4-13-2018

IDSC USA Response to Idahos Appeal

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No. 45381-2017

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

STATE OF IDAHO,

Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

BRIEF OF RESPONDENT UNITED STATES OF AMERICA

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

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STATEMENT OF THE CASE

A. Nature of the Case

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

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

These categories of claims individually accomplish necessary parts of the Reservation's general homeland purpose. Consumptive claims address the water necessary for lands owned by the United States in trust for the Tribe or for an allottee or for lands owned in fee by the Tribe or its members, and such claims amount to less than one percent of the total outflow of the Coeur d'Alene-Spokane River Basin. Domestic usage claims address the water necessary for the population of the Reservation. Agricultural claims address the water necessary to achieve the well-established practicably-irrigable acreage standard. Claims for the maintenance of instream

flows address water for the Tribe's fishery through maintaining biological requirements of certain fish species that migrate upstream from Lake Coeur d'Alene to spawn. Finally, the claim for the maintenance of the level of Lake Coeur d'Alene is measured by the Lake surface's natural average elevation at different months of the year.

In its May 3, 2017, decision, the Water Court held that the Coeur d'Alene Tribe is entitled to a water right for certain "primary purposes" of its Reservation, which was established via executive order in 1873 after the Tribe and the United States reached an agreement under which the Tribe would retain a key portion of its aboriginal territory.[1] While the Water Court rejected the arguments of the United States and the Tribe about the right to use water for certain other purposes— which are the subject of the United States' related appeal, *See* United States' Br. as Appellant at 10–26 in No. 45382—the court correctly determined that the Tribe holds a right to use water for hunting, fishing, domestic, and agricultural activities. And while the Water Court dismissed all claims for maintenance of instream flow in waterways outside the Reservation's boundaries—also at issue in the United States' appeal—it correctly allowed claims for instream flow within the Reservation to proceed to the next phase of the adjudication.

The State of Idaho appeals the Water Court's decision, arguing—in conflict with *Idaho v. United States,* 533 U.S. 262 (2001) ("*Idaho II*")—that the Tribe holds no water right for subsistence activities because those activities had by that time been abandoned by the time the present Reservation was created in 1891, and that the Water Court erred by approving instream

[1] The Water Court's decision is the subject of four appeals pending before this Court. In addition to the instant appeal, see No. 45382 (appeal by the United States); No. 45383 (appeal by Coeur d'Alene Tribe); No. 45384 (appeal by North Idaho Water Rights Alliance, et al.). These appeals have a consolidated record on appeal, *see* R.1–2, but briefing of the appeals is proceeding separately. Citations to the Clerk's Record on Appeal prepared jointly for the related appeals are designated as "R.#."

flow claims within the Reservation where the Tribe does not currently own land underlying or abutting the relevant stream. A group of private objectors has separately appealed from the same decision, *see* No. 45384, additionally arguing that the Water Court should have rejected all claimed rights to groundwater and water for agriculture.

B. Statement of Facts

The Coeur d'Alene Tribe's aboriginal territory included Lake Coeur d'Alene, the St. Joe River, and surrounding areas, within a vastly larger area of more than 3.5 million acres in what is now northern Idaho and northeastern Washington. *See Idaho II,* 533 U.S. at 265 (detailing the history of the Tribe and establishment of its Reservation as background to determining that the United States holds submerged lands within the Reservation in trust for the benefit of the Tribe). The U.S. Supreme Court recognized that "Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." *Id.* (citations and footnote omitted).

The United States acquired title to this area under an 1846 treaty with Great Britain. *Id.* As conflicts grew due to increasing settlement by non-Indians into the Tribe's territory, President Johnson in 1867 issued an executive order setting aside "a reservation of comparatively modest size." *Id.* Once the Coeur d'Alene became aware of the Order, the Tribe rejected it: "The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways." *Id.* at 266. Accordingly, when the Tribe petitioned the Commissioner of Indian Affairs for an adequate reservation, "it insisted on a reservation that included key river valleys because 'we are not as yet quite up to living on farming' " *Id.* After further negotiations, the Tribe agreed in 1873 to relinquish all claims to its aboriginal lands outside the bounds of a larger reservation; in exchange, the United States would

"set apart and secure" lands "for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons." *Id.* (quoting 1873 agreement). The reservation boundaries described in the agreement included part of the St. Joe River and nearly all of Lake Coeur d'Alene. *Id.*; *see also* R.1865–67; R.4201–03 (full text of the 1873 Agreement). The 1873 agreement was by its terms not binding without congressional approval, but later that year "President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians.' " *Idaho II*, 533 U.S. at 266 (quoting Exec. Order of Nov. 8, 1873, *reprinted in* 1 C. Kapler, *Indian Affairs: Laws and Treaties* 837 (1904)); *see also* R.1868.

As pressure from the new white settlers intensified and valuable minerals were discovered in this part of Idaho, Congress sought to make more land available to settlers and prospectors by altering the boundaries of the Coeur d'Alene Reservation. After further negotiations, the United States and Tribe in 1889 negotiated a new agreement under which the Tribe would cede the northern portion of its reservation in exchange for $500,000. *Idaho II*, 533 U.S. at 269–70; R.1882–84. Congress ratified this 1889 agreement in 1891, along with an 1887 agreement that had reaffirmed the establishment of the 1873 Reservation. *Idaho II*, 533 U.S. at 270. While these agreements confirmed the 1873 Reservation and then ceded certain of those Reservation lands, they did not purport to establish a new reservation, alter the purpose of the existing Reservation, or abrogate any other tribal rights.

The boundaries of the Coeur d'Alene Reservation have remained largely constant since that time, but control of Reservation lands has evolved, most substantially as a result of the 1906 Indian Appropriations Act, ch. 3504, 34 Stat. 325, 335–36 (1906), which authorized allotment of the Reservation. Under that law, and over vigorous and near-universal objection by the Tribe, *see* R.1750–51, each Indian on the Coeur d'Alene Reservation received an allotment of 160 acres,

and the surplus lands—i.e., those lands not allotted or reserved for common tribal purposes—were open to settlement by non-Indians. 34 Stat. at 335–37. Application of this law soon caused non-Indian holdings of Reservation lands to exceed Indian holdings, due both to non-Indian homesteading and to the loss of Indian allotments resulting from sale, forfeiture, or loss in mortgage sale. *See* R.2244–50. The United States subsequently reversed course on that Indian allotment policy, through enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. As for the Coeur d'Alene Tribe, that significant policy change resulted in the eventual transfer back to the Tribe of remaining surplus lands (i.e., lands that had not yet been homesteaded following the 1906 allotment Act). R.3101, 3105; R.799–802. Over the last few decades, the Tribe has endeavored to reacquire lands alienated from tribal control during allotment. *See* R.3108–10.

C. Course of Proceedings

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

entitlement and quantification. R.461–62. The Water Court has thus far considered—and this appeal involves—only issues of entitlement and of the priority date to be assigned to different categories of water claims.

