3d 1067, 1073 (2015) (citing *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008)). Under the doctrine of collateral estoppel, the Supreme Court has explained that "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984) (citing *Montana v. U.S.*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439

[20] The Tribe raised the preclusive effect of the State's arguments below, R. at 3120-32 (Tribe's Resp. to State, et al.), but the district court did not address this issue in reaching its decision on the motions for summary judgment.

U.S. 322, 326 n.5 (1979) ("judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action").[21]

The dispositive issues in *Idaho II* were whether Congress was on notice that the Executive Order reservation included submerged lands and whether the purposes of the reservation would have been compromised if submerged lands passed to the State upon statehood. *Idaho II*, 533 U.S. at 273-74.[22] To resolve these issues, *Idaho II* determined whether the federal government knew in establishing the Tribe's Reservation that the Tribe depended on the waters and submerged lands to support its traditional ways of life. 95 F. Supp. 2d at 1098-1100. The State took the position in *Idaho II* that the purposes of the 1873 Reservation changed over time and "[t]he 1889 Act was not an affirmation of the 1873 Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe." R. at 4149 (Second Aff. of Vanessa Boyd Willard, Ex. 3 (Br. for Pet'r, *Idaho v. U.S.*, 533 U.S. 262 (2001) (No. 00-189), 2001 WL 76238, at *46)). The State also argued that the 1873 reservation was "only a temporary set-aside," R. at 4182, (Second Aff. of Vanessa Boyd Willard, Ex. 4 (State of Idaho's Trial Br. at 29, *U.S. v. Idaho*, 95 F. Supp. 2d 1094 (D. Idaho 1998) (No. CIV 94-328-N-ELJ)), and that Congress "repudiated" the 1873 Reservation and created a new Reservation with an agricultural purpose through the 1889 appropriation and 1891 ratification acts, R. at 4146 (Br. of Pet'r at *37).

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[21] In applying collateral estoppel to an issue of fact or an issue of law, the Supreme Court has stated that for the purpose of determining when to apply an estoppel,

> [w]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law."

U.S. v. Stauffer Chem. Co., 464 U.S. 165, 171 (1984) (quoting Restatement (Second) of Judgments § 28 cmt. b (1982) (alteration and ellipses in original).

[22] *But see supra* n.7.

The State further asserted that under the 1889 Appropriation Act, the purposes of the Reservation were limited to agriculture, stating that the "language of the Act directs the Secretary to protect the Tribe's agricultural lands, reflecting the fact that the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities." *Id.* at 4149 (Br. of Pet'r at *46). Likewise, the State argued that in connection with the 1887 Agreement, the "reports submitted to Congress . . . uniformly portrayed the Coeur d'Alene Indians as farmers." *Id.*; *see also Idaho II*, 210 F.3d at 1074 ("Idaho argues that none of the events leading up to its statehood in 1890 constitute affirmative ratification of the executive intent to convey or reserve the submerged lands and thus cannot show congressional intent to defeat state title to these lands.").

The federal courts in *Idaho II* rejected these very arguments, holding instead that Congress fully ratified the Tribe's 1873 Executive Order Reservation and the Tribe retained all rights and privileges not expressly ceded in the 1887 and 1889 Agreements ratified by Congress under the 1891 Act. In arguing here that the 1891 Act superseded the purposes of the 1873 Executive Order and resulted in a "reduced reservation . . . to fulfill the Tribe's desire to establish a permanent livelihood based primarily on agriculture," State Br. at 18, 20,[23] the State attempts to relitigate issues already decided against it in *Idaho II*. If the State were correct in its position, the Supreme Court in *Idaho II* would have ruled against the Tribe and the United States on the submerged lands issue.

The State tries to evade *Idaho II* by claiming that the federal courts in *Idaho II* did not "address whether Congress, in establishing new Reservation boundaries in [the] Act of March 3, 1891 . . . adopted the Executive Order's purpose or intended to encourage new purposes and

[23] The State argues here that there was a "'change in condition' that occurred as a result of the 1887 and 1889 Agreements" and that the negotiating history of both the 1887 and 1889 Agreements "establishes that the primary purpose of the [1891] Act was to encourage the Tribe in its agricultural endeavors" and not to encourage hunting and fishing. *See id.* at 20, 22, 24.

uses . . . ." *Id.* at 7. But the State made the same contention in *Idaho II*, and the Supreme Court expressly rejected the assertion that the United States changed its intent to preserve the Tribe's traditional activities as a specific purpose of the Reservation through the 1891 Act. *Idaho II*, 533 U.S. at 278 ("nor . . . is there any hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho"). The State's attempt to circumvent the preclusive effect of *Idaho II* must therefore fail.

