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Hecla's Memo in Opposition to USA-CDAT Joint Mtn SJ

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

In Re CSRBA	Subcase No. 91-7755, *et al.*
Case No. 49576	**HECLA'S MEMORANDUM IN OPPOSITION TO THE UNITED STATE'S AND COEUR D'ALENE TRIBE'S JOINT MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Hecla Limited ("Hecla"), by and through its attorneys of record, Barker Rosholt and Simpson LLP, and submits this Memorandum in Opposition to the Joint Motion for Summary Judgment filed by the United States and the Coeur d'Alene Tribe ("Tribe") in this matter. Hecla joins in the response filed by the State of Idaho and provides the following additional argument.

INTRODUCTION

A federal reserved water right does not spring to life whenever such a water right would be nice to have for the United States or the Tribe as they contemplate the future. Instead, a right arises only when a primary purpose of the reservation would be "entirely defeated" without such a right. The United States' claims on behalf of the Tribe do not begin to meet this stringent

standard. When viewed in light of the proper legal standard, the off-reservation instream flow claims, lake level maintenance claims and irrigation claims must be dismissed as a matter of law.

The claims for off-reservation instream flows cannot withstand dismissal, and the United States' and Tribe's arguments do not begin to show that the Reservation would be "entirely defeated" without such right. The Agreements between the Tribe and the United States do not provide for any hunting or fishing rights – either on or off the Reservation. Many of the treaties of the time expressly, and commonly, "guaranteed the right to fish."[1] However, the Agreements before this Court are noticeably silent on the matter. *See* Act of March 3, 1891, Ch. 543 §§ 19, 20, 26 stat. 1027, 1029. Instead of retaining any such right, the Tribe ceded "all right, title and claim" outside the Reservation. The United States and Tribe would have the Court ignore this clear and unambiguous language and manufacture implied water rights for off-reservation instream flows to protect fish habitat.

Among the fundamental flaws in the United States' and Tribe's arguments is the absence of any evidence that the primary purpose of the Reservation was to protect fish habitat. *See State v. United States (In Re SRBA Case No. 39576)*, 134 Idaho 940, 946 (2000) ("In order to meet the test of necessity required for a federal reserved water right, the need for water must be so great that, without water, the primary purpose of the reservation will be entirely defeated"); *see also Cappaert v. United States*, 426 U.S. 128, 139 (1976) (reserved water rights must be for a "primary purpose" of the Reservation); *United States v. New Mexico*, 438 U.S. 696, 701 (1978) (same). Neither the United States nor the Tribe can point to any historical documents showing

[1] *See Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (Treaty in question "guaranteed the right to fish 'at all usual and accustomed places, in common with the citizens' of Washington"); *United States v. Winans*, 198 U.S. 371 (1905) (same); *Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts and other Objectors who Have Joined and/or Supported the Various Motions*, Cons. Subcase No. 03-10022 (Nov. 10, 1999) (the "*Nez Perce Order*") (same).

that fish habitat was the "primary purpose" of the Reservation or that, without this claim for fish habitat, the "primary purpose of the reservation will be entirety defeated."

The United States and Tribe attempt to circumvent this "primary purpose" analysis by asserting that the Coeur d'Alene Reservation was set aside for a broad and undefined "homeland" purpose. But, a claim of use based on a "homeland" purpose eviscerates the required "primary purpose" analysis and is contrary to law. *United States v. Washington 375 F. Supp. 2d 1050, 1065 (W.D. Wash. 2005)* (rejecting a tribe's claim for water for a "homeland purpose" as "contrary to the "primary purpose" doctrine under federal law). Further, claiming a "homeland" still begs the question of the "primary purpose" of the reservation as of the time of the reservation, not the modern day activities of a tribe. *Id.*

The United States and Tribe pin their claims on the 1873 Executive Order setting aside a reservation for the Tribe – mentioning only in passing the 1887 and 1889 Agreements that were actually ratified by Congress. Act of March 3, 1891. Congress never ratified the 1873 Executive Order. *Idaho v. United States*, 533 U.S. 262, 265-72 (2001) ("*Idaho III*").[2] Rather, further negotiations resulted in adjustments to the Reservation defined in the 1873 Executive Order. *Id.* As a result, the Tribe has no claim to rights outside the boundaries established in the 1887 and 1889 Agreements (as well as subsequent cessions like the Harrison strip). All those aboriginal claims were extinguished when the Tribe agreed to cede "all right, title and claim" outside the Reservation. Therefore, even if a reservation of hunting or fishing rights could give rise to a

[2] As in Hecla's opening brief, the federal district court, court of appeals and Supreme Court decisions in the Coeur d'Alene Lake ownership case are *Idaho I*, *Idaho II*, and *Idaho III*, respectively.

reserved water right off the Reservation, no such right could be in the circumstances of this case.[3]

The United States' instream flow reserved water right claims seek to impose an environmental servitude on all off-reservation water users for on-reservation fish habitat. The off-reservation rivers and streams subject to these claims are located in the very places where the Tribe relinquished all (not some) of its "right, title and claim" so that the area could be opened to settlement and development.