The water rights claimed by the United States for the Tribe fall into several categories, all of which are intended to accomplish the Reservation's purpose as a permanent homeland for the Coeur d'Alene Tribe. The United States claimed non-consumptive water rights to support the Tribe's hunting, fishing, gathering, cultural practices, transportation, recreation, and related uses. These claims are for the maintenance of certain flows or levels in Lake Coeur d'Alene and its associated waterways and for seeps, springs, and wetlands on Reservation lands. These in-situ water rights allow for the Tribe's continued traditional activities on Reservation waters, which require protecting the upstream habitat upon which the Tribe's fishery depends. The claimed consumptive water rights would entitle the Tribe to divert water for domestic, agricultural, municipal, commercial, and industrial uses, which serve the Reservation's homeland purpose by supporting basic domestic needs and by aiding in the Tribe's continued economic development and self-sufficiency.

Because a tribe's water rights vest no later than a reservation's creation, the historical context of the Coeur d'Alene Reservation's creation is critical to understanding the nature and extent of these implied rights. The United States and Tribe retained historians who prepared reports on the history of the Coeur d'Alene Tribe, particularly with respect to the circumstances surrounding the creation of the Reservation. *See* R.2627–28 (United States and Coeur d'Alene Tribe's Joint Statement of Facts, summarizing expert reports submitted in this case). These expert reports thoroughly document the Tribe's historical reliance on waterways for fishing, hunting, gathering, trade, culture, and general survival from time immemorial through (and beyond) Reservation creation; the Tribe's initiation of agriculture on the Reservation; the

negotiations between the Tribe and various federal representatives and entities leading to the 1873 Agreement, including the Tribe's firm demand for a reservation with waterways; and the negotiations that continued after Reservation establishment. *See generally* R.2632–72. Historical experts also documented tribal resistance to federal allotment policy and the Tribe's continued commitment to fighting for its water resources. R.2671–76. An expert explained the biological attributes of the fish species that are the focus of the claims for instream flows to protect fish habitat, as well as why maintenance of fish habitat both within and outside the Reservation's boundaries is critical to effectuating the fishing purpose of the Reservation. R.2676–78.

On motions for summary judgment, the United States argued that the Coeur d'Alene Reservation was established in 1873 to create and maintain a permanent homeland for the Coeur d'Alene Tribe. The United States relied heavily on the U.S. Supreme Court's decision in *Idaho II*, which explained the history of the Coeur d'Alene people and the establishment of the Reservation in holding that the submerged lands beneath navigable waters in the Reservation had been reserved for the Tribe in the establishment of the Reservation. The United States urged that the Water Court's inquiry should center—as did the Supreme Court's in *Idaho II*—on the purposes underlying the establishment of the Reservation via executive order in 1873 and the Tribe's uses of the Reservation lands and waters at that time. In support of the claims for maintenance of instream flows, the United States pointed to the Tribe's traditional reliance on the Lake Coeur d'Alene fisheries for subsistence, coupled with the biological reliance of those fisheries on adequate upstream habitat to carry out their full lifecycle. The fact that the Tribe does not currently own or control all lands underlying or abutting the streams in which flow is claimed is not relevant to the reserved water rights determination, because the claim is based on the Tribe's established right to fish downstream on Lake Coeur d'Alene, not on underlying or abutting land ownership.

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

In this appeal, the State of Idaho argues that the Water Court was wrong to recognize water rights to facilitate the Coeur d'Alene Tribe's hunting and fishing on its Reservation. As elaborated below, however, the Water Court's recognition of this key purpose of the Reservation should be affirmed. In determining the United States' entitlement to water for the Tribe, the Water Court properly focused on the purposes of the Reservation's establishment in 1873 and the Tribe's use of its lands and waters at that time. That inquiry led the Water Court to conclude that one purpose of the Reservation's creation—a purpose for which water was impliedly reserved—was to allow the Tribe to continue its traditional hunting and fishing activities. R.4321–22. The Court therefore correctly allowed all hunting- and fishing-related claims for waters on the Reservation to proceed to the quantification phase of this litigation.

ISSUES PRESENTED

The issues presented in this appeal by the State of Idaho are:

1. Whether the Water Court properly focused on the purposes of the Reservation's establishment through the President's 1873 executive order, and whether it correctly determined that the Reservation's purpose included continuation of traditional hunting and fishing.

2. Whether the Water Court correctly allowed on-Reservation claims for the maintenance of instream flows to proceed to the quantification phase, without regard to the specific land ownership underlying or abutting those streams.

STANDARD OF REVIEW

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

ARGUMENT

I. The Water Court properly focused its inquiry on the 1873 executive order that created the Coeur d'Alene Reservation.

The Coeur d'Alene Reservation was established by executive order in 1873 as a permanent homeland for the Coeur d'Alene Tribe. Contrary to the State's argument, the 1873 executive order created a reservation equally valid as a reservation that might have been created by an Act of Congress. *See, e.g.*, *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty *or executive order*, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." (emphasis added)); *Arizona v. California*, 373 U.S. 546, 598 (1963) ("*Arizona I*") (*Winters* doctrine of implied water rights applies to reservations established by executive order). With the establishment of this reservation of land, water was also impliedly reserved to make the Reservation livable as a permanent homeland. *See Winters v. United States*, 207 U.S. 564 (1908);

Arizona I, 373 U.S. at 599. These rights vested no later than when the Reservation was established. *See id.* at 600. [2]

Because *Winters* water rights are impliedly reserved by the creation of a tribe's reservation, they need not be made explicit at any time during negotiations between a tribe and the United States, nor need they be expressly indicated in any document formalizing the reservation. *See Winters*, 207 U.S. at 576–77; *United States v. Adair*, 723 F.2d 1397, 1409 (9th Cir. 1983); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 75 (Ariz. 2001); *Mont. ex rel. Greely v. Confed. Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985). Instead, these rights are determined through consideration of several important factors, including the history of the tribe and the reservation at issue, including the tribe's traditional practices and its need to maintain itself under changed circumstances; the language of the treaty, order, or agreement that created the Indian reservation; and the canon of interpretation requiring agreements between the federal government and Indians to be construed in a light favorable to the Indians. *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *Adair*, 723 F.2d at 1409, 1412; *see also Washington v. Wash. State Comm'l Fishing Vessel Ass'n*, 443 U.S. 658, 676, 680 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 206 (1999). Also important to recognize in determining a tribe's reserved water rights is that an agreement to confine a tribe to a reservation "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also Pocatello*, 180 P.3d at 1057; *United States*

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

v. Santa Fe Pacific R. Co., 314 U.S. 339, 353–54 (1941) (creation of Indian reservation protects any pre-existing possessory rights of the Indians in absence of clear contrary intent).

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

An Act of Congress was not necessary for the establishment of the Coeur d'Alene Reservation. Once established, however, the Reservation and associated rights could be altered only by explicit action of Congress. Indeed, unlike *recognition* of a tribe's water rights, which occurs by implication upon establishment of a reservation, *abrogation* of tribal rights must be explicit and may not be accomplished through implication or silence. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). Although Congress later reduced the size of the Coeur d'Alene Reservation and allowed for fee ownership of lands within the Reservation (including by non-Indians), Congress never abrogated the Tribe's reserved right to use water for

hunting and fishing. Accordingly, these reserved rights, which relate to the Tribe's aboriginal uses, *see Winans*, 198 U.S. at 381, vested when the Reservation was established in 1873, *see Arizona I*, 373 U.S. at 600, and continue to be held today.

