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CDAT's Memo in Support for Mtn SJ

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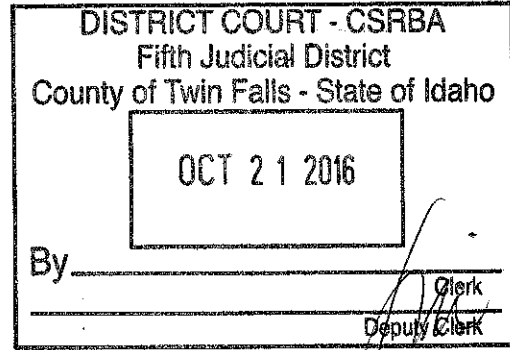
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

In re CSRBA) Consolidated Subcase No. 91-7755
)
 Case No. 49576) COEUR D'ALENE TRIBE'S
) MEMORANDUM IN SUPPORT OF
) MOTION FOR SUMMARY JUDGMENT
)
)

COMES NOW, the Coeur d'Alene Tribe (hereinafter referred to as "Tribe"), and hereby offers the Court this memorandum of law in support of its joint motion for summary judgment. As noted in the motion, this memorandum, joint statement of facts, and accompanying affidavits are expressly incorporated therein.

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INTRODUCTION

The purpose of this memorandum of law is to specifically address an issue of overarching importance to the Coeur d'Alene Tribe: whether a purpose of the Coeur d'Alene Reservation was to set aside a water right to ensure the protection and preservation of Lake Coeur d'Alene and the St. Joe River within the current exterior boundary of the Coeur d'Alene Reservation.

This issue has already been resolved by the Supreme Court of the United States, which affirmed the federal district court's conclusion that "a purpose of the 1873 Executive reservation was to retain the submerged lands [of Lake Coeur d'Alene and the St. Joe River] for the benefit of the Tribe." *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094, 1102 (D. Idaho 1998) ("*Idaho IP*").¹ In affirming the district court, the Supreme Court found "the submerged lands ***and related water rights*** had been continuously important to the Tribe" *Idaho v United States*, 533 U.S. 262, 275 (2001) (emphasis added) ("*Idaho IP*").

The United States, in coordination and cooperation with the Coeur d'Alene Tribe, has filed in this subcase a memorandum that argues, among other things, that the overall purpose of the Coeur d'Alene Reservation was to set aside a permanent homeland for the Coeur d'Alene People. Water rights are necessary to fulfill a number of components of that overarching homeland purpose. Namely, water rights for fishing, hunting, gathering, lake levels, culture, and spiritual needs, as well as water rights for agriculture and domestic, commercial, municipal, and industrial uses. These are

¹ To reiterate, the United States' and Tribe's joint claim to maintain Lake Coeur d'Alene expressly limits the place of use for the claim "to those submerged lands where title is quieted in favor of the United States for the benefit of the Coeur d'Alene Tribe." See *Notice of Claim: Federal Reserved Water Right In re In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755* (Jan. 30, 2014).

all essential purposes that require water to fulfill the overall homeland purpose of the Coeur d'Alene Reservation. *Idaho II* is also binding precedent² establishing that

a purpose of the 1873 Agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, **a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe.**

Idaho II, 95 F.Supp.2d at 1109 (emphasis added). Pursuant to the *Winters* Doctrine, the Tribe is entitled to a federal reserved water right to fulfill this essential purpose, which requires sufficient water to preserve and protect Lake Coeur d'Alene and its related waters in their natural condition.³

² As a party to the litigation, the State of Idaho is collaterally estopped and barred from challenging the findings of fact and conclusions of law from *Idaho II*. *Idaho II*, 95 F.Supp.2d 1094 (D.Idaho 1998), *aff'd*, 210 F.3d 1067, 1073 (2000) (“the State does not appear to have challenged any of the court’s underlying factual findings...”); *aff'd*, 533 U.S. 262, 266 n. 2 (“Petitioner, the State of Idaho, did not challenge the District Court’s factual findings on appeal.”). Because the decision in *Idaho II* involved intimate issues of sovereignty, the State of Idaho’s participation in that litigation binds not only itself, but also all of the people of Idaho through the doctrine of *parens patriae*. *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (“[t]he ‘*parens patriae*’ doctrine... is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, ‘must be deemed to represent all its citizens.’”). The doctrine is a recognition of sovereign dignity and a rule of good judicial administration. *Id.* at 373. The Supreme Court of the United States has observed, “the wisdom of the rule.” *Id.*

³ The United States’ and Tribe’s joint claim expressly states that “[t]his claim does not seek to affect present licensed operations at Post Falls,” which maintains the Lake during the summer months to an elevation of 2,128 feet above sea level. *See Notice of Claim: Federal Reserved Water Right In re In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755* (Jan. 30, 2014). This additional storage water in the Lake and St. Joe River remains available for appropriation by others

FACTUAL BACKGROUND

The *United States' and Coeur d'Alene Tribe's Joint Statement of Facts* filed concurrently with this brief is incorporated herein. See *United States' and Coeur d'Alene Tribe's Joint Statement of Facts*, In re In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Oct. 20, 2016).

STANDARD OF REVIEW

The Tribe hereby adopts and incorporates herein the statement of the standard of review contained in the Memorandum of the United States in Support of Motion for Summary Judgment. See *United States' Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 4 (Oct. 20, 2016).

ARGUMENT

I. PURSUANT TO THE WINTERS DOCTRINE, THE COEUR D'ALENE TRIBE IS ENTITLED TO WATER RIGHTS NECESSARY TO FULFILL THE PURPOSES OF THE COEUR D'ALENE RESERVATION

The *Winters* Doctrine holds that where the United States and an Indian Tribe agree to set aside land for the benefit of the Tribe, they also, by implication, reserve water rights necessary to fulfill the purposes of that reservation. *Winters v. United States*, 207 U.S. 564 (1908). Importantly, there is no preordained purpose or set of purposes that apply to all Indian reservations.⁴ No court has said that

⁴ See e.g., *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) (finding the five Colorado River reservations were set aside to allow the Tribes to engage in agriculture); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied 475 U.S. 1010 (1986) (finding a

the purpose of Indian reservations is limited to only use rights such as agriculture, hunting, fishing, or gathering. Instead, determination of the *particular purposes* of a particular Indian reservation turns on “an analysis of the intent of the parties to the . . . [t]reaty as reflected in its text and surrounding circumstances.” *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1984) (emphasis added) (citing *Washington v. Fishing Vessel Ass’n.*, 443 U.S. 658, 675-76 (1979); *Winters*, 207 U.S. at 575-76).⁵

homeland purpose that included both agriculture and fishing); *United States v. Adair*, 478 F.Supp. 336 (D.Ore. 1979) (Treaty protected Indians’ right to pursue their traditional culture and means of livelihood while encouraging them to develop agriculture.); *Adair*, 723 F.2d at 1394 (finding more than one primary purpose of the reservation: treaty creating reservation gave Indians rights to water for purposes of supporting agriculture, hunting and fishing on reservation lands); *Joint Board of Control v. United States* (“*Joint Board of Control*”), 832 F.2d 1127 (9th Cir. 1987) (finding a reserved water right for fisheries: “To the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them.”); *United States v. Anderson* (“*Anderson P*”), 591 F.Supp 1 (E.D. Wash. 1982) (finding reserved right for both fishing and agriculture), aff’d in part, rev’d in part, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1973) (water reserved in quantities sufficient to sustain implicit purpose of fishing as well as explicit purpose of agriculture); *State of Mont., ex rel., Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation* (“*Greely*”), 712 P.2d 754 (Mont. 1985) (finding reservation’s purpose was for agriculture, hunting and fishing, and “acts of civilization”); *In re Gen. Adjud. Of All Rights to Use Water in Gila River Sys. & Source* (“*Gila V*”), 35 P.3d 68 (Ariz. 2001) (Finding homeland purpose encapsulates multiple activities which support Tribe and its members.); *Dept. of Ecology v. Yakima Res. Irr. Dist.* (“*Acquavella IP*”), 850 P.2d 1306 (Wash. 1992) (finding that there may be more than one primary purpose of an Indian reservation (irrigation and fisheries)); *In re Gen. Adjud. Of All Rights to Use Water in the Big Horn River System* (“*Big Horn P*”), 753 P.2d 76 (Wyo. 1988), aff. sub. nom. 492 U.S. 406 (1989) (finding purposes to include agriculture (including livestock), domestic, municipal, and commercial, but not fisheries, lumbering, milling, mineral or industrial).