Further, the 1887 and 1889 Agreements do not expressly reserve for the Tribe *exclusive* hunting and fishing rights on the Reservation. Indeed, the Agreements with the Tribe, including even the 1873 Agreement, do not mention any hunting or fishing rights. Thus, the cases the United States relies upon, such as *Adair*, recognizing on-reservation reserved water rights for hunting and fishing from the circumstances surrounding the Klamath Reservation and its explicit reservation of exclusive hunting and fishing rights on the reservation, are not applicable here.

Objectors have demonstrated, and the United States and Tribe have not shown to the contrary, that the primary purpose of this Reservation, as expressed in 1887 and 1889, was for an agricultural home for tribal members to assimilate into an agrarian society, with access to some hunting and fishing "for a while" but certainly not in perpetuity. Other claimed uses, like water parks, golf courses, fish hatcheries and casinos, were simply not primary purposes of the 1887 and 1889 Agreements. *See United States v. Washington, supra.*

Accordingly, the Court should deny the United States' and Tribe's motions for summary judgment, and grant Hecla's and the State's summary judgment motions.

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[3] Moreover, the law of the SRBA is that even off-reservation, in-common fishing rights were not intended to establish a federal reserved water right. *Nez Perce Order, supra.*

LEGAL ARGUMENT

I. The Tribe's Off-Reservation Claims Would Give Control of the Rivers to the United States and Tribe and are Contrary to the Agreements to Cede "All Right, Title and Claim" Outside the Reservation.

The Tribe ceded all of its "right, title and claim" outside of the Reservation. Yet, the United States and Tribe now seek to control off-reservation waters by dictating off-reservation instream flows for "fish habitat for fish species harvested within the Reservation." *Notice of Claim* (91-7755). Importantly, neither the Tribe nor the United States can point to any express language in any of the Agreements establishing the Reservation to support their demands. That is because there is no such language. The statutory text is the most probative evidence of Congress' intent. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

In essence, the United States and Tribe ask this Court to imply a perpetual hunting and fishing right from statements (outside the Agreements) that Tribal members needed hunting and fishing "for a while." They then would have the Court further imply, based on the original flawed implication, that a perpetual federal reserved water right was intended. The law does not allow the Court to rewrite the Agreements in such a manner. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

In interpreting treaties, the Court must determine the intent of the parties – resolving any ambiguities in favor of the tribe. *Winters v. United States*, 207 U.S. 564, 576 (1908); *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Idaho v. Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983). This rule of interpretation, however, does not allow the Court to rewrite the agreement to avoid some recently perceived injustice. *Choctaw Nation of*

Indians, supra; *see also United States v. Choctaw Nation*, 179 U.S. 494 (1900) ("the Court cannot employ any "notion of equity or general convenience, or substantial justice," to "incorporate into an Indian treaty something that was inconsistent with the clear import of its words").

In this case, the agreement language is crystal clear. In 1887, the Tribe agreed to cede

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

United States v. Idaho, 95 F. Supp. 2d 1094, 1096 (D. Idaho 1998) ("*Idaho I*"). In 1889, the Tribe agreed to further land cessions, again ceding "all right, title and claim" in those lands. *Id.* at 1097. In 1891, Congress ratified the 1887 and 1889 Agreements, recognizing that:

> For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands ... except ... the Coeur d'Alene Reservation.

Idaho v. Andrus, *supra* 720 F.2d at 1465.

There is no ambiguity in this language. There is no limitation or exception to its scope – it included "all" claims outside the reservation. *Id.* ("The Tribe agreed to cede approximately four million acres of aboriginal land to the United States. In 1891 the Tribe formally ceded to the United States the tribal aboriginal land ... Appropriations bills were passed to compensate the Tribe and its members for the land ceded"). The Tribe was compensated for their cession – resulting in a diminishment of their aboriginal lands and claims. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (Whenever an act of Congress "contains both explicit language of cession, evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate

the Indian tribe for its opened land,' a 'nearly conclusive,' or 'almost insurmountable,' presumption of diminishment arises"). In the absence of language to preserve any right, title or claim outside the Reservation (including any "claim" to water rights) the Agreements must be interpreted consistent with their plain language – language which was "precisely suited to diminish reservation boundaries." *Andrus*, 720 F.2d at 1466.

The Tribe and United States spend much of their briefing discussing the importance of hunting and fishing in the Tribe's traditional lifestyle. *U.S. Br.* at 17-33; *Tribe Br.* at 8-30. They argue that the Tribe's members used the water ways within their historical homeland for transportation, fishing and other aspects of their lives. *Id.* Hecla does not dispute that the waterways were used by Tribe members at the time, or that the United States took action to secure, on behalf of the Tribe, less than one-third of the beds and banks of Lake Coeur d'Alene lying within the current Reservation boundaries.