The Water Court correctly recognized that "the Tribe's need to access the waterways to facilitate its traditional fishing and hunting practices" was at "the forefront of" the negotiations between the Tribe and the federal government for the establishment of a reservation. R.4321. Crediting the United States' expert's findings and the Supreme Court's decision in *Idaho II*, 533 U.S. at 266, the court explained that the Tribe was moving toward incorporating agriculture into its way of life but at the same time continued to rely on hunting and fishing for its survival. The court acknowledged that the United States fully understood that the Tribe intended to negotiate a reservation that included waterways for hunting and fishing, and that it was in the United States' interest to provide those waters to the Tribe to avoid "trouble" while extinguishing tribal claims to lands within much of the Tribe's aboriginal territory. R.4322. The court agreed with the United States that the "history and circumstances surrounding the 1873 agreement and resulting Executive Order thus establish that" the "very locale and construct of the reservation was tailored to serve" the purpose of facilitating "traditional fishing and hunting practices." R.4322. The court thus correctly recognized that the Coeur d'Alene Tribe holds a reserved right to water for hunting and fishing with a time immemorial priority date. R.4322, 4326.

The State argues that whatever were the purposes of the Coeur d'Alene Reservation when established in 1873, Congress rejected those purposes and established a new, superseding reservation in 1891, intended solely to provide for the Tribe's agricultural pursuits. The State's argument has three crucial defects: first, the Supreme Court of the United States already rejected the State's argument in *Idaho II*, and the State may not relitigate that issue; second, even if that issue were still open, the State is wrong as a matter of law and fact that Congress either could or

did so alter the Reservation's purposes; and third, the State's argument rests on a fundamental misunderstanding of the *Winters* reserved water rights doctrine, which does not support the State's theory that changes to the Coeur d'Alene Reservation's boundaries after establishment fundamentally altered the purposes of the Reservation.

A. The State may not relitigate its argument that Congress fundamentally redefined the Coeur d'Alene Reservation in 1891, because the Supreme Court rejected the very same argument in *Idaho II*.

The State urges this Court to look to Acts of Congress nearly two decades after the establishment of the Coeur d'Alene Reservation to determine the purposes for which water was impliedly reserved for the Reservation. But the State is precluded from making this argument, which was presented, considered, and rejected by the Supreme Court in *Idaho II.*

The doctrine of issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted). By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," this doctrine protects against "the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–54 (1979). The State's reliance on this already presented and decided argument is impermissible based on all five factors that this Court has set forth for determining whether issue preclusion (also known as collateral estoppel) bars relitigation of an issue: (1) the State "had a full and fair opportunity to litigate the issue decided" in *Idaho II*; (2) the issue decided in *Idaho II* regarding the effect of later Acts of Congress on the Coeur d'Alene Reservation "was identical to the issue presented" here; (3) the issue "was actually decided" in

Idaho II; (4) "there was a final judgment on the merits" in *Idaho II*; and (5) the State "was a party" to *Idaho II*. *Ticor Title Co. v. Stanion*, 157 P.3d 613, 618 (Idaho 2007).

The State asserts that *Idaho II* did not present—and thus the Supreme Court not consider—any issue beyond the purposes of the 1873 creation of the Coeur d'Alene Reservation, leaving open the question whether later congressional action "established new purposes for the diminished reservation." State Br. 7.[3] The State's characterization of *Idaho II* is incorrect: the Supreme Court specifically considered events surrounding the Reservation's creation, and it decided the legal effects of later changes, through and beyond Congress's 1891 Act altering the Reservation's boundaries, *see* Act of Mar. 3, 1891, ch. 543, 26 Stat. 1028, because the State made the very same argument in that case that it does here. Having considered the State's argument in that case, the U.S. Supreme Court squarely rejected the theory that the State now presents to this Court.

The State made the identical argument in *Idaho II*: While the ultimate issue in *Idaho II*—quieting title to land—differs from the water rights issues presented here, the State presented the very same argument in that case that it attempts to resurrect for this Court's decision, namely the extent to which Congress altered the scope of the initial Reservation through subsequent actions. In *Idaho II*, the State argued before the U.S. Supreme Court that the United States does not hold

[3] The State improperly utilizes the term "diminished" when it asserts that the 1891 Act approving the 1887 and 1889 Agreements was an act "establishing a diminished reservation." State Br. 7, 13. "Diminishment" is a legal term of art in Indian law, and refers to a situation where more than just an Indian reservation's boundaries change. Diminishment removes certain lands from Indian Country jurisdiction. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). No court has ruled that the Coeur d'Alene Reservation has been "diminished," and at no point in this adjudication has the State even argued that the Reservation has been "diminished." Instead, the State misuses this term of art as simply an adjective to refer to the change of the Reservation's borders. For this reason, the United States respectfully urges the Court to not use the term "diminished," as the implications of that term are broader than the State's casual usage suggests.

title to submerged lands within the Reservation in trust for the Tribe because, under the State's theory in that case—and now in this case—in 1889, "Congress repudiated the Reservation as it then existed, directed its diminishment, and drafted its description of the lands to be purchased so as to avoid any implication that it was recognizing tribal title to the submerged lands." R.3612 (State's Brief before Supreme Court in *Idaho II* (citing Act of Mar. 2, 1889, 25 Stat. 980, 1002 (the "1889 Act"))).[4] Thus, the argument went, whatever the United States initially intended regarding the ownership of submerged lands within the Reservation, later Acts of Congress made clear that submerged lands would not be retained for the Tribe because "the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe" and thus tribal control of these lands was "not necessary to fulfill the purposes of the diminished Reservation." R.3612. The State argued that the Ninth Circuit had "mischaracterized Congress' actions" "by holding that Congress did not 'repudiate' the 1873 Executive Order Reservation," R.3618, and that "the court of appeals' failure to explore the purposes of the Reservation, as understood by Congress, is indefensible," R.3621.

The State's argument in this appeal is "identical to the issue presented" to and rejected by the Supreme Court in *Idaho II*. *Ticor Title Co.*, 157 P.3d at 618. The State first suggests that the Water Court's reliance on the 1873 Agreement and the executive order based on it was improper,

[4] The 1889 Act directed negotiation with the Coeur d'Alene Tribe to acquire as much of its Reservation lands as the Tribe was willing to cede. *Idaho II*, 533 U.S. at 277 (citing Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002). That negotiation resulted in the Agreement of 1889, which was ratified by Congress in 1891. Thus, while the State in *Idaho II* largely pointed to the 1889 Act directing the negotiation as evidence that Congress rejected the 1873 Reservation and now points to the 1891 Act ratifying the resulting agreements as evidence that Congress rejected the 1873 Reservation, this shift of focus does not represent any meaningful change in the State's argument.

State's Br. 21, and then it argues that during the period that the Tribe and Congress were negotiating regarding cession of part of the Reservation, the Tribe was interested only in maintaining its agricultural lands. State's Br. 22–23. The State reasserts the theory presented to the U.S. Supreme Court in *Idaho II* that the Tribe's apparent silence about the importance of other activities is evidence that the Tribe accepted a Reservation reduced not only in size, but also in purpose. State's Br. 23–24. Under this theory, the only explicit purpose of the 1887 and 1889 Agreements on the part of either Congress or the Tribe was encouraging agriculture, so this became the new, restrictive purpose of a new reservation. State's Br. 24. In short, just as in *Idaho II*, the State's argument here is that later congressional Acts *rejected and replaced* the Reservation established in 1873 by executive order and fundamentally changed not just the Reservation's boundaries but also its purpose.