⁵ Although the Ninth Circuit was specifically analyzing the Klamath Treaty of 1864, the United States Supreme Court has been clear that the analysis under the *Winters* Doctrine is the same for all Indian reservations, regardless of whether they were initially set aside by treaty, congressionally ratified agreement, or executive order. *Arizona I*, 373 U.S. at 598. Specifically, the Supreme Court found that “[w]e can give but short shrift at this late date to the argument that the reservation either of land or water are invalid because they were originally set apart by the Executive.” *Id.* As a result, the Court concluded executive order reservations “like those created directly by Congress, were not limited to land, but included waters as well.” *Id.*

Analysis of the mutual intent of the United States and Indian tribes must be “construed as the tribes would have understood them. And any ambiguity in a treaty must be resolved in favor of the Indians.” *Adair*, 723 F.2d at 1412-13.⁶ Consistent with this principle, the Ninth Circuit has declared that “the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.” *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981).

A broad homeland purpose can have many component purposes that require water. To identify these purposes, the Ninth Circuit

Consider[s] the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed conditions.

Id.

Each of these factors were analyzed by the federal district court for the district of Idaho as part of its decision in *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d 1094 (D. Idaho 1998). Based upon these factors, the district court, affirmed by the Ninth Circuit and the Supreme Court of the United States, determined that “a purpose of the Executive Order was to reserve the submerged lands [of Lake Coeur d’Alene and the St. Joe River] under federal control for the benefit of the Tribe.” *Id.* at 1109.

⁶ Citing, among others, *United States v. Winans*, 198 U.S. 371, 381 (1905), *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir.1976); *Callahan*, 493 F.2d at 566 & n. 7 (treaty construed as Indians would have understood it given practices and customs of tribe at time treaty was negotiated); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir.), cert. denied, 459 U.S. 977 (1982)..

II. IDAHO II IS BINDING PRECEDENT THAT AN ESSENTIAL PURPOSE OF THE COEUR D'ALENE RESERVATION WAS TO RESERVE THE SUBMERGED LANDS UNDERLYING LAKE COEUR D'ALENE AND THE ST. JOE RIVER WITHIN CURRENT RESERVATION BOUNDARIES

Idaho v. United States was a suit to quiet title to the submerged lands underlying navigable waters within the current exterior boundaries of the Coeur d'Alene Indian Reservation. 533 U.S. at 262 (2001). Such a suit, seeking to quiet title to submerged lands underlying navigable water for the benefit of an Indian tribe, is almost unprecedented. This is due to the fact that “ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, ‘is an essential attribute of sovereignty.’” *Tarrant Regional Water Dist. V. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). As a result of the equal footing doctrine, “a State is presumed upon admission to the Union to ‘succeed to the United States’ title to the beds of navigable waters within [its] boundaries.” *Idaho II*, 95 F.Supp.2d at 1097 (quoting *Alaska*, 521 U.S. at 4). Because of these strong sovereign interests, there is a “strong presumption against defeat of a State’s title” to the submerged lands. *Id.* (quoting *Alaska*, 521 U.S. at 4).

Although no such presumption exists in the context of *Winters* rights, the overall framework between the determination of title to submerged lands and the *Winters* doctrine is very similar. The ultimate issue to be determined in both cases is the mutual intent of the United States and the tribe in creating an Indian reservation. *Compare Idaho II*, 95 F.Supp.2d at 1098 *with Adair*, 723 F.2d at 1409. In a submerged lands case, this requires examination of the “language of the relevant documents,” as well as determination of “the purpose of the reservation.” *Compare Idaho II*, 95 F.Supp.2d at 1098 *with Winters*, 207 U.S. at 564. Indeed, the district court pointed out that “under [Supreme Court precedent] the purpose of the reservation . . . ‘is a critical factor in determining federal intent.’” *Idaho*

II, 95 F.Supp.2d at 1108 (quoting *Alaska*, 521 U.S. at 39). “Where the purpose [of the reservation] would have been compromised . . . it is simply not plausible that the United States sought to reserve only the upland portions of the area.” *Idaho II*, 533 U.S. at 274. Tribal dependence upon the watercourse for a significant portion of its needs—as well as awareness on the part of the United States of that dependence at the time the reservation was created—is strong evidence that a purpose of the reservation was to retain submerged lands for the benefit of the Tribe. *Compare Idaho II*, 95 F.Supp.2d at 1098 with *Walton*, 647 F.2d at 47 (finding *Winters* right for a fishing purpose where the tribes traditionally used fishing for subsistence purposes).

In finding the United States and the Tribe had overcome the “strong presumption” against defeat of the state’s title to submerged lands, federal district court Judge Edward Lodge made several findings cogent to the question here. First, he found that “[t]he Tribe depended on the lake and associated waterways for a significant portion of the Tribe’s needs.” *Idaho II*, 95 F.Supp.2d at 1099. Second, the court found that “[a]t the time of the 1873 Executive reservation, the Federal Government was plainly aware of the vital importance of the submerged lands and the water resource to the Tribe.” *Id.* at 1102. In coming to this latter determination, the court found (a) the Tribe continued to be dependent on the water resource in 1873; (b) The Federal Government was plainly aware of the Tribe’s dependence on the Lake and rivers at the time of the Executive reservation in 1873; and (c) Compelling evidence and/or a public exigency supports the conclusion that the Federal Government intended to include the submerged lands within the 1873 reservation. *Id.* at 1102-07. Based upon these and other factors, the federal district court decreed:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d’Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation;

2. The United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation; and

3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation.

Id. at 1117.

In coming to these conclusions, Judge Lodge, affirmed by the Ninth Circuit and the Supreme Court, analyzed the history of the Coeur d'Alene Tribe, the 1873 Agreement and Executive Order, as well as the circumstances surrounding the creation of the 1873 Executive Order reservation in order to ultimately hold that “a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe.” *Id.* at 1109. *See also Walton*, 647 F.2d at 47.

A. The language of the 1873 Agreement and Executive Order, as construed in *Idaho II* conclusively demonstrate that a purpose of the Coeur d'Alene Reservation was to reserve the submerged lands underlying Lake Coeur d'Alene and the St. Joe River for the benefit of the Tribe

In its entirety, the 1873 Executive Order creating the Coeur d'Alene Reservation reads as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said territory, viz:

“Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman’s) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly

direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington . . . thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U.S. Grant 1873

Aff. R. Hart, Ex. 3 (1873 Executive Order)

The Ninth Circuit has found a broad homeland purpose that included *Winters* rights for both agriculture as well as instream flow rights for fish based upon an executive order that is similar to this one. *See Walton*, 647 F.2d at 47. However, in this case, the 1873 Executive Order "had a much broader purpose . . ." *Idaho II*, 95 F.Supp.2d at 1109. Rather than simply act to "preclude appropriation of lands within the reservation [by non-Indians]," "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that *mirrored the terms* of the 1873 Agreement . . ." *Id.* at 1109 (emphasis added). As such, the most probative evidence of the intent behind the creation of the 1873 Executive Order reservation is the terms and language of the 1873 Agreement.