C. *Winters* Does Not Establish a Rule That Later Agreements Establish New and Narrower Purposes of an Indian Reservation.

As we have demonstrated above, the governing legal principles, the terms of all the Agreements, and the history of the negotiations involving this Reservation all clearly demonstrate that the State's argument cannot be sustained—as, contrary to the State's contentions, there was continuity in the broad purposes of the Reservation throughout this period, and because they were never abrogated by Congress, those broad purposes remained intact. In a final effort to evade this conclusion, the State points to *Winters*, claiming that *Winters* somehow created a rule that means that the congressional act approving the 1887 and 1889 Agreements superseded the purposes of the 1873 Coeur d'Alene Reservation and narrowed those purposes to agriculture only. State Br. at 18-20.

But the State is reading far too much into a passing discussion in *Winters* regarding the background history of that Reservation. First, *Winters* was a narrow suit for an injunction, 207 U.S. at 565, and the Court did not reach any issue concerning the full scope of Fort Belknap Reservation purposes, or whether a later statute superseded an earlier one regarding Reservation purposes. Having not addressed those issues even with regard to the Fort Belknap Reservation, *Winters* cannot be understood to have established a broader rule that applies to all Indian reservations, as the State would have it here. The history of the Coeur d'Alene Reservation must

be viewed on its merits, and nothing in *Winters* remotely suggests that Congress could not preserve the original purposes of a Reservation in subsequent enactments – as occurred here. Likewise, nothing in *Winters* can fairly be read to overcome the established principles of federal law that govern this area – that reserved water rights vest no later than when the Reservation is created, *Arizona I*, 373 U.S. at 600, and those rights cannot be abrogated absent clear action by Congress, *Pocatello*, 145 Idaho at 506. Indeed, since the Supreme Court has expressed those principles repeatedly after *Winters*, there is simply no basis for suggesting that *Winters* overcomes or defeats those principles. Here, those principles compel the determination that the broad purposes of the 1873 Reservation remain intact. [24]

Indeed, the record in this case and the determinations of the Supreme Court in *Idaho II* discussed in Section II.A *supra*, conclusively establish that in the 1887 and 1889 Agreements as ratified by Congress, the Tribe intended to preserve all of the purposes it bargained for within the boundaries of the 1873 Reservation. Thus, even if *Winters* were read as determining that the 1888 Agreement creating the Fort Belknap Reservation superseded all the Tribes' prior rights under earlier statutes and Executive Orders pertaining to that Reservation's lands, State Br. at 20, that would furnish no basis to generalize that reading to Coeur d'Alene or any other Indian reservation where the history of dealings between the Tribe and the United States is different.[25]

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[24] The State also briefly cites *Winters* and *Arizona I* as establishing a principle that reservations are established by looking forward only to what the parties anticipated would be the Tribe's permanent means of livelihood. State Br. at 19 Even assuming the State's reading is correct—which it is not because *Winters* and its progeny look to present and future uses—here, the historical record shows that the Tribe's 1873 Reservation was established to not only protect the Tribe's traditional activities, but also allow the Tribe to advance in agricultural, industrial, and commercial pursuits that would sustain a permanent home into the future. *See* Section II.A *supra*.

[25] The State also attempts to use *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn I*"), to further support its position. State Br. at 23. In *Big Horn I*, the Wyoming Supreme Court, relying in part on a prior U.S. Supreme Court

The State also relies on dicta from *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), a case that dealt with the Blackfeet Reservation. State Br. at 20. *British-American* had nothing to do with reserved water rights, or the purposes for which the Blackfeet (or any other Reservation) was created. Instead, it dealt with which of two different statutory schemes applied to minerals held by the Blackfeet Tribe on allotted lands on that reservation—and ultimately whether Congress had authorized state taxation of those minerals. 299 U.S. at 161. The Court found that to resolve this issue, an 1896 act, under which certain reservation lands had been ceded, rather than prior executive orders, was the only relevant action. *Id.* at 162-63. But this determination was based on the particular history of the Blackfeet Tribe and the minerals issue before the court, *see Blackfeet Nation v. U.S.*, 81 Ct.Cl. 101, 128-29 (1935), which has no application here.