The Supreme Court actually decided the argument in the United States' favor: Not only was the State's argument the same in *Idaho II* as it presents again here, the Supreme Court considered and squarely rejected the State's argument that Congress unilaterally repudiated and replaced the 1873 executive order Reservation with Acts of 1889 and 1891. The Court explained that Congress was aware of the scope of the 1873 Reservation and "clearly intended to redefine the area of the reservation . . . only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder" of the lands not ceded. *Idaho II*, 533 U.S. at 280–81. "There is no indication that Congress ever modified its objective of negotiated consensual transfer." *Id.* Congress's posture is critical: because it understood the 1873 Order as establishing a Reservation and that it would need the Tribe's agreement for any change to of that Reservation, any alteration of the Reservation would need to be express, indicating the agreement by the Tribe. *Id.* at 277–78. Put succinctly, the Supreme Court held that in renegotiating the extent of the Tribe's Reservation, the "intent . . . was that anything not consensually ceded by the Tribe would remain

for the Tribe's benefit." *Id.* at 278. The Supreme Court found no basis for determining that the Tribe had agreed to cede its submerged lands, *id.* at 381–81, as the State argued was a result of the federal government's focus on the Tribe's agricultural pursuits, *see* R.3621–22.

Simply put, not only did the State present an identical argument in *Idaho II* to the one it raises now, the Supreme Court actually decided that issue in the United States' favor on its way to finding that the United States holds submerged lands in trust for the Tribe, thus satisfying two critical factors for issue preclusion to adhere. *See Ticor Title Co.*, 157 P.3d at 618.[5] Because the Supreme Court considered and rejected that identical argument, the State is precluded from relitigating that issue in this Court now.

B. To the extent this issue may be relitigated, the State's argument has no merit.

Even if the State may relitigate whether Congress altogether rejected the 1873 Reservation and replaced it with a new reservation with different purposes, the State's argument fails for several reasons.

First, although the State now suggests that the 1873 executive order establishing the Reservation somehow lacks the imprimatur of a reservation created via another mechanism, State's Br. 21, the law is clear that executive-order reservations are no less valid than those established by other mechanisms. More than a half-century ago, the Supreme Court held that it gave "short shrift at this late date to the argument that the reservation of either land or water were invalid because they were originally set apart *by the Executive*. *Arizona I*, 373 U.S. at 598

[5] The State's argument plainly also satisfies the other requirements of issue preclusion: the State had a "full and fair opportunity to litigate the issue decided," as it devoted much of its briefing before the U.S. Supreme Court to its later-acts-of-Congress argument; "there was a final judgment on the merits" in *Idaho II*, as the U.S. Supreme Court ultimately affirmed the district court's judgment in favor of the United States, *United States v. Idaho*, 95 F. Supp. 2d. 1094, 1117 (D. Idaho 1998); and the State of Idaho "was a party" to *Idaho II*. *See Ticor Title Co.*, 157 P.3d at 618.

(emphasis added); *accord, e.g.*, *Spalding*, 160 U.S. at 403. That Congress has not expressly confirmed some reservations established by executive order has not been taken to indicate congressional disapproval; rather, the U.S. Supreme Court has deemed Congress's acquiescence in the executive branch's reservation of lands to support the full lawful effect of such a reservation. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 469–73 (1915). Thus, the 1873 executive order that mirrored an 1873 Agreement between the Coeur d'Alene Tribe and the United States government did establish the Coeur d'Alene Reservation as a matter of fact and law. *Cf.* Idaho Supreme Court: Tribal History, *available at* https://isc.idaho.gov/tribal-state/tribalhistory (last accessed Mar. 15, 2018) ("The Coeur d'Alene Reservation was established by Executive Order dated November 8, 1873.").

Congress could have terminated the Reservation by clear and explicit action to that end. But the State can identify no such action taken by Congress. Contrary to the State's argument, in ratifying the 1887 Agreement, Congress *confirmed* (rather than *rejected*) the Reservation that was established in 1873. The 1887 Agreement referred to the "present Coeur d'Alene Reservation," to "the boundaries of" the "present reservation," and to Indians "now residing on the Coeur d'Alene Reservation," R.1873, leaving no question that Congress viewed the Reservation as then existing and continuing to exist. Congress's 1888 Resolution seeking information about the extent of that Reservation provides further confirmation, as it speaks of the Reservation in present tense, i.e., "the present area of the Coeur d'Alene Indian Reservation" and "Indians now on such reservation." R.1878. And the later-ratified 1889 Agreement likewise acknowledges not only that the Reservation continues to exist, but also that the Coeur d'Alene Tribe is entitled to compensation for the portion of the Reservation that it agreed to cede. R.1882. Nothing in these agreements or in the statutes ratifying them contains any indication that Congress intended to repudiate, reject, terminate, or replace the Reservation created in 1873, or

that it intended to terminate or in any way limit the Tribe's existing water rights or communal rights to hunting and fishing. The purpose of the 1887 and 1889 Agreements was to purchase from the Tribe the portions of its Reservation that the Tribe was willing to cede, as well as to guarantee that Reservation lands would be held forever as a tribal homeland. The size of the Reservation after ratification of these agreements in 1891 was smaller than before, but the smaller Reservation was not a new Reservation.

In any event, even if the State were correct that the Reservation's purposes were somehow reduced or altered through these later agreements and Congress's 1891 Act, the State is incorrect as a matter of fact when it argues that, by this time, the Tribe had accepted that its Reservation would have only an agricultural purpose. Contrary to the State's assertion that the Tribe expressed no concerns about the loss of subsistence hunting and fishing on the ceded lands and waters during the late-1880s negotiations, State Br. 43, the Tribe in fact expressed great resistance to ceding parts of its Reservation and did so only in exchange for a guarantee that its remaining Reservation lands would be "held forever as *Indian land* and as homes for the Coeur d'Alene Indians." R.2665 (emphases added); *see also* R.1874. "Indian land" has been understood to indicate the implied right to fish and hunt. *See Menominee Tribe*, 391 U.S. at 406–07.

The Tribe insisted on these protections in part because subsistence activities remained an important part of their way of life. *See generally* R.2669–71 ⁋⁋ 85–88 (United States' and Tribe's Joint Statement of Facts);[6] R.787 (2016 Smith Report describing findings that "even successful tribal farmers did not rely entirely on agriculture for their subsistence"). The record establishes that fishing, hunting, and gathering remained important to the Tribe thorough the years leading to congressional ratification of the Reservation in 1891. Some families continued

[6] The State did not object to any of these proposed findings of fact. *See* R.3374.

to reside at traditional village sites and continued to rely on hunting and fishing. *See* R.2670 (citing R.3025 (Wee Report); R.643 (2015 Smith Report); R.1859 (2015 Hart Report); R.788 (2016 Smith Report)). A Department of the Interior report in 1891 explained the difficulty of obtaining an accurate census of the Coeur d'Alene Tribe because many tribal members had "gone in to the mountains hunting and fishing which made it impossible to see them all." R.788 (2016 Smith Report); R.3029 (Wee Report). In short, even if the State were correct that we must look to the purposes of a supposedly congressionally created new reservation in 1891, rather than the Reservation created by executive order in 1873, there is no evidence to support the State's argument that the purposes of this supposed later reservation excluded the hunting and fishing on which the Coeur d'Alene had traditionally and still relied.[7] *Cf. In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 78 (Wyo. 1988) (rejecting fishing as a purpose of that reservation because it found no "dependency upon fishing for a livelihood [or] a traditional lifestyle involving fishing").