The 1873 Agreement provides that in exchange for the cession of almost three million acres of land that made up the Tribe's aboriginal territory, the remainder would be "set apart and secure[d] as a Reservation for the *exclusive use* of the Coeur d'Alene Indians." Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1) (emphasis added). The reservation boundary set out in the 1873 Agreement has the same legal description as the 1873 Executive Order. Note that almost every boundary of the Reservation is defined in terms of an important tribal waterway. The only cession mentioned in the agreement comes in article 1, describing those aboriginal lands to be ceded. Absolutely no rights

were ceded in the portion reserved. *United States v. Winans*, 198 U.S. 371, 381 (1905) (treaties are “not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted.”). Far from any cession, the Agreement expressly reserved all “lands and privileges” in its newly formed reservation. Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1).

Most important, the Agreement expressly states that “water running into said reservations shall not be turned from their natural channel where they enter said reservation.” Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1). While no transcript exists from the negotiations of this Agreement, one negotiator later stated that the Tribe “demanded an extension of their reservation so as to include” the water resource up to the thread of the Spokane River. *Idaho II*, 95 F.Supp.2d at 1105. This guarantee ensures that water would continue to flow into the Reservation, whereupon it would continue to be one of the “privileges” appurtenant to the lands reserved that were set aside for the Tribe’s “exclusive use” and control. Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1).

Based partially upon this language, the district court concluded that “a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource.” *Idaho II*, 95 F.Supp.2d at 1109.

B. *Idaho II* is binding precedent that the history of the Coeur d’Alene Tribe conclusively demonstrates that “the right to control the lakebed and adjacent waters was traditionally important to the Tribe”

Just as the Ninth Circuit found a water right for the Colville Indians based upon its observation that “the Colvilles traditionally fished for both salmon and trout,” the Supreme Court has found in the case of the Coeur d’Alenes that “[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe” *Idaho II*, 533 U.S. at 274; *Walton*, 647 F.2d at 48. Although

the Supreme Court based this finding upon its observation that “Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities,” the Tribe’s relationship to the Lake and its rivers is much more than a mechanical recitation of the Tribe’s component uses and activities on the Lake. Indeed, as Judge Lodge put it, “the Lake and rivers served not only as a means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe’s spiritual and cultural identity.” *Idaho II*, 95 F.Supp.2d at 1101. The Tribe’s “spiritual, religious, and social life centered on the Lake and rivers.” *Id.* According to tribal elder and Vice-Chairman Ernie Stensgar “[i]t [the Lake] was the heart of them. They really loved that lake and they had a special connection to it. Not even physically but spiritually.” Aff. C. Matheson, Ex. 1 (at 1:33). Although there is no question that the Tribe depended upon the lake and rivers for a “reliable year-round source of food and fibre,” those waterways were just as critical to the Tribe “in their manner of self-identification, language and religious practices.” *Idaho II*, 95 F.Supp.2d at 1102.

It is the interconnection of these critical facets— food, fiber, transportation, recreation, spiritual, religious, social, and cultural—that led Richard Hart to conclude that “[t]he Tribe was dependent on these aquatic resources not only for physical well-being, but for the maintenance of their cultural and spiritual lives.” Hart 2015 Report at 42. Practically all the Tribe’s villages were located directly adjacent to one of the primary waterways within their territory. *Id.* at 7-15. The Lake was the source of the Tribe’s sustenance through fishing, hunting, and gathering. *Idaho II*, 95 F.Supp.2d at 1100; Statement of Facts, pg. 12-15 ¶ 16-25; Hart 2015 Report 20-30 (“without their provident supply of fish, they could not survive.”). As recently deceased tribal elder Felix Aripa put it “[w]hen they get a severe winter, they can come down to the Lake. They can survive the winter. The Lake always gives them something to live on.” Aff. C. Matheson, Ex. 1 (at 1:09). It was also a primary source of building materials, as well as materials for everyday household items. *Idaho II*, 95

F.Supp.2d at 1100 (“[t]he Coeur d’Alenes also collected rushes and tule alongside the waterways for use in the construction of baskets, mats and the Tribe’s lodges.”); Statement of Facts, pg. 15 ¶ 24; Hart 2015 Report at 30-39. The Tribe did not only take physical sustenance from the Lake, it was where tribal members would go to revitalize their spiritual sustenance as well. It was recently put this way by Coeur d’Alene tribal member Quannah Matheson: “[f]rom our perspective, the lake is a female. When we go to the Lake, we go to nurse . . . if you look at the lake as a person, you will treat it differently.” Aff. C. Matheson, Ex. 6 (North Idaho’s gem). This connection remains today; as Cajetan Matheson recently pointed out

[t]he spiritual connection that the Tribe has with the lake is so important; it’s the reason why we do what we do. We’re the leader [in protecting the Lake and rivers] but there’s a reason why we do that, a reason why we step forward. And it’s because of this emotional, spiritual connection the Tribe and our members have with the Lake. And people should know that.

Aff. C. Matheson, Ex. 1 (at 9:43). It was the fact that the waterways provided the Tribe with practically *everything* it needed to serve both its physical and spiritual well-being that the Tribe came to view itself as “inextricably linked to the inland aquatic world centered on Lake Coeur d’Alene.” Joint Statement of Facts, pg. 10 ¶ 9. This is why almost every early non-Indian account of the Tribe describes it and its members in terms of the Lake and its related waterways. *See e.g.*, Hart 2015 Report at 47 (recounting the account of Lewis and Clark, which described the Coeur d’Alenes as Indians that “reside at the falls of a large river, [which] takes its rise from a large lake in the mountains.”). *See also id.*, Figures 19-25 (paintings and drawings by Father Point in the 1840s). As tribal elder Felix Aripa recently said “I think about my elders, what that lake meant to them. I’m part of it. I’ve always been a part of it.” Aff. C. Matheson, Ex. 1 (at 14:34).

It was the sum of these parts, with no individual purpose being more important than the others, that resulted in the Tribe's dependence upon the waterways leading to the creation of the 1873 Reservation.

C. The circumstances surrounding 1873 Agreement and Executive Order, as construed in *Idaho II* conclusively demonstrate that a purpose of the Coeur d'Alene Reservation was to reserve the submerged lands underlying Lake Coeur d'Alene and the St. Joe River for the benefit of the Tribe

Just as the Ninth Circuit examined the circumstances surrounding the creation of the Colville Reservation to determine a dual fishing-agriculture purpose, Judge Lodge, affirmed by the Ninth Circuit and the United States Supreme Court, examined the circumstances surrounding the creation of the Coeur d'Alene Reservation and ultimately concluded that "a purpose of the 1873 Executive reservation was to retain the submerged lands for the benefit of the Tribe." *Idaho II*, 95 F.Supp.2d at 1101; *Walton*, 647 F.2d at 48. This was based upon three critical historical findings. First, the Tribe continued to be dependent upon the water resource in 1873. *Idaho II*, 95 F.Supp.2d at 1102. Second, the federal government was "plainly aware" of that dependence in 1873. *Id.* at 1104. Third, as a result of the public exigencies that were taking place in the Northwest leading up to the 1873 Agreement and Executive Order, the federal government "could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands." *Id.* at 1107.