III. The Tribe's Reserved Water Rights to Instream Flows Have Never Been Abrogated and Continue to Exist Within the Reservation Regardless of Underlying Land Ownership.

The Tribe's reserved water rights to instream flows exist to fulfill the purposes of the Coeur d'Alene Reservation by supporting fish species the Tribe harvests within the Reservation. R. at 10 (Tribal Claims Letter from Vanessa Boyd Willard, Envt. & Natural Res. Div., U.S. Dep't of Justice, to Gary Spackman, Dir., Idaho Dep't of Water Res. (Jan. 30, 2014)). Fish need water throughout a continuous and uninterrupted stream to survive, not just in discrete segments on

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decision in a takings case, determined that the Wind River Reservation was created for "a sole agricultural purpose." *Id.* at 96-97 (citing *U.S. v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (finding a purpose on the part of the U.S. "to help to create an independent farming community upon the reservation")). Significantly, and unlike the facts before this Court, the court in *Big Horn I* found no "extraneous evidence . . . sufficient to attribute a broader purpose," including no showing of "a dependency upon fishing for a livelihood nor a traditional lifestyle involving fishing." *Id.* at 98, 99. Unlike the prior Supreme Court decision that *Big Horn I* relied on, here the Supreme Court in *Idaho II* previously considered and rejected the State's argument that the Reservation was created solely "to protect the Tribe's agricultural activities." R. at 4149 (Br. of Pet'r at *46). In short, the Wind River Reservation, and the history of the tribes for which it was established, provides no comparison to the Coeur d'Alene Tribe and its Reservation.

Tribal lands. R. at 2676-78 (Jt. Stmt. Facts. ¶¶101-06). The Tribe's claims to instream flows continue to be necessary to fulfill the fishing purposes of the Reservation even after some lands were alienated from Tribal ownership. *Id.* The State contends that the district court should have determined that the Tribe's non-consumptive water rights for instream flows to protect fish on Reservation lands in Tribal ownership did not survive the 1906 Allotment Act with respect to lands alienated to non-Indians. State Br. at 24-28. From this flawed premise, the State claims that the Tribe's reserved water rights to instream flows "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." State Br. at 29.

The State mischaracterizes the Tribe's reserved water rights to instream flows as a claim by the Tribe to "control" uses of lands on the Reservation owned by non-Indians. But the Tribe's instream flow water rights exist to fulfill the purposes of its Reservation and do not entail any ownership claims to lands held by non-Indians. Instead, these water rights consist of the right to prevent junior appropriators from withdrawing water and reducing instream flows in a manner that adversely impacts the fishery in Coeur d'Alene Lake and other waterways on the Reservation. This Tribal reserved water right is no different in its effect than any other senior water right.

The State also misstates the law when it claims that the Tribe's water rights "ceased" on alienated land unless Congress acts expressly to <u>retain</u> those rights. To the contrary, federal law provides that the Tribe's water rights continue to exist unless Congress clearly acts to <u>abrogate</u> those rights. *Dion*, 476 U.S. at 737-38; *see also Pocatello*, 145 Idaho at 506. Here, there has been no such action by Congress.

A. The Tribe's Instream Flow Water Rights Fulfill the Purposes of the Reservation.

The district court correctly found that a purpose of the Reservation was to "facilitate its traditional . . . fishing practices," and accordingly upheld the Tribe's claims to non-consumptive instream flows (or "instream flows") within the Reservation to fulfill that purpose. R. at 4322 (Order Mots. S.J.); 4482 (Order on Mot. to Set Aside & Modify). Likewise, the district court correctly determined that the Tribe's reserved right to this water turns on the purposes of the Reservation, not on the ownership of the lands over which the water flows.

A non-consumptive reserved water right, like the Tribe's instream flow claims, is a right to prevent others from appropriating water, not to possess a body of water. *Cappaert*, 426 U.S. at 135, 143; *Adair*, 723 F.2d at 1411 (instream flow water right prevents appropriators "from depleting the streams[']s waters below a protected level in any area where the non-consumptive right applies"). This water right does not require the use of alienated land, nor is it an exercise of the Tribe's regulatory authority to control non-Indian uses on such land.