In short, just as the U.S. Supreme Court rejected the State's theory that Congress took a backhanded approach to "pull a fast one" on the Tribe by unilaterally redefining the Reservation

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

to exclude submerged lands, *Idaho II*, 533 U.S. at 278, this Court should reject the State's effort to argue that Congress silently and implicitly rejected the broad purposes of the 1873 Reservation and replaced them with a new, more limited, set of purposes never explicitly contained in any agreement with the Tribe or Act of Congress. To determine the Coeur d'Alene Tribe's entitlement to water, this Court should focus its inquiry on the purposes of the 1873 Reservation. As the Water Court correctly set forth, hunting and fishing were activities the Tribe was not prepared to give up in agreeing to be confined to a reservation. The water rights implicitly reserved to facilitate these activities arose based on the Tribe's aboriginal uses, vested upon the establishment of the Reservation and continue to exist today.

C. *Winters* does not support the State's argument that only the 1891 Act is relevant to determining the Tribe's entitlement to water.

Finally, the State urges that *Winters* supports its argument that only Congress's intention in ratifying the 1887 and 1889 Agreements is relevant to determining the extent of reserved water rights held for the Tribe. State Br. 18–20. In doing so, the State misrepresents the legal and factual context of *Winters* and misconstrues the scope of the decision.

Winters was not a general stream adjudication, and so the Court had no occasion to determine the full extent of water rights that inhere to that reservation. *Winters* presented only the more limited question whether to enjoin upstream users from damming up water that would have otherwise flowed down the Milk River to the Fort Belknap Reservation. To determine whether the Reservation's creation had an associated water right that would limit upstream use, the U.S. Supreme Court looked to the circumstances surrounding "the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation." 207 U.S. at 575. This agreement was key to the Court's analysis because the upstream and allegedly-senior water diverters had begun their complained-of activities in 1900. *Id.* at 567. The Supreme Court had no reason to consider

whether the Fort Belknap Tribe's water rights had an even-earlier priority date based on the 1855 Blackfeet Treaty, as that would have made no difference to its ruling on the question before it.[8] *Winters* similarly had no reason to consider—and did not consider—questions about reserved water rights for hunting and fishing or water rights in any other waterway other than the Milk River.

Moreover, if the State were correct that a court should look instead to the last federal action that changed the boundaries of a reservation when determining the scope of a water right for that reservation, the *Winters* Court would have considered an 1895 agreement (ratified in 1896) between the United States and the Fort Belknap Tribes that reduced the boundaries of the reservation. *See Gros Ventre Tribe v. United* States, 469 F.3d 801, 804 (9th Cir. 2006) (discussing the Grinnell Agreement). Like the 1889 Agreement with the Coeur d'Alene, the 1895 Grinnell Agreement with the Fort Belknap Tribes ceded reservation lands that held valuable minerals. *Id.* That the *Winters* Court saw no reason to consider this subsequent Agreement and instead focused on the 1888 Act, 207 U.S. at 576, confirms that—as here—agreements that simply change a reservation's boundaries do not as a matter of course also fundamentally change a reservation's purpose or redefine reserved water rights. Just as the 1895 Agreement was not a "change in conditions" that essentially created a "new smaller reservation" at Fort Belknap in *Winters*, State Br. 20, the 1889 Agreement with the Coeur d'Alene that similarly reduced the size of the Coeur d'Alene Reservation cannot be understood to have established a wholly new

[8] Congress has explicitly recognized that the 1855 Treaty is in fact the operative document for determining water rights on the Fort Belknap Reservation. In particular, the statute confirming the Blackfeet-Montana water rights compact defines the Blackfeet Indian Reservation as "established by the Treaty of October 17, 1855," as modified by later agreements, including the 1888 Act, and it recognizes "equal priority dates" for the water rights of the Blackfeet and Fort Belknap Reservations. *See* Blackfeet Water Rights Settlement Act, Pub. L. 114-322, tit. III, subtit. G §§ 3703(14)(A), 3705(c)(2)(A), 130 Stat. 1628, 1815–16, 1818 (2016).

reservation. Instead, as the Supreme Court did in *Idaho II*, this Court should focus on the 1873 Agreement and executive order that *did* create the Coeur d'Alene Reservation.

Finally, the State cites *British-American Oil Producing Co v. Board of Equalization*, 299 U.S. 159, 164 (1936), to suggest that the 1873 executive order establishing the Coeur d'Alene Reservation has only second-class status, and that this Court must look only to the 1891 Act and the agreements it ratified. State Br. 20. First, as explained above (pp. 9, 17–18), Indian reservations created by executive order are no less valid than those established by other mechanisms. To the extent *British-American Oil* conflicts with that premise, it has been abrogated by subsequent Supreme Court decisions like *Arizona I.* In any event, *British-American Oil* did not concern tribal water rights. Rather, that case addressed a dispute over whether the state could tax oil and gas production from beneath allotments on the Blackfeet Reservation. In determining whether Congress had authorized state taxation, the Supreme Court—with minimal analysis—concluded that it should look to the Blackfeet Reservation's boundaries after an 1896 Act ceding a portion of that reservation. 299 U.S. at 162. *British-American Oil*'s analysis of the 1896 Act for the purposes of deciding a taxation issue concerning the Blackfeet Tribe neither addressed nor sub silentio altered the *Winters* reserved water rights doctrine. That case has no bearing on the question of when water rights for the Coeur d'Alene Tribe were implicitly reserved.

*** * ***

The State's argument that the 1891 Act silently created a new reservation that supplanted the 1873 Coeur d'Alene Reservation was considered and rejected in *Idaho II* and finds no support in the historical record before this Court. The Water Court properly centered its analysis on the purpose of the 1873 Reservation and reached the well-supported conclusion that the purpose included facilitating the Tribe's traditional hunting and fishing practices.

II. The Water Court properly allowed on-Reservation instream flow claims to proceed to the quantification phase of this adjudication; particular ownership of lands adjacent to the streams has no bearing on the validity of this right to maintain flow.

The United States claimed non-consumptive water rights for the Tribe both within and outside of the Reservation's boundaries as needed to maintain the Tribe's fishery. These non-consumptive water rights are necessary to maintain the fish species harvested by the Tribe within its Reservation boundaries, and they are part of the implied reservation of water to facilitate that use of Reservation resources. The Water Court properly recognized both the importance to the Tribe of Lake Coeur d'Alene and associated waterways for fishing, and that the United States "impliedly reserved water rights necessary to fulfill the fishing and hunting purpose of the Reservation." R.4322. The Water Court dismissed claims for instream flow outside of the Reservation's boundaries, a holding the United States has appealed, but approved the claims within the Reservation as a matter of course.[9]

[9] The instream rights claimed here may be understood as concentric circles:

- In the innermost circle are instream rights on Reservation lands that the Tribe owns or controls. The State generally disputes the reservation of *any* water for hunting and fishing, *see supra* Section I, but does not otherwise contest the Water Court's recognition of Tribal rights to these waters.
- In the middle circle are the instream rights on Reservation lands that the Tribe does not own or control. The Water Court recognized these rights, and they are the subject of the State's argument here.
- Finally, the outermost circle represents the off-Reservation instream flow rights that the Water Court rejected. These are a subject of the United States' related appeal, No. 45382. *See* United States' Br. as Appellant at 30–38.