1. The Tribe continued to be dependent on the water resource in 1873

In 1873, most tribal members continued to live near the waterways and still lived in a traditional way that depended upon the water resource for survival. Statement of Facts, pg. 38 ¶ 69. The most compelling evidence that the Tribe remained reliant upon the Lake and rivers in 1873

comes a few years earlier with its rejection of the 1867 Reservation. *Idaho II*, 95 F.Supp.2d at 1103; Statement of Facts, pg. 26 ¶ 48. That reservation “consisted for the most part of the area known as the Hangman Valley and included only a small sliver of the Lake.” *Idaho II*, 95 F.Supp.2d at 1102. The Tribe did not become aware of this reservation until sometime in 1871 or early 1872. *Id.* at 1103. Upon learning of it, the Tribe immediately rejected this reservation and petitioned the government for a larger reservation, expressly demanding that it include the Lake and rivers. *Id.* That petition stated:

In our first petition we made no mention of our church nor of the two valleys of S. Joseph and Coeur d’Alene Rivers, but because of our ignorance we thought it a matter of course

As to the two valleys, we did not think to ask for them, though they have been from old the habitual residence of most of us . . . what we are unanimous in asking . . . are the two valleys, the St. Josephs, from the junction of the S. and N. forks, and the Coeur d’Alene from the mission inclusively. . . .

Id. Judge Lodge found “[t]he second petition makes three points relevant to the Court’s present inquiry. First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home. Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs.” *Id.* See also, *United States v. Idaho*, 210 F.3d 1067, 1070 (9th Cir. 2000) (“the Tribe refused to settle within the confines of the 1867 reservation because it did not include the Tribe’s mission or waterways . . . The Tribe’s request [in the petition] was based in part on its continuing dependence on water resources . . .”).

2. *The United States was aware that Tribe continued to be dependent on the water resource in 1873*

“All early [non-Indian] accounts indicated the Tribe’s reliance on its water resources. The United States understood during those years leading to the establishment of the reservation and during the 1873 negotiations that Coeur d’Alene Lake, the Coeur d’Alene River, the St. Joe River and other tribal waters were required by the Tribe. Both government and non-government officials had pointedly emphasized the importance of the Tribe’s waters.” Hart 2015 Report at 146.

“Any uncertainty [on the part of the United States] concerning the extent of the Tribe’s dependence on the Lake and rivers in 1873 was dispelled by the Tribe’s request in the . . . petition for inclusion of the waterways in an expanded reservation.” *Idaho II*, 95 F.Supp.2d at 1106. In response, the Commissioner of Indian Affairs directed the formation of a commission to visit the Coeur d’Alene Tribe, which eventually negotiated the 1873 Agreement. *Id.* at 1105. Judge Lodge found the agreement was *per se* evidence of the United States’ awareness of the Tribe’s dependence on the water resource. *Id.*

[t]he agreement called for setting aside a significantly larger portion of the Tribe’s aboriginal territory than had been reserved by the 1867 Executive Order. Besides the Hangman Valley, the boundaries of the proposed reservation enclosed all but a small portion of the Lake, the Coeur d’Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to present-day site of St. Maries, and a tract of land laying to the south of the Spokane River.

Id. The Court also noted “[i]n addition to expanding the boundaries of the reservation to include the Lake and rivers, the agreement also guaranteed ‘that the water running into said reservation shall not be turned from their natural channel where they enter said reservation.’” *Id.* The district court concluded that the combination of this language along with reference to specific water features

describing the boundaries of the Reservation “suggests a federal intent to include submerged lands within the reservation.” *Id.* at 1108.

The district court also found that Governor Bennett, one of the federal negotiators to the 1873 Agreement later noted that the reason for the significantly expanded reservation was that “[w]e found that the Indians *demand*ed an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River.” *Id.* at 1105 (emphasis in original). However, the right reserved was not a bare fishing right, the reservation was specifically drawn to ensure the Tribe’s exclusive ownership of the submerged lands. The instructions to the government surveyor expressly directed him to “run the northern boundary across the Lake . . . [which] was contrary to the usual practice of meandering a survey line along the mean high water mark.” *Id.* Further, the survey “fixed the reservation’s total area at 598,499.85 acres, a calculation that included submerged lands under the Lake and rivers within the boundaries of the reservation.” *Id.*

Based upon this and other evidence, the district concluded “that in 1873 the Federal government was plainly aware of the Tribe’s dependence on the Lake and rivers.” *Id.*

3. *Based upon the public exigencies existing for the United States in 1873, the Federal Government intended to include submerged lands within the 1873 Reservation*

The Coeur d’Alene Tribe’s intent to reserve a water right appurtenant to its submerged lands is clear based upon its historic use and reliance of the waterways within its aboriginal territory, as well as its continued reliance on those waterways in 1873. *Walton*, 647 F.2d at 42; *Adair*, 723 F.2d at 1394. Indeed, the record demonstrates that the Tribe “demanded an enlarged reservation that included the Lake and rivers.” *Idaho II*, 95 F.Supp.2d at 1107.

The district court found that the United States' reaction to the Tribe's demand clearly demonstrated federal intent to likewise include the submerged lands within the Tribe's reservation. *Id.* As Richard Hart put it, "[t]he intent of the United States in establishing the 1873 Coeur d'Alene Executive Order Reservation was driven, in essence, by the Tribe's intent." Hart 2015 Report at 146. The United States had a number of goals, or exigencies, to address leading up to the creation of the 1873 Reservation. Foremost was the opening of the Tribe's aboriginal territory to non-Indians in an effort to promote non-Indian settlement in the region. *Idaho II*, 95 F.Supp.2d at 1107. Equally important to the United States was to open the region in a manner that would avoid further war on the heels of the Civil War and in the face of Indian wars going on throughout the region and the West. *Id.* See also, Statement of Facts, pg. 21-22 ¶ 36, 53; Hart 2015 Report at 142-43; 148. As the Supreme Court observed, "[t]he Tribe had shown its readiness to fight to preserve its land rights when in 1858 it defeated a force of the United States military" *Idaho II*, 533 U.S. at 276. Richard Hart, based upon the historic record, concluded that "the Tribe was confident in its ability to defend and preserve its homelands against the United States." Hart 2015 Report at 143. The Supreme Court found the risk of hostility remained in the early 1870s, based upon a report by the resident surveyor to the surveyor general that there "will in my opinion be trouble with these Indians," if the reservation did not include the Lake and rivers. *Idaho II*, 533 U.S. at 276. These facts led the district court to conclude

[t]hus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreement to a reservation that included the submerged lands.

Idaho II, 95 F.Supp.2d at 1107. See also *Idaho II*, 210 F.3d at 1075 ("the reservation was expanded from its 1867 borders because the Tribe refused to settle on lands that did not encompass the Lake and its associated waterways."). The Supreme Court affirmed, finding that "although the goal of

extinguishing aboriginal title could have been achieved by congressional fiat . . . the goal of avoiding hostility could not have been attained without the agreement of the Tribe.” *Idaho II*, 533 U.S. at 277.

4. *An essential purpose of the Coeur d’Alene Reservation was to set aside the submerged lands underlying navigable waters within the boundaries of the Reservation*

The historical record is conclusive that the “intent of the parties to the [1873 Agreement and Executive Order] as reflected in its text and surrounding circumstances” demonstrates that the Coeur d’Alene Tribe “demanded an enlarged reservation that included the Lake and rivers,” and the United States expressly agreed to that demand. *Idaho II*, 95 F.Supp.2d at 1107; *Adair*, 723 F.2d at 1409. In other words, the basis of the bargain was the inclusion of the portions of Lake Coeur d’Alene and the St. Joe River that remained within the Reservation.