Unlike consumptive uses, which support the productive use of a particular piece of land and are only exercised by the diversion and consumption of water, non-consumptive rights preserve a certain amount of water in a hydrological system and are not exercised by consuming water. *Adair*, 723 F.2d at 1411 (citing *Cappaert*, 426 U.S. at 143). The Tribe holds its reserved instream flow water rights, not for the purposes of exercising any property interest in land that has been alienated to non-Indians within the Reservation, but to support the exercise of its historic traditional rights to fish on the Reservation, which rights cannot be sold or alienated to third parties. *Adair*, 723 F.2d at 1418 ("it follows that no subsequent transferee may acquire that [non-consumptive] right of use or the reserved water necessary to fulfill that use") (emphasis added). The purposes of the Reservation include supporting the continuation of these traditional rights,

such as fishing, and the water rights needed to fulfill these purposes were reserved and legally attached as an appurtenance to the Reservation. *See John v. U.S.*, 720 F.3d 1214, 1229-30 (9th Cir. 2013) ("[j]udicial references to such [water] rights being 'appurtenant' to reserved lands . . . refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land"). For that reason, the Tribe's instream flow rights are not affected by the underlying ownership of lands on the Reservation.

The State's position also contradicts Idaho law and general principles of prior appropriation.[26] Notwithstanding the federal source of the right, the effect of the Tribe's instream flows on landowners is no different than any other senior water right in the State. In *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2006), this Court held that a landowner had an appurtenant water right in a stream crossing land it did not own, because land does not need to have a "physical relationship" to a water right. *Id.* at 12; *cf. John*, 720 F.3d at 1229-30. In *Joyce*, this Court rejected the notion that the property right to exclude others from land is a basis for a water right under Idaho law. 144 Idaho at 7. *Joyce* found that a water right "is not based upon having exclusive access to a water source," and that the right "does not constitute ownership of the water." *Id.*

Indeed, "[a] water right is an independent right and is not a servitude upon some other thing . . . ." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 150 P. 336, 339 (1915).

> A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to

[26] Moreover, the State itself claims minimum stream flows in waters that flow over land it does not own, such as the State's claim in Wolf Lodge Creek. *See* Notice of Claim to a Water Right Acquired Under State Law No. 95-7874, at 2 (Jan. 28, 2013) (stating that the State does not "own the property listed above as place of use" for its claim to minimum stream flows in Wolf Lodge Creek), *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/jwq101_.PDF (last accessed Apr. 12, 2018).

> the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use.

Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059, 1062 (1909). In Idaho's appropriative water right system, a junior water right holder upstream of a senior user has no right, by virtue of land ownership, to stop the water flowing over his or her land from satisfying the downstream senior right. *See, e.g.*, *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421, 424 (1941) (landowner cannot divert water to the detriment of a senior water right and "must allow the water to flow down the bed of the natural channel"). Likewise, underlying private land ownership provides no basis to defeat the Tribe's instream flow water rights under federal law.

Three federal court decisions clearly hold that instream flow reserved water rights are implied to fulfill the purposes of a reservation without regard to underlying land ownership. *Walton I*, 647 F.2d at 45, 48, 52; *Adair*, 723 F.2d at 1411-12; *U.S. v. Anderson*, 591 F. Supp. 1, 5, 13 (E.D. Wash. 1982), *rev'd in part on other grounds*, 736 F.2d 1358. These cases establish that the Tribe's reserved instream flow water rights were not affected by allotment and are held regardless of the ownership over which the waters flow. The State's attempts to distinguish these cases are all unavailing and should be rejected.

In *Walton I*, the Ninth Circuit addressed non-consumptive water rights in a non-navigable stream flowing over lands within the reservation established for the Colville Confederated Tribes. 647 F.2d at 44-45. The Tribe lost these lands under the General Allotment Act and a non-Indian owned three of the seven allotments at issue. *Id.* at 45. Notwithstanding allotment and non-Indian ownership, the court held that the Tribe continued to hold reserved instream flow water rights within the Reservation to support the Tribe's traditional fishing activities, including where water passes through non-Indian-owned lands. *Id*. at 48, 52.

The State argues that *Walton I* "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." State Br. at 40. In fact, the court's conclusion in *Walton I* has nothing to do with the preponderance of land ownership on the Reservation or in the watershed involved. Rather, it establishes that instream flows are implied to support fish habitat for spawning, because "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." 647 F.2d at 48. As the Ninth Circuit determined in a later opinion involving this dispute after remand, the quantity of Colville's reserved water right to instream flows "was not affected by the allotment of reservations lands and passage of title out of the Indians' hands." *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("*Walton III*").