However, neither use of the water ways nor ownership of the beds and banks of some portion of Lake Coeur d'Alene can be construed as evidence that the Tribe and the United States intended to impose an environmental servitude on off-reservation water use or preserve fish habitat in the tributaries. The Tribe expressly gave up those rights when it entered an unqualified agreement to cede "all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere."[4] *Idaho I, supra* at 1096; *see also Andrus, supra* at 1465 (Congressional ratification of agreement to cede "all right, title and claim" outside the

[4] The Tribe misunderstands the effect of ceding "all right, title and claim" outside the reservation. It asserts that, since the 1887 and 1887 Agreements do not mention "water or water rights" the Tribe must have intended to reserve the ability to control off-reservation stream flows. *Tribe Br.* at 24 ("This silence is deafening in this case"). Yet, the Agreements are <u>not</u> silent on this issue. Indeed, the Tribe's agreement to cede "all" of its claim outside the Reservation must be interpreted based on its plain language and clearly evidences an intent to relinquish any right to control land and/or resources outside the Reservation. *Supra.*

reservation). Nothing in the Agreements, or Congress' 1891 ratification, reserve any right outside the Reservation – including any instream flows. *Choctaw Nation of Indians, supra* at 432 ("There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. ***Without such a finding the agreement must be interpreted according to its unambiguous language.***") (Emphasis added).

If the United States or Tribe placed the emphasis on off-reservation water resources that they now claim to have, surely they would have included provisions regarding the Tribe's ability to control off-reservation stream flows. The absence of any such language is telling – particularly in light of the agreement to relinquish all "right, title and claim" outside the Reservation. Through the Agreements, the Tribe ceded any right or claim, if it even had any, to control the flows of off-reservation rivers and streams. Having ceded all of its interest outside the Reservation, there can be no claim now that the Tribe retained any right to control off-reservation water flows.

II. Claims for Off-Reservation Instream Flow are Inconsistent with the Intent of the United States in Entering Indian Treaties to Open Up Land for Settlement and Development.

The Snake River Basin Adjudication ("SRBA") Court addressed, and denied, similar claims in the *Nez Perce Order* – a decision ignored by the Tribe and United States. Those proceedings involved off-reservation instream flow claims based on the Nez Perce Treaty. Like the Agreements at issue here, the Nez Perce Treaty recognized that the Nez Perce ceded all "right, title and interest" in "their aboriginal grounds." *Nez Perce Order* at 27. Unlike the Agreements in this case, however, the Nez Perce Treaty maintained a right to hunt and fish "in common with the citizens of the territory" on off-reservation lands. *Id.* at 12-13; *see also id.* at 30

("This Court is being asked to view the history of the Treaty, the Nez Perce culture, the Treaty negotiations, and then imply that the Nez Perce reserved a water right as a necessary component of their reserved fishing right or to otherwise give effect to that right").

In rejecting these off-reservation instream flow claims, this Court explained:

> The purpose of the Stevens Treaties [including the Nez Perce Treaty] was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers. It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. ... it defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty."

Id. at 38.[5]

Applying the same analysis in this case requires denial of these off-reservation instream flow claims. In 1866 – before any agreement was reached with the Tribe – the United States enacted the Mining Act, which opened public lands to mineral development and codified an intent to recognize and protect mineral development and its associated water rights. Act of July 26, 1866, 14 Stat. 253 (codified at 50 U.S.C. §§ 51, 52 and 43 U.S.C. § 661). The Mining Act protected water rights necessary for mineral development. Act of July 26, 1866, 14 Stat. 253 (codified at 43 U.S.C. § 661) ("Whenever by priority of possession rights to the use of water for mining ... have vested and accrued ... the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed"). An 1870 amendment to the Mining Act again confirmed the recognition and protection of water rights associated with

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[5] The SRBA Court also concluded that the right to fish "in common with" other settlers did not equate to a right to a certain quantity of fish – only a right to the available fish supply. *Nez Perce Order* at 30-37.

mineral development. Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661) ("all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or right to ditches and reservoirs used in connection with such water rights, as may have been acquired").[6]

In 1877 – a decade before the 1887 and 1889 Agreements – Congress passed the Desert Lands Act, authorizing persons to enter and claim irrigable lands "by conducting water upon the same." Act of March 3, 1877 (codified at 43, U.S.C. § 321). The statute provided that:

> all surplus water over and above such actual appropriation and use, together with the water from all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. This Act thus reinforced the right to use water for mining purposes.

These laws were in effect long before the United States and Tribe negotiated agreements for the Reservation. Indeed, the negotiations were prompted, in large part, over the Tribe's concerns relative to the development of mining claims by white settlers. *United States v. Idaho*, 533 U.S. 262, 267 (2001) ("*Idaho III*") ("In the 1880's, the Tribe became concerned with the mineral development interfering with its lands and pushed for negotiations to establish a reservation"). In fact, following the 1887 negotiations and agreement, Congress authorized further negotiations after receiving pressure from settlers seeking additional mineral development opportunities. *United States v. Idaho*, 210 F.3d 1070 (9th Cir. 2000) ("*Idaho II*").

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[6] These statutes protect water rights associated with mineral development into the future. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (The Acts of 1866 and 1870 "were not limited to recognizing pre-existing rights of possession, but '[t]hey reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain'").