This was the conclusion of the district court, which expressly found that “a purpose of the 1873 Executive reservation was to retain the submerged lands for the benefit of the Tribe.” *Idaho II*, 95 F.Supp.2d at 1102. The district court went on to find

[t]hat the Federal Government did in fact agree to reserve submerged lands for the benefit of the Tribe is demonstrated by the following factors: 1) the United States was aware that the waterways were essential to the Tribe’s livelihood; 2) the boundaries of the enlarged reservation were drawn to include the Lake and rivers; 3) the expanded reservation did not add significantly to the agricultural land base already reserved by the 1867 Executive Order; 4) the description of the reservation’s boundaries by its terms embraced the submerged lands; 5) a member of the commission, Governor Bennet, acknowledged that the expansion of the reservation was for the purpose of meeting the Tribe’s demand for its fishing grounds and a mill site.

Id. at 1109. Based upon this evidence, the district court concluded

a purpose of the 1873 Agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d’Alenes that mirrored the terms of the 1873 agreement, **a purpose of the Executive Order was to**

reserve the submerged lands under federal control for the benefit of the Tribe.

Id. (emphasis added).

All three courts—the district court, Ninth Circuit, and the Supreme Court—further concluded that reservation of the submerged lands was not ancillary to the Agreement or Executive Order but was in fact an essential purpose of the Reservation. The district court found “[t]hus, the Federal Government could only achieve its goals . . . by agreeing to a reservation that included the submerged lands.” *Id.* at 1107. The Ninth Circuit found inclusion of the submerged lands to be “[c]rucial to the Tribe’s acceptance of the 1873 reservation” and *twice* repeated its conclusion that “the purpose of the reservation would have been *defeated* had it not included these lands.” *Idaho II*, 210 F.3d at 1074-75. The United States Supreme Court affirmed, in so doing, it applied the following test:

Whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State. Where the purpose would have been undermined, . . . “[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.”

Idaho II, 533 U.S. 274 (quoting *Alaska*, 521 U.S. 39-40). The Court assumed this test had been met based upon the State’s concession that “the executive branch intended, or by 1888 interpreted, the Executive Order Reservation to include submerged lands.” *Id.* The Court also pointed out, “[t]he concession is a sound one.” *Id.* It went on: “although the goal of extinguishing aboriginal title could have been achieved by congressional fiat, . . . the goal of avoiding hostility . . . could not have been attained without the agreement of the Tribe.” *Id.* at 276. For its part, “the Tribe demanded an enlarged reservation that included the Lake and rivers . . . [and] the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included submerged lands.” *Id.*

Thus, the district court, Ninth Circuit, and Supreme Court all affirmed that the purpose of the Reservation would have been defeated but for the reservation of the submerged lands. In other words, the reservation of the submerged lands was an essential purpose of the Coeur d'Alene Reservation.

D. Despite changed conditions, the Coeur d'Alene Tribe continues to rely upon on the Lake and St. Joe River

The water rights of the Coeur d'Alene Tribe became “effective as of the time the [Coeur d'Alene] reservation[was] created” in 1873. *Arizona v. California*, 373 U.S. 546, 600 (1963). See also *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (“tribal reserved *Winters* rights vest on the date of the creation of the Indian reservation.”). This is also consistent with the facts on the ground in the Coeur d'Alene Case, where “[a]ll subsequent executive and congressional action taken with regard to the reservation . . . operated from the understanding that its boundaries were as stated in the 1873 agreement and executive order.” *Idaho II*, 210 F.3d at 1070. See also, Statement of Facts, pg. 35 ¶ 64. Accordingly any water rights not expressly ceded by the Tribe or abrogated by Congress continue to be held by the United States in trust for the Tribe. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so”).

History subsequent to the creation of the Reservation in 1873 conclusively demonstrates that far from abrogating the essential purpose of the Reservation—its inclusion of submerged lands—Congress actually *confirmed* the Tribe’s ownership of the submerged lands within its current reservation boundary. “As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe.” *Idaho II*, 533 U.S. at 267. New negotiations commenced in 1887, which reaffirmed the 1873 Reservation boundaries. *Id.* The new agreement also stated

“[i]n consideration of the foregoing cession and agreements . . . the Coeur d’Alene Reservation shall be held forever as Indian land and as homes for the Coeur d’Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.”

Id. at 267-68 (quoting 1887 Agreement, Art. 5).⁷

However, before the 1887 Agreement could be ratified, Congress directed the Secretary of the Interior to “negotiate ‘for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe *shall consent to sell.*’” *Id.* at

⁷ In a letter to the Secretary of the Interior forwarding the 1887 Agreement, the negotiators for the United States explained the reasons for inclusion of this Article 5 guarantee:

The anxiety of the Indians about their reservation and their fears that it might in some way be taken away from them, their unexampled good conduct, their friendship for the neighboring whites, displayed on a late memorable occasion [the Nez Perce War] their rapid advancement in self-support and civilization unaided by the Government, their willingness to allow their reservation to be filled up with Indians, the confidence they repose in the Government to settle their claim on its own terms, all conspired to cause us to put in the fifth clause

It may be said that this was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.

Hart 2015 Report at 212. During the 1887 negotiations, “Seltice addressed the commissioners. He made a rather long speech, in which he said the tribe had ‘listened very carefully and understood everything that you have said, and it was good.’” *Id.* Seltice also then declared for the Tribe:

The Government has now thought of our claims for our lost land, and they have sent you to us. Of this we are glad, but neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all Indians living on it shall have it forever. *Id.* at 213.

The lead federal negotiator, Judge “Wright responded that the Government would protect their [Reservation]. ‘It will do so if it takes its whole power.’” *Id.*

269 (quoting 25 Stat. 1002 (1889)) (emphasis added). Based upon this language, the Supreme Court concluded “Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined.” *Id.* The Court went on, “The intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe’s benefit” *Id.* at 278.

In 1889, the Tribe and the United States came to an agreement for the cession of the northern portion of the 1873/1887 Coeur d’Alene Reservation. That agreement made no mention of water or water rights. 26 Stat. 1027, 1029 (1891); *Winans*, 198 U.S. at 381 (treaties are “not a grant of rights to the Indians, but a grant of right from them, -a reservation of those not granted.”). This silence is deafening in this case given not only the canons of construction but the *facts in this case*, which demonstrate that “the intent [of the United States] was that anything not consensually ceded by the Tribe would remain for the Tribe’s benefit” *Idaho II*, 533 U.S. at 278. Federal negotiators followed Congress’ directive. During negotiations, General Simpson, a negotiator for the United States, repeatedly swore that “[w]e want to buy that which you want to sell,” Hart 2015 Report at 248, and “reassured the Tribe that ‘you still have the St. Joseph River and lower part of the lake.’” *Idaho II*, 533 U.S. at 270. From this there can be no question that the Tribe retained its water rights that vested in 1873 for *at least* the portion of the Lake and St. Joe River that remain within its current boundaries.

The Coeur d’Alene Allotment Act also did not act to abrogate tribal water rights. Importantly, the Coeur d’Alene Tribe was unanimously opposed to allotment, which they viewed as “nothing short of open thievery.” Hart 2015 Report at 284. Despite many tribal members’ continued reliance on the waterways for substance purposes through the beginning of the twentieth century, the Tribe was

forced to take its allotments on the western side of the Reservation away from the Lake and rivers.

Statement of Facts ¶ 85-89. As related by cultural resources director Quannah Matheson,

[a] lot of those old people, they shed tears, you know. They cried . . . walking away from the lake when they moved down to the prairies and the Palouse, but their heart was always here [at the lake].