In *Adair*, the Ninth Circuit found that the Klamath Tribe's 1864 Treaty recognized the Tribe's aboriginal water rights and confirmed a continued water right to support the Tribe's fishing lifestyle on its reservation, even after the Tribe's reservation was first allotted and subsequently terminated by Congress. 723 F.2d at 1398, 1412. The State emphasizes that the Termination Act included a provision that nothing was intended to abrogate the water rights of the Tribe. *Id.* at 1412 (cited in State Br. at 38). However, *Adair*'s holding was not premised solely on this provision, but also on the fact that nowhere in the Termination Act had Congress explicitly abrogated the Tribe's reserved water rights. *Id.* ("Because 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.") (emphasis added).

The State also gives but passing reference to the fact that, like the Coeur d'Alene Reservation, the Klamath Reservation was allotted, an event that the Ninth Circuit found "fundamentally changed the nature of land ownership on the Klamath Reservation." *Id*. at 1398.

Unlike the Klamath Termination Act, the Allotment Act contained no savings clause, yet the Ninth Circuit found that the Tribe reserved instream flow water rights and none of those rights passed to out of tribal ownership as a result of either Act because "no subsequent transferee may acquire that right of [hunting and fishing] or the reserved water necessary to fulfill that use." *Id*. at 1418. *Adair* restates the controlling principle that tribal rights, like those reserved in the 1873 Reservation, are not abrogated by implication. *Id.* at 1412 (citing *Menominee Tribe*, 391 U.S. at 413). As with *Walton*, nothing in the court's analysis in *Adair* turned on whether or not Indian ownership of the Reservation lands was predominant.

Finally, *Anderson* held that the Spokane Tribe was entitled to *Winters* rights to maintain instream flows in Chamokane Creek, despite non-Indian ownership of "much of the land . . . immediately adjacent to the Creek." 591 F. Supp. at 5, 13. The State asks this Court to consider *Anderson* "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 . . . ." State Br. at 41. (emphasis added). As a matter of fact, however, the State is incorrect, because the Ninth Circuit in *Anderson* found that non-Indian fee land consisted of "most of the waterfront property within the reservation . . . ." 736 F.2d at 1366 n.1 (emphasis added).

Walton I, *Adair*, and *Anderson* confirm that reserved water rights to instream flows are implied to fulfill the fishing purpose of an Indian reservation, and are awarded in streams without regard to whether the water flows over or adjacent to non-Indian lands. Contrary to the State's assertion, none of these cases took into account whether those tribes "retain[ed] sufficient lands in and along the streams . . . to preserve fishing rights and provide it control of spawning and rearing habitat . . . ." State Br. at 43. This is so because ownership of a particular parcel of land is simply not a part of the test for whether a tribe is entitled to a reserved instream flow water right. The

governing analysis turns on the purposes of the reservation, not on the physical location of the stream. In the *Winters* case, for example, the Supreme Court enjoined non-Indian landowners entirely outside the Reservation from diversions that interfered with the purposes of the Reservation. 207 U.S. at 565, 568-69. Accordingly, the district court correctly found the Tribe was entitled to reserved instream flow water rights within the Reservation based on the fishing purposes of the Reservation.

B. The Tribe's Instream Flow Water Rights Have Never Been Abrogated by Clear Action of Congress.

The Coeur d'Alene Reservation was established by a grant of rights from the Tribe, which confirmed the Tribe's pre-existing rights within the Reservation, including the right to continue its traditional activities. *Winans*, 198 U.S. at 381; *Dion*, 476 U.S. at 737-38; *see also Pocatello*, 145 Idaho at 506; *State v. Coffee*, 97 Idaho 905, 908, 556 P.2d 1185, 1188 (1976) ("treaties provide for retention by the Indians of hunting and fishing rights" on the reservation). The Tribe's water rights to instream flows necessary to support its traditional fishing activities vested when the 1873 Reservation was established and, the district court correctly determined, carry a time immemorial priority date. R. at 4326 (Order on Mots. S.J.). *See also Arizona I*, 323 U.S. at 600 ("reserve[d] . . . water rights . . . effective as of the time the Indian Reservations were created"); *Adair*, 723 F.2d at 1414 ("Such water rights necessarily carry a priority date of time immemorial."). As this Court has recognized, under federal law these rights cannot be abrogated without a clear statement of congressional purpose, especially against the background of tribal opposition. *Pocatello*, 145 Idaho at 506-07. Congress has never made such a clear statement of purpose—either in the 1906 Allotment Act or otherwise—and consequently the Tribe still holds reserved rights to instream flows throughout the Reservation.