The record is devoid of any evidence that the Tribe and United States intended to interfere, in any way, with the development promoted by these laws. There is no evidence that the Tribe or United States intended to impose an environmental servitude on those off-reservation developers by controlling the flows of the area's rivers and streams – and the law does not allow the Tribe and United States to rewrite those agreements now. *Choctaw Nation of Indians, supra* at 432 ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

When the Agreements are viewed in light of the history of legislation protecting settlement and development of off-reservation lands, "it is inconceivable that the United States would have intended or otherwise agreed to allow the [Tribe] to reserve instream flow off-reservation water rights." *Nez Perce Order* at 38. Such a conclusion "defies reason" and should be rejected. *See United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) ("It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians").

III. The Tribe Agreed to Relinquish All of its Right, Title and Claim to Off-Reservation Lands and Cannot Now Claim a Right to Control the Waters Flowing Through Those Relinquished Lands.

Ignoring the agreement to relinquish all right, title and claim in off-reservation lands, the Tribe and United States claim they retained the right to control the flows of off-reservation rivers and streams. *See U.S. Br.* at 42-46; *Tribe Br.* at 30-34. They assert that the Tribe reserved off-reservation instream flow rights based on (1) a sentence in the 1873 Agreement providing that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation," and (2) as a right based on including portions of some rivers and the

Lake within the Reservation. *Id.* These assertions, however, cannot withstand the "careful examination" required for such claims. *New Mexico*, 438 U.S. at 699 ("Careful examination" of a claim for a federal reserved water right is necessary to confirm that the claimed water is a "primary use" and is "necessary to fulfill the very purposes" of the reservation of land).

A. The 1873 Agreement Does Not Evidence an Intent to Control Off-Reservation Instream Flows.

The United States and Tribe point to a sentence in the 1873 Agreement providing that "the water running into said reservation shall not be turned from their natural channel where they enter said reservation," and conclude that such language is evidence of an intent to maintain the natural level of the Reservation's lakes and rivers. *See Tribe Br.* at 32-33. When viewed in its historical context, however, the language does not support their theory.

First, the language in the 1873 Agreement cannot be read in a vacuum. As explained in the *State of Idaho's Statement of Additional Facts*, at 2, the language was included in relation to the reservation of a public "right of passage over reservation roads." *See also Affidavit of Richard Hart*, Ex. 6 ("Hart 2015 Report") at 132 ("While under the proposed terms, the United States reserved the right to construct roads through the reserve, significantly, in return it promised 'that the water running into said reservation shall not be turned from their natural channel where they enter said Reservation"). There is no evidence this sentence was intended to address any right to control off-reservation streamflows.

However, even if this language did address instream flows, it only refers to the "natural channel ***where they enter said Reservation***." (Emphasis added). The language does not recognize any control or other retained right relative to any tributary waters outside of the Reservation (i.e. before "they enter said Reservation"). Nothing is said or even implied about

fish habitat in the tributaries. As discussed above, *supra* Part II, any claim that this language creates a right to control off-reservation stream flows is contradicted by the United States' passage of legislation that promoted the development of public lands (i.e. lands outside the Reservation) for farming and mining – including the associated water use for each activity.

Importantly, the 1873 Agreement was not the final agreement on this matter – indeed, it was never ratified by Congress as required by the express terms of that Agreement. *Idaho III*, at 266-67. Over the following 18 years, there were multiple rounds of negotiations between the Tribe and United States. *Id.* at 267-69; *Idaho II, supra* at 1070-77. The terms of the 1873 Agreement were amended through those subsequent negotiations. *Idaho II*, at 267 ("As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe" and thereafter authorized "new negotiations" in 1885 and 1889 to alter the terms of the 1873 agreement – particularly, the boundaries of the Reservation).

The Reservation identified in the 1873 and 1887 Agreements included "the vast majority of the Lake" and valuable mineral deposits in the area. *See Idaho II* at 1070; *Idaho III*, 533 U.S. at 268 ("the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment"). While the 1887 Agreement was pending before Congress, the United States received "pressure to open up at least part of the reservation to the public (particularly the Lake)." *Idaho II* at 1070. Further negotiations ensued and, in 1889, the Tribe agreed to "cede the approximate northern third of its 1873 reservation to the United States." *Id.* By the 1889 Agreement, the mouth of the Coeur d'Alene River entered the lake above, and outside of, the new Reservation boundary. Importantly, the 1873 language the Tribe and United States refer to was not included in the 1887 or 1889 Agreements or in Congress' ratification of those Agreements. *See* Act of March 3, 1891.

As a condition of the 1889 Agreement, the Tribe demanded that the 1889 Agreement "shall not be binding on either party until the former agreement now existing between the United States ... and the [Tribe], bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress." Act of March 3, 1891. This provision ensured that rights agreed to in the 1887 Agreement were ratified prior to the amendment of those rights in the 1889 Agreement. *Id.* Importantly, there is no such language requiring ratification of the 1873 Agreement – further evidence that the Tribe and United States did not rely on any language in the 1873 Agreement for the final Reservation. If, as the Tribe and United States contend, the language in the 1873 Agreement evidenced some intent to control off-reservation instream flows, then the absence of any similar language in the subsequent, and ultimately ratified, Agreements is telling.