Aff. C. Matheson, Ex. 1 (at 9:12). While it is true that Congress may act to unilaterally abrogate tribal treaty rights, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), that abrogation will not be inferred but must instead be “plain and unambiguous” or “clear and plain.” *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346 (1941).⁸ This requires that Congressional abrogation “be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.” *Bryan v. Itasca Co.*, 426 U.S. 373, 393 (1976) (quoting *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973)). There is absolutely no mention of water or water rights in the Coeur d’Alene Allotment Act. 34 Stat. 325, 335-36 (reported at Kappler, Charles Joseph. *Indian Affairs, Laws and Treaties*, Vol. 3, Washington, D. C.: Government Printing Office, 1913, p. 203). Given this silence, it is inconceivable that Congress intended for the Allotment Act to act to abrogate tribal water rights.

Despite the devastation brought upon the Tribe as a result of the Allotment Act including the forced relocation of tribal members away from the waterways, the Tribe’s relationship to the Lake and rivers has endured. In the face of abject poverty, the Tribe engaged in a twenty-six year legal battle—fighting before the Federal Power Commission and the Federal Energy Regulatory

⁸ See also *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so”); *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (“[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty”); *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 690 (“[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . .”); *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968) (“the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress”).

Commission, as well as twice before the federal district court, the Ninth Circuit, and the Supreme Court of the United States—to conclusively reaffirm its sovereign ownership of all submerged lands underlying navigable waters within the current exterior boundaries of the Coeur d’Alene Reservation. However, the Tribe has never sought to exclude others from the Lake; Cajetan Matheson highlighted this point when he said “we’re owning [the Lake] so that we can make sure it’s taken care of. And not to be selfish either but taking care of it for the benefit of all people whether they’re tribal members or non-tribal members.” Aff. C. Matheson, Ex. 1 (at 11:35). As Ernie Stensgar said, “[i]t’s there for us to protect and it’s there for everyone that lives around us to use and to use in a good way.” Aff. C. Matheson, Ex. 1 (at 9:35).

It has been the Tribe that has led the charge in the monumental effort to remediate and restore the water quality in the Coeur d’Alene-Spokane River Basin. Aff. C. Matheson, Ex. 4 (Pollution in Paradise) (“no one has stepped up . . . EPA officials say a lack of money forces them to concentrate on airborne pollution within one specific area . . . The State of Idaho used several million dollars from a settled suit . . . to clean and restore a few small sections . . . [b]ut it’s a drop in the bucket.”). That effort was initiated by the Tribe with the seemingly impossible task of prosecuting a natural resource damages suit under the Comprehensive Environmental Response, Compensation, and Liability Act against nine mining companies and the Union Pacific Railroad for releasing approximately 64,390,000 tons of heavy metal contaminated tailings into the Coeur d’Alene River, much of which was ultimately deposited in the Lake. *Coeur d’Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1105 (D. Idaho 2003) (“NRDA Case”).⁹ Tribal member Cajetan Matheson recently described his feeling

⁹ Objector Hecla was found to be the largest contributor of hazardous waste, being responsible for 31% of the historical releases of tailings which contained hazardous substances. *Asarco*, 280 F.Supp.2d at 1105.

that “I can remember hurting to the core, going up and seeing the mining tailings piles and looking at what had happened.” Aff. C. Matheson, Ex. 1 (at 5:17).

Idaho walked away from this contamination after settling for a mere \$4.5 million, while the Tribe and, eventually the United States, were able to establish legal liability and ultimately settle with these companies for over \$1 billion in damages earmarked for remediation and restoration.

Environmental Protection Agency, *Interim Record of Decision (ROD) Amendment Upper Basin of the Coeur d’Alene River—Bunker Hill Mining and Metallurgical Complex Superfund Site 2-6* (2012)

(“ROD”).¹⁰ From the perspective of the Tribe, this litigation was necessary; as then Tribal Chairman

Ernie Stensgar put it “we knew [filing the Lake cases and the NRDA Case] was righteous. It [the Lake] was the heart and soul of our people and there wasn’t any other route to take. You know the

love of the Lake was there; that was our home.” Aff. C. Matheson, Ex. 1 (at 10:01). Quanah

Matheson tied the health of the Lake directly to the health of the Tribe, as well as people in general:

[f]or me, it really is just bringing things into balance. Seems like to me that when nature’s in balance that’s a reflection upon us. Because right now we are polluting so many things, that’s a direct correlation on what’s in our hearts and what’s in our minds.

Aff. C. Matheson, Ex. 1 (at 5:40).

Today, the Tribe has a Lake Management Department whose mission is to

protect[] the purposes of the Coeur d’Alene Indian Reservation through management programs and activities designed to preserve, protect, restore and promote aquatic and cultural resources within the historical and cultural territories of the Coeur d’Alene Tribe and to promote and protect the health, welfare and safety relating to those resources for the benefit of present and future generations of Tribal members and the public.

¹⁰ Available at:

https://www3.epa.gov/region10/pdf/sites/bunker_hill/cda_basin/bunker_hill_upper_basin_interim_rod_amendment_082712.pdf (last visited Oct. 11, 2106).

Coeur d'Alene Tribe, *Lake Management*, <http://www.cdatribe-nsn.gov/LakeMngmt/Mission.aspx>

(last visited October 19, 2016). To fulfill this mission, the fifteen member Lake Management Department Staff

Represent[s] the Tribe's sovereign interests at local, regional and national levels and shall seek to take advantage of all opportunities to protect, enhance and restore aquatic resources for present and future generations. The Department shall also manage and control those beds and banks of navigable waters belonging to the Tribe or otherwise subject to Tribal jurisdiction consistent with Reservation purposes to protect the Tribe's exclusive use rights in those resources and with the policy of the Tribe, as expressed through Tribal laws, to provide opportunities for public use of those resources in specific and well defined ways. In doing so, the Department shall also seek to protect public health, safety and welfare as related to these resources.

Id.

The Tribe—through its Lake Management Department—is the Lake's best educational ambassador, educating other stakeholders on the interrelationship between human actions and aquatic health. Part of that curriculum is educating people on the history of the Coeur d'Alene Tribe's relationship to the waterways, “[t]hat helps kids understand how much of an impact pollutants getting into the water have had on the environment.” Aff. C. Matheson, Ex. 7 (Everything is interconnected and dependent). However, the importance of this educational effort goes deeper for the Tribe, “[i]t is a celebration of water and the importance of it to the Coeur d'Alene people.” Aff. C. Matheson, Ex. 10 (Students learn water topics from Cd'A Tribe). As a result, the Tribe is committed to continuing to expand its educational outreach regarding the importance of the Lake. Quannah Matheson, tribal Cultural Resources Director recently related this sentiment:

Let's bring back some of these canoes that we utilize on this lake. Let's relearn how to be on the Lake in a traditional way. Let's learn the language associated with being on the lake. Let's do that. And let's bring all our children. Let's create programs around it and let's bring them down to the lake. Let's utilize it even more. And

in that sense, you know, when I come to the lake it represents health.

Aff. C. Matheson, Ex. 1 (at 13:56).

Boise State anthropology professor Dr. Robert McCarl found that “the Coeur d’Alene people, in the pre-literate past and today, have been and continue to be inextricably linked to the inland aquatic world centered on Lake Coeur d’Alene.” Statement of Facts, pg. 10 ¶ 11. He went on to emphasize that despite “imposed physical distance from Lake Coeur d’Alene and its tributaries, in no way has [that distance] diminished its cultural and ethical importance in Coeur d’Alene culture.” *Id.* at 43. Tribal members demonstrate this relationship every day.