The State attempts to turn this controlling principle on its head by asserting that an express statement is required to retain the Tribe's water rights on alienated lands within the Reservation. State Br. at 27, 29. That simply is not the law. The extinguishment of the Tribe's water rights "is not to be lightly imputed to Congress," and such a drastic result requires a clear expression of congressional intent. *Pocatello*, 145 Idaho at 506-07. Indeed, the Supreme Court held in *Menominee Tribe* that the Tribe's rights survive not only the transfer of land to non-Indians pursuant to an allotment act, but the total termination of a reservation. 391 U.S at 412-13 (declining to construe the Menominee Indian Termination Act, which terminated the Menominee Reservation, as a "backhanded way" of abrogating the Menominee Tribe's hunting and fishing rights).

This Court in *State v. McConville*, 65 Idaho 46, 139 P.2d 485, 487 (1943), rejected this very argument by the State: that "when the reservation was thrown open to settlement if the Indians had desired to retain the right to fish . . . there should have been a provision to that effect in the law or treaty." This Court instead concluded in *McConville* that such an express provision "was not necessary," because "anything not specifically granted was retained" by the Indians and held that "[p]rivate ownership of some lands is not inconsistent with the [Tribe's] right to fish . . . ." *Id.* [27]

Here, as in *McConville*, the State can point to no clear and express action by Congress abrogating the Tribe's water rights—and there is none. The language and legislative history of the Coeur d'Alene Allotment Act say nothing about abrogating the Tribe's water rights. The Coeur

[27] *Accord Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004 (D. Minn. 1971) (allotment act providing for the "complete extinguishment of the Indian title" held not to abrogate hunting and fishing rights because the act "said nothing about the Indian treaty rights to hunt and fish"); *State v. Clark*, 282 N.W.2d 902, 908-09 (Minn. 1979) (tribal hunting and fishing rights continued to exist on allotted land owned by non-Indians within the White Earth Reservation, even though over 95% of the Reservation had been alienated).

d'Alene Allotment Act, ch. 3504, 34 Stat. 325, 335-36 (1906), provided for allotments to be made to individual Indians in accordance with the General Allotment Act, ch. 119, 24 Stat. 388 (1887), which generally provided each Indian on a reservation would receive an allotment of 160 acres that would be held in trust by the United States for 25 years, *id.* § 5, 24 Stat. at 389.[28] The Coeur d'Alene Allotment Act provided that lands remaining after allotment would be classified, appraised, and "opened to settlement and entry" by non-Indian homesteaders. 34 Stat. at 336. Lands not homesteaded remained in trust for the benefit of the Tribe. R. at 798 (Smith Rep. 2016); 2673 (Jt. Stmt. Facts ¶93).[29] The mere fact that under the Coeur d'Alene Allotment Act ownership of certain lands were transferred to non-Indians does not constitute clear evidence that Congress intended to abrogate the Tribe's water rights, which continued to serve the purposes of the Reservation.

The State also overstates the effect of the Coeur d'Alene Allotment Act in suggesting that all communal ownership of lands within the Reservation ceased under the Act. State Br. at 27. Although the Coeur d'Alene Allotment Act did cause the Tribe to lose ownership of some land to individual Indian allottees and non-Indian purchasers of surplus lands, the Tribe still retained the Reservation's unsold and unallotted land for its beneficial use. R. at 2673 (Jt. Stmt. Facts ¶93). *See Ash Sheep Co. v. U.S.*, 252 U.S. 159, 166 (1920) ("until sales should be made, any benefits

[28] The General Allotment Act did not partition and convey a tribe's water rights as it did with lands conveyed to individual Indians. *See Grey v. U.S.*, 21 Cl.Ct. 285, 299 (1990) ("Nothing in the General Allotment Act or other statutes governing irrigation of allotments suggests that Congress was partitioning and conveying tribal water rights as it did with tribal lands."). The Supreme Court has held that the General Allotment Act merely permitted Indian allottees a right to share in the use of some tribal water rights, not that these rights were conveyed to allottees. *U.S. v. Powers*, 305 U.S. 527, 532 (1939) (Indian allottee has the "right to use some portion of tribal waters essential for cultivation").