In *Choctaw Nation of Indians, supra*, the Supreme Court confirmed that an original Tribal agreement can be amended through subsequent negotiations and agreements. In 1866, the United States entered into a treaty with the Choctaw Nation and the Chickasaw Nation. Part of the treaty called for the cessation of slavery by the tribes and the allotment of 40-acre parcels of common lands to the freed slaves – actions that were required within 2-years. 318 U.S. at 424-25. These actions were not taken. In 1882, Congress passed legislation allowing the tribes to complete the allotment of land to the freed slaves. *Id.* While the Choctaw nation adopted their freed slaves, the Chickasaws did not. *Id.* In 1897, the tribes entered the Atoka Agreement which provided that the Choctaw freed slaves would receive an allotment of land from the Choctaw allocation. *Id.* at 426. There was no provision for the Chickasaw freed slaves – though subsequent Congressional confirmation stipulated that the Chickasaw freed slaves would receive their allotment. *Id.* Before the Chickasaw made that allotment, a supplementary agreement was

entered in 1902, which provided that the freed slaves would receive an allocation of land from the "common lands" – as opposed to each tribes separate allotment.

The Court rejected the Chickasaws demand for reimbursement for Chickasaw lands that were allocated to Choctaw freed slaves. The Court concluded:

> The Treaty of 1866, in Article III of which the Chickasaws unconditionally consented to allotments from the common lands to Choctaw freedmen who might be adopted in conformity with the treaty requirements, is not determinative because it was superseded, before any allotments were made, by the confirmed Atoka agreement which required the deduction of all freedmen's allotments, both Choctaw and Chickasaw, from those of the members of their respective tribes. The Atoka agreement was in turn supplemented by the 1902 agreement, which omitted the deduction requirement of the Atoka agreement and contained not a word about deducting freedmen's allotments from the respective tribal shares in the common lands.

Id. at 428.

The same reasoning applies here. The failure of the Tribes and United States to carry forward the language they now rely upon into the subsequent Agreements, agreements that were ratified by Congress, confirms that, even if the language evidenced some intent in 1873 to control off-reservation stream flows, the parties superseded any such agreement. The final Agreements and the Act of Congress contain no such limitation.

B. The Tribe Did Not Reserve a Right to Control Off-Reservation Instream Flows to Protect Fish Habitat.

The United States attempts to avoid the plain language of the Agreements by pointing the Court to various cases that it alleges demonstrate a right to control off-reservation instream flows. *U.S. Br.* at 46-48. In each case, however, the United States' reliance is misplaced.

For example, the United States points the Court to the 1964 Decree entered in *United Arizona v. California*, 376 U.S. 340 (1964) ("*Arizona I*"), where the Court confirmed a water right for the Cocopah Tribe in the Colorado River. It contends that the Reservation was "located

approximately two miles from" the river. *U.S. Br.* at 47. Yet, as explained by the State in its opening brief, this is an error – as the reservation include lands "contiguous with the Colorado River." *State Br.* at 19, n.9. In any event, irrigation water for the Cocopah Tribe (which was necessary to realize a primary purpose of that reservation) is not the same as the off-reservation fish habitat right claimed by the United States for the Coeur d'Alene Tribe.

The United States' reliance on *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985), *Wash. Dep't. of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 1, 1994) ("*Acquavella I*"), and *Wash. Dep't. of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 1, 1994) ("*Acquavella II*"), are misplaced. Each of these decisions addresses the rights of the Yakima Indian Nation as it relates to its 1855 treaty – a treaty that specifically reserved to the Indians "the exclusive right of taking fish in all the streams ... bordering [the] reservation ... also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 763 F.2d at 1033; *see also, e.g., Acquavella I* at 8, 9 & 15. There is no specific reservation of any fishing rights in any of the Agreements with the Coeur d'Alene Tribe. *See Supra*, Part I. The Washington courts' interpretation of the rights reserved under the 1855 Yakima Treaty, therefore, is of no consequence in these proceedings. Furthermore, Idaho courts have interpreted the law differently, as explained by the SRBA Court, such that the "in common" treaty language only protects the right to the available fish supply and not to any guaranteed water supply. *Nez Perce Order, supra.*

In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the court addressed the rights of the Klamath Tribe under its 1864 treaty that specifically "reserved to the Tribe the exclusive right to hunt, fish and gather on its reservation." Since no such rights were reserved in the agreements with the Coeur d'Alene Tribe, *see* Act of March 3, 1891, *Adair* provides no guidance

on the issues before this Court. The question in *Adair* was whether the treaty's exclusive reservation of on-reservation hunting and fishing rights to the Tribe was a primary purpose of that reservation of land. *Id.* at 1409. While the Coeur d'Alene Reservation was inherently suitable to agricultural production, the Klamath Reservation was on a "high, cold plain … too frosty to raise cereal or roots with success." *Id.* at 1409, n.15 (citing 1864 Report of the Commissioner of Indian Affairs 121). Thus, hunting and fishing held the greatest promise for sustaining the Klamath on their reservation. *Id.*

The Klamath Reservation was terminated by an Act of Congress in 1954. *Id.* at 1411, citing 25 U.S.C. §§ 564-564w. The appellants argued that termination of the reservation also terminated the water rights associated with this exclusive on-reservation hunting and fishing right. *Id.* The Court held that the Termination Act did not terminate the water rights because the Act expressly recognized that "nothing in sections 564-564w of this Act shall abrogate any water rights of the Tribe and its members." *Id.* at 1412, quoting 25 U.S.C. § 564m(a).