The historical and biological basis for all three categories of rights is at heart the same. Importantly, if the Court rules in the United States' appeal that off-Reservation instream flow rights were improperly dismissed, it should likewise affirm the Water Court's recognition of on-Reservation rights in this appeal by the State.

The State argues that the reservation of water for these activities was fatally undermined when the Reservation was allotted and a majority of Reservation land was eventually transferred to non-Indians. According to the State, the Tribe's communal hunting and fishing rights may no longer be served by waters that flow across non-tribal property within the Reservation.

Understanding the flaws in the State's argument is assisted by reviewing some of the different types of water right claims that the United States filed in this adjudication and the legal and practical bases for them:

- Consumptive water rights for irrigation: the United States has claimed water to irrigate Indian lands—those held by the Tribe, individual members, and by the United States in trust for the Tribe. The claim is made on a practicably-irrigable-acreage basis, so that the claim is directly tied to the quantity of tribally-owned or -controlled land. *See* R.10.
- Non-consumptive rights to maintain wetlands, seeps, and springs: the United States has claimed rights to maintain water at these features only where the land on which the feature is located is currently owned by the Tribe, individual members, and by the United States in trust for the Tribe. These rights are tied to the Tribe's right to conduct traditional activities, including hunting and gathering, at these locations. R.11–12.
- Non-consumptive rights to maintain instream flows: the United States has claimed a right to maintain adequate flows in streams to support the full life-cycle of fisheries upon which the Tribe has historically depended. *See* R.10. These rights are not based on any claimed right of the Tribe to physically access these upstream waters; instead, they derive from the Tribe's uncontested right to fish in Lake Coeur d'Alene and other downstream waterways.

The State's argument conflates these three categories. Under the State's theory, when parts of the Coeur d'Alene Reservation were allotted following the 1906 Indian Appropriations

Act, 34 Stat. at 336, "[a]ny rights implied from the setting aside of lands for the Tribe's communal use are . . . lost," including "water rights." State Br. 28. The allotment policy did remove from tribal ownership portions of the Coeur d'Alene Reservation's lands that were allocated to individual tribal members, and surplus lands were made available for homesteading by non-Indians. That may also have affected the Tribe's right to access non-Indian-owned property on the Reservation to hunt, fish, and gather. But the State errs in concluding that it is "axiomatic" that all communally-held water rights are extinguished upon reservation allotment, and that a tribe can have no right to maintain flows in streams that cross or abut non-tribal lands. *See* State Br. 28. This Court has rejected that very same argument, and held to the contrary that where a reservation "was thrown open to settlement" by non-Indians, no express provision in the law was required to preserve the right to fish, since "[p]rivate ownership of some lands is not inconsistent with" a tribal right to fish and "anything not specifically granted was retained." *State v. McConville*, 139 P.2d 485, 487 (Idaho 1943).

The Water Court held that water rights to maintain wetlands, springs, and seeps were extinguished when the lands on which these features are located were transferred to non-Indian ownership, *see* R.4474, and that holding is the subject of the United States' related appeal, *see* United States' Br. as Appellant at 38–42 in No. 45382. But regardless of whether that holding is correct, the same need not be true for instream flow claims.[10] *See* State Br. 25. These claims are premised on the biological needs of a downstream fishery, not on underlying or abutting land

[10] The Water Court's decision on reconsideration states that rights "for instream purposes" could "be lost through non-use," because non-Indian successors in interest cannot hold these rights. R.4474. However, the lands to which the instream flow rights at issue here are linked are the downstream Tribal lands where the Tribe conducts its fishing, not the lands across which the waters flow. The United States has claimed only instream flows that are tied to tribal fishing on Indian lands where there has been no potential loss through non-use by non-Indian successors.

ownership. Indeed, even though a portion of the Coeur d'Alene Reservation is now held by non-Indians, the Tribe continues to have exclusive hunting, fishing, and gathering rights on the lands that it continues to own or control within the Reservation, such as the portion of Lake Coeur d'Alene within Reservation boundaries. Those exclusive rights on lands that the Tribe continues to own or control within the Reservation are the basis of the instream flows claims, not any purported right of the Tribe to access these streams, a right to directly regulate the streams as was, or any express retention of water rights at the time of allotment. The fact that instream flow rights might affect the use of water by other would-be diverters is of no moment, since the supremacy of a senior water right-holder's use is the very point of a prior appropriation water regime.

A. The instream flow rights are based on the biological necessity of water to meet the Reservation's fishing purpose.

Importantly, the State does not dispute the biological basis of the instream flow claims: that maintenance of upstream habitat is in fact necessary for the sustainability of Lake Coeur d'Alene's adfluvial fisheries. *See* R.594. The specific instream flows claimed for fish habitat are tied directly to the Tribe's fishing use and the dependence of that fishery on these streams. The strong biological basis for these claims stands unchallenged: fisheries scientist Dr. Dudley Reiser explained that Westslope Cutthroat Trout and Bull Trout—two species that the Tribe historically harvested, R.2676; R.571—are adfluvial species, which means that their life strategy requires access to and movement through properly-functioning lake and riverine habitats, R.2677, R.593. The movements of these species occur without regard to title or political boundaries; they are instead restrained by physical barriers like natural waterfalls, turbulent rapids, or dewatered streams. R.2677; R.562. Relevant here, this life history strategy means that these species spend a substantial part of their lifecycle in Lake Coeur d'Alene, but they also seek suitable spawning

habitat by migrating upstream in rivers and streams both on and off-Reservation. *See* R.2676; R.577–78.[11] Young fish continue to live in these upstream areas for years before migrating back downstream to the Lake. R.2676; R.577. These spawning areas are widely distributed within the Coeur d'Alene Basin: fish may travel from a few miles to more than a hundred miles in search of suitable spawning habitat. R.578. Beyond providing required habitat for the adfluvial fish that are part of the Coeur d'Alene fisheries, these connected rivers and streams also support subpopulations of these species that contribute genetic diversity and thus help ensure survival of the fish population as a whole. R.593. Collectively, the watersheds represented in the instream flow claims are waters upon which the Coeur d'Alene Tribe traditionally relied for fishing. *See* R.561–64.

It is this *use* of water by the fish species subject to the Tribe's on-Reservation fishing right, and not title to land, that supports a claim to impliedly-reserved water rights under *Winters*.[12] The Water Court correctly recognized that fishing was an essential tribal use of the Reservation, and that water was impliedly reserved to serve that use. R.4322. The instream flow claims are intended to ensure that this recognized purpose of the Reservation is not compromised

[11]As noted above, the Water Court dismissed all instream flow claims outside of the Reservation's current boundaries. The United States has appealed this holding in its related appeal, No. 45382. *See* United States' Br. as Appellant at 30–38.

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

by loss of adequate water flows upon which the fishery depends. R.10. The Tribe historically depended and still depends on these fish species, *see* R.2676; R.562–63, and these species correspondingly depend for spawning on these waterways, including rivers, streams, and portions of Lake Coeur d'Alene where the Tribe does not necessarily own the submerged or adjacent lands, *see* R.594. Thus, even though the Water Court's undertook a flawed application of federal water rights law in other respects (as addressed in the United States' appeal), it properly approved instream flow claims within the Reservation because they serve part of the Reservation's core purpose.