[29] The Tribe strongly opposed the Coeur d'Alene Allotment Act because the United States had promised that the Reservation would never be surveyed or sold without tribal consent. R. at 1751 (Hart Rep. 2015). The Tribe viewed allotment and opening of the Reservation as "nothing short of open thievery." *Id.*

[for unsold surplus lands] which might be derived from the use of the lands would belong to the [tribe]"). This land continued to be held for the benefit of the Tribe, including to support the exercise of the Tribe's traditional activities. By its terms, the Coeur d'Alene Allotment Act did not affect in any way the land which continued to be held for the Tribe's benefit. Thus, the State's argument that the Tribe's "[c]ommunal property rights ceased . . . when the reservation was allotted," State Br. at 27, is at odds with the fact that the Tribe still had lands for its communal use and exercised its full measure of rights on that land. The sale of land under the Coeur d'Alene Allotment Act merely permitted non-Indians to own property on the Reservation and thus affected the Tribe's ability to exclude those landowners from their own property.

The State seeks to deflect attention from the clear congressional statement requirement for abrogation of Indian rights with a discussion of case law on unrelated subjects, such as tribal regulatory jurisdiction over fee lands owned by non-Indians. The State relies on three cases—*Montana v. U.S.*, 450 U.S. 544 (1980), *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Nevada v. Hicks*, 533 U.S. 353 (2001)—which hold that tribes have limited jurisdiction to regulate non-Indian activities on lands they own in fee simple within reservations—as somehow supporting its claim that the Tribe's instream flow water rights have been extinguished without Congress saying so. State Br. at 30-35. This case does not involve any assertion of tribal regulatory authority over non-Indians. Rather, the Tribe simply seeks to adjudicate the existence of its senior water rights necessary to support the fishing purposes of the Reservation and to protect that water from being depleted by junior users. That is precisely what the *Winters* case held when it enjoined non-Indians on fee lands outside the Reservation from interfering with water needed to fulfill the Tribe's senior uses on the Reservation.

The State also cites *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165 (1977) ("*Puyallup III*"), as a case "especially on point." State Br at 31-32. But, like

Montana, *Hicks*, and *Brendale*, *Puyallup III* has no application to the Tribe's non-consumptive water rights necessary to protect its fisheries within the Reservation. *Puyallup III* deals with the issue of when a state may regulate tribal fishing at on-reservation sites where non-Indians have a right to fish in common with Indians and when such regulation is necessary for conservation. 433 U.S. at 167 & n.1. The present case involves tribal water rights, not state regulatory authority over treaty fishing sites.

Finally, the State claims that *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), supports "the loss of rights [by the Tribe] on alienated reservation lands . . . ." State Br. at 34. In *Blake*, the Ninth Circuit addressed whether tribal members had the right to "enter and cross lands of [a non-Indian fee land owner] to exercise . . . hunting and fishing rights." 663 F.2d at 908. The Ninth Circuit held that in allotting land on the Klamath River Reservation,[30] Congress intended to "grant an unencumbered title to the Indian allottees and their successors in interest, which would not be subject to any interest in the land that might be implied from the mere creation of the reservation." *Id.* at 911 (emphasis added). *Blake* is inapplicable because this case does not involve issues related to a right of access or any other property interest on non-Indian land. As discussed above, the Tribe claims a non-consumptive use right to maintain instream flows in water that flows over non-Indian land to support fish habitat for the fish the Tribe harvests on Tribal land within the Reservation.

[30] The State mistakenly states, State Br. at 34-35, that *Blake* arose on the Klamath Indian Reservation—which is the locus of the *Adair* case. 723 F.2d at 1397-98. In fact, *Blake* involved the Klamath River Reservation, which is a different reservation in California. 663 F.2d at 908.

CONCLUSION

This Court should affirm the district court's determination that (1) the Coeur d'Alene Reservation was established in 1873; (2) reserved water was implied to fulfill the domestic, fishing, hunting, and agricultural purposes of the Reservation; (3) the fishing and hunting purposes of the Reservation carry a time immemorial priority date; and (4) the agricultural purposes carry an 1873 priority date.

Respectfully submitted this 13th day of April, 2018.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by USPS Priority Mail, on this 13th day of April, 2018, upon the following:

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