Although traditional fishing is significantly curtailed as a result of hazardous waste contamination from the Silver Valley, *see* Aff. C. Matheson, Ex. 2 (Resolution), tribal members continue their traditional gathering activities because, according to tribal member Cajetan Matheson, these activities “were really, really special to the Tribe and still remain special to the Tribe today.” Aff. C. Matheson, Ex. 1 (at 1:00). Each year, the entire Tribe gathers to celebrate water potato day. As tribal member Vincent Peone put it, “[b]y doing this, our ancestors are still alive . . . without an identity, you are a lost people.” Aff. C. Matheson, Ex. 5 (The last harvest). The importance to the Tribe is more than subsistence; Mark Stanger, a tribal elder signifies it is part of the Tribe’s “traditional way.” Aff. C. Matheson, Ex. 8 (Digging up heritage . . . one potato at a time).

The Tribe has also recently resumed the building of their traditional canoes and now, as a people, are using them again on Lake Coeur d’Alene. As Chief Allan, Chairman of the Coeur d’Alene Tribe, said recently about a newly built traditional canoe:

Making this shovelnose canoe has sparked a sort of cultural awakening within our Tribe. We’ve seen *hundreds* of tribal members who have taken an interest in the canoe, stopped by to lend a hand, and they’ve learned more about our history and our people in the process. Our

Tribe is stronger today because of the interest and investment that has been made in preserving our culture.

Aff. C. Matheson, Ex. 12 (Canoe landing ceremony Wednesday in Cd'A) (emphasis added). LoVina

Louie, another tribal member, expressed her feelings about a recent canoe journey:

I just started crying. We haven't had those canoes in our waters for so many years. In the canoe, you are sitting on the water, you're wet and you can feel our ancestors in the water . . . when you're in the canoe, you smell the wood. You worked on it, you carved it—your blood, sweat and tears are in it. And that's why I think I started crying when my dad started singing, because all the work we put into it and then to hear our songs with the canoe, it was so beautiful. I felt like we were home.

Aff. C. Matheson, Ex. 13 (Coeur d'Alene Tribe canoe stops at City park). She later would conclude that reaffirmation of the Tribe's ownership of the Lake has caused "[o]ur people, the Schitsu'umsh people, we have the ability to once again stand proud of who we are." Aff. C. Matheson, Ex. 1 (at 14:22).

III. THE MUTUAL INTENT OF THE UNITED STATES AND THE TRIBE WAS TO SET ASIDE NOT ONLY SUBMERGED LANDS BUT ALSO SUFFICIENT WATER TO MAINTAIN THE LAKE AND ST. JOE RIVER IN THEIR NATURAL CONDITION

Pursuant to *Winters*, the United States holds in trust for the Tribe water rights sufficient to fulfill the purposes of the Reservation. *Winters*, 207 U.S. at 576. In this case, an essential purpose of the Coeur d'Alene Reservation was to set aside the submerged lands for the benefit of the Tribe. *Idaho II*, 95 F.Supp.2d at 1109. Ultimately, whether this purpose requires an appurtenant water right depends upon the intent of the United States and the Tribe. *Adair*, 723 F.2d at 1409. The Indian law canons of construction demand that the documents and circumstances surrounding the creation of the Coeur d'Alene Reservation be "construed as the tribes would have understood them," with "any ambiguity . . . resolved in favor of the Indians." *Id.* at 1413. The question therefore becomes: would

the Coeur d'Alene Tribe in 1873 have understood the bargain to be solely for a reservation of submerged lands or also a reservation of sufficient water to preserve the Lake and St. Joe River as the Tribe had always known them?¹¹ The only possible answer is that the mutual intent of the Tribe and federal government was to ensure there would be sufficient water to maintain their homeland, which included the Lake and its rivers in their natural condition.

The Tribe's intent, as evidenced by its history and actions leading up to the creation of the 1873 Reservation leave no doubt that it was negotiating not just for ownership of submerged lands, but for sufficient water to maintain the Lake and rivers. The Tribe's historical and traditional dependence upon the Lake and rivers was predicated not merely upon the submerged lands, but on the water itself. Each of the component parts that the Supreme Court found necessary for the Tribe's self-identity and survival required water for their existence.¹² However, *Idaho II* demonstrates that the Tribe was not simply bargaining for the reservation of the component uses of the waterways but instead "demanded an enlarged reservation that included the *Lake and rivers*." *Idaho II*, 95 F.Supp.2d at 1107 (emphasis added). *See also Idaho II*, 533 U.S. at 287 (Rehnquist, C.J., dissenting) (arguing in dissent that the Tribe reserved only a right to fish and travel on the Lake).

¹¹ *See City of Pocatello v. State*, 145 Idaho 497, 507 (2008) ("[t]he record does not reveal a single instance where the Indians were apprised of the possibility that they were to lose some water rights. Serious discussions between the federal officials and the Indians would certainly have ensued if that were the case.").

¹² For example, fish need water to exist. *See Idaho II*, 95 F.Supp.2d at 1100. It was specifically the water, not the submerged lands, that made the deer drives such an effective hunting technique. *Id.* Water potatoes only grow in the marshy environment that exists on the unique overflow lands directly adjacent to the Lake and rivers. *Id.* These lands require water from the Lake to continue to be productive water potato habitat. Similarly, tules require land and water—an aquatic environment—to exist. *Id.* Likewise, tribal members traveled upon the *water*, not the submerged lands, when it used the Lake for transportation purposes related to travel, trade, and commerce. *Id.* Finally, the Tribe's "spiritual and cultural identity" is inextricably linked to not only the land underlying Lake Coeur d'Alene, but to the water that is the essence of Lake Coeur d'Alene.

Given the canons of construction, along with the inextricable relationship the Tribe had with these waterways, *see* sections II(B)-(C) *supra*, the tribal understanding could only have been that the 1873 reservation included water sufficient to maintain the waterways in their natural condition. Indeed, as found by the Supreme Court, “[a] right to control the lakebed *and adjacent waters* was traditionally important to the Tribe” *Idaho II*, 533 U.S. at 274 (emphasis added). Accordingly, “it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the [agreement].” *Adair*, 723 F.2d at 1409. *See also Winans*, 198 U.S. at 381 (treaties are “not a grant of rights to the Indians, but a grant of right from them, -a reservation of those not granted.”). *See also Idaho II*, 533 U.S. at 278 (“the intent [of the United States] was that anything not consensually ceded by the Tribe would remain for the Tribe’s benefit”).

Likewise, federal action leading up to 1873 clarify the United States’ intent to include not just the submerged lands within the Reservation but a sufficient amount of “related water” to support the continued existence of the Lake and St. Joe River. As both the district court and Supreme Court found, the United States could only achieve its goals through the development of a peaceful agreement with the Tribe. *Idaho II*, 95 F.Supp.2d at 1107; *Idaho II*, 533 U.S. 277. There is no question that the Tribe, in demanding an extension of the Reservation, was bargaining not only for submerged lands but also the water that necessarily went with it. The historic record clearly demonstrates that negotiators for the United States, namely Governor Bennett, understood the scope of this demand. *Idaho II*, 95 F.Supp.2d at 1105. Simply put, in an effort to achieve its ends, the United States readily agreed to the Tribe’s demand for an “enlarged reservation that included the *Lake and rivers*.” *Idaho II*, 95 F.Supp.2d at 1107 (emphasis added).