B. The instream flow water claims are not based on a claimed right to hunt and fish on or to regulate non-tribal lands.

The State insists that because the 1906 Act that allowed allotment of the Reservation did not explicitly "hold back communal water rights for fish habitat," State Br. 30, these rights have been lost. This argument misrepresents the effect of the Allotment Act and contravenes the established presumption that Indian rights are *not* lost except where Congress considers their existence and clearly cedes or revokes them. *See Menominee Tribe*, 391 U.S. 404. That Act did not purport to extinguish tribal water rights and did not affect the Tribe's right to fish in its own waters. This type of wholesale termination of rights cannot be implied by an Act of Congress; termination must be explicit to have such an effect. *See id*.

The State relies primarily on *Montana v. United States*, State Br. 30–31, which considered the "narrow" issue whether the Crow Tribe could prohibit non-Indians from hunting or fishing on reservation land owned in fee by nonmembers of the Tribe. 450 U.S. 544, 557

(1981).[13] The U.S. Supreme Court held that the Treaty establishing the Crow Tribe's reservation provided the tribe with authority to control hunting and fishing only on lands where the Tribe exercises "absolute and undisturbed use and occupation." *Id.* at 558–59. The Court determined that this language did not provide the tribe with the power to regulate hunting and fishing by non-Indians on non-Indian-owned land. *Id.* at 559.

Montana has no relevance to the question presented here, which is whether alienation of upstream Reservation lands extinguished the Coeur d'Alene Tribe's right to adequate water to maintain its downstream fishery. The State characterizes the United States' claim on behalf of the Tribe as derivative of a claimed tribal right to hunt and fish on non-Indian land or to regulate non-Indian hunting and fishing on non-Indian land. *See* State Br. 35–36. But that characterization is demonstrably incorrect: the United States does not argue that the Coeur d'Alene Tribe has the right to fish on non-tribal lands, and this case does not involve any assertion of tribal regulatory authority over non-Indians. Rather, the United States asserts a senior water right for the Tribe that is necessary to fulfill the fishing purposes of the Reservation—a right that is claimed based on the Tribe's right to fish on *tribal lands* and the biological needs of that fishery. The recognition of that property interest in water no more improperly regulates nontribal upstream lands than *Winters* did by recognizing the seniority of the tribe's property right there and enjoining upstream diverters. If there were needed any further reason to reject the State's improper reliance on *Montana*, this case does not present any question of rights explicitly created by treaty or agreement. Instead it presents an unrelated question about the persistence of *Winters*

[13] The State's assertion that *Montana* instead stands for a broad, "common-sense proposition" about Tribe's loss of rights on alienated lands, State Br. 31, is unsupported by any law and is particularly untenable given the decision's own characterization of the question before it as "narrow."

rights—implied from a reservation's purpose—in the absence of any express extinguishment of those rights. *Montana* is simply inapposite.

The State's attempted analogy to *Montana* and other tribal-regulation cases muddies the difference between "a property right, a servitude, or a regulatory right." State Br. 35. This Court has long recognized that 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.*, 150 P. 336, 339 (Idaho 1915). Water rights are fundamentally different from an assertion of regulatory power. Whereas an entity's regulatory power will ordinarily be tied in some way to its control over a geographic area, water rights do not similarly operate. In a prior appropriation regime like Idaho's, water rights always have the practical effect of affecting the conduct of others—even those geographically distant—even though the right-holder holds no "regulatory" power over the other party. A senior right-holder will always, at least in theory, limit the activities of others on a hydrologically-connected waterway, because the senior owner's ability to require the full share of his water rights may limit the water available for junior right-holders. *See, e.g.*, *Moe v. Harger*, 77 P. 645 (Idaho 1904). This is not an assertion of regulatory power, nor is it an assertion of a right to physically enter those lands; it is simply the consequence of one party having an established superior water right within a prior appropriation system.

Here too, the Tribe's right to a continued fishery on tribally-controlled lands implies a water right that prevents upstream users from dewatering a stream to the extent that it does not allow water for that fishery. That assertion of reserved water rights does not represent either a tribal attempt to regulate non-tribal lands or a usurpation of "absolute, unqualified title." State Br. 36. It is merely an assertion of a property right like *any* senior water right-holder might assert in this State. *Montana* and its kin provide no support for the State's argument here.

Puyallup Tribe, Inc. v. Department of Game of State of Washington, 433 U.S. 165 (1977), is likewise distinguishable. Like *Montana*, that case involved fishing rights established by a treaty giving that tribe "exclusive use," and it addressed the question of regulation of fishing on non-tribally owned lands. The U.S. Supreme Court held that because the Puyallup Tribe had alienated virtually all of its Reservation (all but 22 acres of an 18,000-acre reservation), including all lands abutting the Puyallup River, the Tribe no longer held fishing grounds for its "exclusive use," and thus the State of Washington could exercise regulatory control over fishing in those areas. 433 U.S. at 174–76. The State's comparison of the present case to *Puyallup* fails because of the fundamental difference between the issues presented. This case concerns recognition of water rights, not a claimed right to regulate fishing. Here, the Tribe's instream flow claims are based on its right to fish in tribally-controlled areas, such as the part of Lake Coeur d'Alene within the Reservation; the Tribe makes no claim of a right to fish on non-tribal lands.

The State's reliance on *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), is likewise unavailing. That case also addressed the assertion of tribal regulation of non-tribally controlled parts of a reservation, and it similarly rests on the notion that the tribe's control of its reservation was inextricably tied to its exclusive use of those lands. Finally, *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), holds only that the Yurok Indians no longer could enter private lands within their reservation to hunt and fish. Once again, the instream flow rights claimed here are not based on any purported right to fish on private land. These rights are claimed to support fish populations harvested by the Tribe on tribal lands only. At bottom, even under the State's theory, because "the United States retains the lands for the purpose that is the basis for implying the water right," State Br. 28—i.e. the lands and waters on which the Tribe exercises its fishing rights—the water rights persist.

C. Courts have recognized instream flow rights even in the absence of total tribal ownership or control over submerged or adjacent lands.

Disregarding the biological and practical basis of these water rights claims, the State argues that in order to claim a right to maintain instream flows within the Reservation, some certain proportion of the land underlying or abutting that stream must be Indian-owned. This argument finds no supports in the law. The State fails to distinguish the many cases in which courts have found instream flows all fail, because its cramped reading of these cases wrongly focuses on the particulars rather than the broad concepts of federal reserved water rights law that these cases represent.

First, it is well-established that water rights need not be physically tied to the lands or purpose that they serve. The legal concept of appurtenance is a *conceptual*, not a *physical*, requirement. The Ninth Circuit recently explained this concept in *Katie John v. United States,* 720 F.3d 1214 (9th Cir. 2013), which held that off-reservation waters may be tied to reserved lands. In so determining, the court found "an apparent consensus that [appurtenancy] does not mean physical attachment" of water to land. 720 F.3d at 1229–30. Instead, "appurtenancy" has to do with the "*relationship* between reserved federal land and the use of the water, not the *location* of the water." *Id.* at 1230 (emphasis added).[14] This understanding of the appurtenance requirement accords with the Supreme Court's recognition of water rights for irrigation of reservation lands from a water source two miles from the reservation boundary. *Arizona v. California*, 376 U.S. 340, 344–45 (1964) ("*Arizona II*"); *see also Cappaert v. United States*, 426 U.S. 128, 141, 147 (1976) (holding that the federal government's implicit reservation of water

[14] The Ninth Circuit's explanation in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), that federally reserved water rights must be "appurtenant" to, or "attached to," a reservation did not alter or even test this holding of *Katie John*, since *Agua Caliente* involved groundwater that "underlies" the reservation at issue there. 849 F.3d at 1271 & n. 10.

for Devil's Hole National Monument included "appurtenant water sufficient to maintain the level" of an underground pool, and affirming an injunction that limited the pumping of groundwater by private citizens *2.5 miles away* from the pool). It also accords with the law applying to non-Indian private users in this State, which does not require ownership or control over a stream in order to find those waters "appurtenant" to land not touching the stream. *See Joyce Livestock Co. v. United States*, 156 P.3d 502, 513–14 (Idaho 2007).