The reservation of water rights in the Termination Act stands in stark contrast to the 1887 and 1889 Agreements with the Coeur d'Alene Tribe, ratified by Congress in 1891. Act of March 3, 1891. That 1891 Act of Congress did not recognize or preserve any water rights held by the Coeur d'Alene Tribe. Thus, the 1891 Act of Congress was an unambiguous diminishment of the Tribe's Reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (Whenever an act of Congress "contains both explicit language of cession, evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly conclusive,' or 'almost insurmountable," presumption of diminishment arises"); *Hagen v. Utah*, 510 U.S. 399, 411 (1994) (same); *Wyoming v. EPA*, 2017 WL 674481 (10th Cir. Feb. 22,

2017) (Wind River Reservation diminished by Congress when the Tribe ceded all right, title and interest outside the boundary).

These cases do not support an interpretation of the 1887 and 1889 Agreements and Congress' 1891 ratification that would provide any off-reservation rights to the Coeur d'Alene Tribe, much less a water right. The language of the 1855 Yakima Treaty was common in Northwest treaties during the 1800's.[7] It is telling that this otherwise common language does not appear in any of the Agreements before this Court. Therefore, even if the right to hunt and fish in common with the citizens of the United States had been included, it would not create a water right. *See Nez Perce Order, supra.* This Court cannot imply any agreement to control off-reservation waters from the language of the Agreements at issue here. *See Choctaw Nation of Indians,* 318 at 432 ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."); *Choctaw Nation*, 179 U.S. at 532 ("It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians"). This is particularly true in light of the unqualified agreement by the Tribe to cede "all right, title and claim" outside of the Reservation.

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[7] *See Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (Treaty in question "guaranteed the right to fish 'at all usual and accustomed places, in common with the citizens' of Washington"); *United States v. Winans*, 198 U.S. 371 (1905) (same); *Nez Perce Order, supra* (same).

IV. There is No Trust Obligation to Claim Water Rights for Off-Reservation Instream Flows.

These off-reservation instream flow claims on behalf of the Tribe are not supported by any trust obligation the United States has to the Tribe. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995) (The United States had no trust obligation to pursue off-reservation water claim claims for the Shoshone-Bannock Tribes in the SRBA. Yet, that Tribe has even more expansive off-reservation rights than the Coeur d'Alene Tribe has here – a contingent off-reservation hunting right). The Coeur d'Alene Tribe ceded "all right, title and claim" outside the Reservation – an unqualified agreement that included any claim that the Tribe may have had to the control of off-reservation instream flows. The Reservation boundary provides an important dividing line relative to the United States' trust obligations to the Tribe. Outside the Reservation, an agency's obligations to a Tribe are discharged by complying with the law. *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981).

> [U]nless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes. This is the law of the circuit, and this is the law [the courts] must follow.

Gros Ventre Tribe v. United States, 469 F.3d 801, 812 (9th Cir. 2006); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary responsibility exists, it is a limited one only").

Here, there is no asserted violation of any law or regulation. Neither the United States nor the Tribe cites one. Rather, the United States and Tribe rely on a strained reading of the historical documents in an effort to impose an environmental servitude on off-reservation water users in

the entire Coeur d'Alene, St. Joe and St. Maries basins. These demands are not supported by the law or facts and certainly are not required by any trust obligation the United States has to the Tribe.

V. The Claims for Reserved Water Rights are Based on the *Winters* Doctrine and, as such, Any Priority Date for Such Rights Should be the Date of Ratification of the Agreements.

The notices of claim for the reserved water rights assert, as a basis for the claim, "the doctrine of federal reserved water rights articulated by the United Supreme Court in *Winters v. United States*." *See, e.g., Notice of Claim* (91-7755). In its briefing, however, the United States attempts to expand the claims to include the doctrine expressed by the Supreme Court in *United States v. Winans*, 198 U.S. 371 (1905) – even asserting that the doctrines are the same. *U.S. Br.* at 33-40; *see also id.* at 8 ("The federal courts generally have not distinguished between *Winans* and *Winters* rights"). The United States further argues that two priority dates apply to its claims – "time immemorial" for "aboriginal activities," and "November 8, 1873" for all other claims. *Id.* Both claims fail.