Even more probative, The 1873 Agreement—drafted by federal agents—expressly states that “the water running into said reservation shall not be turned from their natural channel where they

enter said reservation.” *Idaho II*, 95 F.Supp.2d at 1105 (emphasis added). It is difficult to envision a more clear expression of federal intent to include a sufficient water right to maintain the natural level of the Reservation’s lakes and rivers. Although this agreement was not ratified, “an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d’Alenes that *mirrored the terms* of the 1873 agreement.” *Idaho II*, 95 F.Supp.2d at 1109 (emphasis added).

Subsequent action by the United States demonstrates further federal understanding that the Coeur d’Alene Reservation included not just submerged lands but water *per se*. In 1888, the Senate passed a resolution directing the Secretary of the Interior to inform the Senate as to whether the Coeur d’Alene Reservation “includes any portion, and if so, about how much of the navigable *waters* of Lake Coeur d’Alene and of Coeur d’Alene and St. Joseph Rivers.” *Idaho II*, 533 U.S. at 268 (emphasis added). In response, the Secretary, citing a report of the Commissioner of Indian Affairs, informed the Senate that “the reservation appears to embrace all the navigable *waters* of Lake Coeur d’Alene except as small fragment cut off by the north boundary of the reservation” *Id* (emphasis added). The House Committee of Indian Affairs likewise recognized that the Reservation “contains a magnificent sheet of *water*, the Coeur d’Alene Lake” *Id*. at 269 (emphasis added). Finally, government negotiators expressly told the Tribe during negotiations for the 1889 Agreement that “you still have the St. Joseph River and lower part of the lake.” *Id*. at 270. Not just the submerged lands, but the St. Joe *River* and the *Lake*. This history is conclusive that the United States, from 1873 onward, demonstrated not only its understanding but full agreement with the Tribe’s demand for a reservation that included sufficient water to maintain the Lake and St. Joe River in their natural condition.

Finally, it is important to emphasize that unlike a bare use right such as hunting, fishing, or gathering rights, the Supreme Court has repeatedly recognized that ownership of submerged lands is

“an essential attribute of sovereignty.” *Alaska*, 521 U.S. at 5; *Tarrant*, 133 S. Ct at 2132. These sovereign rights are “just as necessary, perhaps even more so, to [the Tribe’s] own dignity and ancient right” as they are to a state’s dignity and right. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 287 (1997). However, those sovereign interests are not limited to the lands *per se* but extend to the “navigable waters and the soils under them” *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842) (emphasis added). In fact, it is the submerged nature of these lands beneath navigable waters that cause them to be so vitally important to the sovereign for their “accompanying power to control navigation, fishing, and other public uses of water.” *Tarrant*, 133 S. Ct at 2132 (emphasis added).

The only way to protect this sovereign interest and ensure the lands remain submerged when an Indian tribe owns them is through the *Winters* doctrine. Without a legally enforceable water right, the Tribe would lack the ability to protect and preserve its submerged lands and related waters. Such a situation would defeat this “essential” sovereign interest, which in turn would “entirely defeat” the purpose of the Coeur d’Alene Reservation.

In sum, the critical sovereign nature of these lands, along with the unique history of the Coeur d’Alene Reservation is why the Supreme Court found “the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation” *Idaho II*, 533 U.S. at 275 (emphasis added). There is no question that the mutual intent of the United States and the Tribe was that the Coeur d’Alene Reservation would include a sufficient amount of water to preserve the Lake and its related waters in their natural condition.

CONCLUSION

The United States and Coeur d'Alene Tribe are entitled to water rights sufficient to fulfill the purposes of the creation of the Coeur d'Alene Indian Reservation. *Winters*, 207 U.S. at 564.

Determination of the purposes for which the Coeur d'Alene Reservation was established requires

Consider[ation of] the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed conditions.

Walton, 647 F.2d at 47.

Idaho II is binding precedent that conclusively establishes, based upon the history of the Coeur d'Alene people, that tribal members not only used the water resource for their “corporeal survival, but also as the source of the Tribe’s spiritual and cultural identity.” *Idaho II*, 95 F.Supp.2d at 1101. The Tribe depended on the waterways for food, fiber, and transportation, as well recreation, spiritual, religious, social, and cultural needs—almost *everything* it required for both its physical and spiritual survival. As a result, the Tribe did not view the waterways as a thing just to be used but was instead “inextricably linked to the inland aquatic world centered on Lake Coeur d'Alene.” Joint Statement of Facts, pg. 10 ¶ 9.

Further, the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation, as construed in *Idaho II*, establishes that the mutual intent of the United States and the Tribe was to set aside a reservation that included the lakes and rivers. The Tribe continued to rely on the water resource in 1873 and the United States was plainly aware of that dependence. *Idaho II*, 95 F.Supp.2d at 1103-05. Because of this dependence, the Tribe “demanded an enlarged reservation that included the Lake and rivers,” and, as a result of the exigencies that existed at the time, the United States could only achieve its goals by “agreement to a reservation that included the

submerged lands.” *Id.* at 1107. Based upon these operative documents, as well the circumstances surrounding the creation of the Coeur d’Alene Reservation, the district court, affirmed by the Ninth Circuit and Supreme Court of the United States, found

a purpose of the 1873 Agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d’Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe.

Idaho II, 95 F.Supp.2d at 1109 (emphasis added).

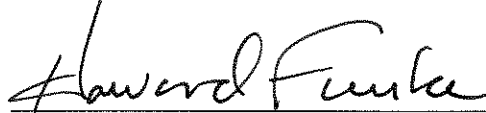
The historic record conclusively demonstrates that the mutual intent of both the United States and the Tribe was to reserve not only the submerged lands, but “the submerged lands and related water rights” *Idaho II*, 533 U.S. at 275 (emphasis added). From both a logical and historical perspective, there is no question the Tribe’s intent and understanding in 1873 was that its “reservation . . . included the *Lake and rivers*.” *Idaho II*, 95 F.Supp.2d at 1107 (emphasis added). There is likewise no doubt the United States also intended the Coeur d’Alene Reservation to include not only submerged lands but also water overlying those submerged lands. First, the United States was committed to acquiescing to the Tribe’s demand for an extension of the reservation to include the Tribe’s aboriginal waterways. *Idaho II*, 533 U.S. at 276. Second, federal intent can be derived from the 1873 Agreement, which expressly promised “the water running into said reservation shall not be turned from their natural channel where they enter said reservation.” *Idaho II*, 95 F.Supp.2d at 1105 (emphasis added). Finally, Congress repeatedly acknowledged that the Reservation included not just submerged lands but “the navigable *waters*,” within the Reservation. *Idaho II* 533 U.S. at 269 (emphasis added).

Accordingly, the history of the Coeur d'Alene Tribe, the 1873 Agreement and Executive Order, the circumstances surrounding those documents, as well as the Tribe's need to maintain itself under changed conditions all lead to the inescapable conclusion that "a purpose of the Executive Order was to reserve the submerged lands [within the current boundaries of the Reservation] under federal control for the benefit of the Tribe." *Idaho II*, 95 F.Supp.2d at 1109. *See also Walton*, 647 F.2d at 47. This essential purpose requires a water right pursuant to the *Winters* Doctrine for a sufficient amount of water to maintain Lake Coeur d'Alene and the St. Joe River in their natural condition.

For the foregoing reasons, the Court should grant the United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment.

Respectfully submitted this 20th day of October, 2016.

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I hereby certify that on the 20th day of October, 2016, a true and correct copy of the foregoing document was served upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

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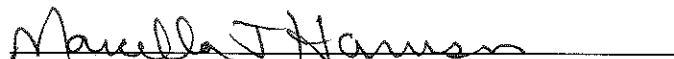
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