Physical adjacency to tribally-owned lands is no more a requirement for an instream-flow claim than for the irrigation claims in *Arizona II* and *Katie John*. In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033–35 (9th Cir. 1985), for example, the Yakima Nation sought protection for stream flows that provide salmon spawning habitat. The Ninth Circuit recognized the need for sufficient water to support the spawning portion of the salmon's lifecycle even though the stream flows at issue were 50 miles from the Yakima Reservation. *Id.* In the subsequent adjudication of the Yakima River Basin, the state court confirmed that water rights extend not just within the reservation but even beyond the boundary of that reservation to support the fishery's migratory lifecycle. *Wash. Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 9 (Wash. Super. Ct. Sept. 1, 1994), *available at* R.2308. *Kittitas* involved treaty fishing rights—as opposed to a reservation created with an eye to providing for fishing on-reservation—yet the concept that water is necessary to the continued vitality of a fishery is equally applicable here.

The State acknowledges several other instances where the Ninth Circuit has recognized reserved water rights for instream flows without regard to the specific underlying ownership of lands across which that stream flows, but its efforts to distinguish each of these cases fail. First, in *Walton*, the Ninth Circuit weighed whether the Colville Confederated Tribes held a flow-maintenance right in a stream that flowed across both Indian and non-Indian owned allotments.

The court determined that because "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Coleville Reservation," the Tribes hold "an implied reservation of water" to develop and maintain the Tribe's fishery. 647 F.2d at 48. Just as in this case, while the fishing grounds at issue were in Omak Lake, the court recognized a tribal right of water in an upstream creek that was a source of fresh water to the lake and in which the trout spawned. *Id.* The decision does not state that the reservation of water is based on tribal ownership of the lower reaches of the creek at issue, nor on the fact that there is more tribal land along the creek than non-tribal. Instead, it states that is based simply on the Colville Reservation's "homeland" purpose, *id.* at 47, and the biological needs of that downstream replacement fishery that was part of that purpose, *id.* at 48. On this basis, the court recognized a tribal water right that prevents the non-Indian allotment owner from dewatering the stream and interfering with the tribe's downstream fishery. The State attempts to limit the reach of this decision in ways that the decision does not limit itself. *See* State Br. 40. But even if the State were correct that the instream flow approved in *Walton* technically ended at the edge of the tribally-controlled allotments, the practical effect of that right would still be to also require maintenance of the flow across the non-tribally-controlled allotments immediately upstream.[15]

The State's attempt to distinguish *Adair*, in which the Ninth Circuit ruled that the Klamath Tribe continued to hold instream-flow water rights on its former reservation, is also unavailing. The Klamath Reservation was created by treaty in 1864 and allotted beginning in 1887, with many individual allotments passing into non-Indian ownership over time. 723 F.2d at 1398. Congress enacted the Klamath Termination Act in 1954 and the reservation's termination was made final in 1961 when the United States condemned most of the tribal land and made

[15] As discussed above (p. 31), this limitation on junior upstream water right-holders is no different from the limiting effect of a typical private state-law water right.

payments to individual Indians, which "essentially extinguished the original Klamath Reservation as a source of tribal property." *Id.* The court first determined that a purpose of the treaty establishing the Klamath Reservation was to provide hunting and fishing rights. *Id.* at 1409. The court thus readily found that the Tribe held an entitlement that "consists of the right to prevent other appropriators from depleting the streams water below a protected level" to "further the Tribe's hunting and fishing purposes." *Id.* at 1411. The State of Oregon and others argued that regardless whether this right initially existed, the Klamath Termination Act abrogated any water rights that had accompanied the Tribe's right to hunt and fish; the court rejected that argument based on express language of that Act that it did not "abrogate any water rights of the tribe and its members." *Id.* at 1411–12 (internal quotation marks omitted).

The State here focuses on the language in the Termination Act, arguing that absent this type of express preservation of water rights, the allotment of the Coeur d'Alene Reservation *did* terminate the Coeur d'Alene Tribe's water rights. *See* State Br. 38. That focus is a red herring. The analogous part of the Klamath Reservation's history to this case is not that reservation's *termination*, it is its *allotment*. The implication of *Adair*'s ruling about the effect of the Termination Act is that Klamath Tribe's instream flow rights to support hunting and fishing persisted through allotment and were still intact at the time of the Reservation's termination many decades later. The court makes no mention of a loss of tribal rights due to allotment or transfer of individual allotments to non-Indians. Indeed, the court explains that it could not find that such rights had been abrogated in the absence of an explicit statement by Congress. *Id.* at 1412 (citing, e.g., *Menominee Tribe*, 391 U.S. at 413). Here too, the allotment of the Coeur d'Alene Reservation had no effect on the Tribe's water rights that are tied to hunting and fishing on the parts of the Reservation that it still controls.

Finally, the State argues that *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *rev'd on other grounds*, 736 F.2d 1358 (9th Cir. 1984), limits the recognition of instream flows to situations where a tribe owns the lands underlying or the banks of a waterway. That characterization is incorrect. In *Anderson*, the district court found a reserved water right to fulfill the Spokane Indian Reservation's purposes, which was "to insure the Spokane Indians access to fishing areas and to fish for food." 591 F. Supp. at 5. On this basis, the court held that "under the *Winters* doctrine the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek." *Id.* Although the reservation was owned in part by non-Indians, *see Anderson*, 736 F.2d at 1361, the court made no mention of tribal ownership of submerged lands when considering whether the Tribe held instream flow rights. The State imagines that the district court's holding was actually based on an "unstated assumption" that the Tribe retained lands underlying or abutting the Creek. State Br. 41. But there is no need to invent an unstated basis for the court's recognition of flow rights, because the court was *explicit* about the source of those rights: they rights flowed from the reservation's purpose and the Spokane Tribe's use of water for its fishery. *Anderson*, 591 F. Supp. at 5. Here, too, it is the Coeur d'Alene Reservation's homeland purpose—which encompasses fishing in tribally-controlled areas—and the Coeur d'Alene Tribe's use of water for its fishery that supports the instream flow rights claimed within its Reservation.

*** * ***

Whether upstream lands were lost from tribal ownership simply has no bearing on whether the instream flows are still necessary to support fish with a migratory lifecycle. These flows continue to support Reservation lands held in trust for the Tribe, were never expressly abrogated, and the Water Court properly approved the United States' on-Reservation claims for rights to maintain these flows.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Water Court insofar as it accepted the United States' water claims tied to hunting and fishing uses, including the claims for maintenance of instream flows within the Reservation.

Respectfully Submitted,

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April 13, 2018
DJ No. 90-6-2-00946

CERTIFICATE OF SERVICE

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

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