In the *Nez Perce Order*, the SRBA Court explained the "fundamental" differences between a *Winters* claim and a *Winans* claim. The *Winters* doctrine – addressing federal reserved water rights – provides that "the government intended to reserve the necessary amount of appurtenant water so as to effectuate the purpose for which the land was withdrawn." *Nez Perce Order* at 24. Any such "federal reserved water rights," therefore, are given a priority date based on the removal of the land from the public domain. *Id.* ("A federally reserved water right ... takes a priority date corresponding to the date the land was withdrawn from the public domain"); *see also United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). *Winans*, however, established the doctrine relating to an "Indian reserved water right" – providing that the water

rights are not based on the reservation of land but on "the recognition by the federal government of an aboriginal right (i.e. hunting or fishing) either reserved by the Indians or not expressly ceded by the Indians through a respective treaty or other agreement." *Nez Perce Order* at 24. Unlike a *Winters* right, "the priority date of an Indian reserved water right ... can relate back to 'time immemorial.'" *Id.* at 25.

Ignoring the "fundamentally different" nature of a *Winters* claim and a *Winans* claim, the United States claims that water rights for "aboriginal activities" should have a priority date of "time immemorial." *U.S. Br.* at 33-40. Yet, a claim under the *Winters* doctrine – as is the case with the claims filed by the United States – can only establish a priority date consistent with the date the land was removed from the public domain. In this case, the land was removed from the public domain on March 3, 1891, when Congress officially ratified the 1887 and 1889 Agreements. As such, any assertion of a priority date of "time immemorial" must be rejected.

The United States further contends that the priority date for irrigation, and other uses should be November 8, 1873. *U.S. Br.* at 39. It bases this claim on the date of the first Agreement and Executive Order relating to the formation of the Reservation. *Id.* Yet, as the Court in *Idaho II, supra* explained, the 1873 Agreement was never ratified. Rather, the Reservation was not formally established – and the lands were not officially removed from the public domain – until March 3, 1891, when Congress "accepted, ratified and confirmed" the 1887 and 1889 Agreements with the Tribe. *Idaho II*, 533 U.S. at 265-71; *see Arizona, supra* at 600 ("The water right vests on the date the reservation is created, not when the water is put to use or at some later time").

Since the only basis for the United States' claims is under the *Winters* doctrine, the law requires that the priority date for any rights recognized must be March 3, 1891.

VI. The United States has Not Shown Entitlement to Any Right for Irrigation Water.

The United States agrees that a primary purpose of the Reservation was to provide pastoral and agricultural uses for the Tribe. *U.S. Br.* at 29. However, neither the United States nor the Tribe have established that irrigation was necessary for these agricultural and pastoral activities, either at the time of the Reservation or today. They have not demonstrated, and really do not even contend, that the primary purpose of agricultural development on the Reservation would be "entirely defeated" without a water right for irrigation of lands on the Reservation. The United States bases its irrigation claims on the practicably irrigable acreage ("PIA") method. *U.S. Br.* at 15-16 & 46. The PIA methodology is a means to quantify the reserved irrigation right and examines the arability of the land by economically feasible methods. *See, generally, Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*").

However, any PIA analysis is only triggered when the Court determines that the irrigation of arid lands was a primary purpose of the reservation. *See, e.g., Winters,* 207 U.S. at 575 ("The lands were arid and, without irrigation, were practically valueless"); *Arizona II,* 460 U.S. 605 (discussing the "problem of irrigating the arid lands of the Colorado River" and concluding that it is necessary to provide "the respective Reservations appropriate water rights to service the irrigable acreage").

The Coeur d'Alene Reservation is not comprised of arid land in need of irrigation. As such, no implied right arises in the first place and the PIA analysis does not apply to this Reservation. Much of the irrigable land on the Reservation is suitable for dry land farming and has never been irrigated. Irrigation of arid lands – which would require a PIA analysis – was not a primary purpose of this Reservation. Indeed, the fact that irrigated agriculture was not a primary purpose of the Reservation is apparent from the fact that the Tribe primarily engaged in

dry land farming. *See Affidavit of Steven R. Wee*, Ex. 2 at 4 ("Wee Report") ("Coeur d'Alene farmers, like their non-Indian Palouse neighbors, continued to dry farm; while they made use of wells or nearby springs for domestic purposes and some limited truck garden irrigation, they built no diversion or storage structures for water, and there is no historical evidence that such works were either feasible or necessary"); at 19 ("Coeur d'Alene agricultural activity came to mirror closely those of non-Indian farmers in the Palouse region of eastern Washington: dry-farming of grains, supplemented by livestock raising"); at 102 ("The Coeur d'Alene thus practiced a mixed agriculture that leaned heavily towards livestock, small dry-farmed grains, and vegetable gardens"). Neither the Tribe nor the United States' experts claim that the Reservation land has to be irrigated for it to be suitable for agricultural use, or that the purpose of agricultural use of the lands would be "entirely defeated" without an irrigation water right.

The test for a reserved right is whether the primary purpose of the reservation would be "entirely defeated" without a reserved water right to support that purpose. *See State*, 134 Idaho at 946 ("In order to meet the test of necessity required for a federal reserved water right, the need for water must be so great that, without water, the primary purpose of the reservation will be entirely defeated"); *see also Cappaert*, 426 U.S. at 139 (reserved water rights must be for a "primary purpose" of the Reservation); *New Mexico*, 438 U.S. at 701 (same). Since neither the Tribe nor the United States can even plausibly assert that the primary purpose of the agricultural use of the Reservation requires irrigation, summary judgment must be granted on this claim to the State and denied to the United States.

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VII. There Can be No Reserved Water Right to Maintain Lake Levels.

The United States and Tribe assert a claim in Lake Coeur d'Alene at historic levels, "*in situ*." *U.S. Br.* at 42. Yet, in the 1889 Agreement, the Tribe agreed to cede "all right, title and claim" in the "northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene." *Idaho III*, at 269-70. In essence, the Tribe agreed to retain only a small portion of the beds and banks of the Lake – ceding "all right, title and claim" in the vast majority of the Lake to the settlers. *Id.* The 1889 Agreement does not identify any guaranteed lake level.

By ceding "all right, title and claim" in over two-thirds of the Lake, the Tribe and United States effectively recognized that there was an "in common" right to use the Lake as between the Tribe and settlers. The Lake is a water body that cannot be carved into slices with lake levels maintained at different elevations. *See In Re Sanders Beach*, 143 Idaho 443, 447 (2006) (high water mark in Lake Coeur d'Alene is one line not a series of lines). By demanding a water right to maintain lake levels at pre-Post Falls Dam lake levels, the United States and Tribe seek to convert their interest in the use of a small portion of the Lake into an exclusive right to control the Lake and its levels. They base this historic lake level claim on a right (unexpressed in the treaty) to fish in the Lake. This lake level maintenance claim for a shared resource is unprecedented.

The SRBA Court, in the *Nez Perce Order* rejected a similar argument relating to the Nez Perce Tribe's "in common" fishing rights. There, the Nez Perce Tribe argued that their right to fish "in common" with the settlers created a right to control instream flows to protect fish habitat. The SRBA Court rejected the argument, concluding that an "off-reservation fishing right does not guarantee a predetermined amount of fish, establish a minimum amount of fish, or otherwise require maintenance of the status quo." *Nez Perce Order* at 33.

> Simply put, the Nez Perce do not have an absolute right to a predetermined or consistent level of fish. In times of shortages, the Supreme Court noted that it may be necessary to reallocate proportionate shares to meet the subsistence or ceremonial needs of the Tribe. Consequently an implied water right is not necessary for the maintenance of the fishing right as it has been defined by the Supreme Court.

Id.; *see also id.* at 36, *citing Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791 (D. Idaho 1994) ("the Tribe does not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of the settlers and the resulting development of the land").

Similarly, nothing in the right to own a portion of the beds and banks or in any right to use Lake Coeur d'Alene in common with the settlers provides a right to the Tribe to control the lake levels. The fact that the Tribe relies on Lake Coeur d'Alene – much like the Nez Perce relied on fishing – does not create a right to control the Lake. Rather, the Lake must be used in common with the settlers. "[T]he Tribe does not have an absolute right to" control the Lake. *See Nez Perce Order, supra.* Moreover, there has been no showing that a right to exercise complete control over this shared resource is necessary for the Court to imply a reserved water right to the United States or that without a lake level right at historic, pre-dam elevations the primary purpose of the Reservation would be "entirely defeated." As such, the Court should deny the United States' and Tribe's claims for lake level water rights and grant summary judgment to the State.

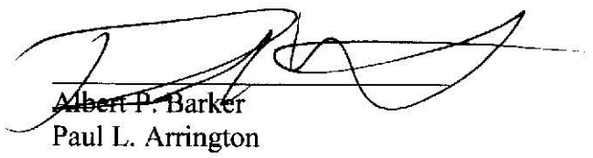
CONCLUSION

The United States' and Tribe's attempts to claim off-reservation instream flow rights is not supported by the law or facts. These claims are directly contradicted by the Tribe's agreement to cede "all right, title and claim" to lands outside of the Reservation. The off-

reservation instream flow claims are further contradicted by the Mining Act and other legislation that promoted the development of off-reservation lands – including associated water uses. They retained no habitat servitude on the ceded lands. They have not demonstrated that irrigation was necessary for a primary purpose of the reservation. Nor can they show that the United States and Tribe intended to control the Lake level. The "homeland" theory simply cannot override the duty to show that the claims were necessary to support a primary purpose of the reservation or that without a water right, these purposes would be "entirely defeated." Accordingly, the United States' and Tribe's motions for summary judgment should be denied.

DATED this 23rd day of February, 2017.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 2017, a true and correct copy of the foregoing was mailed with sufficient first-class postage addressed to the following:

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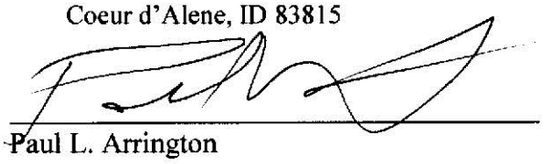

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